

The Perfect Storm is Here

Elements that Contribute to a Storm

Under the Workers Compensation Act (the “Act), there are two types of injuries: scheduled and “whole body.” A **scheduled** injury involves a particular body part identified under the Act, for instance, a shoulder, arm, leg, foot, eye, finger, etc. A “**whole body**” injury refers to any injury that is not listed in the schedule, and includes injuries to the back, neck, skin, internal organs, and mental conditions.

Most employers are familiar with the term “work disability,” which comes into play when an injured worker 1) sustains a “whole body” injury, *and* 2) the employee is earning less than earning 90% of what the employee earned prior to the work-related injury. In calculating a work disability award, the Judge considers two factors: **wage-loss** and task-loss.

The Calm Before the Storm

In the past, an employer could defend itself against the wage-loss portion of a work disability claim by showing that the employee’s alleged wage-loss resulted from the employee’s failure to make a “good faith effort” to find employment as opposed to the work-related injury. This defense evolved from a Court of Appeals decision from 15 years ago that established what has become known as the “good faith effort” doctrine. Under the doctrine, if the employee rejects an accommodated job offer or doesn’t try to go find another job, the employer can argue that the employee has not made a good faith effort to find employment and thereby is precluded from receiving work disability benefits.

The “good faith effort” doctrine evolved from the Kansas Court of Appeals’ “interpretation” the Workers Compensation Act, which *implied* that an injured worker is required to show that they made a “good faith effort” to find or maintain employment before that injured worker would be entitled to compensation for a work disability award under the Act. The Court of Appeal, in establishing the doctrine, observed that it would be “unreasonable” for an injured worker to receive work disability when the injured worker refuses to work or fails to attempt an accommodated job within the injured worker’s work restrictions. Since 1994, the doctrine has been applied to thousands of factual scenarios and evolved into a highly refined set of legal precedent.

Clouds on the Horizon

In March 2007, the Supreme Court rendered an opinion that seemed favorable to employers. In *Casco v. Armour Swift-Eckrich*, the Supreme Court held that parallel bilateral scheduled injuries should not be characterized as a whole body injury. Prior to *Casco*, the Act was construed to allow bilateral scheduled injuries to be considered as whole body injuries and thereby added work disability exposure for the employer if the employee could not be brought back to work. In *Casco*, the Supreme Court utilized a

“strict interpretation” of the statute, which is a legal guideline applied by courts when analyzing written documents. In applying a strict interpretation analysis, the Court gives effect to the express language in the document if the meaning of that language is “plain and unambiguous.”

As mentioned above, *Casco* was considered an employer-friendly decision because it precluded work disability claims in cases involving bilateral scheduled body parts. However, the Supreme Court’s application of a strict interpretation analysis of the Act started a churning for what is a cataclysmic event from the employer’s perspective.

As the atmosphere settled, Claimant’s attorneys observed that a “strict interpretation” of the statute does not allow the Court to *imply* a “good faith effort” obligation, and in fact, the words “good faith effort” are not even contained in the statute. Instead, the statute provides that the wage loss is “the difference between the average weekly wage the worker was earning at the time of injury and the average weekly wage the worker is earning after the injury...”

The decisions that followed *Casco* began to cast doubt on whether the good-faith effort doctrine would survive; and on September 4, 2009, the fate of the good-faith effort doctrine was determined.

Batten Down the Hatches

In *Bergstrom v. Spears Manufacturing Company*, No. 99,369 (2009), the Kansas Supreme Court held an employee does not have an obligation to prove that he/she made a good faith effort to find employment. Instead, an employee’s wage loss is simply a comparison of the pre-injury wage to the post-injury wage with no consideration for the employee’s post-injury effort to find employment. In other words, if the employee decides they can’t perform an accommodated job, and instead sits at home watching television, then that employee’s post-injury wage is zero thereby resulting in a 100% wage loss for the purposes of calculating the employer’s exposure under the Act.

It is expected that the *Bergstrom* decision will cause an immediate push for amendments under the Act, but until such time as the legislature enacts these amendments, employers are faced with a serious challenge in controlling their workers compensation claims.

The following points should be considered.

1. If an employee reports an injury to a scheduled body part, then document it as an injury to that particular body part and have the employee acknowledge the description of the injury. A scheduled injury does not provide for a work disability claim, therefore wage loss is not an issue.
2. Recognize that an injured employee with a whole body injury who is not offered an accommodated job with 90% of the pre-injury wage will have a work disability

claim. Under a strict interpretation of the Act (which is what the Kansas Supreme Court has applied), an injured employee can arguably choose not to work and in doing so *significantly* increase the value of their workers compensation claim.

3. Aggravation of a pre-existing condition is sufficient to establish a compensable injury. Once a compensable claim occurs, the employer will have to continue to employ an injured worker after an aggravation occurs or face a work disability claim.