S. HRG. 110–737

EEOICPA: IS THE PROGRAM CLAIMANT FRIENDLY FOR OUR COLD WAR HEROES?

HEARING

OF THE

COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS

UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

ON

EXAMINING THE EFFICACY OF THE ENERGY EMPLOYEES OCCUPATIONAL ILLNESS COMPENSATION PROGRAM (EEOICPA), FOCUSING ON OUR COLD WAR HEROES

OCTOBER 23, 2007

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C O N T E N T S

STATEMENTS

TUESDAY, OCTOBER 23, 2007

ADDITIONAL MATERIAL

EEOICPA: IS THE PROGRAM CLAIMANT FRIENDLY FOR OUR COLD WAR HEROES?

TUESDAY, OCTOBER 23, 2007

U.S. SENATE,
COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS,
Washington, DC.

The committee met, pursuant to notice, at 10:06 a.m. in Room SD–430, Dirksen Senate Office Building, Hon. Jeff Bingaman, presiding.

Present: Senators Bingaman, Murray, Brown, Alexander, Murkowski, and Allard.

Also present: Senator Reid.

OPENING STATEMENT OF SENATOR BINGAMAN

Senator BINGAMAN. This is an oversight hearing on the Energy Employees Occupational Illness Compensation Program Act. First, let me thank the witnesses for being here and taking the time to testify. I know that some of you have traveled a distance to be here, and I thank you for that.

This is the first oversight hearing this Congress on this Energy Employees Occupational Illness Compensation Program Act. Last Congress the House Judiciary Committee held five oversight hearings regarding claimed efforts by OMB to trim back the program in order to control costs for budget reasons. I believe that phase is over, and this committee does not have to focus on that issue, specifically, this year.

I've been working on this act, as many of my colleagues have, since it was first put into law in 2000, and that includes the major restructuring of the act that occurred in 2004. The principle purpose in formulating the program was to provide compensation to persons who'd become sick as a result of work in the nuclear weapons program. And to do so under assumptions that were favorable to the claimant, given in many cases the fact that exposure data was lacking at some of the older facilities that we had in the country.

Since many of these workers are either ill or elderly, an inherent assumption was made that the claimant—to have a claimant-friendly determination, with minimal confusion and frustration on behalf of the worker.

Today's hearing will look at whether the Program's being administered to meet this overarching principle. Let me thank all of the witnesses again, and Senator Alexander, did you have any opening statements you'd like to make at this point?

STATEMENT OF SENATOR ALEXANDER

Senator ALEXANDER. Thanks Senator Bingaman, I would like to make a couple of comments.

First, I'd like to thank Senators Bingaman and Bunning, especially, for their leadership on this issue over the years. We've all worked on it, and are concerned about it.

Tennessee has a special concern about these claims, and I have a special feeling about it, I grew up near Oak Ridge, TN, and watched people from my county drive over there from World War II on through. And, we always had great respect for what they did, they never talked about what they did, a lot of it was secret, and we expected that the government knew what it was doing.

Turns out the government didn't know what it was doing in terms of the health of many of these workers.

As a result, these cold warriors, as I would call them, became sick from risks that, largely, had to do with being around nuclear radiation.

Tennessee has more than 24,000 compensation claims that have affected 10,000 workers. We have twice the number of claims of any other State. Sixteen percent of all of the claims come from Tennessee, and so Senator Corker and I, and others in our delegation, are very interested in making sure that we do everything we can to make sure the claims are fairly and promptly resolved.

What I'm especially interested in hearing about today is how we can speed things up. Since the law that we passed in 2004, based upon the information I have, Senator Bingaman, the average wait time for processing claims has actually increased.

Now, there's some reasons for that, but that still seems to be a fact and a discouragement to sick nuclear workers who are growing older, and who—if they were to die—their families wouldn't, in many cases, receive the benefit of the claim.

I'm also interested in making sure that claimants or potential claimants are treated courteously, the same way we like for our staff members on our Senate staffs to treat everyone.

And, so those are the two things I want to look at: Are we doing this as efficiently and promptly as we can? And are we treating each of these claimants with dignity in making sure that their needs are respected.

I thank the witnesses for coming, I look forward to the testimony.

Senator BINGAMAN. Let me just see if Senator Brown and Senator Allard are both here, if either of them have a short statement.

Go right ahead, Senator Brown.

STATEMENT OF SENATOR BROWN

Senator BROWN. I thank you, Mr. Chairman, thank you for holding this hearing. Senator Alexander, thank you, and my statement will be brief.

My home State of Ohio has played a major, significant role in the Department of Energy programs that eventually resulted in the creation of the Energy Employees Occupational Illness Compensation Program we're discussing here today.

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In Miamisburg, near Dayton, the Mound Laboratory was the top secret research center involved in the processing of plutonium and polonium, and Hamilton and Butler counties just north—just in Cincinnati and north of Cincinnati, the feed materials production center produced uranium for nuclear weapons, and in southern Ohio, we've enriched uranium for nuclear submarines and power plants.

This short history doesn't include the other Department of Energy facilities in Lucky and Painesville, in Ashtabula and the larger city of Columbus. Every month, literally, my office receives requests from constituents asking for help in navigating this complex and complicated program.

In August, Deb Garrison, from Yellow Springs community in Green County near Dayton, shared her EEOICPA experience with my office. She told me how her father died in 1960, just 3 years after retiring from his 8 years of service at the Mound Lab in Miamisburg. She described how her mother, attempting to file for compensation, could not complete her claim as a result of her own failing health. Picking up where her mother left off, Ms. Garrison, after months and months of work, is still navigating the bureaucracy. She's now in a fourth dose reconstruction, has no real idea when her mother's claim will finally be resolved.

Sadly, her story is not unique. I'm sure all of us here today have heard similar stories from Tennessee constituents, New Mexican constituents, others.

The list of hurdles this program faces is not short, many of the program's claimants are older, sometimes ill, often dealing with rare diseases that the medical community is still learning about. Records needed to substantiate work histories and job descriptions are still classified, sometimes, simply, they don't exist.

But these obstacles can't be excuses. Reports of the program's delays and inaction and ineffectiveness are not simply just disheartening and disappointing, they're a breach of trust from our government to our citizens.

Former nuclear workers shouldn't have to navigate an overly complex and seemingly never-ending bureaucratic maze, or be required to prove the un-provable. They deserve a program that treats them with dignity and respect, they deserve fair judgments, and timely, transparent process. They deserve the compensation promised to them.

As this hearing moves forward, our priorities must not be to point fingers, we must focus on the claimants and their experiences examining the details of the program from their perspective. We must stay focused on Ms. Garrison and all of the people like her, struggling to make sense of this program.

Thank you, Mr. Chairman.

Senator BINGAMAN. Senator Allard.

STATEMENT OF SENATOR ALLARD

Senator ALLARD. Mr. Chairman, I do have a brief statement, and first of all, I just want to thank you and Senator Alexander both for putting together this hearing.

This is important to those of us who come from States where we have Department of Energy employees who have worked around nuclear facilities.

I appreciate the testimony of the witnesses here today, and I would like to extend a special welcome to the workers and their families who are in the audience. This hearing presents an opportunity to discuss very important issues facing the system, and process in place to compensate employees and their families who worked in nuclear weapons facilities during the cold war.

Enacted in 2001, and then amended again in 2004, the Energy Employees Occupational Illness Compensation Act is essentially a Federal workers compensation program designed to provide benefits to certain nuclear workers and their survivors.

In my home State of Colorado, men and women of Rocky Flats and their nuclear weapons facility sites on the Western Slope have struggled for some time to receive compensation, but have seen little resolution.

I've been supportive of the Rocky Flats workforce, and will continue to be an advocate of their efforts. As a Member of Congress who helped authorize the EEOICPA program, I know firsthand that Congress' intent was to honor and care for our cold war veterans, our Nation's heroes, who have become ill while working at Rocky Flats, and other DOE facilities.

This program is about people and science, and doing the right thing, not politics. Thank you, Mr. Chairman.

Senator BINGAMAN. Senator Murray, did you have a statement you want to make?

STATEMENT OF SENATOR MURRAY

Senator MURRAY. A very brief one. Thank you very much, Mr. Chairman, and Senator Alexander, for calling this hearing.

This is an important issue to me, because it does affect many families in my home State of Washington. We have thousands of workers at the Hanford plant near the tri-cities, who produced plutonium for the Manhattan Project, and helped America win World War II and the cold war. Now many of these brave men and women are ill, as a result of their service, and they and their families are suffering some of the painful consequences of their commitment to our national security.

We're here today because it is our responsibility to ensure that these men and women are receiving the compensation we promised them, in a fair and timely manner. I'm really glad we're holding this hearing, because I do have some questions about how the Federal Government is administering this compensation program. I'm concerned about how long it takes to process claims, because many people are waiting far too long for a final decision.

I'm very troubled that workers and their families find it very difficult to get information about the status of their claims, and I want to know what we can do to make this process more transparent.

I'm especially interested to hear more about a recent request by some of our Hanford workers, to get a special classification that will make it easier for them to get their benefits.

Our government has a responsibility to those who gave so much of themselves to our country. These sick workers and their families shouldn't have to struggle with a frustrating bureaucracy as they seek their compensation.

Mr. Chairman, thank you very much for holding this hearing, and I look forward to hearing from all of our witnesses today.

[The prepared statement of Senator Murray follows:]

PREPARED STATEMENT OF SENATOR MURRAY

Thank you, Mr. Chairman, for calling this important hearing to help us determine whether the Federal Government's compensation program for our Nation's energy workers is serving our cold war heroes adequately.

Many of these brave men and women and their families have suffered painful consequences from their commitment to our national security. We're here today because it's our responsibility to ensure they're receiving the compensation promised them in a fair and timely manner. I'm glad we're holding this hearing, because I have questions about how the Federal Government is administering the program:

- I'm concerned about how long it takes to process claims—too many people have been waiting far too long for a final decision.
- I'm also troubled that workers and their families find it difficult to get information about the status of their claims.
- And I want to know what we can do to make the process more transparent.

I know that many of the Senators here with me represent States where these heroes worked for years. They've heard first hand how exposure to dangerous radiation and toxic substances affected families for generations. Unfortunately, the same is true for the workers in my home State of Washington.

The Hanford facility, near the Tri-Cities in Washington State, began more than 60 years ago as a plutonium production site on the Columbia River. During its peak years, nearly 50,000 employees worked at Hanford, where they played a vital role in the Manhattan Project. Residents of the surrounding area sacrificed to help America win World War II and the cold war.

Today, it is the Nation's most contaminated nuclear site and the largest environmental cleanup project in U.S. history. Nearly half the size of the State of Rhode Island—the site is imposing. Approximately 11,000 workers are part of the cleanup effort. We know that working with such hazardous materials impacted the environment and harmed many of the workers who dutifully served their country at a difficult time during our Nation's history.

I've heard countless stories of workers and survivors who've waited too long for a response to their concerns or claims. Thousands in Washington State and across the country are stuck in a long and arduous filing process that often continues after the worker has lost their life to dangerous exposures. The pain that accompanies illness and loss should not be compounded by bureaucratic and administrative frustrations.

During my time in the Senate, I've pushed the Federal Government to do the right thing by those at Hanford—to adequately com-

pensate workers and their families and cleanup the Hanford site for the well-being of those who live and work in the surrounding communities. It's hard to believe that it's been 6 years since I helped to create the Senate Nuclear Cleanup Caucus—a bipartisan effort to increase funding for nuclear waste cleanup. And I'll continue that fight until the job is done.

Because of the incompetence of officials in processing claims at the Department of Energy, 2 years ago a number of us worked to move this compensation program to DOL. I'm anxious to learn how things are going and what we can do better for those who've suffered so much. As I said earlier, I have concerns about how the program is being carried out. We must ask those responsible for administering the program some basic questions:

- How can we shorten the time it takes for a claimant to get a final decision from the Department of Labor?
- How can the Department better assist claimants in retrieving their records?
- How can the Department communicate more clearly and openly with claimants?
- How can we make the entire applicant process more accessible, transparent, and user-friendly?

And I'm particularly interested to hear more about a recent request by Hanford workers to get a special classification that will make it easier for them to get benefits.

As we examine these critical questions, I would encourage the agencies involved to hold themselves accountable to these heroes and their families by measuring their service and making the process as transparent as possible.

I would also encourage the Department of Labor to maintain the office of the ombudsman so that applicants have a place to go for help navigating such a complex program. I applaud the work that the office has done over the last 2 years.

Mr. Chairman, our government has a responsibility to those who gave so much of themselves for our country. These sick workers and their families shouldn't have to struggle with a frustrating bureaucracy as they seek compensation. I look forward to hearing from the witnesses about the government's progress with this program, and learning more about how we can make it more responsive to the thousands of claimants still waiting for a decision.

Senator BINGAMAN. Well, thank you very much.

We have two panels of witnesses. On the first panel we have Shelby Hallmark who is the Director of the Office of Workers' Compensation Programs in the Department of Labor, thank you very much for being here.

Dr. John Howard, who is the Director of the National Institute for Occupational Safety and Health, thank you very much for being here.

Mr. Malcolm Nelson who is the Ombudsman with the Energy Employee Compensation Program in the Department of Labor. Thank you very much.

Also, Senator Harry Reid has indicated that he would like to come and make a statement to the committee. Because of his time pressures, if he does come, I may insert him in between one of you

witnesses, I'm sure you can understand that. But why don't we go right ahead and hear from each of you in the order that I introduced you, and then we will have some questions.

Mr. Hallmark.

STATEMENT OF SHELBY HALLMARK, DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, DEPARTMENT OF LABOR, WASHINGTON, DC.

Mr. HALLMARK. Good morning, Mr. Chairman, and committee members. It's my pleasure to be here to discuss the Department of Labor's management of the Energy Employees Occupational Illness Compensation Program Act or as we call it, EEOICPA. The Program actually got off to a slow start, because it takes so long to read the name.

The question today, is EEOICPA being administered well and is it claimant friendly.

DOL recognizes nuclear weapon workers' service to our Nation, and the hardships many have endured. We know how long they've waited for compensation; first for the passage of this statute, and then for their claims to be processed, in some cases, multiple times.

We are also aware that most of our claimants are elderly and seriously ill. My written testimony explains at length the many ways that our program at DOL reaches out to inform, assist and support these workers and their families, often helping to prove claims in ways that the families aren't even aware of.

But, I also hear about special efforts that we've made on a particular case. Just last Wednesday, our office in Jacksonville learned of a former Oak Ridge worker who had been given no more than 24 hours to live. They had already done an expedited award for this gentleman, but forms needed signing, and there was little time. Our resource center manager there at Oak Ridge went to the hospital personally, and obtained the signatures from this sick individual. Staff in Washington, DC. talked Treasury into issuing a same-day payment—which they don't like to do—and on Thursday, this gentleman was comforted to learn that his family had the money in-hand. He, unfortunately, died on Friday.

These kinds of stories are repeated time and again. On October 1, for example, Jacksonville got a brand-new claim from a terminally ill Oak Ridge woman. Somehow, they managed to issue payments totaling $387,500 on October 9. Had they not done that, her entire benefit would have died with her, because she did not have eligible survivors. She died on October 14.

Beyond the question of service and assistance, however, the true test of this program is whether those Congress intended to be compensated are, in fact, getting paid. By this measure, EEOICPA is clearly exceeding expectations. In just over 6 years, DOL has paid out more than $3.2 billion to nearly 35,000 recipients. That is a real achievement.

Very few of these workers won State Workers' Comp benefits, and in 4 years of the old Part D program, the Department of Energy, only a million dollars was paid out.

CBO assumed in 2000 that only 460 individuals would be paid via the dose reconstruction process in 10 years. In fact, there have been 4,900 such payments in only 6 years. And CBO estimated an

$840 million payoff for Part E in 10 years, and DOL has exceeded that amount in less than 3 years.

When clearly invalid applications are set aside, more than half of Part B and Part E cases are being approved. The current program, whatever its faults, is delivering benefits.

The last key measure of claimant friendliness is the speed with which decisions are rendered. Workers and their families deserve an expeditious decision, even though their cases are complicated. In this arena, we have not been as successful as we would like. The dose reconstruction process is complex and time-consuming. Although it's getting quicker now, on average, since the beginning of the program, it's taken 2 years for a case to clear through NIOSH, and nearly 3 years when DOL's additional processing to those cases is added.

I don't blame claimants for being frustrated with that kind of delay. We are able to decide Part B cases that don't go to NIOSH more rapidly, at about 250 days. That's still not fast enough.

With the advent of Part E in 2005, DOL is obliged to take on an entirely new program, it's huge AIDs backlog, and to meld it with our existing one. We promised those who have been waiting for years at DOE that they would not have to go to the back of the line. And we followed through on that promise.

Our key goal last year was to issue at least an initial determination on every single one of those cases we inherited from DOE, that was 26,000 cases. I'm proud to say we met that goal on the last day of the fiscal year. That group of claimants has now received almost one-half billion dollars in Part E benefits.

Unfortunately, the need to focus on those old cases, plus the addition of new, special exposure classes, and the need to reopen and send thousands of cases back to NIOSH due to changes in their procedures, has slowed DOL processing of the newer claims. I'm not satisfied with our current processing speed, but we will fix it. We're committed to erasing the backlog of claims and reach a steady stayed posture by the end of this fiscal year. To do so, I've authorized staffing up immediately from our 525 current Federal employees, to nearly 600 FTE.

We work hard to get payments to eligible claimants, but some don't meet the legal criteria and it's also our job to promptly, objectively and sympathetically tell those claimants no. This isn't easy for anyone to hear. Most are convinced that their work caused their illness, and some are sure that denials mean that the government is simply abusing them all over again. I can't speak for the cold war past, but the Department of Labor is delivering this program in accordance with the law, and with all the fairness, compassion and speed we can muster.

I'll be happy to answer your questions.

[The prepared statement of Mr. Hallmark follows:]

PREPARED STATEMENT OF SHELBY HALLMARK

Good morning Chairman Kennedy, Ranking Member Enzi and members of the committee. My name is Shelby Hallmark and I am the Director of the Office of Workers' Compensation Programs, a component of the Employment Standards Administration of the U.S. Department of Labor (DOL). I am pleased to appear before the committee today to discuss our efforts to fulfill the promise made to veterans of the cold war with the enactment of the Energy Employees Occupational Illness

Compensation Program Act (EEOICPA). During the cold war era, thousands of workers served the Nation in building its nuclear defense programs. Many of these workers were exposed to radioactive and toxic substances that caused serious illness or death. The EEOICPA compensation and benefits provided at the Federal level are intended to minimize the financial hardships of claimants who have developed occupational illnesses related to the production and testing of nuclear weapons.

In previous testimony, I have highlighted the dedication of the DOL staff to ensure that we adjudicate claims and provide benefits to eligible workers and their survivors in a manner that is timely, fair, consistent, and according to the law as enacted by Congress. We do our best to administer the program in the best interest of the workers and survivors for which it was intended, and as outlined in the statute—and we believe the results demonstrate that the promise of the statute is being kept.

"IS EEOICPA BEING ADMINISTERED IN A CLAIMANT FRIENDLY MANNER?"

DOL has been working since the inception of EEOICPA to address the concerns of stakeholders. We have designed and implemented our program to provide a wealth of assistance and multiple opportunities for claimants to obtain information, request reconsideration of decisions, and otherwise better understand the process. I will outline some of those efforts below.

In any compensation program, including EEOICPA, the administering agency has a dual role of service to claimants and program stewardship. Stewardship means we must adhere to the statute's eligibility criteria established in law, and thus some claims will be unsuccessful. Even for denied cases, however, DOL seeks to provide as clear, helpful, and prompt a process as possible, so that claimants fully understand why they received the decision they did, and what their options are if they disagree.

THE ADJUDICATION PROCESS

Our adjudication process is the primary means whereby we assist claimants in pursuing and perfecting their claims. At the outset, DOL moved quickly to establish a fair but streamlined and flexible adjudication structure. Thanks to the dedication of our staff and managers, we have been able to modify our strategies over the years to address the frequent and substantial changes in this program. From the start we have been keenly aware that EEOICPA is a complex law and that our claimants are generally ill and elderly, and have been awaiting compensation for their sacrifices for a long time. Our staff works hard to process claims fairly and promptly, and has made extraordinary efforts to help suffering nuclear workers and their families.

DOL strives to clearly inform claimants about EEOICPA requirements and benefits as well as DOL's adjudication process, including the process for objecting to our decisions. In the first phase, DOL (via our Resource Centers) helps claimants gather information and file applications for benefits. Next, the claim is forwarded to a DOL district office for development and adjudication. During the development phase, claims examiners do all they can to help claimants collect evidence to support their claims. Following collection and review of the evidence, the district office will issue a recommended decision to accept or deny benefits.

If the case involves a claim of radiation-induced cancer, and is not covered by a Special Exposure Cohort (SEC) class (i.e., the cancer was not 1 of the 22 listed cancers for which SEC covered claims are presumed to have been caused by workplace radiation, or the work was not at an SEC facility, or the work was at an SEC facility but did not meet the 250-work day requirement), DOL must request and receive a dose reconstruction report from the National Institute for Occupational Safety and Health (NIOSH) before issuing a recommended decision. DOL then uses the information in NIOSH's report to determine if the worker's exposure meets the statutory minimum test that the illness had a 50 percent or greater probability of being caused by work-related exposure. In these cases, the "probability of causation" outcome is the key determinate in the recommended decision.

All recommended decisions are sent to the claimant with a detailed explanation of the decision, as well as an explanation of the claimant's rights and the process for formally objecting to the recommendation. At this point, the recommended decision is also forwarded to the Final Adjudication Branch (FAB) for a final decision. The FAB is a separate and independent component from the district office. In the final decision phase, claimants can object to the recommended decision and have a formal review of the written record or an oral hearing. The FAB may also remand a decision back to the district office if further development of the case is needed.

Ultimately, the FAB reviews all recommended decisions and any evidence/testimony submitted by the claimant and issues a final decision.

The last administrative step, reconsideration, is for the claimant's benefit. If the claimant objects to the final decision, he/she may request a reconsideration of the claim within thirty (30) calendar days. As a further protection for claimants, we do not close the evidentiary record when our administrative process is completed. A claimant may request a reopening of his or her claim at any time if there is new or compelling evidence. Lastly, the claimant may appeal a final decision to the U.S. District Court.

This procedural structure provides the foundation for a system of claims adjudication that allows for multiple opportunities for claimants to perfect their claim. However, we do not rely only on our administrative procedures to provide claimants every possible opportunity to receive a positive outcome; we make efforts at each stage of the process to assist them. We strive to foster an organizational culture wherein our claims staff knows their job is to ensure that all eligible claimants are compensated, not merely to close claims as quickly as possible.

DOL CLAIMANT ASSISTANCE, CUSTOMER SERVICE AND OUTREACH

The EEOICPA is complex in terms of its clientele, the exposures and types of diseases involved, the science used in determining causation, the multiple agencies engaged in delivering the program, and the various types of compensation and medical benefits available. A total of 64,187 workers are represented by the 108,172 cases reported under the EEOICPA. This includes employees who worked in a broad range of occupations and professions at one (or more) of the 130 facilities identified as Department of Energy (DOE) facilities, 200-plus facilities identified as atomic weapons employers (AWEs), 70-plus beryllium vendors, and 4,000-plus uranium mines or mills covered by the EEOICPA. These workers suffer from a broad range of illnesses. In some cases, we have experienced difficulty in locating employment records to support claims. Many claimants have found it difficult to obtain documentation that can establish exposure to radiation and toxic substances due in large part to the secrecy and lack of information available about nuclear weapons production processes. Others struggle to locate medical records. Nearly all find it difficult to understand the complexities of the statute, and the differing eligibility rules under its various provisions. Their advanced ages and poor health only magnify these difficulties. If the worker is deceased, the survivors may not even be aware of their parent's, grandparent's or other family member's work history and may not have access to the documents and records required to support a claim.

All of these factors have required extraordinary efforts by DOL to not only inform the public about EEOICPA but to assist covered workers and their families who may be eligible for benefits. DOL continues to employ a wide range of outreach activities to educate the public and to provide specific assistance to claimants in completing forms, navigating through the process of submitting evidence and other information, and understanding the adjudication process from start to finish.

ASSISTANCE IN OBTAINING EMPLOYMENT VERIFICATION

DOL understands the difficulties claimants may have in locating employment records that are necessary to substantiate a claim, and has taken steps to provide meaningful assistance. DOL and DOE use a DOE database for on-line employment verification of some claims. DOL also has a contract with the Center to Protect Workers' Rights (CPWR) to secure employment information for subcontractors. For example, CPWR helps to obtain information about construction workers who may have been exposed at DOE sites but whose employment information was not captured in DOE's prime contractor data sets. DOL also works with DOE's Former Workers Program, and with other contractors, to locate appropriate records that are not immediately available through DOE. These key relationships help relieve the burden on the claimants to attempt to locate records. Another source of information is the Social Security Administration; with the claimant's permission, we can request earnings data to verify a claimant's work history.

RESOURCE CENTERS

DOL operates 11 Resource Centers (RCs)[1] where knowledgeable staff work one-on-one with claimants to file forms, and gather and submit pertinent information

[1] Resource Center locations include: Livermore, California; Westminster, Colorado; Idaho Falls, Idaho; Paducah, Kentucky; Las Vegas, Nevada; Espanola, New Mexico; Amherst, New York; Portsmouth, Ohio; North Augusta, South Carolina; Oak Ridge, Tennessee; and Richland, Washington.

for their claims. These RCs are located near major nuclear weapon production and testing facilities to serve locations with the highest claimant populations. The RCs handle the initial intake of information from claimants (i.e., claims forms, occupational history, and employment verification[2] and send completed claims to the DOL's district offices. RC staff meets face-to-face with claimants and works via DOL's toll-free telephone service to provide all relevant information at the initial stages of claim submission and to answer any questions. They also participate in numerous local events to communicate with various stakeholder groups and potential claimants. We monitor the performance of the RCs via accountability reviews and direct feedback from our district offices, and they continue to provide high-quality service to claimants.

SPECIAL IMPAIRMENT AND WAGE-LOSS BENEFITS PROJECTS (PART E)

In 2006, DOL recognized that many claimants (including those who received a positive causation determination) were not submitting Part E claims for impairment and wage-loss benefits, due to their confusion over the complexity of the benefit structure. In response, we immediately tasked the RCs with the critical role of helping claimants understand their potential eligibility for Part E benefits. RC staff contacted eligible claimants to explain impairment and wage-loss benefits and offered one-on-one assistance to individuals who sought to file claims.

Because of our concern that many living workers appeared to be uncertain about filing for Part E impairment or wage-loss benefits, we established a special performance target for the district offices to ensure that at least half of the cases potentially eligible for such benefits would receive a decision on that issue in fiscal year 2007. We exceeded that goal, with 58 percent of the cases receiving a decision or an affirmative determination that the claimant did not want to pursue such benefits. As a result of this effort, we made over 1,250 impairment-rating payments in fiscal year 2007—a six-fold increase from fiscal year 2006.

AVOIDING "EXTINGUISHED CLAIMS"

Because many of our claimants are elderly and very ill, we try to see to it that eligible claimants who are near death receive their benefits. However, when a claimant dies before a decision is made or before receipt of benefits, DOL will work with the survivors to reapply and to speed that process. While the death of even a single eligible employee or survivor prior to payment is extremely unfortunate, our records show that this rarely occurs. Of the more than 20,000 Part B cases and 14,000 Part E cases that have an initial decision awarding benefits, only 64 cases involved eligible workers or survivors who died before payment and the benefits were "extinguished" (that is, no other member of the family was eligible). In 35 of the 64 cases, the family received Part B payments, but could not receive Part E benefits, primarily because the definition of "survivor" in the Part E statute is narrower than that specified in Part B. For the remaining 29 cases, no payments were made under either Part B or Part E of the Act. We regret that any family suffers in this way, and our staff continues to work as diligently as possible to prevent this unfortunate scenario from occurring.

ROUNDTABLES ON TOXIC EXPOSURES

DOL also understands the difficulties claimants have in locating exposure records that are necessary to substantiate their claims. DOL has sent teams to DOE facilities to work jointly with DOE to collect records that describe the types of toxic materials present at DOE work sites and how these materials were used. Since 2006, DOL has conducted 86 roundtable meetings nationwide, meeting face-to-face with 918 workers from 48 DOE sites. The roundtable meetings have allowed DOL to identify toxic materials present at DOE sites, learn how the toxic materials were used, investigate how workers may have been protected from those substances, and find out whether there were any toxic material incidents. During these meetings, workers were encouraged to provide documents that might shed light on the use of toxic substances at the site or to provide information they may have regarding where such documents may be found. These efforts have proven invaluable and have resulted in over 100 toxic substances being identified and verified at DOE sites that may not have otherwise been found. DOL also has interviewed former workers of Radiation Exposure Compensation Act (RECA)-covered facilities in the uranium mining and milling industry.

[2] To date, RCs have processed more than 16,600 employment verifications and over 15,400 occupational history questionnaires.

DISTRICT MEDICAL CONSULTANTS (DMCS)

DOL also contracted with more than 200 physicians throughout the country to assess medical evidence used in issuing decisions related to causation and impairment. The DMCs work with DOL to review particularly difficult claims and assist in cases where claimants do not otherwise have access to a physician who can provide an impairment evaluation utilizing the AMA Guides.

SITE EXPOSURE MATRICES (SEM) DATABASE

Another way that we help claimants in assembling their evidence is through the Site Exposures Matrices (SEM) database. In fact, for the great majority of claimants, the SEM relieves some of the burden of providing information and records regarding workplace exposures. After years of work with DOE, we developed the SEM in 2006 to be a repository of information on toxic substances present at covered facilities. This information can be accessed by our claims examiners and by claimants (via DOL's public Web site). While inclusion in the SEM is sufficient evidence of the presence of specific toxic substances, our claims staff makes additional efforts if claimants allege exposure to substances not found in SEM. The SEM database now houses information on 2,581 toxic substances/chemicals at 33 DOE sites, as well as 4,170 uranium mines, 48 uranium mills, and 17 uranium ore-buying stations covered under RECA and EEOICPA.

EXTENSIVE DOL EEOICPA WEB SITE

This year, DOL updated and improved its EEOICPA Web site. The Web site allows claimants to access claim forms and to complete and file claims electronically. The Web site also provides searchable access to the program's regulations, procedures, and instructive final decisions; a link to the list of covered facilities; the program's current statistics, including claims status and payments made at every EEOICPA site; links to NIOSH, DOE and the Department of Justice (DOJ); a page for medical providers; and information on the medical billing process. The public also may access an online version of our SEM database and may submit information relative to worksite toxic substances. This effort has resulted in several hundred substances being identified and added to the SEM.

ACCESS TO DOL DISTRICT OFFICES AND FINAL ADJUDICATION BRANCH

Each of our four district offices and the Final Adjudication Branch have toll-free telephone lines and provide prompt response to thousands of inquiries each year. The quality and promptness of staff responses to telephone calls and letters is monitored at the office and individual employee level, and improving the accuracy and timeliness of responses will receive increased focus in fiscal year 2008.

TOWN HALL MEETINGS

DOL remains dedicated to reaching out to the public to increase awareness of the EEOICPA and to alleviating the burden on the claimants by assisting them at all stages of the adjudication process. Since the beginning of the program, our Traveling Resource Centers have provided program information and claims assistance to people who live outside the immediate areas of our district offices and RCs. DOL also held numerous, well-publicized Town Hall Meetings in various locations throughout the country where there was a significant population of individuals currently or formerly employed at covered facilities. DOE, DOJ, and NIOSH have participated in these meetings, providing information and answering questions about their responsibilities under the statute. DOL has continued these meetings as new regulations and procedures are developed. We also have held Focus Group meetings with claimants, as we have realized that claimants' questions about medical benefits and Part E benefits have demanded more personal attention.

In 2007, Town Hall and Focus Group Meetings were held (or will soon be held) in Oak Ridge, Tennessee; Kennewick, Washington; Albuquerque and Santa Fe, New Mexico; and North Augusta, South Carolina. These meetings give DOL officials the opportunity to meet with claimants who were identified as having a positive causation determination, to explain additional wage loss and impairment benefits available to them under Part E, as well as to obtain feedback on the claims process. The focus groups give claimants an opportunity to discuss the difficulties they have encountered with the medical bill payment process. As a result of the feedback we have received, DOL is increasing our outreach efforts to medical providers and is taking steps to simplify the medical provider enrollment process. DOL has also developed an action plan to make our processes more claimant-friendly.

OUTREACH TO RECA CLAIMANTS (URANIUM MINERS, MILLERS AND TRANSPORTERS)

DOL has also strengthened its outreach to RECA claimants. There are three federally funded programs assisting uranium workers potentially eligible for some form of Federal compensation: (1) EEOICPA—administered by DOL; (2) the Radiation Exposure Screening and Education Program—administered by the Department of Health and Human Services (HHS); and (3) RECA—administered by DOJ. These agencies are hosting town hall meetings to provide general program information to uranium workers regarding EEOICPA benefits and those of the HHS and DOJ programs. Meetings were held on October 2, 2007 in Grand Junction, Colorado, and on October 4, 2007 in Moab, Utah. Additional town hall meetings are scheduled for November 14, 2007 in Shiprock, New Mexico, and November 15, 2007 in Grants, New Mexico.

