ANWAG
Alliance of Nuclear Worker Advocacy Groups

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Steven Markowitz, M.D., Ph.D.
Chair – Advisory Board on Toxic Substances and Worker Health
U.S. Department of Labor
Frances Perkins Office Building
200 Constitution Avenue, NW
Washington, DC 20210

Dear Dr. Markowitz:

The Alliance of Nuclear Worker Advocacy Groups (ANWAG) has written to the ABTSWH Board in the past on matters of importance to Advocates and Claimants. Most recently policies and practices related to the management and utilization of the Site Exposure Matrix have garnered much attention.

Today, we write with concerns related to the Industrial Hygiene process which we believe should be revisited with an eye toward correction, improvement, and common understandings. We focus on the following: 1) Use of site monitoring evidence language in IH reports which creates incomplete or false impressions to the reader/claimant, 2) program communication processes and understanding of respective roles and responsibilities between Claims Examiners and IH staff, and 3) commonly understood rules of evidence from a program and legal standpoint.

We raise these issues, ask questions, and certainly do not have the answers.

Site Monitoring Language in IH Reports

A stated objective for IH reports is to present a reasonably accurate assessment as to potential chemical exposure(s) based on a worker's job function(s) for consideration by a claimant's physician or a contract medical consultant for the purpose of developing a medical causation opinion. This process is heavily reliant on a physician's interpretation of an IH report, and then their comfort and willingness to provide a (causation) opinion. ANWAG and the Board have previously discussed references to adherence to "regulatory standards" found within IH reports, and that language was removed by policy change at DEEOIC.

The language of concern we raise today follows:

It is important to note that after the mid-1990s, environmental health and safety programs at DOE facilities were well developed and fully implemented. These programs include, but are not limited to, chemical/hazardous material management programs, strong administrative and engineering controls, the extensive use of personal protective equipment (PPE) and, where appropriate, industrial hygiene monitoring. This does not mean the employees would not have had the potential for hazardous exposures. However, it does mean that the likelihood for significant exposures to toxic materials at DOE facilities was greatly reduced after the mid-1990s, and that any work processes, events, or circumstances leading to significant exposure would likely have been identified and documented in employment records.

However, there is no evidence in the case file (i.e. personal and/or area industrial hygiene monitoring data, claimant provided information or documentation, or other relevant site industrial hygiene records) indicating that, as part of this position after the mid-1990s, exposures occurred that would have been considered a workplace exposure violation or incident. Any exposures (he/she) might have received, as part of this position after the mid-1990s, would have been incidental in nature, well-controlled and not significant.

This first paragraph (above) is found as the opening "Discussion" paragraph of (CaseIDs 50034644, 50040561) IH report(s), and the second paragraph is presented at the conclusion of ***each*** chemical assessment for all DOE employment occurring after 1995 and when an IH opinion is that there have been either "no" exposures or "insignificant" exposures (most all cases).

There are many aspects of this boilerplate language to breakdown as to what is factual, presumptive, and practical, given the variations in operational and records management policies at all work sites. However, our focus herein is on the ***intended reader of such reports, a claimant's chosen physician***. Our contention is this language directs the reader (physician) to the conclusion (based on misleading assertions) that there was a) no exposure of significance, and b) there were processes in place to monitor individual and site exposure levels for all chemicals in question.

The language has the potential to discount incremental causation and/or contribution due to chemical exposure(s) without supporting facts.

ANWAG requests a review of this language and its implications, and potential actions including 1) a recommendation from the Board for removal of such language from all future IH reports, or 2) a requirement for proof relative to the scope of the actual individual and/or site monitoring if in fact there was any (and the above language is used in an IH report), or 3) moving the language to make it a footnote or a separate paragraph in reports and make it explicit that this language is based on non-public statements/assurances from DOE, without detailed or claim specific support in the record, and that it fails to acknowledge that business practices varied from site to site and there may be the potential for unaccounted exposures.

