

THE CONTINUED EROSION OF THE EXCLUSIVE REMEDY DOCTRINE

The exclusive remedy doctrine, a cornerstone upon which the workers' compensation system was built, provides a basic give-and-take arrangement for addressing work-related injuries and disease: the employee relinquishes the right to sue the employer in exchange for a guaranteed, yet limited, set of benefits without regard to fault. Thus, workers' compensation becomes the employee's "exclusive remedy" for addressing work related injuries. While this doctrine has been under attack since the enactment of Missouri's Workers' Compensation Act, recent changes in Missouri law have increased litigation in this area. Employers and their attorneys will have to defend workers' compensation claims carefully and decide whether a potential defense will encourage filing of tort lawsuits or create results that will be used to support future tort lawsuits.

Part I of these materials discusses the history of workers' compensation law and the exclusive remedy doctrine. Parts II and III discuss three recent Missouri appellate court decisions—*Missouri Alliance for Retired Americans v. Department of Labor Industrial Relations*, 277 S.W.3d 670 (Mo. Feb. 24, 2009), *State ex. rel. KCP&L Greater Missouri Operations Co. v. Cook*, --- S.W.3d --- (Mo. App. W.D., Sept. 13, 2011), and *Robinson v. Hooker*, 323 S.W.3d 418 (Mo. App. W.D. 2010)—and their combined effect on the exclusive remedy doctrine in Missouri. Part IV discusses the use of the exclusive remedy doctrine in defense of a civil action after *J.C.W. v. Wyciskalla*, 275 S.W.3d 249 (Mo. Banc 2009), and *McCracken v. Wal-Mart Stores East, LP*, 298 S.W.3d 473 (Mo. App. 2009). Part V concludes with a discussion of national trends in this area, including a discussion of the disturbing use of federal RICO claims to avoid the exclusive remedy of workers' compensation.

I. History of the Exclusive Remedy Doctrine

In 1909, Missouri's legislature first considered enacting a Workers' Compensation Act. After a few false starts, Missouri voters finally passed a workers' compensation law on November 2, 1926, making Missouri the 43rd state to adopt such a program.

By adopting the Missouri Workers' Compensation Law, employers and employees entered into what has been termed the "great bargain" -- employers gave up their fault-based defenses to a common law tort action but received immunity from unlimited tort liability while workers gave up their common-law right to sue their employers for job-related injuries in exchange for more certain, if limited, compensation benefits. R. Robert Cohn, *History of Workmen's Compensation Law*, Preface to Chapter 287, 15 V.A.M.S. (1965). The new law thus replaced civil tort actions with an administrative remedy, affording limited but more certain remedies for injuries arising out of and in the course of employment, irrespective of fault. *Bass v. National Super Markets, Inc.*, 911 S.W.2d 617, 619 (Mo. 1995) (en banc).

Originally, the legislature defined accident as “an unexpected or unforeseen identifiable event or series of events.” In 1941, the Missouri Supreme Court held that an “accident” only occurred when the injury was accompanied by a slip or fall, or when the strain was unexpected or abnormal. *State ex rel. Hussman-Ligonier Co. v. Hughes*, 153 S.W.2d 40 (Mo. 1941). Thus, if an employee was injured during the performance of regular job duties, compensation was not allowed.

Within a few years, the plaintiff’s bar succeeded in opening a door to the civil courtroom for some work-related injuries. In 1960, the Court of Appeals ruled that employees sustaining certain work injuries not covered by workers’ compensation could return to the circuit court in a personal injury lawsuit against the employer for negligence. *Hines v. Continental Baking Co.*, 334 S.W.2d 140 (Mo. App. 1960). The Supreme Court confirmed this in 1968 in *Harryman v. L & N Buick-Pointiac, Inc.*, 431 S.W.2d 193.

Later, both the legislature and the judiciary acted to bring more work-related injuries under the umbrella of workers’ compensation. In 1973, the legislature made participation mandatory for most employers. In 1983, the Missouri Supreme Court overruled the *Hussman* decision in *Wolfgeher v. Wagner Cartage Service, Inc.*, 646 S.W.2d 782 (Mo. 1983) (en banc). The Court described the increase in litigation in both the civil and workers’ compensation arenas as litigants tried to use the definition of accident as either a shield or a sword, depending on the litigant’s point of view:

The aftermath of *Hussman* was the narrow rule that where the only unexpected or unforeseen event is the injury, there is no ‘accident’ for which compensation may be awarded. Only where the strain is accompanied by a slip or a fall, or where the strain is unexpected or abnormal, will the injured person be deemed to have sustained an “accident.” The number of cases cited for that proposition alone indicates the amount of litigation this narrow rule of construction has invited, and hints of the strained factual distinctions which have resulted from its application. (citations omitted).

The *Wolfgeher* Court implemented a more liberal and broader definition of “accident” to include any “job related” injury. More claims became compensable under the Workers’ Compensation Act, which became the exclusive remedy for the injured workers, and civil litigation brought by injured employees against employers waned.

From 1983 to 2005, the judicial construction of the term accident remained largely the same as that pronounced in *Wolfgeher*. However, the enactment of SB1 in 2005 and the Supreme Court opinion of *Missouri Alliance for Retired Americans v. Dept. of Labor and Industrial Relations*, 277 S.W.3d 670 (Mo. Feb. 24, 2009), resulted in increased litigation in both the civil and administrative courts. There has already been a significant amount of litigation in the workers’ compensation arena aimed at further defining the terms “accident” and “injury.” The state circuit courts and federal district courts have become a new battlefield where employers and employees are fighting over the meaning of those terms in the context of work related injuries.

II. Recent Appellate Cases Affecting the Exclusive Remedy Doctrine

Since 2009, appellate courts in Missouri have issued several opinions that have significantly reduced the breadth of the exclusivity provision contained in Missouri's worker's compensation act. Three of these include the Supreme Court's decision in *Missouri Alliance for Retired Americans v. Department of Labor Industrial Relations*, 277 S.W.3d 670 (Mo. Feb. 24, 2009), and the Western District Court of Appeals' decisions in *Robinson v. Hooker*, 323 S.W.3d 418 (Mo. App. W.D. 2010), and *State ex. rel. KCP&L Greater Missouri Operations Co. v. Cook*, --- S.W.3d --- (Mo. App. W.D., Sept. 13, 2011).

A. *Missouri Alliance for Retired Americans v. Department of Labor & Industrial Relations*

In *Missouri Alliance for Retired Americans v. Department of Labor Industrial Relations*, 277 S.W.3d 670 (Mo. Feb. 24, 2009), the Missouri Supreme Court declined to decide various constitutional challenges to the 2005 amendments to the Missouri Workers' Compensation Act (RSMo. Chapter 287), but granted the Appellant labor organizations certain declaratory relief regarding the exclusive remedy provision of the Act, RSMo. 287.120.

