

**Before the American Arbitration Association
North American Court of Arbitration for Sport Panel**

United States Anti-Doping Agency, Claimant,

and

AAA No. 30 190 00825 07

Josh Moreau, Respondent,

ARBITRAL AWARD

I, the Undersigned Arbitrator, having been designated by the above named parties and having been duly sworn and having heard the allegations and the evidence of the parties at a hearing on April 28, 2008 in Colorado Springs Colorado, do hereby render the following award:

I. Background

Josh Moreau is a 26 year old elite level weightlifter who trains at the United States Olympic Trainer Center in Colorado Springs, Colorado. Since May 2005 he has been employed at the Training Center. He is a member of the International Weightlifting Federation (IWF) whose rules apply to his conduct.

On May 13, 2007 he was tested in-competition at the Weightlifting National Championships in Schaumburg, Illinois where he finished third in the men's +105kg division. His test was positive for a THC metabolite

which is banned in-competition. This was his second in-competition positive test for the same substance.

Prior to the May 13th test, Moreau had tested positive on December 3, 2006 at the American Open in Birmingham Alabama. On January 18, 2007, he accepted a three month period of ineligibility from competition with the three months deferred if he completed USADA's online education program. He completed the online course on January 18, 2007 and thus did not serve any period of ineligibility for his first offense.

Immediately after completing the online course, he signed the Athlete's Pledge for Clean Sport and Fair Competition which reads, in part, as follows:

I Josh Moreau will specifically honor this Athletes Pledge and promise to:

...
Respect myself
My integrity is found in competing fairly.
Having good health is important to me.
I compete drug-free.

I believe that the only Good Sport is Fair Sport, Sport that is Clean and I agree:
To respect the ideals of fair play and the Olympic Movement.
With the values of doping-free sport.
To abide by any and all anti-doping rules that relate to me and my sport.
To be a role model for other athletes, and people younger than me.

He also got a public warning and the results of the competition including medals, points, and prizes were disqualified. Less than four months after taking the online course and signing the athletes pledge, Moreau tested positive again.

Moreau's May 13, 2007 sample was tested at the University of Utah Sports Medicine Research and Testing Laboratory. On June 29, 2007, the Utah lab reported that the A Sample contained "Carboxy THC (THCA) detected at a concentration significantly greater than 15ng/ml." Moreau was notified on July 3, 2007 that his A Sample was positive. He waived his right to attend the opening and testing of the B Sample. The B Sample report dated July 20, 2007, confirmed the findings of the A Sample. On August 3, 2007, Moreau accepted a provisional suspension.

By letter dated August 20, 2007, the United States Anti-Doping Agency (USADA) charged Moreau with a second doping violation for testing positive for Carboxy-THC (THCA) at a concentration significantly greater than 15 ng/ml. In that charging letter, USADA advised Moreau that he was subject to the following sanctions for a second doping violation:

Disqualification of the competitive results obtained on or subsequent to May 13, 2007, the day your sample was collected, including forfeiture of any medals, points, and prizes; and

Two year period of ineligibility beginning on the date of the hearing decision in this matter with

credit given for the time served during the provisional suspension period beginning on August 3, 2007 from participating or coaching in U.S. Olympic, Pan American Games or Paralympic Team and having access to the Trainer Centers or other programs and activities of the USOC

Following exchange of information and pre-hearing briefing the matter came on to be heard on April 28, 2008. Moreau's main contention on brief and at the hearing was this: "What is the appropriate sanction for an athlete whose urine sample allegedly contained a metabolite of a non-performance enhancing, specified substance forty-one days after his use of such substance, if any?" He argued that a two year suspension is too much and that he should either have "no period of ineligibility or a period of only one year" of ineligibility.

II. Applicable Rules

Several important rules guide our decision in this matter. First, the procedures used by a WADA-accredited laboratory and the outcome of their tests, are presumed to be correct:

WADA-accredited laboratories are presumed to have conducted Sample analysis and custodial procedures in accordance with the International Standard for laboratory analysis. The Athlete may rebut this presumption by establishing that a departure from the International Standard occurred. **IWP ADP 3.2.1**

Second, the use of metabolites of cannabinoids is banned “in-competition. World Anti-Doping Code, 2007 Prohibited List, effective 1 January 2007, provides as follows in the section labeled “Substances and Methods Prohibited In-Competition”:

S8. Cannabinoids

Cannabinoids (e.g. hashish, marijuana) are prohibited.

