BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

VANESSA BRUSS, surviving spouse of NEIL BRUSS, Claimant, vs. GROUT SCOUTS, INC., Employer, and ACCIDENT FUND INSURANCE COMPANY OF AMERICA, Insurance Carrier, Defendants.	FILED JAN - 8 2019 WORKERS' COMPENSATION File No. 5065045 APPEAL DECISION Headnote No.: 3303

Claimant Vanessa Bruss, surviving spouse of Neil Bruss, appeals from a Ruling on Claimant's Motion for Commutation/Motion for Leave to Amend and Dismissal of Partial Commutation (hereinafter "Ruling") filed on September 19, 2017.

On December 20, 2018, the Iowa Workers' Compensation Commissioner delegated authority to the undersigned to enter a final agency decision in this matter. Therefore, this appeal decision is entered as final agency action pursuant to Iowa Code section 17A.15(3) and Iowa Code section 86.24.

On March 1, 2017, claimant filed a petition seeking death benefits on behalf of her husband, Neil Bruss. In their answer, defendants Grout Scots, Inc., employer, and Accident Fund Insurance Company of America, insurer, disputed claimant's entitlement to death benefits.

On June 29, 2017, claimant filed a petition for full commutation, along with a "Motion for Full Commutation, or in the alternative, Motion for Partial Commutation." On June 30, 2017, claimant filed a motion for leave to amend her petition to include a claim for full or partial commutation. Through her respective motions, claimant acknowledged

she had neither a settlement nor an arbitration decision that established the period during which compensation was payable, but she instead argued that none was required because there was no legitimate bona fide dispute regarding her entitlement to death benefits. She also argued the commissioner's decision in Sloan v. Mark D. Sloan, D.D.S. d/b/a Sloan Family Dentistry, P.C., File No. 5065386 (Commissioner's Ruling on Motion to Dismiss Petition for Partial Commutation, June 12, 2017) was erroneously decided.

Defendants filed a resistance to claimant's motion for leave to amend and motion for commutation on July 12, 2017. Defendants asserted that claimant's petition for commutation should be dismissed because there was no settlement or arbitration decision establishing claimant's entitlement to death benefits and/or the correct rate.

On September 19, 2017, a deputy workers' compensation commissioner issued his Ruling in which he found that the period during which compensation is payable could not be definitely determined "at this time." (Ruling, p. 2) This finding was based both on defendants' position that claimant's entitlement to death benefits was at issue and the absence of any settlement or adjudication. Consistent with the commissioner's ruling in Sloan, the deputy commissioner concluded that "there is nothing to be commuted at this point in time[,] and as such, claimant's petition for partial commutation is premature." (Ruling, p. 3)

On October 4, 2017, claimant filed a notice of appeal of the deputy commissioner's Ruling. As mentioned, this appeal was delegated to me on December 20, 2018.

However, prior to this delegation and, consequently, before an appeal decision was issued, claimant's underlying claim for death benefits proceeded to hearing. In an arbitration decision, issued on January 26, 2018, a deputy commissioner explained that the parties entered into numerous stipulations "establishing liability for the death claim surrounding Neil Bruss's February 27, 2017 work injuries." (Arbitration Decision, p. 2) In fact, the parties identified no factual or legal issues for resolution; in essence, the parties sought a decision confirming their stipulations. Based on these stipulations, the deputy commissioner issued a decision ordering defendants to pay death benefits pursuant to Iowa Code section 85.31(1)(a)(1) at the parties' stipulated rate.

Despite the January 26, 2018 arbitration decision, claimants' appeal of the deputy commissioner's September 19, 2017 Ruling is still outstanding. For purposes of claimant's appeal, it is important to remember that although claimant now has an

arbitration decision establishing a definitely determined period for which benefits are owed and payable, claimant had no such decision or settlement at the time of the deputy's Ruling from which she appealed.

