STATEMENT BY

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BEFORE THE

**SUBCOMMITTEE ON FEDERAL WORKFORCE,
U.S. POSTAL SERVICE, AND LABOR POLICY**

OF

HOUSE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

FECA: A FAIR APPROACH

ON

APRIL 13, 2011

Mr. Chairman and Members of the Subcommittee, my name is Milagro Rodríguez, and I am the Occupational Health and Safety Specialist for the American Federation of Government Employees, AFL-CIO (AFGE). On behalf of the members of our union, which represents more than 600,000 federal employees, I thank you for the opportunity to testify today the proposed changes to the federal workers' compensation program.

We wish we would be offering our views on how to improve the federal workers' compensation program *and* how to save the government money. Too often the stories we hear from our injured or ill members are stories of loss—loss of income, loss of health, loss of choices, loss of their preferred shift, and more and more, loss of a job. The proposed changes would bring more loss to injured or ill employees by reducing benefits in order to save money.

The changes we would like to see are the changes that improve the claims process. The changes that would result in employees getting the medical attention they need sooner so they can return to work sooner. The changes that would give employees the time they need to recover in order to return to work sooner.

What would improve the process is the employing agencies promptly processing the claims and submitting them to OWCP for adjudication. The agency should not be taking the role of adjudicator and holding on to claims they deem not compensable, or not "good claims." If agencies processed claims in accordance with FECA regulations and

in keeping with the deadlines, *that* would save money and return employees to work sooner.

If claimants could make contact with their claims examiners sooner, *that* would save money. They would not have to wait weeks and months to get clarification on a requirement or to ask what is expected of them, or to miss deadlines because they did not know there was one. They would know sooner what action they needed to take, what documentation they needed to present.

What would save money is OWCP making decisions on medical authorization more promptly as they will reduce the number of lost days. The sooner a needed surgery is approved, when appropriate documentation has been submitted, the sooner an injured employee will begin the recovery process and the sooner the employee will be able to return to work.

Employees should not have to satisfy duplicate requirements from OWCP and their employing agencies. At TSA for example, employees can be required to provide medical information to their agency in addition to the information they already provide to OWCP. Sometimes the TSA request for medical information is above and beyond what FECA requires. The TSA request is so detailed, in fact, that some treating physicians do not want to fill out because it intrudes on the privacy of their patient. Once the FECA requirement is met by submitting information to OWCP, the employee should not have to keep submitting similar information to the agency, which sometimes changes the requirements, until the agency is satisfied that it is acceptable.

The whole premise of "putting employees to work" should be reversed. Incentives should be going to the agency to give injured or ill employees work while they recover. In returning employees to work, agencies focus on full time duties. When employees are able to do some parts of their jobs but not others due to medical restrictions, they are required by FECA to tell their doctors that their agency may be able to offer light or limited duty positions. Agencies often claim that there are no light duty/limited duty positions available, or in the case of TSA, that there are only a few. When the agency does offer limited duty positions, the limited duty work is sometimes so unproductive and demeaning as to appear punitive. Injured employees should not have to be forced to work in such demoralizing conditions. Employees want to be productive and contribute in a meaningful way to the mission of their agencies. The stories we hear from our members are reminiscent of the stories we heard from chicken processing plants years ago where injured employees were told to report to work only to sit in a break room just so the company would not have to report lost-time injuries and increase their injury rates. That should not be happening in the federal workplace.

The incentive should be to the agency to improve health and safety so workers do not get hurt or become ill in the first place. Agencies are concerned about the costs of workers' compensation, yet do not take action when employees are injured to correct or improve the workplace. Employees continue to work in the same workplaces, doing the work the same way, and often injured employees return to the same workstation that caused their injury.

The federal workers' compensation program should strive to be the best— the model program. It should not be competing with the states in a "race to the bottom." The rationale behind several of the proposed changes is that state compensation programs do it that way. The idea that the changes "provide benefits in a more equitable fashion" is bad. Bad changes were made for the postal workers; therefore, we will make it equally bad for other federal employees. The state programs provide benefits that are less beneficial for employees than FECA, so let's make FECA equally bad. That should not be what the federal government is striving for.

The external criticisms with the current FECA that DOL lists do not include the ones we hear: long processing periods, lack of communications with the claims examiner; long waiting periods for decisions on surgery or other medical treatments.

Another rationale for the proposed changes is that it would increase employment of disabled workers. On the contrary, one agency, TSA, is terminating employees who have been permanently disabled by their on-the-job injuries. Those efforts and the proposed changes are counter to the Executive Order President Obama signed in July 2010 calling on all federal agencies to improve the retention and return-to-work rate of federal employees with disabilities, particularly those with work-related disabilities.

