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Supreme Court nuclear fight at odds with ‘Cancer Moonshot’

By Niina H. Farah | 03/22/2022 06:10 AM EST



The decommissioned plutonium-producing DR reactor (left) and D reactor are shown on the Hanford Site in 2017 near Richland, Wash. AP Photo/Nicholas K. Geranios, File

The Biden administration is leading a Supreme Court fight over expanded benefits for workers at a nuclear waste site — even as the president has pledged to address the risks of toxic exposures and heralded new efforts to expand access to cancer treatment.

On April 18, the justices are scheduled to hear oral arguments in *United States v. Washington*. The administration will argue for the high court to overturn a state law that makes it easier for federal contract workers at the Department of Energy’s decommissioned Hanford Site in Benton County, Wash., to access workers’ compensation benefits.

Washington state Rep. Gerry Pollet (D), the co-sponsor of the law at the heart of the legal fight, said it was “very disappointing” to see the Biden administration bring the matter to the nation’s highest bench.

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“In this case, the Energy Department is essentially saying, ‘We want to go back to a system where we can fight every claim,’” Pollet told E&E News in a recent interview.

The Supreme Court challenge comes as President Biden has touted his administration’s work to address toxic exposure and cancer risk, particularly among military veterans.

“The [Department of Veterans Affairs] is pioneering new ways of linking toxic exposures to disease, already helping more veterans to get benefits,” Biden told Congress during his first State of the Union address earlier this month.

Biden’s remarks were part of his broader “Cancer Moonshot,” aimed at improving the detection and treatment of cancer. The goal is a personally important one to the president, who said he suspects that toxic exposure in the military played a role in the 2015 death of his son Beau Biden.

“We don’t know for sure if a burn pit was the cause of his brain cancer, or the diseases of so many of our troops. But I’m committed to finding out everything we can,” said Biden in prepared remarks.

Biden’s Cancer Moonshot renews a program he began as vice president in 2016 to accelerate research into the eradication of cancer. Under his presidency, the program’s goals have expanded to include cutting the age-adjusted death rate from cancer in half. It is funded by a 2016 law, which allocated \$216 million for fiscal 2023 and included a total of \$1.8 billion in funding over seven years.

The Cancer Moonshot also advocates for environmental cleanup of Superfund sites like Hanford and has prompted a new \$1 billion investment from EPA to clean up dozens of contaminated sites across the country.

Advocates for Hanford workers would like to see these cleanup efforts become a bigger part of the administration’s public health focus, instead of the Justice Department fighting payments to workers harmed from working at nuclear sites.

“Not exposing people to carcinogens, chemicals that can cause cancer, is the first step,” said Tom Carpenter, executive director of the Hanford Challenge, a nonprofit organization that advocates for current and former employees at the site.

Pollet, who is also a clinical instructor at the University of Washington School of Public Health, urged Biden to focus on what he dubbed a “clean up shot” — rather than a cancer moonshot.

“I view it as an opening to educate the president and the Energy secretary to bear responsibility for the exposures to carcinogens that the United States as a government has,” he said.

Public health threats are especially bad at Hanford, according to Washington state officials who described it as a “uniquely dangerous worksite” in their [brief](#) to the high court.

Decommissioned in 1989, the Hanford Site produced two-thirds of the country’s weapons-grade plutonium during World War II and the Cold War. Cleanup of the “highly radioactive and chemically hazardous” waste is expected to continue for another 60 years, according to DOE.

Along with the dangers of cleaning up nuclear waste, workers also face threats from other sources, like exposure to beryllium and dimethyl mercury, which put them in a much higher risk category, said Carpenter.

“Hanford workers ... have got the short end of the stick for decades in trying to get that compensation,” said Carpenter. “So we’re grateful that there’s a sea change starting to happen; it just hasn’t been at the Department of Energy yet.”

Legacy waste

DOE has acknowledged that work at Hanford is hazardous.

An agency report from 2014 found that vapors emitting from tank farms on the site were “inconsistent with the provision of a safe and healthful workplace free from recognized hazards,” noted Washington state Attorney General Robert Ferguson (D) to the Supreme Court.

Despite the risks, Washington alleged, contractors at Hanford failed to consistently provide protective equipment to workers.

