

Independent Anti-Doping Disciplinary Panel – Jamaica

No. 09 of 2021

In the Matter of Jamaica Anti-Doping Commission v. Ms. Deidre Lewis

Decision on JADCO complaint that athlete breached Article 2.1 of the 2015 Anti-Doping Act

Jamaica Anti-Doping Commission, Kingston, Jamaica, W.I. Complainant

Represented by Mr. Andre Scheckleford, Attorney-at-law instructed by Hart, Muirhead Fatta

v.

Ms. Dieder Lewis, athlete, Jamaica, W.I. Respondent

Represented by Miss Ashleigh Ximines, Attorney-at-law instructed by Knight, Junor & Samuels

1. The Parties

1.1. Ms. Dieder Lewis (hereinafter 'Ms. Lewis and or 'the Athlete') is an amateur bodybuilder athlete who competes at the national level for approximately three years.

1.2. The Jamaica Anti-Doping Commission (JADCO) is an independent Anti-Doping Organisation in Jamaica and is charged with the responsibility to administer the anti-doping programme in Jamaica. It has the necessary authority, in keeping with its core functions, to implement the 2020 World Anti-Doping Code and the International Standards.

1.3. JADCO is independent of the Independent Anti-Doping Disciplinary Panel (IADP) and the Anti-Doping Appeal Tribunal.

1.4. JADCO and the IADP derive their respective jurisdictions from the 2015 Anti-Doping Rules ('JADCO rules').

2. The Factual background

2.1 In the instant case the complainant alleges that the Athlete, Miss Deidre Lewis, breached Article 2.1 of the JADCO rules.

2.2 Article 2.1 of the JADCO rule reads "*Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample.*"

2.3 On the 29th day of September 2020 JADCO conducted an out of competition testing at the home of the Athlete. The testing was conducted by obtaining and analyzing urine samples collected and marked as sample code 4514594 for identification.

2.4 The Athlete was duly notified by a letter dated 09th December 2020 where she was notified that she had a case to answer as there was an adverse analytical finding of the testing of her sample A specimen taken on the 29th September 2020. The Athlete's testing report revealed the presence of 0.2 ng/ml of zeranol metabolites. Zeranol is a prohibited substance which falls under the category of Class S1.2 – Other Anabolic agents in the World Anti-Doping Agency 2020 prohibited list.

2.5 In the aforesaid JADCO letter the Athlete was informed of her rights pursuant to the Anti-Doping in Sports Act and the JADCO Rules which includes the right to have her B sample specimen tested and the right to an impartial hearing by the Independent Anti-Doping Disciplinary Panel.

2.6 The Athlete proffered an explanation in a letter to JADCO dated the 31st December 2020 that she accepted the findings in her A sample but she never intentionally took any performance enhancing substances. In this letter Ms. Lewis further stated that she was prepared to waive her right to be heard by the IADP should the testing of the B sample reveal the adverse analytical finding.

2.7 On the 11 January 2021 the Laboratoire de Contrôle du Dopage in Laval Quebec confirmed in the Athlete's B sample the zeranol found in the Athlete's A sample, namely S1.2 Other Anabolic Agents/zeranol. On the 15th January 2021 JADCO notified the athlete in a letter of the findings in the B sample of her urine taken on the 29th September 2020. In the letter it read inter alia, "Zeranol metabolite falls under the Category of Class [S1.2], Other Anabolic Agents in WADA's 2020 Prohibited List. This is a **"Non-Specified Substance"** and is prohibited at all times in an out of competition.

2.8 The Athlete then had a Disciplinary Hearing by IADP on the days 11th February 2021, 18th March 2021, 31st March 2021 and 20th April 2021 which had testimony from one witness, who was appointed as an expert, Professor Dr. Wayne McLaughlin as well as 21 exhibits, witness statements and submissions filed by both Parties. The hearings were conducted partly face to face and by ZOOM internet hearings.

