

## DECISION

Claim ID: 9254

1. On February 15, 2006, the Administrator denied the claim for compensation of the Claimant filed on the basis of qualifying as a primarily-infected person under the transfused HCV Plan. The claim was denied on the grounds there was insufficient evidence that the Claimant received blood within the Class period from a donor who was determined to be HCV antibody positive.
2. The Claimant requested that the Administrator's denial of his claim be reviewed by a Referee.
3. Following a series of pre-hearing telephone conference calls and an exchange of correspondence, the parties agreed a hearing was required to review the Administrator's denial of the claim.
4. The Claimant submitted documentation in support of his claim by way of affidavit evidence from two nurse practitioners. He provided oral testimony at the hearing as did his wife. The two deponents were not called as witnesses. Thus their evidence, while admissible, was not tested through cross-examination or other enquiry. The hearing was held on September 20, 2007.
5. Most of the relevant facts are not in dispute and can be summarized as follows:
  - (a) The Claimant is infected with Hepatitis C.
  - (b) The Claimant testified he has not had sexual relations with anyone but his wife since their marriage in 1984. The Claimant testified he is not and has never been an intravenous drug user.
  - (c) The Claimant was involved in an automobile accident on February 12, 1989. As a result of the accident he suffered a serious back injury. He was admitted to St. Paul's Hospital in April 6, 1989, and underwent surgery on April 7, 1989.

- (d) The Claimant testified that prior to surgery he requested of a member of the nursing staff, that his wife be called after the operation to update her on his condition.
- (e) The Claimant's wife testified that she received a telephone call from a person who identified herself as a nurse at St. Paul's to advise that the surgery on the Claimant had gone well and that he had been given a blood transfusion. She further testified that she advised her husband of the phone call and the information she had been given, when she visited him later in the day.
- (f) The Claimant made several requests for his medical records from St. Paul's Hospital with respect to his surgery in 1989. With the exception of the intake and output form, which was not found to be in the file, the Claimant has been provided with his entire medical record.
- (g) The Claimant submitted medical documentation in support of his claim, which the Administrator reviewed and considered. The documentation includes the pre-operative checklist, the anesthetic record completed by the anesthetist, the recovery room record completed by the nurse in the recovery room, notes of the nurse written after the patient was returned to his own hospital room, and the discharge summary. There is no reference in any of the medical documentation of any blood transfusion taking place or bleeding or other complication requiring a transfusion. The documentation reveals that a Class match was ordered, but only a Group and Screen was done which usually indicates no blood was required or released from the Blood Bank.
- (h) When the claim was made, the Administrator directed the required Traceback Procedure to be carried out by Canadian Blood Services.
- (i) By letter dated August January 23, 2006, the Administrator was advised by Canadian Blood Services that the Claimant's medical records were available and that there is no record of any transfusion taking place.
- (j) The Administrator denied the claim on the basis that there was no evidence to establish that the Claimant received blood during the

Class Period and in particular, as a consequence of the automobile accident and the surgery at St. Paul's Hospital in April 1989.

6. Based on these facts, it is clear that the Administrator's decision must be sustained.
7. The 1986 - 1990 Hepatitis C Settlement Agreement defines "Class Period", as the title implies, as the period "from and including 1 January 1986 to and including 1 July 1990." The Transfused HCV Plan provides the identical definition. The Plan defines a "Primarily-Infected Person", a status a successful Claimant must achieve, as "a person who received a Blood transfusion in Canada during the Class Period . . .".
8. Pursuant to Article 3.01 of the Plan, a person claiming to be a Primarily-Infected Person is required to produce to the Administrator medical records "demonstrating that the Claimant received a Blood transfusion in Canada during the Class Period."
9. Article 3.04(1) of the Plan provides as follows:

Notwithstanding any other provision of this Agreement, if the results of a Traceback Procedure demonstrate that none of the donors or units of Blood received by a HCV-Infected Person or Opted-Out HCV Infected Person before 1 January 1986 is or was HCV antibody positive or that none of the donors or units of Blood received by a Primarily-Infected Person or Opted-Out 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 of such HCV Infected Person and all Claims pertaining to such HCV Infected Person or Opted-Out HCV Infected Person including Claims of Secondarily-Infected Persons, HCV Personal Representatives, Dependents and Family Members.

