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From: Steinberg, Debra [Debra.Steinberg@cwt.com]
Sent: Monday, April 25, 2011 3:48 PM
To: NIOSH Docket Office (CDC)
Cc: Jennifer Adams; Lee Ielpi
Subject: 226 - Implementation of the James Zadroga 9/11 Health and Compensation Act of 2010 (Pub. L 111-347)
Attachments: SFA Zadroga Comment 2011.pdf

Please find attached the September 11th Families' Association/ Tribute WTC Visitor Center submission to the NIOSH Docket re Implementation of the James Zadroga 9/11 Health and Compensation Act of 2010 (Pub. L. 111-347).

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SEPTEMBER 11TH FAMILIES' ASSOCIATION
Tribute WTC Visitor Center



April 14, 2011

NIOSH Docket Office (CDC)
Robert A. Taft Laboratories, MS-C34
4676 Columbia Parkway
Cincinnati, Ohio 45226

Re: James Zadroga 9/11 Health and Compensation Act of 2010
NIOSH Docket No. NIOSH-226

Dear Sir or Madam:

The September 11th Families' Association submits, for your consideration these written comments on implementing the James Zadroga 9/11 Health and Compensation Act of 2010 (Pub. L. 111-347). The September 11th Families' Association was founded by New York City Fire Department families in November 2001 to provide information to all 9/11 families, to present evolving issues, and to share resources for long-term recovery. In 2004, the September 11th Families' Association broadened its mission to create the Tribute WTC Visitor Center. The Tribute Center, located across from the World Trade Center site, is a museum dedicated to sharing the stories of the 9/11 community -- survivors, family members who lost loved ones, first responders, civilian volunteers, neighborhood residents -- and to providing a destination for over 500,000 visitors annually. Since opening in September 2006, the Tribute Center has welcomed over two million visitors from every state in the United States and 134 countries. In furtherance of our mission to support the 9/11 community, we offer these comments in furtherance of the fair, equitable, and successful implementation of the Zadroga Act for all claimants.

* * *

The Air Transportation Safety and System Stabilization Act (49 U.S.C. § 40101) (ATSSSA) created the original September 11th Victim Compensation Fund of 2001 ("VCF" or the "Fund"). The original VCF closed on December 22, 2003. The "Final Report of the Special Master for the September 11th Victim Compensation Fund of 2001" documents that, "[i]n total, the Fund distributed over \$7.049 billion to survivors of 2,880 persons killed in the September 11th attacks and to 2,680 individuals who were injured in the attacks or in the rescue efforts conducted thereafter." (Final Report, p. 1, footnote omitted, available at http://www.justice.gov/final_report.pdf). The Zadroga Act amends the ATSSSA to reopen the VCF, extend and expand eligibility for compensation, extend the filing deadline, and cap total compensation paid by the reopened VCF to first responders and survivors at \$2.775 billion.

The Regulations implementing the original VCF established: “(1) guidelines defining eligible claimants; (2) a ‘presumed award’ methodology, providing a uniform set of guidelines for the valuation of economic loss which would be favorable to most victims and yet based on information that claimants should be able to obtain easily; (3) policies for the assessment and deduction of collateral source compensation; and (4) flexible procedures for the submission and presentation of claims.” (Final Report, pp. 6-7). This transparent process enabled claimants to make fairly informed decisions about whether to submit a claim to the VCF or to pursue litigation, and it helped in managing their expectations. We support an equally transparent process for the reopened VCF. Detailed guidelines should be published explaining the computation methodology and the assumptions incorporated into the calculations, as well as charts showing computation examples. Guidance in the form of Frequently Asked Questions should be available to inform claimants on, among other things, (a) new developments, policy decisions, and treatment of recurring issues; (b) the right to attorney representation, the Zadroga Act’s limitation on attorneys’ fees, and contact information for area bar association legal referral services; and (c) claim submission, award pro-ration, and payment procedures.

