

WORKER ADVOCACY ADVISORY COMMITTEE

United States Department of Energy
1000 Independence Avenue, S.W.
Washington, DC 20585

August 31, 2001

The Honorable Steven Cary
Acting Assistant Secretary for Environment Safety and Health
U.S. Department of Energy
1000 Independence Avenue, S.W.
Washington, D.C. 20585

Re: Energy Employees Occupational Illness Compensation Program Act of 2000

Dear Assistant Secretary Cary:

The Worker Advocacy Advisory Committee (WAAC) has expressed a number of its concerns to Secretary of Energy Abraham regarding implementation of Subtitle D of the Energy Employees' Occupational Illness Compensation Program Act (EEOICPA). In addition to those comments, I am writing to you directly on the Committee's behalf to raise a number of additional concerns that we have regarding the Department of Labor's (DOL) implementation of the federal compensation component of the Act.

The WAAC's charter charges us broadly with providing policy advice to the Department of Energy regarding workers' compensation issues. As an Advisory Committee to the DOE we believe it is appropriate to share with you our concerns with DOL implementation of its part of the program. This is particularly important because, even though DOL is administering the federal compensation portion of the program, the diseases covered were contracted during employment in the nuclear weapons industry by, or on behalf, of DOE. We understand that an active interagency taskforce, on which Office of Worker Advocacy (OWA) staff participate, is discussing all aspects of the implementation of the program, including both DOE and DOL components. We are asking that you communicate the following concerns regarding DOL implementation to DOL representatives on our behalf.

1. It is the consensus of the members of the WAAC that the Interim Regulations do not provide a realistic understanding of the difficulties claimants will encounter in processing claims. This is particularly true in providing assistance for claims development and in providing a fair adjudication review process for claimants. The DOL system needs to have a more independent review procedure that is provided outside of the immediate office operating the program.
2. The rules for refiling of claims with respect to newly discovered evidence and changes that may occur with respect to qualifying for special cohorts also need to be liberalized to recognize the realities of the difficulty claimants are likely to have in obtaining records and other information.
3. DOL's restrictive definition of survivor under the Interim Regulations will result in serious inequity as between the EEOICPA program and the Radiation Exposure Compensation Act (RECA). The long and bitter history of the difficulties these families have had in

Honorable Steven Cary
August 31, 2001
page 2

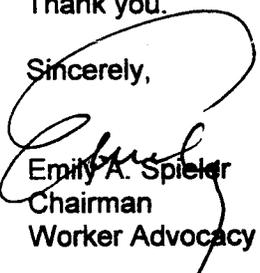
obtaining relief should not bar adult survivors from receiving the compensation benefits that were due their deceased parent.

4. We are also concerned about some of the claims procedures instituted by DOL. The current letter that is sent to claimants seeking additional information is both difficult to understand and sets the unreasonably short deadline of 30 days for submitting additional information. Neither the statute nor the Interim Final Rules require this 30 day time limitation. Often, the information requested is either difficult to find or requires additional medical testing that cannot be arranged within this arbitrary time limit. Claimants may be discouraged from pursuing their claims, since the letter gives the impression that this is an absolute deadline for the submission of the information. This notice might send them prematurely to seek legal representation. DOL should change the letter to eliminate the deadline or to suggest that if information cannot be submitted within 30 days the claimant should call a designated person. In addition, no notification is sent to claimants after a claim file is forwarded by a Resource (intake) Center to a processing center. A simple postcard indicating that the information has been received, a claim file established, with a claim number and the name and phone number of a person managing the claims would be enormously helpful to claimants who are worried, confused, and perhaps distrustful.
5. As we have suggested to OWA staff at our meetings, we believe that it is absolutely essential that DOL and DOE work cooperatively to reduce the barriers for claimants in the various components of the program. In order to accomplish this, the Resource Centers must do adequate intake for both programs; information such as exposure, employment and medical histories should be compiled only once and shared among the agencies; and so on.

We very much appreciated your willingness to take the time to meet with our Committee in Denver, and we hope that you will communicate these concerns to your counterparts at the Department of Labor.

Thank you.

