BEFORE THE AMERICAN ARBITRATION ASSOCIATION

North American Court of Arbitration for Sport Panel

USADA, Claimant **AAA No. 30 190 00713 03**

and

Amber Neben, Respondent

AWARD AND DECISION OF THE ARBITRATORS

WE, THE UNDERSIGNED ARBITRATORS, having been designated by the above-named parties, and having been duly sworn and having duly heard the proofs and allegations of the parties, and, after a hearing held on October 1 and 2, 2003, do hereby render this full award pursuant to its undertaking to do so by October 16, 2003.

1. Introduction

1.1 The Claimant, USADA, is the independent anti-doping agency for Olympic Sports in the United States and is responsible for conducting drug testing and any adjudication of positive test results pursuant to the United States Anti-Doping Agency Protocol for Olympic Movement Testing ("USADA Protocol").

1.2 The Respondent, Amber Neben, is a professional cyclist and a member of the T-Mobile Women's Cycling Team, a trade team owned by USA Cycling and sanctioned by the international federation for the sport of cycling, Union Cycliste International ("UCI"). The UCI Cycling Regulations prohibit doping as it "contravenes the fundamental principle of Olympism and sports and medical ethics. " (USADA Ex. 2, p.3)

1.3 Respondent is subject to testing by USADA and UCI. (USADA Ex.1 and Ex.2)

2. The Applicable UCI Regulations.

2.1 Under the USADA Protocol and the AAA Supplementary Procedures for Arbitration Initiated by USADA ("AAA Supplementary Procedures"), applicable to this proceeding, the UCI Regulations apply, including the provisions relating to prohibited substances and sanctions. The Regulations applicable to this case include the following:

> Doping is:
>
> 1) the use of an expedient (substance or method) which is potentially harmful to athletes' health and/or capable of enhancing their performance, or
>
> 2) the presence in the athlete's body of a prohibited substance or evidence of the use or attempted use thereof or evidence of the use or attempted use of a prohibited method.

(USADA Ex.2, Art. 4, p.3)

The UCI Regulations state that the mere "presence" of a prohibited substance in a rider's sample constitutes a doping offense. *Id.* The "success or failure of the use of the prohibited substance ...is not a prerequisite." *Id.* at Art. 6, p.3.

2.2 Further, the UCI Regulations state that:

> it shall be the personal responsibility of every rider to ensure that they neither use any prohibited substance or prohibited method nor permit any such substance or method to be used.
>
> *Warning: Riders must refrain from using any substance, food stuff or drink of which they did know the composition. It must be emphasized that the composition indicated on a product is not always complete. The product may contain prohibited substances not listed in the composition.*

(USADA Ex. 2, Art. 7, P. 3)

2.3 The list of UCI prohibited substances expressly classifies nandrolone, 19-norandrostenediol and 19-norandrotendione as prohibited substances. (USADA Ex. 3, p.3)

2.4 Under the UCI Regulations, the nandrolone reporting threshold of 5 ng/ml of urine will be considered positive. (USADA Ex. 3, p. 3)

2.5 The Regulations further provide:

Within the limits set by the present regulations, the penalties imposed must be proportionate with the offence committed, taking account of both the specific details of the case in hand and the characteristics of cycle sport and its various disciplines. Therefore the following elements, inter alia, will be considered:

- The circumstances surrounding the offence,
- The character, age and experience of the transgressor,
- The gravity of the consequences of the penalty for his social, sporting and economic position,
- The risk to a professional career,
- The rider's normal discipline and programme, particularly as regards the length of the season for that discipline and the number and importance of the events.

(USADA Ex. 2, Art. 124, p.19)

* * *

The duration of suspension from all competition may be reduced below the minimum laid down hereafter as long as such a reduction is expressly based on the aspects covered by article 124.

In no case may the duration of the suspension from all competition be reduced to less than a quarter of the minimum laid down hereafter.

The minimum length of the suspension under point 1 of article 129 may not be reduced.

(USADA Ex. 2, Art. 125, p.19)

2.6 The Regulations also address fines:

* * *

2. The fine is obligatory for licence-holders exercising a professional cycling activity and in any event for members of a TT/I, TT/II, TT/III, women's trade team or mountain bike trade team.

3. The value of the fine shall be set in line with the gravity of the offence and the financial situation of the person penalized.

4. For licence-holders covered by point 2 above, a minimum fine must be imposed of CHF 2000 for elite men, CHF 1000 for elite women and CHF 500 for under 23 riders. These amounts shall be doubled in the event of a subsequent offence, refusal or fraud and in the event of complicity. They may be reduced by two thirds for licence-holders resident outside Europe in line with incomes and the cost of living.

(USADA Ex. 2, Art. 128, p. 20)

2.7 The Regulations defines doping offenses:

In cases of doping where the substance detected is ephedrine, phenylpropanolamine, pseudoephedrine, caffeine, strychnine or related substances, the rider shall be penalised as follows:

a. first offence, other than intentional doping:
– suspension for a period of between one and six months
However, if it is demonstrated that the offence was caused by simple inattention, a warning may instead be issued. In this case a subsequent doping offence with a <soft> substance, other than intentional doping, will be considered as a first offence for which the suspension must be imposed.

b. second offence or intentional doping:
– suspension for a period of between two and eight years.

