

**Before the American Arbitration Association
Commercial Arbitration Tribunal**

United States Anti-Doping Agency, Claimant

v. Case No. 01-17-0003-4443

Gil Roberts, Respondent

Final Award

I. Background

Gil Roberts is a professional track and field athlete who specializes in the 400 Meters and 4x400 Meter Relay; he has won gold medals in world championship competitions and in the Olympics. He has been subject to doping control testing since 2008, when he was in college. Since 2009, when he turned professional, he has been placed intermittently in the Registered Testing Pool. He has been tested 15 times since 2008. His first adverse analytical finding is at issue in this case.

Roberts was tested out-of-competition on March 24, 2017. By letter dated April 14, 2017, USADA advised Roberts that he had tested positive for probenecid at an estimated concentration of 9ng/ml. Probenecid is a Specified Substance in the class of Diuretics and Masking Agents on the WADA prohibited list.

On April 19, 2017, Roberts advised USADA that he had withdrawn from the upcoming IAAF World Relays and the Penn Relays. On May 1, 2017, USADA notified Roberts that his B sample had tested positive. On May 5, 2017, USADA received Roberts signed provisional suspension form.

Before the matter was submitted to the Anti-Doping Review Board, Roberts asked for time in which to analyze the supplements he had been taking. On June 2, 2017, USADA and Roberts' counsel agreed to stay the case for 30 days to allow for the analysis. On June 7, 2017, Roberts' counsel notified USADA that he had been contaminated with the banned substance from kissing his girlfriend, that he was without fault, and that he requested an expedited hearing prior to the start of the USATF Outdoor Nationals on June 22, 2017.

Because of Roberts' request for expedition, rather than submitting the case to the Anti-Doping Review Board, USADA instead, on June 12, 2017, sent a charging letter to Roberts. On June 13, 2017, the parties selected this Arbitrator. A Preliminary Hearing was held on June 14, 2017. Roberts' pre-hearing brief was submitted on June 17, 2017; USADA's pre-hearing brief and a supplemental brief on June 19, 2017. An evidentiary hearing was held on June 20, 2017 at 11:00am EDT. The athlete argued that he

either had no fault under Article 10.4 of the World Anti-Doping Code or no significant fault or negligence under Article 10.5 of the Code. The Arbitrator issued an operational award by 5:00pm, ruling that the Athlete was without fault. This Final Award explains that operational ruling.

II. Facts

The evidence showed that, at the time of the out-of-competition drug test, Roberts had been dating his girlfriend, Alex Salazar, for two years. A few weeks prior to the March 24, 2017 test, Ms. Salazar had been on a trip with her family to India. While there she came down with a sinus infection and sought medicine to remedy her condition. She was in what she called semi-rural India. Her step-father, who spoke Hindi, took her to a local “chemist” to secure medicine. The place they visited looked like the lower floor of a dwelling. She called it “makeshift” and “messy” and said that the man they dealt with wore street clothes.

Her step-father explained to the man that Ms. Salazar had trouble swallowing pills and that she needed the medicine in capsules so that she could take the capsules apart and swallow the medicine. They did not have a prescription and had not seen a doctor. After they explained the situation, the “chemist” took down a box labeled “Moxylong,” took out several capsules, put them in another container, told them that the

medicine was Moxylong and directed her to take 1 capsule per day for 14 days. The capsules had a clear two-part covering and contained a yellow substance; she got them on March 14, 2017 and took the first one that day.

She arrived back in the United States on March 17 and continued to take the medicine. She saw Roberts soon thereafter, while she was still on the meds. Whenever they were together, they kissed frequently and passionately. Every time she took one of the capsules, she took it apart, poured the contents in her mouth, then swallowed the medicine with water.

