



Arbitration CAS 2008/A/1712 Marta Bastianelli v. Comitato Olimpico Nazionale Italiano (CONI) & CAS 2008/A/1742 Union Cycliste Internationale (UCI) v. Marta Bastianelli, Federazione Ciclistica Italiana (FCI) & CONI, award of 29 May 2009

Panel: Mr Romano Subiotto (United Kingdom), President; Prof. Luigi Fumagalli (Italy); Mr Beat Hodler (Switzerland)

Cycling

Doping (norfenfluramine)

Athlete's responsibility for ingesting a substance not expressly listed in the Prohibited List

Athlete's responsibility for the fault or negligence of his/her entourage

Significant fault of the athlete

Determination of the commencement of the applicable disciplinary sanction

- 1. It is the duty of all athletes to be responsible for their own bodies, and the presence of prohibited substances. To meet their duty, athletes must exercise “utmost caution” at all times. Accordingly, the athlete’s duty is rigorous in the WADA Code (and the UCI Rules). In this respect, a substance needs not be explicitly listed in the Prohibited List to be illegal, so long as it can be classified within a group of substances that are included in the Prohibited List. The Prohibited List also clearly states that it is not a definitive and complete list of all banned substances. The broad scope and inclusive wording of the Prohibited List is designed to put athletes on notice that extra vigilance is required because many products could contain one or a number of the listed substances. In this regard, there are numerous available sources of information (both commonly accessible and medical).**
- 2. The implications of the WADA Code and the CAS jurisprudence are clear: athletes are responsible for their choice of medical personnel, a provision that prevents athletes from justifying their conduct based on their medical advisors’ errors in all but the most exceptional circumstances. Therefore an athlete cannot rely on the fact to have received a wrong advice from a physician s/he consulted to contend s/he committed no fault or negligence.**
- 3. It is the athlete’s duty to know that ingesting substances that could contain a prohibited substance for non-medical reasons is an inherently risky activity. In this respect, an athlete cannot be without any fault or negligence if he did not exercise the “utmost caution” by failing to make any research. More specifically, an athlete is at significant fault for taking medication not medically necessary like diet pills without taking all necessary precautions for the purpose of determining whether the pills contained a prohibited substance and contrary to the advice of a physician.**

- 4. An athlete who has committed an anti-doping violation shall be declared ineligible for a period of two years. Considering the athlete's cooperation with the investigators and the prompt acceptance of an interim suspension, a panel has some discretion as to the commencement of the period of ineligibility which can run from the date of the collection of the first positive doping test.**

Marta Bastianelli ("Bastianelli"), the appellant in the first action and a respondent in the second action, is an Italian international level cyclist. In September 2007, Bastianelli won the Union Cycliste Internationale's (UCI) Women's World Road Championship in Stuttgart, Germany. Bastianelli is also a member of the Fiamme Azzurre professional cycling team, which is registered with the Federazione Ciclistica Italiana (FCI).

The Comitato Olimpico Nazionale Italiano, a respondent in the first and second action, is the Italian National Olympic Committee. It is designated under the World Anti-Doping Code (the "WADA Code") as the National Anti-Doping Organization (NADO) for Italy. The Ufficio Procura Antidoping (UPA), an office within CONI, is charged under Italian anti-doping rules (the "CONI Rules", which implement the WADA Code) with investigating potential breaches of the CONI Rules and prosecuting alleged breaches before the Italian National Anti-Doping Tribunal ("TNA"). Article 8(1) and 8(2) of the CONI Rules empower the UPA to appeal against decisions of the TNA or respond on behalf of CONI in cases where TNA decisions are challenged by third parties. For the purposes of this award, the Comitato Olimpico Nazionale Italiano and the Ufficio Procura Antidoping are referred to collectively as "CONI".

The UCI, the appellant in the second action, is an international sporting federation and the world governing body for cycling based in Aigle, Switzerland. The UCI oversees competitive cycling events internationally, including administration of the cycling world championships, the 2008 European U23 Junior Road Championships in Verbania, Italy, and the 2008 Giro d'Italia Internazionale Femminile (the "women's Giro d'Italia"). The Anti-Doping Rules of the UCI (the "UCI Rules") implement the WADA Code.

