

**THE ATP TOUR ANTI-DOPING TRIBUNAL  
APPEAL OF MARIANO PUERTA**

---

**OPINION**

---

This appeal by Mariano Puerta {"Player"} was heard on 1 December 2003 in Miami, Florida before an ATP Tour Anti-Doping Tribunal {"Tribunal"} consisting of Prof. Richard H. McLaren, Esq., Chair, Dr. Arturo Marti, technical scientific member and Dr. Gary Wadler, M.D., medical member.

Alvaro Garcia Alaman de la Calle, Esq., Eduardo Ipiens Castillo, Esq., Ifiglio Perez, Esq. represented the Player at the hearing. Mr. Puerta and his wife were also present at the hearing.

The ATP Tour {hereafter the "Tour" or the "ATP"} was represented by Stephen D. Busey, Esq., John MacLennan, Esq. and Mark V. Young, Esq., ATP General Counsel and Executive Vice-President. Also present was Richard Ings, ATP Executive Vice-President of Rules and Competition.

**BACKGROUND FACTS**

1. The Player is a professional tennis player from Argentina. He has been a member of the ATP since 13 June 1997 and a member of Division 1 since February 1998.
2. The ATP Tour is a not-for-profit membership organization composed of male professional tennis players and tournament organizations. The ATP sanctions tennis tournaments and provides league governance and support to its member tournaments and players. Pursuant to this role the ATP has adopted rules for the conduct of tournaments and players. The parties have stipulated that the ATP Tour 2003 Official Rulebook {the "Rules"} is applicable to this case.
3. On 10 February 2003 the Player signed the standard consent form required by Rule B. 1. for the 2003 season. By that form he acknowledged that he had received a copy of the Rules. He further acknowledged that he had an opportunity to review the Rules and agreed to be bound by all the provisions

therein and to play by the Rules.

4. The Tennis Anti-Doping Program {"Anti-Doping Rules"} are set out within the Rules and are described at pages p.86 through 116. The Anti-Doping Rules are designed to maintain the integrity of professional tennis and protect the health and rights of all tennis players. The Program includes (i) doping tests in and out of competition, (ii) the imposition of penalties for Doping Offenses, and (iii) support and assistance to players when applicable. The player and tournament members of the ATP support the Program.
5. The Player provided a urine sample pursuant to the Anti-Doping Rules during the ATP sanctioned tournament the "Bell South Open Torneo de Viña del Mar", Chile on 13 February 2003.
6. The urine sample provided was analyzed by the Laboratoire de Controle du Dopage INRS – Institut Armand Frappier {"the Lab"}, located in Montreal, Canada, an International Olympic Committee {"IOC"} accredited laboratory. The Lab reported to Mr. Sahlstrom of the International Doping Tests & Management {"IDTM"} who is the Anti-Doping Program Administrator {"APA"} for the ATP Anti-Doping Program. The Lab analytical result contained in the Doping Control Report indicated that the A sample revealed a Clenbuterol concentration of 5.0 ng/ml. Clenbuterol is listed as a Class I Prohibited Substance referred to in Appendix B of the Anti-Doping Rules. In the Addendum to Appendix B it is stated "Clenbuterol is an anti-asthma medication that is also a powerful anabolic agent that promotes muscle growth and is prohibited under Anabolic Agents". The B analysis confirmed the existence of the Prohibited Substance.
7. Mr. Sahlstrom, representing the APA selected four Review Board {"RB"} members under Rule J. 2. and E. 3. a. The members of the RB were Gavin S. Appleby, Esq., Bernard Montalvan, M.D., Andrew Pipe, M.D. and R.H Barry Sample, Ph.D.
8. In accordance with the Anti-Doping Rules the APA obtained the Lab's analytical package and provided it to the RB, which was not informed of the Player's identity. Following their confidential review, the RB unanimously determined that the "A" sample was positive. The RB requested that the Medical Liaison, Dr Peter Hemmingsson, {the "ML"} contact the Player as provided for by Rule J.4. and request further information for the

consideration of the RB.

9. The ML contacted the Player as is provided for in the Anti-Doping Rules. The information obtained by the ML was relayed to Mr. Sahlstrom who provided it to the RB. On review of the additional information the RB unanimously concluded that the medical information did not support the disqualification of the positive "A" specimen and that the "B" specimen should be tested.
10. The information provided to the RB consisted of a note from Dr. Viola the attending physician provided by the Player's health insurance company, a note from the Player's Psychologist and one from the Player himself. The Player's note lists the three vitamins which he was consuming currently and which he had listed on his Doping Control Form, namely Ultra Mega Gold, Coenzima Q10 and Vitamin C. He mentioned one additional substance Total Magnesiano not listed on the Form.
11. The Player did not attend nor did he select a representative to be present when the "B" sample was to be analyzed by the Lab. The Lab analysis was carried out on the 25<sup>th</sup> and 26<sup>th</sup> of March 2003 in the presence of Mr. Dominic Massi whom the APA appointed as the Player's surrogate. Mr. Sahlstrom also observed the analysis of the "B" sample. The director of the Lab certified that the "B" specimen was positive for the presence of Clenbuterol. IDTM submitted a confidential memorandum to the RB. After further review of this second confidential file the RB unanimously determined, that the analytical findings on the "B" specimen should not be disqualified as is provided for in Rule J. 15.
12. Pursuant to Rule J. 16. the APA notified Richard Ings, Executive Vice-President of Rules and Competition for the ATP that the Player had committed a Doping Offense. By letter of 11 September 2003 the ATP advised the Player that he had committed a Doping Offense under Section C. 1. a. of the Anti-Doping Rules. He was advised that he would be suspended on the eleventh business day after receipt of the letter unless a request to have a hearing before an Anti-Doping Tribunal had been made. The Player made such a request and activated the process leading to this decision.
13. This Anti-Doping Tribunal {the "Tribunal"} was established pursuant to Rule L. 2. Counsel for both parties confirmed by signing Procedural Order

No. 1 that they had no objection to the Tribunal's composition or its jurisdiction to hear, determine and issue a decision in this appeal.

