

DISSENTING OPINION

Introduction

I respectfully disagree with the decision of the majority of the commission to approve the parties' agreement to resolve the final award in this matter as proposed by the parties in the *Joint Petition and Settlement*. Using the regulatory discount rate and a standard life expectancy (adjusted downward to reflect the possibility of remarriage), the present value of Ms. [redacted]'s award is approximately \$500,000.00. The parties have asked us to approve a settlement of the final award whereby employer will pay to Ms. [redacted] payments with a present value of approximately \$300,000.00 – only 60% of the value of the final award.

Bad Facts Make Bad Law

The majority has decided to approve the parties' agreement following the holdings in the two appellate decisions in *Nance v. Maxon Electric, Inc. (Nance I and Nance II)*.¹ As the employee representative on the commission, I cannot concur. I write this dissent with a bit of trepidation because I cannot explain my position in the instant matter without criticizing the decisions in the *Nance* cases. It is not my practice to publicly criticize judicial decisions. But, if the *Nance* cases are allowed to control our consideration of post-award commutation requests, the well-being of injured workers, their families, and the public will be profoundly, negatively affected.

With all due respect to the *Nance* courts, I believe *Nance I* and its progeny are classic examples of the maxim *bad facts make bad law*. Here are the bad facts from *Nance*. Mr. Nance's former employer Maxon was obligated to pay to Mr. Nance weekly permanent total disability benefits for Mr. Nance's lifetime pursuant to a final workers' compensation award. Mr. Nance and Maxon wished to close out the final award by a one-time payment from Maxon to Mr. Nance. The parties agreed to submit to the commission a joint motion for commutation that asked the commission to commute the permanent total disability benefits due Mr. Nance to a lump sum of slightly more than \$180,000.00. At the time the parties reached their agreement, Maxon was aware that Mr. Nance was ill with stage IV cancer. The parties' signed a joint motion to commute and mailed it to the commission. The parties cited § 287.530 RSMo as authority for commission approval of the joint motion.² Sadly, Mr. Nance died before the commission received the joint motion. Maxon filed a motion to withdraw the joint motion because Mr. Nance's passing rendered the present value of his award zero. The commission agreed and dismissed the joint motion for commutation. Mrs. Nance appealed the commission denial, although she was not then a party to the award.

The *Nance* facts are bad indeed. Maxon knew Mr. Nance was ill when it entered into the agreement. The commission probably seemed heartless when it allowed Maxon to withdraw its assent to the agreement on seemingly technical grounds. The commission's decision, however, was consistent with the commission's long-standing practice of protecting the interests of the public and the rights of all parties to workers' compensation awards.

Commutations Generally

The joint motion for commutation considered by the *Nance I* court involved an agreement that would have provided Mr. Nance with at least the value of his permanent total disability

¹ *Nance v. Maxon Elec., Inc.*, 395 S.W.3d 527 (Mo. App. 2012)(*Nance I*); *Nance v. Maxon Elec., Inc.*, 425 S.W.3d 926 (Mo. App. 2014)(*Nance II*).

² I have reprinted the relevant statutes in an appendix to this opinion.

award (and probably more after adjusting his life expectancy due to his ill health). If Mr. Nance had not died before the commission ruled the request, the commission likely would have approved the commutation. I wish all commutation requests presented to the commission were so supportive of working families. Unfortunately, the circumstances of *Nance* are unlike the circumstances existing in most of the commutation requests presented to this commission.

In reality, the vast majority of the commutation requests that this commission receives resemble the request in this case wherein parties jointly request that the commission approve their agreement to close out an award by the payment to the awardee³ of a lump sum that falls short of the present value of the award. Often the awardees agreeing to accept less than the present value of their awards are financially unsophisticated and/or are not represented by counsel. Worse still, many of the awardees agreeing to accept less than the value of their awards are in such severe financial difficulty that even if they fully understand how much money they are agreeing to give up, they feel as if they have no choice but to accept far less than they deserve in order to resolve their immediate financial problems.

