DECISION

BACKGROUND

1. On August 11, 2005, the Administrator denied the Claimant's request for compensation as a Primarily-Infected Person under the Transfused HCV Plan (the "Plan"). The claim was denied on the basis that the Claimant had not provided sufficient evidence to support his claim that he was infected with HCV for the first time by a blood transfusion received in Canada during the Class Period.

2. On September 10, 2005, the Claimant requested that the Administrator's denial of his claim be reviewed by an arbitrator. He and fund counsel agreed to have the hearing conducted by way of written submissions.

3. On December 1, 2005, fund counsel, on behalf of the Administrator, filed written submissions. On December 30, 2005, the Claimant filed written submissions. The hearing concluded on January 9, 2006 when neither party filed any further submissions.

EVIDENCE

4. The Claimant swore 2 statutory declarations dated June 15, 2004 and October 4, 2004 respectively. In the first statutory declaration, the Claimant declared that he had used non-prescription intravenous drugs prior to the date of his first drug transfusion, which was sometime in 1986. He claimed that he had first used non-prescription intravenous drugs 2 or 3 times between 1989 and 1990. In his second statutory declaration, the Claimant claimed that he received his first blood transfusion on January 9, 1987. He stated that he did not use non-prescription intravenous drugs prior to his first blood transfusion but had used non-prescription intravenous drugs 2 or 3 times between 1989 and 1990.

5. The medical records indicate that the Claimant received his first blood transfusion in 1982. The units from the 1982 transfusion tested negative for Hepatitis C. The records also indicate that the Claimant was transfused in 1987 with nine units of blood on different occasions. A traceback was conducted. Donors of seven of the units tested negative for the HCV antibody. Two units were inconclusive as the donors could not be located and have not been confirmed as positive or negative for the HCV antibody.

6. The Plan provides that when a Claimant advises that they have used non-prescription intravenous drugs, the Claimant must provide "other evidence establishing on a balance of probabilities that he or she was infected for the first time with HCV by a blood transfusion in Canada during the Class Period."

7. A court approved protocol ("CAP") was approved which provides that the administrator must be satisfied on a balance of probabilities that the HCV person was first infected with HCV by a blood transfusion received in Canada in the Class Period. The burden of proof is on the Claimant. The CAP requires that the administrator conduct a traceback, which was done. Where the traceback is either negative or inconclusive, the administrator is instructed under section 7 of the CAP to perform additional investigations as prescribed under section 8 of the CAP.

8. Section 8 of the CAP requires that the administrator:

> Obtain the opinion of a medical specialist experienced in treating and diagnosing HCV as to whether the HCV infection and the disease history of the HCV Infected Person is more consistent with infection at the time of the receipt of Blood, the Class Period Blood transfusion(s) or the secondary infection or with infection at the time of a non-prescription intravenous drug use as indicated by the totality of the medical evidence.

9. The Administrator asked for the opinion of Dr. Gary Garber, a professor and head of the Division of Infectious Disease at the University of Ottawa and The Ottawa Hospital. I accept that Dr. Garber qualifies as a "medical specialist experienced in treating and diagnosing HCV."

Dr. Garber reviewed the Claimant's medical history. Although he noted in his report that there were three unaccounted for units of blood, on that same day, Canadian Blood Services reported that an additional unit had tested negative for the HCV antibody. In concluding his review, Dr. Garber states as follows:

> The patient has Hepatitis C, however the question is whether he most likely got this infection from his multiple drug transfusions or from his intravenous cocaine use. As well, his injection drug use was at a similar time course as his blood transfusion, therefore progression of disease cannot discriminate between the two. Similarly, his liver function tests have waxed and waned which seems more likely on the basis of his anti seizure medication rather than disease. As well, we would be weighing three untested [now two untested] units of blood against an undefined prolonged period of injection drug use. The patient has been quite forthright with his information although apparently was unable to give details for where he went for drug rehabilitation. He denies sharing needles but clearly one does not have to share needles to acquire Hepatitis C if paraphernalia or water is shared. Therefore, although one cannot be certain where the source of Hepatitis C was, on the balance of probabilities, it is more likely that he was exposed through his prolonged injection drug use than from his blood transfusion.

10. The Claimant's medical file, which was relied on by Dr. Garber in his review, has references to the Claimant's drug use, both intravenous and non-intravenous. In the treating physician form dated September 2, 2003, the Claimant's physician notes a history of non-prescription intravenous drug use which was admitted by the Claimant. Another physician to whom the Claimant was referred also notes a history of intravenous drug use. Both the Claimant and his mother confirmed that he attended a rehabilitation centre in 1990 in Tennessee. However, his mother stated that the Claimant was in rehabilitation for alcohol not drug abuse. Although the Claimant has submitted the address of the rehabilitation facility in Tennessee, he has not obtained the facility's records to establish that he was there for alcohol abuse only. His physician's records indicated - "drug and alcohol abuse - rehab Tennessee 1990. Abstinate (sic) – drugs 1993."

ANALYSIS

11. The onus is on the Claimant to establish on the balance of probabilities that he was first infected as a result of a blood transfusion in the Class Period and not as a result of intravenous

drug use during the Class Period. I find that the Claimant has not satisfied me that, on the balance of probabilities, he was first infected as a result of a blood transfusion in the Class Period. First, the Claimant's statutory declarations are not consistent. Also, although the Claimant states that he used intravenous drugs on only 2 or 3 occasions during the latter part of the Class Period, his medical records consistently note that he has a history of drug use. I prefer the opinion evidence of Dr. Garber to that of the Claimant. Dr. Garber concluded, after reviewing the Claimant's medical records, that it is more likely that the Claimant was exposed to the Hepatitis C virus through his prolonged drug use than from a blood transfusion.

12. The Administrator under the Settlement Agreement is required to administer the Plan in accordance with its terms. Compensation is limited to a defined class of individuals. Unfortunately, the Claimant does not qualify for compensation. The Administrator does not have authority to vary the terms of the Plan nor does an arbitrator or a referee when asked to review the Administrator's decision.

CONCLUSION

13. I uphold the Administrator's denial of the Claimant's request for compensation.

Judith Killoran
Arbitrator

February 5, 2006