



Tribunal Arbitral du Sport
Court of Arbitration for Sport

CAS 2016/A/4371 Robert Lea v. United States Anti-Doping Agency (USADA)

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition

President: Prof. Matthew J. Mitten, Professor of Law in Milwaukee, Wisconsin, U.S.A.

Arbitrators: The Hon. Hugh L. Fraser, Judge in Ottawa, Canada
Mr. Barry A. Sanders, Attorney-at-Law in Los Angeles, California, U.S.A.

between

Robert Lea, Mertztown, Pennsylvania, U.S.A.

Represented by Howard L. Jacobs, Esq., Law Offices of Howard L. Jacobs, Westlake Village, California, U.S.A., and Mike Morgan, Esq., Morgan Sports Law LLP, London, United Kingdom

as Appellant

and

United States Anti-Doping Agency (USADA), Colorado Springs, Colorado, U.S.A.

Represented by William Bock III, Esq., General Counsel, and Jeff Cook, Esq., Legal Affairs Director

as Respondent

* * * * *

I. PARTIES

1. Robert Lea (the “Appellant”) is a 32-year old elite level cyclist who has achieved considerable national and international success, primarily in track cycling events and has represented the United States in two Olympic Games as a member of its track cycling team.
2. The United States Anti-Doping Agency (“USADA” or the “Respondent”) is an independent anti-doping agency in the United States, which is responsible for providing drug education to athletes as well as conducting drug testing and adjudicating positive test results pursuant to the USADA Protocol for Olympic and Paralympic Movement Testing (“USADA Protocol”).

II. BACKGROUND

A. Facts

3. Appellant is an experienced international level professional track cyclist who frequently travels long distances across many time zones to compete in national and international cycling events throughout the world. He usually travels with several different sleep aids to assist with travel-related sleep difficulties.
4. For the past several years, Appellant regularly has used Melatonin and Ambien, a prescription medication, for sleep difficulties. Melatonin and Ambien are not on the World Anti-Doping Agency (“WADA”) list of Prohibited Substances.
5. In July 2014, Neal Stansbury, M.D., his sports medicine physician, provided Appellant with a prescription for thirty tablets of Percocet, a medication containing oxycodone, (a Specified Substance whose usage is prohibited only in-competition by the World Anti-Doping Agency), primarily for pain relief in the event of injuries that might result from future bicycle race crashes. The bottle in which the Percocet prescription was filled was labelled with a notation that Percocet contains oxycodone.
6. Between July 2014 and 7 August 2015, Appellant used Percocet approximately ten times, mostly as a sleep aid during long flights and once for pain relief for an injury caused by a bicycle crash during a race in late April 2015. During that time period, Appellant tested negative for any Prohibited Substances in his system eight times during out-of-competition drug tests and four times during in-competition drug tests. When he was tested out-of-competition on 5 May 2015, on his Doping Control Official Record, Appellant disclosed his 30 April 2015 usage of one tablet of Percocet for pain relief for the injury in the recent crash. He tested negative in that instance, too.
7. Between 4 and 8 August 2015, Appellant participated in the USA Cycling Elite and Junior National Championships in California and competed in the following events:
 - (a) The Omnium (which comprised six races over two consecutive days);
 - (b) The Individual Pursuit;

- (c) The Scratch Race;
 - (d) The Madison; and
 - (e) The Points Race.
8. On 4 August 2015, Appellant competed in the first three of the six Omnium races.
 9. On 5 August 2015, Appellant competed in the final three Omnium races, and he finished first overall in the Omnium. On this date, he provided a urine sample for doping control purposes, which tested negative for any Prohibited Substances.
 10. On 6 August 2015, Appellant finished in first place in the Individual Pursuit.
 11. On 7 August 2015, he finished fifth in the Scratch Race and first in the Madison.
 12. On the evening of 7 August 2015, Appellant took part in an awards ceremony at the site of the cycling events, which started at approximately 10:00 p.m. PDT. After it ended, he bicycled to his hotel room (approximately one mile away), took a shower, had something to eat, consumed a “couple of beers,” and took a Melatonin tablet. He then placed a “NormaTec” recovery boot on each of his legs to assist his recovery from that day’s performances. While he had the recovery boots on, he downloaded statistical data recorded from his bicycle into his computer. After doing so, he went to bed and watched a television show on his mobile telephone as he prepared to go to sleep.
 13. Because he was having difficulty falling asleep that evening notwithstanding his consumption of the beers and a Melatonin tablet, Appellant decided to take an Ambien tablet (which he kept in the same bottle as his Percocet prescription) but discovered that he had run out of this medication. He instead took the last Percocet tablet remaining in that bottle from his July 2014 prescription. Thereafter, he interacted on social media for a short time before eventually falling asleep.
 14. On 8 August 2015, Appellant competed in the qualifying heat of the Points Race at approximately 11:24 a.m. PDT. He later competed in the finals of the Points Race at approximately 8 p.m. PDT.
 15. On 8 August 2015 at 9:08 p.m. PDT, Appellant was notified he had been selected for a drug test. He arrived at the doping control station at 10:04 p.m. PDT and provided his urine sample at 10:06 p.m. PDT. On his Doping Control Official Record, he declared his 8 August 2015 use of hemaplex, I-cartine, zertec, and pro air “HFA,” but not his use of melatonin or Percocet.
 16. On 17 August 2015, Appellant submitted to an out-of-competition doping control test, and the result was negative for any Prohibited Substances.
 17. On 4 September 2015, Appellant received notification from Respondent of an adverse analytical finding for a “low” level of noroxycodone (a metabolite of oxycodone, which is an ingredient in Percocet) in the “A” portion of the sample he had given on 8 August 2015.

18. By letter dated 4 September 2015, USADA invited Appellant to provide an explanation for the adverse analytical finding.
19. On 10 September 2015, Appellant accepted the laboratory's finding of an adverse analytical finding for noroxycodone in his 8 August 2015 "A" sample, waived his right to have the "B" portion of his sample analysed, acknowledged its presence in his system constituted his first anti-doping rule violation, and accepted a provisional suspension beginning on that date.
20. From 30 September 2015 through 14 October 2015, Appellant and Respondent unsuccessfully attempted to agree on an appropriate sanction for his anti-doping rule violation. Appellant asserted that he had ingested a permissible out-of-competition Percocet tablet as a sleep aid, which resulted in a positive test for noroxycodone during an in-competition drug test, but did not create a competitive advantage or mask an injury. Therefore, in the view of Appellant, a three-month suspension from competition would be the maximum appropriate sanction. Respondent sought a four-year period of ineligibility, alleging that Appellant had intentionally ingested a Prohibited Substance in-competition during the USA Cycling Elite and Junior National Championships. Respondent subsequently charged Appellant with an anti-doping rule violation pursuant to the UCI ADR, and Appellant submitted a request for resolution of this dispute by an American Arbitration Association (AAA) Panel in accordance with the USADA Protocol.

B. Proceedings before the American Arbitration Association

21. An expedited hearing took place at the request of both parties on 19 November 2015 in Los Angeles, California before a AAA Panel.
22. The AAA Panel issued an Interim Preliminary Award on 21 November 2015.
23. At the request of the parties, and after further consultation with the parties by telephone conference call, the AAA Panel issued a Modified Operative Interim Award on 15 December 2015, which determined in relevant part as follows:

Respondent acknowledged that he has committed a first anti-doping rule violation;

The Panel determined that the applicable standards for establishing a violation under Article 10.2.1 have not been established to the Panel's comfortable satisfaction. Consequently, in accordance with Article 10.2.2 of the WADA Code, the period of ineligibility shall not exceed two (2) years;

The Panel determined that the period of ineligibility for this violation shall be sixteen months commencing on September 10, 2015, the date on which he accepted his provisional sanction;

The results of the competition in which Respondent participated on August 8, 2015 shall be disqualified; all of the Respondent's other competition results until the date he accepted his provisional sanction shall be deemed valid.

