ALLIANCE OF NUCLEAR WORKER ADVOCACY GROUPS

Coalition for a Healthy Environment, Oak Ridge, TN
Harry Williams 865-693-7249, Janine Anderson 865-984-0786
Janet Michel 865-966-5918

Grassroots Organization of Sick Workers, Craig, CO
Terrie Barrie 970-824-2260, Kay Barker 970-887-3558

Tri-Valley CAREs, Livermore, CA
Robert Schwartz 925-443-7148

New Mexico Alliance for Nuclear Worker Advocates
Dr. Maureen Merritt 505-455-0550

Southern Illinois Nuclear Workers
Dr. Dan McKeel
573-323-8897

SUMMARY OF LEGISLATIVE REFORMS NEEDED FOR THE ENERGY EMPLOYEES OCCUPATIONAL ILLNESS COMPENSATION PROGRAM ACT of 2000

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Summary

The Energy Employees Occupational Illness Compensation Program Act of 2000 (EEOICPA) was passed into law by a bi-partisan Congress in October 2000 and signed into law by two presidents. Nuclear weapons workers who contracted various cancers, chronic beryllium disease, silicosis, or a host of other disabling and life threatening diseases as a result of their exposures to toxic substances believed they would now receive compensation. These workers were placed in harm's way while employed at ultra-hazardous facilities without being fully informed of the potential health effects of working with the plethora of poisons. Finally, after decades of denial, these workers believed they would now be able to receive the medical care and monetary compensation for some of the diseases they had suffered from through a "non-adversarial" and claimant friendly process.

Unfortunately, the initial objective of the law has been intentionally corrupted beyond recognition by its administering agencies. Instead of the compensation being delivered to these claimants or their survivors in a fair and timely manner, a massive bureaucracy grew in just a few short years; consequently, DOL has found the most insidious ways to deny claims. DOL states that they manage this program exactly like they run other workmen's compensation programs by requiring a preponderance of the evidence to prove a claim. Unfortunately, this is exactly the opposite of the original intent of the law. The program is set up to "deny claims by

design." If the former nuclear workers could have qualified for state workmen's compensation before this compensation program was started there would have been no need for Congress to enact this program. The requirements are overly burdensome for claimants because they cannot gain access to records or locate site history exposure. Implementation of the law has actually limited the number of approved claims instead of providing a non-adversarial and claimant friendly program, as intended by Congress.

The major issues these claimants face are summarized below along with suggestions for reforming this historic legislation.

I. Part B

1. Dose Reconstruction and Special Exposure Cohort Petitions

NIOSH has spent millions of dollars developing site profiles and evaluating Special Exposure Cohort petitions. An independent auditor, Sanford Cohen and Associates, when tasked by the Advisory Board on Radiation and Worker Health (The Board) to investigate NIOSH's findings, found serious omissions and/or invalid scientific methodologies. Seven years after passage of the EEOICPA, NIOSH still has a backlog of over 6,000 dose reconstructions, with the possibility of hundreds or even thousands that will need to be reworked due to revisions to the dose reconstruction methods. In addition, NIOSH has adopted the policy of using surrogate data for facilities that do not have adequate monitoring records and/or co-worker data for individuals who do not have complete dosimetry information.

Solution

Reform the legislation to read that if a facility does not have complete monitoring records for the site or for an individual, the facility or individual will automatically be considered a Special Exposure Cohort. The reform will apply to the gaseous diffusion facilities that were legislated as Special Exposure Cohort in the original Act for the post 1992 years. NIOSH will submit a list of facilities that fall into this category within 60 days of enactment of the reform legislation. No data from other facilities or individuals are to be used in reconstructing dose. This change will not only be fair to the claimants whose records were destroyed, lost or were not properly monitored, but will encourage the Department of Energy to keep accurate records for current workers.

Also, this will alleviate the need for the Advisory Board on Radiation and Worker Health, although, oversight will still be needed. This will be addressed later in the summary.

