Pacific Maritime Association
Headquarters

October 13, 2011

The Honorable David Michaels
Assistant Secretary of Labor for Occupational Safety and Health
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

By http://www.regulations.gov

Re: Proposed Rule: *Occupational Injury and Illness Recording and Reporting Requirements* (76 Fed. Reg. 36414). Docket No. OSHA-2010-0019

Dear Assistant Secretary Michaels:

Pacific Maritime Association appreciates the opportunity to comment on OSHA's proposed rule on *Occupational Injury and Illness Recording and Reporting Requirements*.

As background, PMA is a non-profit mutual benefit corporation that serves as the multi-employer collective bargaining and centralized payroll representative for approximately 70 member companies who are the stevedoring companies, marine terminal operators, and maintenance contractors who employ longshoremen and other categories of dockworkers at marine cargo handling facilities at ports in California, Oregon and Washington.

Pacific Maritime Association and our members continually seek to lower injury frequency rates and to improve the safety of the workplace. While under the proposed rule, PMA itself would be partially exempt from the recordkeeping requirements (NAICS 8139), our members would not. Consequently, PMA Member's would be affected by the proposed rule.

Reducing the Reporting Requirement to a Single Employee is Unnecessary

PMA comments concern the changes to Section 1904.39 – *Reporting Fatality, In-Patient Hospitalization, and Amputation Incidents to OSHA.* This proposed rule would require employers to report within eight hours work-related injuries that result in the in-patient hospitalization of one or more employees, the death of an employee, and within 24 hours a work-related amputation.

The current rule requires an employer to report to OSHA only when three or more employees are injured under the regulation. This current requirement is simple and straightforward. The intent behind this regulation is for a "prompt investigation of incidents causing serious injury is a key element in OSHA's ability to enforce existing standards, evaluate the effectiveness of current standards, and identify the need for new standards."

The proposed rule would require employers to notify OSHA on a single injury, reduced from three. This injury could be purely accidental and provide for a reduction in OSHA's valuable resources. PMA does not agree that a lower reporting requirement will result in better safety data. We believe this would result in more serious injuries incurred by three or more employees being caught in the backlog of cases. The more serious injuries would wait in line in place of isolated incidents that may have nothing to do with workplace safety, or worse, be the result of a pre-existing injury or illness.

A person complaining of chest pains on the job could be transported to the hospital and subsequently be admitted. A reasonable person could conclude this in non work-related, but because of the proposed regulation would be inclined to report. With the current requirement of three or more hospitalizations the potential for ambiguity for reporting non work-related injuries is diminished.

PMA recommends that OSHA maintain the current reporting requirement of three of more injured employee's. We propose that OSHA attempt to inspect the tens-of-thousands of employers in this country that have never had a single OSHA inspection instead of trying to gather additional information which they cannot possible handle. This would instill an atmosphere of safety awareness and bring safety to the forefront of many employers.

Lack of Clarity Involving In-Patient Hospitalization

The proposed rule is unclear and vague on the in-patient hospitalization requirement. For purposes of OSHA recordkeeping, in-patient hospitalization occurs when a person is "formally admitted" to a hospital or clinic for at least one overnight stay. If OSHA were to expand the current rule to cover every in-patient hospitalization (even for observation), employers would undoubtedly lack this information.

Has OSHA ever tried to contact a hospital to gather information on an employee? Perhaps when you mention you are from the federal government, hospitals are more willing to provide information, but our employers do not have this luxury. The reply that we often receive is that we cannot provide you with any information due to privacy concerns. Despite being entitled to know if an employee has been "admitted" to the hospital, this does not always occur. This places employers in a state of limbo, attempting to gather information while the OSHA clock is running.

PMA comments that OSHA places too high a value on being admitted to a hospital. Hospitalizations often result from physicians' admitting the employee for observation only. The proposed rule does not take into consideration the differences in medical facilities or the availability of medical care. An in-patient hospitalization does not always indicate there is an emergency that requires an immediate inspection by OSHA.

We encounter vast differences in the treatment of employees from one area to another or from one state to another. For the same injury, one worker could be treated in an emergency room and released within hours, while in another state the same injured employee would be "admitted" for various reasons. Even though both of these employees received the same injury, only one of these would be reported to OSHA.

An in-patient hospitalization does not always indicate there is an emergency that requires an immediate inspection by OSHA. In fact, we believe that hospitalizations are already over-reported and do not believe the increased reporting would be beneficial to OSHA in helping better protect workers.

How is OSHA to decide what in-patient hospitalizations to investigate with an employer inspection and which ones to just log in a database? PMA comments that OSHA should maintain the current reporting requirement and instead continue to focus attention on those industries with either a traditionally high DART rate, or those industries reporting an increased injury rate with information collected during the yearly Survey of Occupational Injuries and Illnesses by the Bureau of Labor Statistics.

Employer Knowledge

> *As provided in proposed paragraph (b) (7) of section 1904.39, employers would generally not be required to report fatalities, hospitalizations, or amputations of which they were not aware.*

This proposed rule states that employers would generally not be required to report incidents in which they were unaware. Since "generally" does not cover every occurrence, for what circumstances would an employer be required to report an injury for which they were unaware?

Not all employers are the same. The West Coast marine cargo handling industry orders longshore labor out of a "hiring hall." Our members do not employ the same dockworkers on a daily basis. A longshore worker could very possibly work at "Employer X" for one day but not work for that employer for the rest of the year. While in an ideal world an employer would have good communication with an employee and have their contact information, this is just not the case for PMA members.

