University of Arkansas at Little Rock Law Review

Volume 21 | Issue 3 Article 5

1999

Workers' Compensation—Who Has Jurisdiction to Determine Jurisdiction? The Arkansas Supreme Court Abandons a Rule of Concurrent Jurisdiction and Adopts the Doctrine of Primary Jurisdiction. Van Wagoner v. Beverly Enterprises, 334 Ark. 12, 970 S.W.2d 810 (1998).

Jill Jones Moore

Follow this and additional works at: https://lawrepository.ualr.edu/lawreview

Part of the Jurisdiction Commons, and the Labor and Employment Law Commons

Recommended Citation

Jill Jones Moore, *Workers' Compensation—Who Has Jurisdiction to Determine Jurisdiction? The Arkansas Supreme Court Abandons a Rule of Concurrent Jurisdiction and Adopts the Doctrine of Primary Jurisdiction. Van Wagoner v. Beverly Enterprises, 334 Ark. 12, 970 S.W.2d 810 (1998).*, 21 U. Ark. Little Rock L. Rev. 543 (1999).

Available at: https://lawrepository.ualr.edu/lawreview/vol21/iss3/5

This Note is brought to you for free and open access by Bowen Law Repository: Scholarship & Archives. It has been accepted for inclusion in University of Arkansas at Little Rock Law Review by an authorized editor of Bowen Law Repository: Scholarship & Archives. For more information, please contact mmserfass@ualr.edu.

WORKERS' COMPENSATION—WHO HAS JURISDICTION TO DETERMINE JURISDICTION? THE ARKANSAS SUPREME COURT ABANDONS A RULE OF CONCURRENT JURISDICTION AND ADOPTS THE DOCTRINE OF PRIMARY JURISDICTION. *VANWAGONER V. BEVERLY ENTERPRISES*, 334 Ark. 12, 970 S.W.2d 810 (1998).

I. INTRODUCTION

The workers' compensation system[1] provides compensation based on a statutory scheme to employees who sustain on-the-job injuries and shields employers from tort liability.[2] Workers sustaining compensable injuries are guaranteed workers' compensation benefits, and therefore, avoid the burden of proving the employer's fault in a civil suit.[3] In return, the employer escapes litigation costs and potentially high tort damages.[4] Workers' compensation provides the exclusive remedy for work-related injuries falling within the act's definitions.[5] Exclusivity, is therefore, the central feature of workers' compensation systems.[6]

In recent years, workers' attempts to circumvent the workers' compensation system in search of tort damages have met recognized success under judicial exceptions to the exclusivity principle.[7] The judicial exceptions threaten to chip away at exclusivity and encourage employees to seek tort damages, thus stripping away the employer's protection from tort liability.[8]

In addition to judicial exceptions, the workers' compensation system was threatened by other external factors which challenged exclusivity. Employers experienced soaring insurance costs due primarily to increased medical costs, and within the system, fraudulent claims increased.[9] In Arkansas, the

---

1. Throughout this note, the administrative agency charged with the authority of interpreting and applying the remedies of a state workers' compensation statute will be referred to in the generic term of board or commission.

2. *See* Loretta F. Samenga, *Workers' Compensation: The Exclusivity Doctrine*, 41 LAB. L. J. 13, 14 (1990).

3. *See id.*

4. *See* Arthur B. Honnold, *Theory of Workmen's Compensation*, 3 CORNELL L.Q. 264, 265 (1918).

5. *See* Samenga, *supra* note 2, at 14.

6. *See* Joan T.A. Gabel & Nancy R. Mansfield, *Practicing in the Evolving Landscape of Workers' Compensation Law*, 14 LAB. LAW. 73, 73 (1998). The bargain struck between employees and employers whereby an employee gives up the right to bring a tort action in exchange for guaranteed recovery for compensable injuries is often referred to as the quid pro quo. *See id.* Essential to the maintenance of the bargain is the rule of exclusivity which prevents employees from recovering tort damages for work-related injuries compensable under workers' compensation. *See id.*

7. *See id.*

8. *See id.* at 73-74.

9. *See* Joseph H. Purvis, *From the Respondent: Workers' Compensation Reform: An Attempt to Save the Goose that Laid the Golden Egg*, 27 ARK. LAW., Summer 1993, at 25.

legislature responded to the growing crisis with Act 796,[10] which curtailed compensability and cut back the judicial exceptions to exclusivity, thus making it more difficult for workers to recover.[11]

The recent Arkansas Supreme Court case *VanWagoner v. Beverly Enterprises*,[12] in keeping with the legislative intent of Act 796, overturned past precedent by adopting the doctrine of primary jurisdiction.[13] Traditionally in Arkansas both the courts and the Workers' Compensation Commission had jurisdiction to determine if an employee's injury was covered by workers' compensation, an issue crucial to determining if exclusivity barred a tort remedy.[14] Under a rule of primary jurisdiction, a court cannot decide questions of jurisdiction, and the matter must be dismissed for the worker to file a claim for compensation with the board.[15] If the board determines it lacks jurisdiction, the worker may file a tort action.[16]

This note focuses on the impact that a rule of primary jurisdiction has on workers' compensation and the concept of exclusivity. In so doing, it is necessary to provide a brief introduction to workers' compensation in the United States, trace the background on primary jurisdiction and exclusivity, and review how other states have proceeded on the matter. Part II of this note provides a summary of the *VanWagoner* decision. Part III examines the background of workers' compensation and includes a discussion of primary jurisdiction and exclusivity. Part IV discusses the reasoning of the Arkansas Supreme Court in *VanWagoner*. The note concludes with Part V which suggests the possible implications of the *VanWagoner* decision on the future of workers' compensation law in Arkansas.

II. SUMMARY OF FACTS

On the morning of February 15, 1995, Laurie VanWagoner slipped and fell on a rug while walking down a hallway at Beverly Enterprises where she was employed as an administrative assistant.[17] VanWagoner submitted a Employee's Notice of Injury on a Form AR-N[18] to the Arkansas Workers'

---

10. *See* Arkansas Workers' Compensation Act of 1993, Act No. 796, (codified at ARK. CODE ANN. §§ 11-9-101 to -1001 (Michie 1996 & Supp. 1997)).

11. *See* John D. Copeland, *Workers' Compensation, Exclusivity, and the "Balderdash" Response*, 1996 ARK. L. NOTES 1, 1.

12. 334 Ark. 12, 970 S.W.2d 810 (1998).

13. *See VanWagoner*, 334 Ark. at 13, 970 S.W.2d at 811.

14. *See id.*

15. *See* 2 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 14.1 (3d ed. 1994).

16. *See id.*

17. *See* VanWagoner v. Beverly Enter., 334 Ark. 12, 13, 970 S.W.2d 810, 811 (1998).

