

regardless of the railroads' actual performance.

At the post-NPRM working group meeting, FRA replied that the RSAC Working Group was able to consider only one approach at the Working Group meeting: whether or not to adopt OSHA's *old* enforcement policy (that was finally put into rule form), which was essentially the same as FRA's policy at that time. In contrast, OSHA was able to consider this issue in more detail and over a greater period of time than was FRA, as is evident from the overview of OSHA's evolved position on this issue.

AAR acquiesced in accepting the criteria for reporting, but was concerned that there would be increases in reportables for the first few years, as OSHA had estimated that this new change would result in a significant increase in cases. AAR asked FRA to consider reporting the hearing loss cases under covered data, spread over three years. After the meeting, AAR sent a letter to FRA dated December 13, 2002, echoing the concerns expressed at the meeting.

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OSHA also noted concern among employers because the application of the new criteria in 29 CFR 1904.10 would result in an increase in recorded hearing loss cases. *See* 67 FR 44038–40. However, after recognizing that the new criteria will capture more hearing loss cases, and that caution must be used when comparing the future data with prior years, OSHA emphasized that by requiring an employer to record only those STSs that exceed 25 dB from audiometric zero, the regulation “assures that all recorded hearing losses are significant illnesses.” *See* 67 FR 44040. In the discussion of its decision, OSHA concluded that it would be inappropriate to adopt a policy of recording only 25-dB shifts from the employee's baseline audiogram as this would “clearly understate the true incidence of work-related hearing loss.” *See* 67 FR 44040–41. Additionally, aligning the recording threshold with the STS criterion in OSHA's Noise Standard will provide more opportunities for employer intervention and prevention of future hearing loss cases. *See* 67 FR 44046. Thus, OSHA was fully aware of the expected increase in occupational hearing loss cases, but nevertheless concluded that it was very important that this data be collected. FRA agrees. The importance of capturing the true magnitude of work-related hearing loss; is justification alone for adopting these criteria; however, it is important to note that the

increase in the number of reportables will be partially offset by OSHA's reclassification as non-reportable many events that previously were reportable.⁷ Because the Working Group could not reach full consensus, the issue was presented to FRA for resolution. Upon careful consideration and review of AAR's comments and letter, FRA has decided not to include occupational hearing loss cases under covered data. Note that, for clarification and simplicity, the rule text definition has been amended to reflect the actual recording criteria used by OSHA (for calendar year 2003 and beyond) rather than the citation to the relevant section of OSHA's regulation. This amendment does not represent a substantive change from OSHA's criteria.

Proposal

As noted above, OSHA is reconsidering the definition of musculoskeletal disorder and the requirement of having a separate column on the OSHA 300 log for the recording of MSD and occupational hearing loss cases, having delayed these provisions until January 1, 2004. *See* 67 FR 77165. As the issue of OSHA's proposed delay was not before the Working Group when consensus was reached and the delay had not been adopted by OSHA prior to the publication of FRA's NPRM, FRA sought comment on whether or not the definition and column requirements should be adopted if OSHA's proposed January 1, 2004 delay took effect. It was noted in the NPRM that if FRA were to go forth with the provisions as approved by the Working Group, FRA would be adopting these provisions in advance of OSHA, a result that may not have been contemplated by the Working Group when it agreed to follow OSHA on these issues prior to the proposed delays.

In the event that OSHA chose not to delay the effective date of these provisions, FRA sought comment on whether or not to diverge from OSHA by not adopting the definition or column requirements, since FRA already had its own forms and methods in place to collect this data for OSHA's purposes. Instead of requiring railroads to record cases and check boxes on the OSHA 300 log, FRA requires railroads to report these cases using assigned injury codes on the FRA Form F 6180.55a. Code 1151, for example, is the code for occupational hearing loss cases, thus no additional column would be necessary. Similarly, the different kinds of injuries

that could qualify as an MSD are given separate codes. Once OSHA decides what types of injuries are appropriate to include in the category or definition of an MSD, OSHA would be able to identify the MSD cases by their respective code numbers, thereby allowing OSHA to use FRA's data for national statistical purposes. Although it is not practical for FRA's injury codes to be as extensive as OSHA's codes, it would be possible to amend the *Guide* so as to reflect the major codes recognized by OSHA and to add a category such as “Other MSDs, as defined by OSHA in § 1904.12.”

FRA also sought comment on whether or not a definition of an MSD was necessary, since FRA had no special criteria in its regulations beyond the general recording criteria for determining which MSDs to record, and because OSHA's definition appeared to be used primarily as guidance for when to check the MSD column on the 300 Log. *See* 66 FR 6129–6130.

Comments

AAR believes no purpose would be served by having separate columns, since OSHA would still be able to use FRA's data for statistical purposes without adoption of this requirement. Although no specific comments were received regarding the adoption of a definition of an MSD, FRA raised the issue at the post-NPRM Working Group meeting. FRA pointed out that there were no special reporting criteria for MSDs and that there may be more problems in trying to delete the definition than to leave it in. Because MSDs must be independently reportable, there seemed to be little or no effect on the regulated community by retaining the proposed definition. AAR indicated that it was inclined to leave the definition in, but might reconsider the issue and provide FRA with a position on the issue after the meeting. However, no further comments were received.

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Since FRA already has its own forms and methods in place to collect data on occupational hearing loss and MSD cases for OSHA's statistical purposes, and because OSHA has not yet adopted the column requirement, FRA has not adopted the column requirement for the reporting of occupational hearing loss and MSD cases in its final rule. Additionally, for the reasons stated above, FRA has adopted the MSD definition as proposed. *See also* the discussion of deleting the exclusion of MSDs from the definition of “privacy concern case.” This difference will be

⁷ *See* later discussion concerning the definitions of “medical treatment” and “first aid” at section “III.J.3.” of this preamble.