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The Trivial Pursuit of OSHA Recordkeeping

Barbara J. Wisniewski, CIH, CSP, CPEA
Vice President Health & Safety
McWane, Inc.
Birmingham, AL

Introduction

Ever since the introduction of the Occupational Safety and Health Act in 1971, employers (with a few exceptions based on size and/or classification as a low hazard industry) have been required to keep records of occupational injuries and illnesses. After passage of the Act, OSHA's rules for reporting of these injuries and illnesses were promulgated as 29 CFR 1904.

The first major effort to revise the recordkeeping rules was through a final rule published on January 19, 2001, which went into effect on January 1, 2002. With this revision, OSHA's recordkeeping regulation was written in a question- and-answer style which was intended to be easier to read and understand. However, as clear as these new regulations appear to be, there remain numerous idiosyncrasies regarding specific injury and illness scenarios and whether they must be reported under these OSHA standards.

As a result, employers and other industry groups and associations periodically submit questions to OSHA for review and response; OSHA subsequently publishes Letters of Interpretation as their means of providing additional guidance and understanding. Prior to the promulgation of the new OSHA recordkeeping regulations, there were over four hundred Letters of Interpretation listed on OSHA's website. Subsequent to the revised regulations, OSHA's website now contains only sixty-six such Letters of Interpretation.

This presentation is intended to provide an overview of some of the basic principles of OSHA recordkeeping requirements and review a number of injury and illness scenarios that may be subject to these regulations. The number of examples, however, is certainly not exhaustive. In fact, each workplace injury and illness situation comes with its own set of individual circumstances which must be evaluated independently against the regulations to determine proper reporting procedures and hence, is sometimes a quest in the trivial pursuit of the appropriate analysis of OSHA recordkeeping.

The Recordkeeping Analysis

When reviewing any potential recordkeeping scenario, it is important to follow a similar process of review and analysis of specific questions, including the order in which they are asked, and to maintain documents in the files to demonstrate the appropriate logic used to make the recordkeeping decisions.

Although the recordkeeping rules run from 29 CFR 1904.1 through 29 CFR 1904.46, there are actually only two major sections of the OSHA Recordkeeping regulations that cover the recordability of injury and illness cases; e.g., 29 CFR 1904.5 Determination of Work Relatedness and 29 CFR 1904.7 General Recording Criteria.

The Event or Exposure and Work Relationship

In order to start the recordkeeping analysis, an event or an exposure must occur that leads to an injury or illness. These events must be either reported by an employee or observed. On occasion, an employee may report an incident that was not witnessed, or is not believed by management to actually have occurred in the work environment. OSHA's low threshold for recordkeeping does not require the event to be witnessed; rather, it is the employer's obligation to analyze the situation. Similarly, delay by the employee in reporting an incident is also not automatically a reason to determine the case is not work related.

Once the event or exposure has occurred, the next question to answer is whether it is work related. OSHA's definition of work relationship is extremely broad; consequently, OSHA's threshold for recordkeeping requirements is quite low. As noted in 29 CFR 1904.5, "You must consider an injury or illness to be work-related if an event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness. Work-relatedness is presumed for injuries and illnesses resulting from events or exposures occurring in the work environment, unless an exception in § 1904.5(b)(2) specifically applies." There are only nine exceptions that are listed in 29 CFR 1904.5(b)(2) that can be used to rule out the work relationship for an event or exposure that occurs within the general boundaries of an employer's property. However, even if it is determined that the event is work related, a second step in the analysis must be made to determine if the event is covered by the OSHA recordkeeping regulations and entered on the employer's OSHA 300 log.

