

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

WILLIAM LAWRENCE,	FILED	File No. 928126
Claimant,	MAY 15 2019	
vs.	WORKERS COMPENSATION	PARTIAL COMMUTATION
A.Y. McDONALD, MFG., CO.,		DECISION
Employer,		
Self-Insured,		
Defendant.		Head Note No.: 3303.20

STATEMENT OF THE CASE

This is a proceeding for a partial commutation of all remaining benefits with the exception of the final week. The contested case was initiated when claimant, William Lawrence, filed his original notice and petition for a partial commutation with the Iowa Division of Workers' Compensation. The petition was filed on March 8, 2017. Claimant alleged he was entitled to a partial commutation. (Original notice and petition)

For purposes of workers' compensation, A. Y. McDonald Mfg. Co., is self-insured. Defendant filed its answer on March 24, 2017. The defendant requested a hearing on the matter.

The hearing administrator scheduled the case for hearing on May 24, 2018. The hearing took place at 150 Des Moines Street in Des Moines, Iowa. The undersigned appointed Ms. Vicki L. Newgard, as the certified shorthand reporter. She is the official custodian of the records and notes.

Claimant testified on his own behalf. Defendant did not call any witnesses to testify at the hearing. Claimant offered exhibits 1 through 4. Defendant offered exhibits A through H. All proffered exhibits were admitted as evidence. A copy of the hearing transcript was filed. The parties also submitted post-hearing briefs on August 1, 2018. The case was deemed fully submitted on that date.

PROCEDURAL HISTORY OF THE CASE

Claimant sustained an injury to his low back on August 24, 1989. Initially, claimant settled his case pursuant to an agreement for settlement on August 14, 1991. Claimant agreed to settle for 15 percent permanent partial disability to the body as a whole. Claimant lost his employment with A.Y. McDonald in February of 1992. As a

consequence, claimant retained the legal services of his present attorney. On May 11, 1992, claimant filed a review-reopening petition. The case proceeded to hearing. Claimant was awarded an additional 50 percent permanent partial disability. Subsequently, claimant underwent two back surgeries. Neither surgery was successful. Claimant filed a second petition for review-reopening. On February 8, 2000, claimant was awarded permanent total disability benefits. The award was appealed to the Workers' Compensation Commissioner, to the Iowa District Court and to the Iowa Court of Appeals. At each step of the way, the permanent total disability award was affirmed. The Iowa Court of Appeals affirmed the award on September 25, 2002

STIPULATIONS

The parties completed the designated hearing report. The various stipulations are:

1. There was the existence of an employer-employee relationship at the time of the alleged injury;
2. Claimant sustained an injury on August 24, 1989, which arose out of and in the course of his employment with respect to the abdomen/oblique and back;
3. Temporary benefits are not at issue;
4. The injury is a cause of permanent disability;
5. Claimant was awarded permanent total disability benefits on February 8, 2000 in a Review-Reopening Decision which was affirmed on Appeal;
6. The weekly benefit rate is \$247.34;
7. Defendant waives any affirmative defenses it may have had available to the employer;
8. Medical benefits are no longer in dispute;
9. The parties agree claimant has paid the costs listed.

ISSUE

The issue presented is:

Is claimant entitled to a partial commutation pursuant to Iowa Code section 85.45?

FINDINGS OF FACT

This deputy, after listening to the testimony of claimant and after judging the credibility of claimant, plus after reading the evidence, and the post-hearing briefs, makes the following findings of fact and conclusions of law:

The party who would suffer loss if an issue were not established has the burden of proving the issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6).

Claimant is presently 74 years old and married. His date of birth is July 9, 1944. Claimant had been married to his current spouse, Darlene, for 29 years. She is 71 years old. They reside in the Village of Dickeyville, Wisconsin. Darlene is still working a part time clerical position at the Village of Dickeyville. She works approximately 15 hours per week at \$11.50 per hour. She expects to continue to work in the part time position.

Claimant and his spouse filed for bankruptcy in 2010 in Federal Bankruptcy Court in Wisconsin during 2010. Their debts were discharged in 2011. Claimant blamed the cause for the bankruptcy on credit card debt and poor money management.

