

Summer 2013

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### Recommended Citation

N. Drew Kemp, *Exclusively Confusing: Who Has Jurisdiction to Determine Jurisdiction under the Missouri Workers' Compensation Law*, 78 Mo. L. Rev. (2013)  
Available at: <http://scholarship.law.missouri.edu/mlr/vol78/iss3/7>

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## NOTE

# “Exclusively” Confusing: Who Has Jurisdiction to Determine Jurisdiction Under the Missouri Workers’ Compensation Law?

*Cooper v. Chrysler Group, LLC*, 361 S.W.3d 60 (Mo. App. E.D. 2011)

N. DREW KEMP\*

### I. INTRODUCTION

The Missouri Workers’ Compensation Act (Act) was originally designed as a bargain between employers and employees by creating a no-fault, exclusive administrative remedy and by making sure more employees received compensation for their on-the-job injuries.<sup>1</sup> The Act also reduced litigation and transaction costs for employers, thereby lowering the cost of doing business.<sup>2</sup> In general, if an injury falls under the definitions set forth under chapter 287 of the Missouri Revised Statutes, then the Labor and Industrial Relations Commission (Commission) has exclusive jurisdiction over the matter.<sup>3</sup>

The Commission is the administrative body that oversees workers’ compensation claims and it has the power to enact all regulations necessary for the efficient management and operation of the workers’ compensation system.<sup>4</sup> In the typical case, when a workplace injury occurs, the employee must notify the employer and the Commission by filling out a “Report of Injury” within thirty days from the injury date.<sup>5</sup> If the employer and employ-

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\* University of Missouri, B.S. 2010, J.D. 2013; Associate Member, Missouri Law Review, 2012-13. I would like to thank Dean Gely for his terrific suggestions and help with the editing process. I would also like to thank my family and friends for their support in this lengthy endeavor of becoming a lawyer.

1. See generally Amanda Yoder, Note, Resurrection of a Dead Remedy: Bringing Common Law Negligence Back into Employment Law, 75 MO. L. REV. 1093, 1100 (2010).

2. *Id.*

3. MO. REV. STAT. § 286.005.3 (2000 & Supp. 2012). The term “exclusive” is derived from the language of the statute which gives the employer immunity from “all other liability whatsoever, whether to the employee or any other person.” § 287.120.1.

4. Seeley v. Anchor Fence Co., 96 S.W.3d 809, 815 (Mo. App. S.D. 2002), overruled by Hampton v. Big Boy Steel Erection, 121 S.W.3d 220 (Mo. 2003).

5. § 287.420; *Injury Reporting Responsibilities*, MO. DEP’T LAB. & INDUS. REL., [http://labor.mo.gov/DWC/Employers/report\\_respon.asp](http://labor.mo.gov/DWC/Employers/report_respon.asp) (last visited Sep. 4, 2013).

ee dispute whether the employer is liable under the Act, then the parties may request mediation,<sup>6</sup> or the employee may file a claim for compensation, which initiates a contested claim.<sup>7</sup> The Commission will assign an administrative law judge to hear the parties' case and determine whether the injury falls within the scope of the Act and the employer's liability, if any.<sup>8</sup>

It is clear now that if a work injury is not within the scope of the Act, employees have a right to bring a common law action against their employer just as they could before workers' compensation was adopted.<sup>9</sup> In such a civil case, the employer may object by raising the exclusive remedy defense, which the Supreme Court of Missouri has held will be waived unless it is timely brought as an affirmative defense.<sup>10</sup> Because the circuit courts and the Commission are mutually exclusive in the eyes of an injured employee seeking compensation, a determination must be made as to which venue has jurisdiction over his injury.

In 2011, the Eastern District of the Missouri Court of Appeals summarized and clarified the issue of which court has jurisdiction to determine jurisdiction. After *Cooper v. Chrysler Group, LLC*, it is clear that a Missouri circuit court must yield to the Commission when the jurisdiction-determining issue is one of fact.<sup>11</sup> However, a circuit court can nevertheless review jurisdictional issues of law. An important question remains, however: will a circuit court distinguish between issues of fact and issues of law if an affirmative defense is not timely raised by the employer?

This distinction between jurisdictional issues of fact and issues of law is important because failing to distinguish the two may result in inefficiency and unfairness.<sup>12</sup> Additionally, understanding the procedural jurisprudence regarding these types of parallel cases<sup>13</sup> is becoming increasingly necessary. For nearly eighty years, the Act was interpreted broadly to cover most injured workers. However, the 2005 amendments to chapter 287 significantly limited its scope,<sup>14</sup> and courts are still refining their interpretations of these statutes.<sup>15</sup>

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6. MO. CODE REGS. tit. 8, § 50-2.010(4) (2013).

7. § 50-2.010(7)(A).

8. See § 50-2.010.

9. Mo. Alliance for Retired Ams. v. Dep't of Labor & Indus. Relations, 277 S.W.3d 670, 684-85 (Mo. 2009) (en banc).

10. McCracken v. Wal-Mart Stores E., LP, 298 S.W.3d 473, 476 (Mo. 2009) (en banc).

11. 361 S.W.3d 60, 63 (Mo. App. E.D. 2011). Issues of fact are under the primary jurisdiction of the Commission. *Id.* at 63-64.

12. See discussion *infra* notes 137-155 and accompanying text.

13. That is, cases in which an injured employee seeks relief in the workers' compensation system and tries to sue his employer in circuit court because he is uncertain as to which has jurisdiction.

14. See, e.g., Johme v. St. John's Mercy Healthcare, 366 S.W.3d 504, 513 (Mo. 2012) (en banc); Miller v. Mo. Highway & Transp. Comm'n, 287 S.W.3d 671, 673 (Mo. 2009) (en banc).

As a result, employees who normally would seek refuge under the Act may be surprised when they are kicked out.<sup>16</sup> Similarly, employees seeking damages from their employers in circuit courts may be told that their claims belong with the Commission.<sup>17</sup> This has forced injured employees to seek remedies for their injuries on both fronts – from the Commission and the circuit courts – simultaneously.<sup>18</sup>

## II. FACTS AND HOLDING

On March 2, 2007, while working as an assembly worker at a Chrysler plant in Fenton, Missouri, Kevin Cooper was injured when he slipped and fell near his workstation.<sup>19</sup> Just seven days later, he filed a Claim for Compensation with the Commission for injuries to his lower back and body as a whole.<sup>20</sup> As the parties contested liability under the Act, four years went by

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15. Specifically, courts have been inconsistent in interpreting and applying the definition of “accident,” which is defined as “an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift.” MO. REV. STAT. § 287.020.2 (2000 & Supp. 2012); *see, e.g.*, Kristen Norman, Injury No. 06-00182, 2007 WL 2353272 (Mo. Lab. Ind. Rel. Com. July 3, 2007) (holding that bending one’s knee to place a shoe cover on one’s shoe was not an “unusual strain or traumatic event” because employer required the shoe cover); *cf.* Jason Gamet, Injury No. 06-064607, 2007 WL 4055934 (Mo. Lab. Ind. Rel. Com. Nov. 13, 2007) (holding that employee’s act of bending over to pick up a pallet *was* an unusual strain).

