

JUDICIAL AWARD DELIVERED BY THE FISA DOPING HEARING PANEL

sitting in the following composition

Members: **John Boulton**
 Tricia Smith
 Anita DeFrantz

In the case of
Kissya Cataldo Da Costa (BRA)

The Facts

On behalf of FISA, the Anti-Doping Organisation of Brazil conducted out of competition testing in Brazil in accordance with the regulations of the World Anti-Doping Code. A urine sample was collected on 12 July 2012 (the "Sample") from athlete Kissya Cataldo Da Costa (the "Athlete").

The Sample collected from the Athlete was numbered 2683273 and recorded on the Doping Control Form. The Athlete signed this form and received a copy. The Athlete declared on the form that she had taken a total of 11 products some of which are unreadable but which include creatine, whey protein, multi vitamins, herbalife, omega 3 and caffeine during the seven days before the test. She made no comments on the doping control procedure. The WADA accredited laboratory in Montreal received the "A and B" samples on 19 July 2012.

The Certificate of Analysis from the Montreal Laboratory dated 2 August 2012 indicates that the Sample showed the presence of the isoforms of recombinant EPO which is on the 2012 Prohibited Substances/Methods List of the World Anti-Doping Code. Recombinant EPO is classified in class S2, Peptide Hormones, Growth Factors and Related Substances.

It has been determined by FISA that the Athlete did not have a valid Therapeutic Use Exemption (TUE) for EPO and that no departures from the International Standard for Testing (ISL) have been established.

The Athlete was notified verbally by FISA on 3 August 2012 with details of the possible anti-doping violation and of a provisional suspension from competition. The Athlete was to compete in a race at the London Olympic Games when the result from the Laboratory was communicated by FISA. On 6 August the Athlete received the notification letter through the Team Manager in London and was asked to respond quickly regarding the B sample analysis. FISA received a response from the Athlete through an email from the National Federation dated 7 August 2012 requesting to proceed with the analysis of the B sample.

The control analysis ("B sample") was conducted at the Montreal Laboratory. Certificate of analysis dated 29 August 2012 shows that the result of the B sample analysis confirms that of

the A sample analysis, that is the presence of the isoforms of recombinant EPO in sample 2683273.

As the result of the B sample analysis confirmed the positive result of the A sample, a FISA Doping Hearing Panel was appointed to determine the nature, the circumstances and the gravity of the doping offense.

Hearing

A letter was sent to the National Federation on 31 August 2012 to inform the Athlete of the positive B sample result and to ask her to confirm if she would choose to be present at a Hearing, or provide a written submission to the Hearing Panel or to forego the Hearing by acknowledging the Anti-Doping Rule Violation.

The Athlete submitted a written statement prepared by her lawyers, Renata Mansur Fernandes Bacelar and Wagner De Oliveira dated 12 September stating her position regarding the case. She also confirmed in a declaration dated 19 September 2012 that she *“doesn't has interest in the establishment of the panel. Adduces, that accepts the penalty and informs that doesn't has economical conditions to go to Swiss to present defense. Thus, adds that is primary on doping, and this must be considered on culpability”*

The Hearing Panel has noted that the standard of the translation into English of the correspondence and the written submission is not perfect.. However it is understood that the Athlete has accepted the doping rule violation. She does not have the means to attend a Hearing in Switzerland. She says that the Hearing Panel should take into consideration that this is her first doping offense.

The written statement of the Athlete mentions the long career of the Athlete in rowing beginning in 2000 and that this is her first positive doping test.

The Athlete states that because the test was conducted out of competition, the potential unfairness to other athletes from the performance enhancing effects of taking recombinant EPO were minimised compared to if she had taken a doping substance in-competition. The following quotes are taken from the Athlete's statement: *“In the present case, it is observed that the athlete was subjected to test educational control in view (it) was done in 12/07/12 and at that date, or date, the athlete was not participating in any competition. In the mat(ter)it is clear that potential harmful becomes smaller with respect to the intake of the substance prohibited in order to not have generated high-potential competitive compared to other athletes.”... “In turn, the case in point, although the intake has been certified, no deceit greatest potential to generate over another athlete, behold doping was attested out of competition.”*

In the statement submitted by the Athlete, there is mention of the supplements taken by the Athlete. However the translation is again is not completely clear but the Panel's understanding is that the athlete claims she may have inadvertently ingested the banned substance through ingestion of the reported supplements: .:

“When performing the test as proof attached document, the athlete reported that ingested substances. In turn, never thought that the supplements ingested could be caused penalty from class of rower.”

