DEALING WITH OBESITY IN WORKERS' COMPENSATION CASES: FROM THE SUBLIME TO THE RIDICULOUS

TABLE OF CONTENTS

I. INTRODUCTION

Workers' compensation is a means whereby victims of work-related injuries are provided wage benefits and medical expenses without regard to fault.[1] The system is based on a social philosophy which holds that an injured worker has the right to financial support while he is unable to work to prevent destitution and the loss of his dignity and self-respect.[2] Unlike the social insurance structure of Great Britain,[3] the American system imposes unilateral liability on the employer and seeks to place the cost of such compensation ultimately on the consumer of the product whose manufacture was the occasion of the injury.[4]

While no one can dispute the value of workers' compensation as protection for the injured worker, there seems to be no corresponding concern which purports to protect the ultimate consumer who unwittingly pays the cost of that protection through higher prices on the goods and services he purchases. It is generally presumed that there are within the structure safeguards and limitations which preclude abuse and ensure that benefits are paid only to those who deserve them and only for as long as they deserve

1. A. LARSON, WORKER'S COMPENSATION LAW: CASES, MATERIALS, AND TEXT § 1 (1984) [hereinafter LARSON].

2. *Id.* at § 2.20.

3. *Id.* at § 3.10. Workers' compensation is part of the comprehensive social security system whereby the needs of all disadvantaged persons are addressed. A separate fund to which the employer, the employee, and the government contribute, compensates workers for industrial injuries. Benefits are paid at a fixed flat rate, regardless of the amount of prior earnings. All medical expenses are paid by the National Health Service Program.

4. *Id.* at § 1.20.

them.[5]

It is conceded that the rules pertaining to work-relatedness are well established. Virtually every state's statutory scheme limits coverage to injuries "arising out of and in the course of employment," and if an injury falls outside of the well-drawn parameters, it is not compensable.[6] One area, however, where the lines of limitation seem to be fading arises from the concept that once an employee suffers a work-related injury, he has a duty to mitigate or minimize that injury by submitting to recommended medical treatment. While cases involving blatant refusal to submit to corrective surgery, for example, are supposedly decided on the basis of a reasonableness standard,[7] an interesting view of "reasonableness" appears in certain cases in which the recommended treatment for an obese employee is weight loss.[8]

This note will explore the factor of obesity in workers' compensation, where it may operate to prevent an injured employee from recovering for his injury. There is an obvious trend toward reducing to virtual non-existence any duty which might be imposed on the employee to make an individual effort to mitigate his injury in this area.[9] The justifications used for making awards to persons who do not accomplish prescribed weight losses can be said to have ranged from the sublime to the ridiculous. However, an interesting side issue appears in the fact that the courts are not quite so sympathetic nor so eager to liberalize the rule if the case involves an obese *woman*.[10]

Prompting this exploration is the recent decision handed down by the Iowa Industrial Commission in *Lumley v. City of Des Moines*.[11] The Commission allowed healing period benefits to be extended indefinitely for a claimant weighing over 400 pounds, and ordered the employer to provide and pay for a comprehensive treatment program for the obesity.[12] The astonishing fact in this case is that the claimant weighed over 230 pounds at the time of his knee injury and *gained* over 170 pounds during his initial convalescence—a two-year, four-month period during which the city was required to pay him $208.30 per week in healing period benefits.[13] The weight gain effectively precluded the curative surgery that would have restored his

---

5. *See generally* IOWA CODE § 85 (1985). The Code specifically denies compensation only where the employee intentionally and willfully injures himself, where the employee's intoxication is the proximate cause of his injury, or where the employee is injured by the willful act of a third person who acts for personal reasons. IOWA CODE § 85.16 (1985).

6. LARSON, *supra* note 1, at § 6.10.

7. Stufflebean v. City of Fort Dodge, 233 Iowa 438, 9 N.W.2d 281 (1943).

8. *See infra* text accompanying notes 23-72.

