

CAS A3/2007 ASADA v/ Belinda Van Tienen

FINAL ARBITRAL AWARD

Rendered by the

COURT OF ARBITRATION FOR SPORT

OCEANIA REGISTRY

Ordinary Division

Sitting in the following composition:

Panel:

Mr. David Grace QC

Sole Arbitrator

In the matter of:

**AUSTRALIAN SPORTS ANTI-DOPING AUTHORITY,
(on behalf of the Australian Weightlifting Federation)**

Represented by Ms. Elizabeth Brimer, Barrister, Melbourne, Australia

Instructed by Mr. Richard Redman, Principal Solicitor of ASADA, Canberra, Australia

- Applicant -

and

BELINDA VAN TIENEN

Represented by Mr. Paul J. Hayes and Mr. Michael Schulze, Barristers, Melbourne, Australia

Instructed by Mr. John McMullan of McMullan Solicitors, Melbourne, Australia

- Respondent -

AUSTRALIAN SPORTS COMMISSION, Canberra, Australia

AUSTRALIAN OLYMPIC COMMITTEE, Sydney, Australia

WORLD ANTI-DOPING AGENCY, Montreal, Canada

INTERNATIONAL WEIGHTLIFTING FEDERATION, Athens, Greece

- Affected Parties -

Date and place of hearing: 28 May 2008, Melbourne, Australia

Date of Award: 16 June 2008

PRELIMINARY

1. At all material times, Belinda Van Tienen, the Respondent, has been an elite athlete in the sport of weightlifting. She has been a member of, and has been contracted to, the Australian Weightlifting Federation ("**AWF**") on whose behalf the Australian's Sports Anti-Doping Authority ("**ASADA**"), the Applicant, has brought this Application. The AWF has an Anti-Doping Policy (2004) ("**ADP**") to which the Respondent has agreed to be bound under the contract comprised by the rules of the AWF to which she has subscribed.

ANTI-DOPING POLICY (ADP)

2. Article 3.2 of the ADP provides, inter alia, that athletes:
 - 3.2.1 *must be knowledgeable of and comply with all Anti-Doping Policies and rules applicable to them;*
 - 3.2.2 *must read and understand the **Prohibited List** as it relates to them;*
 - 3.2.4 *must take full responsibility, in the context of Anti-Doping, for what they ingest and Use....."*
3. Article 4 of the ADP provides that doping is defined as the occurrence of one or more of the Anti-Doping Rule Violations ("**ADRV**") set forth in Article 5.1 to Article 5.8 of the ADP.
4. Article 5 of the ADP provides, inter alia, as follows:

"ARTICLE 5 – ANTI-DOPING RULE VIOLATIONS

The following constitute *Anti-Doping Rule Violations*:

 - 5.1 **The presence of a *Prohibited Substance* or its *Metabolites* or *Markers* in an *Athlete's bodily Specimen*.**
 - 5.1.1 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 bodily *Specimens*. Accordingly, it is not necessary that Intent, fault, negligence or knowing *Use* on the *Athlete's* part be demonstrated in order to establish an anti-doping violation under **Article 5.1**.
 - 5.1.2 Excepting those substances for which a quantitative reporting threshold is specifically identified in the *Prohibited List*, the detected presence of any quantity of a *Prohibited Substance* or its *Metabolites* or *Markers* in an *Athlete's Sample* shall constitute an *Anti-Doping Rule Violation*".
 - 5.2 ***Use* or *Attempted Use* of a *Prohibited Substance* or a *Prohibited Method*.**
 - 5.2.1 The success or failure of the *Use* of a *Prohibited Substance* or *Prohibited Method* is not material. It is sufficient that the *Prohibited Substance* or

Prohibited Method was Used or Attempted to be Used for an Anti-Doping Rule Violation to be committed.

5. The term *Prohibited List* is defined in Appendix 1 of the Applicant's ADP as meaning "*the List identifying the prohibited substances and prohibited methods*". That List is published and revised from time to time by the World Anti-Doping Agency (WADA) and forms part of the World Anti-Doping Code (**Code**). The term *Use* is defined in Appendix 1 as being "*the application, ingestion, injection or consumption by any means whatsoever of any prohibited substance or prohibited method*"

6. Article 6 of the ADP provides, inter alia, as follows:

"ARTICLE 6 – PROOF OF DOPING

6.1 Burdens and Standards of Proof

The AWF or the IWF shall have the burden of establishing that an *Anti-Doping Rule Violation* has occurred. The standard of proof shall be whether the AWF or IWF has established an *Anti-Doping Rule Violation* to the comfortable satisfaction of the hearing body bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where this policy places the burden of proof upon the *Athlete* or other *Person* alleged to have committed an *Anti-Doping Rule Violation* to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.

6.2 Methods of Establishing Facts and Presumptions.

Facts related to *Anti-Doping Rule Violations* may be established by any reliable means, including admissions. The following rules of proof shall be applicable in *Doping cases*

6.2.1 WADA-accredited laboratories are presumed to have conducted *Sample analysis* and custodial procedures in accordance with the *International Standard for Laboratory Analysis*. The *Athlete* may rebut this presumption by establishing that a departure from the *International Standard* Occurred.

If the *Athlete* rebuts the preceding presumption by showing that a departure from the *International Standard* occurred, then the IWF or the AWF shall have the burden to establish that such departure did not cause the *Adverse Analytical Finding*.

6.2.2 Departures from the *International Standard for Testing* which did not cause an *Adverse Analytical Finding* or other *Anti-Doping Rule Violation* shall not invalidate such results. If the *Athlete* establishes that departures from the *International Standard* occurred during *Testing* then the IWF or the AWF shall have the burden to establish that such departures did not cause the *Adverse Analytical Finding* or the factual basis for the *Anti-Doping Rule Violation*".

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7. Article 10 of the ADP provides, inter alia, as follows:

"ARTICLE 10 – RESULTS MANAGEMENT

10.3 Results shall be managed in accordance with Article 7 of the Code, the *WADA International Testing Standards* and the (proposed) *WADA Test Result Management Guidelines*".

8. Article 7.1 of the Code, provides, as follows:

"ARTICLE 7: RESULTS MANAGEMENT

Each *Anti-Doping Organization* conducting results management shall establish a process for the pre-hearing administration of potential anti-doping rule violations that respects the following principles:

7.1 Initial Review Regarding Adverse *Analytical Findings*

Upon receipt of an *A Sample Adverse Analytical Finding*, the *Anti-Doping Organization* responsible for results management shall conduct a review to determine whether: (a) an applicable therapeutic use exemption has been granted, or (b) there is any apparent departure from *International Standards for Testing* laboratory analysis that undermines the validity of the *Adverse Analytical Finding*."

BACKGROUND

9. In June 2005, as a member of the AWF, the Respondent represented Australia at the Mermet Cup Weightlifting event in the United States. The competition was held between 24 and 26 June 2005. At 6.33 p.m. on 25 June 2005, the Respondent received notification from the United States Anti-Doping Agency that she would have to provide an in-competition urine sample for drug testing. She provided that sample. The sample was tested for a number of substances (with negative results) at the University of California Los Angeles Olympic Drug Testing Laboratory ("UCLA"). The sample was not tested for the presence of Benzylpiperazine ("BZP"). At the time, BZP was not a target substance in the UCLA screening procedure for stimulants. The data obtained from the testing of the sample was retained electronically by UCLA but the actual sample itself was discarded in accordance with WADA protocol. The same situation pertained to other Australian Weightlifters who competed at the Mermet Cup event.
10. In October 2005, four Australian weightlifters tested positive to BZP. An investigation was then commenced by ASADA into doping issues concerning the AWF. The Respondent was involved in the sale of the product known as Fortius Synephrine to Camilla Fogagnolo and through Ms. Fogagnolo to Jenna Myers. Both Fogagnolo and Myers who were elite weightlifters, tested positive to BZP in 2005 as a result of in-competition tests. A third weightlifter, Corran Hocking, who at all material times was a friend of the Respondent and living with her, also tested positive to BZP in an in-competition test in 2005. Each of Fogagnolo, Myers and Hocking were sanctioned with two years' ineligibility from competition as a result.