14. On 3 October 2003, the Chairman of the Tribunal issued Procedural Order No. 1 detailing the process and procedure the case was to follow and by which it was to be heard. The hearing was held within the 60-day guideline set out in Rule L. 2. On 7 November 2003, the Chairman issued a further Procedural Order No. 2 refining and augmenting the procedure in this matter. The death of the father of one of the witnesses required the Chairman to issue a further Procedural Order No. 3. The hearing commenced at 9:00 a.m. on 1 December 2003 at a hotel hearing room in Miami, Florida and concluded at approximately 5:30 p.m.
15. Pursuant to the Procedural Orders counsel for the parties filed sworn affidavits from each witness intended to be called. The Player provided written statements from himself, his brother Mauro Sebastian Puerta, his fiancée Sol Nazarena Estebanez, his attending physician Dr. Abel Viola, his close friend and former professional tennis player Guillermo Vilas and an expert Report from Professor Vivian James, Emeritus Professor of Chemical Pathology in the University of London and a consultant in medical biochemistry. The ATP accepted without cross-examination all statements other than that of the Player and Dr. Viola. The Player gave evidence on his own behalf and was cross-examined by the ATP counsel and questioned by the Tribunal, as was Dr. Viola.
16. The Tour provided a sworn affidavit from Richard Ings the Executive Vice-President of the ATP for Rules and Competition. Also provided were will say statements of Dr. Andrew Pipe a member of the RB and Mr. Sahlstrom, President of the IDTM. Counsel for the Player did not accept without cross-examination any of the witness or will say statements. When it became apparent that Dr. Pipe would be unable to be present at the hearing the Chairman issued Procedural Order No. 3. Pursuant to that Order a will say statement of Dr. Montalvan was filed with the Tribunal by e-mail on 26 November 2003. He was examined and cross-examined on a conference telephone call.
17. Procedural Order No. 3 contemplated an election by both parties as to whether they were satisfied with the evidentiary record as it developed at the hearing on 1 December 2003. Either party was permitted to elect to examine

or cross-examine Dr. Pipe, at a time to be scheduled. Neither party took up their right of election. The Tribunal closed the proceedings on the day of the hearing.

18. In accordance with the Procedural Orders the following are the agreed case stipulations.

1. There is no issue as to the collection procedures, chain of custody or laboratory analysis of the sample provided by the Player.
2. The Player's sample contained clenbuterol.
3. There was no prior medical exemption for the player's use of clenbuterol and the Player had never made a request for any such exemption.

19. Professor James's expert report provides at various paragraphs the following.

#### **Significance of the finding of Clenbuterol**

##### *Pharmacology*

- 16 Clenbuterol belongs to a class of drugs which are called beta-2-receptor agonists. Many drugs act by attachment to receptor sites which are located in particular tissues, and in so doing they initiate the pharmacological effect typical of that drug. Smooth muscle tissue in the bronchus contains beta-2-receptors and the effect of clenbuterol is to cause it to relax. It thus produces bronchodilation, which is useful in the treatment of asthma and chronic obstructive pulmonary disease. It is not entirely selective in its action, and acts on other tissues like the heart and peripheral muscles, and this can cause unwanted side-effects. Its effects are similar to other drugs such as salbutamol, which is also a beta-2-agonist and is used to treat asthma.

##### *Clinical use*

- 17 In some countries, clenbuterol is only approved for veterinary treatment of respiratory conditions, but in others, e.g. Italy, Germany, and Spain, it is approved for use in humans. The usual dose is 20ug daily by mouth but doses of up to 40ug twice daily have occasionally been used. It is also given by inhalation in a usual dose of 20ug three times a day.

##### *Anabolic effects*

- 18 Studies with animals have shown that in high doses clenbuterol has anabolic properties (i.e. it causes growth of muscle tissue) and increases energy expenditure and hence reduces the amount of body fat. This re-partitioning effect increases the proportion of lean tissue to fat in animals and thus improves their market value. For this reason it has been used illicitly by some farmers. Although this practise is illegal in the EU, there have been a few cases reported in which organs or meat from treated animals has been consumed by humans and this has caused illness.
- 19 Because of the findings in animals that the drug increases the proportion of muscle to fat tissue, it has attracted the attention of bodybuilders who find this property attractive. To achieve this

objective, a large dose is apparently required. The dose reported to be used for bodybuilding is 80-140ug per day.

*Stimulatory effects*

- 20 Like other beta-2-agonists, clenbuterol has stimulant effects on the nervous system. When ingested accidentally, for example after eating contaminated meat, it caused tremor, rapid heart rate, palpitations, headache, painful muscles, and nervousness.

*Abuse by athletes*

- 21 Although it might be expected from the work on animals that Clenbuterol is an effective anabolic agent in humans subjects, there is very little scientific evidence to support this suggestion

• • •

**Prohibitions**

- 25 Clenbuterol is considered to be a performance enhancing drug and an anabolic agent, and is a banned substance. It is listed in the IOC Medical Code Prohibited Classes of Substances and Prohibited Methods in Class C Anabolic Agents, 2 Beta-2 Agonists, and in the ATP Tennis antidoping program. Unlike salbutamol and some other beta-2 agonists, the use of which is permitted by inhaler when previously certified to the relevant medical authority, there is no such therapeutic exemption for clenbuterol, and thus there is no urinary threshold level. It is only necessary for the laboratory to demonstrate that the drug is present in the sample

