

BEFORE THE AMERICAN ARBITRATION ASSOCIATION

North American Court of Arbitration for Sport Panel

United States Anti-Doping Agency, Claimant

and

AAA No. 30 190 00759 04

David M. Fuentes, 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 November 8, 2004, at the Offices of Carlton, DiSante & Freudenbeger, LLP, 260 California Street, Suite 500, San Francisco, CA 94111, do hereby render this full award pursuant to its undertaking to do so by November 18, 2004.

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 (AUSADA Protocol@).

1.2 The Respondent is thirty-one and is a member of USA Cycling. Starting in early 2004, he was a member of the McGuire Pro Cycling TT/III team. He competed in Pro/Cat 1 / 2 races.

1.3 The Respondent is subject to testing by USADA and Union Cycliste Internationale (“UCI”) Anti-Doping Examination Regulations (“AER”), the international federation for the sport of cycling.

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.

(UCI AER, Art. 4, attached as USADA Ex.2)

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.

(*Id.* at Art. 7, p. 3)

2.3 The UCI Prohibited Classes of Substances and Prohibited Methods lists Oxymetholone as a prohibited substance in the class of Anabolic Agents. Oxymetholone is a Schedule III controlled substance pursuant to United States law.

2.4 The UCI 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.

(*Id.* at 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.

(*Id.* at Art. 125, p.19)

2.5 The Regulations defines doping offenses:

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

- first offence, other than intentional doping:
 - suspension for at least two years.
- second offence or intentional doping:
 - suspension for a minimum of four years up to and including suspension for life.

(*Id.* at Art. 130, p. 20)

2.6 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.

(*Id.* at 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.

(*Id.* at 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.

(*Id.* at Art. 148, p 24)

2.7 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.)

(*Id.* at Art. 91, p 14)

2.8 The Regulations provide that any suspension from competition may be effective on the date of any suspension in national races and national out-of-competition tests. (*Id.* at Art. 150)

3. Background and Facts.

3.1 On March 25, 2004, Respondent gave a urine sample designated as USADA specimen number 479583 at the Redlands Classic in Redlands, California.

3.2 The parties stipulated to the following:

- a. That each aspect of the sample collection and processing for the A and B bottles of USADA specimen number 479583 was conducted appropriately and without error;
- b. That the chain of custody of USADA specimen number 479583 from the time of collection and processing at the collection site to the receipt of the sample by the International Olympic Committee accredited laboratory at the University of California in Los Angeles (“UCLA Laboratory”) was conducted appropriately and without error;
- c. That the UCLA Laboratory’s chain of custody for USADA specimen number 479583 was conducted appropriately and without error;
- d. That the UCLA Laboratory, through accepted scientific procedures and without error, found the presence of the prohibited substances Oxymetholone metabolites (17a-methyl-5a-androstan-3a, 17B-diol, 2z-hydroxymethyl-17a-methyl-5a-androstan-3, 17B-diol, and 2z-hdroxymethyl-17a-methyl-5a-androstan-3z, z, 17B-triol) in both the A and B bottles of USADA specimen number 479583;
- e. That the presence of Oxymetholone metabolites in Mr. Fuentes’ urine constitutes an anti-doping rule violation pursuant to UCI Anti-Doping Examination Regulations;
- f. That USADA agrees that this violation is subject to sanction under UCI AER Article 130.1, a first offense, other than intentional doping.
- g. That the remaining issue to be determined concerning this first doping offense by Mr. Fuentes is the length of suspension imposed for this

violation, within the range of 6 months to 2 years, mandated by the UCI AER, Articles 124, 125, 126, 127 and 130.1.

3.3 The parties held preliminary telephone conferences relating to the hearing on September 1, 2004 and September 17, 2004.

3.4 The Respondent had never been tested prior to March 25, 2004, and has not been tested since that day. His last competitive race was September 26, 2004.

