

**FINAL AWARD**

Rendered by the

**COURT OF ARBITRATION FOR SPORT**

Sitting in the following composition:

**The Hon Justice Jeffrey Spender**

Sole Arbitrator

Ad Hoc Clerks: Ms Louise Chau, Solicitor, Sydney, Australia  
Mr James Hughes, Solicitor, Brisbane, Australia

In the matter of:

**AUSTRALIAN SPORTS ANTI-DOPING AUTHORITY**

on behalf of **CYCLING AUSTRALIA**

represented by Ms Penny Sibtain, Barrister, Sydney, Australia

instructed by Mr Richard Redman, Canberra, Australia

- Applicant -

and

**MR NATHAN O'NEILL**

Represented by Mr Peter Baston, Barrister, Brisbane, Australia

- Respondent -

Date of Award: **13 June 2008**

**Background**

- 1 Mr Nathan O'Neill, a professional cyclist and an 8 Time Australian National Time Trial Champion, Commonwealth Games Gold and Bronze medallist and Australian Olympic team member, tested positive for Phentermine in a test administered by the USADA (United States Anti-Doping Authority) following his win in the *Tour of Elk Grove* in the United States of America on 12 August 2007.
  
- 2 The respondent, the Australian Sports Anti-Doping Authority (ASADA), was established by the *Australian Sports Anti-Doping Authority Act 2006 (Cth)* (The Act). It came into force in Australia on 14 March 2006. Under that Act ASADA was given the legislative authority, amongst other things, to investigate possible violations of anti-doping rules applicable to athletes and support persons. ASADA is authorized to make findings relating to such investigations, to establish and maintain a Register of such findings, and to notify athletes, support persons and sporting administration bodies of findings on the Register and of ASADA's recommendations as to the consequence of such findings. ASADA is also authorized to present findings on the Register and its recommendations and the consequences of such findings at hearings of the Court of Arbitration for Sport (CAS) or other sporting tribunals. (see ss 13, 21(1), and 22(1) of the Act).
  
- 3 On 26 July 2006, the Australian Cycling Federation Incorporated, trading as Cycling Australia, signed a Referral of Doping Authority to ASADA. The first three paragraphs of that referral recite:
  - "1. *Cycling Australia (CA) has an express constitutional object to encourage and promote sporting competition free of prohibited substances and prohibited methods.*
  2. *To facilitate this object CA wishes to refer its anti-doping functions, powers and responsibilities ("anti-doping functions") to ASADA.*
  3. *CA hereby refers the following anti-doping functions to ASADA:*
    - *investigating possible anti-doping rule violations in the sport of cycling;*
    - *issuing infraction notices or other matters under the determined results management process;*
    - *convening hearings before the Court of Arbitration for Sport (CAS). ASADA acknowledges there is no other hearing body for anti-doping matters in the sport of cycling;*
    - *presenting allegations of anti-doping rule violations and all relevant, incidental matters in hearings before CAS; and*

- *notifying the results of investigations and hearings and all relevant, incidental matters to relevant bodies including CA and the International Cycling Union (UCI) (IF). Any notification will be subject to the Australian Sports Anti-Doping Authority Act 2006 (ASADA Act) and privacy legislation."*

4 ASADA accepted that referral on 31 July 2006.

5 On 31 March 2007, ASADA sent an infraction notice concerning an anti-doping rule violation allegation to Mr O'Neill. That infraction notice read:

*"This infraction notice is being sent to you by the Australian Sports Anti-Doping Authority (ASADA) as agent for Cycling Australia (CA) in accordance with a letter of referral executed on 26 July 2006 and in accordance with the CA Anti-Doping Policy (copies of which are **attached**).*

*CA has been advised by ASADA of an alleged Presence and Use of a prohibited substance, being Phentermine, by you on or shortly prior to 12 August 2007.*

*Article 5.1 of the CA anti-doping rules identifies the "presence of a prohibited substance or its metabolites or markers in an athlete's bodily specimen" as an anti-doping rule violation. Article 5.2 of the CA anti-doping rules identifies "use or attempted use of a prohibited substance or a prohibited method" as an anti-doping rule violation.*

*Details of the Alleged Anti-Doping Rule Violation*

*Presence of a Prohibited Substance*

*On 12 August 2007 it is alleged that a sample provided by you for doping control was positive for the presence of the following prohibited substance:*

*Phentermine*

*Use of a Prohibited Substance*

*On or shortly prior to 12 August 2007 it is alleged that you used the following prohibited substance:*