24. On 5 January 2016, the AAA Panel issued its full reasoned award. In its ruling, the Panel found that Appellant’s demeanour during the arbitration hearing credibly supported his testimony that he is an athlete who takes very seriously his responsibility to comply with anti-doping obligations.
25. The AAA Panel rejected USADA’s argument that Appellant’s anti-doping violation was intentional because the evidentiary record did not establish an intentional anti-doping violation as defined in ADR 10.2. (¶26). In determining that Appellant did not commit an intentional anti-doping violation, the AAA Panel considered the UCI ADR definition of “In-Competition Event Period,” which is “the period commencing twelve hours before a Competition in which the Rider is scheduled to participate through the end of such Competition and the Sample collection process related to such Competition.” It concluded: “[Appellant] established, based on the balance of probabilities, that he ingested the Percocet more than twelve hours before his next scheduled race, and thus was out of competition when the violation occurred.” (¶29). Appellant did not commit an “intentional” anti-doping rule violation as defined by UCI ADR 10.2.3 because “the record does not support a conclusion that he [took] a medication that he knew contained a prohibited substance or ignored a known risk that taking the Percocet would create an anti-doping violation.” (¶28).
26. The AAA Panel found that Appellant “was negligent in not researching the constituent ingredients before he took the Percocet pill” on 7 August 2015. (¶28). It concluded: “Because he intended to ingest a known pain reliever available only by prescription, he was obligated to check its ingredients against the Prohibited Substances list before ingesting it.” (¶32). “[He] was in the midst of a multi-day competition. He was negligent in taking the Percocet so close to the next competition, after which he could be subject to testing.” (¶39).
27. The AAA Panel determined Appellant “did not intend to gain any competitive advantage other than sleeping well” when he took one tablet of Percocet on 7 August 2015 (¶27) and “given the short-term effects of a single Percocet tablet, [his] negligence did not create a sporting or competitive advantage.” (¶56).
28. In determining Appellant’s sanction pursuant to UCI ADR Article 10.5.1.1 based on his “degree of fault” for the presence of a Specified Substance (i.e., oxycodone) in his system during an 8 August 2015 in-competition drug test, the AAA Panel primarily relied on the guidelines established by the CAS Panel in *Cilic v. International Tennis Federation*, CAS 2013/A/3327 & *International Tennis Federation v. Cilic*, CAS 2013/A/3335 (*Cilic*). It determined that “[u]nder the Cilic standard of analysis, as well as under pre-Cilic decisions, Mr. Lea is culpable for ‘significant fault’ for failing to check the ingredients of Percocet” before taking it on 7 August 2015. (¶48). In determining Appellant’s appropriate period of ineligibility within the 16-24 months range for “significant fault” under *Cilic*, it considered various mitigating and aggravating factors.
29. The AAA Panel found that the factors weighing in favor of a reduced sanction for Appellant were the absence of any discernible competitive advantage from ingesting a single Percocet tablet, his possession of the Percocet pursuant to a valid prescription from his treating physician that had been taken over a long period of time without

incident, and his prompt admission of a first anti-doping offence. Another factor that the Panel deemed to favor a reduced sanction was the fact that his mistake, although careless, was understandable at the end of a long day of competition. It also determined that Appellant did not engage in conduct that constituted an intentional anti-doping violation, which arose from permissible out-of-competition ingestion of a specified substance.

30. The factors that the AAA Panel found weighed against a reduction of Appellant's sanction were his voluntary and known ingestion of Percocet, the evident nature of Percocet as a therapeutic painkiller available only by prescription, his secondary use of the Percocet as a sleep aid rather than for its primary prescribed purpose as pain relief from a cycling injury, the minimal effort that would have been required to ascertain whether the Percocet contained any Prohibited Substances, and the use of the Percocet during a multi-day competition. It also took into account that Appellant neglected to inform drug testing officials that he had taken Percocet the previous night when he was selected for post-race testing the next day and failed to disclose taking it on his doping control form.
31. The AAA Panel concluded that Appellant's "negligent conduct involving ingestion of a single Percocet tablet while out of competition, his prior out of competition use of Percocet over a long period of time without a problem, and the fact that his level of awareness had been reduced by a careless but understandable mistake, placed him in the lower end of [*Cilic*'s] 'significant fault' range," which justified imposing "a period of ineligibility of sixteen months." (§58).

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT AND SUBMISSIONS OF THE PARTIES

32. The following briefly summarizes the proceedings before the CAS as well as the contentions of the parties based on their respective written submissions, pleadings, witness testimony, and evidence presented at the CAS hearing. While this Panel has fully considered all the facts, contentions, evidence, witness testimony, and legal arguments submitted by both parties in this proceeding, it refers in its Award only to those it deems material and necessary to resolve the relevant issues and to explain its reasoning.
33. On 29 December 2015, Appellant filed his Statement of Appeal appealing the AAA Panel's 15 December 2015 imposition of a 16-month period of ineligibility for his anti-doping rule violation and requested the following relief: that "his sanction be reduced and/or eliminated;" that he "be named to USA Cycling's 'Long Team' pursuant to USA Cycling's Athlete Selection Procedures for the 2016 Olympic Games;" and that USADA bear all costs of the proceedings, including a contribution toward his legal costs. Appellant requested that this appeal be in English and be resolved on an expedited basis in accordance with the timetable agreed to by the parties "in order to allow him to compete at the 2 March 2016 World Track Cycling Championships, which also serve as an important qualifying event for the 2016 Olympic Games."
34. In the Statement of Appeal, Appellant admitted he had tested positive for noroxycodone, a metabolite of oxycodone, a Specified Substance (Section 1.2.1 of the Statement of

Appeal); and he stated that “The basis of this appeal to [CAS] is that the USADA/AAA ARBITRATION PANEL failed to follow the applicable rules and regulations in rendering its decision; failed to follow the rules and regulations of the World Anti-Doping Code in rendering its decision; made improper assumptions in rendering its decision; failed to accurately assess the evidence submitted in rendering its decision; rendered a sanction that was inconsistent with recent sanctions; and all other reasons set forth in the Appeal Brief which will be submitted by Robert Lea in accordance with CAS Art. R51.” (Section 1.2.2 of the Statement of Appeal.)

35. On 25 January 2016, the parties were informed that the President of the ICAS granted Appellant a Legal Aid award to apply to his share of the advance CAS administrative costs and costs and fees of this Panel.
36. Pursuant to the timetable agreed by the parties, if Respondent were to exercise its right to file a cross-appeal with CAS regarding any determination, issue, or ruling by the AAA Panel in its 15 December 2015 Modified Operative Interim Award or 5 January 2016 award, it was required to do by 3 February 2016. Respondent filed no cross-appeal.
37. On 3 February 2016, in accordance with the timetable agreed by the parties, Appellant filed his Appeal Brief with CAS. In Sections 1.4 and 1.5 of the Appeal Brief, respectively, Appellant stated:

Mr. Lea is appealing the Decision on the basis that the period of ineligibility imposed on him:

- (a) was excessive; and*
- (b) should not have exceeded three months.*

This Appeal Brief is thus limited to the issue of sanction . . .

38. At Section 11.1 of the Appeal Brief, Appellant requested the following relief:
 - (a) annul the Decision;*
 - (b) limit any period of ineligibility imposed on him to a maximum of three months (notwithstanding the fact that Mr. Lea will already have served over 5 months of provisional suspension by the date of the appeal hearing);*
 - (c) order USADA to:*
 - (i) reimburse Mr. Lea his legal costs and other expenses pertaining to these Appeal proceedings before CAS;*
 - (ii) bear the costs of the arbitration.*

39. The core of Appellant’s argument is set forth in Section 8 of his Appeal Brief:

8 OXYCODONE AND THE PURELY TECHNICAL NATURE OF THE VIOLATION

- 8.1 *It is important for the Panel to understand that the case before it involves a purely technical breach of the UCI ADR.*
- 8.2 *Oxycodone is a Section 7 “Narcotic”, and therefore a “Specified Substance”. It is prohibited only “In-Competition”. In other words, it is perfectly permissible out-of-competition.*
- 8.3 *Mr Lea’s out-of-competition ingestion of Percocet on the evening of 7 August 2015 was not intended to and did not enhance his performance in-competition on 8 August 2015:*

(a) The medical/pharmaceutical literature is clear that the effects of Percocet (pain relief and sedation) only last 4-6 hours, and would not have provided any benefit to Mr Lea the day after taking it:

Percocet [...] takes effect in about 15 minutes and lasts an average of four to six hours, depending upon the patient and the dosage [...] Percocet provides fast-acting pain relief and sedation

(b) The testimony of Dr Stansbury at pages 206 and 207 of the Hearing transcript:

[...] It's not one of the longer acting narcotics. It tends to not be effective after four hours or so. So that's the recommended length of time to prescribe Percocet for. They do have other narcotics out there obviously that are longer lasting, but Percocet tends to be a shorter acting drug.

Q In your medical opinion, would any of the benefits of Percocet still be effective 12 hours after taking a single Percocet pill?

A No. I don't think it would at all. The amount left in your system would almost be negligible, I would think.

Q Based on your background and experience both as a medical doctor and as a former elite cyclist, would you consider Percocet to be a performance enhancing drug in the sport of track cycling?

A If I thought that, I wouldn't be answering this -- I wouldn't be trying to help out Bobby at this point. So the answer would be absolutely not. To my knowledge, I can't see how it would be performance enhancing. If anything, it would be a sedative or narcotic, something that would diminish his ability to perform rather than increase it.

