Arbitration CAS 2012/A/2972 Matti Helminen v. Royale Ligue Vélocipédique Belge (RLVB), award of 23 July 2013

Panel: Mr Romano Subiotto QC (United Kingdom), President; Mr Guido De Croock (Belgium); Mr Olli Rauste (Finland)

Cycling
Doping (Probenecid)
Delays in the result management
CAS jurisprudence's precedential value
Irregularities in the transportation documentation and ambiguity in some official documents
Contention that a prohibited substance does not have a performance enhancing effect and strict liability
Meaning of the "balance of probabilities" standard
Evidences of the source of a specified substance in the athlete's sample
Calculation of the athlete's fine on the basis of a full year's net income

1. **Even if the report on the A-sample from the laboratory takes more than 30 working days, although it may be ideal to have the results reported within that timeframe, it is not always possible or even advisable. Furthermore, the deadline for the reporting of the A sample analysis' results is not strictly compulsory and can be extended by an agreement between the laboratory responsible for the analysis and the organization responsible for the sample testing and the management of the test results. Such delay may further be due to a surcharge of the laboratories, the complexity of the analysis during the holiday period or other reasons. In all cases, the athlete should prove that the delay could have affected the AAF.**

2. **Even though CAS jurisprudence is not subject to the principle of binding precedent, and a CAS Panel in principle might end up deciding differently from a previous panel, it must accord to previous CAS awards a substantial precedential value and it is up to the party advocating a jurisprudential change to submit persuasive arguments and evidence to that effect.**

3. **An athlete cannot validly claim irregularities in the transportation documentation and ambiguity in some official documents, if such athlete and his representative have attended the opening of the B-sample without making any reservations as to the identity or sealing of the sample.**

4. **The contention that a prohibited substance did not have a performance enhancing effect on the athlete and that he/she must have ingested the substance inadvertently does not preclude the strict liability principle of Article 21.1.1 of the UCI Anti-Doping Rules (ADR). Consequently, pursuant to Articles 22, 296 and 297 ADR and according to settled CAS jurisprudence, in order for the athlete to escape a sanction, the burden**

of proof shifts to the athlete who has to establish how the prohibited substances entered his/her system; and that he/she in an individual case bears no fault or negligence, or no significant fault or negligence.

5. **Providing evidence on a "balance of probabilities" has been interpreted in previous CAS cases as evidencing that an alternative explanation is more likely to have occurred than not to have occurred.**

6. **The concentration of the prohibited substance is irrelevant, and the facts that the prohibited substance is difficult to find on the regular market, that it might be used in meat production in a country, and that the prohibited substance has only a limited share in the total amount of positive doping controls do not evidence the source of the prohibited substance found in the athlete's urine sample by a balance of probabilities.**

7. **It is settled CAS jurisprudence that the fine should be calculated on the basis of a full year's net income. Hence, there is no room to lower the fine on the basis of the fact that the athlete could not compete, and thus had no income from cycling, after his suspension.**

I. PARTIES

1. Matti Helminen (the "Appellant"), is a Finnish professional cyclist born on August 14, 1975 in Kotka (Finland), who is a License-Holder as defined in the Cycling Regulations of the Union Cycliste Internationale ("UCI").

2. The Royale Ligue Vélocipédique Belge (RLVB) (the "Respondent") is a non-profit organization that carries out organizational and promotional tasks as regards cycling in Belgium.

3. The Appellant and the Respondent are together referred to as the "Parties".

II. FACTUAL BACKGROUND

A. Background Facts

4. The Appellant participated in the Skoda Tour Luxembourg (the "Tour") from 30 May 2012 to 3 June 2012. On 31 May 2012, a urine sample was taken in Hesperange (Luxembourg) in connection with a doping control. On 4 June 2012, the laboratory received the sample. On 22 June 2012, the A-sample was analyzed by the *Agence Française de lute Contre le Dopage* ("AFLD"). On 28 June 2012, the UCI was notified of the results of this analysis.

5. By letter dated 6 July 2012, the Appellant was informed that the A-sample resulted in an Adverse Analytical Finding ("AAF") as to the existence of Probenecid. On the same date, the letter was sent to the Appellant by email.

6. Upon receipt of this letter on 11 July 2012, the Appellant requested analysis of the B-sample. In response to this request, the Respondent sent the Appellant an email, proposing three dates for the analysis of the B-sample: 17, 19 or 24 July 2012. On the same day, the Appellant responded that he would be available on 24 July 2012. The B-sample analysis was carried out on 24 July 2012 in the presence of the Appellant and his counsel, and confirmed the AAF as regards Probenecid.

7. The Appellant voluntarily accepted on 6 August 2012 to be provisionally suspended as of that day.

B. Proceedings before the Committee

8. On 4 October 2012, the Disciplinary Committee on Doping of the Respondent (*Disciplinaire Commissie inzake Dopingpraktijken*, the "Committee") held a hearing where the Appellant was present. On 18 October 2012, the Committee decided to suspend the Appellant from participating in any cycling activity for two years as of 6 August 2012, fined him for an amount of EUR 19,250 and disqualified him from his competitive results from 31 May 2012 (the "Decision").

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

A. The Appeal

9. On 8 November 2012, the Appellant filed an appeal with the Court of Arbitration for Sport ("CAS") against the Decision (the "Appeal"), pursuant to Article R48 of the Code of Sports-related Arbitration (the "Code"). The time limit to file a complete appeal brief was extended until 14 December 2012.

