

IN THE MATTER OF A REFERENCE
PURSUANT TO THE PROVISIONS OF THE
TRANSFUSED HCV PLAN ESTABLISHED BY VIRTUE OF
THE HEPATITIS C, JANUARY 1, 1986 – JULY 1, 1990
CLASS ACTIONS SETTLEMENT

Claim Number:	2203
Province of Alleged Infection:	Saskatchewan
Province of Residence:	Saskatchewan
Fund Counsel Representing Administrator:	John Callaghan
Referee:	Daniel Shapiro, Q.C.
Date of Submissions Teleconference:	July 7, 2014
Date of Decision:	September 28, 2014

DECISION

A. Introduction

[1] By way of Application dated September 18, 2000,¹ the Claimant, a Saskatchewan resident who was then 40 years of age, applied for compensation as a Primarily-Infected Person pursuant to the Transfused HCV Plan (“the Plan”), which is Schedule B to the 1986 -1990 Hepatitis C Settlement Agreement (“the Settlement Agreement”). The application was submitted through the Claimant’s then legal counsel.

[2] Pursuant to the terms of the Settlement Agreement and the Plan, the “Class Period” (January 1, 1986 to and including July 1, 1990) is the only period of time in respect of which compensation may be available. Further, while there are many possible sources of infection with respect to the Hepatitis C Virus (“HCV”), the Plan only provides compensation for individuals who received transfusions during the Class period of defined blood products, generally, but with an exception, where the donors have been tested and found to be infected with the HCV.

[3] There is no dispute that the Claimant has been diagnosed with HCV infection. There is also no dispute that the Claimant received a Blood transfusion in Canada during the Class Period.

[4] In his application, the Claimant stated that he: (a) had never been transfused outside of Canada; (b) was not sure how many times he had received Blood transfusions in Canada in his lifetime; and (c) had not received Blood transfusions prior to 1986, but that he had received “one for sure” Blood transfusion between January 1, 1986 and July 1, 1990.

¹ The Claim Centre File for the Claimant consists of a total of 91 pages. The application is found at pages 22-25.

[5] Health records indicate that on August 8, 1986, the Claimant was admitted to St. Paul's Hospital in Saskatoon for surgery for a frontal sinus fracture and a laparotomy to repair a kidney laceration following a stabbing incident. There is no dispute that 8 units of blood were cross-matched ahead of this surgery and that of these units, only one was transfused to the Claimant.² As required by the Plan, a Traceback was undertaken by Canadian Blood Services ("CBS"), which involved testing the blood of the donor of that specific unit of blood. CBS determined that the donor was HCV negative.³

[6] St. Paul's Hospital provided a letter indicating that although the Claimant underwent surgery at that hospital in July 1983 (reconstructive nose surgery) and June 1991 (ankle surgery), no Blood or Blood products were given during either procedure.

[7] By way of letter dated January 9, 2002,⁴ the Settlement Administrator wrote to the Claimant, in care of his then lawyer, advising that based on the results of the Traceback, in response to which the Claimant did not provide any further evidence to the Administrator, the compensation claim was denied. The letter advised the Claimant of his right to file a Request for Review within 30 days of the date of that letter, or the decision denying the claim would become final. There was no Request Review filed within the 30-day period. Notwithstanding this, on March 3, 2014, the Administrator received a Request for Review signed by the Claimant, together with a typewritten letter outlining the Claimant's position. While not vigorously objecting to the review proceeding at this late date, the Administrator did, quite properly, point out the provisions of Section 10 of the Plan Text, dealing with the time period for review, which I will discuss further below.

[8] The Claimant, who was self-represented for the purposes of this review, specifically asked that an "in-person" hearing not be held. Instead, it was agreed that the matter would be resolved on the basis of the written materials provided by the parties, as supplemented by oral submissions made by the parties by way of a teleconference of July 7, 2014.

B. Issues

[9] The issues raised in this review request are as follows:

- (a) Has the time within which the Claimant may seek a review of the Administrator's decision passed?
- (b) If not, has the Claimant established grounds for reversing the denial of the Claim by the Administrator?

² pp. 38, 77-78, 85

³ pp. 81, 82

⁴ pp. 3 and 4

C. Conclusion

[10] The time within which the Claimant may seek a review of the Administrator's decision denying the claim has long since expired. However, if I am incorrect in this conclusion, I am satisfied that in any case the Claimant has not established grounds for reversing the denial of the claim.

