

DECISION of the FEI TRIBUNAL

dated 23 July 2012

Human Anti-Doping Case No.: 2012/03

Athlete / NF: Eder Gustavo Baldin Pagoto /BRA

FEI ID: 10000165

Event: CIC2*- Colina SP (BRA) 2012_CI_1072_C_S_01_01

Sampling Date: In-competition, 22 April 2012

Prohibited Substances: Isometheptene and metabolites

1. COMPOSITION OF PANEL

Dr. Armand Leone, Chair
Ms. Randi Haukebø, Member
Mr. Pierre Ketterer, Member

2. SUMMARY OF THE FACTS

2.1 Memorandum of case: By Legal Department.

2.2 Summary information provided by the Athlete:

The FEI Tribunal duly took into consideration all evidence, submissions and documents presented in the case file and at the oral hearing, as also made available by and to the Athlete.

2.3 Oral hearing: 18 July 2012 – Telephone conference.

Present

The hearing body:

The FEI Tribunal Panel
Ms. Erika Riedl, FEI Tribunal Clerk

For the Athlete: Mr. Eder Gustavo Baldin Pagoto, Athlete
Mr. Thomas H. Norton, Interpreter

For the FEI: Ms. Lisa Lazarus, FEI General Counsel
Ms. Carolin Fischer, FEI Legal Counsel

Others: Mr. Elson Marcelo Baldin Pagoto, Athlete
Mr. Fabrício Caldas Albuquerque, Athlete

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 15 November 2011 ("**Statutes**"), Arts. 1.3, 34, 36 and 37.

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

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

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

World Anti-Doping Code 2009.

2012 Prohibited List of the World Anti-Doping Agency.

3.2 The Athlete: Mr. Eder Gustavo Baldin Pagoto

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 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* by means of publication on the www.fei.org website, and each *National*

Federation shall ensure that the current Prohibited List is available to its members and constituents."

4. DECISION

4.1 Factual Background

1. Mr. Eder Gustavo Baldin Pagoto (the "Athlete") participated at the CIC2* in Colina SP, Brazil from 21 to 22 April 2012 (the "Event"), in the discipline of Eventing.

2. On 22 April 2012, the Athlete was selected for in-competition testing. Analysis of urine sample no. 2683146 taken from the Athlete at the Event was performed at the WADA-approved laboratory, Institut Armand Frappier ("INRS"), in Montreal, Canada for analysis. The analysis of the urine sample revealed the presence of Isometheptene and metabolites. Isometheptene is a Prohibited Substance according to the 2012 Prohibited List of the World Anti-Doping Agency ("WADA"), in force at the time of sample collection (Certificate of Analysis dated 24 May 2012). Isometheptene is listed in class S6 "Stimulants" of Prohibited Substances and is considered a "Specified Substance" under the 2012 WADA Prohibited List. It is prohibited in-competition.

3. Two other Brazilian athletes, Mr. Elson Marcelo Baldin Pagoto and Mr. Fabricio Caldas Albuquerque, were also submitted to an anti-doping test on the same day and at the same Event. The samples of those two athletes also tested positive for Isometheptene, and are the subject of separate FEI Tribunal Decisions.

4. No valid Therapeutic Use Exemption ("TUE") had been granted for the substance as set forth in Article 4.4 of the FEI Anti-Doping Rules for Human Athletes ("ADRHA"). Therefore, the positive finding for Isometheptene 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 22 June 2012, through the Brazilian Equestrian Confederation ("BRA-NF").

4.3 The B-Sample Analysis

6. The Athlete was also informed in the Notification Letter of 22 June 2012 that he was entitled: (i) to the performance of a B-Sample analysis on the positive sample; and (ii) to attend or to be represented at the B-Sample analysis.

