

BEFORE THE AMERICAN ARBITRATION ASSOCIATION

North American Court of Arbitration for Sport Panel

UNITED STATES ANTI-DOPING AGENCY,

Claimant,

v.

KAYLE LEOGRANDE,

Respondent.

ARBITRAL AWARD

AAA No. 77 190 00111 08

THE UNDERSIGNED ARBITRATORS, having been designated by the above-named parties, and having duly heard the proofs and allegations of the parties, do hereby find and issue this Final Award, as follows:

I. THE PARTIES

1. Claimant, the United States Anti-Doping Agency ("USADA") is the independent anti-doping agency for Olympic Movement sports in the United States and is responsible for conducting drug testing and adjudication of potential doping offenses pursuant to the USADA Protocol for Olympic Movement Testing (the "USADA Protocol").
2. Respondent, Kayle Leogrande ("Leogrande"), 31 years old, has been a professional cyclist since 2005. He has submitted numerous doping control samples to USADA, all of which have been ultimately reported by the testing laboratory and/or USADA as negative for any Prohibited Substances. With respect to a doping control sample taken in August 2006, the World Anti-Doping Agency accredited laboratory in Los Angeles (the "UCLA Lab") which tested the sample, reported the A sample as positive on September 20, 2006; and the B sample was tested on October 3, 2006 with a witness for Respondent present. At the time of the testing, the method for testing for the Prohibited Substance, EPO, was set forth in the Technical Document, TD 2004 EPO but a new method was under consideration. The conclusion made by the UCLA Lab, was that this sample was borderline for the presence of EPO and because of the prospect of a new method in the updated Technical Document which was to be issued in 2007, the sample was ultimately declared negative for the presence of EPO and Respondent was so informed by letter dated January 3, 2007 from USADA.
3. Leogrande raced as part of the Union Cycliste Internationale ("UCI") professionally licensed Rock Racing Team at an elite cycling multi day competition, The Point Premium Root Beer International Cycling Classic, better known as "Super Week", in Wisconsin during July 2007.

4. The parties stipulated to the Panel's jurisdiction by agreeing that the USADA Protocol governs the hearing for an alleged doping offense involving Leogrande.

II. THE CASE AGAINST MR. LEOGRANDE

5. USADA asserts that Leogrande admitted his Use of several Prohibited Substances, including recombinant human erythropoietin ("EPO") to a Soigneur and the Director Sportif of his Rock Racing team, in connection with Super Week.
6. In addition, USADA asserts that Leogrande attempted to use a Prohibited Substance and tampered with the doping control process.
7. At the hearing held in Los Angeles, California, on November 17 and 18, 2008, the Panel heard testimony from Suzanne Sonye ("Sonye"), Frankie Andreu ("Andreu") and Jordan Schwere ("Schwere"), all employees of Rock Racing at the time of the incidents described.
8. The relevant parts of the testimony presented by USADA are below.
9. During the week of July 15, 2007, Sonye, then Soigneur (an assistant responsible for various matters such as physical therapy, feeding, clothing and escorting the riders on a cycling team) for the Rock Racing team, was with the team at Super Week, in Milwaukee, Wisconsin. There, she stayed with the team at a Milwaukee EconoLodge hotel. During Super Week Respondent asked Sonye if she knew where to obtain testosterone patches. This conversation took place in her hotel room which was a place where the racers hung out, since there was food and always an open door. He told her that he had used testosterone gel but wanted patches because he thought they would work better. Sonye replied that she did not know, but maybe they could be bought in Mexico.
10. After that encounter Respondent was selected for a USADA in-competition drug test after a race held in Sheboygan, Wisconsin on July 26, 2007. The doping control chaperone approached Respondent after he finished the race, waited for him by his car as he was changing clothes, then allowed Respondent to "pee" at Respondent's request in the parking lot, witnessed by the chaperone who then escorted him to the doping control station for the giving of his sample. After Respondent had provided his sample, he and the chaperone both completed a Supplementary Report Form identifying the stop in the parking lot, as this was not allowed. The next day Respondent told Sonye that he was nervous and had not slept well the night before because of the doping control test he had taken.
11. Sonye asked Respondent why he was nervous and had not slept well. Respondent then told Sonye that he had taken Vicadin, Ventalin and EPO and admitted to her that he had recently taken EPO. During this conversation, he placed his hand as if holding a syringe and pretended to stick a needle into his arm. When Sonye told him that he would test positive, Respondent explained to her that he had put soap on his wrist prior to entering the doping control station and that, while giving his sample, he put some of the soap into the stream of his urine, thinking the soap "would fuck up the test."

