SPORT DISPUTE RESOLUTION CENTRE OF CANADA (SDRCC)
CENTRE DE RÈGLEMENT DES DIFFÉRENDS SPORTIFS DU CANADA (CRDSC)

Nº: SDRCC DT 19-0314
(Doping Tribunal)

Canadian Centre for Ethics in Sport (CCES)
Athletics Canada

and

Janz Stein
(Athlete)

and

Government of Canada
World Anti-Doping Agency (WADA)
(Observers)

ARBITRATION AWARD

ARBITRATOR: Janie Soublière

Legal Representation

For the Athlete Janz Stein: Erin Durant
Kanika Sharma

For the CCES: Alexander Maltas
Elizabeth Cordonier
Lindsay Peretz

INTRODUCTION

1. Janz Stein (the Athlete) was tested at the 2019 Canadian Athletics Championships. The laboratory analysis report indicated a positive finding for hydromorphone, a narcotic.

2. Thereafter, the Canadian Centre for Ethics in Sport (CCES) charged him with the commission of an anti-doping rule violation (ADRV) for the presence of a specified substance in his urine sample.

3. The Athlete admits that he committed an ADRV but submits that he inadvertently and unintentionally ingested the hydromorphone. He says he has no significant fault and argues that a Reprimand is the applicable sanction.

4. The issue for determination is the appropriate period of ineligibility, if any, to impose on the Athlete pursuant to the Canadian Anti-Doping Program (CADP) as a result of his admitted ADRV.

THE PARTIES

5. The Athlete is a 38-year-old male who competes in track and field, specifically the Paralympic long jump and 100-meter events. He is affiliated with Athletics Canada, the national governing body for the sport of Track and Field in Canada, which has adopted and implements the CADP.

6. The CCES is a Canadian independent not-for-profit organization which promotes ethical conduct in all aspects of sport. The CCES maintains and carries out the CADP, including providing anti-doping services to national sport organizations, including Athletics Canada, and their members, including the Athlete.

7. Pursuant to CADP Rule 1.3.1.1, the CADP applies to all athletes who are members of any sport organization that adopts the CADP. Consequently, as a participant in Athletics Canada sport activities, the Athlete is subject to the CADP.

8. As Canada's *National Anti-Doping Organization*, the CCES complies with the World Anti-Doping Code (the "Code") and its mandatory International Standards. The CCES has implemented the Code and its mandatory International Standards through the CADP, the domestic rules which govern this proceeding. The purpose of the Code and of the CADP is to protect the rights of all athletes to fair competition.

JURISDICTION

9. The Sport Dispute Resolution Centre of Canada (SDRCC) is established pursuant to subsection 9(1) of the *Physical Activity and Sport Act* (Bill C-12 assented to on March 19, 2003). Subsection 4(1) of the said *Act* states in part that the Government of Canada's policy regarding sport is founded on the fair, equitable, transparent and timely resolution of disputes in sport. Subsection 10(1)(a) of the *Act* specifies that the mission of the SDRCC is to provide to the sport community a national alternative dispute resolution service for sport disputes.

10. CADP Rule 8.1 and its subsections grants the SDRCC jurisdiction to hear the matter. It states that an ADRV and its consequences are to be determined by a Doping Tribunal pursuant to the rules set out in the *Canadian Sport Dispute Resolution Code (2015)*, unless the Athlete or Person waives their right to a hearing pursuant to CADP Rule 7.10.1 or Rule 7.10.2. It also specifies that the hearing shall be conducted by a single arbitrator and that the Doping Tribunal (the Tribunal) shall be constituted and administered by the SDRCC.

11. To this end, I have been appointed to hear the present matter on consent of all Parties.

12. This arbitration award is rendered pursuant to paragraph 6.21 of the *Canadian Sport Dispute Resolution Code (2015)*.

UNDISPUTED FACTS

13. The sample giving rise to the Athlete's adverse analytical finding (AAF) is collected by the CCES in-competition at the 2019 Canadian Athletics Championships in Montreal, Quebec on July 25, 2019, in accordance with the CADP and the International Standard for Testing and Investigations.

14. Further to being selected for sample collection as a result of his gold medal in long jump, the Athlete provides a urine sample coded 4408103.

15. Sample 4408103 is sent to the Montreal WADA accredited laboratory (Institut national de la recherche scientifique - INRS) on July 26, 2019. On August 7, 2019, the INRS reports an AAF of hydromorphone in urine sample A4408103.

16. Hydromorphone is classified as a section S7 Narcotic under the WADA Prohibited List. It is a specified substance, the use of which is prohibited in-competition in Track and Field.

PROCEDURAL HISTORY

17. Upon notification of the AAF and further to completing its preliminary review pursuant to CADP Rule 7.2, the CCES determines that there is no apparent departure from the CADP Doping Control Rules or the International Standard for Laboratories that could undermine the validity of the Athlete's AAF.

18. On August 8, the CCES informs Athletics Canada and the Athlete of the AAF, inquiring whether or not the Athlete might possess a valid TUE for the use of the substance and offering him the possibility of exercising his rights to the analysis of his B sample and to request the laboratory documentation packages.

19. The Athlete exercises both these rights. The B sample analysis is scheduled for August 15, 2019.

20. On August 14, 2019, the CCES formally charges the Athlete with the commission of an ADRV pursuant to CADP Rule 2.1 for the presence of hydromorphone in his urine sample and proposes a 2-year period of ineligibility as the applicable sanction.