10. On 28 January 2013, the Respondent filed its answer pursuant to Article R55 of the Code (the "Answer").

B. Composition of the Panel

11. Article R50 of the Code provides in relevant part

> *"The appeal shall be submitted to a Panel of three arbitrators, unless the Appellant establishes at the time of the statement of appeal that the parties have agreed to a Panel composed of a sole arbitrator or, in the absence of any agreement between the parties regarding the number of arbitrators, the President of the Division decides to submit the appeal to a sole arbitrator, taking into account the circumstances of the case, including whether or not the Respondent paid its share of the advance of costs within the time limit fixed by the CAS Court Office.* […]*".*

12. The Appellant nominated Mr. Rauste as arbitrator in his statement of appeal, the Respondent designated Mr. De Croock within the appropriate time limit. After receipt of a suggestion by the CAS Court Office to have a sole arbitrator appointed in this case, subsequent to the Appellant's request *"to moderate the advance of costs"*, of 4 January 2013, the Appellant agreed with the appointment of a sole arbitrator. The Respondent, however, did not.

13. There was thus no agreement between the Parties for the appointment of a sole arbitrator. In case of disagreement between the Parties on the number of arbitrators, it is for the Division President (or his Deputy) to decide. By order dated 13 February 2013 the Deputy President of the CAS Appeals Arbitration Division ruled that the Panel in the present dispute would be constituted of three arbitrators.

14. On 15 March 2013 the CAS Court Office notified the Parties that the Panel would be comprised of Mr. Subiotto QC as president of the Panel, and Mr. Rauste and Mr. De Croock as arbitrators (together, the "Panel").

C. Translation of Documents

15. By letter dated 2 May 2013 the CAS Court Office requested the Parties to submit within ten days a translation into English made by an independent and neutral interpreter of any exhibit submitted in another language than English, failing which the Panel would disregard such documents. With respect to the documents submitted in Dutch, the Appellant was given the opportunity to expressly accept that the Panel would rely on documents in Dutch without an English translation. The Appellant did not give such consent, and the Respondent only submitted a translation of the appealed Decision. The Appellant submitted a translation into English of two documents in French.

D. The Hearing

16. On 5 February 2013, the Appellant requested a hearing to be held in the present matter, which took place on 17 May 2013 at the CAS office in Lausanne.

17. At the hearing the following experts and witnesses were heard: Dr. Douwe de Boer (Doping expert), Dr. Reinald Boonen (Doctor in sports medicine), Mr. Eduardus Froyen (Pharmacist), Mr. Etienne Oyen (Mentor of the Appellant), Mr. Gérard Bulens (Manager Team Landbouwkrediet-Euphony), Mr. Matti Helminen (Appellant), all called by the Appellant.

18. With the consent of all the parties, Mr. Boonen, Mr. Froyen, Mr. Oyen and Mr. Bulens were examined by telephone combined with a skype image.

19. The parties did not raise any objection regarding the composition of the Panel. At the end of the hearing, the parties confirmed that their rights to be heard have been respected.

E. Further Written Submissions

20. After the hearing and upon request from the Panel, the Parties submitted additional documents and made further written submissions. In particular, the Appellant provided more details about his financial situation.

IV. SUBMISSIONS OF THE PARTIES

21. The Appellant's Appeal, in essence, may be summarized as follows:

- First, the Appellant alleges that the Respondent did not respect the time limits and requirements for result management, thereby hindering the Appellant to trace the origin of the prohibited substance found and impeding his possibilities to defend himself. The Appellant also submits that the irregularities in the chain of custody of his sample render the results of the analyses unreliable.

- Second, the Appellant argues that there are alternative explanations for the origin of Probenecid found in his urine.

22. The Respondent's Answer disputes the Appellant's submissions.

V. ADMISSIBILITY

23. The Respondent initially expressed a reservation of inadmissibility of the Appeal since the Appellant had not fully paid the advance of costs pursuant to Article R64.2 of the Code, which provides:

"Upon formation of the Panel, the CAS Court Office shall fix, subject to later changes, the amount and the method of payment of the advance of costs. The filing of a counterclaim or a new claim may result in the calculation of separate advances. To determine the amount to be paid in advance, the CAS Court Office shall fix an estimate of the costs of arbitration, which shall be borne by the parties in accordance with Article R64.4. The advance shall be paid in equal shares by the Claimant/Appellant and the Respondent. If a party fails to pay its share, the other may substitute for it; in case of non-payment within the time limit fixed by the CAS, the request/appeal shall be deemed withdrawn and the CAS shall terminate the arbitration; this provision shall also apply to any counterclaim, where applicable".

24. However, such claim becomes without object and in accordance with the CAS case law (CAS 2010/A/2170-71 and 2010/A/2144), it must be emphasized that the management of the advance of costs is an administrative issue which is dealt with by the CAS Court Office. The non-payment of the advance of costs within the time limit prescribed by the Secretary General cannot be invoked by a party to request that an appeal or a claim be automatically considered as inadmissible. The deadlines which are fixed for the payment of the advance of costs only allow the CAS Court Office to terminate a procedure in the absence of payment, in accordance with article R64.2 of the Code.

25. The Appeal and the statement of appeal of the Appellant were filed in due time, and complies with all the other requirements set forth by Article R48 of the Code. The Panel therefore concludes that the Appeal is admissible.

VI. JURISDICTION

26. The CAS possesses in principle jurisdiction to hear the underlying case pursuant to Article R47 of the Code, which provides:

"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".

