



Arbitration CAS ad hoc Division (OG Turin) 06/001 World Anti-Doping Agency (WADA) v. United States Anti-Doping Agency (USADA), United States Bobsled & Skeleton Federation (USBSF) and Zachery Lund, award of 10 February 2006

Panel: Mr. Peter Leaver QC (United Kingdom), President; Mr. Malcolm Homes QC (Australia); Mr. Kaj Hobér (Sweden)

Skeleton

Doping (Finasteride)

No Significant Fault or Negligence

Period of ineligibility resulting in the exclusion from the Olympic Games

- 1. The use of Finasteride which has been included on the WADA Prohibited list since 1 January 2005 as a masking agent constitutes a doping violation in breach of the USADA Protocol and of the FIBT Doping Control Regulations.**
- 2. Under the FIBT Doping Control Regulations, in order to establish “No Fault or Negligence” an athlete has to show that he did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he had used the Prohibited Substance. It cannot seriously be argued that an athlete who realized (and has been told by his national federation) that he had to check the Prohibited List each year and who failed to look at the list at all for over a year had exercised the utmost caution. It is a failure not to continue to monitor the Prohibited List, in accordance with his duty as an athlete.**
- 3. In order to establish “No Significant Fault or Negligence”, an athlete has to show that his fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for “No Fault or Negligence” was not significant in relation to the anti-doping rule violation. Once the test has been satisfied, the period of ineligibility can be reduced. An athlete has satisfied the test where he has shown to be an honest athlete, open and frank with his failure, who for a number of years regularly checked the Prohibited List but failed to do so one year continuing however to include on the Doping Control Form the information that he was taking medication. The fact that the information was not picked up by any anti-doping organisation until the positive test is relevant.**

This is an appeal by the World Anti-Doping Agency (WADA) against a decision by the United States Anti-Doping Agency (USADA) made on 22 January 2006 in respect of a doping violation by Mr Zachery Lund (Mr Lund).

The facts giving rise to this appeal can be shortly stated. Mr Lund competed as a member of the United States Skeleton Team in the World Cup races held at Calgary, Canada, in November 2005. The skeleton race at the World Cup was a competition organized by the Fédération Internationale de Bobsleigh et Tobogganing (FIBT). The FIBT is the “*supreme authority*” in all matters relating to international bobsleigh and skeleton (Art. 1.3. of the FIBT Articles of Association).

Following a doping control test conducted on 10 November 2005 after the skeleton race Mr Lund tested positive for Finasteride. Finasteride is an alphareductase inhibitor, which has been included on the WADA Prohibited List since 1 January 2005 as a masking agent. Mr Lund disclosed on the Doping Control Form that he had taken Proscar, a medication which contains Finasteride. He did not then have, and had not applied for, a Therapeutic Use Exemption (TUE) for the use of Finasteride.

By letter dated 12 December 2005, the FIBT informed the US Bobsled and Skeleton Federation (USBSF) that Mr Lund had tested positive for Finasteride, and required the USBSF to conduct Results Management procedures in accordance with Art. 7 of the FIBT Doping Control Regulations 2004, and to inform the FIBT of the results of those procedures and of possible sanctions.

Pursuant to the USADA Protocol for Olympic Movement Testing (the “USADA Protocol”), USADA undertook the Results Management on behalf of the USBSF.

On 22 January 2006, Mr Lund acknowledged that he had committed a doping violation in breach of the USADA Protocol and of the FIBT Doping Control Regulations and accepted the sanction of a public warning and disqualification of all competition results in the World Cup in Calgary, including forfeiture of any medals, points and prizes.

On 23 January 2006, USADA informed the FIBT, USBSF, WADA and the United States Olympic Committee (USOC) of Mr Lund’s acceptance of the sanction sought by USADA. WADA immediately asked USADA to provide it with the full case file “*in order to preserve our right of appeal*”.

WADA’s appeal to the CAS ad hoc Division was made on 2 February 2006.

In order to complete the factual introduction, it is necessary to record that Mr Lund has openly been using medication containing Finasteride since 1999 to treat male pattern baldness.

On 14 December 2005, as a consequence of the notification of the positive result of the doping control test, Mr Lund’s medical practitioner, Dr Jared Probst, signed a TUE application on Mr Lund’s behalf. On the same day, Mr Lund also applied to USADA for a standard TUE.

On 21 December 2005, the USBSF purported to issue an Abbreviated TUE. It is common ground that the “*Abbreviated TUE Process*” could not be used in respect of Finasteride. The certificate purported to cover the period between 31 October 2005 and 31 October 2006.

