

NATIONAL ANTI-DOPING PANEL

**IN THE MATTER OF PROCEEDINGS BROUGHT
UNDER THE ANTI-DOPING RULES OF
THE WELSH RUGBY UNION**

Before:

Mr Matthew Lohn (Chairman)

Mr Mark Hovell

Ms Lorraine Johnson

B E T W E E N:

UK ANTI-DOPING

National Anti-Doping Organisation

- and -

JOSEPH PHELPS

Respondent

FINAL DECISION OF THE NATIONAL ANTI-DOPING PANEL

1. Introduction

1. This is the final decision of the Anti-Doping Tribunal ("the Tribunal") appointed pursuant to Article 5.1 of the 2015 Rules of the National Anti-Doping Panel and Article 8.1 of the UK Anti-Doping ("UKAD") Rules ("the ADR") adopted by the Welsh Rugby Union. The purpose of this decision is to determine the sanction in respect of a charge brought against Mr Joseph Phelps ("Mr Phelps") on 2 July 2015 by UKAD.
2. Mr Phelps has been charged with an Anti-Doping Rule Violation ("ADRV") in breach of ADR Article 2.1. Article 2.1 provides that the presence of a Prohibited Substance or its metabolites or markers in an athlete's sample constitutes an ADRV, unless the athlete can establish that the presence is consistent with a Therapeutic Use Exemption ("TUE"). Mr Phelps did not have a TUE.
3. Mr Phelps does not dispute that he committed the ADRV and no issue of jurisdiction arises. However, he argues that the otherwise applicable four year period of ineligibility should be reduced on the basis that there was no intent to commit the ADRV.
4. The hearing of this case took place at the offices of Hugh James Solicitors in Cardiff on 29 September 2015 at which Mr Phelps was present but unrepresented. UKAD was represented by Ms Claire Parry ("Ms Parry").

The Facts

5. Mr Phelps (D.O.B 22 June 1994) is a 21 year old man and a Welsh Rugby Union member. Mr Phelps has until recently been playing for a Division 5 team, Hafodyrynys RFC with a permit. Prior to this, Mr Phelps was registered as a player with Newbridge RFC.
6. On 16 June 2015, UKAD conducted an Out-of-Competition test on Mr Phelps. He provided a urine sample to a UKAD-accredited Doping Control Officer, which was split into two separate bottles and given the reference numbers A1114320 and B1114320

7. Mr Phelps was given the opportunity to disclose on the Doping Control Form ("DCF") any prescription or non-prescription medications or supplements that he had taken in the preceding 7 days, but he only indicated that he had taken hay fever tablets and cold and flu tablets. The samples were taken to the Drug Control Centre at King's College London on 17 June 2015. They were analysed in accordance with the procedures prescribed by WADA's International Standard for Laboratories.
8. The analysis returned an Adverse Analytical Finding ("AAF"). The urine sample provided by Mr Phelps tested positive for nandrolone, an Anabolic Androgenic Steroid. This is a Prohibited Substance under the World Anti-Doping Agency 2015 Prohibited List ("the Prohibited List"). The substance can be found under s1.1(a) in the list of "Anabolic Agents".
9. On 29 June 2015, Ms Isabelle Mundy, UKAD Medical Educational Officer, affirmed that Mr Phelps did not hold an applicable TUE permitting his use of nandrolone. As a result, Mr Phelps was charged with the commission of an ADRV, pursuant to ADR Article 2.1, by letter dated 2 July 2015. Mr Phelps was provisionally suspended from participation in all competitions, events and other activities that are organised, convened, authorised or recognised by the Welsh Rugby Union in accordance with ADR Article 7.7.1.