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11. The Respondent was interviewed in the course of the AWF investigation on 27 February 2006, 3 March 2006, 4 March 2006 and 21 April 2006. Transcripts of those interviews were tendered in evidence.
 12. As a result of the investigation, the Applicant requested UCLA to review the results of analysis of a number of samples of urine taken from Australian Weightlifters at the Mermet Cup Competition between 24-26 June 2005, including the sample provided by the Respondent, to specifically check for the substance BZP. Although the urine samples had been destroyed, UCLA still had the analytical data from the screening performed on these samples stored in its computer files. To accommodate the Applicant's request to determine whether or not any of the samples contained BZP, UCLA obtained a reference standard of BZP and then compared the retention time and chromatogram of that reference standard with the data from the Respondent's sample. That analysis established that the A sample of the Respondent contained BZP. The same analysis detected BZP in the A samples of other Australian weightlifters in the Mermet Cup event.
 13. On 26 November 2007, the Applicant filed with the Court of Arbitration Sport Oceania Registry and subsequently served an application upon the Respondent alleging an Anti-Doping Rule Violation.
 14. The absence of A and B sample confirmation analysis has the result that the UCLA A sample result cannot be concluded as being a positive test triggering the presumption of laboratory validity pursuant to Article 6.2 of the ADP. There is thus no onus upon the Respondent to rebut the presumption of validity and it is the Applicant who is required to establish by any reliable means, to the requisite standard of proof, any Anti-Doping Rule Violation.
 15. The parties have agreed that the Court has jurisdiction pursuant to Article 11.3 of the ADP to determine the matter contained in the Applicant's application. Pursuant to Article 11.8 of the ADP, the Australian Sports Commission, the Australian Olympic Committee, WADA and the International Weightlifting Federation all had the right to attend the hearing of the matter as affected parties. No such body exercised that right.
 16. The parties agreed that the Arbitration would be conducted by the Court according to the Code of Sports Related Arbitration, 2004 Edition, in particular the rules relating to the Ordinary Division, Rule 38 and following. The parties further agreed for the Court, for the purposes of the Arbitration, to be constituted by Mr. David Grace QC. as sole Arbitrator and that the seat of the Arbitration be in Lausanne, Switzerland. The parties further agreed that the law of the merits, being the substantive law of the dispute, shall be the law of the State of Victoria, Australia, and that the 2004 ADP is the relevant policy which applies to the dispute. The parties agreed that the Arbitrator would arbitrate on the dispute and render

an Award in conformity with the agreement between the parties to submit their dispute for Arbitration before the Court.

17. Prior to the hearing, an Order of Procedure was agreed to by the parties which included a timetable for the filing and service of submissions. Unfortunately, due to various reasons, this timetable was not adhered to and there was a consequent delay in the convening of a hearing. The Court received substantial assistance through the provision of detailed written submissions together with the documentary evidence to be relied upon by the parties, prior to the hearing. The hearing took place on 28 May 2008 in Melbourne, Victoria, Australia.

THE HEARING

18. The Applicant relied upon the following evidence:
- 18.1 Affidavit and viva voce evidence from Professor Don Catlin (previously Director of the University of California Los Angeles (UCLA) Olympic Laboratory).
 - 18.2 Affidavit and viva voce evidence from Dr. Rymantas Kazlauskas, Director of the Australian Sports Drug Testing Laboratory.
 - 18.3 Affidavit evidence of Richard R. Young, Lead Investigator in the investigation into possible Anti-Doping Rule Violations amongst members of the AWF and his report dated December 2006.
 - 18.4 Various correspondence and chain of custody documentation.
 - 18.5 Transcripts of the records of interview of the Respondent referred to in paragraph 11 above.
19. The Respondent relied upon her own Affidavit and viva voce evidence.
20. At the commencement of the hearing the Respondent objected to the admissibility of the Affidavit of Mr. Young and of his Report. The major concern was the conclusions reached by Mr. Young in relation to the Respondent. The Court made it clear that Mr. Young's conclusions and comments would not be relied upon at all by the Court. Further objection was made to the proposed evidence of Doctors Catlin and Kazlauskas, primarily based upon the inability to analyse the urine sample for the presence of BZP and specifically the absence of the B sample. That submission was rejected and the evidence was allowed, however as will be discussed later in these reasons, the submission was repeated in closing argument on behalf of the Respondent.
21. It was common ground between the parties that:

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- 21.1 BZP was a "*Prohibited Substance*" at the relevant time because it was a substance with a similar chemical structure or similar biological effect as that of a prohibited substance.
- 21.2 the chain of custody of the Respondent's urine sample from source to analysis at UCLA was unbroken.
- 21.3 the retrospective analysis conducted by Dr. Catlin at UCLA was an established scientific method of analysis.
22. The Applicant's case primarily relied upon the fact that the analysis conducted by Dr. Catlin in 2006 of the data produced by the testing of the Respondent's A sample in June 2005 revealed that BZP was in the Respondent's urine in June 2005. It was submitted that the data representation of the original A sample analysis was produced by a reliable process and conducted in accordance with international standards by the highly qualified and experienced Dr. Catlin. Therefore the retrospective analysis of the analytical data was a reliable means by which the Anti-Doping Rule Violation of use of a prohibited substance had been established. It was further submitted that there was no reason to disregard the analytical data produced from the A screen analysis on the basis that no B sample was available for analysis. The Applicant emphasised, that as a result of the evidence from Dr. Catlin, his opinion that BZP was in the Respondent's urine was reliable because the peak recorded in the analytical data of the sample was like a fingerprint to the extent that it was unique and that it matched the peak of the standard for BZP, and that furthermore such a match could not have been obtained other than by BZP being in the sample. It was further emphasised that BZP is a synthetic substance (as deposed by Dr. Kazlauskas in his Affidavit and unchallenged) that cannot be produced naturally in the body and in order for it to be in the sample, BZP must have been consumed or ingested by the Respondent, and therefore "*used*".
23. The Applicant further relied upon alleged admissions made by the Respondent during her records of interview. It was submitted that the Respondent had admitted that she ingested or consumed Fortius Synephrine during the Mermet Cup and that the Court should draw the probable inference that BZP was contained in the Fortius Synephrine that the Respondent had ingested or consumed.
24. The Respondent's case was that the Applicant had not led sufficient (or indeed any) evidence to permit the Court to find to a high level of comfortable satisfaction that the Respondent had committed an Anti-Doping Rule Violation in contravention of Article 5.2 of the ADP. The Respondent submitted that the evidence of Doctors Catlin and Kazlauskas was undermined by the absence of the ability of the Respondent to have the B sample tested and that the alleged admissions by the Respondent, primarily alleged to have been made during her interview with Richard Young on 21 April 2006, were taken out of context and did not amount to proper admissions and in any event they did not have any weight or probative value.

