



Arbitration CAS 2005/A/990 P. v. IIHF, award of 24 August 2006

Panel: Mr Dirk-Reiner Martens (Germany), President; Mr Richard H. McLaren (Canada); Mr Hans Nater (Switzerland)

Ice Hockey

Doping (nandrolone)

Strict liability

No fault or negligence

Liability for failing to disclose a medical treatment and to apply for a (retroactive) TUE

1. It is generally accepted and has been recognised by the CAS in numerous awards that the so-called strict liability principle is not objectionable under Swiss law as long as the athlete has a right to adduce counter evidence as to his/her fault or negligence in connection with his/her doping violation.
2. Art. 10.5 WADC burdens the athlete with proving the absence of (significant) fault or negligence on his/her part thus shifting the burden of proof to the athlete. This principle has been recognised by CAS as not being in violation of Swiss law. The standard of proof is a balance of probability (Art. 3.1 WADC).
3. The clear evidence that a prohibited substance was administered by the treating doctor in an emergency situation and that the athlete had no means of preventing its administration because of his/her very bad physical and psychological condition is a sufficient reason to discharge the athlete's burden of proof of no fault or negligence in the circumstances of the case.
4. The WADC is not entirely clear as to whether the athlete has to prove that he/she is without fault or negligence not only in connection with the entering of the substance into his/her body but also in respect of that substance staying there. In other words, the question is whether an athlete is still liable for an anti-doping violation if he/she negligently fails to disclose his/her medical treatment and to apply for a (retroactive) TUE. This question can remain unanswered in the present case due to its unique circumstances.

The Appellant P. (the "Appellant" or the "Player") is a Ukrainian professional ice hockey player who participated in the IIHF Senior Ice Hockey Championship 2005 in Vienna and Innsbruck as a member of the National Ice Hockey Team of Ukraine.

On 1 May 2005, after the game between Ukraine and Sweden, the Appellant was requested to submit to doping control. The analysis of the “A” sample showed the presence of norandrosterone, a metabolite of the anabolic steroid nandrolone, which is a prohibited substance under the IIHF anti-doping rules. The “B” test confirmed this result.

On 14 November 2005 the IIHF Disciplinary Committee (the “IIHFDC”) imposed a two-year suspension on the Player for having committed an anti-doping rule violation (the “Contested Decision”). The suspension started 5 May 2005 and was to end on 04 May 2007. The Contested Decision came to the conclusion that the Player committed an anti-doping rule violation and that he failed to provide sufficient evidence that he was without (significant) fault or negligence in connection with this violation. In particular, the Contested Decision argues that the Player did not prove that *“the presence of the prohibited substance ... has its source in a medical treatment of the alleged heart ailment with retabolil”*. The Contested Decision further concluded that the Player failed to prove, *“that the treatment of a heart ailment with retabolil met the medical standard in the Republic of Belarus, or has given any verifiable reason why he nevertheless would have been treated in such a way”*. According to the Contested Decision the documentation produced by the Player *“leaves open whether the injection actually has been performed”*. The Contested Decision also states *“that the Panel received the information about his [the Player’s] treatment only through P, and that the Panel neither got information about the person who treated him nor a statement on the medical indication of the treatment with retabolil”*. As a result, the Contested Decision concludes that *“the Panel has not found any evidence that the presence of the prohibited substance has been or could have been caused by a medical treatment he [the Player] was not aware of”*.

This decision by the IIHF is the subject matter of the appeal filed by the Player on 13 December 2005. On 28 December 2005 the Player also filed an application for a stay of the execution of the IIHFDC decision. The application was dismissed on 19 January 2006.

The Player submits that during a championship game of his team “Khimovolokno-Mogilev” in Belarus on 21 March 2005 he was body checked by a player of the opposite team and, as a result, hit the boards so hard that he had to be taken off the ice. In the changing room he was helped out of his hockey gear and then taken to the hospital where he was treated on account of acute heart failure which was later diagnosed as “Postcardio cardiosclerosis”. In the emergency room he was given intravenous and intramuscular injections. The Appellant contends that unbeknownst to him one of these injections was 1 ml of Retabolil 5%, a steroid also known as Nandrolone. According to the Player, the team doctor failed to accompany him to the hospital, a fact which caused the team to terminate the doctor’s engagement by the team. The Player further submits that when arriving at the hospital he was in a very bad physical and mental condition which made it impossible for him to monitor or even ask questions about the treatment which was going to be applied. He was in severe pain and all he cared about was saving his life. According to the Player, his physical condition improved rapidly after his treatment on 21 March 2005 in the hospital which allowed him not only to leave the hospital the next day but also to resume training approximately two weeks later and to join the Ukrainian national team on or about 15 April 2005. After leaving the hospital he did not pay much attention to the incident and was merely looking forward to being part of the Ukrainian national team during the forthcoming World Championship. Following his positive doping test on 1 May 2005 the Player conducted his own investigations as to how the prohibited substance had entered his body. In June 2005, he requested from the hospital the documentation of his treatment