12. During that conversation, Respondent also told Sonye that his mother had previously taken EPO under a doctor's orders, that his mother knew Respondent had used EPO, and that she had told him to stop taking it.
13. The next day, July 28, 2007, after agonizing about what to do, Sonye went to the team's chief mechanic on site, Schware, and told him that Respondent had confessed doping to her. She sought Schware's advice on what to do about it. Schware suggested to Sonye that she call the team Director Sportif, Andreu, and inform him of the admission. Sonye then placed the call from Schware's cell phone. At the time of the call, Andreu was in France covering the Tour de France as a commentator. He understood Sonye to be calling him asking for direction about what to do with the information Leogrande had told her. Andreu told Sonye that she had done the right thing by telling him and stated that he would take care of it.
14. The day after that, July 29, 2007, Respondent received a message from Sonye, during which he told Sonye that he did not want his career to end with a positive test to which Sonye responded that there was a good chance that the drug test he took would come back positive. Later, on the same day, Respondent called Sonye and told her that he really respected her and understood that she was doing her job, which Sonye took to mean that Respondent had been informed that she had told team management of his admissions.
15. Andreu confirmed that Sonye called him and reported Respondent's admissions of EPO use, his placement of soap on his wrist and Respondent's concern about testing positive. He respected and trusted Sonye, did not see any reason she had to lie and perceived she was looking out for the good of the team. He then contacted another Rock Racing manager to relay what Sonye had told him.
16. When Andreu returned to the United States from France, he had a short cell phone conversation with Respondent during which he told Respondent that Sonye had told him what happened at Super Week, and asked Respondent: "what the hell was he was thinking?". It was clear the subject was Respondent's admission of doping, as Andreu said: "this is a big problem, the whole team could fold because of this." Respondent replied that: "he had made a mistake, he regretted it, it was a stupid thing to do, he had let the team down." Andreu had no doubt in his mind that Respondent told Sonye he had used EPO during Super Week.
17. After that call with Respondent, Andreu had multiple conversations with members of management at Rock Racing and recommended that Respondent be terminated based on Respondent's admissions of doping. A decision was made to suspend Respondent from racing for two weeks, after which he was restored to race with the team. No one within the Rock Racing management questioned whether Respondent had used EPO. The only debate was what to do about it. Management determined that it would not terminate Respondent, but instead wait until Respondent received his doping control results from Super Week before making that decision.
18. Sonye called USADA some time before the end of August 2007 to report Respondent's admission of doping.

