

WORLD RUGBY

IN THE MATTER OF THE REGULATIONS RELATING TO THE GAME

AND IN THE MATTER OF AN ALLEGED ANTI-DOPING RULE VIOLATIONS BY AARON DAVIS (UNITED STATES of AMERICA) CONTRARY TO REGULATION 21

BEFORE AN INDEPENDENT JUDICIAL COMMITTEE APPOINTED PURSUANT TO REGULATION 21.8.2 CONSISTING OF:

Judicial Committee:

Hon. Graeme Mew (Canada - Chairman)

Dr Margo Mountjoy (Canada)

Nicholas Stewart QC (England)

Representatives and Participants:

Ben Rutherford (Counsel for World Rugby)

Howard Jacobs (Counsel for the Player)

Mike Earl (General Manager, Anti-Doping, World Rugby)

David Ho (Anti-Doping Manager - Compliance and Results, World Rugby)

Aaron Davis (the Player)

Michael Keating (Medical Services Manager, USA Rugby)

Dave Hodges (General Manager, Men's Eagles, USA Rugby)

Hearing conducted by video/telephone conference on 21 July and 18 September 2017.

REASONS FOR DECISION

Overview

[1] Aaron "Spike" Davis (the "Player") is one of a number of North American athletes who have successfully transitioned from gridiron football to rugby union. In the Player's case he has gone from a successful College American football player, to the fringes of the National Football League before switching to rugby, joining Tiger Rugby in 2014. By 2015-16 he was training with the USA Eagles Sevens and USA Men's Eagles. In 2016 he signed with the Ohio Aviators of PRO Rugby North America and was the league's top try scorer.

[2] On 1 April 2016, the Player was included on the Registered Testing Pool of the United States Anti-Doping Agency (“USADA”).

[3] A urine sample provided by him on 30 January 2017 returned an Adverse Analytical Finding (“AAF”) for 19-Norandrosterone, a Prohibited Substance.

[4] The Player acknowledges that an anti-doping rule violation (“ADRV”) has occurred. However, he claims that the violation was inadvertent and was caused by his use of a contaminated multi-vitamin/multi-mineral product called “Animal Pak”. As a consequence, he asserts that the presumptive sanction of four years Ineligibility should not apply and that the appropriate sanction should be no more than the term of his Provisional Suspension, which took effect on 16 March 2017.

[5] World Rugby asserts first, that the Player has failed to establish that Animal Pak was the source of his AAF and secondly, that his ADRV was “intentional” in the sense that that term is used in Regulation 21.10.2.3., with the result that the presumptive four year sanction should apply.

[6] Much of the evidence and the submissions received at the hearing concerned the possibility of the Animal Pak supplement being contaminated. Expert testimony was tendered by both the Player and World Rugby and evidence was also received from an executive of the manufacturer of Animal Pak.

[7] For the reasons which follow, the Judicial Committee finds that the Player has failed to establish, on a balance of probabilities, that his AAF was caused by a contaminated supplement or that his anti-doping rule violation was not intentional. Accordingly the four year sanction provided for by Regulation 21.10.2.1.1 is applicable.

Procedural History

[8] The Player was tested Out of Competition on 30 January 2017 at a Doping Control carried out on World Rugby’s behalf by the USADA in Chula Vista, California, USA. The Player stated on his Doping Control Form

I am required to declare any of the following to the USADA DCO via the provided Declaration of Use form: ... dietary supplements and/or other substances taken in the last seven (7) days (including: vitamins, minerals, herbs, proteins, amino acids and any other dietary supplement(s))... I affirm that: I have no Substances or Methods to declare... By signing below I certify that I have reviewed the substances and methods, if any, listed in this declaration. I confirm that it fully and accurately represents my declarations to the USADA Doping Control Officer and that my declaration is truthful and complete. [signed] Aaron Davis.

[9] The Player returned an AAF for 19-Norandrosterone as reported by the WADA-accredited laboratory in Salt Lake City, Utah, USA (“SMRTL”) on 7 March 2017.

[10] 19-Norandrosterone is listed as a metabolite or isomer in S.1.1b (Endogenous Anabolic Androgenic Steroids) of the Prohibited List 2017 set out in Schedule 2 to World Rugby Regulation 21 (the "Regulations"). It is not a Specified Substance and its Use is prohibited at all times.

[11] A preliminary review of the case was undertaken in accordance with Regulation 21.7.2, following which the Player was notified, via USA Rugby (the "Union"), that it was alleged that he had committed an anti-doping rule violation. The Player was provisionally suspended with effect from 16 March 2017 pursuant to Regulations 21.7.9 and 21.7.10, pending the outcome of his case.

