

ORDER

Injury No.: 02-016564

Employee: Scott Curran
Employer: Johnson Controls, Inc.
Insurer: Authorized Self-Insurer

Introduction

On March 29, 2012, the Labor and Industrial Relations Commission (Commission) issued an award in this workers' compensation case allowing compensation to employee. Among other things, the award provides as follows with respect to employer/insurer's obligation to provide future medical treatment:

The claimant has been receiving medical treatment from Dr. Middleton for more than six years. The treatment appears to have brought the claimant some relief from this pain. He has a strong doctor patient relationship with Dr. Middleton. He has never been required to see her for over four times a year. I believe this treatment to be reasonable and necessary to cure and relieve the claimant from the condition of his repetitive injury.

I order and direct the employer to provide non-surgical medical treatment by Dr. Middleton for up to four visits per calendar year.

Award of Administrative Law Judge – affirmed and adopted by the Commission, page 6.

On November 17, 2017, the Labor and Industrial Relations Commission (Commission) received employee's "Motion to Compel Compliance with Award" (hereinafter "Motion") alleging that employer/insurer has failed to provide the full extent of future medical treatment as ordered; that employee has incurred out-of-pocket medical and prescription costs, and had to rely on his private insurance to pay most of his medical expenses; and that employee had also incurred mileage expenses in traveling to his treating physician's office. Employee requested the Commission issue an order enforcing the award and compelling employer/insurer to comply with same and reimburse employee the medical, prescription, and mileage expenses he has incurred.

On December 19, 2017, the Commission received employer/insurer's "Motion in Response to Claimant's Motion to Compel Compliance with Award." Therein, employer/insurer alleged it had paid all valid and authorized medical expenses it has received to date. Employer/insurer requested a finding from the Commission that it was in full compliance with the award.

On January 17, 2018, the Commission received from employee, with five numbered exhibits, "Claimant's Reply to Respondent's Response to Claimant's Motion to Compel Compliance with Award." Therein, employee alleged employer/insurer did not begin paying for employee's treatment pursuant to the award until August 2013; that Dr. Middleton's office had moved outside the metropolitan area of St. Joseph, and as a result, employee incurred mileage expenses in traveling to her office for treatment; that employee had been forced to use his private insurance and pay out-of-pocket for

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medications prescribed by Dr. Middleton; that despite multiple demands from employee's counsel for reimbursement of said expenses, employer/insurer had failed to respond or tender same; and that employer/insurer was underpaying the costs of employee's treatment with Dr. Middleton by requiring employee to first bill his personal insurance, and then paying any remainder; and that employee was receiving collection notices from the medical provider. Employee requested the Commission order employer/insurer to: (1) pay him the sum of \$8,001.43; (2) pay his additional prescription costs and mileage for ongoing treatment with Dr. Middleton's office; (3) pay the full amount of medical treatment employee needs pursuant to the award; and (4) pay any amounts employee's private health insurer may request or seek in reimbursement for amounts it has paid toward employee's awarded care.

On January 23, 2018, the Commission received from employer/insurer, with one exhibit, "Respondent's Response to Claimant's Reply to Respondent's Response to Claimant's Motion to Compel Compliance with Award." Therein, employer/insurer alleged that it had been making payments on behalf of employee dating back to at least May 21, 2012; that employer/insurer had made a total of \$7,681.06 in medical payments to Cameron Regional Medical Center; and that employee had not established the actual distance between his home and Dr. Middleton's office.

On February 6, 2018, the Commission received from employee, with one exhibit, "Claimant's Second Reply to Respondent's Second Response to Claimant's Motion to Compel Compliance with Award." Therein, employee alleged that his charges from Dr. Middleton and Cameron Regional Medical Center extend back to March 14, 2011; that the exhibit attached to Respondent's Response was insufficient, in various respects, to demonstrate that employer/insurer had complied with the award; that employer/insurer did not refute that it was not providing payment for prescriptions or mileage; and that employee had discovered that employer/insurer had failed to pay the award of three weeks for disfigurement pursuant to the award in this matter.

On February 14, 2018, the Commission received from employer/insurer "Respondent's Third Response to Claimant's Second Reply to Respondent's Second Response to Claimant's Motion to Compel Compliance with Award." Therein, employer/insurer disputed and responded to the various allegations set forth in employee's filing of February 6, 2018.

