

**IN THE MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

---

JERRY JACKSON )  
 )  
 Employee/Appellant, )  
 )  
 v. )  
 )  
 STAHL'S SPECIALITY, )  
 )  
 Employer-Insurer/Respondent. )

Case No. WD70909

---

**ON APPEAL FROM  
THE LABOR AND INDUSTRIAL RELATIONS COMMISSION**

---

**APPELLANT'S BRIEF  
ORAL ARGUMENT IS REQUESTED**

---

Submitted by:  
Rick Koenig #31523  
Attorney at Law  
600 South Ohio  
Sedalia, MO 65301  
660/827-3366  
660/826-4156 (FAX)  
rkoeniglaw@sbcglobal.net



## Table of Contents

Table of Authorities.....	iv	
Jurisdictional Statement.....	1	
Statement of Facts .....	2	
.....Offer of Proof		6
Ruling .....	7	
Points Relied On.....	9	
Argument.....	20	
Point I .....	20	
Standard of Review .....	20	
§287.390 mandates approval of the settlement agreement because the statutory requirements for §287.390 were proven by uncontroverted, clear, convincing, satisfactory, competent and material evidence.....	21	
1.....		T
he Parties voluntarily settled .....	22	
2.....		M
ust be approved by the ALJ or Commission .....	26	
3.....		T
he Parties settlement agreement was in accordance with the rights of the		

Parties pursuant to Chapter 287 .....	27
4.....	S
hall be approved because it was A) not the result of undue influence or fraud B) Appellant fully understood his rights and benefits, and C) Appellant voluntarily agreed to accept the terms. ....	27
Point II .....	32
Standard of Review .....	32
§287.390 mandates approval of the settlement agreement and non-approval of the agreement is a “final award” pursuant to §287.480 .....	33
Point III.....	39
Standard of Review .....	40
The Commission has jurisdiction pursuant to §287.480 as this is a collateral action for specific performance, which collateral action suspends the original action and which collateral action is to be resolved before proceeding with the original action and §287.390 mandates that the settlement agreement be approved .....	41
Point IV.....	45
Standard of Review .....	45
Seeking approval of a settlement is specifically allowed by §287.390 and for a party to seek that right is not frivolous .....	46
Point V .....	49
Standard of Review .....	49

Testimony of Mr. Koenig is competent and material evidence to prove the entitlement to a claim .....	50
Point VI.....	54
Standard of Review .....	54
Exhibit N is competent and material evidence to prove entitlement to a claim.....	55
Point VII .....	57
..... Standard of Review	57
..... Appellant seeks only approval of the settlement agreement	58
Conclusion .....	60
Certificate of Compliance.....	62
Certificate of Service .....	63

## TABLE OF AUTHORITIES

### Missouri Cases:

<u>Ayotte v. Pillsbury Company</u> , 871 S.W.2d 139 (Mo.App. 1994) .....	10, 23, 36
<u>Block v. Rackers</u> , 256 S.W.2d 760 (Mo. 1953) .....	26
<u>Cox v. Tyson Foods, Inc.</u> , 920 S.W. 2d 534, 535, (Mo. En Banc. 1996) .	16, 19, 28, 48, 58
<u>Delong v. Hampton Envelope Company</u> , 149 S.W.3d 549 (Mo.App. 2004) .....	16, 47
<u>Endicott v. Display Technologies Inc.</u> ,77 S.W.3d 612, 615  (Mo. En Banc. 2002) .....	21, 33, 40, 46, 50, 55, 58
<u>Fisher v. Waste Management of Missouri</u> ,  58 S.W.3d 523, 526 (Mo. En Banc. 2001) .....	11, 34
<u>Forkum v. Arvin Industries, Inc.</u> , 956 S.W.2d 359, 362 (Mo.App. 1997) .....	34, 43
<u>Grippe v. Momtazee</u> , 705 S.W.2d 551, 559 (Mo.App. 1986) .....	17, 18, 51, 56
<u>Hampton v. Big Boy Steel Erection</u> ,121 S.W.3d 220, 223  (Mo.En Banc. 2003) .....	16, 21, 33, 40, 46, 47, 50, 55, 58
<u>Highley v. Martin</u> ,784 S.W.2d 612 (Mo.App. 1990) .....	28, 37
<u>Hoover v. Wright</u> , 202 S.W.2d 83, 86 (Mo. 1947). .....	44
<u>Jennings v. Crestside Heating and Cooling</u> ,142 S.W.3d 843 (Mo.App. 2004) .....	37

<u>Johnson v. Denton Constr. Co.</u> , 911 S.W.2d 286, 287	
(Mo. En Banc. 1995) .....	21, 33, 40, 46, 50, 55, 58
<u>Kenny v. Vansittert</u> , 277 S.W.3d 713 (Mo.App. 2009) .....	17, 53
<u>McKean v. St. Louis County</u> , 964 S.W.2d 470 (Mo.App. 1998) .....	13, 14, 39, 42, 43
<u>Mikel v. Pott Industrie</u> , 896 S.W.2d 624 (Mo. En Banc. 1995) .....	41
<u>Mosier v. St. Joseph Lead Co.</u> , 205 S.W.2d 227 (Mo.App. 1947) .....	10, 14, 29, 34, 41, 44
<u>Muller v. St. Louis Housing Authority</u> , 175 S.W.3d 191 (Mo.App. 2005).....	11, 34, 43
<u>Myers v. Cap Sheaf Bread Co.</u> , 192 S.W.2d 503 (Mo. En Banc. 1946) .....	10, 30
<u>Nolan v. Degussa Admixtures, Inc.</u> , 246 S.W.3d 1(Mo.App. 2008) .....	16, 47
<u>Precision Investments, LLC v. Cornerstone Propane</u> , 220 S.W.3d 301	
(Mo. En Banc. 2007) .....	13, 14, 39, 41, 42, 43, 44
<u>Roberts v. City of St. Louis</u> ,	
254 S.W.3d 280 (Mo.App. 2008) .....	10, 11, 14, 17, 23, 35, 41, 50, 53
<u>Smith v. Smith</u> , 237 S.W.2d 84 (Mo.App. 1951) .....	17, 18, 50, 56
<u>Strange v. SCI Business Products</u> , 17 S.W. 3d 171 (Mo.App. 2000) .....	11, 32, 36, 37, 38

Sutton v. Vee Jay Cement Contracting, Co., 37 S.W.3d 803, 807

(Mo.App. 2001) ..... 21, 33, 40, 41, 46, 50, 55, 58

Missouri Statutes and Other Authorities:

Roberts v. City of St. Louis, Injury No. 02-121517 (Commission’s opinion)..... 30, 35

Strange v. SCI Business Products, Injury No. 98-002359 (Commission’s opinion) ..... 36

8CSR20-3.030 ..... 38

§286.060 R.S.Mo. (1995)..... 10, 29

§287.390 R.S.Mo. (2005)1, 3, 5, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 24, 26, 27, 28, 29

§287.460 R.S.Mo. (1998) ..... 8, 29, 34, 38, 41

§287.480 R.S.Mo. (1998) ..... 8, 11, 12, 13, 14, 29, 31, 32, 33, 34, 36, 38, 39, 41, 44 , 60

§287.495 R.S.Mo. (1998)..... 1, 20, 21, 32, 33, 35, 36, 37, 40, 45, 46, 49, 54, 55, 57

§287.560 R.S.Mo. (1993)..... 8, 15, 16, 45, 47

§477.070 R.S.Mo. (2004). ..... 1

Mo. Const. Art. 5, Sec. 3 (1994) ..... 1

Supreme Court Rule 84.13 ..... 17, 18, 51, 56

## **JURISDICTIONAL STATEMENT**

This case involves a Workers' Compensation matter pursuant to Appellant seeking approval of a settlement pursuant to §287.390 R.S.Mo. (2005), tried before an Administrative Law Judge (hereinafter ALJ) of the Division of Workers' Compensation, Department of Labor and Industrial Relations of Missouri. The ALJ issued an Order dated March 3, 2009, denying the Motion to Approve Settlement, finding there had been no settlement agreed to and signed off on by the Parties. Appellant timely appealed to the Labor and Industrial Relations Commission (hereinafter Commission). The Commission issued an Order dated April 9, 2009, dismissing Appellant's Application for Review for lack of jurisdiction.

It is from the Commission's Final Award dated April 9, 2009, that Appellant timely appeals pursuant to §287.495.1 R.S.Mo. (1998). The issues involved do not fall within the exclusive appellate jurisdiction of the Missouri Supreme Court, as provided in Art. 5, Sec. 3, Constitution of Missouri (1994). This case falls within the general appellate jurisdiction of the Missouri Court of Appeals. §287.495.1 R.S.Mo. (1998). The case was tried before an ALJ in Henry County, Missouri, and therefore the matter falls within the territorial jurisdiction of the Western District of the Court of Appeals. §477.070 R.S.Mo. (2004).

## STATEMENT OF FACTS

The Appellant, Jerry Jackson is 58 years old, and lives in Warrensburg, Missouri. He suffered injuries due to an accident, in the course and scope of his employment for Stahls Specialty, (hereinafter Respondent), on August 18, 1999. A trial was held before the Honorable Judge Mark Siedlik on November 17, 2003, and an award was entered. Appellant appealed this award to the Commission. The Commission issued a temporary award, awarding Appellant temporary total disability and additional medical treatment. Appellant received additional medical treatment and temporary total disability has continued to be paid since that award. (TR P 8-9, and P 88, Deposition P 44 [P 88 is misnumbered in transcript]).

Rick Koenig (hereinafter Mr. Koenig) has represented Appellant since the initial claim was filed. (TR P 14). Anne Wickliffe (hereinafter Ms. Wickliffe) is the attorney for Respondent and Thomas McGee. (TR P 55).

A mediation was conducted in June 2006, and negotiations to settle the claim took place thereafter. (TR P 9, 49).

Mr. Koenig conducted the negotiations on behalf of Appellant. Ms. Wickliffe negotiated on behalf of Respondent. (TR P 14, 15). Ms. Wickliffe was the only person on behalf of Respondent that discussed settlement offers, acceptances of settlement offers, or negotiations with Mr. Koenig. (TR P 85, 86, 87).

In approximately December 2006, the Respondent requested Gould and Lamb

prepare a report to submit to CMS/Medicare for Medicare's approval, on what Appellant needed for future medical treatment. (TR P 55-56, 93-101). Gould and Lamb generated a Medicare Set-Aside summary report in February 2007, proposing that \$8,610.72, be set aside in trust for the Appellants' future medical needs. (TR Exhibit F, P 101-108, P 60 and 61).

In February 2007, Appellant authorized Mr. Koenig to settle his claim for \$200,000, plus \$4,305.36, to be paid by the Respondent. (TR P 9).

