North Carolina Department of Labor
Occupational Safety & Health Division

Raleigh, NC

Chapter 7 CFR Revision 127E
Subchapter 7A

Field Information System
Occupational Injury and Illness Recording and Reporting
29 CFR 1904

Final Rule

Discussion:

On January 19, 2001 (66 FR 5916), federal OSHA promulgated the revised final rule, 29 CFR 1904, "Recording and Reporting Occupational Injuries and Illnesses". Two sections of this rule were revised in earlier rulemakings.

On October 12, 2001 (66 FR 52031), federal OSHA issued an amendment to the final rule. The amendment delayed sections 29 CFR 1904.10, "Recording criteria for cases involving occupational hearing loss"; 29 CFR 1904.12, "Recording criteria for cases involving work-related musculoskeletal disorders"; and 29 CFR 1904.29 (b)(7)(vi), only the sentence stating "Musculoskeletal disorders are not considered privacy cases" until January 1, 2003. The amendment discussed the employer's requirements for recording these types of injuries/illnesses for calendar year 2002.

On December 17, 2002 (67 FR 77165), federal OSHA extended the delay of three provisions of the final rule published January 19, 2001 until January 1, 2004. The delayed provisions are 29 CFR 1904.10 (b)(7), the requirement to check the hearing loss column on the 300 log; 29 CFR 1904.12, the definition of "musculoskeletal disorder (MSD)"and the requirement to check the MSD column on the 300 log; and 29 CFR 1904.29 (b)(7)(vi), only the sentence stating "Musculoskeletal disorders are not considered privacy concern cases." (The hearing loss and the musculoskeletal disorder columns will not be added back to the 300 log until January 1, 2004, at the earliest. However, this does not eliminate the general requirement to record work related hearing loss as defined in the July 2, 2002, *Federal Register* amendment or musculoskeletal disorders that are determined to be work related.)

Action:

In accordance with 13 NCAC 7A.0301(b), the N.C. Commissioner of Labor automatically adopted the federal Recording and Reporting Occupational Injuries and Illnesses Standard with an effective date of January 1, 2003. Reference the *Federal Register* (Volume 67, No. 242) for the details related to these requirements.

Signed on Original
John H. Johnson
Director

01/06/03
Date of Signature

N.C. Effective Date: January 1, 2003

NCAC Number: 13 NCAC 7A.0301(b)

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1904

[Docket No. R–02B]

RIN 1218–AC06

Occupational Injury and Illness Recording and Reporting Requirements

AGENCY: Occupational Safety and Health Administration (OSHA), Department of Labor.

ACTION: Final rule.

SUMMARY: The Occupational Safety and Health Administration (OSHA) is delaying the effective date of three provisions of the Occupational Injury and Illness Recording and Reporting Requirements rule published January 19, 2001 (66 FR 5916–6135). The provisions being delayed define ''musculoskeletal disorder (MSD)'' and require employers to check the MSD column on the OSHA Log if an employee experiences a work-related musculoskeletal disorder, state that MSDs are not considered privacy concern cases, and require employers to enter a check in the hearing loss column of the OSHA 300 Log for cases involving occupational hearing loss. The effective date of these provisions is delayed from January 1, 2003 until January 1, 2004. OSHA will implement the hearing loss column requirements on January 1, 2004, and will continue to evaluate the MSD provisions over the next year. *See* **SUPPLEMENTARY INFORMATION** for the specific regulatory sections and paragraphs.

DATES: The amendments in this rule will become effective on January 1, 2003. Section 1904.10(b)(7) added on July 1, 2002 (67 FR 44037) and effective on January 1, 2003, is further delayed until January 1, 2004. Section 1904.12, revised on January 19, 2001 (66 FR 5916), effective on January 1, 2002, and delayed on October 12, 2001 (66 FR 52031), is further delayed until January 1, 2004. The second sentence of 1904.29(b)(7)(vi), revised on January 19, 2001, effective on January 1, 2002, and delayed on October 12, 2001 (66 FR 52031), is further delayed until January 1, 2004.

FOR FURTHER INFORMATION CONTACT: Jim Maddux, Occupational Safety and Health Administration, U.S. Department of Labor, Directorate of Standards and Guidance, Room N–3609, 200 Constitution Avenue, NW., Washington, DC 20210. Telephone (202) 693–2222.

SUPPLEMENTARY INFORMATION:

I. The MSD Provisions

In January, 2001 OSHA published revisions to its rule on recording and reporting occupational injuries and illnesses (66 FR 5916–6135) to take effect on January 1, 2002. A more complete discussion of the MSD definition issue is contained in the preamble to the January 19, 2001 rule. On July 3, 2001, OSHA proposed to delay the effective date until January 1, 2003, of 29 CFR 1904.12, recording criteria for cases involving work-related musculoskeletal disorders. OSHA explained that it was reconsidering the requirement in 29 CFR 1904.12 that employers check the MSD column on the OSHA Log for a case involving a ''musculoskeletal disorder'' as defined in that section. This action was taken in light of the Secretary of Labor's decision to develop a comprehensive plan to address ergonomic hazards, and to schedule a series of forums to consider key issues relating to the plan, including the approach to defining ergonomic injuries (66 FR 35113–35115).