On March 1, 2018, the Commission issued an order dismissing employee's Motion to the extent it requested that the Commission enforce the award or compel employer/insurer to tender some past due or future medical expense with regard to treatment with Dr. Middleton, because the Commission does not have jurisdiction to enforce the award.¹ On the other hand, because the award did not address whether employee was entitled to mileage expenses, the Commission concluded it was authorized pursuant to § 287.140.1 RSMo and the decision in *State ex rel. ISP Minerals, Inc. v. Labor & Indus. Rels. Comm'n*, 465 S.W.3d 471 (Mo. 2015) to consider

¹ "Only a court can enforce administrative orders so that they have the effect of a judgment. The ability to render judgments and conduct judicial review is within the exclusive power of the judiciary. Accordingly, the Commission has no power to pronounce a judgment or to enforce a workers' compensation award. Only a court can do so." *Baxi v. United Techs. Auto. Corp.*, 122 S.W.3d 92, 96 (Mo. App. 2003).

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the parties' dispute with respect to mileage expenses. The Commission thus remanded this matter to the Division of Workers' Compensation for a hearing on that specific issue, and also to take evidence to establish the appropriate amount of an award of attorney's fees under § 287.560 RSMo, if it were shown that either party had brought, prosecuted, or defended these proceedings without reasonable ground.

The remand hearing was never held; instead, the parties pursued mediation before an administrative law judge.

On October 1, 2018, the parties submitted to the Commission a Joint Motion to Enter Into Compromise Settlement (Joint Motion). Therein, the parties now request the Commission to approve an agreement that employee will accept a lump sum payment of \$50,000.00 in exchange for "a full and final settlement of all issues, including all medical bills, medical mileage, attorney's fees, and future medical benefits" where "employee understands this lump sum settlement is a negotiated figure to settle all issues in this claim." *Joint Motion*, page 2.

Discussion

As recounted in the procedural history set forth immediately above, this matter was remanded for a limited hearing to take evidence relevant to the disputed and unresolved issues of mileage expenses and attorney's fees. In addition, the Commission expressly dismissed employee's Motion to the extent it requested enforcement of the award of future treatment with Dr. Middleton, because this issue had been finally adjudicated and resolved by the award of March 29, 2012. However, the parties now ask us to approve an agreement intended to resolve not only the issues of mileage expenses and attorney's fees, but also the additional issues of all medical bills and all future medical benefits. It thus appears that the parties contemplate employee's receipt of the proposed sum of \$50,000.00 will work the effect of releasing employer/insurer from any future obligation pursuant to the award to provide treatment with Dr. Middleton.²

Faced with these circumstances, we must first determine whether the Commission is authorized to consider and approve such an agreement. The scope of the Commission's authority to approve a settlement in a workers' compensation claim is set forth in § 287.390.1 RSMo, which provides, in relevant part, as follows:

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

² Stated another way, we are confident that employer/insurer has not agreed that employee has incurred at least \$50,000.00 in mileage expenses and attorney's fees.

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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.

In the recent case of *Dickemann v. Costco Wholesale Corp.*, 550 S.W.3d 65 (Mo. 2018), the Supreme Court of Missouri considered whether the Commission was authorized to approve a proposed "settlement" reducing a final award of weekly permanent total disability payments to a lump sum payment. *Id.* at 67. The Court held the Commission was not so authorized:

The key to a proper interpretation of section 287.390 is found in the first sentence, which provides, "Parties to **claims hereunder** may enter into voluntary agreements." ... Here, Dickemann asserted his **claim** for workers' compensation following his injury in 2010. In 2013, a hearing was held on his claim and, in April 2014, an award was rendered on Dickemann's claim in his favor. Therefore, as of April 2014, Dickemann's claim had been resolved. As a result, in signing the Agreement in November 2016, Dickemann was no longer making an authoritative "request," "claim," or "demand" for compensation under the workers' compensation law. Instead, from and after April 2014, Dickemann possessed a **right** to such compensation. Because Dickemann and Costco were not "parties to claims" under the workers' compensation statutes in November 2016 when they entered into the Agreement, the Agreement did not constitute a "settlement" of such claims for purposes of section 287.390.1. Accordingly, the Commission did not have the authority to consider — let alone approve — the Agreement under section 287.390.

Id. at 69-70 (emphasis in original).

Here, it appears that the parties' Joint Motion asks us to approve a lump sum payment that will relieve employer/insurer of any obligation it may have with respect to future medical treatment, which necessarily includes the awarded treatment with Dr. Middleton. However, applying the analysis from *Dickemann*, we must conclude that there is no pending "claim" for future medical treatment with Dr. Middleton capable of resolution via compromise settlement pursuant to § 287.390, because the parties' respective rights and obligations with respect to that issue were finally adjudicated in the Commission's award of March 29, 2012. As of October 1, 2018, when the parties filed the Joint Motion with the Commission, employee did not have a pending claim for future medical treatment; instead, from and after March 29, 2012, employee possessed a right to same. Accordingly, we must conclude that we are without authority to consider, let alone approve, the Joint Motion pursuant to § 287.390.

