REFEREE'S DECISION
HEPATITIS C CLASS ACTION
JANUARY 1, 1986 – JULY 1, 1990

Claimant:	Claimant #3372
File No.:	416611 – 24
Province of Infection:	Alberta
Province of Residence:	Alberta
Date:	August 16, 2007

Decision

1. On June 14, 2005, the Administrator denied the Claimant's claim for compensation as a Primarily-Infected Person pursuant to the Transfused HCV Plan on the basis that the Claimant had not provided sufficient evidence that he was infected for the first time with HCV by a blood transfusion received in Canada within the Class Period.

2. The Claimant requested an oral hearing by a Referee to review the decision of the Administrator.

3. A hearing was held on July 24, 2007 in Edmonton.

4. Neither party disputed the following facts:

   (a) The Claimant currently resides in Edmonton, Alberta;

   (b) The Claimant was diagnosed with Hepatitis C on or about July 28, 1994;

   (c) After a motor vehicle accident in June of 1986 in Alberta, the Claimant underwent surgery for his injuries at the Royal Alexandra Hospital ("RAH") in Edmonton and received 26 blood transfusions;

   (d) The Tran 2 completed by the Claimant's physician, Dr. Robert Bailey, indicated that he had seen the Claimant on only one occasion in 1999 and noted that the Claimant had a history of non-prescription intravenous drug use;

   (e) On the Tran 3, the Claimant admitted that he had used non-prescription intravenous drugs;

   (f) Canadian Blood Services indicated on February 27, 2002 that the traceback was conducted of the 26 transfusions but five donors could not be traced such that its findings were inconclusive.

5. The Administrator asked for the opinion of Dr. Gary Garber, a professor and head of the Division of Infectious Diseases at the University of Ottawa and the Ottawa Hospital and received a report from Dr. Garber on May 16, 2005.

6. Fund Counsel submitted the medical opinion from Dr. Garber who opined that the most likely cause of the infection was the intravenous drug use.

7. Dr. Garber noted that the first of the Claimant's elevated liver function test results occurred in 1992.

8. Dr. Garber's review of the Claimant's medical records noted there were additional transfusions in 1993, all of which were negative for Hepatitis C.

9. In cross examination Dr. Garber, conceded that:

   (a) the liver function tests are performed to consider how the liver is functioning in general;

   (b) liver filters the blood that is circulated throughout the body and many chemicals (including alcohol) are filtered throughout the body;

   (c) over the counter medications may affect and decrease the function of the liver due to various states and thus a health care provider may order a panel of liver functions tests.

10. The Claimant testified that:

   (a) he was born in Alberta in 1964;

   (b) he has a large tattoo of an eagle on his right upper arm which he received in a tattoo parlor in Edmonton in Grade 10;

   (c) he experimented with marijuana and hallucinogenic drugs a few times in high school;

   (d) after he completed his high school education, he worked for a short period for a music band and then found work in the oil industry in Alberta;

   (e) he enjoyed partying on weekends at this time in his life;

   (f) he helped some of his friends inject drugs in that time period but did not do so himself;

   (g) the motor vehicle accident on June 17, 1986 which resulted in 26 blood transfusions, occurred when he was operating a truck, after having consumed some drinks and while driving at a high rate of speed;

   (h) he sustained serious injuries in the accident including a broken back, ruptured spleen, punctured lung and was in a coma for one month;

   (i) after discharge from the RAH he received treatment at the Glenrose Hospital, where he underwent occupational and other therapies to relearn activities of daily living;

(j) upon his discharge from the Glenrose Hospital, he returned to live with his parents, although for some period of time he lived in an apartment in the inner City of Edmonton and then in a mobile home on or near his parent's home;

(k) when he lived in Edmonton he became an easy target for the inner city community;

(l) in this interval of time, he fell into a bad crowd who took advantage of him;

(m) he had been introduced to intravenous drugs by a prostitute he met in a location which he understood to be a safe haven for intravenous drug users;

(n) he took in a roommate who turned out to be an ex-convict;

(o) that roommate supplied him with, and also taught him how to freebase, cocaine;

(p) he was taught the safe use of IV drugs and would buy new syringes in Zeller's or he would go to the Boyle Street needle exchange;

(q) he voluntarily entered Alberta Hospital Ponoka ("AHP") in 1989 and recalled some attendances in the Brain Injury Rehabilitation Program ("BIRP") at that time;

(r) he had been stabbed with an unknown needle by a delusional assailant;

(s) he attempted suicide on July 31, 1993 by reason of being assaulted the night before;

(t) he received an AISH pension in about 1993;

(u) he told Dr. Taylor, the physician who testified on his behalf at the hearing, that he estimated he injected cocaine approximately 160 times;

(v) he could not now remember how many occasions he had engaged in intravenous drug use.

11. No records from RAH were produced to me to verify the nature and extent of the treatment or the recovery, however records from AHP indicate that at the RAH the claimant underwent surgery to relieve a subdural hematoma and an exploratory laparotomy.

12. The AHP records also indicate that the brain injury consisted of right frontal subdural hematoma, frontal lobe disinhibition, and intellectual and memory deficit. They indicate that thereafter he suffered from dysphasia and dyspraxia, remained disinhibited, and had recent and remote memory deficits and residual dysphasia.

13. The AHP records corroborate the admission in 1989 and state that the Claimant was admitted to the BIRP program for attempted rehabilitation. He was discharged into the Edmonton community after it appeared some improvement had occurred.

14. The AHP records confirm that the Claimant attempted suicide in 1993 by shooting himself in the face with a rifle; that he was treated for numerous facial injuries at the University of Alberta Hospital and thereafter was referred to AHP. The records documented at the time of that hospitalization, that he was abusing cocaine which he was using intravenously.

