

BEFORE THE AMERICAN ARBITRATION ASSOCIATION**North American Court of Arbitration for Sport Panel****USADA, Claimant****AAA No. 30 190 00463 03****and****Danu Cherry, Respondent****AWARD AND DECISION OF THE ARBITRATORS**

WE, THE UNDERSIGNED ARBITRATORS, having been designated by the above-named parties, and having been duly sworn and having duly heard the proofs and allegations of the parties, and, after a hearing held on November 3, 4, and 5, 2003, do hereby render its full award pursuant to its undertaking to do so by November 24, 2003.

1. Introduction

1.1 The Claimant, USADA, is the independent anti-doping agency for Olympic Sports in the United States and is responsible for conducting drug testing and any adjudication of positive test results pursuant to the United States Anti-Doping Agency Protocol for Olympic Movement Testing ("USADA Protocol").

1.2 The Respondent, Danu Cherry, is an elite-level athlete in the sport of track and field (athletics). She has been in the USA Track and Field ("USATF") out-of-competition ("OOC") drug testing pool since the fourth quarter of 2001.

2. The Applicable IAAF Rules.

2.1 Under the USADA Protocol and the AAA Supplementary Procedures for Arbitration Initiated by USADA ("AAA Supplementary Procedures"), applicable to this proceeding, Rules of the International Association of Athletics Federations ("IAAF"), the

international federation for the sport of athletics, apply. Those Rules classify doping as a strict liability offense. (IAAF Rule 55)

The Rules applicable to this case include the following:

- 1. Doping is strictly forbidden and is an offense under IAAF Rules. The offense of doping takes place when ...:
 - i) a prohibited substance is present within an athlete's body tissues or fluids;
 - ...
- 2. It is an athlete's duty to ensure that no substance enters his body tissues or fluids which is prohibited under these Rules is present in his body tissues or fluids (sic). Athletes are warned that they are responsible for all or any substance present in their body.
- 3. The expression "prohibited substance" shall include a metabolite of a prohibited substance.

Id.

2.2 The list of IAAF prohibited substances appears to be identical to the International Olympic Committee ("IOC") List of Classes of Prohibited Substances and Methods drawn up by the IOC Medical Commission. (*Id.*, Schedule 1.) The IAAF Schedule expressly classifies anabolic agents, including 19-norandrosterone and 19-norandrosterone, as prohibited. (*Id.*)

3. Background and Facts.

3.1 On February 18, 2003, as part of an out-of-competition drug test, Respondent provided a urine sample at the request of a USADA Doping Control Officer. The IOC accredited University of California at Los Angeles Olympic Analytical Laboratory ("UCLA Lab") performed the testing on the A sample and it revealed the presence of 19-norandrosterone at a concentration above the IOC threshold for women of 5 ng/ml, at an estimated concentration of approximately 149 ng/ml. (USADA Ex. 10, May 14, 2003, letter from Sanja Starcevic.) This finding was reported to USADA. The Respondent was notified of such finding by letter and requested an analysis of the "B" sample. The UCLA Lab tested the "B" sample and reported that

Respondent's urine sample was positive for 19-norandrosterone at an estimated concentration of approximately 114 ng/ml.

3.2 The parties entered into a joint stipulation as to a number of facts. (USADA Ex.

6.)

1. That the USADA Protocol for Olympic Movement Testing governs the hearing for an alleged doping offense involving USADA specimen number 468454.
2. That the definition of doping, Prohibited Classes of Substances and Prohibited Methods, and sanctions, of the International Association of Athletics Federation ("IAAF"), are applicable to this hearing for the doping offense involving USADA specimen number 468454;
3. That Ms. Cherry gave the urine sample designated as USADA specimen 468454 on February 18, 2003, during an out-of-competition test;
4. That each aspect of the sample processing for Ms. Cherry's urine sample was conducted appropriately and without error;
5. That the chain of custody for Ms. Cherry's urine sample from the time of processing at the collection site to the receipt of the sample by the International Olympic Committee accredited laboratory at the University of California in Los Angeles ("UCLA Laboratory") was conducted without error;
6. That the UCLA Laboratory's chain of custody for USADA specimen 468454 was conducted without error;
7. That the UCLA Laboratory, through accepted procedures and without error, found the presence of 19-norandrosterone at a concentration greater than 5 ng/ml of urine in USADA specimen 468454; and
8. That Ms. Cherry has been tested five times by USADA – on November 17, 2001 (Out-of-Competition Test), March 2, 2002 (Event Test), February 18, 2003 (Out-of-Competition Test), March 11, 2003 (Out-of-Competition Test) and June 22, 2003 (Event Test) – and the only reported positive test result occurred in connection with the February 18, 2003 out-of-competition test. The June 22, 2003 Event Test results have not yet been reported, but will be provided as soon as they are received.