2. Approved Cancers Limited to 22

NIOSH was tasked to determine if additional cancers should be covered under Part B. They reported to Congress that only one should be added – basil cell carcinoma. However, they neglected to completely search available scientific literature, including their own epidemiological reports which show a prevalence of prostate cancer among the Pantex and K-25 workers. The National Academy of Science's BIER VII report states that there is no level of radiation below which cancer will not form.

Solution

Claimants and advocates would like to see all cancers eligible for Part B lump sum compensation.

In the event that this is politically unattainable, the following cancers, taken in part from the Veteran's Administration Handbook 1301.01, should be added to the list of cancers compensable under Part B.

1 – Prostate
2 – Skin
3 – Male and female reproductive organs (including uterine and endometrial)
4 – All leukemias, including chronic lymphocytic leukemia
5 – Cancers of the renal pelves, ureters and urethra
6 – Parathyroid Adenoma
7 – Benign neoplasms of the brain and central nervous system
8 – Brochio-alveolar carcinoma (a rare lung disease)

Claims for these cancers previously denied for these cancers under the SEC will be reopened.

3. Chronic Beryllium Disease Claims

The Department of Labor (DOL) changed the way they approve claims for Chronic Beryllium Disease (CBD). Until February 2007, DOL allowed a living claimant to use the pre-1993 criteria established by the EEOICPA, and compensated many workers in this manner.

In February 2007, DOL began requiring living claimants to use new criteria, which includes undergoing an invasive procedure (lung lavage) or having a positive LPT test (a test that is only 50% accurate, at best, and was intended for screening workers for CBD not for diagnosing the disease). False readings are common, especially for people who are on steroidal treatment for their lung condition, which is the best known treatment for this disease.

Solution

Delete Section 7384l 13 (A) and use the following criteria for CBD claims

> ***(i) occupational or environmental history, or epidemiologic evidence of beryllium exposure; and***
> ***(iii) any three of the following criteria:***
> > ***(I) Characteristic chest radiographic (or computed tomography (CT)) abnormalities.***
> > ***(II) Restrictive or obstructive lung physiology testing or diffusing lung capacity defect.***
> > ***(III) Lung pathology consistent with chronic beryllium disease.***
> > ***(IV) Clinical course consistent with a chronic respiratory disorder.***
> > ***(V) Immunologic tests showing beryllium sensitivity (skin patch test or beryllium blood test preferred).***

4. 250 Aggregate Day Requirement For Inclusion In Special Exposure Cohort

The law requires that a worker at any of the originally legislated Special Exposure Cohort (SEC) sites must have 250 aggregate days at that facility (along with one of the specified cancers) to be included as a member of the SEC, Section 7384l (14). At first, this qualification appears to be reasonable. However, recent information suggests that these requirements need be revisited under the law. Certain jobs exposed workers to the maximum annual allowable dose in a very short time. The late Ray Slaughter, stated in an interview with a KLAS-TV, Las Vegas television station, that he received the maximum allowable dose in 3 days at the Nevada Test Site. However, if a co-worker was involved in the same incident, which incidentally, was a common occurrence at these nuclear sites, and was only physically present at that site for less than 250 days, this claimant would **not** be eligible for compensation.

Solution

Add "or a shorter duration connected to specific events" after "250 aggregate days" in Section 7384l (14) (A).

II. Part E

The current manner in which DOL is implementing Part E of this program places the burden of proof squarely on the shoulders of the claimant. If the claimant had access to the documents necessary to prove their case in a state workers compensation system, there would be no need for a federal program. DOL does have the documents (Site Exposure Matrix with a Corresponding Disease List) but, refuses to share this information with the claimants – a direct violation of Section 7384v. Also, there are some documents that are still classified which may prevent claimants from proving their

claims. Not all employees had the highest security clearance at these sites and often did not know what they were exposed to while on the job. This makes it even harder for claimants to provide the preponderance of evidence DOL requires.

1. EEOICPA Language

Some of the issues include the interpretation of the law by the administering agencies and is with the language itself. The agencies, in some instances, interpret the law too narrowly.