On appeal, claimant argues the appeal is interlocutory in nature, that the deputy commissioner erred in his interpretation of Iowa Code section 85.45 and application of Sloan, and that the deputy commissioner failed to address whether an ex post facto application of the Iowa legislature's amendments to Iowa Code section 85.45 violated claimant's rights.

Pursuant to Iowa Code section 17A.15 and Iowa Code section 86.24, I performed a de novo review of the evidentiary record before the presiding deputy workers' compensation commissioner. I affirm and adopt as the final agency decision those portions of the September 19, 2017 Ruling that relate to issues properly raised on intra-agency appeal with the following additional analysis.

At the outset, although the agency for a period of time treated such appeals as interlocutory, the Iowa District Court has since decided otherwise. See, e.g., Erlbacher et all v. REM Iowa et al, Consolidated Case No. CVCV055118 (Ruling on Consolidated Petitions for Judicial Review, May 9, 2018). The court directed the agency to decide such appeals on their merits, consistent with how the agency handled Sloan. See id. Thus, claimant's argument that her appeal is interlocutory is rejected.

Claimant also argues Sloan was erroneously decided. In Sloan, the commissioner decided as follows:

> The parties present an issue of first impression at the Commissioner level. Given recent statutory changes, this issue may become more prevalent and direction is needed to permit deputy commissioners to understand the agency interpretation of this issue as well as to provide these and various other parties guidance as to the agency's interpretation. Given that numerous parties may be affected in several cases that may be filed in the very near future, I deem it appropriate, as the Workers' Compensation Commissioner, to retain jurisdiction over the pending motion to dismiss claimant's petition for partial commutation. I specifically retain jurisdiction over this issue, I enter a ruling as final agency action on this matter, and I remand the remainder of the issues in the underlying arbitration proceeding for hearing and determination at the deputy commissioner level.

Rule 876 IAC 4.35 makes Iowa Rule of Civil Procedure 1.421, regarding motions to dismiss, applicable to this agency. Iowa Rule of Civil Procedure 1.421 permits an attack upon a petition when the facts alleged within that petition fail to state a claim upon which any relief may be granted.

A motion to dismiss should only be granted if there are no stated facts conceivable under which a claimant might show a right of recovery. Nixon v. State, 704 N.W.2d 643, 644, (Iowa 2005). A motion to dismiss is sustainable only when it appears to a certainty that claimant is not entitled to any relief under any stated facts that could be proved to support a claim. Bindel v. Iowa Manufacturing Co. of Cedar Rapids, 197 N.W.2d 552, 553 (Iowa 1972). To prevail on a motion to dismiss, a movant must show that there are no stated facts conceivable that claimant might show a right of recovery. State ex rel. Miller v. Philip Morris, Inc., 577 N.W.2d 401, 403 (Iowa 1998).

When a motion to dismiss tests the legal sufficiency of the petition, the allegations pled by the claimant are admitted as true and all inferences which may be drawn from those facts are construed in a light most favorable to the claimant. The motion to dismiss also waives any ambiguity or uncertainty in the petition. Leuchtenmacher v. Farm Bureau Mut. Ins., 460 N.W.2d 858, 861 (Iowa 1990); Curtis v. Bd. of Sup'rs of Clinton County, 270 N.W.2d 447, 448 (Iowa 1978).

When interpreting workers' compensation provisions, the law is construed liberally in favor of the claimant. Hanson v. Reichelt, 452 N.W.2d 164, 168 (Iowa 1990); Teel v. McCord, 394 N.W.2d 405, 406-407 (Iowa 1986); Thomas v. William Knudson & Son, Inc., 349 N.W.2d 124, 126 (Iowa App. 1984). The beneficial purposes of the law will not be frustrated by reading something into it which is not there or by adopting a strained or narrow construction. Thomas, 349 N.W.2d at 126.

