IN THE SUPREME COURT OF MISSOURI

S.C. No.: 94478

State of Missouri ex rel ISP Minerals, Inc.,
Relator,

vs.

The Labor and Industrial Relations Commission,
Respondent.

RESPONDENT THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

AMENDED RESPONSE BRIEF

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JURISDICTIONAL STATEMENT

At issue is whether Respondent properly exercised its authority in taking jurisdiction to hear a dispute concerning medical treatment in a Workers' Compensation case when a partial 287.390 settlement left the issues of payment for future pulmonary related medical care open for the life of the Employee at the cost of the Employer/Insurer.

This is not a matter on appeal of a final award from the Labor & Industrial Relations Commission (Commission) and **R.S.Mo.** Sec. 287.495 (1998) does not apply. This matter is before the Missouri Supreme Court on an original Petition in Prohibition/Alternative Petition in Mandamus filed by ISP Minerals. Relator alleges that the Commission acted in excess of its jurisdiction. This Court has jurisdiction to issue original remedial Writs. Mo. Const. Art. V, sec. 4. " A Writ of Prohibition is available in the following circumstances: 1) to prevent a usurpation of judicial power when the Circuit Court lacks authority or jurisdiction; 2) to remedy an excess of authority, jurisdiction or abuse of discretion when the lower court lacks the power to act as intended; or 3) when a party may suffer irreparable harm if relief is not granted." **State ex rel. Houska v. Dickhaner,** 323 S.W.3d 29, 32 (Mo.banc 2010). "Prohibition may be appropriate to prevent unnecessary, inconvenient, and expensive litigation." **Id.** Prohibition lies only where an act in excess of jurisdiction is clearly evidenced, e.g., **State ex rel. Clem Trans. Inc. v. Gaertner,** 688 S.W.2d 367, 368 (Mo. banc 1985), and where there is no adequate remedy by way of appeal, e.g., **State ex rel. McNary v. Hais,** 670 S.W.2d 494, 496-97 (Mo. banc 1984).

STATEMENT OF FACTS

Introduction

The Workers' Compensation Act (herein after the Act) confers jurisdiction on the Commission to review an approved Workers' Compensation Settlement Agreement and order an Evidentiary Hearing regarding the rights and obligations of the parties to that Settlement Agreement in future medical care issues. The Commission acted correctly in finding it possessed jurisdiction to review the approved 287.390 Settlement Agreement and determine Employer's obligations thereunder to provide future medical care, and in ordering the Division to hold an Evidentiary Hearing on the issue of medical treatment. Thus, the Court must quash its Preliminary Writ of Prohibition.

Respondent generally agrees with the Relator's statement of facts, but submits the following additions or disputed entries. On July 31, 2008 not October 14, 2005, Michael Alcorn filed an Amended Claim for Compensation, Injury No. 05-120536, against ISP Minerals. On October 14, 2005, the Employee was diagnosed with injuries to his lungs as a result of inhalation of silica dust at his employment. (Ex.1-2). [1] The parties in the Workers' Compensation action entered into a Stipulation for Compromise Settlement under Section 287.390 as amended on January 8, 2009. Under the Settlement Agreement, ISP Minerals agreed to pay $36,508.00 to Employee, said payment representing an approximate disability of 25% of the body as a whole (BAW), regarding the lungs for alleged occupational chemical dust induced COPD and bronchial reactivity. Under paragraph 6, the Settlement Agreement stated:

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[1] Matters referred to herein which are contained in the Exhibits will be designated as (Ex.____).

"…Employer/Insurer agrees to leave future related pulmonary medical care open. Auth med. care thru Dr. Jos. Ojile of Cadeacus Corp. in St. Louis, MO for monitoring care of occ chemical dust induced COPD & bronchial reactivity w/ obstructive airway." (Ex.4-5)

Respondent disagrees with Relator's allegation as fact that prescriptions for inhaler medication were not made after August 8, 2009. There are no facts in evidence that supports this statement. Relator alleges that ISP Minerals continues to provide and pay for authorized medical monitoring care. There is no factual evidence that supports this claim and Respondent disputes this as a fact.

Respondent does not agree with Relator's speculation on why Alcorn did not withdraw his June 12, 2014 Request for Hearing with the Commission after the July 2, 2014 Missouri Court of Appeals, S.D. issued its Permanent Writ in Prohibition.

