

United States Senate

WASHINGTON, DC 20510

July 29, 2005

VIA FAX and E-MAIL

Honorable Elaine Chao
Secretary of Labor
U.S. Department of Labor
200 Constitution Ave, SW
Washington, DC 20210

Re: DOL Interim Final Rule, RIN 1215-AB51

Dear Madame Secretary:

We commend the Department of Labor for meeting its deadline in issuing the Interim Final Rule (IFR) implementing Subtitle E of the Energy Employees Occupational Illness Compensation Program Act (EEOICPA), P.L. 108-375, within 210 days as required by Subtitle E. This letter provides our comments on that interim final rule. Please find below items we believe the Department should address and/or revise in its final rule.

- 1) **The DOL rule excludes impairment benefits for covered illnesses/conditions which are not rated in the AMA Guides.** Congress directed DOL to pay workers \$2,500 for each percentage point of impairment caused by their occupational illness, as rated in accordance with the *American Medical Association Guides to the Evaluation of Permanent Impairment* (up to \$250,000). The Conference Report for the FY 05 Defense Authorization Act (pp. 892-893) directs the DOL to cover any impairment whether or not it is ratable under the *AMA Guides*:

“Under the new subtitle E of EEOICPA, covered DOE contractor employees would be compensated based on any impairment from a covered illness resulting from exposure to a toxic substance at a DOE facility.” (emphasis added)

“In some cases, particularly in cases involving illnesses to long exposure to toxic substances, there may be an illness for which the *AMA Guides* do not provide an impairment rating. As a result, each individual employee should be evaluated individually and the determination of impairment and work disability should be through a combination of the *Guides* and by physicians suitably trained and qualified.”

Congress foresaw that the *AMA Guides* would not be all inclusive. Indeed, the text of the *AMA Guides* itself explicitly states that not all conditions are covered. The Conference Report was clear that no claimant should fall through the cracks simply because a condition was not ratable using the *AMA Guides*. We believe the final rule should incorporate the precise requirements of the Conference Report concerning *AMA Guides*.

- 2) **The DOL rule does not address the Congressional intent to provide for independent physician panel reviews where there are disputes over causation of an illness from exposure to toxic substances or wage loss attributable to such illness.** The Conference Report directs DOL to: *"consider an appeal process whereby claimants have an opportunity to have an adverse determination reviewed by an independent physician or physician panel."* An appeals process using physician panels is crucial for evaluating questions related to causation or whether wage loss is attributable to the covered illness. Certain cases will involve complex issues requiring expertise in medicine, toxicology, industrial hygiene or epidemiology. The DOL rule does not afford claimants the right to such appeals, and improperly ignores Congressional intent. We believe these appeal rights should be included in the final rules' due process rights that are inherent to the program itself and should not be met on an *ad hoc* or discretionary basis.
- 3) **The DOL rule applies the wrong standard of causation for radiation related cancers.** The standard of causation under Subtitle E is whether exposure to a toxic substance is "a significant factor which aggravated, contributed to or caused the illness." DOL follows this contributory standard for all toxic substances, except radiation-related cancers. For radiation related cancers, DOL's interim rule requires the Subtitle E claimant to prove that "it is at least as likely as not that exposure to radiation caused the illness." These two standards of causation are not the same, and DOL is not at liberty to modify the statute through rulemaking. DOL's preamble states that to apply the law, as written, will require decisions to be based on a "substantial speculative component." The contributory standard under Subtitle E is applied in numerous state jurisdictions, and the DOL uses it for all other toxic substance claims under Subtitle E. DOL's rule applies the contributory standard when there are mixed exposures involving both radiation and toxic substances. DOL should set forth a contributory standard for radiation related cancers of less than 50% (at the upper 99% confidence interval) which is guided by science.
- 4) **The DOL rule does not provide administrative appeals for denial of a medical benefit for a covered illness (or consequential illness).** Not providing for such an administrative appeals process, will force appeals into the federal courts. It is thus conceivable that the DOL interim final rule would clog the courts with cases that involve medical benefit denials. DOL data indicates that administrative appeals reduce the number of cases that are ultimately brought to the Courts. An administrative appeals process should be provided for workers whose medical benefits have been denied.

Wayne Allard
