UNDER THE IRONMAN ANTI-DOPING PROGRAM

ANDREW STARYKOWICZ,

Applicant,

vs.

WORLD TRIATHLON CORPORATION,

Respondent.

AWARD

I, the undersigned, having been duly appointed as the arbitrator ("Arbitrator") in this matter by McLaren Global Sport Solutions Inc. ("MGSS") pursuant to Article A.6.1 of the WTC Hearing Protocol and Arbitration Rules for Anti-Doping Rule Violations and Other Disputes (the "Arbitration Rules") published as “Appendix 2 Definitions” under the IRONMAN Anti-Doping Rules (the “Anti-Doping Rules” or “ADR”), Version 6.0, 2017, have reviewed all of the materials, testimony and arguments submitted by and on behalf of Andrew Starykowicz ("Mr. Starykowicz" or the “Applicant” or the “Athlete”) and the World Triathlon Corporation (“WTC” or “Respondent”) and do hereby find and issue this Award. Capitalized terms in this Award that are not otherwise defined shall have the meanings set forth in the Arbitration Rules or the Anti-Doping Policy, as applicable.

SUMMARY AND DECISION

1. The parties agree that Anti-Doping Rules violations have occurred and the issue in this case is the appropriate sanction.

2. A hearing in this matter was held on October 22, 2020. In lieu of oral closings arguments, the parties submitted post-hearing briefs on October 31, 2020. This Award is based on all of the submissions and arguments of the parties.

3. The period of suspension commenced on December 5, 2019, the date on which the Provisional Suspension which went into effect, and will end on January 1, 2021.

4. The Athlete’s results from the November 2, 2019 race at IRONMAN Florida are disqualified, and the Athlete forfeits all medals, point and prizes and shall repay $6,500 in prize money received as a consequence of the disqualification. The Athlete will not be allowed to participate in any IRONMAN affiliated events, or events owned or operated by the WTC, until the prize money is repaid.

5. The Athlete’s results from the October 27, 2019, IRONMAN Waco 70.3 are disqualified, and the Athlete forfeits all medals, points and prizes, which shall include loss of a
qualifying slot for the 2021 IRONMAN 70.3 World Championship. The Athlete shall repay the $2,750 in prize money he received as a consequence of the disqualification. The Athlete will not be allowed to participate in any IRONMAN affiliated events, or events owned or operated by the WTC, until the prize money is repaid.

6. The Athlete’s results in the 2019 Challenge Daytona are disqualified.

7. The Arbitration costs and the court reporter costs in this case will be borne by WTC. Each party shall bear its own costs and attorney’s fees.

FACTS

8. Andrew Starykowicz is a 37-year-old American professional triathlete residing near Chicago, Illinois. A former mechanical engineer for a construction machinery and equipment company, Mr. Starykowicz competed in cycling and triathlon events while maintaining a full-time job, until 2009. In 2009, Mr. Starykowicz decided to focus on a full-time professional triathlon career. Not long after, he recorded the fastest-ever half-Ironman bike split at the Ironman 70.3 World Championships. Since turning professional, Mr. Starykowicz has won 18 triathlon races.

9. The Athlete is an experienced professional athlete who has been in the Registered Testing Pool of USADA or IRONMAN for over five years. During the course of his career, Mr. Starykowicz has been tested at least 37 times, 18 of those by the United States Anti-Doping Agency (“USADA”).

10. As a condition of his being an IRONMAN Professional Member Athlete, the Athlete signed an IRONMAN Anti-Doping Agreement each year in which he acknowledged he understood and agreed to comply with IRONMAN Anti-Doping Rules, and that he understood all athletes in the IRONMAN Registered Testing Pool “must obtain a TUE before using a Prohibited Substance, as provided in WADA’s International Standard for Therapeutic Use Exemptions (accessible on WADA’s website).” The Athlete also acknowledged his duty to notify Athlete Support Personnel regarding his obligations under the Anti-Doping Rules and to “take responsibility to make sure that any medical treatment received does not violate the Anti-Doping Rules.” As part of the registration process for each WTC event, the Athlete also received a PRO Newsletter and again signed the IRONMAN Anti-Doping Waiver. Both documents specifically address the IRONMAN Anti-Doping Rules and TUE requirements, and provide links to additional information.

11. Mr. Starykowicz stated that he is diligent about his use of medication and supplements. He received anti-doping education from USADA and WADA, knows that it is his responsibility to make sure he does not take banned substances, and had a working knowledge of how to check the Global DRO website before he takes anything when he gets sick.
12. On or about October 2, 2019, the Athlete began to experience coughing and shortness of breath. The week before, his son had visited a hospital with similar symptoms and had been diagnosed with pneumonia.

13. On or about October 8, 2019, the Athlete began a course of antibiotics, without seeing significant improvement in his condition.

14. On October 12, 2019, due to his illness, he was forced to withdraw from the Ironman World Championships in Kona, which was scheduled to take place on that day.

15. On October 15, 2019, the Athlete was examined by Dr. Anita Shah, a pulmonologist in Chicago, who diagnosed him with possible viral pneumonitis and mucopurulent bronchitis (bronchospasm), with a possible viral etiology. Dr. Shah prescribed the Athlete a Medrol (Methylprednisolone) pack (course of 5 days) and a one-month course for once daily use of a Breo Ellipta 200/25 (Fluticasone Furoate and Vilanterol inhalation powder) inhaler (“Breo”).

16. Methylprednisolone and Fluticasone Furoate (Glucocorticoids) and Vilanterol (a Beta-2 Agonist) are included in the List of Prohibited Substances and Methods (the “Prohibited List”) established by the World Anti-Doping Agency (“WADA”) for 2019. Vilanterol is prohibited at all times; Methylprednisolone and Fluticasone Furoate are prohibited in-competition only, when administered by oral, intravenous, intramuscular or rectal routes, but not by inhalation.