STANDARD OF REVIEW

Relator has filed an original Writ with this Court. The extraordinary remedy of a Writ of Prohibition is available: (1) To prevent the usurpation of judicial power when the Trial Court lacks authority or jurisdiction; (2) To remedy an excess of authority, jurisdiction or abuse of discretion where the lower Court lacks the power to act as intended; or (3) Where a party may suffer irreparable harm if relief is not granted. **State ex rel. T.W. v. Ohmer,** 133 S.W.3d 41, 43 (Mo. banc 2004).

Prohibition may be used to "undo" acts done in excess of a Court's authority "as long as some part of the Court's duties in the matter to remain to be performed" and may be used "to restrain further enforcement or orders that are beyond or in excess of a [Court's] authority… "**State ex rel. Robinson v. Franklin,** 48 S.W.3d 64, 67 (Mo.App.2001) (citation omitted). Whether a Trial Court has exceeded its authority is a question of law, which an Appellate Court reviews independently of the Trial Court. **In re Smythe,** 254 S.W.3d 895, 896-97 (Mo.App.2008); see also **State ex rel. Teffey v. Bd. of Zoning Adjustment,** 24 S.W.3d 681, 684 (Mo. banc 2000) (whether administrative body's action exceeded the authority granted to it is a question of law for the "independent judgment of the reviewing Court".

Respondent agrees that the issue before the Court as to the Industrial's Commission authority and jurisdiction to review issues of future medical treatment and care in a **287.390** Settlement Agreement is a question of law.

POINTS RELIED ON

I.

THE SUPREME COURT SHOULD QUASH ITS PRELIMINARY WRIT OF PROHIBITION ABSOLUTE, FOR THE REASONS THAT:

A.

RELATOR IS NOT ENTITLED TO A WRIT IN PROHIBITION BECAUSE RESPONDENT COMMISSION DID NOT ERR IN EXERCISING JURISDICTION OVER A PARTIAL SETTLEMENT AGREEMENT AND ORDERING AN EVIDENTIARY HEARING TO DETERMINE MEDICAL TREATMENT REQUIRED BY THE PARTIAL SETTLEMENT IN THAT THE COMMISSION NEVER LOST JURISDICTION OVER THE MEDICAL CARE IN DISPUTE AS IT HAD PREVIOUSLY APPROVED A PARTIAL SETTLEMENT OF ALL ISSUES BUT FUTURE MEDICAL AND THEREFORE HAD RETAINED JURISDICTION OVER FUTURE MEDICAL TREATMENT ISSUES IN ORDER TO MAKE THE SETTLEMENT "ENFORCEABLE" AS REQUIRED BY 287.390.1.

B.

THE ACT AND CASE LAW SUPPORT AND CONFER THE RESPONDENT'S ACTION IN ISSUING ITS AUGUST 14, 2014 ORDER TO DETERMINE WHETHER MEDICAL TREATMENT AND CARE ARE RELATED TO THE INJURY, AND ARE REASONABLE AND NECESSARY TO RELIEVE THE AFFECTS OF THE INJURY.

C.

RELATOR ISP MINERALS HAS NOT ESTABLISHED THAT IT WILL SUFFER IMMEDIATE AND IRRIPAIRABLE HARM BY THE QUASHING OF THE PRELIMINARY WRIT; APPELLANT HAS NOT BEEN PAYING FOR THE UNDERLYING PARTY'S MEDICATION TO DATE AND WILL HAVE OPPORTUNITY TO PRESENT ITS EVIDENCE TO THE COMMISSION, AS IT WOULD IN CIRCUIT COURT.

ARGUMENT

I.

THE SUPREME COURT SHOULD QUASH ITS PRELIMINARY WRIT OF PROHIBITION ABSOLUTE, FOR THE REASONS THAT:

A.

RELATOR IS NOT ENTITLED TO A WRIT IN PROHIBITION BECAUSE RESPONDENT COMMISSION DID NOT ERR IN EXERCISING JURISDICTION OVER A PARTIAL SETTLEMENT AGREEMENT AND ORDERING AN EVIDENTIARY HEARING TO DETERMINE MEDICAL TREATMENT REQUIRED BY THE PARTIAL SETTLEMENT IN THAT THE COMMISSION NEVER LOST JURISDICTION OVER THE MEDICAL CARE IN DISPUTE AS IT HAD PREVIOUSLY APPROVED A PARTIAL SETTLEMENT OF ALL ISSUES BUT FUTURE MEDICAL AND THEREFORE HAD RETAINED JURISDICTION OVER FUTURE MEDICAL TREATMENT ISSUES IN ORDER TO MAKE THE SETTLEMENT "ENFORCEABLE" AS REQUIRED BY 287.390.1.

