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October 27, 2003  
DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

*Appeal*

Name of Case: Worker Appeal  
Date of Filing: July 15, 2003  
Case No.: TIA-0027

XXXXXXXXXX (the applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. The applicant's late husband, William H. Kendall (the worker), was a DOE contractor employee at DOE's Amchitka, Alaska site. The OWA referred the application to an independent physician panel. The panel determined that the worker's illness was not related to his work as a DOE contractor employee, and the OWA accepted the panel's determination. The applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA), arguing that the panel's determination was erroneous. As explained below, we have concluded that the application should be remanded to OWA for additional consideration.

*I. Background*

A. The Energy Employees Occupational Illness Compensation Program Act

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. The Act provides for two programs.

The Department of Labor (DOL) administers the first program, which provides \$150,000 and medical benefits to certain workers with specified illnesses. Those workers include DOE and DOE contractor employees who worked at DOE facilities and contracted specified cancers associated with radiation exposure. 42 U.S.C. § 73411(9). In general, a worker in that group is eligible for an award if the

worker was a "member of the Special Exposure Cohort" or if it is determined that the worker sustained the cancer in the performance of duty. *Id.* Membership in the Special Exposure Cohort includes DOE employees and DOE contractor employees who were employed on Amchitka Island, Alaska prior to 1974 and were exposed to ionizing radiation in the performance of duty related to the Long Shot, Milrow, or Cannikin underground nuclear tests. 42 U.S.C. §73411(14)(B). Those tests occurred in October 1965, October 1969, and November 1971, respectively. The DOL program also provides \$50,000 and medical benefits for uranium workers who receive a benefit from a program administered by the Department of Justice (DOJ) under the Radiation Exposure Compensation Act (RECA) as amended, 42 U.S.C. § 2210 note. See 42 U.S.C. § 7384u. To implement the program, the DOL has issued regulations, 20 C.F.R. Part 30, and has a web site that provides extensive information concerning the program. 1/

The DOE administers the second program, which does not provide for monetary or medical benefits. Instead, it is intended to aid DOE contractor employees in obtaining workers' compensation benefits under state law. Under the DOE program, an independent physician panel assesses whether an identified illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3). In general, if a physician panel issues a determination favorable to the employee, the DOE instructs the DOE contractor not to contest a claim for state workers' compensation benefits unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs if it contests the claim. 42 U.S.C. § 7385o(e)(3). The DOE program is limited to DOE contractor employees because DOE and DOE contractors would not be involved in state workers' compensation proceedings involving other employers. To implement the program, the DOE has issued regulations, which are referred to as the Physician Panel Rule. 10 C.F.R. Part 852. The OWA is responsible for this program and has a web site that provides extensive information concerning the program. 2/

The Act requires that the DOE assist DOL and DOE applicants by providing certain records in DOE's control. See 42 U.S.C. §§ 7384v(a), 7385o(e). That assistance includes verifying the workers' claims concerning their employment history at DOE and

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1/ See [www.dol.gov/esa](http://www.dol.gov/esa).

2/ See [www.eh.doe.gov/advocacy](http://www.eh.doe.gov/advocacy).

providing their exposure records. See 67 Fed. Reg. 52841, 52848 (2002) (preamble to the Physician Panel Rule).

The applicant in this case filed applications with both the DOL and DOE programs, stating that the worker was employed by various DOE contractors as a pipefitter at Amchitka in connection with the Long Shot and Milrow tests. One employer was the worker's incorporated business; other employers were partnerships or joint ventures with other businesses. The application attributed the worker's subsequent death from lung cancer at the age of 63 to exposure to radiation during his work at Amchitka.

The DOL processed the DOL application and approved an award in May 2002. The DOL final decision discusses the efforts to verify the worker's employment. See DOL Final Decision dated May 11, 2002.

