

**OVERSIGHT OF THE MANAGEMENT PRACTICES
AT THE OFFICE OF WORKERS' COMPENSATION
PROGRAMS**

HEARING
BEFORE THE
SUBCOMMITTEE ON GOVERNMENT MANAGEMENT,
INFORMATION, AND TECHNOLOGY
OF THE
COMMITTEE ON
GOVERNMENT REFORM
AND OVERSIGHT
HOUSE OF REPRESENTATIVES
ONE HUNDRED FIFTH CONGRESS
SECOND SESSION

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JULY 6, 1998
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OVERSIGHT OF THE MANAGEMENT PRACTICES AT THE OFFICE OF WORKERS' COMPENSATION PROGRAMS

MONDAY, JULY 6, 1998

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON GOVERNMENT MANAGEMENT,
INFORMATION, AND TECHNOLOGY,
COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT,
Long Beach, CA.

The subcommittee met, pursuant to notice, at 10 a.m., in the City Council Chambers, 333 West Ocean Boulevard, Long Beach, CA, Hon. Stephen Horn (chairman of the subcommittee) presiding.

Present: Representatives Horn and Davis.

Staff present: J. Russell George, staff director and chief counsel; Mark Brasher, senior policy director; and Matthew Ebert, clerk.

Mr. HORN. The Subcommittee on Government Management, Information, and Technology will come to order.

We are delighted to have with us this morning, Mr. Tom Davis, a Member from Virginia, chairman of the Subcommittee on the District of Columbia, under the full committee which we both serve, the House Committee on Government Reform and Oversight.

The Office of Workers' Compensation Programs, which we are reviewing today, is responsible for adjudicating the compensation claims of injured Federal employees. The Federal Employees Compensation Act provides that Federal employees injured while on official duty are entitled to receive compensation benefits. The act also requires that the Office of Workers' Compensation Programs make an award for or against a compensation claim based on a finding of facts.

Today, we are going to investigate whether injured Federal employees receive timely and equitable adjudication of their compensation claims. I fear the answer will be no. The subcommittee has received allegations that the Office of Workers' Compensation Programs employs tactics to delay and deny legitimate compensation claims. As we will hear today, the result can be financial and emotional hardship for injured Federal employees and their families. This is exactly the opposite of what the Federal Employees Compensation Act was intended to accomplish. In addition, we will investigate what rights a claimant has when there is reason to believe adjudication of the claim was unfair.

We will hear first from the hearing representatives of the Office of Workers' Compensation Programs. They will discuss the admin-

istrative process for adjudication of compensation claims according to the regulations found in the Compensation Act Manual.

Next, a panel of injured Federal employees will discuss their experiences in filing compensation claims. We are not here to seek resolution about individual cases. We are seeking to find ways to improve the compensation system.

Finally, representatives from the Office of Workers' Compensation Programs will discuss the management practices of the Federal employees compensation system to process claims in a timely fashion.

All of our witnesses from panel one and two have come before us voluntarily. We hope their testimony is viewed as a benefit to this subcommittee and to the Office of Workers' Compensation Programs for making improvements to the compensation system. We recommend that the witnesses be treated in a professional manner with no duress imposed by any Federal agency because they testified before this committee. And we follow up on those cases with previous investigations, as well as this one, and Congress will look with great chagrin and take very rapid action on any agency personnel that do try to make it more difficult for the people that have these cases who already have great difficulties.

The subcommittee staff has received unsolicited and solicited statements for the record of the hearing. The subcommittee would like to encourage additional thoughts on this issue and we will hold open the testimony for 3 weeks for any person that wishes to provide an additional statement. We do not mean to close the door to any point of view and we encourage healthy debate.

We welcome our witnesses and we look forward to their testimony. I would like to ask the gentleman from Virginia if he has an opening statement to make.

[The prepared statement of Hon. Stephen Horn follows:]

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INDEPENDENT

**"Oversight of the Management Practices of the Office of Workers'
Compensation Programs"**

July 6, 1998

OPENING STATEMENT
REPRESENTATIVE STEPHEN HORN (R-CA)

Chairman, Subcommittee on Government Management,
Information, and Technology

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the management of the Federal employees' compensation system to process claims in a timely fashion.

All of our witnesses from panel one and two have come before us voluntarily. We hope their testimony is viewed as a benefit to this Subcommittee and to Office of Workers' Compensation Programs for making improvements to the compensation system. We recommend that the witnesses be treated in a professional manner with no duress imposed by any Federal agency.

The Subcommittee staff has received unsolicited and solicited statements for the record of this hearing. The Subcommittee would like to encourage additional thoughts on this issue, and we will hold open the testimony for three weeks for any person to provide a statement. We do not mean to close the door to any point of view, and we encourage healthy debate.

We welcome our witnesses and look forward to their testimony.

Mr. DAVIS. Thank you, Mr. Chairman.

I represent 54,000 Federal employees that live in my congressional district outside of Washington in Fairfax and Prince William County, and I want to thank the chairman for holding this hearing today to address the concerns that have arisen regarding the operation of the Office of Workers' Compensation Programs. I also want to thank all of our witnesses for being here with us today, and I understand that some that are not going to testify are going to be submitting statements and I appreciate the chairman holding the record open so that they can be made part of the permanent record.

The role of the Workers' Compensation Office is very important to our workers. I know that responsiveness and efficiency in the daily performance of the OWCP is extremely critical to my own constituents. However, I and many of our constituents have been frustrated by the persistent lack of assistance and followup that we get sometimes from OWCP when we have submitted claims for their attention.

Consistent failure to return calls, frequent changes in caseworkers handling particular cases and the occasional inability to locate needed case files are all instances indicative of fundamental problems in the Workers' Compensation office.

Furthermore, my own congressional inquiries received unresponsive treatment from this office. Recently, my district director came away from a meeting with Mr. Michael Johnson, the OWCP District 25 Director, feeling even more frustrated than when she went in. From that meeting, we discovered that the job turnover for a caseworker for the OWCP is 6 months and that a caseworker's decision is seldom questioned. I would like to give just a couple examples of some of the problems faced by my constituents and by me in pursuing these cases.

On December 19, 1997, Mr. Gregory Scott called my office for help with his workers' compensation case that was first opened in March 1996. The basis of his claim was a recurrent injury to his left foot. He sought my assistance when he continually received no response to his phone messages or any timely followup in processing his case. The problems he encountered with the OWCP include unexpected interruptions in compensation payments, long delays in reimbursement for out-of-pocket medical expenses, failure to correct errors in dates in compensation and failure to respond to letters. After prolonged delay and inaction in Mr. Scott's case, his request for an oral hearing was remanded back to the OWCP for further review just last week.

On December 30, 1997, I sent an inquiry to OWCP on behalf of Ms. Mary Ann Smith. She suffered a knee injury from a fall at the Department of Defense and has been seeking reimbursement for treatment on a claim which was already accepted. On June 30, I received a copy of a response addressed to Ms. Smith that was dated April 20, 1998, 2 months before. The address for Ms. Smith was an old address, Ms. Smith never even received that letter.

Now while I understand that OWCP is dealing with difficult cases and investigations on a daily basis, progressive action has to be taken to ensure that the employees who are affected receive the understanding and continuity they deserve when they seek their services. We have to be concerned about the cost to taxpayers of

an office whose purpose is to investigate and resolve each of these cases in an efficient and timely manner.

I hope we can explore ways together to address these basic weaknesses and ensure the permanent improvement in the way the Workers' Compensation Office serves our citizens.

Now I would just add one other item. It has been tough in recruiting and retaining good Federal employees the last few years. They have been hit from an administration that has arbitrarily sought to downsize the number of Federal workers without putting a necessary savings line to the bottom line. We have had congresses who have threatened to cut their retirement pay, take more out of their paycheck to pay toward retirement, that has threatened them with taking away parking, capping their benefits from the Federal Employees Health Benefit Plan. We went through two Government shutdowns in the last Congress that I think were an embarrassment to everybody that was involved except for those employees who kept working on a day-to-day basis.

But we find as we move into an information age that the most valuable asset any organization has today is no longer its machinery or its equipment or its land, it is its employees. And at the Federal level, we have to do more if we are going to attract and retain the best and the brightest to get the job done. I think that is part of the problem here. Since we are getting such a turnover, we may have to look at that as well. I appreciate the hard work people are doing, but I think we can do better and I think we owe the Federal workers who have these complaints better than we have given them to date and I look forward to hearing the testimony today.

Thank you, Mr. Chairman.

Mr. HORN. I thank the gentleman for his excellent opening statement.

Let me describe some of the procedures we follow in all of these hearings. No. 1, we start with some expert witnesses that will lay out the background on the law and particular administrative rulings and regulations, and that will be panel one. We will give each of them 15 minutes to summarize their statement. Both were excellent written statements, one was 100 pages. Obviously we do not expect that to be read. We do not want it read, we have read it, and we do not have the time to read 100 pages. But we will give you 15 minutes to summarize it and then we want to have questions asked by Mr. Davis and myself.

Then after that panel, both of who, by the way in the first panel are hearing representatives—after that panel will be a number of individuals who have had experience with the claims they have filed and they were picked out of a long list of complaints that we have received over the years.

Finally, panel three will be representing the Office of Workers' Compensation Programs, Mr. Michael Kerr, the Deputy Assistant Secretary and Director of that office. He will be accompanied by the Deputy Director and we will introduce each group appropriately.

We will give panel two generally 5 minutes to summarize their statements and we will give panel three the same as panel one, 15 minutes to lay out the law as they see it.

So we will begin. All panels will be separately sworn in. This is an investigating committee, so everyone that testifies before us

takes the oath or they do not testify. We will just start down the line now with Mr. Joseph Perez, the hearing representative, Office of Workers' Compensation Programs; and William Usher, the hearing representative, Office of Workers' Compensation Programs. Mr. Perez, Mr. Usher, if you will remain standing, we will give you the oath.

[Witnesses sworn.]

Mr. HORN. The clerk will note both witnesses affirmed the oath. We will start with you, Mr. Perez, and you have a very rich background in this, as does Mr. Usher, and we will put the biographies as well as both your statements automatically in the record at this point, and would like you to summarize those in 15 minutes each. The clerk will be keeping a timer on that. So please, proceed, Mr. Perez.

STATEMENTS OF JOSEPH PEREZ, HEARING REPRESENTATIVE, OFFICE OF WORKERS' COMPENSATION PROGRAMS; AND WILLIAM USHER, HEARING REPRESENTATIVE, OFFICE OF WORKERS' COMPENSATION PROGRAMS

Mr. PEREZ. Mr. Chairman and distinguished members of the subcommittee, thank you for holding this important hearing today.

I have a brief opening statement and I request that my full written statement be entered into the record.

Mr. HORN. It is automatically with all witnesses.

Mr. PEREZ. Thank you, Mr. Chairman.

Mr. Chairman, as you well know, Federal employees represent a large and significant work force which is well integrated into today's society. Unfortunately, the Federal work force as a whole suffers from at least one problem that Members of Congress understand all too well; namely, the Federal work force as a whole is held in less esteem than its individual members.

I have traveled all over this country and have found dedicated and hard working Federal workers everywhere. For in truth, we are everywhere. Federal employees deliver the mail, they are health care providers in our VA hospitals, they work to ensure that our air is clean, our water is pure, and our food and drugs are safe. Federal workers help the United States run well. Indeed, these individuals are our colleagues, our neighbors, and your constituents. Unfortunately, this body of hard-working individuals is often a constituency without a voice.

Mr. Chairman, I would like to discuss two concepts at the outset of my oral statement. These concepts form recurring themes in my written testimony and I think they are important concepts to consider. One is the concept of justice, the other is the concept of integrity.

Mr. Chairman, as you know, workers' compensation law rose out of the frustrations and dissatisfaction of the tort-based system for recoveries which was prevalent in the 19th century. This system was considered unjust by its participants because there were many procedural blocks to needy injured employees recovering for damages. Employers were also rightfully frustrated because they could not predict their future liability since it was determined based upon a jury award. Out of that frustration and injustice, workers' compensation arose and it represented a covenant between employ-

ers and employees where they would forgo the litigiousness and adversarial relationship of the tort-based system in favor of one which provided the employers with a known future liability they could predict and incorporate into their overhead. It also provided injured employees with swift, sure benefit recovery without the necessity of litigation.

As long as both parties receive the results of that covenant, they are satisfied. However, I believe that justice is not being done to Federal employees. And the testament to that fact is the enormous number of complaints which have arisen regarding this system. I know that throughout OWCP and DFEC materials, the constant theme is that we are approving most of our cases, we are making timely decisions.

Well, Mr. Chairman, I suggest that the facts of the matter undermine the integrity of these statements. In DFEC's strategic plan, it states that it takes pride in its return-to-work success, its swift benefit delivery, its cost-effective and people-oriented administration, and its low friction cost and nonadversarial procedures for adjudicating and managing cases. Mr. Chairman, I believe that the facts indicate that these statements are not true. In fact, benefits are not swiftly provided. In fact, administration of the Federal Employees Compensation Act by the Office of Workers' Compensation Programs and its Division of Federal Employees Compensation is not people-oriented. And Mr. Chairman, I maintain that the proceedings are adversarial in nature.

