



# AMERICAN ACADEMY *of* ACTUARIES

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December 15, 2000

Darla L. Lyon  
Director  
Insurance Division of South Dakota  
118 W. Capital Avenue  
Pierre, SD 57501

RE: OSHA's Ergonomics Program Standard

Dear Director Lyon:

I serve as the Chairperson of the American Academy of Actuaries' Workers' Compensation Work Group.<sup>1</sup> At the December NAIC Workers' Compensation Task Force meeting, I volunteered to have our work group document areas where the ergonomic standard ("the Standard") recently promulgated by the Occupational Safety and Health Administration (OSHA) might significantly impact workers' compensation. This letter contains our comments on the Standard, particularly the work restriction protection provisions ("WRP provisions") and the potential impact on the workers' compensation system. Our intent is to offer our assistance to the NAIC and to address some issues that, based on our experience with the workers' compensation system in the United States, we believe should be of concern.

The stated purpose of the Standard is to reduce the number and severity of musculoskeletal disorders (MSDs) caused by exposure to risk factors in the workplace. There definitely are potential benefits that will result from the Standard. However, we are concerned about the potentially unexpected and undesirable impacts which portions of the Standard may have on the workers' compensation insurance industry. We are also concerned about the interaction between the Standard and state workers' compensation systems.

## **Potential Cost Benefits from the Standard**

The introduction of ergonomic programs can help to prevent work-related injuries and reduce workers' compensation costs. These programs have played a major role in achieving the workers' compensation cost reductions of the 1990s. Additionally, there are many employees and employers who would still benefit from the implementation of ergonomic programs.

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<sup>1</sup> 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.

### **Insurance Coverage Availability**

The Standard raises questions about whether or how workers' compensation insurance coverage will apply to these new injury payment obligations. The standard workers' compensation insurance policies generally exclude payment for OSHA obligations, but insured employers may come to expect their insurance to cover this cost through the employer's liability (Part B) section of the worker's compensation policy. Employers are going to need coverage for this liability whether it is under a workers' compensation policy, employers' liability coverage, a health policy or a whole new form of coverage or policy. The absence of clarification could result in more litigation.

### **Potential For Increased Claims Costs**

Required reporting for MSDs may potentially also have the effect of increasing the frequency of workers' compensation claims. The Standard requires that an employer inform its workers of how to identify a potential MSD, the potential hazards of a MSD and the availability of substantially higher benefits for MSDs under the ergonomic rules. It is possible that the required notification of additional benefits may lead to an increase in the number of workers' compensation claims reported. Some of these new ergonomic claims may be compensable under workers' compensation coverage.

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 an increased number 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 provision benefits may create negative incentives for injured workers to cooperate with employer return-to-work programs prior to the end of the 90 day benefit period. This is a common result in situations where an injured worker can receive a benefit that approaches or exceeds their actual wage.

### **Increased Litigation Costs**

Employers' costs may increase on new claims found to be non-compensable under the workers' compensation coverage. Also, employers' costs could increase due to the costs of documentation, investigation and litigation of the denied claims that may be 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.

### **Conflict with State Workers' Compensation Laws**

The Standard will likely result in federal incursion into a state-based disability system. States will have to

determine how to best coordinate with the federal government. Conflicts may arise because the Standard is not as well defined as similar requirements contained in typical state workers' compensation laws. According to the Standard, an MSD claim must have three triggers. These three triggers are 1) causality, which is not defined the same as causality as under the states' workers' compensation system, 2) medical assistance beyond first aid and 3) signs and symptoms that are work related and last for more than 7 days after the claim has been reported. Additionally, there could be some ambiguity in interpreting the applicability of the triggers

The WRP provisions of the proposed OSHA Standard also 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. The Standard has limited the benefits to a 90-day period, but the Standard does not limit the number of 90-day periods that can be triggered by a single disability. These provisions are likely to increase the number of workers' compensation claims filed and extend the period during which benefits will be paid. As a result, workers' compensation costs could increase.

There are also potential conflicts with state managed care laws, which are discussed in more detail below.

### **Potential for Cost Increases**

The proposed OSHA Standard clearly expands an employer's obligation to compensate these MSD injuries and may impair its ability to manage the cost of MSD and other claims. There are a number of employers who have already implemented ergonomic and risk-management programs that contributed to the downward cost trend in workers compensation of the 1990s. These employers and their employees have already benefited from reduced MSD claims, yet the proposed standard will still likely increase both administrative and workers' compensation costs. For the employer community in general, there may be several years of increases in workers' compensation rates, before the savings associated with this Standard are realized and rate decreases can be implemented.

### **Impact by Class Code**

There is a great amount of variation across the employee classes for ergonomic claim potential. Even if one is able to estimate the cost of implementing the Standard correctly, it would not impact all classes the same, as the typical worker's compensation benefit change does. Unfairly discriminatory rates may result, if the same rate change is applied across all classes.

### **Effect on Managed Care Programs**

We are 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.

The "MSD management" provisions require an employer to provide "prompt access" to a "health care professional" for "evaluation, management, and follow-up." The employee is permitted to go the physician

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of their choice for the initial diagnosis, but not for any subsequent medical treatment.

If the employer disagrees with the employees' physician's diagnosis, the employer can select its own physician to do a diagnosis. If the diagnoses are significantly different and a third physician is required, the employer picks the third physician. Multiple diagnoses create additional costs to the system.

Since most state workers' compensation laws also regulate the types of recognized medical providers, the Standard's definition of "health care professionals" standard may be in conflict with workers' compensation 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.

Additionally, the health care providers are instructed "not [to] include any findings or information that is not related to workplace exposure." Non-communication of relevant influences on the MSD may prevent workers' compensation insurers from appropriately managing claims caused by conditions external to the working environment.

In conclusion, ergonomic programs are important. They have played a major role in achieving the workers' compensation cost reductions of the 1990s. Additionally, there are many employees and employers who would still benefit from the implementation of ergonomic programs. Yet, we are concerned that some aspects of the Standard and of the WRP provisions are likely to create unnecessary increases in workers' compensation administration, litigation and claim costs.

Once again, the actuarial profession stands ready to assist the NAIC in identifying the issues that may concern it or impact its day to day operations. 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

CC: Bob Card, NAIC Workers' Compensation Task Force