

IN THE SUPREME COURT OF THE
STATE OF MISSOURI

DOCKET NO. **SC88352**

DAVID HARRIS,

Plaintiff/Appellant

v.

WESTIN MANAGEMENT EAST, INC., and
JEREMY NEU

Defendant/Respondent

On Transfer from the Missouri Court of Appeals
Eastern District

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This case originated as an appeal as of right from a “Order and Judgment,” entered on May 9, 2006 dismissing for lack of subject matter jurisdiction all claims and parties in a civil action filed in the Circuit Court of the City of St. Louis. Plaintiff timely appealed. On February 27, 2007, the Missouri Court of Appeals, Eastern District, entered its Opinion in favor of Appellant, and including an Order transferring this matter to this Court pursuant to Supreme Court Rule 83.02. Jurisdiction lies in this Court pursuant to Rule 83.02 and under Article V, Section 3 of the Missouri Constitution.

STATEMENT OF FACTS

AND PROCEDURAL BACKGROUND

I. FACTUAL BACKGROUND

On December 11, 2002, David Harris was riding as a passenger in the right front seat of a vehicle which was owned and being operated by an acquaintance, Felicia Lambert. [Police Report, A-10]. Harris was employed at the Westin Hotel, located at 811 Spruce Street in downtown St. Louis. [Affidavit of Harris, A-16]. Harris was a kitchen worker whose duties were confined to an assigned specific work area at the hotel, and had no duties whatsoever that involved taking or performing work away from the hotel or his work area. [Affidavit of Harris, A-16-A-17; Harris Statement, A-21]. At the time relevant to the underlying claims, the vehicle in which Harris was riding was traveling westward on Spruce Street, which meant it was traveling behind and to the south of the Westin hotel. [Police Report, A-11]. Harris was required, as an employee, to enter the

Westin property through the entrance at 9th Street and Clark, on the northwest side of the hotel and about a block away and around the corner from where he was when the accident occurred. [Affidavit of Harris, A-17; Depo. of Melodee Lee, A-29]. Harris had not yet reached the property of his Employer, and would not begin his work day until he clocked in. [Affid. of Harris, A-17].

On that same day, Jeremy Neu was also employed at the Westin Hotel by Westin Management East, Inc. Neu was employed as a valet driver, and there is no dispute that he was already in the course and scope of his employment while Harris was still traveling to work. [Westin Security Report, A-12].

At the time of the accident at issue, Neu drove a Westin van out of the Westin driveway and onto Spruce Street, a public road. As he pulled onto west-bound Spruce, Neu's vehicle broadsided the vehicle in which Harris was riding, causing injury to Harris. [Police Report, A-11; Westin security report, A-12].

II. PROCEDURAL BACKGROUND:

Harris brought suit against Neu and Neu's employer Westin Management East in March 2005, and filed his Second Amended Petition March 28, 2006. Aside from the derivative respondeat superior liability for the negligence of Neu, the claims against Westin include their negligent hiring and failure to adequately train their employee. On March 13, 2006, defendants filed a Motion to Dismiss Plaintiff's First Amended Petition (which was taken to apply to the Second Amended Petition when the same was filed). This motion was argued before the Honorable Judge Grady, who issued his ruling

denominated “Order and Judgment,” on May 9, 2006. That Order dismissed this cause on a finding that the court lacked subject matter jurisdiction until the Labor and Industrial Commission determined the jurisdiction issue. [Order, A-1-A-6]. A Petition for Writ was filed with the Eastern District of the Missouri Court of Appeals on June 8, 2006, which Petition was summarily denied on June 13, 2006. [A-7]. A petition for Writ to the Supreme Court was also summarily denied on August 22, 2006. Plaintiff timely appealed. On February 27, 2007, the Missouri Court of Appeals, Eastern District, entered its Opinion in favor of Appellant, and including an Order transferring this matter to this Court pursuant to Supreme Court Rule 83.02. [A-36].

POINTS RELIED ON

I.

