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November 7, 2019

Hon. Eugene Scalia
Secretary of Labor
U.S. Department of Labor
200 Constitution Ave, NW
Washington, DC 20210

RE: Comments on Notice of Proposed Rulemaking "Occupational Exposure to Beryllium and Beryllium Compounds in Construction and Shipyard Sectors," Docket OSHA-H005C-2006-0870

Dear Secretary Scalia:

For reasons set forth below, this letter opposes three changes proposed by the U.S. Department of Labor in the Notice of Proposed Rulemaking (NPRM) published in the Federal Register (84 FR 53902) on October 8, 2019 that may weaken health protections for occupational exposure to beryllium in the construction and shipyard sectors. The NPRM revises the standards for *Occupational Exposure to Beryllium and Beryllium Compounds* covering construction and shipyards that had been issued as a final rule by the Occupational Safety and Health Administration (OSHA) on January 9, 2017.

The NPRM requests comments on the proposed revisions to the ancillary provisions of the construction (29 CFR 1926.1124) and shipyard (29 CFR 1915.1024) standards that are tailored to these two sectors.

- 1. OSHA proposes to require a confirmatory Beryllium Lymphocyte Proliferation Test (BeLPT) within thirty (30) days of the initial BeLPT test. According to medical experts, this interval is impracticable to implement, and increases the risk that many beryllium sensitized workers will not be diagnosed and receive necessary workplace protections.**

The Beryllium Lymphocyte Proliferation test (Be-LPT) is a blood test used to determine whether workers have become beryllium sensitized, or "confirmed positive" as OSHA characterizes it in its proposed rule. A confirmed positive indicates that the individual has incurred an immunological response to beryllium exposure and is at an elevated risk of contracting Chronic Beryllium Disease (CBD), a debilitating, and often fatal disease of the lungs. On average, an estimated 40 to 60 percent of workers with beryllium sensitization will eventually go on to

develop CBD, according to National Jewish Health.¹ They note that recent research suggests that each year, 6 to 8 percent of individuals with beryllium sensitization will develop CBD each year--at least in the first 6 years. Under OSHA's proposed rule, in order to be "confirmed positive" for beryllium sensitization, workers must have received either (1) two abnormal, (2) one abnormal and one borderline, or (3) three borderline LPT results. Once an individual is "confirmed positive", the construction standard at 29 CFR 1926.1124(k) and the shipyard standard at 29 CFR 1915.1024(k) requires the employee to be informed of his or her status, and the employer must refer the employee to a CBD diagnostic center, provide continued periodic medical surveillance, and offer medical removal from airborne exposure to beryllium.

OSHA's January 9, 2017 final rule, *Occupational Exposure to Beryllium and Beryllium Compounds* covering the construction and shipyard industries had no time limits for conducting confirmative Be-LPT tests. That rule only required employers to offer continued medical monitoring on a two-year cycle. In contrast, the October 9, 2019 NPRM for construction at 29 CFR 1926.1124(b) and shipyards at 29 CFR 1915.1024(b) changes the definition of "confirmed positive" to require that confirmatory Be-LPT test(s) be conducted within a 30-day follow-up test period after a first abnormal or borderline Be-LPT test result. The NPRM attempts to justify this limit (where the initial test and the retesting must occur within 30 days) by reasoning that if there is no limit, the confirmatory test could be given at any time, even as long as ten years in the future which would result in false positives.

There are several problems with this proposed change:

- **The 30-day cycle is impractical.** As National Jewish Health (NJH) commented on the 2018 General Industry rulemaking proposal, which contained the same language,² "It is almost logistically impossible for a confirmed abnormal to occur in 'one 30-day cycle of testing.'"³ The turnaround time for a Be-LPT in the laboratory is around 14 days, including time to culture cells and have the results analyzed and reviewed by a physician. Since it normally takes approximately 14 days for a single test to be completed, 30 days is not adequate to culture cells, analyze and review the results by a physician, and if abnormal or borderline, make an appointment to redraw blood and allow another 14 days for test results. While it is often very difficult to have two BeLPT tests conducted in 30 days, in cases where a third test would have to be conducted in 30 days (for example, if the first two are borderline), it would be impossible to fulfill this requirement in the required timeframe.

NJH estimates that less than a quarter of 194 of their patients with CBD would have met the "one 30-day cycle of testing" requirement "with 150 patients missing the opportunity to be referred for clinical evaluation and missing an appropriate and timely diagnosis of CBD."⁴

¹ Comments of National Jewish Health on OSHA's Notice of Proposed Rulemaking, Revising the Beryllium Standard for General Industry, December 11, 2018, Document ID OSHA-2018-0003-0022.