On March 24, 2017, the date of the drug test, Ms. Salazar arrived at Roberts' apartment near noon; they kissed and "chilled out." Around 1:00 or 1:30 pm, she went into the kitchen to take her medicine. She did not tell Roberts what she was doing and he did not see her take the medicine. She opened the capsule, poured the contents in her mouth, then washed it down with water. Shortly thereafter she found Roberts and started kissing him. Roberts could not count the number of times they kissed between 1:00 p.m. and the doping control officer's arrival.

The doping control officer arrived at 4:07 pm. Roberts kissed Ms. Salazar, told her he was being tested, and left the room to provide a urine sample. The sample was sealed at 4:16 pm.

Roberts testified that he did not intentionally take probenecid and that he did not mistakenly take one of Ms. Salazar's capsules. He said that he was not worried about testing positive. He let the doping control officer into his apartment instead of pretending that he was not at home and on the doping control form he checked the box which allowed for his test results to be used for future scientific purposes. He admitted that though he was taking several supplements, he did not declare any of them on his doping control form. But once he got the adverse finding he had all of his supplements tested; none was positive for probenecid.

He had no idea that kissing his girlfriend could lead to his ingesting a prohibited substance. When he kissed her he did not remember the taste of medicine in her mouth. Roberts did not know that she was taking Moxylong and he did not see her take the medicine.

Alex Salazar testified that in her two years with Gil Roberts, she had never seen him take a banned substance. She said that he always told her how proud he was to a clean athlete. She said that she always pays attention to his demeanor and she thinks she would know if he was using illegal drugs.

She had never heard of probenecid until the test results. She did not know that Moxylong contained probenecid. She said Roberts was

distraught and couldn't figure out what had happened. He asked her whether she had been taking probenecid. When she googled Moxylong, she discovered that it came in the form of a pill that contained 500 mg of probenecid and 500 mg of Amoxicillin. She still had one of the capsules left which was tested by Banned Substances Control Group (BSCG) and found to contain .442 grams of material that tested positive for probenecid. Later, when BSCG was asked to estimate the quantity of probenecid in the capsule, it sent this report:

The material provided was used up in the course of the analysis and no material remains. The original aliquot vial is not available so the sample can't be reanalyzed.

. . . . In order to provide a quantity estimate at this point we had to compare the qualitative screen testing results with a spiked standard for probenecid run on a different day and do a single point linear estimate based on the standard. Estimating quantity in this way is not in accordance with our normal SOP's and the estimate provided will be a rough estimate only. Based on a standard spiked with probenecid at 50ng/g a rough single point linear estimate of the quantity of probenecid in the item tested is 19, 821.938 ng/g.

Dr. Pascal Kintz testified as Robert's expert. In his witness statement, he said that "Moxylong composition has been confirmed by the manufacturer. It contains 500 mg of Probenecid and 500 mg of Amoxycillin." He also stated that "[a] single 500 mg oral dose [of probenecid] in a male volunteer resulted in a peak urine probenecid concentration of 83 mg/l after 6 hours."

Dr. Kintz explained further that “probenecid is quick acting and performs a retentive role for a variety of substances. It has to be taken in large amounts (2-5 grams) to stop detection of banned substances such as steroids. The large dose would virtually block any excretion for a short time (a number of hours).” He added that “[s]mall amounts, such as therapeutic doses, are of no interest to sport-drug testers because they would be ineffective for cheating purposes.”

With respect to the implications of the small amount of probenecid found in Roberts’ sample, Dr. Kintz said this:

It is more than likely that the very low concentration of probenecid measured in the urine of Gil Roberts is the consequence of exposure to minute amounts of the drug, something less than 2 mg within a few hours before specimen collection. At this dose, probenecid does not have any masking property. Ingestion of a 2mg or less dose by the oral route would have been ineffective, producing no masking effects because such a low dose cannot affect the renal functions.

On the question of the manner in which Roberts was contaminated with probenecid, Dr. Kintz offered this opinion:

The interpretation of the adverse analytical finding in the urine of Gil Roberts during a doping control is consistent with incidental exposure of the athlete to minute amounts of probenecid some hours earlier. It is more than likely that the origin of probenecid was the consequence of kissing Alex Salazar, his partner who admitted having used Moxylong (mixture of an antibiotic with probenecid) before kissing the athlete.

