

7 October 2009
Lausanne, Switzerland

AWARD
DELIVERED BY THE FISA DOPING HEARING PANEL



with the following composition

Members:

Tricia Smith
Jean Christophe Rolland
Michael Williams

In the case of
Sergey SHUSHIN

Hearing held by videoconference from Toulouse, France 7 August 2009

THE FACTS

On behalf of FISA, the Russian Anti-Doping Agency, ("RUSADA"), conducted out of competition tests on Russian rowers in Rostov-on-Don in accordance with the regulations of the World Anti-Doping Code. A urine sample was collected on 6 April 2009 (the "Sample") from rower Sergey SHUSHIN (the "Rower").

The analysis of the sample showed the presence of hydrochlorothiazide which is on the 2009 Prohibited Substances/Methods List of the World Anti-Doping Agency. Hydrochlorothiazide is a diuretic listed in Section 5 (Diuretics and other masking agents).

The sample taken from the Rower was numbered 2329567 and recorded on the Doping Control Form. The Rower signed this form and received a copy. The WADA accredited laboratory in Moscow received the "A" sample on 7 April 2009.

The Rower was notified through the Russian Rowing Federation by letter 22 April 2009 with details of the possible anti-doping violation and of a provisional suspension.

On 23 April 2009, the Rower submitted a letter to FISA with documents outlining his case, including medical treatment he had received prior to providing the Sample. The Rower accepts that the substance was found in his system; in fact he noted the related substance on his doping control form. This appeal is made by the Rower under Section 10.4 of the FISA Rules. He submits that there was no fault on his part and that he should not be sanctioned.

THE HEARING

FISA retained a professional interpreter Andrei Dolgov and it was agreed that he would interpret all Russian into English for the Panel, all the Panel's comments made in English into Russian and any representations made in English on behalf of the Rower into Russian. Mr Dolgov also interpreted from French to English and to Russian in the case of the witness Dr. Lacoste.

Present were Mr Nicolai Rusak, Vice President of the Russian Rowing Federation; Mr Victor Berezov from the Russian Olympic Committee Legal Department there to represent the Rower, Mr Sergey Shushin and Ms Elena Vladimirskaia identified as an anti-doping specialist for the Russian Rowing Federation.

The Panel confirmed all parties had been provided with a package of materials including the summary of events, the explanation of the Rower with documentation signed by treating doctors.

Evidence of the Rower

The Rower was sworn to tell the truth.

He advised that on 31 March 2009, during training, he suffered acute sharp pain in his lower back which was so painful he couldn't move by himself. His teammates helped him out of the boat and he called his coach from the dressing room. The coach told him on the telephone to call the special sport medical facility (the "Facility") and to describe to them what had happened.

The Rower called the Facility and spoke to Dr. Milejko, a specialized sports doctor. An ambulance was sent from the Facility with Dr. Milejko. He took the Rower to this special sports Facility and an initial diagnosis was made. Immediate arrangements were made for a magnetic resonance imaging scan ("MRI") which confirmed the diagnosis.

The Rower stayed in hospital until 6 April 2009 inclusive. The doctors prescribed treatment which included medicines and physiotherapy.

On 6 April 2009 the Rower was called by his coach who advised that an anti-doping team was present at the rowing club and that he had to take a doping test. The Rower called his parents asking them to take him to the testing. He said he felt better at this time but not sufficiently to get there himself.

The Rower said that during the testing procedure he was given a form and he had to specify all the medications he had been given. He called Dr. Milejko to ask what he had been given over the last 6 to 7 days. Dr. Milejko gave him the list. He put that information on the Doping Control Form.

The Rower said that when the person in charge of the doping control procedure saw the medications he had put on the form, she told him that one of medications was a prohibited substance. He said that he was shocked. He asked her what to do. She told him it was too late because a Therapeutic Use Exemption ("TUE") should have been filed earlier. He said again he was shocked. He tried to call the Russian Rowing Federation (the "Federation") in Moscow but was only able to reach them the next day (7 April 2009).

