

DECISION of the FEI TRIBUNAL

dated 27 November 2012

Human Anti-Doping Case No.: 2012/02

Athlete / NF: Aleksandr Kovshov / UKR

FEI ID: 10039044

Event: CDI-W Zhashkiv (UKR)

Sampling Date: In competition test, 25 February 2012

Prohibited Substance: 11-nor-delta-9-tetrahydrocannabinol-9-carboxylic acid (Carboxy-THC)

1. COMPOSITION OF PANEL

Mr. Pierre Ketterer, Chair
Mr. Patrick A. Boelens, Panel Member
Ms. Randi Haukebó, Panel Member

Ms. Erika O'Leary, FEI Tribunal Clerk

2. SUMMARY OF THE FACTS

2.1 Memorandum of case: By Legal Department

2.2 Summary information provided by the Athlete: The FEI Tribunal took into consideration all evidence, submissions and documents presented in the case file, as also made available by and to the Athlete.

2.3 Oral Hearing: None, by correspondence.

3. DESCRIPTION OF THE CASE FROM THE LEGAL VIEWPOINT

3.1 Articles of the Statutes / Regulations which are applicable or have been infringed.

Statutes 23rd edition, effective 15th November 2011 ("**Statutes**"), Arts. 36 and 39.

General Regulations, 23rd edition, 1st January 2009, updates effective 1st January 2012, Arts. 143.1, 168.4 and 169 ("**GRs**").

Internal Regulations of the FEI Tribunal, 2nd edition, 1st January 2012 ("**IRs**").

FEI Anti-Doping Rules for Human Athletes, 1st January 2011, updates effective 1st January 2012 ("**ADRHA**").

The World Anti-Doping Code 2009.

2012 World Anti Doping Agency Prohibited List ("the WADA Prohibited List").

3.2 Athlete: Mr Aleksandr Kovshov

3.3 Justification for sanction:

GR Art. 143.1: "Medication Control and Anti-Doping provisions are stated in the Anti-Doping Rules for Human Athletes (ADRHA), in conjunction with The World Anti-Doping Code, and in the Equine Anti-Doping and Medication Controlled Medication Regulations (EADCM Regulations)."

Art. 2.1.1 ADRHA: "It is each *Athlete's* personal duty to ensure that no *Prohibited Substance* enters his or her body. Athletes are responsible for any *Prohibited Substance* or its *Metabolites or Markers* found to be present in their *Samples*. Accordingly, it is not necessary that intent, fault, negligence or knowing *Use* on the *Athlete's* part be demonstrated in order to establish an anti-doping violation under Article 2.1."

Art. 4.1 ADRHA: "These Anti-Doping Rules incorporate the *Prohibited List* which is published and revised by *WADA* as described in Article 4.1 of the Code. The *FEI* will make the current *Prohibited List* available to each *National Federation*, and each *National Federation* shall ensure that the current *Prohibited List* is available to all its members and constituents."

4. DECISION

4.1 Factual Background

1. Mr. Aleksandr Kovshov (the "**Athlete**") participated at the CDI-W in Zhashkiv, UKR (the "**Event**") from 24 to 26 February 2012, in the discipline of Dressage.

2. On 25 February 2012, the Athlete was selected for in-competition testing. Analysis of the urine sample no.3042880 taken from the Athlete at the Event was performed at the WADA accredited laboratory, Institut Municipal d'Investigacio Medica in Barcelona, Spain. The analysis revealed the presence of 11-nor-delta-9-tetrahydrocannabinol-9-carboxylic acid (Carboxy-THC), which is a Prohibited Substance according to the WADA Prohibited List in force at the time of the Sample collection (certificate of analysis dated 30 March 2012).

3. Carboxy-THC is a metabolite of THC, which is listed in Class S8 "Cannabinoids" of Prohibited Substances. It is prohibited in-competition and considered a "Specified Substance" under the WADA Prohibited List. While the presence of Carboxy-THC in the Athlete's Sample constitutes an Anti-Doping Rule Violation, because of the fact that Cannabinoids are classified as "Specified Substances" on the Prohibited List, they are treated differently from other Prohibited Substances.

4. No valid Therapeutic Use Exemption ("**TUE**") under Article 4.4 of the ADRHA had been granted for this substance. Therefore, the positive finding for Carboxy-THC gives rise to an Anti-Doping Rule Violation under the ADRHA.

4.2 The Proceedings

5. The presence of the Prohibited Substance following the laboratory analysis, the possible rule violation and the consequences implicated, were officially notified to the Athlete by the FEI Legal Department on 25 May 2012, through the Ukrainian Equestrian Federation ("UKR-NF"). Together with the Notification Letter, the FEI submitted a copy of the Doping Control Form, on which the Athlete had declared the use of vitamin C and calcium supplements.

4.3 The B-Sample Analysis

6. The Athlete was also informed in the Notification Letter of 25 May 2012 that he was entitled to (1) the performance of a B-Sample analysis and (2) to attend or to be represented at the B-Sample analysis.