And let me just talk about a few of the actions taken by OWCP and DFEC which undermine the credibility of their statements. The Division of Federal Employees Compensation, mindful of employers' complaints about rising compensation costs, introduced a number of procedures for managing these cases—the Periodic Roll Management Project and the Quality Case Management Procedures. Since introduction of these procedures, there has been a 22-percent increase in hearing requests. This increase in hearing requests is not correlated in any way to the number of injuries. In fact the number of injuries have fallen by 12 percent over the same period.

I know that OWCP officials will say well, we approve most of the cases. And I have seen statistics provided by them which indicate that they approve anywhere from 85 to 95 percent. Well, Mr. Chairman, this is another misleading statement. In 1992, in fiscal year 1992, OWCP introduced computerized systems for managing initial cases and deciding which ones did not need to be reviewed. These cases, when they are created, they are either no lost time or lost time of a few days, the agency does not controvert, the medical bills do not exceed \$1,500. In fact, these cases are not even looked at. In OWCP's fiscal year 1993 report, it indicates that "by employing the computerized process when cases are created, many non-controverted traumatic injury claims are screened to allow for the payment of medical bills which pass a series of checks for appropriateness of treatment. These cases are reviewed by a claims examiner only after medical bills exceed a certain amount."

So you have—half of the injury reports are no lost time, they are not reviewed, they are automatically put into this category of cases called administratively reviewed. Traumatic injuries which have

very little lost time, 72 percent of all those cases are approved using these computerized techniques. Of these cases, fewer than 14 percent are subsequently reopened. So actually the majority of cases are not approved as the implication is created in OWCP's materials. The majority of these cases are simply sent to the file with a code.

Mindful of the fact that the language of this code had negative connotations when OWCP was soliciting comments to redesign its ADP system, it got this comment—"the term administratively unreviewed cases has a negative connotation, perhaps administratively reviewed cases or automated reviewed cases would give a more positive public perception."

Mr. Chairman, I propose that OWCP and DFEC is engaged in a lot of these public relations spins to data. We have already discussed the approval rate. Based upon testimony submitted by then acting Director Shelby Hallmark at a September 30 oversight hearing in Chairman Ballenger's subcommittee, he indicated that 92 percent of traumatic injuries and 67 percent of occupational disease cases are approved each year, leaving approximately 20 to 25,000 cases which are not approved. That really is the measure of the true workload of this agency.

The number of serious injuries which will result in time lost more than 45 days and uncertain return to work, those cases are assigned to the Quality Case Management Project. They represent 10,500 cases a year and Mr. Hallmark testified to that fact, that OWCP received approximately 10,000 serious cases each year. So the actual workload of this agency is 10 to 20,000 cases.

When you look at the success rate in handling those cases, it is startling, Mr. Chairman. As I mentioned before, there has been a dramatic increase in the number of hearing requests. However, the quality of decisions which motivate these requests for hearing are uniformly poor. Over the last 9 years, the remand rate has averaged 45 percent—that is for 9 years—on merit decisions. The Employees' Compensation Appeals Board, the highest appellate body under the act, their remand rate is 41 percent. That means that of the 55 percent of cases affirmed by Hearings and Review, at least a portion of those, when the claimant appeals to the Employees' Compensation Appeals Board, 41 percent of those cases are remanded. Which means the effective remand rate is actually higher than 50 percent.

Mr. Chairman, I think everyone can understand an error rate. For instance, when people buy lottery tickets, they are willing to entertain an error rate in the millions. I know in the Fairfax County lottery, it is—or the Virginia lottery, it is 1 in 7.1 million. On the other hand, on the other end of the spectrum is an error rate of a surgeon performing surgery on you. You want his error rate to be less than 1000th of a percent. Mr. Chairman, between those two points is a pretty broad range of error rates, but I would suggest that an error rate of 50 percent is appalling to anyone.

These statistics are based upon my analysis of publicly available information, certainly correlations are not facts, they just indicate trends in the statistics. However, I submit the points I am raising here are corroborated by the enormous number of complaints which have been brought against this agency. If in fact, the majority of

cases are being approved and paid timely as OWCP and DFEC would like to suggest, what is the basis of these complaints?

I know it is fashionable to malign injured Federal employees by saying that they just want to receive compensation for life for nothing. Mr. Chairman, that has not been my experience and certainly that has not been borne out by the various investigations of the FECA claimants which have been undertaken. The Postal Inspection Service, which is very aggressive in inspecting and investigating post office claims, they, based upon testimony provided at a March 30 hearing before Chairman Ballenger's subcommittee, were only able to convict five people last year for fraud. Of the total number of post office cases, this is a minuscule percent.

Similarly, over the approximately 9 to 10 years that the Department of Labor's inspector general has inspected cases, they have found similarly some 300 cases of fraud out of the millions of cases filed during that period.

I submit to you, Mr. Chairman, that in fact most of these cases are legitimate and there are needless roadblocks being put up against these employees. What is the basis for these roadblocks, Mr. Chairman? I feel it is complaints from the employing agencies about rising compensation costs.

Mr. Chairman, these are legitimate concerns when you are talking about a program which dispenses almost \$2 billion—that is significant money. You know, to paraphrase Senator Dirksen, a billion here and a billion there, pretty soon we are talking about real money. I certainly do not want to minimize the concern of the employing agencies; however, I just have not seen any convincing evidence that these injured Federal employees are not entitled to benefits. It just has not been shown to me.

One strategy that has been utilized by OWCP is to encourage injured employees to return to work sooner. Mr. Chairman, the No. 1 strategic goal for the Division of Federal Employees Compensation is to reduce lost production days. Mr. Chairman, this is another public relations term developed by OWCP. Lost production day actually means a day of disability, a day when an injured employee is unable to work. The Division of Federal Employees Compensation has set yearly goals for reducing the number of lost production days between now and fiscal year 2002. Mr. Chairman, that is a fine goal and I believe that injured employees should be brought back to work as soon as medically suitable. But when the No. 1 goal for the agency is to reduce the number of lost production days, I am sure you can see that this is susceptible to abuse and quotas. You know, everyone has a numerical quota, they see that this is what we want to reduce, and the efforts are being channeled in that direction.

Mr. Chairman, since the introduction of Quality Case Management Procedures and early nurse interventions, as I mentioned earlier, there has been a 22-percent increase in hearing requests. There seems to be a correlation between these techniques for getting people back to work and a dissatisfaction with the decisions. Now some could say this dissatisfaction is being motivated by employees who want to be on the dole for the rest of their life. But Mr. Chairman, when the remand rate is 50 percent, that is just not an accurate statement. These individuals have legitimate claims

and when they reach an appellate level, their case is being approved. So I do not believe that these figures support the proposition that these dissatisfied employees really do not want to go back to work. I maintain, Mr. Chairman, that these aggressive procedures to reduce the number of lost production days are forcing legitimately disabled employees back to work in inappropriate jobs.

Once again, the data provided by OWCP and DFEC is conspicuously noncommittal on the success rate of these returns to work. They quote data regarding the number of resolutions for these quality case management cases. Resolution is certainly a neutral term, they do not actually track how successful these individuals are at staying at work for a year, how many recurrences of disability these individuals have because the job is inappropriate, how many times an individual is brought back to the job and the job after 60 days is removed. These statistics are not revealed, Mr. Chairman. While a 70 percent resolution rate in 1 year appears impressive, the actual meaning, the actual context of this statistic is not reported anywhere.

Mr. Chairman, in fiscal year 1996, there were close to 8,000 hearing requests. The Employees Compensation Appeals Board received 2,900 appeals. Mr. Chairman, that is more than 10,000 appeals. That does not count the number of appeals which—the number of reconsiderations which dissatisfied injured employees filed with the district office. These number of appeals, more than 10,000 is 100 percent of the number of serious injuries received in a year, as testified to by Mr. Hallmark, and they are half of the number of disapproved cases each year. Mr. Chairman, that is a startling figure, 10,000—it is more than 10,000 actually, 10,000 just represents the hearing requests in 1 year and the appeals taken to the Board. That is a phenomenal figure.

Mr. Chairman, the other concept I wanted to talk about was justice. When the act was substantially amended in 1974, the legislative materials indicated that the purpose of the amendment was to ensure that injured employees, disabled employees of all public agencies, including the post office, are to be treated in a fair and equitable manner. That is justice, Mr. Chairman. That idea comports with the workers' compensation covenant where justice is to be served. Injured employees are to be treated in an equitable manner. Mr. Chairman, I suggest that this is not the case. It is regrettable that injured employees come to the district office and Mr. Davis has already reported regarding his own frustrations in trying to get satisfactory answers from the district office and I believe that this frustration is replicated all over the country.

It must be really significant, Mr. Chairman, because this is really the only data that OWCP reports from its customer surveys, the inability of people to reach the office by phone, injured employees and providers. They do not mention anything else from their customer surveys. They mentioned in one of their reports earlier that the anecdotal evidence indicates injured employees are happy with the nurse intervention program; however, they do not follow up on that and provide concrete data. The only data they really provide, and it is just slightly mentioned, is the dissatisfaction with reaching the district office by phone.

Mr. Chairman, I do not believe that is the only problem here, and I believe that the failure of the Office of Workers' Compensation Programs and its Division of Federal Employees Compensation to acknowledge these serious errors and to take concrete steps to correct them is really a failing. It is a failure of the agency to carry out its mission to see that injured employees are treated in a fair and equitable manner.

Mr. HORN. We have got about a minute more and then we will turn to Mr. Usher.

Mr. PEREZ. I think, Mr. Chairman, at this point, I just want to sum up to say that the Federal Employees Compensation Act is designed to treat the employee fairly and equitably, and also the Office of Workers' Compensation public documents do not fully describe its many serious shortcomings in achieving this goal.

Thank you for allowing me this opportunity to testify today. I will be happy to answer any questions.

Mr. HORN. Well, I think your statement in full would make an excellent law review article. If you have not sent it in, you should.

Mr. PEREZ. Thank you, Mr. Chairman.

Mr. HORN. Mr. Usher, we are delighted to have you with us. William Usher is also a hearing representative of the Office of Workers' Compensation Programs. Please proceed.

[The prepared statement of Mr. Perez follows.]

Executive Summary

The Federal Employees' Compensation Act (FECA) is the exclusive remedy by which Federal employees may obtain disability, medical and/or survivor benefits from the United States for workplace injuries. FECA is administered by the Department of Labor's Division of Federal Employees' Compensation (DFEC).

Workers' compensation law arose out of the frustrations employees and employers experienced with the common law remedies for workplace injuries and deaths. These frustrations were due to the difficulty employees had in obtaining an award for workplace injuries under the tort system; and the inability of employers to make provisions for their financial liability since jury awards were unpredictable.

Workers' compensation, therefore, represents a covenant. Under workers' compensation law each side gives up something that is available to it under the common law, but simultaneously receives something as well. The employer relinquishes the defenses enjoyed under the common law, but this loss is offset by a known level of liability for work-place injuries and deaths. The employee gives up the opportunity for large settlements provided under the common law, but receives the advantage of prompt payment of compensation and medical bills. These trade-offs make the workers' compensation system acceptable to both parties. However, where either party does not receive the benefits of this covenant, the system becomes unacceptable.

When the FECA was amended in 1974, Congress stated

[i]t is essential that injured or disabled employees of all covered departments and agencies, including those of the United States Postal Service, be treated in a fair and equitable manner. The Federal

Government should strive to attain the position of being a model employer.

However it appears that the Division of Federal Employees' Compensation (DFEC), the agency charged with insuring that injured or disabled employees are treated in a fair and equitable manner, is guilty of misfeasance.

DFEC's Strategic Plan states that "[i]t takes pride in its return to work success, its swift benefit delivery, its cost-effective and people-oriented administration, and its low friction costs and nonadversarial procedures for adjudicating and managing claims." However, DFEC's actions belie this statement. In fact benefits are not swiftly delivered, the administration of the FECA is not people-oriented and DFEC acts in an adversarial manner toward injured employees. Despite the covenant which underlies the workers' compensation principle, and the stated intent of Congress, DFEC has sided with employing agencies, and against injured employees, to lower compensation costs. DFEC has implemented flawed procedures to reduce or terminate benefits and has processed claims in a rigid and inflexible manner.

To reduce the number of Claimants receiving continuing disability payments DFEC created the Periodic Roll Management (PRM) project which began in April 1992. The function of this Project is to screen the long-term disability roll for cases needing medical examination, medical and vocational rehabilitation, including job training and placement.

In 1993, DFEC instituted new case management procedures which it called Quality Case Management (QCM). These procedures are aimed at those cases

where the Claimant has not returned to work within 45 days of the injury. A registered nurse, under contract to DFEC, works with the injured employee, the treating physicians and the employing agency to clarify the nature and extent of injury-related disability and arrange for the Claimant to return to work as soon as possible.