[12] The Player was also informed of his right, pursuant to Regulation 21.7.3, to have the "B" sample, which was provided by him at the time he was tested, analysed.

[13] On 24 March 2017, the Union confirmed that the Player wished to have his "B" sample tested.

[14] As a result of technical issues which were being experienced by SMRTL in relation to the testing of the "B" sample, arrangements were provisionally made for that testing to be undertaken by the WADA accredited laboratory in Montreal in the event that the problems that SMRTL could not be resolved within a reasonable time. Ultimately, testing of the "B" sample did take place at SMRTL, but not until 1 May 2017. The Player nominated Paul Scott to attend on his behalf and witness that testing.

[15] On 11 May 2017 the Player was advised, via his legal representative, that the "B" sample analysis confirmed the AAF of the "A" sample.

[16] The same day, the Player, through his lawyer, requested production of the complete laboratory documentation for both the "A" and "B" sample testing by SMRTL. It took until 8/9 June for the laboratory package to arrive.

[17] In the meantime, the Player had informed World Rugby that he wanted a hearing. This independent Judicial Committee ("JC") was therefore appointed to consider the Player's case in accordance with Regulation 21.8 (Right to a Fair Hearing).

[18] On 9 June 2017, the JC provided the parties with written directions concerning disclosure, written submissions, evidence at the hearing and scheduling.

[19] A hearing date was established for 21 July 2017 by video and telephone conference.

[20] Minor extensions of deadlines set out in the directions were granted. The hearing duly commenced on 21 July 2017 and was conducted mainly by telephone conference. Despite the allocation of approximately six hours, the hearing was not finished. Unfortunately due to vacation and other availability issues on the part of counsel and the JC, the hearing could not resume until 18 September 2017.

[21] While the JC has considered the entire record and paid careful attention to the testimony of the witnesses and the comprehensive written and oral submissions of the parties, we refer in these reasons only to those matters which we regard as necessary to describe and explain our decision.

Issues

[22] As a result of the Player's acceptance of the AAF, World Rugby has met its burden of establishing that the Player has committed an Anti-Doping Rule Violation, namely the presence in the player's sample of the Prohibited Substance 19-norandrosterone.

[23] Because the Player's ADRV does not involve a Specified Substance, he bears the onus of establishing, on a balance of probabilities, that his ADRV was not intentional. That would then lower the presumptive sanction from four years' Ineligibility to two years.

[24] The Player can obtain a further reduction of the otherwise applicable sanction if he can establish, on a balance of probabilities:

- a. that there was No Significant Fault or Negligence on his part and that the detected Prohibited Substance came from a Contaminated Product, in which case the period of Ineligibility would, at a minimum, be a reprimand and no period of Ineligibility, and at a maximum, two years of Ineligibility, depending on the Player's degree of Fault (Regulation 21.10.5.1.2);
- b. that he bears No Significant Fault or Negligence, in which case the otherwise applicable period of Ineligibility may be reduced based on the Player's degree of Fault, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable.

The Evidence

[25] Witness statements were provided for each witness and stood as their evidence in chief. Expert evidence was provided by Professor Christiane Ayotte (Director of the Laboratoire de contrôle du dopage, INRS-Institut Armand-Frappier, Montréal, Canada) and by Paul Scott (President of KorvaLabs Inc, San Dimas, U.S.A.).

[26] A number of the witnesses supplemented their witness statements by oral evidence-in-chief, cross-examination, or both.

Aaron Davis

[27] The Player played defensive end for the Southern Methodist University Mustangs (SMU) Div-I (American) football team. After graduation, he was involved in mini camps for the Green Bay Packers and Washington Redskins in the National Football League. But he decided instead to join Tiger Rugby, a member of the USA Rugby National Development Academy programme. He trained both with the USA Men's Eagles Sevens during the 2015-16 season and then the USA Men's Eagles prior to the 2016 Americas Rugby Championship. In 2016, he signed with the Ohio Aviators of PRO Rugby North America and was the league's top try scorer, playing wing. At the conclusion of the inaugural 2016 season of PRO Rugby, he led the league in tries with 14. Later in 2016, he signed with the Tasman Griffins in New Zealand, but was only there briefly due to concerns raised by his U.S. team about his contractual obligations to them.

[28] The Player describes himself as "passionate about rugby, about being the best rugby player that [he] can be, and about growing the game of rugby in the United States".

He claims to “have never taken any shortcuts, and would never do anything that would hurt the game of rugby”.

