Getting paid to sit at home and refuse to work

by Boyd A. Byers

The Kansas Supreme Court has given malingering workers an early Christmas gift this year. The majority of the court reversed 15 years of judicial precedence in a way that, according to the Chief Justice Kay McFarland's dissenting opinion, will encourage injured workers "to merely sit at home, refuse to work, and take advantage of the workers' compensation system."

Foulk story

In 1993, Kansas lawmakers amended the provisions of the Workers' Compensation Act that are used to calculate the amount of a disability award. Permanent partial disability, or work disability, is the average of two percentages: (1) the worker's lost ability to perform her job tasks and (2) the difference between her pre-injury wage and post-injury wage. But if the worker is performing any work and earning 90 percent or more of her pre-injury wage, then her permanent partial disability compensation is limited to the percentage of her functional, or anatomical, impairment.

The Kansas Court of Appeals interpreted that new standard a year later in *Foulk v. Colonial Terrace*. The court concluded that the statute implicitly contains a requirement that injured workers make a good-faith attempt to work in order to avoid or limit lost wages due to their work impairments. So if an administrative law judge (ALJ) finds that an unemployed worker hasn't made a good-faith effort to work after an injury, then the ALJ assumes an appropriate post-injury wage based on the evidence presented, including any expert testimony about the worker's capacity to earn wages.

"Construing [the statute] to allow a worker to avoid the presumption of no work disability by virtue of [his] refusal to engage in work at a comparable wage would be unreasonable where the proffered job is within the worker's ability and [he] has refused to even attempt the job," the court wrote in the *Foulk* decision. "The legislature clearly intended for a worker not to receive compensation [when he] was still capable of earning nearly the same wage." The Kansas Supreme Court was asked to review the *Foulk* opinion but declined.

The Kansas Court of Appeals applied the *Foulk* good-faith rule in a series of cases over the next 15 years. The workers' comp review board and ALJs followed the standard in thousands of cases, and it was considered well-settled law.

Employers and insurers 'Speared'

In late 2009, the Kansas Supreme Court overruled the *Foulk* decision and all the other cases imposing a requirement that injured workers make a good-faith effort to limit their wage loss accepting or seeking post-injury employment. The majority of the court ruled that because the statute doesn't expressly state that an injured employee is required to *attempt to work*, or that disability is determined by whether the employee *is capable of*

engaging in work for wages equal to 90 percent or more of his pre-injury wage, the legislature must not have intended to impose any good-faith-effort requirement.

Chief Justice McFarland wrote a strong dissent in which she reasoned that if the legislature believed the court of appeals had incorrectly construed the law in the *Foulk* case, it would have corrected that error during one of the subsequent 15 legislative sessions. She stated that there wasn't even a suggestion that the good-faith-effort rule is unworkable or unsound.

She then quoted from the *Foulk* decision: "[I]t would be unreasonable for this court to conclude that the legislature intended to encourage workers to merely sit at home, refuse to work, and take advantage of the workers compensation system. To construe [the statute to allow a worker to avoid the presumption of no work disability by refusing to engage in work at a comparable wage] would be to reward workers for their refusal to accept a position within their capabilities at a comparable wage." That reasoning, she said, is as valid today as it was in 1994. *Bergstrom v. Spears Mfg. Co.*, 214 P.3d 676 (2009).

Fallout

The reaction to the *Bergstrom* ruling was predictable. Workers' comp defense lawyers pointed out that the ruling would immediately increase employers' liability exposure. A risk-management consultant wrote on his blog that it's the type of decision that could cause insurance carriers to pull out of the state and harden the workers' comp insurance market. Business interests and industry groups are expected to push Kansas lawmakers to amend the statute to re-impose the good-faith requirement on injured workers.