INTRODUCTION

Respondent did not err in exercising jurisdiction in this matter and Sections 287.390 **R.S.Mo.**, 287.140.1 **R.S.Mo.**, and 287.801 **R.S.Mo.** support the Commission's order to schedule an Evidentiary Hearing on the issue of Employer's failure to provide medical treatment to relieve the effects of Mr. Alcorn's work related pulmonary condition pursuant to the partial agreement entered into by Alcorn and ISP Minerals which left future medical care open.

There are several relevant sections of the Act that support the Commission's jurisdiction in this case.

287.140.1 **R.S.Mo.** in relevant part:

> …In addition to all other compensation paid to the Employee under this section, the Employee shall receive and the Employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing's, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury.

287.390.1 **R.S.Mo.** (2005):

> Parties to claims hereunder may enter into voluntary agreements in settlement thereof, but no agreement by an employee or his or her dependents to waive his or her rights under this chapter shall be valid, nor shall any agreement of settlement or compromise of any dispute or claim for compensation under this chapter be valid until approved by an Administrative Law Judge or the Commission, nor shall an Administrative Law Judge or the Commission approve any settlement which is not in accordance with the rights of the parties as given in this chapter. No such agreement shall be valid unless made

> after seven days from the date of the injury or death. *An Administrative Law Judge, or the Commission, shall approve a Settlement Agreement as valid* ***and enforceable*** *as long as the settlement is not the result of undue influence or fraud, the Employee fully understands his or her rights and benefits, and voluntarily agrees to accept the terms of the agreement.* [2]

Also added as part of the 2005 Amendments to the Act is 287.801 **R.S.Mo.** which provides:

> Beginning January 1, 2006, only Administrative Law Judges, the Commission, and the Appellate Courts of this state shall have the power to review Claims filed under this chapter.

Finally, interpretations of the Act in favor of the public welfare was changed to "strict" construction at 287.800 **R.S.Mo.** (2005)

Respondent notes the statutory evolution of § 287.140 **R.S.Mo.** provided that until September 1977, § 287.140 and its predecessor statutes created a specific obligatory treatment period (most recently 180 days), after which treatment could only be required by special order of the Commission. Effective September 28, 1977, the obligatory treatment period was eliminated and, with it, the need for a special order regarding ongoing medical treatment. **William v. A.B. Chance Co.,** 676 S.W.2d 1,3, fn. 1 (Mo.App.1984). 287.140.1 **R.S.Mo.** (eff. 6/8/1977) previously read in relevant part.

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[2] Italicized sentence was added to this statute in 2005 amendment.

> In addition to all other compensation paid to the Employee under this section, the Employee shall receive and the Employer shall provide such medical, surgical and hospital treatment, including nursing, ambulance and medicines, as may reasonably be required for the first one hundred eighty days after the injury or disability, to cure and relieve from the effects of the injury, and thereafter such additional similar treatment as the Division or the Commission by special order may determine to be necessary.

At issue before the Court is whether the Act empowers the Commission to retain jurisdiction over settlements where future medical is left "open" and indeterminate without time constraints, pursuant to the settlement agreement approved by ALJ Lane. Relator cites several cases for the proposition that the Commission loses jurisdiction of a settlement once approved, but cites only cases that deal with different partial settlement issues. **Shockley v. Laclede Electric,** 825 S.W.2d 44, 48-49 (Mo.S.D. 1992) (settlement agreement did not reference future medical for prosthetic and therefore closed out claim); **Mosier v. St. Joseph Lead Co.,** 205 S.W.2d 228, 233 (Mo.E.D. 1947) (final settlement off all issues, once approved is irrevocable and no ongoing jurisdiction "unless, perchance, the settlement was for some reason void on its face so as to have left the matter pending before the Commission on the Employee's claim which theretofore filed"); **Derby v. Jackson County Circuit Court,** 141 S.W.3d 413, 416 (Mo.W.D. 2004) (settlement leaving open medical for future surgery for period of two years was not reviewable after two year period had expired); **Meinczinger v. Harrah's Casino,** 367 S.W.3d

666, 669 (Mo.E.D. 2012) (filing a new claim with new date of injury could not serve to revive jurisdiction for an injury claim that had previously been settled).

None of these cases dealt with an instance such as herein where a general clause to the settlement document expressly left "future medical" "open" to later determination at an indefinite time. Therefore, none of the cases cited by Relator are on point.

