

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

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Applicant

AND:

The Court Appointed Administrator

Respondent

Appearances:

On behalf of the Applicant: No one attended on behalf of the Applicant

On behalf of the Administrator: Milena Protich, Plan Counsel
Heather Batchilder, Evaluator

COURT APPOINTED ARBITRATOR:

Reva Devins

REPORT

1. Mr. ***** ***** (the "Applicant"), has submitted an application for compensation under the Walkerton Compensation Plan. Mr. ***** was not a resident of Walkerton, however, he worked in town and he claims that he became ill as a result of consuming contaminated water in April 2000.

2. The Applicant was classified as a Class Member under section 1(b) of the Plan and received \$2000.00 as an initial minimum. The Administrator made an Offer of Compensation for illness in the amount of \$3000.00, less the \$2000.00 advance. This offer was not accepted.
3. Pursuant to the Directions of Mr. Justice Winkler¹, Status Review Hearing were scheduled to review this application. The first hearing was set down for September 23, 2004 and a second hearing was convened on November 10, 2004. The Applicant did not attend either Hearing. On the basis of evidence provided at the November hearing, the Referee was satisfied that the Administrator contacted the Applicant by telephone, that Mr. ***** advised the Administrator that he was aware of the scheduled Hearing, however, he did not intend to attend. Both Status Review Hearings were adjourned.
4. An Arbitration to determine this matter was convened on April 19, 2005. The Applicant did not attend. A Notice of Proceeding was sent to the Applicant by Registered Mail on March 22, 2005. Heather Batchilder, Claim Evaluator with the Walkerton Compensation Plan, testified that the Notice of Proceeding was not returned and that mail previously sent to that address had been received by the Applicant. On the basis of this evidence, I was satisfied that notice of the Arbitration had been provided to the Applicant and the matter proceeded in his absence.

The Plan

5. 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. ...

¹ Supplementary Directions issued March 30, 2004 following a Case Conference held on February 18, 2004 and Reasons and Directions issued February 27, 2004 by Winkler, J., Ontario Superior Court of Justice.

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.

6. Under the terms of the Plan, Class Members are entitled to receive full and complete compensation for losses sustained because of contaminated water in accordance with Ontario law. The Administrator is obliged to assess each claim on an individual basis and to offer compensation to claimants who suffered through the Walkerton water emergency. The Plan is designed as a compensation scheme without the trappings of the traditional adversarial model.
7. In order to facilitate the fair and expeditious resolution of similar cases, a mediation effort requested by Mr. Justice Winkler² 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, 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.

Mr. *** application for compensation**

8. In his initial application for compensation³, Mr. ***** claimed that he was ill with diarrhea, cramps and that he was sick to his stomach between April 1, 2000 and June 2001. In his Stage 2 application⁴, he described his symptoms as ongoing

² 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.

³ Stage 1 Application, signed and dated June 2, 2001.

⁴ Signed and dated October 4, 2002.

diarrhea, bloody stool, cramps, vomiting and nervous shock. As of October 2002, his illness had resolved “slightly” and he was seeking further medical attention. Mr. ***** advised that a “scope” was scheduled for October 10, 2002 and that he was still experiencing cramps and diarrhea off and on, although he was uncertain how often.

9. The Applicant’s physician, Dr. Mar , provided a Health Practitioner’s Information Form (HPIF) dated August 6, 2001 confirming that Mr. ***** suffered from intermittent abdominal cramping, but stating that his stool was normal with no diarrhea or blood. Mr. ***** symptoms first appeared “prior to 11.10.00”⁵ and were described as improved as of November 14, 2000. The diagnosis was “possible IBS, possible B. hominis enteritis”. Stool tests performed in October 2000 note the presence of blastocystis hominis. An abdominal sonogram was performed in October 2000 but no cause of recurrent abdominal pain was found. A second HPIF was submitted by the same physician in June 2003. This second form was virtually identical to the first, however, Dr. Mar now noted that the Applicant also reports occasional indigestion.
10. In completing both Forms, Dr. Mar stated that he was “uncertain”⁶ whether the Applicant was ill because of the consumption of Walkerton water between April 1, 2000 and December 5, 2000. Similarly, when asked if the Applicant had become ill as a result of exposure to someone who became ill due to consumption of Walkerton water between April 1, 2000 and December 5, 2000, the Applicant’s physician responded “unknown”⁷.
11. The clinical notes of Dr. M ; commencing in 1996, were also provided. These records indicate a history of epigastric pain from 1997 onward that was treated by prescriptions of Ranitidine through to February 2001. No visits to Dr. M were noted between December 1997 and November 2001.

⁵ 11.10.00 and 14.11.00, p. 1 Health Practitioner’s Information Form (HPIF).

