

APPEAL TRIBUNAL

NATIONAL ANTI DOPING PANEL

Charles Flint QC
Colin Murdock
Dr Barry O'Driscoll

UK Anti-Doping
-and-
Dillian Whyte

Date of hearing: 22 March 2013

Date of decision: 27 March 2013

Dr. Gregory Ioannidis and Leanne Coulton of Vassiliades & Co. for Dillian Whyte
Ms. Hannah McLean and Graham Arthur for UKAD

FINAL DECISION OF THE APPEAL TRIBUNAL

Introduction

1. This is the final decision of the Appeal Tribunal of the National Anti-Doping Panel convened under article 12.1 of the NADP Procedural Rules to decide an appeal brought by Dillian Whyte against the decision made on 22nd January 2013 by the Anti-Doping Tribunal. That decision was that a doping offence had been established, and that the Appellant should be ineligible for competition for a period of 2 years from 13th October 2012.

2. The Appellant is a 24 year old professional heavyweight boxer who took a supplement called Jack3d which contained methylhexanamine (MHA). The Appellant does not dispute that a doping violation was committed contrary to article 2.1 of the rules in that he provided an in-competition sample which showed the presence of MHA which is a prohibited substance listed under section S6.b (Specified Stimulants) of the WADA 2012 Prohibited List.
3. The Appellant appeals against the decision on the grounds that he bore no significant fault or negligence for the commission of the doping offence and that under article 10.5.2 of the anti-doping rules adopted by the British Boxing Board of Control ('the rules') the period of ineligibility should be reduced from the mandatory period of 2 years.
4. The facts, which are thoroughly set out in the decision of the tribunal, are not in dispute, and it is not necessary to set them out again in this decision. It is accepted by UKAD that the MHA detected in the sample entered the athlete's body from his ingestion of the supplement in the circumstances which he described in his evidence to the tribunal.

Issues

5. Article 10.5.2 provides

"If a Participant establishes in an individual case that he or she bears No Significant Fault or Negligence for the Anti-Doping Rule Violation charged, then the period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the minimum period of Ineligibility otherwise applicable... When the Anti-Doping Rule Violation charged is an Article 2.1 Violation... the Athlete must also establish how the Prohibited Substance entered his/her system in order to have the period of Ineligibility reduced."

6. It is accepted by UKAD that the athlete has shown how the prohibited substance entered his body, so the precondition for the application of article 10.5.2 is satisfied. The only issue is whether the athlete can show that he bore no significant fault or negligence in relation to the violation.

No Significant Fault or Negligence

7. No Significant Fault or Negligence is defined in the rules as follows:

No Significant Fault or Negligence. The Athlete 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 relation to the Doping offence.

8. Article 10.5.2 requires consideration of the athlete's moral fault, judged against the necessarily strict standards set by the rules which apply the WADA Code. The athlete has a personal responsibility, from which he cannot be absolved by reliance on others. Article 1.3 provides that it is the sole responsibility of each athlete to acquaint himself with all the provisions of the rules and that he takes full responsibility for what he ingests. Any athlete has a clear duty to check whether any medication or supplement being taken by him is permitted under the anti-doping rules. It is fundamental to the strict liability anti-doping regime that an athlete is responsible for any prohibited substance found to be present in his body and that ignorance of the rules or of the nature of any substance administered or ingested can be no defence.
9. The duty of utmost caution imposed on athletes is set out in the advisory opinion in *FIFA v. WADA* CAS 2005 /C/976 & 986 at paragraphs 73 – 75. The decision in *Kendrick v. ITF* CAS 2011/A/2518 at paragraph 10.14 restates the principle that the athlete's fault must be judged against the fundamental duty to do everything in his power to avoid ingesting a prohibited substance.
10. If the athlete fails to meet the high duty of care he may be regarded as having borne some fault, but it may not be "significant". That adjective in its context connotes a lack of serious or substantial moral fault or blameworthiness, so that the rigorous application of these very strict anti-doping rules is tempered in the case of an excusable and understandable failure to have foreseen or prevented the doping offence where the conduct of the athlete was not culpable, but failed to meet the standard of utmost caution. However, as the commentary to the WADA Code makes clear, the circumstances have to be truly exceptional so as to prevent the principle of strict liability being eroded.
11. It is clear that an athlete who decides to take a supplement has a duty to check properly whether that supplement contains a prohibited substance. He must take the precautions which could reasonably be expected from an athlete wishing to avoid the risks connected to the use of supplements (see *WADA v Hardy* CAS 2009/A/1870 at paragraph 120). If an athlete fails to take the clear and obvious precautions which any

athlete would take before taking a nutritional supplement, such as reading the label and making enquiry, then his conduct will demonstrate significant fault or negligence (see *Knauss v CIS CAS 2005/A/847* at para 7.3.6).

