

SC88352

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**IN THE SUPREME COURT OF MISSOURI**

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**DAVID HARRIS,**

**Plaintiff-Appellant,**

**v.**

**WESTIN MANAGEMENT COMPANY EAST and JEREMY NEU,**

**Defendants-Respondents.**

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**Appeal from the Circuit Court of the City of St. Louis, Missouri  
The Honorable Thomas C. Grady**

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**SUBSTITUTE BRIEF OF RESPONDENTS**

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## STATEMENT OF FACTS<sup>1</sup>

Plaintiff-appellant David Harris filed suit against Westin Management Company East (“Westin”) and Jeremy Neu for injuries sustained in an automobile collision. LF 1-4. Harris admits that on the day of the accident he “was employed at the Westin Hotel” (Brief of Appellant at 1) and was approaching the Westin premises to begin work (*id.* at 2). The judgment on appeal arises from the lower court’s determination that “primary jurisdiction as to the question of whether the injury occurred in the scope and course of Plaintiff’s employment rests with the Labor and Industrial Relations Commission.” LF 183-84 (Harris Appendix A-5 to A-6). In arguing against this result, Harris largely ignores two facts that confirm the Commission’s primary jurisdiction to determine whether he sustained an injury arising out of and in the course of his employment on the extended premises of the hotel where he worked.

First, Harris revealed the true nature of his suit by submitting a claim for workers’ compensation arising out of this incident. LF 26-28 (Appendix A1). In his claim for compensation filed in late 2005, Harris identified the place of accident as “Westin St. Louis Hotel.” LF 27 (Appendix A2). Harris likewise identified the Westin St. Louis Hotel as “the employer in whose employment the injury or occupational disease occurred.” *Id.* By his signature, Harris made claim

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<sup>1</sup> The one-volume legal file will be cited by page as “LF \_\_\_\_.” The appendix to this brief will be cited parenthetically as “Appendix \_\_\_\_.”

for “all compensation as provided in the Missouri Workers’ Compensation law, relating to injury (or death) of the employee by accident arising out of and in the course of the employment.” LF 28 (Appendix A3). It was only after the defendants moved to dismiss his civil action that Harris voluntarily dismissed his compensation claim in late March 2006. LF 53.

Second, and consistent with his assertion before the Division of Workers’ Compensation that the place of accident was the Westin St. Louis Hotel, Harris asserted in his second amended petition a premises liability claim, thereby again acknowledging the relationship between the Westin premises and his injuries. LF 145-46.

**POINT RELIED ON**

- I. The Circuit Court Correctly Dismissed Harris' Action Without Prejudice For Lack Of Subject Matter Jurisdiction Under The Workers' Compensation Law Because The Labor And Industrial Relations Commission Has Primary Jurisdiction To Decide Its Own Jurisdiction Based On Disputed Issues Of Fact About Whether Harris Sustained Injury From An Accident Arising Out Of And In The Course Of His Employment On The Extended Premises Of The Hotel Where He Worked. (Response To Appellant's Points I, II And III)**

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

*State ex rel. McDonnell Douglas Corp. v. Ryan*,

745 S.W.2d 152 (Mo. banc 1988)

*Wells v. Brown*, 33 S.W.3d 190 (Mo. banc 2000)

*State ex rel. Consumer Adjustment Co. v. Anderson*,

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## ARGUMENT

### **I. The Circuit Court Correctly Dismissed Harris' Action Without Prejudice For Lack Of Subject Matter Jurisdiction Under The Workers' Compensation Law Because The Labor And Industrial Relations Commission Has Primary Jurisdiction To Decide Its Own Jurisdiction Based On Disputed Issues Of Fact About Whether Harris Sustained Injury From An Accident Arising Out Of And In The Course Of His Employment On The Extended Premises Of The Hotel Where He Worked. (Response To Appellant's Points I, II And III)**

This case turns on the doctrine of primary jurisdiction. The circuit court dismissed without prejudice after determining it was not the appropriate tribunal to decide whether Harris sustained injury by accident arising out of and in the course of his employment. Thus, the only issue presented is “who decides?” Based on the well-settled doctrine of primary jurisdiction as established in several decisions by this Court, the circuit court correctly dismissed without prejudice in favor of the primary and exclusive authority of the Labor and Industrial Relations Commission to decide its own jurisdiction.