D. Submissions

Claimant

[11] The Claimant submits that he had a breakdown in communication with his lawyer, as a result of which he was not informed of the 30-day review period. Further, he was involved in a marital breakdown – as a result, while his ex-spouse may have received the denial letter, he did not.

[12] The Claimant submits:

Trace back findings did not include medical procedures and processes, although trace back to donor came back negative. Statistics show a high probability that this infection is a result of tainted blood, contaminated tools and equipment and blood products.

... I am contending that medical treatment from the Ambulance care and St. Paul's hospital caused this infection. I am not an intravenous drug user and I did not have any infections or illnesses at the time of this surgery.

In order for my surgical procedure to be contaminated, some part of this process was exposed to the virus. It is common knowledge that hepatitis C virus can withstand high levels of heat and can live outside the body for prolonged periods. The likely cause of my infection stems from the hospital treatment, tainted blood products, surgical equipment or contraptions. The Canadian Medical Error Statistic Reports will support my contention that contaminated blood directly or indirectly is highly likely the cause of my infection. For example:

Canwest News Service; March 29/07 states: Medical Errors Kill 24,000 People Annually. As many as 24,000 people die each year from in-hospital adverse events like surgical errors, wrong medications and hospital-acquired infections, according to Statistics from the Canadian Institute for Health Information. One in every thirteen Canadian Patients experience a preventable hospital related infection or incident. There are many more reports that identify in-hospital infections as a cause of various blood borne diseases.

Since I did not have any blood infections and I am not an intravenous drug user it is beyond reasonable doubt that I was infected by the medical intervention I received. Whether it was blood product, tainted equipment or supplies, the fact remains that it is all a result of tainted blood. Having said this I know I fall into the Hepatitis C class action suit. I am requesting that in all fairness, your office reconsider and accept my claim that my infection is a result of tainted blood...

Administrator

[13] Fund Counsel submits that Article 10 of the Plan is clear that reviews must be filed within 30 days. Further, with the trace back having been negative, the Administrator had no choice but to deny the claim. The Claimant himself points out that he entered a bloody fight upon leaving a bar in 1986; it is thus possible that he came into contact with contaminated blood during the stabbing incident itself. In any case, there are numerous possible sources of the HCV apart from the single unit of Blood transfused in 1986.

E. Analysis

[14] Article 10.01 of the Plan Text states:

**ARTICLE TEN
DISPUTE RESOLUTION**

10.01 Reference to Referee or Arbitrator

A person making a Claim may, within 30 days after he or she receives notice of the Administrator's decision respecting his or her Claim, refer that decision to, at his or her option, a Referee or an Arbitrator by filing with the Administrator a notice requiring a reference or arbitration and setting out the objection to its decision and the reasons in support of the objection. If no notice requiring a reference or arbitration is filed within the 30 day period, the Administrator's decision will be automatically confirmed and be final and binding. [Emphasis added]

[15] The Notice to the Claimant denying the claim was delivered to his then legal counsel on January 9, 2002. Legal Counsel was the Claimant's representative, to whom the Administrator was legally obligated to direct communications, including the denial letter. Once the denial letter was delivered to counsel on the Claimant's behalf, the Administrator was entitled to conclude that delivery of the Notice to legal counsel conclusively constituted delivery of the notice to the Claimant. Even if that were not the case, the record makes it clear that on June 17, 2005, the Appeal Coordinator returned a call from the Claimant indicating that he had just received his Denial letter from his ex-wife and wanted to appeal. He was advised that he needed to write a letter indicating why he had not replied until then and attach it to the Request for Review Form. He was asked to provide his current address.⁵ However, there was no further contact from the Claimant until November 13, 2013 at which point (notwithstanding the notes from 2005 indicated above) he asserted that he was never made aware of the denial of his claim or his right to appeal. On February 10, 2014, he called the Appeal Coordinator and again insisted that he never knew about his rejection letter sent in 2002. He was advised that the Administrator would re-send the denial letter and that the Claimant would need to send a letter explaining why he did not appeal earlier.

[16] I conclude that the Claimant's right of review likely ended within 30 days of the date of delivery of the January 9, 2002 letter. At the very latest, it ended in 2005. I do not have the jurisdiction to extend the time frames for review set out in the Settlement Agreement. Accordingly, I conclude that the time within which the Claimant may seek a review has expired. On that basis alone, the review request must fail.

⁵ Claim file, p. 13.

