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OSHA Docket Office
Docket number OSHA-2009-0044
U.S. Department of Labor, Room N-2625
200 Constitution Avenue, NW
Washington D.C. 20210

The National Telecommunications Safety Panel (NTSP¹) would like to provide its comments on the Notice of Proposed rulemaking issued in the Federal Register, No. 75:4728-4741 on January 29, 2010 regarding the occupational injury and illness recordkeeping and reporting requirements. The NTSP is a consortium of major telecommunications companies within the United States comprising approximately 700,000 employees. The NTSP is comprised of environmental, health and safety professionals, dedicated to promoting employee safety and health, preventing accidents and promoting EH&S responsibly throughout the telecommunications industry. The NTSP (also referred to as the Panel) strives to provide constructive input in the development and promulgation of environmental, health and safety standards and guidelines that affect the varied businesses within the telecommunications industry. As such, the Panel maintains an active advocacy role, providing comments and recommendations to federal and state agencies where issues concern the telecommunications industry. The comments submitted herein are from the NTSP and do not supersede comments filed by individual companies which may have filed different and/or additional comments.

The NTSP has been collaborating amongst member telecommunications companies for over 25 years on the topic of Ergonomics and in 2004 embarked on a very successful Alliance on Ergonomics with OSHA. This Alliance was renewed in 2006 and 2008. The Alliance program, a mutually beneficial program, has produced seminars, educational tools, and opportunities for dialogue and information exchange between OSHA and the telecommunications industry.

We believe the level of experience and education the NTSP has developed over time allows us the opportunity to provide valuable and constructive insights on the proposed occupational injury and illness recordkeeping and reporting requirements particularly as they relate to the topic of Musculoskeletal Disorders (MDSs).

Executive Summary

The NTSP recognizes OSHA's desire to capture data within American industry. However, the NTSP has some concerns about the manner in which the proposed regulations would do so. First, the Panel believes that the proposed MSD definition is overly broad because it includes

¹ NTSP member companies participating in the comments are Sprint Nextel Corporation, Cincinnati Bell Telephone Company, Alcatel-Lucent, Windstream Communications, Inc., Qwest, AT&T and Verizon Communications.



back disorders. The NTSP believes that this broad definition will cause Industry to grossly over report work related injuries which in turn will result in increased costs. In addition, the Panel believes that the language of the proposed rule is inconsistent with the Congressional Mandate invalidating the 2001 Ergonomics Rule.

Back Disorders should not be defined as an MSD

The NTSP opposes including disorders of the back in the definition of an MSD because disc disease, sciatica, herniation of discs and low back pain are conditions that occur in a high percentage of the American population with or without a job related connection. According to the Center for Disease control, "Low-back pain (LBP) is common in the general population: lifetime prevalence has been estimated at nearly 70% for industrialized countries; sciatic conditions may occur in one quarter of those experiencing back problems." In addition, the CDC also reports that a "back disorder is multifactorial in origin and may be associated with both occupational and non work-related factors and characteristics." Duke University reported in a study of Back Pain Costs, that "medical treatment for back pain (not back surgery) was estimated to be [26 billion annually](#)". Because it is very difficult to distinguish if back pain and related back disorders are work related or a result of hereditary and other life style and off the job circumstances, employers would be assuming responsibility, by nature of an OSHA log, to cure or control a condition that research indicates is common across many Americans and in many instances may not be work related.

In fact many experts have struggled with the definition of an MSD, in great part because of concerns about the classification of back injuries. In 2002, the Department of Labor created the National Advisory Committee on Ergonomics (NACE) which consisted of 15 members appointed by the Secretary of Labor to help OSHA reduce work-related musculoskeletal injuries by providing advice in the areas of guidelines, research, outreach and assistance. The National Advisory Committee on Ergonomics (NACE) worked together for 2 years and during their last meeting November 17, 2004 made the following statements.

The National Advisory Committee on Ergonomics, at its final meeting, has developed the following points with the intent that they will be useful to guide OSHA concerning the development of future guidelines, outreach and assistance, and research.

