

NST-E24-334771

Mandy Mason v Athletics Australia & Sport Integrity Australia

Determination

National Sports Tribunal Anti-Doping Division

sitting in the following composition:

Panel Members

Mr Richard Redman

Professor Deborah Healey

Professor David Handelsman AO

in the arbitration between

Mandy Mason

(Applicant)

Represented by Blake Primrose, Legal Representative

And

Athletics Australia

(Respondent – Sporting Body)

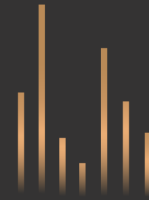
Represented by Peter Bromley, CEO, and Karen
Murphy, General Manager – People & Culture

And

Sport Integrity Australia

(Respondent – Sport Integrity Australia CEO)

Represented by Patrick Knowles, Senior Counsel;
Emily Fitton, Director – Legal; Peta Rogers, Senior Lawyer; and Chris Bold,
Lawyer



PARTIES

1. The Applicant is a participant in the sport of athletics holding registration with the First Respondent, Athletics Australia (AA).
2. The First Respondent, AA, is the National Sporting Organisation for the sport of athletics.
3. The Second Respondent, Sports Integrity Australia (SIA) was established pursuant to the *Sport Integrity Australia Act 2020* (Cth) and is the agency tasked with mitigating integrity threats to sports including, amongst other concerns, anti-doping control.

INTRODUCTION

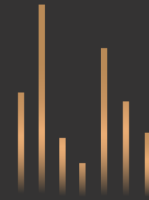
4. This matter involves the Mandatory Provisional Suspension provisions that are imposed upon an athlete as a result of an Adverse Analytical Finding (AAF).
5. The submission in this matter in summary is that the Mandatory Provisional Suspension imposed upon the Applicant should be eliminated by the National Sports Tribunal (NST) pursuant to article 7.4.1 of the *Australian National Anti-Doping Policy 2021* (ANADP) as it is likely to have involved a Contaminated Product.

NST JURISDICTION

6. The NST Anti-Doping Division has jurisdiction under section 22 of the *National Sports Tribunal Act 2019* (Cth), and Clause 7.4.1 of the ANADP to which AA has agreed to be bound. The NST's jurisdiction is engaged until resolution of the dispute.
7. The Applicant is bound by the ANADP pursuant to section 22(1)(b) as an "Athlete" within the meaning of the ANADP.

FACTUAL BACKGROUND

8. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties, it refers in its determination only to the submissions and evidence that it considers necessary to explain its reasoning.
9. From 11 to 19 April 2024, the Australian Athletics Championships occurred at South Australia Athletics Stadium in Adelaide. AA event information records that the Applicant was listed online as a participant in the 100m, 200m and 4x100m sprint events.
10. On 13 April 2024, the Applicant was subjected to an In-Competition doping control test. Analysis of the "Part A" of the Athlete's sample (#1180821) returned an adverse analytical finding for Ligandrol (LGD-4033) and di-hydroxy LGD-4033 (a metabolite of LGD-4033).
11. Ligandrol is listed under Class S1.2 (Other Anabolic Agents) of the *World Anti-Doping Code - International Standard - Prohibited List 2024*. It is prohibited at all times and is not designated as a Substance of Abuse. No therapeutic use exemption permitting use of Ligandrol was present.
12. On 13 June 2024, the Applicant was sent a Notice of ADRVs. Also on that date, AA imposed a Mandatory Provisional Suspension pursuant to Clause 7.4 of the ANADP.



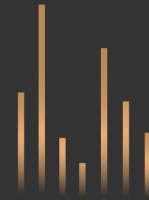
13. On 1 August 2024, the Applicant applied to the NST for a provisional hearing.

