

**THE ATP TOUR ANTI-DOPING TRIBUNAL
APPEAL OF JUAN VILOCA**

OPINION

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 MD, medical member, was formed by Richard Ings the **ATP Administrator of Rules** following a **Review Board** {"RB"} determination that Juan Albetls Viloca {"Player"} had a case to answer under the Tennis Anti-Doping Program 2004 {"Anti-Doping Rules"}. Those rules are contained within the ATP 2004 Official Rulebook {"Rules"} found at p. 87 through 122. The Anti-Doping Rules are designed to maintain the integrity of men's 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.

Senior Luis Miguel DeLaFuente Mochales, Esq. represented the Player.
Mr. John MacLennan, Esq. represented the ATP Tour {hereafter the "Tour" or the "ATP"}

Procedural Order No. 1 was issued on 16 February 2005 to prescribe the procedure to be followed in this proceeding. An amending order was issued on 5 April 2005. During the course of following the amended Procedural Order, the Player elected under Rule K. 1. c. of the Anti-Doping Rules to admit to the commission of a Doping Offense. The effect of that admission, made by his counsel during a conference telephone call on 12 April 2005, is that the Player accedes to the consequences specified in the notice of 11 January 2005 from the ATP of a case to answer under the Anti-Doping Rules. That notice indicated that a sanction of possibly up to two years ineligibility from any ATP (or its related organizations) authorized and organized events or activities, together with any other sanctions provided for in the Anti-Doping Rules could, be imposed depending upon the circumstances.

As a result of the Player's admission in accordance with Rule K. 1. c., a hearing before the full Tribunal was no longer required. At the time of the conference call on 12 April 2005 during which the admission of a Doping Offense was made, it

was agreed by counsel that there was no need to provide the Chairman of the Tribunal with any further written submissions. By e-mail note to the parties' counsel, the Chairman closed the proceedings on 12 April 2005. The Chairman of the Tribunal following consultation with the other members of the Tribunal issues the decision herein.

BACKGROUND FACTS

1. The Player is a professional tennis player from Spain. He is a long time member of the ATP. On 2 January 2004 the Player signed the consent form required by Rule B. 1. for the 2004 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.
2. The ATP 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 both the tournaments and the players.
3. The Player provided a urine sample pursuant to the Anti-Doping Rules during an ATP sanctioned challenger tournament at the Bonasport Club of Barcelona, Spain on 9 October 2004. The sample was collected in accordance with the International Standard and Rule F. 5. of the ATP Anti-Doping Rules.
4. The urine sample provided was analyzed by the Laboratoire de Controle du Dopage INRS Institut Armand-Frappier {"the Lab"}, located in Pointe Claire, Quebec, Canada, a World Anti-Doping Agency {"WADA"} accredited laboratory. The Lab reported to Mr. Sahlstrom of the International Doping Tests & Management {"IDTM"}. He is the **Anti-Doping Program Administrator** {"APA"} under the Anti-Doping Rules. The Lab analytical result contained in the Doping Control Report states that the "A" sample of the Player indicated the presence of 16a-Hydroxyprednisolone (budesonide metabolite), which is a Glucocorticosteroid, listed in Appendix 3 (*The 2004 Prohibited List*) at S. 9

in the Anti-Doping Rules. The Player did not exercise his right to request that the “B” sample be analyzed to confirm the existence of the **Prohibited Substance**.

5. Following the notification of the **Adverse Analytical Finding** Mr. Sahlstrom, representing the APA, selected three RB members under Rule J. 2. a. The RB advised the APA that there was a case to answer. The APA in turn advised the **ATP Administrator of Rules**.
6. On 21 December 2004 the APA notified the Player under Rule J. 2. d. that his “A” sample had produced an analytical positive result for the prohibited Substance budesonide. The Player was advised that he had a right to have the “B” sample analyzed. That notification further advised that if he did not request the testing of the “B” sample within 14 days, he would be deemed to have waived his right to have the “B” sample analyzed.
7. The Player did not request that the “B” sample be analyzed. The consequence of this failure and the operation of the Anti-Doping Rules caused the APA, Mr. Shalstrom, to notify the ATP that the Player had committed a **Doping Offense**.
8. The appointment of this Tribunal was confirmed by correspondence dated 11 January 2005. The Player by signing the amended Procedural Order No. 1 on 5 April 2005 confirmed the appointment of the Tribunal and agreed that he had no objection to the composition or the jurisdiction of this Tribunal. The ATP likewise confirmed the appointment and composition of the Tribunal on signing Procedural Order No. 1.
9. As required by Rule K. 1. a., the **ATP Administrator of Rules** notified the Player on 11 January 2005 that he had committed a **Doping Offense** and he could be subject to up to a two-year period of ineligibility. The Player exercised his right under the rules to have a hearing following which the **ATP Administrator of Rules** caused the formation of this Tribunal.
10. By Rule J. 2. e. the Player is deemed to have accepted the “A” sample analysis. Therefore, the Player has admitted to the commission of a **Doping Offense** because of the presence of a **Prohibited Substance** in his urine specimen.

