

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BRYAN NOLAN,

Claimant,

vs.

CITY OF DAVENPORT,

Employer,
Self-Insured,
Defendant.

FILED

MAY 09 2019

File No. 5014177

WORKERS COMPENSATION PARTIAL COMMUTATION

DECISION

Head Note No.: 3303.20

Claimant Bryan Nolan filed a petition for partial commutation against the defendant, City of Davenport (hereinafter "the City"), on June 23, 2017, seeking to commute all, but two weeks, of his weekly benefit payments. The City filed response requesting a hearing on the petition for partial commutation.

A hearing on the petition for partial commutation was held on April 4, 2019. Attorney Nicholas Avgerinos represented Nolan. Nolan appeared and testified. Attorney Peter Thill represented the City. Joint Exhibit ("JE") 1, and Exhibits A through E, and 1 through 6 were admitted into the record. The record was held open through May 3, 2019, for the receipt of post-hearing briefs. The briefs were received and the record was closed.

Before the hearing the parties prepared a hearing report, listing stipulations and issues to be decided. The City waived all affirmative defenses.

1. An employer-employee relationship existed between the City and Nolan at the time of the alleged injury.
2. Nolan sustained an injury on January 4, 2003, which arose out of and in the course of his employment with the City.
3. The alleged injury caused both a temporary and a permanent disability.
4. Temporary benefits and permanent benefits are no longer in dispute.
5. At the time of the injury Nolan's gross earnings were \$554.00 per week, he was married and entitled to seven exemptions, and Nolan's weekly rate is \$390.20.

6. From January 4, 2003 through the present Nolan has been paid permanent total disability benefits at the rate of \$390.20 per week and the City is entitled to a credit for all benefits paid.

7. Costs have been paid.

ISSUES

1. Should Nolan's request for a partial commutation be granted?
2. Should costs be assessed against either party?

FINDINGS OF FACT

Nolan filed a petition in arbitration against the City alleging he sustained an injury on November 12, 1996, while working for the City, File Number 1159643. (Exhibit 4, p. 1) The Commissioner approved an agreement for settlement between the parties on June 26, 2000. (Ex. 4, p. 1) The parties agreed Nolan had sustained a 27.5 percent industrial disability. (Ex. 4, p. 1) The City paid all benefits due and owing to Nolan based on the settlement agreement. (Ex. 4, p. 1)

Nolan filed a petition for review-reopening for File Number 1159643 and a petition in arbitration, File Number 5014177, alleging he sustained an injury while working for the City on January 7, 2003. (Ex. 4, p. 1) The matters were consolidated and the hearing on both matters was held on February 15, 2005, before a deputy workers' compensation commissioner. (Ex. 4, p. 1)

The deputy workers' compensation commissioner issued an arbitration and review-reopening decision on February 28, 2005. (Ex. 4) The deputy workers' compensation commissioner awarded Nolan nothing for the November 12, 1996 work injury, File Number 1159643. (Ex. 4, p. 7) The deputy workers' compensation commissioner found Nolan had sustained a new injury on January 7, 2003, and determined based on the new injury Nolan was permanently and totally disabled, and ordered the City to pay Nolan permanent total disability benefits at the rate of \$390.20, from January 7, 2003. (Ex. 4)

The City later filed a review-reopening petition, alleging Nolan had sustained a change of condition. (Ex. 5, p. 1) The deputy workers' compensation commissioner issued a review-reopening decision on January 2, 2014, dismissing the petition for review-reopening. (Ex. 5)

On June 23, 2017, Nolan filed a petition for partial commutation, seeking to commute all, but two weeks of his weekly benefits. The City requested a hearing on the petition. At the time of the hearing on the petition for partial commutation, Nolan was fifty-seven. (Tr., p. 7)

Nolan graduated from high school, but has received no formal schooling or education since graduating from high school. (Tr., p. 7) After Nolan graduated from high school the City hired Nolan to work as a sanitation worker collecting garbage. (Tr., pp. 7-8) While working for the City Nolan sustained injuries in 1996 and 2003. (Tr., p. 8) Nolan has not returned to work since the 2003 work injury. (Tr., p. 8)

Nolan receives weekly workers' compensation benefits of \$390.20. (Tr., pp. 8, 13) Nolan owed outstanding child support that had been deducted from his weekly benefits. (Tr., pp. 9, 13) Nolan's child support obligation has been satisfied. (Tr., p. 13) Nolan's attorney keeps one weekly benefit check per month of \$390.20, for attorney fees. (Tr., p. 38)

