

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

HASKA HODZIC,

Claimant,

vs.

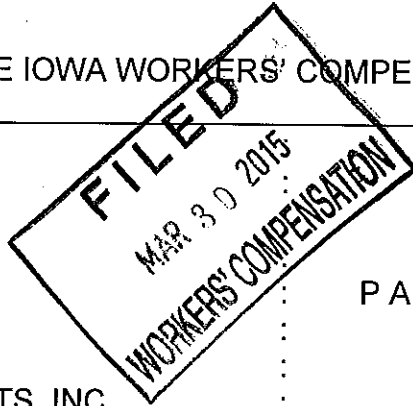
TYSON FRESH MEATS, INC.,

Employer,
Self-Insured,
Defendant.

File No. 5028889

PARTIAL COMMUTATION
DECISION

Head Note No.: 3303.20



STATEMENT OF THE CASE

Haska Hodzic, claimant, filed a petition in arbitration seeking partial commutation of workers' compensation benefits from Tyson Fresh Meats, Inc., self-insured employer, as a result of an injury she sustained on April 8, 2008, that arose out of and in the course of her employment. The case was heard in Des Moines, Iowa, on February 16, 2015 and fully submitted on March 9, 2015.

Claimants' exhibits 1 through 10 were admitted into evidence. Defendant's exhibits A through C were admitted into evidence. Claimant was provided additional time to file a responsive report to a report that was provided to claimant after disclosure deadlines had passed. Pages 11 through 14 were admitted into the record. Claimant, her husband, Nezir Hodzic, and Steven Walsh testified at the hearing. Claimant provided a pre-hearing contentions statement.

Both parties provided post-hearing briefs. Administrative notice was taken of the review-reopening decision of April 9, 2013, the prior partial commutation decision dated November 18, 2013, and the decision of the commissioner dated April 14, 2014.

The hearing was interpreted.

ISSUES

1. Whether a partial commutation of all but the last week of permanent total disability benefits is in the best interest of claimant.
2. Whether claimant is entitled to costs.

FINDINGS OF FACT

The deputy workers' compensation commissioner, having heard the testimony and considered the evidence in the record, finds that:

The claimant was 58 years old on the date of hearing. Claimant lives with her husband, Nezir Hodzic, and their 22-year-old son. Claimant came to the United States as a refugee from Bosnia. She was injured while working for Tyson Fresh Meats and was awarded permanent total disability benefits on April 9, 2013 at the weekly rate of \$372.12 per week. (Administration file) Of that weekly amount, after deductions for attorney's fees and litigation cost, claimant receives \$248.08 per week. (Exhibit 1, page 2) Defendant has paid the claimant weekly benefits through the date of hearing and continues to pay those weekly benefits.

Claimant filed an application for partial commutation on April 30, 2013. This application was denied on November 18, 2013, and the denial was affirmed by the commissioner on April 14, 2014. (Admin. file)

The original notice and petition for partial commutation of benefits was filed by the claimant on April 24, 2014. As of the date of her partial commutation petition claimant was requesting \$267,976.87 in benefits. Of this amount, she proposed \$20,000.00 to pay off debts, \$70,000.00 to pay off her mortgage, \$170,000.00 to invest in an annuity and \$107,658.95 for attorney's fees. Claimant's attorney has discounted his fee request by \$15,000.00.