[29] The Player is familiar with anti-doping rules and processes. He was first tested when he was 18 years old playing college football. He was also tested for street drugs. He underwent doping control procedures when he was with the Green Bay Packers. And he was selected for testing when he was playing in Ohio. In total, he has been tested six times. He has not previously had an AAF for any substance.

[30] Since 2010 or 2011, the Player has taken a multivitamin/multi-mineral supplement called Universal Nutrition Animal Pak (“Animal Pak”). Animal Pak comes in individually wrapped “packets” containing 11 different tablets. The Player has not hitherto experienced any problems as a result of his use of Animal Pak. Some of his football teammates used it. He chose it because it was a well-known multivitamin containing “fairly standard” vitamins and minerals. He initially purchased it from a well-known and reputable retailer of nutritional supplements. More recently he purchased the product in Walmart or at a vitamin store. In his witness statement the Player said that he used it on a daily basis, following the product’s “suggested use” recommendations of 1 to 2 packets per day. However, when he was asked whether he was using Animal Pak on a previous occasion that he was drug tested he could not recall whether he was or not.

[31] The Player claims that he did not think to declare Animal Pak on his Doping Control Form - he was in a “bit of a hurry” and did not “have a guilty mind” about it - but he did put Animal Pak on a list of supplements which he gave to USA Rugby.

[32] The Player was also using a supplement called “Ruck Science Twitch Faster”, which he described as “a pre-workout drink mix made specifically for rugby players by a nutritional supplement company that specializes in creating premium nutrition products for rugby players”. He says that he chose Ruck Science because (i) he knew many rugby players who used their supplements; and (ii) they do not make any supplements that contain any prohibited substances. He used the Twitch Faster supplement on a daily basis, and followed the product’s “suggested use”.

[33] The Player did not disclose the use of Twitch Faster on his Doping Control Form either.

[34] The player acknowledged that he had not consulted USADA’s “Supplement 411” website or World Rugby’s “Keep Rugby Clean” website to research the supplements he was using. He could not recall the specifics of posters or videos that he may have seen concerning doping issues but did recall receiving briefings and advice to check supplement use with team personnel. And he acknowledges having taken USADA’s Athlete Advantage online tutorial and quiz. He claims to have checked the ingredients each time he bought a new container of Animal Pak. However when he made the switch from football to rugby he did not check to see whether there were any differences between the NCAA, NFL and rugby anti-doping regimes.

[35] The Player says that he was shocked when he received notification that he had an AAF. He has been tested throughout his life as an athlete. He says that he is not so stupid that he would ever deliberately or knowingly ingest any prohibited substance, and he asserts that he has never done so. He rejects any suggestion that he may have injected

himself with nandrolone. He does not know the source of his AAF but based on Mr. Scott's evidence, he believes that it was a contaminated Animal Pak product.

Chad Lewis

[36] Through the testimony of the Vice-President Regulatory Affairs & Quality, Universal Nutrition, of New Brunswick, NJ, United States, World Rugby sought to establish that there was no credible possibility of Animal Pak being contaminated at the production stage.

[37] Mr. Lewis explained that Universal Nutrition does not formulate any products with 19-nor-steroids or any steroids and that are no steroids within its production facility. He stated that Animal Pak containers are sealed at Universal Nutrition's facility prior to shipping and retail sale and speculated that if a container had been opened by a third party in order to add a steroid or some other substance during the shipping process or prior to retail sale the seal would be broken which would be obvious to a purchaser and/or retailer.

[38] Under cross-examination, Mr. Lewis did concede that Universal Nutrition purchases its ingredients from around the world. Its supplier evaluation system requires a good manufacturing process. While it is not part of Universal Nutrition's routine screening to test all of its ingredients, Mr. Lewis was not aware of any batch of Animal Pak having ever tested positive for a 19-norsteroid.

Animal Pak

[39] A label for the Animal Pak product states:

Born from the needs and desires of professional bodybuilders... Animal Pak also represents a group of products that have stood the test of time... where it counts most... The gym and the stage... Animal Pak has been the choice for hard-nosed, uncompromising strength athletes all over the world... formulated for competitive and world-class bodybuilders and powerlifters... fundamental nutritional framework for any lifter serious about iron warfare...

WARNING: Not intended for use by those under the age of 18. This is a potent bodybuilding supplement...