9. *See infra* text accompanying notes 23-43.

10. *See infra* text accompanying notes 44-72.

11. Lumley v. City of Des Moines, Iowa Indus. Comm'n, File No. 763158, Arb. Decision (July 23, 1986), *reh'g denied*, (Aug. 13, 1986).

12. *Id.* at 4-8.

13. *Id.*

knee.[14]

II. Philosophy of Workers' Compensation in Iowa

The underlying theme of all decisions handed down in recent years by Iowa courts can be summarized by the statement: "Our compensation law is for the working person's benefit and should be liberally construed to that end."[15] Elaborating upon this, the Iowa Supreme Court has said:

> In keeping with the humanitarian objectives of the worker's compensation statute, we apply it broadly and liberally. The legislation is primarily for the benefit of the worker and the worker's dependants [sic]. Its beneficial purpose is not to be defeated by reading something into it which is not there, or by a strained and narrow construction.[16]

In light of the foregoing, there can be no doubt that the spirit of the Iowa compensation law favors the employee. The person who bears the burden of its cost—the ultimate consumer—is not considered.

One must go back over thirty years to find a court decision which indicates any limitation on this very liberal stance. In a case in which the "going and coming" rule was applied to deny death benefits to a worker's widow, the court upheld the denial and explained:

> We are cognizant of the fact that the compensation law is for the benefit of workers and is to be liberally administered to that end. But it must be administered by the application of logical and consistent rules or formulas notwithstanding its benevolent purpose. It cannot be made to depend on the whim or sympathetic sentiment of the current administrator or presiding judge. We apprehend every member of the court is sympathetic to the claimant in the instant case. But the compensation statute is not charity. It is a humanitarian law to be administered, not by sympathy, but by logical rules, evolved from the determination of many cases under literally countless factual variations. Compensation is to be paid by the employer (or his insurer) as matter of contract, not as a gratuity.[17]

This case is a rarity: a decision in which the court has given deference to the entity which pays the benefits and has ventured to suggest that compensation is paid "as a matter of contract." This concept would lend itself well to the idea that an injured employee has a reciprocal obligation to make an effort to mitigate his injury while receiving benefits. However, no such connection has ever been made, and the duty to mitigate enjoys an obscurity which parallels that of the contract theory.

---

14. *Id.* at 4.

15. Thomas v. William Knudson & Son, Inc., 349 N.W.2d 124, 126 (citing Hoenig v. Mason & Hanger, Inc., 162 N.W.2d 188, 190 (Iowa 1968)).

16. *Id.* (citing Cedar Rapids Community School v. Cady, 278 N.W.2d 298, 299 (Iowa 1979); Disbrow v. Deering Implement Co., 233 Iowa 380, 392, 9 N.W.2d 378, 384 (1943)).

17. Bulman v. Sanitary Farm Dairies, 247 Iowa 488, ____, 73 N.W.2d 27, 30 (1956).

One must look back to 1943 to find a case in which the court discussed the duty to mitigate in the context of refusal by a workers' compensation claimant to submit to curative treatment. In *Stufflebean v. City of Fort Dodge*,[18] such a situation confronted the court. Because the Iowa Code does not contain a provision which imposes on the injured employee an obligation to submit to medical treatment, the court relied upon the general rule of reasonableness which exists in most states.[19] Instead of setting forth guidelines for the application of such a rule in Iowa, however, the court found that the benefits which would be payable for the surgery and the recuperation period were approximately equivalent to the partial permanent disability award granted by the Commission, and affirmed the award.[20]

It is interesting to note that in 1943 the court held the view that the purpose of the Legislature in creating the Industrial Commission was "to do rough justice—speedy, summary, informal, untechnical."[21] One cannot tell whether "rough justice" was supposed to include a reasonableness standard which would operate to create a duty to cooperate with treatment to mitigate an injury. The court satisfied itself with the belief that substantial justice had been done.[22]

Considering the nebulous nature of the decision in *Stufflebean* and the fact that no case involving obesity has reached a higher court in Iowa, it is no wonder that a firm and clear standard of reasonableness has not materialized for consistent application in such cases.

