Tribunal Arbitral du Sport
Court of Arbitration for Sport

CAS 2013/A/3170 Omar Andres Pinzon Garcia v. Federación Colombiana de Natación

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Prof. Richard H. McLaren, Barrister in London, Ontario, Canada

Arbitrators: Jeffrey G. Benz, Attorney-at-law in Los Angeles, California, U.S.A. and London, UK

Guillermo Cabanellas, Attorney-at-law in Buenos Aires, Argentina

in the arbitration between

Omar Andres Pinzon Garcia, Bogotá, Colombia.

Represented by Howard L. Jacobs, Attorney-at-law, Westlake Village, California, U.S.A.

Appellant

and

Federación Colombiana de Natación, Santiago de Cali, Colombia

Represented by Pedro Perez and Edgar Ivan Ortiz Lizcano, Edificio Loteria del Valle, Cali, Colombia

Respondent

I. PARTIES

1. Omar Andres Pinzon Garcia ("Pinzon", "Appellant", or the "Athlete") is a three-time Olympic swimmer from Colombia. In addition to competing in the 2004, 2008 and 2012 Olympic Games, he swam collegiately for the University of Florida in Gainesville, Florida, where he continues to live and train. His highest rank was 10th in the World in the 200 meter backstroke.

2. The Federación Colombiana de Natación ("FECNA') is the national swimming organization in Colombia. FECNA is a member of the Fédération Internationale de Natation ('FINA'), the international governing body responsible for the worldwide administration of the sports of swimming, diving, water polo, synchronized swimming and open water swimming.

II. FACTUAL BACKGROUND

A. Background Facts

3. Below is a summary of the relevant facts and allegations based on the filed written submissions, pleadings and evidence adduced at the hearing. Additional facts and allegations found in the written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Panel has considered all the facts, allegations, legal arguments and evidence duly submitted in the present proceedings, it refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning.

4. On 10 November 2012, the Athlete provided an in-competition sample while competing at the Colombian National Sporting Games.

5. On 13 November 2012 the sample was sent to the Laboratorio de Control al Dopaje Coldeportes Nacional Registro del Laboratorio (the "Lab") in Bogota, Colombia. The Lab returned an Adverse Analytical Finding ("AAF") for the presence of cocaine ("COC"). In particular, the Lab reported a positive for the presence of cocaine's primary metabolite Benzoylecgognine ("BZE") and its secondary metabolite Methylecgognine ("EME").

6. The Lab Documentation Package produced to the Athlete's counsel only provided the screening result for the secondary metabolite EME and cocaine (Screening I).Screening III for the primary metabolite BZE was not included. Following repeated requests by CAS counsel on behalf of the Panel and directions to translate documents into English, the Respondent produced a single-page document that purports to be the screening for the primary metabolite BZE.

7. The "A" confirmation analysis of the sample conducted by the Lab confirmed the presence of the parent drug cocaine and the secondary metabolite EME. The Lab chose not to perform an "A" sample confirmation analysis for the primary metabolite BZE, explaining that it did this because of the "unavailability of the LC/MS testing equipment". When the "B" sample analysis to confirm the "A" sample analysis was performed, the Lab again omitted the analysis for BZE.

8. The Anti-Doping Commission for the XIX National Sporting Games held a hearing regarding the matter. On 28 November 2012 the Anti-Doping Commission found that the Athlete did not have a Therapeutic Use Exemption ("TUE"); the sample taking process was carried out in accordance with the international sample taking standards; and the sample analysis was carried out in accordance with the laboratory standards.

B. Proceedings before the FECNA Disciplinary Commission

9. In addition to the hearing before the Anti-Doping Commission, a two day hearing was held before FECNA's Disciplinary Commission (the "DC"). During the course of that hearing the Lab director testified, notably and unusually, behind closed doors. The Athlete and his counsel were excluded from this aspect of the procedure at that time.

10. At the hearing, the DC reviewed the report of the Anti-Doping Commission for the XIX National Sporting Games, the Laboratory Documentation Package from the Lab, as well as documentary evidence provided by the Athlete, including: documents from Arcpoint Labs in the United States regarding cocaine; documents relating to the ingestion of cocaine from SIPLAS Diagnostic Medicine Centre; and a detailed report regarding the Athlete from Unitox, including the Athlete's clinical and medical history. In addition to the physical evidence, the DC heard testimony from Dr. Fernando Florez Pinzon, Dr Camilo Uribe Granja, Dr Gloria Gallo Isaza, the athlete's coaches Sergio Aristizabal Gomer and Jairo Antonio Lizundia Diaz, and Mr. David Salo, head coach from the University of Southern California.

