SPORT DISPUTE RESOLUTION CENTRE OF CANADA

IN THE MATTER OF THE CANADIAN ANTI-DOPING PROGRAM;

AND

IN THE MATTER OF AN ANTI-DOPING RULE VIOLATION BY
VALENTYNA ZOLOTAROVA (Athlete)
ASSERTED BY
THE CANADIAN CENTRE FOR ETHICS IN SPORT (CCES);

AND

IN THE MATTER OF A HEARING BEFORE THE DOPING TRIBUNAL

(SDRCC File No. DT 08-0087)
(Doping Tribunal)

SOLE ARBITRATOR:	JOHN P. SANDERSON, Q.C.
REPRESENTING THE CCES:	DAVID LECH
REPRESENTING THE ATHLETE:	SELF-REPRESENTED
DATE OF HEARING:	DECEMBER 3, 2008
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF DECISION:	DECEMBER 18, 2008

DECISION

INTRODUCTION

This arbitration is pursuant to the application of Section 7 of the Canadian Anti-Doping Program (CADP) concerning Valentyna Zolotarova, an elite athlete resident in Vancouver, who is a member of the National Karate Association (NKA). The issue in summary form is whether Ms. Zolotarova has committed an anti-doping rule violation and if so, what are the consequences of that violation.

The Canadian Centre for Ethics in Sport (CCES) is an independent non-profit organization which is responsible for maintaining and carrying out the CADP, including providing anti-doping services to national sports organizations and their members. CCES submits to this tribunal that Ms. Zolotarova has committed an anti-doping rule violation involving a prohibited substance. CCES further submits the appropriate sanction is a two-year period of ineligibility from competition, the mandated period of suspension under the CADP. The position of CCES is that there are no proper reasons for eliminating or reducing the required period of suspension.

Ms. Zolotarova does not dispute that an anti-doping rule violation occurred in the circumstances of this case. However, Ms. Zolotarova claims there are "exceptional circumstances" that justify a reduction in the two-year period of suspension. Ms. Zolotarova submits that taking into account the totality of the evidence, the appropriate suspension should be reduced, commencing with the date when the anti-doping rule violation was detected.

BACKGROUND FACTS GIVING RISE TO THE ARBITRATION

CCES is a signatory to the World Anti-Doping Code ("Code") and is responsible for ensuring that the Canadian Anti-Doping Program is consistent with international best practices. The general purpose of the CADP code is to protect the rights of athletes and the integrity of sport.

As noted above, Ms. Zolotarova is a member of the NKA, which is the national sport organization governing the sport of karate in Canada. The CADP applies to all members of NKA, which organization adopted the CADP on June 15, 2004. Consequently, Ms. Zolotarova is subject to the rules of the CADP, as a member of NKA sport.

On July 5, 2008, the CCES conducted out-of-competition doping control in St. John, New Brunswick. A sample collection took place which included Ms. Zolotarova. Ms. Zolotarova's sample was delivered by secure chain of custody to the appropriate laboratory in Montreal where it was analyzed. On July 30, 2008 the certificate of analysis with respect to Ms. Zolotarova's sample was received by the CCES. The certificate of analysis indicated an adverse analytical finding. Specifically, the sample contained Hydrochlorothiazide.

Section 3.0 of the CADP incorporates the Prohibited List International Standard issued by the World Anti-Doping Agency. Hydrochlorothiazide is a prohibited substance according to the Prohibited List. Ms. Zolotarova did not have a therapeutic use exemption from the CCES for the use of Hydrochlorothiazide and consequently, a notice was issued by the CCES that Ms. Zolotarova has committed an anti-doping rule violation according to rules 7.16 to 7.20 of the

CADP. As this was a first violation, the CCES proposed a sanction pursuant to rule 7.20 and 7.37 of two years ineligibility and permanent ineligibility for direct financial support from the Government of Canada.

There is no dispute between the parties that Ms. Zolotarova committed an anti-doping rule violation due to the presence of Hydrochlorothiazide in her sample. The CCES does not dispute that the adverse analytical finding and the resulting anti-doping rule violation was probably caused by Ms. Zolotarova taking a diuretic, prescribed by a doctor in connection with excessive swelling in her sprained ankle, which did contain Hydrochlorothiazide.