III. Obesity as a Factor in Other Jurisdictions

Courts in other jurisdictions have addressed the issue of obesity in a variety of factual circumstances. Their decisions indicate a liberal, if not sympathetic, view toward the worker who is told he must lose weight in order to recover from his work-related injury.

In Louisiana, a 55-year-old gang saw operator weighing 255 pounds was awarded total permanent disability for back strain. The employer appealed, claiming the disability was actually due to the worker's poor posture and

---

18. Stufflebean v. City of Fort Dodge, 233 Iowa 438, 9 N.W.2d 281 (1943).

19. *Id.* at 440, 9 N.W.2d at 283.

> In most states, the compensation statutes specifically provide that an arbitrary or unreasonable refusal to submit to offered medical or surgical treatment, which does not seriously endanger claimant's life or health and which is shown to be reasonably certain to minimize or cure the disability for which compensation is sought, will warrant reduction, suspension or forfeiture of such compensation. In a number of states where there is no such express statutory provision, a similar rule appears to prevail by reason of judicial decision.

Id. (citation omitted).

20. *Id.* at 443, 9 N.W.2d at 284.

21. *Id.* at 442, 9 N.W.2d at 283 (citing Rhyner v. Hueber Bldg. Co., 71 A.D. 56, 156 N.Y.S. 903 (N.Y. App. Div. 1916)).

22. *Id.* at 443, 9 N.W.2d at 284.

preexisting obesity—he had a pendulous abdomen.[23] The claimant had lost only 15 pounds in a period of one year, and doctors recommended that he lose between 40 and 50 more pounds.[24] In a decision displaying some homespun philosophy, the court upheld the award on the basis that the claimant's failure to lose weight did not amount to clear, convincing, and conclusive proof of willful failure to cooperate with medical treatment.[25] The court did not, however, grant the claimant's petition for a 10% penalty against the employer for making a frivolous appeal, stating that the appeal was not so "totally without merit as to justify such penalty."[26]

In a similar case decided one year later, the same Louisiana court upheld a total permanent disability award to an obese 37-year-old garbage collector who had injured his back, in spite of testimony that weight loss would increase the mobility of his back from 15% to 60%.[27] In this case, the court gave credence to testimony that it is extremely difficult for a person to reduce his weight below his lifelong average, and it is particularly difficult for a low-income individual because weight-producing starches and sweets are much less expensive than low-calorie foods.[28]

New Mexico's workers' compensation statute contains a provision whereby benefits may be reduced or suspended if the worker persists in any unsanitary or injurious practice which impedes his recovery, or refuses to submit to medical treatment which is reasonably essential to promote his recovery.[29] In the case of a worker five feet, five inches in height, weighing 185 pounds, who was awarded temporary total disability benefits for a back injury, the court upheld the award in spite of a claim that the worker had

---

23. Guillory v. Reimers-Schneider Co., 94 So. 2d 134 (La. Ct. App. 1957).
24. *Id.* at 136.
25. *Id.* The court stated:

> The inference attempted to be drawn from the employee's failure to lose weight is not only contradicted by the employee's heroic loss of some weight from his lifelong norm despite a much more sedentary life, but also by common observation that the Lord Who created some of mankind fat and some lean, also created men with unequal abilities to gain or lose weight, through different metabolisms, degrees of will-power, practical opportunities to follow different diets, etc. Certainly the mere failure to lose weight in accordance with a glib medical recommendation cannot in the light of ordinary observation be characterized as proof of willful failure to cooperate with medical treatment.

Id.