18. *See id.* In Arkansas, an employee is required by statute to file a Form AR-N,

Compensation Commission on February 29, 1996.[19] On October 15, 1996, VanWagoner filed for workers' compensation benefits, asserting that her hip injury was the result of a work-related accident.[20] Beverly controverted her claim and denied that VanWagoner's injury was compensable.[21] Beverly maintained that VanWagoner's injury resulted from pre-existing conditions.[22] As a statutory defense, Beverly asserted that VanWagoner was not performing employment services as defined under the Workers' Compensation Act[23] since she was on her way to the break room when the alleged fall occurred.[24]

VanWagoner's counsel requested cancellation of an April 9, 1997, compensability determination hearing before the commission.[25] Thereafter, on May 15, 1997, VanWagoner instituted a civil action in the Sebastian County Circuit Court in Fort Smith, Arkansas, alleging that Beverly Enterprises's negligent failure to maintain its premises was the proximate cause of VanWagoner's slip and fall injury.[26] VanWagoner claimed that the Workers' Compensation Act could not provide an exclusive remedy since she was not providing employment services when the alleged fall occurred.[27] The circuit court dismissed the action with prejudice, holding that the exclusive remedy provision of the Workers' Compensation Act barred the suit.[28] VanWagoner appealed to the Arkansas Court of Appeals which certified the case to the Supreme Court of Arkansas.[29] In affirming the decision of the circuit court, the Arkansas Supreme Court held that the Workers' Compensation Commission has primary jurisdiction to determine if cases fall within its jurisdiction and within the Workers' Compensation Act.[30]

"Employee's Notice of Injury." *See* ARK. CODE ANN. § 11-9-701 (Michie 1996).

19. *See VanWagoner*, 334 Ark. at 13, 970 S.W.2d at 811.

20. *See id.*

21. *See id.*

22. *See id.*

23. *See id.* A compensable injury does not include an "[i]njury which was inflicted upon the employee at a time when employment services were not being performed, or before the employee was hired or after the employment relationship was terminated." ARK. CODE ANN. § 11-9-102(5)(B)(iii) (Michie 1996 & Supp. 1997).

24. *See VanWagoner*, 334 Ark. at 12, 970 S.W.2d at 810.

25. *See VanWagoner*, 334 Ark. at 13-14, 970 S.W.2d at 811.

26. *See id.*

27. *See id.* at 14, 970 S.W.2d at 810-11.

28. *See id.*

29. *See id.* The action was certified pursuant to ARK. SUP. CT. R. 1-2(d)(2) as involving an issue of significant public interest or a legal principle of major importance. *See id.*

30. *See VanWagoner*, 334 Ark. at 15, 970 S.W.2d at 812.

III. BACKGROUND

A. Background of Workers' Compensation in the United States

As early as 1841, workers in the United States began suing their employers on negligence principles.[31] However, in order to recover damages, the employee had to prove the employer's negligence.[32] This was no easy task for the employee, who met obstacles in the common law that practically ensured the employee's defeat.[33] Employers easily overcame employee actions for work-related injuries with the common law defenses of contributory negligence, assumption of risk, and the fellow servant doctrine.[34] In addition to these obstacles, fellow employees feared employer retaliation for offering supporting testimony for an injured co-worker.[35] Furthermore, litigation was costly for both the employer and the employee, and the money expended in litigation benefitted neither party.[36] Consequently, the common law left a majority of workers uncompensated for their injuries.[37]

With increased industrialization, the number of worker injuries increased correspondingly, and the common law remedy remained inadequate.[38] The common law came to be viewed as both economically and morally unjust.[39]

---

31. *See* Richard A. Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 GA. L. REV. 775, 777 (1982). Although there were earlier cases of employees suing employers over occupational injuries, *Murray v. South Carolina Railroad* is one of the earliest documented cases in the United States. *See id.* (citing 26 S.C.L. (1 McMul.) 385 (1841)).

32. *See* Samenga, *supra* note 2, at 13.

33. *See* Samenga, *supra* note 2, at 13.

34. *See* ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 4.30 (1998). Under contributory negligence, an employee could not recover from the employer if the employee's own negligence contributed to the injury. *See id.* Under the assumption of risk doctrine, an employee could not recover from the employer for accidents arising from risks associated with the job that the employee should have recognized. *See id.* Under the fellow servant doctrine, an employee could not recover from the employer for injuries sustained from the negligence of a fellow employee. *See id.*

35. *See id.*

36. *See* Honnold, *supra* note 4, at 265. Money spent on litigation could have been spent by employers to further the industry, but instead many employers chose to run the risk of being held liable rather than install safer equipment. *See* Honnold, *supra* note 4, at 265.

37. *See* Joseph H. King, Jr., *The Exclusiveness of An Employee's Workers' Compensation Remedy Against His Employer*, 55 TENN. L. REV. 405, 415 (1988) (citing PROSSER & KEETON ON THE LAW OF TORTS § 80, at 572 n.43 (5th ed. 1984)). Seventy to ninety-four percent of all industrial accidents were uncompensated. *See id.*

38. *See* Honnold, *supra* note 4, at 264.

39. *See* Honnold, *supra* note 4, at 266-67 (discussing declarations of purpose made by several states in establishing their workers' compensation statutes).

Under workers' compensation, work-related injuries would be treated as a cost of production which should be paid by the industry and the consumer.[40]

The first steps toward altering the common law defenses began with the judiciary, and legislative efforts soon followed.[41] Each stage in the development of workers' compensation in the United States mirrored the developments in England.[42] In 1880, the English Parliament passed the English Employers' Liability Act[43] which served as a model for early statutes in the United States.[44] The Employers' Liability Act displaced the common law defenses with respect to certain injuries but still retained a negligence standard.[45]

The next legislative phase ushered in modern compensation statutes beginning with the passage of the British Workers' Compensation Act in 1897.[46] It stimulated American interest, and states began assembling experts and commissions to investigate the proposition of state workers' compensation systems.[47] The first enactments, beginning with New York, met with constitutional challenge.[48] In 1911, the New York Court of Appeals held the 1910 New York Act unconstitutional based on an impermissible exercise of police power and stated that the taking of employer property without fault amounted to a due process violation.[49] New York responded by adopting an

40. *See* Honnold, *supra* note 4, at 268.

41. *See* LARSON, *supra* note 34, at § 4.40. Some courts carved out exceptions to the fellow servant rule, such as the vice principle exception. *See* LARSON, *supra* note 34, at § 4.40. This exception in some states, excluded all supervisory employees from the fellow servant rule. *See* LARSON, *supra* note 34, at § 4.40. Other states took a more expansive view and declared all employees carrying out an employer's duties excluded from the rule. *See* LARSON, *supra* note 34, at § 4.40.

42. *See* LARSON, *supra* note 34, at § 4.50.

43. *See* LARSON, *supra* note 34, at § 4.50.

