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October 24, 2001

Ms. Loretta Young
Office of Worker Advocacy, EH-8
U.S. Department of Energy
1000 Independence Avenue, S.W.
Washington, D.C. 20585

Attention: Physicians Panel Rule

Re: Comments on the Department of Energy's Proposed Rules on
"Guidelines for Physicians Panel Determinations on Worker Requests for
Assistance in Filing for State Workers' Compensation Benefits"

Dear Ms. Young:

I appreciate the opportunity to comment on the Proposed Rules on the Department of Energy's responsibilities under Subtitle D of the Energy Employees Occupational Illness Compensation Program Act (EEOICPA) that appeared in the *Federal Register* on September 7, 2001.

The Paper, Allied-Industrial, Chemical and Energy Workers International Union (PACE) represents 320,000 workers nationwide in oil, chemical, pulp, paper, auto parts and nuclear industries. We represent workers at eleven (11) Department of Energy sites in the DOE nuclear complex and workers at a number of current and former beryllium and other atomic weapons suppliers. Additionally, PACE represents tens of thousands of former workers potentially affected by this proposed rule. These "Guidelines for Physicians Panel Determinations on Worker Requests for Assistance in Filing for State Workers' Compensation Benefits" will govern how our members and their families, and thousands of other workers, can apply for and receive DOE assistance with their state workers' compensation claims.

The enactment by Congress of this program, as the preamble notes, was attributable to the failure of the state workers' compensation system to provide uniform and adequate compensation to workers who were made sick working with dangerous and hazardous materials in the nation's nuclear weapons complex. Congress also acted to rectify decades of refusal by the federal government to accept responsibility and liability for its own actions

that harmed tens of thousands of loyal, dedicated, and hard-working citizens who were directly or indirectly employed in this effort.

The U.S. Department of Energy was directed, under this legislation, to assist the workers of its contractors, whose illness or death may have been related to employment at a DOE facility, in filing claims under the appropriate state workers' compensation program. The Congress, recognizing and attempting to correct past actions by the DOE, directed the Secretary of Energy not to oppose legitimate claims and to take action to ensure that DOE contractors would not contest or deny these claims.

The following are comments on specific sections of the Proposed Rule:

Definitions

Section 3661 (a) of EEOICPA enables the Secretary of Energy to enter into agreements with States "to provide assistance to a Department of Energy contractor employee in filing a claim under the appropriate State workers' compensation system." In §852.2 of the Proposed Rules, DOE has defined this task as setting "forth the terms and conditions for dealing with an application for assistance."

This is wrong and should be eliminated. The Act does not allow or direct the DOE to work out arrangements with States to set "forth terms and conditions for dealing with an application for assistance under Subpart D of the Act." If this language is permitted in the rule it would allow the Department to continue the very behavior that gave rise to the passage of EEOICPA in the first place. What the Act intends is for the Department to reach agreements with the States to enable it to assist workers with their claims - not to determine the terms and conditions of those claims.

The agreements entered into with the States should specify that they are to allow the Secretary of Energy to "provide assistance to a Department of Energy contractor employee in filing claim under" that State's workers' compensation system.

Materials Required for Application

It is entirely reasonable for the DOE to require certain items be submitted, in writing, by individual's who are applying for assistance for their claims. §852.4 (e) of the Proposed Rule, however, is too open-ended. It is not reasonable to permit the Office of Worker Advocacy (OWA) to require from individuals any information or materials "deemed" by the OWA to be relevant to that person's application.

It would be far better, and more reasonable, for this section to read: "As part of the application for review and assistance, an individual must submit, in writing... (e) any other information or materials that the Program Office demonstrates to be relevant to a determination of the individual's eligibility for the review and assistance program..."

Satisfying State conditions

The Department proposes, in §852.5 (a)(3), that OWA will only submit applications to a physicians panel if certain conditions in State agreements are or can be satisfied. Here again the DOE misreads the intent of the Congress. The law does not permit the DOE to erect barriers to the application of claims through agreements with States. The law enables DOE to work out agreements with States to permit the DOE to assist workers. The burden is placed on the Department. The proposal turns the language of the Act on its head and would permit the DOE to create a burden on applicants by making them meet “conditions” in State agreements. States are perfectly capable of interpreting their own conditions. The DOE should not create circumstances which allow the Department to interpret State conditions. The Act specifically provides that the DOE shall submit applications to a physicians panel if the DOE has entered into an agreement with a state that allows it to provide such assistance to its contractor employees.