Before the Hearing

10. Mr Phelps responded to the charge against him by calling UKAD on 8 July 2015. He advised UKAD that he had not taken anything for performance enhancement in sport, but that he had been taking Viagra and a "test booster" product to treat erectile dysfunction. Mr Phelps informed UKAD that he had experienced symptoms of erectile dysfunction since sustaining a testicular injury some time ago.
11. On 9 July 2015, Mr Phelps was asked by UKAD to confirm details of the products he had been taking to treat his symptoms. The details requested included the name and brand of any product, the relevant ingredients and images of any packaging, details of where and when products had been purchased and details of how they were administered.

12. On 12 July 2015, Mr Phelps responded twice by email, once at 3:16pm and again at 3:18pm. In these emails, Mr Phelps explained that he had been too embarrassed to go to the doctor to receive treatment for his erectile dysfunction and confirmed that he had instead purchased a number of Viagra products. When these had no effect, Mr Phelps carried out research online and purchased a supplement that purported to "boost" bedroom performance. Mr Phelps' second email contained a screen shot of a product called Niwali Advanced Test-O-Boost, the tub of which he stated was almost identical to the tub of supplements he had purchased online. Mr Phelps confirmed he had stopped taking this supplement approximately three weeks prior to providing a urine sample to UKAD.
13. In respect of his failure to disclose his use of this supplement on his DCF, Mr Phelps advised UKAD that he had been too embarrassed. Mr Phelps further stated that he had no reason to suspect that the supplement contained anything that was prohibited in sport.
14. On 14 July 2015, UKAD referred the matter to the National Anti-Doping Panel ("NADP") for determination.

Evidence at the Hearing

15. Mr Phelps expanded on the facts set out above significantly during his oral evidence at the hearing and provided new evidence that had not previously been disclosed to UKAD. Mr Phelps explained that his testicular condition was on occasion so painful that he could not walk and that upon attending hospital he had received medication to alleviate his symptoms.
16. Mr Phelps confirmed that he subsequently sought further medical treatment upon experiencing sexual dysfunction which he believed was connected to his testicular pain. He attended hospital to receive treatment; however, upon being advised that his appointment was scheduled with a female doctor Mr Phelps was embarrassed and decided to leave. To avoid further embarrassment, Mr Phelps chose to conduct his own research into possible treatments. Mr Phelps named Blue Zeus and Niwali as two of the products he self-prescribed to alleviate his symptoms in the absence of medical intervention. He informed the Tribunal that these had no effect.

17. At the end of the season, having been demoted to a Division 5 Team, Mr Phelps explained he was feeling low and had experienced erectile difficulties again. Mr Phelps located a nutrition store in Newbridge using Facebook. The owner of the store was a bodybuilder who advised Mr Phelps that he should try a drug called Test Propate to enhance his natural testosterone. The owner subsequently arranged for Mr Phelps to meet a contact of his at a Morrison's store to collect the drug. Mr Phelps attended and paid £25.00 in cash to this individual. The drug presented as a clear liquid in a small bottle.
18. Mr Phelps was unsure how to take the drug and sought advice from someone he knew at a local gym who he described as being "on the gear". On being asked by the Tribunal what that meant, Mr Phelps said that the person was taking steroids and that it was easy to identify at the gym who such people were from their physique. Upon showing this person at the gym the clear liquid he had collected from Morrison's, Mr Phelps was told that he had to inject the drug and was advised to purchase a syringe. Several weeks later, Mr Phelps injected the drug with the assistance of his cousin. Mr Phelps maintained throughout his evidence that at the time he had been seeking drugs in respect of his erectile dysfunction only.
19. In respect of his failure to disclose his use of Test Propate to UKAD in prior correspondence, Mr Phelps reiterated that he had been embarrassed that people would find out about his symptoms and was concerned that people might view him as a "drug taker" if they found out he had injected a drug using a syringe. He maintained throughout that he never took the drugs to enhance his sporting performance.
20. So far as his anti-doping awareness was concerned, Mr Phelps said he had never received anti-doping education and was unaware of UKAD and the Prohibited List.
21. When asked why he had only disclosed this evidence for the first time before the Panel, Mr Phelps said that he realised that his initial explanation had been shown to be untrue by Professor Cowan's evidence.
22. In a report obtained by UKAD, Professor Cowan explained that the human body does not naturally produce nandrolone in measurable quantities and that

