BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ENRIQUE GUTIERREZ, Claimant, vs. MERIVIC, INC., Employer, and ZURICH NORTH AMERICA, Insurance Carrier, Defendants.	FILED OCT 29 2015 WORKERS' COMPENSATI N File No. 5030102 PARTIAL COMMUTATION DECISION Head Note No.: 1803

STATEMENT OF THE CASE

Enrique Gutierrez, claimant, has filed a petition for partial commutation and seeks workers' compensation from Merivic, Inc., employer, and Zurich North America, insurance carrier, defendants.

This matter came on for hearing before deputy workers' compensation commissioner, Jon E. Heitland, on June 4, 2015, in Des Moines, Iowa. The record in the case consists of claimant's exhibits 1 through 11; defense exhibits A through D; as well as the testimony of the claimant and Ted Lodden.

ISSUES

The parties presented the following issue for determination:

1. Whether a partial commutation is appropriate.

FINDINGS OF FACT

The undersigned, having considered all of the testimony and evidence in the record finds:

Enrique Gutierrez testified at the time of the arbitration hearing that he was living in Oklahoma. He is married and his wife's name is Guadalupe Gutierrez. He has two adult daughters living with him, as well as two grandchildren, ages 11 and 3. He is 55 years old. His education consists of attending nine years in school in Mexico. He has few English skills, either in speaking or understanding. He has lifting restrictions from his work injury, including not lifting more than four to six pounds. He is seeking a partial commutation of his prior award in the form of a lump sum payment except for one week, in order to maintain a partial commutation. He stated he seeks this one lump sum payment because he needs more money to make ends meet.

Claimant consulted Ted Lodden, a financial adviser. He has been told with the commutation he could pay off all of his debts at once and not continue to pay interest. He could also own his home instead of paying rent. He would have money left over for an annuity which would pay him monthly benefits, and if he died, his family would continue to receive those benefits.

Currently he is unable to pay his monthly expenses with the income he and his wife have. He has monthly expenses of $3,800.00 or more. His monthly income with his current workers' compensation benefits, after attorney's fees, would be about $2,500.00. His wife earns about $1,500.00 per month. Thus, they currently have an income of about $4,000.00 per month. This leaves a buffer of only $200.00 per month, which is often used up by unexpected expenses. As a result they have fallen behind in their bills and he and his wife have had to borrow money. His debts currently include his wife's three loans, in the amount of $1,000 each. He has loans from his mother in Texas, currently in the amount of $1,500.00. His total debt is $50,000.00, which includes the three loans of his wife, a car loan with $34,000.00 remaining, and $12,000.00 he owes on an old car loan for his son which he co-signed and his son then defaulted on the loan when he fell behind on his child support. Claimant was injured and not able to keep up the payments and the car was repossessed.

When he was working, he was clearing about $1,000.00 or $1,100.00 per week after taxes. Now, after attorney's fees are taken out, he gets about $567.00 per week in workers' compensation benefits, or about $400.00 per week less. He felt less financial pressure when he was working.

He and his wife share one vehicle, a truck. His insurance policy covers three vehicles, which includes his son's vehicle and his son's wife's vehicle. Claimant does not own those cars but he pays the insurance because it is cheaper.

If he gets the commutation, he intends to buy a home outright, pay off his debts all at once, and work with Mr. Lodden for an annuity which would be purchased for about $440,000.00. That annuity will pay him, or his family if he dies, for several years and pay attorney's fees but at a reduced rate.

He currently rents his home, paying $995.00 per month. He feels he would be better off and would feel less financial pressure if he were able to buy a home, versus paying rent indefinitely for the remainder of his life. He would own his own home. Rent is his largest monthly expense and that would be eliminated. He has consulted a construction company, and a house would cost him about $150,000.00. He owns land in Texas that he bought 20 years ago. It was paid off over time, the last payment being made in February 2015. He has about 7.25 acres there. If he does not receive a commutation, he does not see how he could ever afford to put a house on that land because he no longer can work. It was his plan to do so up until he was injured. If he gets the commutation, he would be able to build the house and own it outright.

An annuity was recommended by Mr. Lodden as a way of providing money even if claimant dies. If he were to die now, his workers' compensation benefits would cease under the law. He would like to leave something for his family, especially a home and monthly income.

Defendants have hired an expert who assumed claimant's attorney's fees on his current weekly workers' compensation benefit checks was 20 percent, however it is actually 25 percent. That expert pointed out claimant, if awarded the commutation and a house is built, would have monthly expenses he does not have now. Claimant stated he knows friends and relatives in Texas who have skills to help him maintain the house.

