

**BEFORE THE SPORTS DISPUTES TRIBUNAL
OF NEW ZEALAND**

SDT/06/05

Anti-doping violation application

BETWEEN

BikeNZ

Applicant

AND

Amy Diana Mosen

Defendant

Tribunal: Hon Barry Paterson, QC (Chairman), Carol Quirk and Farah Palmer

Date of Hearing: Wednesday, 25 May, 2005

**DECISION OF TRIBUNAL
31 May 2005**

Introduction

1. BikeNZ, the governing body of cycling in New Zealand, was advised by letter of 31 March 2005 from the International Cycling Union ("UCI") that Amy Mosen had tested positive for the substance terbutaline at a women's World Cup meeting in Geelong, Australia on 27 February 2005. Ms Mosen does not challenge the positive finding and the matter comes before the Tribunal for the imposition of the appropriate sanction.
2. A Report of Analysis dated 15 March 2005 from the Australian Sports Drug Testing Laboratory stated:

"The presence of Terbutaline was confirmed at a level less than the 1000 ng/mL WADA threshold..."

Anti-Doping Policy

3. Both BikeNZ and the Cycling New Zealand Federation have similar anti-doping policies. They are based on the World Anti-Doping Code 2003 (the WADA Code) and the UCI Rules. The 2005 Prohibited List – International Standard includes, at S3, Beta-2 Agonists. Terbutaline is a Beta-2 Agonist. However, use of some Beta-2 Agonists, including terbutaline, is permitted “when administered by inhalation to prevent and/or treat asthma and exercise-induced asthma/broncho-constriction...” They do, however, require a Therapeutic Use Exemption (“TUE”).
4. BikeNZ’s anti-doping code notes that athletes with a documented medical condition requiring the use of a prohibited substance must obtain a TUE in accordance with the WADA standard.
5. BikeNZ’s anti-doping code provides that every person who commits an anti-doping rule violation is liable for sanction in accordance with Article 10 of the WADA Code. That Code provides for a two year term of ineligibility for a first violation unless the provisions of Article 10.3 apply. Under Article 10.3, where an athlete can establish that the use of a Specified Substance was not intended to enhance sports performance, a lesser sanction may be imposed. For a first violation the minimum sanction is a warning and reprimand, and no period of ineligibility from future events. The maximum sanction is one year’s ineligibility. Included in the Specified Substances List in the 2005 Prohibited List are “all inhaled Beta-2 Agonists, except Clenbuterol”.

Amy Mosen’s Position

6. Ms Mosen’s position is that the incident resulted from an accidental omission to seek a TUE for her current asthma condition. Although she had previously been selected to represent New Zealand in a World Cup meeting in Wellington on 6 March 2005, she was subsequently selected at short notice to represent New Zealand in the Geelong World Cup on 27 February 2005. She obtained a letter from a local health centre advising that she was on Bricanyl and Pulmicort Turbuhalers daily for asthma, as prescribed by Dr Lillis. Her evidence was that to the best of her knowledge she did all that she was required to do to notify her asthma treatment. She was unaware of the need to make an application on an official TUE form. She stated that she did not intend to break the anti-doping rules.

BikeNZ’s Position

7. BikeNZ’s position was supportive of Ms Mosen. It took the view that the incident resulted from an accidental omission to seek a TUE for asthma medication and consequently, the minimum sanction should be imposed, namely a reprimand and a warning with no period of ineligibility from future events.

Findings

8. Ms Mosen was advised by letter of 14 February 2005 from BikeNZ that she had been selected to represent New Zealand at the Wellington World Cup. The events were to be held approximately from March 2 to 6, 2005, inclusive. The letter detailed various arrangements and included:

“If you are an asthma sufferer, please provide Marilyn a copy of your documentation. (Doctors Certificate and TUE)”

At no time was Ms Mosen advised by BikeNZ of the procedure to apply for a TUE or provided with an application form to obtain a TUE or advised what a TUE was.

9. On Thursday, 18 February Ms Mosen was advised that she had been selected for the Geelong meeting and was to leave New Zealand two days later on the 20th. On receipt of the advice she obtained the letter already referred to giving details of her treatment for asthma.
10. Ms Mosen was not a carded athlete and had not previously received any information from BikeNZ advising her of her requirements to obtain a TUE. As Ms Mosen was not on the register of athletes to be tested 'out of competition' she therefore would not have received any information from the New Zealand Sports Drug Agency (NZSDA) regarding the need for TUE forms. She had never before been tested. Her evidence was that she did not actually know what a TUE was.
11. After the test and being aware of the position, Ms Mosen applied for and obtained a TUE.
12. The Tribunal accepts that Ms Mosen is an asthma sufferer and has been so for a period of approximately nine years. The terbutaline entered her body through her asthma sprays and we are satisfied that it was not taken with the intention of enhancing her sports performance. She thought, wrongly, that by obtaining a certificate detailing the treatment she was taking, she had complied with what was required of her. We accept that she did not know what a TUE was. She could have, and probably should have, enquired what was meant by TUE in the letter of 14 February 2005. However, her failure to make further enquiries is understandable in the circumstances, both because of the short time in which she had to prepare to leave the country and because of the information which she received from BikeNZ.
13. While it is a little surprising Ms Mosen did not have a greater knowledge of what was required, we accept that in the circumstances she did not. She was not a carded athlete, was not on the drug testing programme of Bike NZ or the NZSDA, had not previously been tested and had not received information relating to drug testing and in particular, TUE's.
14. We observe that in this case BikeNZ may have contributed to the position. Under Article 4.4 of the WADA Code BikeNZ has an obligation to have in place a process whereby athletes with documented medical conditions requiring the use of a prohibited substance may request a TUE. Both the Cycling Federation of New Zealand and BikeNZ's Anti-Doping Codes note that the WADA Code may be used in understanding and interpreting the policies. Clause 9 of BikeNZ's Anti-Doping Code does contain a provision requiring athletes with a documented medical condition requiring the use of a prohibited substance to obtain a TUE in accordance with the WADA standard. However, in the Tribunal's view, BikeNZ did not have in place an

adequate process to allow Ms Mosen to make an application. We do not consider that it complied with its requirements by merely advising Ms Mosen to provide a TUE without letting her know what a TUE was and how she should go about obtaining one.

15. The Tribunal understands that BikeNZ has revised its selection letter as a result of the events in this case. This is commendable. The Tribunal recommends that in the future when a cyclist is selected to represent New Zealand, especially when that cyclist is not a carded athlete and has not been on the drug testing list, BikeNZ should ensure it has procedures in place to inform the cyclist of all the relevant information he or she needs to know, not only in relation to TUEs, but also to anti-doping matters in general.

Decision

16. We accept that the use of terbutaline was not with the intention of enhancing Ms Mosen's performance and the failure to obtain a TUE was due to inadvertence. Accordingly the minimum sanction is appropriate in this case. Ms Mosen is therefore warned and reprimanded.
17. The parties will meet their own costs.



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Hon B J Paterson QC
Chairman of Sports Disputes Tribunal
31 May 2005