* * *

In cases of doping other than those covered by Article 129, the rider shall be penalised as follows:

a. first offence, other than intentional doping:
– suspension for at least two years.

b. second offence or intentional doping:
– suspension for a minimum of four years up to and including suspension for life.

(USADA Ex 2, Art. 129-130, p. 20)

3.1 The Regulations mandate disqualification and certain penalties:

Any case of doping of a rider during competition shall automatically and independently of any penalty imposed, and even where it is not explicitly noted in the decision, lead to that rider's disqualification.

(USADA Ex 2, Art. 143, p. 23)

* * *

If the offence is found to have occurred and no suspension is imposed or a suspension effectively shorter than the minimum period is applied, then the minimum period of effective suspension shall apply automatically, without prejudice to the right of appeal. The effective minimum suspension shall be determined in accordance with Article 125 solely if the conditions of application for that Article have been respected.

The UCI, or, in the case of a national event, the national federation shall notify the guilty person of this. In such a case the time limit within which any appeal must

be lodged shall run from the date of this notification.

(USADA Ex 2, Art. 147, p. 24)

* * *

> If the offence is found to have occurred and no fine or a fine below the minimum level is imposed, then the minimum fine shall be applicable automatically. The UCI, or, in the case of a national event, the national federation shall notify the guilty person of this. In such a case the time limit within which any appeal must be lodged shall run from the date of this notification.

(USADA Ex 2, Art. 148, p 24)

4. Background and Facts.

4.1 On May 31, 2003, during the Coupe du Monde Montreal, Respondent provided a urine sample at the request of UCI. The INRS-Institut Arand-Frappier at the University of Quebec ("Montreal Lab") an International Olympic Committee ("IOC") accredited laboratory received the sample on June 2, 2003. On June 4, 2003, the laboratory screening test performed from the "A" sample of Respondent's urine specimen indicated the presence of a prohibited substance, a metabolite of an anabolic steroid. The "A" confirmation testing was performed on June 30, 2003, and it revealed the presence of the anabolic steroid metabolite 19-norandrosterone at 6.9 ng/ml, a level above the established 5 ng/ml cutoff. (USADA Exs. 9 and 10) This finding was reported to UCI. The Respondent was notified of the finding and she requested that the "B" sample be analyzed and sent an expert on her behalf to witness this analysis.

4.2 On July 14, 2003, the Montreal Lab began the testing of the "B" sample. The three replicates from the "B" sample also were positive for the anabolic steroid metabolite, 19-norandrosterone at 6.9 ng/ml, above the 5 ng/ml cutoff.

4.3 Respondent was advised of her right to request a hearing before a Panel of North American Court of Arbitration for Sport ("CAS") arbitrators who are also American Arbitration

Association ("AAA") arbitrators in accordance with the USADA Protocol to contest the sanction proposed by USADA. She chose to pursue the hearing.

4.4 Respondent accepted a provisional suspension commencing on July 13, 2003.

4.5 During the course of the preliminary telephone conference of September 11, 2003, issues relating to the hearing were discussed.

4.6 The UCI Regulations regarding Respondent's rights specifically apply to facts in international races, such as the one Respondent participated in. (USADA Ex 2, Art. 88, p.14)

4.7 The Regulations specify that:

* * *

> ***If the anti-doping commission considers, in view of the exceptional circumstances, that the facts of the case enable to conclude that there is no significant fault nor negligence, the commission may inform the national federation that the penalties as stated under Article 129 may apply instead of the penalties of Article 130.*** (Emphasis in original.)

(USADA Ex 2, Art. 91, p 14)

4.8 On September 26, 2003, the parties received a letter from Leon Schattenberg, President of UCI. He advised that, after a review of certain facts, the UCI Anti-Doping Commission had no objections to applying Article 129 of its Regulations to this matter. (USADA Ex. 50) UCI did not receive any documents from USADA. The parties engaged in correspondence with President Schattenberg regarding the meaning and intent of that letter. On October 1, 2003, President Schattenberg wrote that the Anti-Doping Commission did not find Respondent had engaged in intentional doping and that the Commission had no objections to the Panel applying Article 129 rather than Article 130, although the Commission recognized that the Commission's opinion was not binding on the Panel. (USADA Ex. 53)

4.9 The evidentiary hearing took place on October 1 and 2, 2003, in Denver, Colorado. An expedited preliminary decision was requested. The Interim Award and Decision was issued October 6, 2003.

4.10 On October 14, 2003, USADA filed its Request for Clarification with respect to the Interim Award. Specifically, USADA requested that the Panel clarify the applicability, if any, of UCI Regulations Article 151 and 152 and the duration of testing.

4.11 Respondent objected to USADA's request. However, if the Request was granted, Respondent requested clarification and direction with respect to the limitation of the cost of testing.