In March 2007, Appellant and Respondent, thru their attorneys, agreed to settle the workers comp claim pursuant to §287.390, with Respondent paying \$200,000, for the permanent total disability; Respondent paying \$4,305.36, for the Medicare Set-Aside; Respondent to continue to pay temporary total disability until the settlement was approved; Respondent to pay all past medical expenses; and Appellant to pay \$4,305.36, which was one-half of the Medicare Set-Aside, and pay any Medicare lien. (TR P 29, 30, 31).

Respondent gave Appellant the information on temporary total disability and medical paid so Appellant could prepare the stipulation. (TR P 65-66).

Appellant drafted the stipulation and emailed that stipulation to Respondent on March 28, 2007. (Exhibit I, P 111-118). Respondent made hand-written changes on this stipulation and faxed that to Appellant on April 26, 2007. (Exhibit K, P 167-172). Appellant made all the changes requested by Respondent and emailed the revised stipulation to Respondent on April 27, 2007. (Exhibit L, P 173-180).

Respondent, in furtherance of the settlement, had agreed to forward the stipulations to Gould and Lamb and have Gould and Lamb submit the information to CMS/Medicare to obtain Medicare's approval on the Medicare Set-Aside amount. (TR P 34, Exhibit K, P 167).

The stipulation was not to be presented to the ALJ for approval until after Medicare had approved the Medicare Set-Aside. (TR P 27).

At the end of June, first of July 2007, Ms. Wickliffe called Mr. Koenig and stated that Respondent would not follow through with the settlement agreement. (TR P 35).

Respondent had not requested Medicare to approve of the Medicare Set-Aside either thru itself or thru Gould and Lamb, as it had agreed. (TR P 82).

Mr. Koenig requested that Medicare approve the Medicare Set-Aside amount as agreed to by Appellant and Respondent. (TR P 35-36). Medicare approved that amount rounded up to the nearest dollar. (TR P 36).

Nicole Clayton-Sawyer (hereinafter Ms. Sawyer), the senior claims adjustor on behalf of the Respondent, testified by deposition. (TR P 50-51). Ms. Sawyer brought with her all of the documents concerning the settlement information, offers, and agreements communicated between Respondent and Appellant. Ms. Sawyer would not produce those documents pursuant to the instructions of Ms. Wickliffe. (TR P 51 - P 52).

Ms. Sawyer testified she was made aware of all offers and that any proposals by Respondent to Appellant were made through Ms. Wickliffe. (TR P 53 and TR P 54).

Ms. Sawyer reviewed the stipulations. (Deposition Exhibit 8, TR Exhibit I, TR P

71; Deposition Exhibit 10, TR Exhibit K, TR P 76; and Deposition Exhibit 11, TR Exhibit L, P 79-80).

Ms. Sawyer would not answer any questions about the settlement, settlement offers, acceptance, or negotiations, if she was asked any of those questions, pursuant to the instructions of Ms. Wickliffe. (TR P 84 - P 85).

Appellant's Motion to Approve Settlement pursuant to Mo.Rev.Stat. 287.390, was heard by Judge Siedlik, on January 30, 2009. Respondent was represented by Ms. Wickliffe, Appellant by Mr. Koenig. Because it was necessary for Mr. Koenig to testify, Jerry Kenter, entered his special appearance to act as attorney on behalf of Appellant to present Appellant's Motion to Approve the Settlement. (TR P 4 - P 5).

Judge Siedlik stated before the hearing began that he did not believe he had jurisdiction to entertain Appellant's Motion to Approve a Settlement but allowed the hearing for whatever appeal purposes Appellant chose to pursue. (TR P 4).

Exhibits A thru M were admitted without objection. Exhibit N was offered and objected to by the Respondent, on the basis that Respondent had never seen the document before that morning. The objection to Exhibit N was sustained. (TR P 6 - P 7).

Appellant requested that the ALJ find there was a settlement agreement and approve that agreement. (TR P 10). Appellant stated there was no undue influence perpetrated on him as a result of the negotiations, and that there were no fraudulent statements made or any fraud committed on him. (TR P 10).

Appellant testified that all his rights under the work comp laws were explained to him by Mr. Koenig and he understood those rights. Appellant voluntarily accepted the terms of the agreement. (TR P 10).

Certain portions of Mr. Koenig's testimony was objected to as well as the admission of Exhibit N. The following is the evidence submitted by Appellant pursuant to an offer of proof.

#### OFFER OF PROOF

Mr. Koenig testified that a settlement agreement was entered between the parties on March 14, 2007, with the permanent disability settled for \$200,000; that Gould and Lamb's assessment of \$8,610.72, for the Medicare Set-Aside, would be paid one-half by Respondent and one-half by Appellant; the temporary total disability would continue until the judge approved the stipulation; all approved and authorized medical to date would be paid by the Respondent; and Appellant would pay Medicare if Medicare paid any unauthorized medical treatment. (TR P 15, 16, 17, 18, and 19). The Parties were going to wait to submit the settlement agreement to the Judge for approval, after Medicare approved the set-aside. (TR P 18 and P 27).

Information concerning the benefits paid, as needed to prepare the stipulation, was provided by Ms. Wickliffe to Mr. Koenig, on March 26, 2007. (TR P 19, and Exhibit H, P 110). A draft of the stipulation, was emailed to Ms. Wickliffe on March 28, 2007. (TR P 20, Exhibit I, TR P 111-118). Ms. Wickliffe hand wrote changes on that stipulation, and faxed the stipulation with her hand written changes (Exhibit K, P 167-172) to Mr.

Koenig on April 26, 2007. (TR P 20). Ms. Wickliffe's changes did not change any material terms of the settlement agreement. (TR P 21). Every change requested by Ms. Wickliffe to the stipulation was made and the revised stipulation (Exhibit L, P 173-180), was emailed to Ms. Wickliffe, on April 27, 2007, so that Ms. Wickliffe could give it to Gould and Lamb to submit to Medicare for Medicare's approval. (TR P 21, 22, and 23).

Ms. Wickliffe had agreed to take the stipulation and send the Gould and Lamb report to CMS/Medicare for CMS/Medicare approval. (TR P 23 and P 24).

At the end of June first of July 2007, Ms. Wickliffe called Mr. Koenig and said Respondent would not go thru with the settlement. (TR P 23).

There was no signed stipulation presented to the Judge for approval because the Parties were waiting for Medicare approval, then the stipulation would be signed and presented for approval. (TR P 24).

Mr. Koenig sent the information with the stipulation to CMS/Medicare to obtain CMS's approval on the Medicare Set-Aside. Exhibit N (TRP 182-188), is CMS's response to that request. (TR P 24-25). CMS/Medicare requested that the amount recommended by Gould and Lamb, rounded up to the dollar, be put in the set-aside. (TR P 25).

Appellant offered Exhibit N into evidence. Respondent objected to it because it had never been produced to her and this objection was sustained. (TR P 25).

## RULING

On March 3, 2009, Judge Siedlik entered his Order denying Appellant's Motion to

Approve Settlement, finding that pursuant to §287.390 R.S.Mo. there had been no settlement agreed to and signed off on by the parties. He further found that Appellant's Motion to be frivolous pursuant to §287.560 and ordered costs to be assessed against Appellant and Appellant's attorney. (L.F. P 1-2). Respondent filed their costs (L.F. P 22-29), and Appellant objected to those costs. (L.F. P 30-33). Appellant timely filed an Application for Review on March 13, 2009. On April 9, 2009, the Commission dismissed the Appellant's Application for Review for lack of jurisdiction on the basis that the ALJ's order was not an award pursuant to §287.460 R.S.Mo. and therefore not appealable pursuant to §287.480 R.S.Mo. (L.F. P 34).

**POINTS RELIED ON**

**WITH PRIMARY AUTHORITY**

**I.**

**THE COMMISSION ERRED AS A MATTER OF LAW IN RULING THAT IT LACKED JURISDICTION AND ITS FAILURE TO APPROVE THE SETTLEMENT CREATED REVERSIBLE ERROR because §287.390 R.S.MO. (2005) MANDATES THAT THE COMMISSION EXERCISE ITS POWERS, DUTIES, AND JURISDICTION AND “SHALL APPROVE” THE SETTLEMENT AGREEMENT WHEN THE STATUTORY REQUIREMENTS OF §287.390 ARE PROVEN in that THE UNCONTROVERTED, CLEAR, CONVINCING, SATISFACTORY, COMPETENT, AND MATERIAL EVIDENCE PROVED THE APPELLANT AND RESPONDENT VOLUNTARILY SETTLED THIS CLAIM; WHICH AGREEMENT WAS IN ACCORDANCE WITH THE RIGHTS OF THE PARTIES PURSUANT TO CHAPTER §287; THE AGREEMENT WAS NOT THE RESULT OF UNDUE INFLUENCE OR FRAUD, THE APPELLANT FULLY UNDERSTOOD HIS RIGHTS AND BENEFITS, AND VOLUNTARILY ACCEPTED THE TERMS OF THE AGREEMENT; THEREBY SATISFYING THE REQUIREMENTS OF §287.390 R.S.MO., AND MANDATING THE APPROVAL OF THE SETTLEMENT AGREEMENT.**

Ayotte v. Pillsbury Company, 871 S.W.2d 139 (Mo.App. 1994)

Mosier v. St. Joseph Lead Co., 205 S.W.2d 227 (Mo.App. 1947)

Myers v. Cap Sheaf Bread Co., 192 S.W.2d 503, 948 (Mo. En Banc. 1946)

Roberts v. City of St. Louis, 254 S.W.3d 280 (Mo.App. 2008)

§286.060 R.S.Mo. (1995)

§287.390 R.S.Mo. (2005)

**POINTS RELIED ON**

**II.**

**THE COMMISSION ERRED AS A MATTER OF LAW IN RULING IT LACKED JURISDICTION AND CREATED REVERSIBLE ERROR IN FAILING TO APPROVE THE SETTLEMENT AGREEMENT because AN ORDER NOT APPROVING A SETTLEMENT AGREEMENT WHEN §287.390 MANDATES THAT THE SETTLEMENT AGREEMENT BE APPROVED, IS A “FINAL AWARD” PURSUANT TO THE HOLDING IN STRANGE V. SCI BUSINESS PRODUCTS, 17 S.W.3D 171, 174 (MO.APP. 2000), FOR WHICH §287.480 GIVES THE COMMISSION JURISDICTION, AS §287.390 MANDATES THAT THE SETTLEMENT AGREEMENT BE APPROVED, WHICH WILL DISPOSE OF THE ENTIRE CONTROVERSY BETWEEN THE APPELLANT AND RESPONDENT in that THE UNCONTROVERTED EVIDENCE SATISFIED THE REQUIREMENTS OF §287.390, WHICH THEN MANDATED THE APPROVAL OF THE SETTLEMENT AGREEMENT, AND BEING A MATTER OF LAW THAT THE AGREEMENT BE APPROVED, THE NON-APPROVAL OF THE AGREEMENT IS AN APPEALABLE “FINAL AWARD”.**

