EMPLOYER REPRESENTATIVES' COMMENTS
ON
THE PROPOSED RULE ON
OCCUPATIONAL INJURY AND ILLNESS RECORDING AND REPORTING (RECORDKEEPING)

BEFORE
THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

Docket No. OSHA–2009–0044 (RIN 1218-AC45)
29 CFR 1904

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These Comments are Endorsed by the Following Employer Representatives:

Associated Builders and Contractors, Inc.
The Associated General Contractors of America
American Trucking Associations, Inc.
The Food Marketing Institute
Independent Electrical Contractors
The International Foodservice Distributors Association
The International Franchise Association
IPC – Association Connecting Electronics Industries
The Motor & Equipment Manufacturers Association
National Association of Home Builders
The National Association of Manufacturers
The National Association of Wholesaler-Distributors
The National Oilseed Processors Association
The National Restaurant Association
The National Retail Federation
The National Roofing Contractors Association
The Shipbuilders Council of America
Textile Rental Services Association
The U.S. Chamber of Commerce

On January 29, 2010, the Occupational Safety and Health Administration (OSHA) published a notice in the Federal Register announcing a proposed revision to the agency's Occupational Injury and Illness Recording and Reporting Rule ("the Recordkeeping Rule").[1] The groups indicated below welcome this opportunity to comment on questions relating to the Proposed Rule.

Associated Builders and Contractors, Inc. (ABC)--ABC is a national construction industry trade association representing more than 25,000 merit shop contractors, subcontractors, materials suppliers and construction-related firms within a network of 77 chapters throughout the United States and Guam. ABC member contractors employ more than 2.5 million skilled construction workers, whose training, skills, and experience span all of the twenty-plus skilled trades that comprise the construction industry. Moreover, the vast majority of our contractor members are classified as small businesses. Our diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry. This philosophy is based on the principles of full and open competition unfettered by the government, nondiscrimination based on labor affiliation, and the award of construction contracts to the lowest responsible bidder through open and competitive bidding. This process assures that taxpayers and consumers will receive the most for their construction dollar.

The Associated General Contractors of America (AGC) is the leading association for the construction industry. Founded in 1918 at the express request of President Woodrow Wilson, AGC now represents more than 33,000 firms in nearly 100 chapters throughout the United States. Among the association's members are approximately 7,500 of the nation's leading general contractors, more than 12,500 specialty contractors, and more than 13,000 material suppliers and service providers to the construction industry. These firms engage in the construction of buildings, shopping centers, factories, industrial facilities, warehouses, highways, bridges, tunnels, airports, waterworks facilities, waste treatment facilities, dams, hospitals, water conservation projects, defense facilities, multi-family housing projects, municipal utilities and other improvements to real property. Unlike many associations in the industry, AGC proudly represents both union and open-shop construction contractors.

American Trucking Associations, Inc. is a united federation of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interests of the trucking industry. Its members include more than 2000 trucking companies and industry suppliers of equipment and services. Directly and indirectly through its affiliated organizations, ATA encompasses over 37,000 companies and every type and class of motor carrier operation.

The Food Marketing Institute (FMI) is a national trade association conducting programs in public affairs, food safety, research, education and industry relations on behalf of its 1,500 member companies –food retailers and wholesalers – in the United States and around the world. FMI's U.S. members operate approximately 26,000 retail food stores and 14,000 pharmacies. Their combined annual sales volume of $680 billion represents three-quarters of all retail food sales in the United States. FMI's retail membership is composed of large multi-store chains, regional firms and independent supermarkets. Its international membership includes 200 companies from more than 50 countries. FMI's associate members include the supplier partners of its retail and wholesale members.

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[1] 75 Fed. Reg. 4728, (Jan. 29, 2010).

Independent Electrical Contractors—Established in 1957, IEC is a trade association composed of more than 3,500 members with 68 chapters nationwide. Headquartered in Alexandria, Virginia, IEC is the nation's premier trade association representing America's independent electrical and systems contractors. IEC National aggressively works with the industry to establish a competitive environment for the merit shop - a philosophy that promotes the concept of free enterprise, open competition and economic opportunity for all.

The International Foodservice Distributors Association (IFDA) is the leading trade association representing foodservice distributors throughout the United States and internationally. IFDA's members include broadline, systems, and specialty foodservice distributors that supply food and related products to restaurants and other food away from home foodservice operations. IFDA members operate more than 700 distribution facilities representing more than $110 billion in annual sales.

The International Franchise Association (IFA) is the largest and oldest franchising trade group, representing more than 85 industries, including more than 11,000 franchisee, 1,200 franchisor and 500 supplier members nationwide. IFA protects, enhances and promotes franchising by advancing the values of integrity, respect, trust, commitment to excellence and diversity. According to a 2008 study conducted by PricewaterhouseCoopers, there are more than 900,000 franchised establishments in the U.S. that are responsible for creating 21 million American jobs and generating $2.3 trillion in economic output. Franchising operates in industries including automotive, commercial & residential services, restaurants, lodging, real estate and business and personal services.

IPC – Association Connecting Electronics Industries—IPC is a global trade association dedicated to the competitive excellence and financial success of its 2,700 member companies which represent all facets of the electronics industry, including design, printed board manufacturing, electronics assembly and test. As a member-driven organization and leading source for industry standards, training, market research and public policy advocacy, IPC supports programs to meet the needs of an estimated $1.5 trillion global electronics industry. IPC maintains additional offices in Taos, N.M.; Arlington, Va.; Garden Grove, Calif.; Stockholm, Sweden; and Shanghai, China.

The Motor & Equipment Manufacturers Association (MEMA) represents more than 650 member companies that manufacture motor vehicle parts for use in the light vehicle and heavy-duty original equipment and aftermarket industries. MEMA represents its members through three affiliate associations: Automotive Aftermarket Suppliers Association (AASA), Heavy Duty Manufacturers Association (HDMA), and Original Equipment Suppliers Association (OESA). Suppliers manufacture the parts and technology used in domestic production of new cars and trucks produced each year and the aftermarket products necessary to repair and maintain more than 248 million vehicles on the road today.

National Association of Home Builders (NAHB) is a Washington, DC-based trade association representing more than 175,000 residential home building and remodeling industry members. Known as "the voice of the housing industry," NAHB is affiliated with more than 800 state and local home builders associations around the country. NAHB's builder members construct about 80 percent of the new housing units, making housing a large engine of economic growth in the country.

The National Association of Manufacturers (NAM) is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. Nearly 12 million Americans work directly in manufacturing- about 10 percent of the overall workforce. Manufacturers are committed to working with their employees to improve the safety of their workplaces. The NAM appreciates the opportunity to comment on the proposed rulemaking to express the concerns of our members and the impact it has on the terms of the settlement agreement the NAM reached with the Department of Labor on November 16, 2001 FR Doc. 01-31808.

The National Association of Wholesaler-Distributors is comprised of direct member companies and a federation of national, regional and state associations and their member firms which collectively total approximately 40,000 employers, with locations in every state in the United States. NAW-affiliated companies are a constituency at the core of our economy – the link in the marketing chain between manufacturers and retailers and commercial, institutional and governmental end-users. Industry firms vary widely in size, employ millions and American workers, and account for $4.5 trillion in annual economic activity.

The National Oilseed Processors Association (NOPA) is a national trade association that represents 15 companies engaged in the production of vegetable meals and oils from oilseeds, including soybeans. NOPA's member companies process more than 1.7 billion bushels of oilseeds annually at 65 plants located throughout the country, including 60 plants that process soybeans.

The National Restaurant Association represents the nation's 945,000 restaurants and foodservice locations that employ nearly 13 million people. The restaurant industry is the nation's second largest private sector employer.

The National Retail Federation (NRF)--As the world's largest retail trade association and the voice of retail worldwide, the National Retail Federation's global membership includes retailers of all sizes, formats and channels of distribution as well as chain restaurants and industry partners from the U.S. and more than 45 countries abroad. In the U.S., NRF represents the breadth and diversity of an industry with more than 1.6 million American companies that employ nearly 25 million workers and generated 2009 sales of $2.3 trillion.

The National Roofing Contractors Association (NRCA) is one of the construction industry's most respected trade associations and the voice and leading authority in the roofing industry for information, education, technology and advocacy. Founded in 1886, NRCA is a nonprofit association that represents all segments of the roofing industry, including contractors; manufacturers; distributors; architects; consultants; engineers; building owners; and city, state and government agencies. NRCA's mission is to inform and assist the roofing industry, act as its principal advocate and help members in serving their customers. NRCA continually strives to enhance every aspect of the roofing industry. NRCA has more than 4,000 members from all 50 states and 53 countries and is affiliated with 97 local, state, regional and international roofing contractor associations. NRCA contractor members range in size from companies with less than $1 million in annual sales volumes (40 percent of the current membership) to large, commercial contractors with annual sales volumes of more than $20 million. More than half perform both residential and commercial roofing work, and more than one-third have been in business for more than a quarter of a century.

The Shipbuilders Council of America (SCA) was established in 1920 as the trade association dedicated to representing the interests of the competitive U.S. shipbuilding and ship repair industry. SCA members build, repair and service America's fleet of commercial and government vessels. The Council represents 44 companies that own and operate over 100 shipyards in 21 states, with facilities on all three U.S. coasts, the Great Lakes and the inland waterways system. SCA also represents 33 affiliate members that provide goods and services to the shipyard industry.

Textile Rental Services Association (TRSA)—Founded in 1912, TRSA is the world's largest textile service industry association, representing more than 1000 linen supply companies, uniform rental and commercial and industrial laundry facilities both domestically and internationally. The membership of TRSA encompasses our nation's largest service companies, large regional companies and small business one-plant operations. TRSA member operating companies rent, sell and clean linen, uniforms and other textile products for the hospitality industry, healthcare facilities, industrial plants, manufacturers and operations concerned with dust control. Collectively our industry represents an over $15 billion marketplace and employees over 170,000 people with facilities located in all fifty states.

The U.S. Chamber of Commerce (Chamber), the world's largest business federation with over three million members, represents businesses of all sizes and in every market sector and throughout the United States which will be directly affected by the OSHA MSD Recordkeeping regulation. Over 96 percent of the Chamber's members are small businesses employing 100 or fewer employees. For this reason, the Chamber is particularly sensitive to the difficulties faced by small businesses in their efforts to interpret and comply with OSHA standards and regulations.

I. EXECUTIVE SUMMARY

Sections 8 and 24 of the OSH Act direct OSHA to adopt reasonably clear injury and illness recordkeeping rules that will result in the creation of accurate records of significant work-related injuries and illnesses, which are demonstrated to be necessary to assist OSHA, employers and employees in furthering the objectives of the OSH Act with a minimum burden upon employers. The stated purpose of the Proposed Rule is to add a separate column on the OSHA Form 300 Log for conditions referred to as musculoskeletal disorders ("MSDs"), and a new Section 1904.12 that would define the term "MSD" and provide further guidance in using the MSD column. The term "MSD" is a broadly and vaguely defined "term of art" used to describe a generally unrelated collection of conditions, many of which are based entirely on subjective symptoms that are not subject to objective verification. Despite many years of study and research, the scientific community remains unable to reliably define, diagnose or determine the cause of MSDs, or identify appropriate remedial measures with any degree of precision. This absence of medical and scientific consensus on such fundamental issues as how to define an MSD, or how best to respond, means that OSHA's rulemaking to require employers to record MSDs is beyond what the statutory authority permits.

In proposing to broadly define the term "MSD" to include any disorder of any tissue in the musculoskeletal system, which might be evidenced by any subjective symptoms appearing at work, OSHA would gloss over both these fundamental scientific shortcomings and the applicable legal requirements of the OSH Act to impose an insurmountable, counterproductive and unauthorized recordkeeping burden on employers. Contrary to the provisions and objectives of Sections 8 and 24 of the OSH Act, the Proposed Rule would require the burdensome collection of

inaccurate and misleading data, including a multitude of insignificant conditions, and a multitude of conditions unrelated to work, that would undermine the current recordkeeping system, produce meaningless and misleading statistical "analyses," and trigger a misallocation of resources by OSHA and employers -- all of which would retard rather than advance workplace safety and health.

The Proposed Rule would also make two other material changes to the OSHA Recordkeeping Rule, although the OSHA did not highlight these changes and only careful reading of the Federal Register notice reveals them. First, the Proposed Rule would change the currently applicable criteria for recording cases involving a restricted duty or transfer by revoking the exemption for "preventive restrictions" established under the Settlement Agreement between the National Association of Manufacturers and OSHA that resolved the NAM's legal challenge to the Revised Recordkeeping Rule issued on January 19, 2001. If implemented, that change would cause employers to record insignificant conditions and discourage employers from taking proactive preventive measures by penalizing them for taking those measures. It would also subject the real world managers of businesses, focused on efficiently running their operations, to the enormous and distracting burden of determining, on an ongoing basis, when any subjective deviation from a worker's normal sense of wellness might potentially rise to the level of an abnormal condition that would constitute an "injury or illness," and trying to ensure they discover that condition before the worker begins to work.

Second, having previously determined, after an extensive analysis of the issue, that all MSDs are injuries, the Proposed Rule would, without any analysis or discussion of the issue, arbitrarily reclassify all MSDs as illnesses. The distinction between illnesses generally covered by OSHA health standards and injuries generally covered by OSHA safety standards has potentially enormous consequences. No rationale is offered for this apparent about-face in OSHA's characterization of these conditions. It is unclear whether OSHA even considered this issue and recognizes this change, or whether it was simply trying to ensure that BLS would collect certain data. Given the lack of any discussion of this issue, and the short comment period provided, this rulemaking is not the appropriate forum to address this issue.

For the foregoing reasons, which are explained in greater detail below, we believe it would be inappropriate for OSHA to proceed with the proposed rule and that it should be withdrawn.

II. INTRODUCTION

The Revised Recordkeeping Rule, issued on January 19, 2001,[2] contained a Section 1904.12, scheduled to take effect on January 1, 2002, which would have defined the term MSD, required employers to identify all recordable occurrences of MSDs by entering a check in a special MSD column, and provided further guidance regarding the use of the MSD column.[3]

[2] Occupational Injury and Illness Recording and Reporting Requirements, 29 CFR Parts 1904 and 1952 Final Rule, 66 Fed. Reg. 5915 (January 19, 2001).

[3] Section 1904.12 of the Final Rule read as follows:

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

Several intervening events led OSHA to delay and then revoke that rule. In March 2001, Congress took the unprecedented step of rescinding OSHA's newly promulgated Ergonomics Program Standard, based, at least in part, on the failure of the standard to take into account the scientific controversies and uncertainties underlying MSDs, including their means of diagnosis, their attribution to work, and the nature and effectiveness of workplace interventions designed to address them. The MSD provisions in Part 1904 were adopted as companion components for the agency's Ergonomics Program Standard and reflected the same scientific shortcomings.