19. In October 2007, Sonye spoke by telephone to Matt DiCanio who maintains a web site where he attacks cycling and doping. Without her knowledge, their telephone conversation was recorded. During that conversation, she also told DiCanio that Leogrande had admitted doping to her. The conversation was ultimately posted on DiCanio's web site.
20. During Super Week, in addition to the urine sample given by Respondent on July 26, 2007, Respondent gave a urine sample to USADA for doping control on July 28, 2007 upon winning a race that day. Ultimately, Respondent's urine samples were not reported positive by the UCLA Lab and no action was immediately taken to remove Respondent from the Rock Racing team.
21. USADA also provided photographs of Respondent holding some synthetic EPO vials, which Respondent testified were taken at Joe Papp's house, along with a United Parcel Service ("UPS") notecard from its Upland, California location, with the following note in what appears to the Panel to be Leogrande's handwriting: "Joe, 2 boxes G. 100 iu; 7 boxes E. 60,000; \$500. I owed you! Thanks, Kayle". At the time the note was written, Respondent resided in Upland.
22. USADA also introduced Joe Papp's cell phone records which showed 274 telephone calls and text messages with Respondent between July 2006 and July 2007.
23. USADA's expert witness, Dr. Christiane Ayotte, Director of the World Anti-Doping Agency accredited laboratory in Montreal, testified after reviewing four urine samples provided by Respondent. These samples were provided by Respondent on August 20, 2006, April 1, 2007, July 26, 2007 and July 28, 2007 and tested by the UCLA Lab. The last sample was not considered in her analysis as its isoelectric profile was too faint to be reliably interpreted.
24. Dr. Ayotte concluded that the three samples taken together were not consistent with human EPO nor with the atypical profiles which could be generated when there is enzymatic activity or following strenuous exercise. The UCLA Lab ran a test for the enzymatic activity ("activity test") and an exertion test, but neither influenced the protein bands which show up in the synthetic EPO zone of interest. She also disagreed with the UCLA Lab's finding that one of the tests was negative, contending that had her Lab been processing this test, it would have declared this sample positive. She demonstrated that a comparison to the pharmaceutical control results need not show identical results, because they are expected to differ after the drug has been processed in the human body.
25. Her conclusion with respect to Respondent's EPO test results taken together was that they all reflected the administration of the Prohibited Substance, recombinant EPO. USADA relied upon Dr. Ayotte's expert testimony concerning Respondent's samples to corroborate Respondent's admissions of drug use.
26. In connection with these samples, Respondent stipulated that (1) he provided the samples, (2) the Doping Control Official Records (DCORs) for all of the samples and a Supplementary Report Form for one sample were signed by him, (3) that each aspect of sample collection and chain of custody by USADA and the UCLA Lab was conducted appropriately and

without error, and (4) the documents pertaining to his samples are admissible as UCLA Lab business records.

27. Respondent's doping control forms, signed on July 26, 2007 and July 28, 2007, list albuterol as having been taken by Respondent on those days.
28. Larry Bowers of USADA testified that at the time of the testing by UCLA Lab of Respondent's samples, UCLA Lab was reporting samples which contained in excess of 1,000ng/ml, but was mistakenly not reporting to USADA when samples showed the presence of albuterol in volumes between 100ng/ml and 1,000 ng/ml. This is required, so as to allow USADA to check against their records to see whether the required Therapeutic Use Exemptions allowing the taking of albuterol are on file. That misunderstanding has since been corrected and the UCLA Lab is currently reporting such presence of albuterol. The standard procedure for the completion of the doping control form is for the doping control officer to assist the athlete, but s/he is not to guess what the athlete is taking, for purposes of listing those substances on the form.

III. APPLICABLE RULES

29. Union Cycliste Internationale Anti-Doping Rules ("UCI ADR") 15.2 is identical to Article 2 of the World Anti-Doping Code (the "Code") and includes as an anti-doping rule violation:

Use or Attempted Use of a Prohibited Substance or a Prohibited Method.

The Code defines the term "Use" as "the application, ingestion, injection or consumption by any means whatsoever of any *Prohibited Substance* or *Prohibited Method*." The Code's Comment to Article 2.2.1 provides that "'Use' can be proved, for example, through admissions, third party testimony or other evidence."

30. An *Attempt* to use a Prohibited Substance or Prohibited Method is also a violation under both the UCI ADR and Code. The Code defines "Attempt" as "purposely engaging in conduct that constitutes a substantial step in a course of conduct planned to culminate in the commission of an anti-doping rule violation. Provided, however, there shall be no anti-doping rule violation based solely on an *Attempt* to commit a violation if the *Person* renounces the attempt prior to it being discovered by a third party not involved in the *Attempt*."
31. UCI has adopted the World Anti-Doping Agency ("WADA") Prohibited List as described in Article 4.1 of the Code.

The Prohibited List states as follows:

Prohibited Substances

S2. HORMONES AND RELATED SUBSTANCES

The following substances and their releasing factors are prohibited:

- 1 Erythropoietin (EPO)

32. Burden of Proof

UCI ADR 16 provides that USADA "shall have the burden of establishing that an anti-

doping rule violation has occurred. The standard of proof is whether [USADA] has established an anti-doping rule violation to the comfortable satisfaction of the hearing body bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt".