17. The Athlete alleges that, while he was still at Dr. Shah’s office, he “consulted GlobalDRO and the WADA website,” determined “there were no therapeutic alternatives that contained combination inhalers and glucocorticoids (sic),” and “concluded that there were no alternatives to Breo that were not also banned to one degree or another.” He alleges that he and his wife, who is a PharmD, “input ‘Advair’ and another medication in before determining that Breo would be the most appropriate medication consistent with Dr. Shah’s recommendation.”

18. In fact, the Athlete’s conclusions were erroneous and based on a negligent misreading of one sentence in a WADA document and his negligent failure to read the second sentence and turn the page to see a full description of permitted therapeutic alternatives. His wife reached the same erroneous conclusion with respect to a permitted alternative, Advair, when she failed to scroll down two more lines on her phone to see that Advair was permitted in a therapeutic dose.

19. On October 15, 2019, the Athlete first used Breo and Medrol.

20. On the same day, October 15, 2019, the Athlete filed with USADA an application for a Therapeutic Use Exemption (“TUE”) for Breo (Vilanterol) and Medrol (Methylprednisolone). The TUE application, also signed by Dr. Anita Shah, referred to a diagnosis of “Mucopurulent chronic bronchitis”, and was for the administration of Breo
inhaled "once daily x 4 wks", and of 4 mg tabs of Medrol administered orally "daily x 5 days".

21. On October 21, 2019, the Athlete received an email from USADA indicating that his TUE application was incomplete. To complete the application, he Athlete was asked to provide "a statement from your physician explaining why the prohibited substance is necessary and why any permitted alternative is not appropriate or were not effective in treating the condition."

22. On or about October 23, 2019, the Athlete submitted to USADA a declaration signed by Dr. Anita Shah, as follows:

I am treating Andrew Starykowicz for cough and SOB which has been ongoing for the last several weeks. His chest-x-ray is concerning for a viral pneumonitis. His lung exam has diffuse expiratory wheezing consistent with bronchospasm from his viral infection. Andrew is severely limited in his daily activity due to this bronchospasm. Bronchospasm and infectious cough requires anti-inflammatory and bronchodilator therapy for treatment. He has already completed a course of steroids for 5 days and requires the Breo which is an inhaled steroid and bronchodilator for 4 weeks. There is no other acceptable alternate therapy in the short term given his abnormal lung exam and symptoms. I am aware that Breo is on the list of banned medications for professional athletes however Mr. Starykowicz has a serious illness that was causing disability and requires a limited 4 week treatment with the above medications.

23. On October 25, 2019, USADA sent an email to the Athlete advising him that his TUE application was now complete and had been forwarded to the TUE Committee of USADA (the "USADA TUEC") for review, and that until and unless a certificate of approval was received the Athlete did not have an active TUE. That email warned that "if the TUE has not been granted by the start of your competition, you will be committing an anti-doping rule violation by competing without an approved TUE for a prohibited substance" (emphasis added).

24. At the hearing, Mr. Starykowicz admitted that the warning in this email was "consistent with" what he had been told by a USADA representative by telephone on October 25th.

25. On October 27, 2019, despite these warnings, the Athlete competed at IRONMAN 70.3 Waco, where he placed second. He was not selected for in-competition testing.

26. On November 2, 2019, the Athlete competed at Ironman Florida, in Panama City, Florida, and underwent an in-competition doping control

27. On November 8, 2019, the Athlete's TUE application for Methylprednisolone (Medrol) was approved but that his TUE application for Vilanterol (Breo) had been denied.

28. On November 11, 2019, the Athlete completed his 28-day prescription of the Breo inhaler.
29. On November 21, 2019, the Athlete submitted a statement from Dr. Anita Shah in response to the USADA TUEC Decision, accompanied by an article regarding lung function testing, as follows:

"... I saw Andrew in my pulmonary clinic with an acute illness. He presented with several days of cough, shortness of breath and chest pain. Lung exam revealed bilateral expiratory wheezing and scattered rhonchi which is suggestive of bronchoconstriction. Andrew's 3-year-old son presented to the emergency department with similar symptoms of cough and shortness of breath. Pneumonia was confirmed on his son’s chest x-ray and his son was prescribed formoterol 110mcg inhaled twice daily, albuterol every six hours and as needed for shortness of breath and antibiotics (azithromycin and amoxicillin). Given that Andrew presented with identical symptoms to my office and had a chest x-ray suggestive of pneumonia, Andrew was treated with Augmentin, Medrol dose pack and Breo. Andrew presented with chest pain and an acute illness which is likely to cause suboptimal pulmonary function test results. I have attached the American Thoracic Society guidelines “ATS/ERS TASK FORCE: STANDARDISATION OF LUNG FUNCTION TESTING” which clearly outlines in Table 1 “conditions that will lead to suboptimal results.” “Chest or abdominal pain of any cause” is the first item listed in the table and that is the reason long function testing was not performed on Andrew prior to treatment. As such there is no documentation of lung function reversibility.

Given that Andrew presented with wheezing suggestive of bronchoconstriction, a beta-adrenergic agent was indicated. Vilanterol is a beta-adrenergic agonist and chemically similar to formoterol and salmeterol but is inhaled only once daily increasing compliance among patients. Andrew only used Breo during his acute illness and did not use it outside the period of acute illness.

I was unaware that other agents were allowed based on the website as there is nothing listed identifying acceptable alternatives. (Emphasis added.) I provided samples to Andrew to save him a co-pay for an inhaler that was only going to be used in the short term. Thank you for your consideration.

