

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RUSVETA ISLAMOVIC,

Claimant,

vs.

BISHOP DRUMM CARE CENTER,

Employer,

and

ALTERNATIVE INSURANCE
MANAGEMENT SERVICES, INC.,

Insurance Carrier,
Defendants.

FILED

JUN 05 2015

WORKERS COMPENSATION

File No. 5030842

PARTIAL COMMUTATION

DECISION

Head Note No.: 3303.20

STATEMENT OF THE CASE

Rusveta Islamovic, claimant, requests partial commutation of a prior permanent total disability award. Ms. Islamovic's case was initially heard on October 25, 2010. On April 21, 2011 an arbitration decision was issued, which found claimant failed to prove she sustained an injury as alleged on January 28, 2009. On intra-agency appeal the arbitration decision was reversed and claimant was awarded permanent total disability benefits. That award was affirmed on judicial review on December 27, 2012.

The hearing on claimant's request for partial commutation was held on March 16, 2015. Ms. Islamovic testified live at hearing using the services of an interpreter. Elvis Islamovic, and Mirela Islamovic testified live without the use of an interpreter. The evidentiary record also includes joint exhibits 1-11. The parties submitted a hearing report at the commencement of the evidentiary hearing. On the hearing report, the parties entered into certain stipulations. Those stipulations are accepted and relied upon in this decision. No findings of fact or conclusions of law will be made with respect to the parties' stipulations.

The parties request the opportunity for post-hearing briefs, which were submitted on April 20, 2015.

ISSUES

The parties submitted the following issues for resolution:

1. Whether a partial commutation of claimant's permanent total disability award would be in her best interest.

2. Whether claimant should be awarded costs.

FINDINGS OF FACT

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

As a result of the January 28, 2009, work injury Ms. Islamovic sustained a vestibular injury as well as an injury to her neck, back, and left shoulder. The circumstances of her injury, treatment, and resulting permanent total disability are set forth in the June 11, 2012 appeal decision and will not be reiterated.

Claimant now seeks to partially commute her permanent total disability award. She specifically request to commute all but the last two weeks of benefits using her life expectancy under the agency's life expectancy table.

Ms. Islamovic was born on April 26, 1963. She was 51 years of age at the time of the partial commutation hearing. She is 52 years of age as of the date of the issuance of this decision. She is a native of Bosnia. She moved to the United States in 1999. All of her formal schooling took place in Bosnia. She testified she has the equivalent of an American high school education. She can speak very little English and cannot read or write any English. She believes that her ability to speak English has actually decreased since she stopped working at Bishop Drum in December of 2009. (Testimony)

Ms. Islamovic was not married at the time of this hearing. She testified that since the arbitration decision her condition has worsened. She continues to receive treatment for her back and neck. She also continues to have problems with her balance. She continues to take medication for her shoulder. Additionally, she continues to take medications for her depression and anxiety. She takes ten medications daily. She said she is not well at all. She only sleeps three to four hours per night. She believes that her depression has affected her relationships with family members. (Testimony)

Ms. Islamovic lives with her son, Elvis Islamovic, his wife, Mirela Islamovic, and their two sons (ages five and seven). She is not able to care for her grandkids due to her physical and mental condition. They currently reside in a three-bedroom house. Ms. Islamovic's room is on the ground floor because she testified that she cannot climb stairs. She has to climb stairs to get to the bathtub; this requires assistance. She lives with her family because she requires assistance. Since the accident she no longer drives due to vertigo and depression. Her family makes her doctor appointments. Her daughter-in-law, Mirela, manages her medications for her. Ms. Islamovic testified she is not able to prepare her own meals. She is afraid to live on her own due to fear of falling and she also testified she is unable to afford to live alone. (Testimony)

After her employment with Bishop Drum ended her only income was short-term disability benefits. She began receiving Social Security Disability (SSD) benefits in September of 2010; she received a little over \$1,100.00 per month. She said this was

very little money compared to what she was paid when she was working. From January of 2010 to September of 2010 the claimant contributed to the household expenses but she could not have survived without her son and daughter-in-law.

Ms. Islamovic's current income consists of \$1,155.00 per month SSD benefits and \$570.04 per week of workers' compensation benefits. Every fourth workers' compensation check is given to her attorney as attorney fees. Most of Ms. Islamovic's income goes to household expenses to pay for bills and groceries for herself, her son, her daughter-in-law, and her two grandsons. She relies on her son and daughter-in-law to help manage her personal finances. Ms. Islamovic does not have any debt, she does not have any credit cards, and she does not own a vehicle. Her current income is used to pay for the car of her son and daughter-in-law. Ms. Islamovic filed for bankruptcy in the spring of 2010 because she was unable to pay her bills due to her injury and the significant decrease in her income. (Testimony)

At hearing Ms. Islamovic was asked by her attorney about a partial commutation. Ms. Islamovic seemed confused and asked to have the question repeated. Ms. Islamovic then testified that she knew she wanted to buy a ranch house with four bedrooms because this would be easier for her at her age. She understood that a partial commutation would mean that her weekly benefits would stop. She wanted a lump sum of money so she could use the majority of the money to buy a ranch home so it would be easier for her to bathe. She would like to pay for the house in full so that there would be no need to worry about a mortgage. She also wanted to give a portion of her lump sum (\$50,000.00) to her son and daughter-in-law, and to put a portion of the lump sum into savings. She admitted that they have not met with a mortgage broker to see if they would qualify for a mortgage.

