

BETWEEN DRUG FREE SPORT NEW ZEALAND
Applicant

AND TOM (ZIG ZAG) WALLACE
Respondent

DECISION OF TRIBUNAL GIVEN ON 5 MARCH 2009

Hearing: 3 March 2009 at Auckland

Present: P David for Applicant
 M Smyth for Respondent

In attendance: G Steel and J Kernohan for Applicant
 Respondent in person

Interested parties: B Lyall and Dr D Renata for Boxing New Zealand
 Inc.

Tribunal members: Hon B J Paterson, QC
 A Greenwood
 C Quirk

Registrar: Brent Ellis

BACKGROUND

1. Mr Wallace is a boxer who undertook an out of competition test by Drug Free Sport (DFS) on 21 October 2008. He tested positive for Probenecid. When advised, by letter dated 14 November 2008, of the adverse analytical finding, Mr Wallace waived his right to have the B sample analysed.
2. Mr Wallace participated in the hearing to make submissions on any sanction or penalty which might be imposed.

MR WALLACE'S SUBMISSIONS

3. Mr Wallace contracted an infection in his left knee which was subsequently diagnosed as cellulitis. He planned to see his general practitioner on 20 October 2008.
4. The pain in his left knee became worse to the point that he was compelled to seek urgent medical assistance on 19 October. He visited the Accident and Emergency Clinic at Anglesea Street Clinic in Hamilton and was treated by Dr Neave.
5. Mr Wallace's evidence was that the doctor explained that he would administer an antibiotic by IV drip and would also prescribe Probenecid tablets which were used to increase the potency of the treatment. The doctor stated he would administer the first treatment then and that Mr Wallace would require two follow up treatments with his regular doctor.
6. Mr Wallace advised the doctor that he was a competitive boxer who was frequently tested by DFS. He sought reassurance that what was being prescribed would not cause him to have a positive test. His evidence was that Dr Neave told him that there was no problem with what he was prescribing, and further that there was a clear medical need that he be treated in this way. Relying upon the doctor's expertise, Mr Wallace authorised the administration of the medication.

7. Mr Wallace subsequently visited his own general practitioner and was administered the balance of the antibiotics and the Probenecid. These visits took place on 20 and 21 October.
8. Dr Neave gave evidence. He confirmed Mr Wallace's evidence. His evidence was that the administration of Probenecid in conjunction with antibiotics for the treatment of cellulitis significantly increases the chance of recovery by making the antibiotics more effective to treat the infection.
9. He said that when told of the suggested treatment plan, Mr Wallace told him that he was a competitive boxer and as a consequence would often be tested for prohibited substances by DFS. He asked whether the treatment plan which the doctor had suggested "*would cause any problems if he was subsequently tested*".
10. The doctor replied that he was not aware of all the substances on the prohibited list, but since he knew that antibiotics and Probenecid did not enhance sporting performance, he assumed that there would be no difficulties with following the established protocol to treat the cellulitis. That established protocol encouraged him to "*reassure Mr Wallace that the treatment plan would not cause any difficulties for him*". He was satisfied that the proposed treatment was the best option for Mr Wallace. He said that if he had known that the Probenecid was a prohibited substance, he would have prescribed him antibiotics only, but this could have caused the treatment to be ineffective and could have later caused further complications including requiring Mr Wallace to be admitted to hospital for more intensive treatment.
11. It was also the doctor's evidence that he was given very little education about what treatments are prohibited for sporting purposes. He was not aware when he treated Mr Wallace that the Probenecid was a prohibited substance.

DRUG FREE SPORT'S POSITION

12. According to DFS's records, Mr Wallace entered the registered testing pool on 3 November 2006 and has been provided annually with the educational material explaining his responsibilities, including the athlete's wallet card.
13. It was the submission of DFS that this was not a case where the no fault defence could succeed, because there was some fault attributable to Mr Wallace.
14. In respect of the *lex mitior* principle, which was described in the recent case of *Drug Free Sport New Zealand v Dane Boswell* (ST 01/09), counsel for DFS accepted that the preconditions for the possible application of rule 14.4 of the Sport Anti-Doping Rules (2009) (the rules) are met. It was then for the Tribunal to consider the degree of fault on Mr Wallace. Mr David, counsel for DFS, accepted that if the Tribunal determined the case under the *lex mitior* principle the level of fault was not high.

DISCUSSION

15. The Tribunal is required to consider whether the no fault principle applies. If not, there appears little point in considering whether the no significant fault principle applies because any sanction under that principle would be more severe on Mr Wallace than any sanction imposed under the *lex mitior* principle.
16. Mr Smyth, counsel for Mr Wallace submitted that the no fault principle applied in the circumstances of this case. Mr Wallace needed urgent medical treatment. He went to the Accident and Emergency Clinic at the Anglesea Medical Centre because it was a weekend and he was unable to see his own practitioner. It was submitted that Mr Wallace was entitled to rely on the advice given him by the doctor and to assume that the doctor was aware of the substances on the prohibited list. In respect of the warning on the wallet card which had been supplied to Mr Wallace, it was submitted that this placed a greater

obligation on Mr Wallace than did the strict terms of rule 14.5 of the rules (the no fault or negligence provision). It was submitted that the Tribunal should judge the matter on the wording of rule 14.5 and not the wallet card. It was also submitted that it would have been impracticable to apply and obtain a therapeutic use exemption (TUE) on the Sunday that he visited the Anglesea Medical Clinic. It would, in Mr Smyth's submission, be sending the wrong message to athletes if fault was attributed to Mr Wallace in this case.

