

addressed in the MOU with OSHA, as appropriate.

#### Proposal

FRA also sought comment on whether the definitions of terms in its regulations should “float,” *i.e.*, change automatically anytime OSHA revises the definition of the term in its regulations, since the main purpose of this rulemaking was to bring FRA’s rule into general conformity with OSHA’s regulations (which are developed by OSHA after a full opportunity for notice and comment), or whether FRA’s adoption of a fixed and certain approach to the definitions of terms could better serve FRA’s safety objectives and the needs of the regulated community. This issue was particularly relevant for the proposed definition of “medical removal.” Because medical removal is such a complex issue, and one that is rarely, if at all, encountered in the railroad environment, FRA sought comment on whether this particular definition should “float” with OSHA’s. That is, should we word our definition so that it is tied to OSHA’s standard anytime OSHA might change that standard? Since the proposed definition<sup>8</sup> referenced OSHA’s standard without restating it within the rule text or preamble, this would appear to reflect the intent of the Working Group.

#### Comments

AAR commented that it was opposed to the concept of floating regulations, stating that there should be an opportunity for FRA’s regulated community to comment on the suitability of any changes in OSHA’s regulations since there is sometimes a need to differ from OSHA.

#### Final Rule/Decision

FRA still believes that with respect to issues that are not unique to railroading, AAR would have a full opportunity for notice and comment through OSHA’s rulemaking in the event that OSHA decides to change its regulations. However, FRA recognizes AAR’s concerns and has decided not to float the definition of “medical removal” or any other terms. Accordingly, any definitions that have been modeled on OSHA’s wording have been adopted by using the same or similar wording; any definitions that incorporate OSHA’s regulations by reference are noted as

adopting the year-specific version of such regulations.

#### Proposal

*Finally, OSHA added another category of reportable cases:* “significant injuries or illnesses.” With regard to the reportability of illnesses and injuries of railroad employees, there were at least three primary differences between OSHA’s reporting criteria and FRA’s reporting criteria at the time of this rulemaking, at least as stated in § 225.19(d). First, FRA required that all occupational illnesses of railroad employees be reported. *See* §§ 225.5 and 225.19(d)(4). By contrast, under OSHA’s Final Rule, only certain occupational illnesses are to be reported, namely those that: result in death, medical treatment, days away from work, or restricted work or job transfer; constitute a “significant illness”; or meet the “application to specific cases of [29 CFR] 1904.8 through 1904.12.” Second, for the reason that FRA’s interpretation of part 225 was already very inclusive, FRA’s § 225.19(d) criteria did not use the term “significant injuries,” which is incorporated in OSHA’s Final Rule. While FRA did not use the phrase “significant injuries” in its 1997 rule text, the 1997 *Guide* did require the reporting of conditions similar to OSHA’s “significant injuries.”

The distinction between medical treatment and first aid depends not only on the treatment provided, but also on the severity of the injury being treated. First aid \* \* \* [i]nvolves treatment of only *minor* injuries \* \* \* An injury is not minor if \* \* \* [i]t impairs bodily function (*i.e.*, normal use of senses, limbs, etc.); \* \* \* [or] [i]t results in damage to the physical structure of a nonsuperficial nature (*e.g.* fractures); \* \* \* 1997 *Guide*, Ch. 6, p. 6. Accordingly, under the 1997 *Guide*, fractures were considered not to be minor injuries, and a punctured eardrum was likewise not considered a minor injury because it would involve impairment of “normal use of senses.” *Id.* Third, FRA did not have “specific cases” reporting criteria for occupational injuries of railroad employees.

FRA proposed to conform part 225 to OSHA’s Final Rule with regard to these three differences by amending its regulations at § 225.19(d) and related definitions at § 225.5. FRA would, however, distribute the specific conditions specified under OSHA’s “significant” category (§ 1904.7(b)(7)) into injuries and illnesses, subcategories that OSHA could, of course, aggregate, and FRA would omit the note to OSHA’s description of “significant illnesses and injuries,” which did not appear to be necessary for a proper

understanding of the concept and which might have been read as open-ended, a result FRA did not intend. The text of the note is excerpted below:

Note to § 1904.7: OSHA believes that most significant injuries and illnesses will result in one of the criteria listed in § 1904.7(a) \* \* \*. In addition, there are some significant progressive diseases, such as byssinosis, silicosis, and some types of cancer, for which medical treatment or work restrictions may not be recommended at the time of the diagnosis but are likely to be recommended as the disease progresses. OSHA believes that cancer, chronic irreversible diseases, fractured or cracked bones, and punctured eardrums are generally considered significant injuries and illnesses, and must be recorded at the initial diagnosis even if medical treatment or work restrictions are not recommended, or are postponed, in a particular case.

29 CFR 1904.7(b)(7). FRA believed that the note was intended to reference a statutory issue not present in the case of FRA’s reporting system and could be omitted from FRA’s rule as not relevant and to avoid potential ambiguity. FRA also proposed to explain these new reporting requirements in the 2003 *Guide*. *See* later discussion of Chapter 6 of the 2003 *Guide*.

#### Comments and Final Rule/Decision

No specific comments were received on this issue. For the reasons stated above, FRA has adopted the amendments to the rule and *Guide* as proposed.

#### 2. FRA’s Reporting Criteria Applicable to Employees of a Contractor to a Railroad

##### Proposal

As previously noted, under the 1997 rule’s § 225.19(d), “Each event arising from the operation of a railroad shall be reported \* \* \* if it results in \* \* \* (1) Death to any person; (2) Injury to any person that requires medical treatment \* \* \*.” Under the “definitions” section of the accident reporting regulations, “person” included an independent contractor to a railroad. *See* 1997’s § 225.5. Reading these regulatory provisions together, deaths to employees of railroad contractors that arose from the operation of a railroad, and injuries to employees of railroad contractors that arose from the operation of a railroad and required medical treatment would appear to be reportable to FRA. (The 1997 *Guide*, however, narrowed the requirement through its reading of “arising from the operation of a railroad.”) FRA did not require reporting of occupational illnesses of contractors; under 1997’s § 225.19(d)(4), only the occupational illnesses of

<sup>8</sup> The proposed definition read: “Medical removal means medical removal under the medical surveillance requirements of an Occupational Safety and Health Administration standard in 29 CFR part 1910, even if the case does not meet one of the general reporting criteria.”