DECISION

Claim No. 18713

Province of Infection – Nova Scotia

1. The Claimant applied for compensation as a Primarily-Infected Person pursuant to the Transfused HCV Plan.

2. By letter dated January 26, 2011, the Administrator denied the claim on the basis that the Claimant had not provided sufficient evidence to establish that he had received a blood transfusion during the Class Period.

3. The Claimant requested that the Administrator's denial of his claim be reviewed by a Referee.

4. The Administrator's letter of January 26, 2011 gave the following reasons for denying the claim:

> "The Settlement Agreement requires the Administrator to determine a person's eligibility for class membership.
>
> All the material that you provided to support your claim was carefully reviewed by the Administrator. You have not provided sufficient evidence to support your claim that you or the HCV Infected Person received blood during the Class Period.

> In your original application you indicated you received transfusions in 1988 at the Victoria General Hospital in Halifax. There were no medical records submitted to support this statement. In cases where the claimant is having difficulty obtaining documents to support the HCV infected person received a transfusion; the Traceback department contacts Canadian Blood Services (CBS) to request their assistance in obtaining transfusion information directly from the hospital. In your case CBS contacted the Hospital and the response was received in December 2010. The hospital advised CBS they searched your records from admissions in 1986, 1988 and 1989. They have stated your records are available and there is no evidence that you were transfused. Therefore based on Article 3.01 (1a) of the 1986-1990 Hepatitis C Settlement Agreement; your claim must be denied because there is no evidence to support you received a transfusion of Blood between January 1, 1986 and July 1, 1990."

5. Following my appointment as Referee, I advised the Claimant of his right to an oral hearing. The Claimant responded by telephoning me on April 19, 2011. That conversation is summarized in my letter to Fund Counsel of April 21, 2011, which is reproduced below:

> "April 21, 2011
>
> ...[Fund Counsel]
>
> **Re: Claim No. 18713 (*Claimant*)**
>
> I spoke with the *Claimant* concerning this matter on April 19, 2011. He advised me that he was injured in a lawnmower accident in May of 1988. He was initially taken to the Dartmouth General Hospital and transferred later the same day to the Victoria General Hospital where he underwent surgery. The *Claimant* believes that he was

transfused based on the nature and severity of his injury, as well as information provided to him by his wife at the time.

In reviewing the medical records in the Appeal file, there is only a one-page Discharge Report dated June 5, 1988 from the Victoria General Hospital and the Operation Record dated May 20, 1988. I note that the *Claimant* was in the V.G. for more than three weeks and that there are no records at all from the Dartmouth General.

Under the circumstances, I believe it would be worthwhile to obtain a complete set of records from both the Victoria General Hospital and the Dartmouth General Hospital with respect to the *Claimant*'s treatment in those facilities relating to his May 1988 injury. I would appreciate it if you would prepare the usual documentation to obtain the hospital records.

Yours truly,

S. Bruce Outhouse
SBO:sw
cc: The *Claimant*"

6. With the assistance of Fund Counsel, all medical records pertaining to the Claimant which originated during the Class Period were obtained from the Victoria General Hospital and the Dartmouth General Hospital. Those records were provided to the Claimant on or about November 24, 2011. Those records contain no reference to any blood transfusion or even a crossmatch.

7. On January 8, 2013, I sent the following letter to the Claimant:

"January 8, 2013

CONFIDENTIAL
The *Claimant*
...Saint John, NB...

Dear [the *Claimant*]:

Re: 1986-1990 Hepatitis C Class Action Settlement – Claim No. 18713

I note in reviewing this file that it has been inactive for over a year now.

Having previously reviewed the Capital Health medical records received from Fund Counsel on November 23, 2011, I note that the records contained no reference to any transfusion or even a cross match.

Would you kindly give me a call or send me an email at your convenience to advise whether or not you still wish to proceed with your claim for compensation.

I look forward to hearing from you.

Yours truly,

S. Bruce Outhouse
/sw
fc: ...Fund Counsel..."

8. On January 10, 2013, the Claimant telephoned me indicating that he had an appointment with his doctor the following week. He said he was hoping to obtain further information which might assist him in pursuing his claim and that he would get back to me after meeting with his doctor.