There are two primary financial opinions about claimant's plan for her partial commutation. Telford Lodden provided a written report. (Ex. 1, pp. 1 – 8) Mr. Lodden interviewed the claimant on December 3, 2014, with an interpreter, as well as reviewing a number of documents. (Ex.1, p. 1) It was his conclusion that the claimant's plan to purchase a home of up to \$140,000.00 in value, pay off a credit card and invest in a 20-year certain annuity was a reasonable plan. It was his opinion claimant would have enough money to cover the expenses of a new home, that her legal fees would be reduced and the claimant would have an asset (the new home) to leave to her children. (Ex. 1, p. 6) Mr. Lodden determined claimant would have approximately \$833.00 per month in excess money each month if she is awarded the partial commutation and follows her plan. (Ex. 1, p. 7) In his report of February 17, 2015 Mr. Lodden continued to assert that a partial commutation was in the best interest of the claimant. Mr. Lodden stated that his budget for the Hodzics included a 37 percent increase in monthly costs such as utilities. Mr. Lodden noted that if claimant refinanced her current mortgage, claimant's monthly payments might decrease; however, claimant would have refinancing costs. (Ex. 1, p. 12)

Claimant has requested reimbursement of the cost of this report, which is \$1,500.00. (Ex. 1, p. 10) There is also an invoice for the February 17, 2015 report of

\$800.00. (Ex. 1, p. 14) Mr. Lodden has extensive credentials. (Ex. 1, p. 9) I find the costs of his reports to be reasonable.

Steve Walsh prepared a report and testified at the hearing. (Ex. A, pp. 2 – 6) Mr. Walsh was of the opinion that the claimant's plan for managing and spending her money, if awarded the partial commutation, was not in her best interest.

Mr. Walsh reported that the amount of cash flow to the household would be reduced by about \$718.00 per month if the claimant proceeds with her plan. (Ex. A, p. 6) Mr. Walsh testified that the interest portion of claimant's annuity would be subject to federal income tax. He testified that about one-third of the annuity payment would be taxable, at the claimant's tax rate applicable to each year. Mr. Lodden assessed claimant's potential tax liability and concluded that claimant's annuity would not provide an income tax problem. Mr. Lodden is more qualified than Mr. Walsh to render an opinion on taxes, and his opinion is accepted by the undersigned. Mr. Walsh expressed concerns that claimant may not be able to sell their current home for enough to cover the mortgage and therefore she may not be able to purchase an annuity that provides her \$500.00 per month.

Mr. Walsh expressed concern that the claimant and her husband had not shown in the past an ability to develop a financial strategy. He stated that "Cash flow is reduced for the luxury of a new home." (Ex. A, p. 5) In his testimony, Mr. Walsh expressed concerns about the cost of the claimant in moving and maintaining a new home.

The claimant has shown since her last arbitration decision that she and her husband are living within their means and have reduced debts somewhat.

Claimant submitted the following current budget information,

Haska Hodzic Budget

Expenses Fixed averaged out per month

Mortgage* (plus escrow)	\$685.72
Credit Card	\$200.00
Water/Sewer/Garbage	\$40.00
Phone (two \$30 cards)	\$60.00
Internet Mediacom	\$50.00
Car Insurance	\$77.00

Heat/Electricity Mid American	\$150.00
Medicine	\$30.00
TOTAL	\$1,292.72

Average Variable Expenses

Fuel	\$225.00
Groceries	\$600.00
Clothing	\$100.00
Misc.	\$100.00
Cigarettes	\$105.00
TOTAL	\$1,130.00
BUDGET TOTAL	\$2,422.72

INCOME

Nezir Hodzic (husband) \$440/week	\$1,900.00
Haska Hodzic SSD take home	\$600.00
WC Proceeds per month	\$1,075.00
TOTAL INCOME	\$3,575.00

* principal and interest only is \$443.56

(Ex. 4, p. 1)

Claimant testified that these numbers were accurate, and defendants did not dispute these household budget figures. Under these figures claimant should have over \$1,000.00 dollars left over each month. Claimant did not testify that she was able to save that much a month, and there are no substantial amounts of money in checking, savings or retirement accounts. Presumably, most of the \$1,000.00 is spent each month on various sundry items. The claimant's household is similar to many

households in spending a large percentage of their income on various items without any direct accounting for the expenses. If the claimant's household were more frugal they may be able to save significant income each month. Her household is similar to many in Iowa.

