BEFORE THE SPORTS TRIBUNAL
OF NEW ZEALAND **ST 04/12**

BETWEEN	**DRUG FREE SPORT NEW ZEALAND**
	Applicant
AND	**NIGEL CORDES**
	Respondent
AND	**NEW ZEALAND POWERLIFTING FEDERATION**
	Interested Party

DECISION OF TRIBUNAL
DATED 12 OCTOBER 2012

Tribunal:	Alan Galbraith QC (Deputy Chairperson) Dr Lynne Coleman Chantal Brunner
Present:	Nigel Cordes, athlete Paul David, counsel for Drug Free Sport New Zealand Jayne Kernohan, Drug Free Sport New Zealand Steve Lousich, New Zealand Powerlifting Federation
Registrar:	Brent Ellis

1. Nigel Cordes is charged by Drug Free Sport New Zealand (DFS) with a violation of Rule 3.1 of the Sports Anti-Doping Rules 2012 (SADR) as the result of a positive test to 1, 3 dimethylpentylamine (also known as methylhexaneamine) in competition at the North Island Powerlifting Championships on 9 June 2012. He was provisionally suspended by another division of the Tribunal on 15 August 2012.

2. The violation is admitted and the question before the Tribunal is the application of Rule 14.4 of the SADR.

3. The hearing was conducted by telephone conference on 18 September 2012. Mr Cordes represented himself and Mr David appeared for DFS. A written statement was received from Mr Cordes, supplemented by oral evidence at the hearing, and three written references were received. A brief of evidence was filed by Jayne Kernohan for DFS.

Background

4. Mr Cordes first became registered as a powerlifter in March 2012. He subsequently competed at his regional championship and then, in June 2012, at the North Island Championship where he placed second in his class. At the time of registration he signed an Acknowledgement which records his acceptance of the SADR and the testing regime.

5. Mr Cordes' evidence was that, apart from signing the Acknowledgement, he did not prior to the June Championship receive any specific information about the SADR and had not at any time prior to registering had any contact with the anti-doping programme. As Mr Lousich, representing the Federation, said that was unsurprising because, although the Federation had an active information programme and material would have been available at the regional championships, it might take a little time before a new registrant is picked up by the system.

6. Mr Cordes, both in his written and oral evidence, said that his impression was that the anti-doping programme was targeted towards serious abuses, such as medicines

and steroids, and in his mind he had not appreciated potential problems with supplements that were available in sports and health shops.

7. Mr Cordes told the Tribunal that in March he had gone to his local sports nutrition store, from which he had in the past purchased protein supplements, looking for a stronger caffeine based product than the caffeine pills he had been using. He said that he used the caffeine pills to help him focus during training on occasions when he felt mentally drained at the end of the day. He was recommended and purchased a container of 1.m.r. which he correctly understood at the time was a caffeine based supplement. However, it also contains 1, 3 dimethylpentylamine.

8. After his experience at the regional championships, Mr Cordes decided that he would use a 1.m.r. drink at the North Island Championships to help him stay focused through what he anticipated would be a long day. He said that on the day of the competition he sipped from this drink to help him keep focused. In the competition he matched his previous best and placed second in his class but said he did not believe the drink had helped him other than in maintaining focus during the day. When he was selected for testing he completed a form in which he listed 1.m.r. as a substance which he had taken in the previous 24 hour period.

9. DFS filed a brief from Jayne Kernohan which described the nature of the 1.m.r. product and the information available on the manufacturer's website. The website identifies the presence of 1, 3 dimethylpentylamine in the product and contains a warning that certain ingredients in the product may be banned by certain sports organisations. Ms Kernohan's brief stated that Mr Cordes advised her that, after he had been advised of his positive test, he had identified the prohibited substance on the label of the 1.m.r. container. However, Mr Cordes' evidence was that at the time of his purchase and use of the 1.m.r. he was unaware that it was an ingredient.

Discussion

10. For an athlete to obtain relief under Rule 14.4 of the SADR it is necessary for the athlete to prove:

    (a) how the substance got into the athlete's system; and

(b) to the "comfortable satisfaction" of the Tribunal that taking the prohibited substance was not intended to enhance the athlete's sports performance.

11. If the athlete fails to satisfy the Tribunal on both matters then a two year period of suspension applies. If the athlete does satisfy the Tribunal then the degree of fault will determine what period of suspension up to a maximum of two years will apply.

