

Exhibit #51



"Donald Elisburg" <delisbur@infi.net> on 11/08/2001 10:52:20 PM

To: Loretta Young/EH/DOE@EH  
cc:

Subject: Comments on Physician Panel Determinations

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Loretta,

Attached are my comments on the Physician Panel Determination Proposal. I will forward a hard copy to your office, but given the delays in the mail, please accept this e-mail version.

Don Elisburg



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Ms. Loretta Young  
Office of Advocacy EH-8  
US Department of Energy  
1000 Independence Avenue SW  
Room 1E 245  
Washington DC

Re: Guidelines for Physician Panel Determinations

Dear Ms. Young:

My name is Donald Elisburg and I am a public member of the Department of Energy Worker's Advocacy Advisory Committee. These comments are submitted in my individual capacity. I have more than 30 years experience in the field of workplace disability and workers' compensation policy, including responsibility for the Federal government's FECA, Longshore, District of Columbia and Black Lung workers compensation programs from 1977-1981.

I believe that DOE's proposed physician panel guidelines are inconsistent with EEOICPA and are based on a profound misunderstanding of the principles of state workers compensation programs. DOE should adopt final regulations that conform to the statutory directives of Congress as reflected in the EEOICPA.

As many witnesses have made clear in these hearings, in creating the Energy Employees Occupational Illness Compensation Program, the federal government is attempting to address the serious problem that workers in the nuclear weapons industry who have been made sick as a result of exposure to toxic agents rarely receive the workers compensation benefits they deserve.

In section 3602 of the Energy Employees Occupational Illness Compensation Program Act (Public Law 106-398), Congress recognized that the long-standing federal policy of litigating all occupational illness claims "has deterred workers from filing workers compensation claims and has imposed major financial burdens on such employees who have sought compensation."

This finding is echoed in Executive Order 13179, entitled Providing Compensation to America's Nuclear Weapons Workers:

Existing workers' compensation programs have failed to provide for the needs of these workers and their families...many of these individuals have been unable to obtain state workers' compensation benefits. This problem has been exacerbated by the past policy of the Department of Energy (DOE) and its predecessors of encouraging and assisting DOE contractors in opposing the claims of workers who sought those benefits.

In addressing this problem, EEOICPA mandated two federal programs to provide compensation for weapons complex workers with occupational illness. One is a program that is administered by the US Department of Labor, for workers with certain diseases associated with exposure to beryllium, radiation or silica, and a program to be administered by the Department of Energy for workers with all other occupational illnesses associated with toxic exposures.

Under Section 3661 of EEOICPA, the Energy Secretary is called upon to assist workers in this second category in obtaining state workers compensation benefits. The Department is instructed to set up panels of physicians, independent of the Department (selected by the Secretary of Health and Human Services). These panels, and these panels alone, are charged with determining whether a claimant's illness or death "arose out of and in the course of employment by the Department of Energy and exposure to a toxic substance at a Department of Energy Facility."

In this regard, the statute does not call upon the Department to rely on the criteria utilized in each state for determining work-relatedness as suggested in these proposed guidelines. The Department should not attempt to limit those cases that will be offered assistance in this program to claimants whose conditions would meet the criteria of each state's laws. There are a number of reasons for this conclusion:

It is a basic principle of state workers compensation law that an employer is permitted to pay any compensation claim that such employer determines to be work-related. The law exists to ensure that in those cases where the employer does not agree with the claimant that a condition is work-related, each party will receive a fair hearing. In general, workers compensation law provides employers with certain defenses against paying that the employer may attempt to use, subject to the rules of each state system. However, the law in no way obligates that employer to use these defenses. Most compensation claims are settled; however, settlement does not mean the employer/insurer agree the worker clearly meets all criteria only that weighing the relative merits of each side of the case, some payment to the worker for injuries is in both parties interest and litigation does

not serve those interests equally as well. To the extent the DOE engages in a prescreening process, it removes the incentives to settle. Providing vigorous assistance increases the incentives to settle claims.

Section D of the Act directs the Secretary to instruct DOE contractors not to utilize these defenses for those claims found by the physician panels as work-related. In other words, the contractor is directed to accept these claims as valid. For these claims, there will be agreement by the employer (DOE's contractor) and the employee on the validity of the claim, and the state will accept these claims as valid. And, this process assumes that the DOE will reimburse or otherwise make the contractor whole for the cost of the claim.

The proposed rules would have the state workers compensation systems **and** the Secretary undertake a virtually impossible task: to determine *a priori* which claims would be work-related under the laws and regulations of the relevant state or states of each claim. In state systems, the work-relatedness of disputed workers compensation claims is determined only through an adjudicatory process. Many state systems will not be able to provide simple criteria to be used to determine, absent an adjudicatory process, what types of claims would be eligible or ineligible for compensation benefits. It is inconceivable for the Department of Energy to establish correctly whether a specific claim would be found to be work-related in any specific state system.

The statute clearly states it is the Secretary's obligation to assist workers. The approach described in the proposed rules will very likely result in the Secretary's failing to assist many workers who both require and deserve the Secretary's assistance. Congress intended that the decision of whether or not a claim is work-related should rest in the physician panels, not in the rules of a state workers compensation system.

The model proposed in the legislation provides a national standard for determining work-relatedness of occupational illnesses associated with exposures occurring in the development, manufacture, testing and clean-up of nuclear weapons. The nuclear weapons program is a national program, ensuring the security of all Americans. Work-relatedness of diseases covered by the Department of Labor-administered program are determined through application of a single, national standard. It is appropriate to have the same criteria cover all workers in this program who have been put in harms way helping protect out future. The state law is to be used for determining the level and duration of benefits only.

Section 3661 of the Act provides for Agreements between the Secretary and States for the solely stated purpose of assisting the "employee in filing a claim under the appropriate State workers compensation system." These Agreements were not envisioned by

Congress to be mechanisms to limit the ability of workers to obtain assistance from the Secretary, but rather, to facilitate the Department of Energy's mandate to assist workers obtain state workers compensation benefits. The Agreements contained in the proposed rule accomplish the opposite.

Executive Order 13179 states clearly that:

The Secretary of Energy shall...establish a Worker Advocacy Program to help individuals whose illness is related to employment in the DOE's nuclear weapons complex. This assistance shall include ... submittal of reasonable claims to a physician panel...for determination of whether the individual's illness or death arose out of and in the course of employment by the DOE or its contractors and exposure to a toxic substance at a DOE facility.

There is nothing in either the Act or Executive Order that even suggests that DOE pre-screen workers' claims using the "applicable criteria" that form the existing state barriers to compensation that this law was intended to overcome.

DOE contractor employees who have illnesses they believe are work-related and who meet all the state law requirements for compensation most likely do not need DOE assistance to obtain it. Congress enacted EEOICPA, and the Executive Order established DOE's Worker Advocacy Office, so that DOE would help claimants who do not necessarily meet all the criteria for workers' compensation under state law.

The consequence of promulgating these guidelines will have the effect of returning the Department of Energy to its previous policy of "deny and defend." These workers were put at risk for illness and disability to help protect and preserve America's freedom. They were the ultimate warriors in the Cold War. There is no merit in constructing additional barriers to these workers receiving just compensation. The Secretary should adopt final regulations that are consistent with the commitment made to these workers by Congress and the President.

Thank you for considering these comments.

Sincerely,

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