Claimant testified that she wants the partial commutation for a number of reasons.

First, claimant wants to move from her current home into a larger home without as many steps. Claimant has steps from the garage to her house, steps to enter the house and steps to go to do the laundry.

I find that this factor is a reasonable and prudent factor to allow a partial commutation.

Second, claimant testified she had difficulty using her walker in the bathroom. Claimant and her husband testified that remodeling would not work, as the rooms in the house are small, and making the bathroom bigger would make the bedroom too small. The claimant and her husband have not asked a contractor to give them an estimate about remodeling or providing an addition to their home.

The pictures found in Exhibit 10 confirm claimant's testimony about the steps in the house, the small size of the bathroom, as well as other portions of the house. Given the claimant's limitations due to her back injury, I find that this factor is a reasonable and prudent factor to allow a partial commutation.

Third, is the fact that claimant's current mortgage is at 6.15 percent. Claimant could refinance at a rate that Mr. Walsh believed to be about 3.8 percent. While refinancing the current mortgage would result in a lower monthly payment, claimant would still be living in an inadequate home. Under claimant's proposal she will pay off her current mortgage, buy a house with cash and pay no interest.

I find that this factor is a reasonable and prudent factor to allow a partial commutation.

Fourth, is claimant wants to pay of the balance of her credit card to stop the high rate of interest. Mr. Walsh testified that considering the claimant's current household income they could pay off the credit card balance in eight months. While it is possible claimant and her household were more frugal they could pay off the credit card without the partial commutation, claimant has not been able to do that thus far.

This is a reasonable approach to eliminate this debt.

Fifth, claimant said she wanted the annuity so that if she were to die her family would still continue to receive some income. Under the annuity claimant plans on buying her family would be entitled to some benefit for 20 years. If she dies, her

workers' compensation benefits and her Social Security disability will cease. Claimant would also have a home without a mortgage to leave to her family.

I find that this factor is a reasonable and prudent factor to allow a partial commutation.

Sixth, claimant's attorney is discounting his attorney fee claim by \$15,000.00. This is a substantial reduction in the attorney fee claim and will provide claimant more money to realize her financial plan.

I find that this factor is a reasonable and prudent factor to allow a partial commutation.

Claimant's husband, Nezir Hodzic, testified. His testimony was interpreted as well. His testimony generally confirmed the testimony of his wife. He did testify that in the past he had over 10 years' experience in construction and did not believe their current home could be remodeled.

Mr. Walsh testified that the claimant will have approximately \$500.00 less per month in income if she purchases an annuity. Claimant was aware of this drop in income and said that without the mortgage and credit card payment she could meet her expenses.

I find claimant and her husband's testimony to needing a bigger home with fewer steps to be convincing. Claimant has a very significant back injury. Their current house makes it difficult for claimant, as it has steps inside, from the garage, and the bathroom is very small as well as the rest of the house. Claimant has some difficulty in using her walker in her narrow hallways. (Ex. 1, p. 2)

Mr. Walsh testified that if claimant purchases an annuity, she would not be able to reach that asset in an emergency, that the annuity could not be tapped for extra money. When claimant has an annuity she will not be able to reach that money in case of an emergency. That is also true for her workers' compensation benefits; they are unavailable to use as an asset if unexpected bills or expenses come up. However, if claimant is able to purchase a house without a mortgage, she could use the equity in her house to obtain a loan in an emergency.

Claimant has requested reimbursement of the cost for the report by Mr. Lodden. Mr. Lodden worked for 8.25 hours on his report and billed \$1,927.75. That billing represents a rate of \$233.63 per hour [$\$1,927.75 / 8.25 = \233.63]. Mr. Lodden reduced his bill to \$1,500.00. This reduced his billing rate to \$181.81 per hour [$\$1,500.00 / 8.25 = \181.81]. (Ex. 1, p. 10) For the supplemental report he performed \$1,671.00 in services and billed \$800.00. Mr. Lodden is a CPA and has numerous certifications in financial fields, as well as being a managing partner in his firm. (Ex. 1, p. 9) Given the qualifications of Mr. Lodden, I find his bill to be reasonable.