3.3 Respondent declined to accept the two-year sanction recommended by USADA in reliance upon the IAAF Rules. Respondent accepted a provisional suspension effective August 2, 2003.

3.4 Respondent was further advised of her right to request a hearing before a panel of North American Court of Arbitration for Sport ("CAS") arbitrators who are also American Arbitration Association ("AAA") arbitrators in accordance with the USADA Protocol to contest the sanction proposed by USADA. Respondent advised USADA of her election to proceed to arbitration, contending that the positive test result was the result of her own endogenous production

3.5 During the course of three preliminary telephone conferences during a period from September 3, 2003 to October 21, 2003, issues relating to the hearing, including discovery of expert reports and expert testimony, were discussed.

3.6 The evidentiary hearing took place on November 3, 4, and 5, 2003, in New York, New York.

4. The Evidentiary Hearing

4.1 The Claimant, USADA, was represented by Mr. William Bock, of the law firm of Kroger Gardis and Rogas LLP. Dr. Larry D. Bowers, USADA's Senior Managing Director, Technical and Information Resources, was also present on behalf of USADA. Dr. Don H. Catlin, Director of the UCLA Lab, testified as an expert witness for USADA by telephone.

4.2 The Respondent, Dawn Cherry, was represented by Ms. Julie North, Ms. Julie Davis, Ms. Emily Chiang, and Ms. Melissa Bailey, all of Cravath, Swaine and Moore LLP. Ms. Cherry testified on her own behalf. She is an intelligent, educated and articulate 26-year old who has distinguished herself in her field. She produced the report of Dr. Mauro Di Pasquale, certain of her medical records, and the affidavits and medical records of some family members.

4.3 Dr. Di Pasquale, on behalf of Respondent, testified about his extensive medical practice in Canada, which included sports medicine and bariatric medicine. In addition to his

medical degree, Dr. Di Pasquale is a certified medical review officer and he holds a certificate as a master of fitness sciences. He maintains a number of web sites for the selling and distribution of nutritional supplements. Dr. Di Pasquale opined that Respondent's body was not operating under normal conditions on the day of the positive drug test. He opined that Respondent's positive test result was likely due to aromatase activity that instigated endogenous production of 19-norandrosterone, rather than a substance coming from an exogenous source. He attributed this to a combination of factors: Respondent's suspected endometriosis, her asthma, musculoskeletal inflammation, a combination of prescription medications, hyperinsulinemia, hypoglycemia, growth factor, over-reaching and over training.

4.4 For rebuttal purposes, the Claimant presented the testimony by telephone of Dr. David B. Seifer, the Director, Division of Reproductive Endocrinology and Infertility and Professor, Obstetrics, Gynecology, and Reproductive Sciences, University of Medicine and Dentistry of New Jersey—Robert Wood Johnson Medical School, New Brunswick, New Jersey. Dr. Serdar E. Bulun, Professor and Friends of Prentice Distinguished Physician in Obstetrics and Gynecology, Chief, Division of Reproductive Biology Research, Northwestern University Feinberg School of Medicine, Chicago, Illinois, also testified by telephone for the Claimant on rebuttal.

4.5 The hearing was governed by the Commercial Rules of the AAA, amended as of January 1, 2003, as modified by the AAA Supplementary Procedures, referred to in the USADA Protocol as Annex D. The parties filed pre-hearing briefs and numerous exhibits, all of which were deemed admitted in evidence (as were the written statements submitted by Ms. Cherry), in accordance with the Panel's procedural orders. All witnesses were sworn in. The parties made

opening statements and closing arguments, and the record was closed on November 14, 2003, after the conclusion of the hearing and the receipt of the transcript.

4.6 Respondent through her pleadings, pre-hearing brief, oral argument, and testimony given at the evidentiary hearing contends that the doping charge should be dismissed, arguing that the positive result was solely due to endogenous production.

5. Legal Analysis and Decision

5.1 The Panel is obligated, in accordance with the USADA Protocol contractually binding upon the parties, to apply the IAAF Rules as to the definition of doping and as to the consequences of a doping offense. (USADA Ex.1 and IAAF Rule 60.)