A consortium of labor unions, labor councils, and a not-for profit corporation filed suit in Cole County, Missouri Circuit Court, asserting that many of the 30 amendments to the Workers' Compensation Act enacted in 2005 deprived injured workers of due process and violated Article I, section 14 of the Missouri Constitution, the "open courts" provision, by depriving them of their right to certain compensation for a work-related injury without regard to fault. Both the plurality and concurring opinions declined to reach the merits of these constitutional challenges on the grounds that: (1) because no individual workers' compensation claims were before the court, the labor organizations' attacks on the amended Workers' Compensation Act were hypothetical only; and (2) it would be premature for the Court to resolve the constitutional validity of the individual provisions of the amended Act at present because there has not been judicial determination of their meaning in the context of specific workers' compensation claims. Only one justice (Richard B. Teitelman) believed that the constitutional challenges were ripe for decision and in his dissenting opinion he concluded that the overall effect of the 2005 amendments, in narrowing remedies and recoveries for work-related injuries, was in violation of the open courts provision of the Missouri Constitution.

Plainly, the Supreme Court has determined that constitutional challenges to the amended Act will have to be made to specific provisions (i.e., to the 30 amendments adopted in 2005) in the context of specific claims of injured workers. Accordingly, we can anticipate more litigation hereafter that will eventually require the Missouri Supreme Court to address the constitutionality of all or most of the 2005 amendments.

However, for reasons not at all clear or persuasive, a plurality of three justices determined that, unlike the challenges to the constitutionality of the amended Act, the

labor organizations' request for a declaratory judgment as to the scope of the exclusivity clause (RSMO. 287.120) was ripe for decision and not hypothetical or non-justiciable. (The concurring opinion of Judge Wolff, joined by two justices), noted that the "[t]he one claim on which this Court grants relief - for declaratory judgment - strikes me as about as hypothetical as the rest of the claims."). Exactly what the Court decided regarding the exclusivity provision of the Workers' Compensation, as opposed to just stating a well-recognized general principal of law, is not at all clear.

First, the plurality opinion described the labor organizations' request for declaratory judgment. In their petition, which was before the Court on appeal, the labor organizations pointed out that the 2005 amendments (at section 287.020.2 and 287.020.3) narrowed the definition of "accident" and "injury," thereby excluding from compensation a substantial number of employees with work-related injuries. "They seek a declaratory judgment to address whether the exclusivity provision in section 287.120 bars those workers' ability to pursue negligence tort actions against their employers."

The plurality opinion then cited the language of the exclusivity provision (RSMo. 287.120) to the effect that the employer liable for workers' compensation benefits is released from all other liability (i.e., common law negligence liability) to its injured employee or other persons for "personal injury or death" of the employee by "accident" arising out of and in the course of the employee's employment. The employer's immunity from civil tort suit extends to any rights and remedies "on account of such accidental injury or death."

Based on the plain language of RSMo. 287.120, the Court's plurality held that the Workers' Compensation Act "is the exclusive remedy only for those 'injuries' that come within the definition of the term 'accident' under the act." Any injuries, which because of the 2005 amendments to RSMo. 287.020 no longer fall within the definition of an "accident," are not compensable under the Act and, therefore, are not subject to the exclusivity provision of the Act. "Workers excluded from the act by the narrower definition of 'accidental injury' have a right to bring suit under the common law, just as they could and did prior to the initial adoption of the act."

The declaratory relief actually granted by the plurality opinion consisted entirely of this rather broad and vague conclusion. Specifically, it is adjudged, decreed and declared that "workers excluded from the act by the narrower definitions of 'accident' and 'injury' have a right to bring suit under the common law ... because they no longer fall within the exclusivity provision of the act as set out in section 287.120."

The plurality opinion expressly declined to decide what injuries fall within the definition of "accident" in amended RSMo. 287.020.2 and left the question of whether certain employees have remedies under the Workers' Compensation Act or under common law "to be decided on a case-by-case basis depending on individual facts." It is for this reason that the concurring opinion of Justice Wolff characterizes the declaratory relief being granted as "an abstract principle of law," amounting to nothing more than a

restatement of the general rule that an injured worker who is precluded from recovery under the Workers' Compensation Act can pursue a tort remedy in court. Where an employee sustains an on-the-job injury, his exclusive remedy is a workers' compensation claim if, but only if, such a remedy is actually available under the Act. "Just how and whether that declaration of law applies in any given case depends on the facts of the case presented."

To the extent that the plurality opinion of the Supreme Court is not merely an abstract statement of law which will have to be applied on a case-by-case basis hereafter, its holding can be summarized as follows. To the extent the definitions of "accident" and "injury" have been narrowed in the 2005 amendments, those work place incidents that no longer constitute "accidents" and those medical conditions which no longer constitute "injuries" may be the subject of civil actions filed against the employer in circuit court.

Prior to the 2005 amendments, an "accident" was defined as "an unexpected or unforeseen identifiable event or series of events happening suddenly, with or without human fault, and producing at the time objective symptoms of an injury." Such injury is compensable if work is a "substantial factor" in the cause of the resulting medical condition or disability. Under the current law, an "accident" is 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." Moreover, an injury by accident is compensable only if the accident was the "prevailing factor" in causing both the resulting medical condition and disability, which, in turn, is defined as "the primary factor, in relation to any other factor, causing both the resulting medical condition and disability."

The 2005 amendments to RSMo. 287.020 also narrow the circumstances under which an "injury" is deemed to have "arisen out of and in the course of employment" (including adoption of the prevailing factor test and excluding injuries occurring from hazards or risks unrelated to the employment to which the worker would have been equally exposed outside of and unrelated to the employment in normal nonemployment life), exclude injuries from idiopathic causes from compensation, and narrow the circumstances under which cardiovascular and pulmonary diseases are compensable (prevailing factor test).

From the foregoing, it appears that to the extent that employers may successfully defend workers' compensation claims on the grounds that no "accident" occurred (that is, no traumatic event or strain identifiable by specific time and place and producing symptoms of an injury caused by a specific event during a single work shift), that the injury from work-related accident was not the prevailing (primary) factor in causing resulting medical condition and disability, that the accident was not the prevailing factor in causing the injury, that injury resulted from idiopathic causes, that the hazard or risk was one to which the injured worker would have been equally exposed outside of the work place, or that work place incidents were not the prevailing factor causing certain diseases, then the injured worker can make a claim for negligence in civil court against his employer. Recovery in the civil suit, of course, would be based on pure comparative

fault and would not be limited to the statutory workers' compensation benefits. Even a finding of 5 or 10 percent fault on the part of the employer could result in a substantial tort judgment in cases of severe injury or death.

