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April 2, 2003
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal
Date of Filing: January 7, 2003
Case No.: TIA-0017

XXXXXXXXXX (the applicant) applied to the Department of Energy (DOE) Worker Advocacy Office for DOE assistance in filing for state workers' compensation benefits. The DOE Worker Advocacy Office determined that the applicant was not a DOE contractor employee and, therefore, was not eligible for DOE assistance. The applicant appeals that determination. As explained below, we have concluded that the determination is correct.

I. Background

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

The Department of Labor (DOL) administers the first EEOICPA program, which provides federal monetary and medical benefits to workers having radiation-induced cancer, beryllium illness, or silicosis. Eligible workers include DOE employees, DOE contractor employees, as well as workers at an "atomic weapons employer facility" in the case of radiation-induced cancer, and workers at a "beryllium vendor" in the case of beryllium illness. See 42 U.S.C. § 7384l(1). The DOL program also provides federal monetary 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.

The DOE administers the second EEOICPA program, which does not provide for monetary or medical benefits. Instead, the DOE program provides for an independent physician panel assessment of whether a "Department of Energy contractor employee" has an illness related to exposure to a toxic substance at a DOE facility. 42 U.S.C. § 7385o. 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 a 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.

The regulations for the DOE program are referred to as the Physician Panel Rule. See 67 Fed. Reg. 52,841 (August 13, 2002) (to be codified at 10 C.F.R. Part 852). The DOE Worker Advocacy Office is responsible for this program and has a web site that provides extensive information concerning the program. 1/

Pursuant to an Executive Order, the DOE has published a list of facilities covered by the DOL and DOE programs, and the DOE has designated next to each facility whether it falls within the EEOICPA's definition of "atomic weapons employer facility," "beryllium vendor," or "Department of Energy facility." 67 Fed. Reg. 79,068 (December 27, 2002) (current list of facilities). 2/ The DOE's published list also refers readers to the DOE Worker Advocacy Office web site for additional information about the facilities. 67 Fed. Reg. 79,069.

This case involves the DOE program, i.e., the program through which DOE contractor employees may obtain independent physician panel determinations. The applicant states that he worked for Harshaw Chemical Co. and Harshaw Filtrol Partners in Cleveland, Ohio during

1/ See www.eh.doe.gov/advocacy.

2/ See Executive Order No. 13,179 (December 7, 2000). The DOE first published a list in January 2001, 66 Fed. Reg. 4003 (January 17, 2001), and a revised list in June 2001, 66 Fed. Reg. 31218 (June 11, 2001).

the 1970's and 1980's and was injured during that employment by exposure to toxic substances. The DOE Worker Advocacy Office determined that the applicant's employer was an "atomic weapons employer," not a DOE contractor. See December 6, 2002 letter from DOE Worker Advocacy Office to the applicant. Accordingly, the DOE Worker Advocacy Office determined that the applicant was not eligible for the physician panel process. In his appeal, the applicant argues that he was a DOE contractor employee.

II. Analysis

A. Worker Programs

As an initial matter, we emphasize that the DOE physician panel process is separate from state workers' compensation proceedings. A DOE decision that an applicant is not eligible for the DOE physician panel process does not affect (i) an applicant's right to file for state workers' compensation benefits or (ii) whether the applicant is eligible for those benefits under applicable state law.

Similarly, we emphasize that the DOE physician panel process is separate from any claims made under other statutory provisions. Thus, a DOE decision concerning the physician panel process does not affect any claims made under other statutory provisions, such as programs administered by DOL and DOJ.

We now turn to whether the applicant in this case is eligible for the physician panel process.

B. Whether the Applicant is Eligible for the DOE Physician Panel Process

As stated above, the Physician Panel Rule applies only to employees of DOE contractors who worked at DOE facilities. Again, the reason is that DOE and its contractors would not be parties to workers' compensation proceedings involving other employers.

When the DOE Worker Advocacy Office determined that the applicant was not a DOE contractor employee, that Office indicated that Harshaw was an "atomic weapons employer," not a DOE contractor.

This determination is consistent with the DOE's published list and description of facilities, which identifies Harshaw as an "AWE," i.e., an "atomic weapons employer," during the period 1942 to 1955, when the firm processed uranium for the government. See 67 Fed. Reg. 79,073; www.eh.doe.gov/advocacy (searchable database on sites).

The DOE Worker Advocacy Office determination that the Harshaw plant was not a DOE facility is correct. A DOE facility is a facility where the DOE conducted operations and either had a proprietary interest or contracted with a firm to provide management and operation, management and integration, environmental remediation services, or construction or maintenance services. 42 U.S.C. § 73841(12); 67 Fed. Reg. 52854 (to be codified at 10 C.F.R. § 852.2). During the applicant's employment, Harshaw was a privately owned and operated chemical company. As of 2001, the site was owned by Englehard Corporation and Chevron Chemical LLC.

In his appeal, the applicant raises the issue whether the 1974 inception of the Formerly Utilized Sites Remedial Action Program (FUSRAP) resulted in DOE environmental remediation activities at the site, thereby rendering the Harshaw site a DOE facility. A report prepared by the United States Army Corps of Engineers indicates that FUSRAP environmental remediation activities have not yet begun. See U.S. Army Corps of Engineers, FUSRAP Preliminary Assessment, Former Harshaw Chemical, Cleveland, Ohio (April 27, 2001). The Preliminary Assessment indicates that in 1999 the DOE advised the Corps of Engineers that the Harshaw site was eligible for inclusion in the program, that in 2001 the Corps of Engineers completed its Preliminary Assessment of the site, and that the next step is site inspection. *Id.* at 1, 7. Thus, the Preliminary Assessment indicates that although FUSRAP began in 1974, the DOE did not perform environmental remediation activities at the site.

Because DOE did not conduct environmental remediation activities at Harshaw, there are no DOE activities that would render the Harshaw plant a DOE facility. Accordingly, the applicant is not eligible for the DOE physician panel process. Again, we emphasize that this determination does not affect whether the applicant is eligible for (i) state workers' compensation benefits or (ii) federal monetary and medical benefits available under other statutory provisions.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy, Case No. TIA-0017 be, and hereby is, denied.
- (2) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: April 2, 2003