Like many other federal agencies, OWCP is underfunded and understaffed. This affects the availability of OWCP personnel to discuss questions and issues with the injured or ill worker. AFGE is proud to count among its members the claims examiners

who dutifully adjudicate workers' compensation claims. We know that despite improvements in communications made over the years, their current workloads do not allow for more contact with claimants, which we believe would help claimants receive benefits and medical treatment sooner and potentially return to work sooner. Ensuring that this office has the necessary funding would greatly improve how well it meets the needs of workers suffering from on-the-job injuries or illnesses and would ultimately help reduce costs through improvements in the process.

The Current Proposal

First, the language in the proposal implies that injured employees do not want to get back to work if unfortunate. Words such as "incentive" and "motivate" lead one to believe that employees are injuring themselves so they can be paid by OWCP, so they don't have to work, and eventually "retire" with workers' compensation benefits. This does not take into account the diminished work life that many employees injured or made ill by their jobs face. It does not take into account the physical pain employees must endure and the psychological pain they have to deal with when their lives start spiraling into debt because they OWCP payments take so long or because their cases are denied.

Our experience is to the contrary. Many injured or recovering employees want to return to their jobs. Some can only return with some modifications in their duties for some time and some need accommodations indefinitely. However, most find their agencies unwilling to make accommodations.

The spirit of FECA is that "an injury should not be to the benefit or to the detriment of the worker". The Act is intended to ensure that workers are treated fairly and equitably based on their employment at the time of their injury, to ensure all injury related medical expenses are covered and to ensure an employee is able to return to medically suitable, meaningful employment. This proposal seeks to save agencies money by taking away benefits from workers injured or made ill by their jobs and is contrary to the spirit of FECA.

To address the specific changes being proposed, we offer the following:

Section 101. Physicians' Assistants and Nurse Practitioners

AFGE thinks it is an excellent idea to allow PAs and NPs to certify disability during the continuation of pay period. This language would address the concern that injured federal workers are not able to utilize local clinics if only a PA or NP is on-site. Not only is this important in rural areas but in several large cities where there are not enough physicians who work with OWCP or where there are lengthy wait times for an appointment with the physician.

However, we question the use of PAs and NPs only during the continuation of pay period. Why not allow federal workers use their services throughout the claim? Once the claim has been accepted and a medical condition accepted, the claimant should be able to continue to have PAs and NPs certify disability. The requirement could be that

the employee has to be under the care of the physician and see the PA and NP under the physician's direction.

Section 103. Vocational Rehabilitation

The creation of an assisted reemployment program which allows DOL to enter into agreements to reimburse a federal agency that salary paid to an injured federal worker for up to three years seems to be a positive step. However, we are concerned that this would serve as a disincentive to agencies to make every effort to find suitable employment for their injured employees. It would potentially create a rush to get the worker into a program. The worker may be forced to return to work before it is medically advisable, and this may interfere with the recovery process.

AFGE is also concerned about what happens after the three year period. For example, a TSA worker is injured and cannot do his TSA job – but he can do an SSA job. So for three years he works at SSA and DOL reimburses SSA for his salary. But if he remains seriously disabled and cannot go back to his TSA job, and SSA will no longer employ him because the three year subsidized period has ended, what alternative does the employee have?

We question how OWCP will address the needs of workers who do not find employment after the vocational rehabilitation program is completed. Merely retraining employees and expecting them to find employment is potentially setting them up to be without income following their injury or illness. This is particularly true if the loss of wage

earning capacity determinations are based on the position they held with another agency.

Section 104. Conversion Entitlement and Reporting Requirements

AFGE does not believe employees who have permanent disabilities which prevent them from working should be penalized by having their benefits reduced. If due to their on-the-job injuries or illnesses workers are not able to continue working, they do not receive the within-in-grade increases they would have had they continued working. They would not have received any promotions leading to higher pay. They would not have been able to make contributions to their Thrift Savings Plans; neither would their employing agencies. Their high-3 salaries average salaries would be those before their injury. If they have been unable to work for some time, the high-3's would certainly be lower than if they continued working.

While OWCP makes the case that employees who retire at 62 receive a lower monthly benefit amount than employees who receive workers' compensation benefits, injured employees may well have elected to continue working until past age 62. In current economic times, workers are choosing to continue working because they cannot afford to live on their retirement benefit. In addition, workers with a work-related disability who are pushed to disability retirement may not be physically able to earn supplemental income as so many healthy annuitants currently do. FECA would impose a retirement date that may not have been of the employees' choosing.

To make this change more equitable and fair to injured or ill employees, and not merely a cost-saving measure, the amount of the reduced benefit should be higher than 50%. Alternatively, FECA could allow for withholding of TSP contributions and require the employing agency to pay their allowable matching contribution.

