

THE 1986-1990 HEPATITIS C CLASS ACTION SETTLEMENT

IN THE MATTER OF AN APPEAL FROM THE DECISION OF THE ADMINISTRATOR
DATED February 27, 2004

DATE OF HEARING: December 8, 2004, February 23, 2005

IN ATTENDANCE:

CLAIMANT: #12311

FOR THE CLAIMANT James Hunt

FOR THE ADMINISTRATOR: John Callaghan
Carol Miller

REFEREE: C. Michael Mitchell

DECISION

1. This is an Ontario-based Claimant file, claim #12311.
2. The Claimant applied for compensation as a primarily infected person pursuant to the Transfused HCV Plan.
3. The Administrator denied the claim on the basis that there was no evidence of a transfusion during the Class Period.
4. The Claimant requested the Administrator's denial of a claim be reviewed by a Referee.
5. Oral hearings took place on December 8, 2004 and February 23, 2005.
6. The Claimant testified that she was in good health until 1986, when she was admitted to Scarborough General Hospital with problems with her period. She was not transfused at that time, and had not been transfused previously. The Claimant testified that she has never used non-prescription intravenous drugs, that she was not infected with Hepatitis C as of January, 1986, and that she had not obtained medical treatment between 1986 and the late summer of 1988.
7. In the late summer of 1988, the Claimant was hospitalized at the Scarborough General Hospital for a hysterectomy. The Claimant recollects that when she awoke from the anesthetic, she saw blood being transfused into her arm. She was upset that she had not been told that she would receive blood, and she indicated to the nurse that she was upset. The Claimant was upset because she believed that if blood was going to be administered to her, it should have been taken from someone in her family. She simply didn't want a stranger's blood. After the nurse inquired as to the basis of the Claimant's concerns, the nurse advised her that she had signed a consent form allowing for the procedure, it would make her feel better and recuperate faster, and there was nothing to worry about.
8. The Claimant testified that she was visited in the hospital by her oldest son "P", who was at the time 16 years old, and in high school, and also by her friend, "JM". She recalled speaking both to her son and to JM at the time about how upset she was with respect to the blood. She recollects that her son reassured her, and that there was no reason for her to be so upset about the fact that she was receiving blood.
9. The Claimant had three children at the time, including the youngest, who was four. The Claimant worked as a bartender/waitress, and also cut hair at home to supplement her income, but her primary job was taking care of her children. After a time, the Claimant began not to feel well, and was unable to do most of the activities that she had previously engaged in. The relationship she was in deteriorated, as the Claimant was unable to cook, bake, go camping or do many

of the other things that she previously had enjoyed. Also, her relationship with her middle child deteriorated, and the Claimant felt she had no choice but to have her middle child live with her mother in Florida, which occurred in 1989, the summer following surgery. Even with the middle child living with her mother, the Claimant was unable to take a large degree of responsibility for her youngest child, and that was done increasingly by her oldest son.

10. The Claimant constantly sought medical attention, but all the physicians indicated to her that there was nothing wrong with her. It wasn't until the winter of 1998 that the Claimant found out that she had Hepatitis C.
11. The Claimant's health continued to deteriorate and around 2000, she was advised to have her kidney removed. Subsequently, the Claimant found out she only had a kidney infection and did not require surgery, but her health continued to deteriorate in numerous other ways. For a time, the Claimant claimed that vitamins, which were very expensive and paid for by her mother, provided relief, but she no longer was able to take them when her mother was no longer able to pay for them. Once again, her health deteriorated.
12. As of the time of the hearing, the Claimant had recently moved to live with her son, who essentially looks after her as her health has continued to deteriorate significantly.
13. In cross-examination, the Claimant described the bag of blood that she claimed she saw in September, 1988. She said it was almost square, small and red. She indicated there were two bags, one was just water, which she was told was to keep her hydrated – she thought it was a saline solution. The Claimant said she could not swear to where the bags were situated on her arms. The Claimant was certain that the blood was administered while she was asleep. She recalls seeing it only when she woke up, and it was at that time that she asked if that was blood, and she was upset when she was advised that it was. The Claimant did recall that she was told before the operation that they would cross-match her blood, but was also told this was something done whenever someone is admitted for an operation for anything, and she also recalled having a blood test several days before the surgery.
14. The Claimant recalls that at the time she saw the blood, she was in a lot of pain from the surgery, and she was getting pain medication at various points because she does not tolerate pain well. The Claimant did not recall how many other beds or patients there were when she saw the blood, but she believes there was at least one other woman present, and the Claimant spent most of her time sleeping.
15. The Claimant remembers that her son, P, and JM were both present in the recovery room. She remembered JM, who was working at the time at the race

track. She also recalled JM saying that the fact that the Claimant had received blood was "no big deal", and that she couldn't understand why the Claimant was so upset.