10. Article 3.04(2) of the Plan reads as follows:

A claimant may prove that the relevant Primarily-Infected Person or Opted-Out Primarily-Infected Person was infected, for the first time, with HCV by a Blood transfusion received in Canada during the Class Period or that the relevant Secondarily-Infected Person or Secondarily-Infected Person who opted out of the Class Action in

which he or she would otherwise be a Class Member was infected for the first time with HCV by his or her Spouse who is a Primarily-Infected Person or Opted-Out Primarily-Infected Person or Parent who is a HCV Infected Person or Opted-Out HCV Person, *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]

11. A Traceback Procedure is defined in Article 1.01 of the Plan as follows:

"Traceback Procedure" means a targeted search for and investigation of the donor and/or the units of Blood received by a HCV Infected Person.
12. As has been noted, the evidence is that a Traceback Procedure was conducted. As a consequence, it was not established there was any unit of blood cells transfused in April 1989.
13. Thus, the Claimant submits that not all of the medical records were before the Administrator when the decision to deny the claim was made. Specifically, the intake output form is missing. The purpose of that form is to record all fluids taken in or secreted by the Claimant, which would obviously include a blood transfusion if one had been administered. The Claimant and his wife have provided evidence that the Claimant's wife was advised by an unnamed nurse following the back surgery that the Claimant had been transfused and if the missing form was available it would confirm that information. The affidavit evidence of the two nurse practitioners is that the intake output form is usually completed by the medical team and its absence indicates the medical file in this case is incomplete. Accordingly, the Claimant submits he should not be prejudiced by what he describes as "the absence of a key medical document".
14. I have reviewed and considered a number of prior decisions provided to me by counsel for the Fund and counsel for the Claimant. These decisions deal with circumstances where medical records had been lost or destroyed. They consider the obligation of a Claimant to present evidence independent of their own personal recollection or that of a family member, in order to establish, on a balance of probabilities, that he or she received a blood transfusion. Most of these cases emphasize that each decision is necessarily dependent on the individual facts of that case.

15. I have had the opportunity to consider the reasons for judgment of Mr. Justice Pitfield with respect to claim number 1300593. In that case, the issue was similar to the question before me, in that the Claimant was seeking to invoke the exception provided in Article 3.04(2). The most helpful paragraphs of the decision read as follows:

[9] Article 3.04(1) applies notwithstanding any other provision of the Settlement Agreement except Article 3.04(2). Article 3.04(1) provides that the Administrator must reject a claim for compensation if either of two conditions is satisfied: the Claimant received blood prior to January 1, 1986 and the traceback in respect of that transfusion indicates that the blood donor was infected with the Hepatitis C antibody, or the Claimant received a transfusion or transfusions in the class period and the traceback in respect of that or those transfusions indicates that neither the donor nor donors of the blood transfused in the class period tested Hepatitis C antibody positive.

[10] Article 3.04(2) provides an exception to Article 3.04(1). Notwithstanding traceback results, a Claimant may prove that he or she was infected with the Hepatitis C antibody for the first time by a blood transfusion received in the class period. The Settlement Agreement is silent with respect to the applicable burden of proof and the nature of the evidence that might refute the traceback result.

...

[15] The evidence the Claimant would be required to adduce on appeal would include, at the least, complete family and personal medical history and detailed evidence of all aspects of the Claimant's lifestyle including evidence of the absence of opportunity to be infected by needles or injections, however and for whatever purpose received. The kinds of evidence I have described are not intended to be exhaustive. Rather they are intended to point to the process that must be followed in the attempt to refute the traceback result.