Shortly after the Ergonomics Program Standard was rescinded, Secretary of Labor Elaine L. Chao announced that she would be conducting a series of forums to explore the fundamental controversies and unanswered questions, including the appropriate definition of "MSD," with the objective of developing a "comprehensive approach to ergonomics." Recognizing that it would be inappropriate to proceed with a recordkeeping revision that presumed a workable definition of an MSD, even as this issue was still being debated in the forums and deliberated within the agency, OSHA wisely extended the effective date of the MSD revisions until January 1, 2003.

When Secretary Chao announced her "comprehensive approach to ergonomics" on April 5, 2002,[4] she found that variations among industries and jobs, along with other barriers to a universally applicable standard, were insurmountable. Accordingly, she opted for industry-or-task-specific guidelines, coupled with enforcement measures, workplace outreach, and additional research into the science underlying MSDs. The comprehensive plan did not include a single definition for MSDs. To the contrary, as stated by the agency (68 FR 38602, col. 2):

(a) **Basic requirement.** If any of your employees experiences a recordable work-related musculoskeletal disorder (MSD), you must record it on the OSHA 300 Log by checking the "musculoskeletal disorder" column.

(b) **Implementation.** (1) **What is a "musculoskeletal disorder" or MSD?** Musculoskeletal disorders (MSDs) are 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.

(2) **How do I decide which musculoskeletal disorders to record?** There are no special criteria for determining which musculoskeletal disorders to record. An MSD case is recorded using the same process you would use for any other injury or illness. If a musculoskeletal disorder is work-related, and is a new case, and meets one or more of the general recording criteria, you must record the musculoskeletal disorder. The following table will guide you to the appropriate section of the rule for guidance on recording MSD cases.

(i) Determining if the MSD is work-related. See § 1904.5.
(ii) Determining if the MSD is a new case. See § 1904.6.
(iii) Determining if the MSD meets one or more of the general recording criteria:
(A) Days away from work, see § 1904.7(b)(3).
(B) Restricted work or transfer to another job, or see § 1904.7(b)(4).
(C) Medical treatment beyond first aid. See § 1904.7(b)(5).
(3) **If a work-related MSD case involves only subjective symptoms like pain or tingling, do I have to record it as a musculoskeletal disorder?** The symptoms of an MSD are treated the same as symptoms for any other injury or illness. If an employee has pain, tingling, burning, numbness or any other subjective symptom of an MSD, and the symptoms are work-related, and the case is a new case that meets the recording criteria, you must record the case on the OSHA 300 Log as a musculoskeletal disorder.

[4] http://osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=1230

OSHA recognized that "MSD" is **a term of art** in scientific literature that refers collectively to a group of injuries and illnesses that affect the musculoskeletal system and that there is no single diagnosis for these disorders [emphasis added].

Furthermore, OSHA has explicitly stated "that no single definition of 'ergonomic injury' [is] appropriate for all contexts."[5] In making these determinations, OSHA again properly acknowledged that additional research into MSDs was necessary in order to create and implement a clear, concise definition—if possible—of what constitutes an MSD. Accordingly, OSHA further extended the effective date of the MSD provisions of Section 1904 until January 1, 2004.

On June 30, 2003, OSHA formally announced its determination that the MSD column was not necessary or supported by the rulemaking record, and the MSD provisions in Section 1904.12 were revoked.[6] On November 17, 2004, the National Advisory Committee on Ergonomics (NACE) announced that it was unable to reach a consensus on the definition of the term "MSDs" and further concluded that agreement on a definition of the term would not help to reduce their number:[7]

> The pursuit of a single definition of MSDs has not reached consensus. The various/numerous MSD definitions cover a host of conditions limited only by those doing the defining, none of which directly help to reduce the number of such disorders. OSHA should continue the development of guidelines independent of any final definition of MSDs.[8]

Nothing has changed since June of 2003 to provide the definitional content and certainty that was lacking when Section 1904.12 was revoked in June of 2003, nor has OSHA offered any scientific or other supporting evidence to the contrary in this rulemaking. It has become abundantly clear that OSHA's earlier conclusion was and remains correct—the term "MSD" remains a broadly and vaguely defined **term of art** that means different things to different people. Accordingly, no workable definition of work-related "musculoskeletal disorders" is currently possible in light of the limited medical understanding of those disorders, their multi-factorial etiology and their subjective nature. Against this backdrop of great uncertainty, and without a new foundation, the agency, acting under a new political administration, would have us accept the idea that the unworkable MSD provisions in the Proposed Rule are necessary for the agency to carry out its statutory responsibilities under the Occupational Safety and Health Act ("the OSH Act"). We respectfully disagree. For OSHA to proceed with the Proposed Rule would be manifestly inappropriate and it should be withdrawn.

III. SUMMARY OF POINTS

[5] 67 Fed. Reg. 44,124, col. 3. (June 30, 2003)

[6] 68 FR 38601.

[7] http://www.osha.gov/SLTC/ergonomics/recommendations.html

[8] More revealing is the initial version of this point as approved by the Guidelines Workgroup before it was presented to the full committee on November 17, 2004:

> There is not a widely-agreed upon definition of musculoskeletal disorders (MSDs), so the Workgroup decided that the pursuit of a definition of MSDs is unproductive, suggesting that NACE, OSHA, and others should continue their work and not get caught up in finding a definition.
> http://osha.gov/SLTC/ergonomics/nace_mins_11_2004.html

A. OSHA's assertion that the proposed rule would simply require the employer to review the cases that have been recorded on the OSHA 300 Log, make a determination as to whether they are MSDs and, if so, place a check in the MSD column is based on the erroneous premise that the current level of scientific knowledge is adequate to identify, diagnose and determine the cause of conditions known as MSDs.

B. The Proposed Rule would improperly require employers to record conditions on the OSHA 300 Log that (1) are not significant and (2) have no meaningful relationship to the workplace.

C. The Proposed Rule would require employers to make determinations that go beyond their abilities and the abilities of many medical professionals. Employers would be faced with the untenable choice of recording a condition which does not have an adequate definition, or immediately undertaking extensive inquiries, often into an employee's otherwise private medical history and personal life, to enable the employer to make the necessary determinations (whether an injury, work-related, preexisting etc.).

D. The incorporation of the MSD provisions into the OSHA recordkeeping system will produce materially inaccurate and misleading "injury and illness" records of disparate and unrelated conditions that will result in a misallocation of OSHA's resources.

E. OSHA has materially understated the costs of compliance with the proposed rule and has no factual basis for certifying that the Proposed Rule would not have a significant economic impact on a substantial number of small entities and therefore avoiding compliance with the Regulatory Flexibility Act as amended by the Small Business Regulatory Enforcement Fairness Act.

F. The proposed rule does not comply with the Paperwork Reduction Act.

G. OSHA omitted material information and mischaracterized the nature and scope of this proposal by erroneously stating that the Proposed Rule would not change the currently applicable criteria for recordability.

H. There is insufficient time to implement the proposed rule by January 1, 2010.

For the foregoing reasons, which we address in further detail below, we believe it would be inappropriate for OSHA to proceed with the Proposed Rule and that it should be withdrawn.

IV. OVERVIEW OF OSHA'S STATUTORY AUTHORITY

OSHA's authority to require the recording and reporting of work-related injuries and illnesses is provided and limited by Sections 8 and 24 of the OSH Act.

Section 8(c)(2) of the OSH Act provides that the Secretary of Labor "shall prescribe regulations requiring employers to maintain accurate records of .... work-related deaths, injuries and illnesses other than minor injuries requiring only first aid treatment and which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job." 29 U.S.C. § 657(c)(1) (emphasis added).

Section 8(d) of the OSH Act provides that "any information obtained by the Secretary, the Secretary of Health and Human Services, or a State agency under this Act shall be obtained with a minimum burden upon employers, especially those operating small businesses." It also provides that "unnecessary duplication of efforts in obtaining information shall be reduced to the maximum extent feasible." 29 U.S.C. § 657(d).

Section 24(a) of the OSH Act provides that in order to further the purposes of the Act, the Secretary of Labor "shall develop and maintain an effective program of collection, compilation, and analysis of occupational safety and health statistics." It also provides that the Secretary "shall compile accurate statistics on work injuries and illnesses which shall include all disabling, serious, or significant injuries and illnesses, whether or not involving loss of time from work, other than minor injuries requiring only first aid treatment and which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job." 29 U.S.C. § 673(a).

Under these provisions, OSHA has the authority only to require the recording of serious illnesses and injuries that are caused by conditions in the workplace. In construing these provisions, reviewing courts will be guided by the fact that much of the Act was drafted with the intent of limiting the Secretary's authority. Industrial Union Dept. AFL--CIO v. American Petroleum Inst., 448 U.S. 607, 651 (1979) ("Benzene") ("it is important to note that Congress repeatedly expressed its concern about allowing the Secretary too much power over American industry").

Sections 8(c)(2) and 24(a), quoted above, grant OSHA the limited authority to require the recording of serious illnesses and injuries. Under § 8(c), OSHA may only require the recording of injuries and illnesses that are "other than minor." Similarly, under 24(a), OSHA may require the recording only of "disabling, serious, or significant injuries and illnesses... other than minor injuries..."

The legislative history of the Act makes clear that these limitations on OSHA's authority are the product of specific deliberation and are not to be ignored. The early versions of the Act would have required employers to record "all work-related deaths, injuries and illnesses."[9] These broad proposals were expressly rejected by the Conference Committee and omitted from the final version of the Act. According to the Conference Report,

> A Senate bill provision without a counterpart in the House amendment permitted the Secretary to require an employer to keep records and make reports on "all work-related deaths, injuries and illnesses." The House receded with an amendment limiting the reporting requirement to injuries and illnesses other than of a minor nature, with a specific definition of what is not of a minor nature [emphasis added].[10]

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[9] See S. 2193, 91st Cong., 2d Sess. (1969), reprinted in The Legislative History of the Occupational Safety and Health Act of 1970, 204, 251 (Comm. Print 1971) ("Legis. Hist."); see also H.R. 16785, 91st Cong. 2d Sess. (1970), reprinted in Legis. Hist., at 950 (same); H. R. No. 91-1291 accompanying H.R. 16785 at 6, 39, 91st Cong. 2d Sess. (1970), reprinted in Legis. Hist., at 831, 869.

[10] Conf. Rep. No. 91-1765 accompanying S. 2193, 91st Cong., 2d Sess. at 37 (1970), reprinted in Legis. Hist., 1154, at 1190 (emphasis added).

Read together, and in accordance with other generally applicable principles of law, we believe the referenced portions of the OSH Act direct OSHA to adopt reasonably clear injury and illness recordkeeping rules that will result in the creation of accurate records of significant work-related injuries and illnesses, which are demonstrated to be necessary to assist OSHA, employers and employees in furthering the objectives of the OSH Act with a minimum burden upon employers. We further believe that the term "significant injuries and illnesses" is limited to those conditions for which medical treatment, restricted duty or days away from work is or would be required by a qualified medical professional who properly examines the affected employee and is in possession of and reviews the information needed to make an informed medical determination. Given varying levels of knowledge and expertise within the medical profession, and the pressures to make quick decisions with less information than would be desirable, employers need the ability to obtain a second opinion from someone they believe to be more qualified on the basis of expertise or newly available information. The Proposed Rule fails to meet these critical statutory requirements and is therefore beyond the authority granted OSHA for these purposes.

As explained more fully below, adoption of this proposal will result in employers recording cases of minor subjective symptoms rather than of significant injuries, and conditions that will not have a meaningful nexus to the workplace. In addition employers would be compelled to expend inordinate resources in an attempt to comply with this rule and the final product would be inaccurate records of unrelated conditions providing no value to workplace safety and health.

V. PROPOSED SECTION 1904.12

The Proposed Rule would add a new Section 1904.12 that reads as follows:

> Sec. 1904.12 Recording criteria for cases involving work-related musculoskeletal disorders.
>
> (a) Basic requirement. If any of your employees experiences a recordable work-related musculoskeletal disorder (MSD), you must record it on the OSHA 300 Log by checking the "musculoskeletal disorder" column.
>
> (b) Implementation--(1) What is a "musculoskeletal disorder" or MSD? MSDs are 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.
>
> (2) How do I decide which MSDs to record? There are no special criteria for determining which MSDs to record. An MSD case is recorded using the same process you would use for any other injury

or illness. If an MSD disorder is work-related, is a new case, and meets one or more of the general recording criteria, you must record the case as an MSD in the MSD column. The following table will guide you to the appropriate section of the rule for guidance on recording MSD cases.

(i) Determining if the MSD is work-related. See Sec. 1904.5.

(ii) Determining if the MSD is a new case. See Sec. 1904.6.

(iii) Determining if the MSD meets one or more of the general recording criteria:

(A) Days away from work, See Sec. 1904.7(b)(3);

(B) Restricted work or transfer to another job, See Sec. 1904.7(b)(4); or

(C) Medical treatment beyond first aid. See Sec. 1904.7(b)(5).

(3) If a work-related MSD case involves only subjective symptoms like pain or tingling, do I have to record it as an MSD? The symptoms of an MSD are treated the same way as symptoms for any other injury or illness. You must record the case on the OSHA 300 Log as an MSD if:

(i) An employee has pain, tingling, burning, numbness or any other subjective symptom of an MSD;

(ii) The symptoms are work-related;

(iii) The MSD is a new case; and

(iv) The case meets one or more of the general recording criteria.

(4) When do I have to start recording work-related MSDs on the MSD column? You must begin recording work-related MSDs on the MSD column as of January 1, 2011.[11]

VI. DISCUSSION AND ANALYSIS

A. OSHA's assertion that the proposed rule would simply require the employer to review the cases that have been recorded on the OSHA 300 Log, make a determination as to whether they are MSDs and, if so, place a check in the MSD column is based on the erroneous premise that the current level of scientific knowledge is adequate to identify, diagnose and determine the cause of conditions known as MSDs.

