Arbitration CAS 2002/A/400 M. / International Ski Federation (FIS), award of 24 January 2003*

Panel*:* Prof. Richard H. McLaren (Canada), President; Mr Dirk-Reiner Martens, (Germany); Mr Jean-Pierre Morand (Switzerland)

Cross Country Skiing
Doping
Deliberate use of prohibited substance
Applicable sanction

1. **The substance Darbepoetin alfa is an analogue-mimetic to EPO, which is a Prohibited Substance under the FIS Medical Guide. Darbepoetin is an artificial substance, which is never produced naturally by the human body and is different than EPO. Darbepoetin is easily detected using testing methods similar to those used to detect exogenous EPO.**

2. **In the absence of any explanation by the athlete of the presence of the Prohibited Substance in his body, there is no alternative, given the nature of Darbepoetin and its very effective performance enhancing effect, but to conclude that there is no other explanation than deliberate use.**

3. **In the absence of a personal appearance by the athlete (and a corresponding explanation of how the Prohibited Substance might have found its way into his body in a situation where there could only be exogenous administration of the Prohibited Substance) there is simply no reason whatsoever for CAS to consider reducing the disciplinary sanction imposed.**

The Appellant, M. was selected to compete at the XIX Winter Olympic Games in Salt Lake City ("the Games") as a cross-country skier.

The Respondent, FIS, "*is the supreme authority in all matters concerning the sport of skiing*" (Article 2.1 of the Statutes). FIS was responsible for the technical control and direction of the sport of skiing during the Olympic Games in Salt Lake City, including the event of the men's 50km cross-country ski held on 23 February 2002.

* NB: In relation to this case, see also the award CAS 2002/A/374 M. / IOC.

The Respondent was not the responsible body for carrying out doping controls during the period of the Games, which were within the authority of the IOC as provided for in the Preamble of the Olympic Movement Anti-Doping Code ("OMAC").

In order to be eligible for participation in FIS events, a competitor must have a FIS licence. The relevant national ski association issues the licence: see the FIS International Ski Competition Rules – Paragraph 203.2. M. received a licence from his Ski Association. As a competitor in FIS events, he was, therefore, obliged to comply with FIS rules and regulations: Paragraph 205.3. These rules and regulations include the FIS Doping and Medical Control Regulations as set out in the FIS Medical Guide ("the Medical Guide").

The cross-country skiing events at the Games, in which M. participated, were organised by FIS on behalf of the IOC. Accordingly, M. had to comply with both the OMAC and the FIS Medical Guide.

The Panel constituted in this proceeding is the same one which previously decided the case between M. and the IOC (CAS 2002/A/374) (hereafter referred to as the "Related Award"). In that decision this Panel determined that the Appellant had an analytical positive lab result arising from an out–of-competition doping control test conducted by the IOC at the Salt Lake City Winter Olympic Games on 21 February 2002. Therefore, the Appellant had used a Prohibited Substance in violation of the OMAC whilst competing in the Games. The Appellant was found to be in breach of Chapter II, Article 2.1 and 2.2 of the OMAC.

As a consequence of that decision, and pursuant to Chapter II, Article 3.1, 3.3 and 3.5 of the OMAC, the IOC was entitled to disqualify the Appellant from retaining the Olympic Gold medal in the men's 50 km. classical cross-country ski event which he was awarded on 23 February 2002. The IOC was also held to be entitled to exclude him from the Games.

This Panel has upheld the decision of the IOC as being one within its powers under the OMAC. It is on the basis of that decision that FIS imposed a two-year disciplinary sanction in accordance with the FIS Medical Guide. It is this action by the FIS, which is the subject of the Appellant's appeal and this award.

The Appellant is appealing against the decision of the FIS Council rendered on 3 June 2002, whereby he was given a disciplinary suspension for a period of two years. The sanction was imposed pursuant to Section D, Rule 2 subsection 2.1.1 of the FIS Medical Guide (2001-2002) and based upon an IOC out-of-competition test on 21 February 2001 that revealed the presence of Darbepoetin in the Appellant's urine. In the Related Award this Panel determined that Aranesp is an analogue and mimetic of EPO and therefore a Prohibited Substance under the OMAC.

