



Arbitration CAS 2011/A/2398 World Anti-Doping Agency (WADA) v. World Triathlon Corporation (WTC) & Timothy Marr, award of 20 February 2012

Panel: Mrs Maidie Oliveau (USA), President; Prof. Richard McLaren (Canada); Mr Christopher Campbell (USA)

Triathlon

Doping (amphetamine)

Assessment of the ineligibility period

In assessing the period of ineligibility to impose, a panel must have regard to the particular circumstances of each case. In a particular case where the facts are agreed to between the parties that the athlete had no intention to take the prohibited substance thus no intent to enhance sports performance, he was consuming a beverage he thought to be his, he was travelling with a friend, he was not in a hostile environment when he consumed the beverage, he was not aware that his friend suffered from Attention Deficit Disorder, nor was he aware that his friend was prescribed medication for the disorder, the degree of fault or negligence by the athlete is very limited.

The Appellant, World Anti-Doping Agency (WADA) is a Swiss private law foundation whose headquarters are in Montreal, Canada, but whose seat is in Lausanne, Switzerland. It is a global regulator whose self-proclaimed mission is

“To promote, co-ordinate and monitor the fight against doping in sport in all its forms”.

The First Respondent, World Triathlon Corporation (WTC) is a Florida based company that is the owner and organizer of Ironman and Ironman 70.3 branded events.

The Second Respondent, Mr. Timothy Marr (“Marr”), is a professional triathlete. On 18 July 2010, Marr was the 5th place finisher at the 2010 Vineman Ironman 70.3 (the “Event”) competition.

Following the Event, Marr was selected to provide a bodily sample. The A-sample was tested by the UCLA Olympic analytical Laboratory (the “Lab”) and that sample was reported positive for amphetamine.

At the request of Marr, the B-sample was opened and analyzed by the Lab. The B-sample confirmed the presence of amphetamine in Marr’s sample.

Marr was advised of these results by letter dated 7 September 2010 and was advised that he was declared ineligible for a period of two years beginning on 13 August 2010.

Marr challenged the decision and elected to appeal the decision before the American Arbitration Association (AAA).

In a decision dated 22 February 2011, the AAA Arbitrator held that Adderall (the substance which the Athlete had ingested) was a Specified Substance according to the World Anti-Doping Code (the “Code”) and Marr’s period of ineligibility should run from 13 August 2010, until the date of the Award (the “AAA Decision”), a period just over six (6) months.

It is this decision which WADA appeals.

On 5 April 2011, WADA filed its Statement of Appeal with the Court of Arbitration for Sport (CAS), requesting the CAS rule:

1. *The Appeal of WADA is admissible.*
2. *The Award rendered on 22 February 2011 by Mr. Alan E Harris, sole arbitrator of the American Arbitration Association in the matter of Mr Timothy Marr (arbitration No 74 190 00738 10 JENF) is set aside.*
3. *Mr Timothy Marr is sanctioned with a two-year period of ineligibility starting on the date on which the CAS award enters into force. Any period of ineligibility (whether imposed to or voluntarily accepted by Mr Timothy Marr) before the entry into force of the CAS award shall be credited against the total period of ineligibility to be served.*
4. *All individual competitive results obtained by Mr Timothy Marr from 13 August 2010, through the commencement of the applicable period of ineligibility shall be disqualified with all of the resulting consequences including forfeiture of any medals, points and prizes.*
5. *WADA is granted an Award for costs.*

On 15 April 2011, WADA filed its Appeal brief with accompanying Exhibits. The Request for Relief in paragraph 3 was amended as follows:

3. *Mr Timothy Marr is sanctioned with a period of ineligibility to be set in accordance with article 10.5.2 WTC Anti-Doping Rules for Ironman Triathlon Events Version 3.0 (January 2010) (“WTC ADR”), between 12 and 24 months, starting on the date on which the CAS award enters into force. Any period of ineligibility (whether imposed to or voluntarily accepted by Mr Timothy Marr) before the entry into force of the CAS award shall be credited against the total period of ineligibility to be served.*

On 12 May 2011, WTC, the First Respondent, filed its Answer and accompanying Exhibits. In its Answer, the WTC requested the CAS to rule:

1. *The Appeal of WADA is admissible.*
2. *The award rendered on 22 February 2011 by Mr. Alan E. Harris, sole arbitrator of the American Arbitration Association in the matter of Mr. Timothy Marr (Arbitration No. 74 190 00738 10 JENF) is set aside.*