CONCLUSIONS OF LAW

The issue to be resolved is whether a partial commutation of all but the last week of permanent total disability benefit is in the best interest of the claimant.

In determining whether the commutation is in the best interest of claimant, this agency cannot act as a conservator and disregard claimant's desires and reasonable plans just because success of the plan is not assured. Diamond v. Parsons Co., 256 Iowa 915, 129 N.W.2d 608 (1964). The Iowa Supreme Court in Dameron v. Neumann Bros. Inc., 339 N.W.2d 160, 165 (Iowa 1983) has held that this agency should examine the following in determining whether to allow a commutation:

The worker's age, education, mental and physical condition, and actual life expectancy (as contrasted with information provided by actuarial tables).

The worker's family circumstances, living arrangements, and responsibilities to dependents.

The worker's financial condition, including all sources of income, debts, and living expenses.

The reasonableness of the worker's plan for investing the lump sum proceeds and the worker's ability to manage invested funds or arrange for management by others (for example, by a trustee or conservator).

The Dameron court went on to state that a request for commutation should be approved unless the potential detriments to the worker outweigh the worker's expressed preference and the demonstrated benefits of commutation. Dameron, 339 N.W.2d at 165.

Iowa Code section 85.48 provides:

When partial commutation is ordered, the workers' compensation commissioner shall fix the lump sum to be paid at an amount which will equal the future payments for the period commuted, capitalized at their present value upon the basis of interest at the rate provided in section 535.3 for court judgments and decrees. Provisions shall be made for the payment of weekly compensation not included in the commutation with all remaining payments to be paid over the same period of time as though the commutation had not been made by either eliminating weekly payments from the first or last part of the payment period or by a pro rata reduction in the weekly benefit amount over the entire payment period.

When the period of future compensation to which a claimant is entitled is definitely determinable and a claimant's work-related medical condition is stable,

claimant may receive a lump sum discounted payment of future benefits, provided claimant establishes that the commutation of benefits is in claimant's best interest. A claimant's preference for receiving a lump sum payment is balanced against the potential detriments that could result if the employee invests unwisely, spends foolishly or otherwise wastes the funds to the point where they no longer provide the wage substitute intended by the workers' compensation law. Dameron, 339 N.W.2d at 160.

It is important to point out in this case that the claimant is married and her husband has a steady income working at Tyson Fresh Meats, Inc. There was no indication that his job was insecure or that the parties were contemplating separation or divorce. The claimant is receiving Social Security disability payments. Thus, even if claimant's plan to invest in an annuity does not work out as she hopes or as indicated by Mr. Lodden, the family will not be destitute. They would need to adjust their lifestyle, but would not be on public assistance.

One of the reasons claimant is requesting a partial commutation is if she were to die, she would be able to have her husband and family receive the remainder of the 20-year annuity and a home that has no mortgage. At present, if the claimant dies, both her Social Security disability benefits and her workers' compensation benefits will cease.

This agency has recognized that the desire to provide for family members in case of death can be a valid reason for a partial commutation of benefits. Sporleder v. Crouse Cartage Company, File No. 1254033 (App. May 5, 2011).

The claimant's plan for the partial commutation is similar to the plan she proposed in her first attempt at a partial commutation. Claimant proposes to use the commuted benefits to pay the attorney fees, pay off a home and buy a new, larger, more expensive one, pay off debts, and to invest the remainder in an annuity. The plan will reduce, depending on the exact amount of the annuity, her monthly income by approximately \$500.00 per month. While her income will be reduced, she will be eliminating a mortgage payment of \$443.00 and her credit card debt of \$200.00 per month if her commutation is approved. Claimant's attorney will reduce his fee by \$15,000.00, if the partial commutation is approved.