SIGNIFICANT ADMINISTRATIVE CHALLENGES REMAIN FOR EEOICPA

DOL has faced major challenges as the program has matured and changed—with the resultant shifts in workload and priorities. Most notably, in 2004, after nearing steady state in our handling of Part B claims, we were tasked with the new Part E program. During fiscal year 2005–2007 we devoted the lion's share of our attention to implementing Part E, which involved our management of 25,000 aged cases from the DOE's old Part D operation. Unfortunately, most of the old Part D (now Part E) cases were already 4 years old when we received them. Part of our representation to Congress at that time was that these individuals would not have to "go back to the end of the line," and we have worked hard to keep that commitment. I will address our actions to fulfill that promise in greater detail later on, but as of September 30, 2007, all cases that we had inherited from DOE have received at least an initial determination.

In addition, to ensure that Part E claimants receive all benefits due, we focused on identifying and paying valid impairment rating cases during fiscal year 2007. These initiatives were successful, but as a result of our necessary focus on older cases, the speed with which DOL could address newer claims, both Part B and Part E, was diminished.

Similar impacts have been, and will continue to be, felt by DOL as a result of program changes emanating from NIOSH. These include the creation of new Special Exposure Cohort (SEC) classes and NIOSH changes to its dose reconstruction procedures—activities that consume the time of both DOL and NIOSH to identify cases that need to be either withdrawn from or returned to NIOSH for a new dose reconstruction. These issues are described in greater detail below. The addition of new SEC classes (24 classes to date) has required analysis and dialogue to fully understand this evolution and its potential impact on the program.

NEW SEC DESIGNATIONS

In the early years of the program, it was believed that few, if any, additions to the SEC would be made, and that any new classes would be narrowly drawn. NIOSH was confident that they could do a dose reconstruction for almost any case. As the program matured, NIOSH found that many types of data were missing or could not be relied upon for dose reconstructions—giving rise to the addition of new SEC classes. As HHS determines and introduces new SEC classes into the claims process, DOL's role is to adjudicate claims based on the definitions of these classes, explain the effect of HHS's SEC decisions to stakeholders, and ultimately, assist DOJ in defending compensation decisions in Federal district court.

For each new class, DOL, in consultation with NIOSH, advises its claims staff on how to interpret the class definition, and how to identify which cases are covered by the class (and thus need immediate processing under presumptive rules) and which are not. When an HHS SEC designation contained an imprecise class definition such as the first Y–12 designation—DOL staff encountered greater problems in adjudicating the coverage of the class, and those cases took longer to decide. DOL now works with NIOSH to ensure that the class definitions are precise and can be properly interpreted by DOL staff. This has resulted in increased timeliness.

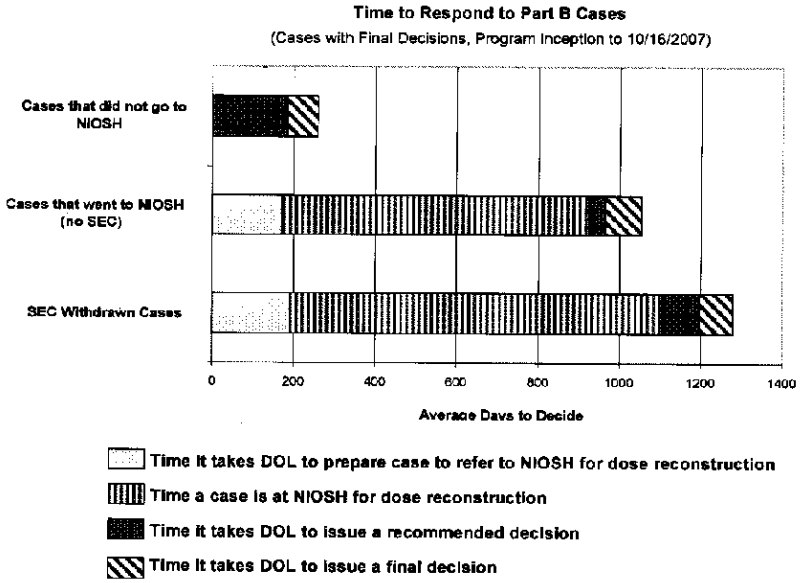
Under the statute, the designation of a class as an SEC means that members of the class who suffer from one of the cancers listed in the statute are presumptively entitled to Part B benefits. Since each new SEC class designation is unique in its rationale and in its impact on how (or if) dose reconstruction can be done for those cancers that do not have presumptive entitlement, DOL and NIOSH have had to coordinate unique procedures for each class. For example, if a worker from an SEC-covered facility has a non-presumptive illness, typically NIOSH will only be able to conduct a "partial dose reconstruction" because some data has been found to be

missing or unusable. If the outcome is negative for the worker, DOL staff must then explain to the claimant why the SEC designation had this negative impact on him or her.

When a new SEC class is designated, DOL takes steps to ensure that workers' claims are reviewed timely for potential inclusion in the SEC and rapid payment for those who are covered. However, the complexity of this process and the slow unfolding of new SEC classes have reduced the overall speed and efficiency of the claims process, and often leaves claimants and other stakeholders confused while waiting for a determination. For example, an SEC class was declared for a small subset of buildings within the Los Alamos National Laboratory in December 2006, only to be subsumed in a larger SEC class declared 6 months later. Similarly, before NIOSH determined that an SEC class was required for the Hanford site for the World War II era, it had already completed 328 of 378 relevant dose reconstructions (86 percent of cases involving the years in the SEC).

THE DOSE RECONSTRUCTION PROCESS

The dose reconstruction process is complex, confusing to the public, and time-consuming. Our records show that, on average, cases requiring dose reconstruction have taken over 2 years and 10 months to reach a final decision. Of that time, the case remains with NIOSH for an average of over 2 years. I should note that during the past year, NIOSH's time to produce dose reconstructions has been reduced significantly. In these cases, DOL must wait for NIOSH to perform the dose reconstruction and return the results to DOL before we can adjudicate the claim. Since the inception of the programs, our statistics on cases where no dose reconstruction is required from NIOSH indicates that it takes DOL an average of 6 months to issue a recommended decision, and an additional 73 days to issue a final decision. Unfortunately, in fiscal year 2007, the DOL-only average for Part B recommended decisions rose by about 60 days as we focused on eliminating the old Part D backlog that we inherited from DOE. We will continue to work to reduce the average time it takes to complete our processes, and expect this measure to improve over time. For SEC claims that had to be withdrawn from NIOSH, our records show that these SEC claims have taken an average of 1,278 days to reach a final decision. Of that time, the case remained with NIOSH for an average of 905 days. The following chart demonstrates these comparisons.



DOL's claims process requires that a claims examiner, after receiving a dose reconstruction report from NIOSH, review the report for accuracy and consistency

prior to issuing a recommended decision on a case. Therefore, claims examiners will check for anomalies in the reports which require further analysis. For example, if a dose reconstruction was conducted based on a different cancer than the one used by NIOSH in its initial dose reconstruction, or additional evidence was received following or during a dose reconstruction that reveals additional employment evidence and/or medical evidence, a claims examiner will initiate a rework of the dose reconstruction. In all instances, if the information may change the outcome of the dose reconstruction or can affect the accuracy of the case, DOL will request a rework.

As of March 31, 2007, Labor had returned 2,811 cases to NIOSH for rework. Many of these cases were returned to NIOSH as a result of new evidence. The vast majority (87 percent) of the cases returned for rework did not previously meet the statutory minimum of having at least a 50 percent probability of causation (POC) based on NIOSH's initial dose reconstruction, and thus the affected claimants would likely not have received compensation. After the rework, 385 of the denials/negative cases were switched to approvals; and 41 of the positive cases were switched to denials. While reworks often lead to favorable decisions for some claimants, they represent another workload factor.

Recently, the pace at which cases must be returned to NIOSH for rework of the dose reconstruction has substantially increased because of the modifications NIOSH has made to its scientific procedures for performing a dose reconstruction. Neither NIOSH nor DOL want to add further unnecessary paperwork and heartache for claimants who were previously told they were ineligible—only to have that bad news repeated as a result of the rework. However, if it is possible that the change may alter the dose reconstruction so that a previous denial may be overturned, DOL and NIOSH have agreed that these claimants should receive a new dose reconstruction report so their due process rights are protected. If NIOSH cannot determine the potential impact of the change in its procedure, we refer the case to NIOSH for a determination if a new dose reconstruction is necessary. To date, we are in the process of returning over 4,400 cases to NIOSH for new dose reconstructions based on NIOSH's identification of cases that may be affected by the new procedures, and we are referring about 5,000 additional cases to NIOSH for case-specific determinations on the need for a new dose reconstruction.

We work as closely as possible with NIOSH on all of these issues, conferring at the staff level on at least a weekly basis to streamline the handling of the SEC class and dose reconstruction issues. However, as indicated by the sheer numbers of cases requiring return, rework, SEC consideration, partial dose reconstructions, or notification of NIOSH evaluation of a possible rework—these changes have created a substantial and growing burden on DOL's adjudication process and decisional timelines.

PROGRAM ACCOMPLISHMENTS

Despite these challenges, DOL has made great progress since 2001 in implementing Part B of the Act—and similar progress since October 2004 in implementing Part E. We have set ambitious performance targets—and consistently exceeded those targets—to ensure that workers and their families, who have waited so long for compensation, receive prompt and accurate decisions. An analysis of the overall program statistics shows that the Energy Compensation program is moving forward, despite its complexity and ongoing change. We continually seek new ways to improve and streamline our compensation system and embrace the valuable input of the workers and families we serve.

It has been 6 years since Secretary of Labor Elaine L. Chao issued the first EEOICPA benefit check on August 9, 2001. Since then, DOL has paid nearly $3.2 billion in total EEOICPA compensation and medical benefits to workers and their survivors. Under Part B, DOL has issued more than 27,000 payments with compensation totaling nearly $2.2 billion. Under Part E, DOL has made nearly 7,400 payments with compensation totaling nearly $850 million.

Despite these significant accomplishments, some suggest that DOL has denied a high percentage of claims for budget reasons and is antagonistic toward claimants. No such animus exists, and I believe that impression rests in part on a misunderstanding of the statute's requirements. While anyone can file a claim, many applications have been filed that do not meet the statute's basic requirements for eligibility. This is especially true for those who filed Part B claims early in the program, as many of these individuals did not have one of the three medical conditions required for Part B eligibility. Similarly, many "adult children" of deceased workers filed Part D (later Part E) claims who did not meet the narrower survivor definition that Congress created for Part E.

If we set aside those applications that do not meet the statutory minimum requirements, our records show that over half of the remaining claims have been ap-

proved under both Parts B and E. Specifically, since 2001, DOL has received over 59,000 Part B cases and has issued final decisions on 83 percent of them. Almost 20,000 have been approved for payment (55 percent when non-covered applications are set aside), with nearly $2.2 billion in compensation so far.

After Part E's enactment in 2004, DOE transferred over 25,000 aged Part D cases to DOL. In response to this new workload, DOL identified certain quick decision claims that met specific, straightforward criteria contained in the amendment. Within 2 months of Part E's enactment, DOL was paying claimants under the newly established Part E. Further, DOL is especially proud of its success in addressing the backlog of aged DOE cases. DOL has focused on doing everything it can to speed the processing of these cases, which clearly deserved to be prioritized, given the long wait these claimants have endured. For fiscal year 2007 we set and met a goal to issue at least an initial determination for all 25,000 cases inherited from DOE. Additionally, DOL has paid nearly $500 million in Part E benefits to this group of claimants.

Our total Part E workload of 48,925 claims includes more than 23,000 *new* Part E claims. Notably, more than 8,000 (17 percent) Part E claims were "non-covered," mostly from "adult children" who did not meet the basic requirements for eligibility. To date, DOL has issued at least one final decision on over 70 percent of the (old and new) Part E cases. When non-covered claims are set aside, our approval rate on covered Part E cases is over 51 percent. To date, DOL has approved about 13,500 Part E cases, with payments totaling nearly $850 million.

SUMMARY

The record of DOL's administration of EEOICPA demonstrates that our Nation's promises made to our cold war veterans are being kept. Over 34,000 eligible workers and their survivors have received more than $3.2 billion in benefits and medical reimbursements; we have eliminated the Part D backlog; and litigation remains remarkably low.

DOL continues to strengthen its processes and procedures, maintain its outreach efforts, improve its service to claimants, and adjudicate and pay eligible claims as promptly and accurately as possible. We have continually re-evaluated the program's performance goals and strategies, and we remain proactive in addressing the many program changes that have challenged our operation. I am proud of the efforts of our staff in carrying out the important mission of this program.

I will be glad to answer any questions the committee may have.

Senator BINGAMAN. Thank you very much. As I indicated, Senator Reid wanted to make a statement on this issue, and why don't we go ahead and hear from him, because I'm sure he has other commitments this morning.

So, Senator Reid, go right ahead?

STATEMENT OF SENATOR REID

Senator REID. Mr. Chairman, thank you very much, I appreciate the attendance of the other members.

This hearing is very important, dealing with securing compensation for sick atomic weapons workers. I've been working on this for a long period of time.

Our country has made progress over the past decade, but the Employees Compensation Program is still finding thousands of cold war veterans who now have cancer and other illnesses. The meetings I hold with these folks in Nevada is really sad—a room full of people who are very, very sick.

The program needs some help, and this hearing is a step in the right direction. Eight years ago, I joined with my colleagues to pass bipartisan legislation to recognize the sacrifices made by these weapons workers. We passed the Energy Employees Occupational Illness Compensation Program Act to provide workers and their survivors with compensation medical reimbursement.

But sadly, years after this program was created, many Nevadans with cancer, caused by their service working on atomic weapons programs, still are concerned about the lack of care, lack of attention. They tell me their sacrifices are being ignored, and I hope this committee, as I know it will, begin to find some solutions for them today.

Mr. Chairman, the workforce of the State of Nevada, at the Nevada test site was huge, at least by Nevada standards, we had over 11,000 workers there for many years. It's, of course, dropped significantly.

Of the nearly 117,500 covered applications, 35,000 have received compensation nationally. The situation is worse for atomic weapons workers in Nevada. Fewer than 20 percent of Nevada test site workers with qualifying illnesses have received compensation.

This program has the right intentions, but it is failing thousands of Americans who helped in the cold war. These workers did not wear the military uniforms, they weren't even military, but they're just as responsible as anyone else for winning the cold war.

When the Energy Employees Occupational Illness Compensation Program was crafted, we knew that the Department of Energy did not consistently monitor atomic weapons workers for radiation. These classified programs were highly secretive, and over the years, records were lost or even thrown away. It's also nearly impossible to estimate radiation exposure from some worker deaths.

Mr. Chairman, to hear the stories of these workers, they were exposed, they have dust all over them. They were told to not even take a shower, continue working. On one occasion I was told about a whole dormitory, they learned that the exposure was more than it should have been, they were awakened in the middle of the night, they were taken outside, they were sprayed with a hose, water.

Information about nuclear testing is held very tightly, and it's difficult, we understand, to verify some of these stories. But there are witnesses, it's not as if a person is coming in, basing it entirely on hearsay. I've heard these stories time after time, and I would invite the committee to either send an investigator out to hear some of these stories, or in some way, I'd be happy to work with the committee to get some of these stories so we can look at them, some of the horrible things that went on. These are people who now are very, very sick, and said they were not exposed to these real things that make you sick.

Workers near Ground Zero at the Nevada Test Site, for example, would be told not to wear these badges that were supposed to indicate how much exposure to radiation you had, so they could continue working even after they'd already received a full year's dose of radiation. You're supposed to get so much in a year, someone would get it in 3 months, someone would get it in 1 day. And, if they wanted to keep working, they didn't wear their badges anymore.

The government knew that these workers were exposed to cancer-causing materials. If they didn't know, they should have known. And these men, and a few women, were encouraged—and sometimes ordered—to cover up information about the radiation exposure levels.

We can't change what's already happened, but we can right the government's wrongs. We can give these workers and their survivors an easier path toward compensation. This program made sure that streamlining the process was an option for special classes, a special class of claimants. Within this program, atomic workers can apply for Special Exposure Cohort status. If they receive this designation, workers with qualifying cancers are paid benefits without undergoing complicated dose reconstruction. Reconstruction dose is difficult, if not impossible, especially with the limited radiation monitoring data and lost records.

All Nevada test site workers should have this Special Exposure Cohort status. There were approximately 1,000 tests held at the Nevada test site, the last one, 15 years ago. Men and women who served at the test site after 1963 still have to struggle through the program's red tape to be able to be even considered for compensation for their illnesses. Only half of these claimants even received a final decision.

Test site workers helped America win the cold war. Now that we finally have a program to recognize their sacrifices, thousands upon thousands of sick atomic weapons workers are still being ignored.

Mr. Chairman, I have been to the test site, I call it, in Hanford, Washington where you have these huge tanks of nuclear waste, some of it leaking out, hopefully none of it going into the river. Workers exposed to this, the test site, they were asked to go back into these tunnels and shafts after a bomb had gone off, quickly. Had to keep the work going, more tests were coming.

The government then, they did this because they thought they were doing the right thing, and they were told it wouldn't make them sick. The government's implementation of the rest of the Energy Employees Occupational Illness Compensation Program should be drastically improved. The existing adjudication process is failing to uphold the statutory mandate that the process be claimant-friendly.

And Mr. Chairman, I don't really impugn the hard work of Mr. Hallmark, I'm sure he's doing the best he can. But, I am very troubled with the lack of quality assurance and transparency and the Labor Department's claim adjudication procedures. It's unacceptable that a government program of this significance has so few quality controls in place. We need to restore faith in the claims adjudication process.

Mr. Chairman, we tried to help World War II veterans. And one of the reasons we try to work on some of the programs as quickly as we can is they're dying, and it's the same with these test site workers—they're dying. A significant obstacle for sick atomic workers is the burden of proof they face to receive compensation.

Under the Energy Employees Occupational Illness Compensation Program, a claimant has the ultimate burden to prove that his or her illness was related to radiation or hazardous materials exposure at work.

This might seem like a standard burden, but remember, it's the government's responsibility to maintain employment records and information about radiation to which the workers were exposed, and in many cases there isn't any. All they have is the word of the workers and their colleagues who were there with them.

And these stories that they tell about being awakened in the middle of the night, put outside—they were not even told to wash their clothes, they wore the same clothes, day after day. Even with—and a lot of it had, now we've learned, radiological dust on what they were working, and the clothes they were working in. But the Labor Department doesn't have the records for these people to prove their case, because some of them didn't exist.

Even with our Labor Department's assistance developing their cases, sick claimants ultimately pay the price. If their employment and medical records are insufficient to meet the high burden of proof or the government lost their records, these workers likely won't receive compensation.

None of us intended for the program to be this unforgiving to our cold war veterans. Workers were placed in harms' way, yet they're asked to work through a complex process and shoulder a substantial burden in showing that the cancer or other illness was work-related. The least we can do is find a way to give sick workers a better chance of meeting this burden, so the program actually works in their favor.

Recently, Labor Secretary Elaine Chao acknowledged the need to improve the processing of compensation claims. She noted that the time is running out for many families, and that's an understatement. It's simply taking too long to compensate many workers.

So, Mr. Chairman, members of this committee, I appreciate you giving me this opportunity to address the committee. The Energy Employees Occupational Illness Compensation Program was developed for a good purpose, but it has the potential to be even more helpful to our Nation's atomic weapons workers. I look forward to working with you and our colleagues to improve this program, and to secure compensation for these people who really are veterans in the true sense of the word.

Thank you very much, Mr. Chairman.

[The prepared statement of Senator Reid follows:]

PREPARED STATEMENT OF SENATOR REID

Thank you Chairman Bingaman for holding this hearing today. Securing compensation for sick atomic weapons workers is something that we've been working on together for a long time. There is no doubt that our country has made progress over the past decade. But, the energy employees compensation program is still failing thousands of our cold war veterans who now have cancer and other illnesses. We must fix this program, and I think this hearing is a step in the right direction.

Eight years ago, I joined my colleagues to pass bipartisan legislation to recognize the sacrifices made by atomic weapons workers and help them live with terrible diseases caused by exposure to radiation and other hazardous materials. We passed this law, the Energy Employees Occupational Illness Compensation Program Act, to provide workers and their survivors with compensation and medical reimbursement in some cases. Sadly, 8 years after EEOICPA was created, I still hear from many Nevadans who have cancer caused by their service on government nuclear weapons programs. They tell me that their sacrifices are still being ignored. I am confident we can begin to find some solutions for them today.

Of nearly 117,500 covered applications—covered applications are from applicants whose employment and sicknesses are covered by EEOICPA—fewer than 35,000 have received compensation nationally. That is less than 30 percent. The situation is even worse for atomic weapons workers in Nevada. Fewer than 20 percent of Nevada Test Site workers with qualifying illnesses have received compensation. Chairman Bingaman, I think this program has the right intentions, but it is clearly failing thousands of Americans who helped us win the cold war.

When EEOICPA was crafted, we knew that the Department of Energy did not consistently monitor atomic weapons workers for exposure to radiation. These classified programs were highly secretive, and over the years records have been lost or even thrown away. It is also nearly impossible to estimate radiation exposure from some nuclear tests, and monitoring for certain cancer-causing radionuclides was simply inadequate. Information about nuclear testing is held so tightly, it's sometimes difficult to verify workers' stories.

And I've heard the same terrible stories time after time. For example, workers near ground zero at the Nevada Test Site would be instructed to not wear their dosimeter badges so they could continue working, even after they've already received a full year's dose of radiation. Think about that . . . the government knew these atomic workers were exposed to cancer-causing materials. And these men were encouraged to—sometimes ordered—to cover up information about their radiation exposure levels.

We cannot change what has already happened, but we can right our government's wrongs. We can give workers and their survivors an easier path towards compensation. EEOICPA made sure that streamlining the process was an option for special classes of claimants.

Under this program, atomic workers can apply for Special Exposure Cohort status. If they receive SEC designation, workers with qualifying cancers are paid benefits without undergoing complicated dose reconstruction. Reconstructing dose is difficult—especially with limited radiation monitoring data and lost records. And we all knew when we passed EEOICPA that there could be tens-of-thousands of nuclear weapons workers who fit in this category.

I strongly believe that all Nevada Test Site workers should have SEC status. Nine hundred and twenty-eight nuclear tests took place in Nevada—the last one in 1992. Men and women who served at the Test Site after 1963 still have to struggle through the program's red tape to be considered for compensation for their cancers. Only half of these claims have even received a final decision. NTS workers helped America win the cold war, and now that we finally have a program to recognize their sacrifices, thousands of sick atomic weapons workers are still being ignored.

While I think that NTS workers should receive SEC status, I also recognize that the government's implementation of the rest of Parts B and E should be drastically improved. One reason we are here today is because there are serious concerns that the existing adjudication process is failing to uphold the statutory mandate that the process be claimant friendly. I am troubled by the lack of quality assurance and transparency of the Labor Department's claims

adjudication procedures. It is unacceptable that a government program of this magnitude and significance has so few quality controls in place. We need to restore faith in the claims adjudication process.

A significant obstacle for sick atomic workers is the burden of proof they face to receive compensation. Under EEOICPA, a claimant has the ultimate burden to prove that his or her illness was "at least as likely as not" related to radiation or hazardous materials exposure at work. This might seem like a standard burden; but remember, it is the government and its contractors' responsibility to maintain employment records and information about the radiation to which workers were exposed. Even with the Labor Department's assistance in developing their cases, sick claimants ultimately pay the price—if their employment or medical records are insufficient to meet the high burden of proof, or the government lost their records, these workers probably will never receive compensation.

I don't think any of us intended for EEOICPA to be this unforgiving to our cold war veterans. Workers were placed in harms way by the government, yet they are asked to work through a complex process and shoulder a substantial burden in showing that their cancer or other illnesses were work-related. I think the least we can do is find a way to give sick workers a better chance of meeting this burden so the program actually works in their favor.

Recently Labor Secretary Elaine Chao acknowledged the need to improve the processing of EEOICPA claims. She noted that "time is running out" for many families. It is simply taking too long to compensate many workers.

Chairman Bingaman, again I appreciate you giving me this opportunity to address the committee. I think EEOICPA has a good purpose, but it has the potential to be so much more helpful to our Nation's atomic weapons workers. I look forward to working with you and our colleagues to improve EEOICPA and to secure compensation for cold war veterans in Nevada and throughout our country.

Senator BINGAMAN. Thank you very much, Senator Reid, and I know the importance of this to you and to your constituents, and we appreciate your testimony very much. Let me——

Senator Reid. I suppose I might also say, some of them are being rejected because they didn't work there long enough. Mr. Chairman, sometimes they were there at the wrong time. They happened to be called back in a tunnel too quickly, and many of them had been working there a year, or 2 years, but they're really sick, and they're being turned down, a lot of times, because they didn't work there long enough. So, thank you very much.

Senator BINGAMAN. Well, thank you, thank you very much, again, for your testimony.

Our next witness is Dr. John Howard, the Director of NIOSH, the National Institute for Occupational Safety and Health, why don't you go right ahead, Doctor?

STATEMENT OF JOHN HOWARD, M.D., DIRECTOR, NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH, WASHINGTON, DC.

Dr. HOWARD. Thank you, Mr. Chairman, I'm pleased to be here representing the Department of Health and Human Services and telling you about some of the progress that we've made under the act.

As of October 16 of this month, 25,494 claims have been referred to us by the Department of Labor, action has been completed by us on approximately 80 percent of those claims, leaving 5,127 claims in active status.

Twenty-four classes of workers representing 19 facilities have been added to the Congressional Special Exposure Cohort, to date. Nine of those twenty-four, we have added on our own motion and presented them to the Presidential Advisory Board on Radiation and Worker Health.

We always strive to improve the level of service we offer to claimants, and we welcome any criticism and suggestions that anyone has to help us improve the process.

To assist the claimants and petitioners in navigating the process, which is complex, we have made available two claimant ombudspersons, including Ms. Denise Brock, who is a former petitioner, who successfully petitioned us for the addition of a class at the Mallinckrodt Plant in St. Louis.

We continue to proactively conduct worker outreach, to obtain input on program technical and procedural approaches, we sponsor 77 outreach meetings, five town hall meetings, four public meetings. We've held five workshops to explain the dose reconstruction process, and six SEC worker outreach meetings to collect specific information about a particular SEC evaluation report.

In all of our interactions with claimants we strive to, not only listen, but to hear, to consider, and to act on the information that they provide us in the dose reconstruction process. To enhance our external communication with claimants, we've revised the packet that we send to claimants, including a video. We prepare all of these materials, in preparing these materials, we've sought input from the Board, from the claimant ombudspersons, and from claimants. We're committed to resolving informational and scientific uncertainties, because we do rely on science as our first evaluation in the dose reconstruction process.

But we try to resolve all of our uncertainties consistent with the act, with the Executive Order and with the regulations developed through public rulemaking. We believe that our dose reconstructions are grounded in the best available science, but when there is uncertainty, we use claimant-favorable assumptions to complete the dose reconstruction. These assumptions and methods have led to a compensability rate by the Department of Labor of 30 percent, which compares to an initial expectation in this program of about 10 percent, which relates to attributable risk of radiation in population-generated cancer in our society.

Claimant favorability is built into the act in many, many ways. When determining the probability that a claimant's work exposures to radiation caused their cancer, the act mandates that the inherent uncertainty in calculating such a probability will be higher

than the actual value, or the true value, which none of us can really know, 99 times out of 100. We rely on a series of other claimant-favorable assumptions, when science provides no answer at all—when data is missing when we have incomplete information.

The Special Exposure Cohort process also has many steps to ensure the decisions are as scientifically sound as they can be. They're reviewed by the Advisory Board, which analyzes the petition report that we give them, they obtain information from petitions also, they spend many hours assessing whether the information on exposure is adequate or inadequate to estimate the radiation dose with sufficient accuracy. The Board is involved in all aspects of the HHS program, and has met 50 times since it was first chartered.

HHS is dedicated to transparency in all aspects of the program, we welcome anyone's interest in expanding that transparency, and letting us know that we can do a better job.

For instance, we recently went beyond the requirements of the Federal Advisory Committee Act by providing verbatim transcripts and detailed minutes of all Advisory Board meetings, including those of the working groups, and making them available to the public on our Web site, we're striving to post those minutes within 30 days of occurrence of the meeting.

So, in conclusion, we've made a great deal of progress in carrying out our responsibilities under the act, but we continue to strive to serve claimants better, and we are very open to hearing any suggestions about how we can do a better job.

Thank you.

[The prepared statement of Dr. Howard follows:]

PREPARED STATEMENT OF JOHN HOWARD, M.D.

Chairman Kennedy and members of the committee, my name is John Howard, and I am the director of the National Institute for Occupational Safety and Health (NIOSH), part of the Centers for Disease Control and Prevention (CDC) within the Department of Health and Human Services (HHS). I am pleased to appear before you today to update you on the progress HHS has made under the Energy Employees Occupational Illness Compensation Program Act of 2000 ("EEOICPA" or "the act") (Pub. L. No. 106–398). I will describe several of our initiatives to provide better service, and I assure you that we are committed to continuing to improve the program to better serve former workers and their survivors and honor their service to our country.

The role of HHS in the program focuses on the science of conducting dose reconstructions, including the related issue of considering and deciding upon petitions from classes of employees wishing to be added to the Special Exposure Cohort (SEC), and providing support for the Advisory Board on Radiation and Worker Health (Advisory Board). The Department of Labor (DOL) has the lead responsibility in the program for administering EEOICPA, including carrying out activities such as processing and paying claims.

PROGRESS TO DATE

I would like to start by describing the progress and accomplishments NIOSH has made in implementing EEOICPA, followed by highlighting NIOSH initiatives to provide the best possible service to claimants.

At a meeting of the Advisory Board 3 weeks ago, DOL reported that the program has paid more than $869 million to claimants, based on either a completed dose reconstruction, which DOL determined was compensable, or by membership in a nonstatutory, HHS-designated SEC class.

Dose Reconstructions

As of October 16, 2007, DOL has referred 25,492 claims to NIOSH, and NIOSH has returned 17,280 of these claims to DOL with a completed dose reconstruction.

Of the remaining claims, NIOSH has returned to DOL 1,466 claims for a determination of SEC eligibility; DOL has "pulled," or taken back, 648 claims for various reasons; and there are 971 claims with completed dose reconstruction reports, which are currently being reviewed by claimants. This leaves approximately 20 percent of the claims at NIOSH in an active status.

Our efforts have been and are focused on completing the oldest claims in our system. As a result, of the first 5,000 claims that NIOSH received from DOL, we have completed or sent to DOL for adjudication 98.7 percent of those claims (compared with about 80 percent for the program overall). Of the remaining 64 claims for which we have not completed a dose reconstruction, 20 claimants worked at a facility for which NIOSH recommended adding an SEC class. NIOSH considers completion of the oldest claims in the system to be a top priority so claimants can have their cases resolved.

Special Exposure Cohort

Through NIOSH's efforts, 24 classes of workers, representing 19 facilities, have been added to the SEC to date. NIOSH has initiated almost 40 percent (9) of the 24 classes that have been added, based on the authority under our rules (42 CFR Part 83) to initiate petitions when NIOSH determines that we lack data to estimate radiation doses with sufficient accuracy.

SERVICE TO CLAIMANTS AND PETITIONERS

NIOSH constantly strives to improve the level of service we offer to claimants. I will tell you about the most recent steps we have taken. We have made available two staff members to help claimants and petitioners navigate this complex program. We continue to reach out to former workers to seek their input and incorporate it into our scientific and technical work products. We also have developed new communications materials to promote claimants' understanding of the program.

Claimant Resources

NIOSH has created two new staff positions to aid petitioners with the petitioner-initiated SEC process. These are the SEC Petition Counselor and the NIOSH Petitioner/Claimant Ombudsman, both of whom have toll-free telephone numbers and other contact information posted on the NIOSH Web site. The SEC Petition Counselor, Ms. Laurie Breyer, helps petitioners through the submission, development, qualification, evaluation, and Advisory Board deliberation processes of SEC petitions. Petitioners may also seek assistance from the NIOSH Petitioner/Claimant Ombudsman, Ms. Denise Brock, a former petitioner whose efforts led to the addition of a class of employees at Mallinckrodt Chemical Works in Missouri. In addition to responding to phone calls and e-mails, the SEC Petition Counselor and the Petitioner/Claimant Ombudsman have jointly held two SEC outreach meetings (one in Idaho Falls, Idaho, and one in Calabasas, California) and are in the process of arranging a third meeting in Augusta, Georgia, in November. The purpose of these meetings is to increase claimant and public understanding of the SEC process. Ms. Breyer and Ms. Brock have also attended, by invitation, meetings held by potential petitioners and/or union groups to explain the SEC process. These meetings took place in New Mexico, Washington, DC., New York, and Pennsylvania.

Worker Outreach

NIOSH continues to proactively conduct worker outreach. In an effort to obtain input on program technical and procedural approaches, NIOSH has sponsored 77 worker outreach meetings, five town hall meetings, and four public meetings. NIOSH has held five dose reconstruction workshops to explain the dose reconstruction process to workers, union officials, and claimant advocates. NIOSH also has held six SEC worker outreach meetings to collect information specific to preparation of a NIOSH SEC evaluation report.

