given, and the name of the person who will do it. We will also give the examiner any necessary background information about your condition when your own physician will not be doing the examination or test.

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[FR Doc. 81-26768 Filed 9-14-81; 8:45 am]
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DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1910

Access to Employee Exposure and Medical Records; Construction Industry; Lifting of Administration Stay

AGENCY: Occupational Safety and Health Administration, Labor.

ACTION: Final Rule; Lifting of administrative stay.

SUMMARY: After a review of the record and of recommendations made by the Construction Advisory Committee, OSHA has decided to lift the administration stay of the Access to Employee Exposure and Medical Records standard, 29 CFR 1910.20, which has been in effect for the contract construction industry since April 28, 1981. The notice explains the basis for this decision and indicates that OSHA intends to consider whether the standard should be modified for the construction industry as part of its overall review of the standard.

EFFECTIVE DATE: September 15, 1981.

FOR FURTHER INFORMATION CONTACT: James F. Foster, Occupational Safety and Health Administration, Office of Public Affairs, Rm. N3641, 200 Constitution Avenue, NW., Washington, D.C. 20210. Telephone 202-523-8148.

SUPPLEMENTARY INFORMATION: In the April 28, 1981, Federal Register (46 FR 23740) OSHA stayed § 1910.20 of 29 CFR (Access to Employee Exposure and Medical Records) with respect to the construction industry, except that employers in the industry were required to (1) continue to preserve exposure and medical records and make them available to OSHA, and (2) make employee medical records available to employees. In the same notice, OSHA solicited comments on whether the stay should be continued pending the standard's consideration by the Construction Advisory Committee (CAC) and the outcome of any subsequent rulemaking on the standard.

More specifically, the notice asked commenters to respond to four questions related to the stay issue: (1) What has been the experience in the construction industry with the standard since October 1 when the standard went into effect for this industry? (2) What are the unique aspects of the construction industry which would render the existing access standard inappropriate? (3) What have been the benefits and costs, if any, of the standard's being in effect? and (4) Are there alternatives to total effectiveness or total stay of the employee access provisions?

The deadline for comments was June 12, 1981. This deadline was extended to June 26, 1981 (46 FR 31010) to allow interested parties to comment on any specific matters raised at the CAC meetings of June 10-12, 1981. A total of 47 comments were received. In addition, the proceedings before the CAC have also been considered.

Following the close of the construction stay record, OSHA decided to review the entire records access standard in general, and not just for the construction industry (see 46 FR 40492; August 7, 1981). The purpose of this review is to determine whether, and to what extent, to modify the standard by means of additional rulemaking. Since OSHA is considering modification of the standard, a motion has been filed in the U.S. Court of Appeals for the District of Columbia Circuit seeking a six-month delay in the briefing schedule in the union and industry challenges to the standard. *Industrial Union Department, AFL-CIO* v. *Marshall*, No. 80-1550 and consolidated cases. This motion was granted by the Court. During this period, OSHA intends to scrutinize all aspects of the standard, including current enforcement experience; the issues raised by the litigation; pending petitions for modification from several trade associations; and other comments on the standard that have been received from numerous interested persons.

The appropriateness of the records access standard to the contract construction industry remains one of the important issues which OSHA has been considering regarding the standard. In their comments, construction contractors generally maintain that the stay of the records access standard should remain in effect since the standard is not suited to the unique nature of the contract construction industry. Conversely, contract construction employee organizations argue that the stay should be lifted because their employees have a need for exposure and medical records comparable to other employees and because the standard is suitable to the construction industry. Responses to the specific questions are discussed below.

1. Experience of the construction industry under the records access standard.

Many commenters stated that the brief time period during which the standard has been in effect (10/1/80-4/28/81) does not allow for adequate assessment of the effect of the standard on the construction industry. The National Constructors Association (NCA) (Ex. 2-42) commented that there have been very few employee records access requests. However, the International Brotherhood of Painters and Allied Trades (IBPAT) (Ex. 2-31) stated that the standard encourages and made possible the joint labor-management development of low cost means of medical and exposure monitoring and recordkeeping which goes beyond the actual requirements of the standard. They also observed that since few construction employees maintained records in the past, the greatest benefits will be in the future as more records are generated.

2. Do the unique aspects of the construction industry make the records access standard inappropriate?

The recommendations of the CAC, discussed below, indicate the Committee's belief that, with relatively minor clarification and modifications, the standard is appropriate to the construction industry.

