# In the Missouri Court of Appeals
# Eastern District

**DIVISION FIVE**

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| ANDREW DICKEMANN, | ) | No. ED105266 |
| | ) | |
| Appellant, | ) | Appeal from the Labor and |
| | ) | Industrial Relations Commission |
| vs. | ) | |
| | ) | |
| COSTCO WHOLESALE CORPORATION, | ) | |
| | ) | |
| Respondent. | ) | Filed: May 23, 2017 |

*Introduction*

Andrew Dickemann ("Employee") appeals from the Labor and Industrial Relations Commission's ("Commission") order denying his and Costco Wholesale Corporation's ("Employer") joint motion to settle and commute his permanent disability award into a lump sum. In his sole point on appeal, Employee argues that the Commission misapplied the law and exceeded its authority when it denied the joint motion because it was required to approve the parties' joint motion under § 287.390.1. We affirm.

*Factual and Procedural Background*

In July 2010, Employee was injured during the course and scope of his employment with Employer. Employee filed a claim for compensation against Employer, and, in March 2014, an Administrative Law Judge ("ALJ") of the Missouri Division of Workers' Compensation (the

"Division") awarded Employee weekly permanent total disability benefits of $799.11. Neither party filed an application for review, and the award became final in April 2014.

In November 2016, Employee and Employer voluntarily entered into a "Stipulation for Voluntary Settlement and Agreement to Commute the Award" (the "Joint Agreement"). The parties filed the Joint Agreement with the Commission. As part of the Joint Agreement, Employer agreed to pay Employee a lump sum of $400,000 to fully and finally settle Employee's award for lifetime disability benefits. In the Joint Agreement, Employee acknowledged that he understood his rights and benefits, that the Joint Agreement was not the result of undue influence or fraud, and that he voluntarily agreed to accept the terms of the Joint Agreement.

On January 5, 2017, the Commission issued an order denying its approval of the Joint Agreement without prejudice. The Commission found that the Joint Agreement did not contain allegations that, if true, would support commutation of the permanent disability award under § 287.530.[1] The Commission further found that it did not have authority to approve the Joint Agreement under § 287.390 because the parties did not identify a dispute regarding the availability of award modifications under sections 287.241, 287.470, or 287.530, and the parties did not explain how the Joint Agreement was in accordance with Employee's rights under Chapter 287. This appeal follows.

*Standard of Review*

Our review of this case is governed by the provisions of § 288.210. *Clement v. Kelly Services, Inc.*, 277 S.W.3d 327, 329 (Mo. App. E.D. 2009). We may modify, reverse, remand for rehearing, or set aside the decision of the Commission on the following grounds:

(1) That the commission acted without or in excess of its powers;

(2) That the decision was procured by fraud;

[1] All references to statutes are to RSMo Cum Supp. (2013) unless otherwise indicated.

(3) That the facts found by the commission do not support the award; or

(4) That there was no sufficient competent evidence in the record to warrant the making of the award.

*Grubbs v. Treas. of Missouri*, 298 S.W.3d 907, 910 (Mo. App. E.D. 2009) (quoting § 288.210).

The findings of the Commission as to the facts, if supported by competent and substantial evidence and made without fraud, are conclusive. *Id.* However, we are not bound by the Commission's conclusions of law or its application of law to the facts, and questions of law are reviewed independently. *Id.*

Furthermore, "[s]tatutory construction is a question of law, which we review de novo." *New Madrid County v. St. John Levee & Drainage Dist.*, 436 S.W.3d 573, 573–74 (Mo. App. S.D. 2013) (citing *Bantle v. Dwyer*, 195 S.W.3d 428, 431 (Mo. App. S.D. 2006)).

*Discussion*

Employee's sole point of error is that the Commission exceeded its authority and misapplied the law when it denied the Joint Agreement. Specifically, Employee argues that under the precedent set forth in *Nance v. Maxon Elec. Inc.*, 395 S.W.3d 527 (Mo. App. W.D. 2012) ("*Nance I*") and *Hinkle v. A.B. Dick Co.*, 435 S.W.3d 685 (Mo. App. W.D. 2014), the Commission was required to approve the Joint Agreement because it was entered into voluntarily by both parties and met the requirements § 287.390.1.[2] Employer does not dispute Employee's claim of error, and has adopted Employee's brief as its own.