3. The Complainant's evidence

3.1 The Complainant has asserted that as Ms. Lewis has admitted to committing an anti-doping rule violation the IADP is only required to apply the appropriate sanctions and whether any mitigating factors may be relevant.

3.2 The Complainant has also asserted that the Athlete's case would then appear to, at best, rest on Rule 10.5.2. which states, "If an Athlete or other Person establishes in an individual case where Article 10.5.1 is not applicable, that he or she bears No Significant Fault or Negligence, then, subject to further reduction or elimination as provided in Article 10.6, the otherwise applicable period of ineligibility may be reduced based on the Athlete or other Person's degree or Fault, but the reduced period of ineligibility may not be less than one-half of the period of Ineligibility other wise

applicable. If the otherwise applicable period of ineligibility is a lifetime, the reduced period under this Article may be no less than eight years”

3.3 The Complainant cited from the testimony of Professor Dr. Wayne McLaughlin most notably that Zeranol breaks down over time, and a non-natural intake could result in the concentration’s presence in the Athlete’s urine sample. It would take a long time for the zeranol to break down, and a period of three months would be a “long time”. The IADP will refer later herein to other testimony of Prof. Wayne McLaughlin in the Findings.

3.4 It is the Complainant’s view that the Athlete is incapable of establishing any contaminated product, within the meaning of the JADCO Rules as a source.

3.5 The Complainant cited the case of Maurico Fiol Villanueva v Federation Internationale de Natation (FINA) CAS 2016/A/4534 (16 March 2017). In this case the Athlete advanced the theory that the source of the prohibited substance was contaminated horse meat sold as beef which he had consumed in Peru before he travelled to Toronto. The Panel in that case found that the foundations of the contaminated horse meat theory were unsound and depended in any event on a series on improbabilities none of which were (sic) established to the satisfaction of the Panel.

3.6 The Complainant also cited the observations of the Disciplinary Panel in World Anti-Doping Agency (WADA) v Darko Stanic & Swiss Olympic CAS 2006/A/1130 (4 January 2007). The Panel noted that under article 17.4.1. of the doping statute (“no fault or negligence”) this **precondition** (my emphasis) is as follows: “.....the Athlete must be able to establish, before obtaining any elimination of the ineligibility period, how the prohibited substance entered his or her system.”

3.7 The Complainant has adopted the dictum in part of the cited case at para. 3.5 that similarly the Athlete has provided no evidence that the substance may have been derived from a contaminated product. The Expert could provide no details or information concerning Zeranol in local foods.

3.8 The Complainant contends that the precondition is important and necessary otherwise the Athlete's degree of diligence or absence of fault would be examined in relation to circumstances that are speculative and that could partly or entirely made up. To allow any such speculation as to the circumstances in which an Athlete ingested a prohibited substance would undermine the strict liability rules underlying Swiss Olympic's doping Statute and the World Anti-Doping Code, thereby defeating their purpose.

3.9 In the Complainant's view the Athlete has failed to meet the threshold for the invocation of Rule 10.5.1.2.

4 The Respondent's evidence

4.1 The Respondent has posited that Article 2.1.2 of the JADCO rules provides the circumstances within which a violation of the JADCO rules may be founded and reads as follows: "Sufficient proof of an Anti-Doping Rule Violation under Article 2.1 is established by any of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Athlete's A Sample where the Athlete waives analysis of the B sample is analyzed and the analysis of the Athlete's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Athlete's A Sample; or where the Athlete's B Sample is split into two bottles and the analysis of the second bottle confirms the Presence of the Prohibited Substance or is Metabolites or Markers found in the first bottle"

4.2 The Respondent has relied on the case of CAS 2006/A/1067 International Rugby Board v Jason Keyter, award of 13 October 2006, which illustrates that it is not necessary that intent, fault or negligence or knowing use on the athlete's part be demonstrated to establish an anti-doping rule violation.