*Fisher v. Waste Management of Missouri*, 58 S.W.3d 523, 526 (Mo. En Banc. 2001)

*Muller v. St. Louis Housing Authority*, 175 S.W.3d 191 (Mo.App. 2005)

*Roberts v. City of St. Louis*, 254 S.W.3d 280 (Mo.App. 2008)

Strange v. SCI Business Products, 17 S.W. 3d 171 (Mo.App. 2000)

§287.390 R.S.Mo. (2005)

§287.480 R.S.Mo. (1998)

**POINTS RELIED ON**

**III.**

THE COMMISSION ERRED AS A MATTER OF LAW IN RULING IT LACKED JURISDICTION AND CREATED REVERSIBLE ERROR IN NOT APPROVING THE SETTLEMENT AGREEMENT because THE COMMISSION HAS THE POWER, DUTIES AND JURISDICTION TO APPLY THE EXISTING LAWS TO RESOLVE THE ISSUES PRESENTED TO IT PURSUANT TO §287.390 AND §287.480, WHICH EXISTING LAWS, PRECISION INVESTMENT LLC V. CORNERSTONE PROPANE, 220 S.W.3D 301 (MO. EN BANC 2007), AND MCKEAN V. ST. LOUIS COUNTY, 964 S.W.2D 470 (MO.APP. 1998), PROVIDE THAT THE MOTION TO APPROVE THE SETTLEMENT CREATED A COLLATERAL ACTION WHICH SUSPENDED THE ORIGINAL CLAIM AND WHICH COLLATERAL ACTION SHOULD BE EXPEDITED AND RESOLVED FIRST, in that THE UNCONTROVERTED EVIDENCE ESTABLISHED THE SETTLEMENT AGREEMENT AND SATISFACTION OF ALL REQUIREMENTS OF §287.390, WHICH §287.390 THEN MANDATED THE APPROVAL OF THE SETTLEMENT AGREEMENT, AND THE SEEKING OF SPECIFIC PERFORMANCE CREATED AN ENFORCEABLE ACCORD EXECUTORY, WHICH SUSPENDED THE ORIGINAL CLAIM AND CREATED A COLLATERAL ACTION, WHICH COLLATERAL ACTION IS TO BE

**EXPEDITED AND RESOLVED BEFORE PROCEEDING WITH THE ORIGINAL CLAIM, AND THE NON-APPROVAL OF THE AGREEMENT IS AN APPEALABLE “FINAL AWARD.”**

*McKean v. St. Louis County*, 964 S.W.2d 470 (Mo.App. 1998)

*Mosier v. St. Joseph Lead Co.*, 205 S.W.2d 227 (Mo.App. 1947)

*Roberts v. City of St. Louis*, 254 S.W.3d 280 (Mo.App. 2008)

*Precision Investments, LLC v. CornerstonePropane* 220 S.W.3d 301 (Mo. En Banc.

2007)

§287.390 R.S.Mo. (2005)

§287.480 R.S.Mo. (1998)

**POINTS RELIED ON**

**IV.**

**THE COMMISSION ERRED AS A MATTER OF LAW IN NOT EXERCISING JURISDICTION AND THEREBY AFFIRMING THE ALJ'S ORDER FINDING THAT THE APPELLANT'S ACTIONS IN SEEKING A RIGHT GIVEN BY §287.390, WAS FRIVOLOUS PURSUANT TO §287.560 R.S.MO. (1993) AND ORDERED COSTS TO BE ASSESSED AGAINST APPELLANT AND APPELLANT'S ATTORNEY, THEREBY CREATING REVERSIBLE ERROR, because §287.390 GIVES THE RIGHT TO PARTIES TO SEEK APPROVAL OF SETTLEMENT AGREEMENTS AND §287.560 PROVIDES THAT TO BE ENTITLED TO AN AWARD OF COSTS THE ACTION OF THE PARTY IS TO BE EGREGIOUS in that APPELLANT HAD THE RIGHT PURSUANT TO §287.390 TO SEEK APPROVAL OF THE SETTLEMENT AND SOUGHT APPROVAL THRU §287.390, HIS ACTIONS WERE NOT FRIVOLOUS, OR EGREGIOUS, APPELLANT'S ATTORNEY WAS NOT A PARTY TO THIS CLAIM, AND THEREFORE THE RULING FINDING APPELLANT'S ACTIONS FRIVOLOUS AND ORDERING COSTS TO BE ASSESSED SHOULD BE REVERSED.**

Delong v. Hampton Envelope Company, 149 S.W.3d 549 (Mo.App. 2004)

Nolan v. Degussa Admixtures, Inc., 246 S.W.3d 1 (Mo.App. 2008)

Cox v. Tyson Foods, Inc., 920 S.W. 2d 534, 535, (Mo. En Banc. 1996).

§287.390 R.S.Mo. (2005)

§287.560 R.S.Mo. (1993)

**POINTS RELIED ON**

V.

**THE COMMISSION ERRED AS A MATTER OF LAW IN NOT EXERCISING JURISDICTION AND THEREBY AFFIRMING THE ALJ'S ORDER EXCLUDING FROM EVIDENCE THE TESTIMONY OF MR. KOENIG, CREATING A REVERSIBLE ERROR OF LAW because COMPETENT AND MATERIAL EVIDENCE TENDING TO PROVE AN ENTITLEMENT TO A CLAIM IS ADMISSIBLE AND ITS EXCLUSION MATERIALLY AFFECTED THE MERITS OF THE ACTION in that MR. KOENIG'S TESTIMONY WAS COMPETENT AND MATERIAL EVIDENCE OF THE PARTIES' SETTLEMENT AGREEMENT, AND EXCLUDING THIS EVIDENCE SHOULD BE REVERSED AS IT MATERIALLY AFFECTED THE MERITS OF THE ACTION.**

*Grippe v. Momtazee*, 705 S.W.2d 551, 559 (Mo.App. 1986)

*Smith v. Smith*, 237 S.W.2d 84, 87 (Mo.App. 1951)

*Roberts v. City of St. Louis*, 254 S.W.3d 280 (Mo.App. 2008)

*Kenny v. Vansittert*, 277 S.W.3d 713 (Mo.App. 2009)

§287.390 R.S.Mo. (2005)

Supreme Court Rule 84.13

**POINTS RELIED ON**

**VI.**

**THE COMMISSION ERRED AS A MATTER OF LAW IN NOT EXERCISING JURISDICTION AND THEREBY AFFIRMING THE ALJ'S ORDER EXCLUDING FROM EVIDENCE THE RESPONSE FROM CMS/MEDICARE APPROVING THE MEDICARE SET-ASIDE REQUIREMENT AS AGREED TO BY THE PARTIES AND THEREBY CREATING REVERSIBLE ERROR, because COMPETENT AND MATERIAL EVIDENCE TENDING TO PROVE AN ENTITLEMENT TO A CLAIM IS ADMISSIBLE AND ITS EXCLUSION MATERIALLY AFFECTED THE MERITS OF THE ACTION in that, THE PARTIES' AGREEMENT REQUIRED MEDICARE'S APPROVAL OF THE SET-ASIDE AMOUNT AND EXHIBIT N, WAS COMPETENT AND MATERIAL EVIDENCE, TO PROVE THAT AGREEMENT THEREFORE THE RULING EXCLUDING THIS EVIDENCE MATERIALLY AFFECTED THE MERITS OF THE ACTION.**

*Grippe v. Momtazee*, 705 S.W.2d 551, 559 (Mo.App. 1986)

*Smith v. Smith*, 237 S.W.2d 84 (Mo.App. 1951)

§287.390 R.S.Mo. (2005)

Supreme Court Rule 84.13

**POINTS RELIED ON**

**VII.**

**THE COMMISSION ERRED AS A MATTER OF LAW IN NOT EXERCISING JURISDICTION OF THE APPELLANT'S MOTION TO APPROVE THE SETTLEMENT AGREEMENT AND THEREBY AFFIRMING THE ALJ'S FINDING THAT APPELLANT SOUGHT ENFORCEMENT OF THE SETTLEMENT, AND THEREBY CREATING A REVERSIBLE ERROR OF LAW because §287.390 ALLOWS A PARTY TO SEEK APPROVAL OF A SETTLEMENT AGREEMENT AND NOT ENFORCEMENT, in that THE APPELLANT HAS ONLY SOUGHT APPROVAL OF THE SETTLEMENT AGREEMENT, NOT ENFORCEMENT AND THE RULING FINDING APPELLANT SOUGHT ENFORCEMENT SHOULD BE REVERSED.**

*Cox v. Tyson Foods, Inc.*, 920 S.W. 2d 534, 535, (Mo.En Banc. 1996)

§287.390 R.S.Mo. (2005)

## ARGUMENT

### POINT I

THE COMMISSION ERRED AS A MATTER OF LAW IN RULING THAT IT LACKED JURISDICTION AND ITS FAILURE TO APPROVE THE SETTLEMENT CREATED REVERSIBLE ERROR because §287.390 R.S.MO. (2005) MANDATES THAT THE COMMISSION EXERCISE ITS POWERS, DUTIES, AND JURISDICTION AND “SHALL APPROVE” THE SETTLEMENT AGREEMENT WHEN THE STATUTORY REQUIREMENTS OF §287.390 ARE PROVEN in that THE UNCONTROVERTED, CLEAR, CONVINCING, SATISFACTORY, COMPETENT, AND MATERIAL EVIDENCE PROVED THE APPELLANT AND RESPONDENT VOLUNTARILY SETTLED THIS CLAIM; WHICH AGREEMENT WAS IN ACCORDANCE WITH THE RIGHTS OF THE PARTIES PURSUANT TO CHAPTER §287; THE AGREEMENT WAS NOT THE RESULT OF UNDUE INFLUENCE OR FRAUD, THE APPELLANT FULLY UNDERSTOOD HIS RIGHTS AND BENEFITS, AND VOLUNTARILY ACCEPTED THE TERMS OF THE AGREEMENT; THEREBY SATISFYING THE REQUIREMENTS OF §287.390 R.S.MO., AND MANDATING THE APPROVAL OF THE SETTLEMENT AGREEMENT.

### STANDARD OF REVIEW

The standard of review is as set forth in §287.495.1 R.S.Mo. The Court shall

review only questions of law and may modify, reverse, remand, or set aside the award of the Commission if (1) the Commission acted without or in excess of its powers; (2) the award was procured by fraud; (3) the facts found by the Commission do not support the award; and (4) there was not sufficient, competent evidence in the record to warrant the making of the award. §287.495.1 R.S.Mo. (1998).

