

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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REBECCA GORDON,

Claimant,

vs.

PENFORD PRODUCTS,

Employer,

and

ZURICH NORTH AMERICAN  
INSURANCE COMPANY,

Insurance Carrier,  
Defendants.

**FILED**

APR 21 2015

WORKERS COMPENSATION

File No. 5034933

PARTIAL COMMUTATION

DECISION

Head Note No.: 3303.20

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STATEMENT OF THE CASE

Claimant, Rebecca Gordon, filed a petition for partial commutation of benefits owed by Penford Products, employer, and Zurich North American Insurance Company, insurance carrier, both as defendants. Claimant sustained a work-related injury on December 29, 2007 and was found permanently and totally disabled as a result of this injury by a deputy workers' compensation commissioner in an arbitration decision filed February 8, 2012. Defendants appealed. The authority to issue final agency action was delegated by the workers' compensation commissioner to a distinct deputy workers' compensation commissioner, who affirmed the award of permanent total disability benefits by a decision dated April 16, 2013. Defendants sought judicial review; the appeal decision was affirmed by ruling dated November 7, 2013.

This matter came on for hearing before Deputy Workers' Compensation Commissioner, Erica J. Fitch, on March 2, 2015, in Cedar Rapids, Iowa. The record in this case consists of claimant's exhibits 1 through 4, defendants' exhibits A through I, and the testimony of the claimant. The parties submitted post-hearing briefs, the matter being fully submitted on March 25, 2015.

### ISSUE

The sole issue presented is whether claimant has established that a proposed partial commutation of all but the final week of the previous award of permanent total disability benefits is in her best interest.

The stipulations of the parties in the hearing report are incorporated by reference in this decision.

### FINDINGS OF FACT

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

Claimant's testimony was consistent as compared to the evidentiary record and her demeanor at the time of evidentiary hearing gave the undersigned no reason to doubt claimant's veracity. Claimant's testimony was clear and she demonstrated knowledge of her plan for use of the proposed commutation proceeds, as well as her limitations in handling her finances. Claimant is found credible.

By the agency file, it appears claimant was 59 years of age at the time of evidentiary hearing. Claimant is a high school graduate. (Exhibit H, page 2) Claimant began work at defendant-employer at age 27. She remained in the employ of defendant-employer for 26 years; her employment was terminated after she sustained a work-related injury on December 29, 2007. During her 26 years of employment, claimant worked mandatory and voluntary overtime. She maintained a good credit score, remained solvent, and suffered with no financial difficulties or bankruptcies. (Claimant's testimony)

Defendant-employer terminated claimant on October 1, 2010; however, claimant's employment was "bridged" to December 1, 2010 in order to allow claimant to become eligible for her pension. Claimant then began to receive her pension, although her distribution was reduced by approximately 36 percent due to her young age. (Claimant's testimony)

In 2011, claimant enlisted the assistance of a financial advisor, who rolled over claimant's 401k from defendant-employer into an investment portfolio. The portfolio included an annuity which claimant did not want as part of her investments. When her financial advisor did not heed her wishes, claimant fired the financial advisor. She subsequently hired a new financial planner, Denny Stoddard of Stoddard Investment Group/Raymond James Financial Services, Inc., in July 2012. Mr. Stoddard continues to manage claimant's 401k investments. Claimant testified she receives and is capable of understanding her quarterly financial statements. (Claimant's testimony; Ex. 1, p. 1; Ex. D, pp. 5, 7)

Claimant's current monthly income is earned from several sources. Claimant receives Social Security Disability benefits in the amount of \$1,685.00; she recently received a small increase in this amount. Claimant testified this figure is her benefit after purchasing Medicare. Claimant also indicated her Social Security Disability benefits are offset by workers' compensation benefits and this offset will continue until she reaches Social Security retirement age, even if she commuted her workers' compensation benefits. Her current workers' compensation benefit, after attorney's fees, amounts to \$2,094.68 per month. Claimant also receives pension benefits in the amount of \$758.01, after payment of a supplemental insurance policy. Finally, claimant receives a payout on a life insurance policy through the union to which she belonged at defendant-employer. This policy is paid out over a 5-year period, with the final payment to be issued in October 2016. This temporary life insurance payment totals \$812.00 per month. (Claimant's testimony; Ex. 3, p. 5)