16. The Claimant believes that the doctor, who did the surgery, came to see her, but she also recollects when she saw him subsequently in his office, she asked him about the fact that she had received blood. She stated he reassured her that she had lost a lot of blood, but had nothing to worry about.
17. The Claimant's eldest son, P, now 34, was 16 at the time of the hospitalization when the alleged transfusion took place. He recalled going to the hospital and visiting her a couple of times. Once was in the recovery room when JM was there. In fact, JM gave him a ride to the hospital. He said he saw his mother in the recovery room under heavy anesthetic, and he and JM spent 15 or 20 minutes there. He testified his mother was upset at the fact that she was getting blood. He noticed that there were IVs in his mother's hand, and one of them was attached to a red bag, and the other bag was possibly on the back of the bed, but what he really remembers was that his mother was really upset at the fact that she was receiving blood.
18. He believes that he went to visit her in the hospital on one more occasion and on the other occasion she was in her room and not in the recovery room. She was getting an IV the second time, and was a lot more conscious then she had been on the occasion of the first visit. He believes that on the first visit, he was with JM, and on the second visit he saw her alone.
19. It took his mother a long time to recover from the hysterectomy and generally over the next period of time she felt ill. His mother was not sickly before surgery, and she was definitely not herself and complained a lot after the surgery. He took on a lot more responsibility in the home, taking care of his brother most of the time.
20. His mother worked less and less over the years, and he continued to take responsibility for his brother, except when he started college in a theatre arts course. His mother moved from the city to "CB", and took the youngest child with her. CB was less expensive than the city to live in and P had to move downtown for college and could not take care of them.
21. He describes his mother at the present time as semi-homeless, staying at friends' places in Toronto and also staying with him and his girlfriend. She has some good days and some days when she is only able to stay in bed and read and sleep.
22. On cross-examination, P testified that on the day of the surgery he believed he called JM and arranged for her to give him a ride, but possibly it was

prearranged. He was intending to visit his mother later on, but she wanted someone in the recovery room with her.

23. JM was a friend of his mother's and the family, and he thought the surgery was pretty serious and they went together to see her in order to support her. It is possible that he was taken out of school in order to go to the hospital, but he is not sure. He recalls driving to the hospital with JM because he did not get his driver's license until he was 18, and he remembers that she had a "K car".
24. He recollects he and JM went into the recovery room together. His mother was already there, and was there when they left. She was conscious, in pain, but she recognized P and was able to converse with him. She also recognized JM. He recollects there were quite a few people in the recovery room, where there were dividers and curtains. It seemed to him as if the recovery room was full, and he passed a few patients on his way to see his mother, so he does not believe she was located at the very end of the room. He noticed the blood being administered after his mother mentioned it. She was not screaming or anything like that, but she was visibly unhappy. He recollects there was a nurse, although it could have been a nurse or a doctor, who said that administration of the blood was standard, and he remembers some discussion about the blood being matched. He recollected two bags. The one with blood, was smaller than the other, and the other contained a solution which looked to be clear. JM and he were present together in the recovery room with his mother for 15 to 20 minutes.
25. JM testified that she had known the Claimant since she was 19 or 20, and the Claimant was 14. They met when they were both living in the Parkdale area of Toronto. JM was working at Woodbine Racetrack, and would see the Claimant off and on, perhaps once a week, and would speak to her once a week. In 1988, the Claimant told JM that she had a problem and that she was having a hysterectomy and she wanted someone there when she woke up, and therefore they arranged for JM to see her on the day of the operation.
26. JM is not sure when this was, except that it was in 1988. JM was driving a Sundance Plymouth, and testified that she picked up P at home. She doesn't remember when, except it was close to lunch time. The witness called P. He knew that his mother wanted him there and it was during the week. They figured out what time the Claimant should be out of the operating room and determined to go sometime after that. She believes they went in to see the Claimant in the recovery room, and the Claimant was upset about the blood that she was receiving, which is why she remembers the event. The Claimant was talking to the nurses and asking why blood had been administered. They said that there was nothing wrong, and it was ok. They asked her whether her objection to the blood was religious, and she said if she was going to get blood, she would have wanted to get it from someone in her family.