21. The CCES' *Notification of an Anti-Doping Rule Violation* outlines the various options open to the Athlete at this juncture:
    i. Proceed to a hearing to determine if an ADRV occurred and/or the applicable consequences;
    ii. Voluntarily admit the ADRV;
    iii. Waive his right to hearing;
    iv. Take no further action.

22. On August 14, 2019, further to receipt of the *Notification of an Anti-Doping Rule Violation*, Athletics Canada promptly notifies the Athlete that it is provisionally suspending him pending the outcome of an anticipated expedited hearing.

23. On August 15, 2019, because of his scheduled imminent departure for Lima, Peru to participate and represent Canada in the Parapan Am Games, the Athlete requests an expedited hearing before the SDRCC, and the CCES consents.

24. The Athlete receives confirmation of the results of the B sample analysis whilst on the SDRCC resolution facilitation call on August 16, 2019. The certificate of analysis from the INRS laboratory validates the finding of hydromorphone in B sample 4408103, thereby confirming the results of the A sample analysis and the ADRV pursuant to CADP Rule 2.1.

25. I am appointed to hear this matter on the same day and a preliminary hearing call is expeditiously scheduled for that same afternoon. The call proves useful to sort out the various tight deadlines which exist both by virtue of the Athlete needing to cancel or reschedule his flight for Lima and Athletics Canada's requirement to confirm its final list of eligible participants with the International and Canadian Paralympic Committees no later than end of day August 22, 2019.

26. Both Parties' Counsel are to be commended on being so collaborative. Further to establishing an accelerated yet sensible Order of Procedure that is suitable to all, a teleconference hearing is scheduled for 10 a.m. (EDT) on August 22, 2019.

27. Counsel for the CCES at the hearing are Alexander Maltas, Elizabeth Cordonier, Lindsay Peretz.

28. Counsel for the Athlete at the hearing are Erin Durant and Kanika Sharma

29. The only two witnesses heard at the hearing are the Athlete and his girlfriend.

30. Further to closing the hearing with all parties confirming their satisfaction with the process and fairness of the hearing, my short decision was issued at 5 p.m. (EDT) on August 22, 2019. It reads as follows:

The Athlete has established that he bears no significant fault for his admitted anti-doping rule violation.

Applying the principles of the Court of Arbitration for Sport Cilic Award[1] *relied upon by both parties, my assessment of the objective and subjective elements of this case place the Athlete within a light range of fault.*

Yet, the Athlete does not succeed in establishing that his light degree of fault warrants the imposition of a mere Reprimand. I have carefully considered and weighed all the evidence before me and regrettably find that neither the Canadian Anti-Doping Program nor relevant jurisprudence provide for such a rare outcome in this case.

The exact period of ineligibility to be imposed as a result of the Athlete's anti-doping rule violation will be communicated along with my written reasons within the timelines prescribed by the Canadian Sport Dispute Resolution Code and will, as a result of the Athlete's timely admission, be backdated to July 25, 2019, the date of sample collection.

To dispel any doubt or avoid confusion, the period of ineligibility that I intend to impose will, unfortunately, render the Athlete ineligible to compete at the Parapan Am Games.

31. The following is my reasoned decision.

THE PARTIES' SUBMISSIONS

32. During the preliminary meeting call, the Parties agree to file concurrent submissions as a first step, file reply submissions concurrently on the question of sanction as a second step, and then supplement their argumentation as needed during the oral hearing scheduled for August 22, 2019. The first round of concurrent submissions is received on August 19, 2019 and the rejoinders on August 21, 2019.

33. Athletics Canada is named as a party to the case file but elects not to submit any documents on its behalf nor to make any oral submissions during the hearing.

34. The Athlete and the CCES' written and oral submissions and arguments, just as the legal precedents they rely upon, have all been carefully considered. The following provides a succinct summary of these submissions. Additional evidence may be referred to below where relevant to the Tribunal's deliberations and legal argument.

[1] *International Tennis Federation v. Martin Cilic,* CAS 2013/A/3327, 2013/A/3335 (hereinafter *Cilic)*

The Athlete

35. The Athlete admits the ADRV but submits that the positive finding of hydromorphone in his urine sample is the result of inadvertence. He considers the circumstances surrounding his unintentional ingestion of the hydromorphone to be extraordinary and says his fault is not significant. Accordingly, he argues that CADP Rule 10.5.1.1 applies and that a Reprimand is the appropriate sanction for his ADRV because his degree of fault is "*very light*".

36. The Athlete explains that he had been prescribed hydromorphone for pain after his leg was amputated, but that he had immediately stopped taking it as a result of its negative side effects. He says it makes him feel off, messes up his stomach and "*makes him feel disgusting*".

37. He explains that other than taking a multivitamin daily, he sometimes takes Tramadol for pain management. He acknowledges that he failed to declare the use of Tramadol on his doping control form at the time of sample collection. Tramadol is not a prohibited substance.

38. He confirms that he has followed the CCES' online education courses. He maintains that he is and has always been very careful about what he puts in his body, always consults his coaches and health care professionals before doing so and that he would never, and has never, intentionally taken a banned substance.

39. The Athlete's girlfriend ("CF"), for whom he acts as sole caregiver, is a double leg amputee. She also suffers from kidney failure and diabetes. She is currently enrolled in a rehab program further to developing an addiction to her pain killers. At the time of the ADRV, she was in a precarious state and still remains so.

