IN THE MATER OF A REFERENCE PURSUANT TO THE HEPATITIS C 1986-1990 CLASS ACTION SETTLEMENT AGREEMENT
(Parsons v. The Canadian Red Cross et al.
Court File No. 98-CV-141369)

BETWEEN

Claimant File 1401831

- and -

The Administrator

(On a motion to oppose confirmation of the decision of Shelley L. Miller, released August 4, 2004)

Reasons for Decision

WINKLER R.S.J.:

Nature of the Motion

1. This is a motion to oppose confirmation of the decision of a referee appointed pursuant to the terms of the Settlement Agreement in the Hepatitis C litigation for the class period January 1, 1986 to July 1, 1990. The Claimant made a claim for compensation pursuant to the Agreement which was denied by the Administrator charged with overseeing the distribution of the settlement monies. The Claimant appealed the denial to a referee in accordance with the process set out in the Agreement. The referee upheld the decision of the Administrator and denied the appeal. The Claimant now opposes confirmation of the referee's decision by this court.

Background

2. The Settlement Agreement is Pan-Canadian in scope and was approved by this court and also approved by courts in British Columbia and Quebec. (See *Parsons v. The Canadian Red Cross Society* (1999), 40 C.P.C. (4th) 151 (Ont. Sup. Ct.)). Under the Agreement, persons infected with Hepatitis C through a blood or specified blood product transfusion, within the period from January 1, 1986 to July 1, 1990, are entitled to varying degrees of compensation depending primarily on the progression of the Hepatitis C infection.

Facts

3. The Claimant is a Primarily Infected Person who resides in Alberta. She has been approved by the Administrator for level 3 compensation pursuant to the Transfused HCV plan.

4. The Claimant is entitled to compensation for loss of income pursuant to section 4.02 of the Transfused HCV Plan. At issue is the quantification of the Claimant's loss of income.

5. The Claimant has completed a massage therapist course and was a registered massage therapist.

6. In submissions provided in support of this motion, the Claimant indicated that she briefly operated her own massage therapy practice in 1996. She charged $30 for half-hour massages and $60 for one-hour massages. The Administrator, however, indicated in its submissions to the referee that the Claimant only worked for a few clients and that these clients were closely related to her. The Claimant's experience operating a massage therapy practice was not addressed in detail by the referee.

7. Some time in 1996, the Claimant became too fatigued to continue her practice. She believes that the fatigue was related to her hepatitis C infection.

8. There is no evidence that the Claimant has any experience as a massage therapist other than her brief experience operating her own practice.

9. The Administrator offered to base the Claimant's loss of income on the average industrial wage in Canada, which was calculated to be $35,853.00. The Claimant declined this offer on the grounds that her likely income would have been higher.

10. At the hearing before the referee, the Claimant agreed that she would have worked under contract at a massage therapy clinic had she not contracted HCV. She also agreed that she would have earned an hourly rate of $35.67. However, after the hearing, she indicated to the referee in an e-mail dated June 5, 2004 that she no longer agreed with this hourly rate and she implicitly reopened the issue of whether she would have worked as a self-employed therapist or a contractor.

11. In submissions made for the purpose of this motion, the Claimant explained why she changed her position:

> While in the hearing Fund counsel requested that I accept an hourly wage of $35.67 (which was based on 5 letters I obtained from local employers who pay massage therapists an hourly wage the average was $35.67 an

> hour) and requested that we base the agreement on a therapist working in a clinic setting working for an employer. At that time I believed it would be based on a full time position and all the businesses expenses would be paid by my employer. So I quickly accepted and I believed it would be based on the following formula: 40 hours a week X $36.67 an hour X 50 weeks a year which equals $71340 a year. After accepting the offer, Fund Counsel then introduced evidence that the $35.67 should be based only on 22 hours a week and speculated that 16% of that income going to business expenses. I disagreed with Fund Counsel and no longer wanted to be held to the $35.67 senario as I strongly disagreed to the hours worked and the 16% expenses …

12. According to the referee's decision, the Claimant's modified position seemed to be that:

a) she would have billed customers $60 per hour (presumably, she would have had to share part of this amount with her clinic if she worked as a contractor);

b) she would have seen clients for 6 hours a day and worked 5 days a week for fifty weeks per year;

c) she would have worked through most statutory holidays;

d) she would have delayed having children in favor of pursuing her career; and

e) her gross annual income would have been $73,000.00 as a contractor and $97,000.00 as a self-employed massage therapist.