7. By letter dated 31 May 2012, the Athlete waived his right to have the B-Sample analysis performed.

4.4 The Further Proceedings

8. On 31 May 2012, the Athlete further provided his response to the charges. The Athlete submitted that on the eve of the competition he had attended a billiard club with friends. That they had ordered a hookah containing a fruit mixture, and that his friends had persuaded him to try it. He further submitted that he was not aware that the hookah contained any Prohibited Substances and was therefore relaxed when informed at the Event that he had been selected for doping control. That he was surprised at the subsequent positive test result. That he had no intention to enhance his sporting performance, that the case at hand was his first violation in his career, and that he regretted the incident.

9. The FEI responded to the Athlete's submission on 29 August 2012. The FEI argued that it had discharged its burden of establishing that the Athlete had violated Article 2.1 of the ADRHA. It further submitted that a Period of Ineligibility under Article 10.2 of the ADRHA of two (2) years

should be imposed on the Athlete since the prerequisites of Article 10.4 of the ADRHA were not fulfilled. Specifically, the FEI argued that while Carboxy-THC is a Specified Substance, the Athlete had failed to establish, by a balance of probability, how the Specified Substance entered his body, since he had not indicated the precise date of the alleged consumption of Carboxy-THC, and had adduced no evidence that the hookah with the fruit mixture also contained the Prohibited Substance detected in his Sample. With regard to the question of the intention to enhance his sport performance, the FEI highlighted that the Athlete had not submitted, as required under Article 10.4 of the ADRHA rules, any corroborating evidence to prove the absence of intent to enhance his sport performance, or mask the use of a performance enhancing substance. The FEI further argued that no elimination or reduction of the Period of Ineligibility based on exceptional circumstances under Article 10.5 of the ADRHA should be granted, even if the Tribunal would consider that the Athlete had established how the Carboxy-THC had entered his body. In this context the FEI argued that the Athlete had been highly negligent to smoke the hookah as he could not possibly have known what he ingested by smoking the fruit mixture, and that apparently he did not question the content of the hookah, in order to assure that it did not contain any Prohibited Substances. The FEI further requested that in addition to the automatic disqualification of results under Article 9 of the ADRHA, all the results obtained by the Athlete in the Event should be disqualified, in accordance with Article 10.1 of the ADRHA.

10. On 19 November 2012, the Athlete through the UKR-NF informed the FEI that he had chosen not to submit a response to the FEI submission.

4.5 Jurisdiction

11. The Tribunal has jurisdiction over this matter pursuant to the Statutes, GRs and the ADRHA.

4.6 The Decision

12. Under Article 3.1 of the ADRHA, it is the burden of the FEI to establish that an Anti-Doping rule violation has occurred.

13. The Athlete has been charged with a violation of Article 2.1 of the ADRHA, i.e. "the presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample". Athletes subject to the ADRHA are strictly responsible for any Prohibited Substances found in their Sample and it is not necessary for the FEI to establish any intent, fault, negligence or even knowledge on the part of the Athlete charged, in order to establish a violation under Article 2.1 of the ADRHA. Therefore, to discharge its burden, the FEI must establish, to the comfortable satisfaction of the hearing panel, i.e. the Tribunal that the Prohibited Substance (or its Metabolites or Makers) was present in the urine sample collected from the Athlete on 25 February 2012.

14. In support of its charge, the FEI relies on the Adverse Analytical findings of the WADA accredited laboratory, Institut Municipal d'Investigacio Medica, Barcelona, Spain. Article 3.2.1 of the ADRHA provides that WADA accredited laboratories are presumed to have complied with the International Standard for Laboratories and that it is for the Athlete to prove otherwise. The Athlete has not sought to do so in the case at hand, and therefore the presumption prevails. The Athlete had further waived his right to the B-Sample analysis and therefore accepted the accuracy of the Adverse Analytical findings made in regard of his A-Sample, in accordance with Article 7.1.4 of the ADRHA.

15. The Tribunal is satisfied that the laboratory report relating to the A-Sample reflects that the findings of the Institut Municipal d'Investigacio Medica are accurate, and that the test results evidence the presence of 11-nor-delta-9-tetrahydrocannabinol-9-carboxylicacid (Carboxy-THC).

16. The presence of a Prohibited Substance or its Metabolites or Makers in an Athlete's sample is not considered an Anti-Doping Rule Violation if it is consistent with a TUE previously obtained by the Athlete. The Tribunal acknowledges that the Athlete has not provided any applicable TUE for the Prohibited Substance. In the absence of any TUE for the Prohibited Substance found in the Athlete's Sample, all the elements of the Anti-Doping rule violation under Article 2.1 of the ADRHA have been met. Accordingly, the Tribunal is comfortably satisfied that the Athlete has committed an Anti-Doping rule violation under Article 2.1 of the ADRHA. This is undisputed between the Parties.