27. She recollects being there approximately 15 minutes, and remembers seeing a red bag with blood and an IV saline solution. She recollects that there were other people in the recovery room.
28. JM moved away in 1989 with her family to FE. Once the Claimant moved out of the city, the two saw each other more, visiting at least twice a week. After the surgery, the Claimant was unable to keep up her normal life. For example, she used to clean the house regularly, but that declined and she seemed to be chronically worse. There was definitely a change in the relationship after the hysterectomy as the Claimant had been much more active previously.
29. JM describes her relationship with the Claimant as very close. She says she virtually "took her in" when she was 14, and was like her "big sister".
30. She doesn't recollect if she had to sign in at the hospital. The room was relatively small, no more than 10 metres on each side, and she does not recall how many spaces there were. There were curtains around the bed. She doesn't believe she talked to a nurse before going in, or to a doctor. The Claimant was groggy, but recognized JM. She believes the nurse actually came in after when she and P were there. She believes the nurse was a female. The blood was hanging from a pole. The Claimant knew she was getting blood. She saw the red bag and she was angry. She did not know she was going to get the blood. She said she felt weird getting blood, and she got very upset as she typically does in those kinds of circumstances when she is upset.
31. The witness said she believed the nurse just came in and the Claimant started asking her why she was getting blood. The nurse asked if the reason the Claimant objected was religious. The Claimant was very upset and talking about the blood, but was also in a lot of pain. She recollects taking P home and talking to him on the way home about why the Claimant had gotten so upset.
32. In terms of discussing this claim with the Claimant, she testified the Claimant asked her whether or not she remembered the incident with the blood sometime before the Claimant asked her to see the Claimant's lawyer. This would have occurred in the summer of 2002. From this witness's knowledge, the Claimant did not take drugs and had never been in jail. The Claimant did drink alcohol a lot while she was in Scarborough and in FE. The witness is aware that the Claimant found out that she had hepatitis C. In March, 2004, the Claimant said she was going to follow through and she said she ought to be reimbursed for all her pain and suffering. She told JM she was going to try to find a lawyer. The witness did not know that the Claimant had been denied her claim, only learning about that later. When the Claimant asked JM whether or not she remembered visiting her in the hospital and her receiving blood, JM responded that she did recall because she remembered that the Claimant was so upset.

33. Finally, it is important that in the hospital records concerning the Claimant's admission to Scarborough General Hospital, the Claimant listed JM on the form as next of kin to be contacted in case of emergency.
34. On consent, the Claimant was recalled to give evidence and testified that her son did not have a ride, and she asked both her son and JM to be there at the hospital when she came out of the surgery.
35. The Claimant testified she did not tell JM that she had hepatitis C. The reason she kept it a secret was because she did not understand the illness and didn't know whether it was like AIDS or whether she could infect somebody else. She described JM as one of her very good friends since the age of 14. She finally told her that she had Hepatitis C much later when she realized the illness was not as serious as she originally thought and she could not infect anybody with it. It was after that that she confided in JM. She told her at least by 1999.
36. In terms of what was necessary to prove her claim, the Claimant indicated she didn't know she had to prove anything. Everyone, she understood, was having difficulty getting medical records, and she was also having a difficult time getting medical records and she was also having a difficult time getting records from her physicians, Dr. Au and Dr. Matzko. When she finally got a lawyer, Mr. Hunt, he asked her whether anyone else had seen the blood and she advised that both her son and a friend had been there. In April, 2004, a letter from Hunt came indicating that she would need another witness besides her son. It was after that that she had another meeting with Mr. Hunt. This presumably was to explain why there was nothing in the application form indicating the existence of an independent witness who could give corroborating evidence of a transfusion.
37. The Claimant indicated at that time she was on morphine and sick all the time and very ill. In her mind she was dying and the whole thing didn't matter. She was very ill and bedridden, and drinking alcohol because of the pain. Mr. Hunt helped her complete the original appeal form, and she understood that the only person she needed was her son and no other witness was necessary. In April, Mr. Callaghan wrote that they needed a corroborating witness. In May, she had an office conference with Hunt and looked in the records. She then spoke to P and to JM and only then realized that JM had also seen the red bag of blood.
38. An affidavit of "JB" was filed and she testified and was cross-examined by telephone. JB testified that she knew about the Claimant's operation in October/November, 1988. She had known the Claimant as a friend for a long time. JB got a call from a friend of the Claimant's, "J", which she remembers as she was pregnant at the time and she decided to check it out. She remembers visiting the hospital, but doesn't know how long she stayed. The Claimant was surprised to see JB at the hospital. JB doesn't recall which hospital or which floor, but she recollects that her boyfriend drove her and no one else was there.

