

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ALLEN CONELL,

Claimant,

vs.

NESTLE USA,

Employer,

and

INDEMNITY INS. CO. OF N. AMERICA,

Insurance Carrier,

Defendants.

FILED
FEB 12 2019
WORKERS' COMPENSATION

File No. 5036585

PARTIAL COMMUTATION

DECISION

Head Note No.: 3303.20

STATEMENT OF THE CASE

Allen Conell filed a petition for partial commutation of a prior permanent total disability award. The hearing on claimant's request for partial commutation was held on December 18, 2018, in Des Moines, Iowa. Mr. Conell testified live and under oath at hearing. The parties introduced joint exhibits 1 through 6 at hearing which were received without objection. Administrative notice was taken of the entire file, including, in particular, the Petition for Partial Commutation. The evidentiary record closed at the conclusion of the December 19, 2018, hearing. The matter was fully submitted on January 22, 2019, after helpful briefing by the parties.

ISSUE

The parties submitted the following issues for determination:

1. Whether claimant's request for partial commutation of his prior permanent total disability award should be granted.
2. Whether the claimant should be granted costs.

FINDINGS OF FACT

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

At the time of hearing and as of the date of issuance of this decision, the claimant is 63 years old. He was born in March 1955. He has been married to Kim Conell for 18 years. They reside together in Mason City, Iowa. He has one grown son and three grown stepdaughters, none of whom are financially dependent. Mr. Conell did not graduate high school and served two years in the U.S. Navy.

Mr. Conell testified live and under oath at hearing. His testimony is deemed to be highly credible. Mr. Conell had a good grasp of his finances and financial problems. He presented as a person who is fully capable of managing and understanding his finances. His testimony was consistent with the remainder of the record. There was nothing about his demeanor which caused the undersigned any concern about his truthfulness.

Mr. Conell became permanently and totally disabled as a result of a horrific work-related accident in November 2010. Mr. Conell has not worked since that date. In that accident, he lost his left hand, suffered a disability to his left shoulder, and he now suffers from post-traumatic stress disorder (PTSD). He was determined to be permanently and totally disabled in December 2014.

Mr. Conell receives approximately \$4,985.00 per month between Social Security Disability and workers' compensation payments¹. Ms. Conell receives \$534.00 per month in Social Security income. None of this income is taxable. This is the only income the Conells have.

Mr. Conell estimated expenses in the amount of \$5,177.00 per month. (Transcript, page 37) These are, generally, normal and reasonable monthly household expenses. The areas which stick out are the minimum credit card payments of \$1,022.00, the car payment of \$532.00 and credit counseling of \$539.00.²

¹ Mr. Conell receives \$673.00 per week after payment of attorney fees. When converted to a monthly amount this number is multiplied by 52 weeks and then divided by 12 months. ($673 \times 52 = 34,996 / 12 = 2,916$). This number is then added to the monthly SSD payment of \$2,069.00 for a total of \$4,985.00.

² The credit counseling of \$539.00 per month is for Kim Conell's debts. Essentially, her entire monthly Social Security payment is being used to pay off her debts, and the Conell's are living off Mr. Conell's income. At hearing, Mr. Conell's best estimate was that she needed to make payments on this for three or four more years before the debts are paid off, at which time payments would resume to Ms. Conell. (Tr., p. 11)

The Conells own their four bedroom home, which is valued at \$58,680. There is a mortgage on the home in the amount of \$21,917.57. This loan is at a very high interest rate (20.396%). He has multiple, high interest credit cards with an outstanding revolving debt of \$7,440.00. He has an auto loan of \$17,191.00. He also has a personal loan in the amount of \$13,000.00. In addition to these actual debts, Mr. Connel has significant concerns about his home. It needs a new roof, windows and siding, as well as replacement of sheet rock inside the home due to water damage from roof leaks. Mr. Conell testified credibly that, but for his work injury, he could have made most of these repairs himself at a substantially lower cost. His home also needs a new furnace and air conditioner. He presented an estimate for the roof, windows and siding in the amount of \$44,852. (Joint Exhibit 2, pages 63 to 64) He estimated the cost of a new furnace and air conditioner at \$8,000.

