REFEREE'S DECISION

1. On March 27, 2003, the Administrator approved the Claimant's claim at Level 3. On July 21, 2004, the Administrator denied a claim for out-of-pocket expenses associated with a therapeutic spa at the cost of $10,100 on the basis that it was not recoverable as an expense within the meaning of Section. 4.07 of the 1986-1990 Hepatitis C Settlement Agreement.

2. The Claimant requested that a Referee review the Administrator's decision at an oral hearing.

3. Hearings occurred by telephone conference on March 8 and March 22, 2005, supplemented by written submissions presented via email.

4. The following facts were not in dispute:

   (a) The Claimant is a primarily infected person under the 1986-1990 Hepatitis C Settlement Agreement.

   (b) She first contacted the Hepatitis C Claims Centre requesting guidance on how to proceed with funding for treatment and asked the following questions:

   - could she claim for the cost of a spa/hot tub?
   - If so, would a prescription be required?, and
   - Is there a maximum amount she could claim?

   (c) The Administrator via email on May 6, 2004 advised that it required a letter from her HCV medical specialist indicating the reasons he recommended spa therapy for her HCV condition and the number of recommended treatments. She was advised that once the specialist's letter was received, the Administrator's management would review her claim.

   (d) The Claimant advised the Administrator via email on May 6, 2004 she received a letter from her family doctor supporting her claim.

   (e) In an email response, the Administrator advised as follows:

   "We require a letter from your **HCV medical specialist** which includes the following:

   (i) His/her **recommendation** for the spa;

   (ii) The Reasons **WHY** your HCV medical specialist recommends the spa;

   (iii) **HOW** it is related to your **HCV medical condition**; and

(iv) The **number** of treatments that he/she recommends."

The Administrator further advised that once the letter was received with all the information from her HCV medical specialist, management would review and decide if the item could be claimed as a generally accepted treatment due to her HCV infection.

(f) The HCV medical specialist confirmed in a letter dated June 23, 2004 received by the Claimant on or about July 19, 2004, that

- The Claimant has the requisite HCV infection
- She has significant fatigue and significant joint pains and arthralgias, which can be associated with Hepatitis C.

He recommended that she not use certain analgesics such as acetaminophen and stated she was not a candidate for some of the other anti-inflammatory medications. For this reason, he recommended that she use primarily physical therapy, relaxation, massage therapy and also spa therapy. He stated that she has found these modalities actually quite helpful to her and in particular has found the spa therapy extremely helpful. He then stated as follows:

> "With this in mind I have recommended to her that she continue with the spa therapy as it is very helpful to her and I would certainly support her in offsetting the costs for the spa therapy for her. Hopefully this information helps you determine her eligibility for help in paying for alternative therapies for her Hepatitis C."

He also stated if there were further concerns or questions regarding this, "Please do not hesitate to contact me."

(g) Email communication from the Claimant on July 8, 2004 indicated the Claims Centre "out-of-pocket expenses" Department advised that the Administrator would be rejecting the claim unless the HCV specialist issue further correspondence to address the number of treatments per day and the period she would require the spa therapy. The Claimant advised that the physician considered his initial letter to be sufficient, straightforward, did not require further explanation and accordingly he declined to provide further information.

(h) While the Claimant requested the Claims Centre to approve of the payment before the purchase and installation of a spa, ("the home spa") she was informed that the Administrator would reject the claim on the basis that it was unreasonable.

(i) The Claimant nevertheless proceeded to purchase and install the home spa on July 14, 2000 and then gave notice of the intention to appeal the denial.

5. It remained disputed whether she is able to avail herself of alternative, reasonably priced spa treatment outside of her home.

6. The Claimant testified that the Claims Centre has never given her any guidance as to what might be a reasonable expense in connection with spa therapy.

7. The Claimant testified that because of the lack of guidance she had no choice but to purchase the home spa and to secure regular treatments on a daily basis at that time.

8. The Claimant testified that the home spa chosen was worth over $15,000 but was secured for the lower price of $10,100 because it was a model used for demonstration purposes.

9. The Claimant testified that since her use of the home spa starting in July 2004, her pain has been alleviated.

10. She was asked by me and confirmed that no other family members utilize the home spa because she does not desire to expose her family members to the Hepatitis C virus.

11. The Claimant tendered written submissions dated September 14, 2004 indicating that both her family doctor and the HCV specialist recommended to her that she continue with spa treatment which helped with her worsening and constant joint pain.

