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Building and Construction Trades Department, AFL-CIO

Statement of George Jones Government Relations Representative

Guidelines for Physicians Panel Determinations on Worker Requests for Assistance in Filing for State Workers' Compensation Benefits

Hearing Before the Department of Energy
Office of Worker Advocacy, EH-8
1000 Independence Avenue, SW
Washington, DC 20585

October 10, 2001

My name is George Jones and I am the Government Relations Representative for the Building and Construction Trades Department, AFL-CIO. I have a statement that I would like to present to you today and I am also submitting a more detailed statement on behalf of President Sullivan of the BCTD concerning these proposed Guidelines. Our comments are submitted by the Building and Construction Trades Department, AFL-CIO on behalf of all of its affiliated International Unions, and the several hundred thousand members of these unions who have been employed at DOE facilities throughout our country.

I would also like to let you know that I have first hand experience working at a DOE facility. I was employed for many years at DOE's Oak Ridge facility. I know first hand the dedication of our members to the mission of the Department. Unfortunately, I also know of the difficulties and problems that our workers have had with illness and the inability for them to receive appropriate treatment and workers' compensation.

The basic problem with the current proposed Rule is that the Department of Energy is proposing to create the equivalent of a claims adjudication system that is not contemplated by the Statute or Congressional intent.

The proposed Rule inappropriately defers to individual states regarding rules of causation and as a consequence, sets up an unworkable and unfair system.

The "more likely than not" criteria for causation moves the goal posts beyond where Congress intended by creating a more stringent barrier for victims to overcome.

Congress intended these rules to be a relatively simple and straightforward way for the DOE to assist workers in obtaining benefits under their State workers' compensation program. They drafted legislation for a physicians panel to determine whether the illness arose out of and in the course of employment. The statute then authorizes the DOE to pay the claim through a mechanism whereby DOE would instruct the contractor not to defend the claim in the State system, thereby setting the stage for the contractor to bill the costs of that claim back to the DOE.

While perhaps not the most ideal arrangement, a system was designed to assure that workers whose claims would otherwise have been barred by various restrictions under State law, including statutes of limitations, standards of causation, and other factors, would be able to receive that State's workers' compensation benefits.

However, what we have in this proposed Rule turns Congress' intent on its head. This Rule, if allowed to become final, sets up a system that is almost certainly going to make sure that workers do not receive benefits, that their claims will not be processed or approved, and that, in reality, would only provide a very narrow window for very few claimants to receive any benefits.

This contrasts sharply with the more reasonable approach that would provide for many claimants that was articulated by DOE during its many hearings around the United States in 1999 and 2000, and indeed, during the public town meetings held around the country in recent months.

There are two fundamental areas where we dispute DOE's interpretation of the Act.

First -- Congress Did Not Intend for DOE to Follow State Compensation Statutes Regarding Eligibility. Causality and Timeliness.

These deficiencies were acknowledged by DOE in public hearings in 2000 and in Town Hall meetings during the summer of 2001. Clearly, Congress recognized that toxic illnesses have been caused by work at DOE facilities and also recognized that the state statutes do not provide the remedy for these toxic illnesses that workers should be entitled to. Accordingly, we therefore believe that DOE must reconsider its interpretation of the congressional intent and replace its current interpretation with the one which Congress intended. Namely, that **uniform national standards be established for eligibility and causality that can be applied by the physicians panels, and payment of benefits be based on what the state statutes provide once DOE has accepted the claim based on the findings of the physicians panels.**

Second -- Congress Did Not Intend that DOE Contractors or their Insurers Be Responsible for Paying these Retroactive Claims.

In many instances the contractors no longer exist. This is particularly true for the legacy sites, but it also applies to all current sites that have been in operation for many years. In many instances it may even be hard to establish which insurer(s) are liable for claims, and

some claims may span employment across many different DOE facilities involving many different employers and insurance carriers.

The DOE position stated in the proposed Rule is contrary to the interpretation of the statute presented by DOE throughout numerous public meetings and hearings, where they clearly stated the intent to find ways to pay for these claims in such a manner that they not be charged to any contractor or insurer without having some mechanism of indemnifying or reimbursing the contractors or insurance carriers for these costs.