on 21 March 2005. The documentation provided to him was initially inconclusive as to the type of injections administered to him. Only after a change in the hospital administration in November 2005 did the Player receive additional documents which proved, inter alia, the injection of Retabolil. As a result of his submissions, the Player argues that he cannot be accused of having “used” a prohibited substance within the meaning of the IIHF regulations. The term “use” required an action on the part of the Player and cannot be extended to a situation where he was injected with a (prohibited) substance without his will and knowledge. But even if the mere presence of a prohibited substance in his body was to be considered a doping offence, in the Player’s opinion he bears no fault or negligence in connection with his positive doping test because he was physically and mentally unable to control the treatment applied on 21 March 2005. The Player therefore requests the CAS to set aside the Contested Decision.

The Respondent argues that the mere presence of a prohibited substance in an athlete’s bodily specimen constitutes an anti-doping rule violation pursuant to the IIHF and WADA rules. No intent, negligence or knowing use was necessary. There can thus be no doubt that the player committed an anti-doping rule violation. With respect to the Player’s claim of no (significant) fault or negligence on his part, the Respondent contends that the Player *“did not offer any adequate evidence that would support his allegations that have to be qualified as untrustworthy in their entirety”*. The Respondent also argues that even if one were to assume in the Player’s favour that he was without fault or negligence in connection with the injection of Retabolil on 21 March 2005, *“he would still have had the obligation to care about what substances he received and to disclose his medical treatment prior to entering the World Championship and the training camp”* (which the Player does not contest having failed to do).

A first hearing was held in this matter on 21 April 2006 at which the Player’s witnesses were unable to attend because of visa problems. Despite the IIHF’s agreement to hear the witnesses’ testimony via telephone conference, the Panel felt unable to do so because it wanted to form its own view and ask questions in the witnesses’ physical presence. Therefore, the matter was adjourned to another day. A second hearing was held on 21 June 2006 at which the *viva voce* testimony of three witnesses on behalf of the Appellant was taken.

LAW

1. According to Article R 58 of the Code of Sports-related Arbitration the *“Panel shall decide the dispute according to the applicable regulations and (...)”*; in this case these are the IIHF Disciplinary Regulations.
2. On the basis of the parties’ submissions and the testimony of the witnesses, there can be no doubt – and it is uncontested – that a prohibited substance was present in the Player’s urine sample collected on 1 May 2005 and that, therefore, he committed an anti-doping rule violation. Based on the evidence before it, the Panel concludes that the presence of the prohibited substance was caused by the injection of Retabolil in the emergency room of the hospital.

3. The Panel does not have to discuss the question of whether the Player “used” a prohibited substance in that according to Section 6.3(a) of the IIHF Disciplinary Regulations,
“In case of presence of a prohibited substance in an athlete’s bodily specimen (Code [i.e. World Anti Doping Code] Article 2.1).

...

The following sanctions shall apply:

- *First violation: Two years ineligibility”*

the mere presence of a prohibited substance in an athlete’s urine sample constitutes an anti-doping rule violation. It is generally accepted and has been recognised by the Court of Arbitration for Sport in numerous awards that this so-called strict liability principle is not objectionable under Swiss law as long as the athlete has a right to adduce counter evidence as to his fault or negligence in connection with his doping violation.

4. According to Section 3.10 of the IIHF Disciplinary Regulations “(T)he Deciding Panel [i.e. the IIHF Disciplinary Committee] ... *gives the alleged person [i.e. the Player] the possibility of establishing a basis for eliminating or reducing the sanctions as foreseen in Article 10.5 of the Code [i.e. the World Anti-Doping Code]*”. Article 10.5 of the Code burdens the athlete with proving the absence of (significant) fault or negligence on his part thus shifting the burden of proof to the athlete. This principle has been recognised by CAS as not being in violation of Swiss law (CAS 2005/A/830, seq. 10.17). The standard of proof is a balance of probability (Art. 3.1 of the World Anti-Doping Code).

Consequently, the only issue for this Panel to decide in this matter is whether the Player was able to establish that he bears either no fault or negligence or no significant fault or negligence for the Anti-Doping Rule Violation. In the Panel’s opinion the Player succeeded in proving that he bears no fault or negligence.