THE EVIDENCE

25. The Affidavit evidence of Dr. Catlin was to the effect that:
- 25.1 BZP was present in the sample.
 - 25.2 the use of electronic data files to detect the existence of BZP in the sample was extremely reliable and that it would be impossible for a sample that did not have BZP in it to produce the result that was obtained from the analysis of the sample.
 - 25.3 for BZP to have been located in the sample, which was collected on 25 June 2005, it was more likely than not to have been ingested by the athlete on either 24 or 25 June 2005 and that it would be unlikely, though not impossible, for BZP to be ingested prior to these days due to the short retention time of BZP in the body.
 - 25.4 that the only reason BZP was not detected at the time the initial sample was analysed was because the UCLA laboratory at that time analyzed samples using the WADA list and that BZP was not a target substance for the UCLA laboratory to look for due to it being not specifically named in the 2005 WADA prohibited list of substances (although it was still a prohibited substance in 2005) and furthermore the UCLA laboratory did not routinely screen for the product unless specifically requested.
26. In cross-examination Dr. Catlin agreed that the importance of the B sample is to ensure the accuracy or reliability of the A sample should the athlete wish to compare those two samples, and that, as such the B sample is a critical part of the overall doping test in ensuring its accuracy and reliability. He further agreed that the B sample was not analysed. In re-examination, Dr. Catlin confirmed that the use of electronic data files to detect the existence of BZP in the sample was extremely reliable. In the course of questioning by the Court, Dr. Catlin stated that he was not aware of any other case in which a retrospective data analysis of a specific named stimulant had occurred, however the Balco affair may have given rise to a similar situation.
27. Dr. Kazlauskas testified by Affidavit that in his opinion there was no doubt that BZP was present in the sample as a result of the full scan mass spectra obtained. In cross-examination he agreed with the proposition that the B sample is an integral part of the overall process to establish the accuracy and reliability of a doping test comprised by the A sample if there has been an adverse analytical finding reported in the A sample. He commented that because an adverse analytical finding had not been found, the B sample was not relevant.
28. Before outlining the relevant parts of the records of interview of the Respondent, it is important to note the context in which those interviews were undertaken. The Terms of Reference of the ASADA investigation regarding Australian weightlifting, led by Richard Young as the Principal Investigator, was as follows:

"The purpose of the Investigation is to examine possible doping problems in Australian weightlifting. The Investigation will proceed in two phases. In phase one, the Investigation will focus on:

- "(a) the positive drug tests for benzylpiperazine (BZP) by four Australian weightlifters in October 2005;
- "(b) the allegations that these positive test results came from contaminated supplements;
- "(c) the allegations that the relevant supplements were provided by Belinda Van Tienen;
- "(d) the connections between Belinda Van Tienen, the four weightlifters with positive BZP tests, the companies that manufactured, sold or distributed the allegedly contaminated supplements, and other individuals in the Australian Weightlifting community;
- "(e) the chain of supply of BZP.

"In phase two, the Investigation will investigate any other alleged anti-doping rule violations involving Australian weightlifting which may be brought to its attention."

29. There are two important facts to be noted when considering the evidence of the records of interview. There was no evidence nor any admissions on the part of the Respondent that she knew or had some reason to suspect that the Fortius Synephrine sold by her to Fogagnolo and through Fogagnolo to Myers contained BZP or another prohibited substance. In addition, at the time of the interviews, there was no evidence that the Respondent had tested positive herself to using BZP in competition (BZP was not a prohibited substance "out of competition"). The request by ASADA to UCLA for the retrospective analysis of the data obtained as a result of the analysis of the Respondent's urine sample at the Mermet Cut competition was not made until 12 June 2006 (with the results sometime afterwards), therefore some months after the interviews had been concluded. There was no further interview of the Respondent after the results of Dr. Catlin's analysis were reported to ASADA.
30. The first three interviews were conducted by Mr. Wayne Carney, a private investigator working for Australian Forensic Services. Mr. Richard Young conducted the fourth interview. The first three interviews occurred in late February 2006 and early March 2006 at a time when the Respondent had been selected as a member of the Australian weightlifting team to compete in the 2006 Commonwealth Games in Melbourne, Australia. Those Games were to commence later in March 2006 (the Respondent ultimately withdrew from that team due to injury). Those first three interviews were all conducted in Canberra. At the time, the Respondent was training at the Australian Institute of Sport in Canberra, Australia. The Respondent was then 19 years of age having been born on 11 April, 1986.

At the relevant time she was residing in Victoria, Australia and a beneficiary of a scholarship from the Victorian Institute of Sport.

31. In the course of the first record of interview on 27 February 2006 the Respondent stated, inter alia, that:
- 31.1 she had sought legal advice prior to the interview commencing.
 - 31.2 she worked for the business known as Fortius on a commission basis as a sales assistant from the end of 2004.
 - 31.3 the business was run by the owner of the house in which she rented a room from early 2004.
 - 31.4 She arranged for Camilla Fogagnolo to market and distribute Fortius products in Tasmania, Australia.
 - 31.5 the products sold by Fortius included Protein, Creatine, Synephrine, Steroline and Staminade.
 - 31.6 She was aware of the use of Fortius Synephrine by Fogagnolo, Myers and her boyfriend Corran Hocking.
 - 31.7 She was aware that Myers and Fogagnolo had tested positive to BZP, at the National Championships in October 2005, from Fortius Synephrine provided to Fogagnolo by her.
 - 31.8 her understanding of the benefits of Fortius Synephrine was that it was of assistance in weight loss as it contained products that speeds up metabolism and that she knew of that benefit as she had used the product for about a year.
 - 31.9 the product was legal and that all the ingredients were approved by ASDA (the fore-runner to ASADA).
 - 31.10 until about March 2005 Fortius used to purchase the product in bulk in 25 litre drums, but after that bought it already packaged in 500 ml or 250 ml containers.
 - 31.11 after buying it in that form, Fortius would take the labels off the canisters and put a new label on without any change to the ingredients.
 - 31.12 the Synephrine was contaminated at the manufacturing level from the manufacturer who supplied Fortius with the Synephrine.
 - 31.13 the product provided to Fogagnolo was in a sealed bottle from the manufacturer in Victoria.
 - 31.14 the bulk product had already been used before the products were sold to Fogagnolo meaning that the product sold to Fogagnolo was already sealed individually from the manufacturer; she never saw it being packaged but was involved in the re-labeling of the product with the Fortius labels being placed on the containers.

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- 31.15 any product that she had consumed herself was not from the same batch that was provided to Fogagnolo but was from the bulk amounts, part of which she had retained.
- 31.16 She had observed but had not taken part in the transferring of product from the bulk containers to smaller containers for sale.
- 31.17 the change from buying it in bulk to buying it in smaller quantities directly from the supplier was due to less orders and that that procedure occurred from June 2005 onwards.
- 31.18 At question 240 the Respondent was asked:
"What is the difference between what's in this sealed Synephrine, Fortius Synephrine canister as opposed to the bulk?"
she answered:
"Nothing, this product is sold by about 50 different distributors within Victoria only".
- 31.19 The reason for athletes testing positive to BZP was due to it being contaminated in the course of manufacture.
- 31.20 she had never heard of BZP nor did she have any knowledge of any person involved with the Fortius business putting BZP in the Synephrine product.
32. On 3 March 2006 the second interview was conducted. Further questions of a substantive nature were sought to be asked by Mr. Carney. Because the Respondent requested legal representation Mr. Carney did not proceed with the interview.
33. The third interview was conducted on 4 March 2006 after the Respondent had received legal advice. Prior to that interview commencing the Respondent had perused the transcript of the first interview on 27 February 2006. During the course of the third interview the Respondent, inter alia, stated that:
- 33.1 Cell Biology supplied the Synephrine to Fortius.
- 33.2 the Synephrine was bought in quantities of 20 or 30 at a time in 500 ml bottles.
- 33.3 the labels were removed and the Fortius label substituted.
- 33.4 she had no explanation as to how Fortius Synephrine had BZP in it other than it occurring in the course of manufacture by Cell Biology.
- 33.5 at her home where the business was conducted the Synephrine liquid was transferred from a 25 litre drum into 500 ml amounts, put into a container, sealed with a stopper and a lid and then the product labels were put on the container which was subsequently sold and marketed.
- 33.6 after the positive tests they had one of their sealed containers bought from Cell Biology tested and that it contained BZP.