except JB and her boyfriend and the Claimant. They were joking around at the hospital which made the Claimant laugh. JB thinks that there was one other bed, but she doesn't really remember. What she says stands out in her mind was her kidding the Claimant over her "psychosis" over blood. The Claimant told them that she had received blood and she was crying and upset, so they were trying to make her laugh and trying to cheer her up. The Claimant told them that when she woke up from her operation, she looked up to see a bag of blood being administered. The essence of what she remembers is that the Claimant was very upset and crying over the blood, and JB was trying to comfort her.

39. Recently the Claimant called JB to ask whether JB recalled the two of them discussing the issue of a blood transfusion at the time of the operation. JB was unaware then that the Claimant had Hepatitis C. At that time, the witness told the Claimant that she did recollect coming to see her and the Claimant speaking to her about how upset she was over the blood that she had received. The Claimant did not speak to JB about this hearing until she told her she had a lawyer, and asked whether JB would be willing to testify as to these events, and asked JB whether she would go and see her lawyer, Mr. Hunt, which JB agreed to do.
40. Carol Miller testified on behalf of the Administrator. She is a nurse who graduated in 1977 and has given evidence in numerous similar proceedings. She has worked in a number of hospitals in a number of different areas in Canada. She has been at the Claims Centre of the Administrator since 2000. She testified as to what the normal procedures she would expect to see in a file if blood was given.
41. When a sample of blood is taken, a requisition is completed and signed by two nurses as a witness. The sample is sent to a blood bank, its type and RH factor are found out and, if a cross-match is required, then a technician takes it from the same type of blood to make sure there is not a bad reaction. They do a cross-match, and if it passes, it is labeled and the requisition is completed with unit numbers and then stored in the blood bank fridge. If it is later requested, there would be a doctor's order or an anesthetist's request during surgery. The anesthetist would not normally fill out an order form, but would just say they want the blood, and it will be recorded when it is administered.
42. The procedure is required as the blood is obtained out of the blood bank and signed for. At that time, when it is signed for, the numbers are read out and there must be a match. The blood bank is in the hospital. The blood is then taken back where it is administered in a similar procedure, and so before blood can be started, two other people go through the same procedure and read out the numbers to each other to make sure the proper blood is being administered and there is a match between the blood and the information on the patient's arm band. When the blood is hung it is initialed, and there is a record that it is being hung using the unit number. There are bar codes which can be put on to record

the use of stickers with numbers. There is also a record of the blood always recorded in the nurses' notes.

43. In the Claimant's records, there is a record that a sample of blood was taken where one would expect to see it, and there is evidence of a cross-match, and there are two units of blood recorded as being cross-matched. It is very common that there is a cross-match ordered but then the blood is not used. There was no requisition to show blood was required from the doctor, and no doctor's order regarding the blood, and no record of the anesthetist requiring blood. Normally there would be a record of these things in the hospital records and nothing is recorded in the Claimant's records. There is a record of the care by the nurses in the recovery room, both the medication given and a clear IV solution. If blood is used there is a location for it to be noted, and no such record exists in these medical records.
44. Moreover, there is no record in the blood bank to record if the blood left the blood bank. If blood was administered on the floor, there would also be signed documentation, but there are no nurses' notes to this effect. However, in this case, the nurses' notes were "trimmed" from the file because they were not needed to be kept. However, there are complete recovery room records available. They were not "trimmed" and it is in the recovery room that the witnesses testified that they saw blood administered. Thus, there are doctors' orders post-operation and nurses' notes and notes of medications administered, such as Demerol and other medications, but there are no notes or records of blood being transfused. The painkiller that the Claimant testified was administered, Demerol, was in fact recorded in her hip at 12:20, and there was another one administered at 13:10.
45. Normally if blood is administered, it takes 2-4 hours, and not any more than 2 hours. After four hours out of the fridge, it is considered to be too long. The period in which it is administered can be shorter than two hours if it is an emergency, but then there would be a mention of blood infused at a faster rate. It appears from the records, according to Ms. Miller, that at least three different nurses dealt with the Claimant. There is a record in the surgical records of loss of blood, which is minimal, at 200 ccs, or less than a unit of blood.
46. On cross-examination, Ms. Miller advised that she had never worked at the hospital in question, and was not familiar with the policies there. She testified that if blood was ordered in the operating room, there might not be an order recorded, but the transfusion would be written in on the medical records when it was transfused. Blood is like a medication and has to be recorded, and that would be the job of the anesthetist.