When the Rower spoke with the Federation he spoke to Elena Vladimirskaia who told him to download the TUE application forms from the RUSADA site and to collect all the papers to confirm the evidence.

He printed out the TUE forms and took them to the hospital and asked them to prepare the justification papers and all reference papers. The hospital told him they would contact him when all the papers were ready.

The hospital contacted him and he picked the papers up on 20 April 2009 and he immediately scanned them and sent them to the Federation.

The Rower said as of the day when this happened until now he has not been training at all. Despite the treatment he still has lower back pain. He said he is finding it difficult to accept not training.

He said that when he went to the clinic and gave the TUE forms to the doctors that he was informed that he was the first one in a situation like this for them. They didn't know about the forms.

He said that after 6 April 2009 he was treated but with physiotherapy and exercises and was no longer an inpatient and was living at home. He was getting physiotherapy and medical treatment.

The Rower said that he was given no assistance in downloading the forms and arranging to have the TUE forms filled out.

He was subsequently told by the Federation that his TUE was rejected by RUSADA because of time restrictions. He said he was never aware of any timelines and was never advised by the Federation of any timelines.

Upon questioning from the Panel members, the Rower said he had no precise recollection when he took the medication but believes he took it while in hospital and as far as he can recall 4 days possibly 1, 2, 3 and 4 April 2009.

Evidence of Ms. Vladimirskaia

Ms. Vladimirskaia was sworn to tell the truth.

The witness said she received a telephone call 7 April 2009 from the Rower who informed her of the situation and who asked for advice. She said she told him to fill in the TUE forms and gave him the RUSADA site and the list of documents he should collect to submit. On 20 April 2009 she received the whole package from the Rower and sent it the same day to RUSADA. She waited one week but received no response so she started to telephone them. After two weeks she received the reply from RUSADA that the TUE application was rejected. She then personally went to RUSADA. She said that the rejection was communicated through verbal conversation. She was told in the conversation that the TUE application should have been made within 7 days after the beginning of the treatment.

In response to a question from the Panel, she said that in her verbal conversations RUSADA didn't say that the TUE would have been approved if it had been received in time but she got the impression that it would have been.

She said that there was no appeal made from this decision to WADA because she then sent the information to FISA.

Evidence of Dr. G. Shkilnyuk Treating Doctor/ Neurologist

The Rower and his counsel presented no medical witnesses. However the Panel was able to reach Dr. Shkilnyuk by telephone. Dr. Shkilnyuk is listed on the TUE supporting documentation as the doctor who prescribed the prohibited substance. She was reached in between consultations with patients and she made it clear that she had limited time.

She was asked by the Panel about the treatment of the Rower. She recalled treating the Rower and her evidence was that he had been presented to her to receive an MRI on an expedited basis.

The Panel asked why she prescribed diuretics. She said that, according to local norms, treatment for the group of injuries including back pain includes medications including anti-inflammatories and diuretics. She said that she is not a specialist in sports medicine and all that relates to athletes, and she does not normally deal with athletes. She said when the Rower came to her, he had acute and prolonged pain and her first duty was to alleviate the pain. She said in such cases of inflammation diuretics may help in small doses. She said her consideration of what to prescribe also depends on a number of other factors including, for example, what the insurance company might pay for a particular patient. She said she prescribed the medication that would normally be prescribed by her which was diuretics.

She was asked when the diuretics were prescribed and when they were taken. She said everything is in the file. She doesn't know when the Rower took the medication or if he continued taking the medication.

The doctor was asked if she was aware the Rower was on a national team. She said she is not aware of such things. It is not in her job description.

The doctor was asked who she communicated with in terms of the medications she prescribes. She said it is all documented in the patient history.

Evidence of Dr. Lacoste

Dr. Lacoste was sworn to tell the truth.

He gave his evidence in French which was translated by the translator to Russian and to English.