For instance, Part E Procedure Manual E-500 (3), states that the Claims Examiner must research if it is plausible that a worker was exposed to **a** toxic substance that caused a disease.

A second example is NIOSH's interpretation of Section 7384q (3) (c)

> DEADLINES—(1) Not later than 180 days after the date on which the President receives a petition for designation as members of the Special Exposure Cohort, the Director of the National Institute for Occupational Safety and Health shall submit to the Advisory Board on Radiation and Worker Health a recommendation on that petition, including all supporting documentation.

NIOSH decided that the President received a petition only after NIOSH qualified it for acceptance.

Solution

Clarify the language of the law. For instance, in Section 7384 (5) add "and toxic chemicals." between "radiation" and "beryllium".

Section 7385s-4(c)(A) and 7385s-4(c)(B) should read:

(A) it is at least as likely as not that exposure to toxic substances, including radiation or combination of the two, at a Department of Energy facility was a significant factor in aggravating, contributing to, or causing the illness; and
(B) it is at least as likely as not that the exposure to such toxic substances, including radiation or combination of the two, was related to employment at a Department of Energy facility.

2. Presumptive Disease List

Responding to Congressman Tom Udall's written inquiry, Secretary Chao stated that DOL did not develop a presumptive disease list because Congress did not legislate DOL to do so. DOL ***did*** contract with Econometrica to develop such a list. The full report can be located here:

http://www.dol.gov/esa/regs/compliance/owcp/eeoicp/PartE/econometrica/DOL%20Part%20E%20Final%20Report.htm

Additionally, DOL ignored official Congressional comments on DOL's Final Interim Rules concerning cancer claims under Part E.

Solution

The following diseases will automatically be covered under Part E:

1 – All cancers
2 – Silicosis
3 – Asbestosis, mesothelioma
4 – Lung fibrosis
5 – COPD
6 – Chronic renal insufficiency
7 – Peripheral neuropathy
8 – Chronic encepathalopathy
9 – Occupational Asthma
10 - Pneumoconiosis

For all other diseases, DOL will search the Site Exposure Matrix and, if DOL can determine that a worker had the potential to be exposed to one or more toxins responsible for the disease, that claim will be approved.

3. Wage Loss

DOL currently requires that wage loss be assigned only if a worker is disabled solely from a covered disease. For instance, DOL approved a claimant for peripheral neuropathy, but denied a disease(s) that also contributed to their inability to work and impairment. That worker will not receive wage loss.

Solution

Change Section 7385s2(a)2(A)(i) to read "The Secretary will determine (i) the calendar month during which the employee first experienced wage loss as the result of any covered illness which contributed to the wage loss contracted by that employee

through exposure to toxic substance(s) at a Department of Energy facility;"

4. Amount of Compensation

DOL has a history of delaying claims. NIOSH takes many months to establish dose reconstruction for each claimant. It has been well over seven years since the EEOICPA was passed into law and the cost of living has increased dramatically during that time period. Thus, compensation today does not have the same financial value as compensation received seven years ago.

Additionally, some workers became disabled from toxic exposure(s) at a very young age. Under Part E, placing a cap on their wage loss is not fair due to what their earning potential would have been if they had not disabled.

Solution

A cost of living increase will be added to the original compensation amounts for each year it takes for a claim to be adjudicated. For example, a Part B cancer claim approved today would receive $172,302.83 for a 2% per year Cost of Living increase for a lump sum. The same would apply to Wage Loss and Impairment compensation.

Delete the cap of $250,000. Impairment ratings to remain the same (except for Cost of Living increase.) Claimants will be eligible for wage loss up to 65 years of age.

5. Qualified Survivors

Due to the unnecessary length of time it has taken the administrating agencies to process claims, many claimants have passed away before the claim was adjudicated. Also we are still hearing that Part B claimants are not being advised that they may also apply for Part E. Any claims under B, whether approved or denied must be notified of potential monetary or medical compensation available under Part E. The Claims Examiners should be tasked with the responsibility of advising the Part B claimants of this potential for compensation under Part E.