40. CF takes numerous medications, one of which is hydromorphone. As her main caregiver, the Athlete is responsible for storing, administering and assisting his girlfriend in taking her medication twice daily. Because of her addiction and in order to monitor its use, he keeps her pain medication, hydromorphone, in the same cabinet as he keeps his Tramadol, but on a higher shelf so that she cannot reach it.

41. The Athlete files into evidence an undisputed doctor's note supporting his allegation that he is intolerant to Hydromorphone. He argues that because of the negative side effects of hydromorphone, he would never take it intentionally.

42. His sole explanation is that he accidentally took his girlfriend's hydromorphone in lieu of his Tramadol, a mistake which he says must be attributed to the fact that both pill bottles are blue, that the pills are the same size and that he was distracted and suffering phantom pain at the time he took them.

43. The Athlete's oral and written evidence is that he is an extremely busy person with a lot of demands and stresses – from running two businesses, to caring for CF, to administering his deceased mother's estate, keeping a house, caring for three dogs and training in track and field.

44. The Athlete testifies that he is aware of the risks of having several prescription painkillers in his home and of keeping them in the same cabinet, but argues that he took reasonable measures to mitigate against the risks of having prohibited substances in his home by storing his girlfriend's hydromorphone on a separate shelf.

45. He says that what happened here was an honest mistake, caused by his grueling daily routine and the stress of managing so many difficult situations at the same time. He simply grabbed the wrong bottle and consumed the wrong painkiller.

46. The Athlete submits that this is a relatively minor violation. He is alleged to have competed with a substance in his system that is banned during competition. Yet, the hydromorphone does not provide him with any performance enhancing benefits. If anything, the substance was detrimental to his performance given his adverse history with hydromorphone and the fact that he says he had his worst results ever at the Canadian Championships.

47. The subjective elements around his inadvertent consumption of the prohibited substance include mounting fear and responsibility surrounding CF's illnesses and well-being, dealing with his mother's estate, the prospect of competing in his final major competition for a sport he loves, training, and managing the businesses that he owns. He argues that these subjective elements (as applied in *Cilic)*, along with the degree of care that he alleges to have exercised in seeking to avoid anti-doping rule violations, place his degree of fault at the lower end of the "no significant fault or negligence" spectrum.

48. Finally, he submits that the imposition of any period of ineligibility would deny him the ability to participate in the Parapan Am Games, the last major international competition of his career. He argues that such a consequence would be disproportionate to his conduct.

49. As a result, he submits that the appropriate sanction for his ADRV is a Reprimand; which would reinstate his eligibility to compete in the Parapan Am Games.

The CCES

50. At the hearing, the CCES concedes that the Athlete has established how the substance entered his system to the required standard of proof. But, the CCES argues that his degree of fault cannot be considered "*light or very light".*

51. The CCES reiterates that it is the Athlete who bears the onus of proving that a sanction reduction is warranted under the CADP and that even if the Athlete is able to establish that he ingested the hydromorphone accidentally, the Athlete still bears considerable fault for the violation.

52. The CADP Rules, the principle of strict liability and legal precedent have long required Athletes to be responsible and accountable for the substances that enter their bodies.

53. The CCES says the Athlete's explanation for how the substance was consumed demonstrates a significant degree of carelessness in that he failed to keep his medication sufficiently separate from his girlfriend's medication. He also failed to read his prescription bottle or notice a visual difference between medications before consuming the hydromorphone. Also, considering that the Athlete had allegedly previously suffered adverse effects from taking hydromorphone, the CCES suggests that it would have been prudent for the Athlete to take an extra measure of care to avoid the substance.

54. The CCES concisely outlines the following shortcomings to the Athlete's explanation which; it argues, on the whole, do not support the imposition of a mere Reprimand:

    a. The Athlete should have taken greater care in not keeping his medicine with that of CF;
    b. The Athlete should have paid more attention to the pills he ingested on the day in question;
    c. The pill bottles are not that similar, with one having a conspicuous red cap;
    d. The pills themselves are not identical, differing in color;
    e. The Athlete failed to read his prescription bottle or notice a visual difference between medications before consuming the hydromorphone;
    f. The Athlete did not declare the use of the Tramadol on his doping control form at the time of testing even if he used it 3-4 days in a row prior to sample collection;
    g. The Athlete is an international level athlete who should be held to the same standard of care as anyone else;
    h. The Athlete is a carded athlete who has received anti-doping education;
    i. The Athlete has experience with prescription pain medication and its side effects;
    j. The Athlete has not provided any compelling evidence that his mental capacity was diminished at the time of the ADRV.

55. Considering the above, while the CCES concedes that the Athlete has no significant fault for the ADRV, based on the circumstances of the case and the evidence presented to the Panel, the CCES pleads that the appropriate sanction should be more than a Reprimand.

56. The CCES is sympathetic to the Athlete's situation. However, the various subjective factors the Athlete has brought forward, without more, do not prove that the Athlete's mental capacity was affected in such a way as to prevent him from taking the basic step of reading a prescription label and verifying what he was ingesting. Therefore, the CCES submits that the athlete's subjective factors have minimal weight in assessing the Athlete's degree of fault and that the Athlete's actions, if accepted at face value, demonstrate a normal degree of fault.