The FCI, a respondent in the second action, is the Italian Cycling Federation. Italian athletes wishing to participate in cycling on behalf of Italy at the international level must be licensed by the FCI. Bastianelli is licensed by the FCI. By letter dated 27 January 2009, the FCI advised the Court of Arbitration for Sport (CAS) of its intention not to participate in these proceedings.

On two separate occasions in 2008, results from analytical doping tests performed on samples of Bastianelli's urine were found to contain norfenfluramine, a substance that is prohibited under the Prohibited List of the WADA Code.

CONI investigated both positive tests and brought anti-doping charges against Bastianelli before the TNA. On 15 October 2008, the TNA issued a decision (the “TNA Decision”) that found Bastianelli to have committed an anti-doping offence contrary to Article 2.1 of the WADA Code. However, the TNA also found under Article 10.5.2 that the doping offence occurred despite a lack of significant fault or negligence on the part of Bastianelli, and exercised its discretion to reduce her suspension to one year, commencing 7 August 2008. The TNA Decision directed that it be notified to the FCI, the UCI and the World Anti-Doping Agency (WADA).

By letter dated 14 November 2008, through her attorney, Bastianelli filed an appeal of the TNA Decision with the CAS against CONI. The CAS designated Bastianelli’s appeal as CAS 2008/A/1712.

On 22 December 2008, the UCI filed an appeal against the TNA Decision. The CAS designated the UCI’s appeal as CAS 2008/A/1742.

By letter dated 24 December 2008, Counsel for the CAS proposed to all parties that the two proceedings be consolidated under Rule 50 of the Code of Sports-related Arbitration, which governs these proceedings (the “CAS Rules”). The parties consented to the consolidation of the separate appeal proceedings by letters dated 24 December 2008 (UCI), 30 December 2008 (Bastianelli), 12 and January 2009 (CONI).

In correspondence with counsel to the CAS dated December 10, 2008, Bastianelli requested that this Panel accept the document she filed on November 14, 2008, as both her Statement of Appeal and Appeal Brief under Rule 48 and Rule 51 of the Code. In accordance with Art. R51 of the Code, if no Appeal Brief is filed, the appeal should be deemed withdrawn. However, in view of the following circumstances, this Panel consents exceptionally to Bastianelli’s request: the document submitted on November 14, 2008 is accepted as Bastianelli’s Appeal Brief for the purposes of Rule 51. In reaching this decision, this Panel took due account of CONI’s consent expressed at the oral hearing, as well as of the fact that, as confirmed by Bastianelli’s defense in CAS 2008/A/1742, Bastianelli’s Statement of Appeal sets forth all the arguments supporting her case. As a result, finding Bastianelli’s appeal inadmissible pursuant to Rule 51 would have reflected excessive formalism.

By letters of 9 March 2009, Bastianelli and CONI requested that an oral hearing be held in these proceedings. The oral hearing was held in Lausanne on 20 April 2009.

The majority of the facts upon which this Award is pronounced were originally recorded in the TNA Decision.

On 5 July 2008, Bastianelli competed at the UCI’s 2008 European U23 Junior Road Championships in Verbania, Italy, where she was subject to doping control. During the course of the doping control, Bastianelli signed the UCI’s anti-doping control test certificate, where she declared “*mineral salts*” to be the only pharmaceutical substance she was taking at the time of the control. Bastianelli’s sample was forwarded to the WADA-accredited laboratory in Athens and returned on 23 July 2008; the

laboratory's analysis confirmed the presence of norfenfluramine in Bastianelli's sample. The WADA Code's Prohibited List expressly prohibits norfenfluramine (Category S6: stimulants).