11. On 5 April 2013, the DC held that the Athlete had committed an Anti-Doping Rule Violation ("ADRV") and sanctioned him with a two (2) year period of ineligibility from all regional, national and international competitions of the official calendar of the FECNA as of 10 November 2012, the date on which the sample was collected.

12. The DC further held that if the preliminary decision were not appealed within the time limit established for such purpose, the decision would be final.

13. Pinzon appealed the 5 April 2013 preliminary decision of the DC on 17 April 2013. On 22 April 2013, the DC denied the appeal on the basis that it was not timely, and determined that the 5 April 2013 decision would become final. The Athlete received notification of the FECNA's final decision on 23 April 2013.

14. It is this decision that is the subject matter of this appeal.

III. Proceedings before the Court of Arbitration for Sport

15. On 13 May 2013, the Athlete timely filed his Statement of Appeal. In addition to his Statement of Appeal, the Athlete also sent a request for an extension of the time limit for the filing of the appeal brief and a request to FECNA asking that they produce the following documents:

- The LC/MS data from "Screen III" as referenced at page 12 of the Laboratory Documentation Package for sample number 2757281;
- The concentration of cocaine and methylecgognine in the positive control sample(s) for the testing conducted on sample number 2757281; and

- The Laboratory's Standard Operating Procedure for its test for cocaine.

16. On 19 June 2014, CAS suspended the time limit for the filing of the appeal brief until the issuance of a decision on the Appellant's foregoing procedural requests by the Panel to be constituted.

17. By 17 July 2013 the Appellant paid his share of the costs. The Respondent, despite being the national governing body of the sport of swimming, declined to pay its share of the advance of costs. The Athlete, therefore, had to advance the entire sum of costs.

18. On 31 July 2013, the parties were informed that the Panel was constituted as follows: Prof. Richard H. McLaren, President, Mr Jeffrey G. Benz, as arbitrator appointed by the Appellant; and Mr Guillermo Cabanellas, as the arbitrator appointed by the President of the CAS Appeals Arbitration Division in lieu of the Respondent.

19. On 9 August 2013, as the Respondent had not provided any of the documents requested by the Appellant's counsel, CAS ordered the Respondent to produce, within 10 days, all of the documents requested.

20. On 28 August 2013, noting the Respondent's failure to produce the documents or otherwise respond, CAS granted the Respondent an additional and ultimate deadline of one week from receipt of the letter for Respondent to produce all of the documents requested. In addition to this letter, CAS simultaneously wrote to FINA and requested that FINA assist in obtaining the Respondent's compliance with the order.

21. On 2 September 2013, FINA asked the Respondent to comply with the CAS request.

22. On 5 September 2013, the Respondent wrote to CAS advising that it would produce all of the requested documents, but requested a brief extension of time to do so.

23. On 5 September 2013, the Respondent produced a document in Spanish and on 7 September 2013, the Respondent produced another document also in Spanish.

24. On 17 September 2013, CAS wrote to the Respondent advising that it considered that the Respondent had still not complied with the discovery order, as the Respondent had failed to provide the Lab's Standard Operating Procedure ("SOP") for its test for cocaine. The CAS ordered the Respondent to produce the SOP by no later than 20 September 2013, or in the absence of same, explain why it could not do so.

25. On 26 September 2013, CAS wrote to the parties advising that it believed the Respondent had now produced, on 19, 23 and 24 September 2014, the SOP, provided the Athlete with copies of same and invited him to submit his appeal brief within 15 days.

26. On 7 October 2013, the Athlete wrote to the CAS requesting additional time to submit his Appeal Brief, citing various reasons, including the lack of cooperation by Respondent.

27. On 7 and 9 October 2013, FECNA produced additional documents by email. Those documents were provided to the Athlete on 11 October 2013.

28. On 11 October 2013, the Athlete wrote to the CAS objecting to the manner of document production and requested a suspension of the time limit for the filing of the appeal brief. In particular, the Athlete noted that the documents were produced in Spanish only, and that FECNA had now sent two different versions of Manual Screening I part 2.

29. On 21 October 2013, CAS directed FECNA to confirm which set of documents was responsive to the original 9 August 2013 Discovery Order and invited the Athlete to submit his appeal brief within 15 days from receipt of the English translation of the documents submitted by the Respondent.