#### **Standard of Review**

Dismissal for lack of subject matter jurisdiction based on primary jurisdiction presents a question of law regarding the exclusive jurisdiction of the Labor and Industrial Relations Commission and is therefore reviewed de novo. *See Killian v. J & J Installers, Inc.*, 802 S.W.2d 158 (Mo. banc 1991); *see also*

*State ex rel. McDonnell Douglas Corp. v. Ryan*, 745 S.W.2d 152, 154 (Mo. banc 1988) (issuing writ to uphold “sole jurisdiction” of Commission to make determination that neither “trial court nor this Court can make”).

**A. Doctrine of Primary Jurisdiction**

This Court has long recognized the doctrine of primary jurisdiction as establishing the appropriate framework for resolving questions about whether the wholly substitutional remedy of the workers’ compensation law supplants and supersedes a common law claim:

Under the primary jurisdiction doctrine, courts will not decide a controversy involving a question within the jurisdiction of an administrative tribunal until after that tribunal has rendered its decision: (1) where administrative knowledge and expertise are demanded; (2) to determine technical, intricate fact questions; (3) where uniformity is important to the regulatory scheme.

*Killian*, 802 S.W.2d at 160. Under the doctrine of primary jurisdiction, a circuit court “may not determine whether there was an ‘accident arising out of and in the course of . . . employment.’” *Jones v. Jay Truck Driver Training Center, Inc.*, 709 S.W.2d 114, 115 (Mo. banc 1986). “[T]he 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. Thus, the “Commission has exclusive and original jurisdiction over claims for injuries covered by the Act, and it also has original jurisdiction to determine the fact issues

establishing jurisdiction.” *Hannah v. Mallinckrodt, Inc.*, 633 S.W.2d 723, 726 (Mo. banc 1982). If a circuit court purports to decide jurisdiction under Chapter 287, then it has erred by effectively creating concurrent jurisdiction rather than respecting the exclusive jurisdiction of the Commission. *Id.* at 727; *Killian*, 802 S.W.2d. at 160. To permit such overlapping authority would defeat the goal of simplicity and speed that is served by a “straightforward policy of primary administrative jurisdiction.” *State ex rel. Consumer Adjustment Co. v. Anderson*, 815 S.W.2d 84, 86 (Mo. App. 1991) (internal quotation omitted).

When the doctrine of primary jurisdiction is at issue, the question presented “is not whether plaintiff’s injuries are compensable under workers’ compensation.” *Id.* (issuing writ compelling trial judge to dismiss without prejudice). “Instead, the issue is whether the trial court had jurisdiction over plaintiff’s action absent a Labor and Industrial Relations Commission determination that plaintiff’s injuries were not compensable under workers’ compensation.” *Id.* A record showing a plaintiff has filed both a common law tort action and a compensation claim based on the same incident is sufficient to require the trial court to dismiss in favor of the Commission’s primary jurisdiction. *See id.* at 85-86.

A plaintiff may not circumvent the doctrine of primary jurisdiction by pleading what may appear to be a non-compensable claim. “To hold otherwise would not only violate precedent, but also would put the trial court and the parties in an untenable position.” *Id.* at 86. If the trial court’s jurisdiction depended on

how the plaintiff chose to plead the claim, then the “trial court’s jurisdiction could come and go, based upon amendments to the pleadings.” *Id.* Consequently, the standard for liberal interpretation of the pleadings on a motion to dismiss for failure to state a claim (*see* Brief of Appellant at 6 and section I.B.1., *infra*) cannot apply when the trial court’s jurisdiction is challenged under the primary jurisdiction doctrine. *See State ex rel. McDonnell Douglas*, 745 S.W.2d at 152-54 (issuing writ to protect primary jurisdiction regardless of plaintiffs’ effort to plead around workers’ compensation); *State ex rel. Consumer Adjustment*, 815 S.W.2d at 86 (same).

The circuit court recognized the doctrine of primary jurisdiction and correctly applied it in dismissing this suit without prejudice because the record revealed the existence of an issue that could only be decided by the Commission. Despite his belated rhetoric against the Commission’s jurisdiction, Harris had previously filed a claim for workers’ compensation arising out of this same accident. LF 26-28 (Appendix A1 to A3). Westin’s suggestion that it “appears” the circuit court lacked jurisdiction as contemplated under Rule 55.27(g)(3), together with Harris’ admissions invoking the Commission’s jurisdiction, were plainly sufficient to support dismissal in favor of the Commission’s primary and exclusive jurisdiction; indeed, any further factual development by Westin or determination by the lower court would have necessitated the exercise of concurrent jurisdiction contrary to the doctrine of primary jurisdiction. *Hannah*, 633 S.W.2d at 727; *Killian*, 802 S.W.2d at 160.

