

**BEFORE THE SPORTS TRIBUNAL
OF NEW ZEALAND**

ST 03/12

BETWEEN DRUG FREE SPORT NEW ZEALAND

Applicant

AND PETER MARTIN

Respondent

AND PARALYMPICS NEW ZEALAND

Interested Party

DECISION OF TRIBUNAL

Dated 6th August 2012

Tribunal: Barry Paterson QC (Chairman)
Sir Bruce Robertson (Deputy Chairman)
Ron Cheatley

Hearing: By telephone conference on 6 August 2012

Present: Peter Martin, respondent
Michael Smyth, counsel for Peter Martin
Dr Singh, witness for Peter Martin
Paul David, counsel for Drug Free Sport New Zealand
Graeme Steel and Jayne Kernohan, Drug Free Sport New Zealand
Fiona Allan and Mark Copeland, Paralympics New Zealand
Rebecca Hooper, counsel for Paralympics New Zealand

Registrar: Brent Ellis

1. This decision is given without reasons because of time exigencies. Reasons will follow.

Decision

2. The Respondent has established to the comfortable satisfaction of the Tribunal under the provisions of r 14.4 of the Sports Anti-Doping Rules 2012 that the substance was not intended to enhance the Respondent's sports performance or mask the use of a performance enhancing substance.
3. The sanction is a reprimand. No period of ineligibility is imposed.

Dated 6th August 2012



.....
B J Paterson QC
Chairman

BETWEEN **DRUG FREE SPORT NEW ZEALAND**

 Applicant

AND **PETER MARTIN**

 Respondent

AND **PARALYMPICS NEW ZEALAND**

 Interested Party

REASONS FOR DECISION OF TRIBUNAL DELIVERED ON 6 AUGUST 2012

DATED 9 AUGUST 2011

Tribunal: Barry Paterson QC (Chairperson)
 Sir Bruce Robertson (Deputy Chairperson)
 Ron Cheatley

Hearing: By telephone conference on 6 August 2012

Present: Peter Martin, respondent
 Michael Smyth, counsel for Peter Martin
 Dr Singh, witness for Peter Martin
 Paul David, counsel for Drug Free Sport New Zealand
 Graeme Steel and Jayne Kernohan, Drug Free Sport New Zealand
 Fiona Allan and Mark Copeland, Paralympics New Zealand
 Rebecca Hooper, counsel for Paralympics New Zealand

Registrar: Brent Ellis

1. Peter Martin has been selected to represent New Zealand at the Paralympic Games in London, commencing later this month, in shot put and the javelin. He is also the head coach of the New Zealand Wheelchair rugby team (who are not competing in the 2012 Paralympic Games) but he voluntarily stood down from coaching at a wheelchair rugby tournament after learning he had returned a positive result to an anti-doping test.
2. On 3 August 2012 he was notified by Drug Free Sport New Zealand (DFS) that following an out of competition drug test on 10 July 2012 he was found to have probenecid in his system.
3. It is common ground that it is a specified substance under the World Anti-Doping Agency (WADA) Prohibited List.
4. The Tribunal received immediate advice that an application would be filed after the weekend for a provisional suspension and the anticipation was that there would be a request for an expedited hearing.
5. As matters progressed it became clear that a substantive decision was required to be made by Tuesday 7 August if Mr Martin could realistically maintain his position in the New Zealand team. The Tribunal was glad to be able to facilitate the hearing by an 8.00 pm telephone conference on Monday 6 August (the day the application was filed) and acknowledges the cooperation of everyone involved.
6. In essence the application alleging an Anti-Doping Rule Violation was made on the basis that:
 - (a) On 10 July 2012 DFS collected an out-of-competition sample from Peter Martin at his residence. The analysis of the sample confirmed the presence of the substance probenecid which is prohibited for use both in and out-of-competition under "s5 Diuretics and other Masking Agents" in the 2012 WADA Prohibited List International Standard. Probenecid is a specified substance.