When asked how FISA grants a TUE he said there were a number of factors to examine, including a review of the file, the merits of the diagnosis considering if the treatment is in accordance with the diagnosed pathology and if there is an alternative substance or treatment which is not on the WADA prohibited list. Finally, the application for a TUE must be made within 7 days of the start of the treatment as set out in the World Anti-Doping Code.

FISA studied whether the prescribed treatment is absolutely compatible by looking at the recognized medical data bases to compare the recommended treatments and consulted with several neurologists. These inquiries confirmed the testimony of Dr. Lacoste.

Dr. Lacoste said that with the information received in this case, FISA would not have granted a TUE. He would have sought additional information.

Dr. Lacoste said for this type of pathology the recognized treatment options would be anti-inflammatories; muscle relaxants; pain killers; or corticosteroids.

He confirmed in the medical data bases, which are recognized internationally, one does not find diuretics for slipped discs or acute back pain.

Dr. Lacoste said the role of the doctor is to treat and reduce pain and equally to use a substance which is appropriate for the pathology. The role of the doctor for a national sports team is to know the anti-doping legislation and, if a prohibited substance has to be used, to appropriately declare that treatment within seven days of the start of the treatment.

Dr. Lacoste said if there was a justification for use of this treatment he has not seen it.

Upon questioning by Mr. Berezov as to what further information he would wish to receive, Dr. Lacoste responded that he would need justification as to why diuretics were prescribed. He had not seen enough information as to why the pathology of the Rower was treated with a diuretic. He said from all the information he has seen in the case there is no information to justify the use of a diuretic.

Dr Lacoste subsequently confirmed this was still his view even after hearing the evidence of Dr. Shkilnyuk.

Legal Argument of behalf of the Rower

Mr. Berezov confirmed in his final argument that the Rower does not challenge the accuracy and the validity of the positive test. The Rower, in fact, admitted in his Doping Control Form that he had taken the medication which is banned as a prohibited substance.

Mr. Berezov stated that because this prohibited substance is a specified substance it is not necessary to deal with the standard two-year sanction. This is a case which should be dealt with under Article 10.4 of Appendix 4 of the FISA Rules. The article allows an opportunity to reduce the sanction under the following conditions.

Firstly, the Rower has to establish how the substance got into his body. Mr. Berezov said the Rower has satisfied this condition. He honestly disclosed the substance on the Doping Control Form.

Secondly the Rower must produce evidence that the specified substance was not intended to enhance performance or mask the use of a performance enhancing substance. In this case, the specified substance was prescribed by the doctor. The Rower's only aim was to take the medication for medical reasons.

Mr. Berezov submitted therefore that the Rower had satisfied both conditions. Section 10.4 contemplates consideration of the degree of fault of the athlete.

Mr. Berezov therefore submitted his opinion, on behalf of the Rower, that the Panel should decide that a violation had been committed and that the appropriate sanction is a reprimand.

DECISION

The Panel has carefully considered this case.

Essentially, the Rower contends that he was treated at the place recommended by his sports doctor and where he was taken by his sports doctor. As soon as he became aware of being given a prohibited substance he did his best to obtain a TUE and he was unaware of any time restriction. He submits he honestly disclosed the substance and had no intent to use the substance to enhance performance or mask performance enhancing substances.

The Panel also noted his evidence that the Rower's coach and sports medicine doctor, Dr. Milejko were very involved in getting him to the specialized sports medicine facility and in fact, when the Rower called Dr. Milejko to ask what medications he had taken and should put on his Doping Control Form, Dr. Milejko told him the medications, which included the prohibited substance.

Dr. Shkilnyuk's evidence was that the Rower was presented to obtain an MRI on a priority basis. Dr. Shkilnyuk also submitted that diuretics are one of the normal prescriptions she would prescribe for a pathology such as that presented by the Rower. She said she was unaware of any sports related issues regarding this prescription and claimed this was not in her job description.

