

IN THE MATTER OF HEPATITIS C – CLASS ACTION SETTLEMENT 1986-1990

CLAIM FILE NO. 2629

REFEREE

Gerald J. Charney, Q.C.

APPEARANCES FOR THE ADMINISTRATOR

Christine Kark - Counsel

APPEARANCES FOR THE CLAIMANT

The Claimant

The hearing in this matter took place on August 1, 2007 and April 28, 2008 at Ottawa, Ontario.

DECISION

The facts of this case are as follows:

On July 18, 2000, the claimant submitted a claim to the Administrator under the Plan.

On February 3, 2003, the Administrator denied the claimant's claim on the basis that there was no evidence of a transfusion during the class period.

The claimant did not appeal the Administrator's decision within the prescribed delay of 30 days.

In July 2006 the claimant contacted the Administrator and asked to be provided with another Request for Review form since she apparently did not receive the Administrator's decision rendered on February 3, 2003.

In September 2006 the Administrator provided the claimant with another copy of its decision.

On October 18, 2006 the claimant requested a review of the Administrator's decision and an in-person hearing before a Referee.

On December 12th fund counsel wrote the claimant to determine why in 2003 she did not appeal the Administrator's decision with prescribed delay of 30 days.

On December 14th the claimant responds to the fund counsel and explained that she was unaware of the Administrator's decision rendered in February 2003 since her husband at that time destroyed all her mail.

Further to the claimant's response, the Administrator decided not to contest the claimant's delayed request for review.

REASONS FOR REVIEW

1. The claimant requests a review of the Administrator's decision and indicated that she believed that she had received a blood transfusion at the Reddy Memorial Hospital in 1986.
2. The evidence presented by the claimant confirms that she is infected with Hepatitis C which was first diagnosed on October 12, 1999.
3. On May 2, 2002, the claimant wrote to Héma-Québec and a trace back study was initiated to obtain transfusion information from the archives of the Reddy Memorial Hospital and from the blood bank of the Montreal General Hospital.
4. As appears from the final report of the trace back study, the Reddy Memorial Hospital and the blood bank of the Montreal General Hospital both confirmed

that the claimant did not receive any blood transfusion during her hospitalization at these hospitals.

5. In the initial Treating Physician Form (TRAN 2), Dr. Marc Deschênes, indicates that the claimant received a blood transfusion during the class period.

On November 20, 2002, the Administrator wrote to Dr. Deschênes to determine whether his statement was corroborated by any medical documentation.

On November 27, 2002, Dr. Deschênes responded to the Administrator that he wrote that the claimant received a blood transfusion during the class period solely on the basis of the claimant's verbal statement.

6. On September 19, 2006 there was a letter from Dr. Curtis Cooper who stated that she received a blood transfusion. This was based entirely on the evidence provided by the Claimant.
7. The procedure that the hospital report says that was done at the Reddy Memorial Hospital on February 5, 1986 was a therapeutic abortion that was performed at 1:30 p.m..

The Administrator does not contest the fact that the claimant is infected with hepatitis C. Her hepatitis C was diagnosed in 1999 at the Montreal General Hospital where she went in for fractured ribs and they did a blood test and found that she was infected with hepatitis C.

To be entitled to compensation the claimant must prove that he/she has been infected by HCV following a blood transfusion in Canada during the class period.

Article 3.01 of the Transfused HCV Plan provides the following:

1. A person claiming to be a Primarily-Infected Person must deliver to the Administrator an application form prescribed by the Administrator together with:
 - a) medical, clinical, laboratory, hospital, The Canadian Red Cross Society, or Canadian Blood Services of Hema Quebec records demonstrating that the claimant received a Blood transfusion in Canada during the Class Period.

If a claimant cannot comply with the provisions of section 3.01(1) a of the Transfused HCV Plan, Article 3.01 (2) provides the following:

Notwithstanding the provisions of Section 3.01(1) a), 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.

The claimant believes that she had received a blood transfusion in 1986 while hospitalized at the Reddy Memorial Hospital.

The traceback results confirm that the claimant did not receive any blood product during the Class Period.

Since there is no record of a blood transfusion taking place in the relevant time period, the only legal basis upon which the claimant could succeed is under the abovementioned article 3.01(2) of the Transfused HCV Plan.

Therefore, the claimant needs corroborating evidence independent of her personal recollection or that of a family member establishing on the balance of probability that she received a blood transfusion in Canada during the class period.