26. *Id.*
27. Levy v. Travelers Ins. Co., 102 So. 2d 561 (La. Ct. App. 1958).
28. *Id.* at 562.
29. N.M. STAT. ANN. § 52-1-51(C) (1978) (1987 Repl.) provides:

> If any worker persists in any unsanitary or injurious practice which tends to imperil, retard or impair his recovery or increase his disability or refuses to submit to such medical or surgical treatment as is reasonably essential to promote his recovery, the hearing officer may in his discretion reduce or suspend the worker's compensation benefits.

Id.

failed to mitigate his injury.[30] Medical testimony revealed that, while the loss of 40 or 50 pounds would bring the claimant down to his ideal weight, it would make little or no difference in the condition of his back. Thus, the weight loss was not "reasonably essential" to the worker's recovery.[31] In a later case, the court of appeals overturned a district court's judgment reducing permanent disability benefits from 100% to 25% because the claimant had failed to lose weight. To the district court this failure constituted persistence in an injurious practice.[32] In clarifying when persistence in an injurious practice can warrant a decrease in benefits, the court of appeals said that a decrease is justified if "a workman . . . as a matter of habit, go[es] on resolutely or stubbornly in spite of opposition, importunity, or warning, to inflict or tend to inflict injury to himself."[33]

In the case of a cook who weighed 422 pounds when injured in a fall, the California Supreme Court affirmed an award of reimbursement for the cost of self-procured treatment for ten months at the Duke Medical Center obesity clinic in Durham, North Carolina, and for future participation in the program, as well as for continuing temporary disability benefits.[34] In justifying this substantial and extraordinary award, the court stated that, though the claimant had been told by three doctors to lose weight to aid in the cure of his injury, "at no time did any of the physicians recommend a specific weight reduction program, nor did the employer ever offer to reimburse applicant for the expenses incurred in such program."[35] It is noteworthy that, in exercising his right to choose his own treatment after the doctors had failed to prescribe it, the claimant lost approximately 175 pounds while in the closely-supervised live-in clinic.[36] Under its stated policy of liberal construction, the court found the costs of the treatment reasonable, although the facility was 3,000 miles from the claimant's home, because it was a unique facility and suited the claimant's needs.[37]

In a recent decision in Oregon, a 55% permanent disability rating was reinstated for an obese 62-year-old claimant suffering from back strain and degenerative disc disease.[38] In this case, the claimant had been advised by his doctors to lose weight in order to relieve his pain, but had failed to lose weight while attending weight loss classes[39] which had previously been suc-

30. Gonzales v. Bates Lumber Co., 96 N.M. 422, 631 P.2d 328 (N.M. Ct. App. 1981).
31. *Id.* at ___, 631 P.2d at 330.
32. Martinez v. ZIA Co., 99 N.M. 80, 653 P.2d 1226 (N.M. Ct. App. 1982).
33. *Id.* at ___, 653 P.2d at 1228.
34. Braewood Convalescent Hosp. v. Worker's Compensation Appeals Bd., 34 Cal. 3d 159, 666 P.2d 14, 193 Cal. Rptr. 157 (1983).
35. *Id.* at ___, 666 P.2d at 19, 193 Cal. Rptr. at 162.
36. *Id.* at ___, 666 P.2d at 17, 193 Cal. Rptr. at 160.
37. *Id.* at ___, 666 P.2d at 20-21, 193 Cal. Rptr. at 163-64.
38. Lee v. Freightliner Corp., 77 Or. App. 238, 712 P.2d 836 (1986).
39. *Id.* at ___, 712 P.2d at 839.

cessful for him.[40] Noting that one physician believed that the claimant could not lose weight because he was depressed,[41] the court concluded that it had not been shown that the claimant unreasonably failed to follow medical advice.[42] Of interest in this case is the fact that the weight of the claimant is not disclosed. Oregon is not quite so protective of the dignity of women claimants.[43]

The foregoing cases generally support the idea that courts will grant benefits to obese claimants in virtually all circumstances, and that they will strain, in most cases, to justify their decisions by finding some redeeming or pitiful factor in the claimant himself, or some less than satisfactory conduct on the part of the employer or the treating physician.