After considering the views of interested parties, OSHA published a final rule on October 12, 2001 delaying the effective date of 29 CFR 1904.12 until January 1, 2003. OSHA also added a note to 29 CFR 1904.29(b)(7)(vi) explaining that the second sentence of that section, which provides that MSDs are not ''privacy concern cases,'' would not become effective until January 1, 2003.

OSHA concluded that delaying the effective date of the MSD definition in Section 1904.12 was appropriate because the Secretary was considering a related definitional question in the context of her comprehensive ergonomics plan. The Agency found that it would be premature to implement § 1904.12 before considering the views of business, labor and the public health community on the problem of ergonomic hazards. It also found that it would create confusion and uncertainty to require employers to implement the new definition of MSD contained in § 1904.12 while the Secretary was considering how to define an ergonomic injury under the comprehensive plan (66 FR 52031–52034).

On April 5, 2002, OSHA announced a comprehensive plan to address ergonomic injuries through a combination of industry-targeted guidelines, enforcement measures, workplace outreach, research, and dedicated efforts to protect Hispanic and other immigrant workers. In that announcement, OSHA found that no single definition of ''ergonomic injury'' was appropriate for all contexts, stating that, as OSHA develops guidance material for specific industries, the Agency may narrow the definition as appropriate to address the specific workplace hazards covered. (OSHA Press Release USDL 02–201 and associated Frequently Asked Questions).

On July 1, 2002, OSHA proposed to delay the effective date of Section 1904.12 for an additional year until January 1, 2004 to give the agency the time needed to resolve whether and how MSDs should be defined for recordkeeping purposes. This proposed delay had no effect on the employer's obligation to record all workplace injuries and illnesses that meet the criteria established in Sections 1904.4 through 1904.7, including those related to ergonomic stressors. The July 1, 2002 **Federal Register** document also requested public comment on various issues related to the MSD definition and column requirement. These issues included the following: ''Is an MSD column needed on the OSHA 300 Log? Should the column be reinstated in § 1904.12 or should § 1904.12 be deleted? Would the statistics generated by an additional column be superior to the statistics now generated by the BLS?'' (67 FR 44127)

The period for submission of comments on the proposed rule closed on August 30, 2002. After considering the views of interested parties, OSHA has determined that the effective date of Sections 1904.12 and 1904.29(b)(7)(vi) should be delayed until January 1, 2004. This **Federal Register** document addresses only the delayed effective date of these provisions. OSHA is still considering the need for an MSD column and other substantive issues related to § 1904.12 on which comment has been requested. OSHA will announce its decision on these issues in a subsequent **Federal Register** document.

A. Comments on MSD Delay

Many commenters supported the delay, citing reasons similar to those in the July 1, 2002 proposal, or urged OSHA to rescind Section 1904.12 altogether (Exs. 2–2, 2–3, 2–5, 2–6, 2–7, 2–8, 2–9, 2–12, 2–13, 2–14, 2–15, 2–16, 2–21, 2–23, 2–27, 2–28, 2–29, 2–30, 2–31, 2–32, 2–33, 2–35, 3–3, 3–4, 3–5, 3–12, 3–13, 3–14, 3–16, 3–17). In a representative comment, the American Dental Association stated that:

> The proposal demonstrates the Agency's understanding of the complexity of defining MSDs and the potential consequences of adopting a hastily developed standardized definition. It is likely that once a MSD

definition is adopted by OSHA it would be difficult to alter or change it in future rulemakings, so it is important that the Agency not act precipitously (Ex. 2–15)

Commenters suggested that additional delay was appropriate to allow for consideration of relevant comment (*See, e.g.,* Exs. 2–2, 2–5, 3–14), to avoid confusion (*See, e.g.*, Exs. 2–2, 2–3, 2–5, 2–16, 2–33), to avoid unnecessary training and computer programming costs (*See, e.g.*, Exs. 2–7, 2–12, 2–21). Two commenters argued that delay was not harmful because there is no effect on the recording of MSD cases (*See, e.g.,* Exs. 2–3, 2–30) and one stated that the delays would not affect safety because MSD cases would be recorded even when the MSD column was not checked (*See, e.g.*, Ex. 3–13). Several commenters suggested that OSHA should delay the MSD definition for recordkeeping purposes until a common definition is adopted for ergonomic purposes (*See, e.g.*, Exs. 2–13, 2–16, 2–30).