² Notice of Proposed Rulemaking, Revising the Beryllium Standard for General Industry, 83 Federal Register, 63746 (December 11, 2018)

³ Comments of National Jewish Health on OSHA's Notice of Proposed Rulemaking, Revising the Beryllium Standard for General Industry, December 11, 2018, Document ID OSHA-2018-0003-0022.

⁴ Comments of National Jewish Health on OSHA's Notice of Proposed Rulemaking, Revising the Beryllium Standard for General Industry, December 11, 2018, Document ID OSHA-2018-0003-0022.

Due to the logistical impracticability of a 30-day cycle for confirmative tests, OSHA's proposal would increase risks to the overwhelming majority workers with an indication of abnormal Be-LPT results. This risk would be most evident where a worker with two borderline tests would be considered "normal" and sent back into exposure for another two years until the employer offers another round of medical surveillance that is required under the rule. This puts this worker at risk of disease when and if he or she is finally identified as beryllium sensitized in the next round of surveillance. For some workers, beryllium sensitization and chronic beryllium disease progress slowly, but for others this is not the case; as such, OSHA's proposed approach would fail to protect this worker from continuing beryllium exposure and increase the likelihood of CBD.

The American Thoracic Society (ATS)⁵ also strongly opposes the 30-day cycle, noting that it is infeasible because "there are few centers with expertise in beryllium-related health effects making this requirement overly restrictive. It can take weeks to schedule and arrange an appointment. Workers often cannot coordinate travel, work and personal obligations in this time frame." Any technical problems that arise with the blood draw or blood test would make meeting the 30-day limit impossible. NJH notes that where facilities must use a third party to draw blood and perform the analysis, there have been delays in receiving test results of up to six weeks. Obviously in these cases, two or three tests within 30 days would be impossible.

ATS and NJH both note that the problem would be worse in remote areas where a worker may need to travel from the workplace and where there is limited access to healthcare, or where a phlebotomist must be scheduled. ATS notes that it would also be burdensome and logistically challenging for workplaces in smaller industries without a medical director or workplace health care provider.

The American College of Occupational and Environmental Medicine (ACOEM)⁶ also notes that a 30-day window for a repeat test abnormality or borderline result is unnecessarily restrictive and will delay follow-up medical testing and other protections to at risk workers.

- **There is no scientific basis for setting a 30-day repeat period, according to leading beryllium experts.** ATS writes that "there is no scientific evidence to support this time frame" and cites studies that show that a "worker can develop sensitization with combination of BeLPTs up to 10 years from the first abnormal findings." ATS also notes that because the false negative rate is higher than the false positive rate, some medical surveillance protocols use by the Department of Energy and others recommend waiting a few months to help exclude false negatives.

⁵ Comments of the American Thoracic Society on OSHA's Notice of Proposed Rulemaking, Revising the Beryllium Standard for General Industry, December 11, 2018, Document ID OSHA-2018-0003-0021.

⁶ Comments of American College of Occupational and Environmental Medicine on OSHA's Notice of Proposed Rulemaking, Revising the Beryllium Standard for General Industry, December 11, 2018, Document ID OSHA-2018-0003-0024.

ACOEM also comments that “OSHA has stated no compelling rationale or scientific basis for making this change other than the concern of false positives which are less common than true positives.”⁷

ATS, NJM and AOEC recommend that repeat testing should be offered to employees within 30 days of the first abnormal or borderline test, but up to two to three years or longer should be allowed for repeat testing between abnormal test results to identify confirmed positive workers and ensure workers are accurately diagnosed and provided protections.

In conclusion, it is vital that beryllium sensitized workers be properly and timely identified, so that they have the opportunity to receive medical testing and other protections to stop beryllium sensitization from progressing to CBD. The impractical and scientifically unfounded 30-day requirement will mean that many workers will not be accurately diagnosed with beryllium sensitization, which will delay in follow-up medical testing and other protections, including their ability to take advantage of Medical Removal Protection under the Construction (29 CFR 1926.1124(l)) and Shipyards (29 CFR 1915.1024(l)) provisions of the final standard. OSHA should significantly lengthen the period allowed between initial and confirmatory testing and develop a testing protocol that is both practicable and based on science.

2. Removing “Beryllium sensitization” from the definition of “Confirmed positive” and creating a new definition of “Beryllium sensitization” will prevent workers from being classified as diagnosed with beryllium sensitization.

The January 9, 2017, beryllium standards for General Industry, Construction, and Shipyards all included criteria for a worker to be “confirmed positive” and stated that “confirmed positive” means the worker tested “has beryllium sensitization” as defined by OSHA’s BeLPT testing criteria. However, OSHA’s 2018 General Industry proposal and the proposed Construction (29 CFR 1926.1124(b)) and Shipyards (29 CFR 1915.1024(b)) standards remove the term “beryllium sensitization” within the definition of “confirmed positive,” and establish a separate new definition of “beryllium sensitization.”