Claimant seeks to commute all but the final week of her award of permanent total disability benefits. Claimant hopes to use the proceeds of the commutation to pay off her home mortgage and outstanding loans, as she is forced to pay interest on these debts. Claimant's outstanding debts include a \$210,000.00 mortgage, \$7,415.00 car loan, \$4,637.00 home equity loan, and \$6,600.00 to \$6,800.00 in credit card debt. (Claimant's testimony; Ex. 3, pp. 4, 6) Claimant's detailed monthly expenses include: \$1,594.00 mortgage; \$289.00 utilities; \$150.00 cable/internet; \$400.00 food; \$60.00 transportation; \$100.00 clothing/gifts; \$60.00 cell phone; \$47.50 vehicle insurance; \$50.00 set aside for vehicle repairs; \$400.00 recreation; \$573.00 vehicle loan; and \$150.00 home equity loan. Claimant indicated the \$400.00 recreation allocation is designed to allow her to save for an annual vacation she takes with friends. Each year, she and a large group of friends select an all-inclusive trip to take together. (Claimant's testimony; Ex. 3, p. 7) Notably absent from claimant's list of monthly expenses are credit card payments and insurance and taxes upon her residence.

Claimant wants to pay off her large debts and thereby eliminate these monthly expenses. Claimant acknowledges the commutation will also eliminate a monthly source of income in the form of her workers' compensation benefits. Claimant testified she has examined the impact of the loss of this income and the loss of these expenses on her monthly budget. Claimant indicated even with the loss of her workers' compensation benefits, her monthly income will exceed her expenses by \$500.00 if her debt burden is eliminated. (Claimant's testimony)

After expunging her debts, claimant wants to invest the remainder of the commutation monies with the assistance of Mr. Stoddard. Claimant intends to pursue a strategy which will allow her to earn income on her investments, with the goal of the investments outpacing inflation. Claimant explained her workers' compensation benefit is static at \$725.08 per week and will not be adjusted to keep pace with inflation. Claimant's primary concern is that her workers' compensation benefits have no possibility for growth. (Ex. 3, p. 4; Claimant's testimony)

In conjunction with Mr. Stoddard, claimant desires to invest the remainder of her commutation proceeds in a diversified portfolio. Claimant has discussed her goals with Mr. Stoddard and would like to implement a portfolio similar to that in which her 401k is invested, including stocks, bonds, and available cash. She described her investment strategy as moderate risk, one not too risky but which will allow her to increase her assets. Claimant is aware that investment involves risk and the value of her portfolio will fluctuate, whereas her workers' compensation benefits are guaranteed income on which she does not owe taxes. (Claimant's testimony)

On December 12, 2014, Mr. Stoddard issued his opinions on the question of whether the partial commutation proposed by claimant was in her best interest. Mr. Stoddard expressed belief claimant demonstrated responsibility and discipline with management of her portfolio during the approximately 2 ½ years he had served as her financial advisor. Mr. Stoddard identified claimant's weekly workers' compensation benefit as a fixed \$725.08. He indicated by the Bureau of Labor, the inflation rate has averaged 4.2 percent over the 50 years preceding 2013. At this rate of inflation, Mr. Stoddard explained claimant would require \$2,491.25 in 30 years' time in order to maintain the same purchasing power as \$725.08 presently carries. Mr. Stoddard indicated claimant desired to pay off her home mortgage and loans, actions he indicated would not be immediately possible without the lump sum payment offered by the commutation. Mr. Stoddard also indicated the interest rate of 2.12 percent used in claimant's proposed commutation is low, resulting in a substantial increase in claimant's lump sum payment. (Ex. 1, p. 1)

Acknowledging that interest rates are low and could lead to low rates of return in certain investments, Mr. Stoddard recommended development of an investment policy which would allow for current income and growth of future income. He recommended working with claimant to develop this plan to meet her goals and provided a hypothetical profile which met these general goals. (Ex. 1, p. 1) In the hypothetical profile, Mr. Stoddard proposed a diversified portfolio with the following breakdown of assets: 9.64 percent cash; 57.13 percent in U.S. stocks; 5.18 percent in non-U.S. stocks; 24.87 percent in bonds; and 3.18 percent in other investments. (Ex. 1, p. 6) The hypothetical profile created for claimant would allow claimant to use income from her investments; however, claimant indicated it was not her intention to withdraw money from the portfolio on a regular basis. Instead, claimant indicated she intended to only withdraw income from the portfolio in the event of a large or unexpected purchase; for example, if she needed a new car. (Claimant's testimony)

Defendants secured Michael Sandberg, Ph.D., financial consultant and professor of finance emeritus at Coe College, to perform an economic evaluation of the factors relevant to determining if the requested commutation was in claimant's best interest. Dr. Sandberg issued a report of his opinions dated February 11, 2015. (Ex. A, p. 1) Dr. Sandberg indicated a commutation would provide claimant with greater control and flexibility in her financial management decision-making. However, it would simultaneously impose a burden on claimant to handle the expanded net worth and to

obtain an investment scenario which would produce income for the remainder of claimant's life. (Ex. A, pp. 1-2)