[17] If, however, I am incorrect in this assessment, I will address the merits of the review request below.

[18] The Claimant is unquestionably convinced that he contracted HCV from his 1986 hospital stay. However, the Plan and CAP require more than a Claimant's honest conviction to meet the burden upon him.

[19] This claim falls under the Transfused HCV Plan, which is Schedule 1 to the Settlement Agreement. The Claimant met the initial or *prima facie* burden imposed on him under Section 3.01 of the Plan, to demonstrate that he:

- (a) Received a Blood transfusion in Canada during the Class Period;
- (b) Has been infected by HCV; and
- (c) Provided a Declaration confirming that he has never used non-prescription intravenous drugs and was not infected with HCV prior to January 1, 1986.

[20] Having meet these *prima facie* criteria, however, the Traceback results were negative. The donor of the unit of blood that was transfused was tested and shown to be negative for the HCV. In these circumstances, Section 3.04 of the Plan applies. This provides:

ARTICLE THREE REQUIRED PROOF FOR COMPENSATION

3.04 Traceback Procedure

- (1) Notwithstanding any other provision of this Agreement, ***if the results of a Traceback Procedure that ... none of the donors or units of Blood received by a Primarily-Infected Person ... during the Class Period is or was HCV antibody positive***, subject to the provisions of Section 3.04(2), ***the Administrator must reject the claim...***
- (2) ***A claimant may prove that the relevant Primarily-Infected Person ... was infected, for the first time, with HCV by a Blood transfusion received in Canada during the Class Period... notwithstanding the results of the Traceback Procedure.*** For greater certainty, the costs of obtaining evidence to refute the results of a Traceback Procedure must be paid by the Claimant unless otherwise ordered by a Referee, Arbitrator or Court.

[Emphasis added]

[21] The Administrator followed the Court Approved Protocol (“CAP”) containing the Criteria for Traceback Procedures for Primarily Infected Persons. Having done so, it was then obligated to reject the claim, applying the provisions of subsection 3.04(1) of the Plan text. This rejection is subject to a claimant’s right to provide evidence to refute the Traceback Procedure results, as provided in subsection 3.04(2) of the Plan text.

[22] In short, given the negative Traceback, a reverse onus applies: the burden of proving infection from the blood transfusion remains squarely on the Claimant. While it is indeed *possible* that the Claimant’s 1986 hospitalization is responsible for his HCV infection, this is not the test under the Plan, in two important respects:

- (a) The standard of proof under the Plan is not proving that it was *possible* that the transfusion caused the infection; the burden of proof is that of the *balance of probabilities* – the Claimant must prove that it is **more likely than not** that his infection was caused by a Blood transfusion during the Class Period;
- (b) The Claimant is further of the view whether his infection was occasioned as a result of the ambulance attendance, blood transfusion or hospital stay, it is covered by the Plan. However, this is not what the Plan states.

[23] I acknowledge that the Claimant provided a sworn declaration indicating that he had never used non-prescription intravenous drugs and that he was not infected with the HCV prior to January 1, 1986. I have no reason to doubt these assertions. However, there is simply no evidence here to indicate how the Claimant contracted the HCV. HCV is spread by many forms of blood to blood contact. It is only where the infection was specifically caused by **transfused Blood** during the Class Period that the right of compensation arises.

[24] There are numerous possible sources of infection that are unrelated to Blood transfusion. Thus, even if it were proven that a procedure undertaken during the Claimant’s 1986 ambulance attendance or hospital stay, whether by means of a surgical device, instrument or medical / hospital equipment, was responsible for the transmission of the virus (which it has not been), this would not bring these facts into the scope of the Plan. The literature to which the Claimant refers makes it clear that there are numerous possible sources of infection, even within the hospital setting alone. This does not include possible sources of infection outside of the hospital, including the stabbing incident itself. Further, medical literature (including the SHOT Report) shows that there is 10% of the Hepatitis C population in which the source of the infection cannot be identified. Dr. Robert Remus, a professor in the Department of Public Health Sciences at the University of Toronto, testified, when the Settlement Agreement was approved, to the effect that there are people for whom no explanation as to why they have been infected has been identified, when the disease cannot be connected to blood transfusion.

[25] The CATIE website states:

How do I get hepatitis C?

Hepatitis C is common worldwide. An estimated 170 million individuals worldwide including an estimated 250,000 in Canada are infected. Hepatitis C is spread through blood-to-blood contact, which means that to contract hepatitis C, blood infected with the hepatitis C virus must get into your blood stream.