16. *See, e.g., Miller*, 287 S.W.3d at 674 (holding that the injury was not compensable under the Missouri Workers’ Compensation law because there was no causal connection between the work activity and the injury).

17. *See, e.g., State ex rel. Tri-Cnty. Elec. Coop. Ass’n v. Dial*, 192 S.W.3d 708, 712 (Mo. 2006) (en banc) (holding that the Commission had exclusive jurisdiction over the claims against Tri-County resulting from the workplace death of an employee).

18. Indeed, empirical evidence shows that the 2005 narrowing of the scope of the Workers’ Compensation law did not significantly reduce the number of injuries when compared to the number of claims. *See* Missouri Division of Workers’ Compensation, *2010 Annual Report*, February, 2011, at 10-14, *available at* <http://www.labor.mo.gov/DWC/Forms/DWC2010AnnualReport.pdf> [hereinafter *2010 Annual Report*] (reporting that First Reports of Injury dropped by about 10 percent between the years 2005 and 2006 whereas Claims for Compensation fell by 15 percent in the same period). This might suggest that many injured employees are seeking relief in other venues. *Id.*

19. *Cooper v. Chrysler Grp., LLC*, 361 S.W.3d 60, 62 (Mo. App. E.D. 2011).

20. *Id.* “Body as a whole” is a technical term referring to the number of “weeks” that should be awarded under the Act. § 287.190. Specifically, the Act sets out a schedule of losses, which assigns different parts of the body a number representing the number of weeks as a measure of loss. In the typical case, the loss of the “great” toe on either foot is assigned 40 weeks. *Id.* The loss of the little finger at the distal

without Cooper receiving any compensation from his employer.<sup>21</sup> According to Cooper's counsel, Chrysler Group LLC's (Chrysler) managers had been warned that a machine near Cooper's workstation was leaking oil onto the floor and that someone might get injured.<sup>22</sup> While his workers' compensation claim was pending and with no resolution in sight, on January 11, 2010, Cooper filed a petition in the St. Louis County Circuit Court, Division Two, alleging that his employer's negligence caused his injuries.<sup>23</sup>

As amended, Cooper's petition sought "damages on the same set of facts and for the same injury as that alleged in his workers' compensation claim."<sup>24</sup> Chrysler filed a timely answer to Cooper's petition, asserting the affirmative defense of exclusivity.<sup>25</sup> Cooper responded to Chrysler's defense by arguing that workers' compensation was not the exclusive remedy because the fall was not the "prevailing factor"<sup>26</sup> in causing his injuries, and the fall itself was not an "accident"<sup>27</sup> as defined under the Act.<sup>28</sup> The trial court entered summary judgment in favor of Chrysler and Cooper appealed.<sup>29</sup>

The Eastern District of the Missouri Court of Appeals first concluded that the trial court's consideration of "whether summary judgment [was] the proper remedy at this stage of the proceeding merit[ed] plain error review."<sup>30</sup> The court then found that the primary jurisdiction doctrine provided that issues of law could be determined by the circuit courts themselves but that questions of fact were solely within the jurisdiction of the Commission.<sup>31</sup> Finally, the court determined that because the issues in the case – namely, whether Cooper suffered an "accident" and whether his surgery was necessary – were questions of fact, the Commission had sole authority to determine

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joint is assigned 16 weeks. *Id.* The loss of an arm: 232 weeks, and so on. *Id.* Some vital body parts, which are not enumerated in section 287.190, are assigned the maximum number of weeks, or 400. *Id.* Injury to the "body as a whole" or "BAW" is given such treatment. *Id.*

21. Appellant's Brief, *Cooper*, 361 S.W.3d 60 (No. ED96549), 2011 WL 3467625, at \*6.

22. *Id.*

23. *Id.*

24. *Cooper*, 361 S.W.3d at 62.

25. *Id.*; see also *McCracken v. Wal-Mart Stores E., LP*, 298 S.W.3d 473, 476 (Mo. 2009) (en banc) (holding that the exclusivity provisions of the Workers' Compensation law must be raised as an affirmative defense to the court's statutory authority to proceed with resolving the claim).

26. *Cooper*, 361 S.W.3d at 62. The "prevailing factor" is defined to be "the primary factor, in relation to any other factor, causing both the resulting medical condition and disability." MO. REV. STAT. § 287.020.3(1) (2000 & Supp. 2012).

27. § 287.020.3(2)(a).

28. *Cooper*, 361 S.W.3d at 62.

29. *Id.*

30. *Id.* at 64.

31. *Id.*

whether Cooper could sue under a negligence theory or had to rely on workers' compensation.<sup>32</sup> The court concluded that granting summary judgment and leaving Cooper without any remedy (in the event the Commission determined that the Act did not apply) would result in manifest injustice.<sup>33</sup> Thus, the court held that when the applicability of the Act is at issue, questions of fact shall be exclusively determined by the Commission, and any civil proceeding will be stayed until such issues are resolved.

### III. LEGAL BACKGROUND

The Act was created to remedy the harsh effects of inadequate recoveries for injured employees under traditional common law tort actions.<sup>34</sup> In 1921, prior to the enactment of the Act, it was estimated that about 25,000 employees were killed or injured each year in Missouri due to work-related accidents.<sup>35</sup> However, eighty percent of those injured were not compensated at all, and the other twenty percent who received compensation "had to bear the expense and delay of litigation."<sup>36</sup> As a result, on November 2, 1926, Missouri became the forty-third state to adopt a worker's compensation program.<sup>37</sup> By adopting the law, employers gave up their fault-based defenses under the common law in exchange for immunity from tort liability from injured workers.<sup>38</sup> Injured workers gave up their common law right to sue their employers for negligence in exchange for more certain, but limited, compensation benefits.<sup>39</sup> Specifically, injured workers<sup>40</sup> may be entitled to medical treatment,<sup>41</sup> future medical expenses,<sup>42</sup> lost wages,<sup>43</sup> and permanent

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32. *Id.*

33. *Id.* at 66.

34. *Todd v. Goostree*, 493 S.W.2d 411, 416 (Mo. App. K.C.D. 1973) superseded by statute, Missouri Employers Mutual Insurance Company Act, S.B. 251, 87th Gen. Assem., 1st Reg. Sess. (Mo. 1993).

35. *Id.* at 416 n.2.

36. *Id.*

37. JEFFREY A. BURNS, *Workers' Compensation*, in 2A MO. PRAC., METHODS OF PRAC.: LITIGATION GUIDE § 27.1 (4th ed. 2013); MCANANY, VAN CLEAVE & PHILLIPS, P.A., THE CONTINUED EROSION OF THE EXCLUSIVE REMEDY DOCTRINE 1 (2011), available at [http://www.mvplaw.com/post/news/Exclusive% 20Remedy.pdf](http://www.mvplaw.com/post/news/Exclusive%20Remedy.pdf).