The new definition for “beryllium sensitization” simply states that “Beryllium sensitization means a response in the immune system” and thereby decouples it from the definition of “confirmed positive.” The proposal then adds a sentence explaining that beryllium sensitization is not associated with any kind of physical symptoms, illness or disability, but is required for the development of CBD.

Organizations representing occupational physicians and other beryllium disease experts strongly oppose these changes. The historic definition of beryllium sensitization had been two abnormal BeLPTs until 2006, when Middleton *et al* from the CDC confirmed that one abnormal and one borderline, or three borderlines, also confirmed beryllium sensitization with equal positive

⁷ Comments of American College of Occupational and Environmental Medicine on OSHA’s Notice of Proposed Rulemaking, Revising the Beryllium Standard for General Industry, December 11, 2018, Document ID OSHA-2018-0003-0024.

predictive value (PPV).⁸ Since that time, additional publications have confirmed these findings and at present, ATS, ACOEM and NJH accept these combinations as evidence of confirmed positive beryllium sensitization.

The ATS points out that the new “beryllium sensitization” language is confusing and should be rewritten so that, “test results that constitute the determination of ‘confirmed positive’ are the definition of beryllium sensitization.”⁹ This is common practice and was the original definition in the 2017 standards. Separating the definition of “confirmed positive” from the definition of beryllium sensitization is unprecedented, makes no sense and, according to ATS will “reduce worker protections and the right to file for worker’s compensation.”

The AOEC agrees, commenting that the changed definition of “beryllium sensitization” differs from the medically accepted interpretation of Be-LPT results and the definition of beryllium sensitization as defined in the ATS Statement on beryllium.

Removal of the term “beryllium sensitization” makes very little sense even in the context of this proposal. The regulatory text itself is inconsistent with the removal of the term “beryllium sensitization” from the definition of “confirmed positive.” The new definition of Chronic Beryllium Disease, for example, states that CBD “means a chronic granulomatous lung disease caused by inhalation of airborne beryllium by an individual *who is beryllium-sensitized*. [emphasis added]. But the definition of beryllium sensitized no longer refers to the definition of “confirmed positive,” which defines the criteria for being determined beryllium sensitized.

Meanwhile, paragraph (k)(5)(i)(A) of the NPRM for both Construction and Shipyards explains what the written medical report given to the employee must include:

Any detected medical condition, such as CBD or *beryllium sensitization* (*i.e.*, the employee is *confirmed positive*, as defined in paragraph (b) of this standard), that may place the employee at increased risk from further airborne exposure.

This paragraph equates “beryllium sensitization” with an employee’s status as “confirmed positive, which is consistent with the original 2017 standards, but not consistent with the decoupling of these terms in the current proposal.

While the term “confirmed positive,” when separated from the term “beryllium sensitized,” does not relieve the employer of any actions triggered by the confirmatory Be-LPT testing, there are consequences. For example, if an employee leaves employment, the employee’s medical record may only contain the term “confirmed positive,” rather than “beryllium sensitized,” sending confusing and possibly misleading messages for future medical, medical surveillance or workers’ compensation should the worker later develop CBD.

⁸ The BeLPT: Algorithms and Implications, *American Journal of Industrial Medicine* 49:36–44 (2006) and Middleton, et. al. “Optimizing BeLPT Criteria for Beryllium Sensitization,” *American Journal of Industrial Medicine* 51:166–172 (2008)

⁹ Comments of the American Thoracic Society on OSHA’s Notice of Proposed Rulemaking, Revising the Beryllium Standard for General Industry, December 11, 2018, Document ID OSHA-2018-0003-0021.

3. OSHA’s proposal to eliminate the requirements for certain personal protective equipment and housekeeping requirements in Construction and Shipyards standards is premised on the erroneous assumption that abrasive blasting is the only beryllium exposure that maritime or construction workers will face. The NPRM overlooks other beryllium exposures for which protections would be weakened.

In the NPRM, OSHA has removed any reference to dermal contact contained in the January 9, 2017 final standard, as well as a number of requirements for Construction Personal Protective Clothing and Equipment previously included in the 2017 final standard (29 CFR 1926.1124 Paragraph (h)(2)(i)-(v), (3)(iii)-(iv)) and Housekeeping (29 CFR 1926.1124 (j)(1)(i)-(ii), (2)(i)-(iv) and (3)), as well as for Shipyard Personal Protective Clothing and Equipment (29 CFR 1915.1024 Paragraph (h)(2)(i)-(v), (3)(iii)-(iv)) and Housekeeping (29 CFR 1926.1124 Paragraph (j)(1)(i)-(ii), (2)(i)-(iv), based on the assumption that the only exposure that construction and maritime workers will face is from abrasive blasting and that, except for abrasive blasting itself, most dust exposures would be considered “trace amounts” (less than 0.1 percent in weight.)

