

# An Overview of Non-Analytical Positive & Circumstantial Evidence Cases in Sports

Richard H. McLaren

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## ARTICLES

# AN OVERVIEW OF NON-ANALYTICAL POSITIVE & CIRCUMSTANTIAL EVIDENCE CASES IN SPORTS

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## I. INTRODUCTION

As new technologies for detecting drug violations in sport struggle to keep up with the creation of new doping substances and methods,<sup>1</sup> non-analytical positive cases have become a more prominent tool in the fight against doping. Although doping offenses are most commonly established by direct evidence, where a positive analytical result from an accredited laboratory directly shows that an athlete had a prohibited substance in his or her body, situations will arise where only circumstantial evidence points to the commission of a doping offense. The challenge in such cases will be to prove the use of prohibited substances or techniques without direct evidence.

A circumstantial evidence case can be troublesome because the benefit from the concept of strict liability is eliminated.<sup>2</sup> Strict liability has evolved in the jurisprudence of the Court of Arbitration for Sport (CAS)<sup>3</sup> and has been adopted in the World Anti-Doping Agency Code (WADA Code).<sup>4</sup> Strict liability means that a doping violation occurs when a banned substance is found in an athlete's body. The conclusion that an infraction occurred is not based upon intent or lack thereof. The assessment is then analyzed in the context of the active duty on the athlete to prove that exceptional circumstances existed to avoid the full doping infraction and to obliterate or reduce the sanction. Because non-analytical positive charges do not involve results from a positive analytical laboratory-doping test, they must be proven without the benefit of the presumption embodied in the strict liability principle. Therefore, the burden rests on the anti-doping organization to prove a doping offense. As a result, the success of proving a non-analytical doping

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1. See RICHARD H. McLAREN, REVISED OR NEW TESTING PROCEDURES: WHAT CAS REQUIRES [forthcoming in 2006]. The piece was originally presented at the Play the Game conference in Copenhagen, Denmark on November 9, 2005.

2. See LAURI TARASTI, LEGAL SOLUTIONS IN INTERNATIONAL DOPING CASES (2000) (discussing the concept of strict liability as it evolved in the decisions of the IAAF Arbitration Panel until its termination in 2001 and the adoption of CAS as the arbitral body for the IAAF).

3. See ADAM LEWIS & JONATHON TAYLOR, SPORT: LAW AND PRACTICE 950 (2003), accompanying the discussion of USA Shooting & Quigley v. Union Internationale de Tir, CAS 94/129; see also generally A. v. FILA, CAS 2000/A/317 (2001); Raducan v. IOC, CAS ad hoc Division (O.G. Sydney) 2000/011 (2000); B. v. ITU, CAS 98/222 (1999); A.C. v. FINA, CAS 96/149 (1997); L. v. FINA, CAS 95/142 (1996); C. v. FINA, CAS 95/141 (1996).

4. See WORLD ANTI-DOPING AGENCY, WORLD ANTI-DOPING CODE art. 2.1.1 cmt [hereinafter WADA CODE] (discussing the rule of strict liability). The WADA Code was introduced at the commencement of the "Welcome Home" Games of the XXVIII Olympiad held at Athens in August of 2004. The WADA Code had been accepted by all summer Olympic sports, albeit only on the eve of the Games in the case of cycling. The winter sports and some other professional sports such as football (soccer) and tennis, for example, have also adopted the regime. The WADA Code harmonized the doping rules for all sports and countries that adopted it.

charge depends largely on the value and weight of the circumstantial evidence and the standard of proof that will be applied to evaluate this evidence.

Several recent cases illustrate the need to look beyond drug testing to establish a doping offense. Specifically, a number of cases have arisen out of the Bay Area Laboratory Co-Operative (BALCO) scandal. The BALCO scandal was revealed after a U.S. Justice Department investigation of the laboratory. In September 2003, FBI agents searched the premises and discovered, among many other matters, that BALCO was distributing prohibited doping agents to athletes. The substances were either undetectable or difficult to detect in routine drug testing. Victor Conte, President of BALCO, named fifteen track and field athletes, as well as athletes from the National Football League and Major League Baseball, whom he alleged were clients of BALCO. The investigation resulted in the indictment of Mr. Conte along with other BALCO conspirators. In October 2005, Mr. Conte pleaded guilty to several of the charges against him. He was sentenced to four months imprisonment and an additional four months of home confinement. Mr. Conte commenced his prison sentence in December 2005.

The decisions that have come out of the BALCO scandal to date, as well as other so-called “non-analytical positive” cases, are discussed in this paper. The scope of these cases is broad; there are many different types of non-analytical positive cases and each turns on its own facts. The cases are analyzed to determine the standard of proof used by the arbitration panels in establishing a doping offense. Additionally, the quantity and quality of circumstantial evidence required by the arbitrators to establish a doping offense are analyzed. Furthermore, this paper examines the evolution of the standard of proof with the onset of the WADA Code to determine how the comfortable satisfaction standard is used by various arbitration panels, including its impact on the weight of the evidence required in proving non-analytical positive doping offenses.

## II. TYPES OF NON-ANALYTICAL POSITIVE CASES

The body enforcing anti-doping rules bears the burden of proving that an athlete has committed a doping offense,<sup>5</sup> and it may be proven even where the evidence of a doping offense is circumstantial.<sup>6</sup> There are many different types of non-analytical positive cases. Prior to the cases arising from the BALCO affair, non-analytical positive cases before CAS primarily involved an apparent manipulation or contamination of a sample given by an athlete as

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5. *de Bruin v. FINA*, TAS 98/211, ¶ 10.1.

