

CAS 2002/A/376 Baxter v/IOC

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Mr. David W. **Rivkin**, Attorney at law in New York, United States of America

Arbitrators: Prof. Richard H. **McLaren**, Barrister in London, Ontario, Canada
Mr. Dirk-Reiner **Martens**, Attorney at law in Munich, Germany

between

Mr. Alain **BAXTER**, England

Represented by Michael J. Beloff, QC, London, England and by Ms Sara Friend, Legal
advisor of the British Olympic Association, London, England

and

INTERNATIONAL OLYMPIC COMMITTEE (IOC), Lausanne, Switzerland

Represented by Mr. Jan Paulsson, Attorney at law in Paris, France

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I. FACTS

- 1.1. Alain Baxter competed for the British team in the men's alpine skiing slalom event on 23 February 2002 at the XIX Olympic Winter Games in Salt Lake City. He finished third and was awarded a bronze medal in the event.
- 1.2. Mr. Baxter has a well-documented long-standing medical condition of nasal congestion. He has used a non-prescription Vicks Vapor Inhaler for the purpose of relieving nasal congestion as needed over many years. The Vicks inhaler is included in the list of permitted substances issued by the United Kingdom Sports Council.
- 1.3. The Vicks inhaler sold over the counter in the United States has a different formulation than the one sold in the United Kingdom. The U.S. version of the inhaler contains "levmetamfetamine."¹
- 1.4. When Mr. Baxter first began to suffer from nasal congestion in Salt Lake City, he consulted the British team doctor about medication he could use. The team doctor recommended a different Vicks product than the Vicks inhaler. He used this product but found it unsatisfactory. However, when Mr. Baxter saw the Vicks Vapor inhaler for sale in a store in Park City, he bought it and did not consult with the team doctor because, he said, it appeared to be the same product as the one he had used regularly in the United Kingdom.
- 1.5. Mr. Baxter said that he did not read the back of the package, which clearly identifies levmetamfetamine as an active ingredient in the Vicks inhaler.
- 1.6. According to Mr. Baxter, he started using the inhaler on 17 February 2002; he continued to use the product as needed until his race on 23 February.
- 1.7. As a medalist, Mr. Baxter was required to undergo a doping test, for which he submitted a urine sample.

¹ The scientific authorities use various spellings for this substance. The parties debated the significance of these various spellings. For purposes of this Award, the Panel uses the spelling that appears on the Vicks Vapor Inhaler package.

- 1.8. On 25 February 2002, the IOC Accredited Laboratory in Salt Lake City informed the IOC Medical Commission of an adverse finding on the A sample provided by Mr. Baxter on 23 February. The laboratory reported the presence of “methamphetamine” of approximately 20-25 Ng/ml. Mr. Baxter accepts that it was his sample that was tested and that the results of those tests were as stated. The cause of those results is consistent with the explanation of Mr. Baxter before this Panel.
- 1.9. On 4, 6 and 11 March 2002, Mr. Baxter requested that the IOC direct the accredited laboratory at UCLA to conduct an isomer separation analysis on his A and B sample to show whether the dextro or levo form of methamphetamine was present in his system at the time of competition. These requests were denied.
- 1.10. Pursuant to the Bye-Laws to the Olympic Movement Anti-Doping Code (the “OMAC”), an Inquiry Commission was established. The Commission held an investigative hearing on 15 March 2002 at the IOC Headquarters in Lausanne, Switzerland. The hearing was attended by Mr. Baxter, his lawyer, his coach, and members of the British Olympic Association.
- 1.11. At that hearing, the Commission heard evidence that both the A sample and B sample of Mr. Baxter’s urine had registered a positive for methamphetamine.
- 1.12. The Inquiry Commission concluded that a prohibited substance was contained in Mr. Baxter’s body when he competed in the alpine skiing slalom competition, and referred the matter to the IOC Disciplinary Commission.
- 1.13. The Disciplinary Commission held a hearing on 16 March 2002 at the IOC Headquarters in Lausanne. Mr. Baxter, his lawyer, his coach, and members of the British Olympic Association attended this hearing.
- 1.14. The Disciplinary Commission unanimously proposed to the IOC Executive Board that Mr. Baxter be disqualified from the men’s alpine skiing slalom event, that his bronze medal and diploma be withdrawn, and that he be excluded from the XIX Olympic Winter Games Salt Lake City 2002.