*Phentermine*

*Notice of Possible Sanctions*

*Article 13 of the CA Anti-Doping Policy specifies the applicable sanctions for Anti-Doping Rule Violations.*

*For a first anti-doping rule violation under Article 13 of the CA Anti-Doping Policy, the sanction is two (2) years' ineligibility.*

*However, you shall have the opportunity before a period of ineligibility is imposed to establish the basis for eliminating or reducing this sanction."*

- 6 ASADA, on behalf of Cycling Australia, made an application to the CAS. Paragraph 9 of that application specified the issues which ASADA was submitting to the CAS for determination:

*"In accordance with the CA Anti-Doping Policy, ASADA on behalf of CA refers the matter to a CAS hearing. ASADA wishes for the CAS to determine whether the athlete committed the anti-doping rule violations of an adverse analytical finding being the Presence of a prohibited substance, and the Use of a prohibited substance, namely Phentermine, and if so, what penalty should apply."*

- 7 In paragraph 10 of the application, the orders that ASADA sought from the CAS were set out:

*"ASADA seeks that the CAS determine that the athlete committed the anti-doping rule violations of Presence and Use of a prohibited substance in breach of clause 5.1 and 5.2 of the CA anti-doping policy, and sanction the athlete in accordance with the policy."*

- 8 The application is dated 14 April 2007.

- 9 At the hearing, ASADA did not press the allegation of an anti-doping rule violation in respect of Article 5.2 of the Anti-Doping Policy of Cycling Australia (the Policy). That Article relevantly related to the Use of a Prohibited Substance.

- 10 ASADA maintained its claim that Mr O'Neill was in breach of Article 5.1 of the Policy. Article 5 relevantly provides:

**"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."*

- 11 Article 6 of the Anti-Doping Policy of Cycling Australia provides, relevantly:

**"Article 6 PROOF OF DOPING**

**6.1 Burdens and Standards of Proof.**

*CA or UCI shall have the burden of establishing that an Anti-Doping Rule Violation has occurred. The standard of proof shall be whether CA or UCI 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."*

12 Article 13 of the Policy deals with the sanctions on individuals. It relevantly provides:

**"Article 13 SANCTIONS ON INDIVIDUALS**

**13.1 Disqualification of Results in Event During which an Anti-Doping Rule Violation Occurs.**

*An Anti-Doping Rule Violation occurring during or in connection with an Event may lead to Disqualification of all of the Athlete's individual results obtained in that Event with all consequences, including forfeiture of all medals, points and prizes, except as provided in Article 13.1.1.*

**13.1.1** *If the Athlete establishes that he or she bears No Fault or Negligence for the violation, the Athlete's individual results in the other Competition shall not be disqualified unless the Athlete's results in Competition other than the Competition in which the Anti-Doping Rule Violation occurred were likely to have been affected by the Athlete's Anti-Doping Rule Violation.*

**13.2 Imposition of Ineligibility for Prohibited Substances and Prohibited Methods.**

*Except for the specified substances identified in Article 13.3, the period of Ineligibility imposed for a violation of Article 5.1*

*(presence of Prohibited Substance or its Metabolites or Markers)*

*... shall be:*

*First violation: Two (2) years' Ineligibility.*

*Second violation: Lifetime Ineligibility.*

*However, the Athlete or other Person shall have the opportunity in each case, before a period of Ineligibility is imposed, to establish the basis for eliminating or reducing this sanction as provided in Article 13.6."*

- 13 In Appendix 1 to the Policy, "No Fault or Negligence" is defined as:

*"The Athlete'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."*

- 14 "No Significant Fault or Negligence" is defined as:

*"The Athlete'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."*

- 15 On 20 May 2008, the CAS, constituted by Justice Jeffrey Spender as sole arbitrator, conducted a preliminary conference by telephone with Ms Penny Sibtain of Counsel, instructed by Mr Richard Redman for the applicant, and Mr Peter Baston of Counsel for the respondent. The parties have subsequently signed the Order of Procedure rendered during that conference call.

