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INTERNATIONALE
DE NATATION

**FINA Doping Panel 03/15
14 September 2015**

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FINA Doping Panel

comprised of

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In the proceedings against

the swimmer **Kylie Palmer** affiliated to the Swimming Australia Ltd

represented by:

Mr. Stephen Meade,
Partner, K&L Gates,
Melbourne, Australia

Mr. Ben Ihle, Barrister
Melbourne, Australia

I. THE PARTIES

1.1 The FEDERATION INTERNATIONALE de NATATION (FINA) is the International Federation governing disciplines related to swimming. FINA has established and is carrying out, *inter alia*, a doping control program, both for in-competition as well as out-of-competition testing.

1.2 The SWIMMING AUSTRALIA LTD. (SAL) is a member of FINA. SAL is required to recognize and comply with FINA's anti-doping rules which are set out in the FINA Doping Control Rules ("FINA DC"). The FINA DC is directly applicable to, and must be followed by,

Competitors, Competitor Support Personnel, coaches, physicians, team leaders, and club and representatives under the jurisdiction of SAL.

1.3 Ms. Kylie Palmer is a twenty-five (25) year old elite international swimmer, a native of Australia. She has participated in numerous elite level swimming events and international competitions since 2006.

1.4 Ms. Palmer competed for Australia in the 2008 Beijing Olympic Games and in the 2012 London Olympic Games. She won an Olympic gold medal as a member of the 4x200m freestyle relay team at the Beijing Olympics and an Olympic silver medal as a member of the 4x200m freestyle relay team at the London Olympics. Additionally, she won a silver medal in the individual 200m freestyle at the FINA World Championships, Shanghai 2011 and won a silver medal as a member of the 4x200m freestyle relay team at the FINA World Championships, Barcelona 2013.

II. NATURE OF THE CASE

2.1 This case concerns the proper sanction for an adverse analytical finding for the prohibited substance furosemide (a specified substance) which was found in Ms. Palmer's 31 July 2013 urine sample collected at the FINA World Championships, Barcelona 2013 but which was not notified to Ms. Palmer until 13 April 2015 some twenty (20) months after her positive test.

2.2 The question in this case is whether Ms. Palmer should be found to have committed an ADRV and what, if any, sanction should be imposed as a result of the AAF from Ms. Palmer's 31 July 2013 urine sample.

III. INITIAL HANDLING OF ADVERSE ANALYTICAL FINDING

3.1 Ms. Palmer provided the following samples in connection with her participation in the FINA World Championships, Barcelona 2013:

a. a pre-competition blood sample on 25 July 2013 collected for the purposes of the Athlete's Biological Passport;

b. a urine sample collected by FINA on 31 July 2013 following completion of the individual 200m freestyle final; and

c. a urine sample and a blood sample collected by FINA on 1 August 2013 following completion of the 4x200m freestyle relay.

3.2 Ms. Palmer's 31 July 2013 urine sample was analyzed at the World Anti-Doping Agency (WADA) accredited laboratory in Barcelona, Spain on 2 August 2013, and reported to FINA as an adverse analytical finding ("AAF") due to the presence of the prohibited diuretic furosemide in the sample. The laboratory reported, "[t]he concentration of furosemide is extremely low (less than 10 ng/ml)."

3.3 On 3 August 2013 the AAF from the 31 July 2013 urine sample was brought to the attention of the FINA Doping Control Review Board ("DCRB").

3.4 On 5 August 2013, the Barcelona Laboratory conducted analysis on Ms. Palmer's blood sample provided on 1 August 2013, detecting no prohibited substances.

3.5 On 7 August 2013, the Barcelona Laboratory conducted analysis on Ms. Palmer's urine sample provided on 1 August 2013, detecting no prohibited substances.

3.6 On 3 September 2013, the FINA DCRB communicated to FINA its recommendation that "given the extremely low levels of the prohibited substance detected" that no further action be taken at this time and that the Barcelona Laboratory be requested to provide additional information concerning the sample analysis for review by the DCRB.

3.7 In November and December of 2013, Ms. Palmer was the subject of additional FINA doping control tests.

3.8 On 3 January 2014, the FINA DCRB formally recommended that "[no] further action be taken at this time. Target testing be performed on [Ms. Palmer] on at least three occasions."

