IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI ex rel ISP MINERALS, INC.,	)	
Relator,	)	
vs.	)	SC94478
THE LABOR & INDUSTRIAL RELATIONS COMMISSION,	)	
Respondent.	)	

By Writ from the Labor & Industrial Relations Commission

AMICUS BRIEF OF THE MISSOURI ASSOCIATION OF TRIAL ATTORNEYS IN SUPPORT OF RESPONDENT

Respectfully Submitted By:

THE ALBERHASKY LAW FIRM, PC

/s/ Randy Charles Alberhasky
Randy Charles Alberhasky
MoBar #42551
Attorney for Amicus MATA
419 N. Boonville Ave.
Springfield, MO 65806
(417) 865-4444
FAX: (417) 865-5159
alberhaskylaw@sbcglobal.net

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES & CONSTITUTION

JURISDICTIONAL STATEMENT

Since this is not a matter on appeal of a final award from the Labor & Industrial Relations Commission ("LIRC"), R.S.Mo. Sec. 287.495 (1998) does not apply. This matter is before the Missouri Supreme Court on Petition In Prohibition/Alternative Petition in Mandamus filed by ISP Minerals after the Missouri Court of Appeals, Western District, denied the same. 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

MATA hereby adopts the factual background set forth in Relator's Brief.

POINTS RELIED ON

I. RELATOR IS NOT ENTITLED TO A WRIT IN PROHIBITION OR MANDAMUS PREVENTING RESPONDENT LIRC FROM EXERCISING JURISDICTION OVER THE ISSUE OF MEDICAL TREATMENT BECAUSE RESPONDENT LIRC RETAINED JURISDICTION OVER THE PARTIAL SETTLEMENT AGREEMENT IN ORDER TO DETERMINE THE MEDICAL CARE NECESSARY TO CURE AND RELIEVE THE EFFECTS OF THE INJURY IN THAT THE MEDICAL CARE IN DISPUTE HAD NOT BEEN RESOLVED BY THE PREVIOUSLY APPROVED PARTIAL SETTLEMENT, WHICH LEFT FUTURE MEDICAL TREATMENT "OPEN", AND THEREFORE RESPONDENT LIRC RETAINED CONTINUOUS JURISDICTION OVER DISPUTED MEDICAL TREATMENT ISSUES IN ORDER TO MAKE THE SETTLEMENT "ENFORCEABLE" AS NEEDED UNDER R.S.Mo. SEC. 287.390.1 (2005) AND R.S.Mo. SEC. 287.801 (2005).

Weiss v. Anheuser-Busch, 117 S.W.2d 682 (Mo App. E.D. 1938)

Turner v. School Dist. of Clayton, 318 S.W.3d 660 (Mo. banc 2010)

Brown v. Color Coating, Inc., 867 S.W.2d 242 (Mo. App. S.D. 1993)

ARGUMENT

I. RELATOR IS NOT ENTITLED TO A WRIT IN PROHIBITION OR MANDAMUS PREVENTING RESPONDENT LIRC FROM EXERCISING JURISDICTION OVER THE ISSUE OF MEDICAL TREATMENT BECAUSE RESPONDENT LIRC RETAINED JURISDICTION OVER THE PARTIAL SETTLEMENT AGREEMENT IN ORDER TO DETERMINE THE MEDICAL CARE NECESSARY TO CURE AND RELIEVE THE EFFECTS OF THE INJURY IN THAT THE MEDICAL CARE IN DISPUTE HAD NOT BEEN RESOLVED BY THE PREVIOUSLY APPROVED PARTIAL SETTLEMENT, WHICH LEFT FUTURE MEDICAL TREATMENT "OPEN", AND THEREFORE RESPONDENT LIRC RETAINED CONTINUOUS JURISDICTION OVER DISPUTED MEDICAL TREATMENT ISSUES IN ORDER TO MAKE THE SETTLEMENT "ENFORCEABLE" AS NEEDED UNDER R.S.Mo. SEC. 287.390.1 (2005) AND R.S.Mo. SEC. 287.801 (2005).

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.

