



**Arbitration CAS 2006/A/1130 World Anti-Doping Agency (WADA) v. Darko Stanic & Swiss Olympic, award of 4 January 2007**

Panel: Mr Quentin Byrne-Sutton (Switzerland), President; Mr Stefan Netzle (Switzerland); Ms Corinne Schmidhauser (Switzerland)

*Handball*

*Doping (benzoyllecgonine; methylecgonine)*

*Athlete's burden of establishing how the prohibited substance entered her/his body*

*Applicable standard of proof*

1. In attempting to establish “*no fault or negligence*” or “*no significant fault or negligence*”, an athlete must in all events meet the precondition of establishing how the prohibited substance entered her/his system. This precondition is important and necessary; otherwise an athlete’s degree of diligence or absence of fault would be examined in relation to circumstances that are speculative and that could be partly or entirely made up. To allow any such speculation as to the circumstances in which an athlete ingested a prohibited substance would undermine the strict liability principle.
2. The balance of probabilities is the most adequate standard of proof to apply where an athlete is seeking to establish how a substance entered her/his system because the principle of strict liability under which a positive test creates a presumption of fault is already demanding on athletes.

On 28 April 2006, after a handball game between the Swiss clubs of St. Otmar St. Gallen and Grasshoppers, the first Respondent Darko Stanic, a professional player who plays for Grasshoppers, was tested positive for Benzoyllecgonine and Methylecgonine, which are metabolites of cocaine; cocaine being specified within WADA’s list of substances prohibited In-Competition. The analysis of the B sample, which was made on Darko Stanic’s request, confirmed the results of the analysis of the A sample.

Upon receiving the results, Darko Stanic immediately indicated his surprise to the president of his club, Grasshoppers, and assured him he had not voluntarily taken cocaine in any form.

The disciplinary Chamber of the second Respondent, the Swiss Olympic Association (“Swiss Olympic”), opened a procedure against Darko Stanic, who was convened to a hearing.

During his hearing, Darko Stanic stated that he had come to the conclusion that the cocaine must have entered his system as a consequence of him unknowingly smoking a cigarette containing cocaine, in the following circumstances:

- Four days before the positive test, in the early morning of 24 April 2006, he and one of his friends Vladan Marsenic had gone to a discotheque in Zurich.
- In general, he smokes approximately one packet of cigarettes a day and at some point during their stay in the discotheque he ran out of cigarettes and asked his friend for one.
- Because his friend had none, he asked a group of compatriots from ex Yugoslavia with whom they had been talking whether someone could give him a cigarette.
- The cigarette he was offered did not raise any suspicions in his mind because although he did recognize that it was probably a self-made cigarette it was the same shape and size as an industrially-produced cigarette. In other words, the cigarette did not have the funnel shape typical of a so-called “joint” containing marijuana, hashish or other drugs rolled into cigarettes.
- He accepted the cigarette and while smoking it felt somewhat strange. He also quite quickly began feeling nausea and some unusual stomach pains aches and therefore decided to leave the discotheque with his friend. Upon arriving home he could not sleep.

On 6 July 2006, the disciplinary Chamber of Swiss Olympic issued its decision, whereby Darko Stanic was suspended for a period of six months. In reaching its decision, the disciplinary Chamber of Swiss Olympic considered that Darko Stanic had committed “*no significant fault or negligence*” as defined by article 17.4.2 of its doping Statute and that given the overall circumstances, including Darko Stanic’s personal situation, the minimum sanction of one year’s suspension should be reduced to six months.

On 13 July 2006, Swiss Olympic’s decision was copied to the Appellant, the World Anti-Doping Agency (“WADA”).

On 27 July 2006, WADA filed a Statement of Appeal with the Court of Arbitration for Sport (“CAS”) against Swiss Olympic’s decision of 6 July 2006. It considered Swiss Olympic to have misapplied its doping Statute by relying on article 17.4.2 and fixing a six-month suspension rather than a two-year suspension based on articles 12.1 and 17.1 of the Statute.

## LAW

### Jurisdiction

1. The jurisdiction of the CAS, which is not disputed, derives from articles 20.2.1 and 20.2.2 of Swiss Olympic’s doping Statute and art. R47 of the Code of Sports-related Arbitration (the “Code”).

