

designation “alleged” would be removed, and the record would be transferred to the reporting officer for retention and reporting in the normal manner. In the event the narrative block (Form FRA F 6180.98, block 39) indicated that the case was not reportable, the explanation contained in that block would record the reasons the railroad determined that the case was not reportable, making reference to the “most authoritative” information relied upon. Although the Form FRA F 6180.107 or equivalent would not require a railroad to include all supporting documentation, such as medical records, it would require a railroad to note where the supporting documentation was located so that it would be readily accessible to FRA upon request.

FRA believes that the system of accounting for contested illness cases described above will focus responsibility for these decisions and provide an appropriate audit trail. In addition, it will result in a body of information that can be used in the future for research into the causes of prevalent illnesses. Particularly in the case of musculoskeletal disorders, it is entirely possible that individual cases may appear not to be work-related due to an imperfect understanding of stressors in the workplace. Review of data may suggest the need for further investigation, which may lead to practical solutions that will be implemented either under the industrial hygiene programs of the railroads or as a result of further regulatory action. Putting this information “on the books” is a critical step in sorting out over time what types of disorders have a nexus to the workplace. See amendments to §§ 225.21, 225.25, 225.33, and 225.35 and new Chapter 13 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 and new form as proposed.

#### b. FRA Review of Railroads’ Work-Relatedness Determinations

##### Proposal

Concern arose within the Working Group regarding how FRA planned to review a reporting officer’s determination that the illness was not work-related. As discussed below in section “III.P.3.” of the preamble, it is the railroad’s responsibility to determine whether an illness is work-related. In connection with an inspection or audit, FRA’s role will be to determine whether the reporting

officer’s determination was reasonable. Even if FRA disagrees with the reporting officer’s determination not to report, FRA will not find that a violation has been committed as long as the determination was reasonable. FRA understands that this is consistent with the approach OSHA is employing under its revised rule, and in any event it is most appropriate given the assignment of responsibility for reporting to the employing railroad. FRA plans to establish access to appropriate expert resources (medical, ergonomic, etc.) as necessary to evaluate the reasonableness of railroad decisions not to report particular cases.

#### Comments and Final Rule/Decision

No specific comments were received on this issue. FRA has adopted the policy as proposed.

#### 3. Technical Amendments

##### Proposal

The Working Group also agreed to propose certain minor changes to subsections 225.25(b)(16), (b)(25), (e)(8), and (e)(24), simply to bring these subsections into conformity with the other major changes to the regulatory text that are proposed.

#### Comments and Final Rule/Decision

No specific comments were received on these changes. For the reasons stated above, the amendments have been adopted as proposed.

#### H. Addition of § 225.39, “FRA Policy Statement on Covered Data”

##### Proposal

FRA proposed to add a new section to the regulatory text that would include a policy statement on covered data. Specifically, § 225.39 would state that FRA will not include in its periodic summaries of data for the number of occupational injuries and illnesses, reports of a case, not otherwise reportable under part 225, involving (1) one day away from work when in fact the employee returned to work, contrary to the written recommendation to the employee by the treating physician or other licensed health care professional; (2) one day of restricted work when in fact the employee was not restricted, contrary to the written recommendation to the employee by the treating physician or other licensed health care professional; or (3) a written over-the-counter medication prescribed at prescription strength, whether or not the medication was taken.

#### Comments

AAR commented that the *Guide* needed to be clearer in its discussion of covered data so as to include: a definition of that term; instructions on how to report such cases; and clarification of the treatment of these cases in the questions and answers section of the *Guide* and in the instructions for Form FRA F 6180.55a. In its comments on the NPRM, verbal comments at the post-NPRM Working Group Meeting, and post-meeting letter and e-mail, AAR expressed concern regarding the sharp increase in the number of reportables that would result upon adoption of the proposed changes. In order to soften the impact of these changes on railroad industry data, AAR requested that the covered data classification be extended to three other areas of reporting:

#### 1. One Time Dosage of Prescription Medication

In the revised OSHA regulation, a one-time dosage of a prescription medication, regardless of whether it is a topical medication or a drug that is taken orally, is now considered a reportable event. Multiple treatments or an injection have always been reportable. AAR requested that all one-time dosages be classified as “covered data.”

#### 2. Oxygen Therapy

The administration of oxygen is often a matter of routine, e.g., a pre-hospital protocol performed by an Emergency Medical Technician (EMT). The administration of oxygen, in and of itself, is *not* reportable. However, when oxygen is provided in response to “signs or symptoms,” the case becomes reportable. Previously, oxygen administered for a short period of time was classified as “first aid” and *not* reportable, but OSHA has now removed that distinction. AAR requested that oxygen therapy for a short time be classified as a “covered data” case.

#### 3. Hearing Loss

OSHA has revised its reporting rules for hearing loss, and the Working Group acquiesced in adopting OSHA’s new standard in FRA’s regulation. AAR, however, requested that the occupational illness cases involving hearing loss under the new OSHA regulation be classified as “covered data.”

#### Final Rule/Decision

Because the Working Group could not reach full consensus on whether to extend covered data to include these additional three areas, the issues were