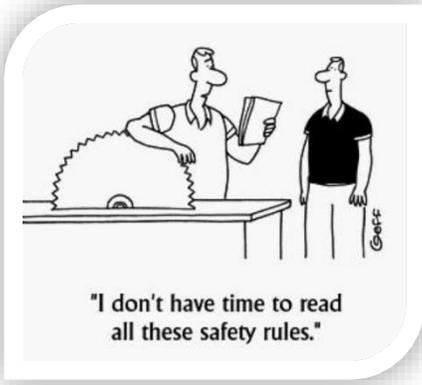


How to Protect Your Right to Take a Safety Rule Penalty in a Workers' Compensation Claim

by
Drew Rzepiennik, Attorney
Ruegsegger Simons Smith & Stern



When an injury is caused by the willful failure of an employee to use safety devices provided by the employer or by the willful failure of an employee to obey any reasonable rule adopted by the employer for the safety of the employee, the employer or their insurer can claim a 50% reduction of workers' compensation indemnity benefits. See C.R.S. §8-42-112(1)(a)(b). The safety rule penalty encourages employers to have strong safety policies, with an added incentive for employee compliance. Assessing this penalty can result in a significant savings for the employer and the insurer depending on the seriousness of the injury.

That seems fairly straight forward. If an employee violates your safety rule, and suffers an injury from that violation, the employee's compensation benefits can be reduced by 50%.

However, as is the case with many things in the "work comp world", enforcing the safety rule penalty can be tricky. Keep in mind that an employee's attorney will almost always challenge a safety rule penalty because of the significant financial impact the employee stands to suffer if the penalty is enforced. These challenges have resulted in the safety rule penalty being riddled with exceptions and defenses that often make it hard to enforce the 50% offset.

The following is a list of things you can do to help you defend your right to take the safety rule penalty:

- **Put Safety Rules in Writing:** A safety rule does not need to be in writing to be enforceable. However, in practicality it is nearly impossible to enforce an unwritten safety rule. A safety rule that is not reduced to writing provides too much room for interpretation, variance, or excuse for violations. Also, make sure your written rules require compliance with all product or equipment safety warnings as well.
- **Have Employees Confirm That They Have Received and Reviewed Safety Rules:** One of the primary factors considered by a judge is whether the safety rule violation was "willful." It is common for the employee to argue that they never received the safety manual, never read the manual, or did not understand the requirements of the safety rule. The best way to defend against this excuse is to have employees review and sign the safety manual (and any changes or amendments) confirming that they have received and understand the rule. These signed forms should be kept in the employee's file for future use should a safety rule issue arise.
- **Conduct and Document Safety Meetings:** It is very easy for an employee to say that they either forgot or did not understand a particular safety rule. However, if you conduct regular safety meetings where you address safety rules it is very difficult for a judge to believe that an employee did not know or understand the policies. Every safety meeting should have a sign-in sheet and document the safety rules that were discussed. Judges can be more easily persuaded by documents that prove that the employee was present at a safety rule meeting where the safety rule was discussed. Also consider short safety quizzes after each meeting that confirm that your employees understood of the safety topic addressed.

- **Consider Language Barrier Issues:** Very often an employee will argue that he did not understand the safety rule because the information provided was in a language that he did not understand. Consider having all meetings in both English and any other primary language used by your workers. All safety rules should be written in both English and the other languages as well. Likewise, all sign-in sheets and quizzes should take into consideration any language barriers that may exist.
- **Enforce Safety Rules and Document Violations:** The most frequent reason given by a judge when rejecting imposition of the penalty is the lack of enforcement of the rule or policy by an employer. It is essential that you uniformly and consistently enforce safety rules and document violations in all circumstances. Employees very often argue that a written rule was not taken seriously and judges will “bite” on this argument. On-site documentation can be as simple as a short summary noting that a violation was observed and the follow-up actions to be taken, if any. More formal actions can be addressed by human resources or management if necessary. The simple fact of documenting the violation and providing a write-up is essential to establishing consistent enforcement at the time of a hearing. It is recommended that you keep a separate file for safety rule violations or disciplinary action so that when it comes time for you to prove that safety rules are uniformly enforced, it is just a matter of handing the safety rule file over to your counsel or carrier for review and use at hearing.
- **Consider Safety Spot Checks:** One of the easiest ways to show that you are serious about enforcement of safety rules are safety spot checks. Many of you do this as part of your business practice already. However, documenting these safety checks is the key, particularly in those situations where your employees may often work alone or without direct supervision. Again, judges are very persuaded by evidence that is documented, as opposed to “he said – she said” disputes. Keep in mind that documentation does not have to be a burdensome process. A simple check-off form can be used at the work-site noting that a safety inspection occurred and what violations were addressed. Keep a separate file of these for easy access should an issue arise in the future.
- **Educate Supervisors and Foremen:** It is imperative that you tell those in the trenches the importance of following safety rules, enforcing rules, and documenting violations. Supervisors and foremen should be aware of the reasons enforcement and documentation is essential and the affect this can have on workers’ compensation claims and other aspects of your business. Most importantly, supervisors and foremen should be the “shining light” of safety at all times. It should be very difficult for any employee to allege at a hearing that violations were accepted, ignored, or overlooked on your jobsite, especially by supervisors and foremen.
- **Do Not Make Exceptions:** Over the years I seen employees argue that they either had to violate a safety rule, or were directed to violate a safety rule, in order to accomplish the assigned task. A judge will bite on this defense and refuse to apply the penalty. Take for example an employee who violates a safety rule to not stand on the top rung of a ladder. As may be predicted, he falls and suffers an injury. The employee at the time of hearing alleges that he had to violate the rule to reach a particularly high area where he was working. There were no other ladders at the site for the employee to use and he needed to stand on the top rung to finish his assignment. Based on this evidence the safety rule penalty was rejected by the judge. Employees should be told that they should not violate a safety rule under any circumstance. Again, this advisement should be in writing. Also, make sure that your employees have the necessary equipment, or can ask for the necessary equipment, to safely accomplish the job.
- **Document the Safety Rule Violation at the Time of Any Injury:** If an employee is injured, thoroughly document any safety rule violation that may have contributed to the injury. Gather any witness statements, take any relevant pictures, obtain any surveillance video that may exist on the job site, and preserve this information where it can be easily accessed if needed. No matter how minor the injury, assume that a workers’ compensation issue may arise in the future. Having these materials preserved

will help you reduce your exposure and assist your carrier defend your workers' compensation claim when necessary.

Unfortunately, even the simplest of concepts in the workers' compensation arena can become complicated. Creating a simple process that can be duplicated on a daily basis is key. If you need help putting together a safety policy that best preserves your rights under the Colorado Workers' Compensation Act, please feel free to contact me Drew Rzepiennik at 303-575-8096 for any advice.

**** Note: The information contained in this document does not convey legal advice of any kind. Please consult your attorney for advice on the application of the law to the specific facts of your case or legal problem.**

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