OSHA's assertion is apparently based on an ideal world where the alleged hazard and its injury and illness consequences are clearly discernable and definable. Unfortunately, with MSDs they are not. As OSHA previously admitted and as the proposal itself demonstrates, the term "MSD" is a broadly and vaguely defined "term of art" used to describe a generally unrelated collection of largely subjective conditions, not subject to objective verification. Despite many years of study and research, the scientific community remains unable to define, diagnose or determine the cause of MSDs, or identify appropriate remedial measures with any degree of precision. On November 17, 2004, after an extended series of discussions, involving numerous revisions to its draft guidelines, which highlighted the scientific uncertainties surrounding the

[11] 75 Fed. Reg. 4741, col. 3 (Jan. 29, 2010).

causation and prevention of MSDs, the National Advisory Committee on Ergonomics ("NACE") adopted the following guideline recommendation:[12]

> MSDs are a consequence of exposures to risk factors of a multi-factorial nature. Although the exact cause of a specific MSD may not be known, and the precise effectiveness of an intervention may not be predictable, the objective of ergonomics is to reduce, to a practical minimum, the demands, such as physiological, cognitive, behavioral, of doing the work by controlling these exposures. To this end, a number of tools and guidelines may be useful.

In other words, although we do not know what conditions caused a given MSD, and we do not know what intervention might eliminate the undetermined (occupational and/or non-occupational physiological, cognitive and/or behavioral) conditions that caused the MSD, NACE explained that there is a process called ergonomics that has, as its objective, reducing the demands of work with the apparent hope of reducing the frequency and severity of MSDs.

In this context, OSHA's assertion that the Proposed Rule represents a minor bookkeeping exercise is simply absurd. It overlooks the practical aspects of how the rule would be implemented in the real world. It ignores the fact that the proposal would effect a material change in the current recordkeeping criteria. OSHA also fails to acknowledge that the proposed changes, combined with the statement that the MSD data will be used to target enforcement efforts[13]--despite its acknowledgement that no single definition of MSD is suitable for all purposes--will force employers to engage in a far more comprehensive analysis in assessing potential MSD cases than they currently undertake.

1. No acceptable definition of MSDs currently exists.

Ergonomics would be a far less controversial subject if the alleged hazard and its injury consequences were clearly discernable and definable. Unfortunately, they are not. The scientific community's inability to agree on a definition of MSDs is evidence of the confusion surrounding ergonomic issues and provides a compelling argument against creating a separate MSD column for recording these ill-defined conditions.

The depth of the current uncertainty regarding the appropriate definition of MSDs is evident from the countless substantively distinct definitions that have circulated in recent years. A striking example of the divergence in definition is underscored by comparing the National Academy of Sciences' ("NAS") definition with OSHA's. NAS has defined a musculoskeletal "disorder" as "an alteration in an individual's usual sense of wellness or ability to function,"

[12] http://osha.gov/SLTC/ergonomics/nace_mins_11_2004.html

[13] "In addition to its statistical value, the MSD column would provide valuable information to assist OSHA's inspection, outreach, guidance, and enforcement efforts. Each year, OSHA collects summary data from OSHA 300 Logs from approximately 80,000 establishments and uses them to schedule targeted inspections in high hazard industries. The summary data are comprised of the totals for each column on the OSHA 300 Log. These data include totals for the number of injuries and illnesses, cases with days away from work, cases involving restricted work or job transfer, and cases of each specific illness listed on the log. However, the summary data do not include any data specifically on MSDs. Restoring the MSD column on the OSHA 300 Log would provide the Agency with such data." 75 Fed. Reg. 4732.

which "may or may not be associated with well recognized anatomic, physiologic, or psychiatric pathology."[14] OSHA's rescinded ergonomics standard defined MSDs as "disorders of the muscles, nerves, tendons, ligaments, joints, cartilage, blood vessels, or spinal discs."[15] The NAS definition—"an alteration in an individual's usual sense of wellness"— highlights, properly we might add, the ephemeral nature of MSDs, which lack the precision of understanding needed to regulate or record them. The proposed OSHA definition is divorced from the medical and scientific reality that belies the physiological linkage it presumes.[16]

OSHA cites to the definition of MSDs used in the ANSI A10.40-2007 standard for Reduction of Musculoskeletal Problems in construction as support for its approach of using specific examples of MSDs in the definition "to help illustrate the types of disorders the definition is intended to cover."[17] However, for several reasons, the ANSI A10.40 standard is not an appropriate authority supporting OSHA's approach. This putative "voluntary consensus standard" was adopted without the required substantial agreement among materially affected interests and the Committee that adopted the Standard lacked the necessary balance with the Committee dominated by the faction favoring adoption of the Standard. The Committee failed to give consideration to opposing views or to put forth a "concerted effort" toward resolving negative comments and objections and the Committee was unable to—and did not—provide a rationale relevant to the comments when overruling negative ballots.[18] Each one of these deficiencies reflected a fundamental failure of due process that eliminates any pretense that ANSI A10.40-2007 should be considered a "national consensus standard" as that term is used in Sections 3(9) and 6(b)(8) of the OSH Act. In addition, beyond these fundamental defects, the defined term "musculoskeletal problems" is not being used in the ANSI A10.40 standard to define MSDs. It is being used to define a much broader set of conditions that would trigger some type of response under the type of ergonomics program standard that was adopted by OSHA at the close of the Clinton administration and subsequently invalidated by Congress under the Congressional Review Act.

In fact, even some of the organizations favoring regulation have recognized that MSDs are shrouded in definitional conflict and uncertainty. M.E. Greer, president of the American Society of Safety Engineers in 2000, noted that "at least two hundred different definitions" are available, adding:

> It almost seems as if we are using the "Field of Dreams" approach to ergonomics with this question. . . . Instead of a line of cars coming to the field to play ball at the end of the movie, we now have thousands of safety, health, and environmental professionals, lining

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[14] National Research Council, NAS, *Musculoskeletal Disorders and the Workplace: Low Back and Upper Extremities* at 1-15 (2001). [Hereinafter "NAS Report"].

[15] 65 Fed. Reg. 68,853 (Nov. 14, 2000).

[16] Washington's state OSHA plan adopted essentially the same ergonomics standard as OSHA did in 2000, but the standard was rescinded on a referendum vote in which the lack of adequate definition of MSDs played a role in energizing public opposition. Most people know that when medical diagnoses are not well-defined, some people will abuse the system to get time off or additional pay.

[17] 75 Fed. Reg. 4734, col. 1 (Jan. 29, 2010).

[18] See *The American Subcontractors Association, Inc. et al. v. American Society Of Safety Engineers*, in its capacity as the Secretariat for the A10 Accredited Standard Committee, Respondent, Appeal of Action on American National Standard A10.40, Reduction of Musculoskeletal Problems in Construction, Before the ANSI Board of Standards Review, November 9, 2007.

up in the bullpen trying to get their definitions up on the pitchers' mound.[19]

Definitions of MSDs are not only multitudinous and conflicting but they also lack the *sine qua non* of any definition of a scientific term—precision and replication of outcome. In other words, without objective verification that can be duplicated by all employers who make the final decision to record, recording MSDs is pure guesswork: an amputation is an amputation; a 10 db STS is a 10 db STS; an MSD, even today, is anyone's guess.

Testifying in the California ergonomics rulemaking, which led to the adoption of a rule limited to "repetitive stress injuries" meeting specified criteria, Dr. Blair Filler of the California Orthopedic Association commented on the problem that faced the State of California then, and OSHA now:

> Organic diseases will have well-defined systems [in] which there are measurable, and I underline "measurable," objective findings [that] occur in a specific site with pathologic findings and have a well-defined course. Organic disease[s] have a predictable response to treatment programs.
>
> Repetitive strain injury is based on subjective complaints with no measurable objective findings. There's variable-sided involvement, there's no pathologic findings, and an unpredictable course and a poor or variable response to treatment. Symptoms based solely on subjective complaints are difficult to correct for one cannot address treatment to a non-existing finding. Repetitive strain injury does not conform to accepted human response patterns.[20]

Objective standards for MSD diagnosis are essential. Unfortunately, it is equally clear that medical science is not yet capable of providing such standards.

In most areas of medical research, such as studies involving suspected carcinogens, the relevant health outcome is clearly understood and readily identifiable. In the field of ergonomics, however, profound uncertainties as to outcome definition impair the effectiveness and usefulness of scientific analyses. Even the National Institute for Occupational Safety and Health ("NIOSH"), whose 1997 survey of existing research formed the heart of OSHA's scientific case, acknowledged that "the scarcity of objective measures (including physical examination techniques) to define work-related MSDs, and the lack of standardized criteria for defining MSD cases," can "make study comparisons difficult."[21]

In the end, the disparate definitions serve primarily to disclose the problems inherent when MSD concepts encompass such a huge range of poorly understood symptoms, signs, disorders, or injuries—each one unique. As Dr. Tapio Videman observed:

> Each of these disorders has its own biological basis. The etiology, epidemiology, and natural history of each disorder would have to be established. All these disorders would have a distinctive set of risk

[19] Testimony of M.E. Greer before the OSHA Forum on Ergonomics, July 17, 2000 (http://www.asse.org/ngcomm66.htm).

[20] Testimony of Dr. Blair Filler, CR 001205, January 18, 1996.

[21] National Institute for Occupational Safety and Health ("NIOSH"), Musculoskeletal Disorders and Workplace Factors: A Critical Review of the Epidemiologic Evidence for Work-Related Musculoskeletal Disorders of the Neck, Upper Extremity, and Low Back at 1-7 (1997). [Hereinafter "NIOSH Report"].

> factors—known and unknown. Each would respond to a different set of treatment and prevention programs. Each disorder should be considered individually.[22]

No conclusion as to etiology, the necessary predicate for recording, can be drawn without separately analyzing each disorder. Even if this agglomeration of MSDs could be—as they must be—sharply limited to a specified group of objectively defined and diagnosable conditions, each condition is so different that one column with one definition cannot responsibly or scientifically encompass them all.

As OSHA explained when it revoked the MSD column in June of 2003:

> However, the total number [of MSDs], standing alone, tells nothing about the specific types of disorders that may be involved. The MSD definition in § 1904.12 encompasses a broad range of health conditions from back injuries to carpal tunnel syndrome. Thus, the total MSD count in an establishment could include a number of disparate disorders that have little in common. More importantly, the total number of cases tells nothing about the possible causes and prevention of ergonomic hazards. Simply knowing that a certain number of MSD cases have occurred does not permit one to determine which jobs or working conditions pose ergonomic hazards and how they may be abated.
>
> To effectively analyze and address [MSDs] that are occurring in workplaces, employers and others must be able to link specific types of injuries to specific characteristics of jobs or working conditions. This requires evaluation of each individual case to determine the part of the body affected, the nature of the job performed by the injured employee and other relevant data. Such information is currently available in the case-description section of the 300 Log and in the 301 Incident Report. Evaluation of these case-entry data, particularly the job title and the description of the injury and affected body part contained in Columns C and F on the 300 Log, will enable employers, workers and OSHA to identify specific types of MSDs, to link specific MSD injuries to specific ergonomic risk factors, and to identify trends in certain jobs or work practices over time.
>
> The MSD column would not assist with the kind of detailed analysis necessary to effectively abate MSDs at the establishment level. Conscientious employers, employees and authorized representatives who wish to address MSDs in their workplaces will do so, as they have in the past, by examining the entire Log, whether or not an MSD column is implemented. Some employers and others may wish to use the § 1904.12 definition of MSD as part of their comprehensive records analysis or they may wish to use a

[22] *Statement of Tapio Videman*, March 2, 2000, OSHA Docket No. S-777, Exh. 32-241-3-20 at 2.

> different definition more suited to their specific working conditions. For example, nursing home employers may wish to focus particularly on back cases in analyzing the effectiveness of patient lifting and repositioning abatement measures. On the other hand, employers and others who do not wish to perform a comprehensive analysis would not be able to use an MSD column as a substitute for the analysis.
>
> To the extent that the aggregate total of MSD cases is of some relevance, the number can easily be determined without a column. Based on the description-of-injury information in column F of the Log, one can very quickly identify which cases are MSDs under the § 1904.12 definition, or an alternative definition such as the one in OSHA's meatpacking guidelines. The MSD column is simply not necessary for this purpose. For these reasons, OSHA concludes that the MSD column would not be a useful tool at the establishment level.

If the column provides no useful information at the establishment level, surely this aggregate of information cannot provide any useful information at a national level.

In light of the existence of over two hundred definitions of "musculoskeletal disorder" and the lack of any true consensus as to what constitutes an MSD, they are simply indefinable. We respectfully submit that OSHA's contemplated imposition of a single definition upon employers for recordkeeping purposes would be arbitrary and inconsistent with the statutory purpose of recordkeeping: to "compile *accurate* statistics on work injuries and illnesses . . . . [emphasis added]."[23]

2. Any definition must be limited to those conditions that are objectively verifiable.

If, despite the lack of supporting science, OSHA persists in requiring employers to record MSDs in a separate column, OSHA should limit its definition of MSDs only to those conditions that are objectively verifiable. The following portion of OSHA's proposed definition, discussed in more detail *infra*, includes subjective symptoms and is not satisfactorily limited to objectively verifiable conditions:

> (3) If a work-related MSD case involves only subjective symptoms like pain or tingling, do I have to record it as an MSD? The symptoms of an MSD are treated the same way as symptoms for any other injury or illness. You must record the case on the OSHA 300 Log as an MSD if:
>
> (i) An employee has pain, tingling, burning, numbness or any other subjective symptom of an MSD;
>
> (ii) The symptoms are work-related;
>
> (iii) The MSD is a new case; and
>
> (iv) The case meets one or more of the general recording criteria.

[23] 29 U.S.C. § 673(a).

More specifically, the statement "You must record the case on the OSHA 300 Log as an MSD if: (i) An employee has pain, tingling, burning, numbness or any other subjective symptom of an MSD" appears to state that any pain, tingling, burning or numbness involving any tissue of the musculoskeletal system (e.g., the muscles, nerves, tendons, ligaments, joints, cartilage and spinal discs) is deemed to be conclusive evidence of the existence of an abnormal condition or disorder known as an MSD.

The proposed definition exceeds OSHA's statutory mandate of addressing illness and injury that is both work-related and significant, and contravenes two of the key principles articulated for the Department's approach to ergonomics-- feasibility and clarity.[24] OSHA simply should not be in the business of validating as "ergonomic injuries" the normal aches and pains of life—feelings of discomfort that are a response to not only both work and non-work activities but also to the normal aging process and other personal health factors such as weight or genetics—through an arbitrary and unscientific diagnostic that assigns determinative significance to subjective symptoms by officially labeling them as MSDs.[25]

The need for a definition of MSDs with clear objective parameters is hardly a new or unsupported concept. The NAS Report urged that:

> The National Institute for Occupational Safety and Health should take the lead in developing uniform definitions of musculoskeletal disorders for use in clinical diagnosis, epidemiologic research, and data collection for surveillance systems. These definitions should (1) include clear and consistent endpoint measures, (2) agree with consensus codification of clinically relevant classification systems, and (3) have a biological and clinical basis.[26]

The 1997 NIOSH report also noted the utility of objective definitions: "It would be useful to have a concise physiopathological definition and corresponding objective clinical test for each work-related MSD...."[27] While there are distinct problems with NIOSH's methodology, as detailed in prior comments,[28] it is hard to argue with the simple conclusion that objective definitions are crucial.