Nolan is married and lives in Davenport, Iowa, with his wife, his adult son who is a person with a disability, and his grandson, who is a child with a disability. (Transcript, pages 7, 9, 11) Nolan's son receives \$500.00 per month from the Social Security Administration for his disability. (Tr., p. 9) Nolan testified he and his wife fully support their grandson, but they do not provide financial assistance to their son who is living at home. (Tr., pp. 9-10) Nolan's wife has not worked for approximately fifteen years. (Tr., pp. 12-13)

Nolan and his wife receive \$670.00 in food assistance per month through the Supplemental Food and Nutrition Program ("SNAP") to feed the household. (Tr., pp. 9-10, 13-14) Nolan's grandson receives supplemental assistance from the state of Iowa based on his disability. (Tr., pp. 11-12) Nolan and his wife do not receive any additional income other than his weekly workers' compensation payment and the SNAP payment for food. (Tr., p. 14)

In 2007 Nolan was awarded Social Security Disability Insurance ("SSDI") benefits. (Tr., p. 14) Nolan received \$1,100.00 per month in SSDI benefits. (Tr., p. 14) Nolan received an overpayment of almost \$40,000.00 in SSDI benefits and his SSDI benefits are suspended until 2021. (Tr., pp. 14-15, 39) Nolan testified he spoke with a person with the Social Security Administration who informed him a partial commutation may not affect his SSDI benefits in the future. (Tr., p. 39)

In his answers to interrogatories, Nolan reported he has monthly bills of \$325.00 for electric and gas, \$130.00 for water, \$145.00 for cable, \$55.00 for a cellular telephone, \$300.00 for fuel for his vehicle, \$100.00 for clothing, and \$490.00 for his mortgage. (Ex. D, p. 9) These expenses total \$1,545.00. Nolan pays his bills at Hy-Vee each month. (Tr., p. 20)

Nolan does not have a history of problems with substance abuse, mental health issues, or gambling issues. (Tr., pp. 15-16) Nolan has never been subject to a guardianship or conservatorship. (Tr., p. 16) Nolan is not the subject of any criminal or civil proceedings that could affect his financial status. (Tr., p. 21)

When Nolan's parents passed away they left Nolan their home. (Tr., p. 18) Nolan's parents owed back taxes on the property, so he had to take out a loan to pay the back taxes. (Tr., pp. 17-18) Nolan testified he owes approximately \$15,000.00 on his home and pays \$363.00 per month toward the debt. (Tr., p. 17) Nolan does not have any credit cards or credit card debt. (Tr., p. 18)

Nolan has two bank accounts with Wells Fargo and Vibrant. (Tr., p. 18) Vibrant is the lender for his loan. (Tr., p. 18) Nolan has a checking account with Wells Fargo where his workers' compensation benefits are deposited. (Tr., p. 19) He also has a savings account, but he does not use it. (Tr., p.19) Nolan reported his checking account balance is \$20.00. (Tr., p. 20) Nolan has banked with Wells Fargo for twenty years. (Tr., p. 27)

Nolan does not have a driver's license. (Tr., p. 20) His wife has a driver's license and they do not have a motor vehicle loan, or other consumer debt. (Tr., p. 20) Nolan and his wife do not have any pensions, annuities, or other investments. (Tr., p. 21) Nolan testified he and his wife live paycheck to paycheck. (Tr., p. 21)

Nolan and his wife filed for bankruptcy in 1997 and 2003. (Tr., p. 22) Nolan testified after his work injuries he "got behind on a lot of stuff. I had my injuries, a lot of bills backed up on me. I just felt like I was backed into a corner. That was my only way out and that's what I did." (Tr., p. 22) Nolan agreed on cross-examination in 1997 he discharged between \$10,000.00 and \$20,000.00 in bankruptcy, and he could not recall how much he discharged in bankruptcy in 2003, but he believed it was less. (Tr., pp. 34-35) Nolan has not declared bankruptcy since 2003. (Tr., p. 22) Nolan has never sought advice from a credit counselor. (Tr., pp. 41-42)

Nolan testified if the partial commutation is granted, he will hire a financial manager through his bank to help him manage his money. (Tr., pp. 23-24) Nolan stated he trusted the recommendation of his financial expert he hired in this matter, Bryan Murphy. (Tr., p. 24) Nolan met with Murphy on one occasion only. (Tr., pp. 43-44) Nolan testified he did not discuss any possible tax consequences with Murphy if the partial commutation is granted. (Tr., p. 46) Murphy has never met the City's expert, Michael Alexander. (Tr., p. 49)