The Labor & Industrial Relations Commission ("LIRC") is a statutory creation under The Missouri Workers' Compensation Law and only possesses such power and jurisdiction as provided by statute. *Hayes v. Show Me Believers*, 192 S.W.3d 706, 707 (Mo. banc 2006); *State ex rel. Melbourne Hotel v. Hostetter*, 126 S.W.2d 1189, 1192 (Mo. banc 2006). In 2005, "strict" construction replaced the "liberal" construction as the rule for statutory interpretation of The Missouri Workers' Compensation Law. R.S.Mo. Sec. 287.800.1 (2005). "Strict construction means that a statute can be given no broader application than is warranted by its plain unambiguous terms." *Shaw v. Mega Industries*, Corp. 406 S.W.3d 466, 472 (Mo. W.D. 2013). When interpreting statutes, the intent of

the legislature must be considered if the language is ambiguous or lead to an illogical interpretation:

> The primary rule of statutory interpretation is to ascertain the intent of the legislature from the language used, to give effect to the intent if possible, and to consider the words used in their plain and ordinary meaning. The legislature is presumed to have intended what the statute says, and if the language used is clear, there is no room for construction beyond the plain meaning of the law. *We will look beyond the plain meaning of the words of a statute only when the language is ambiguous or would lead to an absurd or illogical result.*

Shaw at 469 (italics provided).

However, "strict construction" is not the only rule of statutory construction, to be applied to the exclusion of all others. "Provisions of an entire legislative act must be construed together and, if reasonably possible, all provisions must be harmonized." *Chester Bross Const. Co. v. Missouri Dept. of Labor and Indus. Relations, Div. of Labor Standards*, 111 S.W.3d 425, 427 (Mo. App. E.D. 2003) (quoting *St. Louis County v. B.A.P., Inc.*, 25 S.W.3d 629, 631 (Mo. App. E.D. 2000)). Statutory provisions relating to the same subject matter "must be considered in context and sections of the statutes in pari materia, as well as cognate sections, must be considered in order to arrive at the true meaning and scope of the words." *Harpagon MO, LLC v. Bosch*, 370 S.W.3d 579, 584 (Mo. banc 2012) (quoting *South Metro. Fire Prot. Dist. v. City of Lee's Summit*, 278

S.W.3d 659, 666 (Mo. banc 2009)); see also *Sedgwick* at 209 ("It is well settled, that in construing a doubtful statute, and for the purpose of arriving at the legislative intent, all acts on the same subject-matter are to be taken together and examined, in order to arrive at the true result.") This allows the legislation to be read consistently and harmoniously. *Crawford v. Div. of Employment Sec.*, 376 S.W.3d 658, 664 (Mo. banc 2012). "The rule that statutes in pari materia are to be consulted for the construction of each other, holds good, though some of the statutes may have expired, or even been repealed, and whether they are referred to or not." *Sedgwick* at 212. Statutes are enforced as they are written, not as they might have been written. *Turner* at 667. The Court presumes the legislature intended every word, clause, sentence, and provision of a statute to have effect and did not insert superfluous language into the statute. City of *Shelbina v. Shelby County*, 245 S.W.3d 249, 252 (Mo. App. E.D. 2008). "The construction of statutes is not to be hyper-technical, but instead is to be reasonable and logical and [to] give meaning to the statutes." *Lewis v. Gibbons*, 80 S.W.3d 461, 465 (Mo. banc 2002) (internal quotations omitted).

In keeping with the rules of statutory construction, there are several applicable statutes in The Missouri Workers' Compensation Law that must be considered *together* when determining whether the LIRC retains ongoing jurisdiction over a settlement leaving medical open for undetermined future medical care. We start with those statutes

dealing with jurisdiction and/or medical care that predate and were unchanged by the 2005 amendments, or were more recently amended, R.S.Mo. Sec. 287.120 (2013)[1]:

> 287.120. 1. Every employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation *under the provisions of this chapter* for personal injury or death of the employee by accident or occupational disease arising out of and in the course of the employee's employment.

We can garner from several sections the overall intent of the legislature to leave all evidentiary and factual determinations in the sole province of the LIRC. R.S.Mo. Sec. 287.410 (1980) states that the "power and duty to review any award made under the workers' compensation law, as authorized by sections 287.470 and 287.480[2], may not be delegated , but such power and duty shall be exercised exclusively by the commission". Section 287.470 deals with the LIRC's power to review and change an award "Upon its own motion or upon the application of any party in interest on the ground of a change in condition". The Missouri Workers' Compensation Law provides that when there is a

---

[1] The 2013 amendment added occupational diseases, which were not included in the 2005 statute, and also included a release of liability for co-employees.

[2] R.S.Mo. Sec. 287.480 (1998) deals with the application of review to the LIRC being filed within 20 days of the date of the award and that the LIRC "shall make an award and file it in like manner as specified in section 287.470".

disagreement among the employee and the employer as to the amount "payable" under the statute, a hearing may be held pursuant to R.S.Mo. Sec. 287.450 (1992):

> If the employer and employee or his dependents do not agree in regard to compensation payable under this chapter, either party may make application in a manner determined by the division for a hearing in regard to the matters at issue and for a ruling thereon, except that no application for a hearing shall be considered until fourteen days after the receipt by the division of the report of accident required under section 287.380. The fourteen-day waiting period is not applicable to applications for hardship hearings. After the application has been received, the division shall set a date for a hearing, which shall be held as soon as practicable, and shall notify the interested parties of the time and place of the hearing.