On 16 January 2006, the USBSF selected Mr Lund to compete in the XX Olympic Winter Games in Turin.

In the light of Mr Lund's acknowledgement of a breach of the USADA Protocol and of the FIBT Doping Control Regulations, WADA submits that USADA should have imposed a two-year period of ineligibility on Mr Lund in accordance with Art. 10.2 of the FIBT Doping Control Regulations.

WADA further submits that the burden rests on Mr Lund to establish either that he bears "No Fault or Negligence" (in which case the period of ineligibility can be eliminated) or "No Significant Fault or Negligence" (in which case the period of ineligibility can be reduced).

Under the FIBT Doping Control Regulations, in order to establish "No Fault or Negligence" Mr Lund has to show that he "*did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution*" (emphasis added), that he had used the Prohibited Substance. In order to establish "No Significant Fault or Negligence", Mr Lund has to show that his fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for "No Fault or Negligence" was not significant in relation to the anti-doping rule violation.

WADA points out that Art. 2.1.1 of the FIBT Doping Control Regulations provides that it is each athlete's personal duty to ensure that no Prohibited Substance enters his body, and that athletes are responsible for any Prohibited Substance or its metabolites or markers found to be present in their bodily specimen.

Proscar and Propecia, which are the medications which Mr Lund takes to combat male pattern baldness, contains Finasteride as its sole component. As has been stated, Finasteride has been a Prohibited Substance since 1 January 2005, but its inclusion in the Prohibited List from that date was announced in September 2004.

In a letter to Mr Lund dated 21 December 2005, the USBSF stated, inter alia, that it understood that Mr Lund had "*just recently*" become aware that Finasteride was added to the list of Prohibited Substances in 2005.

WADA relies upon the content of that letter to demonstrate that Mr Lund was in breach of his duty, and that he cannot establish either "No Fault or Negligence" or "No Significant Fault or Negligence".

Further, WADA submits that the use of Finasteride to combat male pattern baldness could not qualify for a TUE. Mr Lund would not experience "*a significant impairment to health*" if he were not permitted to use Finasteride. The fact that he has always declared its use on Doping Control Forms is irrelevant for the purpose of a TUE.

Finally, WADA submits that all of Mr Lund's results after Calgary should be disqualified.

USADA's submissions can be shortly stated:

- Mr Lund was misled by the contents of the FIBT website, which, on one page specifically noted that Finasteride had been added to the list of Prohibited Substances as a masking agent, but on another page, listed masking agents as "Specified Substances".
- FIBT's mistake should not be held against Mr Lund, who is not a "cheat".
- Mr Lund's doping test record and medical history establishes that Mr Lund used Finasteride for medical and not for performance enhancing purposes.

Mr Lund's submission broadly followed those of USADA. In addition, however, Mr Lund submitted that WADA was estopped from contending that Finasteride is not a specified, as opposed to a Prohibited, Substance. The estoppel is said to arise from the FIBT's error and from the fact that WADA is, in effect, standing in the FIBT's shoes.

Although it was named as a respondent to the appeal, the USBSF made no written submissions and took no part in the hearing. The FIBT, which was named as an Interested Party, also made no written submissions and took no part in the hearing. The USOC, which was permitted to attend the hearing as an observer was invited by the Panel to make such observations as it wished, but in the event made none other than to state its support for Mr Lund.

LAW

Jurisdiction

1. As has been stated above, USADA's decision was made on 22 January 2006, and WADA's appeal was made on 2 February 2006.
2. The jurisdiction of the CAS ad hoc Division is contained in Art. 1 of the Arbitration Rules for the Olympic Games (the "CAS ad hoc Rules"), which is in the following terms:

"Article 1 Application of the Present Rules and Jurisdiction of the Court of Arbitration for Sport (CAS)

The purpose of the present Rules is to provide, in the interests of the athletes and of sport, for the resolution by arbitration of any disputes covered by Rule 61 of the Olympic Charter, insofar as they arise during the Olympic Games or during a period of ten days preceding the Opening Ceremony of the Olympic Games.

In the case of a request for arbitration against a decision pronounced by the IOC, an NOC, an International Federation or an Organising Committee for the Olympic Games, the claimant must, before filing such request, have exhausted all the internal remedies available to him/her pursuant to the statutes or regulations of the sports body concerned, unless the time needed to exhaust the internal remedies would make the appeal to the CAS Ad Hoc Division ineffective".