Other commenters recommended deletion of the § 1904.12 requirements, including the MSD column and the MSD definition (*See, e.g.*, Exs. 2–2, 2–3, 2–5, 2–6, 2–7, 2–8, 2–9, 2–12, 2–13, 2–14, 2–16, 2–21, 2–23, 2–27, 2–28, 2–29, 2–30, 2–31, 2–32, 2–35, 3–5, 3–12, 3–13, 3–14, 3–16, 3–17), arguing that it is an unnecessary paperwork burden (*See, e.g.*, Exs. 2–2, 2–5, 2–9, 2–12, 2–21, 2–23), that a column is not needed (*See, e.g.*, Exs. 2–7, 2–9, 2–14, 2–21, 2–23, 2–27, 2–30, 3–5, 3–12, 3–16), that OSHA's comprehensive ergonomics plan found that no single definition is appropriate (*See, e.g.*, Exs. 2–3, 2–12, 2–13, 2–16, 2–28, 2–29, 2–32, 2–35), that the § 1904.12 MSD definition was inappropriate (*See, e.g.*, Exs. 2–3, 2–6, 2–7, 2–8, 2–9, 2–12, 2–13, 2–16, 2–23, 2–27, 2–28, 2–29, 2–30, 2–31, 2–32, 2–35, 3–3, 3–14, 3–16), and that controversy and lack of consensus in the scientific and medical communities on the MSD issue makes it premature for OSHA to include a regulatory definition (*See, e.g.*, Exs. 2–8, 2–12, 2–13, 2–14, 2–31, 2–32, 2–35, 3–17).

Several commenters opposed a delay in implementing the recordkeeping rule's definition of MSD and the requirement to check the MSD column (*See, e.g.*, Exs. 2–10, 2–11, 2–18, 2–19, 2–20, 2–22, 2–24, 2–25, 2–26, 2–34, 2–35, 2–36, 2–37, 2–39, 3–2, 3–7, 3–9, 3–15). The United Food & Commercial Workers International Union (UFCW) stated:

> The UFCW believes strongly that OSHA should utilize the broadest definition for recording musculoskeletal disorders on the OSHA Form 300. As well, columns for recording MSDs and hearing loss are absolutely necessary for accurate surveillance as well as utilization of the logs for prevention purposes of these two significant safety and health problems facing UFCW members (Ex. 2–39)

Commenters argued against further delay because delay will make it difficult to collect information on these disorders and make it difficult to take future action (*See, e.g.*, Exs. 2–10, 2–22, 2–24, 2–35, 3–9), delay will make it more difficult to track MSD (*See, e.g.*, Exs. 2–19, 2–20, 2–24, 2–35, 2–36, 2–39, 3–7, 3–9, 3–15), an MSD column can be used to identify injuries and develop prevention strategies (*See, e.g.*, Exs. 2–10, 2–11, 2–18, 2–19, 2–20, 2–22, 2–24, 2–25, 2–34, 2–35, 2–36, 2–39, 3–9, 3–15), an MSD column is needed to develop more complete and consistent statistics by BLS (*See, e.g.*, Exs. 2–11, 2–18, 2–20, 2–24, 2–25, 2–26, 2–35, 2–36, 3–7), an MSD column helps OSHA and NIOSH during workplace interventions (*See, e.g.*, Exs. 2–20, 2–24, 2–25, 2–26), and lack of an MSD column may lead to under-recording of MSD injuries (*See, e.g.*, Ex. 2–25).

Many commenters supported the broad definition of MSD in § 1904.12 to promote a complete capture of MSD cases regardless of risk factor, to produce more complete statistics on MSD, to protect workers from MSD injury by identifying ergonomic problems, and because it is difficult to ascertain one-time versus ongoing exposure (*See, e.g.*, Exs. 2–4, 2–10, 2–11, 2–18, 2–20, 2–22, 2–24, 2–26, 2–34, 2–35, 2–36, 2–39, 3–6). Commenters also expressed their support of the MSD definition in the Section 1904.12 regulation, noting its similarity to definitions used in many other contexts, such as industrial hygiene practice, OSHA's guidelines for meatpacking plants, the National Academy of Sciences reports on ergonomics, NIOSH, employers with effective ergonomics programs, OSHA's settlement agreements, the former recordkeeping system, other government agencies, and other countries (*See, e.g.*, Exs. 2–10, 2–11, 2–19, 2–20, 2–22, 2–24, 2–25, 2–26, 2–35, 2–36, 2–39, 3–9, 3–15). Several commenters observed that the definition is the same as the MSD definition used by the Bureau of Labor Statistics for the last three years (*See, e.g.*, Exs. 2–10, 2–11, 2–19, 2–20, 2–22, 2–24, 2–35, 2–36, 2–39, 3–15).

The AFL–CIO (Ex. 2–24–1) supported these comments, and also argued that, without an MSD definition it would be difficult for DOL to take enforcement actions on ergonomics hazards under the general duty clause. The AFL–CIO also argued that the January 2001 revised OSHA recordkeeping rule included provisions that would assist employers, unions, workers and the government in identifying and addressing MSDs. The AFL–CIO recommended that the Department of Labor maintain the provisions of the 2001 recordkeeping rule and move immediately to implement the rule in its entirety.

B. OSHA's Decision on MSD Delay

OSHA does not believe that a MSD definition should be implemented now, for the same reasons outlined in the July 1, 2002 proposal to delay § 1904.12. While the Agency has not yet decided on the correct approach for dealing with the Part 1904 MSD definition, OSHA plans to publish a final rule in 2003 to resolve the MSD definition issue for the year 2004 and beyond.

