

**COMMENTS TO GUIDELINES FOR PHYSICIANS PANEL
DETERMINATIONS ON WORKER REQUESTS FOR ASSISTANCE IN FILING
FOR STATE WORKERS' COMPENSATION BENEFITS, 66 Fed. Reg. 46742
(9/7/01)**

October 8, 2001

Honeywell Federal Manufacturing & Technologies, LLC, is the management and operating contractor at the United States Department of Energy's Kansas City Plant. Although the proposed rule does not contemplate that the contractor is an active participant in the physicians panel process, Honeywell has a few comments from a contractor's perspective.

Information Gathering

Honeywell appreciates that Congress is requiring DOE to establish an expedited, simplified procedure for processing legitimate workers compensation claims relating to toxic exposures at DOE facilities. To fulfill this intent, it is clear that DOE is designing a system that is non-adversarial in nature. Nevertheless, DOE also has an obligation to determine when a claim is not valid. The job of the physicians panel will be challenging, particularly from a causation perspective. Diseases caused by toxic exposures also can result from non-work related issues, including non-work related exposures and genetics. Even the issue of exposure at work often is a matter of dispute.

While the proposed rules give the physicians panel and the DOE program offices authority to gather all relevant evidence, more can be done to ensure that all relevant evidence is in fact considered, including evidence that may point out that a particular claim is not valid. DOE should consider revising the proposed rule to enhance the prospect of gathering all relevant evidence.

One way to do this would be to more clearly specify the duties and obligations of the physicians panel and program offices. Currently, the obligations are very discretionary. For example, the physicians panel "should review" all records relating to an application that "may include" such clearly relevant evidence as exposure records. Section 852.8. Similarly, although the rules give the program office the ability to gather records, nothing requires it to do so. We recommend that DOE mandate duties that the program office gather all relevant information available, including information that might support a finding that a claim is invalid. The physicians panel also must be required to review all relevant information, both supportive and non-supportive, and render a determination based on all of the information.

Even though the contractor is not a party to the proceeding, a contractor could have available information relevant to a determination, particularly on causation. DOE should consider that the rules require notification to contractors having employed claimants that an application has been filed, and an opportunity to provide information that may be relevant to the panel's determination.

Finally, though we can appreciate that the application process must be simplified for the claimant, claimants should be required to provide any information at all relevant to causation, whether or not it is supportive of the claim. Claimants should have an affirmative duty, for example, to provide the panel with information regarding exposures to toxic substances outside the DOE facility including at other places of employment. The rule also should require the claimant to provide a sufficient and complete personal medical history, in a form to be developed by the physicians panel, at the outset of the claim.

Application of State Standards of Liability

The intent of the rules appears to be designed around applying a state's workers compensation standards to the claim rather than, for example, easing the burden of proving that a particular claimant is entitled to a remedy against a particular contractor. It does not appear, however, that the process in general, including the determination of the physician's panel, will properly account for the peculiarities of state law in every case. The rules, in particular, must take into consideration state laws that determine responsibility among multiple employers.

Under the proposed rule, the program office will review an application against standards negotiated in state agreements to determine whether an application "can satisfy" the applicable criteria. Section 852.6. As a practical matter, all facts may not be available to make that determination based on the application, particularly facts relating to the potential responsibility of employers other than the DOE contractor. Once the application is considered by the physicians panel, the panel only determines whether, in effect, there is a basis to conclude that a claimant's disease is associated with exposure to toxic substances at a DOE facility. Section 852.7. Under some state laws, even a causal connection between workplace exposure and disease may be insufficient for liability.

An example of this is the state of Missouri which applies the "last exposure rule" in determining which of several employers may be legally liable in the case of toxic exposures. Under this rule, the last employer to have exposed an employee to a workplace hazardous substance causing a disease is liable for the full amount of coverage, notwithstanding that exposures from other employers may have at least contributed (or perhaps even actually caused) the disease.

It is not clear how these new rules would ensure that state laws such as the last exposure rule will receive appropriate consideration. DOE should not ignore liability rules such as the last exposure rule. Such rules have been decided upon by states as an appropriate mechanism to determine which of several employers will bear responsibility, to the ultimate benefit of both employees and employers. DOE, on occasion, must pay out on a claim under the last exposure rule even though another employer might be more appropriately *factually* responsible for a work-related disease. DOE and taxpayers would bear a disproportionate share of workers compensation responsibility if these rules do not properly account for state laws that determine responsibility among employers.

Result of Physician's Determination

The proposed rule states that, once the panel makes a positive determination for the claimant, the program office will assist the claimant in filing a workers compensation claim. At least under Missouri law, the majority of workers compensation matters are resolved prior to filing a claim. The employer sends the employee to a qualified physician for any necessary treatment plus an independent disability rating once maximum medical improvement is achieved, and the employer and employee then finally resolve the case with a disability payment that is approved by the workers compensation administration at a conference. The filing of a claim typically is an action that indicates a matter is disputed and must be resolved adjudicatively. Resolving the matter prior to filing the claim is faster and less expensive. To ensure that the fastest, most efficient process for providing benefits is achieved, we recommend that Section 852.18(a)(1) be amended to read that the program office will "assist the applicant in receiving workers compensation benefits by, including, but not limited to, working with the DOE contractor, the insurer, the applicant, and the relevant State's workers compensation system in the payment of all benefits, and, if necessary, filing a claim with the relevant State's workers compensation system."

Nature of Workers Compensation Remedy

The proposed rules are focused on whether to "accept" a workers compensation claim that has been filed in state court. The rules also state that DOE may direct a contractor not to contest "the claim or any award." Very often, the major issue in workers compensation is not whether to "accept" the claim as valid and work-related, but rather, determining the remedy for the claimant. Based on a fair reading of the proposed rule, the physicians panel and program office plays no role in determining the extent of the remedy to an employee filing a workers compensation claim. Accordingly, contractors will be free to resolve issues of, for example, partial versus total disability, and extent of partial disability, in the traditional manner before the state's workers compensation adjudicative body. If this assumption is inaccurate, these rules need to clarify the role of the program office and or the physician's panel after a claim has been "accepted" by the contractor in the state workers compensation proceeding. Moreover, the rules need to clarify whether a directive that a contractor "not contest... any award" limits the contractor's traditional duty to work within the workers' compensation system to fashion an appropriate remedy.

Allowability of Costs

As mentioned above, these rules provide that program offices may direct contractors not to contest a particular workers compensation claim. It is presumed that any costs resulting from the workers' compensation proceeding will thereafter be an allowable cost to contractors without reservation, although the proposed rules do not

explicitly state as much. Contractors would appreciate clarification of this matter in the final rule.

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