38. *See Todd*, 493 S.W.2d at 416; *see also Yoder*, *supra* note 1, at 1100.

39. *See Todd*, 493 S.W.2d at 416; *see also Yoder*, *supra* note 1, at 1100.

40. "Injury" is defined under the Workers' Compensation law as "an injury which has arisen out of and in the course of employment." MO. REV. STAT. § 287.020.3(1) (Supp. 2012).

41. § 287.140.

42. *Conrad v. Jack Cooper Transp. Co.*, 273 S.W.3d 49, 51 (Mo. App. W.D. 2008) (discussing the inclusion of future medical expenses with the compensation available under section 287.140).

43. § 287.170.

disability.<sup>44</sup> Close family members of those who are killed on the job may be entitled to death benefits<sup>45</sup> and funeral expenses.<sup>46</sup>

The original version of the Act required that “[a]ll of the provisions of this act shall be liberally construed with a view toward the public welfare.”<sup>47</sup> Early interpretation of this “liberal construction” provision required that where a question of jurisdiction was in doubt, it should be held in favor of the Commission.<sup>48</sup> Section 287.120, which sets out the scope of the Act, only applies to accidental injuries and has remained unchanged since its enactment. It states:

Every employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of an employee by accident arising out of and in the course of the employee’s employment . . . [and] shall be released from all other liability whatsoever, whether to the employee or any other person.<sup>49</sup>

As such, the law was deemed the exclusive remedy for injured workers.

#### A. *The Revolving Door to Circuit Court*

The years following the adoption of the Act proved to be somewhat of a rollercoaster. The scope of the Act was narrowed, then expanded, and then narrowed again. Under the original Act, the legislature defined an “accident” as “an unexpected or unforeseen identifiable event or series of events.”<sup>50</sup> In interpreting this definition, the Supreme Court of Missouri ruled that an “accident” only occurred when the worker’s injury was accompanied by a slip or a fall or when the strain was unexpected or abnormal.<sup>51</sup> Thus, if an employee was injured as a result of the performance of ordinary job duties, compensation was not permitted.

Eventually, plaintiffs succeeded in opening the door, albeit slightly, to the civil courtrooms. In *Hines v. Continental Baking Co.*, the Missouri West-

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44. § 287.190.

45. § 287.230.

46. § 287.240.

47. MO. REV. STAT. § 3764 (1939) (amended by MO. REV. STAT. § 287.800 (2000)); *see also* Sargent v. Clements, 88 S.W.2d 174, 178 (Mo. 1935).

48. Ringeisen v. Insulation Servs., Inc., 539 S.W.2d 621, 625-26 (Mo. App. E.D. 1976) (citing Hughes v. Md. Cas. Co., 76 S.W.2d 1101, 1105 (Mo. App. K.C.D. 1934)).

49. MO. REV. STAT. § 287.120.1 (2000 & Supp. 2012).

50. MO. REV. STAT. § 287.020.2 (2000) *amended* by S.B. 1 & 130, 93d Gen. Assem., 1st Reg. Sess. (Mo. 2005).

51. *See State ex rel. Hussman-Ligonier Co. v. Hughes*, 153 S.W.2d 40, 42 (Mo. 1941).

ern District Court of Appeals held that a worker who sustained certain work injuries not covered by workers' compensation could nevertheless bring a personal injury claim against her employer in circuit court.<sup>52</sup> In *Hines*, the plaintiff worked on an assembly line at a bread company.<sup>53</sup> Her job included removing loaves of bread from a conveyor belt, placing them on a rack, and moving the rack once it became full.<sup>54</sup> The plaintiff injured her back while pushing the rack to another location and subsequently filed a claim for worker's compensation.<sup>55</sup> After losing her claim on appeal to the Commission,<sup>56</sup> she filed a tort action, alleging that her employer negligently failed to properly maintain the metal rollers on the bottom of the racks and that this caused her injuries.<sup>57</sup> The employer, who prevailed by claiming that the plaintiff did not suffer an "accident" as defined under the Act,<sup>58</sup> was estopped from asserting as an exclusivity defense that an "accident" did occur.<sup>59</sup> Thus, the court allowed the civil action to proceed, since the applicability of the Act was excluded.<sup>60</sup> In 1968, the Supreme Court of Missouri confirmed this holding in *Harryman v. L. & N. Buick-Pontiac, Inc.*<sup>61</sup>

By 1973, the legislature expanded the scope of the law by requiring mandatory participation for most employers.<sup>62</sup> In 1983, the Supreme Court of Missouri provided a much broader definition of "accident" to include "any job-related" injury.<sup>63</sup> As a result, more claims became compensable under the Act, and the number of circuit court filings from injured employees declined.<sup>64</sup> In 2001, the total number of Claims for Compensation filed in Missouri was approximately 25,000.<sup>65</sup>

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52. 334 S.W.2d 140, 145-46 (Mo. App. K.C.D. 1960).

53. *Id.* at 141-42.

54. *Id.*

55. *Id.* at 142.

56. In the typical case, an injured employee may have the administrative law judge's decision reviewed by the Commission, who has the authority to change the award. MO. REV. STAT. § 287.470 (2000). The injured employee also has the right to appeal the decision of the Commission to the appropriate circuit court. § 287.490. After review by the appropriate circuit court, a claimant may appeal to the Missouri Court of Appeals. *Id.*

57. *Hines*, 334 S.W.2d at 143.

58. *See supra* text accompanying notes 50-51.

59. *Hines*, 334 S.W.2d at 144.

60. *Id.*

61. 431 S.W.2d 193, 197 (Mo. 1968) (en banc).

62. *See* MO. REV. STAT. § 287.030 (2000).

63. *Wolfgeher v. Wagner Cartage Serv., Inc.*, 646 S.W.2d 782, 785 (Mo. 1983) (en banc).

64. MCANANY, VAN CLEAVE & PHILLIPS, P.A., *supra* note 37, at 2.

65. 2010 *Annual Report*, *supra* note 18, at 14.

In 2005, the legislature passed several amendments to the Act that significantly narrowed its scope.<sup>66</sup> The amendments, which apply to injuries occurring after August 28, 2005, require work to be “the prevailing factor,” rather than “a substantial factor,”<sup>67</sup> in causing the injury.<sup>68</sup> Therefore, the injured employee has a higher burden of proving that there were no other contributing non-employment factors. Another major change was the addition of the requirement that the accident be “identifiable by time and place of occurrence.”<sup>69</sup> This language had the effect of excluding injuries caused by repetitive actions or motions over time. Finally, and perhaps most notably, the amendment to Section 287.800.1 requires that all of the provisions within the Act be “strictly construed.”<sup>70</sup>

In 2009, the Supreme Court of Missouri considered a constitutional challenge to these amendments. In *Missouri Alliance for Retired Americans v. Department of Labor & Industrial Relations (M.A.R.A.)*, the plaintiffs’ labor organization challenged the constitutionality of the 2005 amendments<sup>71</sup> and sought declaratory judgment as to the rights of injured workers whose accidents were no longer within the scope of the Act.<sup>72</sup> The court determined that if an injury comes within the definition of the term “accident,” then it is included within the exclusivity provisions of the Act, and recovery can be had, if at all, only under the terms of the Act.<sup>73</sup> If the injury is one that is not included within the term “accident,” the employee is not subject to the exclusivity provisions of the Act.<sup>74</sup> The court held that such employees were nevertheless entitled to pursue recovery under common law negligence, just as they had done before the adoption of the Act.<sup>75</sup>

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66. S.B. 1 & 130, 93d Gen. Assemb., 1st Reg. Sess. (Mo. 2005).