The Appellant acknowledges that the sporting sanction of an automatic withdrawal of the result and the loss of a medal are appropriate where there has been an in-competition doping infraction. The Appellant submits, however, that the disciplinary sanction of an automatic fixed suspension cannot be justified when the resulting disciplinary sanction arises from an out-of-competition test, which will effectively terminate the Appellant's career.

Under the circumstances the Appellant argues that the FIS provisions do not mandate a fixed sanction and that the FIS failed to consider the factual basis surrounding the sanction. It is further submitted that a more flexible approach is appropriate and consistent with CAS case law. Additionally, because the out-of-competition test that resulted in the sanction was conducted during the Games, Chapter II, and Article 3.b. III of the OMAC applies. That provision provides: *"… suspension from any competition for a minimum period of two years. However, based on specific, exceptional circumstances to be evaluated in the first instance by the competent IF bodies, there may be provision for a possible modification of the two-year sanction"*.

The Appellant submits that the sanction ought to be reduced considering:

a) the athlete's previously clean record;

b) the degree of uncertainty that surrounds the detection of Aranesp;

c) the impact the sanction has had on the Appellant's image;

d) the economic hardships the Appellant has faced as a result of the sanction; and

e) the fact that the sanction is equivalent to the termination of the Appellant's career.

The Respondent submits that the Appellant obtained a FIS license through the Spanish Olympic Committee and is thereby bound to comply with the FIS Statutes, Rules and Regulations.

The Respondent argues that its decision of 3 June 2002, was proper in suspending the Appellant for a doping infraction, which was determined by the IOC Executive Board on 24 February 2002. The IOC clearly proved to the comfortable satisfaction of this Panel, as determined in the Related Award, that M. had Aranesp, an analogue-mimetic of a Prohibited Substance, in his body.

The consequences of a doping infraction are set out in the FIS Medical Guide and provide for a two-year sanction in cases of deliberate doping and a 3-month sanction in cases of inadvertent doping. The Respondent submits that Aranesp is a substance that is not produced endogenously in the human body. Therefore, Aranesp must be deliberately administered in order for it to be the subject of an analytical positive in the laboratory. The Appellant has not provided any explanation for how Aranesp entered his body.

The Respondent contends that the athlete committed an intentional doping infraction and there is no basis for reducing such a sanction under the FIS Medical Code. Furthermore, the Respondent claims that a reduction of the sanction based on the fact that Aranesp is a new substance would be inconsistent with the fight against doping.

The Respondent requests the tribunal to dismiss the appeal and affirm the FIS two-year suspension of the Appellant.

The Appellant filed a Statement of Appeal and 8 exhibits with the CAS on 12 July 2002 against the decision of the FIS Council of 27 February 2002 to impose an interim suspension; and, the further decision of the Council of 3 June 2002 to sanction the Appellant with a suspension for two years

from all international FIS Calendar competitions form 21 February 2002 until and including 20 February 2004.

The hearings in this matter took place in conjunction with those of the Appellant and the IOC in CAS 2002/A/374 M. v. IOC (hereafter referred to as the "Related Proceeding"). The Panel issued an award in that proceeding which is referred to in this proceeding as the Related Award. All the findings of fact and reasons in the Related Award are hereby incorporated into and form part of this Award.

The Appellant filed a joint appeal brief in this and the Related Proceeding on 6 August 2002. The response brief of the IOC in the Related Proceeding was filed on 27 September 2002. The Respondent filed its response brief on 13 September 2002.

The hearing was held on December 9 and 10 in Lausanne, Switzerland.

LAW

1. The parties are not in dispute as to the jurisdiction of CAS to resolve this dispute. That jurisdiction is explicit in the Disciplinary Procedure for Doping Offences of the FIS Medical Code. Rule 2.2 of Section D provides:

   "The athlete has the right to appeal the decision of the FIS Council to the Court of Arbitration for Sport (CAS)".

