

## **DECISION**

### **A. Introduction**

[1] This will be treated as a paper review, as requested by the Claimant initially. At the end of the day, although the Claimant did not formally advise that he had abandoned his appeal, he has not responded to numerous attempts over recent months to contact him. I will therefore render a decision in my capacity as Arbitrator, as requested in the Claimant's Request for Review, and confirmed by him subsequently. The Claim file, consisting of 81 pages has been marked as Exhibit 1.

[2] A summary of events with respect to this review since it was received by my office on January 3, 2006 is as follows:

- January 4, 2006:<sup>1</sup> I wrote the Claimant and Ms. Bain, Fund Counsel representing the Administrator, advising that I had been appointed as Arbitrator, and requesting confirmation that the Claimant had received copies of his complete file as well as the Plan, Rules and Fund Counsel Submissions, inviting the Claimant to advise whether he was requesting an in-person hearing, whether he actually preferred an Arbitrator (whose decision was final) to a Referee (whose decision is subject to being reviewed by the Court in the event that the Claimant disagrees with a decision) and whether he had all the information he required in order to proceed with his appeal.
- January 16, 2006:<sup>2</sup> The Claimant sent a fax to my office, confirming that he had all of the file and Plan materials and that he was not requesting an "in-person" hearing but preferred to proceed on the basis of written material. He also confirmed that he wished me to proceed as an Arbitrator. He advised that he would be available for a conference call to discuss next steps.
- January 19, 2006: A conference call was held which included the Claimant, Ms. Bain and me. At that time, the Claimant advised that he was concerned that he may not have all relevant records from North York General (or North York Branson) Hospital ("the Hospital"), where he believes he received a Blood transfusion in February, 1989. I undertook to obtain the Claimant's written consent and thereafter to write to the Hospital and request a copy of the Claimant's health record. It was arranged that once those records were received, a further teleconference would be held to discuss next steps.
- February 9, 2006<sup>3</sup>: Having received the Claimant's written authorization, I wrote to the Hospital, advising that I had received copies of the correspondence and records flowing to date between the Claimant and the Hospital, confirming that I have full authority to compel production of records,

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<sup>1</sup> Ex. 2

<sup>2</sup> Ex. 3

<sup>3</sup> Ex. 4

and requesting a copy of the **complete health record** for the Claimant regarding his February 1989 hospitalization.

- February 28, 2006: I received a letter from the Release of Information officer for the Hospital, dated February 22, 2006, enclosing an invoice and records which I numbered as pages 00-72.<sup>4</sup>
- March 2, 2006:<sup>5</sup> I wrote to the Claimant and Ms. Bain, with a copy to Carol Miller, RN, Appeal Co-ordinator, enclosing copies of the correspondence from the Hospital and inviting them to advise as to their availability to participate in a further teleconference, to discuss how to proceed from that point forward.
- March 16, 2006: A teleconference was held which included the Claimant, Ms. Bain, Ms. Miller and me. Having reviewed the records supplied by the Hospital, Ms. Miller advised that there was nothing whatsoever to suggest that a transfusion had occurred and that there was therefore no change in the Administrator's position that the claim should be denied. The Claimant advised that he had no visitors during that Hospital stay apart from an aunt and uncle and did not remember the names of any of the nurses or doctors who had treated him. The Claimant further advised that he would be seeing his current doctor on April 3, 2006 and that he wanted his doctor to review these additional records to confirm that they meant what Ms. Miller interpreted them to mean, before he decided about going forward with his appeal. A conference call was scheduled for April 5, 2006, but I was unable to participate in this call and the Claimant did not dial in either. The call was re-scheduled for April 6, 2006, but that call did not proceed because Ms. Miller was unable to participate. Attempts were made to schedule a call on later dates, but these attempts were unsuccessful.
- There was no contact from the Claimant for some time. I attempted to telephone the Claimant a number of times on May 5, 2006 and May 6, 2006. There was no answer and no answering device available on which to leave a message.
- May 6, 2006:<sup>6</sup> I wrote by ordinary mail to the Claimant and Ms. Bain, stating :  
I have been attempting to schedule a teleconference to include the 3 of us, as well as Carol Miller. However, I have been unable to reach (Claimant) by telephone and there is no answering device or voice mail, so I have been unable to leave a message. To recap ..., during our last teleconference, of March 16, 2006, (Claimant) advised that he had received the copy of his records from North York General Hospital that I forwarded to him. He further advised that he wished to have his physician review these

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<sup>4</sup> These materials are marked collectively as Ex. 5.

