

**THE ATP TOUR ANTI-DOPING TRIBUNAL
APPEAL OF D. LUIS FEO BERNABÉ**

OPINION

An ATP Tour Anti-Doping Tribunal {"Tribunal"} consisting of Prof. Richard H. McLaren, Esq., Chair, Dr. Arturo Marti, technical scientific member and Dr. Gary Wadler MD, medical member was formed by Richard Ings the **ATP Administrator of Rules** following a **Review Board** {"RB"} determination that D. Luis Feo Bernabé {"the Player"} had a case to answer under the Tennis Anti-Doping Program 2004 {"Anti-Doping Rules"}. Those rules are contained within the ATP 2004 Official Rulebook {"Rules"} found at pgs. 87 through 122. The Anti-Doping Rules are designed to maintain the integrity of men's professional tennis and protect the health and rights of all tennis players. The Program includes (i) doping tests in and out of competition, (ii) the imposition of penalties for Doping Offenses, and (iii) support and assistance to players when applicable.

Josep Riba, Esq. represented D. Luis Feo Bernabé
John MacLennan, Esq. represented the ATP {the "Tour" or the "ATP"}.

Procedural Order No. 1 was issued on 28 January 2005 to prescribe the procedure to be followed in this proceeding. During the course of following that Order, the Player elected under Rule K. 1. c. of the Anti-Doping Rules to admit to the commission of a Doping Offense. The effect of that admission, made by his counsel on 23 February 2005, is that the Player accedes to the consequences specified in the notice of 3 January 2005 from the ATP of a case to answer under the Anti-Doping Rules. That notice provided for a sanction of two years ineligibility from any ATP (or its related organisations) authorized and organized events or activities together with any other sanctions provided for in the Anti-Doping Rules.

As a result of the Player's admission in accordance with Rule K. 1. c., a hearing before the full Tribunal was no longer required. Procedural Order No. 2 was issued on 8 March 2005 to set the revised procedure to be followed. Under that Procedural Order, written submissions were completed and filed by 30 March 2005. Upon completion of that process, the Chairman of the Tribunal following consultation with the other members issues this decision.

BACKGROUND FACTS

1. The Player is a professional tennis player from Spain. He is currently a member of the ATP Tour.
2. The ATP is a not-for-profit membership organization composed of male professional tennis players and tournament organizations. The ATP sanctions tennis tournaments and provides league governance and support to its member tournaments and players. Pursuant to this role, the ATP has adopted rules for the conduct of both the tournaments and the players.
3. On 10 January 2004, the Player signed the consent form required by Rule B. 1. for the 2004 season. By signing that form, the Player acknowledged that he had received a copy of the Rules. He further acknowledged that he had an opportunity to review the Rules and agreed to be bound by all the provisions therein and to play by the Rules.
4. The Player provided a urine sample pursuant to the Anti-Doping Rules during the “ATP Challenger Tournament” (an ATP sanctioned tournament) in Seville, Spain on 2 October 2004. By these proceedings, the Player accepted the analysis of the Laboratoire de Contrôle du Dopage INRS Institut Armand-Frappier {“the Lab”}, located in Pointe-Claire, Quebec, Canada which is accredited as a World Anti-Doping Agency {“WADA”} laboratory. The Lab Doping Control Report states that the A sample of the Player indicated the presence of *Betamethasone* which is a Glucocorticosteroid listed in Appendix 3 (*The 2004 Prohibited List*) at S. 9 in the Anti-Doping Rules. The Player deliberately did not request that the B sample be analyzed to confirm the existence of the **Prohibited Substance**.
5. By Rule J. 2. e. when there is no request to analyze the B sample, the Player is deemed to have waived his right to have the B sample analyzed. He is also deemed to have accepted the A Sample’s analytical results.
6. On 23 February 2005 the Player’s counsel advised the Chairman that the Player wished to admit that he had committed a Doping Offense in accordance with the election provided under Rule K. 1. c. Thereafter, a procedural Order No. #2 was issued. Two years of Ineligibility would arise under Rule M. 2. Under Rule K. 1. c. where there is a range of possible **Consequences**, as there are here, written submissions on a lesser sanction

may be made to the Tribunal.