Although Harris virtually ignores his compensation claim (except for attempting to disown it as a pro se act of “desperation” (Brief of Appellant at 21)), he signed a document asserting the essence of a compensable injury. Among other things, Harris averred the accident took place at the Westin Hotel while he was in its employment. LF 27 (Appendix A2). This is an admission by Harris that he sustained a compensable injury, particularly in light of the principle that the workers’ compensation law is to be liberally construed and any doubts resolved in favor of expanding the Commission’s jurisdiction. *Vatterott v. Hammerts Iron Works, Inc.*, 968 S.W.2d 120, 121 (Mo. banc 1998) (liberal construction “may limit a particular individual’s recovery, but it ensures that more individuals enjoy the protection intended by the Workers’ Compensation Law”). Moreover, Harris admits he was on his way to work at the hotel (LF 32-33) and even asserted a premises liability claim against Westin—thereby acknowledging he was on or approaching Westin’s premises. *See* LF 145-46; *see also* section I.C.2., *infra*.

Based on these actions and admissions by Harris indicating he was being dropped off at his workplace to report for work, defendants presented the lower court with authority showing how the case presented a question regarding the extended premises doctrine within the exclusive jurisdiction of the Commission. LF 20-22. *Accord Wells v. Brown*, 33 S.W.3d 190, 192 (Mo. banc 2000) (workers are not in the course of their employment except when “in *or about*” the premises of the employer; emphasis added). Therefore, the circuit court correctly dismissed

without prejudice to enable the Commission to exercise its exclusive jurisdiction as established by the legislature.

This was entirely appropriate because the application of Chapter 287 here implicates considerations of policy and administrative expertise which are entrusted to the Commission. It falls within the primary jurisdiction of the Commission to decide whether, as a matter of uniformity and policy, the “extended premises doctrine” is applicable. *See Wells*, 33 S.W.3d at 192-93 (discussing extended premises doctrine). This question also requires the determination of technical, intricate fact questions about the configuration and boundaries of the employer’s premises and extended premises and employees’ access thereto, all of which must be decided by the Commission based on the more extensive record appropriately developed there rather than in the circuit court, which has neither original nor concurrent jurisdiction over such matters. *See* note 3, *infra*.

Until there is a final decision as to Commission jurisdiction over Harris’ claim against his employer, it is not appropriate to determine whether the conduct of Harris’ co-employee (Jeremy Neu) involved an “affirmative negligent act” outside the scope of the employer’s duty to provide a safe workplace. “Actions for simple negligence against fellow employees . . . are preempted by the Workers’ Compensation Law, and the trial court is without jurisdiction.” *State ex rel. Taylor v. Wallace*, 73 S.W.3d 620, 621 (Mo. banc 2002) (deciding question of co-employee liability only after plaintiff had already filed for and received

compensation from his employer). The lower court correctly declined to reach this issue, finding it “premature.” LF 183 (Harris Appendix A-5). Harris is therefore patently inaccurate in asserting that the lower court “should never have reached that non-issue” (Brief of Appellant at 8) and “solely analyzed and relied upon this [*Taylor*] line of ‘something more’ cases in reaching its decision to dismiss.” Brief of Appellant at 8. Finally, and in any event, one of Harris’ own cases demonstrates that his allegations that Neu was performing his job as a valet driver in a rushed manner (*see* LF 139-42) do not rise to the required level of “something more”; instead, Harris was improperly attempting to sue his co-employee for breach of the employer’s duty to maintain a safe working environment. *Graham v. Geisz*, 149 S.W.3d 459, 461-63 (Mo. App. 2004); *accord State ex rel. Taylor*, 73 S.W.3d at 622 (“an allegation that an employee failed to drive safely in the course of his work and injured a fellow worker is not an allegation of ‘something more’ than a failure to provide a safe working environment”).

### **B. Response to Harris’ Arguments**

Rather than focusing on the decisive issue of primary jurisdiction, Harris raises various inaccurate or misdirected arguments that produce confusion rather than clarity. In his opening brief to the court of appeals, Harris failed to mention the doctrine of primary jurisdiction or cases applying it, but he now acknowledges them with the suggestion that “cases regarding where the responsibility lies for determining jurisdiction under the Act can seem contradictory.” Brief of

Appellant at 15. The contradictions perceived by Harris arise only because he relies on cases where primary jurisdiction was not the determinative issue.

Therefore, quotations taken out of context without regard to the facts, posture or issue do not create an unsettled legal question or justify any departure from the settled law of primary jurisdiction as articulated by this Court. Likewise, Harris is incorrect when he asserts the doctrine of primary jurisdiction is implicated only when the plaintiff has attempted to allege an intentional tort—this Court has at least twice invoked the doctrine in cases involving no suggestion of intentional conduct. *Jones*, 709 S.W.2d at 115 (plaintiff fell down stairs); *Hannah*, 633 S.W.2d at 724, 726-27 (employee required to work under equipment in bent, twisted and awkward manner).