67. MO. REV. STAT. § 287.020.1 (Supp. 2012).

68. See Adele Nicholas, *Workers Comp Decision a Mixed Bag for Employers*, INSIDE COUNSEL (May 1, 2009), available at 2009 WLNR 21858569, and <http://www.insidecounsel.com/2009/05/01/workers-comp-decision-a-mixed-bag-for-employers?t=circuit-updates>.

69. § 287.020.2.

70. MO. REV. STAT. § 287.800 (2000) (amended 2008).

71. 277 S.W.3d 670, 675 (Mo. 2009) (en banc) [hereinafter *M.A.R.A.*] (The challenge was based on allegations that the amendments to the Act limited injured employees’ rights to access the courts in violation of Due Process.).

72. *Id.* at 674.

73. *Id.* at 679.

74. *Id.*

75. *Id.* at 674, 680. As noted before, the exclusive remedy provision distinguishes between injuries by accident, and injuries by occupational disease. See MO. REV. STAT. § 287.020.3(5) (Supp. 2011) (Injury “shall in no case except as specifically provided in this chapter be construed to include occupational disease in any form . . .”). In *State ex rel. KCP & L Greater Missouri Operations Co. v. Cook*, the court issued a decision that further limited the reach of the exclusivity provision. 353 S.W.3d 14 (Mo. App. W.D. 2011). In that case, the plaintiff first filed suit in circuit court alleging injuries from exposure to asbestos due to his employer’s negli-

Thus, a line was drawn, and two mutually exclusive avenues were opened for injured employees seeking relief from their employers. However, because the amendments are relatively new, administrative law judges have been unable to consistently apply the ambiguous definitions of “accident” and “injury.”<sup>76</sup> This uncertainty has led injured employees to seek relief in both venues.<sup>77</sup> As a result, it is now the responsibility of the employers to raise the exclusive remedy defense.<sup>78</sup> The timing with which an employer may raise this defense has become yet another issue.

### B. Exclusivity Becomes an Affirmative Defense

The Act's exclusivity provision gives jurisdiction over workers' compensation cases to the Commission.<sup>79</sup> However, Missouri's constitution is unequivocal in stating that circuit courts have “original jurisdiction over all cases and matters, civil and criminal.”<sup>80</sup> Under principles of preemption, no statute can rob a circuit court of its ability to hear a particular case over which it has original jurisdiction.<sup>81</sup> When a statute gives a specific tribunal exclusive authority to hear certain types of cases, a circuit court's authority to act can only be objected to as an affirmative defense.<sup>82</sup>

Nevertheless, beginning in 1982, Missouri courts, in interpreting the exclusivity provision, consistently held that the circuit courts lacked jurisdiction over the subject matter of workers' compensation claims.<sup>83</sup> Because circuit

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gence. *Id.* at 16-17. The employer asserted that the plaintiff was injured in the scope and course of employment and subsequently filed a motion to dismiss based on the exclusive remedy provision. *Id.* at 17. The court responded by holding that “[t]he only statutory provision which arguably bars [the plaintiff] from proceeding against KCP & L in the circuit court . . . is § 287.120.” *Id.* at 18. However, the court concluded that “§ 287.120 only denies [the plaintiff] a common-law remedy for personal injury or death by accident.” *Id.* (internal quotation marks omitted). Therefore, the court concluded that the exclusive remedy provision of the Act did not apply to occupational disease claims and thus the Plaintiff could bring suit under common law. *Id.* at 19-20.

76. See *supra* note 15 and accompanying text.

77. See *Cooper v. Chrysler Grp., LLC*, 361 S.W.3d 60, 62 (Mo. App. E.D. 2011) (In addition to filing a claim for compensation with the Commission, the plaintiff also filed a civil lawsuit against his employer.).

78. See *McCracken v. Wal-Mart Stores E., LP*, 298 S.W.3d 473, 477 (Mo. 2009) (en banc).

79. *Cooper*, 361 S.W.3d at 63.

80. MO. CONST. art. V, § 14; *McCracken* 298 S.W.3d at 476-77.

81. See *McCracken* 298 S.W.3d at 476-77.

82. *Kemper v. Gluck*, 39 S.W.2d 330, 333-34 (Mo. 1931) (en banc).

83. See *State ex rel. McDonnell Douglas Corp. v. Ryan*, 745 S.W.2d 152 (Mo. 1988) (en banc) (holding that a motion to dismiss for lack of subject matter jurisdiction is the proper method to raise the defense of workers' compensation), *overruled by McCracken*, 298 S.W.3d 473; see also *Jones v. Jay Truck Driver Training Ctr.*,

courts can only adjudicate issues over which they have subject matter jurisdiction, a motion to dismiss for lack of subject matter jurisdiction could be raised at any time.<sup>84</sup> Thus, the employer could raise the exclusive remedy defense at any time during a civil case – including the day of the trial.<sup>85</sup> This is precisely what happened in *McCracken v. Walmart Stores East, LP*.<sup>86</sup>

McCracken, who delivered bread to Walmart under contract, was injured when he was struck in the shoulder by a bread rack.<sup>87</sup> He was successful in obtaining workers' compensation benefits.<sup>88</sup> However, Mr. McCracken subsequently filed a civil action against Walmart, alleging that a Walmart employee negligently pushed the bread rack into his shoulder.<sup>89</sup> It was not until the morning of trial that Walmart filed a motion to dismiss for lack of subject matter jurisdiction on the grounds that Mr. McCracken was a statutory employee.<sup>90</sup> McCracken disagreed, arguing the circuit court had subject matter jurisdiction to hear the claim.<sup>91</sup> The Supreme Court of Missouri agreed and stated that “to the extent that some cases have held that a court has no jurisdiction to determine a matter over which it has subject matter and personal jurisdiction, those cases have confused the concept of a circuit court’s jurisdiction – a matter determined under Missouri’s constitution – with the separate issue of the circuit court’s statutory or common law authority to grant relief in a particular case.”<sup>92</sup>

The court held that the exclusivity provision invoked the circuit court’s authority to act and not its subject matter jurisdiction.<sup>93</sup> The court then noted that “nothing in the Act supports the conclusion that the determination of applicability of the Act was intended to divest circuit courts of subject matter jurisdiction over personal injury actions that implicate provisions of the Act.”<sup>94</sup> In recognizing that, in all other instances, a court’s statutory authority to act is properly objected to by an affirmative defense, the court stated that

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709 S.W.2d 114, 115-16 (Mo. 1986) (en banc), *overruled by McCracken*, 298 S.W.3d 473; *Shaver v. First Union Realty Mgmt., Inc.*, 713 S.W.2d 297, 299 (Mo. App. S.D. 1986), *abrogation recognized by McCracken*, 298 S.W.3d 473; *Parmer v. Bean*, 636 S.W.2d 691, 695 (Mo. App. E.D. 1982), *overruled by McCracken*, 298 S.W.3d 473.