### Jurisdiction

- 16 The Order of Procedure signed by the parties acknowledged:

*"2.1 The parties agree that, pursuant to clause 16.2 of the Anti-Doping Policy of Cycling Australia (the Policy), the Court of Arbitration for Sport (CAS) has jurisdiction to determine, by arbitration, the dispute which is the subject of the application brought by the Australian Sports Anti-Doping Authority (ASADA) on behalf of Cycling Australia (the Applicant) against Mr Nathan O'Neill (the Respondent) and agree to refer the dispute to CAS for determination by arbitration.*

*2.2 The decision of CAS will be final and binding on all parties and no party will institute or maintain proceedings in any court or tribunal. In particular, without restricting the generality of the foregoing and for further and better assurances, no party including any affected or third party will have the right of appeal under clause 5 of the Second Schedule of the Arbitration Act 1996."*

- 17 The parties further agreed that the arbitration would be conducted by the CAS according to the Code of Sports-related Arbitration (2004 Edition) (CAS Code), and in particular the provisions relating to the Ordinary Division, Rules 38 to 46. The parties acknowledged that CAS, for the purposes of the arbitration, would be constituted by the Honourable Justice Jeffrey Spender (Sole Arbitrator). The seat of the arbitration is in Lausanne, Switzerland. The language of the arbitration shall be English, and the law of the merits, being the substantive law of the dispute, shall be the law of New South Wales.
- 18 The parties specifically agreed that the Anti-Doping Policy of Cycling Australia is the relevant policy which applies in the dispute.
- 19 Directions were given as to the filing of material in relation to the dispute. The matter was set down for hearing on Wednesday, 11 June 2008 at 10.00 am.
- 20 As to confidentiality, the Order of Procedure provides:  
*"The parties acknowledge Article 17 of the CA Anti-Doping Policy. Article 17.2.2 provides as follows:*  
No later than twenty (20) days after an Anti-Doping matter has been finally determined, CA must Publicly Report its result including any sanction imposed."
- 21 As to costs, the signed Order of Procedure says:  
*"The parties acknowledge Article 11.10 of the CA Anti-Doping Policy, which provides:*  
CA will bear the costs of the relevant hearing body (including any appeal under Article 16.2) but each party will bear their own costs of any hearing."
- 22 The signed Order of Procedure addressed the question of Arbitrator Immunity as follows:

*"The parties agree not to institute or maintain any proceedings, or bring any claim against CAS, the CAS Oceania Registry or The Hon Justice Jeffrey Spender, in respect of any act or omission during the course of the arbitration, in relation to the award or arising out of any findings made, except in the event of fraud."*

**Agreed Facts**

23 At the hearing of the matter, the parties agreed the following facts:

*"1. In July 2006, Cycling Australia (CA) referred by agreement its anti-doping functions, powers and responsibilities to ASADA.*

*2. Mr Nathan O'Neill (the Respondent) is an elite level cyclist. He is an 8-time Australian time-trial champion. The Respondent is also an Australian Commonwealth Games gold medallist (2006) and bronze medallist (2002).*

*3. On 12 August 2007, the Respondent was bound by the CA Anti-Doping Policy.*

*4. On 12 August 2007 at the Tour of Elk Grove cycling event in the USA, the Respondent was tested during competition. The Respondent tested positive for the presence of Phentermine.*

*5. The use and presence in the system of Phentermine is prohibited in competition: WADA 2007 Prohibited List and Articles 5.1 and 5.2 Cycling Australia's Anti Doping Policy.*

*6. On 24 September 2007, the Respondent was advised of his right to request a second test of his specimen (the B Sample analysis). On 10 October 2007, the B Sample analysis confirmed the presence of Phentermine.*

*...*

*9. Phentermine can be obtained on prescription. It is an appetite suppressant, ordinarily used for reducing weight in obese patients, when used short term and combined with exercise and diet.*

*..."*

24 There is no challenge by the respondent to the tests conducted by the United States ADA Laboratory and the results obtained, nor was there any challenge to the assertion that Phentermine is a prohibited substance in competition. There is no challenge to an order being made for the disqualification of the respondent's results in the Tour of Elk Grove. It was accepted by the respondent that he would forfeit the first placing achieved at that race, including all prizes, pursuant to Article 13.1 of the Policy.

