

**DECISION of the FEI TRIBUNAL**

**dated 23 July 2012**

**Human Anti-Doping Case No.:** 2012/04

**Athlete / NF:** Elson Marcelo Baldin Pagoto /BRA

**FEI ID:** 10009817

**Event:** CIC3\*- Colina SP (BRA) 2012\_CI\_1072\_C\_S\_02

**Sampling Date:** In-competition, 22 April 2012

**Prohibited Substance:** 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. Elson Marcelo 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. Eder Gustavo Baldin Pagoto, Athlete  
Mr. Fabricio 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 23<sup>rd</sup> edition, effective 15 November 2011 ("**Statutes**"), Arts. 1.3, 34, 36 and 37.

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

Internal Regulations of the FEI Tribunal 2<sup>nd</sup> 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. Elson Marcelo 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](http://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. Elson Marcelo Baldin Pagoto (the "Athlete") participated at the CIC3\* 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. 2683150 taken from the Athlete at the Event was performed at the WADA-approved laboratory Institut Armand Frappier ("INRS"), 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. Eder Gustavo 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 26 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 migraines. That he was not aware that Neosaldina contained the Prohibited Substance Isometheptene, and would not have used it had he known it contained Prohibited Substances. That Neosaldina was a commonly used medication for headaches in Brazil, and available over the counter.
- b) That at the time of the Event, he had already qualified for the Olympic Games and therefore had participated at the Event only aiming for "the maintenance of a good rhythm for his horse". That because of that, he also had no reason to use a stimulant at the Event. That his sole intention had been to heal a migraine crisis, and that he had no intention to enhance his performance. That compared to his previous results, his results at the Event would not have improved, and that therefore the level playing field had apparently not been jeopardized. That the discipline of Eventing was a sport in which the communication between horse and rider had to be precise, and that any "behaviour modification" of the rider, either by a stimulant or a sedative, could be fatal.
- c) That he knew that athletes should be aware of Prohibited Substances and that he had been negligent in taking a medication without previously consulting the Anti-Doping Rules. That he believed that Neosaldina was the commercial name for Dypirone, an analgesic permitted by the rules.
- d) That he had never been punished for any infractions against FEI Rules and strongly agreed with the fight against Anti-Doping. Finally, that "a penalty of awareness" would have the desired effect on him, since the rule violation had not been intended.

9. Together with his submission, the Athlete also submitted the Doping Control Form completed by him at the time of the testing.

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, since he had only provided the Doping Control Form, had not produced sufficient corroborating evidence establishing the absence of intent to enhance sport performance.
- d) That, if the Tribunal nevertheless found that the corroborating evidence was sufficient, the Athlete's degree of fault had then to be assessed as criterion for any reduction of the period of Ineligibility. That the Athlete, aged 36 and competing on an international for many years, had been highly negligent in not making himself familiar with the WADA Prohibited List and the ADRHA. That apparently, he had not taken any precautions to avoid ingesting any Prohibited Substances and that CAS had held in *S. v. FINA* (CAS 2005/A/830) that it was negligent for an athlete to use a medical product without any advice of a doctor.

- e) That therefore the period of Ineligibility of two years as stipulated under Article 10.4 of the ADRHA should be applied.
- 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.

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

- a) That since he had suffered from a headache crisis on the night prior to the Event, he had been given the medication Neosaldina from his brother Eder Gustavo Baldin Pagoto, with whom he shared a hotel room and who was using Neosaldina for migraines, as prescribed by his doctor. Further, that he had never taken Neosaldina before.
- b) That he had not attempted to mask the use of another Prohibited Substance, which could be concluded from both the fact that no other Prohibited Substance had been detected, and the low concentration detected. In this context, the Athlete explained that whereas the concentration detected was not indicated in the laboratory report, it had to be taken into account that he had only taken one pill of Neosaldina, and that this is what he had indicated on the Doping Control Form too.
- c) That is it could not be concluded merely from the fact that he did not have a medical prescription for Neosaldina that he had necessarily intended to dope. That if indeed he would have had the intent to benefit from the medication, it should be noted that one tablet, as ingested by him, would not have had the desired effect. That therefore the absence of any intention to enhance his performance had been demonstrated and therefore the requirements of Article 10.4 of the ADRHA were fulfilled.
- d) That his negligence was only to be considered as significant if he had taken the medication 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 not the case, since when he took the medication, he was convinced that it did not contain any Prohibited Substances that would interfere with his reflexes and therefore have an impact on the behaviour of the horse.