Prior to discussing the OSHA recording criteria; however, it important to note that OSHA recordkeeping regulations and workers' compensation regulations are completely different. Cases that may be OSHA recordable may not be covered under workers' compensation, and similarly, cases which are compensated under workers' compensation do not necessarily need to be recorded under OSHA criteria. Occasionally, the rationale for deciding if a case is OSHA recordable or compensated under workers' compensation may be a factor considered in the analysis. However, decisions made in one venue are not to be the sole reason for deciding the outcome of the case in the other venue. For example, under workers' compensation, an employee must be performing a work related activity when an injury occurs. Under OSHA recordkeeping regulations, there is no need for an employee to be performing any work activity to establish the work-relationship; i.e., if the employee is stung by a bee merely while just being present at the employer's premises, OSHA considers the event work related.

There are also times when employees may not be on the employer's premises and an event that triggers medical treatment, restricted work activity, or days away from work may in fact be OSHA recordable. If the employee was present in the situation as a condition of their employment, the case becomes OSHA recordable. An employee who is required to participate in an off-site business dinner or a company mandated golf outing are examples in which, even though the employee is not on the employer's business premises, an associated injury or illness would be considered work-related under OSHA recordkeeping purposes.

Recording Criteria

However, not all injuries and illnesses that occur in the work environment which are determined to be work related are actually OSHA recordable. The recordability of injuries is covered in five general criteria in section 29 CFR 1904.7 of the OSHA regulation. These five criteria cover medical treatment, restricted work activity, days away from work, loss of consciousness, and fatalities. OSHA has also identified, however, four additional conditions which are automatically recordable, regardless of whether they involve medical treatment, restricted work activity, days away from work, loss of consciousness, or a fatality. These four conditions are identified in 29 CFR 1904.7(b)(7) and are fractures of any type, chronic irreversible diseases, cancers, and punctured eardrums.

29 CFR 1904.8 through 29 CFR 1904.11 provides additional direction for recording requirements on specific cases such as needlesticks, medical removal due to chemical exposure, hearing loss, and tuberculosis. Employers are encouraged to be familiar with individual recording requirements as well, should such scenarios present themselves in the work environment.

With the revised recordkeeping rules, OSHA simplified their definition of what constitutes medical treatment in 29 CFR 1904.7(b)(i) to include the "management and care of a patient to combat disease or disorder". However, rather than providing a list of the types of treatment that are considered medical treatment, OSHA elected to list only three categories that are NOT medical treatment. Any other type of medical service is, consequently, considered medical treatment under OSHA recordkeeping rules and must be recorded. The three categories that are not medical treatment are (1) visits to a licensed health care provider solely for purposes of observation or counseling, (2) diagnostic procedures such as x-rays and blood tests, and (3) fourteen specifically identified first aid services. The list of first aid services is contained in 29 CFR 1904.7(b)(5)(ii).

As noted previously, in addition to medical treatment, restricted work activity is also one of the five conditions that are OSHA recordable. To be considered restricted work, the focus is (1) whether the employee can continue to perform all of their routine functions following the day of the injury or illness and (2) whether the employee can work the full workday, which would include any scheduled overtime work. It is important to note that OSHA's definition of routine functions is not related to the Americans with Disability Act definition of essential functions. Instead, OSHA considers routine functions to be those work activities that the employee regularly performs at least once per week, as noted in 29 CFR 1904 (b)(4)(ii).

It is also important to note that an employer, in addition to a licensed health care professional (LHCP), can actually dictate restricted work activity. If a supervisor decides to limit the number or type of work tasks normally assigned to an employee following an injury or illness, the case becomes restricted work activity even in the absence of a determination by a LHCP that restricted work is necessary, or even if the LHCP has indicated the employee could return to full duty.

The Trivial Pursuit of Recordkeeping Decisions

Although from the above brief description of the OSHA recordkeeping rules it may appear that recordkeeping decisions are quite straightforward and simple, in reality, the idiosyncrasies of each individual situation often include details which may confuse the individual responsible for analyzing the case and making the appropriate recordkeeping situation. The following hypothetical scenarios are presented as examples of such situations.

