

criteria under 29 CFR 1904.9 for medical removal cases. "Medical removal" refers to removing an employee from a work location because that location has been determined to be a health hazard. FRA proposed that this definition change automatically if OSHA elects to revise its recording criteria.

#### Comments

Although no specific comments were received on the definition itself, AAR commented that it was opposed to the concept of floating regulations.

#### Final Rule/Decision

FRA has adopted the proposed definition of "medical removal" and its incorporation of OSHA's provision in 29 CFR part 1910. However, in order to make clear that FRA is not "floating" this definition with OSHA's definition of that term, FRA has adopted a year-specific version of OSHA's definition, namely, the 2002 version. *See also* earlier discussion of this definition in the context of the "float" vs. "fixed" issue at section "III.D.1." of this preamble.

#### Proposal

"Needlestick and sharps injury" and "new case" were defined in general conformity with OSHA's definitions of these terms under 29 CFR 1904.8 and 1904.6, respectively.

#### Comments and Final Rule/Decision

No specific comments were received on these definitions. The definitions have been adopted as proposed.

#### Proposal

"Privacy concern case" was defined as in 29 CFR 1904.29, except that FRA would categorically exclude MSDs from its definition of "privacy concern case." As discussed in section "III.G.1.," above, FRA sought comment on whether or not FRA should adopt this exclusion, especially if OSHA's proposed January 1, 2004, delay took effect, but in either case. FRA also sought comment on whether it should adopt the proposed exclusion of MSDs from its definition of "privacy concern case" as a fixed approach beginning on the effective date of FRA's final rule or whether FRA should "float" with OSHA, *i.e.*, make the existence or nonexistence of the exclusion contingent on OSHA's action.

#### Comments and Final Rule/Decision

No specific comments were received on this definition. FRA has adopted the definition as proposed and has not adopted the exclusion of MSDs from its definition of "privacy concern case."

*See also* discussion at section "III.G.1." of this preamble. FRA intends to address the slight differences on this issue in its MOU with OSHA.

#### Proposal

"Occupational hearing loss" was defined as OSHA defined it under 29 CFR 1904.10 for calendar year 2002. As discussed in section "III.D.1.," above, FRA sought comment on whether FRA should adopt OSHA's new approach for calendar year 2003 as its fixed approach, beginning on the effective date of FRA's final rule, or whether FRA should diverge from OSHA and continue to enforce OSHA's current approach (which was approved by the Working Group and the RSAC and is the same as FRA's current approach) as a fixed approach beginning on the effective date of FRA's final rule.

#### Comments

AAR strongly opposed the adoption of OSHA's new policy, noting that the policy would lead to a greater number of hearing loss cases being reported by the railroad industry and result in an adverse trend in the occurrence of railroad injuries regardless of the railroads' actual performance. After further discussion of the criteria at the post-NPRM meeting, AAR acquiesced in accepting the criteria for reporting, but was still concerned regarding the anticipated increases in reportables. AAR requested that FRA consider placing the hearing loss cases under covered data.

#### Final Rule/Decision

The importance of capturing the true magnitude of work-related hearing loss is justification alone for adopting OSHA's 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.<sup>9</sup> For a more detailed discussion of this issue, see sections "III.D.1." and "III.H." of this preamble. 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.

<sup>9</sup> See earlier discussion concerning the definitions of "medical treatment" and "first aid" at section "III.J.3." of this preamble.

#### Proposal

The definition of "occupational illness" was revised to make it clear that only certain occupational illnesses of a person classified under Chapter 2 of the *Guide* as a Worker on Duty-Employee are to be reported. By contrast, under the 1997 definition of "occupational illness," other categories of persons, such as Worker on Duty-Contractor, were included in the definition, but illnesses to those persons were not reportable because § 225.19(d)(4) limited the reportability of occupational illnesses to those of "a railroad employee."

#### Comments and Final Rule/Decision

No specific comments were received on this definition. The definition has been adopted as proposed.

#### Proposal

"Occupational musculoskeletal disorder" was defined essentially as it was set forth by OSHA in January 2001. *See* 29 CFR 1904.12 as published in 66 FR 6129. One of the most common forms of occupational musculoskeletal disorder is Carpal Tunnel Syndrome and other repetitive motion disorders. Under § 1904.12 of its January 19, 2001, final rule, OSHA defined musculoskeletal disorders (MSDs) as:

disorders of the muscles, nerves, tendons, ligaments, joints, cartilage and spinal discs. MSDs do not include disorders caused by slips, trips, falls, motor vehicle accidents, or other similar accidents. Examples of MSDs include: Carpal tunnel syndrome, Rotator cuff syndrome, De Quervain's disease, Trigger finger, Tarsal tunnel syndrome, Sciatica, Epicondylitis, Tendinitis, Raynaud's phenomenon, Carpet layers knee, Herniated spinal disc, and Low back pain.

66 FR at 6129. *See also* 66 FR at 52034. However, as noted in the overview in section "I." of this preamble, OSHA delayed the effective date of this provision from January 1, 2002, to January 1, 2003, and proposed delaying the effective date until January 1, 2004, "to give [OSHA] the time necessary to resolve whether and how MSDs should be defined for recordkeeping purposes." *See* 67 FR 44125. After the publication of this NPRM, OSHA adopted this proposed delay in its December 17, 2002 final rule. *See* 67 FR 77165.

As the issue of OSHA's proposed delay of this provision was not before the Working Group when consensus was reached, FRA sought comment on whether or not FRA should still adopt the above definition of MSDs if OSHA's proposed January 1, 2004 delay took effect. FRA noted that if the provision were adopted as approved by the Working Group, FRA would be adopting