30. On 30 October 2013, CAS wrote to the parties advising that the Respondent had failed to respond to the tribunal's correspondence of 21 October 2013 and that accordingly, CAS would, as announced, consider the second set of documents to be the responsive documents.

31. On 14 November 2013, the Athlete wrote to CAS and advised that it appeared as though FECNA had still not produced two of the three documents requested. In particular, the Respondent had failed to provide the LC/MS data from Screen III; and the SOP. The Appellant therefore requested a new suspension of the time limit for the filing of the appeal brief.

32. On 15 November CAS, wrote to the parties and ordered FECNA to produce within one (1) week, the Screen III and the SOP, or in the alternative, to indicate where in the documents produced to date the relevant information was, or to confirm that it did not exist. The parties were also informed that the time limit for the filing of the appeal brief was suspended and were requested to sign and return a copy of the Order of Procedure within the same deadline. The parties were furthermore invited to state within 3 days whether they were requesting the holding of a hearing in this case.

33. On 22 November 2013, counsel for the Athlete signed and returned the Order of Procedure and asked the permission to express his position regarding the holding of a hearing at the time of the submission of his appeal brief.

34. On 27 November 2013, CAS wrote the parties advising that FECNA had produced, on 25 November 2013, additional documents and a letter of explanation. The letter of explanation was written in Spanish; accordingly, CAS requested a translation of same.

35. On 4 December 2013, CAS was provided the English translation of FECNA's letter.

36. On 5 December 2013, the Athlete wrote to CAS and noted, *inter alia*, that upon review of the additional documentation, it appeared as though there was only one single new page contained within same. A review of the documentation, according to the Athlete, made it clear that the SOP had still not been produced. The Athlete suggested that because it appeared clear that FECNA would not comply with the order, he would submit his Appeal Brief on or before 23 December 2013.

37. On 11 December 2013, CAS wrote to the parties and directed Pinzon to submit his Appeal Brief by 23 December 2013, and provided FECNA with an opportunity to respond to Pinzon's 5 December 2013 letter. The CAS Court Office informed the parties that the Panel would be available for a hearing on 10 or 12 February 2014.

38. In a letter dated 17 December 2013, the Respondent wrote to the CAS clarifying its letter of 27 November 2013. The Respondent stated for the first time that it was the responsibility of the Lab to produce the documentation requested by the Athlete, and not FECNA's responsibility.

39. On 23 December 2013, the Athlete submitted his Appeal Brief. In his Appeal Brief, the Athlete designated that in addition to himself, he intended to call the following witnesses to be heard by the Panel:

- Ron Grenier, polygraph examiner;
- Paul Scott, President of Scott Analytics Inc., and former Director of Client Relations at the UCLA Olympic Analytical Laboratory in Los Angeles, California; and
- Bruce A. Goldberger, Professor in the Department of Pathology, Immunology and Laboratory Medicine, University of Florida College of Medicine, and Board-certified forensic toxicologist.

40. By letter of 27 December 2013, delivered to the Respondent on 2 January 2014, the Respondent was invited to submit its answer within twenty days and the parties were requested to book the dates of 10 and 12 February 2014 for the holding of a possible hearing in New-York.

41. On 13 January 2014 and considering the Appellant's request to hear witnesses, the Panel invited the parties and their witnesses to a hearing to be held in New-York on 12 February 2014.

42. Further to a request from the Respondent, the Panel informed the parties, by letter of 17 January 2014, that it had the right, but not the obligation, to submit an answer and to appear at the hearing and underlined that in case of failure and/or absence of the Respondent, the Panel would proceed with the hearing and issue an award.

43. The Appellant sent its list for attendees at the hearing on 21 January 2014.

44. On 27 January 2014, the Respondent informed the Panel that it would not appear at the hearing because of lack of human resources and submitted a signed copy of the Order of Procedure and of the Answer, in English, but with several exhibits in Spanish. The Appellant raised an objection to the admissibility of various Spanish-language attachments provided by FECNA. The Appellant also objected to the fact that the Answer brief was not filed by 22 January in accordance with the CAS Code timeline for filing of an Answer.

45. On 6 February 2014, the Panel ruled that the Answer brief and of the related documents which were sent too late and not in conformity with the CAS Code and would not be admitted as part of the proceedings in this matter. The Panel furthermore reminded the Respondent that it had the opportunity to attend the hearing either in person or by Skype/telephone conference.