In preparation for the possibility of a partial commutation, Mr. Conell worked with Telford Lodden, CPA. (Jt. Ex. 1) Mr. Lodden helped Mr. Conell develop a plan consistent with his goals. Mr. Conell seeks to commute his benefits for a period in the future, from December 13, 2030, through June 18, 2037. Mr. Lodden estimated the present cash value of these benefits at \$264,705.00. After attorney fees, Mr. Conell would net \$198,529.00.³ (Jt. Ex. 1, pp. 4-5) With this lump-sum, Mr. Conell would use the money as follows:

- Pay off Home Mortgage \$21,918.00
- Pay off Vehicle Loan \$17,191.00
- Pay off Credit Cards and Personal Loan \$20,440.00
- Home Repairs \$53,000.00
- New Vehicle for Ms. Conell \$22,000.00
- Invest Remaining Money in Annuities \$63,980.00

(Tr., pp. 30-33, 53; see also Jt. Ex. 1, p. 6)

Defendants also presented an expert report from Chris Harlan, President of Summit Structured Settlements. (Jt. Ex. 4) Mr. Harlan pointed out a number of quite reasonable concerns about Mr. Conell's plans, including potential tax implications. Most notably, Mr. Harlan expressed concern about how the Conells will make ends meet

³ As part of this decision, I make no finding with respect to the actual numbers. This determination solely addresses the issue of whether a partial commutation is in claimant's best interest. The responsibility will be upon the parties to perform the actual calculations of the amount of the value of the partial commutation as of the date the decision is entered.

during the period of time they will be receiving no weekly benefits between December 2030 and June 2037. (Jt. Ex. 4, pp. 69-70) Mr. Conell expressed an understanding of these concerns at hearing.

I find that the plan developed by Mr. Conell and his financial adviser is a good plan. In fact, it appears to be an excellent plan if he and his wife actually follow the plan. The plan would allow the Conells to pay down exorbitantly high-interest debt, fix up their house and obtain reliable transportation, while simultaneously creating a small investment with a significant cash value. Realistically, if the Conells follow this plan, it will likely result in a significant improvement in the quality of their lives. Paying off the high interest debt will free up their current income and will allow them to have financial freedom to live the type of life they would like. Fixing up their home will improve their quality of life by increasing the value of their primary asset while simultaneously giving them a safer, more enjoyable place to live. Purchasing reliable transportation will buy the Conells peace of mind.

The obvious downside to the plan is that there will be a significant hole in their income for nearly seven years, from December 2030 through June 2037. Mr. Conell is in generally good health and, hopefully, will live well into old age. I find that, as long as the Conells follow the plan, this income gap will be manageable because many of their monthly expenses will be paid off. They should not need nearly as much income during that time period to make ends meet.

The defendants contend that the financial history of the Conells demonstrates that they are unlikely to successfully follow their own plan. There is some validity to this concern. Mr. Conell, in fact, acknowledged at hearing that he and his wife had not managed their finances very well before the accident. (Tr., p. 56) Mr. Conell explained this on cross examination at hearing.

Q. But what, I guess, my question to you is you basically just told us, 'I'm in this situation because I didn't manage my money very good up to this point'?

A. Up to a point before this - - before this accident, yes.

Q. Okay.

A. I didn't manage my money very well.

Q. How about - - Go ahead. Sorry.

A. But since this accident, I have taken charge and totally changed the whole structure of how I handle things as much as I possibly can. I pay everything on time. If you pull up my credit report, you're going to see where it says - - where they rate you, you know, for how you pay, everthing's in the good. I got everything up-to-date and paid on time, and

that's - - that's good. I just want to get rid of all the debt. I want to start fresh. I want to start at the bottom.

(Tr., pp. 55-56) On redirect, he explained further.

Q. And then when Mr. Wegman was asking you questions, you at one point said since you have taken charge you've been able to at least, I suppose, knock some of this debt down.

A. Yeah.

Q. Does that sound accurate?

A. Yes.

Q. What do you mean by taking charge?

A. Okay. What I meant by that is prior - - prior to the accident, I was pretty much letting my wife take care of everything, let her pay the bills. I'd put the money in the bank, and 'Here you go; you pay the bills.' Then we worked - - tried to work together on it getting it paid. Well, that didn't work too well, and I finally said, 'I'm going to do it myself. I'll set up my own game plan and lay it out on a spreadsheet so I know exactly what I'm paying, who I'm paying, and when I'm paying.'

