

MEMORANDUM

DATE: December 15, 2009

TO: Montgomery County Action Council Board Members

FROM: Bradley Eilts, Director
Montgomery County Action Council

SUBJECT: Worker's Compensation Concerns

Below is information that explains our concerns related to Kansas Worker's Compensation law. This ruling impacts businesses throughout Kansas of all sizes and industries. In Montgomery County, we are working on a project that will not happen if this law is not changed, the new jobs will not be created and the capital investment will not occur.

The Kansas Supreme Court recently ruled that there is no "good-faith effort" required by a post-injury worker to mitigate their employer's liability by finding alternate employment or accepting accommodations. This ruling was made under K.S.A. 44-510e. *Bergstrom v. Spears Manufacturing Co.*, No. 99,369 (Kan. Sept. 4, 2009) and overrules fifteen years of worker's compensation precedent. It will have a severe and adverse impact on worker's compensation rates and the cost of doing business for every business in Kansas.

We are continually seeking ways to make our State and our communities competitive on a national and global scale. There are several issues related to worker's compensation that need to be addressed. Tackling this specific issue head-on and adding the words "in good faith" to the language of K.S.A. 44-510e will be a solid step in the right direction.

K.S.A. 44-510e reads in relevant part:

"An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in or capable of any work for wages equal to 90% or more the average gross weekly wage that the employee was earning at the time of the injury."

It is widely recognized that one of Kansas' strength is its strong work ethic; this ruling goes against the grain of this assertion and sends the wrong message to our existing business base and to those that we are trying to attract to our community of businesses. Although not specifically referenced in Kansas Statutes, fifteen years of precedent and generally accepted values, more than suggest that employees are to approach their assigned duties in a mode of good faith. Below is information that explains in more depth these concerns.

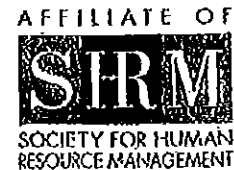
Your support and efforts in adding language requiring a "good faith" effort on the part of the injured employee is essential to maintaining our state's economic development competitiveness. This issue needs to be immediately addressed.

We have distributed letters to all Kansas Senators and Representatives to both their homes and to their offices in Topeka. I would encourage you to contact your legislator to express your concern about this and discuss how it can be corrected. Please read through this information and contact me with any questions. I can be reached at 620/331-3830 or at eilts@actioncouncil.com.

Thanks -- Brad



Kansas State Council
Society for Human Resource Management
Kansas Case Update



By Jessica Garner, JD and Trinidad Galdann, JD, PHR
Kutak Rock LLP
September 23, 2009

The Kansas Supreme Court has recently held that there is no good-faith effort required on the part of an injured worker to mitigate his damages by finding alternate employment or accepting accommodations under K.S.A. § 44-510e. *Bergstrom v. Spears Manufacturing Co.*, No. 99,369 (Kan. Sept. 4, 2009). This decision overrules fifteen years worth of workers' compensation precedent saying otherwise and can greatly affect an employer's liability in certain situations.

The Law in Kansas Before *Bergstrom*

Kansas statute 44-510e(a) states the requirements an employee must meet to be entitled to permanent partial general disability compensation, or "work disability." Under that statute, a worker who engages in work for wages similar to what he was making before the injury has no work disability, and the employer is not required to pay any work disability benefits.

In 1994, the Kansas Court of Appeals considered whether a worker who has the ability to make wages similar to what he was making before the injury, but chooses not to, has a work disability. *Fouk v. Colonial Terrace*, 20 Kan. App. 2d 277, 284, 887 P.2d 140 (1994). The Court of Appeals concluded that there was a good-faith effort required on the part of workers because "[t]he legislature clearly intended for a worker not to receive compensation where the worker was still capable of earning nearly the same wage." *Id.* Thus, the court held that a worker was required to show that they made a good-faith effort to find or maintain employment in order to receive work disability benefits.

The good-faith requirement was expanded in *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 320, 944 P.2d 179 (1997). The *Copeland* court stated that if the worker does not make a good-faith effort, then the court can consider all of the evidence before it in calculating an appropriate post-injury wage, including expert testimony concerning the capacity to earn wages. Thus, the courts have the ability to impute a post-injury wage on the worker for purposes of calculating the amount of work disability. This imputed wage often results in much lower, and often times denial of, compensation to the injured worker.