THE DISMISSAL BY THE TRIAL COURT WAS IN ERROR, AND WAS AN ABUSE OF DISCRETION IN THAT IT IGNORED THE PRIMARY AND UNDISPUTED FACT THAT PLAINTIFF/RELATOR HARRIS WAS NOT IN THE COURSE OF HIS EMPLOYMENT AT ANY RELEVANT TIME, THAT THIS ACCIDENT DID NOT ARISE OUT OF THE COURSE AND SCOPE OF EMPLOYMENT, AND THAT THIS ACCIDENT CAN IN NO WAY FIT INTO AN EXCEPTION TO THE “COMING AND GOING” DOCTRINE WHICH BARS WORKERS COMPENSATION FOR INJURIES INCURRED WHILE ON THE WAY TO OR FROM WORK.

Crow v. Kansas City Power and Light Co., 174 S.W.3d 523 (Mo.App. W.D. 2005)

James v. Poppa, 85 S.W.3d 8 (Mo. banc 2002)

Kunce v. Junge Baking Co., 432 S.W.2d 602 (Mo.App. 1968)

McClain v. Welsh Co., 748 S.W.2d 720 (Mo.App.E.D. 1988).

II.

THE TRIAL COURT’S “JUDGMENT” AND ORDER OF DISMISSAL IS IN ERROR AND AN ABUSE OF DISCRETION BECAUSE BY ITS TERMS, THE ORDER MAKES THE FINDINGS (AND APPARENTLY THE DISMISSAL)

CONTINGENT ON THE DETERMINATION OF JURISDICTION BY THE LABOR AND INDUSTRIAL RELATIONS COMMISSION, AND THE TRIAL COURT CANNOT ABROGATE ITS DUTY TO MAKE THIS DETERMINATION OF ITS OWN JURISDICTION ABSENT A PREPONDERANCE OF THE EVIDENCE SHOWING THAT JURISDICTION IS LACKING.

Crow v. Kansas City Power and Light Co., 174 S.W.3d 523 (Mo.App. W.D. 2005)

Graham v. Geiz, 149 S.W.3d 459 (Mo.App.E.D. 2004)

James v. Poppa, 85 S.W.3d 8 (Mo. banc 2002)

III.

THE DISMISSAL BY THE TRIAL COURT WAS IN ERROR AND WAS AN ABUSE OF DISCRETION IN ABROGATING ITS DUTY TO DETERMINE ITS OWN JURISDICTION BECAUSE NO REASONABLE METHOD IS AVAILABLE TO MAKE THIS DETERMINATION, AS THERE IS NO PROCEDURE WITHIN THE DIVISION OF WORKERS COMPENSATION FOR SETTING OR HEARING OF MOTIONS AS TO JURISDICTION ALONE, AND THERE IS NO METHOD OF PROCEEDING WITH ANY ISSUE BEFORE THE DIVISION OF WORKERS COMPENSATION AFTER THE STATUTE OF LIMITATIONS HAS EXPIRED FOR SUCH A CLAIM.

Article I, Section 14 of the Missouri Constitution

Kilmer v. Mun, 17 S.W.3d 545 (Mo. banc 2000)

ARGUMENT

STANDARD OF REVIEW

Appellate review of a trial court's grant of a motion to dismiss is *de novo*. . Where the essential facts necessary to establish subject matter jurisdiction are not in dispute, a pure question of law is presented, which this court reviews de novo. *Ryan ex rel. Estate of Reece v. Reece*, 31 S.W.3d 82, 86 (Mo.App. W.D.2000).When reviewing the dismissal of a petition for failure to state a claim, appellate courts treat the facts contained in the petition as true and construe them liberally in favor of the plaintiffs. *Ste. Genevieve Sch. Dist. R II v. Bd. of Aldermen of City of Ste. Genevieve*, 66 S.W.3d 6, 11 (Mo. banc 2002). In general, constitutional provisions are subject to the same rules of construction as other laws, except that constitutional provisions are given a broader construction due to their more permanent character. *StopAquila.org v. City of Peculiar*, 208 S.W.3d 895, 899 (Mo. banc 2006). This Court is required to give due regard to the primary objectives of the constitutional provision under scrutiny, as viewed in harmony with all related provisions. *State ex rel. Upchurch v. Blunt*, 810 S.W.2d 515, 516 (Mo. banc 1991).