A. Hearing

46. A hearing took place commencing at 9:30 a.m. and continuing until 2:30 p.m.in New York City on 12 February 2014 at The Cornell Club, 6 East 44th Street, New York. All the members of the Panel were present as was Brent Nowicki, CAS Counsel. Neither any objection as to the constitution and composition of the Panel nor any other procedural issues were raised.

47. Attending at the hearing were: the Athlete, his counsel Mr. Jacobs and Ms. Pineros Alejandra, an observer. Appearing as witnesses by conference telephone were expert witnesses Ron Grenier, Paul Scott and Bruce A. Goldberger.

48. The Respondent elected to not appear at the hearing and declined to take up the invitation of the Panel to participate by way of video conference.

49. The witnesses heard by the Panel were invited by its President to tell the truth subject to the consequences provided by Swiss law. They were all examined in chief by the Athlete's counsel and questioned by the Panel.

50. The parties had ample opportunity to present their cases, submit their arguments and answer the questions posed by the Panel. After final submissions the President closed the hearing and reserved the Panel's final award. All the evidence that had been admitted into the arbitration process was considered and has been carefully considered even if it has not been summarized herein.

51. No party raised prior to, at the hearing or thereafter any objection with the Panel in respect of their right to be heard and to be treated equally in the arbitration proceeding.

52. Following the hearing, by letter dated 13 February 2013, the parties were invited to make a written submission on their legal fees and costs. On 24 February 2014, the Appellant filed his submission; the Respondent did not make a submission.

IV. Submissions of the Parties

(i) For the Athlete

53. The Athlete's submissions, in essence, may be summarized as follows:

- Both the internal and external Chain of Custody of the samples is not intact. In particular:

  - The Athlete submits that there is no documentation or information provided as to where the Athlete' sample was kept between 10 November 2012 and 13 November 2012. This is a violation of WADA Technical Document 2009LCOC ("TD2009LCOC").

  - TD2009LCOC provides that the external record is initiated at the collection site to ensure that the samples and the results generated by the Lab can be unequivocally linked to the Athlete.

- It is further submitted that the Laboratory Documentation Package reveals several irregularities and gaps in the Chain of Custody of the Sample and Aliquots within the Lab. In particular:
  - The screening sample was aliquoted on 15 November 2012, while the screening analyses took place between 16 November 2012 and 20 November 2012. There is no documentation establishing the location of the Aliquots after that time;
  - The documentation also shows that the "A" confirmation sample was analyzed on 18 November 2012, but there is no documentation showing when the "A" confirmation was aliquoted, by whom it was aliquoted, the identity of the individual(s) preparing the Aliquot(s), or the individual(s) obtaining the Aliquot(s) for analysis.

- The test method utilized by the Lab to detect the presence of cocaine is not the standard test for cocaine:
  - WADA accredited labs generally test for BZE, the primary metabolite of cocaine. The Respondent's response that this was not reported because a particular instrument was not available for the confirmation analysis at the time is inconsistent with the evidence it has provided. Furthermore, the documentation provided by the Respondent to substantiate its positive contains a Spanish word "suspositivas" on it. This document is more consistent with a confirmation analysis than a screen analysis.
  - The failure of the Respondent to provide the Lab's method file for Screen III makes it impossible to confirm that the documents provided are in fact the Screen III analysis requested as a production demand.
  - The failure of FECNA to produce the Lab's SOP prevents the Athlete from properly answering the case against him and as such this should not be held against him. The Appellant relies on the case *CAS 2009/A/1752 & 1753* where it was stated: *"in consequence of Laboratory's refusal [to provide documents], the Panel holds that it cannot place the Appellants at a procedural disadvantage in bearing their burden of proof, where the evidence requested is critical to their defence [...]"*

- The results of the Lab are inconsistent with biology. In particular, the test results do not follow typical excretion patterns for cocaine and its metabolites. In a peer-reviewed analysis, the results showed that for all subjects and for all methods of administration of cocaine, the concentration level of the EME metabolite was greater than the concentration of the parent drug, cocaine. In contrast to this study, the Athlete's test reveals a concentration level of cocaine that is approximately twice the level of EME.

- In addition, the Athlete produced the results of a polygraph examination he voluntarily attended. During the examination, the Athlete denied using any form of cocaine in the last two years and was found to have been answering truthfully.

