

## **Kansas Supreme Court grinds up sausagemaker's claim**

by Boyd A. Byers

Benjamin Disraeli said that if someone loves sausage or the law, then he shouldn't watch either being made. That quip seems particularly fitting for a new court ruling in which a sausagemaker's workers' comp claim was run through the litigation meat grinder. Overturning a decision that stood for more than 75 years, the Kansas Supreme Court has changed the way benefits are calculated for workers who injure two body parts, such as both arms, both legs, or an arm and a leg. According to a lawyer who represents injured workers, the changes "are both far-reaching and devastating to many claimants' cases."

### ***Making sausage — literally***

Alejandro Casco worked in sausage production for Armour. His job duties included repetitively tying sausages, placing them in a box, and carrying the 20- to 25- pound box to another location. He suffered a repetitive-use injury to his left shoulder that he claimed was due to his employment. He underwent two surgeries on his left shoulder. He said that because of the injury and his resulting medical restrictions, he began overusing his right arm to perform his job. He then injured his right shoulder and had surgery on it.

Casco's doctor released him to return to work with permanent restrictions. Armour didn't have any jobs available within his restrictions, so it placed him on a leave of absence. He then moved to Maryland to live with his son.

A few weeks later, Armour informed Casco that a job within his restrictions had opened up and that he needed to report to work by a specific date. When he reported to work two weeks late, Armour told him the job was filled and there were no other positions available within his restrictions. Casco then went back to Maryland to look for work. He said he applied for 84 jobs but couldn't find employment within his restrictions.

A medical expert rated Casco's impairment as 27 percent for the left arm, six percent for the right arm, and 19 percent to the whole body. A vocational expert concluded that because of his restrictions, he could no longer perform 43.5 percent of the job tasks he used to be able to do and could expect a 37.5 percent loss in his ability to earn wages.

### ***Making sausage — figuratively***

Casco filed a workers' comp claim. The administrative law judge (ALJ) found that his right shoulder injury was "the natural and probable consequence of" the left shoulder injury, so the two injuries should be treated as one general body injury. The ALJ awarded him the maximum amount allowed for a permanent partial disability, \$100,000.

The Workers' Compensation Appeals Board rejected the ALJ's conclusion that Casco's right shoulder injury was the natural and probable consequence of his left shoulder injury. The board found that he suffered two separate accidental injuries on two separate dates and awarded him \$30,341 for the 27 percent disability to his left arm and \$4,338 for the six percent disability to his right arm.

Casco appealed to the Kansas Court of Appeals, which reversed the board's decision. Armour then asked for review by the Kansas Supreme Court.

The supreme court addressed two questions. The first question was whether Casco suffered one injury or two separate injuries. If the injury to his right shoulder was a necessary and probable consequence of the injury to his left shoulder, then it was one injury. The court found that it was one injury based on undisputed evidence that the injury to his right shoulder was caused by overcompensating for the injury to his left shoulder.

The second question involved the calculation of Casco's award. The Workers' Compensation Act governs the calculation of disability awards and contains a disability "schedule" for injuries to an eye, hand, arm, foot, leg, and other listed body parts. If a worker injures a scheduled body part, the amount of compensation is based on the schedule alone without regard to his loss in earning power. If an injury isn't included on the schedule, the compensation is based on the reduction in the worker's ability to perform work in the open labor market and to earn comparable wages. Nonscheduled injuries are usually worth more than scheduled injuries if the worker is unable to work following the injury.

In 1931, the Kansas Supreme Court created the "parallel injury rule," which provides that an injured worker may receive compensation based on a permanent partial general disability rather than scheduled injuries if he simultaneously injures "parallel members," such as two arms or two legs. In Casco's case, the court concluded that its ruling 76 years earlier was based on an incorrect reading of the law and overturned it.

The court then fashioned a new rule: If a worker has injured both eyes, both hands, both arms, both feet, both legs, or any combination of those body parts, there's a rebuttable presumption in favor of permanent total disability. If the presumption is not rebutted, his compensation is calculated as a permanent *total* disability. If the presumption of permanent total disability is rebutted with evidence that the worker is capable of engaging in any type of substantial and gainful employment, his award is calculated as a permanent *partial* disability under the schedule.

The court said that because Casco suffered from the loss of both arms, there's a rebuttable presumption of permanent total disability. Because there was no finding about whether he is completely and permanently incapable of engaging in any type of substantial and gainful employment, the court sent the case back to the ALJ to decide that issue. If the ALJ finds that Casco isn't capable of engaging in any type of substantial and gainful employment, his compensation will be calculated based on a

permanent total disability. If the ALJ finds that he is capable of engaging in some type of substantial and gainful employment, his compensation will be calculated as two scheduled injuries. *Casco v. Armour Swift-Eckrich*, \_\_\_ Kan. \_\_\_, 154 P.3d 494 (2007).

### ***More sausage, anyone?***

This new ruling will reduce the amount of compensation awarded in many cases in which a worker injures two scheduled body parts and is unable to return to his job. That situation isn't uncommon given the large number of carpal tunnel syndrome cases. In the long run, the decision should save you money on your workers' comp premiums.

The impact of this case hasn't been lost on lawyers who represent injured workers, who refer to it as the "Casco fiasco." Don't be surprised if you see a bill to undo the decision introduced in the Kansas Legislature next year.