I.

THE DISMISSAL BY THE TRIAL COURT WAS IN ERROR, AND WAS AN ABUSE OF DISCRETION IN THAT IT IGNORED THE PRIMARY AND UNDISPUTED FACT THAT PLAINTIFF/RELATOR HARRIS WAS NOT IN THE COURSE OF HIS EMPLOYMENT AT ANY RELEVANT TIME, THAT THIS

ACCIDENT DID NOT ARISE OUT OF THE COURSE AND SCOPE OF EMPLOYMENT, AND THAT THIS ACCIDENT CAN IN NO WAY FIT INTO AN EXCEPTION TO THE “COMING AND GOING” DOCTRINE WHICH BARS WORKERS COMPENSATION FOR INJURIES INCURRED WHILE ON THE WAY TO OR FROM WORK.

"In determining the question of its subject matter jurisdiction, the circuit court is not only the arbiter of the law, but the facts necessary to decide the question." *Kesterson v. Wallut*, 116 S.W.3d 590, 594 (Mo.App. W.D.2003). Whether the subject matter of an action falls within the exclusive jurisdiction of the Labor and Industrial Relations Commission is a question of fact, resolution of which is left to the sound discretion of the trial court. *Crow v. Kansas City Power and Light Co.*, 174 S.W.3d 523, 528 (Mo.App. W.D. 2005). While the quantum of proof may not be high, it must appear by the preponderance of the evidence that the court is without jurisdiction." *James v. Poppa*, 85 S.W.3d 8, 9 (Mo. banc 2002)(emphasis added).

As the party seeking to dismiss, defendants Westin and Neu (“Westin”) had the burden to show by a preponderance of the evidence that the Trial Court was without jurisdiction. Regardless of how that burden is measured, there certainly must be some minimal evidence put forward that suggests application of the Act. Unfortunately, in this matter, there is and was no fact before the court which suggested that Plaintiff/ Appellant was in the course and scope of employment at the time of the accident. Instead, the Court spent some effort in analyzing whether defendant Neu could be found to have committed

the “something more” to allow civil liability against a “co-employee.” The Court should never have reached that non-issue.

There are numerous cases dealing with the liability of a co-employee. Each of those published cases, including the leading case of *State ex rel. Taylor v. Wallace*, 73 S.W.3d 620 (Mo. banc 2002) considers a matter where both plaintiff and defendant were in the course of employment at the time of the injury. In *Taylor*, for example, the plaintiff was at work on the same trash truck as the defendant, who was accused of negligent operation of that truck. In such a situation, Missouri law is clear that the co-employee must have committed some affirmative act, beyond the failure to maintain a safe workplace common to all employees, which placed the plaintiff in a greater danger (the “something more”).

Taylor, and cases in the same line, should have no bearing on this matter, because this matter occurred outside the scope of Harris’ employment. The trial court, however, after setting out the correct question, then solely analyzed and relied upon this line of “something more” cases in reaching its decision to dismiss. [Order and Judgment, A-1-A-6]. At no point in its decision did the trial court discuss the more relevant issue of whether or not an employee could be considered to be “within the course and scope of employment” when not on employer’s premises, and not conducting any action whatsoever on behalf of the employer. **An employee’s injuries are only in the course of employment “if the accident occurs within the period of employment at a place where the employee may reasonably be fulfilling the duties of employment.”**

McClain v. Welsh Co., 748 S.W.2d 720, 724 (Mo.App.E.D. 1988).

The facts here are that Relator Harris was a passenger in a vehicle passing by the building owned by employer, with the intention of being dropped off at an employee entrance a block and a half away. The accident occurred south of the Westin Hotel at 8th and Spruce streets, and the employee entrance was on the other side of the building at 9th and Clark Streets. [Police Report, A-8-A-11; Affidavit of Harris, A-16-A-19; Admissions by Westin, A-33]. Relator was a kitchen worker and his work was all related to specific kitchen sites within the Westin. [Affidavit of Harris, A-16]. Relator had not begun his work shift, had not clocked in, and had not even reached the premises of his employer. [Affidavit of Harris, A-17]. Relator was not conducting any work for his employer, and he was engaged in no activity that could be construed as a legal mutual benefit to the employer. [Affidavit of Harris, A-17]. There was no allegation before the trial court that the site of the accident was owned or controlled by employer, nor that Relator was ever directed to be driven on that route on his way to work.