Solution

Revise the law to read that if a claim has not been decided prior to the death of a worker or survivor, the compensation shall be disbursed according to the schedule under Part B. This provision will be retroactive to October 2000.

6. AWE Sites and Beryllium Vendors Not Eligible for Part E

Excluding AWE sites and Beryllium vendors from Part E is not consistent with the program since uranium miners, millers and transporters can receive Part E benefits.

Solution

Add AWE sites and Beryllium vendors as covered facilities under Part E.

7. Offset for Workers Compensation Settlements

Most state workers compensation settlements include wage loss, impairment, medical and diseases other than the covered disease under EEOICPA. In most cases, these settlements are not separated by wage loss, impairment and medical benefits for these workers. Contrary to the law and their own rules, DOL has deducted these settlements from Part E compensation awards. Please note that Part B claimants do not have an offset unless they were involved in a tort lawsuit. In addition, we suggest that if a tort lawsuit was not filed against DOE or its contractors there should be no offset.

Delete the offset language.

8. Judicial Review

Section 7385s-6 requires that a claimant file a federal lawsuit, after all administrative procedures are exhausted, within a 60-day period. This is an inadequate amount of time for a claimant to obtain legal assistance and to file a complaint. Additionally, the current law does not include the entire language of the Administrative Procedures Act.

Solution

Change the time limit from 60 days to 180 days. Add the language of the Administrative Procedure Act "abuse of discretion or contrary to law" after arbitrary and capricious, located in the last sentence of the section.

9. Time limits to Process a Claim

The agencies have no time limits or constraints to process claims, whether the claims are Part B dose reconstruction, Part E causation or Part E medical.

Solution

The oversight Board, in conjunction with the Ombudsman, will determine the length of time necessary for the administering agencies to process a claim. This determination will be incorporated into the Final Rules.

DOL will issue Final Interim rules within 60 days after enactment of the reform legislation.

III. General Implementation of EEOICPA

1. Lack of Oversight of DOL's Implementation of EEOICPA

There are many areas where DOL has failed the claimant population in administering the EEOICPA. One example is Section 7384v, which requires DOL to assist the claimant in developing their claim. This assistance includes diagnostic testing for Part B diseases. We have heard many CBD claimants explain to us that DOL will **not** pay for an LPT test or a repeated test for bladder cancer. This is not following the initial intent of the law.

Solution

Appoint a Board to oversee the implementation of the reform legislation by the administering agencies for no less than a two-year term. The Board will have the power to review denied claims and reopen them if they find they were improperly denied and to participate in DOL's rule making, and in the development of final bulletins and procedure manuals.

The Office of the Ombudsman will be expanded to include Part B claims and extended indefinitely. The Ombudsman will have the power to investigate allegations, recommend any punishments and/or fines deemed necessary for any misuse of power or misinterpretation of the law. The Ombudsman will assume the responsibility of the Board after the Board is disbanded.

Both entities will file a report to Congress every quarter for the first two years and the Ombudsman will report annually thereafter.

2. Medical Screening

As mentioned above, DOL is required to assist a claimant in developing their claim. Diagnostic testing is a part of this assistance. Many personal physicians are not familiar with the toxins at the workplace and the diseases that may result from exposures to these hazardous materials.

Solution

Medical screening, including diagnostic testing for a variety of diseases, performed by qualified occupational medical physicians will be made available to the claimants.

There may be other sections of the law that will need to be clarified. We would like to discuss the details of the additional language changes with you in the near future.

CONCLUSION

Congress saw fit to reform the EEOICPA in 2004 due to the fact that the responsible administering agencies involved in this historic legislation were remiss in interpreting and implementing the law. We have waited another four years for NIOSH and DOL to show that they will do the right thing by the claimants and follow the letter and initial intent of the law. This has **not** been done. It is time for additional reforms to be legislated immediately and without further delay for these deserving claimants and their families.