

1904.12 and 1904.29(b)(7)(vi),³ regarding musculoskeletal disorders ("MSDs"). See 66 FR 52031. On July 1, 2002, OSHA published a final rule establishing a new standard for the recording of occupational hearing loss cases for calendar year 2003. See 67 FR 44037. However, because OSHA was still uncertain about how to craft an appropriate definition for musculoskeletal disorders, and whether or not it was necessary to include a separate column on the OSHA log for the recording of these cases and occupational hearing loss cases, OSHA simultaneously published a proposed delay of the effective dates of these provisions, from January 1, 2003 to January 1, 2004, and requested public comment on the provisions. See 67 FR 44124. On December 17, 2002, OSHA published a final rule adopting the proposed delay. See 67 FR 77165.

Prior to OSHA's final rule, the recordkeeping rule had no specific threshold for recording hearing loss cases. See 67 FR 44038. The Final Rule established a new 10-dB standard at 29 CFR 1904.10:

If an employee's hearing test (audiogram) reveals that a Standard Threshold Shift (STS) has occurred, you must record the case on the OSHA 300 Log by checking the "hearing loss" column. * * * A standard Threshold Shift, or STS, is defined in the occupational noise exposure standard at 29 CFR 1910.95(c)(10)(i) as a change in hearing threshold, relative to the most recent audiogram for that employee, of an average of 10 decibels (dB) or more at 2000, 3000, and 4000 hertz in one or both ears.

See 66 FR 6129 (January 19, 2001). On October 12, 2001, OSHA delayed the provision until January 1, 2003, in order to seek comments on what should be the appropriate hearing loss threshold. See 66 FR 52031. As an interim policy for calendar year 2002, OSHA added a new paragraph (c) to 29 CFR 1904.10 that adopted the 25-dB standard set forth in OSHA's enforcement policy, which had been in effect since 1991, and which was FRA's approach at the time of this rulemaking.⁴ The enforcement policy

stated that OSHA would cite employers for failing to record work-related shifts in hearing of an average of 25 dB or more at 2000, 3000, and 4000 Hz in either ear. Thus, the hearing loss of an employee would be tested by measuring the difference, or shift, between the employee's current audiogram and the employee's original baseline audiogram. See 67 FR 44037, 44038. If the shift was 25 dB or more, OSHA required that it be recorded. The employee's original baseline audiogram is one of two starting points, or baselines, from which you can measure a Standard Threshold Shift (STS), the other being audiometric zero.

Audiometric zero represents the statistical average hearing threshold level of young adults with no history of aural pathology, thus it is not specific to the employee. This is the starting point from which the American Medical Association (AMA) measures a 25-dB permanent hearing impairment. The employee's original baseline audiogram, on the other hand, is taken at the time the worker was first placed in a hearing conservation program.⁵ This starting point, which has been enforced by OSHA since 1991 and is the starting point in use by FRA until the effective date of this final rule, fails to take into account any hearing loss that the employee has suffered in previous jobs and can present a problem if the employee has had several successive employers at high-noise jobs.

Thus, if an individual employee has experienced some hearing loss before being hired, a 25-dB shift from the employee's original baseline would be a larger hearing loss than the 25-dB shift from audiometric zero that the AMA recognizes as a hearing impairment and disabling condition. For example, if an employee experienced a 20-dB shift from audiometric zero prior to being hired in a job where he later suffered a 15-dB shift hearing loss from his original baseline audiogram, the AMA would count this as a 35-dB shift, a serious hearing impairment, but under OSHA's enforcement policy (and FRA's approach prior to this final rule), this would only have counted as a 15-dB

or more at 2000, 3000, and 4000 hertz in either ear. Documentation of a 10 dB shift is not, of and by itself, reportable. There must be a determination by a physician * * * that environmental factors at work were a significant cause of the STS. However, if an employee has an overall shift of 25 dB or more above the original baseline audiogram, then an evaluation must be made to determine to what extent it resulted from exposure at work."

⁵ Not all employees are placed in a hearing conservation program. OSHA only requires such a program to be in place in general industry when the noise exposure exceeds an 8-hour time-weighted average of 85 dB.

shift that is not recordable under OSHA's enforcement policy or 29 CFR 1904.10 for calendar year 2002. In order for it to become recordable, the employee would have had to suffer an additional 10-dB shift, which would mean that the employee would have suffered a 45-dB shift from audiometric zero—almost twice the amount that the AMA considers to be a permanent hearing impairment.

After considering several comments demonstrating that a 25-dB shift from an employee's original baseline audiogram was not protective enough and that a 10-dB shift from an employee's original baseline audiogram was overly protective (and more appropriate as an early warning mechanism that should trigger actions under the Occupational Noise Exposure Standard⁶ to prevent impairment from occurring), OSHA adopted a compromise position that made a 10-dB shift from an employee's original baseline audiogram recordable in those cases where this shift also represented a 25-dB shift from audiometric zero.

Proposal

As OSHA's new approach to defining and recording occupational hearing loss cases was not before the Working Group when consensus was reached, FRA sought comment on whether FRA should adopt OSHA's new (2003) approach as FRA's fixed approach, beginning on the effective date of FRA's final rule, or whether FRA should diverge from OSHA and continue to enforce OSHA's 2002 approach (which was approved by the Working Group and the RSAC and was the same as FRA's approach at the time of this rulemaking) as a fixed approach beginning on the effective date of FRA's final rule. See proposed *Guide* at Ch. 6, pp. 27–28, and Appendix E, p. 4.

Comments

In its written comment, AAR strongly opposed the adoption of OSHA's new policy "without any discussion of the wisdom of the policy by the RSAC working group considering the issues posed in this proceeding." AAR also noted that the policy would result in a greater number of hearing loss cases being reported by the railroad industry and result in an adverse trend in the occurrence of railroad injuries

⁶ Under 29 CFR 1910.95, employers must take protective measures (employee notification, providing hearing protectors or refitting of hearing protectors, referring employee for audiological evaluation where appropriate, etc.) to prevent further hearing loss for employees who have experienced a 10-dB shift from the employee's original baseline audiogram. See 67 FR at 44040–41.

³ The effective date of the second sentence of § 1904.29(b)(7)(vi), which states that musculoskeletal disorders are not considered privacy concern cases, was delayed until January 1, 2003 in OSHA's October 12, 2001, final rule. On July 1, 2002, OSHA proposed to delay the effective date of this same provision until January 1, 2004. See 67 FR 44124. On December 17, 2002, OSHA adopted this proposed delay. See 67 FR 77165. This provision will be discussed in the context of privacy concern cases in the section-by-section analysis at "III.G.1." of this preamble.

⁴ See 1997 *Guide* at Appendix E, p. 4. FRA's Occupational Illness Code #1151 in the 1997 *Guide*, concerning noise-induced hearing loss, provides in part: "An STS is a change in hearing threshold relative to a baseline audiogram that averages 10 dB