4. The Evidentiary Hearing

4.1 The Evidentiary Hearing took place on November 8, 2004, in San Francisco, California. The Claimant was represented by Travis Tygart, Senior Managing Director, General Counsel, USADA, and by Michelle Freddolino, Legal Affairs Director, USADA. Dr. Jeff J. Podraza, Pharm.D, Manager – Drug Reference Line, USADA, testified by telephone for USADA.

4.2 The Respondent, David Fuentes, was represented by Raymond C. Marshall and Zachary J. Alinder, Bingham McCutchen LLP, Three Embarcadero Center, Suite 1800, San Francisco, California 94111-4067.¹ He testified on his own behalf. He presented letters and testimony by telephone in support of his position from members of the cycling community: Richard Quintero, John Hunt, Chris Black, and Thierry Attias. He also presented a letter in his support from Barry Orlando.

4.3 The Respondent, through his pleadings, pre-hearing brief, oral argument and testimony given on November 8, 2004, at the evidentiary hearing, argued that the penalty sought by USADA should be reduced substantially. He contended that the circumstances surrounding the offense, his character, age, and experience, the gravity of the consequences of the penalty for

¹ Counsel for the Respondent are commended for their diligent representation of the Respondent. The Panel appreciates their efforts and agreement to undertake this pro bono representation.

his social, sporting, and economic position, the risk to his professional career, and his normal discipline and programme all support his contention that the penalty should be no more than six months. He also sought credit for the voluntary suspension served thus far and requested that a fine be waived due to his economic situation.

4.4 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 with numerous exhibits. All of the Respondent's exhibits were admitted in evidence, along with the written witness statements. All of USADA's tendered exhibits, except for a portion of Exhibit 19, were also admitted into evidence. The parties made opening statements and closing arguments, and the record was closed on November 8, 2004, after the conclusion of the hearing. All witnesses were sworn in.

4.5 Dr. Podraza, a clinical pharmacologist, testified that Oxymetholone is a Class III rated drug. This drug is not produced naturally in the body. While it cannot be obtained over the counter, it may be obtained over the Internet. In his capacity with USADA, Podraza testified that he answers calls to the hot line. He has never had any calls inquiring about Oxymetholone. He testified that the medicine was originally developed for the treatment of anemia, some forms of breast cancer, and some wasting diseases, but that there are much more effective prescriptions for those conditions now. Oxymetholone has no pain killing benefit and is not prescribed for treatment of injuries. He indicated that it would benefit cyclists as it increases red blood cell production, increasing a rider's stamina and recovery time similar to EPO. Dr. Podraza is not aware of any studies showing that this prescription drug has shown up in any supplements. He did advise that it was possible that it could be placed in food or drink.

4.6 The Respondent testified that on March 24, 2004, during one stage of the race, he was involved in a crash and severely injured his shoulder. He was able to finish that stage, but

was hampered by the injury. He testified that later that night he took some unknown medication that he had had in his possession for some time. This included some pills in a black film canister that included some left over from an alleged prescription for a prior cycling injury. He could not recall what those pills were. The next day, March 25, 2004, he was unable to complete the race due to the extreme pain. He was randomly selected for drug testing. He raced again on March 28 in the Criterium and won that event.

4.7 The Respondent was not able to trace the prescription that he had allegedly previously been given and was not aware of its name. He testified that he had never called the USADA drug hotline.

4.8 The Respondent's witnesses testified that they had all known the Respondent for differing periods of time and described him as honest, dedicated, and a hard trainer. They all opined that the Respondent was an asset to cycling and was well-respected.

5. Legal Analysis and Decision

5.1 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.

5.2 The UCI Regulations prohibit even the presence in a competitor's body of any prohibited substance. (*Id.* at Art. 4, p.3)

5.3 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 of Oxymetholone, was present in the athlete's urine sample. (*Id.* at

Art. 6, 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.

5.4 The parties stipulated that the testing and the analysis were properly conducted by the UCLA Lab. Accordingly, USADA met its burden of proving that a doping offense had occurred.