2. On the application of the IOC (date of letter joinder and Panel decision to hear together in correspondence) the Panel agreed to hear this appeal at the same time as M.'s appeal against his sporting sanction disqualification and loss of medal by the IOC.

3. Pursuant to Article 58 of the CAS Code of Sport related Arbitration ("the Code") these arbitration proceedings are to be governed by the applicable regulations and rules of law chosen by the parties or in absence of such a choice by the law of the country in which the Federation is domiciled. The FIS is domiciled Switzerland and accordingly this dispute is to be resolved according to the rules and regulations of FIS and Swiss Law.

4. In the decision rendered in the Related Proceeding this Panel determined that M. had committed a doping infraction.

5. The Panel concluded in the Related Award that the substance Darbepoetin alfa is an analogue-mimetic to EPO, which is a Prohibited Substance under the OMAC. It is also prohibited under the FIS Medical Guide. The Panel further concluded that Darbepoetin is an artificial substance, which is never produced naturally by the human body and is different than EPO. In the Related Award the Panel concluded that Darbepoetin is easily detected using

testing methods similar to those used to detect exogenous EPO. The reasoning and conclusion in the Related Award are adopted and made a part of this award.

6. In the FIS Medical Guide the rules define doping at p. 14 to be :

   1. *the use of an expedient (substance or method) which is potentially harmful to athletes health and/or capable of enhancing their performance.*
   2. *the presence in the athlete's body of a prohibited substance or evidence of the use thereof or evidence of the use of a prohibited method.*

   Based upon the findings of fact in the Related Award the Panel has no other alternative than to conclude that the Appellant has been doped within the above FIS Medical Guide definition in an out-of-competition doping control test. Therefore, a doping infraction has occurred under the FIS Medical Guide as well as under the OMAC as was determined in the Related Award.

7. The Appellant entered an agreement with the FIS through the FIS license he obtained from the Spanish Olympic Committee. Under the terms of his FIS eligibility the Appellant is bound by the FIS Medical Code.

8. The FIS Medical Code clearly sets out the consequences for a doping infraction stating:

   1. *Deliberate Doping*

      1.1 *Suspension from participation in all international ski competitions for 2 years for the first offence.*

9. The FIS properly relied upon the IOC finding of doping and accordingly properly exercised its authority to impose a sanction on the Appellant under its Medical Guide. The Panel agrees with FIS that this is certainly not a case of inadvertent doping such as the case before CAS in CAS 2002/A/376 Baxter v. FIS. In this case the Appellant has not provided any explanation for how the Prohibited Substance found its way into his system and in fact did not even appear before the Panel to be questioned on the matter. The Panel has no explanation whatsoever as to how the analytical positive lab result occurred. In the absence of such an athlete explanation, there is no alternative, given the nature of Aranesp and its very effective performance enhancing effect, but for this Panel to conclude that there no other explanation than deliberate use.

10. The question to be determined is whether the two year sanction imposed by FIS should be reduced. The FIS Medical Guide, does not provide for a reduction of a sanction and only provides for a lower sanction where there is evidence that the doping infraction was inadvertent. Accordingly, this Panel does not have the jurisdiction to reduce the sanction based upon the FIS rules.

11. The Appellant contends that exceptional circumstances provisions are incorporated into the FIS decision through the OMAC because the impugned conduct arose out of the Games. The Panel construes Article 3.b.III of the OMAC as providing competence to an International

Federation ("IF") such as the FIS to apply their own sanctions to athletes that commit a doping infraction. Indeed, the same provision notes that a two-year suspension is the minimum consequence of a doping infraction and thereby implicitly affords IF's the autonomy to impose greater sanctions on an athlete if its rules so provide. Similarly, the provision allows an IF that has an exceptional circumstances clause to impose a lower sentence. For this reason the Appellant's argument that exceptional circumstances are incorporated into the FIS Medical Guide because of the OMAC must fail. The provisions of the OMAC operate to provide consideration for the specific rules an IF may select and apply, but they do not work in the reverse. Therefore, the Panel again notes that it does not have the express authority to reduce the Appellant's disciplinary sanction.