Dr. Sandberg expressed some question on the issue of whether claimant is capable of managing her resources properly. Namely, Dr. Sandberg indicated over the "recent past," claimant accumulated approximately \$240,000.00 in debt and only \$81,000.00 in assets. He highlighted claimant's lack of experience in managing large sums of money commensurate to the proceeds from the commutation. He indicated, generally speaking, that a person's propensity to spend almost always outweighs a propensity to save. Dr. Sandberg also indicated that while paying off claimant's debts would result in a reduction of nearly \$2,000.00 in monthly expenses, this savings only lasts the duration of the loan terms. (Ex. A, p. 2)

Dr. Sandberg also highlighted the certainty of claimant's guaranteed weekly workers' compensation benefit as compared to the uncertainty in income which would attend a portfolio. He indicated the hypothetical portfolio proposed by Mr. Stoddard varied greatly year-to-year. Dr. Sandberg identified the reality that funds invested in the commercial marketplace are exposed to market price fluctuations in the principal, as well as fees and taxes. He noted these are not influences upon claimant's guaranteed weekly workers' compensation benefit. (Ex. A, p. 2)

Finally, Dr. Sandberg addressed superannuation concerns, namely the risk of outliving one's ability to meet living expenses. He indicated claimant presented with several decades of life expectancy, implying she may outlive her ability to meet her expenses. Dr. Sandberg also indicated claimant's desire to leave an estate for her family is in their best interest, not her own. (Ex. A, pp. 2-3)

In conclusion, Dr. Sandberg expressed it "may be" that the proposed commutation is not in the best interest of claimant. Dr. Sandberg indicated an alternative plan would be to use a partial commutation to reduce claimant's debt burden, thereby decreasing her monthly expenses, while also maintaining a reduced, but guaranteed, workers' compensation benefit. (Ex. A, p. 3)

Mr. Sandberg did not interview claimant when completing his economic analysis. Claimant acknowledged she has never possessed large sums of money and therefore does not have experience managing large sums. However, claimant testified she has a trusted financial planner with whom she has an established relationship and with whom she has created an investment plan with which she is comfortable. Claimant further indicated her understanding of the proposed partial commutation would allow her workers' compensation benefits to be reinstated, should she outlive the life expectancy used in computing the commutation. (Claimant's testimony)

Claimant denied classifying herself as a "big spender" with regard to a propensity to spend versus save. She acknowledged her home is more expensive than some other homes available in Cedar Rapids. However, claimant testified she chose this home in

part due to her disabilities. Claimant explained she is unable to do yard work or snow removal as a result of the work injury. Claimant's son offered to perform these tasks for claimant, provided claimant lived in the same neighborhood. Therefore, claimant purchased a home in the same neighborhood in which her son lived. Claimant further testified the area will likely produce good resale possibilities. (Claimant's testimony)

Review of claimant's tax records reveals claimant earned between \$51,000.00 and \$52,000.00 in the years 2006 and 2007. (Ex. B, p. 1; Ex. C, p. 1) During these years, claimant remained employed full time at defendant-employer. (Claimant's testimony)

The evidentiary record also contains tax records in years following claimant's termination. In 2011, claimant reported a total taxable income of \$62,418.00. (Ex. D, p. 1) During 2011, claimant's income was derived from Social Security Disability benefits, pension, IRA distribution, insurance payout, and unemployment. (Ex. D, pp. 1, 3-4, 8-9) The 2011 IRA distribution included approximately \$30,000.00 claimant withdrew to purchase a house. (Claimant's testimony; Ex. D, p. 6) In 2012, claimant reported a total taxable income of \$35,175.00. During 2012, claimant derived income from Social Security Disability benefits, pension, and insurance payout. (Ex. E, pp. 1, 3-5, 7) In 2013, claimant reported total taxable income of \$66,985.00. Claimant's 2013 income was derived from Social Security Disability benefits, pension, insurance payout, and an IRA distribution. Claimant explained she withdrew money from her IRA for home improvements and to pay taxes owed. (Claimant's testimony; Ex. F, p. 1)

#### CONCLUSIONS OF LAW

The sole issue presented is whether claimant has established that a proposed partial commutation of all but the final week of the previously awarded permanent total disability benefits is in her best interest.

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

Iowa Code section 85.45 governs commutations. The section states that "[f]uture payments of compensation may be commuted to a present worth lump sum payment" provided that: (1) the period during which compensation is payable can be definitely determined; and (2) the workers' compensation commissioner is satisfied that commutation will be in the best interests of the person or persons entitled to the compensation. Iowa Code section 85.45.