Additionally, The Missouri Workers' Compensation Law makes specific provision under R.S.Mo. Sec. 287.510 (2005) for claims to be left "open" to modification if only a partial or temporary award is made:

> In any case a temporary or partial award of compensation may be made, and the same may be modified from time to time to meet the needs of the case, and **the same may be kept open until a final award can be made**, and if the same be not complied with, the amount *equal to the value of compensation ordered and unpaid*

may be doubled[3] in the final award, if the final award shall be in accordance with the temporary or partial award.

Obviously, the case before us does not deal with an *award* issued by an ALJ or the LIRC, but rather a partial *settlement* that was approved by the ALJ on January 8, 2009, whereby the parties stipulated "ER/INS *agrees to leave future related pulmonary med. care open*." (Ex. 4-5, italics supplied). Still, R.S.Mo. Sec. 287.510 (2005) is illuminating when determining the intent of the legislature to keep jurisdiction before the LIRC on open medical issues.

Since we are dealing with a partial settlement, R.S.Mo. Sec. 287.390.1 (2005) is especially relevant:

> 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

[3] The portion in italics was added in 2005.

> 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*.[4]

Finally, as part of the many 2005 amendments to massive overhaul of The Missouri Workers' Compensation Law, a crucial addition was made by the legislature which in plain language bears upon the clear intent of the legislature to keep the review of all claims within the jurisdiction of the LIRC and out of circuit court. R.S.Mo. Sec. 287.801 (2005) was added:

> [b]eginning 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."

With these several existing statutes, post 2005 amendments and entirely new additions in mind, we can address the issue before the court now as to whether The Missouri Workers' Compensation Law empowers the LIRC to retain jurisdiction over partial settlements where future medical is left "open" and indeterminate without time constraints, pursuant to the settlement agreement approved by an ALJ on January 8, 2009 for an October 14, 2005 injury. Relator cites several cases for the proposition that the

---

[4] The italicized sentence was added to the statute in the 2005 amendment.

LIRC loses jurisdiction of *any and all settlements*, once approved, but all of the cases cited (1) make no mention of "*future medical*" in the settlement, but rather purport to close out *"all issues" forever*; (2) cite *specific and predetermined* medical care expenses to be reimbursed where there is no issue of whether the care is "necessary to cure and relieve the effects of the injury"; or (3) deal with limited instances where future medical was left open for a *predetermined time period that had subsequently passed*. *Shockley v. Laclede Electric*, 825 S.W.2d 44, 48-49 (Mo. App. 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. App. 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. App. W.D. 2004) (settlement leaving open medical for future surgery for period of two years[5] was not reviewable *after two year period had expired*);*Meinczinger v. Harrah's Casino*, 367 S.W.3d 666, 669 (Mo. App. E.D. 2012)(filing a new claim with new date of injury could not serve to

---

[5] The language of the settlement read, "If claimant becomes a surgical candidate within 2(two) years from the date of this stipulation, employer will pay reasonable & customary charges for surgery by a doctor of claimant's choice to resolve the ACL tear to claimant's knee and the torn lateral ligaments of her left ankle."

revive jurisdiction for an injury claim that had previously been settled in its entirety). However, none of these cases dealt with an instance, such as herein, where the settlement document expressly left "future medical" "open" for later determination at an indefinite time. As such, simply none of the cases cited by Relator are on point. Notably, only one case *(Meinczinger)* even deals with post 2005 law.

Relator acknowledges that substantial amendments were made in 2005 to The Missouri Workers' Compensation Law, but falsely asserts that "the legislature did not add any language to Sec. 287.390, stating the Division and/or Industrial Commission possessed jurisdiction to review or enforce an approved settlement, or to hold additional proceedings 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." Au contraire, that is exactly what the legislature did in 2005 to R.S.Mo. Sec. 287.395.1 (2005). Even if the LIRC did not retain jurisdiction to determine issues involving "future medical" being "left open" prior to 2005, which Relator has not and cannot establish under the cases cited, it certainly garnered the power to retain jurisdiction to do so under the 2005 amendments, where the following new language was added to R.S.Mo. Sec. 287.390.1 (2005):

> *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.