Implementation of the Periodic Roll Management Project and Quality Case Management procedures and early nurse interventions have resulted in a 22% increase in the number of hearing requests. Although increased implementation of these procedures have increased the number of decisions appealed, the quality of these decisions is poor. The remand rate from OWCP's Branch of Hearings and Review (H&R) has averaged 45% over the past 9 years. Also, there is a considerable backlog in H&R which delays the timely resolution of improperly denied cases.

In addition to the PRM and QCM procedures which appear flawed, DFEC has established and enforced time standards on the District Offices which result in premature denials of benefits. These time standards require a District Office Claims Examiner to render a decision on a claim within 45 days and to act on a proposal to terminate benefits within 30 days. These time frames are too short, and are too rigidly enforced, to permit appropriate consideration of the merits of claims.

For example, after the initial review of a claim a Claims Examiner (CE) will write to the injured employee and advise him or her of any evidence necessary to perfect the claim for compensation. The injured employee is typically given 30 days to respond. However, when the Claims Examiner drafts the deficiency letter it is

not received the same day it is dated. The letter spends some time in the District Office waiting to be mailed. The letter also takes time to reach the Claimant by mail. Therefore, a Claimant actually receives the letter several days after it is dated. The Claimant then prepares a response which takes several days to reach the District Office. In fact, when a decision is rendered 30 days from the date of the letter, the Claimant has not received "at least 30 calendar days" to respond as required by the regulation.

Similar problems plague the procedure for terminating benefits. While it may take months for a District Office to develop evidence to issue a proposal to terminate benefits (pretermination notice), a Claimant is provided less than 30 days to assemble evidence to rebut the proposal. This imbalance is clearly not equitable. An increase in terminations has also led to an increase in hearing requests. Despite the large numbers of improper decisions, DFEC continues to herald its success in making timely decisions.

As noted above, 45% of appealed decisions are remanded. The majority of remanded cases are remanded prior to hearing. This fact places DFEC on the horns of a dilemma. If in fact Claimants are provided sufficient time to submit requested information, then 45% of these "timely adjudications" were incorrect when rendered. An amazing statistic. If, on the other hand, these "timely adjudications" are in fact rendered before the requested information can be submitted, then there is something fundamentally wrong with the time standards.

Even though DFEC rushes to deny benefits it is delinquent in resolving improperly denied claims. While a District Office gives a Claimant only 30 days to

respond to deficiency and termination notices it takes more than 90 days to reconsider a denied case. Furthermore, it takes more than 8 months to schedule an oral hearing and have a decision issued. It is neither fair nor equitable to quickly deny benefits without also quickly correcting improper denials. The improper denials are caused by several systemic problems with how DFEC administers the FECA.

A Claimant for FECA benefits carries the burden of persuasion, and must satisfy this burden by a preponderance of the evidence. However, DFEC has increased a Claimant's burden of proof by requiring the submission of evidence which meets the beyond a reasonable doubt standard. DFEC routinely discredits the medical evidence submitted by Claimants because the report is not "so conclusive as to suggest causal connection beyond all possible doubt in the mind of a medical scientist".

Similarly, DFEC does not apply the "true doubt" rule to factual evidence submitted by Claimants and gives greater weight to the factual statements of employing agencies. Furthermore, DFEC acts in collusion with employing agencies to reduce or deny compensation by accepting false information.

DFEC has also prevented Claimants from commenting on the Statement of Accepted Facts (SOAF). This is one of the most important documents a Claims Examiner prepares and has a profound impact on the development of the medical evidence. The SOAF provides a frame of reference for the physician reviewing the medical evidence and/or examining the Claimant. It allows the physician to place the medical questions posed in the larger context of the mechanism of injury, the

requirements of the Claimant's job or the conditions which prevailed in the workplace. It may also provide the physician with a chronology of events after the injury

DFEC's handling of medical evidence is unfair and inequitable. It weighs the medical evidence to determine which opinion is most probative value. However, DFEC routinely discounts medical evidence submitted by Claimant's because it does not establish causal relationship beyond a reasonable doubt.

DFEC further diminishes the Claimant's medical evidence by resorting to paid consultants (second opinion physicians or SECOPS) who produce medical reports which include opinions requested by DFEC solely to deny claims. These SECOPs base their opinions on flawed SOAFs and leading questions from Claims Examiners. Although the Act requires DFEC to obtain a third opinion when there is any disagreement between the SECOP and the Claimant's physician, DFEC has characterized this as "a time-consuming process which is not always necessary." It avoids its statutory obligation by investing the SECOP's opinion with exaggerated weight and, through spurious reasoning, by diminishing the weight of the Claimant's medical evidence.

Based upon this flawed medical evidence DFEC proceeds to establish a Claimant's wage-earning capacity. As with so many of DFEC's procedures, the wage-earning capacity determination process has many areas susceptible to abuse. As discussed above, the medical evidence may be selectively developed and evaluated to show that the injured employee is capable of performing some work. DFEC's Strategic Goal of reducing the number of "lost production days" has made

this an important objective.

Once the medical evidence establishes that the Claimant is not totally disabled, a District Office Rehabilitation Specialist (RS) will select positions for a "constructed" wage-earning capacity determination. In many cases the Claimant is not qualified for the position. However, the RS can state that the position is suitable and reasonably available in the Claimant's without providing any corroborating evidence. DFEC grants the RS's opinion presumptive weight "[b]ecause the RS is an expert in the field of vocational rehabilitation, the CE may rely on his or her opinion as to whether the job is reasonably available and vocationally suitable."

Employing agencies also have a financial incentive to develop medical evidence which establishes that a Claimant is only partially disabled. Based upon this evidence an agency will make an offer of alternative employment. However, although that District Office is required to evaluate whether the position is suitable, it does not do so in many cases. Instead the District Office will rely on the agency's statement that the position is suitable. The employing agency often will not make a written offer of alternative employment. Instead, the agency will assure the District Office that they can provide a position which accommodates the Claimant's residual disability. However, without a written job offer, the agency can, and often does, force the Claimant to perform other, medically unsuitable duties.

Not content with the harshness of the present inequitable system, DFEC has proposed regulations which would make it harder for injured employees to receive

justice. As noted above, injured employees are not given enough time to submit necessary information. As a result, many of their claims are prematurely denied. Where the current regulations provide a Claimant least 30 days to submit requested evidence, the proposed regulations give the Claimant a maximum of 30 days. It does not appear reasonable to grant injured employees less time to submit evidence when they already have insufficient time. Although it is obvious that 30 days is too short a period and should be extended for good cause, the proposed regulation fails to allow for a good cause extension. The proposed regulation also prohibits any extension in the 30 day period to respond to a pretermination notice.

The current regulations permit postponement of a hearing for good cause. However, the proposed regulations eliminate postponements. This proposal is another example of how DFEC continues to curtail the rights of injured employees. Congress provided oral hearings as a way for Claimants to present evidence in person. The proposed regulation, denying postponements, appears inconsistent with the intent of the FECA to grant an injured employee the right to an oral hearing.

Congress has mandated "that injured or disabled employees of all covered departments and agencies, including those of the United States Postal Service, be treated in a fair and equitable manner." However, DFEC does not carry out this mandate. In an effort to mollify agency complaints regarding rising compensation costs, DFEC has implemented procedures, of questionable fairness, designed to reduce costs. This is plainly inconsistent with the workers' compensation covenant.

It is also inconsistent with the purpose of the Act. In fact, DFEC is permeated with anti-Claimant bias.

Director, DFEC Markey routinely violates the integrity of the appeals process. As the top official involved with the day-to-day administration of the FECA he has a vested interest in upholding the decisions of the District Offices under his authority and direction. These offices carry out the policies that Director Markey has established and their successful performance is measured in part by how often their decisions are overturned.

Director Markey routinely reviews the decisions of Hearing Representatives. This is a clear violation of the independence of the hearing process since Hearing Representatives are delegates of the Director, OWCP. Director Markey directly interferes with the rendering of fair decisions in favor of injured employees. He does this by trying to intimidate Hearing Representatives into rewriting their decisions and, when this is unsuccessful, actually overturning the decisions. When Director Markey cannot intimidate Hearing Representatives into rewriting their decisions he has them rewritten.

In order to rectify these abuses DFEC should: 1) provide more realistic time frames for the submission of required information; 2) involve Claimants in preparation of the Statement of Accepted Facts; 3) develop medical evidence in a fair and impartial manner; 4) take steps to prevent erroneous decisions; 5) provide more timely decisions on appeals; 6) move the Branch of Hearings and Review to the Office of the Secretary of Labor; 7) take steps to prevent abuses by employing agencies.

DFEC should recommit to its mission of providing “swift benefit delivery . . . people-oriented administration . . . and nonadversarial procedures for adjudicating and managing claims.” This will insure “that injured or disabled employees of all covered departments and agencies, including those of the United States Postal Service [are] treated in a fair and equitable manner.”

Office of Workers' Compensation Programs

The Federal Employees' Compensation Act (FECA)¹ is administered by the Department of Labor's Division of Federal Employees' Compensation (DFEC). Organizationally, DFEC is within the Office of Workers' Compensation Programs (OWCP) which is within the Employment Standards Administration.

The Employment Standards Administration is headed by an Assistant Secretary. OWCP is headed by a Director, whose title is Deputy Assistant Secretary for Workers' Compensation. The Branch of Hearings and Review (H&R), an FECA appellate body which conducts oral hearings,² is in a peculiar position. H&R Hearing Representatives conduct hearings as delegates of the Secretary, but, organizationally, H&R is located in DFEC.

For long periods of time, OWCP had no Director. During these periods, OWCP was headed by Mr. Shelby Hallmark, who was the Acting Director, OWCP. Mr. Dennis Mankin was Mr. Hallmark's special assistant. DFEC is headed by Mr. Thomas M. Markey, who is the Director, DFEC. H&R is headed by Mr. Robert Barnes assisted by Mr. Edward Duncan who is the Assistant Branch Chief.

The Workers' Compensation Covenant

Workers' compensation law arose out of the frustrations employees and employers experienced with the common law remedies for workplace injuries and deaths. These frustrations were due to the difficulty employees had in obtaining an award for workplace injuries under the tort system; and the inability of employers

¹ 5 U.S.C. §§ 8101-8151 (1994).

to make provisions for their financial liability since jury awards under this system were unpredictable.

Before 1910, the laws determining employers' responsibility for industrial injuries in almost every State had been handed down from the pre-industrial period in England and the United States. Under these laws an injured worker's only recourse was through the courts where the common law rules of liability attempted to determine who was at fault.

Under the common law, the employer was deemed to have certain legal duties of protection which he owed to his employees. These duties were: 1) to provide and maintain a reasonably safe place to work, and safe appliances, tools and equipment; 2) to provide a sufficient number of suitable and competent fellow employees to permit safe performance of the work; 3) to warn employees of unusual hazards; and 4) to establish and enforce proper safety rules.

Under the law of negligence, failure to use that degree of care which was reasonably necessary to protect another person from injury constituted a cause of civil action. To sustain this action, the injured party had to prove damage and a natural and continuous sequence, uninterruptedly connecting the breach of the duty of protection with the damage, as cause and effect. If the employer properly performed all of its duties of protection, it could not be held liable for an injury to an employee arising out of the employment.

As the test of the performance of the employer's duty extended only to proper

² See n.101, *infra*, and accompanying discussion.

diligence, breach of this duty was not easy to prove in court. This problem of proof was compounded by the fact that the usual witnesses to a work-injury were fellow workers who were reluctant to testify against the employer.

Furthermore, an employer had several defenses under the common law which deflected responsibility for work-related illnesses, injuries, and deaths from the employer to the affected employee, or to other employees: the principle of contributory negligence; the fellow servant doctrine; and, the assumption of risk doctrine. With the expense of litigation added to these defenses, the worker faced almost insurmountable obstacles in pressing a claim.³ However, if the employee was successful, the jury award could be very large.

Workers' compensation differs from tort liability in a number of important ways. The basic test of liability in workers' compensation is work connection rather than fault. Thus, the test is not the relation of an individual's personal fault to an event, but the relationship of an event to employment. Under workers' compensation, unlike tort, the only injuries compensated for are those which produce disability and thereby presumably affect earning power. For this reason, some classes of injuries which resulted in verdicts of thousands of dollars at common law produce no award whatever under a compensation statute. This addresses some of the employers' concerns.

A workers' compensation system, unlike a tort recovery, does not pretend to restore to the injured employee what he or she has lost; instead it gives the disabled

³ Willis J. Nordlund, *A History of the Federal Employees' Compensation Program* 11-12 (1992)

worker a sum which, added to his remaining earning ability, if any, will presumably enable the disabled worker to exist without being a burden to others. In summary, tort litigation is an adversary contest to right a wrong between the contestants; workers' compensation is a system, not a contest, to supply security to injured workers and distribute the cost to the consumers of the product.