6. *Id.* ¶ 12.18.

part of the doping control sample collection process. In the past, the rules of most International Federations (IFs), and now the WADA Code, prohibited athletes from altering the integrity of a sample obtained from the doping control procedure. An athlete found to have manipulated or contaminated a sample has committed a doping offense regardless of whether use of banned substances actually occurred.<sup>7</sup> Therefore, if a laboratory result concludes that an athlete's sample was manipulated, it becomes unnecessary for the tribunal to evaluate the circumstantial evidence as a prima facie doping offense will be found based on this manipulated, though non-positive, sample.

However, while laboratory testing may bring to light sample manipulation or contamination, the IF typically has only circumstantial evidence implicating the athlete who provided the sample. The CAS has held that where the evidence suggests there is a high degree of probability that a sample was altered while in the custody of the athlete, it falls to the suspected athlete to raise an explanation that will refute the circumstantial evidence.<sup>8</sup> To date, suspected athletes have been unsuccessful in raising the possibility that third parties manipulated their samples as an explanation to counter the IF's collected circumstantial evidence.

It is likely that no one athlete has effectively presented examples of specific individuals who may have had the motive, opportunity, and technical expertise to alter the athlete's samples because such circumstantial or direct evidence is well-nigh impossible for an athlete to obtain.<sup>9</sup> Suspected athletes have also unsuccessfully argued that the sealed containers used to store and transport doping samples could be opened without detection, as convincing contrary evidence has consistently been presented in answer to such claims.<sup>10</sup>

Article 2.3 of the WADA Code outlines an additional course to raise an allegation that an athlete has committed a doping infraction in the absence of a positive analytical result. It provides that an anti-doping rule violation has occurred if an athlete: (1) refuses to submit to sample collection, (2) fails, without compelling justification, to submit to sample collection, or (3)

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7. For example, FINA Doping Rules 2005-2009 Rule 2.2 establishes that the use of a "prohibited method" constitutes an anti-doping rule violation as does International Wrestling Foundation (IWF) Anti-Doping Policy 2005-2008 Rule 2.2. The WADA Code 2005 Prohibited List establishes that "[t]ampering, or attempting to tamper, in order to alter the integrity and validity of *Samples* collected in *Doping Controls*" is a prohibited method. WADA CODE, THE 2006 PROHIBITED LIST 7 (2006) (emphasis in original).

8. *Boevski v. IWF*, CAS 2004/A/607, ¶ 7.9.6.

9. There are numerous examples of this proposition in respect of the use of contaminated supplements and other substances that might have provided an explanation of a positive analytical result. See, e.g., *de Bruin*, TAS 98/211; *Boevski*, CAS 2004/A/607.

10. These arguments were raised in the cases of *de Bruin*, TAS 98/211 and *Boevski*, CAS 2004/A/607.

otherwise evades sample collection.<sup>11</sup>

The first two anti-doping rule violations are neither new nor novel. The comment on Article 2.3 of the WADA Code indicates that a “[f]ailure or refusal to submit to Sample collection after notification is prohibited in almost all existing anti-doping rules.”<sup>12</sup> Further, the comment provides that such conduct may be based on either “intentional or negligent conduct of the Athlete.”<sup>13</sup> The third anti-doping rule concerning evading a sample collection is just a more generalized rule with respect to the first two specific rules. The comment on Article 2.3 of the WADA Code indicates such conduct would include “an Athlete . . . hiding from a Doping Control official who was attempting to conduct a test.”<sup>14</sup> Accordingly, this third anti-doping rule violation “contemplates intentional conduct by the Athlete.”<sup>15</sup>

Non-analytical positive cases may also involve scenarios where a substantial amount of evidence leads to the suspicion that a doping offense occurred absent evidence of manipulation of a drug test or a test in general. The most recent cases involving successful non-analytical doping charges arose out of the BALCO scandal. Although there was significant circumstantial evidence in these cases, they were substantiated by the testimony of a fellow whistleblower athlete regarding what the CAS panel characterized as admissions made by the athletes involved.<sup>16</sup>

### III. PRE-WADA CODE

#### *A.) Summary of Burden and Standard of Proof Before WADA*

The standard of proof required to meet the burden of proving a doping offense varied between IFs before the widespread acceptance of the WADA Code. The individual sports bodies’ regulations prescribed the substantive law to be applied in doping cases and indicated which standard of proof should be

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11. WADA CODE, *supra* note 4, art. 2.3.

12. *Id.* art. 2.3 cmt.

13. *Id.*

14. *Id.*

15. *Id.* The cases of the Greek sprinters at the Athens Olympic Games (*IAAF v Kenteris & Thanou*) may prove to be such a situation. These cases were scheduled to be heard on February 22, 2006. The president of the CAS Panel, Yves Fortier, Q.C., stood down from the panel as a result of irregularities in the unrelated cases of *USADA v. Montgomery*, CAS 2004/O/645 (2005), and *USADA v. Gaines*, CAS 2004/O/649 (2005). The sprinters’ cases are now scheduled to be heard again from the beginning with a new president on June 26, 2006. Therefore, the CAS ruling was not available at time of publication of this article.

16. See *Montgomery*, CAS 2004/O/645; *Gaines*, CAS 2004/O/649.

used in doping cases in their sport. For example, in *USADA v. Collins*,<sup>17</sup> the International Association of Athletics Federations (IAAF) required the United States Anti-Doping Agency (USADA) to prove beyond a reasonable doubt that the athlete used a prohibited substance or technique.<sup>18</sup> In the *de Bruin* case, the standard of proof applied by Fédération Internationale de Natation Amateur (FINA) was one of comfortable satisfaction.<sup>19</sup> An athlete facing a doping charge would always argue that the standard of proof be the highest standard of beyond a reasonable doubt, as opposed to one of comfortable satisfaction or some other lesser standard.

