[redacted]

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 June 13, 2011)

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, but lived in the area and frequently visited the Town. In doing so, the Appellant evidently consumed contaminated water, which has been claimed as the cause of a variety of ailments.

3. On March 17, 2005, the Appellant accepted an offer of compensation in the amount of $55,000.00 pertaining to gastrointestinal illness, joint pain, fatigue, and reactive arthritis found to have been causally related to the contamination of Walkerton's water supply. The Appellant had also made claims in relation to Diffuse Idiopathic Skeletal Hyperostosis ("DISH"), hypertension, arrhythmia, swallowing difficulties, and subcutaneous nodules; no offer was made by the Administrator to compensate [redacted] for these ailments, as they had not been demonstrated as causally-linked to the Walkerton event.

4. On July 27, 2005, the Appellant reached a settlement with the Administrator to accept $1,500.00 in relation to FLA claims.

5. In December 2006, the Appellant filed a new Stage 2 Application relating to damages alleged to have been caused by worsening arthritis, spinal fusion, daily pain, hypertension, fatigue, and other ailments, each of which were alleged to have been caused by the Walkerton

contamination event.

6. On May 27, 2008, the Appellant agreed to accept a total amount of $525,000.00 in compensation for his economic losses associated with his inability to carry on his previous self-employed profession. Having accepted this amount in the course of mediation by arbitrator Martin Teplitsky, the Appellant subsequently appealed the terms of the agreement arising from the May 27, 2008 settlement. That appeal, which dealt with all outstanding issues relating to the Appellant's economic losses arising from the contamination of Walkerton's water supply, was decided in reasons released by this court on September 26, 2011.

7. As part of the settlement of the Appellant's economic loss claims, the Appellant agreed to withdraw the claims advanced in the December 2006 Stage 2 Application. This withdrawal was stipulated as being without prejudice to the Appellant's right to advance claims pursuant to s. 2.3 of the Compensation Plan for any ailments developing after the 2005 settlements.

8. By letter dated November 20, 2008, claims were advanced by the Appellant in regard to "health items included in original Stage 2 claim and not taken into consideration of compensation offer as stated in letter dated March 14, 2005, from your office." Further correspondence from the Appellant to the Administrator dated April 28, 2009 again referred to the health items included in the original Stage 2 claim for which the Administrator had offered no compensation. As noted at paragraph 3 above, these complaints included DISH, hypertension, arrhythmia, swallowing difficulties, and subcutaneous nodules

9. By letter dated October 4, 2010, the Administrator indicated that no offer of compensation would be made for the above-noted claim, noting that no causal connection had been demonstrated between the complaints made and the Walkerton water contamination and that the claims did not meet the requirements of s. 2.3 of the Compensation Plan.

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

11. On November 8, 2010, counsel for the Appellant advised that the claims to which the arbitration related were not further claims pursuant to s. 2.3, but, rather, were unfinished items from a previous claim.

12. The Appellant's claim was heard by arbitrator Martin Teplitsky on December 10, 2010. At the hearing, the Appellant advised Mr. Teplitsky that he would not proceed with any of the claims in issue except for that related to hypertension, and requested additional time to produce evidence supporting that claim. Mr. Teplitsky's order dated December 10, 2010 granted an adjournment to a later date, writing as follows:

> [The Appellant] has advanced a number of claims. Except for hypertension, all other conditions are not being proceeded with.
>
> With reference to "hypertension", a recent article in the British medical Journal suggests the potential for increased risk of hypertension resulting from the

consumption of contaminated water.

> However there is no evidence upon which I could find the claimant's hypertension is related to the water. In the light of the article above-noted, it cannot be said that this claim is incapable of being provided to the appropriate standard.
>
> Accordingly, I adjourn the arbitration on this issue and any expenses to a date to be agreed upon [...].

13. The only evidence before Mr. Teplitsky on December 10, 2010 regarding the Appellant's claim for hypertension was an email from Dr. W.C., a nephrologist who does not appear to have actually treated or examined the Appellant at any time. Dr. W.C., in response to an email request from the Appellant, wrote as follows in August 30, 2010:

> I think the [...] hypertension could be a likely consequence of the water contamination and hope that Crawford Adjustors can be encouraged to reach a more timely solution to your ongoing travails.