- 8.4 *The sole reason that Mr Lea consumed Percocet on the evening of 7 August 2015 was to sleep. Mr Lea’s use of the Percocet was, therefore, wholly unrelated to sport or sports performances.*
- 8.5 *Mr Lea’s use of Oxycodone on 7 August 2015 was perfectly permissible. Mr Lea was simply extraordinarily unfortunate that its metabolites remained in his system on 8 August 2015.*

40. In the Appeal Brief at Section 3.17, Appellant asserts:

Mr Lea had, erroneously, assumed that Percocet was not an anti-doping risk because:

Mr Lea knew that trusted teammates of his used Percocet as a sleep aid. Those teammates are also subject to doping control and none of them had ever had trouble with their use of Percocet. Mr Lea therefore assumed that Percocet was safe to use.

Percocet – like Ambien - had been prescribed by his trusted doctor who was familiar with the WADA Prohibited List, who knew that Mr Lea was subject to doping control and who ordinarily ensured that he did not prescribe anything which might contain a Prohibited Substance. It therefore did not cross Mr Lea's mind that Dr Stansbury might have prescribed him anything which contained a Prohibited Substance.

Percocet had similar properties to his other sleep aids (i.e. melatonin and Ambien). It therefore did not cross Mr Lea's mind that Percocet might pose any anti-doping risk.

Mr Lea himself had previously used Percocet on approximately ten occasions without any issues. In fact, Mr Lea had used Percocet a short while before a doping control test on 5 May 2015 (which Mr Lea declared on his doping control form). No adverse analytical finding was reported with respect to that analysis. Mr Lea therefore had no reason to suspect that Percocet might pose any kind of anti-doping risk.

41. On 5 February 2016, CAS informed the parties that the Panel appointed to decide this case is constituted as follows: President—Prof. Matthew Mitten, Professor in Milwaukee, Wisconsin, United States; Arbitrators—The Hon. Hugh L. Fraser, Judge in Ottawa, Canada (nominated by Appellant); Mr. Barry A. Sanders, Attorney-at-Law in Los Angeles, California, United States (nominated by Respondent).
42. On 15 February 2016, Respondent timely filed its Answer Brief, which argued the AAA Panel properly applied *Cilic* and concluded:

Because Appellant is a very experienced athlete who has been well educated on anti-doping issues, the rules require a high level of care before ingesting substances, especially prescription medications. But Appellant ignored all the warning signs and did not exercise any due diligence before ingesting prescription medicine the night before a competition. Additionally, Appellant has admitted taking Percocet as a sleep aid, which is an off-label purpose, and not reporting the use of the prescription medicine on his doping control form. On balance, the AAA Panel was extremely generous to give Appellant a period of ineligibility at the bottom of the sixteen (16) to twenty-four (24) month range, and no further reduction is warranted. (Answer Brief, Section 2.b.)

43. Respondent did not appeal any part of the AAA Panel's 15 December 2015 Modified Operative Interim Award or any of the following explicit or implicit factual and/or legal determinations in its 5 January 2016 reasoned award: 1) Appellant's only anti-doping rule violation is the presence of a specified substance in his system during an 8 August 2015 in-competition test pursuant to UCI ADR 2.1.2, not the prohibited in-competition use of a specified substance on this date in violation of UCI ADR 2.2 because "[Appellant] established, based on the balance of probabilities, that he ingested the

Percocet more than twelve hours before his next scheduled race, and thus was out of competition when the violation occurred” (§29); 2) Appellant did not commit an “intentional” anti-doping rule violation as defined by UCI ADR 10.2.3 because “the record does not support a conclusion that he [took] a medication that he knew contained a prohibited substance or ignored a known risk that taking the Percocet would create an anti-doping violation” (§28); 3) Appellant “did not intend to gain any competitive advantage other than sleeping well” when he took one tablet of Percocet on 7 August 2015 (§27) and “given the short-term effects of a single Percocet tablet, [Appellant’s] negligence did not create a sporting or competitive advantage” (§56); 4) Appellant established no significant fault or negligence for his anti-doping rule violation by a balance of probability, which satisfies a necessary condition for his sanction pursuant to UCI ADR Article 10.5.1.1 to be, “at a minimum, a reprimand and no period of *Ineligibility*, and at a maximum, two years of *Ineligibility*,” and 5) a sixteen (16) month period of ineligibility is appropriate based on Appellant’s “degree of fault.”

44. Pursuant to the timetable agreed by the parties, on 19 February 2016, this Panel held an expedited hearing in Los Angeles, California. Mike Morgan, Esq. and Howard L. Jacobs, Esq. appeared as counsel for Mr. Lea. Jeff T. Cook, Esq. appeared as counsel for USADA, and William Bock, III, Esq. participated by telephone as counsel for USADA. At the beginning of the hearing, the parties and their counsel confirmed they had no objections to the constitution of this Panel.
45. At the beginning of the hearing, to rebut the contention in Respondent’s Appeal Brief that he took the Percocet tablet less than twelve hours before the qualifying heat of the Points Race on 8 August 2015, Appellant sought to introduce into evidence printouts from his track bike computer and clock as well as a map of the route he rode on his bike from his hotel to the site of the USA Cycling Elite and Junior National Championships. Respondent objected that these documents are inadmissible pursuant to Article R56 of the Code because they were submitted after submission of the Appeal Brief. After consulting with the other members of the Panel, the Panel President determined that exceptional circumstances existed that justify admission of these documents solely as rebuttal evidence. Appellant also sought to admit a 22 November 2005 IAAF press release regarding Torri Edwards’ Reinstatement and two other general media releases concerning this same topic to provide background information about the aftermath of *Torri Edwards v IAAF & USA Track and Field*, CAS OG 04/003. Respondent objected thereto and the Panel President ruled to be inadmissible pursuant to Article R56 of the Code. In support of its contention that Swiss substantive law applies subsidiarily pursuant to Article R58 of the Code, Appellant also sought to introduce as legal authority three CAS cases in French, to which Respondent objected. The Panel President ruled are inadmissible because they were not translated into English, the official language of this proceeding.
46. At the hearing, the Panel heard testimony from Mr. Lea; Ms. Shelby Walter; Neal Stansbury, M.D. (by telephone); Mr. Tom Mahoney (by telephone); and USADA Science Director Matthew Fedoruk, Ph.D. (by telephone).
47. Mr. Lea testified as follows: He has been a life-long cyclist, and a professional cyclist for the last 10 years. The UCI racing season is year-round and requires extensive national and international travel. He frequently experiences sleep issues because his

cycling career involves air travel across several different time zones. He regularly takes Melatonin and Ambien, a prescription drug, as sleep aids. He participates in USADA's annual anti-doping webinar, "takes the principle of strict liability very seriously," constantly fears taking banned substances, and normally checks the GlobalDro.com before taking any medications or products. In July 2014, he obtained a prescription for 30 tablets of Percocet for pain relief from possible future cycling crashes and as a secondary sleep aid from Dr. Stansbury, a sports medicine physician who has treated him for various cycling injuries for many years and whom he trusted. Between July 2014 and 7 August 2015, he took Percocet approximately 10 times as a sleep aid on long flights and for pain relief from a 29 April 2015 cycling crash. He had often observed cycling teammates taking Percocet as an out-of-competition sleep aid without testing positive during in-competition drug tests. On 7 August 2015, he competed in two cycling events (the Scratch Race and Madison) during the USA Cycling Elite and Junior National Championships in California. Thereafter at approximately 11pm PDT, he took one tablet of Percocet because he was having difficulty falling asleep and was out of Ambien. He knew that Percocet is effective for approximately four hours and that it contains oxycodone, whose usage is permitted out-of-competition but banned in-competition, and that trace amounts of its metabolites can remain in your system for some time thereafter. Before taking the Percocet tablet, he took no steps to verify its ingredients or to determine how long any of them could remain in his system after ingestion. On 8 August, after competing in the Points Race qualifier and finals, he was selected for drug testing and gave a urine sample, but did not disclose taking melatonin or Percocet the previous night. He has a history of failing to declare his use of sleep aids on doping control forms. His 10 September 2015 provisional suspension for testing positive for metabolites of oxycodone in his 8 August urine sample has prevented him from participating in any subsequent cycling events (including UCI World Cup races) and a continued suspension extending beyond the date of the CAS hearing would prevent him from participating in the 2 March 2016 World Track Cycling Championships and possibly the 2016 Olympic Games.

