

BEFORE THE AMERICAN ARBITRATION ASSOCIATION

United States Anti-Doping Agency,
Claimant,

v.

AAA No. 77 190 00543 09

Jessica Cosby,
Respondent.

AWARD OF ARBITRATORS

We, The Undersigned Arbitrators, having been designated by the above named parties, and having been duly sworn, and having duly heard the allegations and proofs of the Parties, do hereby, FIND as follows:

I. Background

This is the case of Jessica Cosby, a 27 year old world-class hammer thrower who tested positive in an out-of-competition urine sample test for hydrochlorothiazide and chlorothiazide which are listed as Prohibited Substances in the class of Diuretics and Other Masking Agents. This is a first offense for the athlete. Since 2005, Ms. Cosby has been in USADA's Registered testing program, which means she has long been familiar with doping control testing.

On August 28, 2009, a USADA Doping Control Officer collected an out-of-competition urine sample from Ms. Cosby. On September 18, 2009, Ms. Cosby was notified that the A Sample had tested positive. She requested that the B Sample be tested in order to help quantify the level of

the Prohibited Substances that had been found in her sample.

On September 21, 2009, following the A Sample results but prior to learning of the B Sample results, Ms. Cosby signed a Provisional Suspension.

On October 16, 2009, Ms. Cosby was notified that the B Sample confirmed the A Sample results. By letter dated October 22, 2009, USADA wrote Ms. Cosby to advise her of what she would have to establish in order to qualify for a reduction in the period of ineligibility under Art. 10.4 of the World Anti-Doping Code. In that letter, USADA invited Ms. Cosby to submit a "Specified Substance Submission" to explain how the prohibited substances entered her body.

On October 29, 2009, Ms. Cosby notified USADA that she waived her right to review by the USADA Anti-Doping Review Board. And on November 2, 2009, Ms. Cosby submitted her "Specified Substance Proposal" to USADA.

Thereafter, on December 4, 2009, Ms. Cosby received a routine charging letter from USADA which offered her the chance to accept a two year suspension. On December 14, 2009, Ms. Cosby declined the proposed two year suspension and requested this hearing.

USADA seeks, in these proceedings, a two year period of ineligibility

pursuant to Rule 40 of the IAAF Anti-doping Rules with credit given for the provisional suspension that the athlete accepted on September 21, 2009. The athlete argues that her suspension should be reduced to a maximum of three months pursuant to the terms of the World Anti-Doping Code Article 10.4 or Articles 10.5.1 and 10.5.2.

II. Facts

The parties stipulated that there is no dispute about sample collection, chain of custody, or testing procedures.

The athlete was in the registered testing pool, and prior to the positive result that is the subject of these proceedings she had tested negative on more than 20 drug tests.

Much of Ms. Cosby's evidence at the hearing in Los Angeles on April 8, 2010, concerned a series of events that had affected her life beginning in April 2009 and leading up to the sample collection on August 28, 2009.

The athlete testified on direct examination that she has a close relationship with her mother and does not keep secrets from her. She added that her mother is her biggest supporter and that her mother had never done anything to hurt her. Ms. Cosby was 17 years old when her parents divorced and has lived with her mother since then.

She started throwing the hammer as a student at UCLA in 2000 and

went on to become the Junior National Champion, PAC 10 Champion, and NCAA runner up in her sport. She was U.S. Champion in 2006, 2008, and 2009. She was selected for the U.S. Olympic team in 2008. She testified that she has a strong work ethic, that she has worked hard to achieve in her sport and that she loves her sport. This was her first positive test out of more than 20 tests.

In April 2009 the athlete learned that her fiance was having an affair with an athlete that Ms. Cosby was coaching and that the affair had been continuing since 2008. On the day she learned of the affair, her coach, Art Venegas, called a meeting with Ms. Cosby and the other athlete, who confessed the affair. Ms. Cosby was embarrassed because several of her colleagues had known about the affair and those same colleagues had been invited to attend her wedding, which had been scheduled for September 2009.