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- 33.7 The liquid in the container that tested positive to BZP was not from the same batch that was supplied to Fogagnolo but had been bought from the same place, namely Cell Biology.
- 33.8 The product known as B2 or B3 was Synephrine; she had no knowledge that BZP had been added to the Synephrine; the product that was tested by Fortius was B2 Synephrine.
- 33.9 At question 133 the Respondent was asked:
"Regardless if it comes in bulk 25 litre drums or the plastic containers or the aluminum canister that you decanned it to, you believe that BZP was in that?"
to which the answer was
"Yep".
- 33.10 Her only information or knowledge that BZP was in that product was as a result of the test and she had never seen it being put into the product.
- 33.11 She agreed that the product provided to Fogagnolo, and through her to Myers, came from Cell Biology in a sealed bottle and described it as B2 Synephrine purchased in 500 ml amounts in individual containers.
- 33.12 a number of the answers she gave in her interview conducted on 27 February 2006 needed to be amended (and this was done after she had been given the opportunity to do so.)
- 33.13 in relation to the issue of Fogagnolo testing positive by reason of the supply and purchase by Fogagnolo of the contaminated product, the following questions and answers are relevant:
"Q169 What you're say at the wrong time is in relation to as in the past where you have sold it to others and haven't proven positive, is that right?"
A169: Yep. Well Camilla's had the product before and been tested with the product and not tested positive.
Q170 Was that tested in completion?
A170 Yes, it was in America
Q171 Yes but I don't know, I can't recall?
A171 They have the same prohibitors as
Q172 Do they test for BZP?
A172 In competition if they are going test for it in one competition they have to test
Q173 Yes but I don't know if they test before, the process, the material
A173 For BZP, like when they do the, when they come up with the spiking, they can see in, they have, all test all substances are suppose to go through the computer where as if it comes up with a certain spiking, it can tell that is obviously a bad substance. And many competitions before people have used it, so"
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34. The fourth and final interview was conducted on 21 April 2006 by Richard Young (assisted by Tom McQuillen of ASADA). A lengthy interview was conducted over the course of 67 minutes. Set out hereunder are the relevant questions and answers:

Q26 Um, let me start with one of the things that has puzzled me and that is that if it is um, the Fortius Synephrine product that's caused the positive test for BZP...

A26 Yes

Q27 How come other people haven't tested positive before? I mean, is it you're understanding that lots of people have taken Fortius Synephrine and then been tested in competition?

A27 Um, a lot of people have taken it for a length of time and have been tested in and out of competition and not gone positive.

Q28 Okay. So give me some examples. I mean, have you taken it the day of competition and been tested?

A28 Yes. In America I was tested at the Mermet Cup and I'd taken that product as well as Corran and Camilla. And Sergo and Alex. We had all taken it at that competition and been tested.

Q29 When was that?

A29 It was July last year.

Q30 Okay. Um, and any other times you have taken it?

A30 I've taken it for the last year.

Q31 In competition, on the day of competition and been tested though?

A31 Yes.

Q32 Give me another example.

A32 Specific competitions?

Q33 Probably any...Would it be fair to say that any competition you were in, you took it that day and...?

A33 Um, depending on if I was going heavy. If I was like, if it's a serious competition then yes I would have, until the positives which I quit after that, obviously.

Q34 Okay, so if I went back a year from when, and looked at your serious competitions...

A34 I started using it um, probably mid 2004.

Q35 Okay, so if I looked at any of your serious competitions from mid 2004, you would have taken it that day and if...

A35 It's also a training thing like cause, it's to lose weight and obviously I'm in weight division and I'm watching my weight, so within training or competition.

Q36 But on competition days, if I looked at, if I looked at your in-comp tests....?

A36 Yep.

.....

Q52 *Um, I've looked at, I've looked at your in-comp doping control forms, actually your out of comp doping control forms too, you didn't list it, how come?*

A52 *Because, it's just a supplement, I don't know. There's never been any problem with it so, I don't know. I mean I only usually list Tribulus and medication. They are usually the only things I list. I think I might have listed maybe (undecipherable) but that might have been a while ago but I don't know.*

.....

Q55 *Okay. Um... have you ever taken the Metaslim B2, that wasn't the Fortius product, meaning, have you ever just taken Metaslim B2 as, as the way it came from Cell Biology?*

A55 *Well, me, Corran and Sergio all use the generic product. We don't use the Fortius product because obviously we buy it direct from Cell Biology and so there's no bother, we don't mind what it looks like, what label is on it. We just use the Cell Biology one, so yes we all used Cell Biology. See I don't, I usually get it direct from Cell Biology and just use that product.*

Q56 *Let me ask a question about containers. Um, I understand that there were the 25 litre tubs and that Fortius stopped buying those in March 2005?*

A56 *I looked up Keith's, because of the investigation, I looked up Keith's dates and receipts and all that and we last purchased it in February, in 2005. that was 25 litres.*

Q57 *That was the last of...?*

A57 *That was the last bulk. That was obviously because everyone knew that Fortius was shutting down so there was no point in buying bulk anymore.*

Q58 *Why did everyone know that Fortius was shutting down?*

A58 *Because of Keith's case.*

Q59 *Okay. Um, and so any Fortius that was purchased after February of 2005 would have come in bottles not?*

A59 *It would have come already sealed in um, smaller decanter sort of things, 500 ml.*

Q60 *Um, could you buy it from Cell Biology in 250 ml?*

A60 *(Undecipherable) a mixer.*

Q61 *So that when you resold it as Fortius in 250 ml, how did you do that?*

A61 *How did I do that?*

Q62 *How did Fortius do that?*

A62 *It was put into the silver decanters that you've probably seen and labeled the same as Cell Biology except with the Fortius label.*

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- Q63 *So in other words it came out of the, it came out of the Cell Biology, poured out of the Cell Biology plastic container into the silver container, 250 mls worth, sealed and labeled?*
- A63 *Yep.*
- Q64 *Um...*
- A64 *Some, there used to be one series you could buy from Cell Biology already in the silver bottles.*
- Q65 *When was that?*
- A65 *(Undecipherable) because I don't always go down to Cell Biology to buy it so I'm not, I haven't packaged since the last bulk came in.*
- Q66 *When you say you haven't packaged since the last bulk amount came in, tell me what do you mean by that?*
- A66 *I mean I haven't since the last 25 litres came in that was the last time I, that I actually put things into containers. Since then I only worked in the office and put labels on things and shipped stuff.*
- Q67 *Um, did you go down and buy the um, 500 ml containers from Cell Biology yourself ever?*
- A67 *For myself, yes I have been down there before to buy them.*
- Q68 *And, and by yourself I mean, you bought them both for yourself and bought them for Fortius as well? You were the pickup person?*
- A68 *Um, obviously I was there so the last time I went down was just after America so it was, it would have been start of August, end of July. I'm pretty sure it started in August that is what the receipt is for.*
-
- Q80 *Okay*
- A80 *2004 I went down more often but 2005 we weren't buying very much.*
- Q81 *2004 though when you went down you were getting the 25 litres instead of the 500 mls?*
- A81 *Yep.*
- Q82 *Okay, um about how many times in 2005 would you have gone down and gotten the 500 ml?*
- A82 *Maybe two or three, three.*
- Q83 *And each time, the one time...*
- A83 *One time I went down but it wasn't available, there wasn't anything left so...*
- Q84 *Okay*
- A84 *That was just before I went to America.*
- Q85 *Okay. Um, and all those times it was in plastic bottles?*

A85 Yep.