5.2 The IAAF Rules prohibit the mere presence in a competitor's body of any prohibited substance. (IAAF Rule 55.)

5.3 The applicable IAAF Rules clearly define doping as a strict liability offense; that is, a doping offense has been committed where a prohibited substance, in this case the 19-norandrosterone, was present in the athlete's urine sample, whether or not the athlete *knowingly* used the prohibited substance. (IAAF Rule 55.) In other words, proof of the presence of a prohibited substance in the athlete's urine sample creates a rebuttable presumption of a doping offense.¹ It is, therefore, incumbent upon USADA, in order to prevail, to meet its burden of proving to the comfortable satisfaction of the Panel that the 19-norandrosterone was properly identified in Respondent's urine sample.

5.4 The strict liability rule inherent in the IAAF Rules has been confirmed previously.² Other sports federations' similar provisions have likewise been confirmed in several

¹ This is consistent with the Olympic Movement Anti-Doping Code, Chapter II, Article 2.

² See e.g., *Walker v. IAAF* (IAAF Arbitration Panel, August 20, 2000); *Orrey v. IAAF* (IAAF Arbitration

CAS, AAA/CAS, and International Federation decisions notwithstanding the quasi-criminal nature of the sanctions applied to an offence.³

5.5 The Stipulations entered into between the parties constituted conclusive proof of a *prima facie* case of doping under the IAAF Rules.

5.6 Accordingly, USADA met its burden of proving a doping offense was established from properly conducted testing and analyses of Respondent's urine sample by the accredited UCLA Lab.

5.7 It is incumbent, therefore, on Respondent to establish her defenses. Respondent testified at length that she did not take any prohibited substances; that she had not taken any dietary supplements that contained any prohibited substances, and that the list of prescription and nonprescription medications that she had provided to USADA for purposes of the hearing was true and correct. That list, consisting of 20 separate substances, was over two pages in length. The list included L-Carnitine and packets containing Zinc. (USADA Ex. 11.) On cross-examination Respondent advised that she had also taken Creatine. (Resp. Ex. A.) Her sole defense was that the positive test result was due to endogenous production. This production, she contended, was due to her hormonal profile, her medical history, her family's medical history, and the medications that she was taking at the time of the test. She did not have any of her supplements tested.

5.8 Dr. Di Pasquale testified at length regarding the basis for his theory of endogenous production. He testified that he did not consider supplement contamination at all in arriving at

Panel, July 3, 2000). See also *Bauman v. IOC, et al.* (CAS OG 00/006).

³ See *Poll v. FINA* (CAS 2002/A/399); *Meca-Medina v. FINA* (CAS 99/A/234); *UCI v. Moller* (CAS 99/A/239); *UCI v. Outchakov* (CAS 2000/A/272); *Janovic v. USADA* (CAS 02/A/360); *USADA v. Dickey* (AAA 30 190 00341 02); *USADA v. Moninger* (AAA 30 190 00930 02); and *Brooke Blackwelder v. USADA* (AAA No. 30 190 00012).

his theory.

5.9 On cross-examination, Dr. Di Pasquale acknowledged that Respondent had not been definitively diagnosed with endometriosis, that he had not made a physical exam of Respondent, and that he based his conclusion on his interview with her, her records, and her family history. He did not refer her to a specialist or request that she have any further tests or procedures to determine a definitive diagnosis. He was questioned extensively regarding his articles, publications, and interviews on his web sites on steroid use. Many of these might be interpreted as supportive of the use of prohibited substances. Dr. Di Pasquale testified that he had not done any clinical research in the area of endometriosis or in support of his theory regarding Respondent's positive test result. He further testified that there were no scientific articles that supported his theory. He did not test his theory and he admitted that he would be only approximately 80% positive that the positive test result was due to his theory of endogenous production.

5.10 Dr. Don Catlin testified that the analysis of Respondent's urine had a positive reading of the prohibited substance. The level of 19-norandrosterone found in Respondent's urine was approximately 23 to 29 times the IOC cutoff. The IOC laboratories uniformly have applied a 5ng/ml threshold for females. *IOC Analytical Criteria for Reporting Low Concentrations of Anabolic Steroids* (1998). (USADA Exhibit 16.) Studies have confirmed that the level of 5 ng/ml far exceeds any amount which may be produced naturally. *Nandrolone Review* (2000) and *Nandrolone Progress Report* (2003). (USADA Exhibits 17 and 18.) In *Poll v. Fina* (CAS 2002/A/399), the Panel noted that:

This threshold for reporting nandralone positives for female is scientifically backed by the majority of the medical opinions stated on this issue.

Stress and physical exertion has no impact on the quantity of the substance
(Citation omitted).

Poll v. Fina at ¶ 9.4.24.