33. Disqualification of Results in Event during which an Anti-Doping Rule Violation occurs
UCI ADR 256 provides:

"... an anti-doping rule violation occurring during or in connection with an *Event* leads to *Disqualification* of the *Rider's* individual results obtained in that *Event* according to the following rules:

2. If the violation involves a) the presence, *Use* or *Attempted Use* of a *Prohibited Substance* or a *Prohibited Method* (articles 15.1 and 15.2)... all of the *Rider's* results are disqualified...

34. Disqualification of Results subsequent to anti-doping violation
UCI ADR 274 provides:

"In addition to the automatic *Disqualification* of the results in the *Competition* pursuant to article 256, all other competitive results obtained from the date a positive *Sample* was collected (whether *In-Competition* or *Out-of-Competition*), or other doping violation occurred, through the commencement of any *Ineligibility* period, shall, unless fairness requires otherwise, be *Disqualified*."

35. Commencement of Ineligibility Period
UCI ADR 275 provides:

"The period of *Ineligibility* shall start on the date of the hearing decision providing for *Ineligibility*..."

IV. MR. LEOGRANDE'S CASE

36. Respondent testified that he had never taken the Prohibited Substance, EPO, nor admitted to Sonye or Andreu that he had taken EPO or any other substances. He did not know what Sonye had against him or why she claimed that he had admitted to using the drugs she listed and that he had never even heard of Vicadin or Ventalin.
37. In connection with his 2006 sample, Respondent felt that the USADA testing process had been unprofessional and the results unfairly delayed by USADA. Because of this treatment, he was in fact nervous after giving his sample on July 26, 2007 and having the Supplementary Report Form to complete, describing his having to pee before giving his sample, which he learned thereafter was in contravention of the rules.

38. Respondent also testified that he did not put soap on his wrist prior to giving his sample nor was he able to as he was in the presence of the doping control chaperone from the time he completed the race until he gave his sample.
39. Respondent had a different recollection of his conversations with Sonye and Andreu during which they claimed he had admitted to taking EPO, testosterone and other substances. He testified that he had been nervous after giving his sample on July 26, 2007 because of what had happened with his sample and USADA in 2006, with the long drawn out process before his sample was declared negative. He did not even speak to Sonye on July 27, 2007 as she claimed he had.
40. He also did not say anything about his mother taking EPO. His mother also testified that she had never taken EPO or discussed it with her son until after this matter arose.
41. He confirmed that he had gotten a massage from Sonye on July 29, in the presence of another rider but that the subject of doping did not come up, nor did he remember calling Sonye for any reason other than to schedule a massage.
42. Respondent's wife testified that she was present when Respondent received a massage from Sonye on July 27 or 28 and that the subject of doping did not come up. She also testified that from the day she arrived at Super Week, on July 26, 2007, she did not see Leogrande talk to Sonye other than during a massage.
43. Respondent testified that in his conversation with Andreu all that happened was that he was told that the team wanted to wait until the results of his doping control tests were known and that until then, he would not race. He had no recollection of Andreu asking him: "what the hell were you thinking?". He denied telling Andreu about being sorry. He did recall that Andreu told him that Sonye claimed Respondent was taking Prohibited Substances. He did not protest being told by Andreu about this or that he would not race, but rather called the owner of the Rock Racing team.
44. Respondent initially testified that he had never heard of Ventalin, that he did not have an inhaler nor had he ever. Ventalin is a name for an inhaler of albuterol. However, upon cross examination, when Respondent was shown that he had disclosed the use of albuterol on his doping control form on July 26, 2007 and July 28, 2007, he testified that he had not completed that part of the doping control form. Rather, Respondent contended that the doping control officer must have included that information based on something Respondent told the doping control officer. He had however signed the doping control form. He then recalled that he had a puffer/inhaler, which he had told the doping control officer about, but that he did not know the name of the product.
45. With respect to the photographs of him holding vials of EPO, Respondent testified that they were taken at Joe Papp's home, in front of his open refrigerator, that Joe Papp was showing him a box of vials with liquid, which Papp identified to Respondent as EPO. Papp took the photographs without Respondent's knowledge and never told Respondent what he did with the EPO.