20. Dr. Pipe expressed in his will say statement that “in my view Clenbuterol is not an appropriate drug for the treatment of asthma in athletes”. He further indicates that “because a medical exemption would never had [*sic*] been granted to this player for the use of Clenbuterol, the medical information<sup>8</sup> was not sufficient to establish a medical reason to support the player’s use of Clenbuterol”. Based upon this view and the conference call amongst the other members of the RB on which he was unable to be present, Dr. Pipe concluded that the “A” specimen test results should not be disqualified. His view did not change when the RB considered the “B” sample.
21. Mr. Ings in his sworn statement indicates that every player is given a card concerning the Anti-Doping Program. This card contains a complete list of Prohibited Substances and lists Clenbuterol as a Class I anabolic agent. The card further provides: “Clenbuterol is an anti-asthma medication that is also a powerful anabolic agent that promotes muscle growth and is prohibited under Anabolic Agents”. The card also suggests that the player keep it with him at all times and should give a copy to a physician if consulting one. There is also a warning that a “medical exemption” be applied for “before

---

<sup>8</sup> Under Rule J. 2 the RB may request the APA to obtain additional information from the player. Under Rule J. 4 the player at the request of the RB may offer additional medical information or documentation through the ML to the RB for its consideration.

using any banned substance”. The ATP records indicate that the Player attended the ATP player meeting in Australia in January 2003 at which the cards are distributed. Mr. Ings’ cross-examination at the hearing added nothing to his statement nor impinged any of it.

22. The Player had an asthmatic condition until the age of eight or nine, after which it no longer afflicted him. He underwent an operation on his wrist in January of 2001 and the asthmatic condition returned. Since this time he has suffered from bad attacks from time to time. The condition led him to apply for and receive a medical waiver for the use of an inhaler in August of 2003.
23. The Player had a particularly acute asthma attack in February of 2003 apparently brought on by the hospitalization of his 18 day-old niece who had to undergo heart surgery. The Player’s brother, parents and other members of the family were extremely distressed by these events. The stress during the week following the surgery resulted in his having a moderately severe asthma attack. The attending physician considered hospitalization but elected to give immediate treatment at home. A prescription medicine was given to the Player’s fiancée who had the prescription filled at an all night chemist whilst the Player was in bed. Dr. Viola, the attending physician, advised that if the Player’s condition did not improve hospitalization would be required.
24. Dr. Viola testified by conference telephone call that the Player had a moderate to severe asthma attack, grade 1 to 2. At the time when he attended him on 3 February the situation was urgent. It was Dr. Viola’s opinion that there was a serious health risk. It was his diagnosis that the onset of the asthma attack was rooted in psychosomatic factors related to the family situation going on with the Player’s niece. He obtained this information and the patient’s medical history from the Player at the time of attending upon him. Dr. Viola is of the opinion that the prescribed medication was the best and most appropriate remedy given the Player’s history of asthma and the seriousness of the crises that was occurring at the time he attended upon the Player. The dosage prescribed was three pills per day for the first 48 hours; then two pills per day for the following five days.

**SUBMISSIONS of the PARTIES**

Submissions by the Petitioner Player

25. Counsel for the Player alleges that there was a failure in due process at the RB stage in connection with the medical information provided to it. That failure ought to result in the declaration by this Tribunal that the RB conclusion not to disqualify the “A” sample was erroneous. Therefore, the Tribunal ought to make a declaration that there has been no Doping Offense.
26. It is submitted that Exceptional Circumstances as per Rule E 4. c. are present in this case. The Player identified with specificity the source and how the Clenbuterol came to be present in his body. He relied upon the professional expertise of his physician in using the pills that contained the Prohibited Substance. He was unaware that it contained such a substance. In the emergency circumstances that existed surrounding his use of the substance his conduct was reasonable. It was argued that these facts support a finding of no Doping Offense; or, in the alternative an ameliorative measure that the Tribunal considers appropriate.

Submissions by the Respondent ATP

27. The Tour’s position was that the Player had committed a Doping Offense by having a Prohibited Substance in his body during competition in violation of the ATP Anti-Doping Rules.
28. The Tour submits that the Player has not satisfied the requirements of the Exceptional Circumstances in the Rules. It is submitted that the Player has proven with specificity the source of the Prohibited Substance in his specimen. However, he failed to establish that he did not know or ought to have known of the Prohibited Substance and in any event he has not demonstrated that his conduct was reasonable in all of the circumstances.
29. For these reasons the Tour submits that the Tribunal should find the player guilty of a Doping Offense and assess the penalties mandated by the Program.



**RELEVANT ANTI-DOPING RULES**

30. The relevant Anti-Doping Rules of the Program read:

**A. General Statement of Policy**

1. The purpose of the Tennis Anti-Doping Program (“the Program”) is to maintain the integrity of tennis and protect the health and rights of all tennis players.

The scope of the Program includes:

- a. Doping tests in and out of competition;
- b. The imposition of penalties for Doping Offenses;
- c. Providing support and assistance to players when applicable.

...

**B. Covered Players and Events**

1. Any player who enters or participates in an event organized, sanctioned or recognized by the ATP, or who is an ATP member or is listed in the Singles or Doubles ATP Entry Ranking, shall comply with and be bound by the provisions of this Program. Further, for each calendar year all such players shall, as a condition to entering or participating in any event organized or sanctioned by the ATP, deliver to the ATP a signed consent in the form set out in Appendix A.

...

**C. Doping Offenses**

Doping is forbidden and constitutes a Doping Offense under this program. Doping occurs when:

1.
  - a. A Prohibited Substance is found to be present within a player's body; or
- ...
3. A player is absolutely responsible for any Prohibited Substance found to be present within his body. Accordingly, it is not necessary that intent or fault on the player's part be shown in order for a Doping Offense to be established under paragraphs 1 and 2 of this section C, nor is the player's lack of intent or lack of fault a defense to a Doping Offense.

...

#### **D. Prohibited Substances and Doping Methods**

- ...
4. It is the sole responsibility of each player (or, where applicable, that player's legal guardian) to acquaint himself with all of the provisions of the Program; and further, it is each player's sole responsibility to notify his personal physicians, coaches and other relevant personnel of the provisions of the Program.

...