OSHA justifies these removals by arguing that the agency “did not intend to require employers who only work with materials containing trace amounts of beryllium to protect employees or other individuals against dermal contact with beryllium absent significant airborne exposures and it is not aware of any operations in the construction or shipyard sectors in which dermal contact with beryllium would occur at levels above trace amounts, making such a provision unnecessary.”

This reasoning ignores the possibility that construction or shipyard workers may be exposed to greater than trace amounts of beryllium in operations other than abrasive blasting. Public comment cited in the Preamble to the January 9, 2017 final Beryllium standard, which was submitted by NJH and the United Steelworkers, describe how shipyard workers often use non-sparking tools that contain beryllium. Some of these require periodic sharpening, grinding or straightening which may expose workers to greater than trace amounts of beryllium. In addition, worker exposure from beryllium alloys may be possible when working on high-tech aircraft carriers or nuclear submarines. Similarly, the National Institute for Occupational Safety and Health testified that construction workers may be exposed to beryllium when demolishing buildings or building equipment.¹⁰

OSHA cited these issues in the 2017 Final Standard stating that

OSHA acknowledges the USW’s concerns about future beryllium use and recognizes that there is potential for exposure to beryllium in construction and shipyard operations other than abrasive blasting. As such, workers engaged in such operations are exposed to the same hazard of developing CBD and other beryllium-related disease, and therefore deserve the same level of protection as do workers who are engaged in abrasive blasting or covered in the general industry final rule.

¹⁰ 82 Federal Register 2639 (January 9, 2017)

Therefore, although at this time OSHA cannot specifically quantify exposures in construction or shipyard operations outside of abrasive blasting, OSHA has determined that it is necessary for the final standards for construction and maritime to cover all occupational exposures to beryllium in those industries in order to ensure that the standard is broadly effective and addresses all potential harmful exposures.¹¹

OSHA fails to explain in the Preamble to the 2019 NPRM for Construction and Shipyards why the agency is no longer concerned about the potential for exposure to beryllium in construction and shipyard operations other than abrasive blasting. OSHA has not provided any evidence that the basis for these concerns has changed, or any explanation or evidence that OSHA's 2017 decision was in error when the agency issued a final standard that ensured that these workers have "the same level of protection as do workers who are engaged in abrasive blasting or covered in the general industry final rule."

OSHA should therefore rescind proposed changes to the Personal Protective Clothing and Equipment and Housekeeping sections of the January 9, 2017 standard, and restore references to dermal contact in order to ensure that construction and shipyard workers receive protections from exposure to beryllium equal to protections now afforded to General Industry workers.

Conclusion and Summary

The proposed changes to the January 9, 2017 beryllium standard for Construction and Shipyards are likely to have the effect of under-identifying beryllium sensitized workers, preventing them from being diagnosed and receiving needed protections (such as medical surveillance), and leave other beryllium-exposed workers with weaker workplace protections.

1. The 30-day limit for conducting all follow-up Be-LPT tests should be significantly lengthened and a new testing protocol should be developed that is practicable and based on science. The proposed procedure is infeasible and not scientifically founded. Many beryllium sensitized workers will not be identified within the narrow time constraints in the NPRM and not have the opportunity to receive the protections and surveillance they need to prevent progression to CBD.
2. The change in the definition of "confirmed positive" and the removal of the term "beryllium sensitized" from the definition of "confirmed positive" should both be eliminated. Separating these definitions is unprecedented in the industry, unnecessary and will only lead to confusion and potentially undermine future access to benefits for beryllium sensitized workers.
3. Protections need to be provided to construction and maritime workers who may be exposed to beryllium above trace amounts. The assumption that abrasive blasting is the only beryllium exposure that maritime or construction workers will experience may leave workers exposed to other sources of beryllium insufficiently protected.

Finally, we would urge OSHA to consult with the Maritime Advisory Committee on Occupational Safety and Health, in addition to the Advisory Committee on Construction Safety

¹¹ 82 Federal Register 2639 (January 9, 2017)

The Hon. Eugene Scalia

November 7, 2019

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and Health, in reviewing its proposed changes to the January 9, 2017 rule *Occupational Exposure to Beryllium and Beryllium Compounds*.

Thank you for your consideration of these comments. Please contact Jordan Barab of the staff of the Committee on Education and Labor with any questions at 202-225-3725 or by email at jordan.barab@mail.house.gov.

Sincerely,



ROBERT C. "BOBBY" SCOTT

Chairman



ALMA S. ADAMS

Chairwoman

Subcommittee on Workforce Protections