Individual experts also agree. Dr. Peter Nathan, a clinician and researcher with over thirty years of experience, argues strongly in favor of an objective definition, pointing out that "failure to require a strict, objective definition for 'ergonomic injuries' will allow a wide variety of diffuse and non-pathologic conditions to be included under the umbrella of ergonomic injury. Inclusion of these non-pathologic conditions in the category of ergonomic injury will allow all forms of activity-related soft tissue discomfort, including those presentations of benign exertional myalgia that are a natural and normal physiologic consequence of resisted physical activity, to be considered an injury."[29] In other words, employees who are sore after exercise would be able to claim they have an MSD.

The importance of on objective definition for recordkeeping purposes is self-evident. If

[24] 66 Fed. Reg. 31,695 (June 12, 2001).
http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=FEDERAL_REGISTER&p_id=16696
[25] *Statement of Stanley Bigos*, July 9, 2001, OSHA Docket No. S-777, Exh. 7-40-10 at 1-2.
[26] NAS Report at ES-7.
[27] NIOSH Report at 1-7.
[28] OSHA Docket No. S-777, Exh. 32-241-4 at 107-112.
[29] *Statement of Peter Nathan*, July 9, 2001, OSHA Docket No. S-777, Exh. 7-40-12 at 4.

there is any hope of discerning the work-relatedness of any particular individual's condition, it can be realistic only for physical conditions that can be seen and measured. The challenge for researchers will be insurmountable if they—much less employers and treating physicians—are asked to first record and then address subjective signs or symptoms that cannot even be seen or measured, much less attributed to a specific cause. As OSHA stated in the preamble to its proposed ergonomics standard:[30]

> [T]he multi-dimensional pattern of personalized risk factors, non-work risk factors, and external, work-related risk factors complicates etiology identification. As with other chronic and sub-chronic diseases, it may be difficult, and sometimes impossible, to differentiate between underlying morbidity and causative, exacerbating, or even disabling features (stressors) in the external environment.

OSHA further acknowledged in that preamble, regulatory interventions targeting MSDs "pose[] specific challenges for disease identification."[31] MSDs are admittedly different from the more traditional workplace disorders that OSHA regulates and requires employers to record. OSHA recognized that those traditional disorders and exposures have discrete and identifiable effects and, therefore, "exposure assessment does not require significant attention to individual work factors or personal factors, or there may be a consensus test for disease (as for noise)."[32] OSHA properly contrasted MSDs with these hazards that are capable of measurement:

> For MSDs, on the other hand, microanatomic injury and repair is often sub-clinical and generally invisible to clinical testing or surveillance measures. Although, the object of much active research, the relationship between sub-threshold injury and the onset of recognized clinical disorders is imprecisely understood. Because of regional and individual differences in diagnosis and treatment, disease recognition depends on professional practice, diagnosis, and treatment patterns.[33]

OSHA correctly noted that MSDs are not easily identifiable; it logically follows that MSDs are not easily recordable.

In addition, the lack of an objective definition would preclude the intolerable outcome of holding employers strictly liable for recording the ubiquitous aches and pains of daily life. The proposed definition of MSDs for recording purposes would cross this line by requiring employers to record virtually every employee complaint of pain, numbness, stiffness or any other subjective symptom that is alleged to be associated with work. Indeed, by eliminating the language from the NAM settlement, see *infra,* no level of employee discomfort will be beyond review and potential recording.

3. Subjective complaints cannot be reliably or systematically defined or equated with injury.

The need for an objective definition is underscored by the unreliability of basing a

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[30] 65 Fed. Reg. 65,867, col. 2 (Nov. 23, 1999).
[31] *Id.*
[32] *Id.*
[33] 64 Fed. Reg. 65,868, col. 1.

definitional framework on subjective factors. MSDs are largely characterized by reports of subjective symptoms, such as pain, to which OSHA would add "tingling, burning, numbness or any other subjective symptom of an MSD." Yet, these symptoms lack observable physical pathology and largely escape objective diagnosis. This is not to say that these conditions are imaginary or the product of malingerers. However, without accompanying physical damage that can be detected and observed these genuine, subjective sensations defy coherent, medically valid attempts at definition or response. Purely subjective sensations such as pain, particularly in the musculoskeletal system, vary as infinitely as the number of human beings. They depend upon a myriad of indefinable factors, such as pain threshold and psychosocial and socioeconomic factors, the definitive classification or prognosis for which demands knowledge that exceeds the limitations of modern medical science. OSHA's proposed definition would greatly complicate this analysis through an all-encompassing definition that would include any subjective symptom regardless of frequency, severity or duration.

The question posed in this rulemaking is whether, as a matter of fact and law, these subjective symptoms can be or must be recorded as a distinct, work related, cognizable injury. We submit that the answer is no and that until medical science can separate the objective from the subjective, OSHA cannot require employers to diagnose and separately record MSDs.

It would be a grave mistake to reject evidence-based medicine in favor of the view that such subjective symptoms are properly recordable because they reflect emerging musculoskeletal injury or illness[34] or that pain or discomfort in the presence of physical "risk factors" indicate that a worker is suffering from an incipient MSD.[35] OSHA has historically posited that such subjective indicators are injury or illness: "OSHA believes that pain or other symptoms indicate an injury or illness…"[36] That assertion is wrong, both as a matter of science and as a matter of public policy.

In truth, pain and injury are poorly correlated. As Dr. Videman noted: "It is important to remember that pain is not a disease, not a good clinical sign, or a quantifiable symptom. It is simply a vague subjective complaint."[37] Pain is a symptom resulting from a sensation recognized by the brain.[38] Injury is medically observable damage to tissue.[39] Musculoskeletal pain can be a symptom of stress, fatigue, or poor conditioning, but in and of itself, it does not establish injury.[40]

Studies have shown that workers often develop symptoms, symptoms that they reflexively attribute to the physical demands of their jobs, but that typically are not accompanied by any actual, objective evidence of disease.[41] In technical terms, musculoskeletal symptoms and disability are often experienced in the absence of tissue pathology, physical injury, or pathophysiology.[42] Individuals with the same condition, in fact, often report widely variable symptoms.[43] As the World Health Organization concluded at its January 2000 meeting:

[34] 64 Fed. Reg. 65,783.
[35] *Statement of Tapio Videman*, March 2, 2000, OSHA Docket No. S-777, Exh. 32-241-3-20 at 2-3.
[36] 66 Fed. Reg. 6021, col. 1 (January 19, 2001).
[37] *Statement of Tapio Videman*, July 9, 2001, OSHA Docket No. S-777, Exh. 7-40-6 at 3.
[38] *Statement of Stanley Bigos*, March 2, 2002, OSHA Docket No. S-777, Exh. 32-241-3-4 at 2.
[39] *Id.* at 2, 4-5.
[40] *Id.* at 2.
[41] *Statement of Arthur Barsky*, July 9, 2001, OSHA Docket No. S-777, Exh. 7-40-7 at 2.
[42] *Id.*
[43] *See id.* at 2-3.

"Discomfort, aches, pains commonly categorized as sprains and strain are undocumentable and predicated on many non-physical factors."[44]

The most widely recognized researcher in the field of low back pain, Alf Nachemson, confirmed these distinctions: "Very rarely does back pain signal serious disease."[45] The research shows that, even in those who have back pain for more than six weeks, only 15 percent of cases result in the diagnosis of specific disease or pathology.[46] Conversely, a substantial portion of patients who have objectively identifiable spinal alterations, evidenced by changes detectable on an x-ray or MRI, report no back pain at all.[47]

The NAS Report likewise includes a slightly different—but fully consistent— articulation of the same critical principle. According to the NAS, there is an "important distinction" between

> the experience of being ill or sick (symptoms, other discomforts, dysfunctionality, fear, and social impacts) on the one hand, and disease, a biological event characterized usually but not invariably by definable and objective change (for example, abnormalities in X-rays, blood tests, or on examination of the heart) on the other.[48]

We respectfully submit that OSHA's statutory mandate to record extends only to the latter and not to the former.

4. Inclusion of subjective symptoms in the definition would improperly medicalize conditions that are universal in the general population and generally self-resolving.

By recording subjective symptoms as musculoskeletal injuries, OSHA would elevate experiences that are universally present in the general population to a medical crisis. Fifty to sixty percent of Americans experience back pain every year; 80 percent experience it in their lifetimes.[49] "Regional musculoskeletal pain is an intermittent and remittent predicament of life," writes the respected researcher and physician Dr. Nortin Hadler; without regard to one's occupation, "[i]t is distinctly unusual to live a year without having had to cope with a backache, or 3 years without having to cope with arm pain."[50] Roughly 15 percent of the general population (workers and non-workers) experience pain, numbness, and tingling in the hands.[51] Further, at any given time more than 20 percent of the population complains of neck pain, and up to two thirds of Americans will experience neck pain in their lifetime.[52] At any point in time up to 10

[44] *Statement of Stanley Bigos,* March 2, 2002, OSHA Docket No. S-777, Exh. 32-241-3-4 at 5.

[45] *Statement of Alf Nachemson,* March 2, 2002, OSHA Docket No. S-777, Exh. 32-241-3-12 at 6.

[46] Deyo, R. & Phillips, W., *Low Back Pain, A Primary Care Challenge*, 21 SPINE 2826-2832 (1996).

[47] Id.

[48] NAS Report at 1-6.

[49] Loney, P. & Stratford, P., *The Prevalence of Low Back Pain in Adults: A Methodological Review of the Literature*, 79 PHYSICAL THERAPY 3 84-396 (1999); Frymoyer, J. & Durett, L., *The Economics of Spinal Disorders, in* 1 THE ADULT SPINE: PRINCIPLES AND PRACTICE 143- 150 (Frymoyer, J. ed., Lippincott-Raven 2d ed. 1997). *See also* Von Korff, M. *et al.*, *An epidemiologic comparison of pain complaints*, 32 PAIN 173-183 (1988); Valkerberg, H. & Haanen, H., *The Epidemiology of Low Back Pain,* in SYMPOSIUM ON IDIOPATHIC LOW BACK PAIN 9-22 (White, A. & Gordon, S. eds., 1982).

[50] *Statement of Nortin Hadler,* July 9, 2001, OSHA Docket No. S-777, 7-40-3 at 2.

[51] Annunen, S. et al., An Allele of COL9A2 Associated with Intervertebral Discs Disease, 285 SCIENCE 409-412 (1999).

[52] Cote, P. *et al.*, *The Saskatchewan Health and Back Pain Survey: The Prevalence of Neck Pain and Related*

percent of Americans report upper extremity pain sufficiently severe to interfere with ordinary activities,[53] while up to 35 percent have such pain sometime in their lives.[54]

By throwing these common, transient, self-resolving incidents into an overly broad definition of "MSD" and recording all employees who experience them as ill or injured—with their employers responsible for their injuries—OSHA would risk significant harm to the very workers it is pledged to protect. Amplification through recordation of transient symptoms is likely to hinder the path to recovery.[55] Moreover, since the vast majority of these incidents—95 percent of all symptoms, according to surveys—do not currently prompt a visit to the doctor, even a small change in the way they are classified and treated could have serious impacts on the health care system and its ability to cope with all forms of injury and illness.[56] OSHA should be very wary of proceeding down that path, particularly when the prospects for a successful journey are so speculative.

5. The "proposed" revocation of the exception under which "minor musculoskeletal discomfort" is not classified as a restricted work case would greatly exacerbate the fundamental problems posed by the lack of a scientific foundation for the MSD column.

Under the current OSHA rule, a case is recordable if there is an injury, it is new, it is work-related and it meets the severity criteria. Unfortunately, rather than establishing a directly applicable and objective measure of severity, OSHA adopted a rule that, to a significant extent, opts for administrative convenience over accuracy. In other words, it relies, to a significant extent – the boundaries of which has never been clear—on a proxy for the severity determination—i.e., did the case result in days away, restricted duty, transfer or medical treatment?

Before the 2001 rule took effect, the Secretary recognized that literal application of that rule was likely to lead to inaccurate statistics by recording insignificant cases. This result would be contrary to Sections 8 and 24 of the OSH Act, and would undermine the practice followed by many employers in implementing proactive work restrictions or transfers to prevent a condition that would be described as minor musculoskeletal discomfort from progressing to the severity of a recordable injury. We say undermine in the sense that it appears the rule would have converted these insignificant conditions into recordable cases because it appeared that an employer would be taking a substantial risk of adverse enforcement action in concluding that they were not injuries. That was one of the factors that led the NAM to file a suit challenging the 2001 rule.

The NAM suit was resolved in a November 19, 2001 settlement agreement between the NAM and the Secretary. Under that settlement agreement, the Secretary agreed to include the following interpretation of its Revised Recordkeeping Rule in its initial compliance directive for the rule:

> A case is not recordable under 1904.7(b)(4) as a restricted work case if the employee experiences minor musculoskeletal

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Disability in Saskatchewan Adults, 23 SPINE 1689-1698 (1998).

[53] Hall, W. & Morrow, L., *Repetition Strain Injury: An Australian Epidemic of Upper Limb Pain*, 27 SOC. SCI. MED. 645-649 (1988).

[54] *Id.*

[55] *See, e.g.*, *Statement of Arthur Barsky*, July 9, 2001, OSHA Docket No. S-777, Exh. 7-40-7 at 17-18.

[56] *Id.* at 18-19.

> discomfort, a health care professional determines that the employee is fully able to perform all of his or her routine job functions, and the employer assigns a work restriction to that employee for the purpose of preventing a more serious condition from developing.

This provision was designed to avoid the recording of insignificant cases and ensure that employers could continue to implement truly preventive modifications to work assignments without the penalty of having to record the case as a restricted work case. The adoption of this provision reflected a sound public policy determination by OSHA that—as required by the statutory mandate — favored accurate statistics over administrative convenience and encouraged proactive employer measures likely to advance employee safety and health.

The official interpretation of the current rule, based on the NAM settlement agreement — that preventive restrictions to address minor musculoskeletal discomfort are not recordable cases — has now been in place for over eight years and as such has acquired a status akin to regulatory text. It is an essential tool that has been relied upon by many employers and their service organizations in addressing workplace efficiency, comfort, and safety issues. Rather than being eliminated, it needs to be expanded to reflect the realities of managing these issues, especially for a small business. We believe there are a significant number of cases in which supervisors and employees are able to make these decisions without the need to incur the significant expenses of a medical consultation and the lost productivity of an employee sent off site for that consultation.