Improved Communications Products

To enhance external communication, NIOSH has revised the acknowledgement packet sent to each claimant once NIOSH receives his or her claim from DOL. The new acknowledgment packet provides a more descriptive explanation of the dose reconstruction process and the steps that a claim will go through in that process. We have developed, distributed, and made available on our Web site the following new materials:

- probability of causation fact sheet,
- SEC fact sheet,
- residual contamination fact sheet,
- technical documents used in dose reconstruction fact sheet,

- dose reconstruction fact sheet,
- overview of the dose reconstruction process,
- detailed steps in the dose reconstruction process,
- glossary of terms, and
- answers to frequently asked questions.

We have also created a video explaining the dose reconstruction process; the video may be viewed on our Web site and is also available at Advisory Board meetings and by request in CD, DVD, and VHS formats. In preparing all of these materials, NIOSH sought input from the workers, the Advisory Board, and the NIOSH Petitioner/Claimant Ombudsman to make the information as clear as possible. NIOSH has also implemented and maintains an external mailing list so that interested individuals will receive automatic e-mail updates when new information is added to the NIOSH Web site.

In addition to these outreach initiatives and the development of new communication information, NIOSH responds to numerous letters, telephone calls, and e-mails from claimants, the public, and Congress. NIOSH has received and responded to over 9,000 e-mails to our general program inbox, and NIOSH and our technical support contractors have received and responded to over 300,000 telephone calls since the inception of the program. NIOSH has responded to over 4,000 congressional requests for information, provided over 100 congressional briefings, and hosted a congressional delegation visit to our Cincinnati office where NIOSH's EEOICPA work is performed.

ADDRESSING UNCERTAINTY

NIOSH is committed to resolving uncertainties in all aspects of NIOSH's work in the program in a manner consistent with the act, the Executive Order, and the rules developed through public rulemaking. Based on the act's direction that the purpose of the program is to provide "timely, uniform, and adequate compensation" and the statement in Executive Order 13179, which allocates responsibilities among agencies under the act, that compensation should be "compassionate, fair, and timely," the HHS procedures for dose reconstruction (contained in 42 CFR Part 82) address the need for efficient processes to better serve claimants. The Preamble of the dose reconstruction procedures, which were promulgated through public rulemaking procedures and took into consideration comments from the public and the Board, "give the benefit of the doubt to claimants in cases of scientific or factual uncertainty or unknowns." The SEC rule (42 CFR Part 83) reiterates that the act intends for the program to provide "timely compensation" and "uniform, fair, scientific consideration." I will now briefly discuss several examples of methods that NIOSH has incorporated to give the benefit of the doubt to claimants to account for uncertainty in dose reconstructions, probability of causation (POC), and the SEC process.

Dose Reconstruction

Dose reconstructions are grounded in the best available science and when there is uncertainty NIOSH may use the following claimant-favorable assumptions, when appropriate, to complete the dose reconstruction:

- use of factors that would yield the highest estimated dose when there are equally plausible scenarios; for example, assuming that a worker is directly next to the exposure source instead of a further distance away;
- application of missed internal and external dose to compensate for the limits of the monitoring programs at the time;
- assignment of neutron doses to workers with little evidence of neutron exposures to compensate for the technical limitations of monitoring of neutrons at the time;
- assumption of certain external doses as acute or chronic to maximize dose; for example, there are instances in which an assumption of an acute exposure of a certain dose may yield a higher estimated dose than an assumption of a chronic exposure, and vice versa;
- assumption of external dose even if it is not clear that there was an appreciable potential for exposure; and
- use of maximum ambient doses for workers in administrative areas; for example, even though workers in administrative areas may not have been exposed to doses in the work environment, NIOSH nevertheless includes the work environment exposure.

Such assumptions and methods, following the dose reconstruction procedures established through public rulemaking, have led to a compensability rate by DOL of slightly more than 30 percent.

Probability of Causation

The act mandates that all POCs must be established at the 99th percentile confidence interval. The use of the 99th percentile confidence level is the most significantly claimant-favorable aspect of the program. NIOSH built upon this foundation in establishing the POC guidelines (42 CFR Part 81) for DOL. DOL uses these POC guidelines, along with dose reconstruction information provided by NIOSH, to determine the POC for a given claim. Using the 99th percentile confidence interval, as opposed to the median or average POC value, means it is unlikely that an individual could have developed cancer covered by the program and not be compensated.

In creating the guidelines, HHS provided DOL with procedures to follow when there is uncertainty. For example, when DOL is unable to identify the primary cancer, and only secondary cancers are identified, the NIOSH-authored POC guidelines require DOL to use as the primary cancer the cancer that will yield the highest POC in making the compensation decision. Another example is when multiple cancer risk models may apply, the POC guidelines require DOL to apply the model that will result in the highest POC.

Special Exposure Cohort

The SEC process likewise has many provisions to assist petitioners. NIOSH offers assistance to petitioners in preparing submissions and throughout the SEC process. As previously indicated, two full-time staff are dedicated to assisting petitioners in the SEC process. Further, if information that is needed to evaluate a petition will not be available in a timely manner, the SEC rule allows NIOSH to determine that such information is not available for purposes of the evaluation, allowing the petition to move forward. SEC petitions also receive careful review by the Advisory Board, which analyzes the NIOSH petition evaluation report, obtains input from petitioners, and spends numerous hours assessing whether information is adequate to estimate radiation dose with sufficient accuracy. In the SEC rule, NIOSH provided petitioners with two opportunities for administrative review of non-favorable decision. Finally, as mentioned earlier in the testimony, NIOSH may initiate an SEC petition if NIOSH determines that there is a lack of data to estimate radiation doses with sufficient accuracy, placing less burden on affected claimants.

OVERSIGHT OF NIOSH'S APPLICATION OF THE SCIENCE

The Advisory Board, which advises HHS on the science underlying our implementation of EEOICPA, provides an important source of outside review that helps inform our work. The Advisory Board focuses on the scientific detail that is necessary to oversee such a program, and it makes use of rigorous peer review to accomplish its work. The Advisory Board is very involved in all aspects of HHS program activities. The full Board has met a total of 50 times, either in person or by teleconference. The subcommittees have met 20 times, and the Advisory Board's working groups (of which there are more than a dozen), which focus on technical scientific issues, have met a total of 48 times. HHS provides administrative services, funds, facilities, staff, and other necessary services to support the Advisory Board's work. CDC has obtained a technical support contractor, Sanford Cohen & Associates (SC&A), to assist the Advisory Board in reviewing NIOSH's dose reconstruction estimates, site profile documents, and SEC petition evaluations.

Since NIOSH is dedicated to transparency in all aspects of the program, all Advisory Board meetings, including working group meetings, are publicly announced in the Federal Register and open to the public, except where closure is required. We go beyond the requirements of the Federal Advisory Committee Act (5 U.S.C. App. 2) by providing verbatim transcripts and detailed minutes of all Advisory Board meetings, including those of working groups, and making them available to the public on our Web site.

SUMMARY

In conclusion, NIOSH has made a great deal of progress in carrying out the responsibilities of HHS under EEOICPA. We will continue to strive to serve claimants better by communicating with them more effectively and processing their claims more quickly.

Thank you again for the opportunity to testify today. I am happy to answer any questions you may have.

Senator BINGAMAN. Thank you very much.

Mr. Nelson, we're glad to have you here. Go right ahead.

STATEMENT OF MALCOLM D. NELSON, OMBUDSMAN, ENERGY EMPLOYEE COMPENSATION PROGRAM, DEPARTMENT OF LABOR, WASHINGTON, DC.

Mr. NELSON. Thank you, Mr. Chairman, and members of the committee. Before I begin, I'd like to acknowledge that Secretary Chao has extended the term of the Office of the Ombudsman until legislation is passed.

I also want to personally thank Secretary Chao for extending to me, the privilege of continuing to serve as ombudsman. So, thank you, Secretary Chao.

Since my appointment as ombudsman I have attended four town hall meetings, and my office has received hundreds of telephone calls, e-mails and letters from claimants and potential claimants. Based on these contacts, and in response to the question asking whether this program is claimant-friendly, I can say that a majority of the people with whom my office has spoken are of the opinion that this program is not living up to its promise of being claimant-friendly.

Time will not allow me to address all of the complaints and grievances that my office receives, however, let me take a few minutes to summarize some of these issues.

One of the biggest concerns involves the length of time that it takes to process a claim. Many claimants are of advanced age. Many suffer from debilitating illnesses. We continuously hear from claimants who tell us that if they are made to wait too long, they feel that they will not be around to enjoy their benefits.

Further compounding this anxiety, is the realization that under Part E, if they pass away before benefits are paid, in most instances their adult children will not be eligible to receive their benefits.

Trying to establish work at a covered facility and the extent of exposure to toxins are a source of many complaints. The Department does offer assistance in locating these records. However, where records have been lost or destroyed, many claimants believe that this assistance is not sufficient. Where such records cannot be located, a refrain we often here is, if the government can not find these records, how can anyone expect us to find them?

On the other hand, where records are located, claimants often question their accuracy. Moreover, many claimants are confident that their employers manipulated or destroyed records.

The burden of establishing that one's illness was caused by exposure to toxins at work, is also a source of many complaints. Many claimants report that they are unable to find a doctor who will assist them. Where the claimant does retain a doctor, many nevertheless become frustrated when their evidence is deemed insufficient to satisfy their burden of proof.

Claimants also tell us that it is extremely frustrating to establish causation, where their illness has been identified by Bulletin 6–10 as "one with no known causal link to toxic substances." Claimants question the evidence relied upon in creating this bulletin, and they question the quality of evidence necessary to establish entitlement in such cases.

We also hear complaints suggesting that the decisions denying benefits often do not adequately explain why claimants' evidence

was not sufficient. Moreover, many claimants report that it is simply difficult to comprehend the letters and documents that they receive.

In addition, many claimants tell us that it is impossible to find an attorney or representative to assist them, and many believe that this lack of representation has worked to their disadvantage.

Overall, my interactions with claimants and their families are usually very frank encounters where people are very blunt in expressing their frustrations with this program. I often have to remind people that my office cannot change the results of their decision. However, I always promise that I will record their complaints, and that when I have the opportunity, I will express those complaints to the Program office, and to Congress.

So, in concluding, let me reiterate that a majority of the people who contact my office strongly believe that this program is not living up to its promise of being claimant-friendly. Thank you very much for your attention, I will be more than happy to answer any questions the committee may have.

[The prepared statement of Mr. Nelson follows:]

PREPARED STATEMENT OF MALCOLM D. NELSON

Good morning. I am Malcolm D. Nelson, the Ombudsman for the Energy Employees Occupational Illness Compensation Act, Part E, and I would like to thank the Committee on Health, Education, Labor, and Pensions for inviting me to testify today.

The 2004 amendments to the Energy Employees Occupational Illness Compensation Program Act (EEOICPA) repealed Part D of the program which had been administered by the Department of Energy, and enacted Part E, effectively transferring responsibility for administration of contractor employee compensation from the Department of Energy to the Department of Labor. These amendments also created the Office of the Ombudsman and directed that it be an independent office located within the Department of Labor. The statute outlines three duties for the Office of the Ombudsman:

1. To provide information on the benefits available under this part and on the requirements and procedures applicable to the provision of such benefits;
2. To make recommendations to the Secretary regarding the location of resource centers for the acceptance and development of claims for benefits; and
3. To submit to Congress by February 15th of each year, a report outlining the number and types of complaints, grievances, and requests for assistance received by the Office during the preceding year, and an assessment of the most common difficulties encountered by claimants and potential claimants.

Since our establishment in 2004, outreach has been an important aspect of the Office of the Ombudsman, and our office strives to reach out to as many claimants and potential claimants as possible. As a result of our outreach efforts, as well as the efforts of others, we are contacted on a daily basis by claimants and potential claimants regarding their grievances, complaints and requests for assistance. Our most recent annual report was submitted to Congress on February 15, 2007, and since that time, we have heard from hundreds of new claimants. We look forward to reporting on their concerns, grievances and requests for assistance in our report for 2007.

The essential characteristics of any Ombudsman's office are: independence, impartiality, and confidentiality.

Consistent with these characteristics, and with the statutory responsibilities outlined above, the Office of the Ombudsman provides assistance and guidance to those who request it. We do not possess investigatory authority and we cannot advocate on behalf of individual claimants as a private attorney might. Rather, we direct claimants to the appropriate resources, we answer their questions (to the extent that we are able), and in some instances, we simply record their concerns. Based upon a review of our records, and relying upon my personal interactions with claimants either at town hall meetings or in one-on-one conversations, I am confident in stating that a large percentage of the claimants and potential claimants with whom we have spoken do not believe that this program is, or has been, claimant friendly.

There are many reasons for this and it would take too long to discuss every concern and grievance that we have received. However, let me take a few minutes to discuss a few of the more common complaints that this office hears.

Before I begin, however, I should note that in light of the mission given to the Office of the Ombudsman, we generally only hear from those who have complaints, grievances, and/or requests for assistance. This in no way detracts from the validity of their concerns; rather I simply want to note that we tend to only hear of the problems.

DELAYS

The fact that it often takes years to adjudicate a claim is a concern that many claimants express to us. We continue to hear from claimants who initially filed a Part B or Part D claim, meaning that they filed their claim prior to October 2004, and yet they are still awaiting a final resolution. In many other instances, while the claim may not have been pending since 2004, there still has been a lengthy wait. Even where there is an explanation for the delay, many claimants nevertheless assert that the wait is too long, especially since you are referring to a program that is intended to be claimant friendly. Many of the people with whom we speak are elderly, and quite a lot of them are sick, often suffering from malignant and debilitating illnesses. Claimants have been quite blunt in telling us that they fear that if they are made to wait too long, they will not be around to receive benefits.

In addition, generally under Part E, if the worker dies prior to the awarding of benefits, only surviving spouses or certain surviving children are eligible for benefits. In light of this, many claimants voice a concern that if benefits are not awarded during their lifetime, their family will not receive anything from this program—regardless of the severity of their illness. Moreover, there are claimants who simply need the money—sometimes to help pay for their health costs, and other times, for any number of reasons. I recently spoke to a woman who is anxious to receive her benefits so that she can pay for the installation of a new heater.

BURDEN OF PROOF

Under Part E, the claimant has the burden to establish entitlement to benefits. In general, in order to establish entitlement to benefits under Part E, a living worker claimant must establish:

- employment at a covered DOE facility;
- an illness;
- that the illness is related to exposure to a toxic substance;
- that the exposure to the toxic substance is the result of employment at the covered DOE facility; and
- impairment and/or wage loss (if the claimant wishes to be compensated for impairment and/or wage loss) due to the illness.

We hear a large number of complaints from claimants who believe that the burden on them is virtually impossible to meet. For instance, a number of claimants have indicated that in developing evidence of their employment at a covered facility or of their exposure to toxic substances, they were stymied because relevant records had been either lost or destroyed. Where such claims are ultimately denied on the ground that the claimant failed to present sufficient evidence of covered employment or of toxic exposure, the claimants often turn to us with the same questions, "if the government cannot find these records, how can I be expected to find them?" and "why should I lose because this evidence has been lost or destroyed?" Although, the Program Office, as well as this Office, will sometimes suggest other means of developing necessary evidence, following through on these suggestions is often beyond the capabilities of the claimant.

Moreover, even where the records are available, many claimants question the accuracy of these records. A common complaint that we hear is that employment records fail to recognize that during the day the employee was routinely "ordered" to go to other sites around the facility. Transportation workers and security guards often tell us that they were not required to wear dosimetry badges, yet their duties often required them to travel throughout the facility and to have contact with a broad spectrum of the workforce. Furthermore, we encounter claimants who strongly believe that their employers manipulated or destroyed exposure data. The most common assertion that we hear is that employees were sometimes "ordered" to take off their dosimetry badges.

We also hear complaints relating to the burden of establishing that one's illness was caused by exposure to toxic substances at work (causation). Many claimants tell us that they simply cannot find a doctor who will assist them. Moreover, even when

claimants are able to retain a doctor, many become frustrated when their doctors' reports are ultimately deemed insufficient to satisfy their burden.

EEOICPA Bulletin 06–10 is a source of many complaints. Bulletin 06–10 informs claims examiners that DEEOIC "has identified certain illnesses with no known causal link to toxic substances." Where a covered worker is determined to have one of these conditions, Bulletin 06–10 instructs the claims examiner to send a letter to the claimant stating this finding and telling the claimant that "it is necessary to submit factual or medical documentation to show a relationship between the claimed medical condition(s) and exposure to a toxic substance." In response to this bulletin, some claimants assure us that they are aware of (or have) medical/scientific evidence drawing a link between their illness and a toxic substance, and thus question the evidentiary basis for the conclusions in Bulletin 06–10. (Bulletin 06–10 states that "DEEOIC specialists researched authoritative scientific publications, medical literature, and occupational exposure records," but does not specifically identify the publications, literature or records consulted.) There are also claimants who believe that Bulletin 06–10 imposes an even higher burden on what is supposed to be a claimant friendly program. In addition, we encounter many claimants who assert that they have no appreciation of the quantum or quality of evidence necessary to overcome Bulletin 06–10.

LACK OF CLARITY/EXPLANATION

Similarly, many claimants who contact our office contend that the decisions denying benefits do not adequately explain why their evidence was not sufficient to support an award of benefits. According to many claimants, an explanation as to why their previous evidence was insufficient, as well as clear guidance concerning the quantum and quality of evidence needed to meet one's burden, would assist them tremendously in their efforts to develop evidence.

Many claimants also find it a challenge to understand the letters and other documents that they receive. These documents often discuss legal and medical matters which simply are beyond the grasp of some claimants. For instance, many claimants are potentially eligible under Part B, as well as Part E, yet it is not unusual to talk to a claimant who, in spite of receiving correspondence from DEEOIC, still cannot confidently state whether the application that they filed has become a Part B or Part E claim, or both.

LACK OF LEGAL REPRESENTATION/EXPERT MEDICAL ASSISTANCE

The inability to obtain an attorney or other representative to assist them often exacerbates the problems that claimants encounter as they attempt to establish entitlement to benefits. Also, finding medical evidence to support one's claim often requires diligence and perseverance. We, however, encounter claimants who do not have the physical stamina to engage in this level of activity. In addition, assuming that evidence can be located, much of it will be extremely technical in nature. Many claimants simply are unable to fully comprehend such technical information. The fact that some claimants do not have access to a computer or are not computer-savvy adds to these problems.

For example, I recently spoke to a woman who has been denied benefits on the ground that there is no evidence linking her husband's death to any of the toxins at his worksite. If this woman wishes to continue to pursue her claim, she will need to find a link between her husband's death and one of the toxins now identified on the Site Exposure Matrices—a tool developed by DEEOIC to catalogue, to date, which particular toxic substances were present at a Department of Energy facility during a particular claimant's employment. Consequently, this woman needs to review medical literature to try to find this link. Unfortunately, this woman is elderly, she does not live near a library, she does not drive, she does not have access to the internet, and she does not have anybody who is actively assisting her. At this point it is impossible to say whether this woman will prevail; however, it is safe to say that this woman will need assistance if she wishes to continue to pursue this matter.

MISCELLANEOUS

As I indicated at the beginning, I am not going to try to discuss all of the complaints and grievances that claimants have reported to our office. However, I do want to note that many claimants tell us that they believe that it is unfair that under Part B adult children can receive benefits if the eligible parent dies, yet under Part E, adult children generally are not eligible. It should be noted that some of these Part E adult children were not eligible to receive benefits under Part B because their parent did not have one of the illnesses covered by Part B. We also con-

tinue to hear complaints concerning the courteousness and professionalism of some of the staff involved with this program. Moreover, even when benefits are awarded, we hear from claimants who do not understand or disagree with the methodology used to determine if a coordination of benefits is needed for a previous non-EEOICPA award of benefits or compensation.

CONCLUSION

Many of the claimants who attend our town hall meetings or who call our office come to us with a sense of frustration. It does not matter where the claimant lives, or whether the claimant is the worker or a survivor of a worker, we continue to hear many of the same complaints and grievances. Unfortunately, in response to many of these complaints and grievances, we often must remind claimants that this Office cannot change the result, we cannot award benefits and we cannot rewrite the statute. However, we then inform these claimants that the Office of the Ombudsman can and will take their concerns and express them to the program agency and to Congress. I realize that I cannot adequately describe the depths of their frustration, but in order for me to live up to the promise that I have made to these claimants and potential claimants, I want to conclude by again stating that a large percentage of the claimants and potential claimants who contact our Office very strongly and unequivocally believe that this program is not living up to its promise of being claimant friendly.

Thank you very much for your time and attention.

Senator BINGAMAN. Thank you very much, let me just, for the information of all Senators, indicate we've got four votes scheduled sometime after 11 o'clock, and we're not sure how quickly, and we also have a second panel of witnesses that we hope to get to.

Let me ask a question, and then defer to Senator Alexander for any questions he has.

Dr. Howard, let me just ask you, this dose reconstruction process seems to be a very long, drawn-out process, in many cases takes several years to accomplish. I gather that's not unusual. Is there anything we could do, that you could do or that the Congress could do to short-circuit that, and get that process completed more quickly?

Dr. HOWARD. I think, Senator, from our perspective within the program, we are trying to shorten that process, considerably. If you look at the program, as a whole, since it began, and got the data for the median length of time it's taken us to do a dose reconstruction as the Department of Labor has indicated, it is probably around 2 years.

But, when we started the Program, our dose reconstruction regulations were not done before we began to receive cases. If you look at just the last 2 years of our program, we've reduced that down to less than a year.

It is almost impossible to reduce it to a level that a claimant may feel is their ideal—within weeks or months of filing a claim. That's often very difficult, because the process is complex.

But when we have enough data, scientifically, enough monitoring data from the site—and when we don't, and we're applying claimant-favorable assumptions—it is a more complex process to be able to calculate, especially if there's multiple cancers, if there's multiple exposures to different radioisotopes.

Dose reconstruction, in general, is not the easiest process, and it certainly isn't the easiest process to explain to claimants.

Senator BINGAMAN. Senator Alexander.

Senator ALEXANDER. So that we can get to the next panel, I'll just ask one question, too. But, let me focus—as Senator Bingaman did—on NIOSH. As I understand it, it takes about 3 years, did you

say, Mr. Hallmark? Three years is waiting for NIOSH to process a claim, and then 1 year is for the Department of Labor?

Mr. HALLMARK. That's the rough average, since the beginning of the program.

Senator ALEXANDER. Since the beginning of the program?

Mr. HALLMARK. Since the beginning of the program. What we did a few years ago, out of respect for the Department of Labor's better record, we transferred all of these claims over there.

Senator ALEXANDER. Now, we have in Tennessee 24,000 claims, 18,500 of which have received a final decision, 5,500 are in process, waiting. Are there more than 5,500? Are there new claims coming in all of the time? Or, do you have all of the claims that you're likely to get yet?

Mr. HALLMARK. No sir, the claims continue to come in. We received somewhere in the neighborhood of 15,000 new claims for Part B and Part E, combined, in 2007 and we expect the same levels in 2008, and continuing. The program has no sunset, as long as people get sick, they can come forward and file claims, and obviously there is still a lot of people who can do that.

Senator ALEXANDER. So, Dr. Howard, based on your experience, and you've been able, you say, to reduce the time—as follow up to Senator Bingaman's question, should we change some law? Should we ask you to do some different regulation? Is there a different way of evaluating some of these claimants that would save time, and still come to a fairly accurate result? Based upon your experience, can you think of ways that we can speed things up, from just the part of the review that you have?

Dr. HOWARD. One of the ways that we're speeding things up, is by taking claims that we're unable to do individual dose reconstructions on, that may represent only one or two claims from a particular site. We are proposing to the Board that they approve them, those claims being added to the Special Exposure Cohort, so we're doing that on our own.

The limitation, of course, is that we have to prepare a report to the Board, the Board meets only a certain number of times a year, they can only consider a certain number of those claims. So, we're constantly presenting to them, usually 2, 3, or 4 per meeting. So, we're trying to expand that number.

For instance, in the first 5,000 claims that we received from the Department of Labor which are our oldest claims, we only have 64 claims left. So, those 64 claims that we have left, we are now preparing what's called an 8314 process in the regulation, which allows us to say, "We cannot do dose reconstruction, we would like the Board to designate these particular claims as part of a class." We're trying to speed that process up.

But, I think ultimately, unless you decide to re-do the act such that it is just a presence requirement of employment, and a radiogenic cancer—unless you do away with the dose reconstruction process altogether, it is very difficult—although we are trying to reduce the envelope that dose reconstruction is within, in terms of time limits. But, other than taking it out of the process, it's very difficult.

Senator ALEXANDER. Thank you, Senator Bingaman.

Senator BINGAMAN. Senator Murray.

Senator MURRAY. I understand the time constraints, so I'll just ask a few questions. Dr. Howard, I wanted to ask you about a group of workers in Washington State who were recently added to this Special Exposure Cohort, making it easier for them to apply for benefits.

I understand that a second class of workers petitioned to be part of the SEC, but NIOSH's recommendation to the Advisory Board earlier this month contained only a subset of that class. I understand the Advisory Board is reviewing the petition, independently, before making a determination on NIOSH's recommendation. Can you explain to me in layman's terms, why NIOSH did not endorse the petitioner's full request?

Dr. HOWARD. Yes. The petition requested from 1942 to 1990. We were able to recommend to the Board that two classes be added, 1946 to 1959, and 1949 to 1968. We had data for 1968 to 1990, monitoring data that allows us, under the scientific principles of dose reconstruction to actually reconstruct the dose. We did not have data available for the years prior to that.

So, what we did, then, is select out those years that we're able to do individual dose reconstructions, and say to the Board, "We can do that on an individual level, but we cannot do it for these years." So, it's a matter of the availability of scientifically-sound data.

Senator MURRAY. OK.

Can you tell me what the average time is NIOSH expects to fully evaluate and complete an SEC?

Dr. HOWARD. That's really an excellent question. In the legislation we are given 180 days to complete our activity, and often times, in the SEC process, data collection sometimes takes awhile. What we do is stop the clock while the petitioner is trying to obtain information, or we're working with the petitioner.

But, in the 42 cases that we have, all but four of the petitions that have been qualified for SEC, we've met in the 180 days. But, the four that we haven't met, for example, Rocky Flats and a couple of others, were highly complex SECs. We tried to meet it, we were unable to meet it.

But in 90 percent of the time, we've met the congressional language.

Senator MURRAY. OK. You do track that information on how long it takes?

Dr. HOWARD. Yes, Senator.

And we can provide additional data for you on each of the sites, and how long it took.

Senator MURRAY. OK.

I do have additional questions that I hope to submit for the record.

Senator BINGAMAN. Yes, we will have questions for the record for all witnesses.

Senator Allard.

Senator ALLARD. Thank you, Mr. Chairman.

In 2005, the Rocky Flats Steel Workers of Colorado filed a Special Exposure Cohort, and under the requirements outlined by EEOICPA, it was amended in 2004 to include the SEC petition procedure. The workers, after 2½ years, got a decision back, that was

just June 12, 2007. That seems to me like anything but a speedy process.

I have looked back on the Department, and the Department has performance evaluations conducted on it from time to time. Part of that evaluation, they said the Program's statutory laws that we passed reduces its effectiveness. They say, and I quote, "The program's design requires the involvement of multiple agencies and certain claims, decisions, and resulting in delays." Is there something we could do, legislatively, to deal with that issue that was raised, when they looked at their performance?

And also, how are Federal managers and program partners held accountable for cost schedule and claims processing?

Dr. HOWARD. On the latter question, which is an easy one, through performance appraisals, directly. We do that in every program. Also, we do program reviews to look at the program in aggregate.

But if you're going to the first——

Senator ALLARD. Have you had some that haven't measured up on their performance?

Dr. HOWARD. Yes, sir.

Senator ALLARD. What happens as a result of that?

Dr. HOWARD. Well, there's a progressive process of identifying the issues, counseling the individual, looking for performance improvements.

Senator ALLARD. And if they still don't perform, what happens?

Dr. HOWARD. Well, then we make changes to the program——

Senator ALLARD. What happens? Do they get transferred, or they get laid off? If they don't do their work, do they get fired?

Dr. HOWARD. Well, I'd have to look back at the specifics, Senator. I don't have the specifics right now.

Senator ALLARD. I'd appreciate knowing the detail. If we have nonperformers in the programs affecting people's lives, and their families lives. I think there's a serious problem.

Dr. HOWARD. I agree with you.

Senator ALLARD. The people responsible for that need to be held accountable. So, go ahead and finish your response to my question.

Dr. HOWARD. I just wanted to add that, not only with our own HHS employees, but also with our contractor employees.

Senator ALLARD. Yes.

Dr. HOWARD. In terms of the larger issue, which I think relates to the timeframe and the multiple levels of review, some of the Special Exposure Cohorts do require additional information, oftentimes from DOE and we also have a very detailed peer review process that we undergo with the Advisory Board on Radiation Worker Health, as well as their contractor looks in excruciating detail at many issues, especially when our petition evaluation says, we want to deny the petition.

I think that it is important for that peer review to take place, for everyone to look very carefully at our assumptions that we've made, to make sure that they're sound.

So even though there may be a significant amount of time there, I don't think it's important that peer review take place.

Senator ALLARD. Now, did you address the legislative issues?

Dr. HOWARD. In terms of?

Senator ALLARD. The performance.

Dr. HOWARD. Oh, yes.

Senator ALLARD. They suggest that there's multiple agencies and certain claims disclosure, and that's resulted in inefficiencies. Is there something we can do legislatively?

Dr. HOWARD. Well, I'm not a legislator, but I would imagine——

Senator ALLARD. Yes, but you're responsible for administering the program.

Dr. HOWARD. Yes.

Senator ALLARD. Do you have some recommendations you might submit to the committee?

Dr. HOWARD. Exactly. I would say that, one of the issues for us, of course, looking at discretionary deadlines, versus mandatory deadlines, that sends different signals to a program. So, I would suggest that mandatory deadlines are a different thing than discretionary deadlines.

Senator ALLARD. Thank you for your comments.

Senator BINGAMAN. Senator Murkowski.

Senator MURKOWSKI. Chairman, thank you, and I do have a statement that I would like you to put into the record.

Mr. Hallmark, with many of the workers that were out on Amchitka when the nuclear weapons test was done out there, we had a situation where the individuals were not necessarily paid by the Department of Energy, they were employees of subcontractors, they were then paid by the Department of Defense. Do we have any idea how many employees might be out there, in this situation—any estimates in terms of the cost of extending the EEOICPA program to cover, not only the active duty military, but the DOE defense subcontractor employees? And, I know this may be more of an OMB-type of a question, but it is a situation for us in Alaska where we're looking at them, and they just don't fit into the neat categories.

Mr. HALLMARK. The question of coverage of contractors working on DOD contracts, as opposed to DOE contracts was one that was debated and discussed at length when the statute was enacted back in 2000.

It's my understanding that a decision was made to draw a bright line, and not cover DOD contractor-employees. The result of that is that there are these circumstances where there are people who are working closely together at a number of these sites around the entire complex, who are working on various DOD activities. The statute even excludes, specifically, people working for the Naval Nuclear Propulsion Activity, and then the radiation associated with that.

I can't tell you why that decision was made by Congress in 2000. Clearly, if there is a desire to look into expanding the statute, that's something that would need legislation.

As to how many people are in that category, the question has not been put to me, and I don't have a basis right now, and I don't know whether I could find the basis, but I certainly don't have any information currently available about the number of DOD contract employees who might, under a different structure of the legislation, be covered.

Senator MURKOWSKI. We may want to follow up with that. It's one of those where, as you say, you can have two individuals ex-

posed to the exact same situation, and depending on where they got their paycheck from, one gets covered, and the other one doesn't. It doesn't seem fair.

Let me ask you, Mr. Nelson, very quickly—you've indicated that those that are coming to you do not believe that this process is claimant-friendly, as you have been working in your capacity as Ombudsman, have you seen an increase in the level of frustration, is it getting any better, are we doing anything right that we can take some credit here for?

Mr. NELSON. I think, yes, there are some things that are being done right. The problem for many of the claims is that, it takes so long that, with some of the claimants, even if they are ultimately awarded benefits, or finally, get their final decision, they are so frustrated because it has taken so long, that they can't get over that frustration.

The other problem I find, is that while we are doing a lot of things, sometimes the things we think are helping the claimants, aren't really helping them. It's not translating——

Senator MURKOWSKI. Such as?

Mr. NELSON. One process that I've seen—because many of these claims take a long time, there's often a process where claims are moved around to different claims examiners. This is an attempt to help the claimants to make sure the claims are moving faster.

Unfortunately, for many of the claimants, they see the fact that they have 3 or 4 claims examiners handling their claims as a problem. They think that they've developed a relationship with one claims examiner, only to have that claims examiner move off, now they have a new claims examiner, they have to establish a new relationship with that one.

As I said before, it's done to help the claimants, unfortunately in the minds of the claimants, they see it as another delay.

Senator MURKOWSKI. Thank you, Mr. Chairman.

Let me just follow up on that—is it actually delaying the process? Or is it just viewed as a delay? Because there's a difference there.

Mr. NELSON. Yes. Again, I hear it from the claimants, their view is that it's actually delaying, I mean, they'll tell me stories where they said, "We thought our claim was at one process, was at one level in the process, however, we get a new claims examiner, all of a sudden, we're back to square one. Or, we've had claimants, they've asked us all of these questions, now we have a second claims examiner, they're asking us all of the same questions over again.