There is no dispute that the general rule under the applicable law is that “an employee does not suffer injury arising out of and in the course of employment if the employee is injured while going to or journeying from the place of employment.” *McClain v. Welsh Co.*, 748 S.W.2d 720, 724 (Mo.App.E.D. 1988). The rationale is that the traveling risks are those shared by the common public. *Davis v. McDonnell Douglas*, 868 S.W.2d 170, 171 (Mo.App.1994). There is no risk unique to the workplace because “[I]t is the inevitable condition of employment that every worker present himself at the

assigned location to perform the task for which he was hired and depart therefrom."

Garrett v. Industrial Comm'n, 600 S.W.2d 516, 519 (Mo.App.1980).

There are two specific and limited exceptions to the general rule, neither of which has any relevancy to the case at issue. In *Cox v. Copeland Brothers Construction*, 589 S.w.2d 55 (Mo.App.W.D. 1979), the court noted that **"if the exposure to the perils of the highway is related to the employment** even though the employment is not the sole cause of such exposure to such risks but is combined with or is a concurrent personal cause, the benefit of compensation is not to be withdrawn." *Cox*, 589 S.W.2d at 57. This is commonly referred to as the "dual purpose doctrine," and it has roots well established in Missouri law. Additionally, Missouri cases have established the "mutual benefit doctrine." Under facts that establish a mutual benefit, an injury is compensable if it is incurred "while performing an act for the mutual benefit of the employer and the employee." *Brenneissen v. Leach's Standard Service Station*, 806 S.W.2d 443, 448(Mo.App. E.D. 1991).

These are the only exceptions which might bring an employee within the purview of the Workers Compensation Act while simply on the way to work, before entering upon the premises of the employer. There are no facts which could bring this case within either exception. Numerous cases, including *Ray v. Great Western Stage & Equipment*, 413 S.W.2d 576 (Mo.App. 1967), *Davis v. McDonnell Douglas*, 868 S.W.2d 170 (Mo.App. 1994), and *Bear v. Anson Implement, Inc.*, 976 S.W.2d 553 (Mo.App. 1998) denied any jurisdiction or application of the Workers Compensation Act where the court

found there was insufficient evidence that the employee was involved in work or a mutual benefit for the employer in going to or coming from work. In fact, although in an older decision, the Missouri Supreme Court has found that even where employer and employee are riding in the same vehicle, a civil suit may be maintained where they were on a personal errand for the employer at the time of an accident and not acting in the course of business. *Leidy v. Taliaferro*, 260 S.W.2d 504 (Mo. 1953).

Another possible “exception” to the “coming to or going from” doctrine, applies where the injury occurs on premises that may be considered an “extension” of the employer’s property. It must be emphasized that no substantial facts were presented to the trial court on this point. There are no facts here which could have suggested that Spruce Street, under the circumstances presented, was such an extension. A clear description of the two-part test for compensability in an extended premises case was set out in *Cox v. Tyson Foods, Inc.*, 920 S.W.2d 534 (Mo. banc 1996). The *Cox* court described the requirements as: “(a) the injury-producing accident occurs on premises which are owned or controlled by the employer, or on premises which are not actually owned or controlled by the employer but which have been so appropriated by the employer or so situate, designed and used by the employer and his employees incidental to their work as to make them, for all practicable intents and purposes, a part and parcel of the employer’s premises and operation; **and** (b) if that portion of such premises is a part of the customary, expressly or impliedly approved, permitted, **usual and acceptable route or means employed by workmen to get to and depart from their places of**

labor and is being used for such purpose at the time of the injury.” *Id.* at 535-36.

In *Kunce v. Junge Baking Co.*, 432 S.W.2d 602 (Mo.App. 1968), the court discusses why, even on owned premises, an injury will not fall within the Act where the route being used was not the customary or assigned one to the actual work site. *Kunce*, 432 S.W.2d at 607.