Prior to the return of the 5 July 2008, test results, Bastianelli competed in the UCI's 2008 women's Giro d'Italia, where she finished in tenth place. Following the eighth and final stage on 13 July 2008, Bastianelli was again subject to doping control. Bastianelli again signed the UCI's anti-doping control test certificate, indicating on this second occasion that she was not at that time taking any pharmaceutical substances. Bastianelli's second sample was forwarded to the same laboratory in Athens, which confirmed the presence of norfenfluramine in her urine in a certificate dated 1 August 2008.

In a written declaration made to CONI on 5 August 2008, Bastianelli explained that in and around late June 2008, and prior to the 2008 European U23 Junior Road Championships, she decided to ingest a substance that would assist with weight loss. She consulted with her personal physician, Dr. Pasquale Tamburrini. According to Bastianelli, Dr. Tamburrini attempted to persuade her that there was no need to lose weight. However Bastianelli insisted, so Dr. Tamburrini suggested that she ingest a product sold under the trade name Drenoplus.

Apparently dissatisfied with this advice (potentially because Drenoplus is said to be a herbal product, and Bastianelli is said to have been dissatisfied with the dieting results of herbal products), Bastianelli approached her pharmacist, Dr. Massimo Urbani. Dr. Urbani advised Bastianelli that all dieting products on the market contained prohibited substances, but that he would prepare pills for Bastianelli for dieting purposes that were made from substances not prohibited by the WADA Code. Dr. Urbani provided Bastianelli with a list of substances he proposed to include in the pills. Dr. Urbani testified that he did not know that any of these substances were prohibited. Bastianelli checked this list of substances against the Prohibited List of the WADA Code and satisfied herself that none of the substances were mentioned. Bastianelli also provided the list of substances to Dr. Tamburrini for review. One of the substances on this list was Benfluorex. Norfenfluramine is a metabolite of Benfluorex. After having inspected the list, Dr. Tamburrini called Bastianelli back and confirmed her initial conclusion that none of the substances contained in the list of proposed ingredients appeared on the Prohibited List of the WADA Code¹.

Bastianelli made no attempt to contact a physician associated with or recommended by either her professional team or the Italian national team, of which she was a member. Bastianelli checked the WADA list of prohibited substances, and noted that Benfluorex did not figure on this list. She made no further effort to understand or conduct any research as to the nature, chemical structure or

¹ Dr. Tamburrini initially testified before the TNA that Bastianelli was not his patient after early 2008; that he had not received a list of ingredients from Bastianelli for review; and that he did not tell Bastianelli that the list was free from substances on the Prohibited List of the WADA Code. At a subsequent hearing, Dr. Tamburrini was confronted with phone records that evidenced text messages between himself and Bastianelli around the time the pills were prepared, and a recording of a phone conversation between himself and Bastianelli on September 13, 2008 where he admits to having advised that the substances detailed on the list, including Benfluorex, were not forbidden for doping purposes. As a result, Dr. Tamburrini recanted his initial evidence and admitted to the truth of Bastianelli's allegations.

biological effect of any of the substances included on Dr. Urbani's list of substances, or to determine whether any of those substances could produce a prohibited metabolite when ingested.

After having been informed of her positive analytic results, Bastianelli provided CONI with the remaining pills originally provided to her by Dr. Urbani. By letter dated 5 August 2008 CONI forwarded these pills to a WADA accredited laboratory in Italy for testing for Benfluorex. By letter dated 11 August 2008, the laboratory confirmed the presence of Benfluorex in the pills, noting also that the pills did not contain any other substance appearing on the Prohibited List of the WADA Code.

At the oral hearing, Bastianelli could not recall exactly how many pills she had ingested and for how long. Apparent discrepancies between Bastianelli's declarations on how many pills she ingested, how many she had been given (60), and how many remained when they were handed over to CONI (30) remain unresolved. Counsel for Bastianelli explained that some pills might have fallen into Bastianelli's handbag. Apparent discrepancies concerning Bastianelli's declarations of how many pills she took, the rate at which Benfluorex is evacuated from the body after ingestion, and the concentrations of Benfluorex found in her urine samples taken at the 5 June and 13 June 2008, doping controls also remain unresolved.