As regards commuting compensation, courts have long told us that we have an obligation to protect not only the rights of the parties but also the public's legitimate interest in not bearing the financial burden of those awardees who would quickly exhaust a commuted lump sum and turn to charity or to the state for their necessities. The court in *State ex rel. Missouri Gravel Co. v. Missouri Workmen's Compensation Commission*⁴ put it this way:

The commission is required to pass on many facts under the terms set out in said section [§ 287.530] in making a commutation to a lump sum payment. It must find whether any unusual circumstances exist which would require such a departure. It must find whether it will be of any real benefit to the dependent receiving such lump sum payment. Many dependents would, following the well known weakness of human kind, speedily and injudiciously spend the lump sum payment and therefore become dependent on charity for subsistence. If the dependent receives the compensation weekly, such a result is not so probable. This is against the purpose and the spirit of the Workmen's Compensation law. The compensation allowed the injured employee, or the dependents of a deceased employee, in a way represents wages. Society and the state are interested.

The most comprehensive and thoughtful judicial analysis regarding our authority as regards commutation was issued by the Western District Court of Appeals, the same judicial district that decided *Nance* and its progeny. In *American Oil Co. v. Pierce*,⁵ the court said this:

The purpose of the Workmen's Compensation Act and its component sections has also been said to be "to ameliorate, in the interest of the workman and public welfare, losses sustained by the workman and his dependents from accidental injuries received by the workman in the proper course of his work" "for the full time and to the full extent he is actually

³ I use the term "awardee" to refer to an employee receiving permanent disability benefits under an award and to the dependents of a deceased employee receiving death benefits under an award.

⁴ 113 S.W.2d 1034, 1038 (Mo. App. 1938).

⁵ 472 S.W.2d 458, 462 (Mo. App. 1971)(internal citations omitted).

disabled" by providing periodic income benefits for needed ongoing support and placing these benefits beyond the reach of creditors. This purpose is "based largely on a social theory of providing support and preventing destitution". In passing on whether a commutation is proper, our courts have given effect to this legislative purpose which requires consideration not only of the claimant's best interest but that of the public which, ultimately, must bear the burden of relieving the claimant's hardship when the lump sum has been used and no periodic payments remain to him.

I find no statute or case relieving us of our obligation to consider the interests of the public when determining whether to exercise our discretion to approve commutation of an award.

The Nance Analyses

A plain statement of the legal analysis of the *Nance I* court is helpful to understanding my complaints about the reasoning. The *Nance I* court conceded that § 287.390 did not itself confer upon the *Nance* parties the right to settle Mr. Nance's award. Rather, the court identified three statutory provisions that permit the commission to make modifications to final awards (§§ 287.241, 287.470, and 287.530) and held that if parties to a final award have a dispute as to the availability of modification of the award under one of the enumerated sections, then the parties have the right to settle their dispute under § 287.390.

The linchpin of the *Nance I* court's rationale was the court's implicit *finding* that the *Nance* parties' were seeking to settle a dispute about whether modification of the *Nance* award was available under § 287.530. This finding by the *Nance I* court is troubling for several reasons. First, the making of findings in workers' compensation matters is a function exclusively reserved to this commission.⁶ In its order denying the modification of the *Nance* final award, the commission made no finding that the parties had a dispute between them about the availability of commutation under § 287.530.

Next, notably absent from *Nance I* is the identification of the § 287.530 dispute between the *Nance* parties. Missouri courts – including the Missouri Supreme Court – have long held that awardees have no absolute right to agree to a commutation of an award.⁷ Instead, a determination about whether to commute an award to a lump sum is within the discretion of the commission and cannot be delegated to the parties. Again, I refer to the Western District's thoughtful analysis in the *American Oil* case:

[Section 287.530] however, not only describes the manner in which the commutation shall be made, but also requires that the commission make it and express it in terms of a money award. "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 which shall be fixed by the division or the commission . . .*" Sec. 287.530, as amended, V.A.M.S. The commission was without authority to delegate that statutory duty.⁸

...