Paul Scott

[40] Mr. Scott founded KorvaLabs Inc. in 2014. KorvaLabs is an analytical chemistry laboratory with a focus on sports anti-doping and clinical testing. Its principal testing methods are the GC/MS and LC/MS/MS processes. Although there are applications pending, for example for Clinical Laboratory Improvement Amendments (CLIA) certification, KorvaLabs is not currently accredited by any recognised accreditation body. And while Mr. Scott did his undergraduate work in chemistry (he also holds a law degree) and was employed for over two years at the UCLA Olympic Analytical Laboratory in Los Angeles, he does not possess any postgraduate scientific qualifications.

[41] KorvaLabs tested Animal Pak and Ruck Science supplements provided to him by the Player's lawyer. Nothing of note resulted from the Ruck Science supplements.

However, the Animal Pak testing produced a non-specific result which Mr. Scott felt was indicative of the possibility of the presence of a 19-nor-steroid which could metabolise to 19-Norandrosterone:

As of 25 May 2017, the Animal Pak supplement had tested negative for nandrolone, 19-norandrosterone, 19-noretiocholanolone, 19-norandrostenedione and 19-norandrostenediol. However, that testing also revealed small, but non-background peak at approximately 4.4 minutes (close to the retention time range for other 19-Nor compounds / nor-steroids) that share transitions of 19-norandrostenediol. ... Based on the testing ... it was my belief that this small, but non-background peak probably represented a 19-nor-steroid that could metabolize to 19-Norandrosterone.

[42] He continued:

It is my opinion, based on the testing that has been conducted to date, that the small, but non-background peak that I saw in the Animal Pak supplement ... is probably a nor-steroid; in which case, if an athlete regularly consumed the Animal Pak supplement from the same canister that I tested ... he would most likely have some level of 19-Norandrosterone in his urine.

[43] Mr. Scott was challenged on his use of the word “probably”. He conceded that during his testimony he had used the terms “possibly” and “probably” interchangeably and without particular thought to their legal significance.

[44] Neither Mr. Scott, nor Prof. Ayotte, were able to obtain a reference standard against which there testing of Animal Pak could be compared for the purposes of identifying the presence of a 19-nor-steroid. Mr Scott did however purchase a nutritional supplement called Nor-Andro Max and tested it for nandrolone and precursors of 19-Norandrosterone. Those test results generally showed the likely presence of a different 19-nor steroid. While this testing did not identify the small, non-background peaks that he saw in the Animal Pak supplement, Mr. Scott felt that it did confirm that there are over-the-counter nutritional supplements that could cause an AAF for 19-Norandrosterone.

[45] What Mr. Scott felt he could say with some confidence about his testing of the Animal Pak supplement is that the peak he detected was more likely to have been caused by a nor-steroid than by anything else.

[46] Having concluded that the Player’s AAF was due to supplement contamination, Mr. Scott expressly rejected Prof. Ayotte’s theory that the most likely source of the Player’s AAF was by way of an injection or oral administration of nandrolone a few days before his sample was obtained.

Christiane Ayotte

[47] Prof. Ayotte holds a Ph.D in organic chemistry. Since 1991, she has been a Professor at INRS and Director of its WADA-accredited Doping Control Laboratory (the Montreal Laboratory). She is the current President of the World Association of Anti-Doping Scientists and is also a member of the WADA Laboratory Expert Group.

[48] Prof. Ayotte has contributed or directed research work on the detection of nandrolone metabolites by GC-MS, and on the development of a GC-C-IRMS method for determining the origin of urinary 19-NA.

[49] In her report, Prof. Ayotte notes that testing of the Player's sample had revealed the presence of the main urinary metabolite of nandrolone and related nor-steroids, 19-Norandrosterone, in an amount of 9.2 ng/mL (specific gravity: 1.010) and of demonstrated exogenous origin.

[50] Dr. Ayotte's testing of the Animal Pak supplement from the same batch as that tested by Mr. Scott found no evidence or even suggestion of the presence of a nor-steroid. Asked to comment on Mr. Scott's findings and opinion, she rejected the possibility that consumption of Animal Pak had caused the AAF and concluded that the presence of 19-Norandrosterone in the Player's urine sample was "probably due to an injection(s) a few months before the collection of the sample on 30 January 2017 of nandrolone decanoate from a preparation similar to ones that [her laboratory had] tested" although she said that she could not exclude the possibility of ingestion of a supplement containing a nor-steroid a few days prior to the test.

[51] With respect to Mr. Scott's opinion that the non-background peak he had observed probably represented a 19-nor-steroid that could metabolise to 19-Norandrosterone, Dr. Ayotte, having expressed reservations about Mr. Scott's analytical method, commented:

Simple attempts were not made to better identify what caused that signal, such as the analysis on a very basic GC-MS instrument in the full scan mode. A "non-background" signal means nothing in such vague analytical context. Without any analytical information, it could be one of the several "non-medicinal" ingredients present in the pills (starch, sugar, triglycerides, colorant, fatty acids, phthalates etc) or a bias from the testing method.