57. The CCES submits that the Athlete's degree of fault is significant, within the "*normal*" *Cilic* range and warrants a sanction of between 6 and 10 months.

58. In support of its request for relief, the CCES relies on SDRCC, Court of Arbitration for Sport (CAS) and American Arbitration Association jurisprudence. The cases relied upon generally support the imposition of period of ineligibility of 4-10 months for cases involving the presence of a specified substance where there are mitigating factors similar to those of the case at hand.

THE APPLICABLE PROVISIONS OF THE CADP

10.2 *Ineligibility* for Presence, *Use* or *Attempted Use*, or *Possession* of a *Prohibited Substance* or *Prohibited Method*
The period of *Ineligibility* for a violation of Rules 2.1, 2.2 or 2.6 shall be as follows, subject to potential reduction or suspension pursuant to Rules 10.4, 10.5 or 10.6:

10.2.1 The period of *Ineligibility* shall be four years where:

10.2.1.1 The anti-doping rule violation does not involve a *Specified Substance,* unless the *Athlete* or other *Person* can establish that the anti-doping rule violation was not intentional.
10.2.1.2 The anti-doping rule violation involves a *Specified Substance* and CCES can establish that the anti-doping rule violation was intentional.

10.2.2 If Rule 10.2.1 does not apply, the period of *Ineligibility* shall be two years.

[…]

10.4 Elimination of the Period of Ineligibility where there is No Fault or Negligence
If an Athlete or other Person establishes in an individual case that he or she bears No Fault or Negligence, then the otherwise applicable period of Ineligibility shall be eliminated.

10.5 Reduction of the Period of *Ineligibility* based on *No Significant Fault or Negligence*

10.5.1 Reduction of Sanctions for Specified Substances or Contaminated Products for Violations of Rule 2.1, 2.2 or 2.6.

10.5.1.1 Specified Substances
Where the anti-doping rule violation involves a Specified Substance, and the Athlete or other Person can establish No Significant Fault or Negligence, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years of Ineligibility, depending on the Athlete's or other Person's degree of Fault.

[…]

Appendix 1. Definitions

No Fault or Negligence: The *Athlete* or other *Person's* establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had *Used* or been administered the *Prohibited Substance* or *Prohibited Method* or otherwise violated an anti-doping rule. Except in the

case of a *Minor*, for any violation of Rule 2.1, the *Athlete* must also establish how the *Prohibited Substance* entered his or her system.

No Significant Fault or Negligence: The *Athlete* or other *Person's* establishing that his or her *Fault* or negligence, when viewed in the totality of the circumstances and taking into account the criteria for *No Fault or Negligence*, was not significant in relationship to the anti-doping rule violation. Except in the case of a *Minor*, for any violation of Rule 2.1, the *Athlete* must also establish how the *Prohibited Substance* entered his or her system.

ISSUES

A. The ADRV

- *Has an ADRV occurred?*

B. Fault

- *Does the Athlete establish that he has no fault for the ADRV?*
- *Does the Athlete establish that he has no significant fault for the ADRV?*

C. Ineligibility

- *What are the appropriate consequences to impose under the circumstances?*

DELIBERATIONS

Preliminary note:

59. As stated at the onset of the hearing, although I am both sympathetic and empathetic to the fact the Athlete wholeheartedly argues that his goal is to compete at the Parapan Am Games and that this is his last opportunity to do so,

> *[…] the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility,* ***or the fact that the Athlete only has a short time left in his or her career, or the timing of the sporting calendar,*** *would not be relevant factors to be considered in reducing the period of Ineligibility under Article 10.5.1 or 10.5.2.*
>
> [*Definition of Fault set out in Appendix 1 of the CADP*; Emphasis is mine.]

60. To be clear, I cannot and have not considered the Athlete's plea regarding the timing of the ADRV, his imminent retirement or his planned departure for Lima in my assessment of his fault.

61. If based on all the evidence before me, he is successful in establishing that his degree of fault in relation to the ADRV warrants the lowest possible sanction, then it will be my pleasure to impose a mere Reprimand, which would reinstate his eligibility and allow him to depart for Lima.

62. But, if he does not succeed in meeting his evidentiary burden, then a proper application of the CADP will regrettably result in my imposing a period of ineligibility which will render him unable to compete at the Parapan Am Games.

A. The ADRV

63. The B sample analysis confirmed the finding of hydromorphone in sample 4408103. This constitutes sufficient proof of the commission of an ADRV pursuant to CADP Rule 2.1.

64. There was no evidence put forth by the Parties of any departures from any International Standard that could have caused or can invalidate the ADRV.

65. On August 20, 2019 the Athlete signed a timely admission form, admitting the ADRV and not contesting the presence of hydromorphone in his urine sample.

66. I am comfortably satisfied that the Athlete committed an ADRV.

B. FAULT

Does the Athlete establish that he has no fault?

67. Where any degree of negligence or fault exists on the part of the Athlete, there is very little room to maneuver and CADP Rule 10.4 (cited *supra*) should not apply.

68. In his submissions, the Athlete brings forth very little arguments, other than case law which the CCES rightly argues neither compares nor applies to the circumstances at hand, to suggest or compel the Tribunal to conclude that he has no fault. As such, my findings on this point are brief.