7. On 25 June 2012, the Athlete waived his right to have the B-Sample analysis performed.

4.4 The further Proceedings

8. On 4 July 2012, the Athlete, through the BRA-NF, submitted in essence the following:

- a) That he had ingested the medication "Neosaldina" as declared on the Doping Control Form, on the day prior to sample collection to treat a migraine crisis. That he was not aware that Neosaldina contained the Prohibited Substance Isometheptene, and that, had he known this, he would have applied for a Therapeutic Use Exemption ("TUE"). That he had been suffering from migraines for years and that Neosaldina had been prescribed by his doctor.
- b) That he had taken Neosaldina for its analgesic benefits and not its stimulating benefits, and that he had no intention to enhance his performance. That he had only taken part in the Event to prepare for another Event and that therefore, he had no reason to ingest any stimulants at the Event in question.
- c) That he had never been punished for any infractions against FEI Rules and strongly agreed with the fight against Anti-Doping. That in light of the fact that in a case involving Isometheptene, the Athletics Brazilian Confederation (CBAt) had sanctioned another athlete, Ms. Jennifer do Nascimento Silva with a warning, the same sanction should be applied to him. In support of his allegation, the Athlete submitted a press release related to the case of Ms. do Nascimento Silva, but did not submit the decision itself.

9. Together with his submission, the Athlete also submitted the Doping Control Form completed by him at the time of the testing, and a statement by Dr. Pedro Perin Jr., neurologist of 26 June 2012, who confirmed having prescribed Neosaldina, containing 30mg Isometheptene and 300 mg Dipyrone, to the Athlete since January 2010, as treatment for migraines.

10. On 12 July 2012, the FEI submitted its Response to the Athlete's explanations. Together with its submission, the FEI provided a statement by Dr. Peter Whitehead, Member of the FEI Medical Committee. Dr. Whitehead commented that the Athlete had provided plausible explanations with regard to the positive finding for Isometheptene, since Neosaldina was used extensively in Brazil as an analgesic, especially for headaches, and since the Athlete had declared the medication at testing. That stimulants, such as Isometheptene, were used to combat natural fatigue and therefore potentially gave the rider an advantage. That stimulants would also lead to a false sense of well-being which diminished the riders' reflexes, and could therefore be dangerous for both horse and rider. That a TUE request for Neosaldina was unlikely to be approved since

there were many other effective migraine treatments available that did not contain Prohibited Substances.

11. In essence the FEI argued:

- a) That since the Athlete had not disputed that Isometheptene was present in the sample collected from him at the Event, and since no TUE had been provided for the Prohibited Substance, it had discharged its burden of establishing that the Athlete had violated Article 2.1 of the ADRHA. Further, that a period of Ineligibility of two years according to Article 10.2 of the ADRHA should be imposed, 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, were met.
- b) That as affirmed by Dr. Whitehead, evidence had been adduced on behalf of the Athlete, as required under Article 10.4 of the ADRHA, that was likely to prove, by a balance of probability, that the Isometheptene in the Athlete's system resulted from ingesting the medication "Neosaldina" on the day prior to sample collection. That the Athlete's explanation was corroborated by his notation of "Neosaldina" on the Doping Control Form.
- c) That according to the wording of the commentary to Article 10.4 of the ADRHA and the Court of Arbitration for Sport ("CAS") decision in International Wheelchair Basketball Federation v. UK Anti-Doping & Simon Gibbs (CAS 2010/A/2230), two elements of corroborating evidence establishing the absence of intent to enhance sport performance were required, and that the Athlete, by means of the Doping Control Form and the statement by Dr. Perin, had therefore produced sufficient corroborating evidence.
- d) That therefore the Athlete's degree of fault had to be assessed as criterion for any reduction of the period of Ineligibility. That the Athlete, aged 39 and competing on an international level for many years, had been highly negligent in not making himself familiar with the WADA Prohibited List and the ADRHA. That he had further simply relied on the fact that his doctor had prescribed the medication, having apparently not taken any precautions to avoid ingesting any Prohibited Substances. That according to the CAS Decision in K. v. FIS, CAS 2005/A/918, the Athlete could not simply transfer his duty of care to a third party, such as a doctor. That CAS similarly held in CAS 2008/A/1488, P. v. International Tennis Federation (ITF) that it was of little relevance to the determination of fault that a product used by an athlete was prescribed with "professional diligence" and with "a clear therapeutic intention".
- e) That therefore, any reduction (if any) of the period of Ineligibility under Article 10.4 of the ADRHA should be minimal.

- f) That no elimination or reduction under Article 10.5 of the ADRHA should be applied. In this context the FEI argued that insofar as the Athlete was highly negligent, the prerequisites of Article 10.5.1 of the ADRHA were not met and that Article 10.5.2 was not applicable as Article 10.4 of the ADRHA was the more specific provision.
- g) That no facts and details of the case of Ms. do Nascimento Silva were provided by the Athlete and that therefore, no comparison was possible to the case at hand. That the Tribunal had to impose an appropriate financial sanction on the Athlete and that the BRA-NF had to be ordered to reimburse the FEI for all costs that the FEI had incurred in pursuing this matter.