Dr. Kintz opined that probenecid can contaminate the oral cavity by binding to the cheek, teeth, and gums. Though he had no way to know how much of the probenecid might have bound to Salazar's mouth, he opined that it was possible for enough to remain there to result in the extremely low result found in Roberts' sample. Dr. Kintz opined that the amount found in Roberts' sample would have been higher had it been the result of intentional consumption. Dr. Kintz also said that the fact probenecid is not water soluble like cocaine does not mean that it cannot be transmitted from one person to another because a small amount can pass from mouth to mouth through kissing.

Dr. Kintz admitted that he had assumed the information that he had been given about Moxylong – that it was a 1 gram capsule containing 500mg of probenecid and 500mg of Amoxicillin -- had been correct and thus the fact that the tested capsule that Ms. Salazar had submitted contained only 442 mg and a very small estimated amount of probenecid affected his conclusions about the amount of probenecid that would be left in Ms. Salazar's mouth when she took the medicine.

Dr. Kintz admitted too that the information he had been given about the composition of Moxylong related to a dispartab (a pill) not a capsule and that a pill would not leave residue in the mouth the way the contents of

a capsule would. Further, he admitted that he had no scientific studies to support his conclusion that 5% of the medicine stayed in the oral cavity after ingestion; that he had no way of knowing what amount of probenecid Roberts ingested prior to the test that would result in a 9ng/ml outcome; and that Roberts could have taken a large dose of probenecid days before the test rather than a small amount of probenecid on the day of the test. Dr. Kintz agreed that probenecid could not be excreted within minutes of having been consumed.

Dr. Kintz also noted that the absence of any other prohibited substances in the test sample suggested to him that the athlete had not cheated. But he agreed that since every substance has its own excretion rate it was possible that a prohibited substance could have been taken and excreted prior to the March 24, 2017 test.

Dr. Kintz testified that he had no information regarding how much saliva was present in Ms. Salazar's mouth, or how much probenecid was in the saliva, or how much saliva was transferred from her mouth to Roberts when they kissed. But he insisted it is absolutely possible that 9ng/ml of probenecid could result from 1 to 2 mg being transferred from a kiss. He testified that taking a capsule apart and pouring its contents in the mouth increased the chance of contaminating the oral cavity.

Dr. Matthew Fedoruk testified as USADA's expert. In his witness statement he said that "Probenecid is a Specified Substance prohibited at-all-times under S5 Diuretics and Masking Agents on the current and past WADA Prohibited Lists. . . . There is no threshold under which this substance is not prohibited. Under the World Anti-Doping Code, any amount of probenecid confirmed in an athlete's sample is reported by WADA-accredited laboratories." He explained that "[p]robenecid is a well-known masking agent because it could conceivably allow athletes to continue using doping agents closer to competition and still deliver a clean test." He said that controlled studies have shown "that the administration of probenecid produced a substantial reduction in the excretion of both endogenous . . . and synthetic . . . androgenic steroids." He agreed that the capsule that Roberts had obtained from Ms. Salazar "returned a test result consistent with the presence of probenecid." He contended that

[w]ithout a detailed scientific scenario as to how 2 mg or less probenecid could be achieved, Dr. Kintz is merely speculating that this is the best explanation. Alternatively, it remains more than likely that the probenecid concentration observed in Mr. Roberts urine could have originated from the consumption of a therapeutic dose in the days preceding the sample collection.

Dr. Fedoruk opined that it was highly unlikely Roberts would have ingested a significant amount of probenecid from Ms. Salazar's saliva in the three

hours before his sample collection . . . to result in his adverse analytical finding.

In his view, the BSCG report on the quantity of probenecid in the capsule was valid. He thinks that the capsule she was taking was not Moxylong because it did not contain 500mg probenecid and 500mg amoxicillin.