27. The Appellant relies on Article 24(a) of the internal disciplinary code on doping of the non-profit association KBWK (*Koninklijke Belgische Wielrijdersbond/Royale Ligue Vélocipédique Belge,* Royal Belgian Cyclists' Federation) and the non-profit association WVB (*Wielerbond Vlaanderen,* Cyclists' Federation Flanders) (*intern tuchtreglement inzake dopingpraktijken van de vzw KBWB en de vzw WVB in Vlaanderen*) that was in force at the time of the Decision (the "Disciplinary Code") as conferring jurisdiction on the CAS. This Article provides that the athlete concerned can lodge an appeal against every disciplinary measure of the Committee (*Commissie*) (The Dutch text reads: *"De volgende personen of instanties hebben het recht tegen elke disciplinaire maatregel van de commissie beroep aan te tekenen bij het TAS: (a) de betrokken sportbeoefenaar / begeleider (b) …"*).

28. In addition, Article 329 of the UCI Anti-Doping Rules ("ADR") provides in relevant part:

"The following decisions may be appealed to the Court of Arbitration for Sport: (1) a decision of the hearing body of the National Federation under article 272 […] *(5) the final decision at the level of the National Federation regarding a License-Holder that was referred to his National Federation according to article 203".*

29. The Respondent does not contest the jurisdiction of the CAS, which is furthermore confirmed by the signature of the Order of procedure which was issued by the CAS and signed by both parties.

30. The Panel concludes that it has jurisdiction to hear the present appeal pursuant to Article R47 of the Code, Article 24(a) of the Disciplinary Code, and Article 329 ADR.

VII. APPLICABLE LAW

31. Article R58 of the Code provides as follows:

"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".

32. Article 1.1.004 of the UCI Cycling Regulations (Part 1 General Organisation of Cycling as a Sport) provides:

"Anyone requesting a licence thereby undertakes to respect the constitution and regulations of the UCI member Federations, as well as to participate in cycling events in a sporting and fair manner. He shall undertake to respect the obligations referred to in article 1.1.023. As from the time of application for a licence and provided that the licence is issued, the applicant is responsible for any breach of the regulations that he commits and is subject to the jurisdiction of the disciplinary bodies. Licence holders remain subject to the jurisdiction of the relevant disciplinary bodies for acts committed while applying for or while holding a license, even if proceedings are started or continue after they cease to hold a licence".

33. Article 1 ADR provides:

"These Anti-Doping Rules shall apply to all License-Holders. […]*".*

34. Article 345 ADR provides:

"The CAS shall decide the dispute according to these Anti-Doping Rules and for the rest according to Swiss law".

35. Article 369 ADR provides:

"These Anti-Doping Rules shall be interpreted as an independent and autonomous text and not by reference to existing law or statutes. However, these Anti-Doping Rules having been adopted pursuant to the applicable provisions of the Code [The World Anti-Doping Code] *they shall be interpreted in a manner that is consistent with applicable provisions of the Code. The comments annotating various provisions of the Code may, where applicable, assist in the understanding and interpretation of these Anti-Doping Rules".*

36. There is no dispute among the Parties that the following regulation is applicable:

a. The Disciplinary Code;

b. The ADR; and

c. The World Anti-Doping Code ("WADC").

37. On a subsidiary basis, and where necessary, this dispute will be decided according to Swiss law.

VIII. MERITS

38. The following refers to the substance of the Parties' allegations and arguments without listing them exhaustively in detail. In its discussion of the case and its findings on the merits, the

Panel has nevertheless examined and taken into account all of the Parties' allegations, arguments and evidence on record, whether or not expressly referred to.

39. The Appellant's requests can essentially be captured in two groups: First, the Appellant alleges that the Respondent did not respect the time limits and requirements for result management as provided for in the ADR to the detriment of the Appellant. The Appellant also submits that the analyses of the A- and B-sample lack credibility. Second, the Appellant argues that there are alternative explanations for the Probenecid found in his urine.

A. Time Limits, Result Management and Credibility of the Analyses

40. The Appellant claims that the Respondent has not respected the rules of the ADR and the International Standard for Laboratories ("ISL") with respect to time limits and result management, in particular Articles 206 ADR and 5.2.6.5 ISL, as well as Article 223 ADR. The Appellant further holds that the results of the tests are questionable, based on the *"obscurities of the documentation and the unclarity of the conditions before delivering the sample to the laboratory"*. In respect of these points, the Appellant relies on the presumption of innocence and the principle of *in dubio pro reo*.

a. Articles 206 ADR and 5.2.6.5 ISL

i. Arguments of the Parties

41. Article 206 ADR provides in relevant part:

"[…] *the UCI shall promptly notify the rider of (a) the Adverse Analytical Finding; (b) the Rider's right to the analysis of the B Sample under the conditions of these Anti-Doping Rules; (c) the scheduled date, time and place for the B Sample analysis; (d) the opportunity for the Rider and/or the Rider's representative to attend the B Sample opening and analysis; and (e) the Rider's right to request copies of the A and B Sample laboratory documentation package which includes information as required by the International Standard for Laboratories.* […]*"* (emphasis added).

42. Article 5.2.6.5 ISL provides:

"Reporting of "A" Sample results should occur within ten (10) working days of receipt of the Sample. The reporting time required for specific Competitions may be substantially less than ten days. The reporting time may be altered by agreement between the Laboratory and the Testing Authority".