Ms. Cosby called off the wedding, but she lost \$6,000 that could not be recovered for her wedding dress, bridesmaid's gowns, and other expenses. Even though she was heartbroken, she tried to carry on in her job as a UCLA coach.

At the time she learned of the affair, Ms. Cosby was in training for the World Championships. Her workout schedule required her to throw the

hammer on Mondays, Wednesdays, and Fridays and to run and lift weights whenever she could. The hammer throw kept her going through this difficult time because she believed that since people had invested in her she should "tough it out."

Ms. Cosby's competition schedule as of April 2009 called for her to compete in the U.S. Nationals in June; to compete in a tune up meet in Portland, Oregon in July; and then to compete in the World Championships in Berlin in August. On July 1, 2009, Ms. Cosby's coach, Art Venegas, lost his job at UCLA. He told Ms. Cosby that as a result of losing his job he did not want to coach any college or "open" athletes anymore. Since Ms. Cosby was an Open Athlete, this meant that Coach Venegas was saying that he no longer wanted to coach her.

Ms. Cosby continued to train with her workout partner, Boldie Kocson, who tried to help coach her as best he could. Ms. Cosby said it was hard for her to work out without Coach Venegas. She had to make do without him until about a week and a half prior to the World Championships, when he came back to help her just before she left for Berlin.

Five days before she left for the World Championships, Ms. Cosby received a voicemail from UCLA telling her that she was fired as a coach. She went to UCLA's website and read the announcement that another

coach would take her place. At that point, it seemed to her that the hammer throw was all she had left. In rapid succession she had experienced a broken engagement, a cancelled wedding, the loss of her long time coach, and then the loss of her job.

Ms. Cosby testified that in the aftermath of this series of events she was "just trying to hang on." She met with her pastor and her ex-fiance in a session that was supposed to bring closure or reconciliation, but Ms. Cosby said nothing changed for her as a result of that session. She said that her family members tried to encourage her, but that she was sad. She testified that prior to this series of misfortunes, she had been a quiet person who was happy but afterwards she felt she was confronting things that she had never seen before.

Ms. Cosby left for the World Championships on August 9, 2009. She felt mentally tired, but she tried to stay focused on throwing. In Berlin, she roomed with Michele Carter, with whom she had roomed at the 2008 Olympics in China. She said that she did not have a "heart to heart" with her roommate about her problems but that Michele knew of the broken engagement and said that she was sorry. Ms. Cosby said that in Berlin she stayed mostly to herself in her room.

At the Worlds, Ms. Cosby achieved a personal best and finished in 7th

place. She said that she did well because she stayed focused on throwing. In her words she, "couldn't let the things at home beat me up." After the Worlds she was tired but proud of herself, and she thought that she might have done better if she had not been so mentally tired.

Ms. Cosby testified that while in Berlin she had eaten to survive and had drunk only enough water to stay hydrated. On her last night in Berlin she went out with some friends but she did not eat or drink.

As the events in Berlin came to an end Ms. Cosby said that she did not want to return to L.A. because of what she had to face back home.

She left Berlin on August 24 and flew to Amsterdam and from there to Los Angeles. She was tired on the trip home. She slept on the flight and missed all the meals. She testified that she went to the restroom in Berlin but did not do so on the long flight back to Los Angeles.

Ms. Cosby arrived home in Los Angeles on the evening of August 24 around 6:00 pm. She went to her room, but she did not sleep through the night. She sat in bed, watched tv and had a restless night. She had no food or drink that night and did not go to the restroom.

On August 25 she remained tired and restless, but she said that she ate and drank something. She tried to urinate on August 25 and though she felt she needed to do so, she could only produce a trickle of urine. She

said her stomach seemed bloated and that she pushed on her stomach to force herself to urinate, but to no avail. She said she felt this way for the next few days and that her feet were swelling, "really puffy" she said. During that time she had headaches and her stomach felt bloated.