Hypothetical Scenario #1

An employee was picking up a clock at his work station to "spring the time forward." The clock dropped and injured his finger, resulting in a possible fracture. This was not an essential function of his job. Is the case recordable?

The recordkeeping analysis focuses on whether there was an identifiable event or exposure. In this situation, the event was the dropping of the clock while at the employee's work station. The employee does not need to be performing an essential function or any job task at the time of the injury to be considered work-related by OSHA recordkeeping rules. Additionally, although 29 CFR 1904.7(b)(7) does indicate fractures as one of the types of injuries that are automatically recordable, in this scenario, the fracture has not been confirmed. Until the fracture is confirmed, or unless the employee is given medical treatment or the employee is put on restricted or days away from work activity, this scenario is not recordable.

Hypothetical Scenario #2

While at work, an employee gets something in his right eye. The next day, the employee reports to work at 6:00 a.m. and works his regular duties until 8:00 a.m. when he is seen by the Plant Nurse. The employee is sent to the Occupational Clinic where he was put off work for the remainder of the shift. Is this case recordable with a day away from work or as restricted work activity?

Restricted work activity under OSHA recordkeeping occurs if the employee cannot work a full work day as noted in 29 CFR 1904.7(b)(4)(i)(A), although restricted work does not apply for the day on which the injury occurred or the illness began as noted in 29 CFR 1907.7(b)(4)(iii). If the employee had been sent to the clinic on the same day of the injury, the scenario would not have been a restricted work case. However, in this scenario, the employee works two hours prior to going to the clinic and being taken off work. Since the employee did work part of the shift, the case is counted as restricted work activity.

Hypothetical Scenario #3

An employee is injured at work and placed on restricted work by the Company doctor. The employer suspends the employee for violating the lockout/tagout policy. Do the days of suspension turn the case into a case involving Days Away from Work (DAFW)?

In this scenario, during the incident investigation, the company identifies the fact that the employee was injured due to failure to properly implement lockout/tagout. As a result, the employer suspends the employee, resulting in days away from work. The suspension is for the lockout/tagout policy rule infraction, however, and it not a description of the severity of the case. The days away from work were not recommended by the licensed health care provider or by the company due to the medical condition of the employee.

Although OSHA's recordkeeping regulation is written in the format of questions and answers and was believed by the Agency to address most provisions of the rule, OSHA has also developed additional guidance in the form of Frequency Asked Questions to help employers comply with the recordkeeping requirements. These Frequently Asked Questions are posted on their website at http://www.osha.gov/recordkeeping/detailedfaq.html#1904.7. Occasionally, those making recordkeeping decisions are confused by OSHA's Frequently Asked Question 7-21 which allows a day count to stop if the reason for the termination is unrelated to the injury or illness. This FAQ only applies to day counts, however, not for determinations of restricted work or days away from work. Since OSHA recordkeeping counts calendar days, the days of restriction as determined to be medically needed for the lockout/tagout injury in this scenario must continue to be counted, although the suspension does not change the case from restricted work activity to one of days away from work (DAFW).

Hypothetical Scenario #4

An employee complains of discomfort in her right shoulder from a work-related activity and goes to her physician for treatment. The doctor prescribes 600 mg of over-the-counter ibuprofen to the employee. Is this case recordable?

Under OSHA recordkeeping rules, medications are not recordable if they are given in dosages which are considered first aid. Section 1904.7(b)(5)(ii)(A) further explains, however, that using a non-prescription medication prescription strength is considered medical treatment for recordkeeping purposes. It is, therefore, the employer's responsibility to determine what constitutes prescription strength. OSHA's Frequently Asked Question (FAQ) 7-8 states, "The prescription strength of such

medications is determined by the measured quantity of the therapeutic agent to be taken at one time, i.e., a single dose. The single dosages that are considered prescription strength for four common over-the-counter drugs are:

Ibuprofen (such as Advil™) - Greater than 467 mg
Diphenhydramine (such as Benadryl™) - Greater than 50 mg
Naproxen Sodium (such as Aleve™) - Greater than 220 mg
Ketoprofen (such as Orudus KT™) - Greater than 25mg

To determine the prescription-strength dosages for other drugs that are available in prescription and non-prescription formulations, the employer should contact OSHA, the United States Food and Drug Administration, their local pharmacist. or their physician."