54. *The Athlete requested that the CAS rule as follows:*

- *Declare that Appellant's appeal should be upheld;*
- *Declare that the 2 year sanction issued by the FECNA Disciplinary Commission bet set aside;*
- *Reinstate any results that were set aside by the FECNA Disciplinary Commission;*
- *Award the Appellant reimbursement from Respondent FECNA for all arbitration costs that the Appellant advanced for the costs of the arbitration (CHF 32,000) and all translation costs; and*
- *Award the Appellant a contribution toward his legal costs in this Appeal.*

(ii) <u>For the Respondent</u>

55. The Respondent filed its Answer brief late and without full English language translations of the related exhibits, in nonconformity with the requirements previously provided to the Respondent by the Panel. The Panel ruled the brief to be inadmissible.

56. The Respondent declined to attend the hearing based upon self-declared financial exigencies and did not take up the Panel's offer to participate in the hearing by video conference call.

V. ADMISSIBILITY

57. Article R49 of the Code provides as follows:

In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late.

58. Rule 13.6 of the FINA Doping Control Rules provides that "*The deadline to file an appeal to CAS shall be twenty-one (21) days from the date of receipt of the decision by the appealing party and FINA.*"

59. The Athlete received notification of the DC's preliminary decision on 6 April 2013; and received notification of FECNA's final decision regarding the review on 23 April 2013. The Athlete filed his Statement of Appeal on 13 May 2013. Accordingly, the appeal is timely.

VI. JURISDICTION

60. Article R47 of the Code provides as follows:

An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the

Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body.

61. Rule 13.1 of the FINA Doping Control Rules provides that "*Decisions made under these Anti-Doping Rules may be appealed as set forth below in DC 13.2 through 13.4 or as otherwise provided in these Anti-Doping Rules. Such decisions shall remain in effect while under appeal unless the appellate body orders otherwise. Before an appeal is commenced any post-decision review provided in these Anti-Doping Rules must be exhausted.*"

62. Rule 13.2.1 provides that "*In cases arising from participation in an International Competition or in cases involving International-Level Competitors, the decision may be appealed exclusively to the Court of Arbitration for Sport ("CAS") in accordance with the provision applicable before such court.*"

63. Pinzon is an International Level Competitor in accordance with the meaning of the term. No party ever disputed the jurisdiction of the Panel, which was expressly confirmed by the signature of the OP. As such, the Panel concludes it has jurisdiction to hear and determine the dispute.

VII. Applicable Law

64. Article R58 of the Code provides as follows:

The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.

65. The in-competition test was conducted on 10 November 2012. As such, the regulations applicable to the present case are FINA's 2009-2013 Doping Control Rules.

66. The parties have not agreed on the law applicable to the dispute, but the Appellant is an international level athlete who did not dispute being subject to the FINA rules. FECNA is affiliated to FINA and used both the FINA and WADA Code provisions in its disciplinary decision. Therefore, the Panel deems the rules and regulations of FINA shall apply primarily and Swiss law shall apply complementarily.

VIII. Merits

67. Article R57 of the CAS Code empowers the Panel to hear the case *de novo*. Therefore, any procedural defects that arose in the bodies below CAS including FECNA's refusal to hear the appeal of Pinzon are not the subject of this appeal. This Panel has the full power to review the facts and the law.

A. Chain of Custody

68. The external chain of custody, meaning the chain of custody process before the sample arrived at the Lab, began with the collection of the sample on 10 November 2012 as an in-competition sample. There is no documentation or information provided as to: (1) how, by whom and at what time the sample was collected; (2) how long the Athlete was in the doping control procedure; or (3) where the sample was kept and by whom and how it was stored between the date of collection and shipment to the Lab on 13 November 2012.

69. There is no information from the Doping Control Officer ("DCO") involved in sample collection and processing for delivery of the sample to the laboratory. In the usual course of a doping hearing that person would testify as to the procedure followed and would verify the documentation completed at the time of the giving of the sample. There is no doping control information at the point of collection sent to the swimming federation filed with the athlete's signature on it. The only documentation from the doping control process before the Panel is the copy of the Chain of Custody document which arrives in the box in which the samples are shipped. That document does not identify the Athlete or confirm that the number inscribed on the "A" & "B" bottles (being 2757281) received by the Lab and given their control number (35601) is in fact the one assigned to the Athlete and then affixed the tops onto the bottles. All of the information regarding what took place during the doping control process and the doping control documentation, with the exception of what is mentioned above, is not before the Panel.