The following observations refute the various arguments by Harris.

**1. Erroneous standard of review**

The confusion begins with Harris’ failure to articulate clearly and consistently the applicable standard of review. *Compare* Brief of Appellant at 6 (reciting a de novo standard of review for “pure question of law”) *with id.* at 7 (asserting Commission jurisdiction “is a question of fact . . . left to the sound discretion of the trial court”). Although Harris cites a wide variety of decisions that could supply an appropriate standard of review in some other case, none of them is pertinent to the issue of primary jurisdiction presented here.

For example, Harris cites several cases suggesting that the exclusive jurisdiction of the Commission presents a question of fact to be decided by the

trial court and reviewed only for abuse of discretion, yet in none of the cases cited was the court faced with an issue governed by the doctrine of primary jurisdiction. Indeed, Harris cites several cases where the issue presented arose only *after the Commission's jurisdiction already had been established via an award of compensation*. See, e.g., *Kesterson v. Wallut*, 116 S.W.3d 590, 592-93, 595 (Mo. App. 2003) (considering tort claim against co-worker after plaintiff “applied for and received workers’ compensation benefits claiming that she was injured in the course and scope of her employment”; “only disputed issue for the trial court in determining its jurisdiction was whether the appellants’ petition alleged ‘affirmative negligent acts’” against co-employee; petition found insufficient); *State ex rel. Taylor*, 73 S.W.3d at 621, 622-23 (tort claim against co-employee after plaintiff received workers’ compensation benefits for the accident; allegations against co-employee failed to show “something more” than breach of duty to maintain a safe working environment; writ issued to compel dismissal of action); *Graham*, 149 S.W.3d at 463 (affirming dismissal for failure to allege “something more” against co-employee; “case falls squarely within *Taylor*”); *Crow v. Kansas City Power & Light Co.*, 174 S.W.3d 523, 529 (Mo. App. 2005) (tort action filed by survivors after requesting and receiving workers’ compensation death benefits; deciding no factual question as to existence of injury arising out of and in course of employment).

Harris also relies on cases that turn on the existence of an employment relationship, which is not a matter that calls for dismissal based on primary

jurisdiction. *Killian*, 802 S.W.2d at 160. In one case, this Court found Chapter 287 inapplicable because the defendant was an independent physician who did “not allege that he is an employee or agent of the employer.” *James v. Poppa*, 85 S.W.3d 8, 9 (Mo. banc 2002). The decision in another case turned on whether the defendants in a tort action were acting as agents of the employer in managing care for plaintiff’s compensable injury. *Burns v. Employer Health Services, Inc.*, 976 S.W.2d 639 (Mo. App. 1998). In still another case, the court was deciding whether the plaintiff (an employee of a subcontractor) was a statutory employee of the general contractor sued in tort. *State ex rel. J.E. Jones Construction Co. v. Sanders*, 875 S.W.2d 154 (Mo. App. 1994). In none of these cases did the court disregard the doctrine of primary jurisdiction by deciding the existence of an accident arising out of and in the course of employment.

Other cases cited by Harris have absolutely nothing to do with workers’ compensation. *See, e.g., Missouri Soybean Ass’n v. Missouri Clean Water Comm’n*, 102 S.W.3d 10 (Mo. banc 2003) (considering subject matter jurisdiction of state courts in connection with Missouri Administrative Procedure Act); *Ste. Genevieve School Dist. v. Board of Alderman*, 66 S.W.3d 6 (Mo. banc 2002) (considering whether taxpayer and school district had stated a claim for relief for improper use of tax increment financing); *Ryan ex rel. Estate of Reece v. Reece*,

31 S.W.3d 82 (Mo. App. 2000) (discussing subject matter jurisdiction of probate division of circuit court).<sup>2</sup>

## **2. Erroneous assertions regarding the facts**

Time and again, Harris erroneously claims the facts are undisputed or asserts there is no evidence to support the result below. *See, e.g.*, Brief of Appellant at 6-9, 13. To the contrary, the facts are disputed and the motion to dismiss was based on the best possible evidence to establish the existence of a matter within the Commission’s primary jurisdiction with respect to this incident—Harris himself filed a claim “for all compensation as provided in the Missouri Workers’ Compensation law, relating to injury (or death) of the employee by accident arising out of and in the course of the employment.” LF 28 (Appendix A3). Harris averred therein that the accident happened at the hotel while he was in the employment of Westin. LF 27 (Appendix A2). Regardless of Harris’ attempts to diminish, dismiss or disavow his compensation claim, it provided a sufficient basis for the lower court’s conclusion that the case presented a matter for the primary jurisdiction of the Commission.