11. On 29 December 2003 Dr. Malet I Casajuana conducted an allergic reaction test on the Player. He prescribed the use of a Nasal Budesonide 100mg, puffer. The Player was instructed to use the puffer by the inhalation of 1 puff through each nostril once a day. The purpose was to treat the diagnosed condition of extrinsic continuous rhinitis. Since December of 2003 the Player has been following this treatment *with specific immunotherapy to dust acarids and receives symptomatic treatment with topic corticoids: nasal Budeconide 100 meg. Aldo- Union and oral antihistaminic: Ebastel (ebastine) for his nasal symptoms control.* {Sworn witness statement of 17 January 2005}
12. A copy of the Doping Control Form found as attachment “A” in the Report of the APA clearly indicates in the medical declaration portion of the form that the Player is using *Budesonida Nasal*. Therefore, at the time of the giving of the sample, the Player made the necessary declaration that he was using a puffer. What he failed to do was to obtain the Therapeutic Use Exemption {TUE} required under S.9 of Appendix Three being the 2004 Prohibited List.
13. In accordance with amended Procedural Order No. 1 the Player provided sworn copies of character references from Cristobal Pichel Martinez, a partner in the Barcino Tennis Club of which the Player has been a representative for more than ten years and from Mrs. Ana-“Esperanza” Marin Teixeira, a person who has known the Player for many years. Both statements attest to the high opinion they hold personally of the Player. Mr. Martinez attests that members of the tennis club have a high opinion of the Player as a tennis professional and as a person. Ms. Teixeira attests to the Player’s *impeccable behaviour*. Both individuals’ statements also attest to the fact that they knew of the Player’s allergic problem and the fact that he used medication for it.
14. The Player admitted at an early stage in the process that he was using the puffer. He attests that he had no intention to gain a performance advantage by the use of the puffer. It was prescribed for an existing medical condition that had been diagnosed by a medical doctor. He also states that he was unaware that he was using a prohibited substance. The ATP reply brief states that they have no evidence to refute Mr. Viloca’s statements.
15. It was agreed between counsel for the parties that the Player had not

competed in any ATP Tour (or its related organizations) authorized and organized events or activities since receiving the notification of the commission of a Doping Offense on 22 December 2004. Therefore, the period of voluntary **Ineligibility** amounts at the time of writing to almost four months.

16. **THE RELEVANT ANTI-DOPING RULES**

B. Covered Players and Events

...

2. Any player who enters or participates in a **Competition, Event** or activity organized, sanctioned or recognized by the ATP, or who is an ATP member or who has an ATP ranking (a "**Player**") shall be bound by and shall comply with all of the provisions of this Program ... Further, for each calendar year all such players shall, as a condition of 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 2.

...

C. Doping Offenses

Doping is defined as the occurrence of one or more of the following (each, a "**Doping Offense**”):

1. *The presence of a Prohibited Substance or its Metabolites or Markers in a Player’s Specimen, unless the Player establishes that the presence is pursuant to a therapeutic use exemption granted in accordance with Article E.*

...

E. Therapeutic Use Exemptions

1. *The International Standard for Therapeutic Use Exemptions issued by WADA sets out the circumstances in which Players may claim an exemption to Use one or more Prohibited Substances or Prohibited Methods to treat documented medical conditions. In order to rely upon such an exemption to excuse the Use, the presence in a Sample or the*

Possession of a Prohibited Substance or Prohibited Method that would otherwise amount to a Doping Offence under this Program, a Player must obtain a therapeutic use exemption (“TUE”) prior to such Use, presence or Possession.

...

J. Review Board

2. Review of Adverse Analytical Findings

...

e. If the player does not request analysis of the B Sample within fourteen days of receipt of the notice specified in Article J.2.d., above, the Player shall be deemed (a) to have waived his right to have the B Sample analyzed; and (b) to have accepted the A Sample analytical results.

...

