

# INTERNATIONAL RUGBY BOARD

IN THE MATTER of the Regulations Relating  
to the Game

A N D

IN THE MATTER of a doping offence by  
JAMES PATERSON ("the  
Player")

## Judicial Committee

T M Gresson	(New Zealand)	(Chairman)
Doctor Barry O'Driscoll	(Ireland)	
Gregor Nicholson	(Scotland)	

## Appearances and Attendances

### For the Board

Ben Rutherford	(RWC Legal Counsel)
Tim Ricketts	(IRB Anti-Doping Manager)

### Player

James Paterson	(Player)
Robert P Latham	(Counsel for the Player)

Doctor Patrick McNair	(Team Physician)
Nigel Melville	(CEO United States Rugby Union)

## Hearing

24 November 2011 (by way of telephone conference) and thereafter by written submissions

## REASONS FOR DECISION OF THE BOARD JUDICIAL COMMITTEE

1. The Board Judicial Committee (BJC) now provides its reasons for its decision released on 13<sup>th</sup> December 2011.
2. On 27<sup>th</sup> September 2011, James Paterson ("the Player") provided a urine sample (Code Number 1985203) during an In-Competition Test conducted on behalf of the Rugby World Cup (RWC), the Tournament Organiser of RWC 2011 held in New Zealand. Subsequently, the sample returned an Adverse Analytical Finding for the substance Oxycodone ("the substance").

3. Oxycodone is classified as a narcotic under s.7 of the World Anti-Doping Agency's (WADA) List of Prohibited Substances and Methods. It is a specified substance. The WADA Prohibited List was incorporated in RWC 2011 Tournament Anti-Doping Programme (TADP) as Schedule 2. The TADP was based upon IRB Regulation 21 amended for the specific circumstances of RWC 2011. The Player accepted he had not applied for, and been granted, a therapeutic exemption allowing him to use the substance.
4. Following receipt of the analysis of the A sample, and after a preliminary review conducted in accordance with Clause 19 (which confirmed that an anti-doping rule violation may have been committed), the Player was provisionally suspended on 13<sup>th</sup> October 2011. On 15<sup>th</sup> October 2011 the Player confirmed by way of correspondence from the Vice-Chairman of the United States Rugby Union and Counsel for the Player that the Player did not require the "B" sample to be analysed and he admitted the anti-doping rule violation.

#### **Brief Summary of the Evidence**

5. The Player is aged 24. He was first selected to represent the United States National Team (the "Eagles") in August 2011. Thereafter, he played for the Eagles during RWC 2011. During the second match against Russia played on 15<sup>th</sup> September 2011 he suffered a shoulder injury. Following musculoskeletal and neurological examinations, x-rays and a MRI scan Dr Patrick McNair (the Team Physician) diagnosed a small tear at the insertion of the Player's rotator cuff, tendonosis and bruising. Because of the injury the Player did not play in the Eagles next match against Australia but played in the final pool match against Italy on 27<sup>th</sup> September 2011.
6. During the period leading up to the final match, as Dr McNair (who had not previously treated the Player) concluded the Player had a chance of playing in the final pool match. Therefore Dr McNair decided to treat the Player with an aggressive daily course of rehabilitation and various medications which were listed by the Player with the assistance of Dr McNair in the Doping Control Form as follows:

Declaration of Medication/s and/or Supplement/s taken in last 7 days / Déclaration de Médication/s et/ou Supplément/s pris dans les 7 derniers jours / Declaración de Medicaciones y/o Suplementos Ingeridos en los últimos 7 días					
Name / Nom / Nombre	Dosage / Dosage / Dosis	Date / Date / Fecha	Name / Nom / Nombre	Dosage / Dosage / Dosis	Date / Date / Fecha
1. <u>TORDOL</u>	30mg	27/9/11	5. LIDOCAINE inj.	5cc 1%	27/9/11
2. CODEINE	2 tab	27/9/11	6. MARCAIN inj	5cc 5%	27/9/11
3. OXYCODONE	5mg	27/9/11	7. CELESTONE	5gm inj.	27/9/11
4. CELEBREX	100mg	27/9/11	8. TRIAZOLAM	1 tab	26/9/11