Ms. Islamovic testified that she met with Jill Greiner who came up with a plan for the lump sum. The only understanding claimant verbalized was that Ms. Greiner explained that the money would grow. Ms. Islamovic met with Ms. Greiner on one occasion. Ms. Greiner does not speak Bosnian but a translator was present at the meeting. The materials Ms. Greiner provided were all in English and were not interpreted for Ms. Islamovic. However, Ms. Islamovic testified that her kids helped her understand the materials. Ms. Islamovic did not verbalize any understanding as to the different plans set forth in Exhibit 1. Ms. Islamovic did not demonstrate any understanding of risk of any investments. Ms. Islamovic plans to continue to rely on her son and daughter-in-law with regard to managing her financial resources.

Ms. Islamovic's son, Elvis, is 30 years of age. He is also a native of Bosnia; he moved to the United States at the age of 15. He graduated from Hoover High School in 2003. Since that time he has had some driving jobs. More recently he worked at Mediacom. At the time of hearing he was in-between jobs. He was planning to start a new job detailing cars in approximately 1 week. He would be paid based on productivity and was hoping to earn \$20.00 to \$30.00 per hour, but the number of hours per week is not known.

Elvis testified that his mother moved in with him and his family in January of 2010 due to her physical, mental, and financial situation. He believes it is his duty as her son to take care of her; it is part of the Bosnian culture. He believes his mom will live with them for the rest of her life. Ms. Islamovic is home alone during the day but Elvis and Mirela call home throughout the day to check on her. If she does not answer then one of them would leave their job to go check on her.

Elvis believes a partial commutation would allow his mother to have more stability with her home because there would not be a mortgage. Also, they would purchase a ranch home that would have more space and less stairs. He testified that his mother would give \$50,000.00 of the lump sum amount to him and his wife to pay them for their past help. The amount remaining after the house and \$50,000.00 would then be invested so she would be "set for life." He testified that the 3 adults in the household all manage their finances together. His wife does the bill paying. He believes that if his mother did not live with them she would need to live in an assisted living facility. He testified that he and his wife have no plans to evict his mother and that she currently has a stable home. (Testimony)

Ms. Islamovic's daughter-in-law, Mirela also testified at the hearing. She is 26 years of age. She was born in Bosnia and moved to the United States at the age of 10. She graduated from Roosevelt High School in 2006. Following high school she attended 1 year of liberal arts classes at Des Moines Area Community College. She did not obtain any type of degree. Since high school she has worked at 3 different banks. She testified that she received a pay raise at each bank she worked. She currently works as a Customer Service Assistant Manager.

Mirela testified that in Bosnia it is common for a mother to live with her son. Mirela loves having her mother-in-law living with them and would not want Ms. Islamovic to be alone. Mirela helps care for Ms. Islamovic. Mirela does her laundry, sorts her pills, prepares her meals, schedules and takes her to medical appointments, and helps translate at some medical appointments. Mirela agreed that although all 3 adults discuss the household finances, she is the primary bill payer. Mirela is also a joint owner on Ms. Islamovic's bank account. The expenses for all 5 in the household are managed out of one "pool" of money. Mirela testified that Ms. Islamovic also sends \$300.00 per month to her brother in Bosnia.

Mirela has never filed for bankruptcy or bounced a check. She testified that there is \$3,000.00 in savings. According to Mirela there is \$12,000.00 in credit card debt due to medical bills, home emergencies, and furniture. She testified they purchased their current home in June of 2013. Prior to that time the credit card debt was a little less than the current amount. She pays more than the minimum payment on the credit card, which has an interest rate of 8.6 percent. There is also a car loan with an interest rate of 3.5 percent. If the partial commutation is granted they would use a portion of the \$50,000.00 that Ms. Islamovic would give to them to pay debt.

Mirela also testified that Ms. Islamovic's workers' compensation benefits is what allowed them to buy their current home. They used \$38,000.00 of Ms. Islamovic's lump

sum benefits for the down payment on their home. However, the home is not in Ms. Islamovic's name. Mirela is the only one on the mortgage on the current home. The current home has a value of \$181,000.00 and a current mortgage of \$138,000. She testified that the only debt they have is credit card, car loan, and home mortgage.