- 25 As the CAS (constituted by Mr David W Rivkin, Attorney at Law of the United States of America as President, Professor Richard McLaren, Barrister of Canada, and Mr Dirk Reiner Martens, Attorney at Law of Germany as Arbitrators) said in *Baxter v International Olympic Committee* CAS 2002/A/376 at 3.4:  
*"Consistent CAS case law has held that athletes are strictly responsible for substances they place in their body and that for purposes of disqualification (as opposed to suspension), neither intent nor negligence needs to be proven by the sanctioning body."*
- 26 The submissions on behalf of the respondent acknowledge that Mr O'Neill was in breach of Article 5.1 of the Policy. The principal contention on his behalf is that "the CAS ought impose a penalty no greater than a one year disqualification." This contention implicitly acknowledges that it was not argued on Mr O'Neill's behalf that his breach of Article 5.1 of the policy occurred in circumstances of "no fault or negligence": rather, the submission is a recognition that Mr O'Neill undertook to establish that his Anti-Doping Violation had occurred in circumstances involving "no significant fault or negligence". It was further submitted, "any other penalty would be disproportionate to the circumstances of the case, not reflect his culpability, and would not recognize ... the fact that the positive finding was one without significant fault or negligence on his part." The claim that there was no significant fault or negligence on his part is based on the assertion on his behalf that he could not have reasonably apprehended that Phentermine could remain in his system for some seven days.
- 27 It is apparent from the above that this case is not about liability.
- 28 Most of the cases in the CAS are cases where the athlete has ingested or absorbed a prohibited substance, claiming ignorance of the character of that substance. The principal question in those cases has been whether the presence of the prohibited substance in the body of the athlete occurred without "fault or negligence" on the part of the athlete or without "significant fault or negligence" on the part of the athlete.
- 29 In *Australian Weightlifting Federation Inc v Myers* CAS 2002/A/2, Ms Myers, who won the 75+ kg Women's category at the 2005 Australian Open Weightlifting Championships, tested positive to a prohibited substance, which had a similar structure or biological effect to the stimulant known as amphetamine. The Court acknowledged that, "*the Respondent having admitted committing an Anti-Doping Rule Violation*", the only issue to be determined was the appropriate sanction to be imposed.

- 30 Ms Myers claimed that she had bought a supplement product. It was, in fact, contaminated. It was pleaded on Ms Myers' behalf that she had actually exercised the "*highest level of caution*" that she practically could in the circumstances. Accordingly, the exercise of utmost caution did not cause her to know, nor could she reasonably be expected to have known that the use of the Fortius Synephrine would lead to her testing positive to the use of a prohibited substance. Alternatively, it was submitted that the Respondent bore no significant fault or negligence pursuant to Article 13.6.2.
- 31 The CAS, constituted by Mr David Grace QC, Sole Arbitrator, reviewed a number of cases relevant to the question and concluded that the respondent had not established by a balance of probability that she "*could not reasonably have known or suspected even with the exercise of utmost caution*" that she had used the prohibited substance. The CAS also found that the respondent had not established that 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. Notwithstanding the Court's acceptance that the respondent's use of the prohibited substance was inadvertent, not deliberate, and most unfortunate, given her personal and competitive background and her reputation for honesty and integrity, the Court was of the view that what the respondent in fact did was "*clearly insufficient in the circumstances*". In those circumstances, the CAS found that Ms Myers could not avail herself of the provisions of Article 13.6 of the Anti-Doping Policy of the Australian Weightlifting Federation, and accordingly, the applicable period of ineligibility was two years commencing on the date of the award.
- 32 In *Knauss v ISF CAS 2005/A/847*, the athlete ingested a nutritional supplement which caused the Anti-Doping Rule Violation. This was in the context of clear warnings by International Sports Federations and other appropriate authorities of the risk of contamination/or mislabelling in nutritional substances. The athlete had requested written certification from the manufacturer that its products were clean. In those circumstances, the Court concluded that, notwithstanding his attempts to establish there was no contamination, the athlete had clearly failed to exercise the care required for "no fault or negligence", namely, utmost caution.
- 33 In *Edwards v IAF CAS OG 04/003*, the athlete, whilst in a foreign country, had ingested glucose which had been purchased for her by her chiropractor. The glucose contained a prohibited substance. The athlete argued that it was reasonable for her to accept that the glucose provided to her did not contain any prohibited substances. However, the product

had been purchased in a foreign country and no one had examined the packet or the leaflet which accompanied the packet, which indicated that the product contained more than glucose.

