DIVISION OF OCCUPATIONAL SAFETY AND HEALTH
POLICY AND PROCEDURES MANUAL

# ENFORCEMENT OF 8 CCR SECTION 5110	P&P C-13 Issued: 1/1/00 Revised:

AUTHORITY: Labor Code Sections 6400, 6401, 6402 through 6404, 6405 through 6507, and Title 8, California Code of Regulations (CCR), Section 5110.

POLICY: It is the policy of the Division of Occupational Safety and Health to investigate every complaint alleging the existence of a repetitive motion injury (RMI) to at least one employee in a manner consistent with 8 CCR Section 5110.

PROCEDURES:

A. COMPLAINT EVALUATION AND EVIDENCE DOCUMENTATION

1. Complaint Validity

   A complaint alleging the existence of a repetitive motion injury (RMI) to at least one employee at a place of employment shall be considered a valid complaint by the District Manager for purposes of assignment to compliance personnel for a 5110 investigation. A second (or "triggering" RMI) does not have to exist at the time a complaint investigation is initiated.

2. Evidentiary Documentation

   To assist compliance personnel in documenting a 5110 enforcement action, an "Evidentiary Checklist of Questions" is available in the Appendix to P&P C-13.

B. DETERMINING COVERAGE

When conducting any 5110 investigation, compliance personnel shall first ascertain if the employer is subject to Section 5110 by documenting evidence in the inspection case file to answer each of the four (4) coverage questions found in Section B.

1. Existence of One or More RMIs

Is there evidence that a licensed physician has objectively identified and diagnosed one or more RMIs using information that is customarily relied upon by other licensed physicians in the same field of practice, so that the information, taken as a whole, is sufficiently sound to support the RMI diagnosis?

NOTE ONE: "RMI" refers to an injury caused by a repetitive job, process or operation to the human body's musculoskeletal system, which is composed of bones, cartilage, joints, muscles, tendons, ligaments, spinal discs, nerves and blood vessels.

NOTE TWO: The phrase "objectively identified" is to reinforce that a diagnosis of an RMI is done on measurable and observable signs and symptoms, not on just a subjective identification based on an employee's description of symptoms. Objective criteria are not limited to just clinical laboratory findings. The standard is not triggered on just the description of symptoms. The term does not limit or make reference to the actual person performing the diagnosis as being objective or an impartial third party. The medical professional can be employed by the employer or the employee.

NOTE THREE: Compliance personnel shall consult with the Medical Unit when information is needed from medical professionals regarding the diagnosis and cause of the RMI, or if assistance is required in obtaining confidential medical records. When differing medical conclusions by licensed physicians exist regarding the diagnosis of an RMI, compliance personnel shall consult with the Medical Unit.

a. If there is no evidence of any diagnosed RMIs, then proceed no further with the 5110 investigation.
b. If there is evidence of at least one diagnosed RMI, then proceed to answer coverage question 2.

2. Predominantly Caused by Repetitive Work

Is there evidence that one or more RMIs have been predominantly caused, i.e., 50% or more, by repetitive work?

NOTE: Compliance personnel should be able to obtain evidence of RMI causation by repetitive work from several different sources of information, e.g., the employee's medical records, an

Employers' First Report of Injury, a Doctor's First Report of Injury, documentation generated as part of the employee's workers' compensation claim, verbal discussions with the employee or with the diagnosing licensed physician, or other similar sources that addresses the issue of causation.

a. If no, then proceed no further with the 5110 investigation.
b. If there is evidence that only one RMI has been predominantly caused by repetitive work, then prepare an Information Memorandum in accordance with Section D.2. of P&P C-13.
c. If there is evidence that two or more RMIs have been predominantly caused by repetitive work, then document in the inspection file the specifics of how the work-related factors have caused the RMIs and proceed to answer coverage question 3.

3. Last Twelve (12) Months

Is there evidence that any two diagnosed RMIs were reported to the employer within 365 days of each other?

NOTE ONE: In general, compliance personnel shall calculate the period of time between any two RMIs based on the date that the RMI report was received by the employer, not the date on which the RMI was diagnosed by a licensed physician. In the event there is a difference between the date of diagnosis and the date a report of injury was received by the employer, and difference has an impact on whether the 365-day rule applies, compliance personnel shall consult with the Legal Unit.