In fact, the claimant's testimony shows this part of his employer's property was not an employees' entrance, that the garage door was closed, and that he had no intention of using it as a way or route over bakery premises in reaching the shipping room where he was employed. In each of the Missouri cases cited..., the claimant, while going to or from work on the employer's premises, was using a route intended for that purpose when injured. In the instant case, Mr. Kunce's purpose in traversing the runway was not to follow it as part of a recognized entrance into the bakery. **His employment of the runway was no different than his use of the public streets, alleys and sidewalks in returning to the building.**

Kunce, 432 S.W.2d at 607-8.

Recently, the appellate court discussed the requirements for a finding of extended premises in *Huffmaster v. American Recreation Products*, 180 S.W.3d 525 (Mo.App. 2006). The *Huffmaster* court noted that “Each case must turn upon the point of whether, under its particular circumstances, the injury arose from something that had become an incident of the employment. *Id.* at 528. In the only cases that have found a part of a

public street or sidewalk to be within the extended premises doctrine, the employee/claimants were injured while walking from designated parking lots or spaces on an approved route to the employer's premises. *Gaston v. Steadly Co.*, 69 S.W.3d 158 (Mo.App.S.D. 2002); *Frye v. Viacom, Inc.*, 927 S.W.2d 545 (Mo.App.1996).

In this matter, there is no allegation that Employee was in, on or at an assigned parking area. He was not on a particular assigned route from a parking area to his workplace, or even from one part of Employer's premises to another. He was not in a parking lot, he did not have a car, and no one instructed him on the way to go to work other than the admonition that he was not to enter the employer's premises at any location other than the employee's entrance over a block and a half away on the opposite side of the building. He was on an open and public street, on a route chosen by the non-employee owner and operator of the vehicle in which he was a passenger. Aside from all of that, no evidence related to such an exception was presented to the trial court.

There was, in fact, NO evidence that the underlying accident occurred in any manner related to the scope of the Workers Compensation Act. As the Appellate Court found, "as a matter of law, without treading into the territory of issues reserved for the Commission's determination...when one is not at work, but merely driving by his or her place of employment on a public street, worker's compensation law does not apply." [Appeal Opinion, A-39]. There is nothing in the record on the facts of this particular case which would trigger a question of jurisdiction within the realm of workers compensation. For the reasons stated above, the trial court's determination that there was a basis to

dismiss for lack of subject matter jurisdiction was in error and an abuse of discretion, and should be reversed, with remand for this cause to proceed to trial.

II.

THE TRIAL COURT'S "JUDGMENT" AND ORDER OF DISMISSAL IS IN ERROR AND AN ABUSE OF DISCRETION BECAUSE BY ITS TERMS, THE ORDER MAKES THE FINDINGS (AND APPARENTLY THE DISMISSAL) CONTINGENT ON THE DETERMINATION OF JURISDICTION BY THE LABOR AND INDUSTRIAL RELATIONS COMMISSION, AND THE TRIAL COURT CANNOT ABROGATE ITS DUTY TO MAKE THIS DETERMINATION OF ITS OWN JURISDICTION ABSENT A PREPONDERANCE OF THE EVIDENCE SHOWING THAT JURISDICTION IS LACKING.

On this point, the duty of the trial court was set out recently in *Crow v. Kansas City Power and Light Co.*, 174 S.W.3d 523, 528 (Mo.App. W.D. 2005): "In determining the question of its subject matter jurisdiction, the circuit court is not only the arbiter of the law, but the facts necessary to decide the question." *Id.*, citing *Kesterson v. Wallut*, 116 S.W.3d 590, 594 (Mo.App. W.D.2003). Thus, whether the subject matter of an action falls within the exclusive jurisdiction of the Labor and Industrial Relations Commission is a question of fact, resolution of which is left to the sound discretion of the trial court. *Id.*, citing *Burns v. Employer Health Servs., Inc.*, 976 S.W.2d 639, 641 (Mo.App. W.D.1998). Its decision on this question may be "based not only on facts appearing of record, but facts adduced by affidavits of the parties, oral testimony, and

depositions." *Kesterson*, 116 S.W.3d at 595.