<sup>5</sup> Ex. 6

<sup>6</sup> Ex. 7

materials and interpret them for him before deciding how to proceed with respect to his appeal. It was decided that we would convene another teleconference afterwards to discuss the issue of how he wishes to proceed...

I will be out of country between May 9 and 18. Therefore, I invite (Claimant) to kindly leave a voice mail with my office to advise as to whether he can be available to participate in a teleconference ... on May 23, 24, 29, 30 or 31. I invite Mr. Callaghan (in Ms. Bain's absence) to email me or leave a voice mail message advising as to which of these dates and times works best for him. Once I return, I will confirm the time with both of you and with Ms. Miller...

- May 26, 2006:<sup>7</sup> As there was no response from the Claimant, I made further attempts to contact the Claimant by telephone, without success. I therefore wrote again to the Claimant and Ms. Bain, with a copy to Ms. Miller, this time by XPress Post with signature to the Claimant, as follows:

I have not heard anything from Claimant in reply to my letter of May 6, 2006 (copy attached). Further, I have been unable to reach (Claimant) by telephone and there is no answering device available for me to leave a message for him. I would appreciate receiving a letter, fax, or collect call from (Claimant) shortly, so we can discuss how or whether he wishes to proceed with his appeal. If (Claimant) requires more time to prepare for his appeal, is awaiting further information, or requires assistance in obtaining further information, I will be pleased to take all reasonable steps to accommodate this. However, if it is (Claimant's) intention not to pursue this appeal, I would appreciate being advised accordingly.

In the event that I have not heard from (Claimant) by June 30, 2006, I will contact Ms. Bains and if she chooses to do so, I will entertain her request to consider this appeal to have been abandoned....

- May 29, 2006:<sup>8</sup> The Canada Post website confirmed that the Claimant had signed for my letter(s) of May 6 and May 26, 2006. The Claimant's signature is clearly visible.
- July 13, 2005:<sup>9</sup> Ms. Bain sent an email, stating:

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<sup>7</sup> Ex. 8

<sup>8</sup> Ex. 9

<sup>9</sup> Ex. 10

I understand that the claimant has not responded to several attempts on your part to contact him, and that as a result you are considering dispensing with the appeal. Under the circumstances, we would request that you do in fact make an order dispensing with the appeal.

- There has been no contact from the Claimant since the March 26, 3006 teleconference and no reply to my letters of May 6 and 26, 2006.

## B. Document Review

[3] By way of Application dated May 5, 2005, the Claimant, a Manitoba resident, submitted a claim as a Primarily-Infected Person pursuant to the Transfused HCV Plan ("the Plan"), which is Schedule B to the 1986 -1990 Hepatitis C Settlement Agreement ("the Settlement Agreement"). There is no dispute that the Claimant has tested positive for the Hepatitis C Virus (HCV).

[4] Pursuant to the terms of the Settlement Agreement and the Plan, the "Class Period" (January 1, 1986 to and including July 1, 1990) is the only period of time in respect of which compensation may be available. Further, while there are many possible sources of infection with respect to the HCV, the Plan only provides compensation for individuals who have established that they received transfusions of defined blood products during the Class period, and generally where the donors have been tested and found to be infected with the HCV. The Claim was denied by the Administrator on the basis that the Claimant had been unable to provide evidence that he received a transfusion of blood products during the Class Period. By way of Request for Review dated December 3, 2005, the Claimant sought a review of the Administrator's denial of his claim by an Arbitrator.

