

Think you recognize a recordable work injury?

BY ARTHUR G. SAPPER
SPECIAL TO CONTRACTOR

The Obama Administration is determined to toughen enforcement by the Occupational Safety and Health Administration. OSHA's new head, David Michaels, said flatly to the House Subcommittee on Workforce Protections in March 2010, "Safe jobs exist only when employers have adequate incentives to comply with OSHA's requirements. Those incentives are affected, in turn, by both the magnitude and the likelihood of penalties."

One target for stiffer penalties is the Form 300 injury and illness logs that OSHA uses to target inspections, set priorities and determine whether industries and workplaces are taking adequate safety actions. Plumbing and HVAC contractors should take proactive steps now to avoid two big mis-

takes consistently made by building trades employers on Form 300 logs.

Work restrictions

The single most common of mistakes that lead to recordkeeping charges is misunderstanding what an OSHA-recordable work restriction is. Employers commonly but honestly believe that if an injured employee can still perform useful work, the

injury is not recordable as a work restriction. Thus, employers may try to avoid an OSHA recordable by assigning office work to an injured tradesman. Other employers believe that an injury case is not recordable if the employee can still

perform work within his job description. So they might, for example, give purely sedentary electrical work to electricians who otherwise would climb ladders daily to perform their jobs.

Both ideas would be mistakes. OSHA's regulations (29 C.F.R. § 1904.7(b)(4)(i)-(ii)) state that a restriction occurs when either: 1) the employer keeps an occupationally injured employee from performing one

'Routine function' is specially defined as a work activity regularly performed at least once per week.

or more "routine functions" of his job; or 2) a licensed health care professional recommends that the employee not perform one or more "routine functions" of his job. The term "routine function" is specially defined as a work activity regularly performed at least once per week. In the case of the injured electrician now unable to climb a ladder, the case is recordable because the electrician otherwise regularly climbs ladders every day.

These misconceptions nevertheless seem to be tenaciously held by a wide range of construction industry employers. They were common even before the 2001 overhaul of the recordkeeping regulations. The 1989 OSHA-commissioned Keystone Report, the consensus of knowledgeable persons from OSHA, industry and unions, stated that "the recording of restricted work is perhaps the least understood and least accepted concept in the recordkeeping system." That is still the case today. However, given the substantial commitment that OSHA is making to improve the recording of injuries, it can be safely said that ignorance of the regulations will be no excuse to avoid an accusation of violation.

Light duty

A second and related misconception is that light duty is not a work restriction. A recordkeeping regulation (§ 1904.7(b)(4)(vii)) indicates that light duty can indeed amount to a work restriction. In fact, this regulation indicates — although indirectly — that light duty is presumptively a restriction.

The regulation starts with the question, "How do I handle vague restrictions from a physician or other licensed health care professional, such as that the employee engage only in 'light duty' or 'take it easy for a week?'" After stating that the employer "may" ask the physician whether this means that the employee may not perform all of his routine job functions or work his entire normally assigned work shift, the lengthy provision ends with

this: "If you are unable to obtain this additional information from the physician ... who recommended the restriction, record the injury or illness as a case involving restricted work."

OSHA officials take this last sentence to mean that "light duty" is a recordable work restriction unless the physician affirmatively states that the employee may perform all of his routine job functions and may work a full shift. Employers are thus well advised that when faced with a vague restriction such as "light duty" to contact the physician and get clarification on what tasks the employee may not perform. If even one of these tasks is among the work duties regularly performed at least once a week, an OSHA recordable case must be entered on the log.

Another aspect of light duty work restrictions that employers overlook is that the recordability of a restriction depends on the particular employee's routine functions. Hence, two employees can be identically injured, treated and restricted, but the restriction might be recordable for only one of them. A restriction for an ironworker might not be a restriction for a receptionist. An employer therefore needs to review with the employee or the employee's immediate supervisor what tasks the employee regularly performs at least once per week and whether the restriction prevents any from being performed.

Final caution

A caution can be offered about these misconceptions. Even OSHA's online Recordkeeping Handbook, www.osha.gov/recordkeeping/handbook/index.html, of which few employers are aware, gives inadequate information about gray areas in the regulations. Employers with questions are understandably reluctant to call OSHA, plus area offices are often too busy for an employer to reach a knowledgeable person; moreover, different OSHA offices may offer different advice. Even so, employers should make every effort to get definitive guidance from OSHA or legal counsel rather than guessing what the recordkeeping requirements are. A wrong guess may mean big penalties from a less than sympathetic agency. **G**

Arthur G. Sapper is a partner in the OSHA Practice Group of McDermott Will & Emery, a former Deputy General Counsel of the Occupational Safety and Health Review Commission, and a former professor of OSHA law. He has participated in numerous audits and cases involving OSHA injury recordkeeping, and can be reached at 202/756-8246 or asapper@mwe.com.

For information circle **XXX**