LAW

Jurisdiction, admissibility and applicable law

1. Rule 47 of the CAS Rules provides, in part, as follows:

Rule 47 Appeal

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. Under Article 3(24) of Appendix H of the CONI Rules of 23 July 2008², all interested parties have the right to appeal the TNA Decision to the CAS within 30 days of being notified of the decision. As Bastianelli is the subject and an addressee of the TNA Decision, she is deemed to be an interested party for the purposes of the CONI Rules, and as the CONI Rules make specific allowance for appeal to the CAS, this Panel has jurisdiction to rule upon Bastianelli's appeal. The TNA Decision was issued on 15 October 2008 and the CAS received Bastianelli's

² An identical provision is included at Article 1(4) of Appendix G and Article 3(24) of Appendix H of the revised CONI Rules of January 1, 2009.

appeal by letter dated 14 November 2008. As Bastianelli's appeal was submitted within 30 days of being notified of the TNA Decision, in accordance with Article 3(24) of Appendix H of the CONI Rules, the appeal CAS 2008/A/1712 is admissible.

3. The UCI was also an addressee of the TNA Decision, and accordingly is also an interested party for the purposes of the CONI Rules. This Panel therefore has jurisdiction to consider the UCI's appeal. According to the UCI, it received the TNA Decision (and its accompanying file) from CONI on 26 November 2008. As the UCI filed its Statement of Appeal with the CAS on 22 December 2008, being less than 30 days since it received the complete file, in accordance with Article 3(24) of Appendix H of the CONI Rules, the appeal CAS 2008/A/1742 is therefore admissible.
4. The UCI also submits that this Panel has jurisdiction and its appeal is admissible under the UCI Rules. Bastianelli participates in international cycling through a license granted by the FCI. The FCI can grant licenses to participate in international cycling events (*i.e.*, events organized by the UCI) because the UCI has delegated its licensing authority to national organizations like the FCI. A condition of that license, as mandated by the UCI, is that, "*These Anti-Doping Rules [UCI Rules] shall apply to all License-Holders*"³. The UCI Rules delegate to each athlete's National Anti-Doping Organization (in this case, CONI) the obligation to prosecute athletes for positive analytical tests obtained during the course of events organized by the UCI. The two positive analytical tests at issue in this case were taken from Bastianelli at UCI events. Articles 280 and 281 of the UCI Rules permit the UCI to appeal decisions of a National Anti-Doping Organization to the CAS in cases involving athletes licensed by the UCI⁴. Accordingly, this Panel finds that it has concomitant jurisdiction to consider the UCI's appeal under the UCI Rules, as well as under the CONI Rules. Article 285 of the UCI Rules mandates that UCI lodge any appeal against the decision of a National Anti-Doping Organization within one "*month of receipt of the full case file from the hearing body*"⁵. As the CAS received the UCI's appeal in time, the UCI's appeal is admissible.
5. Rule 58 of the CAS Rules provide as follows.

Rule 58 Law Applicable

This 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.

³ See Article 1 of the UCI Rules.

⁴ All references in this Award to the UCI Rules are to the UCI Rules in force at the time of the anti-doping infractions at issue in this case, *i.e.*, the 2004 version of the UCI Rules. For convenience, where the relevant article of the UCI Rules has changed numbers between different versions of the rules, reference is also made to the UCI Rules as effective as of 1 January 2009. The provisions that are relevant to this case have not changed from the time of Bastianelli's violation of the UCI Rules. For the equivalent of Articles 280 and 281 of the 2004 UCI Rules, see Articles 329 and 330 of the 2009 UCI Rules.

⁵ See Article 334 of the 2009 UCI Rules.

6. The TNA Decision, against which the appeals are brought, issued its decisions pursuant to the WADA Code. The submissions of the UCI are brought on the basis that the applicable law is the UCI Rules. This Panel takes note of the fact that the UCI Rules implement the WADA Code. As there are no substantive differences between the UCI Rules and the WADA Code that would affect the outcome of these proceedings, all references to substantive law in this Award are made to both the WADA Code and the UCI Rules. There are, however, procedural differences between the WADA Code and the UCI Rules. To the extent these differences affect this case, this Award makes exclusive reference to the applicable set of rules.