#### **E. Organization of the Program**

- ...
- 4.c. Upon the finding of a Doping Offense by the Anti-Doping Tribunal, the Anti-Doping Tribunal may reduce the penalties as set out in section M<sup>2</sup> and sections N3 and N4 of the Program (but not overturn its finding of a

---

<sup>2</sup> Excluding the penalties set out in section M3a of the Program

Doping Offense) only if the player establishes by a preponderance of the evidence that Exceptional Circumstances exist and that as a result of those Exceptional Circumstances the penalties as set out in section M<sup>2</sup> and sections N3 and N4 in the program should be reduced. However, in all cases where a Doping Offense arises out of in-competition testing, the player shall forfeit prize money and Race/Entry Ranking points earned at the event at which the Doping Offense was committed. For the purposes of this paragraph, “Exceptional Circumstances” shall mean circumstances where:

- (i) The player establishes with specificity the source of the Prohibited Substance(s) or the Doping Method(s) in question and how the Prohibited Substance(s) came to be present in his body or the Doping Method(s) in question was used; and
- (ii) The player establishes by reference to the specific circumstances of the ingestion or administration of the relevant substance or use of the Doping Method in question that he did not know that he had ingested or been administered the relevant substance or used the Doping Method in question; and
- (iii) In taking steps to avoid and in not knowing that he was ingesting the relevant substance or having it

---

<sup>2</sup> Excluding the penalties set out in section M3a of the Program

administered to him or using a Doping Method, the player's conduct was reasonable.

This section E4c shall apply only to the Doping Offenses set out in sections C1a, C1b and C2a of the Program.

...

## **F. Exemptions**

A player's physician may apply to the APA in writing for a prior exemption allowing a player to use a Prohibited Substance. The details of the procedure for such an application are set out in Appendix C

...

## **J. Test Results**

...

5. On receipt of any medical information and/or medical document from the ML, the Review Board shall, as soon as reasonably practicable, determine whether there are sufficient medical reasons to support the player's use of the Prohibited Substance or Doping Method. Only where (i) a prior exemption allowing the player's use of the Prohibited Substance would have been granted under section F and Appendix C, and (ii) in the judgment of the Review Board, the Prohibited Substance was not used for the purpose of enhancing performance, may the Review Board determine that an analytically positive test should be disqualified. In making this determination, the Review Board shall consider the class of the Prohibited Substance, whether the player could have, but did not, seek an exemption, and any other relevant medical circumstances.

...

**M. Penalties**

1. Class I Prohibited Substances and Doping Methods

a. First Doping Offense

A player who is found through the procedures set forth in this Program to have committed a Doping Offense involving a Class I Prohibited Substance or Doping Method, shall be suspended from participation in any and all ATP sanctioned or recognized tournaments or events for a two (2) year period.

...

**N. Suspension and Forfeitures**

1. Suspensions shall commence and forfeiture penalties shall become payable to the ATP as follows:

...

b. In the case of a hearing before an Anti-Doping Tribunal, on the day after the Anti-Doping Tribunal's finding that a Doping Offense has been committed; or

...

2. a. All Doping offenses will be publicly announced by the ATP. In its sole discretion, the ATP may defer a public announcement until the conclusion of any proceeding brought before the Court of Arbitration for Sport pursuant to section U3 of this program.

...

- c. Subject to the confidentiality provisions in section S, in cases where the Anti-Doping Tribunal upholds the finding of a violation, the ATP in its sole discretion may publish parts of the proceedings, findings and penalties of the Anti-Doping Tribunal.
3. A player who is found through the procedures set forth in this program to have committed a Doping Offense pursuant to an in-competition test (regardless of whether an Anti-Doping Tribunal may have reduced or eliminated the suspension as provided in section E4c) will (1) forfeit all Race/Entry Ranking points earned at the tournament or event where the player provided the positive specimen or refused to submit to a doping test or comply with any provision of the program, and (2) forfeit and return to the ATP all prize money without deduction of tax earned at the tournament or event where the player provided the positive specimen or refused to submit to a doping test or comply with any provision of the Program. The player shall also forfeit, subject to section E4c, all Race/Entry Ranking points and will forfeit and return to the ATP all prize money without deduction of tax earned at subsequent ATP sanctioned or recognized events in which the player competed following the tournament at which the player provided the positive specimen or refused to submit to a doping test, or comply with any provision of the program, until the commencement of a suspension, if any, imposed by the ATP.

...

## **T. Deviations**

Any deviation or deviations form the Program including, but not limited to deviations relating to

specimen collection, chain-of-custody or laboratory analysis, whether arising as a result of the requirement of applicable national or regional laws or otherwise, shall not invalidate any finding, decision or positive test result, unless the player establishes by a preponderance of the evidence that the deviation or deviations raises a material doubt as to the reliability of the finding, decision or positive test result.

## **APPENDIX B**

### **Prohibited Substances and Doping Methods**

For the purposes of this Program, the Prohibited Substances and Doping Methods are categorized under the following Classes. (See Addendum for examples of Prohibited Substances and Doping Methods).

...

- Class I:      Anabolic Agents (Anabolic androgenic steroids and other anabolic agents) and Related Substances (as defined in Section (D) 1 of the Program).  
                  Diuretics and Related Substances (as defined in Section (D) 1 of the Program).  
                  Peptide Hormones, Mimetics and Analogues.  
                  Agents with anti-oestrogenic activity.  
                  Masking Agents  
                  Prohibited Doping Methods  
                  i)      Enhancement of Oxygen Transfer  
                  ii)     Pharmacological, Chemical and Physical Manipulation  
                  iii)    Gene Doping

...

## **APPENDIX C**

**Procedures When Applying for Exemptions**

1. A player's physician may petition the APA in writing to receive permission from two medical members of the Review Board to use for valid medical reasons a Prohibited Substance or a Doping Method.

...