On cross examination, claimant stated he was age 15 when he left school. He did not graduate. He had no training in economics or finance. His math skills are average. He is relying on the accuracy of Mr. Lodden's report for his request for a commutation.

He does not normally save the $200.00 per month left over after expenses. Right now he has about $400.00 in the bank which he used to travel to this hearing. He banks in Oklahoma, with a checking account. He does not have a savings account and never has. He has never had any investment account and has never owned any stocks or bonds. He has not had a retirement account. He has no cash stashed away for emergency funds. This was true prior to his work injury as well. Just before his work injury, he had about $1,000.00 or $1,400.00 in his checking account. If he receives the partial commutation, he plans to move to Texas. His wife does not have a job lined up there but she will look for one.

His credit report shows other outstanding debts, including a hospital bill. It shows a poor credit rating. (Exhibit 4) He and his wife did not have to take out loans to make ends meet before his work injury. He purchased his truck on March 6, 2013. This was two weeks after his case for his left shoulder injury came to a conclusion. He has been making payments on that truck loan but recently made a late payment.

Exhibit 5, page 75, is a February 2015 statement showing he had only made seven payments on the truck loan he took out in March 2013. He is not aware of what the interest rates are on his loans. He is not aware whether his workers' compensation benefits are taxable. He does not know what the tax consequences would be if he were to receive annuity payments.

He was not given a formal written estimate of the cost of the new house. He estimated he would spend $5,000.00 of the commutation to purchase furniture and other items for their new home in Texas. He does not know what the real estate taxes would be on the home. Prior to his injury, he had not saved any money toward the construction of his home in Texas, but this was because he was saving to pay off the land. He agreed even though his friends would help him with labor for any maintenance or repairs of his house, they would not pay for materials and he would have to pay for those. He agreed home ownership entails unexpected expenses.

He stated Mr. Lodden explained a 20-year certain period annuity to him. Claimant understood this would pay him between $1,800.00 and $2,000.00 per month. He realizes he could purchase a life insurance policy to provide for his heirs upon his death.

On re-direct examination, claimant stated some months he has more money than his expenses, and some months he does not. He is not claiming to be a financial expert himself. That is why he has hired an expert. He and his wife have discussed whether there are jobs available in the area of Texas where they plan to live, and there are.

The credit report shows debt of $47,000.00. Even if his creditors find out he has a sum of money, it will not matter because he intends to pay off all his debts and loans. He would not have any net worth if he does not get the commutation. But he also agreed he did not have any net worth before his injury either. When he spoke with Mr. Lodden, he used a friend as an interpreter.

Ted Lodden was called as a witness for claimant. He is a financial adviser in West Des Moines, Iowa. He attended Grand View College, where he obtained an A.A. degree, followed by a B.S. degree from Iowa State University. He then earned a M.A. degree from Drake University. He is a Certified Public Accountant, a certified financial planner, as well as being licensed in securities and in insurance. He has worked for the largest locally owned CPA firm in Iowa for a time. In 1978 he became a partner in that firm and in 1985 started his own CPA firm which he owns today. He does audit, consulting, tax, financial planning, and estate planning services. He does business valuations. They have a sister company that manages money which currently manages $150 million. The CPA firm has a staff of 35 in office employees as well as part-time personnel who work outside the office. As a certified financial planner, services provided include helping someone with a budget, elaborate investment strategies, planning for retirement, etc. He helps clients assess various investment vehicles according to their needs.

He first met with claimant at the end of January 2014. An interpreter was present. Claimant wanted to discuss how to get out of his debts, own his own home and provide for his children after his death. Claimant provided documents such as a credit report and other information. Mr. Lodden issued a report after reviewing those documents. (Ex. 1) His curriculum vitae is attached to exhibit 1. An annuity was recommended by Mr. Lodden as a way of providing money even if claimant dies. At the time Mr. Lodden did his calculations, claimant was 54 years old. Claimant is older now and that affects the calculation, but claimant's attorney has reduced his fee to offset that difference.

Mr. Lodden noted claimant pays $995.00 per month for rent. One of claimant's goals was to build a suitable house for $150,000.00 for his family, on land he owns. Claimant was asked if he had spoken to builders. Claimant desired to move from Oklahoma to Texas to the land he owned. Three reporting agencies reported information on the credit report, and all three had similar information. He is paying nine percent on his car loan. He is earning two percent on his workers' compensation money. Claimant had borrowed $3,000.00 from his mother to travel to see a sick relative, but he has paid that down to $1,500.00. When added to the $47,000.00 debt on his credit it gives claimant about $50,000.00 in debt. Claimant receives $567.87 per week now for his workers compensation benefits, or about $ 2,400.00 per month.