OSHA does not agree that delayed implementation of Section 1904.12 will make it more difficult for employers, workers and OSHA to address workplace ergonomic hazards, or undermine OSHA's ability to enforce the general duty clause for ergonomic hazards. Employers are required to record all injuries and illnesses meeting the criteria established in Sections 1904.4 through 1904.7 of the recordkeeping rule regardless of whether a particular injury or illness meets the definition of MSD in Section 1904.12. Thus, the delay in implementing Section 1904.12 will not reduce the number of cases recorded or affect the narrative description of the injury or illness that must be provided for each case. Employers who use the Log and injury reports to discover ergonomic hazards will be able to continue to do so, relying on the description-of-injury information and other data to identify MSDs in their workplaces. Employees will continue to have access to the information provided in the Log and, under the new rule, to the information in the part of the Incident Report explaining how the incident occurred. Employers and employees will be able to categorize this injury and illness information in any manner they find useful.

The delay will not affect the quality or availability of useful statistical data on MSDs. At the facility level, employers, employees and government workers will continue to estimate MSD incidents by analyzing individual injury and illness entries, just as they have done in the past.

Finally, OSHA notes that the delay in the implementation of Section 1904.12 will have no effect on the Department's enforcement of the general duty clause. The definition of MSD in that section has never been in effect, and has not

been a factor in enforcement of the clause. The sole effect of the delay is that employers need not use the definition to categorize cases on the OSHA Recordkeeping Log for calendar year 2003. This recordkeeping issue does not affect an employer's obligation under the general duty clause. The employer remains obligated to free its workplace from recognized hazards that are likely to cause serious physical harm.

OSHA is modifying the note following the introduction to Section 1904.12 to inform employers of the policy that will be in effect during 2003. The note also informs the employer that, instead of checking the column on the 300 Log for musculoskeletal disorders (since this column has been removed from the log), the employer is to check the column for ''injury'' or ''all other illness,'' depending on the circumstances of the case.

In a related matter, the privacy provisions of Part 1904 use the MSD definition from § 1904.12. Specifically, paragraph 1904.29(b)(7)(vi) of the rule states that employers must consider an illness case to be a privacy concern case, and withhold the employee's name from the forms, if the employee independently and voluntarily requests that his or her name not be entered on the Log. The second sentence of the paragraph states ''[m]usculoskeletal disorders (MSDs) are not considered privacy concern cases.'' Because the effective date of the § 1904.12 MSD definition is being delayed, OSHA will be unable to implement the § 1904.29(b)(7)(vi) requirement during 2003. Accordingly, OSHA is modifying the note to Section 1904.29(b)(7)(vi) stating that the second sentence takes effect on January 1, 2004.

II. The Hearing Loss Column Provisions

In January, 2001 OSHA published revisions to its rule on recording and reporting occupational injuries and illnesses (66 FR 5916–6135) to take effect on January 1, 2002, including provisions for recording occupational hearing loss when an employee experienced a standard threshold shift (STS). An STS is defined in OSHA's § 1910.95 noise standard as a change in hearing threshold, relative to the baseline audiogram for that employee, of an average of 10 decibels (dB) or more at 2000, 3000, and 4000 hertz (Hz) in one or both ears. On July 3, 2001, OSHA proposed to delay the effective date of 29 CFR 1904.10 Recording criteria for cases involving occupational hearing loss until January 1, 2003. OSHA explained that it was reconsidering the requirement in 29 CFR § 1904.10 due to ongoing concerns about the level of hearing loss that should be considered a significant health condition, asked for comment on whether or not to delay the provisions while reconsidering the issue, and asked the public to submit substantive comments on the hearing loss recording issue (66 FR 35113–35115).

After considering the views of interested parties, OSHA published a final rule on October 12, 2001 delaying the effective date of 29 CFR 1904.10 until January 1, 2003, and setting forth interim hearing loss recording criteria for 2002 (66 FR 52031–52034). The Agency then issued a final rule on July 1, 2002 establishing new recording criteria for occupational hearing loss that captured STS cases when the employee's overall hearing level exceeded 25 dB from audiometric zero. (67 FR 44037–44048). In a separate proposed rule published that same date, OSHA proposed to delay the requirement to check a hearing loss column on the OSHA 300 Log, and asked for substantive comment on the utility of the column, the usefulness of the data that would be produced, and any costs or burdens associated with implementing a hearing loss column (67 FR 44124–44127).

The period for submission of comments on the proposed rule closed on August 30, 2002. After considering the views of interested parties, OSHA has determined that the effective date of Section 1904.10(b)(7) should be delayed until January 1, 2004. OSHA will implement the provisions at that time, and does not see any need for further delay on the hearing loss column issue.

