



E. I. DU PONT DE NEMOURS & COMPANY

WILMINGTON, DELAWARE 19898

LEGAL DEPARTMENT

November 5, 1981

Mr. Mark Cowan
Deputy Assistant Secretary
Occupational Safety and
Health Administration
200 Constitution Avenue, N.W.
S-2315
Washington, D.C. 20210

Re: Interpretation -- OSHA Regulation
entitled "Access to Employee Medical
and Exposure Records", 29 CFR §1910.20

Dear Mr. Cowan:

The purpose of this letter is to obtain from the Occupational Safety and Health Administration (OSHA) a formal internal interpretation of an issue related to the regulation entitled "Access to Employee Medical and Exposure Records", 29 CFR §1910.20. Recently, an investigation by an OSHA area office has drawn into question the Du Pont Company's interpretation of this regulation. As you are aware, the regulation states that employees may have access to their own medical records and the records characterizing their potential exposures to "toxic substances or harmful physical agents". If an employee requests, he or she is entitled to have one copy of his or her medical and exposure records at the employer's expense.

After the regulation was issued, Du Pont analyzed it for compliance purposes. The question arose as to whether it required employers to provide employees requesting duplicates of their records with free true copies of their x-rays (i.e., not a photocopy). We determined it did not for a number of reasons. First of all, the language of the regulation does not appear to require this and, to our knowledge, this was never contemplated by OSHA during the rulemaking proceedings. The regulation defines medical records to include "the results of medical examinations ... and laboratory tests (including x-ray examinations and all biological monitoring)" [emphasis added]. The result of a radiologist's

November 5, 1981

examination of an x-ray is a report which is kept in the employee's medical file. Du Pont interpreted this provision to require the Company to give employees a copy of the radiologist's report interpreting their x-ray but not a copy of the x-ray itself. Like the example given in Section (c)(6)(ii)(A) of the regulation, we considered the x-rays to be a "physical specimen" like a blood or urine sample which, according to standard medical practice, is routinely discarded. Indeed, consistent with radiographic practice, were we not required to retain x-rays under another provision of the regulation, i.e., Section (d)(iii)(2), we would routinely discard normal x-rays after a reasonable time period.¹ We would, however, retain the radiologist's report interpreting the x-ray together with the other medical data which comprises the employee's medical file.

Other reasons supporting our interpretation of the regulation are that a copy of an x-ray would be meaningless to an employee and would be of limited clinical value to his physician. No one other than a trained medical professional can read an x-ray. The radiologist's report interpreting the x-ray will provide an employee the most useful information. In at least one case, several copies of x-rays were returned to us after an employee's physician expressed his opinion of their inadequacy for diagnostic purposes. Even though they are of limited usefulness clinically, copies of x-rays are expensive. A single copy costs around \$10.00 to make. Some employees may have as many as 25 x-rays in their files and the potential cost of duplicating these films is extraordinary.

With regard to x-rays, Du Pont's practice is similar to that of most radiology laboratories. If an employee's physician needs to see his x-rays, we will allow him to review it at our medical facilities. We do not send the original x-rays off-site because in many instances where we have released original x-rays, these have not been returned to us, even after repeated requests. Because we are now required by OSHA to keep the x-rays "in their original state", we are even more convinced that they should remain on-site.

Our interpretation of the access regulation came to OSHA's attention by virtue of an employee complaint. A worker at one of our facilities asked for a copy of his medical records, which we provided him at no charge. When he requested a copy of his x-rays, we informed him that his medical records contained a radiologist's report interpreting the x-ray and that we would make the original x-ray available to his physician if necessary.

¹Formerly, Du Pont's policy with regard to x-ray retention was that it retained the last normal x-ray and the first abnormal x-ray and all those subsequent to it.

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November 5, 1981

Nevertheless, the employee insisted upon a copy of the x-ray and we told him there would be a reproduction charge for this copy, to which he initially agreed. A complaint was subsequently filed with the local area office. The regional solicitor's office has informed us that, on first impression, they believe the letter of the regulation requires employers to provide one free copy of an employee's x-rays even though they do not dispute that this is of limited value to the employees or their physicians, is impractical, and is not cost effective.

We believe that Du Pont's practice complies with both the letter and the intent of the regulation. To interpret it otherwise leads to an absurd result--i.e., that an employer must pay exorbitant copying costs to provide employees and their physicians with useless data. This problem is compounded by the fact that x-ray copying equipment is not readily available. Only two Du Pont sites in the entire United States have x-ray copying equipment. Thus, copying x-rays will prove to be a large administrative burden for Du Pont and all of industry.

We have informed the Regional Solicitor's Office that the potential adverse impact of their tentative interpretation of our duties under the regulation is significant. For this reason, we asked that they delay action until we could obtain a formal internal interpretation of the regulation's requirements from the national office.

We are aware that OSHA is considering modifying the current access regulation and commend the agency's efforts with regard to the trade secrets issue. Du Pont fully supports wholesale revision of the regulation for a number of reasons, such as the rule's threat to employee privacy, its burdensome record-keeping requirements, and the fact that we believe it far exceeds OSHA's statutory authority. Because of the importance of the x-ray question, as an interim measure, Du Pont respectfully requests that OSHA issue a formal internal interpretation and field directive indicating that the regulation requires employers to provide employees with copies of the radiologist's report interpreting the x-rays but not a copy of the x-ray itself. If the employee's personal physician needs to review original x-rays, the site medical doctor should have the appropriate latitude to either allow him to review the x-ray on site or make some other arrangement consistent with the employer's duty to assure retention of the original x-ray. Access by union representatives should be controlled by the collective bargaining process. If copies of x-rays are sought for litigation purposes, then their access should be controlled by the applicable discovery procedures. We believe this interpretation appropriately accommodates the interests of all parties.

Mr. Mark Cowan

-4-

November 5, 1981

We are grateful for your consideration in this matter. Please feel free to contact me if you need any further information regarding our requests.

Very truly yours,

Julia L. Phillips

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