

ANADO Legal Note 7: More Anti-Doping Decisions 2008 and 2009

Introduction: The Importance of Getting it Right

Here is another set of summaries of anti-doping decisions from 2008 and early 2009, most involving WADA and all but one from CAS. The full texts of the decisions involving WADA are available on the WADA website at www.wada-ama.org/legal. The full text of the *Rasmussen* and *Hoch* decisions are posted on the CAS website (*Rasmussen* in French, *Hoch* in English) at www.tas-cas.org. A summary of the *Pavlov* decision is posted on the UEFA website at www.uefa.com.

Virtually all of the decisions involving WADA are appeals from decisions of national disciplinary tribunals or of International Federation tribunals. In all cases, those tribunals failed to find that an adverse analytical finding should result in an anti-doping rule violation or, if they did, failed to impose the necessary consequences. This suggests a lack of understanding of anti-doping rules by members of tribunals. This suggests poor training of tribunals. This also suggests a failure of Anti-Doping Organizations conducting results management to bring fully documented and well-presented cases to those tribunals.

This should be a matter of concern to all Anti-Doping Organizations. Appeals are expensive and time consuming. Moreover, a successful appeal lessens confidence in the judgment and competence of the national or the international tribunal with original authority to address a possible case of doping. That puts the entire anti-doping system in a poor light.

As NADOs bring their first cases under their revised 2009 World Anti-Doping Code-compliant rules, they should make special efforts to ensure that the tribunals considering these matters are properly instructed on the anti-doping rules and on relevant decisions of other tribunals in like circumstances. Outside of the conduct of individual cases, NADOs should insist, for example, that national disciplinary tribunals and their members receive appropriate general training in doping control (how samples are collected and analyzed), in how results are managed, and in content of the World Anti-Doping Code-compliant rules (what are the violations, what is strict liability, what are the presumptions and burdens of proof, what are the factors that govern the consequences for anti-doping rule violations, roles and responsibilities, etc.). National disciplinary tribunals and NADOs, and the athletes and other sport participants they serve, have a common interest in correct decisions that do not require appeal, and will resist appeal if one is brought.

Previously decided CAS and other anti-doping decisions will be invaluable in both training tribunals and pursuit of individual anti-doping rule violations. Previous decisions illustrate the proper application of anti-doping principles and rules to specific facts. They ensure consistent application of anti-doping rules from country to country and from sport to sport. They discourage frivolous challenges to the assertions of anti-doping rule violations made by NADOs and other Anti-Doping Organizations. They

remind NADOs and other Anti-Doping Organizations of best practices and the vital importance of continually improving anti-doping programs to protect athletes' rights to doping-free sport.

Refusal/Whereabouts Failure

WADA v. FILA and Delfattah (1) CAS 2007/A/1365 December 11, 2007

Refusal to provide out-of-competition sample by Egyptian athlete training at U.S. training centre – initially IF issued warning – WADA filed appeal to CAS – on further consideration, IF imposed provisional suspension, held hearing and imposed a six month period of ineligibility – WADA filed an additional appeal to CAS – CAS determined that the IF decision-making failed to follow its own constitution and was, therefore, invalid – internal recourse not fully exhausted – assertion of refusal to give a sample referred back to IF for proper consideration – IF ordered to contribute to WADA's costs; athlete to bear own costs

WADA v. FILA and Delfattah (2) CAS 2008/A/1470 September 3, 2008

Refusal to provide out-of-competition sample by Egyptian athlete training at U.S. training centre – as ordered by CAS, further consideration by IF led to imposition of six month period of ineligibility – WADA appealed – contradictory evidence about the communication between the athlete and doping control personnel, particularly about the athlete's capacity to communicate in English, presentation of letters of authority, the athlete's alleged desire to contact his national federation to determine if he was properly subject to the out-of-competition doping control, and the athlete's alleged explicit refusal to provide a sample – CAS determined there was adequate authority to take a sample – given athlete's education, international experience, and the fact that he had been training in the United States for 6 weeks prior to the request for a sample, CAS unwilling to accept athlete's assertion that he could not communicate in English at all, or that doping control personnel had failed to properly identify themselves – 2 year period of ineligibility imposed

Rasmussen c. FMC and UCI, CAS 2008/A/1612, January 22, 2009 [decision in French]