The claim submission, evaluation, and hearing process should be non-adversarial, assure prompt determination of awards, and minimize the burden on claimants. As with the original VCF, “a proactive approach” should be taken to “ensur[e] that claimants [are] able to obtain and present the best information in support of the claim; assist[] claimants to obtain helpful information; explain[] to claimants information that would assist the Fund in maximizing the computation of economic loss and resolv[e] uncertainties in favor of the claimant.” (Final Report, p. 1). For example:

- Unreasonable documentation requirements should not be imposed or used as grounds for denying legitimate claims. Recognizing that contemporaneous records may not have been created or preserved, the original VCF eased the burden on claimants by allowing submission of various forms of proof such as affidavits. (Final Report, pp. 20-22). This approach should be continued. For example, the original VCF “contacted the human resources department of identified organizations and requested a list of all employees who were killed on September 11, along with an affidavit supporting presence at site requirements. These affidavits were used to establish eligibility and obviate the need for claimants to submit separate proof of presence at site.” (*Id.*, at p. 67). The reopened VCF should take the same approach and request proof-of-presence affidavits from relevant government agencies, private employers, unions, and volunteer organizations (e.g., Red Cross, Salvation Army).
- As in the original VCF, a presumed economic loss methodology should be developed and published to “assure[] that the economic loss of similarly situated victims . . . would be consistent.” (Final Report, p. 7). This methodology, like the one used in the original Fund, should “rel[y] on a combination of the victim’s own objectively verifiable historical

experience with assumptions about likely future events based on publicly available national data.” (*Id.*). It should be “designed to provide generous awards to the families and to be simple to administer. Claimants [should] not need to present detailed computations or analyses. Instead, they need[] only to supply the Fund with easily obtained data. . . .” (*Id.*).

- The original VCF based the non-economic loss awards for pain and suffering on “the nature, severity and duration of the injury and the individual circumstances of the claimant. The Fund assured consistency by categorizing injuries so that claimants with like injuries (in terms of severity and duration) would receive a similar non-economic award.” (Final Report, p. 43). This approach, which properly takes into account a claimant’s individual circumstances, should be continued. Among the individual circumstances that should be considered are pain and suffering enhanced by: (a) a combination of multiple injuries; or (b) physical injuries linked to, or in combination with, diagnosed Post Traumatic Stress Syndrome (PTSD).

“The hearing process was integral to the success of the [original] Fund.” (Final Report, p. 17). We recognize that the volume of claims filed under the reopened VCF will far exceed that of the original VCF, which, in turn, may impact the feasibility of holding hearings on every claim. (*Id.*, documenting that the VCF “conducted a total of 3,962 eligibility and award hearings”). The “Track A” approach used by the original VCF strikes a fair balance and should be continued in the reopened Fund: “Under Track A, the Fund evaluated the claim submission first to determine whether the claim was ‘substantially complete.’ The Fund then issued a determination on eligibility and a presumed award within 45 days of the substantially complete determination. Upon receipt of this determination, the claimant could request a review (*i.e.*, an appeal). On appeal, the claimant had the right to an in-person hearing and to request the Fund make a determination of ‘extraordinary circumstances’ that might justify a departure from the presumed award calculation.” (*Id.*, at p. 15).

The Zadroga Act does not amend ATSSSA § 405(c)(3)(B), which states: “Not more than one claim may be submitted under this title by an individual or on behalf of a deceased individual.” Construction of this provision may be of paramount importance to the “2,680 individuals who were injured in the attacks or in the rescue efforts conducted thereafter”, and who filed claims with the original VCF.¹ The Regulations should allow claims made to the original Fund to be reopened in cases where, for example, (a) claimants did not know, and could not reasonably have known, of their WTC-related health conditions before the original VCF

¹ The injury types identified in the Final Report were: (1) asthma/other respiratory (51% of all injury claims); (2) back injury; (3) broken bones/fractures; (4) bruises/cuts; (5) burns; (6) heart attack/other cardiac problems; (7) neurological problems (stroke, seizure, brain damage, etc.); (8) “other injury”; (9) sensory problems (vision, hearing, etc.); (10) soft tissue; and (11) “multiple injuries”. (Final Report, p. 56).

closed on December 22, 2003; or (b) claimants were held ineligible to participate in the Fund based on statutory criteria that have now been amended or rescinded. Similarly, the addition of new WTC-related health conditions during the pendency of the reopened VCF should be grounds for reopening claims processed before those newly designated conditions were published. This approach is consistent with the statutory scheme (including filing deadlines based on discovery of a claim for a designated WTC-related health condition), does not penalize those who file early in the program, and promotes a just result.

* * *

In closing, the September 11th Families' Association supports implementation of the reopened VCF in a manner that is fair, consistent, transparent, eases the burden on claimants, and, as in the original VCF, "resolv[es] uncertainties in favor of the claimant." (Final Report, p. 1).

Respectfully submitted,



Jennifer Adams
Chief Executive Officer



Lee Ielpi
Board President