You may risk exposure to hepatitis C by using injection drugs (even once), getting tattoos, piercings, pedicures, manicures or medical procedures with improperly sterilized equipment, sharing personal hygiene items with an infected person (e.g. razors, toothbrushes, nail clippers) or having had a blood transfusion or received blood products prior to July 1990.

Who is most at risk of contracting hepatitis C?

You have a **high risk** of contracting hepatitis C if you:

- use or have used injection drugs; even if it was just once or many years ago
- have received blood or blood products or an organ transplant before July 1990 in Canada
- have been in jail; or
- have been injected or scratched during vaccination, surgery, blood transfusion or a religious/ceremonial ritual in regions where hepatitis C is common.

You have a high **moderate risk** of contracting hepatitis C if you:

- have tattoos or body piercing;
- have multiple sexual partners;
- have a sexually transmitted infection (STI), including HIV or lymphogranuloma venereum (LGV);
- have experienced traumatic sex or rough sex or have used sex toys or fisting that can tear body tissue;
- have vaginal sex during menstruation;
- have received a kidney treatment (hemodialysis);
- have received an accidental injury from a needle or syringe;
- share personal items with a hepatitis C-infected person (e.g., razors, nail clippers, toothbrush);
- share cocaine (snorting) equipment;
- have another infectious disease (e.g., hepatitis B, HIV);
- were born to a hepatitis C infected mother; or
- have a sexual partner infected with hepatitis C.

[26] It is useful to bear in mind other decisions which bear specifically on the issue of the importance of the court approved Traceback Protocol in the overall functioning of the Plan, including:

Confirmed Referee Decision # 39 – February 6, 2002, John P. Sanderson, Q.C., Referee, as upheld on June 14, 2002 by a decision of the court having jurisdiction in the Class Action (The Honourable Mr. Justice Pitfield.)

Confirmed Referee Decision # 29 – December 21, 2001, Shelly Miller, Q.C., Referee

Confirmed Referee Decision # 42 – March 11, 2002, Judith Killoran, Referee

Confirmed Referee Decision # 59 – September 18, 2002, Martin Hebert, Referee

Arbitrator Decision # 54 – August 15, 2002, Vincent R.K. Orchard, Arbitrator

Arbitrator Decision # 40 – February 16, 2002, Tanja Wacyk, Arbitrator

[27] While there was *some* evidence adduced in this case that a Referee could certainly consider on the issue of whether or not the Claimant had “refuted the results of the Traceback Procedure,” there was insufficient evidence to refute the Traceback results.

[28] This process must have been particularly frustrating for the Claimant in that he did establish the threshold requirement that a blood transfusion was received during the Class Period.

[29] However, in the end, the Administrator’s denial of the Claimant’s request for Compensation must be upheld.

[30] The Administrator has an obligation to assess each claim and determine whether or not the required proof for compensation exists. The Administrator has no discretion to allow compensation where the required proof does not exist. In the circumstances, I am unable to find that the Administrator has failed to properly apply the terms of the Plan and the CAP to these facts. Further, I find that the Claimant has failed to meet the burden upon him to establish that he was probably infected with HCV for the first time as a result of a 1986 Blood transfusion.

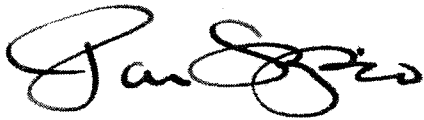
[31] The appeal must therefore fail. The Claimant is not entitled to receive compensation. The Administrator has an obligation to assess each claim and determine whether or not the required proof for compensation exists. The financial sufficiency of the Fund depends upon the Administrator properly scrutinizing each claim and determining whether the Claimant qualifies. A Referee similarly has no jurisdiction to alter, enlarge or disregard the terms of the Settlement Agreement or Plan.

F. Decision

[32] The time within which the Claimant may seek a review of the Administrator's decision denying his claim has long since passed. However, if I am wrong in reaching that conclusion, upon careful consideration of the Settlement Agreement, Plan, CAP and documentary evidence tendered, the Administrator's denial of the Claimant's application for compensation is hereby upheld.

[33] I would like to express my appreciation to the parties for their assistance and courtesy shown to one another and to me throughout.

Dated at Saskatoon, Saskatchewan, this 28th day of September, 2014.



Daniel Shapiro, Q.C., C. Arb., Referee

THIS DOCUMENT has been prepared by:

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