



DECISION OF THE FEI TRIBUNAL

dated 15 June 2010

Positive Medication Case No.: 2009/15

Horse: CORNET OBOLENSKY

FEI Passport No: GER28145

Person Responsible: Mr. Marco Kutscher, GER

Event: Games of the XXIX Olympiad, Beijing 2008, Hong Kong

Prohibited Substance: Lactanase

1. COMPOSITION OF PANEL

Mr. Ken E. Lalo
Mr. Patrick A. Boelens
Mr. Pierre Ketterer

2. SUMMARY OF THE FACTS

2.1 Memorandum of case: By Legal Department.

2.2 Summary information provided by Person Responsible (PR):

The FEI Tribunal duly took into consideration all evidence, submissions and documents presented in the case file, which were also made available to the PR, as well as the pleadings of the parties and the testimony of the Person Responsible presented at the oral hearing.

2.3 Oral hearing: on 22 March 2010, in Geneva

Present: The FEI Tribunal Panel

For the FEI:

Ms Lisa F. Lazarus, General Counsel

Ms Carolin Fischer, Legal Counsel

For the PR:

Mr. Marco Kutscher, Person Responsible

Dr. Alexander Birnstiel, Counsel for the PR

Ms Eleonora Ottaviani, Counsel for the PR

Ms Helga McGrew-Walter, Interpreter for the PR

3. APPLICABLE STATUTES, REGULATIONS, AND RULES

3.1 Articles of the Statutes/ Regulations which are applicable or have been infringed:

Statutes 22nd edition, effective 15 April 2007 ("**Statutes**"), Arts. 1.4, 34 and 37.

General Regulations ("**GRs**"), 22nd edition, effective 1 June 2007, Arts. 142, 146.1 and 174.

The Equine Anti-Doping and Medication Control Rules ("**EADMCRs**"), effective 1 June 2006.

Veterinary Regulations ("**VRs**"), 10th edition, effective 1st June 2006, Art. 1013 and seq. and Annex III (the Equine Prohibited List).

FEI Code of Conduct for the Welfare of the Horse.

IOC Anti-Doping Rules applicable to the Games of the XXIX Olympiad, Beijing 2008, Art. 15.

The FEI Regulations for Equestrian Events at the Olympic Games (22nd ed.) ("**FEI OG Reg**"), effective for the 2008 Beijing Olympic Games (Hong Kong), Arts 614, 615 and Annex G.

3.2 Person Responsible: Mr. Marco Kutscher

3.3 Justification for sanction:

GR Art. 146.1: *"The use of any substance or method that has the potential to harm the horse or to enhance its performance is forbidden. The precise rules concerning Prohibited Substances and Medication Control are laid down in the EADMCRs."*

EADMCR Art. 2.2: *"The success or failure of the Use of a Prohibited Substance or a Prohibited Method is not material. It is sufficient that the Prohibited Substance or Prohibited Method was Used for a rule violation to be committed."*

4. DECISION

4.1 Factual Background

1. CORNET OBOLENSKY (the "**Horse**") participated in the Games of the XXIX Olympiad, Beijing 2008, from 8 to 21 August 2008 in Hong Kong (the "**Event**"). The Horse was ridden by Mr. Marco Kutscher (the "**PR**").
2. The PR is an international Show Jumping rider and was a member of the German Olympic Team at the Event. The PR has been competing in Show Jumping competitions for many years and is a highly ranked successful Show Jumping rider.
3. The PR made the following statements in relation to the Event during a German television show "Sport Inside", which was broadcast on 4 May 2009:

"What has actually happened is that Cornet Obolensky, after the first round of the Nations Cup, has received a sports medical treatment. And upon this, to explain it this way, he got a bit sick. As you know, when humans receive medicines, they are asked to lie down on a couch. Horses stand – and for a short while, his knees started shaking. But has been ok again immediately. Yes, and this is what has happened. Yes."

4. Based on this statement, which was made by the PR in May 2009, the FEI registered a Protest against the PR for alleged horse abuse at the Event. The FEI requested a Provisional Suspension of the PR for three weeks (the "**Interim Proceedings**"), pending the outcome of a FEI Ethics Panel that had been convened to investigate allegations of Anti-Doping rule violations involving German athletes and German National Federation ("GER NF") representatives (the "**Ethics Panel**"). On 29 May 2009, an oral hearing via a telephone conference call took place to address issues relating to the Interim Proceedings, with the participation of a panel of the FEI Tribunal, the FEI Secretary General, the FEI General Counsel, representatives of the GER NF and the PR.
5. During that conference call, the PR confirmed that the Horse was treated by injection with Lactanase at the Hong Kong Olympic Games, that the treatment was undeclared and that to his knowledge no Medication Form as required under the FEI Veterinary Regulations had been submitted. The FEI Tribunal, in its decision of 5 June 2009 relating to the Interim Proceedings, denied the FEI's request for a Provisional Suspension on the grounds that Provisional Suspension was not a remedy available under the regulations pertaining to horse abuse.