12. On 13 July 2012, the Athlete, through the BRA-NF submitted his Rebuttal submission. In a nutshell he argued:

- a) That Neosaldina was known in Brazil as a "simple painkiller without any malicious effect", and that therefore its use was not to be considered serious negligence. That his negligence would only have to be considered as significant if he had taken the medicine in doubt of the existence of a prohibited component and without consulting the Anti-Doping Rules. That only under those conditions, it was demonstrated that an athlete was assuming the risk of taking a stimulant and therefore accepted an eventual beneficial result. That this was however not the case, since when he took the medicine he was convinced that it did not contain any Prohibited Substances that would interfere with his reflexes and therefore have an impact on the the behaviour of the horse.
- b) That in case the period of Ineligibility would not be reduced to a *reprimand*, this would put him at the same level as an athlete who intended to dope. That since he fulfilled the requirements of Article 10.4 of the ADRHA, a reduction of the penalty was permitted.
- c) That no reasoned decision had yet been issued in the case of Ms. do Nascimento Silva, and that a in another case involving Isometheptene, reported by the CBAt, the athlete Ms. Tania Regina Spindler had been punished with a warning. In support of his allegation, the Athlete submitted a press release by the Brazilian Athletics Confederation, dated 19 April 2012, according to which the CBAt had imposed a warning on Ms. Spindler. That according to the comment to Article 10.2 of the ADRHA, it was "simply not right that two Athletes from the same country who tested positive for the same Prohibited Substance under similar circumstances should receive different sanctions only because they participate in different sports", and that therefore, harmonization of sanctions had to be taken into consideration.

13. The Hearing took place on 18 July 2012. All Parties agreed to conduct one Hearing together with all three (3) Brazilian athletes so that Mr. Elson Marcelo Baldin Pagoto's and Mr. Fabricio Caldas Albuquerque's cases were heard at the same time.

14. At the hearing, the Athlete explained that he has been competing as a professional rider since 2000 and had even competed at the 2000 Olympic Games. That he trained approximately six hours per day, in addition to owning a riding school where he also worked as an instructor. He confirmed that he was aware of the Anti-Doping Rules, but underlined that he was only in possession of the 2002 Prohibited List. That he had learnt after his case had arose that Isometheptene was added to the Prohibited List in 2006. He explained further that he believed that Neosaldina contained an analgesic and was not aware of the other ingredient which is a stimulant. Regarding the statement of Dr. Perin, the Athlete explained that he had not informed Dr. Perin that he was a professional athlete subject to anti-doping testing, and had not asked whether the medication prescribed to him contained any Prohibited Substances. That once he was confronted with the anti-doping rule violation, he had conducted a "simple internet search", and had discovered that Neosaldina contained a Prohibited Substance, and that there were previous cases involving Athletes from Brazil who had violated the anti-doping rules because they had taken Neosaldina. That without his medication, if he had a migraine crisis, he was not able to compete. The Athlete admitted his negligence but requested that the Tribunal take into consideration that this was his first doping offense, that he was relying on an "old" Prohibited List, that he thought Neosaldina contained only analgesics and it had been prescribed to him by a doctor, and that he had no intent to enhance his sport performance.

15. In closing, the FEI confirmed that the Athlete had sufficiently explained how the Prohibited Substance came into his system. Further, that there was likely satisfactory corroborating evidence that the substance was not intended to enhance sport performance in light of Dr. Perin's prescription and the contemporaneous notation on the Doping Control Form that he had taken Neosaldina. However, and referring to Dr. Whitehead's statement that stimulants, such as Isometheptene, were used to combat natural fatigue and therefore potentially gave the rider an advantage, the FEI suggested that the Prohibited Substance may have had a performance enhancing effect. The FEI also reminded the Tribunal of the fact that the Athlete testified that he felt better after taking Neosaldina and that if he had a true migraine he could not compete without taking it. The FEI concluded that given the Athlete's competitive career of more than 12 years including competing at an Olympic Games he should have been more knowledgeable about the rules. Further, he himself had testified that a "simple internet search" lead to large amounts of information about Neosaldina, Isometheptene, and other Brazilian Athletes who had violated the anti-doping rules for taking the same substance. The fact that he had only performed this "simple internet search" **after** the violation and not before amounted, in the FEI's view, to serious negligence.