⁶ See *Beecham v. Greenlease Motor Co.*, 38 S.W.2d 535, 537 (Mo. App. 1931)("The Workmen's Compensation Act not only vests in the commission the power to find the facts in all cases which arise under the act but expressly withholds that power from circuit courts and appellate courts.")

⁷ *Shroyer v. Missouri Livestock Com. Co.*, 61 S.W.2d 713, 716 (Mo. 1933)("Neither the employer nor the employee has an absolute right to settle an 'agreement, award or judgment for compensation' upon the basis of its commutable value."), overruled on other grounds by *Snowbarger v. M. F. A. Cent. Cooperative*, 317 S.W.2d 390 (Mo. 1958).

⁸ *American Oil Co.*, 472 S.W.2d at 461(emphasis in original).

Whether the decision of the commission that the balance of the award of March 4, 1970, shall be commuted and paid appellant in a lump sum is supported by competent and substantial evidence upon the whole record is a **question of law** to be determined according to the purpose of Sec. 287.530, as amended V.A.M.S. within the larger purpose of the Workmen's Compensation Act.⁹

If *American Oil* and the other reported commutation cases are good law – and the *Nance I* court did not say they were not – then any disagreement about *whether* to commute the *Nance* award or at what amount to commute the *Nance* award cannot logically be said to have been a dispute between the *Nance* parties. And, since the question of whether the facts found by the commission support commutation of an award is a question of law, the commission is not bound by stipulations or agreements between parties purporting to resolve the question.¹⁰

Next, I must address the *Nance I* court's conclusion that Mrs. Nance had the right to commute Mr. Nance's award after his death. The *Nance I* court found support for this conclusion in the language of § 287.530. The court considered the provision of § 287.530 allowing the commission to approve a commutation "if it appears that the commutation will be for the best interests of the employee *or the dependents of the deceased employee*" and ruled that the emphasized language "indicates that the statute anticipates and allows dependents of a deceased employee to proceed with a commutation" of the employee's permanent total disability award after the employee has died.¹¹

The court's conclusion was based upon its unfounded belief that allowing commutation of permanent total disability benefits in favor of a deceased employee's dependents after the employee's death is the only purpose that could possibly exist for the inclusion of the phrase "or the dependents of the employee." Thus, the court reasoned that if the phrase does not mean dependents can commute the permanent total disability awards of a deceased employee after the employee's death, then the phrase is "excess verbiage."¹² The court's reasoning on this point crumbles under the weight of reported Missouri cases dealing with commutations.¹³ A review of the reported cases reveals the real purpose for the inclusion of the phrase "or the dependents of the deceased employee": to permit the commission to commute **death benefits** due to the dependents of a deceased employee pursuant to the provisions of § 287.240 RSMo.¹⁴

Contrary to the *Nance I* court's conclusion, § 287.530 does not establish the right to benefits for anyone; it merely authorizes the commutation of benefits awarded under other sections of Chapter 287. For example, § 287.200 sets forth the permanent total disability benefits to which a permanently and totally disabled employee is entitled. Section 287.240 sets forth the death benefits to which dependents of a deceased employee are entitled in cases in which the employee died as a result of injuries arising out of and in the course of his employment. But, there is no section setting forth any benefits to which the surviving

⁹ *Id.*, at 462 (emphasis mine).

¹⁰ See *Bull v. Excel Corp.*, 985 S.W.2d 411, 415 (Mo. App. 1999)(holding that while stipulations of fact are generally binding in Missouri, parties may not invoke a stipulate to fix a conclusion of law.).

¹¹ *Nance I*, 395 S.W. 3d at 537 (emphasis in original).

¹² *Id.*

¹³ Remarkably, the *Nance I* court did not discuss or cite any of the Missouri cases that discuss commutation or interpret § 287.530.