Sincerely,



Emily A. Spierer
Chairman
Worker Advocacy Advisory Committee

cc: Shelby Hallmark, OWCP, DOL
David Michaels, DOL
WAAC members
Judy Keating, FACA, OWA, EHS, DOE

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Secretary of Energy
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Washington, D.C. 20585

Re: Energy Employees Occupational Illness Compensation Program Act of 2000

Dear Secretary Abraham:

I am writing to you on behalf of the Worker Advocacy Advisory Committee (WAAC) to raise a number of concerns with regard to the Department of Energy's implementation of the Energy Employees Occupational Illness Compensation Program Act of 2000 (EEOICPA). At its last meeting in Denver on August 28-29, 2001, and in its prior meetings, the WAAC has concluded that the recommendations in this letter are crucial to the successful implementation of a program of compensation under Subtitle D of the EEOICPA. These recommendations have been communicated verbally at our meetings to the staff of the Office of Worker Advocacy (OWA), but as a committee we have also concluded that it is important to bring them directly to your attention. Please note that every recommendation in this letter is supported unanimously by Committee members unless otherwise noted.

As you know, the EEOICPA was designed to provide just compensation to American workers who have been made ill by their work in the U.S. nuclear weapons complex. Subtitle D of the Act requires the Department of Energy to assist these workers in obtaining compensation under state workers' compensation laws. In order to accomplish the goals of this legislation, the members of WAAC believe that it is essential that DOE do the following:

1. DOE must set aside federal funds to pay workers' claims against current DOE contractors under the provisions of Notice 350.6 that are validated by the DOE/HHS-appointed physicians panels. We strongly urge that these funds be in addition to those currently allocated to contracts, and that DOE seek supplemental appropriations for this purpose if necessary.
2. If compliance with Notice 350.6 is to be accomplished within current contract parameters, it is critical that DOE ensure, through appropriate procurement mechanisms, that current contractors will not be penalized in any way for their compliance with orders to pay claims, without litigation, under this program. Costs of complying, including costs of evaluations or payment for any aspect of the workers' compensation claims under the EEOICPA, must not be considered in the contractor's compliance with any contract requirements or qualification for bonuses or incentive payments under their contracts. OWA and procurement must work cooperatively to achieve this critical goal.

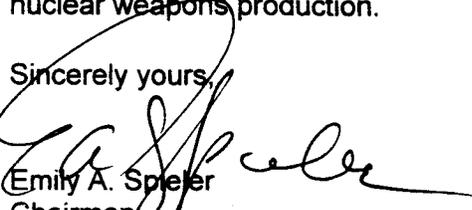
3. DOE must allocate funds to pay directly (not through insurers or prior employers) for workers' claims that involve exposure at DOE facilities where there is currently no contractor with a contract. These claims are not affected by Notice 350.6. This should include claims involving employees of Atomic Weapons Employers, Beryllium Vendors, employers at privatized DOE sites, predecessor employers where the current contractor does not have responsibility for claims, prior and current subcontractors where the current primary contractor does not have responsibility for the claim, and claims for which insurers are legally responsible for payment.
4. All workers' claims in which the worker presents evidence that he or she worked in a DOE facility and he or she suffers from any illness that the worker or a physician believes may have been caused by toxic exposure at these facilities should be evaluated by the DOE/HHS-appointed physicians panels.
5. The physicians panels should use a uniform standard to evaluate medical causality in order to determine whether it is more likely than not that a worker's medical condition was caused, aggravated or accelerated by the worker's exposure to toxic substances at one or more DOE facilities. The physicians panels should not be asked to make determinations regarding the legal compensability of claims in the various state jurisdictions.
6. Any claim in which a physicians panel has determined that the workers' illness meets this standard of medical causality should be considered a valid claim by DOE, in the absence of significant evidence to the contrary. WAAC members, with only one dissenting vote of a voting member, feel that this is critical to appropriate implementation of this program. The amount and duration of benefits will be determined under the applicable state workers' compensation law and will therefore vary from one state to another.
7. The efficient and fair processing of claims is essential. DOE must move quickly to promulgate necessary rules, develop essential procurement and budgeting components, and hire and train crucial staff. Cooperation with other agencies is critical. Cooperation (and any written agreements) with state workers' compensation programs should be designed to assist claimants under this program, as is required by the Act. DOE must continue to work cooperatively with DOL in order to provide claimants with the most seamless and simple claims process possible.
8. Quality assurance and performance measures must be developed and utilized from the outset. Continual monitoring will provide helpful information to the Department in order to make the program a success. It will also provide information, and hopefully reassurance, to the many workers, employers, and advocacy groups who are following the implementation of the program.