Written Submissions on behalf of the Player

7. The plea here is to impose the minimum sanction set out in Rule M. 3. which is a written warning and reprimand and no period of **Ineligibility** and no further sanction relating to the forfeiture of any medals, titles, computer ranking points or prize money obtained by the Player in the Competition.
8. The Player has for many years used Mr. Josep Pineda as his trainer as well as his nutritionist and adviser in natural medicines. The Player suffered light muscular pains and Mr. Pineda personally prepared a homeopathic substance termed Traumel for the treatment. It contained no banned substances.
9. When the pain persisted, Mr. Pineda recommended a consultation with the Sabadell Sports Centre. The centre is under the supervision of Dr. Ramon Cugat. Mr. Josep Orriols I Verges, a quiro-masseru, naturopath and health technician at the centre applied treatments based on massage-therapy, acupuncture, electrical therapy etc. On occasion he also supplied an anti-inflammatory product, Voltaren.
10. The Player's pain did not subside with the homeopathic treatments. On the recommendation of Mr. Pineda, a further examination at the Sabadell Sports Centre was undertaken on 27 September 2004. Mr. Orriols, under the supervision of Dr. Cugat examined the Player and administered .5cc of "celestome crinodose", a dermatological anti-inflammatory. The Player then went to the tournament in Seville.
11. During the consultation on 1 April 2005 between the Chairman and the other members the Tribunal the method of administration of the anti-inflammatory became an issue. The Chairman made an inquiry of the Player's lawyer and received the following response. *After due consultation with Dr. Josep Orriols, we wish to inform the Tribunal that the substance 'celestome crinodose' was applied directly to the skin in the form of a pomade termed celestoderm/v and by the technique known as ionfontoresis [sic]. This consists in applying the pomade with sponges. Dr. Orriols has indicated his willingness to certify this in the presence of a notary, were the Tribunal to consider it necessary.*

12. Upon receiving the analytical results of his urine specimen, the Player immediately questioned Josep Orriols and Dr. Rmaon Cugat and asked for an explanation. After consultation with the appropriate medical authorities, the Player was informed that the substance that he had been given could contain *Betamethasone*, a Glucocorticosteriod listed in Appendix Three S. 9. It is provided in the Appendix Three, that the administration route of Glucocorticosteriod must not be oral, rectal or intravenous or intramuscular and for which a Therapeutic Use Exemption is required. Glucocorticosteriods are specified substances under the Anti-Doping Rules.
13. It is submitted that the Player did not intentionally commit a Doping Offense. While he may have lacked some diligence on his part, he is a player who has always paid attention to the Anti-Doping Rules. The substance when administered to Olympic sportsmen and competitors in World Cups has never produced a case of doping. The player's pain had been intense. This led to the additional treatment that caused the problem. The persons who administered the treatment were his regular medical staff with whom he had worked for many years and had no reason to doubt their professional diligence to protect him from the consequences that have now arisen. The treatment was for therapeutic use.
14. The player underwent an operation on 17 December 2004 to correct by a laparoscopic surgery the source of the pain he had been experiencing. He was discharged from the Barcelona hospital on 18 December 2004. There is no doubt the Player had a medical condition that required treatment and corrective surgery.

Written Submissions on behalf of the ATP

15. Counsel for the ATP submits that the Player has no points or prize money to be forfeited. The only sanction is a possible period of **Ineligibility**.
16. It is submitted that the Player should have been more aware of what medications he was being administered. He should have taken greater precautions to be certain the administered medications did not contain any prohibited substances.
17. Pursuant to Procedural Order No. 1 the following agreed upon stipulations were filed with the Tribunal.

1. On 2 October 2004, Mr. Bernabé provided a urine sample in competition during the ATP Challenger Tournament in Seville, Spain
 2. Mr. Bernabé's sample was given the unique identifying number of 384423.
 3. Mr. Bernabé's sample was collected in accordance with the ATP Tennis' 2004 Anti-Doping Program.
 4. The sample tested by the laboratory number 384423 is the sample provided by Mr. Bernabé.
 5. The sample contained the substance *Betamethasone*.
 6. *Betamethasone* is defined as a specified substance under the ATP Tennis Anti-Doping Program 2004 under S.9 glucocorticosteroids.
18. The recommendation of the ATP is that a period of **Ineligibility** of between two and four months would be appropriate in all of the circumstances. It is also submitted that the Player continued playing after the sample was given. Therefore, any period of **Ineligibility** would commence from the date of the Tribunal's decision in accordance with Rule M. 8. c.

19. **THE RELEVANT ANTI-DOPING RULES**

B. Covered Players and Events

2. *Any player who enters or participates in a **Competition, Event** or activity organized, sanctioned or recognized by the ATP, or who is an ATP member or who has an ATP ranking (a "**Player**") shall be bound by and shall comply with all of the provisions of this Program ... Further, for each calendar year all such players shall, as a condition of entering or participating in any event organized or sanctioned by the ATP, deliver to the ATP a signed consent in the form set out in Appendix 2.*

...