43. The Appellant argues that, by not respecting the abovementioned time limits, the Respondent has deprived the Appellant of a reasonable chance to analyze his nutrition during the race, in order to find the source of the Probenecid.

44. The Respondent argues that the Appellant was notified promptly as meant in Article 206 ADR, and that the period of time elapsed was normal. In particular, some additional tests had to be carried out in order to determine that the samples tested positively on Probenecid.

45. The Respondent furthermore points out that the Appellant should have evidenced that not respecting the time limits of Article 5.2.6.5 may have caused the AAF and refers in that respect to Article 24 ADR, which provides in relevant part:

"WADA-accredited laboratories or as otherwise approved by WADA are presumed to have conducted Sample analysis and custodial procedures in accordance with the International Standard for Laboratories. The License-Holder may rebut this presumption by establishing that a departure from the International Standard for Laboratories occurred which could reasonably have caused the Adverse Analytical Finding. […]*".*

46. The Respondent fails to see how a departure from the period of ten working days could have caused the AAF.

ii. Assessment of the Panel

47. The Panel observes that, on the basis of Article 24 ADR, it is for the Appellant to evidence that a departure from the time limit in Article 5.2.6.5 ISL can reasonably have caused the AAF.

48. In its award in CAS 2009/A/1931 of November 12, 2009, the CAS Panel held that, even though the report on the A-sample from the laboratory took more than 30 working days notwithstanding Article 5.2.6.5 ISL, that *"the language in this section is permissive and that while it may be ideal to have the results reported within that timeframe, it is not always possible or even advisable. There is, therefore, no departure from the 2008 ISL, such that it could have caused the AAF or even contributed to it".* (CAS 2009/A/1931, at 42).

49. Furthermore, in CAS 2010/A/2041, the CAS Panel held that there was no breach of Article 5.2.6.5 ISL, even though the receipt of the sample occurred on 8 January 2009, and the reporting of the results was only on 14 August 2009. It considered *"that the deadline for the reporting of the A sample analysis' results is not strictly mandatory, since it can be extended by an agreement between the laboratory in charge of the analysis* […] *and the organization responsible for the sample testing and the management of the test results* […]*"* (CAS 2010/A/2041, at 113-116).

50. Finally, in TAS 2006/A/1119, the CAS Panel considered that there was no breach of Article 5.2.6.5 ISL, even though the time span was 23 working days (instead of 10). The UCI recognized the delay, but held that it was due to *"la surcharge des laboratoires, la complexité de l'analyse et la période des vacances".* The Panel concluded that, as the Applicant could not prove that the delay could have affected the AAF, there was no breach of Article 5.2.6.5 ISL (TAS 2006/A/1119, at 69-75).

51. Even though CAS jurisprudence is not subject to the principle of binding precedent, and *"a CAS Panel in principle might end up deciding differently from a previous panel, it must accord to previous CAS awards a substantial precedential value and it is up to the party advocating a jurisprudential change to submit persuasive arguments and evidence to that effect"* (CAS 2008/A/1545, at 55).

52. In the case at hand, the time span amounted to 19 working days: the laboratory received the sample on 4 June 2012, and reported the results to the UCI on 28 June 2012. The Panel considers, in view of the case-law cited, that there is no evidence that the time span of 19

working days, notwithstanding Article 5.2.6.5 ISL, can have caused, or contributed to, the AAF. In particular, the Appellant's expert, Dr. De Boer, clarified during the hearing that Probenecid is a very stable substance at almost any temperature, which does not decompose or appear all of a sudden.

53. The Panel furthermore fails to see how the time span between the Tour and the notification of the results of the testing of the A-sample has significantly limited the Appellant's ability to reconstruct his alimentation during the Tour. It therefore concludes that there is no breach of Article 206 ADR, nor of Article 5.2.6.5 ISL.

b. Article 223 ADR

i. Arguments of the Parties

54. There is discussion between the Parties whether or not the Appellant has waived his right to invoke the time limits of Article 223 ADR during the hearing of 4 October 2012. Article 223 ADR provides:

> *"During World Championships, a stage race or a six-day race, upon receipt of an A Sample Adverse Analytical Finding from a test conducted at that stage race or a six-day race and completion of the review described in article 204, the UCI shall notify the Rider via the president of the commissaires panel, the Doping Control Officer or another representative of the UCI. The president of the commissaires panel, the Doping Control Officer or the UCI representative shall hear the Rider's explanations".*

55. The Decision reads in relevant part: *"At the hearing of 4 October 2012, the sportsman explicitly declared before the commission that he does not wish to rely on the terms regarding stage races provided for in article 223 of the Antidoping Rules. This does not seem relevant in this matter, since the sportsman has finished the race"* (The original Dutch text reads: *"De sporter heeft ter zitting van 4 oktober 2012 voor deze commissie uitdrukkelijk verklaard dat hij zich niet wenst te steunen op de termijnen zoals in art. 223 van de Anti-dopingregels UCI zijn voorzien voor etappewedstrijden; dit lijkt te dezen ook niet relevant nu immers de sporter de wedstrijd uitgereden heeft"*).

56. The Respondent argues that the Appellant did not submit any written arguments or documents relating to Article 223 ADR during the hearing.

57. In any event, the Respondent holds, contrary to the Appellant, that Article 223 ADR is irrelevant to the matter at hand. The Respondent argues that Article 223 applies to the situation in which the UCI receives an A-sample of a test conducted during the stage race. However, according to the Respondent, this does not imply that all analyses of the test conducted during a stage race should be carried out during the stage race, which would also be practically impossible.

ii. Assessment of the Panel

58. The Panel considers that the purpose of this Article is to have in place additional checks and balances for the situation in which the receipt of an A-sample containing an AAF occurs

during a race, so that it can be determined whether or not the rider can continue to participate in the event, or should be disqualified or banned from the event, as provided for in Articles 241-245 ADR.