We elaborate on many of these points in greater detail in the Attachment to this letter. We feel that these points are absolutely essential to the successful implementation of Subtitle D of the EEOICPA.

Honorable Spencer Abraham*
August 31, 2001
page 3

Members of the Committee would be happy to discuss these issues with you at your convenience. We believe that your direct leadership is critical to ensuring the success of this program. As advisors to DOE, we are taking the steps to let you know of our concerns before the disappointment of the claimants overwhelms the good will that has been generated by the government's willingness to acknowledge the harm caused to American workers made ill by nuclear weapons production.

Sincerely yours,



Emily A. Spierer
Chairman

Worker Advocacy Advisory Committee

cc: Deputy Secretary Robert G. Card
Acting Assistant Secretary Steven Cary
Members of WAAC
Judy Keating, OWA

Attachment
Workers' Advocacy Advisory Committee Recommendations to the Secretary of Energy
August 31, 2001

Background

In January, Secretary Richardson appointed the Worker Advocacy Advisory Committee (WAAC) as a federal advisory committee under the Federal Advisory Committee Act to provide advice on workers' compensation policy to the Department of Energy. In particular, the Committee has been asked to assist DOE as the Department has undertaken the very complex task of implementing its responsibilities under the EEOICPA. The members of the committee are national experts in the fields of occupational medicine and workers' compensation, as well as representatives from communities, contractors, and unions affected by the EEOICPA.

Since January, the Committee has met on several occasions to review progress with DOE officials and has provided specific recommendations to DOE regarding implementation of the EEOICPA. In addition, members of the Committee have devoted considerable time to providing assistance, guidance and recommendations through the Committee's subcommittee structure as well as individually. We have all recognized that this program affords an extraordinary opportunity for the government to provide fair compensation to many workers who were employed at the DOE Weapons Complex or by the suppliers and processors involved in nuclear weapons activity.

We wish to commend the staff of DOE, and particularly of the Office of Worker Advocacy (OWA), for their good will and good faith in developing the programs and offices necessary to assist those filing with the Department of Labor (DOL) as well as the many thousands of workers who expect their claims to be processed by the OWA. DOE has done a commendable job in holding public meetings and in opening offices within the time frame required by the EEOICPA.

Setting up a new program is never easy, and this startup has been complicated not only because the statute has a number of complex features but also because the very tight time frame required implementation by July 31, 2001. Perhaps the most significant factor has been the change in Administrations which left DOE's ES&H directorate short staffed and without significant policy leadership during this very difficult time.

During the course of our full WAAC meetings as well as during many subcommittee meetings, we were asked as a Committee for our views on such issues as claims development and processing, standards for decision making, payment and procurement, relations with state agencies, and other substantive issues relating to this compensation program. We have as a Committee responded to each of these requests, often with very detailed suggestions to the staff.

Our starting point is this: Subtitle D of the EEOICPA is specifically designed to encourage just compensation, through state workers' compensation programs, for workers who worked and were made ill by their exposure to toxic substances in this country's nuclear weapons industry. The Act is intended to change the historical practice of resisting payment of these claims and to provide compensation where it has previously been fought and denied. DOE is called upon to assist workers with these illnesses when DOE/HHS appointed physicians panels conclude that

the illness is likely to have been caused by work at a DOE facility.

At this point, we have a number of serious concerns about the direction that DOE is taking with respect to the resolution of some of these matters.

Payment of valid workers' compensation claims

It is essential that the process that is being developed by the OWA provide for the approval and prompt payment of claims for state workers' compensation benefits made by workers with illnesses caused by their work at DOE facilities (as determined by the DOE/HHS-appointed physicians panels). A commitment by DOE to pay these claims is critical to ensure prompt and adequate implementation of the Act.

