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INTERNATIONALE
DE NATATION

FINA Doping Panel 05/15
14 March 2016

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FINA Doping Panel

comprised of

Robert Fox	(SUI)	Chairman
William Bock, III	(USA)	Member
Peter Kerr	(AUS)	Member

In the proceedings against

the swimmer **Mauricio Fiol Villanueva (“the Athlete”)**
affiliated to the Federación Deportiva Peruana de Natación
(“FDPN”)

represented by: Mr. Howard L. Jacobs,
Legal Counsel

I THE PARTIES

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

1.2. The FDPN is a member of FINA. FDPN is required to recognize and comply with FINA’s anti-doping rules which are set out in the FINA Doping Control Rules (“FINA DC”). The FINA DC is directly applicable to and must be followed by, *Competitors, Competitor Support Personnel,*

coaches, physicians, team leaders, and club and representatives under the jurisdiction of the FDPN.

1.3 The Athlete was born on [REDACTED]

II NATURE OF THE CASE

2.1 On 12 July 2015 the Athlete provided urine samples as a result of a doping control conducted by the Pan-American Sports Organisation (“PASO”) Medical Commission at the XVII Pan American Games conducted in 2015 in Toronto, Canada (“PanAm Games”).

2.2 The Athlete's samples were submitted to the INRS Montreal an accredited laboratory of the World Anti-Doping Agency on 13 July 2015.

2.3 On 16 July 2015 the PASO Medical Commission received a notification that asserts that the Athlete has committed an Anti-Doping Rule violation. INRS Montreal reported that the Athlete's A Sample was positive to:

- S1.1A Exogenous AAS/stanozolol and metabolites (“**the Prohibited Substance**”)

and the Athlete was provisionally suspended.

III THE PROCEEDINGS

3.1 On 25 July 2015 the Executive Board of PASO published that the Athlete was excluded from the PanAm Games, his results were disqualified and his medal forfeited.

3.2 On 21 August 2015 PASO referred the decision in relation to the Athlete to FINA in application of PASO Rule 7.1.2 and 10.2.2.

3.3 Further, PASO forwarded to FINA the certificate of analysis of the B Sample of the Athlete confirming the result of the A Sample.

3.4 By email of 31 July 2015 to the PASO Medical Commission, Howard L. Jacobs ("**the Attorney**") advised that he was the attorney representing the Athlete and requested that all correspondence and documentation be directed to him. A Power of Attorney dated 21 August 2015 has been provided to FINA in these terms.

3.5 By letter of 27 August 2015 Cornel Marculescu, Executive Director of FINA advised the Attorney that "this matter is now with FINA who will proceed accordingly in application of its Doping Control Rules".

3.6 By email of 30 September 2015 to Robert Fox, Chairman of FINA Doping Panel, the Attorney advised that the Athlete requests a hearing. He further advised:

"Furthermore, with respect to the provisional suspension imposed pursuant to DC 7.9.1, Mr Fiol does not request that the provisional suspension be lifted. However, as we are in the process of testing nutritional supplements for possible contamination, Mr. Fiol reserves the right to request a reduction in his sanction, pursuant to FINA DC 10.5, if evidence is developed that the detected *Prohibited Substance* came from a *Contaminated Product* or from some other product."

3.7 On 14 October 2015 Robert Fox, Chairman of FINA Doping Panel, advised the Attorney that a hearing before the FINA Doping Panel would be held on 4 December 2015 in Lausanne, Switzerland at a time and

place to be confirmed which was subsequently advised to Mr Andres Bel Mejia, President of FDPN.

3.8 The Athlete has accepted the results of the A and B sample analysis.

3.9 The Attorney provided to FINA a Pre Hearing Brief of written submissions dated 24 November 2015 (“**the Submissions**”).

