

own appointment, the long argumentative refusal of the 24th of December. It was of the essence of a fair investigation, if this letter was justifiable at all, that it should come into the possession, and remain under the control, of the board and be of record in their proceedings, and it was not enough to leave to this arbitrator to shew the letter to the other arbitrators or not as he might think fit; it was for the solicitors to see to it that the letter would be available for all and an open record on the case. The reference in this letter to the probable action of counsel for the plaintiff should not have been made, and a copy of the letter should have been furnished if the original was lost.

Dr. Powell alone seems to have fully realized the judicial character of the duties imposed by the submission, and the arbitrator for the plaintiff, I should say, not at all.

It is true that the arbitrators have not the right to say what evidence shall be given, but they have not the right to reject competent evidence offered by either counsel. They come to the conclusion that the evidence of a specialist was necessary to a proper understanding of the matters in issue, and one of the counsel having adopted this view, they should not have rejected it at the instance of the other.

I need not take up other grounds of objection. The first two are, I think, fatal to the validity of the award. Subject to the question of physical examination, a question which I think plaintiff's counsel was hardly in a position to raise, the exclusion of Dr. Beemer's evidence is an equally strong objection to the award. The defendants were to pay the costs of the arbitration. The attitude of the defendants' counsel in the early stages of the enquiry and his omission to directly insist upon the board admitting the evidence contributed I think to the conspicuous irregularity of the proceedings in this case; and the costs now incurred in straightening the matter out may well be added to the costs covered by the agreement.

The award will be set aside, but in the circumstances the defendants will pay the plaintiff's costs of and incidental to the motion.

References: *Livingstone v. Livingstone*, 13 O. L. R. 604, and *Campbell v. Irwin*, 5 O. W. N. 957, where the cases are collected.