Dismissal for lack of subject-matter jurisdiction is proper when it appears that the court is without jurisdiction. *Mo. Soybean Ass'n v. Mo. Clean Water Comm'n*, 102 S.W.3d 10, 22 (Mo. banc 2003); *Rule 55.27(g)(3)*. While the quantum of proof may not be high, it must appear by the preponderance of the evidence that the court is without jurisdiction." *James v. Poppa*, 85 S.W.3d 8, 9 (Mo. banc 2002)(emphasis added). For the determination at issue to be proper, the trial court must find that a preponderance of the evidence before it demonstrates that "the employer, the employee and the accident fall under the Workers' Compensation Law, the case is cognizable by the Labor and Industrial Relations Commission and the Commission's jurisdiction is original and exclusive." *State ex rel. J.E. Jones Constr. Co. v. Sanders*, 875 S.W.2d 154, 156 (Mo.App. E.D.1994).

The "preponderance of the evidence" is the proper and workable standard, and it is the one that passes Constitutional muster. It is completely improper for the Civil Courts to dodge the responsibility to make the primary determination as to their subject matter jurisdiction. While it must be acknowledged that the cases regarding where the responsibility lies for determining jurisdiction under the Act can seem contradictory, there is clear and proper authority to hold that the Court must make the primary determination, and the same must be to at least a preponderance of the evidence. There is no doubt that, if the Division of Workers Compensation does make a determination as to jurisdiction on a particular case, that determination holds as authority. This is not,

however, such a case.

There is, however, a need for clarification at least regarding the case law guiding these determinations. In *Killian v. J & J Installers, Inc.*, 802 S.W.2d 158 (Mo. banc 1991), this Court discussed the doctrine of primary jurisdiction and noted that “The Labor and Industrial Relations Commission has exclusive jurisdiction to determine whether an employee’s injuries resulted from an accident.” *Killian*, 802 S.W.2d at 160. In *Killian*, the plaintiff admitted an employment relationship, *and there was no dispute that he was on the job at the time of the injury*, but attempted to avoid the exclusive jurisdiction of the Workers Compensation Act by alleging intentional torts by the defendant. *Killian*, 802 S.W.2d at 160. In analyzing this issue, the *Killian* Court cited cases which dealt with the determination of whether or not a workplace injury was a compensable “accident” or were the result of “intentional” torts. *Id.* at 160, citing *Hannah v. Mallinckrodt, Inc.*, 633 S.W.2d 723 (Mo. banc 1982)(holding that the LIRC has exclusive jurisdiction to determine whether an employee's injuries resulted from an accident), and *State ex rel. McDonnell Douglas Corp. v. Ryan*, 745 S.W.2d 152 (Mo. banc 1988)(“The only issue before the Ryan court was whether the decedent's death was an accident” within the Act, where plaintiff had asserted an intentional tort.) Notably, the *Killian* Court’s holding was specific to this point: “we hold that the question whether Daniel Killian's injuries were the product of an accident or of an intentional act by the employer lies within the exclusive jurisdiction of the Labor and Industrial Relations Commission.” *Killian*, 802 S.W.2d at 161.

This is not the issue in the present case. Here, there is no question of an “accident” and there is no allegation of an “intentional tort” to trigger the need for administrative insight or analysis of the co-employee’s actions. As the Appellate Court properly observed, in this case, Harris was merely riding as a passenger in a vehicle driving past the employer’s building on a public street. There are no allegations that he was at work, had begun work, or reasonably fit within an exception.

However, the *Killian* holding has led to suggestions that, once a trial court has determined that there was an employer-employee relationship, the role of the judicial branch has ended. This is not the proper interpretation, as most cases following *Killian* have held. In *State ex rel. Consumer Adjustment Co. v. Anderson*, 815 S.W.2d 84 (Mo.App. 1991), cited by Defendant, the issue again was “Whether plaintiff’s on-the-job assault arose out of and in the course of his employment.” *Id.* at 86. However, the *Anderson* court goes on to make the statement that “A circuit court may not determine whether there was an accident arising out of and in the course of...employment.” *Id.* at 86, citing *Jones v. Jay Truck Driver Training Center, Inc.*, 709 S.W.2d 114, 115 (Mo. banc 1986). If taken to its extreme, this statement could be untenable and unworkable in the litigation environment, as this would require dismissal of any case at the whim of a party defendant without a showing of any substantive basis.