However, a Commission decision that involves interpretation or application of law is reviewed de novo for correctness which allows the Court of Appeals to examine issues and make holdings as though it were the Court of origin. Sutton v. Vee Jay Cement Contracting, Co., 37 S.W.3d 803, 807 (Mo.App. 2001). The Court reviews question of law independently. Johnson v. Denton Constr. Co., 911 S.W.2d 286, 287 (Mo. En Banc. 1995); Endicott v. Display Technologies Inc., 77 S.W.3d 612, 615 (Mo. En Banc. 2002).

If there is no error as a matter of law, the Court determines whether an award is supported by substantial, competent evidence by examining the evidence in the context of the whole record. Hampton v. Big Boy Steel Erection, 121 S.W.3d 220, 223 (Mo. En Banc. 2003).

Although the Court reviews the decision of the Commission, when the Commission affirms or adopts the findings and decisions of the ALJ, the Court will review the ALJ's decision and findings as adopted by the Commission. Sutton, 37 S.W.3d at 807.

**§287.390 MANDATES APPROVAL OF THE SETTLEMENT AGREEMENT  
BECAUSE THE STATUTORY REQUIREMENTS FOR §287.390 WERE**

**PROVEN BY UNCONTROVERTED, CLEAR, CONVINCING, SATISFACTORY,  
COMPETENT AND MATERIAL EVIDENCE**

The Appellant seeks approval of the settlement agreed to by the Appellant and Respondent pursuant to §287.390 R.S.Mo. (2005). §287.390 provides that parties in workers compensation claims may voluntarily settle their claim between themselves. The requirements for Appellant to be entitled to the approval of a settlement agreement pursuant to §287.390 are:

- (1) Parties enter into voluntary settlement agreement;
- (2) The agreement must be approved by the ALJ or the Commission;
- (3) The agreement must be in accordance with the rights of the parties as given by Chapter 287;
- (4) An ALJ or the Commission shall approve a settlement as valid and enforceable as long as;
  - (a) settlement is not the result of undue influence or fraud
  - (b) the employee fully understands his or her rights and benefits;
  - (c) the employee voluntarily agrees to accept the terms of the agreement.

The uncontroverted evidence proved all of §287.390's requirements.

**1. THE PARTIES VOLUNTARILY SETTLED**

A compromise settlement is a contract, that to be legally valid must possess the

essential elements of a contract, and a meeting of the minds is required. A party requesting specific performance of an agreement has the burden of proving the claim by clear, convincing, and satisfactory evidence. *Roberts v. City of St. Louis*, 254 S.W.3d 280, 283 (Mo.App.2008).

It is a question of law, whether there was a contract between Appellant and Respondent, for settlement of the claim. *Ayotte v. Pillsbury Company*, 871 S.W.2d 139, 142 (Mo.App. 1994).

Mr. Koenig, with authority of his client to settle the claim (TR P 9), testified that the parties agreed to settle in March 2007, with Respondent paying \$200,000 for the permanent total disability; Respondent paying \$4,305.36, for the Medicare Set-Aside; Respondent to continue to pay temporary total disability until the settlement was approved by the ALJ; Respondent to pay all past medical expenses; and Appellant to pay one-half of the Medicare Set-Aside, \$4,305.36, and any Medicare lien. (TR P 29, 30, 31).

Appellant drafted the stipulation and sent this to Respondent on March 28, 2007. (Exhibit I, TR P 111-118). Medicare's approval on the Set-Aside amount was needed. Respondent was to submit the request for approval to Medicare. (TR P 34, 167, 173). The stipulation was not to be presented to the ALJ for approval until CMS had approved the Medicare Set-Aside amount. (TR P 27).

Respondent was required pursuant to the Commission's award, to pay temporary total disability. (TR P 27, and 88). Temporary total disability benefits were paid by

Respondent from March 14, 2007, thru July 1, 2007, and thereafter. (TR Exhibit J, P 131-146).

The senior claims adjustor for the Respondent, Ms. Sawyer, testified that all negotiations and acceptance of offers on behalf of Respondent, were made by Ms. Wickliffe. (TR P 85, 86 and 87).

On April 26, 2007, Ms. Wickliffe sent the settlement document back to Appellant, writing her edits on the document. (TR P 167-172).

On the facsimile note from Respondent, Exhibit K, Ms. Wickliffe stated:

“Attached are my edits to the settlement document. Please look them over and send me a final version to submit to Gould and Lamb.” (TR P 167).

That settlement document, “Stipulation for Compromise Lump Sum Settlement Pursuant to Section 287.390 R.S.Mo.”, (TR P 168), states the parties stipulate and agree to the following:

“That because of these disputes, it is agreed by the parties hereto to enter into a compromise lump sum settlement under Section 287.390, R.S. Mo. as amended, for the payment by Employer/Insurer to Employee, a lump sum of TWO HUNDRED THOUSAND DOLLARS AND NO CENTS (\$200,000), for Employee’s alleged claim for permanent total disability; and the Employer/Insurer further **agrees** to pay the Employee ½ of the Worker’s Compensation Medicare Set-Aside **Trust** (WCMSAT) requirements, attached and incorporated herein by reference, which pursuant to such Set-Aside **Trust** the Employer/Insurer will pay

to Employee at the time of settlement **FOUR THOUSAND THREE HUNDRED FIVE DOLLARS AND THIRTY-SIX CENTS (4,305.36)**, and Employee will contribute **FOUR THOUSAND THREE HUNDRED FIVE DOLLARS AND THIRTY-SIX CENTS (4,305.36)** into the **WCMSAT**, for a total of \$8,610.72; and the Employer/Insurer will further pay all approved and authorized past medical expenses to date if not already paid. If there is a Medicare lien for past medical expenses paid by Medicare, Employee assumes responsibility to pay that lien pursuant to this settlement.” (TR P 169). (Respondent’s hand written changes to the stipulation are underlined and set forth in bold.)

Appellant made the changes requested by Respondent (Exhibit K, TR P 167), and sent that corrected stipulation to the Respondent, on April 27, 2007. (Exhibit L, TR P 173). Mr. Koenig testified that the stipulations were prepared because there was an agreement to settle the claim and because Respondent needed the stipulation to give to Gould and Lamb to submit it to Medicare/CMS, for their approval. (TR P 34).

At the end of June, first of July 2007, Ms. Wickliffe, called Mr. Koenig and stated that Respondent would not follow through with the settlement agreement. (TR P 35).

Mr. Koenig requested CMS approval of the Medicare Set-Aside amount agreed to by the Parties. (TR P 35-36). CMS approved the set-aside amount as agreed upon by the Parties, rounded to the nearest dollar. (TR P 36).

This evidence is clear, convincing, and satisfactory that the Appellant and Respondent voluntarily agreed to settle the claim, with all material terms agreed upon,

and with a meeting of the minds.

The Respondent provided no evidence in contradiction to the clear, convincing, and satisfactory evidence of the voluntary settlement agreement. The Respondent's senior claims adjuster reviewed the stipulations concerning the settlement. (TR P 71, 76). She would not provide any of the Respondent's documents evidencing this agreement or testify concerning the Parties' agreement. (TR P 51-52 and 84-85). Her unwillingness to provide the documents, and testify, raises a strong presumption that if she did, such documents and testimony would be unfavorable and damaging to the Respondent. *Block v. Rackers*, 256 S.W.2d 760, 764 (Mo. 1953).

Ms. Wickliffe, who was the direct person involved in the settlement agreement on behalf of the Respondent, did not testify. This raises a strong presumption that what she would say was unfavorable and damaging to the Respondent. *Block v. Rackers* at 764.

Appellant asserts that the portions of the testimony of Mr. Koenig, and Exhibit N, not allowed into evidence, was improperly excluded as set forth in Points V and VI. That evidence, pursuant to the offers of proof, lends additional support and explanation of the settlement agreement.

The ALJ stated in his award: "pursuant to §287.390 there has been no settlement agreed to and signed on by the parties." (L.F. P 1-2) The clear, convincing, and satisfactory evidence confirms this finding. The Parties settled this claim and the stipulation had not been signed before Respondent breached the agreement. (TR P 24).

**2. MUST BE APPROVED BY THE ALJ OR COMMISSION**

§287.390 requires the voluntary settlement agreement to be approved by an ALJ or the Commission and states that the ALJ or Commission shall approve the settlement agreement because the requirements of §287.390 were satisfied.

**3. THE PARTIES SETTLEMENT AGREEMENT WAS IN ACCORDANCE WITH THE RIGHTS OF THE PARTIES PURSUANT TO CHAPTER 287**

§287.390 requires that the agreement be in accordance with the rights of the parties given by Chapter 287. Exhibit K, the stipulation, either drafted or modified by Appellant and Respondent, states that the parties stipulated and agreed:

“ . . . that the settlement is in accordance with the rights of the parties.” (TR P 171).

By the very terms of the settlement agreement, the Parties have stipulated that it was in accordance with the rights of the Parties. There was no evidence presented that the agreement was not in accordance with the rights of the Parties under Chapter 287. The agreement was in accordance with the rights of the Parties.

**4. SHALL BE APPROVED BECAUSE IT WAS A) NOT THE RESULT OF UNDUE INFLUENCE OR FRAUD B) APPELLANT FULLY UNDERSTOOD HIS RIGHTS AND BENEFITS, AND C) APPELLANT VOLUNTARILY AGREED TO ACCEPT THE TERMS.**

§287.390 states the ALJ or Commission shall approve the settlement agreement if it is not the result of undue influence or fraud, the Employee fully understands his rights and benefits and voluntarily accepts the terms of the settlement.

Appellant testified that the agreement was not the result of undue influence or fraud, he understood his rights under the work comp laws, and voluntarily accepted the terms of the settlement. (TR P 10).

Respondent presented no evidence that the agreement was the result of undue influence or fraud.

In summary, the uncontroverted evidence, for which there is no dispute, is that the Appellant and Respondent voluntarily agreed to settle with Respondent paying \$200,000, on the permanent total disability, paying \$4,305.36, on the Medicare Set-Aside, paying all approved and authorized medical, and paying temporary total disability until the settlement was approved. Appellant was to pay \$4,305.36, on the Medicare Set-Aside and pay any Medicare lien. This agreement was in accordance with the rights of the Parties, was not the result of undue influence or fraud, Appellant fully understood his rights and benefits and voluntarily accepted the terms of the agreement. This uncontroverted evidence satisfied all the requirements of §287.390.1. When the facts pertinent to an issue are not in dispute it is a question of law requiring de novo review. *Cox v. Tyson Foods, Inc.*, 920 S.W. 2d 534, 535, (Mo. En Banc. 1996). §287.390 mandates that the settlement agreement be approved.