In this scenario, because the dosage of the Ibuprofen is over 467 mg, the case is recordable.

Hypothetical Scenario #5

An employee with a history of low back spasms leans forward to pick up a sheet of paper from a chair at work and goes into spasm. The employee considers this to be a personal medical condition. The employee stays home due to the pain. The employee does not go to a doctor and takes 600 mg of ibuprofen 4 times a day. Is this case recordable?

This scenario relates to pre-existing, non-work related medical conditions as well as the need to determine whether the medication taken by the employee constitutes medical treatment. As noted in the previous scenario, the 600 mg of ibuprofen 4 times a day is a prescription dosage of over-the-counter medication and would be considered recordable if those were the only facts of the scenario. However, this scenario also involves the question of significant aggravation of a non-work related medical condition.

OSHA rules regarding events and exposures defining which injuries and illnesses are considered pre-existing and which are considered significantly aggravated are covered in 29 CFR 1904.4 and 29 CFR 1904.5. For OSHA, the phrase significantly aggravated is NOT related to the mechanism of the injury. All that OSHA means by the phrase "significantly aggravated" is whether as a result of the work-related aggravating event, the level of medical treatment increased compared to the level of treatment prior to the event.

In this scenario, the employee has elected to take 600 mg of ibuprofen. From the facts provided, we do not know what treatment the employee may have had prior to picking up the piece of paper. If the employee had not been taking any medication, and now (after the event) is taking the 600 mg of ibuprofen, it would appear the case is recordable. Yet, the case is actually NOT recordable under OSHA recordkeeping rules. The 600 mg of ibuprofen was not prescribed by a licensed health care provider. Employees themselves do not dictate the outcome of recordability. A case becomes recordable only through actions of either a licensed health care provider or the employer. Consequently, this scenario is not a recordable case, even though there was an aggravation of a pre-existing medical condition, as neither a licensed health care provider nor the employer satisfied any of the five general recording criteria in 29 CFR 1904.7.

Hypothetical Scenario #6

An employee develops wrist pain while performing repetitive tasks at work. The employee's personal doctor diagnosed bilateral carpal tunnel syndrome and the employee was injected with dexamethasone. The employee was also given immobilizing braces to wear at night and moved to a position where repetitive tasks are very limited. The Company doctor subsequently evaluated the case and stated that

the case could have been managed without the injection, with non-prescription medicines, and without the accommodation being offered. Since a more authoritative doctor can overrule another doctor, is the case recordable?

Under most usual circumstances, it can be inferred that a company doctor may be more authoritative regarding the work environment, than an employee's own personal physician, as the company doctor is most likely to have been to the facility multiple times and would be aware of the work assignments and would have treated employees for work-related injuries in the past. Frequently Asked Question (FAQ) 7-10a addresses the subject of contemporaneous second provider's opinions and which may be more authoritative. OSHA's response to that question indicates the employer may determine which is the more authoritative opinion; however, the response also states once medical treatment is provided, or work restrictions have occurred, or days away from work have been taken, the case is automatically recordable. The more authoritative opinion that occurs subsequent to already provided medical treatment, restricted work activity, or lost time days, cannot 'undo' the recordability of the case. In this scenario, the medical treatment had already been provided by the injection of the prescription, and the employee had already been given immobilizing braces, and had also been moved to a position with limited repetitive tasks. Consequently, this scenario is a recordable case with days of restricted work activity (RWA).