2. Furthermore, it is not disputed that the appeal was timely.
3. The scope of the Panel's jurisdiction is defined in art. R57 of the Code, which provides that: *"The Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance"*.

### **Applicable Law**

4. Art. R58 of the Code provides that:  
*"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"*.
5. The Parties having both relied on the provisions of Swiss Olympic's doping Statute, these are deemed applicable. Moreover, because the foregoing doping Statute provides in its preamble that it was adopted to implement the obligations imposed by the World Anti-Doping Code, the latter may be accounted for in interpreting the scope and meaning of the Swiss Olympic's doping Statute. Any issues that need determining that are not regulated by the foregoing rules shall be decided on the basis of Swiss law, as the law most closely connected with the dispute, since both Respondents are domiciled in Switzerland and the ingestion of the Prohibited Substance took place in Switzerland.
6. The following provisions, among others, of Swiss Olympic's doping Statute are relevant in deciding the case:

#### ***"1 Définition***

*Est considérée comme dopage, au sens du présent Statut, la concrétisation d'un ou plusieurs acte(s) délictueux tel(s) qu'énumérés(s) ci-après sous chi. 12.*

#### ***3 Liste des substances et des méthodes interdites***

*3.1 La CLD publie périodiquement une Liste des substances et des méthodes interdites. Elle correspond à la liste adoptée par l'AMA, mais peut contenir des explications et des informations complémentaires.*

*3.2 La Liste des substances et des méthodes interdites revêt un caractère contraignant pour toutes les fédérations membres.*

#### ***12 Actes délictueux vis-à-vis des dispositions antidopage***

*Les faits suivants sont considérés comme des violations des dispositions antidopage:*

*12.1 La présence d'une substance interdite, ou de ses métabolites ou de ses marqueurs, dans les échantillons prélevés sur le sportif.*

12.1.1 Il incombe à chaque sportif de s'assurer qu'aucune substance interdite ne pénètre dans son organisme. Les sportifs sont responsables de toute substance interdite, de ses métabolites ou marqueurs, dont la présence est décelée dans leurs échantillons. Par conséquent il n'est pas nécessaire, pour établir une violation des dispositions antidopage en vertu du chi. 12.1, de faire la preuve de l'intention, de la faute, de la négligence ou de l'usage conscient de la part du sportif.

12.1.2 La présence démontrée d'une substance interdite, de ses métabolites ou marqueurs dans l'échantillon fourni par un sportif constitue une violation des dispositions antidopage, à l'exception des substances pour lesquelles un taux limite est expressément indiqué.

12.1.3 A titre d'exception à la règle générale spécifiée sous chi.12.1, la Liste des substances interdites peut prévoir des critères d'appréciation spécifiques susceptibles de démontrer la présence de substances interdites pouvant également être produites (de façon endogène) par le corps lui-même.

## **17 Suspension infligée à des sportifs individuels**

### **17.1 Condamnation à une suspension en raison d'usage de substances interdites et de méthodes interdites**

Sauf pour les substances (spécifiques) mentionnées sous chi. 17.2, la durée de la suspension prononcée pour une violation du chi. 12.1 (présence d'une substance interdite, ou de ses métabolites ou de ses marqueurs), du chi. 12.2 (usage ou tentative d'usage d'une substance interdite ou d'une méthode interdite) et du chi. 12.6 (possession de substances interdites ou de méthodes interdites):

- pour une première violation: deux ans
- pour une deuxième violation: à vie.

Le sportif ou la personne autre doit toutefois obtenir dans tous les cas, avant qu'une période de suspension ne lui soit infligée, la possibilité d'argumenter dans le but d'obtenir une annulation ou un allègement de la sanction, conformément au chi. 17.4.

#### **17.4.1 Absence de faute ou de négligence**

Si le sportif parvient à démontrer, dans un cas particulier de violation des dispositions antidopage selon le chi. 12.1 (présence d'une substance interdite, ou de ses métabolites ou de ses marqueurs, dans les échantillons prélevés sur le sportif), ou impliquant l'usage d'une substance interdite ou d'une méthode interdite selon le chi. 12.2, qu'il n'y a pas de faute ni de négligence à l'origine de la violation, la durée de suspension normalement applicable est annulée. Lorsqu'une substance interdite, ou ses métabolites ou ses marqueurs sont décelés dans les échantillons prélevés sur le sportif en violation du chi. 12.1 (présence d'une substance interdite), le sportif doit être en mesure de démontrer, avant d'obtenir l'annulation de la suspension, comment la substance interdite est parvenue dans son organisme. En cas d'application de cette disposition et de l'annulation de la durée de suspension normalement applicable, la violation des dispositions antidopage ne doit pas être considérée comme violation déterminant une suspension pour violation répétée comme spécifiée sous chi. 17.1, 17.2 et 17.5.