12. In some situations where the rules of an IF provide for a fixed disciplinary sanction the CAS has reduced a sanction on the basis of proportionality. These cases generally involve federations that have a sanction that is higher than the minimum amount prescribed in the OMAC; or, are based upon other special circumstances surrounding the athlete and the situation.

13. The Appellant contends that he has a previously untarnished record. The Respondent asserts that the Appellant tested positive during the Games on three occasions in addition to the February 21 out-of-competition test. On this point the Panel sides with the Appellant. It is not enough for the Respondent to claim that there were three additional positives that occurred during the Games. In fairness to the athlete the Panel cannot consider such alleged positives in absence of the athlete being properly informed of an analytical A sample positive and subsequently having an opportunity to attend the B sample analysis and otherwise contest the results if desired. Such bold and unsubstantiated assertions against the athlete smack in the face of natural justice and are wholly inappropriate without sufficient evidence being advanced to prove the allegations. The Panel therefore finds that prior to February 23rd the Appellant had not tested positive for a prohibited substance. However, an untarnished record in and of itself is not a sufficient basis for the reduction of a sanction.

14. The Panel does not give any weight to the fact that Aranesp is a new substance when deciding if the sanction should be reduced. It was thought by the sporting world that Aranesp could not be detected. When there is deliberate use of a new substance, as the Panel has found here, which is an analogue or mimetic of a Prohibited Substance, is an aggravating circumstance and certainly not a mitigating one. To give credence to such arguments concerning a new substance would be an absurd result and contrary to the design of anti-doping regimes in sport.

15. The Appellants also point to the economic consequences directly resulting from the sanction, such as the loss of a medal and income as a basis for the reduction of the sanction. The Panel cannot accept this claim. When the Appellant made what this Panel has determined to be; a deliberate and conscious decisions to dope, he did so with the knowledge that it would assist him in attaining victory at the Olympic Games. A victory that would secure him significant economic rewards and Olympic medals. Thus, the Appellant accepted great risks with the possibility of achieving what might have only been known to him as illusory rewards. This was

a decision the athlete made. He accepted the risks that fall upon him and he cannot attempt to shrug them off as if he had not considered the consequences of his actions. Just as the Titan Atlas was forced to bear the weight of the world and heavens on his shoulders for his transgressions against the Gods of Olympus, M. must bear the burden of his flagrant disregard for the laws of the Olympic Movement.

16. The final assertion by the Appellant, and the one that carries the most weight, is that the disciplinary sanction is tantamount to a termination of M.'s career. Even if this were true, this fact would not justify a reduction of the sanction. The FIS two-year sanction is consistent with the minimum standard prescribed by the Medical Guide and is also in line with a variety of other IF's rules. In all of the circumstances of this case the sanction imposed by the federation is not unduly onerous.

17. The Panel agrees with FIS that this case is not one where the athlete has demonstrated special circumstances that warrant off-setting or reducing the sanction. In the absence of a personal appearance by the Appellant (and a corresponding explanation of how the Prohibited Substance might have found its way into his body in a situation where there could only be exogenous administration of the Prohibited Substance) there is simply no reason whatsoever for the Panel to consider reducing the disciplinary sanction imposed by the FIS.

18. In accordance with the FIS Medical Guide the Appellant committed a doping infraction and shall be sanctioned for a period of two years. The Appellant has not provided any acceptable reason for the Panel to reduce M.'s sanction. The Appellant failed to appear before the Panel. It is difficult to imagine how a reduction of a sanction could ever be warranted without an opportunity to assess the credibility of the Appellant and the explanations, which he might have. He most certainly did not express remorse for his actions.

The Court of Arbitration for Sport rules:

1. The appeal filed by M. on 12 July 2002 is dismissed.

2. The decision of the FIS Council of 3 June 2002 is upheld.

3. (…).