46. Respondent had no knowledge of the UPS notecard and denied that the signature on it was his.
47. Respondent provided the testimony of its scientific witness, Dr. DeLanghe, who has published peer reviewed articles on the subject of EPO doping control tests and the possibility of their yielding false positives. Dr. DeLanghe disagreed with Dr. Ayotte's conclusion that the profiles of Respondent's samples indicated the presence of EPO, for numerous reasons.
- a. He had a concern that the antibody used by the World Anti Doping Agency laboratories for testing urine for EPO, since it is not approved by the FDA for clinical research, but only for research, might bind to other proteins thus causing an atypical pattern in the test results.
 - b. He was concerned that the banding pattern shown in the Respondent's result did not correspond to the pharmaceutical controls.
 - c. He contends the analysis of the EPO urine test data is very difficult and unreliable.
 - d. Taking an athlete's urine within one hour of the completion of competition also causes unreliable results because of the exertion's impact on the production by the body of huge amounts of protein.

His conclusion from looking at all three of Respondent's urine sample EPO test results together was that the antibody used cross reacted with other (interfering) proteins than EPO ("activity"). He disagreed with Dr. Ayotte's conclusion that one of the samples she analyzed should actually have been found positive for recombinant EPO at the time the UCLA Lab originally analyzed it; and that the presence of interfering proteins would show in the Lab's activity test outside the EPO test "zone of interest". He did however agree with Dr. Ayotte that the EPO test results on Respondent's samples are very atypical and do not show the presence of human (endogenous) EPO as they should. He concluded that it was difficult to draw a conclusion about the presence of synthetic EPO in Respondent's urine based on the sample test results of Respondent.

V. PARTIES' CONTENTIONS

USADA

48. At the conclusion of the hearing, USADA narrowed its case to a contention that it has established Respondent's Use of the Prohibited Substance, EPO, through the following evidence:
- a. the testimony of Sonye, Schwere and Andreu, who are all consistent in their recollection of the events during Super Week whereby Respondent admitted use of EPO.
 - b. Rock Racing's actions at the time of Sonye's report of Respondent's admission, in suspending him from racing.

- c. Respondent's lack of reaction when he was told he would be suspended from racing by Rock Racing management.
 - d. The corroborating scientific evidence with respect to which both scientists agree that the protein patterns are very atypical and show suppression of the human production of EPO. This result is to be expected with the taking of synthetic or recombinant EPO.
49. USADA argued that Respondent's testimony is not credible as he lied about the taking of albuterol in the face of his own signed doping control forms which list albuterol as a substance he is taking.
50. USADA also asserts that it does not make sense that the only time Respondent ever saw EPO was in the one set of photographs USADA was able to obtain.
51. Based on the totality of the evidence and the lack of credibility of Respondent's testimony, USADA argued that the Panel would have no difficulty finding that Respondent had actually *Used* at a minimum EPO during Super Week.

RESPONDENT

52. Respondent contends that USADA has not met its burden of proof to establish either the Use or Attempted Use of any Prohibited Substances by Respondent. He cites the evidence proffered in the BALCO cases (*USADA v. Montgomery*, CAS 2004/0/645; *USADA v. Gaines*, CAS 2004/0/649; *USADA v. Collins*, AAA 30 190000658 04) and the *French v. ASADA* case (CAS 2004/A165) and compares that evidence to the evidence presented by USADA at the hearing. In the BALCO cases, none of the athletes testified, but in this case, Leogrande did testify in his defense. In addition, in the BALCO cases, there were other corroborating documents and tests in addition to the admissions of use of a Prohibited Substance. He asserts that the evidence in this case proffered by USADA is insufficient for a finding of Use by Respondent, in a manner similar to the *French v. ASADA* case.
53. Mark French was a cyclist residing at the Australian Institute of Sport ("AIS") from late September 2003 to December 1, 2003. The day after French left the AIS (December 2), the cleaners found a bucket in French's room, which was said to contain used injection syringes, used insulin injection syringes, used needles, used ampoules of Testis compositum N (German brand name) ampullen, used Vitamin B and Vitamin C vials, as well as other substances. French maintained that some of these items were not his. He also stated that he did receive vitamin injections; and that he received injections of a product known as "Testicomp" that he had purchased over the counter without a prescription. See *French v. ASADA* at ¶¶32-40.
54. Following an arbitration hearing, the CAS Arbitrator found that ASADA had failed to meet its burden of proving that a doping offense had occurred. With respect to whether the admitted use of Testicomp established "use" of a *prohibited substance*, the Tribunal at ¶47 stated as follows:

"A Doping Offence occurs if there is use of a glucocorticosteroid. Does the verb "use" require an interpretation that mens rea be an element or does the word "use" create strict

liability? In sporting matters involving anti-doping rules the approach of strict liability has normally been the case. However, before one reaches that issue, it is required that what French admits to using, Testicomp, must first be proven to have within in it the *prohibited substance* and second he must be shown to have used it."

55. The Tribunal then went on to explain why ASADA had failed to meet its burden of proving use of a Prohibited Substance:

"The Respondents' submission is to the effect that the proof of the contents of the bucket containing the glucocorticosteroid as a *prohibited substance* is not required because of the admission of the use of Testicomp by French was a breach of his contractual duties. The Panel finds that an admission to use of Testicomp does not amount to an admission that there has been use of a *prohibited substance* unless the product used is shown by chemical analysis to contain that which it purports to contain by its product leaflet. The contents itself must be proved to have contained the *prohibited substance* and that was not proved. An admission of use of Testicomp does not factually prove the fact of what it is that has been used and that it contains the substance stated on the label. It is at best hearsay evidence. Although the Panel is not bound by the rules of evidence, having regard to the seriousness of the allegation and the consequences that would follow upon a finding of doping, we find we should not act on the admission alone."

56. Pursuant to *French v. ASADA*, supra, Respondent asserts that USADA must prove not only that Kayle Leogrande made an admission of the use of substances to Sonye and/or Andreu, but that the substances that he admitted to using have been shown to be banned.
57. Respondent contends that he knows nothing about the photographs USADA obtained and Joe Papp did not testify about the events surrounding their taking.
58. He denies making the statements to Sonye and points to there being no independent admissions by anyone or witnesses to the statements made.
59. With respect to the claimed admissions by Respondent to Sonye and Andreu, Respondent points to the affidavit of Andreu drafted by USADA and signed on January 24, 2008, which differs from the testimony given at the hearing. Andreu's testimony was that Respondent had in fact not admitted the use of performance enhancing drugs, but rather Andreu inferred from the conversation he had with Leogrande when he apologized that Leogrande was admitting such use, as opposed to the use of a specific *prohibited substance*.
60. In addition, Sonye was unable to explain why Leogrande would ask her where to find testosterone patches or why she answered: "maybe in Mexico". She could not remember the exact details of her conversations with Schware and Andreu even though she had agonized about disclosing Respondent's admissions to her and it had been a difficult decision to tell them about the admissions. He also points out some inconsistencies on the date sequences in her conversation with DiCanio and in Schware's recollections.
61. Respondent objects to the use of negative doping results as proof of doping. He cites two CAS cases (*CONI Advisory Opinion*, CAS 2005/C/841 and *USADA v. Montgomery*) for the

proposition that proof of Use without positive Lab results, i.e. a "non-analytical positive" is more difficult to prove. He reiterates the Panel's holding in *USA Shooting and. George M. Quigley, Jr. v. Union Internationale de Tir*, CAS 94/129 that the standards to which an athlete is to be held need to be clear, specific and predictable. In this regard, he asserts that test results which were actually found to be negative for EPO can not then be used to show the presence of EPO.