The Iowa Legislature changed Iowa Code section 85.45 dealing with commutations effective July 1, 2017. Since claimant filed his petition for a partial commutation prior to July 1, 2017 and the period during which compensation is payable can be definitely determined, claimant's petition falls under Iowa Code section 85.45 as it existed prior to July 1, 2017. The old section reads:

85.45 Commutation.

1. Future 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.

c. When the recipient of commuted benefits is a minor employee, the workers' compensation commissioner may order that such benefits be paid to a trustee as provided in section 85.49.

d. When a person seeking a commutation is a surviving spouse, an employee with a permanent and total disability, or a dependent who is entitled to benefits as provided in section 85.31, subsection 1, paragraph "a", subparagraphs (3) and (4), the future payments which may be commuted shall not exceed the number of weeks which shall be indicated by probability tables designated by the workers' compensation commissioner for death and remarriage, subject to the provisions of chapter 17A.

2. Future payments of compensation shall not be commuted to a present worth lump sum payment when the employee is an inmate as set forth in section 85.59.

In the case of Diamond v. Parsons Co., 256 Iowa 915, 928-929, 129 N.W.2d 608 (1968), the Iowa Supreme Court held one must determine what is in the "best interest" of the person who is seeking the commutation. The Court also stated the trier of fact should not act as "an unyielding conservator of claimant's property and disregard his desires and reasonable plans just because success in the future is not assured." Id. at 929.

In Dameron v. Neumann Bros., Inc., 339 N.W.2d 160 (Iowa 1983), the Iowa Supreme Court detailed the factors that should be focused upon when considering a petition for commutation. The factors are:

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).

Id. at 164.

The Court in Dameron, continued to explain there was a benefit-detriment balancing of factors. The Court wrote:

Ultimately, the Diamond analysis involves a benefit-detriment balancing of factors, with the worker's preference and the benefits to the worker of receiving a lump sum payment weighed against the potential detriments that would result if the worker invested unwisely, spent foolishly, or

otherwise wasted the fund so it no longer provided the wage substitute intended by our worker's compensation law. Under the last two paragraphs quoted above from the Diamond opinion, however, a request for commutation is approved on 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. at 164.

The Dameron Court also indicated:

We further believe that the Diamond analysis, with its emphasis on the worker's own personal and financial circumstances, makes good sense. We reemphasize what Diamond specifically highlighted-commutation turns on what is in the best interest of the worker, not on what is in the best interest of the employer or insurance carrier.

Id. at 165.

During the hearing, claimant testified about the household financial situation. At the time of the hearing, the financial profile of claimant's monthly debt/expenditures was prepared, claimant still had a mortgage on his house. The mortgage payment was \$823.79 per month. The payment included house insurance and property taxes that were placed in escrow and paid by American Bank. Claimant's mortgage was paid in full on November 4, 2018. However, claimant and his spouse are now personally responsible to pay yearly property taxes and insurance on the house. The sum amounts to approximately \$310.00 per month that must be set aside. (Transcript, pages 18-19) Claimant and his spouse now have an additional \$513.00 per month to spend or set aside as savings. In 2016, the value of the home was appraised at \$157,100.00. (Claimant's Exhibit 2, page 3) Claimant paid \$143,000.00 for the house in 2013. The house has appreciated in the six years since it was purchased.

Claimant has two life insurance policies with American Family Insurance. Because claimant is receiving workers' compensation benefits, the premiums are paid by American Family, in the amount of \$97.00 per month. Claimant testified there is a loan balance of a \$2,240.00 against the largest of the insurance policies.

Claimant's counsel retained the services of a financial expert to issue a report regarding the benefits of a partial commutation. Brian J. Murphy, of Stonefield Investment Advisory, met with claimant on May 9, 2017. Claimant reported to Mr. Murphy that he was in poor health. Claimant worried about the financial security his wife would encounter in the event of his death, since his weekly benefits in the amount of \$247.34 would cease.

Mr. Murphy suggested claimant pay off his mortgage which has already been accomplished. The financial advisor also suggested claimant pay the balance owed on the auto loan at Summit Credit Union for the 2013 Dodge Van. The monthly payment is \$178.00 per month at an interest rate of 3.34 percent. The auto loan is scheduled to be satisfied in September of 2021.

Finally, Mr. Murphy advised claimant and his spouse to purchase a Joint-Life Single Premium Immediate Annuity (SPIA). According to Mr. Murphy's report, the SPIA will provide the couple with guaranteed monthly income for both claimant and his spouse. Mr. Murphy wrote: "Under this scenario, they will have enough monthly income to meet their needs while also reducing the financial impact of William's eventual death." (Cl. Ex. 1, p. 4)

Mr. Murphy acknowledged:

As Proposed Purchase a Joint-Life, Single Premium Immediate Annuity (SPIA) to offset the loss of IWC income

Premium: \$75,000 Male 73, Female Age 70 (outdated ages)

Annual Benefit \$4,728

This option provides ample income for them to meet their monthly financial needs. In addition, it provides income for both of their lives instead of just for William's life.