3.9 FINA did not notify WADA in 2014 that FINA had decided not to move forward on the AAF from Ms. Palmer's 31 July 2013 test. Nor was Ms. Palmer advised in 2013 or in 2014 of her positive test.

3.10 On 5 October 2013, on 4 December 2013, and 15 December 2014 WADA sent email correspondence to FINA requesting the status of the results management of the AAF reported by the Barcelona Laboratory on the 31 July 2013 sample, and on 23 December 2014, WADA sent email correspondence to FINA inquiring why the case had been closed by FINA.

3.11 On 4 February 2015 FINA advised WADA that:

Ultimately it was the view of the DCRB that the interests of doping-free sport were not served by advancing a case involving a specified substance detected at very low levels and FINA [decided] to take no further action with this case other than to continue with further target testing of the athlete. All such tests have been negative.

3.12 On 13 March 2015 WADA appealed to the Court of Arbitration for Sport challenging FINA's decision not to bring forward an anti-doping rule violation (ADRV) based on the analysis of Ms. Palmer's 31 July 2013 sample.

3.13 On 4 April 2015 FINA staff sent an email to the Chairman of the FINA DCRB stating:

We have received a letter from WADA . . . confirming that FINA must proceed with the results management of the Furosemide's case involving the Australian swimmer. Once the swimmer is duly notified about this AAF, they will withdraw their appeal at CAS. Therefore we need to receive as soon as possible the new recommendation from the DCRB on his case.

3.14 On 10 April 2015 the FINA DCRB revised its recommendation concerning Ms. Palmer's 31 July 2013 sample, stating:

This result [should] be interpreted as an Adverse Analytical Finding (AAF) and the case be forwarded to the Doping Panel in the usual manner. The Doping Panel be specifically advised as to: the extremely low level found in the initial analysis; the absence of evidence of this substance in a subsequent analysis; the absence of evidence of other prohibited substances in either analysis; and, the negative results of subsequent target tests.

IV. PROCEEDINGS

4.1 By letters dated 13 April 2015, the FINA Executive Director notified Ms. Palmer and the Chief Executive Officer of SAL for the first time of the positive test from Ms. Palmer's 31 July 2013 sample (622 days prior).

4.2 On 15 April 2015, Ms. Palmer requested that FINA "advise why it has taken approximately 20 months to receive advice of my positive test."

4.3 On 15 April 2015, the FINA Executive Director responded:

Please be advised that initially FINA decided not to proceed further with the adverse analytical finding in a sample 2025262 given the concerns expressed by the FINA Doping Control Review Board (DCRB) as to the low levels of furosemide detected, the absence of this substance in a subsequent test, the absence of any other prohibited substance in the samples. Nevertheless, WADA after the review of this matter in 2015, filed an appeal to the Court of Arbitration for Sport in Lausanne, CAS (which is now suspended pending the outcome of the FINA proceedings) and requested FINA to reopen the case and to proceed with this adverse analytical finding as a potential violation of doping control rules. Consequently, we had no other choice as to follow the World Antidoping Code and WADA's decision in this matter.

4.4 By letter dated 15 April 2015, the Chief Executive Officer of SAL inquired from FINA "the reason for such a delay between the test and communication of the test results." On that same day the FINA Executive Director responded as follows:

Please be sure that I am as surprised as you that WADA nearly after two years after the collection of the sample filed an appeal to the Court of Arbitration for Sport in Lausanne, CAS (which is now suspended) and requested FINA to re-open this matter. Unfortunately, according to the WADA Code they are entitled to do so and therefore we had no other choice that to proceed accordingly.

For your information, 3 weeks ago there was the WADA Symposium held in Lausanne and Dr. Andrew Pipe, the FINA Doping Control Review Board (DCRB) Chairman, had discussions with the WADA representatives regarding this matter. Following those discussions, we have received a recommendation from the FINA DCRB to re-open this case.

4.5 On 19 May 2015, the B-sample of Ms. Palmer's 31 July 2013 sample was analyzed and it confirmed the presence of furosemide in her sample.

4.6 By letter dated 20 May 2015 Ms. Palmer and SAL were advised by the FINA Executive Director that Ms. Palmer's case would be forwarded to the FINA Doping Panel (the "FINA DP") for further consideration.

4.7 The FINA DP was formed pursuant to FINA Rule C 22.9.

4.8 On 28 May 2015, the Chairman of the FINA DP advised Ms. Palmer's representative, Mr. Stephen Meade, of the opportunity for a prompt hearing before the FINA DP to occur in June 2015.

