IN THE MATTER OF AN ARBITRATION PURSUANT TO THE WALKERTON SETTLEMENT AGREEMENT

(Smith, et at. v. The Corporation of the Municipality of Brockton, et al. Court File No. 00-CV492173 CP)

BETWEEN:

[redacted]

(The Appellant)

and

The Administrator

(On an appeal of the decision of Martin Teplitsky, Q.C., released December 15, 2010)

Reasons for Decision

WINKLER C.J.O.:

Nature of the Appeal

1. This is an appeal of a decision of an arbitrator made pursuant to the Walkerton Compensation Plan. Under the Compensation Plan, Class Members are entitled to certain compensation for losses caused by the contamination of the Walkerton water supply for the period April 1, 2000 to December 5, 2000.

Facts

2. The Appellant was not ordinarily a resident of the Town of Walkerton at the time of the Walkerton water contamination crisis, but lived in the area and frequently visited the Town to run errands or visit with friends. In the course of doing so, the Appellant evidently consumed contaminated water, which has been claimed as the cause of a variety of ailments. On March 17, 2005, the Appellant accepted an offer of compensation in the amount of $10,000 pertaining to the "exacerbation of pre-event gastro-intestinal symptoms" and mental distress associated with a positive test for Yersinia, a pathogen which attending medical professionals described as unrelated to the Walkerton contamination crisis.

3. The Appellant subsequently accepted an additional offer of compensation in the amount of $5,500 on July 25, 2005 in relation to FLA claims.

4. By letters dated November 20, 2008 and thereafter, claims were advanced by the Appellant's spouse on the Appellant's behalf in regard to "health items included in the original Stage 2 claim and not taken into consideration of compensation offer." [*sic*] These health items are enumerated in the Appeal Submissions of the Appellant as insomnia, night sweats, rashes, nausea, headaches, modules neuritis and joint and muscle pain.

5. By letter dated October 1, 2010, the Administrator indicated that no offer of compensation would be made for the above-noted claim, noting that "no causal connection has been demonstrated between the complaints [...] and the Walkerton water contamination and the claims do not meet the requirements of s. 2.3 of the Plan."

6. The noted section of the Walkerton Compensation Plan provides as follows:

> **2.3 Further Applications To This Plan Permitted**
>
> A Class Member of Family Class Member who receives a payment under this Plan may make further applications and seek further damages if he, she or it suffers damages occurring or materializing after, or not reasonably discovered before, the date of the latest prior application, for which compensation has not previously been assessed or paid.

7. The Appellant filed an election to arbitrate the decision of the Administrator on October 31, 2010.

8. The Appellant's claim was heard by arbitrator Martin Teplitsky, Q.C. on December 15, 2010. Mr. Teplitsky indicated in his reasons that there was "no medical evidence to support a further claim under s. 2.3 of the Plan," and that this was "not a case of subsequent discovery of a potential causal connection not understood at the time of the first settlement." Mr. Teplitsky also noted that this was not "a case of unexpected exacerbation of symptoms."

9. Mr. Teplitsky denied the Appellant's claim on the basis that there was no evidence to support the claim advanced.

10. The Appellant's Appeal Submissions focus on the fact that the March 17, 2005 settlement "was confined to diarrhea, cramps and mental distress," such that the Appellant, therefore, was not compensated for insomnia, night sweats, rashes, nausea, headaches, modules neuritis and joint and muscle pain. It must be noted that, according to the November 20, 2008 letter, these 'health items' were "included in the original Stage II claim," which was advanced prior to the March 17, 2005 settlement. The Appellant asserts that Mr. Teplitsky's failure to address the causal connection between the health items complained of in the November 20, 2008 letter and the Walkerton water contamination crisis constitutes a reviewable error.

11. The sole issue on this appeal, therefore, is whether Mr. Teplitsky in fact erred in dismissing the Appellant's claim.