§852.5 (a)(3) should be changed to read: “The DOE has entered into an agreement with the State in which the contractor employee or employee’s estate intends to make a claim.”

Applicable Criteria

§852.6 of the proposed rules would require that State agreements contain “applicable criteria” that would be used by DOE to determine which claims would be allowed to continue with the assistance to workers that was intended by the Congress. Incredibly, the Department is proposing a system that would enable it to block the submission of cases to the physicians panels on the basis of its own assessment as to whether the claim will “satisfy” state criteria for the determination of a valid claim.

It would be wrong, foolish and dangerous for the Department of Energy to attempt to interpret state laws on the compensability or admissibility of workers’ compensation claims. Decades of experience with state workers’ compensation laws on occupational illness claims have clearly demonstrated that states have erected numerous blocks and hurdles to these claims. The Congress did not ask the DOE to block cases on these “criteria” – they did just the opposite.

This section should be removed in its entirety.

Physicians Panel Determinations

Just as it was absurd for the DOE to propose giving itself the responsibility of interpreting state law, it is preposterous for the Department to propose, as it does in §852.11 (c)(4), that physicians panels must provide OWA with a “finding as to whether the specified criteria is satisfied.” Again the Department demonstrates its total misunderstanding of state workers’ compensation law and practice.

State workers' compensation systems recognize and accept that physicians are trained and capable of issuing findings as to causality. No state system relies on physicians to make findings as to compensability. Yet this is precisely what the Department is asking in this rule.

§852.11(c)(4) should be removed.

Re-examination of Panel Determinations

Under Subtitle D, and if provided in an agreement with the state, the Department is allowed to review a physicians panel's determination. Specifically, such a review is limited to information the panel considered in making its determination, to relevant new information not reasonably available at the time of the panel's deliberations, and the basis used by the panel to reach its determination.

However, under §852.15 of the proposed rule, the Department grants itself an array of circumstances that would permit the OWA to order that specific cases be re-examined by the original physicians panel, or an entirely new panel. Such circumstances, according to the proposal, could include the need for quality assurance, any situation the OWA deems would constitute "good cause," "doubt" by the OWA that evidence supports the panel's determination, conflict of interest, and the need for "consistency."

In our view the basis for review of physicians panel determinations in the Act is quite clear and appropriate. We view the expansion of the circumstances for review of determinations as unreasonable and inappropriate. The proposed rules are far too broad and would permit the Department to review virtually any panel determination for any reason. The Congress intentionally limited the Secretary's actions in reversing a physicians panel determination to those situations where there is "significant evidence to the contrary."

§852.15 should be rewritten in its entirety to reflect the intent of Congress as expressed in Sec. 3661(e)(1) and (2).

Assistance to Claimants

The DOE should clearly address the issue of funding the costs of medical exams and other tests for workers whose tests and exams are requested and/or required by the physicians panel. The proposed rule is silent on this issue despite the fact that Section 3661(c) of the Act requires the Secretary to "assist the employee in obtaining additional evidence with its control and relevant to the panel's deliberations."

A section should be provided in the proposed rule that clearly describes the right of claimants to have the Department of Energy pay for any specific tests required by a

physicians panel to assist that panel in making a final determination regarding causality of a disease.

Ending Contractor Contesting of Claims

Except for a mere recitation of the language in the Act, the proposed rules at §852.18(a)(2) & (b), offer no guidance or regulatory scheme to ensure that claims that receive a positive determination by a physicians panel are not contested by the Department or by its contractors. The Department needs to make clear what actions it will take to carry out the will of the Congress to guarantee that specified claims approved as arising "out of and in the course of employment" and the awards arising from such claims are not fought, denied or contested, as they have been historically, by the DOE or its contractors.

Sincerely,

A handwritten signature in black ink, appearing to read "James N. Ellenberger". The signature is fluid and cursive, with a large initial "J" and "E".

James N. Ellenberger
Consultant