“And neither the contractors nor DOE have consistently monitored conditions to allow medical professionals to know about particular workers’ exposures to hazards,” Ferguson wrote.

“Because of these failures, workers often have a difficult time identifying specific incidents at work that caused their diseases or conditions,” he continued. “And with no documentation of exposures, fairly compensating Hanford workers for injuries and diseases presents challenges not present at most Washington worksites.”

Washington’s H.B. 1723, which was signed into law in 2018, provides workers’ compensation coverage to nearly all of Hanford’s large, contract worker-dominated workforce. It presumes workers with certain illnesses are eligible for compensation from federal contractors, and it covers about 100,000 current and former employees involved in the cleanup of waste at the sprawling federal nuclear production complex in southwestern Washington.

The Biden administration challenged the state law, citing concerns about federal sovereignty and the law’s cost, but lost its fight in the 9th U.S. Circuit Court of Appeals. The Justice Department

then asked the Supreme Court to weigh in on the dispute, and the justices, who only accept a small number of cases that come their way, agreed.

DOJ has argued to the Supreme Court that the Washington law violates “principles of intergovernmental immunity” under the supremacy clause of the Constitution, which says that federal law takes precedence over state law.

“That state law imposes potentially massive costs on the United States and those with whom it deals at Hanford, but not on state and other private employers whose workers are otherwise similarly situated,” the government wrote in one of its Supreme Court briefs.

Pollet defended the state law, which he said was grounded in his decades of advocating for the cleanup of the Hanford Site as executive director of the nonprofit Heart of America Northwest.

“We’re basically saying, we’re going to have a presumption, just like we do for firefighters, that if you have one of these cancers, and you’ve got a work history, then you get workers’ comp instead of fighting for it,” he said.

Pollet said the Biden administration’s concerns over the law’s narrow focus on contract workers at Hanford are answered by a law newly signed by Gov. Jay Inslee (D) clarifying that eligibility for workers’ compensation extends to “all personnel working at a radiological hazardous waste facility” in the state, rather than only at the Hanford Site.

In a [brief](#) to the Supreme Court on March 15, Washington’s attorney general urged the justices to deem the challenge invalid after the new state law takes effect.

“Washington has now changed its law so that it no longer applies exclusively to federal contract workers at a specified federal facility,” Ferguson wrote. “Rather, it applies to *any* employee, including state employees, who work at a range of facilities. The question presented is thus moot.”

Chemical exposure

Workers directly involved in cleaning up the Hanford Site faced health risks from exposure to radiation.

Studies of 300,000 nuclear workers by the World Health Organization’s International Agency for Research on Cancer have shown an association between long-term low-level exposure to ionizing radiation and death from solid cancers and leukemia.

But even those who weren’t directly involved with the cleanup faced other workplace hazards, like exposure to beryllium, a lightweight metal used in nuclear weapons, Pollet said. The metal forms very fine particles that easily become airborne, and dozens of facilities at Hanford have been found to contain beryllium contamination, he said.

Workers who inhale the metal particles can develop beryllium sensitivity that can become chronic beryllium disease. The lung disease can cause symptoms including “shortness of breath, unexplained coughing, fatigue, weight loss, fever, and night sweats,” according to the Occupational Safety and Health Administration’s website.

But at Hanford, DOE kept beryllium contamination a secret for years, leaving employees like electricians who were not directly tasked with addressing hazardous waste unknowingly exposed, according to Pollet.

He said workers would develop lung disease and file compensation claims that would then be denied. It wasn’t until the end of the Clinton administration that DOE apologized for harm to workers and set up a chronic beryllium disease prevention program in 1999.

Even then, Pollet said, workers who had received diagnoses still struggled to access benefits.

“What workers go through waiting for workers’ comp is just horrible because they’re unable to work, and the bills pile up, and they start losing their homes while the company just stretches out the fights,” he said.

Another powerful neurotoxin, dimethyl mercury, also posed health risks to workers that have been difficult to quantify, according to Carpenter. The compound is readily absorbed through the skin, and there is no safe level of exposure. The toxic substance is emitted in vapor from nuclear waste tanks at the site, though DOE isn’t able to precisely measure how much, given the difficulty of measuring airborne quantities of the compound.

On its website for the Hanford Site, DOE stated it had an “integrated, site-wide” program to minimize beryllium exposure.