In the years following the *Fouk* and *Copeland* decisions, various Court of Appeals decisions cited the "good-faith" requirement as a justification for lowering or denying

awards to workers' compensation claimants. However, in the most recent years, Court of Appeals panels have raised doubts about the validity of the good-faith effort requirement.

The Kansas Supreme Court's Decision in *Bergstrom*

In *Bergstrom v. Spears Manufacturing Co.*, the Supreme Court of Kansas, for the first time, considered whether K.S.A. § 44-510e contained a good-faith effort requirement. The Court determined that no such requirement existed.

The case considered the on-the-job injury of Carolyn Bergstrom, who worked for Spears Manufacturing as a production janitor. While lifting a garbage can, Bergstrom injured her back and was eventually reassigned to a conveyor line to avoid bending. The new assignment, however, also posed problems because she could not stand in one place for an extended period of time. Bergstrom saw several medical and psychological professionals and was directed to stop working. After she stopped working for a period of time, she returned to work and was assigned to the conveyor line again. Because she was unable to perform her job and was in pain, Bergstrom went home. Her employer terminated her. After her termination, she was awarded a 10 percent permanent partial disability, which was a reduced award based on the finding that Bergstrom had not exercised good faith in performing alternate job duties for her employer.

The Court, in considering whether §44-510e required that Bergstrom give a good faith effort, noted that when a statute is plain and unambiguous, the court should give effect to the express language of the statute and not "read the statute to add something not readily found in it." The Court determined that the language of K.S.A. §44-510e was unambiguous which required the Court to give full effect to the plain language of the statute.

The Court held that the language of the statute does not state any requirements that the injured worker make a good-faith effort to find alternate employment. In finding so, the Court overruled years of precedent holding otherwise. As a result, Kansas no longer has any requirement that an injured worker make a good-faith effort to seek post-injury employment to mitigate the employer's liability. This decision means that an injured employee can choose not to work post-injury and possibly increase the value of his workers' compensation claim. This is a significant change in Kansas workers' compensation law of which employers should be aware.

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The information in this Alert is supplied by employment attorneys at Kutak Rock LLP. If you have any questions or updates to forward to the KS-SHRM Legislative Director please contact:

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October 2, 2009

Loophole alert: She can work but law says she doesn't have to

■ 'Good faith' effort isn't necessary, say judges

Baseball players and managers all agree: It's OK if umpires call high strikes (or low ones, or outside ones) -- as long as they're consistent.

Employers who have the misfortune to get involved in workers' comp cases would undoubtedly say the same thing.

But the men and women in robes often seem much less consistent than the men and women in blue.

The result: a minefield of unpredictability. Judges don't just change the strike zone -- sometimes they outright change the rules.

Take a recent case. The majority opinion seemed so misguided to a dissenting judge, she said her fellow judges were basically encouraging workers to "sit at home, refuse to work, and take advantage of" workers' comp.

Permanent or not?

Here's what happened: An employee hurt her back while lifting a garbage can.

She managed to get permanent total disability before a second doctor determined that she'd be able to handle

a less physically demanding job.

So her employer found her one. She reported to the modified position, but went home after three hours, claiming the work caused her too much pain.

Her employer then terminated her.

15 years out the window

When her employer let her go, it had 15 years of well-established precedent on its side.

Judges in that state had always required injured employees to make a "good-faith" effort to find suitable employment before awarding permanent disability.

But this time the judges noticed a loophole: Nothing in the law explicitly said anything about requiring a good-faith effort.

It had always just been assumed that employees needed to do that.

Well, of course, said the dissenting judge. It only makes sense, for one thing. For another, the Legislature has had 15 years to do something about it, if it didn't like our interpretation.

No matter. Now this employee is going to get paid for doing nothing -- even though she could be working.

The lesson: The only thing you can take for granted with workers' comp is that your best bet is to do all you can to prevent having to deal with it.

Info: *Bergstrom v. Spears Manufacturing Co.*, Kan. Supr. Ct., No. 99,369, 9/1/09.