⁶ P. 1, HPIF.

⁷ P. 2, HPIF.

12. In the fall of 2002, Mr. ***** was referred to Dr. L by Dr. Mc Dr. L notes a history “of bright red blood per rectum”, “dyspepsia” and “some diarrhea”⁸. Based on this history, Dr. L recommended an EGD and colonoscopy. The EGD showed some gastritis “which on biopsy shows a reactive gastropathy likely related to previous reflux”⁹ and a small polyp was found. In his reporting letter to Dr. M¹⁰, Dr. L advised that the test results “shows a reactive gastropathy likely related to a previous reflux”.

13. Dr. L provided a HPIF, dated, June 4, 2003 in which he states that Mr. ***** has symptoms of blood per rectum, diarrhea, dyspepsia which first appeared “approx Jan 02” but which had abated by November 2003. The cause of these symptoms was “unknown”. In a letter provided to the Plan¹¹, Dr. L states that he is “unable to determine if (the Applicant’s) illness was secondary to the Walkerton water contamination”. He does suggest that Mr. ***** “symptoms are consistent with possible previous exposure to a pathogen such as E. coli”, however, he cannot establish a causal link. He notes that causal links are exceedingly difficult to prove in these sorts of infections and in the end he is unable to determine whether Mr. ***** symptoms are attributable to E. coli or other causes.

Administrator’s submissions

14. The Administrator accepts that Mr. ***** consumed contaminated water and that he became ill as a result. A written offer of \$3000.00 was made to the Applicant and took into consideration symptoms of diarrhea, bloody diarrhea, cramps and vomiting in April 2000, with some limited recurrences. After the offer was made, Heather Batchilder, Claim Evaluator, spoke to the Applicant and was advised of some of the details of Mr. ***** illness, including the frequency of

⁸ Letter from Dr. Lozon to Dr. McArthur, dated 2002-Mar-18

⁹ Reporting letter from Dr. Lozon to Dr. McArthur dated November 13, 2002.

¹⁰ Letter dated November 13, 2002.

¹¹ Letter dated June 4, 2003.

his symptoms and the impact on his daily life. Based on this information, the Administrator revised its offer at the hearing and submitted that an appropriate amount of compensation for the claim was \$6,000¹². It was the position of the Plan that this amount took into account the Applicant's symptoms in 2000 with a possible diagnosis of IBS and is in keeping with offers of compensation made to other similarly situated applicants. The offer did not include compensation for the symptoms that the Applicant experienced in 2002, including the onset of frank blood in the stool, as it was the position of the Plan that these symptoms were not causally related to the consumption of contaminated water in Walkerton.

Award of Compensation

15. The Plan was intended to provide applicants with an efficient and straightforward means of obtaining compensation for losses suffered as a consequence of the contamination of Walkerton's water supply in the spring of 2000. Applicants could get legal assistance if they wanted, their claims were to be assessed by the Plan and if they were not satisfied with the Plan's offer of compensation, Applicants were provided with an opportunity to appear in person before an independent arbitrator.
16. In this case, Mr. ***** elected not to appear at the Status Review Hearing or the Arbitration convened to consider his application, nor did he retain counsel to appear on his behalf. Applicants are free to proceed as they see fit and I fully respect Mr. ***** manner of proceeding. His failure to appear, however, does limit my review of his application to the written material provided by him and his doctors. It would have been extremely helpful to hear directly from the Applicant and to have heard his description of his symptoms and their evolution. Mr. ***** was provided with a number of opportunities to attend a hearing and provide further details in support of his claim for compensation; he elected not to attend

¹² The Administrator's revised offer was not accurately reflected in my initial Award and an amended Award is therefore being issued to rectify this error. Since the revised offer operates to the benefit of the Applicant, I am satisfied that I am empowered under s. 44 of the *Arbitration Act* to amend my decision in order to correct an injustice caused by oversight.

and I must therefore make a determination on the basis of the evidence that has been put before me.

17. The Administrator accepts that Mr. ***** was ill with diarrhea, cramps and vomiting after he consumed tainted water in April – June, 2000 and that he experienced some recurrence of his symptoms thereafter. In submissions at the hearing, Plan Counsel relied on the HPIF of Dr. Mar. in support of its position that the Applicants' illness had resolved by November 2000. It is for this period of illness that the Administrator has made an offer of compensation of \$6000.00, less the advance. The offer takes into account the Administrator's view that the symptoms experienced by the Applicant in the fall of 2000 were consistent with IBS or an alternate cause (b. hominus) and that the further gastrointestinal symptoms which presented in 2002 were not causally related to the consumption of contaminated water.
18. The Administrator's submissions raise two issues for my consideration:
 - a. Does the offer of \$6000.00 for illness adequately compensate the Applicant for his initial illness symptoms in 2000;
 - b. Is there a subsequent period of illness that is compensable under the Plan?
19. In his Stage 2 application, the Applicant describes his ongoing symptoms as including periodic diarrhea, bloody stool and cramping. His physician offered a slightly different view. Dr. Mar. stated that Mr. ***** experienced "intermittent abdominal cramping, stool normal no diarrhea or blood in stool". In any event, Mr. ***** symptoms were of sufficient concern in the fall of 2000 that he provided stool samples for analysis and had an abdominal sonogram. The Applicant's initial symptoms then appeared to subside: there was no further treatment and no recorded medical visits for the next twelve months.