70. The Panel concludes that the sample collection process was not proven by the Respondent and the sample was unaccounted for during this three day time period. Therefore, WADA TD2009LCOC has been breached, making it uncertain whether the sample and its results can be unequivocally linked to the Athlete. On these grounds alone this appeal could be allowed and the decision below set aside.

71. The external chain of custody would also have provided information such as the time the Athlete was contacted for a doping control test and the period of time the Athlete was with a chaperone before the sample was obtained, which can both have implications for evaluating the analytical results. Such information is important given the Athlete's case because only a small part of cocaine is eliminated in the urine as the parent compound COC. The amount of BZE and EME, the two metabolites, is eliminated in much larger amounts and therefore detectable for a longer period of time. The analytical results of the Lab show a concentration level of the parent drug cocaine significantly exceeding the concentration level of the secondary metabolite EME. The absence of the documentation from the Respondent proving the external chain of custody and the timing of the doping control procedure affects in a very material way the evaluation of the Lab's AAF. See the CAS 2009/A/1930 &1926 case as an illustration of science backing up the explanation of an athlete. The absence of this information is both a breach of the TD2009LCOC and further grounds for allowing the appeal and setting aside the decision of FECNA. The complete absence of an external chain of custody is a fundamental distinguishing feature between this case and that of CAS 2011/A/2612 (were evidence was presented on the subject of the external chain of custody).

72. The internal chain of custody within an accredited WADA laboratory is described in great detail in contrast to the external chain. The TD2009LCOC requires *"a continuous record of individuals with custody of the Samples or Sample Aliquots"*. There are two difficulties with the Lab documentation. First, there is no documentation of what was done with the screening samples after they were aliquoted on 15 November 2012 and the screening analysis of 20 November 2012. There is also no documentation showing the identity of the individuals who prepared the aliquots or the individuals who obtained the aliquot for analysis. Second, there is no documentation showing when the "A" confirmation was aliquoted, by whom it was done, the identity of the individual who prepared the Aliquots or the individuals who obtained the Aliquots for analysis. All these points are deficiencies in the internal chain of custody.

73. The expert evidence of Mr. Scott sums up the situation when he states that the documentation provided leaves either the chain of custody of the bottles lacking in proper recording of transfers and storage; or, alternatively that the chain of custody of the Aliquots is missing, which would record the transfers and storage of the Aliquots. He testified that from the evidence that is provided and only partially translated into English there is no ability to determine what precisely is going on regarding the internal chain of custody for the bottles containing the urine or the Aliquots of urine.

74. The Panel concludes that the evidence provided suggests that there may well have been open Aliquots the possession of which by various Lab personnel is unknown. Therefore, the suggestion that something happened to the urine sample in the Lab is a real possibility.

75. Such violations of the TD2009LCOC are a violation of the WADA International Standard for Laboratories ("ISL"), which when it could affect the analytical result such as where and with whom an open Aliquot might be, means that the burden shifts to the Respondent FECNA to prove that the violations in the Lab did not cause the AAF. In failing to appear and call a witness from the Lab to potentially provide explanations and having had its Answer brief disallowed, the Respondent has no possibility of satisfying this burden. Thus, the internal chain of custody, like its external counterpart, breaches the standards of the TD2009LCOC. These grounds alone could permit the Panel to grant the appeal and set aside the decision of the FECNA DC below.

B. The SOP for the Cocaine Test

76. The primary metabolite of cocaine is BZE and not EME. WADA accredited labs generally test for the parent drug cocaine COC as well as the primary metabolite BZE. The Lab in this matter did not test for BZE. Furthermore, despite the fact that repeated requests were made by this Panel for the Respondent to produce the relevant SOP for cocaine they have never done so. Indeed, the Panel asked for the assistance of FINA and even with their intervention there was never compliance with the Panel's order to produce the SOP. Therefore, it is impossible for the Appellant to verify if the Lab followed its own SOP as it is required to do under the WADA ISL para. 5.2.6.3. The expert testimony of Mr.Goldberger suggests that most laboratories would not declare a positive result without the BZE screen.

