

COURT FILE NO.:00-CV-192173CP
DATE:20040330

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

JAIME SMITH, ALANA DALTON, JAMIE
MCDONALD and IRENE SALES INC.,
OPERATING AS THE HARTLEY HOUSE

Plaintiffs

-AND-

THE CORPORATION OF THE
MUNICIPALITY OF BROCKTON, THE
BRUCE-GREY-OWEN SOUND HEALTH
UNIT, STAN KOEBEL, THE WALKERTON
PUBLIC UTILITIES COMMISSION and HER
MAJESTY THE QUEEN IN RIGHT OF
ONTARIO

Defendants

-AND-

IAN D. WILSON ASSOCIATES LIMITED,
DAVIDSON WELL DRILLING LIMITED,
EARTH TECH (CANADA) INC.,
CONESTOGA-ROVERS & ASSOCIATES
LIMITED, B.M. ROSS AND ASSOCIATES
LIMITED, GAP ENVIROMICROBIAL
SERVICES INC., A&L CANADA
LABORATORIES EAST, INC., DAVID
BIESENTHAL AND CAROLYN
BIESENTHAL

Third Parties

Proceeding under the *Class Proceedings Act*,
1992

)
) *F. Paul Morrison, Darryl Ferguson and*
) *Caroline Zayid for Her Majesty the*
) *Queen in Right of Ontario*

)
) *Heather Rumble Peterson, Class*
) *Counsel Representative*

)
) *Bruce Lee, Plan Counsel*

)
) *William Dermody, Independent Advice*
) *Counsel*

)
) *Stanley Tick, Q.C., Michael Peerless,*
) *James Virtue, Robert Garcia, Dave*
) *Williams, Michelle Beckow, Claimants'*
) *Counsel*

)
)
)
)
)
)
) Case Conference February 18, 2004
) Supplementary Directions March 30,
) 2004, *ex parte*

SUPPLEMENTARY DIRECTIONS

WINKLER R.S.J.:

[1] On February 27, 2004, I released my Reasons and Directions, which followed from a case conference that I held on February 18, 2004 for the purpose of reviewing the administration of the settlement in this matter. In paragraphs 9 and 23 of those Reasons, I directed that a review be undertaken by class counsel and the court appointed monitor with respect to outstanding claims.

[2] The review process, although not yet complete, has revealed that there are currently 852 outstanding illness claims, much less than previously reported, but a significant number nonetheless, considering that the Plan has been in operation for almost 3 years. However, the mere number of outstanding claims does not tell the whole story because the review also indicates that offers have been made in respect of 478, or 55 per cent, of those claims for which the Administrator has not received a response from the claimants. In most cases, the offers have been outstanding for at least 90 days and in some cases for as long as 240 days.

[3] It appears that there are two primary reasons for the current number of outstanding claims. First, the files indicate that processing delays within the offices of counsel representing claimants are significant. In that regard, there are some cases where an offer presented to counsel representing a claimant do not appear to have been presented to the claimant by counsel until at least 4 months following receipt by counsel. Delays of this nature on the part of counsel in communicating offers to their clients are unacceptable. This problem will, however, be alleviated in the future because the Administrator will, pursuant to my earlier order, henceforth be required to send a copy of any offer sent to the claimants counsel, directly to the claimant as well.

[4] However, the court remains concerned that there may have been offers presented by the Administrator to counsel that still have not been communicated to claimants by counsel. Consequently, counsel are directed to review their files to determine whether all offers received by them have been communicated to each respective client. In the event that counsel is in receipt of any offer that has not been communicated to the client, the situation shall be rectified forthwith. I further direct that counsel in receipt of any offer on an outstanding file report to the Administrator within 14 days as to the status of the offer, including the date on which it was sent to or discussed with the client.

[5] Beyond delays attributable to counsel, there appears to be a second aspect that is contributing to the number of outstanding offers, namely, a continuing concern by claimants as to the provision of the Plan that permits future or subsequent claims. This concern appears to centre on the future operation of the Plan itself and, in particular, on the absence of a defined process for accessing compensation through the Plan after the all claims presented at this stage have been concluded.

[6] Simply stated, claimants need certainty as to how the claims review process can be initiated if the current administrative structure put in place to deal with large numbers of claims is significantly reduced or, more to the point, eliminated at the conclusion of all current outstanding claims.