The ALJ failed to approve the settlement, finding there was no settlement agreement that had been signed by the Parties. (L.F. P 1). The failure to approve the settlement was an error of law. The Court in *Highley v. Martin*, 784 S.W.2d 612, 616 (Mo.App. 1990), stated that nothing within the regulations or within §287.390 requires

the stipulations to be in writing and signed by the Parties.

Because the ALJ would not approve the settlement based upon an error of law, Appellant sought to present the agreement to the Commission, as §287.390 states it shall be approved by an ALJ or the Commission when all of the requirements of §287.390 were satisfied.

The Commission held it had no jurisdiction, stating that the ALJ's Order was not an award rendered pursuant to §287.460, and since there was no "§287.460 award" the Commission had no statutory authority pursuant to §287.480 to consider the Application for Review and dismissed the Application for lack of jurisdiction. (L.F. P 34).

The Appellant has only, and can only, seek approval of the settlement agreement pursuant to §287.390, and not thru §287.460.

The workers compensation laws prescribed the procedures to be followed in the case of what may be termed adversary proceedings (§287.460), and the Legislature at the same time saw fit to preserve to the parties in compensation cases their right to make voluntary agreement in settlement thereof (§287.390), with the approval of the Commission. This was undoubtedly done in recognition of the well-established principal that the law favors the compromise of disputed claims. *Mosier v. St. Joseph Lead Co.*, 205 S.W.2d 227, 231 (Mo.App. 1947).

The Commission, has the duty, power, jurisdiction, and authority to exercise all of the powers, duties, and responsibilities conferred or imposed upon it by the workers compensation law (Chapter 287, R.S.Mo.). §286.060(1) and (3) R.S.Mo. (1995).

The Supreme Court has held that the law places a duty upon the Commission, pursuant to §287.390, to rule on any settlement attempted to be made and this duty cannot be avoided. *Myers v. Cap Sheaf Bread Co.*, 192 S.W.2d 503, 506 (Mo. En Banc. 1946).

The 2005 amendment to §287.390 added to this duty to review, the mandate that if the statutory requirements of §287.390 were proven the Commission shall approve the settlement. The Commission in *Roberts v. City of St. Louis*, Injury No. 02-121517, concerning §287.390, stated:

“Section 287.390 mandates that we approve the settlement so long as it is not the result of undue influence or fraud, employee fully understands his rights and benefits, and employee voluntarily agrees to accept the terms of the agreement. The record contains no evidence to suggest that the agreement was the result of undue influence or fraud. Employee is represented by counsel. Absent evidence to the contrary, we presume employee’s counsel explained to employee his rights and benefits under the Workers’ Compensation Law and under the agreement and that employee’s counsel has ensured that employee’s agreement is voluntary”. (Appendix P 21).

§287.390 specifically authorized and placed the duty on the Commission to review the settlement agreement between Appellant and Respondent. §287.390 further mandated that the settlement agreement be approved because all the elements of

§287.390 were proven by the evidence.

The Commission additionally has jurisdiction pursuant to §287.480, the Commission's review powers.

## ARGUMENT

### POINT II

THE COMMISSION ERRED AS A MATTER OF LAW IN RULING IT LACKED JURISDICTION AND CREATED REVERSIBLE ERROR IN FAILING TO APPROVE THE SETTLEMENT AGREEMENT because AN ORDER NOT APPROVING A SETTLEMENT AGREEMENT WHEN §287.390 MANDATES THAT THE SETTLEMENT AGREEMENT BE APPROVED, IS A “FINAL AWARD” PURSUANT TO THE HOLDING IN STRANGE V. SCI BUSINESS PRODUCTS, 17 S.W.3D 171, 174 (MO.APP. 2000), FOR WHICH §287.480 GIVES THE COMMISSION JURISDICTION, AS §287.390 MANDATES THAT THE SETTLEMENT AGREEMENT BE APPROVED, WHICH WILL DISPOSE OF THE ENTIRE CONTROVERSY BETWEEN THE APPELLANT AND RESPONDENT in that THE UNCONTROVERTED EVIDENCE SATISFIED THE REQUIREMENTS OF §287.390, WHICH THEN MANDATED THE APPROVAL OF THE SETTLEMENT AGREEMENT, AND BEING A MATTER OF LAW THAT THE AGREEMENT BE APPROVED, THE NON-APPROVAL OF THE AGREEMENT IS AN APPEALABLE “FINAL AWARD”.

### STANDARD OF REVIEW

The standard of review is as set forth in §287.495.1 R.S.Mo. The Court shall review only questions of law and may modify, reverse, remand, or set aside the award of the

Commission if (1) the Commission acted without or in excess of its powers; (2) the award was procured by fraud; (3) the facts found by the Commission do not support the award; and (4) there was not sufficient, competent evidence in the record to warrant the making of the award. §287.495.1 R.S.Mo. (1998).

However, a Commission decision that involves interpretation or application of law is reviewed de novo for correctness which allows the Court of Appeals to examine issues and make holdings as though it were the Court of origin. Sutton v. Vee Jay Cement Contracting, Co., 37 S.W.3d 803, 807 (Mo.App. 2001). The Court reviews question of law independently. Johnson v. Denton Constr. Co., 911 S.W.2d 286, 287 (Mo. En Banc. 1995); Endicott v. Display Technologies Inc., 77 S.W.3d 612, 615 (Mo. En Banc. 2002).

If there is no error as a matter of law, the Court determines whether an award is supported by substantial, competent evidence by examining the evidence in the context of the whole record. Hampton v. Big Boy Steel Erection, 121 S.W.3d 220, 223 (Mo. En Banc. 2003).

Although the Court reviews the decision of the Commission, when the Commission affirms or adopts the findings and decisions of the ALJ, the Court will review the ALJ's decision and findings as adopted by the Commission. Sutton, 37 S.W.3d at 807.

**§287.390 MANDATES APPROVAL OF THE SETTLEMENT AGREEMENT AND NON-APPROVAL OF THE AGREEMENT IS A “FINAL AWARD” PURSUANT TO §287.480**

The Commission refused to exercise jurisdiction pursuant to §287.480 R.S.Mo. because the ALJ had not issued an award pursuant to §287.460 R.S.Mo. (Document P 34). §287.480 R.S.Mo. (1998) provides that applications for review from awards can be made to the Commission.

The Supreme Court in *Fisher v. Waste Management of Missouri*, 58 S.W.3d 523, 526 (Mo. En Banc. 2001) stated that the legislative intent is derived from the statute's words, "used in their plain and ordinary meaning." When a term is not defined the legislature is not held to a technical meaning, but rather reference is made to the dictionary to find the meaning that the legislature intended.

"Award" is not defined by the legislature in Chapter 287. "Award" is defined in the Webster's New World Dictionary, 1977, as meaning: Vt.(1) to give, as by legal decision; N. 1. A decision, as by a judge.

A "final award" is one which disposes of the entire controversy between the parties. *Muller v. St. Louis Housing Authority*, 175 S.W.3d 191, 194 (Mo.App. 2005). An order lacks finality where . . .it expressly remains tentative, provisional, contingent subject to recall, revision, or reconsideration by the issuing agency. *Forkum v. Arvin Industries, Inc.*, 956 S.W.2d 359, 362 (Mo.App. 1997). §287.390 contemplates the settlement of the entire claim and the discharge of the Employer's entire liability. *Mosier* at 233.

§287.390 gives the ALJ or the Commission the authority to approve or reject the settlement agreement. §287.390 does not use the word "award". The approval or non-

approval of a settlement agreement is a legal decision that meets the dictionary meaning of award. The legal decisions concerning settlement agreements have treated those decisions as awards.

In *Roberts v. City of St. Louis*, 254 S.W.3d 280, 282 (Mo.App. 2008) the employee claimed a settlement was agreed to while the claim was being tried before the ALJ. The parties asked the ALJ to wait on issuing an award so the parties could get a response on the Medicare Set-Aside. The settlement agreement was never submitted to the ALJ for approval. Contrary to the parties request, the ALJ issued an award on the original claim. The Employee filed an Application for Review, and a motion to enforce the oral settlement agreement with the Commission. The Commission reviewed the evidence concerning the alleged oral settlement agreement and issued a “final award” finding the parties had entered into a settlement agreement. *Id* at 283. Employer appealed this “final award”, finding a settlement agreement, to the Court of Appeals pursuant to §287.495. The Court of Appeals treated the approval of the settlement agreement as a “final award.” If the settlement agreement approval was not a “final award”, the Court of Appeals would not have jurisdiction.

The Commission in its opinion in *Roberts v. City of St. Louis*, Injury No. 02-121517, resolved the settlement action and did not consider the appeal from the ALJ’s award on the original claim. The Commission stated that once it approved the settlement agreement pursuant to §287.390, then it shall enter an award in accordance with the settlement agreement. (Appendix P 19). (Emphasis supplied). The Commission did

approve the settlement agreement pursuant to §287.390, and entered a “final award”. (Appendix P 22). This decision by the Commission in 2007, is contrary to the Commission’s reasoning in denying jurisdiction in this claim. The Commission herein stated that the ALJ in considering a compromise agreement pursuant to §287.390 is not called upon to render an award. (L.F. P 34).

In Ayotte v. Pillsbury Company, 871 S.W.2d 139, (Mo.App. 1994) the ALJ found a settlement agreement had been reached and approved the settlement. The employee appealed this to the Commission pursuant to §287.480. This approval of a settlement agreement pursuant to §287.390 could not have been appealed to the Commission, if it was not considered an “award”. The Commission affirmed the settlement. The employee appealed this pursuant to §287.495 to the Court of Appeals. Again, if the approval of the settlement pursuant to §287.390 was not a “final award”, the Court of Appeals could not review the Commission’s decision approving the settlement.

The allowance of an appeal, when a settlement agreement was not approved, and this non-approval was an appealable “final award”, occurred in Strange v. SCI Business Products, 17 S.W. 3d 171 (Mo.App. 2000). In Strange, the ALJ issued a temporary award that was appealed to the Commission. While pending with the Commission, the parties settled the claim. The Commission refused to sign the settlement agreement because the second injury fund was not included in the settlement agreement. The Employer appealed the Commission’s failure to approve the settlement pursuant to §287.495 to the Court of Appeals.

In Strange v. SCI Business Products, Injury No. 98-002359 (Commission's opinion), the Employer had paid medical expenses for the Employee before the hearing was held before the ALJ. (Appendix at P 33). In Jennings v. Crestside Heating and Cooling, 142 S.W.3d 843, 846 (Mo.App. 2004), the payment of past expenses by the Employer made it clear that the Employer was only contesting the nature and extent of liability, and not all liability, and an appeal on a temporary award was not allowed. Because the Employer had paid medical and was not contesting all liability, an appeal on the temporary award would not have been allowed in Strange v. SCI Business Products, 17 S.W. 3d 171 (Mo.App. 2000). The Court of Appeals in Strange v. SCI Business Products, 17 S.W. 3d 171 (Mo.App. 2000), however did allow the appeal on the employer's request to approve the settlement.