77. The majority of the screening analysis for the "A" sample was run on the 16th and 17th of November in 2012. On 25 November 2013, following repeated requests by the Panel through the CAS Court Office; a single page document was submitted to the Appellant purporting to be the "Screen III" analysis which indicates it was run on the 19th of November 2012. This is the document which the Appellant doubts is what it is supposed to be. The Lab Documentation Package shows that the "A" confirmation analysis was run on 18November 2012, which means that the screening analysis (Screen III) was run after the "A" confirmation analysis of the 18th. The reason for doing so is unexplained by the Lab and forms part of the Appellant's suspicion regarding the very late production of the Screen III analysis. The evidence of both experts Mr. Scott and Mr. Goldberger is that such a situation is certainly not the usual laboratory practise. Furthermore, the testimony of the Lab Director before the DC was done in closed session without the presence of the Athlete or his lawyer at the time and any evidence obtained in that part of the hearing forms no part of the decision that is appealed. Therefore, the Panel does not even have the benefit of knowing what was before the DC body of first instance.

78. The Panel concludes that it is a real possibility that the Lab did not follow its SOP for cocaine. Therefore, the Panel cannot enforce against the Appellant the presumption that the Lab has conducted its sample analysis in accordance with the ISL. See CAS 2009/A/1752 & 1753. The possibility of not following the SOP is aggravated by the breach of the external chain of custody of the sample and by the problems in the internal chain of custody discussed above.

79. The Athlete told the Panel he did not use cocaine on the day of the test and that, indeed, he has never used the substance. The expert polygraph evidence before the Panel is of some value to conclude that the Athlete is telling the truth. The Panel had the benefit of hearing the Athlete and questioning him and concludes of its own volition that the Athlete is truthful when he says he did not use cocaine that day, or ever. Given the possibility of some manipulation of the sample before its arrival at the Lab combined with the Respondent's unwillingness to co-operate in this proceeding and explain legitimate matters raised in this award leaving it open that something went wrong in the Lab, the Panel concludes that the Lab does not have the benefit of the presumption set out in the WADA Code at 6.7.1. Therefore, the Respondent has the burden to establish that the departures did not cause the AAF. The Respondent and a representative of the Lab did not appear before the Panel or take part in the hearing. Furthermore, the Respondent's Answer brief has been ruled to have not been submitted on time. Therefore, there is absolutely no explanation or evidence relating to the fulfilment of the burden on the Respondent. Again for this reason alone the decision appealed from can be set aside.

C. Are Test Results Inconsistent with Biology?

80. An article in the Journal of Analytical Toxicology[1] demonstrates that the parent drug cocaine is excreted in the urine more rapidly than its metabolites. The two metabolites of cocaine are excreted in much larger amounts and therefore can be detected for a longer period of time after administration. The route or method of administration may

[1] Cone et al., "*Urine Testing for Cocaine Abuse: Metabolic and Excretion Patterns Following Different routes of Administration and Methods For Detection of False-Negative Results*" Journal of Analytical Toxicology, Vol. 27 (Oct. 2003), pp. 386-406.

also affect the excretion levels. The article indicates that in some cases cocaine concentration can be more than EME (a ratio around 1.5). Such a situation would correspond to a urine sample collected less than two hours after the intake of cocaine.[2]

81. The Athlete informed the Panel that he was notified that he would be subject to doping control after the 200 meter fly. From that time forward he was under chaperone supervision. He was not taken to the doping control centre until after he had competed in the following 200 meter event in backstroke. He estimates that including warm down after the back event at least an hour and a half had elapsed. He estimates that he would have been in the doping control centre for 20 to 30 minutes. Therefore, given that any supposed administration would have to have been taken before the fly event, the administration would be outside the two-hour window referred to in the article. The article demonstrates why the information surrounding the external chain of custody is so important in this case. However, it is not part of the record here.

82. The analytical results in this case reveal a concentration level of the parent drug cocaine at nearly double the concentration level of the metabolite EME. In contrast, in the positive control used by the Lab the concentration level of EME is approximately 10 times greater than the concentration of the parent drug cocaine. The "B" sample reflects the same analytical results. There is no known scientific study that would support the biological excretion pattern that appears to be shown in the Appellant's urine sample analysis. The scientific evidence produced by the Appellant would suggest that these test results are virtually impossible in a human urine sample after the injection or other methods of ingestion of cocaine. The fact that the sample was never tested for BZE makes it even more difficult to rely upon the analytical result of the Lab. Therefore, the Panel concludes that the Lab result can only be explained by lab error, manipulation of the sample or adulteration of the sample. This conclusion constitutes the third and final reason for setting aside the decision appealed from.