.....
Q114 *Okay, roughly what month was that?*

A114 *Probably two months before that so just prior to America I think.*

Q115 *Okay. Um, when you went through the records, were you able to figure out which batch is, or which, which um, invoice tracked the....?*

A115 *The Synephrine was bought on the same day as the transaction was, the invoice number...*

Q116 *Okay, and is that the one that she might be tested positive from?*

A116 *Yeah. I think so, I'm not sure. It could have been the one before that she was in America because she said she had, that it was the same bottles that she had used in America and she had been tested on that one, so, I don't know.*

Q117 *Okay.*

A117 *That was just from her recollect when she was talking to me.*

Q118 *Right. That's what I'm trying to figure out; I'm trying to track these bloody bottles.*

A118 *See, I don't know because she was saying that she, it could have been the same one as America and we're just not sure, maybe in America they don't test for it or it didn't come up in the testing procedure, I don't know. We're still not sure why, when BZB was, started being in the product.*

Q119 *Okay, so the, if we were to look at bottles she would have purchased before u, you know there's a couple of months before September that got sent to, you thought were for her boyfriend and that had...?*

A119 *A Synephrine and a, like a Tribulus tab.*

Q120 *So that one Synephrine, do you know it was the 250 or 500? But the records show that?*

A120 *Yeah*

Q121 *And then um, if the bottles she took to America wasn't one of these two bottles, did you check invoices to see what bottle that could have been?*

A121 *Well, I think it was about May of last year I gave her a consignment pack because she, that was about the time when, I think it was May, I'm not sure because that invoice is not there, when she wanted to start selling it in Tasmania so I gave her a consignment pack that just had all different types of products. It had aminos, proteins, Synephrine, and um, I think that's the one and there was a Synephrine in there and she said she kept one for herself which I said was fine and I think that was the one she was still using at the America comp so...*

Q122 *Um, and would that have been 500 or 250?*

A122 *I think there was a 500 and 250 in that pack. (Next sentence undecipherable).*

.....

Q130 *Okay. Um, so of all the um, Fortius Synephrine that had been sent to Camilla, it would have um, come from Cell Biology in plastic bottles?*

A130 *Yeah.*

Q131 *And then, somebody would have transferred it into metal bottles?*

A131 *Yeah.*

Q132 *Put a label on it?*

A132 *Or what have, what I do is I take it off the shelf, their already in steel containers and I put the label on because it gets dusty and dirty and so...*

Q133 *So somebody else, somebody else....*

A133 *Puts it in a bottle and then I take it off the shelf and put the label on it.*

.....

Q137 *Okay. Um, okay, so let's talk about um, do you know where the bottle that Sergio tested positive on came from?*

A137 *I never gave any products to Sergio so it would have come from Keith so I don't know where he would have got it from.*

Q138 *How about the bottle that Corran tested positive on?*

A138 *I was training there. It was straight, in the same bottle that it came from, from Cell Biology; it was in a plastic bottle.*

Q139 *Okay, and is that one that you used too? I mean you guys shared that bottle?*

A139 *Sometimes. Depends on if I had any left or not.*

Q140 *And so when would that bottle have been purchased from Cell Biology?*

A140 *Um, at the same time as Camilla's, well maybe a bit before.*

Q141 *And which of Camilla's?*

A141 *The one in September. Because they were new bottles that he tested positive on and at that time they were fairly full.*

.....

Q149 *Okay. Um, I was, I was a little perplexed reading the first two transcripts. Um, it seemed to me that you were saying over and over um, the bottles that were sent to Camilla were the very same sealed bottles that came from the manufacturer?*

A149 *Well I mean they were sealed, I mean that when I was speaking to you it was getting very heated. I was very pissed off and stressed at that point. Um, what I was trying to say is when I get it, it's already sealed like, he was trying to say what do you do, how do you pour it into it, how do you, what do you add to it. I mean, Fortius doesn't make any product that's, finished product, and when I get it, it's already sealed and it's ready to put a label on. I mean, I used to put it into containers when it came in bulk but since this, there's no point in me to do it.*

Q150 *Okay so the, the, to make it real clear, see if I've got it straight. Um, that when we're now past February and the bulk time um, the um, 500 ml bottles that come from Cell Biology are plastic...*

A150 *Yep*

Q151 *And um, and those, you and Sergio and Keith would go ahead and just use the plastic bottles?*

A151 *Yep*

Q152 *Um, but on anything you would send to Camilla or anybody else, some...*

A152 *Camilla wanted to be a distributor so she didn't want, she wanted obviously a name that didn't have address of Cell Biology on it so she could still keep her, keep her customers sort of thing.*

Q153 *Right. So anything that went to her or anybody else, somebody but not you...*

A153 *Yep*

Q154 *Would take what was in the plastic bottle, unseal it, pour it into the metal bottle and reseal it and put it on the shelf?*

A154 *Yeah*

Q155 *Then when it was time to ship to somebody like Camilla, you would dust it off, put a label on it and send it out?*

A155 *Yeah*

Q156 *Is that right?*

A156 *Yeah.*

.....

35. In the computer data analysis referred to by Dr. Catlin in his evidence he established that not only the A sample of the Respondent contained BZP but also the A sample of Camilla Fogagnolo and Corran Hocking. It appears that consideration was given by the Applicant to the bringing of charge of an Anti-Doping Rule Violation against Fogagnolo and Hocking based upon their use of BZP during the Mermet Cup however because they had already been found to have committed Anti-Doping Rule Violations for the use of BZP at the October 2005 National Championships and received 2 year periods of ineligibility, there would be no point in bringing further proceedings as it could not add to the period of ineligibility.
36. In her Affidavit filed with the Court, the Respondent stated that she had used a different batch of Synephrine to the batch of Synephrine used in late 2005 by Fogagnolo and Myers. She claimed to have had a batch of Synephrine (sold by Cell Biology as Metaslim B2) from the bulk 25 litre drum purchased in late 2004. She claimed that that was the only Synephrine that she ever possessed or used whereas Fogagnolo and Myers had used the

Fortius Synephrine, purchased by Fortius, pre-packaged, in the 500 ml or 250 ml packages from Cell Biology. In relation to the answers given by her in the records of interview, she stated, inter alia, that:

- 36.1 that she had never used the Fortius Synephrine product but had used the bulk Synephrine product.
 - 36.2 that any answers appearing to the contrary are taken out of context and are misleading.
 - 36.3 It is apparent when the total interview with Richard Young is considered, that there was no admission that she had used Fortius Synephrine but rather the bulk Synephrine product.
 - 36.4 in answers to questions 26-36 of the fourth record of interview on 21 April 2006, she failed to make the qualification as to the distinction between Fortius Synephrine and the bulk-purchased Synephrine product, but that this was made clear by question 55 and the answer thereto, and that this was emphasised by specific answers in the 27 February 2006 interview.
37. In cross-examination by Counsel for the Applicant, the Respondent agreed that she first gave Fogagnolo Fortius Synephrine in a consignment pack around May 2005 and that the Fortius Synephrine that was provided to Fogagnolo came from Cell Biology in plastic bottles originally. The Synephrine was then transferred to a metal bottle and a Fortius label put on it. She maintained that between the last purchase of the bulk substances in February or March 2005 to the end of that year that any Synephrine used by her was from that bulk quantity. She agreed, however, that she had during 2005 shared Synephrine belonging to her friend Corran Hocking who had used Synephrine from plastic 250 ml or 500 ml bottles but that would probably have been in training only. She agreed further that if she ran out of her own bottles she would have used Hocking's bottle. She further stated that Hocking didn't use the bulk amount but had used the Synephrine from the 250 ml or 500 ml bottles purchased from Cell Biology.
38. When cross-examined about the contents of her records of Interview the Respondent agreed that she was being truthful and honest in the answers she gave to questions put to her and did her best to answer accurately. She agreed that she had stated that if she ran out of her bulk amount she would sometimes use Hocking's and that it was an honest statement. She then agreed that after February/March 2005 she would use the plastic 250 ml or 500 ml bottles containing Synephrine obtained from Cell Biology with the only difference between those bottles and those sent to Fogagnolo being the Fortius label on the Fogagnolo bottles. She maintained that she would have used the plastic bottles if she was with Hocking, but that she still had her own supply from the bulk amount. She emphasised that at the time of the interviews the questioning was directed to the issue as to whether or not she had intentionally put a substance into the products supplied to Fogagnolo and Myers and that she was not aware of there being any issue about which