- 1.15. On 21 March 2002, the IOC Executive Board upheld the proposal disqualifying Mr. Baxter and removing his bronze medal and diploma.
- 1.16. Mr. Baxter appealed that decision to the Court of Arbitration for Sport ("CAS") by serving a statement of appeal on 11 April 2002.
- 1.17. Mr. Baxter has requested that the Panel order the IOC (i) to direct the IOC-accredited laboratory at UCLA to perform an isomer separation analysis on the residue of Mr. Baxter's A and B sample, (ii) to reinstate him in the men's alpine skiing slalom event at the XIX Olympic Winter Games Salt Lake City 2002, (iii) to return his bronze medal and diploma, and (iv) to pay his costs of this proceeding.
- 1.18. CAS appointed three arbitrators to hear the appeal: Richard H. McLaren of London, Ontario, Canada, nominated by Mr. Baxter; Dirk-Reiner Martens of Munich, Germany, nominated by the IOC; and as President, David W. Rivkin of New York, New York, United States.
- 1.19. The Panel received various submissions from the parties, including documents, witness statements, expert reports and briefs, and issued several procedural orders. The Panel held a hearing in London, England on 5-6 September 2002.
- 1.20. As a consequence of the positive urine test, the Fédération Internationale de Ski ("FIS") suspended Mr. Baxter from competition for three months. Mr. Baxter did not challenge the suspension or the length of the suspension, but in a separate CAS proceeding he appealed the manner of calculating the three-month period. Another CAS panel upheld the appeal and re-calculated the effective dates of the three-month suspension. The issue of any suspension is therefore not before this Panel, which is only asked to determine the appropriateness of the disqualification of Mr. Baxter's Olympic results.

II. PROCEDURAL FRAMEWORK

- 2.1. CAS enjoys jurisdiction by reason of the OMAC, Chapter III Article 1 (p. 19), which provides: "Any participant affected by a decision rendered in application of this OMAC by the IOC ... may appeal from that decision to the Court of Arbitration for Sport, in accordance with the provisions applicable before such court."
- 2.2. The governing law is the OMAC and Swiss law (the law of the IOC's domicile).
- 2.3. Jurisdiction and governing law are not in dispute in this case.

III. DISCUSSION

- 3.1. In support of his appeal, Mr. Baxter makes three arguments: (1) the IOC rules require it to establish fault in Mr. Baxter, and it has failed to do so; (2) the IOC has not established that the substance found in Mr. Baxter's sample was a prohibited substance under the OMAC; and (3) in the circumstances of this case, the sanction of disqualification is disproportionate. We take each of these arguments in turn.
- 3.2. Mr. Baxter's first argument -- that the IOC is required to prove intentional use or fault -- is inconsistent with a long line of CAS authority.
- 3.3. There is no serious dispute as to the circumstances of Mr. Baxter's use of the Vicks inhaler and his ingestion of levmetamfetamine. The level of substance found in his body is consistent with his taking the medication for therapeutic use. The IOC has not sought to present any evidence disputing Mr. Baxter's description of the circumstances of his taking of the medication. The Panel finds Mr. Baxter's story to be sincere and compelling.
- 3.4. Whether or not Mr. Baxter should have been more careful before taking the medication -- by reading the label showing the presence of levmetamfetamine in the product or by consulting with the team doctor before taking the medication -- is irrelevant to our decision. 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. Article 2.2 of Chapter II of the OMAC states that doping is “the presence in the body of a prohibited substance” Thus, the OMAC recognizes that the mere presence of a prohibited substance, whether or not intentional or negligent, can affect the results of the event so that the presence of the substance is sufficient to find a doping violation.