nandrolone is a drug usually administered via deep intra-muscular injection. Professor Cowan confirmed that the finding of nandrolone itself was indicative of a recent injection, taking place approximately seven days prior to any adverse sample being provided. He also confirmed that there are no ingredients in Niwali Advanced Test O Boost which would suggest that the supplement contains nandrolone. Mr Cowan said that if nandrolone is taken by mouth it is rapidly deactivated by the liver in a process known as first pass metabolism.

Article 10 of the Anti-Doping Rules

23. Given that liability was admitted, the only issue for the Tribunal to consider was sanction. The sanction to be applied in respect of an ADR Article 2.1 ADRV is set out in Article 10.2. This states:

10.2 Imposition of a Period of Ineligibility for the Presence, Use or Attempted Use, or possession of a Prohibited Substance and/ or a Prohibited Method

The period of ineligibility for an Anti-Doping Rule Violation under Article 2.1, 2.2 or 2.6 that is the Athlete's or other Person's first anti-doping offence shall be as follows, subject to potential reduction or suspension pursuant to Article 10.4, 10.5 or 10.6:

10.2.1 The period of ineligibility shall be four years where:

(a) The Anti-Doping Rule Violation does not involve a Specified Substance, unless the Athlete or other Person can establish that the Anti-Doping Rule Violation was not intentional.

(b) The Anti-Doping Rule Violation involved a Specified Substance and UKAD can establish that the Anti-Doping Rule Violation was intentional.

10.2.2 If Article 10.2.1 does not apply, the period of Ineligibility shall be two years.

24. Under ADR Article 3.3.1, anabolic agents are not classed as a Specified Substance. Pursuant to ADR Article 10.2.1(a), the mandatory sanction is therefore

a period of Ineligibility of four years, unless Mr Phelps could establish that the ADRV was not intentional. This must be established on the balance of probabilities, as per ADR Article 8.3.2.

25. The meaning of intentional has been set out in ADR Article 10.2.3. It states:

10.2.3 As used in Articles 10.2 and 10.3, the term "intentional" is meant to identify those Athletes or those other Persons who cheat. The term, therefore, requires that the Athlete or other Person engaged in conduct which he or she knew constituted an Anti-Doping Rule Violation or knew that there was a significant risk that the conduct might constitute or result in an Anti-Doping Violation and manifestly disregarded that risk. An Anti-Doping Rule Violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall be rebuttably presumed to be not "intentional" if the substance is a Specified Substance and the Athlete can establish that the Prohibited Substance was used Out-of-Competition. An Anti-Doping Rule Violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall not be considered "intentional" if the substance is not a Specified Substance and the Athlete can establish that the Prohibited Substance was used Out-of-Competition in a context unrelated to sport performance.

26. In its written submissions, UKAD suggested that in order to show that he did not act intentionally, Mr Phelps must establish how the Prohibited Substance came to be present in his system. Although there is no explicit requirement in the wording of Article 10.2.3 in this regard, UKAD submitted that without being satisfied as to the method of ingestion, the Tribunal would not be able to make a proper assessment of intention.
27. The wording of Article 10.2.3 itself requires that for intention to be established, the Athlete must have either (i) engaged in conduct which he knew constituted an ADRV, or (ii) known that there was a significant risk that his conduct might constitute an ADRV and manifestly disregarded that risk.
28. UKAD submitted that the word "conduct" must mean the facts, matters and circumstances that led to the ADRV arising.

