

ADVISORY NO. 296
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TOPIC: NEW OSHA ERGONOMIC RULES
WILL AFFECT WORKERS' COMPENSATION

The Occupational Safety and Health Administration (OSHA) has adopted an ergonomics program standard, the purpose of which is “to reduce the number and severity of musculoskeletal disorders (MSDs) caused by exposure to risk factors in the workplace.” These rules are based upon the premise that MSDs are associated with physical work activities and that reducing ergonomic risk factors reduces MSDs, such as carpal tunnel syndrome, despite a significant body of scientific literature to the contrary. The effective date of the rules is January 16, 2001, in the absence of a stay of the rule. A lawsuit was filed on November 20, 2000, in the U.S. Circuit Court of Appeals for the District of Columbia challenging the legitimacy of the ergonomic standard.

A significant component of the rules is an implementation of “work restriction protection” (WRP). This is a requirement for maintaining an injured employee’s employment rights, wages, and benefits, when temporary work restrictions are necessary because of an MSD. If an employee alleges an MSD, the employer must provide, at no cost to the employee, access to a healthcare professional (HCP), any necessary work restrictions, including time off to recover, work restriction protection, and evaluation and follow up of the MSD incident. The employer must obtain a written opinion from the HCP for each evaluation, and must instruct the HCP that the opinion may not include any findings or information that is not related to the workplace exposure to the risk factors.

Accordingly, the sole purpose of the exam is to inform the employer about the workplace hazard and how to remediate it (and not whether something else may be contributing to the problem). Therefore, the HCP may not communicate information about other possible contributing causes of the MSD to the employer except where authorized to do so by State or Federal law. Because causation is a threshold issue in Worker’s Compensation, this information is “authorized” by Texas law and indeed it is a common communication. If the claimant also presents a claim, one would think that the HCP would have to comment about other contributing causes, especially upon request of the carrier or the Commission. The phrase “when authorized” is not otherwise defined.

If the employer selects an HCP, the employee may select a second HCP to review the first HCP’s finding at no cost to the employee. If the two HCPs disagree, the employer must take

reasonable steps to arrange for the two HCPs to discuss and resolve their disagreement. If they are unable to, the employer and the employee, through the respective HCPs, must designate a third HCP to review the determination of the two HCPs. The employer must act consistently with the determinations of the third HCP in the absence of an agreement between the employee and the employer.

If the employee has restrictions that are accommodated by the employer, the employer must maintain the employee's employment rights and benefits, and 100% of his or her earnings, until the earlier of the ability of the employee to return to the former work, an HCP determines that the employee can never resume his or her former work, or 90 calendar days have passed. If the employee must take time off from work, the employer must provide the employee's employment rights and benefits and at least 90% of his or her earnings until one of the three previously mentioned incidents occur. Note: There is no limitation on the number of times that this occurs.

Theoretically, an employee may return to work for one day after being off for 90 days, and if the HCP determines that the employee should be off again, the 90-day clock restarts. In addressing a concern that this might be abused, OSHA rejected it as not "realistic," stating:

While there may be some unusual instances in which employees will legitimately need work restrictions more than once in a year for the same job, employers need not allow employees to cycle endlessly in and out of WRP. If an employee requires work restrictions on several consecutive occasions despite the fact that the MSD hazards have been controlled to the extent required in the standard, that is a strong indication that the employee is physically unable to perform the job.

These new rules will affect workers' compensation in Texas. Section 4(b)(4) of the Occupational Safety and Health Act provides:

Nothing in this Act shall be construed to supercede or in any matter affect any workman's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

OSHA interprets this provision as prohibiting it from "legally preempting State workers' compensation law," noting that, "even if WRP were to have a 'great practical effect' on State workers' compensation systems, it would not violate Section 4(b)(4) so long as it left the State's scheme 'wholly intact as a legal matter', whatever that means. Thus OSHA intends that these rules survive the almost certain Section 4(b)(4) challenge that they are an unlawful infringement

upon the regulation of workplace injuries reserved to State workers compensation systems.