Athlete received a total of 2 notifications from each of the NADO of his home country and his IF (UCI) concerning missed tests or failure to file up-to-date whereabouts information or inaccurate whereabouts information, all in a seven month period – in accordance with UCI anti-doping rules, the national federation which licensed the athlete conducted a hearing and imposed two year period of ineligibility – CAS rejected the athlete's appeal, and accepted that the athlete deliberately committed all four failures – the athlete claimed that his home NADO (Anti-Doping Denmark or ADD) had no jurisdiction over him because he lived and was licensed as a rider in Monaco – the Panel disagreed, finding that he had previously acknowledged the authority of ADD and

competed for Denmark in international competitions, requiring him to be in ADD's registered testing pool – athlete found to have violated whereabouts requirements and to have evaded or avoided doping control (because he deliberately provided false whereabouts information for a trip from Europe to Mexico) – CAS imposing two year period of ineligibility, the most severe sanction for the violations committed – panel rejected plea for reduced period of ineligibility because of so-called cooperation in establishing anti-doping rule violations by other members of Rabobank cycling team

WADA v. CONI, FIGC, Maninni and Possanzani, CAS 2008/A/1557, January 29, 2009

Football athletes notified of doping control at conclusion of match – an way to doping control station, intercepted by team coach and President and ordered to attend team meeting – chaperone barred from dressing room where meeting occurred and players not under observation for thirty-five minutes – conflicting evidence on whether doping control personnel had agreed with team officials to the players attending the meeting before reporting for doping control – first instance disciplinary tribunal finds no anti-doping rule violation – domestic appeal body finds anti-doping rule violation and imposes fifteen day suspension – on appeal, CAS determined that the mere fact of giving a sample later does not itself excuse the initial refusal/failure to appear for doping control – no evidence that athletes insisted that they should report for doping control first – athletes could have ignored direction to attend team meeting without repercussion and should have reported to doping control directly – athletes' justification not "compelling" – fifteen day period of ineligibility not based on anti-doping rules – pressure on athletes to attend team meeting establishes "no significant fault or negligence" – normal two year period of ineligibility should be reduced to one year

Comment:

This decision should be referred to with caution. The internal logic of the CAS Panel is not convincing: how could the same pressures from club officials that justify "exceptional circumstances" and a finding of "no significant fault or negligence" not provide "compelling justification" to excuse the athletes' failure to ignore club officials in the first place? It seems to me that if a set of facts cannot provide "compelling justification" it cannot be "exceptional circumstances." To put it the other way, if the facts establish "exceptional circumstances," one would think they would also be "compelling" enough to "justify" the delay in reporting in the first place.

The decision is also unsatisfactory in its failure to comment on the culpability of the team officials who were the cause of the athletes' failure to report to doping control. There is no suggestion, as there should have been, that these officials be investigated for possible anti-doping rule violations themselves in diverting the athletes and in barring doping control personnel from the team meeting. Compare to Pavlov v. UEFA, below.

Non-analytical Positive: Possession and Aiding & Abetting

IOC and WADA v. FIS and Pinter, CAS 2007/A/1434 & 1435, November 20, 2008

Police raid of athlete accommodation at Torino Olympic Games finds unused syringes and used syringes with traces of athlete's blood, and other medical waste indicating organized program blood doping involving the athlete and teammates – IOC decision to suspend athlete and teammates appealed unsuccessfully to CAS (CAS 2006/A/1286, 1288 & 1289, January 4, 2008), which found the athlete had committed violation of aiding and abetting (“complicity”) in doping by other athletes and disqualifying athlete from Olympics – subsequent disciplinary proceedings to determine consequences outside of Olympics – national federation and FIS Doping Panel each determined it did not have enough evidence to find the particular athlete had committed and anti-doping rule violation – on appeal, CAS determined that the evidence established “constructive possession” of a prohibited substance – athlete provided inconsistent evidence of the reason for his own possession of syringes, and there was ample evidence of organized doping on the athlete's accommodation – CAS Panel also accepted earlier Panel's determination of violation of “complicity” – four year period of ineligibility