Although Mirela has never met with Ms. Greiner, she is aware that she put together a financial plan. Mirela stated that if the partial commutation was granted \$300,000.00 would go towards a new home, \$50,000.00 would be gifted to her and her husband for taking care of her mother-in-law, and the remainder would be invested for Ms. Islamovic's future. The claimant wants to buy the home outright, she wants the security of not having a mortgage. Without the partial commutation Mirela does not believe they could afford the homes they are looking to buy. Mirela also testified that Ms. Islamovic has \$30,000.00 in a 401K at Bishop Drumm. When Mirela was questioned about the rate of return on that 401K, Mirela demonstrated no understanding of this concept.

On February 13, 2015, Jill D. Greiner, Vice-President – Investment Officer sent a letter to claimant's counsel. This letter, along with the documents provided by Ms. Greiner, were submitted into evidence without any explanation or clarification from any of the witnesses. Ms. Greiner reviewed Ms. Islamovic's current financial condition and ultimately recommended she receive a partial commutation and "invest the funds in a manner consistent with the attached recommended plan." (Ex. 1, p. 3) Ms. Greiner analyzed three scenarios as set forth on the second page of her letter. (Ex. 1, p. 2)

The first scenario is referred to as investment plan result 5. This plan contemplates continuing to receive workers' benefits in the amount of \$1,852.63 monthly.

The second scenario is referred to as investment plan result 0. This plan contemplates receiving a lump sum of \$496,580.08, utilizing \$360,000.00 of that for purchase of a new home and accessories and repayment of family members. The remaining balance of \$136,580.08 would then be invested. This scenario most closely resembles the intentions of all 3 hearing witnesses.

The third scenario is referred to as investment plan result 86. This plan contemplates receiving the same lump sum amount of \$496,580.08 and investing that amount. Selling their current home and utilizing the "net proceeds of sale of existing home for down payment on new home" and obtaining a mortgage for the remaining amount of the purchase price. This plan would then set up monthly systematic distributions that would cover the net difference between social security payments and the annual spending amount. This distribution amount would be reviewed annually to adjust for inflation purposes.

Ultimately, Ms. Greiner finds that investment plan 86 is ideal and/or recommended and investment plan 5 is acceptable. (Ex. 1, p. 11) There is no evidence that Ms. Greiner recommends investment plan 0 or even finds this scenario to be

acceptable. Thus, Ms. Greiner's report does not support the stated intentions of the witnesses.

On February 4, 2015, Michael L. Sandberg, Ph.D. sent a letter to defense counsel after performing an economic evaluation pertaining to the variable factors of a partial commutation. Mr. Sandberg agrees that a lump sum from weekly payments would allow Ms. Islamovic to have greater control and flexibility. However, he had four concerns regarding her ability to properly manage her resources, which he sets forth in his letter. (Ex. 2, pp. 32-33) Additionally, after the purchase of the home, accessories, and monetary gift to her son and daughter-in-law, the remainder could not be safely invested to replace her weekly benefits. According to Mr. Sandberg, she would need an after-tax return greater than 16 percent. Thus, he stated, the Islamovic's stated plan for the use of the partial commutation proceeds would leave her with a significant reduction in monthly income and increase her monthly expenses when compared to her current situation. He concludes that a partial commutation is not in the claimant's best interest. There is no evidence in the record that any of the witnesses at hearing had reviewed or considered Mr. Sandberg's opinions.

Since the workers' compensation injury, Ms. Islamovic filed for bankruptcy. She currently does not have any debts. However, according to Ms. Greiner she also does not have any assets. The record shows Ms. Islamovic has a monthly income of \$3,007.00 per month. Ms. Islamovic pays for one-half of the household's monthly expenses. Her half of the expenses amount to \$2,387.50 per month. This would leave a surplus of \$619.50 per month. However, she does not have any type of savings account in her name. Ms. Islamovic testified that she does not have any savings as she uses any surplus on miscellaneous items. Elvis and Mirela both have joint access to her account and they write checks from her account to themselves to help pay for expenses. (Testimony)

Ms. Islamovic intends to use the bulk of any partial commutation funds to purchase a home for her, her son, and daughter-in-law. This is similar to what Ms. Islamovic did with a large portion of a prior lump sum workers' compensation payment. The down payment of approximately \$38,000 for their current home came from Ms. Islamovic's workers' compensation benefits. However, the only individual whose name appears on the mortgage is Mirela. There is no evidence in the record to show that the parties have any different intention if they purchase a second home with a portion of the partial commutation funds. Ms. Islamovic also plans to gift \$50,000.00 to her son and daughter-in-law. The stated plan is to use \$310,000.00 for a home that would likely be placed in the daughter-in-law's name and an additional \$50,000.00 would be gifted to the son and daughter-in-law. There is no stated plan for any type of conservatorship or other mechanism to protect Ms. Islamovic's interests. It is troubling to the undersigned that the stated plan essentially takes \$360,000.00 out of the control or possession of the claimant.