[2] Although not discussed by either party, the Commission denied the Joint Agreement without prejudice. "[G]enerally, a dismissal without prejudice is not a final judgment and, therefore, is not appealable." *Phox v. Boes*, 481 S.W.3d 920, 921 (Mo. App. W.D. 2016). Although we have not found case law that directly addresses the appealability of the Commission's denial without prejudice of the Joint Agreement in this case, we note that courts have held that

> [w]hen the effect of the order is to dismiss a plaintiff's action and not merely the pleading, then the dismissal is appealable. If the dismissal was such that refiling of the petition at that time would have been a futile act, then the order of dismissal is appealable. Applying these exceptions, dismissals without prejudice have been held appealable in such cases where the dismissal was

Before discussing *Nance I* and its progeny, it is important to provide some background information. In the Workers' Compensation Law, sections 287.390 and 287.530 govern compromise settlements and commutations, respectively.

Section 287.390.1, relating to compromise settlements, reads:

> "Parties to claims hereunder may enter into voluntary agreements in settlement thereof, but no agreement . . . [shall be] valid until approved by an administrative law judge or the commission . . . . 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 understands his or her rights and benefits, and voluntarily agrees to accept the terms of the agreement. (Emphasis added).

Section 287.530.1, relating to commuting compensation, reads:

> The compensation provided in this chapter may be commuted by the division or the commission and redeemed by the payment in whole or in part, by the employer, of a lump sum . . . equal to the commutable value of the future installments which may be due under this chapter, taking account of life contingencies, the payment to be commuted at its present value upon application of either party, with due notice to the other, if it appears that the commutation will be for the best interests of the employee or the dependents of the deceased employee, or that it will avoid undue expense or undue hardship to either party, or [the employee is about to remove from the United States, or the employer has disposed of the greater part of its business]. (Emphasis added).

Section 287.530.2 directs the Commission, when determining whether a commutation is in the best interest of the employee, to "constantly bear in mind that it is the intention of this chapter that the compensation payments are in lieu of wages and are to be received by the injured

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> based on statutes of limitations, theories of estoppel, a plaintiff's lack of standing, failure of the petition to state a claim where the plaintiff chose not to plead further . . . . A common factor of those dismissals without prejudice found appealable was that the plaintiffs could not maintain their actions in the court where the action was filed if the reason for the dismissal was proper.

*New Eng. Carpenters Pension Fund v. Haffner*, 391 S.W.3d 453, 459 n.6 (Mo. App. S.D. 2012) (internal citations omitted).

In the present case, we hold that the Commission's order was a final order because it would be futile for the parties to refile their Joint Agreement under their submitted theory. The current situation is analogous to situations where a petition is dismissed for failure to state a claim and "the plaintiff chose not to plead further." *Id.* The parties during oral argument made clear that they had no intention of refiling their Joint Agreement pursuant to the Commission's order.

employee or his dependents in the same manner in which wages are ordinarily paid."[3] (Emphasis added). Section 287.530.2 further states that "commutation is a departure from the normal method of payment and is to be allowed only when it clearly appears that some unusual circumstances warrant such a departure." (Emphasis added).

In *Nance I*, the employee and his past employer entered into a joint agreement to commute the permanent total disability payments an ALJ had previously awarded him. *Nance I*, 395 S.W.3d at 531. A medical expert's affidavit was attached to the joint agreement indicating that the employee had a life expectancy of thirteen years. *Id.* Pursuant to the joint agreement, the employer agreed to pay the employee a lump sum equal to twenty-four years' worth of his weekly benefits, not reduced to present value. *Id.* On the afternoon the employer sent the joint agreement to the Commission for its approval, the employee died for reasons unrelated to his work injury. *Id.* Upon learning of the employee's death, the employer sought to withdraw the joint agreement arguing that, under Chapter 287, there were no longer any benefits due to the employee or his survivors. *Id.* The employee's widow contested the employer's attempt to withdraw from the joint agreement. *Id.* The Commission entered an order denying the joint agreement because it determined that no future payments were due because of the employee's death. *Id.* at 531-32.

