

**IN THE MATTER OF AN ARBITRATION PURSUANT TO
THE WALKERTON COMPENSATION PLAN**

[REDACTED] (minor)

Applicant

AND:

The Court Appointed Administrator

Respondent

Appearances at a hearing convened in Walkerton, Ontario on August 9, 2005

And July 16, 2008:

On behalf of the Applicant: Patrick Kelly, Applicant counsel
[REDACTED], parent (August 9, 2005 only)

On behalf of the Administrator: Milena Protich, Plan counsel
Pam Oetting, Plan Administrator

COURT APPOINTED ARBITRATOR:

Reva Devins

DECISION

1. Ms. [REDACTED] has submitted an application on behalf of her minor son, [REDACTED], (the "Applicant"), for compensation under the Walkerton Compensation Plan.
2. The Applicant claimed compensation for illness arising from contaminated water. Although he was not a resident, he was born at the South Bruce Grey Health Centre in Walkerton on [REDACTED] 2000. He remained in hospital, with his mother, until May 19, 2000. [REDACTED] was bathed in water delivered by the Walkerton PUC and he was breastfed by his mother after she had consumed contaminated water in hospital.
3. The Applicant was diagnosed with jaundice shortly after his birth, which resolved by May 29, 2000. In the fall of 2000, after [REDACTED] was weaned, he had difficulty

maintaining weight. In April 2001, he was diagnosed with Dientamoeba fragilis ("d. frag."), a parasitic bowel infection.

4. The Applicant's mother submitted an application for compensation and maintained that [REDACTED] illnesses were either directly caused by the consumption of or exposure to contaminated water, or that his immune system was suppressed by his exposure to contaminated water and that rendered him more susceptible to these illnesses. [REDACTED] family doctor submitted an opinion in support of this application.
5. The Administrator determined that [REDACTED] was not ill due to the consumption of contaminated water and that he therefore did not meet the criteria for Class Membership. In arriving at its decision, the Administrator relied upon an expert opinion that d. frag. was not part of the Walkerton outbreak, and that the Walkerton outbreak had no impact on the development or persistence of [REDACTED] jaundice or any other illness that he experienced after his birth.
6. An arbitration to determine [REDACTED] eligibility as a class member was commenced on August 9, 2005. Ms. [REDACTED] attended the hearing and was represented by counsel, Pat Kelly. The arbitration was adjourned to permit the Applicant to present further medical evidence.
7. This matter was reconvened for hearing on July 16, 2008. Ms. [REDACTED] did not attend the hearing. She confirmed through counsel that she was aware of the hearing, however, she declined to attend.

The Plan

8. The Overview to the Walkerton Compensation Plan provides, in part, as follows:

The Government of Ontario is committed to providing financial support and compensation to any individual who became sick or lost loved ones or otherwise incurred certain out-of-pocket expenses or losses, because of contaminated water in Walkerton. ...

The purpose of this Walkerton Compensation Plan is to pay to the Applicants full and complete compensation, without regard to fault, in accordance with Ontario law and with the terms and conditions herein, provided, however that no amount shall be paid for aggravated, exemplary or punitive damages.

Individuals will have access to fair compensation through an efficient, timely, and impartial process. Applications will be individually evaluated and, if necessary, resolved through a mediation process, and where unsuccessful, independent arbitration.

9. Under the terms of the Walkerton Compensation Plan, non-residents of Walkerton will be admitted as Class Members if they establish that they "consumed or used

water delivered by the Walkerton PUC at any time in the period April 1, 2000 to June 27, 2000" and they "became ill or died as a result thereof."¹

10. In accordance with section 3.2.2 of the Plan, the Administrator can only offer compensation when it is satisfied, on a balance of probabilities, that:
 - a. The Applicant is an eligible person under the Plan;
 - b. The physical injury or loss was caused by the contamination of Walkerton's water supply between April 1 and December 5, 2000;
 - c. The damages claimed were suffered; and
 - d. The damages are payable in accordance with Ontario law.