THE ISSUE FOR DETERMINATION

According to the CADP, an athlete is responsible for any prohibited substances found to be present in his or her body. It is not necessary that intent, fault, negligence, or knowledge be demonstrated to establish a violation. A first "presence" violation requires a period of ineligibility for two years unless there are "exceptional circumstances". The CADP sets out what are exceptional circumstances. There are two categories: "no fault or negligence" and "no significant fault or negligence". If either can be established by evidence in accordance with a standard of proof by balance of probability, the imposed sanction can be reduced or eliminated. Ms. Zolotarova claims "no fault or negligence" and "no significant fault or negligence" and seeks to reduce her sanction as set out above.

The CADP Glossary incorporates part of the World Anti-Doping Code, including its Commentary as a source of interpretation of the CADP. The phrases "no fault

or negligence" and "no significant fault or negligence" are defined in the Glossary as follows:

> No fault or negligence:
> The *Athlete's* establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had *Used* or been administered the *Prohibited Substance* or *Prohibited Method.*
>
> No significant fault or negligence:
> The *Athlete's* 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 relationship to the anti-doping rule violation.

According to the Commentary, the equivalent of rule 7.38 and 7.39 are meant to be applied "where the circumstances are truly exceptional and not in the vast majority of cases". The Glossary continues as follows:

> To illustrate the operation of Article 10.5, an example where No Fault or Negligence would result in the total elimination of a sanction is where an Athlete could prove that, despite all due care, he or she was sabotaged by a competitor. Conversely, a sanction could not be completely eliminated on the basis of No Fault or Negligence in the following circumstances: (a) a positive test resulting from a mislabeled or contaminated vitamin or nutritional supplement (Athletes are responsible for what they ingest (Article 2.1.1) and have been warned against the possibility of supplement contamination); (b) the administration of a prohibited substance by the Athlete's personal physician or trainer without disclosure to the Athlete (Athletes are responsible for their choice of medical personnel and for advising medical personnel that they cannot be given any prohibited substance); and (c) sabotage of the Athlete's food or drink by a spouse, coach or other person within the Athlete's circle of associates (Athletes are responsible for what they ingest and for the conduct of those persons to whom they entrust access to their food and drink). However, depending on the unique facts of a particular case, any of the referenced illustrations could result in a reduced sanction based on No Significant Fault or Negligence. (For example, reduction may well be appropriate in illustration (a) if the Athlete clearly establishes that the case of the positive test was contamination in a common multiple vitamin purchased from a source with no connection to Prohibited Substances and the Athlete exercised care in not taking other nutritional supplements.)
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> Article 10.5.2 applies only to the identified anti-doping rule violations because these violations may be based on conduct that is not intentional or purposeful. Violations

> under Article 2.4 (whereabouts information and missed tests) are not included, even though intentional conduct is not required to establish these violations, because the sanction for violations of Article 2.5 (from three months to two years) already builds in sufficient discretion to allow consideration of the Athlete's degree of fault.

PRELIMINARY ISSUES

As I have already noted, the facts surrounding the manner in which the prohibited substances became present in the athlete's body are not significantly in dispute. Rather, the issue is the proper conclusion to be drawn from those facts.

In documents filed with me prior to the hearing, Ms. Zolotarova, with the assistance of her lawyer, provided information and submissions with respect to procedural errors claimed to have taken place during the testing procedure. At the hearing, Ms. Zolotarova, who represented herself, together with representatives from the National Karate Association, discussed some of her concerns which involved alleged deficiencies with the notice requirements, the time she was given to provide a sample, and delays in notification. CCES denied there were any procedural errors and reviewed each of the areas of concern in relation to the evidence provided as well as the verification documentation filed in this case.

It is not necessary for me to review these matters in any detail. There is insufficient evidence to allow me to make any finding in Ms. Zolotarova's favour on any one of these elements. More importantly, even if there were procedural errors or misunderstandings between Ms. Zolotarova and the persons conducting the test, they had no bearing on the validity of the test results. Ms. Zolotarova was not denied her right to have the tests and analysis conducted with all proper professional care and respect for her rights.

MS. ZOLOTAROVA'S EVIDENCE

Ms. Zolotarova is an impressively bright and capable young woman. As a witness, she is entirely credible. Her evidence was clear and delivered in a straight-forward manner.

Ms. Zolotarova testified with respect to her concerns regarding the conduct of the testing procedure in relation to the various bouts in which she was competing. She explained that she did not feel she had been allowed sufficient time for the collection of her sample although the issue revolved around her tight schedule of bouts. She also testified with respect to delays in getting information to her and problems in contacting her directly. As I have said, I am satisfied there were no breaches of the testing rules and procedures and no unfairness in the collection process. The delays and miscommunications between CCES and Ms. Zolotarova were inadvertent and were caused by confusion on the part of the NKA which had not had an athlete of theirs involved in such a process before. Accordingly, I will set out the relevant parts of Ms. Zolotarova's testimony with respect to her claim that exceptional circumstances exist and the suspension imposed on her should be modified or removed.