On appeal, the Western District reversed the Commission's order. *Id.* at 539. The Western District held that although the statute which originally authorized the parties' joint agreement was § 287.530, which governs commutations, the parties had a right to settle their

[3] *See also* § 287.200.1, which states that "[c]ompensation for permanent total disability shall be paid during the continuance of such disability for the lifetime of the employee at the weekly rate of compensation in effect under this subsection on the date of the injury for which compensation is being made."

"claim"[4] under § 287.390. *Id.* at 535-36. The Court held that § 287.530's requirements applied only to "contested" commutations. *Id.* As a result, the Court held that when the parties have reached a settlement agreement, the Commission must review the agreement only under § 287.390. *Id.* at 536-37.

Under § 287.390.1, the Court determined that the Commission was required to approve the joint agreement because the last sentence of § 287.390.1 states that the Commission "shall approve a settlement as valid and enforceable as long as the settlement is not the result of undue influence or fraud, the employee understands his or her rights and benefits, and voluntarily agrees to accept the terms of the agreement." *Id.* at 534. The Court noted that neither party had argued the joint agreement was the result of fraud or undue influence or that the employee had been coerced into accepting the terms of the agreement. *Id.* at 538. The Court determined that the employee evidenced that he understood his rights and benefits by signing the joint agreement. *Id.* Therefore, the Court concluded that the Commission was required to accept the joint agreement, and it remanded the case to the Commission in order for it to approve the joint agreement. *Id.* at 539.

In *Nance v. Maxon Elec. Inc.* ("*Nance II*"), the employer appealed the Commission's approval of the joint agreement which the Commission had entered pursuant to the Court's order in *Nance I*. 425 S.W.3d 926, 929 (Mo. App. W.D. 2014). The Western District again held that the Commission was required to approve the joint agreement under § 287.390.1 as long it was not made as a result of undue influence or fraud, the employee understood his rights and benefits, and he voluntarily agreed to accept the terms of the agreement. *Id.* at 931. Accordingly, because

[4] The *Nance* Court recognized that the employee's original claim for compensation was already resolved. *See Nance,* 395 S.W.3d at 534. However, the Court classified the parties' joint agreement as a "claim" under § 287.390. *Id.* at 534-35.

of the court's prior determinations in *Nance I,* the Western District affirmed the Commission's approval of the joint agreement. *Id.* at 932.

Appellant also cites to *Hinkle v. A.B. Dick Co.*, in which Mrs. Hinkle was awarded a weekly $478 death benefit after her husband was killed while working within the course and scope of his employment. 435 S.W.3d 685, 686-87 (Mo. App. W.D. 2014). Approximately six years after the award was made final, Mrs. Hinkle and her late husband's employer filed a joint agreement to commute her weekly benefits into a lump sum payment of $200,000. *Id* at 687. The Commission denied approval of the joint agreement because it determined that: 1) the settlement between the parties was not reached to resolve any pending claim or dispute between the parties; 2) Mrs. Hinkle was waiving her rights under Chapter 287 because she would only receive 49% of the present value of the benefits she had been awarded; and 3) the settlement was not in accordance with her rights under Chapter 287 because she would only receive 49% of the present value of her benefits. *Id*.

On appeal, the Western District determined that under its precedent set forth in *Nance I,* the Commission was required by § 287.390.1 to approve the joint agreement. *Id.* at 688-99. The Court noted that, as in *Nance I,* the parties had stipulated in the joint agreement that the agreement was not the result of undue influence or fraud, that Mrs. Hinkle understood her rights and benefits and the consequences of the settlement, and she voluntarily accepted the terms of the agreement. *Id*. at 689. The Court reversed the Commission's determination and remanded the case to the Commission in order for it to approve the joint agreement. *Id*.