Nolan does not have any background in finance or experience with investments. (Tr., pp. 25-26) He has never purchased stock, and he is not familiar with bonds, mutual funds, or annuities. (Tr., p. 26) Nolan stated he planned to continue paying monthly payments on his loan, depending on his cash flow. (Tr., p. 24) Nolan testified math is not his strong suit, and if the partial commutation is granted he would not manage or invest the money on his own. (Tr., pp. 28, 30)

Nolan and his wife own a 1993 minivan. (Tr., p. 25) Nolan testified if the partial commutation is granted, he plans to purchase a new used car. (Tr., p. 25) Nolan continues to pay his attorney twenty-five percent of his weekly workers' compensation

benefits. (Tr., pp. 37-38) If the partial commutation is granted, Nolan's attorney will receive twenty-five percent of the lump sum payment.

Murphy issued his report on August 13, 2018. (Ex. 1a) Murphy determined the assessed value of Murphy's home is \$74,290.00, and Nolan had a \$20,000.00 home equity loan that is outstanding. (Ex. 1a, p. 3)

Murphy found Nolan receives \$11,427.00 per year in workers' compensation, \$8,040.00 in food assistance per year, and his dependents receive \$12,000.00 in Social Security benefits, for total annual income of \$31,467.00. (Ex. 1a, p. 3) Murphy identified a need of \$20,000.00 to pay off the home equity loan, and \$15,000.00 to purchase a reliable used vehicle. (Ex. 1a, p. 2)

Murphy determined the partial commutation amount would be \$362,504.00, and Nolan would receive \$271,878.00, after payment of \$90,626.00 in attorney fees. (Ex. 1a, p. 3) After paying off the home equity loan and purchasing a vehicle, Nolan would have \$236,878.00 to invest. (Ex. 1a, p. 3)

Murphy recommended two options for investing the funds. (Ex. 1a, p. 4) Under the first option Nolan could purchase a single life immediate annuity with twenty years certain that would provide \$12,540.00 per year, a joint life immediate annuity that would provide \$11,412.00 per year, or a joint life immediate annuity with twenty years certain that would provide \$11,376.00 per year. (Ex. 1a, p. 4) The second option is a conservative combination of exchange traded funds and fixed annuity that would expect to yield \$9,320.00 in income. (Ex. 1a, p. 4) The first option would generate more or nearly as much income as his current weekly workers' compensation benefits, if Nolan selected that option.

Alexander prepared a report on January 11, 2019. (Ex. A) Alexander noted Nolan has annual income of \$11,427.00 in workers' compensation, \$8,040.00 in food assistance, and \$12,000.00 for the Social Security benefits received by his dependents. (Ex. A, p. 1) Alexander noted Nolan's household cash flow excluding food assistance is \$23,427.00, which should create a monthly surplus. (Ex. A, p. 2) Alexander noted Nolan's expenses are \$1,545.00 per month, or \$18,540.00 per year. (Ex. A, p. 2) He also noted Nolan is charged multiple fees for monthly ATM balance inquiries and he should learn to balance his account or have online banking to avoid the fees. (Ex. A, p. 2) He also recommended Nolan consult a credit counselor. (Ex. A, p. 2)

Alexander noted Nolan and his wife have very little investment experience and two bank accounts with no value. (Ex. A, p. 3) Alexander stated Murphy "has done a good job of presenting a reasonable solution to the Nolan's financial situation," but Alexander is concerned whether Nolan and his wife would accept the financial advice and stick with it long-term, with their history of two bankruptcies and virtually no investment experience. (Ex. A, p. 3) Alexander noted the single premium immediate annuities still have some type of liquidity, so Nolan could access the principal, and option two poses the principal to market risk. (Ex. A, p. 3)

CONCLUSIONS OF LAW

I. Partial Commutation

This case involves a petition for partial commutation filed before July 1, 2017. At the time of the filing of the petition for partial commutation, Iowa Code section 85.45(1) (2016) provided,

[f]uture payments of compensation may be commuted to a present worth lump sum payment on the following conditions:

a. When the period during which compensation is payable can be definitely determined.

b. When it shall be shown to the satisfaction of the workers' compensation commissioner that such commutation will be for the best interest of the person or persons entitled to the compensation, or that periodical payments as compared with a lump sum payment will entail undue expense, hardship, or inconvenience upon the employer liable therefor.

Nolan has requested a partial commutation of all but the last two weeks of benefits owed pursuant to the life expectancy table adopted by the Division of Workers' Compensation in rule 876 Iowa Administrative Code 6.3. Iowa Code section 85.48 provides,

[w]hen 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.