- 34 The Court concluded that it would have been clear to any person viewing the tablets that there was more than one ingredient in the tablets, and that there was negligence in not ascertaining that no prohibited substance was present within the tablets before they were ingested. The Court found that the factual circumstances did not give rise to the exceptional facts necessary for a reduction of the otherwise mandatory sanction applicable for a doping offence pursuant to the IAAF Rules.
- 35 In *Squizzato v FINA CAS 2005/A/830* the athlete had used a cream chosen and purchased by her mother, which the athlete applied to her foot to fight against a skin infection. The mother was not aware that it could contain a prohibited substance. The substance did not enhance the athlete's capacity, nor did it favour her performance, and she claimed that she bore "no fault or negligence". The Court found that the athlete had failed to abide by her duty of diligence. With a simple check she could have realized that the cream contained a prohibited substance, or, at the very least, she could have asked her doctor, coach, or any other competent person to check the contents of the cream. The Court found that she did not bear "no fault or negligence". The Court further found that as the athlete appeared *"to have no intention whatsoever to gain an advantage toward her competitors, her negligence and forgetting to check the content of a medical cream can be considered as mild in comparison with an athlete that is using doping products in order to gain such advantage"*.
- 36 The Court found in *Squizzato* that the athlete appeared to bear "no significant fault or negligence", and a period of 12 months ineligibility was ordered.
- 37 In *Baggaley v ACI, SLA and ASC CAS 2005/A3*, the athlete had consumed a prohibited substance contained within orange juice which had been placed in a refrigerator by his brother. The Court found that the athlete had established how the prohibited substance entered his system and that he had established by balance of probability that he bore "no significant fault or negligence" when viewed in the totality of the circumstances and taking into account the criteria for no fault or negligence. The Court accepted the athlete's evidence as to his intentions in consuming the orange fruit drink, his lack of intention to consume a prohibited substance and the totality of the evidence called on his behalf. The Court found that the unique circumstances in the case fell within the category of

exceptional circumstances and reduced the period of ineligibility from 2 years to 15 months.

- 38 In *Hipperdinger v APT Tour, Inc.* CAS 2004/A/690, the CAS was concerned with a professional tennis player domiciled in Barcelona, Spain who had supplied a urine sample on 9 February 2004 during a tennis tournament held in Vina del Mar in Chile. The athlete did not contest the findings of the laboratory but submitted that the *"consumption was destined to avoid the symptoms of altitude sickness and that he did not know that he was eating coca leaves."*
- 39 The Anti-Doping Tribunal, which was provided for by the ATP Rules, found, amongst other things, that *"there were no grounds to admit that there was 'No Significant Fault Or Negligence' on the part of the Appellant ... therefore, a two year period of ineligibility was to be applied, taking effect from the date of the decision ..."*
- 40 An appeal was directed to the CAS constituted by Dr Stephan Netzle, Attorney-at-Law from Switzerland as President, Mr Candido Paz-Ares, Attorney-at-Law from Spain and Mr Yves Fortier, QC, Attorney-at-Law from Canada as Arbitrators. The panel, amongst other questions, asked itself, at [42]:  
*"Did the Appellant know or suspect or could he have reasonably known or suspected, with the exercise of the utmost caution, that the tea he was drinking and the leaves he was chewing were of a coca plant and that this could result in the presence of cocaine in his body?"*  
...  
*Was the negligence of the Appellant significant in relation to his doping offence?"*
- 41 The CAS in paragraph 53 of its reasons said:  
*"53. In order to examine whether the Appellant was at fault, i.e. has acted with intent or with negligence regarding the presence of a prohibited substance in his organism, one must determine the standard of care to be observed by the Appellant in such a situation and the knowledge to be expected from the Appellant.*  
  
*54. The situation in which the Appellant was when he ingested the coca tea and chewed the coca leaves may, according to the undisputed facts of the case, be summarised as follows: Before playing at the tournament in Vina del Mar in Chile, he visited a friend in Tucuman, a town of Northeastern Argentina at a level*

*of more than 3,000 metres above sea level. The Appellant stayed there for three to four days. He suffered from headaches and an upset stomach. He was advised to drink a certain herbal tea and chew certain leaves, which were given to him. Upon his departure, the Appellant took a bag of said leaves with him in order to continue to drink the tea and chew the leaves to both rid himself of the symptoms he suffered and to prepare himself for a return to his friend's home in Argentina. At that time, the Appellant did not know about the nature or the source of the leaves."*

42 The Panel found (at [57]) that *"... the Appellant did not inquire about the leaves even though this would have been possible from a medical point of view. The Panel therefore finds that the Appellant did not comply with his duty of care and thereby acted negligently."*

43 The Panel proceeded to consider whether the exemption of "No Significant Fault or Negligence" had application in the circumstances of the case.

44 The CAS said, at paragraph 77 of its reasons:

*"77. ... the Panel is of the opinion that the application of the exemption of "No Significant Fault or Negligence" is to be assessed on the basis of the particularities of the individual case at hand."*

...