In the present case, Employee argues the Joint Agreement complied with § 287.390 as interpreted in the *Nance I* and *Hinkle* decisions. Employee explains that in the Joint Agreement, Employee attested that he understood his rights and benefits under Missouri law, the Joint

Agreement was not the result of undue influence or fraud, and that he voluntarily agreed to accept the terms of the Joint Agreement. Accordingly, Employee asserts that this Court is bound by the doctrine of stare decisis to follow the Western District's precedent set forth in *Nance I* and its progeny, and that we must remand the matter to the Commission and instruct the Commission to approve the Joint Agreement.

While we agree with Employee that his argument is consistent with the *Nance I* and *Hinkle* decisions, we decline to follow the Western District's interpretation of sections 287.390 and 287.530 in those cases. In our opinion, *Nance I* and its progeny fail to correctly interpret sections 287.390 and 287.530.

i. Statutory Construction

"The primary rule of statutory interpretation requires this Court to ascertain the intent of the legislature by considering the language used while giving the words used in the statute their plain and ordinary meaning." *State v. Loughridge,* 395 S.W.3d 605, 609 (Mo. App. S.D. 2013) (internal quotations omitted). Furthermore, when interpreting statutes, we presume the legislature did not enact meaningless provisions. *McGhee v. W.R. Grace & Co.*, 312 S.W.3d 447, 454 (Mo. App. S.D. 2010). Therefore, "[w]e are required to give effect to all provisions of a statute." *Herschel v. Nixon*, 332 S.W.3d 129, 134 (Mo. App. W.D. 2010). Additionally, provisions of an entire legislative act must be construed together and, if reasonably possible, all provisions must be harmonized. *Hardesty v. City Of Buffalo,* 155 S.W.3d 69, 74 (Mo. App. S.D. 2004).

In 2005, the Missouri legislature amended the Workers' Compensation Law to require courts to strictly construe its provisions. Section 287.800.1. Strict construction means that a "statute can be given no broader application than is warranted by its plain and unambiguous

terms." *Harness v. S. Copyroll, Inc.*, 291 S.W.3d 299, 303 (Mo. App. S.D. 2009). The operation of the statute must be confined to "matters affirmatively pointed out by its terms, and to cases which fall fairly within its letter." *Allcorn v. Tap Enters., Inc.*, 277 S.W.3d 823, 828 (Mo. App. S.D. 2009). "A strict construction of a statute presumes nothing that is not expressed." *Id*. Furthermore, under both liberal and strict construction, "[c]ourts cannot add words to a statute under the auspice of statutory construction." *Peters v. Wady Industries, Inc.*, 489 S.W.3d 784, 792 n.6 (Mo. banc 2016) (quoting *Sw. Bell Yellow Pages, Inc. v. Dir. of Revenue*, 94 S.W.3d 388, 390 (Mo. banc 2002)).

Under an interpretation of sections 287.390 and 287.530 that adheres to the rules of statutory construction, we agree with the Commission's determinations that the Joint Agreement does not contain allegations that, if true, would support commutation under § 287.530. Further, we hold that the Commission does not have authority to consider the Joint Agreement for approval as a settlement under § 287.390.[5]

ii. Section 287.390

Section 287.390 expressly, plainly, and unambiguously restricts its application to "[p]arties to claims." The plain meaning of the word "claim" is: "1. A statement that something is yet to be proven true . . . . 2. The assertion of an existing right . . . . [or] 3. A demand for money . . . to which one asserts a right . . . ." BLACK'S LAW DICTIONARY (10th ed. 2014) (emphasis added). In the present case, a hearing was held for Employee's claim for compensation in December

[5] Given our conclusion that § 287.390 does not apply to § 287.530 commutations, we are not confronted with, and do not analyze, the inherent conflict contained in § 287.390.1 presented by Employee's position. Employee asserts, correctly, that § 287.390.1 requires the ALJ or the Commission to approve settlements as long as the settlement is not the result of undue influence or fraud, the employee understands his or her rights and benefits, and voluntarily agrees to it. Section 287.390.1 also states the ALJ or the Commission cannot approve "any settlement which is not in accordance with the rights of the parties" under the Workers' Compensation Act. (Emphasis added). Whether Employee's settlement presents a conflict within § 287.390.1 and whether one mandate of § 287.390.1 takes precedence over the other mandate of § 287.390.1 is left to a future case which would directly present this issue for the Court to consider.