5. The Evidentiary Hearing

5.1 The Claimant, USADA, was represented by counsel by Richard R. Young, Holme Roberts & Owen LLP, and by Travis T. Tygart, Director of Legal Affairs, USADA. Witnesses for USADA were by telephone Josee Bedard, UCI Antidoping Test Inspector; Dr. Christiane Ayotte, Director of the Doping Control Laboratory, INRS-Institut Armand-Frappier, Montreal; and, on rebuttal, Dr. Larry D. Bowers, USADA's Senior Managing Director, Technical and Information Resources, in person, and Brian Frank, owner and product developer for Hammer Nutrition, by telephone.

5.2 The Respondent, Amber Neben, testified on her own behalf. She presented the testimony of Ms. Mari Holden, a professional cyclist, T-Mobile team member, and Olympic medallist; Sean Petty, Vice President for Marketing for USA Cycling; Gerard Bisceglia, CEO for USA Cycling; Steve Johnson, COO and Director of Athletics for USA Cycling; Jim Miller, Director of Women's Endurance for USA Cycling; Bob Stapleton, Vice Chair for T-Mobile USA; Dr. Timothy Robert, Associate Director, Aegis Analytical Laboratories; and Jeff Pierce, sales executive with T-Mobile.

5.3 The hearing was governed by the Commercial Rules of the AAA, amended as of January 1, 2003, as modified by the AAA Supplementary Procedures, referred to in the USADA Protocol as Annex D. The parties filed pre-hearing briefs and numerous exhibits, all of which

were deemed admitted in evidence in accordance with the Panel's procedural orders. The parties made opening statements and closing arguments, and the record was closed on October 6, 2003, after the issuance of the Interim Award. All witnesses were sworn in at the hearing.

5.4 Respondent, through her pleadings, pre-hearing brief, oral argument and testimony given at the evidentiary hearing, contends that the doping charge should be dismissed for a variety of reasons.

6. Legal Analysis and Decision

6.1 The Panel is obligated, in accordance with the USADA Protocol contractually binding upon the parties, to apply the UCI Regulations as to the definition of doping, as to the consequences of a doping offense, and as to whether there are exceptional circumstances present for a possible modification of the sanction. (USADA Ex. 2)

6.2 The UCI Regulations prohibit even the presence in a competitor's body of any prohibited substance. (USADA Ex. 2, Art. 4, p.3)

6.3 The applicable UCI Regulations clearly define doping as a strict liability offense; that is, a doping offence has been committed where a prohibited substance, in this case the anabolic steroid metabolite, 19-norandrosterone, was present in the athlete's urine sample. (USADA Ex.2, Art. 6, p. 3, and USADA Ex. 4, p.3.) In other words, proof of the presence of a prohibited substance in the athlete's urine sample is all that is required for an offence to be established.[1] It is, therefore, incumbent upon USADA, in order to prevail, to meet its burden of proving to the comfortable satisfaction of the Panel that the substance, 19-norandrosterone, was properly identified in Respondent's urine sample. (USADA Ex. 3, p. 3)

6.4 The strict liability rule inherent in the UCI Regulations has been confirmed

[1] This is consistent with the Olympic Movement Anti-Doping Code, Chapter II, Article 2.

previously.[2] Other sports federations' similar provisions have likewise been confirmed in several CAS, AAA/CAS and International Federation decisions notwithstanding the quasi-criminal nature of the sanctions applied to an offence.[3]

6.5 Claimant clearly demonstrated to the Panel's satisfaction that a prohibited substance was found in Respondent's test sample resulting in a doping offense within the meaning of the UCI Regulations. (USADA Ex.2) The extensive documentation provided to Respondent demonstrates presumptively that the chain of custody of the sample was followed, that the laboratory analysis was correctly conducted, that Respondent's urine specimen had not deteriorated or been contaminated, and that the proper laboratory procedures had been followed. Moreover, the results of the Montreal Lab, an IOC accredited lab, are presumed to be scientifically correct, and the tests and analyses were presumed to have been conducted in accordance with the highest scientific standards. (USADA Protocol, Ex.1, p.9.)

6.6 *The testimony of Ms. Bedard and Dr. Ayotte* conclusively established that the testing was performed in accordance with USADA protocol. Chain of custody from the sample collection through testing conformed to USADA and IOC standards.

6.7 The testing performed by the Montreal Lab on the "A" & "B" Samples was conducted in accordance to prevailing and acceptable standards of scientific practice. (USADA Ex. 1)

6.8 Dr. Ayotte testified that the "B" confirmation was performed consistent with the OMADC and IOC procedures. (USADA Ex.1) She testified at length that the positive reading

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2 See *USADA v. Montinger*(AAA No. 30-190 00930 02); *UCI v. Moller* (CAS 99/A/239); *UCI v. Outchakov* (CAS 2000/A/272); *Brook Blackwelder v. USADA* (AAA No. 30 190 00012).

3 See *Poll v. FINA* (CAS 2002/A/399); *Meca-Medina v. FINA* (CAS 99/A/234); *Jovanovic v. USADA* (CAS 2002/A/360).

could have been the result of the ingestion of a contaminated supplement or from the ingestion of nandrolone.

6.9 Accordingly, USADA has met its burden of proving a doping offense was established from properly conducted testing and analyses of Respondent's urine sample by the accredited Montreal Lab.

