

**IN THE MATTER OF A REFERENCE TO REVIEW THE  
DECISION OF THE ADMINISTRATOR UNDER THE  
HCV 1986-1990 TRANSFUSED SETTLEMENT AGREEMENT**

Claim I.D. No. 12129

Before: Vincent R. K. Orchard, Q.C.

Heard: November 17, 2004 and December 5, 2005 at Vancouver, British Columbia

## **DECISION**

**Claim ID: 12129**

### **OVERVIEW**

1. The Claimant applied for compensation as a Primarily-Infected Person under the Transfused HCV Plan (the "Plan") established by the 1986-1990 Hepatitis C Settlement Agreement (the "Settlement Agreement").
2. By letter dated January 21, 2004 the Administrator denied her claim on the basis that the Claimant did not receive transfused Blood within the Class Period.
3. The Claimant requested that the Administrator's denial of her claim be reviewed by a Referee.
4. An in-person hearing commenced on November 17, 2004. The hearing was attended by the Claimant and her husband. Mr. John Callaghan, Ontario Fund counsel, attended the hearing as did Ms. Carol Miller of the Administrator's office. The Claimant and Ms. Miller testified. The hearing was adjourned primarily (i) to obtain clarification of the evidence of Dr. H. H. Allen, an obstetrician and gynecologist, who operated on the Claimant in London, Ontario during July, 1989, and; (ii) to obtain the complete medical file of the Claimant from the London Health Sciences Centre, also known as Victoria Hospital (the "Hospital"), for the Class Period.
5. The hearing resumed by telephone conference call on December 5, 2005. Dr. H. H. Allen testified. During the adjournment a complete copy of the Claimant's medical chart from the Hospital was obtained. As well, Mr. Callaghan, at my direction, caused a law clerk to attend at the Hospital and provide evidence concerning an illegible photocopy of a document entitled Victoria Hospital Blood Bank Report of July 16, 1989, page 34 of the paginated medical chart. According to the law clerk's memorandum of September 15, 2005, which I accept as evidence, the report describes the Claimant's blood type and a negative antibody screen. The document does not indicate a transfusion. In addition, the law clerk also noted that during her visit to the Hospital, the Hospital's Health Records Department checked their database and confirmed that during the Claimant's admission of July, 1989 she did not receive any blood transfusions.

6. The Claimant and the Fund counsel have submitted written submissions and made oral submissions. In order to determine the Claimant's eligibility for compensation under the Plan, the threshold question is whether there is sufficient proof that the Claimant received a blood transfusion during the Class Period.

7. The Claimant is infected with Hepatitis C. The Claimant honestly believes she contracted Hepatitis C as a result of the admission to the Hospital in July 1989. She believes that she had a transfusion on the ward following the surgery by Dr. Allen.

8. Canadian Blood Services ("CBS") conducted a Traceback which results were summarized in a letter dated November 24, 2003 (claims file pp. 71-73). The results of the Traceback indicate that the Claimant received transfusions in the pre-Class Period in 1979 and 1984. There were no blood bank records of transfusion at the Hospital in July 1989, nor at any other time in the Class Period.

9. There was some confusion regarding the blood bank records and what preliminary tests and screens may have been done regarding the Claimant's blood during her admission to the Hospital in July 1989. There was no confusion in the evidence concerning whether or not the records indicated a transfusion occurred. Dr. Allen's evidence cleared up any confusion regarding the records of the Hospital and specifically blood bank records.

## **DECISION**

10. As a Referee and trier of fact, I am required to give written reasons for my decision. However, reasons for decision are not intended to recite all the evidence and submissions received. That I choose to refer to only some of the evidence and the submissions does not mean that I have not considered everything put before me.

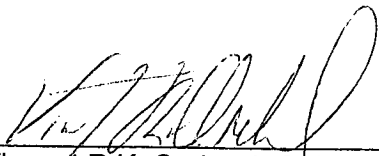
11. To be entitled for compensation under the Plan as a Primarily-Infected Person, a claimant must provide records as set out in Article 3.01(1)(a) proving that he or she received a blood transfusion in Canada during the Class Period. If a claimant cannot provide the records required by Article 3.01(1)(a), Article 3.01(2) states that a claimant must deliver evidence, independent of the Claimant's recollection or that family members, establishing on a balance of probabilities that he or she received a blood transfusion in Canada during the Class Period. If a blood transfusion was not received during the Class Period, then the claimant is not entitled to compensation.

12. Dr. Allen's oral testimony was quite conclusive of the threshold issue of a blood transfusion during the Class Period. Dr. Allen testified that he attended the Hospital and reviewed all records very carefully for any evidence of a transfusion or any evidence that there may have been some defect in recordkeeping. Dr. Allen found no record keeping deficiency in the chart and no record of transfusion. Indeed he testified that none of his patients who had the type of surgery he performed on the Claimant required a blood transfusion. The Claimant questioned Dr. Allen concerning her post-operative hemoglobin levels as she believes she had a reduced hemoglobin reading post-surgery. Dr. Allen noted that from the chart the Claimant's hemoglobin level was 105 and a transfusion would only be ordered if the hemoglobin reading was below 70. In response to the Claimant's questioning concerning poor record keeping or omissions from the chart, Dr. Allen gave evidence that there was no defect or gap in the chart and he added that he had been through the chart at least 10 times. Dr. Allen also testified that the nursing staff must record any transfusion: two nurses must sign off and record a transfusion. Dr. Allen clarified that the Claimant did not have what is referred to as a "full group and cross", rather she had a "group and reserve". She also had an antibody screen which was reported as negative. A "group and reserve" simply means that there is a reserve of similar blood in the blood bank available for cross matching if necessary. No specific blood is set aside for the patient. Dr. Allen clarified a letter he wrote on June 9, 2004 in which he indicated that the Claimant had a cross match. He corrected that in a letter dated December 2, 2004 in which he indicated that she had "a group and reserve". More importantly in his written evidence (letters dated June 9 and December 2, 2004 and August 26, 2005) and in his oral testimony, Dr. Allen has maintained throughout that the Claimant did not have a transfusion during her admissions to the Hospital in July, 1989 nor was there any reason for her to have a transfusion.

13. Despite the Claimant's honest belief she had a transfusion in July 1989 at the Hospital, there is absolutely no evidence as required by Article 3.01(2) of the Plan to support her belief. It is clear that the Administrator's decision must be sustained. On the basis of the facts before the Administrator, the Administrator had no alternative but to deny the claim. There is simply no proof that the Claimant received transfused Blood in Canada during the Class Period. It has been said many times that the Administrator has no discretion to allow compensation where the required proof does not exist. The Administrator has no authority to alter or ignore the terms of the Plan established under the Settlement Agreement. As a Referee, called upon to review a decision of the Administrator, I am also bound by the terms of the Plan and cannot amend or act contrary to its terms.

14. Accordingly, I find the Administrator has properly determined that the Claimant was not entitled to compensation under the Plan. I uphold the Administrator's denial of the claim.

DATED at Vancouver, British Columbia, this 4<sup>th</sup> day of January, 2006.



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Vincent R.K. Orchard, Q.C., Referee