- 1. Ergonomics is a noun, not an adjective. It is recommended that it is used as such in formal documents. Hazards exist in the form of poorly designed work practices and/or workplaces. Ergonomics is a process that can be beneficially used to address job and workplace design – the human interface with the work system. Improved safety characteristics occur in concert with productivity improvements. Once workers no longer need to devote maximum energy to "overcoming" the demands of their work practices and/or workplaces, they can devote those same energies to productivity and quality aspects of their jobs.*
- 2. 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.

3. *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.*
4. *Ergonomics should be included in comprehensive occupational safety and health programs. Ergonomics should be integrated into business processes in the same way as job safety analysis, personal protective equipment hazard assessments, process hazard analysis, and similar occupational safety and health tools.*
5. *It must be recognized that there are non-occupational components, such as general health, non-work, leisure, play, and physical daily living activities) that also contribute to the development and occurrence of MSDs. To reach outside the work arena, these components are best addressed by educating the workforce concerning such non-work hazards.*

As you can see from the NACE recommendations, NACE could not reach consensus on a definition of an MSD. We were surprised that there was no mention of the NACE committee and its findings in the documentation of the proposed occupational injury and illness recordkeeping and recording regulation. Rather, OSHA referenced statements from the Advisory Committee on Construction Safety and Health (ACCSH). The charter of ACCSH is:

“The Advisory Committee on Construction Safety and Health (ACCSH) is a continuing advisory body established under section 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 333, of 1973, commonly known as the Construction Safety Act) to advise the Assistant Secretary for Occupational Safety and Health with respect to setting construction standards and policy matters affecting federally financed or assisted construction.”

<http://www.osha.gov/doc/accs/backgroundandhist.html>

[ACCSH](#) is chartered to advise OSHA on matters of occupational safety and health as it relates to construction standards. While we do not believe that this group should be ignored, we believe that it is important for OSHA to also consider the opinions of NACE, a group established for the specific purpose of advising OSHA on ergonomics issues.

In 2001, NIOSH (National Institute for Occupational Safety & Health) published a document titled “[National Occupational Research Agenda for Musculoskeletal Disorders – Research Topics for the Next Decade – A Report by the NORA Musculoskeletal Disorders Team](#)” which recommended that work needs to be done to develop standard clinical definitions for MSD which include clear endpoints. The NORA team, like NACE, recognized the need to develop definitions for stages of the disease process characterized by such terms as discomfort, pain, injury, disability, and recovery.” This team recognized the fact that more works needs to be done in order to provide a clear and consistent definition of an MSD. Moving forward before this



definition is developed, as the proposed rule would do, is likely to cause significant problems in the field at a high cost to the regulated industry. Moreover, these high costs and problems will not result in any more knowledge about workplace injuries or provide information with which either the employer or the government will be able to use to make the workplace safer. Without further clarity of the definition of an MSD, companies across the United States that are required to implement the proposed regulation will struggle with interpreting the MSD definition and unfortunately the desired outcomes of the standard will be unattainable. The proposed requirements for reporting MSDs would not enhance the safety of the work environment, but would only result in a cumbersome and burdensome OSHA recordkeeping system.

OSHA Lacks the Authority to Enact this MSD Reporting Requirement

The NTSP also believes that the provisions relating to ergonomics reporting have been rejected by Congress and, therefore, prohibited by the Congressional Review Act of 1996 (CRA). Specifically, with respect to the Ergonomics Rule, Congress invoked the CRA, which allows the Legislature to overturn executive branch regulations.² Under the CRA, when a motion to disapprove passes in both the House and Senate, and is then signed by the President, the rule at issue essentially disappears. Where it has already taken effect, it can no longer be enforced or defended in court. More importantly, the affected federal agency is also barred from pushing a *substantially similar* version of the rule at a later date.³ In this case, the proposed rule, and the definition of MSD that is central to that rule, is substantially similar as that in the ergonomics rule in that both are requiring reporting on MSDs.⁴ Although the newly proposed law does not require the creation of an ergonomics program for the job, it does require employers to report injuries under a very similar, very broad definition of MSD. As a result, even though the proposed regulation is missing this substantive requirement to establish an ergonomic program based on the injuries reported, the initial burden placed on companies by this regulation (and to which Congress objected under the CRA) remains the same as under the repealed Ergonomics Program. As a result, due to this substantial similarity, OSHA should not adopt a rule that has the same faults as one struck down earlier by Congress under the CRA.

