

CLAIM #18600

Province of Infection: Ontario
Province of Residence: Ontario

**IN THE MATTER OF A REFERENCE
TO REVIEW THE DECISION OF THE ADMINISTRATOR**

Before: Tanja Wacyk

Heard: June 10, 2011, at Kitchener, Ontario

Appearances: Mark Grossman, Claimant and Claimant's Father for the Claimant
Belinda Bain and Carol Miller for the Administrator

Decision

Background:

1. The Claimant submitted an application for compensation as a Primarily Infected Person under the Transfused HCV Plan ("the Plan"), as set out under the terms of the 1986-1990 Hepatitis C Settlement Agreement ("the Settlement Agreement").
2. By letter dated May 26, 2009, the Administrator denied his claim on the basis the Claimant failed to provide sufficient evidence to support his claim that he received blood during the period from January 1, 1986 - July 1, 1990 ("the Class Period").
3. The Claimant requested that a Referee review the decision of the Administrator in an in-person hearing.

Evidence at the Hearing:

The Claimant

4. The Claimant testified that in September 1986, he was stabbed multiple times during an altercation in Toronto.
5. Following the stabbing, the Claimant's brother, who was with him at the time, drove the Claimant back to Kitchener, the Claimant's city of residence. Inexplicably, rather than take the Claimant to a hospital, his brother dropped the Claimant off on the street. The Claimant then made his way to a Doughnut Shop where an ambulance was called, and he was taken to St. Mary's General Hospital in Kitchener.
6. The Claimant testified he had lost a lot of blood, as evidenced by his blood soaked clothing. He also submitted that the subsequent police investigation and resulting forensic report indicated he experienced significant blood loss. In particular, the Claimant referred to a picture included in the forensic report, which showed a large section of carpet stained with his blood. Neither the forensic report nor the photograph was entered as an exhibit.
7. The Claimant conceded he could not recall a great deal of what happened at the hospital, and testified there was much confusion during his admission and treatment. Although he does not specifically recall having a blood transfusion, he testified he is certain he received one. In that regard, he noted that he was in intensive care, and recalled being stuck with a "lot of needles", and the medical staff discussing his stabbing and resultant blood loss. He testified that at the time, he felt as though he was dying.
8. The Claimant discovered he had Hepatitis C in either 2007 or 2008, when he was in Millhaven Penitentiary. He denied any other risk factors, but conceded he has been in and out of penal institutions since the age of 16. He is currently 44 years of age.

The Claimant's Father

9. The Claimant's father testified that he attended at the hospital after the Claimant was stabbed. He indicated that on his arrival in the Emergency Department he was very surprised to see the Claimant receiving what he assumed was a blood transfusion. He described seeing a clear bag with a red coloured fluid attached to the Claimant's arm via a tube. The only information he received from the medical staff was that the Claimant was receiving the appropriate medical care and attention. On that occasion the Claimant's father remained at the hospital between ½ hour and 45 minutes.

10. Although the Claimant's father returned on subsequent occasions, after the Claimant had been admitted to a ward, he could not say whether the Claimant received any additional blood. He did note that a nurse told him they had blood on "standby".

11. The Claimant's father testified that prior to the stabbing his son's health was good.

Carol Miller R.N.

12. Carol Miller is the Appeal Co-ordinator for the Fund. She is a Registered Nurse with more than 20 years of nursing experience in various hospital settings in Newfoundland, Manitoba, and Ontario. Her experience includes the administration of blood transfusions.

13. Ms. Millar reviewed the Claimant's hospital records related to his treatment in hospital following his stabbing. Ms. Miller noted the records indicated the Claimant's blood type had been identified and a supply of blood was cross-matched and reserved in the event a transfusion was required.

14. However, Ms. Miller testified that blood transfusions are closely monitored and pointed out that none of the documents on which a blood transfusion would normally be recorded contained any reference to any transfusion. These include: The Emergency Room Records; the Cross-match Requisition Form; and the Discharge Summary. Ms. Miller testified that such documents would normally be independent sources of information regarding a blood transfusion had one occurred.