NOTE TWO: If the most recent RMI was reported to the employer more than 365 days before the inspection was begun, compliance personnel shall consult with the Legal Unit to determine whether there is a statute of limitations issue.

a. If no, then prepare an Information Memorandum in accordance with Section D.2. of P&P C-13.
b. If yes, then proceed to determine evidence to answer coverage question 4.

4. Identical Work Activity

Is there evidence that any two employees incurring the RMIs were performing a job, process, or operation of identical work activity?

NOTE ONE: "Identical" work activity means that the employees were performing the same repetitive motion task, such as, but not limited to, word processing, assembly or loading.

NOTE TWO: In 8 CCR Section 5110, the occurrence of exposures at one workplace would make an employer subject to the requirements of the standard at that workplace only. This is consistent with the application of any other Title 8 standard. If the exposure occurred outside of work, at another employer's workplace, or at a geographically separate workplace of the employer, these exposures would not trigger application of 5110.

a. If no, then prepare an Information Memorandum in accordance with Section D.2. of P&P C-13.
b. If yes, then proceed to conduct an evaluation of the employer's RMI Program. See Section C. of P&P C-13.

C. RMI PROGRAM EVALUATION

1. Worksite Evaluation

Is there evidence that the employer has evaluated each job, process, or operation of identical work activity (or a representative number of such jobs, processes or operations of identical work activities) for exposures which have caused RMIs?

a. If no, the employer shall be cited for violating Section 5110(b)(1). Proceed to evaluate the employer's program for exposure control measures.
b. If yes, then determine whether the employer's evaluation meets the requirements of Section 5110(b)(1) by examining the burden of proof requirements of 5110(c). See Section C.4. of P&P C-13.

NOTE: Gathering appropriate evidence of the employer's compliance with the requirement for worksite evaluation begins with gaining a sound understanding of the actual measures implemented by the employer. In evaluating the adequacy of the employer's measures, compliance personnel may consider whether the employer has addressed employee exposures such as (1) frequency, i.e., the rate of repetitive motions or exertions; (2) force, i.e., physical exertion by or pressure applied to any part of the body during a repetitive motion; (3) duration, i.e., the length of any period of repetitive work activity which

represent an exposure risk; (4) posture, i.e., the position of a body part during repetitive work activity; (5) localized or whole-body vibration; (6) repetitive motion of hands and feet under conditions of extreme cold temperature; and/or (7) any other exposures which are reasonably likely to have caused the RMIs requiring evaluation in the employer's workplace.

1. If the employer's evaluation was sufficient, then proceed to evaluate the employer's program for exposure control (correction or minimization).
2. If the employer's evaluation was insufficient under Section 5110(c), then the employer shall be cited for violating Section 5110(b)(1). Proceed to evaluate the employer's program for exposure control.

2. Exposure Control Measures
   a. Actual Correction of Exposures

      Has the employer corrected, in a timely manner, those exposures which have caused RMIs?

      1. If yes, then proceed to evaluate the employer's program for training. See Section C.3.
      2. If no, then proceed to determine whether the exposures are capable of being corrected.

   b. Potential for Exposures to be Corrected

      Are the exposures that have caused RMIs capable of being corrected?

      NOTE: The phrase "capable of being corrected" means capable of being changed through engineering or administrative controls, as defined in Section 5110(b)(2), so that they do not cause RMIs.

      1. If yes, the employer shall be cited for violating Section 5110(b)(2). Document all evidence supporting that conclusion and document all evidence of the employer's failure to correct the exposure in a timely manner and proceed to evaluate the employer's training program.
      2. If no, then proceed to determine whether the employer has minimized RMIs to the extent feasible.

c. Minimizing Exposure

Has the employer minimized RMIs to the extent feasible?

NOTE: A "feasible" corrective measure is one that is reasonable and is capable of being implemented. See Labor Code Sections 6401 and 6403.

1. If yes, then proceed to evaluate the employer's program for training. See Section C.3.
2. If no, then determine whether the employer's exposure control measures meet the requirements of Section 5110(b)(2) by examining the burden of proof requirements of 5110(c). See Section C.4. of P&P C-13.
    a. If the employer's exposure control measures were sufficient, then proceed to evaluate the employer's program for training.
    b. If the employer's exposure control measures were insufficient under Section 5110(c), then the employer shall be cited for violating Section 5110(b)(2). Proceed to evaluate the employer's program for training.