Facts

11. The Applicant lives with his parents in [REDACTED] Ontario. [REDACTED] was delivered by caesarian section at the South Bruce Grey Health Centre in Walkerton on [REDACTED] 2000. He remained at the hospital with his mother until May 19, 2000. During his stay in Walkerton, [REDACTED] was breastfed by his mother who had consumed water delivered by the Walkerton PUC. He was also bathed in contaminated water. [REDACTED] was diagnosed with jaundice shortly after his birth, which resolved by May 29, 2000.
12. [REDACTED] was exclusively breast fed for the first six months of his life and he did not develop any symptoms of gastroenteritis during this period. Nor did his mother become ill after she consumed water in Walkerton. [REDACTED] was not circumcised immediately after birth and subsequently developed phimosis. He was eventually circumcised at age three, without complications.
13. Dr. J. David Barr, the Applicant's physician, filled out the Health Practitioner's Information Form, on February 6, 2002. He indicated that during the months of September and October 2000, [REDACTED] had difficulty maintaining weight and was seen numerous times for failure to thrive. In April 2001, he exhibited signs and symptoms of gastroenteritis and was ultimately diagnosed with d. frag., a parasitic bowel infection. Several other immediate family members were also ill and treated at this time. When asked whether the Applicant was ill because of the consumption of water delivered by the Walkerton P.U.C. between April 1, 2000 and December 5, 2000, Dr. Barr checked the "No" box; but wrote in 'maybe yes' beside it.
14. In a letter dated March 30, 2004, Dr. Barr provided this opinion:
[REDACTED] was protected from expressing symptoms secondary to the consumption of contaminated water, by the immunity contained in breast milk he received from his mother.
[REDACTED] was never diagnosed by objective evidence, (stool cultures), to have contacted E-Coli, but was positive for an amebic parasite infection by a waterborne pathogen, specifically Dientamoeba fragilis.

¹ Section 1(b) of the Walkerton Compensation Plan.

To assume that this infection was not a result of exposure to contaminated water would be incorrect. To be frank, it would be absurd.

[REDACTED] represents a special case because of his age and symptoms, which were not confirmed to be E-Coli. Nevertheless, I believe that his sickness was likely due to his exposure to contaminated water and no other reason."

15. An expert medical opinion was sought from Dr. James Brunton, a microbiologist qualified as an expert at the Walkerton Inquiry and director of the division of infectious diseases at the Toronto General Hospital.
16. In his first opinion, dated April 28, 2005, Dr. Brunton concluded:
 - a. [REDACTED] would have developed symptoms at the time of exposure had he been infected with *E. coli* or *Campylobacter* as a result of the Walkerton water outbreak, his symptoms would not appear for the first time after he stopped breastfeeding.
E. Coli 0157:H7 and *Campylobacter*, the bacteria that caused the Walkerton outbreak, cause symptoms within 10 days of ingestion. The bacteria do not persist in the gut for months and suddenly cause symptoms and disease at a later date, regardless of whether an infant is being breastfed. Therefore, if [REDACTED] had been infected by exposure to Walkerton water, his symptoms would not suddenly emerge once he stopped breastfeeding;
 - b. [REDACTED] was ultimately diagnosed with a recognized pathogen, *Dientamoeba fragilis*, that can cause diarrhea and stomach cramps, especially in children, and this may have been the cause of his symptoms in April 2001;
 - c. *D. frag.* is not considered a water borne pathogen and was not associated with the Walkerton outbreak in May 2000;
 - d. For all of these reasons, Dr. Brunton concluded that there was no causal relationship between the Walkerton water contamination in May 2000 and the symptoms that [REDACTED] developed after he was weaned.
17. An arbitration to determine [REDACTED] eligibility as a Class Member was first convened on August 9, 2005. At that time, Mr. Kelly advised that the Applicant accepted Dr. Brunton's expertise and his opinion. The Applicant's mom did not believe that his opinion addressed the possibility that [REDACTED] was rendered more susceptible to later illness as a result of his exposure to contaminated water. Counsel also submitted that there were further medical documents that should be considered before the matter was finally determined. This matter was adjourned on consent and a joint letter from Plan Counsel and Applicant counsel was sent to Dr. Brunton seeking further clarification.
18. By letter dated August 18, 2005, counsel for the Applicant confirmed that [REDACTED] s family accepted that *d. frag.* was not present in the water in May 2000 and that [REDACTED] did not contract the parasite as a result of the Walkerton out

break. The family was concerned, however, that [REDACTED]'s immune system was suppressed as a result of his mother's exposure to contaminated water during her pregnancy. They feared that a weakened immune system rendered him more susceptible to other illnesses and that he experienced more severe symptoms when he did become ill. The family also wanted an opinion on the likelihood that [REDACTED] jaundice or delayed circumcision was in any way related to his exposure to contaminated water.