12. Unfortunately the letter from the HCV specialist did not answer question (iv) posed by the Administrator as to the number of treatments he recommended, nor did he address specifically the question of whether spa therapy was a generally accepted treatment due to her HCV infection, nor whether he was supporting her claim for the purchase of a home spa, or merely advocating that she seek spa treatment at an appropriate clinic.

13. I inquired whether the parties wished me to contact the HCV specialist to secure more details of his opinion. There was no agreement by the parties that I should proceed in this fashion and it was left to me to reach my decision based on the evidence before me at the time of the hearing.

14. At the hearing, the Claimant testified that she was to use the home spa as required and in fact uses it in the morning, in the evening and during the day for pain relief. She contended that it was impractical for her to travel to a facility over 50 km. from her home; it would be difficult to obtain babysitting services when required and her level of fatigue would obviate the benefit of the spa therapy if she was required to take it outside of her residence.

15. She submitted that the cost of spa therapy, if it were available outside of her home, would be approximately $5.00 per day. The mileage would be approximately $0.45/km. for a round-trip of 100 km. The cost of a babysitter would be $5.00 per hour for the 3 hour time period to obtain the spa services. She availed herself of treatment with the home spa 2 times per day on average, and 3 times per day when possible.

16. She contended that if she took such treatments daily in a clinic setting, the annual cost would stand in a range of $47,450.

17. The Claimant presented evidence that the cost of the home spa is not recoverable by or on behalf of the Claimant under any public or private health care plans.

18. In further support of her claim, she submitted a decision of the Tax Court of Canada in *James D. Donahue v. Her Majesty the Queen* rendered December 8, 2003. The Claimant contends that if the Federal government has recognized the purchase of a spa to relieve joint pain to allow further mobility as an allowable medical expense, this authority should guide the Administrator under the Settlement Agreement.

19. During the hearing on March 8, 2005, the Claimant submitted that the Public Health Act and its regulations prohibited the use of swimming pools by persons who had communicable diseases and Hepatitis C was one of the diseases listed in the regulations.

20. In particular, she cited Section 22(3) of the Alberta Regulation 247/85 which provides as follows:

> 22(3) the owner shall refuse admittance to the swimming pool to any person
>
> (a) Who he has reason to believe has a communicable disease or communicable infection."

Section 22(4) provides as follows:

> 22(4) "No Person shall
>
> (a) Use a swimming pool if he has a communicable disease or a communicable infection."
>
> And Schedule 1 of Communicable Disease Regulation, Alberta Regulation 238/85 that includes the following as a Notifiable Communicable Disease:
>
> Hepatitis A, B, Non-A,

21. During the hearing on March 22, 3005, Fund Counsel produced email communication from a physiotherapist in Alberta from an entity identified only as "Disease Control and Prevention" who provided commentary that the regulation was not intended to prohibit access to swimming pool facilities by individuals infected with Hepatitis C.

22. The Claimant disputed that the commentary by an employee of Disease Control and Prevention Office could supersede the plain wording of the Act and regulations. In any case, she took the position that it would be irresponsible of her to use a public facility since she might inadvertently pass blood while using the facilities and accidentally cause infection to other users.

23. Subsequently, Fund Counsel produced further email communications from a Dr. Lamont Sweet from the government of Prince Edward Island on March 24 and April 4, 2005. Dr. Sweet interpreted the regulation to apply only to persons who are ill with a communicable disease which can be transmitted in a swimming pool but went on to say that "if someone with hepatitis C comes to a pool and is obviously ill, then we ask that they be excluded." He sent a further comment that as a result of the inquiry the lawyer

who drafted the regulation agreed that the wording should be clearer and it would be reviewed.

24. An email response from a Donna Hill from the government of Manitoba indicated, *inter alia*, that an individual with Hepatitis C can lawfully use a swimming pool in Manitoba as long as the individual is not actively bleeding and that any individual should be barred from using a swimming pool if they have an active bleeding site.

25. Fund Counsel maintains that the claim should not be allowed and specifically contends that nothing in the Court Approved Protocol regarding Uninsured Treatment and Medical Expenses and Out of Pocket Expenses and the list of remotely covers the home spa.

26. It submits that the opinion of the HCV specialist is relevant to her claim under Section 4.07 for the uninsured medical expenses for disease Level 3, and entitles her to massage therapy treatment, but not to a home spa as indicated by the list of approved medical expenses.

27. Further it pointed out that the Claims Centre has not had such a request previously and had no background upon which to consider the reasonableness of such a request.

28. Fund Counsel also submitted for consideration the decision of the Federal Court of Canada in *Gibson v. Canada*. [2001] F.C.J. No 1758.