84. See *McCracken*, 298 S.W.3d at 477.

85. *Id.*

86. *Id.* at 476.

87. *Id.* at 475.

88. *Id.*

89. *Id.* at 476.

90. *Id.* The Missouri statute provides that “[a]ny person who has work done under contract on or about his premises which is an operation of the usual business which he there carries on shall be deemed an employer and shall be fully liable under this chapter . . .” MO REV. STAT. § 287.040.1 (Supp. 2012).

91. *McCracken*, 298 S.W.3d at 476.

92. *Id.* at 477 (emphasis omitted).

93. *Id.* at 478-79.

94. *Id.* at 479.

“[t]o treat workers’ compensation defenses differently would promote continued confusion in the courts as to whether a court’s error in following a statute is jurisdictional in nature.”<sup>95</sup> Therefore, the exclusivity provisions of the Act must be raised as an affirmative defense to a circuit court’s statutory authority to proceed, and that defense will be deemed waived if not asserted.<sup>96</sup> The court ultimately concluded that Walmart was not Mr. McCracken’s statutory employer and reversed the trial court’s dismissal.<sup>97</sup>

In this way, the procedural mechanisms for parallel suits were put in place. When an employee, who has been hurt at work, brings a civil suit that is arguably subject to the Act, the employer can seek to get rid of the lawsuit by pleading the affirmative defense of exclusivity.<sup>98</sup> If the court determines that the employee’s injury falls under the narrowly defined scope of the Act, the suit will be dismissed with prejudice, and the injured employee will have to seek relief under the exclusive jurisdiction of the Commission.<sup>99</sup> If, however, the court determines that the employee does not fall within the realm of the Act, the court will deny the motion and adjudicate the civil case on the merits.<sup>100</sup> Sometimes, however, the court will refuse to determine if the employee falls within the scope of the Act.<sup>101</sup> This scenario makes it even more difficult for employers to get rid of these cases.

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95. *Id.* (internal quotation marks omitted).

96. *Id.*

97. *Id.* at 481.

98. The Western District of the Missouri Court of Appeals slightly refined the *McCracken* decision in 2010. See *Fortenberry v. Buck*, 307 S.W.3d 676 (Mo. App. W.D. 2010). In *Fortenberry*, an employee at a Ford Motors manufacturing facility was injured at work and subsequently filed a claim for compensation. *Id.* at 677. While his workers’ compensation claim was still pending, the employee filed a negligence action against the Ford plant alleging that the on-staff doctor who treated him committed medical malpractice. *Id.* at 678. Following the decision in *McCracken*, the Ford plant promptly filed a motion to dismiss. *Id.* In applying the affirmative defense requirement, the court held that a defendant seeking a pretrial dismissal based on workers’ compensation exclusivity must file a motion for summary judgment. *Id.* at 679. The court mentioned in a footnote that “[w]hen the applicability of [workers’ compensation] appears from the *face* of the petition, a defendant can also properly file a motion to dismiss for failure to state a claim upon which relief can be granted” under Missouri Supreme Court Rule 55.27(a)(6) or a motion for judgment on the pleading under Rule 55.27(b). *Id.* at 679 n.2. Thus, the employer must first determine if the jurisdictional issue appears on the face of the petition. See *id.* Missouri’s three appellate courts have subsequently issued opinions following these procedural guidelines. See, e.g., *Cooper v. Chrysler Grp., LLC*, 361 S.W.3d 60 (Mo. App. E.D. 2011); *Heirien v. Flowers*, 343 S.W.3d 699 (Mo. App. S.D. 2011); *Treaster v. Betts*, 324 S.W.3d 487 (Mo. App. W.D. 2010).

99. See *Cooper*, 361 S.W.3d at 65.

100. See *id.*

101. See generally *id.* at 65-66.

*C. Distinguishing Issues of Law from Issues of Fact*

Each case above involved issues of law.<sup>102</sup> The difference between issues of law and issues of fact has proved to be paramount in determining the correct mutually exclusive venue in which an injured worker must seek relief. In *Killian v. J & J Installers, Inc.*, the Supreme Court of Missouri addressed this issue.<sup>103</sup> The employee, Killian, was an ironworker.<sup>104</sup> When a framework within which he was standing collapsed, he fell onto steel reinforcing rods and sustained severe injuries.<sup>105</sup> Killian and his wife sued his employer in the Circuit Court of the City of St. Louis, alleging that the employer's intentional acts caused the framework to collapse.<sup>106</sup> The worker's employer filed a motion to dismiss, challenging the subject matter jurisdiction of the circuit court.<sup>107</sup> The circuit court sustained the employer's motion to dismiss, and the appellate court reversed.<sup>108</sup>

In affirming the circuit court's judgment, the Supreme Court of Missouri held that because the issue was whether the employee's injuries were the result of an accident or an intentional act, a question of fact, the Commission had primary jurisdiction.<sup>109</sup> "Under the primary jurisdiction doctrine," the court noted, "courts will not decide a controversy involving a question within the jurisdiction of an administrative tribunal until after that tribunal has rendered its decision."<sup>110</sup> The reasoning behind this distinction is that "where administrative knowledge and expertise are demanded," such knowledge and expertise are necessary "to determine technical, intricate fact questions," and "uniformity is important to the regulatory scheme."<sup>111</sup> Thus, only the Commission shall hear the fact issues that determine whether a claim is subject to the jurisdiction of the Commission. However, the issue remained as to what a

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102. *McCracken*, 298 S.W.3d 473, discussed *supra* notes 84-97 (involving a question of whether injured worker was a "statutory employee"); *Fortenberry*, 307 S.W.3d 676, discussed *supra* note 98 (involving an issue of co-employee immunity); *Heirien*, 343 S.W.3d 699, discussed *supra* note 98 (involved an issue of co-employee immunity); *Treaster*, 324 S.W.3d 487, discussed *supra* note 98 (involving an issue of co-employee immunity).

103. 802 S.W.2d 158 (Mo. 1991) (en banc).

104. *Id.* at 159.

105. *Id.*

106. *Id.*

107. *Id.* at 159. It should be noted that this case was decided before *McCracken*, and even though *Killian* is not mentioned in the *McCracken* decision, *McCracken* held that "[t]o the extent that [previous] cases hold that the Act's applicability is a matter of the trial court's subject matter jurisdiction, they are overruled." *McCracken*, 298 S.W.3d at 479.