Accordingly, DOE should withdraw the proposed interpretation of congressional intent and replace its current interpretation with the one which Congress intended. Namely, that **DOE will reimburse contractors or their carriers for any claims payments made under Subtitle D provided that the contractor or insurance carrier agrees to abide by the intent of DOE Notice 350.6 to accept valid claims.**

A word about several other matters of concern:

1. Evidentiary Requirements

In section 852.7, the Rule defines the burden of proof to be met as being “more likely than not” rather than the “as likely as not” standard used elsewhere in the Act. The Rule provides no justification for this definition, except to say its definition is more consistent with the proof of causation required by the Act’s provisions for the physician panels. In truth, the whole rationale of the Act is that DOE imposed toxic hazards on workers, and that DOE used the State laws to the fullest to deny workers’ compensation for the illnesses caused by those hazards. To correct this, the Act, as a whole, must be seen as a remedy of this history. Therefore, for DOE to pick the more limited of the two standards for burden of proof is inconsistent with Congressional intent. The difference between the two standards for purposes of the determination of causality may be more theoretical than real. None the less, DOE, by choosing a standard that clearly gives the impression of being tougher on the claimant, once again sends the wrong message to the claimant and again unnecessarily ratchets up the burden upon the claimant.

2. The Role of Physicians Panels – Sections 852.7-14.

The proper domain of physicians with expertise in occupational medicine is to render a judgment about medical causation. They are to bring to bear the full knowledge available from all medically relevant disciplines, such as biology, epidemiology, toxicology and pathology, to a question about the relationship between a set of exposures and subsequent illness. That judgment about medical causation will not vary from state to state, because it depends on biology, not on legal or administrative inventions. Physician panels should base their decisions only on medically relevant factors. Physician panels that review DOE claims should not be asked to consider any legal or administrative refinements of causal criteria in making their determinations. Therefore, Section 852.11 (b) (4) should be deleted.

3. The Obligation of DOE to Assist Workers

We would also like to use this opportunity to raise important issues regarding the progress that DOE has made in fulfilling its legal obligation under Subpart D of EEOICA to assist DOE workers obtain compensation.

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.

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.

In conclusion --

We believe that the DOE has sorely missed the mark in these proposed guidelines.

In our view Congress enacted the Act and the provisions of Subpart D to provide a pathway for ill workers to obtain relief under the State Workers' Compensation systems. The rules proposed by the Department of Energy do nothing but erect multiple barriers to these victims. It is not what Congress intended and it is certainly not what the DOE advocated before Congress as to its intent in promoting the legislation.

The aim of this legislation was to improve a victim's ability to pursue a claim. These proposals, unfortunately, will make it no easier, and much more difficult, for workers to successfully process a claim at DOE and then in the State systems.

The BCTD is committed to not only helping its members but all workers who were employed at DOE facilities and suffered the illnesses that have led to Congress enacting this program. We are as committed to working with the Department of Energy to achieve a workable set of guidelines for physicians, as we are committed to working with the Department of Labor to assure that its part of the program is fair and equitable to claimants.

We will be pleased to continue working with you to achieve the correct result for those who need this relief.

Building and Construction Trades Department, AFL-CIO

Comments Concerning Guidelines for Physicians Panel Determinations on Worker Requests for Assistance in Filing for State Workers' Compensation Benefits

Submitted to

Office of Worker Advocacy, EH-8
U.S. Department of Energy
1000 Independence Avenue, SW
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These comments are submitted by the Building and Construction Trades Department, AFL-CIO (BCTD) on behalf of all its affiliated International Unions, and the several hundred thousand members of these unions who have been employed at DOE facilities throughout our country.

Summary Comments Concerning the Overall Intent of the Rule

The DOE is proposing the equivalent of a claims adjudication system that is not contemplated by the Statute, and we believe that there are several important issues that must be addressed by the DOE with respect to the proposed Rule.