When the DOL asked the DOE to verify the worker's employment at Amchitka, DOE advised that it did not have any record of the worker's employment. See DOE Response to Employment History for Claim Under EEOICPA (DOL Form EE-5), dated September 25, 2001. The DOL then sought alternative evidence. The DOL also contacted the DOE a second time, and the DOE reiterated that it had no information concerning the worker or his companies, stating that the worker's firm was not a prime contractor and that the DOE had limited information on subcontractors at Amchitka. See DOL Final Decision at 2. Ultimately, the DOL record included (i) an Alaskan agency's confirmation that a business license had been issued to the worker's firm, 3/ (ii) the worker's Social Security Administration itemized statement of earnings, (iii) a letter from the local plumbers and pipefitters union, confirming that the worker was a member of the union during the relevant period, 4/ (iv) a copy of an affidavit from a co-worker, attesting that the worker was employed at Amchitka, and (v) an affidavit from a union official, attesting that the co-worker was an employed at Amchitka by the worker's business from January 1966 to April 1966 and by an

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3/ Letter dated April 25, 2002 from the Alaska Department of Community and Economic Development, Division of Occupational Licensing.

4/ Letter dated December 22, 1986 from the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry Local 367 (worker was a continuous member in good standing from 1963 to 1975).

unrelated business during a later period. The DOL concluded that the worker was a DOE contractor employee at Amchitka from January 1966 to April 1966 and, therefore, was a member of the Special Exposure Cohort. That membership, together with his subsequent diagnosis of lung cancer, resulted in a DOL award to the applicant.

During its processing of the applicant's DOE application, the DOE obtained the DOL file and included the file in the material sent to the physician panel. The DOE summary of the worker's application listed the verified period of employment as January 1966 to April 1966, and the physician panel used that period for its calculation of the worker's radiation exposure.

Because the DOE did not have exposure records for the worker, the physician panel based its calculation of the worker's radiation exposure on (i) a 1998 report prepared by Dr. Rosalie Bertell, entitled "Summary of Data on Potential Worker Exposures to Ionizing Radiation, Amchitka, Alaska", and (ii) the opinion of Jeffrey L. Kotch, a DOL health physicist. The panel noted that it had no evidence that the worker had any radiation exposure above background level, but included an additional amount that the Bertell report assigned to exposure to contaminated water. See Panel Report at 1-2; Bertell Report at 3. Even with that additional amount, the panel concluded that the exposure would have been less than one percent above background level. The physician panel concluded that this exposure was too small to have contributed to the worker's illness.

The OWA accepted the physician panel's determination. See June 30, 2003 Physician Panel Case Review and May 22, 2003 Letter from the DOE to the applicant. Accordingly, the OWA determined that the applicant was not eligible for DOE assistance in filing for state workers' compensation benefits.

In her appeal, the applicant contends that the January 1966 to April 1966 employment period used by the physician panel represents only part of the worker's employment at Amchitka. The applicant argues that she has difficulty documenting the worker's employment because most of his co-workers have died of cancer.

## II. Analysis

### A. The Worker's Period of Employment at Amchitka

It is clear that the DOE attempted to verify that the employers listed in the applicant's DOE application performed work at Amchitka. The DOE made this attempt in connection with DOL's processing of the applicant's DOL application. The DOE responded that it had no employment information concerning the worker, and there is no reason to believe that the DOE's response was incorrect.

It is also clear that the DOE did not attempt to verify whether the additional employers listed on the worker's social security records performed work at Amchitka and, if so, when. The DOE did not attempt such verification in response to DOL requests: the DOL inquiries focused on the employment listed on the application. See DOL Notice of Final Decision dated May 11, 2002. The DOE did not attempt such verification when it processed the DOE application, apparently not seeing any need for verification beyond the January 1966 to April 1966 period. As explained below, the Act requires that DOE make such an attempt.