7. As can be seen the prescribed medications (some were administered by Dr McNair by injections) included anti-inflammatory drugs, narcotics for pain relief and nausea, a steroid, local anaesthetics and sleeping pills. The medication included the strong pain killer Oxycodone, an opium derivative narcotic which was provided to the Player in single 5 mg tablet form by Dr McNair. With the exception of the Codeine and Triazolam, all of the medication had been prescribed by Dr McNair following his arrival in New Zealand on 17<sup>th</sup> September 2011 when he took over the responsibilities of Team Physician from Dr Schneider, who on the 15<sup>th</sup> September had given the Player a Tordol injection and Tramadol tablets.
8. The Player stated the Oxycodone medication made him feel lethargic. He was disappointed with the standard of his play against Italy. He attributed this to the injury being in the back of his mind. He stated in terms of his physical commitment during the match he adopted a "cautious" approach. He described his main contribution to the team effort as being "strategic" (ie. as an experienced professional player assisting in the marshalling of players on attack and defence during the match). He advised he was under no external pressure to play. He further stated, playing in the RWC 2011 Tournament was the pinnacle of his rugby career and he was anxious not to let his team mates down.
9. The Player stated that since 2008 he has been a professional player representing New Zealand Super 15 (Crusaders and Highlanders) and NZ Provincial Teams. He played in two previous IRB Tournaments in 2005 and 2006 when he signed Participation Agreements and received anti-doping education. Further, he received information prior to RWC 2011 when he was provided with the Anti-Doping Handbook which included a TUE Guide. He also received anti-doping education through his involvement as a professional player with New Zealand teams.
10. The player stated he always adopts a professional approach to his rugby commitments (including avoiding taking any banned substances). He accepted he had personal responsibility to carefully monitor the ingestion of

any substance but during the RWC he *“totally trusted the Eagles’ medical personnel not to allow him to take anything which would jeopardise his career”*. He stated he was provided with individual Oxycodone pills and he acknowledged that he never requested Dr McNair to show him their container or packaging.

11. Dr McNair during his evidence acknowledged he had made an *“egregious error”*. Indeed, in his view *“James’ only error was in trusting me to protect him from banned substances”*.

### **The Doping Offence**

12. The TADP sets out the framework under which all players can be subjected to Doping Control and the procedures for any alleged infringements of the Programme. The TADP also adopts the mandatory provisions of the World Anti-Doping Code (“the Code”)<sup>1</sup>.
13. Both the TADP and the Code are based on the principles of personal responsibility and strict liability for the presence of Prohibited Substances or the use of Prohibited Methods.
14. Pursuant to Clause 2.1 the *“presence of a Prohibited Substance or its Metabolites or Markers in a Player’s Sample”* constitutes an anti-doping rule violation.
15. Clause 2.1 provides:

*“The presence of a Prohibited Substance or its Metabolites or Markers in a Player’s Sample constitutes an anti-doping rule violation. A violation does not require intent, fault, negligence or knowing use [as defined in the Programme] on the part of the Player”.*
16. In relation to the principle of personal responsibility Clause 6 provides:
  - 6.1 *It is each Player’s responsibility to ensure that:*
    - (a) *no Prohibited Substance is found to be present in his body and that Prohibited Methods are not used;*
    - (b) *he does not commit any other anti-doping rule violation;*
    - (c) *...*

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<sup>1</sup> The WADA Code can be found on the WADA website at [http://www.wada-ama.org/documents/world\\_anti-doping\\_program/WADP-The-Code/WADA\\_Anti-Doping\\_CODE\\_2009\\_EN.pdf](http://www.wada-ama.org/documents/world_anti-doping_program/WADP-The-Code/WADA_Anti-Doping_CODE_2009_EN.pdf)

(d) *he informs Player Support Personnel, including, but not limited to, their doctors of their obligation not to use Prohibited Substances and Prohibited Methods and to take responsibility to ensure that any medical treatment received by them does not violate any of the provisions of the Regulations.*

6.3 *It is the sole responsibility of each Player, Player Support Personnel and Person to acquaint themselves and comply with all of the provisions of these Anti-Doping Regulations including the Guidelines.”*

17. Pursuant to Clause 3.1 the Board has the burden of establishing an anti-doping rule violation to the comfortable satisfaction of the BJC. The Player accepted and did not challenge the analytical findings of the laboratory. Accordingly, the BJC finds the Board has established to the required standard the anti-doping rule violation; that is the presence of the Prohibited Substance Oxycodone in the Player’s bodily sample.