C. Doping Offenses

Doping is defined as the occurrence of one or more of the following (each, a “**Doping Offense**”):

1. *The presence of a Prohibited Substance or its Metabolites or Markers in a Player’s Specimen, unless the Player establishes that the presence is pursuant to a therapeutic use exemption granted in accordance with Article E.*

...

E. Therapeutic Use Exemptions

1. *The International Standard for Therapeutic Use Exemptions issued by WADA sets out the circumstances in which Players may claim an exemption to Use one or more Prohibited Substances or Prohibited Methods to treat documented medical conditions. In order to rely upon such an exemption to excuse the Use, the presence in a Sample or the Possession of a Prohibited Substance or Prohibited Method that would otherwise amount to a Doping Offence under this Program, a Player must obtain a therapeutic use exemption (“TUE”) prior to such Use, presence or Possession.*

....

J. Review Board

2. **Review of Adverse Analytical Findings**

...

- e. *If the player does not request analysis of the*

***B Sample** within fourteen days of receipt of the notice specified in Article J.2.d., above, the Player shall be deemed (a) to have waived his right to have the **B Sample** analyzed; and (b) to have accepted the **A Sample** analytical results.*

...

K. Due Process

1. Commencing proceedings before the Anti-Doping Tribunal

...

*c. The **Participant** shall be entitled at any stage to admit that he has committed the Doping Offense(s) specified in the Notice and to accede to the **Consequences** specified in the Notice. In such circumstances, a hearing before the **Anti-Doping Tribunal** shall not be required. Instead, the Chairman of the **Anti-Doping Tribunal** shall promptly issue a decision confirming the commission of the Doping Offense(s) specified in the Notice, and ordering the imposition of such **Consequences** (including, where this Program specifies a range of possible **Consequences**, specifying what the **Consequences** should be in that particular case). Where a range of possible **Consequences** is specified in the Program, written submissions may be made by or on behalf of the **Participant** in mitigation at the time of admission of the Doping Offense, and the Chairman of the **Anti-Doping Tribunal** shall be entitled to take those submissions, as well as any rebuttal submitted by the ATP, into account in determining what **Consequences** should apply.*

...

L. Automatic Disqualification of Individual Results

1. *A doping Offense committed by a Player in connection with or arising out of an **In-Competition** test automatically leads to **Disqualification** of the individual result obtained by the Player involved in that **Competition** with all resulting consequences, including forfeiture of any medals, titles, computer ranking points and prize money (without deduction for tax) obtained in that **Competition**.*

...

M. Sanctions on Individuals

2. Imposition of Ineligibility for Prohibited Substances and Prohibited Methods

*Except where the substance at issue is one of the specified substances identified in Article M.3, the period of **Ineligibility** imposed for a violation of Article C.1 (presence of **Prohibited Substance** or its **Metabolites** or **Markers**), Article C.2 (**Use or attempted Use of Prohibited Substance or Prohibited Method**) or Article C.6 (**Possession of Prohibited Substances and/or Prohibited Methods(s)**) shall be:*

First Offence: Two (2) years' Ineligibility.

Second Offence: Lifetime Ineligibility.

*However, the **Participant** shall have the*

*opportunity in each case, before a period of **Ineligibility** is imposed, to establish the basis for eliminating or reducing this sanction as provided in Article M.5*

...

3. Lesser Sanction for Specified Substances.

*The **Prohibited List** may identify specified substances that are particularly susceptible to unintentional anti-doping rules violations because of their general availability in medicinal products or that are less likely to be successfully abused as doping agents (a "**Specified Substance**"). Where a player can establish that the **Use** of such a Specified Substance was not intended to enhance sport performance, the period of **Ineligibility** found in Article M.2 shall be replaced with the following:*

*First offense: At a minimum, a warning and reprimand and no period of **Ineligibility** from future **Events**, and at a maximum, one (1) year's **Ineligibility**.*

...

7. Disqualification of Results in Competitions Subsequent to Sample Collection

*In addition to the automatic **Disqualification**, pursuant to Article L, of the results in the **Competition** that produced the positive **Sample**, all other competitive results obtained from the date a positive **Sample** was collected (whether **In-Competition** or **Out-of-Competition**) or other Doping Offense*

*occurred through to the date of commencement of any **Ineligibility** period shall, unless fairness requires otherwise, be Disqualified with all of the resulting consequences, including forfeiture of any medals, titles, computer ranking points and prize money (without deduction for tax).*

...