On August 26 and 27, Ms. Cosby ate more like normal, but she said she just wanted to lie down and that she did not have the energy or desire to do anything. Again she stayed home and watched tv. On the 27th she tried to go to the bathroom at least three times but again could not produce more than a trickle of urine. She said that on she was drinking water but less than usual.

On the evening of August 27, Ms. Cosby went into the room where her family was sitting and told her mother that something was wrong with her. She complained of headaches, swelling feet, and the inability to urinate. Ms. Cosby testified that her mother said that she had a "water pill" that would help her.

Ms. Cosby also testified that she knew that her mother had high blood pressure and that she knew that her mother had a prescription for "water pills" to help treat the high blood pressure. When she was asked at the hearing what she was thinking when her mother mentioned the "water pill" Ms. Cosby responded: "I just wanted relief. I wanted to feel better. I

wanted to go to the restroom.” Ms. Cosby testified that her mother could tell that she had been crying and that her mother suggested going to the hospital but that she had responded to her mother by saying, “I need to pee.” Ms. Cosby said that she had never felt like that before.

Ms. Cosby testified that by time she told her mother of her problem urinating she was having uncontrollable bouts of crying. She would think of her job and her life and just break into tears. So when her mother brought her the pill she took it. Then she lay down on the sofa and waited for the pill to work.

Ms. Cosby said that when she took the pill she was not thinking of drug tests. She did not research the pill. She did not study the bottle it had come from and she did not know that she was taking hydrochlorothiazide. She said that when she took the pill she “was desperate.”

The next morning at 6 a.m., a USADA Doping Control Officer came to Ms. Cosby’s house for an out of competition urine sample. Ms. Cosby said that when the agent came in to take the sample it was her “first good pee in a long time.” Ms. Cosby testified that she did not note on the Doping Control Officer’s report form that she had taken a “water pill.”

Ms. Cosby said that she did not take any more pills and did not see a doctor. She said, too, that she was surprised to receive a positive result on

the drug test. She testified that when she showed her mother that she had tested positive for hydrochlorothiazide, her mother immediately said "that's the name of that water pill that I take."

On Cross examination Ms. Cosby admitted that when she had taken prior drug tests, she had declared other drugs that she had been taking at the time. She also testified that at the time of the hearing she was still depressed.

USADA pointed out that at the World Championships Ms. Cosby increased her personal best throw from 72.03 to 72.21 meters and that her throw at the Worlds was better than the throws of 16 other athletes who had previously had personal bests better than Ms. Cosby's. But the athlete explained that throwing conditions for her at the Worlds were ideal for her because she is a left hand thrower and the throwing ring at the Worlds was positioned in such a way as to benefit left handed throwers.

Ms. Cosby testified on cross examination that the flight home was tough for her because of what she had to face when she landed. She said that on the flight home she drank small cups of water and that when she got home all she could produce was a trickle of urine when she tried to use the restroom.

She repeated that the "water pill" that she took from her mother was

the only such pill she had ever taken.

USADA pointed out that in Ms. Cosby's pre-hearing brief she had said that when the Doping Control Officer asked for the urine sample she had to try long and hard before she could urinate but that in her live testimony before the panel she had said that she urinated right away in the presence of the Doping Control Officer. Ms. Cosby admitted that the statement in her brief came from her and that she was responsible for the inconsistency. She testified that she took the one pill her symptoms went away and that at present she has no further problem urinating.

In March 2010 Ms. Cosby underwent a complete physical examination which indicated that she had high blood pressure.

Ms. Cosby admitted on cross examination that she was placed in the registered testing program in 2005 and that she has completed 23 whereabouts forms for the program. She admitted that on 7 of those forms she listed her mother Beverly Cosby as the primary contact and that she is familiar with and has used USADA's online site to file some of her forms.

She further admitted having received educational materials from USADA regarding drugs and drug testing. She admitted having seen the USADA wallet card that lists hydrochlorothiazide as a prohibited substance.

The athlete's mother, Beverly Cosby, testified on direct examination

that Ms. Cosby is her second child and her oldest daughter. She said that she and her family, "love the Lord" and that she has tried to raise her children to have religious values. She lives with her daughter, they talk every day, and they know each other very well.