Whether that's actually causing the delay, or whether it simply has the perception of a delay, I can say clearly, for the claimants, it has the perception of delay.

Senator MURKOWSKI. Sure. Thank you, Mr. Chairman.

[The prepared statement of Senator Murkowski follows:]

PREPARED STATEMENT OF SENATOR MURKOWSKI

Mr. Chairman, a sincere thank you for holding this hearing into the workings of the Energy Employees Occupational Illness Compensation Program Act—EEOICPA for short.

Coming from Alaska where more than 2,000 workers toiled for the Department of Energy to prepare for three large nuclear weap-

ons tests on Amchitka Island in the late 1960s and early 1970s, I know first hand just how important this legislation is to provide help to workers who volunteered to help America's nuclear program at the height of the cold war. It is important because, unfortunately, in all too many cases these workers have been suffering horrible health consequences as a result of occupational exposures either to radiation or other contaminants that they faced.

Developing a compensation program was difficult three and four decades after the fact when Congress first passed it in 2000. The complexities spawned changes in 2004 when Congress repealed Part D because of the difficulties of implementing it and substituted Part E to speed compensation for lost wage claims because of disabilities caused by nuclear ailments and illness. The delays in implementation caused Congress to replace the Department of Energy with the Department of Labor to process claims.

It also caused Congress to create an Ombudsman to help the tens of thousands of employees thread their way through the complex claim application and review process.

While the Department of Labor certainly is doing a far better job of processing old claims and new ones stemming from Part E, the calls and letters my offices are receiving indicate that there are still problems with the nuclear worker program—problems that Congress may need to again address.

Clearly, we need to extend the authorization for the Ombudsman's office, since there is clear evidence that employees likely will continue to need assistance to apply for and get through the adjudication process for their compensation claims. While the Senate has already voted to extend the office as part of the Defense Authorization Act, until that bill is actually conferenced and signed into law, I join many on this committee in hoping that the Department of Labor will administratively keep the Office open until a formal reauthorization passes and becomes law.

The bigger question is whether there are still fundamental problems with the structure of the compensation program that Congress needs to fix. That is what I hope this hearing will shed light on.

My office has certainly received a host of complaints in the past several years about the compensation process. The complaints have generally fallen into a half dozen areas. They include:

1. Complaints about delays in adjudicating claims, that the wait is too long. In some cases workers are quite ill and afraid that they will die before their claims are approved, complicating the receipt of assistance to their families.

2. Complaints about what workers have to prove—the burden of proof—to be entitled to benefits. The problems stem from workers having trouble finding firm evidence that they actually worked on projects, especially those who worked for DOE subcontractors. The employment records and the length of employment documentation are a challenge after nearly half a century. Worse, employment records are frequently so sketchy that they complicate, not help, workers to show their radiation or contaminate exposures.

3. This flows into the problem of "dose reconstruction." While I know we will have testimony today about how much better the National Institute for Occupational Safety and Health Centers are

doing in developing radiation dose information—vital for the adjudication of disability claims—still I'm getting a host of complaints about lengthy delays in processing the requests and sometimes in the physician panels that are involved in determining disability compensation. A related problem is that workers are developing cancers that are not solely radiation dependent, but ones like prostate cancer, where radiation exposure could have played a large contributing role. I'm also getting complaints that the requirements for the amount of time at a job site—the exposure information—may be inaccurate.

4. I'm getting complaints about the inadequacy of explanations about why claims are denied. Many say after long waits they are being denied aid because their evidence was insufficient, but that they are not getting enough guidance on how to remedy the filing shortfalls. The frustration for workers denied aid is growing.

5. I'm getting complaints from relatives about the compensation process. For example under Part B adult children can receive benefits if the eligible parent dies, but under Part E, adult children generally are not eligible for compensation. One woman who called my office said the program was actually tearing her family apart, since of 10 children, only 1 was a minor and qualified to gain all of the aid, the other nine children feeling unfairly treated. This is clearly an issue for Congress, not the Department of Labor to settle.

6. And finally I'm getting complaints from my State from workers on the Amchitka weapons tests who were employees of subcontractors who effectively were paid by the Department of Defense, not the Department of Energy. While active duty military gained regular military benefits, DOE subcontractor employees who often did the same work as DOE-funded subcontractors, currently are not entitled to any benefits.

Another issue may be whether compensation is owed to non-contract employees who visited radiation sites. For example Alaska's then Secretary of State, now what is called our Lt. Governor, at the request of the military toured the mine staffs at Amchitka between tests. He developed and died of a radiation-cancer but his widow is not entitled to compensation because he was not an actual employee.

There clearly is an issue of fairness here that we dodged in both 2000 and at the time of the improvements in the act in 2004.

Many of these complaints and many others, are expressed in the testimony by the Ombudsman and by others that we will hear about today. I hope this committee can fashion just and reasonable solutions to speed fair compensation to those who stepped up to the plate to help America in its time of need.

These workers and their families now need our help. I hope we can make this program fulfill its promise and truly help our Nation's nuclear workers. Thank you Mr. Chairman.

Senator BINGAMAN. Thank you all, very much. I think this was useful testimony.

Senator MURRAY. Dr. Howard are you getting all of the information from DOE that you are requesting, in a timely fashion?

Dr. HOWARD. It's much improved. We are—DOE is working very hard on a number of our cases, Chapman Bell being one of them

that they are trying to expeditiously get us information. If I could compare 2002–2003 to 2006–2007, there's a remarkable difference.

Mr. HALLMARK. I would second that. Our relationship with them has been outstanding in recent years, and they're very, very prompt.

Senator MURRAY. OK, thank you.

Senator BINGAMAN. Again, thank you all very much for your testimony, why don't we go ahead right to the second panel.

This panel consists of Dr. James Melius, who is a member of the Advisory Board on Radiation and Worker Health at the National Institute for Occupational Safety and Health in Albany, and also Dr. Ken Silver, who's Assistant Professor of Environmental Health Sciences at East Tennessee State University in Johnson City, TN.

Thank you all for being here. If each of you could take a few minutes to summarize your testimony, that would be great, and then we'll have questions, assuming we still have time to do that.

So, Dr. Melius, why don't you go right ahead? Is that the correct pronunciation, Melius?

Dr. MELIUS. Yes, it is.

Senator BINGAMAN. Please push the button there so that we can all hear you, thank you.

STATEMENT OF JAMES MELIUS, M.D., DrPh, MEMBER, ADVISORY BOARD ON RADIATION AND WORKER HEALTH, NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH, ALBANY, NY

Dr. MELIUS. Senator Bingaman, Senator Alexander, other members of the panel, I greatly appreciate the opportunity to testify before you today about the EEOICP.

I'm an occupational physician epidemiologist, worked in the past at NIOSH, and had considerable experience working at evaluating health problems at DOE facilities in the past. And it's been going for the last several years, I've served as a member of the Advisory Board for the Program, attended over 50 meetings to discuss various aspects of that program, and had the opportunity to hear from hundreds of claimants who've attended the public sessions of our Advisory Board.

You've already heard today from the Department of Labor and NIOSH about their efforts to make the program more claimant-friendly, and I believe that both agencies have made considerable efforts to do so.

However, it's quite evident from hearing from the claimants at our public meetings of the Advisory Board, that there's widespread dissatisfaction with the program. And, I think that in evaluating the reasons for this, I think it's important that we understand that claimants friendliness is more than technical adjustments in the dose calculations. It should be to provide timely, fair and accurate compensation decisions and provide such decisions in a consistent and transparent manner.

While the claimants may not always be satisfied with the final results of the determination—their claim is turned down—they should believe that they've been treated in a fair manner, their claims were thoroughly and adequately researched, and that they have the opportunity to submit information they believe is relevant

to their claim. This information was reviewed, and more appropriate, was taken in to account in their dose calculations and claim decisions. I think that's particularly important in this program—I think what you've all said here today—this program goes back many years, there's a great deal of secrecy, and a great deal of sacrifice on the part of the people working at these facilities to serve their country and they did so in a very remarkable way. Now they deserve a good, transparent, and sound compensation program.

Now, in my testimony, I've laid out a number of the reasons why I believe that the claimants, many of the claimants do not feel they're being treated in a claimant-favorable way. Some of it is technical, just the nature of missing records, the fact that these dose calculations, claim decisions are very technical, require complex calculations that may be difficult to understand.

However, there are also a number of administrative issues, I think, that greatly contribute to the claimants dissatisfaction with the program. First of all, and I think most importantly, claimants do not believe that their input to the program really is taken into account, that it matters.

And the nature of the interview process with NIOSH, in particular, with the Subtitle B part of the program, the cancer claims, it is the same interview for everybody, no matter where you worked. If you worked at Amchitka, if you worked at Los Alamos, you get the same questions.

So even though those two facilities are extremely very different in terms of activities and the kind of work that's done there. And in my testimony, I've laid out some of the other problems with that.

But it's important that the lack of taking into account the claimants' experiences and their input into the claim decisions—it's not just a matter of how clean and friendly does the program appear. I think it's also a serious technical shortcoming.

As Senator Reid has spoken today, and we hear this repeatedly from people from many different sites, there are a great number of situations where people have problems with high, very high exposures, incidents which are not recorded, and often there isn't any record kept of that particular incident and that exposure. And therefore, if it's not picked up in an interview, they don't have a chance to provide that. It ends up with an inaccurate claim, dose reconstruction.

There are some other issues that I've laid out with the program. And then, I also believe that, I made three areas of recommendations, which I think would greatly improve the program without necessarily requiring that there be a change in the law.

The first recommendation would be to improve the interview process. I think that needs to be tailored to the particular site and I think it needs to be set forth in a way that the claimants can feel that their input is appropriately followed up on.

Recently we had a report, a graph report from the Board's contractor reviewing part of what's called the close-out interview. And that report found some pretty serious incidents where information put forth by the claimants was not being followed up on. And the claimants weren't aware of that, they found.

I also believe that the process for reviewing SEC petitions needs to be improved. And we need to make sure that people, the worker

representatives and the petitioners, have an adequate time to participate in that process and can be fully made aware of what's going on. I think NIOSH has taken some steps recently to improve that, but I think more needs to be done.

And finally, we need to improve the timeliness of the program. Now that is, I think, a difficult "to do" within the constraints of the law and the way the program is set up. But, I think it's critical. We shouldn't have 64 claims, whatever's left over from 5 years ago, that have not been processed. That's not fair to anybody involved. And, now they're taking steps, I think that's—glad to hear that, but at the same time, we need to take other steps, particularly, I think, a much more active program to look at where those reconstructions are not going to be feasible to do.

Under the current program, the way the law's written and the regulations, has the determination that those reconstructions can not be done with sufficient accuracy. And, that process ends up with this very long, drawn-out evaluation that Dr. Howard has described, the Board reviewing it, and so forth. And it just doesn't work.

I think it ends up taking 2 or 3 years to go through that process for the petitioners. This is the process that should allow you to speed up the program and take into account that records are missing, that we can't do it, can't do the dose reconstructions in a scientifically sound way. And we need to make that process work better. And I think there's some changes in the regulations and some changes in the administration of the program that could be done in a way that would greatly speed up that process. And I think also, lower the burden on NIOSH for the many thousands of those reconstructions that they would have to do if they do not take adequate advantage of that Special Exposure Cohort process.

So, let me end there. I'd be glad to answer questions at the appropriate time.

[The prepared statement of Dr. Melius follows:]

PREPARED STATEMENT OF JAMES MELIUS, M.D., DRPH

Honorable Chairman Kennedy, Ranking Member Enzi, and other members of the Health, Education, Labor, and Pensions Committee, thank you for the opportunity to testify here today regarding the Energy Employees Occupational Illness Compensation Program Act (EEOICPA).

I am an occupational health physician and epidemiologist currently working for a labor-management health and safety organization affiliated with the Laborers' International Union of North America and its contractors in New York State. Over my past 25 years of work in occupational and environmental health, I have considerable experience evaluating occupational illness issues at Department of Energy nuclear weapons facilities while working for the National Institute for Occupational Safety and Health and later as a member of various review and advisory committees including the Advisory Board on Radiation and Worker Health established under EEOICPA. As a member of that Board, I have attended over 50 meetings to discuss various aspects of that program and have had the opportunity to hear from hundreds of claimants and their families about their experiences with the program. I should note that I do not testify here today on behalf of the Advisory Board on Radiation and Worker Health.

ENERGY EMPLOYEES OCCUPATIONAL ILLNESS COMPENSATION PROGRAM ACT

EEOICPA was established to address the work-related cancers and other illnesses suffered by the thousands of men and women who helped build and maintain our Nation's nuclear weapons starting during World War II and continuing into the present time. Especially during the early years of the program, these people worked

under very difficult conditions. They worked under tight deadlines using new manufacturing processes that involved handling very dangerous materials, often with minimal protection from exposure to dangerous radioactive elements. They also worked under great secrecy, facing severe criminal penalties for any breach of secrecy. Often they were given very minimal information about the materials that they worked with and the potential health consequences of their exposures.

I want to emphasize that these people worked under these conditions willingly, knowing the critical importance of their work to our Nation's security. However, many of these people and their families are now angry that this past secrecy and those difficult working conditions have not been acknowledged and have been used to deny their past claims for work-related illnesses. The credibility of the EEOICPA program to these people is very dependent on the fairness, timeliness, and transparency of the program's procedures.

As a consequence of this work, these workers are at increased risk of developing cancer and other occupational illnesses. Because information on the exposures and the consequent health risks were hidden from these workers for so many years, Congress established the Energy Employees Occupational Illness Compensation Program in 2000 to provide some compensation to these workers and their survivors for their work-related health problems. In doing so, Congress recognized that attempting to provide fair and equitable compensation for people working at these facilities for the past 50 years or more was difficult and, in many cases, would not fully compensate these people or their families for their suffering and sacrifice for our country.

IS THE PROGRAM CLAIMANT FRIENDLY?

You have already heard today from the Department of Labor and from NIOSH about their efforts to make the program more claimant friendly. I believe that both agencies have made considerable efforts to do so. However, it is quite evident when hearing from the claimants or their representatives at the public meetings of the Advisory Board or in other settings that there is widespread dissatisfaction with the program. Most of my experience with the program has been regarding the Subtitle B Claims (i.e., dose reconstructions and special exposure cohort petitions) rather than the Subtitle E program that is administered solely by the Department of Labor. Therefore, most of my remarks will be about the Subtitle B program. However, I believe that many of the same issues are also relevant to the Subtitle E program.

Before discussing the reasons for this dissatisfaction, I would like to discuss how I evaluate the degree to which this program is claimant favorable. I believe that it is more than just performing dose calculations in a manner that provides an appropriate adjustment for the level of uncertainty in the available monitoring records, monitoring methods, etc. A claimant favorable program should provide timely, fair, and accurate compensation decisions and provide such decisions in a consistent and transparent manner. While the claimants may not always be satisfied with the decision in their case, they should believe that they were treated in a fair manner, that their claims were thoroughly and adequately researched, that they had the opportunity to submit information that they believe is relevant to their claim, and that this information is reviewed and, where appropriate, used in their dose calculation. I believe that these criteria also apply to other parts of the EEOICP including the Special Exposure Cohort petition process. A transparent, credible process is especially important in the EEOCIP because the compensation process is so complex, and the ability of the claimants to appeal these decisions is limited by this complexity and their limited resources.

Why are so many claimants dissatisfied with the EEOICPA program? I would like to briefly discuss several reasons.

First, the dose reconstruction and SEC evaluation processes are very complex and difficult for a person not trained in health physics or dose reconstruction to understand. When individual exposure records are available, the calculations of dose are often technically complicated and may require multiple calculations of many different types of exposure over the person's career at the facility. In many cases the exposure records need to be adjusted to take into account deficiencies in the monitoring program at that facility. In other instances, individual exposure records are not available, and complicated methods are used to estimate exposures based on data from co-workers, information about the radioactive materials and processes at that facility, or utilizing data from other facilities. Many of these procedures are complicated and difficult for someone not trained to do these procedures to understand. Many of these procedures require considerable judgment on the part of the person doing the dose reconstruction about how to apply these procedures to an in-

dividual case. Many claimants question the fairness of these methods and extrapolations and whether the methods and assumptions are appropriate for their individual case.

Second, many of these claims relate to exposures during the early days of nuclear weapons development. Exposure monitoring methods were not available or under development. In some cases, little or no monitoring was done. Some of the information needed to evaluate these early monitoring data is not available, and many of the people involved with the early monitoring programs have died. Many of the claimants from these early years are dead, and their survivors often know very little about their work or work exposures (due to the secrecy of the program). The methods used for these older cases often involve more assumptions about exposure conditions, and more use of data from other sites. These factors make it very difficult for the claimants or their survivors to understand and trust the dose reconstruction process that is being used to process these claims from the early years of the nuclear weapons program.

There are also a number of administrative issues that contribute to the claimants' concerns about the program.

First, the dose reconstruction process was designed to be largely based on the exposure records and related site documents. In the vast majority of cases, information from the claimant plays little or no role in the dose reconstruction process. Each claimant or their survivor is interviewed. However, the initial interview is the same for all claimants and follows a script approved by OMB before the dose reconstruction process was fully developed. Many of the interview questions are confusing, involve technical terminology that the claimant or their survivor may not understand, and ask about information or exposures that is not relevant to the site where the claimant worked. This is very confusing to the claimant or their survivor. Often they believe that their answers to these irrelevant questions may be important to processing their claim when they are not. Conversely, those being interviewed may be led to believe that important information about their exposures is actually not important because they were not asked about it in the interview.

Although claimants or their survivors have the opportunity to provide additional information at the end of the interview and during the dose reconstruction close out process, it appears that information provided by the claimants is often ignored or not fully utilized. A recent draft report from the audit contractor working for the Advisory Board on Radiation and Worker Health documented this lack of follow through on information provided by the claimants. Many people speaking at the public comment sessions at the Board meetings have reported similar complaints. As the interviews are the main opportunity for the claimants to interact with people who are handling their claim and one of the few opportunities that they have to provide such information, it is important that their input be appropriately ascertained and addressed.

In addition to being a source of dissatisfaction with the program, this lack of adequate consideration of information from the interviews with the claimants is also a serious technical shortcoming in the dose reconstruction process. The people doing the work at the specific facilities are often best able to report on actual working conditions and circumstances that may have impacted their exposures (e.g., high exposure incidents, times when they were not monitored, etc.) Often these individual situations were not fully documented (or the records are lost), and often they may account for a very high exposure for the claimants. We have repeatedly obtained credible information from claimants and worker representatives that often contradicts the information available from the official exposure records. We have repeatedly been told about credible instances where workers have been told to not utilize their monitoring badges for a particular operation because the exposures would be too high. The lack of adequate methods for obtaining and utilizing such information from the claimants is a serious flaw in the program and also a major source of frustration to the claimants. This problem also extends to the handling of the SEC petitions and the development and review of the site profiles and other technical documents.

Another problematic aspect of the program is that the dose reconstruction methods are continually changing. In order to address the large number of claims when the program first started, NIOSH and their contractors rapidly developed so-called Site Profiles and related technical documents to provide a summary of the technical information about a particular site that was judged to be important for dose reconstruction for people who worked at that site. NIOSH recognized that these profiles were not complete and would need modification once NIOSH had more time to do so. NIOSH has worked to continually update and modify these documents and to add new technical procedures to assist in dose reconstruction.

NIOSH and DOL have also established a policy that when these documents are modified, any dose reconstruction that could be changed by the modified information would be reviewed. Those claims that would become compensable because of the change (i.e., their probability of causation increases) would then be compensated. Although this is helpful to many claimants, it is confusing for those whose claims are being reexamined through this process but whose modified dose reconstruction does not reach a level where it is compensated. All claimants whose dose reconstructions are being reevaluated are notified of the process, although many will become more frustrated and dissatisfied when their claims are again denied. However, this continual updating and changes in technical documents means (in effect) that a given claim is never closed and that claims may be reopened and found to be compensable many years after first being turned down. It also raises the issue why adequate dose reconstruction documents were not developed in the first place.

A related issue concerns the timeliness of the SEC petition evaluation process. Once NIOSH approves an SEC petition, NIOSH staff usually complete their evaluation of the SEC petition within the required 180 days. However, the evaluation of these petitions often takes a much longer time period. For example, a petition regarding the Rocky Flats plant qualified in June 2005; NIOSH's evaluation report was received in April 2006; and the Board's final recommendation was made in July 2007. A petition for the Fernald facility in Ohio qualified in April 2006; an evaluation report was published in October 2006; and that evaluation report is still being reviewed by the Board. Similarly, a petition for the Blockson facility in Illinois qualified in March 2006; a second NIOSH evaluation report was produced in July 2007; and that evaluation report is still being reviewed by the Advisory Board. There are many reasons for the delays including the complexity of these sites and the long time periods involved in these petitions. However, often the review of NIOSH's technical reports by the Advisory Board or its contractor finds significant deficiencies that need to be addressed. These lead NIOSH to revise the technical documents used for that site which can involve considerable time to search for additional documentation and to make such revisions. This is frustrating for the petitioners and very confusing as the methods being used for dose reconstruction at that site are continually changing. Individual dose reconstructions are being delayed while this review is under way. The long review benefits the claimants by helping to improve the dose reconstruction process, but the long time period and the technical complexity of the review and deliberations are quite frustrating for the petitioners and claimants.

Recently, the SEC evaluation process has also been delayed by questions about which parts of the facility and/or what time periods are covered by the program. This problem has involved at least three sites (Blockson Chemical, Dow Madison, and Chapman Valve). The determination of what facilities (or parts of a facility) are covered and about the time period of coverage involves evaluations and determinations by the Department of Labor and Department of Energy. The process for coordinating between the three agencies involved in this process has not been well worked out and is also frustrating for those involved in those facilities.

I have tried to enumerate some of the problems with the current EEOICPA program. I also would like to make some recommendations to address these problems and improve the program. I believe that all of these recommendations can be accomplished within the current framework of the program and without legislative changes:

1. *Improve the Interview Process.* The current interview should be revised to be easier for the claimants or their survivors to understand and should incorporate questions directed at specific facilities (or types of facilities), types of work, and exposures. This would be helpful to the claimants and could greatly improve the dose reconstruction process. There should be a better procedure for documenting how information provided by the claimants has been utilized in the dose reconstruction process, and if it has not been utilized, the claimant should be informed. NIOSH with input from the Advisory Board should also institute a vigorous quality assurance program to make sure that information provided by the claimants is being appropriately recorded and utilized.

2. *Improve the Process for Review and Participation by Petitioners and Worker Representatives.* Although NIOSH has taken some steps to provide better input by SEC petitioners and worker representatives in the review of their technical documents, better efforts are needed. The current technical documents are largely based on input from people who managed the radiation monitoring programs at these facilities. In addition to a transparent and stringent conflict of interest program, NIOSH needs to ensure that SEC petitioners and worker representatives have adequate opportunity to review and provide input on the documents that are used in evaluating SEC decisions and conducting dose reconstructions. NIOSH's past prac-

tice has often been to meet with those representatives after the documents were completed. In fact, the Board has often been presented with SEC evaluation reports for sites where NIOSH has never held a public meeting to get input on their recommendations. NIOSH needs to continue to address this problem. In particular, NIOSH should assure that SEC petitioners and others involved in that process have full and timely access to all of the information that is being used for making decisions about a petition.

3. *Improve the Timeliness of the Program.* This is the most difficult problem to address. Due to the complex technical nature of the program and the time and effort required to find and process past monitoring records, it is difficult to speed up the program and, at the same time, maintain a sound technical basis for the dose reconstructions and SEC petition reviews. One recommendation is to make sure that there are adequate resources to conduct the program for NIOSH and for the review of the technical documents by the Board and its contractors. This summer NIOSH was forced to stop much of its contract activities due to a funding shortfall, and this stoppage has significantly delayed many SEC petition reviews, technical document updates, etc. More importantly, NIOSH needs to reevaluate its approach of attempting to first conduct individual dose reconstructions and only after that fails to consider placing groups of workers in the SEC. There is no reason that over 5 years after the start of the program, that some of the initial few thousand claims should not have been completed. NIOSH often recommends that a group be added to the SEC in response to a petition in situations where NIOSH has already completed many dose reconstructions for that group. In other words, there never was an adequate basis for those dose reconstructions and the inadequacy of the data should have been recognized in the site profile and dose reconstruction development. NIOSH has a small program to self identify additions to the SEC cohort (so-called 83.14 petitions). This program should be expanded, and NIOSH should review their dose reconstruction and SEC regulations to better delineate situations where dose reconstructions are not feasible including situations where even determining feasibility may require several years of effort. Former DOE workers deserve a timely resolution of their claims and petitions.

I appreciate the opportunity to appear before you today and would be glad to answer any questions.

Senator BINGAMAN. Thank you very much.

Dr. Silver, go right ahead.

STATEMENT OF KEN SILVER, ASSISTANT PROFESSOR, ENVIRONMENTAL HEALTH SCIENCES, EAST TENNESSEE STATE UNIVERSITY, JOHNSON CITY, TN

Mr. SILVER. Thank you very much, Senator Bingaman, Senator Alexander, and other members of the committee.

Senator BINGAMAN. You might push the button there on your speaker. There.

Mr. SILVER. Most of my education in environmental health sciences was supported by Federal training programs, but some of the Government's own facilities were at the bottom of the class when it comes to protecting workers' health. Contributing to a remedy for this situation, for the benefit of cold war workers, has educated my heart.

I want to acknowledge the presence today of Terry and George Barry of the Alliance of Nuclear Worker Advocacy Groups and others. I hope you and your staff will take time to hear their ideas.

The phrase "cold war heroes" is beginning to lose its shine of sincerity outside the beltway, as the promises made in enacting this law have turned to dross for many families. They deserve better than the delays and dubious excuse-making that are occurring and recurring systemically at each of the major steps in the claims process, involving each of the agencies with duties under the act. I'll be citing cases from Los Alamos, but you'll find many similar stories from claimants at Oak Ridge, in my written statement.

Claimants are still experiencing major obstacles to getting medical and exposure records out of DOE sites. Alex Smith of Albuquerque, diagnosed with mercury poisoning in 1948, battled neuropsychiatric problems, which forced him to retire in 1982, shy of his Social Security retirement age.

After a field hearing in March 2000, I helped him find smoking gun evidence, the original memos and industrial hygiene reports. What's interesting, is that when Mr. Smith filed his claim in 2002, DOE turned over his supposedly complete medical file, but it contained almost no evidence of the mercury episode. Only when Congressman Tom Udall made another request on his behalf, were the handwritten notes of the diagnosing physician released.

What has become of the hundreds of other claimants who couldn't access smoking gun documentation, or whose first language isn't English, or who didn't receive excellent constituents services, or were not among the most visible public citizens, like Mr. Smith was, in campaigning for the law. Many of the intended beneficiaries of this program are simply giving up.

DOL has lost records submitted by claimants trying to meet the criteria of Part E. A few years ago, I helped Ben Ortiz of Nambe, NM compile a loose leaf binder of documentation for his wage loss claim. Each item was cross-referenced to specific clauses in DOL's regulations. It was submitted by the Congressman to DOL's Denver office in September 2005. In conference calls over the next few months, Mr. Ortiz and his daughters, who's his authorized representative, were unable to locate the contents of the notebook in the DOL bureaucracy. His tax returns for the last 3 years on the job were also submitted via the Congressman's office, but recently, a claims examiner told his daughter his wage loss claim was stalled because they supposedly don't have his tax returns.

In early 2007, the local DOL resource center offered a startling explanation for the delays in this case. Each time congressional staff got involved, the explanation went, the paper file is sent from the District Office to DOL headquarters, where specialists in responding to congressional inquiries take over. Without the paper file in hand, claims examiners stop working on the case.

Now, if there is truth to this explanation, it's kind of an embarrassing admission of DOL's inability to walk and chew gum at the same time, on some of these cases.

Many NIOSH dose reconstructions have become a matter of what we call in science modeling, garbage in, garbage out. The agency relies on dosimetry data, which the site contractor, at the DOE facility, has typically had a chance to rework and edit. An insider told me that data NIOSH is using at Los Alamos had been "massaged" and "taken care of" before this program passed, to the point that, "Lionel can feel very comfortable saying these are the official records of Los Alamos."

Historical occurrence reports have been underutilized. So, I'm pleased to announce the public distribution of a CD–ROM containing more than 350 Los Alamos occurrence reports made public by CDC. Copies of the disc will be mailed to 20 key stakeholders in New Mexico, and this could get interesting.

The claimant community may be getting on in years, with little time or energy to fight an increasingly Kafka-esque system, but

they know what's going on here. And we need your good offices to fix it.

So, No. 1, amend the statute to create an independent advisory board for external review and oversight of Part E. Under the radiation part of this law, we've learned that without outside checks and balances, Federal agencies will go badly astray.

No. 2, remove the perverse incentive—real or perceived—that DOL may currently have to stall in order to save on benefit costs, under Part E. Amend the statute so that Part E benefits can be paid to the estate of a claimant who dies before a pending claim is resolved. Physically locate a representative of the Ombudsman Office in each of the DOL resource centers, and give this Office expanded powers to work on Part B claims, and advocate, and when necessary, litigate for claimants. We also need technical assistance and advocacy grants for nonprofits doing this work, and we need to look at ways to create incentives for graduates of occupational medicine residency programs to go into practice in rural and community clinics near DOE facilities.

There are nine other recommendations for reform in my written statement which will help make this law fulfill its promise as being claimant friendly.

Thank you for your attention.

[The prepared statement of Dr. Silver follows:]

PREPARED STATEMENT OF KEN SILVER

BACKGROUND

My name is Ken Silver. I am an Assistant Professor of Environmental Health at East Tennessee State University. From 1997 to 2003 I lived in New Mexico. In 1999, as a consultant to an environmental health project at the University of New Mexico, I sat down with Mr. Ben Ortiz, a former Los Alamos worker made ill by toxic chemical exposures, to review his medical and exposure records. On seeing the names and affiliations of prestigious doctors and scientists who had examined him 10 years earlier, and attributed his respiratory and neurological illnesses to job exposures, I thought "Why wasn't he compensated a long time ago?" We built a mailing list of people in New Mexico with similar concerns. Through action alert postcards, phone banking, op-eds, a private meeting of families with Dr. David Michaels, and two large public meetings, we generated grassroots support for the legislative efforts of New Mexico political leaders in passing EEOICPA, the compensation law that is the subject of today's hearing.

OVERVIEW

In my testimony today I call for increased congressional oversight of the activities of both DOL and NIOSH in administering this program. Administrative costs are exorbitant in comparison to the outcomes achieved. If the claimant community were getting what was expected, no one would begrudge the agencies a few extra dollars for administration. But worker knowledge is not being incorporated into radiation dose reconstructions. Close-out interviews are perfunctory. Site profiles do not reflect workers' concerns. Conflicts of interest are ignored. Quite incomprehensibly, historical occurrence reports, which represent a highly valuable source of information on workers' past exposures to radiation have been underutilized. The 2006 report of the DOL Office of the Ombudsman listed the top three concerns of claimants to be: (1) Difficulties in Proving Causation Issues; (2) Difficulties in Retrieving Employment, Exposure and Medical Records; and (3) Concerns About Claimant Interactions with DEEOIC Personnel. These problems are illustrated through three cases at Los Alamos, two of them Part E claims. Greater public oversight and involvement are recommended by means of: a Part E Advisory Board to DOL; initiatives to expand independent occupational medicine services at DOE sites; and funding for public interest participation.

CONGRESSIONAL OVERSIGHT IS NEEDED

109th Congress. This committee and this Congress have a duty to pick up where the 109th Congress left off in conducting oversight of the EEOICPA program. The House Subcommittee on Immigration, Border Security and Claims held four oversight hearings between March and December 2006. Chairman John Hostettler summarized the oversight committee's findings: "Backroom manipulation" had occurred in a program which was "supposed to assure workers the deceit was over and their government was finally going to do right by them." He said "those tasked with implementing the program" "need to be exposed for what they've done." And he encouraged continued congressional oversight: "The babysitting of these individuals must continue."

Those of you in Washington who work on these issues are already familiar with the Office of Management and Budget's notorious pass-back memo which laid out five policy options for ratcheting down on the Advisory Board on Radiation and Worker Health (ABRWH) and its independent contractor, as well as the public petition process for membership in the Special Exposure Cohort (SEC).

Outside of Washington, we had an "Ah-ha" moment upon learning of the pass-back memo. Until then we couldn't comprehend why a rising New Mexico labor leader and an outstanding public health physician were about to be removed from the Board. And it seemed Orwellian that anyone would raise conflict-of-interest issues about the only group of outside analysts hired to work on this issue in the public interest, SC&A, the audit contractor to the Advisory Board on Radiation Worker Health (ABRWH). Meanwhile, conflict of interest statements for the site profile team members at Los Alamos were not posted on the Web, as required by the official conflict of interest policy. Further, we were puzzled by a turnabout in Resource Center personnel from barnstorming tours of signing up claimants to publicly rationalizing the denial of claims in terms of "saving tax dollars." And we saw few claims being paid at sites like Los Alamos.