Workers' compensation, therefore, represents a covenant. Under workers' compensation law each side gives up something that is available to it under the common law, but simultaneously receives something as well. The employer relinquishes the defenses enjoyed under the common law, but this loss is offset by a known level of liability for work place injuries and deaths. The employee gives up the opportunity for large settlements provided under the common law, but receives the advantage of prompt payment of compensation and medical bills. These trade-offs make the workers' compensation system acceptable to both parties.⁴ However, where either party does not receive the benefits of this covenant, the system becomes unacceptable.

DFEC's Mission

According to DFEC's Mission Statement

[t]he purpose of the Federal Employees' Compensation program is to provide Federal employees who sustain work-related injury or disease with adequate and timely benefits for medical care and wage loss replacement, as well as assistance in returning to work where necessary.⁵

⁴ Willis J. Nordlund, *A History of the Federal Employees' Compensation Program* 10 (1992).

⁵ Query: are employing agencies customers?

DFEC's Customer Service Plan emphasizes that injured employees can expect timely adjudication of their claims and prompt payment of accepted claims. Injured employees can also expect assistance in returning to work.

Although various OWCP and DFEC documents state that the interests of injured employees are paramount, an analysis of the data published by OWCP, together with the enormous numbers of complaints from injured employees suggests otherwise. These complaints, together with the implications of OWCP's data, pose the question: is DFEC properly carrying out its mission?

A Paradigm for Success

According to its Strategic Plan, DFEC has the following vision

[a]s the country's largest self-insured employer, the Federal government is uniquely situated to find the best ways to take care of people affected by workplace injuries. And as one of the longest-standing workers' compensation programs in the nation, FECA can be a laboratory for excellence in the field. It takes pride in its return to work success, its swift benefit delivery, its cost-effective and people-oriented administration, and its low friction costs and nonadversarial procedures for adjudicating and managing claims (emphasis added)

DFEC wants "Federal employees who experience work-related injuries or illness to know that they can rely on the FECA program to provide them with the best assistance and services possible." To implement this vision, DFEC has established, among others, the following Strategic Goals and Objectives

STRATEGIC GOAL 1 : Under the FECA, employees return to work following a work injury at the earliest appropriate moment.

Objective 1.1: Reduce the average number of lost production days.⁶

⁶ "Lost production day" actually means a day lost from work due to disability. In its Strategic Plan,

STRATEGIC GOAL 7: Enhance adjudicatory efficiency and quality.

Objective 7.2: Increase adjudication quality in FECA.⁷

STRATEGIC GOAL 8: Injured FECA workers are served by a fair, swift, and people-oriented compensation system.⁸

Rising Compensation Costs Upset Employers' Expectations

In 1993, the Office of Workers' Compensation Programs (OWCP) first submitted a report to Congress regarding administration of the Federal Employees' Compensation Act by its Division of Federal Employees' Compensation (DFEC).⁹

This *Report*, covering activities during fiscal year (FY) 1992, noted: "[i]ncreases in the number of injury cases in the 1970's and 1980's resulted in a substantial growth in the size of the number of long-term disability cases which is called the 'periodic roll.'" The FY93 *Report* noted: "[f]rom 1980 to 1991, the number of Federal employees receiving long-term compensation payments increased by approximately three percent per year even though the number of Federal employees remained constant."¹⁰

DFEC has established annual goals, extending through the year 2002, for reducing "the previous year's average number of days lost due to disability for cases in Quality Case Management." According to the FY96 *OWCP Annual Report to Congress*, "prompt and effective service to [Claimants and beneficiaries] continues to be a high priority within the FEC program." FY96 *Report* at 13. In light of this, why is the reduction of compensation the number one Strategic Goal?

⁷ According to DFEC, through the first 2 quarters of FY97 "70+% of decisions in the four offices measured thus far are fully supportable on appeal." This contradicts data OWCP publishes in its *Annual Report*. See e.g., Table 4.

⁸ Query: why isn't this the number one goal?

⁹ *OWCP Annual Report to Congress FY 1992 (FY92 Report)*.

¹⁰ FY93 *Report* at 10.

The FY96 *Report* contains the following data:¹¹

Table 1: Relationship between Injuries and Growth of Periodic Roll¹²

Year	Injuries ¹³	Change	Periodic Roll			PR Change
			Short Term	Long Term	Total	
1991	96356	(0.7%)	355	51679	52034	3.2%
1992 ¹⁴	98458	2.2%	1339	51763	53102	2.1%
1993 ¹⁵	107167	8.8%	2616	50312	52928	(0.3%)
1994	113722	6.1%	3009	50538	53547	1.2%
1995	105483	(7.2%)	2383	50685	53068	(0.9%)
1996	100064	(5.1%)	1955	50021	51976	(2.1%)

The FY96 *Report* also revealed that total compensation benefits had risen, over the same period, from \$1.6 billion to \$1.9 billion.¹⁶

The DFEC Response

DFEC responded to the growth in compensation expenditures, and to the complaints of employing agencies,¹⁷ by adopting several management strategies.

To address the growth of the periodic roll, DFEC proposed, and Congress approved, the Periodic Roll Management Project which began in April 1992. DFEC stated that the function of the Periodic Roll Management Project is to screen the long-term disability roll for cases needing medical examination, medical and vocational rehabilitation, including job training and placement.¹⁸ DFEC also

¹¹ Data derived from FY96 *Report*, Tables A-1, A-2.

¹² Totals exclude death cases.

¹³ For purposes of this table, "injury" means lost time injury and occupational disease.

¹⁴ Periodic Roll Management (PRM) Project begins April 1992.

¹⁵ Quality Case Management (QCM) procedures implemented.

¹⁶ FY96 *Report*, Table A-3. Up from \$1 billion in 1984 (Table A-3, FY93 *Report*).

¹⁷ Of the \$1.9 billion compensation benefits paid in FY 1996, the three largest chargeback bills went to the Department of Defense (\$597.4 million), the U.S. Postal Service (\$547.2 million), and the Department of Veterans Affairs (\$140.7 million). See FY96 *Report* at 8, and Table A-3.

¹⁸ FY93 *Report* at 10.

adopted a new tool to deal with the periodic roll increase, *i.e.*, the short-term roll.

The FY92 *Report* stated that

[t]he short-term roll is particularly appropriate for cases involving vague or uncertain prognosis, or indefinite periods of projected disability. It allows the claims examiner to approve the initial compensation for a period keyed to the expected period of disability, considering the physician's report and the medical matrix.¹⁹

In FY92, DFEC "carried out a pilot test of early interventions in disability cases using registered nurses to visit injured employees and in assist in their medical case management and early return to work."²⁰ DFEC also began emphasizing vocational rehabilitation which it described as "assist[ing] disabled employees to minimize their disabilities and return to gainful employment."²¹

In 1993, DFEC instituted new case management procedures which it stated would "provide better service to Claimants and effect cost savings as well."²² These procedures, collectively called Quality Case Management, deal with those cases where the Claimant has not returned to work within 45 days of the injury. A registered nurse, under contract to DFEC, would work with injured employees,

¹⁹ FY92 *Report* at 9. The DFEC medical matrix: "shows the usual length of disability in selected conditions most commonly accepted under the FECA. The matrices provide guidelines to recognize the normally expected periods of disability for identified conditions, and to intervene if disability for work persists." FY92 *Report* at 9 (emphasis added). It is clear that simple reliance on the medical matrix is insufficient to sustain DFEC's burden to terminate compensation. See 20 C.F.R. § 10.110(c). Claimants on the short term roll must continually establish entitlement when the duration of their disability does not conform to the procrustean medical matrix.

²⁰ FY92 *Report* at 8. "During FY 1993, each DFEC district office hired a staff nurse and arranged for the services of field nurses in the geographic region served by the district office, and all district office staff were trained in these new procedures. [T]he statistical results of this initiative will not be known until it has been operational for a year . . ." FY93 *Report* at 9.

²¹ FY92 *Report* at 12.

²² FY93 *Report* at 9. Although the OWCP *Annual Reports* claim that this, and other initiatives, provide better service to Claimants, DFEC has never revealed whether customer surveys support this claim.

their physicians and the employing agency to clarify the nature and extent of injury-related disability and arrange for the Claimant to return to work as soon as possible. By FY94, Quality Case Management (QCM) and early nurse intervention procedures were fully implemented.

DFEC also set goals for timely decision making. The FY95 *Report* stated that

[t]he FEC program regularly meets high standards of timeliness in deciding and paying claims. For example, 94 percent of traumatic injury claims are decided²³ within 45 days of receipt and 83 percent of wage loss claims are paid within 14 days.²⁴

For simple occupational disease cases, DFEC determined that a decision would be issued within 90 days; for the large majority of occupational illness cases, which require more extensive evidentiary development, a decision would be made within six months of receipt; and, for very complex occupational illness cases, a decision would be rendered within 10 months of receipt.²⁵

The Impact

Although OWCP and DFEC continually state that service to injured employees is paramount, the data published by OWCP in its *Annual Reports* to Congress appear to contradict this claim. In fact, implementation of the Periodic Roll Management Project, Quality Case Management procedures and the early nurse intervention initiative appears to have resulted in a 22% increase in the

²³ As discussed below, most cases are not in fact decided. See n.62 *infra* and accompanying text. Furthermore, the decisions that are made are wrong nearly 50% of the time. See n.47 *infra* and accompanying text.

²⁴ FY95 *Report* at 10. According to the most recently published figures, in FY 1996, 20,392 new wage loss claims were initiated. See FY96 *Report*, Table A-2. This means that at least 3,466 claims were not paid timely. Going without funds for more than 2 weeks is a hardship for most people who live from paycheck to paycheck.

number of hearing requests.²⁶ For example, as shown in Table 2, there is a positive correlation between the number of hearing requests and the number of cases screened by the Periodic Roll Management Project.

Table 2: Correlation between PRM Activity²⁷ and Hearing Requests

Year	PR Cases ²⁸	Screened	Terminations	Hearing Requests	ROR ²⁹ Requests	Remand Rate
1993	52928	6133 ³⁰	2267 ³¹	6710	544	45%
1994	53547	4000	2200 ³²	6703	583	40%
1995	53068	7400	2700 ³³	7250	806	38%
1996	51976	7000	1900 ³⁴	7991	830	43%
Average		6133	2267		693	42%

Similarly, as shown in Table 3, there is a positive correlation between the number of QCM cases processed, the number of second opinion medical

²⁶ From DFEC's Customer Service Plan.

²⁷ For purposes of this discussion, the term "hearing request" includes requests for written reviews.

²⁸ According to DFEC "[s]ince the project's inception [in April 1992], claims examiners have reviewed over 36,000 disability cases and acted on over 10,400 cases (28 percent of those screened by September 1996)." *FY96 Report* at 10. This means that, on average, DFEC screened 8004 cases per year and acted on 2,241 of the cases screened (28%). However, as with so much of the data OWCP publishes, these figures do not add up. For example, from FY94 to FY96 DFEC screened 14,800 cases leaving 21,200 cases which must have been screened in the 18 months from April 1992 to September 1993, or an average of 14,133 cases screened per year. This is more than twice the rate screened in the most active years for which DFEC has provided yearly data.

²⁹ Represents long-term and short-term periodic roll.

³⁰ "In lieu of an oral hearing, a Claimant shall be afforded an opportunity for a review of the written record [ROR] by an Office representative designated by the Director [OWCP]. Such review will not involve oral testimony or attendance of the Claimant; however, the Claimant may submit any written evidence or argument which he or she believes relevant." 20 C.F.R. § 10.131(b).

³¹ Represents an average of the 3 years of data actually reported by DFEC.

³² Represents an average of the 3 years of data actually reported by DFEC.

³³ "In FY 1994, nearly 4,000 cases were screened and 2,200 had benefits adjusted or terminated" *FY94 Report* at 13.

³⁴ "In FY 1995, 7,400 cases were screened and benefits were adjusted or terminated in 2,700 cases . . ." *FY95 Report* at 12.

³⁵ "In FY 1996, nearly 7,000 [Periodic Roll] cases were screened and benefits were adjusted or terminated in 1,900 cases where beneficiaries had potential return to duty or where their injury-related disabilities had been resolved." *FY96 Report* at 10. According to Director, DFEC Markey, 40% of these 1,900 Claimants did not reply. Of the 60% who did reply and request a hearing, an

examinations (SECOP) scheduled and the number of hearing requests. As the number of QCM cases processed increased the numbers of cases referred for early nurse intervention also increased. However, it is important to note that the number of hearing requests is negatively correlated with the actual number of injuries which actually has fallen by 12% since 1994

Table 3: Correlation between QCM Cases and Hearing Requests

Year	Injuries ³⁵	QCM Cases	SECOPs	Hearing Requests	ROR Requests	Remand Rate
1994 ³⁶	113722	4300	1000	6703	583	40%
1995	105483	9500 ³⁷	2000	7250	806	38%
1996	100064	10500 ³⁸	3400	7991	830	43%
Average						40%

The FY94 Report described QCM in the following manner

[t]he guiding principle of this new approach . . . is early, active management of the case through staff teamwork, leading to return to light or alternative work if possible. If intervention by the occupational health or rehabilitation nurse does not lead to return to work, the case is expected to move quickly to medical and vocational evaluation. If evaluation supports a wage-earning capacity, the injured worker is advised that OWCP judges him or her to be partially disabled, and that benefits will be adjusted.³⁹

In describing the purpose of the PRM and QCM procedures, OWCP's FY96

average 45% of the decisions were reversed.

