

FINA Doping Panel 1/04

The

FINA Doping Panel,

comprised of

Harm Beyer	Chairman
Peter Kerr	Member,
Toshiro Ueyanagi	Member

in the proceedings against

the swimmer

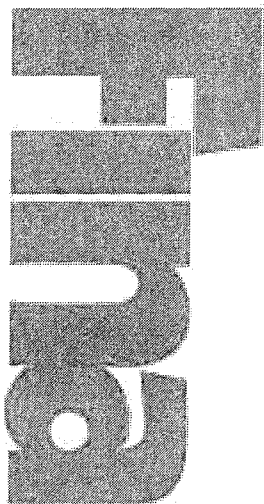
Ms Corrie Clark
affiliated to the
United States Swimming Inc.

represented by: Mark Muedeking
Attorney at Law

on 25th January 2004 decided:

The athlete is acquitted from the charge to have committed a doping offence.

This judgement shall become effective immediately.



I THE PARTIES INVOLVED

1. The FÉDÉRATION INTERNATIONALE de NATATION (FINA) is the world-wide aquatic sports organisation. FINA has established and is carrying out *inter alia* an Anti - Doping - Control Program, in-competition as well as out-of-competition.

2. The Pan American Sports Organisation (PASO) is an international sports organisation carrying out international competitions between teams of international federations. They share the commitments of the IOC as well as of FINA to discourage the use of banned substances and practices, to ensure a safe, equitable and honourable environment for competition.

3. Ms Corrie Clark is a female elite class swimmer. She is affiliated via United States Swimming Inc. to United States Aquatic Sports, which is a member federation of FINA. She has been engaged in domestic competitions and in many international competitions, representing her country.

II THE FACTS

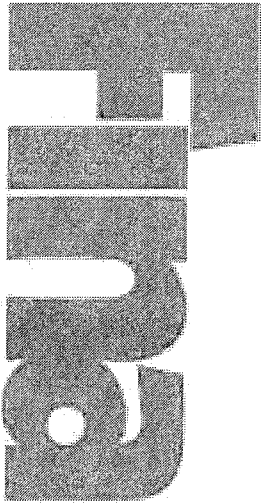
4. On 14 August 2003 the swimmer competed in the 14th Pan American Games held in Santo Domingo (DOM). After she won the silver medal in 100m breaststroke swimming she had to undergo a doping control. A urine sample was taken from her in the doping control station at the venue and split in an A sample and a B sample. The samples were sent together with several other samples collected during the games to the IOC accredited laboratory in Pointe-Claire, Québec H9R 1G6. The samples were received at the laboratory on 18 August 2003.

On 20 August 2003 the laboratory reported to PASO that the A sample showed the presence of caffeine at a mean concentration of 14.1 µg/ml.

III PROCEEDINGS

5. The PASO Executive Committee by fax message of 26 August 2003 informed about the findings of the laboratory. FINA on 1st September 2003 notified the swimmer and her federation about the findings of the laboratory. FINA also requested the swimmer to inform at what date within the next three weeks the analysis of the B sample was to be arranged.

5. The B sample then was opened in the laboratory on 24 November 2003 and subsequently analysed. And the laboratory on 26



FEDERATION
INTERNATIONALE
DE NATATION



FOUNDED IN 1908

November 2003 reported to FINA, that the analysis of the B sample has confirmed the positive finding of caffeine in the A sample.

6 The swimmer, her federation and her attorney-at-Law were informed by FINA accordingly on 1st December 2003. And they were informed that the case of the swimmer will be forwarded to the FINA Doping panel for further considerations.

8. No reaction was received by the Panel neither from the swimmer nor her attorney-at law.

9. The FINA Doping Panel then decided to take a judgement without a verbal hearing.

IV MOTIONS and CONTENTIONS

10. After having received the information by FINA, that the analysis of the A sample was positive to caffeine the attorney-at-law, representing the swimmer sent a letter to FINA, dated 20 October 2003, requesting, *“that FINA take no further action with respect to the pending case involving Ms. Clark and impose no sanction with respect to the test results”*.

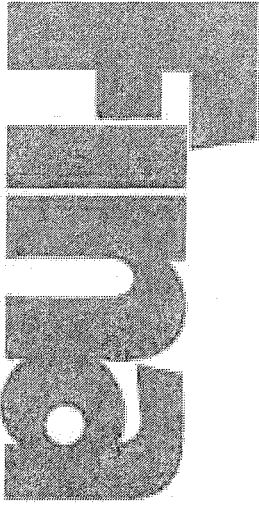
11. He referred to a recently announced WADA (World Anti Doping Agency) decision to take caffeine off of the list of banned substances *“because WADA has determined that caffeine is not a performance-enhancing substance”*.

12. He also stated, that *“the lab report from the Montreal laboratory indicates the level of caffeine in Ms Clark’s A sample was only slightly over the limit allowed under the rules as in effect prior to the WADA action. And in his opinion the document package for the A sample further indicates that, as a result of certain errors made in testing the A sample, the screening analysis of the A sample does not indicate caffeine over the allowable limit”*.

13. Finally he referred to the fact, that the swimmer never before had any positive samples for in-competition or out-of-competition testing. Based on his knowledge of Ms. Clark *“she is a fine example of the type of amateur athlete that will bring credit to FINA, the sport of swimming and amateur athletics generally”*.

V IN LAW

14. FINA Anti-Doping-Rules as approved by the Extraordinary FINA Congress on 11 July 2003 apply. These Anti-Doping-Rules incorporate the *Prohibited List* which is published and revised by WADA (FINA Rule DC 4.1).



15. The *Prohibited List*, in effect on 14 August 2003, when the sample in question was taken from the swimmer, included caffeine as a prohibited substance in the category of stimulants in case the concentration in urine exceeded 12 µg/ml.

16. However, according to a recently taken decision by WADA, the *Prohibited List* in effect since 1st January 2004 does not at all include caffeine as a prohibited substance any more, notwithstanding the concentration.

17. In the case at hand the Principle of *lex mitior* must be applied. This principle whereby a criminal law applies as soon as it comes into force if it is more favourable to the accused is a fundamental principle of any democratic regime. This principle also applies to anti-doping regulations. (see also CAS 24/128, judgement of 5th January 1995).

VI CONCLUSION

18. Ms. Corrie Clark may have committed a doping offence by having taken caffeine in a quantity not permitted, when she competed on 14 August 2003.

However, according to the principle of *lex mitior which must be applied* she cannot be sanctioned in no case as caffeine since 1st of January 2004 is not any more on the list of prohibited substances.

Harm Beyer

Peter Kerr

Toshiro Ueyanagi

Signed on behalf of all three Panel Members

Harm Beyer