3.10 In summary the Submissions assert and submit:

- The Athlete has never knowingly taken the Prohibited Substance nor any substance that could have caused his positive test.
- The Athlete tested the eleven (11) nutritional substances that he had been taking all of which supplements tested negative for stanozolol contamination. The test results are annexed to the Submissions as Exhibit 5.
- Under the 2015 FINA Doping Control Rules it is recognized that the Athlete cannot seek a reduction of the "default sanction" unless he can prove the source of the Prohibited Substance which he has been unable to do despite going to extreme lengths. He has also reviewed the laboratory determination and raises no issues with respect to the chain of custody or the finding of stanozolol in the urine sample. He therefore has no choice but to accept the fact that he will be unable to seek a reduction in the "default sanction".
- The Athlete accepts that the sanction is four years unless he can prove that his violation was not "intentional" in which event the sanction is two years.
- It was further submitted that where an athlete did not knowingly take the substance for which he tested positive and cannot despite best efforts determine the source of the

prohibited substance the issuance of a four year sanction would be disproportionate.

- During the Hearing the Attorney submitted that DC10.2.1 raises additional concerns:
 - what happens to an athlete who has no idea why he has tested positive;
 - a burden of proof cannot be created that is impossible to meet;
 - because a source cannot be proved this cannot be equated with an intention to break the rules.
- Questioned by the Panel the Athlete:
 - advised he knew what the Prohibited Substance was;
 - considered meat might have been a source of the Prohibited Substance;
 - admitted had received injections of vitamin B and an anti-inflammatory drug Norflex prescribed and administered by a sports doctor.
 - the Athlete is sponsored by Herbalife but also uses other supplements sourced in United States of America as not available in Peru, these other supplements were not specified;
 - the Athlete is advised by a nutritionist in Peru Mr R [REDACTED] [REDACTED] who was recommended by team mates on Peru team;
 - the other supplements used were not analysed as their containers were discarded;
 - when asked what was the most likely cause of the positive test the Athlete answered "supplements or horse meat in sausages";
 - the Athlete was taking Herbalife Prepare and Lift Off six days prior to testing and other Herbalife products on the day of testing.

IV JURISDICTION AND APPLICABLE RULES

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

4.2 The applicable Rules in this case are the FINA Doping Control Rules in effect since 1 January 2015.

V. MOTIONS AND CONTENTIONS

A. The Athlete's motions and contentions

5.1 The Athlete did not question or dispute the adverse analytical finding and admits that he has committed an Anti-Doping Rule Violation.

5.2 The Athlete did not use the Prohibited Substance nor was aware of its source.

5.3 The Athlete used a number of supplements that were recommended by a nutritionist many of which he had tested and were found to be negative to the Prohibited Substance.

5.4 That the anti-doping rule violation was not intentional under DC 10.2. He has provided honest testimony and acquitted the burden of proof required under 10.2 and therefore DC 10.2.2 applies and the period of Ineligibility should be two years.

5.5 Pursuant to DC 3.1 the burden of proof placed upon the athlete to rebut a presumption is by a balance of probability which the Athlete by the Submissions and his testimony has established in his favour.

VI LEGAL DISCUSSION

A. THE FACTS

6.1 The Prohibited Substance belongs to the Class S1.1A Exogenous Anabolic Agents in the Prohibited List which is published and revised by WADA and is therefore prohibited at all times, in and out of competition, pursuant to FINA DC 4.1.

B. THE LAW

6.2 FINA DC 2.1.1

"It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Athlete's part to be demonstrated in order to establish an anti-doping violation under DC 2.1."

6.3 FINA DC 2.1.2

"Sufficient proof of an anti-doping rule violation under DC 2.1 is established by any of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Athlete's A Sample where the Athlete waives analysis of the B Sample and the B Sample is not analysed; or, where the Athlete's B Sample is analysed and the analysis of the Athlete's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the first bottle."

6.4 FINA DC 9

"A violation of these Anti-Doping Rules in Individual Sports in connection with an in-Competition test automatically leads to Disqualification of the result obtained in that Event with all resulting Consequences, including forfeiture of any medals, points and prizes."

6.5 FINA DC 10.1

"An anti-doping rule violation occurring during or in connection with a Competition may, upon the decision of the ruling body of the Competition, lead to a Disqualification of all of the Athlete's individual results obtained in that Competition with all Consequences, including forfeiture of all medals, points and prizes (...)."