Unfortunately, based on the clarification provided by representatives of the Secretary during the question and answer session on Tuesday March 9, 2010, it now appears clear that OSHA has proposed to take a giant step backwards. As part of this rulemaking, OSHA would amend the current protocol by revoking the interpretation from the NAM settlement agreement, which provides that preventive restrictions to address minor musculoskeletal discomfort are not recordable cases.[57]

According to OSHA, the agency proposed this amendment to the current rule "to eliminate any potential for confusion" and furthermore, "OSHA believes that the language in the Compliance Directive is not necessary because § 1904.4 of the Recordkeeping regulation clearly and fully specifies when cases involving work restrictions and transfers must be recorded."[58]

Under the agency's theoretical, decision-tree approach, if a new, work-related condition falls into the category of an "injury or illness," vaguely defined as an abnormal condition or disorder,[59] any subsequent transfer or work restriction responding to that condition would be recordable. The reality of the human condition is that a feeling of perfect wellness is a fleeting experience of youth, and "an alteration in an individual's usual sense of wellness or ability to function" is entirely subjective.

While it may seem simple, OSHA's theoretical decision-tree approach simply is not suited

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[57] 75 Fed. Reg. p. 4735, col.2 (Jan 29, 2010).
[58] 75 Fed. Reg. p. 4735, col. 2-3 (Jan. 29, 2010).
[59] 29 CFR 1904.46(3).

to assessing conditions referred to as MSDs. Unfortunately, the assessment of MSDs is often based entirely on reports of subjective symptoms that vary greatly in terms of their level, duration, and frequency, and the individual's perception of those conditions is often driven by psychosocial factors. As a result, application of the decision tree becomes a circular, boot-strapping exercise in which implementation of a work restriction in response to a workplace hint or suggestion of a possible or potential "alteration in an individual's usual sense of wellness or ability to function" leads to the conclusion that there was an injury and that it was work-related.

Recognizing that OSHA's decision tree appeared to ignore these realities, the NAM filed a suit to challenge this approach and OSHA then agreed to an exception to recordability for voluntary or preventive job restrictions. This proposal would eliminate that necessary and reliable connection with reality, leaving employers exposed to the risk of adverse enforcement actions if they were to instead rely on the ability to screen out minor musculoskeletal discomfort as not meeting the threshold definition of an injury.

The rationale now offered by OSHA in support of this "proposed" change to the criteria for a restricted duty case is wholly unpersuasive. OSHA says that the agency is making this change to avoid confusion as to what is recordable. We see it to be quite the opposite. Leaving aside the intractable issue of causation, employers currently understand that "minor musculoskeletal comfort" does not encompass persistent and significant pain and does not encompass any condition that the medical community would view as a manifestation of a significant injury. By removing the NAM settlement language, it appears likely that OSHA would treat any reported subjective symptom as rising to the level of an injury. Clearly, the outcome would be to grossly inflate the number of recordable cases by recording insignificant conditions that were never intended to be recorded by Congress. The result would be inaccurate and misleading statistics that would cause OSHA and employers to misallocate resources to insignificant cases.

The unstated rationale for the proposed change in interpretation, we believe, is OSHA's belief that employers "game" the system by having employees report to their workplace but not perform any meaningful work to avoid lost workday cases. If a physician evaluates the employee and determines that the employee is only fit for limited duty, the case is clearly recordable. But OSHA's new approach ignores the fact that employees equally game the system by seeking medical practitioners who prescribe time off or restricted duty without an adequate basis for the limitation. OSHA's proposed approach will likely lead to employers not giving employees the time to recover from minor fatigue and soreness, and lead to employees "doctor shopping," thereby encouraging fraud. [60] The current interpretation balances the various interests and

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[60] An anecdotal example of this was reported in the March 19, 2010 issue of INJURY PREVENTION & COST CONTROL ALERT:

> In my first three months here, we had four lost-time accidents. Obviously, that was unacceptable. And it was especially troubling because the injuries involved hadn't really appeared to be very serious.
>
> A sprain here, a strain there - not the kinds of debilitating injuries that should force people to miss a lot of work. A little investigating revealed the real problem.
>
> The common thread was the chiropractor they were all seeing. We had a company doctor, but if workers didn't like what she said, they went to this guy.
>
> **Light duty vs. no duty?**
>
> Our company doc, who's actually very conservative, might say, "You can go back to work, but with two weeks of restricted time." The chiropractor, on the other hand, didn't care. It was easy money for him. He'd just say, "You're off for two weeks."

competing pressures to make sure only "serious, disabling and significant" injuries are recorded, while giving a medical expert the job of gatekeeper to the process. OSHA should not change this approach.

B. The Proposed Rule would improperly require employers to record conditions on the OSHA 300 Log that (1) are not significant and (2) have no meaningful relationship to the workplace.

If the phrase "significant injury" in Section 24 of the OSH Act is to have any meaning, a rule defining cases as recordable must distinguish between those that are transient manifestations of discomfort and those that are medically cognizable diagnoses. It appears that, under the proposed rule, in practical effect, every employee report to the employer of pain, soreness, discomfort or other undefined subjective symptom manifesting itself at work–regardless of level, duration, cause, or frequency–would be a recordable case if:

(1) the employee expressed a concern that he might not be able to perform all of the functions of his job, or
(2) the employer took a conservative approach and implemented a work restriction to prevent the condition from becoming significant.

OSHA's proposal would, in effect, remove the word "significant" from the definition of recordable cases in Section 24 of the OSH Act.

Furthermore, there are likely to be many cases in which an employee has a pre-existing condition from another job or recreational activity. Suppose, without mentioning this condition to the employer, the employee engages in some work before the subjective symptom manifests itself, or became more pronounced, possibly because the condition was affected by psychosocial factors. The employee then goes to the employer and describes the subjective complaint. Under this proposal, if the employer implements any preventive restriction, it appears OSHA would assert that the preventive restriction reflected the existence of a significant work-related aggravation of the condition, making the case recordable.

Suppose the employee does mention the pre-existing condition to the employer before beginning work, and they agree the employee will try to work his normal job and report back to the supervisor if the employee experiences some discomfort. After two hours, the employee indicates that he is becoming uncomfortable and the employer assigns restricted duty. Again, under this proposal, it appears OSHA would assert that the preventive restriction reflected the existence of a significant work-related aggravation of the condition, making the case recordable. These are just some examples of insignificant cases that appear to be recordable under the proposed rule and have no meaningful relationship to the workplace.

C. The Proposed Rule would require employers to make determinations that go beyond their abilities and the abilities of many medical professionals. Employers would be

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Of course, restricted time is a lot better for us. We've got plenty of light-duty work available.
The solution: We said we're not going to recognize that chiropractor unless the company doctor specifically sends you there. If the company doctor recommends a specialist, of course we'll honor that.
Otherwise, if you want to take "restricted" days off, you need to take vacation or sick days.
Since making that call, our lost days have gone way down.

faced with the untenable choice of recording a condition which does not have an adequate definition, or immediately undertaking extensive inquiries, often into an employee's otherwise private medical history and personal life, to enable the employer to make the necessary determinations (whether an injury, work-related, preexisting etc.).

The Proposed Rule would require employers to choose between two burdensome and wholly unjustified options:

(1) over-recording and bearing the costs of that approach (e.g., targeted OSHA enforcement and public shaming); or

(2) incurring the enormous costs required in an effort, which would generally be fruitless, to appropriately decide whether a case is recordable and adequately document the basis for that determination.

OSHA acknowledges that there is no universally accepted definition of MSDs and that different definitions are used for different purposes. Despite the uncertain science as to the causes of MSDs, OSHA indicates in the preamble that it is intent on using this data primarily to target its enforcement efforts.[61] Under the current recordkeeping system, we believe some significant number of employers have been inclined to record a case that would be classified as an MSD rather than invest the substantial human resource management, medical and employee resources in a detailed investigation to try to determine whether the condition was a new, work-related injury, or whether it represented a preexisting condition. Given the perception of many employers that the purpose of the MSD column is to target employers for enforcement, many of those employers will now feel compelled to spend the substantial additional resources required to more thoroughly investigate and document their findings in those cases that may not be recordable.

To avoid erroneously recording a case that is not a new, work-related injury or a significant aggravation of a pre-existing injury, the employer would be required to develop sufficient medical expertise among supervisory and human resources personnel to know when an employee would be capable of continuing in a job and when job activity would pose an unreasonable risk of further injury. Where that is either not practical or inadequate to make the required determinations, the proposed rule will create a strong incentive for employers, at enormous cost, to send every potential MSD case to a qualified medical professional to assist in making these determinations, in spite of the fact that many medical professionals will be unable to make the required determinations. The medical professional at a local clinic will rarely have access to the information in the employee's medical files that would often be necessary to make an informed judgment as to whether a case is a new, work-related injury. Given these circumstances, there will be many erroneous determinations as to whether conditions are new, whether they are injuries, whether they are work-related, and whether they rise to the level where restricted duty/transfer is actually required at that point in time, or whether they are at a minor or insignificant level where one might recommend a preventive restriction.

The unfairness of this situation is further compounded by OSHA's position on the consequences of failing to complete this complicated investigation and make a determination on a "timely" basis. This activity would have to be completed in time for the advice obtained from the qualified medical professional to be considered contemporaneous with any contrary or ambiguous diagnoses that may already have been provided. This will often require sending employees away from work to participate in those additional medical consultations.

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[61] 75 Fed. Reg. 4738, col. 3 (Jan. 29, 2010).

The 2001 Revised Recordkeeping Rule placed employers in the impossible position of balancing between the privacy interests of the employee in his or her medical records, and the regulatory directive to discover whether the employee has a recordable MSD under the OSHA Injury and Illness recordkeeping rule. The adoption of this proposal will return employers to that impossible choice.

D. The incorporation of the MSD provisions into the OSHA recordkeeping system will produce materially inaccurate and misleading "injury and illness" records of disparate and unrelated conditions that will result in a misallocation of OSHA's resources.

1. The asserted value of the MSD column to workplace safety and health is based on the erroneous premise that "MSDs" are conditions with a common, work-related etiology that can be identified and prevented with common workplace measures.

The serious shortcomings in the proposed rule are due to many factors. There is an inadequate understanding as to the causal factors for the conditions referred to as MSDs. We believe OSHA recognizes that the etiology of MSDs is often multi-factorial and that it often will not be clear whether the precipitating event occurred in the work environment or elsewhere. Studies published by the Cochrane Collaboration and Dr. Stanley Bigos, et al. since 2000 raise questions about OSHA's biomechanical-based theory of MSD causation and the remedies for low back pain based on that analysis. Other studies on conditions such as carpal tunnel syndrome further undermine the conclusion that work activities are a primary cause of these conditions.[62] We note that OSHA has not made any effort to suggest that its analysis of the science related to the causation of MSDs in issuing this proposal has been updated, implying instead that the science has remained static over the last ten years. Even the short bibliography noted here shows that there has been a substantial amount of published research on the diagnosis and treatment of soft tissue injuries that undermine many of OSHA's 2000 era ergonomic theories.

OSHA offers a number of unpersuasive explanations as to why the MSD column would provide valuable information to OSHA, employers and employees. First, OSHA asserts that the MSD column would improve the quality of OSHA national statistics on MSDs and assist OSHA in gaining an understanding of the number and rate of MSDs as if MSDs were conditions with sufficiently common characteristics to logically place into a single grouping for purposes of counting, analysis, and the development of interventions expected to reduce their frequency and severity. Second, OSHA asserts that the MSD column would assist the agency in targeting inspection, outreach, guidance and enforcement efforts at MSDs. Third, OSHA asserts that having an MSD column at the establishment level would assist employers and employees in quickly identifying and tracking the incidence of MSDs at the facility. All of these asserted benefits are based on a faulty premise that the term "MSD" refers to a common set of conditions

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[62] For example, the following studies suggest that CTS is not caused by computer use or related to work activities of railroad workers. *Carpal Tunnel Syndrome and Keyboard Use at Work: A Population-Based Study*, Atroshi, I., Gummesson, C., Ornstein, E., Johnsson, R., and Ranstam, J. **Arthritis & Rheumatism**, Vol. 56, No. 11, November 2007, pp 3620-3625; *Carpal Tunnel Syndrome in Railroad Workers*, Cosgrove, James L. MD, Chase, PM, Mast, NJ, and Reeves, R. **American Journal of Physical Medicine & Rehabilitation**, Vol. 81, No. 2, pp. 101-107.

that can be well defined and that the cause of these defined condition can be determined. Unfortunately, that is not the case. MSDs are not comparable to skin disorders or respiratory illnesses. One generally avoids respiratory illnesses by implementing measures that avoid inhalation of toxic materials and avoids skin disorders by avoiding dermal contact with toxic materials. In the workplace, these causative agents can be identified. Because the etiology of MSDs is far more complex and the causative agents so poorly identified, there are few if any changes that reliably can be adopted by employers to mitigate the complaints that the new regulation would require employers to record.

The absence of a workable definition of the term "MSD" effectively prevents the implementation of any simple "checkbox" system for recording MSDs. If the best and most current medical research is incapable of giving scientists and doctors a reliable way of deciding whether a particular case is an MSD, and what caused that condition, then it would be folly to assume that employers could make reliable and accurate determinations. To proceed with a checkbox system despite the absence of a clear definition, moreover, would produce records and statistics that would be at best unreliable and at worst affirmatively misleading. Policymaking, enforcement decisions, and resource allocation would all be adversely affected.

2. OSHA's other suggested rationales for an MSD column are not persuasive.

In addition to an MSD column being unworkable, inaccurate, misleading, and inconsistent with the OSH Act, we believe it is also appropriate to address the other explanations offered by OSHA for this initiative. OSHA suggests that the current method for determining the number of MSD cases is "complicated" because (1) it requires close cooperation between OSHA and BLS, since MSDs were not recorded in a single column, and (2) it also requires special computer analyses to calculate MSD numbers.[63] Is OSHA sincerely suggesting it should impose any new recordkeeping obligation on the private sector, much less one of this magnitude, because two agencies within the Department of Labor would otherwise have to cooperate with each other? Is OSHA sincerely suggesting that it should impose any new recordkeeping obligation on the private sector, much less one of this magnitude, because BLS would have to continue applying a simple piece of software that it has been using for the last 10 to 15 years, and which is far less "complicated" than the software used by BLS to determine that its annual survey of approximately 350,000 worksites provides a statistically valid basis for the extrapolations used in its annual reported estimates of work-related injuries, illnesses and deaths covering 6 million worksites?

