IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***HCV Settlement Agreement Claim No. 11910,***
2004 BCSC 1431

Date: 20041104
Docket: C965349
Registry: Vancouver

IN THE MATTER OF THE HCV 1986-1990 TRANSFUSED SETTLEMENT AGREEMENT RE: CLAIM NO. 11910

Before: The Honourable Mr. Justice Pitfield

Reasons for Judgment

Counsel for the Claimant:	Self-Represented
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Written Submissions Received:	September 14, 2004 October 4, 13, 2004
	Vancouver, B.C.

[1] The Claimant opposes confirmation of Referee Daniel Shapiro's decision dismissing an appeal from the Administrator's rejection of her claim for compensation advanced under the Transfused HCV Plan which is part of the 1986-1990 Hepatitis C Settlement Agreement. The Administrator concluded that the claim must fail because the Claimant was unable to demonstrate that she had been infected with the HCV antibody for the first time by blood or blood products transfused in the period covered by the Settlement Agreement.

[2] The nature of the review in which the court must engage when considering a Claimant's application to oppose confirmation of a referee's decision was described by Winkler J. of the Ontario Court of Justice in *Confirmed Referee Decision No. 2,* November 27, 2001, at para. 6, as follows:

> In a prior decision on a motion to oppose confirmation of a referee's decision in this class proceeding, the standard of review set out in *Jordan v. McKenzie* (1987), 26 C.P.C. (2d) 193 (Ont. H.C., aff'd (1990)), 39 C.P.C. (2d) 217 (C.A.) was adopted as the appropriate standard to be applied to motions to oppose confirmation of a referee's decision by a rejected claimant. In *Jordan*, Anderson J. stated that the reviewing court "ought not to interfere with the result unless there has been some error in princip[le] demonstrated by the [referee's] reasons, some absence or excess of jurisdiction, or some patent misapprehension of the evidence".

[3] The Claimant's circumstances are most unfortunate. For a variety of reasons, she required breast-related surgery on numerous occasions from and after 1988. She tested positive for the HCV antibody in 2001. She firmly believes she received a blood transfusion in British Columbia when she underwent surgery on June 13, 1988.

[4] To be eligible for compensation under the Transfused HCV Plan, the Claimant must demonstrate that she received blood or blood products in the Class Period extending from January 1, 1986 to and including July 1, 1990. The fact of transfusion with infected blood is most often identified through a traceback procedure approved by the court for use in connection with the Plan. The traceback conducted in respect of the Claimant failed to

identify her as a recipient of any transfused blood or blood products in the Class Period. That being the case, the Claimant was obliged to comply with s. 3.01(2) of the Plan in order to substantiate her claim. The section provides as follows:

> (2) Notwithstanding the provisions of Section 3.01(1)(a), if a claimant cannot comply with the provisions of Section 3.01(1)(a) [requiring the claimant to demonstrate receipt of a blood transfusion in the Class Period], 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 received a blood transfusion in Canada during the Class Period.

[5] Having considered all of the evidence available to him, the Referee concluded as follows at paras. 40 through 42 of his reasons:

> [40] In conclusion, there was simply no persuasive contradictory medical or other evidence adduced by the Claimant that could meet either the Miller or Nols criteria, in order to allow a Referee to reasonably conclude that the Claimant had received a blood transfusion during the Class Period.
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> [41] It must be said that the Claimant has been most honourable in her manner of approaching this claim and in advancing her claim in the most vigorous way possible. In the interests of finding the truth, she has been most forthcoming with information and documentation, even where it did not support her position. Unfortunately, the Claimant will in all probability never know the definitive source of her infection with any degree of certainty. The Claimant has emerged from an astonishing array of medical, surgical and personal setbacks in such a manner that has permitted her to retain a positive deposition and sense of humor, all the while, from all descriptions, admirably parenting her son and developing into an accomplished artist herself. She is quite a remarkable individual. If the applicable test was whether or not the Claimant is a good person, she would have succeeded. If the applicable test was whether or not the Claimant is in poor health and in need of financial help, she would have succeeded. If the applicable test was whether or not the Claimant was truthful in her belief that she obtained a blood transfusion, she would have succeeded, in that I have no doubt whatsoever as to the honesty of her views in that respect. The evidence points inescapably to the conclusion that she was simply mistaken. The Claimant did not ignore or minimize the problems in her life and, while she was clearly upset with Drs. W and K and is mistrustful in particular of Dr. W, her evidence was provided in a most candid and straightforward manner. There is no basis to doubt the sincerity of her views. In other words, if there is any way that the evidence would have allowed me to find in the Claimant's favour, I would be been delighted to have been able to do so.