Ms. Zolotarova testified that on May 10, 2008, she injured her ankle while training. The following day she went to her family doctor, a person in whom she had great faith in terms of her medical skills because of the doctor's care and treatment of her father. Ms. Zolotarova testified that she was told to take an x-ray on her ankle, which was done on May 12. The x-ray was negative and showed no break or bone damage.

On May 15, Ms. Zolotarova met again with her doctor. She was told by her doctor to take physiotherapy treatments at the University of British Columbia. Her doctor also told her she should take Hydrochlorothiazide to reduce the swelling in her ankle. Ms. Zolotarova believes she was told Hydrochlorothiazide is a diuretic. The doctor wrote out a prescription for Hydrochlorothiazide, which she took to the pharmacy to be filled.

Ms. Zolotarova testified that the doctor was fully aware that she was an elite athlete and that she trusted her doctor's advice. She said she asked the doctor if she was allowed to take the prescribed medication, as an athlete, and that the doctor said she was. She testified she took the medication several times during the next few weeks and that while she was able to resume some training, her ankle continued to bother her.

Ms. Zolotarova testified that on June 30 she flew to New Brunswick to compete in the National Karate Championships. On the flight, her ankle began to swell and to compound her difficulties, her menstruation cycle began. She testified that as a consequence of both of these conditions she took another dose of the prescribed medication. On the morning of July 5, having competed and won a gold medal in one of her competitions, she was told she would have to provide a urine sample in accordance with the CADP testing procedures. There were some difficulties arranging the sample collection procedure due to the fact that she was competing in four different divisions and had multiple bouts throughout the day. In any event, the procedure was completed and the sample sent for testing and analysis in the laboratory.

On August 23, Ms. Zolotarova flew to Chile to take part in the Pan-American Championships. On September 4, the day before the competition began, she was officially informed that she had tested positive and that Hydrochlorothiazide had been identified in the sample she had provided in New Brunswick. She was asked to advise what medications she had been taking. She testified that she did not recall the name, so she called her mother in Vancouver to ask her if her mother knew the name of the medication she had been taking for her swollen ankle. She said that her mother's native language is Russian and she named the drug as "Triampur Kompozitum". Ms. Zolotarova testified that she immediately responded to the notification from CCES and in her email reply she provided the name given to her by her mother with respect to the medication she used.

On September 5, Ms. Zolotarova testified that she received an email from CCES which gave her several options, including the right to compete and appeal the finding later. She testified that she did not want to disgrace her province or her country and despite her emotional state she decided she would proceed to compete as best she could. Unfortunately, but understandably, she did not do well in her initial bouts and was eliminated from the competition.

As has been noted, Ms. Zolotarova admits using a medication that is a diuretic that either is, or contains, Hydrochlorothiazide. She admits she relied on her doctor's assurance that it was alright for her to take this drug and that she took no independent steps to investigate or inquire into the use of the drug. She testified that she cooperated fully with the requirements of the testing procedures and that she openly provided all the information she was asked to give. With respect to the confusion over the name of the drug itself and her use of the term Triampur Kompozitum, she testified that she regrets the error and

says she certainly was not attempting to conceal anything. She testified that she now realizes that Hydrochlorothiazide is a prohibited substance. However, she said that she believes she has provided evidence that exceptional circumstances exist that warrant a reduction or elimination of the required period of suspension.

DECISION

This is a case in which the parties agree on most of the facts. The question is whether the facts merit a penalty of two years ineligibility or whether that penalty should be reduced.

A first violation requires a period of ineligibility of two years unless there exists exceptional circumstances that provide justification for the elimination or reduction of that penalty. The source of the justification must be found within the required definition under the CADP and the heading of "exceptional circumstances". Two categories of exceptional circumstances are set out: "no fault or negligence" and "no significant fault or negligence". Either or both must be established by evidence to a standard of a balance of probability.

In this case, there is no proper basis for a find that Ms. Zolotarova qualifies for elimination of her period of ineligibility under the "no fault or no negligence" provision of the CADP. Ms. Zolotarova took a medication prescribed by her doctor which was the cause of her adverse analytical finding. She took the medication without making any independent inquiry or even questioning her doctor. As an elite athlete and having competed at a national and international level for a number of years, she is familiar from the repeated warnings from her NSO, from CCES and WADA emphasizing the risk of taking any medication and

that the responsibility for what is found in the body of any athlete lies with that individual athlete. Simply put, I find Ms. Zolotarova was familiar with those warnings but she chose to ignore them. Accordingly, I find she failed to exercise the standard of care required by the category of "no fault or negligence".