First, the proposed Rule sets criteria that are not contemplated by the Statute or congressional intent. Second, the proposed Rule inappropriately defers to individual states regarding rules of causation and as a consequence, sets up an unworkable and unfair system. And, finally, the "more likely than not" criteria for causation once again moves the goal posts beyond where Congress intended by creating a more stringent barrier for victims to overcome.

Congress intended these rules to be a relatively simple and straightforward way for the DOE to assist workers in obtaining benefits under their State workers' compensation program by providing a mechanism for determining whether the illness arose out of and in the course of employment [Physician panel determination] and then authorizing the DOE to pay the claim through a mechanism whereby DOE would instruct the contractor not to defend the claim in the State system setting the stage for the contractor (employer) to bill the costs of that claim back to the DOE.

While perhaps not the most ideal arrangement, the construct is designed to assure that workers

whose claims would otherwise have been barred by various restrictions under State law including statutes of limitations, standards of causation, and other factors would be able to receive that State's workers' compensation benefits.

What we have in this proposal turns this concept on its head. This Rule, if allowed to become final, sets up a system that is almost certainly going to make sure that workers do not receive benefits, that their claims will not be processed or approved, and that provides a very narrow window for a few claimants. This contrasts sharply with the more reasonable approach articulated by DOE during its many hearings around the United States in 1999 and 2000, and indeed, during the public town meetings held around the country in recent months that would provide for many claimants.

Basic Construct

DOE asserts that the Rule is intended to implement Subtitle D of the Act. The Rule not only does not comply with the Act, but as now constructed, circumvents the Act. The basic construct of the Rule must be recast to conform with the Act, and that any further implementation of the Rule should be delayed until such time as the procedures are rewritten to conform to the intent of the Act..

There are two fundamental areas where we dispute DOE's interpretation of the Act.

Congress Did Not Intend for DOE to Follow State Compensation Statutes Regarding Eligibility and Causality. Congress passed Subtitle D recognizing the serious deficiencies which reside in state statutes regarding compensation of toxic illnesses. [See Preamble] These deficiencies include (but are not limited to):

Eligibility. Many statutes consider toxic illnesses as being "illnesses of ordinary life" and therefore exclude compensation for them.

Causality. Many statutes preclude consideration of multi-factorial etiologies.

Timeliness. Many statutes preclude compensation for long-latent illnesses due to the need to file the claim within a short time period from time of exposure.

These deficiencies were acknowledged by DOE in public hearings in 2000 and in Town Hall meetings during the summer of 2001. Clearly, Congress recognized that toxic illnesses have been caused by work at DOE facilities and also recognized that the state statutes do not provide the remedy for these toxic illnesses that workers should be entitled to. The failure of the State

statutes resides in their limited definitions of eligibility and causality. For DOE to contend in this Rule that the Act intended DOE to follow state law with regard to eligibility and causality defies logic. If that were the case, there would be no need for Subtitle D. Indeed, in Part II (N) which refers to Section 852.5 of the Rule, DOE itself questions the reliance on State law and asks comments on whether "State claims' timeliness should be excluded..." DOE is intentionally defying the Act's intent, in the face of its own doubts about the practicality of doing so, in order to limit the possibility of claimants to obtain compensation they are entitled to under the Act. This approach comports with the approach that DOE has taken historically, and which was revealed in all its horrors during the public hearings that DOE held across the nation in 2000. It was this history which led Congress to enact the Act and include in it Subtitle D. Accordingly, we therefore believe that DOE must reconsider its interpretation of the Congressional intent and replace its current interpretation with the one which Congress intended. Namely, that **uniform national standards be established for eligibility and causality that can be applied by the physicians panels, and payment of benefits be based on what the state statutes provide once DOE has accepted the claim based on the findings of the physicians panels.**

