

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

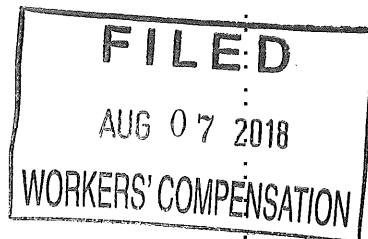
RANDY A. SANDS,

Claimant,

vs.

CITY OF SIOUX CITY,

Employer,
Self-Insured,
Defendant.



File No. 5050047

PARTIAL COMMUTATION

DECISION

Head Note No.: 3303.20

STATEMENT OF THE CASE

Claimant, Randy Sands, filed a petition in arbitration seeking workers' compensation benefits against City of Sioux City, self-insured, employer, as defendant, for an accepted work injury dated October 4, 2013. This case was heard on May 29, 2018, and considered fully submitted upon the simultaneous filing of briefs.

The record consists of joint exhibits 1-7, claimant's exhibits 1 through 3, and defendants exhibits A-E along with the testimony of claimant.

ISSUE

Whether claimant is entitled to a partial commutation of his award of permanent total disability benefits.

STIPULATIONS

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

On December 20, 2016, claimant was found to be totally and permanently disabled arising out of and in the course of his employment with the defendant employer. There was no appeal of this decision.

On February 13, 2017, claimant filed a petition for partial commutation seeking a payout of \$491,736.07, leaving a remainder of \$591.18.

FINDINGS OF FACT

Claimant, Randy Sands, was a 62-year-old person at the time of the hearing. At all times material hereto he was married and entitled to two exemptions. The present case is a partial commutation request seeking a lump sum payment of all but one month of the estimated monthly benefits due claimant as a result of his permanent total disability. (Petition for Partial Commutation) The comminuted value sought is \$491,736.07. The claimant's payout would be impacted by attorneys' fees.

Claimant's current income includes monthly benefits from Social Security disability in the amount of \$1,659.00 per month or \$19,908.00 annually and IPERS in the amount of \$588.53 per month or \$7,062.36 annually. He also receives a workers compensation check weekly in the amount of \$394.12 for a total of \$20,494.24 annually.

Claimant's wife is 65 years old. She is paid \$3,244.50 per month for a total of \$38,934.00 annually with a 2017 bonus of \$6,444.00. (Exhibit 1:14). Her benefits include a 401(k) plan and health insurance. Claimant is currently covered under his wife's health insurance plan. He is eligible to receive Medicare at the age of 65.

Claimant is able to cover his monthly expenses without the workers compensation payment as the monthly household expenses are approximately \$1300.00 per month. Claimant testified that he has approximately \$8,000.00 in cash. His testimony vacillated between using the cash for further renovations to the condo or re-investing it.

Claimant has three checking accounts, savings account and three annuity Accounts with Principal Financial Group.

In 2016, claimant sold a rental property along with his homestead netting \$90,680.90 for the rental and \$90,449.16 for the Homestead. (Exhibit 1:18) Together he and his wife purchased a condominium for a total of \$159,500.00. He is also responsible for a monthly maintenance fee of \$175.00. (Exhibit 1:17)

Three years ago, claimant and his sister bought a timeshare in Branson, Missouri. Each of them paid \$4,500.00. This was paid for with money he had saved while working for the city.

The claimant and his wife own three vehicles including a 2013 Honda CRV, 1999 Chevy S10 pickup, and a 1976 Chevy Chevette purchased for \$14,500.00. (Exhibit 1:19)

From the lump sum payment of accrued benefits received pursuant to the underlying Arbitration Order, claimant invested \$50,000.00 with principal securities on March 23, 2017 and another \$20,000.00 on August 1, 2017. He took money out of the second account to buy a 1976 Chevette. On March 22, 2018 he put \$24,000.00 back into the account through the sale of a 1968 Chevelle along with \$2,500.00 in cash. (Exhibit 1:20) Before claimant was injured, he dabbled in classic car restoration.

Of the current investment accounts, \$33,713.00 is accessible without penalty. The remainder are in accounts that are subject to an early withdrawal penalty. Claimant testified that the \$33,713.00 would be available to be used to pay for any expenses arising from a catastrophic event.

Claimant would not be able to obtain private health insurance due to his health problems. He has not worked since December 2015. Currently claimant suffers from osteoarthritis, COPD, diabetes, and anxiety. (Joint Exhibit 1, 2, 3, 4) In the recent past he experienced shortness of breath and fatigue on exertion. (Joint Exhibit 3:19) He was admitted to the hospital recently after a failed abnormal stress echocardiogram. (Joint Exhibit 3:16) His exercise capacity was considered poor for his age. (Joint Exhibit 3:16)

Due to COPD, humidity and cold limits him from going outside. He uses nebulizers to help with his breathing. In 2016 claimant was admitted to the hospital for exacerbation of his COPD and then discharged with oxygen. (Exhibit 1:4 – 6) One medical record indicated that he had quit smoking, but in another there was a notation that he continued to smoke. (Joint Exhibit 3:5) In claimant's answer to interrogatories, he maintained that he had quit smoking two years ago. (Exhibit 1:8)

He testified that he and his wife plan to move to Florida after she retires.

