

DECISION of the FEI TRIBUNAL

dated 23 July 2012

Human Anti-Doping Case No.: 2012/05

Athlete / NF: Fabricio Caldas Albuquerque /BRA

FEI ID: 10004123

Event: CIC3*- Colina SP (BRA) 2012_CI_1072_C_S_01_01

Sampling Date: In-competition, 22 April 2012

Prohibited Substances: Isometheptene and metabolites

1. COMPOSITION OF PANEL

Dr. Armand Leone, Chair
Ms. Randi Haukebø, Member
Mr. Pierre Ketterer, Member

2. SUMMARY OF THE FACTS

2.1 Memorandum of case: By Legal Department.

2.2 Summary information provided by the Athlete:

The FEI Tribunal duly took into consideration all evidence, submissions and documents presented in the case file and at the oral hearing, as also made available by and to the Athlete.

2.3 Oral hearing: 18 July 2012 – Telephone conference.

Present

The hearing body:

The FEI Tribunal Panel
Ms. Erika Riedl, FEI Tribunal Clerk

For the Athlete: Mr. Fabricio Caldas Albuquerque, Athlete
Mr. Thomas H. Norton, Interpreter

For the FEI: Ms. Lisa Lazarus, FEI General Counsel
Ms. Carolin Fischer, FEI Legal Counsel

Others: Mr. Eder Gustavo Baldin Pagoto, Athlete
Mr. Elson Marcelo Baldin Pagoto, Athlete

3. DESCRIPTION OF THE CASE FROM THE LEGAL VIEWPOINT

3.1 Articles of the Statutes/ Regulations which are applicable or have been infringed:

Statutes 23rd edition, effective 15 November 2011 ("**Statutes**"), Arts. 1.3, 34, 36 and 37.

General Regulations, 23rd edition, 1 January 2009, updates effective 1 January 2012, Arts. 143.1, 168.4 and 169 ("**GRs**").

Internal Regulations of the FEI Tribunal 2nd edition, 1 January 2012 ("**IRs**").

FEI Anti-Doping Rules for Human Athletes, 1 January 2011, updates effective 1 January 2012 ("ADRHA").

World Anti-Doping Code 2009.

2012 Prohibited List of the World Anti-Doping Agency.

3.2 The Athlete: Mr. Fabricio Caldas Albuquerque

3.3 Justification for sanction:

GR Art. 143.1: "Medication Control and Anti-Doping provisions are stated in the Anti-Doping Rules for Human Athletes (ADRHA), in conjunction with The World Anti-Doping Code, and in the Equine Anti-Doping and Controlled Medication Regulations (EADCM Regulations)."

Art. 2.1.1 ADRHA: "It is each *Athlete's* personal duty to ensure that no *Prohibited Substance* enters his or her body. *Athletes* are responsible for any *Prohibited Substance* or its *Metabolites* or *Markers* found to be present in their *Samples*. Accordingly, it is not necessary that intent, fault, negligence or knowing *Use* on the *Athlete's* part be demonstrated in order to establish an anti-doping violation under Article 2.1."

Art. 4.1 ADRHA: "These Anti-Doping Rules incorporate the *Prohibited List* which is published and revised by *WADA* as described in Article 4.1 of the Code. The *FEI* will make the current *Prohibited List* available to each *National Federation* by means of publication on the www.fei.org website, and each *National*

Federation shall ensure that the current Prohibited List is available to its members and constituents."

4. DECISION

4.1 Factual Background

1. Mr. Fabricio Caldas Albuquerque (the "Athlete") participated at the CIC3* in Colina SP, Brazil from 21 to 22 April 2012 (the "Event"), in the discipline of Eventing.

2. On 22 April 2012, the Athlete was selected for in-competition testing. Analysis of urine sample no. 2683148 taken from the Athlete at the Event was performed at the WADA-approved laboratory, Institut Armand Frappier ("INRS"), in Montreal, Canada for analysis. The analysis of the urine sample revealed the presence of Isometheptene and metabolites. Isometheptene is a Prohibited Substance according to the 2012 Prohibited List of the World Anti-Doping Agency ("WADA"), in force at the time of sample collection (Certificate of Analysis dated 24 May 2012). Isometheptene is listed in class S6 "Stimulants" of Prohibited Substances and is considered a "Specified Substance" under the 2012 WADA Prohibited List. It is prohibited in-competition.