The upshot of the declaratory judgment issued by the Supreme Court in *Missouri Alliance* is to clarify that the exclusive remedy provision of the Workers' Compensation Act applies only to compensable claims of work-related injuries and, to the extent that an on-the-job injury or illness is not compensable because it does not fall within the then-current definitions of "accident" and "injury," the employee may be able to recover from his employer in civil court if he can prove negligence or other fault-based tort liability (for example, wrongful death). Employers and their insurers, therefore, should anticipate that the claimants' bar will simultaneously pursue civil and workers' compensation claims, particularly where the injury is a severe one and where there is even a credible claim of negligence or fault on the part of the employer. Moreover, the raising of compensability defenses in answer and response to a workers' compensation claim (in particular, the defenses relating to definitions of "accident" and "injury" described above) will likely lead to the filing of civil claims for damages due to the possibility that such defenses will be successful in defeating the workers' compensation claims. Generally speaking, there is a five-year limitations period for filing civil suits in negligence, and a three-year limitations period for wrongful death actions, so theoretically a claimant could pursue his workers' compensation claim to conclusion before deciding whether to initiate a civil action in the event that his compensation claim fails.

Obviously, in serious injury cases, the claimants' bar may prefer not to pursue a workers' compensation claim in the first place, but instead to file exclusively in circuit court for tort damages. That would then put the burden on the defendant employer to prove, in raising the exclusivity of workers' compensation affirmative defense, that the incident at issue was an "accident" under the Workers' Compensation Act and that the plaintiff's medical condition and resulting disability constitute an "injury" under the Workers' Compensation Act. This litigation posture could lead to the defendant employer having to establish by expert medical evidence that the on-the-job incident was the "prevailing factor" in the medical condition of the plaintiff while the plaintiff would want to prove that pre-existing impairments, conditions, or illnesses were the primary (but not sole) cause of his damages and injury.

While the specific effect of the declaratory relief granted to the Appellants in *Missouri Alliance* will have to await further litigation and judicial decisions, it is fair to say that the Supreme Court's decision will have the following immediate consequences: (1) more instances in which employers and their insurers will have to defend civil suits brought by injured employees, and more instances in which a single injury or accident will lead to dual filings in the Division of Workers' Compensation and in the Circuit Courts of the State of Missouri; (2) employers and their insurance carriers will have to coordinate defense of simultaneous compensation claims and civil suits; (3) employers and their attorneys will have to defend workers' compensation claims with careful attention to whether such defense will encourage filing of tort lawsuits or will create results that will

be used to support future tort lawsuits; and (4) employers will need to carefully examine their respective insurance policies (workers' compensation, employers liability, commercial general liability, etc.) to determine whether they have coverage that will provide defense and indemnity for both workers' compensation claims and tort claims that might be filed against them by injured employees.

B. *Robinson v. Hooker*

On August 3, 2010, the Western District of Missouri Court of Appeals held that co-workers and supervisors of injured employees are not immune from liability in civil negligence claims even if the employer is liable under the workers' compensation laws. In *Robinson v. Hooker*, 323 S.W.3d 418 (Mo. App. W.D. 2010), the Court of Appeals held that the "something more" test is no longer required after the shift to strict statutory construction under the 2005 amendments to the Missouri Workers' Compensation Act. Traditionally, a negligent co-employee could not be sued in tort absent a showing of "something more" than ordinary negligence. The "something more" doctrine was judicially created by the court in 1982 in *State ex rel. Badami v. Gaertner*, 630 S.W.2d 175, 179 (Mo.App. 1982), and required proof of an affirmative negligent act that purposefully and dangerously caused or increased an employee's risk of injury. If the "something more" test was not satisfied, the negligent co-employee enjoyed civil tort immunity under the exclusivity of workers' compensation.

In *Robinson*, an employee for the City of Kansas City sustained injury when a co-employee lost her grip on a high pressure hose, causing the hose to swing and hit the employee in the eye, resulting in blindness in one eye. The employee brought a workers' compensation claim against the City and reached a compromise settlement. After settling the workers' compensation claim, the employee brought a civil negligence lawsuit against the co-employee. The Circuit Court granted the co-employee's motion to dismiss, which was reversed by the Court of Appeals. The Court of Appeals reasoned that under a strict construction of the workers' compensation law, the exclusivity provision of RSMo § 287.120 applies only to employers, not co-employees, and thus the judicially created "something more" test to defeat civil tort immunity and trigger co-employee liability was discarded. Therefore, the employee was free to proceed in tort against the allegedly negligent co-employee without a showing of "something more" than ordinary negligence.

The decision is limited to the liability of the negligent co-employee. It is clear, based on the Supreme Court's decision in *Missouri Alliance* that the employer remains released from all liability for death or personal injury by accident that arises out of and in the course of employment, which presumably includes vicarious liability for a tort committed by a co-worker or supervisor. As will be discussed in greater detail below, many commercial liability policies exclude coverage for claims that arise out of the employment environment, and employer liability (Part B) policies typically name only the employer as an insured. Thus, Missouri employees who commit torts against their fellow servants may not only face civil liability for those acts, but may be financially responsible for them as well. Employees who wish to protect their assets from these

types of claims may want to consult with their insurance broker to make sure they are covered. Several insurance carriers offer fellow employee liability coverage as an endorsement to business auto or other commercial liability policies.

Within twenty-four hours of the *Robinson* decision, the plaintiff's bar was recommending that practitioners review settled cases to determine whether any co-employee liability was involved and discussing which insurance policies might provide coverage for these claims. The attack on the workers' compensation exclusive remedy continues, and Missouri employers and employees alike face increased risk as a result.

C. *State ex. rel. KCP&L Greater Missouri Operations Co. v. Cook*

On September 13, 2011, in *State ex. rel. KCP&L Greater Missouri Operations Co. v. Cook*, the Missouri Court of Appeals for the Western District issued another decision that further diminishes the reach of the exclusive remedy provision of the Workers' Compensation Act. In this case, the Court held that the long-standing exclusivity provision of the Workers' Compensation Act is no longer applicable in occupational disease cases.

The Plaintiff filed suit in circuit court, alleging that he was exposed to asbestos during the course of his employment for KCP&L and that this exposure directly and proximately caused him to develop mesothelioma. KCP&L asserted that Plaintiff's claims are barred because his exclusive remedy, if any, is under Missouri Workers' Compensation Law. Plaintiff argued that, pursuant to the 2005 amendments to the Act, only claims arising out of an "accident" as defined in § 287.020.2 are subject to the Act's exclusivity provisions, and that his claims do not involve accidental injury.

