

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

* * * * *

Applicant

AND:

The Court Appointed Administrator

Respondent

COURT APPOINTED ARBITRATOR:

Reva Devins

REPORT

1. The Applicant, ***** a minor, has submitted a Stage Two application for compensation under the Walkerton Compensation Plan. In her application, she claimed compensation for the stress and inconvenience related to the disruption of water service in Walkerton, for the loss of care and companionship of her mother and sister, and for illness suffered as a result of consuming contaminated water.
2. ***** was a resident of Walkerton at the time of the water contamination and she has been admitted as a Class Member. She has accepted the Administrator's Offer of Compensation for water disruption. Her claim for compensation for the loss of care and companionship of family members affected by the Walkerton water

crisis has been deferred, on consent, until the primary claim for compensation by those family members has been determined.

3. The issue for consideration at Arbitration was the amount of compensation that should be provided to ***** for the physical and psychological symptoms that she suffered as a result of the Walkerton water crisis.

The Plan

4. 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. In the cases of serious injury or death, an assessment of damages by a judge of the Ontario Superior Court of Justice is also available.

...

The Walkerton Compensation Plan is to be interpreted broadly to accomplish its objectives.

5. In order to facilitate the fair and expeditious resolution of similar cases, a mediation effort requested by Mr. Justice Winkler¹ resulted in an understanding that fair and reasonable compensation for disturbance arising from the disruption of the water supply to Walkerton residents was \$6000.00 for adults and \$3000.00 for minors.
6. In dealing with the issue of illness, an offer of \$500 was considered to be fair and reasonable if the primary symptoms of diarrhea, vomiting and cramps lasted less than 72 hours, and that \$3000.00 would be offered where a Class Member experienced these primary symptoms for more than 72 hours but for no more than 30 days.

Facts

7. ***** was a resident of Walkerton and consumed water delivered by the Walkerton P.U.C. at the time that water borne pathogens were found to be in the system². In her application for compensation, ***** stated that she experienced diarrhea and cramping for the months of May and June 2000. She has also suffered from periodic cramping and unexplained headaches since that time.
8. At the Arbitration hearing, ***** mother, ***** testified that ***** gastrointestinal problems were most acute during the first month after the Walkerton water crisis. The first year after her initial symptoms was relatively

¹ This mediation took place on June 11 and 12, 2001 and involved the Administrator, Class Counsel Representative, Plan counsel and counsel from Tick and Garcia, Siskinds and Harrison Pensa.

² Between April 1, 2000 and December 5, 2000.

symptom free. More recently, ***** has intermittently complained of abdominal cramping and diarrhea, however, these episodes have been infrequent and are diminishing. ***** mother did not take her to see her doctor with regard to these episodes as she believed that the symptoms would pass on their own. She did not recall any complaints of headaches.

9. ***** medical records contain references to her having had diarrhea at the time of the Walkerton crisis, although these notes were not made contemporaneously with those symptoms. A physician examining ***** in respect of another medical condition, also noted in a letter dated November 1, 2001, that at that time she denied any history of abdominal pain or cramps. There was no medical documentation with regard to any complaints of ongoing headaches.
10. In her application for compensation, ***** also claimed that she suffered from mental distress and nervous shock as a result of the Walkerton water crisis. She said that she experienced stress when she visited sick friends in the hospital, she was frightened when she heard the helicopters overhead and that her school and extra-curricular activities were disrupted as a result of the water contamination. ***** mother testified that all of her children felt stigmatized by the water crisis. As an example, she recalled that ***** was active in soccer and that other teams would not travel to Walkerton to compete in the town.

Submissions

11. At the hearing³, the Administrator offered \$3000.00 to compensate the Applicant for her diarrhea, gastroenteritis and abdominal cramping. It was the position of the Administrator that the Applicant's symptoms were consistent with an offer for minor illness. It was further submitted that the offer of \$3000.00 compensation for water disruption, which had been accepted by the Applicant, was sufficient to compensate her for the anxiety and distress experienced by her at the time of the water crisis.
12. On behalf of the Applicant, counsel stated that the Applicant is still experiencing gastrointestinal complaints as a result of her consumption of tainted water and, under Ontario law, she is entitled to recover an amount in excess of that offered by the Administrator. She also experienced significant stress and should be compensated for her mental distress. It was submitted that she should recover \$10,000.00 in compensation.

Analysis

13. The Applicant has applied for compensation under the terms of the Walkerton Compensation Plan, as approved by Court Order of the Honourable Chief Justice Le Sage issued on March 19, 2001. The terms of the Plan provide that Class

³ The Plan provides that the Administrator is to make an offer of compensation upon receipt of a completed application from Class Members. If this offer is rejected by the Applicant, the Plan further provides for Mediation and then Arbitration if the mediation is unsuccessful. In this case, in order to expedite the proceedings, this matter was set down, on consent, for a "mediation/arbitration" despite the fact that the Administrator had not received a completed application form. Consequently, the Administrator's "offer" was not made until the hearing had commenced and the Applicant provided the details of her claim.