29. While it would have been preferable to have had the HCV specialist address all the questions put to him by the Administrator, instead, I am left to interpret the incomplete response in light of the remaining evidence put before me. In this instance, I have decided to give a liberal construction to his opinion and I conclude it is implicit in his opinion that he considered spa therapy generally accepted within his specialty and appropriate for this claimant's case.

30. However, Fund Counsel properly argued that the HCV specialist did not specifically recommend the purchase of a home spa or identify the number of spa treatments the Claimant should receive.

31. Fund Counsel argued that the recommendation of the HCV specialist was for physical therapy, relaxation, massage and spa therapy but that it does not follow from such recommendation that she was entitled to purchase a home spa for herself. It urged upon me that the language of the agreement does not permit such an interpretation in any event.

32. The issue on appeal requires a consideration of the application of Section 4.07 - Compensation for out-of-pocket expenses. I have also asked the parties whether the claim could be made under Section 4.06.

33. For ease of reference, the wording of these sections is set out below, as follows:

> 4.07 - Compensation for out-of-pocket expenses

An approved HCV infected person who delivers to the Administrator evidence satisfactory to the Administrator that he or she has incurred or will incur out-of-pocket expenses due to his or her HCV infection that are not recoverable by or on behalf of the Claimant under any public or private health care plan is entitled to be reimbursed for all reasonable costs so incurred provided:

(i) Out-of-pocket expenses will include:

A. Expenses for travel, hotels, meals, telephone and other similar expenses attributable to seeking medical advice or generally accepted medication or treatment due to his or her HCV infection and

B. I. Medical expenses incurred in establishing a claim; and The amount of the expenses cannot exceed the amount therefore in the guidelines from the regulations issued under the *Financial Administration Act* (Canada) from time to time.

4.06 - Compensation for uninsured treatment and medication

An approved HCV infected person who delivers to the Administrator evidence satisfactory to the Administrator that he or she has incurred or will incur costs for generally accepted treatment and medication due to his or her HCV infection which are not recoverable by or on behalf of the Claimant under any public or private health care plan is entitled to be reimbursed for all reasonable past, present or future costs so incurred, to the extent that such costs are not costs for care or compensation for loss of services in the home, provided:

(ii) The costs were incurred on the recommendation of the Claimant's treating physician; and

(iii) If the costs are incurred outside of Canada, the amount of compensation cannot exceed the lesser of the amount of compensation payable if the costs have been incurred in the province or territory where the Claimant resides or is deemed to reside and the actual costs.

34. In this particular case, I am required to interpret the meaning of the sections of the Settlement Agreement and the meaning within the HCV specialist's opinion, in light of the fact that the Claims Centre had not previously considered such a request and had no background upon which to consider the reasonableness of this request.

35. I can well understand the decision of the Administrator to deny the claim based on the wording of Section 4.06 and the lack of clarification from the HCV specialist. However, I was given much more detailed information from the hearing about the likely costs to the Claimant if she were to seek spa therapy in the nearest urban centre to her where such services were more readily available.

36. In this regard, I note that Fund Counsel did not dispute the testimony of the Claimant as to her frequency of use, exclusivity of use of the home spa and the calculation of likely out of pocket expenses if she were to avail herself of the same amount of services outside her home as she currently does now with her home spa.

37. I have considered the reported decisions of *Donahue v. Her Majesty the Queen* (2003-1208) 2003TCC888 and *Gibson v. Canada*. [2001] F.C.J. No 1758 submitted by the Claimant and Fund Counsel respectively. Each reported decision deals with a claim in a tax return for medical expenses for a hot tub. In the former case, the claim was allowed, and in the latter it was disallowed. Although the authorities are deserving of great respect, I do not consider them binding based as they are upon interpretation of provisions of the Income Tax Act rather than the 1996-1990 Hepatitis C Settlement Agreement.

38. In any case, they are, in my view, distinguishable because in *Donahue*, the issue was whether a hot tub was an allowable expense within the meaning of the Income Tax Act but there the claimant had clearly purchased the hot tub on the advice of his physician, and in *Gibson* the test was whether the individual was mobile or functional within a dwelling, which is not the issue under consideration here.

39. Fund Counsel says the subject claim was properly denied under Section 4.07 as an out of pocket expense because it cannot fit within the perimeter of that provision. In particular, it contends the Claimant did not submit satisfactory evidence that the purchase was an out-of-pocket expense due to her infection, it was not a reasonable cost; it is not an expense similar to travel, hotel, meals or telephone; it is not treatment due to her infection and in any case exceeds the amounts in the guidelines in the Regulations issued under the Financial Administration Act (Canada) from time to time.