On the other hand, the plain meaning of the statute must also be enforced. Carolan v. Hill, 553 N.W.2d 882, 887 (Iowa 1996). Unambiguous language in a statute should be given its plain and rational meaning and applied as written. Id. Therefore, a motion to dismiss is only sustained when it appears to a legal certainty that claimant would not be entitled to any relief under any state of facts which could be resolved in support of

> the claims asserted. Halvorson v. City of Decorah, 258 Iowa 314; 138 N.W.2d 856, 860 (1965).
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> Iowa Code section 85.45 requires that "the period during which compensation is payable can be definitely determined" before future payments of compensation may be commuted to a present worth lump sum payment. In this instance, claimant's petition for partial commutation asserts that any benefit entitlement is yet "to be determined." Taking claimant's petition for partial commutation on its face, along with the fact that claimant filed a simultaneous petition for arbitration, it is apparent that the period during which compensation is payable cannot be definitely determined. Iowa Code section 85.45(1)(a).
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> This agency has previously held that a petition for partial commutation cannot be filed until after there is a definitely determined period for which benefits are owed, either through an agreement for settlement or by the filing of an arbitration decision. See Thornton v. Clayton County Recycling, File No. 5039943 (Ruling January 2013); Johnson v. West Ridge Care Center, File No. 5019237 (Ruling on Motion to Dismiss March 2009). I concur with the analysis of the prior deputy rulings on this issue.
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> Given that there has been neither a settlement nor an arbitration award in this matter, there is nothing to be commuted at this point in time. On its face, claimant's petition for partial commutation concedes that any entitlement to benefits remains "to be determined." As such, claimant's petition for partial commutation fails on its face to establish "the period during which compensation is payable" and whatever that period is certainly cannot be "definitely determined" at this juncture. Claimant's petition for partial commutation is premature and is not permissible pursuant to Iowa Code section 85.45(1)(a).

Sloan, File No. 5065386 (Commissioner's Ruling on Motion to Dismiss Petition for Partial Commutation, June 12, 2017).

Although claimant in this case argues Sloan was erroneously decided, Sloan was affirmed by the Iowa District Court after claimant filed her appeal. Sloan v. Mark D. Sloan, D.D.S. d/b/a Sloan Family Dentistry, P.C., Case No. CVCV054329 (Ruling and Order on Petition for Judicial Review, Nov. 20, 2017). I am not aware of any decisions

to the contrary subsequent to the district court's affirmance of Sloan. Thus, claimant's argument that Sloan was erroneously decided is also rejected.

In Sloan, the claimant in his petition for partial commutation conceded that any entitlement to benefits was "to be determined." Unlike Sloan, claimant in this case argues her benefits can be definitely determined because death benefits, if awarded, are awarded for life; in other words, there is no subjective determination regarding the extent of permanent disability to be made, which in turn makes the period during which benefits would be payable definitely determinable. While I acknowledge this distinction, claimant overlooks the fact that defendants were disputing claimant's entitlement to death benefits at the time she made her commutation claim. The determination of whether a claimant is entitled to benefits is a condition precedent to the determination of the period during which such benefits, if any, are payable. In other words, until one is found to be entitled to benefits, there is no period during which benefits are payable.

Claimant's argument assumed she would successfully obtain a future award in a future hearing. The fact that claimant was ultimately correct is immaterial to the circumstances as they were at the time of the deputy's Ruling and claimant's appeal. For these reasons, I agree with the deputy commissioner in this case and affirm his finding that the period during which compensation is payable could not be definitely determined at the time claimant made her commutation claim.

Because that initial determination regarding claimant's entitlement to benefits had not yet occurred in this case when claimant made her claim for commutation, the reasoning and analysis in Sloan is relevant and directly applicable. Like in Sloan, there was nothing to be commuted in this case when claimant made her claim for commutation. See Sloan, File No. 5065386 (Commissioner's Ruling on Motion to Dismiss Petition for Partial Commutation, June 12, 2017) ("Given that there has been neither a settlement nor an arbitration award in this matter, there is nothing to be commuted at this point in time."). I therefore affirm the deputy commissioner and conclude claimant's claim for partial commutation was premature and was not permissible pursuant to Iowa Code section 85.45(1)(a).