Finally, the evidence of Dr. Lacoste is that the pathology described would not justify the use of diuretics, which is the banned substance in this case. Dr. Shkilnyuk provided no additional information on why this medication was prescribed aside from what was already submitted in the TUE application.

The Panel also noted that the Russian Federation did not make an appeal of the decision of RUSADA regarding the TUE to WADA.

Applicable law

The applicable rules

The applicable rules are the FISA Anti-Doping Rules in force at the time of the test (6 April 2009). 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 his body;
- Article 10.4 which states that where a Rower can establish how a Specified Substance entered his body and such substance was not meant to enhance the Rower's performance or mask the use of a performance enhancing substance, the period of ineligibility found in Article 10.2 shall be replaced with the following: for a first violation be, at a minimum a reprimand and no period of ineligibility from future events and at a maximum, two years of ineligibility.

To justify any elimination or reductions, the Rower must produce corroborating evidence in addition to his word which establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sport performance or mask the use of a performance enhancing substance. The Rower's degree of fault shall be the criterion considered in assessing any reduction of the period of ineligibility.

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

Under Section S5 of the WADA code Masking Agents are prohibited. Masking agents include diuretics such as the one found in the Athlete's specimen.

Merits

The Panel is satisfied that a positive test was established by the evidence before it. In fact the Rower did not dispute the findings of the test. The sanction for a positive finding in this case is a two year period of ineligibility.

Under Article 10.4 the Rower must explain how the Prohibited Substance entered his body. The evidence on this issue, taken alone, would have satisfied the panel that the Rower had done so. However the evidence related to the second part of Article 10.4 raised doubt with the panel.

In that section, the Panel must decide if it is "comfortably satisfied" that the Rower has provided sufficient evidence as required under Section 10.4 to reduce the period of ineligibility.

Dr. Shkilnyuk's evidence was the Rower was brought to her and put as a priority to obtain an immediate MRI scan. She treated him but claimed no special knowledge of issues relating to treating high performance athletes. The Rower testified Dr. Milejko came with the ambulance to the training site to take him to the special sports clinic and it was Dr. Milejko who the Rower called to find out what medications he should list on his doping control form.

The Rower is responsible for any prohibited substances found in his body. The evidence was that the Rower was in severe pain and although this would not absolve the Rower of this responsibility, the Panel assumes the Rower took comfort in the fact he was taken personally by the sports doctor to a sports clinic.

The Panel found it difficult to understand how Dr. Shkilnyuk could be unaware of World Anti-Doping Code rules regarding use of prohibited substances. The Panel also does not understand that, after allegedly being so closely involved in getting him to the Facility, where Dr. Milejko was during the on-going treatment of the Rower or why he did not ensure that the medicine prescribed conformed with the World Anti-Doping Code. In addition, the Panel does not understand why Dr. Milejko did not immediately apply for a TUE. He should have been aware of the treatment and was at least aware of the use of the banned substance at the time he informed the Rower how to complete the Doping Control Form. It seems this doctor was not then involved in any further effort on behalf of the Rower until signing the document sent to the Russian Federation 20 April 2009.

Finally, the evidence of Dr. Lacoste is that the pathology described would not justify the use of diuretics and the Russian doctor provided no additional information which would convince the Panel that such was appropriate.

In cases such as this, the panel has to assess the credibility of the witnesses. This is done, in part, by an assessment of the reasonableness of the explanation provided by the evidence. For the reasons above, the Panel finds that the Rower has not proved to their comfortable satisfaction, that he was not taking the specified substance to enhance performance or to mask a substance which would enhance performance.

FOR THESE REASONS

The FISA Doping Hearing Panel finds:

1. Sergey SHUSHIN has committed an Anti-Doping Rule Violation under the Anti-Doping By-Laws.
2. Mr SHUSHIN 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, 22 April 2009.
4. This award is rendered without costs.

For the FISA Doping Hearing Panel:



Tricia Smith



Jean Christophe Rolland



Mike Williams