Hence, under the newly added language, in 2005 it became the duty of the ALJ, or the LIRC, to approve all settlement agreements not only as valid, as had always been the case, but "*enforceable*" as well. The term "enforceable" has a distinct and specific legal meaning in context. It is of no coincidence that R.S.Mo. Sec. 287.500 (1963) provides that a certified copy of "a memorandum agreement approved by the division or by the commission or of and order or decision" can be filed in circuit court, "whereupon said court shall render judgment in accordance therewith". When a settlement agreement is so filed, the circuit court has no choice but to enter a judgement in accordance therewith so long as the agreement as approved is *"enforceable"*:

> A Workers' Compensation award adjudicates the rights of the parties as effectively as a judgment of a court of law, and proceedings pursuant to § 287.500 merely provide a method for *enforcement* of the award. *Spradling v. Wackman Welded Ware Co.*, 239 Mo.App. 1195, 205 S.W.2d 290, 291 (1947). While not providing a complete review of the award after the time for a direct appeal has expired, an appeal from a judgment entered pursuant to § 287.500 does permit review under the principles applicable to collateral attacks on judgments. See *Brashear v. Brand-Dunwoody Milling* Co., 21 S.W.2d 191, 192-93 (Mo.App.1929). Judgments which are void are subject to collateral attack. *LaPresto v. LaPresto*, 285 S.W.2d

568, 570 (Mo.1955); *Woodruff v. Tourville Quarry, Inc.*, 381 S.W.2d 14, 19 (Mo.App.1964). Accordingly, an appeal from a judgment entered pursuant to § 287.500 permits review to determine if the award was void. *Woodruff v. Tourville Quarry, Inc.*, 381 S.W.2d at 19. If void, the award may be impeached at any time in any proceeding. Id. *A judgment which is indefinite is void and unenforceable. Luna v. Grisham*, 620 S.W.2d 427, 428 (Mo.App.1981). If a judgment is void, an appellate court acquires jurisdiction only to determine the invalidity of the order or judgment appealed from and to dismiss the appeal. *Cook v. Curtis*, 837 S.W.2d 29, 30 (Mo.App.1992). Therefore, the pertinent inquiry in the instant case is whether the judgment in question was void and *unenforceable. An essential requirement of a judgment is that it be sufficiently certain in its terms to be susceptible of enforcement in the manner provided by law. To comply with this requirement, the judgment must adjudicate the controversy to a conclusion which permits issuance and processing of an execution without external proof or another hearing. In re Marriage of Dusing*, 654 S.W.2d 938, 945 (Mo.App.1983) (quoting from *Ravenscroft v. Ravenscroft*, 585 S.W.2d 270, 273 (Mo.App.1979)). It has also been said: ... [A] judgment must fix the rights and responsibilities of the parties, with the obligor's duties readily understood so as to be capable of performance, and with the clerk able to issue, and the sheriff to levy, execution. *Payne v. Payne*, 695 S.W.2d 494, 497 (Mo.App.1985); *Luna v. Grisham*, 620 S.W.2d at 428.

Brown v. Color Coating, Inc., 867 S.W.2d 242 (Mo. App. S.D., 1993)(italics provided).

When the legislature amended R.S.Mo. Sec. 287.390.1 in 2005, it presumably was aware of the not only the existing language in R.S.Mo. Sec. 287.500 (1963), but also the preexisting case law regarding "enforceable" settlements, orders and awards. *Turner v. School Dist. of Clayton*, 318 S.W.3d 660, 667 (Mo. banc 2010). When one reads the clear and plain language of the amendment to R.S.Mo. Sec. 287.390.1 (2005), in context with The Missouri Workers' Compensation Law in general and R.S.Mo. Sec. 287.801 (2005) specifically, it is self-evident that it is the LIRC retains jurisdiction over a partial settlement where "future medical" is left open and it is the LIRC, or the ALJ, that must "approve" the specific amount of the settlement or award in order to make it "enforceable". The reading of R.S.Mo. Sec. 287.500 (1963) and R.S.Mo. Sec. 287.801 (2005) together do not contemplate circumstances where the circuit court would ever hear any evidence or make any factual determinations in a workers' compensation claim, such as would be required with an "open medical" agreement or award, where a factual determination must be made as to what treatment is necessary to cure and relieve the effects of the injury. Nonetheless, R.S.Mo. Sec. 287.140 (2005) clearly requires the employer to provide such medical treatment as is reasonably necessary to cure and relieve the effects of the employee's injury. See *Tillotson v. St. Joseph Med. Ctr.*, 347 S.W.3d 511, 517 (Mo. App. 2011).