Merits

A. *Anti-doping violation*

7. Bastianelli does not contest the fact that a WADA accredited laboratory identified norfenfluramine in her urine samples on two separate occasions, nor that norfenfluramine is a substance appearing on the Prohibited List of the WADA Code⁶. Bastianelli therefore admits to having committed an anti-doping violation under Article 2.1 of the WADA Code and Article 15 of the UCI Rules⁷.
8. As Bastianelli was not advised of the presence of a prohibited substance in her first sample until after she was subject to doping control on 13 July 2008, under Article 10.7.4 of the WADA Code and Article 269 of the UCI Rules this Panel will consider both positive results as a single anti-doping violation of the WADA Code⁸.

B. *Bastianelli's appeal: no fault or negligence*

9. Bastianelli alleges that norfenfluramine was present in her body due to her ingestion of Benfluorex in the pills prepared by her pharmacist, Dr. Urbani, norfenfluramine being a metabolite of Benfluorex. For the purposes of this Award, this Panel accepts that Dr. Urbani's pills were the source of the norfenfluramine found in Bastianelli's urine samples.
10. Bastianelli submits that she should be exempted from any sanction because she ingested the norfenfluramine through no fault or negligence of her own, under the defense available at Article 10.5.2 of the WADA Code and Article 264 of the UCI Rules⁹.

⁶ The UCI Rules adopt and incorporate the Prohibited List of the WADA Code by reference. See Article 21 of the UCI Rules. See Article 29 of the 2009 UCI Rules.

⁷ See Article 21 of the 2009 UCI Rules.

⁸ See Article 309 of the 2009 UCI Rules.

⁹ See Article 296 of the 2009 UCI Rules.

11. This Panel observes at the outset that it is the duty of all athletes to be responsible for their own bodies, and the presence of prohibited substances, except only in the most rare of circumstances¹⁰, constitutes a failure on an athlete's part to fulfil this duty.

WADA Code Article 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 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 antidoping violation under Article 2.1¹¹.

12. The high standard of the "personal duty" imposed on athletes is reflected in the definition of "No Fault or Negligence" in the WADA Code (and the UCI Rules)¹².

No Fault or Negligence

The Athlete's (Rider's) establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method.

13. To meet their duty, athletes must exercise the "utmost caution" at all times. Accordingly, the athlete's duty is rigorous: "Anti-doping rule violations do not "just happen" but are, in most cases, the result of a breach of that duty of care"¹³.

a) Benfluorex not on the Prohibited List

14. In her submissions, Bastianelli contends that because Benfluorex is not a substance that is expressly included on the Prohibited List of the WADA Code, she could not have known she was ingesting a prohibited substance. In other words, Bastianelli ingested a prohibited substance through no fault or negligence of her own because she did not or could not have known that it was prohibited.

15. The Panel rejects this submission. Article 4.1 of the WADA Code, which establishes the Prohibited List, expressly permits that prohibited substances be listed through the inclusion of "general categories". The effect of this article is unambiguous: a substance need not be explicitly listed in the Prohibited List to be illegal, so long as it can be classified within a group of substances that are included in the Prohibited List. The Prohibited List also clearly states that it is not a definitive and complete list of all banned substances. Category S6. of the Prohibited List, which contains norfenfluramine, explicitly says that,

¹⁰ See CAS 2003/A/448 ("only truly exceptional circumstances").

¹¹ See Article 15(1)(1.1) of the UCI Rules. See Article 21 of the 2009 UCI Rules.

¹² CAS OG 06/001, paragraph 4.11 ("The burden on an athlete to establish No Fault or Negligence is placed extremely high").

¹³ CAS 2005/C/976 & 986, at para 131.

“All stimulants ... are prohibited.

Stimulants include ... fenfluramine ... norfenfluramine ... and other substances with a similar chemical structure or similar biological effect(s)”.