48. Ms. Walter testified as follows: She is a track cyclist and Mr. Lea's girlfriend. Mr. Lea generally is very careful about the medications he takes and engages in research to determine their ingredients before taking anything. She shared a hotel room with him on 7 August 2015, but does not know the precise time he took the tablet of Percocet that evening.
49. Tom Mahoney testified as follows: He is the USA Cycling Technical Programs Manager. He was present at the USA Cycling Championships and was responsible for running the events as well as the awards presentation. He recalled that the cycling track was closed down at 9:30 p.m. on 7 August 2015 and the awards ceremony began around 10:00 p.m. with the ceremony for the Madison race ending the evening program. The events of 8 August 2015 ran on schedule to the best of his recollection, and the second race that the Appellant competed in had to have started before 11:00 a.m. If it had not started by that time, he would have had to provide lunch for the race volunteers—which he did not do.
50. Neal Stansbury, M.D. testified as follows: He is an orthopaedic surgeon who is the medical director of the Lehigh Valley Velodrome in Pennsylvania. He frequently provides medical advice and treatment to elite cyclists. For approximately 30 years, he

was a competitive cyclist who won several national and state titles. For the past 10 years, he has served as Appellant's sports medicine physician and provided him with treatment for bicycle crash and overuse injuries. In July 2014, he provided Appellant with a prescription for 30 tablets of Percocet primarily for pain relief from injuries resulting from future bicycle race crashes. He did not recall any discussions with Appellant regarding his usage of Percocet as a sleep aid. Based on his assumption that Appellant already knew the cycling anti-doping rules, he did not inform him that Percocet contained oxycodone, that its usage was prohibited in-competition, or that its metabolites would remain in his system beyond Percocet's approximately four-hour period of effectiveness. Nor did not warn Appellant not to take Percocet within any particular time period before he participated in a cycling competition or during multi-day cycling competitions, although he would have recommended against taking it the night before a cycling race if Appellant had asked for such advice prior to doing so. He testified that Percocet would not be performance enhancing for a cyclist unless taken in large amounts immediately before a race.

51. Matthew Fedoruk, Ph.D. testified as follows: He is a bio chemist and molecular biologist. He has been working with USADA for approximately four years. He noted that in-competition substances generally are those with an immediate performance enhancing property. He acknowledged that it is difficult for athletes to ensure that permissible out-of-competition substances are out of their systems at the time of competition. In response to a question asking how an athlete would know how long a substance might remain his or her system after ingesting it, he responded "it's a challenging question that USADA is often asked: 'How do I determine the clearance period of substance 'X'?" His office generally tells athletes they should discuss this with their physicians and make the appropriate choices when competing and to apply for a therapeutic use exemption ("TUE") if they need to use a prohibited substance in competition. He also testified that although it was possible for an athlete to get a TUE for in-competition use of oxycodone if an athlete was injured or in need of pain medication, he could not recall any instance in which a TUE was granted for use of Percocet as a sleep aid. He testified that a TUE generally is not granted in advance for a potential future injury. With regard to the significance of the twelve-hour window that defines the out-of-competition period, he stated that he did not know why it was so defined. He added that there are scientific and physiological differences in the way that individuals metabolize substances and that an athlete who was not a habitual user of oxycodone may metabolize it more slowly. He also noted that genetics may be a factor in how quickly oxycodone is metabolized. In response to a question about what USADA would do if an athlete were to disclose his or her use of Percocet on an in-competition doping control form, his reply was that it would normally wait for the lab results to come back. He added that sometimes, as a courtesy, USADA has followed up with athletes to warn them about clearance periods; other times USADA does not do so because it might be a moot point. With regard to how long oxycodone remains in one's system, he testified that if it were taken six days before a competition, it likely would not be detectable at the time of testing because 24-72 hours is the likely period of time it continues to be in one's system. He reiterated that USADA will refer athletes to their personal doctors to get answers on medication clearance periods.
52. The undisputed testimony of the witnesses was that Mr. Lea knowingly used Percocet as a sleep aid on the night of 7 August 2015; that since July 2014, when Percocet was

prescribed for him, Mr. Lea had known that it contained oxycodone; that Mr. Lea knew that the usage of Percocet and oxycodone are banned in-competition, but not banned out-of-competition; that Mr. Lea had previously taken Percocet about 10 times out-of-competition without any positive tests for oxycodone or its metabolites;; that Mr. Lea had often observed teammates taking Percocet as an out-of-competition sleep aid without adverse drug tests; that Mr. Lea was aware that Percocet is effective for a period of four to five hours, but that trace amounts of oxycodone can stay in your system for some time thereafter; that Percocet is not a performance enhancing substance unless it is taken in large amounts right before a race; and that the application of the 12-hour out-of-competition rule to various medications is the question most frequently asked of Dr. Fedoruk's department at USADA, and that they normally refer the athlete back to his or her own doctor.

53. Respondent did not cross-appeal the AAA Panel's ruling that Appellant took a Percocet tablet out-of-competition on 7 August 2015 that resulted in his positive in-competition test on 8 August 2015, and its counsel expressly stated at the CAS hearing that it was not seeking a longer sanction than the 16-month suspension imposed by the AAA Panel. Respondent did not contend or produce any evidence that Appellant took the Percocet on 8 August 2016. However, Respondent asserted and produced evidence that Appellant ingested the Percocet tablet within twelve hours of the starting time of the qualifying heat of the Points Race he participated in on 8 August 2015, contending that this is relevant evidence and a factor for the Panel to consider in determining the length of his period of ineligibility. Relying on ¶17b of the USADA Protocol (which states "CAS shall conduct a review of the matter on appeal which, among other things, shall include the power to increase, decrease or void the sanctions imposed by the previous AAA Panel regardless of which party initiated the appeal"), Respondent contended the CAS Panel has the authority to increase the length of Appellant's suspension beyond 16 months.
54. After presenting their respective evidence and making closing arguments during the 19 February 2016 hearing, the parties and their counsel agreed that each of them had received a full and fair opportunity to be heard, and this Panel closed the hearing.
55. On 25 February 2016, this Panel issued the operative part of its Award:

The appeal filed on 29 December 2015 by Mr. Robert Lea against the 15 December 2015 Award rendered by the American Arbitration Association/North American Court of Arbitration for Sport Panel is partially upheld.

The period of ineligibility imposed on Mr. Robert Lea by the 15 December 2015 Award rendered by the American Arbitration Association/North American Court of Arbitration for Sport Panel is reduced to six (6) months, commencing from 10 September 2015 (the date he accepted his provisional suspension).

Except as aforesaid, the 15 December 2015 Award rendered by the American Arbitration Association/North American Court of Arbitration for Sport Panel in this matter remains in full force and effect.

The costs of the arbitration, to be determined and notified to the parties by the CAS Court Office, shall be borne by the parties in equal shares.

Each party shall bear his/its own costs, including attorney's fees, incurred in connection with the present proceedings.

All other motions, requests, or prayers for relief are dismissed.

IV. JURISDICTION

56. 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.

57. Appellant brings this appeal pursuant to UCI ADR Article 13.2, which provides that “a decision imposing *Consequences* . . . for an anti-doping rule violation . . . may be appealed exclusively as provided in this Article 13.2.” Article 13.2.1 states in “cases involving “*International-Level Riders*, the decision may be appealed exclusively to CAS.” It is undisputed that Appellant is an “International-Level Rider” who is appealing the AAA Panel’s imposition of a 16-month suspension for his anti-doping rule violation.

58. Article 17b of the USADA Protocol provides that “the final award by the AAA arbitrator(s) may be appealed to the *CAS*” by any athlete, not only international-level athletes.

59. At the beginning of the hearing and in accordance with the parties’ signed order of procedure, counsel for both parties stipulated to the Panel’s jurisdiction to hear and resolve the merits of Appellant’s appeal.

60. It follows that the Panel has jurisdiction to decide this appeal.

61. Separately, although Appellant requested in his Statement of Appeal that he “be named to USA Cycling’s ‘Long Team’ pursuant to USA Cycling’s Athlete Selection Procedures for the 2016 Olympic Games,” he did not address this issue in his Appeal Brief or during the hearing. Appellant’s eligibility and/or alleged right to be selected as a member of the United States 2016 Olympic Games team is exclusively governed by the Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. §220501, et seq., and Section 9 of the Bylaws of the United States Olympic Committee, which provide for final and binding AAA arbitration of any dispute between a U.S. athlete and the National Governing Body for his sport. Thus, the Panel has no jurisdiction to consider such a claim or to provide the requested relief.

V. ADMISSIBILITY

62. 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.

63. UCI ADR Article 13.2.5.1 provides:

Unless otherwise specified in these rules, appeals under Article 13.2.1 and 13.2.2 from decisions made by the UCI Anti-doping Tribunal or UCI Disciplinary Commission shall be filed before the CAS within 1 (one) month from the day the appealing party receives notice of the decision appealed.