³⁵ For purposes of this table, "injury" means lost time injury and occupational disease.

³⁶ "FY 1994 was the first full year of experience for FEC's new comprehensive approach to disability [QCM]." FY94 Report at 12.

³⁷ "Over 7,800 cases assigned to rehabilitation nurses [in FY95] versus 4,300 in 1994." FY95 Report at 11.

³⁸ "Over 9,700 cases assigned to nurses v. 7,800 last year." FY96 Report at 10. At a September 30, 1997, Oversight hearing, Acting Director Hallmark testified that DFEC receives approximately 10,000 serious injuries each year.

³⁹ FY94 Report at 17 (emphasis added).

Report states

[c]ase actions under the PRM initiative, along with QCM's success in returning injured employees to work, have reduced the size of the periodic roll by two percent. Previously, the roll had been increasing by four percent annually.⁴⁰ At the end of FY 1996 58,329 beneficiaries⁴¹ were receiving long-term compensation, the lowest number on the roll since 1990. With very low administrative costs, less than \$14 million for the PRM project's 4 ½ years, PRM is an extremely cost-effective initiative that has contributed to *the reversal in compensation payment increases and assisted in curtailing the increase in the size of the disability roll.*⁴²

It therefore appears that the 22% increase in hearing requested is related to the activities of the Periodic Roll Management Project, the increased implementation of QCM procedures and increased referrals for rehabilitation nurse intervention. These activities appear to be suspect in light of the fact that the remand rate, for appealed decisions, has averaged 42% since FY92.

It also appears that DFEC has chosen to address the imbalance in the traditional workers' compensation covenant, *i.e.*, predictable compensation costs in exchange for timely payment of benefits, by adopting measures designed to reduce the amount of benefits paid. In addition, DFEC began measuring its success by the amount of compensation benefits saved rather than service to injured employees.

Measuring Success

Although the FY92 *Report* described the early nurse invention program as one of several "new initiatives to streamline and improve our case management and

⁴⁰ This "factoid" is not supported by the data published in Table A-1 of the FY96 *Report* or OWCP's prior statement, in its FY93 *Report*, quoted above. See n.10 *supra*, and accompanying text.

⁴¹ This figure includes recipients of death benefits.

⁴² FY96 *Report* at 10 (emphasis in original, italics added).

service to injured workers."⁴³ its results were actually reported in terms of reduced benefits.⁴⁴ Similarly, the FY92 *Report* described the criteria for success of the Periodic Roll Management Project in the following manner:

[f]or each injured worker restored to employment with no loss of wage-earning capacity, average savings of \$20,000 are estimated for each successive year that the worker would have remained a recipient. At the end of FY 1992, after only three months of activity, the four project teams had already taken actions which would directly result in savings to the compensation fund of \$13 million over the next four years. (The full four Office project is currently expected to save more than \$100 million after the cost of staff is subtracted.)⁴⁵

DFEC's number one Strategic Goal is to reduce the number of lost production days. "Lost production day" is a euphemism for disability for work caused by injury or illness. In its Strategic Plan, DFEC has established yearly goals, through 2002, for reducing disability. This goal is placed before improving the quality of decisions and improving customer service. The goal of reducing "lost production days" implies that compensation is being paid for periods where employees are not actually disabled. How will DFEC achieve its goal once disabled employees cannot be returned to work sooner? The fact that an increase in the activities designed to return Claimants to work sooner has resulted in a 22% increase in the number of hearings, and the fact that the remand rate for appealed decisions is nearly 50%, appears to suggest that such a Strategic Goal is in fact forcing injured employees

⁴³ FY92 *Report* at 8 (emphasis added). DFEC states "it is clear from anecdotal evidence that Claimants are well disposed to intervention by the nurses." (*Id.* at 9) OWCP has never supported this claim with data from its customer surveys.

⁴⁴ "In a controlled study of 224 lost-time injury cases, Claimants receiving [early nurse] intervention services within 100 days of injury experienced fewer days lost from work, fewer weeks on the compensation rolls, and lower compensation costs." FY92 *Report* at 8-9 (emphasis added).

⁴⁵ FY92 *Report* at 9 (emphasis added).

back to work too soon.

DFEC's Strategic Plan publicly states that reducing the amount of compensation paid for disability is more important than any other goal. However this emphasis on reducing compensation costs is not without consequences for injured workers. As part of the workers' compensation covenant, injured employees are entitled to receive prompt payment of compensation and medical bills. The significant number of injured employees experiencing problems with their compensation claims demonstrates that the covenant has broken down.⁴⁶

Injured Federal Employees Are Not Receiving the Benefit of Their Covenant

Although increased implementation of the Periodic Roll Management Project and QCM case procedures appears to have increased the number of decisions which are appealed, the data indicates that the quality of these decisions is poor. For example, as shown in Table 4, OWCP's statistics reveal that the Branch of Hearings and Review (H&R) has consistently remanded⁴⁷ an average of 45% of the decisions denying or reducing benefits. Similarly, data provided by OWCP discloses that the Employees' Compensation Appeals Board (ECAB), the highest appellate body under the FECA, has remanded 41% of the cases it considered.⁴⁸ The ECAB remand rate is very significant since no new evidence can be submitted in the proceedings. This

⁴⁶ Query: by considering employing agencies customers, has DFEC neglected its primary mission, of providing compensation for injured workers, in favor of providing "service" to agencies?

⁴⁷ If an appealed decision is incorrect, H&R may reverse the decision or vacate the decision and remand the case to the District Office for additional development and a *de novo* decision. In its *Annual Reports* OWCP has not indicated how many remanded cases are actually reversals.

⁴⁸ According to data provided by DFEC, the ECAB completed 11,785 cases from the beginning of FY89 to the end of April 1996. Of these cases, the ECAB sustained 6,930 (59%) of the decisions appealed and modified, reversed or remanded 4,855 (41%) of the decisions appealed.

means that 41% of the decisions considered by the ECAB are incorrect on their face without the submission of evidence not considered by the original decision maker. Furthermore, it takes at least 8 months to receive a hearing decision and 24 months to receive an ECAB decision. These error rates, coupled with the length of time it takes to receive a decision, are compelling evidence that DFEC's procedures are not designed to provide "swift benefit delivery [and] cost-effective and people-oriented administration."

Table 4: Remand Rate at Branch of Hearings and Review⁴⁹

	Total Merit Decisions ⁵⁰	Procedural Decisions	Remands Total/% TMD	Pre-Hearing Remands Total/% Total Remands/% of TMD
1988	2388	1667	1328/56%	810 61% 34%
1989	2722	2354	1263/42%	778 62% 29%
1990	2588	2463	1263/49%	790 63% 31%
1991	3360	1303	1582/47%	859 54% 26%
1992	3290	1198	1519/46%	827 54% 25%
1993	3290	1352	1519/45%	823 54% 25%
1994	4035	1810	1636/40%	840 51% 21%
1995	4334	1879	1648/38%	742 45% 17%
1996	4178	1877	1812/43%	993 55% 24%
Average	3354	1624	1508/45%	829⁵¹ 55% 25%

⁴⁹ Data derived from *OWCP Annual Report to Congress FY 1996, Table A-2.*

⁵⁰ "Total Merit Decisions" (TMD) represents Total Hearing Dispositions minus the following categories of procedural decisions: dismissals and withdrawals/no shows. TMD also does not include Reviews of the Written Record, for which DFEC has not provided data on remands. It is expected that the remand rate for this category of cases would emulate that of hearing cases.

⁵¹ Represents 2.6 person years of work. Hearing Representatives must take 9 trips per year containing 36 cases which equals 315 hearing cases per year per Hearing Representative ($829 + 315 = 2.6$).

Another telling statistic is that the majority of cases remanded by H&R are remanded prior to a hearing. An analysis of the data published by OWCP in its *Annual Reports*, and summarized in Table 5, reveals that, in fact, 55% of cases remanded by H&R are remanded prior to hearing. This means that the decision was incorrect at the time it was rendered or that additional evidence sufficient to set aside the decision was received after the decision was rendered but before a hearing.

With the remand rate so high, and with the number of pre-hearing remands comprising the majority of remands, the process obviously is not streamlined to provide "a fair, swift, and people-oriented compensation system," as claimed by DFEC officials. As noted above, the most important goal is the reduction of compensation costs. Neither the OWCP *Annual Reports*, nor DFEC's vision statement and Strategic Plan, identify the reduction of improper denials as a goal. While DFEC's Strategic Plan,⁵² states that "70+% of decisions in the four offices measured thus far are fully supportable on appeal,"⁵³ this figure is contradicted by the data summarized in Table 4.

The flood of improper denials has also lengthened the time an injured employee must wait for a hearing. In written testimony, presented at a September 30, 1997, oversight hearing before the Subcommittee on Workforce Protections of the House Committee on Education and the Workforce, Acting Director, OWCP

⁵² Strategic Plan, Goal 7, Objective 7.2.

⁵³ As explained by Director, DFEC Markey, this statement does not mean that "70+% of decisions reviewed actually were sustained. This "statistic" merely represents the opinion of the reviewing

Shelby Hallmark stated: "[t]he time required for a hearing to be held and a decision issued varies depending on where the hearing must be held, but is generally about eight months."⁵⁴ This means that, in addition to a high remand rate, injured employees must wait an average of 8 months to have an incorrect decision set aside. In the majority of these cases the injured employee is without any benefits for this period. This fact, together with the enormous numbers of complaints from injured employees, belies DFEC's claim that it provides "swift benefit delivery."

team that a decision would be sustained if appealed.

⁵⁴ This statement does not appear accurate since the letter sent to Claimants when their hearing request is received by H&R states: "If you have requested an oral hearing, and it is determined that the case is in posture for such, you can expect the case to appear on a hearing docket in approximately six to eight months." Hearing Representatives have approximately 75 calendar days after the hearing to release 70-85% of their decisions and 100 calendar days to release 96% of their decisions..

Table 5: Relationship Between Pre-Hearing Remands and H&R Backlog⁵⁵

	THR ⁵⁶	THD	Deficit ⁵⁷	Total Remand Rate	Pre-Hearing Remands Total/% THR/% Deficit
1992	5976	4967	(1009)	46%	827 14% 82%
1993	6710	5294	(1416)	45%	823 12% 58%
1994	6703	5294	(1409)	40%	840 13% 60%
1995	7250	7019	(231)	38%	742 10% >100%
1996	7991	6885	(1106)	43%	993 12% 90%
Average	6926	5892	(1034) ⁵⁸	42%	845 12% 82%
Cumulative Backlog					
Cumulative Pre-Hearing Remands					4225⁶⁰

(6171)⁵⁹

⁵⁵ Data derived from *OWCP Annual Report to Congress FY 1996*, Table A-2.

⁵⁶ Total Hearing Requests (THR). Total Hearing Dispositions (THD)

⁵⁷ This represents number of cases not disposed of in a given year, which is derived by subtracting THD from THR. The deficit is added to the cumulative backlog.

⁵⁸ Represents 3.3 person years of work. Hearing Representatives must take 9 trips per year containing 35 cases which equals 315 hearing cases per year per Hearing Representative (1034 ÷ 315 = 3.3). This means that H&R requires additional Hearing Representatives just to stay current. In the alternative, the number of Hearing Requests needs to be reduced.

⁵⁹ Represents 16.4 person years of work. This means that more than 16 people would have to be assigned to H&R for a year to eliminate the backlog which has accumulated since 1992.

⁶⁰ Since cumulative pre-hearing remands represented 82% of the cumulative backlog, a reduction in the number of pre-hearing remands would have reduced the cumulative backlog which, in turn, would shorten the more than 8 months it currently takes to hold a hearing and issue a decision.

As noted in Table 5, the number of pre-hearing remand cases has caused the backlog in the Branch of Hearings and Review to steadily increase to the point that it would have taken more than 16 person years to eliminate at the end of FY 1996. This backlog has materially lengthened the time it takes to have a hearing and receive a decision. When deserving injured employees are without benefits, justice delayed is justice denied.

The FECA is remedial legislation and one of its major purposes is to prevent Federal employees, who are without income because of job-related injuries, from sinking into poverty. However, the combination of large numbers of improperly denied cases and delays in scheduling hearing has forced many injured employees into poverty which is directly contrary to the purpose of the Act. It is not unusual for an injured employee to wipe out his or her life savings, lose their house and be forced into bankruptcy because of lack of timely benefit payment.

