

**Hearing on Proposed Physician Panel Rules
Department of Energy
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**Statement by John F. Burton, Jr.
School of Management and Labor Relations
Rutgers: The State University of New Jersey
50 Labor Center Way
New Brunswick, Jersey 08901-8553**

My name is John F. Burton, Jr. I am a Professor in the School of Management and Labor Relations at Rutgers: The State University of New Jersey. I conduct research on workers' compensation and on occupational safety and health, and I am the Editor of the *Workers' Compensation Policy Review*. I am currently the Chair of the Steering Committee on Workers' Compensation for the National Academy of Social Insurance and a member of the Workers' Advocacy Advisory Committee for the Department of Energy, although I am submitting this statement solely on my own and not as a representative of these organizations.

I served as the Chairman of the National Commission on State Workmen's Compensation Laws in 1971-72. The Occupational Safety and Health Act of 1970 created the National Commission and its members were appointed by President Richard Nixon. The National Commission submitted its unanimous report to the President and the Congress in 1972.

I. Background on my Comments on the Proposed Rules

A. A Brief History of the Coverage of Work-Related Diseases

The Report of the National Commission on State Workmen's Compensation Laws contained 84 recommendations, of which 19 were designated as essential. The National Commission Report did not devote much attention to the topic of work-related diseases. However, one of the essential recommendations was R2.13: "We recommend that all States provide full coverage for work-related diseases."

The Department of Labor continues to monitor the compliance of state workers' compensation laws with the 19 essential recommendations. As of January 1, 2001, all 50 states plus the District of Columbia are considered in compliance with recommendation R2.13, which suggests that the coverage of work-related diseases by state workers' compensation programs is not a problem.

The basis for the compliance assessment for R2.13 by the Department of Labor is, however, confined to only one aspect of state workers' compensation programs. Historically, state workers' compensation programs limited coverage to specific occupational diseases that were included in a schedule in the statute. The schedule of occupational diseases often contained a description of a process or type of work that had to match the occupational diseases in order for the worker to be eligible for workers' compensation benefits. Thus, §3.2 of the New York Workers' Compensation statute provides that "anthrax" associated with the process of "Handling of wool, hair, bristles, hides or skins" is a compensable occupational disease. The New York statute has a list of 29 specific occupational diseases with associated processes. If New York only had these 29 specific occupational diseases with the associated processes, then the

Department of Labor would not consider them in compliance with recommendation R.2.13 of the National Commission. However, New York has as entry 30 in its statute "Any and all occupational diseases" which are associated with "any and all employments" covered by the act, and it is on the basis of this final entry that New York is given credit for complying with recommendation R.2.13. As of January 1, 2001 all states have such an apparent "catch-all" occupational disease category, which is why the Department of Labor considers all states in compliance with recommendation R.2.13.

There are, unfortunately, a number of other aspects of state workers' compensation laws that preclude many workers with work-related diseases from receiving benefits. The most comprehensive assessment of limitations on full coverage of work-related diseases by state workers' compensation laws were conducted by Lloyd Larson (1979) and Peter Barth (1980).

1. Limitations from the Definitions of Work-Related Diseases

Larson (1979:12) reported that many of the statutory definitions of occupational diseases "are loaded down with qualifiers and restrictive clauses which make genuine 'full' coverage still unachieved, unless through liberal rulings by the administrative agencies or the courts." He noted, for example, that 21 states only compensated diseases that are due to a risk or hazard "peculiar to the employee's trade, process, occupation, or employment," and many of these states add a requirement that the hazard also be "characteristic of" the employment. While Larson refers to liberal rulings providing genuine full coverage, the fate of the apparently inclusive language in the New York statute provides a counter example of court interpretation. As discussed by Barth (1980), the New York Court of Appeals interpreted the phrase "any and all occupational diseases" to require the disease to be a natural and unavoidable result of the worker's particular occupation. Thus, even though a worker could establish that he contracted tuberculosis as a correction officer in a state facility, the Court denied compensation because that disease was not a natural result of that occupation.

Larson (1979:13) also indicated that "about 30 states exclude 'ordinary diseases of life' or 'diseases to which the general public is equally exposed,' or use some other language to indicate that the risk of contracting a diseases must be 'in excess of the ordinary hazard of employment as such.'" As Larson makes clear, these qualifying conditions for diseases are not applied to work-related injuries.