64. Article 17(b) of the USADA Protocol provides:

[T]he final award by the AAA arbitrator(s) may be appealed to the CAS within twenty-one (21) days of issuance of the final reasoned award or when an award on eligibility without reasons is deemed final as set forth below. If the AAA arbitrators issue an award on eligibility without reasons, such award shall be deemed final for purposes of appeal to CAS on the earlier of (a) issuance of the final reasoned award by the AAA Panel or (b) thirty (30) days from issuance of the award without reasons.

65. Although UCI ADR Article 13.2.5.1 and Article 17b of the USADA Protocol set forth different time limits for filing an appeal to the CAS, this appeal is timely under both provisions. The Appellant filed his Statement of Appeal on 29 December 2015, which is within 1 (one) month or thirty (30) days from the date of the AAA Panel's 15 December 2015 Award, which is without reasons and Appellant received notice of it on this date.

66. At the beginning of the hearing, counsel for both parties stipulated that this appeal was filed in a timely manner and is admissible.

67. The Panel thereby confirms that this appeal is admissible.

VII. SCOPE OF THE PANEL'S REVIEW

68. Article R57 of the CAS Code provides:

“The Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance...”

69. Thus, this Panel has the authority to provide *de novo* review of the sole issue raised by this appeal, which is the appropriate and proportionate length of Appellant's period of ineligibility pursuant to UCI ADR Article 10.5 (Reduction of the Period of *Ineligibility* based on *No Significant Fault or Negligence*), specifically UCI ADR Article 10.5.1.1 (*Specified Substances*), for his violation of UCI ADR Article 2.1 ((*Presence of a Prohibited Substance or its Metabolites or Markers in a Rider's Sample*) determined by the AAA Panel.

70. Accordingly, “the mission of the CAS is that of an appeal body and not that of a review body.” CAS 2012/A/2924, *UCI v. Monica Bascio & USADA* at ¶47. This Panel “must consider [this appeal] on the evidence before it which is not necessarily the same as that which was before the [AAA Panel].”

71. In CAS 2011/A/2518, *Robert Kendrick v. ITF* at ¶14, the CAS Panel explained:

Where, as is the case with Article R57 of the Code, rules or legislation confer on an appellate body full power to review the facts and the law, no deference to the tribunal below is required beyond the customary caution appropriate where the tribunal had a particular advantage, such as technical expertise or the opportunity to assess the credibility of witnesses.

VIII. APPLICABLE LAW

72. Article R58 of the Code provides as follows:

The Panel shall decide the dispute according to the applicable regulations and subsidiarily, to 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.

73. Accordingly, the Panel will apply the following applicable and relevant provisions of the UCI ADR, which are identical to or substantially the same as the corresponding provisions of the 2015 World Anti-Doping Code:

10.5 Reduction of the Period of Ineligibility based on No Significant Fault or Negligence

10.5.1 Reduction of Sanctions for Specified Substances or Contaminated Products for Violations of Article 2.1, 2.2 or 2.6.

10.5.1.1 Specified Substances

Where the anti-doping rule violation involves a Specified Substance, and the Rider or other Person can establish No Significant Fault or Negligence, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years of Ineligibility, depending on the Rider's or other Person's degree of Fault.

Appendix 1: Definitions

Fault: Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing a Rider or other Person's degree of Fault include, for example, the Rider's or other Person's experience, whether the Rider or other Person is a Minor, special considerations such as impairment, the degree of risk that should have been perceived by the Rider and the level of care and investigation exercised by the Rider in relation to what should have been the perceived

level of risk. In assessing the Rider's or other Person's degree of Fault, the circumstances considered must be specific and relevant to explain the Athlete's or other Rider's departure from the expected standard of behavior. Thus, for example, the fact that an Rider would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Rider only has a short time left in his or her career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Article 10.5.1 or 10.5.2.

No Fault or Negligence: The Rider or other Person's establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule. Except in the case of a Minor, for any violation of Article 2.1, the Rider must also establish how the Prohibited Substance entered his or her system.

No Significant Fault or Negligence: The Rider or other Person's establishing that his or her Fault or Negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the anti-doping rule violation. Except in the case of a Minor, for any violation of Article 2.1, the Rider must also establish how the Prohibited Substance entered his or her system.

74. Because the “seat” of this arbitration proceeding is Lausanne, Switzerland (although the geographical location of the hearing was Los Angeles, California, U.S.A.), Swiss law governs all procedural aspects of this proceeding.
75. The parties disagree regarding which country's substantive rules of law “*subsidiarily*” apply in resolving the merits of this appeal. The Appellant contends that Swiss law applies because the UCI ADR is part of the UCI Regulations, as is the UCI Constitution, which states that the UCI's registered office is in Switzerland and that “[i]n the absence of a choice of law by the parties, the Court of Arbitration for Sport will apply Swiss law.” USADA asserts that Swiss law is inapplicable because the UCI is not a party to this proceeding and this appeal is brought pursuant to Article 17(b) of the USADA Protocol, which requires that this appeal hearing occur in the U.S.; therefore, “to the extent any ‘governing law’ is relevant to the Panel's decision, U.S. law applies.” It is unnecessary for this Panel to resolve this dispute regarding the applicable substantive law because the sole issue raised by this appeal can and will be determined without reference to any Swiss or U.S. rules of law which are in conflict.

IX. MERITS

76. The sole issue for determination by the Panel is the appropriate length of Appellant's period of ineligibility under UCI ADR Article 10.5.1.1 based on his “degree of fault” for the presence of noroxycodone (a metabolite of oxycodone, a Specified Substance), in his system during an in-competition drug test. *FINA v. Molina*, CAS 2011/A/2515 at ¶ 65 (the issues a CAS panel has jurisdiction to resolve is “defined by Appellant's requests”). Therefore, all factual determinations and rulings of the AAA Panel that have

not been appealed by either party are finally decided and not subject to de novo review by this Panel.

77. The Appellant is appealing the AAA Panel’s determination that his period of ineligibility shall be 16 months commencing from the 10 September 2015 date of his provisional suspension, asserting it should be eliminated or reduced to three months from that date (or no longer than the period of time elapsed since then until the 19 February 2016 date of the CAS hearing). Because Respondent did not appeal the AAA Panel’s 16-month period of ineligibility despite its assertion that the Athlete “is culpable for ‘significant fault’ for failing to check the ingredients of Percocet” (¶48), 16 months is the maximum limit established by the AAA Panel’s ruling for purposes of this appeal. *FINA v. Cesar Augusto Cielo Filho & CBDA*, CAS 2011/A/2495/2496/2497/2498 at ¶8.12 (to challenge before CAS a determination or ruling by a national anti-doping tribunal, “it would have been necessary for the Respondents to file a cross-appeal”); *FINA v. Molina*, CAS 2011/A/2515 at ¶ 65 (“it is a fundamental principle of international arbitration that the Panel cannot act *ultra petita*”).
78. Article 10.5.1.1 of the UCI ADR provides that a Rider’s degree of fault should determine his period of ineligibility. The UCI ADR defines “*Fault*” as “any breach of duty or any lack of care appropriate to a particular situation.” In its definition of “*No Significant Fault or Negligence*,” a determination of “fault” requires consideration of the “totality of circumstances and taking into account the criteria for *No Fault or Negligence*” and whether the negligent conduct was “significant in relationship to the anti-doping rule violation.” Its definition of “*No Fault or Negligence*” requires consideration of whether an athlete “did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he . . . violated an anti-doping rule.” Read together, these provisions of the UCI ADR require the this Panel to evaluate Appellant’s degree of fault for the specific anti-doping violation he committed based on the totality of circumstances, including in particular his knowledge and the reasonable foreseeability that his taking one tablet of Percocet as a sleep aid late in the evening of 7 August 2015 before a morning race on 8 August 2015 would constitute an anti-doping violation (i.e., the presence of oxycodone in his system during an in-competition drug test on 8 August 2015) .
79. Both parties and the AAA Panel rely on *Cilic* , decided under Article 10.4 of the 2009 WADC (“**Elimination or Reduction of the Period of Ineligibility for Specified Substances Under Specific Circumstances**”), which is the corresponding (but not identical) predecessor to Article 10.5.1.1 of the UCI ADR and 2015 WADC. In *Cilic* at ¶75, the CAS Panel identified the specific anti-doping rule violation that occurs when the permissible out-of-competition use of a Specified Substance only prohibited in-competition results in an in-competition positive test for its presence in an athlete’s system:
- b. *For substances prohibited in-competition only, two types of cases must be distinguished:*
 - i. *The prohibited substance is taken by the athlete in-competition. In such a case, the full standard of care described above should equally apply.*

- ii. *The prohibited substance is taken by the athlete out-of-competition (but the athlete tests positive in-competition). Here, the situation is different.*

The difference in the scenario (b ii) where the prohibited substance is taken out-of-competition is that the taking of the substance itself does not constitute doping or illicit behaviour. The violation (for which the athlete is at fault) is not the ingestion of the substance, but the participation in competition while the substance itself (or its metabolites) is still in the athlete's body. The illicit behaviour, thus, lies in the fact that the athlete returned to competition too early, or at least earlier than when the substance he had taken out of competition had cleared his system for drug testing purposes in competition. In such cases, the level of fault is different from the outset. Requiring from an athlete in such cases not to ingest the substance at all would be to enlarge the list of substances prohibited at all times to include the substances contained in the in-competition list. CAS jurisprudence supports the view that the level of fault in case (b ii) differs. The Panel in this respect is mindful of the decision in the case CAS 2011/A/2495 in which it is held: "Of course the athlete could have refrained from using the [product] at all, but it can hardly be a fault (or at least a significant one) to use a substance which is not prohibited" (para 8.26). It follows from this that if the substance forbidden in-competition is taken out-of-competition, the range of sanctions applicable to the athlete is from a reprimand to 16 months (because, in principle, no significant fault can be attributed to the athlete).