3. Training

Has the employer provided training to all employees who work at, and who supervise employees who work at, the jobs, processes or operations of identical work activity that have been identified as causing RMIs?

a. If no, the employer shall be cited for violating Section 5110(b)(3).
b. If yes, proceed to document whether the employer's program for training includes explanations for each of the five required components of training.

NOTE: The five components of 5110 training include explanations for each of the following: (1) the employer's RMI program; (2) the exposures which have been associated with RMIs; (3) the symptoms and consequences of injuries caused by repetitive motion; (4) the importance of reporting symptoms and injuries to the employer; and (5) methods used by the employer to minimize RMIs.

1. If no, then the employer shall be cited for violating subsections 5110(b)(3)(A), (b)(3)(B), (b)(3)(C), (b)(3)(D) and/or (b)(3)(E) as applicable.
2. If yes, then determine whether the employer's training meets the requirements of each subsection of 5110(b)(3) by examining the burden of proof requirements of 5110(c). See Section C.4. of P&P C-13.
    a. If the employer's training was sufficient, then close the 5110 investigation.
    b. If the employer's training was insufficient under Section 5110(c), then the employer shall be cited for violating the applicable subsection(s) of 5110(b)(3). Proceed to close the investigation.

4. Division's Burden of Proof Regarding the Adequacy of an Employer's Compliance with Section 5110(b)(1), (b)(2) and (b)(3)
    a. Applicability

    Section 5110(c) has special requirements regarding the burden of proof the Division must meet in order to substantiate certain violations of section 5110(b)(1), (b)(2), or (b)(3). It is important to have an understanding of when these burden of proof provisions apply and when they do not. Generally, the burden of proof provisions apply when it is alleged that an employer has initiated activity as required by 5110(b)(1), (b)(2) or (b)(3) but the initiated activity has failed to fully meet the requirements of the applicable subsection. However, there are three specific situations in which the burden of proof provisions do not apply as follows:

    1. Failure to Initiate Activity

    The employer has failed to initiate any activity required by the standard.

    EXAMPLE: An employer has not taken any action to train employees as required by section 5110(b)(3).

    2. Lack of Good Faith

    The employer has initiated activity but the action does not constitute a good faith attempt to comply with the standard.

EXAMPLE: The employer passes out a booklet which purportedly contains the information on which employees are to be trained, but does not give them time to read it or ask questions about it, or the material clearly does not meet the subject matter requirements of the standard.

3. Failure to Meet a Definite Requirement

The employer has failed to meet a definite, as opposed to an indefinite requirement of the standard.

EXAMPLE: The Division alleges that the employer has failed to meet the definite requirement of correcting an exposure that is "capable of being corrected." In this case, Section 5110(c) does not apply. However, if the Division alleges that the employer has failed to comply with the indefinite requirement of minimizing to the extent feasible an exposure that is not capable of being corrected, then a good faith effort to comply will be governed by Section 5110(c).

NOTE: Compliance personnel are encouraged to consult with the Legal Unit whenever they have questions about the applicability of 5110(c), or if they have questions about gathering evidence related to the Division's burden of proof under 5110(c).

b. Burden of Proof Requirements

1. Existence of More Effective Measures Than Those Taken by the Employer

Is there evidence that any measure not taken by the employer to comply with subsections 5110(b)(1), (b)(2) or (b)(3) is substantially certain to cause a greater reduction in RMIs than the measure(s) chosen by the employer?

NOTE: For any such measure, compliance personnel shall support their determination by documenting in the inspection file the basis for their conclusion that

the measure is substantially certain to cause a greater reduction in RMIs in the employer's workplace.

a. If yes, then proceed to determine whether the identified compliance measure was known to the employer.
b. If no, then the employer shall not be cited for a failure to implement more effective measures.

2. Known to the Employer

Was the identified compliance measure known to the employer?

NOTE: To determine whether the identified compliance measure was "known" to the employer, compliance personnel shall document evidence of the extent to which the employer had actual knowledge of the existence of the identified compliance measure.

a. If yes, then proceed to determine whether the identified compliance measure would impose additional unreasonable costs.
b. If no, then the employer shall not be cited for a failure to implement more effective measures.

3. Additional Unreasonable Costs

Is there evidence that the identified compliance measure would impose additional unreasonable costs?

