

BETWEEN **DRUG FREE SPORT NEW ZEALAND**
Applicant

AND **CLAYTON LEWIS**
Respondent

AND **NEW ZEALAND FOOTBALL**
Interested Party

**DECISION OF SPORTS TRIBUNAL
27 July 2016**

Hearing: 26 July 2016 in Auckland

Tribunal: Sir Bruce Robertson (Chairperson)
Ron Cheatley
Chantal Brunner

Present: Paul David QC, counsel for Applicant
Graeme Steel, Jude Ellis and Andrew McCowan, Drug Free
Sport NZ
Mark Hammond, counsel for Respondent
Clayton Lewis, Respondent
Brenda Lewis, Narelle Sindos, and Ivan Vicelich, in support of
Clayton Lewis
Daniel Farrow and Brandon Chik, New Zealand Football

Registrar: Megan Lee-Joe

Background

1. Clayton Lewis is a member of the All Whites Football team and of Auckland City Football Club. Having played for his Auckland City team in an ASB National Premiership competition game at the Forsyth Bar Stadium in Dunedin on 18 February 2016, Mr Lewis tested positive for the presence of Salbutamol in a sample taken from him at a concentration greater than that permitted on WADA's Prohibited List.
2. Salbutamol, commonly known as Ventolin, is a medication used to alleviate the symptoms of asthma. It is listed as a specified substance on the Prohibited List, but in the case where it is administered by inhaler, it is only prohibited above a specified concentration, that is, a maximum of 1600 micrograms over 24 hours. Under the Prohibited List, the presence in urine of Salbutamol in excess of 1000ng/ml is considered to be an Adverse Analytical Finding unless the athlete proves, through a controlled pharmacokinetic study, that the abnormal result was the consequence of the use of the therapeutic inhaled dose up to the maximum permitted above.
3. The concentration of Salbutamol in the sample provided by Mr Lewis was 1700ug/ml. In the interests of expediting this matter, Mr Lewis had waived his right to obtain a pharmacokinetic study, which he was told would take 6-8 weeks to complete. Similarly testing of his "B" sample.
4. Drug Free Sport New Zealand (DFS) filed an application for the provisional suspension of Mr Lewis on 6 July 2016. At the same time, the substantive proceedings were filed. A provisional suspension order was made by the Tribunal Chair, without opposition, on 8 July.
5. Mr Lewis admitted the violation of Rule 2.1 of the Sports Anti-Doping Rules (SADR) but asked to be heard on the sanction to be imposed. It was Mr Lewis' preference to appear before the Tribunal to present his case.

Background Facts

6. Mr Lewis is 19 years old and is a gifted footballer who has risen to national representative selection with an exemplary record of fair play and professionalism.
7. He was diagnosed with asthma as an infant and has been reliant on his Ventolin and Flixotide preventative medication throughout his life to control his symptoms and to prevent asthma attacks.
8. Prior to the game where he was tested, Mr Lewis had not been managing his asthma as well as he could by taking his Flixotide preventative medication twice daily. He began using his Ventolin more often. On this occasion, he had two puffs of Ventolin the night before the game, and eight puffs in the three hours prior to the game because he felt wheezy due to the cold night air in Dunedin.
9. Mr Lewis had previously attended three anti-doping seminars as part of DFS's education programme. He said that "as far as information, all I was told in relation to being an asthmatic was to be careful and make sure I manage it well and mention it when tested. I was never told that I could have too much or that there was a limit."
10. Mr Lewis had been tested on two previous occasions, the most recent being before the Under 20 World Cup in 2015. Both tests were negative.

SADR Relevant provisions

11. Salbutamol is a specified substance under the Prohibited List. As DFS did not contend that this case involved the intentional use of a specified substance, the standard period of ineligibility is two years under SADR 10.2.2. For cases involving intentional use, the standard period of ineligibility is four years.
12. The provisions of the SADR that allow for the possible elimination or reduction of the standard period of ineligibility are Rule 10.4 (no fault) and Rule 10.5.1.1 (no significant fault or negligence). This is not a case where it was suggested there was no fault under Rule 10.4.

13. Under Rule 10.5.1.1, where the Respondent can establish "No Significant Fault or Negligence" the period of ineligibility shall be from a reprimand and no period of ineligibility to a maximum of two years of ineligibility, depending on the degree of fault.
14. DFS accepted that the presence of Salbutamol in Mr Lewis' sample could be explained by the use of his Ventolin inhaler during and prior to the game in Dunedin. It also accepted there was no significant fault or negligence on the part of Mr Lewis in relation to the violation. New Zealand Football was supportive of Mr Lewis and agreed that this was a case where there was no significant fault or negligence. The issue before the Tribunal was the appropriate period of ineligibility having regard to Mr Lewis's degree of fault.

Degree of Fault and Sanction

15. "Fault" is defined in SADR as follows:

Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an Athlete or other Person's degree of Fault include, for example, the Athlete's or other Person's experience, whether the Athlete or other Person is a Minor, special considerations such as impairment, the degree of risk that should have been perceived by the Athlete and the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of risk. In assessing the Athlete's or other Person's degree of Fault, the circumstances considered must be specific and relevant to explain the Athlete's or other Person's departure from the expected standard of behaviour. Thus, for example, the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Athlete only has a short time left in his or her career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Rules 10.5.1 or 10.5.2.

16. The facts highlighted by counsel to support a low level of fault by Mr Lewis were:
 - the therapeutic use of Salbutamol to control and prevent an asthma attack;

- the exacerbation of his asthma symptoms because of the cold night air in Dunedin;
 - at none of the three DFS anti-doping seminars attended, was he been told of the specific risks associated with taking Salbutamol above a certain level. The educational literature provided by DFS, including a handbook and wallet card, lists Salbutamol as being a permitted medicine with no limit. It was conceded that Mr Lewis had not read this literature;
 - no previous violations despite being tested on two other occasions;
 - his youth;
 - good character;
 - the co-operation and contrition shown by Mr Lewis following the positive test including voluntarily withdrawing part way through the All Whites tour of Australia and Papua New Guinea and not attending trials for the Nations Cup to the detriment of his professional prospects;
 - changing his method of asthma control since to ensure the risk of any repetition is negligible; and
 - future implications on his football playing commitments and career.
17. Counsel for DFS pointed out that matters of general mitigation such as general character and the effect of a period of ineligibility on sporting opportunities are not relevant to the question of fault under SADR. Under SADR, the responsibility clearly rests on the athlete to exercise utmost caution. This means that an athlete taking medication on a regular basis even where prescribed by his or her doctor needs to make further inquiries of DFS to check the status of the medication. The educational material produced by DFS is intended to be a guide only and does not replace the need for an athlete to make specific inquiry about medication ingested in the context of the strict anti-doping regime.
18. Such steps were not taken by Mr Lewis and in DFS's contention a low level of fault should be attributable to Mr Lewis. In this case, DFS considered that a sanction of between 1 and 3 months was appropriate.

Mr Lewis acknowledged that he was at fault by not checking his medication with DFS but that this should be assessed at the lower end of that range.

19. We are satisfied that a period of one month's suspension from 8 July which was the date of the provisional suspension properly reflects the degree of fault. Clearly Mr Lewis used the Ventolin for a therapeutic purpose. He was not a drug cheat but was unthinking about the use of his inhaler. This was a breach of the high obligation placed on every athlete to ensure a drug free sporting environment.

Dated: 27 July 2016



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Sir Bruce Robertson (Chairperson)