59. This also follows from *e.g.,* the comments to Article 8.2 WADC on expedited hearings during events:

"For example, a hearing could be expedited on the eve of a major Event where the resolution of the anti-doping rule violation is necessary to determine the Athlete's eligibility to participate in the Event or during an Event where the resolution of the case will affect the validity of the Athlete's results or continued participation in the Event" (emphasis added).

60. The Panel concludes that Article 223 ADR is not applicable in the present case, as the analyses were not carried out during the Tour.

c. Credibility of the Analyses

i. Arguments of the Parties

61. The Appellant questions the circumstances under which and the place where the sample was kept during the four days before the sample was delivered to the laboratory, and claims that in general the chain of custody of the samples is defective, in particular due to some irregularities in the waybill documentation. These irregularities and the ambiguity of the marking in some official documents would, according to him, raised serious reason to doubt the correctness of the results.

62. The Respondent, however, explains that the samples were taken on Friday evening 31 May 2012, and that the laboratory received the samples on Monday 4 June 2012, which, according to the Respondent, is perfectly reasonable in view of the weekend.

63. The Respondent refers to Article 3.2.2 of the WADC, which is directly relevant to the International Standard for Testing ("IST"):

"Departures from any other International Standard or other anti-doping rule or policy which did not cause an Adverse Analytical Finding or other anti-doping rule violation shall not invalidate such results. If the Athlete or other Person establishes that a departure from another International Standard or other anti-doping rule or policy which could reasonably have caused the Adverse Analytical finding or other anti-doping rule violation occurred, then the Anti-Doping Organization shall have the burden to establish that such departure did not cause the Adverse Analytical Finding or the factual basis for the anti-doping rule violation".

64. The Respondent concludes that the Appellant did not establish any such departure, and therefore that there it is not debatable that the Respondent has established an anti-doping violation.

ii. Assessment of the Panel

65. The Panel observes that the IST provides requirements for transport and storage of samples and documentation. Article 9.3.1 provides:

"The ADO [Anti-Doping Organisation] *shall authorize a transport system that ensure Samples and documentation will be transported in a manner that protects their integrity, identity and security".*

66. Article 9.3.2 provides:

"Samples shall always be transported to the WADA-accredited laboratory (or as otherwise approved by WADA), using the ADO's authorized transport method, as soon as practicable after the completion of the Sample Collection Session. Samples shall be transported in a manner which minimizes the potential for Sample degradation due to factors such as time delays and extreme temperature variations".

67. Article 3.2.2 of the WADC (cited by the Respondent) is essentially similar to Article 25 ADR, which provides:

"Departures from any other International Standard, these Anti-Doping Rules, the Technical Documents set by the UCI, or any other applicable anti-doping rule or policy or technical document which did not cause an Adverse Analytical Finding or the factual basis for any other anti-doping rule violation shall not invalidate such findings or results. If the License-Holder establishes that any such departure which could reasonably have caused the Adverse Analytical Finding or factual basis for any other anti-doping rule violation occurred, then the UCI or its National Federation shall have the burden to establish that such a departure did not cause the Adverse Analytical Finding or the factual basis for the anti-doping rule violation".

68. The Panel considers that the appropriate legal framework requires the Appellant to establish that the departure from any International Standard can reasonably have caused the AAF. The Appellant did not establish any such circumstances and the Panel therefore dismisses the argument of the Appellant.

69. As to the alleged irregularities in the transportation documentation and ambiguity in some official documents, the Panel observes that the Appellant and his representative have attended the opening of the B sample without making any reservations as to the identity or sealing of the sample. In any event, a defect in the transportation documentation, if any, cannot have affected the results of the analysis. With regard to the transportation time under allegedly unknown conditions, the Panel refers to the testimony of the Appellant's expert, Dr. de Boer, who explained that Probenecid is a very stable substance at almost any temperature, which does not decompose or appear all of a sudden.

B. Alternative Source of Probenecid

i. Arguments of the Parties

70. The Parties agree that Probenecid is qualified as a specified substance pursuant to Article 4.2.2. WADC, and that it is included on the Prohibited List in group S.5 "Diuretics and Masking Agents".

71. The Appellant submits, however, that Probenecid in itself does not enhance performance, and is prohibited for its masking effects only. It is, according to the Appellant, only effective in masking other substances when used in large amounts. The very low concentration of Probenecid in the Appellant's urine sample therefore, again according to the Appellant, could not have had any masking effect, and he could not have had any incentive to take Probenecid. Rather, the likely source of Probenecid is alimentation, as it may be used in meat production. Otherwise, Probenecid may be found in soil, which may have been the source of the Probenecid found in the Appellant's urine sample. The Appellant and his experts claim that:

- The reported concentration of Probenecid was extremely low, and therefore could not have had any masking effects;

- It has in any event only limited clearance efficiency, and is not a popular medicine. Probenecid is considered an obsolete medicine, is very easy to detect and is difficult to obtain for human applications;

- Rather, Probenecid is claimed to be used in large amounts by Chinese meat producers. The most likely source of Probenecid is food, or food supplements;

- It was extremely difficult to reconstruct the Appellant's dietary intake at the time of the sample collection, due to the time period between the sample collection and the start of the investigation. However, the Appellant claims that he has only consumed meals (breakfast and dinner) at the hotel that was selected by the organization of the Tour. In addition, the riders consumed sports products of their sponsor, W-Cup. No unopened packages thereof were available to analyze; and

- Finally, it is possible that Probenecid residues are found in soil, and cyclists are exposed to different kind of terrains during competitions.