Third, the penalty for a second violation of the use of a substance that is banned “in-competition” is two years:

Specified Substances:

“The Prohibited List may identify specified substances which are particularly susceptible to unintentional anti-doping rules violations because of their general availability in medicinal products or which are less likely to be successfully abused as doping agents. Where an Athlete can establish that the Use of such a specified substance was not intended to enhance sport performance, the period of ineligibility found in Article 10.2 shall be replaced with the following:

First Violation: At a minimum, a warning and reprimand, and no period of ineligibility for future Events and, at a maximum, one (1) years’ ineligibility.

Second Violation: Two (2) years’ ineligibility.

IWF ADP 15.3, WADC 10.3.

Fourth, proof of exceptional circumstances is required in order to obtain a reduction in the prescribed penalty for a second violation:

IWF Rule 15.5 concerns “Elimination of Reduction of Period of ineligibility Based on Exceptional Circumstances.” Rule 15.5.1 provides in pertinent part that:

“If the Athlete establishes in an individual case involving an anti-doping violation under Article 2.1 (presence of Prohibited Substance or its Metabolites or Markers) . . . that he or she bears No Fault or Negligence for the violation, the otherwise applicable period of ineligibility shall be eliminated. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete’s Specimen in violation of Article 2.1 . . . the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility eliminated.”

And Rule 15.5.2 provides in pertinent part that:

“if an Athlete establishes in an individual case involving such violations that he or she bears no Significant Fault or Negligence, then the period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the minimum period of Ineligibility otherwise applicable.”

Fifth, the comments to the World Anti-Doping Code provisions on the reduction of sanctions (Rule 10.5) based on exceptional circumstances make clear that such circumstances are “meant to have an impact only in cases where the circumstances are truly exceptional and not in the vast majority of cases.”

III. The Evidence Adduced At the Hearing

At the hearing, USADA established that the sample in dispute was collected from Josh Moreau on May 13, 2007 and that the athlete signed the appropriate forms at the event. USADA also established the chain of custody of the sample and that it was delivered to the Utah Lab where it was screened, found to contain metabolites of cannabinoids in excess of the threshold levels, and that finding was confirmed. USADA also established that the B Sample was later tested and the results confirmed the results of the A Sample. USADA cited the rule that athletes are responsible for what enters their bodies; invoked the presumption of regularity of the procedures and results from a WADA-accredited lab; cited IWF ADP 15.7 as the basis for disqualifying “all competitive results, medals, points and prizes obtained by Respondent on or subsequent to May 13, 2007, the date of the positive drug test”; asked for the imposition of the two-year period if ineligibility, then rested its case.

The aim of Moreau’s defense was to establish that he was entitled to a reduction in the recommended penalty from a two-year period of ineligibility to either no sanction at all or a sanction reduced to a one-year period of ineligibility. Moreau testified that he started weightlifting in 1998. He said that he was first in the Junior Nationals in 1999 and second in the

Junior Nationals in 2000. He attends Pike's Peak Community College and hopes to transfer, as a Junior, to the University of Colorado to pursue a major in Sports Management. He has been a resident athlete at the U.S. Olympic Training Center since the summer of 2000. He has been employed at the Training Center since 2005. He testified that he will lose his job at the Training Center if he is found responsible for a second doping violation.

Moreau stated that he has been tested in-competition more than 18 times and has had two positives, both for marijuana. He has been tested out-of-competition 3 to 4 times per year and has never tested positive out of competition. He understood that he was placed in the out-of-competition testing pool because he was an elite athlete with a previous violation. He is familiar with the anti-doping rules from coaches, other athletes, and his own reading.