Other Considerations:

1. Willingness to Hire a Financial Advisor.

William has agreed to seek help of a financial adviser [sic] to help him make informed decisions concerning the investment of any funds that may be awarded.

2. Taxation is Not an Issue.

It should be noted that annuity income is traditionally taxable unlike Worker's Compensation income which is non-taxable. Currently, the Lawrence's annual taxable income is not large enough to pay either federal or state income taxes. This will remain the case even with the addition of the annuity income.

Final Conclusions

Considering that the purchase of a Joint-Life, SPIA offers the income security that William is seeking to provide his wife and his willingness

to hire a professional financial adviser, it is my recommendation that a partial commutation be awarded.

In closing, my opinion in this matter is based upon my education, training and over 20 years of experience as a financial adviser and investment management consultant in the financial services industry.

(Cl. Ex. 1, pp. 5-6)

It should be noted. The annual income from the purchase of the SPIA is \$4,728.00 and subject to taxes. The workers' compensation payments listed in Mr. Murphy's report is \$8,566 and not subject to taxes. (Cl. Ex. 1, pp. 3-4) That results in a substantial reduction in monthly income. Although, Ms. Lawrence would receive the annuity for the duration of her life.

Defense counsel, Mr. Jenkins, asked claimant a variety of questions about Mr. Murphy and his recommendation to purchase a Joint-Life Single Premium Immediate Annuity.

Cross-Examination

Q. (By Mr. Jenkins) And I think I understood you today that you never really - - what you understand about annuities, that's never much impressed you as anything you should be investing in.

A. That's the way I was - - yes, that's right.

Q. And you don't have any intent now that you would invest your money in that annuity that Mr. Murphy suggested?

A. Not - - no, not with him.

Q. Okay. And, in fact, you aren't going to - - it isn't your intent to invest in an annuity at all, is it?

A. I'm just looking for whatever I can get the best, and my biggest concern has always been my wife, so - -

Q. Okay. And your present thought would be that you would contact Mr. Reeves to talk about that.

A. I've already talked to him.

Q. Okay. Have you talked specific number, types of investments, any of those sorts of things?

A. No. He gave me two proposals, but I can't tell you what they are because I don't remember what they are.

Q. When did he give you these proposals?

A. I don't know. A year ago, maybe.

Q. Okay. Why - -

A. I don't - -

Q. I'm sorry. I didn't mean to interrupt you.

A. I don't remember when I got them, but - -

Q. Did you like those proposals better than the one that was provided in Mr. Murphy's report here about six or seven months ago?

A. I think it was a matter of trust with Mr. Reeves, because - - I don't know if there was any - - there was nothing because we didn't have anything, or we don't have anything, and I think it was just basically to talk to him, to see what our financial picture was, even at the time of what we were, 'cause - -

Q. Did you talk to him - - back whenever that was, did you talk to him in terms of what might happen if you received a lump sum of money? And what you would do with it?

A. I talked to him about that, but there was no mention of what - - as far as he couldn't do anything without - - he had to have some kind of an idea what we're talking about, I mean, as far as - -

Q. Did you talk to him after October of 2014?

A. Yes, I did.

Q. Okay. And on October 1, of 2014, when your petition was filed, you had some idea based on what was in this petition - - I'll hand it to you again - - that there was a commuted value listed down there of 160-some thousand dollars; right?

A. Yeah, I guess.

Q. But you didn't talk to Mr. Reeves about that kind of money being available for investment and what options you might take?

A. No. No, I didn't.

Q. You've not had that conversation with him yet, have you?

A. No.

(Tr., pp. 51-53)

Mr. Jenkins continued to question claimant about his knowledge of investments. The defense counsel asked:

Q. (By Mr. Jenkins) Okay. And he [Mr. Murphy] made a single recommendation as to how you could use your funds and that was an annuity.

A. Well, I'm thinking that there wasn't - - I mean, there might have been figures thrown around, but, I mean, I didn't listen - - I wasn't catching them.