6.10 It is incumbent, therefore, on Respondent to establish her defenses. Respondent testified at length that she did not take any prohibited substances and that the labels for the many vitamins, minerals and dietary supplements that she had taken did not reflect that they contained any prohibited substances.

6.11 Respondent asserted that it was possible that she took a contaminated supplement that had been provided to her and other T-Mobile team members by the trainers of USA Cycling. She presented the testimony of a number of witnesses regarding USA Cycling's relationship with Hammer Nutrition. The witnesses testified that they were provided with energy drinks, recovery drinks, and electrolyte caps before, during, and after the races.

6.12 No other members of the T-Mobile team were tested during the Montreal competition.

6.13 The Respondent presented a great deal of testimony about the procedures of T-Mobile and USA Cycling. Some of the witnesses testified that most, if not all, elite athletes take some form of supplements, including but not limited to recovery drinks. The witnesses testified that neither UCI nor USA Cycling provide any "real education" to the athletes about the dangers of supplement contamination, even after the Scott Moninger decision.[4] Some of these very same witnesses had even been witnesses in that case.

[4] *USADA v. Moninger (AAA/Case No. 30 190 00930 02).*

6.14 Mr. Bisceglia, the CEO for USA Cycling, testified that he was not aware of the risks or dangers involved in taking supplements and that, in fact, he had not visited the USADA web site to review the information about that subject. He was not aware that any USA Cycling employees had been handing out any supplements.

6.15 Dr. Robert, Respondent's expert, testified about the analysis that his laboratory performed on Respondent's supplements. He admitted that he was very familiar with the studies on contaminated supplements.[5] He admitted that he was also familiar with studies that had shown zinc had been contaminated with nandrolone metabolites. He analyzed samples of the fourteen (14) supplements Respondent had taken, including zinc and the Hammer Nutrition products. All samples tested negative for any prohibited substances.[6] He admitted that, based on the Montreal Lab documentation and results, it was not possible to determine whether Respondent had intentionally or inadvertently ingested nandrolone.

6.16 There is no requirement under the UCI Regulations for USADA to prove or identify the source of the prohibited substance found in Respondent's urine sample. (USADA Ex. 2; *USADA v. Moninger* (AAA 3019000930 02.))

6.17 In *USADA v. Moninger*, the Panel dealt with an athlete who had tested positive for an anabolic steroid. The athlete raised a number of defenses, including an argument that he had not taken any prohibited substances. He contended that one of the supplements he was taking caused his positive reading. The Panel reviewed the UCI Regulations and stated that those provisions established the principle that the athlete was responsible for the presence of doping products in his body. Respondent took two approaches to the determination of the appropriate sanction. "First he has attempted to provide an explanation as to how a Prohibited Substance

[5] Analysis of Non-Hormonal Nutritional Supplements for Anabolic Androgenic Steroids – An International Study; Trace Contamination of Over-the-Counter Androstenedione and Positive Urine Test Results for a Nandrolone Metabolite. (USADA Exs. 23 and 24)

[6] He also analyzed a number of urine samples of Respondent taken approximately two months after the positive reading. All were negative and all indicted no evidence of endogenous production.

might have been in his urine thereby explaining how the analytical finding might have occurred. Second he has called testimony directly connected to Article 124 to plead a reduction of the sanction which, at its least could not be less than six months." *Id.* at 17.

The *Moninger* Panel however determined that there was *no* explanation for the analytical positive result and thus dealt with the appropriate penalties including an analysis of Art. 124 of the UCI Regulations. The Panel specifically noted Art. 7, which placed personal responsibility on a cycling athlete to ensure he or she does not use any prohibited substance. *Id.* at 18. The Panel noted:

> This warning is particularly germane in this case. There was a change in the supplement regime. While the Panel is not satisfied that the changed supplement was the cause of the analytical result it is the responsibility of the athlete to be careful in respect of the entire regime that is used.

Id. at 19.

The Panel then analyzed the offence pursuant to the guidelines under UCI Art. 124. The Panel noted that Respondent had "an impeccable and long-standing reputation in the cycling community." *Id.* The Panel considered the doctrine of proportionality as it is described in Art. 124 and reviewed sanctions in other cycling cases. The Panel noted that there had not been a case where the full sanction of either one year or now two years had been applied. *Id.* at 21. The Panel thus concluded that a one-year suspension was proportionate with the offence committed. Further, the Panel reduced the fine in accordance with UCI Art. 128. *Id.* at 22.

6.18 Respondent's defense is similar to the defense raised in the *Moninger* case. She, too, presented the testing results of the substances. As in *Moninger*, the Respondent had a change in her supplement regime. Likewise, this Panel is not satisfied that the changed supplement was the cause of the positive analytical result. After all, it is Respondent's responsibility to ensure that all supplements, vitamins and minerals that she chooses to place in

her own system do not contain any prohibited substances. Respondent was unable to show that her positive result was due to any contaminated substance from Hammer Nutrition.

6.19 The Panel has applied the guidelines found in Art. 124 of the UCI Regulations to assist in the proportionality analysis.