16. The broad scope and inclusive wording of the Prohibited List is designed to put athletes on notice that extra vigilance is required because many products could contain one or a number of the listed substances. This duty to be vigilant is in accord with Article 2 of the WADA Code, which expressly requires that athletes take responsibility for all substances that are found in their body. As detailed in the submissions of the UCI, there are numerous commonly available sources of information (such as wikipedia.org, in Italian and English), which clearly indicate the link between Benfluorex and norfenfluramine and other metabolites expressly prohibited by the WADA Code¹⁴. A simple Google search would have thus shown the link between Benfluorex and norfenfluramine. In addition, there are numerous commonly available medical reference books that also indicate the links between Benfluorex and prohibited substances. In the absence of having consulted a physician associated with either her professional team or the Italian national team, failing to have checked whether the substances listed by Dr. Urbani had any chemical, biological or performance relationship to substances prohibited by the WADA Code, assuming that when processed by the body Benfluorex would not produce a banned metabolite, and instead relying solely on Dr. Tamburrini, Bastianelli cannot credibly claim to have exercised the *“utmost caution”*. Accordingly, Bastianelli cannot be said to have ingested the prohibited substance without any fault or negligence, and as a result her defense must fail.
17. This Panel’s view that Bastianelli did not act with the *“utmost caution”* also holds, despite the new evidence submitted by Bastianelli’s counsel at the oral hearing, without objection from the other parties to these proceedings, pointing out that a product sold in France, Mediator, containing Benfluorex contains a warning notice concerning doping risks, reflecting measures in Italy debating whether steps should be taken to include Benfluorex in the Prohibited List, and inviting pharmacists and trainers to point out the doping risks resulting from preparations containing substances with a similar chemical structure or similar biological effect to those substances included in the WADA list of prohibited substances. Though the efforts of the medical and pharmaceutical communities to assist athletes’ efforts to better understand which products do or do not contain prohibited substances are of assistance to the fight against doping in sports, they do not diminish the obligation on athletes to be ultimately responsible for all substances found in their bodies.
18. Before departing from this point, the Panel notes Bastianelli’s contention that the ingestion of substances not included on the Prohibited List, but which have a similar chemical structure or biological effect, somehow constitutes a lesser offence than a different type of anti-doping violation. There is no support for this position in the WADA Code or in the jurisprudence of

¹⁴ Among the similarities between Benfluorex and norfenfluramine that emerges from the most basic online research is the fact that the two substances chemically resemble each other to such a degree that an athlete contemplating ingesting Benfluorex and mindful of his duty would immediately be aware that further consultation with a physician or chemist would be necessary.

the CAS. To the contrary, there is a significant record of CAS tribunals finding athletes to have committed doping offences based on positive tests resulting from substances not included on the Prohibited List¹⁵. The rationale for these decisions is clear: failing to prohibit substances with a similar chemical structure or biological effect to those already included in the Prohibited List would hinder the fight against doping in sports and detract from the unequivocal warning set out in the Introduction to the WADA Code: *“Doping is fundamentally contrary to the spirit of sport”*.

b) No Fault On Account of Consultations With Physician and Pharmacist

19. Bastianelli contends in her submission that she committed no fault or negligence because she consulted with her pharmacist and her physician, both of whom advised her that the list of substances contained in Dr. Urbani’s pills did not contain a substance appearing on the Prohibited List.

20. To avail herself of the defense in Article 10.5.2 of the WADA Code and Article 258 of the UCI Rules, Bastianelli bears the obligation of proving she took *“all due care”*¹⁶. The official commentary to the WADA Code specifically notes that athletes are responsible for their choice of medical personnel, a provision that prevents athletes from justifying their conduct based on their medical advisors’ errors in all but the most exceptional circumstances.

*At any rate other than in the most exceptional case, for the purposes of determining whether a no-fault defense succeeds, the fault of an adviser such as a physician must be attributed to the player even if the player is not personally at fault: otherwise the fight against doping in sport would be seriously undermined*¹⁷.