Missouri Courts have approved the Commission's jurisdiction on the necessity and work relatedness of treatment rendered or recommended after a final award which included future medical care. **Cahall v. Riddle Trucking,** 956 S.W.2d 315, 318 (Mo.App. 1997), overruled on other grounds by **Hampton v. Big Boy Steel Erection,** 121 S.W.3d 220 (Mo. banc 2003). They further have upheld Commission decisions on future medical care disputes in 287.390 settlements. **Noel v. ABB Combustion Engineering,** 383 S.W.3d 480 (Mo.App.E.D. 2012). Finally, Missouri Courts have treated settlements pursuant to 287.390 which leave open future medical care as temporary awards. **Weiss v. Anheuser-Busch, Inc.,** 117 S.W.2d 682 (Mo.App. 1940); **Blissenbach v. General Motors Assembly Division,** 776 S.W.2d 889 (Mo.App.E.D. 1989).

Courts have routinely held that determinations regarding as to medical care under § 287.140 is for administrative determination by The Division of Workers' Compensation or the Commission. **State ex rel. Rival co. v. Gant,** 945 S.W.2d 475, 477 (Mo.App.W.D.1997), citing **State ex rel. Standard Register Co. v. Mummert,** 880 S.W.2d 925, 926 (Mo.App.E.D.1994); See also, **State ex rel. Lester E. Cox Med. Ctr. V. Wieland,** 985 S.W.2d 924 (Mo.App.S.D.1999).

The Courts have held that the Workers' Compensation Act permits the allowance for the cost of future medical treatment and such an award is an exception to the general rule regarding

the 'definiteness" requirements. In **P.M. v. Metromedia Steakhouses Co. Inc.,** 931 S.W.2d 846, 850 (Mo.App.1996) the Court rejected a contention that future medical cost in an award should be rejected because it was "vague, indefinite", and not authorized by law. See also **Taylor v. St. John's Regional Health Center,** 161 S.W.2d 868, 872 (Mo.App.S.D. 2005). It is impossible to know what conditions or complications may medically arise in the future. **Gill v. Massman Construction Company,** 458 S.W.2d 878, 881 (Mo.App.1970).

As previously noted, in 2005 the legislative made numerous amendments to the Act, none prohibited the Commission's jurisdiction post settlement or in a final award regarding the issue of determining future medical care.

If a final award contains an award of future medical care to cure and relieve the effects of a work injury or if an award contains a provision leaving future medical care "open," the Commission has the authority to determine the necessity and reasonableness of requested medical care and to determine whether such medical care is causally-related to, and flows from, the work injury.

This same authority (i.e., the authority to determine the necessity and reasonableness of requested medical care and to determine whether such medical care is causally-related to, and flows from, the work injury) applies to settlements approved, in part, based upon and Employer's promise to provide future medical care. To hold otherwise, puts the workers' health at risk by delays in treatment especially if the injured worker is not represented and would create inconsistent rulings in Circuit Courts around the state with little familiarity with the interpretations of the Act. It is clear that the 2005 Amendments do not authorize the Circuit Court to have any jurisdiction, pursuant to 287.801 except as provided in 287.500.

It is well established that Section 287.500 does not provide authority for a Circuit Court to review a Workers' Compensation settlement or award. **Roller v. Steelman,** 297 S.W.3d 128, 133-134 (Mo.App. 2009), citing **Cochran v. Travelers Ins. Co.,** 284 S.W.3d 666 (Mo.App.2009) held:

> "The Circuit Court is not authorized to review a Workers' Compensation Claim. [§ 287.801 R.S.Mo.]. Section 287.500 provides a means by which a final award can be enforced by the Circuit Court. [See **Cochran** at 669; **Baxi** at 69]. However, as explained in **Cochran**, although section 287.500 authorizes a Circuit Court to enter a Judgment on a final Workers' Compensation award as if it were an original judgment of the Court, it does not afford the Circuit Court any discretion in entering that Judgment. A section 287.500 action is purely ministerial. It does not involve the merits of the award, and there are no further factual issues to be determined by the Circuit Court. **Id**. Thus, the Circuit Court may only enter a Judgment that is in accord with the Commission's award." (Emphasis in original).

The 2005 amendment adding language to § 287.390.1 **R.S.Mo.** requires "enforceability" and confers that approved settlements must be enforceable.

