A Word on MO Safety Penalties

By: Chris Archer, 2019

287.120. Safety Penalties

For the Claimant:
4. Where the injury is caused by the failure of the employer to comply with any statute in this state or any lawful order of the division or the commission, the compensation and death benefit provided for under this chapter shall be increased fifteen percent.

For the Employer:

5. Where the injury is caused by the failure of the employee to use safety devices where provided by the employer, or from the employee's failure to obey any reasonable rule adopted by the employer for the safety of employees, the compensation and death benefit provided for herein shall be reduced at least twenty-five but not more than fifty percent; provided, that it is shown that the employee had actual knowledge of the rule so adopted by the employer; and provided, further, that the employer had, prior to the injury, made a reasonable effort to cause his or her employees to use the safety device or devices and to obey or follow the rule so adopted for the safety of the employees.

Comments and Notes:

1. Be mindful that highlighting the issue can end up hurting you if the claimant can make a case for the penalty to be applied against the employer.
2. OSHA regulations are not applicable as they are Federal law and not a "statute in this state." Most penalty issues against employer are made referencing Chapter 292 of the revised statutes of Missouri.
3. The safety penalty is assessed against the employer directly, not its' workers' compensation carrier. Separate legal counsel may be needed if a conflict arises between the employer and its carrier.
4. For either penalty, it is assessed against the total of benefits paid including TTD, PPD and the medical expense incurred. (See *Nolan* case from Intoxication section applying intoxication penalty to medical- Commission has applied safety penalty to med expense incurred)
5. For accidents after 8-28-05, only requirements are necessary for an Employer to assert a penalty:

    1. **actual knowledge of the rule on behalf of the employee; and**

    2. **showing of reasonable effort to cause employees to follow rule or use safety device by the Employer; and**

    3. **the injury was impacted by the failure of the employee to follow the policy**

Because of omission of the requirement for a "willful" violation and record of "diligent" enforcement (now it has to be simply reasonable effort); as well as the elimination of the posting requirement- this provision could be implicated in a greater number of cases.

Case Notes:

Carver v Delta Innovative Services WD 2012

The claimant suffered a back injury on October 1, 2007 while carrying a 100-pound roll of composite weather barrier roofing material up a ladder. The claimant testified that he felt immediate pain in his back and leg while carrying the load up the ladder. The Employer argued that the claimant caused his own injury by failing to follow its "three-point" safety rule while climbing a ladder. As a general matter, the three-point rule requires that workers continuously maintain three points of contact with a ladder at all times. Roofers are supposed to use a hand pulley or power equipment, or request the assistance of a coworker, to lift materials to the top of the ladder.

The court reversed the application of the penalty and remanded the case back to the commission finding that there was insufficient evidence and factual findings to support the application of the penalty. "Given that there was substantial evidence in the record which would support a contrary conclusion, the Commission was required to make explicit factual findings concerning the "basic facts" which support its determination that Delta "made a reasonable effort to cause [its] employees ... to obey or follow the [three-point] rule." Without such findings, we cannot meaningfully determine whether the Commission's ultimate conclusion on this issue was supported by substantial and competent evidence. For this reason, we must remand the case to the Commission, for the entry of more specific findings addressing the facts necessary to support a reduction under § 287.120.5."

An Employer has the burden of proof in asserting a safety penalty including specific evidence on how "**the employer... made a reasonable effort to cause [its] employees … to obey the safety rule[s].**" Section 287.120.5 RsMo 2005

Terry Hornbeck v Spectra Painting ED 2011

Claimant was injured in a compensable work-related accident and asserted that the Employer violated the Scaffold Act, section 292.090 RsMo. They asserted that the violation of this state safety statute mandates application of a 15% penalty on all benefits and compensation inclusive of medical expenses paid or awarded. The court agreed and applied the 15% penalty as against all forms of compensation including the medical expenses paid or awarded as against the Employer but refused to include the value of the compensation awarded as against the Second Injury Fund.

Eddie Thompson v ICI American Holding f/k/a National Starch and Chemical WD 2009

Claimant sustained serious injuries in an accident that occurred when he failed to follow a lock-out, tag-out safety rule and policy when repairing a piece of machinery at his place of employment. The ALJ found that accident occurred as a result of claimant's failure to follow the safety policy, and assessed a 37.5% penalty against the value of TTD, PPD and medical expenses in total that were provide or ordered in the case. The commission affirmed the award of the ALJ.

The court found the changes made to section287.120.5 RsMo in 2005 were constitutional and did not violate the equal protection clause of the Missouri Constitution. On the argument made that the Employer did not "enforce" the lock-out tag-out policy, the court stated that the statute only requires: "the employer to have made a reasonable effort to cause [its] employees … to obey and rule[s]." section 287.120.5 RsMo 2005