6.20 Respondent only raced for a few years and has only been a professional cyclist for two years. She is 28 years of age. She has been tested a number of times and all results have been negative. She further differs from *Moninger* in that she tested negative in a test nine days before her positive test and had two negative tests three and four days after her positive test. She presented an impressive list of witnesses. The Panel is satisfied that the Respondent has an outstanding reputation in the cycling community and is respected by both team members and officials of USA Cycling.

6.21 Respondent's attempts to compare her situation to those of the tennis players in the appeal of Bohdan Ulihrach fails. (USADA Ex. 44) Dr. Ayotte testified at length that Respondent's situation, at least from the test results, was entirely different and distinguishable. Further, Respondent was unable to show that the positive test reading was a result of any particular substance.

6.22 This Panel is, however, disturbed by the testimony from the USA Cycling witnesses and officials. It is obvious that the organization has acted in complete disregard of its athletes, in particular, those below the elite level. There appears to be little to no attempt at communicating the dangers of contaminated supplements to the thousands of USA Cycling athletes. In fact, the testimony indicated that many officials believe that the use of supplements is "necessary" in order to succeed at the elite level. The fact that USA Cycling encouraged the use of supplements, including Hammer Nutrition products, underscored the total disregard for

the warnings USADA and IOC have issued for years. To this Panel, it is inconceivable that such a highly regarded organization could disregard its obligations to its athletes.7

6.23 It appeared from the testimony, including that of the Respondent, that these athletes at the least ignore the USADA and IOC supplement contamination warnings and, at the most, roll the dice in hopes that they will not turn up positive. Regardless of the inaction or neglect of the cycling community, the athlete must make the final determination as to his/her intake. If these athletes read any of their USADA materials and Respondent apparently did not read it carefully, the message is quite clear that there are numerous risks associated with ingesting these supplements, including the extreme danger to the athlete's health. While Respondent seemed to acknowledge these risks, her desire to compete apparently overroad those concerns.

6.24 The Panel also determines that UCI bears some responsibility in this case. Rather than undertake a thorough investigation of the issues involved in the case, UCI issued its opinions and recommendations. It appears that no effort was made to undertake an examination of USA Cycling's role in this situation.

6.25 The case law clearly indicates that the proportionality doctrine has to date been applied in a sports specific and conduct specific manner taking into account the specific international federation rules and, in the case of United States athletes, the USADA Protocol.

7. Decision and Award

The Panel decides as follows:

7.1 A doping violation occurred on the part of Respondent. The Panel finds that this was not an intentional doping violation.

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[7] If these NGB's are going to urge their athletes to use supplements, they should at least be proactive and require the companies to disclose their manufacturing sources and require testing.

7.2 The minimum suspension for a first offender of two (2) years to take place effective from July 13, 2003, is imposed on Respondent pursuant to UCI Regulations, Art. 130. Since UCI indicated their decision on the Respondent's, suspension was not binding upon this Panel, which has the authority to impose the suspension in this manner with respect to Articles 124-126.

7.3 Pursuant to the provisions of UCI regulations, Arts. 124, 125, and 126, eighteen (18) months of Respondent's suspension are deferred for discharge pending her compliance with the terms and conditions of a probation as follows:

a. Respondent is prohibited from participating in any capacity whatsoever in any events sponsored by UCI, USOC, or USA cycling during the six-month period of time from July 13, 2003. There was no evidence submitted by USADA as to any period of inactivity as defined by UCI Articles 151 and 152.

b. Prior to the end of the six-month period, Respondent will meet with her fellow T-Mobile team members and the athletic staff of USA Cycling and discuss with them the USADA and IOC warnings on the possible contamination of dietary supplements, including vitamins and minerals. In addition, Respondent will meet at least once with the other licensed elite cyclists of USA Cycling, along with the athletic staff of USA Cycling, to also discuss with them the above USADA and IOC information. She will confirm in writing to USADA that she has completed these conditions of her probation.

c. During the term of her full probation, Respondent will submit to urine drug testing at her expense on a monthly basis by an IOC accredited

laboratory. She will work with USADA to set up a schedule and the procedures of such testing. This testing will be in addition to any random out-of-competition and competition testing that she may be subjected to over the course of her probation. If Respondent test positive during any of this time, her probation will be revoked, any and all competition results would be cancelled in compliance with UCI regulations, and she will serve the remainder of the two-year suspension, commencing from the time of another positive test result.

7.4 In accordance with Art. 128, a fine of CHF $700 is assessed against the Respondent.

7.5 All competitive results which occurred on or after May 31, 2003, are cancelled.

7.6 A six-month period of ineligibility beginning July 13, 2003, from access to the training facilities of the USOC Training Centers or other programs and activities of the USOC, including grants, awards or employment is imposed.

7.7 The administrative fees and expenses of the American Arbitration Association and the compensation and expenses of the arbitrators shall be borne by USADA.

7.8 The parties shall bear their own costs and attorneys' fees.

This Decision and Award is in full settlement of all claims submitted to this arbitration.

Signed this 20th day of October, 2003.

Carolyn B. Witherspoon, Esq. - Chair

Chris Campbell, Esq.

