

**Comments of the
United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial
and Service Workers International Union**

on

**OSHA's Proposed Rule on Clarification of Employer's Continuing Obligation to
Make and Maintain an Accurate Record of Each Recordable Injury and Illness**

Docket No. OSHA-2015-0006

October 28, 2015

The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW) is pleased to provide comments on OSHA's Proposed Rule: Clarification of Employer's Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness. We are submitting these comments on behalf of 600,000 members of the United Steelworkers in the United States. The USW is the largest manufacturing union in North America, representing a variety of industries in manufacturing, as well as public and service sector workers.

In regard to the health and safety of our members, we know that occupational hazards may differ greatly between various sectors. However, in all industries, accurately maintained data from workplace injury and illness logs is an important and vital tool for workers, their unions, health and safety advocates, and their employer to participate in activities aimed at identifying and addressing workplace hazards and reducing occupational injury and illnesses. Review of properly maintained data allows these groups to identify equipment, processes, and work areas where one or more injuries occurred.

"Accurate records are not simply paperwork, but have an important, in fact life-saving purpose," said Assistant Secretary of Labor for Occupational Safety and Health Dr. David Michaels. *"They will enable employers, employees, researchers and the government to identify and eliminate the most serious workplace hazards - ones that have already caused injuries and illnesses to occur."*¹

An accurate and well-maintained OSHA Injury and Illness log is imperative for identifying hazards, the key component of successful health and safety programs. In the preamble to "29 CFR Parts 1904 and 1952 Occupational Injury and Illness

¹ OSHA issues proposed rulemaking clarifying the ongoing obligation to make and maintain accurate records of work-related injuries and illnesses. United States Department of Labor sent this bulletin on 07/28/2015 10:34 AM EDT

Recordkeeping and Reporting Requirements; Final Rule,” OSHA highlights the significance of accurately maintained documents:

- *“One use is to provide information to employers whose employees are being injured or made ill by hazards in the workplace. The information in OSHA records makes employers more aware of the kinds of injuries and illnesses occurring in the workplace and the hazards that cause or contribute to them. When employers analyze and review the information in their records, they can identify and correct hazardous workplace conditions on their own. Injury and illness records are also an essential tool to help employers manage their company safety and health programs effectively.”*
- *“Employees who have information about the occupational injuries and illnesses occurring in their workplace are also better informed about hazards they face. ...When employees are aware of workplace hazards and participate in the identification and control of these hazards, the overall level of safety and health in the workplace improves.”*
- *“The records required by the recordkeeping rule are also an important source of information for OSHA. ... OSHA also uses establishment-specific injury and illness information to help target its intervention efforts on the most dangerous worksites and the worst safety and health hazards. Injury and illness statistics help OSHA identify the scope of occupational safety and health problems and decide whether regulatory intervention, compliance assistance, or other measures are warranted.”*
- *“Finally, the injury and illness records required by the OSHA recordkeeping rule are the source of the BLS-generated national statistics on workplace injuries and illnesses, as well as on the source, nature and type of these injuries and illnesses. ...These statistics chart the magnitude and nature of the occupational injury and illness problem across the country. Congress, OSHA, and safety and health policy makers in Federal, State and local governments use the BLS statistics to make decisions concerning safety and health legislation, programs and standards.”²*

As important as this data is, the U.S. Court of Appeals for the District of Columbia Circuit’s decision on April 6, 2012, *AKM LLC v. Secretary of Labor*, commonly referred to as the Volks decision, determined that OSHA may no longer issue citations against an employer for failing to record an employee injury on the log more than six months prior to the inspection. The trial concluded that the citations were issued to Volks in an untimely manner.

² Federal Register, Vol. 66, No. 13/Friday, January 19, 2001. Pages 5916-5917.

“OSHA cited and fined petitioner, Volks Constructors, for failing to properly record certain workplace injuries and for failing to properly maintain its injury log between January 2002 and April 2006. OSHA issued the citations in November 2006, which was, as Volks points out, at least six months after the last unrecorded injury occurred. Because “[n]o citation may be issued ... after the expiration of six months following the occurrence of any violation,” 29 U.S.C. § 658(c), we agree with Volks that the citations are untimely and should be vacated.”³

“...the specific language in OSHA’s existing recordkeeping regulation does not implement this statutory authority and does not create continuing recordkeeping obligations.”⁴

Placing a “statute of limitations” on the enforcement of proper injury and illness log maintenance prevents many occupational injuries from being identified or continuously monitored. Without OSHA’s ability to issue a citation after a six month period, employers are not obligated to follow up on occupational injuries and illnesses. This leaves unidentified hazards in the workplace.