Respondent agrees that Workers' Compensation is not supplemental or declaratory of any existing rule, right, or remedy, but creates an entirely new right or remedy, which is wholly

substitutional in character, and supplants all other rights and remedies where Employer and Employee have elected to accept the Act, or are subject thereto by operation of law. **Sheets v. Hill Brother Distributers,** 379 S.W.2d 514, 516 (Mo.1964). All remedies, claims, or rights accruing to an Employee against an Employer for compensation for injury arising out of and in the course of employment are those provided for in the Act, to the exclusion of any common law or contractual rights. **Id.**

In the present case, Alcorn filed a Claim for Compensation for an occupational condition that was discovered on October of 2005 and that the Act, as amended in 2005, will govern the jurisdictional issue before this Honorable Court. The 2005 amendments to the Workers' Compensation Act changed the requirement of construction for the good of the public welfare. **Robinson v. Hooker,** 323 S.W.3d 418,423 (Mo.App.W.D.2010). As amended, Section 287.800.1 states ALJs, the Division and Industrial Commission "shall construe the provisions of this chapter strictly." R.S.Mo. §287.800.1. Strict construction of a statute presumes nothing which is not expressed therein. **Robinson,** 323 S.W.3d at 423. The clear, plain, obvious, and natural import of the language must be used. **Id.** The statute can be given no broader application that is warranted by its plain and unambiguous terms. **Id.** The legislature also added a new Section 287.801 which became effective January 1, 2006 which provides that only Administrative Law Judges, the Commission, and the Appellate Courts of this State shall have the power to review Claims filed under this chapter.

Section 287.390 provides that an Employer and Employee are authorized to compromise and Settle a Compensation Claim. **Strange v. SCI Business Products,** 17 S.W.3d 171, 173 (Mo.App.E.D.2000). Below are the noted amendment's to **R.S.Mo.** 287.390 made in 2005:

> [Nothing in this chapter shall be construed as preventing the] Parties to Claims hereunder [from entering] may enter into voluntary agreements in Settlement thereof, but no agreements by an Employee or his or her dependents to waive his or her rights under this chapter shall be valid, nor shall any agreement of settlement or compromise of any dispute of Claim for Compensation under this chapter be valid until approved by an Administrative Law Judge or the Commission, nor shall an Administrative Law Judge or the Commission approve any Settlement which is not in accordance with the rights of the parties as given in this chapter. An Administrative Law Judge, or the Commission, shall approve a Settlement Agreement as valid and **enforceable** as long as the Settlement Agreement is not the result of undue influence or fraud, the Employee fully understands his or her rights and benefits, and voluntarily agrees to accept the terms of the Agreement." R.S.Mo. §287.390.1 [3] (Emphasis added)

Section 287.390 does not provide that the Commission loses jurisdiction post settlement. It provides that the Division or Commission may approve and **enforce** Agreements. Those circumstances in part are based on the legislative authority to ascertain necessary and reasonableness of medical care protecting and insuring that the injured worker receives all

[3] The 2005 changes to §287.390 are set out in brackets when removed and underlined when added. The bold is added by the Respondent.

necessary medical care which is reasonably necessary to cure and relieve the effects of the injury. 287.140(1) **R.S.Mo.**

Relator has cited several Missouri cases that provide the Division and Commission loses jurisdiction of the case upon a voluntary Settlement or Award. However, a review of these cases will show only that they did not leave future medical care open for the duration of the Employee's life.

In **Shockley v. Laclede Electric Cooperative,** 825 S.W.2d 44 (Mo.App.S.D.1992) the two issues were (a) whether the Stipulation for Compromise Settlement was entered in violation of 8 **CSR** 50-2.010(31) and that the Claimant did not appear in person before the approval; and (b) the Award failed to fully relieve "the effects of the work-related injury even after Settlement or Award an Hearing, because the Award failed to provide for payment of future prosthetic devices as required by §287.140. **Id.** pg. 47. The Settlement contained no language keeping future medical care open and the Court held that on review of the Settlement Agreement was complete and left no issues, medical care, or payment for prosthetic devices open and therefore, completely discharged the Employers entire liability, including any liability for prosthesis expenses. **Id.** pg. 49.

In **Mosier v. St. Joseph Lead Co.,** 205 S.W.2d 227 (Mo.App.E.D.1937) the Employee and Employer/Insurer entered into a settlement agreement pursuant to §287.390. Future medical care was not part of the settlement agreement. The Employer later sought an Order from the Commission to set aside the Compromise Settlement and grant additional medical care. The Commission and the Court concluded that on approving the agreement was not subject to review as the Commission had no jurisdiction as future medical care was not part of the partial agreement.

In **Derby v. Jackson County Missouri Circuit Court,** 141 S.W.3d 413 (Mo.App.W.D.2004) the §287.390 agreement was found to be specific in time for surgical care (2 years post settlement) that did not allow an enlargement of the time period. The agreement did not leave open future medical care for the injury indefinitely. The Employee filed a Motion with the Commission to extend the 2 year time period. The Court determined that there was nothing in the settlement agreement that intended the Commission to review the issue of future medical treatment beyond the two year.