APPENDIX THREE

THE 2004 PROHIBITED LIST

Valid 1st January 2004
(Updated 25 November 2003)

SUBSTANCES AND METHODS PROHIBITED IN-COMPETITION

PROHIBITED SUBSTANCES

S.9 GLUCOCORTICOSTEROIDS

Glucocorticosteroids are prohibited when administered orally, rectally, or by intravenous or intramuscular administration

All other administration routes require a medical notification in accordance with section 8 of the International Standard for Therapeutic Use Exemptions.

SPECIFIED SUBSTANCES

“Specified Substances” are listed below:

Stimulants: ephedrine, L-methylamphetamine, methylephedrine.

Cannabinoids.

Glucocorticosteroids

REASONS

20. A Doping Offense has been established under Anti-Doping Rule C. 1. by virtue of the admission made pursuant to Rule K. 1. c. It is so found by this Tribunal.
21. The Player committed a Doping Offense pursuant to an **In-Competition** test. Under Rule L. 1. of the Anti-Doping Rules, this leads to the automatic **Disqualification** of the individual results obtained by the Player in that competition. The Player must forfeit any medals, titles computer ranking points and prize money {without deduction of tax} obtained in that **Competition**. This Tribunal finds that the automatic **Disqualification** applies in this case.
22. Betamethasone is a Glucocorticosteroid listed in Appendix 3 (*The 2004 Prohibited List*) at S. 9 in the Anti-Doping Rules. It is also a Specified Substance under the same Appendix. Under Rule M. 3 the sanction for a first offense is at a minimum a warning and reprimand and at a maximum one (1) year’s **Ineligibility**.
23. Under Rule M.3, a lesser sanction is applicable when a player establishes that his use of the substance “*was not intended to enhance sports performance*”. The Player contends and submits evidence that the substance did not enhance his performance for he had unwittingly received the *Betamethasone* in connection with an anti-inflammatory product, “*celestrom crinodose*” with which he was treated by a physician. There is no other evidence to establish that it may have been performance enhancing. Therefore, this Tribunal finds that the *Betamethasone* was not intended to enhance performance, thereby bringing Rule M. 3. into play.

24. The Player was suffering considerable muscular pain of various origins in the autumn of 2004. His advisers with whom he had worked for a number of years elected to go beyond the usual substances they would advise the Player to use. As a consequence, a dermatological anti-inflammatory product “celestones cronodose” was used as additional treatment. Unfortunately, that substance contained a banned substance. It is established that the Player was not aware that he had been administered a medical product that could contain a banned substance.
25. Rule C. 1. a. places upon the Player a personal duty to ensure that no **Prohibited Substance** enters his body. That personal duty is not lessened by reliance upon professional or other advisers who may give advice on treatment. Indeed, in this case, the professionals were used to working with the Player and were, or ought to have been, familiar with the Anti-Doping Rules relating to tennis. The Player’s conduct lacked the necessary quizzical inquiry about the new product being used. He simply relied upon his long time advisers to ensure that his responsibilities towards the Anti-Doping Rules were fulfilled. In the submissions on behalf of the Player, he accepted that his conduct represented *a certain lack of diligence on his part*.
26. The Player has no history of anti-doping issues. In the past he has demonstrated care and attention to the Anti-Doping Rules and the programme of the ATP. It was only when his pain became particularly intense that he resorted to the problematic product. When he did so, he resorted to and took the advice of the same staff he always dealt with and had relied upon previously. Their intention was to treat him for the additional pain he was experiencing by providing therapeutic assistance. There can be little doubt that the Player was experiencing additional pain that was never satisfactorily relived until he underwent the surgery in December of 2004. The motives of both the Player and his staff of professionals are not in doubt. Everyone had legitimate intentions, which were not directed at violating the Anti-Doping Rules.
27. Given the medical history provided, if the medical team had suspected that there was a problem with the substance chosen they could have either sought a Therapeutic Use Exemption provided for under Rule E or deployed an alternative product. The difficulty is that they were unaware of the need to take either course of action.