OSHA could determine that an employer should have known of an injury through reasonable due diligence and then issue a citation for that employer for not reporting the injury. The employer may never know of the hospitalization until days or weeks later. Would the employer be in violation for not reporting this incident to OSHA even though they had no knowledge that a hospitalization occurred?

Confusion Involving Proposed 1904.39(b)(7)

> *What if I don't learn about an incident right away? If you do not learn of a reportable incident at the time it occurs and the incident would otherwise be reportable under paragraphs (a) and (b) of this section, you must make the report within eight (8) hours (for a fatality or an in-patient hospitalization) or twenty four (24) hours (for an amputation) of the time the incident is reported to you or to any of your agent(s) or employee(s).*

OSHA has proposed that the report should be made within 8 hours of the time the incident is reported to any of our employees. Did OSHA intend to use the word "any?" PMA cannot support any proposal that would allow notification of the injury to any employee or agent.

PMA members order longshore labor out of a Union hiring hall. Workers report on a day to day basis, and may only work for a member company one day out of the year. Would this be considered an employee? Compliance with the reporting requirement would be next to impossible.

We believe the best procedure is what is currently found in our collective bargaining agreement. Injuries should be reported to a direct supervisor or management. This is the only means in which an employer can be in knowledge of the injury.

In many states, a posting is required to inform employees who to contact in case of an injury. Specifically for the marine cargo handling industry, this form is the Department of Labor, Longshore and Harbor Workers Compensation Act form LS-242. It is clear about whom notice of an injury is to be reported to. What is the purpose of requiring PMA members to post a DOL notice of injury reporting requirements and then have OSHA ignore the same form in which they require us to post?

OSHA should specify the reporting requirement starts when the information has been reported to the injured employee's supervisor or those management employees whose responsibilities include OSHA reporting. As OSHA proposes to expand the reporting requirements from three employees (which most certainly an employer would know about) to a single employee, there is a much greater likelihood that an employer would lack knowledge of the information they are required to report.

More than Eight Hours Should Be Provided to Make a Report

PMA does not object to the eight hour reporting requirement for work related fatalities. This information would clearly be available to any employer.

The current rule requires an employer to notify OSHA when three employees are injured under the regulation. The current requirement eliminates those situations that provide no justification for investigation.

OSHA has proposed to require the reporting of work-related in-patient hospitalizations for a single employee within eight hours. The employer may not have all of the necessary facts within eight hours. PMA comments this is too tight a deadline and is a recipe for false or misleading information to OSHA. In order to avoid incorrect reporting and to allow the employer to focus on employee's, the time period for reporting inpatient hospitalizations should be 72 hours. This amount of time would allow the employer to gather all of the facts but still allow OSHA to conduct a serious investigation.

Concerns with OSHA's Economic Analysis

PMA believes that OSHA has underestimated the costs associated with the proposed rule.

OSHA has estimated it takes one hour for the initial training of recordkeepers and a turnover rate of 0.2 hours per establishment per year. PMA finds this estimate hard to believe. Quickly reading through the *OSHA Recordkeeping Handbook* only once would take an inexperienced

reader well over one hour. One can hardly expect to be fully knowledgeable on the complexities of the recordkeeping regulation in such little time. The training of a competent OSHA recordkeeper vastly exceeds one hour. It is an on-going process that involves the study of the recordkeeping handbook, examination of the Federal Register summaries and understanding of the various recordkeeping Letters of Interpretation. This will take considerably more than a single hour in part because OSHA's regulations are complex and not always intuitive.

PMA also finds fault with the cost analysis. OSHA estimates that Human Resources Specialists earn a mean hourly wage of $28 (annual salary of $56,000 per year) and would most likely perform recordkeeping duties. Disregarding that assumption, does OSHA believe that private sector workers do not already work 40-hour weeks? The only way that we can use your cost estimate is if OSHA intends on removing another set of duties imposed by regulations to free time and make it available to perform these new recordkeeping tasks. When imposing new regulations, OSHA should always estimate that the work performed will have to be completed at the overtime rate of pay (of time and a half).

PMA does not object to maintaining accurate records of workplace injuries and illnesses. In fact, PMA maintains an extensive database of occupational injuries to assist with industry trends and analysis. We find this information of value, not because it is imposed by OSHA, but because we are committed to maintaining a safe work environment.

PMA strongly urges OSHA to re-examine their cost analysis of this proposed regulation.

Reporting Technology has Advanced

OSHA asked if other means than a telephone should be available to report injuries. PMA believes that the easier it is for employers to report injuries to OSHA, so much the better. In addition to the 800 number, an email, website reporting tool, or similar application would create a time stamped record that both the employer and OSHA could find of use.

NAICS

Pacific Maritime Association supports OSHA proposed transition from SIC to NAICS.

Conclusion

Given OSHA's current fiscal resources in combination with the difficulty that employers encounter in gathering and reporting, we feel that OSHA should work with employers to help resolve the difficulties they see with the current regulations.

We believe the proposed rule does not accurately reflect the realities in dealing with gathering and reporting employee injuries, especially for the west coast maritime industry. OSHA should fully engage employers to understand their concerns and alternatives prior to issuing any changes in the reporting requirement rules.

While PMA appreciates OSHA's intent to reduce workplace injuries and illness, we cannot support the proposed regulation. They do not reflect our members practical experience in

dealing with the reporting and recordkeeping regulations. The proposed regulations are unclear and burden employers with information we feel would be of limited use to OSHA. OSHA should engage in dialogue with employers to obtain a better understanding of the burdens in the proposed rule.

Thank you for this opportunity to comment.

Sincerely,

Gerald M. Swanson
Coast Director, Accident Prevention & Security
Pacific Maritime Association