The Court acknowledged that the Act distinguishes between two general categories of compensable injuries: (1) injuries by accident; and (2) injuries by occupational disease. Citing the statutory definitions of "accident" and "occupational disease," the Court held that "the only statutory provision which arguably bars Plaintiff from proceeding against KCP&L in the circuit court is § 287.120." However, that section refers only to personal injury or death of the employee by accident. Thus, the Court concluded that because the exclusive remedy provisions of the Workers' Compensation Act do not apply to occupational disease claims, Plaintiff retained his right to bring suit under the common law.

The Court rejected the employer's argument that the definition of "accident" in § 287.120 should be construed to include occupational disease claims. Citing *Robinson v. Hooker*, 323 S.W.3d 418 (Mo. App. W.D. 2010), the Court reasoned that the legislative mandate of strict construction prohibited the Court from adding injuries by occupational disease to §§ 287.120.1 and .2, when the provisions unambiguously refer only to injuries caused "by accident." Furthermore, the conclusion that the Act's exclusivity provisions are limited to injuries or death caused by an "accident" as defined in § 287.020.2 is confirmed by the Missouri Supreme Court's decision in *Missouri Alliance for Retired Americans v. Department of Labor & Industrial Relations*, 277

S.W.3d 670 (Mo. banc 2009) (discussing interplay between exclusivity provisions and narrower definitions of “accident” and “injury” following 2005 amendments).

The Court recognized that the employer’s argument was consistent with a recent federal district court decision, which held that a worker’s exclusive remedy for an occupational disease claim remained through the workers’ compensation system, despite the 2005 amendments. See *Idekr v. PPG Industries, Inc.*, No. 10-0449-CV-W-ODS, 2011 WL 144922 (W.D. Mo. Jan. 18, 2011). However, for the reasons noted above, the Court concluded that *Idekr* was incorrectly decided and declined to follow it.

Justice Welsh and Justice Smart authored dissenting opinions. Justice Welsh focused primarily on the Court’s application of strict construction to remove occupational diseases from the exclusivity provisions of the Act. Relying on legislative history, Justice Welsh departed from the majority, concluding “it cannot seriously be contended that the legislature intended to decouple the Act’s coverage from the Act’s exclusivity.” Justice Smart agreed and added that the majority focused too heavily on the General Assembly’s 2005 removal from § 287.800 of the concept of “liberal construction.” Justice Smart suggested the legislature made an error as to the scope of the command, but did not intend to extend the strict construction requirement to every provision of the chapter.

The dissents also discussed, at length, the significant procedural implications this decision may have, in that this decision leaves open to the employee the “unqualified, unilateral right to select his or her own initial forum” in occupational disease claims, which includes injuries from repetitive motion. Accordingly, it may be wise to obtain a release from civil liability as part of any workers’ compensation settlement of these types of claims.

III. Application of the exclusive remedy doctrine after *Missouri Alliance, Robinson v. Hooker*, and *State ex. rel. KCP&L Greater Missouri Operations Co. v. Cook*

The following analysis discusses the types of injuries that may be claimed, the types of actions that may be filed, the types of damages awarded, and the types of insurance coverage that may apply when civil actions outside of the scope of the exclusive remedy of workers’ compensation are filed in accordance with the three cases discussed above. A brief discussion of similar treatment of the exclusive remedy doctrine in other jurisdictions is discussed in part V.

A. Types of injuries that may be filed as civil actions outside of the scope of the exclusive remedy of workers’ compensation

Without attempting to provide an exhaustive list, this section discussed four of the most obvious types of injuries which claimants may attempt to pursue outside of the scope of workers’ compensation: Repetitive Trauma, Injuries from idiopathic causes, Injuries for

which the accident was not the “prevailing factor” but was the “proximate cause,” and Injuries caused by co-employee negligence.

1. Repetitive trauma

The amendment to the definition of accident set forth in RSMo. 287.020.2 can exclude repetitive trauma injuries caused in part by a work-related factor if the accident is not “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.” It is therefore possible for an employee to allege a repetitive trauma injury which was proximately caused by employment (the standard for causation under a negligence analysis) but which did not produce objective symptoms by a single event during a single work shift.

Repetitive trauma injuries are also likely candidates because these types of claims have been filed for decades in the fault based system of the Federal Employers’ Liability Act (FELA). Under FELA, employees have alleged and sometimes proven claims of negligence against their railroad employers for carpal tunnel syndrome, noise induced hearing loss, bursitis, tendonitis and more recently repetitive stress injury (RSI), overuse strain (OS) and occupational overuse syndrome (OOS). FELA claims for repetitive trauma injuries have, at times, led to large verdicts.

As discussed above, the Court of Appeals for the Western District recently determined occupational disease claims, which include repetitive trauma injuries, are not subject to the exclusivity provision of the Act.

2. Injuries from idiopathic causes

The definition of “injury” as amended in 2005 provides “an injury resulting directly or indirectly from idiopathic causes is not compensable”. RSMo § 287.020.3(3). It is possible for a claimant to allege an injury indirectly caused by idiopathic causes, but which was proximately caused by a work related factor.

3. Injuries for which the “accident” was not the “prevailing factor” but was the “proximate cause”

Under the 2005 amendments, an “injury” is only considered to arise out of the course and scope of employment if the “accident” is the prevailing factor in causing the injury. The *Missouri Alliance* dissent argues that this raises the standard of causation above the proximate cause standard applicable at common law. Presumably claimants will attempt to place cases into the purported middle ground between proximate cause and prevailing factor. Employers and insurance carriers may successfully defend against a claim under the workers’ compensation laws by proving the accident was not the prevailing factor in causing the injury, yet still be liable for common law claims if the claimant can prove that the accident was the proximate cause of the injury.

4. Injuries caused by co-employee negligence

In light of the decision in *Robinson v. Hooker*, it is clear that claimants have the right to pursue a civil suit against co-employees for injuries arising out of and in the course of employment. Although this does not subject employers to civil liability directly, it represents an avenue for claimants to pursue tort actions even for injuries that would generally fall under the Workers' Compensation Act.

B. Types of civil claims that may be filed against employers

Injured employees must not only allege an injury which falls outside the exclusive remedy of workers' compensation, but also allege a basis for liability against their employer for the injury. Likely, many of these actions will take one of three basic forms: claims based on duties arising out of the employment relationship, claims based on duties arising from the employer's status as the owner of the employment premises, and claims arising out of injuries proximately caused by co-workers.