Q. Okay. But I'm just - - in terms of his written report, he recommended one thing, and that was an annuity.

A. Annuity.

Q. And you don't have anything - - any interest in doing that.

A. Not in- - I don't know if there's a difference between certain annuities and - -

Q. So as we sit here today talking about this, you don't really have any intent to rely on what Mr. Murphy put in his report.

A. No, I don't.

(Tr., pp. 57-58)

Defendant submitted a report from its own financial expert, Dennis L. Markway, CFP, President, Iron Horse Wealth Management, LLC. Mr. Markway concluded a partial commutation of claimant's workers' compensation benefits would not be in the best interest of claimant. However, Mr. Markway provided his opinion with one mistaken fact. He thought claimant and his spouse would have their auto load paid in November of 2018. The fact is: The auto loan will not be satisfied until October of 2021. (Defendant's exhibit A)

Mr. Markham provided the bases for his determination why the partial commutation would not be in the best interest of claimant. He wrote in his report of March 27, 2018:

Not having met the Lawrence family, I am reliant on the discovery responses through this process and the proposal of Mr. Murphy to determine how the family has handled their finances, built assets and managed their debts. Based upon the evidence in the file, the Lawrence family has managed their budget well despite a low income level, has reduced their debts, has little discretionary or retirement savings, yet has significant equity in their home. Given their income constraints, it is admirable how much they've achieved and the discipline they've had – especially considering they will be fully debt free by paying off their home and their car in 2018.

However, therein lies my concern that the partial commutation of Mr. Lawrence's weekly benefit is not in his best interest in this case. Considering the car and mortgage liabilities dissipate this year, the family outflows will be cut in half. If current expenses of \$3213/month being reduced by the amount of the mortgage payment (\$824.79), credit card payment (\$172.00) and the car payment (\$178.00) – this will reduce a [sic] monthly expenses to \$2038. Since current income for the Lawrence family is \$3782 per month, this will result in net positive savings for the family. Should the family follow Mr. Murphy's recommendation, they would yield \$3600 per year less than they do now.

The final consideration in Mr. Murphy's report is the implication the commuted payout would have on the estate of Mr. Lawrence and the availability of income to support Mrs. Lawrence in retirement. While such a concern is rational, the ability of Mrs. Lawrence to receive an inherited benefit does not serve the best interests of Mr. Lawrence. In my opinion, the argument for commutation of weekly benefits for the reason of creating a benefit for the spouse does not seem to conform to the notion that the employee has a specific need and lump sum is in the employee's best interest. The future value of an estate is not a specific need, and estate growth would be in the best interest of the employee's heirs, not of the employee.

Moreover, the [sic] is no evidence in the file that Mr. Murphy pursued other potential options as a solution to the problem – only documentation of the commuted value of the weekly benefits being used to purchase an immediate annuity exist in the file. In my professional opinion, most of the flaws in Mr. Murphy's recommendation come from a failure in process and a failure to look at the larger picture for the Lawrence family. As a Certified Financial Planner TM, I employ a defined process that conforms to the CFP Board Financial Planning Practice Standards which includes:

1. Establishing and Defining the Relationship with the Client
2. Gathering Client Data

3. Analyzing and Evaluating the Client's Financial Status
4. Developing and Presenting the Financial Planning Recommendation
5. Monitoring

Based upon the discovery documents, there are gaps in the procedural path that would lead to the recommendations from Mr. Murphy.

- First, there is no documentation of the Establishing and Defining the Relationship with the Client – this is a material element in the recommendations as it speaks to the obligations of Mr. Murphy and his compensation (compensation, which would then lower the net returns of the portfolios recommended).
- Second, while there are some insights in Mr. Murphy's letter which indicate consideration was given to the [sic] Mr. Lawrence's cashflow needs (and that their main fixed expenses will end by November of this year), the significant deficiencies manifest themselves in the failure to effectively analyze and evaluate the client's financial status as well as to develop and present the financial planning recommendations. There should be documentation and pursuit of a broad range of solutions for the Lawrence family such as a base case, further adjusting expenses, or seeking options like a reverse mortgage to convert their largest liquid asset into a resource that could support them throughout their joint retirement.

In my professional opinion, utilizing the CFP Board financial planning processes to evaluate Mr. Murphy's recommendation for Mr. Lawrence, I find the assessment to be incomplete and burdened with deficiencies. Therefore, it is my opinion (and the opinion of humble arithmetic) that the partial communication [sic] of Mr. Lawrence's weekly compensation benefits is not in his best interest and would leave him in a disadvantaged position.