108. *Killian*, 802 S.W.2d at 159.

109. *Id.* at 161.

110. *Id.* at 160.

111. *Id.*

circuit court should do if it determines that the Commission has primary jurisdiction over an issue of fact that is the subject of a motion to dismiss. The circuit court could grant the motion to dismiss or deny the motion to dismiss and stay the proceeding until the Commission determines the applicability of the Act.

#### IV. INSTANT DECISION

Cooper alleged that, due to this fall, he suffered injuries to his back and body as a whole.<sup>112</sup> Cooper subsequently filed a claim for compensation on March 9, 2007.<sup>113</sup> Chrysler filed an answer to Cooper's claim. In its answer, Chrysler admitted that Cooper sustained a workplace injury and that Chrysler subsequently provided physical therapy to Cooper as treatment for the injuries.<sup>114</sup> Sometime during 2008, Cooper had surgery.<sup>115</sup> In October 2009, counsel for Chrysler asserted that they disputed medical causation and that Cooper's surgery was not necessitated by the fall.<sup>116</sup> Chrysler later confirmed that it did not deny the accident, but rather challenged whether the 2008 surgery was "reasonably required to cure and relieve" Cooper from his work-related injury.<sup>117</sup>

While his workers' compensation case was still pending, Cooper filed a civil lawsuit against Chrysler seeking damages on the same set of facts and for the same injury.<sup>118</sup> Chrysler responded by raising the affirmative defense of exclusivity in its answer.<sup>119</sup> Chrysler then filed a motion for summary judgment.<sup>120</sup> Cooper "opposed the summary judgment motion on the ground that the Act was not the exclusive remedy because [his slip-and-fall] was not 'the prevailing factor'" and thus did not fall under the definition of an "accident" as required by the Act.<sup>121</sup> The trial court found in favor of Chrysler and entered summary judgment.<sup>122</sup>

On appeal, Cooper relied on *M.A.R.A.* in asserting that because his injury was not within the new narrow definition of an "accident," he had a

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112. Cooper v. Chrysler Grp., LLC, 361 S.W.3d 60, 62 (Mo. App. W.D. 2011).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. Respondent's Brief, *Cooper*, 361 S.W.3d 60 (No. ED96549), 2011 WL 3584285, at \*7-8. Section 287.140 requires employers to provide medical treatment that may "reasonably be required after the injury or disability, to cure and relieve from the effects of the injury." MO REV. STAT. § 287.140.1 (Supp. 2012).

118. *Cooper*, 361 S.W.3d at 62.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

right to bring a civil action.<sup>123</sup> The court first noted that the record cited by Cooper “does not support the assumptions that [Chrysler] ‘denied’ the claim or that . . . the slip and fall was not the ‘prevailing factor’” in causing his injury.<sup>124</sup> Indeed, Chrysler relied on this assertion in its brief by arguing, *inter alia*, that Cooper admitted the applicability of the Act.<sup>125</sup> However, the court determined that the plaintiff’s brief – challenging the defendant’s motion for summary judgment – was nonetheless enough to generate an issue of fact for the court.<sup>126</sup>

The court recognized the holdings in *M.A.R.A.* and *Killian* and concluded that *M.A.R.A.* did not attempt to change the primary jurisdiction doctrine laid out in *Killian*.<sup>127</sup> Thus, the court determined that Cooper had a right to file a common law action if he was excluded from the scope of the Act due to the nature of his injury. The court also found that in this case, the applicability of the Act was a question of fact to be determined by the Commission.<sup>128</sup> The court held that the trial court did not err in concluding the same.<sup>129</sup> Finally, the court noted that as Cooper failed to raise the issue of whether summary judgment was the proper remedy, it could only reverse and remand if the court found plain error under Missouri Rule of Civil Procedure 84.13(c).<sup>130</sup> After applying the plain error review doctrine, the court stated that the proper remedy was to stay the proceeding in circuit court until the pending workers’ compensation case yielded an answer to the factual issue.<sup>131</sup> The court concluded that granting summary judgment was clear error and resulted in “manifest injustice” because Cooper would be prevented from subsequently bringing his civil claim in the event that the Commission determined that his injury did not result from an “accident” under the Act.<sup>132</sup>

## V. COMMENT

Section 287.120 sets out the exclusive remedy for injured employees under Missouri workers’ compensation law.<sup>133</sup> However, this section only applies to accidental injuries and not occupational diseases.<sup>134</sup> After the Act

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123. *Id.* at 63.

124. *Id.* at 62.

125. Respondent’s Brief, *supra* note 117, at \*6.

126. *See Cooper*, 361 S.W.3d at 63.

127. *Id.*

128. *See id.* at 64.

129. *Id.*

130. *Id.*

131. *Id.* at 66.

132. *Id.*

133. MO. REV. STAT. § 287.120 (Supp. 2012).

134. *State ex rel. KCP & L Greater Mo. Operations Co. v. Cook*, 353 S.W.3d 14, 19 (Mo. App. W.D. 2011).

was significantly narrowed by the 2005 amendments, the Supreme Court of Missouri declared that individuals whose injuries do not fit within the scope of the Act may bring civil actions just as they had done before the Act was adopted.<sup>135</sup> If a civil action is brought in the first place, a defendant may object to the court's authority to act under the exclusivity provision, but it must do so as an affirmative defense.<sup>136</sup> The defendant may file a motion for summary judgment or a motion to dismiss for failure to state a claim if the jurisdictional issue appears on the face of the petition.<sup>137</sup> If this affirmative defense motion involves an issue of law, the circuit court will adjudicate it.<sup>138</sup> If, however, the defense involves an issue of fact, the circuit court must conclude that only the Commission shall decide the issue.<sup>139</sup> Under these circumstances, as in *Cooper*, if a parallel workers' compensation claim is already pending, the circuit court will stay the proceeding until the Commission determines the jurisdictional issue of fact.<sup>140</sup>

Jurisdictional issues of fact are those factual issues that will determine whether the employee falls under the scope of the Act.<sup>141</sup> Thus, employers may raise these defenses in order to avoid all liability under the Act.<sup>142</sup> These issues include, but are not limited to, determinations of (i) whether an "accident" occurred,<sup>143</sup> (ii) whether the injury from the work related accident was the prevailing factor in causing the resulting medical condition and disability,<sup>144</sup> (iii) whether the accident arose out of and in the course of employment,<sup>145</sup> (iv) whether the injury resulted from idiopathic causes,<sup>146</sup> and (v) whether the hazard or risk was one to which the worker would have been

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135. *M.A.R.A.*, 277 S.W.3d 670, 680.

136. *McCracken v. Wal-Mart Stores E., LP*, 298 S.W.3d 473, 479 (Mo. 2009) (en banc).

137. *See Fortenberry v. Buck*, 307 S.W.3d 676, 679 n.2 (Mo. App. W.D. 2010).

