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United States Senate

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COMMITTEES:
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COMMERCE, SCIENCE, AND TRANSPORTATION
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RULES AND ADMINISTRATION

February 22, 2019

The Honorable Alexander Acosta
Secretary
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Dear Secretary Acosta:

I write to express strong concerns regarding the final rule published February 8, 2019 by the Workers Compensation Program Office at the U.S. Department of Labor (DOL) regarding Claims for Compensation under the Energy Employees Occupational Illness Compensation Program (EEOCIPA). Attached is a letter my office received that highlights claimant concerns about the new rules and asks that they be repealed. In addition, it appears that the new rules ignore specific recommendations by the DOL Advisory Board on Toxic Substance and Worker Health (the Advisory Board). Those recommendations are included at the end of this letter.

As you may know, a bipartisan coalition in Congress established the Advisory Board in 2015 to provide the DOL Office of Workers Compensation Programs Division of Energy Employees Occupational Illness Compensation (DEEOIC) with advice to improve the program by ensuring that claims are adjudicated in fair and consistent manner and based on the best current medical and scientific knowledge. DOL has repeatedly delayed seating the Board, yet despite these delays and the shortened time in which they have operated, the Advisory Board has provided DEEOIC with key recommendations to improve the program including those listed at the end of this letter.

I am confused by DOL's wholesale rejection of the Advisory Board's recommendations as they relate to the recently published final rules. The men and women who were exposed to radiation and toxic substances at our nation's nuclear facilities deserve to have their claims evaluated in a fair and equitable manner. ANWAG points to several examples in which the new rules appear more restrictive than the statute. For example, the most recent changes increase the burden on claimants by requiring DOL's permission for claimants to change physicians by first proving to DOL that a change is warranted. The rules also make it harder for claimants to receive seamless care when transitioning from inpatient to home care by requiring pre-authorization for home health care and changing the effective date of care. Finally, the new rules also require the claimant to be the individual who files the OWCP form requesting initial home healthcare, nursing home or assisted living services. This requirement places another burden on the claimant population that could be better met by healthcare professionals.

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I am particularly concerned that the new rules may violate Executive Order 13175 that requires DOL's prior consultation with tribal officials given the impact of the changes on claimants under the Radiation Exposure Compensation Act (RECA) claimants. Further, the rules apparently provide DOL with maximum administrative discretion without full regard for the adverse impact to claimants. I urge DOL to consider the attached request given the preponderance of concerns expressed by the Advisory Board, worker advocates, and claimants.

If you have any questions about this request, please contact my staff responsible for EEOICPA and DOL oversight, Michele Jacquez-Ortiz at (505) 988-6511 or Jeff Lopez at (202) 224-6621. Thank you for your attention to this matter.

Sincerely,

Tom Udall,
United States Senator

Attachment(s) 2:

1. Proposed Changes in DOL EEOICP Regulations, Comments and Recommendations, DOL Toxic Substances and Worker Health Advisory Board
2. Petition to repeal Final Rules for Energy Employees Occupational Illness Compensation Program, Alliance of Nuclear Worker Advocacy Groups

Proposed Changes in DOL EEOICP Regulations

Comments and Recommendations
DOL Toxic Substances and Worker Health Advisory Board

1. §30.231 (a) Proof of employment (p. 40)

The Board finds that the proposed new language is vague and contradictory. The Board notes that the proposed new language contradicts Section 30.111 (c) in a manner that limits the value of affidavits. If the goal is to increase the likelihood that affidavits are valid, then guidelines on what elements need to be included in an affidavit should be issued to clarify the claimants' task of proving an employment history in the absence of other evidence.

The Board recommends that the proposed rule changes not be made.

2. §30.112 (b) (3) Evidence of covered employment (p. 27)

The Board proposes the following language for this section:

If the only evidence of covered employment is a written affidavit or declaration subject to penalty of perjury by the employee, survivor or any other person, and DOE or another entity either disagrees with the assertion of covered employment or cannot concur or disagree with the assertion of covered employment, then OWCP will evaluate the probative value of the affidavit under § 30.111.

3. §30.231 (b) Proof of exposure to a toxic substance (p. 40)

The Board recommends that DOL issue guidelines on how OWCP determines reliability of information under this section.

The Board recommends that the following language be added to this section:

(3) Occupational history or affidavit obtained from the claimant and/or co-workers; or
(4) Occupational history obtained by a health care provider other than those who are part of a DOE-sponsored Former Worker Program; or
(5) Any other entity or source that is deemed by OWCP to provide reliable information to establish that the employee was exposed to a toxic substance at a DOE facility or RECA section 5 facility.

