



AMERICAN ACADEMY of ACTUARIES

February 28, 2000

Charles N. Jeffress
Assistant Secretary of Labor for Occupational Safety and Health
U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue NW
Washington, D.C. 20210

RE: Proposed Ergonomics Program Standard

Dear Mr. Jeffress,

I am Chairperson of the American Academy of Actuaries' Workers' Compensation Work Group. This letter contains our comments on OSHA's proposed Ergonomics Program Standard, particularly the Work Restriction Protection ("WRP") provisions. Our intent is to offer our assistance to OSHA and to address some issues which, based on our experience with the workers' compensation system in the United States, we believe should be of concern.

The American Academy of Actuaries is the public policy organization for actuaries practicing in all specialties within the United States. A major purpose of the Academy is to act as the public information organization for the profession. The Academy is non-partisan and assists the public policy process through the presentation of clear and objective actuarial analysis. The Academy regularly prepares testimony for Congress, provides information to federal elected officials, comments on proposed federal regulations, and works closely with state officials on issues related to insurance. The Academy also develops and upholds actuarial standards of conduct, qualification and practice and the Code of Professional Conduct for all actuaries practicing in the United States.

There is no question that the introduction of ergonomic programs can help to prevent work-related injuries and reduce workers' compensation costs. However, we are concerned about potentially unexpected and undesirable impacts that portions of the bill may have on the workers' compensation system. We are also concerned about the wide disparity of cost estimates associated with this proposal. As experts in the estimation of workers' compensation costs, we offer the assistance of our Work Group to your agency in evaluating and resolving the differences in these cost estimates.

Issues we believe should cause concern include:

Conflict with State Workers' Compensation Laws - The WRP provisions of the proposed OSHA rules conflict with state workers' compensation laws. The WRP payments are due with no waiting period, no maximum weekly benefit and ensure 100% replacement of after tax wages in some instances. These provisions are likely to increase the number of workers' compensation claims made and extend the period during which benefits will be paid. As a result, workers' compensation costs could increase.

Potential for Increased Claim Frequencies - The ergonomic rules could increase the frequency of workers' compensation claims. This is due to OSHA's requirement that employers notify workers of potential hazards along with the availability of substantially higher benefits under the rules. These "new" claims, claims made based on the required notification that additional benefits are

available, may add workers' compensation system friction costs to employers' business operations.

Increased Litigation Costs - Some of these new claims may be compensable under workers' compensation coverage. However, employers' costs will also increase on new claims found to be non-compensable under the workers' compensation laws due to the documentation, investigation and litigation of the denied claims generated solely by the required notification that additional benefits are available. OSHA enforcement appears to be the only mechanism to resolve disputes. We are concerned that OSHA may not be equipped to handle the volume of litigation and dispute resolution anticipated on these new claims.

Insurance Coverage Availability - The proposed standard raises questions about whether or how workers' compensation insurance coverage will apply to these new injury payment obligations. The standard workers' compensation insurance policy excludes payment for OSHA obligations, but insured employers may expect their insurance to cover this cost through the employer's liability (Part B) section of the policy. In the absence of clarification, this could result in more litigation.

Increased Claim Severities - Substantial research indicates that increasing the level of benefits available increases both the number of claims made and the duration of the benefit period. States that have introduced increased wage replacement rates have experienced increased rates of claim filings and prolonged duration of benefit utilization. While there is not necessarily a change in the number of incidents that may lead to claims, there is a change in the number of workers who choose to file claims for benefits. The level of WRP benefits may create negative incentives for injured workers to cooperate with employer return to work programs prior to the end of the six month benefit period. This is a common result in situations where an injured worker can receive a benefit that approaches or exceeds their actual wage. We are also concerned that the WRP medical provisions may interfere with the ability of employers and insurers to maintain the effectiveness of their managed care programs. These programs have contributed to the reduction of claim severity trends over the last decade.

Effect on Managed Care Programs - The "MSD management" provisions require an employer to provide "prompt access" to a "health care professional" for "evaluation, management, and follow-up." This provision may potentially interfere with workers' compensation requirements related to choice of physician, diagnosis and treatment. Since most state workers' compensation laws also regulate the types of recognized medical providers, the OSHA "health care professionals" standard may conflict with these laws by permitting chiropractors, physician assistants, nurses, physical therapists, etc., to determine what is a work-related injury and when a worker can return to work.

Basis for Cost Savings Estimates - We understand that OSHA has relied on a major 1993 ergonomics study to estimate the costs and benefits of the proposed standard based on the extent to which establishments had already implemented ergonomic programs at that time. This study was completed at the end of a ten-year upward spiral in workers' compensation costs in most states. In response to this spiral, many employers implemented ergonomic and other loss prevention programs which produced a significant downturn in claim frequencies that was only starting in the early 1990s and persisted throughout the rest of the decade. This trend, along with the introduction of managed care programs noted above, has dramatically reduced workers' compensation loss costs (expressed as a percentage of payroll) for employers since the 1993 study. In fact, injuries covered by the OSHA standard, such as back injury and carpal tunnel syndrome, represent a significant share of the workers' compensation payment dollar and the major source of cost savings during the decade. This suggests the estimated future cost savings may be overstated.

Potential for Cost Increases - The proposed OSHA standard clearly expands an employer's workers' compensation obligation for these MSD injuries and may impair its ability to manage the cost of MSD and other claims as noted above. As a result, for those employers that implemented the ergonomic and risk management programs that produced the downward cost trend of the

1990s, the proposed standard will likely increase both administrative and workers' compensation costs.

It is clear that, not only are ergonomic programs important, they have played a major role in achieving the workers' compensation cost reductions of the 1990s. Without question there are many employees and employers who would still benefit from the implementation of ergonomic programs... However, we are concerned that some of the WRP provisions and other aspects of the proposed standards are likely to unnecessarily increase workers' compensation costs, that the study being used to estimate costs may not accurately reflect current conditions and that in combination these factors may cause the estimates to be significantly inaccurate.

Once again, the actuarial profession stands ready to assist OSHA in evaluating and reconciling the various cost estimates presented to it. If you have questions regarding this letter or desire further assistance from the Academy, please do not hesitate to call Greg Vass at the Academy (202) 223-8196 or me at (617) 574-5514.

Sincerely,

Nancy Treitel, FCAS, MAAA, ARM, CPCU, Chairperson
Workers' Compensation Work Group