138. *Cooper v. Chrysler Grp., LLC*, 361 S.W.3d 60, 65 (Mo. App. E.D. 2011).

139. *Id.*

140. *Id.* at 66. Categorically, in serious injury cases, the injured worker may prefer not to pursue a workers' compensation claim in the first place, but instead file only in circuit court and bring his case before a jury. Following *Cooper*, issues of fact shall only be determined by the Commission because it holds the administrative expertise and knowledge to determine these issues accurately and efficiently. *Id.* at 63-64. It remains unknown, however, whether, in this situation, a circuit court will order an injured plaintiff to file a claim for compensation if he has yet to do so.

141. *See id.* at 65-66.

142. *See id.* at 62.

143. MO. REV. STAT. § 287.020.2 (Supp. 2012).

144. § 287.020.3(1).

145. § 287.020.3(2); *Harris v. Westin Mgmt. Co. E.*, 230 S.W.3d 1, 3 (Mo. 2007) (en banc).

146. § 287.020.3(3).

equally exposed to outside of normal non-employment life.<sup>147</sup> If any of these issues are raised in a civil action in Missouri, the defense should timely raise an affirmative defense, and the circuit court should conclude that only the Commission may determine the issue.

Exclusivity of workers' compensation is not treated consistently among the states, however. Courts vary in their positions on who has "jurisdiction to determine jurisdiction."<sup>148</sup> One approach is known as the "split-jurisdiction" approach.<sup>149</sup> Under this approach the Commission will always hear issues of fact regardless of where the claim is first filed.<sup>150</sup> This is the approach followed in *Cooper*.<sup>151</sup> Other jurisdictions, including Oregon<sup>152</sup> and Michigan,<sup>153</sup> also follow this rule but do not directly differentiate between issues of law and issues of fact. The Oregon Supreme Court held that:

[While it] is true that the Workers' Compensation Board (board) routinely addresses questions regarding the compensability of workplace injuries[,] . . . we see nothing regarding the board's statutory jurisdiction or adjudicative responsibilities that makes the board, rather than a court, a preferable forum, in the primary jurisdiction sense, for the resolution of the issue [of law] presented here.<sup>154</sup>

Similarly, the Michigan Supreme Court has held that a court may decide whether a defendant is the plaintiff's employer (a question of law) but lacks the power to determine whether an injury occurred in the course of employment (question of fact).<sup>155</sup>

A second approach puts the Commission and the circuit courts on equal grounds in that the first to secure jurisdiction over the controversy shall decide which jurisdiction applies.<sup>156</sup> Under this approach, the first party to

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147. § 287.020.3(2)(b); see *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504, 511-12 (Mo. 2012) (en banc).

148. See generally Daniel Keating, Comment, *Employee Injury Cases: Should Courts or Boards Decide Whether Workers' Compensation Laws Apply?*, 53 U. CHI. L. REV. 258 (1986) (examining "three approaches that courts have adopted for deciding which tribunal has 'jurisdiction to determine jurisdiction' in potential workers' compensation actions").

149. *Id.* at 265.

150. See *id.* at 265-66.

151. *Cooper v. Chrysler Grp., LLC*, 361 S.W.3d 60, 65-66 (Mo. App. E.D. 2011).

152. See *Panpat v. Owens-Brockway Glass Container, Inc.*, 49 P.3d 773, 776 (Or. 2002) (en banc).

153. See *Sewell v. Clearing Machine Corp.*, 347 N.W.2d 447 (Mich. 1984) (per curiam).

154. *Panpat*, 49 P.3d at 776.

155. *Sewell v. Clearing Machine Corp.*, 347 N.W.2d 447, 450 (Mich. 1984); see also Keating, *supra* note 148, at 266.

156. Keating, *supra* note 148 at 263. Keating suggests that this is the majority approach among the states. *Id.*

file can feel secure in their belief as to which tribunal will be deciding exclusivity of workers' compensation. Here, issues of law are treated identical to issues of fact. California and Arkansas are two of the jurisdictions following this rule.<sup>157</sup>

A final approach is known as the "substantial question approach."<sup>158</sup> This narrow approach "requires a court to defer to the [administrative] board if there is a 'substantial question' as to whether a particular injury occurred in the course of employment."<sup>159</sup> This rule was adopted by New York.<sup>160</sup> In *O'Rourke v. Long*, New York's highest court held that "where the availability of workers' compensation hinges upon the resolution of . . . mixed questions of fact and law, the plaintiff may not choose the courts as the forum for the resolution of such questions."<sup>161</sup>

The "split-jurisdiction," or Missouri approach, may be superior to the latter two approaches because it avoids situations in which the circuit courts have to answer questions for which "administrative knowledge and expertise are demanded."<sup>162</sup> To be sure, a circuit court addressing a factual issue regarding the applicability of workers' compensation would likely lead to role-reversal. This rule would put the burden on the defendant employer to prove, after timely raising the affirmative defense of exclusivity, that the plaintiff suffered an "accident" under the Act and that the plaintiff's medical condition and resulting disability constitute an "injury" under the Act. These factual assertions could lead to the employer having to establish by expert medical evidence that the work-related incident was the "prevailing factor" in causing the plaintiff's current medical condition. The plaintiff, on the other hand, would have to prove that, at the time of his injury, he was not working within the scope and course of his employment, or that pre-existing impairments, conditions, or illnesses were the primary causes of his injuries.

Ultimately, the employer would have to make the injured employee's case for benefits under the Act – in order to avoid civil liability – and the employee would assert the usual defenses available under the Act. If the employer were to prevail, and if the circuit court dismissed the action with prejudice, a subsequent workers' compensation hearing before the Commission could be awkward. An assertion of collateral estoppel<sup>163</sup> by the injured

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157. *Id.* at 264 (citing *Scott v. Ind. Acc. Comm'n*, 293 P.2d 18 (Cal. 1956) (per curiam)); see *VanWagoner v. Beverly Enters.*, 970 S.W.2d 810 (Ark. 1998).

158. Keating, *supra* note 148, at 266.

159. *Id.*

160. See *O'Rourke v. Long*, 359 N.E.2d 1347, 1354 (1976).

161. *Id.* at 1354; Keating, *supra* note 148, at 267.

162. See *Cooper v. Chrysler Grp., LLC*, 361 S.W.3d 60, 63 (Mo. App. E.D. 2011); see also Keating, *supra* note 148, at 265-66.

163. Certainly, in a workers' compensation case, an employee could assert that, under common law, the employer is estopped from denying liability under the Act after a valid and final judgment, granted by a circuit court, dismisses the action on the grounds that the employer is exclusively liable under the Act. See *Boswell v. Ameri-*

worker would likely secure a victory. The employer would have effectively proved his liability under the Act in an effort to disprove his liability in the civil action. Having spent considerable resources proving its liability, the employer would have to settle for feeble arguments against the nature and extent of the injury, or something similar.