A. Comments on the Need for and Whether To Delay the Hearing Loss Column

A number of commenters either supported OSHA's proposed one-year delay of § 1904.10(b)(7), or recommended deleting the requirement to identify hearing loss cases in a separate column of the OSHA 300 Log (*See, e.g.*, Exs. 2–3, 2–6, 2–7, 2–14, 2–28, 2–29, 2–30, 2–33, 2–35, 3–1, 3–3, 3–4, 3–5, 3–12, 3–13, 3–14, 3–17). Commenters argued that delay will reduce the cost and burden associated with revising and reissuing the form (*See, e.g.*, Exs. 2–3, 2–7, 2–28, 2–29, 3–13), will provide time to update and distribute the forms (*See, e.g.*, Exs. 2–28, 2–29, 3–13), will allow employers enough time to update computer software used to comply with Part 1904 (*See, e.g.*, Exs. 2–28, 2–29), provide time for employee training (*See, e.g.*, Ex. 3–13), minimize confusion due to the inflated number of hearing loss cases recorded in the first year (*See, e.g.*, Exs. 2–28, 2–29), and allow OSHA to work with BLS to work out an alternative methods for collecting statistics (*See, e.g.*, Ex. 2–35).

Commenters also supported a delay until the MSD column issue is resolved (*See, e.g.*, Exs. 2–3, 2–26, 3–13) so the forms would only be revised once. For example, NIOSH stated that it ''[r]ecognizes that multiple year revisions in the OSHA 300 form may cause confusion among employers and can jeopardize the accuracy of survey data based on a sample of 300 Logs. Therefore, NIOSH believes that OSHA should make every effort to consolidate any revisions to the OSHA 300 Log decides to make at one point in time'' (Ex. 2–26).

A number of commenters recommended OSHA delete the hearing loss column altogether (*See, e.g.*, Exs. 2–6, 2–7, 2–14, 2–30, 2–35, 3–3, 3–5, 3–12, 3–14, 3–17). Commenters objected to the column with statements that a separate column for hearing loss is not needed (*See, e.g.*, Exs. 2–6, 2–7, 2–14, 2–30, 2–35, 3–5), because it is unclear how the column would be used to improve the effectiveness of an employer's hearing conservation program, given the follow-up actions required by 1910.95 (*See, e.g.*, Exs. 2–7, 2–35), because the data will not shed light on causes or provide value in determining prevention strategies (*See, e.g.*, Ex. 2–30), because work relatedness determinations are subject to error and a column is subject to more error than a survey that accounts for non-occupational hearing loss (*See, e.g.*, Ex. 2–35), because statistics can be generated from the descriptions on the 300 Log (*See, e.g.*, Ex. 2–6), and that it would be better to conduct a BLS survey with real life examples, questions and practical definitions with input from industry, medical professions, and statisticians (*See, e.g.*, Ex. 3–14). The National Grain and Feed Association argued that the column would have no protective value, stating that:

> It is unclear how a separate hearing loss column on the 300 Log could be used to further improve the effectiveness of an employer's hearing conservation program. For example OSHA's Occupational Noise Exposure Standard (29 CFR 1910.95) already requires employers to monitor employees' exposure to noise and take certain actions if workplace noise exceeds specific levels, including implementing a hearing conservation program, employee audiograms, administrative and engineering controls and employee training (Ex. 3–14).

Other commenters opposed further delay of the hearing loss column and urged OSHA to implement the

§ 1904.10(b)(7) requirements in 2003 (*See, e.g.*, Exs. 2–4, 2–10, 2–11, 2–17, 2–18, 2–19, 2–22, 2–24, 2–25, 2–26, 2–34, 2–36, 2–37, 2–39, 3–9, 3–15). These commenters argued that a hearing loss column is needed to provide a basis for prevention efforts (*See, e.g.*, Exs. 2–11, 2–17, 2–19, 2–20, 2–24, 2–36, 2–37, 3–7, 3–15), that there is little or no burden to adding a hearing loss column (*See, e.g.*, Exs. 2–4, 2–11, 2–24, 2–34, 2–37, 2–39), and that waiting for resolution of the MSD column issue is unnecessary and inappropriate and causes unnecessary delay with collection and analysis of the data, (*See, e.g.*, Exs. 2–4, 2–24, 2–34). The International Chemical Workers Union Council stated that delay will condemn more workers and even supervisors to unnecessary hearing loss, and that a column would provide information to employees because ''There are no requirements for employers to post or even develop a summary of hearing loss by workplace, department, or job type. As such, the only way that workers and their representatives can learn what areas of the plant and how many workers are experiencing significant hearing loss is by these being posted on the 300 Log, by word of mouth, or by convincing the employer to develop a summary of hearing loss on a yearly basis'' (Ex. 2–34).

Commenters also cited statistical reasons for a hearing loss column, stating that a column will improve the BLS data as current BLS data on hearing loss is limited and includes only cases resulting in days away from work (*See, e.g.*, Exs. 2–10, 2–11, 2–17, 2–18, 2–19, 2–20, 2–24, 2–26, 2–34, 2–36, 2–37, 2–39), that there are no other credible sources of national statistics on hearing loss (*See, e.g.*, Ex. 2–20), that no alternative data collection methods are as effective (*See, e.g.*, Ex. 2–10), and that there is no other cost effective method for collecting occupational hearing loss statistics (*See, e.g.*, Exs. 2–24, 2–26). The Coalition to Protect Workers' Hearing (Ex. 2–4), which includes the American Academy of Audiology, the American Association of Occupational Health Nurses, the American Industrial Hygiene Association, the American Speech-Language-Hearing Association, the Council for Accreditation in Occupational Hearing Conservation, the Institute of Noise Control Engineering, The National Hearing Conservation Association, and Self Help for Hard of Hearing People, Inc., argued that:

> The inability to quantify with reasonable accuracy rather than estimate the effects of noise on the U.S. workforce has significant ramifications. While we understand the effects of noise on hearing reasonably well, we are unable to address such issues as the efficacy of hearing protection devices, strengths or deficiencies in hearing conservation programs, and benchmarking standards for comparable employers and industries without comprehensive data on prevalence of noise induced hearing loss.