[52] She concluded:

... setting aside the inconsistencies and major flaws in this testing and reporting, that Mr. Scott failed to identify a contaminant norsteroid in any of the athlete's supplements. Mr. Scott appears convinced that this signal is due to a norsteroid, however, there is not a single element to support that. The "signal" cannot be judged, insufficient analytical details being provided. We have not found suspicious signals in our analysis of the athlete's product and [an oral supplement called Nor-Andro-Max described as containing "19-Norandro"] that we purchased.

[53] According to Prof. Ayotte, even assuming that the presence of a nor-steroid in the Animal Pak pills was possible, the amount present would not be "a small, but non-background peak" as described by Mr. Scott, but, rather, would have been easily identified by GC-MS. Prof. Ayotte was unable to reproduce Mr. Scott's findings of a small unknown signal.

Applicable Provisions

[54] The following provisions of World Rugby Regulation 21 are engaged:

Strict Liability

21.2.1 Presence of a Prohibited Substance or its Metabolites or Markers in a Player's Sample

21.2.1.1 It is each Player's personal duty to ensure that no Prohibited Substance enters his or her body. Players are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, Fault, negligence or knowing Use on the Player's part be demonstrated in order to establish an anti-doping rule violation under Regulation 21.2.1 (Presence).

Onus

21.3.1 Burdens and Standards of Proof

World Rugby shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether World Rugby has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel 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 these Anti-Doping Rules place the burden of proof upon the Player 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.

Medications

21.4.8 Nutritional Supplements and Medications

21.4.8.1 The use of nutritional supplements by Players is a risk. In many countries regulations either do not exist or are limited in nature in relation to the manufacturing and labelling of supplements. This may lead to a supplement containing an undeclared substance that is prohibited under these Anti-Doping Rules. Nutritional supplements may not be regulated or could be contaminated or suffer from cross contamination or may not have all the ingredients listed on the product label. Players are advised to exercise extreme caution regarding the use of nutritional supplements.

21.4.8.2 Many of the substances in the Prohibited List may appear either alone or as part of a mixture within medications or supplements which may be available with or without a doctor's prescription. Any Player who is concerned about the appropriateness of treatment being administered to him, or medications or supplements being ingested by him, should seek clarification from his doctor or other relevant authority as to whether such treatment is or such medications or supplements are prohibited prior to taking possession of or using such item. For the avoidance of doubt nothing herein shall displace the Player's responsibility to ensure he does not commit an anti-doping rule violation.

Sanctions

21.10.2 Ineligibility for Presence, Use or Attempted Use, or Possession of a Prohibited Substance or Prohibited Method

The period of Ineligibility for a violation of Regulations 21.2.1 (Presence), 21.2.2 (Use or Attempted Use) or 21.2.6 (Possession) shall be as follows, subject to potential reduction or suspension pursuant to Regulations 21.10.4, 21.10.5 or 21.10.6:

21.10.2.1 The period of Ineligibility shall be four years where:

21.10.2.1.1 The anti-doping rule violation does not involve a Specified Substance, unless the Player or other Person can establish that the anti-doping rule violation was not intentional.

21.10.2.1.2 The anti-doping rule violation involves a Specified Substance and World Rugby (or the Association, Union or Tournament Organiser handling the case as applicable) can establish that the anti-doping rule violation was intentional.

21.10.2.2 If Regulation 21.10.2.1 does not apply, the period of Ineligibility shall be two years.

21.10.2.3 As used in Regulations 21.10.2 and 21.10.3, the term “intentional” is meant to identify those Players who cheat. The term therefore requires that the Player or other Person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall be rebuttably presumed to be not intentional if the substance is a Specified Substance and the Player can establish that the Prohibited Substance was Used Out-of-Competition. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall not be considered intentional if the substance is not a Specified Substance and the Player can establish that the Prohibited Substance was Used Out-of-Competition in a context unrelated to sport performance.

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

21.10.5.1 Reduction of Sanctions for Specified Substances or Contaminated Products for Violations of Regulations 21.2.1 (Presence), 21.2.2 (Use or Attempted Use) or 21.2.6 (Possession).