28. The Player and his counsel did not dispute the A sample analysis by waiving the right to the B sample. He then admitted his offense under the Rules. Both he and his counsel have co-operated fully in these proceedings and never hesitated to act in full compliance with all of the Rules and the process.
29. The ATP in its submissions recommends a suspension of between 2 and 4 months. The Player in its submissions recommends a reprimand and warning. The Rule in M. 3. provides for a possible range of between a minimum of a warning and reprimand with no period of **Ineligibility** from future **Events** and a maximum of a one-year period of **Ineligibility**. The Panel finds that the Player has been honest and conducted himself with integrity and respect of the Anti-Doping Program of the ATP. It is the view of the Tribunal that the conduct involved here does reflect carelessness and a lack of quizzical review of what treatments he was receiving. His conduct in violating his personal duty imposed by the Anti-Doping Rules is not of a significant or flagrant nature. This is a clear case of inadvertent conduct for which there ought to be some sanction but not at the full end of the range. It is found that the Player should serve a period of 2 months **Ineligibility**.
30. The 2005 Anti-Doping Rules of the ATP have changed in respect of Glucocorticosteroids. The dermatological preparations are not prohibited as they were in the previous year. The provision in the 2005 Anti-Doping Rules of the ATP reads:

S.9 GLUCOCORTICOSTEROIDS

Glucocorticosteroids are prohibited when administered orally, rectally, intravenously or intramuscularly. Their use requires a Therapeutic Use Exemption approval.

All other routes of administration require an abbreviated Therapeutic Use Exemption.

Dermatological preparations are not prohibited.¹

¹ The underlining represents new language in comparison to the 2004 Anti-Doping Rules. There are also a number of deletions in the 2005 language not shown in this quote.

31. The change in the Anti-Doping Rules in 2005 in respect of dermatological preparations of glucocorticosteroids brings into play the legal principle of *lex mitior*². Under the principle of *lex mitior*, if new rules come into force between the alleged Doping Offense and the hearing of the allegations; then the sanctions that are more favourable to the athlete must be applied. For a similar application to the rules of FINA who adopted the WADA Code as of 11 September 2003 see *Strahija v. FINA* CAS 2003/A/507 at paragraph 7.2.2. The principle has also been applied in *Oliver v. ATP* a decision of an ATP Anti-Doping Tribunal chaired by Prof. McLaren dated 6 February 2004.
32. If the dermatological preparations provision of the 2005 Anti-Doping Rules were to be applied there would be no sanction. Also, there would have to be a declaration that no **Doping Offense** has occurred in this case because of the principle of *lex mitior*. In this case, the method of administration was dermatological in certain respects but not in other aspects. The Player reported to the sports clinic for muscle pain and not for a skin complaint. The technique used to apply the substance for treatment for muscle pain was iontophoresis. That technique involves the use of an electric current to ensure that the substance is not applied at the skin surface but below it to have application to the tissues under the skin. The treatment is an understandable medical procedure for muscle pain. However, this Tribunal finds that the absence of a sanction for dermatological preparations in the 2005 Anti-Doping Rules is intended to be for skin applications of a substance for matters such as a rash or surface skin irritation. The preparation used here was for muscular pain and the method of administration was not a surface skin application but rather an iontophoresis application. The Tribunal finds such an administration is not within the exception accorded to dermatological preparations. Therefore, an abbreviated TUE would have been required under the 2005 Anti-Doping Rules. This being the case the Tribunal finds that the principle of *lex mitior* does not apply to the facts of this case.
33. For all the foregoing reasons the circumstances of this case require that some sanction be applied to the conduct of the Player. The Tribunal selects a

² For a discussion of the principle see Lewis, A. & Taylor, J. *Sport: Law and Practice*: Butterworths (2003). See also *AC v. FINA* CAS 1996/A/149.

minimal two-month period of **Ineligibility** as being appropriate in the absence of the application of the principle of *lex mitior*. The quantum of the period is based upon the circumstances of this case and for this particular Player.

DECISION

The Tribunal makes the following orders based upon the foregoing grounds and discussion in the above opinion.

1. The Player under Rule K. 1. c. admitted a First Doping Offense thereby establishing the Doping Offense defined in Rule C 1. The Doping Offense involved the use of a Specified Substance a Glucocorticosteroid referred to in S. 9. of Appendix Three "*The 2004 Prohibited List*".
2. Rule L. 1. disqualifies the results obtained at the "ATP Challenger Tournament" in Seville, Spain on 2 October 2004. Any medals, titles, computer ranking points and prize money (without reduction for tax) obtained at the Competition are forfeited. The commencement of the foregoing Consequences is to be effective in accordance with Rule M. 8.
3. Under Rule M. 3. the period of Ineligibility otherwise applicable is determined to be two {2} months. In accordance with Rule M. 8. c. this suspension shall commence on the date herein

DATED THIS 7th DAY of APRIL 2005.

Prof. Richard H. McLaren, C.Arb
(Chairman)
Barrister and Solicitor

SIGNED AT: London, Ontario, CANADA