- 3.5. As the CAS panel in Aanes v. FILA (CAS 2001/A/317) stated, “It is therefore perfectly proper for the rules of a sporting federation to establish that the results achieved by a ‘doped athlete’ at a competition during which he was under the influence of a prohibited substance must be cancelled irrespective of any guilt on the part of the athlete.”
- 3.6. There are a number of CAS cases where athletes have had the sanction of disqualification imposed under circumstances at least as sympathetic as Mr. Baxter’s. For example, in Raducan v. IOC (CAS OG00/011), the panel upheld the disqualification of a 16-year-old gymnast who took a medication provided by the team doctor that contained the prohibited substance of pseudoephedrine. See also C v. FINA (CAS 95/141).
- 3.7. Therefore, the principal issue in this case is whether or not the substance found in Mr. Baxter’s body, as reported by the IOC-accredited laboratory, was a prohibited substance within the meaning of the OMAC.
- 3.8. The Vicks Vapor Inhaler used by the Appellant contains the chemical levmetamfetamine -- so called because its chemical rotation is “levo” or left, distinguished from the other isomer of methamphetamine, which has a “dextro” or right rotation.
- 3.9. It is a matter of construction or interpretation of the OMAC as to whether these two chemicals are included within its single reference to methamphetamine. Mr. Baxter contends that levmetamfetamine is not a stimulant, not prohibited by the OMAC, and not related to methamphetamine as the term is used in the OMAC. The IOC flatly rejects Mr. Baxter’s contentions and argues that levmetamfetamine is a stimulant, is specifically prohibited by the OMAC as it is encompassed by the term

methamphetamine, and, at the very least, is sufficiently related to methamphetamine that it is prohibited as a “related substance” within the meaning of the OMAC.

- 3.10. Appendix A to the OMAC lists the “Prohibited Classes of Substances.” One such class is “stimulants,” which include the following examples: “. . . amphetamines, . . . and related substances.”
- 3.11. Chapter IV of Appendix A then contains a “List of Examples of Prohibited Substances,” which begins with the cautionary language: “This is not an exhaustive list of Prohibited Substances. Many substances that do not appear on this list are prohibited under the term ‘and related substances.’” This list of examples includes “methamphetamine.”
- 3.12. The IOC does not test to determine which isomer of methamphetamine has been found in a drug test. As noted above, Mr. Baxter’s test simply showed that a level of “methamphetamine” had been found. For that reason, Mr. Baxter asked the IOC to order additional testing to determine which isomer had been found, but the IOC refused to undertake that test.
- 3.13. As a result, for purposes of this proceeding, the Panel must assume that the substance found in Mr. Baxter’s urine was levmetamfetamine, as he contends. However, for the reasons described below, there is no need for the IOC to conduct the additional testing, because the Panel holds that the term methamphetamine on the list of prohibited substances in the OMAC includes both isomers of methamphetamine, including levmetamfetamine, or at a minimum, that levmetamfetamine falls under the term “amphetamines” as a stimulant pursuant to Appendix A to the OMAC.
- 3.14. Mr. Baxter argues that levmetamfetamine is a separate substance from methamphetamine and that it is therefore not included in the list of prohibited substances.
- 3.15. It is Mr. Baxter’s contention that the isomer with the left rotation is always referred to as levmetamfetamine, while the isomer with the right rotation is alternatively referred to as dextromethamphetamine or simply as methamphetamine. (For purposes of this Award, we refer to the right rotation isomer as methamphetamine, as does Mr. Baxter in his papers.). Therefore, Mr. Baxter argues, the use of the term “methamphetamine” in

the OMAC does not encompass levmetamfetamine.

- 3.16. Levmetamfetamine is approved in some countries, including the United States, as a nasal decongestant that acts primarily on the vascular system. Methamphetamine, the right-rotation isomer, on the other hand, is an intense stimulant known on the street as “meth” or “speed.” The parties’ experts agree that levmetamfetamine has a significantly weaker stimulant effect (about 5–20% as potent a central nervous system stimulant), that if taken in excess levmetamfetamine can have a stimulant effect on athletic performance, and that at the levels found in Mr. Baxter’s body it is very unlikely that the levmetamfetamine had any stimulant effect.
- 3.17. Mr. Baxter also points to other differences between the two isomers, including different molecule configurations, different descriptors and different numbers assigned by the Chemical Abstracts Service.
- 3.18. In support of his contentions, Mr. Baxter’s expert cites a number of pharmacological sources, including Martindale, the Merck Index, Index Nominum and the U.S. Pharmacopeia. According to that expert, Dr. Brian S. Finkle, each of these reference books either (i) has separate listings for methamphetamine (sometimes also referred to as methylamphetamine) and for levmetamfetamine, or (ii) lists only methamphetamine referring only to the dextro-rotation form (through reference to the rotation, Chemical Abstracts number or other descriptor). From this literature, Dr. Finkle concludes, “in its common usage among forensic toxicologists and pharmaceutical scientists, the term methamphetamine refers to the dextro isomer only while levmetamfetamine is always referred to as such (or by one of its synonyms). The term methamphetamine is not taken to mean either the dextro or levo rotation isomers but simply the dextro rotation substance.”
- 3.19. The IOC’s two experts, Dr. Don H. Catlin and Dr. Richard L. Hilderbrand, on the other hand, state that the term methamphetamine denotes both the isomer forms and that the separate terms are only used when there is a need for distinction between the two substances, such as in a workplace drug test in the United States or in a physician’s reference book. These experts cite various scientific articles, as well as some other pharmacological works, in support of their arguments. Dr. Catlin states, “One uses the