30. On December 5, 2019, the Athlete was notified by WTC that the in-competition doping control from the Florida IRONMAN race had returned an adverse analytical finding for vilanterol, that a provisional suspension had been imposed upon him pursuant to Article 7 of the Ironman ADR, and that WTC would impose a sanction including a four-year period of ineligibility.

31. On the same day, December 5, 2019, the Athlete requested that the denial of a TUE for Vilanterol be reviewed by USADA.
32. On December 12, 2019, USADA confirmed the denial of the TUE application.

33. On December 13, 2019, the WTC charged the Athlete with an anti-doping rule violation pursuant to Articles 2.1, 2.2 and 2.6 of the Ironman ADR.

34. On December 14, 2019, the Athlete competed in a non-WTC event, Challenge Daytona 2019.

35. On December 20, 2019, a final appeal was made to the USADA Medical Review Board.

36. On January 14, 2020, USADA confirmed its denial of the TUE application for Breo.

37. On February 4, 2020, the Athlete requested a review of USADA’s TUE denial by the WADA Therapeutic Use Exemption Committee (the “WADA TUEC”) pursuant to Article 4.4 of the Ironman ADR.

38. On March 6, 2020, the WADA TUEC issued a decision (the “WADA TUEC Decision”) concluding that:

   the Athlete has not discharged his burden of proof that all four of the conditions listed in ISTUE Article 4.1 have been met on a balance of probabilities. Consequently, the WADA TUEC upholds the decision of the USADA TUEC.

39. The WADA TUEC Decision contained the following “Analysis” and “Reasons”:

   **D. Analysis**

   . . . .

   In such an “acute” case of bronchoconstriction, considering probable diagnoses based on the Physician’s description, a fast-acting bronchodilator and an anti-inflammatory treatment with an inhaled corticosteroid (ICS) or an oral (if the underlying airway obstruction was considered severe) glucocorticoid would be a standard treatment protocol.

   The glucocorticoid treatment was correctly prescribed. However, the Physician gave the Athlete Breo Ellipta, a combination of ICS (fluticasone furoate) and vilanterol. The bronchodilator vilanterol is not considered a fast-acting “reliever” and it is also a prohibited drug as per the WADA List of Prohibited Substances and Methods. Either salbutamol or formoterol could have been prescribed, together with an inhaled glucocorticoid. Indeed, Breo Ellipta is not indicated for the relief of acute bronchospasm. The FDA approved monograph (USA) says: Important limitation: Not indicated for relief of acute bronchospasm.

   In the documents submitted, the Athlete’s Physician states that a sample of Breo Ellipta was offered to the Athlete to favor adherence to the treatment
in an acute situation and to avoid the co-payment of the drug.

The argument that once-daily medication, when available, is the standard of care to treat acute and urgent illness is not in keeping with current national and international guidelines. There are no specific guidelines for such acute events in athletes and the general consensus is that for the athlete population, current general guidelines apply, taking into account the prohibited agents (such as vilanterol and terbutaline, for example).

While it has been estimated that the cost to the patient for either a generic or brand named inhaler of vilanterol plus fluticasone would be between $5-$50, this cost should never influence a decision to use a prohibited substance.

The Physician, in this case, did not consider available permitted alternatives. In fact she stated that she was unaware that other agents were allowed.

The Athlete continued his therapy with a prohibited medication despite the TUE denial, and the Physician did not consider changing medication to a permitted beta-2 agonist.

In summary, the Athlete, suffering from an acute respiratory illness, sought urgent medical assistance from a palliative care specialist. His Physician chose to use a combined preparation of inhaled vilanterol and fluticasone as her standard protocol for the acute management of bronchospasm, in this case secondary to probable viral infection. It would appear that at this time the attending Physician was not aware that alternative permitted medication options were available. The TUE request was declined in a reasoned statement. The Athlete, a mature international competitor subject to anti-doping rules, accepted the decision of his Physician despite being informed that he was using a prohibited medication. Despite the availability of permitted alternative drugs, the Athlete continued to use the prohibited substance. Despite a request to the Physician for additional endorsement for the use of the prohibited substance, no convincing evidence was provided and indeed, the drug chosen is contraindicated for the treatment of acute bronchoconstriction. Subsequently the Athlete returned an AAF for the use of a prohibited beta-2 agonist in the absence of a valid TUE.

E. Reasons

Pursuant to ISTUE Article 4.1, an athlete may be granted a TUE if they can demonstrate, on a balance of probabilities, that all of the conditions listed in ISTUE Article 4.1 have been met.

....
c) **ISTUE Article 4.1(c)**

In the WADA TUEC’s view, there are reasonable alternatives to the use of vilanterol to treat bronchoconstriction. Indeed, vilanterol is contraindicated in acute bronchoconstriction whereas a fast-acting beta-2 agonist is the appropriate alternative based on clinical guidelines. Importantly, there are permitted fast-acting beta-2 agonists such as salbutamol (albuterol) and formoterol. These permitted alternatives are accepted first-line choices in the management of acute bronchoconstriction in situations demanding urgent intervention. The urgency of the situation was stressed by the attending Physician in her letter. The WADA TUEC considers that reasonable alternatives such as salbutamol and formoterol exist and that the Athlete should have used one of these appropriate medications instead of vilanterol, in association with the glucocorticoid therapy. The prohibited substance [vilanterol] was used when suitable permitted alternatives of equal efficacy were available but were not used, considered nor excluded by clinical evidence.

*For the reasons mentioned above, the WADA TUEC considers that the Athlete has failed to discharge his burden of proof in relation to ISTUE Article 4.1(c).*

40. On March 26, 2020, as an accommodation to the Athlete, WTC agreed to extend the Athlete’s deadline for filing an appeal to MGSS to 10 days following the Athlete’s receipt of a decision from CAS related to the Athlete’s appeal from the denial of his TUE application.