72. The Appellant's pharmacist Mr. Froyen testified that he has prepared the Appellant a vitamin supplement which is completely legal for sportsmen. Mr. Bulens, manager of the Landbouwkrediet-Euphony Team, confirmed that the Appellant used the W-Cup Recovery Drink during the Tour, which was prepared by the support staff of the team. The team members also used other W-Cup products, such as energy bars. Bulens also affirmed that there were no left-overs of the drink available to analyze as it was not possible to establish that it was exactly the same product. Bulens furthermore testified that the Team Landbouwkrediet-Euphony stayed and ate in the Hôtel Bernini during the Tour, which was

assigned to them by the organization of the Tour. Finally, Bulens confirmed that none of the other riders of the team was tested.

73. The Respondent invokes Article 22 ARD, which reads:

"The UCI and the National Federations shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the UCI or its National Federation has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegations which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these Anti-Doping Rules place the burden of proof upon the License-Holder 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 by a balance of probability, except as provided in articles 295 and 305 where the License-Holder must satisfy a higher burden of proof".

74. The Respondent further refers to Article 21.1.1 ADR, which provides:

"It is each Rider's personal duty to ensure that no Prohibited Substance enters his body. Riders are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their bodily Specimens. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Rider's part be demonstrated in order to establish an antidoping violation under article 21.1. Warning: 1) Riders must refrain from using any substance, foodstuff, food supplement or drink of which they do not know the composition. It must be emphasized that the composition indicated on a product is not always complete. The product may contain Prohibited Substances not listed in the composition. 2) Medical treatment is no excuse for using Prohibited Substances or Prohibited Methods, except where the rules governing Therapeutic Use Exemptions are complied with".

75. The Respondent submits that whether or not the prohibited substance has had a performance enhancing effect on the Appellant, and whether or not he has ingested the prohibited substance inadvertently, is not relevant, referring to CAS case 2011/A/2384 & 2386.

76. The Respondent further submits that in order to escape a sanction, the Appellant has the burden of proof to establish by a balance of probability (referencing Articles 22, 296 and 297 ADR, and CAS cases 2011/A/2384 & 2386, 2006/A/1130, 2006/A/1067 and 2005/A/922, 923 & 926):

a. How the prohibited substance entered the Appellant's body; and

b. That the Appellant does not bear any (significant) fault or negligence.

77. Articles 296 and 297 ARD provide in relevant part:

"No Fault or Negligence. If the Rider establishes in an individual case that he bears No Fault or Negligence, the otherwise applicable period of Ineligibility shall be eliminated. When a Prohibited Substances or its Markers or Metabolites is detected in a Rider's Sample as referred to in article 21.1 (presence of a Prohibited Substance),

the Rider must also establish how the Prohibited Substance entered his system in order to have the period of Ineligibility eliminated. […]*".*

"No significant Fault or Negligence. If a License-Holder establishes in an individual case that he bears No Significant Fault or Negligence, then the period of Ineligibility may be reduced, the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable. […] *When a Prohibited Substance or its Markers or Metabolites is detected in a Rider's Sample as referred to in article 21.1 (presence of Prohibited Substance), the Rider must also establish how the Prohibited Substance entered his system in order to have the period of Ineligibility reduced".*

78. The Respondent submits that the concentration of the prohibited substance is irrelevant, and the facts that Probenecid is difficult to find on the regular market, that it might be used in meat production in China, and that Probenecid has only a limited share in the total amount of positive doping controls does not evidence the source of the Probenecid found in the Appellant's urine sample by a balance of probabilities.

79. The Respondent holds that the Appellant did not evidence any attempts to reconstruct its alimentation during the Tour, or the reason why it is no longer possible to reconstruct this. The Respondent further submits that the statement made by pharmacist Froyen, holding that the vitamin supplement that he prepared for the Appellant was completely legal, can hardly be considered as evidence that the supplement could have been the source of the AAF. The Respondent also points to contradictions of the Appellant as to the supplements taken during the Tour.

80. Finally, the Respondent points out that it is the first time that the Appellant refers to a W-Cup Recovery drink that was supplied to Appellant's team members after the Tour, and submits that the Appellant has not, to the required extent, explained how Probenecid could have ended up in this drink.

ii. Assessment of the Panel

81. First, the Panel recalls that the contention that the prohibited substance, Probenecid, did not have a performance enhancing effect on the Appellant and that he must have ingested the substance inadvertently does not preclude the strict liability principle of Article 21.1.1 ADR. Consequently, pursuant to Articles 22, 296 and 297 ADR and according to settled CAS jurisprudence as referred to by the Respondent, in order for the Appellant to escape a sanction, the burden of proof shifts to the athlete who has to establish:

a. How the prohibited substances entered the Appellant's system; and

b. That the Appellant in an individual case bears no fault or negligence, or no significant fault or negligence (CAS 2011/A/2384 & 2386, at 47-49).

82. In paragraph 68 the Panel held that there is no room to contest the presence of the prohibited substance. Therefore, pursuant to the regulatory framework as described above and the submissions of the Parties, the main question to be resolved by the Panel in the present dispute

is, taking into account that an anti-doping violation has been established by the Respondent, whether the Appellant has established, on a balance of probabilities, how the prohibited substance entered his system.