1. ***Contractor Reimbursement Procurement Issues.*** The DOE issued Notice 350.6 shortly after the EEOICPA was enacted. The purpose of that Notice was to provide the path for DOE contractors to pay workers' compensation claims found to be valid by the OWA. Under the program, when DOE determines that a claim is valid, it is to instruct the Contractor not to contest that claim in the State system. Not long after the WAAC began its work, the potential limitation of that Notice in terms of the details of the various types of contracts entered into by DOE with its various contractors became obvious. Our WAAC Subcommittee worked with OWA staff to propose various contractual and administrative remedies to carry out the Notice. We are, however, deeply concerned that these issues are not yet resolved, and many new hurdles seem to be developing to thwart prompt payment of these claims. Contractors are concerned that no allocation has been made for the payment of claims, that no provision has been made for adjustment of other contractual obligations based upon the need for payment of these claims, and that they will essentially be penalized in other ways if they comply with Notice 350.6. We urge you to review the procurement issues promptly and to promulgate the necessary contractual instructions so as to make the claims payable in a speedy fashion without penalizing contractors who make good faith efforts to comply. This must include clear assurances that payment of any costs associated with these claims will not be counted against a contractor's compliance with other terms of its contract or against its ultimate performance for receipt of any bonus or incentive payments.
2. ***Payment of valid state claims in the absence of current DOE contractors.*** Equally important is the fact that large numbers of state workers' compensation claims are likely to be filed by workers who were employed by employers that do not have current contracts with DOE. This will include claims in which predecessor contractors, subcontractors, insurers or now privatized employers may technically be the responsible party. In addition, claims will continue to be filed after current contractors successfully decommission sites. None of these claims will be paid by contractors under Notice 350.6. Even if we assume that current claims involving existing contractors may be addressed by the appropriate implementation of Notice 350.6, the claims of these other workers must be addressed. This Committee has strongly, repeatedly, and unanimously urged that DOE stand in the place of the prior contractors and subcontractors and pay these claims directly without allowing third parties, including special state funds and

insurers, to raise defenses to the claims that were not contemplated under the EEOICPA. We again reiterate that recommendation. Referral of these claims to state mechanisms will result in lengthy litigation, unreasonable delays, and ultimately in denial of claims that should be valid under the EEOICPA. It will also result in serious inequities among workers who worked in the same state and sometimes at the same site.

3. The budgetary issues created by the EEOICPA must be addressed. Both the development of the necessary information to assist claimants in their pursuit of benefits (including researching employment and exposure histories) and the paying of benefits will require dedicated resources. The WAAC strongly urges DOE to seek supplemental appropriations to pay for these costs if the current DOE appropriations are not adequate. WAAC members and their constituencies would gladly support any attempt to seek funding for this purpose.

Assistance to Claimants and Prompt Claims Processing

We have serious concerns that the claims filing and processing systems that are being put into place will not provide the prompt access and resolution that have been promised by DOE. We have been advised that the current staffing and processing may not provide sufficient resources to move claims to an early decision in a reasonable time. The steps needed to enable the physicians panels to make determinations are still under discussion. Resource center staff are not trained to assemble the information necessary for Subtitle D claims. Claimants have said that they are not receiving necessary assistance in the development of their employment and exposure histories, a task that DOE clearly must fulfill under the Act. Claimants are not being alerted to the state forms that must be completed or to the need to identify an employer for a state claim. Costs to claimants of duplication of medical records are sometimes prohibitive, and could be controlled in some states if requested under state workers' compensation guidelines. No process is yet in place for the development of full occupational histories and exposure records for claimants, an essential DOE responsibility under Subtitle D. It now appears that the necessary components to move ahead with implementation of Subtitle D of the EEOICPA may not be in place until the end of calendar year 2001, at the earliest. In the meantime, claimants may have claims denied in the state workers' compensation systems that they may be unable to reopen later. DOE is charged by the Act with assisting claimants. We urge DOE to provide sufficient staff and assistance to claimants so that claims made under Subtitle D receive prompt and fair consideration.

DOE must work cooperatively with state workers' compensation agencies in order to assist claimants in this program. Written agreements with the states must be finalized quickly, with specific attention to providing assistance to claimants under this program, as is required by Section 3661(a) of the Act. We also encourage DOE staff to work closely with state information services and ombudsmen. DOE staff and state personnel can be cross trained so that both systems work together in resolving claims. DOE should also devote significant resources to program outreach to assure that all eligible workers are fully informed about the program and the process for asserting their claims.