3. An exemption will be evaluated on a case-by-case basis using the following procedures and criteria:

a. Class I: A Class I Prohibited Substance or Doping Method may not be used unless approved by two medical members of the Review Board. Due to the nature of the substances prohibited under Class I, an exemption will rarely be granted for such substances. However, the Review Board will consider the medical validity of the treatment and the possible performance enhancement effect that such a substance could have on the player and the Review Board may provide an exemption in exceptional circumstances. Only medically documented cases of extreme conditions may be considered by the Review Board.

...

**Addendum**

**CLASS I PROHIBITED SUBSTANCES**

**ANABOLIC AGENTS**

\*Clenbuterol

...

\*Clenbuterol is an anti-asthma medication that is also a powerful anabolic



agent that promotes muscle growth and is prohibited under Anabolic Agents.

...

**CLASS II PROHIBITED SUBSTANCES**  
**STIMULANTS**

\*Bambuterol

...

\*Fenoterol

...

\*Formoterol

...

\*Reproterol

...

\*Salbutamol

...

\*Salmeterol

...

\*Terbutaline

...

\*Permitted by inhaler only to prevent and/or treat asthma and/or exercise-induced asthma. Written notification by a treating physician that the player has asthma and/or exercise-induced asthma is necessary to the APA.

**ISSUES**

1. Should the "A" specimen test results be disqualified on the basis of the medical information provided to the Review Board?
2. If the answer to question one is No, was there a Doping Offense?
3. Are Exceptional Circumstances established?
4. If so, what sanctions are appropriate?

**REASONS**

**1. Should the "A" specimen test results be disqualified on the basis of the medical information provided to the Review Board?**

31. The Anti-Doping Review Board {"RB"} is described in Rule E. 3. as an outside group of experts with medical, technical and legal knowledge of anti-doping procedures who provide general assistance to the Anti-Doping Program of the ATP Tour. The RB has two mandatory functions to: a.) review test results confirmed at the laboratory as analytically positive; and, b.) review medical exemption requests. Both of these mandatory functions are involved in this matter. The issue under discussion involves the review of lab results by the RB in accordance with Rule J.
32. Under Rule J. 5. on receipt of medical information from the ML the RB shall determine whether "there are sufficient medical reasons to support the player's use of the Prohibited Substance". The RB may determine that an analytically positive test should be disqualified only if two circumstances are satisfied. First, if a prior medical exemption allowing the player's use of the Prohibited Substance would have been granted under section F and Appendix C. Second, if in the RB's judgement the Prohibited Substance was not used for the purpose of enhancing performance.
33. On the first of these circumstances in Rule J. 5. paragraph 1 of Appendix C provides that the two medical members of the RB are the decision makers. They are directed under paragraph 3 of Appendix C to evaluate the situation on a case-by-case basis using the described criteria. Those criteria indicate in clause a. that due to the nature of the substances prohibited under Class 1 an exemption "will rarely be granted". If an exemption is to be granted the RB is to consider the "medical validity of the treatment and the possible performance enhancement effect that such a substance could have on the player". The RB may provide an exemption in exceptional circumstances. In so doing only medically documented cases of extreme conditions may be considered.
34. The fact that the Player suffers from asthma has been established in these proceedings. Appendix C paragraph 1. provides a procedure by which a player's physician may petition in writing to the APA for a medical exemption in advance of the use of Clenbuterol in an asthma inhaler<sup>3</sup>. This was never done. Under Rule J. 5. the RB may also make the same

---

<sup>3</sup> The Tribunal is construing the Rules here in such a fashion as to primarily permit the use of Clenbuterol by an inhaler and not by oral ingestion. This is done because the reference to the less severe category of Class II is only by way of inhaler.

determination after the fact of an analytical positive test as it would have had to make in respect of a physician's petition to the APA in advance of the use of the substance. Clenbuterol is a Class I Prohibited Substance and has a note in the Addendum that "*it is an anti-asthma medication that is also a powerful anabolic agent*". Class II Prohibited Substances under the heading Stimulants permits inhalers to be used to prevent or treat asthma. Class II is a lesser category of Prohibited Substances than Class I in that the sanction for a first offense is three months as compared to two years. The RB may provide a medical exemption for such substances in advance or after the fact.

35. The Player submits that the RB did not take appropriate steps to make a reasonable and well-documented decision on whether the "A" specimen should be disqualified. It also submits that given the manner in which it went about making the decision it did not adhere to proper due process.

Decision of the RB

36. The quality of the RB's decision in these circumstances is dependent upon the information provided to it. In this case the RB was not advised by either the Player or the attending physician that the circumstances were an extreme emergency, as counsel for the Player kept reiterating at the hearing.

37. Dr. Viola's letter (Exhibit #5) describes the Player's condition as:

*I found the patient with a compatible picture with an asthma grade I-II (generalized broncho-spasm with middle obstruction to the exhalation without signs of cyanosis or sub cyanosis without fever).*

The Doctor's sworn statement to the Tribunal indicates the severity was grade II to III but that was not maintained by him in his cross-examination during the Tribunal hearing. In any event, the information before the RB was that the asthma attack was a Grade I to II; such an attack would be moderate in nature and does not indicate an emergency. The treatment also indicates the situation was not an emergency.

38. The patient was treated at home and was not hospitalized. The immediate treatment selected by the attending physician did not involve an injection or the use of an inhaler where the effects would be more immediate. Instead a

prescription was given to take 3 pills a day for two days and then two pills a day for five days. Such treatment does not indicate an emergency situation.