In addition, by expressly disapproving the ergonomics rule, Congress implicitly indicated its belief that the ergonomics rule and its elements (including the MSD category) was not consistent with the underlying Occupational Safety and Health Act ("OSH Act"). Case law has well established that when Congress fails to act, it implicitly approves of a federal agency's rulemaking as consistent with statutory purpose.⁵ Conversely, where Congress *expressly*

² PL 104-121 codified at 5 U.S.C. Section 801 et seq.

³ "A rule that does not take effect (or does not continue) under paragraph (1) may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule." 5 U.S.C. Section 801(b)(2).

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⁵ See, *Faygo Beverages, Inc. v. U.S.*, 640 F.2d 27 (C.A.Mich. 1981) ("Because of the scant legislative history to the contrary and the regulation's long existence unmolested by Congressional disapproval, this Court cannot hold that the regulation is plainly inconsistent with the Congressional intent of the revenue statutes."); see also, *U.S. v. Kassan*, 208 F.Supp. 858, 861 (D.C.Cal. 1962) ("[where] regulations have been in force and undoubtedly have come under



disapproves of a regulation, by that very disapproval, it is indicating lack of consistency with Congressional intent. In fact, as held by the D.C. Circuit in *Consumer Energy Council of Am. v. FERC*, 673 F.2d 425, 469 (D.C. 1982), such disapproval acts as a directive to the agency to alter the agency's direction. In this case, enactment of the substantially similar MSD category from the disapproved ergonomics rule would be contrary to Congress' clear signal against this vague provision not in keeping with the OSH Act.

Finally, we note that OSHA's proposal fails to address the deficiencies of not only the CRA reversal by Congress, but also OSHA's own prior rulemaking history in declining to implement general MSD recordkeeping requirements. Specifically, the 2001 Recordkeeping Rule intended to add an MSD column to various recordkeeping requirements, including the OSHA 300 log. However, the Agency ultimately eliminated the general definition after determining that no single definition was appropriate.⁶ Instead, the Agency concluded that industry specific guidance was more appropriate.⁷ Nothing in the current proposed rule suggests any new information or other justification exists for reversal of the earlier conclusions that industry specific requirements are more appropriate. In fact, to attempt to reinstate such a proposal would be contrary to the considered approach previously taken by the Agency, including the response to comments provided by interested stakeholders. Such an attempt would be arbitrary and capricious and in contravention of the requirements of the Administrative Procedures Act. Accordingly, without such justification or new information, OSHA's re-issuance of the same general MSD reporting requirements is inappropriate.

Conclusion

The NTSP appreciates this opportunity to comment upon the proposed rule modification. For reason noted above, the NTSP strongly urges OSHA to reconsider the use of a problematic MSD definition in a recordkeeping rule; a definition that includes non work related back pain and the exact fundamental wording of a definition that was an instrumental part of a standard rescinded by Congress years ago. The NTSP would be happy to meet with OSHA representatives to discuss these comments or this proposed rule.

Sincerely,

Marie Robinson, M.S., CPE
Chairperson, National Telecommunications Safety Panel
(714) 505-3982 or mr3871@att.com

congressional scrutiny and there has been no indication of congressional disapproval. . . Congress has apparently impliedly approved these regulations.").

⁶ See e.g., 67 FED. REG. 44124 (July 1, 2002) (proposing delay of the effectiveness date of the MSD definition); see also, 68 FED. REG. 38601 (June 30, 2003) (deleting the provision with the MSD definition altogether).

⁷ Through this individualized industry or task oriented program, OSHA has issued guidelines for the following industries: Shipyard, Poultry Processing, Retail Grocery Stores, and Nursing Homes. See <http://www.osha.gov/SLTC/ergonomics/guidelines.html>.