The application of different standards of proof contributed to discrepancies in the sanctioning of doping offenses between IFs. It was difficult to discern what types of evidence could be used and how much evidence was needed to prove a doping offense because there was little guidance in the IFs' anti-doping rules and not a significant jurisprudence base interpreting each IF's rules. The burden of establishing a doping offense is on the anti-doping organization, and the absence of evidential instruction and jurisprudence made it extremely difficult for those organizations to establish non-analytical doping offenses. Future cases will depend upon how convincing the circumstantial evidence of the sports body is in establishing an infraction of the rules.

The WADA Code was conceived and established in 2003 but not adopted by most IFs until the commencement of the Athens Olympic Games in August 2004. The majority of non-analytical positive cases originated before the WADA Code was accepted as a universal anti-doping code in the sport world. The pre-WADA cases show the difficulties of establishing a doping offense without the benefit of strict liability and help define the new comfortable satisfaction standard that can now be found in the Code. Additionally, these cases outline the lack of guidance provided by tribunals on what type of circumstantial evidence will suffice to prove a doping offense.

### *B.) Summary of Cases*

Michelle Smith de Bruin

In the case of Michelle Smith de Bruin, CAS confirmed that where circumstantial evidence implicates an athlete in a doping offense, the body enforcing the anti-doping rules is not required to eliminate all possibilities

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17. AAA No. 30 190 00658 04 (Dec. 2004).

18. *Id.* ¶ 1.3.

19. *de Bruin*, TAS 98/211, ¶ 10.1.

other than commission of the offense by the athlete.<sup>20</sup> The standard of proof required to prove a doping offense was not outlined in the FINA Anti-Doping Code. The panel explained that to adopt a criminal standard in doping cases, i.e., beyond a reasonable doubt, “is to confuse the public law of the state with the private law of the association.”<sup>21</sup> Therefore, CAS adopted the comfortable satisfaction standard from a previous CAS case, *Korneev and Ghouliev v. IOC*.<sup>22</sup> The panel emphasized the statement in *Korneev and Ghouliev* that “ingredients must be established to the comfortable satisfaction of the Court having in mind the seriousness of the allegations which is made.”<sup>23</sup> The panel noted that the allegation spoke directly to the dishonesty of an athlete (whereas other doping offenses may be ones of strict liability) and “such an allegation bespeaks an extremely high degree of seriousness.”<sup>24</sup>

This case reiterated that what CAS requires for the comfortable satisfaction standard of proof to be met depends on the seriousness of the allegations. Also of importance, the panel noted that despite resolving the “twin questions of burden and standard of proof, . . . the further question of *what* it is that has to be prove[n]”<sup>25</sup> remains unanswered.<sup>26</sup> This insight by the CAS panel has proven to be a key flaw that remains unanswered in circumstantial evidence cases, even after the BALCO cases.

In *de Bruin*, there was circumstantial evidence that the Irish swimmer had contaminated a urine sample with alcohol. The sample contained “unequivocal signs of adulteration.”<sup>27</sup> Additionally, the sampling officers did not directly observe Ms. de Bruin’s sample-taking procedure<sup>28</sup> and noted that the sample smelled of alcohol.<sup>29</sup> Contrary to the athlete’s contentions, the court held that there were no flaws in the chain of custody and no third party had contaminated the athlete’s sample. An examination of the chain of custody provided no irregularities, and the athlete offered no specific theory as to how a third party might have contaminated the sample.

Further, evidence suggested that the sample containers could not be opened without detection, and even if this had been possible, it would not be

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20. *Id.* ¶ 12.2.

21. *Id.* ¶ 10.3.

22. *Id.* (adopting the standard from *Korneev and Ghouliev v. IOC*, CAS O.G. 96/003-004).

23. *Id.* (quoting *Korneev and Ghouliev*, CAS O.G. 96/003-004).

24. *Id.* ¶ 10.3.

25. *Id.* ¶ 10.4 (emphasis added).

26. *Id.*

27. *Id.* ¶ 3.26.

28. *Id.* ¶ 3.8.

29. *Id.* ¶ 3.20.



sufficient to establish the athlete's third party manipulation hypothesis.<sup>30</sup> The circumstantial evidence in the case was supported by the direct evidence of the appearance of adulteration and the smell of alcohol in the sample. The manipulation of the sample proved that a doping infraction had been found. The circumstantial evidence was sufficient to prove to a level of comfortable satisfaction that she had committed a doping infraction.

### Mark French

Although Mark French never tested positive for a doping offense, making the case a non-analytical one, there was circumstantial and physical evidence that indicated that a doping offense may have been committed but not necessarily by French.<sup>31</sup> This evidence included a bucket of used syringes, needles, and other paraphernalia that had been found in a room assigned to, and then vacated by, French at an Australian athletic complex.<sup>32</sup> The needles contained traces of equine growth hormone, a prohibited substance, and the supplement Testicomp.<sup>33</sup> The label on the Testicomp bottle stated that the product contained glucocorticosteroids, a banned substance.<sup>34</sup> New evidence was produced at the appeal, including statements that contradicted French's first instance testimony, and both sides produced additional scientific evidence. The panel stated that the strict liability principle did not apply in non-analytical positive cases and clarified what the sports agency must establish: "In the absence of evidence of the presence of a prohibited substance in the athletes [sic] body, such as a urine sample and its laboratory analysis, what is required to be prove[n] is the use of the prohibited substance itself."<sup>35</sup>

The standard of proof was at issue in the appeal by Australian cyclist Mark French of a first instance decision that found him guilty of committing several doping infractions, including use and trafficking. French submitted that pursuant to Australian authority and CAS jurisprudence, the standard of proof required to be met by Cycling Australia and the Australian Sports Commission was "somewhere between the balance of probabilities and beyond a reasonable doubt."<sup>36</sup> The panel concluded, "the offences [were] serious allegations and that the elements of the offence must be proven to a

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30. *Id.* ¶ 12.10.