39. Finally, the Doctor, who was not familiar with the patient professionally, obtained all the medical history and other information from the Player at the time of attending on the Player at his home. The Player never advised the Doctor that, as a professional tennis player he was not permitted to take certain drugs that might be in prescribed medications. He failed to do so despite the fact that he had an ATP wallet card that clearly listed Clenbuterol as a Class I Prohibited Substance and referenced its anabolic effect. The Player was able to provide vital medical information while ignoring equally vital professional tennis information of a related medical nature. The Tribunal rejects submissions by the Player's counsel that he was not able to provide such information at the time because he was in extreme circumstances.
40. Given the foregoing analysis of the situation by the Tribunal and the information provided to the RB by the Player and his attending physician, the Tribunal must conclude that the RB was not under the impression that the situation was an emergency as was claimed before the Tribunal. Furthermore, the Doctor does not indicate to the RB that the steps he had taken were standard prescribing practises in Argentina. The Player should have been more explicit and detailed about what was going on in both his and the Doctor's submissions to the ML for the RB's consideration. The Tribunal finds that the Player did not establish before it, or in the documents placed before the RB, that the treatment was a "*documented case[s] of extreme conditions*" as required in Appendix C Paragraph 3. Therefore, the premise upon which the RB might have been able to grant a retroactive exemption was not present given the information provided by the Player and the Physician. That premise or necessary condition must also be read in the context of Appendix C in Paragraph 3, where it is stated that "*due to the nature of the substances prohibited under Class I, an exemption will rarely be granted for such substances*".
41. The Tribunal finds that there is no basis upon which to conclude that the RB did not take appropriate steps to make a reasonable well-documented decision on whether the "A" specimen ought to be disqualified. To the extent the RB did not have information it is the fault of the Player and his attending physician. The RB cannot be criticized for acting on the

information provided to it. The Tribunal concludes that the RB did take appropriate steps to make a reasonable and well-documented decision on whether the “A” specimen should be disqualified.

Decision making process of the RB

42. The Player submits that the APA did not administer the RB process with diligence when it permitted Dr. Pipe to miss the conference call. It is further submitted that the conference call failure was then aggravated by the APA taking upon itself to inform Dr. Pipe as to what had transpired on the RB telephone conference call after which Dr. Pipe ratified the decision of the RB.
43. While the Tribunal understands the necessity of a surgeon to be in his surgery there is an equally compelling duty to discharge the RB’s functions with full respect for due process. The RB is an integral part of the process of determining whether a Doping Offense has occurred under the Anti-Doping Rules. Under Rule J. 5., the RB alone has the power to determine that an analytically positive test should be disqualified. To exercise that jurisdiction and authority appropriately all members of the RB ought to be present and participating in any of its deliberations. Dr. Pipe was not present. He did not discharge his function as a member of the RB by failing to participate in the RB’s telephone conference discussions. After the deliberations Dr. Pipe was briefed on what had transpired. He subsequently ratified a decision taken by others. The RB lost the benefits of his input into their deliberations. The Tribunal wishes to caution the RB that it must observe all aspects of due process set out and required to be undertaken by the Anti-Doping Rules. This requirement means that, should there be a meeting for the purpose of making a decision, all members of the RB must be present and participating in the discussion and debate in discharging its obligation under the Anti-Doping Rules<sup>4</sup>. To do less is to commit a procedural error under the requirements of the Anti-Doping Rules. The RB’s failure to exercise procedural due process could possibly give rise to an exoneration from a potential Doping Offense.
44. The issue for the Tribunal to determine is whether the inappropriate action of the RB (deviation) ought to give rise to a substantive right on the Player’s

---

<sup>4</sup> Rule E. 3. requires the RB in discharging its functions in paragraphs a. & b. to be in unanimous agreement.

part to have the “A” sample disqualified on the facts of this case. In this assessment the Tribunal must apply Rule T. Does the deviation by the RB relating to its decision on a preponderance of the evidence before the Tribunal give rise to a material doubt as to the reliability of the decision?

45. The Rules do not require the RB to have a meeting. Thus, it is appropriate for the Tribunal to examine the e-mail correspondence between members of the RB. The e-mail of Dr. Pipe of the 16<sup>th</sup> of May 2003 triggered the conference call. He sets out in his e-mail certain information concerning the use of Clenbuterol in some European countries and noted that it is not available in North America. He also noted its anabolic effects indicating that its use in animal husbandry is why it is banned in sport. This information is confirmed as to its accuracy in the Player’s expert report filed with the Tribunal by Professor James.
46. Dr. Pipe in his e-mail felt that the documentation provided by the athlete’s physician indicated that the medication was appropriately prescribed. He thus felt a quick conference call was in order. When the call was arranged he was not on the call. This failure was the deviation from due process requirements. Dr. Montalvan, the other medical member of the RB, researched the subject through inquiries of his colleagues at the Paris hospital where he works as he advised the Tribunal in his testimony. He shared the results of that inquiry with the other members of the RB on the conference call. They unanimously agreed to not disqualify the analytical positive test result. Dr. Pipe appears to have accepted the RB deliberations upon learning of the result first from Mr. Appleby on 22 May 2003 and then in a letter from IDTM, the APA, on the same date. That letter indicates that there was discussion on the conference call of the fact that even if asthma were treated in Argentina with Clenbuterol there would not have been a medical exemption because Clenbuterol is a Class I Prohibited Substance. On receipt of this letter Dr. Pipe was asked to vote as to the outcome as were all the other members of the RB. The RB unanimously voted, as is reflected in faxes to the APA, to not disqualify the analytical positive test result.
47. All members of the RB had the material facts provided to them. The RB, other than Dr. Pipe had a discussion in his absence. The information discussed was summarized and distributed to Dr. Pipe by the APA.

Members including Dr. Pipe had time to reflect on their positions. The RB subsequently voted unanimously as a whole in a recorded vote by fax.

48. Applying the provisions of Rule T and based on a consideration of all of the foregoing facts in the paragraph above as well as all of the evidence the Tribunal does not find that the deviation raises a material doubt as to the reliability of the RB's decision. Therefore, the failure to adhere to procedural due process in the circumstances of this case should not result in the Tribunal declaring that there is no Doping Offense because the "A" sample ought to have been disqualified retroactively.