Relator cites **Meinczinger v. Harrah's Casino,** 367 S.W.3d 666 (Mo.App.E.D. 2012) in support of position that the Commission does not have jurisdiction over a 2002 settled Claim pursuant to Section 287.390. Again, this agreement did not involve the issue of future medical care. The question was whether filing a new claim with a new date of injury could serve to revive jurisdiction for an injury claim that had been previously settled.

Relator incorrectly states that when the legislature amended Section 287.390, in 2005:

> It did not add any language to that section stating the Division/or Industrial Commission possessed jurisdiction to review or enforce an approved settlement agreement, or to hold additional proceeding on a Claim, including an Evidentiary Hearing on disputed factual issues between parties to the Claim, after an ALJ or the Industrial Commission approved a Settlement Agreement compromising the Claim. (Relator's brief pg. 45).

Relator argues that the failure of the legislature to confer jurisdiction on the Commission is evidence that there is no jurisdiction. Relator completely ignores that the legislature did indeed confer jurisdiction by adding the word "enforceable" to the powers of the Administrative Law Judge and Commission in 287.390.1. When the statutes are amended, the Legislature is presumed to be aware of existing case precedent. In this case there is case precedent.

In **Weiss v. Anheuser Busch, Inc.,** 117 S.W.2d 682 (Mo.App.1940) the Employee and Employer/Insurer entered into an Agreement by Stipulation in which the insurer agreed to furnish future medical care. The Court concluded that the Commission had authority to retain jurisdiction of the Claim as the Agreement conclusively appeared to leave the Claim open for future adjustment for medical care. **Id.** pg. 686.

In **Blissenbach v. General Motor's Assembly Division,** 776 S.W.2d 889 (Mo.App.E.D.1989) the parties agreed and entered into a Compromise Settlement that provided in additional to a lump sum settlement for permanent partial disability, that future medical care would be provided by the Employer. The Court of Appeals cited **Weiss v. Anheuser Busch, Inc.,** stating that the Agreement to furnish future medical payments made the Award a "temporary or partial Award, with the Commission expressly and explicitly retaining jurisdiction over the Claim for such future adjustments as might be deemed proper. **Id.** pg. 684. The **Blissenbach** decision again held the Commission's jurisdiction was held open when future medical care remained open. **Id.** pg. 891.

In the present case the agreement contains language leaving issues for future medical care open for Alcorn's pulmonary condition and authorizing the treating physician. This represents a partial or temporary settlement as the treatment is ongoing during the life of the Employee. Pursuant to **Weiss**, **Blissenbach, Noel,** and the Act, the settlement is not final and the Commission has authority and jurisdiction to hold a Hearing on the issue of treatment by use of inhalers for Alcorn's COPD and pulmonary related disease. The Employer/Insurer had been paying for this treatment prior to and after the January 8, 2009 settlement. The Act does not require the Claimant to provide evidence at the time of the Hearing or settlement as to specific medical treatments or procedures that will be necessary in the future as that would put an

impossible and unrealistic burden upon the Claimant. **Bradshaw v. Brown Shoe Co.,** 660 S.W.2d 390, 394 (Mo.App.S.D. 1983).

A settlement that agrees to provide future medical care should not be expected nor can it be possible to list every medical treatment an Employee would need. It is well realized with the Act that there will be future factual issues that may arise. The Act is clear that any factual issues are to be resolved by the Commission and deference should be given to those factual findings by that administrative body. This provides for consistency and guidance. If Circuit Courts throughout Missouri were to make these determinations, the potential for inconsistent outcomes would unfortunately occur and create confusion and peril to the working citizens of Missouri who sustain accidents at work and have no choice but to be governed by the Missouri Workers' Compensation Act.

The determination of what sort of care as may be necessarily needed to be rendered to the Employee is within the exclusive province of the Division of Workers' Compensation §287.140.1. **R.S.Mo.**; **Felt v. Ford Motor Company,** 916 S.W.2d 798, 801, 802 (Mo.App.1995); **State ex rel Standard Register Co. v. Mummert,** 880 S.W.2d 925, 926 (Mo.App.E.D.1994); **State ex rel Rival Co. v. Grant,** 945 S.W.2d 475 (Mo.App.W.D.1997).

Relator's incorrectly states that the Alcorn-ISP Minerals settlement agreement:

> "failed to preserve any right to future medical care, other than the medical monitoring care to be performed by Dr. Ojile expressly authorized in paragraph 6 or reserve any right he might have to additional proceeding before either the Division or the Industrial Commission on the issue of medical care. Accordingly, Employee waived any right he might possess to have the issue of medical treatment adjudicated by the Division or Industrial Commission, including the right to an Evidentiary Hearing on that issue." (Relator's brief pg. 50)

The aforementioned statement mistakes Exhibit 4-5, paragraph 6 and the fact that Employer/Insurer paid for the authorized medications in question before and after the 287.390 agreement was entered into on January 8, 2009.

