CONSTANGY
BROOKS & SMITH, LLP
The Employers' Law Firm, Since 1946

OSHA UPDATE

OSHA Moves Forward on Adding a Separate Column to the OSHA 300 Log for Musculoskeletal Disorders

OSHA announced on May 17, 2011, that it is reopening the rulemaking record and once again moving forward on a proposal to add a separate column to the OSHA 300 Log of Occupational Injuries and Illnesses for recording musculoskeletal disorders (MSDs). OSHA initially proposed adding the column in January 2010, but after holding public meetings and providing a comment period on the proposal, the Agency temporarily closed the rulemaking record and withdrew the proposal on January 25 of this year. According to OSHA, the temporary withdrawal was needed to seek additional input from small businesses through a series of teleconferences conducted with the Small Business Administration's Office of Advocacy. OSHA has now completed those teleconferences and posted a summary of them on the Agency's website at http://www.regulations.gov/#!documentDetail;D=OSHA-2009-0044-0139.

The proposed new regulation adding the MSD Column is virtually identical to the 2001 final Recordkeeping Regulation on MSDs, 29 C.F.R. §1904.12, which was dropped in 2003 before it went into effect. The proposed regulation would require employers to place an "x" or a checkmark in the MSD Column of the OSHA 300 Log for any recordable case that meets the definition of an MSD. Under the proposal, MSDs are defined 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.

Back cases would continue to be recorded as either injuries or illnesses depending upon whether the condition resulted from an instantaneous event or exposure.

Although the above definition of MSDs refers to "disorders" and specific, diagnosed conditions, the proposed regulation makes it clear that an MSD consists of any reported "pain, tingling, burning, numbness or *any other subjective symptom* of an MSD" (emphasis added) and that the case is recordable if an employee with such reported symptoms is offered or receives "medical treatment." OSHA has acknowledged in the announcement of its proposed new regulation that this defini-

tion is "broad and is intentionally so," although the Agency does not explain why the definition must be so broad. Although OSHA has denied that these changes to the recordkeeping requirements are a precursor to some form of a new Ergonomics Standard, many believe that the MSD Column information might be used to support the issuance of such a standard. At the very least, an MSD Column could help support OSHA's planned, more aggressive use of the OSH Act's General Duty Clause in citations against employers for alleged ergonomic hazards.

OSHA has also stated its intention to change the Recordkeeping Compliance Directive to eliminate language under which employers do not have to record cases when licensed health care professionals recommend that employees' job tasks be temporarily revised to prevent initial complaints of "minor musculoskeletal discomfort" from developing into a more serious condition. Eliminating this language from the Recordkeeping Compliance Directive would presumably also result in the deletion of Frequently Asked Question 7-19, which provides as follows:

> **QUESTION 7-19. Does the employer have to record a work-related injury and illness, if an employee experiences minor musculoskeletal discomfort, the health care professional determines that the employee is fully able to perform all of his or her routine job functions, but the employer assigns a work restriction to the injured employee?**
>
> As set out in Chapter 2, I., F. of the Recordkeeping Policies and Procedures Manual (CPL 2-0.131) a case would not be recorded under section 1904.7(b)(4) if 1) the employee experiences minor musculoskeletal discomfort, and 2) a health care professional determines that the employee is fully able to perform all of his or her routine job functions, and 3) the employer assigns a work restriction to that employee for the purpose of preventing a more serious condition from developing. If a case is or becomes recordable under any other general recording criteria contained in section 1904.7, such as medical treatment beyond first aid, a case involving minor musculoskeletal discomfort would be recordable.

Under the new proposed rule, not only then would medical treatment beyond first aid make a minor MSD recordable, but apparently also a work restriction that is given solely for the purpose of preventing a minor MSD from developing into a more serious condition.

Judge Upholds OSHA Recordkeeping Citation, Overrules Company Doctor's Finding that MSD is Not Work-Related

In what OSHA is describing as the first decision of its kind, Administrative Law Judge Patrick B. Augustine of the Occupational Safety and Health Review Commission recently upheld an OSHA recordkeeping citation issued against Caterpillar Logistics Services, Inc. for failing to record a musculoskeletal disorder (MSD) case on the OSHA 300 Log that Caterpillar contended was not work-related. The employee in the case had been diagnosed with right elbow epicondylitis, commonly known as "tennis elbow," for which medical treatment beyond first aid was provided, and the case resulted in job transfer and days away from work. The employee's job duties had included receiving and unpacking totes, scanning items, packing shipping boxes, and handling from 2,000 to 6,000 parts during a shift. The employee would move the parts from a rack to containers that were then transferred to other areas of the facility.

In making its decision not to record the case, the company relied upon an ergonomic evaluation of the injured employee's work area and an assessment by its company physician concluding that there were unspecified "non-occupational factors which are primarily responsible for this diagnosis." At trial, OSHA's expert witness, a physician and university professor with significant expertise in MSD cases, testified that it was his professional medical opinion that there were sufficient risk factors in the employee's job duties to conclude "within a reasonable degree of medical certainty" that the case was work-related.