4.9 By letter dated 1 June 2015, Ms. Palmer, through her counsel, requested additional time to advise the FINA DP as to whether she would request a hearing.

4.10 By letter dated 16 June 2015, Ms. Palmer, through her counsel, advised the Chairman of the FINA DP of her intent to accept a voluntary provisional suspension and to withdraw from participation in the upcoming FINA World Championships, Kazan 2015, Russia, although she had qualified to compete in the World Championships.

4.11 By letter dated 6 July 2015, the Chairman of the FINA DP requested that Ms. Palmer, through her counsel, advise whether she wished to have her case heard at a hearing.

4.12 By letter dated 10 July 2015, counsel for Ms. Palmer, wrote that he was unable to respond at that time as to whether she would request a hearing and advised that “[w]e will revert in relation to that matter as soon as the relevant investigations are concluded.”

4.13 By letter dated 14 August 2015, Ms. Palmer, through her counsel waived her right to a hearing and asked the FINA DP to consider her written submissions.

4.14 On 10 September 2105, the FINA DP issued its short decision in this matter finding that Mr. Palmer should receive a reprimand for her first anti-doping rule violation and that only the results she obtained on 31 July 2013, the date of her positive test, should be disqualified.

V. JURISDICTION AND APPLICABLE RULES

5.1 The jurisdiction of the FINA Doping Panel arises out of the following provisions of the FINA Rules: C 22.8, C 22.9 and FINA DC 8.1.

5.2 The applicable Rules in this case are the FINA Doping Control Rules in effect since 1 January 2009 (amended on the occasion of the FINA General Congress on 24 July 2009).

VI. LEGAL DISCUSSION

A. THE FACTS

The FINA DP has found that the following facts were established in this case:

6.1 The WADA accredited Barcelona Laboratory found furosemide in Ms. Palmer's 31 July 2015 sample and reported that "[t]he concentration of furosemide is extremely low (less than 10 ng/ml)."

6.2 Furosemide is a prohibited diuretic in Class S5 of the 2013 WADA Prohibited List and is therefore prohibited at all times, in and out of competition, pursuant to FINA DC 4.1.

6.3 Athletes subject to the WADA Prohibited List may not use Furosemide without a valid TUE.

6.4 Furosemide is a specified substance pursuant to FINA DC 4.2.1.

6.5 Although furosemide was reported to FINA as being present in Ms. Palmer's sample as early as 2 August 2013, Ms. Palmer did not receive notice of her AAF for furosemide until 13 April 2015, some twenty (20) months after her positive test.

6.6 Ms. Palmer asserted that she was unaware of what may have caused her positive test and that the failure to notify her of her AAF for such an extended period of time undermined Ms. Palmer's ability to conduct an investigation to ascertain the source of the furosemide in her sample.

B. THE LAW

6.7 The FINA Doping Control Rules are founded on the fundamental premise contained in FINA DC 2.1.1 that:

It is each *Competitor's* personal duty to ensure that no *Prohibited Substance* enters his or her body. *Competitors* are responsible for any *Prohibited Substance* or its *Metabolites* or *Markers* found to be present in their *Samples*.

6.8 Ms. Palmer failed to fully uphold her duty to prevent a prohibited substance from entering her body. She did not argue otherwise.

6.9 Consequently, Ms. Palmer must be sanctioned for her first anti-doping rule violation for the presence of furosemide in her sample.

6.10 For a specified substance, according to FINA DC 10.4 the sanction for a first violation can be "[a]t a minimum, a reprimand and no period of Ineligibility . . . and at a maximum, two years of Ineligibility."

6.11 In order to be entitled to the more lenient sanction treatment of FINA DC 10.4 for a specified substance, the athlete must "establish how a Specified Substance entered his or her body . . . and that such Specified Substance was not intended to enhance the Competitor's sport performance or mask the use of a performance enhancing substance."

6.12 In terms of lack of intent to enhance performance to justify a reduction the competitor “must produce corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sport performance or mask the Use of a performance enhancing substance.” FINA DC 10.4

6.13 The FINA DP concludes that the “extremely low” level of Furosemide found in the athlete’s sample, coupled with the absence of furosemide from tests on 25 July 2013 and 1 August 2013 bookending the athlete’s positive test from 31 July 2013 is sufficient corroborating evidence in this case to establish the absence of an intent to enhance or mask use of a prohibited substance.