3. Rule 61 of the Olympic Charter provides:

“Rule 61 Disputes – Arbitration

Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport, in accordance with the Code of Sports-Related Arbitration”.

4. In the present case, the only appeal provided by FIBT Doping Control Regulations is an appeal to the CAS. Art. 13.2.3 of the FIBT Doping Control Regulations gives WADA, amongst others, the right to appeal. It follows, therefore, that the decision by USADA was the final domestic decision, and that all “*internal remedies*” have been exhausted, as is required by Art. 1 of the CAS ad hoc Rules so as to found the jurisdiction of the CAS ad hoc Division.
5. However, the other condition precedent for the jurisdiction of the CAS ad hoc Division is that the dispute has to have arisen during the Olympic Games or during the period of 10 days preceding the Opening Ceremony, which for the XX Olympic Winter Games is on 10 February 2006.
6. The Panel, therefore, has to decide whether the dispute arose within the period of 10 days preceding 10 February 2006. WADA received the FIBT files sometime after 23 January 2006. Then it considered the file, and having done so, made this appeal on 2 February 2006. The appeal was well within the period permitted for appeal by the USADA Protocol, and the 21 days permitted by Art. 13.5 of the FIBT Doping Control Regulations.
7. It was open to WADA to decide not to appeal, if it so wished. However, in the Panel’s opinion, it would not be possible to say that, on the facts of the present case, a dispute had arisen until WADA had decided to appeal and notified its decision to do so. That notification was given within the 10 days preceding the Opening Ceremony.
8. The Panel is also satisfied that the dispute is “*in connection with*” the Olympic Games as Mr Lund has been selected to compete in the United States team.
9. Accordingly, the CAS ad hoc Division has jurisdiction to hear this appeal. The Panel notes that no party disputed its jurisdiction.

Discussion

10. A number of matters can be dealt with shortly. First, Mr Lund’s own evidence entirely undermines the sole basis of the USADA decision. He did not look at the FIBT website in 2005 until after the positive test result. It follows that he was not misled by its content. He very frankly said that he had checked the Prohibited List on the FIBT and USADA websites every year for five years from 1999 to 2004 because the FIBT advised him to check every year. He also said that he was appearing before the Panel “*because I failed to check in 2005*”.
11. During the hearing, the Panel was shown a print-out of the FIBT website. It had some difficulty in following the submission that the website was confusing. In the Panel’s view, a

fair reading of the website as a whole makes it very clear that the reader should take the link to the WADA Prohibited List in order to satisfy himself as to the status of any substance. In addition, the Panel noted that on page 6 of the website it is expressly stated that “*TUE’s are now required*” for “*Group S5 Diuretics and other masking agents*” including Finasteride (misspelt as “Finaterid-Proscar), that are “*used for treatment of male pattern hair loss*”. That statement alone should set alarm bells ringing in the ears of any reader. But, as has been noted, Mr Lund did not read the website at all until after the positive result.

12. Secondly, Mr Jacobs was unable to point to any confusion in the FIBT’s Doping Control Regulations themselves. His submission amounts to a plea that an athlete was entitled to look at just one page of a website or of a document, and if he was in doubt about what was said, rely upon that doubt to secure his acquittal of a breach of the rules.
13. In the light of that evidence, the Panel rejects the submission that the case CAS 94/129 entitles Mr Lund to the benefit of the doubt because there was a “*thicket of mutually qualifying or even contradictory rules*”.
14. Thirdly, the Panel rejects the submission that it should in some way be bound by the USADA Decision simply because USADA is a vigorous anti-doping organisation. Art. 16 of the CAS ad hoc Rules provides that the Panel shall have full power to establish the facts on which the application is based.
15. Fourthly, as Mr Lund did not look at the FIBT website at the relevant period no estoppel can arise as a result of any confusing or contradictory contents of that website. However, the Panel has found that there was no such confusing entry in any event.
16. It was submitted on behalf of Mr Lund that the Panel should decide whether Finasteride should have been on the Prohibited List at all. The Panel declined to enter into that debate. In CAS 2005/A/921, the CAS Panel said, at paragraph 32: “*Once a substance has been put on the List, it is the fact that such a substance has been detected in the athlete’s body which is deciding. The list and the agreed procedure for its elaboration and enforcement leaves no room for a counter-analysis to determine whether a substance was effectively used as a masking agent or not*”.
17. The Panel wholeheartedly endorses that approach. If International Federations or anti-doping organisations are unhappy with the contents of the Prohibited List, they must persuade WADA to change the list. It is not within the jurisdiction of this CAS Panel to make that decision. Mr Jacobs requested permission to cross-examine WADA’s witnesses, Olivier Rabin and Hans Geyer, about the reason for the inclusion of Finasteride on the Prohibited List. However, as this evidence was irrelevant to the issue to be decided by the Panel, and has not been taken into account by it, the Panel did not allow this cross-examination.
18. Mr Jacobs also relied on the decision in case CAS 2004/A/726. In that case, a CAS Panel held that WADA had failed to establish that a substance which had not been specifically named on the Prohibited List was a Prohibited Substance as being similar to a named Prohibited