Claimant was initially denied Social Security disability.

Clmt has undergone surgery for CTS and cervical fusion. Evidence in file shows the clmt has made excellent recovery without complications. There have been no ER or hospital visits due to his COPD. 12-16 evidence in file also shows bilateral heel pain. Clmt does have a diagnosis of plantar fasciitis and mild bunions. He received an injection for pain. Exam showed that he had tenderness on palpation of both plantar medial region.

Clmt ADLs in file indicate that the clmt has indicated that he gets fatigued easily and has problems with SOB. Indicated that he has pain with movement of his neck. Clmt has indicated that he has no problems with personal care. He also reported that he has difficulty with lifting over his head and more than [sic] 25 lbs. He is able to perform light types of household chores without difficulty. The clmt has indicated on the pain report that he is not able to pick up small items due to his bilateral CTS. However, evidence in file has indicated that he has made good recovery without limitations.

(Ex. 5:11)

A reconsideration application was filed on December 21, 2016. (Joint Exhibit 5.2) With the application for reconsideration, a mental functional capacity assessment was performed. (Joint Exhibit 5:13) Claimant expressed difficulties in remembering and understanding things, difficulty in maintaining attention, concentration and pace,

interacting with others, using good judgment, and adjusting to change. (Joint Exhibit 5:14) At hearing, claimant testified with a sheaf of notes in front of him. Due to the mental component, claimant was found to be disabled by the full security administration. (Joint Exhibit 5:16)

Of particular relevance, Michael P. Baker, Ph.D., noted that claimant had difficulty with his recollection, demonstrated extremely poor spelling, responded to judgment items at a fair level, and could likely use supervision in handling cash benefits. (JE 6)

Kevin Keane, a certified financial planner, testified at hearing. He met with claimant and reviewed claimant's financial picture. Mr. Keane found claimant and his wife to live well within their means with no debt. They had, according to Mr. Keane, sufficient monthly income to meet their needs but would eventually need to deal with increasing health insurance premiums.

Mr. Keane would place claimant's lump sum into an annuity which would provide a guaranteed payout in seven years of \$20,268.00. This requires an initial premium payment of \$298,000.00. It has an annual payout rate of 5.55 percent with some portion of the annual income tax-free. (Exhibit 1:46) There is also a death benefit of \$74,500.00. (Exhibit 1:46) Each additional year that the money remains in the annuity, a 1 percent income bonus would be paid. In the first seven years, 7 percent annual increase is guaranteed. In order to receive that benefit, however, claimant would need to leave his money untouched in the annuity for eight years. The monthly payment is taxable unlike the workers' compensation payment.

Christopher Sarris a financial advisor for Eagle Strategies, LLC and New York Life. He did not attend the hearing live but was subject to a deposition taken on May 10, 2018. Mr. Sarris has a bachelor degree in business administration, and fellowship in the Life Underwriters Training Council, and is licensed to sell life and health insurance together with stocks, bonds and other investments. Mr. Sarris proposed an investment that allowed for no access to the principal during the first six years but with an annual payment of \$21,148.56. The investment that has a payout rate of 7.23 percent if the claimant were to purchase an annuity and have the money sit for six years.

The main difference between the product recommended by Mr. Keane and that recommend by Mr. Saras is the ability to withdraw money. Mr. Saras' product would not allow for any early withdrawal.

CONCLUSIONS OF LAW

Claimant feels that he is in poor health due to his work injury, a recent diagnosis of diabetes, worsening of his COPD, and increasing anxiety. He brings the present claim to seek a lump sum payment known as a commutation from his permanent total disability award. During testimony, claimant expressed his desire to place his money in

a joint investment that would pay the claimant's spouse continually even if he were to pass.

In support of this argument, claimant presented the expert opinion of Christopher Sarris and Kevin Keane. Mr. Sarris is a financial advisor for Eagle Strategies, LLC and New York Life. Mr. Sarris proposed an investment that has a payout rate of 7.23 percent if the claimant were to purchase an annuity and have the money sit for six years. While there is no penalty for taking the money out earlier, it would reduce the monthly payout.

Mr. Keane testified at hearing. He has over thirty years of experience improving financial advice and expressed an opinion the claimant and his wife lived well within their means given their debt free status as well as their savings. He proposed a joint life benefit and the purchase of an annuity with a guaranteed payout in seven years. Mr. Keane testified that this financial product is only recommended for individuals who have liquidity and no need for access to the annualized monies.

Claimant admits that their current healthy financial condition is due to his wife's careful management.

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

Claimant has requested a partial commutation of all but the last week of benefits owed pursuant to the life expectancy table adopted in agency rule 876 IAC 6.3. 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. Rule 6.3 provides, "The 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." The Commissioner's adoption of agency rule 876 IAC 6.3 provides a presumption of life expectancy and makes the number of weeks owed claimant under her permanent total disability award definitely determinable.