Hypothetical Scenario #7

An employee injures his lower back on November 1 and is on Restricted Work Activity (RWA) which is expected to last into January of the following year. On November 15, he goes out of work for a non-work-related surgery. He is out of work until December 18. The employee decides to retire as of January 1 because of a generous pension package the company has just announced. How many and what type of days (restricted and/or days away from work) must be entered on the OSHA log?

Under 29 CFR 1904.7(b)(3)(iv), OSHA addresses the subject of whether weekends, holidays, or other days the employee would not have worked must be counted on the OSHA log. OSHA indicates that calendar days, rather than scheduled work days, must be counted. Consequently, it does not make any difference that the employee in this scenario goes out of work for non-work-related surgery. Prior to the surgery, the employee sustained a work-related injury due to the severity of the lower back incident and the doctor determined the employee will be required to be put on restrictions until sometime in January. All of the days through the employee's non-work related surgery must continue to be counted as restricted. Consistent with FAQ 7-21, mentioned previously, the day count can be stopped if the employee's employment is terminated for a reason unrelated to the injury. In this scenario, the employment is terminated not due to the injury, but because the employee wants to take advantage of the generous pension package being offered by the employer. In this scenario, the employer would be required to count restricted days beginning November 2 through December 31, resulting in 60 calendar days of restricted work activity.

Hypothetical Scenario #8

An employee is on modified duty due to a work related injury. The company is going to be in shutdown mode for the annual maintenance schedule for a two-week period. However, the company is able to provide work for the employee within the requirements of the employee's restriction. The employee has declined the work and elects not to report to work. Is this case considered a Days Away from Work (DAFW) or Restricted Work (RWA) case?

In this scenario, the employee is already on restricted work at the time of the company's temporary shutdown. 29 CFR 1904.7(b)(3)(iv) states "You must count the number of calendar days the employee

was unable to work as a result of the injury or illness, regardless of whether or not the employee was scheduled to work on those day(s). Weekend days, holidays, vacation days or other days off are included in the total number of days recorded if the employee would not have been able to work on those days because of a work-related injury or illness."

Even though the employee elected not to report to work, the case does not change to a days away from work (DAFW) case, as employees cannot dictate the outcome of the case. The physician had already determined the severity of the injury by placing the employee on restricted work prior to the shutdown. As a result, this is a restricted work activity (RWA) case, with the days counted through shutdown and until the employee is released by the physician to full duty.

Hypothetical Scenario #9

An employee is shoveling snow with a co-worker. The employee then goes on a break and after the break, while walking across a level walkway, begins to feel back pain. The employee is put on Restricted Work Activity (RWA) status. You learn from a co-worker that the employee had back problems in the past. Is this case work-related?

Under OSHA 29 CFR 1904.5(b)(3), the question asked is "How do I handle a case if it is not obvious whether the precipitating event or exposure occurred in the work environment or occurred away from work?" OSHA's response is that "In these situations, you must evaluate the employee's work duties and environment to decide whether or not one or more events or exposures in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing condition." The analysis in effect, is does it seem more likely than not that the employee's work tasks either caused or contributed to the condition. In this case, it appears the decision would need to be made that shoveling snow could likely aggravate a pre-existing back problem.

As discussed previously, OSHA recordability does require consideration of non-work related pre-existing conditions, using an analysis of whether the event caused a significant aggravation. Under the significant aggravation analysis, we need to evaluate the level of treatment prior to and after the event. As a result of shoveling the snow, did the level of treatment increase? In this scenario, the employee was put on restricted work activity (RWA), which, is a higher level of treatment from when he reported to work that day (assumption that he was not already on restrictions for another previous incident). The analysis of this scenario indicates to us this is a work-related case that must be recorded with restricted work activity (RWA).

Hypothetical Scenario #10

An employee is knitting in the company cafeteria during lunch and slips with the needle, resulting in the need to have three stitches to the employee's left hand. Is this case recordable?

