Safety Rules: The Employer Strikes Back

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In the defense of workers' compensation claims, employers are often frustrated by injured employees whose injuries could have been avoided by simply following the employer's well-communicated and emphasized safety rules. While an employee's negligence is no defense to a workers' compensation claim, there is an often-overlooked and little-utilized provision of the North Carolina Workers' Compensation Act that may help to soften the blow.

N.C. Gen. Stat. § 97-12 provides that "when the injury or death is caused by the willful failure of the employee to use a safety appliance or perform a statutory duty *or by the willful breach of any rule or regulation adopted by the employer and approved by the Commission and brought to the knowledge of the employee prior to the injury,* compensation shall be reduced by ten percent (10%)." Of course, this begs the question of how an employer would go about having its safety rules "approved by the Commission."

I spoke with Dennis Parnell, the Safety Education Director at the Industrial Commission, to obtain some clarification about this issue. Mr. Parnell indicated that the process would be initiated by having the employer's rules sent to the director's office for approval and to be kept on file with the Industrial Commission. He emphasized that the employer would send only the rules and regulations, and not the employer's full safety plan or safety program. After having an opportunity to review the submitted rules, the Commission Safety Section will either approve the safety rules or disapprove them and will notify the employer of its decision.

Industrial Commission Agency Legal Specialist Abigail Hammond indicated that the employer rules approval process is so infrequently utilized by employers that she could not be sure as to the appeal process, or if there even is such a process in the event the safety rules as submitted are disapproved. She speculated that any appeal would probably need to ultimately go to a deputy commissioner or special deputy commissioner for review. Further, she confirmed that safety rules cannot be approved retroactively, i.e. even if an employee willfully ignores a safety rule, the 10% reduction cannot be applied if the rule was not already approved by the Commission on the date of injury

Mr. Parnell further specified that in order for the 10% penalty to be enforced against a claimant's award of benefits (after the safety rule is already approved), the employer would submit an application to the Executive Secretary. Ms. Hammond speculated that because the employer would need to prove certain factual elements in addition to the Commission approval in order for the 10% reduction to apply (such as willful failure to comply and employee knowledge of the rule), it is likely that an evidentiary hearing before the Deputy Commissioner would ultimately be required. There is, however, no specific form or format for the submission of this request because of the infrequency with which this provision is utilized.

In speaking with Ms. Hammond, it became clear that this is a rarely asserted claim by employers. At best, the legal specialist could only speculate about the proper procedure or method for asserting the 10% penalty, but these were her suggestions. She recommended applying to the Commission for enforcement of the penalty simultaneously when the Form 60 is filed or along with a Form 26A in the case of a request for a reduced award based on an admitted permanent partial impairment rating. Presumably, in the case of a denied claim, the employer would submit the request for a 10% reduction as a proposed alternative award following an opportunity to present evidence in support of the reduction in the event the claim is deemed compensable. Again, due to the infrequent use of this provision, there does not appear to be an established, concrete procedure.

There is a cautionary flashing yellow light of which employers need to be aware. Mr. Parnell stated that in the event the employer's rules are on file with the Commission, and the rules provide that certain safety equipment (i.e. a helmet) would be provided to the employee, and such equipment was not, in fact, provided, the employee would be in a position to apply for a 10% increase in compensation. The statute includes a provision for a 10% increase in compensation when the employer willfully fails to comply with a statutory requirement or Commission order, but there is no language specifically supporting the safety director's statement. Not surprisingly, Ms. Hammond refused to provide any guidance with regard to the Mr. Parnell's statement when asked about the ramifications of such a scenario because she was not permitted to provide legal advice or statutory interpretation. Once again, the "on a case by case basis" was the mantra of choice. Thus, it remains a realistic possibility that such an interpretation may be utilized by the Commission, and employers need to be careful not to open themselves up to another avenue for an employee to obtain a 10% increase in compensation due to the employer's non-compliance with its own rules on file with the Commission.

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