6.14 As for establishing how the specified substance entered her body, Ms. Palmer is admittedly unable to do this. However, the fact that she was notified of her positive drug test over 20 months after her sample was given is a very significant factor which has undermined the prospect of her being able to meet this threshold burden.

6.15 Moreover, the late notice was entirely outside Ms. Palmer’s control and deprived her of the right guaranteed by FINA DC 8.1 “to be fairly and timely informed of the asserted anti-doping rule violation.”

6.16 Had FINA notified Ms. Palmer of her positive test in 2013, even as FINA was working out whether to proceed on the positive then Ms. Palmer could have commenced an investigation at a time where she might have had a better chance to discover the cause of her positive drug test.

6.17 Had Ms. Palmer been timely informed of her positive test in 2013 she may have had a far better opportunity to determine how

(and therefore establish how) the prohibited substance came to be in her body.

6.18 As a consequence, the FINA DP finds that the requirement of proving how the substance entered an athlete's body may be excused in these extraordinary circumstances where the anti-doping organization with results management responsibility knew that there was a positive drug test and still waited over 20 months to notify the athlete of the positive test.

6.19 The FINA DP considers that such a finding best balances the specified substance rule which recognizes that there are many substances such as furosemide which can result in an unintended anti-doping rule violation and therefore call for some leniency and the fact that by failing to notify Ms. Palmer of her positive test FINA potentially hindered her ability to discover the cause of her positive test.

6.20 The FINA DP notes that the fact that FINA could have notified Ms. Palmer of her positive test but chose not to do so, distinguishes this case from a situation where an athlete may later be found through re-testing to have used a prohibited substance. Every situation where there is a delay after sample collection in notifying the athlete of a positive test does not necessarily require that the athlete gets a lower burden. For instance, in a re-testing scenario there is no reason to balance the equities as the FINA DP has in this case because the anti-doping organization has not deprived an athlete of timely notice. (Further, when retesting for serious doping substances like anabolic agents and hormones there is not an issue because these substances do not entitle an athlete to specified substances treatment.)

VII. SANCTION

7.1 As explained above, where the specified substances rule applies the period of ineligibility for a first violation shall be “[a]t a minimum, a reprimand and no period of Ineligibility . . . and at a maximum, two years of Ineligibility.” FINA DC 10.4.

7.2 After evaluating the unique circumstances in this matter, the FINA DP believes a reprimand and no period of ineligibility is appropriate.

7.3 Pursuant to FINA DC 9 a positive test during an Event automatically leads to disqualification of all results achieved in the Event. Therefore, all results obtained on 31 July 2013 by Ms. Palmer are disqualified.

7.4 According to FINA DC 10.8 all competitive results obtained from the date of a positive sample through the commencement of any provisional suspension or ineligibility period shall, unless fairness requires otherwise, be disqualified.

7.5 The FINA DP concludes that pursuant to FINA DC 10.8 results after 31 July 2013 should not be disqualified because subsequent testing showed the furosemide was no longer in the swimmer’s system and therefore did not affect any subsequent results she achieved. Nor (unlike with use of a steroid or EPO) is there apparently any residual or lingering benefit to using furosemide after it has cleared the system. Consequently, “fairness requires otherwise” and Ms. Palmer’s subsequent competitive results should be upheld.

VIII. SUMMARY OF THE DECISION

8.1 Ms. Kylie Palmer receives a public reprimand and no period of ineligibility for her first anti-doping rule violation.

8.2 All results obtained by Ms. Palmer on 31 July 2013 are disqualified and any medals, points and prizes achieved on that date shall be forfeited. Fairness requires that all results obtained by Ms. Palmer after 31 July 2013 shall not be disqualified.

8.3 All costs of this case shall be borne by the SAL in accordance with FINA DC 12.2.

8.4 Any appeal against this decision may be referred to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland not later than twenty one (21) days after receipt of this judgement (FINA Rule C 12.9.3 and DC 13.6).

Robert Fox
Chairman

Farid Ben Belkacem
Member

William Bock, III
Member

Signed on behalf of all three Panel Members

A handwritten signature in black ink, appearing to be 'R. Fox', written over a horizontal line.

Robert Fox