NOTE: To determine whether the identified compliance measure would impose additional unreasonable costs on the employer, compliance personnel shall document in the inspection file the following information: (1) the estimated cost of the identified compliance measure; (2) the expected results of implementing the identified compliance measure, including the likely reduction of risk of injury; (3) the employer's size (number of employees); and (4) overall impact on the employer's business of implementing the measure.

a. If yes, then the employer shall not be cited for a failure to implement more effective measures.
b. If no, the employer shall be cited for failure to implement the identified compliance measure. See Section D.

D. ISSUANCE AND REVIEW OF CITATIONS AND INFORMATION MEMORANDA

1. Citation Issuance

a. Maximum Number of Alleged Violations

Section 5110 contains three independent requirements: worksite evaluation ((b)(1)), control measures ((b)(2)), and training ((b)(3)).

NOTE: Since the five subsections of Section 5110(b)(3) all deal with training, they are not independent requirements, and therefore, only one item or citation shall be issued for any failure to comply with (b)(3) or its subsections. For example, if an employer has failed to comply with subsection (b)(3)(D) and (b)(3)(E), and the violation is classified as "general", the violation shall be alleged as one item listing both subsections.

Therefore, if an employer completely fails to comply with Section 5110, the maximum number of violations that shall be alleged in a citation is three.

b. Classification

1. Violations of Section 5110(b)(1), (b)(2) or (b)(3) shall be alleged in all cases as separate items or citations, depending on whether the violations are alleged as general (violations to be alleged as separate items in a single citation) or serious, willful, failure-to-abate, or repeat (violations to be alleged as separate citations).
2. See P&P C-1B, Section D.1., 2. through 5. for information on classification of general and serious violations.

NOTE: To date, ergonomic injuries like RMIs have been addressed by only one California Occupational Safety and Health Appeals Board Decision After Reconsideration, i.e., Abatti Farms Produce, OSHAB 81-0256 (1985). In Abatti Farms, "serious

physical harm" includes "an injury or illness, immediate or cumulative... which reasonably could lead to impairment of part of the body by substantially reducing its efficiency on or off the job for more than 24 hours." Therefore, pursuant to Labor Code Section 6432, if there is a "substantial probability" that such an injury "could result" from the 5110 violation, then the violation shall be classified as serious.

In most cases, the injuries upon which the existence of the violation is based will constitute the best evidence of what harm is substantially probable to arise from the violation. The following rules generally apply to evaluating RMIs for the purposes of classifying 5110 violations: (1) mild tendon strains and similar medical outcomes that are not permanent and have resulted in little or no lost or restricted work time are to be considered non-serious physical harm for purposes of classifying 5110 violations; and (2) other, more severe medical outcomes are to be considered serious physical harm.

In situations in which both types of harm have resulted, compliance personnel shall determine which outcome is most probable to result and classify the violation accordingly. If the employer has an effective medical management program, it is reasonable to conclude that RMIs are likely to be identified when they first appear and thus are not likely to lead to serious physical harm. However, the conclusion shall ultimately be made based on what the evidence, taken as a whole, indicates is the most likely outcome.

2. Information Memorandum Issuance
    a. Evidentiary Situations for Information Memorandum Issuance
        1. Solitary RMI

There is evidence for a single RMI which has been objectively identified and diagnosed by a licensed

physician and found to be predominantly caused by repetitive work. See Section B.2.b.

2. Multiple RMIs Not Reported Within 365 Days

   There is evidence of two or more RMIs, which have been objectively identified and diagnosed by a licensed physician, found to be predominantly caused by repetitive work, but no two of the RMIs were reported to the employer within 365 days of each other. See Section B.3.a.

3. No Two Employees Performing Identical Work Activity

   There is evidence of two or more RMIs, which have been objectively identified and diagnosed by a licensed physician, found to be predominantly caused by repetitive work, and any two of the RMIs were reported to the employer within 365 days of each other, but no two employees incurring the RMIs were performing identical work activity. See Section B.4.a.

b. Format
   1. RMI Description
      a. Describe generally the RMI(s) which is the subject of the Information Memorandum and the repetitive job, process or operation that appears to be causal.