4.3 The Respondent has placed for the consideration of IADP a range of factors to be considered by the IADP. Some of these factors for consideration are:- (a) Zeranol is a natural metabolite of the mycotoxin zearalenone that is produced by fusarium fungus present in various foods such as corn, wheat, barley, oats, millet and rice or contaminated meat, (b) the Athlete's understanding of Zeranol as a prohibited substance and how the drug may be ingested through the contamination of everyday foods such as a wheat, oats, barley, etc. was non-existent before now, (c) the Athlete did not notice any side effects which might have raised any suspicion of the ingestion of the prohibited substance, (d) the Athlete's diet has not changed since engaging in the sports internationally and was proven acceptable as she has previously been tested five (5) times in one year without incident/positive findings, (e) it was determined at that time that her diet should be in keeping with that which will assist in the natural growth of muscle mass and does not run contrary to her diet as explained in the athlete's letter and witness statement, (f) the Athlete is generally careful about what she ingests and is not cavalier about her anti-doping obligations. The Athlete did not intentionally or wilfully depart from her duty to exercise the utmost caution to keep prohibited substances out of her body.

4.4 The Respondent contends that when considering whether the Athlete has shown no significant negligence or fault, the question to be answered in this regard, is "did the athlete deliberately use the product for performance enhancing purposes, meaning did he or she intend to cheat?" The Respondent further posits that the finding of the prohibited substance was not to

provide her with an unfair advantage nor was it an attempt to cheat. The Respondent went on to lay out a raft of reasons why the IADP should concur with this contention.

4.5 The Respondent cited the findings of Professor Dr. Wayne McLaughlin in what she contended was the lack of intention of the Athlete to ingest the prohibited substance.

4.6 The Respondent has acknowledged the fact that she committed an anti-doping violation as established by Article 2.1 of the JADCO Rules. Therefore, the case of the Complainant remains unchallenged.

4.7 The Respondent cited the cases of JADCO v Yohan Blake, Marvin Anderson, Allodin Forthergill and Landsford Spence, Jamaica Anti-Doping Appeals Tribunal (14th September 2009), JADCO v Ricardo Cunningham [supra], Sherone Simpson v JADCO CAS 2014/A/357, award of 07th July 2015 and Asafa Powell v JADCO CAS 2014/A/3571, award of 07th July 2015. The substantial finding in the Blake and Simpson cases was that the athletes were found to be in breach of Article 2.1 of JADCO Rules. In the Cunningham case the athlete was found not to be culpable as the athlete explained how the contaminated substance entered his body and in keeping with Article 10.4 of the JADCO rules.

5. The substantive issues to be decided

5.1 Whether the Athlete is able to rely on Article 10.5.2 of the JADCO Rules.

5.2 Whether the sanctions to be determined, if any, based on the facts and circumstances should be a warning and an order as to no fault or no negligence be granted.

6. Legal Analysis

6.1 Article 10.5.2 of JADCO Rules state “If an Athlete or other Person establishes in an individual case where Article 10.5.1 is not applicable, that he or she bears No Significant Fault or Negligence, then, subject to further reduction or elimination as provided in Article 10.6, the otherwise applicable period of ineligibility may be reduced based on the Athlete or other Person’s degree or Fault, but the reduced period of ineligibility may not be less than one-half of the period of Ineligibility other wise applicable. If the otherwise applicable period of ineligibility is a lifetime, the reduced period under this Article may be no less than eight years”.

6.2 The Athlete has by her own witness statement stated “I have experienced grave difficulties in seeking to mount a defence. One of the most significant challenges faced is my ability to locate or identify what foods I may have eaten that would have caused me to ingest the prohibited substance. I am certain that it was not from any other source as at the time, I can recall that I was not taking any supplements other the occasional potassium pills. The resultsof the adverse finding was too delayed for me to conduct a fulsome enquiry.”