3. Two other Brazilian athletes, Mr. Eder Gustavo Baldin Pagoto and Mr. Elson Marcelo Baldin Pagoto were also submitted to an anti-doping test on the same day and at the same Event. The samples of those two athletes also tested positive for Isometheptene and are the subject of separate FEI Tribunal Decisions.

4. No valid Therapeutic Use Exemption ("TUE") had been granted for the substance as set forth in Article 4.4 of the FEI Anti-Doping Rules for Human Athletes ("ADRHA"). Therefore, the positive finding for Isometheptene gives rise to an Anti-Doping Rule Violation under the ADRHA.

4.2 The Proceedings

5. The presence of the Prohibited Substance following the laboratory analysis, the possible rule violation and the consequences implicated, were officially notified to the Athlete by the FEI Legal Department on 22 June 2012, through the Brazilian Equestrian Confederation ("BRA-NF").

4.3 The B-Sample Analysis

6. The Athlete was also informed in the Notification Letter of 22 June 2012 that he was entitled: (i) to the performance of a B-Sample analysis on the positive sample; and (ii) to attend or to be represented at the B-Sample analysis.

7. On 28 June 2012, the Athlete waived his right to have the B-Sample analysis performed.

4.4 The further Proceedings

8. On 6 July 2012, the Athlete, through the BRA-NF, submitted in essence the following:

- a) That he had been suffering from fever and headaches in the week prior to the Event and has suffered from chronic sinusitis and rhinitis since he was eleven years-old. Because he was feeling ill, he went to see a doctor, Dr. Bruno Ulisses Calumbi Guedes, who not diagnosed sinusitis on that visit, but had prescribed Neosaldina and Vitamin C.
- b) That, as his health status had worsened because of the rainy weather during the Event, he had ingested the medication Neosaldina to ease his headaches and nausea. That Neosaldina was also sold over the counter in Brazil.
- c) That he had declared the use of Neosaldina on the Doping Control Form, on the day of the testing.

9. Together with his submission, the Athlete also submitted a prescription, dated 16 April 2012, which was prior to Sample collection, by Dr. Calumbi Guedes, prescribing the use of Neosaldina in cases of pain and/or fever.

10. On 12 July 2012, the FEI submitted its Response to the Athlete's explanations. Together with its submission, the FEI provided a statement by Dr. Peter Whitehead, Member of the FEI Medical Committee. Dr. Whitehead commented that the Athlete had provided plausible explanations with regard to the positive finding for Isometheptene, since Neosaldina was used extensively in Brazil as an analgesic, especially for headaches, and since the Athlete had declared the medication at testing. That stimulants, such as Isometheptene, were used to combat natural fatigue and therefore potentially gave the rider an advantage. That stimulants would also lead to a false sense of well-being which diminished the riders' reflexes, and could therefore be dangerous for both horse and rider. That a TUE request for Neosaldina was unlikely to be approved since there were many other effective migraine treatments available that did not contain Prohibited Substances.

11. In essence the FEI argued:

- a) That since the Athlete had not disputed that Isometheptene was present in the sample collected from him at the Event, and since no TUE had been provided for the Prohibited Substance, it had discharged its burden of establishing that the Athlete had violated Article 2.1 of the ADRHA. Further, that a period of

Ineligibility of two years according to Article 10.2 of the ADRHA should be imposed, unless the conditions for eliminating, reducing or increasing that period, as set out in Articles 10.4, 10.5 and 10.6 of the ADRHA, were met.