On the other hand, as stated in the Commission's order of remand in this matter, it does appear that there are legitimate, presently justiciable disputes between the parties with respect to the issues of mileage expenses and attorney's fees, and that the Commission

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has authority to adjudicate such disputes pursuant to §§ 287.140 and 287.560 RSMo, and the decision in *State ex rel. ISP Minerals, Inc. v. Labor & Indus. Rels. Comm'n*, 465 S.W.3d 471 (Mo. 2015). It follows that we have authority to consider and approve a settlement of those issues pursuant to § 287.390. Accordingly, rather than deny the Joint Motion outright, we deem it appropriate to first afford the parties an opportunity to submit an amended or substituted motion capable of being considered and approved by the Commission pursuant to § 287.390, as construed by the Court in the *Dickemann* case.

Alternatively, we will entertain an amended or substituted motion for commutation of the future medical portion of the award pursuant to § 287.530 RSMo, provided such motion satisfies each of the statutory elements for approval of a commutation thereunder, including evidence or stipulations sufficient to permit the Commission to make the requisite factual findings that 1) the proposed lump sum amount is equal to the commutable value of the award of future medical treatment; 2) that such would be in the best interest of the employee and/or avoid undue expense or undue hardship to either party; and 3) that unusual circumstances exist warranting commutation.

Order

The parties are directed to submit an amended or substituted motion within thirty (30) days of the date of this order addressing the concerns outlined above, or to otherwise show cause why the Commission should not enter an order dismissing the Joint Motion for lack of jurisdiction to consider or approve same.

If no responses are received, the Commission will take up and consider the Joint Motion based on the information available.

Given at Jefferson City, State of Missouri, this 27th day of November 2018.

LABOR AND INDUSTRIAL RELATIONS COMMISSION



Robert W. Cornejo
Robert W. Cornejo, Chairman

CONCURRING OPINION FILED

Reid K. Forrester
Reid K. Forrester, Member

Curtis E. Chick, Jr.
Curtis E. Chick, Jr., Member

Attest:

Pamela M. Hoffman
Secretary

Employee: Scott Curran

CONCURRING OPINION

While I concur in the Commission majority's choice to give the parties a chance to provide additional information, I write separately to announce my strong preference in favor of approving a settlement of the outstanding future medical portion of this case. Over a year has elapsed since the present litigation before the Commission began. During that time, the parties have undoubtedly incurred legal fees and expenses, all the while suffering the ambiguity (and acrimony) that pending litigation tends to foster. In this context, it is my desire and aim that this matter be resolved, once and for all, on the basis of a mutually agreeable compromise between the parties.

To be clear, it is my opinion that if the parties are able to identify **any** dispute between them with regard to the award of open future medical treatment with Dr. Middleton, I believe we are authorized pursuant to § 287.390 RSMo to approve a settlement of same. By way of example, it strikes me that the award leaves wholly unresolved the extent of the parties' rights and liabilities should Dr. Middleton leave the practice of medicine or otherwise become unavailable to provide the awarded visits. This contingency, standing alone, would appear to provide the requisite ambiguity giving rise to a colorable "claim" capable of resolution via compromise settlement.

The law is well settled that any dispute that can be the subject of an action of colorable merit may be the basis of a compromise. The law favors compromise of doubtful claims[.] ... The fact that, had the parties proceeded to litigate the claim, one of them would certainly have won, does not destroy the consideration for the compromise, for the consideration is said to be the settlement of the dispute. The merits of the controversy will not be considered after the parties have agreed upon a compromise.

Weinberg v. Globe Indem. Co., 355 S.W.2d 341, 346 (Mo. App. 1962).

While I have some doubts as to whether the holding in *Dickemann v. Costco Wholesale Corp.*, 550 S.W.3d 65 (Mo. 2018) is strictly applicable to a settlement attempting to close future medical, I do agree with the majority that specific identification of the parties' dispute, or the particular "claim" to be settled, is necessary to invoke the Commission's authority to approve any settlement pursuant to § 287.390. I would urge the parties to respond to the show cause order at the earliest opportunity. Upon receipt of information sufficient to allow me to identify a colorable dispute with respect to the awarded treatment with Dr. Middleton, I will stand ready to approve the settlement advanced by the parties.

With the foregoing caveats and clarifications, I concur in the decision of the Commission to issue the show cause order.



Reid K. Forrester, Member