DECISION

47. This case falls to be determined pursuant to the provisions of section 3.01 of the Plan text, which provides as follows:

"3.01 Claim by Primarily-Infected Hemophiliac (top)

(1) A person claiming to be a Primarily-Infected Hemophiliac must deliver to the Administrator an application form prescribed by the Administrator together with:

- (a) medical, clinical, laboratory, hospital, The Canadian Red Cross Society, Canadian Blood Services or Héma-Québec records demonstrating that (i) the claimant has or had a congenital clotting factor defect or deficiency and (ii) the claimant received or took Blood during the Class Period;
- (b) an HCV Antibody Test report, PCR Test report or similar test report pertaining to the claimant;
- (c) a statutory declaration of the claimant including a declaration (i) that he or she has never used non-prescription intravenous drugs, (ii) as to where the claimant first received or took Blood during the Class Period, and (iii) as to the place of residence of the claimant, both when he or she first received or took Blood during the Class Period and at the time of delivery of the application hereunder.

(2) notwithstanding the provisions of Section 3.01(1)(a), if a claimant cannot comply with the provisions of Section 3.01(1)(a)(i) or (ii), the claimant must deliver to the Administrator corroborating evidence independent of the personal recollection of the claimant or any person who is a Family Member of the claimant establishing on a balance of probabilities that he or she has or had a congenital clotting factor defect or deficiency and received or took Blood during the Class Period."

48. The Claimant is unable to prove her claim pursuant to the provisions of Article 3.01, and the issue in this case is whether or not the Claimant has met the provisions of Section 3.01(2), which requires corroborating evidence independent of the personal recollection of the claimant or any person who is a Family Member which establishes on the balance of probabilities that she received a blood transfusion during the Class Period.
49. There is a heavy burden on the Claimant to demonstrate that she fits within the notwithstanding provisions of Section 3.01(2), but it is not an insurmountable burden.

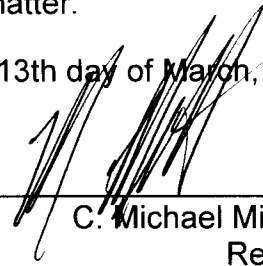
50. I have been persuaded on the balance of probabilities, based on the evidence of the witness, particularly JM, that the Claimant did receive a blood transfusion in the appropriate time frame. I have also relied to a lesser extent on the evidence of the witness JB, although had there only been the evidence of JB, and not the evidence of JM, I may well not have had sufficient confidence in the evidence to find that the Claimant had met the necessary burden of proof. In relying on the evidence of JM, and to a lesser extent of JB, I have not ignored the evidence of the Claimant or her son, but I have not relied on that evidence for the purpose of finding corroboration. For example, had I found reason to seriously doubt the evidence of the Claimant or the Claimant's son, notwithstanding the evidence of JM, I might have found that the burden of proof was not met. However, in the total context of all of the evidence, I felt confident in relying on the evidence of JM as providing credible evidence, and corroborating evidence independent of the recollection of the Claimant and her son, demonstrating that the Claimant did have a blood transfusion.
51. JM had a close relationship with the Claimant, but this is to be expected in anyone who would visit any claimant in the hospital for any procedure. Pure strangers are unlikely to visit, and are even less likely to recollect whether or not there was a transfusion. As was noted in the Knowles decision (confirmed referee decision #150), "that claimant and Mr. J. are friends was both obvious and perfectly normal, as one rarely goes to the hospital to see a total stranger!"
52. In this case, there is corroborating evidence that the Claimant and the witness had a relationship and that JM could indeed have visited because the hospital records listed JM as next of kin in respect of that particular admission. I found JM's evidence that she had been requested by the Claimant to be present when the Claimant came out of surgery, and to bringing the Claimant's son to the hospital with her, to be cogent and credible. Moreover, I found JM's evidence as to the circumstances of her coming to the hospital, seeing the Claimant's reaction to the blood, and recalling it, to be sufficient corroborating evidence in this case.
53. Standing against JM's evidence and the other *viva voce* evidence of the Claimant, her son, and JB, are the hospital records which do not contain any evidence of a blood transfusion whatsoever, and which, in the absence of JM's and JB's evidence, or any other corroborating factor, would have led to an inference that a transfusion did not take place. However, in this case, the Administrator did not work in the hospital in question, and there is no actual evidence as to what the system there was or what actually transpired in the case of this patient in this hospital. Moreover, even if there was such evidence, if I were to take the records as conclusive in each and every case, there would likely be little purpose served by the notwithstanding clause and the ability of the Claimant to demonstrate on the balance of probabilities that a transfusion did take place. Rather, such a provision would, for the most part, be rendered meaningless.