Nearly all commenting employers and employer groups, however, contended that the standard is inappropriate for construction due to the nature of construction employment. In particular, this claim is based on (1) high annual employee turnover; (2) reliance on area monitoring, the records of which do not reveal the identities of individual employees exposed; and (3) general reliance on off-site physicians who do not provide any information to the employer except that information necessary for insurance purposes.

Worker organizations (e.g., IBPAT, Ex. 2-31) maintain the transience and mobility of construction workers make the access standard particularly appropriate for the construction industry, since construction workers do not have the benefit of many of the industrial hygiene controls found at permanent fixed work sites and there is currently no other mechanism for providing a continuous medical history for construction workers. If employees can gain access to their medical and exposure records, they can help to create some continuity in their medical

care. In addition, they point out that modern computerized recordkeeping methods make the storage and access of medical and exposure records feasible and inexpensive.

3. What have been the benefits and costs of the standard's being in effect.

Employer groups generally contend that the occupational health benefits of the standard have been inconsequential since few employees to date have sought access to records and the records which are available do not contain complete information for occupational health purposes or cannot be related to individual employee exposure.

In contrast to these views, employee groups argue that construction workers are increasingly exposed to toxic substances, and the standard helps them find out what they are exposed to and act accordingly. The IBPAT credits the regulation with enabling the joint labor/management development of a low cost comprehensive program of exposure and medical monitoring and recordkeeping. In Canada, where no general right of access exists, they have been unable to achieve a similar program.

The IBPAT estimated that records storage and access would cost between $16 and $22.50 per worker per year. The Industrial Health and Hygiene Group, a private firm which develops and markets protocols for compliance with the standard in the construction industry, estimated the costs to be between $6 and $19 per employee per year (Ex. 2–20). However, a study contracted by the NCA concluded that the costs of the standard would be approximately $100 per employee per year. IBPAT argues that the costs of staying the standard totally would be greater than total implementation, due to litigation and other costs associated with seeking access to records which the standard now affords them.

4. Are there alternatives to total effectiveness or total stay of the employee access provisions of the standard?

An alternative to the records acess standard suggested by many employer organizations was to use in-place records systems such as workers' compensation records and insurance company case files for occupational health research. Health research, however, is not the primary purpose of the standard. Further, the standard does not in any event require the creation of new records not already in existence and kept by the employer. Employee groups maintain that access to complete exposure and medical data is necessary to ascertain the causes and effects of occupational health problems, and that any alternative to this would be unacceptable. They contend that the limited obligations and narrower definitions of the current stay make the standard largely unenforceable and deprive them of access to important information, e.g., material safety data sheets and medical records maintained by contract physicians.

Other specific alternatives and modifications to the standard are discussed with respect to the CAC recommendations.

The Construction Advisory Committee Recommendations

At the June CAC meeting, the Committee (1) recommended that OSHA lift the stay, and (2) reviewed the standard and offered 13 suggestions and recommendations. These recommendations, which appear to be generally supported by both industry and labor, do not challenge the fundamental applicability of the standard to the construction industry. Almost all of them raise questions which can be simply handled as a matter of interpretation, and are discussed below.

(1) *Clarification of "contract" physician.* The scope of the standard includes records generated by a physician under contract to an employer. The CAC desired the term "contract" clarified to exclude the records of physicians with whom they do not have an ongoing relationship and whose records are not available to the employer.

Coverage of records generated or maintained by a physician pursuant to an agreement with the employer is crucial since the rulemaking record indicated that many medical services are performed through contractual arrangements rather than done in-house by persons employed by the employer. The contractual arrangements typically exist in written form specifying the medical services to be provided and the corresponding fees. Under the records access standard, OSHA specifically requires that, where necessary, contractual arrangements be modified to assure that the access and preservation provisions of the rule are complied with (45 FR 35259).

The CAC noted that written contracts for medical services do not typically exist in the construction industry. Instead, arrangements for the medical treatment of an injured worker or a worker exposed to toxic substances are usually made by phone with a private physician, and the records of that treatment are not available to the employer except to the extent necessary for insurance purposes. In such a case the employer is responsible for making a reasonable effort to make the records access standard known to the physician and to ensure that the physician complies. If a reasonable effort has been made to assure physician compliance, the employer will not be cited for failure to comply with the standard.