15. Ms. Miller further noted that the Claimant's hemoglobin count was recorded as 146 on admission. She maintained this was well within the normal range of 135-180, and indicated a blood transfusion was unnecessary. She also noted that the following day, his hemoglobin count dipped to 130, which Ms. Miller maintained was inconsistent with the Claimant having received a blood transfusion the prior day.

Treating Physician Form

16. In addition to the *viva voce* evidence set out above, the evidence filed at the hearing included a "Treating Physician Form" completed by Dr. Peter Hwee.

17. Dr. Hwee's answers on the form are somewhat confusing. Although Dr. Hwee indicated he has know the Claimant for 14 years, he has also indicated that he has never treated

the Claimant. However, in answer to the question “When was the last date you treated the HCV infected person for any condition?” Dr. Hwee indicates the date is September 17, 2008.

18. Dr. Hwee also answered “Yes” to the question of whether the Claimant had received a Blood transfusion during the class period.

19. However, Dr. Hwee also stated the Claimant does not have a history of any of the listed risk factors, although “Prison Incarceration” is on the list of risk factors he was to consider.

ANALYSIS:

20. In order to qualify for compensation under the terms of the Transfused HCV Plan the Claimant must satisfy the criteria set out in that Plan.

21. Article 3.01(1)(a) of the Plan provides that a person claiming to be a Primarily-Infected Person must provide the Administrator with, amongst other things, "...records demonstrating that the Claimant received a blood transfusion in Canada during the Class Period." As noted above, the Settlement Agreement establishes the “Class Period” to be “the period from and including 1 January 1986 to and including 1 July 1990.”

22. If a person claiming to be a Primarily-Infected Person cannot comply with Article 3.01(1)(a), Article 3.01(2) provides that that individual 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.

23. The Claimant bears the onus of demonstrating the Administrator erred in denying his application.

24. No hospital records demonstrating the Claimant received a blood transfusion in Canada during the Class Period, as required by Article 3.01(1)(a) of the Plan, were produced. The Claimant submitted this may simply be the result of an error on the part of hospital staff. However, I accept that, as Ms. Miller testified, the transfusion of blood is closely monitored. Accordingly, I find it unlikely that all the staff involved in any transfusion failed to record the transfusion.

25. Nor can I give any weight to Dr. Hwee’s assertion the Claimant received a blood transfusion. In the first instance, it is not at all apparent whether Dr. Hwee has ever treated the Claimant. Further, in the face of the Claimant’s own admission that he has a somewhat extensive history of incarceration, it is apparent Dr. Hwee’s indication the Claimant had none of the risk factors associated with HCV is erroneous. In the absence of an explanation, I find this renders the reliability of the other information on the Treating Physician Form suspect.

26. In the absence of records demonstrating that the Claimant received a blood transfusion in Canada during the Class Period it is open to him to demonstrate, through some other form of corroborating evidence, that this is indeed the case.

27. While the Claimant's father testified he witnessed what he assumed to be a transfusion, the terms of the Settlement Agreement require the corroborating evidence be "independent of the personal recollection of the claimant or any person who is a family member of the claimant". Consequently, under the terms of the Settlement Agreement, the evidence of the Claimant's father is not sufficient to demonstrate the Claimant received a blood transfusion in Canada during the Class Period.

28. Neither the Administrator, nor I as a Referee, have discretion to grant compensation to individuals infected with Hepatitis C who cannot show they received a transfusion within the time lines of the Class Period.

29. In this instance, the Claimant has provided no reliable documentation indicating he received a Blood transfusion while being treated for his stab wounds. Nor has he produced corroborating evidence which is independent of his recollection or that of his family.

30. Accordingly, I find the Administrator correctly determined the Claimant is not entitled to compensation pursuant to the Hepatitis C 1986-1990 Class Action Settlement, as he has not demonstrated that he received a Blood transfusion during the Class Period.

31. The decision of the Administrator to deny the Claimant compensation pursuant to the Hepatitis C 1986-1990 Class Action Settlement is upheld.

DATED AT TORONTO, THIS 19TH DAY OF JUNE 2011.

Tanja Wacyk, Referee