Administrative Law Judge Augustine first explained in his decision that for a case to be work-related for purposes of OSHA recordkeeping, the "employee's work activities do not have to be *the* cause of an injury or illness, but rather *a* cause." He then found that the company's ergonomic evaluation of the employee's work station had been "deficient," as it did not include an interview of the employee, an examination of the postures, repetition, and force necessary to move parts, or consideration of the various risk factors related to epicondylitis. The Judge pointed out that the company's assessment was conducted in one day and the assessment report was just 2 pages and 23 sentences long. He also noted that the company physician was not able to establish any likely cause for the employee's epicondylitis, such as sports or hobbies performed outside of work.

While Judge Augustine emphasized that the burden of proving that an MSD case is work-related remains with OSHA and "the court is not implying any reversal of the burden here," the decision appears to require companies to expend considerable effort and resources to determine whether an MSD case is in any way related to work, only to have that determination subject to challenge after the fact by OSHA and its medical experts. Simply relying upon a single assessment and determination by the company's doctor may not be sufficient and risks later citation if OSHA disagrees with that doctor's determination. Moreover, upon implementation of OSHA's proposed new requirement to identify MSD cases in a separate column on the OSHA 300 Log of Occupational Injuries and Illnesses, it is expected that the Agency's scrutiny of employers' recording of, and responding to, MSD cases will increase.

OSHA Seeks Comments on Proposed Revision to Occupational Injury and Illness Reporting Requirements

OSHA announced on June 22, 2011, a proposed revision to the Agency's current regulation that requires an employer to report to OSHA, within eight hours, all work-related fatalities and in-patient hospitalizations of three or more employees. Under the proposal, employers would be required to report to OSHA any work-related fatalities and all in-patient hospitalizations within eight hours, and work-related amputations within 24 hours. Reporting amputations is not required under the current regulation.

The proposal also includes a planned update to the coverage provisions of the OSHA recordkeeping rules that would identify the partially exempted industries using more recent injury and illness data and the North American Industry Classification System (NAICS code) instead of the currently used Standard Industrial Classification system (SIC code).

Comments on the proposal, including responses to specific questions about issues and potential alternatives, may be submitted to OSHA by Sept. 20, 2011. The proposal text and preamble can be accessed at http://www.gpo.gov/fdsys/pkg/FR-2011-06-22/html/2011-15277.htm.

CONSTANGY
BROOKS & SMITH, LLP
The Employers' Law Firm, Since 1946

OSHA UPDATE

July 2011

OSHA's Subpoena of Insurance Company's Safety Inspection Records Upheld by U.S. District Court

In a May 2, 2011 decision, the U.S. District Court for the Northern District of Illinois upheld a subpoena issued by OSHA to compel a workers' compensation insurance company to produce records it had prepared for an Illinois grain elevator operator involved in a multiple-fatality engulfment incident. OSHA's subpoena to the insurance company, Grinnell Mutual Reinsurance Co. ("Grinnell"), requested copies of site safety inspections, applications for insurance coverage, and correspondence between Grinell and its client that operated the grain elevator, Haasbach LLC. Grinnell argued that the inspection reports, applications, and correspondence were privileged under Illinois law and that the insurance company and its employer client could be harmed if the documents were released because they might ultimately be used by plaintiffs in other litigation arising from the accident. Grinnell also contended that release of the privileged inspection reports would have a "chilling effect" both on businesses allowing their insurers to conduct safety inspections and on insurers conducting such inspections to determine risk of loss. The insurance company emphasized that their clients would be particularly discouraged from allowing them to conduct accident investigations if the results of those investigations could be later used against the employer in personal injury or worker's compensation litigation or in OSHA enforcement proceedings.

The federal District Court first ruled that OSHA's jurisdiction to investigate the grain engulfment fatalities meant that the Agency also had the authority to require the production of relevant evidence and the ability to issue a subpoena to obtain that evidence. The Court then found that all of the documents that OSHA requested from the insurance company, including the safety inspection reports, "reasonably relate to the investigation of the incident and the question of OSHA jurisdiction." Responding to the claim that release of the documents would have a "chilling effect" on future safety inspections and accident investigations, the Court explained that "assuming for the sake of argument that this is true, correcting that problem is a policy decision to be made somewhere other than in the federal courts." Significantly, in upholding OSHA's subpoena, the Court also ruled that OSHA's Policy on Voluntary Employer Self-Audits was just a policy and did not preclude the Agency from seeking these safety records.

OSHA Launches National Survey of Employers' Safety and Health Practices to Help Guide Future Rules and Outreach

OSHA has recently launched a comprehensive survey of private sector employers as a tool "to better design future rules, compliance assistance and outreach efforts." As many as 19,000 employers nationwide will receive the "Baseline Survey of Safety and Health Practices, which asks various questions about the employers' workplace safety and health management program and practices.