PROCEEDINGS BEFORE THE NST

14. The parties and NST agreed to an expedited hearing process in order to accommodate the Applicant's desire to compete, if successful in her application, at the World Masters Athletics Competition on 14 August 2024. Indeed, at the time of the hearing, the Applicant had already departed Australia and was journeying to the event.
15. By arbitration agreement dated 5 August 2024, the parties agreed to the following timetable for submissions:
- a. By 5 August 2024, the Applicant to file with the NST Registry and serve on the other Parties their submissions and any witness statement(s), evidence, and all other documents they wish to rely on by 7.00pm (AEST);
 - b. By 7 August 2024, the Respondents to file with the NST Registry and serve on the other Parties their submissions and any witness statement(s), evidence, and all other documents they wish to rely on by 7.00pm (AEST); and
 - c. On 9 August 2024 at 2.00pm (AEST), the parties are to attend an online (video conference) hearing.
16. A preliminary matter before the Panel involved an application by the Applicant to submit an expert statement after agreed submission timelines. This was opposed by the Second Respondent. The Panel considered the merits of receiving the additional material and the probative value of such. Given the narrow scope of this matter regarding the suspension elimination only, it was considered by the Panel that the additional material was not required in order to fairly determine the matter.
17. Furthermore, given the expedited nature of the proceedings and time limitations placed on the parties and tribunal, it was determined that there would be no cross-examination of the Applicant (or husband who had also provided a statement), but that the written statements and oral submission by council would be accepted and given due weight and consideration.
18. No objection was made at the outset of the hearing to the composition of the Panel and at its conclusion the parties confirmed that their procedural rights had been fully respected.
19. Upon conclusion of the hearing the Panel reserved judgment. The next day the Panel issued its determination with written reasons to follow. These are those reasons.

APPLICABLE RULES

20. The Second Respondent submitted to the Panel that as at the time of the hearing, the SIA CEO had not made an assertion against the athlete under clause 4.08 of the National Anti-Doping Scheme. No letter of charge alleging anti-doping rule violations had been issued.
21. The sole matter for determination by the Panel is whether the Mandatory Provisional Suspension imposed upon the Applicant should be eliminated pursuant to Article 7.4.1 of the ANADP.
22. Article 7.4.1 relevantly provides as follows:



“A Mandatory Provisional Suspension may be eliminated if (i) the Athlete demonstrates to the National Sports Tribunal that the violation is likely to have involved a Contaminated Product...”

“The decision of the National Sports Tribunal not to eliminate a mandatory Provisional Suspension on account of the Athlete’s assertion regarding a Contaminated Product shall not be appealable.”

23. “Contaminated Product” is defined in the ANADP as follows:

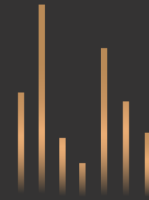
“Contaminated Product: A product that contains a *Prohibited Substance* that is not disclosed on the product label or in information available in a reasonable internet search.”

MAIN SUBMISSIONS OF THE PARTIES

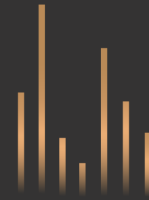
24. Both the Applicant and Respondent provided concise yet detailed submissions at short notice. The Panel is grateful for the manner in which the parties approached these proceedings.

Applicant’s submissions

25. The Applicant provided written and oral submissions.
26. The Applicant’s submission, in short, was that the asserted violations are likely to have involved a Contaminated Product such that, per article 7.4.1 of the ANADP, the NST should eliminate the Provisional Suspension.
27. Relevantly it was submitted that the inquiry before the tribunal was in effect two-fold:
- whether the likely source of the prohibited substance in the Applicant’s system was caused by a bottle of the athlete’s husband’s supplement (known as “Gain”); and
 - if so, whether that bottle of “Gain” was a Contaminated Product for the purpose of the ANADP.
28. The Applicant and her husband provided statutory declarations as to the events surrounding the matter. Relevantly those submissions provided as follows:
- The Athlete has taken supplements for approximately the last 5 years. She only uses supplements carefully selected from sports doctors, coaches and nutritionists.
 - The Athlete is aware of anti-doping rules, and aware that she is responsible for what enters her body. This awareness is supported by records provided to the Panel as part of the hearing bundle which indicates some anti-doping course attendance by the athlete.
 - The Athlete’s husband is an avid gym attendee and takes extensive supplementation. The husband says he is not an athlete, but is supportive of the Applicant’s athletic pursuits and is responsible for her logistics in that regard.
 - The husband consumes supplements to enhance strength performance, and he researches his own supplements via the internet. He does not have regard for supplement ingredients.



