U.S. Department of Labor

Occupational Safety and Health Administration
Washington, D.C. 20210

Reply to the attention of:

FEB 13 2009

Mr. Phillip G. Retallick
Clean Harbors Environmental Services, Inc.
400 Arbor Lake Drive, Suite B-900
Columbia, SC 29223

Dear Mr. Retallick:

Thank you for your November 4, 2008 letter to the Occupational Safety and Health Administration (OSHA) concerning the recordkeeping regulation contained in 29 CFR Part 1904 - Recording and Reporting Occupational Injuries and Illnesses. You requested specific guidance on the recordability of an employee bee sting in the workplace, and OSHA's no-fault recordkeeping system as it relates to the Voluntary Protection Program (VPP). I understand that you recently had discussions by telephone regarding these issues with members of OSHA's Recordkeeping Group, Directorate of Evaluation and Analysis.

Recordable Injuries and Illnesses Under OSHA's Recordkeeping Regulation

In your letter, you state that an employee at one of your VPP Star Sites sustained a bee sting while walking from one work building to another work building. The employee, who is allergic to bee stings, had previously been prescribed an Epinephrine Personal Injection Device (Epi Pen) by his personal physician. However, because the employee failed to renew his Epi Pen prescription, he suffered an allergic reaction from the workplace bee sting, and was transported to a local medical facility where he received an injection of prescription steroids.

You also state in your letter that you do not believe the incident described above is a recordable injury because, although the bee sting took place when the employee was at work, the bee was part of the general outdoor environment, and because the incident was not the result of any direct work event or exposure. The employee was not assigned to any outdoor work activity, and his only exposure to bees resulted from walking from one work building to another. You contend that had the employee properly renewed his Epi Pen prescription before the bee sting, he would not have sustained the allergic reaction, and the medical treatment provided at the medical facility would not have been rendered.

Response

OSHA's recordkeeping regulation at Section 1904.5(a) provides that an injury or illness must be considered work-related if an event or exposure in the work environment either caused or contributed to the injury or illness or significantly aggravated a pre-existing injury or illness. Section 1904.5(b)(1) defines the work environment as the establishment and other locations where one or more employees are working or are present as a condition of their employment. Work relatedness is presumed under Part 1904 for injuries and illnesses resulting from events or exposures occurring in the work environment, unless an exception in Section 1904.5(b)(2) specifically applies.

Some injuries and illnesses occur at work that do not have a clear connection to a specific work activity, condition, or substance that is peculiar to the employment environment. For example, an employee may trip for no apparent reason while walking across a level factory floor; be sexually assaulted by a co-worker; or be injured accidentally as a result of an act of violence perpetrated by one co-worker against a third party. In these and similar cases, the employee's job-related tasks or exposures did not create or contribute to the risk that such an injury would occur. Instead, a causal connection is established by the fact that the injury would not have occurred but for the conditions and obligations of employment that placed the employee in the position in which he or she was injured or made ill. *See, the January 19, 2001 preamble to the final rule revising OSHA's injury and illness recordkeeping regulation, 66 Federal Register 5916 at 5946.*

We presume from your letter that, at the time of the bee sting, the injured employee was in your workplace when he walked from one building to another. This fact would establish the geographic presumption that the injury is work-related, unless an exception in Section 1904.5(b)(2) can be established.

Section 1904.7(b)(1)(iv) provides that a work-related injury or illness must be recorded if it results in "medical treatment beyond first aid." For purposes of OSHA recordkeeping, the use of prescription medication to treat a work-related injury or illness is "medical treatment beyond first aid." The injury described in your letter met the general recording criteria in Section 1904.7 when the employee received an injection of prescription steroids at the local medical facility to treat the work-related bee sting, and therefore must be recorded. We note that even if the employee had renewed his Epi Pen prescription prior to the bee sting, and used the device to treat

his work-related injury, such use of prescription medication would also have met the recording criteria for "medical treatment beyond first aid."

OSHA's No-Fault Recordkeeping System and the Voluntary Protection Program

You state in your letter that you are concerned about the incongruity between OSHA's "no-fault" recordkeeping system and the continued use of Total Recordable Case (TRC) and Days Away, Restricted and Transferred (DART) injury and illness rates as measurements in both OSHA's targeted enforcement and cooperative programs. You further state that because of your establishment's small site, and limited number of man-hours, the bee sting injury described above could adversely affect your continued status as a Star Site in the VPP program

Your company respectfully requests that OSHA eliminate the "no-fault" approach to injury and illness recordkeeping, and develop new guidelines based on whether the employer could have eliminated the hazard that caused the injury or illness. Alternatively, you ask that if OSHA continues to use the "no fault" recordkeeping system, the Agency should eliminate the requirement for below average injury and illness rate when determining Star Site status under VPP.

Response

OSHA's recordkeeping system has never included the concept of fault, either on the part of the employer or the employee, as a consideration in determining recordability. The Agency believes that including employer/employee fault would lead to both inconsistent determinations and underreporting of cases because employers would be placed in a position where they would have to evaluate the degree to which the injury or illness resulted from distinctly occupational causes. Requiring the case to be quantified in this way would create practical problems which in all likelihood would not be applied consistently by the 1.5 million employers covered by the regulation.

The general requirement to record all injuries and illnesses that take place in the work environment assists employers, employees, and OSHA in identifying potential occupationally-related hazards, as well as providing a resource of information that can be used to prevent future injuries and illnesses. Accordingly, OSHA will

continue its longstanding "no fault" approach for determining work relationship, which has been in place since the early 1970's. Also, please note that any change to the "no fault" approach used in determining work relationship would require OSHA to initiate notice and comment rulemaking to revise the recordkeeping regulation.

VPP is OSHA's premier recognition program to recognize companies with excellent safety and health management systems. The requirement for Star participants to have below average TCIR and DART rates is an eligibility requirement that sets a baseline for participation. In over 26 years of experience, OSHA has found this baseline to be effective in identifying companies who can qualify for and maintain their VPP status. Also, the VPP policies and procedures provide flexibility for participants to qualify for and remain in the VPP in the event their injury and illness performance rate declines periodically. For example:

1. 3-year rate provision: VPP applicants and participants use a 3-year rate calculation to qualify for the VPP and the 3-year rate calculation is compared to highest BLS rates published in the last three years. A one year spike in injury/illness rates, therefore, usually does not disqualify applicants/participants.

2. Employer calculation provision: For small employers where two injuries in a year push them over the BLS rate, the employer may use the injury and illness rates from their best three out of four years to calculate their three-year injury/illness rate. This provision provides an additional cushion for employers to qualify for and remain in the programs.

3. Rate Increase provisions: If a VPP participant experiences a spike in injury/illness rates, the participant may be placed on a Rate Reduction Plan or on a One-year conditional status. This gives the employer an opportunity to bring their rates down before being asked to withdraw from the programs.

OSHA has determined that these provisions are adequate to ensure VPP participants can qualify for VPP and remain in the programs even if their injury and illness rates fluctuate due to unusual circumstances. Therefore, the Agency is not prepared to change the VPP requirements at this time

Thank you for your interest in occupational safety and health. We hope you find this information helpful. OSHA requirements are set by statute, standards, and

regulations. Our interpretation letters explain these requirements and how they apply to particular circumstances, but they cannot create additional employer obligations. This letter constitutes OSHA's interpretation of the requirements discussed. Note that our enforcement guidance may be affected by changes to OSHA rules. Also, from time to time we update our guidance in response to new information. To keep appraised of such developments, you can consult OSHA's website at http://www.osha.gov.

Sincerely,

Donald G. Shalhoub
Deputy Assistant Secretary