Mr. Lodden stated claimant would have $645,428.00 left after paying his attorney's fees. Claimant would use that to pay off his debts of $51,000.00 plus. Claimant would use another $150,000.00 to build his house, and spend $5,000.00 for furnishings. This is assuming the new house would have a new dishwasher, refrigerator, etc. with warranties. This would leave about $440,428.00 to invest in an annuity.

He pointed out claimant's current landlord collects enough to cover his property taxes, insurance and interest, so claimant is in a way paying those costs already through rent, but on someone else's property. He is not accumulating any equity to pass on to his family if he dies. Thus, the annuity and house purchase is a much better arrangement for claimant. Paying off his debts would also be in claimant's best interests, as opposed to continuing to pay interest on those debts. For example, one car payment of over $600.00 per month was $260.00 in interest.

The annuity is a 20-year certain annuity, which means if claimant were to die, the annuity would continue to pay out for a guaranteed period of 20 years. If he doesn't die, the annuity has a life insurance policy built into it which would continue to pay claimant for life. It differs from workers' compensation in that it would pay for at least 20 years. The reduction of claimant's attorney fees helps significantly to produce this result.

Mr. Lodden feels claimant is serious about resolving his debts and building some equity for his family. He has reviewed the report of Michael Sandberg, the financial expert for defendants. Mr. Sandberg says claimant would only receive $626,000.00, not $645,000.00, but this is due to the fact Mr. Sandberg did not realize claimant's attorney was reducing his fee. Mr. Sandberg felt claimant was able to meet his expenses each month. Mr. Lodden said claimant and his wife can meet their expenses some months, other months they cannot, but it is always very close.

He noted claimant's wife income figure of $1,768.00 was before withholding, and her take home pay was closer to $1,500.00. Their monthly income is therefore $3,900.00 for the two of them, and expenses are $3,784.00. Thus, there is a very narrow margin between their income and expenses. Because of this, he is not surprised claimant and his wife had to take out loans. Those loans were at high interest rates, which have contributed to their financial problems. Those loans would be eliminated with the commutation.

Mr. Sandberg felt Mr. Lodden's figures for home expenses did not comport with the Bureau of Labor Statistics, which offers information for the entire country. Mr. Lodden used the property tax rate for homes in the area of claimant's land in Texas in estimating this expense for claimant, using an estimate of the square footage of the home. The same was done for the insurance costs in that area. Mr. Sandberg was concerned about claimant's ability to handle management responsibility. He stated the long-term goal is financial security for the rest of claimant's life. Mr. Lodden noted claimant's goals are not just for his life, but for his family after his death as well. The annuity recommended is designed to meet this goal.

The land in Texas is valued at about $37,000.00 per tax appraisals. But claimant has $50,000.00 in debt, so he has no net worth now. He would have net worth under the annuity plan. Mr. Sandberg noted workers' compensation benefits are a riskless investment, as opposed to the annuity. Mr. Lodden disagreed, stating as long as a reliable company is used, an annuity is a riskless investment as well. Regulations require reserves that protect annuitants. He commonly uses annuities for low income clients as the money is safely held by the insurance company and an annuity forces the recipient to adhere to a budget.

Unlike Mr. Sandberg, Mr. Lodden does not see claimant's language barrier as affecting his ability to benefit from an annuity. Mr. Sandberg also noted that owning real estate incurs new expenses for claimant. However, Mr. Lodden feels claimant currently paying rent means he is helping the landlord pay those same expenses. Claimant would free up that $995 in rent he is currently paying to apply to any home repairs or maintenance. Since it will be a new home, there should not be any expenses for some time.

Mr. Sandberg noted an annuity would be taxable. A portion of the annuity, the income portion, would be taxable, but the rest would be a return of the money he invested and would not be taxable. Claimant can offset the income tax liability. For example, if an investment of $400,000.00 is made, and the income is three percent, the income portion would be about $12,000.00. That would be reported on a tax return as ordinary income. But claimant would be entitled to a standard deduction of $12,000.00, and personal exemptions of about $15,000.00 on his current tax returns. His wife makes about $19,000.00 per year. Even adding the income from the annuity would not incur a large tax liability. Mr. Lodden does not see any risk for claimant with this plan other than the fact claimant has to learn to live within the parameters of the budget the annuity will impose on him. Claimant's life expectancy is 1,327 weeks, or about 27 years. Mr. Lodden recommends his annuity plan and debt payoff plan as being in claimant's best interests.