Substance. In the present case, that issue does not arise as Finasteride was specifically named on the Prohibited List.

19. So the Panel is satisfied that Mr Lund committed a doping rule violation and turns to what it considers is the critical issue in this case, namely, can Mr Lund satisfy it that notwithstanding the fact that he was found to have taken a Prohibited Substance any sanction should be eliminated or reduced because there was No Fault or Negligence or no Significant Fault or Negligence.
20. The burden on an athlete to establish No Fault or Negligence is placed extremely high. As has been noted above, Mr Lund would have to establish either that he did not know or suspect or that he could not reasonably have known or suspected even with the exercise of utmost caution that he was not using a Prohibited Substance. In the present case, it cannot seriously be argued that an athlete who realized (and has been told by his national federation) that he had to check the Prohibited List each year and who failed to look at the list at all for over a year had exercised the utmost caution, albeit that for several years previously he had scrutinised the list with care. It is his failure to continue to monitor the Prohibited List, in accordance with his duty as an athlete, that has placed Mr Lund in his present predicament.
21. It follows that the period of ineligibility required by the FIBT Doping Control Regulations cannot be eliminated.
22. As CAS Panels have frequently stated and the WADA Code, the FIBT Doping Control Regulations and Annex A to the USADA Protocol expressly provide, it is each athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Furthermore, athletes are responsible for any Prohibited Substance found in their bodily specimen.
23. In these circumstances, the Panel concludes that Mr Lund, on his own admission, an admission which was contained on the Doping Control Form, committed an anti-doping violation and cannot escape a period of ineligibility.
24. The Panel arrives at this decision with a heavy heart as it means that Mr Lund will miss the XX Olympic Winter Games. The Panel found Mr Lund to be an honest athlete, who was open and frank about his failures. WADA did not suggest otherwise. For a number of years he did what any responsible athlete should do and regularly checked the Prohibited List. But in 2005, he made a mistake and failed to do so. However, even then he continued to include on the Doping Control Form the information that he was taking medication which was known to the anti-doping organisations to contain a Prohibited Substance, and yet this was not picked up by any anti-doping organisation until his positive test in late 2005.
25. The Panel finds this failure both surprising and disturbing, and is left with the uneasy feeling that Mr Lund was badly served by the anti-doping organisations.
26. However, for the reasons already given, he cannot escape all liability. Art. 10.2 of the FIBT Doping Control Regulations and the WADA Code enable a Panel to take the *"totality of the*

circumstances” into account in deciding whether there has been No Significant Fault or Negligence. The Panel finds that Mr Lund has satisfied it that in all of the circumstances he bears No Significant Fault or Negligence, and, therefore, reduces the period of ineligibility from two years to one year.

27. The one-year period of ineligibility is to start on the date of the positive doping test (10 November 2005). The Panel has chosen that date as it enables Mr Lund, who, as a result of this decision will miss the XX Olympic Winter Games in Turin to begin racing again early next season.
28. WADA asks that all Mr Lund’s results after the test should be disqualified. Art. 10.7 of the FIBT Doping Control Regulations provides that such a result should follow “*unless fairness requires otherwise*”. In the Panel’s opinion on the facts of this case fairness does require otherwise, and it declines to disqualify those results.

On the basis of the foregoing facts and legal aspects, the ad hoc Division of the Court of Arbitration for Sport renders the following decision:

1. The Appeal filed by the World Anti-Doping Agency on 2 February 2006 is allowed in part.
2. The USADA Decision made on 22 January 2006 is overruled.
3. Mr Lund’s period of ineligibility is for one year commencing on 10 November 2005 and concluding on 9 November 2006.
4. WADA’s request for the disqualification of Mr Lund’s results after 10 November 2005 is rejected.