31. French v. Australian Sports Comm'n, CAS 2004/A/651 (2005).

32. *Id.* ¶ 32.

33. *Id.*

34. *Id.* ¶ 45.

35. *Id.* ¶ 58.

36. *Id.* ¶ 42.

higher level of satisfaction than the balance of probabilities.”<sup>37</sup> The CAS Panel accepted that the offenses of trafficking and aiding and abetting were serious allegations that required a higher level of satisfaction than the balance of probabilities.<sup>38</sup>

The appeal panel thereby attempted to answer the point left open in the *de Bruin* case on what has to be proven in a circumstantial evidence case. The panel found that French could not be found to have committed a doping offense because “there [was] no direct evidence that Mr. French used the material in the sense that no-one saw him use it and he has consistently denied use.”<sup>39</sup> This conclusion was drawn on the basis that there could have been third party contamination in that “[t]here [we]re many gaps concerning who handled the bucket, who had access to the bucket, its method of storage, and conditions of storage”<sup>40</sup> leading to potential cross-contamination of materials in the bucket.<sup>41</sup>

Additionally, the contradictory scientific evidence led the panel to conclude that “[t]he state of evidence is not satisfactory and is totally insufficient”<sup>42</sup> to prove a non-analytical positive.<sup>43</sup> This decision has importance as it clarifies that CAS has an expectation that doping investigations must be conducted in a careful and cautious manner for a non-analytical positive doping infraction to be found. It is the only decision based purely on circumstantial evidence that provides guidance as to what circumstantial evidence will suffice to prove a doping offense. Of additional importance, the *French* decision stated that absent a positive doping test, a prohibited substance listed on a supplement’s label is not sufficient circumstantial evidence to prove that an athlete, who has admitted to use of the supplement, committed a doping offense.<sup>44</sup>

### Michelle Collins

*Collins*<sup>45</sup> was the first American decision that dealt with the so-called “non-analytical positives” arising out of the BALCO situation. In May 2004, the USADA advised Collins that it was investigating her for the use of banned

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37. *Id.*

38. *See id.*

39. *Id.* ¶ 58.

40. *Id.* ¶ 78.

41. *Id.*

42. *Id.* ¶ 81.

43. *Id.*

44. *Id.* ¶ 51.

45. USADA v. Collins, AAA No. 30 190 00658 04.

substances and methods provided by BALCO.<sup>46</sup> The USADA charged her with violations of the IAAF anti-doping rules and sought a lifetime ban from competition.<sup>47</sup> Collins' case was heard before a North American CAS Panel, with American Arbitration Association (AAA) qualifications.<sup>48</sup> Since the alleged offense had occurred prior to March 1, 2004, when the WADA Code was adopted by the IAAF, the rules of IAAF's 2002 regulations formed the substantive law.<sup>49</sup> Therefore, the WADA Code did not apply, and the USADA was required to prove to a higher standard, i.e., beyond a reasonable doubt, that Collins used a prohibited substance or technique.<sup>50</sup>

The arbitration panel concluded that the USADA satisfied its burden of proof and found Collins guilty of a doping violation.<sup>51</sup> Although Collins never tested positive for a prohibited substance, the evidence presented by the USADA supported her use of banned substances and techniques.<sup>52</sup> That evidence against Collins included emails between her and the president of BALCO, in which she admitted to using some prohibited substances and techniques without testing positive by an International Olympic Committee (IOC) accredited lab.<sup>53</sup> The panel found that the "blood and urine tests taken together demonstrate[d] a pattern of doping."<sup>54</sup> However, the panel avoided answering directly what is required to prove a doping offense and, instead, stated that "[n]one of this evidence by itself would be sufficient to find doping, but it is consistent with the charges and the other proof presented by USADA."<sup>55</sup> For these violations, the arbitration panel suspended Collins for a period of eight years.<sup>56</sup> Thus, the panel was satisfied that her use of a prohibited substance was proved beyond a reasonable doubt by the USADA.<sup>57</sup>

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46. *Id.* ¶ 2.12.

47. *Id.* ¶ 2.14.

48. *See id.*

49. *Id.* ¶ 3.1.

50. *Id.* ¶¶ 3.4-.5.

51. *Id.* ¶ 4.26.

52. *Id.* ¶ 4.25.

53. *Id.* ¶¶ 4.1, 4.3-.4.

54. *Id.* ¶ 4.23.

55. *Id.* ¶ 4.24.

56. *Id.* ¶ 5.7. The case was appealed to CAS International, but Collins subsequently agreed to drop the appeal and USADA reduced the sanction from eight years of ineligibility to four. Press Release, United States Anti-Doping Agency, U.S. Track & Field Athlete Agrees to Four-Year Suspension (May 19, 2005), available at [www.usantidoping.org/files/active/resources/press\\_releases/USADA%20Press%20Release%20-%20Collins%20Appeal.pdf](http://www.usantidoping.org/files/active/resources/press_releases/USADA%20Press%20Release%20-%20Collins%20Appeal.pdf).

57. *Id.* ¶ 4.26.

