

ARBITRATOR'S DECISION
HEPATITIS C CLASS ACTION
JANUARY 1, 1986 – JULY 1, 1990

Claimant:	Claim 486
File No.:	416611-22
Province of Infection:	Alberta
Province of Residence:	Alberta

DECISION

1. On July 12, 2000, the Administrator approved the Claimant's claim at Level 5 and on May 17, 2005 the Administrator allowed a claim for loss of income benefits.
2. The Claimant requested an oral hearing by an Arbitrator to review the decision of the Administrator.
3. The hearing was held on November 8, 2005 at Calgary, Alberta.
4. Neither party disputed the following facts:
 - (a) The Claimant resides in Calgary and has been self employed since 1975 as a short haul trucker;
 - (b) He had purchased his first truck in about 1975, then a loader in 1981 and thereafter a bigger truck with more power;
 - (c) His work services consisted of short haul trucking, transporting gravel and snow removal;
 - (d) He began experiencing severe pressure to his head which affected his ability to work in the years 1983-1985;
 - (e) He was eventually hospitalized in 1988 for surgery due to aneurysms for which he received transfused blood;
 - (f) He was still making payments on his trucking equipment when he underwent the surgery;
 - (g) His sister had also sustained an aneurysm which was treated with medication to control her blood pressure;
 - (h) Following the surgery, he continued to experience severe symptoms in his head, then his stomach, and then throughout his body, all of which affected his ability to perform his work duties;
 - (i) While he had performed snow removal services in the winters before 1988, his symptoms precluded him from performing these services after 1988;
 - (j) His spouse, who had previously performed bookkeeping services for the business, was obliged in 1993 to learn to drive a gravel truck and to take over more and more of the driving responsibilities;
 - (k) His spouse arranged with the bank to refinance the loan obligations;

- (l) His treating physician suspected other causes such as cancer, for the severe symptoms, but gradually ruled out such diseases until the Claimant was eventually tested for and diagnosed with Hepatitis C in about 1996;
- (m) The symptoms persisted and when the Claimant was prescribed experimental drugs such as Interferon, the drugs aggravated his symptoms to the point he was put on suicide watch;
- (n) Despite the severe symptoms, he attempted to contribute to the trucking operation as he was able;
- (o) In about 2000 or 2001, the Claimant, his spouse and two sons formed a limited company to operate the trucking business;
- (p) It is a Canadian controlled private corporation, and the earnings from the business do not flow directly to the Claimant but through the company;
- (q) The Claimant retains shares in the company and continues to participate in running the business;
- (r) On the basis that his income from the business decreased due to his Hepatitis C, the Claimant received loss of income benefits from the Plan, but he disputes the accuracy of the calculations of the Administrator's expert and contends the deductions are incorrect or inappropriate.
5. The Claimant made the following arguments in support of the appeal:
- (a) *"Since the Class Action Settlement Agreement provides that no tax is payable on any money received by a class member, an amount for CPP premiums should not be deducted in calculating his net income since it is not remitted by the Administrator into the CPP system and upon attaining age 65, his CPP retirement benefit may be reduced as a result of the lack of contributions remitted on his behalf during his period of disability;*
- (b) *If the Administrator is representing the Claimant's employer in the case of a class member with self employed earnings, then the Administrator should issue a T4A;*
- (c) *If tax and CPP are to be withheld and not deposited to the class member's CPP plan or his tax account, then the Administrator should be bound to remit such amounts to Revenue Canada, as would any other employer;*
- (d) *The failure to remit payments into the CPP will deprive the claimant of a CPP pension or his spouse from CPP survivor or death benefits if he is subsequently disqualified from the Settlement Agreement or predeceases his spouse;*
- (e) *Canadian controlled private corporation's taxable earnings should not be treated as the Claimant's personal earnings";*

6. Fund Counsel made the following submissions:

(a) Section 4.02 of the HCV Transfused Plan establishes the formula for calculation of loss of income. In accordance with the formula, CPP Premiums are considered to be “ordinary deductions” which are applied to both pre-claim and post-claim gross income figures, for purposes of arriving at pre-claim and post-claim net income figures. The Claimant’s annual loss of net income is the difference between the Claimant’s pre-claim and post-claim net income.

(b) As Section 4.02 expressly requires deductions to be made in this fashion, the Administrator has neither the authority nor the obligation to remit contributions to CPP on the Claimant’s behalf.

(c) Decision 118 by referee Judith Killoran supports Fund Counsel’s position when she ruled as follows:

“I agree with the submissions of fund counsel that regardless of the precise impact of the manner in which CPP premiums...are dealt with under section 4.02 of the Plan, the Administrator has not been given any discretion to deviate from that formula for the purposes of calculating loss of income. Section 4.02 expressly requires CPP premiums to be deducted in the calculation of pre-claim and post-claim net income. There is no obligation or authority on the part of the Administrator under the Settlement Agreement of the Plan to remit CPP contributions on behalf of the claimant.