- (b) Mr Martin was therefore alleged to have committed a violation of Sports Anti-Doping Rule 3.1 ("Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample") by testing positive to probenecid.
7. Mr Martin admitted the violation but gave evidence it occurred inadvertently. Mr Martin filed a witness statement with supporting medical material. He appeared at the hearing as did the relevant doctor.
8. The factual position can usefully be taken from his own witness statement as follows:

How the Probenecid came to be in my system

7. Since I use a wheelchair I put a lot of pressure on my arms as they lean against the wheels of my chair. As a consequence my arms develop hard skin in the same way that the feet of an able bodied person may do the same thing. Just like feet which have hard skin, my arms sometimes develop cracks which then become prone to infection.

8. I run a small farm block and receive many minor scrapes and bruises from time to time. During June I had been treating some ewes for pink eye. I was also heavily involved in feeding cattle and so during the day my arms would get very dirty and exposed to possible infection through an open crack. Normally my body is fairly resilient to infections but because I had been training hard for the Games my immune system was in all likelihood fairly depleted.

9. On 28 June I developed an infection in my arm. I had some amoxicillin antibiotics at home which I had for infections like this and immediately took one. The following day the infection had become worse so I went to see a GP at my doctor's clinic. He prescribed me flucloxacillin which is another antibiotic but said that if there was no improvement within 24 hours I should seek urgent medical assistance.

10. That night I didn't sleep very well and woke the next morning to find that the infection had worsened and I had a temperature. I noticed that there was puss seeping from the wound and I was feeling sick off and on. Therefore I went to the Anglesea clinic in Hamilton which offers a 24 hour Accident and Emergency service.

11. At the clinic I saw Dr Manvir Singh. Dr Singh diagnosed that I had cellulitis and needed to be treated immediately for it. Since I am a high performance athlete I am aware of my responsibility to ensure that no prohibited substances enter my system. I therefore advised Dr Singh that I had recently been selected to represent New Zealand at the London Paralympic Games. I told him that I was subject to drug testing and that I could not take anything which was a prohibited substance.

12. I recall that Mr Singh was particularly rushed off his feet that day being a Saturday [approximately midday]. After I asked him if the medication was safe to take I saw him looking in a book. I don't know what book he was looking in and it

may have even related to another patient, however, after looking in that book he came back to my cubicle and confirmed that the medication which he was prescribing was safe for me to take. A nurse was also present who was to administer the medication and I recall that she queried with the Doctor whether it was safe for me to take the medication and again he confirmed that it was.

13. I relied on the Doctor's expertise to satisfy myself that the medication he was prescribing would not cause an anti-doping rule violation. Therefore the nurse administered IV antibiotics and also gave me some tablets which I now understand to be probenecid. I was advised to return to the clinic on Sunday and Monday for two further doses. When I left the clinic Dr Singh wished me luck for the Games.

14. When I returned to the clinic on Sunday I was treated by the same Doctor and nurse who administered the first dose. The swelling had gone down a little but there was clearly still an infection. I returned to the clinic again on the Monday and this time was treated by Dr Hameed Al-Ghanim and a different nurse. When I spoke to Dr Al-Ghanim I again told him that I had been selected to represent New Zealand at the up-coming Paralympic Games and I again queried that the medication would not cause an anti-doping rule violation. Again Dr Al-Ghanim confirmed that the medication would not cause me any problems. I then asked Dr Al-Ghanim to print off a copy of my medical history in order that I could produce that in the event of a drugs test. He said he was happy to do so and proceeded to print me a copy. A copy of my medical notes is attached.

15. Since receiving the medication I have consulted with six medical professionals who have been made aware of the treatment protocol applied to me at the clinic and none have advised me that probenecid is a prohibited substance or that I should apply for a TUE.

9. As the proceeding advanced it was clear that the vital issue for the Tribunal was whether the presence of the specified substance could be dealt with a sanction of less than two years' ineligibility. This required Mr Martin to satisfy the requirements of Rule 14.4 of the Sports Anti-Doping Rules (SADR). If he could not, then two years' ineligibility was required under the SADR. If however, he satisfied the requirements of Rule 14.4, then the sanction could range from a reprimand with no period of ineligibility to the two years of ineligibility.
10. Under Rule 14.4 of the SADR, the onus was on Mr Martin to demonstrate:
 - how the probenecid came to be in his system and
 - that it had not been taken with a performance enhancing intention or to mask the use of a performance enhancing substance.