The athlete's mother remembers that in April 2009 Ms. Cosby came home early in the day in tears from her coaching job at UCLA and that she went to her room and basically stayed there. This was when Ms. Cosby had learned of her fiance's affair. The athlete's mother testified that at that point, her daughter did not want to go to Berlin to compete in the World Championships. She said that her daughter was experiencing anxiety about her own job at UCLA.

Mrs. Cosby testified that she and her daughter prayed everyday. She said that she was trying to encourage her daughter not to give up. Mrs. Cosby recalled that two days prior to going to Berlin her daughter lost her job at UCLA.

The athlete's mother testified that her daughter finally decided to go to Berlin and concentrate on the hammer throw. While Ms. Cosby was in Berlin, her mother said that she spoke to her daughter everyday. Mrs. Cosby said that when her daughter returned home from Berlin she was in despair and was continually asking "What can I do?" She said that her

daughter talked about having no job and no marriage and was distraught about her future. At that point, it was hard to get Ms. Cosby out of bed.

But then one day, Mrs. Cosby said her daughter got out of bed and came to sit by her on the couch. Mrs. Cosby testified that her daughter was holding her head in her hands as if she were in pain, and that she said, "Mom, I can't pee." Mrs. Cosby said that she responded, "I have a water pill that will make you use the bathroom." Mrs. Cosby said that she knew the "water pill" could help her daughter because Mrs. Cosby had a prescription for these pills and when she used them, she would urinate. So Mrs. Cosby got one of the pills and gave it to her daughter who took it and then lay down on the couch.

Mrs. Cosby said that she did not know that hydrochlorothiazide was a prohibited substance. She was surprised to learn that her daughter had received a positive test result. Only when she read the report and saw the word "hydrochlorothiazide" did Mrs. Cosby realize that was the name of her "water pills." She testified that she had never heard of a "masking agent" until her daughter's positive test result and she added that if they had been trying to cheat on the day that the Doping Control Officer showed up for the sample they would have said that Ms. Cosby was not at home. "Had we been trying to cover something up, we would have said she was not home.

But we didn't."

On cross examination, Mrs. Cosby testified that when her daughter came home from Berlin she had trouble sleeping and that she kept the television on late into the night. This conduct caused Mrs. Cosby to be concerned. When Mrs. Cosby saw her daughter hold her head in her hands in pain, it caused her concern. Mrs. Cosby did not see her daughter's swollen feet until August 27.

On August 27, when Ms. Cosby came to her mother, Mrs. Cosby said she tried to tell her daughter that she could make it through all these troubles, but that her daughter just broke down and cried.

Mrs. Cosby said that she knew about drug testing, but that she did not think this one pill could have any effect on her daughter, especially since her daughter had told her that she was "through for the season." Mrs. Cosby said that she just didn't see how this one pill could help her daughter gain an advantage in her sport.

Mrs. Cosby admitted that she knew she was not supposed to give someone one of her prescription medicines and she testified that she wishes that she had not done it. Mrs. Cosby said that all her daughter did was to take that one pill that one day. And then she lamented, "We are here because of what I did to try to help my daughter. She was stressed

and depending on me.”

Ms. Cosby’s toxicological expert, Dr. Richard Stripp, testified by telephone that the athlete’s urine sample contained a concentration of 3.4 nanograms per liter of hydrochlorothiazide. In his opinion, this level of HCTZ in Ms. Cosby’s urine sample was consistent with her testimony of having taken one 25mg dose of HCTZ within 24 hours of sample collection. In response to a question from the panel, Dr. Stripp testified that had Ms. Cosby been using HCTZ over a long period of time it would be unlikely to see such a low concentration in the sample.