Beginning on May 10, 2011, the surveys were sent to private sector employers of all sizes and across all industries under federal OSHA's jurisdiction. The survey questions include whether the respondent employers already have a safety management system, whether they perform annual inspections, who manages safety at their establishments, and what kinds of hazards they encounter at their facilities. Participation in the survey is completely voluntary, and the identities of the employer respondents are not being provided to OSHA by the contractor who is administering the survey. According to OSHA, the survey results will not be used for enforcement.

Many believe that the main purpose of the survey is to help OSHA support the need for its planned "Injury and Illness Prevention Program" rule. That rulemaking, which is a top priority at the Agency, would require employers to prepare and implement a written comprehensive safety and health program that contains certain required elements, including "management leadership, worker participation, hazard identification, hazard prevention and control, education and training, and program evaluation and improvement." Once the new rule is issued, an employer's failure to address a hazard that is not specifically regulated, like ergonomics or heat stress, might be cited as a failure to implement an effective program under the rule.

The survey is accompanied by a cover letter from Assistant Secretary of Labor for OSHA, Dr. David Michaels. Contact information for OSHA and its contractor, Eastern Research Group (ERG), is included for respondents who have questions about the survey. While the surveyed employers will receive a paper copy of the survey that can be filled out and returned to ERG, they will also have the option of completing the survey online. Only those employers targeted to participate in the survey, and who are therefore sent a paper copy, will be allowed to complete the online version. OSHA expects the data collection phase to be completed by August 2011, at which time ERG will begin providing the results to OSHA.

OSHA has posted additional information and a copy of the survey on the Agency's website at the following address: http://www.osha.gov/national-survey/national-survey-announcementbaseline-survey.html.

OSHA Withdraws Significant Proposed Change to its Occupational Noise Enforcement Policy

OSHA announced in January of this year that it was withdrawing it proposed noise enforcement policy change, titled "Interpretation of OSHA's Provisions for Feasible Administrative or Engineering Controls of Occupational Noise," and suspending work on the proposal in order to "study other approaches to abating workplace noise hazards." OSHA proposed the interpretation on October 19, 2010, and described it as a clarification of the term "feasible administrative or engineering controls" as used in the OSHA Noise Exposure Standard, 29 C.F.R. §1910.95. The effect of the proposal, however, would have been a significant change in OSHA's enforcement policy on the extent to which employers must reduce workplace noise levels rather than rely solely on hearing protection devices, like ear plugs or muffs.

Specifically, the proposed change would have required employers to reduce employee exposure to occupational noise down to an 8-hour time-weighted average of 90dBA either by engineering controls, such as noise barriers or equipment re-design, or by administrative controls, like job rotation or shortened work shifts, or by a combination of both types of controls. Employers would not have been permitted to rely upon employees using ear plugs or ear muffs to reduce their exposure to 90dBA, unless the employer could show that it would cost so much to achieve the 90dBA limit with engineering and/or administrative controls alone that the employer would go out of business. Under the current policy, set out in the April 22, 2011 version of OSHA's Field Operations Manual, employers are allowed to rely on appropriate hearing protectors and a hearing conservation program when (1) noise levels are below 100dBA, and (2) the costs of engineering and/or administrative controls are less than the cost of an effective hearing conservation program.

The proposed policy change, and the projected costs to employers, had elicited widespread opposition from numerous industries and business groups, including the National Association of Manufacturers and the U.S. Cham-

ber of Commerce. Around the same time, OSHA and the other federal agencies were beginning a review of their regulations for possible impact on job growth, pursuant to an executive order by President Obama. According to a statement from OSHA Assistant Secretary David Michaels explaining OSHA's decision to withdraw the proposal: "...it is clear from the concerns raised about this proposal that addressing this problem requires much more public outreach and many more resources than we had originally anticipated. We are sensitive to the possible costs associated with improving worker protection and have decided to suspend work on this proposed modification while we study other approaches to abating workplace noise hazards."

Constangy, Brooks & Smith, LLP has counseled employers on labor and employment law matters, exclusively, since 1946. A "Go To" Law Firm in Corporate Counsel and Fortune Magazine, it represents Fortune 500 corporations and small companies across the country. Its attorneys are consistently rated as top lawyers in their practice areas by sources such as Chambers USA, Martindale-Hubbell, and Top One Hundred Labor Attorneys in the United States, and the firm is top-ranked by the U.S. News & World Report/Best Lawyers Best Law Firms survey. More than 130 lawyers partner with clients to provide cost-effective legal services and sound preventive advice to enhance the employer-employee relationship. Offices are located in Alabama, California, Florida, Georgia, Illinois, Massachusetts, Missouri, New Jersey, North Carolina, South Carolina, Tennessee, Texas, Virginia and Wisconsin. For more information, visit www.constangy.com.