



CHARTERED
ATTORNEYS AT LAW

September 4, 2009

TO ALL INTERESTED COMPANIES

Re: Work Disability Defense of Good-Faith Effort to Find/Maintain
Employment Eliminated by Kansas Supreme Court—*Bergstrom v.*
Spears Manufacturing Company

Dear Friends:

Today, the Kansas Supreme Court reversed fifteen years of precedent and determined that a claimant need not make an effort to find or retain employment to receive work disability benefits

As you know, prior to today's decision, a claimant that was not working had a 100% actual wage loss to be averaged with the percentage of claimant's task loss. While this mathematical computation of claimant's work disability will continue to be how work disability awards are calculated, the Kansas Supreme Court's decision today eliminates two ways in which a 100% actual wage loss can be successfully lessened or defeated altogether.

Under the old interpretation, a claimant that did not make a good faith attempt to find post-injury employment could have a wage imputed to him or her. If, for example, credible vocational evidence suggested that a claimant could earn 85% of his or her pre-injury wages, claimant's wage loss would be 15%, even though claimant had no current source of income. Under the new interpretation, a claimant has no obligation to search for employment after suffering a non-scheduled injury in Kansas.

Worse yet, prior to today's ruling, if an employer made an offer of accommodated employment to a claimant and the claimant turned that offer down or was terminated for cause after returning to accommodated employment; work disability benefits could be denied altogether. Under the strict interpretation of the relevant statute adopted today by the Kansas Supreme Court; a claimant can quit or be rightfully terminated from

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accommodated employment without any repercussion as to the value of his or her work disability award.

Under the Kansas Supreme Court's new interpretation, the only question to be asked is how much the claimant is currently earning. If the claimant is making 90% or more of his or her pre-injury wages, work disability benefits are not recoverable and the claimant will be limited to an Award based upon the degree of his or her functional impairment. If, however, claimant is earning less than 90% of his or her pre-injury wages, the only issue remaining is to determine how much, if any, income the claimant currently has. No regard will be given to the reasons for claimant's lack of income.

We expect that today's decision may lead the Kansas Legislature to write the good-faith requirement back into the Kansas Workers Compensation Act, but that will take time. Today's decision will affect *all* cases which have not been resolved finally. This includes cases that are currently on appeal. We believe that attempts by claimants to review and modify prior final Awards based on the previous interpretation of the law will be unsuccessful, as were attempts to review and modify Awards paying work disability benefits to individuals with multiple, scheduled injuries after those types of injuries were deemed by the Kansas Supreme Court to be insufficient to receive work disability benefits.

In light of this significant change in the operation of the work disability statutes, reserves will likely need to be adjusted and defense strategies will need to be revised for all pending work disability cases. We remain ready to answer your questions as to how to most effectively litigate affected cases from this point forward.

Sincerely,

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