17. Mr Wallace acknowledged that he had received both the relevant athletes' handbook and the wallet card from DFS. The wallet card recommended that an athlete "*not take any medications given to you by others (athletes, coach, etc), without checking them first*". In a section headed "*REMEMBER*", the context reads:
 - Always advise your doctor/chemist that you are an athlete subject to sports drug testing before you are prescribed medication.
 - Ask that you doctor/pharmacist refer to the MIMS New Ethicals Catalogue to clarify status of substances.
 - Ensure that all TUE requirements are met.
18. There were similar warnings in the athletes' handbook. In one section of the handbook Probenecid was included as an example under the heading "Diuretics and other Masking Agents".
19. Mr Wallace complied with the direction in the wallet card to advise the doctor that he was an athlete subject to sports drug testing. He did not however ask the doctor to refer to the New Ethicals Catalogue to clarify the status of the substance. Nor did he ensure that TUE requirements were met. The athletes' handbook provides a check list which should have been applied in the circumstances. If the doctor had advised that Probenecid was a prohibited substance and that there were no alternatives available, a TUE form could then have been completed and treatment could have begun immediately. There is a provision in

emergency situations for a retrospective TUE which would in all likelihood have been granted in this case.

20. The Tribunal has sympathy for the position in which Mr Wallace finds himself. It is understandable that he accepted the doctor's assurance. The Tribunal finds it regrettable that the doctor was prepared to give this assurance without checking the matter. He appeared to be motivated by the need to treat Mr Wallace and did not consider the consequences on Mr Wallace as a sportsman or alternative treatments. It is salutary to note that if the rules had not changed on 1 January last, the Tribunal would have had no alternative but to impose a period of ineligibility of at least twelve months on Mr Wallace.
21. The no fault or negligence provision is contained in rule 14.5 of the rules. The effect of determining that there was no fault or negligence is that there can be no period of ineligibility imposed on Mr Wallace. The requirements of the rule are that the athlete must establish how the prohibited substance entered his system and that there was no fault on his part. As noted, the Tribunal accepts that the substance entered his system after being prescribed by the doctor. It also accepts that it was not taken for the purposes of enhancing performance or masking prohibited substances.
22. It is only in exceptional circumstances that a finding of no fault can be made. The Tribunal regrets that it cannot make such a finding in this case because there were two steps which could and should have been taken. Mr Wallace should have requested Dr Neave to check the New Ethicals Catalogue. This clearly states that Probenecid is a prohibited substance. It would have then led to the second step of making an application for a TUE and proceeding with the treatment, or finding alternative treatment. Another factor which goes to fault is that Mr Wallace did not raise the issue of Probenecid being a prohibited substance when he subsequently visited his own doctor. The Tribunal accepts there was no significant fault on Mr Wallace's behalf but does not accept that there was no fault.

23. The minimum period of ineligibility on a finding of no significant fault is 12 months. If Mr Wallace is entitled to the application of the principle of *lex mitior*, the minimum period of ineligibility is nil and he is likely to receive a less onerous sanction than the minimum one which applies to no significant fault. There is therefore no point in considering the no significant fault principle.
24. The Tribunal accepts that the principle of *lex mitior* applies. Rule 22.1.2 of the rules authorises the application of the principle. Probenecid is now a specified substance and Mr Wallace has, in accordance with the requirements of 14.4 of the rules (which applies to specified substances), established how the Probenecid entered his body and that it was not intended to enhance his sports performance or mask the use of a performance enhancing substance. It was prescribed to Mr Wallace to alleviate a painful situation and he had no knowledge either that it was a prohibited substance or the reason for it being so prohibited. The issue is the correct sanction.
25. In the recent case of *Boswell*, the Tribunal determined that in that case a period of three months' ineligibility was the appropriate starting point. In this case, the period is obviously less than that because:
 - (a) Mr Wallace was aware of his obligations and made an appropriate request of the doctor. He relied upon the doctor and although this cannot absolve him of all his obligations, it is a factor which can be taken into account when considering the sanction;
 - (b) Mr Wallace has voluntarily withdrawn from competing since 14 November 2008, the date on which he was advised of the positive test.
26. In the circumstances, the Tribunal considers that the degree of the athlete's fault to be nearer the trivial rather than the grave extremes of the measure of fault. It considers that in the circumstances of this case, the appropriate sanction is a reprimand. This is the minimum sanction which may be imposed under 14.4 of the rules.

Result

27. Mr Wallace is reprimanded.

Dated 5 March 2009



.....
Hon B J Paterson QC
Chairman