Dr. Fedoruk said the kissing theory is missing several key aspects: none of the cocaine cases discussed “washing down” the cocaine; there is no information on the amount of saliva traded during a kiss; and the peak excretion is six to eight hours not four.

Dr. Fedoruk admitted that probenecid could bind with the oral cavity but asked how would it unbind to move from her mouth to his. He said there is no way to know how much medicine would be left in the mouth after the contents of the capsule were poured on the tongue and washed down.

Dr. Fedoruk said the 9ng outcome might mean only that Roberts had taken a larger dose earlier rather than a small dose near the time of the test. He also said that an athlete could intentionally take probenecid in order to reduce endogenous steroids. But he agreed that he did not see anything irregular with respect to Robert’s biological passport. And he

further agreed that they tested for all other drugs on the prohibited list but nothing came up in the analysis.

III. Findings and Conclusions

A. Burden of Proof and Applicable Legal Principles

The question here is whether the athlete has proved to a balance of the probabilities that he was without fault in ingesting probenecid. A similar question was considered in two previous cases involving kissing where the athletes were found to be without fault.

ITF v Richard Gasque, CAS 2009/ A / 1926, involved a professional tennis player who had been tested frequently by doping control and had always had negative results until he was charged with a doping violation based on metabolites and trace amounts of cocaine found in his urine samples. He insisted that he had never used cocaine and that the tested sample must not have been his. When DNA testing proved that it was his urine sample the player denied fault.

The evidence showed that the night before he was scheduled to play in a tournament, he and some of his friends met a group of women at dinner and struck up a conversation. Later, all of them left the restaurant and went to a night spot. While there, they drank from open bottles of vodka and apple juice; the player began kissing one of the women and

drinking from her vodka glass. He continued kissing her throughout the evening.

The next day at the tournament site, he was selected for doping control. About a month later he was charged with a doping offence.

When the player's hair was tested for whether he had consumed more than 10 mg of cocaine in the preceding 4 months, the results were negative. The woman he had been with admitted that she had used cocaine in her life; denied that she had used cocaine when with the player; and denied that she had kissed him on the mouth. When her hair was tested for cocaine, the results showed that she was a regular cocaine user. The player's expert witness opined that the cocaine in his system came from kissing the woman.

The player argued to the doping review panel that either he was without fault and should not be penalized or without significant fault or negligence and worthy of a reduced penalty. The doping review panel ruled that he was not without fault because he had acted recklessly by sharing open bottles of drink with a woman he had just met, drinking from her glass, and kissing her intimately when he did not know whether or not she used cocaine. Yet, the doping review panel was persuaded that it was "more likely than not that Pamela's kisses were the source of the

player's contamination." The doping review panel ruled that he was without significant fault.

When the case was appealed to the CAS, the CAS Panel ruled that the player was without fault. The CAS Panel said that "it cannot find that the Player did not exercise utmost caution when he met Pamela in an unsuspecting environment like an Italian restaurant ("Vita"). He could not have known that she might be inadvertently responsible for administering cocaine to him if he were to kiss her that night." Also, the Panel concluded that it was impossible for the Player to have known, still exercising the utmost caution, that when he was kissing the woman, she might inadvertently administer cocaine to him:

As the Player did not know her cocaine history and did not see her taking cocaine or appearing to be under its influence, how could he imagine that she had been consuming cocaine? And even more, how should he have been in a position to know that, even assuming that he knew that she had been consuming cocaine, that it was medically possible to be contaminated with cocaine by kissing someone who had ingested cocaine beforehand?

The CAS Panel's was this: "even when exercising the utmost caution, the Player could not have been aware of the consequences that kissing Pamela could have on him. It was simply impossible for the Player, even when exercising the utmost caution, to know that in kissing Pamela, he could be contaminated with cocaine." Gasque, CAS 1926 at ¶5.31.