### **Sanction**

18. The IRB’s regulatory framework stipulates that in imposing the appropriate sanction the BJC is required to apply the relevant provisions of Clause 22 (which are based on the World Anti-Doping Code). The period of Ineligibility for a Prohibited Substance for a first time offence is two years pursuant to Clause 22.1 (IRB Regulation 21.22.1).

19. Oxycodone is a Specified Substance. The relevant provision is Clause 22.3 which provides:

#### ***“Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances***

*22.3 Where a Player or other Person can establish how a Specified Substance entered his body or came into his possession and that such Specified Substance was not intended to enhance the Player’s sport performance or mask the Use of a performance-enhancing substance, the period of Ineligibility found in Regulation 21.22.1 shall be replaced with the following:*

*First violation: At a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years.*

*To justify any elimination or reduction from the maximum period of Ineligibility set out above, the Player or other person must produce corroborating evidence in addition to his word which establishes to the comfortable satisfaction of the Judicial Committee the absence of intent to enhance sport performance or mask the Use of a performance enhancing substance. The Player’s or other Person’s*

*degree of fault shall be the criterion considered in assessing any reduction of the period of Ineligibility.”*

20. It follows that in order to satisfy Clause 22.3 the Player is required:
- On the balance of probabilities to establish how the Oxycodone entered his body; and
  - To establish to the comfortable satisfaction of the BJC that his Use of Oxycodone was not intended to enhance his sport performance or mask the Use of a performance-enhancing substance<sup>2</sup>. To justify any reduction or elimination of the sanction the Player must produce corroborating evidence in addition to his word of the absence of intent to enhance sports performance or mask the Use of a performance enhancing substance.
21. If the foregoing pre-conditions are satisfied the Player's degree of fault shall be the criterion for assessing any reduction of the period of Ineligibility.
22. In relation to the above pre-conditions the BJC was satisfied they had been established to the requisite standard. There were no issues with regard to the truthfulness and reliability of the respective accounts of the Player and Dr McNair (the latter being subject to an exclusion direction given by the BJC when the Player gave his evidence)<sup>3</sup>. Thus, the BJC accepted their evidence which clearly established (and Counsel for RWC properly did not suggest otherwise) that Dr McNair, as part of the Player's treatment had provided the Player with the Oxycodone 5 mg tablets, including a tablet the evening before the match against Italy. The tablets were only taken for the purpose of pain relief and not to enhance performance.

#### **Degree of Fault (If Any)**

23. Counsel presented the Player's case on an alternative basis. He submitted if the BJC determined the pre-conditions had been established the extent of fault (if any) should be assessed pursuant to Clause 22.3 or, if the elements of Clause 22.3 had not been established, the exceptional circumstances

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<sup>2</sup> The nature of the burdens the Player must satisfy are set out in the Comments to Article 10.4 of the WADC which is available at [www.wada-ama.org](http://www.wada-ama.org). The Comments also elaborate upon the type of circumstances which in combination might lead a hearing panel to be comfortably satisfied of no-performance-enhancing intent, for example *“the fact that the nature of the Specific Substance or the timing of its ingestion would not have been beneficial to the Athlete; the Athlete's open Use or disclosure of his or her Use of the Specified Substance; and a contemporaneous medical records file substantiating the non sport-related prescription for the Specified Substance ...”*

<sup>3</sup> Also, Dr McNair was given the usual warning with regard to his evidence being potentially self-incriminating. Dr McNair confirmed he understood the warning but nevertheless elected to testify.

provisions under Clause 22.4 (no fault or negligence) or Clause 22.5 (no significant fault or negligence) should be applied. Given the BJC's finding that the pre-conditions of Clause 22.3 have been satisfied it will not be necessary to consider Clauses 22.4 and 22.5.

### **Assessment of Fault Principles (Clause 22.3)**

24. In relation to the assessment of fault under Clause 22.3, WADA in its commentary to Article 10.4 of the Code (which is replicated by Clause 22.3 and IRB Regulation 21.22.3) provides examples of irrelevant considerations in determining whether there should be any reduction.