3. *Mr. Marr is sanctioned with a period of ineligibility to be set in accordance with Article 10.5.2 WTC ADR, between 12 and 24 months, starting on the date on which the CAS award enters into force. Any period of ineligibility (whether imposed to or voluntarily accepted by Mr. Timothy Marr) before the entry into force of the CAS award shall be credited against the total period of ineligibility to be served.*
4. *All individual competitive results obtained by Mr. Timothy Marr from 13 August 2010 through the commencement of the applicable period of ineligibility shall be disqualified with all of the resulting consequences including forfeiture of any medals, points and prizes.*
5. *That WADA be granted an Award for costs solely from Mr. Timothy Marr That WADA should not be granted an award for costs from WTC since, at all times, WTC has consistently advocated the positions expressed by WADA.*

On 13 May 2011, the Second Respondent, Marr, filed his Answer Brief with accompanying Exhibits. In his Answer Brief, Marr requested the CAS make the following ruling:

1. *The Award by the AAA Arbitrator, rendered on February 22, 2011, was appropriate and should be affirmed based on any and all of the following:*
 - a) *Adderall is a Specified Substance under the WADA Prohibited List because none of Adderall's component substances are expressly listed in the S6.a list of Non-Specified Stimulants;*
 - b) *any ambiguities regarding the WADA Prohibited List should be construed against the drafter, WADA, and therefore, Adderall and/or its component substances should be classified as a Specified Substance; and*
 - c) *Adderall is a Specified Substance by implication because the WADA Prohibited List expressly lists several types of amphetamine substances as Non-Specified Stimulants, yet none of those amphetamine substances are contained in Adderall.*
2. *In the alternative, the period of ineligibility should be eliminated altogether because Mr. Marr has met the no fault no negligence standard under the WTC ADR.*
3. *Mr. Marr is granted an award for costs.*

On 30 May 2011, the Panel having reviewed the parties' submissions and correspondence, made a ruling that it would determine as a preliminary issue whether Adderall should be considered a Specified Substance.

On 19 August 2011, the Panel issued its partial award holding that:

- (a) *Adderall is a Non-Specified Stimulant as listed in the WADA Prohibited List; and*
- (b) *The matter shall proceed with the Panel to conduct a hearing to determine Marr's period of ineligibility.*

By letter dated 9 December 2011, WADA advised the Panel and the CAS that it was amending its requests for relief as follows:

1. *The Appeal of WADA is admissible;*
2. *The Award rendered on 22 February 2011 by Mr. Alan E Harris, sole arbitrator of the American Arbitration Association in the matter of Mr. Timothy Marr (...) is set aside;*

3. *Mr. Marr is sanctioned with a period of ineligibility to be set in accordance with article 10.5.2 WTC ADR, between **12 and 14 months** commencing on 13 August 2010 and ending at the latest on 13 October 2011;*
4. *Since Mr. Timothy Marr has already been suspend [sic] from 13 August 2010 to 22 February 2011, all individual competitive results obtained by Mr. Timothy Marr from 23 February 2011 through the end of the applicable period of ineligibility shall be disqualified with all of the resulting consequences including forfeiture of any medals, points and prizes.*
5. *WADA is granted an award for costs.*

WADA further advised that in consideration of its amending its requests for relief that the parties requested that the Panel render an award on the basis of the written submissions only.

On 12 December 2011, the Panel wrote to the parties requesting further clarification regarding the partial agreement of the parties. In particular, the Panel requested that Marr confirm whether he was no longer maintaining his assertion of no fault or negligence under the WTC ADR. The Panel further advised that in order to properly assess the period of ineligibility for Mr. Marr it would require a sworn statement from Mr. Marr.

On 13 December 2011, WADA advised the Panel that as the facts held by the AAA Sole Arbitrator were not challenged by WADA, the Panel could assess the degree of fault/negligence on this basis. WADA stated that the parties agreed that the start date for the period of ineligibility should commence on 13 August 2010. WADA also stated that it did not object to Mr. Marr filing a witness statement and agreed not to cross-examine him.

On 21 December 2011, Mr. Marr provided his sworn statement.