*79. If the Appellant had only consumed a tea made from coca leaves, the Panel may have been prepared to agree with the Appellant. Indeed, the Panel finds no reason to hold that the Appellant should have been particularly vigilant before drinking, in good faith, an herbal tea that was given to him by a friend and that was supposed to bring relief to his headaches and stomach aches. As members of the Panel have observed themselves, it is common practice in many Andean countries of South America to drink tea made of coca leaves to soothe the effects which high altitude may have on the human body. The Panel therefore is of the opinion that the Appellant was not significantly negligent in drinking the tea that was offered to him without enquiring about its nature or source.*

*80. However, the Appellant did not only drink tea. The Appellant chewed leaves of un-known origin, purpose and effect, and did so for a period of several days. ...*

81. ... the Panel finds that the Appellant did not exercise the caution that was expected from him in his very situation and that, accordingly, the Appellant acted with significant negligence pursuant to Rule M.5.b of the ATP Rules. The sanction of a two years' period of ineligibility provided for by Rule M.2 of the ATP Rules may therefore not be reduced by the Panel but has to be upheld."

- 45 In *Hipperdinger*, the CAS concluded (at [100]) that "... for reasons of fairness ... the period of ineligibility should commence on the date of the sample collection ..."
- 46 All of the cases discussed above are concerned with a claim by the athlete that the ingestion or absorption of the prohibited substance was done unknowingly, and the question in most of those cases concerned whether the violation occurred through "no fault or negligence" on the part of the athlete, or through "no significant fault or negligence" on the part of the athlete.
- 47 Those cases referred to above are to be distinguished from the present, where the athlete candidly admits that Phentermine is a prohibited substance in competition; that he was aware of that circumstance; and that he deliberately ingested that substance. He contends, and it is not disputed, that he had taken Phentermine as an out-of-competition appetite suppressant. He denies, and I accept his denial, that Phentermine was used by him as a stimulant, but rather as an appetite suppressant. The present application is not about a mistake as to the composition of a substance which had been ingested.
- 48 The present case is about the "*clearance time*" that was necessary to remove that substance from the body of the athlete. In particular, this case concerns the question whether Mr O'Neill's belief (that the time that had elapsed from his last ingestion of Phentermine to the time of competition was such that Phentermine was not present in his body at the time of the taking of his urine sample) involved "no significant fault or negligence" on his part, as that is defined in Appendix 1 of the Policy.
- 49 In these proceedings, the applicant relied on correspondence and reports concerning the analysis of the sample from the respondent, the facts agreed by the parties, and an affidavit from Associate Professor Robert Weatherby, from the School of Health and Human Sciences, Southern Cross University, New South Wales.

50 The respondent relied on his own affidavit, a statement from Mr Gregory Kyle, a consultant clinical pharmacist and lecturer at the School of Pharmacy at the University of Queensland, and a report from Dr Lynagh, a consultant psychologist who had professional dealings with Mr O'Neill over a three month period in 1993.

51 Only the respondent was cross-examined by counsel from ASADA.

52 In his affidavit, Mr O'Neill said:

*"I was aware of the banned use of phentermine in competition. I understood that 5 days would be more than enough time to clear this drug from my system. I knew that Phentermine would be tested for and detected during In Competition tests."*

53 In oral evidence, Mr O'Neill explained that his "*understanding*" that five days would be more than enough time to clear this drug from his system was based on his research on the internet about the drug Phentermine. In addition, he claimed in his oral evidence that his father, a practising and qualified pharmacist in Toowoomba, Queensland, had told him in 2007 that five days would be more than ample time to clear the drug from his body.

54 No reason has been advanced as to why the respondent's father could not give evidence of that advice if it had, in fact, been given. It is clearly relevant to the reasonableness of his belief that "*five days would be more than enough time to clear this drug from my system*". In all the circumstances, and particularly given the unexplained absence of Mr O'Neill's father from giving evidence about this advice, I am not prepared to accept that this advice was given by his father.

55 Mr O'Neill stated in his affidavit:

*"I was extremely shocked by the news that I had tested positive for phentermine. Not because the drug was unknown to me, but because I honestly believed that I had allowed enough time for it to clear from my system. I am proud to say that I have cooperated with the authorities from the beginning. I admitted the mistake immediately, and released a statement on my website [www.nathanoneill.com](http://www.nathanoneill.com)."*

56 I am satisfied that Mr O'Neill, who says that he has been "*well educated in the area of clean competition in sport*", made inquiries over the internet as to how long Phentermine

would remain in the system, and that he honestly believed that five days would be more than enough time to clear Phentermine from his system.