*To ignore these facts was at a minimum negligence on the part of the chiropractor and such a negligence must be attributed to the athlete who uses him in supplying the athlete either a food source or a supplement. It would put an end to any meaningful fight against doping if an athlete was able to shift his/ her responsibility with respect to substances which enter the body to someone else and avoid being sanctioned because the athlete himself/ herself did not know of that substance*¹⁸.

21. The implications of the WADA Code and the CAS jurisprudence quoted above are clear: Bastianelli’s defense cannot succeed because she failed to take all due care for the reasons specified above.

¹⁵ See, for instance, CAS OG 96/003-4, CAS 2002/A/370; CAS 2002/A/371; CAS 2002/A/400; and CAS 2005/A/963.

¹⁶ Official commentary to Article 10.5.2, WADA Code. See Article 290 of the 2009 UCI Rules.

¹⁷ ITF Independent Anti-Doping Tribunal, *IFT / Koubek* (18.01.2005).

¹⁸ CAS OG 04/003.

C. *UCI's appeal: there exists significant fault or negligence*

22. The UCI appeals against the TNA Decision's finding that Bastianelli committed the anti-doping violation without significant fault or negligence. The UCI's argument is that there was no medical ground for Bastianelli to seek to lose weight or to take substances for those purposes, and that she did not take all necessary precautions for the purpose of determining whether the pills contained a prohibited substance. Accordingly, Bastianelli assumed the risk that the pills would contain a prohibited substance, for which she is at fault, and failed to discharge the duty of care required of athletes under the WADA Code and the UCI Rules, for which she is negligent. The UCI characterizes Bastianelli's level of fault and negligence as at least significant. In her defense, Bastianelli makes contentions of fact and law that are the substance of her appeal, namely that she could not be at fault or negligent for ingesting a substance not expressly listed in the Prohibited List, that the substance was not ingested for performance enhancing purposes, and that she should not bear any responsibility for the fault or negligence of her physician and pharmacist.
23. This Panel accepts the UCI's contention that there was no medical need for Bastianelli to ingest the pills. Both her physician and her pharmacist initially discouraged Bastianelli from attempting to lose weight. Bastianelli rejected that advice, despite the fact that the very first sentence of the Prohibited List states that, "*The use of any drug should be limited to medically justified indications*". It is the athlete's duty to know that ingesting substances that could contain a prohibited substance for non-medical reasons is an inherently risky activity. As a CAS tribunal recently noted,
- "The risks linked with nutritional supplements are very well known to the public and athletes in particular and although CCES and WADA expressly discouraged the use of nutritional supplements, Mr. Despres took on the risk of contamination by taking not just one, but several supplements"*¹⁹.
24. Bastianelli admits in her written submissions that there was no medical need for her to lose weight, but rather losing weight was done for "*feminine*" reasons that had no performance enhancing effect. At the oral hearing, Bastianelli explained that she felt bloated through water retention and that she weighed about two kilograms more than her ideal weight. Counsel for Bastianelli repeated that Bastianelli had no intention of enhancing her performance, and submitted that Benfluorex is not a stimulating product and that its ingestion has serious side effects, such as cardiac arrests, and death. These submissions are irrelevant, and in any event are rejected. As the UCI notes, in road cycling there is a performance enhancing purpose associated with low body weight. This Panel finds Bastianelli at significant fault for taking medication that was not medically necessary. Furthermore, the WADA Code is designed to protect against more than just the effect of performance enhancing substances. The

¹⁹ CAS 2008/A/1489 & CAS 2008/A/1510, at para. 7.12. See also CAS 2002/A/385 ("*It would be all too simple and would frustrate all the efforts being made in the fight against doping to allow athletes the defense that they took whatever the team doctor gave them, thus attempting to shift the responsibility to someone else. The athlete's negligence lies in the fact that he/she uses food supplements which include a generally known risk of contamination... The Panel notes that the above analysis is perfectly in line with established CAS case law to the effect that athletes are themselves solely responsible for, inter alia, any medication and any nutritional supplements they take. Even medication taken on the basis of a doctor's prescription has been held not to suffice as a valid excuse for an athlete*").