DOE referred questions on the Supreme Court case to the Department of Justice, which declined to comment.

The Hanford Site Chronic Beryllium Disease Prevention Program includes giving workers appropriate training and equipment to address beryllium-containing dust and debris. Access to any areas that are deemed contaminated is restricted to staff with specialized training and protective equipment, DOE said.

“DOE and all Hanford contractors are committed to ensuring that current and former employees that may have received exposure to beryllium have an opportunity to receive appropriate medical testing, and if necessary, follow-up medical attention,” the agency stated on its website.

‘Massive new costs’

Washington state’s workers’ compensation law grants lifetime benefits to those who develop conditions — such as respiratory ailments, cancers, or neurological or immunological diseases — that are “probably” caused by their employment.

Even contract workers at the site who were not directly working with hazardous materials would be eligible for compensation, and their claims can only be denied by “clear and convincing” evidence that their illness had a different cause. Surviving family members are also able to seek benefits after a former contractor has died.

Of the 10,000 federal contract workers currently at the Hanford Site, about 30 to 40 percent deal with hazardous waste, according to DOE. The majority of federal contractors at the facility are in construction jobs or office positions that do not involve entering hazardous waste sites or radiological areas.

“HB 1723 thus makes it far easier for current and former Hanford federal contract workers to obtain workers’ compensation benefits,” the Biden administration wrote in its [petition](#) to the Supreme Court. “It consequently exposes their employers — and by extension the United States — to massive new costs that similarly situated state and private employers do not incur.”

In response to new arguments that the case before the Supreme Court should be dismissed, DOE has urged the justices to keep the challenge going to recoup costs it has already incurred.

The federal government has challenged nearly all of the more than 200 workers’ compensation claims made under the state law. Washington state requires the payment of claims being appealed but also mandates beneficiaries repay the money they received if they lose their case.

DOE already paid out \$17 million in claims allowed since the law took effect four years ago and has allocated an additional \$20 million for future payment on the allowed claims, according to the Biden administration.

That represents a small fraction of the agency’s overall \$45.1 billion budget for just fiscal 2022.

“If, as the United States has contended throughout this case, H.B. 1723 is invalid under principles of federal intergovernmental immunity, DOE would not be liable for claims that were allowed under that law,” Solicitor General Elizabeth Prelogar wrote in a Thursday [brief](#).

A ruling in the Biden administration’s favor would relieve the government of those financial obligations, providing “effectual relief” that would prevent the court from ruling the case was moot, Prelogar wrote.

Carpenter of the Hanford Challenge called DOE’s warnings about the increased costs of the state law “more histrionics.”

While there did appear to be an uptick in claims, the change was nowhere near the opening of the floodgates the Justice Department warned of, said Carpenter. He also noted that it could take some time for people to become aware of the law, and some people who could benefit may be discouraged from seeking compensation because of DOE’s litigation.

Washington state, meanwhile, has argued in its own brief that workers’ compensation claims have actually decreased since the passage of the 2018 state law, and there has been “no

meaningful” increase in costs to the federal government as a result of its passage, pointed out Bob Burke, an attorney for the Workers’ Injury Law & Advocacy Group, who will pen a “friend of the court” brief in the case in support of the state law.

“If you got cancer, and you’ve been working around these incredibly hazardous radioactive materials, then you ought to have an evidentiary leg up going into the courtroom,” Burke said.

He said it is still possible for an employer to refute those claims, including in cases where an employee has a type of cancer not generally associated with radiation exposure.

“States ought to be in a position to shape their own benefits and evidence for injuries or occupational illnesses,” Burke said.

Burke drew a comparison with the Supreme Court’s January order that froze the federal government’s requirement for Covid-19 vaccination or testing and masking for employers with more than 100 workers. Justice Neil Gorsuch’s concurring opinion in the case affirmed that state and local authorities hold “considerable power” to regulate public health, Burke said.

Washington’s approach to workers’ compensation could benefit other states like Ohio, Colorado, Idaho and Tennessee that are dealing with their own legacies of environmental contamination, Pollet added.

“If the law is upheld,” he said, “it should embolden other state legislatures to use it as a model and to make sure that the workers who are ill and dying at other facilities are also given workers’ compensation.”