The Court of Appeals in Strange v. SCI Business Products, 17 S.W. 3d 171 (Mo.App. 2000), found that there was no legal requirement that the Fund would have to join in the settlement and reversed the Commission's denial. Id at 174. The Court allowed this appeal from the denial of a settlement agreement pursuant to §287.390. The Commission's denial was an appealable "final award" because the Court of Appeals exercised jurisdiction pursuant to §287.495.

The ALJ herein stated that there was no settlement agreed to and signed off on by the Parties. This is a correct finding, but was an error of law in not approving the settlement. See Highley v. Martin, 784 S.W.2d 612, 616 (Mo.App. 1990). In a personal injury claim the Appellant would be entitled to specific performance based upon the ALJ

finding the agreement. The Appellant proved this agreement by clear, convincing, and satisfactory evidence. However being a workers compensation claim, Appellant must satisfy the additional requirements of §287.390, as set forth in Point I. Appellant satisfied all of the requirements of §287.390 and because of that, §287.390 mandated that the settlement agreement be approved. The statutory mandate requiring approval of the settlement agreement completely resolves all of the controversies between the Appellant and Respondent. The ALJ and Commission's failure to follow this mandate was an error of law. Because the settlement agreements approval was mandated by §287.390, as a matter of law, it created an appealable, "final award", pursuant to the holding in *Strange v. SCI Business Products*, 17 S.W.3d 171 (Mo.App. 2007).

Settlement agreements to resolve pending workers compensation claims pursuant to §287.390 can be agreed to at any stage of the proceedings. The Commission's and Court of Appeals' authority over settlements is not dependent upon whether it was the subject of an "award" entered pursuant to §287.460 as the Commission herein has held.

The Commission also by its regulations allows for appeals from orders. 8CSR20-3.030 provides that any interested party in a contested case may appeal from a final award, order, or decision by an ALJ, by making an application for review within twenty days from the date of the award, order, or decision, with the Commission as provided by Section 287.480 R.S.Mo. (Appendix P 15). (Emphasis supplied).

The ALJ and Commission's failure to approve the settlement as mandated by §287.390, was an appealable "final award."



## ARGUMENT

### POINT III

THE COMMISSION ERRED AS A MATTER OF LAW IN RULING IT LACKED JURISDICTION AND CREATED REVERSIBLE ERROR IN NOT APPROVING THE SETTLEMENT AGREEMENT because THE COMMISSION HAS THE POWER, DUTIES AND JURISDICTION TO APPLY THE EXISTING LAWS TO RESOLVE THE ISSUES PRESENTED TO IT PURSUANT TO §287.390 AND §287.480, WHICH EXISTING LAWS, PRECISION INVESTMENT LLC V. CORNERSTONE PROPANE, 220 S.W.3D 301 (MO. EN BANC 2007), AND MCKEAN V. ST. LOUIS COUNTY, 964 S.W.2D 470 (MO.APP. 1998), PROVIDE THAT THE MOTION TO APPROVE THE SETTLEMENT CREATED A COLLATERAL ACTION WHICH SUSPENDED THE ORIGINAL CLAIM AND WHICH COLLATERAL ACTION SHOULD BE EXPEDITED AND RESOLVED FIRST, in that THE UNCONTROVERTED EVIDENCE ESTABLISHED THE SETTLEMENT AGREEMENT AND SATISFACTION OF ALL REQUIREMENTS OF §287.390, WHICH §287.390 THEN MANDATED THE APPROVAL OF THE SETTLEMENT AGREEMENT, AND THE SEEKING OF SPECIFIC PERFORMANCE CREATED AN ENFORCEABLE ACCORD EXECUTORY, WHICH SUSPENDED THE ORIGINAL CLAIM AND CREATED A COLLATERAL ACTION, WHICH COLLATERAL ACTION IS TO BE

**EXPEDITED AND RESOLVED BEFORE PROCEEDING WITH THE ORIGINAL CLAIM, AND THE NON-APPROVAL OF THE AGREEMENT IS AN APPEALABLE “FINAL AWARD.”**

**STANDARD OF REVIEW**

The standard of review is as set forth in §287.495.1 R.S.Mo. The Court shall review only questions of law and may modify, reverse, remand, or set aside the award of the Commission if (1) the Commission acted without or in excess of its powers; (2) the award was procured by fraud; (3) the facts found by the Commission do not support the award; and (4) there was not sufficient, competent evidence in the record to warrant the making of the award. §287.495.1 R.S.Mo. (1998).

However, a Commission decision that involves interpretation or application of law is reviewed de novo for correctness which allows the Court of Appeals to examine issues and make holdings as though it were the Court of origin. *Sutton v. Vee Jay Cement Contracting, Co.*, 37 S.W.3d 803, 807 (Mo.App. 2001). The Court reviews question of law independently. *Johnson v. Denton Constr. Co.*, 911 S.W.2d 286, 287 (Mo. En Banc. 1995); *Endicott v. Display Technologies Inc.*, 77 S.W.3d 612, 615 (Mo. En Banc. 2002).

If there is no error as a matter of law, the Court determines whether an award is supported by substantial, competent evidence by examining the evidence in the context of the whole record. *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 223 (Mo. En Banc. 2003).

Although the Court reviews the decision of the Commission, when the

Commission affirms or adopts the findings and decisions of the ALJ, the Court will review the ALJ's decision and findings as adopted by the Commission. *Sutton*, 37 S.W.3d at 807.

**THE COMMISSION HAS JURISDICTION PURSUANT TO §287.480 AS THIS IS A COLLATERAL ACTION FOR SPECIFIC PERFORMANCE, WHICH COLLATERAL ACTION SUSPENDS THE ORIGINAL ACTION AND WHICH COLLATERAL ACTION IS TO BE RESOLVED BEFORE PROCEEDING WITH THE ORIGINAL ACTION AND §287.390 MANDATES THAT THE SETTLEMENT AGREEMENT BE APPROVED**

The Commission refused to exercise jurisdiction either pursuant to §287.390 R.S.Mo. or §287.480 R.S.Mo.

The Commission has subject matter jurisdiction to apply the existing law in order to resolve the issues before it. See *Mikel v. Pott Industries*, 896 S.W.2d 624, 627 (Mo. En Banc. 1995). The Appellant can only seek approval of the settlement agreement pursuant to §287.390. The existing laws, allowing parties to settle their workers compensation claims pursuant to §287.390, were preserved to the parties by the Legislature, separate and apart from adversary proceedings held pursuant to §287.460. See *Mosier*, at page 231.

The Court of Appeals in *Roberts v. City of St. Louis*, 254 S.W. 3d 280, 283, (Mo.App. 2008), set forth the existing law to be applied in a workers comp claim where a party was seeking specific performance of a settlement agreement pursuant to §287.390,

citing *Precision Investment LLC v. Cornerstone Propane*, 220 S.W.3d 301 (Mo. En Banc. 2007). The Supreme Court in *Precision*, set forth the existing laws to be applied where a party was seeking specific performance of a settlement agreement in a pending claim.

In *Precision*, Precision recovered a judgment in the trial court against Cornerstone. Cornerstone appealed that judgment to the Court of Appeals. During the appeal of this judgment, Cornerstone asserted that the parties settled the case. This settlement was disputed by Precision. The Court of Appeals requested the trial judge to determine if the parties had settled. The trial judge found that the parties had settled the claim. The Court of Appeals directed the trial court to enter judgment on the settlement and dismissed the judgment appeal. Precision contested whether the settlement existed and sought a review of the Court of Appeals' dismissal of the judgment appeal.

The Supreme Court differentiated the original judgment and the settlement judgment. The Court stated that agreements to settle pending lawsuits are enforceable by motion. A motion to compel settlement adds to a pending action a collateral action for specific performance of the settlement agreement. *Id* at 303.

The Court then stated that the settlement agreement becomes an “accord executory”, or an agreement for the future discharge of an existing claim by a substituted performance. An enforceable accord executory suspends the original claim. The Supreme Court held that the collateral action of the settlement should be expedited and resolved before a determination is made on the primary action. *Id* at 304. (Emphasis supplied).

In McKean v. St. Louis County, 964 S.W.2d 470, 471 (Mo.App. 1998), cited by Precision, the Court of Appeals explained that with a settlement agreement for a pending lawsuit, if one of the parties refuses to comply with the agreement, the other party can abandon the settlement agreement and proceed under the original cause of action, or bring a collateral action seeking specific performance of the terms of the agreement. (Emphasis supplied).

The Appellant's Motion to Approve the Settlement, pursuant to §287.390, and Precision, was a collateral action, separate from the primary action. As the Supreme Court stated in Precision, this collateral action should be resolved before a determination is made on the primary action. See Precision at 304.

The entire controversy in this collateral matter, is Appellant seeking approval of the settlement agreement. Because all the requirements of §287.390 were satisfied, §287.390 mandated that the settlement agreement be approved. This mandated approval was an enforceable accord executory which suspended the original claim. See Precision at 304. The Commission's and ALJ's Order denying approval of the agreement, when §287.390 mandated the approval, was an error of law. This error of law is a final award. It was a legal decision that disposed of the entire controversy in this collateral action. See Muller at 194. This order was not expressly made tentative, provisional, subject to recall, revision or reconsideration. See Forkum at 362. After this Order was entered, the Appellant could have abandoned the settlement agreement and proceeded under the original cause or continued to seek specific performance thru this collateral action. See

McKean at page 471. The Appellant continued to seek specific performance in this collateral action, and the collateral action is to be expedited and resolved before the original action is determined. See Precision at 304. Appellant therefore timely filed his appeals to continue to seek specific performance and not abandon the settlement agreement. The ALJ's and Commission's Orders were "final awards".

Specific performance is a remedy that is invoked primarily so that complete justice may be done between the parties. Hoover v. Wright, 202 S.W.2d 83, 86 (Mo. 1947).

Were the employee not to be held to his compromise settlement when validly made, the employer likewise could not be held, and §287.390, would thereby be rendered meaningless and ineffective, and a resort to its provisions would be a vain and futile thing. Mosier at 233 and 234.

§287.480 gave the power, duty, and jurisdiction over Appellant's Motion to Approve the Settlement to the Commission, as an order not approving a settlement agreement, when §287.390 mandated the approval of that agreement, is an enforceable accord executor, and is a "final award."