OSHA asserts that it "is also reconsidering restoring the MSD column in light of recent information that indicates employers are recording fewer and fewer cases as days away from work cases." OSHA seems to be suggesting something sinister is underway. In reality, BLS has reported declining days-away case rates for the last 10 to 15 years, which suggests that the programs of the prior administrations were effectively advancing workplace safety and health. OSHA further asserts that this reduction in the number of days away cases "increases the importance of understanding what is happening with the other kinds of cases, which are not reflected in the BLS detailed case characteristics analyses." This is a *non sequitur*. One can see what is happening by looking at the BLS statistics, which show that DJRT (days of job transfer or restriction only cases) rates have been fairly flat from 2003 through 2008.

[63] 75 Fed. Reg. 4730, citing 66 FR 6030.

OSHA asserts that "recently, concerns have been raised about accuracy of workplace injury and illness records," which somehow would justify the need for an MSD column. "Concerns" have been raised about the accuracy of workplace injury and illness records for as long as they have been maintained, just as they have been raised about the accuracy of every other government-mandated recordkeeping system. The recently raised concerns were the politically motivated concerns raised in the hearing before the House Education and Labor Committee, which led to a politically-driven Staff Report titled "Hidden Tragedy: Underreporting of Workplace Injuries and Illnesses." The Staff Report concluded, not surprisingly, that work-related injuries and illnesses in the United States are chronically and substantially underreported. As a result, the Democratic-controlled Congress authorized additional funds for OSHA enforcement of OSHA's Recordkeeping Rule and, in effect, directed the agency to go find this huge group of alleged scofflaws that, according to the academic studies, media reports and worker testimony, was grossly under-reporting workplace injury and illness cases. For the past six months, OSHA has been sending out teams of OSHA recordkeeping auditors in support of this Congressionally-inspired National Emphasis Program on Recordkeeping. Despite these wide-ranging, intrusive and extremely burdensome investigations by specially trained inspectors using medical access orders and subpoenas, we have yet to hear of any evidence that would suggest significant non-compliance in the private sector, much less evidence of pervasive non-compliance on the scale alleged by the Staff Report.

Indeed, the only report in recent years assessing employer recordkeeping habits concluded

> "*Overall Accuracy of Employer Recordkeeping*. The percent of establishments classified with accurate recordkeeping (at-or-above the 95 percent threshold) is above 96 percent for both total recordable and DART injury and illness cases. Based on 95 percent confidence intervals for the two estimates, the percentages of 98.34 percent for total recordable cases and 96.27 percent for DART cases are not statistically different. Overall, the universe estimates for this year are consistent with the level of accuracy observed for employer injury and illness recordkeeping over previous years of the audit program. OSHA applied a statistical test to the accuracy estimates for CY 2006 and CY 2005 and found no significant difference in the means for either total recordable or DART cases. Among manufacturing and non-manufacturing, the overall percent of establishments below the threshold of accuracy was similar for total recordable and DART cases."[64]

The preamble then shifts from this general discussion on the accuracy of OSHA 300 Logs to a discussion of a series of articles in the Charlotte Observer alleging a serious under-reporting of MSDs at poultry plants in North and South Carolina. If the allegations in those articles are accurate, it is unclear as to why some appropriate enforcement action was not taken by the responsible state agencies to remedy compliance issues that appear to go far beyond OSHA recordkeeping. What is clear beyond any doubt is that, if the allegations involving those poultry processing sites are accurate, having an MSD column would not make a bit of difference.

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[64] *OSHA Data Initiative Collection Quality Control: Analysis of Audits on CY 2006 Employer Injury and Illness Recordkeeping, FINAL REPORT,* November 25, 2009, *Prepared for:* Office of Statistical Analysis, Occupational Safety and Health Administration, *Prepared by:* ERG Lexington, MA & National Opinion Research Center Chicago, IL, p. ES-4.

As senior OSHA personnel, in both Democratic and Republican administrations, have stated over the years, the great majority of employers care about the health and safety of their employees, and try to do the right things to protect them from harm. Having recognized that fact, OSHA should also recognize that it is inappropriate, as a matter of law and public policy, to focus on or to cite to the aberrant behavior of a few as the justification for adoption of a new broadly applicable legal requirement.

Applying the theory that statistics can be used to say whatever you want them to say, OSHA proceeds to assert:

> Employer use of restricted work and job transfer has **grown** significantly during the past decade. In 1997, for instance, occupational injuries and illnesses involving restricted work or job transfer accounted for 36% of all cases . . . . In 2007, they accounted for 43% of all injuries and illnesses...[65]

OSHA, therefore, uses injury and illness rates (e.g.: TRC = total recordable cases; DART = days away from work, job transfer, or restriction cases; DAFW = days away from work cases; DJTR = days of job transfer or restriction only cases) as the best measure of performance and trends, except when it does not support its politically-directed objective. According to BLS, the overall from 1.1 in DJTR has trended slightly **downward** from 2003 and 2004, to 1.0 in 2005 and 2006, to 0.9 in 2007 and 2008.[66] Clearly, that category of cases has not grown at all; in other words, OSHA ignored the government's own statistics and reported data that are factually incorrect and materially misleading. This behavior is in direct contravention of the Data Quality Act and OMB guidelines for reporting the use of scientific data.

That inconvenient detail led OSHA to search for another statistical analysis to support its political objective of showing significant growth in transfer and restricted work cases. With a continuing decline in the total number of cases, a statistical analysis based on total recordables would not work. OSHA's solution is to use percentages of recorded cases as a reference. With the other types of recordable cases going down at a faster rate than DJTR, the portion of recordable cases falling into the job transfer and restricted would be greater, which OSHA translated into "significant growth."

OSHA goes on to state:

> As the number of MSD cases being shifted from days away from work to restricted work continues to grow, there will be fewer and fewer MSDs represented in BLS detailed statistics on cases with days away from work.[67]

Contrary to what OSHA asserts, there is no evidence of a shift from "days away from work" cases to "restricted work" cases. To the contrary, the evidence clearly shows that the DAFW rate is falling faster than the DJTR. Instead of acknowledging the positive efforts made

[65] 75 Fed. Reg. p. 4733, col. 2 (Jan. 29, 2010).

[66] WORKPLACE INJURIES AND ILLNESSES – 2008, USDL-09-1302, October 29, 2009 http://www.bls.gov/news.release/pdf/osh.pdf

[67] 75 Fed. Reg. p. 4733, col. 2 (Jan. 29, 2010).

by employers through their return to work programs, which Congress clearly encouraged in adopting the American with Disabilities Act Amendments of 2008, it appears that OSHA is biased toward the view that there is widespread gaming of the system. The great majority of employers, who sincerely care about the health and safety of their employees, do not bring them back to work before they are physically and mentally ready to return to work. It is unfortunate that OSHA has not looked beyond the aberrations alleged in the Charlotte Observer. Instead of extrapolating on the basis of the lowest common denominator, OSHA might consider asking a representative sampling of human resources personnel about the practical HR problems that would be created if an employer established a practice of bringing an employee back to work before they could be productive simply to avoid recording a days away case.

3. The addition of a separate MSD column would harm, rather than improve, the quality of MSD recordkeeping and statistics.

Presently, recordable determinations for conditions that might be classified as MSDs are made under the general criteria applicable to all injuries and illnesses. The Bureau of Labor Statistics ("BLS")—and, derivatively, OSHA—estimate the total number of MSDs by adding results from six "nature of injury" codes: sprains, strains, and tears (code 021); back pain—hurt back (code 0972); soreness, pain, hurt, except the back (code 0973); carpal tunnel syndrome (code 1241); hernia (code 153); and arthropathies and related disorders (arthritis) (code 171).[68] There is an active and heated debate as to the appropriateness of including each of these codes within the tally; but at least the debate is informed by the underlying BLS coding information.

Under OSHA's proposed Section 1904.12, on the other hand, employers would be instructed to determine formally whether a particular condition constitutes an "MSD." They would do so without the benefit of any "special criteria for determining which musculoskeletal disorders to record."[69] Instead of an MSD count composed of BLS codes for which the merits of inclusion in the tally can be individually assessed, the MSD checkbox will produce a single total that will be assumed to represent a definitive statistic, based on the uneducated guesses of both employees and employers. Because it would be gathered through a process that presumes the same relative certainty as in any other decision whether to record an injury or illness, it will be viewed as a definitive estimate that reports the national scope of MSDs with some precision. But it will be a false precision, for employers will be designating—or declining to designate—conditions as MSDs without any reliable or workable means for making that decision.

Without a means of making rational judgments, the decision whether to record incidents implicated by the vague MSD concept will generate an irrational and arbitrary recordkeeping system. The resulting data will be ungrounded and unreliable—but the real danger is that they will be assumed to be reliable, purporting to tally the exact phenomenon at issue: MSDs. The outcome will be damage to the very system of reporting that Section 1904.12 seeks to improve.

The agency's insistence on granting these conditions a new, formal definition as MSDs creates the appearance that employers are facing a discrete and definable group of conditions, while in reality the category of complaints commonly referred to as MSDs is, as demonstrated above, broad and amorphous. While the lack of precision in current BLS statistics is evident, OSHA's proposed modification to the recordkeeping forms will only make an unwieldy situation

[68] 65 Fed. Reg. 68,542.

[69] 66 Fed. Reg. 6129.

worse.

4. The MSD column would not advance initiatives furthering OSHA's statutory objectives, but will result in a misallocation of OSHA's limited resources.

OSHA asserts that the MSD column would assist the agency in targeting inspection, outreach, guidance and enforcement efforts at MSDs. That assertion is based on the erroneous premise that the collected information would provide quality data on MSDs. The proposed MSD column would not be useful for any of those purposes; rather the mere existence of the column places a superficial spotlight on MSDs and will lead OSHA to direct an inordinate portion of its resources to address the perceived MSD issue. OSHA will be chasing the chimera primarily composed of idiopathic low back pain, because those comprise the large majority of soft tissue complaints. Indeed, if OSHA were to properly exclude low back pain from this aggregation, it is possible that the numbers of cases would be too small to be cognizable as a regulatory imperative.

With regard to enforcement, OSHA uses both the National Emphasis Programs and Site Specific Targeting Program to focus on those employers with seemingly high incidents of workplace injuries and illnesses. The discrete statistics generated by the MSD column, even if they were not inflated by the proposed revocation of the special rule for "minor musculoskeletal discomfort," will lead OSHA to misdirect its resources toward an amorphous and imprecise "disease." OSHA will devote its resources to battling that which escapes true definition and may defy workplace "cures" given the universally recognized multifactorial causation of MSDs. In this context of uncertainty, to require a separate MSD column is more politics than rational rulemaking. It would be inappropriately used to transform the controversial and elusive into the clear and unmistakable. The large collection of vaguely described conditions of uncertain causation referred to as MSDs would be inaccurately portrayed as a precise statistical base for the purpose of justifying further regulatory and enforcement initiatives – all based on principles that Congress and then OSHA found unworkable.

Based on the level of MSDs recorded, OSHA's compliance officers will then be sent to numerous workplaces and will find precisely nothing unusual. They will find employers who have tried everything under the sun and those who have given up after extensive efforts to reduce or eliminate these complaints. They will make suggestions that have already been tried and failed to have an impact on the cases. Much effort and expense will be expended, including large legal fees, but in the end OSHA's efforts will leave nothing changed. This is exactly the wrong approach.

In addition, given the debate over the work-relatedness of MSDs, it is clear that a separate MSD column is not consistent with OSHA's legal mandate. OSHA is charged with reducing *occupational* injuries and illnesses, not with eradicating disparate and multi-faceted musculoskeletal complaints. Any effort to extend OSHA's responsibilities to those conditions that bear only a disputed relationship to the workplace will reduce OSHA's ability to satisfy its primary, and arguably sole, responsibility of ensuring that employees do not suffer work-related injuries and illnesses. Misleading and inflated MSD statistics generated from the proposed Form 300 Log will inevitably lead OSHA to devote its energies to reduce conditions that are rooted in environments far beyond the control of employers.

What OSHA should do is ask NIOSH to support real research on these conditions, to

develop definitions for conditions that are truly work-related such that remedies and preventive measures can be prospectively evaluated to find real causes and cures. This research effort has not received the support it deserves, which leaves OSHA in the same position it was in 2001, not knowing much at all about soft tissue complaints or even how to define them.

5. Having an MSD column at the establishment level would not benefit employers and employees in quickly identifying and tracking the incidence of MSDs at the facility.

Again, for the reasons previously stated, this asserted benefit is based on the erroneous premise that there is a workable definition of the term "MSD" that would reliably record significant, work-related conditions. Furthermore, when OSHA rescinded the MSD provisions of 1904.12 in June of 2003, it clearly and persuasively explained that the column would not provide a benefit to the employer and employees in addressing MSDs at the establishment level:

> The MSD column would not be a useful tool in addressing MSDs at the establishment level for two reasons. First, because the column would show only the total number of MSDs that occurred in an establishment and nothing about the nature or cause of these disorders, it would be of very little practical use in devising abatement methods for ergonomic hazards. Second, to the extent that employers and workers believe that the total count of MSD cases is relevant in an establishment, the number is easily obtainable without the column requirement.[70]

Nothing in the record suggests that there are objective data or evidence to change this conclusion. The only material difference is the change of administrations, thus placing this proposal in a political context rather than a workplace safety and health context.

E. OSHA has materially understated the costs of compliance with the proposed rule and has no factual basis for certifying that the Proposed Rule would not have a significant economic impact on a substantial number of small entities and therefore avoiding compliance with the Regulatory Flexibility Act as amended by the Small Business Regulatory Enforcement Fairness Act.

In addition to the various levels of confusion and inaccuracy, we believe the proposed rule would impose substantial additional costs on employers. OSHA's estimate that this new regulation would take a mere five minutes to learn and understand, and then an additional single minute to record each MSD is astounding. Fundamentally, this proposal represents a new recordkeeping regimen for a set of highly complicated, multi-factorial conditions that are not well understood, either by employers or the medical profession.

In light of the changes that would be effected by this proposal, and the measures that would be required in the effort to properly implement it, we believe it is clear that OSHA's estimate of the costs of compliance understates the real cost by some orders of magnitude. We believe it is also clear that OSHA has no factual basis for its certification that the proposed rule

[70] 68 Fed. Reg. 38,603-4

would not have a significant economic impact on a substantial number of small entities [71] and that, accordingly, a SBREFA panel should be convened to analyze this issue if OSHA plans to proceed with this initiative.[72]

Beyond the extensive time and costs required to become familiar with and develop a procedure for implementing the proposed rule, we believe employers will incur the following costs:

(1) the cost of sending employees for medical evaluations to determine the nature, cause and severity of their injuries or conditions including compensation for any time spent;
(2) the cost of any penalties OSHA imposes due to allegedly incorrect recordation of an alleged work-related injury;
(3) the costs of targeted inspections and ensuing citations triggered by erroneously overstated total injury or MSD rates;
(4) the cost of challenging adverse recordation determinations by OSHA; and
(5) the adverse financial impact resulting from the publication of erroneously overstated and/or misleading total injury rates or MSD rates — which would result in loss of good will, potential loss of government contracts, and the effects of OSHA's announced use of "shaming" tactics to influence employers, their customers and ultimately the consumer.