The more difficult question is whether Ms. Zolotarova's fault or negligence is "significant" as defined in section 3.9 of the CADP. I have carefully reviewed and considered the various arbitration rulings as submitted by CCES at the hearing. While each of the various cases is driven by the particular facts, considerable guidance is available from the analysis and principles expressed in each of those cases.

The most useful arbitral authority in the context of the present case is WADA vs. Despres, CCES and Bobsleigh Canada Skeleton. In that case, the athlete ingested a nutritional supplement that had been recommended to him by his nutritionist to aid in recovery from surgery. The athlete was unaware that the nutritional supplement contained a prohibited substance. He did not question his nutritionist about what the supplement might contain nor did he make any inquires of his own. In dealing with the athlete's submission that he took the supplement on the advice of the team nutritionist, the arbitration panel said as follows:

> 7.4 The issue to be decided is whether Mr. Despres' fault or negligence is "significant" as defined in Article 7.39 of the CADP. As the CADP incorporates the WADC, the Panel first turns to the official commentary to the WADC for guidance in interpreting this provision. The commentary makes two essential points:
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> (a) A period of ineligibility will be reduced based on no significant fault or negligence only in cases where the circumstances are truly exceptional and not in the vast majority of cases.

(b) A reduced sanction based on no significant fault or negligence may be appropriate in cases where the Athlete clearly establishes that the cause of the positive test was contamination in a common multiple vitamin purchased from a source with no connection to Prohibited Substances and the Athlete exercised care in not taking other nutritional supplements.

7.5 In the Panel's view, the circumstances in this case are not truly exceptional.

7.6 Although Mr. Despres argues that the Panel's decision to reduce the sanction period in *Knauss* applies in the present case, *Knauss* is distinguishable. Mr. Knauss made a direct inquiry with the distributor of the product to ascertain the safety of the supplement. The Panel noted that this direct inquiry fell within the category of "clear and obvious precautions," which Mr. Knauss took before ingesting the supplement. Had Mr. Knauss not taken these precautions, "his conduct would indeed constitute 'significant fault or negligence.' " In the present case, Mr. Despres did not make any attempt to contact the distributor or manufacturer of Kaizen HMB to obtain more information about the product. Had he done so, he would have demonstrated the higher level of care necessary to establishing "no significant fault or negligence."

7.7 Mr. Despres claims that he did not contact the manufacturer directly to seek a guarantee because he believed such guarantees to be "generic." If so, then this is all the more reason that Mr. Despres should not have been satisfied by the guarantee posted on Kaisen's website. Mr. Despres was aware that obtaining a guarantee directly from the manufacturer was on the CCES list of suggested steps to take before selecting a nutritional supplement. Simply believing such guarantees to be generic fails to explain why he did not take this additional, prescribed step. Even if the guarantee had turned out to be wrong, at least Mr. Despres would have taken steps within his control to reduce the risk.

7.8 The Panel is not suggesting that an athlete must exhaust every conceivable step to determine the safety of a nutritional supplement before qualifying for a "no significant fault or negligence" reduction. To that end, the Panel recognizes Mr. Despres' argument that taking reasonable steps should be sufficient since "one can always do more." The panel in *Knauss* followed this logic when it determined that even through Mr. Knauss could have had the nutritional supplement tested for content, or simply decided not to take it altogether, "these failures give rise to ordinary fault or negligence at most, but do not fit the category of "significant" fault or negligence." Similarly, the Panel distinguishes between reasonable steps Mr. Despres should have taken and all the conceivable steps that he could have taken. In light of the risks involved, the Panel finds that Mr. Despres did not show a good faith effort to leave no reasonable stone unturned before he ingested Kaizen HMB.

. . .

7.13 The Appellant claims that he did not take HMB supplements for performance reasons but rather to help him recover after a surgery. He testified that he took the supplements in order to recover sooner. The Panel finds that taking a nutritional supplement for faster recovery *is* a performance-related reason.

7.14 The Panel finds Mr. Despres' argument that he took HMB on the advice of the team nutritionist, Mr. Berardi, to be an inadequate claim for establishing "no significant fault or negligence." To hold otherwise would open a loophole for unscrupulous teams to use prohibited substances and then face reduced penalties. Moreover, Mr. Despres did not check Mr. Berardi's advice with a doctor or follow upon the advice by asking a doctor or Mr. Berardi himself about the specific brand.