Intentional Use

29. As noted above, ADR Article 10.2 provides for a mandatory four year ban unless the athlete is able to show that the ADRV was not intentional. The burden of proof is on the athlete and must be satisfied on the balance of probabilities. UKAD referred to the decision of *UKAD v Lewis Graham*, and commended the approach set out at paragraph 46 of the decision as the approach to take when considering Article 10.2. The Tribunal noted and approved the approach set out in the Graham decision as follows:

"... we consider that it is incumbent upon an Athlete who wishes to establish that the ADRV was not intentional to satisfy the Tribunal on a balance of probabilities:

(a) as to the nature of the conduct which led to the ADRV, which in the case of an AAF will be how the Prohibited Substance came to be found in his body; and

(b) that he did not know that such conduct constituted an ADRV or knowing that there was a significant risk that such conduct might constitute or result in an ADRV, he did not manifestly disregard that risk.

30. Mr Phelps in his evidence before the Tribunal made it clear that he did not seek to rely upon the Viagra or the oral supplements as being potential sources of the presence of nandrolone in his sample. Mr Phelps explained that it became clear to him upon reading Professor Cowan's evidence that the only explanation for his adverse results could be the clear liquid he had injected. He was clearly right to do so given the evidence provided by Professor Cowan which explained that neither of the initially admitted products could have resulted in the presence of nandrolone in Mr Phelps' sample.
31. Having considered the evidence, the Tribunal accepted that the injection of the clear liquid by Mr Phelps was the method by which a Prohibited Substance came to be found in his sample. The Tribunal considered that Mr Phelps had satisfied it regarding the first limb of the test outlined in *UKAD v Lewis Graham*.

32. In reaching this decision the Tribunal reminded itself of the evidence from Mr Phelps regarding the circumstances surrounding his ingestion of the drug he referred to as Test Propate and in particular that he:
- (a) used Facebook to identify a nutrition store owned by a bodybuilder;
 - (b) attended a local Morrison's store to collect the drug that was recommended to him;
 - (c) subsequently attended a gym to speak to someone who was "on the gear" about how the drug should be administered;
 - (d) acknowledged that the same gym had been investigated by the Police for the distribution of performance enhancing drugs; and
 - (e) administered the drug in private and subsequently failed to disclose its administration either on his DPF or to UKAD during initial correspondence regarding the current charge.
33. Having established that the first limb of the test was satisfied, the Tribunal went on to consider the second limb. The Tribunal concluded that Mr Phelps had failed to establish that he did not know there was a significant risk that injecting the clear liquid would result in an ADRV, and that he did not manifestly disregard that risk. Mr Phelps could not therefore show that the ADRV was not intentional.
34. In reaching this decision, the Tribunal reminded itself that Mr Phelps proved he was capable of researching various supplements to initially treat his medical condition. When the initial treatment did not work, Mr Phelps acted to source a drug from a known bodybuilder and came into contact with drug users and facilities associated with performance enhancing drugs. The Tribunal simply did not consider it credible that Mr Phelps was unaware he was taking a Prohibited Substance. Mr Phelps' failure to subsequently disclose the drug use to UKAD was not based on his embarrassment at his underlying erectile dysfunction but because he knew he had taken an illegal substance.

Conclusion

35. For the reasons set out above, the tribunal makes the following decision:

- (a) The Anti-Doping Rule Violation under Article 2.1 of the ADR has been established;
- (b) Mr Phelps has not established that the Anti-Doping Rule Violation was not intentional and the Tribunal has determined to impose a period of Ineligibility of four years;
- (c) Pursuant to ADR Article 10.11.3 credit must be given against the total period of Ineligibility for Mr Phelps' Provisional Suspension which commenced on 2 July 2015. Accordingly, the period of Ineligibility will run until 1 July 2019.

Right of Appeal

36. Mr Phelps and the other parties identified at Article 13.4 of the ADR have a right to appeal this decision. In accordance with ADR Article 13.7 any party who wishes to appeal must lodge a Notice of Appeal with the NADP Secretariat within 21 days of receipt of this decision.

Signed on behalf of the Tribunal



Matthew Lohn

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