F. The proposed rule does not comply with the paperwork reduction act.

The Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501 *et seq.*[73] was adopted by Congress to ensure the integrity, quality, and utility of the Federal statistical system, and to ensure

[71] 5 U.S.C. § 605(b).
[72] 5 U.S.C. § 609(b).
[73] **Section 3501, Purposes. Provides as follows:**
The purposes of this subchapter are to—

(1) minimize the paperwork burden for individuals, small businesses, educational and nonprofit institutions, Federal contractors, State, local and tribal governments, and other persons resulting from the collection of information by or for the Federal Government;

(2) ensure the greatest possible public benefit from and maximize the utility of information created, collected, maintained, used, shared and disseminated by or for the Federal Government;

(3) coordinate, integrate, and to the extent practicable and appropriate, make uniform Federal information resources management policies and practices as a means to improve the productivity, efficiency, and effectiveness of Government programs, including the reduction of information collection burdens on the public and the improvement of service delivery to the public;

(4) improve the quality and use of Federal information to strengthen decision making, accountability, and openness in Government and society;

(5) minimize the cost to the Federal Government of the creation, collection, maintenance, use, dissemination, and disposition of information;

(6) strengthen the partnership between the Federal Government and State, local, and tribal governments by minimizing the burden and maximizing the utility of information created, collected, maintained, used, disseminated, and retained by or for the Federal Government;

(7) provide for the dissemination of public information on a timely basis, on equitable terms, and in a manner that promotes the utility of the information to the public and makes effective use of information technology;

(8) ensure that the creation, collection, maintenance, use, dissemination, and disposition of information by or for the Federal Government is consistent with applicable laws, including laws relating to—

(A) privacy and confidentiality, including section 552a of title 5;

(B) security of information, including section 11332 of title 40; and

(C) access to information, including section 552 of title 5;

that information technology is acquired, used, and managed to improve performance of agency missions, including the reduction of information collection burdens on the public. The PRA and its implementing regulations forbid OSHA from adopting and enforcing a recordkeeping requirement unless and until OSHA demonstrates (to OMB) that it has taken every reasonable step to ensure that the proposed collection of information:

> (i) Is the least burdensome necessary for the proper performance of the agency's functions to comply with legal requirements and achieve program objectives;
> (ii) Is not duplicative of information otherwise accessible to the agency;
> (iii) Has practical utility; and
> (iv) Minimizes the cost to the agency of collecting, processing, and using the information, but not by means of shifting disproportionate costs or burdens onto the public.
> 5 C.F.R. § 1320.5(d)(1).

The term "*Practical utility*" means the actual, not merely the theoretical or potential, usefulness of information to or for an agency, taking into account its accuracy, validity, adequacy, and reliability ... 5 C.F.R. § 1320.3(1).

Furthermore, absent demonstration of a statutory requirement or other substantial need, OMB may not approve a collection of information--

> (1) In connection with a statistical survey, that is not designed to produce valid and reliable results that can be generalized to the universe of study; or
> (2) Requiring the use of a statistical data classification that has not been reviewed and approved by OMB. 5 C.F.R. § 1320.5(d)(2).

Finally, OMB is responsible for making an independent determination as to whether the collection of information, as submitted by the agency, is necessary for the proper performance of the agency's functions. 5 C.F.R. § 1320.5(e).

The criteria stated above have not been fulfilled. The dramatic expansion of what will be considered "recordable" and "work-related" under the Proposed Rule will frustrate, not support, the objectives of the OSH Act and OSHA's own stated goal of using the collected data to focus intervention efforts "on the most dangerous worksites and worst safety and health hazards."[74] At the same time, the expanded scope of those terms will place added burdens on employers with regard to the records and logs they must maintain. This is in direct conflict with the OSH Act's directive as to what constitutes a "recordable injury" and its command that OSHA collect data that *accurately* portrays *workplace* health and safety problems. Nor would the inaccurate and misleading collection of information required by the Proposed Rule meet the "practical utility" requirement for mandatory information collection demands. For all of these reasons, the proposed information collection would not represent action that is "the least burdensome necessary for the proper performance of the agency's functions to comply with legal requirements and achieve program objectives," as the required under the PRA.

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(9) ensure the integrity, quality, and utility of the Federal statistical system;

(10) ensure that information technology is acquired, used, and managed to improve performance of agency missions, including the reduction of information collection burdens on the public; and

(11) improve the responsibility and accountability of the Office of Management and Budget and all other Federal agencies to Congress and to the public for implementing the information collection review process, information resources management, and related policies and guidelines established under this subchapter.

[74] 61 Fed. Reg. at 4030.

G. OSHA omitted material information and mischaracterized the nature and scope of this proposal.

1. The notice of proposed rulemaking was procedurally defective.

Every proposed rule or Notice of Proposed Rulemaking (NPRM) must be published in the Federal Register. [75] The required content of the preamble of an NPRM published in the Federal Register is further specified in 1 CFR § 18.12, "Preamble requirements." Section 18.12 provides as follows:

> (a) Each agency submitting a proposed or final rule document for publication shall prepare a preamble which will inform the reader, who is not an expert in the subject area, of the basis and purpose for the rule or proposal [emphasis added].
>
> (b) The preamble shall be in the following format and contain the following information[emphasis added]:
>
> AGENCY:___________________
> (Name of issuing agency)ACTION:___________________
>
> (Notice of Intent), (Advance Notice of Proposed Rulemaking), (Proposed Rule), (Final Rule), (Other).
>
> SUMMARY:___________________
>
> (Brief statements, in simple language, of: (i) the action being taken; (ii) the circumstances which created the need for the action; and (iii) the intended effect of the action.) [emphasis added]
>
> DATES:___________________
>
> (Comments must be received on or before: _____.) (Proposed effective date: _____.) (Effective date: _____.) (Hearing: _____.) (Other: _____.)
>
> ADDRESSES:___________________
>
> (Any relevant addresses.)
>
> FOR FURTHER INFORMATION CONTACT:
>
> ___________________

[75] 5 U.S.C. § 553(b).

(For Executive departments and agencies, the name and telephone number of a person in the agency to contact for additional information about the document [Presidential Memorandum, 41 FR 42764, September 28, 1976].)

SUPPLEMENTARY INFORMATION:__________________

____

(See paragraph (c) of this section.)
(c) The agency may include the following information in the preamble, as applicable:
(1) A discussion of the background and major issues involved;
(2) In the case of a final rule, any significant differences between it and the proposed rule;
(3) A response to substantive public comments received; and
(4) Any other information the agency considers appropriate.

In short, there are two basic requirements. First, the preamble of the NPRM must inform the reader, <u>who is not an expert in the subject area</u>, of the basis and purpose for the proposed rule. Second, the SUMMARY section of the preamble must contain brief statements, <u>in simple language</u>, of: (i) the action being taken; (ii) the circumstances which created the need for the action; and (iii) the intended effect of the action. Based on a review of the preamble of the January 29, 2010 NPRM, it is clear that neither of those requirements has been met.

The "SUMMARY" section in the preamble of the January 29, 2010, Federal Register notice reads as follows:

> SUMMARY: OSHA is proposing to revise its Occupational Injury and Illness Recording and Reporting (Recordkeeping) regulation to restore a column to the OSHA 300 Log that employers would use to record work-related musculoskeletal disorders (MSD). The 2001 Recordkeeping final regulation included an MSD column, but the requirement was deleted before the regulation became effective. This proposed rule would require employers to place a check mark in the MSD column, instead of the column they currently mark, if a case is an MSD that meets the [*existing*] Recordkeeping regulation's general recording requirements [*language in italics added*].

Based on the language of the quoted SUMMARY, confirmed by the OSHA press release announcing this action,[76] OSHA would have one believe that the proposed rule would

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[76] OSHA's January 28, 2010 Press Release 10-135-NAT provides, in part:

> **US Department of Labor's OSHA proposes recordkeeping change to improve illness data**
> WASHINGTON -- The U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) is proposing to revise its Occupational Injury and Illness Recording and Reporting (recordkeeping) regulation by restoring a column on the OSHA Form 300 to better identify work-related musculoskeletal disorders (MSDs). The rule does not change existing requirements for when and under what circumstances employers must record musculoskeletal disorders on their injury and illness logs.

require nothing more than inserting a check in the MSD column for cases that would already be on the OSHA 300 Log under the existing and already challenging recording criteria. As we make clear below, the quoted SUMMARY describes only one of the three major changes apparently sought to be implemented through the proposal. It makes no attempt to describe the circumstances which created the need for the action or the intended effect of the action.

First, as representatives of the Department of Labor and OSHA acknowledged during the March 9, 2010 public meeting, OSHA is also proposing to amend the existing "Recordkeeping regulation's general recording requirements" by revoking the interpretation on preventive restrictions--contained in the NAM settlement agreement– that has been in place for over eight years. Because this language has been relied upon by employers, and OSHA field personnel in enforcing the current recordkeeping regulation, OSHA is now bound by that interpretation as if it was part of the regulatory text. In other words, while not officially regulatory text, that interpretation may be changed only through notice and comment rulemaking in which the agency affirmatively notes that it is proposing a change, solicits comment on the change and then objectively weighs the pros and cons of retaining, changing or deleting this language. As stated by the U.S. Court of Appeals for the District of Columbia, in a long line of cases:

> [A]n interpretation of a legislative rule "cannot be modified without the notice and comment procedure that would be required to change the underlying regulation-otherwise, an agency could easily evade notice and comment requirements by amending a rule under the guise of reinterpreting it." Molycorp, Inc. v. EPA, 197 F.3d 543, 546 (D.C.Cir.1999); see also Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 586 (D.C.Cir.1997). ... Alaska Prof'l Hunters Ass'n, Inc. v. FAA, 177 F.3d 1030, 1034 (D.C.Cir.1999) ("When an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment."), and Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 586 (D.C.Cir.1997) ("Once an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking.").[77]

In both the official SUMMARY section of the preamble and the summary section of the SUPPLEMENTARY INFORMATION section of the preamble, OSHA states that the proposed rule would restore a column to the OSHA 300 log that would be used to record work-related MSDs. There is no mention of the fact that OSHA is proposing any other changes to the rule, much less a material change in the general recording criteria for restricted duty cases. Buried eight pages into the NPRM, under the heading "Subjective Symptoms," is a discussion that starts out with the following:

> OSHA intends to remove language from the Recordkeeping Compliance Directive that says that "minor musculoskeletal

[77] *Environmental Integrity Project v. EPA*, 425 F.3d 992, 995 and 997 (D.C. Cir. 2005).

discomfort" is not recordable under Sec. 1904.7(b)(4) as a restricted work case "if a health care professional determines that the employee is fully able to perform all of his or her routine job functions, and the employer assigns a work restriction for the purpose of preventing a more serious injury" (CPL 02-00-135, Chapter 2, Section 1(F)).[78],

According to OSHA, the agency planned to take this action "to eliminate any potential for confusion" and furthermore,

> OSHA believes that the language in the Compliance Directive is not necessary because § 1904.4 of the Recordkeeping regulation clearly and fully specifies when cases involving work restrictions and transfers must be recorded.[79]

The quoted language strongly suggests that no material change in the law is being proposed, but simply a clarification to avoid confusion. However, OSHA then proceeds to explain that it rejected suggestions made during the rulemaking leading to the current rule to adopt an exception to recordability for "voluntary or preventive job transfers." The agency's statement to the effect that it is simply clarifying and not changing the current rule conflicts with the fact that it is announcing its intention to withdraw an interpretation that it initially rejected in the rulemaking leading up to the 2001 Final Rule [80] and then accepted as part of a settlement agreement resulting from a legal challenge to that rule.

OSHA apparently did not want to acknowledge that the NAM settlement agreement language on preventive transfers was the rule of the land and that, pursuant to the due process requirements reflected in the Administrative Procedure Act (APA), it could only be modified by notice and comment rulemaking. However, recognizing the real possibility that notice and comment rulemaking would be required by the APA, OSHA is attempting to claim that it is putting stakeholders on notice, while not highlighting this change or inviting comments on it. At the March 9 public meeting, DOL and OSHA staff defended this approach on the basis that the issue of revoking the "preventive transfer" settlement language was recognized by counsel for the

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[78] 75 Fed. Reg. 4735, col. 2, (Jan. 29, 2010).

[79] *Id.*

[80] The cited language reads as follows from 75 Fed. Reg. 4735, col. 3 and 4736, col. 1:

> The agency underscored this point in the preamble discussion of job transfer in the 2001 rule. The agency rejected suggestions to add an exception to recordability for voluntary or preventive job transfers. The agency explained that this concept is not relevant to the recordkeeping rule:
>
> > Transfers or restrictions taken before the employee has experienced an injury or illness do not meet the first recording requirement of the recordkeeping rule, i.e. that a work-related injury or illness must have occurred for recording to be considered at all. * * * However, transfers or restrictions whose purpose is to allow an employee to recover from an injury or illness as well as to keep the injury or illness from becoming worse are recordable because they involve restriction or work transfer caused by injury or illness. All restricted work cases and job transfer cases that result from an injury or illness that is work-related are recordable on the employer's Log. (66 FR 5981).

NAM and the Chamber. We believe this approach to rulemaking is both misleading and improper as a matter of law and public policy. As stated in 1 CFR 18.12, the agency "shall prepare a preamble which will inform the reader, who is not an expert in the subject area, of the basis and purpose for the rule or proposal." (emphasis added) OSHA's preamble, while including a discussion on this point, understates it and mischaracterizes the proposed regulation as merely restoring the OSHA 300 Log column for MSDs, and relying on the identical definition of MSDs from the earlier version of this rule, when in reality this proposal greatly expands the number of cases employers will have to consider and record.

2. The NPRM suggests that OSHA is improperly attempting to redefine MSDs as illnesses rather than injuries.

Without providing any meaningful notice or any explanation to stakeholders, OSHA appears to be attempting to reverse the longstanding OSHA determination that MSDs are injuries, by redefining all MSDs as illnesses rather than injuries.