Hoch v. FIS and IOC, CAS 2008/A/1513, January 26, 2009

Police raid of coach's accommodation at Torino Olympic Games finds blood doping equipment and medical waste – coach immediate left Torino Olympic Games and returned home to Austria – FIS Doping Panel imposed life time ineligibility for possession of doping substances and for aiding and abetting doping – on appeal, CAS reduced the period of ineligibility to fifteen years – Panel rejects argument that life ban violated coaches rights under Art. 6(1) of *European Convention on Human Rights* (minimum rights for those charged in a criminal proceeding) as appeal to CAS cures any possible procedural defects of FIS Doping Panel proceeding (citing *Eder*, CAS 2007/A/1286)) – coach's conduct met both objective and subjective criteria for the violation of aiding and abetting – within range of sanctions for aiding and abetting (four year to lifetime period of ineligibility), while the offence was serious, a life ban would not be proportionate – coach did not have the sole or lead responsibility for doping – fifteen year period of ineligibility based 2/3 of coach remaining working life of twenty-one years

Comment: This may be the only anti-doping decision so far to consider the length of sanction for athlete support personnel in a range up to a life ban. It remains to be seen whether future Panels will give “a break” to other coaches or support personnel who while committing the anti-doping rule violation of “aiding and abetting” did so under the direction of others. The danger of the Panel's approach is that it suggests that support personnel should not subject to the same sort of strict liability as are athletes explicitly and/or it applies a tacit form of exceptional circumstances under the guise of “proportionality” where none are authorized by the World Anti-Doping Code.

Exceptional Circumstances

WADA v. USADA and Thompson, CAS 2008/A/1490, June 25, 2008

In-competition adverse analytical result for cocaine – high school athlete admitted to social use the night before the junior national championship – domestic disciplinary body imposed only one year period of ineligibility due to “exceptional circumstances,” citing the athlete’s youth, his contrition, his inexperience with anti-doping rules and his lack of anti-doping education – CAS rejected WADA’s appeal for two year period of ineligibility – the totality of the athlete’s inexperience in sport, lack of consistent coaching, lack of anti-doping education (including lack of knowledge that cocaine was a prohibited substance), lack of intention to influence or enhance performance, and relatively young age combined to establish “no significant fault or negligence” – one year period of ineligibility upheld

Comment: This decision will offend purists. To some it will illustrate the legal axiom that “hard cases make bad law.” To some it will illustrate application of common sense to a particular set of facts. It seems to me that the governing factors were that the athlete was still school-aged (have just graduated from high school several days before the competition) and had no previous experience with sport at a level where anti-doping rules were in operation. The lesson for NADOs is that anti-doping education and information should come before doping control begins, especially when a national program is applied to levels of sport far removed from eligibility for international competition and such competition itself.

No Exceptional Circumstances

WADA v. Football Association of Wales and James, CAS 2007/A/1364, December 21, 2007

In-competition adverse analytical finding for cocaine metabolite – finding not contested – national federation imposes six month, ten day period of ineligibility and small fine – on appeal, CAS imposes two year period of ineligibility – athlete’s avowed failure to resist “extreme peer pressure” to knowingly take drugs does not qualify as an exceptional circumstance – athlete’s good character is not a mitigating factor that establishes exceptional circumstances (reliance on *Knuass v. FIS*, CAS 2005/A/847)

WADA v. FIG and Visotskaya, CAS 2007/A/1413, June 20, 2008

In-competition adverse analytical finding for diuretic furosemide – athlete a minor at the time of the doping control – FIG imposes nineteen month period of ineligibility, but does not notify WADA of the decision for nearly one year – on appeal, CAS determines posting press releases on website is not sufficient to notify WADA of the decision so the appeal is not out-of-time – exceptional circumstances not available because athlete did not demonstrate how the prohibited substance had entered her system – no evidence that

athlete took any care in what she consumed – being a minor is not itself an exceptional circumstance (see previous CAS decisions: CAS 2006/A/1032 and CAS 2005/A/830) – fact that female gymnasts have relatively short careers not relevant to length of period of suspension – WADA’s costs to be contributed to by both the FIG and the athlete