- e. The athlete does not consume her husband's supplements, although sometimes her husband uses her supplements. However, the Athlete's husband and the athlete always prepare their own supplement regimes, and never use the same blenders or shakers without washing.
 - f. In March 2024 the Athlete's husband obtained an unlabelled bottle of a product from an acquaintance at the gym named "Josh". He was told the substance was named "Gains" and would make him stronger. He did not tell the Athlete that he was taking "Gains".
 - g. During the period 11 to 15 April 2024 when the applicant and her husband stayed at an AirBnb in South Australia for the event, the unlabelled "Gains" bottle travelled with the Athlete's husband and he was using it every day.
 - h. Whilst there, the athlete and her husband shared kitchen items typically used for eating and drinking. Furthermore, whilst at the event the Athlete received a promotional shaker from a stall, and the husband may have used the shaker on occasion without the Athlete's knowledge.
 - i. The Athlete and her husband engaged in sexual intercourse (without protection) on the night prior to her test, the morning of her test, and then again later during the day of her test.
 - j. In May 2024, the husband received a second bottle from "Josh". This bottle was labelled "Gain".
 - k. Upon hearing the news of the Athlete's adverse analytical finding, a check of the second "Gain" bottle identified LGD-4033 on the label.
29. Accordingly, as to the source of the prohibited substance, the submission was that it was likely that the husband's bottle of "Gain" was responsible, and that it entered the Applicant's system via either cross-contamination on kitchenware or utensils, or shared use of the promotional shaker, or via her husband's ejaculate.
30. As to whether the product "Gain" is a Contaminated Product, the Applicant submitted, in short that unlike common understandings of *contaminate* or other dictionary definitions (implying impurities, or that a product contains something that it should not), the ANADP specifically gives "Contaminated Product" a precise and limited meaning.
31. Thus, under the ANADP, a product is not contaminated *because it contains a Prohibited Substance when it should not*, but rather a product is contaminated *because it does not disclose the existence of a Prohibited Substance* (and nor could the Prohibited Substance's existence be known from a reasonable internet search).
32. As such, as the specific "Gain" bottle was unlabelled it does not disclose that it contains Ligandrol, and that itself could be sufficient to qualify the bottle of "Gain" as a Contaminated Product by ANADP definition.
33. However furthermore in this case, the Athlete had no knowledge of the bottle of "Gain" in the relevant period, nor the ingredients in the bottle of "Gain", nor that her husband was consuming the "Gain", and could not find out via an internet search its ingredients. They are each further



matters that go toward the bottle of “Gain” being classified as a Contaminated Product under the definition in the ANADP.

First Respondent’s submissions

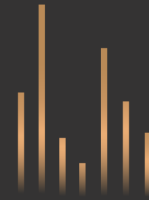
34. The First Respondent did not provide written or oral submissions, however attended the hearing and was available if required.