The necessarily correct analysis was cited by the court in *Graham v. Geiz*, 149 S.W.3d 459 (Mo.App.E.D. 2004):

"A motion to dismiss for lack of subject matter jurisdiction is an

appropriate means of raising the workers' compensation law as a defense to a common law tort action." *James v. Poppa*, 85 S.W.3d 8, 9 (Mo. banc 2002). A circuit court shall dismiss the action "whenever it 'appears' by suggestion of the parties or otherwise that the court lacks subject matter jurisdiction." *Id.*, citing Rule 55.27(g)(3). "As the term 'appears' suggests, the quantum of proof is not high; it must appear by the preponderance of the evidence that the court is without jurisdiction." *James*, 85 S.W.3d at 9. Thus, in the context of a motion to dismiss, whether the circuit court has subject matter jurisdiction is a question of fact left to the sound discretion of the trial court. *Id.* In addition to the facts alleged in the petition, the court may consider facts adduced by affidavits of the parties, oral testimony, and depositions. Rule 55.28;"

Graham v. Geiz, 149 S.W.3d at 462, (string citations omitted).

There should be no doubt that the credibility and authority of the judicial branch would require at least this minimal inquiry into its own jurisdiction. This is particularly so, in light of the inability of the Commission to address these issues separately, as discussed in Point III below. Where there is no substantive evidence of an on-the-job injury, it is incumbent upon the Circuit Court to determine, within the preponderance of the evidence standard, whether deferral to the Division of Workers Compensation is appropriate.

III.

THE DISMISSAL BY THE TRIAL COURT WAS IN ERROR AND WAS AN ABUSE OF DISCRETION IN ABROGATING ITS DUTY TO DETERMINE ITS OWN JURISDICTION BECAUSE NO REASONABLE METHOD IS AVAILABLE TO MAKE THIS DETERMINATION, AS THERE IS NO PROCEDURE WITHIN THE DIVISION OF WORKERS COMPENSATION FOR SETTING OR HEARING OF MOTIONS AS TO JURISDICTION ALONE, AND THERE IS NO METHOD OF PROCEEDING WITH ANY ISSUE BEFORE THE DIVISION OF WORKERS COMPENSATION AFTER THE STATUTE OF LIMITATIONS HAS EXPIRED FOR SUCH A CLAIM.

It is, admittedly, difficult to provide caselaw support for a negative proof. Here, the fact is that there is no standard “Motion” practice established within the Division of Workers Compensation. The Administrative Law Judges are not authorized to rule on isolated issues of law separately from a Hardship Hearing or a full Hearing. It is true that various branches of the Division, and some ALJ’s, will accommodate such a partial and limited ruling because there appears to be no other manner in which to proceed absent a full hearing on the merits, but it is uncertain what authority supports such actions.

The problem shows up glaringly in this case. First, Plaintiff is immediately placed in the position of being required to file a Claim for Compensation (the initiating form for filing of a Workers Compensation Claim) which requires him to assert that he was injured in the course and scope of employment. A copy of the required Claim form is

included in the Appendix at A-40-41. The second page [A-41 at line 15] requires the claimant's signature averring that he has suffered an injury in the scope and course of employment. This is an impossible requirement for an injured party who does not believe he was in the course of employment at the time of injury. There is no other form nor process for initiating a claim, and there is no form whatsoever for initiating a request for a ruling on fundamental matters such as jurisdiction. There is a Constitutional presumption that Harris is entitled to bring an action in the Circuit Court of this State. Article I, Section 14 of the Missouri Constitution which mandates:

That the Courts of Justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay.

This provision **“applies against all impediments to fair judicial process, be they legislative or judicial in origin.”** *Kilmer v. Mun*, 17 S.W.3d 545, 548 (Mo. banc 2000).