Claimant also argues that the denial and dismissal of her commutation claim was an ex post facto application of the Iowa legislature's amendments to Iowa Code section 85.45 and a violation of both her statutory right to a commutation and her right to due process. The Iowa legislature made changes to Iowa Code section 85.45 that took effect on July 1, 2017; more specifically, as of July 1, 2017, claimants can no longer obtain commutations without the consent of defendants. See Iowa Code § 85.45(1)

(2017); HF 518 § 24, 87th G.A. (Iowa 2017) ("The sections of this Act amending section 85.45 apply to commutations for which applications are filed on or after the effective date of this Act."). Claimant's petition for commutation and motion for leave to amend to add her claim for commutation were filed in June of 2017, just days before the amendments took effect. On appeal, claimant argues that "[a]llowing a [d]efendant to decide if a commutation is granted before it is duly given that power by the Iowa Legislature" violates claimant's statutory and constitutional rights.

However, as of June 29, 2017, and June 30, 2017, when claimant's petition for commutation and motions were filed, claimant had no statutory or constitutional right to a commutation because, as explained above, her entitlement to death benefits had not been established, meaning there was no definitely determinable period during which compensation was payable. Even assuming the legislature had left Iowa Code section 85.45 untouched, claimant's petition for commutation would not have been ripe for determination. In other words, it was not an ex post facto application of the legislature's amendments to Iowa Code section 85.45 that prevented claimant from obtaining a commutation; instead, it was the same application of Iowa Code section 85.45 that this agency had followed in years prior to the legislature's recent changes. See, e.g., Thornton v. Clayton County Recycling, File No. 5039943 (Ruling January 2013); Johnson v. West Ridge Care Center, File No. 5019237 (Ruling on Motion to Dismiss March 2009). Because claimant had no right—statutory, constitutional, or otherwise—to a commutation at the time she made her claim for commutation, her statutory right and constitutional rights were not violated when her claim was denied and dismissed.

Further, claimant's belief that the prohibition of ex post facto laws extends to civil laws is not shared by the Iowa Supreme Court. "'[T]he prohibition of ex post facto laws applies only to penal and criminal actions.' As a result, '[p]urely civil penalties . . . are not subjected to such restrictions,' 'even where the civil consequences are "serious" in nature.'" Formaro v. Polk Cty., 773 N.W.2d 834, 843 (Iowa 2009) (quoting State v. Corwin, 616 N.W.2d 600, 601 (Iowa 2000); State v. Flam, 587 N.W.2d 767, 768 (Iowa 1998); Hills v. Iowa Dep't of Transp., 534 N.W.2d 640, 641 (Iowa 1995)). Additionally, the amendments to Iowa Code section 85.45 do not constitute a "punitive measure" or "penalty," such as a monetary fine, so the entire ex post facto analysis is inapplicable. See Formaro, 773 N.W.2d at 843. For these reasons, claimant's ex post facto argument is unconvincing.

In sum, I affirm the deputy commissioner's findings of fact and conclusions of law in their entirety with the above additional analysis. Claimant's "Motion for Full

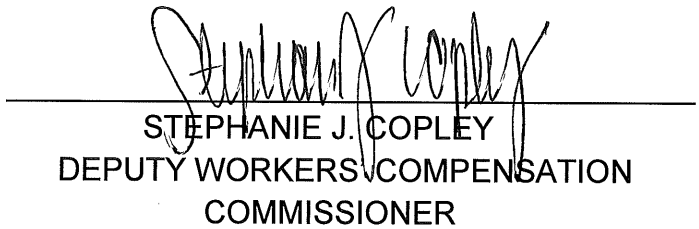
Commutation, or in the alternative, Motion for Partial Commutation" and motion for leave to amend are denied, and claimant's petition for commutation is dismissed.

ORDER

IT IS THEREFORE ORDERED that the Ruling dated September 19, 2017 is affirmed in its entirety with my additional analysis.

Claimant shall bear the costs of this appeal pursuant to rule 876 IAC 4.33.

Signed and filed this 8th day of January, 2019.



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