terms levmetamfetamine or dextromethamphetamine to indicate a specific chemical structure. When the intent is not to specify a particular isomer of methamphetamine, the term methamphetamine is used.” Dr. Hilderbrand notes that references to a specific isomer are not intended to create a distinction or to indicate a separate substance, but only to be more specific about the isomer involved.

- 3.20. The Panel agrees with the IOC and its experts that the term methamphetamine encompasses both isomer forms. This conclusion is based on a number of factors. First, even the pharmacological works on which Mr. Baxter and his expert rely are not consistent. For example, the 32nd edition of Martindale includes separate entries for levmetamfetamine and for methylamphetamine hydrochloride (i.e., methamphetamine), but the latter entry specifically describes levmetamfetamine and the Vicks Vapor Inhaler within the description of methamphetamine. Similarly, the STN Easy Registry online database lists methamphetamine and levmetamfetamine (including specifically the Vicks inhaler) together in the same chemical listing.
- 3.21. A review of the pharmacological works shows that, for the most part, the reference texts from 1991 through 1996 refer only to methamphetamine while more recent references (including a later edition of Martindale) list levmetamfetamine separately from methamphetamine. This history is consistent with the statement of Dr. Kurt Weingand of Proctor & Gamble (the manufacturer of the Vicks inhaler), whose letter was submitted by Mr. Baxter. Dr. Weingand’s letter specifically states that “many standard reference texts for drugs and chemicals . . . now refer to the two chemical isoforms of this compound differently” (emphasis added).
- 3.22. Thus, it appears that the practice of making some distinctions between the isomers is relatively recent. Even these distinctions, however, appear to consider levmetamfetamine as a subcategory of methamphetamine and thus under the general definition of that term.
- 3.23. This understanding is consistent with the IOC’s use of the term methamphetamine in the OMAC. The IOC presented evidence that it had considered on several occasions whether to specify in the OMAC one or both isomers of methamphetamine and that the

IOC had decided to leave the broader term referring to both.² Moreover, in 1997 the IOC expressly banned as a Prohibited Substance the drug selegiline, which metabolizes to levmetamfetamine within eight hours after ingestion. Therefore, this substance can only be detected during a very limited period of eight hours after ingestion until it metabolizes. The evidence shows, however, that the IOC did not view this as a problem, because after the eight-hour period, the test would still show the metabolite of selegiline -- levmetamfetamine -- which in the IOC's opinion was already listed as a Prohibited Substance, an opinion shared by this Panel.

- 3.24. It is also worth noting that the Guide to Prohibitive Substances published by the U.S. Anti-Doping Agency ("USADA") in October 2000 specifically lists the Vicks inhaler as an "over-the-counter product containing a prohibited stimulant," which is described as levmetamfetamine. While the USADA Guide cannot be used to define the terms in the OMAC, it nevertheless demonstrates a common understanding of the meaning of the OMAC, and the USADA Guide shows that common understanding to be consistent with the other evidence described above: namely, that the term methamphetamine includes levmetamfetamine.
- 3.25. Finally, even if one were to conclude that the term methamphetamine in the OMAC did not include levmetamfetamine, the Panel notes that Appendix A (I) to the OMAC lists among the classes of prohibited substances "amphetamines." There can be no doubt *that any form of amphetamines is covered by this listing, and there can also be no doubt that both isomers of methamphetamine, including levmetamfetamine, are amphetamines within the meaning of that term.* The list of examples in Chapter IV of Appendix A to the OMAC, including methamphetamine, makes clear that it is non-exhaustive, so that any form of amphetamine falls within the general class and is thus prohibited.
- 3.26. The IOC may wish to consider at some time whether to distinguish between the two isomers of methamphetamine and to introduce a threshold as it has done in the case of other stimulants, such as caffeine. However, it has chosen not to do so at this point, and