5. The Contested Decision which, unlike this Panel, did not have the benefit of Ms P.’s written declaration of 23 January 2006 and of the live testimony of the three witnesses, was not convinced of the truthfulness of the Player’s explanation as presented at the time when the Contested Decision was made and thus concluded that it did not find “*any evidence that the presence of the prohibited substance has been or could have been caused by a medical treatment he [the Player] was not aware of*”. Likewise, the Respondent’s Disciplinary Committee found the Player’s allegations “*untrustworthy in their entirety*” and further argued that “*it would have been the obligation of Appellant [the Player] to call for witnesses who were at the hospital and can confirm that the Appellant was treated in the way alleged by Appellant, that he had a heart failure and that Appellant was given the substance without Appellant’s knowledge*”. This is exactly what the Player did by bringing three witnesses to the hearing on 21 June 2006 who fully confirmed the Player’s explanation.
6. On the basis of the evidence provided by the Player since the Contested Decision was made, the Panel finds that sufficient evidence has been provided by the Player that under the unique circumstances of this case he was unable to influence or control the treatment applied to him

in an emergency situation. The Panel can find no reason to put into question Ms P.'s testimony that the Player was *"in a very bad physical and psychological condition (...). As a result of severe pain (he) was unable even to speak"*. In these circumstances he was unable to prevent the treating doctor from administering a prohibited substance. The Panel is thus of the opinion that the Player demonstrated that he was without fault or negligence for the anti-doping rule violation and that the otherwise applicable period of ineligibility must be eliminated.

7. It is irrelevant under the circumstances of this case whether the diagnosis of an *"acute heart failure"* was accurate or whether – as is stated in the Contested Decision – *"the treatment of a heart ailment with Retabolil met the medical standards in the Republic of Belarus"* or that of Western Europe or North America. There is clear evidence that Retabolil was administered and that the Player had no means of preventing its administration. This is sufficient reason to discharge the Player's burden of proof of no fault or negligence in the circumstances of this case.
8. In his closing statement, counsel for the Respondent posed a number of questions which he believes remain unanswered, e.g.
 - why a steroid like Retabolil was administered in a case of an alleged heart failure where steroids are known to cause rather than cure such illness,
 - why no follow-up treatment was made after an acute heart failure,
 - why the Player did not inform the Ukrainian national team of his alleged illness.

All of these questions are irrelevant for the outcome of this case unless they are designed to challenge the credibility of the Player's explanation. In this respect, however, the Panel found the witnesses' testimony convincing and trustworthy and therefore reaches the conclusion that the Player must be considered as being without fault or negligence.

The Panel recognises that Dr V., who testified as an expert-witness on behalf of the Respondent, expressed doubts as to the accuracy of the diagnosis of a heart condition because of the Player's speedy recovery. However, the fact remains that Retabolil was administered to the Player at a point in time when he had no control over what was happening to him.

9. Finally, the Respondent argues that *"even if one was to accept in favour of Appellant that the substance was given to him without any fault and knowledge on his side, he would still have had the obligation to care about what substance he received and to disclose his medical treatment prior to entering the World Championship and the training camp"*, thereby implying that the Player's failure to do so would by itself constitute an anti-doping rule violation. In fact, the question must be asked whether an athlete who is without fault or negligence in connection with the entering of a prohibited substance into his body is still liable for an anti-doping rule violation if he negligently fails to disclose this fact and to apply for a (retroactive) Therapeutic Use Exemption (TUE).
10. The Code considers "the presence" of a prohibited substance in an athlete's bodily specimen as an anti-doping rule violation. Consequently, such "presence" constitutes a violation at any point in time from the moment the substance enters the body until it is no longer "present". In order to escape the sanctions under the Code, the athlete must establish that he bears no

(significant) fault or negligence “for the violation” (Section 10.5 of the Code). The Code is not entirely clear as to whether such defence requires the athlete to prove that he is without fault or negligence not only in connection with the entering of the substance into his body but also in respect of that substance staying there. The latter interpretation is supported by Section 4.7 of the WADA International Standard for Therapeutic Use Exemptions which provides:

“An application for a TUE will not be considered for retroactive approval except in case where:
a. emergency treatment or treatment of an acute medical condition was necessary, (...).”

11. This rule indicates that in the present case the Player would in fact have been obligated to apply for a retroactive TUE and that his failure to do so makes him liable for sanctions under the Code unless he establishes that he bears no fault or negligence in connection with this failure.
12. The Panel does not have to decide whether this is the proper construction of the Code because in the unique circumstances of this case the Player bears no fault or negligence for his failure to disclose his treatment and to apply for a (retroactive) TUE. The evidence has shown that the Player found out long after his positive test that he had been treated for a heart condition. From the Player’s perspective, he was taken to the hospital after he was body checked and had hit the boards very hard. He left the hospital less than 24 hours after the incident and was able to resume training soon thereafter. Under these circumstances, the Panel considers that the Player had no reason to suspect that he was treated with a substance which – contrary to practice in Western Europe – was being applied for a heart condition. Therefore, the Player was without fault or negligence in connection with his failure to disclose his treatment and to apply for a (retroactive) TUE.

The Court of Arbitration for Sport rules that:

1. The Appeal filed by P. on 1 December 2005 is upheld.
2. The decision and the suspension imposed on P. by the Disciplinary Committee of the International Ice Hockey Federation on 14 November 2005 are annulled.

(...)