21.10.5.1.1 Specified Substances

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

The Player's Position

[55] The Player argues that on a balance of probabilities the source of the 19-Norandrosterone found in his sample came from his use of a contaminated supplement. He asserts that there is no evidence to support the speculation by Prof. Ayotte of deliberate doping by injection or supplement. To the contrary, the Player had an unblemished record as a college athlete and when he was a NFL trialist.

[56] No expert has tested for every nor-steroid. Prof. Ayotte only tested for nor-steroids for which she had a reference standard. There is no available certified reference standard for 19-Nor DHEA, despite the recent proliferation on the market of new supplements containing this nor-steroid. But the fact that no reference standard is available does not mean that the possibility that the Animal-Pak supplement contained 19-Nor DHEA should be ignored.

[57] By its own admission, in the manufacture of Animal Pak Universal Nutrition uses raw materials which it does not test. The possibility of contamination cannot therefore be ruled out.

[58] A player with an AAF from taking a supplement that is contaminated with a prohibited substance not disclosed on the label could not have intended to violate the anti-doping rules. Furthermore, in consuming a common multi-vitamin/multi-mineral product – a completely commonplace and reasonable action – the Player cannot be considered to have known that there was a significant risk that taking the Animal Pak supplement might constitute or result in an anti-doping rule violation (let alone manifestly disregarding that risk).

[59] Regulation 21.10.2.3 specifies that the term “intentional” is meant to identify those players who cheat. It must therefore follow that if the JC accepts that it is more likely than not that the Animal Pak supplement used by the Player was the source of his AAF, the JC should also find that for the purposes of Regulation 21.10.2.1.1 the Player has established that the ADRV was not intentional.

[60] If it is accepted that the Player’s ADRV was not intentional, it should also be found that there was no significant fault or negligence on his part. He had used the same product without incident for a number of years. It is difficult to see what more he could reasonably have done to avoid an AAF. An appropriate sanction should be no more than the time he has already served under his provisional suspension.

World Rugby’s Position

[61] World Rugby’s primary position is that the Player’s AAF did not result from the use of a contaminated supplement. The JC should prefer the evidence of Dr. Ayotte and find that 19-Norandrosterone was not present in the Animal Pak purportedly being used by the Player. The most likely explanation for the AAF is that the Player intentionally ingested Nandrolone or another 19-nor-steroid

[62] Furthermore, the Player was well aware of the risks of supplement use. He had received extensive anti-doping education. He did not seek professional advice about his use of Animal Pak. He did not inform USA Rugby team personnel that he was using it (although he says he provided USA Rugby with a list of supplements he was using, no copy of such list was adduced in evidence).

[63] The product label itself should have raised multiple red flags given the clear bodybuilding intention of the product, the high number of ingredients and the health warning on the packaging. His use of Animal Pak was reckless. As a result even if the JC accepts that a contaminated Animal Pak supplement was the cause of the AAF, the Player's Use was still "intentional" for the purposes of Regulation 21.10.2.3.

[64] The definition of "intentional" does not require the Player to have known the specific substance which was in a supplement. It is sufficient that that he was or should have been aware of the significant risk that consuming that supplement might result in an anti-doping rule violation and that he manifestly disregarded that risk in proceeding to consume the supplement. The Player's burden is to prove on a balance of probabilities that he "did not manifestly disregard the significant risk of engaging in conduct which might constitute an anti-doping rule violation": [World Rugby v Campomar](#) (10 October 2016) at para. 18.

[65] If the JC accepts that Animal Pak was the source of the AAF and that he has met his burden of establishing that his ADRV was not intentional, his degree of fault is nevertheless high and the availability of a reduced sanction of less than two years under Regulation 21.10.5.1.2 (Contaminated Product) or Regulation 21.10.5.2 (Application of No Significant Fault or Negligence) would therefore not be engaged.

Discussion and Analysis

[66] The Player denies intentional Use of a prohibited substance. His explanation for his AAF relies on Mr. Scott's conclusion that the small, but non-background peak that he saw when he tested the Animal Pak supplement was probably a nor-steroid and that if the Player had regularly consumed the Animal Pak supplement from the same canister that Mr. Scott tested, he would most likely have some level of 19-Norandrosterone in his urine.

[67] The Player's burden is to prove on a balance of probabilities that his anti-doping rule violation was not intentional: Regulation 21.10.2.1.1. The classic formulation of the application of the balance of probabilities was stated by Denning J. in *Miller v. Minister of Pensions*, [1947] 2 All E.R. 372 in these terms:

If the evidence is such that the tribunal can say 'we think it more probable than not' then the burden is discharged, but if the probabilities are equal it is not.