R.S.Mo. Sec. 287.500 (1963) mandates that the award be definite in order to be "enforceable" and the circuit court cannot enter a judgement if the award is indefinite and hence unenforceable. *Brown* at 244 ("An essential requirement of a judgment is that it be

sufficiently certain in its terms to be susceptible of enforcement in the manner provided by law. To comply with this requirement, the judgment must adjudicate the controversy to a conclusion which permits issuance and processing of an execution without external proof or another hearing.") Would Relator's interpretation of R.S.Mo. Sec. 287.390 be accepted, it would lead to the absurd conclusion that the legislature intended that neither the LIRC or the circuit court have jurisdiction over approving the "enforceable" amount of the Award, even as Section 287.390 expressly affirms that the LIRC or ALJ must approve the agreement as "enforceable", i.e. capable of determination and entry of judgement without further evidence.

The 2005 amendment to R.S.Mo. Sec. 287.390.1, when read *pari materia* in conjunction with: (1) the *entirely new* addition of R.S.Mo. Sec. 287.801 (2005) dictating 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"; (2) R.S.Mo. Sec. 287.450 (1992) providing that "[i]f the employer and employee or his dependents do not agree in regard to compensation payable under this chapter, either party may make application for a hearing in regard to the matters at issue"; and (3) R.S.Mo. Sec. 287.510 (2005) providing for temporary or partial awards, "the same may be modified from time to time to meet the needs of the case, and the same may be kept open until a final award can be made", can only lead to the conclusion that the 2005 amendments were meant to affirm, if not extend, the jurisdiction of the LIRC and the ALJs to determine the "enforceable" amount of a voluntary settlement leaving future medical "open". Just as the LIRC retains

jurisdiction in a R.S.Mo. Sec. 287.510 (2005) award, jurisdiction continues over settlements until the settlement is approved as "enforceable". Then, and only then, can the settlement be filed and perfected as a judgment in circuit court under R.S.Mo. Sec. 287.500 (1963), without requiring further evidentiary proceedings. See *State ex rel Lester E. Cox Medical Center v. Wieland*, 95 S.W.2d 924, 926 (Mo. S.D. 1999). This is the only consistent an logical interpretation of The Missouri Workers' Compensation Law.

While jurisdiction plainly lies before the LIRC in this instance, it is notable to mention that the Court has recognized that the "plain language" of the 2005 amendments to the Missouri Workers' Compensation Law, under the lense of "strict construction", may lead us to conclude that concurrent jurisdiction lies between *both* the workers' compensation system and circuit court actions:

> But it is not an "absurd or illogical result" that would justify this Court in ignoring the plain language of the Act's various provisions. In other States, workers have been recognized to have parallel remedies through the workers' compensation system and court actions in a variety of circumstances, including in connection with claims for "[i]ntentional injury by the employer, non-physical injury torts, failure to provide safety devices, [and] employment of minors....". Indeed, Missouri's Workers' Compensation Law itself provides that an injured worker has the option of pursuing either an administrative or judicial remedy in at least one

> situation: where the worker's employer fails to maintain statutorily required insurance. See § 287.280.1; While perhaps unusual, it would therefore not be unprecedented, absurd, or irrational for the legislature to have provided repeat-exposure occupational disease claimants with a non-exclusive workers' compensation remedy.

State ex rel. KCP & L Greater Missouri Operations Co. v. Cook, 353 S.W.3d 14, 29 (Mo. App. 2011)(citations ommitted).

Relator's contention that res judicata and estoppel by judgment bar the employee from seeking medical treatment under the "open medical" provision of the settlement is clearly erroneous. Both principle's involve litigation that has previously been *concluded,* barring separate litigation over the same issues. In this instance, the issue of future medical care was specifically *unresolved* and the LIRC never lost jurisdiction over future medical issues. There is no prior judgment. Neither res judicata or estoppel apply herein because the issue of future medical was never fully litigated, the claim never final in its entirety. By definition, did Alcorn even have the opportunity to litigate the issue of "future medical"[6] needed to cure and relieve the injury. See *In re Marriage of Evans*, 155

[6] Relator argues in its brief that "the settlement agreement contained no reservation as to future proceedings on medical care". Relator contends that "employee failed to preserve any right to future medical care, other than medical monitoring care to be performed by Dr. Ojile". Relator's argument is incredible to the point of being incapable of legitimate debate. Relator

S.W.3d 90, 97-98 (Mo. App. S.D. 2004); *Ingels v. Citizens State Bank*, 632 S.W.2d 9, 12-13 (Mo. App.W.D. 1982).