As long as the Division of Workers Compensation has no procedure for determining jurisdiction, it is wholly improper to deny the Constitutional right to access to the courts by demurring to that agency. While it is true that this Court has considered the deprivation of the right of access to the courts under the Act in *Goodrum v. Asplundh Tree Expert Co.*, 824, S.W.2d 6 (Mo.banc 1992), there was no issue raised in that case regarding the lack of provisions within the legislative scheme for addressing this basic issue.

Indeed, the case at hand illustrates several gaps in the “legislative court” ability to substitute for the essential right to access to the courts. The first is the inability to initiate a “claim” or procedure within the administrative scheme without averring that the injury occurred in the course and scope of employment. But there are also numerous matters, including the instant one, that would be disposed of on other grounds without ever reaching the jurisdiction issue.

In this case, Plaintiff proceeded pro-se to file a claim with the division, based upon his desperation due to not being able to return to work after his injury. Shortly thereafter he dismissed that claim pro-se prior to any action by the Division. There is no provision within the Workers Compensation Act for re-filing of this same claim for a determination that was not made in the first filing. Again, this would leave a party with no resort for determination of a threshold legal issue. And, along the same lines, it is evident from the record that this accident occurred in 2002, and the dismissal by the Court occurred in 2006. There is no provision within the Division for opening of a case that is past the statute of limitations for purposes of determining any issue, let alone that of jurisdiction. All of the issues raised in this matter arose long after the two-year limitation period for filing of a Workers Compensation claim, which alone is jurisdictional for the Division. If, as is the case here, Plaintiff’s claims truly do not fall within the jurisdiction of the Act, there is then no place that Plaintiff may go to receive a ruling to this effect. (It should be noted that this case is wholly different from one where a claimant failed to act timely to file an appropriate claim. Here, there was no indication to anyone that the plaintiff could

ever have such a claim because he was not at work and was injured on a public street.)

Defendants suggest that the “tolling” provisions of §287.440 RSMo. would apply to preserve a Workers Compensation claim, but that statute is wholly without relevance to this case. §287.440 provides that a claim would be preserved where the employee filed a civil action within two years of the date of the injury. [A-42]. The statute of limitations for civil suits in Missouri is five years, and in this case the civil action was properly filed more than three years after the accident. In such cases, while plaintiff did everything proper under the law, the present scheme allows no mechanism for determination of the jurisdiction issue within the Division.

Currently, these matters may be handled informally where all parties, and the A.L.J., agree on a process for resolution. If they do not agree, however, a plaintiff may be in the position of having to proceed through proof of injury, damage, wage rates, medical care, and permanent partial disability without knowing which side of the argument he must take. Where this process takes more than a year, which is almost certain where appeals are involved, there is no tolling provision to allow him to re-file the civil suit when a determination is made that the Division of Workers Compensation does not have jurisdiction. Clarification of the procedure to be followed is needed.

CONCLUSION

For the reasons stated above, Plaintiff prays this Court find in favor of Plaintiff and hold that jurisdiction of this matter does lie in the Circuit Court and Order this case be remanded for further proceedings in the Circuit Court, for costs of the proceedings,

and for such other relief as this Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the above and foregoing document were served by U.S. mail, postage prepaid, this ____ day of _____, 2007, to Mara Cohara, Lathrop & Gage L.C., 2345 Grand Blvd., Kansas City, MO 64108-2684, Telephone: 816-292-2000; Fax: 816-292-2001, attorneys for all defendants.

CERTIFICATE OF COMPLIANCE

Pursuant to Supreme Court Rule 84.06(c)

I, David N. Damick, counsel for Plaintiff/Appellant herein, do certify that:

1. The attached Brief of Appellant includes the information required by Rule 55.03;
2. The attached Brief of Appellant complies with the limitations contained in Rule 84.06(b);
3. The number of words in the attached Brief of Appellant is 6689, inclusive of cover, certificate of service, this certificate, signature block and appendix, as determined by WordPerfect 8;
4. The diskette accompanying this Brief pursuant to Rule 84.06(g) has been scanned for viruses and the undersigned certifies that to the best of his knowledge, information and belief, is virus-free.

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