Hon. Peter J. Lindberg

82398

AMBER NEBEN v. UNITED STATES ANTI-DOPING AGENCY
American Arbitration Association No. 30 190 00713 03
North American Court of Arbitration for Sport Panel

Christopher L. Campbell, concurring in part and dissenting in part.

1. For breakfast this morning I had orange juice fortified with vitamin C and cereal fortified with vitamins and minerals. For lunch I was sipping on Gatorade and munching a Power Bar. All these items contains vitamin supplements. Research conducted for the International Olympic Committee ("IOC"), United States Anti-Doping Agency ("USADA") and United Kingdom ("UK") proved that 18% of vitamin supplements contain substances, not listed on their labels, which are prohibited by the Olympic Movement Anti-Doping Code.

2. This panel is now being asked to severely penalize Ms. Neben, who is the likely victim of a contaminated supplement, under a theory of preserving a level playing field for athletes. As arbitrators, it is not our place to debate the rationality of such a rule. However, it is our duty to apply the law to the facts of Ms. Neben's case.

A. Limits of the Strict Liability Rule

3. When a prohibited substance is found in an athlete's body that athlete is strictly liable regarding the competition which produced the positive test. *Aanes v. FILA CAS 2001/A/317* (v.2.3), p. 17; *Raducan v. IOC*, Award of 28 September 2000, CAS Digest II p. 665 ad hoc Division (O.G. Sydney) 2000/011. For this reason, I concur with the majority decision that Ms. Neben must be disqualified from the May 31, 2003 event and her results and awards forfeited.

B. Ms. Neben did not Intend to place a prohibited substance in her body

4. I likewise concur with the majority decision finding that Ms. Neben did not intentionally take a prohibited substance. The positive test was the likely result of her ingestion of a contaminated supplement or other food source. This was the conclusion of the Union Cyclists International ("UCI") Ant-Doping Commission ("Commission").

5. UCI is the organization with supreme authority over this doping dispute. *Prusis v. IOC* CAS arbitration No CAS OG 02/001, ¶ 33. In a September 26, 2003 letter to USA Cycling, the Commission stated the following: "in this case we concluded that the 6.9 ng/ml . . .has no performance enhancing effect, can not be the [result] of an earlier injection or oral intake of nandrolone and logically the measured presence of the forbidden product is not a case of intentional doping." It confirmed this finding in a letter to USADA on October 1, 2003 stating: "the anti-doping commission's view that the data available to us do not match with the pattern that may be expected from an oral intake of 19-norandrostenedione and does not indicate an intentional doping." This panel should give deference to the Commission's finding. See

Chevron U.S.A., Inc. v. Natural Resources Defense Council, (1984) 467 U.S. 837 [Courts must give deference to the superintending agency's interpretations, the only limitation on an agency's interpretation is that it must be "reasonable."]

6. The Commission's finding is reasonable because of Ms. Neben's testing history: she had a negative test on May 22 before the positive test on May 31, followed by two negative tests on June 3 and 4. A person who was intending to gain a competitive advantage from taking a prohibited substance would have elevated levels during the entire period.

7. The fact that Ms. Neben's positive test was likely caused by a contaminated supplement is also supported by IOC, USADA and UK studies.[1] With the submission of this evidence, Ms. Neben sustained her burden of proof. She did not intentionally take a prohibited substance. It is more likely than not that a contaminated supplement (or other food or drink fortified with a vitamin supplement), was the culprit.

C. Strict Liability Rule Does Not apply to Sanctions regarding future competitions

8. Because Ms. Neben did not intend to take a prohibited substance, this panel must decide whether Ms. Neben was negligent in taking the vitamin supplements that likely caused her positive test. Only after a finding of negligence can the panel impose sanctions over and above disqualifying the athlete from an event. *Aanes v. FILA CAS 2001/A/317* (v.2.3), p. 16 [the strict liability rule does not sufficiently respect the athlete's right of personality with respect to suspension of an athlete from future competition]. A strict liability rule regarding future competition would also violate an athlete's human right to compete in international competition. *Kaufman-Kohler and Malinverni, Legal Opinion On The Conformity Of Certain Provisions Of The Draft World Anti-Doping Code With Commonly Accepted Principles Of International Law*, (February 26, 2003), ("Legal Opinion"), Summary Opinion ¶ 4.4, p.5 and 6[2][Athletes must be allowed the opportunity to eliminate the period of ineligibility by demonstrating no fault or negligence and reduce the period of ineligibility by demonstrating no significant fault or negligence.]; see *Olympic Charter, Fundamental Principles*, No. 8, p. 9; see also *USADA v. Vencil*, AAA No. 30190 0029103, July 24, 2003, ¶7.13, FN 25 ["There must be a balance

[1]Prof. Dr. Wilhelm Schanzer, Analysis of Non-Hormonal Nutritional Supplements for Anabolic Androgenic Steroids - An International Study - Institute of Biochemistry German Sport Univesrtity Cologne, (February 2002); Don H. Catlin, MD, Trace Contamination of Over-the-Counter Androstenedione and Positive Urine Test Results for a Nandroline Metabolite 2618 JAMA, (November 22/29, 2000); Vol. 284, No. 20; Prof. VHT James, Emeritus Professor of Chemical Pathology, University of London, Nandrolone Review, Report to UK Sport (January 2000).