62. Under the holding of *Calle Williams v. IOC* (CAS 2005/A/726), he also contends that since two Lab directors, from the UCLA Lab and the Montreal Lab, have reached two different conclusions on the test results, these should be resolved in favor of the athlete. In addition, under the WADA procedures, the final decision with respect to a test result goes to the Lab which conducted the test; in this case, the UCLA Lab which found the samples of Respondent negative for the presence of EPO.
63. Respondent further contends that USADA has not proffered any scientific evidence regarding the use of testosterone or Ventalin by Respondent nor has USADA offered proof of tampering, all of which are claimed to have been admitted by Respondent.

VI. DISCUSSION

64. In order for USADA to meet its burden of proof, the Panel must be comfortably satisfied that an anti-doping rule violation has been established, bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt.
65. The testimony of Sonye was convincing to the Panel beyond a mere balance of probability. She did not deviate from the very first instance of her reporting of Leogrande's admissions to her of doping to Schwere and then Andreu. She had nothing to gain by reporting his admissions and a lot to lose, but she nevertheless persisted.
66. As far as the contention that Sonye was unable to explain some of her statements, the Panel found that she was believable with respect to the entirety of the events and was consistent in the core of her understanding of what Leogrande admitted to her.
67. Andreu's testimony confirmed Sonye's interpretation of Respondent's admission. Andreu also had nothing to gain by confirming Sonye's testimony. He had no doubt that Respondent admitted to doping, using EPO and testosterone and possibly other Prohibited Substances. His testimony was also convincing to the Panel beyond a mere balance of probability.
68. The Panel found the Respondent's testimony denying his admission to Sonye and Andreu not to be credible for numerous reasons.
 - a. He misrepresented his use of an inhaler by initially calling it a puffer. When realizing the inconsistency with the doping control forms, he then went on to claim he had no idea of the contents of the inhaler, but trusted the doctor who had prescribed it.
 - b. Respondent had numerous communications with Joe Papp during the one year period from July 2006 to July 2007. Respondent testified that Papp stored EPO at his home,

thus it is very certain that he was in a position to have knowledge of EPO and the ability to obtain it. This close relationship with Papp, combined with the UPS note card, which does appear to be a receipt for E. (EPO) and G. (Human Growth Hormone) addressed to "Joe", and which was signed by "Kayle", which Leogrande denies was his signature, calls his credibility into question. For Respondent to disavow any knowledge of this card is unconvincing. The signature, in addition to being that of his unusual first name, looks to this Panel, to include the same script features as Respondent's distinctive signature on the doping control forms.

- c. Respondent's lack of denial or outrage when he spoke to Andreu, under either Respondent's or Andreu's version of the telephone call, is persuasive of his having used the Prohibited Substances (EPO, albuterol and testosterone) he was being punished for/accused of taking in that conversation.
- d. Respondent did not recall important events and conversations when it would have been very helpful for him to do so. Thus, he had no credible explanation for the conversations recalled clearly by Sonye and Andreu.

69. The scientific evidence is corroborative of the admissions of Leogrande as reported by Sonye and Andreu. USADA is not presenting the test results as proof of an analytical positive doping result, but rather as corroborative evidence of the admissions by Respondent to doping.

70. Both scientists agreed that the test results showed very atypical urine, there was clearly suppression of the human EPO which is typical when synthetic EPO is ingested. Each of the test results of Respondent showed this same result and neither scientist convinced the Panel that there was any explanation for this other than the taking of synthetic EPO. Dr. Ayotte's conclusion was convincing to the Panel, along with her explanation of the concerns raised by Dr. DeLanghe with respect to the test results of Respondent, including cross reactivity with proteins which was tested by the lab ("activity test"), effort distortions which Dr. DeLanghe pointed out are not an issue if the sample is given more than an hour after exertion, which was the case with respect to at least one of the samples; and comparison to the pharmaceutical control, which is indeed expected to differ in each case because of the drug going through the human body.