While I sympathize with the concerns expressed by the claimant, I find that the Administrator correctly applied the formula for calculating the claimant’s loss of income as set out in the Plan.

The Administrator had no discretion to alter this formula. There is also no discretion granted to an Arbitrator or Referee to modify the terms or provisions of the Plan:”

7. The testimony given by the Claimant and his spouse at the oral hearing gave rise to a consideration of whether the Claimant could adduce additional evidence to prove that the calculation as to Pre-Claim Net Income under section 4.02(2) (b) (ii) should be increased on the basis that his “Earned Income” for the three highest income earning years preceding his entitlement to compensation might have been higher absent the Hepatitis C infection. The Claimant did not have any additional evidence to adduce. However, Fund Counsel requested and was given an opportunity to make further written submissions concerning paragraph (e) of the Claimant’s argument.

8. On November 15, 2005 Fund Counsel made the following additional submission:

(a) The Claimant's entitlement commenced as of 1988 when he was first infected with HCV;

(b) For purposes of calculating the Pre-Claim Net Income, only the years before 1988 are taken into account to determine the highest earning years.

(c) The highest years to date were found to be 1981, 1982, and 1983.

(d) There seems to be no evidence that could be presented by the Claimant to bring himself within the section applicable to claimants who contracted HCV at some time prior to the years in which they had become entitled to loss of income compensation.

(e) Although the Claimant was advised that 50% of income earned though the company would be attributed to the Claimant as post-claim income, such attribution has not occurred to date since in the years 2002, 2003 and 2004, the company has, after various deductions, reported negative or no income for income tax purposes.

(f) Accordingly, there is no jurisdiction in the Arbitrator for a ruling where no factual basis exists for the same,

(g) In the alternative, any such attribution of income, if made, would be permitted in any case and would be in accordance with the terms and provisions of the Plan.

(h) The Plan specifically addresses the calculation of loss of income and with respect to the attribution to an individual of income earned through a corporation, Section 4.02(2)(d) defines Earned Income as follows:

“Earned Income” means taxable income for the purposes of the Income Tax Act (*Canada*) from an office or employment or from the carrying on of an active business and any taxable income for purposes of the Income Tax Act (*Canada*) of a corporation from the carrying on of an active business to the extent that the person establishes to the satisfaction of the Administrator that the person has significant shareholding in such corporation and that such income is reasonably attributable to the activities of such person.

(i) It is submitted that the Administrator is correct to use a similar approach for the purpose of determining what will qualify as earned income for purposes of calculating post-claim loss of income.

(j) It is submitted that the Claimant retains a significant shareholding in the company, he continues to participate in the running of the business and that the income of the business is in part, at least, reasonably attributable to his activities.

9. On December 3, 2005 the Claimant advised that he had no further reply or rebuttal to the submissions made by Fund Counsel.

10. It was evident after a full discussion at the hearing that there were two arguments to be maintained by the Claimant. The first related to the requirement of the Administrator to submit funds to the CPP as if it were an employer for purposes of the Income Tax Act. The second related to the attribution of income of the business to the Claimant.

11. I found both the Claimant and his spouse to be credible and justifiably concerned about the Claimant's health condition in view of his ongoing and clearly severe symptoms and the consequences to his spouse to support the family business.

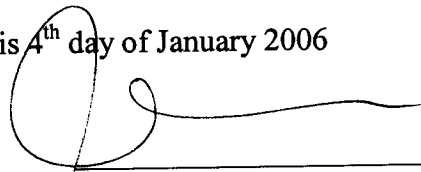
12. While I sympathize with the Claimant's concerns, I note that there is no discretion granted to the Administrator to alter the formula in the Plan or to an Arbitrator or Referee to modify the terms or provisions of the Plan.

13. Accordingly, in respect of the first issue, I cannot accept the rationale of the Claimant for the argument that the Administrator should remit CPP contributions. Further, I have reviewed and agree with the reasoning of Referee Judith Killoran in decision 118 which I find applicable to the case at hand. In the result, I find there is no basis to require the Administrator to remit CPP contributions on behalf of the Claimant.

14. In respect of the second issue, I am persuaded that it is premature for me to make a ruling where no factual foundation has been established that corporate income has yet been attributed to the Claimant as post-claim income. **It follows from this however, that if the Claimant's benefits are reduced at any time in the future due to the attribution of corporate income to the Claimant, the Claimant will have the right at that time to challenge the reduction in benefits and will not be precluded from attempting to show that a 50% attribution rate is unreasonable given the circumstances then in existence including the contributions being made by the Claimant's spouse and sons for the corporation's revenues.**

15. Subject to the above, I uphold the Administrator's denial of the Claimant's request for increased compensation.

Dated at Edmonton, Alberta, this 4th day of January 2006



Shelley L. Miller, Q.C.
Arbitrator