## **2. Was there a Doping Offense?**

49. There is an admission that Clenbuterol was in the Player's body. It is listed as a Class I Prohibited Substance under Anabolic Agents in the Addendum to Appendix B of the Anti-Doping Rules. Therefore, the ATP has established a *prima facie* Doping Offense within Rule C. 1. a. It has already been decided by this Tribunal that the RB's decision not to disqualify the "A" was in accordance with the Rules.

## **3. Are Exceptional Circumstances established?**

50. It is asserted on the Player's behalf that the facts of this matter are within the Exceptional Circumstances provisions found in Rule E. 4. c. In order to be within the scope of this Rule the Player must establish on a preponderance of the evidence: (i) with specificity the source of the Prohibited Substance; that, (ii) he did not know that he had been administered the relevant substance; and that, (iii) his conduct was reasonable in taking steps to avoid the substance being administered to him. The first criterion is met. The Tribunal knows with specificity the source of the Clenbuterol. It is the second and third criteria that require examination in this case.
51. Given the circumstances of the Player's niece and his own medical distress, it is possible that the Player did not know at the time of first administration

that he was receiving a Class I Prohibited Substance. The label from the box provided to the Tribunal clearly states that the substance is Clenbuterol. Even a person who spoke no English could match the ATP wallet card and the label on the box of medication. Thus, the Player could have discovered what he was taking if he was so inclined. Elite athletes, and particularly professional athletes, are well aware of the problems for sport in the clandestine use of performance enhancing drugs. Therefore, they know and are taught from the earliest stages of their career to be extremely careful of what they ingest. By Rule C. 3. the Player is “absolutely responsible for any Prohibited Substance found to be present within his body”. Prior Anti-Doping Tribunals of the ATP have found this rule to be one of strict liability<sup>5</sup>. The Tribunal also notes that the Player did not indicate on his doping control form or in his letter to the ML on 1 May 2003 that he had been taking an asthma medication. The Tribunal finds that the Player could have, and should have, made inquiries as to what medicine had been prescribed. The Tribunal finds that he knew or ought to have known that he was taking Clenbuterol after the initial two or three days of treatment. Therefore, the second criterion for use of the Exceptional Circumstances Rule E. 4. c. is not satisfied.

52. Even if the second criterion were satisfied, albeit briefly, the third criterion can never be satisfied on the facts of this case. The Player’s failure to inform his attending physician that he was a professional tennis athlete who could not take certain medications was not reasonable. Rule D.4 makes a player responsible for being knowledgeable of the provisions in the Rules; and, of the Program. This Rule also places upon the Player the responsibility to notify “his personal physicians, coaches and other relevant personnel” of the provisions of the Program<sup>6</sup>. The Player consented and agreed to the ATP Rulebook, see ATP Exhibit #2, and agreed by Rule B.1. that he would comply with and be bound by the provisions of the Anti-Doping Program set out therein. He knew or ought to have known under the Rules that he alone had absolute responsibility for what goes into his body as discussed above in connection with Rule C. 3. He did not give the doctor the ATP Tour wallet card. He made no attempts after his condition improved to discover what he was ingesting. Even a quick and cursory look at the box of medication would have revealed that he was taking Clenbuterol. In these circumstances, the Tribunal does not find that the

---

<sup>5</sup> See the decisions of *Chella; Coria* and the first decision in *Ulihrach* dated 1 May 2003.

<sup>6</sup> For a discussion of the point see the case of *Coria v. ATP* dated 19 December 2001 at paragraph 28.



Player's conduct was reasonable in taking steps to avoid the substance being administered to him after the first two days of administration. Therefore, the third criterion for use of the Exceptional Circumstances Rule E. 4. c. is not satisfied.

53. For all the foregoing reasons the Tribunal finds that the Player has not met the stated criteria for Exceptional Circumstances to be applied to his case. Therefore, the Player has been unable to rebut the presumption of strict liability by the evidence presented.

#### **4. What sanctions are appropriate?**

54. The Tribunal has found that the Player has committed a Doping Offense under Rule C. 1. a. in that he permitted Clenbuterol<sup>7</sup>, a Prohibited Substance to be in his body.
55. Rule M. on Penalties provides that for a Class I Prohibited Substance on a first Doping Offense the sanction is a suspension from "participation in any and all ATP sanctioned or recognized tournaments or events for a two-year period". The suspension will commence according to Rule N. 1. b. the day following the date of this Tribunal Decision. In *Coria, supra* and *Ulihrach*<sup>8</sup> credit was granted in the calculation of the suspension for time served voluntarily not playing tennis. In this case, the Player advised Mr Ings of his decision not to compete in any tournament from 2 October 2003 and has not played since that date. Therefore, credit will be granted for the voluntary suspension only from 2 October 2003.
56. The strict liability sanction for a Doping Offense arising out of an in-competition test is set out in Rule N.3. The Player will forfeit all Race/Entry Ranking points earned at the "Bell South Open Torneo de Viña del Mar", Chile. Rule N.3. also provides for "forfeit and return to the ATP all prize money without deduction for tax earned at the tournament". The foregoing forfeiture penalties become effective or payable under Rule N. 1.

---

<sup>7</sup> It is interesting to note that in all of the CAS jurisprudence there is only one case that involves Clenbuterol. See *UCI v. Aboujaparov & Uzbekistan Cycling Federation CAS 97/A/175. ???*

<sup>8</sup> The original decision on 1 May 2003 before its reversal based on new evidence in the decision of 8 July 2003.