The CAS Panel discussed the proof needed to show how the cocaine entered the player's system:

It is the Panel's understanding that, in case it is offered several alternative explanations for the ingestion of the prohibited substance, but it is satisfied that one of them is more likely than not to have occurred, the Player has met the required standard of proof regarding the means of ingestion of the prohibited substance. In that case, it remains irrelevant that there may also be other possibilities of ingestion, as long as they are considered by the Panel to be less likely to have occurred. The Player thus only needs to show that one specific way of ingestion is marginally more likely than not to have occurred.

The CAS Panel ruled out the intentional ingestion of cocaine because of the small amount found in his system and the negative test on the player's hair. On a balance of probability, the CAS Panel concluded that it was more likely than not that the player's contamination with cocaine resulted from kissing Pamela. Thus, the player met his burden of proof.

Also pertinent is *The Matter of An Anti-Doping Violation By Shawn Barber*, SDRCC DT 16-0249. There, an elite level athlete used Craigslist to find a partner for the weekend to "relieve stress" on the day prior to the Canadian Championships. His inquiry led him to a meeting in a hotel room with a man and a woman he had never met. The athlete was offered a drink which he declined because he had not seen the drink being mixed and did not know what was in it. He did not know that the woman had used cocaine that evening. He had asked for someone drug-free, disease

free, and professional. He had sexual relations with the woman while the man waited in another room. Their encounter lasted about 30 minutes. He kissed her off and on during their encounter and when he kissed her he did not sense any unusual taste in her mouth. When tested in competition he was found positive for metabolites of cocaine.

Barber was shocked by the test result because he had never tested positive and had never used cocaine. He contended that he was not at fault. He said that he did not realize that there was any potential to ingest drugs by kissing the woman. The woman testified in his favor that he did not see her use cocaine and that he did not know she had used cocaine. He relied on the *Gasquet* decision. His counsel argued that in both cases, the woman in question ingested cocaine prior to meeting the athlete, that both couples kissed several times during their encounters, that neither athlete saw any cocaine in the area, neither saw the woman use cocaine, neither knew the woman was using cocaine, and neither knew there was a risk of transferring cocaine from kissing.

In *Barber*, the anti-doping agency conceded that the ingestion of cocaine was not intentional and agreed that the likely source of the cocaine was his sexual encounter with the woman. However, the Canadian

authorities argued that the athlete's risky conduct deprived him of the right to claim he was without fault.

The Barber Panel rejected the foregoing argument and wrote as follows about whether the athlete had proved that he was without fault: "The sole issue in this case is whether or not Mr. Barber has met the burden of proof of establishing, on a balance of probability, that he bears no fault or negligence with respect to the anti-doping rule violation." The definition of "*No Fault or Negligence*" in the CADP states that the athlete must establish 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 been administered a prohibited substance or otherwise violated an anti-doping rule. Further, the athlete must establish how the prohibited substance entered his system.

The panel ruled that Barber had satisfied his burden on a balance of probability, that he was without fault because:

He did not know or suspect, and could not have reasonably known or suspected, even with the exercise of utmost caution, that he was at risk of ingesting a prohibited substance by kissing W. He had no way of knowing, and had no reason to suspect, that W had ingested cocaine before their sexual encounter, nor that she could possibly contaminate him with a prohibited substance.

B. Conclusions

1. This Was Not A Case of Intentional Doping

In its brief, USADA stated that it was reserving the right to contend that Roberts had intentionally consumed probenecid but that it recognized that if USADA sought to establish intentional misconduct it would have the burden to prove such conduct to the comfortable satisfaction of the Arbitrator. In its closing argument, USADA conceded that it had not met the burden of proving intentional use of probenecid. That concession was appropriate. The Arbitrator is persuaded that Roberts did not intend to dope. As the evidence showed, he had been tested for nearly a decade and had been found to be clean. Further, the amount of probenecid found in his sample is too small to have a masking effect. Nor was there any evidence that he had ingested probenecid from any other sources. Also, there was no indication of any other prohibited substances in his sample and as Dr. Fedoruk agreed there were no irregularities in his biological passport.