*"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 behaviour. 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 this Article. It is anticipated that the period of Ineligibility will be eliminated entirely in only the most exceptional of cases".*

### **Previous Cases**

25. In their submissions Counsel for the Player and RWC helpfully referred the BJC to cases which resulted in reduced sanctions on the basis of IRB 21.22.3 (the equivalent of Clause 22.3) having been satisfied. These cases included:
- IRB v Pronenko (BJC full decision, 9 November 2011), a case which involved a medically prescribed diuretic (Furosemide) to reduce significant oedema in the lower leg - six months ineligibility;
  - IRB v Slimani (BJC, 14 October 2008) – (medically prescribed nasal decongestant which contained the banned substance Tuaminoheptane – reprimand and warning);
  - IRB v Bertj (BJC, 27 October 2006) – (Ephedrine, the source being either a nasal decongestant prescribed by a national team paramedic or guarana food supplements – six week period of ineligibility);
26. Reference can also be made to the case of IRB v Sorokin (7 January 2009) – (medically prescribed use of medicine which contained Indapamide to treat a serious heart condition – reprimand and warning).

27. Counsel for RWC correctly noted that since the Berti case (2006) the sanctions imposed in more recent IRB Specified Substance cases have tended to be higher, for example, the six months in Pronenko and the sanctions in IRB v Gurusinghe, Swarnathilake and Kumara (nine months)<sup>4</sup> and IRB v Jamaluddin (six months)<sup>5</sup>.
28. Authorities from other International or National Sports Tribunals were also cited by both counsel. For example, in Federation Internationale de Gymnastique ("FIG") v Melnychenko (FIG Presidential Commission, 25 February 2011) a 15 year old gymnast was taken to hospital with a very high temperature and "*sharp pain*" in her swollen nose caused by a dangerous furuncle which was life threatening because it could have spread to her brain. She was treated with Furosemide. She was suspended for a total of five months.
29. In Jamaica Amateur Athletics Association ("JAAA") v Fraser (JAAA Disciplinary Tribunal ("Tribunal") and JAAA Medical and Anti-Doping Committee ("Committee"), 12<sup>th</sup> July 2010) the athlete (who did not have direct access to a team physician) was suspended for six months for the use of Oxycodone (provided by her coach) taken for the "*relief*" of tooth pain.
30. In Drug Free Sport NZ v Tristan Moran (25 August 2011) a decision of the NZ Rugby Union Anti-Doping Tribunal, the player (a professional rugby player) was prescribed Probenecid (a masking agent) by the team physician for a serious condition involving a swollen leg which had developed an abscess and cellulites. He was suspended for one week.
31. All of these cases have been considered by the BJC which notes that the range of sanctions extend from a reprimand and warning to nine months suspension. Understandably, in their respective submissions both Counsel skilfully sought to either rely on or distinguish features of these cases in support of their arguments as to the appropriate sanction. Counsel for the IRB, in submitting the period of suspension should be the same as the sanctions imposed in Fraser and Pronenko (both six months), referred to the Player being in "*grave*" dereliction of his personal responsibilities in that he

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<sup>4</sup> Available at <http://www.keeprugbyclean.com/en/cases/2011/>

<sup>5</sup> Available at <http://www.keeprugbyclean.com/en/cases/2010/>

had “*out-sourced that responsibility to the Team Physician thus demonstrating a high degree of fault*”. Further Counsel submitted because of the availability of anti-doping resources and, the absence of a medical emergency, the degree of fault was “*equivalent to, or higher than that of Pronenko*”. Conversely, Counsel for the Player placed reliance on the cases of Slimani and Moran and submitted no period of ineligibility should be imposed as the Player understandably assumed the experienced Team physician (who had been with the team for approximately ten years) would be completely familiar with WADA’s lists of banned substances and would perform his duties with the “*highest degree of professionalism*”.

32. As mentioned, the sanctions imposed in more recent cases involving specified substances have tended to be higher and the BJC is aware of the broad need for consistency in the levels of penalties imposed. But, of course, although previous cases can be of assistance, ultimately every case will depend on its unique features.