*C.) Conclusions Regarding Pre-WADA Code Cases*

The Pre-WADA Code cases provided articulation as to the burden and standard of proof to be applied in circumstantial evidence cases. The panels helped to define the comfortable satisfaction standard and how to apply it, specifically stating that the comfortable satisfaction standard of proof was dependent on the severity of the offense. This was the standard subsequently adopted in the WADA Code.

The pre-WADA Code cases, however, were less instructive in terms of what had to be proven to find an athlete guilty of an offense without the benefit of a positive analytical test and the strict liability principle. It was hoped the WADA Code would change this state of affairs and provide guidance to decision makers in this area.

## IV. POST-WADA CODE IMPLEMENTATION

*A.) Summary of Burden and Standard of Proof After WADA Code Introduction*

The WADA Code harmonized all national and international sports federation anti-doping rules into a single regime worldwide. Now, Olympic sports and most other IFs or organizations that have adopted the WADA Code are required to use the WADA-defined standard when establishing what standard of proof exists in doping offenses. The applicable standard of proof that must be met is the comfortable satisfaction of the court, with the seriousness of the allegation in mind.<sup>58</sup> This standard of proof originates from court decisions in Australia and other Commonwealth countries that created a standard of proof that involved the personal reputation of the athlete; the standard is more stringent than the balance of probability but less burdensome than beyond a reasonable doubt.

For the WADA Code to take effect, the alleged doping offense must have taken place after the date on which the sports federation adopted the WADA Code. The cases that follow involve a discussion of the appropriate standard of proof that should be applied in doping cases. Although these cases involve situations where the standard subscribed to by the sports body was not dictated by the WADA Code (because the alleged infraction took place prior to the sports body's adoption of the WADA Code), the cases were heard after the WADA Code had been largely accepted, and therefore, the panels refer to the WADA Code. The panels build on the pre-WADA cases and give further direction as to the burden and standard of proof to be applied in future non-

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58. WADA CODE, *supra* note 4, art. 3.1.

analytical positive cases. The WADA Code explicitly states that the standard of proof should be the comfortable satisfaction standard and that the seriousness of the allegation should be taken into account.<sup>59</sup>

The most recent non-analytical positive cases<sup>60</sup> help to define the effect that the seriousness of the allegation will have on the standard of proof to be applied. From these decisions, it seems that the conclusion will allow for significant variation within this single standard of proof. However, it is also clear that this single standard is always a high one: the comfortable satisfaction standard is always higher than a balance of probabilities and may even reach the level of beyond a reasonable doubt.

Unfortunately, the WADA Code does not provide instruction regarding what must be proven in a circumstantial evidence case. As a result, the trend continues in the post-WADA cases where panels leave unanswered the question of what is required to be proven and provide no clear direction for future panels. This is the greatest deficiency in the cases that follow.

### *B.) Post-WADA Non-Analytical Cases*

#### Galabin Boevski

Boevski was charged with a doping offense in accordance with the International Wrestling Federation (IWF) Anti-Doping Policy after three out-of-competition samples, collected from three different athletes, produced the laboratory result that the three samples were identical and none of the samples were those of the athletes who gave them.<sup>61</sup> Boevski, along with the two other weightlifters, was suspended as a result.<sup>62</sup>

In *Boevski*, the IWF Anti-Doping Policy remained silent as to the standard of proof to establish that an anti-doping violation has occurred. Therefore, the panel defined the standard according to Swiss law, which had been chosen by the parties:

[T]he Panel, based on objective criteria, must be convinced of the occurrence of an alleged fact. However, according to the jurisprudence of the Swiss Supreme Court, no absolute assurance is required; it suffices that the Tribunal has no serious doubts on a specific fact or

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59. *Id.*

60. See *Montgomery*, CAS 2004/O/645; *Gaines*, CAS 2004/O/649.

61. *Boevski*, CAS 2004/A/607, ¶¶ 2.5.2-.5.3.

62. *Id.* ¶ 2.6.1.

that the remaining doubts appear to be light.<sup>63</sup>

The Swiss Supreme Court concluded that this standard was that of comfortable satisfaction; therefore, it was in line with the CAS jurisprudence.<sup>64</sup> The panel said of the WADA Code,

This standard is close to art. 3.1 of the WADA Code, which provides that the standard of proof shall be whether the anti-doping-organisation [sic] has established an anti-doping-rule violation to the comfortable satisfaction of the hearing body bearing in mind the seriousness of the allegation, which is made. The same article continues to state that this standard of proof is greater than a mere balance of probability but less than proof beyond a reasonable doubt.<sup>65</sup>

Therefore, although the panel did not apply the WADA Code in its decision, it acknowledged that the standard that it did apply was consistent with that set out in the WADA Code.

In the case of Galabin Boevski, the lab results of a doping test on the Bulgarian weightlifting team revealed that three of the urine samples, purportedly from three different athletes, were identical.<sup>66</sup> Further DNA testing confirmed that the urine could not have come from any of the three athletes who had supposedly provided the samples.<sup>67</sup> It was an undisputed conclusion from the lab and DNA evidence that there was a physical manipulation of the samples.<sup>68</sup> Under Rule 5.1(b) of the IWF Anti-Doping Policy, a prohibited doping method in the form of manipulation had occurred.<sup>69</sup> Boevski was one of three weightlifters suspended as a result. Only Boevski appealed to CAS.

Boevski alleged that he was the victim of conspiracy.<sup>70</sup> He claimed that the manipulation occurred sometime after the caps had been tightly screwed onto the sample bottles and before the sample arrived at the laboratory.<sup>71</sup> The panel did not accept Boevski's challenge to the chain of custody of the sample,

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63. *Id.* ¶ 7.9.4.