Section 106. Augmented Compensation for Dependents

AFGE wonders why there is a removal of augmented compensation on the basis of dependents. Current law provides 66% for injured workers without dependents and 75% for those with dependents. This section provides that there will not be an increased percentage for claimants with dependents. Other sections state that the basic compensation rate will be 70% of monthly pay for both injured workers with dependents and those without. This may make it easier for the DOL to provide compensation, but isn't it unfair to those injured workers with dependents? It's not a matter of increasing compensation because a worker has dependents but of providing injured workers with compensation comparable to what their take-home pay was prior to their claim. The take-home pay for a worker will vary based on the number of dependents – or exemptions – the worker can claim. That is why an augmented compensation for dependents in needed. Perhaps a more equitable way of calculating an augmentation would be to base it on the number of dependents the claimant is able to claim as per the IRS definition.

Section 108. Maximum and Minimum Monthly Payments

For some employees, such physicians employed by the Department of Veterans' Affairs, limiting compensation to the maximum rate of basic pay for GS-15 results in additional loss. For example, 70% of the GS-15 basic pay would be the equivalent of a 40% reduction for a physician. The maximum should be the comparable rate of pay the individual worker at the time of the injury.

Section 112. Waiting Period

This section would amend FECA to place the three-day waiting period immediately after an employment injury and prior to the 45-day continuation of pay period. Currently, the three-day waiting period is effectively placed after the 45-day continuation of pay period. The amendment permits the use of sick leave, annual leave or leave without pay for the waiting period days. So if a worker is injured or made ill on the job, the worker suffers a loss of income or is forced to use his or her own leave because that will keep workers' from filing workers' compensation claims.

The intent of the change is "to reinvigorate the effectiveness of the three-day waiting period." Proponents argue that the three-day waiting period provides the injured worker with time to think whether he should make a FECA claim. In others words, it's intended to effectively reduce FECA claims. Our question: Is there any evidence – from state-level experiences and Postal Service experiences - that a three-day waiting period after an employment injury (1) causes injured workers to contemplate whether or not he

should make a workers compensation claim and/or (2) results in a reduction of workers compensation claims? If not, why make the change?

Other than penalizing employees for becoming sick or injured on the job, we do not see any reason to change the way this is currently done. The reason that OWCP gives – that it would equalize benefits among postal employees and non-postal employees – is not a valid one. This cost-saving measure only benefits the agency that injured or sickened the employee and takes away from the injured or ill employee. It is meant to keep employees from filing claims and again, the language implies that employees have to be "incentivized" – not to file "frivolous" claims, to return to work, to not "retire" on workers' compensation.

Section 114. Sanction for Non-Cooperation with Nurses

This change is much too harsh and does not include any 'due process' considerations. In our experience, the primary reason claimants sometimes resist the nurses' intervention is that they sometimes exceed their authority by talking with treating physicians and influencing their opinions or reports to OWCP. It is usually in an effort to get the employee back to work, sometimes even when the treating physician advises against it for medical reasons. When nurses are essentially violating the claimants' right to privacy with their treating physicians, the employee should be able to register a

complaint and have addressed. If there are to be sanctions, there needs to be a forum for the claimant to state his or her position and to be heard.

Section 117. Funeral Expenses

AFGE supports increasing the amount payable for funeral expenses since the limit of the current law has been significantly changed since 1949. But the $6,000 increase is much too small – funeral expenses generally cost about $8,500. In order to fully update this benefit amount, a more current amount should be used. Cursory internet research shows that the proposed $6,000 amount would not cover most basic funeral costs and it should be increased.

Closing

In his July 1998 statement, Joseph M. Perez testified that:

> Workers' compensation law arose out of the frustrations employees and employers experienced with the common law remedies for workplace injuries and deaths. These frustrations were due to the difficulty employees had in obtaining an award for workplace injuries under the tort system; and the inability of employers to make provisions for their financial liability since jury awards were unpredictable.
>
> Workers' compensation, therefore, represents a covenant. Under workers' compensation law each side gives up something that is available to it under the common law, but simultaneously receives something as well. The employer

relinquishes the defenses enjoyed under the common law, but this loss is offset by a known level of liability for work-place injuries and deaths. The employee gives up the opportunity for large settlements provided under the common law, but receives the advantage of prompt payment of compensation and medical bills. These tradeoffs make the workers' compensation system acceptable to both parties. However, where either party does not receive the benefits of this covenant, the system becomes unacceptable.

Thirteen years later, we are again looking at proposals that upset that balance, that trade-off, by taking away benefits from injured or ill workers. We should be focusing on ***facilitating*** return to work, not forcing injured employees to return to work sooner than medically-recommended because they fear losing their benefits or losing their jobs.