44. *See* Epstein, *supra* note 31, at 787. The Employer Liability Statutes of 1880 provided that in the event of personal injury or death to a workman, the workman or the workman's representative shall have the same right of compensation against the employer as if the workman had not been a workman for the employer. *See* Epstein, *supra* note 31, at 787 & n.29.

45. *See* Epstein, *supra* note 31, at 797. The traditional common law rules governing liability were displaced in five circumstances under the Act. *See* Epstein, *supra* note 31, at 788. The first case dealt with defects in machinery or plant; the next three covered instances where the employee acted under the supervision of other workers; the last circumstance covered situations where the worker was injured by the negligence of any person in charge of railway signals or engines. *See* Epstein, *supra* note 31, at 787-88 & n.29.

46. *See* Epstein, *supra* note 31, at 797 (citing 60 & 61 Vict., ch. 37).

47. *See* LARSON, *supra* note 34, at § 5.20.

48. *See* LARSON, *supra* note 34, at § 5.20. Many of the first laws were compulsory and denied the employer and employee the right to choose to be governed by the act. *See* LARSON, *supra* note 34, at § 5.20.

49. *See* LARSON, *supra* note 34, at § 5.20.

amendment to the state constitution allowing the legislature to pass a compulsory law.[50]

Other states answered the constitutional question by adopting legislation that gave the employer an option to either be bound by the compensation plan or be subject to common law actions without the common law defenses.[51] Forty-two states passed compensation acts by 1920.[52] In 1920, 41.2% of workers were covered by workers' compensation, and that figure steadily rose to 81.5% in 1940 and to 87% in 1989, where it remained steady.[53]

Workers' compensation in the United States is based on a no-fault approach.[54] The system relieves the employee from having to prove the employer's negligence in a tort action and results in quicker recovery, although compensation is generally less than a tort recovery.[55] Likewise, an employer benefits by avoiding potentially costly tort damages.[56] Regardless of employer fault or employee negligence, an injured employee usually recovers as long as the injury arose out of and in the course of employment and was sustained during the employment relationship.[57]

The amount awarded to the injured worker depends on the employee's earning capacity.[58] Contrasted with tort damages where there is no maximum limit on recovery, workers' compensation awards have a statutory base that focuses on the employee's disability and sets a maximum for recovery.[59]

---

50. *See* LARSON, *supra* note 34, at § 5.20

51. *See* LARSON, *supra* note 34, at § 5.20.

52. *See* LARSON, *supra* note 34, at § 5.30. Today all states have adopted a workers' compensation system. *See* LARSON, *supra* note 34, at § 5.30.

53. *See* LARSON, *supra* note 34, at § 5.30 (citing WILLIAM J. NELSON, JR., WORKERS' COMPENSATION: 1894-1998 BENCHMARK REVISIONS SOCIAL SECURITY BULLETIN (1992)).

54. *See* Samenga, *supra* note 2, at 14-15.

55. *See* Samenga, *supra* note 2, at 14-15.

56. *See* Samenga, *supra* note 2, at 14-15.

57. *See* Samenga, *supra* note 2, at 14-15. Act 796 of 1993 imposed more requirements on recovery and redefined compensable injury. *See* ARK. CODE ANN. §§ 11-9-101 to -1001 (Michie 1996 & Supp. 1997). In Arkansas, a compensable injury is an "accidental injury . . . arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is 'accidental' only if it is caused by a specific incident and is identifiable by time and place of occurrence." ARK. CODE ANN. § 11-9-102(5)(A)(i) (Michie 1996 & Supp. 1997). The section continues to define injuries that are not compensable under the Act. *See* ARK. CODE ANN. § 11-9-102(5)(B) (Michie 1996 & Supp. 1997). Many states, including Arkansas, have broken down the phrase "arising out of the course of employment" so that "arising" relates to causal origin and "in the course of employment" relates to the time, place and circumstance surrounding the accident. *See* LARSON, *supra* note 34, at § 6.10.

58. *See* LARSON, *supra* note 34, at § 2.40. The employee is entitled to medical and temporary disability benefits. *See* ARK. CODE ANN. § 11-9-102(F)(i) (Michie 1996 & Supp. 1997). Injuries, like loss of sexual potency or loss of sensory organs that may produce large tort damages go uncompensated under the workers' compensation system since these injuries do not effect earning capacity. *See* LARSON, *supra* note 34, at § 2.40.

59. *See* LARSON, *supra* note 34, at § 2.50. Most states base compensation on a percentage

Workers' compensation recovery in most states is limited to an amount based on the state's average weekly wage.[60] The statutory scheme categorizes the worker's injury into one of four categories based on the degree and duration of the injury.[61]

B. Exclusivity and Workers' Compensation Law in Arkansas

As part of the compromise between employers and employees, workers' compensation benefits provide the exclusive remedy for an employee's occupational injuries arising during the course of employment.[62] The employer avoids liability for tort damages, and in exchange, the employee may obtain compensation even if negligent.[63] However, judicially created exceptions including the dual capacity doctrine, dual persona doctrine, third party contribution and the intentional torts exception have chipped away at the

---

of the worker's average wage between one-half and two-thirds and set a maximum weekly recovery. *See* LARSON, *supra* note 34, at § 2.50. The goal is to find an amount which will compensate the worker but will not result in malingering. *See* LARSON, *supra* note 34, at § 2.50.

60. *See* LARSON, *supra* note 34, at § 2.50. Under Act 796, the maximum weekly benefit for a compensable injury is 85% of the state's average weekly wage. *See* ARK. CODE ANN. § 11-9-501(b)(4) (Michie 1996).

61. *See* 4 LARSON, *supra* note 34, at § 57.12(a). The four categories are "temporary partial, temporary total, permanent partial, or permanent total" with death cases receiving different treatment. *See* 4 LARSON, *supra* note 34, at § 57.12(a). The following are a sample of maximum benefits for selected permanent partial injuries: loss of arm at the elbow, 244 weeks; loss of arm between elbow and wrist, 183 weeks; loss of hearing in both ears, 158 weeks; loss of leg at knee, 184 weeks; loss of leg between knee and ankle, 131 weeks; loss of thumb, 73 weeks; loss of big toe, 32 weeks; loss of first finger 43 weeks. *See* ARK. CODE ANN. § 11-9-521(a) (Michie 1996 & Supp. 1997).

62. *See* 5 LARSON, *supra* note 34, at § 65.00. The Arkansas exclusive remedy provision states that "[t]he rights and remedies granted to an employee subject to the provisions of this chapter, on account of injury or death, shall be exclusive of all other rights and remedies of the employee . . . ." ARK. CODE ANN. § 11-9-105(a) (Michie 1996). Workers who are injured by third parties are not bound by the exclusive remedy rule, and the worker may receive benefits from the employer and sue the third party for damages. *See* 5 LARSON, *supra* note 34, at § 65.00. Statutory recovery from the employer must be reimbursed from any tort award to avoid double recovery. *See* 5 LARSON, *supra* note 34, at § 65.00.

