

## ***Bergstrom v. Spears Manufacturing Co.: The End of the Good Faith Requirement in Work Disability***

Author: Brandon Lawson  
Evans & Dixon, L.L.C.

Kansas law allows a claimant's disability to be increased beyond the permanency found by physicians if an unscheduled injury results in permanent restrictions the employee cannot accommodate. If the claimant is not making at least 90 percent of their pre-injury wages, then she is entitled to work disability by averaging the task loss percentage and the wage loss percentage. K.S.A. § 44-510e(a). In 1995, the Kansas Supreme Court held that this statute implied that the claimant must make a good faith effort to find work for this to apply. *Foulk v. Colonial Terrace*, 887 P.2d 140 (Kan. App. 1995). This requirement, however, was recently abolished by the Kansas Supreme Court.

Ms. Bergstrom injured her back while working as a janitor for Spears. Because she could no longer perform her job tasks, she sought work disability. However, on appeal, the Board reduced Ms. Bergstrom's award because she failed to exercise good faith in finding a new position. The Supreme Court determined that because the statutory language did not include an explicit requirement of good faith, then one should not be implied. *Bergstrom v. Spears Mfg. Co.*, 214 P.3d 676 (Kan. 2009). Her full award for work disability was reinstated.

The Kansas Supreme Court took a hard line approach towards the Workers' Compensation statutes. The Court indicated that it would look only to the "express statutory language" in interpreting the statute and that it would not add anything to a statute "not readily found in it." *Id.* at 680. Beyond this simple analysis, the Court provided little guidance to how it would proceed on other questions.

The Court did not address or provide any guidance as to whether this would retroactively apply to cases which have been left open. In Kansas, a claimant has a right to future medical treatment and review and modification of the award, unless these rights are explicitly closed in a settlement. The right to review and modification includes the right to modification of disability. K.S.A. § 44-528. Therefore, a claimant whose case has been left open can theoretically seek to have it modified under the *Bergstrom* decision to add work disability if she becomes unemployed. If the Court determines that these cases can be modified, which is likely, then any unscheduled injury that is left open has the potential to become a work disability case if the claimant loses his job for any reason, including termination for cause. For this reason, full and final settlements on unscheduled injuries have become much more important and valuable.

We also anticipate attempts to apply the Court's logic beyond work disability. In the case of temporary total disability payments, we anticipate arguments from claimants' counsel that the *Bergstrom* decision requires that employees who are given work restrictions which are not accommodated must pay TTD, no matter what the employee's employment status is, including those who have been laid off or terminated for cause.

The *Bergstrom* decision also cause problems when viewed in light of the Court's recent decision in *Scheidt v. Teakwood Cabinet & Fixture, Inc.*, 211 P.3d 175 (Kan. 2009). In *Scheidt*, the Court allowed a case which had settled on a running award to be modified to include work disability even though Mr. Scheidt's injuries were no longer considered unscheduled because of the *Casco* decision. Under *Casco*, claimants could no

longer convert injuries to parallel body parts to unscheduled injuries. Considering this case in conjunction with *Bergstrom*, employers will also face exposure for work disability in those cases which are no longer considered unscheduled because of *Casco*.

Overall, *Bergstrom* vastly expands exposure in unscheduled injuries. Employees who are laid off or terminated will instantly have wage loss of 100percent, so even if their task loss is 0 percent, the work disability will average to 50 percent. While an act of the legislature could fix this problem, until that happens, employers and insurers should anticipate a large increase in claims for work disability after this decision.

For questions, please contact your Evans & Dixon attorney.

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## Evans & Dixon, L.L.C. Office Locations

### **Evans & Dixon, L.L.C.**

515 Olive St., Suite 1100  
St. Louis, Missouri 63101  
(314) 621-7755

### **Evans & Dixon, L.L.C.**

1717 E. Republic Dr. Suite C  
Springfield, MO 65804  
(417) 882-4700

### **Evans & Dixon, L.L.C.**

City Center Square  
1100 Main Street, Suite 200  
Kansas City, MO 64105  
(816) 472-4600

For more information, please visit us on-line at

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