In the absence of a hearing, the Panel accepted the Affidavit of Mr. Marr, which is summarized as follows:

- He and his friend D. decided to drive to the Bay Area together for the Vineman race scheduled for July 18, 2010;
- On July 16, 2010 they drove to Santa Rosa together for the race and it is his belief that it was during this trip that he inadvertently ingested Adderall;
- He was not aware that D. was under a physician's care for Attention Deficit Disorder (ADD);
- D. began taking Adderall in May of 2009;
- D.'s dosage was increased in April 2010 and he experienced side effects from the increased dosage. Accordingly, D. starting halving his dosage;
- During the trip to Santa Rosa, D. poured Adderall into a drink when Marr was away from the car – this was consistent with his practice of lowering the dose he was taking;

- D. advised the AAA Arbitrator that he put the dose of Adderall in the drink when Marr was out of the car because he did not want to tell Marr that he was taking drugs for the condition;
- D. testified at the hearing that he could not recall whether he poured the Adderall in a soda or a Gatorade. Marr believes it was added to a soda. This belief is based on the fact that they stopped at a Jack in the Box for lunch and they bought identical large Cokes and placed them in cup holders in the centre console of the car in a parallel position to each other;
- When Marr took his drink he did not recall there being anything different about the two drinks and that if he had noticed any, he likely would have asked D. which drink was his;
- Marr believes this was the only occasion on which he could potentially have been exposed to D.'s Adderall;
- Marr did not knowingly take Adderall and does not believe that he was careless in this instance as he "*simply drank a drink that was recently purchased and appeared to be identical to the other drink*";
- Marr further states that he had "*no prior knowledge that D. was taking Adderall or that it was his practice to halve his dosage of this prescription medicine*". Nor did he know that D. had put Adderall into this drink.

LAW

Jurisdiction of the CAS

1. Article R47 of the CAS Code provides as follows:
An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body.
2. Pursuant to article 13.2.1 of the WTC ADR, in cases arising from competition in an Ironman Triathlon event or in cases involving members of the WTC's registered testing pool, the decision may be appealed exclusively to the CAS in accordance with the provisions applicable before such Court.
3. Under 13.2.2(e) of the WTC ADR, WADA has the right to appeal to CAS against the decision rendered on 22 February 2011.
4. WADA's appeal was timely filed.

5. The parties agree that this Court has jurisdiction to hear and decide this Appeal.

Applicable Law

6. Article R58 of the CAS Code provides as follows:

The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.

7. Marr participated in the Event. In participating in the Event, Marr agreed to be bound by the WTC ADR.
8. The parties agreed that the WTC ADR are the regulations applicable to this procedure.
9. Article 2.1 of the WTC ADR provides as follows:

The presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's bodily Specimen

2.1.1 It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their bodily Samples. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping violation under Article 2.1.

2.1.2 Sufficient proof of an anti-doping violation under Article 2.1 is established by either of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Athlete's A Sample where the Athlete waives analysis of the B Sample and the B Sample is not analyzed; or, where the Athlete's B Sample is analyzed and the analysis of the Athlete's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Athlete's A Sample.

2.1.3 Excepting those substances for which a quantitative reporting threshold is specifically identified in the Prohibited List, the presence of any quantity of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample shall constitute an anti-doping rule violation.

10. Article 4.1 of the WTC ADR provides as follows:

ARTICLE 4 THE PROHIBITED LIST

4.1 Incorporation of the Prohibited List

These Anti-Doping Rules incorporate the Prohibited List which is published and revised by WADA as described in Article 4.1 of the Code (...)

11. S.6.a of the WADA Prohibited List:

PROHIBITED SUBSTANCES

S6. STIMULANTS

All stimulants (including both optical isomers where relevant) are prohibited, except imidazole derivatives for topical use and those stimulants included in the 2011 Monitoring Program.*

Stimulants include:

a: Non-Specified Stimulants:

Adrafinil; amfepramone; amiphenazole; amphetamine; amphetaminil; benfluorex; benzphetamine; benzylpiperazine; bromantan; clobenzorex; cocaine; cropropamide; crotetamide; dimethylamphetamine; etilamphetamine; famprofazone; fencamine; fenetylline; fenfluramine; fenproporex; furfenorex; mefenorex; mephentermine; mesocarb; methamphetamine(d-); p-methylamphetamine; methylenedioxyamphetamine; methylenedioxymethamphetamine; modafinil; norfenfluramine; phendimetrazine; phenmetrazine; phentermine; 4-phenylpiracetam (carphedon); prenylamine; prolintane.

A stimulant not expressly listed in this section is a Specified Substance.

12. Article 10.2 of the WTC ADR provides:

10.2 Ineligibility for Presence, Use or Attempted Use, or Possession of Prohibited Substances and Prohibited Methods

The period of ineligibility imposed for a violation of Article 2.1 (Presence of Prohibited Substance or its Metabolites or Markers) (...) shall be as follows, unless the conditions for eliminating or reducing the period of Ineligibility, as provided in Articles 10.3 and 10.5, or the conditions for increasing the period of Ineligibility, as provided in Article 10.10 are met:

First violation: Two (2) year's Ineligibility.