IV. Disparate Treatment in Workers' Compensation Cases Involving Obese Women

In Pennsylvania, a 43-year-old woman weighing 300 pounds suffered a work-related herniated lumbar disc, and corrective surgery was not feasible due to her obesity.[44] At her employer's urging she was institutionalized and placed on a no-calorie diet consisting of broth and diet soft drinks.[45] After three and a half weeks, she signed herself out of the facility. The employer claimed that she had refused reasonable medical services, which may result in forfeiture of benefits under Pennsylvania law.[46] There was testimony from her family physician that further institutionalization would probably have caused her to suffer a nervous breakdown.[47] The court, however, based its decision to affirm the disability award on the ground that the claimant had been cooperative and had not refused treatment—and on a glib statement that the treatment had simply not achieved the desired result.[48] It is beyond comprehension how a starvation diet in an institutional setting could be considered reasonable medical treatment, but that issue was not addressed.

A 212-pound seamstress in Arizona suffered a work-related back injury,

---

40. *Id.* at ____, 712 P.2d at 838.

41. *Id.* A rehabilitation specialist had characterized the claimant as "not as highly motivated as he may have been three or four years ago when his prospects for work seemed better." *Id.*

42. *Id.* at ____, 712 P.2d at 839.

43. *See infra* text accompanying notes 55-64.

44. Folmer Ice Cream Co. v. Workmens' Compensation Appeal Bd., 330 A.2d 584 (Pa. Comm'n 1975).

45. *Id.* at 585.

46. *Id.* Pa. Stat. Ann. tit. 77, § 531(4) (Purdon 1986) provides in part: "If the employee shall refuse reasonable services of duly licensed practitioners of the healing arts, surgical, medical and hospital services, treatment, medicines, and supplies, he shall forfeit all rights to compensation for any injury or any increase in his incapacity shown to have resulted from such refusal."

47. Folmer Ice Cream Co. v. Workmens' Compensation Appeal Bd., at 586.

48. *Id.*

but her disability benefits were suspended because she failed to follow a weight reduction program.[49] Medical testimony in this case indicated that the claimant simply "would feel better physically if she lost some weight."[50] She was placed on a diet, visited her doctor frequently, and joined Weight Watchers, but experienced no success.[51] In the ten-month period prior to the hearing at which her benefits were suspended, the claimant had been hospitalized for gall bladder surgery and a tubal ligation in March and for an emotional relapse in August.[52] In disregarding the effect which the claimant's hospitalization might have had on her ability to lose weight, the court determined that the surgery was "not really of a major nature," and pointed out that during her hospitalization for the emotional relapse the claimant "was in bed most of the time."[53] The claimant attempted to explain that she was one of those persons who simply cannot lose weight despite persistent efforts, but her doctor testified that he believed she had the ability to lose weight if the proper dietary regime was strictly followed.[54] The court believed the doctor and was neither liberal nor sympathetic to the claimant.

The Workers' Compensation Board of Oregon reduced a referee's award of 25% disability to 5% on the ground that the claimant's failure to continue a weight loss program kept her from recovering as fully as she otherwise would.[55] The claimant in the case was a 300-pound nurse's aide who suffered work-related back strain.[56] Weight loss was prescribed and she was placed on a 1000 calorie per day diet and on medication; the result was a loss of 37½ pounds.[57] Just prior to the hearing, however, the claimant's doctor signed a statement which had been prepared by the employer-respondent and which opined, inter alia, that the claimant had made no progress in the previous two or three months, that she had lost enthusiasm and desire to proceed further, and that her ability or inability to lose weight depended on her willpower and desire, or lack thereof.[58] The court agreed with

---

49. Moctezuma v. Industrial Comm'n, 19 Ariz. App. 534, 509 P.2d 227 (1973).
50. *Id.* at ____, 509 P.2d at 228.
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.* at ____, 509 P.2d at 229.
55. Nelson v. EBI Companies, 64 Or. App. 16, 666 P.2d 1360 (1983).
56. *Id.* at ____, 666 P.2d at 1361.
57. *Id.*
58. *Id.* at ____, 666 P.2d at 1361 n.2. The letter from respondent to Dr. Lautenbach, including his response, reads:

> Dear Dr. Lautenbach:
>
> I understand your opinion in this matter to be as follows: that you have treated the claimant for some time regarding her weight problem.
>
> The weight loss program for claimant in your opinion is not working. The claimant has reduced her weight from 137 kilograms to 119 kilograms through the initial portion of the program, but no further progress has been noted in the last two or three months. You are not aware that there has been any weight gain either. It is

the Board that, while the claimant had made some effort to lose weight, "it was not a reasonable effort"[59] and she could have continued to lose weight—"all that was required was an exercise of will."[60]

In an almost identical case decided less than two years later, another 300-pound claimant with lumbar strain faired better in the Court of Appeals of Oregon.[61] On appeal from an order of the Workers' Compensation Board which decreased her total (100%) permanent disability to 20% because of her obesity, the claimant prevailed in spite of the fact she had not lost any significant weight.[62] The distinguishing factor in this case was the testimony of her doctor who stated in regard to morbid obesity:

> that it is typical for those individuals to lose weight but be unable to keep it off, that there has been virtually no success in treating the condition and that medical science has yet to determine its cause or find its cure. Claimant's changing motivation apparently is of physiological or psychological etiology.[63]

Discussing the reasonableness of the claimant's effort to lose weight, the court pointed out that she had made repeated attempts and had been cooperative with her physician.[64]

In fairness to the courts of Louisiana and Florida, reported cases from these jurisdictions indicate that they take a liberal view of the weight loss efforts of obese women claimants.[65]

---

your opinion that the claimant has lost any enthusiasm or desire to proceed further with the weight loss program.

You have not heard any complaints from Mrs. Nelson regarding her low back in the last several months. It is your opinion that the low back problem is minimal at best.

Because of the claimant's overweight state, she is more inclined to have repetitive back injuries and will always have such injuries throughout her life due to her weight problem. If she lost 100 pounds, she would probably have fewer back complaints.

Her overweight problem is completely within her control and is entirely voluntary. Her weight loss is entirely a matter of will-power and desire and is not caused by involuntary factors.

If you agree with the foregoing, would you please signify below.

X___ Yes, the foregoing is correct.

____ No, the foregoing is not correct.

Id.

59. *Id.* at ____, 666 P.2d at 1362.
60. *Id.* at ____, 666 P.2d at 1363.
61. Christenson v. Argonaut Ins. Co., 72 Or. App. 110, 694 P.2d 1017 (1985).
62. *Id.* at ____, 694 P.2d at 1017.
63. *Id.* at ____, 694 P.2d at 1019.
64. *Id.*
65. Lewis v. Insurance Co., 322 So. 2d 429 (La. App. 1975) (no doctor placed claimant on prescribed weight reducing regimen from which she voluntarily deviated, so it could not be said that she refused treatment); Primous v. Flagler Sys., Inc., 477 So. 2d 1057 (Fla. App. 1985) (reversed an order denying claim for weight loss treatment because claimant had only made

A comparison of the cases discussed in Section III, involving male claimants, and those discussed in this section, involving female claimants, indicates that much more sympathy is extended to the male claimant. A loss of 15 pounds by a male claimant will be considered "heroic,"[66] while a loss of 37½ pounds by a female will not amount to a reasonable effort.[67] Male claimants are granted grace because of the difficulty involved in losing weight below one's lifetime average,[68] while benefits are denied to women because weight loss is a matter of "willpower."[69] Males will be excused from weight loss due to low income or depression,[70] while women in the same circumstances will not.[71] And what male claimant had to be subjected to institutionalization and a starvation diet to be considered worthy of benefits?[72]

It is conceded, and devoutly to be wished, that workers' compensation boards and courts may have become aware of these disparities in later unreported decisions. The possibility, however, of underlying bias against obese women claimants is worthy of careful consideration.