4. §30.232(a) (1) and (2) Establishing diagnosis of covered illness (pp. 40-41)

The Board believes that sufficient expertise in the causation of occupational illness is unlikely to be available in DOE communities and the time commitment of physicians to produce such a documented report on causation makes this requirement unrealistic and places too great a burden on claimants.

The Board recommends that DOL remove the requirement that the claimant must produce written medical evidence wherein the physician describes the "reasoning for his or her opinion regarding causation." The Board recommends that, if the claimant submits an opinion of a qualified physician as defined in section 30.230(d)(2) (iii) that provides a rationale for determining that the employee's illness was caused, contributed to, or aggravated by the exposure, then that opinion should be assessed for its probative value by OWCP.

In addition, the Board is concerned that "Any other evidence OWCP may deem necessary..." is overly broad, unnecessary, and may form the basis for adversarial interactions between OCWP and claimants. The Board is concerned that the change in language from "an illness that may have arisen from exposure to a toxic substance" to "an illness that resulted from an exposure to a toxic substance" places an unnecessary burden on the claimant.

5. §30.230(d)(2)(iii) Physician opinion about contribution or causation (p. 39)

The Board notes that the phrase: "An opinion of a qualified physician with expertise in treating, diagnosing or researching the illness claimed to be caused or aggravated by the alleged exposure" differs from §30.230(d)(1)(ii) " ... was a significant factor in aggravating, contributing to, or causing the illness" and should be made consistent with language in §30.230(d)(1)(ii).

6. §30.405(b) and (c) Change of physicians (p. 55)

The Board believes that claimants should be able to change physicians without approval of the OWCP. The Board notes that the added language does not clarify what the claimants need to produce and finds it implausible that claimants can provide medical or factual evidence in support of requests to change physicians.

The Board recommends that the proposed changes in §30.405(b) be eliminated and be replaced by the following: "The claimant may cite personal preference as a valid reason to change physicians." The language of 30.405(c) should be changed in accordance with this recommendation.

7. §30.206(a) Proof of employment with regards to beryllium use (p. 31)

The Board is uncertain about the reason for the apparent narrowing of beryllium-using sites and is concerned that the change might unnecessarily limit benefits to berylliumexposed workers who should be eligible for the program.

This same comment applies to §30.5 (j) (p. 14)

8. §30.509(c) Use of AMA Guides (p. 65)

The Board notes that codifying the 5th edition in a regulation may reduce OWCP's flexibility in using future editions of the AMA Guides. Citation to a specific edition of the AMA Guides in the DEEOIC procedures manual will obviate the need for new regulations to adopt updated Guides.

9. §30.805 and §30.806 Evidence of wage-loss (p. 96)

The Board recommends that wage loss should be compensated if the covered illness contributed to retirement; e.g., a worker was told that work was no longer available due to his covered illness and that worker took early retirement.

The Board recommends that the phrases "was caused" and "but for" in Section 30.805 (a) (3) be replaced by the language of the standard of "aggravated, contributed to or caused" that appears in the EEOICA Act. That is, if the covered illness aggravated, contributed to or caused the health problems associated with wage loss in the trigger month, then that wage loss should qualify for benefits.

physician's fully explained and reasoned decision…" The Board recommends that the phrase "convince the fact finder" in line 2 be replaced with the phrase "allow the fact finder to determine."

10. §30.5(ee) Definitions – definition of "physician" (p. 17) 9. The Board recommends that "includes" should be restored so the definition reads "Physician includes surgeons…" in order to be more inclusive of physicians who typically treat patients with work-related illnesses (e.g., family practice physicians, internists, etc)

11. §30.5 (x)(2)(iii) Delivery or removal of goods (p.16)

The Board recognizes that workers who were exposed to hazardous materials in the course of delivery or removal of goods or materials from a DOE facility should be included in coverage by the EEOICP. The Board recommends that the sentence beginning with "The delivery or removal of goods…" be eliminated.

12. The Board notes that the regulations make frequent reference to causation. The Board also notes that the EEOICPA Act refers to "aggravation, contribution to, and causation." The Board therefore recommends that the proposed changes in the regulations reflect the language of the Act.