K. Due Process

1. Commencing proceedings before the Anti-Doping Tribunal

...

c. The Participant shall be entitled at any stage to admit that he has committed the Doping Offense(s) specified in the Notice and to accede to the Consequences specified in the Notice. In such circumstances, a hearing before the Anti-Doping Tribunal shall not be required. Instead, the Chairman of the Anti-Doping Tribunal shall promptly issue a decision confirming the commission of the Doping Offense(s) specified in the Notice, and ordering the imposition of such Consequences (including, where this Program specifies a range of possible Consequences, specifying what the Consequences should be in that particular case). Where a range of possible Consequences is specified in the Program, written submissions may be made by or on behalf of the Participant in mitigation at the time of admission of the Doping Offense, and the Chairman of the Anti-Doping Tribunal shall be entitled to take those submissions, as well as any rebuttal submitted by the ATP, into account in

determining what **Consequences** should apply.

...

L. Automatic Disqualification of Individual Results

1. *A doping Offense committed by a Player in connection with or arising out of an **In-Competition** test automatically leads to **Disqualification** of the individual result obtained by the Player involved in that **Competition** with all resulting consequences, including forfeiture of any medals, titles, computer ranking points and prize money (without deduction for tax) obtained in that **Competition**.*

...

M. Sanctions on Individuals

2. **Imposition of Ineligibility for Prohibited Substances and Prohibited Methods**

*Except where the substance at issue is one of the specified substances identified in Article M.3, the period of **Ineligibility** imposed for a violation of Article C.1 (presence of **Prohibited Substance** or its **Metabolites** or **Markers**), Article C.2 (**Use** or **attempted Use** of **Prohibited Substance** or **Prohibited Method**) or Article C.6 (**Possession** of **Prohibited Substances** and/or **Prohibited Methods(s)**) shall be:*

First Offence: Two (2) years' Ineligibility.

Second Offence: Lifetime Ineligibility.

*However, the **Participant** shall have the opportunity in each case, before a period of **Ineligibility** is imposed, to establish the basis for eliminating or reducing this sanction as provided in Article M.5*

...

3. **Lesser Sanction for Specified Substances.**

The **Prohibited List** may identify specified substances that are particularly susceptible to unintentional anti-doping rules violations because of their general availability in medicinal products or that are less likely to be successfully abused as doping agents (a "**Specified Substance**"). Where a player can establish that the **Use** of such a Specified Substance was not intended to enhance sport performance, the period of **Ineligibility** found in Article M.2 shall be replaced with the following:

First offense: At a minimum, a warning and reprimand and no period of **Ineligibility** from future **Events**, and at a maximum, one (1) year's **Ineligibility**.

...

7. **Disqualification of Results in Competitions Subsequent to Sample Collection**

In addition to the automatic **Disqualification**, pursuant to Article L, of the results in the **Competition** that produced the positive **Sample**, all other competitive results obtained from the date a positive **Sample** was collected (whether **In-Competition** or **Out-of-Competition**) or other Doping Offense occurred through to the date of commencement of any **Ineligibility** period shall, unless fairness requires otherwise, be Disqualified with all of the resulting consequences, including forfeiture of any medals, titles, computer ranking points and prize money (without deduction for tax).

...

8. **Commencement of Consequences**

Any **consequences** set out in the decision of the **Anti-Doping Tribunal** shall come into force and effect on the date that the decision is issued, save that:

...

c. The period of **Ineligibility** shall start on the date that the decision is issued, provided that:

*(i) any period during which the Player demonstrates he has voluntarily foregone participating in Competitions shall be credited against the total period of **Ineligibility** to be served; and*

APPENDIX THREE

THE 2004 PROHIBITED LIST

Valid 1st January 2004
(Updated 25 November 2003)

SUBSTANCES AND METHODS PROHIBITED IN-COMPETITION

PROHIBITED SUBSTANCES

S.9 GLUCOCORTICOSTEROIDS

Glucocorticosteroids are prohibited when administered orally, rectally, or by intravenous or intramuscular administration

All other administration routes require a medical notification in accordance with section 8 of the International Standard for Therapeutic Use Exemptions.