6.3 In the case of CAS 2006/A/1067 International Rugby Board v Jason Keyter¹it was held that the Respondent has a stringent requirement to offer persuasive evidence of how such contamination occurred. Unfortunately, apart from his own words, the Respondent did not supply any factual evidence of the specific circumstances in which the unintentional ingestion of cocaine occurred. The Panel, therefore finds that the Respondent’s explanation was lacking in corroborating evidence and unsatisfactory, thereby failing he balance of probability test.

¹Supra paragraph 4.2 herein

6.4 The Athlete, Miss Lewis is in a similar situation as was Mr. Keyter in the above cited case² whereby the Athlete is unable to offer any evidence as to how the contaminated substance entered her body.

6.5 Professor Dr. Wayne McLaughlin has offered no substantive evidence as to how the Athlete had ingested Zeranol when cross examined on this aspect of the expert report which is quote “From these findings of very low levels of α -zeranol (0.04 ng/mL) and β -zeranol (talernanol) (0.16 ng/mL) in the athlete's urine sample would imply natural intake. It is therefore our opinion that the substances found in the athlete's urine sample supports the assumption that a mycotoxin contamination caused the findings in the doping control specimens rather than a misuse of the anabolic agent” unquote to which he was asked “...that conclusion is based solely on the concentration of the relevant chemicals in the Athlete's sample?” to which he replied “Yes”. **Professor McLaughlin was only able to offer theoretical assumptions as to how the Athlete was found to have tested positive for a non-specified substance and to conclude by saying that there were very little studies on humans with Zeranol.**

6.6 The cases presented by the Complainant in support of its case have been fully considered as well as the case relied on by the Respondent. All the cases save for the Cunningham case, albeit in the Cunningham case taking cough syrup for the flu was a heavy factor in how the IADP decided that case, adopted this rationale³ in its findings as to why application of a strict liability standard is justified in principle, that is the prohibition of banned substances will not be lifted in recognition of its accidental absorption. The vicissitudes of competition, like those of life generally, may create many types of unfairness, whether by accident or the negligence of unaccountable persons, which the law cannot repair.

²Supra paragraph 6.3 herein

³ Article “Ideology, Doping and the Spirit of Sport” – Vincent Geerates, Sport, Ethic and Philosophy, 2018 Vol.12, No. 3, 255-271.

6.7 Furthermore, it appears to be a laudable policy objective not to repair an accidental unfairness to an individual by creating an intentional unfairness to the whole body of other competitors. This is what would happen if banned performance-enhancing substances were tolerated when absorbed inadvertently. Moreover, it is likely that even intentional abuse would in many cases escape sanction for lack of proof of guilty intent. And it is certain that a requirement of intent would invite costly litigation that may well cripple federations- particularly those run on modest budgets- in their fight against doping. The IADP adopts this rationale.

7 Orders-

The Independent Anti-Doping Panel finds as follows:-

7.1 The Athlete had in her body a **Non-Specified Substance** in violation of Class [S1.2], Other Anabolic Agents, in WADA's 2020 Prohibited List.

7.2 The Independent Anti-Doping Disciplinary Panel does not find on the evidence presented that the athlete, Miss Denise Lewis, bears no fault or negligence whereby the applicable period of ineligibility shall be eliminated.

7.3 In the circumstances of this case the athlete is ineligible for a period of **2 years**, as per JADCO Rule 10.2.1.1, and the period of provisional suspension from the time of the official

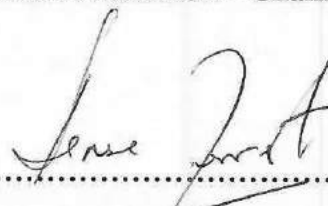
notification by JADCO⁴ to the Athlete of the adverse analytical findings for time already served would be deducted from the 2 years period of ineligibility.

Dated this 11th day of May 2021



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Kent P. Gammon – Chairman IADP



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Denise Forrest – Member of the IADP



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Dr. Donovan Calder – Member of the IADP