According to Harris’ own formulation of the standard, this was at least “some minimal evidence put forward that suggests application of the Act.” Brief

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<sup>2</sup> Harris also cites cases regarding the standard of review for constitutional issues, but as discussed below, there is no constitutional issue in this case. *See* section I.B.4., *infra*.

of Appellant at 7. It is the appearance of an issue for decision within the primary jurisdiction of the Commission—regardless of any assessment of merit or any prediction as to the probable outcome of that issue—that requires dismissal for lack of subject matter jurisdiction. *See State ex rel. McDonnell Douglas*, 745 S.W.2d at 153-54; *State ex rel. Consumer Adjustment*, 815 S.W.2d at 85-86; Rule 55.27(g)(3) (court “shall dismiss” whenever it “appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter”).

The circuit court has no concurrent jurisdiction with the Commission (*Killian*, 802 S.W.2d at 160), and Harris has no authority requiring that all evidence that might be presented to the Commission must be previewed with the circuit court. To do so would defeat the purpose of primary jurisdiction and invite the circuit court to render a decision entrusted in the first instance to the Commission (and subject thereafter to appropriate judicial review). Thus, the circuit court properly disregarded Harris’ effort to bulk up the record with detailed evidentiary materials that can only be considered by the Commission. *See State ex rel. Consumer Adjustment*, 815 S.W.2d at 85-86 (issuing writ for dismissal based on record merely showing that plaintiff had filed workers’ compensation claim based on same incident).<sup>3</sup>

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<sup>3</sup> In the workers’ compensation action that Harris filed in June 2006 after this suit was dismissed without prejudice, Westin has presented additional evidence pertinent to the issue of extended premises, including the special paving

### 3. Erroneous treatment of extended premises

Harris argues that the extended premises doctrine should not apply allegedly because “no substantial facts were presented to the trial court on this point.” Brief of Appellant at 11. Once again, Harris has overlooked his own claim for compensation, which Westin presented to the circuit court in the context of the extended premises doctrine to establish grounds for dismissal (LF 21-22, 26-28); the lower court’s opinion mentioned (but did not apply) the doctrine. LF 180 (Harris Appendix A-2). Harris cannot fault the lower court for failing to make a decision on extended premises, which is precisely the sort of factually intricate and policy-laden decision entrusted to the primary jurisdiction of the Commission.

Notably, the cases cited by Harris discussing the extended premises doctrine were all decided on judicial review of Commission decisions—such matters are never decided by a circuit court. *See Cox v. Tyson Foods, Inc.*, 920 S.W.2d 534 (Mo. banc 1996); *Huffmaster v. American Recreation Products*, 180 S.W.3d 525 (Mo. App. 2006); *Gaston v. Steadley Co.*, 69 S.W.3d 158 (Mo. App. 2002); *Frye v. Viacom, Inc.*, 927 S.W.2d 545 (Mo. App. 1996); *Kunce v. Junge Baking Co.*, 432 S.W.2d 602 (Mo. App. 1968). The posture of these cases, which

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installed and maintained by Westin on Spruce Street at the main hotel entrance where the accident occurred, which is directly across Spruce from the hotel parking lot used by employees.

show substantive discussion of various issues under the workers' compensation law only on appellate review of Commission decisions, confirms that the circuit court was correct in deferring to the primary jurisdiction of the Commission. *See also* LF 182 (Harris Appendix A-4) (observation by circuit court that cases cited by Harris “are appeals from decisions of the Commission” and “do not address the question of primary jurisdiction”).<sup>4</sup> In sum, Harris' complaint about the allegedly insufficient level of evidence and fact finding regarding extended premises is nothing more than an erroneous challenge to the circuit court's proper refusal to exercise concurrent jurisdiction with the Commission.

#### **4. Erroneous jurisdictional and constitutional arguments**

In his second and third points on appeal, Harris attempts to erode the doctrine of primary jurisdiction by portraying it as somehow in conflict with the inherent authority—or “duty”—of a court to determine its own subject matter jurisdiction, but once again, Harris relies on cases taken out of context. Harris also seems to suggest that a circuit court that dismisses an action in favor of the Commission's primary jurisdiction somehow runs afoul of the “open courts” provision found in article I, section 14 of the Missouri Constitution. These arguments are meritless.