The six month enforceable time frame for accurately maintaining injury and illness records does not ensure the quality of the record over time. After the enforceable time limit expires, it is no longer necessary for the employer to ensure the accuracy of the reported occurrence. This can result in inaccurate OSHA Recordable Injury and Illness logs.

The Volks Decision represents a major departure from OSHRC’s historical interpretation of the regulation and could affect a range of OSHA standards. For example, the Process Safety Management Standard, 29 CFR 1910.119, requires the retention of several documents. 29 C.F.R. § 1910.119(e) (5) requires an employer to retain documentation showing that certain findings and conclusions of process hazard analyses (PHAs) have been resolved. 29 C.F.R. § 1910.119(o) (4) requires an employer to retain documentation showing that findings from a compliance audit have been addressed or corrected.

In these instances, OSHA has issued citations for these standards as continuing violations because the improper documentation was not addressed. In fact, during the Petroleum Refinery Process Safety Management National Emphasis Program, OSHA issued citations for errors in complying with documentation requirements that occurred 10 to 20 years ago.⁵

³ Volks v. Secretary of Labor, No. 11-1106, U.S. Court of Appeals, District of Columbia Circuit. 2012. Page 2.

⁴ Federal Register, Vol. 80, No. 145/Wednesday, July 29, 2015. Page 45119.

⁵ Directorate of Enforcement Programs (2007, June 7). Petroleum Refinery Process Safety Management National Emphasis Program (DEP Directive CPL 03-00-004). Washington, DC: Author.

Applying the Volks Decision analysis, the “occurrence” starts when the documentation was first created. OSHA would only have six months from the date of that occurrence to issue a citation for faulty documentation.

Since the Volks decision, some employers can simply neglect to accurately maintain records, knowing they can only get cited for six months prior. Most workplaces do not get inspected. Many states would need over 120 years⁶ to inspect all workplaces given current OSHA staffing levels. For example, with current OSHA staffing levels, an employer in West Virginia may never see an inspector because it would take 207 years for the inspection to take place! For facilities such as these, an accurate injury and illness log provides OSHA with safety and health data. Limiting the accuracy of the data for three months leaves trends unidentified and leads workers to suffer needlessly:

- In one USW-represented workplace, the local health and safety committee noticed a failure to record and maintain several hand lacerations on the injury and illness log. After one worker suffered an amputation operating the same equipment, OSHA entered the facility and cited the company for machine guarding, not failure to maintain record due to the six month timeframe. If properly recorded, the trend could have been identified. The guarding received citation does not ensure that the company will properly record and maintain logs in the future. The Volks II decision made OSHA incapable to cite this employer for a recordkeeping violation.
- In one USW-represented workplace, the local health and safety committee noticed that the employer was not properly recording occupational injuries on the OSHA 300 log. After attempting to work with the company to get the logs corrected to reflect the high proportion of workers with muscle strains, OSHA randomly inspected the facility. However, they only cited the employer for the errors on the 300 log within the six month time frame. Many previous errors went unaddressed. Clearly this workplace was out of compliance. OSHA’s role was limited to the 6 months prior to the investigation.

The six month enforceable time limit loses sight of the goal of properly tracking occupational injuries and illnesses. Peoples’ health and lives become at risk and employers escape enforcement that would allow trends to be identified:

- Occupational Hearing Loss- Threshold shifts in from audiometric testing occur over time. Trending shifts can be identified and lead to the implementation of engineering controls.

⁶ AFL-CIO (2015) *Death on the Job: A Toll of Neglect*. Retrieved from <http://www.aflcio.org/content/download/154671/3868441/DOTJ2015Finalnobug.pdf>

- Needle stick injuries and cuts from sharp pathogen-infected objects- Immediate intervention are often required when properly recorded, however there could be long-term adverse health effects.
- Occupational exposures-Employee exposures to chemicals or compounds that may chronic and long-term effects.
- Musculoskeletal disorders-These progressive injuries not properly recorded and maintained can result in missed ergonomic interventions.
- Workplace violence- Accurately maintained records can identify these hidden hazards in the workplace

We applaud OSHA for following up on this important issue with the Federal Register notice on July 29, 2015. OSHA is now amending its recordkeeping regulations to clarify that the duty to make and maintain accurate records of work-related injuries and illnesses is an ongoing obligation. OSHA is now seeking comment on (1) whether the proposed rule is necessary for the proper performance of the Agency's function, including whether the information is useful; (2) the accuracy of OSHA's estimate of the burden (time and cost) of the information collection requirements; (3) ways to minimize compliance burden on employers; and (4) the quality, utility and clarity of information collected. In response to these points, the USW maintains that:

(1) The revised collection of information requirements is necessary for the continued performance of the agency. The information is useful to workers and employers, and the Department of Labor, DOL, relies heavily on its accuracy. In the notice of the proposed rule revision, the Occupational Injury and Illness Recording and Reporting Requirement in 1996, the Administration states:

"The injury and illness records are intended to have multiple purposes. One purpose is to provide information for employers and employees, raising their awareness of the kinds of injuries and illnesses occurring in the workplace and their related hazards. Increased employer awareness should result in the identification and voluntary correction of hazardous workplace conditions. In this role, the records serve as a "management tool" for the administration of company safety and health programs. Likewise, employees who are provided information on injuries and illnesses will be more aware of hazards in the work environment, and therefore more likely to follow safe work practices, and report workplace hazards. This would generally raise the overall level of safety and health in the workplace.

Another purpose for keeping these records is to provide OSHA compliance staff with information which can facilitate safety and health inspections. During the initial stages of an inspection, the inspector reviews the injury and illness data for

the establishment and subsequently focuses his or her inspection efforts on the safety and health hazards revealed by the injury and illness records.

Another use of the injury and illness records is to produce statistical data on the incidence of workplace injuries and illnesses, thereby measuring the magnitude of the injury and illness problem across the country. BLS and participating States make the survey data available at an aggregate level by industry group for research purposes and for public information. OSHA also will use employer-specific information to help focus its intervention efforts on the most dangerous worksites and the worst safety and health hazards.”⁷

(2) Revising the current regulation and the adoption of this proposed rule will provide clarification on the employer’s continuous recordkeeping obligations, however adds no new compliance obligations. The obligation to create and maintain these records already exists. The proposed rule is only a clarification of the original intent of the law. Until the *Volks II* decision these were the employers’ obligations; no additional burden or cost is placed on employers.

(3) Since the proposed revision to OSHA’s recordkeeping rule does not constitute an economically significant impact under Executive Order 12866, this clarification of the employer’s obligation should not create a compliance burden or increase the current cost associated with the recordkeeping rule. Additionally OSHA does not have to factor in costs of industry’s noncompliance. The proposed amendments add no new compliance obligations; since the proposed rule is only clarifying...there is no additional burden of compliance. The idea of not including costs of compliance to current standard is shown in the silica proposed rule.

(4) This regulation ensures documents are maintained for a five year time period. It does not ensure the quality of the data recorded on the log.

USW would like to take this opportunity to urge OSHA to adopt further recordkeeping regulations to improve the quality of data captured on workplace injury and illness logs.

Employer practices that discourage injury reporting have grown exponentially in the last several decades; they include prize programs, injury discipline policies where workers reporting injuries suffer discipline up to and including termination, and worse. A few years ago one of our employers tried to require all workers who suffered an OSHA-recordable injury to wear a fluorescent orange vest to work for one week.

⁷ Federal Register, Vol. 61, No. 23/Friday, February 2 1996, Pages 4030-4067

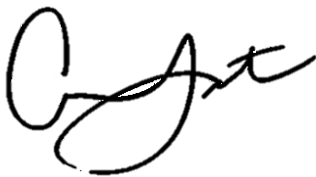
These practices unfairly benefit employers. Workers are less likely to report injuries and file workers' compensation claims, employers are less likely to experience surprise OSHA inspections, supervisors and managers may get "safety" bonuses, and the employers' public image is enhanced, resulting in more investments and additional contracts. Workers themselves suffer threats, intimidation, and job loss. Many workers are not reporting injuries, causing underlying hazards to persist. As a result, workplace health and safety is degraded, as is important data on job injuries and illnesses. USW would like to emphasize that without adequate protections in place, deterrents to job injury reporting are extremely common.

With the addition of an enforceable prohibition on employer practices that discourage injury and illness reporting, such gaming of the system could be curtailed. The goals OSHA sets out for improvements in workplace safety and health and data accuracy through improved tracking of workplace injuries and illnesses can finally be realized.

Additional documentation can be found in the USW testimony and comments submitted into the docket OSHA-2013-1123 RIN 1218-AC49 "Proposed Rule: Improve Tracking of Workplace Injuries and Illnesses."

OSHA's role as an enforcement agency is a needed and necessary component of a system to ensure proper data quality and worker health and safety. Limiting the quality and quantity of data received must be addressed through the enforcement process. Recordkeeping logs should be available and accessible, and should show continuous violations for the proposed five year period.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Ashlee Fitch', with a stylized, cursive script.

Ashlee Fitch
United Steelworkers
Health, Safety and Environment