13. Article 10.5.1 of the WTC ADR provides:

If the Athlete establishes in an individual case that he or she bears No Fault or Negligence for the violation, the otherwise applicable period of Ineligibility shall be eliminated. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Specimen in violation of Article 2.1 (presence of Prohibited Substance), the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility eliminated. In the event this Article is applied and the period of Ineligibility otherwise applicable is eliminated, the anti-doping rule violation shall not be considered a violation for the limited purpose of determining the period of Ineligibility for multiple violations under Article 10.6.

14. Article 10.5.2 of the WTC ADR provides:

If an Athlete establishes in an individual case that he or she bears No Significant Fault or Negligence, then the period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the minimum period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this section may be no less than 8 years. When a Prohibited Substance or its Markers

or Metabolites is detected in an Athlete's Specimen in violation of Article 2.1 (presence of Prohibited Substance), the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility reduced.

The Substantive Arguments

15. Given the Panel's ruling on the issue of Adderall as a Specified Substance, this Award will not repeat the parties' submissions on those issues and will deal with the arguments relating to the determination of sanction only.
16. WADA's position is summarized as follows:
 - The presence of Amphetamine was detected in the bodily sample provided by Marr.
 - Amphetamine is a non-specified stimulant that appears on the WADA 2010 Prohibited List. There is therefore, *prima facie*, a violation of article 2.1 WTC ADR (presence of a prohibited substance or its metabolites or markers in an athlete's bodily specimen).
 - According to Article 10.2 WTC ADR, a two-year period of ineligibility must be imposed for the doping offence, unless, pursuant to Article 10.5 WTC ADR, Marr can establish that, in view of exceptional circumstances, the otherwise applicable period of ineligibility should be eliminated or reduced.
 - In order to avail himself of the provisions under 10.5, Marr must establish how the prohibited substance entered his system, and secondly, that he either demonstrated no fault or negligence or no significant fault or negligence.
 - WADA accepts the facts found by the AAA Arbitrator, including:
 - the source of the adverse analytical finding was Adderall;
 - Marr was not aware that his friend was prescribed Adderall.
 - Marr was not present when his friend poured some Adderall in his drink;
 - Marr had no reason to suspect that his friend's drink would contain a prohibited substance;
 - Marr was not in a hostile environment such as a bar;
 - The contaminated substance was a soft drink – not a particularly suspicious drink;
 - Marr unknowingly ingested a prohibited substance;
 - Marr had no intention to take Adderall.
 - Pursuant to the strict liability principle outlined in CAS jurisprudence, athletes must be aware at all times that they must drink from clean glasses.
 - Marr shared a glass with a friend prior to an important competition, as a result, there is some negligence on his part and he should not benefit from an elimination of his suspension for no fault or negligence.
 - Marr bears no significant fault or negligence and as such, he is entitled to a substantial reduction of the ordinary two-year period of ineligibility. The reduction is in the discretion

of the Panel, subject to the limits of article 10.5.2 of WTC ADR (between 12 and 24 months of suspension)¹.

17. WTC's position on the merits is summarized as follows:

- WTC agrees with WADA's statements regarding the anti-doping rule violation of Marr;
- WTC agrees with WADA that the CAS Panel may make use of its discretion to impose a proper sanction against Marr within the limits of Article 10.5.2 of the WTC ADR.

18. Marr's position on the merits is summarized as follows:

- The period of ineligibility should be eliminated because Marr has met the 10.5.1 no fault or negligence standard;
- Marr has sufficiently established how Adderall entered his system;
- Marr did not and could not have reasonably known or suspected – even with the utmost caution – that he ingested Adderall:
 - Marr inadvertently consumed his friend's drink;
 - Marr was not aware that his friend was prescribed Adderall;
 - Marr was not present when the medication was poured by his friend into his drink;
- The utmost caution standard should not be construed so strictly as to require all athletes to drink from clean glasses all the time. Such a standard is not practical because it would effectively require athletes to personally clean every glass they drink from all the time.
- The first instance Arbitrator correctly held that Marr's consumption of Adderall without his knowledge in a moving vehicle travelling for several hours was an "exceptional" circumstance.
- The AAA Arbitrator erred in applying the CAS 2006/A/1025 case where the Panel stated that athletes must be aware at all times that they must drink from clean glasses.
- Marr's case can be distinguished from other cases where the athlete failed to establish no fault or negligence in that:
 - In CAS 2006/A/1025 the athlete knew his wife had been regularly taking a prohibited substance for several years and that she had taken it on that very day;
 - The athlete knew that the prohibited substance was administered by placing a colourless, tasteless, and odourless substance in a glass of water;
 - The CAS 2006/A/1025 Panel did not hold that an athlete must drink from a "clean glass" in all situations. The CAS 2006/A/1025 Panel did not define or sufficiently describe what constitutes a clean glass.
 - Marr had no reason to suspect that his close friend and former roommate was taking Adderall. Accordingly, Marr had no reason to suspect that a potential unclean glass might contain Adderall;

¹ It is noted however, that this request was amended by WADA's letter dated 9 December 2011 in which it sought to reduce the penalty to a period between 12 and 14 months.