1. Breach of duty arising out of employment relationship

Most of these actions will be based on common law negligence, requiring the employee to plead and prove (1) a duty owed by the employer to the employee; (2) the employer breached that duty; (3) the breach of duty proximately caused the injury; and (4) damages resulting from the injury. In this type of claim, the employee will rely on duties arising directly out of the employer/employee relationship to allege negligence. The most general of these is a duty to provide a reasonably safe work place. From this duty, an employee can allege that any dangerous/unreasonable work condition is a breach of the employer's duty. The employee will further allege that the dangerous/unreasonable work condition proximately caused his or her injury and resulted in damages.

2. Premises liability

Another alternative is a claim based upon premises liability. Under common law, the owner or occupier who controls the premises owes duties to the people who enter the premises. These duties vary based upon the classification of the person entering the premises as an invitee, licensee or trespasser. Employees are clearly not trespassers, but it is not clear whether they would be placed in the invitee category, licensee category, or if a new categorization is necessary.

In a premises case, the employee will allege that the employer controls the premises and therefore owes duties to those entering the premises. Employees will presumably allege that their presence at work is for the benefit of the employer and therefore the employee is classified as an invitee (the classification for which the premises defendant owes the highest standard of care). Employees will allege that a condition of the premises was a dangerous condition that should have been eliminated by the employer or for which a warning should have been given by the employer. Finally, the employee

will allege that the dangerous condition proximately caused the injury and the injury resulted in damages.

3. Respondeat superior

Another alternative may arise if the employee can allege that the injury was caused by the tort of a co-worker. Under the theory of respondeat superior, or “let the master answer”, the employer/master is vicariously liable for the torts of its employees/servants. Respondeat superior does not render the employer vicariously liable for intentional torts of its employees, such as assault and battery.

For this type of claim, the injured employee will allege that his or her injury was proximately caused by the tort of a co-employee. The injured employee will then further allege that an employment relationship exists between the co-employee and the employer and that the tort occurred in the course and scope of the co-employee’s employment. Such a claim does not release the co-employee from liability, but rather allows the injured employee to pursue a claim against either the employer or the co-employee, or both (although the injured employee can only get one recovery). Naturally, the injured employee will likely choose the employer to have a better chance at actually collecting any judgment awarded. It seems unlikely that an employer could be held liable under a respondeat superior theory if the claimant sustained an injury by accident as defined by the Act, however, because § 287.120.1 provides that, in cases covered under the Act, the employer “shall be released from all other liability therefore whatsoever.”

C. Types of damages that might be awarded in common law personal injury claims

One of the primary differences of course between a claim made in the scope of the Workers’ Compensation Act and one made at common law is damages. These differences arise both in the types of damages, and the method by which the damages are awarded.

Assuming the claimant can make a successful personal injury claim against the employer, damages which might be awarded include both economic and non-economic. Economic damages (damages for which a specific dollar figure can be determined) include past and future medical expenses reasonably related to the injury, past and future wage loss, and loss of earning capacity. Any other economic loss arising out of the injury can also be alleged. For example, if claimant alleges the injury renders him unable to mow the lawn and, as a result, he pays a lawn service to mow the lawn, the cost of the lawn service is an economic damage that could be collected in a common law personal injury action.

Lost wages can be claimed at the full value of the actual wages lost if the claimant was unable to work by reason of the injury at issue. However, the claimant has a duty to mitigate damages, including loss of wages.

The most significant departure between the workers' compensation scheme and common law is the award of pain and suffering damages. These damages are meant to compensate the injured party for the past and future pain and suffering experienced by reason of the injury. There is no statutory schedule for this type of damage, nor is there any specific cap for such damages in Missouri law.

The difference in compensation between workers' compensation claims and common law claims is magnified by the method of award. Most personal injury claims are tried to a jury and it is the jury as the trier of fact which decides the amount, if any, of damages to be awarded. There is no provision for temporary or ongoing payments between the time suit is filed and the case reaches trial. Instead, the jury renders a verdict deciding the amount of damages suffered by claimant from the date of the injury to the date of the verdict and the amount that will be suffered from the date of the verdict into the future.

Another substantial difference is the possibility of a loss of consortium claim at common law. A loss of consortium claim alleges that the spouse of an injured party has suffered damages in the form of damage to the marital relationship and loss of the services, society and companionship of the injured spouse. The claim is derivative in the sense that the loss of consortium must arise out of the physical injury alleged by the claimant. However, in Missouri it is a separate action filed by the spouse alleging the loss of consortium. If a loss of consortium claim is made, the physically uninjured spouse will simply be joined as a plaintiff in the common law action and a separate count will be made in the lawsuit for loss of consortium.

D. Types of insurance coverage that may apply

Whether and how such claims will be covered by insurance must be determined on a case by case basis. A coverage decision will depend upon the exact type of allegations raised by the employee in any attempted common law action and the exact language of the applicable insurance policies. It should be noted that the same general type of coverage can vary by the language of the policy from employer to employer and from year to year. The following is a general discussion based upon assumptions of the types of allegations that may be raised and based upon form policies which may or may not be the same as the policies in effect for a given employer.

This analysis will consider whether such claims could be covered by the following three types of insurance: (1) commercial general liability; (2) workers' compensation; and (3) employers liability.

1. Commercial general liability

Most if not all employers will have some form of commercial general liability (CGL) insurance. These policies generally cover the employer for qualifying claims for bodily injury and property damage. Bodily injury for purposes of CGL coverage is typically

defined broadly enough to include acute injuries as well as repetitive trauma and occupational disease.¹

CGL policies generally include the following exceptions which will likely apply to a determination of coverage for a common law action by an injured employee against an employer.²

- i. Exclusions - insurance does not apply to:*
 - a. Workers' Compensation and Similar Laws - Any obligation of the insured under a workers' compensation, disability benefits or unemployment compensation law or any similar law.*
 - b. Employer's Liability - "Bodily injury" to:*
 - 1) Any "employee" of the insured arising out of and in the course of:*
 - a) Employment by the insured; or*
 - b) Performing duties related to the conduct of the insured's business; or*
 - 2) The spouse, child, parent, brother or sister of that "employee" as a consequence of Paragraph (1) above.*
- ii. This exclusion applies:*
 - a. Whether the insured may be liable as an employer or in any other capacity; and*
 - b. To any obligation to share damages with or repay someone else who must pay damages because of the injury.*
 - 1) This exclusion does not apply to liability assumed by the insured under an "insured contract".*

Under the terms of such a policy, a negligence action by the employee against the employer based upon a breach of duties arising out of the employer/employee relationship would likely be excluded from CGL coverage by exclusion *i(b)(1)* as it would likely be considered an injury arising out of and in the course of the claimant's employment with the employer and/or the performance of duties related to the conduct of the employer's business.