#### **17.4.2 Absence de faute ou de négligence significatives**

Cette disposition ne s'applique qu'aux violations inhérentes au chi. 12.1 (présence d'une substance interdite, ou de ses métabolites ou de ses marqueurs, dans les échantillons prélevés sur le sportif) ou impliquant l'usage d'une substance interdite ou d'une méthode interdite selon le chi. 12.2, le refus ou le fait de se soustraire à un prélèvement d'échantillons selon le chi. 12.3, ou l'administration d'une substance interdite ou d'une méthode interdite selon le chi. 12.8. Dans ces circonstances, si le sportif parvient à démontrer, dans un cas individuel lié à l'un ou à l'autre

*de ces types de violations, qu'aucune faute significative ne peut lui être imputée, la durée de la suspension peut être réduite; toutefois, la durée réduite de la suspension ne peut être inférieure à la moitié de la durée minimale normalement applicable. Si la durée de suspension normalement applicable est la suspension à vie, la suspension liée à cette disposition ne peut être réduite à moins de 8 ans. Si la présence d'une substance interdite, ou des métabolites ou de ses marqueurs est décelée dans les échantillons prélevés sur le sportif en violation du chi. 12.1 (présence d'une substance interdite), le sportif doit également être en mesure de démontrer, avant d'obtenir une réduction de la durée de sa suspension, comment la substance interdite est parvenue dans son organisme.*

### Définitions

#### **Absence de faute ou de négligence**

*Démonstration apportée par le sportif qu'il ignorait, ne se doutait pas ou n'aurait pas pu, même avec la plus grande vigilance, raisonnablement savoir ou présumer qu'il avait fait usage ou s'était vu administrer une substance interdite ou une méthode interdite.*

#### **Absence de faute ou de négligence significative**

*Démonstration apportée par le sportif: qu'en regard de l'ensemble des circonstances et compte tenu des critères inhérents à l'absence de faute ou de négligence, sa faute ou sa négligence n'était pas significative par rapport à l'infraction commise".*

7. Under WADA's "Prohibited List 2006", which is applicable in accordance with article 3 of Swiss Olympic's doping Statute, cocaine is classified as a stimulant under section 6 of the list defining "Substances and Methods Prohibited In-Competition".

### **The Doping Offence**

8. Since the existence of a doping offence as defined by Swiss Olympic's doping Statute is not contested, the only question to examine is whether Darko Stanic was correctly sanctioned for such offence by the disciplinary Chamber of Swiss Olympic, under the applicable rules.

### **The Disciplinary Sanction**

#### *A. Possible Elimination or Reduction of the Sanction*

9. Under articles 12.1 and 17.1 of Swiss Olympic's doping Statute, the disciplinary sanction for a first doping offence of the type involved is a two-year suspension of the athlete, which is the sanction that the Appellant argues should apply in this case to Darko Stanic.
10. However, Swiss Olympic's disciplinary Chamber reduced the sanction based on a finding of "no significant fault or negligence" and Darko Stanic contends that he is entitled to have the sanction entirely eliminated on the basis of "no fault or negligence".
11. Accordingly, the Panel will now examine the conditions that apply to the elimination or reduction of a disciplinary sanction under Swiss Olympic's doping Statute.