69. The Athlete self-administered the hydromorphone, placed these pills in his own cupboard, was aware of their contents and they were correctly labelled. Logically, it follows that he does not establish that "*he did not know or suspect and could not reasonably have known or suspected, even with the exercise of the utmost caution, that he had been administered a prohibited substance"* (as per the Definition of *No Fault* cited *supra).*

70. CADP Rule 10.4 does not apply here.

Does the Athlete establish that he has no significant fault?

71. CADP Rule 10.5.1.1 is cited *supra*. Its effective application is contingent on the Athlete clearing two hurdles:
    i. The Athlete must establish, on a balance of probabilities, how the substance entered his system;

    Then, only if the first hurdle is cleared:

    ii. The Athlete must convince the Tribunal that he has "no significant fault" for the ADRV– as per the definition of *No Significant Fault* cited *supra*.

72. Once the Athlete successfully clears those two hurdles, the Tribunal can assess the appropriate sanction to impose based on his degree of fault.

73. The CCES concedes at the hearing that the Athlete has established on a balance of probabilities how the substance entered his system. Therefore, the first hurdle has been cleared.

74. CCES concedes and I agree that the Athlete has also established that he has no significant fault for the ADRV. Consequently, it is now up to the Tribunal to assess this fault and determine the appropriate sanction to impose as a result.

75. The well-established and often cited principles laid out in *Cilic* (see as a recent example SDRCC DT 18-0304*)* guide my assessment of whether the Athlete in this case has:

    a. A significant degree or considerable fault, warranting a period of ineligibility ranging between 16-24 months
    b. A normal degree of fault; warranting a period of ineligibility ranging between 8-16 months
    c. A light degree of fault, warranting a period of ineligibility ranging between 0-8 months.

76. When deliberating on an Athlete's degree of fault, the CAS Panel in *Cilic* outlined the importance of taking both objective and subjective elements into consideration in an assessment of the evidence when it stated:

    > *71. In order to determine into which category of fault a particular case might fall, it is helpful to consider both the objective and the subjective level of fault. The objective element describes what standard of care could have been expected from a reasonable person in the athlete's situation. The subjective element describes what could have been expected from that particular athlete, in light of his personal capacities.*
    >
    > *72. The Panel suggests that the objective element should be foremost in determining into which of the three relevant categories a particular case falls.*

73. The subjective element can then be used to move a particular athlete up or down within that category.

74. Of course, in exceptional cases, it may be that the subjective elements are so significant that they move a particular athlete not only to the extremity of a particular category, but also into a different category altogether. That would be the exception to the rule, however.

77. Both parties rely upon the *Cilic* award in their oral and written submissions. Therefore, in my deliberations I too shall inspire myself from the same award and canvass the objective and subjective elements of this case in order to assess and determine the Athlete's degree of (non-significant) fault.

Objective elements:

In-competition vs out-of-competition use

78. The Athlete argues that because hydromorphone is only prohibited in-competition, the Tribunal should treat the Athlete's inadvertent use of the same out-of-competition as a mitigating factor in its assessment of his fault. Counsel explained that in light of the timelines, there was insufficient time to pursue this line of argumentation in light of the scientific and expert evidence required to successfully further such an argument, but mentioned in her closing arguments that this is a factor to be considered by the Tribunal in its assessment of objective fault.

79. Indeed, the *Cilic* Award considered the following in the assessment of objective elements of an athlete's ADRV:

> *The difference in the scenario where the prohibited substance is taken out-of-competition [versus taken in competition] is that the taking of the substance itself does not constitute doping or illicit behaviour. The violation (for which the athlete is at fault) is not the ingestion of the substance, but the participation in competition while the substance itself (or its metabolites) is still in the athlete's body.* ***The illicit behaviour, thus, lies in the fact that the athlete returned to competition too early, or at least earlier than when the substance he had taken out of competition had cleared his system for drug testing purposes in competition. In such cases, the level of fault is different from the outset.*** *Requiring from an athlete in such cases not to ingest the substance at all would be to enlarge the list of substances prohibited at all times to include the substances contained in the in-competition list*. [Emphasis is mine][2]

80. Here, the Athlete did not intentionally take the substance. He did not take it out-of-competition with an expectation that it would clear his system before doping control, as envisioned *supra* in

[2] *Cilic*, supra, para. 75

Cilic. Consequently, at first glance, I am inclined to disregard the out-of-competition ingestion as a mitigating objective factor.

81. To leave no stones unturned, questions are put to the CCES to provide an expert opinion on the same. Specifically, I request the following prior to the hearing:

> […] *Can you provide explanations and context on the concentration of hydromorphone detected in the urine sample - which is stated as being 330 ± 30 ng/ml on the lab report ?*
>
> *Expert testimony, written or verbal, is requested to succinctly explain the Lab "doc pack" findings as well as the toxicology and pharmacology (half-life, excretion rate, etc.) of hydromorphone.*

82. Professor Ayotte, Director of the INRS laboratory indicates in her Expert Opinion:

> [*Because hydromorphone is only prohibited in competition,] when [it is] identified in a urine sample, the laboratory must first demonstrate that it is not due to the ingestion of permitted hydrocodone (of which hydromorphone is a metabolite) and <u>if HM [hydromorphone] is present in an amount roughly estimated as being greater than 50% of the</u> MRPL [Minimum Required Performance Level] for <u>narcotics</u>* [….]

83. Therefore, the hydromorphone detected in sample 4408103 is greater than 50% of the Minimum Reporting Limit for narcotics. This means it is not a negligible amount.