The preamble to the rule states that there is no “evidence to support the assertion that WRP will have a significant practical effect on State workers’ compensation systems.” Nothing in the standard requires the employers to pay for or provide medical treatment. If such is required, the employee must file a claim for compensation. Secondly, with the exception noted above, the employer is only liable for 90 days of salary continuation. Further, the employer’s “obligation to provide WRP benefits to a temporarily restricted or removed employee is reduced to the extent that the employee receives compensation for earnings lost during the work restriction period from either a publicly or an employer funded compensation or insurance program, or receives income from employment made possible by virtue of the employee’s work restriction.” Therefore, the employer is only required to make up the difference between that which is provided by the workers’ compensation carrier and the WRP benefit amount required.

One concern was raised that whenever the workers’ compensation system delays benefits for any legitimate reason, the worker is paid WRP, and then is later paid for the same lost time work by the workers’ compensation carrier. The argument was that the employer has no legal mechanism for recapturing that portion of the WRP pay that was supposed to be offset. However, in Texas, TWCC Rule 129.2(c)(6) does provide that the workers’ compensation carrier can utilize any monies paid by the employer as salary continuation in calculating the post-injury earnings for purposes of determining the amount of temporary income benefits. Therefore, in Texas, the employee/claimant should not receive a double recovery. However, in the event of an erroneous overpayment by a carrier unaware of an OSHA mandated salary continuation, absent a recoupment from IIBs, there is no provision under Texas workers’ compensation law for the carrier or employer to be reimbursed. Other benefit coordination issues may arise because of the independent requirements imposed upon the different payors.

It would further appear that these new ergonomic rules will significantly frustrate the return-to-work programs established by the Texas Workers’ Compensation Act and Rules. OSHA rejected these concerns as not “legitimate”. OSHA’s rationale was that “the vast majority of workers who receive WRP because they are removed entirely from work, therefore, will receive approximately the same amount of money with WRP as they would under most State workers’ compensation systems. Because WRP and TTD benefits are approximately equal, WRP is no more repugnant to the ‘return-to-work’ philosophy than are State workers’ compensation systems.” However, this is absolutely incorrect with respect to the Texas workers’ compensation system. The employer-mandated payment is 90% of the employee’s wages versus 70% to 75% under workers compensation. A 90% wage continuation would substantially erode any immediate financial incentive to return to work.

Under the new OSHA standards, the employer is bound by the HCP selected under that system,

which may be a doctor completely outside of the workers' compensation system. However, under the Workers' Compensation Act and Rules, the obligation is not so narrowly defined. Rule 129.6(f) defines five different doctors whose opinions may be binding upon the employee. If the claimant refuses the offer of employment, then the carrier is entitled to reduce the claimant's temporary income benefits accordingly. However, if the OSHA HCP indicates the claimant has no ability to work, or restrictions that cannot be accommodated by the employer, regardless of the credibility of those, the employee not only will receive continued benefits for being off work, but will receive benefits significantly higher than those established under the Texas Workers Compensation Act. Therefore, the claimant has a disincentive to return to work, rather than the incentive provided by the Texas Workers' Compensation Act. OSHA's response is: "The mere fact that WRP has a 'different' benefit level and does not contain maximum or minimum levels does not mean that it 'supercedes' or 'effects' State workers' compensation systems.

Because of the way that the new OSHA standards obviously frustrate the return-to-work provisions of the Texas Workers Compensation Act and Rules, it is difficult to see how it could be argued that it does not supercede substantial portions of the Texas Workers Compensation Act. Nevertheless, in the absence of a successful lawsuit, or a repeal of these rules by OSHA under a different administration, employers will be bound by them. Pursuant to TWCC Rule 120.3, employers will be required to report any benefits provided to the claimant under the WRP to the workers compensation insurance carrier to insure that the proper benefit amount is paid. Likewise, the insurance carrier will need to keep the employer apprised of the payment or non-payment of the benefits so as to insure that the employer does not take an offset for benefits that are not paid, or pays benefits that are not due.