¹⁴ The following cases all involve a dependent spouse's attempt to commute a death benefit award: *Schmelzle v. Ste. Genevieve Lime & Quarry Co.*, 37 S.W.2d 482 (Mo. App. 1931); *Mikesch v. Scruggs*, 46 S.W.2d 961 (Mo. App. 1932); *Shroyer v. Missouri Livestock Com. Co.*, 61 S.W.2d 713 (Mo. 1933); *Stolbert v. Walker-Jamar Co.*, 231 Mo. App. 1020 (Mo. App. 1935); *State ex rel. Missouri Gravel Co. v. Missouri Workmen's Compensation Com.*, 113 S.W.2d 1034 (Mo. App. 1938); *Wims v. Hercules Contracting Co.*, 123 S.W.2d 225 (Mo. App. 1939); *England v. Missouri Gravel Co.*, 129 S.W.2d 50 (Mo. Ct. App. 1939); *American Oil Co. v. Pierce*, 472 S.W.2d 458 (Mo. App. 1971).

spouse of a deceased permanently and totally disabled employee is entitled in her own right.¹⁵ Rather, § 287.230 establishes her rights upon the death of her permanently and totally disabled spouse: “The death of the injured employee shall not affect the liability of the employer to furnish compensation as in this chapter provided, *so far as the liability has accrued and become payable at the time of the death*, and any accrued and unpaid compensation due the employee shall be paid to his dependents without administration, or if there are no dependents, to his personal representative or other persons entitled thereto, but the death shall be deemed to be the termination of the disability (emphasis mine.)” Under a correct interpretation of the relevant statutes, Mrs. Nance was entitled to only those benefits for which Maxon’s “liability [had] accrued and become payable at the time of [Mr. Nance’s] death.”

The only reason expressed by the *Nance I* court for concluding this commission had authority to commute Mr. Nance’s permanent total disability benefits in favor of Mrs. Nance after his death was that if the court did not so hold, the phrase “or the dependents of the deceased employee” would be relegated to excess verbiage. I have now shown that the phrase has a well-accepted meaning that does not produce unreasonable results.

In addition to my concerns about the *Nance I* court’s finding that there existed a dispute between the *Nance* parties and its holding that the dispute conferred upon the parties the right to “settle” a finally-adjudicated award under § 287.390, I have concerns about the *Nance* courts’ interpretations of the meaning of the provisions of § 287.390. The courts’ interpretations are at odds with the reported decisions interpreting the meaning of § 287.390.

As regards our duties under § 287.390, the courts have said we have a duty to determine the parties’ rights under chapter 287 and “vouchsafe to them.”

[W]hatever the agreements may have been, the claimants nevertheless had definite rights under the act which it was the duty of the commission to vouchsafe to them. It is provided by section 3333, Rev. St. 1929, that nothing in the act shall be construed as preventing the parties to claims thereunder from entering into voluntary agreements in settlement thereof, but that no agreement by an employee or his dependents to waive rights accruing under the act shall be valid, nor shall any agreement of settlement or compromise be valid until approved by the commission, nor shall the commission approve any settlement which is not in accordance with the rights of the parties as given in the act.¹⁶

The *Nance II* court acknowledged we have a duty to determine if a settlement is in accord with *some* rights of the parties. But, the *Nance II* court ruled that the “rights of the parties under this chapter” are really just the rights set out in the next sentence of § 287.390. To wit; 1) the settlement is not the result of undue influence or fraud, 2) the employee fully understands his or her rights and benefits, and, 3) the employee voluntarily agrees to accept the terms of the agreement. Not only is the *Nance II* court’s holding contrary to any reasonable interpretation of phrase “under this chapter,”¹⁷ the holding is contrary to reported decisions considering the meaning of the phrase. For example, courts have held

¹⁵ But see, *Schoemehl v. Treasurer*, 217 S.W.3d 900 (Mo. 2007) holding that under some circumstances a surviving spouse or other dependent may become the “employee” entitled to permanent total disability upon the death of the injured worker.