7.15 During the hearing, Mr. Despres frequently referred to the widespread use of supplements by athletes. He testified that every coach and trainer with whom he worked gave supplements directly to athletes. He claimed that even through everyone takes supplements and knew to take precautions, he took more precautions that anyone on his team. The Panel rejects this defense.

7.16 The Panel favorably notes that Mr. Despres acknowledges having made a mistake, has expressed regrets and hopes to act as a spokesperson on the issue. However, he essentially argues that whenever an athlete can prove that the supplement is contaminated, he or she should be found to have acted with "no significant fault or negligence." Given the numerous warnings by WADA, CCES, and other agencies about the risks of contaminated supplements, contamination alone cannot be a sufficient basis for finding "no significant fault or negligence." The WADA Code commentary refers to contaminated vitamins, not supplements, as providing a basis for such a finding.

It must be emphasized that in this case the responsibility on the athlete is considerably greater than in the case of Mr. Despres. In his case, one is dealing with a nutritional supplement that turned out to be contaminated. His use of the prohibited substance was found to be entirely unintentional. Nevertheless, the arbitration tribunal/panel found that the circumstances were not truly exceptional and therefore the two-year period of ineligibility could not be reduced. In this case we are dealing with a drug that is specifically referred to on the Prohibited List. The athlete intentionally took the drug to assist her in her training and immediately before competing as an athlete. She did not question her doctor who prescribed the drug and who told her "it was allowed". She is familiar with the anti-doping requirements. The evidence is that some years

previously, she had obtained a TUE in order to help her compete. She is well educated and computer literate. It would have been a simple matter for her to go to the CCES website, the WADA website or a number of other places to look at the list of Prohibited Substances for herself. Easier still, she could have simply asked her doctor while they were together in her office to check the list and be sure that the drug was not listed as a Prohibited Substance.

In my view, Ms. Zolotarova did not act with sufficient care regarding what she ingested in the circumstances of this case. The drug she took is directly related to her role as an athlete. She had been competing at an elite level for many years and clearly understood from the warnings and the materials provided to her how careful she ought to be. In my view, the test is not just what the athlete knows but what the athlete should reasonably have suspected and should have questioned. Put differently, she exercised no caution. She relied on her doctor, just as Mr. Despres relied on his nutritionist. Unfortunately for both athletes, that is not enough to avoid their personal responsibility for what went into their respective bodies.

On December 8, 2008, in accordance with the SDRCC Rules, I issued the following decision summary to the parties:

> The hearing of this matter took place in Vancouver, on December 3, 2008.
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> I have reviewed and carefully considered the evidence together with the helpful and comprehensive submissions of the parties. I will provide full written reasons for my decision in due course. However, in accordance with the Rules, a decision must be made with respect to an anti-doping matter that proceeds to a hearing, as in this case, within five days of such hearing. Accordingly, my decision in summary form is as follows:
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> 1. The evidence, together with the admissions and stated positions of the parties, establishes that an anti-doping violation occurred involving

the presence of Hydrochlorothiazide metabolites in the athlete's collected sample. Hydrochlorothiazide is a prohibited substance according to the Prohibited List Rules of the CADP.

2. The evidence, together with the admissions and stated positions of the parties establishes there was fault or negligence by the athlete in ingesting this material. The source was a prescription for diuretics to reduce swelling and pain from an ankle injury in early May 2008.

3. The issue before me is whether the two-year provisional suspension pursuant to Rules 7.16 to 7.20 should be reduced, having regard to the totality of the evidence and the conduct of the athlete. More specifically, the question is whether the athlete bears "no significant fault or negligence" and if so, what is the appropriate reduction, if any, to the two-year period of ineligibility of the athlete from competition.

4. In the unusual and particular circumstances of this case, after a careful review of the evidence, I have determined:

    a. I am compelled to find that the evidence establishes that the athlete's conduct cannot be characterized as insignificant fault or negligence.

    b. Accordingly, I find there is no proper basis to reduce the mandated two-year period of ineligibility. I further find that the period of ineligibility shall commence as of the date of this Decision Summary, in accordance with CADP Rules 7.20 and 7.37.

In the result, for the reasons expressed above, I hereby confirm the above summary decision. I wish to thank the parties and their representatives for their able assistance in dealing with this case.

Dated at Vancouver, British Columbia this 18th day of December 2008.

John P. Sanderson, Q.C.
Sole Arbitrator