² The panel notes that for apparent greater clarity the 27 September 2002 draft version of the WADA code expressly indicates that both the L- and D-isomers of all stimulants are prohibited substances.

both parties agree that the Panel must apply the OMAC as written. It is accordingly unnecessary to consider the “related substance” submissions of the IOC.

- 3.27. The OMAC thus prohibits either form of methamphetamine, including levmetamfetamine, so that Mr. Baxter’s urine contained a prohibited substance. The IOC has not established any threshold level for methamphetamine. As a result, any level of methamphetamine, including the quantity found in Mr. Baxter’s urine, constitutes a violation.
- 3.28. Finally, Mr. Baxter contends that disqualification is a disproportionate remedy in violation of Swiss law, general principles of law and the European Convention on Human Rights. The Panel rejects this argument.
- 3.29. Disqualification is the minimum sanction that automatically follows a doping offence, in accordance with Article 3.3 of the OMAC. As noted above, the disqualification of an athlete for the presence of a prohibited substance, whether or not the ingestion of that substance was intentional or negligent and whether or not the substance in fact had any competitive effect, has routinely been upheld by CAS panels. It is reasonable for the IOC to have determined that it may not always be possible to prove or disprove fault or performance-enhancing effect, but that in order to ensure the integrity of results the mere presence of a prohibited substance requires disqualification.
- 3.30. In summary, therefore, the Panel is of the opinion: (i) that a prohibited substance, the stimulant levmetamfetamine, was present in Mr. Baxter’s body, (ii) that this presence alone constitutes a case of “doping” within the meaning of the OMAC, and (iii) that pursuant to the OMAC this case of doping “automatically leads to invalidation of the result obtained” by Mr. Baxter, whether or not his performance was enhanced.
- 3.31. The outcome of this arbitration is the necessary consequence of a rule-making decision of the IOC. The Panel is unable to rewrite or to ignore these rules unless they were so overtly wrong that they would run counter to every principle of fairness in sport. As noted above, the Panel cannot find that the automatic disqualification rule violates such principles.

- 3.32. For all of these reasons, the Panel upholds the decision of the IOC in disqualifying Mr. Baxter from the men's alpine skiing slalom event at the Salt Lake City Winter Olympics, thereby stripping him of his bronze medal and withdrawing his diploma.
- 3.33. The Panel is not without sympathy for Mr. Baxter, who appears to be a sincere and honest man who did not intend to obtain a competitive advantage in the race. It is unfortunate that, for whatever reason, he did not see the term levmetamfetamine on the package he bought or did not understand its import, and that he did not consult with his team doctor before taking the medication. Nevertheless, because Mr. Baxter took the medication, at the time of his slalom race his body contained a prohibited substance. The consequence for this doping violation must be a disqualification and the loss of his bronze medal.
- 3.34. In light of the consequences already suffered by Mr. Baxter, the Panel does not believe that it would be appropriate for him to have to reimburse the IOC for its costs of this proceeding. Therefore, the Panel orders that each side bear its own costs.

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ON THESE GROUNDS

The Court of Arbitration for Sport:

1. Denies the appeal filed by Mr. Baxter and upholds the ruling of the IOC Executive Board disqualifying Alain Baxter from the men's alpine skiing slalom event at the Salt Lake City Winter Olympics, withdrawing his Bronze medal and diploma, and excluding him from the XIX Olympic Winter Games, Salt Lake City 2002;
2. Declares that the award is rendered without costs except for the Court Office fee of CHF 500.-- (500 Swiss Francs) already paid by Mr. Baxter and which is retained by the CAS.
3. Declares that each party shall bear its own costs.

Done in Lausanne, 15 October 2002

THE COURT OF ARBITRATION FOR SPORT

President of the Panel

David W. Rivkin

Richard H. McLaren
Arbitrator

Dirk-Reiner Martens
Arbitrator