batch of Synephrine might or might not have been used by her. Further, she agreed that Hocking and her had all used the generic product but that Hocking had never used the bulk product and that when she was referring to the generic product in her answers in the interview she was referring to the 250 ml or 500 ml plastic bottles containing Synephrine from Cell Biology. In relation to the Mermet Cup competition, although she took with her a number of bottles of Synephrine in either 250 ml or 500 ml amounts for other weightlifters, including Fogagnolo, she could remember having her own bottle that had Synephrine from the bulk amount.

39. In relation to question 26 in the fourth interview on 21 April 2006 and subsequent questions, the Respondent explained her answers thereto in the following terms:

"I believe I was saying that at the time he was referring to Fortius Synephrine as a generic term. He didn't understand that there was other terms and it had come from different places. He was calling – everything was Synephrine and everything – he was calling it Fortius Synephrine. A few times I had said "No, there's a difference", and its stated in the interview many times, but at this stage I had said "We had all taken it", being Synephrine, not saying which batch it was, but we all had taken Synephrine at that competition".

40. She agreed, that Fogagnolo had never been given the bulk amount nor had Hocking, and that therefore the reference, it was suggested to her, could not have been a reference to the bulk amount. In response to that proposition the Respondent's answer was *"No, but I was referring to "I've taken it", being I have taken Synephrine, "at that competition." Not referring to whether it was bulk or"*

41. The Respondent denied that during the Mermet Cup competition she had used the same product that Hocking, Fogagnolo and others had used being the Synephrine contained in the 250 ml or 500 ml plastic bottles bought directly from Cell Biology. The Respondent denied that she was trying to put a different spin on her answers now to isolate herself from having taken that Synephrine because she was now aware of the connection when she had not been so aware during the course of her interviews.

42. In re-examination the Respondent stated that she felt threatened during the course of the interview process. The threat was the possibility of being charged with an Anti-Doping Rule Violation and she felt that she was being interrogated when it wasn't necessary. She stated that in relation to the Synephrine, there was a period of time when the product wasn't available and assumed that after that period of time it became a different product due to different Ingredients.

SUBMISSIONS

43. The Applicant's Submissions may be summarised as follows:
- 43.1 Pursuant to Article 6.2 of the ADP the facts related to Anti-Doping Rule Violations may be established by any reliable means, including admissions.
 - 43.2 BZP was a prohibited substance.
 - 43.3 On 25 June 2005 the Respondent's urine contained BZP and that the Court should so find to its comfortable satisfaction bearing in mind the seriousness of the allegation which is made. Furthermore, the Applicant has met its burden of proof and that the Anti-Doping Rule Violation is proved pursuant to the standard of proof set out in Article 6.1 of the ADP. The Court should have full confidence that the 2006 analysis of the data produced by the testing of the Respondent's A sample in June 2005 revealed that BZP was in the Respondent's urine in June 2005 and that there was no challenge to the analysis of the data by Dr. Catlin which was conducted in accordance with international standards.
 - 43.4 Particular reliance was placed upon Dr. Catlin's opinion that the peak recorded in the analytical data of the sample was like a fingerprint to the extent that it was unique and matched the peak of the standard for BZP and that such a match could not have been obtained other than by BZP being in the sample.
 - 43.5 Further reliance was placed upon the fact that BZP is a synthetic substance that cannot be produced naturally in the body and must have been consumed or ingested by the Respondent, and therefore used.
 - 43.6 Reliance was placed on the Code commentary to the effect that use of a prohibited substance can be proved through admissions, third party testimony or other evidence.
 - 43.7 Other evidence relied upon were alleged admissions by the Respondent that she ingested or consumed Fortius Synephrine during the Mermet Cup and that the Court should draw the probable inference that Fortius Synephrine containing BZP was ingested or consumed by the Respondent. In relation to inferences reliance was placed upon the decision of the Supreme Court of Victoria in *Transport Industries Insurance Co. Limited v Longmuir* [1997] 1 VR 125 at page 130 and the decision of the Full Federal Court of Australia in *Italiano v Barbaro* (1993) 40 FCR 303 at page 321. Those cases are authority for the propositions that the combined weight of the evidential material needs to be considered in a circumstantial case and that in a civil proceeding, where facts are to be established as a matter of probability, competing explanations need only be excluded on the probabilities.
 - 43.8. In relation to the alleged admissions in the record of interview, the Court should come to the conclusion that the Respondent made no relevant distinction between Fortius Synephrine, Synephrine and Metaslim B2. Substantial emphasis was placed upon the answers to question 28 in the record of interview conducted on 21 April 2006 (see above). Emphasis was also placed on a number of other answers

given in the various records of interview including the answer to question 240 in the interview conducted on 27 February 2006 (see paragraph 31.18 above). Further reliance was placed upon the interchangeable use of "Synephrine" and "Fortius Synephrine" in the various interviews.

- 43.9 Further reliance was placed upon the fact that Fogagnolo and Hocking had also tested positive pursuant to the analysis of the computer data conducted by Dr. Catlin as a result of the urine samples provided by them at the Mermet Cup competition and that they, on the Respondent's version of events, had both used Fortius Synephrine.
- 43.10 After considering all of the evidence, the Court should draw the probable inference that the Respondent consumed Fortius Synephrine during the Mermet Cup and that it contained the prohibited substance BZP.

44. The Respondent's submissions may be summarised as follows:

- 44.1 The Applicant had not led sufficient (or indeed any) evidence to permit the Court to find to the requisite standard that the Respondent had committed an Anti-Doping Rule Violation.
- 44.2 The evidence relied upon by the Applicant as reliable evidence of facts which establish a breach of Clause 5.2 of the ADP should be rejected.
- 44.3 Article 10.3 of the ADP and Article 7 of the Code (see above) have been undermined by the process adopted in this case. It is implicit within the ADP that the athlete should have the opportunity to have the B sample tested where an Anti-Doping Rule Violation is sought to be proved as a result of a positive test to an A sample.
- 44.4 Reliance was placed upon a number of cases decided by the CAS emphasising the importance of the B samples and that procedures must be strictly followed before a positive test such as that arising in this case is accepted. The failure to afford the opportunity to the Respondent to have the B sample tested means that the entire test ought to be disregarded and that in the circumstances of this case that error could not be rectified by the retrospective analysis of the computer data conducted by Dr. Catlin. Accordingly, the Applicant should not be permitted to rely upon its analysis of the A sample data and the evidence should be rejected. (see *Kabaeva v Federation Internationale de Gymnastique* CAS 2002/A/386 at pages 16 and 17, *Beaton and Scholes v Equestrian Federation of Australia* CAS 2003, *USA Shooting and Quigley v International Shooting Union* CAS 94/129 and *United States Olympic Committee and others v International Olympic Committee and another* CAS 2004/A/725 at paragraphs 72 and 73).
- 44.5 In relation to the alleged admissions by the Respondent, these were taken out of context and do not amount to proper admissions.
- 44.6 The interviews took place in circumstances where the Respondent was not legally represented as part of a relentless program of interrogation which took place on four separate occasions.