2. Limitations from Time Limits for Filing Claims

Larson (1979:20) also provides examples of time limits for filing claims that adversely affect some workers with work-related diseases. For example, some 13 states had requirements "that a disease to be compensable must

manifest itself or cause disablement, or be contracted within a certain period after the last injurious exposure" and four states required the disease must manifest itself or cause disablement within a certain period after the last day of work.

3. Limitations from the Use of the Accident Test

Barth (1980: 105-114) also examines the use of the accident test as an obstacle to compensating work-related diseases. Workers' compensation statutes were introduced in most states by 1920 and almost all these laws contained four legal test that all had to be met for a worker to be eligible for workers' compensation benefits: (1) there must be an injury (2) by accident (3) arising out of (4) and in the course of employment. The accident test proved particularly troublesome for diseases in many jurisdictions, where the courts interpreted the accident requirement to require (1) unexpectedness (a) of cause and (b) of result, and (2) a definite time (a) of cause and (b) of result. This narrow view of the meaning of accident meant that many diseases could not qualify for benefits because, for example, the exposure to the toxic substance occurred over an extended period and the manifestation of the disease also was gradually disabling. State workers' compensation programs dealt with this narrow interpretation of the accident test by establishing separate statutes or sections of workers' compensation statutes to deal with work-related diseases. Nonetheless, as Barth indicates in the handling of heart cases, the accident test was adapted to decide which conditions qualified for benefits. Other states made a broader use of the accident test in determining the compensability of work-related diseases.

4. Historical Assessment of the Coverage of Work-Related Diseases

The preceding paragraphs provide a very truncated discussion of the historical coverage of work-related diseases. I do not deal with some of the topics covered by Larson (1979) or Barth (1980) that in general restrict coverage of occupational diseases, such as the use of presumptions and the limits on cash benefits and/or medical benefits for certain types of work-related diseases. I am nonetheless confident of these conclusions applicable to workers' compensation programs as of 1980: (1) many work-related diseases did not qualify for workers' compensation benefits, and (2) workers' compensation programs used much more restrictive legal tests for compensating work-related diseases than for compensating work-related injuries.

B. The Current Status of the Coverage of Work-Related Diseases

I am unaware of any recent study of the coverage of work-related diseases by workers' compensation programs that is comparable in scope and depth to the Larson (1979) and Barth (1980) studies. There are, however,

several reasons to believe that there are still significant gaps in coverage of work-related diseases.

1. Limitations from the Definitions of Work-Related Diseases

I am unaware of any state that has in the last two decades removed the limitations in their definitions of occupational diseases, such as the requirements that the diseases be "peculiar to the employee's trade, process, occupation, or employment" and/or the hazard leading to the diseases must also be characteristic of the worker's employment. Nor am I aware of any state that has extended coverage to "ordinary diseases of life" even when the workplace is the source of a particular worker's illness. In addition, the New York statutory language covering "any and all occupational diseases" has not been amended to overcome the court's narrow interpretation of this language.

2. Limitations from Time Limits for Filing Claims

My impression is that several states have amended their workers' compensation statutes since the 1970s to liberalize their statute of limitations. Nonetheless, there are still statutes with statutory requirements that make it impossible for workers with diseases that are clearly work-related to qualify for workers' compensation benefits, as is evident from recent court decisions.

In *Tisco Intermountain v. Industrial Commission*, 744 P.2d 1340 (Utah 1987) the Supreme Court of Utah held that the widow of George Jakob Werner was not entitled to workers' compensation benefits. The decision stated that it was undisputed that he had been exposed to asbestos from 1947 until 1971. He first experienced symptoms of a medical problem in 1981, which led to surgery in 1982 and his death in 1983 "from complications attendant to peritoneal mesothelioma." The Utah Occupational Disease Disability Law required that death from an occupational disease must result within three years from the last date on which the employee actually worked for the employer against whom benefits are claimed. Since Werner had not worked for the employer where he had been exposed to asbestos since 1971, he was disqualified from obtaining benefits.