40. Fund Counsel says the claim was not considered under 4.06. However in any event, it says the Administrator would be obliged to reject a claim submitted under this section because

- the evidence does not establish that spa therapy is generally accepted treatment within the meaning of 4.06, and
- it was not on the evidence incurred on the recommendation of the claimant's treating physician.

41. I have considered all of the foregoing and conclude that the section requires a large and liberal construction in light of the evidence presented at this hearing. I have concluded the HCV specialist was aware that the purpose for which she sought his opinion was to support the opinion of her family physician, and I must assume that he was aware she was requesting his additional opinion by reason of the claim to the Administrator for the purchase of the home spa. Indeed, if that were the live issue before him, it would explain why he did not provide a specific response to the query under (iv). I thus conclude that his opinion was intended to support her claim for a home spa.

42. Accordingly, it is my conclusion that this claim should be allowed under section 4.07(a) of the Agreement on the basis that this purchase was a reasonable surrogate for the out-of-pocket expenses this claimant would otherwise incur for travel, babysitting and mileage to obtain spa therapy outside of her home.

43. Alternatively, I conclude that the claim should be allowed under section 4.06(a), on the basis that it was a cost for generally accepted treatment due to her HCV infection which is not recoverable by or on behalf of the Claimant under any public or private health care plan and was a cost incurred on the recommendation of the Claimant's treating physician, and supported by the HCV specialist on the basis of the reasons cited in the foregoing paragraph.

44. My decision in this case should be considered to be confined to the facts of this case on the basis of the following:

(a) This particular Claimant has been diagnosed by the HCV specialist as having significant fatigue and significant joint pain and arthalgias which can be associated with Hepatitis C. Because of her liver damage it was recommended that she not use analgesics such as acetaminophen and she was not able to avail herself of other anti-inflammatory medications. She was accordingly restricted to modalities such as physical therapies, relaxation, massage and spa therapy.

(b) Under the treatment of her health care professionals she had tried these various modalities and particularly identified spa therapy as helpful to her condition.

(c) The HCV specialist was satisfied that this reporting of benefits was bona fide in her case and recommended that she continue to utilize the same.

(d) He did specifically support her seeking to offset the cost for spa therapy.

(e) The Claimant satisfied me that in her case spa therapy in a clinic setting would require round trip travel of 100 km. which may not be onerous in other cases but given the fact that she has small children at home and has identified her need to avail herself of the home spa therapy treatment early in the morning before they are up, and late at night after they have been put to bed.

(f) If she were to take spa therapy only 2 to 3 days a week year round, the cost annually would be about the same as the capital expenditure of the home spa, assuming as the Claimant contends, it is a one time purchase.

(g) Although the foregoing factors were sufficient for me to reach my conclusion, I do note that the Claimant also contended the purchase was reasonable in light of the plain wording of the Public Health Act and regulations. While it is not necessary to my conclusion to decide if the legislation bears the interpretation she urged upon me, I do consider that her interpretation seemed reasonable, consistent with her home practice and as direct credible evidence which I was capable of weighing against that of emails proffered by various third parties contacted by Fund Counsel. As I read those various third party emails, I noted some indication

that the wording of the legislation was ambiguous and should be clarified. Thus had such evidence been necessary to my conclusion, when considered in all the circumstances, I would have preferred the claimant's interpretation.

45. In future cases, claimants and Fund Counsel should note it would be preferable where the HCV medical specialist fails to fully address the questions posed by the Administrator, that the parties share the responsibility to obtain complete information before concluding the claim process. In particular, the HCV medical specialist should specifically prescribe

- what would be a reasonable number of treatments for the claimant,
- whether those treatments could be obtained in the patient's community
- what, if any, reasonable surrogates to any particular treatment might exist and equally suit the claimant.

46. However, the burden may ultimately rest with Fund Counsel to follow up with such specialist for specific answers to such questions as it has the greater resources to do so, a sufficient stake in the consequences of such answers on future cases, and the greater risk that incomplete information may result in an interpretation adverse to its position.

47. In future cases, however, claimants should not take any aspect of this decision as encouragement to incur expenses in the hope the Administrator's denials will be reversed *ex post facto* because they have been incurred pending appeal.

48. In light of the foregoing, I allow the app from the Administrator's decision.

Dated at Edmonton, Alberta, this 25 day of April 2005.

Shelley L. Miller, Q.C. Referee