The claimant gave evidence that she had requested her complete file from Reddy Memorial. She received four pieces of records from the hospital. She said that she was hemorrhaging and had a miscarriage. They did a D & C in the recovery room on February 5, 1986. In 1986 she had pains in her abdomen and rushed to Reddy Memorial Hospital and had to have an abortion and that she was nine or ten weeks pregnant. She was 22 years old at that time. She said she went to emergency and she was completely sedated with a general anesthetic and woke up in the recovery room and saw a unit of blood hanging. She told them to remove the blood and they said she had to have it because she was bleeding. Then they sedated her and she was in and out. She thinks she received two units. She went home later that day.

On cross-examination she said that she met her husband in 1984 and they were married in 1987. She said this pregnancy occurred despite birth control. She said when she woke up in the recovery room, there were two tubes, one clear and one with

blood. There were nurses and other people in the recovery room. There 15 or 16 beds with curtains. She asked for her husband in the room, and she was freaking about the blood. She has no explanation as to why if she was hemorrhaging after the D & C there was no hospital report or operative report about loss of blood and she had no explanation as to why instead of calling it a D & C they called it a therapeutic abortion.

In 1990 she had a hysterectomy at St. Mary's Hospital. She does not know if she was transfused.

Her sister gave evidence. She thinks that the incident in 1986 was in summer. The claimant's husband called her that the claimant had a miscarriage and asked her to visit her in the hospital, Reddy Memorial. She arrived just after lunch and the claimant's husband went back to work. The claimant was in a lot of discomfort and distraught and asked her why she was receiving blood. She had hemorrhaged. She was there for 2 or 3 hours if not longer. There was no changing of the blood. That was the one time she visited. She was 22 or 23 years old and the claimant was 22. She thinks the claimant was in her first trimester and she was living in Hudson with her soon to be husband. When asked what kind of room she was in, she was not 100% sure, she said it might be in recovery but no one else was in the room. In the two or three hours no one else visited. Her husband had already left. She was not sure when she was discharged.

The next witness was Paul. He became her husband. He went to see her at noon and saw a blood unit in her arm. He remembers this because he had a bad experience with blood. He was more upset about the blood than she was. On cross-examination he said he worked not too far away and he saw her during lunch, 12-1. When asked about the medical chart that said she had a procedure that started at 1:35

and it was an abortion, he said he just saw a blood unit. When asked what is wrong he said she had a stomach ache and drove her to the hospital. He does not know how pregnant she was. He thinks her sister was there at the time or there earlier. He only saw the claimant in bed with a blood unit then he took her home.

ARGUMENT

The claimant argued that the report from Reddy Memorial Hospital is very sketchy and quite incomplete and therefore the evidence of her witnesses should be considered and should create the probability that the blood she received at Reddy Memorial was tainted and that is where she was infected with hepatitis C.

The Administrator argued that the people that allegedly saw her with blood in her arm are all relatives, one of them is a common law spouse who later became her husband and the other was her sister.

Neither of which can be used under Article 3.01 (2) which says that in order to overcome the lack of a record demonstrating that the claimant received a blood transfusion in Canada during the Class period does not provide corroborating evidence if the witnesses are the claimant herself or any person who is a family member of the claimant.

By any reasonable definition, all of the witnesses were family members of the claimant.

In addition to that, the letters from two doctors, Dr. Curtis Cooper on September 19, 2006, was based entirely on the evidence provided by the claimant.

Similarly, the letter of Dr. Deschênes responded to the Administrator that he wrote that the claimant received a blood transfusion during the Class Period solely on the basis of the claimant's verbal statement.

DECISION

The fact that there is a record of the 1986 procedure and that that record does not contain any evidence of a blood transfusion, and that the only witnesses to the fact that there allegedly was blood being transfused into the claimant, comes from relatives which are not to be used as corroboration under Article 3.01 of the Transfused HCV Plan. It seems to me very unlikely that the hospital would record therapeutic abortion at 1:30 p.m. and not mention that there was a blood transfusion if there was one, is to me unlikely and therefore improbable.

In addition, the evidence of the two witnesses was understandably confused after all this period of time and the time period that they suggest is not likely to have occurred as the evidence was given. In any event, neither the claimant nor the two relatives are capable under Article 3.01 as corroborating that the claimant received a blood transfusion.

In result then, the request for review is dismissed and the decision of the Administrator is upheld.

DATED at Toronto, this 13th day of August, 2008.

"G. Charney"

Gerald J. Charney, Referee