19. In his updated opinion, dated October 2, 2006, Dr. Brunton provided the following opinion:
 - a. Neither [REDACTED] nor his mother had diarrhea in the spring of 2000. Since neither exhibited symptoms of infection with *E. coli* 0157:H7 or *Campylobacter* there is no chance that the Walkerton outbreak had any impact on the development or persistence of jaundice when [REDACTED] was an infant;
 - b. There is nothing in the medical record to indicate that [REDACTED] was ever infected with *E. coli* 0157:H7 or *Campylobacter*. Nor is there any evidence to substantiate Dr. Barr's view that [REDACTED]'s health issues were related to his exposure to contaminated water. Dr. Brunton confirmed his original opinion that [REDACTED]'s intermittent illnesses had nothing to do with the water delivered by the Walkerton PUC in the spring of 2000.
20. Additional medical documents were also submitted from Drs. Salvadori and Morris. Dr. Marina Salvadori, saw [REDACTED] at the WEL Investigators of the Walkerton Health Study. In her letter to Dr. Barr, dated June 7, 2002, she noted that [REDACTED] was in the 75th percentile for weight and height. She also observed that although he had had three episodes of diarrhea and related weight loss, he recovered quickly after each of these occurrences. She concluded as follows: "[REDACTED] seems to me to be a completely normal child with normal stool and bowel patterns. It is not uncommon that when a child gets gastroenteritis, that is usually viral, they lose weight and can be more ill than older siblings. He has always bounced back and is developmentally completely normal and has no failure to thrive." Dr. Morris stated that [REDACTED]'s circumcision was delayed due to his birth weight.

Submissions

21. At the hearing on July 16, 2008, Applicant's counsel confirmed he was not in a position to make any further submissions. He had not been in contact with Ms. [REDACTED] after forwarding Dr. Brunton's final opinion. He had repeatedly tried to contact Ms. [REDACTED], however, she did not return his calls, respond to his letters or contact his office. He therefore has no instructions with respect to the position that Ms. [REDACTED] wished to advance. Before concluding this arbitration, Mr. Kelly was given the opportunity to try to contact Ms. [REDACTED]. He was able to reach her by phone and she confirmed that she was aware of the hearing, understood that it was

proceeding, and that she did not intend to attend nor provide Mr. Kelly with any instructions.

22. Plan Counsel submitted that the Applicant had not established that he was ill as a result of contaminated water. All of the medical evidence supports a conclusion that he was infected with *d. frag.* in April 2001 but that *d. frag.* was not part of the Walkerton outbreak. Nor was there evidence of any other illness that arose as a result of exposure to contaminated water in Walkerton.

Decision on Compensation

23. [REDACTED] was born at the local hospital in Walkerton at the height of the Walkerton water crisis. He was exposed to contaminated water when he was bathed in it and when he consumed breast milk from his mother who had ingested the water during her confinement in hospital. [REDACTED] experienced a number of health issues in his early years: he had jaundice shortly after birth, he had bouts of diarrhea and associated weight loss in 2001, and his circumcision was delayed. Fortunately, [REDACTED] has developed as a healthy, normal little boy. Nonetheless, and quite understandably, his mother fears that his health has been negatively affected by the location and circumstances of his birth. This fear was undoubtedly magnified by the opinion expressed by Dr. Barr. In order to protect his interests, Ms. [REDACTED] has applied for compensation from the Walkerton Compensation Plan on behalf of [REDACTED], who is still a minor.
24. The Walkerton Compensation Plan was intended to be a simple, expeditious means to obtain compensation for those who have suffered a loss as a result of the contamination of Walkerton's water supply. Entitlement to compensation is limited to individuals who suffered a loss or injury, directly or indirectly, from the contamination of the water delivered by the Walkerton PUC². To establish that he is eligible for compensation under the Plan, as a non-resident of Walkerton, [REDACTED] must be able to demonstrate that his illness or illnesses were the result of contaminated Walkerton water.
25. The Applicant has raised a number of concerns through the course of these proceedings. Concerns were raised regarding [REDACTED]'s jaundice, failure to thrive and diarrhea in April 2001 and his delayed circumcision. My review of the medical information does not support a finding that any of these health issues were related to the water delivered by the Walkerton PUC in the spring of 2000. Although I fully appreciate why his mother would be concerned about the relationship between [REDACTED]'s pattern of illness and the Walkerton water crisis, I must arrive at my conclusion on the basis of the objective evidence before me.
26. Dr. Brunton's opinion was the only evidence provided to me regarding [REDACTED]'s jaundice. Neither [REDACTED] nor his mother demonstrated any symptoms of