Unilaterally reducing benefits to the injured worker simply in an effort to lighten the financial liability of the employer is not an equitable response to the increasing injury compensation costs. Injured workers already suffer loses, both financial and emotional, for which they can never be compensated.

We urge the Subcommittee to direct the Department of Federal Employees Compensation to propose changes that save money by improving the workers' compensation process and not by reducing the benefits available to employees injured or made ill by their jobs when they most need them.

Thank you for opportunity to address our concerns with this proposal.

Committee on Oversight and Government Reform
Witness Disclosure Requirement – "Truth in Testimony"
Required by House Rule XI, Clause 2(g)(5)

Name: **MILAGRO RODRÍGUEZ**

1. Please list any federal grants or contracts (including subgrants or subcontracts) you have received since October 1, 2008. Include the source and amount of each grant or contract.

None.

2. Please list any entity you are testifying on behalf of and briefly describe your relationship with these entities.

AFGE, I am employed as the Occupational Health and Safety Specialist.

3. Please list any federal grants or contracts (including subgrants or subcontracts) received since October 1, 2008, by the entity(ies) you listed above. Include the source and amount of each grant or contract.

None.

I certify that the above information is true and correct.

Signature: Milagro Rodriguez Date: 4/12/2011

MILAGRO RODRÍGUEZ, M.P.H.
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PROFESSIONAL EXPERIENCE

1997 - Present Occupational Health and Safety Specialist
American Federation of Government Employees, Washington, D.C.

Charged with developing and implementing an aggressive health and safety program featuring education, information, training, and advocacy. Responsibilities include providing advice, assistance, and leadership to all levels of AFGE on safety and health issues and federal agency safety and health programs. Also, provide guidance in the technical aspects of detecting, preventing, and correcting health and safety hazards involved in a variety of occupations. Develop lesson plans, prepares course material and provides training, including programs geared specifically for local officials and members who serve as safety and health representatives. Represent AFGE on various committees and working groups. In addition, analyze and prepare responses to legislative and regulatory proposals affecting health and safety and workers' compensation programs. Also contributing to a major organizing campaign by conducting educational sessions on health and safety and workers' compensation and providing technical assistance.

1994 - 1997 Training Program Manager
United Brotherhood of Carpenters and Joiners of America, Health and Safety Fund, Washington, D.C.

Managed lead and asbestos abatement worker training programs. Duties included writing worker-accessible summaries of state regulations affecting lead and asbestos abatement; revising course agendas and content to reflect current state and federal training requirements; initial monitoring and guidance of courses to ensure quality of training. Conducted training in English and Spanish on the health effects of lead and asbestos exposure and on the state and federal regulations governing this type of work. Also supervised and edited the Spanish translation of worker courses.

Also responsible for management of federally-funded ergonomics education program for health and safety professionals.

1989- 1994 Director, Special Projects
Workplace Health Fund, Washington, D.C.

In position of increasing responsibility, participated in the development, implementation, and programmatic and financial management of various occupational and environmental health programs. Projects included worker education on ergonomics, HIV/AIDS, health effects of hazardous waste, emergency response planning, and human genome research, as well as coordination of meetings and conferences on

these topics. Also collaborated on the development and analysis of needs assessment surveys.

Lectured on occupational health and safety issues, including ergonomics, pesticide exposure, worker education, U.S. laws and regulations, and labor involvement in occupational health and safety. Also conducted lectures in Spanish for visiting Latin American trade unionists and translated occupational health and safety training materials into Spanish.

1982 - 1984 Research Assistant/Data Coordinator
Workers' Institute for Safety and Health, Washington, DC

Research assistant activities designed to aid in the evaluation of a four-year grant program. Responsibilities included assimilating, reviewing, and summarizing publications and research materials for three projects. Data coordination activities related to a nationwide medical screening and epidemiological research program investigating colorectal cancer in an occupational group.

EDUCATION

M.P.H., George Washington University, Washington, D.C.
B.A., George Mason University, Fairfax, VA

RELATED ACTIVITIES

2006 – Present Member, Federal Advisory Council on Occupational Safety and Health, Occupational Safety and Health Administration, US Department of Labor. Also served as alternate since 1997.

2004 – Present Member, Commonwealth of Virginia Safety and Health Codes Board. Served as Chair, Vice-Chair and Secretary in prior years.

2001 – Present Course Chair, OSHA 6000 Course for Federal Agencies, National Resource Center for OSHA Training (a consortium that includes the National Labor College and the Building and Construction Trades Department)

2005 – Present Member, Board of Advisors, International Chemical Workers' Union Center for Worker Health and Safety Education

2000 – Present Member, Advisory Curriculum Development Committee, Labor Safety and Health Training Project, National Labor College

1997 – Present Member, AFL-CIO Subcommittee on Occupational Safety and Health