64. *Id.* ("This test is in line with standard TAS practice, providing that an anti-doping rule violation must be established to the comfortable satisfaction of the Tribunal."); *see also* Roland Meier v. Swiss Cycling, CAS 2001/A/345; Pantani v. UCI, TAS 2002/A/403 and FCI v. UCI, TAS 2002/A/408 (joined cases).

65. *Id.*

66. *Id.* ¶¶ 2.5.2-.5.3

67. *Id.*

68. *See id.*

69. *See id.* ¶ 5.2.

70. *Id.* ¶ 3.1.2.

71. *Id.*

nor did it accept that the sample containers could have been opened without detection.<sup>72</sup> No evidence as to who may have manipulated the sample was provided, and the evidence was completely inconsistent with any possible sabotage.<sup>73</sup>

Although a doping control officer observed Boevski urinate into the collection container, the athlete was not examined for the presence of a weightlifter's device.<sup>74</sup> The panel held,

A rigorous analysis of the events surrounding the sample collection phase leads to the conclusion that the conditions under which the test took place were not satisfactory and offered several opportunities for the Appellant and the other two athletes to engage in manipulation. The athletes were not under constant direct supervision. The apartment where the samples were being procured was over-crowded. The ease with which one could leave the room because of the multitude of persons and go elsewhere and return could leave the Appellant with ample time to set up a device without being noticed or slip out of sight and engage in some other manipulation or do something else.<sup>75</sup>

Since Boevski had both motive and opportunity, the circumstantial evidence was sufficient to make the CAS Panel comfortably satisfied that the sample was manipulated by the athlete himself, or with his consent and approval, without ever proving who did the manipulation or how it was done.<sup>76</sup> With this holding, the case stands as one of the few purely circumstantial cases in CAS jurisprudence because the method of manipulation is unknown (unlike *de Bruin* where there was direct evidence, i.e., the smell of whiskey at the time that the sample was given, of manipulation by the athlete).

#### Tim Montgomery and Chryste Gaines

The *Montgomery* and *Gaines* cases are the two most recent decisions coming out of the BALCO scandal.<sup>77</sup> The nature of the charges in the two

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72. *Id.* ¶ 7.8.15.

73. *Id.* ¶ 7.9.10.

74. *Id.* ¶ 2.2.3.

75. *Id.* ¶ 7.9.2.

76. *Id.* ¶ 7.9.7.

77. The two earlier cases arising out of BALCO are *Collins*, AAA 30 190 00658 04 and UK Athletics Limited v. Chambers, an unreported decision by Charles Flint Q.C., dated February 24, 2004, in London, England.

separate cases was identical, and with the consent of all parties, they proceeded in lockstep, culminating in the December 2005 awards. In the cases of Montgomery and Gaines, the applicants were charged with violating the IAAF anti-doping rules despite having never tested positive in any in-competition or out-of-competition drug test. The cases started out as circumstantial evidence cases only; the decisions turned on the crucial testimony of a fellow athlete, whistleblower Kelli White.

The CAS Panel, in its written decisions, included an excerpt from a preliminary hearing relating to the appropriate standard of proof. The passage is reproduced here:

#### STANDARD OF PROOF

There is no dispute as to which of the parties, whether Claimant or Respondents, bears the onus of establishing the charges that have been levelled against Mr. Montgomery and Ms. Gaines in these cases. All parties accept that USADA bears the burden of proof in respect of its claims.

There is no such common understanding, however, in respect of the standard of the proof to be made by USADA in order for it to succeed – that is, whether USADA must prove its claims beyond reasonable doubt, as advocated by Respondents, or whether it need only make proof on the balance of probability.

The athletes' submissions are based on the argument (to quote from Mr. Montgomery's Motion on Burden of Proof, at p. 2) that "the U.S. Supreme Court has held that the burden of proof is a substantive rule [that cannot be applied retroactively]," and on the fact that "[p]rior to March 2004, IAAF Rule 59.6 provided that in all doping hearings, 'the Member shall have the burden of proving, beyond reasonable doubt, that a doping offense has been committed'." As further summarised by the athletes' counsel during the 21-22 February 2005 hearing, given that "that is what the new Rules say, you don't even have to consider the substantive/procedural issue."

As set out in its Statements of Claim, USADA's claims against the athletes for violations of IAAF Rules concern allegations that Respondents engaged in systematic doping "commencing in February 2000" (in Mr. Montgomery's case) and "commencing in September 2000" (as regards Ms. Gaines); and, as noted above, USADA refers specifically to alleged violations of the 2002 IAAF Rules. As of 1 March 2004, the IAAF implemented the provisions of the World Anti-Doping Code in new IAAF Anti-Doping Rules, including the



provision (Article 3.1 of the World Anti-Doping Code: “Burdens and Standards of Proof”) that “[t]he standard of proof shall be whether the Anti-Doping Organization has established an anti-doping rule violation *to the comfortable satisfaction of the hearing body, bearing mind the seriousness of the allegation which is made.*”

USADA, not surprisingly, sees things differently than the Respondents. It acknowledges (at p. 42 of its 9 February 2005 Response Brief) that what it calls “[t]he old ‘beyond reasonable doubt’ standard” was replaced by the IAAF as of 1 March 2004. The crux of USADA’s argument is that “[t]he introduction to the new IAAF Rules state that the new rules ‘shall not be applied retrospectively to doping matters pending at 1 March 2004’; *by negative implication, this introductory statement suggests that the new rules may be applied to doping charges initiated after March 1, 2004.*” USADA goes on to challenge the Respondents’ view that the standard of proof is a substantive, as opposed to a procedural, rule; and it refers to U.S. case law as well as CAS precedent in support of the principle that the criminal law standard of proof is inapplicable to these proceedings.