20. Based on this evidence, I am satisfied that Mr. ***** experienced some ongoing symptoms extending beyond 30 days, however, I also find that the Applicant's original symptoms subsided by the late fall of 2000. This finding is consistent with his doctor's statement and the absence of any visits to the doctor between November 2000 and November 2001. I also accept that the Applicant continued to suffer from some bowel irregularity but that his main complaint was of abdominal cramping.
21. In my view, the symptoms described by the Applicant are consistent with a common pattern of illness following the consumption of tainted water in Walkerton. There were individuals who were ill for less than 24 hours, many more were ill for a few days or weeks, and others were ill beyond 30 days. The Applicant complained of cramping from the spring of 2000 and the Administrator has accepted that he suffered some intermittent recurrences of his symptoms. His doctor has provided two diagnoses, one of which is an accepted post infective condition. In light of the broad purposes of the Plan, once an applicant demonstrates that they were ill as a result of contaminated water and are admitted as a Class Member, they are not required to refute every possible alternative cause of their symptoms. Thus, although it is possible that Mr. ***** symptoms were attributable, in part, to other causes, I would not put much weight on that possibility in assessing the amount of compensation that should be awarded for his illness.
22. In reviewing the Administrator's offer of compensation, I am guided by Mr. Justice Winkler's direction that the minor illness offers "were based on the high end of the range for compensation under Ontario law for the losses covered"¹³. In light of the direction that \$3000.00 is at the "high end" of what is fair and reasonable for gastro intestinal symptoms experienced for no more than 30 days, I consider it appropriate to order compensation in excess of \$3000.00 for symptoms

¹³ 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 20.

which extended beyond 30 days. Regrettably, there is very little evidence of the frequency or severity of these symptoms or the extent to which they interfered with Mr. ***** daily activities. The symptoms were clearly of sufficient magnitude that they warranted further medical investigation, however, the tests performed at this time were not overly invasive nor were they followed by identifiable medical treatment. There is a diagnosis of possible IBS and I consider the Administrator's revised offer of \$6000.00 to be appropriate in these circumstances.

23. With respect to the other symptoms for which compensation is claimed, I would not order an additional amount payable for "nervous shock". There was no medical evidence to support this aspect of Mr. ***** claim nor were any details provided by him beyond checking it off on the stage 2 application.
24. Nor would I order an additional amount of compensation for the symptoms that first arose in late 2001. The medical records, HPIF's and medical opinions indicate that Mr. ***** suffered from cramps until the fall of 2000 but that these symptoms abated at that time. There are no recorded visits to his doctor for about a year and Mr. ***** was not referred for further tests for another year. Dr. L indicates that the symptoms of diarrhea, frank blood in stool and dyspepsia arose in "Jan 02" and, in his view, were "likely related to previous reflux". Dr. L was aware of the Applicant's prior exposure to contaminated water and concludes that he is unable to "establish a causal link" between Mr. ***** symptoms in 2002 and his consumption of contaminated water in 2000. He does suggest that the symptoms "may be attributed to pathogenic E. coli exposure, however, they may be attributed to other causes".
25. The evidence related to Mr. ***** illness in 2002 is not that there are two equally plausible diagnoses. Rather, the medical evidence is that the alternate diagnosis, the Applicant's previous reflux condition, is the *likely* cause of his illness and exposure to water borne pathogens is posited as a mere possibility. A

possible link to the consumption of contaminated water is not enough. I must be satisfied, on a balance of probabilities, that Mr. ***** illness in 2002 was caused by his consumption of contaminated water in order to award damages for this aspect of his claim for compensation. Since the evidence in this case I that an unrelated cause is the more likely one, I would not order any compensation beyond the period of initial illness,

Order

26. The Applicant, ***** ***** is awarded \$6000.00, less the \$2000.00 advance previously provided by the Plan, plus the applicable pre-judgment interest, as compensation under the Walkerton Compensation Plan for illness arising as a result of consuming contaminated water in May 2000.

Dated May 22, 2005

Reva Devins,
Court Appointed Arbitrator/Referee