B. *The Athlete's Burden of Establishing How the Prohibited Substance Entered his System*

12. Swiss Olympic's doping Statute provides that in attempting to establish "no fault or negligence" or "no significant fault or negligence", an athlete must in all events meet the precondition of establishing how the prohibited substance entered her/his system.
13. Under article 17.4.1 of the doping Statute ("no fault or negligence") this precondition is formulated as follows: "... *the Athlete must be able to establish, before obtaining the elimination of the ineligibility period, how the prohibited substance entered his or her system*" (free translation of "... *le sportif doit être en mesure de démontrer, avant d'obtenir l'annulation de la suspension, comment la substance interdite est parvenue dans son organisme*"), which constitutes the implementation of article 10.5.1 of the World Anti-Doping Code. Under article 17.4.2 of the doping Statute ("no significant fault or negligence") this precondition is repeated as follows in nearly identical wording: "... *the Athlete must also be able to establish, before obtaining a reduction of the ineligibility period, how the prohibited substance entered his or her system*" (free translation of "... *le sportif doit également être en mesure de démontrer, avant d'obtenir une réduction de la durée de la suspension, comment la substance interdite est parvenue dans son organisme*"), which constitutes the implementation of article 10.5.2 of the World Anti-Doping Code.
14. Obviously this precondition is important and necessary otherwise an athlete's degree of diligence or absence of fault would be examined in relation to circumstances that are speculative and that could be partly or entirely made up. To allow any such speculation as to the circumstances in which an athlete ingested a prohibited substance would undermine the strict liability rules underlying Swiss Olympic's doping Statute and the World Anti-Doping Code, thereby defeating their purpose.
15. In relation to another set of rules containing a similar precondition, namely the anti-doping rules of the International Tennis Federation ("ITF"), the Appellant submitted a decision of 4 April 2005 of the ITF Independent Anti-Doping Tribunal, in which the ITF counsel's apt arguments explaining the rationale for the precondition were reported as follows:

*"Mr Taylor, for the ITF, submitted that the player could not succeed in invoking either of the defences under Article M.5 because he could not show how the prohibited substance entered his system. He contended that this requirement meant not only that the player must show the route of administration – in this case probably oral ingestion – but that he must be able to prove the factual circumstances in which administration occurred.*

*Drawing upon reasoning in ..., CAS 99/A/223..., he submitted that it was quite insufficient merely to suggest innocent explanations coupled with a denial of deliberate doping. Similarly, here the player could not surmount the initial hurdle merely by denying deliberate ingestion and reasoning by a process of elimination that spiking was the only rational alternative. He pointed out that the purpose of what he termed the "threshold requirement" of showing how the substance entered the player's system was to enable the Tribunal to determine the issue of fault on the basis of fact and not mere speculation".*
16. The fact that proof by the athlete of how the prohibited substance entered her/his system is a necessary pre-condition in establishing lack of fault or no significant liability was recently

reaffirmed in clear terms by a CAS panel in a decision dated 10 January 2006 within a case that involved three appeals (CAS 2005/A/922 & 923 & 926; see also CAS 99/A/223, in: Digest of CAS Awards, Vol. II. 1998-2000, pp. 345 and 355).

17. Applying this precondition in the present case means that in order for Darko Stanic to argue that he was not at fault or at least was not significantly negligent when unknowingly accepting a cigarette containing cocaine, he must first establish, under the applicable standard of proof, that he was in the discotheque in question four days prior to the positive test, that he was given and smoked a cigarette containing some form of cocaine and that the metabolite of cocaine found in his system on the date of the test can have originated from smoking cocaine in such fashion four days earlier.
18. Consequently, the Panel will now examine what is the applicable standard of proof and then turn to the evidence offered by Darko Stanic regarding how the cocaine entered his system.

*C. The Applicable Standard of Proof*

19. Under Swiss law, the standard of proof normally applied to a civil claim is whether the alleged facts have been established beyond reasonable doubt, thereby leading to the judges' conviction that the claim is well founded.
20. That said where sports anti-doping rules are concerned and the strict liability rule results in athletes bearing the burden of proof, CAS panels have tended to apply a less strict standard of proof that is referred as the balance of probabilities (see e.g. CAS 99/A/223, in: Digest of CAS Awards, Vol. II. 1998-2000, pp. 345 and 355); the balance of probabilities meaning in effect that a relevant fact must be established as being more probable than not.
21. The balance of probabilities standard has been usefully codified under 3.1 of the World Anti-Doping Code, by providing that "*Where the Code places the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be a balance of probability*".
22. The panel considers that the balance of probabilities is the most adequate standard of proof to apply where an athlete is seeking to establish how a substance entered his system because the principle of strict liability under which a positive test creates a presumption of fault is already demanding on athletes.
23. Consequently, the Panel shall now examine whether on the balance of probabilities Darko Stanic has established how the cocaine entered his system.