12. There was no dispute on the first issue. DFS accepted that the source of the positive test was the 1.m.r. The second question is more difficult. As Mr David correctly submitted there are two lines of authority as to how that question is to be approached. The issue is whether the absence of intent has to be considered specifically in relation to the prohibited substance itself or whether the question is considered by reference to the product containing the substance.

13. The position accepted in *Oliveira v USADA* (CAS 2010/A/2107), and adopted in *UCI v Kolobnev* (CAS 2011/A/2465), was that an athlete who can show ignorance of the presence of the prohibited substance in a product will be able to show that there was no intention to enhance sports performance by taking the unknown substance. By contrast, the approach in *Foggo v NRL* (CAS A2/2011) is to require the athlete to prove that there was no intention to enhance performance by taking the product which contained the unknown substance.

14. Mr David also commented that divisions of the Tribunal had in the past followed the *Oliveira* approach and tended to be relatively accepting of evidence that there was no knowledge of a prohibited substance and hence no intent to augment performance. Examples are *Drug Free Sport New Zealand v Rangimaria Brightwater-Wharf* (ST 14/10) Decision 29 November 2010, *Drug Free Sport New Zealand v Blair Jacobs* (ST 24/10, decision 22 June 2011) and *Drug Free Sport New Zealand v Taani Prestney* (ST 09/11, decision 15 December 2011).

15. In the recent decision in *Drug Free Sport New Zealand v Wiremu Takerei* (ST 01/12, Decision 8 June 2012) the Tribunal, by a majority, maintained that approach. One member of the division dissented and would have followed the *Foggo* approach. Mr

David contended that this was the preferred approach to be consistent with the emphasis in the SADR that athletes were responsible for whatever they ingested.

16. There is a clear conflict between the two lines of CAS authority. In the *Takerei* decision the Tribunal expressed the view that the present position was unsatisfactory and the expectation that WADA would move to bring certainty to the position in the near future. Clarification is still awaited. Having reviewed the present CAS authorities this Tribunal believes it is appropriate to continue to apply the *Oliveira* line of authority, as previously applied by the Tribunal in the cases referred to, until the position is clarified.

17. Even though the Tribunal considers it appropriate to continue to apply the *Oliveira* approach, it is still necessary for the Tribunal to be comfortably satisfied that the athlete did not know of the presence of the prohibited substance. That question has been of particular concern to the Tribunal on the facts of the present case. As the SADR indicate a simple denial of knowledge will generally require corroboration. Ultimately, the Tribunal accepts on the evidence before it, and in particular *because* Mr Cordes did disclose 1.m.r. as a substance which he had taken within the previous 24 hours, that Mr Cordes was not aware of the presence of 1, 3 dimethylpentylamine in the 1.m.r. Accordingly the Tribunal accepts that Mr Cordes does discharge the onus of establishing that he did not take the prohibited substance for the purpose of improving his performance.

18. It remains necessary to consider the degree of fault attaching to Mr Cordes' actions. In the Tribunal's view Mr Cordes did not exercise reasonable care. While it is correct that Mr Cordes had only recently become registered and had no prior direct experience of the SADR, a character reference provided by Mr Cordes in support of his submissions indicated he has had an association over some years with powerlifting activities and had some prior experience of using supplement products. More particularly he had on this occasion sought a product which would have a stronger effect than the caffeine tablets he had previously been taking. He then used the product in training, found it beneficial, and determined to use it during the

day of the North Island Championship competition, all without apparently giving any thought as to why the product was being more effective.

19. Whereas in the other cases referred to, enquiries were made or other extenuating circumstances existed, there are not, in the Tribunal's view, such circumstances put forward here except Mr Cordes' evidence that he thought the anti-doping rules were directed to medicines and drugs such as steroids. Given the intent of the SADR the Tribunal is unable to place weight on that evidence as mitigating Mr Cordes' failure to take any effective steps to identify the ingredients of the product from which he was getting such an added benefit.

20. The Tribunal does take into account, subject to the comments above, the fact that Mr Cordes was newly registered and accordingly newly subject to the SADR. However, the Tribunal regards the degree of fault as significantly greater than existed in *Jacobs*, *Prestney* or *Takerei*, in all of which a period of suspension of 12 months was imposed. For that reason the Tribunal imposes a period of suspension of 18 months, commencing on 15 August 2012, the date of provisional suspension. Mr Cordes is disqualified from his second placing at the North Island Championships.

Dated: 12 October 2012

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A R Galbraith QC
(Deputy) Chairperson