- b. the day after the date of this Tribunal Decision.
57. The sporting disciplinary sanction for a Doping Offense is set out in Rule N. 3. It provides for forfeiture of all Race/Entry Ranking points and forfeit and return to the ATP all prize money without deduction for tax earned at subsequent ATP sanctioned or recognized events in which the player competed following the tournament at which the player provided the positive specimen until the commencement of the suspension under this Tribunal Decision which is 2 October 2003. In the Player's brief it is indicated that he would be obliged to return "\$ 135,795 as well as 23 Race and 311 Entry System Singles points and 118 Entry System Doubles Points".
58. The prescription lasted for 7 days ending on the 10<sup>th</sup> of February. The half-life of the Prohibited Substance is 27 hours<sup>9</sup>. The Lab analytical result of a low concentration of 5 ng/ml is consistent with the half-life expectation of a medically prescribed limited quantity of Clenbuterol for which there had been no administration for 3 days when the sample was given. The Player did not continue with the prescription medication after the 10<sup>th</sup> of February. He has been given the strict liability sanction required by the Rules. There can be no effect on other competitors during the period of his continuing competition until his voluntary cessation of play on 2 October 2003. Such possible continuing effect is one of the justifications for retroactive forfeiture of points and prize money. Furthermore, the expert report of Professor James indicates at paragraph 24 "that there is no direct evidence that the drug has any advantageous effects in trained healthy athletes". The performance enhancing effect, if any, ceased shortly after the completion of the prescription administration. Therefore, having heard the testimony and listened to the Player's explanation the Tribunal is satisfied that this is a case of inadvertent doping with no on going effects benefiting the Player and thus adversely harming the chances of his opponents to compete against him.
59. Any appeal from the Tribunal decision is by Rule U. 3. to the Appeals Arbitration Division of the Court of Arbitration for Sport {"CAS"}. That body has established within its jurisprudence the principle of proportionality. That principle has been described in *W v. International*

---

<sup>9</sup> Medical Clinics of North America March 1994, Chapter: Drug Use Update, Author Dr. Gary Wadler, pg 439-455, Published by W.B. Saunders

*Equestrian Federation CAS 99/A/246 at p. 514.*

*The Panel notes that it is widely accepted general principle of sports law that the severity of a penalty must be in proportion with the seriousness of the infringement.*

Proportionality has been applied in *Chagnaud v. FINA CAS 95/A/141*<sup>10</sup> to reduce a 2 year suspension of a long-distance swimmer with a good reputation of compliance with doping rules who had been accidentally doped by the coach without the swimmer's knowledge and because another swimmer had merely received a strong warning in a parallel case. In *Cullwick v. FINA CAS 96/A/149*<sup>11</sup> a case where there was a technical offence involving salbutamol without knowledge and no additional sanction was imposed beyond the finding of guilt. That decision was very similar to one at the Sydney Olympic Games involving *Raducan v. IOC CAS Sydney 00/11*<sup>12</sup>. The principle was also used to reduce the suspension sanction in two cases arising out of the summer Olympics in Sydney but decided afterwards. See *Aanes v. FILA CAS 01/A/317* and *Leipold v. FILA CAS 00/A/312*.

60. The Tribunal finds that the principle of proportionality ought to be applied to the forfeiture of prize money because the doping violation was inadvertent and for a limited time period of less than two weeks during which there could be no continuing performance enhancing effect after the prescription was no longer used. The Player is also the supporter of his own family and other family members who depend upon his livelihood. Therefore, while the Tribunal will, given the seriousness of the offence, impose the strict liability sanction described in paragraph 56 of this decision it will not give effect to the forfeiture of prize money other than for the tournament in which the positive analytical result was found because of the application of the principle of proportionality.
61. The matter of a continuing disciplinary sanction must also be reviewed against the principle of proportionality. The sporting sanction under the Rules for a Class I Prohibited Substance is a two-year suspension. The same sanction under the Class II Prohibited Substance of which the other

---

<sup>10</sup> Case may be found in *Digest of CAS Awards 1986-1998* (1998, Berne) at p. 215.

<sup>11</sup> *supra*, at p. 251.

<sup>12</sup> Case may be found in *Digest of CAS Awards 1998-200* (2002, Kluver) at p. 665.

asthma treatments must be dealt with is a three month suspension in Rule M. 2. a. Therefore, the sanction in this case must be longer than the Class II suspension for failure to have obtained the medical exemption in advance. In other tennis cases the sanction has been reduced where a Class I substance has been involved for a period of 3 months in the case of *Chela* and a period of 7 months in the case of *Coria*. In both of those cases the Exceptional Circumstances provisions were available and used to reduce the sanction. In this case the Exceptional Circumstances provisions were not available as determined by this Tribunal. Therefore, the sanction ought to be longer than in those cases but not significantly so given all the circumstances and considerations of this case. The Tribunal determines that a suspension of 9 months ought to be imposed. The Player is to receive a suspension under this decision that will end on 1 July 2004.

---

**DECISION**

---

The Tribunal makes the following orders based upon the foregoing grounds and discussion in the above opinion.

1. A First Doping Offense has occurred under Rule C 1. a. The Doping Offense involved the use of a Class I Prohibited Substance for which no medical exemption had been obtained nor could have been retroactively obtained. Under Rule M. 1. a. it is ordered that the Player be suspended from participation in any and all ATP sanctioned or recognized tournaments or events for a two-year period subject to the application of the principle of proportionality by which the suspension is reduced to 9 months inclusive of the voluntary suspension which commenced on 2 October 2003. The suspension is to commence on the day following the date herein as provided for in Rule N. 1. b. and will cease on 1 July 2004.
2. Under Rule N. 3. it is ordered that the Race/Entry Ranking points and prize money earned at the Vina Del Mar tournament in Chile in 2003 be forfeited. The prize money is to be returned to the ATP without deduction for tax and is payable under Rule N. 1. b. on the day following the date herein.
3. There will be no forfeiture of prize monies or Race/Entry Ranking points pursuant to the Rules other than those set out in paragraph 2 above because of the application of the principle of proportionality.

DATED THIS 29<sup>th</sup> DAY of DECEMBER 2003. SIGNED in COUNTERPARTS.

---

Prof. Richard H. McLaren, C.Arb  
(Chairman)  
Barrister and Solicitor

**SIGNED AT: London, Ontario, CANADA**

---

Dr. Arturo Martí  
Rio Piedras, PUERTO RICO

---

Dr. Gary Wadler  
Manhasset, New York

---