B. OSHA's Reasons for Retaining the Hearing Loss Column

OSHA has decided to retain the hearing loss column. Doing so will improve the Nation's statistical information on occupational hearing loss, facilitate analysis of hearing loss data at individual workplaces, and improve the Agency's ability to assess this common occupational disorder. One of the major functions of the Part 1904 regulation is to produce national statistics for occupational injury and illness (29 U.S.C. 657.(c)(1)). The data will clearly improve the Nation's statistics on occupational hearing loss. The current data published by the Bureau of Labor Statistics for injuries and illnesses occurring in year 2000 reveal that the category entitled ''Disorders of the ear, mastoid process, hearing'' provided estimates of 316 cases, and the subcategory of ''deafness, hearing loss'' provided estimates of 146 cases (*http://www.bls.gov/iif/oshwc/osh/case/ostb1047.txt*.

Because the BLS statistics on case characteristics only reflect injuries and illnesses that result in days away from work, and workers commonly suffer hearing loss and never require a day away from work, the BLS estimates represent only a minor fraction of the total hearing loss experienced by U.S. workers and do not reflect the incidence of occupational hearing loss. A discussion of the BLS data systems and how they function may be found at *http://www.bls.gov/bls/safety.htm*. By providing a separate 300 Log column for this disorder, the data for hearing loss will be summarized by the employer at the end of the year, and will be captured by the BLS when sampled employers submit their summary injury and illness information. Thus, national statistics will be available, for the first time, that include cases that result in days away from work and those that do not. Since OSHA recently published new criteria for recording occupational hearing loss that will result in consistent data capture of significant hearing loss cases (67 FR 44037–44048), the column can be used by BLS to generate useful, consistent, and accurate statistics for the Nation.

The resulting statistics will be of value to several groups. The data will have value on their own as a public information resource that can be accessed by students, hearing loss professionals, researchers, and others. The data can be used by policy makers to prioritize hearing loss prevention efforts and measure the performance of those efforts, whether they are enforcement, guidance, outreach or consultation. OSHA believes that the greatest value of the data will be realized by employers and employees at individual workplaces. These individuals have always had the ability to determine the incidence of hearing loss cases in their workplace via analysis of the individual case descriptions on the OSHA 300 Logs; the hearing loss column will only make this task easier. The greater value of the column lies in the new ability to benchmark the hearing loss statistics of an individual workplace to the hearing loss statistics for industry as a whole, or to hearing loss statistics for a comparable industry classification. This will allow employers and employees to compare their hearing loss prevention performance to the performance of their peers and know whether or not their efforts are succeeding. This is a function that is not required under the § 1910.95 noise standard, and is a useful purpose of the Part 1904 records.

OSHA disagrees with the arguments against a hearing loss column. In response to the criticism that the data will not shed light on causes or provide value in determining preventive strategies (*See, e.g.*, Ex. 2–30), a mere entry on the Log does not, by itself, show an employer or employee how to prevent hearing loss. That is the function of further analysis of the hearing loss cases, the workplace, and the employer's hearing conservation program. In this matter, hearing loss is no different than any other type of injury or illness. The Log provides descriptive data about occupational injuries and illnesses and some of the circumstances surrounding them. It does not replace the need for causal analysis of occupational injuries and illnesses. One commenter also raised the error rate for determining the work relatedness of hearing loss cases (Ex. 2–35). OSHA notes that the data only reflect work-related hearing loss cases. Part 1904 requires the employer to consider the case to be work-related only when exposure at work either causes or contributes to a hearing loss, or significantly aggravates a pre-existing hearing loss (§ 1904.5). Section 1904.10(b)(6) allows the employer to consider the case non work-related if a physician or other licensed health care professional determines the hearing loss is not work related.

Finally, the column is not burdensome. Although the rule does not require employers to use computer software to track injuries and illnesses, many employers do so voluntarily, and these employers will have some minimal initial costs to revise their software. Employers will also experience a small training cost to familiarize the employees who maintain the records with the new column. However, once these tasks are completed, it is no more burdensome to check a hearing loss column than one of the other columns on the form.

C. OSHA's Reasons for Delaying the Hearing Loss Column

OSHA has decided to delay the § 1904.10(b)(7) requirements until January 1, 2004. While the Agency has now received comment on the hearing loss column and has collected adequate information to evaluate the issue, there is not enough time to implement the requirement for use in 2003. As the American Petroleum Institute remarked, the one year delay would ''[p]rovide adequate time for OSHA to update and distribute the form 300 and 300S; provide adequate time for employers to update their recordkeeping software and retrain those responsible for recordkeeping; provide OSHA with valuable input from stakeholders; minimize confusion, including the inflated number of hearing loss cases that would be expected during the first (changeover) year of the new criteria for hearing loss; and make more efficient use of resources'' (Ex. 2–29).

