

fatality. FRA proposed to add blocks to Form FRA F 6180.54 and Form FRA F 6180.55a for this information. The reason FRA is seeking to gather this information is to better determine if there is a pattern in the location of certain rail equipment accidents/incidents, trespasser incidents, and employee fatalities. Geographic information systems under development in the public and private sectors provide an increasingly capable means of organizing information. Railroads are mapping their route systems, and increasingly accurate and affordable Global Positioning System (GPS) receivers are available and in widespread use.

Comments and Final Rule/Decision

No specific comments were received. For the reasons stated above, the blocks have been adopted as proposed.

2. Train Accident Cause Code "Under Investigation" (Appendix C of the Guide)

Proposal

One of the tasks addressed by the Working Group was to define "under investigation," as that term is used in Cause Code M505, "Cause under investigation (Corrected report will be forwarded at a later date)," and to put that definition in Chapter 7 of the Guide under subpart C, "Instructions for Completing Form FRA F 6180.54," block 38, "Primary Cause Code" and Appendix C of the Guide. Currently, many accidents/incidents of a significant nature, *e.g.*, ones that are involved in private litigation for many years, are coded as "under investigation." Even if FRA and the railroad think that they know the primary cause of an accident, some railroads will not assign a specific cause code to the accident, either for liability reasons, or because the railroad or a local jurisdiction (or some other authority) is still investigating the accident.

To provide finality to the process of investigating an accident/incident, the Working Group agreed that "under investigation" would mean under active investigation by the railroad. When the railroad has completed its own investigation and received all laboratory results, the railroad must make a "good faith" determination of the primary cause of the accident, any contributing causes, and their proper codes. The railroad must not wait for FRA or NTSB to complete their investigations before assigning the most applicable cause code(s) available. After FRA or NTSB completes its investigation, the railroad

may choose to amend the cause code on the accident report. Accordingly, FRA proposed to revise the *Guide* to demonstrate that the meaning of the cause code in question has been changed to "Cause under active investigation by reporting railroad (Amended report will be forwarded when reporting railroad's active investigation has been completed)."

In addition, the Working Group agreed to add a new code "M507" to denote accidents/incidents in which the investigation is complete but the cause of the accident/incident could not be determined. If a railroad uses this code, the railroad is required to include in the narrative block an explanation for why the cause of the accident/incident could not be determined.

Comments and Final Rule/Decision

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

3. "Most Authoritative": Determining Work-Relatedness and Other Aspects of Reportability

Proposal

The duty to report work-related illnesses under the current rule has occasioned concern and disagreement about not only whether an illness exists, but, more importantly and more controversially, whether the illness is work-related. Often an employee's doctor's opinion is that an employee's illness is work-related, while the railroad's doctor's opinion is that the illness is not work-related. In providing guidance as to how a reporting officer determines whether an illness is work-related, OSHA's final rule states,

[the employer] must consider an injury or illness to be work-related if an event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness. Work-relatedness is presumed for injuries and illnesses resulting from events or exposures occurring in the work environment, unless an exception in Sec. 1904.5(b)(2) applies.

29 CFR 1904.5(a). In addition, the preamble to OSHA's final rule states,

Accordingly, OSHA has concluded that the determination of work-relatedness is best made by the employer, as it has been in the past. Employers are in the best position to obtain the information, both from the employee and the workplace, that is necessary to make this determination. Although expert advice may occasionally be sought by employers in particularly complex cases, the final rule provides that the determination of work-relatedness ultimately rests with the employer.

66 FR 5950.

Following publication of this final rule, the National Association of Manufacturers (NAM) filed a First Amended Complaint challenging portions of the final rule. As part of the NAM-OSHA settlement agreement, published in the **Federal Register**, the parties agreed to the following:

Under this language [29 CFR 1904.5(a)], a case is presumed work-related if, and only if, an event or exposure in the work environment is a *discernable* cause of the injury or illness or of a *significant* aggravation to pre-existing condition. The work event or exposure need only be one of the discernable causes; it need not be the sole or predominant cause.

Section 1904.5(b)(2) states that a case is not recordable if it "involves signs or symptoms that surface at work but result solely from a non-work-related event or exposure that occurs outside the work environment." This language is intended as a restatement of the principle expressed in 1904.5(a), described above. Regardless of where signs or symptoms surface, a case is recordable only if a work event or exposure is a *discernable* cause of the injury or illness or of a *significant* aggravation to a pre-existing condition.

Section 1904.5(b)(3) states that if it is not obvious whether the precipitating event or exposure occurred in the work environment or elsewhere, *the employer* "must evaluate the employee's work duties and environment to decide whether or not one or more events or exposures in the work environment caused or contributed to the resulting condition or *significantly* aggravated a pre-existing condition." This means that *the employer* must make a determination whether it is *more likely than not* that work events or exposures were a cause of the injury or illness, or a *significant* aggravation to a pre-existing condition. If the employer decides the case is not work-related, and OSHA subsequently issues a citation for failure to record, the Government would have the burden of proving that the injury or illness was work-related.

(Emphasis added.) 66 FR 66944. FRA proposed to conform to this language, particularly with respect to making reference to the terms "discernable" and "significant" to qualify the type of causation and aggravation, respectively. See definition of "accident/incident" and proposed reportability criteria at proposed § 225.19(d).

The other part of the problem of determining whether an injury or illness is work-related is "who decides." The Working Group proposed to adopt OSHA's final rule definition of "most authoritative" stated in OSHA's final rule. In the context of discussing how to determine whether or not a case is new, OSHA's final rule states,

If you receive recommendations from two or more physicians or other licensed health care professionals, you must make a decision