

DOL ABTSWH Meeting January 27, 2020

Industrial Hygiene Reports

Background

The first Board reviewed the procedure manual and associated DEEOICP circulars in detail. DEEOICP Circular 15-06 *Post-1995 Occupational Toxic Exposure Guidance* (issued December 17, 2014) and the February 20, 2015 EEOICPA Program Memorandum were concerned with exposures post-1995. The basic conclusion and program guidance from these documents was –

“DEEOIC finds that after 1995 any exposure to a toxic substance by an employee working at a covered DOE facility occurred within existing regulatory standards and/or guidelines.”

At the October 2016 Board meeting in Oak Ridge a recommendation was made that Circular 15-06 be rescinded. While the Board recognized and acknowledged that working conditions and resulting exposures at DOE facilities improved in many DOE facilities over time, it did not consider it appropriate and stated ---

However, a policy that uses a single time period, 1995, to demarcate a moment after which DOE employees would be assumed that a) they would be unlikely to be significantly exposed to toxic materials, and b) potential exposures would be within regulatory standards, is faulty in several respects. First, an empirical basis for this policy is not provided. It is furthermore highly unlikely that an empirical support could be provided. It is doubtful that sufficient industrial hygiene monitoring was performed throughout the DOE complex from 1995 to the present to substantiate a broad claim that all exposures were routinely kept below existing standards. Even if such monitoring was performed periodically, it would be unlikely to accurately capture intermittent and variable work processes, including accidental exposures.

DOL responded to this recommendation in a letter to Dr. Markowitz dated September 19, 2017.

Recommendation #1 – We recommend that EEOICPA Circular No. 15-06 (issued December 17, 2014), Post 1995 Occupational Toxic Exposure Guidance, be rescinded.

As OWCP communicated to the Board in the interim response of March 24, 2017, we agree with this recommendation and have rescinded this Circular, on February 2, 2017. While OWCP believes that there is literature to support that there were greater safety measures in place beginning in the late 1990s, the Circular was rescinded to avoid the appearance that one cohort of claimants is being held to a higher burden of proof than others. We have a plan in place to review cases that may be affected by this change.

The Board has continued to review cases in detail, including any industrial hygiene reports associated with these cases. In doing so, the Board noted the following language is consistently inserted in the industrial hygiene reports for claimants who had periods of employment post-1995.

levels. However, there is no available evidence (i.e., personal and/or area industrial hygiene monitoring data) to support that, after the mid-1990s, his exposures would have exceeded existing regulatory standards.

During the detailed review of cases the Board noted that the above language or very similar language appeared in many IH assessments even when the DAR produced no IH monitoring data at all and none was referenced by the IH completing the report.

Current Board Recommendation and DOL Response

The Board made the following recommendation at the meeting held on April 25, 2019 based on the observations described above:

The Board has observed, based on review of a limited number of recent claims, that recent Energy Employees Occupational Illness Compensation Program industrial hygienist assessments frequently use stereotypic language that cite the absence of monitoring data above the established regulatory levels in the mid-1990's. The Board recommends that this language be omitted from the industrial hygienist report. The basis for a negative exposure determination should be provided by the industrial hygienist in the report. Neither the absence of monitoring data post-1995, nor the presence of data showing exposure levels below regulatory limits should be interpreted as representing an absence of significant exposure or risk.

DOL did not agree with the Board's recommendation. The following is a summary of major points made in the DOL the response of December 18, 2019:

1. In the absence of definitive monitoring data, the level of accuracy in exposure assignments is not high; therefore, DOL His typically assume --- **“a much higher level of toxic exposure than would have been actually encountered by DOE contractor or subcontractor employees”**
2. Exposures at DOE sites have been significantly reduced due to many factors including:
 - a) the shift from production to maintenance and remediation;
 - b) program health and

safety enhancements; and 3) adherence of more protective ACGIH TLVs rather OSHA PELs.

3. DOL IH assessments review all accompanying documentation (i.e. OHQ, EE-3 forms, additional work statements, affidavits, site IH records, etc.) and will assign higher exposures based on – ‘**employee descriptions of specific work activities or work processes**’.
4. DOL further stated:

DOL’s Industrial Hygienists take the position that unless there is some definitive evidence of significant exposure past the mid-1990s, whether that is specific monitoring data or other information of exposure, it is a disingenuous application of industrial hygiene principles to make affirmative findings of significant exposure. Moreover, the assistance

Discussion

DOL appears to have misinterpreted the Board’s recommendation. The Board is not recommending a presumption of significant exposures to toxic substance past the mid-1990. However, the Board is recommending that a presumption that all exposures were within regulatory limits after the mid-1990s also not be made during the IH assessments. In nearly all cases reviewed by the Board thus far, no industrial hygiene monitoring data are provided in the DAR responses or in the IH assessments to support a definitive conclusion concerning exposures post-1995. The position of DOL Industrial Hygienists, as articulated above, places an undue burden on claimants to produce data that either does not exist or is not accessible by them. This is entirely counter to the DOL position when DEEOICP Circular 15-06 was rescinded. In rescinding this circular DOL stated: ‘----- **the circular is being rescinded to avoid the appearance that one cohort of claimants is being held to a higher burden of proof than others**’.

This issue is of major importance when a claimant had a significant portion of their DOE work post-1995 and the claim is denied. In those circumstances, the Board maintains that a much more detailed assessment of exposures is needed, which may include direct IH access to claimants to ascertain whether or not there is definitive evidence to support higher exposures.