[68] The peak found in the analysis by Mr Scott at 4.4 minutes was not rigorously analysed according to WADA laboratory testing standards. Furthermore, neither the Montreal or SMRTL laboratories found any 19-Norandrosterone or other nandrolone substance in their analysis of Animal Pak.

[69] Nevertheless, the absence of any laboratory reference standard to measure 19-nordehydroepiandrosterone (found in Nor-Andro-Max) means that Mr. Scott's theory that the small but non-background peaks that he saw in the Animal Pak supplement are consistent with 19-nor-DHEA contamination remains an unresolved possibility.

[70] That said, the ratio of 19-Norandrosterone (19-NA) to 19-noretiocholanolone (19-NE) in the Player's sample was normal. Yet, as Prof. Ayotte explained, the 19-nor-steroid

found in Nor-Andro-Max is a delta 5 steroid; if a delta 5 steroid is present in an athlete's body, the urinary ratio (19NA-19NE) will be low. Furthermore, Prof. Ayotte was unable to reproduce Mr. Scott's finding of "a small, but non-background peak".

[71] In our view, this puts Mr. Scott's theory in its proper context: possible, but improbable.

[72] It follows that the Player has failed to establish on a balance of probabilities that the source of his AAF was a contaminated supplement.

[73] But even if he had, his use of Animal Pak courted the risk of an ADRV.

[74] While accepting that he had used this over-the counter product for a number of years, his continued use of a product so closely associated with body-building was reckless. His switch from football to rugby and his subsequent entry into the USADA testing pool (at which time he took USADA's Athlete Advantage online tutorial) would have afforded him opportunities to double-check the products he was using and to take proper advice.

[75] The Player failed to exercise extreme caution regarding the use of nutritional supplements as expressly advised by Regulation 21.4.8.1.

[76] Accordingly, we find that the Player has not established that the anti-doping rule violation was not intentional.

[77] The applicable sanction for the Player's anti-doping rule violation is four years Ineligibility.

[78] As a result of our findings, it is not necessary for us to consider whether the sanction should be reduced because of a lack of significant fault or negligence on the Player's part arising from his Use of a Contaminated Product or otherwise.

Start Date

[79] There have been a number of delays in this case. The Player was not notified of the AAF until 16 March 2017, over six weeks after he was tested. He has been provisionally suspended since that date.

[80] It took longer than usual for the Player's "B" sample to be tested because of equipment problems at SMRTL. The Player was notified of those results on 11 May 2017. It then took several more weeks – until 9 June – for a laboratory documentation pack to be put together and delivered to the Player's lawyer.

[81] By that time this JC had already been empanelled and directions given (on 9 June) in relation to disclosure, and the delivery of evidence and submissions. While there continued to be production and other issues relating to the timetable set by the JC, requiring extensions of time and further directions being granted by the JC, the matter continued to move forward and a hearing date of 21 July was set.

[82] The hearing started on 21 July, four and a half months after the Player was notified about the AAF. Despite a better part of a day being set aside for the hearing, it was not

possible to complete the hearing in the allotted time. This was largely a function of counsel electing to undertake lengthy examinations of certain witnesses, particularly Mr. Scott. We make no criticism of this, but the parties would have known that there would then be the risk of a substantial delay before the hearing could be completed. The next date mutually convenient to the parties, counsel and the JC was not until 18 September 2017.

[83] Regulation 21.10.11.1 provides:

Where there have been substantial delays in the hearing process or other aspects of Doping Control not attributable to the Player or other Person, World Rugby (or the Association, Union or Tournament Organiser handling the case as applicable) may start the period of Ineligibility at an earlier date commencing as early as the date of Sample collection or the date on which another anti-doping rule violation last occurred. All competitive results achieved during the period of Ineligibility, including retroactive Ineligibility, shall be Disqualified.

[84] The Player argues that any date of Ineligibility should run from the date of his notification – 30 January 2017 – rather than the date of his provisional suspension because of “substantial delays” that are not attributable to the Player.

[85] World Rugby submits that the delays were not substantial having regard to comparable cases found in the database of cases on KeepRugbyClean.com website.

[86] In *WTC. v. Moats* (AAA No. 77-190-00214012), at para. 7:30, a panel held that where sample collection had occurred in January, but the athlete was not notified until April and a hearing could not be held until August, it was “proper” to commence the period of Ineligibility on the date of sample collection. No reasons were given for the panel’s exercise of its discretion.