## ARGUMENT

### POINT IV

THE COMMISSION ERRED AS A MATTER OF LAW IN NOT EXERCISING JURISDICTION AND THEREBY AFFIRMING THE ALJ'S ORDER FINDING THAT THE APPELLANT'S ACTIONS IN SEEKING A RIGHT GIVEN BY §287.390, WAS FRIVOLOUS PURSUANT TO §287.560 R.S.MO. (1993) AND ORDERED COSTS TO BE ASSESSED AGAINST APPELLANT AND APPELLANT'S ATTORNEY, THEREBY CREATING REVERSIBLE ERROR, because §287.390 GIVES THE RIGHT TO PARTIES TO SEEK APPROVAL OF SETTLEMENT AGREEMENTS AND §287.560 PROVIDES THAT TO BE ENTITLED TO AN AWARD OF COSTS THE ACTION OF THE PARTY IS TO BE EGREGIOUS in that APPELLANT HAD THE RIGHT PURSUANT TO §287.390 TO SEEK APPROVAL OF THE SETTLEMENT AND SOUGHT APPROVAL THRU §287.390, HIS ACTIONS WERE NOT FRIVOLOUS, OR EGREGIOUS, APPELLANT'S ATTORNEY WAS NOT A PARTY TO THIS CLAIM, AND THEREFORE THE RULING FINDING APPELLANT'S ACTIONS FRIVOLOUS AND ORDERING COSTS TO BE ASSESSED SHOULD BE REVERSED.

### STANDARD OF REVIEW

The standard of review is as set forth in §287.495.1 R.S.Mo. The Court shall

review only questions of law and may modify, reverse, remand, or set aside the award of the Commission if (1) the Commission acted without or in excess of its powers; (2) the award was procured by fraud; (3) the facts found by the Commission do not support the award; and (4) there was not sufficient, competent evidence in the record to warrant the making of the award. §287.495.1 R.S.Mo. (1998).

However, a Commission decision that involves interpretation or application of law is reviewed de novo for correctness which allows the Court of Appeals to examine issues and make holdings as though it were the Court of origin. *Sutton v. Vee Jay Cement Contracting, Co.*, 37 S.W.3d 803, 807 (Mo.App. 2001). The Court reviews question of law independently. *Johnson v. Denton Constr. Co.*, 911 S.W.2d 286, 287 (Mo. En Banc. 1995); *Endicott v. Display Technologies Inc.*, 77 S.W.3d 612, 615 (Mo. En Banc. 2002).

If there is no error as a matter of law, the Court determines whether an award is supported by substantial, competent evidence by examining the evidence in the context of the whole record. *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 223 (Mo. En Banc. 2003).

Although the Court reviews the decision of the Commission, when the Commission affirms or adopts the findings and decisions of the ALJ, the Court will review the ALJ's decision and findings as adopted by the Commission. *Sutton*, 37 S.W.3d at 807.

**SEEKING APPROVAL OF A SETTLEMENT IS SPECIFICALLY ALLOWED BY §287.390 AND FOR A PARTY TO SEEK THAT RIGHT IS NOT**

**FRIVOLOUS.**

§287.390 R.S.Mo. allows the Appellant to request approval of a settlement agreement. The evidence of Appellant's entitlement to specific performance pursuant to §287.390, was completely uncontroverted, and §287.390 mandates that Appellant is entitled to specific performance.

The ALJ characterized Appellant's and his attorney's action as frivolous. (Emphasis supplied). (L.F. P 1-2).

§287.560 R.S.Mo. allows costs to be assessed where the actions of the party, to do or not to do a particular act is clear, and the parties action is egregious; see Delong v. Hampton Envelope Company, 149 S.W.3d 549, 555 (Mo.App. 2004); and the party seeking costs is innocent in the matter. See Nolan v. Degussa Admixtures, Inc., 246 S.W.3d 1, 4 (Mo.App. 2008).

Appellant's actions cannot be said to be frivolous, when he is given the right by §287.390 to seek the specific thing he is seeking, and §287.390 mandates that Appellant's settlement be approved. The Respondent breached the settlement agreement. The Respondent is not an innocent party. Additionally Respondent has requested attorneys fees and expenses that are unrelated to this *Motion to Approve the Settlement*, and are unreasonable. (L.F. P 22-29, and 30-33).

The uncontradicted, competent, and material evidence was that Appellant's and Appellant's attorney's actions were allowed by §287.390 and were not frivolous or egregious.

§287.560 R.S.Mo. does not authorize costs to be assessed against a non-party. Therefore the assessment of costs against Appellant's attorney is legally improper.

When facts pertinent to an issue on appeal are not in dispute the issue is a question of law and is reviewed de novo. Cox v. Tyson Foods, Inc., 920 S.W. 2d 534, 535, (Mo. En Banc. 1996).

The Commission and the ALJ erred as a matter of law in finding Appellant's motion to approve the settlement, frivolous and ordering costs to be assessed against Appellant and Appellant's attorney and such order should be reversed.

## **ARGUMENT**

### **POINT V**

**THE COMMISSION ERRED AS A MATTER OF LAW IN NOT EXERCISING JURISDICTION AND THEREBY AFFIRMING THE ALJ'S ORDER EXCLUDING FROM EVIDENCE THE TESTIMONY OF MR. KOENIG, CREATING A REVERSIBLE ERROR OF LAW because COMPETENT AND MATERIAL EVIDENCE TENDING TO PROVE AN ENTITLEMENT TO A CLAIM IS ADMISSIBLE AND ITS EXCLUSION MATERIALLY AFFECTED THE MERITS OF THE ACTION in that MR. KOENIG'S TESTIMONY WAS COMPETENT AND MATERIAL EVIDENCE OF THE PARTIES' SETTLEMENT AGREEMENT, AND EXCLUDING THIS EVIDENCE SHOULD BE REVERSED AS IT MATERIALLY AFFECTED THE MERITS OF THE ACTION.**

### **STANDARD OF REVIEW**

The standard of review is as set forth in §287.495.1 R.S.Mo. The Court shall review only questions of law and may modify, reverse, remand, or set aside the award of the Commission if (1) the Commission acted without or in excess of its powers; (2) the award was procured by fraud; (3) the facts found by the Commission do not support the award; and (4) there was not sufficient, competent evidence in the record to warrant the making of the award. §287.495.1 R.S.Mo. (1998).

However, a Commission decision that involves interpretation or application of law is reviewed de novo for correctness which allows the Court of Appeals to examine issues and make holdings as though it were the Court of origin. *Sutton v. Vee Jay Cement Contracting, Co.*, 37 S.W.3d 803, 807 (Mo.App. 2001). The Court reviews question of law independently. *Johnson v. Denton Constr. Co.*, 911 S.W.2d 286, 287 (Mo. En Banc. 1995); *Endicott v. Display Technologies Inc.*, 77 S.W.3d 612, 615 (Mo. En Banc. 2002).

If there is no error as a matter of law, the Court determines whether an award is supported by substantial, competent evidence by examining the evidence in the context of the whole record. *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 223 (Mo. En Banc. 2003).

Although the Court reviews the decision of the Commission, when the Commission affirms or adopts the findings and decisions of the ALJ, the Court will review the ALJ's decision and findings as adopted by the Commission. *Sutton*, 37 S.W.3d at 807.

**TESTIMONY OF MR. KOENIG IS COMPETENT AND MATERIAL EVIDENCE TO PROVE THE ENTITLEMENT TO A CLAIM**

Competent and material evidence tending to prove an entitlement to a claim is admissible. *Smith v. Smith*, 237 S.W.2d 84, 87 (Mo.App. 1951).

In *Roberts v. City of St. Louis*, 254 S.W.3d 280, 284 (Mo.App. 2008), in considering the Motion to Approve a Settlement, pursuant to §287.390, the Court stated that the Commission should have determined the terms of the alleged settlement

agreement, whether the parties had a meeting of the minds, and whether a settlement had been reached.

Mr. Koenig and Ms. Wickliffe were the two witnesses to the settlement agreement. (TR P 14, 15, 85, 86 and 87). Mr. Koenig's testimony is competent and relevant and is the only testimony as to those issues, since Ms. Wickliffe did not testify.

The issue to be decided by the ALJ was whether there was a settlement agreement. For the ALJ to sustain Respondent's objection to Mr. Koenig's testimony because he was going to testify whether an agreement was reached to settle the claim (TR P 15), materially affected the merits of the action. See Supreme Court Rule 84.13, and *Grippe v. Momtazee*, 705 S.W.2d 551, 559 (Mo.App. 1986). Additionally pursuant to Supreme Court Rule 84.13(3) the Court shall consider the admissible evidence rejected by the ALJ as it was preserved by the offer of proof. The exclusion of the evidence materially affected the merits of the action. The following is the excluded testimony.

#### OFFER OF PROOF

Mr. Koenig testified that a settlement agreement was entered between the parties on March 14, 2007, and that the agreement reached, in settlement of the case, was that the permanent disability was settled for \$200,000; that Gould and Lamb's assessment of \$8,610.72, for the Medicare Set-Aside, would be paid one-half by Respondent and one-half by Appellant; the temporary total disability would continue until the judge approved the stipulation; all approved and authorized medical to date would be paid by the Respondent; and Appellant would pay Medicare if Medicare paid any unauthorized

medical treatment. (TR P 15, 16, 17, 18, and 19). The Parties were going to wait to submit the settlement agreement to the Judge for approval, after Medicare approved the set-aside. (TR P 18 and P 27).

Information concerning the benefits paid, needed to prepare the stipulation, was provided by Ms. Wickliffe to Mr. Koenig, on March 26, 2007. (TR P 19, and Exhibit H, P 110). A draft of the stipulation, was emailed to Ms. Wickliffe on March 28, 2007. (TR P 20, Exhibit I, TR P 111-118). Ms. Wickliffe hand wrote changes on that stipulation, and faxed the stipulation with her hand written changes (Exhibit K, P 167-172) to Mr. Koenig on April 26, 2007. (TR P 20). Ms. Wickliffe's changes did not change any material terms of the settlement agreement. (TR P 21). Every change requested by Ms. Wickliffe to the stipulation was made and the revised stipulation (Exhibit L, P 173-180), was emailed to Ms. Wickliffe, the next day, April 27, 2007, so that Ms. Wickliffe could give it to Gould and Lamb to submit to Medicare for Medicare's approval. (TR P 21, 22, and 23).

Thomas McGee and Ms. Wickliffe had agreed to take the stipulation and send the Gould and Lamb report to CMS for CMS approval. (TR P 23 and P 24).

At the end of June first of July 2007, Ms. Wickliffe called Mr. Koenig and said Respondent/Thomas McGee would not go thru with the settlement. (TR P 23).

There was no signed stipulation presented to the Judge for approval because the Parties were waiting for Medicare approval, then the stipulation would be signed and presented for approval. (TR P 24).

Mr. Koenig sent the information with the stipulation to CMS to obtain CMS's approval on the Medicare Set-Aside. Exhibit N (TRP 182-188), is CMS's response to that request. (TR P 24-25). CMS requested that the amount recommended by Gould and Lamb, rounded up to the dollar, be put in the set-aside. (TR P 25).