(2) *Material Safety Data Sheets.* Paragraph (c)(5)(iii) of the standard defines exposure records to include Material Safety Data Sheets (MSDS's). The CAC noted that MSDS's which typically identify a substance, describe its properties and toxic effects, and provide precautionary information about it, are often inadequate, inaccurate and difficult to obtain.

OSHA agrees; however, where these sheets are available they usually represent the best hazard information readily available. Therefore they should be retained and made available to employees. However, MSDS's are not subject to the 30-year retention period as long as some record of chemical identity is kept for the period. (29 CFR 1910.20(d)(1)(ii)(B)).

(3) *Paragraph (c)(8) definition of "exposure."* The standard provides employees "exposed" to toxic substances with rights of access, and "exposure or exposed" is defined in paragraph (c)(8). Some construction employers have expressed concern that since only "exposed" employees have access rights, this implies the need to measure or monitor exposures. The CAC properly interpreted the standard as not independently requiring the monitoring or measurement of employee exposures. As long as it is likely that an employee was exposed to toxic substances or harmful physical agents, the employee's right to request relevant records is not dependent on an exact determination of what the level or nature of the exposure was.

(4) *Background contaminant levels.* Under the standard, an employee is not considered "exposed" to a toxic substance if the levels are at or below ambient (non-occupational) levels. Consequently, records of such levels are not considered to be "exposure records." The CAC correctly interpreted the standard as not requiring air sampling results to be kept or made available if they show contaminant levels to be at or below ambient (non-occupational) levels.

(5) *Authorization of release of future records.* The CAC indicated that paragraph (c)(10)(ii), which is a limitation on what constitutes "specific written consent" under the standard, is difficult to understand. They concurred,

however, with OSHA's intent, which requires express authorization by an employee before an employer must release medical information created after the date of authorization.

(6) *The 30 year retention period.* Paragraph (d) requires that most exposure and analysis records be kept for 30 years and that medical records be kept for the duration of employment plus 30 years. The CAC agreed that 30 year retention of records is necessary due to the latency periods of occupational deseases. However, they expressed concern about the storage and use of the records for that length of time.

This concern relates to the next recommendation to establish a central records depository. The preservation requirements of the standard will be one of the issues undergoing review by OSHA over the next several months.

(7) *Central records depository.* Responding to concerns about the difficulty for a construction employer in storing records for long periods of time, the CAC recommended the establishment of a central depository for medical and exposure records in the construction industry. A central depository would facilitate employer compliance with the standard by centralizing the recordkeeping function. It would also make it possible to keep track of employee exposure and medical histories over time as employees move from employer to employer.

OSHA encourages any labor/industry effort to provide for centralized storage of records. This should continue to be a topic of discussion at future CAC meetings. However, it does not appear to lend itself to rulemaking since it is unlikely that the government would be directly involved in the establishment or operation of such a depository.

(8) *The paragraph (e)(1)(i) 15-day limit for fulfilling a records access request.* The standard requires employers to provide access to employees and their designated representatives in a reasonable time not exceeding 15 days. The CAC recommended that the 15-day limit be modified as follows: 15-days for records up to 5 years old and 30 days for older records.

OSHA has addressed the 15-day limit in its recent Federal Register publication (46 FR 40490). As we stated, as long as the employer is making a diligent, good faith effort to provide requested records as soon as possible, and is keeping the employee or employee representative informed of any reasons for delay, OSHA will not cite for violations of the 15-day rule. Moreover, in the construction situation, which is characterized by high employee turnover and on-the-job mobility, it would be appropriate for the employer to require of the requesting employee specific information on where and when the employee was working to facilitate an efficient search of the relevant records.

(9) *"Immediate" access by OSHA.* Paragraph (e)(3)(i) states that "each employer shall upon request, assure the immediate access of (OSHA) to (employee records)." The CAC recommended that the word "immediate" in paragraph (e)(3)(i) should be defined to clarify the extent of an employer's obligation to provide OSHA with access to records.

The use of "immediate" in conjunction with OSHA access is intended as a contrast to the 15-day rule with respect to employee and designated representative access. The intent was to require employers to comply with OSHA requests for employee records as quickly as possible, subject to their constitutional and statutory due process rights.

(10) *Employee privacy.* The CAC expressed concern for worker privacy when OSHA has access to personal medical records and health insurance records.

OSHA shares the privacy concerns of the CAC and has therefore adopted 29 CFR Part 1913 (Rules of Agency Practice and Procedure Concerning OSHA Access to Employee Medical Records) which includes stringent privacy protection safeguards to preclude unwarranted violation of personal privacy.