Relator maintains that the LIRC retains no jurisdiction over a settlement leaving future medical "open". At the same time, Relator agrees that the legislature did not intend a R.S.Mo. Sec. 287.500 (1963) action to afford a means of determining the "substantive rights" of the parties, but rather can only be used as a method for "enforcing an award or settlement" without discretion. Presumably, in order to "enforce" a settlement in accordance with the agreement, the settlement must be "enforceable", i.e. determinable, per Sec. 287.390.1 (2005). However, Relator suggests that instead of the LIRC retaining jurisdiction to approve the "enforceable" amount of the settlement for future medical, per the plain meaning of R.S.Mo. Sec. 287.390.1 (2005) under strict construction, it would be left to the circuit courts under a common law theory of specific performance or under a declaratory judgment action pursuant to Sec. 527.020. Unsurprisingly, this has never been done and there is no authority for the proposition. Notably, specific performance requires a higher burden of proof than the preponderance of evidence standard used in workers' compensation law Sec. 287.808 (2005). "The party requesting specific performance of the agreement has the burden of proving the claim by

---

ignores the plain reading of the approved settlement, "*ER/INS agrees to leave future related pulmonary med. care open.*" Clearly, the parties contemplated revisiting the issue of future medical care. As such, it will not be addressed further herein.

clear, convincing, and satisfactory evidence." *Woods ex rel. Woods v. Cory*, 192 S.W.3d 450, 457 (Mo. App. 2006).

Such an interpretation of The Missouri Workers' Compensation Law is not only patently absurd, but contrary to Sec. 287.390.1 (2005) and Sec. 287.801 (2005) when read together, "[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". The whole purpose of designating the LIRC with jurisdiction over the administration of the Missouri Workers' Compensation Law is to relieve the courts of general jurisdiction from the burden handling workers' compensation claims, to simply the process for employers and employees alike, to develop judicial expertise and consistency within the system and to lower the cost of administering claims for all parties. Relator's proposed "remedy" would wreck havoc on the workers' compensation system by bifurcating jurisdiction for claims left open through settlement in a manner that would be fraught with abuse[7], while the LIRC would still retain jurisdiction over the same "open" medical cases where settlement was not reached, but instead a temporary or partial award issued under Sec. 287.510 (2005).

---

[7] Employers would settle claims before medical treatment is concluded, with the promise to leave "future medical open", immediately terminate medical care and force the matter into circuit court where they could use money and obstructive discovery practices to overburden the unrepresented claimant.

Not only is there no statutory basis for Relator's theory, but the proposed interpretation is counterintuitive, inconsistent and would greatly discourage the partial resolution of "any dispute or claim for compensation" where future medical was at issue. Sec. 287.390.1 (2005). Settlements, as a public policy, are to be *encouraged, not discouraged*. *Lowe v. Norfolk & W. Ry. Co.*, 753 S.W.2d 891, 894-95 (Mo. banc 1988) ("The policy of the law is to encourage settlements."). Henceforth, no claimant's attorney would ever recommend to a client that future medical be "left open" by settlement, it would lead to a never ending battle with the insurance company over future medical in circuit courts where filing fees and expanded rules of discovery would drastically slant the odds in favor of the employer and insurer with deep pockets and time to burn.

Respondent makes a distinction between Sec. 287.390.1 (2005), which pertains to the "*settlement or compromise of any dispute or claim*" and the express exceptions to post *award* LIRC jurisdiction under Secs. 287.240(5)[8], 287.470, 287.510 & 287.530. For good reason a distinction can and should be made, but not in the manner propounded by Respondent. With the stated specific exceptions for temporary, partial or permanent and total disability awards, an *award* resolving all issues is final and the Commission loses jurisdiction if no timely appeal is filed under Sec. 287.495.1 (1998), "[t]he final *award* of

---

[8] The statute actually refers to ongoing jurisdiction to modify either an "order or award" for death benefits. This would therefore presumably include an order resulting from a "settlement or compromise" under Sec. 287.390.1.

the commission shall be conclusive and binding unless either party to the dispute shall, within thirty days from the date of the final award, appeal the award to the appellate court. Upon timely filing of a post *award* appeal, the LIRC's jurisdiction is ended and may only be reactivated in the event the award is then reversed or modified and remanded for further proceedings by the appellate court. R.S.Mo. Sec. 287.495.1 (1998). No such jurisdictional limit on *settlements* has ever been enacted by statute.

Under strict interpretation, the mechanism for finalizing a claim and closing out jurisdiction with the LIRC under R.S.Mo. Sec. 287.495.1 (1998) does not apply to the "*settlement or compromise of any dispute or claim*" under R.S.Mo. Sec. 287.390.1 (2005). No appeal may be taken from a settlement or compromise of a dispute or claim and jurisdiction is never statutorily terminated by the issuance of an award. There is no express or implied statutory mechanism under R.S.Mo. Sec. 287.390.1 (2005), or anywhere else, that closes out the jurisdiction of the LIRC over a the "*settlement or compromise of any dispute or claim*" that leaves future medical "open" and therefore it continues indefinitely, unless and until a final award is issued.