As often becomes evident when the question of standard of proof is debated, the debate looms larger in theory than practice. Counsel for all parties concurred with the views expressed by the members of the Panel during the 21-22 February 2005 hearing to the effect that even if the so-called “lesser”, “civil” standard were to apply – namely, proof on the balance of probability, or, in the specific context in which these cases arise, proof to the *comfortable satisfaction* of the Panel *bearing mind the seriousness of the allegation which is made* (what might be called the “comfortable satisfaction” standard) – an extremely high level of proof would be required to “comfortably satisfy” the Panel that Respondents were guilty of the serious conduct of which they stand accused.

Even under the traditional civil model, there is no absolute standard of proof. Built into the balance of probability standard is a generous degree of flexibility that relates to the seriousness of the allegations to be determined. In all cases the degree of probability must be commensurate with and proportionate to those allegations; the more serious the allegation the higher the degree of probability, or “comfort”, required. That is because, in general, the more serious the allegation the less likely it is that the alleged event occurred and, hence, the stronger the evidence required before the occurrence of the event is demonstrated to be more probable than not. Nor is there

necessarily a great gulf between proof in civil and criminal matters. In matters of proof the law looks for probability, not certainty. In some criminal cases, liberty may be involved; in some it may not. In some civil cases – as here – the issues may involve questions of character and reputation and the ability to pursue one’s chosen career that can approach, if not transcend in importance even questions of personal liberty. The gravity of the allegations and the related probability or improbability of their occurrence become in effect part and parcel of the circumstances which must be weighed in deciding whether, on balance, they are true.

Without deciding the matter, the Panel notes that it appears that this is the very sort of approach contemplated by Article 3.1 of the World Anti-Doping Code, which refers to a standard of proof “bearing in mind the seriousness of the allegation which is made” and which further states that “[t]his standard of proof in all cases is greater than a *mere* balance of probability . . .”

From this perspective, and in view of the nature and gravity of the allegations at issue in these proceedings, there is no practical distinction between the standards of proof advocated by USADA and the Respondents. It makes little, if indeed any, difference whether a “beyond reasonable doubt” or “comfortable satisfaction” standard is applied to determine the claims against the Respondents. This will become all the more manifest in due course, when the Panel renders its awards on the merits of USADA’s claims. Either way, USADA bears the burden of proving, by strong evidence commensurate with the serious claims it makes, that the Respondents committed the doping offences in question.<sup>78</sup>

Montgomery is a well-known, very successful American track and field athlete. He is a former world 100-meter record holder, as well as a winner of World Championship and Olympic gold medals. To date, Montgomery is the highest profile athlete to be implicated in the BALCO scandal. Gaines has also won numerous track and field titles. USADA’s evidence of doping against the individual athletes was identical and included the following: documents seized by the United States government from BALCO that had been provided to USADA; blood and urine tests at IOC-accredited and non-IOC-accredited laboratories; admissions against interest made by BALCO officials that implicated the respondents; reports in a San Francisco news

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78. *Montgomery*, CAS 2004/O/645, ¶ 36; *Gaines*, CAS 2004/O/649, ¶ 36 (emphasis in original) (internal citations omitted).

source based on secret grand jury testimony (surrounding Victor Conte's role in the scandal) that amounted to admissions by the respondents; and finally, the respondents' alleged admissions to Kelli White that they had used a prohibited substance known as "The Clear."<sup>79</sup>

In the opinion of the panel, Ms. White, despite having been charged with a BALCO-related doping offense herself, was an intelligent, honest, and credible witness, and her testimony was crucial to the determination of the case.<sup>80</sup> The panel found it unnecessary to consider whether the other circumstantial evidence was conclusive of a doping offense, and it rested its decision on statements made by the respondents and delivered to the panel through the testimony of Ms. White.<sup>81</sup> Therefore, what started out as a circumstantial evidence case became one of direct evidence. Ms. White's testimony amounted to conversations that she had had with each of the respondents about "The Clear."<sup>82</sup> From these discussions, the panel inferred that the respondents used the substance and admitted doing so to Ms. White.<sup>83</sup>

Important to the decision is that Ms. White's testimony, which the USADA claimed to constitute a direct admission of Montgomery's and Gaines's guilt, was not disputed.<sup>84</sup> Both Montgomery and Gaines had the opportunity to testify, but each decided against doing so.<sup>85</sup> This strategy was developed at the outset and never revised, despite the fact that the case changed in nature as time progressed.<sup>86</sup> Counsel for each of the respondents did not in any way undermine, through cross-examination, the evidence offered by Ms. White, and as such, the evidence of the conversations went unchallenged.<sup>87</sup> The panel concluded from the respondent athletes' failure to testify that it had the authority to draw an adverse inference.<sup>88</sup> However, the panel went on to hold that there was no need for the adverse inference to be drawn.<sup>89</sup> The panel found Ms. White's testimony, in the cases of Montgomery

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79. *Montgomery*, CAS 2004/O/645, ¶ 43; *Gaines*, CAS 2004/O/649, ¶ 43.

80. *Montgomery*, CAS 2004/O/645, ¶ 46; *Gaines*, CAS 2004/O/649, ¶ 46.

81. *Montgomery*, CAS 2004/O/645, ¶ 57; *Gaines*, CAS 2004/O/649, ¶ 60.