The USADA Doping Control Officer who collected Ms. Cosby’s sample testified by telephone. She said that she arrived at the athlete’s gated community at 6 a.m. on August 28, 2009 and called from the gatehouse. For some reason that call was disconnected so the Doping Control Officer had to call back. By 6:15 am the DCO was allowed in and went to Ms. Cosby’s house. Ms. Cosby was awake and drank some water. The two talked of the California fires that were raging not far from where they were. The athlete provided the sample and “that was that.” The DCO saw no evidence of crying. She said that Ms. Cosby did not seem disturbed and was able to follow directions. The DCO thought that nothing seemed out of the ordinary. She recalls that Ms. Cosby said she was tired,

not that she was depressed. She does not recall Ms. Cosby having taken a long time to urinate. She was certain that Ms. Cosby did not take ten minutes to give the sample. According to the DCO first contact at the gate was 6:15 am and the sample was labeled and in the bottle by 6:55.

Dr. David L. Fogelson testified by telephone on behalf of Ms. Cosby. He is her psychiatrist; he saw her on one occasion on February 24, 2010 in his office for 90 minutes. He testified that Ms. Cosby suffers from severe major depression. In his opinion her present depression is a recurrence of a depression from earlier in her life. While she was with him Ms. Cosby displayed spontaneous tearfulness, she looked depressed, she had very little affect, and she demonstrated a profound lack of motivation. She seemed not to understand some of his questions. She was digressive and not to the point.

Dr. Fogelson said that he asked Ms. Cosby a series of questions and that her responses included the following: that she had poor appetite; that she had suffered weight loss; that she often felt sleepy; that she had morbid thoughts (not suicidal thoughts, he explained but thoughts such as, "I would be better off dead"); and that she had a depressed mood. He testified that when he saw Ms. Cosby in February 2010, in his opinion, the depression that he diagnosed had been continuing for about 10 months

(since April 2009) without treatment. He testified, too, that in February 2010 she was profoundly depressed and that it takes time to reach that level of depression. He explained that depression can be triggered by events and that a series of severe losses and stresses can culminate in severe depression.

Dr. Fogelson also testified that someone in Ms. Cosby's mental state would be susceptible to suggestion and likely to defer to the judgment of others. He added that severe depression has a negative effect on cognitive ability and that it slows down frontal lobe activity. He added that severe depression affects one's ability to understand the consequences of their actions, to use abstract reasoning.

On cross examination, Dr. Fogelson said that he did not believe that Ms. Cosby was able to think through the consequences of taking her mother's water pill. When he was challenged on cross examination about how he could reach a conclusion about Ms. Cosby's depression based on having seen her for only 90 minutes, Dr. Fogelson responded that he has seen more than 10,000 depressed individuals in his career and that his experience with treating depression gives him the proper medical basis for reaching conclusions from his observations of Ms. Cosby and her answers to his questions. When asked whether someone could function as an elite

athlete while depressed, Dr. Fogelson said “yes.” When asked whether depression would make someone dishonest, he said “no.”

USADA then called Dr. Edward Zambraski, who testified by telephone as an expert witness. He testified that Ms. Cosby’s description of the inability to urinate over a substantial period of time and of swelling feet is the definition of acute renal failure. But he said that Ms. Cosby had not testified to any facts that would suggest a cause for acute renal failure. Dr. Zambraski stated that sometimes unaccustomed athletic exertion like running a marathon for the first time can lead to acute renal failure but that depression cannot cause acute renal failure.

Dr. Zambraski explained that if a person could produce no more than a trickle of urine over the course of several days, then toxins would build up in that person’s blood and the person would need to be hospitalized. Further, he testified that if someone were suffering from acute renal failure, one 25mg dose of hydrochlorothiazide would not solve the problem.

Dr. Zambraski testified that typically the adult body produces about a quart and a half of urine each day and that even a dehydrated person would typically produce about three quarters of a quart. Thus, to go more than 12 hours without producing enough urine to change the color of the water in the toilet was acute renal failure.