V. *LUMLEY*: A CLOSER LOOK

The Iowa Industrial Commission's decision in *Lumley v. City of Des Moines*[73] is extraordinary in at least one important aspect. The claimant's behavior during his convalescence—he gained over 170 pounds during that period—was not tested by any standard of reasonableness.[74] The sole criterion relied upon for the award of continuing healing period benefits appears to have been the deputy's finding that "claimant credibly states that he has made and continues to make an effort to reduce his food intake because 'he can't gain more weight or he'll die.' "[75]

It would seem that this case is a clear example of a situation in which the duty to minimize or mitigate his injury and to cooperate with prescribed medical treatment, in order to maintain his weight at a level no higher than it was at the time of injury, should have been imposed on the claimant. His efforts in that regard, after he had been told emphatically and repeatedly by his physician that he had to control his weight in order to have corrective surgery, should have been evaluated under a standard of reasonableness.

---

slight progress).

66. *See supra* note 25.
67. *See supra* notes 57-60 and accompanying text.
68. *See supra* note 28 and accompanying text.
69. *See supra* note 60 and accompanying text.
70. *See supra* notes 28, 38-42 and accompanying text.
71. *See supra* text accompanying notes 44-60.
72. *See supra* text accompanying notes 44-48.
73. Lumley v. City of Des Moines, Iowa Indus. Comm'n, Arb. Decision, File No. 763158 (July 23, 1986) [hereinafter Arbitration Decision].
74. *Id.*
75. *Id.* at 4.

The question may well have been: in light of the evidence, did Mr. Lumley make a reasonable effort to control his weight?

The record shows that Mr. Lumley's efforts would probably not have been considered reasonable under any circumstances. His own testimony reveals that during his recuperation he spent most of his time sitting around; and he admitted that while he sat around, he ate.[76] He said that he ate more during that time than when he was working, because he ate whenever he was hungry and did not wait for regular meals.[77] His efforts to stop himself from eating so much consisted of cutting out sweets and drinking diet pop,[78] although it appears that he continued to drink beer.[79] The claimant's efforts to cut back on his food intake did not begin until two or three months before the hearing, though the hearing was held almost two years after the injury.[80] It must also be noted that for two and a half months Lumley was visited in his home by a rehabilitation specialist hired by the city; she testified that Lumley was defensive and that she discontinued her visits because Lumley was not interested in pursuing a weight loss program.[81] Classes at a nutrition and weight loss clinic were offered to him at no charge, but he would not attend, claiming that he didn't have transportation.[82] Since Lumley had been a member of Weight Watchers, it could not be said that he was ignorant of ways in which he could have engaged in an independent weight reduction program.[83] But the decision does not take any of these facts into account, because no duty is imposed on the claimant.

The decision further finds that the claimant was not afforded a reasonable opportunity to receive medical assistance in losing weight.[84] In other words, a reasonableness standard is applied to the city's efforts to assist Mr. Lumley in his weight reduction.[85] Since the claimant could justify his refusal to participate in any of its offerings, the deputy found that the city's efforts were not reasonable.[86]

In addition to awarding continuing healing period benefits, the court also ordered the city to provide and pay for a comprehensive treatment program under the direction of a physician-specialist; the program was to include transportation if the care was not provided in Lumley's home, and was to include the cost of surgical or other procedures necessary to accomplish a

---

76. Brief for Appellant at 7, Lumley v. City of Des Moines, File No. 763158 (Iowa Indus. Comm'n Decision Oct. 26, 1986).
77. *Id.* at 8.
78. *Id.* at 9.
79. *Id.* at 8.
80. *Id.* at 11.
81. *Id.* at 5.
82. *Id.* at 5-6.
83. *Id.* at 2.
84. Arbitration Decision, *supra* note 73, at 4.
85. *Id.* at 4-5.
86. *Id.*

weight loss sufficient to allow the knee surgery.[87]