The final part of the Athlete's statement includes the following paragraphs:

"d) reported that, when the examination, all the drugs he had swallowed, having not hidden any of them, as shown in the doping control form, for athlete;

e) If your Excellencies not understand the request, which receive the minimum sentence, for two years, accepted in this case for athlete, taking into consideration the criteria of first time on doping, lack of intent (intent) and eating out of competition."

The Athlete also states that because she was provisionally suspended after being notified of the positive test result for EPO, this meant she was not allowed to race in her event at the Olympics and this was an additional punishment:

The written statement mentions that the Brazilian Code Sport has legislation which would reduce the penalty:

"offender does not have suffered any punishment in the twelve months immediately preceding the date of judgment".

Due to the fact she was not allowed to race in her event after having being suspended, *"the athlete was severely punished by being held out of the water, minutes before competing..."*

The written statement concludes that a warning as a sanction for the alleged doping offense should be given. *"..this is to requires: ...that is applied to the athlete warning penalty, considering that does not negate the ingestion of banned substance, but did not with the intention of harming another athlete, behold doping occurred out of competition"*

Applicable law

The applicable rules

The applicable rules are the FISA Anti-Doping Rules in force at the time of the test (12 July 2012). These rules are consistent with the World Anti-Doping Code.

The relevant rules

The relevant rules in this case are the FISA Anti-Doping Bye Laws including but not limited to:

- Article 2.1.1 which states it is each Rower's personal duty to ensure no Prohibited Substance enters her body;
- Article 10.2 which sets a period of two years' ineligibility for a first violation for the substance here concerned, and which provides that the athlete shall have the opportunity to establish the basis for eliminating or reducing this sanction as provided in Article 10.5;

Article 10.5 which provides for elimination or reduction of the period of ineligibility based on exceptional circumstances: (10.5.1) elimination in the case of "no fault or negligence" and establishing how the prohibited substance entered his or her system; (10.5.2) reduction to no less than one half of the minimum period of ineligibility in the case of "no significant fault or negligence";

Merits

According to FISA Rules and the World Anti-Doping Code, the burden of proof is on the athlete to rebut the presumption of guilt established by the presence of a prohibited substance in her body or fluid.

The Panel is satisfied that a positive test was established by the evidence of the laboratory analysis. In fact the Athlete did not dispute the findings of the test. The sanction for an anti-doping rule violation in this case is a two year period of ineligibility.

The Panel must then decide if the Athlete provided sufficient evidence of exceptional circumstances and no fault or negligence (Article 10.5) or no significant fault or negligence (10.5.2) to reduce the period of ineligibility. Under the Article the Athlete must also explain and give evidence as to how the Prohibited Substance entered her body.

Kissya Cataldo Da Costa has written in her statement that she ingested the banned substance. The Panel believes that the Athlete has implied that the positive test was due to a contaminated supplement. The Panel does not accept this argument. The athlete has not provided satisfactory evidence as to how the positive finding could have resulted from ingesting the supplement.

Kissya Cataldo Da Costa's statement includes an argument that because the prohibited substance was in her body during an "out of competition" period and not "in competition" this minimises the performance enhancing effect and impact on other athletes at the Olympics. The Panel notes that the Athlete was tested on 12 July 2012 and was to compete at the London Olympic Games around three weeks after this date. The FISA Panel finds the argument of the Athlete flawed. It is generally well understood from materials available to the public from WADA and all anti-doping organisations that out of competition testing is just as important if not more than in competition testing. The performance enhancing effects could still be significant for the upcoming competition while the window of detection would have passed by the time of the competition. Therefore it is irrelevant if a prohibited substance is found in a sample collected out of competition or in competition.

The FISA Panel dismisses the Athlete's argument related to her receiving an additional punishment by not being allowed to compete in her race at the Olympics. In all such cases, when FISA is informed by a Laboratory that an analysis has shown the presence of a prohibited substance, the normal procedure is for the Athlete to be immediately suspended from all competition.

Athletes are responsible for the medications and substances they take into their bodies. It was the responsibility of the Athlete to make every effort to ensure that she was not taking a prohibited substance.

The Panel also notes it is important that national federations and national Olympic committees provide comprehensive anti-doping education to ensure that athletes know their responsibilities and rights in all circumstances. The athletes must be aware that it is their responsibility to check any substance given to them and be able to make an informed decision about taking a substance or not.

FOR THESE REASONS

The FISA Doping Hearing Panel finds:

1. Kissya Cataldo da Costa has committed an Anti-Doping Rule Violation under the Anti-Doping By-Laws.
2. Kissya Cataldo da Costa is suspended and ineligible for two years from national and international competition.
3. The period of ineligibility commences from the date of the provisional suspension, 3 August 2012
4. This award is rendered without costs.

Lausanne, 28 November 2012

For the FISA Doping Hearing Panel:

John Boulton

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Anita DeFrantz