He has smoked marijuana since he was 14 years old. He describes himself as an infrequent user who partakes in social settings. He knew that marijuana was prohibited "in-competition." He testified that the first time he got a positive test for marijuana he had stopped his usage 18 days prior to the competition, but that did not prove to be enough time in which to clear the substance from his body. Because of what happened with his first

positive in-competition test he decided that he would stop using marijuana 41 days prior his next event in order to give his body enough time to rid itself of marijuana or its metabolites. But Moreau admitted that he was never told that there is any particular length of time to stop use of marijuana prior to an event that would ensure that metabolites would be clear of the body.

He said he is familiar with the IWF anti-doping rules and that he understood marijuana was not supposed to be in his body, "in competition." He testified further that he understood that if metabolites of marijuana were found in his body in-competition the result would be a hearing, in his words, "exactly what is happening now."

Moreau averred that he did not take marijuana to enhance his performance and that, in his opinion, marijuana does not and cannot enhance performance. He also said he has never trained while "high" on marijuana. When asked to explain "high" he said, "relaxed."

He said that after his first positive test he took the on-line anti-doping course. He was given anti-doping website information. And he signed a pledge that he would remain drug free. He admitted that he knew using marijuana was "taking a chance." He stated that his hope is to be able to qualify for the 2009 World Team.

He said too that if he had to stop all use of marijuana, he could. When he was asked on cross why he had not stopped using marijuana after his first positive result, he said “wrong crowd, peer pressure.”

Moreau called two witnesses to testify on his behalf. Both were weightlifters who he has known at the Training Center. Both witnesses testified that Moreau had told them that he was going to stop using Marijuana on April 1, 2007 so that he could be sure that his body would be clear of the drug by the time of the National Championships. Both witnesses said that Moreau had had no reason to lie to them about that statement and that they believed what he had told them.

One of the witnesses said that it was rare for elite athletes to smoke dope and that he thought Moreau’s use of marijuana was bad but he did not want to tell him how to live his life. That witness also said that though he has seen Moreau use marijuana, Moreau does not use it around that witness because Moreau has enough respect for the witness not to do so. That witness also testified that though he saw Moreau 5 times per week for about 2 hours per day, he was not with Moreau 24 hours a day, thus Moreau could have “sneaked” marijuana use if he had wanted to.

The witness was aware that Moreau had “got popped” for using marijuana when Moreau had stopped use just 18 days before an event. So

this witness said that when Moreau told him that he planned to stop use April 1 for an event in mid-May, the witness was proud of Moreau because he thought Moreau was taking things very seriously. He also said that “Josh is not a dumb guy.” Suggesting that Moreau knew how to make sure that he did not get a positive result.

Moreau’s second witness said that she has seen him use marijuana but she had never seen him under the influence in the gym. She testified that she did not think marijuana enhanced weightlifting performance but she thought that Moreau should not be using the drug. She also said that from April 1 to the National Championships there might have been parties where Moreau could have smoked marijuana and she not see him.

USADA called an expert rebuttal witness on the question of the time it takes for metabolites of marijuana to clear themselves from the human body. Dr. Richard A. Gustafson testified that it was “impossible” for a person to have stopped using marijuana 41 days prior to being tested yet still have metabolites in their body significantly in excess of 15ng/ml when tested in competition. When challenged on the use of the word “impossible” Dr. Gustafson said that has never seen such a result in his experience nor has he seen it in the literature.

In Closing argument, USADA contended that Moreau had failed to prove how the drug got into his body. USADA also argued that it was uncorroborated that Moreau had stopped use 41 days prior to the competition. USADA argued that the test results proved he had not stopped using the drug. USADA argued that despite Moreau's claims to have acted with caution and prudence, it was not cautious and prudent for him to have used an illegal substance. Nor was recreational use of marijuana by an elite athlete cautious and prudent. Peer pressure cannot be a defense in a doping case nor can poor choice of friends be a valid defense. Further, this was not his first time and he is not young and inexperienced.

USADA also argued that the decision in *USADA v Thompson* is distinguishable because that decision involved an 18-year-old high school athlete who had never been instructed about anti-doping rules and who had never been tested before. USADA argued that *USADA v Lund* does not apply because that case involved an impending change in rules.