It is useful to note that the conclusions reached and communicated by the DOL contracted Industrial Hygienists are at odds with the EEOICPA legislation. Nowhere in the statute passed in

2000 is there a suggestion that after 1995 the DOE had implemented and always adhered to applicable industrial hygiene regulations. The amendments passed in 2004 that created Part E and repealed Part D, made no reference to DOE's successful and effective implementation of industrial hygiene regulations.

EEOICPA is a remedial statute designed to reverse decades of DOE efforts to prevent workers from receiving fair compensation for their occupational illnesses. DOE, the agency that exposed its workers to hazardous substances sometimes without their knowledge or consent, should not be given the benefit of the doubt on this issue in the absence of evidence that occupational exposure was properly monitored.

While it is a worker's burden to show that their occupational illness was contributed to by exposures at a DOE facility, it is completely inappropriate to prevent that worker from making their claim when DOE cannot present relevant industrial hygiene evidence and did not collect and preserve industrial hygiene data. This turns a program designed to attempt to ***give the worker the benefit of the doubt***, where evidence is sparce or absent, upside down such that the DOE is given the benefit of the doubt connected to its industrial hygiene practices, in the absence of relevant industrial hygiene data. This places the burden of industrial hygiene monitoring on the worker and not on DOE. It is/was not the worker's obligation to collect industrial hygiene data. Without evidence, the IH report is nothing more than conclusory speculation and conjecture which is exactly what the IH process is designed to eliminate from physician medical opinions as to causation.

Recently the DOL agreed to lift the arbitrary limit on Part B chronic silicosis claims after October 1992, agreeing that the mining of tunnels has continued at the Nevada Test Site through the present day. This means that current Nevada Test Site employees could potentially have a chronic silicosis claim accepted under Part B should they meet all the criteria. However, if the worker falls short on one criterion such as the latency period, then they are subject to an IH referral. So now, solely because a worker was diagnosed with chronic silicosis less than 10 years after their initial exposure and their employment occurred after the arbitrary limit of December 31, 1995, IH reports reach the conclusion that in the absence of evidence to the contrary, those workers were not exposed to a significant amount of silica dust. This includes workers working underground in the tunnels at the Nevada Test Site. This conclusion is reached without any air monitoring data from underground within the tunnels.

CE and IH Staff - Roles and Responsibilities

ANWAG has growing concerns about poorly drafted questions that are provided to the Industrial Hygienist (IH) by Claims Examiners (CEs) who are not conducting adequate or comprehensive searches of DAR records, or who are not familiar with worksite and labor category specifics that may have bearing on exposure. Additionally, there are indications that the Final Adjudication Branch (FAB) is assigning more probative weight to an incomplete IH Report than the physician's opinion.

The EEOICPA Procedure Manual (PM) specifies that CEs questions to IH's should identify a specific set of chemical or biological toxins to which the Employee was most likely exposed. The PM indicates that no more than seven (7) toxins should be identified, and that only those SEM results that provide affirmative results should be submitted along with only those DAR records that reference relevant exposure(s).

[PM Version 8.0, Exhibit 15-5.3: "Question(s) for the IH"].
This guidance implies that a CE will be knowledgeable and discerning through the course of DAR records review, and capable of recognizing significant (or at least relevant) information.

However, there are growing indications that CEs lack the time to conduct a meaningful review of DAR records. Additionally, a CE is likely to lack knowledge about occupational exposure(s) that are related to specific labor categories at any number of unique worksites across the nuclear complex. This is particularly problematic since the National Office 2018 decision to divert EEOICPA claims away from experienced and knowledgeable adjudicators who had the benefit of institutional knowledge at District Offices that had maintained regional jurisdiction(s) since EEOICPA's outset in 2000.

As EEOICPA claims are now randomly assigned to CEs who lack familiarity with the most basic characteristics of worksite operations, CEs are routinely falling short of recognizing information in DAR records that is relevant or significant. As a result, there are now growing indications that the CEs are posing poorly drafted questions to the IH's, and that toxic substances may be randomly selected from SEM search results. As we have already identified, SEM search results may no longer be providing comprehensive information.