On the second requirement, the standard of proof is to the comfortable satisfaction of the hearing panel and Rule 14.4 states that this requires corroborating evidence.

11. Dr Singh gave evidence but his recollections were hazy which may reflect the pressure under which he had been operating on 29 June. However, there was unequivocal evidence that he had prescribed the probenecid for a clear therapeutic reason and that performance enhancement or masking was not in issue in any way. There was a serious medical emergency, which Dr Singh stated could potentially have life threatening consequences if untreated, and this was seen as an essential treatment option.
12. The Tribunal is satisfied that Mr Martin established the requirements of Rule 14.4. How the probenecid entered his system is clear. He established to the Tribunal's comfortable satisfaction that the probenecid was not intended to enhance his performance or mask any performance enhancing drug. The Tribunal considers that Dr Singh's evidence taken as a whole corroborates this, as required.
13. Counsel before us referred to two prior relevant decisions of this Tribunal:
 - ***Drug Free Sport New Zealand v Tom (Zig Zag) Wallace*** (ST 15/08, Decision 5 March 2009).
 - ***Drug Free Sport New Zealand v Dane Boswell*** (ST 01/09, Decision 12 February 2009, Reasons for Decision 24 February 2009).
14. No reliance was placed on Rule 14.5 of the SADR (which, among other things, allows for the elimination or reduction of a period of ineligibility if exceptional circumstances, such as no fault or no significant fault, can be established). The level of fault is however relevant to the assessment to be made under Rule 14.4.
15. Mr Smyth's submissions on the critical issues were:

10. *In DFS v Wallace the level fault was described at "nearer the trivial rather than the grave extreme of the measure of fault". Mr Wallace advised his Doctor that he was subject to drug testing but failed in two material respects:*
- (a) He did not ask the doctor to refer to the New Ethical's Catalogue;*
 - (b) He did not ensure that TUE requirements were met.*
11. *Despite these failings, Mr Wallace received only a reprimand. His fault was nearer the trivial end of the scale.*
12. *In DFS v Boswell, Mr Boswell was also at fault in the same way as Mr Wallace, but also failed to advise the doctor that he was subject to drug testing. Unlike in Wallace the doctor was therefore not aware that he was subject to drug testing. Had the doctor been aware he may not have administered the Probenecid or would have sought a TUE. Mr Boswell received a two month period of ineligibility making him ineligible to compete in the New Zealand Rowing Championships.*
13. *It is submitted that the Respondent's level of fault is identical to or much closer to Wallace than the level of fault identified in Boswell. In the present case, and Wallace and Boswell, the medical practitioner was not a sports doctor, nor the athlete's own GP. However, in all three cases a non sports doctor was chosen because it was a medical emergency. That being the case the Respondent cannot be criticised for his choice of medical practitioner. In Wallace and the present case the non-sports doctor was told that of the athlete's status as an athlete and was alerted to the possibility of drug testing.*
14. *The Tribunal should also take into account the attempts by the Respondent to verify the medication with Dr Al-Gamin when he received the third dose. At that stage it was probably not too late to apply for a TUE yet he was further reassured that the medication was appropriate.*
15. *It is submitted that the Respondent's level of fault is very low.*
16. Mr David for DFS adopted a sympathetic and responsible position but noted the prime responsibility of all athletes to be vigilant in respect of any substance they may take. If they always have available their wallet card to show to a medical practitioner the risks can be eliminated.
17. We would hope that doctors (especially those who hold themselves out to be sports medicine practitioners) will also be mindful of the strict regime which applies to all athletes and counsel and advise patients to ensure that there are not breaches which could be avoided.
18. We are satisfied that the unique circumstances in this case would have justified a therapeutic use exemption (TUE) but in the situation that developed that was overlooked.

19. The breach in this case arose out of a critical medical emergency where insufficient attention was given to Mr Martin being subject to the Drug Free regime. The case is about inadvertence and oversight by a very sick man.
20. The lessons learned from his defection and the potential consequences for him have well and truly underlined the vital importance of the regime. We were persuaded that issuing a warning and reprimand sufficiently reflected the actual culpability inherent in the breach and dealt with the matter accordingly.

Dated 9 August 2012



.....
Sir Bruce Robertson
Deputy Chairperson