Therefore, from the standpoint of penalty analysis, this is a case involving the out-of-competition ingestion of a specified substance which means that the baseline penalty is 2 years unless the athlete can prove by the balance of the probabilities that he was without fault.

2. This Was A Case of Incidental Doping Caused By Kissing

Dr. Kintz testified that when Ms. Salazar opened the capsule and poured its contents into her mouth, even though she then swallowed the medicine with water, some of the medicine remained in her mouth. He opined that whatever was in her mouth could move to Roberts' mouth when they kissed. And as the evidence showed they kissed frequently. So the situation is that somewhere near the time she returned from India through and including the date of the doping control test, she was pouring medicine in her mouth, some of it was sticking there, and he was kissing her passionately. Thus, it would appear that not just on the day of the test but on that day and the days leading up to the test he was from time to time ingesting small amounts of probenecid.

But USADA argues that despite Dr. Kintz's testimony, Roberts has failed to meet his burden of proving on the balance of probabilities how the prohibited substance entered his system. USADA says that all Dr. Kintz did was give an opinion that was not backed up by scientific analysis. USADA argues that Kintz didn't know how much was left in the mouth, how much was transferred, how much was ingested; that Dr. Kintz never testified in terms of probabilities; that all he talked about was what was possible; and that since the capsule that was tested contained much less

than 500mg of probenecid all of Dr. Kintz suppositions were wrong. Thus, according to USADA, Dr. Kintz's opinion does not meet the standard of proof. The Arbitrator disagrees.

As demonstrated by the highlighted portions of Dr. Kintz's witness statement shown on previous pages in this Award, Dr. Kintz did testify in terms of probabilities. He said that it is more likely than not that Roberts was contaminated by the incidental ingestion of probenecid from kissing his girlfriend. It is true that at times during his oral testimony, Dr. Kintz talked in terms of what was possible. But the Arbitrator has considered the totality of his submissions and rules that his testimony meets the required level of proof.

Roberts contends that the probenecid in his system came from kissing his girlfriend while she was taking medicine that contained probenecid. The Arbitrator is persuaded by the athlete's evidence, that he ingested probenecid just as he and his expert say he did. Each day, from March 14, 2017 through March 24, 2017, Alex Salazar pulled apart a capsule of medicine that she had obtained in India, poured the contents of the capsule in her mouth, then washed it down with water.

According to both experts, the medicine contained probenecid which is not water soluble and which binds to protein. Thus, everyday some of

the probenecid that she poured into her mouth stayed in her oral cavity binding to her tongue, gums, cheeks, etc. Starting after she arrived back in the United States on March 17, 2017 she started visiting Roberts, and whenever they were together they kissed frequently and passionately. This Arbitrator is persuaded by Dr. Kintz's testimony that bits of the probenecid that remained in her mouth after she took her medicine could and did move to his mouth through their frequent passionate kissing.

But USADA complains that Dr. Kintz did not prove the amount that remained in Salazar's mouth each time she took her medicine, nor did he prove how much probenecid could be transferred with a kiss, nor how much probenecid the athlete ingested, nor how much had to be ingested to end with a 9ng/ml outcome. The Arbitrator does not agree that such quantitative proof was necessary to demonstrate that the source of the athlete's contamination was kissing his girlfriend. No such specific quantitative proof was called for in the two other "kissing" cases. Neither *Gasquet* nor *Barber* turned on knowing the precise amount of cocaine each woman had consumed prior to kissing the athletes in those cases. Nor was there a discussion about how much cocaine was transferred to the athletes. The question in those cases -- as in this one -- was whether kissing the women could have led to the small amounts of cocaine found in

the athletes. The answer is both those case was yes. The answer here with respect to probenecid is yes.