On cross examination, Mr. Lodden agreed his calculation of claimant's debt was based on the credit report and the indication of personal loans reported by claimant. He agreed there are no repair or maintenance costs to claimant under a typical rental lease. He feels given claimant's goals of passing worth to his family if he dies, renting is not in his best interests. He agreed claimant's life expectancy is 26 years, but after 20 years under the annuity, there would be no death benefit to his family. But, claimant would continue to receive benefits under the annuity. He also agreed eventually claimant will need another new car, and eventually the new house will no longer be new and will begin needing maintenance.

Mr. Lodden stated the only downside would be claimant having some margin in his income versus his expenses, and claimant will need to make sure he lives within his means. Mr. Lodden feels he will do so as claimant does not want to return to that situation. Mr. Lodden originally felt the credit report showed poor financial management, but claimant explained the unusual circumstances that led to some of those debts. He agrees claimant is not financially sophisticated.

The annuity could be purchased through Mr. Lodden's business, but not necessarily. Mr. Lodden would help see claimant gets the best deal by searching about 30 companies. If an annuity was purchased for $440,428.00, Mr. Lodden would get a commission but he does not know how much that would be. He has sold annuities through United Life Insurance before, and has received commissions before. He has not proposed a conservator for Mr. Gutierrez.

On re-direct examination, he stated he did not consider his commission. He focuses on what's best for the client. He would find out what his commission would be before he sold the annuity to claimant, and disclose that to claimant. He would make sure it was a highly rated company, and he sees himself as having a fiduciary responsibility to his clients. He did not undertake this to make money, but to help claimant. He would waive his fee if necessary to result in the same money to claimant.

Mr. Lodden's report is exhibit 1.

CONCLUSIONS OF LAW

The first issue in this case is whether claimant should receive a partial commutation of benefits.

Iowa Code section 85.45 provides that a commutation may be ordered when the commutation is shown to be in the best interests of the person who is entitled to the compensation. Diamond v. Parsons Co., 256 Iowa 915, 129 N.W.2d 608 (1964). The factors relied on in determining if a commutation is in the best interests of the claimant include the following: the claimant's age, education, mental and physical condition, and actual life expectancy; the claimant's family circumstances, living arrangements and responsibilities to dependents; the claimant's financial condition, including sources of income, debts, and living expenses; and the claimant's ability to manage the funds or arrange for someone else to manage them. Dameron v. Neumann Bros. Inc., 339 N.W.2d 160 (Iowa 1983). The analysis used in the decision is whether the commutation is in the best interests of the claimant. Within that context, a benefit-detriment analysis is employed. The above recited factors, along with the claimant's preference and the benefits of the claimant receiving a lump-sum payment, are balanced against the potential detriments that could result if the claimant 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. Diamond, 129 N.W.2d at 617; Dameron, 339 N.W.2d at 163-164.

Mr. Lodden's analysis is found to be accurate. Although Mr. Sandberg raised valid concerns, Mr. Lodden adequately explained them and his conclusions are convincing. Claimant does lack math and financial skills, but with an annuity, that will not matter as he will not have access to the funds. It is true his income will then be taxable whereas now it is not. But, as Mr. Lodden pointed out, the income is low enough claimant will not incur a tax liability. An advantage is even if claimant were to die, his family would still benefit, whereas with workers' compensation benefits, were he to die, the benefits would stop.

The workers' compensation law contemplates weekly payment of benefits to injured workers. But it also provides for commutation of those benefits where it is appropriate and in the claimant's best interests to do so. This agency functions as a protector of the claimant and his award to ensure it is not squandered and claimant would lose the financial security the award is intended to provide. But the agency is not to act as an unyielding and unreasonable guardian when the record shows a legitimate plan for use of the funds which would be in claimant's best interests. Those facts exist in this record. The numbers involved in the calculations will have changed since the hearing, but the basic proposal proffered by claimant is found to be appropriate and in his best interests. A partial commutation of all but one week of benefits is approved.

ORDER

THEREFORE IT IS ORDERED:

Claimant's petition for partial commutation is granted.

Defendant[s] shall pay claimant a lump sum payment of future weekly benefits, except for one 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.

Costs are taxed to defendants.

Signed and filed this 29th day of October, 2015.

JON E. HEITLAND
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

COPIES TO:

James Byrne
Attorney at Law
1441 29th Street, Suite 111
West Des Moines, IA 50266
JByrne@nbolawfirm.com

Jordan A. Kaplan
Attorney at Law
1900 E. 54th Street
Davenport, IA 52807
jak@bettylawfirm.com

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.