> [42] However, regrettably for the Claimant, in the final analysis, while the evidence did not establish the definitive source of her HCV infection, I find that she was unable to establish that she received a blood transfusion during her June 1988 surgical stay at UBC Hospital or at any other time during the Class Period. There was unfortunately for the Claimant simply no evidence that could reasonably be interpreted so as to rise to the level necessary of proof necessary to meet the Miller and Nols tests.

[6] I have reviewed the documentary evidence made available to the Referee in the course of a thorough hearing. I am satisfied that the Referee made no error in principle and that he reasonably comprehended all of the evidence. As a result, there is no basis upon which to refrain from confirming his decision.

[7] In my opinion, there is little to be gained by embarking upon a lengthy recitation of the Claimant's circumstances or the evidence before the Referee. They are set forth in the Referee's extensive reasons. A summary will therefore suffice.

[8] The Claimant testified before the Referee with respect to her belief that she had been transfused as follows. She underwent surgery on June 13, 1988. She saw a drainage bag, a fact confirmed by another witness, from which she concluded there had been extensive bleeding in the course of surgery. The Referee recounted her evidence in this regard as follows:

> In the recovery room, she was in a lot of pain and had some nausea but was given another shot and felt better. She can remember seeing a bag with some blood in it although she was not sure if it was after the 1988 or 1989 surgery. After she was back in her room, Dr. W came in with his hat and gown on and asked how she felt. The Claimant asked about her breasts. She asked Dr. W about the bag and he replied that they put a tube in to draw blood from her chest. She knew it was a drain bag. She asked if she had a transfusion and he replied: "No, but we had to give you a bit of blood." This was the only time the issue of blood was brought up. She was "all doped up" and had not yet gotten out of bed. She was upset, not due to the blood issue, but rather due to the pain and swelling she was experiencing and to the deformity of her breasts that she was already noticing.

[9] The Referee dealt with other evidence pertaining to the possibility of transfusion. He found that the hospital records made no reference to blood or blood products having been transfused during or after the surgery of June 13, 1988. The records indicated that the Claimant's blood type was identified and recorded on a request for blood form completed the day prior to her surgery. He found that blood type was determined so that it would be known if blood were required.

[10] The Referee found, by reference to evidence received and considered by him, that the bag the Claimant saw in the recovery room was a Hemovac used in the course of, and subsequent to, surgery to facilitate the removal of oozing fluids customarily resulting from the kind of surgery in question thereby promoting the healing process. He found that the records and operating reports indicated no extensive bleeding or blood loss which would be pre-requisites to transfusion. He found that none of the operating room nursing record, the anaesthesia record, the physician's orders, the post anaesthesia recovery room record, the discharge summary, or the patient cumulative summary made any reference to a transfusion of blood or blood products.

[11] The Referee found that blood service records were not purged. He found that none of the blood service records made reference to any transfusion of the Claimant. He rejected the Claimant's suggestion that the fact of transfusion was omitted from the records. In doing so, the Referee had regard for the fact that obtaining blood for transfusion required a request signed by two persons, a doctor's order, and entries made in a log to record transfusion. The Referee found that there was no evidence pointing to completion of any of these steps. The Referee also considered the evidence of the surgeon identified by the Claimant as the individual who told her she had received blood. The doctor reported no recollection of telling the Claimant she had received blood and testified to no recollection of ever having given a blood transfusion to any patient since joining the staff of the hospital in

which the surgery was performed. Another surgeon who operated on the Claimant at a later date testified to his experience that operative records "always" record and reflect all fluids, drugs, blood substitutes or blood given during operative procedures.

[12] In the result, the Referee determined that the Claimant's contention that she had been transfused was not corroborated by any of the medical evidence whether derived from written reports or the evidence of the attending doctors.

[13] The Referee described other risk factors including a tattoo, prior surgery, prior infection with Hepatitis B and possible IV drug use as reported by two of her physicians that might explain the Claimant's infection with the HCV antibody. The Claimant strenuously disputes the suggestion that she should be described as an IV drug user. I do not construe the Referee to have made a finding that the Claimant was ever an IV drug user. Rather, he was pointing to the fact that something other than a blood transfusion might account for the Claimant's infection.

[14] The Referee carefully described why, in his view, the Claimant's position differed from that in the Miller and Nols references to which he referred in his reasons. In the Miller reference, an attending doctor testified to the fact of probable extensive bleeding and the high probability of transfusion. That is not the evidence in relation to the Claimant's surgery. In the Nols reference, the complete lack of records made it impossible for the claimant to embark upon the task of proving transfusion. Such is not the case presently. The hospital records relating to the surgery by which the Claimant believes she was infected were available and were produced.

[15] In the circumstances, the decision of Referee Shapiro must be confirmed.

"Mr. Justice Pitfield"