6.6 FINA DC 10.2

"The period of Ineligibility imposed for a violation of DC 2.1, DC 2.2 or DC 2.6 shall be as provided in DC 10.2.1 and if DC 10.2.1 does not apply then pursuant to DC 10.2.2, subject to potential reduction or suspension of sanction pursuant to DC 10.4, 10.5 or 10.6."

6.7 FINA DC 10.2.1

"The period of ineligibility shall be four years where:

10.2.1.1 The anti-doping rule violation does not include a Specified Substance, unless the Athlete or other Person can establish that the anti-doping rule violation was not intentional.

10.2.2 The anti-doping rule violation involves a Specified Substance and FINA or the Member Federation can establish that the anti-doping rule violation was intentional."

6.8 The rules further consider that the term "intentional" identifies those athletes 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 rule violation and manifestly disregarded that risk (FINA DC 10.2.3).

6.9 The strict liability principle is clearly set forth in FINA anti-doping rules, as mentioned above. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Athlete's part to be demonstrated in order to establish an anti-doping violation under DC 2.1.

The burden of proof is put on the athlete's shoulders and FINA DC 3.1 defines that the standard of proof shall be by a balance of probability.

The FINA Doping Panel closely and attentively examined the Athlete's assertion, which in fact basically considers that if the Athlete did not knowingly engage in conduct which could lead to an anti-doping offence then his violation should not be regarded as intentional. The Panel first of all is mindful of the fact that the Rules which govern anti-doping set the cardinal principle of strict liability. Hence upon findings which result in the presence of a prohibited substance in the Athlete's system, lead to the suspension for a four year period with a substance which is not specified unless the Athlete is able to prove that the violation was not intentional.

Contrary to the Athlete, the FINA Doping Panel feels that the absence of proof of intention does not equate with the proof of absence of intention. The burden of proof lies with the Athlete who in this system must establish how the prohibited substance entered his system. Without establishing the likely method of ingestion it would be difficult to properly and fairly consider the question of intent in relation to the conduct that led to the ingestion and that to decide otherwise would be to go against pre-2015 code authority in this area (see also UKAD vs Graham).

In this matter, the Athlete's inability to answer the question relevant to the manner in which the substance entered his system leaves the Panel no

alternative but to consider he failed in discharging his burden of proof to allow him to argue the statutes through which a reduction of sanction may be contemplated. Did the Athlete establish on the basis of a balance of probability how the substance entered his system? The answer can only be negative and leaves no room for any other application of the rules.

C. THE SANCTION

6.10 According to FINA DC 10.8 all competitive results obtained from the date a positive sample was collected through the commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness requires otherwise, be Disqualified with all of the resulting Consequences including forfeiture of any medals, points and prizes.

6.11 Therefore, all competitive results of the Athlete as of 12 July 2015 through and including the date of this decision shall be disqualified. Any medals, points and prizes achieved during that period shall be forfeited.

VII SUMMARY OF DECISION

7.1 The Athlete is found to have committed an Anti-Doping Rule Violation under FINA Rules DC 2.1.

7.2 The FINA Doping Panel is not satisfied that on the balance of probability the Athlete has not intentionally committed an Anti-Doping Rule Violation.

7.3 The Athlete receives, in accordance with the FINA DC Rule 10.2.1, a four year period of ineligibility commencing on 12 July 2015 and ending at the conclusion of 11 July 2019, for his first Anti-Doping Rule Violation.

7.4 All results obtained by the Athlete as of 12 July 2015 and through the date of this decision are disqualified. Any medals, points and prizes achieved during that period shall be forfeited (DC 10.8).

7.5 All costs of this case shall be borne by the FDPN in accordance with FINA DC 12.3.

7.6 Any appeal against this decision may be referred to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland not later than twenty one (21) days after receipt of this judgment.

Robert Fox
Chairman

William Bock, III
Member

Peter Kerr
Member

Signed on behalf of all three Panel Members

A handwritten signature in black ink, appearing to be 'R. Fox', written in a cursive style.

Robert Fox