- b) That as affirmed by Dr. Whitehead, evidence had been adduced on behalf of the Athlete, as required under Article 10.4 of the ADRHA, that was likely to prove, by a balance of probability, that the Isometheptene in the Athlete's system resulted from ingesting the medication "Neosaldina" on the day prior to sample collection. That the Athlete's explanation was corroborated by his notation of "Neosaldina" on the Doping Control Form.
- c) That according to the wording of the commentary to Article 10.4 of the ADRHA and the Court of Arbitration for Sport ("CAS") decision in *International Wheelchair Basketball Federation v. UK Anti-Doping & Simon Gibbs (CAS 2010/A/2230)*, two elements of corroborating evidence establishing the absence of intent to enhance sport performance were required, and that the Athlete, by means of the Doping Control Form and the statement by Dr. Calumbi Guedes, had therefore produced sufficient corroborating evidence.
- d) That therefore the Athlete's degree of fault had to be assessed as criterion for any reduction of the period of Ineligibility. That the Athlete, aged 33 and competing on an international level for several years, had been highly negligent in not making himself familiar with the WADA Prohibited List and the ADRHA. That he had further simply relied on the fact that his doctor had prescribed the medication, having apparently not taken any precautions to avoid ingesting any Prohibited Substances. That according to the CAS Decision in *K. v. FIS, CAS 2005/A/918*, the Athlete could not simply transfer his duty of care to a third party, such as a doctor. That CAS similarly held in *CAS 2008/A/1488, P. v. International Tennis Federation (ITF)* that it was of little relevance to the determination of fault that a product used by an athlete was prescribed with "professional diligence" and with "a clear therapeutic intention".
- e) That therefore, no elimination or reduction of the period of Ineligibility under Article 10.4 of the ADRHA should be granted.
- f) That no elimination or reduction under Article 10.5 of the ADRHA should be applied. In this context the FEI argued that insofar as the Athlete was highly negligent, the prerequisites of Article 10.5.1 of the ADRHA were not met and that Article 10.5.2 was not applicable as Article 10.4 of the ADRHA was the more specific provision.

- g) That the Tribunal had to impose an appropriate financial sanction on the Athlete and that the BRA-NF had to be ordered to reimburse the FEI for all costs that the FEI had incurred in pursuing this matter.

12. On 17 July 2012, the Athlete, through the BRA-NF submitted his Rebuttal submission. In a nutshell he argued:

- a) That an Athlete is responsible to know the applicable rules, including the Anti-Doping Rules, but that he was not a professional, and that only few equestrian events were held in Brazil. That because of this, he had not given the adequate attention to the matter.
- b) That he had not known that Neosaldina contains a Prohibited Substance, and that prior to the case at hand, he had only cared about the substances ingested by his horse. That in the future, he would also pay attention as to what kind of substances he would ingest.

13. The hearing took place on 18 July 2012. All Parties agreed to conduct one Hearing together with all three (3) Brazilian athletes so that Mr. Eder Gustavo Baldin Pagoto's and Mr. Elson Marcelo Baldin Pagoto's cases were heard at the same time.

14. At the hearing, the Athlete explained that he has been competing in the sport for 13 years, but not in 2006, 2007 or 2009 since at that time he had been based in a place where there was no infrastructure for equestrian competition. That by profession, he was a military man, and that he therefore had seen a doctor at the military base, and not a private physician. He explained that he had not informed the doctor that he was an international level athlete subject to anti-doping testing, and that he had not asked whether the medication prescribed to him contained any Prohibited Substances. Further that since he believed that the medication Neosaldina was an analgesic, he had not conducted any research. The Athlete also explained that he had ingested three (3) pills over a period starting two days prior to the Competition as instructed by his doctor, and that he had taken the last pill on the night before the Competition. That after having taken Neosaldina the night before the Competition, he no longer had any headache on the day of the Competition. The Athlete requested that the Tribunal takes into consideration that he was not a professional athlete his lack of experience with anti-doping matters and that he had received no information on anti-doping from his National Olympic Committee.

15. In closing, the FEI confirmed its view that the Athlete had sufficiently explained how the Prohibited Substance came into his system. Further that in light of Dr. Calumbi Guedes's prescription as well as the Athlete's contemporaneous notation on the Doping Control Form that he had taken Neosaldina, the FEI took the position that there was likely satisfactory corroborating evidence that the substance was not intended to enhance

sport performance. However, the FEI suggested that the Prohibited Substance may have had a performance enhancing effect, as followed from Dr. Whitehead's statement that stimulants, such as Isometheptene, were used to combat natural fatigue and therefore potentially gave the rider an advantage. The FEI also reminded the Tribunal of the fact that the Athlete had testified that he no longer had a headache on the day of the Competition after having taken Neosaldina the night before. The FEI concluded that even though the Athlete was not a professional rider, he still should have informed Dr. Calumbi Guedes that he was participating in equestrian competitions and subject to anti doping rules and that he still should have researched the ingredients of Neosaldina.