4.2 The Proceedings

6. The facts as described above along with the relevant evidence, the possible rule violation and the consequences implicated, were officially notified to the PR by the FEI Legal Department on 4 January 2010.
7. On 9 February 2010, the PR submitted his written explanations. In a nutshell, the PR disputed that he had admitted any violation of FEI rules with regards to the treatment of the Horse with Lactanase. Further, that he had been requested by the GER NF to sign a self-binding declaration for the Olympic Games and that according to this declaration, he had been obliged to discuss any treatment with the team veterinarian for the German team during the Olympic Games 2008, Dr. Nölting. That he had had a short conversation with Dr. Nölting, after the First Round of the Nations Cup, about a potential treatment of the Horse, and that the treatment had been administered by Dr. Nölting, in accordance with the self-binding declaration signed by himself. The PR further claimed he was unaware that no authorization had been given for the treatment and that he had only learned about the treatment after it had taken place. Further, that he did not know at the time that a medical treatment in the strict sense of the word would be administered. The PR argued that accordingly, Dr. Nölting should bear the entire responsibility for the consequences

of the treatment and that he himself could not be regarded as Person Responsible. Lastly, the PR alleged that a considerable delay of notification of the case in question had occurred and that such delay violated his due process rights.

8. On 25 February 2010, the FEI submitted its Response to the explanations of the PR. The FEI claimed that an undocumented treatment with Lactanase during the Event had been established and that Lactanase is a Medication A Prohibited Substance under the FEI Prohibited List. The FEI further highlighted that according to GR Article 142, the competitor was the Person Responsible, irrespective of other persons being possibly involved in an Anti-Doping rule violation, and that accordingly, the competitor could not abdicate his or her responsibility. With regard to the question of fault or negligence for the rule violation, the FEI submitted that the PR had acted negligently since he had only briefly discussed a treatment with Dr. Nölting without further following up with the specific details of the treatment. The FEI contended that the PR had not established that he bears No (Significant) Fault and No (Significant) Negligence for the rule violation as required under EADCMR Article 10.5 in order to reduce or eliminate the otherwise applicable sanction. In response to the allegation of delay of the notification, the FEI referred to EADCMR Article 7.1.9, allowing for the FEI, in cases of apparent rule violations not involving Adverse Analytical Findings, to conduct any necessary follow-up investigation before promptly notifying the PR. The FEI argued that the formation of the Ethics Panel, the investigation run by Quest and the final decision making process involving the FEI Bureau were necessary parts of the follow-up investigation in accordance with the above cited stipulation and that it was those obligatory steps that delayed the process. Further, that the PR had been notified promptly upon conclusion of the follow-up investigation.
9. On 11 March 2010, the PR responded to the above submission of the FEI. The PR reiterated that the FEI had not established any rule violation by the PR. He further contended that, in the event the Tribunal found that a violation of FEI rules had been established, the "Person Responsible" concept would have to be interpreted according to its spirit and purpose, taking into account the specific circumstances of the case. According to the PR, the Tribunal should recognize that the treatment had been administered by the German team veterinarian, as required by the rules of the German team, and in conformance with the self-binding declaration the PR had signed for the Olympic Games. In this second submission the PR therefore claimed that under the self-binding declaration, he was not obliged to discuss treatments with the team veterinarian, and that it only followed from the declaration that no medication was to be given without the prior involvement of the team veterinarian. Further, that Dr. Nölting

was a reputable veterinarian upon whom he was entitled to rely. Therefore, if any "person" was responsible for the treatment, that "person" was Dr. Nölting.

10. The Final Hearing took place on 22 March 2010. As a preliminary matter, the Chairman of the Panel, Mr. Ken Lalo, highlighted to the parties his prior involvement in this matter as a member of the Ethics Panel. Following that disclosure, the PR as well as the FEI declared that they did not object to the Chairman of the Panel serving on the present Tribunal Panel and deciding this case, requesting that the matter be heard and decided by the Panel.