In *Cable v. Workmen's Comp. Appeals Bd.*, 664 A2d 1349 (Pa. 1995), the Supreme Court of Pennsylvania denied benefits to Kenneth Cable. He had worked at Gulf Oil where he was periodically exposed to the carcinogens coumene and benzene, most recently in 1981. Gulf Oil no longer employed him after March 1983. In July 1988, he was diagnosed with bladder cancer and was advised that the cause was his exposure to coumene and benzene. The manifestation of the cancer occurred less than 300 weeks after he ended his employment with Gulf, but more than 300 weeks after his last exposure to the carcinogens. The Pennsylvania workers' compensation act provides, in part, that "whenever occupational disease is the basis for compensation . . . it shall apply

only to disability or death resulting from such disease and occurring within three hundred weeks after the last date of employment in an occupation or industry to [sic] which he was exposed to hazard of such disease . . .” The court held that the cancer was not compensable because the relevant employment for the statute of limitations is the period of employment in which the employee was exposed to the coumene and benzene, not the subsequent period of employment with the employer in which he was not exposed to the carcinogens.

Iowa is another state with a statute of limitations that can limit the compensability of work-related diseases. Iowa workers' compensation statute Sec. 85A.12 bars workers' compensation benefits unless signs and symptoms manifest themselves within one year of last injurious exposure. This provision has been interpreted to deny benefits to disabled workers in several cases, including *Ganske v. Spahn & Rose Lumber Co.*, 580 N.W.2d 812 (Iowa 1998).

3. Limitations from the Use of the Accident Test

The accident test is still used in some states to deny benefits to workers disabled with work-related diseases. I can attest to the vitality of the doctrine in Idaho, because I helped argue a case before the Idaho Supreme Court last year. Robert Combes aggravated a preexisting but non-disabling condition of asthma by a gradual exposure to dust, pollen, and animal dander over a three to six month period. As a result, Combes was permanently and totally disabled. The court ruled in *Robert Combes v. Industrial Special Indemnity Fund*, ___ P3d. ___ (Idaho 2000) that Combes did not meet the accident requirement for occupational diseases benefits because there was no single traumatic event that led to his disability.

4. Other recent limitations on Compensability or Work-Related Diseases

The rapid increases in workers' compensation costs in the late 1980s and early 1990s resulted in a number of changes in workers' compensation programs during the 1990s. One category of those changes involved the adoption by many states of more restrictive rules governing benefit eligibility. An excerpt from Spieler and Burton (1998) is included as an Appendix to these remarks. Many of the changes affected the compensability of injuries as well as diseases, but there was probably a disproportionate effect on diseases from these statutory changes.

5. Assessment of the Current Coverage of Work-Related Diseases

The studies by Larson (1979) and Barth (1980) documented restrictions on the compensability of work-related diseases that were found in most state workers' compensation laws. Since then, some of the most restrictive statutes of limitations may have been liberalized. However, the general tightening of eligibility rules during the 1990s has probably overwhelmed any liberalizing

developments. I believe that currently a substantial proportion (and perhaps a majority) of diseases that would be considered work-related using a medical test for causality would not meet the legal tests for workers' compensation benefits in state workers' compensation programs. Clearly the success rate for work-related disease claims will vary among states and among conditions. But the protection provided by state workers' compensation programs to workers with work-related diseases in general is inadequate and inequitable.

II. Comments on the Proposed Physician Panel Rules

I want to provide my interpretation of the logic of the Act because it affects my comments.

On the issue of causation and the determination of eligibility of a worker for workers' compensation benefits, I assume that a primary rationale for the Act is that the Federal Government decided it is unwilling to accept the determinations made under state workers' compensation laws on the eligibility/causation issues (which I am defining broadly to include statute of limitations, exposure rules, etc.). Rather, the purpose of the Act is to provide an independent assessment of the causation issue.

An argument can be made that the Act contemplates a review of eligibility/causation that replicates the criteria previously or currently used by states to determine eligibility. If that is the purpose of the Act, then [to paraphrase Sam Horowitz, a member of the National Commission on State Workmen's Compensation Laws and one of the significant commentators on the history of workers' compensation], the Act is "a snare and a delusion." That is because many, if not most or all, workers' compensation programs contain procedural or substantive requirements that will preclude many, if not most, DOE workers from obtaining benefits. In other words, the obstacle to compensation under state laws is not just lack of medical proof of causation (although that is surely a problem), but instead the problem is that even if medical causation can be established, many state laws have legal limitations that preclude compensation for current or former DOE employees.