15. At the conclusion of the proceedings, the FEI made a separate procedural request to make a submission on costs within five (5) days of the Final Decision given that the ADRHA's provide that the costs of an ADRHA violation will be borne by the National Federation.

4.5 Jurisdiction

16. The Tribunal has jurisdiction over this matter pursuant to the Statutes, GRs and the FEI ADRHA Rules.

4.6 The Decision

17. The Tribunal understands that the case at hand is one out of three (3) positive anti-doping cases concerning Brazilian riders who were tested at the same Eventing competition, involving the same Prohibited Substance, Isometheptene.

18. As set forth in Article 2.1.2 of the ADRHA, sufficient proof of an anti-doping rule violation under Article 2.1 is established by the presence of a Prohibited Substance or its Metabolites or Markers in the Athlete's A-Sample where the Athlete waives his right to the analysis of the B-Sample and the B-Sample is not analysed or the B Sample confirms the A Sample. The Tribunal is satisfied that the laboratory reports relating to the A-Sample reflect that the analytical test was performed in an acceptable manner and that the findings of the INRS are accurate. The Tribunal is satisfied that the test results evidence the presence of Isometheptene in the Sample taken from the Athlete at the Event. Isometheptene is listed as a Prohibited Substance on the WADA Prohibited List. No TUE had been provided for the Prohibited Substance. The Athlete did not contest the accuracy of the test results or the positive findings.

19. The FEI has thus established an Adverse Analytical Finding, and has thereby sufficiently proven the objective elements of an offence in accordance with Article 3 of the ADRHA. This is undisputed between the Parties.

20. Pursuant to Article 10.2 of the ADRHA, the mandatory period for a first breach of the ADRHA is a period of two (2) years Ineligibility. However, depending on the circumstances of the specific case, a reduction or even elimination of this period of Ineligibility is possible under Articles 10.4 and 10.5 of the ADRHA. Article 10.4 of the ADRHA is generally applicable in the case at hand since Isometheptene is classified as a "Specified Substance". In order to benefit from a reduction under Article 10.4 of the ADRHA of the otherwise applicable period of Ineligibility, the Athlete must establish how the Specified Substance entered his or her body. The Athlete also has to establish that such Specified Substance was not intended to enhance his or her sport performance, or to mask the use of a performance-enhancing substance. To justify any elimination or reduction under Article 10.4 of the ADRHA, the Athlete must produce corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of the hearing panel the absence of intent to enhance sport performance or mask the use of a performance-enhancing substance.

21. The Tribunal, in considering the Athlete's explanations and the record and evidence - in particular Dr. Guedes's prescription - as well as Dr. Whitehead's statement - finds that the Athlete has established by "a balance of probability", as required under Article 3.1 of the ADRHA, that the medication used by him, Neosaldina, has caused the positive test result. The FEI Tribunal is therefore satisfied that the Athlete has established how the Prohibited Substance entered his body.

22. In a second step, the Tribunal has to determine whether the Athlete has established that the use of the Specified Substance was not intended to enhance his sport performance. In this context, the Tribunal takes note of the FEI's claim that according to the commentary to Article 10.4 of the ADRHA it was necessary for the Athlete to fulfil at least two of the objective circumstances listed by the commentary to Article 10.4 of the ADRHA. (CAS applied the commentary to Article 10.4 of the ADRHA in the case involving the International Wheelchair Basketball Federation referenced earlier.)

23. Here, the Athlete has fulfilled two objective circumstances as he had openly disclosed the medication containing Isometheptene on the Doping Control Form, and had provided Dr. Guedes's prescription of the medication for non-sport related reasons. The Tribunal is therefore comfortably satisfied that the Athlete produced corroborating evidence - in addition to his word - establishing the absence of intent to enhance sport performance. Therefore, the Tribunal considers that the prerequisites of Article 10.4 of the ADRHA are fulfilled. The Tribunal, however, rejects the FEI's contention that the Neosaldina had a performance enhancing effect in the case at hand because it relieved the symptoms of his headache. The evidence was clear that the Neosaldina had been prescribed for its analgesic effect, which combats headaches, and not for the Isometheptene which has a stimulating effect. Further, while Dr. Whitehead's statement certainly raises concerns about the use of stimulants in equestrian sport with respect to Athlete and horse safety, it does not, in the Tribunal's view, establish that the Athlete took the

Isometheptene, contained in the Neosaldina, for its stimulating or performance enhancing effect.