OSHA agrees with the API. In order to implement the hearing loss column in 2003, the Agency would need to redesign the forms, print them in sufficient quantity, and distribute them for employers use. The states with OSHA Approved State Plans would need to modify their regulations and any state-specific forms they use to obtain equivalent data. Employers would need to implement the new forms, change any software they might be using to keep their records, and make any other changes they deem necessary. While none of these tasks are particularly difficult or burdensome, there is clearly insufficient time available to accomplish these tasks before January 1 of 2003. Waiting until January 2004 will provide all affected parties with more than adequate time to implement the new forms in a methodical, planned fashion.

D. Other Hearing Loss Issues

OSHA would like to clarify three matters in relation to recording occupational hearing loss in conjunction with the Section 1904.10 final rule issued July 1, 2002. First, the preamble to the final rule stated that employers in the shipbuilding industries are not covered by OSHA's noise standard § 1910.95 and are therefore not required to perform audiometric tests. (67 FR 44038, 44040). This statement was an error. OSHA Directive STD 0.2 Identification of General Industry Safety and Health Standards (29 CFR 1910) Applicable to Shipyard Work specifically states that employers in the shipbuilding industry that are covered by the 29 CFR part 1915 Standards are required to comply with a number of 29 CFR Part 1910 standards, including the § 1910.95 requirements for occupational noise.

The second issue involves the computation of a Standard Threshold Shift (STS), which is one part of the two-part recording criteria recently published (67 FR 44037–44048). (The case must also reflect a 25 dB hearing level compared to audiometric zero.) The STS computation is to be made in accordance with the Occupational Noise Exposure Standard 1910.95. As OSHA stated in the preamble to the July 1, 2002 rulemaking, the Section 1904.10 regulation ''[u]ses existing measurements employers are already using to comply with the OSHA noise standard, resulting in less paperwork burden for employers covered by both rules'' (67 FR 44040). Under 1910.95, the employee's current audiogram is compared to the employee's baseline audiogram, which may be the original audiogram taken when the employee was first placed in a hearing conservation program, or the revised baseline audiogram allowed by the Occupational Noise Exposure standard. Paragraph 1910.95(g)(9) of the noise rule states:

(9) Revised baseline. An annual audiogram may be substituted for the baseline audiogram when, in the judgment of the audiologist, otolaryngologist, or physician who is evaluating the audiogram:

(i) The standard threshold shift revealed by the audiogram is persistent, or

(ii) The hearing threshold shown in the annual audiogram indicates significant improvement over the baseline audiogram.

OSHA's former recording criteria required the employer to track separate baselines for recording and hearing conservation purposes. However, the new Part 1904 hearing loss recording system relies on the existing 1910.95 calculations, and separate baselines will no longer be required. In short, under the new Part 1904, a recordable hearing loss case occurs when an employee experiences an STS (as defined in 29 CFR 1910.95), the STS is work-related, and the employee's aggregate hearing loss exceeds 25dB from audio metric zero.

Third, OSHA has noted concern among employers because the application of the new two-part test in the new § 1904.10 recording criteria will result in an increase in recorded hearing loss cases. As noted in the July 1, 2002 rulemaking, the new criteria will capture more hearing loss cases. Employers will experience an increase in recorded hearing loss cases in 2003 and future years. Caution must be used when comparing the 2003 and future data to prior years, when the 25 dB criteria for recordkeeping was used. OSHA recognizes this increase, and will take the changes in the recordkeeping rule into account when evaluating an employer's injury and illness experience.

Agency Determination of Good Cause for an Accelerated Effective Date

The Administrative Procedure Act generally requires a thirty-day period between the publication date and the effective date of a final substantive rule. 5 U.S.C. 553(d) provides, in relevant part, as follows:

The required publication or service of a substantive rule shall be made not less than thirty days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction; [or]

* * *

(3) as otherwise provided by the agency for good cause found and published with the rule.

There will not be thirty days between the publication of this final rule and its effective date of January 1, 2003. However, the exemptions from the thirty-day requirement recognized in 5 U.S.C. 553(d)(1) and (3) apply here. First, this final rule grants an exemption by delaying certain regulatory requirements that would otherwise take effect for the year 2003. The requirements to check the MSD column and the hearing loss column are effective on January 1, 2003 as a matter of law unless this rule takes effect before that date. Therefore, the rule grants an exemption to a legal requirement, and is excepted from the thirty-day effective date requirement.

Moreover, OSHA also finds that there is good cause to make the rule effective on January 1, 2003, even if that date is less than thirty days from publication. The effective date for the requirements to check the MSD and hearing loss

columns was delayed during 2002 while OSHA considered comment on issues related to these requirements. This rule merely continues the status quo during 2003; it does not require any change in recordkeeping procedures.