Members are entitled to receive full and complete compensation, in accordance with Ontario law, for losses sustained because of contaminated water in Walkerton.

14. The Plan provides for individual assessment of compensation and provides Applicants with a means of attaining compensation through an efficient, timely and impartial process. Applicants are entitled to have their claims considered by the Administrator and to then proceed to mediation, arbitration and review by a Justice of the Ontario Superior Court of Justice if they are not satisfied with the resolution of their application.
15. The Plan is also designed as a compensation scheme without the trappings of the traditional adversarial model. The Administrator is obliged to assess individual claims and to offer compensation, in accordance with Ontario law, to address the losses of those who suffered through the Walkerton water emergency. An offer system has been developed for the most common experiences of inconvenience and stress arising from the crisis itself and for the complaints of diarrhea and abdominal cramping shared by many Class Members who consumed tainted water.
16. It is in this overall context, that applications for compensation must be assessed. In particular, I must consider this claim for compensation in light of Mr. Justice

Winkler's direction that the offer system developed under the Plan "set compensation at the high end of the range 'in accordance with Ontario law'"⁴.

17. I am satisfied on the evidence presented by ***** that the Applicant, ***** experienced acute gastrointestinal symptoms for a number of weeks after May 2000. I am also satisfied that she experienced some intermittent cramping and diarrhea beyond 30 days. Although there is no medical documentation to support this claim, the complaints are of a relatively minor nature and would not necessarily warrant further medical attention. The evidence does not, however, support a finding with respect to ongoing headaches.
18. It also follows, however, that ***** experience of intermittent cramping some time after her initial bout of symptoms must be viewed as having had a fairly modest impact on her. On the evidence before me, none of these symptoms required medical attention nor did they appear to have any real effect on ***** day to day life. There was no suggestion that she had to miss school, or limit her social or extra-curricular activities as a result of her abdominal cramping or any other symptom.
19. In support of their submission that ***** was entitled to a sum in excess of that offered by the Administrator, counsel for the Applicant referred me to a 1989

⁴ Winkler, J. commenting on the administration of the Plan in a Motion for direction brought by Maple Creek Landscaping Inc., *Smith v. Brockton (Municipality)*, Court File No. 00-CV-192173CP, Reasons for Judgment issued on March 19, 2003, at paragraph 25.

decision of the Ontario High Court of Justice rendered in *Cupido v. Sargeant*⁵.

Although the court awarded general damages for gastrointestinal symptoms, the symptoms experienced by the plaintiff in that case were of a different order of magnitude than that experienced by the Applicant in this case.

20. The plaintiff in *Cupido* had significant diarrhea and rectal bleeding for a number of months, underwent a series of invasive diagnostic procedures, was hospitalized for several days, was fed intravenously, required pain killers and anti-spasmodic drugs, lost about 30 pounds and was off work for more than four months. In those circumstances, she was awarded \$20,000.00 in general damages.
21. In determining ***** entitlement to compensation, I do not consider this decision to be of much assistance. The factual context is simply too disparate to be of much utility. The plaintiff's symptoms in *Cupido* were so severe that they are qualitatively different from those suffered by . ***** I appreciate that counsel was unable to find any other case law, however, I do not think that I can derive much guidance from the case he has put forward for my consideration.
22. In my view, a more appropriate beginning point is the direction of Mr. Justice Winkler that an offer of \$3000.00 for symptoms like those experienced by the Applicant is at the "high end" of what is fair and reasonable under Ontario law when they are experienced for no more than 30 days. I have already concluded that ***** did experience some gastrointestinal symptoms over a period of time

⁵ Ontario Judgments, [1989] O.J. No. 331, Judgment issued March 7, 1989.

that extended beyond 30 days and I would therefore consider it appropriate to order compensation in excess of the \$3000.00 offered for symptoms that resolve more quickly. I have also determined, however, that these symptoms were relatively minor and did not significantly interfere with *****daily routine. I would therefore assess her entitlement to be no more than \$4000.00.

23. Nor do I consider it appropriate to allocate a further sum for mental distress or nervous shock. There was no medical evidence in support of this claim and the evidence from ***** Mom is consistent with the general level of anxiety and distress that was the natural outcome of living through a crisis such as that experienced by most residents of Walkerton in May to December, 2000. In my view, the offer of \$3000.00 that has been accepted by the Applicant for water disruption is adequate, such that a monetary sum is ever adequate, to compensate for her the stress and fear associated with the water contamination.

Order

24. I therefore find that the Applicant, ***** is entitled to compensation in the amount of \$4000.00 with respect to illness caused by contaminated water in Walkerton.

Dated June 17, 2003

Reva Devins, Referee