17. The violation at question is the Athlete's first Anti-Doping rule violation, and Article 2.1 of the ADRHA provides for a Period of Ineligibility of two (2) years for a first time offender, unless the conditions for eliminating, reducing or increasing that period, as set out in Articles 10.4, 10.5 and 10.6 of the ADRHA are met.

18. Carboxy-THC, a metabolite of THC, is classified as a Specified Substance on the 2012 WADA Prohibited List. However, the Tribunal finds that the Athlete has not established the prerequisites under Article 10.4 of the ADRHA. Specifically, the Tribunal finds that on the balance of probability, the Athlete has failed to establish how the Prohibited Substance entered his body. A mere denial of wrongdoing and the advancement of a speculative or innocent explanation are insufficient to meet the Athlete's burden of showing how the Prohibited Substance entered his body. Rather, the Athlete needs to adduce specific and competent evidence that is sufficient to persuade the Tribunal that the explanation advanced is more likely than not to be correct¹. The Tribunal

¹ IRB v. Keyter, CAS 2006/A/1067: "One hypothetical source of a positive test does not prove to the level of satisfaction required that [his explanation of how the prohibited substance came to be in his body] is factually or scientifically probable. Mere speculation is not proof that it did actually occur...The Respondent has a stringent requirement to offer persuasive evidence of how such contamination occurred..."

finds that the Athlete has provided no evidence to support his speculation that the hookah was contaminated with the Prohibited Substance and has therefore failed the balance of probability test. The Tribunal therefore holds that the Athlete has not established how the Prohibited Substance entered his body. Moreover, even if the Athlete had established how the Prohibited Substance had entered his body, the Tribunal finds that he has not met the further prerequisites of Article 10.4 of the ADRHA. Specifically, the Athlete has not produced any evidence – in addition to his word – which establishes the absence of intent to enhance sport performance. In conclusion, the Tribunal finds that the pre requisites of Article 10.4 of the ADRHA are not fulfilled.

19. In the absence of any evidence and re-iterating the Tribunal's assessment in paragraph 18, the Tribunal further determines that no reduction or elimination under Article 10.5 of the ADRHA may be applied since the Athlete has failed to establish how the Prohibited Substance entered his body. Therefore the Tribunal does not need to assess the Athlete's degree of fault or negligence for the rule violation. The Tribunal therefore determines that no elimination or reduction under Articles 10.4 or 10.5 of the ADRHA is granted, and that the Period of Ineligibility of two (2) years applies.

20. Under Article 10.9 of the ADRHA, in cases as the present, where a hearing is waived, the period of Ineligibility shall commence on the date Ineligibility is accepted or imposed. As the period of Ineligibility is imposed by the present decision, it shall be effective as of the date of this decision.

4.7 Disqualification

21. For the reasons set forth above, the Tribunal is disqualifying the Athlete from the Competition and all medals, points and prize money won in that Competition must be forfeited, in accordance with Article 9 of the ADRHA. The Tribunal is further disqualifying all other individual results obtained by the Athlete at the Event, with any and all horses, in accordance with Article 10.1 of the ADRHA.

4.8 Sanctions

22. As a consequence of the foregoing, the Tribunal decides to impose the following sanctions on the Athlete, in accordance with Article 169 of the GRs and Article 10 of the ADRHA:

- 1) The Athlete shall be suspended for a period of **two (2) years** to be effective immediately and without further notification. Therefore the Athlete shall be ineligible through 26 November 2014.
- 2) The Athlete is fined **CHF 1,000.-**.

3) The Athlete shall contribute **CHF 500.-** towards the legal costs of the legal procedure.

23. No Athlete who has been declared Ineligible may, during the Period of Ineligibility, participate in any capacity in a Competition or activity (other than authorised anti-doping education or rehabilitation programs) that is authorised or organised by the FEI or any National Federation or be present at an Event (other than as a spectator) that is authorised or organised by the FEI or any National Federation, or participate in any capacity in Competitions authorised or organised by any international or national-level Event organisation (Article 10.10.1 of the ADRHA). Under Article 10.10.2 of the ADRHA, specific consequences are foreseen for a violation of the Period of Ineligibility.

24. According to Article 168.4 of the GRs, the present Decision is effective from the day of written notification to the persons or bodies concerned.

25. In accordance with Article 13 of the ADRHA, the Athlete and the FEI may appeal against the decision by lodging an appeal with the Court of Arbitration for Sport within thirty (30) days of receipt hereof.

5. DECISION TO BE FOWARDED TO:

5.1 The person sanctioned: Yes

5.2 The President of the NF of the person sanctioned: Yes

5.3 The President of the Organising Committee of the event through his NF: Yes

5.4 Any other: WADA

FOR THE PANEL

A handwritten signature in black ink, appearing to read 'Ketterer', is written over a horizontal line.

THE CHAIRMAN, Mr. Pierre Ketterer