41. On March 27, 2020, the Athlete filed a statement of appeal with the Court of Arbitration for Sport (“CAS”) against USADA and the WTC pursuant to Article R47 et seq. of the Code of Sports-related Arbitration, challenging the denial of his TUE application for Breo. The statement of appeal cited the WTC and USADA as Respondents and contained the indication that the Parties had agreed to designate Professor Luigi Fumagalli as Sole Arbitrator.

42. On May 8, 2020, the CAS Court Office informed the Parties, on behalf of the President of the CAS Appeals Arbitration Division, that Prof. Luigi Fumagalli had been confirmed as Sole Arbitrator.

43. On May 20, 2020, WTC requested an order dismissing it from the proceedings. Counsel for WTC indicated that he had been authorized by counsel for the Athlete and for USADA to state that they did not have any objection to WTC’s request. In the same letter, in any case, WTC declared that it agrees to recognize and be bound by the final award rendered in this CAS arbitration.

44. A hearing was held by video conference on June 24, 2020, on the basis of the Parties’ agreement and the notice given in the letter of the CAS Court Office dated May 25, 2020.
45. The final CAS Award, issued on or about August 5, 2020, denied the Athlete’s appeal and affirmed the denial of a TUE for the prohibited substance vilanterol.

46. In denying the Athlete’s appeal, Arbitrator Fumagalli concluded:

The Sole Arbitrator notes that Albuterol/Salbutamol (Ventolin) is a SABA [short-acting beta-agonist] not prohibited up to a maximum 1,600 mcg over 24 hours, in divided doses not exceeding 800 over 12 hours from any dose. The FDA Prescribing Information reports that Ventolin is indicated also for treatment or prevention of bronchospasm. As a result, it does not appear to be an unreasonable alternative to Vilanterol.

If, however, the indications of Dr. Topin are to be followed, and a LABA [long-acting beta-agonist] was to be used (primarily if combined with an inhaled Corticosteroid) as a more reasonable therapeutic option for the Athlete, the Sole Arbitrator notes that other products were available, also combining a not prohibited LABA with an inhaled Corticosteroid. For instance:

- Advair Diskus is an inhalation product combining a LABA (Salmeterol) and a Corticosteroid (Fluticasone Propionate), indicated for maintenance treatment of airflow obstruction and reducing exacerbations in patients with chronic obstructive pulmonary disease. Salmeterol is not prohibited for a dose of up to 200 mcg over 24 hours;

- Symbicort is an also inhalation product combining Formoterol (a LABA) and Budesonide (a Corticosteroid), indicated mainly for asthma, but also for maintenance in patients with chronic obstructive pulmonary disease. Formoterol is not prohibited for a dose of up to 54 mcg over 24 hours;

- Foradil Aerolizer is an inhalation also containing Formoterol. It is not a combination with a Corticosteroid, but is indicated for maintenance treatment of bronchoconstrictions in patients with chronic obstructive pulmonary disease.

The Sole Arbitrator remarks that the other factual indications offered by the Appellant to support his indication that there were no reasonable alternatives to Breo do not lead to a contrary conclusion:

- the fact that Breo was readily available for Dr. Shah to prescribe and to demonstrate its use to the Athlete does not imply that the Athlete could not have easy access to, for instance, Advair. In addition, the Athlete could take advantage, for a demonstration of a careful use, of the experience of his wife, a pharmacist;

- there is no indication that the cost of alternative products was unreasonable;
the Athlete is a top-level competitor, was suffering from a “severe illness” (as indicated by his physician to USADA on 23 October 2019), and was wishing to recover to return to training and competition. Issues of compliance, which would have made Breo, to be used once daily, a better option for common patients compared to products requiring a twice-a-day administration, appear to be marginal in the Athlete’s circumstances;

- a cursory research regarding alternative LABAs would have shown that the use restrictions for Albuterol/Salbutamol, Formoterol and Salmeterol allowed proper treatment consistent with the respect of the anti-doping rules;

- the availability at home of a rescue inhaler (to be used with Albuterol/Salbutamol), prescribed for his son, speaks more in favour of a prescription for its use, and not against it.

- The Athlete is highly experienced and did not dispute that he was fully aware of his anti-doping obligations. In this moment in time, however, the Athlete walked blindly with confidence that a TUE would be granted. Logic would have been to seek further guidance or proceed with an alternative LABA in the short term until further confirmation was obtained on the use of Breo.

47. On August 23, 2020, WTC sent an amended charging letter to the Athlete. The letter charges the Athlete with having committed anti-doping rule violations on two occasions:

Your B Sample #4410314 [from IRONMAN Florida] was analyzed at the World Anti-Doping Agency (“WADA”) accredited Sports Medicine Research and Testing Laboratory (the “SMRTL”).

The B sample analysis confirmed the Adverse Analytical Finding under category S3. Beta-2 Agonists for vilanterol, as classified by the World Anti-Doping Agency’s Prohibited List and by the IRONMAN Anti-Doping Rules (“IRONMAN Rules”). You also acknowledged use of vilanterol on October 27, 2019.

Your request for a Therapeutic Use Exemption allowing your use of vilanterol has been repeatedly and consistently denied by USADA, WADA and the Court of Arbitration for Sport.

As first communicated to you on December 13, 2019, and in accordance with the results management process, IRONMAN has charged you with an Anti-Doping Rule Violation.

It is our position that you committed an ADRV on two occasions:

October 27, 2019 – Use of a Prohibited Substance
You competed in IRONMAN Waco 70.3 while continuing use of a Prohibited Substance as indicated in your materials related to your TUE application and review.

November 2, 2019 – Use of a Prohibited Substance and Presence of a Prohibited Substance

You competed in IRONMAN Florida, declared the use of BREO on your Doping Control Official Record, and subsequently tested positive as explained above.

