Why OSHA Changed Its Interpretation of Which

COVID-19 HOSPITALIZATIONS MUST BE REPORTED

By Arthur G. Sapper

Since the COVID-19 crisis began, employers have asked their lawyers this question: Under what circumstances must we report to OSHA that an employee has been hospitalized for a work-related COVID-19 infection?

When their lawyers turned to the regulation that addresses the question, the answer seemed to be that a report is required only if the hospitalization occurred within 24 hours of the employee's work-related exposure to coronavirus. The regulation, 29 CFR § 1904.39(b)(6), states in part:

> What if the . . . in-patient hospitalization . . . does not occur during or right after the work-related incident? . . . For an in-patient hospitalization, . . . you must only report the event to OSHA if it occurs within [24] hours of the work-related incident.

This view of the regulation assumes that the "incident" is the work-related exposure to the coronavirus. As we shall see, this view reflects the wording of the regulation, makes a great deal of legal sense and eventually persuaded OSHA. But it would curtail the number of reports to OSHA, for few employers will know that a particular hospitalization occurred within 24 hours of an employee's on-the-job exposure to coronavirus. CDC has stated that "The incubation period for COVID-19 is thought to extend to 14 days, with a median time of 4 to 5 days from exposure to symptoms onset."

Employers and their attorneys know that OSHA enforcement officials are often driven by practical considerations to interpret regulations as they wish they were written rather than as they are written. So, there was uncertainty whether OSHA would treat the word "incident" as the exposure to coronavirus or as something else, such as employer knowledge of a COVID-19-related hospitalization.

The First Abortive Interpretation

On May 18, 2020, OSHA issued a citation to Winder Nursing Inc., a nursing home in Georgia. The citation alleged a violation of the reporting regulation. It was not clear from the face of the citation whether OSHA issued it on the theory that the "incident" was the exposure to coronavirus, employer knowledge of a COVID-19-related hospitalization or something else.

Then on July 15, 2020, OSHA published on its website an interpretation of § 1904.39(b)(6) as part of a series of frequently asked questions (FAQs) and answers related to COVID-19 issues. It stated:

> If an employee is hospitalized with a work-related, confirmed case of COVID-19 and the hospitalization occurred within 24 hours of confirmation of the COVID-19 case, then you must report the in-patient hospitalization. Specifically, you must report the hospitalization to OSHA within 24 hours of the time you learn of the hospitalization or 24 hours of the time you learn that the case of COVID-19 has been confirmed, whichever is later. Said another way, you must report the hospitalization within 24 hours of knowing both that the employee has been hospitalized and that the reason for hospitalization was COVID-19.

This seemed to treat the "incident" as employer knowledge of a COVID-19 hospitalization. Two days later, OSHA Deputy Assistant Secretary of Labor Amanda Edens announced the same position in a presentation to a workplace safety forum.

The interpretation soon came in for pointed criticism. On July 23, 2020, this attorney and a colleague wrote in a blog post that OSHA's position "appears to depart substantially from the language of the reporting regulation that it purports to interpret" (Jenkins & Sapper, 2020). The post points out that § 1904.39 several times refers to illnesses that occur "*as a result of* work-related incidents" (emphasis added) and that "employees are hospitalized 'as a result' of an illness—not a diagnosis" (Jenkins & Sapper, 2020). In other words, OSHA's interpretation broke the causative link between the incident and the hospitalization required by the regulation's words, and substituted knowledge of the hospitalization and its reason for the illness-causing "incident" referred to by the regulation. In addition, the interpretation made employer knowledge a criterion for reportability when the regulation's words did not refer to it. That OSHA's original FAQ had to couch the interpretation in three different ways also suggested that it lacked an anchor in the regulation's words. The blog post concluded that "OSHA's approach . . . is susceptible to challenge if used in an enforcement action" (Jenkins & Sapper, 2020).

By the next day, July 24, 2020, OSHA had removed the FAQs from its website. No explanation was offered. A news report states that OSHA removed the FAQs "following complaints from industry advocates who said the interpretation didn't line up with its existing illness and injury reporting

Arthur G. Sapper
Art Sapper practices OSHA law in Ogletree Deakins's Washington, DC, office. He was formerly deputy general counsel of the Occupational Safety and Health Review Commission, and special counsel to the Federal Mine Safety and Health Review Commission. He also taught OSHA law for 9 years at the Georgetown University Law Center. Sapper has testified several times before Congress on OSHA issues. He was also a member of the Committee on Model Agency Procedural Rules of the Administrative Conference of the United States, and the Maryland Occupational Safety and Health Work Group.

UTAH778/ISTOCK/GETTY IMAGES PLUS

regulations" (Cullen, 2020). Another possible but complementary explanation is that OSHA's lawyers had not yet reviewed the FAQs. There matters sat for more than 2 months.

The Second Interpretation

On Sept. 30, 2020, OSHA published a new series of answers to its "COVID-19 Frequently Asked Questions." Among the answers was one stating that:

> For cases of COVID-19, the term "incident" means an exposure to SARS-CoV-2 [coronavirus] in the workplace. Therefore, in order to be reportable, an in-patient hospitalization due to COVID-19 must occur within 24 hours of an exposure to SARS-CoV-2 at work. (OSHA, n.d.)

This was essentially the view advocated in the author's July blog post. OSHA also announced that, as a result, it was withdrawing the citation to Winder Nursing.

OSHA's second interpretation was soon criticized harshly. On Oct. 14, 2020, Representatives Bobby Scott (D-VA) and Alma Adams (D-NC), who respectively head the House labor committee and its subcommittee on worker safety, sent a letter to OSHA stating that OSHA's second interpretation "will eliminate, for all practical purposes, reporting of a work-related COVID-19 (COVID) illness" (Committee on Education and Labor, 2020). The letter also stated that OSHA's second interpretation "does not follow the science regarding what is known about COVID-19," referring to the incubation period for the disease. The letter demanded that OSHA provide a "detailed description of OSHA's justification for making this change" (Committee on Education and Labor, 2020). It appears that OSHA has not yet responded.