13. The referee indicated at paragraph 28 of her decision that "[t]he Claimant argued that her expenses would amount to $815 …" whereas she indicated at paragraph 32 that all parties agreed that deductions for self-employment should be equal to 37.5% of gross revenue. Presumably, the $815 amount relates to the expenses that the Claimant would have incurred if she had become a contractor.

14. The referee heard evidence from a number of witnesses in addition to hearing evidence from the Claimant. This includes evidence from an accountant with PriceWaterhouseCoopers LLP who testified on behalf of the Administrator and evidence from a friend of the Complainant who was employed as a massage therapist. The witnesses had differing views on many of the main issues.

15. The referee was presented with several surveys that contained conflicting information about the salaries of massage therapists. There were concerns about the methodology behind the surveys. For example, it was submitted that surveys failed to distinguish between full-time and part-time workers and defined "massage therapist" to include professionals other than massage therapists.

16. The referee concluded that the Claimant would have earned an annual income of $31,781.97 during the years that she worked full-time. She noted that the Claimant would have likely started a family, which would have caused her to work part time at some point. The referee's calculations were based on the following findings:

a) the Claimant would have worked as a contract worker in a clinic;

b) she would have been paid $35.67 per hour by the clinic based on a customer rate of $60/hr, indexed for inflation;

c) she would have worked for 5 hours a day, 5 days a week and 48 weeks per year; and

d) she would have had business expenses equivalent to 19% of her revenue.

17. As a result of these findings, the referee concluded that the Claimant would not have earned more than the average industrial wage in Canada. Accordingly, she upheld the Administrator's decision to base the Claimant's compensation on this average industrial wage.

18. In submissions provided in support of this motion, the Claimant implied that her compensation should be based on the income of a self-employed massage therapist rather than a contractor. She argued that her compensation should be based on an hourly rate of $60 per hour and business expenses equal to 37.5% of revenues.

Standard of Review

19. In a prior 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 on motions by a rejected claimant to oppose confirmation of a referee's decision. In *Jordan,* Anderson J. stated that the reviewing court "ought not to interfere with the result unless there has been some error in principle demonstrated by the [referee's] reasons, some absence or excess of jurisdiction, or some patent misapprehension of the evidence."

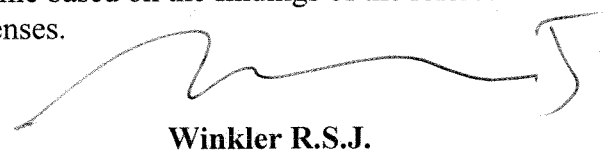
Analysis

20. At issue is whether, on the balance of probabilities, the Claimant would have earned more than the average industrial wage in Canada.

21. I find no errors in principle in respect of the referee's findings that the Claimant would have worked as a contractor in a clinic, that she would have earned $35.67 per hour or that she would have worked 5 hours per day, 5 days per week and 48 weeks per year. However, deducting an additional 19% from the Claimant's earnings as business expenses is inconsistent with her finding that the Claimant would have worked as a contract employee.

Result

22. In the circumstances, and given the singular nature of the issue, I do not think it appropriate or expedient to refer this matter back to the referee for a re-hearing. Rather the referee's decision will be confirmed as varied by these reasons. That is, that the Claimant shall be entitled to calculation of income based on the findings of the referee without the deduction of 19% for business expenses.



Winkler R.S.J.

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