It is likely that taxes on the new home and insurance on her home will increase if she buys a more expensive home. Whether other expenses of homeownership would increase is speculative. If the new home is in better shape and is more energy efficient the costs of maintaining and living in the home may not increase. A larger home not in good repair or having less energy efficient furnace/AC could cost more to maintain. It is just not known precisely what future cost of maintaining a new home will be. From the limited information I could obtain from the pictures of the claimant's current home, it appeared well maintained.

The annuity payments will not be adjusted for inflation. It is also true that workers' compensation benefits do not adjust for inflation.

Considering all of the factors, I determine the claimant's plan for a partial commutation should be approved. The plan is in the best interest of the claimant. While the plan is not assured of success, it is reasonable. It provides the claimant the opportunity to live in a house that will accommodate her disability. The plan provides an opportunity to get out of debt, reduce their liability for attorney's fees and provide some measure of protection to her family if she were to die.

Claimant has met her burden of proof to show that her request for a partial commutation is in her best interest.

Iowa Code section 86.40 provides, "All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner." Rule 876 IAC 4.33 set forth the costs that can be awarded.

The question is whether, under rule 876 IAC 4.33(86), Mr. Lodden's report can be taxed.

Rule 876 IAC 4.33 provides:

876—4.33(86) Costs. Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes. Costs of service of notice and subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery.

It was held in Caven v. John Deere Dubuque Works, File Nos. 5023051 and 5023052 (App. July 21, 2009):

While a doctor or practitioner deposition testimony is limited by Iowa Code section 622.69 and 622.72, no such limitation is contained in this rule for obtaining written reports, nor is there any application of those statutes to written reports. As recently instructed by the Iowa Supreme Court, this agency cannot ignore the plain wording of its own rules. Boehme v. Fareway Stores, Inc., Supreme Court Decision, No. 07-2094, Filed February 27, 2009, page 7; Rock v Warhank, 757 N.W.2d 670, 673 (Iowa 2008). Therefore, the prior agency precedent set forth above shall no longer be controlling agency precedents in cases before this agency and the entire reasonable costs of doctor and practitioner's reports may be taxed as costs pursuant to 876 IAC 4.33.

In Caven v. John Deere Dubuque Works, File Nos. 5023051 and 5023052 (App. July 21, 2009), the prior holdings imposing a cap on doctor and practitioner reports was reversed as wholly inconsistent with the plain language of our administrative rule 876 IAC 4.33(6), which allows for the award of the reasonable cost of both doctor and practitioner reports.

In DeLeon v. John Morrell & Company, File No. 5007832 (App. June 11, 2014), the commissioner awarded the expenses of a report of two financial planners under 876 IAC 4.33(6). As I have found Mr. Lodden's cost to be reasonable, using my discretion, I award the costs of Mr. Lodden's reports to claimant in the amount of \$2,300.00.

ORDER

THEREFORE, it is ordered:

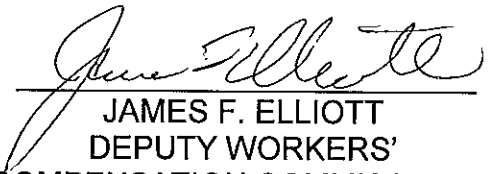
Claimant's petition for partial commutation is granted.

Defendant shall pay claimant a lump sum payment of future weekly benefits, except for the final week, as set forth in claimant's petition for partial commutation, discounted to the present value based on the number of weeks to be commuted and the interest rate for determining the discount as of the date of this decision. Weekly benefits will resume if claimant is still living at the end of her life expectancy per the tables.

Defendant shall pay claimant's cost of Mr. Lodden's reports in the amount of two thousand three-hundred and 00/100 dollars (\$2,300.00).

Defendant shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

Signed and filed this 30th day of March, 2015.


JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.