You are charged under Articles 2.1 and 2.2 of the IRONMAN Rules (Article 2 of the World Anti-Doping Code (the “Code”)) reserving all rights to amend this charge. Under the IRONMAN Rules, doping is strictly forbidden and the possession, use or attempted use of a prohibited substance and/or its presence in a sample provided by an athlete is considered an Anti-Doping Rule Violation. IRONMAN is seeking the following Consequences which are found in the Rules:

Disqualification of all of your competitive results obtained on and subsequent to October 27, 2019, including forfeiture of any medals, points and/or prizes. That would include: Disqualification of your results including, but not limited to: 2019 IRONMAN Waco 70.3, 2019 IRONMAN Florida and December 2019 Challenge Daytona. Forfeiture of medals, points and prizes would include loss of qualifying slots or other status gained from your results at IRONMAN Waco 70.3 and IRONMAN Florida. You will also be required to pay back all prize money an appearance fees awarded to you, including, but not limited to prize money and appearance fees totaling $11500 paid to you in connection with the above mentioned IRONMAN races (IRONMAN Waco 70.3 $2750 prize and appearance of $750, IRONMAN Florida $6500 prize and $1500 appearance).

You will not be allowed to participate in any IRONMAN affiliated events, or events owned or operated by the World Triathlon Corporation until that sum is repaid.

IRONMAN is seeking a period of Ineligibility for this Anti-Doping Rule Violation of two years, starting from the date of your hearing with credit for your Provisional Suspension which went into effect on December 5, 2019. Should vilanoterol be taken off the Prohibited List effective 1 January 2021, IRONMAN will agree to terminate your period of ineligibility as of that date. You should be aware, however, that the hearing arbitrator may impose a longer period of ineligibility as permitted under the Code and the IRONMAN Rules.
As a consequence of this anti-doping rule violation (Pursuant to Article 10.10 of the IRONMAN Rules), and subject to the principle of proportionality, IRONMAN is requesting the arbitrator(s) to consider Financial Consequences to recover costs associated with the anti-doping rule violation.

You are advised that in accordance with Article 10.10.1 of the Code, entities other than IRONMAN will give effect to the consequences of this anti-doping rule violation. These entities include, but are not limited to, the following any WADA Code Signatory, a Signatory’s member organization, or a club or other member organization of a Signatory’s member organization, the International Olympic Committee (IOC), the International Triathlon Federation, National Triathlon Federations, any professional league, any international or national-level Event organization or any elite or national-level sporting activity funded by a governmental agency. It is your obligation to investigate the effect of this sanction on you by other entities. It will be up to Challenge, the Professional Triathlon Organization, the International Triathlon Union and USA Triathlon to apply the consequences of this anti-doping rule violation in accordance with the WADA Code and their rules, including, but not limited to loss of status or return of funds.

48. Exercising its discretion under Article 27.6 of the 2021 World Anti-Doping Code, WTC has determined that the two-year period of ineligibility sought in its charging letter will end on January 1, 2021, the effective date of the WADA 2021 Prohibited List. The 2021 List will allow the prohibited substance used in this case, vilanterol, to be used in a therapeutic dose by inhalation.

APPLICABLE RULES

2.1 Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete’s Sample

2.1.1 It is each Athlete’s personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, Fault, negligence or knowing Use on the Athlete’s part be demonstrated in order to establish an anti-doping rule violation under Article 2.1.

2.1.2 Sufficient proof of an anti-doping rule violation under Article 2.1 is established by any of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Athlete’s A Sample where the Athlete waives analysis of the B Sample and the B Sample is not analyzed; or, where the Athlete’s B Sample is analyzed and the analysis of the Athlete’s B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the
2.2 Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method

2.2.1 It is each Athlete’s personal duty to ensure that no Prohibited Substance enters his or her body and that no Prohibited Method is Used. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Athlete’s part be demonstrated in order to establish an anti-doping rule violation for Use of a Prohibited Substance or a Prohibited Method. (Emphasis added.)

2.2.2 The success or failure of the Use or Attempted Use of a Prohibited Substance or Prohibited Method is not material. It is sufficient that the Prohibited Substance or Prohibited Method was Used or Attempted to be Used for an anti-doping rule violation to be committed.

3.1 Burdens and Standards of Proof

WTC shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether WTC has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these Anti-Doping Rules place the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.

4.4 Therapeutic Use Exemptions (“TUEs”)

4.4.1 The presence of a Prohibited Substance or its Metabolites or Markers, and/or the Use or Attempted Use, Possession or Administration or Attempted Administration of a Prohibited Substance or Prohibited Method, shall not be considered an anti-doping rule violation if it is consistent with the provisions of a TUE granted in accordance with the International Standard for Therapeutic Use Exemptions.

4.4.2 All Athletes Using or intending to Use a Prohibited Substance or Prohibited Method must seek a TUE from their National Anti-Doping Organization or Regional Anti-Doping Organization as applicable in accordance with the policies of those organizations. Athletes in the IRONMAN Registered Testing Pool must obtain a TUE before using a Prohibited Substance or Prohibited Method as provided in the International Standard for Therapeutic Use Exemptions. If permitted by their National Anti-Doping Organizations or Regional Anti-Doping Organizations, all other Athletes may seek to obtain a TUE retroactively. (Emphasis added.)

ARTICLE 9 AUTOMATIC DISQUALIFICATION OF INDIVIDUAL RESULTS

An anti-doping rule violation in Individual Sports in connection with an In-Competition
test automatically leads to Disqualification of the result obtained in that Competition with all resulting Consequences, including forfeiture of any medals, points and prizes.