WADA v. FCN and Prieto, CAS 2007/A/1284 & 1308, July 8, 2008

In-competition adverse analytical finding for nandrolone and elevated T/E ratio – athlete blamed supplements – FINA accepted decision of national federation disciplinary tribunal to impose one year period of suspension for “no significant fault of negligence” due to athlete’s cooperation and due to fraud committed on athlete by supplement manufacturer – no concrete evidence from athlete that supplement was the source of prohibited substances – in any event, athlete failed to take sufficient care in taking supplement (such as proper research into product and ingredients, consulting medical or nutritional experts, etc.) that might justify finding of “exceptional circumstances” – two year period of ineligibility – national federation order to contribute to WADA’s legal costs

WADA v. FILA and Stadnyk, CAS 2007/A/1399, July 17, 2008

In-competition adverse analytical finding for diuretic furosemide – FILA disciplinary body imposed one year period of ineligibility but reopened the matter when WADA threatened appeal to CAS – FILA disciplinary body further consideration led to two year period of ineligibility – however, national federation then presented FILA with evidence of sabotage by another athlete – FILA reduces period of suspension to fifteen months – on appeal, CAS finds that plea of sabotage improbable and contrary to analytical evidence (concentration of prohibited substance inconsistent with timing of alleged sabotage) – since athlete had no other proof of how prohibited system entered their system, “no significant fault of negligence” could not apply – taking into account “fairness to athlete,” start of two year suspension set to date of sample collection to account for FILA’s failures in decision-making and lateness in advising WADA of its decisions – national federation order to contribute to WADA’s legal costs

Comment:

The Panel’s finding involved rejection of evidence that another competitor (who was a minor at the time) had sabotaged the athlete. This evidence was presented by the athlete’s national federation. As summarized by the Panel, it suggests either (a) a deliberate effort by the national federation to use a minor athlete to fabricate an assertion of sabotage, or (b) an arrangement between the two athletes and the national federation to fabricate an assertion of sabotage. Each possibility is highly disturbing. Yet the Panel makes no comment on the implications of its evidentiary findings, particularly the need for further anti-doping investigation to determine whether further anti-doping rule violations were committed (or criminal investigation to determine whether domestic laws concerning the rights of minors were broken). Compare to Pavlov v. UEFA, below.

WADA v. Qatar Football Association and Al-Mohadanni, CAS 2008/A/1445, August 21, 2008

In-competition adverse analytical finding for 19-norandrosterone – athlete fully cooperated with national federation doping control authorities, and was using widely- and legally-available nutritional supplement which according to a national expert was shown to the source of the prohibited substance – three month period of ineligibility – on appeal, CAS found no convincing evidence that the supplement was in fact the source of the prohibited substance (WADA evidence was that the product provided by the athlete did not contain prohibited substances) (reliance on *WADA v. Stanic and Swiss Olympic*, CAS 2006/A/1130) – moreover, athlete had failed to exercise “utmost caution” in purchase and use of nutritional supplement and take “all necessary measures” to avoid prohibited substances (reliance on *Peurta v. ITF*, CAS 2006/A/1065, *WADA v. Lund, USADA and USBSF*, CAS OG/011, and *Hipperdinger v. ATF*, CAS 2004/A/690) – two year period of ineligibility – Qatar Football Association ordered to contribute to WADA’s legal costs

WADA v. Qatar Football Association and Alenza CAS 2007/A/1446 August 21, 2008

In-competition adverse analytical finding for 9-norandrosterone – national federation determined not to sanction the athlete, connecting the adverse analytical finding to medical treatment – no evidence that medical treatment was in fact legitimate or that athlete had a TUE – no evidence to support that medication might have been the cause of the adverse analytical finding – no evidence to support reduction or elimination of period of ineligibility for no fault or negligence or no significant fault or negligence because athlete failed to exercise any care or diligence in *communications* with doctors or in seeking TUE – two year period of ineligibility – Qatar Football Association ordered to contribute to WADA’s legal costs

WADA v. CONI and Piacentini, CAS 2008/A/1516, September 11, 2008

In competition adverse analytical finding for cocaine metabolites – athlete admitted to use – national tribunal imposing one year eight month period of ineligibility due to athlete’s admission and that substance would not enhance performance – on appeal, CAS imposed two year period of ineligibility as no exceptional circumstances demonstrated