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<sup>4</sup> Likewise, the cases Harris cites at pages 9 and 10 of his brief all involve judicial review of Commission decisions and have no bearing on the question of primary jurisdiction presented here.

First, there is no viable or valid constitutional issue in this case. Harris failed to raise any constitutional argument before the circuit court (LF 29-31, 63-84), so the issue is waived. *Killian*, 802 S.W.2d at 161 n.1. Although Harris argued in passing to the court of appeals that he was somehow being deprived of his constitutional right to access the courts, he now acknowledges (Brief of Appellant at 20) that this Court nearly fifteen years ago rejected an “open courts” challenge to the workers’ compensation law and the doctrine of primary jurisdiction. *Goodrum v. Asplundh Tree Expert Co.*, 824 S.W.2d 6, 9-10 (Mo. banc 1992) (citing *Killian*, which applied the doctrine of primary jurisdiction). Moreover, Harris never raised a constitutional issue in any point relied on: “an argument not set out in the point relied on but merely referred to in the argument portion of the brief does not comply with the requirements of Rule 84.04(d) and the point is considered abandoned in this Court.” *Brizendine v. Conrad*, 71 S.W.3d 587, 593 (Mo. banc 2002).

Second, Harris’ attempt to engraft generic notions of subject matter jurisdiction onto the specialized doctrine of primary jurisdiction is misguided and effectively represents an attempt to overturn the settled law of primary jurisdiction. In a series of cases, this Court has made it clear that there are special considerations—administrative expertise, factual intricacy, and regulatory uniformity—mandating that courts defer to the Commission’s primary jurisdiction on the question central to application of the wholly substitutional remedy created by workers’ compensation law, *i.e.* whether there was an accident arising out of and

in the course of employment. *Killian*, 802 S.W.2d at 160-61; *Jones*, 709 S.W.2d at 115-16; *Hannah*, 633 S.W.2d at 726-27. A court is in no way duty-bound to decide a statutory question entrusted by the legislature to another tribunal.

Third, Harris complains about an alleged lack of sufficient and timely Commission procedures to address jurisdictional issues (Brief of Appellant at 19-22), but this is another attempt to raise an “open courts” challenge that was not presented below and was long ago foreclosed by *Goodrum*. The administrative procedures are no doubt sufficient and adaptable on a case-by-case basis to permit efficient decision making and appropriate judicial review—as evidenced by the existence of Commission cases involving extended premises that have made it all the way to this Court. *See, e.g., Wells*, 33 S.W.3d 190; *Cox*, 920 S.W.2d 534. Harris concedes as much. Brief of Appellant at 19, 22 (acknowledging pragmatic flexibility in administrative procedures).

Finally, Harris complains about what he portrays as a potential limitations issue (Brief of Appellant at 21-22), but Harris never raised this argument before the circuit court (*see* LF 29-31, 63-84), never developed it before the court of appeals (Mo. Sup. Ct. R. 83.08(b)), and never even cited Mo. Rev. Stat. § 287.440 until his substitute brief before this Court. Although it appears Harris may be attempting somehow to attach this nascent argument to the “open courts” provision, any such argument was waived and abandoned several times over as explained at the beginning of this subsection. Moreover, any argument somehow challenging an alleged lack of adequate procedures after expiration of a statute of

limitations is tantamount to an attack on the statute of limitations itself, but once again, Harris has never asserted or preserved such an argument. In any event, this speculative and amorphous argument by Harris cannot create circuit court jurisdiction contrary to the doctrine of primary jurisdiction. *See also* LF 183 n.2 (Harris Appendix A-5) (observation by circuit court that tolling “is a question for the Commission”).

### **C. Erroneous Decision by the Court of Appeals**

In reversing the circuit court’s decision, the court of appeals decided there was no reason to send the case to the Commission because in its view the facts did not establish the Commission’s jurisdiction. The court of appeals erred by failing to adhere to the doctrine of primary jurisdiction.

