



A LOOK AT WHAT'S NEW WITH EEIOCPA

October 16, 2011

Near the end of August, I decided it would be a good time for me to plan a visit to Congress to explain the need to pass the legislation introduced by Senator Mark Udall (S545) and Congressman Ed Whitfield (HR 1030) which would create an advisory board to DOL. This board would provide increased transparency to DOL's adjudication of EEIOCPA claims.

I asked Deb Jerison and Faye Vlieger if they were available to travel with me. They were free so off we went.

This update is not about our visit to Congress. I and other advocates have been doing this for over 7 years. Richard Miller, the lead advocate for the sick workers before ANWAG, made the trip for many years before.

This is an accounting of our meeting with DOL.

You might ask, "How did this happen? And why didn't you tell us?" Very valid questions, which I will answer.

You remember when Shelby Hallmark retired and Gary Steinberg was named Acting Director of OWCP. Well, when he was named, I called his office and asked for a meeting. I think this was in March. No response. I called again and again no response. I had an opportunity to speak with Dr. Howard, Director of NIOSH, in July and he suggested I send a formal invitation to Mr. Steinberg, which I did. No response. When the trip to DC was decided, I called Mr. Steinberg alerting him to our visit to DC on October 12 and asked if he could meet with us. No response to two phone calls.

Then comes the Freddie Kruger Associated Press article. By now I have scheduled all the appointments with the Congressional staffers and we are booked. But after reading DOL's response to the article, I was impelled to call Mr. Steinberg's office again. You may remember the statement blamed everything on the contractor and that DOL was not involved,

"The Labor Department issued a statement Tuesday saying a former contractor prepared the manual several years ago for internal use only, and the references in question have been removed after review.

'We agree that the use of fictional characters with negative attributes could be perceived as insensitive,' Gary Steinberg, acting director of the Office of Workers' Compensation Programs, said in the statement. 'An oversight of this nature does not reflect the values and principles by which we operate.'

This statement bothered me a lot. EECAP had the original information on the manual that showed that at least two people from DOL were directly involved in reviewing and/or editing the manual. This evidence also shows that, in at least this version, the manual was not in use before 2010 and not "several years ago".

So, I again called Mr. Steinberg's office to alert him. As a new director, I thought that he did not have all the information that was due him.

On September 29th - 12 days before we were to arrive in DC - Mr. Steinberg's office called and acknowledged my request to meet. We agreed to meet on October 11, the day I and Deb had planned to arrive. Faye was already on the East Coast the day before. Since Dr. David Manuta signed the ANWAG letters calling for Rachel Leiton's resignation, I contacted him to see if he could arrange to attend the meeting despite the short notice. Fortunately, he could.

So enough background. All of us arrived basically on time for the meeting. Present from DOL were Gary Steinberg, Rachel Leiton, Jeff Nesvet (DOL Solicitor for FECA and EEOICPA – please note that FECA has a higher standard of causation than Part E of the program. I wonder now if these different standards are not the root of the problems.), Shawn Hooper (Advisor), Diana Petterson (Public Affairs), Tony Zaffarini (Congressional Liaison) and Jesse Lawder on the phone. Our meeting was scheduled to last for one hour.

DOL asked for and I forwarded an agenda of the issues we wanted to talk about. I figured that since we had this opportunity, why just talk about the manual and Ms. Leiton's statement to the Board for an hour? There were so many issues we could at least address during this meeting. On the conference table, there were six 3 inch binders labeled "DEEOIC Briefing Book". I was impressed at the thoughtfulness. Four binders for the advocates, since we are in different states for the most part, and two for DOL. Alas, I was wrong. Five binders for DOL and one for us. For the most part, the contents of this binder were communications between ANWAG and Congressional members and DOL's response, transcripts, chapters from the Procedure Manual, and Final Bulletins. Deb has scanned the book and it will be made available to interested parties.

There were a few positive items relayed by DOL during this meeting:

A review of the qualifications of the DMCs.

A review of the scientific literature in the SEM and Hazmap by the National Academy of Sciences Institute of Medicine.

The Final Bulletin for the Ruttenber database – this isn't really positive since the roaming workers and those in Building 444 are still not covered under the SEC. But at least it was finally released after 4 years of waiting.

The meeting was cordial but we didn't accomplish much. Rachel Leiton did apologize for her poor choice of words during the May Advisory Board meeting. The offending names in the training manual have been purged. Gary Steinberg stated many times how dedicated Rachel and her group are to the program.