D. Conclusion

83. The Panel concludes that there are three separate and independent reasons for upholding this appeal and setting aside completely the decision appealed from. While any one of those reasons could support that decision, the cumulative effect of all three reasons makes the case to set the decision aside overwhelming. The consequence is that there is no anti-doping rule violation proven in this proceeding and the Appellant has not breached the doping control rules of his sport.

84. In summary, the Panel concludes that:

i. It is not proven to the comfortable satisfaction of the Panel that an AAF from the WADA accredited Lab has been established by the analytical result arising from the testing of the Athlete's sample collected on 10 November 2012;

ii. The failure to prove the existence of an AAF means that there can be no anti-doping rule violation; and

iii. The appeal is upheld and the decision of the FECNA DC is set aside and replaced with this decision.

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[2] In the article the sample was collected at 1.2h and 1.4h after the intravenous or smoked administration.

IX. Costs

85. Article R64.4 of the CAS Code provides: *"At the end of the proceedings, the CAS Court Office shall determine the final amount of the cost of arbitration, which shall include the CAS Court Office fee, the administrative costs of the CAS calculated in accordance with the CAS scale, the costs and fees of the arbitrators calculated in accordance with the CAS fee scale, a contribution towards the expenses of the CAS, and the costs of witnesses, experts and interpreters. The final account of the arbitration costs may either be included in the award or communicated separately to the parties."* In this case the Appellant was completely successful and the Respondent did not pay at the outset its share of the advance on costs nor did it co-operate with the Panel, or attend the hearing.. In light of the outcome of this case the Panel determines that the Respondent shall bear the totality of the arbitration costs, to be determined in a separate letter from the CAS Court Office.

86. Article R64.5 of the Code provides :...*As a general rule, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular , the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the complexity and outcome of the proceedings, as well as the conduct and the financial resources of the parties".* In this case the Respondent never advanced its share of the arbitration costs. It never complied with the many repeated requests to file information in English and not Spanish and failed to produce requested documents or make timely submissions. The Respondent then elected not to proceed to be present at the hearing, to call any evidence; nor to even reply let alone take up the offer of the Panel to participate in the hearing in this matter, even by video-conference. The Panel finds this conduct to be well below the standard expected of bodies involved in the process of sanctioning athletes for anti-doping violations.

87. In using our discretion to determine the costs Article R64.5 directs us, aside from determining the conduct to assess the financial resources of the Respondent. The Respondent has self-declared that its actions are caused by lack of resources. However it had the resources to hold a two day disciplinary hearing. Respondent could have participated by telephone or video conference call but never even replied to that offer from the Panel. We do not accept that they have reduced financial circumstances merely on their so stating. Their uncooperative nature forced the Panel to seek the assistance of the international federation FINA. However, even that intervention was not successful in achieving the satisfaction of the production order for the SOP. When viewing the financial resources of Respondent compared to those of the Athlete, there is little doubt that the Athlete has fewer resources available but was required to bear the full burden of this proceeding to clear his name. The result is that the Respondent has put the Appellant to very significant costs many of which could have been avoided if the Respondent had participated in the proceeding. The language of the Rule suggests that costs ought to be awarded as a contribution and not in full. In view of the actions of the Respondent in this case, it is justified to warrant an award of significant costs. Accordingly, having considered the costs submissions of the Appellant requested to be submitted after the hearing, the Panel has determined that Respondent shall pay to Appellant the amount of USD $20,000.00 constituting a reasonable contribution towards the sum of the Appellant's legal fees and costs related to this proceeding.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Omar Pinzon on 13 May 2013 is upheld.

2. The final decision of the FECNA Discipline Commission dated 22 April 2013 confirming its preliminary judgement of first instance dated 5 April 2013 is set aside.

3. Any results, medals or prize money and diplomas that may have been set aside by the FECNA Disciplinary Commission are to be reinstated.

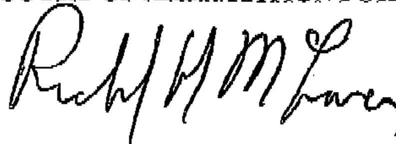
4. The costs of the arbitration, to be determined and served to the parties by the CAS Court Office, shall be borne entirely by the Respondent FECNA.

5. FECNA is ordered to pay to Omar Pinzon a total amount of USD $20,000.00 as contribution towards the costs and expenses incurred in connection with this arbitration proceeding.

6. All other motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland
7 April 2014

THE COURT OF ARBITRATION FOR SPORT



Richard H. McLaren
President of the Panel