71. As contended by Respondent, the Panel concurs that the scientific evidence alone would not have been sufficient to find use of EPO by Respondent. The test results were all reported as negative for the presence of EPO. The Panel concurs with Respondent's argument that "the rule-makers and the rule-appliers must begin by being strict with themselves. Regulations that may affect the careers of dedicated athletes must be predictable." (*Quigley* ¶55) The Panel also concurs that under the holding in *Williams*, the UCLA Lab conclusions prevail, i.e. the samples are negative for the presence of recombinant EPO under the applicable standards set out in the EPO Technical Documents. However, USADA is not using this scientific evidence to show the Use of EPO by an analytical positive. This evidence combined with the admission by Respondent, was only one of the factors taken into consideration by the Panel, not the only factor as would be required in the case of an analytical positive. Respondent's clear and repeated admissions of doping, which in and of

themselves may be sufficient to establish an anti-doping rule violation, are corroborated by a significant amount of circumstantial as well as scientific evidence, including but not limited to, drug tests that were not reported positive but which reveal the presence of recombinant EPO in the Respondent's samples.

72. These facts differ substantially from *French v. ASADA*, supra, in that Respondent here actually admitted the use of a Prohibited Substance to Sonye, namely EPO, testosterone and Ventalin. French admitted to taking a drug named "Testicomp", not the taking of a Prohibited Substance. There was no other corroborating evidence tying the Prohibited Substances to French, whereas in this case, Respondent provided no credible testimony to dispute his admission. There are contemporaneous accounts of his admission, in the decisions of Rock Racing management to suspend Respondent from racing and his apologies to Andreu. There is no need for Respondent to add to this by admitting in so many words the specific substances he took to Andreu. He had already done that in his conversations with Sonye and was responding to that admission in his conversation with Andreu. In addition, there is other corroborative evidence, such as the signed notecard/receipt addressed to "Joe" which Respondent clearly lied about. The Panel does not know what that note signifies, but it does add weight to Sonye and Andreu's testimony regarding Respondent's admissions and it reinforces Respondent's lack of credibility.
73. The Panel agrees with the Respondent's argument that proof of Use without positive Lab results, i.e. a "non-analytical positive" such as we have here, is more difficult to prove. The Panel is acutely aware of the seriousness of the allegation which is being made and the burden of proof which must be met. The Panel is comfortably satisfied that the totality of the evidence in this case clearly establishes that Respondent has committed an anti-doping rule violation.
74. USADA did not present any corroborating evidence which would indicate the Use of testosterone, or albuterol/Ventalin in excess of allowable volume, or the Tampering with the doping control process.
75. The Panel finds that Kayle Leogrande did Use the *Prohibited Substance*, EPO, on the occasion of his competing in The Point Premium Root Beer International Cycling Classic, on July 26, 2007, which is an anti-doping rule violation under UCI ADR 15.2. There is no finding on the other included offenses of Attempted Use, Tampering or the Use of any other Prohibited Substances.

VII. FINDINGS AND DECISION

The Arbitrators therefore rule as follows:

1. Mr. Leogrande shall be ineligible to compete for a period of two years, under the UCI ADR, beginning on the date of this decision, December 1, 2008. Mr. Leogrande shall be eligible to compete again on December 1, 2010.
2. Mr. Leogrande's results obtained during The Point Premium Root Beer International Cycling Classic and all subsequent results he obtained through the date of this decision, December 1, 2008, shall be disqualified, under the UCI ADR.
3. The parties shall bear their own costs and attorney's fees.
4. This Award is in full settlement of all claims submitted in this Arbitration. All claims not expressly granted herein are hereby denied.



Hon. Peter Lindberg
Arbitrator

Hon. John Charles Thomas
Arbitrator

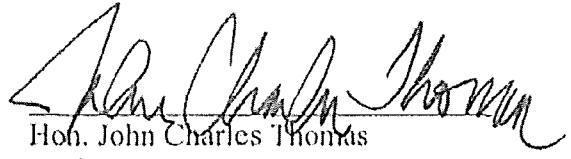
Maidie E. Oliveau
Chair

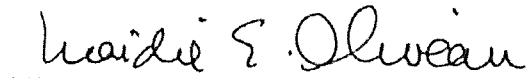
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