The Act requires that the DOE assist DOL and DOE applicants in obtaining information in DOE's control concerning their employment history and exposures. See 42 U.S.C. §§ 7384v(a), 7385o(e); 67 Fed. Reg. 52841, 52848 (2002) (preamble to the Physician Panel Rule). The extent of the worker's employment at Amchitka is critical to this application for assistance, since the length of employment affects the physician panel's assessment of the worker's exposures. Thus, if the worker was employed at Amchitka at different times by different employers, the total length of the employment should be considered by the physician panel. In this respect, the physician panel process differs from a DOL Special Exposure Cohort case, in which DOL is only seeking enough information to conclude that a worker with a covered disease belongs to the Special Exposure Cohort. See 20 C.F.R. § 30.210(a)(1).

Because the Act requires that the DOE attempt to verify the worker's full period of employment at Amchitka, the application should be remanded so that the DOE can attempt to verify that the additional employers were DOE contractors or subcontractors at Amchitka during their employment of the worker. The DOE may limit its review to the periods that the DOE performed work at Amchitka

for the Long Shot and Milrow tests, since the applicant is claiming employment related to those tests.

Although the Act does not require that the DOE seek information outside its control, we believe that union records might help support the application and, therefore, we suggest that the applicant contact the union. During the Long Shot and Milrow periods, the worker was a member of the union, and employed by various firms - his own company, partnerships and joint ventures, and independent firms. Although the applicant indicated in the DOL process that her attempt to obtain union review of its records was unsuccessful, it appears to us that a second attempt may be successful. The co-worker obtained an affidavit from the local union based on its dispatch records. In addition, the DOL spoke to the union concerning the worker. Although the DOL inquiry was not fruitful, it appears that the inquiry was limited to the worker's business and, therefore, did not encompass his work for other employers during the relevant periods. See DOL Final Decision at 2. Accordingly, we suggest that the applicant contact the union to see if its records would help identify whether the worker's employers performed work at Amchitka during the Long Shot and Milrow periods.

#### B. The Worker's Exposures at Amchitka

Although radiation exposure was the only exposure claimed on the application, the physician panel also should have considered asbestos exposure. The physician panel is required to review all of the records submitted to it by the program office. See 10 C.F.R. § 852.9. One of the worker's medical records mentions asbestos exposure, 5/ and asbestos exposure is associated with pipefitting and lung cancer. 6/ Given the foregoing, the physician panel should have addressed the issue of asbestos exposure. Accordingly, once the process for verifying the worker's employment is completed, the case should be sent back to the physician panel for a determination based on the verified employment and radiation and asbestos exposure.

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5/ See Surgeon Operative Report, Providence Medical Center, dated October 26, 1987.

6/ See generally National Cancer Institute, Cancer Facts, Asbestos Exposures: Questions and Answers at <http://cis.nci.nih.gov>.

Finally, although the physician panel concluded that the radiation exposure was too small to have contributed to the worker's lung cancer, the physician panel went on to mention the worker's age and history of tobacco use as more probable factors. We could not find any reference in the file to a history of tobacco use. Accordingly, on remand, the physician panel should explain the source of that statement and whether it refers to smoking, as opposed to other tobacco use.

### III. Summary

As discussed above, we have concluded that the application should be remanded for further consideration. The OWA should seek DOE verification that the worker's additional employers during the periods when DOE performed work related to the Long Shot and Milrow tests were DOE contractors or subcontractors at Amchitka during those periods. When the DOE has completed that process, a physician panel should review the application based on the worker's exposure to radiation and asbestos during the verified employment periods. Finally, the physician panel should identify the source of its statement that the worker had a history of tobacco use and whether that statement refers to smoking.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0027 be, and hereby is, granted as set forth in Paragraph (2) below.
- (2) The application described in the appeal is remanded to the DOE Office of Worker Advocacy for further consideration consistent with this Decision and Order.
- (3) This is a final order of the Department of Energy.

George B. Breznay  
Director  
Office of Hearings and Appeals

Date: October 27, 2003