IV. Analysis

The key provision at issue in this case is as follows:

World Anti-Doping Code 2009:

10.4 Elimination or Reduction of Ineligibility for Specified Substances Under Specific Circumstances

Where an *Athlete* or other *Person* can establish how a Specified Substance entered his or her body or came into his or her *Possession* and that such Specified Substance was not intended to enhance the *Athlete's* sport performance or mask the Use of a performance-enhancing substance, the period of *Ineligibility* found in Article 10.2 shall be replaced with the following:

First Violation: At a minimum, a reprimand and no period of *Ineligibility* from future *Events*, and at a maximum, two (2) years of *Ineligibility*.

To justify any elimination or reduction, the Athlete or other Person must produce corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sport performance or mask the Use of a performance-enhancing substance. The *Athlete's* or other *Person's* degree of fault shall be the criterion considered in assessing any reduction of the period of *Ineligibility*.

Rule 10.4 means that “where an athlete can clearly establish how a specified substance entered their body or came into their possession, and that such substance was not intended to enhance sport performance, the sanction may be reduced as low as a reprimand and no period of eligibility.”

Id. A specified substance is defined in the WADC section 4.2.2 as “all

Prohibited Substances...except substances in the classes of anabolic agents and hormones and those stimulants and hormone antagonists and modulators so identified on the Prohibited List". (Exh. 15).

An athlete seeking reduction of a suspension under Section 10.4 must first establish how the substance entered her body by a balance of probability. *Commentary to Article 10.4*. (Exh. 12) Next, the athlete must produce evidence of an absence of intent to enhance sports performance or mask the use of a performance enhancing substance to the comfortable satisfaction of the hearing panel. *Id.* Upon establishing these two specific elements, the athlete is then automatically eligible for a reduction or elimination of the suspension. The specific penalty is then measured by assessing the athlete's degree of fault.

USADA's counsel argued that an athlete is always responsible for what goes into her body; that the athlete must prove by the balance of probabilities how the substance entered her body and then that the athlete must prove to the comfortable satisfaction of the panel that there was no intent to mask another drug and that there must be corroborating evidence of the lack of intent to mask.

USADA's counsel contended that if Ms. Cosby was not impaired at the time she took the pill then she was plainly responsible; thus the case

turned on whether her mental state rendered her less than fully accountable for her behavior.

Ms. Cosby's counsel argued that this was a case of mitigating circumstances because of the athlete's judgment having been clouded by depression.

The first step in the analysis under Rule 10.4 is to determine whether the athlete proved by the balance of probabilities how the prohibited substance entered her body. The Panel is of opinion that she did. Prior to the sample collection her mother had told Ms. Cosby about a "water pill" that she knew would cause her daughter to use the bathroom. The testimony established that her mother, who had a prescription for these "water pills" took them from time to time and knew the effect they had on her body. Thus when Ms. Cosby complained to her mother about not being able to urinate, her mother very quickly made the connection between the problem that her daughter had described, the problem that she herself sometimes had, and the pills that were in the house to help her urinate.

The Panel accepts the testimony that the "water pill" taken on the evening of August 27, 2009 was the source of the positive result from the sample taken on August 28, 2009 the following morning. In addition, the

Panel believes the testimony from Mrs. Cosby who said that when she saw the report on her daughter's test result and when she saw the word, "hydrochlorothiazide" she recognized immediately that that was the name on the bottle of medicine that she called "water pills." The mother's testimony in that regard had the ring of truth. Not many people walk around with the full names of multisyllabic medications on the tips of their tongues. It is common knowledge that lay people refer to complex medical nomenclature by other terms. And so, the Panel is persuaded by the balance of the probabilities that Ms. Cosby has shown how the prohibited substance entered her body.

The next step in the analysis is to determine whether Ms. Cosby has proved to the comfortable satisfaction of the panel that she had no intent to mask the use of some other drug when she took the "water pill" and whether there was corroboration of this evidence. The Panel is of opinion that she has established these points as well.

First, the Panel notes that when she took her mother's water pill her competitive season was over. She had been actively competing since April 2009, in several high level competitions: U.S. Nationals, a tune up in Oregon, and the World Championships. She had just returned from the Worlds and, if things had gone as she had once thought they would, she

would have been on the verge of her wedding. But instead, she was lying around restless, sad, and worrying about her life, her job, her future. The Panel is of opinion that sports competition was not on her mind.