Second Respondent’s submissions

35. The Second Respondent provided written and oral submissions.
36. Those submissions were that the Applicant’s application should be dismissed as it failed to demonstrate to the requisite standard of proof that the violation(s) are likely to have involved a Contaminated Product.
37. The Second Respondent agreed that issues raised by the Applicant, namely the question of source and the question of contaminated product, did arise. However, the Second Respondent’s position was that the Applicant is required to demonstrate on the balance of probabilities that the source of the product in her system was a Contaminated Product, and further, even if it were held that the standard of proof is lower than the balance of probabilities, the Applicant failed to discharge her burden.
38. Relevantly, as to the source of the prohibited substance, the Second Respondent submitted that the Applicant’s three hypotheses as to how the substance came to be in her system amounted to mere speculation or conjecture, and did not demonstrate the “likely” mechanism as to how the Prohibited Substance came to be in her system.
39. As to “Contaminated Product”, the Second Respondent stated that it may be accepted that the definition expands upon the ordinary meaning of the term, to the extent that it is not limited to products which have become mixed or adulterated by a foreign substance. However, that expansion does not incorporate the “Gain” product in issue, as the Ligandrol (LGD-4033) was not a foreign object or substance, nor an ingredient nor constituent part of a product, it was the product, and that does not fall within any sensible construction of the term “Contaminated Product”. That is, a Prohibited Substance does not become a Contaminated Product simply because it is unlabelled or because the name of it is not known by an athlete and cannot, therefore, be the subject of a reasonable internet search.
40. It was submitted that regard to the purpose of the definition and the substantive Articles in which it is used needs to be considered. The “Gain” ingredients were not mislabelled and the Applicant did not show that the ingredients of the product could not be determined using a reasonable internet search.

“Likely”

41. Much was made in submissions, both oral and written, of the word “likely” in the definition of Contaminated Product.
42. The Applicant submitted, in short, that to construe the word “likely” in article 7.4.1 too strictly may have the undesirable effect of preventing an athlete from competing in circumstances



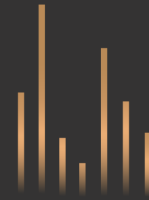
where that athlete might later be subjected to a reduced sanction (or a reprimand) and, had the Provisional Suspension been lifted, that athlete would have been able to compete.

43. It was submitted that the Mandatory Provisional Suspension under 7.4.1 is not a penalty or sanction, those concepts are the result of subsequent action under Article 10, but is only to ensure competition fairness and thus should not be imposed too strictly. Any unfairness in subsequent competition results is able to be rectified via Articles 10.10 and 10.13.
44. Avoiding such an interpretation ensures fairness to the athlete in question and so is consistent with the purpose of article 7 as a whole.
45. Secondly, it was submitted that other parts of the ANADP (including the second limb of 7.4.1) requires proof to the standard of “*comfortable satisfaction*” which is a higher standard than “likely”. As such, the provision’s use of “*likely*” must contemplate a comparatively lower standard of proof.
46. In contrast the Second Respondent submitted, in short, that the Applicant’s contention that “likely” in Article 7.4.1 is a lower standard is directly contrary to existing authority of the CAS in considering the analogous provisions of the WADA Code.
47. In particular, Article 3.1 provides that:

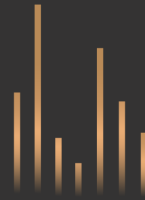
“Where this Anti-Doping Policy places the burden of proof upon the Athlete or Other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, except as provided in Articles 3.2.2 and 3.2.3, the standard of proof shall be by a balance of probability”
48. The submission is that given the Applicant has the burden under Article 7.4.1 of demonstrating that it is “likely” the AAF involved a Contaminated Product, consistently with Article 3.1 that burden must be satisfied on the burden of proof.

MERITS

49. As noted above, the sole matter for determination by the Panel is whether the Mandatory Provisional Suspension imposed upon the Applicant should be eliminated pursuant to Article 7.4.1 of the ANADP.
50. Both the Applicant and Second Respondent acknowledged in submissions that the ANADP cannot be construed simply by deconstructing separate words and phrases used throughout. Rather, words and phrases must be contemplated in the context of the ANADP as a whole and in consideration of its objective purposes. The Panel agrees.
51. A priority of the ANADP is to promote fair competition in sport. This is done via anti-doping detection, deterrence and education amongst other matters. A fundamental principle of anti-doping education, and the wider anti-doping movement itself, is the concept of athlete individual responsibility for what is in their body. The onus is thus on the athlete to establish how a substance was in their system and creates a high standard to satisfy.
52. The Applicant’s submission is, essentially, that the use of the word “likely” in Art 7.4.1 creates within the ANADP a differing standard of proof than that is otherwise established in the WADA Code and anti-doping practice.