Standard of Review

12. Under the Compensation Plan, applications for compensation are initially considered by the Administrator. If the Administrator declines to make a compensation offer or makes an offer that is not satisfactory to the applicant, the applicant may elect to have his or her entitlement

determined by an arbitrator appointed pursuant to the Compensation Plan. An appeal of an arbitrator's award may be taken to this court.

13. The appeal is not a new hearing or trial *de novo,* nor is it a re-hearing of the matter. An arbitrator has an opportunity to hear the witnesses and assess the evidence that does not occur on appellate review.

14. Appeals under the Compensation Plan are analogous to appeals from a reference. Accordingly, the appropriate standard for that review is that as set out in *Jordan v. McKenzie* (1987), 26 C.P.C. (2d) 193 (Ont. H.C., aff'd (1990), 39 C.P.C. (2d) 217 (C.A.), where Anderson J. stated that the reviewing court "ought not to interfere with the result unless there has been some error in principle demonstrated by the [initial decision maker's] reasons, some absence or excess of jurisdiction, or some patent misapprehension of the evidence."

15. In other words, to be successful on appeal, it is not enough for the Appellant to re-argue the facts of the case before the Arbitrator in an attempt to have the reviewing court substitute its own decision for that of the Arbitrator. Argument that the Arbitrator should have made a different finding or reached a different result, without more, is not sufficient to be successful.

Analysis

16. Pursuant to the Compensation Plan, the Administrator must make an offer of compensation for claims of illness or injury arising from the Walkerton water contamination. However, there is no requirement that the offer be for a minimum amount and may be a "zero" offer if the Administrator determines that to be appropriate in respect of the claim. Class Members may elect to arbitrate the amount of compensation or to accept the amount offered.

17. In this case, the Appellant accepted two previous offers of compensation. As a result, the only claim to further compensation is pursuant to s. 2.3 of the Compensation Plan. This is the so-called "Further Claims" provision, which allows for additional compensation in two specific circumstances: a) where the ailment for which compensation is sought either materializes after the latest prior application for compensation; or b) was not reasonably discovered prior to that date. In addition, on either basis, the claim must be one for which no compensation has yet been paid.

18. The Appellant accepted two settlement offers in 2005 under separate heads of loss in respect of ailments arising from the Walkerton water contamination crisis. To obtain additional compensation, the criteria set out in s. 2.3 must be satisfied. The threshold question, contrary to the Appellant's position, is not causality in law, but rather eligibility under s. 2.3. In other words, the Appellant must establish that the ailments for which compensation is now claimed either were not reasonably discoverable prior to the time at which the settlement offers were accepted or did not manifest until after that time.

19. It is clear that Mr. Teplitsky clearly turned his mind to the criteria set out in s. 2.3, as his reasons indicate:

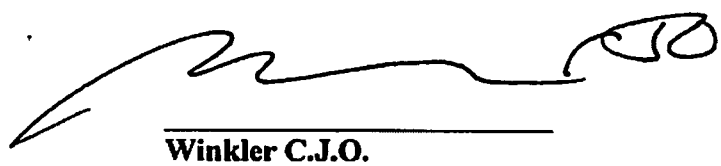
> The applicant has made two settlements. The first for $10,000.00 did not recognize certain conditions which [the Appellant] had complained of as related to the contaminated water.
>
> There is no medical evidence to support a further claim under s. 2.3 of the Plan. This is not a case of subsequent discovery of a potential causal connection not understood at the time of the first settlement, nor is this a case of unexpected exacerbation of symptoms.
>
> In the result, there is simply no basis for a further award.
>
> The claim is dismissed.

20. Mr. Teplitsky employed the proper test, and therefore committed no error in principle.

21. Given his determination on the s. 2.3 threshold issue, Mr. Teplitsky was not required to turn his mind to the question of causation. His refusal to do so, therefore, does not constitute a reviewable error.

Result

22. In my view, the appeal cannot succeed. The Arbitrator committed no error with respect to jurisdiction or by patent misapprehension of the evidence before him. Accordingly, his decision is hereby affirmed.



Winkler C.J.O.

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