(11) *Paragraph (e)(3)(ii) posting requirement.* The CAC noted that the posting of an OSHA access order, as required by the standard, may not adequately alert employees of OSHA's unconsented access to medical records.

OSHA specifies in 29 CFR Part 1913 that additional methods of alerting employees of an access order are permitted. For example, the employer or designated representative may provide actual notice to each affected employee if they believe such notice is necessary.

(12) *Notification of "employees" in paragraph (g)(1).* The standard requires employers to inform employees of their rights under the standard upon entering employment and at least annually thereafter. The CAC questioned whether an employer is required to notify former employees of their records access rights. The CAC recommended that OSHA modify the paragraph, if necessary, to specify that only current employees are required to be notified.

OSHA already interprets the "upon an employee's first entering into employment" language of paragraph (g)(1) as limiting its application to current employees only. Thus, while former employees have the right to request access under the standard, OSHA's intention was to limit the notification requirement to employees who are actually working for the employer at the time of the notification.

(13) *Cost-benefit analysis.* The CAC subgroup posed the question of whether or not the records access standard would be subject to cost-benefit analysis. The cotton dust Supreme Court decision, *American Textile Manufacturers Institute* v. *Donovan,* —— U.S.L.W. —— (June, 1981), precludes a cost-benefit analysis for the records access standard.

Decision To Dissolve Stay and Follow CAC Recommendations

After a careful review of the record and the CAC recommendations, OSHA has decided to dissolve the stay, allowing the entire records access standard, 29 CFR 1910.20, to go into effect for contract construction immediately. At the same time, consistent with OSHA's responses to the CAC recommendations, OSHA's enforcement policy will continue to be sensitive to those unique aspects of the construction industry which warrant some tailoring of the compliance obligations to make the standard more suitable to it.

The April stay was predicated in large part on the need to have the CAC review the standard and consider changes appropriate to the construction industry. Now that they have done so with considerable care and detail, OSHA intends to follow their recommendations as closely as possible. As outlined above, nearly all the CAC recommendations require only clarification of OSHA's intent, which generally coincides with the Committee's views on how the standard should be interpreted. Therefore, the continuation of the stay while OSHA considers possible modification of the standard is not warranted. OSHA is particularly mindful of the fact that the CAC itself recommended that the stay be lifted, as well as of the union submissions, supported by Cal/OSHA (Ex. 2–43), which present extensive arguments on why the standard is particularly necessary to protect the safety and health of construction workers and how the stay is harmful to them. OSHA is likewise mindful of the fact that the NCA, while arguing for continuation of the stay, nevertheless "generally supports the [CAC] recommendation" concerning specific provisions, most of which have been

accommodated. (Ex. 2–42, p. 7). Thus, while the record was generally divided between industry comments supporting continuation of the stay and union comments opposing it, OSHA concludes that the heavy burden to demonstrate infeasibility or irreparable harm which proponents of a stay must bear was not met in this instance, and the standard must accordingly be allowed to go into effect.

This decision to lift the stay does not mean that OSHA has resolved the basic issue of whether the standard should be modified in general or for the construction industry in particular. On the contrary, this question will continue to be a subject for review during the next six months, and the comments in this record will continue to form a major basis for the review process. Rather than consider the construction issue independently from the general reconsideration of the standard, OSHA has determined that it is more rational to examine all aspects of the standard and its impact or suitability for different industries in a single review process. Any modification affecting the construction industry, however, will be submitted to the CAC for their consideration and recommendations prior to proposal. In the meantime, in the absence of compelling justification, the standard is equally in effect for all industries.

(Sec. 6 (84 Stat. 1593; 29 U.S.C. 655); 5 U.S.C. 553; Secretary of Labor's Order No. 8–76 (41 FR 25059))

Signed at Washington, D.C. this 9th day of September, 1981.

Thorne G. Auchter,

Assistant Secretary of Labor.

[FR Doc. 81–26710 Filed 9–11–81; 12:10 pm]

BILLING CODE 4510–26–M

PENSION BENEFIT GUARANTY CORPORATION

29 CFR Part 2619

Valuation of Plan Benefits in Non-Multiemployer Plans; Amendment Adopting Additional PBGC Rates

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Final rule.