He expressed how important it is to have mutual respect for each other in order to continue future discussions. We agreed and we were encouraged that the new relationship will be similar to the one we have had with NIOSH and DOE after our January 2010 meeting that DOL declined to attend. But then he shut down our agenda. Of the 12 chapters in the Briefing Book, we were only allowed to discuss 4 and a half. We were not allowed to talk about the "past" issues. We were not allowed to talk about individuals or individual claims, even if we had written permission from the claimant. This was very disappointing because: a) the "past" issues are the ones that are still causing problems (radiation as a factor under Part E for example) and b) the individual claims we brought with us showed examples of systemic problems with the program.

I had a signed Privacy Act Release from one claimant and I offered it to them. That didn't make any difference. Faye got around it because she is a claimant and was sitting in the room. No release necessary. I did manage to use one example of one claimant being accepted for a disease while his co-worker, who worked side by side with him, had the same disease, offered the same evidence was denied. DOL did not offer comments.

Dr. Manuta spoke about the qualifications of DOL's experts. He explained that in a normal court of law, the judge needs to determine whether an expert witness is qualified to testify. He noted that this is not the case with this program. He also said that sometimes the scientific citations used by DOL's DMCs are outdated. This sometimes causes a claim to be denied.

Deb questioned why DEEOIC had opted for a Final Adjudication Branch rather than an Administrative Law Judge system for claim adjudication. DOL responded that the thinking was that an Administrative Law Judge system would be too formal and difficult for claimants.

Deb asked for an explanation of what DOL considers a self-serving affidavit. Jeff Nesvet opened the binder and read a paragraph of a DOL letter to ANWAG! This, and similar recitations from previous correspondence, really cut into our hour long meeting. Deb reminded him that we read the "explanation" but that it really didn't define it. She asked if there was any point to a claimant submitting an affidavit on his own claim and was told that there was. Jeff Nesvet did most of the talking during the meeting. Basically he said that DOL has responded to our concerns and that's that. No more discussion.

When DOL told us that they contracted with the Institute of Medicine to review the SEM, Deb asked if we could get a copy of the contract. There was some hesitation and Rachel said she will check into whether they can release it. Dr. Manuta asked if the report would be released to the public and DOL was unsure.

I asked their opinion on the advisory board legislation. They said it is not needed, since they do seek outside help, and it will delay the claims process. Hmm. I don't understand how that could be.

The meeting ended with the suggestion that we can continue to meet via teleconference. I told Rachel I'll contact her in November. I thought I would be remiss as a wife and authorized representative if I

didn't use this opportunity to have Mr. Steinberg take a look at my husband's claim. So at the end, I gave Mr. Steinberg a copy of the letter I sent him back in March or April. He originally said he couldn't read it because there was a court case. I explained that there was no court case now and asked him to review and get back to me. I also asked that he review the emails that DOL redacted because of attorney/client privilege. He said he would read the letter but then turned it over to Rachel. Sigh.

So there you have it. It seems to me that Jeff Nesvet is the person who actually makes the decisions, not Rachel or Gary Steinberg. I could be wrong, but it appears that he's the one who wrote all the responses to our past concerns. It doesn't look like there's any chance of changing his mind about the issues.

One other thing bothered me, but I didn't remember it until after the meeting. Gary Steinberg and Rachel were apologizing about the manual. They said a couple of times that this manual was used since 2005. I realized later that the metadata showed it was created in 2010. So what's up with that? Also, Mr. Steinberg said that the reason for the press release that seemed to blame the contractor who wrote the training manual for the inappropriate names was that DOL had to respond within a couple of hours to the article and did not have all the facts. This may be true for the AP article but the reporter who wrote the original article was not able to get a call back from DOL in the several weeks before the article ran.

But this meeting helped us when we met with Congressional staffers the next day. We summarized the meeting, showed the examples of the claims and all were supportive of the legislation to create an advisory board to DOL. There appears to be a push to get it passed this year. **PLEASE call your legislators and ask them to co-sponsor HR 1030 and S545, if they haven't done so yet.** Senator Tom Udall cosponsored it the day after we met with his staffer.

We also asked that Congress act on the changes NIOSH requested on the radiogenicity of basal cell carcinoma and chronic lymphocytic leukemia. We explained that NIOSH has determined those diseases are radiogenic. We also raised the conflict of interest with Ted Katz being the Designated Federal Official for the NIOSH Advisory Board. We explained that since he wrote the final rules for dose reconstruction and special exposure cohort process there is the potential of bias on his part to steer the Board's debates to support those rules.

Thanks,

Terrie