In the OSHA ergonomics rulemaking, one of the major scientific-legal issues, on which OSHA received extensive public comment, was whether MSDs were "injuries" or whether they were "illnesses" caused by a harmful physical agent (a health hazard) under the OSH Act. It was well recognized that the distinction between illnesses (caused by toxic substances or harmful physical agents) covered by OSHA health standards and injuries covered by OSHA safety standards had potentially enormous consequences. Under Section 6(b)(5) of the OSH Act, health standards generally must eliminate or control significant risks of harm to the extent technically and economically feasible. Under Section 6(b) and 3(8) of the OSH Act, the costs of compliance with a safety standard generally must be reasonably related to the benefits of compliance with that standard.

After a detailed and comprehensive analysis of this critical issue, OSHA determined that the conditions encompassed by the term "MSDs" as used by OSHA, referred to injuries rather than illnesses, and were inconsistent with the term illness.[81] Notwithstanding that well-supported and, we believe, inevitable determination, OSHA appears to have proceeded with this rulemaking as if it had come to the opposite conclusion on that issue, as illustrated by the following preamble text:

> Moreover, the MSD category is **no broader than the other illness categories** that are included as columns on the OSHA 300 Log .... Like MSDs, each of these columns combines a class or range **of illnesses or disorders** into a single category. ... OSHA believes that information from the MSD column would be at least as useful as ... data generated from **the other illness columns** already present on the Log .... Furthermore, OSHA believes that, compared to MSDs,

[81] See 65 Fed. Reg. 68270-2. This determination was consistent with the approach taken by the California Superior Court in its review of California's Repetitive Motion Injury Regulation, 8 CCR 5110. *Pulaski v. Cal. Occup. Safety & Health Std. Bd.*, 90 Cal. Rptr. 2d 54 (1999). . It is also consistent with the definition of the term "musculoskeletal problems" in the ANSI A10.40 Standard for the Reduction of Musculoskeletal Problems in Construction cited by OSHA. 75 Fed. Reg. 4734, col. 1. While we have referenced the A10.40 definition of "musculoskeletal problems" for this limited purpose, we wish to be clear that as previously discussed, the A10.40 standard was adopted through an invalid process and cannot be viewed as a "national consensus standard" as that term is used in Sections 3(9) and 6(b)(8) of the OSH Act.

> each of these other categories individually account for **a smaller fraction of the total number of occupational illnesses**. MSDs, on the other hand, accounted for **significantly more occupational illnesses** than the combined total for the specific **illnesses** currently listed on the OSHA 300 Log. ... OSHA believes it is reasonable and appropriate to have a column on the log for the type of case that accounts for such a significant portion of all **occupational illnesses. ...**
>
> OSHA also believes that restoring the MSD column on the 300 Log would help to eliminate some of the uncertainties in existing national **occupational illness statistics**. OSHA believes that MSDs account for a large portion of **"all other illnesses."** In 2000, the last year the OSHA 200 Log contained a repeated trauma column, repeated trauma was the dominant **illness** reported, accounting for 67% of all **illnesses** .... Even if hearing loss cases were removed, repeated trauma still would have accounted for the majority of all **occupational illnesses** reported that year. OSHA believes that having the MSD column not only would help to eliminate some of the uncertainties concerning **occupational illnesses** in the national statistics, but would also provide better information on the nature of the large proportion of **illnesses currently reported in the "all other illnesses" column [emphasis added]**.[82]

The characterization of the cases herein has potentially significant impacts on future rulemaking for addressing MSDs. If MSDs are illnesses, presumably OSHA believes that section 6(b)(5) applies to any standard that would be promulgated to address them. As is well known, the law requires OSHA to set the standard that "most adequately assures, to the extent feasible," that employees are protected. While this is a laudable goal, the result would be to require actions on the part of employers wholly out of proportion to the kinds of conditions ("subjective symptoms") that would be the subject of this rulemaking.

Given that OSHA defined MSDs as injuries in the prior rulemaking, if the agency now intends to define MSDs as illnesses, it needs to identify the issue for interested persons and seek comment, not slip the change through without giving it any attention at all. Once again, OSHA is skirting its obligations under the APA.

From a procedural standpoint, we believe the January 29, 2010 NPRM in this proceeding was materially misleading and legally inadequate with respect to both of these issues. We believe that a new rulemaking to take comment on the removal of the compliance directive language and OSHA's characterization of MSDs as illnesses would be in order, with a new Federal Register notice that adequately informs the public as to the scope of the proposed changes in accordance with the APA and 1 CFR 18.12, and allows for an extended comment period and hearing more appropriate to address the complexity of the issues actually raised by this initiative. Alternatively, OSHA should at least extend the comment period for this rulemaking an additional 60 days and should specifically request employers to provide information on the impact of these changes.

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[82] 75 Fed. Reg. 4732. Consistent with our analysis, the associated January 28, 2010, OSHA press release, Release Number: 10-135-NAT, contains the following heading: "US Department of Labor's OSHA proposes recordkeeping change to improve **illness data."**(emphasis added)

3. Compliance with the APA is More than a Ritual.

OSHA has not complied with the applicable requirements of the APA in this rulemaking with respect to its plan to overturn the rule governing minor musculoskeletal discomfort or to overturn the well-established classification of MSDs as injuries (rather than illnesses). OSHA simply announced the first reversal without acknowledging what it was doing and made the second change on a stealth basis, but for the heading in its press release, which clearly does not satisfy the requirements of the APA. As the D.C. Circuit reminded OSHA in *Chamber of Commerce of the United States v. OSHA*:[83]

> The Assistant Secretary should not treat the procedural obligations under the APA as meaningless ritual. Parties affected by the proposed legislative rule are the obvious beneficiaries of proper procedures. Prior notice and an opportunity to comment permit them to voice their objections before the agency takes final action. Congress enacted 5 U.S.C. § 553 in part to " 'afford adequate safeguards to private interests.' " [Citations omitted.] Given the lack of supervision over agency decision making that can result from judicial deference and congressional inattention, see Cutler & Johnson, Regulation and the Political Process, 84 Yale L.J. 1395 (1975), this protection, as a practical matter, may constitute an affected party's only defense mechanism.
>
> An agency also must not forget, however, that it too has much to gain from the assistance of outside parties. Congress recognized that an agency's " 'knowledge is rarely complete, and it must learn the * * * viewpoints of those whom the regulation will affect. * * * (Public) participation * * * in the rule-making process is essential in order to permit administrative agencies to inform themselves . . . .' " [Citations omitted.] Comments from sources outside of the agency may shed light on specific information, additional policy considerations, weaknesses in the proposed regulation, and alternative means of achieving the same objectives. [Citations omitted.] By the same token, public scrutiny and participation before a legislative rule becomes effective can reduce the risk of factual errors, arbitrary actions, and unforeseen detrimental consequences. See Freedman, Summary Action by Administrative Agencies, 40 U.Chi.L.Rev. 1, 27-30 (1972).
>
> Finally, and most important of all, highhanded agency rulemaking is more than just offensive to our basic notions of democratic government; a failure to seek at least the acquiescence of the governed eliminates a vital ingredient for effective administrative action. See Hahn, Procedural Adequacy in Administrative Decisionmaking: A Unified Formulation (pt. 1), 30 Ad.L.Rev. 467, 500-04 (1978). Charting changes in policy direction with the aid of those who will be affected by the shift in course helps dispel suspicions of agency predisposition, unfairness, arrogance, improper influence, and ulterior motivation. Public participation in a legislative rule's formulation decreases the likelihood that opponents will attempt to

[83] 636 F.2d 464, 470-1 (D.C. Cir. 1980).

sabotage the rule's implementation and enforcement. [Citations omitted.]

OSHA's decision to modify the rule in this fashion reinforces industry's suspicions that OSHA is intent on adopting the proposal based on a political viewpoint rather than objective information and analysis. We object to the Administration issuing a legislative rule without fully complying with the Administrative Procedure Act. As Chief Justice Charles Evans Hughes declared four decades ago: "Democracy is a most hopeful way of life, but its promise of liberty and of human betterment will be but idle words save as the ideals of justice, not only between man and man, but between government and citizen, are held supreme."[84]

4. The required consultation with ACCSH was procedurally defective.

OSHA acknowledged that it was required by the Contract Work Hours and Safety Standards Act (Construction Safety Act) (40 U.S.C. 3704) and OSHA regulations (29 CFR 1911.10(a) and 1912.3(a)), to consult with the Advisory Committee on Construction Safety and Health (ACCSH) about this proposal. The transcript of the December 10 and 11, 2009 ACCSH meeting reveals that the nature of the consultation regarding this issue was cursory and lacked sufficient detail for the Advisory Committee to make an informed decision.

Section 1911.10(a) provides as follows:

> The Assistant Secretary shall consult with the Advisory Committee on Construction Safety and Health, established pursuant to section 107 of the Contract Work Hours and Safety Standards Act, in the formulation of a rule to promulgate, modify, or revoke a standard. The Assistant Secretary shall provide the committee with any proposal of his own ... **together with all pertinent factual information available to him**, including the results of research, demonstrations and experiments. The committee shall submit to the Assistant Secretary its recommendations regarding the rule to be promulgated within the period prescribed by the Assistant Secretary, **which in no event shall be longer than 270 days from the date of initial consultation**. (emphasis added)

In specifying an outside response time of 270 days, we believe it is clear that ACCSH is expected to be given the time necessary to carry out a responsible review of a proposed rule and consult with appropriate individuals. The manner in which the ACCSH was given this matter suggests a rush by OSHA to the ACCSH approval. Furthermore, the legal standard of disclosure is "all pertinent factual information," which would encompass all factual information as determined by a knowledgeable and objective individual. The nature of the ACCSH discussion on December 11 strongly indicates that "all pertinent factual information" was not provided to ACCSH, nor was there the ringing endorsement of the proposed regulation OSHA's summary of the ACCSH action would suggest.

[84] Address of Chief Justice Hughes, 150th Anniversary of the Supreme Court (Feb. 1, 1940), reprinted in 309 U.S. at v, xii (1940).

The transcript of the two day meeting, makes clear that the information packet on this proposal was provided to the members of ACCSH just before members began traveling to the meeting and then again on the first day of the meeting. (Tr.: 349, l. 5-7; 352, l. 13-16), allowing inadequate time for the members to review the materials and consult with their respective organizations or anyone in advance of the meeting. Second, ACCSH members were relying on DOL and OSHA personnel to explain the substance and impact of the proposal (Tr. 352, l. 2-7). Third, in describing the proposal to ACCSH, the DOL and OSHA staff, consistent with the subsequently issued NPRM (described above), omitted material information and mischaracterized the nature and scope of the Proposed Rule in stating that: "this change does not change the criteria for what gets recorded at all" (Tr.: 354, l. 13 through 355, l. 13):

> OSHA: Okay. And I think that the answer to that is that this change does not change the criteria for what gets recorded at all. MSDs get recorded just like any other injury or illness.
>
> MEMBER A: Right.
>
> OSHA: You know, so it doesn't have any impact that way; but it does change the distribution of check marks over these other categories. So right now, they're being put into injuries or all other illnesses, and those are going to shift, then, into this MSD column to some degree.
>
> CHAIRMAN: So the numbers will remain the same –
>
> OSHA: Yes –
>
> CHAIRMAN: It's just that they're going to be more defined on what area it's going to be. And that's –
>
> MEMBER B: They're going to be sorted differently.
>
> OSHA: Correct.

Finally, ACCSH voted to support the Proposed Rule at the same meeting where it was presented. We have no doubt that OSHA indicated to ACCSH that it sought a quick approval by ACCSH. If OSHA had to wait for the next ACCSH meeting to obtain the Committee's support, it might not have been able to proceed in time to adopt a final rule in time for its targeted implementation on January 1, 2011.

H. There is Insufficient Time to Implement the Proposed Rule by January 1, 2010.

We have also been advised by members of the NAM and the Chamber that there is insufficient time to implement the proposed changes by January 1, 2011. Many larger employers would be required to make substantial changes to their current recordkeeping systems to achieve compliance with the Proposed Rule, including system-wide software updates and training of personnel charged with recording injury and illnesses.

Assuming OSHA is able to review, summarize and publish the final regulation by August

or September—an outrageously ambitious schedule given OSHA's failure to comply with the APA, SBREFA and the PRA, and the amount of work necessary given the array of very substantive issues raised by this rulemaking—the development and implementation of such changes cannot be completed by employers as significant software upgrades would be required and key employees would need to be adequately trained in the remaining time.

OSHA is required to allow ample and sufficient time for implementation of changes in the regulations and standards it adopts under both its enabling legislation (compliance with OSHA's rules must be feasible) and the APA. It must not shirk its duty to be sure that the employer community can make the necessary adjustments before the sword of enforcement falls on their heads.

* * * *

CONCLUSION

In light of the obvious inability to define, diagnose or determine the cause of MSDs with any degree of precision, the logical conclusion, mandated by the applicable OSH Act criteria, is that OSHA must acknowledge the limitations it faces in implementing a workable MSD provision in Part 1904 consistent with its statutory authority and withdraw the Proposed Rule. There simply is no medically and scientifically supported definition for the injuries that OSHA expects employers to record. OSHA's attempt to establish an MSD column for the OSHA 300 Log fails to serve any useful purpose and would only lead to an inappropriate misallocation of resources that would detract from efforts to advance workplace safety and health in the United States. OSHA's cost estimate for this proposal strained credulity and the agency utterly failed to provide an adequate factual basis for the certification necessary to avoid having to comply with the Regulatory Flexibility Act as amended by the Small Business Regulatory Enforcement Fairness Act. Finally, the Federal Register notice was defective as OSHA mischaracterized the scope of this proposal and failed to acknowledge the critical re-characterization of MSDs from injuries to illnesses affected by language in the preamble. We urge OSHA to abandon this ill-fated attempt to classify that which is impossible objectively to verify or categorize.

Respectfully submitted,

The Associated Builders and Contractors, Inc.
The Associated General Contractors of America
American Trucking Associations, Inc.
The Food Marketing Institute
Independent Electrical Contractors
The International Foodservice Distributors Association
The International Franchise Association
IPC – Association Connecting Electronics Industries
The Motor & Equipment Manufacturers Association
National Association of Home Builders
The National Association of Manufacturers
The National Association of Wholesaler-Distributors
The National Oilseed Processors Association
The National Restaurant Association
The National Retail Federation
The National Roofing Contractors Association
The Shipbuilders Council of America
Textile Rental Services Association
The U.S. Chamber of Commerce

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[85] A substantial portion of the material in these comments was extracted from the August 30, 2002 Comments of the National Association of Manufacturers (Exhibit 2-32) filed with OSHA in OSHA Docket R-02B and prepared by Baruch A. Fellner, Derry Dean Sparlin and Tanya Axenson MaCallair all of whom were then with the law firm of Gibson, Dunn & Crutcher LLP.