63. *See* Samenga, *supra* note 2, at 14. Supporters of workers' compensation argue that the system was never meant to provide workers will full compensation and the judicial exceptions to exclusivity threaten to dismantle the quid pro quo. *See* Epstein, *supra* note 31, at 809. Supporters also argue that low damages are necessary since they keep down costs of administering the system, prevent fraudulent claims, and encourage employees to take increased self protection measures. *See* Epstein, *supra* note 31, at 800-01. Critics argue that the current system is inadequate in light of the increased value of an employee's common law rights and the courts have properly allowed exceptions to exclusivity. *See* Note, *Exceptions to the Exclusive Remedy Requirements of Workers' Compensation Statutes*, 96 HARV. L. REV. 1641, 1644 (1983).

exclusive remedy provision[64] and have encouraged employees to pursue tort remedies while leaving employers uncertain about their obligations.

The intentional tort exception is founded on the notion that intentional torts are not accidental and are by definition excluded from the statute.[65] Most states require that the employee show more than the employer's acting with gross negligence, recklessness or willfulness in order to succeed on an intentional tort claim.[66]

In Arkansas, the employee must show actual, specific, and deliberate intent on the part of the employer to injure the employee.[67] This requires that the worker plead more than bare allegations, and the nature of the employer's acts determine the cause of action.[68] Once proven, the intentional act severs the employment relationship and allows the worker to sue the employer in tort.[69] In *Heskett v. Fisher Laundry & Dry Cleaners Company*,[70] the Arkansas Supreme Court held that a general manager's unprovoked assault on the

---

64. *See generally* Joseph H. King, Jr., *The Exclusiveness of an Employee's Workers' Compensation Remedy Against His Employer*, 55 TENN. L. REV. 405 (1988) (addressing numerous other grounds for employee's civil suits). The dual capacity doctrine and suits for contribution have been rejected by most states who have considered them, but the intentional tort exception has been widely accepted because of a general belief such injuries are outside of workers' compensation coverage which is limited to accidental injuries. *See* Note, *Exceptions to the Exclusive Remedy Requirements of Workers' Compensation Statutes*, 96 HARV. L. REV. 1641, 1653 (1983) (advocating that increased judicial acceptance to employee tort suits will bring about desirable results by increasing workers' compensation benefits and workplace safety).

65. *See* 6 LARSON, *supra* note 34, at § 68.00. Misrepresentation, nuisance, or defamation are just a few of the numerous other torts workers may sue their employers on. *See generally* King, *supra* note 64, at 405. Courts adhering to the doctrine of primary jurisdiction do so under the rationale that certain factual questions fall within the expertise of the administrative body. *See* Eldridge v. Circle K Corp., 934 P.2d 1074, 1079 (N.M. 1997). The workers' compensation boards manage benefit payments to workers for work-related accidents and can more efficiently process claims and resolve factual questions within the agency's expertise. *See id.* This rationale is not applicable in an employee's common law claim for an intentional wrong. *See id.* In this instance, it is preferable for the court to assume priority over the board since the issue is a matter of law. *See id.* Furthermore, a worker may be disadvantaged by having to prove intent to the board where the opportunities for discovery are limited and a right to trial by jury may be jeopardized. *See id.*

66. *See* 6 LARSON, *supra* note 34, at § 68.13.

67. *See* Miller v. Ensco, Inc., 286 Ark. 458, 461, 692 S.W.2d 615, 617 (1985). An employer's failure to warn of dangers, provide a safe working environment, or violation of government regulations may place the employee in a dangerous situation. *See id.* at 460-61, 692 S.W.2d at 617-18. However, such acts or omissions on the part of the employer do not remove the act or omission from the purview of exclusivity. *See id.* at 461, 692 S.W.2d at 617-18. The employer's act must show an intent to injure the employee or a desire to bring about the expected consequences of the act. *See id.*

68. *See Ensco*, 286 Ark. at 461, 692 S.W.2d at 617.

69. *See* Heskett v. Fisher Laundry & Dry Cleaners Co., 217 Ark. 350, 355, 230 S.W.2d 28, 32 (1950).

70. *See id.*

employee during the course of employment could entitle the plaintiff to common law damages.[71]

The dual capacity doctrine releases an employee from under the exclusive remedy rule by allowing the employee to sue the employer acting in a third party capacity.[72] Those seeking to use the exception argue that the employer is being sued not as an employer but in some other capacity such as owner or lessor of property on which the injury occurred or as the installer of equipment that injured the employee.[73] Dual capacity does have validity where the employer in fact assumes a role totally unrelated to that of the employer or in situations where an employee is suing an employer for injuries sustained outside the employment relationship.[74] The rationale prevents employers who assume dual roles outside the employment relationship from avoiding tort actions.[75] Advocates against the dual capacity exception fear it will not be limited to the extreme cases where the employer and employee are brought together by circumstances outside of the employment relationship; but will overwhelm exclusivity by including cases where the two are joined by a relationship in addition to employment.[76]

The dual persona doctrine, related to the dual capacity doctrine, also allows the injured worker to sue an employer in tort.[77] This doctrine assumes that the employer has several legal personas and the employer may take on a separate legal status.[78] The best example is found in modern day business where an individual may be operating several companies.[79] An employee working for one of the companies may attempt to sue another of the companies in tort.[80] The exception has justification where there is no employment relationship between the injured employee and the company the worker is suing. However, the same danger that exists with dual capacity is present in dual persona, in that dual persona could be extended in a way inconsistent with exclusivity if employees could sue one of several operationally

71. *See Heskett*, 217 Ark. at 356, 230 S.W.2d at 32.

72. *See* King, *supra* note 64, at 492.

73. *See* King, *supra* note 64, at 492-96.

74. *See* King, *supra* note 64, at 492-96.

75. *See* King, *supra* note 64, at 492-96. Employers assume many other roles with respect to employees including landowner, manufacturer, installer, bailor, or safety inspector. *See* Thomas v. Valmac Indus., Inc., 306 Ark. 228, 812 S.W.2d 673 (1991) (citing 2A ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION, § 72.81(a) (1990)). Larson states that a court's recognition of this doctrine severely weakens exclusivity. *See id.*

76. *See* Epstein, *supra* note 31, at 810-11.

77. *See* Thomas v. Valmac Indus., Inc., 306 Ark. 228, 812 S.W.2d 673 (1991). Arkansas adopted the dual persona exception in this case. *See id.* at 231, 812 S.W.2d at 674-75.

78. *See Valmac*, 306 Ark. at 231, 812 S.W.2d at 674-75.