14. After a case conference held by telephone on February 7, 2011, the arbitration was scheduled for June 13, 2011.

15. On June 13, 2011, Mr. Teplitsky denied the Appellant's claim on the basis that there was no evidence to support the claim advanced. Mr. Teplitsky wrote as follows:

> On December 10, 2010, I made an award adjourning his claim that the contaminated water caused or contributed to his hypertension. [The Appellant] did not attend today, the date scheduled for the hearing although his counsel did. [The Appellant] did not file any material which could support the allegation, Accordingly this claim is dismissed.

16. The Appellant's pre-arbitration summary states that the March 17, 2005 settlement "was only for the ailments the Administrator was prepared to deal with at that time," such that the Appellant, therefore, was not compensated for diarrhea, cramps, mental distress and arthritis. The Appellant's appeal submissions also indicated that:

> No claim was ever being made under S. 2.3 of the Plan. The [Appellant] wrote the Administrator Nov 20/08 to which they replied in a letter dated Apr 23/09. This was the **first** response from the Administrator stating the yet uncompensated for ailments were not causally related to Walkerton as far as they were concerned.

17. It must be noted that, according to the November 20, 2008 letter, these 'health items' were "included in the original Stage 2 claim," which was advanced prior to the March 14, 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.

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

Standard of Review

19. As noted in several previous appeals from the arbitrator, the appeal process and standard of review to be applied therein is clear. 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. Any appeals of an arbitrator's decision are then determined by this court.

20. 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.

21. 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."

22. 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 opinion for that of the Arbitrator. Argument that the Arbitrator should have made a different finding or reached a different result, without more, is not a sufficient basis to reverse the Arbitrator's decision.

Analysis

23. It must be stated at the outset that the issues raised in this appeal were, to a substantial extent, addressed in the reasons of this court in [redacted] *v. The Administrator*, dated August 25, 2011. In [redacted], the appellant had accepted two offers of compensation, foreclosing further claims but for those pursuant to s. 2.3 of the Compensation Plan.

24. In [redacted], the appellant accepted two settlement offers under separate heads of loss in respect of ailments arising from the contamination of Walkerton's water supply. In [redacted], it was determined that, to obtain additional compensation, the claimant would have to satisfy the criteria set out in s. 2.3.

25. In the matter under appeal, the Appellant has accepted three settlement offers, one of

which required the Appellant to forgo all claims other than those to be brought pursuant to s. 2.3.

26. Counsel for the Appellant argued that the claims before Mr. Teplitsky were not s. 2.3 claims, but were rather claims not addressed by the original settlements. The relevant portions of the Compensation Plan provide as follows:

> **2.2.1 Class Members Who Became Ill Or Died**
>
> A Class Member who became ill or died may apply for compensation arising from any injury or loss for which an Ontario court would award damages, not paid or payable pursuant to any other plan or program, including the following:
>
> (a) pain and suffering, including physical injury, nervous shock or mental distress;
> (b) past and future lost income;
> (c) past and future health expenses which are not Insured Services; and
> (d) pecuniary losses;
>
> caused by the Contamination.
>
> **2.2.3 Other Losses Of Class Members**
>
> A Class Member may apply for compensation for any other losses, including economic losses, caused by the Contamination, not otherwise described in Section 2.2.1 or 2.2.2 of this Plan, not paid or payable pursuant to any other plan or program, provided that such loss is proven by the Class Member on the facts and provided that the loss is recoverable under Ontario law.
>
> **2.2.4 Family Class Members**
>
> A Family Class Member may apply for compensation for pecuniary losses, other than those paid or payable pursuant to any other plan or program, resulting from an injury to or death of a Class Member caused by the Contamination, including, as set out in subsection 61(2) of the Family Law Act:
>
> (a) actual expenses reasonably incurred for the benefit of the Class Member who was injured or who has died;
> (b) actual funeral expenses reasonably incurred as a result of the death of the Class Member and not otherwise reimbursed to the Estate of the Class Member under this Plan;
> (c) a reasonable allowance for travel expenses actually incurred in visiting the Class Member during his or her treatment or recovery;
> (d) a reasonable allowance for loss of income or for the value of services where, as a result of the injury, the Family Class Member provides nursing, housekeeping or other services for the Class Member; and
> (e) an amount to compensate for the loss of guidance, care and

companionship that the Family Class Member might reasonably have expected to receive from the Class Member if the injury or death had not occurred.