While cost savings and better service are complementary parts of the compensation covenant, Claimants are being cheated. Director DFEC Markey told me that 40% of Claimants whose benefits are terminated never respond. When I asked him to explain why this figure was so high he said "we just don't know." In light of a remand rate averaging 45% it would appear that DFEC should seek some answers. However, as shown by the thrust of the data and narrative presented in OWCP's *Annual Reports*, DFEC is not interested in those types of answers. DFEC is more interested in measuring its success by the amount of benefits reduced.

In addition, to deflect attention from its significant adjudication failures,

DFEC has chosen to emphasize the timeliness of its decisions. Although DFEC attempts to equate "timely decision" with "correct decision" it is obvious that a correct decision, rendered outside of an arbitrary and capricious time standard, is preferable to an incorrect decision which is rendered within such a standard.

The Myth of Timeliness

In his September 30 written testimony, Acting Director, OWCP Hallmark stated "[a]n average of 92 percent of all traumatic injury claims are approved upon initial adjudication." This is misleading. In fact, in October 1993, DFEC implemented new procedures for adjudicating minor, lost-time traumatic injury cases. This type of injury represents the vast majority of all traumatic injuries reported to DFEC.⁶¹ The FY93 *Report* described these procedures as follows:

[b]y employing a computerized process when cases are created, many non-controverted, traumatic injury claims are screened to allow for the payment of medical bills which pass a series of checks for appropriateness of treatment. These cases are reviewed by a claims examiner only after medical bills exceed a certain amount, a wage-loss claim is filed, or the agency controverts the claim.⁶²

According to the FY93 *Report*, "[d]uring a pilot implementation of these procedures approximately 72% of all traumatic 'lost-time' cases created were processed without an initial claims examiner review. Of these cases, fewer than 14% were subsequently reopened for adjudication."⁶³ Furthermore, according to the data published in OWCP's FY96 *Report*, more than half of the traumatic injuries

⁶¹ See FY92 *Report* at 7: cases created equals no lost time cases plus continuation of pay cases.

⁶² FY93 *Report* at 9 (emphasis added).

⁶³ *Id.*

reported actually involved no lost time from work.⁶⁴ This means that the great majority of cases Acting Director Hallmark testified were "approved upon initial adjudication," involve minor or no lost time injuries. These cases are not reviewed by Claims Examiners and are not in fact "approved" in the normal understanding of that word, or the implication created by Acting Director Hallmark's testimony.

When confronted with data showing a consistent remand rate of 45%, a senior OWCP official attempted to minimize the significance of this shortcoming by stating that the actual number of remanded cases is very small in comparison to the total number of injuries reported. This statement is reflective of the arrogance and insensitivity that permeates all of DFEC and OWCP. I am sure that the many employees whose decisions are remanded each year, after a lengthy delay, view the significance of their case differently. Furthermore, the number of cases remanded should be measured against the number of serious injuries reported in a year (10,000) rather than the total number of injuries reported in a year most of which are so minor that DFEC does not even devote staff resources to reviewing them.

However, even the number of cases listed in OWCP's *Annual Reports* as remanded do not reflect the true extent of poor decisions. For example, because of delays in scheduling timely oral hearings, DFEC officials have encouraged Claimants to request a review of the written record in lieu of an oral hearing. According to data published in the *FY96 Report*,⁶⁵ there was an average of 427 requests for written record reviews each year from FY88 to FY91. However, as

⁶⁴ Table A-2.

summarized in Table 6, from FY92 to FY96, the average had increased, by 52%, to 648. Applying the average remand rate⁶⁶ during this period (42%) to this figure means that the number of remands should be increased by 272 cases.

Table 6: Hearing Dispositions by Category⁶⁷

Year	Hearing Requests	ROR Requests	Dismissals	Withdrawal ⁶⁸	Merit Decisions	Remands	Rate
1992	5976	479	734	464	3290	1519	46%
1993	6710	544	863	489	3290	1519	45%
1994	6703	583	1215	596	4035	1636	40%
1995	7250	806	1182	697	4334	1648	38%
1996	7991	830	1288	589	4178	1812	43%
Avg.	6926	648	1056	567	3825	1627	42%

From FY92 to FY96 the number of hearing requests dismissed each year averaged 1,056 and the number of withdrawal/no-shows averaged 567 per year. These numbers are high, representing respectively approximately 15% and 8% of the average yearly hearing requests and 28% and 15% of the average annual merit decisions, for the same period. A hearing request may be dismissed if the injury or death occurred prior to July 3, 1996; if the request was not made within 30 days of issuance of the decision; or, if the decision of the District Office was not final.

Some dismissals occur because the hearing request was not made within 30

⁶⁵ *Id.*

⁶⁶ DFEC has not reported the number of ROR cases remanded. However, it is assumed that the number of cases remanded for this category would emulate the number of hearing cases remanded.

⁶⁷ Sum of categories does not equal Total Hearing Requests. The difference represents the annual disposition deficit identified in Table 5, *supra*.

⁶⁸ Includes no-shows.

days after the of the issuance of the decision. This requirement is statutory.⁶⁹ However, the 30 day period is calculated from the date of the decision, which is not the date it is sent. The decision spends some time in the District Office waiting to be mailed. The decision also takes time to reach the Claimant by mail. Therefore, a Claimant actually receives the decision several days after it is dated. According to the regulations, "[a] Claimant is not entitled to an oral hearing if the request is not made within 30 days of the date of the issuance of the decision as determined by the postmark of the request."⁷⁰ It is not equitable to strictly construe the 30 day period for requesting a hearing when the District Office does not release the decision timely.

In addition, hearing requests are dismissed because, even though the Claimant objects to a District Office action, a formal decision may not have been rendered. Such actions may actually include denial of compensation and medical benefits. However, a decision is not a final decision until it is issued, with appeal rights, in accordance with § 8124(a) of the Act.⁷¹ Notwithstanding this technicality, the Claimant, seeking a remedy, requests a hearing. If no formal decision has been rendered, the case is merely sent back to the District Office. A formal decision is then rendered, whereupon the Claimant requests another hearing. When an average of 15% of hearing requests are dismissed, and when the number of dismissals equals 28% of merit decisions, basic principles of customer service

⁶⁹ 5 U.S.C. § 8124(b)(1).

⁷⁰ 20 C.F.R. § 10.131(a).

⁷¹ "The Secretary of Labor shall determine and make findings of facts and make an award for

require some analysis of the reasons. Once again, neither DFEC data nor OWCP *Annual Reports* address this critical point.

Therefore, it is reasonable to assume that at least a portion of the dismissed cases would have progressed to hearing if DFEC did not impose artificial procedural barriers, *i.e.*, more hearing requests would be timely if the date for "issuance of the decision" were determined by the postmark of the decision rather than the date of the decision. Similarly, more requests for hearing would be ripe if the term "formal decision" were viewed more realistically.⁷² More cases proceeding to hearing would mean that more cases would have been remanded.⁷³

Some of the withdrawal/no-shows represent injured employees who have become frustrated with the more than 8 month delay in the hearing process and have sought some other remedy, *e.g.*, many Claimants apply for Office of Personnel Management disability retirement in order to have some income. Therefore, it is reasonable to assume that a portion of the withdrawal/no-show cases would have gone to hearing and would have been remanded.⁷⁴

Director, DFEC Markey has stated that 40% of Claimant's whose benefits have been terminated do not respond. From FY93 to FY96 an average of 2,267

against the payment of compensation" 5 U.S.C. § 8124(a).

⁷² It seems fairly obvious that Claimants are requesting a hearing for some reason. DFEC should analyze these reasons and take some corrective action.

⁷³ Assume that a third of the average of dismissed cases, from Table 6, would have progressed to hearing. Thirty-three percent of 1,056 equals approximately 352. The average remand rate for the period FY92 to FY96 equaled 42%. Forty-two percent of 352 equals approximately 148.

⁷⁴ Assume that a third of the average withdrawal/no-show cases in Table 6 would have had a hearing if hearings were held in a more timely manner. Thirty-three percent of 567 equals approximately 189. The average remand rate for the period FY92 to FY96 equaled 42%. Forty-two percent of 189 equals approximately 79.

Claimants had their benefits reduced or terminated each year.⁷⁵ The average remand rate for this period was 42%. This means that, if every Claimant whose benefits were reduced or terminated exercised their appeal rights an average of 381 additional cases per year would have been remanded.⁷⁶

This means that approximately 880 cases⁷⁷ should be added to the average number of cases remanded annually between FY92 to FY96, for a total of approximately 2,507.

In his September 30 testimony Acting Director Hallmark stated that DFEC accepts an average of 92% of all traumatic injury cases and 67% of occupational disease cases. Applying these percents to the 1996 data reveals that 12,016 traumatic injury cases and 8,147 occupational disease cases were not approved, for a total of 20,163 disapproved cases.⁷⁸ It would be more relevant to compare the 2,507 remanded cases to this figure. This means that the number of remanded cases represents approximately 12% of denied cases rather than 1% of the total number of cases created. While 12% may still appear insignificant to some Department of Labor officials, it is significant that these 2,507 individuals had their claims wrongfully denied and were without benefits for an extended period of time.

Another way to evaluate the number of remanded cases would be to compare it to the total number of serious injuries reported in a given year. Acting Director,

⁷⁵ See Table 2, *supra*.

⁷⁶ Forty percent of 2,267 equals 907 of which approximately 42% (381) would have been remanded.

⁷⁷ Reviews of the written record (272); dismissed cases (148); withdrawal/no-shows (79); and, terminations (381).

⁷⁸ According to Table A-2 in the FY96 *Report*, 7,991 hearing requests were received in FY 1996 which is approximately 40% of the number of cases denied.

OWCP Hallmark testified that DFEC receives approximately 10,000 serious injuries per year. This number corresponds to the number of QCM cases identified in Table 3. A more accurate indicator of DFEC's success would be to monitor its handling of these cases. The number of remanded cases, derived above, is 24% of the total serious injuries handled by DFEC in FY96.⁷⁹

The number of remanded cases, and the fact that the majority of remands occur prior to hearing, suggest that DFEC's procedures, designed for headlong adjudications, are flawed.

The Rush to Judgment

Director, DFEC. Markey and Acting Director, OWCP Hallmark established and enforced arbitrary and capricious time standards on the District Offices. These time standards require a District Office Claims Examiner to render a decision on a claim within 45 days and to act on a proposal to terminate benefits at the end of 30 days. These time frames are too short and are too rigidly enforced to permit appropriate consideration of the merits of the claim. This has resulted in significant numbers of prematurely denied cases.

For example, after the initial review of a claim a Claims Examiner will write to the injured employee and advise him or her of any evidence necessary to perfect the claim for compensation. The injured employee is typically given 30 days to

⁷⁹ "Over 9,700 cases were referred to nurses under QCM procedures. Nearly 3,400 workers were referred for expert second opinion evaluations, and 1,079 were referred for vocational rehabilitation services. . . . Of QCM cases with outcomes in FY 1996, 73 percent were resolved within one year of the date disability began and 81 percent were resolved within two years." FY96 Report at 9 (emphasis added). In FY96 both the remand rate (43%) and the pre-hearing remand rate (55%) were the highest since QCM procedures were fully implemented in FY94. See Table 4,

respond. However, when the Claims Examiner drafts the deficiency letter it is not received the same day it is dated. The letter spends some time in the District Office waiting to be mailed. The letter also takes time to reach the Claimant by mail. Therefore, a Claimant actually receives the letter several days after it is dated. The Claimant then prepares a response which takes several days to reach the District Office. In fact, when a decision is rendered 30 days from the date of the letter, the Claimant has not received "at least 30 calendar days" to respond as required by the regulation.⁸⁰

When the time standards require a decision, the Claims Examiner will deny the claim if the requested information has not been submitted. A Claimant may ask for a hearing to appeal the denial of the claim. In the period between the time the claim is denied and the time the case is transferred to the Branch of Hearings and Review, the requested evidence may come in. In some cases the information is in fact received by the District Office in time but is not put into the case file quick enough to prevent the denial. However, unless specifically asked to do so, the District Office will not reconsider the denial. It appears to be directly contrary to the purpose of the FECA to quickly deny benefits without at the same time trying to quickly consider the merits of the claim when the requested evidence is received.

Similar problems plague decisions to terminate benefits. In *Kendall v.*

supra. Query: in light of these facts, what does the term "resolved" mean?

⁸⁰ The statute does not specify a 30 day period. This is purely discretionary on the part of DFEC. Furthermore, the relevant regulation does not mandate a 30 day period. In fact, the regulation states: "the Office will inform the Claimant of the defects in proof and grant at least 30 calendar days for the Claimant to submit the evidence." 20 C.F.R. § 10.110(b).