9. Not having heard anything further from the Claimant, I sent him the following letter on May 6, 2013:

> "May 6, 2013
>
> **CONFIDENTIAL**
> The *Claimant*
> …Saint John, NB…
>
> Dear [the *Claimant*]:
>
> **Re: 1986-1990 Hepatitis C Class Action Settlement – Claim No. 18713**
>
> When we spoke in early January, you indicated that you had an appointment with your doctor the following week and that you hoped he would be able to provide you with information which might assist you in proving your claim for compensation. I understood that you would get back to me by phone or letter after you had met with your doctor. However, I haven't heard further from you.
>
> Please advise whether your doctor was able to provide you with any additional information relevant to your claim.
>
> I look forward to hearing from you.
>
> Yours truly,
>
> S. Bruce Outhouse
> SBO:sw
> fc: …Fund Counsel…"

10. The Claimant did not respond to the above correspondence. Accordingly, on June 11, 2014, I sent the Claimant the following letter:

"June 11, 2014

CONFIDENTIAL
The *Claimant*
…Saint John, NB…

Dear [the *Claimant*]:

Re: 1986-1990 Hepatitis C Class Action Settlement – Claim No. 18713

I note from my file that I did not receive a reply from you to my letter of May 6, 2013. A copy of that letter is enclosed for convenient reference.

Unless I hear from you by the end of this month, I will issue my decision in this matter and provide you with a copy of same.

Yours truly,

S. Bruce Outhouse
SBO:sw
Enclosure
fc: …Fund Counsel…"

11. Once again, however, the Claimant did not respond to this letter. However, on July 21, 2014, in response to a request from my assistant that he confirm his current address, the Claimant sent an email which states, in part, that he had come to believe his claim was hopeless and had mentally put the whole process behind him in an attempt to move forward.

12. The issue in this case is whether there is any evidence that the Claimant received a blood transfusion during the Class Period. Without evidence

of a transfusion, there is no basis for interfering with the Administrator's decision to deny the claim.

13. The medical records indicate that the Claimant suffered a partial amputation of the toes of his left foot when he caught it in a lawnmower on May 18, 1988. He was admitted to the Dartmouth General Hospital at 18:41 hours where the wound was cleaned and he received some preliminary treatment, including ringers lactate which was given intravenously. The Claimant was transported by ambulance to the Victoria General Hospital at 19:40 hours where he underwent surgery later the same day. His post-operative course in hospital was uneventful and he was discharged on June 5, 1988.

14. As previously noted, the hospital records at the Dartmouth General Hospital and the Victoria General Hospital do not indicate that the Claimant received a blood transfusion. Indeed, the records do not even indicate that he was crossmatched.

15. In his request for review of the Administrator's decision, the Claimant stated that his spouse at the time of his May 1988 hospitalization clearly remembers that he was given a transfusion. However, beyond that bare statement,

there is nothing else in the record to indicate that the Claimant might have been transfused during the Class Period.

16. This case is governed by s. 3.01 of the HCV Transfused Plan which provides, in part, as follows:

> **"3.01 Claim by Primarily-Infected Person**
>
> (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, Canadian Blood Services or Hema-Québec records demonstrating that the claimant received a Blood transfusion in Canada during the Class Period;
>
> ....
>
> (2) Notwithstanding the provisions of Section 3.01(1)(a), if a claimant cannot comply with 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."

17. Clearly, the Claimant has not been able to prove his claim pursuant to s. 3.01(1)(a). There is no medical record of any kind which demonstrates that he received a blood transfusion during the Class Period. Consequently, the only

question is whether the Claimant has satisfied the requirements of s. 3.01(2) by providing "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 received a Blood transfusion during the Class Period".

18. It has been decided in earlier cases that, under s. 3.01(2), a claimant bears the burden of proof on the balance of probabilities. It has also been authoritatively determined that the burden of proof must be satisfied by the independent evidence without regard to the recollections of a claimant or family members. In Court File No. 98-CV-141369, Winkler R.S.J., as he then was, stated:

> "Given the express wording of s. 3.01(2), the only interpretation it will be [sic] bear is that the evidence independent of the personal recollection of the Claimant or a Family Member is the determining factor. If that independent evidence establishes on a balance of probabilities that the Claimant received blood during the Class Period then the claimant has met the burden. If not, then the Claim must be rejected. The personal recollections of either the Claimant or Family Members are not to be considered."

19. In the present case, no independent evidence was proffered by the Claimant to establish that he had received a blood transfusion in Canada during the Class Period.

20. Under these circumstances, I have no alternative but to uphold the Administrator's denial of the Claimant's request for compensation.

DATED at Halifax, Nova Scotia, this 21st day of July, 2014.

S. BRUCE OUTHOUSE, Q.C.
Referee