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- 44.7 There was no evidence that the Respondent had any knowledge of the manufacturing process used by Cell Biology and had no knowledge that any batches of Synephrine contained BZP.
- 44.8 Both the Respondent and those conducting the interviews had been imprecise in their use of the term "Synephrine" and "Fortius Synephrine" which led to "complacency and confusion" on the part of the Applicant in the use of these terms in questioning the Respondent which in turn provoked complacency and imprecision on "the part" of the Respondent in her answers to the relevant questions. All four interviews should be read as a whole in order to reliably gauge the true substance of the Respondent's answers in proper context, rather than extracting isolated statements alleged to be incriminating. In this respect the alleged admissions relied upon by the Applicant are taken out of context and are misleading and ignore the context of the entirety of the Respondent's evidence in the various interviews. Further, Mr. Richard Young never clearly addressed or squarely put the distinction between the bulk Synephrine and post-March 2005 pre-packaged Synephrine to the Respondent before that part of the interview relied upon as containing an admission. In fairness, the distinction should have been made clear by Mr. Young beforehand if the Applicant seeks to be entitled to rely upon the evidence as an admission.
- 44.9 Even if the Respondent did specifically admit to taking the post-March 2005 pre-packaged Fortius Synephrine, it does not actually mean that the actual dose of the Synephrine ingested by the Respondent between 24-26 June 2005 actually contained BZP. The alleged admissions, in order to be relied upon, should be clear and unequivocal. The answers given by the Respondent in the various interviews, in context, have little weight and probative value and in total fall well short of comfortably satisfying the Court to the necessary high standard that the Respondent admitted to having used BZP on or about 25 June 2005 as alleged.

STANDARD OF PROOF

45. The Court accepts that the allegation of an Anti-Doping Rule Violation is a serious allegation and that the violation must be proven to a higher level of satisfaction than the balance of probabilities. This is consistent with Article 6.1 of the ADP and the decision of CAS in *French v Australian Sports Commission and Cycling Australia* CAS 2004/A/651 at paragraph 42.

FINDINGS

46. Anti-Doping Rule Violations are most commonly established by direct evidence, particularly where a positive analytical result from an accredited laboratory evidences that an athlete had a prohibited substance in his or her body. However, there are a growing number of instances in this area of jurisprudence where such analytical results are not relied upon,

but circumstantial evidence results in the finding that an Anti-Doping Rule Violation has occurred. As noted earlier in these reasons, the Applicant in this case does not have the benefit of a positive analytical result therefore the presumption contained in the ADP is eliminated from consideration. Therefore the burden, as is acknowledged by the Applicant, rests on the Applicant to prove the Anti-Doping Rule Violation. The value in weight of the circumstantial evidence relied upon the Applicant is determinative of the question as to whether the Applicant has satisfied its burden of proof to the requisite standard.

47. The case of *French* (see above) is an example of a non-analytical case. French did not test positive to any prohibited substance however there was circumstantial and physical evidence indicating that an Anti-Doping Rule Violation may have been committed (but not necessarily by French himself). The CAS found that French could not be found to have committed an Anti-Doping Rule Violation because there was no direct evidence that he had used the material. Additional factors included that there could have been third party contamination and there was contradictory scientific evidence. This led the panel to conclude the state of the evidence was not satisfactory and insufficient to prove a non-analytical positive. As Professor Richard H. McClaren (the President of the Panel in *French*) commented in a subsequent journal article (see (2006) *Marquette Sports Law Review* 193 at 201):

"This decision has importance as it clarifies that CAS has an expectation that doping investigations must be conducted in a careful and cautious manner for a non-analytical positive doping infraction to be found."

48. Another case involving a non-analytical positive was the case of *USADA v Michelle Collins* AAA No. 30 190 00658 04. Collins had never tested positive to a prohibited substance, however the evidence presented in her case supported her use over a long period of time of banned substances and techniques. The evidence included emails between her and the BALCO Laboratory in which she admitted to using some prohibited substances and techniques. The Panel found that various emails sent by Collins to BALCO contained admissions as to use which admissions were confirmed by the results of her blood tests conducted by independent laboratories engaged by her. Collins relied on the fact that no single test had been found to result in proof of doping. In relation to her submission the Panel stated:

"The Arbitral Tribunal recognizes that, except in rare instances, athletes have only been found guilty of doping when there has been such a positive test. But see Mayer v. IOC, CAS 2002 A/389-393 (sanctions upheld based on admissions of athletes and the presence of instruments and chemicals necessary for blood doping discovered in the Austrian ski team chalet after the Salt Lake City Olympics). Nevertheless, the Tribunal believes that in the circumstances in this case, all of these blood and urine tests taken together demonstrate a pattern of doping. Doping is the only potential explanation for the extreme variations in both hematocrit levels and T/E ratios. The testimony provided by all three of USADA's

experts was credible and supported. On the other hand, Collins did not present any expert's testimony or any other evidence to provide an alternative explanation of these test results. At the hearing, Collins's attorney pointed only to the fact that some of the test results individually were within normal ranges. He could not explain the extreme variation or the results outside the normal range. Given the extensive weight of the evidence, including USADA's expert testimony, the fact alone is not sufficient to rebut the evidence of doping in these tests."

49. In *Tyler Hamilton v USADA and UCI CAS 2005/A/884*, the dispute concerned whether a new test to detect the presence of transfused blood in Hamilton's blood sample was a reliable test or method to determine an Anti-Doping Rule Violation. In commenting upon the provision that an Anti-Doping Rule Violation may be established by any reliable means, the Panel noted that this rule gives great leeway to Anti-Doping Agencies to prove violations "so long as they can comfortably satisfy the Tribunal that the means of proof is reliable. As a result, it is not even necessary that a violation be proven by a scientific test itself instead, as some cases have found, a violation may be proved through admissions, testimony of witnesses, or other documentation evidencing a violation (see para [48] and *USADA v T. Montgomery CAS 2004/O/645* and *USADA v C. Gaines CAS 2004/O/649*).

The Panel in *Hamilton* commented further, at para [49] that "one consequence of this rule is that WADA need not designate a specific test to prove that a doping violation has occurred. Rather, WADA and its accredited laboratories are free to develop tests based on appropriate scientific principles to demonstrate the existence of a prohibited substance or the use of a prohibited method....."

50. In *IAAF v Boulami CAS 2003/A/452* the lack of specific accreditation for the laboratory that conducted the particular test had the result of the shifting of the burden to the IAAF to show that the test was conducted in accordance with the scientific community's practices and procedures and that the laboratory had satisfied itself as to the validity of the method before using it. The Panel was of the opinion (at para 5.49) that "such a burden-shifting rule provides the necessary balance between the needs of IOC laboratories to implement new, reliable testing methods as quickly as possible, on the one hand, and in the interests of athletes in the sporting community in ensuring trustworthy test results, on the other".