*Brock*⁸¹ a district court granted preliminary injunctive relief to a Claimant whose benefits were terminated without a pretermination notice or an opportunity to respond. DFEC then promulgated FECA Bulletin 86-85. This Bulletin established new procedures for the termination or reduction of compensation benefits.⁸²

The procedures require that a Claimant, whose benefits will be reduced or terminated, must be notified of the proposed action by letter. This letter informs the Claimant that he or she has the right to submit evidence and argument against the proposed action within 30 days.⁸³ The procedures state that

[c]ompensation and medical benefits should not be terminated or reduced during the 30-day period. Payment should continue until any evidence submitted by the Claimant has been reviewed and a formal decision has been issued.⁸⁴

However, this 30 day period is rigidly enforced. The procedures further state:

[a] Claimant may state that he or she intends to submit additional evidence but cannot do so within the 30-day period. The [Claims Examiner] CE should advise the Claimant that the OWCP will issue a decision at the end of the 30-day period and that the Claimant may submit the evidence later, in support of a request for reconsideration of the final decision.⁸⁵

As with the deficiency notice, the pre-termination notice is not released in a manner that will provide a Claimant with the full 30 days to respond.

The procedures require a Claims Examiner to refer the case file, with the

⁸¹ 689 F.Supp. 354 (D. Vt. 1987).

⁸² The procedures were incorporated into the Federal (FECA) Procedure Manual, ch. 2-1400.

⁸³ There is no statutory basis for this 30 day period. This is purely discretionary on the part of DFEC.

⁸⁴ FECA Procedure Manual (PM) ch. 2-1400.7c.

⁸⁵ FECA PM ch. 2-1400.8b. This is not an adequate remedy. In fact, reconsiderations take at least 90 days to complete. See n.95, *infra*, and accompanying discussion. A better solution would be to grant the Claimant a reasonable extension.

notice of proposed termination and a copy of the evidence which forms the basis for the proposal, to a Senior Claims Examiner for review and concurrence. If the Senior Claims Examiner agrees with the proposed termination "he or she will so indicate on the notice and release the letter advising the Claimant of the proposed termination or reduction."⁸⁶ If there is any delay between the date the Claims Examiner prepares the notice of proposed termination and the date the Senior Claims Examiner releases it, the Claimant has less than 30 days to respond. Furthermore, the termination procedures do not allow time for the notice to reach the Claimant by mail and for the Claimant's response to be processed by the DFEC mail room.

DFEC continually emphasizes its timely decision making.⁸⁷ However, when nearly half of these so-called "timely decisions" are remanded when appealed, it is incredible that the *OWCP Annual Reports to Congress*, continually herald DFEC's success in making timely decisions.

One important reason why decisions are reversed is that DFEC has taken a rigid and uncompromising position on extensions of the 30 period. Although Acting Director Hallmark's September 30 testimony stated that the 30 day period is "a time frame which for reasonable cause may be extended;" it is obvious that such extensions are not being granted since 55% of remanded cases are remanded prior

⁸⁶ FECA PM ch. 2-1400.7b(1).

⁸⁷ See e.g. "Prompt processing of claims is a primary goal for the FEC program since timely and accurate adjudication is the necessary first step to providing service." FY93 Report at 8. "The FEC program regularly meets high standards of timeliness in deciding and paying claims. For example, 94 percent of traumatic injury claims are decided within 45 days of receipt . . ." FY95

to hearing. These pre-hearing remands occur when supporting evidence has been submitted after the "timely decision" but before a hearing. It appears that the rigid 30 day period is arbitrary, capricious and an abuse of discretion.

A more appropriate exercise of discretion would be to permit extensions of time, both to correct initial deficiencies and to respond to termination notices. Furthermore, these extensions should be granted routinely for the following reasons.

Claimants Need More Time to Submit Required Evidence

The rigidly enforced time standards are causing decisions to be made before the evidence necessary to render a correct decision can be submitted. As noted above, deficiency notices are not reaching Claimants in sufficient time so that they can make a timely response. Claimant also have insufficient time to respond to termination notices as can be seen from the following illustration.

A District Offices spends a considerable amount of time preparing evidence to be used to terminate or reduce benefits. For example, it takes more than 30 days for a District Office to schedule a second opinion (SECOP) medical examination. The examining physician then takes more than 30 days to submit a report. The Claims Examiner often requests a supplemental report from the SECOP which means another 30 or more days. Once the medical evidence is received it takes the Claims Examiner more time to evaluate the evidence together with the case record and prepare a proposal to terminate benefits. During this whole period a Claimant

Report at 10. However, timely decision does not mean correct decision.

is kept in the dark. However, when the proposal to terminate or reduce benefits is finally released, a Claimant is provided less than 30 days to assemble evidence to rebut the proposal. In many cases, a Claimant cannot even see a physician during this period, let alone have a medical report written and submitted. Since the opinion of the Claimant's treating physician is often discounted, a Claimant is at a further disadvantage since he or she must try to arrange an examination by a totally new physician. This imbalance is clearly not equitable and DFEC's rationale for its inequitable procedures is revealing.

When confronted with the fact that Claimants are not receiving 30 days to correct deficiencies in their claims as required by the regulations, Director, DFEC Markey stated⁸⁸

[i]t does not appear that the 30-day overall time frame for requesting and submitting information has been burdensome to Claimants. However, it is true that the 30-day time frame stated in many requests for information does not take into account the time needed for the request to reach the Claimant. The draft revision to OWCP's regulations addresses this point by stating that 'the Claimant will be allowed up to 30 calendar days to submit the evidence required.' . . . Extensions are not addressed in the program's procedures. Rather, they have been handled on a common-sense basis. Certainly, the office's high standards for timely adjudication militate against frivolous requests for extension.⁸⁹

When numerous decisions are set aside because of evidence later submitted, Director Markey's characterization of requests for extension as "frivolous" appears

⁸⁸ Although these comments relate to the 30 period to correct deficiencies in a claim, a similar rationale apparently underlies the rigid application of the 30 day period to respond to pre-termination notices.

⁸⁹ January 27, 1998, Memorandum from Director Markey addressing my November 19, 1997, proposal to reduce pre-hearing remands.

baseless. Although the data supports the conclusion that these requests are not “frivolous” Director, DFEC Markey states that “the office’s high standards for timely adjudication militate” against them. From this comment it appears that, in today’s world of lowered expectations, it is more important for Director Markey that adjudications get done at all, let alone done well. In light of the enormous remand rate, it is obvious that adjudications are not being done well. There is no doubt that a remand rate of 45% represents a significant DFEC failure.⁹⁰

Director, DFEC Markey also makes the following conclusory statement: “[i]t does not appear that the 30-day overall time frame for requesting and submitting information has been burdensome to Claimants.” He does not provide any basis for this assertion. However, when 55% of remanded cases are remanded prior to hearing it means either that the initial “timely adjudication” was incorrect or that additional evidence has come in between the date of the decision and the date of the remand. This places Director Markey on the horns of a dilemma. If in fact Claimants are provided sufficient time to submit requested information, then 45% of these “timely adjudications” were incorrect when rendered. An amazing statistic. If, on the other hand, these “timely adjudications” are in fact rendered before the requested information can be submitted, then there is something fundamentally wrong with the arbitrary and capricious time standards.

Director, DFEC Markey’s January 27 memorandum also acknowledges that the current system does not provide a Claimant with at least 30 days to respond as

⁹⁰ Neither OWCP *Annual Reports* nor DFEC’s Strategic Plan have identified strategies to correct

is required by the regulations. Incredibly, he then states: “[t]he draft revision to OWCP’s regulations addresses this point by stating that ‘the Claimant will be allowed up to 30 calendar days to submit the evidence required.’” Under the current regulations, Claimant’s are granted a minimum of 30 days to submit evidence. Under the draft regulations, Claimant’s are granted a maximum of 30 days.⁹¹ Perhaps I am misunderstanding, but how does granting Claimants less time, address the problem of insufficient time to submit evidence?

The 30 day period appears to be DFEC’s attempt to guarantee procedural due process. However, the 30 day period is not mandated by statute and, in light of the enormous remand rate, appears arbitrary, capricious and an abuse of discretion. It is clearly unfair and inequitable to allow a mechanical application of procedural due process to deprive injured employees of the more fundamental right to substantive due process.⁹²

Even though many incorrect decisions are set aside and the cases remanded to the District Office for remedial action, this is not an equitable result. While DFEC has not provided data on the length of time it takes to remand a case prior to hearing, it is reasonable to assume that it takes several months. In addition, Acting Director Hallmark has testified that it takes an average of 8 months to have a hearing and receive a decision. Of course deserving Claimants, who would

this significant program failure.

⁹¹ Title 20 C.F.R. § 10.121 at 62 Fed. Reg. 67,143 (1997). The draft regulations also explicitly state that “OWCP will not grant any request for extension of this 30-day [pretermination notice] period.” 62 Fed. Reg. 67,156.

⁹² “The constitutional guarantee that no person shall arbitrarily deprived of his life, liberty or property; the essence of substantive due process is protection from arbitrary and unreasonable

otherwise be receiving benefits, are without benefits for these periods.

A more equitable way to address this problem would be to reengineer the adjudication process to insure that decisions are correct when rendered and, of equal importance, to quickly revise incorrect or premature decisions.

Claimants Do Not Receive Timely Resolution of Improperly Denied Claims

Section 8124(b)(1) of the FECA states that “[w]ithin 30 days after the hearing ends, the Secretary shall notify the Claimant in writing of his further decision and any modification of the award he may make and of the basis of his decision.” The notice sent by Hearings and Review (H&R) to Claimants who request a hearing states: “[i]f you have requested an oral hearing, and it is determined that the case is in posture for such, you can expect the case to appear on a hearing docket in approximately six to eight months.” Hearing Representatives have 75 calendar days from the date of the hearing to release their decisions. Therefore, Claimants are not receiving notice of the results of the hearing within 30 days of the hearing.⁹³

As noted in Table 5 above, H&R has an enormous backlog of work. This backlog has materially contributed to the substantial delay in the hearings process. Pre-hearing remand cases represent a very significant source of this backlog. For example, the data in Table 4 establishes that, from FY88 to FY96, pre-hearing remand cases represented, on average, 25% of H&R's annual merit decisions, and

action.” *Black's Law Dictionary* (5th Ed. 1979) at 1281 (emphasis added).

⁹³ The regulations define the termination of the hearing as “mailing a copy of the decision, setting forth the basis therefor, to the Claimant's last known address.” 20 C.F.R. § 10.136. It does not appear equitable to broadly construe the time for termination of the hearing, and narrowly construe all other time periods against the Claimant.

2.6 person years of work. Similarly, as documented in Table 5, from FY92 to FY96, pre-hearing remands represented 12% of the total hearing requests received by H&R, and 82% of H&R's annual disposition deficit. In fact, since 1992 the accumulated backlog in H&R has swollen to more than 5,000 cases, representing over 16 person years of work. Pre-hearing remand cases have represented 82% of this cumulative backlog. Diverting scarce resources to this superfluous category of cases means that H&R cannot timely process cases truly needing an oral hearing. Pre-hearing remand cases are superfluous since they represent cases where the decision is so obviously flawed that no additional evidence is needed to reverse it. Pre-hearing cases may also contain evidence submitted in response to a District Office request but which has not been processed.

These facts are well known to Director, DFEC Markey and Deputy Director, OWCP Hallmark since they receive a steady stream of complaints from members of Congress and others. Although they are aware of the problems caused by premature denials, they have chosen to emphasize the timeliness of decisions at the expense of the quality of the decisions. While DFEC can truthfully say, in *OWCP Annual Reports*, that District Offices are rendering timely decisions, Director, DFEC Markey dishonestly conceals the fact that large numbers of these decisions are wrong.

It is also easier for Director, DFEC Markey to minimize the enormous backlog in H&R since this is just one Office among many District Offices and since he can emphasize statistics showing that the District Offices are rendering timely

decisions. Nevertheless, the enormous backlog in H&R, swollen by premature and facially incorrect denials, has materially impeded the swift resolution of improperly denied claims.

Even when a Claimant receives a decision reinstating benefits, he or she is not made whole. Deprivation of benefits for the extended periods of time associated with delays in the hearing process can have catastrophic effects which cannot be remedied by the mere payment of compensation. It is not unusual for this improper deprivation of benefits to cause injured employees to lose all their resources and sink into poverty.

When the FECA was amended in 1974, Congress stated

[i]t is essential that injured or disabled employees of all covered departments and agencies, including those of the United States Postal Service, be treated in a fair and equitable manner. The Federal Government should strive to attain the position of being a model employer.⁹⁴

However it appears that the Federal Government is not a model employer and the agency responsible for insuring that Federal employees are treated in a fair and equitable manner has neglected its responsibility. Instead of a quick resolution, improperly denied cases often languish for more than a year, both in the District Office and the H&R, until a hearing is actually held and a decision rendered.

Furthermore, in a significant number of cases, even though the flawed decision is set aside, the District Office will not reinstate benefits. While each District Office has a special unit to handle remanded cases, these Claims

⁹⁴ S. Rept. No. 1081, 93d Cong. 2d Sess. 1 (1974), reprinted in 1974 USCCAAN 5341.

Examiners will actually disregard the decision of the Hearing Representative and take steps to deny the case again.