2013, and his award resulting from that claim became final in April 2014. Employee proved he was permanently totally disabled. After his award became final, he no longer was asserting a right to benefits−he possessed a right to benefits. There was therefore no "claim" at the time the parties entered into the Joint Agreement. Only "parties to claims" can enter into settlements under § 287.390.

The Court in *Nance I* noted that Missouri courts have interpreted the term "claim" in the Workers' Compensation Law to include disputes resolved informally through settlements. *Nance I*, 395 S.W. at 534. In *Nance I*, the Western District cited to *Grubbs v. Treasurer of Missouri*, in which this Court held that a "stipulation for compromise settlement" constituted a "claim" against an employer for the purposes of § 287.430 RSMo (2000). *See* 298 S.W.3d at 911-12.[6] Section 287.430 RSMo (2000) provides, in relevant part, that "[a] claim against the second injury fund shall be filed within two years after the date of injury or within one year after a claim is filed against an employer or insurer pursuant to this chapter, whichever is later."

In *Grubbs*, the employee was injured in July 2003 and entered into a compromise settlement with his employer in November 2004, without first filing a claim for compensation against his employer. *Id.* at 909. In September 2005, the employee filed a claim for compensation against the Second Injury Fund, which was more than two years after the date of his injury, but less than one year after the date he entered into a compromise settlement with his employer. *Id.* This Court determined that the employee was not barred from filing his claim with the Second Injury Fund, and we held that "[the compromise settlement] in this case constitutes a claim for compensation." *Id.* at 912 (emphasis added).

[6] The holding and reasoning of *Grubbs* was followed by the Western District in *Treasure of Missouri v. Phillip Cook*, 323 S.W.3d 105 (Mo. App. W.D. 2010).

The present case is wholly distinguishable from *Grubbs.* The settlement agreement in *Grubbs* is distinct from the Joint Agreement in the present case for a number of reasons. Here, and in *Nance I,* there is no dispute the employee filed a timely claim against his employer. Here, and in *Nance I,* the disputes arising from the claims were heard in front of an ALJ and reduced to a final award. In the present case, unlike in *Grubbs,* Employee did not enter into the Joint Agreement prior to, or in lieu of, filing a claim for compensation against his employer. Instead, the Joint Agreement's purpose is to commute an award that has already been made final.

Under strict construction, a "statute can be given no broader application than is warranted by its plain and unambiguous terms." *Harness,* 291 S.W.3d at 303. Strictly construed, the parties here are not parties to a "claim" under the plain meaning of the word. Instead, they are parties to an award. Therefore, the Commission does not have authority to consider the Joint Agreement for approval as a settlement under § 287.390.

iii. Section 287. 530

Section 287.530 allows the commutation of an employee's award under Chapter 287 in limited circumstances. Either the employer or employee may request that an employee's award be commuted. The sum of the commutation "shall be equal" to the commutable value of the future installments due to the employee under Chapter 287. Section 287.530.1 (emphasis added). Section 287.530.1 provides that a commutation will only be granted if the Commission determines that the commutation would be in the best interests of the employee or the dependents of a deceased employee, or it would avoid undue expense or undue hardship for either party, or the employee or dependent has been or is about leave the country, or the employer has sold or disposed of the greater part of its business or assets. Section 287.530.2 makes it clear that commutations are to be granted only in "unusual circumstances:"

> In determining whether the commutation asked for will be for the best interest of the employee or the dependents of the deceased employee, or so that it will avoid undue expense or undue hardship to either party, the division or the commission will constantly bear in mind that it is the intention of this chapter that the compensation payments are in lieu of wages and are to be received by the injured employee or his dependents in the same manner in which wages are ordinarily paid. Therefore, commutation is a departure from the normal method of payment and is to be allowed only when it clearly appears that some unusual circumstances warrant such a departure. (Emphasis added).