Respondent acted within its jurisdiction under the Act when it ordered an Evidentiary Hearing to review the approved 287.390 settlement agreement to determine a dispute regarding medical care the Employee needs to cure and relieve the effects of his work related pulmonary condition.

This Honorable Court should quash their Preliminary Write of Prohibition Absolute.

B.

THE ACT AND CASE LAW SUPPORT AND CONFER THE RESPONDENT'S ACTION IN ISSUING ITS AUGUST 14, 2014 ORDER TO DETERMINE WHETHER MEDICAL TREATMENT AND CARE ARE RELATED TO THE INJURY, AND ARE REASONABLE AND NECESSARY TO RELIEVE THE AFFECTS OF THE INJURY.

Relator maintains that the authorities Respondent cited specifically **State ex rel Rival v. Gant,** 945 S.W.2d 475, 477 (Mo.App. 1977); **State ex rel Lester E. Cos Medical Center v. Wiehand**, 895 S.W.2d 924, 926 (Mo.App. S.D. 1999), and **State ex rel Standard Register Co. v. Mummert**, 880 S.W.2d 925, 926 (Mo.App.E.D. 1994) do not support a finding that the Commission maintains jurisdiction post settlement or award to determine issues that arise in future medical care.

Respondent's reference in its order to the aforementioned cases were only cited to reflect Appellate decisions that can confirm and endorse the Commission's exclusive province to determine what sort of medical care may be necessarily rendered to the Employee as provided in section 287.140.1.

The legislators' added the new language providing enforcement to section **R.S.Mo.** 287.390 which enhanced the already recognized authority and jurisdiction of the Commission to effectively carry out the terms of the agreement. Clearly, the new statutory language did not prohibit prior decision and facts of Commission as the holdings set out in **Weiss, Blissenbach**, **Cahall**, and **Noel** providing that the Commission does have jurisdiction.

Relator has ignored the added new section to the Act **R.S.Mo.** 287.801 amendments to the Act which provided beginning in January 1, 2006 that only the Administrative Law Judge, the Commission, and Appellate Courts of this state have the power to review Claims filed under this chapter. This clear unambiguous language appears to prohibit a Circuit Court review of a settlement agreement that arises out of **R.S.Mo.** 287.390.

Relator repeatedly and erroneously argues that no provision of the Act authorizes the Commission to enforce an approved settlement agreement compromising a compensation Claim. Again, this ignores the 2005 Amendment adding the "enforceability" language **R.S.Mo.** 287.390 and the restrictions mandated to the Commission and Appellate Courts in **R.S.Mo.** 287.801.

Respondent does not refute that the Act confers jurisdiction on the Commission to review or otherwise act upon final awards in three circumstances: 1) the modification of an award of death benefits; 2) the modification of an award of permanent total disability benefits; and 3) the commutation of an award of benefits. **R.S.Mo.** § § 287.240(9); 287.470; 287.530. However, the Relator continues to ignore the reality that the Commission has always retained jurisdiction on issues of future medical care whether in a final award or in a 287.390 settlement. In **Noel v. ABB Combustion Engineering,** 383 S.S.3d 480(Mo.App. 2012). Claimant and the Employer/Insurer settled with open future medical treatment. Four years later, the Employer/Insurer sought to change the Claimants medications. The Commission ordered an evidentiary hearing to obtain the

evidence so they could determine whether the change in medication would endanger the Claimant's life, health, or recovery. **Id** 483.

Weiss v. Anheuser-Busch for the holding that an agreement pursuant to section 3333 (currently **R.S.Mo.** 287.390) which provided for future medical care to be kept open was a temporary or partial award and therefore issues concerning the type or changes to care to relieve the effects of the workers injuries were to be addressed by the Commission.

Relator's provides elaborate references to **Cochran v. Travelers**, 284 S.W.3d 666 (Mo.App.S.D.2009); **Baxi v. United Technologies Automotive,** 122 S.W.3d 92 (Mo.App.E.D. 2003); and **Roller v. Steelman,** 297 S.W.3d 128 (Mo.App.W.D. 2009) for the authority that settlements or final awards can only be given enforced by the Circuit Courts pursuant **to R.S.Mo.** 287.500. Respondent does not disagree except when there is the need to determine future medical care issues to which the Division and Commission retain jurisdiction.