Congress Did Not Intend that DOE Contractors or their Insurers Be Responsible for Paying these Retroactive Claims. It is disingenuous of the Rule to interpret the Congressional intent as being that State statutes should apply but that contractors or insurers should forego their right given to them by these statutes to defend the claims filed under the Subtitle D. It is also a very impractical construct. In many instances the contractors no longer exist. This is particularly true for the legacy sites, but it also applies to all current sites that have been operation for many years. In many instances it may even be hard to establish which insurer(s) are liable for claims, and some claims may span employment across many different DOE facilities involving many different employers and insurance carriers. And the DOE position stated in the proposed Rule is contrary to the interpretation of the statute presented by DOE throughout numerous public meetings and hearings, where they clearly stated the intent to find ways to pay for these claims in such a manner that they not be charged to any contractor or insurer without having some mechanism of indemnifying or reimbursing the contractors or insurance carriers for these costs. At least one State Workers' Compensation Director has said that it would be in violation of his State's workers' compensation statute to sign a model Memorandum of Agreement with DOE in which employers and insurance carriers would be denied their rights unless DOE would assume the liabilities that reside with claims filed under Subtitle D which DOE, as a result of the findings of the physicians panels, have deemed to be "valid" claims.

Accordingly, DOE should withdraw the proposed interpretation of Congressional intent and replace its current interpretation with the one which Congress intended. Namely, that **DOE will reimburse contractors or their carriers for any claims payments made under Subtitle D provided that the contractor or insurance carrier agrees to abide by the intent of DOE Notice 350.6 to accept valid claims.**

Evidentiary Requirements

In section 852.7 the Rule defines the burden of proof to be met as being “more likely than not” rather than the “as likely as not” standard used elsewhere in the Act. The Rule provides no justification for this definition, except to say its definition is more consistent with the proof of causation required by the Act’s provisions for the physician panels. This is again disingenuous on the part of DOE, and is a further reflection of the apparent bias of the Department to make it as difficult as possible for claim to succeed. The whole rationale of the Act is that DOE imposed toxic hazards on workers, and that DOE used the State laws to the fullest to deny workers’ compensation for the illnesses caused by those hazards. The Act as a whole must be seen as remedial of this history. Therefore, for DOE to pick the more limited of the two standards for burden of proof is inconsistent with the Congressional intent. The difference between the two standards for purposes of the determination of causality may be more theoretical than real. None the less, DOE, by choosing a standard that clearly gives the impression of being tougher on the claimant once again sends the wrong message to the claimant and again unnecessarily ratchets up the burden upon the claimant.

The Role of Physicians Panels – Sections 852.7-14.

The proper domain of physicians with expertise in occupational medicine is to render a judgment about medical causation. That is, they are to bring to bear the full knowledge available from all medically relevant disciplines – biology, epidemiology, toxicology, pathology, etc. – to a question about the relationship between a set of exposures and subsequent illness. That judgment about medical causation will not vary from state to state, because it depends on biology, not on legal or administrative inventions. Physician panels should base their decisions only on medically relevant factors. Physician panels that review DOE claims should not be asked to consider any legal or administrative refinements of causal criteria in making their determinations. Section 852.11 (b) (4) should be deleted.

In this regard we refer you to the Statement of Dr. Laura Welch, Chief of Occupational Medicine at Washington Hospital Center and a respected Occupational Health Physician. See also the Statement of Dr. Steve Markowitz, Director of the Center for the Biology of Natural Systems of Queens College and Adjunct Professor of Mount Sinai School of Medicine, New York City, another exceptionally well qualified occupational medicine physician.

Comments on Specific Sections

852.1 Purpose and Scope.

In the Preamble to the Rule, DOE states that Section 852.1(b) requires that applications must meet three criteria. The application must be based on the illness or death of a DOE contractor employee. The illness or death must be caused by exposure to a toxic substance. And, the exposure must occurred during the course of employment at a DOE facility. The components of the Rule that follow this definition of scope are inconsistent with this purpose. If the overall

purpose of the Rule is to make sure the provisions of State law are applied when considering eligibility, causality and benefits the intent cannot be met. The fact is that some State laws are incompatible with the intent as stated in Section 852.1(b)..

852.2.J-K State Agreements.

Without including an example of the proposed Agreements included with the Rule, it is difficult to comment on what the Agreements should not contain or should contain. The Rule will not work in its basic construct, and if the Agreements are drafted according to the basic construct, then they will not work either. In our view, the Agreements must contain at least two provisions:

1. In order to meet the intent of the Act, the Agreements must provide for Federal standards to be applied in determining eligibility and causality.
2. It must provide for reimbursement (or indemnification) to contractors or insurance carriers for claims accepted under Subtitle D if DOE intends to rectify its history of relying on scorched earth defenses against claims filed by workers.