[87] In *USADA v. Merritt* (AAA No. 77 190 00293), a panel observed that while a delay of two months before notifying an athlete of a positive test was not, in the circumstances, “unreasonable”, the regulations provide relief where delay has been “substantial”. The panel continued, at para. 10.3:

The Panel finds that a delay in notification for over two months (USADA's best case scenario) is "substantial" and prejudicial to Mr. Merritt. The sooner Mr. Merritt was notified, the sooner he could conduct an investigation into the causes of his positive test (for which he has the burden of proof) and the sooner he would have stopped taking the substance.

[88] In *USADA v. Rivera* (AAA Case No. 01-16-0000-6096) a panel found that the primary burden was on USADA to “facilitate the prompt and fair resolution” of the case. However there was no provisional suspension in that case and the panel found it would be unfair for the start of her suspension to run from the date of a decision rendered a full year after her sample collection.

[89] Any case involving the exercise of discretion provided by Regulation 21.10.11.1 or its equivalents should involve a careful consideration of the circumstances. What were the reasons for the delay? How long was the delay? Was the player provisionally

suspended? What if any prejudice has been caused to the player's efforts to make full answer and defence to the charges against him or her? How long is the period of Ineligibility?

[90] It also has to be borne in mind that while doping disputes should always be resolved as expeditiously as possible, a balance must be struck between an efficient process and a fair process. In the present case, for example, the parties adduced sophisticated expert evidence which in turn required the production by the laboratories concerned of their test data. That took time.

[91] The fact that a delay has been "substantial" does not automatically mean that a suspension must be backdated. The discretion to backdate the commencement of a suspension in cases of "substantial" delay should be exercised where it is fair and just in all the circumstances to do so.

[92] In the present case, the Player, unaware of any issues arising from the sample he provided, was able to play between the date of sample collection and the date he was provisionally suspended. He thus suffered no harm or prejudice because of the delay in testing his "A" sample.

[93] There were then further delays in this case, many not of the Player's making. These delays were not, in our view, unreasonable. Indeed, both sides agreed to expedited timelines for the preparation and delivery of the evidentiary record and of pre-hearing submissions in order to get to a hearing as soon as practicably possible. While there were frustrations arising from the inability of the parties to control information coming from third parties, neither side can be criticised for not making best efforts.

[94] Taking into account all of the circumstances, we are not persuaded that we should exercise the discretion provided to us by Regulation 21.10.11.1 by backdating the start of the suspension.

Findings and Conclusions

[95] The Player committed an anti-doping rule violation as a result of the presence in the sample which he provided of 19-Norandrosterone, a Prohibited Substance.

[96] The JC finds, further, that the Player engaged in conduct which he knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk.

[97] As a result, the applicable sanction is a period of Ineligibility of four years, commencing on 16 March 2017 and ending at midnight on 15 March 2021.

[98] The Player's attention is drawn to Regulation 21.10.12 which provides, inter alia, that:

21.10.12.1 Prohibition Against Participation During Ineligibility

No Player or other Person who has been declared Ineligible may, during the period of Ineligibility, participate in any capacity in a Competition or activity (other than

authorized anti-doping education or rehabilitation programmes) authorised or organised by World Rugby or any Member Union, Association or a Club, Rugby Body or other member organisation of World Rugby or any Association or Member Union, or in Competitions authorised or organised by any professional league or any international- or national-level Event organisation or any elite or national-level sporting activity funded by a governmental agency".

...

A Player or other Person subject to a period of Ineligibility shall remain subject to Testing.

21.10.12.2 Return to Training

As an exception to Regulation 21.10.12.1, a Player may return to train with a team or to use the facilities of a Union, Club, Rugby Body or other member organisation of World Rugby, an Association or a Union during the shorter of: (1) the last two months of the Player's period of Ineligibility, or (2) the last one-quarter of the period of Ineligibility imposed".

[99] The full text of Regulation 21.10.12 and the related commentaries should be consulted. In the case of the Player, he would be able to return to training at the start of month 47 of the four year period of Ineligibility, so on 16 January 2021.

Right of Appeal

[100] This decision is final, subject to referral to a Post Hearing Review Body (Regulation 21.13.8) or an appeal, where the circumstances permit, to the Court of Arbitration for Sport (Regulation 21.13.2). The regulations set out the timelines within which any referral or appeal must be commenced.

Costs

[101] Should World Rugby wish us to exercise our discretion in relation to costs under Regulation 21.8.2.10 or 21.8.2.11, written submissions should be provided to the JC via Mr. Ho within 10 business days of the receipt by World Rugby of this decision. The Player will then have 10 business days to respond.

27 November 2017

A handwritten signature in black ink, appearing to read 'Graeme Mew', with a stylized flourish at the end.

Graeme Mew, Chairman