The situation in this case is similar to that in the other cases. Here as there, the athlete was found with a small amount of the prohibited substance in his system. Let's focus on how small this finding was. According to Dr. Kintz, in order for probenecid to have its masking effect it has to be taken in large doses on the order of 2 to 5 grams. He said that with smaller doses the drug does not have the renal effect of inhibiting excretion of other drugs and medicines. He said too that the amount found in Roberts' sample was not enough to mask anything.

Dr. Kintz reported that a single 500 mg dose of probenecid was shown to have resulted in a urine concentration of 83 mg/ml after 6 hours. Thus if the subject ingested milligrams of the drug then 6 hours later the subject was excreting milligrams of the drug. Though the amount ingested and excreted differed, the order of magnitude was the same. But Roberts result was 9 nanograms per ml, and a nanogram is 1 millionth of a milligram, several orders of magnitude different. So the 9 nanograms found in Robert's system is orders of magnitude smaller than one would expect had he intentionally consumed a normal dose of probenecid.

But USADA says yes, it is small but it could simply be tail end of Roberts' having ingested a large amount of probenecid several days early. But that is an intentional ingestion argument and this Arbitrator has already concluded that this was not an intentional ingestion case. This was a case of incidental ingestion which means he started by ingesting an incidental amount of probenecid and he ended with a small amount in his system.

USADA next argues that though the capsule that Ms. Salazar turned in for testing showed the presence of probenecid, the total weight of the that capsule and the quantitative finding of the amount of probenecid in that capsule means that it was not Moxylong and thus means that Roberts did not prove how the banned substance got into his system. The Arbitrator disagrees.

The capsules that Ms. Salazar ingested were acquired in semirural India. She and her step-father went to a local "chemist," and her step-father made clear that she could not swallow pills and thus needed her medicine in capsules that allowed her to take apart and pour in her mouth. Her step-father saw a box labeled "Moxylong" that the "chemist" took down. The chemist gave them capsules, told them that it was Moxylong, and told her to take one per day for two weeks. Though the manufacturers website says that Moxylong comes in pill form, the Arbitrator is persuaded that Ms.

Salazar was given capsules and was told that it was Moxylong. The simple way to get a capsule from a pill is to crush the pill then to pour the crushed material into a capsule. But in semirural India how precise could a “chemist” be in putting a crushed powder into a capsule? Any given capsule might not contain the precise proportion of medicines. Thus, the Arbitrator thinks that the source of the capsules helps explain the lab tests of the capsule: it contained probenecid but not in the correct amount. But as Roberts’ counsel argued in closing, the one thing we know is that probenecid was in that capsule and it was probenecid that was found in Roberts’ system.

3. The Athlete Has Proved That He Was Without Fault

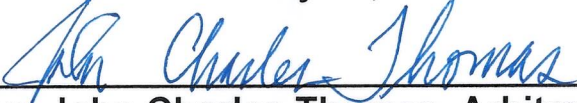
The question asked in the other “kissing” cases is whether the athlete knew or through the exercise of utmost care could have known that by kissing his girlfriend he was exposing himself to a prohibited substance. Roberts did not know that Ms. Salazar was taking probenecid. He did not see her take the medicine. He did not taste medicine when he kissed her. Just as in *Gasque* and *Barber*, he had no way to know that he was exposing himself to a doping violation.

Indeed, Roberts’ situation with his girlfriend of two years is more benign than the situation involving the athletes in the other two cases. Both

of them were arguably reckless because they kissed women about whom they knew nothing. But here Roberts had dated Ms. Salazar for two years and surely had kissed her before without being charged with a doping violation. Thus, for Roberts it must have been like lightning out of a clear blue sky for him to learn that by kissing his girlfriend this time that he was exposing himself to a prohibited substance. Roberts has met his burden of proof. Roberts has explained to the satisfaction of this Arbitrator how the probenecid entered his system and that he was without fault.

This Award is in full settlement of all claims submitted to this Arbitration. All claims not expressly granted are hereby, denied.

It is So Ordered July 10, 2017



Hon. John Charles Thomas, Arbitrator