84. The scientific review article Prof Ayotte files and relies upon in her Expert Opinion explains that:

> *the urinary excretion of HM in hydrolyzed and non-hydrolyzed urine specimens following single-dose administration of a controlled-release 8mg tablet. The results confirm the need to detect conjugated HM, as 28% and 2% of the dose was detected in urine as total and free HM, respectively. The period of detection for total HM ranged from 11 to 52h over the thresholds studied, with the maximum detection period observed for both 50 and 100ng/mL cutoffs.*

85. In this case, the evidence shows that the Athlete ingested a 2 mg tablet. Therefore, my appreciation of the article and Prof Ayotte's testimony is that the 11-52 h cut off would likely need to be divided in four. This means the likely ingestion of the hydromorphone was very close to the time of sample collection.

86. The Athlete submits that his inadvertent use of the hydromorphone out-of-competition should be considered in the Tribunal's assessment of the Athlete's fault. However, because the substance was detected in substantial quantities further to an in-competition sample collection, there is little merit to this argument.

87. For the reasons above, I am satisfied that the hydromorphone was consumed close enough to competition to be considered "in-competition" and do not consider the fact the Athlete ingested it out-of-competition as a mitigating objective factor.

Standard of care

88. Fault is any breach of duty or any lack of care appropriate to a particular situation. In assessing an athlete's degree of fault,

> *the circumstances considered must be specific and relevant to explain the Athlete's or other Person's departure from the expected standard of behavior" (Definition of Fault set out in Appendix 1 of the CADP).*

89. The CCES submits that the Athlete's actions do not reflect an attitude of utmost caution with respect to avoiding prohibited substances. Rather, his reported conduct departs significantly from the standard of behavior expected from an athlete of his seniority and experience.

90. The CCES equally submits that placing the bottles on separate shelves in the same cupboard is not a sufficient or reasonable step to prevent a mix-up, especially considering the potential severe consequences (both the possibility of an ADRV occurring and the negative side effects brought upon by an inadvertent hydromorphone ingestion).

91. The CCES also submits that the prescription bottle that the Athlete claims he mistakenly took had CF's name and the drug description written on it in clear writing, that the two bottles while being blue are not sufficiently similarly to support a mix-up claim, noticeably because one of the bottles has a lid that is conspicuously red and without grooves, and because the evidence shows that CF's hydromorphone bottle was full, while his Tramadol bottle was almost empty.

92. The CCES argues that for the Athlete to ingest a pill from a prescription bottle clearly not his own kept in proximity to CF's prescriptions without first verifying that the bottle, the label, the weight and the contents assured him they were his Tramadol is a marked departure from what is expected of an athlete in the circumstances and evinces a significant degree of carelessness. This is especially so considering the Athlete's evidence is that he had taken a Tramadol pill three nights a row.

93. I generally agree with all of the above. CAS case law has long and well established the obligation that all athletes have in avoiding ingesting prohibited substances. With regards to this, the following passage of *(CAS) advisory opinion FIFA and WADA (CAS 2005/C/976 & 986, 21 April 2006*, which has been often cited in doping cases aptly describes and refers to the "*duty of utmost caution"* that is imposed on all athletes, at par. 73:

> *The WADC imposes on the athlete a duty of utmost caution to avoid that a prohibited substance enters his or her body. Case law of CAS and of other sanctioning bodies has confirmed these duties, and identified a number of obligations which an athlete has to observe, e.g., to be aware of the actual list of prohibited substances, to closely*

follow the guidelines and instructions with respect to health care and nutrition of the national and international sports federations, the NOC's and the national anti-doping organisation, not to take any drugs, not to take any medication or nutritional supplements without consulting with a competent medical professional, not to accept any medication or even food from unreliable sources (including on-line orders by internet) (...) ***The Panel underlines that this standard is rigorous, and must be rigorous, especially in the interest of all other competitors in a fair competition...***

94. Indeed, competitive athletes have important responsibilities when it comes to ensuring that no prohibited substance enter their bodies, whether intentionally or inadvertently, and although the Athlete, by his own account, typically verifies everything he ingests and is diligent in respecting antidoping rules, he neither exercised a standard of care expected from an international level athlete nor respected his duty of utmost caution.

"The Athlete's situation"

95. *Cilic* describes the objective element of fault *as the standard of care that could have been expected from a reasonable person in the athlete's situation*.

96. Here, the Athlete took what he thought to be his own non-prohibited painkillers out of the same bottle he always takes them from, except he accidentally took one of his girlfriend's pills from her bottle instead of his own.

97. According to the evidence on file:

    a. The two bottles have different color caps, one red, one blue;
    b. That the bottles caps have a different texture and slightly different opening mechanism;
    c. Each bottle is clearly and accurately labelled but with completely different labels, pharmacies and contents;
    d. The right medicine was in the respective pill container;
    e. There were 120 pills in CF's hydromorphone pill bottle at the time of the ADRV;
    f. There were only 2-3 Tramadol pills in the Athlete's bottle at the time of the ADRV;
    g. The Athlete was keenly aware of the amount of pills CF had because he was helping her get over her addiction to pain medication;
    h. He was also aware of the quantities in his own bottle since he needed to refill his prescription and had taken one pill for the previous nights;
    i. The pills are different colors.