Relators arguments concerning the order of cost and attorney's fees pursuant to 287.560 is premature, however, because the Commission does retain jurisdiction on determination of future medical issues, the statutes and regulations that govern such proceedings would guide the Respondent including 287.560.

C.

RELATOR ISP MINERALS HAS NOT ESTABLISHED THAT IT WILL SUFFER IMMEDIATE AND IRRIPAIRABLE HARM BY THE QUASHING OF THE PRELIMINARY WRIT; APPELLANT HAS NOT BEEN PAYING FOR THE UNDERLYING PARTY'S MEDICATION TO DATE AND WILL HAVE OPPORTUNITY TO PRESENT ITS EVIDENCE TO THE COMMISSION, AS IT WOULD IN CIRCUIT COURT.

Relator's vigorous but erroneous claims that they do not owe future medical care to the underlying party require a determination that the treatment arises from the work related condition and is needed to cure and relieve the effects of the injury. This unique task has been delegated to the Division of Workers' Compensation and the Commission to determine by statute and case law. In the present case the "open medical" means the Commission has never lost jurisdiction.

Relator has chosen not to pay for Alcorn's medications and is therefore not under a financial harm. Relator's argument that the interpretation of future medical care should be left to the Circuit Courts under a common law action of declaratory judgment or specific performance pursuant to section 527.020 is not applicable in issues of future medical care in a partial settlement requiring the Employee who may be unrepresented to pursue actions in Circuit Court would be detrimental to the basic protections of the Act which was created to provide consistent reasonable and informal adjudication of work related injuries to workers.

In **State ex rel. Womack v. Rolf,** 73 S.W.3d 634, 636 (Mo. banc 2005), the Missouri Supreme Court laid out the Constitutional basis and standard of review for issuing a Writ of Prohibition:

> This Court will exercise its Constitutional authority under Mo. Const. art. V, sec. 4, to grant a Writ of Prohibition in three circumstances: 1) to prevent the usurpation of judicial power when the trial court lacks jurisdiction; 2) to remedy a[n] excess of jurisdiction or an abuse of discretion where the lower court lacks the power to act as intended; or 3) where a party may suffer irreparable harm if relief is not made available in response

to the trial court's order. **State ex rel. Proctor v. Bryson,** 100 S.W.3d 775, 776 (Mo. banc 2003). "The essential function of prohibition is to correct or prevent inferior courts and agencies from acting without or in excess of their jurisdiction." **State ex rel. Douglas Toyota III, Inc. v. Keeter,** 804 S.W.2d 750, 752 (Mo. banc 1991). It is also "not generally intended as a substitute for correction of alleged or anticipated judicial errors…." **Id.**

This extraordinary remedy should not be issued because the Commission retains jurisdiction to rule on issues involving future medical care of workers. In light of the foregoing, it is clear that this Honorable Court should not make its Preliminary Writ of Prohibition Absolute.

CONCLUSION

This Honorable Court must not make its Preliminary Writ of Prohibition Absolute. Case law and the Act provide the Commission with jurisdiction to review an approved settlement agreement and order an evidentiary hearing regarding the rights and obligations of the parties when the issue of medical care arises and the parties agree that medical care would be provided to the worker for the remainder of his life.

The Commissions August 14, 2014 order was proper as the Commission never lost jurisdiction of this partial settlement. A Writ of Prohibition to prevent that order is not appropriate and should be quashed.

Respectfully submitted,
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CERTIFICATE OF SERVICE

A copy of the foregoing document was filed with the Missouri electronic filing system this 26th day of February, 2015, which will send a copy to: Ms. Mary Ann Lindsey and Robert Haeckel, 211 N. Broadway, Suite 2500, St. Louis, MO 63102, (314-621-7755), attorney for Relator; and to John Larsen, Jr., James Avery, Jr., and Curtis Chick, Jr., at Labor & Industrial Commission, 3315 West Truman Boulevard, Jefferson City, Missouri 65102, (573-751-2461); Randy Charles Alberhasky, 419 N. Boonville Ave., Springfield, MO 65806, (417-865-4444), attorney representing Missouri Association of Trial Attorneys.

/s/ Nancy R. Mogab

CERTIFICATE OF COMPLIANCE

This Brief complies with Rule 84.06 (b)(1) and contains 6,478 words. To the best of my knowledge and belief, the copy of the Relator's Brief forwarded to the Clerk of the Court, via electronic mail, in lieu of a floppy disc or CD, has been scanned for viruses, and is virus-free.

/s/ Nancy R. Mogab____