¹⁶ *Schmelzle v. Ste. Genevieve Lime & Quarry Co.* 37 S.W.2d 482, 485 (Mo. App. 1931)(discussing the predecessor to § 287.390).

¹⁷ Even without the benefit of the reported decisions and even in the absence of a strict construction of the statute, can it really seriously be argued the legislature used the words “under this chapter” to mean “in the next sentence?”

that the phrase the “rights of the parties under this chapter” includes the rights conferred by § 287.240 upon the dependents of an employee who died as a result of his work injury¹⁸ and the right to a rehearing and review under §§ 287.470 and 287.530.¹⁹ Regarding § 287.390’s anti-waiver provision, one of the rights of a claimant “under this chapter” that can never be waived is the right to sue in tort as set forth in § 287.780.²⁰

There are other problems with the *Nance I* court’s holding that we must approve joint commutation requests as settlements. The agreements will seldom, if ever, be supported by consideration. An agreement to resolve an award by a lump sum payment of the value of the award is not supported by consideration where the agreement resolves no new issue but merely reduces amounts already owed to their present value.²¹ This view is consistent with the law of contracts in Missouri.²² Thus, the *Nance I* court has directed us to approve agreements that are not enforceable contracts. I do not believe that is what the legislature intended.

Further, the agreements are declared invalid by statute. Section 287.390’s anti-waiver provision states: “[N]o agreement by an employee or his dependents to waive his or her rights under this chapter shall be valid.” Workers’ compensation rights – including the amount of compensation due – are finally determined through a final award. As I mentioned earlier, most of the commutation requests the commission receives provide that employer/insurer will pay to the awardee less than the value of the award. That is, most of the agreements ask the awardee to waive a portion of their finally-determined compensation. I believe such agreements are in plain violation of the anti-waiver provision. I suspect that when the awardees who fell prey to these illegal agreements begin suing their employers for the remainder of the value of their awards, the employers will find they are precluded from asserting defenses based upon the illegal agreement or the purported waiver.

Public Policy Considerations

To be clear, I do not believe that when the *Nance* courts issued their decisions, they intended to strip protections from vulnerable injured workers or their dependents. Nor do I believe the *Nance* courts intended to create a mechanism whereby the financial burden of workplace injuries can be shifted from industry to the public at large. Under the bad facts of the *Nance* case, the courts’ rulings did neither. But in the vast majority of the commutation requests presented to the commission thus far, the *Nance* rulings do both.

We have jurisdiction over matters arising throughout Missouri. So far, only the Western District Court of Appeals has ruled that we have no duty to ensure that the rights of both the parties and the public are protected when we consider whether to modify the terms of a final award. I think the majority disserves the public by endorsing the *Nance* cases, particularly for cases coming to us from the Eastern and Southern Districts. I would not

¹⁸ *Schmelze*, 37 S.W.2d at 485 (“Here the rights of the claimants were to be determined by the construction to be put upon § 3319(b) [the predecessor to § 287.240].”)

¹⁹ *Oard v. Hope Engineering Co.*, 64 S.W.2d 707, 710 (Mo. App. W.D. 1933)(“Clearly the right to a rehearing and review under [the predecessors to §§ 287.470 and 287.530] are rights given by the Compensation Law.”).

²⁰ *Cook v. Hussmann Corp.*, 852 S.W.2d 342, 345 (Mo. 1993), concluding that the provision of § 287.390 stating “no agreement by an employee or his dependents to waive his rights under this chapter shall be valid,” renders void an employee’s purported waiver of the right to sue under § 287.780 RSMo.

²¹ *Oard*, 64 S.W.2d at 710. (“[E]ven if the final receipt does so state, there appears to be no consideration for such an agreement. It was merely a settlement or commutation into one lump sum of the remaining 46.4 weeks yet due under the original award, made without reference to and not in the place of, any other awards which, under the law, might and could be made...”).