If this rule cannot be made effective until thirty days from publication, employers will be required to comply with the new MSD and hearing loss column requirements for a brief time during 2003, only to revert back to the existing requirements. This would impose burdensome requirements on employers to quickly train their employees and modify their recordkeeping software in time to accommodate the new requirements on January 1. These extraordinary efforts would be wasted since the columns would be in effect for only a short time, and would produce no worthwhile data. Moreover, there would be a substantial degree of confusion about compliance responsibilities since the current recordkeeping forms do not contain the columns or the MSD definition, and OSHA could not produce and distribute new forms in time. For these reasons, OSHA believes that this final rule must take effect on January 1, 2003.

Paperwork Reduction Act

The final rule will continue OSHA's current policies regarding the recording of hearing loss and musculoskeletal tissue disorders during 2003 and will not impose any new paperwork requirements during that year. The addition of a new hearing loss column in 2004 will result in minor paperwork burdens associated with the addition of a new column, involving training of recordkeeping staff, obtaining new forms, and conversion of non-mandatory computer programs. The forms will be made available free of charge in 2003, before they are required for use in 2004. These burdens are already taken into account in the paperwork estimates for this rule.

Regulatory Flexibility Certification

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601), the Assistant Secretary certifies that the final rule will not have a significant economic impact on a substantial number of small entities. The rule does not add any new requirements, merely delaying the effective date of two sections of the rule, and allowing a previously delayed section to go into effect in 2004.

State Plans

The 26 States and territories with their own OSHA-approved occupational safety and health plans must adopt a comparable regulation within six months of the publication date of this final regulation. These states and territories are: Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Virgin Islands, Washington, and Wyoming. Connecticut, New Jersey, and New York have OSHA approved State Plans that apply to state and local government employees only.

Due to the short amount of time remaining in 2002, some of the states may not complete their rulemaking actions by January 1, 2003. However, the states will complete rulemaking to delay the effective dates of their equivalent regulations shortly thereafter. In the meantime, employers in these states will use the same forms used in federal jurisdiction states (which as noted above do not currently contain the columns or MSD definition) to ensure the uniformity of national data per Section 1904.37.

Executive Order

This document has been deemed significant under Executive Order 12866 and has been reviewed by OMB.

Authority

This document was prepared under the direction of John Henshaw, Assistant Secretary for Occupational Safety and Health. It is issued under Section 8 of the Occupational Safety and Health Act (29 U.S.C. 657) and 5 U.S.C. 553.

Signed at Washington, DC this 11th day of December, 2002.

John Henshaw,

Assistant Secretary of Labor.

For the reasons stated in the preamble, OSHA hereby amends 29 CFR Part 1904 as set forth below:

PART 1904—[AMENDED]

1. The authority citation for part 1904 continues to read as follows:

Authority: 29 U.S.C. 657, 658, 660, 666, 669, 673, Secretary of Labor's Order No. 3–2000 (65 FR 50017), and 5 U.S.C. 533.

2. Revise § 1904.10(b)(7) to read as follows:

§ 1904.10 Recording criteria for cases involving occupational hearing loss.

* * * * *

(b) * * *

(7) *How do I complete the 300 Log for a hearing loss case?*

When you enter a recordable hearing loss case on the OSHA 300 Log, you must check the 300 Log column for hearing loss. (Note: § 1904.10(b)(7) is effective beginning January 1, 2004.)

* * * * *

3. Revise the note to § 1904.12 to read as follows:

§ 1904.12 Recording criteria for cases involving work-related musculoskeletal disorders.

* * * * *

Note to §§ 1904.12: This section is effective January 1, 2004. From January 1, 2002 until December 31, 2003, you are required to record work-related injuries and illnesses involving muscles, nerves, tendons, ligaments, joints, cartilage and spinal discs in accordance with the requirements applicable to any injury or illness under §§ 1904.5, §§ 1904.6, §§ 1904.7, and §§ 1904.29. For entry (M) on the OSHA 300 Log, you must check either the entry for ''injury'' or ''all other illnesses.''

4. Revise § 1904.29(b)(7)(vi) to read as follows:

§ 1904.29 Forms.

* * * * *

(b) * * *

(7) * * *

(vi) Other illnesses, if the employee independently and voluntarily requests that his or her name not be entered on the log. Musculoskeletal disorders (MSDs) are not considered privacy concern cases. (Note: The first sentence of this §§ 1904.29(b)(7)(vi) is effective on January 1, 2002. The second sentence is effective beginning on January 1, 2004.)

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[FR Doc. 02–31619 Filed 12–16–02; 8:45 am]

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LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 253

[Docket No. 2002–4 CARP NCBRA]

Noncommercial Educational Broadcasting Compulsory License

AGENCY: Copyright Office, Library of Congress.

ACTION: Final rule.

SUMMARY: The Copyright Office of the Library of Congress is publishing final regulations adjusting the royalty rates and terms under the Copyright Act for the noncommercial educational broadcasting compulsory license for the period 2003 through 2007.

EFFECTIVE DATE: January 1, 2003.

FOR FURTHER INFORMATION CONTACT: David O. Carson, General Counsel, or