#### **1. Erroneous standard of review**

The court of appeals first erred by utilizing a standard of review that presupposes fact finding by a circuit court (slip op. at 2 (Harris Appendix A-37)), even though the doctrine of primary jurisdiction exists to ensure that the Commission has the first opportunity to sift through the evidence presented to it and to determine whether those facts establish or negate its jurisdiction. *E.g.*, *State ex rel. McDonnell Douglas*, 745 S.W.2d at 154. Like Harris, the court of appeals erroneously relied on *James v. Poppa*, which did not involve any question of primary jurisdiction or require fact finding as to any matter entrusted exclusively to the Commission. *See* section I.B.1., *supra*. On this basis, the court of appeals found “that there was not a *preponderance* of evidence demonstrating

that this was a case governed by workers' compensation law." Slip op. at 3 (Harris Appendix A-38) (emphasis added). By its terminology, the court of appeals confirmed that it erroneously weighed and evaluated the evidence as part of an exercise in fact finding. *See Chamberlain v. Missouri-Arkansas Coach Lines, Inc.*, 351 Mo. 203, 213, 173 S.W.2d 57, 62 (1943) ("Preponderance of evidence is the greater weight of the credible evidence, that is, evidence tending to show the facts upon which a party's case or affirmative defense depends, which is more convincing to the triers of fact as worthy of belief than that which is offered in opposition thereto.").

In connection with the standard of review, the court of appeals also cited this Court's decision in *State ex rel. McDonnell Douglas*, 745 S.W.2d 152, but then overlooked the essence of that decision. The plaintiffs there had filed both a claim for compensation and a civil action alleging an intentional tort against the employer and others. *Id.* at 153 (plaintiffs' "workers' compensation claim is pending"). The trial court had overruled a motion to dismiss by the employer, which was supported by affidavits from the decedent's supervisors asserting they did not intend any harm towards decedent as well as exhibits from lawsuits previously filed by the plaintiffs. *Id.* In reaching its decision, this Court neither examined nor evaluated any of the evidentiary material submitted with the motion and instead stated:

The Labor and Industrial Relations Commission has sole jurisdiction to determine whether decedent's death was an

“accident.” Neither the trial court nor this Court can make that determination. The rule in prohibition is made absolute.

*Id.* at 154. *State ex rel. McDonnell Douglas* teaches that where the record shows that the parties by their prior course of action have already framed an issue for decision by the Commission, then it is incumbent upon the circuit court to dismiss because it has no jurisdiction “absent a Labor and Industrial Relations Commission determination that plaintiff’s injuries were not compensable under workers’ compensation.” *State ex rel. Consumer Adjustment*, 815 S.W.2d at 86.

It is one thing for a court to engage in incidental fact finding to establish its own jurisdiction in an ordinary case not implicating the primary jurisdiction of a special-purpose administrative body, but that is not comparable to the doctrine of primary jurisdiction under which a court’s jurisdiction arises only if the Commission does *not* have jurisdiction. *Id.* The doctrine of primary jurisdiction mandates that the Commission decide the facts which determine its own jurisdiction, and the court of appeals’ attempt to short-circuit that analysis here was a prohibited assumption of concurrent jurisdiction with the Commission. *Killian*, 802 S.W.2d at 160.

## **2. Erroneous characterization of the facts**

The court of appeals repeatedly and erroneously asserted there were no disputed issues of fact. In so doing, the court ignored Harris’ claim for compensation except for a one sentence acknowledgement that it existed, was filed pro se, and was later dismissed. Slip op. at 2 (Harris Appendix A-37). It is

immaterial that Harris hurriedly dismissed his claim for compensation after receiving the motion to dismiss his civil action; otherwise, a plaintiff would be empowered to create or destroy jurisdiction by changing pleadings or litigation strategy. *See State ex rel. Consumer Adjustment*, 815 S.W.2d at 86. Harris' statements to the Commission placing the accident at the Westin Hotel while he was in its employ are directly material to frame an issue as to the Commission's jurisdiction, and those and other facts showing that Harris was approaching the Westin premises to begin work create an issue within the ambit of the extended premises doctrine that must be determined in the first instance by the Commission. *See* section I.A., *supra*; section I.C.3., *infra*.

Likewise, the court of appeals erred by diminishing the significance of Harris' premises liability claim and narrowly construing it to avoid any admission by Harris that he was on the Westin premises at the time of the accident. This claim is at least an admission that Harris was on approach to the Westin premises at the time of the accident because there would be no premises liability if his destination was an entrance around the corner. *See Wofford v. Kennedy's 2nd Street Co.*, 649 S.W.2d 912, 914 (Mo. App. 1983) (restaurant's duty extended from premises to the approaches; plaintiff was not on approach when around the corner on a public street). This claim also shows that Harris was asserting a nexus between his injuries and the Westin premises not unlike the "extended premises" doctrine under workers' compensation.

In short, it was not for the court of appeals to weigh the evidence and decide whether it is was persuaded, whether the extended premises doctrine should apply, or whether the Commission should have jurisdiction.

