



**DIAB**

DEEOIC INTERIM ADVISORY BOARD

Citizen Volunteers Providing Transparency & Accountability for EEOICPA Claimants  
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June 17, 2015

Rachel Leiton  
Director  
U.S. Department of Labor  
Office of Workers Compensation Programs  
Division of Energy Employees Occupational Illness Compensation  
Frances Perkins Office Building  
200 Constitution Ave., NW  
Washington, DC 20210

SUBJECT: Procedure Manual Chapter 2-0700, Section 2.d. (2)

Dear Ms. Leiton:

An authorized representative alerted the DEEOIC Interim Advisory Board (DIAB) to a potential problem with the Division of Energy Employees Occupational Illness Compensation (DEEOIC) interpretation in the Unified Procedure Manual (PM) of the legislative language guiding Part E of the program, "...at least as likely as not a significant factor..."

As you are aware, Section 7385s-4(c) (1) (A) of the law states,

*Department of Energy contractor employee shall be determined for purposes of this part to have contracted a covered illness through exposure at a Department of Energy facility if—*

*(A) it is at least as likely as not that exposure to a toxic substance at a Department of Energy facility was a significant factor in aggravating, contributing to, or causing the illness*

Chapter 2-0700, Section 2.d. (2) of DEEOIC's PM defines "at least as likely as not" as follows:

*(2) "At Least as Likely as Not." Part E only requires proof that established exposure "at least as likely as not" was a significant factor in aggravating, contributing to or causing the employee's illness, disease or death. As with Part B, "at least as likely as not" means 50% or greater likelihood.*

However, in determining whether a toxic substance is responsible for the development of a disease or condition there is a glaring omission in the PM of a clear definition for the term “significant factor”. The PM simply states,

*3) Significant factor. The CE evaluates the evidence as a whole when attempting to determine whether or not exposure to a toxic substance was indeed a significant factor in contributing to, aggravating, or causing the claimed illness or death of the employee. In most instances this evaluation will be done on a case-by-case basis.*

The term “significant factor” is a crucial element in determining the level of causation and the definition of “significant factor” should not have been omitted or, in fact, separated from the term “at least as likely as not”. The entire clause, “at least as likely as not a significant factor in aggravating, contributing to or causing” must be considered when a claims examiner is deciding on whether a toxic exposure is responsible for a disease or condition, not just “at least as likely as not.”

DIAB addressed the issue of causation in their white paper, “Review of DEEOIC’s Evidentiary Standard for Causation of Illness”, [http://diaboard.org/PDF/2014-9-10\\_DIAB\\_burden\\_proof.pdf](http://diaboard.org/PDF/2014-9-10_DIAB_burden_proof.pdf). DIAB identified that DEEOIC’s own Final Rules determined that “significant factor” meant “any factor,

*In its Final Rule published two years after the enactment of the legislation, DEEOIC determined that the definition of “significant factor” means “any factor”.*  
<http://www.gpo.gov/fdsys/pkg/FR-2006-12-29/pdf/E6-21839.pdf> page 78522 and 78523

*“Because it is impossible to determine the extent to which any individual factor contributed to the development of cancer, OWCP has concluded that the only way to comply with the statutory mandate in Part E is, in effect, to interpret “a significant factor” as including any factor.”*

Of course, DEEOIC’s response addressed the use of the “as likely as not” standard to adjudicate cancer claims under both Part B and Part E. The commenters alleged that using the same standard under both Part B and Part E failed to give effect to the distinct causation language of Part E which requires that a claim for an occupational illness be accepted under Part E where occupational exposure was at least as likely as not a significant factor in the aggravation, contribution to, or causation of the occupational illness and that the occupational exposure was at least as likely as not related to employment at the facility. The DEEOIC defense of using the same standard in both parts in spite of the differing causation standards explains:

Part B, thus, requires that a claimed cancer be determined to be “related to” employment at a covered facility if the radiation dose and other factors combined indicate that there is a statistical probability that the cancer would not have occurred in the absence of work-related exposure to radiation. In other words, the POC determination made for purposes of Part B is actually a determination that

there is a fifty percent or better chance that radiation was a factor, however slight, in “aggravating, contributing to, or causing” a claimed cancer because, in the absence of work-related exposure to radiation, the cancer would not have occurred at all. Because it is impossible to determine the extent to which any individual factor contributed to the development of cancer, OWCP has concluded that the only way to comply with the statutory mandate in Part E is, in effect, to interpret “a significant factor” as including any factor.

Federal Register, 78522 and 78523 (December 29, 2006). The language quoted above represents an attempt to conflate the causation standard under Part B with the causation standard under Part E. It describes the Part B standard as a “but for” causation standard, i.e. “the cancer would not have occurred in the absence of work related exposure to radiation.” It then attempts to describe that causation standard as addressing the Part E causation standard by calling attention to the fact that when radiation is the statistical “but for” cause of cancer, in other words, a factor, in the absence of which cancer would not have developed, that factor is acknowledged as a significant factor no matter how slight the factor may be. This leads to the conclusion that OWCP is forced to interpret “a significant factor” as including “any factor.”