These State Agreements should be considered ministerial in content and should not constitute a separate set of barriers to be overcome by those seeking to file claims.

852.3 Assistance Centers.

The Rule intends for the existing DOE Resource Centers or Former Worker Medical Screening Programs to assist workers with preparing applications under Subtitle D. The fact is that neither of these programs is designed to or have the expertise to interpret State law regarding eligibility or causality, which can be very complex; nor do they have the funding to do so.

DOE should use the Former Worker Medical Surveillance Programs to accelerate and to enhance the activities that it has undertaken to implement Subpart D of EEOICPA. DOE should be much more proactive in coordinating the requirements placed upon applicants under Subpart D with the activities it supports under the Former Worker Medical Surveillance Program. Such action will benefit both the applicants and the DOE.

852.5-6 Screening Procedures & State Agreements.

We believe that both the proposed screening mechanism and the alternative mechanism are inappropriate. To rely on State workers' compensation offices to conduct screening of claims for DOE is not acceptable. The whole intent of Subpart D was to get away from states rejecting out of hand claims for compensation for toxic illnesses. It is inappropriate for DOE to use the same State agencies that so have frequently been a party to the denial of the claims of workers to implement these provisions of the Act. .

information be gathered or interpreted? This is significant in light of the complex work histories of construction workers. The Former Workers Program should be utilized in assisting the Program Office and applicants to develop such work kind work history that the physicians panels will need in order to make a valid determination for a construction worker.

852.16 Acceptance of Physicians Panels Determinations.

This section should be combined with Section 852.15 so as to make clear that the Program Office does not have alternative choices regarding the acceptance of the physician panel determination. The comments regarding the need to clarify "good cause" and "doubt" must be reconciled with the question of "significant evidence to the contrary." It is important that the Program Office not be given the opportunity to second guess the physician panel except for very unusual circumstances which should be carefully spelled out.

852.17 Appeals Mechanism.

The earlier comments regarding the Program Office's limitation on not submitting an application to the physician panel, or not accepting the panel's determination apply to the appeals process. Our statement suggests limiting the Program Office's duties to assisting the applicant in developing the claim and assuring that the necessary information is included in the materials provided to the physician panel and subsequently to the State agency rather than in substituting its judgment for that of the physician panel. This section should be modified accordingly.

852.18 Effect of Acceptance.

See our earlier comments on the importance of DOE indemnification of the contractor for the payment of the claims where the contractor is not to contest the action.

Additional Observations

Payment for Medical Expenses of Claimants

The proposed rules make no allowance for DOE to pay any medical expenses associated with claims submitted under Subpart D. DOE has asked in part Q of the Preamble for comment on proposing regulations to permit the DOE to pay for the development of medical evidence. Our position is that such payment is both permitted and as a practical matter, required under the Act. The DOE should pay for the expenses that claimants incur as a result of specific medical tests that are required to develop the claim, and certainly for any medical examinations that the physician panels require to make a final decision regarding causality of disease.

Summary

Overall, we believe that the DOE has sorely missed the mark in these proposed guidelines. In our view Congress enacted the Act and the provisions of Subpart D to provide a pathway for the ill workers to obtain relief under the State Workers Compensation systems. The rules proposed by DOL do nothing but erect multiple barriers to these victims. It is not what Congress intended and it is certainly not what the DOE advocated before Congress as to its intent in promoting the legislation.

The aim of this legislation was to improve the victim's ability to pursue a claim. These proposals, unfortunately, will make it no easier, and probably much more difficult, for these workers to successfully process a claim at DOE and then in the State systems. The BCTD is committed to helping its members and all of the other workers who were employed at these facilities and suffered the illnesses that have led to Congress enacting this program. We are committed to working with the Department of Energy to achieve a workable set of guidelines for physicians as we are committed to working with DOL to assure that its part of the program is fair and equitable to the claimants. We will be pleased to continue working with you to achieve the correct result for those who need this relief.