- e) That a "minimal penalty" should be applied, or in the alternative a reduction of his sanction according to his degree of fault. That the Panel had to take into consideration that he had ingested the medication for therapeutic purposes only.

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. Eder Gustavo Baladin Pagoto's and Mr. Fabricio Caldas Albuquerque's cases were heard at the same time.

14. At the Hearing, the Athlete explained that he had started competing internationally in 2006 and was competing in approximately three international events per year. He confirmed that he was not a migraine sufferer. That he had taken one (1) Neosaldina tablet from his brother - as affirmed by his brother during the Hearing - since a light headache kept him from sleeping the night before the competition. That he had felt better after taking Neosaldina and that it allowed him to sleep. That according to the package, the recommended dose was three to four tablets per day. That a friend of his, a medical doctor, had suggested Neosaldina to him for headaches, but that he had not conducted any research on the Prohibited List prior to being confronted with the Adverse Analytical Finding. The Athlete also confirmed that this was the first time he took Neosaldina and that he did so on the day prior to a competition without knowing its likely effects.

15. In closing, the FEI confirmed that, on the one hand, the Athlete had sufficiently explained how the Prohibited Substance came into his system. That, on the other hand, he had not established the absence of intent to enhance sport performance. That the evidence adduced by the Athlete - other than his word - was limited to the notation on the Doping Control Form that he had taken Neosaldina. In this respect, 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 underlined that the Athlete had felt better after having taken Neosaldina and that it had allowed him to sleep the night before the Competition. The FEI concluded that given the fact that the Athlete had been competing internationally for six (6) years - even if he had been participating in only a few competitions per year - he should have been more knowledgeable about the rules. In addition, that the Athlete was highly negligent for failing to educate himself about the Anti-Doping Rules in place and for "blindly" taking a medication prescribed for someone else.

16. At the conclusion of the proceedings, the FEI made a separate procedural request to make submissions 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 Prohibited Substances 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 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 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 ADRA in the case involving the International Wheelchair Basketball Federation referenced earlier.)

24. The Tribunal considers that such corroborating evidence is the fact that the Athlete had first openly disclosed the medication containing Isometheptene on the Doping Control Form. Secondly, that the Athlete's brother, during the hearing, had confirmed the non sporting-related ingestion by the Athlete of the medication Neosaldina. The Tribunal holds that the list of examples of the type of objective circumstances provided in the commentary to Article 10.4 of the ADRHA is not exhaustive, and that other types of corroborating examples may also be considered. In the case at hand, the Tribunal is 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.

25. However, the Tribunal finds that the Athlete was, at the least very highly negligent, since he had failed to conduct any basic research on the medication ingested by him. The Athlete's negligence here must be considered as very high, since he took a medication which was not his own, and which had been prescribed to another person to treat a medical condition. He did not do any research of any kind before ingesting the medication. In line with previous CAS case law (CAS "005/A/830, S. v. FINA), the Tribunal finds that the Athlete was highly negligent for using a medical product without the advice of a doctor, no matter whether the medication was available over the counter or not. 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 high degree of negligence with regard to his duty of care as a competitor, the fact that he

took another person's medication, the performance enhancing potential of Isometheptene in this case and the danger of the Athlete taking a stimulant for both horse and rider. 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. The Tribunal also credits the Athlete's transparency in acknowledging his ingestion of Neosaldina on the Doping Control Form. The Tribunal also takes note of the low performance enhancing potential of Isometheptene.

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 in the case at hand. 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 and made no reference to the Prohibited Substance that was an ingredient in the medication.

#### ***4.7 Disqualification***

29. 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***

30. As a consequence of the foregoing, the Tribunal decides to impose the following sanction 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 **nine (9) months** to be effective immediately and without further notice from today's date. Therefore, the Athlete shall be ineligible through 22 April 2013.
- 2) The Athlete is fined **CHF 2000**.
- 3) A decision on costs will be rendered separately.

31. 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.

32. 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.

33. 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', written in a cursive style.

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**THE CHAIRMAN, Dr. Armand Leone**