USADA then turned to the start date for the penalty and said that there is a conflict between IWF's start date rule and the WADA start date rule, but that WADA's provision controls since IWF adopted the WADA code with the express intent that IWF rules would be consistent with WADA

rules. But USADA said that in this case it would agree to a start date of 30 Days from sample collection.

Moreau's counsel argued in closing that Moreau used a drug out-of-competition that was not banned out of competition. He argued further that Moreau admits what he did and that it was not negligent for Moreau to have stopped use 41 days prior to competition. He also argued that Moreau acted reasonably with no significant fault under the totality of the circumstances and that Moreau had done everything that USADA asked him to do. Thus, Moreau's counsel submitted, a penalty of two years ineligibility with loss of his job was just too severe on these facts.

On rebuttal, USADA pointed out that it is not just performance enhancement that the Anti-doping code is aimed at but also the health of the athlete, the safety of people near the athlete, and the spirit of sport.

IV. Findings and Conclusions

The Panel is of opinion that USADA has proved its case against the athlete and that the athlete has failed to prove exceptional circumstances warranting a reduction in the proscribed two-year period of ineligibility.

For one thing, the Panel has considered the examples set forth in the Comments to the WADC regarding eliminating or reduction sanctions for use of substances that are banned in-competition and concludes that the

facts of this case do not fall within those examples. The only example, in the comments, of a complete elimination of the sanction was in a situation of sabotage by another athlete despite the exercise of all due care. No such facts were adduced here.

As noted above, the thrust of Moreau's evidence was to persuade the Panel to reduce his sanction to one year. But the examples of situations warranting a reduction in sanctions are quite different from the present facts; those examples are as follows -- the use of mislabeled or contaminated vitamin or nutritional supplements; the administration of a prohibited substance to an athlete by his physician or trainer without disclosure to the athlete; or sabotage of an athlete's food or drink by someone in the athlete's "circle of associates." Not one of those examples involves the knowing and intentional use of an illegal substance and the miscalculation of the amount of time it would take for the banned substance to clear the human body. The central theme of the examples is unknowing or unwitting consumption of a banned substance. The examples are a far cry from the facts of this case.

Moreau argues in his defense that he "did not know or suspect that metabolites of marijuana would remain in his system forty-one days post-ingestion, at levels significantly higher than 15 ng/mL, and he could not

have known such even with the exercise of utmost caution.” In addition he argues that “his relative youth and experience, and the non-enhancing aspect of marijuana also militate towards a finding of no significant fault.

The problem with this argument is that Moreau is 26 years old and was 25 at the time of the positive test that is the subject of this hearing. He is not new to the world of sports. He has been subject to doping control for nearly a decade. Even his own witnesses said that it is rare for an elite athlete to use marijuana. This case is about a miscalculating the time it takes the body to clear itself of metabolites of marijuana. Moreau used the marijuana and Moreau made the miscalculation. He was the author of his own misfortune.

And though Moreau contends that marijuana did not enhance his performance, he forgets that the anti-doping rules are not limited to enhancement of performance. Rather they are also meant to protect the health and safety of the athlete and to advance the “spirit of sport.” A weightlifter who competes while his judgment is clouded by drugs could be a danger to himself and to others.

Finally, Moreau asserts on brief at 13 that his use of marijuana was, “manifestly limited . . . to medically justified indications. . . .” But there was not a shred of testimony at the hearing that his use of Marijuana was for

medical reasons. All the testimony concerned use in social settings for recreational purposes.

Moreau's effort to rely on the *Thompson, Lund, and Frye* decisions most fail. *Thompson* involved an 18 year old who had never been subject to doping control who used cocaine for the first time in his life just prior to an event. *Thompson* teaches that where a young, inexperienced athlete who had no guidance on doping control issues commits a first offense, a reduction in sanction might be warranted. But, Moreau's situation is a far cry from *Thompson's*. The *Lund* decision differs because there an impending rule change was the basis for leniency. The *Frye* case cannot help Moreau because he invoked that case for the first time as a new defense in the midst of the April 28 hearing and had not advised USADA of this defense thus the Panel would not allow the a defense based on *Frye*.