57 Mr O'Neill was not challenged on the claim in the evidence that the last dose of Phentermine, before the *Tour of Elk Grove* race on the 11 and 12 August 2007, was on 4 August 2007.

58 His claim that he honestly and reasonably believed that the Phentermine would not be present in his body on the collection date of the urine sample, August 12 2007 at 5.36 pm is, in my opinion, supported by the evidence of Associate Professor Weatherby.

59 Associate Professor Weatherby, amongst his other academic awards, has a PhD in Science (Pharmacology) from the University of Sydney, and was involved in coordination of the drug testing procedures at ASDTL during the 2000 Sydney Olympic Games.

60 Of Phentermine, Associate Professor Weatherby says in his affidavit:

*"5. Phentermine is prescription-only medication that is prescribed by doctors as a weight loss medication.*

*6. Phentermine is a synthetic substance, and cannot be produced by the body naturally in any amount.*

*7. Phentermine is a S6 stimulant specifically named in the WADA Prohibited List as a substance banned in-competition."*

61 Of the effect of Phentermine, Associate Professor Weatherby said:

*"8. Phentermine has similar actions to amphetamine although it is less potent as a stimulant. Its stimulant effects generally persist for 4-6 hours after oral administration. However, oral formulations can commonly be included with an ion-exchange resin which provides for sustained release of the Phentermine and the duration of action from these formulations can be up to 18 hours."*

62 Importantly, Associate Professor Weatherby, in speaking of the "clearance time" of Phentermine, said:

*"9. Phentermine is excreted by the kidneys in urine. The half-life of Phentermine in a person's body is typically 16 to 31 hours, however this range is dependent on a number of factors, including: the person's metabolism; the amount of substance consumed; the person's weight and urinary pH. Given that overall in the population the half-life is about 25 hours and that it takes*

*approximately five half-lives for a drug to be eliminated from the body, Phentermine would remain in the system for approximately 4-5 days. In a specific individual, this may be shorter or if the half life was longer (ie 31 hours) then the presence in the system would be greater than 5 days.*

10. *The "clearance time" of a substance is the length of time it takes a human body to eliminate a substance from the body. For Phentermine, the clearance time can be as short as 3 days but as long as 6-7 days.*

11. *However, since Phentermine is a basic amine, I would expect that acidification of the urine can decrease the half-life by approximately half and in those cases a clearance time from the body could be as short as 1-2 days.*

12. *Due to the individual variances in people in the metabolism and clearance of Phentermine, there is no set "detection time" within the scientific community as to how long Phentermine can be detected in a person's sample.*

13. *Given that the limit of detection of laboratory assay methods are approximately 100 ng/mL, Phentermine will not be able to be detected for the complete time of elimination as the amounts being excreted after about 4 half-lives are very small and usually below the limit of detection of the analytical methods.*

14. *It is my opinion that Phentermine should be able to be detected by a laboratory up to 5 days after ingestion."*

(Emphasis added)

63 Associate Professor Weatherby makes the unqualified statement that "*For Phentermine, the clearance time can be as short as 3 days but as long as 6-7 days.*"

64 This expert opinion offered by ASADA, in my view, soundly corroborates both the honesty and reasonableness of the claim by Mr O'Neill that "*I had allowed enough time for it to clear from my system.*" The unchallenged evidence is that Mr O'Neill last took Phentermine, prior to the *Tour of Elk Grove*, on August 4<sup>th</sup>. The urine sample taken from him which tested positive to Phentermine was taken at 5.36 pm on August 12 2008, which is more than 7 days after August 4<sup>th</sup>.

65 Given these facts, how, in the light of Associate Professor Weatherby's evidence, can it be that the sample so obtained contained Phentermine?

66 Mr O'Neill says:

*"After I was notified of a positive test for Phentermine I began researching possible causes for the finding."*

67 As evidence in his case, the respondent relied on the evidence of Gregory Kyle, a practicing consultant clinical pharmacist and lecturer, School of Pharmacy, The University of Queensland. In his affidavit, Mr Kyle says:

*"9. The excretion of Phentermine, like amphetamine, is dependent on the pH of the urine. The half-life of Phentermine is reported as 20 hours in normal human subjects. No data could be located reporting the half-life of phentermine in alkaline urine, however, 70 to 80 percent of an administered dose of phentermine has been reported to be recovered via the urine if the urine is maintained at an acidic pH.*

*10. Data are available for amphetamine excretion in alkaline urine, and the half life doubled from 7-14 hours (pH < 6.6) to 18-34 hours (pH > 6.7). Given the close chemical similarities between these two molecules, it is reasonable to assume a similar extension to the half-life of phentermine in alkaline urine. The normal pH range of urine is 4.7-7.8.*

*11. Based on these data and extrapolations, the half-life for phentermine in alkaline urine could be as long as 40 hours." (References omitted).*

68 Mr Kyle referred to the training habit of Mr O'Neill of using phosphate loading over a five-day period before competition and bicarbonate loading immediately prior to competition. The phosphate loading consisted of 2 x 500 mg tablets of sodium phosphate (1g) four times a day, and the bicarbonate loading of 3 capsules of 840 mg every 15 minutes for two hours prior to competition.