As I understand the purposes of the Act, when the physician panel decides that a toxic substance caused the worker's medical condition, then the employee will use that decision as a basis for proceeding with a claim in a state workers' compensation program. Here we tread a delicate line. We are not preempting state laws on the eligibility/causation rules (which would involve complex legal issues). Rather, we are asking DOE contractors (broadly defined) not to raise possible defenses in contesting claims. There are two possible approaches to induce current contractors' cooperation. First, DOE can tell current contractors to absorb these costs as a condition for remaining a DOE contractor in good standing. Or second, DOE can reimburse the contractors for

any additional expenses they incur as a result of adherence with the Act. I endorse the latter approach, although I recognize the implications of adding to the DOE budget for this expense and I recognize the possibility that contractors may not adequately monitor claims if they bear none of the costs resulting from approval of the claims. (I will ignore for this discussion the vexing problem of how claims from workers or survivors who worked for employers who are not current DOE contractors will be handled, other than to recognize that DOE will also have to provide the resources to pay for these claims.)

Assuming that use of one mechanism or another can persuade current contractors to pay the claims certified by the physician panels, where do the state workers' compensation programs fit in?

First, on the issue of causation/eligibility, we are asking the state agencies to be willing participants in a program that ignores state limits on compensability when the employer is willing to pay the benefits without raising the state limits for the claims within the scope of the federal Act. This is obviously a critical matter that has not yet been resolved for most states, as far as I know. (I am a member of the Workers' Compensation Advisory Committee for the New Jersey program, and when I mentioned this proposed handling of cases for state agencies at a meeting a few weeks ago, I was greeted with skepticism about whether the New Jersey agency could do this even if it wanted to.) If the state workers' compensation programs cannot make this accommodation, then one possible conclusion is that the states should be eliminated from the program. I argued to David Michaels when the law was being drafted that states should be included in the implementation of the program, and I still endorse that view. However, if states cannot accommodate a more generous view of causation when there are employers who are willing payers [a crucial assumption] and a Federal agency willing to pay for the benefits [crucial assumption number 2], then my argument -- that states should be an integral part of providing benefits to disabled former workers in the nuclear weapons industry -- may be less than compelling.

Second, I assume that even if a worker is eligible for some benefits because the causation issue has been satisfied, there is still an important issue concerning the amount of those benefits. Here, as I understand the logic of the Act, state law will determine the duration and amount of those benefits. State workers' compensation agencies will assist the parties in determining the appropriate amount and, if necessary, the agencies will adjudicate any disputes. Thus we will ask the Iowa workers' compensation agency (to pick an example) to decide: assuming the applicant is eligible for benefits under the federal Act (even though we recognize that the applicant may not have met the "normal" rules for compensability under the Iowa statute), how much would this person be entitled to (given the person's prior earnings record, etc.) under Iowa law? Once that decision is made, the employer will be obligated to make that payment. There will be considerable discrepancies among states in the amount of benefits that equally disabled workers will receive under the federal Act. I accept that

outcome as a clear implication of the Act although, needless to say, there are arguments that the Act should have provided uniform benefits for all states

This is, to be sure, a convoluted scheme and one that rests on several critical assumptions. One assumption is that the DOE will interpret its mission as going out of its way to interpret the Act in a way that supports the interests of disabled workers, while also recognizing an obligation to not penalize DOE contractors. Another assumption is that the contractors will accept the spirit of the Act, and will not only not resist, but will support, the efforts of workers disabled by their exposures at work to obtain benefits. Perhaps the most important assumption is that state workers' compensation programs will view the Act as a unique opportunity to redress a serious mistreatment of deserving workers, rather than an annoyance to traditional state procedures or as an example of federalization.

APPENDIX

EMILY A. SPIELER AND JOHN F. BURON, JR., COMPENSATION FOR DISABLED WORKERS: WORKERS' COMPENSATION in NEW APPROACHES TO DISABILITY IN THE WORKPLACE 205, 220-224 (Terry Thomason, John F. Burton, Jr., and Douglas E. Hyatt eds., 1998)

More restrictive rules governing benefit eligibility have played a critical role in the declining workers' compensation cost in the 1990s. Since each state's program is an interdependent system with its own history of tradeoffs among key provisions, it is important to be careful in making generalizations in trends. Some of the more common types of changes in the availability of benefits are, however, apparent.