Likewise, a claim by the injured employee based upon the employer's status as an owner or operator of the work premises would also likely be excluded from CGL coverage by exclusion *i(b)(1)*. In addition, the fact that the employer is not being sued as an employer but as a premises owner/operator is addressed by the extension of the exclusion, stating that it applies "Whether the insured may be liable as an employer or in any other capacity."

¹ "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time. This definition is taken from the Insurance Services Office (ISO) Commercial General Liability Policy, CG 00 01 07 98.

² ISO Commercial General Liability Policy, CG 00 01 07 98.

However, a claim for respondeat superior liability arising out of a tort of a co-employee of the claimant is not as clear as the preceding two examples. This type of claim may be excluded from CGL coverage as well if an employee suffers the injury at issue.

2. Workers' compensation

Common law actions against an employer for an employee's injuries will most likely not be covered by the Part One Workers' Compensation Insurance coverage for a Workers' Compensation and Employers Liability Insurance Policy. This coverage typically requires the insurer to pay benefits required of the employer by the workers' compensation law and defend those claims for benefits due under the Part One coverage. By definition, for these common law claims the claimants will intentionally attempt to avoid the scope of the workers' compensation law and will be seeking damages outside of the workers' compensation law.

3. Employers liability

Part Two of the Workers' Compensation and Employers Liability Insurance Policy provides for Employers Liability Insurance. This coverage appears the most likely to apply to common law personal injury claims by employees against their employers. Part Two provides coverage for bodily injury by accident arising out of and in the course of the injured employee's employment by the insured employer. It also provides coverage for bodily injury by disease caused or aggravated by the conditions of the insured employer's employment. The coverage pays for sums the employer must pay by reason of bodily injury to its employees, if the bodily injury is covered by Part Two.

A typical Part Two coverage includes an express extension of coverage for bodily injury damages alleged by an employee arising out of and in the course of employment claimed against the employer in a capacity other than as employer. This extension may be applicable to a common law personal injury action by an employee against the employer as the owner/operator of the work premises.

It should be recognized that the coverage limits of Part Two are significantly different than the Part One Workers' Compensation Insurance. Part One provides coverage to the extent of benefits required under the workers' compensation law. In other words, the Workers' Compensation Act itself defines the monetary limits of the insurance. Part Two, on the other hand, provides specific dollar limits of coverage.

Finally, Part Two has unique geographic limitations which may have to be considered. Part Two coverage will typically be limited geographically as follows:

The employment [from which the bodily injury arises] must be necessary or incidental to your work in a state or territory listed in Item 3.A of the Information Page.

IV. Procedure for defending a civil action based on the exclusive remedy of workers' compensation

Prior to two decisions in early 2009, a party seeking to dismiss a claim based on the exclusive remedy doctrine filed a motion to dismiss based on lack of subject matter jurisdiction. However, Missouri courts have subsequently held that a motion to dismiss is no longer the proper procedure because the exclusive remedy doctrine is not a matter of subject matter jurisdiction but rather an affirmative defense.

A. Pre-2009 Standard

The Missouri Labor and Industrial Relations Commission has exclusive jurisdiction as to all claims subject to the Workers' Compensation Act. Accordingly, a motion to dismiss for lack of subject matter jurisdiction was the proper method to raise a worker's compensation exclusivity defense prior to 2009. See *James v. Union Elec. Co.*, 978 S.W.2d 372, 374 (Mo.App.E.D. 1998).

A court was required to dismiss the action whenever it found it "appears" by suggestion of the parties or otherwise that the court lacks subject matter jurisdiction. As the term "appears" suggests, the quantum of proof was not high. It must have only appeared by the preponderance of the evidence that the court was without jurisdiction. See *James v. Poppa*, 85 S.W.3d 8, 9 (Mo. 2002) (en banc).

Moreover, because the Workers' Compensation Act was construed liberally, close cases were ruled in favor of finding coverage of a worker by its provisions. *Busselle v. Wal-Mart*, 37 S.W. 3d 839, 841-42 (Mo.App.S.D. 2001). Where a question of jurisdiction was in doubt, it was resolved in favor of granting jurisdiction to the Missouri Labor and Industrial Commission. *Bass v. National Super Markets, Inc.*, 911 S.W.2d 617, 619 (Mo. 1995) (en banc). Subject matter jurisdiction was deemed a threshold issue and could not be conferred by consent, estoppel or waiver. *Oberreiter v. Fullbright Trucking Co.*, 117 S.W. 3d 710, 716 (Mo.App.E.D. 2003). If the court found it lacked jurisdiction, it could take no other action than to exercise its inherent power to dismiss the action before it. *Id.*

B. *J.C.W. v. Wyciskalla*, 275 S.W.3d 249 (Mo. January 27, 2009) (en banc)

The Missouri Supreme Court revisited subject matter jurisdiction in *J.C.W. v. Wyciskalla*, 275 S.W.3d 249 (Mo. 2009), in the context of a child support statute, and held

Subject matter jurisdiction is not a matter of a state court's power over a person, but the court's authority to render a judgment in a particular category of case.

[T]he subject matter jurisdiction of Missouri's courts is governed directly by the state's constitution. Article V, section 14 sets forth

the subject matter jurisdiction of Missouri's circuit courts in plenary terms, providing that '[t]he circuit courts shall have original jurisdiction over all cases and matters, civil and criminal. Such courts may issue and determine original remedial writs and shall sit at times and places within the circuit and determined by the circuit court.'

In evaluating the jurisdiction of circuit courts, there are cases that, in dicta, purport to recognize a third concept, 'jurisdiction competence,' which is often confused with subject matter jurisdiction. . . . Because the authority of a court to render judgment in a particular case is, in actuality, the definition of subject matter jurisdiction, there is no constitutional basis for this third jurisdictional concept for statutes that would bar litigants from relief. Elevating statutory restriction to matters of 'jurisdictional competence' erodes the constitutional boundary established by article V of the Missouri Constitution, as well as the separation of powers doctrine, and robs the concept of subject matter jurisdiction of the clarity that the constitution provides.

C. *McCracken v. Wal-Mart Stores East, LP*, 298 S.W.3d 473 (Mo 2009)

The Supreme Court's decision in *J.C.W.* had significant implications on the issue of the exclusive remedy defense. Following that decision, the Supreme Court incorporated the *J.C.W.* analysis of subject matter jurisdiction to find that the trial court had subject matter jurisdiction over civil matters where the exclusive remedy was raised as a defense, and held that the trial court could no longer simply dismiss those actions.