### **3. Erroneous litmus test**

In a statement that effectively eclipsed the Commission’s prerogative to determine its own jurisdiction, the court of appeals erroneously declared that “the question of whether or not Appellant was acting within the course and scope of his employment is moot, because Appellant was not at work.” Slip op. at 3 (Harris Appendix A-38). However, the court of appeals cited no case establishing “at work” as the litmus test for applicability of Chapter 287.

As this Court has explained, the extended premises doctrine involves various elements that do not turn on whether an employee was “at work.” *See Wells*, 33 S.W.3d at 192-93 (reviewing multiple elements of extended premises doctrine and application to specific facts). Therefore, it was an erroneous oversimplification to reduce this case to a question of whether Harris was “at work”; this reformulation of the issue effectively abolishes the extended premises doctrine, which has repeatedly been applied by the Commission and cited by the courts as supporting an award to an employee who was not “at work” in the common parlance apparently employed by the court of appeals. *See, e.g., Wells*, 33 S.W.3d 190 (employee injured while on the way to work); *Gaston*, 69 S.W.3d 158 (employee injured on his way to work while crossing public street); *Roberts v. Parker-Banks Chevrolet*, 58 S.W.3d 66 (Mo. App. 2001) (employee injured in

public parking lot while parking and exiting his vehicle on the way to work); *Frye*, 927 S.W.2d 545 (employee injured before work while on public sidewalk half a block from entrance to employer’s building); *Huffmaster*, 180 S.W.3d 525 (employee injured after completing work for the day and while on her way to her car to go home). *See also Drewes v. Trans World Airlines, Inc.*, 984 S.W.2d 512, 515 (Mo. banc 1999) (finding compensable injury “in or about” employer’s premises even though claimant was “a fixed-hour, fixed-place worker, . . . injured on an unpaid lunch break in a room that was not owned, rented or controlled” by employer).<sup>5</sup>

In similar fashion, the court of appeals erred by *sua sponte* announcing a *per se* rule “that when one is not at work, but merely driving by his or her place of employment on a public street, workers’ compensation law does not apply.” Slip op. at 4 (Harris Appendix A-39). If any court is to announce such a rule, it should only be on judicial review after the Commission has exercised its primary jurisdiction based on careful examination of the facts and the specialized policy

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<sup>5</sup> *Drewes* was among the cases legislatively abrogated by the 2005 amendments to Mo. Rev. Stat. § 287.020.10. Although this same legislation abrogated the extension of premises doctrine to some extent (*id.* § 287.020.5), it does not apply to an incident that predates its enactment. *Lawson v. Ford Motor Co.*, No. ED88584, 2007 WL 817268 (March 20, 2007). *See also Thomas v. Hollister, Inc.*, 17 S.W.3d 124, 126 (Mo. App. 1999).

considerations underlying workers' compensation, including the rule requiring liberal and expansive interpretation to ensure more individuals enjoy the protection of workers' compensation. *Vatterott*, 968 S.W.2d at 121. By way of illustration, the extended premises doctrine is not by definition limited to pedestrians. In light of authority awarding compensation to an arriving worker injured on a public street as a pedestrian (*Gaston*, 69 S.W.3d 158), the Commission could well find it immaterial that the worker was injured while traversing the same public street by some motorized conveyance so long as the other requirements of the extended premises doctrine are met. Similarly, there is no requirement that those awarded compensation for injuries received in an extended-premises parking lot must use the area for parking a vehicle. *See Wells*, 33 S.W.3d at 193 (claimant was dropped off for work in the parking lot). And, of course, collisions may occur wherever vehicles are present, whether in a parking lot or on another portion of the extended premises.

In summary, the court of appeals ignored the primary jurisdiction of the Commission, the fundamental policy calling for liberal and expansive interpretation of the workers' compensation system, and the unlimited variety of fact patterns that may arise for determination by the Commission. *Thomas*, 17 S.W.3d at 129 (Commission must decide each case on its own particular facts).

## CONCLUSION

Accordingly, Respondents request that the judgment of the circuit court dismissing this case without prejudice be affirmed.

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## **CERTIFICATE OF COMPLIANCE**

I certify that:

1. The brief includes the information required by Rule 55.03;
2. The brief complies with the limitations contained in Rule 84.06(b);
3. According to the word count function of counsel's word processing software (Microsoft® Word 2002), the brief (excluding those portions permitted by Rule 84.06(b)) contains 6,614 words; and
4. The floppy disk submitted herewith containing a copy of this brief has been scanned for viruses and is virus-free.

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Attorney for Respondents

## **CERTIFICATE OF SERVICE**

On this 6<sup>th</sup> day of April, 2007, I hereby certify that two copies of this brief and a copy of this brief on disk were served by first-class U.S. Mail, postage prepaid, addressed to:

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