WADA v. Swiss Olympic Association and Daubney, CAS 2008/A/1515, October 2, 2008

In-competition adverse analytical finding for cocaine – athlete passed polygraph test claiming had never knowingly taken cocaine and claims his drink must have been spiked at one of three public bars where he had accepted drinks from strangers in the week before the competition, one that was know to be unfriendly to his team – disciplinary body accepts athlete’s evidence and on that basis finds no fault or negligence, but in accordance with the rules refers question of sanction to IF, which in turn delegates determination to the national federation – sanction hearing accepts conclusion of

disciplinary body and concludes adverse analytical finding most likely the result of sabotage – no period of ineligibility – however, on appeal, CAS finds no persuasive evidence of how cocaine entered athlete’s system to support athlete’s assertion that his drinks were spiked – analytical result casts doubt on athlete’s assertions – even if that evidence were accepted, requirements for exceptional circumstances not met – athlete’s decision to visit high-risk bar and accept drinks from strangers was a failure to exercise “utmost caution” – two year period of ineligibility

***WADA and CONI v. Comastri* CAS 2008/A/1479, October 20, 2008**

In-competition adverse analytical finding for cocaine – athlete admitted to using cocaine seven days before competition on belief that metabolites would clear her system within three days – national federation determined a one year period of ineligibility because of no significant fault or negligence – no evidence to confirm cocaine taken seven days before the competition (it might have been consumed closer to the competition) – even accepting athlete’s evidence, no evidence to support application of no significant fault or negligence – willful ingestion of drugs offered by a friend, even if under peer pressure, involves a high level of fault and is unmitigated – two year period of ineligibility – reliance on *WADA v. FAW and James*, CAS 2007/A/1364 that peer pressure does not give rise to no significant fault or negligence

***WADA v. FISM and Turinni*, CAS 2008/A/1565, November 4, 2008**

In-competition adverse analytical finding for 19-norandrosterone at world championships – eye drop medication received from non-sport doctor – packaging had indications that it contained the prohibited substance nandrolone – but no TUE for or declaration of medication on doping control forms – IF disciplinary body disqualifies results but did not impose a period of suspension – on appeal, CAS determines that “no fault or negligence” could not apply because athlete responsible for choice of medical personnel – athlete took no steps to justify “no significant fault or negligence” and refers to previous CAS decisions on reliance on medical treatment: *Lund* (CAS OG06/001), *Squizzato* (CAS 2005/A/873), *Vlasov* (CAS 2005/A/837), *Canas* (CAS 2005/A/951) – two year period of ineligibility

***Pavlov v. UEFA, UEFA Appeals Body*, December 28, 2008**

In-competition adverse analytical finding for 19-norandrosterone and 19-noretiocholanone – athlete claimed to have taken medication/supplement provided by team doctor – doctor claimed to have secured products from “unofficial sources” – athlete had not sought a TUE – athlete had not declared use of product on doping control forms – athlete asked no questions and trusted doctor entirely – no evidence that prohibited substances contained in the product provided by the doctor – no evidence that the athlete’s fault or negligence was not insignificant – two year period of ineligibility – in view of team doctor’s admissions (purchasing substances on grey or black market, possessing and administering prohibited substance to athletes), Appeals Body calls for anti-doping investigation into his conduct

Comment: While perhaps not within the Appeal Body's strict authority, it is comforting to see the call for investigation of athlete support personnel whose misconduct is indicated by the evidence. In my view, this should be the norm for disciplinary tribunals and not the exception as is currently the case.

WADA v. CONI, FIGC, Maninni and Possanzani, CAS 2008/A/1557, January 29, 2009

Football athletes notified of doping control at conclusion of match – an away to doping control station, intercepted by team coach and President and ordered to attend team meeting – chaperone barred from dressing room where meeting occurred and players not under observation for thirty-five minutes – conflicting evidence on whether doping control personnel had agreed with team officials to the players attending the meeting before reporting for doping control – first instance disciplinary tribunal finds no anti-doping rule violation – domestic appeal body finds anti-doping rule violation and imposes fifteen day suspension – on appeal, CAS determined that the mere fact of giving a sample later does not itself excuse the initial refusal/failure to appear for doping control – no evidence that athletes insisted that they should report for doping control first – athletes could have ignored direction to attend team meeting without repercussion and should have reported to doping control directly – athletes' justification not "compelling" – fifteen day period of ineligibility not based on anti-doping rules – pressure on athletes to attend team meeting establishes "no significant fault or negligence" – normal two year period of ineligibility should be reduced to one year

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