Rule 876 IAC 6.3 contains a life expectancy table to be used in determining the amount to be paid to claimants in commutation proceedings. The rule provides, "[t]he life expectancy is determined by taking the age of the person, set forth in the 'age' column and comparing it to the 'weeks' column, which indicates the weeks an individual at the age indicated will be expected to continue to live." 876 IAC 6.3. The rule provides a presumption of life expectancy and makes the number of weeks owed to a claimant under a permanent total disability award definitely determinable.

When assessing whether a commutation should be granted, the reviewing body determines whether granting a commutation is in the claimant's best interests. Dameron v. Neumann Bros., Inc., 339 N.W.2d 160, 164-65 (1983); Diamond v. Parsons

Co., 256 Iowa 915, 928, 129 N.W.2d 608, 616 (1964). The Iowa Supreme Court has identified factors to consider in determining whether a commutation is in the claimant's best interest, as follows:

1. The worker's age, education, mental and physical condition, and actual life expectancy (as contrasted with information provided by actuarial tables).
2. The worker's family circumstances, living arrangements, and responsibilities to dependents.
3. The worker's financial condition, including all sources of income, debts and living expenses.
4. 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).

Dameron, 339 N.W.2d at 164. A request for a commutation should be approved using the best-interest balancing test "unless the potential detriments to the worker outweigh the worker's expressed preference and the demonstrated benefits of commutation." Id.

Nolan is fifty-seven. (Tr., p. 7) He sustained two injuries while working for the City. Nolan has not worked since 2003. There is no evidence that Nolan is suffering from a psychological or physical condition that would adversely affect his life expectancy. Nolan has no history of gambling or substance abuse problems.

Nolan graduated from high school, but he has not received any additional training after high school. Nolan is married. His wife is a homemaker who has not worked in fifteen years. Nolan's son and grandson are both persons with disabilities who live with Nolan. Nolan has declared bankruptcy twice in the past. Both dates were after he sustained work injuries. While Nolan had problems with credit in the past, Nolan has not declared bankruptcy in sixteen years.

Nolan has no investment experience and his family lives paycheck to paycheck. His family relies on monthly food assistance to eat. The household has limited income after paying the bills, particularly after Nolan stopped receiving SSDI after the Social Security Administration found he had received an overpayment. Nolan inherited his home from his parents. He had to take out a home equity loan to pay off back taxes his parents owned on their home. Nolan does not have a car payment or other loans. There is no evidence he has made large gifts to family members or otherwise spent his money unwisely.

Nolan is seeking a partial commutation to purchase a new vehicle, and perhaps to pay off the home equity loan, depending on his cash flow. Nolan received an overpayment of SSDI benefits and he is not currently receiving benefits. His benefits should resume in 2021. The first option Murphy posed, which Alexander noted is a

reasonable solution, would provide more or nearly as much income as Nolan's current weekly workers' compensation benefits, depending on which option Nolan selected. Under the circumstances of this case, I find the benefits of the proposed partial commutation outweigh the detriments Nolan may face in the future.

II. Costs

Nolan seeks to recover \$1,800.00 for Murphy's report. (Ex. 6) The City seeks to recover the \$2,100.00 cost of Alexander's report. (Ex. C, p. 6) Iowa Code section 86.40, provides, "[a]ll costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner." Rule 876 IAC 4.33(6), provides

[c]osts 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.

The administrative rule expressly allows for the recovery of the costs requested by Nolan. Using my discretion, I find the \$1,800.00 cost of Murphy's report should be assessed to the City.

ORDER

IT IS HEREBY ORDERED THAT:

Claimant's petition for partial commutation is granted.

Defendant shall pay the claimant a lump sum payment of future weekly benefits, except for the final two weeks of permanent total disability benefits awarded in the February 28, 2005, review-reopening decision, as set forth in the claimant's petition for 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.

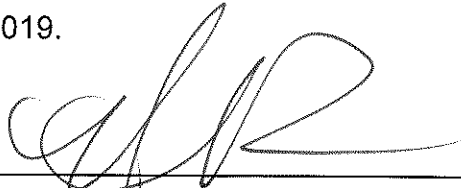
Defendant shall receive a credit for all benefits paid from the date of the filing of the petition until the date the partial commutation is paid.

Claimant's right to medical benefits under Iowa Code section 85.27 shall remain unaffected by this decision.

Defendant is assessed one thousand eighteen hundred and 00/100 dollars (\$1,800.00) for the cost of Murphy's report.

Defendant shall file subsequent reports of injury as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 9th day of May, 2019.


HEATHER L. PALMER
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.