98. I accept the CCES' submissions and find that, had the Athlete been diligent well before the ADRV, he could have prevented it. He could and should have taken clear and obvious precautions which any reasonable person being would take in that situation. E.g.: place the pills in different colored and sized bottles and/or stored them in different locations to avoid any mix up well before it can occur.

99. The Athlete's pre ADRV behaviour was careless. Had he been diligent before the ADRV, he would never have placed himself in such a precarious position. In so doing, he did not rigorously respect his duty of care and utmost caution.

100. The CCES submits that had the Athlete been more diligent at the time of his ADRV , he would have realized when he held the pill bottle that it was not the correct one, because of its red non corrugated lid, different label and weight. The CCES says that to not recognize these differences is a departure from the expected standard of care.

101. The Athlete's evidence is that the ADRV occurred in the middle of the night and he was distracted and in pain. He was highly anxious about leaving his girlfriend and travelling the next day. He simply woke up at 3 a.m. to put out the dogs, and feeling phantom pain and exhausted, as he would normally do, went to his medicine cabinet, grabbed his pill bottle, popped the lid without paying attention to it or its weight or its contents, poured out a small round pill from it and swallowed it – assuming all the time that he had taken his Tramadol - as per usual. It was just a mix up for which his degree of fault is minimal.

102. On the one hand, I accept and find that had greater care been taken ahead of the ADRV, this whole unfortunate turn of events could have been avoided. There is no doubt that the ADRV was brought upon by the Athlete's own carelessness and departure for the expected standard of care. A reasonable person would have done more to mitigate the risks of an ADRV occurring.

103. On the other hand, I am also compelled by the argument that the standard of care expected from the Athlete at the time of the ADRV should not be as strict. The Athlete's situation is one that most "reasonable" people would not lucidly tolerate, comprehend or successfully cope with. Therefore, it is hard for me to conclusively assess or *describe what standard of care could have been expected from a reasonable person in the Athlete's situation*. It follows that while there is also no doubt that the Athlete's actions departed from said standard in that moment, I find that the Athlete's own unique situation warrants a slightly less stringent application of the expected standard of care at the time of the ADRV.

104. An honest mistake occurred. But, under the CADP, mistakes cannot be fully absolved unless an athlete has been diligent, deliberate, conscientious in his or her actions and in carrying out his or her duty of care – at all times. The Athlete simply did not do what was expected of him before the ADRV to prevent it from happening, and also did not exercise sufficient vigilance at the time he accidentally ingested the hydromorphone.

105. My assessment of the objective elements of the case is the Athlete falls within a range which straddles the normal to light degree of fault.

Subjective elements

106. An extensive review of CAS and more recent SDRCC jurisprudence provide that in deliberating on an athlete's level of fault, a consideration of subjective elements is not only permitted but at the core of arbitral deliberations.

107. *Cilic* describes the subjective element as "*what could have been expected from that particular athlete, in light of his personal capacities".*

108. Here, the Athlete argues that the subjective elements of this case are so extraordinary that they warrant a reduction in the presumptive 2-year sanction all the way down to a minimal Reprimand.

109. He says he does not take hydromorphone because, as the evidence filed supports, he does not tolerate it. He explains that the stress levels he was under are so significant that he bears almost no fault for the ADRV because he took what he thought was non prohibited Tramadol when under severe pain in the middle of the night, likely brought upon by his heavy work week demolishing and reconstructing a 40-foot fence, and that on the eve of his departure for the Canadian Championships which was causing him great anxiety as a result of having to leave his girlfriend and because he does not like to travel, he picked up the wrong pill bottle, swallowed one small round pill without taking note of its color, and went back to bed. He was just not thinking clearly.

110. The litany of vicissitudes that the Athlete was living placed him in a position of distress, mental fatigue and emotional exhaustion at the time the ADRV occurred and he submits these subjective elements warrant the imposition of a lenient sanction.

111. The CCES on the other hand says that more was expected from the Athlete, especially because he is an Elite athlete, has followed anti-doping education, is well aware of his obligations and is familiar with prescription medication, its dangers and effects. The CCES acknowledges that, like most athletes, the Athlete is juggling a lot but pleads that it was not unusual for him to be up at 3 a.m. in the morning. By his own evidence, this is something he did on a regular basis. The CCES says that although the Athlete does have a busy life and personal responsibilities, consideration of these factors can only go so far. It is not a suitable excuse for the lack of care he demonstrated by not being more cautious.

112. The factual circumstances of this case resemble those of the CAS Armstrong Award, relied upon by the CCES, *CAS 2012/A/2756 James Armstrong v. World Curling Federation (WCF), award of 21 September 2012*. In the Panel's own words:

> *In the present case the athlete's negligence consists of the fact that on the occasion of his move to a new residence he stored his own TUE-covered medication in one container together with his late wife's anti-cancer prescription drugs which contained a substance prohibited in sport (but was not performance enhancing) and which a few months later the athlete accidentally ingested mistaking them for his own medication.*

113. In Armstrong, on appeal, the CAS Panel imposed a six-month period of ineligibility, considering *inter alia* the high level of stress the athlete was under and the fact that the substance was not used for the purpose of performance enhancement.

114. The CCES argues that the evidence of mitigating subjective factors was stronger in Armstrong than here and that the evidence supports, at minimum, a 6-month sanction.