This logic is flawed as the dose reconstruction process identifies occupational radiation exposure as related to a cancer only when radiation is at least equal to all other factors which exist in the absence of occupational radiation exposure, combined. Compensation under Part B is paid when pre-existing or baseline risk of developing cancer (from genetic or environmental causes) is statistically equal to risks associated solely with occupational radiation exposure such that it is statistically at least as likely as not that radiation was the cause of the cancer. OWCP suggests that compensation is paid under Part B and therefore under Part E even when the factor represented by radiation is exceedingly small but is yet the one factor without which the cancer would not have developed.

But whatever the size of the factor and whatever its significance, no claim is paid under Part B unless the statistical model shows that occupational radiation is a factor that is greater than or equal to all other preexisting or baseline factors combined. This attempt to characterize the Part B standard as giving rise to compensation where occupational radiation exposure constitutes “any factor, however slight” is misleading because compensation is paid under Part B only when occupational radiation exposure can be described statistically as a factor at least as significant as all other pre-existing or baseline factors combined. So the attempt to characterize “a significant factor” as including “any factor” appears to arise out of a flawed attempt to squeeze the Part E causation standard into the Part B causation standard at least in the cancer context.

The Part B causation standard completely fails to address what role radiation plays where, statistically, cancer is likely to occur even in the absence of occupational radiation exposure. The Part E causation standard requires that this issue be addressed, as just because the occupational radiation exposure statistically is not as significant as all other potential causes combined, does not mean it is not a “significant factor aggravating, [or] contributing to” the cancer. The role of occupational radiation exposure when, statistically, cancer was likely to occur even in the absence of occupational radiation exposure is difficult to assess. This does not mean that “any factor” should lead to compensation, or that no factor that cannot also be characterized as at least

as significant as all other preexisting or baseline factors combined, should lead to compensation for cancer under Part E. At the same time, a workable definition would be useful not only in the cancer context but for all diseases that resulted from the exposure to radiation and/or other toxic substances. The fact that the level of significance is difficult to assess does not extinguish OWCP's obligation to assess it. And while it may be similarly difficult to create a workable definition of "a significant factor" for both Parts B and E, OWCP should endeavor to create one in consultation with independent experts located outside of OWCP and publish the findings via notice in the Federal Register so that the public and other stakeholders would have the opportunity to weigh in on OWCP's position. OWCP should avoid the temptation to muddy the waters with flawed and potentially misleading statements of policy in this area.

The *Magnus* case addresses a similar issue in the Black Lung program. See *Magnus v. Director Office of Worker's Compensation Programs, Department of Labor*, 882 F. 2d 1527 (10<sup>th</sup> Cir. 1989) ("The Eleventh Circuit and the Sixth Circuit have adopted the rule that a claimant's pneumoconiosis must be shown to have arisen "at least in part" from his coal mine employment, although such employment need not have been the sole factor leading to disability.).

Additionally, Page 7 of DEEOIC's District Medical Consultant's Handbook, which we understand is currently used by the Contract Medical Consultants, confirms that the standard of causation is less than what is expected in state workers' compensation programs.

[http://eecap.org/PDF\\_Files/DOL\\_Information/DMC\\_Manual.pdf](http://eecap.org/PDF_Files/DOL_Information/DMC_Manual.pdf)

*2. Legal Standards of Certainty and Concepts. There is a wide range of legal standards and concepts for judging certainty depending on the specific venue (e.g., criminal convictions, arrests, searches, police stops, a range of administrative or civil actions, etc.). These range from:*

- a. Highest - beyond a reasonable doubt (e.g., used to determine guilt in criminal cases);*
- b. Clear and convincing evidence (e.g., used in special civil cases such as commitment determinations);*
- c. Mid - preponderance of evidence (usual standard in civil cases and usually means more likely than not);*
- d. Low - reasonable suspicion;*
- e. Lowest - mere suspicion (hunch).*

***In the EEOICP the causation standard for Part E seems to fall between level c and d (above) (Emphasis added).***

The problem with the lack of definition for "at least as likely as not a significant factor in aggravating, contributing to or causing a disease or condition" is not limited to affecting the claims examiners' and hearing officers' decisions. It also affects the quality of reports issued by the Contract Medical Consultants (CMC) and experts employed directly by DEEOIC. This has

resulted in some reports, submitted by the CMCs and other DEEOIC experts, which simply STATE that though there may have been some occupational exposure to a toxic agent, the exposure was not a significant factor in the development of the disease

It is imperative that everyone involved in the adjudication process fully understands the standard of causation under Part E of EEOCPA. DIAB urges DEEOIC to revise the PM to define the entire statute's language and not just one small part of the provision. We ask that DEEOIC provide training seminars and materials to the claims examiners and hearing officers which explain fully explains the causation standard. We also strongly suggest that DEEOIC advise the CMC contractor, QTC, as well as the direct DEEOIC experts of the correct definition of the causation standard. We recommend that all individuals who are involved in the adjudication process provide DEEOIC a signed written statement that they have read and understand the correct legal standard.

Sincerely,

Faye Vlieger,  
DIAB Chair

Cc: Leonard J. Howie, III, Director Office of Workers Compensation Programs  
Gary A. Steinberg, Deputy Director Office of Workers Compensation Program  
Malcolm Nelson, Ombudsman