(Def. Ex. A, pp. 3-4)

CONCLUSIONS OF LAW

When an expert's opinion is based upon an incomplete history it is not necessarily binding on the commissioner or the court. It is then to be weighed, together with other facts and circumstances, the ultimate conclusion being for the finder of the fact. Musselman v. Central Telephone Company, 154 N.W.2d 128, 133 (Iowa 1967); Bodish v. Fischer, Inc., 257 Iowa 521, 522, 133 N.W.2d 867 (1965).

The weight to be given an expert opinion may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. St. Luke's Hospital v. Gray, 604 N.W.2d 646 (Iowa 2000).

The commissioner as trier of fact has the duty to determine the credibility of the witnesses and to weigh the evidence. Together with the other disclosed facts and circumstances, and then to accept or reject the opinion. Dunlavey v. Economy Fire and Casualty Co., 526 N.W.2d 845 (Iowa 1995).

This deputy had serious issues with both financial experts. Mr. Markway assumed claimant's vehicle would be free of debt in August of 2018 rather than September of 2021. From the onset, he was operating under a mistaken fact about claimant's financial condition.

Mr. Murphy, from all apparent facts in the record, did not relate to claimant in a positive fashion. Claimant testified he would never invest with Murphy. Moreover, claimant said he did not trust investing in annuities of any kind. Finally, claimant admitted he was not really listening to the advice Mr. Murphy was giving to him. Even Mr. Murphy recognized the decision to be made about an investment would be a matter for future discussion. (Cl. Ex. 1, p. 6)

Claimant testified he believed receiving a partial commutation of all his benefits except his final week would be in his best interest. (Tr., p. 36) Claimant testified it was important for him as a disabled person to provide for his spouse's financial security. (Tr., p. 36) Claimant wanted some money put away for a "rainy day." He had no real plan to invest with Mr. Reeves. Claimant testified he needed to know the amount of money he would have to invest before Mr. Reeves could advise him.

It is the determination of the undersigned; claimant has failed to prove it is in his best interest to obtain a partial commutation for all weekly benefits except his final week. Claimant did not have a plan for how to invest the money he would receive. He was adamant; he was not going to invest in an annuity. Frankly, the Joint-Life, SPIA annuity would not generate the monthly income claimant's weekly workers' compensation benefits provided. The annuity was taxable. In the event both claimant and his spouse died, any remaining money would be returned to the insurance company and not given to the heirs of the estate. Then there is the issue whether the financial adviser would take a fee off the top of the money he was investing. Claimant had no answer to that question.

Claimant spoke about investing with Mr. Reeves, a financial planner, claimant had known on a casual basis. However, Mr. Reeves did not put together an investment plan. The most information claimant could articulate with certainty was he wanted to pay off his car loan, take care of his spouse, and have a "rainy day fund." Claimant could not vocalize how he would implement his goals.

This deputy would have been persuaded to commute enough weeks for claimant to pay off his car loan and the loan on his American Family Life Insurance Policy, plus the requisite attorney's fees. However, claimant did not request that option. Consequently, the deputy will not grant a partial commutation to cover those debts.

The final issue is the matter of costs.

Iowa Code section 86.40 states:

Costs. All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

Iowa Administrative Code Rule 876—4.33(86) states:

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. This rule is intended to implement Iowa Code section 86.40.

Iowa Administrative Code rule 876—4.17 includes as a practitioner, "persons engaged in physical or vocational rehabilitation or evaluation for rehabilitation." A report or evaluation from a vocational rehabilitation expert constitutes a practitioner report under our administrative rules. Bohr v. Donaldson Company, File No. 5028959 (Arb. November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. December 8, 2010). The entire reasonable costs of doctors' and practitioners' reports

may be taxed as costs pursuant to 876 IAC 4.33. Caven v. John Deere Dubuque Works, File Nos. 5023051, 5023052 (App. July 21, 2009).

Claimant is requesting certain costs as detailed on the attachment to the hearing report.

Stonefield Investment Advisory \$1,215.61

Defendant is not liable for the cost of the financial expert's report.

ORDER

THEREFORE, IT IS ORDERED:

Claimant's request for a partial commutation is denied.

Each party shall pay his/its own costs.

Defendant shall file all reports as required by law.

Signed and filed this 15th day of May, 2019.



MICHELLE A. MCGOVERN
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.