- Unlike the CAS 2008/A/1515 case where the athlete consumed drinks that were handed to him in a hostile bar by random people, Marr was in an unsuspecting environment (moving vehicle with only one other person) with a close friend and former roommate.
- No reasonable or utmost caution could have prevented the accidental ingestion.
- As in the CAS 2009/A/1926 & 1930 matter, where the Panel concluded that the athlete could not have known (even exercising the utmost caution) that his female friend might inadvertently administer cocaine to him if they were to kiss, Marr had no reason to suspect that by simply drinking from a soda, he could ingest a prohibited substance.
- By virtue of the agreement reached between WADA and Marr, Marr chose not to seek an elimination of the sanction on the basis of no fault or negligence.

The Panel's Findings on the Merits

19. There is only one issue for the Panel to decide in this matter, and that is, what is the appropriate sanction for Marr under the circumstances. It follows from that decision that the Panel must then decide the appropriate start date for the sanction.
20. In assessing the period of ineligibility to impose, a Panel must have regard to the particular circumstances of each case.
21. In this particular case, in light of the facts that are agreed to between the parties, including: the fact that Marr had no intention to take Adderall thus no intent to enhance sports performance; he was consuming a beverage he thought to be his; he was travelling with a friend; he was not in a hostile environment when he consumed the beverage; he was not aware that his friend suffered from ADD, nor was he aware that his friend was prescribed medication for the disorder, the Panel is of the opinion that the degree of fault or negligence by Marr is very limited. Thus, the appropriate period of ineligibility is twelve (12) months.
22. Under Art. 10.8 of the WTC ADR, the Panel has a certain discretion as to the starting date of the period of ineligibility. WADA suggests in its communication of 13 December 2011, that there are two possibilities:
 - (i) The period of ineligibility could start on the date of the CAS Award. In this case, the provisional suspension between 13 August 2010 to 22 February 2011 should be credited against the total period of ineligibility to be served;
 - (ii) The period of ineligibility could start on the date of the provisional suspension (i.e. 13 August 2010). In this particular case, the Parties agree that such a solution is required by fairness.
23. The Panel is prepared to accept the parties' agreement that the second is the solution required by fairness, as Marr had already been ineligible for over six months, prior to the AAA Decision, and this matter has taken a long time to reach final resolution through no fault of Marr's.

24. Accordingly, Marr's period of ineligibility shall start on 13 August 2010 and shall end on 12 August 2011. All competitive results obtained by Marr between 23 February 2011 and 12 August 2011 are hereby disqualified.
25. Both parties requested an award for costs in their respective briefs. Article R65.3 of the CAS Code provides that the Panel shall decide which party shall bear the costs of the parties, or in what proportion the parties shall share them, taking into account the outcome of the proceedings, as well as the conduct and financial resources of the parties. Since the parties reached partial agreement on most issues in this appeal, the Panel, applying these standards, finds that the parties shall bear their own respective costs.

Conclusion

26. In summary, the Panel concludes that Marr's total period of ineligibility shall be twelve (12) months commencing on 13 August 2010 and ending on 12 August 2011. All competitive results obtained by Marr between 23 February 2011 and 12 August 2011 shall be disqualified.

The Court of Arbitration for Sport rules:

1. The appeal filed by the World Anti-Doping Agency against the decision issued by the American Arbitration Association on 22 February 2011 is upheld.
2. The Award rendered on 22 February 2011 by the American Arbitration Association in the matter of World Triathlon Corporation v. Mr. Timothy Marr is set aside.
3. Mr. Timothy Marr shall serve a twelve months period of ineligibility, beginning 13 August 2010 and ending 12 August 2011. All competitive results obtained by Mr. Marr between 23 February 2011 and 12 August 2011 shall be disqualified, with all of the resulting consequences including forfeiture of any medals, points and prizes.
4. This award is pronounced without costs, except for the Court Office fee of CHF 1,000 paid by WADA which shall be retained by the CAS.
5. All other or further prayers for relief are dismissed.