Further, the weight of the evidence casts doubts on Moreau's contention that he stopped using marijuana 41 days prior to the event. His own witnesses made clear that they were not with him all the time and both witnesses indicated that either at social gatherings or otherwise that between April 1, 2007 and the time of the Nationals in May 2007, he could have smoked marijuana had he wanted to and they would not have known.

It is just that they believed what their friend had told them about having stopped using the drug.

Moreover, Moreau's 41 day stop time is called into question by the unrefuted testimony of an expert in the field who said that he knows of no situations where metabolites of marijuana remained in the human body at concentrations of 15ng/ml, 41 days after usage had stopped.

Further, Moreau's argument that he did all he could do under the totality of the circumstances is belied by the fact that the positive result in this case came not long after his first positive and long after the online course he had taken as part of the penalty for the first positive result. Apparently he quickly forgot his pledge to remain drug free.

For these reasons, the panel concludes that the two-year period of ineligibility must apply. The only question is when the period of eligibility should commence.

V. Commencement of the Period of Ineligibility

At the hearing, a dispute arose between the parties on when the period of ineligibility ought to commence. USADA contends that it should commence at the time of this ruling; the athlete contends that under IWF rules it must commence at time of sample collection:

IWF 15.8
Commencement of Ineligibility Period

The Commencement of the ineligibility period on sanctions imposed by the IWF or Anti-Doping Organization starts on the date of the Sample Collection. Any period of Provisional Suspension shall be credited against the total period of ineligibility to be served.”

USADA does not dispute that the foregoing is the provision in the IWF rules, but USADA argues that on this score the IWF rules are in conflict with the World Anti-Doping Code and that because the IWF was bound to enact the mandatory provisions of WADC and because the IWF’s own rules say that they are intended to be applied in keeping with the WADC, then the World Anti-Doping Code start of sanction should apply. Here is the WADC provision:

WADC 10.8
Commencement of Ineligibility Period

“The period of ineligibility shall start on the date of the hearing decision providing for ineligibility or, if the hearing is waived, on the date ineligibility is accepted or otherwise imposed. Any period of Provisional Suspension . . . shall be credited against the total period of ineligibility to be served.”

The IWF rules have a provision, at the beginning of the rules, on harmonizing those rules with the World Anti-Doping Code; the provision reads as follows:

International Harmonisation

The IWF Policy implements the mandatory and other portions of the WADA Program including the WADA Code, the mandatory International Standards and the Model Best Practices. The Program recognizes the role of the WADA in setting global standards and co-coordinating anti-doping worldwide.

At the hearing, Moreau's counsel did not answer USADA's argument that because of this conflict between IWF rules and the WADC, the IWF rules must yield on this score. But having considered the matter and having analyzed the IWF's provision on harmonisation, the Panel concludes that in the interest of uniformity and because a contrary rule might undercut an athlete's willingness to accept a provisional suspension, the World Anti-Doping Code provision must control. Thus, the sanction in this case will commence with on the date of this hearing decision.

VI. The Hearing Decision

Having considered all the arguments and evidence of the parties the Panel decides the following:

1. USADA has met its burden of proving a second offense by Josh Moreau of the use of a metabolite of cannabinoid in violation of the Prohibited Substances List for in-competition testing;

2. Josh Moreau has failed to demonstrate that exceptional circumstances exist in this case warranting the reduction of the period of ineligibility;
3. The appropriate period of ineligibility is two years;
4. The two-year period of ineligibility will commence with this hearing decision;
5. The athlete will be given credit against the period of ineligibility for the time of his voluntary suspension.
6. The administrative fees and expenses of the American Arbitration Association and the compensation and expenses of the arbitrator shall be borne by the USOC.

This Award is in full settlement of all claims and counterclaims submitted to this arbitration. All claims not expressly granted herein are hereby denied.

May 7, 2008
Date

John Charles Thomas
Hon. John Charles Thomas

I, Hon. John Charles Thomas, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Award.

May 7, 2008
Date

John Charles Thomas
Hon. John Charles Thomas