Changes in compensability of particular conditions

One of the most obvious constraints on benefit availability involves statutory or regulatory changes that explicitly limit the compensability of claims involving particular medical diagnoses. Not surprisingly, the focus has been on health conditions that are potentially most costly to a compensation program.

For example, many states substantially restricted the right of workers to make claims for psychological injuries resulting from a mental stimulus in the absence of a physical injury (so-called "mental-mental" claims)....

Injuries caused by repetitive trauma, such as carpal tunnel syndrome and noise induced hearing loss present a similar picture. As the incidence of these claims sky-rocketed, state legislatures responded by tightening eligibility standards, using the same mechanisms used to limit compensability of stress claims. In Virginia, the state's supreme court ruled that repetitive injury claims were non-compensable under the language of the state statute. In response to the criticism of these decisions, the Virginia legislature amended the workers' compensation statute to provide nominal, but very narrow, coverage for these conditions.

Limitations on coverage when the injury involves aggravation of a pre-existing condition

Other changes are subtler than explicit restrictions on the compensability of specific conditions. Traditionally, employers were said to "take workers as they found them." This meant that workers with preexisting conditions were not barred from coverage for work injuries, even if the underlying condition contributed to the occurrence of the injury or to the extent of the resulting disability. Through a variety of legislative and judicial changes, rules governing compensation for preexisting conditions or aggravation have been tightened in many jurisdictions.

For example ... both state courts and legislatures have moved to restrict compensation of injuries involving aggravation of preexisting conditions. Most significantly, several states now limit compensation when the current injury is not the sole or major cause of disability. These limitations come in a variety of forms: excluding injuries or resulting disabilities if they are the effects of "the natural aging process"; requiring that work be the "major" or "predominant" cause or "the major contributing factor" of any disability; and excluding injuries for which current work is merely the triggering factor. These changes are reinforced by heightened evidentiary standards for claimants, including requirements of 'objective medical evidence' (discussed below), and by stricter rules and shorter time limits for reopening prior claims when progression of a condition occurs.

Judicial application of these statutory developments illustrates their effects on workers. For example, the Oregon rule requiring that work be the predominant cause of the injury resulted in a finding that when a preexisting condition predisposed a worker to airway irritation, the resulting, occupationally-caused, lung disease was not compensable. In Illinois, a reviewing court denied benefits for occupational lung disease to a coal miner who presented medical evidence of occupational lung disease and who had worked for 25 years in underground mines where he was "continually exposed to coal dust"; the court nevertheless found, despite a statutory presumption of causation in cases involving miners' lung diseases, that his claim was appropriately denied, based upon the claimant's smoking history and conflicting medical testimony. . . .

Procedural and evidentiary changes in claims processing that restrict compensability

Finally, statutory and administrative changes in procedural rules and evidentiary standards are resulting in restrictions on the number of compensable claims in many programs. For example, statutory changes in a number of states now require a claimant to prove both that the injury was primarily work-related and that the resulting medical condition can be documented by 'objective medical' evidence. The requirement for objective evidence excludes claims based upon subjective reports of patients that cannot be substantiated by objective evidence, including debilitating musculoskeletal injuries that involve soft tissue damage and reports of pain and psychological impairment. These heightened requirements appear to be rooted both in a desire to save money and in a distrust of subjective injury reports.

In addition, claimants are sometimes asked to meet increasingly strict burdens of proof. In a landmark case under the federal black lung compensation law, the U.S. Supreme Court . . . ruled that, due to requirements in the Administrative Procedures Act, claimants must prove their cases by a "preponderance of the evidence." The result was a reduction in the number of approved claims. Amendments to some state statutes now require, either in all claims or for specifically delineated ones, that claimants meet this "preponderance" standard

or, for some injuries or diseases, the even more difficult standard of "clear and convincing evidence." Because many workers' compensation programs gave claimants the benefit of the doubt in close cases in the past, these changes are significant.

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[Testimony by JB for 10 Oct Hearing]