69 Reviewing the training regime of Mr O'Neill, including courses of Phentermine, Mr Kyle pointed out that the only time that Mr O'Neill *"did not leave a window of at least five days between ceasing the Phentermine and commencing phosphate loading was in July/August 2007"*, which was immediately prior to the *Tour of Elk Grove*.

70 Mr Kyle considered whether there was an interaction between phosphate loading and Phentermine. He said:

*"20. Since phosphate supplements may increase the pH of urine in the nephron, any phentermine present would be in its unionized form and therefore more readily reabsorbed. This conjecture is supported by a clinical study where the urine was alkalinized and mephentermine and phentermine levels monitored over time."*

71 Mr Kyle later said:

*"22. If Mr O'Neill's phosphate loading contributed to an alkalinizing effect of his urine, which is physiologically possible from the evidence available, it is likely the half-life of the Phentermine would increase to approximately 40 hours, as per paragraphs 10 and 11 above. Consequently, Associate Professor Weatherby's estimate of Phentermine being able to be detected by a laboratory for 5 days would become 10 days."*

72 Mr Kyle expressed his conclusion as follows:

*"24. It is my opinion that Mr O'Neill's adverse drug test result could be due to administration of a phosphate loading regimen commencing in close proximity to his cessation of the Phentermine course. Consequently, I believe the alkalisation of Mr O'Neill's urine extended the half-life of Phentermine past the timeframe when it would normally be expected to have been cleared thus producing the positive test result."*

73 This possible explanation of the positive Phentermine result is conjecture, and in hindsight.

74 Another possible explanation is that Mr O'Neill ingested Phentermine later than August 4<sup>th</sup> as he has claimed. He was not challenged on this claim.

75 In my view, the opinion of Associate Professor Weatherby corroborates the honesty and reasonableness of Mr O'Neill's stated view that *"I honestly believed that I had allowed enough time for it to clear my system"*. I am satisfied, on the balance of probability, that Mr O'Neill's positive Phentermine result occurred without significant fault or negligence, within the meaning of that phrase as defined in Appendix 1 to the Policy.

76 The consequence is that, having regard to Article 13.6.2 of the Policy, I am satisfied that Mr O'Neill has established, in the circumstances of his case involving the Anti-Doping

Rule Violation of the presence of a prohibited substance, that he bears No Significant Fault or Negligence.

- 77 Mr O'Neill was aware that there was a risk that a prohibited substance would remain in his body for a period of time, and the period of time allowed in the instant circumstance was a tolerably close-run estimate.
- 78 In all the circumstances, I think that the period of ineligibility should be reduced to 15 months. The period should date from 12 August 2007, the date of the provision of the positive sample.

**ON THESE GROUNDS**

The Court of Arbitration for Sport rules that:

1. Nathan O'Neill has breached Article 5.1 of the Anti-Doping Policy of Cycling Australia and has thereby committed an Anti-Doping Rule Violation.
2. Pursuant to Article 13.1 of the Anti-Doping Policy of Cycling Australia, Nathan O'Neill is disqualified from his individual results obtained in the Tour of Elk Grove Event on 11 and 12 August 2007 with all consequences, including forfeiture of all medals, points and prizes.
3. Nathan O'Neill has established that he bears No Significant Fault or Negligence, within the meaning of Article 13.6.2 of the Anti-Doping Policy of Cycling Australia, in respect of the Violation referred to in 1 above.
4. The period of ineligibility in respect of that Violation is reduced to a period of 15 months, commencing on 12 August 2007 and expiring at midnight on 11 November 2008.
5. Pursuant to Article 11.10 of the Anti-Doping Policy of Cycling Australia and clause 16 of the signed Order of Procedure herein, there be no order as to costs.

Brisbane, 13 June 2008

**THE COURT OF ARBITRATION FOR SPORT**



The Hon Justice Jeffrey Spender  
Sole Arbitrator