80. As in *Cilic*, Appellant's anti-doping rule violation was competing too soon after voluntarily ingesting one tablet of Percocet containing a Specified Substance (i.e., oxycodone) whose usage by athletes is permitted out-of-competition, resulting in a positive in-competition drug test—not taking Percocet as a sleep aid or failing to check whether it contained a banned substance before doing so. The evidence introduced during the CAS hearing was in dispute regarding the precise length of time (between approximately 11 and 12½ hours) from when Appellant took one tablet of Percocet during the late evening of 7 August 2015 and the start time of the qualifying heat of the Points Race he participated in on 8 August 2015 event. Because Respondent did not appeal the AAA Panel's determination that Appellant's ingestion of Percocet occurred out-of-competition, the CAS Panel is precluded from determining this was an in-competition usage in determining his degree of fault and appropriate sanction.
81. The pre-*Cilic* jurisprudential approach to determining sanctions for anti-doping rule violations involving Specified Substances is illustrated by *Robert Kendrick v. ITF*, CAS 2011/A/2518: "[T]he panel can, in a Specified Substances case, where the preconditions have been met, make whatever reduction it considers properly reflects the Athlete's degree of fault, within the zero to 24-month spectrum. We agree with the observation . . . that this is to provide the extra flexibility desired by stakeholders." (¶25). "In each case, the Athlete's fault is measured against the fundamental duty which he or she owes under . . . the WADC to do everything in his or her power to avoid ingesting any Prohibited Substance." (¶23). "Any mitigating circumstances put forth on behalf of an athlete should be considered in the context of the standards which are expected of the athlete." (¶24). "[A]bsent circumstances evidencing a high degree of fault bordering on serious indifference, recklessness, or extreme carelessness, a twelve month suspension

would be at the upper end of the range of sanctions to be imposed” in a specified substances case. (¶33).

82. In an effort to promote consistency in applying Article 10.4 of 2009 WADC, the *Cilic* Panel promulgated a set of guidelines for determining an athlete’s degree of fault and corresponding range of sanctions for anti-doping violations involving Specified Substances. To determine the appropriate sanction, the *Cilic* panel divided the maximum two-year period of ineligibility into three categories of fault: 0-8 months for a “light degree of fault,” with a “standard” light degree of fault sanction of 4 months; 8 – 16 months for a “normal degree of fault,” with a “standard” normal degree of fault sanction of 12 months; and 16 – 24 months for a “significant” or “considerable degree of fault,” with a “standard” significant degree of fault sanction of 20 months. (¶70).
83. The *Cilic* Panel stated “to determine into which category of fault a particular case might fall, it is helpful to consider both the objective and subjective level of fault.” (¶71). “The objective element describes what standard of care could have been expected from a reasonable person in the athlete’s situation.” (¶71). The “objective” element generally requires consideration of the following: (1) did the athlete read the label or otherwise learn the ingredients; (2) did the athlete cross-check the ingredients with the prohibited list; (3) did the athlete do an Internet search of the product; (4) was the product reliably sourced; and (5) did the athlete consult appropriate experts. (¶74). The Panel noted that “an athlete cannot be reasonably expected to follow all of the above steps in every and all circumstances.” (¶75).
84. According to *Cilic*, “The subjective element describes what could have been expected from that particular athlete, in light of personal capacities.” (¶71). *Cilic*’s suggested “subjective” elements, which would mitigate the athlete’s degree of fault, include: (1) the athlete’s youth and/or inexperience; (2) language or environmental problems; (3) the extent of anti-doping education received or available to the athlete; (4) prior long-term use of the product without incident; (5) previous checking of the product’s ingredients; (5) the athlete’s degree of stress or other impairment; and (6) whether the athlete’s level of awareness has been reduced by a careless or understandable mistake. (¶76).
85. The *Cilic* Panel at ¶77 stated:

Elements other than fault (such as CAS 2012/A/2924, para 62) should – in principle – not be taken into account since it would be contrary to the rules. Only in the event that the outcome would violate the principle of proportionality such that it would constitute a breach of public policy should a tribunal depart from the clear wording of the text.
86. Applying these guidelines, the *Cilic* Panel imposed a four-month suspension on an experienced professional tennis player who took two Coramine Glucose tablets containing nikethamide (a substance banned only in competition) daily for five to eight days before competing in a tennis tournament, which resulted in a positive in-competition drug test. It found that, although he normally “was careful in his conduct relating to doping risks in the past” (¶94a), he did not conduct any internet research, check the WADA list of prohibited substances, or read an information leaflet inside the product’s box warning athletes that using Coramine Glucose could result in a positive

- drug test before ingesting the glucose tablets. Based on the following evidence, it characterized his objective level of fault as “light”:
- a. *The Athlete asked his mother to purchase the product from a safe environment, namely a pharmacy.*
 - b. *The Athlete’s mother did try to ascertain from the pharmacist whether or not the Coramine Glucose would be safe for the Athlete as a competitive tennis player.*
 - c. *The Athlete looked at and read the label on the product. He looked for and noted the two ingredients.*
 - d. *The Athlete took only a limited number of the pills in the box and stopped taking the product a couple of days prior to the Munich Open. (¶85).*
87. The *Cilic* Panel noted the following subjective or mitigating factors in the player’s favor:
- a. *He spoke some French, but not enough and thought that “nicethamide” was French for “nikotinamid”.*
 - b. *He was under considerable stress at the material time (though this is not a factor to which the Panel attributes any significant weight).*
 - c. *He had already taken glucose over a long period of time without incident, which made him feel safe in taking it and less aware of the dangers involved.*
 - d. *Most importantly, when the Athlete read the ingredients, he immediately assumed that nicethamide was nikotinamid, which was a substance the Athlete had previously checked and discovered to be harmless. This initial error, which the Panel finds to be careless but not highly careless, is a) plausible and b) responsible for reducing the Athlete’s subjective capacity to act according to the required standards. (¶88).*
88. Based on its determination that “the exacerbating and mitigating factors in this case are of roughly equal weight,” the *Cilic* Panel concluded that a “standard” suspension of four months within the 0-8 months sanction range for “light” fault is appropriate. (¶95).
89. Unlike Article 10.4 of the 2009 WADC, Article 10.5.1.1 of the UCI ADR and 2015 WADC expressly requires a Rider to establish “No Significant Fault or Negligence” (by a “balance of probability” pursuant to UCI ADR 3.1) to obtain any reduction of the maximum two-year period of ineligibility for an anti-doping violation involving a Specified Substance. In applying the *Cilic* guidelines, the AAA Panel stated that the Appellant “is culpable for ‘significant fault’ for failing to check the ingredients of Percocet.” However, given the context of this statement, the changed terminology in the Code, and the AAA Panel’s imposition of a reduced period of ineligibility of 16 months, the AAA Panel’s ruling implicitly found that Appellant satisfied his burden of proof of establishing “No Significant Fault or Negligence” under Article 10.5.1.1. Neither party has contested this conclusion on appeal; therefore, this Panel has no jurisdiction to reconsider or review *de novo* this factual determination.