[2]Available at http://195.139.49.18/3_wada/files/{0F704EEB-070A-4444-8CC5-D6FF2C4F5D20}.pdf. IOC Medical Code.

between the protection of the athlete's basic, human right to compete and the rights of the many constituents within the athletic community."]

9. In order of priority, the fight against doping is important for the health of athletes, for the concept of fair play in sport, and for the image of sport to the general public.[3] The fight against doping in sport is not the fight against innocent victims of a poorly regulated vitamin supplement industry. After a finding of no intent, the law should be liberally construed to protect the right of athletes to participate in international competition. In these circumstances, athletes should be given the benefit of the doubt. *Smith v. USA Triathlon*, TAS 99/A/241, ¶76. No sanction relating to future competitions should be imposed if other less drastic remedies could accomplish the same result. [4] ***Where there is no intent to cheat, the athlete's human right to compete in international competition must take priority!***

D. Ms. Neben was not Negligent in taking Vitamin Supplements for Her Sport of Road Racing

10. I dissent from the majority's decision on the issue of Ms. Neben's negligence for the reasons stated below. USADA's counsel admitted that the "negligence" referred to in CAS doping decisions was the standard, hornbook negligence, not some special test created by a CAS panel.

E. Negligence test

11. The negligence test is as follows: "the failure to do something which a reasonably careful person would do, or the doing of something which a reasonably careful person would not do. *Ford Motor Co. V. Burdeshaw* (1995) 661 So. 2d 236, 238; *Scully v. Middleton* (1988) 751 S.W.2d 5, 5. Once a panel finds an athlete did not intend to dope, a panel has the obligation to evaluate the facts of the case under this negligence test. Ruling against an athlete without a proper negligence analysis is evidence of bias.

(a) Evaluating the Negligence Test

(i) Defining the reasonable man

12. The Restatement of Tort directs the trier of fact to look to the conduct of the community to determine what is reasonable. [5] The community is not the arbitrators or attorneys who

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[3] Legal Opinion at ¶¶26-34, p. 13-16.

[4] See Legal Opinion at ¶ 80, p.27.

[5] "The chief advantage of this standard of the reasonable man is that it enables the triers

frequently deal with doping disputes. The community is those athletes involved in Road Racing. In this case, the testimony from every witness (including USADA's witnesses) confirmed that the Road Racing community takes vitamin supplements and electrolyte drinks as part of training and in competition.

13. Mari Holden, Olympic Silver Medalist in 2000 and World Champion in 2000, testified that she had personally observed virtually every athlete at competitions taking some type of vitamin supplements. She has been an athlete representative to the USOC. In that position, she gained a better understanding of the risk associated with taking vitamin supplements than most other athletes. In spite of being aware of the warnings, she continues to take vitamin supplements.

14. Sean Petty, USA Cycling - Vice President - Marketing, testified that a very high percentage used vitamin supplements just to maintain general health because it is a very difficult sport. Steve Johnson, USA Cycling ("COO"), testified 100% of the athletes take supplements. He was a full-time professor at one point in Exercise Physiology. Jim Miller, USA Cycling - Director of Women's Endurance, testified that 100% use vitamin supplements. He explained the normal routine is for the athlete to take energy and electrolyte drinks during or prior to the races. They would use Whey Protein after the race to recover.

15. USADA's witness, Brian Frank, owner of Hammer Nutrition, testified that most, if not all, athletes take vitamin supplements. He stated that most foods in the United States now contain vitamin supplements. The evidence presented at the hearing established that it was not only vitamin supplements but a number of food products that could be contaminated with nandrolone. That included electrolyte drinks (like Gatorade or Cytomax, the drinks Ms. Neben used) as in the tennis case referenced by both parties. See *Ulihrach v. ATP Tour*, ATP Tour Anti-Doping Tribunal Decision, July 7, 2003. As a practical matter it would be virtually impossible for an athlete to avoid taking vitamin supplements if he or she wanted to eat or drink something other than water. Even Dr. Larry Bower, Senior Managing Director, Technical/Information Resources for USADA, testified that taking vitamin supplements was prevalent.

16. On this basis alone (especially considering USA Cycling actively encourages its athletes to take vitamin supplements) the panel can infer that Ms. Neben's conduct in taking vitamin supplements was reasonable because it conformed to the custom of the community. [6] Under the

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of fact who are to decide whether the actor's conduct is such as to subject him to liability for negligence, **to look to a community standard rather** than an individual one. . ." (Emphasis added) Restatement of the Law - -Torts §283, Comments (b) and (c).

[6] "Any such custom of the community in general, or of other persons under like circumstances, is always a factor to be taken into account in determining whether the actor has been negligent. Evidence of the custom is admissible, and is relevant, as indicting a composite

Community Standard Test, Ms. Neben is not negligent.