² Definition of Class Member as set out in Schedule A of the Walkerton Compensation Plan.

gastroenteritis in the spring of 2000, and there is no other evidence that either of them had been infected with *E. coli* or *Campylobacter*. I accept Dr. Brunton's unchallenged conclusion that there is therefore no chance that the Walkerton outbreak had an impact on the development or persistence of jaundice in [REDACTED] in this circumstance.

27. I also accept Dr. Brunton's evidence that *d. frag.* is not a water borne pathogen, was not associated with the Walkerton outbreak in May 2000 and that [REDACTED]'s symptoms and diagnosis in April 2001 is unrelated to his exposure to Walkerton water. Although Dr. Barr expressed a contrary view, I prefer the detailed expert evidence of Dr. Brunton, a recognized specialist in microbiology and infectious diseases to the unsupported statement by Dr. Barr. In any event, counsel for the Applicant acknowledged Dr. Brunton's greater expertise in this field and accepted his conclusion that [REDACTED] did not contract *d. frag.* because of exposure to or consumption of Walkerton water.
28. Although [REDACTED]'s mother was concerned that [REDACTED]'s immune system was compromised by his exposure to contaminated water either in utero or after his birth, there is no medical evidence to support this fear. Dr. Brunton was asked to comment on the likelihood that [REDACTED]'s jaundice or subsequent illnesses were in any way related to his exposure to contaminated water. He reviewed all of the medical documents and concluded that there was no causal relationship between [REDACTED]'s illnesses and his exposure to contaminated water delivered by the Walkerton PUC.
29. Dr. Barr's opinion that [REDACTED] was "protected from expressing symptoms secondary to the consumption of contaminated water, by the immunity contained in breast milk" is not credible. It is inconsistent with the expert opinion of Dr. Brunton and the totality of evidence in this case. Neither [REDACTED] nor his mother experienced any symptoms of gastroenteritis in May 2000. Even if [REDACTED] was 'protected' by breastfeeding, his mother was not. Dr. Barr's opinion is predicated on his belief that 'it would be absurd' to believe that [REDACTED]'s infection by *d. frag.*, 'a waterborne pathogen', was not a result of exposure to contaminated water. Dr. Brunton has confirmed that *d. frag.* is *not* a waterborne pathogen and was *not* associated with the Walkerton outbreak in 2000. This opinion was accepted by the Applicant and significantly undermines Dr. Barr's evidence. I appreciate that Dr. Barr's opinion would be of grave concern to [REDACTED]'s family. Nonetheless, his suspicions remain unsupported.
30. I prefer the opinion of Dr. Brunton to that of Dr. Barr for all of the reasons previously cited. In my view, there is insufficient evidence to establish that [REDACTED]'s health was negatively affected by his exposure to contaminated water either before or after his birth. [REDACTED] did not develop any symptoms associated with the water borne pathogens found in the Walkerton water supply, nor did his mother. If they had been infected, [REDACTED] or his mom would have shown

symptoms at that time. There is no credible medical evidence that mere exposure, absent infection, can lead to a weakened immune system.

31. Lastly, Dr. Morris explicitly states that [REDACTED]'s circumcision was delayed due to his size at birth; there was no suggestion that his birth weight was in any way related to exposure to contaminated water.
32. Having reviewed all of the evidence presented to me, I am satisfied that [REDACTED]'s illnesses were not caused or related to water borne pathogens found in the Walkerton water supply in April and May 2000.

Order

33. The Applicant, [REDACTED] has not established that he became ill as a result of consumption of water delivered by the Walkerton PUC in the period April 1, 2000 to June 27, 2000. Therefore, the Applicant does not qualify as a Class Member under the Walkerton Settlement Plan.

Dated September 5, 2008



Reva Devins,
Court Appointed Arbitrator/Referee