This is not a historical novelty. As late as 1977, *all claims were left open for "future" medical* for a period of 90 and then 180 days under previous versions of R.S.Mo. Sec. 287.140.1, with the additional proviso that the Commission could issue a special order for treatment *anytime thereafter*. However, that provision was removed entirely in 1977:

> 3 The text of § 287.140.1 [as rescripted above] was amended on June 8, 1977, to extend from 90 days to 180 days after injury the period of obligatory treatment to an employee by an employer without necessity of a special order for that purpose. That amendment was enacted by an emergency clause and so became effective upon the very day of passage and approval. That same section was thereafter amended in the same session by S.B. 399 to delete altogether the 180 days limitation for obligatory treatment as well as for a special order as a precondition for treatment thereafter. That amendment became effective, in the usual course, on September 28, 1977. The employee suffered the work injury on August 31, 1977, while the June 8, 1977, amendment was still in effect. A precondition for an allowance for future medical costs--after the lapse of 180 days--under that enactment [a prerequisite not imposed thereafter] was the special order of the Commission to that end. There is no contention that the claim for compensation was not sufficient as a request for such a special order, or that the issue was not fully presented to the administrative law judge.

Williams v. A.B. Chance Co., 676 S.W.2d 1, footnote 3 (Mo. App. W.D. 1984).

Weiss v. Anheuser-Busch, 117 S.W.2d 682 (Mo App. 1938), while technically dealing with a partial award, is instructive of the ongoing nature of jurisdiction that the commission holds over settled or compromised "dispute or claims". See also *Blissenbach v. General Motors Assembly Div.*, 776 S.W.2d 889 (Mo. App. E.D., 1989)("In the present

case the parties stipulated that General Motors would pay 'continuing medical treatment.' The jurisdiction of the Industrial Commission was, therefore, held open until the 1975 partial/temporary award was made final. RSMo § 287.510 (1986). We thus remand this case for a determination by the Industrial Commission as to whether a final award has been made."). *Weiss* and *Blissenbach* both dealt with a partial award with future medical being left open essentially *based upon a settlement agreement to leave future medical open*:

> Section 3344, Revised Statutes of Missouri, 1929 (Mo. Stat. Ann., sec. 3344, p. 8281), provides that in any case a temporary or partial award of compensation may be made; that the same may be modified from time to time to meet the needs of the case; and that the claim may be kept open until a final award can be made. Under said statute, the Compensation Commission had full authority to make a temporary or partial award such as it made in this case, for it is conceded that a claim for compensation was duly filed. [*State ex rel. Prescott Laundry Co. v. Missouri Workmen's Compensation Comm.*, 320 Mo. 1156, 10 S.W. (2d) 916.] The law is established that, where an employee's claim for compensation is duly and timely filed, the Compensation Commission's jurisdiction continues until a final disposition is made of the claim. [*Perry v. J.A. Kreis & Sons* (Mo. App.), 49 S.W. (2d) 220.] The mere fact that the Compensation Commission in the case at bar took no action upon respondent's claim after the award of $2000 was made to respondent, and the further fact that respondent did not file his erroneously labeled

application for review on the ground of change in condition within six months thereafter, does not bring into operation the six months limitation statute (section 3337, Revised Statutes of Missouri, 1929 [Mo. Stat. Ann., sec. 3337, p. 8269]) in view of the record in this case, for the claim was, during that interim, still pending before the Commission, no final award having been made. It has been held that an employee's claim for compensation was not barred because it was not filed within six months after the last payment, where the Commission had not approved a settlement agreement for injury arising out of the same accident. *[O'Malley v. Mack Internat'l Motor Truck Corp.*, 225 Mo. App. 1, 31 S.W. (2d) 554.] While the facts in the O'Malley case, supra, were different from the facts in the case at bar, we believe the principle upon which that case was decided with respect to the six months Statute of Limitations is applicable to this case. In the O'Malley case the record showed that no final award had been made for the injury to the claimant's arm at the time he filed an application for compensation on account of a hernia. A settlement agreement by the parties, which had been filed, had neither been approved nor disapproved by the Commission; no action had been taken upon it. It was still pending before the Commission undisposed of as an open claim for compensation. In that case this court held that the failure of the Commission to take action on the settlement agreement within the limitation period ought not to become the means of enabling the employer to interpose the limitation statute to defeat a recovery by the claimant of the compensation to which he was legally

> entitled. For the application of the principle of the O'Malley case on this point, see also *Detienne v. Wellsville Fire Brick Co.* (Mo. App.), 70 S.W. (2d) 369; *Harder v. Thrift Const. Co.* (Mo. App), 53 S.W. (2d) 34. In the case at bar it appears that the award made was not a final award, but was a temporary or partial award, with the Commission expressly retaining jurisdiction.