(ii) Balancing risk under the negligence test

17. If the panel is not comfortable using the community standard, it then should apply the balancing approach. Under the balancing approach, conduct is only negligent if its disadvantages outweigh its advantages. [7] Negligence does not include any assumption that the actor has failed to avoid the risk.

18. In fact, the testimony of Dr. Larry Bower was convincing. USADA has been diligent in undertaking its role to educate athletes about the risk associated with vitamin supplements, including "vitamins, minerals, herbs or other botanical, amino acids, and substances such as enzymes, organ tissues, glandulars, and metabolites.[8] Furthermore, Ms. Neben was aware of the case where another cycling athlete tested positive for a prohibited substance as a result of taking what he alleges were amino acids that were contaminated with nandrolone.

19. Yet, the athlete's awareness of the risk associated with taking vitamin supplements is only the beginning of the negligence analysis. It is not dispositive. "The balancing approach to negligence tends to assume that the actor is aware of that risk, but has tolerated that risk on account of the burdens involved by risk-prevention measures." [9]

20. Ms. Neben testified at length about the grueling nature of Road Racing. Anyone

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judgment as to the risks of the situation and the precautions required to meet them, **as well as the feasibility of such precautions** . . . . if the actor does what others do under like circumstances, there is at least a possible inference that he is conforming to the community standard of reasonable conduct." (Emphasis added) Restatement of the Law - - Torts §295A, Comments (b).

[7] "Conduct is negligent if its disadvantage outweigh its advantages, while conduct is not negligent if its advantage outweigh its disadvantages. The disadvantage in question is the magnitude of risk that the conduct occasions: as noted, the phrase 'magnitude of the risk' includes both the foreseeable likelihood of harm and the foreseeable severity of harm, should an incident ensue. The 'advantages' of the conduct relate to the burdens of risk prevention that are avoided when the actor declines to incorporate some precaution. **The actor's conduct is hence negligent if the magnitude of the risk outweighs the burden of risk prevention.** . . .In those cases in which a plaintiff does allege negligence in the actor's decision to engage in an activity, the overall utility of the activity is a factor the court **needs** to consider." (Emphasis added) Restatement of the Law - - Torts §3, Comment (e) and (j).

[8] "USADA, Pass With Flying Colors, page 21.

[9] Restatement of Law - - Torts §2, comment (k).

following Lance Armstrong understands Road Racing is grueling and all too often dangerous. Evidence was introduced that the races could take upwards of three hours. Stages races could last as long as three weeks. The training required for these events can be even more grueling. The demands placed on the body by Road Racing are far above the demands made on human beings in the normal course of life and greater than most world-class athletes in other sports.

21. From a safety perspective, Ms. Neben testified that an athlete must take the electrolyte drinks and the gels which contained glucose to avoid fatigue and mental lapses. If the blood sugar level goes down so does concentration. Ms. Neben testified tearfully concerning the catastrophic consequences mental lapses can cause in Road Racing. A fellow competitor was killed in one of her races. There are many instances where bones are broken. The consequences of not being properly hydrated, with appropriate electrolyte balance and blood sugar levels (which can be avoided by taking the supplements that Ms. Neben took) are immediate and much greater than the consequences associated with testing positive as a result of taking a contaminated supplement. Given this reality, suggesting that Ms. Neben or other Road Racers avoid taking vitamin supplements in their various forms, including the electrolyte drinks and glucose gels, conflicts with the stated purpose of the fight against doping, "to protect the health of athletes." It is reckless and dangerous.

22. From a long-term health perspective, Ms. Neben testified that she experienced problems with stress fractures as a result of training in the past. Ms. Neben also had other legitimate medical concerns that reasonably caused her to take vitamin supplements. Ms. Neben has a degree in biology and a Masters in Physiology and Bio Physics and a Masters in biology. She had consulted with nutritionists and was told to take a number of different vitamins for her health concerns, including calcium. Even USADA's counsel, Mr. Young, admitted that he could understand Ms. Neben taking calcium.

23. Dr. Bower admitted that doctors prescribe vitamins for medical problems and would not offer an opinion concerning Ms. Neben's need to take such vitamins for her particular health concerns. Ms. Neben's stated reason for taking these vitamin supplements:"I want to be healthy after Road Racing." It was Ms. Neben's conclusion that her long term health after Road Racing was more important than the consequences of taking a vitamin supplement that might be contaminated with a prohibited substance.

24. After Ms. Neben's testimony, Dr. Bower, USADA's witness, was confronted with the ultimate negligence question. In view of USADA's warnings and the general perception of the need for vitamin supplements, is Ms. Neben's conduct of taking vitamin supplements unreasonable? Dr. Bowers' testimony was unequivocal, "No"! I agree and would therefore find that Ms. Neben's conduct in taking vitamin supplements was reasonable. She was not negligent and no sanctions regarding her future competitions should be imposed.

25. I would uphold the disqualification of Ms. Neben from her May 21, 2003 event. I would

not impose sanctions against Ms. Neben for future competition because she proved that she was not negligent. Moreover, in view of protecting the health of athletes in Road Racing, I would not counsel them to avoid taking vitamin supplements and other electrolyte and glucose products.

Dated: October 16, 2003

Christopher L. Campbell