90. In determining Appellant’s “degree of fault” pursuant to Article 10.5.1.1 of the UCI ADR and the new 2015 WADC for the presence of oxycodone in his system during an in-competition drug test, the Panel adopts *Cilic’s* guidelines for determining the appropriate period of ineligibility based on three categories of fault and sanction ranges. However, because the language of Article 10.5.1.1 is different from Article 10.4.1 of the 2009 WADC (which did not require an initial determination of whether the athlete’s degree of fault is “significant”), it is necessary to modify slightly the descriptions of the three categories of fault as follows:
- a. “considerable degree of fault”: 16 – 24 months, with a “standard” considerable degree of fault leading to a suspension of 20 months.
 - b. “moderate degree of fault” (preferable to “normal degree of fault,” which sends the wrong message): 8 – 16 months, with a “standard” moderate degree of fault leading to a suspension of 12 months.
 - c. “light degree of fault”: 0 – 8 months, with a “standard” light degree of fault leading to a suspension of 4 months.
91. This Panel acknowledges *Cilic’s* dictum that “a medicine designed for a therapeutic purpose . . . calls for a higher standard of care . . . because medicines are known to have prohibited substances in them” (¶75) accurately describes the duty of diligence of an athlete taking prescribed medication for the first time to determine whether it contains a Prohibited Substance. However, we conclude this heightened standard of care does not apply under the circumstances present in this case: when a long-time trusted sports medicine physician prescribes permissible out-of-competition medication known to contain a Prohibited Substance and foreseeably used by an athlete for pain relief on non-riding days during multi-day cycling competitions and/or as a sleep aid, without any warnings or information regarding the risk of a positive in-competition drug test for its presence in his system even if taken “out-of-competition” as defined by the UCI ADR and WADC (i.e., “the period commencing twelve hours before a Competition in which the Rider is scheduled to participate through the end of such Competition and Sample collection process related to such Competition”). Moreover, given the express language of Article 10.5.1.1, which states that an athlete’s individualized “degree of *Fault*” should determine the period of ineligibility, we decline to adopt a *per se* rule that the presence of a banned substance in one’s system whose source is prescribed medication, creates a presumption that his degree of fault is “considerable,” and justifies a suspension exceeding 16 months. Moreover, we note that *Cilic* anticipated the non-application of its own dictum regarding therapeutic drugs in situations such as when “a caffeine pill is taken by an athlete out-of-competition to stay awake or to overcome tiredness.” (¶75). In this case, Appellant took one tablet of Percocet as a sleep aid, rather than for a therapeutic purpose, which is analogous to *Cilic’s* exception to its dictum.
92. This Panel is guided by CAS jurisprudence establishing that athletes should have clear notice of conduct that constitutes an anti-doping rule violation: *Any legal regime should seek to enable its subjects to assess the consequences of their actions. . . . The fight against doping is arduous, and it may require strict rules. But the rule-makers and the rule-appliers must begin by being strict with themselves. Regulations that may affect the*

careers of dedicated athletes must be predictable. . . . They should not be the product of an obscure process of accretion. USA Shooting and Quigley v UIT, CAS 94/129 at ¶34.

93. Because the AAA Panel determined that Appellant’s anti-doping rule violation (i.e., the presence of a banned specified substance in his system during an in-competition drug test) was not intentional, then necessarily he had no knowledge that competing approximately 12-12 ½ hours after taking one tablet of Percocet would constitute an anti-doping rule violation. Appellant was generally aware that metabolites of ingredients of Percocet medication such as oxycodone may remain in his system beyond its period of therapeutic effectiveness, which is approximately four hours. Dr. Fedoruk, USADA’s Science Director, testified that oxycodone metabolites can remain in one’s system 24-72 hours after ingestion, but there is no record evidence that the UCI, USADA, or WADA websites or the GlobalDRO.com (the primary Internet resources athletes should check to obtain information about products or substances before taking them) contained this information. Moreover, there is no record evidence that any of these resources provided any warnings that oxycodone or its metabolites might remain in an athlete’s system longer than 12 hours after ingesting it, which could result in a positive in-competition test even if medication containing it is taken out-of-competition. *WADA v. Anthony West and FIM, CAS 2012/A/3029 at ¶64* (“while this factor is not exculpatory in a regime based on strict liability”, a lack of information and warnings from WADA and an IF that “may have contributed to a relative deficit of proactiveness in raising the awareness of riders and team leaders to the importance of active and informed surveillance of what competitors ingest” is appropriately given some weight in determining an athlete’s objective degree of fault).
94. The Panel respectfully disagrees with the AAA Panel’s determination that Appellant’s conduct places him in *Cilic*’s “significant degree of or considerable fault” category and his “appropriate sanction . . . is in the range of sixteen to twenty-four months” (¶52) because “all [he] had to do before shutting off his computer and retiring for the night was to make a quick inquiry to determine if the ingredients of Percocet were appropriate for use during competition.” (¶49). Appellant’s degree of fault must be evaluated in relationship to the specific anti-doping violation he committed based on the totality of circumstances (i.e., his failure to determine the length of time oxycodone is likely to remain in his system after ingesting it), not whether he failed to take appropriate steps to determine whether Percocet contains oxycodone (which Appellant did know). The dispositive inquiry in determining an appropriate, consistent, and fair sanction is his degree of fault for not taking reasonable steps to determine the length of time oxycodone is likely to remain in his system after ingesting it. There is no evidence that Appellant could have obtained reliable, scientifically accurate information from any of the above-referenced Internet resources normally consulted by athletes. Nor is there record evidence he could have obtained reliable information from a general Internet search because, as Dr. Fedoruk testified, the length of time metabolites of oxycodone are likely to remain in one’s system “is a challenging question” and the length of time for clearance is different based on the particular individual’s metabolism and genetics.
95. According to *Cilic*, an objective element (“what standard of care could have been expected from a reasonable person in the athlete’s situation”) “should be foremost in determining into which of the three relevant categories a particular case falls”. (¶¶71-72). Applying this standard, this Panel characterizes Appellant’s level of fault for not

taking objectively reasonable action such as asking his physician the length of time oxycodone is likely to remain in his system after ingesting it as “moderate fault.” In our view, if such information clearly had been provided by his physician or listed on the UCI, USADA, or WADA websites or GlobalDRO.com, Appellant’s failure to check any of these resources would constitute “considerable fault.”

96. In the “moderate fault” category, the range of the period of ineligibility under *Cilic* is “8-16 months, with a ‘standard’ normal degree of fault leading to a suspension of 12 months.” (¶70). According to *Cilic*, after determination of the relevant category based on application of the objective element, the subjective element is “used to move a particular athlete up or down within that category.” (¶73). Recognizing that this is “the exception to the rule”, this Panel determines that the totality of circumstances regarding Appellant’s positive in-competition test for “low” amount of metabolites of oxycodone in an in-competition drug test is an “exceptional case” in which the “subjective elements are so significant that they move [him] not only to the extremity of a particular category, but also into a different category altogether.” (¶74).
97. While recognizing that Appellant is an experienced cyclist (10 years as professional) with a history of receiving and having access to extensive drug education who did not disclose his usage of Percocet the evening of 7 August 2015 in his 8 August 2015 USADA Doping Control Form, this Panel concludes that application of the following subjective mitigating factors justify moving him into the “light degree of fault” category and imposing a six-month period of ineligibility, which is two months longer than the “standard” four-month sanction:
1. He “takes the principle of strict liability very seriously” and has a history of carefully checking before taking any medications, including over the counter cold medications;
 2. His “level of awareness has been reduced by a careless but understandable mistake” (*Cilic* ¶76 d iv) because:
 - a. his long-time, trusted sports medicine physician, Dr. Stansbury, the medical director at a Pennsylvania velodrome who frequently works with elite cyclists, has 30 years of competitive cycling experience (including as a professional cyclist), and is familiar with the WADC, prescribed 30 tablets of Percocet for him in July 2014 as pain relief for injuries after cycling crashes without informing him it contains oxycodone, which is on the WADC Prohibited List, or that its permissible out-of-competition use could result in a positive in-competition test for its metabolites many hours later although it is generally effective as a pain killer or sedative for only approximately four hours;
 - b. in his 5 May 2015 Doping Control Form for an out-of-competition test, he disclosed his usage of one tablet of Percocet on 30 April 2015 (for pain relief after a cycling crash), but USADA did not engage in any follow-up inquiry or warn him that his permissible out-of-competition usage of Percocet could result in a positive in-competition test for its metabolites even if used outside of the 12-hour window before a cycling race;