4.3 Jurisdiction

11. The Tribunal has jurisdiction over this matter pursuant to the Statutes, GRs and EADMCRs.

4.4 The Person Responsible

12. Mr. Kutscher is the Person Responsible for the Horse, in accordance with GR Article 142, as he was the competitor riding the Horse during the Event.

4.5 The Decision

13. The Tribunal finds that the FEI has established, in accordance with EADMCR Article 3, the Use of a Prohibited Substance during the Event on the Horse. During the Hearing, the PR acknowledged that an undocumented treatment of Lactanase was administered to the Horse, on the evening following the first round of the Nations Cup. No Medication Form was submitted for the treatment of the Horse with Lactanase, as required under the VRs. Lactanase is classified as a "Medication A" Prohibited Substance under the FEI Equine Prohibited List. Accordingly, a violation of the EADMCR Article 2.2 has been established by the FEI in accordance with EADMCR Article 3.
14. The PR has raised the following arguments in his defense: (a) he should not be considered the Person Responsible since (i) it was not him who had administered the Lactanase to the Horse; (ii) he did not even know that the treatment had taken place until after it had happened; he further did not know that a medical treatment had been administered; (iii) the treatment had taken place in accordance with the requirements of the self-binding declaration for the Event signed by him upon request of the GER NF; as foreseen by this self-binding declaration, he had discussed the treatment with the German team veterinarian, Dr. Nölting; he was also entitled to rely on Dr. Nölting considering the latter's good reputation; Dr. Nölting was the actual Person Responsible

since he had administered the treatment; and (b) the case had been notified and processed with considerable delays.

15. With respect to the question of the Person Responsible, the Tribunal wishes to highlight that throughout the Statutes, GRs and other FEI rules and regulations, in particular the EADMCRs, the competitor is considered the primary Person Responsible. This responsibility is solely based on the status of the person as a competitor and it does not require that person to commit any particular action or omission, or to fulfill any other criteria. Importantly, it does not necessarily require the competitor's knowledge of the use of any Prohibited Substance. Therefore, whether and at which time the PR had known about the treatment with Lactanase, is irrelevant for the determination of his status and responsibility as a Person Responsible.
16. The competitor may furthermore not abdicate his or her responsibility as a Person Responsible by any means, including through contractual agreements with his National Federation, through having a veterinarian administer the respective Prohibited Substance or otherwise. In fact, the FEI rules are construed to protect against abdication of responsibility by making the rider of the horse the person ultimately responsible for it under all circumstances.
17. With respect to the self-binding declaration, the Tribunal would like to highlight that the EADMCRs unequivocally govern in this case. It follows that despite signing the self-binding declaration, and irrespective of the content of that declaration, the PR remains the Person Responsible in accordance with GR Article 142.
18. Furthermore, the potential responsibility of any third person, such as veterinarians, owners, grooms and others, for the rule violation will not release the competitor from his own responsibility. As GR Article 142.3 unambiguously stipulates that *"The Person Responsible shall be the competitor who rides or drives the Horse during an Event, but the owner and other support personnel including but not limited to grooms and veterinarians may be regarded as **additional Person Responsible** ..."*. From the wording of this rule, in particular the language "additional", it follows that the competitor, under all circumstances, remains the primary Person Responsible.
19. With respect to a possible elimination or reduction of the otherwise applicable period of ineligibility and other sanctions under EADMCR Article 10.5, the Tribunal is of the opinion that the PR has not established that he "could not reasonably have known or suspected even with the exercise of utmost caution, that he

had *Used* on the *Horse*, or the *Horse's* system otherwise contained a *Prohibited Substance* or *Prohibited Method*".