[7] The appropriate way to address this concern is to ensure that claimants have a certain "access point" for future claims. The claims process must of course remain separate from the government, as funder, to accord with the spirit of the Plan. Therefore, to ensure that the various objectives of the

Plan are met in the event that the claims processing centre presently located in Walkerton is closed, the Administrator is directed to establish and maintain a toll free contact phone number, address and e-mail address which may be utilized by claimants wishing to present a claim for subsequent compensation in accordance with the terms of the Plan. The Administrator will be required to deal with claimant inquiries in a timely fashion. All contact information shall be publicized in Walkerton and the surrounding area and, additionally, distributed directly to all claimants under the Plan.

[8] This does not mean that all future claims will be automatically approved. The claimant must still meet the requirements under the Plan. However, in the event that a subsequent claim for compensation cannot be resolved, the Administrator shall arrange for a mediation/arbitration to take place as soon as is practicable. Claimants will remain entitled to have their reasonable legal fees paid for subsequent claims and all other provisions of the Plan will continue to apply. The Administrator will ensure that the claimant receives any compensation payable in respect of a subsequent claim as well as dealing with legal fees and disbursements of counsel for the claimant. The Government of Ontario will remain responsible for funding both the compensation payable and the costs associated with the continuation of the Plan, once those costs have been approved by the court.

[9] I turn now to some other issues that have arisen since the issuance of my Reasons and Directions dated February 27, 2004. The focus of my directions in that instance was delays experienced by some claimants in the claims process. Specific directives were given in order to expedite claims processing and resolve those claims that had not yet been dealt with completely. However, it is of paramount concern to the court that all claimants be treated fairly. It has become clear from the concerns expressed by some claimants, and through the review process initiated by the court, that a procedure must be established to ensure that claimants are not prejudiced by any steps taken with a view to expediting the process.

[10] Through file reviews done on behalf of the court, there is some evidence of a gap in communication between claimants and their counsel. In such situations, it may be unfair to the claimant to proceed to arbitration where the claim file is not complete or up to date. Accordingly, arbitrations will proceed through a modified case management process whereby a status hearing will be conducted by a court appointed referee on each file scheduled for arbitration. Claimants, their counsel and representatives of the Administrator will be expected to attend the status hearing before the referee. Claimants will be given an opportunity to review their claim files so that each may advise the referee whether it is complete and up-to-date. The referee will determine whether the file is sufficiently prepared so that a proper, fair arbitration may be conducted. Once a determination regarding the status of a file is made, the referee will issue such further direction as he or she deems to be appropriate to ensure that the process continues to move along on an expedited basis consistent with fairness. However, since all parties will be at the status hearing, mediators will be available immediately following the hearing in the event that a claimant wishes to avail him or herself of the opportunity to resolve a claim through mediation.

[11] Similarly, it has been brought to the attention of the court that there are a significant number of unrepresented claimants with outstanding claims. Although the court has in the past appointed

4

Independent Advice Counsel to deal with general questions from claimants who do not otherwise have counsel, given the expedited process now being directed, unrepresented claimants may need more specific assistance. Accordingly, the court appoints Patrick Kelly, a solicitor in the area, for the purpose of providing direct legal assistance to unrepresented claimants with outstanding claims. Mr. Kelly will contact unrepresented claimants for the purpose of determining whether his assistance is required. There will be no charge to claimants and, to state the obvious, no requirement for claimants to utilize the services of Mr. Kelly should they not wish to do so. If a claimant chooses not to have the benefit of Mr. Kelly's assistance, the status hearing and arbitration will be scheduled and conducted in the normal course with the claimant appearing unrepresented.

[12] Further directions will be issued if and when necessary.

WINKLER R.S.J.

Released: March 30, 2004

5

COURT FILE NO.: 00-CV-192173CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

JAIME SMITH *et al.*

Plaintiffs

-and-

THE CORPORATION OF THE
MUNICIPALITY OF BROCKTON *et al.*

Defendants

-and-

LAN D. WILSON ASSOCIATES LIMITED
et al.

Third Parties

REASONS FOR DECISION

WINKLER R.S.J.

Released: March 30, 2004