5.5 The strict liability rule inherent in the UCI Regulations has been confirmed in a number of opinions.² However, as was recognized in *Aanes*, a different conclusion may be drawn as to the impact on future competition. *Aanes v. FILA* (CAS 2001/A/317), p.17. The UCI Regulations explicitly recognize the need for proportionality. AER 124.

5.6 The Respondent argued that penalty for his offense should be proportionate with the offense committed pursuant to AER 124. He realized that he must take personal responsibility for the substance found in his body pursuant to AER 7. He requested that the Panel consider the five elements provided for under AER 124, thus allowing a reduction in the two-year period of the minimum suspension. The application of those five elements does not warrant a reduction, however, in this case. First, in examining the circumstances surrounding the offence, the Respondent did not provide any information from a physician as to any anti-inflammatory, such as he claimed for the Oxymetholone use. (He did not include any anti-inflammatory prescription on his Doping Control Form.) While the Respondent had obtained a prescription for the inhaler Albuterol, for which he had previously obtained a waiver, there was no evidence offered that he did the same for Oxymetholone. Even so, if that had been done, there is no evidence that he tried to obtain any waiver for that. While the Respondent did attempt to explain that he ingested some medications from his racing supplement bag, he did not adequately come forward with any evidence regarding ingestion of the prohibited drug. In light

² See *USADA v. Sbeih* (AAA No. 30 190 001 100 03); *USADA v. Moninger* (AAA No. 30 190 00930 020).
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of that fact, the Respondent, at a minimum, could not disprove his negligence, which is his affirmative obligation to do in order for this Panel to consider a reduction of the suspension as required by AER 130.³ Second, the Respondent's age and experience are not such that he merits special consideration. Third, the impact on his social, sporting, and economic position if he does not race for two years will be minimal. He will maintain his current social relationships and his current job. The risk to his professional cycling career may be impacted. However, some of his own witnesses who testified were older than the Respondent and are able to continue cycling.⁴ Last, although the Respondent's discipline will be impacted, there is nothing that will prevent him from continuing to diligently train and engage in other non-sanctioned events and to continue coaching assisting other riders as he has done in the past.

5.7 The Panel is mindful of the fact that “(t)here must be a balance between the protections of the athlete's basic, human right to compete and the rights of the many constituents within the athletic community (athletes, coaches, officials, fans, sponsors and national and international federations) who benefit from a drug-free environment where results are based on ability of athletes playing a proverbial “level” playing field.” *USADA v. Vencill* (AAA No. 30-109 0029203, n.25).

6. Decision and Award

The Panel decides as follows:

6.1 A doping violation occurred on the part of the Respondent.

6.2 The minimum suspension for a first offender of two (2) years to take place effective from March 25, 2004, is imposed on the Respondent pursuant to UCI Regulations, AER 130.

³ See *Aanes v. FILA* (CAS 2001/A/317), p.20.

⁴ Scott Moninger was 36 years old at the time of his suspension. See *USADA v. Mononiger, supra*.
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6.3 All competitive results which occurred on or after that date are cancelled pursuant to AER 143.

6.4 A two-year period of ineligibility beginning from March 25, 2004, 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.

6.5 The Respondent was a TT/III license-holder for approximately three months in 2004. Therefore, in accordance with AER 128 a fine may be imposed against the Respondent. Pursuant to AER 128 that fine is reduced proportionally to the amount of time the Respondent held the license, approximately one-quarter. Further, as allowed by AER 128, since the Respondent does not live in Europe, and in light of his income and the cost of living, the fine is reduced to 165 CHF. The Respondent's limited income and living situation, regardless, warrant a reduction in any fine.

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

6.7 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.

This Award may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

Signed this __12__ day of November, 2004.

Carolyn B. Witherspoon, Esq. - Chair

Chris Campbell, Esq.

Allen Rosenberg, Esq.