50. The cases referred to above make it clear that it is competent for a hearing body to be comfortably satisfied that an Anti-Doping Rule Violation has been established in the absence of a positive analytical laboratory doping test. Of course whether a hearing body reaches that level of comfortable satisfaction depends upon the evidence placed before it. The cases of *Collins* and *Hamilton* (referred to above) make it clear that the type of retrospective computer data analysis undertaken by Dr. Catlin in this case is admissible. The weight that should be given to the evidence depends upon whether the analysis undertaken has been shown to be flawed in any manner or that Dr. Catlin has insufficient expertise or that the analysis was produced by a process that was unreliable and not in accordance with international standards. No such qualifications were suggested in relation

to the evidence of Dr. Catlin (nor the evidence of Dr. Kazlauskas) and there is no reason for the court not to accept that evidence. The challenge by the Respondent to the admissibility of that evidence therefore fails. The absence of the ability on the part of the Respondent to have the B sample analysed has the direct result, to the Respondent's advantage, of the Applicant being unable to rely upon the presumption contained in Article 6.2.1 of the ADP. The result is that the onus is placed clearly on the Applicant to prove the Anti-Doping Rule Violation to the requisite standard of proof. The Applicant is correct in its submission that where there is no A sample of an adverse analytical finding, and therefore the results management processes set out in Article 7 of the Code are not triggered (including the right to have the B sample analysed), it is up to the body seeking to rely on the data that is produced from the A sample analysis to satisfy the hearing body that the results and the conclusions drawn from the data are reliable. The Court has already found that the evidence of Dr. Catlin should be accepted and accordingly it constitutes a reliable means by which the ultimate conclusion may be established. Further support for this conclusion may be gleaned from the decision of the CAS in *CONI and WADA v Petacchi and FCI* CAS 2007/A/1362 and 1393.

51. When consideration is given to the procedures that are required to be adopted pursuant to the Code upon receipt of an A sample analytical finding it can be seen, that in the circumstances of this case, the absence of opportunity to have the B sample tested does not produce the result that any evidence derived from the A sample should be rejected, as the Respondent contends. This is because the results of the A sample analysis were not an adverse analytical finding because the analysis in June 2005 conducted by UCLA did not reveal the presence of any of the prohibited substances tested for at that time. As Dr. Catlin said in his Affidavit dated 11 March 2008: "*as such, no further steps are required to be taken in respect of the testing or reporting of results in relation to the Sample*". The cases of *Kabaeva and Beaton and Scholes* (referred to above) are not analogous as in those cases reliance was placed on the A sample adverse analytical finding with the "*presumption*" being relied upon, and the failure to afford the opportunity to have the B sample analysed proved to be fatal in those circumstances.
52. The evidence of Dr. Catlin as to his analysis of the computer data produced by the analysis of the Respondent's A sample in June 2005 is evidence of substantial weight and probative value in the Court's consideration of whether the Applicant, pursuant to its burden of proof, has met the requisite standard of proof in the circumstances of the case.
53. The second aspect of the case that requires consideration are the answers given by the Respondent to the various questions put to her in the various records of interview. I have set out above in detail the relevant questions and answers together with a summary of the competing submissions of the Applicant and the Respondent as to the findings that ought to be made by the Court in relation to those answers. As emphasized earlier, the records of interview were conducted at a time prior to any request by ASADA to UCLA to conduct a retrospective analysis of the A samples concerned. Therefore it is apparent that in the

minds of the investigators and the Respondent there could have been no knowledge on the part of any of them that the use by the Respondent and others of Synephrine could have resulted in a positive test result for BZP. In fact, the state of mind for all concerned would have been to the contrary due to the fact that urine samples had been taken from the weightlifters at the Mermet Cup in June 2005 and no positive results had been communicated. There was thus no need to differentiate between the bulk and bottled Synephrine as the focus of the investigation was not necessarily upon any such differentiation at that time but rather at a subsequent time closer to October 2005 when Hocking, Fogagnolo and Myers tested positive at the Australian Championships to having BZP in their system. Hence, the answer (A28, 21 April 2006 – see para [34] above) given by the Respondent to the question as to whether she had taken it on the day of competition and been tested: *“Yes. In America I was tested at the Mermet Cup and I had taken that product as well as Corran [Hocking] and Camilla [Fogagnolo]...We had all taken it at that competition and been tested”*. As the Respondent said in her evidence, she was attempting in the course of her answers to be honest, truthful and accurate.

54. The inference is clearly open to be drawn that once the focus shifted when this case commenced to the provenance of the Synephrine consumed by the Respondent at the Mermet Cup, the Respondent was anxious to distance herself from any conclusion that she had consumed Synephrine from the same batch as the others who tested positive at that time.
55. The Court has considered in detail the records of interview and the context of the investigation then being conducted. The Court has also considered in detail the detailed written and oral submissions made by both the Applicant and Respondent, together with the evidence of the Respondent. The Court has had the opportunity to observe her demeanor and assess her credibility. The answers given by the Respondent, taken as a whole and in the proper context, result in the conclusion that the Synephrine consumed by the Respondent at the Mermet Cup was indistinguishable from the Synephrine consumed by Fogagnolo and Hocking. Obviously, further support for this conclusion may be obtained from the evidence of Dr. Catlin. In so far as the evidence of the Respondent is to the contrary, it is rejected.
56. Accordingly, the Applicant has established an Anti-Doping Rule Violation to the comfortable satisfaction of the Court bearing in mind the seriousness of the allegation which is made. The Court has applied a standard of proof greater than a mere balance of probabilities and is satisfied to the highest level of that standard. It is so satisfied due to the evidence of Dr. Catlin and the admissions of the Respondent. The Court is satisfied that the combination of this evidence establishes the Anti-Doping Rule Violation by reliable means in all the circumstances of this case.

SANCTION

57. Pursuant to Article 12 and/or Article 13.1 of the ADP, if an Anti-Doping Rule Violation occurs during or in connection with an in-competition test or in connection with an event an athlete's individual results obtained in that competition or event shall be disqualified with all the consequences, including forfeiture of all medals, points and prizes. Accordingly, the Respondent's individual results obtained in the Mermet Cup competition in June 2005 shall be disqualified and all medals, points and prizes obtained by her shall be forfeited.
58. Pursuant to Article 13.2 of the ADP the period of ineligibility is 2 years. It was agreed between the Applicant and the Respondent that in the event that the Court found that an Anti-Doping Rule Violation had been found proven that the period of ineligibility should date from 27 November 2006 being the date upon which the Respondent voluntarily suspended herself from competition. As a result, the period of ineligibility will commence from 27 November 2006 and end at midnight on 26 November 2008.
59. It was agreed between the Applicant and the Respondent at the hearing of the matter that regardless of its outcome no order as to costs would be sought by either party.
60. In accordance with Rule 64.4 of the CAS Code, the Court determines that the CAS costs of this arbitration shall be borne by the parties in equal shares. The final assessment of the arbitration costs will be communicated to the parties by the CAS Court Office after the communication of the present award.

ON THESE GROUNDS

The Court of Arbitration for Sport Rules that:

1. Belinda Van Tienen has breached Article 5 of the Anti-Doping Policy of the Australian Weightlifting Federation and has thereby committed an Anti-Doping Rule Violation.
2. Belinda Van Tienen's individual results obtained in the Mermet Cup competition or event held in the USA in June 2005 are disqualified; accordingly Belinda Van Tienen forfeits all placings, medals, points and prizes obtained in that competition or event.
3. Belinda Van Tienen is ineligible to compete during the period commencing on 27 November 2006 and expiring at midnight on 26 November 2008.
4. Save for the Court fees which have been paid by the Applicant each party shall contribute equally to the Court's costs. The final assessment of the arbitration costs will be served by the CAS Court Office after the communication of the present award.
5. The Award be made public.

Done in Melbourne, 16 June 2008

THE COURT OF ARBITRATION FOR SPORT



David Grace QC

Sole Arbitrator