D. *Evaluation of the Proof Submitted by Darko Stanic*

24. It does not seem improbable that Darko Stanic spent some time in the discotheque in question as he and his friend, Vladan Marsenic, confirmed. However, that is not a particularly relevant factor in itself.
25. What is more relevant is what happened in the discotheque and in particular whether it appears probable, based on the evidence submitted by Darko Stanic, that while in the discotheque he received from a stranger a cigarette containing cocaine powder or cocaine in the form of crack and smoked it unknowingly.
26. On the basis of the circumstances described and evidence presented by Darko Stanic, and bearing in mind public knowledge relating to cocaine and crack, the Panel finds for the following reasons combined that it is improbable that Darko Stanic unknowingly smoked a cigarette containing cocaine or crack given to him in the discotheque by a stranger:
- There is no direct evidence that the cigarette contained cocaine or crack and even Darko Stanic himself only speculates that it might be the cause of the positive test, after having considered other scenarios such as the possibility of having consumed a spiked drink.
  - There is no obvious reason that anyone in the discotheque would have attempted to offer Darko Stanic a spiked cigarette and the fact that he alleges having asked for the cigarette when his own cigarettes ran out tends to contradict the hypothesis of any form of sabotage or intention by a third party to drug Darko Stanic, since a person with such intentions would have either left the spiked cigarette on the table/bar or spontaneously offered it to Darko Stanic without being asked.
  - Moreover, although not impossible, the chances are not very high that anyone would offer a cigarette containing cocaine or crack to a stranger by mistake. Such an occurrence is therefore also improbable.
  - In the case of cocaine, the foregoing is obvious given, on the one hand, the very high cost of cocaine and, on the other, the fact that cocaine is rarely ingested through smoking, as underlined by the Respondent himself in the following terms: *“Cocaine is expensive and no body offers a cigarette with cocaine to another person for free as in the present case. Furthermore, it is unusual to smoke cocaine. Usually cocaine is sniffed through the nose and not smoked”*.
  - In the case of crack and despite it often being smoked and it being considerably cheaper than cocaine, the probability remains low that someone would make the mistake of giving away a cigarette containing crack.
  - It would seem likely that if the Darko Stanic had smoked a cigarette containing crack he would have had quite a vivid memory of the moment, whereas in the doping-control sheet signed by him four days later, at the time of the doping control, he did not note anything under “Remarks” and when he was informed of the positive test he did not immediately recall the cigarette incident later mentioned. In fact, the President of Grasshoppers, Mr. Adrian F. Howald, testified that he recalled Darko Stanic first talking to him about the possibility of having consumed a spiked drink.



- The Panel found the testimony by Darko Stanic's friend, Vladan Marsenic, unclear and therefore unconvincing.
- 27. In addition, the Respondent filed no scientific evidence regarding how long the metabolites found in his system would most likely have remained detectable; thereby not establishing the degree of likelihood that the smoking of a cigarette four days earlier could be the cause of the positive test.
- 28. For the above reasons, the Panel considers that on the balance of probabilities the Respondent has clearly not provided evidence making it more probable than not that cocaine or crack entered his system as a result of him smoking a cigarette that he asked a stranger for in a discotheque.
- 29. As a result, Darko Stanic has not met the conditions of either article 17.4.1 or 17.4.2 of Swiss Olympic's doping Statute required to prove lack of fault or no significant negligence, and Swiss Olympic erred in applying article 17.4.2. Instead, articles 12.1 and 17.1 must apply with the consequence that Darko Stanic must be suspended for a period of two years.
- 30. That said, the Panel would like to stress that this finding does not imply or mean that Darko Stanic has been untruthful or that he intentionally doped himself. It simply means that he did not meet the burden of proving how the cocaine entered his system, as required by the applicable rules based on the principle of strict liability.

*E. Commencement of the Ineligibility Period*

- 31. In the present case, the Panel considers that the most appropriate and fairest date for the suspension to commence is from the date Darko Stanic in effect played no further official games for Grasshoppers within the Swiss handball league after the date of the positive test but before the decision of Swiss Olympic's disciplinary Chamber. Consequently, it is decided that the two-year suspension shall start on 22 May 2006.

**The Court of Arbitration for Sport rules that:**

- 1. The decision of the Disciplinary Chamber of Swiss Olympic dated 6 July 2006 is set aside.
- 2. Darko Stanic shall be declared ineligible for competition for two years commencing on 22 May 2006.
- (...).