- c. he had witnessed his teammates taking Percocet as a sleep aid many times and none of those uses had resulted in a positive drug test; and
 - d. the UCI and WADC define permissible out-of-competition usage of Specified Substances (i.e., a 12-hour window prior to the beginning of a cycling competition) without providing any formal education or explicit warnings that their usage by athletes too close to this 12-hour window may result in a positive in-competition drug test created a false sense of security for Appellant.
 3. He “has taken a certain product over a long period of time without incident” and, therefore, “did not apply the objective standard of care which would be required or that he would apply if taking the product for the first time (*Cilic* ¶76 d i):
 - a. he used Percocet at least 10 times (mostly to sleep during long flights while traveling to national or international cycling competitions and for pain relief from injuries suffered during the April 2015 cycling crash) for more than one year without any positive results for oxycodone metabolites in four in-competition and eight out-of-competition drug tests, which contributed significantly to his false sense of security; and
 - b. although he could have applied for a Therapeutic Use Exemption for the temporary use of Percocet as pain relief for any current effects of a cycling injury, Dr. Fedoruk testified that he has no recollection of a TUE being granted to anyone for use of Percocet as a sleep aid. Therefore, applying for a TUE in this case would have been futile and thus would not have been an effective means of taking reasonable care and exercising diligence to prevent his 8 August 2015 positive test for oxycodone metabolites in his system.
96. This Panel agrees with the CAS jurisprudence that “although consistency of sanctions is a virtue, correctness remains a higher one: otherwise unduly lenient (or, indeed, unduly severe) sanctions may set a wrong benchmark inimical to the interests of sport”. *Dimitar Kutrovsky v. ITF*, CAS 2012/A/2804 at ¶9.54. In our view, a six-month period of ineligibility for Appellant achieves both objectives because it is a fair and proportionate sanction under *Cilic*’s guidelines as well as the pre-*Cilic* sanctioning principles set forth in *Kendrick*. It is within the four to ten-month range of sanctions imposed by the CAS and national anti-doping tribunals in recent cases for the presence of a specified substance in an athlete’s system during an in-competition drug test resulting from out-of-competition usage under the 2009 WADC. See, e.g., *Stepien v. Polish Rugby Union*, CAS 2013/A/3435 (ten months); *Kendrick* (eight months); *FINA v. Molina & CBDA*, CAS 2011/A/2515 (six months); *WADA v. Szabolcs & RADA*, CAS 2013/A/3075 (five months); *Cilic* (four months); *In the Matter of James Patterson* (Int’l Rugby Bd. Judicial Committee, 20 January 2012) (four months). See also *UCI v Bascio & USADA*, 2012 CAS/A/2924 at ¶61 (three-month suspension imposed on “an educated and experienced athlete familiar with the risks of doping” for in-competition use of nasal decongestant containing specified substance clearly identified on product’s bottle, packaging, and accompanying leaflet with “specific warning for people practicing sports activities”).

97. This Panel notes that the facts in this case are most similar to *FINA v. Molina & CBDA*, CAS 2011/A/2515, in which the CAS Panel imposed a six-month suspension for the presence of specified substance (“MHA”) during an in-competition test of “an older, experienced, and accomplished international level athlete whose career has spanned many years and who was the subject of regular anti-doping controls, with perfect knowledge of her anti-doping obligations.”(¶74). It determined the athlete’s “negligence was not inconsequential; far from doing everything in her power, she blindly relied on her past experience with the online retailer that provided her with the Supplement, did not check on the Internet or seek any kind of advice, and the product label disclosed the presence of MHA, yet she took the risk of ingesting a prohibited substance.” (¶75).
98. In *Stepien v. Polish Rugby Union*, CAS 2013/A/3435, a rugby player received a 10-month suspension for a positive in-competition test for a specified substance in an allegedly mislabeled nutritional supplement that he permissibly ingested out-of-competition two days beforehand. However, this case is factually distinguishable because there was record evidence of clear warnings about the existence of improperly labeled dietary supplements on the IF and WADA websites and that he “was informed and well aware of the risk of using supplements.” (¶105). In determining his degree of fault for the presence of a specified substance in his system during competition, the CAS Panel noted that the International Rugby Board’s website contained “excellent and exemplary publications regarding the risks of nutritional supplements” and WADA’s website had a warning stating “extreme caution is recommended regarding supplement use.” (¶105).
99. Sanctions imposed in prior cases involving the same banned substance are not controlling or necessarily entitled to much weight because the level of fault in a particular case can vary substantially. *Kendrick* at ¶27 (“It is important to note that the Panel is not limited to seeking such guidance as may be useful from cases involving the same substances; in any event under the WADC the Panel is required to evaluate the facts and circumstances of each case and the athlete’s degree of fault in each case, as it often happens that two athletes can ingest the same substance in situations that indicate very different degrees of fault.”); *FINA v. Filho & CBDA*, CAS 2011/A/2495/2496/2497/2498 at ¶8.2 (“[T]he WADC and its analogues must be applied in the light of the facts of the specific case . . . Other CAS decisions based on fact-specific findings are of little relevance in deciding the present appeals unless the facts in such decisions are identical, or at least extremely similar, to the facts with which the present appeals are concerned.”).
100. The following cases imposing a suspension of at least 16 months for the in-competition use of Specified Substances that are permitted out-of-competition are readily distinguishable: *Chan v. Canadian Wheelchair Sports Ass’n and Canadian Centre for Ethics in Sport*, CAS 2015/A/4127 16-month suspension for oxycodone based on “high degree of fault”; athlete deliberately exceeded his prescribed dosage by purchasing “Street Oxys” containing oxycodone and another banned substance and did not make any personal inquiry to determine if he had a TUE to take on a daily basis; no assertion that his in-competition positive test was caused by permissible out-of-competition usage); *WADA v. West and FIM*, CAS 2012/A/3029 (18-month suspension for in-competition usage of methylhexanamine during the day of the motorcycle race).

101. None of the other prior CAS or national awards cited by the parties or that are publically available (*Kutrovsky v. ITF*, CAS 2012/A/2804; *FIFA and WADA v CBF, STJD & Dodo*, CAS 2007/A/1370 and 1376; *Edwards v IAAF & USA Track and Field*, CAS OG 04/003; *USADA v. Piasecki*, AAA No. 30 190 00358 07 (September 24, 2007)), all of which involve an athlete's high or significantly negligent failure to check or adequately check ingredients of products such as nutritional supplements or energy boosters before taking them, are analogous or particularly helpful in determining Appellant's degree of fault for failing to ensure a Specified Substance is not present in his or her system during a multi-day cycling competition during which the athlete took one tablet of a medication containing a banned substance out-of-competition.
102. Because "sanctions imposed by international federations and national anti-doping organizations without adjudicated determination by an independent tribunal are of limited or no assistance" (*Kendrick* at ¶29) in determining an athlete's degree of fault or the appropriate sanction, this Panel is not relying on any of those cited by the Appellant to support its determination that a six-month suspension is appropriate based on his degree of fault for his specific anti-doping rule violation.

X. Costs

103. 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.

104. Article R64.5 of the CAS Code provides:

In the arbitral award, the Panel shall determine which party shall bear the arbitration costs or in which proportion the parties shall share them. 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 outcome of the proceedings, as well as the conduct and the financial resources of the parties.

105. Considering the outcome of this appeal (the Appellant's appeal is partially upheld, his sanction is reduced by 10 months, and the 15 December 2015 Award rendered by the American Arbitration Association/North American Court of Arbitration for Sport Panel in this matter otherwise remains in full force and effect) as well as the conduct (both parties and their counsel acted appropriately and cooperatively during this proceeding) and the financial resources of the parties, this Panel determines that the costs of this arbitration, to be calculated by the CAS Court Office and communicated separately to the parties, shall be borne equally by the parties. For the same reasons, this Panel further

determines that each party shall bear its own legal expenses and other costs, including attorney's fees, incurred in connection with this arbitration proceeding.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 29 December 2015 by Mr Robert Lea against the 15 December 2015 Award rendered by the American Arbitration Association/North American Court of Arbitration for Sport Panel is partially upheld.
2. The period of ineligibility imposed on Mr Robert Lea by the 15 December 2015 Award rendered by the American Arbitration Association/North American Court of Arbitration for Sport Panel is reduced to six (6) months, commencing from 10 September 2015 (the date he accepted his provisional suspension).
3. Except as aforesaid, the 15 December 2015 Award rendered by the American Arbitration Association/North American Court of Arbitration for Sport Panel in this matter remains in full force and effect.
4. The costs of the arbitration, to be determined and notified to the parties by the CAS Court Office, shall be borne by the parties in equal shares.
5. Each party shall bear his/its own costs, including attorney's fees, incurred in connection with the present proceedings.
6. All other motions, requests, or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland

Operative part of the award rendered on 25 February 2016

Date: 4 May 2016

COURT OF ARBITRATION FOR SPORT

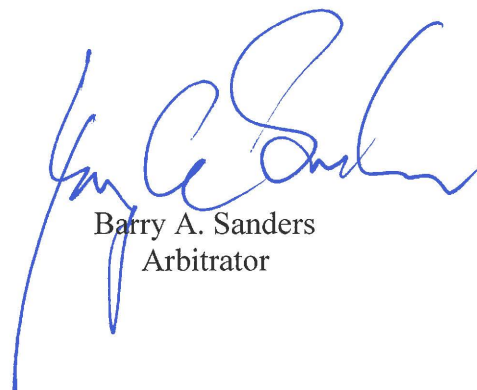


Matthew J. Mitten

President



Hugh L. Fraser
Arbitrator



Barry A. Sanders
Arbitrator