10.2 Ineligibility for Presence, Use or Attempted Use, or Possession of a Prohibited Substance or Prohibited Method
The period of Ineligibility for a violation of Articles 2.1, 2.2 or 2.6 shall be as follows, subject to potential reduction or suspension pursuant to Articles 10.4, 10.5 or 10.6:

10.2.1 The period of Ineligibility shall be four years where:
10.2.1.1 The anti-doping rule violation does not involve a Specified Substance, unless the Athlete or other Person can establish that the anti-doping rule violation was not intentional.
10.2.1.2 The anti-doping rule violation involves a Specified Substance and WTC can establish that the anti-doping rule violation was intentional.
10.2.2 If Article 10.2.1 does not apply, the period of Ineligibility shall be two years.
10.2.3 As used in Articles 10.2 and 10.3, the term “intentional” is meant to identify those Athletes who cheat. The term therefore requires that the Athlete or other Person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall be rebuttably presumed to be not intentional if the substance is a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall not be considered intentional if the substance is not a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition in a context unrelated to sport performance.

10.4 Elimination of the Period of Ineligibility where there is No Fault or Negligence
If an Athlete or other Person establishes in an individual case that he or she bears No Fault or Negligence, then the otherwise applicable period of Ineligibility shall be eliminated.

10.5 Reduction of the Period of Ineligibility based on No Significant Fault or Negligence

10.5.1 Reduction of Sanctions for Specified Substances or Contaminated Products for Violations of Article 2.1, 2.2 or 2.6.
10.5.1.1 Specified Substances
Where the anti-doping rule violation involves a Specified Substance, and the Athlete or other Person can establish No Significant Fault or Negligence, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years of Ineligibility, depending on the Athlete’s or other Person’s degree of Fault.
10.8 Disqualification of Results in Competitions Subsequent to Sample Collection or Commission of an Anti-Doping Rule Violation

In addition to the automatic Disqualification of the results in the Competition which produced the positive Sample under Article 9, all other competitive results of the Athlete obtained from the date a positive Sample was collected (whether In-Competition or Out-of-Competition), or other anti-doping rule violation occurred, through the commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness requires otherwise, be Disqualified with all of the resulting Consequences including forfeiture of any medals, points and prizes.

10.10 Financial Consequences

Where an Athlete or other Person commits an anti-doping rule violation, WTC may, in its discretion and subject to the principle of proportionality, elect to recover from the Athlete or other Person costs associated with the anti-doping rule violation, regardless of the period of Ineligibility imposed.

The imposition of a financial sanction or WTC's recovery of costs shall not be considered a basis for reducing the Ineligibility or other sanction which would otherwise be applicable under these Anti-Doping Rules or the Code.

Definitions

Fault: 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 behavior. 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 Article 10.5.1 or 10.5.2.

No Fault or Negligence: The Athlete or other Person's establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule. Except in the case of a Minor, for any violation of Article 2.1, the Athlete must also establish how the Prohibited Substance entered his or her system.

No Significant Fault or Negligence: The Athlete or other Person's establishing that his or her Fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or negligence, was not significant in relationship to the
anti-doping rule violation. Except in the case of a Minor, for any violation of Article 2.1, the Athlete must also establish how the Prohibited Substance entered his or her system.

ISSUES AND ANALYSIS

49. The Athlete does not dispute that he committed an anti-doping rule violation. He admits he used vilanterol, a substance prohibited both in and out of competition, from October 15, 2019 to November 11, 2019, a period of time that includes IRONMAN Waco 70.3 on October 27, 2019 and IRONMAN Florida. Therefore, the issues in this case are (A) the appropriate period of ineligibility, (B) disqualification of results, including forfeiture of medals, points and prizes, and (C) allocation of cost and expenses of this Arbitration.

A. Period of Ineligibility

50. Under Article 10.2.1.2 of the IRONMAN Anti-Doping Rules, the period of ineligibility for a “Specified Substance”, such as vilanterol, is four years if WTC can establish the anti-doping rule violation was “intentional” (as defined in Article 10.2.3). Otherwise, the period of ineligibility shall be two years under Article 10.2.2. WTC initially took the position that the facts here would support a finding of intentionality under Article 10.2.3, and in its original December 5, 2019, provisional suspension letter, WTC imposed a four-year period of ineligibility. However, in its August 23, 2020, charging letter, WTC considered the totality of the circumstances (including the pending recommendation of the WADA List Committee to treat vilanterol the same as salbutamol, formoterol and salmeterol in the Prohibited List in 2021) and decided to seek only a two-year period of ineligibility, with the understanding that the Arbitrator could impose a longer period as allowed by the Rules. WTC also exercised its discretion to agree that the period of ineligibility would end on 1 January 2020, when WADA took vilanterol off the 2021 Prohibited List.

51. The Athlete seeks either (1) an elimination of period of ineligibility under Article 10.4, Elimination of Period of Ineligibility, or (2) a reduction of the period of ineligibility under Article 10.5, Reduction of Period of Ineligibility based on No Significant Fault or Negligence, and specifically under Article 10.5.1.1, which applies to Specified Substances. The Athlete bears the burden of proof by a balance of probability under both Article 10.4 and Article 10.5.1.1.

1. No Fault or Negligence.

52. Under WADC Art. 10.4, if an athlete can establish that he or she bears No Fault or Negligence, then the otherwise applicable period of ineligibility shall be eliminated. Under the WADC, the standard for No Fault or Negligence is as follows:

“This Article and Article 10.5.2 apply only to the imposition of sanctions; they are not applicable to the determination of whether an anti-doping rule violation has occurred. They will only apply in exceptional circumstances, for example, where an Athlete could prove that, despite all due care, he or she was sabotaged by a competitor. Conversely, No
Fault or Negligence would not apply in the following circumstances: (a) a positive test resulting from a mislabeled or contaminated vitamin or nutritional supplement (Athletes are responsible for what they ingest (Article 2.1.1) and have been warned against the possibility of supplement contamination); (b) the Administration of a Prohibited Substance by the Athlete’s personal physician or trainer without disclosure to the Athlete (Athletes are responsible for their choice of medical personnel and for advising medical personnel that they cannot be given any Prohibited Substance); and (c) sabotage of the Athlete’s food or drink by a spouse, coach or other Person within the Athlete’s circle of associates (Athletes are responsible for what they ingest and for the conduct of those Persons to whom they entrust access to their food and drink). (Emphasis added).