Weiss at 685-686.

The facts herein are similar because Respondent approved an agreement to leave future medical "open", which is what the LIRC did in *Weiss* through the issuance of a formal award leaving medical open. A formal partial award was never issued herein, but certainly could be if requested by a party, which is precisely the direction in which the LIRC is headed after it determines the enforceable amount of the award. Until a final and full award is issued, resolving all disputes, the LIRC retains jurisdiction over the entirety of the unresolved disputes in the claim.

Notably, Respondent alleges that it will be irreparably harmed if a the Writ of Prohibition is not made permanent because it will be forced to prepare for an evidentiary hearing by conducting medical examinations and depositions. Inasmuch as the exact same evidence would be both required and usable in a trial before the circuit court case involving the same parties, the assertion is patently false. There would be no duplication of costs because all of the same evidence, both depositions and medical exams, can be

used both before the commission and the circuit court. Mo. Rule Civ. Proc. 57.07(a). Respondent will suffer no irreparable harm by the LIRC exercising jurisdiction.

CONCLUSION

In MATA's experience, it is an altogether too common experience where a dispute arises after a settlement over what treatment shall be provided when future medical is left "open". In fact, it also frequently happens if an award is issued leaving future medical "open". It is of grave concern to MATA that injured employees who have made bargains and concessions in their claims in order to reach a settlement under R.S.Mo. Sec. 287.390.1 (2005), leaving future medical "open", will be deprived of that which they bargained for if the LIRC is not allowed to retain jurisdiction over "open" medical disputes in order to determine what treatment is reasonable and necessary to cure and relieve the effects of the injury under R.S.Mo. Sec. 287.140.1 (2005). It would be cruelly absurd to interpret the statutes so that the parties could not achieve by settlement, the retention of LIRC jurisdiction, that which they could acquire had they refused to settle and instead insisted on an award. Settlements are to be encouraged by the Court, not discouraged. The splitting of jurisdiction over "open" medical, depending upon whether the dispute is handled by settlement or award, would discourage future settlements involving future medical.

If the LIRC loses jurisdiction over these future medical disputes, then injured employees who have already settled their claims will be forced into circuit court where

there is neither judicial experience or expertise to cope with workers' compensation claims. Employees will be burdened with the added cost, time and emotional burden of litigation, including onerous discovery and procedural rules that favor the employer and insurer over the unrepresented employee. Attorneys will not be able to represent clients in need of future medical care when there is no mechanism by which they might get paid, unless they can afford to do so pro bono. None of this is consistent in any way with the plain meaning of the statutes or the intent of the legislature to keep workers' compensation issues within the sole province of the LIRC. The legislature has consistently passed legislation over the entire existence of the Missouri Workers' Compensation Law that clearly reinforces the jurisdiction of the LIRC and ALJs over all matters having to do with workers' compensation, short of entering judgement and enforcing collection. To suddenly shift over 75 years of practice and law would be inconsistent with the plain meaning of the statutes and the clear intent of the legislature.

WHEREFORE MATA prays that the Writ in Prohibition be permanently quashed and that the matter be remanded to the LIRC for further proceedings to determine what medical treatment should be ordered in a manner consistent with the settlement agreement and The Missouri Workers' Compensation Law.

Respectfully submitted by:

THE ALBERHASKY LAW FIRM, PC

/s/ Randy Charles Alberhasky
Randy Charles Alberhasky
MoBar #42551
419 N. Boonville Ave.
Springfield, MO 65806
(417) 865-4444
FAX: (417) 865-5159
randy@alberhaskylaw.com
Attorney for MATA

CERTIFICATE OF SERVICE

I hereby certify that on this 25st day of February, 2015, I filed the foregoing with the Missouri Supreme Court and a copy was served using the court's electronic filing system and by regular U.S. postal service mail (1 copy) to attorneys for appellant and respondent:

Mary Anne Lindsey
Evans & Dixon, LLC
211 North Broadway, Suite 2500
St. Louis, MO 63102
Attorney for Relator ISP Minerals, Inc.

Nancy Mogab
Mogab & Hughes, PC
701 Market Street,
St. Louis, MO 63102
Attorney for Respondent LIRC

By: /s/Randy Charles Alberhasky
Randy Charles Alberhasky

CERTIFICATE OF COMPLIANCE WITH RULE 84.06 and 55.03

The undersigned hereby certifies that the foregoing brief has a 7,645 word count and is typed in font not smaller than 13 point Times New Roman. The brief complies with the page length requirements of Rule 84.06(b). This brief contains the information required by Rule 55.03.

By: /s/ Randy Charles Alberhasky
Randy Charles Alberhasky