         NOTE: Do not reveal the name of the injured employee in the Information Memorandum.

      b. Describe how the employer's situation does not meet the jurisdictional requirements for coverage by Section 5110 using sufficient detail for the employer to determine whether its situation fits into category 1, 2 or 3 in Section D.2.a.
   2. Language for Information Memorandum

      "On [date] the Division conducted an investigation of your workplace to determine compliance with 8 CCR Section 5110.

It was determined that you are not currently subject to the requirements of Section 5110 because [compliance personnel select which of the following three descriptions applies]:

1. There is evidence that only one RMI has been objectively identified and diagnosed by a licensed physician and predominantly caused by repetitive work; or
2. There is evidence that two or more RMIs have been objectively identified and diagnosed by a licensed physician, found to be predominantly caused by repetitive work, but no two of the RMIs were reported to you within 365 days of each other; or
3. There is evidence that two or more RMIs have been objectively identified and diagnosed by a licensed physician, found to be predominantly caused by repetitive work and two of the RMIs were reported to you within 365 days of each other, but no two employees incurring the RMIs were performing identical work activity.

   If another RMI is reported to you which makes you become subject to Section 5110, Repetitive Motion Injuries, you will be required to establish and implement a program designed to minimize RMIs, that shall include a worksite evaluation, control of exposures which have caused RMIs and training of employees."

3. District and Regional Review of Citations and Information Memoranda

   All proposed citations and information memoranda referencing 8 CCR Section 5110 shall be reviewed by the Regional Manager, and or his or her designee, prior to issuance by the District Manager.

   NOTE: To ensure that all citations referencing Section 5110 can be sustained when contested by the employer, District compliance Cal/OSHA Engineers and Industrial Hygienists, District Managers, Regional Senior Industrial Hygienists, and/or Regional Managers are encouraged at any stage of a 5110 investigation to

seek management and/or legal review of a proposed citation which will be subject to Section 5110(c).

APPENDIX

Evidentiary Checklist of Questions

5110(a) -- Coverage

1.What is the name of the injured employee(s)?

2.What is the date the employer received a report of the injured employee's musculoskeletal injury?

3.How did the employer receive the report, e.g., oral report, return-to-work slip, workers' compensation claim report or other means?

4.What is the exact medical diagnosis made by the licensed physician for each injured employee?

5.What is the name and address of the licensed physician who made each RMI diagnosis?

6. What is the severity of the musculoskeletal injury the injured employee developed, e.g., the number of days away from work (LWD), the number of days of restricted work activity (RWD), or the number of days the employee says that he or she worked "injured?"

7.What type of medical treatment did the injured employee receive, e.g., medications (prescribed or over-the-counter), physical therapy, surgical treatment, or other types of treatment?

8.How did you conclude that the injury is a repetitive motion injury, i.e., arose from repetitive work?

9.How did you conclude that the injury is predominantly caused by repetitive work activity?

10.How did you conclude that the work activity implicated in the two injuries which were reported to the employer within 12 months of each other is "identical?"

5110(b) and (c) -- Proposed Violations

11.What 51109(b) subsections, (b)(1), (b)(2) and/or (b)(3), have been violated?

12.For each proposed 5110(b) subsection violation, has the employer failed to initiate an activity, or has the employer failed to fully meet the requirements under subsections (b)(1), (b)(2) or (b)(3)?

13. For each violation proposed for the employer's failure to initiate activity, answer the following three questions:

a. What is the explanation offered by the employer for its failure to initiate the activity required under the subsection in question?
b. If the employer claims that it has initiated the activity, what specifically does the employer claim has been done, and why have you rejected the employer's objections?
c. What is the name(s) and title(s) of the management representatives who provided the information for questions 13.a. and 13.b.?

14.For each proposed violation for the employer's failure to fully comply with the subsection in question, answer the following four questions:

d. .What has the employer specifically done to comply?
e. What measures known to, but not used by the employer, are substantially certain to reduce the musculoskeletal injuries at issue more than the measures the employer is currently using? What information did you rely on to arrive at this conclusion?
f. What is the employer's explanation as to why it has not implemented the measures on which the proposed violation is based? What is the name(s) and title(s) of the management representatives who provided you with this information?
g. Will implementing the measures you are requiring the employer to take to reduce the musculoskeletal injuries result in unreasonable costs to the employer? What information did you rely on to come to this conclusion, e.g., the estimated cost of the measure; the likelihood of a reduction in employee injuries utilizing this measure; the employer's size (number of employees); and the impact on the employer's business of implementing the measure?