In *Roberts v. City of St. Louis*, supra, the Commission sent the claim back to the ALJ to conduct a hearing concerning whether there was an oral settlement agreement. The attorney for the employee testified to negotiations and that the parties told the ALJ they had an agreement. Id at 284.

In *Kenny v. Vansittert*, 277 S.W.3d 713, 719 (Mo.App. 2009) it was held that the attorney representing one of the parties, could testify concerning the settlement of the claim, even over the objection of his own client.

The testimony of Mr. Koenig was competent and material evidence to prove the terms of the agreement, the meeting of minds, and that a settlement was agreed upon, for which the Commission and ALJ created reversible errors of law in excluding, as it materially affected the merits of the action and should be reversed.

## ARGUMENT

### POINT VI

THE COMMISSION ERRED AS A MATTER OF LAW IN NOT EXERCISING JURISDICTION AND THEREBY AFFIRMING THE ALJ'S ORDER EXCLUDING FROM EVIDENCE THE RESPONSE FROM CMS/MEDICARE APPROVING THE MEDICARE SET-ASIDE REQUIREMENT AS AGREED TO BY THE PARTIES AND THEREBY CREATING REVERSIBLE ERROR, because COMPETENT AND MATERIAL EVIDENCE TENDING TO PROVE AN ENTITLEMENT TO A CLAIM IS ADMISSIBLE AND ITS EXCLUSION MATERIALLY AFFECTED THE MERITS OF THE ACTION in that, THE PARTIES' AGREEMENT REQUIRED MEDICARE'S APPROVAL OF THE SET-ASIDE AMOUNT AND EXHIBIT N, WAS COMPETENT AND MATERIAL EVIDENCE, TO PROVE THAT AGREEMENT THEREFORE THE RULING EXCLUDING THIS EVIDENCE MATERIALLY AFFECTED THE MERITS OF THE ACTION.

### STANDARD OF REVIEW

The standard of review is as set forth in §287.495.1 R.S.Mo. The Court shall review only questions of law and may modify, reverse, remand, or set aside the award of the Commission if (1) the Commission acted without or in excess of its powers; (2) the award was procured by fraud; (3) the facts found by the Commission do not support the award; and (4) there was not sufficient, competent evidence in the record to warrant the

making of the award. §287.495.1 R.S.Mo. (1998).

However, a Commission decision that involves interpretation or application of law is reviewed de novo for correctness which allows the Court of Appeals to examine issues and make holdings as though it were the Court of origin. *Sutton v. Vee Jay Cement Contracting, Co.*, 37 S.W.3d 803, 807 (Mo.App. 2001). The Court reviews question of law independently. *Johnson v. Denton Constr. Co.*, 911 S.W.2d 286, 287 (Mo. En Banc. 1995); *Endicott v. Display Technologies Inc.*, 77 S.W.3d 612, 615 (Mo.En Banc. 2002).

If there is no error as a matter of law, the Court determines whether an award is supported by substantial, competent evidence by examining the evidence in the context of the whole record. *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 223 (Mo. En Banc. 2003).

Although the Court reviews the decision of the Commission, when the Commission affirms or adopts the findings and decisions of the ALJ, the Court will review the ALJ's decision and findings as adopted by the Commission. *Sutton*, 37 S.W.3d at 807.

**EXHIBIT N IS COMPETENT AND MATERIAL EVIDENCE TO PROVE ENTITLEMENT TO A CLAIM**

The Appellant and Respondent settled the claim pursuant to §287.390. The Appellant's and Respondent's settlement agreement was not to be submitted to the Judge for approval until Medicare's (CMS) approval was obtained for the set-aside. (TR P 27). Respondent agreed to obtain CMS approval but failed to do so. (TR P 167, 173, 35-36).

Mr. Koenig did. (TR P 35-36). The terms of the agreement required \$8,610.72, be placed in a Medicare Set-Aside, with each Party paying one-half of this amount. (TR P 31, and Exhibit L, P 173-180). CMS approved what the Parties agreed to, rounded up to the nearest dollar. (TR P 36). Exhibit N is CMS/Medicare's approval of the Medicare Set-Aside amount agreed to by the Appellant and Respondent. (Exhibit N, P 182-188).

Competent and material evidence to prove an entitlement to a claim is admissible. Smith v. Smith, 237 S.W.2d 84, 87 (Mo.App. 1951).

The very issue to be decided by the ALJ was whether there was a settlement agreement. For the ALJ to sustain Respondent's objection to Exhibit N, CMS/Medicare's approval of the Medicare Set-Aside amount (TR P 6 and 25), which was required by the Parties agreement, materially affected the merits of the action on Appellant's *Motion* for the approval of the settlement agreement. See Supreme Court Rule 84.13 and Grippe v. Momtazee, 705 S.W.2d 551, 559 (Mo.App. 1986).

The CMS/Medicare approval of the Medicare Set-Aside, which was required by the parties settlement, was competent and material evidence, and therefore admissible. Pursuant to Supreme Court Rule 84.13, this Court can consider that evidence since it was preserved as an exhibit.

The Commission and ALJ erred as a matter of law in not allowing Exhibit N, CMS/Medicare's response, into evidence to support Appellant's motion to approve settlement, and excluding such evidence created reversible error, and materially affected the merits of this action and should be reversed.

## ARGUMENT

### POINT VII

**THE COMMISSION ERRED AS A MATTER OF LAW IN NOT EXERCISING JURISDICTION OF THE APPELLANT'S MOTION TO APPROVE THE SETTLEMENT AGREEMENT AND THEREBY AFFIRMING THE ALJ'S FINDING THAT APPELLANT SOUGHT ENFORCEMENT OF THE SETTLEMENT, AND THEREBY CREATING A REVERSIBLE ERROR OF LAW because §287.390 ALLOWS A PARTY TO SEEK APPROVAL OF A SETTLEMENT AGREEMENT AND NOT ENFORCEMENT, in that THE APPELLANT HAS ONLY SOUGHT APPROVAL OF THE SETTLEMENT AGREEMENT, NOT ENFORCEMENT AND THE RULING FINDING APPELLANT SOUGHT ENFORCEMENT SHOULD BE REVERSED.**

### STANDARD OF REVIEW

The standard of review is as set forth in §287.495.1 R.S.Mo. The Court shall review only questions of law and may modify, reverse, remand, or set aside the award of the Commission if (1) the Commission acted without or in excess of its powers; (2) the award was procured by fraud; (3) the facts found by the Commission do not support the award; and (4) there was not sufficient, competent evidence in the record to warrant the making of the award. §287.495.1 R.S.Mo. (1998).

However, a Commission decision that involves interpretation or application of law

is reviewed de novo for correctness which allows the Court of Appeals to examine issues and make holdings as though it were the Court of origin. Sutton v. Vee Jay Cement Contracting, Co., 37 S.W.3d 803, 807 (Mo.App. 2001). The Court reviews question of law independently. Johnson v. Denton Constr. Co., 911 S.W.2d 286, 287 (Mo. En Banc. 1995); Endicott v. Display Technologies Inc., 77 S.W.3d 612, 615 (Mo.En Banc. 2002).

If there is no error as a matter of law, the Court determines whether an award is supported by substantial, competent evidence by examining the evidence in the context of the whole record. Hampton v. Big Boy Steel Erection, 121 S.W.3d 220, 223 (Mo. En Banc. 2003).

Although the Court reviews the decision of the Commission, when the Commission affirms or adopts the findings and decisions of the ALJ, the Court will review the ALJ's decision and findings as adopted by the Commission. Sutton, 37 S.W.3d at 807.

### **APPELLANT SEEKS ONLY APPROVAL OF THE SETTLEMENT AGREEMENT**

Appellant has sought, and only seeks, approval of the parties settlement agreement pursuant to §287.390 R.S.Mo. Appellant has never sought enforcement of any settlement agreement.

When facts pertinent to an issue on appeal are not in dispute the issue is a question of law and is reviewed de novo. Cox v. Tyson Foods, Inc., 920 S.W.2d 534, 535 (Mo. En Banc. 1996).

The Commission's and ALJ's finding that Appellant has sought enforcement of a settlement agreement is not supported by any evidence. It is therefore a question of law, and the Commission and ALJ erred as a matter of law, in finding Appellant sought to enforce a settlement agreement and created reversible error that should be reversed.

## CONCLUSION

Parties were given the right by §287.390 to settle their workers compensation claim. The uncontroverted, clear, convincing, satisfactory, competent and material evidence proved that Appellant and Respondent voluntarily agreed to settle this claim pursuant to §287.390, and all elements of §287.390 were proven. §287.390 mandated that the settlement be approved by the ALJ or the Commission. The Commission had jurisdiction pursuant to §287.390 and §287.480, and was mandated by §287.390 to approve the settlement. The failure to approve the settlement was an error of law and an appealable “final award.” Appellant seeks that approval thru this collateral action of specific performance. This collateral action should be resolved first, with the primary action being suspended by the enforceable accord executory. Appellant does not want to abandon this collateral action and seeks complete justice to be done between the Parties pursuant to the §287.390 voluntary agreement to settle. Appellant seeks to have the order excluding the testimony of Mr. Koenig and Exhibit N; in finding Appellant’s actions frivolous in seeking a right given by §287.390; and the non-approval of the settlement agreement entered by the Parties pursuant to §287.390; all reversed and the mandate of §287.390 upheld, with the approval of the settlement agreement, voluntarily agreed to by the Parties.

Respectfully submitted,

---

Rick Koenig            #31523  
Attorney At Law  
600 South Ohio  
Sedalia, MO 65301  
(660) 827-3366  
(660) 826-4156 (FAX)  
rkoeniglaw@sbcglobal.net  
ATTORNEY FOR APPELLANT

**CERTIFICATION PURSUANT TO RULE 84.06**

1. Appellants' Attorney: Rick Koenig, 600 South Ohio, Sedalia, Missouri, 65301, Missouri Bar No. 31523.
2. This brief contains 12,875 words in compliance with Rule 84.06(b).
3. The disc has been scanned and is virus-free.

\_\_\_\_\_  
Rick Koenig

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify by my signature that two true and complete copies of the foregoing Appellant's Brief, together with a CD, were served this 18<sup>th</sup> day of June, 2009, by depositing the same in the U.S. Mail, postage prepaid and properly addressed to Ms. Anne Wickliffe, Foland, Wickens, Eisfelder, Roper & Hofer, P.C., 911 Main St., Ste. 3000, Kansas City, MO 64105, whose email address is awickliffe@fwplaw.com.

---

Rick Koenig           #31523  
Attorney At Law  
600 South Ohio  
Sedalia, MO 65301  
(660) 827-3366  
(660) 826-4156 (FAX)  
rkoeniglaw@sbcglobal.net  
ATTORNEY FOR APPELLANT