79. *See* Cash v. Carter, 312 Ark. 41, 847 S.W.2d 18 (1993).

80. *See id.*

interrelated companies simply because there were some overlapping ownership interests.[81]

Another judicial exception to the exclusivity doctrine includes third party suits for contribution and indemnity which involve attempts to allocate liability fairly between employers and third parties who share the responsibility for the worker's injuries.[82] An injured worker may sue the third party for all damages, and the third party may seek indemnity from the employer.[83] If some or all of the tort cost can be shifted from the third party to the worker's employer, the protection the employer receives under the exclusive remedy rule is compromised.[84] Therefore, claims by third parties for contribution and indemnity represent an indirect exception to exclusivity.[85]

In 1993, the Arkansas legislature drastically altered the Arkansas Workers' Compensation statute.[86] Among the changes, Act 796 broadened the scope of the exclusivity doctrine by eliminating some of the judicial exceptions, thus preventing future expansion by the Arkansas courts.[87] The legislature warned that exclusivity was not to be broadened by administrative law judges, the commission, or the Arkansas courts.[88]

C. An Explanation of Primary Jurisdiction

The courts use the doctrine of primary jurisdiction to refer initial decision making to administrative bodies to avoid conflict due to overlap between the two tribunals.[89] The reasoning behind the doctrine includes the notion that: (1) the administrative body possesses expertise which makes it better equipped than a court to make factual decisions falling within the scope of its statutory

81. *See* King, *supra* note 64, at 496.
82. *See* King, *supra* note 64, at 503-09.
83. *See* King, *supra* note 64, at 503-09.
84. *See* King, *supra* note 64, at 504.
85. *See* King, *supra* note 64, at 504.
86. *See* ARK. CODE ANN. §§ 11-9-101 to -1001 (Michie 1996 & Supp. 1997). *cf.* ARK. CODE ANN. §§ 11-9-101 to -811 (Michie 1987).
87. *See* ARK. CODE ANN. § 11-9-107(e) (Michie 1996). The legislature specifically denounced the court's attempt to carve exceptions from the exclusivity doctrine and annulled *Thomas* and two other cases cutting into exclusivity, *Wal-Mart Stores, Inc. v. Baysinger*, 306 Ark. 239, 812 S.W.2d 463 (1991) and *Mapco, Inc. v. Payne*, 306 Ark. 198, 812 S.W.2d 483 (1991). *See id.* Under the Act, the intentional tort and third party contribution exceptions remain intact. *See id.*
88. *See* ARK. CODE ANN. § 11-9-1001 (Michie 1996).
89. *See* 2 DAVIS & PIERCE, *supra* note 15, at § 14.1. One commentator asserts that primary jurisdiction cannot be stated in a formula, but may be seen as an attempt to resolve procedural and substantive conflicts created when the original jurisdiction granted to an agency confronts the original jurisdiction of the court. *See* Louis L. Jaffe, *Primary Jurisdiction*, 77 HARV. L. REV. 1037, 1037 (1963-64).

jurisdiction; (2) the doctrine also promotes uniformity in decisions; and (3) prevents judicial interference with agency jurisdiction.[90] There are two ways primary jurisdiction may be used.[91] First, a court may decide to refer particular issues of a case to the agency while retaining jurisdiction over the action.[92] Second, a court may conclude that the entire action falls within the agency's jurisdiction and dismiss the entire action.[93] The court may refer initial decision making power to the agency but retain the right to set aside the agency's resolution of the issue on review.[94] The agency decision is granted deference, however, by a reviewing court.[95]

The doctrine of primary jurisdiction was first used in *Texas & Pacific Railway v. Abilene Cotton Oil Company*[96] when Abilene Cotton sued the railway to recover shipping charges on carloads of cotton seed that it deemed excessive and unreasonable.[97] The United States Supreme Court held that the lower court had no jurisdiction to decide whether the rate charged was reasonable and in violation of the Interstate Commerce Act.[98] Abilene was required to seek redress with the Interstate Commerce Commission, which had original jurisdiction over such matters.[99] Although the Court's decision contradicted the plain language of the Act,[100] the Court did more to follow through with Congressional intent by establishing a rule to provide for uniformity in decisions.[101] The ICC Act applied nationwide and resort to the board in the first instance ensured the resolution of disputes in a consistent manner.[102]

---

90. *See* 2 DAVIS & PIERCE, *supra* note 15, at § 14.1.

91. *See* 2 DAVIS & PIERCE, *supra* note 15, at § 14.1. The doctrine of primary jurisdiction does not apply to pure questions of law which fall exclusively within the court's jurisdiction. *See* Great Northern R.R. v. Merchants Elevator Co., 259 U.S. 285 (1922).

92. *See* 2 DAVIS & PIERCE, *supra* note 15, at § 14.1.

93. *See* 2 DAVIS & PIERCE, *supra* note 15, at § 14.1.

94. *See* 2 DAVIS & PIERCE, *supra* note 15, at § 14.1.

95. *See* 2 DAVIS & PIERCE, *supra* note 15, at § 14.1.

96. 204 U.S. 426 (1907).

97. *See Abilene Cotton*, 204 U.S. at 430. *See generally* WILLIAM F. FOX, JR., UNDERSTANDING ADMINISTRATIVE LAW § 69, at 238 (1986).

98. *See Abilene Cotton*, 204 U.S. at 448.

99. *See id.*

100. *See id.* at 446. ". . . [N]othing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." *Id.*

101. *See id.* at 446-47. Under the ICC Act the shipper could choose the forum for redress, and the shipper chose to file in state court. *See id.* Allowing a plaintiff a forum choice under the Act left the chance the decisions and remedies granted by the ICC and the courts would not be uniform. *See id.*

102. *See* BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 8.24, at 487 (2d ed. 1984). The doctrine of primary jurisdiction is judge-made. *See id.* As seen in *Abilene Cotton* it may be applied when policy concerns so dictate. *See id.*

Whereas *Abilene Cotton* involved an entire case that fell within the exclusive primary jurisdiction of the agency, primary jurisdiction also applies where the court retains jurisdiction over the case but refers certain factual issues to the agency.[103] In *United States v. Western Pacific Railway*,[104] the government shipped napalm bombs without fuses, and the railroad charged the United States government the rate that applied to live incendiary devices.[105] The United States contended that, since the bombs had no fuses, a lower rate should apply.[106] The government refused to pay the higher rate, and the shipper brought suit in the United States Court of Claims.[107] The Court of Claims held that the court should determine which rate applied since the issue was a matter of law that did not require resort to the agency.[108] The Supreme Court reversed and held that the court must first refer to the agency where the dispute involved two issues that combined questions of fact and law: 1) interpretation of tariff language and 2) the reasonableness of the tariff.[109]