The Panel notes too that when her mother testified that her daughter said her season was over, that comment was in the midst of other comments such as “what am I going to do; what is going to happen to me.” And so it struck the Panel that Ms. Cosby’s comment that her season was over was meant as a statement that the thing that she had been able to hold on to, the one thing that she had been able to focus on while other parts of her life were collapsing, was also over. Her comment about “my season” is over struck the Panel as yet another note of despair. The Panel does not believe that taking the water pill had anything whatsoever to do with sport. She was not trying to enhance and she was not trying to mask. She was, in our opinion, trying to do precisely what she said at the time, to feel better.

The Panel also believes that the level of HCTZ found in her sample corroborates the lack of an intent to mask. For one thing USADA never suggested anything that Ms. Cosby might have been trying to mask. Nor did USADA adduce evidence that the level of HCTZ found in her sample was not a low level or that it was a level inconsistent with the testimony that

Ms. Cosby had taken one pill, that one time.

Further, the Panel is not persuaded by USADA's efforts to cast doubt on the athlete's veracity by making the argument that when Ms. Cosby said that she could only produce a very little urine when she went to the restroom, that she felt bloated and her feet were swollen -- she was describing "acute renal failure" but that if she had had acute renal failure she would have had to have been hospitalized and one 25mg dose of hydrochlorothiazide would not have helped her. The problem with that argument is that Ms. Cosby never testified that she had acute renal failure. It was USADA which put that label on her condition. And once having labeled Ms. Cosby's condition as acute renal failure, USADA then argued that it could not have been and thus that Ms. Cosby's testimony was suspect.

The Panel rejects USADA's approach. The Panel notes that Ms. Cosby's physical examination indicated that she had high blood pressure; that her mother's testimony was to the effect that high blood pressure ran in her family; and that one of the results was the retention of water, which was why the mother had been prescribed the diuretic that Ms. Cosby took. Thus, there was another explanation for the retention of water in Ms. Cosby body that USADA simply did not contend with. In the Panel's view, USADA

proposed a possible explanation for Ms. Cosby's condition but did not thereby exclude all other possibilities. The Panel does not believe that Ms. Cosby was untruthful.

The Panel believes that the record in this case portrays an athlete who never before tested positive and who has not since tested positive. In this context, the Panel is of opinion that the low level of HCTZ found in the sample is itself corroboration of no intent to mask. Other cases from CAS have said that the level can be too low to mask other substances. We think that is true in this case.

Since we find that the criteria set forth in Art. 10.4 have been met, we conclude that it is not necessary or appropriate to consider the more stringent tests set forth in Art. 10.5.

V. The Appropriate Sanction

In a case under Art. 10.4, the Panel may impose a range of sanctions from nothing to a maximum two year suspension for the first offense. But as commentary to Art. 10.4 makes clear, the level of the penalty must be correlated to the athlete's degree of fault. In this case we are dealing with a young woman who saw her life coming apart in front of her bit by bit. Through it all she tried to cope. She prayed. She sought counseling. She focused on her love of her sport. She battled on. But as the undisputed

evidence of her psychiatrist made clear, she was severely depressed even as she strove to continue functioning.

The Panel believes the unrefuted testimony of Dr. Fogelson that a person suffering severe depression is subject to suggestion and is not in full control of her decision making abilities. Ms. Cosby went crying to her mother with reddened eyes, puffy feet, headaches and a plea for help. In the athlete's words she told her mother, "I need to pee." Her mother got a pill that she thought would help her daughter do just that.