12. The argument for the athlete on this appeal may be summarised as follows:

- (1) the threshold of no significant fault expressed in article 10.5.2 must not be set too high (see *Knauss* at para 7.3.5) and its application must depend on the totality of the circumstances of each particular case;
- (2) the case of *Kutrovsky v ITF CAS 2012/A/2804* establishes that article 10.5.2 may be invoked where the athlete does not know that the supplement contains a prohibited substance, and the the sanction must then be fixed by reference to the degree of fault found to exist.

13. There is no difficulty in accepting the first point as a statement of principle, provided that it is recognised, as the commentary to the WADA Code makes clear, that the circumstances have to be truly exceptional and the athlete's fault is measured against the fundamental duties set out at article 1.3. The decision in *Knauss* at paragraph 7.3.6 makes clear that it is not setting the threshold too high to ascribe fault where the athlete fails to take the clear and obvious precautions necessary to avoid ingesting a prohibited substance in a nutritional supplement.

14. The reliance on the case of *Kutrovsky* is more problematic. In that case the athlete took the nutritional supplement Jack3d the labelling of which, it is to be inferred from the finding at paragraph 9.51.2, actually disclosed the chemical name for MHA. The decision at paragraph 9.52 identifies four factors, including a failure to make any enquiries of the doping authorities, which in aggregate would clearly indicate that the athlete had failed to take all reasonable precautions which any athlete should take before using a nutritional supplement. It is not at all clear from the decision at what point, or on what basis, the panel then concluded that the threshold test of no significant fault or negligence had been met. The factors listed at paragraph 9.52 would appear to rule out any such finding, which would be inconsistent with, inter alia, the decisions in *Knauss* and *Hardy* cited above.

15. Paragraph 9.55 of the *Kutrovsky* decision, in particular in the first and penultimate sentences, appears to show that the panel asked itself the wrong question, seeking to assess the degree of significant fault exhibited by the athlete, rather than, as article 10.5.2 requires, whether there is an absence of significant fault. Article 10.5.2 prescribes a threshold test of no significant fault or negligence. Instead the panel considered that there might be degrees of significant fault with cases of recklessness at the upper end of the scale, and cases

exhibiting a “very low degree of significant fault” at the lower end of the scale. The last sentence in which it is said that the athlete had “more than the minimum lack of significant fault” demonstrates the inconsistency in the decision. If significant fault is found then article 10.5.2 cannot be invoked.

16. This tribunal declines to follow the approach taken by the CAS panel in *Kutrovsky*, which is inconsistent with the wording of article 10.5.2, the commentary to the WADA code and the CAS decisions cited above.
17. Based on the findings of fact set out in the decision under appeal, which are not disputed, it is clear that the athlete failed to take all reasonable precautions before deciding to use a nutritional supplement. The main factors which we have taken into account are:
 - (1) The supplement was described on the container as an ultra-intense muscle supplement, giving strength, energy, power and endurance; it was plainly intended to be a performance enhancing supplement which an athlete should only take after having taken great care to ensure that it does not contain a prohibited substance;
 - (2) The ingredients listed on the container included 1-3dimethylamylamine, which is the chemical compound name for MHA; yet the athlete took no steps to make any proper enquiries of his manager or coach, any person with medical or anti-doping expertise, or the sports authorities, as to whether the supplement was safe to take; a one minute word search on the internet in respect of Jack3d or dimethylamylamine would have revealed that the product might contain a prohibited substance.
18. For those reasons we entirely agree with the decision of the tribunal, at paragraph 64 of its decision, that the Appellant’s enquiries about the contents of Jack3d were wholly inadequate and so he cannot succeed in reducing the otherwise minimum period of ineligibility under article 10.5.2.
19. This case emphasises, yet again, the dangers of athletes taking supplements which contain MHA. These risks have been the subject of a public warning by UKAD following the publication of the decision in *UKAD v Wallader* made on 29th October 2010. A number of sports governing bodies have issued warnings about MHA. On 28th August 2012 the Medicines and Healthcare Products Regulatory Agency removed Jack3d containing MHA from the UK market, following serious concerns about the safety of this substance. A list of supplements which have been tested to proper standards is available at www.informed-sport.com. Any athlete who uses a supplement which is not on that list is running a serious risk of attracting a doping violation.

Decision

20. For the reasons stated above the appeal is dismissed. The period of ineligibility imposed is 2 years from 13th October 2012.

21. Having exercised his right of appeal under article 13.4.1 the Appellant has no further right of appeal under the rules. This decision may be challenged under article 13.6 by the International Federation or by WADA.

A handwritten signature in black ink, reading "Charles Flint.", is centered within a white rectangular box. The signature is written in a cursive style with a long horizontal stroke extending to the right.

Charles Flint QC, Chairman
on behalf of the Appeal Tribunal
27 March 2013



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