However, what is most troubling is that neither financial expert in this case finds that Ms. Islamovic's plan for the use of the proposed partial commutation funds is in

claimant's best interest. The documents from the financial expert claimant retained do not even find her plan to be "acceptable." (Ex. 1 & 2)

I find that Ms. Islamovic has a very minimal understanding of the recommendations being made or the potential risks involved. It does not appear that Ms. Islamovic understands that the plans she, her son, and daughter-in-law has for the partial commutation proceeds were not even found to be "acceptable" or "recommended" by the financial planner they intend to have help them with the funds. Ms. Islamovic has testified that she cannot read English. The documents given to Ms. Greiner were provided in English and were not translated. When challenged on this point, Ms. Islamovic testified that her son explained the documents to her. There is no evidence in the record that Elvis has any understanding of the information provided by Ms. Greiner. Therefore, there is no way to ascertain what explanation was provided to the claimant. I find that it is not realistic to believe that Ms. Islamovic will be able to manage the partial commutation funds on her own. Rather, she will be forced to rely on her son and daughter-in-law; neither of whom have any experience in managing funds of this size. The testimony of the witnesses all point to the daughter-in-law as the bill payer and the one who appears to have the most responsibly with regard to the household finances; yet, she has never met with Ms. Greiner.

I find that Ms. Islamovic's age, language barrier, lack of education, and lack of experience with any management of sophisticated financial resources or dealings are substantial detriments that weigh against an award of a partial commutation. I further find that if the commuted funds are mismanaged, Ms. Islamovic does not have the financial means to overcome such a loss. Neither financial expert supports the proposed plan of Ms. Islamovic. Improper investment, unwise expenditures, and/or any unanticipated losses with the proposed partial commutation funds would be catastrophic to Ms. Islamovic.

Factors that weigh in favor of granting Ms. Islamovic's request for a partial commutation include allowing her greater financial flexibility and her desire to use the commuted funds to purchase a ranch home. A ranch home would allow her to live in an environment that is physically easier for her to move around in. However, I find that the detriments of claimant's proposed partial commutation outweigh the benefits that might be obtained. If there was a financial plan in place that was at least "acceptable" to one of the financial experts in this matter or if there was a conservator or other mechanism in place to protect the claimant then the benefits might have outweighed the detriments. However, Ms. Islamovic's lack of financial knowledge and experience, her language barrier, and lack of support for their plan from any financial expert in this matter all indicate that there is little to no likelihood of success if the partial commutation was granted at this time. Therefore, I find that it is not in Ms. Islamovic's best interest at this time to grant the petition for the partial commutation.

CONCLUSIONS OF LAW

The sole issue to be resolved on appeal is whether a partial commutation of all but the final two weeks of permanent total disability benefits, with benefits to resume if

claimant is still living at the end of his life expectancy per the life expectancy tables, is in the best interest of claimant.

In determining whether the partial 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 v. Parsons Co., 256 Iowa 915, 129 N.W.2d 608 (1964). The Iowa Supreme Court in Dameron v. Neumann Bros. Inc., 339 N.W.2d 160, 165 (Iowa 1983) has held that this agency should examine the following in determining whether to allow a commutation:

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).

The Dameron court went on to state that 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 165.

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 benefit amount over the entire payment period.

When the period of future compensation to which a claimant is entitled is definitely determinable and a claimant's work-related medical condition is stable, claimant may receive a lump sum discounted payment of future benefits, provided claimant establishes that the commutation of benefits is in claimant's best interest. A claimant's preference for receiving a lump sum payment is balanced against the

potential detriments that could result if the employee 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. Dameron, 339 N.W.2d at 160.

As noted above, I recited and weighed the pertinent legal factors to be considered to determine whether the requested partial commutation is in claimant's best interest. Having found that the requested partial commutation was not in Ms. Islamovic's best interest, I conclude that she has failed to carry her burden of proof and further conclude that the partial commutation request should not be granted.

Claimant is also seeking an assessment of costs. Assessment of costs is a discretionary function of the agency. Iowa Code section 86.40. The claimant has not prevailed in this request for a partial commutation. Exercising the agency's discretion, I do not assess any of claimant's requested costs.

ORDER

THEREFORE, IT IS ORDERED:

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

Defendants shall continue to pay the benefits as ordered in the June 11, 2012 appeal decision and the December 27, 2012, ruling on petition for judicial review.

Each party shall pay their own costs.

Signed and filed this 5th day of June, 2015.



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EQP/srs

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.