ANWAG
Alliance of Nuclear Worker Advocacy Groups

February 15, 2019

Alexander Acosta
Secretary
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Subject: Petition to repeal Final Rules for Energy Employees Occupational Illness Compensation Program

Dear Secretary Acosta:

Pursuant to 5 U.S.C. § 553 (e) the Alliance of Nuclear Worker Advocacy Groups (ANWAG) petition the Department of Labor to repeal the Final Rules issued by the Office of Workers Compensation Programs (OWCP) and published on February 8, 2019 for the Energy Employees Occupational Illness Compensation Program (EEOICP).

The basis for this petition is listed below. Please note it is not all inclusive.

I. Explanations are misleading

DEEOIC states that the Final Rules do not have any tribal implications. We strongly disagree with this position. The Navajo Nation alone had over one thousand uranium mines. These workers are directly affected by the Final Rules.

DEEOIC did not provide, as required by Executive Order 13175 Sec. 5 (B)

> *...a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met;*

DOL asserts that the most significant change involves modifying the regulations to address objections to the National Institute for Occupational Safety and Health's (NIOSH) dose reconstruction. This is not accurate. The most significant changes are the incorporation of the policy changes adopted between 12/31/2006 and 2/8/2019 by the Division of Energy Employees Occupational Illness Compensation (DEEOIC) into their Procedure Manual.

II. Examples of changes which are more restrictive than statute

§ 30.403 requires pre-authorization for home health care. It is not unusual for a worker to require emergency home health care. For instance, when being discharged from the hospital or when the worker's health deteriorates and is dying. DOL also changed the effective date of care to when DOL approved the care instead of when the worker applied for the services. This change of date directly violates the statute, § 7384t,

> *(d) An individual receiving benefits under this section shall be furnished those benefits as of the date on with that individual submitted the claim for those benefits in accordance with this subchapter.*

§30.405 limits the rights of claimants to change their personal physician. DOL denies this by stating the claimant still enjoys the right to originally choose their physician. However, the final rules require DOL to give permission to change physicians and that permission will only be given if the claimant provides sufficient evidence warranting the change.

§30.5(2) iii excludes workers who deliver or remove "goods" from the premises of a DOE facility.

> *...the delivery or removal of goods from the premises of a DOE facility does not constitute a service for the purposes of determining a worker's coverage under the Act. Four advocacy groups, one claimant representative, two individuals and the labor organization objected to the added language...However, that language memorializes a policy that has been followed by OWCP since it issued EEOICPA Bulletin No. 03-27 in 2003,*

Please note the number of entities which objected to this regulation. Also note that this Bulletin was issued in 2003. The previous Final Rules was not published until December 2006. This exclusion was not in the 2006 publication.

§30.5 (2) (ii) (2) adversely changes the definition of the time of injury for a survivor claim to be the date of the employee's death. This is a huge departure from the current regulations. Currently, the policy for the time of injury is basically the last day of employment for both the survivor and a worker.

III. DOL ignored suggestions from the public which could improve the compensation program

Throughout the almost two decades of EEOICPA's enactment, DOL asserts that their only interest is to administer the compensation program in a fair and claimant-friendly manner. These Final Rules belie that assertion.

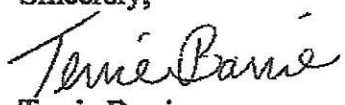
Sixteen times DOL mentions in the Preamble that a "comment did not refer to a change that was proposed in the NPRM, no amendment was made." Some of these comments provided by the stakeholders were offered to improve the adjudication process.

ANWAG realizes that adopting any of the sixteen suggestions may have resulted in reissuing the proposed rules. DOL had ample time to consider and adopt any of these suggestions considering it took them more than three years to publish the Final Rules. If DOL were sincere in improving the program and ensuring that it is a claimant friendly as possible, then they would have accepted, or at least been willing to discuss, the well thought out concerns and suggestions of ANWAG, experienced advocates and home health care providers.

The serious concerns brought by three advocacy groups and three home health care agencies regarding § 30.701(c)(1)(ii) were summarily dismissed. If OWCP implements certain aspects of the Home Health Prospective Payment System, which was devised by CMS as a cost savings measure, thousands of sick and dying claimants will be without the home health care they need and deserve. This action would add to the burdens already borne by the sick and dying workers and their families. That does not represent the intent of this program that acknowledged the sacrifices of hundreds of thousands of workers who were made ill or died because of their exposures. We encourage you to reconsider the effect the proposed changes will have on these workers and their surviving family members.

ANWAG calls upon you to repeal these rules. They are less claimant-friendly, more restrictive than the statute and did not comply with Executive Order 13175.

Sincerely,



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