53. For this purpose, 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 behavior. 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 Article 10.5.1 or 10.5.2.

54. In his pre-hearing brief, the Athlete contends that he had “no fault” for the violations that occurred at IRONMAN Waco 70.3 on October 27, 2019 and IRONMAN Florida on November 2, 2019, because (1) USADA allegedly did not promptly process the Athlete’s request for a TUE and (2) USADA’s Drug Reference Operations Manager allegedly “confirmed [that the Athlete] could race at IRONMAN 70.3 Waco and IRONMAN 70.3 Florida.”

55. With regard to the allegation the allegation that USADA did not promptly process the Athlete’s TUE request, he alleges that USADA “sat on its hands until 25 days after Mr. Starykowicz’s request.” To be accurate, however, USADA’s denial of the TUE was issued on November 8, which was 23 days after the Athlete filed his initial application on October 15th. Moreover, the application that the Athlete filed on October 15th was
incomplete, so that on October 21st, USADA had to request additional information, which the Athlete did not provide until October 23rd. Based on the totality of the facts, then, USADA processed the TUE 16 days after it received the completed TUE application from the Athlete.

56. The Athlete has not alleged that the time taken by USADA to process his completed application violated any applicable rule or standard regarding the processing of TUEs. Nor has he submitted any evidence that USADA intentionally “sat in its hands” or took more time that was typical or necessary to process the Athlete’s TUE application. Consequently, this alleged delay does not provide any basis for Athlete’s allegation that he bears no fault for the violations that occurred at IRONMAN Waco 70.3 on October 27, 2019 and IRONMAN Florida on November 2, 2019.

57. Regarding the Athlete’s allegation in his pre-hearing brief that the USADA’s Drug Reference Operations Manager allegedly “confirmed [that the Athlete] could race at IRONMAN 70.3 Waco and IRONMAN 70.3 Florida,” his testimony at the hearing does not support that allegation.

58. The Athlete admits that he received and read an October 25, 2019, email from USADA advising him that his TUE application had been forwarded to the TUE Committee of USADA (the “USADA TUEC”) for review, and that until a final certificate of approval was received the Athlete did not have an active TUE. That email warned the Athlete that “if the TUE has not been granted by the start of your competition, you will be committing an anti-doping rule violation by competing without an approved TUE for a prohibited substance” (emphasis added).

59. At the hearing, the Athlete admitted that this email warning was consistent with what he had been told by the USADA representative by phone on October 25th. Consequently, there is no merit to the Athlete’s allegations that he was misled by USADA before he decided to participate in IRONMAN Waco 70.3 on October 27, 2019, or IRONMAN Florida on November 2, 2019.

60. A finding of no fault can only be made based on “exceptional circumstances.” In this case, based on the facts and foregoing analysis, such exceptional circumstances do not exist.


61. In order to obtain any reduction from the two-year sanction under Article 10.5.1.1, the Athlete must prove he bears No Significant Fault or Negligence, meaning he must show that “[his] Fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or negligence, was not significant in relationship to the anti-doping rule violation.” The Athlete must also establish how the Prohibited Substance entered his or her system. The term “Fault,” requires consideration of such factors as the Athlete’s experience, 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.” The Athlete carries the burden of proof to show he is entitled to any reduction under Article 10.5.1.1.

62. If the Athlete proves that he bears No Significant Fault of Negligence, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years of Ineligibility, depending on the Athlete’s degree of Fault. No reduction in the two-year period is permitted if the Athlete does not prove that he bears No Significant Fault of Negligence.

63. If the Athlete proves that he bears No Significant Fault of Negligence, then the objective and subjective factors set out in Cilic v. ITF (CAS 2013/A2237) would apply in determining the appropriate sanction. The factors in Cilic need not be considered, however, unless and until the Athlete proves he has No Significant Fault or Negligence with respect to the violations that occurred as a result of his decision to participate in IRONMAN Waco 70.3 on October 27, 2019, and IRONMAN Florida on November 2, 2019.

64. In his pre-hearing brief, the Athlete asserts that he was “not significantly at fault for the same reasons [asserted as his basis for No Fault].”

65. As discussed above, there is no basis to conclude that USADA was delinquent in processing the Athlete’s TUE request or that USADA failed to meet any prescribed deadlines for processing that request. In fact, a significant delay in the processing was due to the Athlete’s failure to provide necessary information in his request.

66. As also discussed above, the Athlete’s claim that a USADA representative told him he could race does not stand up to scrutiny.

67. As to the Athlete’s experience and the degree of risk, although not binding on this Arbitration, this Arbitrator agrees with the observation of Arbitrator Fumagalli who, based on his review of the Athlete’s appeal of the denial of the TUE concluded:

The Athlete is highly experienced and did not dispute that he was fully aware of his anti-doping obligations. In this moment in time, however, the Athlete walked blindly with confidence that a TUE would be granted.

68. The Athlete’s false sense of confidence was based on a negligent misreading of one sentence in a WADA document and his failure to read the second sentence and turn the page to see a full description of permitted therapeutic alternatives. His wife reached the same erroneous conclusion with respect to a permitted alternative, Advair, when she failed to scroll down two more lines on her phone to see that Advair was permitted in a therapeutic dose. The failure of this professional athlete to read the relevant materials cannot be excused as insignificant.