82. *Montgomery*, CAS 2004/O/645, ¶ 47; *Gaines*, CAS 2004/O/649, ¶ 47.

83. *Montgomery*, CAS 2004/O/645, ¶ 57; *Gaines*, CAS 2004/O/649, ¶ 60.

84. *Montgomery*, CAS 2004/O/645, ¶ 48; *Gaines*, CAS 2004/O/649, ¶ 50.

85. *Montgomery*, CAS 2004/O/645, ¶ 52; *Gaines*, CAS 2004/O/649, ¶ 55.

86. *Montgomery*, CAS 2004/O/645, ¶ 52; *Gaines*, CAS 2004/O/649, ¶ 55.

87. *Montgomery*, CAS 2004/O/645, ¶ 50; *Gaines*, CAS 2004/O/649, ¶ 52.

88. *Montgomery*, CAS 2004/O/645, ¶ 54; *Gaines*, CAS 2004/O/649, ¶ 57 ("[In] *USADA v. Collins*, the Arbitral Tribunal found that it 'may draw certain adverse inferences' from the Respondent's refusal to testify, though 'there is no rule obligating a Tribunal to draw an adverse inference.'" (quoting *Collins*, AAA 30 190 00658 04, ¶ 3.9) (emphasis in original)).

89. *Montgomery*, CAS 2004/O/645, ¶ 55; *Gaines*, CAS 2004/O/649, ¶ 58.

and Gaines, to be clear and compelling evidence that was “sufficient in and of itself to find [the] respondent[s] guilty of doping.”<sup>90</sup>

For Montgomery and Gaines, the USADA requested from the panel, “[a] lifetime period of ineligibility beginning on the date [the athlete] accept[s] this sanction or the date of the hearing panel’s decision.”<sup>91</sup> The panel found that Mr. Montgomery’s and Ms. Gaines’s conversations were admissions of their use of prohibited substances that, under IAAF rules, merited a period of ineligibility of two years, commencing the first day of the hearings, June 6, 2005.<sup>92</sup> Furthermore, the panel ordered the retroactive cancellation of all results, rankings, awards, and winnings as of March 31, 2001 for Montgomery and as of November 30, 2003 for Gaines.<sup>93</sup> The dates corresponded with the date that their admissions were made to Kelli White, according to her testimony.<sup>94</sup> This was in accordance with IAAF Rule 60.5, which provides the following:

Where an athlete has been declared ineligible he shall not be entitled to any award or addition to his trust fund to which he would have been entitled by virtue of his appearance and/or performance at the athletics meeting at which the doping offence took place, or at any subsequent meetings.<sup>95</sup>

### *C.) Conclusions Regarding Post-WADA Cases*

The post-WADA Code cases have provided further articulation as to the standard of proof to be applied in non-analytical positive cases. The panels concluded that the comfortable satisfaction standard of proof continues to depend on the gravity of the case and that comfortable satisfaction moves to a very high standard that can become indistinguishable from beyond a reasonable doubt. This range in the standard of proof may well turn the WADA Code into the variation of sanctions experienced with differing

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90. *Montgomery*, CAS 2004/O/645, ¶ 50; *Gaines*, CAS 2004/O/649, ¶ 52.

91. *Montgomery*, CAS 2004/O/645, ¶ 15; *Gaines*, CAS 2004/O/649, ¶ 15 (quoting USADA’s Charging Letter).

92. *Montgomery*, CAS 2004/O/645, ¶¶ 60-61; *Gaines*, CAS 2004/O/649, ¶¶ 63-64.

93. *Montgomery*, CAS 2004/O/645, ¶ 62; *Gaines*, CAS 2004/O/649, ¶ 65.

94. It should be noted that Kelli White, in admitting a doping infraction, only received a two-year period of ineligibility. She suffered retroactive application of the rules to take away prior results back to the date of first use. Dwain Chambers, who tested positive for “The Clear,” was given a similar two-year period of ineligibility without retroactive effect on prior results. Following admissions of use in December 2005, retroactive elimination of results was likely to be applied by the European Athletics Association, which abided by the rules of the IAAF at the time of publication of this article.

95. *Montgomery*, CAS 2004/O/645, ¶ 62; *Gaines*, CAS 2004/O/649, ¶ 65 (quoting IAAF Rule 60.5).

standards when the IFs' rules were the anti-doping regime. The opportunity to clarify the standard was missed and has left the confusion of the pre-WADA jurisprudence in place.

#### IV. CONCLUSIONS

It remains to be seen how CAS will apply the comfortable satisfaction standard of proof in non-analytical positive cases. The cases to date have adequately determined the burden and standard of proof but have given virtually no guidance on what must be proven in an entirely circumstantial evidence case involving a non-analytical positive. The sports world waited in anticipation for the *Montgomery* and *Gaines* decisions to provide instructions on what is required to prove non-analytical positives. However, the decisions ultimately turned on direct evidence and not circumstantial evidence. The CAS panels in those cases declined to offer opinions as to whether the available circumstantial evidence would suffice to prove a doping offense.

As a result, there continues to be insufficient jurisprudence on the matter. Of importance in these cases is that the CAS Panels did provide some light as to future interpretation of the comfortable satisfaction standard. Specifically, CAS determined that what is required for a panel to be comfortably satisfied with the evidence will vary with the nature and gravity of the allegations at issue. Therefore, in some cases, it makes little difference whether the beyond a reasonable doubt or comfortable satisfaction standard is applied. The standard of proof moves towards the highest standard depending upon the gravity of the allegations, although allegations only lead to a two-year period of ineligibility, which is the same as with a positive analytical result. The only thing that can be said for certain is that a higher standard of proof will be required in these cases.