The Panel believes that USADA was correct when it argued that if Ms. Cosby was not affected by depression then Ms. Cosby was responsible for taking that pill. But the Panel is of opinion that Ms. Cosby's judgment was adversely affected by depression and that she thus bears less responsibility than normal for what happened to her. We understand that in the effort to rid sport of doping we must not accept a series of excuses for doping violations because almost anyone can fashion an excuse once they have been caught. But this is a case of medically diagnosed severe depression that followed a series of negative events. Here the depression started in April 2009, existed on August 28, 2009, and extends even to now. Given these facts and circumstances the Panel believes that it has the authority under Rule 10.4 to mitigate the penalty

within the prescribed range.

We are guided in our consideration of an appropriate sanction by decisions by other anti-doping tribunals in similar cases.

In the **International Tennis Federation Decision in the Case of Stefan Koubek**, dated January 26, 2009, the panel considered a doping charge against Koubek based on a positive, in competition drug test at the French Open in May 2004. The drug test was positive for a steroid. It was a first offense for the athlete who had previously received between 50 and 100 negative test results. Prior to the French Open and just prior to a tennis tournament in Austria, Koubek had experienced pain in his right wrist. On the advice of a friend he visited an eminent hand surgeon in Vienna. On May 15, 2004, the doctor -- after a brief discussion with the athlete about whether the proposed treatment would cause problems with doping -- injected the athlete with a steroidal preparation. On May 29, 2004 the athlete underwent a doping test at the French Open.

The panel analyzed the case under the Specified Substance rule of the International Tennis Federation which gave the panel discretion as to the length of the suspension to impose if the athlete could prove how the prohibited substance entered his body and could also prove that he had no intent to enhance his performance. The panel accepted the proof that the

prohibited substance entered his body when he received the injection in Vienna. The panel also believed that the athlete had proved no intent to enhance. On that score, the panel focused on the athlete's state of mind at the time of the injection and believed that at that moment he was thinking about alleviating pain, not about enhancing his performance. The panel also pointed out that the ITF adduced no evidence of intent to enhance and did not even cross-examine the athlete on whether he had an intent to enhance. The panel considered other cases and imposed a three month suspension.

In **USADA and Bruneman, AAA No. 77 190 E 00447 08 JENF**, the athlete was a swimmer who took one of her mother's diuretic pills thinking that she was taking medicine to relieve constipation. The doping violation was a first offense. The parties stipulated that the level of HCTZ found in the sample was low. The athlete proved how the prohibit substance entered her body. The panel noted that she took the pill during the off season, thus it could not have enhanced her performance and the panel was of opinion that the concentration of hydrochlorothiazide found in the sample was too low to mask. The panel there opined that the athlete had made a mistake on an otherwise clean record and had imposed a six months suspension.

In **The ATP TOUR ANTI-DOPING TRIBUNAL APPEAL OF GRAYDON OLIVER**, February 2004, the panel considered the appeal of a first offense doping violation of a tennis player who had consumed an herbal supplement that was contaminated with HCTZ. The panel was persuaded that the athlete had proven how the prohibited substance had entered his body. The panel noted that the amount of HCTZ in the athlete's sample was consistent with his having taken the amount of herbal supplements that he said he had. Nor did the panel believe that the level of HCTZ found in the sample was high enough to have a masking effect. The panel concluded that the ingestion of the prohibited substance had been inadvertent and imposed a two month suspension.

In the present case, USADA asks for a two year suspension which is the standard for a first offense doping violation. The athlete asks for a three month suspension which is near the low end of the range of penalties for a first offense. The Panel, having reviewed all the cases cited by the parties and having considered the life of this young athlete and her hopes for a future is of opinion that she should be suspended for four months and that the time should run from the date of her voluntary suspension which is September 21, 2009. It is so Ordered. This Award is in full settlement of all claims submitted to this Arbitration. All claims not expressly granted herein are hereby, denied.

Signed This 5th Day of May 2010:


Hon. John Charles Thomas, Chair

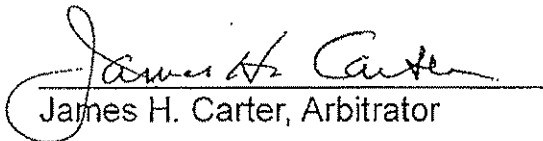
James H. Carter, Arbitrator

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