Strictly construed, nowhere in § 287.530 does the legislature state or suggest that the limitations therein only apply to what the *Nance I* Court referred to as "contested" commutations. We cannot presume something that is not expressed. *Allcorn*, 277 S.W.3d at 828. Therefore, we cannot read the *Nance I* Court's limitation of § 287.530 to "contested" commutations into the law. *See Peters v. Wady Industries, Inc.*, 489 S.W.3d at 792 n.6 ("[W]hether liberally or strictly construed, courts cannot add words to a statute under the auspice of statutory construction.") (internal quotations omitted); *see also Harrah v. Tour St. Louis*, 415 S.W.3d 779, 782 (Mo. App. E.D. 2013) ("[S]trict construction does not allow courts to go outside of the statute when . . . its terms are clear.").

Moreover, when we interpret a statute, we must presume that "the legislature intended for every word, clause, sentence, and provision" to have effect. *Johnson v. Missouri Bd. of Probation and Parole*, 359 S.W.3d 500, 505 (Mo. App. W.D. 2012). Likewise, we presume the legislature did not "insert idle verbiage or superfluous language in the statute." *Moore v. State*, 318 S.W.3d 726, 734 (Mo. App. E.D. 2010) (internal quotations omitted). By applying these rules of statutory construction to § 287.530, we must presume that the legislature intended commutations to be allowed only in "unusual circumstances" and subject to the limitations included in sections 287.530.1 and 287.530.2. This interpretation gives effect to "every word, clause, sentence, and provision" of § 287.530. *See Johnson*, 359 S.W.3d at 505.

In the present case, the Joint Agreement did not contain allegations that, if true, would support a commutation of Employee's award. In its order dismissing the Joint Agreement, the Commission calculated the commutable value of Employee's award at the time the Joint Agreement was submitted to be more than $590,000, not $400,000 as stated in the Joint Agreement. Neither party has disputed the Commission's calculation. Moreover, none of the statutory grounds listed in § 287.530.1, or any unusual circumstances in general, were alleged in the Joint Agreement. As such, the Joint Agreement could not be approved by the Commission under § 287.530. The Commission correctly applied the law when it denied the Joint Agreement.

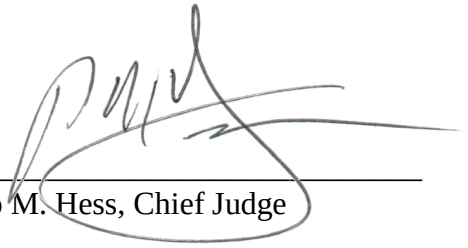
*Conclusion*

Strictly construing and harmonizing § 287.390 with § 287.530, in order to give full effect to both sections, we hold § 287.390 does not apply to § 287.530 and that all commutations of final awards are subject to the requirements of § 287.530.

Employee acknowledges that the Joint Agreement was an agreement to commute his final award, and that commutations are governed by §287.530. Nevertheless, pursuant to the Western District's holding in *Nance I,* Employee argues that the Commission was required to ignore the statutory requirements of § 287.530 and approve the Joint Agreement under § 287.390 because the agreement was not a "contested" commutation. However, the parties are no longer "parties to a claim" for the purposes of § 287.390, as Employee already prevailed on his claim for compensation, and his award was made final. Strictly construed, § 287.390 does not apply to § 287.530 commutations. Furthermore, the Western District's holding in *Nance I* that § 287.530 only applies to "contested" commutations violates strict construction because it is not supported by the plain text of either § 287.530 or § 287.390. The *Nance I* Court's holding nullifies the

requirements of § 287.530.1 and disregards the language of § 287.530.2. *See Johnson*, 539 S.W.3d at 505 (holding that when we interpret a statute, "we must presume that the legislature intended for every word, clause, sentence, and provision" to have effect). The legislature made it clear in § 287.530.1 what the requirements for commutation are. The legislature further made it clear in § 287.530.2 that commutations are granted only in "unusual circumstances." In the present case, neither party alleged any of the statutory requirements or an unusual circumstance warranting a commutation of Employee's award.

For the foregoing reasons, the determination of the Commission is affirmed. Employee's point is denied.



Philip M. Hess, Chief Judge

Lawrence E. Mooney, J. and
James M. Dowd, J. concur.