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 interests 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). 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 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 her best interest. Iowa Rule of Appellate Procedure 6.14(6).

Claimant is an elderly gentleman and declining physical health. His life expectancy is lowered due to his multiple health concerns and mental condition. He graduated from high school with a vocational diploma. It is unlikely claimant would be able to obtain health insurance from the private sector and he is not qualified for Medicaid until January 17, 2020. Claimant is currently covered under his wife's health insurance plan. He has no plan to seek out employment.

Claimant's wife is in good health. They live in the condominium that they have purchased with the proceeds from the sale of a rental property and their personal home. They are debt free and can cover all living expenses with the current stream of income including her salary, and benefits from Social Security. Claimant admits that he is not responsible for money-management in this household.

The plan set forth wherein the claimant would purchase an annuity and allow his funds to remain untouched and grow exponentially is reasonable.

The potential detriments include claimant's own inability to manage his money wisely. Mr. Keane acknowledged that someone with attention and impulse control issues would not be good at managing large sums of money. According to claimant's psychological evaluation, his concentration and impulse control issues, claimant needs assistance in managing his money. Since leaving his employment as a result of injury, claimant opted to purchase a classic car and the timeshare in Branson, Missouri.

However, he and his wife did consolidate real estate holdings to buy a home that is unencumbered by a mortgage. Claimant has conserved the majority of his prior lump sum payout in annuities with Principal Financial Group.

The defendant points out that should claimant suffer an accident, injury, or new serious health issue, it is possible that he would not have the liquidity to cover those expenses. He would be forced to withdraw money from the annuity which would reduce the annuity benefits. Under the present system, claimant would be unable to access any large lump sums from his workers' compensation benefits. Further, claimant does have approximately \$40,000.00 in liquid assets in their joint accounts and the cash at hand kept at home.

Defendant also argues that the primary focus of claimant was to leave a death benefit to his wife. The purpose of leaving an estate does not fall within the purposes of commutation. Mahaffey v. Cardinal Cleaners (Iowa Industrial Commissioner, April 8, 1974). Additionally, the defendant is a public municipality and it is in the best interests of the municipality to avoid a lump sum payout. However, the standard is not whether the partial commutation is in the best interest of the employer, but the injured worker.

There is no guarantee that the claimant will purchase the annuity once the commutation is granted, but the aforementioned plan is a careful and considered one.

The defendants also raise the 2017 law change which requires consent of both parties in order to obtain a partial commutation. Given that this partial commutation was filed prior to that statutory change, it would be inappropriate to examine the facts of this case and apply against the new law.

Finally, the defendants believed that reliance on the life expectancy table contained in rule 876 IAC 6.3 is inappropriate and that the life expectancy data to be applied in determining the partial commutation would be the 2001 CSO Mortality Tables contained in the Code of Iowa. The actual rules for workers' compensation are updated yearly and are authorized under Iowa Code chapters 85, 85A(4), 86 and 87. (876 IAC 1) Chapter 6 of Iowa Administrative Code sets forth how commutations are calculated. 876 IAC 6.3 states specifically the tables in Rule 876 IAC 6.3 are to be used in determining the sum to be paid in appropriate commutation proceedings. Therefore the undersigned is bound to follow the life expectancy tables regardless of the defendant's criticism of them.

Based on the Dameron test, it is found that the greater weight of the evidence supports an order granting partial commutation. While claimant has made a few unwise and impulsive decisions with his money, and he has been found to be incapable of managing his own money by the Social Security administration, his overall financial picture is healthy. He has no debt. He owns his condominium outright. He has sufficient monthly income to meet all of his monthly bills. He is covered by his wife's health insurance. Between the two of them they have nearly \$100,000.00 in savings. In addition, his wife has a pension plan of \$145,000.00.

Claimant has made some frivolous decisions in the past with his money - purchasing the time share, buying a classic car when he already owns two other functional vehicles. However, none of these actions imperiled his financial standing. It is in claimant's best interests to grant a partial commutation of his award.

ORDER

THEREFORE, IT IS ORDERED:

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

Defendants shall pay a lump sum of the commuted benefits for all of claimant's remaining lifetime benefits, except for the final week of her life expectancy, utilizing rule 876 IAC 6.3.

Benefits shall be commuted using the weekly rate of five hundred ninety-one and 18/100 dollars (\$591.18).


Defendants shall be entitled to a discount rate on the commuted benefits pursuant to Iowa Code section 85.47 and Iowa Code section 535.3.

The parties shall cooperate to calculate the applicable value of the commuted benefits.

If the parties cannot reach an agreement on the commuted value, they should file a request for appointment of a financial expert to calculate the value of the partial commutation with the expense of that financial expert to be assessed as a cost against whichever party(ies) presented inaccurate calculations of the commuted value.

Claimant shall remain entitled to causally related medical expenses pursuant to Iowa Code section 85.27.

Signed and filed this 7th day of August, 2018.


JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
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JGL/kjw

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.