This variant of primary jurisdiction was used in later antitrust cases like *Far East Conference v. United States*.[110] The Court again chose to refer to the agency on issues involving agency expertise while retaining jurisdiction over the matter.[111] By following the doctrine of primary jurisdiction and declining to resolve jurisdictional or factual issues, the court avoids the possibility of interfering with an agency's statutory responsibilities.[112] The agency opinion, however, is not binding on the court.[113] In *Federal Maritime Board v. Iserbrandtsen Company*,[114] the board's order was set aside by the court.[115]

103. *See id.*
104. 352 U.S. 59 (1956).
105. *See id.* at 60.
106. *See id.* at 61.
107. *See id.* at 62.
108. *See id.*
109. *See id.* at 63.
110. 342 U.S. 570 (1952). Water carriers agreed to a rate system whereby shippers who dealt exclusively with members of the conference received a better rate. *See id.* at 572. The government brought an anti-trust suit, and the Court dismissed the action to the Federal Maritime Board to determine the reasonableness of the dual rate system. *See id.* at 571. The Court retained jurisdiction over the case which involved anti-trust issues for which the board could not grant relief. *See id.*
111. *See id.* at 575.
112. *See* 2 DAVIS & PIERCE, *supra* note 15, at § 14.2.
113. *See* 2 DAVIS & PIERCE, *supra* note 15, at § 14.2.
114. 356 U.S. 481 (1958).
115. *See id.*

D. Who Has Jurisdiction to Determine Jurisdiction?

Employee attempts to circumvent the workers' compensation commission in order to procure larger tort damage awards are forcing courts to confront the issue of which forum has jurisdiction to determine the applicability of the workers' compensation laws.[116] There are a number of possibilities for resolving the issue. The court may allow the board to have priority and strictly follow the doctrine of primary jurisdiction.[117] In the alternative, a rule of concurrent jurisdiction[118] may be adopted or states may create some combination of the two extremes.[119] The problem is apparent in the situation where an employee files a tort action and the employer seeks to have the action dismissed based on the exclusive remedy provision of the workers' compensation act.[120] Questions as to the existence of an employment relationship and whether the injury arose during the course of employment are only two of the initial factual inquiries a forum must make before determining whether the worker plaintiff is entitled to benefits under the workers' compensation scheme or whether tort remedies are available.[121] Only a few states have addressed the question in unambiguous terms.[122] This note next looks to the differing ways courts have addressed overlapping jurisdiction between courts and agencies.[123]

1. *The Approach of Concurrent Jurisdiction*

The majority position, first established in *Scott v. Industrial Accident Commission*,[124] allows the tribunal where the claim is first filed to assume jurisdiction, and the outcome of the proceedings are res judicata in a later

---

116. *See generally* Daniel Keating, *Employee Injury Cases: Should Courts or Boards Decide Whether Workers' Compensation Laws Apply?*, 53 U. CHI. L. REV. 258 (1986). (advocating that jurisdictional questions be referred to the commission upon the motion of either party.)

117. *See VanWagoner*, 334 Ark. at 12, 970 S.W.2d at 811.

118. *See* Scott v. Industrial Accident Comm'n., 293 P.2d 18 (Cal. 1956).

119. *See* discussion *infra* Part II D.

120. *See* Keating, *supra* note 116, at 260.

121. *See* Keating, *supra* note 116, at 260.

122. *See* Keating, *supra* note 116, at 260.

123. The cases discussed in this note are not an exhaustive list of states adopting the various approaches.

124. 293 P.2d 18 (Cal. 1956).

claim initiated.[125] The courts and the board have concurrent jurisdiction, but once the board or the court assumes jurisdiction, jurisdiction is exclusive.[126]

In *Scott*, the plaintiff filed a personal injury action for damages, and during the proceeding, the defendant company sought an adjustment with the Industrial Accident Commission for the same injuries on the grounds they were suffered in the course of employment.[127] Since the court assumed jurisdiction before the board did, its decisions on jurisdiction were res judicata for the proceeding before the board.[128] The California court stated that it could not award workers' compensation damages and the board could not award civil damages, but both forums could pass on the issue of jurisdiction.[129]

The *Scott* court based its decision on policy and stated that a rule of concurrent jurisdiction protects parties from multiple litigation.[130] The *Scott* court also addressed the race to file in which the employee races to file a tort claim and the employer races to file an adjustment before the board—both knowing that the party to file first will have the claim resolved in the tribunal of their choice.[131] This majority approach is criticized for leading to duplicative litigation, resulting in an unnecessary footrace between the parties, and leading to conflicting results.[132]

A variation on the majority approach of concurrent jurisdiction includes the cases that have allowed proceedings to go forward in both forums until the issue of jurisdiction is resolved in either tribunal.[133] Courts suggest that the rationale behind this approach is that there is no evidence it would be better to refer to the board for a determination of subject matter jurisdiction, nor is the board's expertise required in making such factual determinations.[134]

---

125. *See id.* at 22. Jurisdictions following the majority approach include California, Idaho, Montana, Delaware, and Oklahoma. *See* Ward v. General Motors Corp., 431 A.2d 1277 (Del. 1981); Rex Truck Lines v. Simms, 401 P.2d 520 (Okla. 1965); Hansen v. Harvey, 806 P.2d 426 (Idaho 1991); Profitt v. J.G. Watts Constr., 370 P.2d 878 (Mont. 1962).

126. *See Scott*, 293 P.2d at 21. The *Scott* court discussed two possibilities for resolution of the case. *See id.* at 21-22. The court adopted a rule of concurrent jurisdiction but addressed the alternative of allowing the two tribunals to proceed until one reached a final determination on jurisdiction. *See id.* at 24-25. The alternative not addressed by the court was primary jurisdiction. *See* discussion *infra* Part III.

127. *See Scott*, 293 P.2d at 20.

128. *See id.* at 22.

129. *See id.*

130. *See id.* at 25.

131. *See id.*

132. *See generally* Keating, *supra* note 116, at 258.

133. *See* Ward v. General Motors Corp., 431 A.2d 1277 (Del. 1981). Two California cases have followed this approach. *See* Jones v. Brown, 13 Cal. Rptr. 651 (1970); Busick v. Workers' Compensation Appeals Bd., 500 P.2d 1386 (Cal. 1972).

134. *See Ward*, 431 A.2d at 1283.