In *McCracken v. Wal-Mart Stores East, LP*, 298 S.W.3d 473, the plaintiff was a delivery driver employed by Interstate Brands Corporation. He was delivering bread to a Wal-Mart store when he was struck on the shoulder by a bread cart. He settled a workers' compensation claim against his direct employer, and then filed a civil lawsuit against Wal-Mart, claiming that one of its employees was negligent in handling the cart. On the day of trial Wal-Mart raised, for the first time, a motion to dismiss based on the lack of subject matter jurisdiction, relying on the earlier line of cases so holding. The trial court agreed and dismissed the case.

The court held that the subject matter jurisdiction analysis relied upon in previous cases which allowed the issue of exclusivity to be raised by a motion to dismiss for lack of subject matter jurisdiction "is eviscerated by the constitutional subject matter jurisdiction analysis as mandated by *J.C.W.*"

Therefore, the issue of whether the exclusive remedy provision of the Workers' Compensation Act is applicable to a claim for which recovery is sought in a common law action is an affirmative defense and the burden of establishing the same rests upon the

defendant. This affirmative defense must be raised in a responsive pleading, not a motion to dismiss.

V. National Trends: Contexts in which the courts may or may not apply the Exclusive Remedy Doctrine

Since the first Workers' Compensation Act was enacted, the plaintiff's bar has actively sought to avoid the act's exclusive remedy provision in convenient situations. The following provides a discussion of claims alleging RICO violations and cases from other jurisdictions demonstrating the variety of ways claimants are attempting to erode the exclusive remedy doctrine.

A. RICO (Racketeer Influenced and Corrupt Organizations Act)

One disturbing national trend is the number of cases that have allowed successful RICO (Racketeer Influenced and Corrupt Organizations Act) claims against workers' compensation carriers or employers in the workers' compensation context. RICO is a federal anti-racketeering law enacted in 1970 that was intended to eradicate organized crime. The law allows private civil actions against any members of an "enterprise" that violate certain federal and state law, and successful plaintiffs may recover treble damages. The cases below illustrate how the plaintiff's bar is using RICO in the workers' compensation context.

The first case, *Brown v. Cassens Transport Co.*, although still pending litigation after being remanded to the district court, allowed RICO claims pertaining to the denial of workers' compensation to go forward on the merits. Additionally, in *Vacanti v. State Comp. Ins. Fund*, the last available court decision held that plaintiff's RICO claims were not barred by the exclusive remedies of workers' compensation. That case was also remanded; however the results of further proceedings after the remand are not accessible. Finally, *Encinas v. Pompa* was successful to the extent that judgment was entered in favor of the plaintiffs' RICO claims in the context of workers' compensation.

1. *Brown v. Cassens Transport Co.*, 546 F.3d 347 (6th Cir. 2008).

Plaintiffs, current and former employees of Defendant Cassens, submitted workers' compensation claims to Cassens after sustaining workplace injuries. Plaintiffs alleged that Cassens, a self-insured entity for purposes of paying benefits under Michigan's Workers' Disability Compensation Act (WDCA), contracted with Defendant Crawford to serve as a claims adjuster for the workers' compensation claims of their employees. Plaintiffs further alleged that Defendant employer Cassens, Defendant Crawford and Defendant Margules, in addition to other "cut-off" doctors, engaged in a pattern of racketeering activity to deny plaintiffs' workers' compensation claims, specifically that Defendants Cassens and Crawford intentionally selected and paid doctors who were unqualified to give fraudulent medical opinions to support denial of workers' compensation benefits. Additionally, plaintiffs alleged that Defendants made fraudulent

communications with each other and to plaintiffs via mail and wire, constituting predicate acts for plaintiffs' RICO claims.

The district court granted Defendants' motion to dismiss and the Sixth Circuit Court of Appeals affirmed the dismissal. The United States Supreme Court vacated the Sixth Circuit's judgment and remanded the case back to the Sixth Circuit for reconsideration. On remand, the Sixth Circuit reversed the dismissal of plaintiffs' RICO claims and remanded to the case to the district court for further proceedings.

Although the case is still pending, Plaintiffs have been successful to the extent that their RICO claims pertaining to denial of workers' compensation have been allowed to go forward.

2. *Vacanti v. State Comp. Ins. Fund*, 14 P.3d 234 (Cal. 2001)

Plaintiffs, licensed medical groups providing medical-legal services to employees with workers' compensation claims and medical management companies under contract with the medical groups, brought claims against several workers' compensation insurance carriers. The defendant workers' compensation insurance carriers decided to put plaintiffs out of business by delaying payment and refusing to pay for services plaintiffs rendered to injured workers. Defendants had developed intricate procedures for delaying/avoiding payment to plaintiffs through use of "false, fraudulent, and frivolous objections," even incorporating such schemes into their manuals and training materials. Defendants also promised to promptly pay valid lien claims, further misleading plaintiffs. In the meantime, Defendants made false public accusations about plaintiffs being "fraud mills" and advised other carriers not to pay their claims. These activities resulted in heavy business losses to plaintiffs as they lost significant cash flow but continued to pay treating physicians. In the end, defendants ran plaintiffs out of business by increasing the time from billing to payment and reducing how much was actually collected from the amount billed. Defendants argued Plaintiffs' claims were barred by the exclusive remedy provision of the Workers' Compensation Act.

Defendants filed a demurrer to Plaintiffs' complaint. The trial court overruled the demurrer on exclusivity grounds but dismissed with leave to amend on other grounds. Plaintiffs filed an amended complaint and Defendants filed another demurrer. The trial court again overruled the demurrer, holding Plaintiffs' use of the lien does not impinge on the exclusive jurisdiction of the Workers' Compensation Appeals Board. After the designation of a new judge, two defendants later added to the complaint filed a demurrer on the same grounds. The new judge sustained the demurrer solely on exclusivity grounds, holding exclusive jurisdiction is with the Workers' Compensation Appeals Board. The Court of Appeals affirmed on appeal. The California Supreme Court held that Plaintiffs' RICO claims were not barred by the exclusive remedy provision of workers' compensation and remanded. The results on remand are not accessible.

Plaintiffs were successful to the extent that their RICO claims were not barred by the exclusive remedies of workers' compensation. Unfortunately, what occurred after the case was remanded to the trial court is not clear.

3. *Encinas v. Pompa*, 939 P.2d 435 (Ariz. Ct. App. 1997)

Plaintiff was injured while on the job. Because his employer did not provide workers' compensation insurance, Plaintiff filed a lawsuit for various claims, including RICO violations.

The court entered a default judgment against the defendant employer on the RICO claims, and the court of appeals affirmed.