83. As a preliminary matter, providing evidence on a "balance of probabilities" has been interpreted in previous CAS cases as evidencing that an alternative explanation is more likely to have occurred than not to have occurred (*e.g.*, CAS 2009/A/1926 & 1930, at 31).

84. As explained, the Panel understands that the Appellant claims that the prohibited substance may have entered his body via his diet (either contaminated meat, or the W-Cup Recovery Drink, or vitamin supplements) or via contaminated soil.

85. With respect to the possibility that Probenecid entered his body by means of contaminated meat, the Appellant submits that *"[f]or veterinary applications, Probenecid may have economical* [sic] *value as antibiotics are applied on a large scale with a preventive intention; namely in the meat production area one wants to reduce the risks of diseases in a beneficial way. For that reason large amounts of Probenecid are claimed to be produced by Chinese manufacturers for the world market. At this moment no data are publically available in respect to the scale of this kind of application, but as far as known, Probenecid is currently not routinely screened for in food. Therefore, it is not possible in a reasonable way to obtain information in that respect".*

86. At the hearing, the Appellant himself and Mr. Bulens testified that the meals taken during the Tour contained meat, although they could not recall what these meals exactly consisted of. The Appellant's expert Mr. Boonen referred to a study in which goats were given antibiotics in combination with Probenecid, and explained that traces of Probenecid were detected in *e.g.*, milk and cheese afterwards. No further evidence was provided to develop the Appellant's claim that Probenecid may have entered his body via alimentation, or meat particularly.

87. Even though the Panel does not doubt the possible use of Probenecid in the meat industry, it considers that the Appellant has not, on a balance of probabilities, evidenced that, in this individual case, Probenecid entered his body via meat or other alimentation. To the Panel, this is a remote scenario, which is too far away from the required balance of probabilities.

88. As to the W-Cup Recovery Drink or other sports products provided by W-Cup, Mr. Bulens, manager of the Landbouwkrediet-Euphony Team, confirmed at the hearing that the Appellant used the W-Cup Recovery Drink during the Tour, which was prepared by the support staff of the team. The team members also used other W-Cup products, such as energy bars. Bulens also affirmed that there were no left-overs of the drink available to analyze as it was not possible to establish that it was exactly the same product as the Appellant had used.

89. The Panel considers that the arguments of the Appellant in this respect do not evidence, on a balance of probabilities, that Probenecid entered his body via any of the W-Cup products.

90. With respect to the vitamin supplements that the Appellant took, Pharmacist Mr. Froyen testified that he has prepared the Appellant a vitamin supplement which is *"completely legaly* [sic] *for sportmen* [sic]*"*. In response to the question whether it was possible that Probenecid was

added to the relevant vitamin supplement, Froyen responded during the hearing that Probenecid has not been used in pharmacies since 1992.

91. The Panel considers that the Appellant did not, on a balance of probabilities, evidence that Probenecid entered his body via vitamin supplements.

92. Another alternative explanation for the existence of Probenecid in the Appellant's urine put forward by the Appellant, is that scientific research indicates that Probenecid residues have been found in soil. He submits: *"Due to the nature of cycling it is a fact that cyclists are especially exposed to different kinds of conditions depending on the terrain on which the competition is held. Therefore, cyclists are exposed to different kinds of soil during competition. Taking this into account it can be concluded that Probenecid is not an exceptional substance in the normal living environment"*. The Appellant relies on a 2005 scientific article by Jones, Voulvoulis and Lester called *"Human Pharmaceuticals in Wastewater Treatment Processes"*.

93. Even if there were such scientific evidence, it appears that this scientific article actually refers to Probenecid as a drug that may be degraded during sewage treatment processes. In any event, in order to prove on a balance of probabilities that Probenecid had entered the Appellant's system via Probenecid residues found in soil and/or water, the Appellant should have put forward concrete evidence *e.g.* that this was actually the case during the Tour. The Panel concludes that the Appellant did not prove, on a balance of probabilities, that Probenecid entered the Appellant's system via Probenecid residues found in soil and/or water.

IX. SANCTION

i. Arguments of the Parties

94. The Appellant requests the CAS to overrule the Decision and remove any sanctions imposed on him. In the alternative, he requests the CAS to mitigate the sanction to a notice, or to shorten the ineligibility period to less than two years, and to withdraw the financial sanction.

95. The Appellant invokes Articles 295, 296 and 297 ADR and an alleged breach of the principle of proportionality. Article 295 ADR provides:

> *"Where a Rider or Rider Support Personnel can establish how a Specified Substance entered his body or came into his possession and that such Specified Substance was not intended to enhance the Rider's sport performance or mask the use of a performance-enhancing substance, the period of Ineligibility for a first violation found in article 293 shall be replaced with the following: at a minimum, a reprimand and no period of Ineligibility from future Events, and at a maximum, two (2) years of Ineligibility. To justify any elimination or reduction, the License-Holder must produce corroborating evidence in addition to his word which establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sport performance or mask the use of performance-enhancing substance. The License-Holder's degree of fault shall be the criterion considered in assessing any reduction of the period of Ineligibility"*.