The analysis for this scenario starts, as always, to determine whether there was an event or exposure and then whether the event was work-related. The event is the left hand injury requiring stitches. Although it may not seem likely that this scenario would be recordable, from reviewing 29 CFR 1904.5(b)(2), we see this scenario does not fit into one of the nine exceptions for work relationship.

1904.5(b)(2)	You are not required to record injuries and illnesses if . . .
(i)	At the time of the injury or illness, the employee was present in the work environment as a member of the general public rather than as an employee.
(ii)	The injury or illness involves signs or symptoms that surface at work but result solely from a non-work-related event or exposure that occurs outside the work environment.
(iii)	The injury or illness results solely from voluntary participation in a wellness program or in a medical, fitness, or recreational activity such as blood donation, physical examination, flu shot, exercise class, racquetball, or baseball.
(iv)	The injury or illness is solely the result of an employee eating, drinking, or preparing food or drink for personal consumption (whether bought on the employer's premises or brought in). For example, if the employee is injured by choking on a sandwich while in the employer's establishment, the case would not be considered work-related. **Note:** If the employee is made ill by ingesting food contaminated by workplace contaminants (such as lead), or gets food poisoning from food supplied by the employer, the case would be considered work-related.
(v)	The injury or illness is solely the result of an employee doing personal tasks (unrelated to their employment) at the establishment outside of the employee's assigned working hours.
(vi)	The injury or illness is solely the result of personal grooming, self medication for a non-work-related condition, or is intentionally self-inflicted.
(vii)	The injury or illness is caused by a motor vehicle accident and occurs on a company parking lot or company access road while the employee is commuting to or from work.
(viii)	The illness is the common cold or flu (Note: contagious diseases such as tuberculosis, brucellosis, hepatitis A, or plague are considered work-related if the employee is infected at work).
(ix)	The illness is a mental illness. Mental illness will not be considered work-related unless the employee voluntarily provides the employer with an opinion from a physician or other licensed health care professional with appropriate training and experience (psychiatrist, psychologist, psychiatric nurse practitioner, etc.) stating that the employee has a mental illness that is work-related.

OSHA Recordkeeping Regulation, 29 CFR 1904.5(b)(2)

Once work relationship is established, it is necessary to determine whether the stitches received are considered medical treatment. As noted previously, if treatment other that specifically listed in 29 CFR 1904.7(b)(ii)(A) through 20 CFR 1904.7(b)(ii)(N), is given, the treatment is not first aid under OSHA's definitions and is considered medical treatment. Stitches are not included in the first aid list, and this scenario is therefore, OSHA recordable.

Summary

As required by the OSHA Act and 29 CFR 1904, employers are required to keep records of work related occupational injuries and illnesses of their employees. The primary purpose of the OSHA recordkeeping rule is to improve the quality of the workplace injury and illness records. OSHA believes an improved recordkeeping system will raise employer awareness of workplace hazards with the intent of reducing employee injuries and illnesses.

While the responsibility for analysis and decision making is that of the employer, to assist employers with their recordkeeping obligations, OSHA provides a number of resources on their internet website. The OSHA Recordkeeping Handbook, OSHA publication 3245-01R, dated 2005, is available at http://www.osha.gov/recordkeeping/handbook/index.html#1904.7. This handbook is a compendium of existing agency-approved recordkeeping materials, including the regulatory text from the 2001 final rule on Occupational Injury and Illness Recording and Reporting Requirements and relevant explanatory excerpts from the preamble to the rule, Chapter 5 of the Agency's Recordkeeping Policies and Procedures Manual, Frequently Asked Questions (FAQs), and OSHA Letters of Interpretation.

OSHA Recordkeeping rules may seem to be complicated and somewhat like playing a game of Trivial Pursuit, yet by using a systematic approach of analysis, having a thorough understanding of 29 CFR 1904, and maintaining documentation of the justification or rationale for recordkeeping decisions, employers will be able to stay on top of the game!