The basis of the award of expenses pertaining to the treatment of obesity was a previous commission decision, *Shilling v. Martin K. Eby Construction Co.*[88] In that case the claimant was obese at the time of his injury and his weight prevented him from having the surgery necessary to correct his back injury.[89] The deputy did not find Lumley's situation distinguishable, in spite of the fact that Lumley became prohibitively obese after his injury.[90] The deputy stated that he could see no difference between an unsuccessful attempt to lose weight and an unsuccessful attempt not to gain weight.[91]

The logical question at this point is: what happened to the reasonableness standard which would ordinarily be applied to the injured worker's efforts to lose weight if his obesity prevented his recovery? The answer may well lie in the case of *Moore v. Des Moines Metro Transit Authority*.[92] In *Moore*, the Commission stated that under applicable law, a claimant's failure to follow a weight loss program which was part of the treatment for the injury would be judged by the test of reasonableness.[93] Moore weighed 400 pounds and had lost 95 pounds in 14½ months.[94] On the basis of that progress and the doctor's expectations, the Commission ordered that healing period benefits be paid only until the time when the claimant could reasonably be expected to have accomplished his weight loss.[95] This ruling placed the responsibility for weight loss on the claimant, who was then free to follow his doctor's advice or to develop an effective program of his own.[96] The other important aspect of the ruling was the fact that the healing period benefits would end at the time the claimant could be expected to have lost the required weight.

On appeal to the Iowa District Court for Polk County, the decision of the Commission was reversed and continuing healing period benefits were reinstated.[97] The court did not find in the record substantial evidence which would allow a determination of any contingency for termination of the healing period.[98] Pertinent to the court's decision was testimony in which the

---

87. *Id.* at 8.

88. II Iowa Indus. Comm'n Rep. 350 (1981-82).

89. *Id.* at 354.

90. Lumley v. City of Des Moines, Iowa Indus. Comm'n, Ruling on Application for Rehearing, File No. 763158 (Aug. 13, 1986).

91. *Id.*

92. Moore v. Des Moines Metro Transit Auth., Iowa Indus. Comm'n, File No. 677342, Appeal Decision (Dec. 21, 1983).

93. *Id.* at 251 (citing Stufflebean v. City of Fort Dodge, 233 Iowa 438, 9 N.W.2d 281 (1943)).

94. *Id.*

95. *Id.*

96. *Id.*

97. Moore v. Des Moines Metro Transit Auth., Iowa Dist. Court for Polk County, No. AA-572 (Iowa Dist. Ct. Dec. 11, 1984) (decision on appeal).

98. *Id.* at 3.

doctor discussed the role that genotype—an individual's unique metabolic rate—plays in weight loss.[99] The court apparently did not consider that the claimant's past record of weight loss provided a standard for measuring what could be expected of him in the future.

The district court's decision was appealed to the Supreme Court of Iowa, but a joint motion for remand to consider settlement was filed and granted.[100]

When a district court determines that plain and logical evidence is not substantial enough to support a decision made by the Commission, it can be assumed that the Commission will not base subsequent decisions on the same reasoning and rationale. Thus, ends the use of the reasonableness standard in evaluating a claimant's efforts to lose weight, when his obesity prevents his full recovery.

VI. Conclusion

At the present time in Iowa, an obese claimant will qualify for virtually unlimited healing period benefits while his employer seeks, finds, and provides treatment which accomplishes the required weight loss. Neither statute nor administrative decision imposes on the claimant any duty to make reasonable efforts to lose weight. The absence of a duty to mitigate his injury by losing weight does little to preserve the dignity and self-respect of the claimant. The ultimate consumer, who bears the burden of these open-ended healing period awards, is for all practical purpose making contributions to charity.

Darlene M. Erickson

99. *Id.* at 4.
100. Moore v. Des Moines Metro Transit Auth., No. 84-1988 (Iowa 1985).