54. There have been other cases where adjudicators have found independent, corroborating evidence based either on *viva voce* evidence or other independent factors which pointed to the existence of a blood transfusion being likely. In this case, while those factors are not present, there is independent *viva voce* evidence of the direct existence of a blood transfusion on the date in question which cannot, in the circumstances, be ignored.
55. There are, however, cases where the evidence of such witnesses has been insufficient to persuade the adjudicator.
56. In confirmed referee decision #109, the referee determined that the oral evidence of the claimant, his wife, and an independent witness was too inconsistent to establish that the claimant received a blood transfusion. In particular, the referee found that the witness' testimony was "so devoid of detail as to render it of little assistance". In this case, on the contrary, JM's recollection of the events and her overall credibility was such that I am prepared to accept this evidence as establishing a basis for the claim that a transfusion occurred.
57. In confirmed referee decision #76, a friend of the claimant testified that he had seen blood transfused. The referee found that that the witness' evidence was at odds with an earlier letter in which he stated that the claimant had been transfused with a clear liquid, and there was little information about a document he purported to have seen, which indicated that the claimant had been transfused. In this case, the very basis for the recollection of all of the witnesses was the claimant's behaviour and conduct in reaction to the fact that she has been given blood, and her reaction to reassurances given to her by the witnesses and, according to their evidence, by hospital personnel. Thus, in this case, there was no issue about whether what was being administered was blood or not. Rather, if I rejected the evidence of the witnesses, I would essentially be finding that the events they described never occurred, and that witnesses had arranged to give evidence they knew to be false.
58. Fund counsel did not suggest that there was a conspiracy of the four individuals who testified to falsify their evidence in order to meet the requirements of the Section. Nor was the credibility of any of the witnesses directly challenged in cross-examination. Rather, Fund counsel suggested that the evidence of the witnesses was too similar and, in a way, too pat, for the purposes of meeting the onus required of the Claimant.
59. In referee decision #96, the referee found that there was independent evidence of a transfusion, notwithstanding the hospital records because of the nature of the surgery and the testimony of the physician that in those particular circumstances a blood transfusion was extremely likely. However, in the same case, the adjudicator found that the testimony of a witness alone would not have been sufficient to provide the requisite supporting evidence. In that case, the

evidence of the witness was found by the arbitrator to be analogous to that of the spouse, which may have put the witnesses into a "highly emotional state of concern over her welfare, thus the technical details may not have been recalled with great precision". Here, in contrast, there were no precise technical details which did not ring true, and indeed the relationship was not so close as to be highly emotional in any way.

60. At bottom, this turns on an issue of credibility and what weight I am prepared to give to the *viva voce* evidence of the witnesses who were not family members and were independent of the Claimant. Based on that assessment on these particular facts, I find on the balance of probabilities that the Claimant did receive a blood transfusion in the relevant period, and is therefore eligible for compensation pursuant to the provisions of the plan.
61. I remain seized to deal with any issue arising out of this matter.

DATED this 13th day of March, 2006



C. Michael Mitchell
Referee