53. Although it is for suspension aspects alone as opposed to a full consideration of case merits, the Panel is not convinced the policy drafters had such intention nor the wording has such effect.
54. That a Mandatory Provisional Suspension could be eliminated in circumstances where it is no more than “likely” that a product is contaminated, wholly conflicts in the Panel’s view with the objectives and purposes of the ANADP and indeed the wider anti-doping movement. Such an interpretation would create a lower standard in Article 7.4.1 than the remainder of the ANADP; effectively isolating one aspect of the ANADP required by an athlete to satisfy from the remainder of the policy.
55. Article 7.4.1 requires the Applicant to *demonstrate* to the National Sports Tribunal that the violation is likely to have involved a Contaminated Product.
56. To demonstrate to the Panel that the violation involved a contaminated product, three possible hypotheses were presented that could each (or together) potentially account for how the product entered the Athlete’s system.
57. In the CAS matter of *WADA v International Weightlifting Federation (IWF) & Yenny Fernanda Alvarez Caicedo* (CAS 2016/A/4377) it was observed that:
- “Spiking and contamination — two prevalent explanations volunteered by athletes for such presence — do and can occur; but it is too easy to assert either; more must sensibly be required by way of proof, given the nature for the athlete’s basic personal duty to ensure that no prohibited substances enter his body.”
- (emphasis added)
58. The only proof provided to the Panel to support the contention are the assertions in the statements of the Applicant and husband. And although the narrow and expedited considerations of this matter may result in the Panel not requiring evidence at the same level of detail or precision that might be required at a final hearing, that in and of itself does not obviate the need to meet the applicable burden of proof.
59. Whilst it may be acknowledged that one or more of the claimed hypotheses may indeed be the cause of the product in her system, equally they may not be the cause.
60. As also observed by the CAS in the *Alvarez Caicedo* determination:
- “The raising of an unverified hypothesis is not the same as clearly establishing the facts.”
61. Moreover, the objectives and purposes of the ANADP would be wholly assailed if Article 7.4.1 was enlivened on the mere claim that the unlabelled product of an avid gym attendee partner committed to strength training and who uses supplements purchased online and at the offer of fellow gym attendees, was the cause.
62. The protections available to an athlete in Article 7.4.1 are designed to be available where a minimum level of diligence prior to using sports related products is shown (per *Tomas Zielinski v International Weighting Federation* CAS 2017/A/5178). The Panel is not satisfied that the circumstances presented to it in the Application demonstrate such, especially from an experienced athlete with some education in anti-doping responsibilities.



63. In such circumstances, the casting of hypothetical possibilities does not demonstrate that the violation is likely to have involved a Contaminated Product to the requisite standard.
64. Accordingly, the Panel is unanimous that it cannot be satisfied on the balance of probabilities that the matter was likely the result of a Contaminated Product.
65. Given this finding, the Panel is not required to determine whether the bottle of "Gain" constitutes a Contaminated Product in accordance with the definition in Article 7.4.1.
66. However were it necessary to so determine, the Panel is of the view that a Prohibited Substance does not become a Contaminated Product merely because one relevant open bottle is unlabelled in a particular case (irrespective of how the product may be regularly labelled).

THE TRIBUNAL THEREFORE DETERMINES:

1. The Applicant's request for the NST to eliminate the Provisional Suspension imposed upon the Applicant dated 13 June 2024 pursuant to Article 7.4.1 of the ANADP is denied.
2. Costs of the procedure are as set out in the arbitration agreement dated 5 August 2024.

As per the ANADP, and provided in the Arbitration Agreement, the decision of the NST not to eliminate a mandatory Provisional Suspension on account of the Athlete's assertion regarding a Contaminated Product shall not be appealable.

Date: 26 August 2024



Mr Richard Redman



Professor Deborah Healey



Professor David Handelsman AO