

as to which recommendation is the most authoritative (best documented, best reasoned, or most [persuasive]) and record the case based upon that recommendation.

29 CFR 1904.6(b)(3). (Note: the preamble to OSHA's final rule uses the word "persuasive" while the rule text uses the word "authoritative" where FRA put the word "persuasive" in brackets. FRA chose to use the language from the preamble, instead of that in the rule text, to avoid redundancy.)

The question of who is the "most authoritative" physician or other licensed health care professional arises in a number of contexts when there is a conflict of medical opinion. Conflicting medical opinions, often between an employee's physician and a railroad's company physician, arise regarding the following questions: whether an injury or illness is work-related; whether an employee needs days away from work (or days of restricted work) to recuperate from a work-related injury or illness, and if so, how many days; and whether a fatality is work-related, or arose from the operation of a railroad. FRA proposed to adopt in its *Guide* OSHA's definition in its Final Rule of "most authoritative," and to adopt the language from the NAM-OSHA settlement agreement in order to resolve this issue. *See also* discussion of FRA review of work-relatedness determinations under section "III.G.2.b." of the preamble.

#### Comments

Although no specific comments were received on this issue, a discussion occurred at the post-NPRM Working Group meeting, where representatives from AAR and TRE (Trinity Railway Express) expressed concern that FRA might adopt what they perceived as OSHA's position, namely, that work-relatedness was presumed in hearing loss cases unless the physician stated otherwise. After reviewing OSHA's final rule, FRA explained that although OSHA had originally proposed a presumption of work-relatedness, OSHA later determined that it was not appropriate to include this presumption in its final rule. *See* 67 FR 44045 (July 1, 2002). Consequently, OSHA decided that there are no special rules for determining work relationship with respect to hearing loss cases, rather the general approach would apply; thus, a hearing loss would be work-related "if one or more events or exposures in the work environment either caused or contributed to the hearing loss, or significantly aggravated a pre-existing hearing loss." *Id.*

#### Final Rule/Decision

FRA has adopted its proposed policy concerning work-relatedness. However, based on the foregoing discussion of OSHA's rejection of the presumption of work-relatedness for hearing loss cases, Question and Answer No. 74 in the 2003 *Guide* has been amended to reflect OSHA's changed position.

#### 4. Job Title versus Job Function

##### Proposal

An additional issue resolved by the Working Group was to propose amending the *Guide's* instructions for completing blocks 40–43 of FRA Form F6180.54 to make it clear that the job function of the employee, rather than the employee's job title, would be used to determine the employee's job title for reporting purposes when the railroad gives the employee a job title other than "engineer," "fireman," "conductor," or "brakeman."

##### Comments and Final Rule/Decision

No specific comments were received. The amendments have been adopted as proposed.

#### 5. "Recording" versus "Reporting"

##### Proposal

Under OSHA's final rule, the term "recording" is used. Under FRA's regulations and *Guide*, the term "reporting" is used. Since FRA has always used the term "reporting" in its regulations and *Guide*, and since one of the statutes authorizing part 225 uses the term "reporting," FRA proposed to continue to use the term "reporting" instead of "recording." *See* 49 U.S.C. 20901(b)(1) ("In establishing or changing a monetary threshold for the reporting of a railroad accident or incident \* \* \* .")

##### Comments and Final Rule/Decision

No specific comments were received. FRA will continue to use the term "reporting" instead of "recording" as proposed.

### IV. Section-by-Section Analysis

#### Section 219.5 Definitions

##### Proposal

For purposes of FRA's rule on alcohol and drugs (part 219), the term "accident or incident reportable under Part 225" was redefined to exclude a case that is classified as "covered data" under § 225.5 of this chapter (*i.e.*, employee injury/illness cases exclusively resulting from a written recommendation to the employee by a physician or other licensed health care professional for time off when the employee instead

returned to work, or for a work restriction when the employee instead worked unrestricted, or for a non-prescription medication recommended in writing to be taken at a prescription dose, whether or not the medication was taken). The term "accident or incident reportable under Part 225" appears in § 219.301(b)(2), in the description of an event that authorizes breath testing for reasonable cause:

\* \* \* \* \*

The employee has been involved in an *accident or incident reportable under Part 225 of this chapter*, and a supervisory employee of the railroad has a reasonable belief, based on specific, articulable facts, that the employee's acts or omissions contributed to the occurrence or severity of the accident or incident;

\* \* \* \* \*

[Emphasis added.] It should also be noted that § 219.301(b)(2) is incorporated by reference in § 219.301(c) as a basis for "for cause drug testing."

In addition, the definition of "reportable injury" for purposes of part 219 was revised to mean an injury reportable under part 225 of this chapter except for an injury that is classified as "covered data" under § 225.5 of this chapter. The term "reportable injury" appears in three provisions of part 219, each of which describes an event that triggers the requirement for post-accident toxicological testing: (i) A "major train accident" that includes a release of hazardous material lading with a "reportable injury" resulting from the release; (ii) an "impact accident" involving damage above the current reporting threshold and resulting in a "reportable injury"; and (iii) a passenger train accident with a "reportable injury" to any person. §§ 219.201(a)(1)(ii)(B), 219.201(a)(2), and 219.201(a)(4).

The reason that "accident or incident reportable under Part 225" and "reportable injury" does not, for purposes of part 219, include covered data cases is that while these cases are of importance from the standpoint of rail safety analysis and therefore reportable, they are, nevertheless, comparatively less severe than fatalities, other injuries and illnesses and, as such, should not trigger alcohol and drug testing or related requirements and sanctions.

##### Comments and Final Rule/Decision

No specific comments were received on this section. Note, however, that comments were received on the definition of "covered data" and that the category of covered data has been expanded to include another subset of