15. The AHP records also documented certain behavioral problems and drug abuse for which the Claimant had been treated in 1989, however in the 1989 admission, intravenous drug use was not specifically referenced.

16. On cross examination, the Claimant conceded that:

    (a) he could not remember if he was injecting drugs in 1989 but thought it was more likely that he began the practice in 1991;

    (b) he would inject 10 times in one period at home usually after he received his monthly cheque and occasionally when others present would assist him with the injection;

    (c) despite testifying that he ceased intravenous drug use in July 1993, in November 1993 during his admission at AHP for followup treatment from his suicide attempt he was found with a syringe in his sock;

    (d) the syringe had been used to inject cocaine;

    (e) Dr. Bailey thought he had been infected with Hepatitis C from the incident when he was stabbed with the needle.

17. The Claimant disputed certain of the conclusions drawn by Dr. Garber and Dr. Bailey relative to his employability and reasons why he was not prescribed interferon.

18. The Claimant also disputed the foundation for Dr. Garber's opinion in relation to the history of elevated AST and ALT readings found after 1993.

19. The Claimant pointed out that there was considerable information available on the Internet to show that AST and ALT readings are not always reliable and may be affected by external factors.

20. The Claimant submitted that the liver test results cannot be definitive either in general or in his case specifically.

21. The Claimant also disputed Dr. Garber's suggestion that he could have been infected by needle sharing because he claimed his practice was not to share needles.

22. The Claimant recalled that he sustained a staph infection as a consequence of his 1986 injuries and for that reason suspected the Hepatitis C was due to either an unsterilized needle used or one of the blood transfusions he received when in the RAH.

23. The Hepatitis C Class Action provides that when a Claimant has used non-prescription intravenous drugs, he must provide "other evidence establishing on a balance of probability that he or she was infected for the first time with HCV by a blood transfusion in Canada during the Class Period."

24. The Court Approved Protocol ("CAP") provides that the Administrator must be satisfied on a balance of probabilities that the HCV person was first infected with HCV by a blood transfusion received in Canada in the Class Period.

25. The burden of proof is on the Claimant.

26. The CAP requires that the Administrator conduct a trace back, which was done. When the trace back is either negative or inconclusive, the Administrator is instructed under Section 7 of the CAP to perform additional investigation as prescribed under Section 8 of the CAP.

27. Section 8 of the CAP requires that the Administrator:

> "Obtain the opinion of a medical specialist experienced in treating and diagnosing HCV as to whether the HCV injection and the disease history of the HCV infected person is more consistent with infection at the time of the receipt of blood, the Class Period blood transfusions or the secondary infection or with infection at the time of a non-prescription non-intravenous drug use as indicated by the totality of the medical evidence."

28. It is my obligation as adjudicator to weigh the totality of the evidence obtained from additional investigations and determine whether or not on

the balance of probabilities the infected person meets the eligibility criteria. In doing so, I must also take into account the opinion of medical specialists as to whether the infection and the disease history of the HCV infected person is more consistent with an infection at the time of the receipt of the blood or with an infection at the time of the non-prescription intravenous drug use as indicated by the totality of the medical evidence.

29. I accept that Dr. Garber qualifies as "medical specialist experienced in treating and diagnosing HCV".

30. I note that Dr. Garber was specifically requested to opine on the issue of causation. Dr. Garber was of the view that it was more probable that the infection resulted from intravenous drug use.

31. I also note that Dr. Taylor, who also testified at the hearing on behalf of the Claimant, conceded after hearing Dr. Garber's testimony that he did not have all the information that Dr. Garber had before him when he gave his opinion.

32. In any case, Dr. Taylor offered the opinion that the Hepatitis C was acquired as a result of the transfusions following his self-inflicted gun shot injury in 1993.

33. Given the issue of credibility, I questioned the Claimant about his drug use history as well as the potential of other risk factors that may have been implicated in his contracting of the Hepatitis C virus.

34. The Claimant was candid in admitting that he could not remember many details of his drug use history, and his lack of memory given his tragic life history is not surprising.

35. I conclude that while the Claimant has a *bona fide* belief that the infection must have derived from causes other than his intravenous drug use, and in particular most likely the transfusions in 1986, this belief must be discounted by his own admitted inability to account for all the other high risk sources for his infection.

36. In addition, I note that none of the physicians whose opinions were presented to me considered that the Hepatitis C virus was caused by the transfusions given at RAH in 1986.

37. Further, despite an effective cross examination of Dr. Garber, the Claimant has not persuaded me that all the evidence at the hearing can overcome the conclusion reached by Dr. Garber.

38. The Claimant's own evidence and the medical evidence presented on his behalf did not persuade me that the virus was probably transmitted from

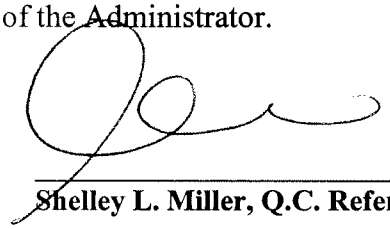
one of the untraceable 1986 transfusions instead of one of the possible other risk factors referenced in his evidence.

39. Like the Administrator, as Referee, I am bound by the terms of the Settlement Agreement which requires the Claimant who has a history of intravenous non-prescription drug use to meet the very difficult task of demonstrating on a balance of probabilities that the infection resulted from a blood transfusion rather than non prescription intravenous drug use.

40. Based on the foregoing, I must conclude that the Claimant has not satisfied the burden of proof upon him.

41. In the result, I uphold the decision of the Administrator.

Dated August 16, 2007.



Shelley L. Miller, Q.C. Referee

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