SUMMARY: This amendment to the regulation on Valuation of Plan Benefits in Non-Multiemployer Plans contains the interest rates and factors for the period beginning October 1, 1981. The interest rates and factors are to be used to value benefits provided under terminating non-multiemployer pension plans covered by Title IV of the Employee Retirement Income Security Act of 1974, (the "Act").

The valuation of plan benefits is necessary because under section 4041 of the Act, the Pension Benefit Guaranty Corporation ("PBGC") and the plan administrator must determine whether a terminating pension plan has sufficient assets to pay all guaranteed benefits provided under the plan. If the assets are insufficient, the PBGC will pay the guaranteed benefits under the plan termination insurance program established under Title IV.

The interest rates and factors set forth in Appendix B to Part 2619 are adjusted periodically to reflect changes in financial and annuity markets. This amendment adopts the rates and factors applicable to plans that terminate on or after October 1, 1981, and enables the PBGC and plan administrators to value the benefits provided under those plans. These rates and factors will remain in effect until PBGC publishes an amendment revising them.

EFFECTIVE DATE: October 1, 1981.

FOR FURTHER INFORMATION CONTACT: Ms. Nina R. Hawes, Staff Attorney, Office of the General Counsel, Pension Benefit Guaranty Corporation, 2020 K Street, N.W., Washington, D.C. 20006, 202–254–3010.

SUPPLEMENTARY INFORMATION: On January 28, 1981, the Pension Benefit Guaranty Corporation (the "PBGC") issued a final regulation (46 FR 9492 *et seq.*) establishing the methods for valuing plan benefits of terminating non-multiemployer plans covered under Title IV of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.* (1976), *as amended by* the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96–364, 94 Stat. 1208 (the "Act"). That regulation, 29 CFR Part 2610, was recodified as 29 CFR Part 2619 on June 24, 1981, effective June 29, 1981 (46 FR 32574). That regulation contains a number of formulas for valuing different types of benefits. In addition, Appendix B to the regulation sets forth the various interest rates and factors that are to be used in the formulas. Because these rates and factors are intended to reflect current conditions in the financial and annuity markets, it is necessary to update the rates and factors periodically.

When first published, Appendix B contained interest rates and factors to be used to value benefits in plans that terminated on or after September 2, 1974, but before October 1, 1975. Subsequently, the PBGC adopted additional rates and factors for valuing benefits in plans that terminated on or after October 1, 1975, but before August 1, 1981. (29 CFR 2610 (1980), 45 FR 64907, 45 FR 75658, 45 FR 75209, 45 FR 82172, 46 FR 3510, 46 FR 16685, 46 FR 18312, 46 FR 26765, 46 FR 31257).

On July 15, 1981, the PBGC last published rates for plans that terminate on or after August 1, 1981 (46 FR 36693). At this time, changes in the financial and annuity markets have necessitated an increase in the rates used by the PBGC to value benefits. Accordingly, this amendment changes the rates in Appendix B to add a set of interest rates and factors for plans that terminate on or after October 1, 1981. These rates and factors will remain in effect until such time as PBGC publishes another amendment which changes the rates.

As a rule, the rates will be in effect for at least one month. If the rates are to be changed, PBGC will publish an amendment in the Federal Register, normally by the 15th of the month prior to the month for which the new rates will be effective. If no change is to be made, no amendment will be published, and the current rates will remain in effect until further notice.

Because the Multiemployer Pension Plan Amendments Act of 1980 established a new insurance program for multiemployer plans, we note that the rates and factors contained in Appendix B to Part 2619 are applicable to non-multiemployer plans only.

The PBGC has determined that notice and public comment on this amendment are impracticable and contrary to the public interest. This determination is based on the need to determine and issue new interest rates and factors promptly, so that the rates can reflect, as accurately as possible, current market conditions. The PBGC has found that the public interest is best served by issuing the rates and factors on a prospective basis so that plans may be able to calculate the value of plan benefits before submitting a notice of intent to terminate. Also, plans will be able to predict employer liability more accurately prior to plan termination. Moreover, becuase of the need to provide immediate guidance for the valuation of benefits under plans that will terminate on or after October 1, 1981, and because no adjustment by ongoing plans is required by this amendment, the PBGC finds that good cause exists for making the rates set forth in this amendment to the final regulation effective less than 30 days after publication.

The PBGC has determined that this is not a "major rule" under the criteria set forth in Executive Order 12291, February 17, 1981, (46 FR 13193) because it will