16. At the conclusion of the proceedings, the FEI made a separate request to make a submission on costs within five (5) days of the Final Decision given that the ADRHA's provide that the costs of an ADRHA violation will be borne by the National Federation.

4.5 Jurisdiction

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

4.6 The Decision

18. The Tribunal understands that the case at hand is one out of three (3) positive anti-doping cases concerning Brazilian riders who were tested at the same Eventing competition, involving the same Prohibited Substance, Isometheptene.

19. As set forth in Article 2.1.2 of the ADRHA, sufficient proof of an anti-doping rule violation under Article 2.1 is established by the presence of a Prohibited Substance or its Metabolites or Markers in the Athlete's A-Sample where the Athlete waives his right to the analysis of the B-Sample and the B-Sample is not analysed or the B-Sample confirms the A-Sample. The Tribunal is satisfied that the laboratory reports relating to the A-Sample reflect that the analytical test was performed in an acceptable manner and that the findings of the INRS are accurate. The Tribunal is satisfied that the test results evidence the presence of Isometheptene in the Sample taken from the Athlete at the Event. Isometheptene is listed as a Prohibited Substance on the WADA Prohibited List. No TUE had been provided for the Prohibited Substance. The Athlete did not contest the accuracy of the test results or the positive findings.

20. The FEI has thus established an Adverse Analytical Finding, and has thereby sufficiently proven the objective elements of an offence in accordance with Article 3 of the ADRHA. This is undisputed between the Parties.

21. Pursuant to Article 10.2 of the ADRHA, the mandatory period for a first breach of the ADRHA is a period of two (2) years Ineligibility. However, depending on the circumstances of the specific case, a reduction or even elimination of this period of Ineligibility is possible under Articles 10.4 and 10.5 of the ADRHA. Article 10.4 of the ADRHA is generally applicable in the case at hand since Isometheptene is classified as a "Specified Substance". In order to benefit from a reduction under Article 10.4 of the ADRHA of the otherwise applicable period of Ineligibility, the Athlete must establish how the Specified Substance entered his or her body. The Athlete also has to establish that such Specified Substance was not intended to enhance his or her sport performance, or to mask the use of a

performance-enhancing substance. To justify any elimination or reduction under Article 10.4 of the ADRHA, the Athlete must produce corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of the hearing panel the absence of intent to enhance sport performance or mask the use of a performance-enhancing substance.

22. The Tribunal, in considering the Athlete's explanations and supporting evidence - in particular Dr. Perin Jr.'s statement - as well as Dr. Whitehead's statement - finds that the Athlete has established by "a balance of probability", as required under Article 3.1 of the ADRHA, that the medication used by him, Neosaldina, has caused the positive test result. The FEI Tribunal is therefore satisfied that the Athlete has established how the Prohibited Substance entered his body.

23. In a second step, the Tribunal has to determine whether the Athlete has established that the use of the Specified Substance was not intended to enhance his sport performance. In this context, the Tribunal takes note of the FEI's claim that according to the commentary to Article 10.4 of the ADRHA it was necessary for the Athlete to fulfil at least two of the objective circumstances listed by the commentary to Article 10.4 of the ADRHA. (CAS applied the commentary to Article 10.4 of the ADRHA in the case involving the International Wheelchair Basketball Federation referenced earlier.)

24. Here, the Athlete has fulfilled two objective circumstances as he openly disclosed the medicine containing Isometheptene on the Doping Control Form and Dr. Perin Jr. confirmed having prescribed the medication for non-sport related reasons. The Tribunal is therefore comfortably satisfied that the Athlete produced corroborating evidence - in addition to his word - establishing the absence of intent to enhance sport performance. Therefore, the Tribunal considers that the prerequisites of Article 10.4 of the ADRHA are fulfilled. The Tribunal, however, rejects the FEI's contention that the Neosaldina was performance enhancing in this case because it relieved the symptoms of his headache. The evidence was clear that the Neosaldina was prescribed for the analgesic it contains which combats the headache and not for the Isometheptene which is the stimulant. Further, while Dr. Whitehead's statement certainly raises concerns about the use of stimulants in equestrian sport with respect to Athlete and horse safety, it does not, in the Tribunal's view, establish that the Athlete took the Neosaldina because of its stimulating effect, in order to enhance his performance.