We further urge DOE to maximize the level of claims processing integration with the Department of Labor. To the extent possible, information that is gathered on claims (particularly

medical, exposure and occupational histories) should be gathered only once and then shared among the agencies, consistent with any necessary signed release from claimants.

Functioning of Physician Panels and Relationship to State Laws

The physician panels are the key component of the DOE assessment of workers' claims in which state workers' compensation benefits should be paid. The WAAC has recommended that there be as few barriers as possible to assessment by the physicians panels: any claim in which a worker has evidence that he or she worked in a DOE facility and in which the worker or the worker's physician asserts that the worker suffers from an illness associated with this exposure should be reviewed by the physicians panels. In order to provide the kind of equal justice contemplated by the Act, it is important that the physician panels get all cases with disease diagnoses and DOE employment histories, without exclusion of any potential claim by DOE staff.

The WAAC has not seen a copy of the current draft of the regulations governing physicians panels. DOE has suggested in earlier drafts that the physicians panels may be asked to apply state legal criteria in making medical determinations of whether an illness was caused or aggravated by exposures in DOE facilities. We are concerned that such requests may impose a difficult burden upon the physicians panels. Moreover, the physicians panels will be made up of experts in determining medical causality, not in parsing state legal provisions. Our committee strongly believes that physician panels should be making their determinations based on a uniform standard governing medical causality and should not be expected to make any determinations regarding legal issues. This standard for medical causation is whether it is more likely than not that the claimant's illness was caused, aggravated or accelerated by his or her exposure to toxic substances while working at a DOE facility.

Failure to proceed in this way will create serious inequities among workers who worked at different facilities and undermine the public's confidence in the program. In particular, state statutes of limitation, specific disease exclusions, increased burdens of proof when occupational disease claims are made, or rules governing last injurious exposure or apportionment have no place in the physicians panel determinations of the legitimacy of these claims under EEOICPA. We urge you to develop a system that is based on the physicians' determination of work-relatedness.

Please note that we are not proposing any intrusion into state law, any action that would violate federal preemption standards, or federalization of state workers' compensation programs. Rather, this program involves a determination by the federal government that the exposure of these workers was related to their work in the weapons program. Once this determination is made, payments and medical care will be made as authorized by the applicable (and different) state laws. Workers with valid claims under the EEOICPA will receive the level of benefits provided under the state law. What we are proposing is the equivalent of the voluntary payment of workers' compensation claims that many employers undertake under existing state systems when the employer is satisfied with the merits of the claim. In essence, employers may waive many defenses when they choose to pay these claims, and they may waive them for a variety of reasons. This is a firm or enterprise level decision, unrelated to the outcome of claims that are fully litigated through state systems. In this case, DOE is the equivalent of the firm, and the

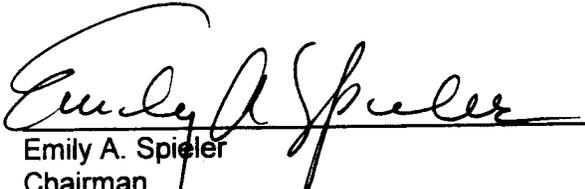
underlying intent of the EEOICPA to rectify past injustices suggests that DOE should apply a relatively liberal standard in deciding to pay claims voluntarily.

Finally, we must reiterate what we stated above: it is absolutely essential that current contractors not be penalized, *in any way*, for their compliance with DOE orders to pay these claims.

Quality Assurance and Performance Evaluation

Quality assurance and performance evaluation must be started immediately. The OWA and DOE will benefit from monthly reports on claims processing and approval. The WAAC also needs better information in order to provide adequate advice under our charter. Because it has been impossible for DOE to estimate the volume of claims that will be filed or the number that will need serious review or the number that will merit payment, it has been extremely difficult to devise either a claims processing system or a payment system that will meet the demands of the program. At this point, it is not clear that the state Memoranda of Understanding, when combined with Notice 350.6 and the draft of the regulations governing physicians panels, will together create a system that will provide efficient, fair, and quick resolution of workers' claims. It is essential that the system be reviewed and modified as information becomes available in order to ensure that the original purposes of the EEOICPA are met. We therefore urge that quality assurance and performance evaluation be made a high priority in the coming weeks.

Respectfully submitted,


Emily A. Spieler
Chairman
Worker Advocacy Advisory Committee

Aug 31, 2001