Plaintiff was successful to the extent that judgment was entered in favor of Plaintiff's RICO claims in the context of workers' compensation.

B. Cases from other jurisdictions

Several other cases have dealt with the non-compensability aspect of bypassing exclusive remedy, in-line with the *Missouri Alliance* decision.

In *Schroeder v. Peoplease Corp.*, No. 1D08-4247 (Fla. Dist. Ct. App. 2009), Employer denied compensation on the grounds that employee's heart episode, which occurred during the course of employment, was the result of a preexisting condition. Employee treated under his private health insurance, but later filed a negligence claim against Employer. Employer attempted to defend asserting exclusivity of workers' compensation. Employee argued, however, that employer was estopped from arguing exclusivity since employer also denied that employee suffered an accident or injury arising out of and in the course of his employment. Employer maintained that it did not intend to deny that an injury occurred during the course of employment. The court remanded for a determination as to the meaning of the employer's notice of denial.

In *Rothwell v. Nine Mile Falls School District*, 206 P.3d 347 (Wash. Ct. App. 2009), a school custodian forced to clean up scene of student's suicide was not barred from bringing civil claim for intentional and negligent infliction of emotional distress against employer where PTSD was not an "injury" or "occupational disease" under the state's Industrial Insurance Act. Specifically, the Act provides that claims based on mental conditions or mental disabilities caused by stress do not fall within the definition of occupational disease. Further, the Act only allowed for compensation of a mental "injury" when the condition resulted from a sudden, tangible, and traumatic event that produced an immediate result. In this case, the custodian's PTSD resulted from a series of incidents over a period of a few days. Thus, since Claimant's PTSD was neither an "injury" nor an "occupational disease," the exclusive remedy provision did not operate as a bar to civil suit.

In *Brown v. Cassens Transport Co.*, 546 F.3d 347 (6th Cir. 2008), plaintiffs were current and former employees who brought a class action claim against Cassens Transport. They alleged that Cassens Transport hired a third party administrator to serve as its claims adjuster and that, together, they both selected Dr. Saul Margules and other doctors to examine the plaintiffs to determine whether they were disabled and eligible to receive benefits. The plaintiffs further alleged that Dr. Margules and the other physicians were deliberately selected to “give fraudulent medical opinions that would support the denial of worker’s compensation benefits and that the defendants ignored other medical evidence in denying them benefits.” Finally, the plaintiffs alleged that the defendants “made fraudulent communications amongst themselves and to the plaintiffs by mail and wire,” thereby violating RICO. The Sixth Circuit found these activities, if proven, sufficient to support a RICO claim against the employer, claims adjuster and doctors.

In *Watters v. Department of Social Services*, 15 So.3d 1128 (La. Ct. App. 2009), a clerical employees’ tort claims against the state employer for exposure to toxic mold in the workplace fell outside the scope of Workers’ Compensation Act because such exposures were not an accident, not an occupational disease, and not peculiar to or characteristic of clerical employment. (citing *Ruffin v. Poland Enterprises, LLC*, 946 So.2d 695, 07-0314 (La.App. 4 Cir. 2006)).

In *Jones v. Ruth*, No. 2080249 (Ala. Civ. App. 2009), a settlement containing release of all claims arising under the Workers’ Compensation Act did not bar tort action for negligence of employer because tort claims are premised on different standards of proof and different measures of damages than claims for workers’ compensation benefits, and as such, do not “arise under” the Act.

In *McDonald’s Corp. v. Ogborn*, No. 2008-CA-000024-MR (Ky. Ct. App. 2009) an employee was the victim of a telephonic hoax, wherein the “pranksters” who posed as detectives called fast food restaurants and retail chains and convinced store managers to detain hapless employees. The managers were then guided through a series of progressively questionable and invasive actions such as strip searches of the alleged criminal employees, supposedly on behalf of the police. Employee filed civil suit and was awarded \$6 million in damages for her humiliating ordeal. McDonald’s attorneys appealed the ruling, invoking the exclusive remedy of workers’ compensation. The Kentucky Court of Appeals disagreed, stating that “We do not find manifest injustice in the trial court’s ruling that Ogborn was not acting in the course and scope of her employment while she was held in the manager’s office.”

In *Brown v. Southern Ingenuity, Inc.*, 4 So.3d 974 (La. Ct. App. 2009), the court found that the transportation provided to a handicapped employee was not incidental to employment services such that injury sustained by employee as she was lifted out of employer’s handicapped accessible van arose out of her employment, subjecting her to the exclusive remedies of Workers’ Compensation Act. Court determined that handicap transportation services were provided in employer’s status as employee’s Medicaid provider and not as an employment service.

But see, Painter v. McWane Cast Iron Pipe Co., 987 So.2d 522 (Al. 2007). **Note: This case doesn't specifically address exclusivity, but may nonetheless be instructive in avoiding tort liability for denied claims. An employee suffered injury to his shoulder after a fall at work. Employer accepted compensability and provided benefits. During the course of treatment, employee began complaining about pain in his lower back. Employer disputed the low-back symptoms, and as such, employee's surgery for a herniated disk was paid for by his private health-insurance. After returning to work, employee was terminated for violating company policy by taking pictures of employer's premises. Employee then filed suit against employer seeking to recover workers' compensation benefits for his lower-back, which he alleged was a work-related injury. A settlement agreement was entered, after which employee amended his complaint to allege that employer fraudulently attempted to violate the Workers' Compensation Act by attempting to have him accept payments from a disability insurance plan instead of benefits under the Act, and by refusing to provide benefits and treatment, though employer knew his back injury was work-related. The court found in favor of the employer, noting that employer acknowledged that an accident occurred and admitted that employee suffered injury as a result. Given that the employer only disputed the lower-back injury because it was not asserted until over a month after the accident occurred, the court did not find employer had engaged in conduct beyond the bounds of the employer's proper role. In addition, the court found that employee's claims were clearly encompassed by the previously executed settlement agreement.

VI. Conclusion

In the wake of *Missouri Alliance* and its progeny, employers and their attorneys should expect substantial new litigation concerning the exclusive remedy doctrine and more instances in which a single injury or accident will lead to dual filings in the Division of Workers' Compensation and in Missouri circuit courts. This requires employers and their insurance carriers to coordinate defense of simultaneous compensation claims and civil suits. Moreover, employers and co-employees alike will need to carefully examine their respective insurance policies to determine whether they have coverage that will provide defense and indemnity for both workers' compensation claims and tort claims that might be filed against them by injured employees. The attack on the workers' compensation exclusive remedy continues, and Missouri employers and employees face increased risk as a result.

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