(Tr., pp. 60-61)

I find that, if the Conells stick to their plan, this partial commutation is clearly in their best interest. The danger is, if they do not stick to the plan, and they run up further high interest debt or spend their funds indiscriminately on frivolities outside of their plan, they will be in the same or possibly worse situation by 2030. While I agree with the defendants that there is a risk this will occur, I do not find that the risks outweigh the potential benefits. I find claimant has met his burden of proof that this partial commutation is in his best interest.

CONCLUSIONS OF LAW

The primary legal issue for determination is whether claimant should be granted his partial commutation request. Iowa Code section 85.45(1) provides in relevant part:

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

Mr. Conell has requested a partial commutation of benefits owed pursuant to the life expectancy table adopted in agency rule 876 IAC 6.3, from the period between December 13, 2030 and June 18, 2037. Iowa Code section 85.48 provides:

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

Agency rule 876 IAC 6.3 provides a life expectancy table that is to be used in determining the amount to be paid a claimant in commutation proceedings.

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 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; the claimant's ability to manage the funds or arrange for someone else to manage them; and the reasonableness of the claimant's plan for investing the lump sum sought. Dameron v. Neumann Bros., Inc., 339 N.W.2d 160, 164 (Iowa 1983).

In determining whether the requested commutation is in the best interests of the claimant, 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, 256 Iowa at 929, 129 N.W.2d at 617; Dameron, 339 N.W.2d at 163-164.

In determining whether the commutation is in the best interest of claimant, this agency cannot act as a conservator and disregard claimant's desires and reasonable plans just because success of the plans is not assured. Diamond, 256 Iowa 915, 129 N.W.2d 608 (1964). A request for commutation should be approved unless the potential

detriments to the worker outweigh the worker's expressed preference and the demonstrated benefits of commutation. Dameron, 339 N.W.2d at 164.

Ultimately, the determination of whether the commutation is within the best interests of the claimant is a factual determination based upon the factors being balanced in each case. Dameron, 339 N.W.2d at 163. ("Where, as here, the industrial commissioner in a contested case proceeding has determined that commutation was in the best interests of the claimant, the trial court and this court are now bound by that determination unless it is 'unsupported by substantial evidence in the record.'") As the party moving for the partial commutation, claimant bears the burden to prove that the commutation is in his best interest. Iowa Rule of Appellate Procedure 6.14(6).

In my factual findings, I recited and weighed the relevant facts to be considered in determining whether the requested partial commutation is in claimant's best interests. I found that the claimant's preference, coupled with the benefits that can be derived from the commutation outweigh the foreseeable detriments that may be caused by the requested commutation. More specifically, I find that, if Mr. Conell sticks to his outlined plan and does not run up further high interest debt following this partial commutation, this partial commutation is clearly in his best interest. Given the financial predicament he is in presently, I agree with the defendants that there is some reason to be concerned. At the end of the day though, Mr. Conell is a competent, grown man. I find he is fully capable of making this type of financial decision and accepting the responsibility for his decisions. This plan provides him with an opportunity to dramatically improve his family's quality of life. Therefore, I conclude that claimant has proven by a preponderance of the evidence that the requested partial commutation is in his best interest and that he is entitled to the requested partial commutation.

Claimant has requested a partial commutation of benefits from December 13, 2030, through June 18, 2037. This partial commutation is granted. It shall be discounted at the applicable rate. Claimant's weekly rate of compensation is stipulated at \$897.34.

The next and final issue is 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).

I find that the costs submitted by the claimant are reasonable, including the fees for the report of Telford Lodden.

ORDER

Claimant's original notice and petition for partial commutation is granted.


Defendants shall pay to claimant a lump-sum partial commutation for the period from December 13, 2030, through June 18, 2037, of the workers' compensation benefits awarded as a result of the work injury on November 2, 2010.

If claimant lives beyond the expiration of the period being commuted, defendants shall resume weekly benefits and continue paying claimant permanent total disability benefits on a weekly basis so long as claimant's total disability persists.

Defendants shall pay the reasonable costs of this action.

Defendants shall file subsequent reports of injury (SROI) as required by our administrative rule 876 IAC 3.1(2).

Signed and filed this 12th day of February, 2019.



JOSEPH L. WALSH
DEPUTY WORKERS'
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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.