Introduction to the WADA Code notes specifically that one of its purposes is to promote “*health*”. There is no healthy purpose associated with consuming dieting drugs unnecessarily and contrary to the advice of a physician.

25. This Panel also accepts the UCI’s contention that Bastianelli was under a duty to conduct additional diligence before ingesting the pills from Dr. Urbani. As noted in the previous section, Bastianelli could and should have consulted other sources (both commonly accessible and medical) before satisfying herself that the substances in the pills were safe to ingest, rather than relying solely on the advice of Dr. Tamburrini. Bastianelli should also have consulted with a physician recommended by her professional team or the Italian national team. Taking at least these reasonable steps would have been necessary for Bastianelli to have shown “*a good faith effort to leave no reasonable stone unturned*” before she ingested the pills, especially in view of the fact that she had no pressing or urgent (or indeed medical) need to ingest the pills prior to the 2008 European U23 Junior Road Championships.
26. The WADA Code (and the UCI Rules) defines “*no significant fault or negligence*” defense thus,
No Significant Fault or Negligence
The Athlete’s (License-Holder’s) establishing that his or her 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 relationship to the Anti-Doping Rule violation.
27. Considering the totality of the circumstances, including that Bastianelli ingested dieting pills absent a medical need and contrary to the advice of her physician; that she failed to conduct any independent research as to the chemical or biological nature of the substances included in the pills, and that she assumed without investigation that none of those substances would produce a prohibited metabolite; and that she consulted only her personal physician rather than a doctor associated with her professional team or the Italian national team as to the appropriateness of ingesting Benfluorex, this Panel finds that Bastianelli’s positive analytical test is attributable to her own fault and negligence, which in the circumstances is significant. As noted in a previous CAS decision, “*more steps could and, in fact, should have been taken*” by Bastianelli to discharge her duty of care²⁰.

D. *Sanction*

28. Article 10.2 of the WADA Code and Article 261 of the UCI Rules require that athletes who have committed an anti-doping violation be suspended for two years²¹. As Bastianelli has failed to successfully raise a defense excusing or partially excusing her anti-doping violation, this Panel does not have discretion to reduce the mandatory two-year suspension. Bastianelli is therefore declared ineligible to compete in all sporting competitions for a period of two years.

²⁰ CAS OG 04/003, at para. 25.

²¹ See Article 293 of the 2009 UCI Rules.

29. Article 10.8 of the WADA Code and Article 275 of the UCI Rules provide this Panel with some discretion as to when to commence the period of ineligibility²². This Panel takes note of the fact that when confronted with the results of the analytic tests Bastianelli cooperated with CONI investigators and promptly accepted an interim suspension from CONI on August 7, 2008. This Panel also takes note of the effect of Dr. Tamburrini's negligent advice to Bastianelli that the substances in the pills did not contain a prohibited substance, and of the cost and effort to Bastianelli in her attempt to prove that she consulted with Dr. Tamburrini prior to ingesting the pills, despite his initial false testimony to the contrary. In view of these and other factors, this Panel orders that Bastianelli's suspension run from the earliest possible date, namely the date of the collection of her first positive analytic sample, which was on July 5, 2008.
30. In accordance with Article 10.7 of the WADA Code and Article 274 of the UCI Rules, all results obtained by Bastianelli on and after 5 July 2008 are disqualified²³.

The Court of Arbitration for Sport rules:

1. The appeal filed by the Union Cycliste Internationale on 22 December 2008 is partially upheld.
2. The award of the Italian National Anti-Doping Tribunal of 15 October 2008, file number 76/2008, is set aside.
3. Ms. Marta Bastianelli is declared ineligible for a period of two years, commencing on 5 July 2008; all her results from competition on or after 5 July 2008, are disqualified.
4. The appeal filed by Ms. Marta Bastianelli on 14 November 2008, is dismissed.
- (...)
7. All other requests for relief are rejected.

²² See Article 314 of the 2009 UCI Rules.

²³ See Article 313 of the 2009 UCI Rules.