5.11 Dr. Catlin testified that none of the Respondent's listed prescriptions, including the birth control product, Yasmine, Allegra, Flonase, Albuterol inhaler, or Bextra, would have caused the positive doping test result. He further testified that he had read Respondent's expert report and disagreed with it. He testified that dehydration would not have caused the high level of 19-norandrosterone in excess of 110 ng/ml that was found in Respondent's urine. Further, neither musculoskeletal inflammation, overtraining/overreaching, asthma, aromatase activity, possible hypoglycemia, nor possible hyperinsulinemia, in his scientific opinion, would have caused the high reading. He added that Respondent's level of 19-NA ranked her as the 16th highest level reported in his lab during the last year and a half. Further, it was the highest reading among the females tested.

5.12 Dr. Seifer testified that he routinely treats patients with endometriosis. He has published a number of peer-reviewed publications in the area of gynecology, including endometriosis. He was present for much of Respondent's testimony and testified that to test for endometriosis one must be given a physical exam, which would also involve imaging and possibly lab tests. Without such, there were too many other diseases that could be the cause of the symptoms. Dr. Seifer testified that he found Dr. Di Pasquale's conclusions "hard to believe."

5.13 Dr. Bulum testified regarding the numerous studies he had participated in and conducted for the National Institute of Health. He has an extensive background in all areas of

endometriosis, including treatment. Among other things, Dr. Bulun has studied extensively in the areas of aromatase and hormone action in endometriosis. (USADA Exhibit 41.) Respondent stipulated that Dr. Bulun was an expert in the areas of aromatase and endometriosis. Dr. Bulun disputed Dr. Di Pasquale's explanation based on his extensive studies and background in his areas. He testified that aromatase in endometriosis produces primarily estrogen in picogram amounts and does not produce norsteroids. He further testified that, based on his extensive research, estrogen produced in aromatase in endometriosis cannot be detected in the urine. Dr. Bulun stated that Dr. Di Pasquale's theory regarding the production of norsteroids in aromatization is not possible.

5.14 In *Walker v. IAAF*, the athlete argued among other things that the taking of dietary supplements which, he contended, did not contain prohibited substances, could provoke the endogenous production of nandralone and/or its metabolites. He further argued that when those supplements are combined with vigorous exercise, the results produce elevated concentrations of 19-NA. The IAAF panel rejected that argument, citing *Ottey v. IAAF* (IAAF Arbitration Panel July 3, 2000), in support of its decision. The *Ottey* panel cited the extensive support for the 5 ng/ml cut off for females.

5.15 The IAAF Rules reflect that the presence in the athlete's body fluids of a prohibited substance or metabolite of such substances which indicate the ingestion of anabolic agents is prohibited at all times. (IAAF Procedural Guidelines, Schedule 1.)

5.16 Respondent is responsible for the presence of the prohibited substance in her body. The Panel is convinced that Respondent's positive test result was not due to endogenous production. Dr. Di Pasquale lacked the expertise and experience, in contrast to Drs. Cattin, Seifer, and Bulun, to support his endogenous production theory, which, in any event, was

unsupported by credible, scientific evidence. See *B. v. LIF*, CAS 98/214 (expert report consisting of a pubic hair analysis was not a scientifically approved technique and had not been endorsed by the IOC).

5.17 The Panel is convinced that the applicable threshold set by the IOC based on a recommendation of the directors of the various IOC accredited labs is valid.

5.18 USADA produced evidence supported by able argumentation that Respondent had not met the burden of proving that a reduction in the suspension period is warranted.

6. Decision and Award

The Panel decides as follows:

6.1 A doping violation occurred on the part of Respondent.

6.2 The minimum suspension for a first offender of two (2) years to take place effective from November 24, 2003 is imposed on Respondent pursuant to IAAF Rule 60. The Respondent is credited with the time of her provisional suspension, effective August 2, 2003.

6.3 All competitive results which occurred on or after February 18, 2003, are cancelled.

6.4 A two-year period of ineligibility beginning August 2, 2003, from access to the training facilities of the USOC Training Centers or other programs and activities of the USOC, including grants, awards, or employment, is imposed.

6.5 The administrative fees and expenses of the American Arbitration Association and the compensation and expenses of the arbitrators shall be borne by USADA.

6.6 The parties shall bear their own costs and attorneys' fees.

This Decision and Award is in full settlement of all claims submitted to this arbitration.

Signed this 20th day of November, 2003.

Carolyn B. Witherspoon
Carolyn B. Witherspoon, Esquire, Chair

Chris Campbell, Esquire

Walter G. Gans

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