Moreover, there are indications that even when the District Office recognizes a physician's narrative as sufficient, the Final Adjudication Branch (FAB) can override the information in favor of an incomplete and inadequate IH Report that was based on limited information.

Example 1: Case ID 50018642 - SRS Security Guard, Parkinson's Disease
DAR records confirm this Employee's performance of duties at various locations around SRS where toxins with established causal links to Parkinson's disease were used. Most notably, the DAR records show this Employee had a prolonged work location assignment to an indoor security desk that was situated inside of a welding facility at the site.

The CE did not provide DAR records for the IH to review. The CE submitted the following toxic substances for evaluation by the IH, to establish causation of Parkinson's disease: toluene; carbon tetrachloride; rotenone; manganese; xylene; trichloroethylene (TCE).

The IH indicated that SEM has no link to any toxic substance that can cause Parkinson's disease

among SRS security guards. The IH failed to note that SEM only referenced "Parkinsonism," which has numerous causal links to known toxins used at SRS. "Parkinson's disease" is not indicated in the SEM.

The IH indicated that SEM has no link between SRS security guards and any of the toxic substances that the CE submitted to the IH for evaluation. There is no indication that the IH considered the multiple work locations where the Employee performed job duties, and the associated work processes that were underway at each location clearly reflected in the DAR records, when evaluating the SRS Security Guard's likelihood of encountering a toxic substance related to Parkinson's disease.

A physician observed that SEM acknowledges the causal links between Parkinsonism (Parkinson's disease) and welding fumes, which can contain manganese (that the IH was asked to evaluate). The physician further observed that, based on the DAR records showing a prolonged assignment to a security desk inside of a welding facility, where welding processes were undoubtedly occurring, it would be logical to have included welding fumes in the IH evaluation.

In addition, the physician noted that the IH was not asked to evaluate the Employee's potential exposure to lead, which is confirmed by SEM. The physician cited several studies on occupational exposure to lead that do support a causal link to Parkinsonism / Parkinson's disease. The District Office recommended acceptance of the claim. The FAB remanded the claim based, in part, on the physician's acknowledgement of toxins that the IH had not been asked to evaluate.

FAB's assertion was that "… that program recognizes an IH is an expert in assessing available employment, labor category, work process or other occupational data, and their expertise is utilized to provide well-rationalized and unbiased opinions on the nature, frequency, and duration of an employee's toxic exposure. As such, an IH opinion on toxic substance exposure holds significant probative value. The IH determined that [your] exposure to manganese and TCE at the SRS was incidental in nature and not significant … Although [your] physician provided articles concerning the causal relationship between Parkinson's disease and lead exposure, FAB will not address this issue since the IH did not provide an analysis of such exposure, and the physician's opinion is not based on an IH analysis of the exposure."

Again, ANWAG is concerned that CEs are not approaching the IH with relevant toxins that are based on adequate or comprehensive DAR records review, or a sufficient understanding of labor categories and work processes at unique sites across the nuclear complex. Claimant physicians can recognize information and identify relevant toxic substances that should have been included in the IH evaluation and note this in their medical opinions supplied in response to the IH Report. Are claimant physicians now expected to "dumb down" their opinions, to match the CEs poorly drafted questions to the IH, and to meet the IH's interpretation of incomplete information?

This FAB Remand Order exemplifies an adversarial attempt by FAB to tie the hands of a qualified physician, who notes details that were missed by the CE and the IH, and that are relevant to establishing causation on behalf of the claimant.