²² *Miller v. Dombek*, 390 S.W.3d 204, 208 (Mo. App. 2012)(a promise to do that which one party is already legally obligated to do cannot serve as consideration for a contract). The *Dombek* case was decided by a panel of judges in the Western District just two weeks after the *Nance I* panel required us to approve the agreement in *Nance*.

exalt the *Nance* line of cases above the eighty-plus-year judicial history confirming our plainly-stated statutory authority to vouchsafe the rights of the parties while protecting the interests of the public.

Nor would I easily cede our long-confirmed authority to consider the interests of the public in workers' compensation matters. The commission is the only entity who can reasonably be expected to object when parties to an award join forces to shift the financial burden of a work injury from industry to the public. By their agreement, the parties have implicitly expressed they have no objection to the shifting. And why would they? Employers and their insurers believe they stand to be relieved of a portion of an indisputable financial obligation. Awardees stand to receive a cash infusion that they believe will solve their immediate financial crises (even as they threaten their long-term solvency). And if this commission does not hold fast and fulfill its duties as laid out in Chapter 287, the public stands to foot the bill for work injuries.

Conclusion

I would deny approval of the *Joint Petition* and *Settlement* for the following reasons: The parties have not identified a § 287.530 RSMo dispute, so § 287.390 is not triggered in this case; the agreement is not in accordance with the rights of the parties under Chapter 287 in that the agreement does not propose payment to Ms. [redacted] of the present value of her award; the agreement requires Ms. [redacted] to waive her right to 40% of the value of her award; the agreement is not supported by consideration; the agreement is not in the best interests of Ms. [redacted]; and, the parties have not alleged unusual circumstances warranting the commutation of Ms. [redacted]'s death benefit award.

For the many reasons set forth herein, I dissent from the decision of the majority of the commission to approve the agreement presented to us in this case.

Curtis E. Chick, Jr., Member

APPENDIX

Section 287.230 RSMo.

1. The death of the injured employee shall not affect the liability of the employer to furnish compensation as in this chapter provided, so far as the liability has accrued and become payable at the time of the death, and any accrued and unpaid compensation due the employee shall be paid to his dependents without administration, or if there are no dependents, to his personal representative or other persons entitled thereto, but the death shall be deemed to be the termination of the disability.

2. Where an employee is entitled to compensation under this chapter, exclusive of compensation as provided for in section 287.200, for an injury received and death ensues for any cause not resulting from the injury for which the employee was entitled to compensation, payments of the unpaid unaccrued compensation under section 287.190 and no other compensation for the injury shall be paid to the surviving dependents at the time of death.

3. In applying the provisions of this chapter, it is the intent of the legislature to reject and abrogate the holding in *Schoemehl v. Treasurer of the State of Missouri*, 217 S.W.3d 900 (Mo. 2007), and all cases citing, interpreting, applying, or following this case.

Section 287.241 RSMo.

The dependent and the employer may, by agreement, enter into a structured settlement which provides for different weekly benefits than provided in section 287.240. Any such settlement must be secured by indemnity insurance issued by a company approved by the Missouri department of insurance, financial institutions and professional registration.

Section 287.390.1 RSMo.

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.

Section 287.470 RSMo.

Upon its own motion or upon the application of any party in interest on the ground of a change in condition, the commission may at any time upon a rehearing after due notice to the parties interested review any award and on such review may make an award ending, diminishing or increasing the compensation previously awarded, subject to the maximum or minimum provided in this chapter, and shall immediately send to the parties and the employer's insurer a copy of the award. No such review shall affect such award as regards any moneys paid.

Section 287.530 RSMo

1. 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 which shall be fixed by the division or the commission, which sum shall be 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 that the employee or dependent has removed or is about to remove from the United States or that the employer has sold or otherwise disposed of the greater part of his business or assets.

2. 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.