The individual or individuals seeking commutation have the burden of proving that commutation is in their best interests. The commissioner must determine the best interests question on a case-by-case basis, although the commissioner may not disregard a claimant's reasonable plans and desires merely because the plan's success

cannot be assured. Diamond v. Parsons Co., 256 Iowa 915, 129 N.W.2d 608 (1964); Dameron v. Neumann Bros., Inc., 339 N.W.2d 160 (Iowa 1983). On the other hand, the commissioner cannot grant a commutation request when the potential detriments to the worker or dependents from potential ill use of any lump sum payment outweigh the asserted benefits of those funds being commuted to their present worth.

The Dameron court charged the commissioner, in determining whether to allow commutation, to examine the following factors:

1. The worker's age, education, mental and physical condition, and actual life expectancy, as contrasted from information that actuarial tables have provided.
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 others such as a trustee or conservator to manage the funds.

Dameron, 339 N.W.2d at 164.

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. Id.

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).

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.

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.

It appears claimant was 59 years of age on the date of evidentiary hearing. Her formal education is limited to completion of high school. Claimant began work at defendant-employer at age 27 and remained in the employ of defendant-employer for 26 years. On December 1, 2010, claimant's employment ended as a result of the work-related injury she sustained on December 29, 2007. Claimant's work-related medical condition is stable, yet permanent in nature. There is no evidence she is in otherwise poor health.

Claimant proposes a partial commutation of all but the final week of her award of permanent total disability benefits. If granted, claimant seeks to pay off her mortgage of approximately \$210,000.00, car loan of approximately \$7,415.00, home equity loan of approximately \$4,637.00, and credit card debt of approximately \$6,600.00. Once these debts are extinguished, claimant desires to invest the remainder of the commutation proceeds with the assistance of a financial advisor.

Although claimant does not possess experience managing large sums of money, she has demonstrated an ability to live within her means and enlist the services of a financial advisor for assistance with investments. Claimant also has demonstrated a willingness to terminate a relationship with a financial advisor, should she disagree with the manner in which her investments are handled. Claimant has maintained a professional relationship with her financial advisor, Mr. Stoddard, since July 2012. Mr. Stoddard already manages claimant's 401k assets, thus establishing the two have a working relationship and Mr. Stoddard has knowledge of claimant's investment goals and objectives. Furthermore, Mr. Stoddard expressed belief claimant has demonstrated responsibility and discipline in management of her portfolio.

Ridding claimant of the liabilities of a mortgage payment, car loan, home equity loan, and credit card debt is in claimant's best interests. Reducing claimant's debt burden is a strategy favored by claimant's financial planner, Mr. Stoddard, and defendants' expert consultant, Dr. Sandberg. Absent a commutation, claimant lacks the means to immediately extinguish such liabilities.



Assuming claimant's workers' compensation benefits are commuted and her current liabilities are extinguished, the undersigned believes claimant has demonstrated the ability to live within her expected income, even without immediately drawing income from her investments. Claimant's testimony and the financial data in evidence indicate if the workers' compensation benefits and outstanding debts are eliminated, claimant's existing monthly income will continue to exceed her monthly expenses. Claimant therefore, would be in a position to reinvest the gains on her investments, rather than removing the gains as income. This method is claimant's expressed intention and will allow claimant the best opportunity to maximize her gains, while also leaving her with funds available should a large expense arise. Commutation of claimant's weekly benefits would allow claimant to invest the remaining lump sum proceeds in an investment strategy that will best suit her goal of moderate risk investment to allow for growth to counteract inflation.

Claimant has demonstrated an ability to prudently manage her money and live within her means. There is no indication claimant would be irresponsible with the commuted funds. Very little evidence presented leads the undersigned to question claimant's ability to adequately manage and avoid wasting the partial commutation proceeds.

It is concluded that on balance, claimant's request for partial commutation is reasonable, in the best interest of claimant, and should be granted.

ORDER

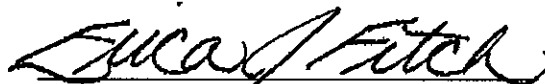
THEREFORE, IT IS ORDERED:

That claimant's request for partial commutation of all but the final week of the previous award of permanent total disability benefits is granted, provided that the original notice and petition for partial commutation shall be revised as appropriate to reflect remainders and commuted values at the time of the signing and filing of this decision.

Defendants shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

Costs are taxed to defendants pursuant to rule 876 IAC 4.33.

Signed and filed this 21<sup>st</sup> day of April, 2015.



ERICA J. FITCH  
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.