Alternatively, questions of law may rightly be determined by a circuit court. To be sure, a circuit court's grant of a motion for summary judgment after finding that the injured plaintiff is actually a statutory employee<sup>164</sup> of the defendant would not secure the employer's inevitable doom in a subsequent workers' compensation case. The employer would still be able to assert that an "accident" did not occur, or that the injury was not the prevailing factor in causing the employee's current medical condition. Regardless of the reasoning that the *Cooper* Court articulated, the fact remains that contrary results would have been bizarre, and ultimately, the court probably got it right in that the circuit courts should let the Commission determine fact issues.

While *Cooper* provided a proper solution to the "which jurisdiction should decide jurisdiction" problem,<sup>165</sup> an important question remains unanswered. A hypothetical scenario may best illustrate this remaining question. Assume a defendant fails to raise an affirmative defense in a civil action, but the circuit court is nonetheless presented with an issue "where administrative knowledge and expertise are demanded."<sup>166</sup> Following *McCracken* and *Fortenberry*, the defendant may only raise the issue of the workers' compensation exclusive remedy in a timely motion and otherwise waives this affirmative defense.<sup>167</sup> If timely filed, the circuit court will hear the jurisdictional issue only if it involves a question of law.<sup>168</sup> It follows that if no affirmative defense is raised, or is raised in an untimely fashion, a circuit court will presumably adjudicate the matter notwithstanding the potential to run into factual issues over which the Commission should have primary jurisdiction. Thus the consequences that follow counsel's failure to file an affirmative defense could resemble those discussed above. Certainly a subsequent legal malpractice claim is not the most efficient way to put all parties back into the positions that they were in before the lawyer's mistake.

It should be noted that some courts may be aware of this anomaly. At least one court has been extremely reluctant to deny a motion to dismiss on

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can Ins. Co., 835 S.W.2d 454 (Mo. App. S.D. 1992). It should be noted, however, that an award pursuant to the workers' compensation law has no res judicata effect upon issues of liability involved in a common law action based on the same occurrence. See *State ex rel. Transit Cas. Co. v. Holt*, 411 S.W.2d 249 (Mo. App. 1967).

164. The issue of whether or not the employer is a statutory employee is an issue of law. See, e.g., *McCracken v. Wal-Mart Stores E., LP*, 298 S.W.3d 473, 479 (Mo. 2009) (en banc).

165. *Cooper*, 361 S.W.3d at 63.

166. *Id.*

167. See *supra* Part III.B.

168. *Cooper*, 361 S.W.3d at 65.

the grounds that counsel failed to raise the defense in a timely manner. In *In re Luby's Cafeterias, Inc.*, the Court of Appeals of Texas refused to deny the employer's motion to dismiss against the wishes of the employee.<sup>169</sup> In that case, the employer waited until just before trial to file a motion to dismiss.<sup>170</sup> The court ruled that "the fact that [the employer] participated in discovery was of necessity to defend itself, not a waiver of all affirmative defenses."<sup>171</sup> Additionally, pending cases are "grandfathered" in. The *McCracken* Court held that a motion to dismiss filed the day before trial, as Walmart Stores did, is not a timely affirmative defense.<sup>172</sup> However, the *McCracken* Court also went on to rule that the new requirement of a timely affirmative defense would not apply retroactively.<sup>173</sup> Walmart Stores' counsel was off the hook. Therefore, counsel in pending civil cases brought by an employee before October 27, 2009, could still raise a motion to dismiss notwithstanding the holding in *McCracken*.

The potential for a circuit court to address a jurisdictional issue of fact still remains for the majority of cases, however. When, for some reason, some counsel somewhere fails to file a timely motion to dismiss, the circuit court may end up addressing issues which *Cooper* rightly determined should be decided by the Commission. One would expect a Supreme Court holding addressing this discrepancy, but the high court has remained silent on the issue.

## VI. CONCLUSION

Until 1926, Missouri workers were forced to seek relief in civil court for injuries sustained at work.<sup>174</sup> The burden of proof facing injured workers was much higher. Under the common law, an employee had an action for negligence only if their employer's conduct fell below the "standard of care established by law for the protection of others."<sup>175</sup> After the Missouri legislature passed the Workers' Compensation Act, employees were able to claim benefits by proving that they suffered a "personal injury . . . by accident arising out of and in the course of [their] employment."<sup>176</sup> Ultimately, the lower

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169. 979 S.W.2d 813 (Tex. App. 1998).

170. *Id.* at 815.

171. *Id.* at 817-18.

172. *McCracken v. Wal-Mart Stores E., LP*, 298 S.W.3d 473, 475, 479 (Mo. 2009) (en banc).

173. *Id.* at 479.

174. Jeffrey A. Burns, *Workers' Compensation – Philosophy and History*, in 2A MO. PRAC., METHODS OF PRAC.: LITIGATION GUIDE § 27.1 (4th ed. 2013).

175. *Harris v. Niehaus*, 857 S.W.2d 222, 225 (Mo. 1993) (en banc) (quoting RESTATEMENT (SECOND) OF TORTS § 282 (1965)).

176. MO. REV. STAT. § 287.120.1 (Supp. 2011).

standard meant injured employees could be more confident in obtaining compensation and could do so in a shorter period of time.

The Act also stipulated that it is the exclusive remedy for injured employees.<sup>177</sup> Thus, workers' compensation and civil suits became mutually exclusive. Injured employees can bring claims in both arenas;<sup>178</sup> however, benefits are obtainable in only one or the other.<sup>179</sup> Thus, employers facing civil suits can now use the Act as a defense. The *McCracken* Court held that this exclusivity defense must be brought as an affirmative defense, or else it will be deemed waived.<sup>180</sup>

Additionally, in *Killian*, the Supreme Court held that the Commission has primary jurisdiction over certain issues of fact and that, therefore, the circuit courts must yield to the Commission's decision-making.<sup>181</sup> In *Cooper*, the court displayed its willingness to stay a proceeding until the Commission determines an issue of fact.<sup>182</sup> The *Cooper* Court got this right in that allowing a circuit court to rule on jurisdiction-determining issues of fact will lead to some inefficient and unfair outcomes. However, *Cooper* and *McCracken* are irreconcilable. If an employer fails to raise the exclusivity defense, a circuit court will nevertheless hear these issues that the *Cooper* Court declared it shall not hear. This conflict may be the result of tension between the courts following the legislature's narrowing of the definition of "accident" and "injury" while still maintaining the Act's exclusiveness.

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177. *See id.*

178. *See Cooper v. Chrysler Grp., LLC*, 361 S.W.3d 60, 62 (Mo. App. E.D. 2011) (In addition to filing a claim for compensation with the Commission, the plaintiff also filed a civil lawsuit against his employer.).

179. *See* § 287.120.1.

180. *McCracken v. Wal-Mart Stores E., LP*, 298 S.W.3d 473, 475, 479 (Mo. 2009) (en banc).

181. *Killian v. J. & J. Installers, Inc.*, 802 S.W.2d 158, 161 (Mo. 1991) (en banc).

182. *Cooper*, 361 S.W.3d at 67.