Finally, appeals will be made to the court which will ultimately have the final say on the board's determination.[135] This approach may be easily criticized for leading to duplicative litigation, resulting in the unnecessary waste of time, resources and money to maintain two proceedings.[136]

2. *The Michigan and Missouri Approach*

Under the approach followed by Michigan and Missouri, the court has the power to decide if an employment relationship exists, but the court cannot determine if the accident occurred during the course of employment.[137] The rationale behind such a split of these issues is based on the determination that employment status is not an issue requiring agency expertise.[138] In *Killian v. J. J. Installers, Incorporated*,[139] the Missouri Supreme Court held that the question of whether the injuries were the product of an accident or a result of intentional conduct was a question within the exclusive jurisdiction of the commission.[140] The *Killian* court cited the earlier case of *Hannah v. Mallinckrodt*[141] where the court held that concurrent jurisdiction between the board and the courts would nullify the purpose of the legislative intent which places exclusive jurisdiction in the commission.[142]

The Michigan Supreme Court likewise held that the courts retain the power to decide the issue of employment, and the board determines whether the injuries were suffered during the course of employment.[143] Again, the rationale of the court is that the employment inquiry is "more fundamental" and is left to the courts to decide.[144] The courts following this approach have failed to articulate why the employment inquiry is "more fundamental" than the course of employment issue.[145] In order for an injury to be compensable, the injury must be sustained at the time an employment relationship existed, and the injury must occur during the course of employment.[146] Both conditions appear to be equally fundamental in that if either condition is not satisfied the employee cannot recover workers' compensation benefits.[147] The

135. *See id.*
136. *See generally* Keating, *supra* note 116, at 258.
137. *See* Killian v. J. J. Installers, Inc., 802 S.W.2d 158, 161 (Mo. 1991).
138. *See* Lamar v. Ford Motor, Co., 409 S.W.2d 100, 107 (Mo. 1966).
139. 802 S.W.2d 158 (Mo. 1991).
140. *See Killian*, 802 S.W.2d at 161.
141. 633 S.W.2d 723 (Mo. 1982).
142. *See Hannah*, 633 S.W.2d at 160.
143. *See* Sewell v. Clearing Mach. Corp., 347 N.W.2d 447 (Mich. 1984).
144. *See id.* at 450.
145. *See id.* at 454 (Levin, J., concurring).
146. *See id.* (Levin, J., concurring).
147. *See id.* (Levin, J., concurring).

"more fundamental" test is criticized for providing little guidance for the courts in future cases.[148]

3. *The Substantial Question Approach*

Under this approach, the court has the power to determine jurisdiction as long as no substantial jurisdictional question exists.[149] If a jurisdictional question remains, then the court must refer to the board.[150] In the event the court feels all factual issues are settled, the court may make a decision as a matter of law without referring to the board.[151] Where there is a substantial question as to whether an employee's injuries are covered by an employment compensation statute, the employee must first pursue a remedy under the workers' compensation system and allow the agency to make initial decisions concerning coverage.[152]

This approach is consistent with the doctrine of primary jurisdiction because it requires courts to refer to agencies for the resolution of issues that have been placed within their competence and expertise.[153] Courts are able to ensure uniformity in the application of the statute, and the agency is not weakened by allowing persons to circumvent its jurisdiction.[154]

In *O'Rouke v. Long*,[155] a ten-year-old newspaper carrier was struck by a truck and injured while trying to cross a street to buy an ice cream cone during his deliveries.[156] In affirming the dismissal of the plaintiff's tort claim, the New York Court of Appeals found that questions of fact or mixed questions of law and fact should be left to the workers' compensation board to determine, and that the plaintiff may not choose the courts as the forum to resolve such issues.[157]

---

148. *See id.* (Levin, J., concurring).

149. *See* Harrington v. Moss, 407 A.2d 658, 661 (App. D.C. 1979). Jurisdictions adopting this view include New York, the District of Columbia and New Mexico.

150. *See id.*

151. *See id.*

152. *See id.* at 661. The court held that there was a substantial question as to whether the husband's death occurred in the course of employment and therefore was not caused by the intoxication of the husband. *See id.* at 662. The court stated it would be best for the court to determine if a substantial question existed and then stay proceedings if issues must be referred to the board. *See id.* at n.7. This would provide for judicial economy and prevent the statute of limitations from running. *See id.*

153. *See id.* at 662.

154. *See Abilene Cotton*, 352 U.S. at 446-47.

155. 359 N.E.2d 1347 (N.Y. 1976).

156. *See id.* at 1349.

157. *See id.* at 1355.

The substantial question approach avoids the race to file and leads to more uniform decisions.[158] However, courts following this approach have failed to define what constitutes a substantial question requiring the court to refer to the board.[159] Since the court retains the ability to resolve the conflict when there is no factual issue, the question remains as to what the court will characterize as a matter of law. Under this approach, the employee still has an incentive to file a tort claim and to press the limits of the substantial question approach.[160]

In announcing its decision to follow the rule of primary jurisdiction, the Arkansas Supreme Court in *VanWagoner* placed Arkansas closest in line with the jurisdictions following the substantial question approach. Under a rule of primary jurisdiction, the Arkansas courts are now required to refer to the workers' compensation board on all jurisdictional matters.[161] This requires the court to dismiss an action and forces the worker to first seek redress through the workers' compensation system.[162] The court may resolve a dispute only when the facts are so one-sided as to become an issue of law.[163] Although Arkansas previously followed the majority of jurisdictions by adopting a rule of concurrent jurisdiction as first set forth by the *Scott* court in California, the Arkansas Supreme Court overturned precedent for the reasons discussed in the following section.

IV. REASONING OF THE COURT

In *VanWagoner v. Beverly Enterprises*,[164] the Arkansas Supreme Court held that the Workers' Compensation Commission has exclusive, original jurisdiction to determine fact issues falling within its jurisdiction.[165] The court overturned earlier decisions granting the Commission and the courts concurrent jurisdiction to determine jurisdictional issues and adopted the doctrine of primary jurisdiction.[166] The court focused on the legislative intent and purpose of the Workers' Compensation Act, which intended that jurisdictional questions be left to the commission's expertise.[167]

---

158. *See* Keating, *supra* note 116, at 272.
159. *See* Keating, *supra* note 116, at 272.
160. *See* Keating, *supra* note 116, at 272-73.
161. *See VanWagoner*, 334 Ark. at 14, 970 S.W.2d at 812.
162. *See id.*
163. *See id.*
164. 334 Ark. 12, 970 S.W.2d 810 (1998).
165. *See id.*
166. *See id.* at 14, 970 S.W.2d at 811 (citing Craig v. Taylor, 223 Ark. 363, 915 S.W.2d 257 (1996); Lively v. Libbey Mem'l Physical Med. Ctr., Inc., 317 Ark. 518, 875 S.W.2d 507 (1994)).
167. *See id.* at 14, 970 S.W.2d at 811 (citing ARK. CODE ANN. § 11-9-105(a) (Michie 1996

According to the majority, concurrent jurisdiction undermines the purpose of the Act by denying the Commission the exclusive right to administer the laws and remedies of the act.[168] The court presented numerous reasons in support of abolishing concurrent jurisdiction, including a concern that the Commission may be prevented from deciding the rights and remedies of the Act.[169] The court stated that by filing with a circuit court parties could circumvent the Commission, thereby leaving many jurisdictional questions to the court.[170] The Arkansas Supreme Court also expressed a fear that concurrent jurisdiction encourages parties to file in both forums, thus creating a threat of duplicate litigation.[171]