In skimming the document trove in Part V of the House Subcommittee hearings I noticed that chapters of the Los Alamos site profile (the Technical Basis Document or "TBD" were provided to DOL months before they were made available to the public. In fact, we had to wait until just 2 weeks before a meeting in June 2005, where Los Alamos workers and advocates were to discuss the site profile with NIOSH and ORAU, for the chapter on external dosimetry to be made available to us. But DOL had its copy a year earlier (e-mail from J. Kotsch to P Turcic, February 10, 2004). The reason for the delay is now obvious. DOL was concerned about passages in a draft version which described DOE dosimetry techniques as "inadequate" and old monitoring methods at Los Alamos as "primitive" and working conditions as "deplorable by present-day standards."

DOL got its way: none of this language is in the final public version. Because DOL's role in the program is supposed to be that of a neutral adjudicator of claims, I must ask: When did DOL become known for its specialized expertise in health physics or the histories of DOE facilities. In one fell swoop, DOL program managers undermined the transparent process Congress intended and put at risk the reputation of NIOSH for scientific independence and responsiveness to labor concerns, which the agency rightly earned prior to EEOICPA.

This calls for a response from Congress that is much sterner than "babysitting."

110th Congress. I require my students who are researching any environmental or occupational health policy issue to read and cite congressional committee hearings. They are the holy writ of the people's business. One Congress may talk about an issue, but they always leave a record in case the next one is ready to take action. The five volumes compiled by the House Subcommittee in the last Congress tell an important story about this part of the people's business.

So, as this committee establishes its agenda for oversight of the EEOICPA program, I hope you'll begin where the House Subcommittee hearings left off. Your first order of business should be to secure all of the loose-leaf binders of internal documents which DOL assembled under threat of subpoena, but which House Subcommittee staff were only allowed to take notes on.

Failure to continue the aggressive oversight activities begun in the last Congress will permit trends unfriendly to claimants to continue. SEC petitions that have been ostensibly approved could be subjected to upwardly creeping criteria for proving membership in the cohort. How will families of deceased Los Alamos construction workers employed prior to 1976 obtain documentation that places their loved one at one of the technical areas that is included in the SEC, when we know that most construction workers typically worked "everywhere?" Widows of construction trade workers, many of them now elderly, were among the main intended beneficiaries of former State Representative Harriet Ruiz's successful SEC petition. Will the Los Al-

amos SEC become a redux of Y–12, where claimants now have to furnish evidence of the specific buildings their loved ones worked in more than 60 years ago?

Will competent attorneys avoid a program that provides insurance-like benefits—but only if a claim meets increasingly tort-like standards of proof?

In my testimony I make several suggestions for reforms. These are:

(p. 6) Copies of the documentation specific to the claim used by the dose reconstructor should be routinely provided to Part B cancer claimants.

(p. 6) Claimants should also have a right to seek repeated extensions to 60-day requirement of signing the OCAS–1 form.

(p. 10) Occurrence reports collections at DOE facilities hold the potential for a portion of dose reconstructions to be based on primary documentation.

(p. 10) DOL regulations could be revised to allow claimants who receive a probability of causation of 40 to 49 percent to submit expert medical opinion on the causation issue.

(p. 12) DOL's adoption of an electronic records management system is an important area for congressional oversight.

(p. 15) Allow coverage of non-cancerous diseases known to be caused by levels of ionizing radiation encountered in occupational settings, such as benign brain tumors and polycythemia vera.

(p. 16) Ensure that the Part E Advisory Board (see below) has purview under the statute to independently audit all aspects of claims management by DOL, including (but not limited to) the training and performance standards of claims examiners.

(p. 17) Revise DOL regulations so Part E benefits can be paid to the estate of a claimant who dies before a pending claim is resolved (through the appeals level).

(p. 17) An independent Subtitle E board should be created by amending the statute.

(p. 18) Adopt authorizing legislation for technical assistance and advocacy grants for EEOICPA activities.

(p. 19) The purview of the DOL Office of the Ombudsman should be expanded to include Part B claims. Explicitly authorize the Ombudsman to "advocate" for claimants.

(p. 19) Physically locate a representative of the Ombudsman's office in each of the DOL Resource Centers.

(p. 19) Intra- and extramural funding mechanisms should be created for CDC to provide technical assistance to claimants' physicians and claimants' organizations involved in the development of causation evidence for Part E and Part B.

(p. 19) Incentives should be created for graduates of occupational medicine residency programs to practice in rural and community clinics near DOE facilities.

Administrative Costs Are Exorbitant in Relation to Outcomes Achieved

Program statistics in a recent presentation by OCAS (the Office of Compensation, Analysis and Support) point to a program that is fundamentally broken. From 2001 to 2007 NIOSH has received $280 million to perform dose reconstructions. NIOSH work has resulted in total payments to claimants of $869,000,000. Administrative costs are therefore equal to 32.2 percent of payments (about one-third). Members of this committee are more familiar with the comparable administrative expense rate for other entitlement programs. For SSDI it's 2.5 percent. The average cost per case was $14,534 per dose reconstruction.

DOL has rejected 4,726 cases, or about one-quarter (24.5 percent), and sent them back to NIOSH to be reworked, mainly because NIOSH updated its methods without redoing the earlier cases.

GAO will have more to say about these numbers. But clearly, despite an unlimited budget, the two agencies responsible for the program don't agree on what is valid in one-quarter of the cases. Little surprise then that many claimants have lost faith in how the program is being administered.

Worker Knowledge is Not Being Incorporated Into Radiation Dose Reconstructions

close-out interviews are perfunctory and lack quality controls

A key step in the processing of an EEOICPA claim is the close-out interview when the claimant must sign the OCAS–1 form. This completes the gathering of facts from the claimant for dose reconstruction. The next step is administrative review by the DOL, where the probability of causation is determined. Decisions to award or deny compensation can hinge on the close-out interview.

Survivor Claimants. At cold war era nuclear facilities, spouses and children of employees have little knowledge of the work that was done. Spouses with claims are

often elderly, with nowhere to turn for documentation of exposure-related issues. An illustrative case is Gertrude Finley's claim, one of the first filed in New Mexico in 2001, for her husband's death due to non-Hodgkin's lymphoma (see below). From Knoxville, TN Kathy Bates told her family's Kafka-esque story to the House Subcommittee. It begins with her mother receiving a preliminary dose reconstruction for the wrong person, not her deceased husband. She followed a NIOSH case worker's instructions to discard the report, only to receive a call a short time later from another case worker who was bent on conducting the close-out interview, before the report on the correct person was even in-hand. After several years of continued back-and-forth, they are now in the midst of their third dose reconstruction with NIOSH.

SC&A Study. But survivor issues are not the only concern. The ABRWH's auditor, Sanford Cohen and Associates, recently issued a report based on auditors listening in on three close-out interviews. In two cases specific information provided by the claimants was ignored. No attempt was made to obtain reports or review data. In essence, the claim's fate was already sealed, but the claimant didn't know it.

The auditors found "potential for inconsistency and arbitrariness in how concerns are researched, communicated and resolved." Most shocking is that key decisions are made by personnel called "HP Reviewers" who, in fact, lack health physics qualifications or experience in dose reconstruction The auditors recommend that HP Reviewers at least make detailed notes about what was done to address claimants' concerns that are raised in close-out interviews.

Los Alamos Ironworker. Ron Chavez, a member of Ironworkers' Local 495, has been treated for non-Hodgkin's lymphoma. He worked at Los Alamos from 1994 to 2000. With his claim pending, in September 2007 he requested from NIOSH copies of his dosimetry data as well as the educational background of the dose reconstructor assigned to his case. He alleges that a manager surprised him by threatening to turn that very phone call into the close-out interview. Mr. Chavez felt this was an arbitrary attempt to close-out his claim prematurely.[1]

Administrative Reform. Copies of the documentation specific to the claim used by the dose reconstructor should be routinely provided to Part B cancer claimants. This would provide a simple check on sloppy close-out interviews harming claimants' interests. This documentation should be provided long before the close-out interview takes place. Claimants would then have an opportunity to generate and pursue leads to additional information, or seek independent technical assistance in critically analyzing the data.

Regulatory Reform. Claimants should also have a right to seek repeated extensions to 60-day requirement of signing the OCAS–1 form.

TECHNICAL BASIS DOCUMENTS DO NOT REFLECT WORKERS' CONCERNS

The problem of assessing the probability that a given cancer was caused by or contributed to by radiation exposure can be approached using at least four types of knowledge:

1. radiation dosimetry data,
2. models,
3. historical knowledge of processes, operations and occurrences, and
4. expert opinion.

The current system used by NIOSH is heavily weighted toward radiation dosimetry data and models (#1 and #2), despite serious misgivings in the wider scientific community. While the Technical Basis Documents (site profiles) compile some historical knowledge of processes and operations, they are deficient in the use of occurrence reports. As described below, this deficiency serves to exclude the first-hand knowledge of workers. In the end, the reliance on dosimetry data and models tilts the site profile away from a workers' perspective. Site managers are considered "experts." As a result, site profile documents rely heavily on written Standard Operating Procedures (SOPs) which delineate how radiation "ought" to have been measured. Workers' expertise is seldom represented on ORAU site profile teams; their insights into what actually occurred is given short shrift.

Worker Submissions Ignored. In December 2003, worker Glenn Bell provided NIOSH and ORAU with two documents (accompanied by release forms) pertaining to historical operations and processes in the Y–12 complex at Oak Ridge. Mr. Bell

[1] Mr. Chavez did receive his dosimetry data. He notes that it shows a zero for the first quarter of 2002. That strikes him as implausible: he still has his badge from that quarter. His last day of work was February 4, 2002. He never turned in his dosimetry badge. To his way of thinking, this casts doubt on the rest of his dosimetry data, which is entirely comprised of zeros. "My buddies have the same thing," he told me. "Zeros all the way through."

believed they contained facts which could introduce a few more claimant-friendly assumptions into dose reconstructions for Y–12 claimants. He reiterated his concerns at the January 2006 meeting of the ABRWH in Oak Ridge. Yet the documents remain "under review" by ORAU. The facts they contain have not yet been incorporated into the site profile for dose reconstructions at Y–12. Mr. Bell wonders how many other key documents have been ignored.

Conflicts of Interest Ignored. The Los Alamos site profile was developed by a 19-member team, a majority of whom are current or former Los Alamos employees with responsibility for radiation safety. In testimony before the House Subcommittee on Immigration, Border Security and Claims on May 4, 2006 Congressman Tom Udall expressed concern over the fact that conflict of interest disclosure statements had not been posted on the ORAU Web site for 8 of these 10 team members. More than a year later, the situation has changed—for the worse. None of the 10 current or former Los Alamos employees have disclosure statements posted at the current time.

Occurrence Reports Not Fully Utilized. Site profiles are based mainly on the written SOPs for radiation monitoring which were prepared by management at each DOE site. "SOPs" are written expressions of how radiation doses "ought" to have been measured. They do not document how it actually was measured under upset or accidental conditions in the field. Many workers recall incidents in which SOPs were ignored due to expediency, time pressures, or inadequate staffing.

In contrast to SOPs, occurrence reports document what actually happened under abnormal conditions, when workers are most likely to have been overexposed. These reports could provide an important antidote to NIOSH's over-reliance on idealized SOPs and the perspective of facility managers in the site profiles.

At the June 2005 meeting between ORAU and former Los Alamos employees in Espanola, it was noted that the site profile contained no information from the LANL historical occurrence reports collection. This is a collection of paper reports, memoranda and monitoring data which documents hundreds of radiation spills, leaks, environmental releases and worker contamination episodes from 1946 to 1990. Part of my doctoral dissertation research was based on reports of off-site environmental release contained in this collection. For each occurrence in which radioactive contaminants escaped off-site, I found roughly five times as many reports which involved worker-only contamination. Elsewhere I have estimated that there are likely to be hundreds of "worker only" occurrence reports from the era of the Manhattan Project through the 1980's.

POTENTIAL USEFULNESS OF OCCURRENCE REPORTS

Numerous workers and survivors have voiced frustration upon reviewing their supposedly "complete" medical and exposure records from DOE facilities, only to find key pieces of documentation missing—occurrence reports, finger ring dosimetry data, internal bioassay results, etc. This problem could be addressed by a more aggressive approach by NIOSH in utilizing historical occurrence reports collections at DOE facilities. Occurrence reports contain individual identifiers such as names, employee identification numbers and group affiliation. These reports could be used to improve the quality of dose reconstructions in several ways.

First—and most obviously—the listing of an individual's employee identification number in an occurrence report is conclusive evidence of the worker's presence at an incident where a dose was likely incurred, a dose which may not be documented elsewhere. This applies particularly to internal radiation doses received in contamination incidents which took place before internal bioassay programs were fully implemented.

Second, in cases where the claimant (or interviewee) describes an incident but is unable to provide precise dates, occurrence reports should be mined in pursuit of contemporaneous documentation. For example, an individualized docket notebook was compiled by an advocacy group for an EEOICPA leukemia claimant at Los Alamos using a "Surrogate Incident Report" form. Its purpose was to alert dose reconstructors to the possible availability of documentation for incidents which the worker recalled from memory. The claim was ultimately awarded under Parts B and E.

Third, exposures resulting from incidents which were never documented, but are described in sufficient detail by interviewees, could be quantitatively modeled using similar incidents that are documented in an occurrence reports collection.

Fourth, radiation dosimetry records do not capture information on dermal contact with radioactive materials. However, many occurrence reports do provide detailed information about levels of contamination on workers' clothing, shoes and skin.

Example: Clean-up Crews at Los Alamos. Phillip Schofield, a former plutonium glove box worker and facility inspector at LANL, provided a compelling rationale for relying more on occurrence reports than on individuals' badge data in some cases. When a spill occurred, many employees would be summoned to clean it up. On several occasions Mr. Schofield was one of those employees. Stationed at the entrance to the room was a radiation control technician (RCT) who would collect the radiation badge of each entering clean-up worker. That's right: each worker removed his badge and handed it to the RCT. The rationale was that if the badge became contaminated with bulk quantities of radioactive dust or liquid, then it would give an inaccurate measurement of the dose to the individual.

The standard procedure for estimating each clean-up worker's dose was to use the RCT as a proxy for everyone on the job. A problem arises when the RCT remained stationed at the door for most of the clean-up: the RCT had less potential for exposure than the actual clean-up crew. Thus, individuals' official dosimetry records will represent an underestimate of the true dose received. This bias may be partially remedied by incorporating environmental measurements and other facts from occurrence reports into individual dose reconstructions in the four ways described above.

Example: Clean-up Workers at Oak Ridge Y–12. Large spills of radioactive liquids at the Y–12 plant during World War II triggered a standard procedure in which clean-up crews first built retaining structures and then recovered the spilled materials. Survivors of two of the men doing this work believed that their claims, both for colon cancer, would be covered by the Special Exposure Cohort for Y–12. However, under recent interpretations of this SEC, the families have been presented with an additional burden. They are now required to provide direct evidence of the handling of radioactive materials or employment in a specific building—60 years ago. Attorney Bob Warren of Black Mountain, North Carolina obtained an affidavit from a priest to one of the workers who remembers his parishioner's clothing have been burned due to contamination incurred on one clean-up operation. However, DOL has indicated to Attorney Warren that the affidavit is insufficient evidence of contact with radioactive materials.

This is precisely the kind of situation in which access to historical occurrence reports collections at the covered facilities would give families a reasonable opportunity to meet EEOICPA's often murky standards of evidence.

CD–ROM OF LOS ALAMOS OCCURRENCE REPORTS

I am pleased to announce public distribution of a CD–ROM containing more than 350 Los Alamos occurrence reports. For many years these were for "official use only." The Centers for Disease Control's Los Alamos Historical Documents Retrieval and Assessment Project (LAHDRA) has made these documents available to the public for the first time. Individual identifiers have been removed. If a claimant recalls an incident but lacks documentation, then there is a possibility that it is contained on this disk. The disk has been indexed and formatted for quick retrieval.

Twenty copies of the disk were placed in the mail yesterday to key stakeholders in New Mexico: cancer claimants, workers, widows and advocates on EEOICPA issues, along with a few journalists who cover the issue. Copies will also be provided to the five congressional offices representing New Mexicans.

This collection is incomplete, however. The LAHDRA project is concerned with offsite releases of radioactive materials. The occurrence reports on this disk were selected on that basis, but many of them happen to have entailed worker exposure as well. The "Total List" file includes dates and a few details on numerous worker-only incidents for which the actual occurrence reports are not yet available.

Importantly, each site in the DOE complex is likely to have a similar collection of historical occurrence reports which could be helpful to EEOICPA claimants. Only in later years were these kinds of reports digitized. At Los Alamos occurrences after 1990 are in an online system.

PRIMARY DOCUMENTATION TO VERIFY WORKERS' KNOWLEDGE

A key area of ongoing oversight on the EEOICPA issue is the extent to which NIOSH dose reconstructions have taken account of information other than individuals' official radiation dosimetry records. Are NIOSH and ORAU really tapping into workers' knowledge? Is this knowledge being incorporated into site profiles (TBDs) and individuals' dose reconstructions' SC&A's audit of close-out telephone interviews suggests otherwise. Rather than dismissing workers' recollections as "anecdotal" information, are NIOSH and ORAU aggressively searching for confirmatory evidence in historical occurrence reports collections? A truly "claimant friendly" dose reconstruction process would leave no stone unturned in locating documentation to verify workers' knowledge.

Administrative Reform. Occurrence reports collections at DOE facilities hold the potential for a portion of dose reconstructions to be based on primary documentation. Use of primary documentation could serve as a quality check on dose reconstructions performed with internal dosimetry data which some DOE sites have provided only after long delays and re-formatting.

MEDICAL OPINION IN PART B

Another source of expert opinion which is not yet accommodated in assessing the probability of causation under Part B is that of physicians who have diagnosed and treated the individual claimant. It is not unprecedented for a cancer specialist to submit a written opinion asserting the work-relatedness of a claimant's cancer, but the claim to be denied because dosimetry data and models produced a probability of causation of less than 50 percent.

Administrative/Legislative Reform. DOL regulations could be revised to allow claimants who receive a probability of causation of 40 to 49 percent to submit expert medical opinion on the causation issue. This claimant-friendly reform would represent a candid admission of the imprecision of Probability of Causation determinations made from dosimetry data and models. In these borderline cases, medical opinions of sufficient probative value could tip the balance in the claimant's favor.

DOL Resource Centers and Regional Offices

The offices of the EEOICP most frequently encountered by claimants are Resource Centers and DOL's district offices. Claims examiners are located in the district offices. Abundant evidence indicates that neither of these points of contact is living up to a standard of "claimant-friendly."

In the 2006 ". . . Report to Congress" by the Office of the Ombudsman, the top three categories of claimants' concerns were:

1. Difficulties in Proving Causation Issues;
2. Difficulties in Retrieving Employment, Exposure and Medical Records; and
3. Concerns About Claimant Interactions with DEEOIC Personnel.

These issues are illustrated in detail by the experiences of:

1. Ben Ortiz, a former Los Alamos electromechanical technician, whose on-the-job exposure to chemicals led to his "medical termination" from Los Alamos in 1989 with reactive airways dysfunction syndrome (RADS) and chronic solvent encephalopathy;
2. Alex Smith, a former Los Alamos chemical technician and machinist who was diagnosed with mercury poisoning in 1948 and suffered neuropsychiatric conditions in the ensuring years; and
3. Gertude Finley, the 86-year-old widow of Jack Finely who died from non-Hodgkin's lymphoma after working for Los Alamos in the transport of shipments of nuclear weapons and radioactive materials.

1. BEN ORTIZ

Espanola Office to Claimant: Congressional Constituent Services Will Delay Your Claim. Ben Ortiz was among the first former Los Alamos workers to file a claim under EEOICPA, having been the principal grassroots organizer in the New Mexico campaign for the law's passage in 1999. (See "Background" above). He received a favorable determination for his respiratory ailments from a DOE Physician's Panel under Subtitle D. Except for limited medical coverage, by the end of 2006 he had not yet received benefits under Part E. Mr. Ortiz should be eligible for wage loss and impairment benefits.

In early 2007 the Espanola Resource Center proffered a startling explanation for the delays in DOL's processing of Mr. Ortiz's claim. Repeated involvement by constituent services staff from congressional offices had delayed the claim. Each time congressional staff got involved, the explanation went, Mr. Ortiz's paper file was sent from the regional office to DOL headquarters in Washington, DC. where specialists in responding to congressional inquiries would take charge. Without the paper file in hand, claims personnel in the regional office would stop working on the case.

If there is truth to this explanation, it is an embarrassing admission of DOL's limited infrastructure for smoothly administering claims under a program with a high degree of congressional interest. The old saw about a dolt who "Can't walk and chew gum at the same time" comes to mind.

Oversight. DOL's adoption of an electronic records management system, however belated, is an important area for congressional oversight.

Regional Offices and Claims Examiners. In 2005 I assisted Mr. Ortiz and Marla Gabaldon (his daughter and authorized representative), in compiling a three-ring loose-leaf binder of medical and exposure documentation. Each item was cross-referenced to specific paragraphs and clauses in DOL's regulations for Subtitle E causation and wage loss determinations. Included in the notebook was a medical report from a nationally recognized occupational medicine specialist who evaluated Mr. Ortiz in 1990 at the University of California San Francisco. Also included were neurocognitive tests performed by a specialist, who trained at the Environmental Sciences Laboratory of Mt. Sinai Hospital in New York. Excerpts from Mr. Ortiz's symptom diary in the months leading up to his medical termination were also included.

The 3-ring binder was submitted by Congressman Tom Udall's staff to the DOL's Denver office in September 2005. In periodic conference calls held during the next several months, Mr. Ortiz and his daughter were unable to ascertain where in the DOL bureaucracy the notebook wound up.

A changing cast of claims examiners has not helped. Mr. Ortiz estimates he has had at least six different claims examiners since DOL took over administration of the program. On a recent conference call he was told that DOL had not received his documentation of wage loss. In fact, Mr. Ortiz's IRS tax returns for the years in question (1986–1989) had been submitted by Congressman Udall's office to DOL months earlier. "And," his daughter writes in an e-mail,

> "as if that wasn't bad enough, during the phone conference they are flipping through the file to find the stuff they've asked us for. The claims examiners are not examining the files."

She continues:

> "Information he has gotten from the Resource Center is incorrect. Most recently he was misinformed about the impairment rating. He'd been told that if he signed a waiver, then a DOL medical consultant would use the information already in his file to develop the impairment rating. We later learn that my dad would need to send in documentation for the impairment rating."

When I last saw Ben Ortiz in August he mentioned that the Resource Center was asking him to submit the standard form affirming that he is not receiving SSDI. He clearly remembers already having submitted this form to the Resource Center months ago.

2. ALEX SMITH

1948 Mercury Poisoning. Senator Bingaman and staff are familiar with the case of Mr. Alex Smith of Albuquerque, (thanks to excellent constituent services provided by the Senator's office and by Congressman Tom Udall). When Mr. Smith testified at the March 18, 2000 field hearing in Espanola, convened by then Assistant Secretary of Energy Dr. David Michaels, he recounted how he and several co-workers were diagnosed with mercury poisoning in 1948 by Dr. Harriet L. Hardy. She ordered the crude mercury still they were operating in K-Stockroom to be shut down. Then she took the men to medical grand rounds in Los Alamos to teach local doctors about the signs and symptoms of mercury poisoning. Among these signs was the classic blue line in the workers' gums.

Early Retirement. Mr. Smith told the March 2000 hearing about how he suffered neuropsychiatric problems in the ensuing years, leading to his early retirement from LANL in early 1982. Although he repeatedly cited the earlier mercury poisoning episode in discussions with Lab doctors, and requested documentation of the incident, none was provided by the Lab medical department. Maybe the Lab doctors didn't know where to look for the documentation. Or, more likely, the institution's restrictive practices governing access to documentation of the health impacts of Lab operations barred the doctors from furnishing this important personal health data to Mr. Smith. Plain and simple, in Mr. Smith's words, a "cover-up" took place. At the time of his early retirement, he recalls feeling like the Lab doctors were intimating he might be a little crazy, as if he'd made up the whole incident.

"Smoking Gun" Evidence. At the May 2002 field hearing at the Convento in Espanola, where DOE Assistant Secretary Beverly Cook was called to account for Subtitle D's dismal performance, Mr. Smith held up the 1948 memos for all to see that he wasn't crazy. (Shortly after his March 2000 testimony I found Dr. Hardy's memoranda about the 1948 mercury poisoning episode in an online DOE data base. The episode is also described in her autobiography and older editions of her textbook). Congressman Udall's staff assisted him in filing a Privacy Act request with DOE to obtain one of the memos with his name unredacted. Despite this "smoking gun" evidence, Subtitle D produced nothing of benefit to Mr. Smith.

Medical Records. Congressional intervention again led in 2006 to LANL releasing Mr. Smith's supposedly "complete" medical record. An item-by-item comparison of this file the one initially released to the Espanola Resource Center upon Mr. Smith filing his claim in 2002 reveals a striking difference. Only with the congressional intervention did Mr. Smith receive Dr. Hardy's original hand-written clinical notes dated February 19, 1948 in which she first suspected mercury poisoning. However, Mr. Smith has not yet obtained a report cited elsewhere in his record which is likely to contain the results of the urinalyses he remembers Dr. Hardy ordering. Her textbook account of the episode refers to the urinalyses. But her autobiography recounts battles with classification officers over disclosing uses of mercury at the Lab.

Soon upon leaving Los Alamos, Dr. Hardy published an article in Physics Today to alert the nascent atomic energy industry to the hazards of mercury. It does not mention the episode in K–Stockroom.

Wage Loss Claim. Mr. Smith's Subtitle E claim was initially rejected by DOL. But with the help of Albuquerque attorneys Robert Maguire and Matt Hoyt, on appeal in March 2007 Mr. Smith won a Recommended Decision for payment of wage loss. Key pieces of evidence were reports from occupational medicine and neurotoxicology specialists at a Boston area institution. Mr. Smith traveled there at his own expense.

3. GERTRUDE FINLEY

The case of Gertrude Finley of Albuquerque, now 86-years-old, is illustrative of the problems faced by survivors with cancer claims under Part B. Her husband Jack Finley worked from 1961 to 1977 as a Security Shipment Specialist responsible for escorting shipments of nuclear weapons and radioactive materials. Mr. Finely was diagnosed with non-Hodgkin's lymphoma in 1990. The Finley's were among the first families in New Mexico to file a claim on July 8, 2001.

Ms. Finley is represented by Attorney Margret Carde of New Mexico Legal Aid (which is an indication of the widow's financial situation). Attorney Carde has prepared a 6-page, 50-item chronology of letters, form-filings, phone calls and reports.[2] It is punctuated by involvement by Senator Bingaman's staff. On one level, Ms. Finley is one of the lucky ones: only once did she receive correspondence addressed to the wrong person (a "Mr. Spencer").

In October 2003, a computer-assisted telephone interview was conducted with Mrs. Finley who, according to Attorney Carde, had "no idea of what Jack did because he worked in a classified area." The dose-reconstruction proceeded, with Mr. Finley's multiple skin cancers also included.

On August 1, 2005 she received a Recommended Decision. In the "Finding of Fact" section, point #7 states:

> "It was shown that Jack Finley's nonhodgkins lymphoma, basal carcinoma of the left ear and right hand, and multiple squamous cell carcinomas were 50 percent or greater probability (more likely than not) caused by his occupational radiation exposure during his employment with DOE."

But then point #8 states:

> "The probability of causation for the nonhodgkins lymphoma, basal carcinoma of the left ear and right hand, and multiple squamous cell carcinomas diagnosed on various dated [sic] from 1990 through 2001 was determined to be 42.69 percent."

Fortunately, Mrs. Finley has an attorney to try to figure out what exactly this means, and to address other inconsistencies and omissions. The Recommended Decision was remanded by the Final Adjudication Branch. A revised dose reconstruction led to the conclusion that "further research and analysis would not produce a level of radiation dose resulting in a probability of causation of 50 percent or greater." Ms. Carde had two conference calls with a NIOSH representative to question why the second dose reconstruction resulted in a lower probability of causation than the first dose reconstruction, despite the evidence of two additional new cancers.

Other Illustrative Cases. Consistent with the Finley family's confusing "Recommended Decision," in which points #7 and #8 were frankly contradictory, a work-

[2] The 50-item chronology of a widow's interactions with the EEOICPA program over 7 years brings to mind the words of Labor Secretary Willard Wertz. Testifying before a hearing of the Joint Committee on Atomic Energy in 1967 about the failure of all levels of government to address job hazards to uranium miners, he said: "It is a record, nevertheless, of literally hundreds of efforts, studies, meetings, conferences and telephone calls—each of them leading only to another—most of them containing a sufficient reason for not doing anything then—but adding up over a period of years to totally unjustifiable "lack of needed consummative action."

er advocate at Oak Ridge says: "I've yet to see a Recommended Decision without mistakes in it."

A compelling example of mismanagement of a claim is that of pancreatic cancer in an Oak Ridge construction worker on whose dose reconstruction report employment at K–25 for most of the 1970's is listed. Clearly, this employee was eligible for inclusion in the SEC for K–25. A dose reconstruction wasn't even necessary. This is further evidence of the "gross ineptitude" cited at the November 15, 2006 House Subcommittee hearing which resulted in members of the SEC at the Nevada Test Site having their claims needlessly delayed by dose reconstruction.

The Eichler Family of Knoxville, TN won a remand from a DOL administrative law judge of a recommended decision to deny compensation for Dr. Eugene Eichler's testicular cancer and for a fatal brain tumor. DOL rejected the brain tumor because of a medical report which identified the brain tumor as a "meningioma." In DOL's view that meant it was "histologically benign." Pointing to another medical report which described it as "malignant" the judge remanded, explicitly citing the claimant-friendly intent of the law. The judge also ordered a closer look at Dr. Eichler's employment history which is especially well-documented. Yet in April 2006 the brain tumor was again rejected for coverage. There is no record of colleagues and co-workers whose names were provided to the dose reconstructors ever having been contacted. And the family feels the employment history has been disregarded. As for the testicular cancer, a second dose reconstruction was of no avail, because it used almost the exact same information as the first one.

Reform. Amend Part E to allow coverage of non-cancerous diseases plausibly caused by levels of ionizing radiation encountered in occupational settings, such as benign brain tumors and polycythemia vera.

The chair of the Beryllium Support Group at Y–12 (Oak Ridge) reports some of his members have complained of rudeness on the part of claims examiners. Equally distressing are cases in which claims examiners are ignorant of basic facts about common occupational diseases. In an Oak Ridge case of CBD which was ultimately fatal due to cor pulmonale, the worker advocate representing the claimant was dismayed to find that the claims examiner was unaware of the cardiac complications of CBD. "It's not the claims examiner's fault," the advocate says. "He just didn't know. He wasn't trained."

In a case of asbestosis in a construction worker who had never worked anywhere but Hanford, another worker advocate voiced frustration over having been told by a claims examiner she would "have to prove" that asbestos exposure occurred at Hanford. Asbestos was ubiquitous in large nuclear and industrial facilities during the era in question—a fact which is obvious to students of occupational health.

An occupational health professional at a DOE facility describes the DOL program as a "nightmare" for employees of the site who have beryllium sensitivity or CBD. "Lost files" and "long delays" are even affecting claims which are fully supported by the DOE site contractor. Claimants "overwhelmingly can't get through" or "get a response" from the district DOL office. This perspective was shared with me on the condition that I not name the facility. (Occupational health professionals are not immune to job retaliation). Suffice it to say that this institution and its staff are not accustomed to being ignored. What happens to claimants who have less formal education when they submit documentation about their claims to DOL?

Legislative Reform. Ensure that the Part E Advisory Board (see below) has purview under the statute to independently audit all aspects of claims management by DOL, including (but not limited to) training and performance standards for claims examiners.

IMPLICATIONS FOR OTHER CLAIMANTS

"Concerns about Claimant Interactions with DEEOIC Personnel" was the third-ranked issue identified by the 2006 report of the Office of Ombudsman. Frequent changes in claims examiners and changes in the district office to which a claim is assigned were cited in the report. Loss of documents and duplicative requests to submit paper work were also cited. This is especially cruel in view of the causation standard for Part E:

> "by a preponderance of evidence the type of toxic substance(s) they were exposed to, when and where this exposure(s) took place, and the extent and time period that the exposure(s) took place."

Even claimants who meet this standard cannot be assured that their records won't go missing.

The experiences of Ben Ortiz and Alex Smith are not isolated incidents. That these difficulties affected claimants who were so visible in the campaign for passage of EEOICPA, and have worked closely with congressional constituent services,

makes one shudder to think how claimants with lower public profiles are being treated. Their best hope may be to find legal counsel when their claim is denied, and try to prevail on appeal.

What has become of the hundreds of other claimants who could not gain access to "smoking gun" or contemporaneous documentation of their exposures and illnesses? What about those who did not have written, occupational diagnoses from internationally recognized physician-scientists, backed up by evaluations performed by specialists using the latest methods of clinical and neurobehavioral testing? What about claimants who can't pay out-of-pocket for specialized medical evaluations? Or those whose first language isn't English? Or those who didn't receive effective constituent services from their congressional offices?

What happens in those households at the end of a long, drawn out process of retrieving records from a DOE contractor, submitting documentation to DOL, and the system responds with "What medical and exposure records?"

It is not surprising to hear from claimants' advocates that many of the intended beneficiaries of the program are simply giving up. The hurdles have simply become too difficult for an increasingly elderly claimant population.