Why OSHA's Second Interpretation Was Right & Inevitable

OSHA and its lawyers are not in the habit of caving in to criticism of OSHA's interpretations. Deference doctrines often insulate OSHA from challenges to all but the most outlandish legal interpretations (and sometimes those too). But OSHA and its lawyers well know that courts will strike down an OSHA interpretation of a regulation that is inconsistent with its wording and the known intent behind it. And that was the case here.

Take the regulation's words, which require reporting if the hospitalization "occurs within [24] hours of the work-related incident." The regulation states eight times that the hospitalization must be the "result of" the "incident." Under OSHA's first short-lived interpretation, the "incident" would be knowledge of a COVID-19 hospitalization. But a hospitalization does not occur as a "result of" knowledge of a hospitalization; it occurs as a result of disease.

Moreover, the regulation several times makes clear that the "incident" must *cause* the adverse bodily condition (injury or illness) for which the employee was hospitalized. For example, paragraph (b)(3) discusses whether one must report a hospitalization "if it resulted from a motor vehicle accident." An illness or injury does not "result from" a hospitalization or knowledge of it or its cause; a hospitalization results from an illness or injury. Thus, OSHA's first interpretation would have made nonsense of the regulation.

OSHA's first interpretation was also refuted by the regulation's preamble, which courts have repeatedly looked to as a persuasive indication of a regulation's original intent. The preamble refers to the "incident" as the injury-causing event in passages such as this: "if an employee suffers a work-related *injury (the work-related incident)* at 11:00 a.m. on Thursday and is hospitalized as an in-patient *as a result of that injury . . .*" (emphasis added; OSHA, 2014, p. 56152). The preamble, like the regulation itself, but unlike OSHA's first interpretation, also sharply distinguishes between "the occurrence of the work-related incident" and "the occurrence of the reportable event (fatality, *in-patient hospitalization*, or amputation)" that ensued from it (OSHA, 2014, p. 56151).

In sum, the regulation and its preamble would have made it impossible for OSHA to have prosecuted employers for violation of the regulation as first interpreted by OSHA. Employers would have rightly claimed not only that OSHA's interpretation bears no relation to the words of the regulation or its original intent, but that employers were deprived of fair notice of what would have struck the courts as a fanciful interpretation.

One news report hypothesized that OSHA's second interpretation may have been "shrewd management of limited resources" (Cullen, 2020). As the following discusses, it is true that OSHA's first interpretation would have likely overwhelmed the agency with reports of hospitalizations. But because OSHA evidently was in favor of its first interpretation, it seems unlikely that OSHA adopted its second interpretation because of a concern with resources. It is more likely that OSHA's lawyers saw the first interpretation as unable to withstand a legal challenge.

What Should OSHA Have Done?

Perhaps OSHA should have proposed a new regulation as soon as it realized that the current

wording of § 1904.3(b)(6) would be a substantial obstacle to the enforceability of its initial view of when COVID-19 hospitalizations should be reported. Although OSHA rulemaking has often been criticized as slow and ponderous, OSHA might possibly have been able to push through a narrow amendment, tailored to infectious disease or tailored to COVID-19, especially if it were temporary.

One problem with adopting such a rule is that if every employer reported every work-related COVID-19 hospitalization, the agency would likely be inundated with many more reports than it could possibly investigate. Even if OSHA adopted criteria for screening the reports, it would likely find itself overwhelmed by even the screening process, not to mention the burden of investigating the few cases that it did not weed out. Moreover, OSHA would then likely be criticized by worker safety advocates for not investigating enough reports. Worse, to avoid citation and penalties, not to mention OSHA's only recently revoked practice of issuing critical press releases when it cites an employer, many employers might, to play it "safe," report to OSHA cases that are not work-related in their view but that might arguably be considered so by OSHA. That employer practice would drive the number of reports into the stratosphere, creating an enforcement nightmare. There is no easy answer. **PSJ**

References

Committee on Education and Labor, U.S. House of Representatives. (2020, Oct. 14). Labor leaders to OSHA: Changing reporting requirements for COVID-19 workplace illness hurts workers and hinders ability to control pandemic [Press release]. https://edlabor.house.gov/media/press-releases/labor-leaders-to-osha-changing-reporting-requirements-for-covid-19-workplace-illness-hurts-workers-and-hinders-ability-to-control-pandemic

Cullen, A. (2020, Oct. 9). Is OSHA's virus reporting plan failing workers? Law360. www.law360.com/articles/1317441

Jenkins, J.D. & Sapper, A.G. (2020, July 23). OSHA publishes new FAQs on reporting hospitalizations and fatalities due to COVID-19. Ogletree Deakins. https://ogletree.com/insights/osha-publishes-new-faqs-on-reporting-hospitalizations-and-fatalities-due-to-covid-19

OSHA. (2001). Reporting fatalities, hospitalizations, amputations, and losses of an eye as a result of work-related incidents to OSHA [29 CFR 1904.39(b)(6)]. www.osha.gov/laws-regs/regulations/standardnumber/1904/1904.39

OSHA. (2014, Sept. 18). Occupational injury and illness recording and reporting requirements—NAICS update and reporting revisions. *Federal Register, 79*(181), 56130-56188. www.govinfo.gov/content/pkg/FR-2014-09-18/pdf/2014-21514.pdf

OSHA. (n.d.). COVID-19 frequently asked questions. www.osha.gov/SLTC/covid-19/covid-19-faq.html