115. I do not agree with the CCES' position that the mitigating subjective factors were stronger in Armstrong than here. Comparing the Armstrong case to the evidence before me, I find that the subjective elements which mitigate the Athlete's degree of fault are more significant here.

116. There is indeed a myriad of mitigating circumstances and subjective factors in this case which were recounted at length in written submissions and during the hearing and *supra*. In a nutshell, the Athlete is dealing with his own impairment as an amputee, acting as main caregiver for his double amputee girlfriend who has various severe health issues including kidney failure, diabetes and addiction, working 12-14-hour workdays running two businesses, keeping a house and yard and taking care of 3 dogs. He has also just lost his mother, his sole relative and is responsible for liquidating her estate including emptying and selling her house. He sporadically suffers from severe phantom pain in his leg stump as a result of his leg amputation. Additionally, his evidence is that he is a recovering alcoholic. And, of course, he trains and competes at least 4 days a week as an elite athlete in long jump and 100-meter sprint.

117. Additionally, as argued by his Counsel, the Athlete's moral fault in terms of how he got into contact with the substance is minimal.

> *When you look at how it happened… the moral fault is not high. The ADRV occurred in his home - because he is caring for a woman with significant health problems… He could not <u>not</u> have the hydromorphone in his home.*

118. CCES argues that while the Athlete has suggested that the contributing factors to his mistaken ingestion of the substance were stress and anxiety, he has in fact not provided any evidence to suggest that his mental capacity was impaired at the time of the ingestion. There is no medical evidence on file to show that that the Athlete's cognitive functions were impaired to a degree that he could not understand his actions.

119. While it is true that the Athlete has not filed medical documentation in support of a diminished cognitive function, I need not obtain medical confirmation to appreciate that everything the Athlete was dealing leading up to and at the time of the ADRV took its toll on him.

120. I do not think it is a matter of not understanding his actions or obligations as an athlete or of willingly disregarding the Rules or his responsibilities. I accept that he was acting on auto pilot when he ingested the wrong pill at 3 a.m. And he, in the process and in his personal and emotional fog, simply made, arguably, one of the biggest mistakes of his athletic career.

121. I have already concluded above that the objective elements of the case place the Athlete within a normal to light degree of fault. For the reasons above, I hereby find that the subjective elements of the case are significant enough to support a finding of a light category of fault. But they are not exceptional enough to move him down to the extremity of this category as the objective evidence on file simply does not support such an outcome.

C. INELIGIBILITY

What is the appropriate sanction that should be imposed under the circumstances?

122. Under CADP Rule 10.2.2, because Hydromorphone is classified as a specified substance, the mandated period of ineligibility to be imposed on the Athlete is 2 years.

123. Any sanction imposed must be commensurate with the Athlete's degree of fault.

124. Both the Parties have cited case law in support of what they believe to be the appropriate sanction to be imposed by the Tribunal. However, each case must be decided on its own facts. I rely on CAS *2014/A/3685 Evi Sachenbacher-Stehle v. IBU* where at par 72, the Panel cites *CAS 2011/A/2518* and says:

> *although consistency of sanctions is a virtue, correctness remains a higher one: otherwise unduly lenient or, indeed, unduly severe sanctions may set a wrong benchmark inimical to the interests of sport*

125. Although the Athlete's degree of fault is at the lower range of the spectrum, the Athlete does not succeed in establishing that this light degree of fault warrants the imposition of a mere Reprimand - as requested. Keeping in mind his departure from the expected the standard of care, such a consequence to the Athlete's admitted ADRV would result in a disproportionately lenient sanction which would very likely "*set a wrong benchmark inimical to the interests of sport*".

126. Still, the CADP definition of no significant fault specifically states that the athlete's level of fault must be assessed "*when viewed in the totality of the circumstances and* […] *in relationship to the anti-doping rule violation*". I refuse to believe that the fight against doping seeks to overly punish individuals when a violation occurs in the middle of a proverbial storm and where an athlete successfully establishes that the violation was clearly inadvertent, that he or she had a total lack of intent to enhance performance, that he or she gained no performance enhancement from the use of the substance, and where evidence reveals that, at time of the ADRV, he or she was braving extraordinary personal circumstances that would overwhelm most.

127. For the reasons above, I hereby impose a period of ineligibility of 4 months on the Athlete.

128. Although he has missed the Parapan Am Games, I do hope that he will delay his retirement and be given the opportunity to qualify for the Paralympic Games in Tokyo. This would of course be an even greater achievement and one I sincerely hope he realizes.

ORDER

129. The Athlete is sanctioned with a 4-month period of ineligibility.

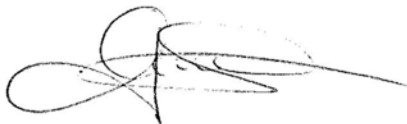
130. This period of ineligibility extends to all sports and all competitions.

131. Pursuant to CADP Rule 9, the Athlete's results and points earned at the 2019 Canadian Championships will be disqualified with all resulting consequences including the forfeiture of any titles, awards, medals, points and prize and appearance money.

132. In accordance with CADP Rule 10.11.2, because of his timely admission, the Athlete's period of ineligibility will start as of July 25, 2019. He will be free to resume competition on November 25, 2019.

133. I retain jurisdiction regarding any issue which may arise concerning the implementation or interpretation of this decision.

Signed in Beaconsfield, Québec, this 4th day of September, 2019.



Janie Soublière, SDRCC Arbitrator