69. Based on these facts, the Arbitrator must conclude that the athlete has not met his burden to show that he bears No Significant Fault or Negligence for the violations that occurred as a result of his decision to participate in IRONMAN Waco 70.3 on October 27, 2019,
and IRONMAN Florida on November 2, 2019. In this regard, the Arbitrator finds the facts and holding in USADA v. Schumm, AAA Case No. 01-17-0001-509, to be instructive. In that case, the Panel found that an amateur cyclist could not establish no significant fault where she knew before a race that she was taking a prohibited substance and that she needed a TUE to continue to take the prohibited substance and race. No less can be expected of this professional athlete who has had extensive training and exposure to the applicable anti-doping rules.

70. Although the parties provided extensive post-trial briefing on the application of the relevant factors in Cilic and proportionality of penalties based on sanctions in other “similar” matters, because the Athlete has not met his burden to prove No Significant Fault of Negligence, those factors have no bearing on the length of ineligibility in this case. Nevertheless, the detailed submission by WTC indicated that, even to the extent that other matters would be suitably “similar” based on the relevant facts, the length of the period of ineligibility requested by WTC in this case is consistent with application of the relevant factors in Cilic and would not violate notions of proportionality.

71. Based on the foregoing analysis, the period of ineligibility must be a period of two years beginning on December 5, 2019 (the effective date of the Provisional Suspension). However, as a result of WTC exercising its discretion under Article 27.6 of the 2021 World Anti-Doping Code, the period of ineligibility will end on January 1, 2021, the effective date of the amendment of the WADA 2021 Prohibited List to allow valanterol to be used in a therapeutic dose by inhalation.

B. Disqualification of Results and Consequences.

72. Under Article 9 of the IRONMAN Anti-Doping Rules, the Athlete’s results from the November 2, 2019 race at IRONMAN Florida are automatically disqualified based on the Athlete’s in-competition positive test for a prohibited substance. The Athlete does not challenge this result. As a Consequence, the Athlete shall forfeit all medals, points and prizes and shall repay $6,500 in prize money he received from his results in this race.

73. With respect to the results from October 27, 2019, IRONMAN Waco 70.3, and the 2019 Challenge Daytona, the Athlete’s results are disqualified under Article 10.8, based on the Athlete’s admitted use of the prohibited substance from October 27th through November 11th, “unless fairness requires otherwise.”

74. For the first time in his post-hearing brief, the Athlete challenged the fairness of disqualification of the IRONMAN Waco 70.3, and the 2019 Challenge Daytona results. The Athlete asserts that, with respect to the December 2019 Challenge Daytona, he had completed his valanterol prescription prior to the race. With respect to IRONMAN Waco 70.3, he alleges that his results were not affected by his use of Brco, which he alleges was not performance enhancing, although there was no proof offered in support of these allegations.

75. In support of his “fairness” argument, the Athlete relies on Glaesner v. FINA (CAS 2013/A/3274), for the proposition that the term “fairness” under Art. 10.8 should be
interpreted broadly, not narrowly. But that case merely held that the term “fairness” in the context of the rule applicable in that case was not limited to the examples set out in the text of the applicable rule. *Glaesner* does not provide any useful guidance for application of the fairness concept in this case.

76. The Athlete also relies on *WADA v. Petacchi* (CAS 2007/A/1362 & 1393), a case in which, unlike this case, the panel concluded that the athlete bore No Significant Fault of Negligence for his violation. The panel specifically referenced this conclusion as the basis on which it determined that “fairness” would not require disqualification of other competitive results. For this reason, *Petacchi* is distinguishable from the facts in this case.

77. With respect to IRONMAN Waco 70.3, because that race took place while the Athlete was using a prohibited substance in knowing violation of the applicable rules and without a TUE, fairness would require that the Athlete’s results *are* disqualified under Article 10.8. Accordingly, the Athlete’s results from IRONMAN Waco 70.3 are disqualified, and he forfeits all medals, points and prizes, which shall include loss of a qualifying slot for the 2021 IRONMAN 70.3 World Championship. The Athlete shall repay the $2,750 in prize money he received as a Consequence.

78. With respect to 2019 Challenge Daytona, although the Athlete had completed his vilanterol prescription prior to the race, taking into account the Provisional Suspension that went into effect on December 5, 2019, this Arbitrator cannot conclude that disqualification of those results would be unfair. Athlete’s results in the 2019 Challenge Daytona are disqualified.

C. *Allocation of Costs and Expenses.*

79. The parties agree that the arbitration costs and the court reporter costs in this case must be borne by WTC. These would include the administrative fees of MGSS and the fees of the Arbitrator.

80. WTC has requested that some or all of its attorney’s fees and costs be borne by the Athlete, subject to the principle of proportionality.

81. The Athlete suggested in his post-hearing brief that this request by WTC evidences animus by WTC towards the Athlete. Similarly, at the hearing of the matter, the Athlete suggested that WTC’s position in this case was influenced by the Athlete’s prior public criticism of TUEs granted to other WTC athletes. However, there was no proof of any animus toward the Athlete or that his prior criticisms of TUEs granted to other athletes improperly affected the WTC’s decisions in this case.

82. Based on the totality of the facts, and specifically the very substantial differences between the financial means of the parties, this Arbitrator declines to order the Athlete to pay any portion of WTC’s fees of costs associated with this Arbitration. Accordingly, each party shall bear its own costs and attorney’s fees.
This Award shall be in full and final resolution of all claims and counterclaims submitted to the Arbitrator. All claims not expressly granted herein are hereby denied.

Mark Medeking
Arbitrator

Date: November 25, 2020