In support of its decision, the court relied on the work of several commentators including Daniel Keating and Arthur Larson.[172] In his article, Daniel Keating explains how concurrent jurisdiction could lead to diverse decisions even on similar facts when left to both juries and the commission.[173] The court also relied on the work of Professor Larson and his recognition of the administrative law rule of primary jurisdiction.[174] According to Larson, a commission should have original jurisdiction in all cases except those where the facts are so one-sided that the matter becomes an issue of law.[175] The court emphasized the reasoning of Keating and Larson who conclude that primary jurisdiction provides for efficiency, simplicity, and uniformity in the disposal of cases.[176]

Justice Imber declined to accept the court's reasoning and objected to the majority's decision to abolish concurrent jurisdiction.[177] She reasoned that concurrent jurisdiction granted courts jurisdiction to determine the existence of an employment relationship.[178] If an employment relationship exists between the parties, then the court cannot retain jurisdiction over the case, and

---

& Supp. 1997)).

168. *See id.*

169. *See id.*

170. *See id.*

171. *See VanWagoner*, 334 Ark. at 14, 970 S.W.2d at 812.

172. *See id.* at 15, 970 S.W.2d at 812 (citing 6 ARTHUR LARSON, LARSON'S WORKERS' COMPENSATION LAW § 67.60 (1997 & Cum. Supp. 1998)); Keating, *supra* note 116, at 271.

173. *See VanWagoner*, 334 Ark. at 14, 970 S.W.2d at 812. (citing Daniel Keating, *Employee Injury Cases: Should Courts or Boards Decide Whether Workers' Compensation Laws Apply?*, 53 U. CHI. L. REV. 258, 271 (1986)).

174. *See id.* (citing 6 ARTHUR LARSON, LARSON'S WORKERS' COMPENSATION LAW § 67.60 (1997 & Cum. Supp. 1998)).

175. *See id.*

176. *See id.* at 14, 970 S.W.2d at 811 (citing 6 ARTHUR LARSON, LARSON'S WORKERS' COMPENSATION LAW § 67.60 (1997 & Cum. Supp. 1998)); Keating, *supra* note 116, at 271.

177. *See VanWagoner*, 334 Ark. at 16, 970 S.W.2d at 813 (Imber, J., concurring).

178. *See id.* at 17, 970 S.W.2d at 813 (Imber, J., concurring).

it must be dismissed to the jurisdiction of the commission.[179] Therefore, she concluded that there is no threat that a party may circumvent the commission even if the party is allowed to file in either tribunal.[180] Justice Imber stated that the establishment of the relationship between the parties is a condition precedent to determining jurisdiction to hear the case.[181]

The concurrence questioned whether the majority had succeeded in abolishing concurrent jurisdiction considering the fact that a party may file in either tribunal for an intentional tort committed by an employer.[182] Justice Imber reasoned that concurrent jurisdiction remains where the facts show an employer acted with intent.[183] Finally, the concurrence questioned the court's acceptance of Professor Larson's work in light of the fact that the court rejected it only two years earlier.[184]

V. SIGNIFICANCE

Before Act 796, the Arkansas courts construed the provisions of the Workers' Compensation Act liberally in connection with the purpose of the Act.[185] Current law mandates, however, that the court and the commission construe the provisions of the act strictly,[186] and the court's decision in *VanWagoner* upholds the legislative intent.

The most obvious and general effect of *VanWagoner* is that it changes how cases will be tried in Arkansas by dictating how plaintiffs must proceed with work-related claims. The *VanWagoner* decision limits plaintiff access to the courts by requiring the plaintiff to go before the Workers' Compensation Commission for an initial determination of whether workers' compensation even applies.

Another general effect of a rule of primary jurisdiction on Arkansas workers' compensation law includes the elimination of confusion that may be wrought by a rule of concurrent jurisdiction whereby similar cases are handled differently by the courts and by the commission. A rule that requires the court to refer to the Workers' Compensation Commission on jurisdictional issues promotes stability and uniformity in decision making.

---

179. *See id.* at 18, 970 S.W.2d at 813-14 (Imber, J., concurring).
180. *See id.* at 17, 970 S.W.2d at 813 (Imber, J., concurring).
181. *See id.* at 19, 970 S.W.2d at 814 (Imber, J., concurring).
182. *See id.* (Imber, J., concurring).
183. *See VanWagoner*, 334 Ark. at 19, 970 S.W.2d at 813 (Imber, J., concurring).
184. *See id.* at 19, 970 S.W.2d at 814 (Imber, J., concurring) (citing Craig v. Traylor, 323 Ark. 363, 915 S.W.2d 257 (1996)).
185. *See* City of Blytheville v. McCormick, 56 Ark. App. 149, 939 S.W.2d 855 (1997).
186. *See id.* (citing ARK. CODE ANN. § 11-9-704(c)(3) (Michie 1996)).

Less obvious are the effects *VanWagoner* will have on workers' compensation claimants and the system. At the very least, a rule of primary jurisdiction will delay the resolution of tort suits in cases where the commission rules that workers' compensation is not applicable. Excluding the one categorical exception involving intentional torts, the *VanWagoner* decision dictates that worker plaintiffs must first seek redress with the commission even for injuries that are clearly not compensable under workers' compensation. For these claimants, this becomes an exercise involving a remedy the commission will deny. Workers are forced through the commission first, which results in the expenditure of time, money, and other resources. Even though a claimant will not bear any expense until after a claim is resolved, this scenario has the effect of increasing costs and decreasing benefits. In addition, during the time jurisdictional questions are pending, the claimant is unable to collect for injuries or for medical bills. While the system was set up to assure speedy compensation, this purpose is thwarted and the employee is pushed toward settling the claim.

Even with what appears to be the firm rule established by *VanWagoner*, questions remain that will eventually have to be answered by the court. It remains to be seen how the court will deal with the many other tort exceptions such as defamation, the tort of outrage, or misrepresentation that do not come under the workers' compensation scheme. Instead of forcing these claimants through the commission for a determination on jurisdiction under a rule of primary jurisdiction, the court may view these injuries as falling within the one categorical exception recognized by the *VanWagoner* majority where the facts are so one-sided as to become an issue of law so that the court may resolve the dispute. In the alternative, the court may decide that these injuries are not covered by workers' compensation and therefore, the only remedy for the worker is with the court system.

It is not clear how the *VanWagoner* decision will ultimately effect worker claimants and the workers' compensation system. For the present, it is enough to know that workers and the attorneys who represent them can no longer attempt to bypass the commission in search of a tort recovery; the commission is now the forum of first resort, a stepping stone to the courts, the forum of last resort.

Jill Jones Moore