

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

* * * *

AND:

Applicant

The Court Appointed Administrator
Respondent

APPEARANCES:

On behalf of the Applicant: Ian C. Johnson, Counsel for the Applicant
On behalf of the Administrator: Milena Protich, Plan Counsel
Kim MacDougall, Claims Evaluator

COURT APPOINTED ARBITRATOR:

Reva Devins

REPORT

1. ***** submitted an application on behalf of her minor daughter, ***** (“Applicant”), for compensation under the Walkerton Compensation Plan. The Applicant claimed compensation for illness arising from her consumption of contaminated water in Walkerton in May 2000.
2. The Applicant was classified as a Class Member and she received \$2000.00 as an initial minimum payment. The Administrator subsequently made an Offer of Compensation for illness in the amount of \$3,000.000. This offer was not accepted and the Applicant made a counter offer of \$9000.00.
3. A Status Review Hearing was convened in November 2004. Neither the Applicant nor her guardian attended. Counsel participated by teleconference call and advised that he had not been able to contact his client or obtain instructions for some considerable period of time. It was agreed that counsel would make further efforts to contact his client. Counsel made several attempts thereafter to obtain instructions, however, the Applicant’s guardian did not respond.

4. Upon consultation with counsel for the Applicant, this matter was scheduled for arbitration at 9:00 a.m. on November 9, 2005. Notice of the Proceedings was sent to the Applicant's guardian and her counsel; only counsel attended. Mr. Johnson advised that he had left several messages asking his client to contact him, however, he had not heard from her in over a year. He had tried to reach her by phone, letter and through personal contact with the Applicant's grandparents. None of these efforts were successful.
5. The hearing was convened at 9:35 a.m. Plan Counsel requested that the matter proceed in the absence of the Applicant and her guardian. It was submitted that the Applicant had been properly served with notice of the proceedings and that she had failed to respond after many attempts to contact her. The matter had been delayed for a considerable period of time while her counsel tried to obtain instructions. Despite her lawyer's repeated efforts to contact her, the Applicant's guardian has still not replied. In the circumstances, Applicant's Counsel advised that he was not seeking a further adjournment and that he did not believe that there was any reasonable prospect that a further delay would result in any change in circumstance.
6. Having considered the submissions of counsel, I was satisfied that Notice had been sent to the Applicant's guardian and that she was aware of today's hearing. In the circumstances, no purpose would be served in further adjourning this matter and I therefore determined that the matter would proceed.

The Plan

7. 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.

8. Under the terms of the Walkerton Compensation Plan, Class Members are entitled to receive full and complete compensation, in accordance with Ontario law, for losses sustained because of contaminated water in Walkerton. 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. The Plan is designed as a compensation scheme without the trappings of the traditional adversarial model.
9. 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 for minor illness claims, 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. Where a Class Member experienced these primary symptoms for more than 72 hours but for no more than 30 days, an offer of \$3000.00 was accepted as appropriate. The Administrator's offers of compensation are based on these mediated amounts.

Facts

10. The Applicant was born on September *, 1998 and was a not a resident of Walkerton. The Administrator of the Plan accepted that ***** consumed contaminated water in Walkerton in May 2000 and that she experienced gastro-intestinal symptoms for a period of two and one half weeks thereafter. The Administrator further accepts that the Applicant attended at the emergency

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.

department of the South Grey Bruce Hospital on a number of occasions during this period. **** was not admitted to the hospital, although she did undergo blood tests as a consequence of her illness.

11. ***** initial symptoms included a high fever, diarrhea, loss of appetite and abdominal pain. Her mother described this period as extremely difficult with ***** screaming and crying with pain. Records from the South Bruce Grey Hospital confirm that the Applicant was seen in May 2000 and that she suffered acute gastrointestinal illness with diarrhea and fever.
12. The Applicant did not mention any symptoms other than those experienced during her initial period of acute illness when she submitted her Stage 1 application in July 2001. Nor were additional symptoms listed in her Stage 2 application submitted in December 2001.
13. In later correspondence from Applicant's Counsel, the Administrator was advised that ***** had suffered a number of viral illnesses since her initial illness in 2000, including a serious kidney infection in 2004. The Applicant's counsel further advised that ***** mother intended to seek a medical opinion as to whether this illness was related to ***** consumption of contaminated water. No further medical records or opinions were provided.

Submissions

14. Counsel for the Applicant advised that he had attempted to contact the Applicant's guardian on many occasions, however, she had not returned his phone calls nor responded to his letters. Consequently, he did not have current instructions or any additional evidence to support the Applicant's claim for ongoing illness. In his submission, the issue of recurrent illness was raised in the material submitted to the Administrator of the Plan, although he acknowledged that there was no evidence at this stage to demonstrate a causal connection with the consumption of contaminated water.