Regulatory/Legislative Reform. Revise DOL regulations so Part E benefits can be paid to the estate of a claimant who dies before a pending claim is resolved (through the appeals level). Under current law, nothing is paid when an elderly claimant passes on. This will remove the perverse incentive, real or perceived, that DOL has to stall in order to contain program benefit costs.

PART E ADVISORY BOARD TO DOL

A key lesson from the first 6 years of EEOICPA implementation is that an independent oversight board can keep government agencies that have been charged with carrying out a "claimant-friendly" program from going astray. Through its external review and oversight functions, the ABRWH has provided essential checks and balances on the activities of NIOSH staff. The Board's meetings have also brought needed transparency to the dose reconstruction process. Especially illuminating have been the special projects conducted by the Board's auditor, Sanford Cohen and Associates.

Meanwhile, DOL's implementation of Subtitle E has occurred with no independent oversight. Determinations of occupational disease causation are being made routinely by claims examiners and district medical consultants. Few of the guideposts used to make these determinations are publicly available. Nor have the qualifications of the district medical examiners been subjected to outside evaluation.

Legislative Reform. An independent Subtitle E board should be created by amending the statute. Its role will be to provide external review and oversight of the DOL's occupational disease determinations, coverage of consequential conditions, and overall implementation of Part E. Like the ABRWH, members would be selected from relevant disciplines (i.e., epidemiology, toxicology, occupational medicine) and sectors (claimants, workers, health professions, government agencies).

PUBLIC INTEREST PARTICIPATION

Claimants face many high hurdles in accessing and interpreting records, seeking diagnoses, and advocating for themselves. The nature of the preparation work is similar to a tort case, while the benefits are comparable to an insurance program. The statute contains caps on legal fees. These factors may discourage competent attorneys from getting involved. Further, many DOE sites are located in remote rural regions of the country where occupational medicine practitioners with a worker orientation are hard to find. After several years of being out of work due to chronic illnesses, few claimants can afford to travel to see big city "occ docs." Union locals at DOE sites that have closed down are no longer able to assist claimants due to obvious resource limitations. Technical assistance on responding to the intricacies of dose reconstruction and Part E causation standards is generally unavailable through the DOL Resource Centers.

The Ombudsman's office at DOL is the subject of many favorable comments from the community of claimants' advocates. At a minimum, Congress should expand the Ombudsman's purview to Part B claims. Administratively, DOL should physically locate a representative of the Ombudsman's office in each of the DOL Resource Centers so they are available to trouble-shoot and advocate for claimants at any step of the process. Another simple enhancement would be to routinely inform and assist claimants with Privacy Act requests for DOE records.

However, as part of the very institution they are expected to keep watch over, the Office of the Ombudsman can only go so far in advocating for change. Broader problems can be addressed by a technical assistance grants program for claimant advo-

cacy organizations and incentives for graduates of occupational medicine residency programs to practice near DOE sites (see below).

Technical Assistance Grants. Congress needs to remind the agencies responsible for administering this program that the public's interest on occupational health issues are often best articulated by advocacy organizations. Funding of these organizations for claimant education, commenting on agency regulations, petitioning for SEC status, and traveling to important meetings is essential. The disparity between the multi-million dollar contract for dose reconstruction services and many claimants' subsistence on fixed incomes is glaring. People who have "gone without" often have ideas for reducing wasteful government spending. But to have a voice, they must be able to get to the meeting fully prepared, ideally as part of an organization of like-minded citizens who are willing to extend a helping hand.

At the second House Subcommittee Oversight hearing on May 4, 2006, Congressman Tom Udall voiced support for a technical assistance program.

Legislative Reform. Congress should adopt authorizing legislation for technical assistance and advocacy grants for EEOICPA activities.

Legislative Reform. The purview of the DOL Office of the Ombudsman should be expanded to include Part B claims. Explicitly authorize the Ombudsman to "advocate" for claimants.

Administrative Reform. Physically locate a representative of the Ombudsman's office in each of the DOL Resource Centers so they are available to trouble-shoot and advocate for claimants at any step of the process.

Occupational Medicine Services

In the 2006 Ombudsman's report the top-ranked concern under Subtitle E was "Difficulties Proving Causation Issues." Several areas are ripe for reform to make Subtitle E more claimant-friendly on causation issues.

The Ombudsman's report correctly notes that many claimants shy away from allowing DOL doctors to make causation determinations. However, when they go to their physician of choice, it quickly becomes apparent that the evidentiary requirements under Part E are beyond the expertise of many doctors. "DOL wants verse and script in my doctor's opinion," says a former Los Alamos worker with radiation dermatitis and apparent multiple chemical sensitivity. "It's beyond his expertise, and that of most doctors, to apply the AMA Guidelines to occupational illnesses," he said.

Although considerable occupational health expertise resides in NIOSH, the agency currently does not have a program of technical assistance to physicians who are developing EEOICPA claims. Applicable resources may also reside in ATSDR and NCEH.

Communities around DOE facilities are often described as "company towns." Physicians in private practice have little to gain—and much to lose—by lending their credibility to EEOICPA claims.

Legislative and Administrative Reform. Intra- and extramural funding mechanisms should be created for CDC to provide technical assistance to claimants' physicians and claimants' organizations involved in the development of causation evidence for Part E and Part B.

Legislative Reform. Incentives should be created for graduates of occupational medicine residency programs to practice in rural and community clinics near DOE facilities. These incentives should be tenable only at clinics that are independent of the DOE site. One such incentive might be more flexible visas for foreign nationals who have completed OEM residencies in the United States.

Medical Care

Because I am not trained in the clinical sciences, I do not try to assist claimants who are experiencing problems with the medical coverage provided by EEOICPA. However, I would be remiss if I did not draw the committee's attention to two cases of beneficiaries whose requests for home health care were grievously delayed by DOL. Requests from the family of George Hackworth (84-years-old) of Tennessee fell on deaf ears as he deteriorated with terminal colon cancer. DOL verbally denied the request for care and called the family on the day Mr. Hackworth died to inform them that the doctor's order for skilled nursing services was "unnecessary."

Submitted for the record is a letter from Greg Austin of Professional Care Management. His company responded to the Hackworths' desperate pleas and did provide several days of care, while waiting for the authorization which never came from DOL. Mr. Austin's letter describes another cancer case in which the "request for home health care lay pending authorization for 197 days with the DOL despite having all the required documentation to make a decision."

ACKNOWLEDGEMENT

I want to publicly express the deep respect and gratitude many people concerned with nuclear worker issues feel for the tireless and often miraculous work of Richard Miller, previously of the Government Accountability Project. If every occupational health issue had a Richard Miller, "That'd be alright." (As in the song by Alan Jackson). Those who work on Capitol Hill are fortunate to have him as a colleague now.

Senator BINGAMAN. Thank you both for your excellent testimony.

Let me ask first, Dr. Melius, your suggestion here to speed things up—I need to understand better how this dose reconstruction issue is being dealt with. In situations where dose reconstruction is determined not to be feasible, in that circumstance NIOSH has decided to go ahead and lump these all together, is that the testimony we just heard?

Dr. MELIUS. Yes, what you just heard was they are doing that, I believe, as I understood it——

Senator BINGAMAN. You might push that button again.

Dr. MELIUS. As I understand it, they are planning to do that with the first, I think, 70 cases that were left over from the first 5,000 claims. There's a number of them involving small facilities and other circumstances like that.

They have a program where they can, on their own, initiate their own, essentially, start the process for adding people to the Special Exposure Cohort. That is, follows the same steps as the ones for the petition process, which is the more common one that usually involves the larger facilities, and so forth. But, for the smaller facilities and for smaller groups of workers within facilities, they have in the past—and apparently are going to try to continue to expand that program where they would initiate the SEC process, Special Exposure Cohort process.

Senator BINGAMAN. Is there any reason why they just can't, on their own, do that? I guess they've concluded that the law permits them to do it—is there something we need to be doing to urge them to do it?

Dr. MELIUS. Definitely. I think that's the single-best way of speeding up this program. Which would be for NIOSH to take a much stronger stance and much stronger program to identify situations where they are unable to do the dose reconstructions—not to go through a very lengthy process in trying to, repeatedly trying to do dose reconstructions.

One of the very frustrating things about the program is, people will submit a Special Exposure Cohort petition, an outside, a group from a facility. And that, NIOSH—in the process of doing your evaluation of that, will discover that there's serious shortcomings in their dose reconstruction process, the way they've been doing those reconstructions and basically, have to start all over again with the background technical work to develop a dose reconstruction program, process. Either the Advisory Board has to accept that on faith, they can do it, or you have to wait a process of a year or two while that's underway, having time for the Board and its contractor to evaluate that, and it just delays the whole process. If they would have a much more vigorous process to basically being willing to admit that it's just not going to be possible to do the dose reconstructions, that it isn't feasible, and it can't be done in a timely way.

And, I think what Dr. Howard said—that if there were some real deadlines in the program, if you cannot complete a dose reconstruction within a set time period, or you cannot go through the process for the SEC petition evaluation in a set time period, then those people should automatically be added to the Special Exposure Cohort. If not, it's justice delayed a long time.

With the Rocky Flats situation, it was a very long, lengthy process and one that was not set to my——

Senator BINGAMAN. But you're saying they have that authority now, under the law, and it does not violate either the statute or their own regulations for them to do exactly that.

Dr. MELIUS. Correct.

Senator BINGAMAN. OK.

Dr. MELIUS. They need the incentive.

Senator BINGAMAN. Dr. Silver, let me just ask you one question—could you give a little more expansive description of that CD that you held up there, as to what that contains and what the significance of it is, as you understand it?

Mr. SILVER. Yes. Dr. Melius referred to claimants who remember episodes that they were involved in during their working careers—spills, accidents, contamination. When they receive their dosimetry records, there were zeroes. So there's a discrepancy between the worker's very clear recollections and the data that's being used by NIOSH for the dose reconstruction.

At every Department of Energy and for that AEC facility, when spills, accidents, contamination episodes occurred, reports were often written. These are historical occurrence reports. Frequently nothing was recorded. In Los Alamos there's a vault of "Official Use Only" documents, we call it the historical occurrence reports collection, going back to 1945, and I did part of my dissertation on those reports, during the era of openness in the DOE complex.

To my great dismay, there has not been a systematic effort to link those episodes to the job histories of people who are undergoing dose reconstructions. The Centers for Disease Control has an environmental dose reconstruction project going on at Los Alamos, they are looking at off-site doses. So, they've been through that open vault, and they've compiled a public database of reports that resulted in off-site releases, and they have made lists available of worker-only occurrences, that did not have off-site releases.

So, this disc has the reports of releases that went off-site, many of them have worker contamination involved, and lists of worker-only occurrences.

So, I'm going to put into the hands of claimants and claimant advocates in New Mexico, many of them have already been through the dose reconstruction process, they have their dosimetry data that shows goose eggs, as they say, and they'll do a little comparison. And I strongly suspect that we'll find people who finally have documentation of the episodes they remember, and they'll bring it back to NIOSH, and hopefully have their dose reconstructions redone.

Senator BINGAMAN. All right, thank you.

Senator Alexander.

Senator ALEXANDER. Dr. Melius, on your suggestion, just so I understand, you say that the Department of Labor and NIOSH could

decide today that a dose reconstruction wouldn't be able to be done within a certain period of time, we just automatically add that person to a cohort, is that correct?

Dr. MELIUS. Correct. There's a process for doing that, it has to go up——

Senator ALEXANDER. It could do that.

Dr. MELIUS. Yes.

Senator ALEXANDER. What would you suggest the timeframe should be? Six months? Four months? A year?

Dr. MELIUS. I think there's no reason that the whole Special Exposure Cohort review process should last less than a year. That for the dose reconstruction, there's no reason dose reconstruction should take more than a year to complete.

Senator ALEXANDER. So, if they were to say, if dose reconstruction on this individual claim can't be done within a year, it moves over to this other category, that would be a suggestion you made.

Dr. MELIUS. Correct.

Senator ALEXANDER. Do either of you know—businesses do customer satisfaction surveys, I believe the testimony was that the taxpayers have paid $3.2 billion to 35,000 people—those would be the successful claims. If those figures are correct, do you know whether there's ever been a survey done of those 35,000 people to see whether they're happy with that? Or whether they're, as the ombudsman indicated, they may have been so frustrated in the process, and by the time they got the money, they weren't happy with it?

Dr. MELIUS. As far as I know, there's been no survey and the NIOSH has been—I believe the Department of Labor has also been reluctant to do a survey because of concerns about claim adjudication and what might be found in a review of claims and so forth. But I think that kind of process could be done in a way that would be very helpful to the program, as well as would—I don't think they need to disturb the claims adjudication process.

Senator ALEXANDER. Typically those kinds of surveys are done, not necessarily to embarrass people, but to just simply to improve service and to learn things that one would want to do.

Dr. Silver, you made the suggestion that I wondered about, too, which is that a claim doesn't expire when a person dies, and the money could be paid to the estate. I can understand how that anxiety might contribute a great deal to the claimant and the family.

And we heard the example of Herculean efforts to make sure that the money arrived just a few hours or a day before someone died. Have you done any research to know what effect that might have on claimants, if they knew that, even if they died, their claim might still be processed and money available to the estate, and what it might cost the taxpayer if that were done?

Mr. SILVER. I haven't approached it from a research standpoint. I view the work I do with claimant families as part of my public service, as a university-affiliated person. I think it's really a matter of trust. When there are so many delays and so many incidents where documents have been misplaced in the claimants file, there's a growing perception of the part of claimants and their families that—as a man in New Mexico told me, "They're just waiting for

us to die," under Part E, which does not allow the claim to pass to survivors.

Senator ALEXANDER. But how many instances are there like that and do you know or have you made any estimate of how much it would cost the taxpayer if that recommendation were adopted?

Mr. SILVER. I don't have quantitative information, but I think we could probably find you a couple of cases to submit to the record of this hearing where that, in fact, occurred. But I think the larger issue is trust. People——

Senator ALEXANDER. Oh, I understand that. But, does this involve 10 people or 10,000 people? And is it a matter of billions of dollars or a few dollars? Or maybe you could tell me who could help me answer that question, if you can't?

Mr. SILVER. I think the advocacy groups for claimants will have a litany of cases where people are near-terminal death, or a handful of cases where it has actually occurred.

Senator ALEXANDER. Thank you.

Dr. Melius, do you have anything to add to that?

Dr. MELIUS. Yes, I would add to that, that I think there are a significant number. I'm not sure 10,000, but certainly because of the number of people with cancer that are processed through the program, both through Subtitle B and E. And, I think it's also important to remember that people's medical bills are not paid, only from the time that they file the claims. So, going back in time, we all know problems that people have with health insurance and the high cost of medical care. So it's been a significant financial burdens on many of these families, because of having to take care of the medical care, let alone, loss of income and so forth. So, I think it's very worthwhile to look into that recommendation.

Senator ALEXANDER. Thank you.

Senator BINGAMAN. Senator Murray.

Senator MURRAY. Yes.

Dr. Melius, I would assume that even though each SEC petition is unique, that the Board's review process is very similar. Can you, based on your experience as an Advisory Board member, explain that process to us?

Dr. MELIUS. Yes. The process starts when the Board receives the evaluation from NIOSH.

The first process, the petition is reviewed by NIOSH. If it's accepted, they then do their evaluation, normally within 180 days of receiving it. That evaluation then goes to the Board. The Board, through our contractor, outside contractor, then has that contractor review NIOSH's evaluation, identify issues, technical issues that need further review and follow up. And then we'll make recommendations to the Board, technically, should this be accepted or not, or whatever.

Particularly in some of the larger sites, such as Hanford and Rocky Flats and so forth that are so complex, that process will identify a number of different technical issues and that process can go back and forth for quite a while, because if the Board's contractor finds a problem, a technical problem, NIOSH then responds. And that may be by starting all over again or developing a new method for doing those dose reconstructions.

That's currently what's underway with the Hanford site.

Senator MURRAY. Right. Can you tell me why the Board chose to investigate further before making a decision on the SEC petition for Hanford?

Dr. MELIUS. Yes. I believe, the reasons for that were, one, the Board had received that report, the most recent one, just shortly before our last meeting. So there had not been adequate time.

Second, to review it, based on some of the work that we had already done at the Board—and I should add that I'm the chair of the work group of the Board that's reviewing that.

Senator MURRAY. Right.

Dr. MELIUS. We also thought that we needed to, we would not be accepting of that recommendation from NIOSH on its face value, particularly that their recommendation, even though it recommended parts, some groups be added to the Special Exposure Cohort, a large part of that, the rest of the petition would not be by NIOSH's recommendation. And we thought that that part of it needed much further scrutiny, based on what we already knew about problems with some of the methods that NIOSH was proposing that they use.

What we're in the process of now, is essentially trying to evaluate whether we can stage the process for reviewing the NIOSH's evaluation report, so that the parts where they have recommended that a group be added to the Special Exposure Cohort, can be dealt with first, and obviously in a more timely fashion. And then, the other parts where they have made the recommendation that the petition not be granted, we look at in more detail and that will inevitably take a longer period of time.

Senator MURRAY. Can you share with us your opinion about some of the unique conditions at Hanford that the Advisory Board ought to be considering as they move forward?

Dr. MELIUS. Yes. I think there are several things. One is the complexity of the site and what we've heard from people that have worked out there about conditions, particularly conditions where people were exposed to very high amounts of radiation and were not being monitored at the time.

We've heard people describe to us that they were given 30 seconds to go in and do a job, and if they didn't have that job done in 30 seconds, they had to leave the area because the radiation was so great. And they were not monitored during that process. And so, getting that information is not possible.

Second, the Board has, in our review of information from the Hanford site, serious questions about the adequacy of the records in the past, for the monitoring of neutron exposures, which is a significant part of the exposure for people at that facility. And frankly, NIOSH has questions about that also, because they're re-looking at their methods for doing dose reconstructions, based on the available records, particularly on neutron exposures.

Senator MURRAY. And if you don't have the records, then?——

Dr. MELIUS. Then we recommend that it be added to the Special Exposure Cohort, that NIOSH's evaluation would be rejected.

Senator MURRAY. OK. All right.

Thank you very much, Mr. Chairman.

Senator BINGAMAN. Senator Allard.

Senator ALLARD. Mr. Chairman, thank you.

In October—I want to direct this to Dr. Melius—the Rocky Mountain News, a newspaper in Denver, wrote an article where they talked about an internal audit by the White House Advisory Board on Radiation Workers' Health's auditor. This included listening to what they call a close-out session. Apparently this is part of the routine, part of the claims process.

According to this article, two out of three claims that were audited, the information was not considered in the process. In fact, they pointed out to one case, where a decision was already made before that part of the interview was done.

I've always been one to advocate that we use science and that we follow the process routinely. And I'm concerned that it appears, that maybe in these cases, it may not have been followed. Do you view this as a problem that's pretty pervasive within the interview, and within the claims process, or is it systemic?

Dr. MELIUS. Senator, yes. I believe that that is a pervasive problem. It has to do with, one, the nature of the initial interview and the way that that's conducted. The lack of asking questions about specific facilities and processes at facilities. It also continues throughout the process, including the close-out interview process that you referred to. I think it's a serious shortcoming and I think it needs to be addressed. In my testimony, I've included some recommendations, both for improving the interview process, as well as setting up a quality control process to make sure that people are listened to.

And in the case of the close-out interview, part of the problem is determining whether or not the information was from the interviewer, and was then properly communicated to the person doing the dose reconstruction. Those are different people. And whether there's adequate follow up. And something happened in that process, and the Board is still—and our contractor is still in the process of reviewing what that is, trying to determine how pervasive that particular issue is.

But I tend to think it's very serious. It's something we hear repeatedly, claimants complaining about their information, and all the problems in the DOE facilities with missing records, and lack of recording of exposures, and so forth. It's very, very important that claimants and their survivors have the opportunity to put this information forward and that it be evaluated and followed up on.

Senator ALLARD. Thank you for your comments. We'll closely review your testimony and see in detail what you've recommended. We have a vote that's just up. I'd just like to make a closing comment that I understand the Advisory Board's set up to take up this issue in their December meeting. I encourage further discussion and review of this issue by the Presidential Advisory Board and other parties involved.

Thank you.

Senator BINGAMAN. Thank you both for your testimony. I think it's been useful. We got some good recommendations from you that we can try to follow up on.

So, that will conclude our hearing today.

[Additional material follows.]

ADDITIONAL MATERIAL

PREPARED STATEMENT OF SENATOR ENZI

Thank you for holding this important hearing, Mr. Chairman. I want to welcome all of the witnesses today, most especially Senator Reid. We very much appreciate everyone's time and willingness to participate in today's hearing.

The Energy Employees Occupational Injury Compensation Program, known as EEOICPA, was created 7 years ago through a bipartisan effort here in the Senate. The program's mission is to provide compensation for certain nuclear workers who have become ill as a result of radiation and other toxic occupational exposures while working in federally funded nuclear programs. EEOICPA provides lump-sum compensation and health benefits to eligible employees as well as lump-sum compensation to certain survivors if the worker is deceased.

It is entirely appropriate for this committee to conduct oversight of the EEOICPA program's administration from the perspective of the claimant. We need to know if the program is working as Congress intended. As most of us know, EEOICPA duties are distributed among three separate cabinet Departments—Energy, Labor, and Health and Human Services—and also involve an independent Board and an Ombudsman. This complex administration has required some readjustment over the years as it became apparent that claimants were not all as well-served as possible. Like the original legislation, the changes made in 2004 were again accomplished through bipartisan efforts. That approach served the beneficiaries of the legislation well, and will hopefully serve as a guide for any future actions.

How well is EEOICPA working? Certainly, improvements have been made, and there is no question that many Americans have benefited. Thirty-four thousand four hundred and nine individuals have received over $3 billion in payments under EEOICPA to date. Of those, about 25,000 are actual employees, and the rest are survivors. In my home State of Wyoming, more than $6.5 million has been distributed to just over 100 claimants.

Is the program sufficiently claimant friendly? There are obviously many ways to measure an answer. The scientists who do the very technical work of determining what each employee may have been exposed to have recommended compensation for a far greater percentage of applicants than was initially projected. Over the program's short existence there has been a great deal of valid concern about the backlog of claims bottle-necked at a number of different administrative junctions and agencies. As I'm sure our first panel of witnesses will attest, that backlog has been greatly reduced and I hope we will congratulate them for that.

Additionally, the Department of Labor has established 11 Resource Centers to assist workers and their families apply for benefits under the Program. The Department has strategically located those Resource centers in areas likely to have a large number of potential claimants. The centers also assist potential claimants over the phone so geography is not an impediment. Four EEOCIPA claim processing district offices are also geographically distributed across the country to provide claimants direct access to their claim

processors. The Department of Labor has also taken its show on the road. The Division of Energy Employee Occupational Illness Compensation ["DEEOIC"] has held over 150 Town Hall Meetings, and sponsored some 27 Traveling Resource Centers to explain the program and provide filing information and assistance. DEEOIC has also hosted over 80 site exposure matrix roundtables designed as a resource for claimants to connect any occupational exposures to disease experience.

Finally, the EEOICPA program has an independent Ombudsman who provides assistance to claimants under the program's Part E, which targets contractor employees. The EEOICPA Ombudsman has also reached out to provide assistance to claimants by holding a half dozen special Town Hall Meetings to assist filers. Earlier this month, the Senate passed legislation extending the EEOICPA Ombudsman authorization another 5 years to 2012.

Today we will be able to look beyond the numbers such as the number of claimants served, the percentages compensated, and the amount of assistance and resources available. I look forward to hearing more from today's witnesses about the program's "claimant friendliness." If there are problems, let's get them out in the open and start discussing solutions.

PREPARD STATEMENT OF SENATOR HARKIN

Mr. Chairman, I thank Senator Bingaman for chairing this critical hearing, and salute him for his long steadfast dedication to this issue. This has been a long hard road for all of us involved, but a longer and harder road for these workers, who by definition are very sick and have to fight not just the illnesses they contracted in service to our country but a complex and sometimes very confusing program.

My involvement with compensating sick workers began with a letter I received from a sick worker, Bob Anderson, back in 1997. As a part of a community college course, he was supposed to write a letter to a Member of Congress. He decided to write about something very close to his heart—I am sick, and I think it is because I used to work for a contractor here in Iowa that manufactured nuclear weapons. At that time, very few people knew the Iowa Army Ammunition Plant was ever even involved in such manufacturing.

Over the years, we worked to get the veil of secrecy lifted. We worked to find lost records and create a program to compensate these sick workers. Two years ago, NIOSH approved the designation of a Special Exposure Cohort for many of these sick workers. It is hard to describe the feeling of winning such a long, hard-fought victory.

To date, over $2 billion in claims and medical expenses have been paid under part B, and thanks in large part to the program amendments in 2004, almost $850 million has been paid under Part E. But far more claims have been denied or are still waiting for approval due to lack of information.

We have a long way to go. This is an incredibly complicated issue, involving difficult scientific analysis of dose reconstruction, patterns of illness, even material questions of employment histories. There is no question in my mind that the Special Exposure Cohort designation process takes too long or that it is too difficult.

Claimants have to deal with a very difficult process, marked by complicated paperwork, burdensome burden of proof requirements, and problems contacting the right agency and getting answers that are understandable. There is a lack of uniformity in the application of the law with regard to proof of employment and proof of disease.

At the outset of this hearing, I would say to the involved agencies that in helping us to compensate these sick workers that we remain focused on the best available science and exposure information. The cost of doing what we need to do to be fair to these folks is going to be significant. But, you cannot and should never put a price on justice. We, as a society, owe these workers for giving up their health and sometimes their lives to do what was asked of them by their government.

I think there are a number of things that Congress can do to improve communication between agencies, make the process more transparent, improve the SEC process, and make it easier for claimants to navigate the process. I hope to work together with my colleagues to do so in the 110th Congress, and look forward to the information and cooperation that this panel has to offer to us in that process.

PREPARED STATEMENT OF SENATOR CLINTON

Mr. Chairman, thank you for allowing me to submit testimony on this important matter.

When Congress passed EEOICPA in 2000 and then amended the statute in 2004, the law promised timely compensation to former workers in the Nation's nuclear weapons complex. Unfortunately, the program has been implemented in a way that falls far short of this goal. One of the major failings of the program has been the dose reconstruction process, which has been too reliant on inadequate information. I have seen this in detail at the Bethlehem Steel site in Lackawanna, NY.

Like workers at many other sites around New York and our country, Bethlehem Steel employees were essential to our cold war effort. These people literally built our nuclear arsenal in the decades after World War II and helped us eventually to win the cold war. In the late 1940s and early 1950s, the government contracted with Bethlehem Steel, which is in Buffalo, to roll uranium at their plant. But the workers weren't told what they were working with. They weren't provided with safety equipment to shield them from radiation. They weren't monitored to determine how much radiation they were being exposed to. But if you talk to the workers who I've spent time talking to, or to their spouses, or their children of workers who have passed on, you know that this was hot, dirty work. Uranium dust was thick in the air. They breathed it. They coated their hands with it. They would sit on areas in the plant to eat lunch and put their lunch down and the uranium dust would be on their sandwiches. They ingested it. It covered their work clothes.

So it's not surprising that many of them got cancer. And for decades they petitioned their government for help and have been denied. Congress finally did the right thing in 2000 with the act that you are examining in this hearing today. This was a landmark law and it was such in the tradition of our country to acknowledge the

wrong that the government had done, and promise timely compensation to workers and their survivors.

As workers and their survivors brought forward information, it became clear that there were great disparities between the site profile that NIOSH had developed and actual conditions at the plant. As a result, I became convinced that reconstructing doses for Bethlehem Steel workers is an impossible task. It shouldn't be surprising. After all, we're talking about work that occurred in secret 50 years ago and before modern radiation monitoring and safety practices had been developed.

When Congress passed the law in 2000, it recognized that reconstructing doses would be impossible in many cases, and that's why the special cohort process was included in the law. The statute to my reading is pretty clear. It says that if the government doesn't have the information to reconstruct doses then workers should be given the benefit of the doubt and their claims should be paid. More precisely it provides for classes of workers to be added to a special exposure cohort if it's not feasible to estimate the radiation doses with sufficient accuracy, and there is reasonable likelihood that the radiation dose may have endangered their health. I don't think we could have a clearer case than Bethlehem Steel, where not a single worker wore a radiation badge; where the only radiation measurements we have are a handful of air samples; where the workers rolled uranium and where many of them contracted radiation-related cancers.

Unfortunately, this Administration has implemented EEOICPA in a way that refuses to give workers the benefit of the doubt in cases where the available data makes dose reconstruction impossible or highly unreliable. The Bethlehem Steel workers have a petition pending with the Advisory Board, and I have urged them to approve it. But I believe Congress needs to amend the Special Exposure Cohort process in light of the way the law is being implemented. To that end, I have introduced legislation with Senator Schumer, and I urge the committee to consider this legislation as you move forward after this hearing.

PREPARED STATEMENT OF SENATOR OBAMA

Senators Kennedy and Enzi, let me thank and commend you for holding this very important hearing to assess whether the men and women who developed our Nation's nuclear weapons program are being treated fairly by the Federal Government as they apply for benefits under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA).

As you are well aware, there remain many questions as to whether those Americans who qualify for benefits under EEOICPA are having their claims processed fairly and in a timely manner.

I first began hearing about the plight of Illinois' former nuclear weapons workers shortly after taking office in 2005. I have since met with many workers and their families, and my office has written dozens of letters to, and held numerous meetings with, the agencies responsible for implementation of this program. We have sought to clarify agency processes and decisions, encourage program changes to benefit claimants, and secure thousands of pages of classified and previously unreleased documents in an effort to

bring greater understanding to the often secret and undocumented work these claimants performed.

To date, hundreds of Illinois' former nuclear weapons workers have received compensation under EEOICPA, although my advocacy has been for the most part limited to helping workers of the Dow Chemical Corporation (Madison), General Steel Industries (Granite City), Blockson Chemical (Joliet) and Allied Chemical (Metropolis, IL) plants, which have the majority of claims among Illinois' 29 EEOICPA-covered sites.

My advocacy for these nuclear weapons workers has at times required me to give voice to the frustrations claimants have had with the agencies who administer EEOICPA, including Health and Human Services (HHS), the National Institute for Occupational Safety and Health (NIOSH), Department of Labor (DOL), and the Department of Energy (DOE). Although I recognize the very difficult and complex task these agencies have, improvements are necessary to EEOICPA because legitimate questions have been raised about the program's fairness and efficiency.

For the most part, the frustrations expressed to me by claimants and their families are related to the timeliness with which claims are processed and the fact that many do not have confidence in the scientific decisions on which their claims are based.

With regard to timeliness, dozens, if not hundreds, of workers at the former Dow Chemical Plant in Madison, IL still have not received a final decision on their claim. Most of the claimants began filing their claims in 2001, nearly 7 years ago. Currently, most of these claims are still undergoing the process of dose reconstruction, as performed by NIOSH.

Six years is far too long to wait for a claim to be decided in any compensation program. In this case, when we are dealing with the men and women who performed the dangerous work required to develop our Nation's nuclear weapons program and who now are elderly and sick, getting decisions made in a reasonable timeframe is critical to this compensation program's credibility.

I encourage the committee to explore legislation which would impose a statutory deadline for when a final decision must be rendered on each claim. For example, the committee should explore the feasibility of imposing a 12-month time limit on the dose reconstruction process. Under this time limit, the Department of Labor would have 90 days to forward a claim to NIOSH, which would then have 365 days to complete a dose reconstruction and return the claim to the DOL, which would then have 90 days to review NIOSH's recommendation and provide a final decision to the claimant.

Under such a time constraint, the entire EEOICPA claims process would be completed within 18 months. If the Department of Labor and NIOSH could not process a claim within this time period, the claim should be paid immediately. In those cases where a delay is caused by the claimant, usually because they are trying to obtain medical records or verification of their employment at an EEOICPA-covered facility, the claim should be re-opened and the time limit extended as needed.

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With respect to concerns that final claims decisions have not been made through a process in which claimants can have confidence, I offer the following recommendations:

1. The committee should investigate a legislative remedy which will provide compensation to claimants on either a sliding scale based on Probability of Causation (POC) scores or based on years of employment.

As of September 27, 2007, 11,911 claims had a completed dose reconstruction (DR) with a POC less than 50 percent, with 4,427 claims having a POC between 30 percent and 49 percent. Given the numerous questions that exist about how the dose reconstruction process is conducted—including questions about the weight DOL and NIOSH give to worker testimony and the recent finding that DOL claims examiners often ignore worker testimony provided in DOL worker interviews—the POC scores assigned to claims should be viewed with a healthy amount of skepticism.

Congress could act to compensate claims as a percentage of the POC score. For example, claimants with a score of 42 percent would receive 42 percent of $150,000. As of September 27, 2007, 1,875 cases had a POC score between 40 and 49 percent. It is difficult to understand from a scientific basis how one claimant with a POC score of 50.1 percent deserves $150,000 but a claimant with a score of 49 percent deserves no compensation at all. As Advisory Board on Radiation and Worker Health member and occupational pulmonary physician Dr. James Lockey noted in a June 4, 2007 letter to me:

> "This all or nothing dividing line will continue to be a source of contention and should be revisited. The process should not put workers in conflict with each other or with the various Federal agencies and Congress who are trying to be responsive."

Congress could also examine whether compensating workers based on years of employment would be a more credible compensation method. As Dr. Lockey explains:

> "It is my suggestion that a simpler and less contentious award compensation process for nuclear production workers be based on the years employed in the nuclear production industry within potential radiation exposure job tasks. The monetary award should be based on cumulative years worked and executed in a linear fashion."