24. The Tribunal however finds that the Athlete was negligent, since he: (i) failed to conduct any basic research on the medication ingested by him; (ii) failed to inform his physician that he was an international level athlete subject to anti-doping testing; and (iii) merely relied on his physician's advice to take Neosaldina. In line with previous CAS case law (CAS 2005/A/918 K. v. FIS and CAS 2008//A/1488 P. v. International Tennis Federation (ITF)) the Tribunal finds that the Athlete has a "proactive responsibility" and that a doctor's prescription does not excuse him from "investigating to his fullest extent" whether any medication he takes contains Prohibited Substances.

25. The range of penalties available for first time offenders - such as the Athlete - in connection with a proven violation relating to the presence of a Specified Substance during the competition is, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years of Ineligibility.

26. In deciding the sanctions, the Tribunal considers, on the one hand, the degree of the anti-doping rule violation, the Athlete's degree of negligence with regard to his duty of care as a competitor, the performance enhancing potential of Isometheptene in this case and the danger of the Athlete taking a stimulant for both horse and rider. On the other hand, and in mitigation, the Tribunal considers the fact that the Athlete has established, to its comfortable satisfaction, the absence of intent to enhance sport performance, and further that the Athlete had used the Prohibited Substance for therapeutic reasons as recently prescribed by his doctor. The Tribunal also credits the Athlete's transparency in acknowledging his ingestion of Neosaldina on the Doping Control Form and the fact that he is competing as an amateur and not a professional. The Tribunal lastly takes note of the low performance enhancing potential of Isometheptene.

27. As regards the question of the applicability of Article 10.5.4 of the ADRHAs, the Tribunal is of the opinion that the requirements of that rule are not met here. The Tribunal finds that the notations on the Doping Control form may not be considered an admission within the meaning of Article 10.5.4 of the ADRHA since the Athlete, at the time when he made the notations, was not aware of the rule violation. This is reinforced by the fact that he simply noted the medication and made no reference to the Prohibited Substance that was an ingredient in the medication.

4.7 Disqualification

28. For the reasons set forth above, the Tribunal is disqualifying the Athlete from the Competition and all medals, points and prize money won at the Competition must be forfeited, in accordance with Article 9 of the ADRHA.

4.8 Sanctions

29. As a consequence of the foregoing, the Tribunal decides to impose the following sanction on the Athlete, in accordance with Article 169 of the GRs and Article 10 of the ADRHA:

- 1) The Athlete shall be suspended for a period of **three (3) months** to be effective immediately and without further notice from today's date. Therefore, the Athlete shall be ineligible through 22 October 2012.
- 2) The Athlete is fined **CHF 1000.**
- 3) A decision on cost will be rendered separately.

30. No Athlete 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 programs) that is authorized or organized by the FEI or any National Federation or be present at an Event (other than as a spectator) that is authorized or organized by the FEI or any National Federation, or participate in any capacity in Competitions authorized or organized by any international or national-level Event organization (Article 10.10.1 of the ADRHA). Under Article 10.10.2 of the ADRHA, specific consequences are foreseen for a violation of the period of Ineligibility.

31. According to Article 168.4 of the GRs, the present Decision is effective from the day of written notification to the persons and bodies concerned.

32. In accordance with Article 12 of the ADRHA, the Athlete and the FEI may appeal against this decision by lodging an appeal with the Court of Arbitration for Sport within 30 days of receipt hereof.

5. DECISION TO BE FORWARDED TO:

5.1 The person sanctioned: Yes

5.2 The President of the NF of the person sanctioned: Yes

5.3 The President of the Organising Committee of the event through his NF: Yes

5.4 Any other: WADA

FOR THE PANEL

A handwritten signature in black ink, appearing to read 'Armand Leone', written in a cursive style.

THE CHAIRMAN, Dr. Armand Leone