#### **Assessment of Degree of Fault (If Any)**

33. While (as in many of these cases) the BJC can understand the reasons why the Player required pain relief and placing his trust in an experienced and well qualified Team Physician, the BJC cannot overlook a fundamental imperative of the RWC Anti-Doping Programme. That is, as mentioned the Player also had the personal responsibility of checking the individual Oxycodone tablets which were handed to him by Dr McNair were not banned. In our view both the Player and Dr McNair each had the responsibility of ensuring a banned substance was not taken by the former. The responsibility did not rest only with Dr McNair. As Counsel for RWC correctly submitted the Player, in failing to check on the medication, “*out-sourced*” his personal responsibility under the RWC anti-doping regime and because of this the Player’s conduct cannot be considered to be free of fault.
34. The Player is an experienced professional rugby player. He had been fully educated about the perils of taking banned substances. He acknowledged he was aware of a South African case heard in 2010 involving two players who had taken a banned supplement (Methylhexanamine - MHA) also in a national team environment. Given his level of knowledge, the Player failed to exercise the required degree of caution in ensuring that none of the

medications (eight of which, including anaesthetic injections were taken on or around match day) were banned. It was not sufficient for the Player to solely rely on Dr McNair (who, as mentioned had not previously treated the Player) and not make appropriate enquiries himself about any of the medications. In this regard the Player's situation was analogous to the case of Pronenko where the BJC held the player in that case had displayed a lack of caution in relation to his personal responsibility of ensuring the medication (a diuretic, which could be used as a masking agent) prescribed by a local doctor did not contain a banned substance.

35. Further, as mentioned, the Oxycodone pills were individually handed to the Player by Dr McNair. Thus the Player never saw or indeed asked to see the packaging that accompanied the pills. In contrast, in the case of Slimani the player was prescribed a nasal decongestant which contained a prohibited ingredient for his clogged up nose. Further, the nasal spray container provided by one of the team doctors to the Player had no label or instructions.
36. In our view this case has a similar feature to the case of Pronenko, in that the Player in failing to make the appropriate enquiries as to whether the prescribed narcotic was not prohibited, allowed his strong wish to participate in his Team's final pool match at RWC to take precedence over his anti-doping responsibilities. To some extent this was understandable but it does not excuse him.
37. The BJC accepts there are some extenuating factors in relation to the Player's infraction which allows it to conclude that the degree of fault was not as serious as in the cases where higher level sanctions have been imposed. As mentioned, the Player stated that he was most impressed with the professionalism of the Team's management and because of this he assumed (wrongly as it transpired) he was able to trust the Team's Physician (who had been with the Eagles for approximately ten years) to have known which substances were banned under the RWC Anti-Doping Programme. Unfortunately, as Dr McNair properly acknowledged he made a serious mistake. Moreover, importantly, in contrast to the case of Pronenko, the Player with the assistance of the Team Doctor declared the medication on the Anti-Doping Control Form. There was no attempt to "cover up" and in

this regard the Player's candour was consistent with the favourable impression he (and Dr McNair) made during the hearing.

38. Ultimately, having regard to the sanctions imposed in previous cases and balancing all the competing factors referred to, the BJC concluded the suspension should be for a period of four months.

#### **Decision**

39. For the reasons outlined, the sanction imposed for this anti-doping rule violation is a period of ineligibility of four months from 13<sup>th</sup> October 2011 (being the date upon which the Player's provisional suspension commenced) and concluding (but not inclusive of) the 13<sup>th</sup> February 2012.

#### **Costs**

40. If the Board wishes us to exercise our discretion in relation to costs pursuant to Regulation 21.21.10, written submissions should be provided to the BJC via Mr Ricketts by 17:00 Dublin time on 27<sup>th</sup> January 2012, with any responding written submissions from the Player to be provided by no later than 17:00 Dublin time on 10<sup>th</sup> February 2012.

#### **Review**

41. This decision is final, subject to referral to a Post Hearing Review Body (Regulation 21.25) or an appeal, where the circumstances permit, to the Court of Arbitration for Sport (Regulation 21.27). In this regard, attention is also directed to Regulation 21.24.2, which sets out the process for referral to a Post Hearing Review Body, including the time within which the process must be initiated.

T M Gresson  
Chairman

20 January 2012