2. The Congress should act to address the lack of transparency with which claimant decisions are made. For example, any information used to deny a claim or an SEC petition should be made automatically available to the claimant and or petitioner. Additionally, if the final decision about whether a claim should be approved or denied rests on classified information that cannot be made available to the claimant, there should be a presumption in favor of approving the claim.

After recently listening in on the "close-out" interviews of claimants as conducted by Department of Labor personnel, the Advisory Board auditor, Sanford, Cohen and Associates (SC&A), issued a report which says in part that auditors found "potential for inconsistency and arbitrariness in how concerns are researched, commu-

nicated and resolved." This finding supports concerns I have had for some time that testimony given by workers as to the conditions they worked under, the chemicals, metals or other substances they worked with, processes used, or safety measures implemented, is not factored into decisions by Labor or NIOSH staff in a systematic and transparent way.

3. Numerous concerns still exist about the Advisory Board on Radiation and Worker Health, including the balance of member perspectives on the Board. The legislation establishing EEOICPA addresses this issue:

> "The President shall make appointments to the Board in consultation with organizations with expertise on worker issues in order to ensure that the membership of the Board reflects a balance of scientific, medical and worker perspectives."

Unfortunately, the President has ignored congressional intent on this subject, and questions remain as to whether or not the board is stacked against claimants. Currently, there are 12 members of the Advisory Board; six members have a science perspective, four maintain a worker perspective and only two represent a medical perspective.

An October 2007 GAO report entitled "Energy Employees Compensation—Actions to Promote Contract Oversight, Transparency of Labor's Involvement, and Independence of Advisory Board Could Strengthen Program," notes in part:

> The process by which board members are appointed is also not clearly established or uniform, presenting a challenge to the advisory board's independence . . . neither the act nor the executive order implementing the act specifies criteria for nominating and selecting board members . . . members of Congress and the claimant community have raised concerns about potential influence by Labor and NIOSH to reduce the number of worker representatives in order to shape the outcome of the board's decisions on SEC petitions. These concerns were precipitated by internal Labor correspondence in 2005 that characterized the advisory board as being essentially a worker advocacy organization and noted that a change in membership would be critical to counteracting the pressure to add more classes to the SEC.

I urge the committee to consider potential legislative remedies to correct the imbalance on the Advisory Board and the resulting perception that this imbalance affects the fairness of the Board's decisions.

In summary, I applaud the committee for holding a hearing on this important issue and believe that additional hearings would be useful to determine what steps we can take in the Congress to improve the efficiency, transparency, and credibility of EEOICPA. Thank you.

PREPARED STATEMENT OF SENATOR SCHUMER

Thank you for the opportunity to address this issue. I appreciate the opportunity to share my views on the administration of EEOICPA. This is an incredibly important program, and I am disappointed that for many claimants it has not lived up to the man-

date which Congress gave the Administration: that all claims must be decided in a claimant-friendly manner. I am hopeful there will be changes that will make the administration of this program more efficient, timely, and just.

The Energy Employees Occupational Illness Compensation Program Act (EEOICPA) was created by Congress to compensate cold war-era laborers who became sick as a result of their work at nuclear production facilities directly managed or financed by the Federal Government. This law was designed to bring justice to these unsung heroes and find the swiftest, fairest way to speed compensation to victims of radiation exposure.

The administration of this program has a clear record—it is not being administered in a claimant-friendly manner. It's time that this administration step up to the plate and bring these cold war heroes the compensation they deserve.

I have spoken with and received correspondence from many former workers and the spouses and children of former workers who were employed at such facilities all across New York State. They have told me heartbreaking stories of debilitating cancers, and have expressed frustration over the program's seemingly endless bureaucracy, and delays. In many cases, the application process has lasted 5, 6, even 7 years—often beyond the litespans of the claimants and their spouses. This excessive review period and bureaucratic process confound the law's purpose and its spirit.

The administration spends unwarranted amounts of time reviewing applications and arriving at decisions on site profiles. Dose reconstructions are frequently based on faulty or insufficient data and special exposure cohort status claims are locked in seemingly endless review. Sick and dying workers are denied their due compensation because of these problems in calculation and administration.

This program is delaying justice for an increasingly aging population of cold war heroes. It mires decent people in a bureaucracy that is insensitive to the pain and hardship these claimants have already suffered for their country.

I have several kind suggestions for putting the program back on track.

First, expedite dose reconstructions and bring answers to the families of cold war heroes. so compensation can be delivered with all due speed. The lengthy waits for compensation are unacceptable, particularly as aging claimants and their spouses are, sadly, already beginning to pass away. In these cases, and particularly under Part E of the EEOICPA, justice deferred is justice never conferred. Delay and bureaucracy are enemies of a claimant-friendly process, and more efforts must be made to streamline the review process and speed compensation.

Second, promptly expand the number of classes to the Special Exposure Cohort (SEC). This designation was created by Congress because of deficiencies in data for sites where records are insufficient to document the full breadth of radiation exposure workers have experienced. Ill workers and their hopeful families are being denied compensation for their sacrifices not because they aren't deserving of justice, but because the administration of the program is inaccurately assessing the probability of the government's re-

sponsibility for their diseases. Since there is no way to verify whether comparisons between similar plant sites are accurate, there is no way to determine whether proxy data is claimant-friendly or not, and therefore cannot meet the legal requirement under EEOICPA that the dose reconstructions are also claimant-friendly. It is the clear intent of the EEOICPA to permit Special Exposure Cohort (SEC) status in these situations, and all evidence points to administration practices that deny and delay the determination of this status at sites where the lack of evidence should give every benefit of the doubt to claimants who worked at these sites. That tendency should be reversed immediately so justice can be assured.

Every effort must be made by the administration to pare down bureaucratic delays and missteps that are denying compensation to our cold war heroes. These men and women need their government's assistance, and their families need to be assured that their country acknowledges their sacrifices and is deeply grateful to them. Thank you for your consideration.

PREPARED STATEMENT OF SENATOR SALAZAR

Thank you, Chairman Kennedy and Ranking Member Enzi, for holding this hearing today. The issue of whether the Energy Employee Occupational Injury Compensation Program (EEOICP) is claimant friendly is critically important and timely. Reports from the Office of the Ombudsman for the EEOICP Part E, and past congressional hearings have revealed considerable claimant dissatisfaction with the Program and a concerted effort to deny compensation to many workers. I hope that the evidence collected through this hearing will inspire swift congressional action to grant compensation to our cold war heroes and enact necessary Program reforms. Although I am not a member of this committee, I look forward to working with you to ensure that these goals are met.

The Energy Employee Occupational Injury Compensation Program Act (EEIOCPA) was enacted to compensate American workers (and certain survivors) who put their health and life on the line to serve our Nation during the cold war. These brave men and women worked in laboratories and factories in the United States building nuclear weapons that led to the fall of the former Soviet Union. Sadly, many of these cold war Veterans were exposed to toxic and carcinogenic properties that made them very sick.

But while thousands of workers are successfully applying and receiving benefits, too many face incredible obstacles as they try to demonstrate that they qualify for benefits. Some workers may not be able to prove that their cancers were caused by their work in nuclear weapons facilities, whether due to the lack of records or other problems that make it difficult or impossible to determine the dose of radiation they received. To protect these workers, Congress designated a Special Exposure Cohort (SEC), a provision in the EEOICPA to enable workers to receive benefits if they suffered from one of the specified cancers known to be linked to radiation exposure.

From 1951 to 1988, approximately 23,000 individuals worked at the Rocky Flats plant located 16 miles Northwest of Denver, Colorado. Throughout the years, many Rocky Flats workers processed

plutonium, one of the most dangerous substances that exists, and crafted it into triggers for atomic weapons. Through five decades, Rocky Flats workers were exposed to toxic and carcinogenic properties, including beryllium, radiation and other hazards.

On February 15, 2005, Rocky Flats workers filed a SEC petition to receive compensation. After 3 years of patiently and diligently making their case to the Federal Government, the Advisory Board on Radiation and Worker Health made its recommendation on June 12, 2007. The Board recommended SEC inclusion for only those plutonium workers employed at Rocky Flats from January 1, 1959 to December 31, 1966. In other words, the Board voted (6 to 4) to exclude from the SEC *all* pre-1966 workers other than plutonium workers and *all* post-1966 Rocky Flats workers. This should limit the number of Rocky Flats workers who receive benefits to approximately 2,000 to 3,000 workers. Secretary Leavitt recently approved the Board's recommendation.

The men and women who worked at Rocky Flats served a critical role in a program deemed essential to our national security by a succession of Presidents and Congresses. Several of these workers have died without receiving the healthcare or compensation they deserve. In fact, a combination of missing records and bureaucratic red tape has prevented many Rocky Flats workers from accessing benefits. Our government failed these workers when they maintained shoddy, inaccurate, and incomplete records.

Furthermore, after years of research and review, many questions remain about the reliability of data and the ability of National Institute of Occupational Safety and Health to accurately measure exposure to toxic materials. On March 1, 2007, I introduced S. 729, *The Rocky Flats Special Exposure Cohort Act.* S. 729 would extend SEC status to workers employed by the Department of Energy or its contractors at Rocky Flats according to the stringent requirements of the act.

With the SEC designation, a Rocky Flats worker suffering from 1 of the 22 listed cancers can receive benefits despite the inadequate records maintained by the Department of Energy and its contractors. I urge this Congress to act now to stop impeding Rocky Flats workers' ability to receive the compensation they deserve. The cold war veterans of Rocky Flats have waited long enough.

In conclusion, I am eager to work with members of this committee to develop and implement much needed reforms to the EEOICP. I also urge the Senate to swiftly take up and pass S. 729 to grant compensation to Rocky Flats who put their health and life on the line for the Nation.

PREPARED STATEMENT OF REPRESENTATIVE MARK UDALL

Chairman Kennedy and members of the committee, thank you for allowing me to submit this statement for the record of this important oversight hearing.

The Energy Employees Occupational Injury Compensation Program Act (EEOICPA) is very important for Colorado because thousands of Coloradans worked at Rocky Flats—a nuclear-weapons site near Denver that has now been cleaned up and closed—as well as some other sites covered by the law. Many of them developed

beryllium disease, cancer, or other ailments from being exposed to beryllium, radiation, or other hazards.

Since coming to Congress in 1999, I have worked with our colleagues on both sides of the aisle and both ends of the Capitol to enact a compensation program for them and others with similar problems from their work at other sites in the nuclear-weapons complex.

After the Clinton administration, led by Secretary of Energy Bill Richardson, reversed the position of previous Administrations—that claims for compensation were to be resisted—and asked Congress to establish a compensation program, a number of us introduced legislation to accomplish that objective, and was among those who strongly supported the EEOICPA provisions that were finally enacted into law.

However, shortly thereafter a new Administration—that of our current President—came into office. And, regrettably, it has not been as strong an advocate of the program as its predecessor.

To put it bluntly, the Bush administration inherited this program, and since then they have both mismanaged it and tried to undermine it.

The part run by the Department of Energy (DOE) was so mismanaged that a Republican-controlled Congress took it away from DOE and assigned it to the Labor Department (which already ran the rest of the program) in 2004. Before that transfer, DOE had spent over $90 million for administrative costs in 4 years, but only about 5 percent of the over 25,000 claims filed had been completely processed.

In connection with that transfer, to make the program more claimant-friendly, the Defense Authorization Act of 2005 created the Office of the Ombudsman for a 3-year period to provide information to claimants and potential claimants on the benefits available under the new Part E of the Act.

Under that legislation, the independent Ombudsman was assigned four primary responsibilities:

- to provide information to claimants, potential claimants, and other interested parties on the benefits available under the new Part E and the requirements and procedures applicable to the provision of those benefits;
- to make recommendations to the Secretary of Labor regarding the location of resource centers across the country, which claimants can contact for assistance in the acceptance and development of Part E claims;
- to issue an Annual Report to Congress detailing the number and type of complaints, grievances and requests for assistance received by the Office of the Ombudsman that year, and an assessment of the most common difficulties encountered by claimants and potential claimants during that year; and
- to make recommendations for improving the administration of Part E of EEOICPA.

The authorization for the Ombudsman's office expired on October 1, the start of the current fiscal year. During the markup of the Defense Authorization bill for fiscal year 2009 in the House's Armed Services Committee, I won adoption of an amendment to extend the office and expand its authority so it can more fully serve

claimants. And during its floor debate, the Senate adopted an amendment by Senator Levin, on behalf of Senator Kennedy, to extend the Ombudsman's authority.

Along with other members of the Armed Services Committee, I expect to be a conferee on the authorization bill, and will work to have the conference report provide for keeping the Ombudsman in business.

And, with Representative Tom Udall of New Mexico and several others—including Representatives Slaughter of New York, Wamp of Tennessee, Whitfield of Kentucky, and Hastings of Washington—I am sponsoring legislation (H.R. 2255) to make the office permanent and to expand its duties.

Under our bill, the Ombudsman would be directed:

1. To assist individuals in making claims;

2. To provide information on the benefits available and on the requirements and procedures applicable to the provision of such benefits;

3. To act as an advocate in appropriate instances, as determined by the Ombudsman;

4. To make recommendations to the Secretary of Labor regarding the location of resource centers for the acceptance and development of claims for benefits; and

5. To carry out such other duties as the Secretary of Labor shall specify.

The bill would also authorize the Ombudsman to inform Congress regarding changes in administrative practices mitigate difficulties encountered by claimants and potential legislative changes which may be appropriate to mitigate such difficulties. And it would authorize the Ombudsman to hire or contract for supplies or services, including the services of experts in relevant disciplines, including health physics, medicine, industrial hygiene, and toxicology, as the Ombudsman may consider appropriate.

However, as I mentioned, right now the Ombudsman's office is somewhat in legal limbo because its formal authorization has lapsed.

I understand the Labor Department is prepared to make arrangements to enable it to continue its work, at least for a while, while Congress considers the question of its future status. I hope that happens, and I hope that the Labor Department and the rest of the Administration will work with us to assure its continuation with additional authority. But I am somewhat wary, because of past experiences.

I say that because there is strong evidence to suggest that not very long ago the Labor Department led an effort to distort an important part of the overall EEOICPA program—the provision for adding additional workers to the Special Exposure Cohort through an unbiased, science-based review of petitions.

Fortunately, that behind-the-scenes effort was exposed when the press, and then the House's Judiciary Committee, came into possession of an OMB "passback" document that revealed what was afoot.

As I read it, the document showed that the Administration seemed ready to put concern about dollars above concern for sick cold war veterans.

And that was not just my interpretation. Representative Hostettler, the Republican from Indiana who chaired the Judiciary Committee's subcommittee that looked into the matter, said that the OMB document "sets out a plan to . . . base SEC status approvals on budget concerns rather than the scientific basis mandated by law." In my opinion, he hit the nail right on the head.

Since that public rebuke, the Administration has repeatedly stated that it has abandoned the idea of cost-containment as an approach to implementing the law.

I hope that is true, but I have to say that I remain concerned that the Administration is prepared to treat the nuclear-weapons workers like the wounded veterans at Walter Reed. Nobody in the Defense Department planned to inflict harm on wounded soldiers—the problem was negligence and indifference—and, at its best, the OMB document suggested the same with regard to at least part, and perhaps all, of the EEOICPA program. But while Secretary Gates insisted on accountability for the Army's failures at Walter Reed, I am not convinced that the Administration will insist on the same degree of accountability when it comes to EEOICPA. So, Mr. Chairman, I think that the attitude of Congress—including this committee—should be the same as President Reagan's attitude toward agreements with the Soviets—trust, maybe, but verify for sure.

Accordingly, I applaud you for holding this hearing. I will carefully review the testimony that will be presented and look forward to working with you and our colleagues in the Congress, to take whatever steps are needed—including further legislation to the extent that is necessary or desirable—to improve this very important compensation program.

In that connection, I want to call your attention to legislation pending in this body that specifically deals with the case of the people who worked at Rocky Flats.

It is S. 729, the Rocky Flats Special Exposure Cohort Act. Introduced by Senator Salazar, it is the Senate companion to H.R. 904, my bill of the same name. Both bills would amend the compensation act so as to include as members of the Special Exposure Cohort all those who were employed at Rocky Flats by DOE or a DOE contractor or subcontractor for an aggregate of at least 250 work days before January 1, 2006.

The result would be to help provide the act's benefits to any of those workers who contracted a radiation-linked cancer specified in the act after beginning employment at Rocky Flats.

As you know, before a worker who is suffering from a covered cancer but not included in the special exposure cohort can receive benefits, it must be established that the cancer is as likely as not to have resulted from on-the-job exposure to radiation. That sounds like a reasonable requirement—and it would be appropriate for Rocky Flats if we had adequate documentation of radiation exposures for the years when it was producing nuclear-weapons components as well as for the more recent time when DOE and its contractors have been working to clean it up and prepare it for closure. However, in fact there were serious shortcomings in the monitoring of Rocky Flats workers' radiation exposures and in the necessary recordkeeping—to say nothing of the slowness of the current

administrative process for making the required determinations concerning links between exposure and employment.

So there is a risk that a significant number of Rocky Flats workers who should be able to benefit from the act will not obtain its benefits in a timely manner or will be denied them entirely. Our legislation would prevent this miscarriage of justice, by recognizing that Rocky Flats workers have been plagued by the same kinds of administrative problems that entangled workers at some other locations—problems that were addressed through inclusion in the act of the provisions related to the "Special Exposure Cohort."

The Rocky Flats workers have sought to be added to the cohort through the petition process provided for in the act—the same process that would have been the target of the cost-containment program the Administration clearly contemplated but now says it has renounced. Their petition was strongly supported by the entire Colorado delegation, in both the Senate and the House of Representatives, as well as by Governor Ritter. Regrettably, however, it was approved only in small part, leaving most of the afflicted former Rocky Flats workers still confronting the daunting challenge of trying to obtain compensation through the labyrinthine process that you will be exploring at today's hearing.

Secretary Leavitt's decision on the Rocky Flats petition is under administrative appeal, but regardless of the outcome of that appeal there remains the question that is the subject of the hearing—Is the Program Claimant Friendly for Our Cold War Heroes?

My answer is that it is not—or at least not sufficiently. I look forward to learning what your witnesses will have to say and what this committee will conclude after hearing their testimony.

In conclusion, I would just reiterate what you already know, Mr. Chairman and members of the committee—this compensation program is not just about money. It is about the government's honor and the honor of our country. The nuclear-weapons workers served America well, and honor demands that they be well served in return.

Thank you for the opportunity to submit this statement.

PREPARED STATEMENT OF MARK AYERS, PRESIDENT, THE BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL–CIO, WASHINGTON, DC.

Mr. Chairman and members of the committee, on behalf of the Building and Construction Trades Department, AFL–CIO, its affiliated unions and their members, we are seeking your assistance in redressing a wrong that continues to plague current and former construction workers employed at Department of Energy (DOE) nuclear facilities.

Many of these workers have, through no fault of their own, been denied benefits under the Energy Employees Occupational Illness Compensation Program Act.

A central issue for these workers is the lack or inadequacy of radiological exposure records for their period of employment at the facilities. It was the responsibility of DOE and its contractors to require and maintain such records. Now many workers with radiological cancers find themselves in the untenable position of trying to prove radiation exposure when the necessary records either do not exist or are inadequate.

Although the law provides for a system to address this issue, the administrative process is slow, complicated, cumbersome and often subject to an insensitive bureaucracy at the Departments of Labor (DOL) and Health and Human Services (DHHS). Both the DOL Ombudsman as well as an independent study commissioned by NIOSH documents many of these failures.

The numbers speak for themselves. Out of a total of 85,676 claims filed for radiological cancer compensation under "Part B" of the program, only 20,362 have been paid. The Department of Labor has rejected nearly 70 percent of the claims.

While there is no question that the system and the bureaucracy can be improved, the fundamental problem is the law itself.

Subpart B of EEOICPA provides Federal compensation of $150,000 (plus future medical benefits) for radiological cancers, beryllium disease, and silicosis. Subpart B is administered by DOL but requires the DHHS/NIOSH to:

(1) Conduct individual dose reconstructions for every claim to determine if radiation could be the cause of the illness claimed by the worker; or

(2) Absent a dose reconstruction, determine whether the claimant should be included in a Special Exposure Cohort (SEC) which presumes that radiation caused 1 or more of 22 different cancers, and pays claimants if they have one of these cancers.

Dose reconstructions are very difficult, if not impossible, where exposure records are either missing or inadequate. Under current law and regulations, the burden of proof lies with the claimant, rather than the government, even though the government was responsible in the first place for producing and maintaining the records.

Special Exposure Cohort: Congress recognized that many workers employed in nuclear weapons facilities were either unmonitored or inadequately monitored for occupational exposure to ionizing radiation and therefore faced an insurmountable hurdle of establishing their radiation dose to prove their claim for cancer. Moreover, there was ample evidence that radiation exposure records were missing, incomplete, unreliable or altered. This is particularly true for construction workers.

The act therefore created "Special Exposure Cohorts (SEC)" by which, claimants from SEC sites are not subject to dose reconstruction requirements and are presumed to have had the radiation dosage that caused their compensable cancer.

By legislative mandate, the original act designated four sites as SEC: three Gaseous Diffusion Plants (Portsmouth, Paducah, Oak Ridge) and the Amchitka Island Test Site. All the workers at these sites had to prove was (1) they worked at the sites for a specified period of time and (2) they had one of the compensable Part B diseases.

In addition, the act included provisions that allowed claimants to petition to become members of an SEC. Unfortunately, the petition process is slow, cumbersome and hamstrung by bureaucratic inertia. Moreover, there is evidence of political tampering in an effort to retard the petition process.[1]

Thus far only 22 such petitions have been approved covering a limited number of workers, and many of these were the result of specific legislative initiatives and congressional pressure.

We believe that the time has come for the Congress to remedy this unfair situation by amending the act to fix the problems inherent in the SEC process. The same presumptions that underlie the original SECs, should apply to all otherwise qualified workers.

Specifically, we recommend that Subpart B be amended to streamline and simplify the SEC process by providing:

(a) Workers who meet the following criteria would be automatically included in an SEC if they were (1) engaged in covered employment in a covered facility; (2) had a covered illness; (3) worked more than 250 days in a covered facility; and (4) their radiation monitoring records cover less than 75 percent of the employment period.

(b) For workers not covered under the above, the process of petitioning for inclusion in the SEC should be simplified by: (1) setting a deadline of 90 days for DHHS/NIOSH to review petitions; (2) simplifying and reducing the need for review of DHHS/NIOSH decisions by the DHHS/NIOSH Advisory Committee; (3) establishing that NIOSH may incorporate groups of workers into the SEC so that this does not have to be done on a worker-by-worker basis; (4) applying the same decisionmaking used for the Gaseous Diffusion Plants that currently are included in the SEC.

The effect of section (a) will be to include within the statutory SEC determination workers from major nuclear weapons facilities such as Savannah River, Hanford, Los Alamos, Oak Ridge (in addition to the already included Gaseous Diffusion Plant Workers) and the Nevada Test Site.

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[1] *See* House Committee on Judiciary, Subcommittee on Immigration, Border Security & Claims, United States House of Representatives, 109th Congress, "The Energy Employee Occupational Illness Compensation Program Act: Are We Fulfilling the Promise We Made to These Veterans of the Cold War when We Created the Program."

In addition, we believe that there should be five technical amendments designed to: (1) cover certain illnesses linked to hazardous exposures that are peculiar to DOE but that were not covered in the act; (2) pay for diagnostic evaluation by experts in occupational medicine where a health problem appears to be linked to DOE work; (3) provide additional independent assistance to claimants so that the process becomes less burdensome; and (4) cover certain subcontractor employees that were inexplicably excluded from the original legislation and (5) change the date of eligibility for benefits from the current requirement, which is the date when the application for compensation is filed to the date when the covered illness was diagnosed.

The EEOICPA was enacted with the best of intentions. For those workers and their families fortunate enough to qualify for benefits, it has been a godsend. However, far too many who are no less deserving have been left out and denied. The amendments we have suggested would go far in redressing this egregious situation for those who, in many cases, gave their lives to protect this country during, the darkest days of the cold war.

Towards that end we urge this committee to consider our request for this proposed legislation.

PREPARED STATEMENT OF SYLVIA DODSON, KNOXVILLE, TN

I would like to submit a statement for the hearing. I would like to request that when there is no living spouse that the surviving children be compensated under Part E. Our father died of lung cancer and bone cancer and cancer in every organ of his body. He worked 41 years at Oak Ridge K–25. His many years of exposures to toxins and chemicals and uranium took his life at the age of 63. Compensating his surviving children is the least our government should do. No one can put a price on a person's life. We know these years of exposure are what shortened his life and caused his death. Compensating the surviving children would help give us some sort of closure of the horrible memories of pain and suffering he went through.

Thank you, surviving daughter's of J.O. Dodson—Sylvia Dodson and Bettye Kaye Richeson.

PREPARED STATEMENT OF DEB JERRISON, YELLOW SPRINGS, OH*

In 2005 my mother asked me to help her with her EEOICPA claim as the process had become too complicated for her. Over the last 2½ years, I have helped other claimants as a volunteer. During this time I have noticed many problems and feel that EEOICPA has moved very far from the original intent of Congress. Here are some of my observations.

1. **The OCAS–1 form, which all claimants must sign to have their dose reconstruction progress from NIOSH to DOL, is missing statutory language.** When a claimant requested a time extension to look for further information she was told this was not possible and that if she did not sign the OCAS–1 within the time limit her claim would be administratively closed. DOL told her that the only option was to close her claim and reopen it if she found more information. This was inappropriate and inaccurate. The statute clearly states the steps to be followed for claimants to be allowed a time extension. This language needs to be on the OCAS–1 form so claimants know of this option.

2. **Notice given by NIOSH for signing the OCAS–1 may not be long enough.** One claimant received a letter dated Oct. 3 from NIOSH which stated that they needed a signed copy of the OCAS–1 in their office by Oct. 17 or the claim would be administratively closed. This claim had been put on hold while the claimant waited on Freedom of Information Act (FOIA) requests and she is still waiting for the information. Previously her claim had been erroneously administratively closed. This is very distressing to claimants.

3. **The program is cumbersome, complicated, and difficult for claimants to navigate, particularly in the case of the elderly, ill, or disabled.** Claimants give up on the program because they can not understand it or do not have the energy or special knowledge needed to pursue their claims. The Resource Centers are a great idea, but are very limited in what help they can offer claimants. Congress set a 2 percent fee cap on the initial claim to protect claimants from unethical attorneys, but instead this has severely limited the number of attorneys or advocates

*Submitted on Behalf of: Deb Jerison; Janet B. Goode; Carolyn Jones; David Goode; Jim Goode; Bob Neff; Virginia Hudgens; Jeff Hudgens; Melissa Webb; Fred Radwanski, PE., Boulder City, Nevada; Eric Parker, Former USW Union President and Local Coordinator for Mound/WHPP; and Paige Gibson, Former Health and Safety Officer for USW, Nurse and Local Coordinator for Mound/WHPP.

available to help claimants. The Part E ombudsman's office is helpful. Part B now has an ombudsman, Denise Brock, who can help claimants but she is overwhelmed. The need for claimant assistance is great. Even a simple claim takes many hours of work and special knowledge to bring to fruition. More help for claimants is needed and the process needs to be simplified.

4. **Although delays in processing claims can be a problem, a more insidious problem is that NIOSH and DOL are not investigating the claims thoroughly enough.** Claims are often rushed through, relying on incomplete monitoring records and mathematical calculations. NIOSH does not talk to co-workers, investigate the papers from a site, or look for additional information on an individual worker. NIOSH prefers mathematical calculations to hard evidence on an individual worker. If a worker was a production worker doing the same thing with the same materials as other production workers this may work. But it does not work at all for research personnel, material control workers or others who worked in small groups or alone.

One claimant worked with every chemical that came into Mound Laboratory. She opened all containers and measured all chemicals out into packaging. She had been given no mask or protective clothing to wear. She contracted two cancers, one of which was a rare soft tissue cancer. DOL was provided with an extensive list of materials she handled, the buildings and dates she handled them and documentation linking the chemicals to her cancer from reliable chemical databases including HazMap and still turned down the claim. She died in April 2007, minus one breast, one lung and one leg. Because her claim was not approved and her medical insurance was exhausted, her family is left with huge medical bills.

One claimant provided NIOSH with documentation from personal records, written in the 1950s, showing he had analyzed all radioactive and non-radioactive materials that came into Mound. NIOSH would not give this evidence credence and told the claimant they would only use official monitoring records.

It is difficult, if not impossible, to get NIOSH to give someone dose for radionuclides that are not listed as being 1 of the 12 radionuclides NIOSH lists as being at Mound, even with proof from Mound's own documents. When questioned about this, NIOSH told the claimant that the worker's dosimetry badge would have picked up all radiation and he was covered this way. This would only be true if the radionuclide gave off the same types of radiation that the worker was being monitored for.

5. **Burden of Proof is a problem for many people.** Many workers died long ago. Hospitals and doctor's offices have closed. It is very hard to locate old medical records. Older records were written to a different standard than current records. As Chronic Beryllium disease (CBD) was not widely known for years, it may not be recognizable in older records, even with the pre-1993 criteria. A DOL claims examiner told one claimant that since the claimant's specific medical finding could be interpreted either for his cancer or CBD, DOL would interpret it as the cancer instead of CBD, although the finding was "consistent with CBD." The worker had died in 1960.

Another issue is the records that DOE was supposed to maintain. One claimant had all 11 of her husband's chest X rays destroyed by DOE a year and a half *after* she opened her claim. These X rays would have provided invaluable information on whether or not the worker had CBD. We've all heard of the 435 boxes of Mound records that were buried in a radioactive waste dump. In these boxes were laboratory notebooks that one claimant needed to assist with her claim. As mentioned before, bioassay and dosimetry records are missing.

Claimants who are looking for DOE documents to assist with their claims do not have access to these documents. Although NIOSH has access, they will not look for the documents, even when claimants request specific documents. Claimants can and do file Freedom of Information Act (FOIA) requests, but because the records are in such disarray, the cost to claimants is often prohibitive. One claimant just received a cost estimate of $45 an hour for Legacy Management to search for documents needed for a claim, with no assurance that the records were in the boxes to be searched. Another claimant was given an estimate of over $30,000 for a list of chemicals she handled while doing her job. There is no archive of documents that claimants have access to. Records at the NARA Federal Records Center in Dayton Ohio are not available to claimants, although records at other NARA centers are. So if claimants cannot afford the exorbitant search fees charged for FOIA requests they cannot get the information they need.

6. **The playing field is unlevel.** DOL/NIOSH has access to all the records and claimants have very limited access as described above.

Part E claimants do not have access to the Site Exposure Matrix (SEM) that DOL uses to determine whether or not to pay a claim. Although there is a public version

of the SEM online, it is merely a list of chemicals used somewhere at the site at some time since the site opened. This means claimants must remember the exact name of the chemicals they used, what building or location they were in at the time and what the date was. (Try remembering the name or chemical composition of the dish detergent you used 20 years ago!) When a claimant advocate complained about this to a DOL employee recently she was told that if claimants had access to the same information DOL did they could "tailor" their claims to the information. The converse is true; because claimants do not have access to the Part E matrices, there is no way to monitor to make sure DOL is using the material appropriately.

There also needs to be a clear statement from DOL on what proof, studies, etc., are needed to create an acceptable link between an illness and a chemical exposure and the steps a claimant should use to make the link available to claimants. I have been told that DOL can only use NIH's Haz-Map data base. While this is a good starting point, it does not list all occupational illnesses. This can, and has, caused valid claims to go unpaid.

7. **NIOSH's method of overestimating probability of causation (POC) causes confusion and agony to claimants.** I have been told that NIOSH overestimates probability of causation on claims that they feel will come in at under 45 percent. If they feel a claim will come in above 45 percent or the claimant has two or more cancers they will do an actual estimate. This is a problem because it is very upsetting to claimants to have a POC of 44 percent for one cancer and then when the claimant gets an additional cancer the POC drops to 20 percent for both cancers. Claimants do not understand this and feel that NIOSH is playing with the numbers.

It also makes it very hard for a person working the claim because it is impossible to know how many more rem you need to find or where the claim really stands. NIOSH is unable, or unwilling, to give claimants a firm, or ballpark, number of how many rem it would take to put the claim at the 50 percent or better mark.

The draft dose reconstructions do not give the claimants the POC, although NIOSH must compute this to determine whether a claim hits the 50 percent mark. If a claimant wants to know how close he is to the magic 50 percent he has to input numbers in tiny print at the end of the draft dose reconstruction into NIOSH's online IREP program. This is beyond many claimants.

Also, the POC seems to jump all over the place from one dose reconstruction to the next. One claimant had a first dose reconstruction that came in with a POC around 18 percent with 44 rem. Several things changed and the second dose reconstruction came in at 44.7 percent with 126 rem. The third dose reconstruction had a POC of 38 percent with 159 rem. How could the POC drop as the rem increased? When questioned about this, NIOSH said the second dose reconstruction was in error. This does not generate trust in NIOSH's calculations and methods.