Example 2: CaseID 50037851 – IH Referral and Report without review of DAR – Kansas City Plant, Lung Cancer

In brief, the worker held an administrative job title and worked in the middle of an open-air large building with machining, electrical motor disassembly and radioactive materials nearby.

a) All ***Engineering*** job titles/functions have NO chemicals associated with them. So, of course, there are no chemicals for "manager" or "administrator".

b) OHI indicates worker was in Maintenance Engineering department from 1984 to 1986, and a worked as Maintenance Manager from 1987 to 2000, regardless of pay grade/job title.

c) When DAR reviewed by AR, details show extensive environmental assessment(s) of buildings/areas worker was located in. Must ask, "Why would environmental assessments" be filed in a worker's DAR?

d) DAR confirms worker had an office located in the Facilities Engineering/Maintenance Services Building from 1985 until retirement due to disability in 2002 at the age of 41.

e) Honeywell Medical Department memo from 01/17/2002 confirmed Chronic Permanent & Long-Term Dizziness, Nausea and Vomiting, for prior 2 years. DAR page 297 confirms worker reported frequent headaches and dizziness.

f) Per site map of building, DAR page 550, her permanent office opened onto the factory floor which had machine shop area(s), various maintenance operations, electrical motoring disassembly / rewiring areas, and tool storage areas. DAR page 534 for full list. Air supply for the entire building was common, with no separate HVAC/Filters for business offices.

g) In the DAR, pages 526 through 755, are numerous site assessments for her department, D162. The various reports confirm the presence of asbestos, beryllium, lead, copper, cadmium, chromium, nickel, mercury, and thallium to name a few.

h) KCP Industrial Hygiene recommended use of PPE throughout D162 for ALL EMPLOYEES. There was no air monitoring in this building. Air sampling was done on an ad hoc basis.

i) As AR reported for writeup to the Board, they rarely make a case for chemical exposure within areas/buildings and "second hand" exposure for travelers or occasional visitors to contaminated or "hot areas". Ironically, her job function/projects were leading site assessment and remediation, maintenance upgrades and worker safety enhancement. In this case the unambiguous evidence of exposure was found in the DAR once someone looked. She left the evidence in her personnel file for someone to find after her passing.

j) To reinforce a broader point, this is a work site where we found monitoring and assessment information within a personnel file. This is NOT common across the work sites we deal with. However, the standard process failed to initially consider this information, and relied solely on

pay grade based administrative job title for an initial SEM search. Further, the initial IH report cited the boilerplate language as to monitoring processes and failed to acknowledge (or was unaware of material) in the DAR.

Claim continues to be under review.

Creating Evidence

It is clear from our experience with thousands of claims filed or reviewed that the vast majority of claimant case files do not contain incident reports, site monitoring data or IH assessments of any kind. There are work sites where if a full Document Acquisition Request (DAR) was requested and added to an individual case file, some of this information may exist (the Kansas City Plant is noteworthy here). With reference to our opening issue on Site Monitoring Language, it appears IH assessments are emanating from a body of knowledge or documentation that is not in the administrative record. Decisions based on material not in the administrative record are often deemed arbitrary and capricious. References to "Regulatory standards", and operational practice successfully implemented after 1995, are not supported by evidence, and are not factually accurate. Alluding to work sites following the proscriptions of DOE safety practices and stating that "if there were incidents of concern they would have been documented" is also not factually accurate; it is our opinion that workplace incident reports were more often after the fact assessments and most often filed any place other than an individual's personnel file. There are notable exceptions for instances of asbestos exposure, chromium spills and other incidents. But, in the main, it is rare to find reports of any chemical exposure within worker case files.

The point of emphasis here is that such references typically are not supported by evidence. We again recognize the program is trying to make policy based on incomplete and hard to obtain information long after the events. However, we wonder if this sort of reasoning based on "standards" that were supposed to be upheld, the presumption that they were upheld, and further, that the absence of incident reports implies nothing happened, are both false and misleading to the reader of an IH report. Would these arguments hold up under legal scrutiny, especially given the admittedly incomplete nature of SEM and other tools/processes?

ANWAG respectfully requests that the Board consider the above issues as they relate to the IH process and outputs that affect worker claims under Part E.

Respectfully submitted,

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