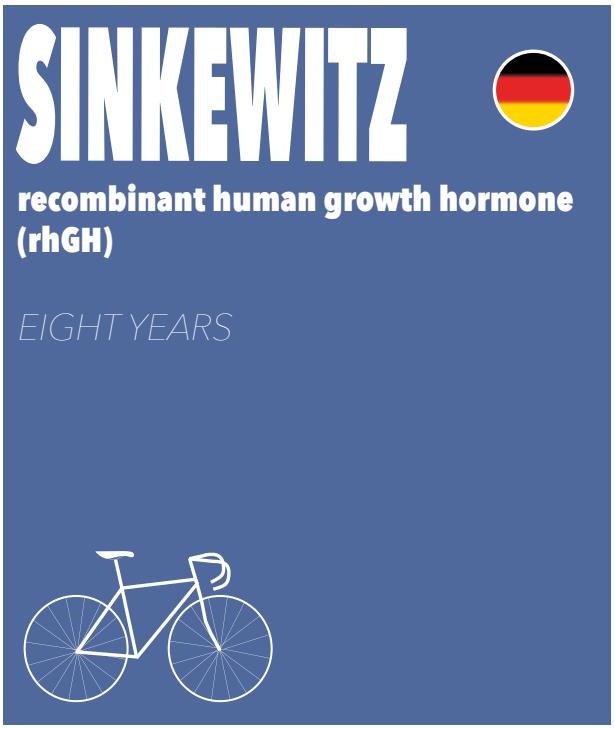
Sinkewitz v. Veerpalu: Struggling to fit anti-doping science into a legal framework



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On 21 February 2014, the CAS panel rendered its award in the NADA v. Sinkewitz matter (CAS 2012/A/2857, NADA v. Sinkewitz, 21 February 2014). The findings in this award are difficult to reconcile with the Veerpalu decision (CAS 2011/A/2566, Veerpalu v. FIS, 25 March 2013) published almost exactly a year ago. A comparative perspective on these two cases casts light on the inherent challenge for CAS panels in dealing with science-related arguments in anti-doping disputes.

In the Veerpalu case, the CAS panel cleared the Estonian cross-country skier Andrus Veerpalu of an anti-doping rule violation for recombinant human Growth Hormone ("rhGH"). This decision set a new milestone in the rather arid landscape of successful judicial challenges against analytical anti-doping science. While the CAS panel declined to condemn as such the scientific validity of the analytical method used to detect rhGH, they did however find that the "decision limits" set by WADA to define the ratio beyond which laboratories should report the presence of rhGH had not been proven to be scientifically reliable. The FIS did not convince the panel by the required standard of comfortable satisfaction that the decision limits had been correctly determined, due in particular to inconsistencies in the studies conducted, the lack of peer review, and insufficient documentation produced in the proceedings.

The Veerpalu award was published during the last consultation round for the 2015 Code revision process. It triggered as an immediate consequence the freezing of all reporting of Adverse Analytical Findings for rhGH pending the completion of new studies to support the determination of the decision limit. The award also contributed to the introduction of a new presumption of scientific validity for analytical methods and decision limits in the revised Code (new Article 3.2.1 WADC 2015), as it was perceived in anti-doping circles as potentially opening the door to systematic challenges by athletes against anti-doping science. By explicitly shifting the burden of proof onto the athlete to rebut this presumption of scientific validity, the new provision intends to clarify the current uncertainty surrounding the extent to which scientific instruments codified in WADA technical rules are subject to judicial review. It is likely to raise a number of interesting substantive and procedural issues, due to its far-reaching practical implications.

The CAS decision in NADA v. Sinkewitz adds an unexpected twist to the rhGH story, practically on the one year anniversary of the Veerpalu breakthrough. In this second matter, the German cyclist Patrik Sinkewitz returned a positive test for rhGH. Sinkewitz attempted to rely on the precedent set in the Veerpalu case that the decision limits for the rhGH test are unreliable and preclude the finding of an anti-doping rule violation. Surprisingly, instead of simply following the reasoning of the Veerpalu award, the CAS panel reached an effectively opposite conclusion. The panel was mindful to stress that Sinkewitz, unlike Veerpalu, was not a "borderline" case and imposed an eight-year ineligibility period on the cyclist (as it was his second violation).

The reasoning of the CAS panel in the Sinkewitz case can be roughly summarized as follows: Currently, the decision limits for rhGH are only defined in WADA Guidelines, which, unlike the International Standard for Laboratories or related Technical Documents, are not mandatory. Therefore, the rhGH decision limits have no legal status and are not decisive for determining whether an anti-doping rule violation was committed. Rather, the decision limits merely represent means of evidence and serve as a recommendation to the laboratories. Hence, even a sample showing a ratio below the decision limits could be reported positive if the experts are convinced of the presence of rhGH, irrespective of the validity of the decision limits and the findings of the Veerpalu panel on this issue. The identification of rHGH can thus be established through expert evidence, since the WADA Code accepts "any reliable means" of evidence.

The findings in the Sinkewitz award may appear both pragmatic and politically soothing. In effect, they amount to lifting the moratorium on the prosecution of rhGH cases pending the formal adoption of new decision limits, at least provided the ratios detected are sufficiently clear-cut to build a solid case, supported by the evidence of laboratory experts. However, the award remains silent on various key issues. The award does not discuss the fact that the violation of "Presence of a Prohibited Substance" under Article 2.1 of the Code is precisely meant to restrict the admissible means of evidence to an Adverse Analytical Finding obtained in compliance with the International Standard for Laboratories and related documents. Significantly, the panel did not question WADA's decision to "outsource" the decision limits into Guidelines through a simple reference in the Technical Document on Decision Limits (TD-2013DL), rather than to enshrine them directly in a mandatory document. Nor was there any assessment of whether the absence of a firm decision limit as part of the identification criteria necessary for validating the rhGH analytical method might per se represent a breach of the International Standard for Laboratories.

Crucially, the two decisions highlight the ambiguity of CAS panels when it comes to the legal characterisation of scientific issues, as well as the difficulty of fitting a complex technical reality into a legally enforceable framework. Indeed, the two CAS panels implicitly – and perhaps unconsciously – appear to rely on different perceptions of the rhGH test. The Veerpalu award seemed to base its reasoning on a characterization of the test as a quantitative analysis applicable to Threshold Substances covered by the Technical Document on Decision Limits. By contrast, the Sinkewitz award would appear to color the test as a qualitative analysis designed to identify the presence of exogenous rhGH, the "decision limits" being reduced to a technical criterion for the identification of the substance. While both approaches appear theoretically sustainable, the fact is that neither currently fits in neatly with the system of the International Standards and related documents. The result is that the status of rhGH remains in limbo, for reasons that go beyond the current uncertainty on the appropriate level of the decision limits.

Available at:

http://wadc-commentary.com/sinkewitz

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