20. The Tribunal takes note of the PR's statement throughout the investigation process and repeated in this written submissions that he only had a "short conversation" with Dr. Nölting, "without [Dr. Nölting (*added by Tribunal*)] disclosing to Mr. Kutscher that he was going to administer Lactanase to Cornet Obolensky". The Tribunal further takes note of the PR's statement that he had "*assumed*" that Dr. Nölting would prepare for a compliant treatment", and that, as a rider, he focuses on the competition during the events and the sports side of a tournament, but not on issues of medication.
21. The Tribunal is of the opinion that the PR should have inquired, especially following the *Horse's* reaction after the treatment, about the details of the actual treatment of the *Horse*. Therefore, the Tribunal does not accept the argument that the PR could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had *Used* on the *Horse*, or the *Horse's* system otherwise contained a *Prohibited Substance* or *Prohibited Method*. To the contrary, the PR admitted, during the Final Hearing, that he knew about the treatment on the same evening as the treatment had taken place. As the primary Person Responsible, the PR takes full responsibility over the *Horse* and cannot "hide" behind reliance on national declarations or experienced veterinarians. The PR was at least negligent by not inquiring fully about the exact treatment given to the *Horse* and authorization for that treatment. When questioned whether he ever reconsidered allowing the *Horse* to compete the following day, the PR stated that he did not reconsider because "the *Horse* had been ok". The Tribunal concludes that the PR, in full knowledge of the circumstances, decided to compete with the *Horse* and ultimately did so with a Prohibited Substance in the *Horse's* system. The Tribunal reiterates that it is the responsibility of competitors to ensure that their horses do not have any Prohibited Substances in their systems (*cf.* Case 2007/19 CASTLE FORBES MAIKE, Final Tribunal Decision dated 7 May 2008).
22. Furthermore, and resulting from the above, Mr. Kutscher similarly did not demonstrate that he bears "No Significant Fault and No Significant Negligence" for the rule violation in accordance with EADMCR Article 10.5.2, since he did not establish to the Tribunal's satisfaction that his fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for *No Fault* or *No Negligence*, was not significant in relationship to the anti-doping or medical control rule violation.
23. With respect to the alleged delay of the notification of the case, the Tribunal concurs with the FEI insofar, as the case at hand is

not a "standard" anti-doping or medication rule violation involving an *Adverse Analytical Finding*, but a procedure dealing with the alleged Use of a Prohibited Substance. Therefore, the case management is governed by EADMCR Article 7.1.9, which entitles the FEI to conduct any necessary follow-up investigation. The Tribunal considers that the FEI, as the prosecutor, has taken steps applying a level of care to ensure accuracy of the facts and fairness to the PR. The Tribunal therefore concludes that any such delay is not sufficient to allow termination of these proceedings, but will take such delay into consideration in applying the sanctions in this case.

4.6 Disqualification

24. For the reasons set forth above, the FEI Tribunal is disqualifying the Horse and the PR from the Event and all medals, points and prize money won at the Event must be forfeited, in accordance with EADMCR Article 9.

4.7 Sanctions

25. In considering the appropriate sanctions in this case the Tribunal takes into consideration the level of the competition, the Olympic Games, the most important competition in an athlete's career, where any athlete should show the highest level of respect of the applicable rules. On the other hand and in mitigation the Tribunal takes into consideration (i) the grade of the Prohibited Substance, a Medication A Prohibited Substance, (ii) the clean record of the PR as well as his reputation in the sport, (iii) the PR's reliance on a reputable team veterinarian and assumption that any treatment followed required FEI rules and was declared, and (iv) the timing of the proceedings as will be highlighted below.
26. The Tribunal notes that in the other doping/ medication cases from the same Event the sanctions included suspensions of up to some 4.5 months for what the Tribunal had considered Medication A violations. The two main differences which do not suffice to relieve the PR from liability but carry significant weight in considering sanctions are the PR's reliance on a reputable team veterinarian and assumption that any treatment followed required FEI rules and was declared, and in particular the delay in finalization of these proceedings. While the Tribunal acknowledges above the necessary and legitimate steps taken by the FEI to prosecute the case, the Tribunal also considers that proceeding promptly following the May 2009 public acknowledgement of the treatment to the Horse would have resulted in a fairer outcome for the PR. As a result of this delay the PR had to continue his professional career during a lengthy

period in which proceedings were pending with all the consequences associated with such proceedings. Additionally and most importantly, and in comparison to the other cases from the Event, any suspension at a time following the Hearing, a time which results from the delays in this case, would have had a far greater impact on the PR's career and potential earnings than any similar suspension at the time such suspensions were imposed. In this case the hearing, which might have taken place some nine (9) months earlier had this case been prosecuted promptly, was concluded in close proximity to the World Cup Finals in Geneva, to the World Equestrian Games and to other very meaningful events.

27. Therefore, and in the very unique circumstances involving this case, the Tribunal has decided not to impose a suspension, but instead to impose a more meaningful fine which highlights the PR's negligence. The Tribunal therefore imposes the following sanctions on the PR, in accordance with GR Article 169 and EADMCR Article 10:

1. The PR is fined **CHF 10,000.-**.
2. The PR shall contribute **CHF 5,000.-** towards the legal costs of the judicial procedure.

5. DECISION TO BE FORWARDED TO:

5.1 The person sanctioned: Yes

5.2 The President of the NF of the person sanctioned: Yes

5.3 The President of the Organising Committee of the Event through his NF: Yes

5.4 Any other: No

FOR THE PANEL



THE CHAIRMAN Ken E. Lalo