2.3 Further Applications To This Plan Permitted

A Class Member or 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.

Section 2.3 Analysis

27. The clear intent of s. 2.3 of the Compensation Plan is to conclude a Class Member's right to compensation pursuant to ss. 2.2.1 through 2.2.4 once payment in accordance with those sections has been made to a Class Member, unless the conditions set out in s. 2.3 can be satisfied.

28. The Appellant's three settlements, entered into on March 14, 2005, July 27, 2005 and May 27, 2008, concluded the Appellant's entitlements pursuant to ss. 2.2.1, 2.2.3 and 2.2.4 of the Compensation Plan. No other head of entitlement provided for by the Compensation Plan is applicable to the Appellant's complaints. As a result, the only claim to further compensation which remains available to the Appellant is pursuant to s. 2.3 of the Compensation Plan.

29. In [redacted], s. 2.3 was interpreted as allowing 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, and it goes without saying that the claim must be one for which the Compensation Plan would allow compensation.

30. As in [redacted], to obtain additional compensation beyond that provided for in the settlements, the criteria set out in s. 2.3 must be satisfied. To do so, 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.

31. The Appellant made no submissions as to the s. 2.3 criteria for further claims. Evidence would be required to establish that the Appellant's claims would be tenable pursuant to that section. As the eligibility for additional compensation is strictly limited by s. 2.3, the claims could only be advanced if the s. 2.3 evidentiary threshold was met.

32. The Appellants did not meet that threshold. In dismissing the Appellant's claims on June 13, 2011, Mr. Teplitsky stated that the Appellant had not discharged his burden of proof.

33. In my view, Mr. Teplitsky's dismissal of the Appellant's claims for failure to discharge the burden of proof required by s. 2.3 was reasonable, as the Appellant provided no evidence and

made no submissions supporting his eligibility for compensation under that section. Nothing in the record indicates that any of the claims advanced by the Appellant were unknown to him as of the dates he accepted his three settlements in regard to claims pursuant to ss. 2.2.1, 2.2.3 and 2.2.4. In fact, each of the claims in question is expressly noted in the November 2008 correspondence as having been advanced in the original Stage 2 Application. As such, each of the claims advanced before Mr. Teplitsky were, by the Appellant's own admission, known to him prior to his first Stage 2 Application, and therefore do not give rise to compensation pursuant to s. 2.3.

Causation Analysis

33. Although my determination on the threshold issue of eligibility under s. 2.3 is sufficient to conclude this matter, the Appellant's arguments relating to causation are addressed for the sake of completeness. They are identical in substance to my conclusions on this issue in [redacted], [redacted] *and* [redacted] *v. The Administrator*, the reasons for which are released concurrently with these. As such, they need not be reproduced here.

34. Suffice it to say, the demonstration of a temporal relationship between alleged cause and purported effect will not be sufficient to raise the causal inference referred to in *Snell v. Farrell*, [1990] 2 S.C.R. 311. That principle allows causation to be inferred from a factual matrix in which causality cannot be concluded with scientific precision, but for which a substantial evidentiary foundation is nonetheless present. See also *Barker v. Montfort Hospital*, 2007 ONCA 282.

35. In this appeal, the Appellant has adduced no probative evidence of a causal relationship between their ailments and the Walkerton water contamination event. No weight can be given to Dr. W.C.'s email, as he at no time actually examined the Appellant or diagnosed him with the ailments from which he is alleged to suffer. As such, I can draw no inference as to a causal link between the Appellant's ailments and the contamination of Walkerton's water supply.

36. Given the Appellant's failure to demonstrate his eligibility for compensation pursuant to s. 2.3, Mr. Teplitsky was not required to turn his mind to the question of causation. As such, Mr. Teplitsky made no reviewable error in dismissing the Appellant's claims.

Result

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

Winkler C.J.O.

Released: July 23, 2013