[16] A simple denial by a Claimant of personal history or actions that have been identified as potential non-transfusion sources of HCV infection will not suffice. The reliability of the assertion which is subjective in nature would have to be tested by reference to all known objective evidence. One of the pieces of objective evidence is the negative traceback result following upon the application of, and adherence to, the approved traceback protocol. Contradictory

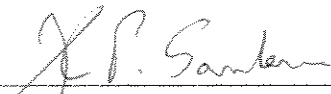
objective evidence would have to be very persuasive if the traceback result is to be refuted.

16. I agree with this analysis. Whether the exception of Article 3.04(2) applies is essentially a factual issue to be decided by a consideration of the objective evidence and relevant information presented in the specific case. There is no generic or abstract principle to be applied in every case. The question the referee or arbitrator appointed under the Settlement Agreement must answer is whether there is sufficient persuasive objective evidence to overcome the Traceback result.
17. In this case, the relevant hospital records have not been lost nor have they been destroyed. To the contrary, the records are complete, detailed, and extensive. The one anomaly is that a document that normally would be found in the medical file, is not there. While the Claimant believes the missing document would contain a reference to a blood transfusion being administered to him, that belief is undercut by the fact that all of the other medical documents in the file separately prepared by the anesthetist, the surgeon and members of the nursing staff, make no reference to a blood transfusion even though there are specific boxes and places on the respective forms for such information to be recorded. In addition, as was stated by Carol Miller, on behalf of the Administrator in her testimony, it is possible that the intake output form was not completed and not placed in the file because there was nothing to record.
18. I have great sympathy for the Claimant and I do not doubt for a moment the sincerity and honesty of both he and his wife. Nevertheless, the language of sections 3.04(1) and (2) of the Plan is clear that the Claimant must produce objective evidence, not speculation or a hypothetical possibility, in order to establish on a balance of probabilities that blood was transfused. If I were to accept the position of the Claimant that the missing document did in fact record that a blood transfusion had taken place, that would mean the other documentation in the medical file is unreliable and imply that the persons who completed these various documents did not provide information they should have recorded.
19. I fully appreciate the Claimant cannot identify any other possible cause of his illness. In his view, because of his admirable lifestyle, he must have contracted Hepatitis C through a blood transfusion. Unfortunately, there is uncontroverted medical evidence that in at least ten percent of the cases

where Hepatitis C is contracted, there is no known or identifiable cause. It is for that reason that the Administrator is required by the terms of the Plan to view and consider all the documentary evidence and make appropriate decisions on the basis of the objective and proven facts, not speculations, disclosed by that evidence.

20. On the basis of the facts of this case, I am compelled to find that the Administrator had no alternative but to deny the Claim. Unfortunately for the Claimant, there is insufficient reliable evidence to establish that he received a blood transfusion during the Class period from a donor who was determined to be HCV antibody positive.
21. It is the role and responsibility of the Administrator, under the settlement agreement, to administer the Plan in accordance with its terms. The Administrator has an obligation under the Plan to review each claim to determine whether the required proof for compensation exists. The words of Article 3.04(1) and 3.04(2) of the Plan are clear and unambiguous that the Administrator " . . . must reject the Claim . . ." in circumstances such as these. The Administrator has no discretion to allow a claim where the required proof has not been produced. The Administrator must administer the Plan in accordance with its terms and he does not have the authority to alter or ignore the terms of the Plan. A Referee, called upon to review a decision of the Administrator is also bound by the terms of the Plan and can not amend it or act contrary to its terms.
22. Accordingly, for the reasons set out above, I find that the Administrator has properly determined that the Claimant was not entitled to compensation under the Plan. I further find that the Administrator's decision must be sustained.

Dated at Vancouver, British Columbia, this 11th day of October 2007.

  
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John P. Sanderson, Q.C.  
Referee