[5] The Claimant states that he believes he received a Blood transfusion at North York Branson Hospital, Ontario. In his Blood Transfusion History form (TRAN5)<sup>10</sup> he states that he was transfused in February, 1989. Dr. Ken Kasper, the Claimant's present Manitoba physician, completed the Treating Physician Form (TRAN 2),<sup>11</sup> indicating that the Claimant received a transfusion during the Class Period. Carol Miller wrote to Dr. Kasper to determine the basis for his TRAN2 reply, inviting him to confirm whether his response had been based on a verbal response from the patient or if Dr. Kasper had obtained medical documentation evidencing a transfusion within the Class Period.<sup>12</sup> Dr. Kasper wrote back<sup>13</sup> advising that he had no medical documentation to support a transfusion between the dates submitted and that the TRAN2 information was solely based on verbal information from the Claimant. Lab Reports Sheets<sup>14</sup> show that a request

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<sup>10</sup> Ex. 1, p. 38

<sup>11</sup> Ex. 1, pp. 26-32

<sup>12</sup> Ex. 1, p. 80

<sup>13</sup> Ex. 1, p. 81

<sup>14</sup> Ex. 1, pp. 70, 75

was made for a cross-match of 6 units of blood for the Claimant, but do not indicate either that the cross-match was in fact carried out, or that any blood was ever transfused. A cross-match is a procedure in which Blood is requested and saved in the hospital Blood Bank, in the event that it may be needed for a transfusion. However, not all Blood that has been cross-matched is in fact transfused. It is not uncommon for Blood which has been cross-matched never to be transfused. As a result, the fact that a cross-match has been performed does not demonstrate that a Blood transfusion has occurred. On September 30, 2005, the Canadian Blood Services (CBS) wrote to the Traceback Co-ordinator, advising that the Hospital had searched their records relating to the Claimant and there was no record of a transfusion.<sup>15</sup> There is nothing in the hospital records originally supplied by the Claimant, the CBS records, or the additional hospital records obtained upon my request, to support the Claimant's assertion that he received a transfusion. The hospitalization at that time pertained to two stab wounds. The Claimant reported at the time that he had consumed 40 ounces of rum, which, coupled with the trauma from the stabbings, undoubtedly explains why his recollection of events may well be understandably hazy. Surgery was performed, but there is nothing in the detailed Emergency Room Records, Consultation Reports, Physician's Orders, Anaesthesia Record, Nurses Record of Operation, Fluid Balance Records, Discharge Summary or other records to suggest that a transfusion had occurred. It does not appear that any significant record is missing. Had blood been transfused, one would have expected this to be documented in a number of these records. Further, I accept Ms. Miller's comments to the effect that there is nothing in these records that in any way supports the Claimant's assertion that a transfusion occurred, following her review of the records supplied by both the Claimant and me.

#### **D. Decision**

[6] In the circumstances, upon careful consideration of the Settlement Agreement, Plan and documentary evidence tendered, the Administrator's denial of the Claimant's application for compensation is hereby upheld.

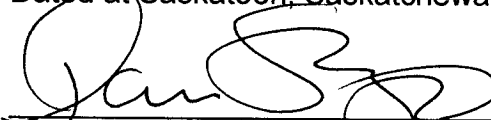
[7] Having said this, there is nothing to suggest that the Claimant has not held an honest belief that he received a Blood transfusion at the hospital. There was certainly bleeding and surgery associated with his attendance there, which occurred during the Class Period. I can readily understand how he came to the conclusion that he was transfused with infected Blood.

[[8] However, unfortunately for the Claimant, there was no evidence or proof produced to support this belief, and the Claimant ultimately appeared to accept the inevitability of this conclusion, as evidenced by his apparent loss of interest in pursuing the appeal.

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<sup>15</sup> Ex. 1, pp. 78, 79

Dated at Saskatoon, Saskatchewan, this 14<sup>th</sup> day of July 2006.

  
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**Daniel Shapiro, Q.C., C. Arb., Arbitrator**

THIS DOCUMENT has been prepared by:

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