25. The Tribunal however finds that the Athlete was, at the very least highly negligent, since he is a very experienced rider who had already participated in an Olympic Games, and is listed as substitute for the upcoming Olympic Games. That the Athlete had failed to conduct any basic research on the medication ingested by him, and was relying on information and documents provided to him about ten years ago. Moreover, that he had even failed to inform his physician that he is a

professional Athlete subject to anti-doping testing, and had merely relied on his physician's advice to take Neosaldina, given to him in early 2010. In line with previous CAS case law (CAS 2005/A/918 K. v. FIS and CAS 2008//A/1488 P. v. International Tennis Federation (ITF)), the Tribunal finds that the Athlete has a "proactive responsibility" and that a prescription by a doctor does not excuse him from "investigating to his fullest extent" whether any medication he takes contains Prohibited Substances. The Tribunal therefore decides that only a minimal reduction of the otherwise applicable sanction is adequate in the case at hand.

26. The range of penalties available for first time offenders - such as the Athlete - in connection with a proven violation relating to the presence of a Specified Substance during the competition is, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years of Ineligibility.

27. In deciding the sanctions the Tribunal considers, on the one hand, the degree of the anti-doping rule violation, the Athlete's negligence with regard to his duty of care as a competitor, in particular taking into account his experience; the performance enhancing potential of Isometheptene, the danger of the Athlete taking a stimulant for both horse and rider, and information about Neosaldina containing a Prohibited Substance (Isometheptene) had been reported in the Brazilian athlete community and press since at least 2009. On the other hand, and in mitigation, the Tribunal considers the fact that the Athlete has established the absence of intent to enhance sport performance to its comfortable satisfaction, that Isometheptene has a low potential for performance enhancement and the fact that the Athlete used the Prohibited Substance for therapeutic reasons, as confirmed by his neurologist. The Tribunal also credits the Athlete's transparency in acknowledging his ingestion of Neosaldina on the Doping Control Form.

28. As regards the question of the applicability of Article 10.5.4 of the ADRHA, the Tribunal is of the opinion that the requirements of that rule are not met here. The Tribunal finds that the notations on the Doping Control form may not be considered an admission within the meaning of Article 10.5.4 of the ADRHA since the Athlete, at the time when he made the notations, was not aware of the rule violation. This is reinforced by the fact that he simply noted the medication on the Medication Control Form, and did not make any reference to the specific Prohibited Substance that was an ingredient of the medication.

29. The Tribunal will not consider the Isometheptene cases from Brazil, referred to by the Athlete, since no specific facts or findings have been provided regarding those cases.

4.7 Disqualification

30. For the reasons set forth above, the Tribunal is disqualifying the Athlete from the Competition and all medals, points and prize money won at the Competition must be forfeited, in accordance with Article 9 of the ADRHA.

4.8 Sanctions

31. 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 **six (6) months** to be effective immediately and without further notice from today's date. Therefore, the Athlete shall be ineligible through 22 January 2013.
- 2) The Athlete is fined **CHF 1500.**
- 3) A decision on costs will be rendered separately.

32. No Athlete who has been declared Ineligible may, during the period of Ineligibility, participate in any capacity in a Competition or activity (other than authorized anti-doping education or rehabilitation programs) that is authorized or organized by the FEI or any National Federation or be present at an Event (other than as a spectator) that is authorized or organized by the FEI or any National Federation, or participate in any capacity in Competitions authorized or organized by any international or national-level Event organization (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.

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

34. In accordance with Article 12 of the ADRHA, the Athlete and the FEI may appeal against this decision by lodging an appeal with the Court of Arbitration for Sport within 30 days of receipt hereof.

5. DECISION TO BE FORWARDED TO:

5.1 The person sanctioned: Yes

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

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

5.4 Any other: WADA; IOC; NOC

FOR THE PANEL

A handwritten signature in black ink, appearing to read "Armand Leone". The signature is fluid and cursive, with a large initial 'A' and 'L'.

THE CHAIRMAN, Dr. Armand Leone