15. With respect to the compensation offered for the Applicant's initial period of illness, it was the submission of Applicant's counsel that an amount in excess of \$3000.00 should be awarded. The Applicant was a very young child when she became ill and she experienced severe symptoms of gastrointestinal illness for a period of two and one half weeks. Counsel suggested that the Applicant still suffers ongoing symptoms and can be presumed to have experienced significant anxiety as a consequence of her illness. In the circumstances, it was argued that the mediated amount of \$3000.00 fails to adequately compensate her for her illness.
16. Plan counsel submitted that \$3000.00 was adequate compensation for the Applicant's initial period of illness and was consistent with the amount awarded to other claimants in similar circumstances. ***** experienced a number of the same symptoms as other residents, was not admitted to hospital and did not suffer any documented complications from her illness. In the circumstances, it was submitted that there were no extraordinary circumstances that would warrant an amount greater than that awarded to other applicants who suffered gastrointestinal symptoms for less than 30 days.
17. With respect to the Applicant's claim of ongoing illness, Plan Counsel took the following position: "Although there are suggestions of ongoing problems in the submitted materials, no medical records or evidence has been provided to allow the Plan Administrator to satisfy itself, as required by the Plan, that ***** is entitled to further compensation for these suggested illnesses. One of the purposes of the Plan is to compensate non-residents affected by consumption of contaminated water from April 1 to June 27, 2000. The Plan Administrator suggests that in these circumstances it is appropriate to expressly leave open ***** rights under 2.3 of the Plan to make further application for the concerns raised of suppression of her immune system and kidney problems and any other health issues upon presentation of evidence confirming a causal relationship

between the illness claimed and the consumption of contaminated water in the relevant time period, even though there is some mention of these conditions in the documents already presented.”

Decision on Compensation

18. 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. The administration of the Plan should not rely on unduly technical or onerous requirements to establish eligibility. Nonetheless, there are minimum criteria that must be met when monetary compensation is being sought. Entitlement is defined in the Plan approved by the Court and requires that the loss or injury being claimed arises, directly or indirectly, from the contamination of the water delivered by the Walkerton PUC².
19. Many claims have been resolved under the offer system developed for the most common complaints of diarrhea and abdominal cramping shared by many Class Members who consumed tainted water. It is in this overall context, that all 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’”, acknowledging that “Exceptional cases may warrant differential treatment”³.
20. With respect to the Applicant’s initial period of acute illness, I do not find anything “exceptional” in the circumstances of this Applicant that would warrant an award of compensation in excess of the mediated amount offered by the Administrator. I am satisfied that ***** was ill for less than 30 days, and although this initial period of illness was difficult, her experience is not

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

³ 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.

significantly different from other individuals, including many children, who fell ill at this time.

21. I have considered ***** age when she became ill in May 2000 and I accept that she would have been in a great deal of discomfort. Her mom was no doubt worried about her daughter and she quite sensibly ensured that she received medical treatment at the emergency room of her local hospital. ***** symptoms did, however, abate within a few weeks, there was no evidence of bloody diarrhea, she was not hospitalized and there was no suggestion that she experienced any complications from her initial illness.
22. In determining an award of compensation for short term illness I have not considered the suggestion that she has suffered from ongoing illness. As counsel readily conceded, there was no evidence to establish that she suffered recurrent or ongoing symptoms as a consequence of her consumption of contaminated water. In any event, compensation for those symptoms was advanced as a separate basis for compensation and should not be “double counted” by also forming a part of the award with respect to her initial period of illness.
23. In my view, an award of \$3000.00 is appropriate compensation for the short term illness suffered by the Applicant. It is also consistent with the offer system approved by the Court to compensate individuals in a fair and equitable manner. Inevitably, compensation will be awarded to individuals with a range of symptoms, some worse than others. To determine the amount of compensation to be awarded to this Applicant, I must consider her unique circumstances as compared to that of other claims resolved within the terms of the Plan. In so doing, I regard ***** symptoms as well within the range of those that were anticipated under the terms of the mediated award of \$3000.00 and I would not vary that amount.

24. The Applicant has suggested that her immune system was compromised and that she suffered many more viral illnesses after May 2000 than she had prior to her initial illness. These subsequent infections are said to include a kidney infection in 2004 for which antibiotics were prescribed. No evidence was provided to support these claims.
25. It is always troubling to make a determination of an Applicant's rights when they have not attended to explain their position. It is even more troubling when the claim for compensation is made by a minor and it is her representative that fails to provide evidence in support of a minor's application. In light of the non-attendance of the Applicant's guardian and the submissions of Plan Counsel, no order will be made with respect to the Applicant's claim of illness beyond the initial period of acute illness in May 2000. The current award is expressly made without prejudice to the Applicant's right to bring a fresh application under subparagraph 2.3 of the Plan for any other illness caused by her consumption of contaminated water.

Order

26. I find that the Applicant,***** is entitled to compensation in the amount of \$3000.00 with respect to illness caused by contaminated water in Walkerton in May and June 2000. Pursuant to the direction of the Court, the amount of compensation ordered, less the \$2000.00 advance, will be paid into Court and held in trust for . until she reaches the age of majority.

Dated December 13, 2005

Reva Devins,
Court Appointed Arbitrator/Referee