8. **Some of the decisions NIOSH makes are more arbitrary and capricious than scientifically based.** NIOSH will not supply claimants with written documentation or bases for decisions. One claimant sent a report to NIOSH stating the worker had gotten a piece of hot stainless steel in his eye. NIOSH told the claimant that since the word "hot" was not in quotation marks this meant heat rather than radioactivity. When questioned, NIOSH referred the claimant to OTIB–0022 "Guidance on Wound Modeling for Internal Dose Reconstruction," which did not address this issue. When the claimant directly asked for what this decision was based on NIOSH declined to answer. When the claimant supplied NIOSH with an official document, MLM–1996 (OP) "Design Features of Mound Laboratory's Medical Decontamination Facility," which stated that Mound could not measure radioactivity in a wound at the time of the incident, NIOSH did not respond.

NIOSH was, and still may be, converting reps to rems incorrectly. In the 1950s neutron dose was at times reported in reps. When a claimant asked about this, NIOSH stated there was a one to one conversion between reps and rems. The 1950 AEC publication, "Control of Radiation Hazards in the Atomic Energy Program," states that for neutrons and protons one rep is the equivalent of 10 rem. The claimant supplied NIOSH with a copy of the document but NIOSH did not respond to questions on whether this has been changed. No changes were made to the dose reconstruction in question.

NIOSH revises incident reports written years ago to say what they think they should have said rather than what was reported. A claimant sent NIOSH an incident report which stated, "his next move was to replace the gauntlets, thereby preventing *further* contamination of the lab." NIOSH says the incident report is incorrect and should have said, "to prevent further *potential* contamination." Because of this they gave the claimant no dose for the radionuclide in question.

The computer program that NIOSH uses to determine tritium dose measurements at Mound gives tritium measurements prior to the date that tritium was monitored at the site. This mistake can actually help claimants, as it allows for missed dose.

At Mound, Health Physics logbooks report many air reversals and ventilation problems in glove boxes and buildings which spread radiation through the building. When a claimant sent copies of these to NIOSH she was told that these would not have added any dose to the claim since the worker was not mentioned by name. When she asked that the logbooks be used for all applicable claimants who were referenced by name, NIOSH said that they could not do this because of a "privacy issue."

NIOSH denies that there are gaps in the dosimetry/bioassay record although claimants remember bioassay samples being taken whose results are not in the record. Since NIOSH does not have records, it does not assign dose. This results in inaccurate dose reconstructions. A claimant clearly remembered an incident in 1950 when her husband was sent home from work and remained off for several days. His dosimetry records indicate that he did not work in his lab for 11 days following the incident. While off work, the worker drove urine and feces samples to Mound each day and was sent home, presumably because the samples were too hot to allow his return. MLM–177 "Monthly Health Information Report" outlines Mound's policy on exposure for this time period. It states that a worker with a count higher than 12c/min/50ml is removed from his job and put to work in an area where the possibility of exposure is more remote, or he is barred from the operating area altogether. It says nothing of what would cause a person to be removed from the site for several days. There is no surviving record of these samples.

When there are gaps in the workers' monitoring records, not only do they not receive dose for the materials they were working with but they also do not receive "missed dose." One worker was a research physicist at Mound in the early years. His monitoring records are missing at least 24 months of bioassay/dosimeter readings. The papers he wrote during this time indicate he was working with radionuclides. NIOSH states that he was obviously working only with non-radioactive materials at this time and will not assign dose or missed dose for this time which results in an inaccurate dose reconstruction.

9. **Can GAO investigate how much money is being spent on salaries to administer this program as opposed to how much is being spent to compensate workers?** The percentage of claimants who are being paid compared to the number of cases filed is abysmally low. DOL and NIOSH keep adding additional staff to administer the program. It seems like it would be a better idea to spend the money paying claimants, since this was the intent of the law, rather than paying staff.

PREPARED STATEMENT OF DANIEL YAEGER, WORKER, U.S. DEPARTMENT OF ENERGY FERNALD SITE

I worked at the U.S. Department of Energy's Fernald site from 1987 until 2005. In 2006, I was diagnosed with kidney cancer. Kidney cancer is a recognized radiation cancer. I am now struggling with the financial expense of this disease. I filed a claim with the U.S. Department of Labor (DOL) under the Energy Employee Occupational Illness Compensation Program Act (EEOICPA) in 2006. The claim was referred to the National Institute for Occupational Safety & Health (NIOSH) for a dose reconstruction. NIOSH issued a dose reconstruction report that concluded the radiation dose I received from working at Fernald was not sufficient to be "at least as likely as not" the cause of my kidney cancer. To be eligible for benefits, the dose reconstruction has to find that a worker received a radiation dose above the causation threshold of "at least as likely as not" (51 percent).

NIOSH does not have complete and accurate monitoring records for the Fernald site to reliably conduct a dose reconstruction. As a result NIOSH primarily based its dose reconstruction on models and what it represents are claimant favorable assumptions. NIOSH doesn't want to acknowledge its lack of monitoring records because it doesn't want Fernald workers to be classified as a Special Exposure Cohort (SEC). Workers in a SEC who incur a specified cancer, qualify for compensation without the completion of a radiation dose reconstruction or determination of the probability of causation. The act allows for the classification as an SEC if there is inadequate information to estimate a worker's radiation dose. A petition was filed with the DOL to designate certain Fernald workers as a SEC. NIOSH has reviewed the Fernald SEC petition and has recommended that it be denied. The matter is now pending before the Advisory Board on Radiation and Worker Health. If this petition were approved, I would be eligible for benefits.

Over 20 other sites already have classes of workers that are included in a SEC. Fernald does not have any more reliable monitoring data than these sites and its workers should not be treated differently. Many NIOSH officials who are responsible for the dose reconstruction program worked at Fernald and were responsible

for radiological safety and monitoring. There is a real conflict of interest for those who were responsible for the Fernald monitoring program to be the same individuals who are responsible for reviewing a petition that cites deficiencies in the program. This conflict cannot be avoided by contracting the task to a third party. In its evaluation of the Fernald SEC petition, NIOSH concluded there is sufficient and accurate monitoring data to estimate doses for Fernald workers. As discussed below, this is simply not the case. I urge you to represent Fernald workers interest in the SEC petition process.

The dose reconstruction process has become a job welfare program for bureaucrats. Taxpayers don't need to fund a large bureaucracy to engage in junk science to deny benefits to ill workers. The money funding this bureaucracy should be channeled to the workers. The dose reconstruction is fundamentally flawed and inefficient and should not be the basis for determining whether to help ill workers. This expensive dose reconstruction program should be eliminated and all workers should be treated as a cohort. Specifically, if a DOE worker develops a specified radiation illness, the worker should be eligible for benefits. Additionally, medical insurance should be part of the benefits provided to ill workers similar to what is provided to retirees. Ill workers face great difficulties in obtaining and affording medical coverage. I urge you to sponsor legislation that would make these changes. The savings from eliminating the expensive dose reconstruction program should make this legislation revenue neutral.

Thank you for your help and assistance.

RESPONSE TO QUESTIONS OF SENATORS KENNEDY, MURRAY, BROWN, AND REID BY MALCOM D. NELSON

SENATOR KENNEDY

Question 1a. Many claimants mistrust the government's motives in administering EEOICPA. They fear that the government would rather deny, than grant, claims. The 2006 Annual Report by your office found that claimants have difficulty finding appropriate medical experts on their own, yet they are hesitant to use the Department of Labor Division of Energy Employees Occupational Illness Compensation Program medical staff because of concern that they will not review claimant's files objectively. How do you think the Department of Labor can increase claimants' trust in its medical staff?

Answer 1a. To offset the mistrust (hesitation) that many claimants have with respect to utilizing medical experts provided by DEEOIC, claimants ought to be afforded more information concerning this process.

Question 1b. Do you think that providing contact information for qualified medical professionals who are not affiliated with the Department would help claimants find the medical resources they need?

Answer 1b. Providing claimants with contact information for qualified medical professionals who have no affiliation with the Department would assist claimants in finding the medicare resources that they need.

Question 2. Dr. Silver noted in his testimony that the Advisory Board on Radiation and Worker Health provides important independent oversight for Part B claimants and suggests a similar mechanism be created for Part E. Do you think this is a good idea? Why or why not? Dr. Silver's other suggestions include giving grants to claimant advocacy groups and qualified medical experts in order to assist claimants from rural areas who have great trouble getting skilled assistance. Is this a good idea? Why or why not?

Answer 2. Because my responsibilities involve Part E, rather than Part B, I only have a cursory appreciation of the operations of the Advisory Board on Radiation and Worker Health. Thus, I do not have a sufficient basis with which to answer whether a similar mechanism should be created for Part E.

As our annual report and my written testimony indicate, the Office of the Ombudsman receives requests for assistance from claimants who find the claims process challenging and burdensome. Some of these claimants would benefit from advocacy to assist them with developing their claims and providing medical and legal experts when necessary. Nevertheless, before responding to the specific question of whether it is a good idea to give grants to claimant advocacy groups and qualified medical experts I would prefer to have the opportunity to review the specifics of such a proposal.

Question 3. By all accounts, the Part E Ombudsman program has been a success in providing help and guidance for Part E claimants. Is there any reason the ombudsman's authority should not be expanded to cover Part B?

Answer 3. This decision clearly rests with Congress. Therefore, the Office of the Ombudsman will not take a position on this matter.

Question 4a. Do you think the Ombudsman's office needs more power?

Answer 4a. As the Office is currently structured, we have successfully performed our mission. However, access to claimant records which are in the possession of the Program Agency would enhance the efficiency of the Ombudsman's Office and would save claimants both time and money,

Question 4b. In addition to giving basic advice, should you be entrusted with an advocacy role when you see a languishing need?

Answer 4b. Based on my experience as Ombudsman for Part E of EEOICPA, it is clear that many of the claimants who contact this Office want an advocate who is on their side and one who will zealously represent their interests, as would a private attorney. Because many claimants face difficulty finding attorneys/representatives who are willing to represent them, some have indicated that they would like the Ombudsman to assume a more forceful role.

In general, however, an Ombudsman's office has three essential characteristics: independence; impartiality; and confidentiality. See Coalition of Federal Ombudsmen and Federal Interagency ADR Working Group Steering Committee, *A Guide for Federal Employee Ombuds*, Section C (May 2006); American Bar Association, *Standards for the Establishment and Operation of Ombuds Offices* (February 2004). Consequently, if the office were entrusted with an advocacy role, I would envision that advocacy remaining consistent with the responsibility to remain independent, impartial and confidential.

SENATOR MURRAY

Question 1. Does the office of the ombudsman have the resources it needs to assist in providing a timely "claimant friendly" process? If not, what is needed?

Answer 1. With our existing resources, the Office of the Ombudsman has managed to carry out its mission. Nevertheless, the uncertainty that surrounded the status of the office, which had been scheduled by statute to sunset and was continued by the Secretary of Labor administratively in October 2007 pending congressional action to continue the Office legislatively, impacted the Office in a number of ways, including our ability to engage in long term planning. The extension of the Office should provide us with needed consistency, and will better enable us to maintain the level of staffing necessary to expeditiously serve claimants.

However, as we currently operate, if a claimant wants us to review the documents associated with their claim, the claimant either has to provide us with the relevant documents or (in cases where the claimant does not have the relevant documents) contact their claims examiner to obtain copies, and then provide the copies to us. This is often time consuming and sometimes results in claimants incurring the costs for mailing, faxing, duplicating, etc. It would be faster and easier for claimants if the Office of the Ombudsman could obtain these documents directly from the Program Agency.

Question 2. Should the Ombudsman's authority be expanded to include Part B claims? What resources would be needed to make this necessary?

Answer 2. The Office of the Ombudsman is committed to serving claimants and potential claimants, and consequently, will carry out its mission consistent with the authority granted by Congress. Because the decision as to whether to expand the Ombudsman's authority to include Part B claims rests with Congress, the Office of the Ombudsman will not take a position on this matter.

However, there are sonic issues, including some very technical medical and radiation issues that are unique to Part B. If the authority of this Office is expanded to include Part B claims, it will be necessary to ensure that the Office has the capabilities to address these unique Part B issues.

Question 3. In your written testimony you state that some applicants are frustrated with differing eligibility requirements and constraints in Part "B" and "E." In your opinion would it make the claims process more efficient for claimants and those reviewing claims to have these requirements standardized?

Answer 3. Standardizing the eligibility requirements of Parts B and E will not necessarily make the process more efficient. Claimants frustrated by the different

eligibility requirements and constraints under Part B and Part E generally see this as an issue of "fairness," rather than an issue of efficiency.

Question 4. Under Part "E" the burden to establish entitlement of benefits is on the claimant who, as you and others have testified, is often elderly or suffering from debilitating diseases. It is concerning that some of the most deserving are not receiving benefits due to their inability to navigate the claims process or afford a personal attorney to do so for them. What other options do these people have?

Answer 4. For many claimants the only option is to navigate the system on their own. In fairness, the Department of Labor does offer assistance to claimants in proving their claims. However, many claimants believe that the offered assistance is not sufficient, or does not go far enough. Moreover, many claimants regard this as an adversarial process and thus do not trust the government (DOE/DOL) to aggressively pursue their claim for benefits.

There are some lay representatives who have experience with this Program, and in some areas of the country there are groups, often former workers, who will assist claimants, however there are not very many.

The Office of the Ombudsman can offer advice and suggestions, but we do not have the personnel (or the authority) to engage in the "footwork," i.e., the research, the writing of letters, the contacting of the claims examiners, that is often necessary to support a favorable claim. Thus, in the end, the only option available for many claimants is to navigate the system on their own or with the assistance of family members.

SENATOR BROWN

Question 1. In terms of the program budget, what is the relative ratio of the cost of administering the program versus the amount of money paid out in compensation?

Answer 1. The Office of the Ombudsman does not possess the information needed to answer this question. The Office of the Ombudsman is an independent office, originally created by Congress in 2004 and continued by the Secretary of Labor administratively in 2007, with a three-fold mission:

- to provide information to claimants and potential claimants on the benefits available under Part E and the requirements and procedures applicable to the provision of such benefits;
- to make recommendations to the Secretary of Labor regarding the location of resource centers; and
- to issue an Annual Report to Congress no later than February 15 of each year detailing the number and type of complaints, grievances and requests for assistance received by the Office and an assessment of the most common difficulties encountered by claimants and potential claimants.

In light of our mission, we do not possess the information required to answer this question.

Question 2. Can you speak to the OMB memorandum sent to the Department of Labor regarding the "cost containment options?" According to the GAO, one of the proposed cost containment options was to, "require administration clearance of special exposure cohort determination." Can you speak to this memo and if any of its five recommendations have been implemented in any small way?

Answer 2. No, I am not in a position to speak to this memo. The issues surrounding this memo arose prior to my appointment as Ombudsman. Although, as stated in the Office's Annual Report for 2006, this Office received inquiries from claimants regarding this memo, the Office's knowledge of this memo is limited to what we read in newspapers and other publicly available sources.

Question 3. What is the current backlog of cases? At the current rate, and if no more cases are opened, how long would it take to offer a ruling on all the current cases?

What is the backlog in Ohio? Is there a plan to address the backlog?

Is there an overabundance of backlog cases specific to any one Ohio site, in other words, is there any one site in Ohio that has much larger backlog than another?

Answer 3. While the Program Office provides statistics addressing the claims filed at various sites, see *http://www.dol.gov/esa/regs/compliance/owcp/eeoip/Statistics/WebPages*, I do not have sufficient information, such as how long these claims have been pending, with which to fully evaluate backlogs.

Question 4. Can you outline the subcontracting process, including what criteria are used to determine whether to subcontract, when and how contractors are evaluated? Please also include as an attachment to your answers a Request for Proposal.

Answer 4. The Office of the Ombudsman does not have any contracts or subcontracts. Moreover, to my knowledge, the Office of the Ombudsman has not utilized any contracts or subcontracts (other than purchase orders for furniture, equipment, etc., for the Office, which do not appear to be the concern of your question).

Question 5. Currently, are there any NIOSH officials that previously worked for or did work related to the Fernald site in Ohio? Have any of those NIOSH officials who worked at Fernald been a part of any discussion concerning the Fernald SEC petition, the Fernald Site Profile, or a Fernald worker's dose reconstruction?

Answer 5. The Office of the Ombudsman does not possess the information needed to address this question. (Part B-related information.)

SENATOR REID

Question 1a. In your testimony, you note that the Office of the Ombudsman does not have investigatory authority and it cannot advocate on an individual claimant's behalf. You also state that a lack of legal representation and expert assistance "exacerbates" the problems with establishing their entitlement to Part E compensation.

If you, as the Claimant Ombudsman for the Department of Labor were given the authority to act as an advocate on behalf of these claimants individually, how would you exercise this authority? Specifically, please identify what you could do for them, how you would do it, and how claimants would benefit.

If you were given investigatory authority and the power to act as a claimant's advocate, how would it change the speed of the process?

Answer 1a. A full discussion on how the Office of the Ombudsman would exercise the authority to advocate on behalf of claimants requires additional research and thought, and would depend on the specifics of the "authority" given to the Office. Nevertheless, here are some general concepts:

- Traditionally, an ombudsman not only works for the resolution of particular issues, but also, where appropriate, makes recommendations for the improvement of the general administration of the entity they serve. Thus, overall the Ombudsman would advocate for fairness in the process.
- Consistent with the "traditional" role of an Ombudsman, the Office would not substitute as someone's lawyer, representative, or counselor.
- The Office would provide information, advice and assistance to claimants.
- The Office would evaluate claims objectively and would advocate for change or relief when the facts support the claim.

The question also asks how claimants would benefit from granting the Ombudsman the authority to act as an advocate. In my opinion, even though the Office would not act as a private attorney, claimants in general would benefit from the "fruits" of our advocacy.

Question 1b. If you were given investigatory authority and the power to act as a claimant's advocate, how would it change the speed of the process?

Answer 1b. Nevertheless, a mere grant of investigatory authority would not change the overall speed of the process. While probing from the Ombudsman may, in certain instances, prompt action on a case, I do not believe that merely having investigatory authority will change the speed of the process.

Question 2a. Your testimony discusses complaints from claimants that they cannot fully establish their claims because the relevant records have been either lost or destroyed by the DOE contractor by whom they were employed. You also state that follow through on locating or finding replacements for missing evidence is beyond the capabilities of the claimant.

What could the Ombudsman's office do about this were it to have additional powers to act as an advocate for individual claimants?

Answer. 2a. Quite honestly, in situations where relevant records have been lost or destroyed there is very little that anyone can do. When confronted with such situations, the Ombudsman's office tries to offer suggestions on where to look for relevant evidence, and of course, we will continue to do that. However, where records do not exist, either because they are lost, were never kept, or destroyed, there really is not much that anyone can do to recreate or find these records.

Question 2b. What specifically in the law or DOL's rules make a claimant responsible for producing evidence, which is typically in the possession of the Department

of Energy or a contractor, in order to establish the claimant's entitlement to compensation under Part E?

Answer 2b. **42 U.S.C. Section 7384v. Assistance for claimants and potential claimants specifies the program's responsibility to assist claimants in securing evidence. The provisions provides:**

(a) ASSISTANCE FOR CLAIMANTS—The President shall, upon the receipt of a request for assistance from a claimant under the compensation program, provide assistance to the claimant in connection with the claim, including—

(1) assistance in securing medical testing and diagnostic services necessary to establish the existence of a covered beryllium illness, chronic silicosis, or cancer; and

(2) such other assistance as may be required to develop facts pertinent to the claim.

(b) ASSISTANCE FOR POTENTIAL CLAIMANTS.—The President shall take appropriate actions to inform and assist covered employees who are potential claimants under the compensation program, and other potential claimants under the compensation program, of the availability of compensation under the compensation program, including actions to—

(1) ensure the ready availability, in paper and electronic format, of forms necessary for making claims;

(2) provide such covered employees and other potential claimants with information and other support necessary for making claims, including—

(A) medical protocols for medical testing and diagnosis to establish the existence of a covered beryllium illness, chronic silicosis, or cancer; and

(B) lists of vendors approved for providing laboratory services related to such medical testing and diagnosis; and

(3) provide such additional assistance to such covered employees and other potential claimants as may be required for the development of facts pertinent to a claim.

Claimant's burden to establish entitlement is outlined at 42 U.S.C. Section 7385s–4(c) (governing living worker claimants) which provides in pertinent part that:

(c) OTHER CASES.—(1) In any other case, a Department of Energy contractor employee shall be determined for purposes of this part to have contracted a covered illness through exposure at a Department of Energy facility if—

A. it is at least as likely as not that exposure to a toxic substance at a Department of Energy facility was a significant factor in aggravating, contributing to, or causing the illness; and

B. it is at least as likely as not that the exposure to such toxic substance was related to employment at a Department of Energy facility.

42 U.S.C. Section 7385s–2(a) (governing survivor claimants) which provides in pertinent part that:

CATEGORIES OF COMPENSATION.—The amount of contractor employee compensation under this part for the survivor of a covered DOE contractor employee shall be determined as follows:

(1) CATEGORY ONE.—The survivor shall receive the amount of $125,000, if the Secretary determines that—

(A) the employee would have been entitled to compensation under section 7385s–4 for a covered illness; and

(B) it is at least as likely as not that exposure to a toxic substance at a Department of Energy facility was a significant factor in aggravating, contributing to, or causing the death of such employee.

(2) CATEGORY TWO.—The survivor shall receive the amount of $150,000, if paragraph (1) applies to the employee and the Secretary also determines that there was an aggregate period of not less than 10 years, before the employee attained normal retirement age (for purposes of the Social Security Act), during which, as the result of any covered illness contracted by that employee through exposure to a toxic substance at a Department of Energy facility, the employee's annual wage did not exceed 50 percent of the average annual wage of that employee, as determined under section 7385s–2(a)(2)(A)(ii).

(3) CATEGORY THREE.—The survivor shall receive the amount of $175,000, if paragraph (1) applies to the employee and the Secretary also determines that there was an aggregate period of not less than 20 years, before the employee attained normal retirement age (for purposes of the Social Security Act), during which, as the result of any covered illness contracted by that employee through exposure to a toxic substance at a Department of Energy facility, the employee's annual wage did not exceed 50 percent of the average annual wage of that employee, as determined under section 7385s–2(a)(2)(A)(ii).

In addition, the relevant provision of the implementing regulations is:
Section 30.111 (20 CFR Section 30.111) which provides that:

a. Except where otherwise provided in the act and these regulations, the claimant bears the burden of proving by a preponderance of the evidence the existence of each and every criterion necessary to establish eligibility under any compensable claim category set forth in § 30.110. Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true. Subject to the exceptions expressly provided in the act and regulations in this part, the claimant also bears the burden of providing to OWCP all written medical documentation, contemporaneous records, or other records and documents necessary to establish any and all criteria for benefits set forth in these regulations.

b. In the event that the claim lacks required information or supporting documentation, OWCP will notify the claimant of the deficiencies and provide him or her an opportunity for correction of the deficiencies.

c. Written affidavits or declarations, subject to penalty for perjury, by the employee, survivor or any other person, will be accepted as evidence of employment history and survivor relationship for purposes of establishing and may be relied on in determining whether a claim meets the requirements of the act for benefits if, and only if, such person attests that due diligence was used to obtain records in support of the claim, but that no records exist.

d. A claimant will not be entitled to any presumption otherwise provided for in these regulations if substantial evidence exists that rebuts the existence of the fact that is the subject of the presumption. Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. When such evidence exists, the claimant shall be notified and afforded the opportunity to submit additional written medical documentation or records.

Subsections 30.112, 113, and 114 of the regulations further discuss the burden of proof and the kinds of evidence necessary to meet those burdens. Taken together, these regulations make it clear that the burden of proof ultimately has been placed on the claimant.

RESPONSE TO QUESTIONS OF SENATOR MURRAY BY JAMES MELIUS, M.D., DRPH

Question 1. In your testimony, you expressed concern about the timeliness of the SEC petition evaluation process. In your experience, what is the average time it takes to complete a petition review by the Advisory Board?

Answer 1. The time taken by the Advisory Board to conduct a SEC petition review depends on the technical effort required to complete that review. For sites where NIOSH recommends that the petition be granted, the review time is usually short. Often, the petition review and recommendation can be completed at the meeting where the petition evaluation report is presented by NIOSH.

If the situation is more complex and NIOSH is not recommending that the petition be granted (or large portions of the petition be granted), the Board's review can last much longer. In these cases, the Board requests that our contractor conduct a detailed technical review of issues relevant to the petition, and then the Board and its contractor work with NIOSH to resolve any disagreements between our evaluation of these technical issues and that of NIOSH (or its contractors). Resolution of these issues is time consuming and can often take several months, particularly for the large DOE facilities.

Question 2. Do Advisory Board members get information from DOE sufficiently in advance of meetings so that they can review the information before having to make a decision? In your opinion, should all parties, including the petitioners (workers and survivors who filed the petition) get all reports prior to the Advisory Board meeting?

Do petitioners regularly have the opportunity to address the Board and ask questions about the Board's decisionmaking process?

Answer 2. In general, DOE and NIOSH have tried to get information to the Board before meetings in order for the Board to have sufficient time to review the information before taking action. In many instances, the Board has refused to take actions without adequate time to review documents and other necessary information. However, there have been significant difficulties for the petitioners in obtaining information prior to the Board taking action on an issue. Many of the documents generated by the Board's contractor or by NIOSH and utilized by the Board for decisionmaking are required to undergo Privacy Act review before they are released to the general public (some also require security review). This review can delay the availability of the documents for several weeks or longer. Recently, the Board has worked with NIOSH to establish a mechanism to better track documents needing review and to

ensure that these documents are transmitted to the petitioners and other interested parties prior to any action by the Board.

In general, the petitioners have the opportunity to address the Board and ask questions at any meeting where their petition is being considered. They are also invited to participate in most work group meetings where their petition is being discussed. However, many of these meetings take place at sites distant from the DOE facility in question, and the petitioners often have to participate by conference call. The complex technical nature of the discussions also makes participation in these meetings difficult. The petitioners often represent diverse work groups at a facility, and the petitioners are often not knowledgeable about other parts of the facility or processes being discussed at a particular meeting. The process would be greatly improved by more active outreach to the petitioners and other interested parties including efforts to obtain more input on the specific technical issues under consideration in the review of that petition.

Question 3. In your written testimony you expressed concern about claimant input in the dose reconstruction process, noting that their comments often go ignored and are not fully utilized. In your opinion, how would the claims process be improved if their input was included and valued?

What advice would you give NIOSH and DOL in seeking out and including worker knowledge in their evaluation process?

Answer 3. The claims process for many claimants would be greatly improved by more consideration being given to input from the claimants. The current claims process is largely dependent on the use of exposure records and monitoring data. Often complete records for an individual's career are not available, and there are many other deficiencies in these records (inadequate monitoring methods and techniques, etc.) When individual records are not available, NIOSH relies on various methods to estimate exposures including the use of exposure records from other works and indirect exposure estimates. Such records can be useful, but they miss the great variability in individual work activity in the DOE complex. Individual workers have a much better understanding of their actual work environment and factors that could have impacted their exposures. The improved utilization of such information would greatly improve the dose reconstruction process by helping to evaluate their exposures during times when records are missing (or otherwise inadequate) and by pointing out additional sources of exposure (e.g., exposure incidents).

In order to better ascertain information from the claimants, I would advise NIOSH to revamp their interview process. Rather than relying on a single interview to cover all sites, NISOH should develop site specific interviews that ask information relevant to that DOE site and give the claimant greater opportunity to provide information on their work exposures, particularly during times when records are not available. The current "generic" site questionnaire is very confusing to many of the claimants. The interviewers should be better trained and should focus on just a few specific sites rather than attempting to cover all sites. This interview process should be supplemented by better follow-back by the person doing the dose reconstruction to obtain additional clarification that will help them complete the dose reconstruction.

This process should be supplemented by a more active outreach program to obtain input from former workers and their representatives about working conditions at each site and other factors that could affect exposures throughout the site. Unfortunately, the credibility of the program has been damaged by NIOSH's reliance on former DOE site health physics staff as the major source of information about each site and the lack of opportunity for workers from each site to have meaningful input into the documents and procedures used for dose reconstruction at that site. This imbalance needs to be corrected.

Question 4. In your experience as a member of the Advisory Board, how prevalent do you think the removal of dosimetry badges was for nuclear workers covered under this program?

Should NIOSH, DOL, and the Advisory Board take the removal of badges into consideration when evaluating a petition? If so, how much weight should such information receive in the decisionmaking process?

Given that many records are incomplete or inaccurate, how should agencies determine whether or not badges were removed? What role should the claimant play in the determination?

Once confirmed, what role should this information play in the determination process for each agency?

In your experience as the Chair of the Hanford Working Group, how prevalent was this practice at Hanford? How should this information influence the Board's consideration of SEC petitions for Hanford workers?

Answer 4. Circumstances where workers were not properly monitored for radiation exposures (such as removal of badges) *must* be taken into account when evaluating a petition or performing an individual dose reconstruction. The weight given to such reports will depend on many factors including the extent of the possible exposure (how frequent, how high was the potential exposure, etc.), the ability to appropriately estimate that exposure based on other information, and other factors. If NIOSH is going to estimate the exposure based on other information, then NIOSH must be sure that their estimate adequately accounts for radiation dose that the claimants may have experienced. I have serious concerns about whether many of the methods utilized by NIOSH are appropriate for use in individual dose reconstruction. A claimant should never be penalized for the failure of DOE or its contractor to properly monitor their exposures.

In some instances, the practice of removing badges may be recorded in the monitoring records or apparent from discrepancies in those records. However, in most instances, the initial report of such practices would be made by the claimants or petitioners. The reports by petitioners or claimants who experienced or witnessed these practices should be given considerable weight when considering such information. To the extent that other workers or supervisory personnel can corroborate this information is also helpful but should not be required (many of these situations occurred over 50 years ago). In follow up, NIOSH also must take steps to try to obtain further information about these practices from DOE and other workers. The petitioners or claimants should not be burdened with having to make the considerable effort that is required to access and review DOE records.

If the reports of removing badges are credible, then this information must be taken into account when considering the petition. If the practice was not just isolated to a few instances, then NIOSH would not be able to adequately perform individual dose reconstruction for that group of workers or process and should grant the SEC petition unless NIOSH can demonstrate that individual dose reconstruction can be done with sufficient accuracy based on other monitoring or exposure information.

In our Advisory Board public meetings in Hanford, the Board heard many reports of instances where Hanford workers performed work involving very high radiation exposures and were not wearing their dosimetry badges. This was apparently a common practice for those situations, and supervisory personnel were aware or had approved the removal of the badges. These reports were confirmed by several people in attendance at the public meeting. In evaluating the SEC petition for Hanford, the Advisory Board work group will obtain further information about such practices at the Hanford site in order to determine the extent of badge removal and will need to take that practice into account when evaluating the petition. While it is too early to reach any firm conclusions about this practice, what I have learned to date at Hanford certainly raises serious doubts about the ability of NIOSH to conduct individual dose reconstructions for these groups of workers.

[Rocky Mountain News, October 4, 2007]

SHORTCOMINGS FOUND IN REVIEW PROCESS FOR ILL NUCLEAR WORKERS—OUTSIDE STUDY SAYS FEDERAL OFFICIALS IGNORED EVIDENCE

(By Laura Frank)

Some former Rocky Flats employees and others who have sought Federal compensation for ill nuclear weapons workers have long suspected that the government ignored information they provided to prove their cases.

A draft of the first outside review of that process says their suspicions may be right.

Investigators listened in as government officials conducted three final interviews with workers or their survivors.

This "close-out interview" gives claimants their last chance to make sure the government has all the necessary information to determine their past exposures to toxic or radioactive substances. The interview is also the first time workers or their survivors see the information compiled by the government as it assesses whether a claimant's work caused the illness.

In two of the three observed interviews, claimants provided significant information to government officials. The officials promised to consider it, but never did, the review found.

The draft report, presented Tuesday to the White House Advisory Board on Radiation and Worker Health, says the process has "serious gaps" and "does not ensure" claimants concerns are fully addressed. It's up to the board now to decide how to proceed.

"It appears to the claimants that the government is ignoring the evidence they're submitting," said Terrie Barrie, of Craig, a national advocate for ill workers like her husband George, who helped build atomic bomb triggers at the former Rocky Flats plant northwest of Denver.

"If they have to develop new procedures because of this, they're going to have to reopen cases all over again," she said.

Wanda Munn, who heads the board subcommittee that received the report, said she could not predict what may happen next. No decision will be made before the group's next meeting on Dec. 6.

Investigators observed the interviews with the permission of the claimants and the National Institute of Occupational Safety and Health.

The report reads: "The evidence is that the underlying data were not reviewed in one case, and no attempt was made to obtain the relevant reports in the other."

The report notes that in one case, the final decision letter actually predated the close-out interview, "despite the fact that the employee provided detailed new information during the close-out interview."

"What are the chances we just happened to pick three cases at random and bam, bam, this happened?" said John Mauro, project manager for SC&A, the contractor in charge of the investigation.

He said the presidential advisory board will now have to determine whether the problems are pervasive.

Tell us what you think of the most recent review of compensation for ill nuclear weapons workers. Are you a former nuke worker—or a survivor—who has applied for Federal compensation under the Energy Employees Occupational Illness Compensation Program Act, or EEOICPA? Tell us your experiences with the process here, including your name and the site where you worked.

Tell us your story.

[Whereupon, at 11:37 a.m., the hearing was adjourned.]

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