96. Articles 296 and 297 ARD provide in relevant part:

"No Fault or Negligence. If the Rider establishes in an individual case that he bears No Fault or Negligence, the otherwise applicable period of Ineligibility shall be eliminated. When a Prohibited Substances or its Markers or Metabolites is detected in a Rider's Sample as referred to in article 21.1 (presence of a Prohibited Substance), the Rider must also establish how the Prohibited Substance entered his system in order to have the period of Ineligibility eliminated. […]*".*

"No significant Fault or Negligence. If a License-Holder establishes in an individual case that he bears No Significant Fault or Negligence, then the period of Ineligibility may be reduced, the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable. […] *When a Prohibited Substance or its Markers or Metabolites is detected in a Rider's Sample as referred to in article 21.1 (presence of Prohibited Substance), the Rider must also establish how the Prohibited Substance entered his system in order to have the period of Ineligibility reduced".*

97. The Appellant further claims that his financial situation should be taken into account when imposing a fine. The Appellant was not able to compete after his suspension on 6 August 2012, and he was forced to resign from his cycling team. To this end, he invokes Article 326 ADR, which provides in relevant part:

"Fines.
In addition to the sanction provided for under articles 293 to 313 anti-doping violations shall be sanctioned with a fine as follows.
1. The fine is obligatory for a License-Holder exercising a professional activity in cycling and in any event for members of a team registered with the UCI.
a) Where a period of Ineligibility of two years or more is imposed on a member of a team registered with the UCI, the amount of the fine shall be equal to the net annual income from cycling that the License-Holder normally was entitled to for the whole year in which the anti-coping violation occurred. The amount of this income shall be as assessed by the UCI, provided that the net income shall be assessed at 70 (seventy) % of the corresponding gross income. The License-Holder concerned shall have the burden of proof to the contrary. […] *If justified by the financial situation of the License-Holder concerned, the fine imposed under this paragraph may be reduced, but not by more than one-half.*
2. No fine shall be imposed for violations for which article 296 (No Fault or Negligence) is applied.
3. In other cases than those under paragraphs 1 and 2 the imposition is optional.
4. In observance of paragraphs 1 to 5 the amount of the fine shall be set in line with the gravity of the violation and the financial situation of the License-Holder concerned. […]*".*

98. In the post hearing submission, the Appellant has provided the Panel with details about, *inter alia*, his current bank accounts, his income in 2012, his monthly rent and he declared that he was not entitled to any unemployment compensation.

99. The Respondent refers to Article 293 ADR, which provides in relevant part:

"The period of Ineligibility imposed for a first anti-doping rule violation under article 21.1 (Presence of a Prohibited Substance or its Metabolites or Markers) […] *shall be 2 (two) years' Ineligibility unless the conditions for eliminating or reducing the period of Ineligibility as provided in articles 295 to 304 or the conditions for increasing the period of Ineligibility as provided in article 305 are met".*

100. The Respondent submits that the Appellant does not refer to any legal basis for the reduction of the period of ineligibility, and holds that the Appellant did not defend himself against the penalty demanded at the hearing before the Committee.

101. As to the requested reduction of the fine, the Respondent submits, referring to Article 326 ADR, that the mere fact that the Appellant was fired during the cycling season (or in the words of the Appellant *"has been forced to resign from his team"*) does not provide a legal basis to adjust the annual income that forms the basis of the calculation of the fine. The Respondent submits that, at the hearing before the Committee, the Appellant never provided any documents to evidence his incapability to pay the fine and his present financial situation.

ii. Assessment of the Panel

102. Considering that the Panel confirmed the Respondent's finding that there was an anti-doping rule violation under Article 21.1 ARD, the presence of a prohibited substance, and taking into account Article 293 ADR and in the absence of any situation as provided for in Articles 296 and 297 ADR (see paras. 76-86), the Panel sees no room for deviating from the sanction as imposed by the Respondent of two years ineligibility, which is in compliance with applicable rules and proportionate.

103. It is settled CAS jurisprudence that the fine should be calculated on the basis of a full year's net income (*see e.g.,* TAS 2011/A/2325 at 145 and the case-law cited there). Hence, there is no room to lower the fine on the basis of the fact that the Appellant could not compete, and thus had no income from cycling, after his suspension.

104. Furthermore, the majority of the Panel concludes that the Appellant's financial situation does not militate in favour of a lower fine. In order to evaluate the Appellant's financial situation, the Panel needs to consider the particular facts before it. Even though the Appellant has provided *e.g.*, an overview of his bank accounts and his 2012 income, he has not evidenced, to the satisfaction of the majority of the Panel, that his financial situation militates in favour of a lowering of the fine or that the imposed fine would be disproportionate. Specifically, the majority of the Panel considers that the Appellant has not detailed why he is not in a position to pay the fine, why he cannot find a job during the suspension period, or why he is not eligible to receive any state support. The majority of the Panel concludes in that respect that it was for the Appellant to explain why the unemployment certificate that he submitted implied that he is not entitled to any public benefits, considering that the certificate as such only determines that the Belgian National Employment Office (*Rijksdienst voor Arbeidsvoorziening*) is not aware of any file of the Applicant. In addition, the certificate of the Public Centre for Social Welfare (*Openbaar Centrum voor Maatschappelijk Welzijn*) only determines that the Appellant did not receive any benefits. The Appellant did not submit that he actually applied for any such benefits, or explain the reason why he was not eligible to receive any.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed by Matti Helminen on 8 November 2012 is dismissed.

2. The decision issued on 18 October 2012 by the Disciplinary Committee on Doping of the Royale Ligue Vélocipédique Belge is confirmed.

3. (…).

4. (…).

5. All other motions or prayers for relief are dismissed.