SPECIFIED SUBSTANCES

“Specified Substances” are listed below:

Stimulants: ephedrine, L-methylamphetamine, methylephedrine.
Cannabinoids.
Glucocorticosteroids

REASONS

17. A **Doping Offense** has been established under Anti-Doping Rule C. 1 by virtue of the admission made pursuant to Rule K. 1. c. It is so found by this Tribunal.
18. The Player committed a Doping Offense pursuant to an **In-Competition** test. Under Rule L. 1. there is an automatic **Disqualification** of the individual result obtained by the Player in that **Competition**, with the resulting consequence of forfeiture of any medals, titles, computer ranking points and prize money obtained in the **Competition**. This Tribunal finds that automatic **Disqualification** of the individual results applies in this case.
19. The Tribunal's finding of proof of a **Doping Offense** leads to a period of **Ineligibility** under Rule M. 2. for a First Offense of two years. That period may be eliminated or reduced depending upon the application of Rule M. 3 dealing with **Specified Substances**; or, under either Rule M. 5 a. or b. if there is either no fault or negligence; or, no significant fault or negligence. This latter Anti-Doping Rule is known as **Exceptional Circumstances**.
20. The analytical finding of 16a-hydroxyprednisolone (budesonide metabolite) is a **Prohibited Substance** that is a glucocorticosteroid listed in Appendix 3 (*The 2004 Prohibited List*) at S. 9 in the Anti-Doping Rules. Glucocorticosteroids are also a Specified Substance under the same Appendix. Under Rule M. 3 the sanction for a first offense is at a minimum a warning and reprimand and at a maximum one (1) year's **Ineligibility**.
21. Rule M.3 comes into play for a lesser sanction when a player establishes that their use of the substance "*was not intended to enhance sports performance*". The Player contends and submits evidence that the substance did not enhance his performance for he had unknown to him received the *Budesonide* in connection with the use of his puffer to treat a known and medically diagnosed condition. There is no other evidence to establish that his use may have been performance enhancing. Therefore, this Tribunal finds that the *Budesonide* was not intended to enhance performance.

22. The Player accepts the responsibility imposed upon him by Rule C. 1. He admits that his actions were careless in not making sure of the composition of the medication he was taking and learning of the need to have applied for a TUE. He was not trying to conceal his use and declared it on his Doping Control Form. His intentions were the legitimate therapeutic use of his puffer. In essence, his error was not applying for the TUE before using the puffer.
23. The Player has no history of Anti-Doping Rule violations. He is a veteran player in the twilight of his career. He is well regarded in his community and considered to be a person of good character and behaviour. In these proceedings he has conducted himself in a manner that accepts the responsibilities placed upon him under the Anti-Doping Rules. He has not attempted to maintain innocence in the face of evidence to the contrary and has not caused the ATP to go to expensive pursuit of his case.
24. In the decision by the present Chairman in *Bernabé v. ATP* dated 7 April 2005, a sanction of two months was imposed for a glucocorticosteroid infraction of a different method of administration. No other cases were cited in support of the ATP suggestion that a period of **Ineligibility** of between two and four months would be appropriate.
25. Under Rule M. 8. c. (i) the time that the Player demonstrates he has voluntarily foregone participation in Competitions is to be credited against any period of **Ineligibility** required to be served. The Tribunal finds that given the fact that he has not competed since receiving notice of the doping infraction on 22 December 2004, he has *de facto* served close to a four-month voluntary suspension from competition. In the circumstances of no intent to have committed a rule infraction and with forthright disclosure, meaning that the primary improper conduct is not applying for a TUE, the period served to date is all that is required as a period of **Ineligibility**. Therefore, the Tribunal finds that the time served voluntarily is to be the period of **Ineligibility** set by this decision. The period of Ineligibility is to cease commencing the day following the issuance of this decision.

DECISION

The Tribunal makes the following orders based upon the foregoing grounds

and discussion in the above opinion.

1. The Player under Rule K. 1. c. admitted a First **Doping Offense** thereby establishing that a **Doping Offense** has occurred as defined in Rule C 1. The **Doping Offense** involved the use of a **Specified Substance**, a Glucocorticosteroid referred to in S. 9. of Appendix Three "*The 2004 Prohibited List*".
2. Rule L. 1. disqualifies the results obtained at the "ATP Challenger Tournament" in Barcelona, Spain on 9 October 2004. Any medals, titles, computer ranking points and prize money (without reduction for tax) obtained at the **Competition** are forfeited. The commencement of the foregoing Consequences is to be effective in accordance with Rule M. 8.
3. Under Rule M. 3. the period of **Ineligibility** otherwise applicable is determined to be the period of voluntarily foregoing participation in **Competitions**. In accordance with Rule M. 8. c. (i) this **Ineligibility** shall terminate on the day following the date herein.

DATED THIS 15th DAY of APRIL 2005.

Prof. Richard H. McLaren, C.Arb
(Chairman)
ATP Tour Anti-Doping Tribunal
Barrister and Solicitor

SIGNED AT: London, Ontario, CANADA