Claimants fair no better with the reconsideration process. A Claimant dissatisfied with a final decision may request a reconsideration.⁹⁵ As with hearing requests, a Claimant will not be granted reconsideration if a final decision has not been released on the issue for which reconsideration is requested.⁹⁶ Furthermore, unless the Claimant specifically asks for reconsideration, the District Office will not reconsider its decision, even if the Claimant submits evidence which would support the claim.⁹⁷ It does not appear fair or equitable to require pro se Claimant's, many of whom are not skilled in the intricacies of DFEC's terminology, to invoke "magical words" in order to receive relief. In fact, as noted above, if a Claimant submits evidence in response to a deficiency notice and the evidence is received after the denial, a District Office will not reconsider the denial upon its own motion. This is plainly inconsistent with the purpose of the FECA and another example of how DFEC narrowly construes the Act against the equitable rights of Claimants. As

⁹⁵ Pursuant to § 8128(a): "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a) (emphasis added). Once again DFEC demonstrates how it constructs procedural barriers for Claimants. Despite the fact that the statute states that the review may be had at any time, DFEC has limited this period, for Claimants, to 1 year. See 20 C.F.R. § 10.138(b): DFEC "will not review under this paragraph a decision denying or terminating a benefit unless the application is filed within one year of the date of that decision." However, DFEC retains the authority to review accepted claims at any time, and, according to its proposed regulations, without any basis. See *infra*, n.173 and accompanying discussion.

⁹⁶ FECA PM ch. 2-1602.3a (1996).

⁹⁷ See *e.g.* 20 C.F.R. § 10.138(b)(1): "No formal application for review is required, but the Claimant must make a written request identifying the decision and the specific issue(s) within the decision which the Claimant wishes the Office to reconsider, and give the reasons why it should be changed." FECA PM ch. 2-1602.3a (1996): "If the contested decision or issue cannot be reasonably determined from the Claimant's request, the CE should return a copy of the application to the

with the hearing process, DFEC has erected procedural barriers which result in narrow technical decisions rather than an equitable review of the merits of the claim.

Furthermore, the reconsideration process is not timely. Although the Procedure Manual states: “[t]he goal for issuing reconsideration decisions is 90 days from receipt of the request,”⁹⁸ this is not adhered to. In fact the process takes so long that the delay affects a Claimant’s other appeal rights. The ECAB will accept appeals filed up to 1 year from the date of the last merit decision. If a reconsideration decision is delayed beyond one year, the Claimant’s right to review of the original decision by the ECAB is abrogated.

A program where many of its decisions are overturned when appealed, where there are significant delays in reversing improper decisions and, as result, where there are significant delays in the payment of compensation, is not streamlined to provide customer service.

DFEC Does Not Treat Claimants in a Fair and Equitable Manner

As noted above, Congress has mandated “that injured or disabled employees of all covered departments and agencies, including those of the United States Postal Service, be treated in a fair and equitable manner.” However, DFEC does not carry out this mandate. In an effort to mollify agency complaints regarding rising compensation costs, DFEC has implemented procedures, of questionable fairness, designed to reduce costs. This is plainly inconsistent with the workers’

Claimant for clarification and take no further action on the request.”

compensation covenant. It is also inconsistent with the purpose of the Act.

The Employees' Compensation Appeals Board (ECAB), the highest appellate body under the FECA, has consistently stated that the Act is a remedial statute and should be broadly and liberally construed in favor of the injured employee to effectuate its purpose and not in derogation of the employee's rights.⁹⁹ The ECAB has also stated that proceedings under the Act are not adversarial in nature nor is the District Office a disinterested arbiter. While the Claimant has the burden to establish entitlement to compensation, the District Office has an obligation to see that justice is done.¹⁰⁰ However, DFEC officials disregard this guidance.

According to its Strategic Plan, DFEC "takes pride in its . . . people-oriented administration." The enormous numbers of complaints regarding DFEC's treatment of injured employees give the lie to this statement. In fact, DFEC is permeated with anti-Claimant bias.

When I pointed out, in one of my decisions, that the actions of a District Office, in recovering an overpayment without any notice or hearing, violated the fifth amendment's guarantee of due process, Director, DFEC Markey cautioned me not to make reference to Claimants' constitutional rights in future decisions. He made this statement after he discussed the case with Deputy Director, OWCP Hallmark's special assistant Mr. Dennis Mankin. Mr. Mankin, who has repeatedly

⁹⁸ FECA PM ch. 2-1602.2c (1996)

⁹⁹ *Stephen R. Lubin*, 43 ECAB 564, 569 (1992). See also *Peggy Ann Avila*, 45 ECAB 812, 814 (1994); *Erlin J. Belue*, 13 ECAB 88, 89 (1961); *Jo Ann Ensor*, 9 ECAB 260, 266 (1957); *Pearl Phillips Parker*, 9 ECAB 200, 205-6 (1956); *Ana Torres (Henry Torres)*, 6 ECAB 375, 377 (1953); *G.A. and E.E. Wightman (George Muller Wightman)*, 5 ECAB 559, 562 (1953).

¹⁰⁰ *Rebel L. Cantrell*, 44 ECAB 660, 666 (1993); *William J. Cantrell*, 34 ECAB 1233 (1983); *Gertrude*

made disparaging comments about injured employees and has repeatedly violated the rights of Claimants, told Mr. Markey that advising Claimants of their constitutional rights would "give them ideas" that would provide additional reasons to challenge DFEC actions.

When I circulated a draft legal memorandum criticizing DFEC's policy of avoiding impartial medical examinations, Mr. Mankin told me that this sort of research was not what I was hired to do. He also questioned whether I was neglecting my assigned duties to do this legal research. I interpreted this as a veiled threat to stop criticizing DFEC policy. As discussed below, Mr. Mankin has also interfered with the integrity of the hearings process.

Section 8124(b)(1)¹⁰¹ of the FECA grants an injured employee, dissatisfied with denial of his or her claim, the right to a hearing before a representative of the Secretary of Labor. This authority has been delegated by regulation from the Secretary, through the Assistant Secretary of Labor for Employment Standards, to the Director, OWCP. The Director, OWCP has delegated the day-to-day administration of the FECA to the Director, DFEC and has delegated the hearing responsibilities to Hearing Representatives who hold § 8124(b)(1) hearings on behalf of the Director, OWCP. However, organizationally, the Branch of Hearings and Review is located in DFEC. There is an obvious conflict of interest in this arrangement.

E. Evans 26 ECAB 195 (1974).

¹⁰¹ "[A] Claimant for compensation not satisfied with a decision of the Secretary . . . is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his

Because of this arrangement, Director, DFEC Markey routinely violates the integrity of the appeals process. As the top official involved with the day-to-day administration of the FECA he has a vested interest in upholding the decisions of the District Offices under his authority and direction. These offices carry out the policies that Director Markey has established and their successful performance is measured in part by how often their decisions are overturned.

Director Markey routinely reviews the decisions of Hearing Representatives. This is a clear violation of the independence of the hearing process since Hearing Representatives are delegates of the Director, OWCP. Director Markey directly interferes with the rendering of fair decisions in favor of injured employees. He does this by trying to intimidate Hearing Representatives into rewriting their decisions and, when this is unsuccessful, actually overturning the decisions. When Director Markey cannot intimidate Hearing Representatives into rewriting their decisions he has them rewritten. I have received reports that hearing decisions are being rewritten, without the knowledge of Hearing Representatives, and sent out over the signature of the Hearing Representative. The majority of these decisions are in favor of the injured employee since those are the only decisions that Director Markey and members of his staff closely scrutinize.

In addition to interfering with the issuance of fair decisions, Director Markey also reverses decisions in favor of injured employees which have been issued. He does this by abusing the authority granted to the Director, OWCP under § 8128(a)

claim before a representative of the Secretary." 5 U.S.C. § 8124(b)(1).

of the FECA. The Employees' Compensation Appeals Board (ECAB) has criticized this practice of overturning hearing decisions.¹⁰²

Section 8128(a) of the FECA authorizes the Secretary of Labor, at any time, to review an award for or against the payment of compensation and revise the award. This authority has been delegated by the Secretary to the Director, OWCP, by regulation. It is readily apparent to any fair-minded individual that it is inappropriate for Director Markey, as the head of DFEC, to set aside decisions of Hearing Representatives, which go against DFEC. These Hearing Representatives hold hearings as delegates of the Director, OWCP. To interfere with these decisions, which are meant to be *de novo* decisions, destroys the fairness and the integrity of the hearing process.

Director Markey interferes with the fairness of the hearing process with the complicity of the Deputy Director, OWCP Hallmark, and members of Mr. Hallmark's staff. The following is an illustrative example. Director Markey was dissatisfied with the decision of a Hearing Representative in a particular case. Mindful of the fact that the ECAB has criticized efforts to interfere with the hearing process, Director Markey, or someone at his direction, had the hearing representative's decision set aside under § 8128(a) and the injured employee was told that his only appeal right was for another hearing. This is plainly illegal, since an injured employee, dissatisfied with a decision, has the right to reconsideration of

¹⁰² "As much as the Office, or the employing establishment, may disagree with the hearing representative's judgment, the Office may not simply impose its own interpretation of the evidence without regard to the hearing representative's review. To do so compromises the integrity of the

the decision or the right to appeal to the ECAB.¹⁰³ When the Hearing Representative assigned to hold the second hearing objected to this illegal procedure, Mr. Hallmark's personal assistant, Mr. Dennis Mankin, inappropriately badgered the Hearing Representative into scheduling the hearing.

Mr. Duncan, the Assistant Chief of Hearings and Review, also interferes with the integrity of the hearings process. Mr. Duncan is blatantly anti-Claimant. He regularly reads letters from case files out loud and laughs about the Claimants. Mr. Duncan is also prejudiced against some attorneys who represent injured employees. He tried to force me to rewrite a hearing decision because he claimed "[t]his particular physician sees all of this attorney's Claimants and routinely provides a higher percentage of impairment." I resisted this attempt on the grounds that relying on how a physician ruled in other cases was prejudice, *i.e.*, an unfavorable opinion formed before the fact. I also wrote a memorandum complaining about this prejudice stating

I disagree with the implied assumption of Mr. Duncan, *i.e.*, simply because the Claimant's physician routinely provides higher impairment ratings, his opinion has diminished weight. It is readily apparent to me that this District Office, as well as most other District Offices, have preferred physicians to whom they refer Claimants knowing that the physician will provide a report supporting a reduction or denial of compensation. It is also apparent that this District Office, as well as most others, use these physicians in tandem as second opinion examiners and referee physicians. I note that the remand rate from Hearings and Review is at least 38 percent. This means that this District Office, as well as most others, routinely relies

appeals process." *Annie R. Luckett*, Docket No. 94-4 (1995).

¹⁰³ See 20 C.F.R. § 10.130: "A copy of the decision, together with information as to the right to a hearing, to a reconsideration, and to an appeal to the Employees' Compensation Appeals Board, shall be mailed to the Claimant's last known address."

on medical evidence which underestimates the Claimant's true disability. Should we also apply the criterion advocated by Mr. Duncan to the reports of these physicians? I believe that to use this criterion to evaluate only the reports of Claimants' physicians would represent one more example of the anti-Claimant bias which so permeates DFEC.

At least one Hearing Representative has publicly stated that "85% percent of compensation claims are fraudulent." This Hearing Representative also stated that all stress cases are phony. Regional Director Kenneth Hamlet publicly threatened to deny an injured employee's claim again and again if she continued to contact her elected representative to exercise her constitutional right to petition the government for redress of her grievances. As noted above, when confronted with the data showing a consistent remand rate of 45%, a senior OWCP official attempted to minimize the significance of this shortcoming by stating that this involved very few cases out of the total number of injuries reported.

These individuals and incidents are reflective of the arrogance and insensitivity which permeates all of OWCP and DFEC. Why are such blatantly anti-Claimant individuals permitted to work at the highest levels of OWCP and DFEC in direct violation of the Congressional mandate that Federal employees be treated in a fair and equitable manner?

Burden of Proof or Insurmountable Barrier?

A Claimant [for FECA benefits] has the burden of establishing by the weight of reliable, probative and substantial evidence that the claimed condition and the disability, if any, was caused, aggravated, or adversely affected by the claimant's Federal employment. As a part of this burden, the claimant must specify the employment incident or the factors or conditions of employment to which the injury, disease or disability is attributed, and must submit rationalized medical opinion evidence, based upon a complete and accurate factual and medical background, showing causal relationship between the claimed condition and the

Federal employment.¹⁰⁴

What do the terms "reliable, probative and substantial evidence" and "rationalized medical opinion evidence" mean?

A workers compensation act is remedial legislation and evidence is to be interpreted in a manner to effectuate its purpose. For example, factual evidence is interpreted using the so-called "true doubt rule," i.e., giving the benefit of the doubt to the injured employee. "Giving the benefit of the doubt is the resolution in the Claimant's favor of a conflict in evidence when the evidence truly supports two opposing conclusions with equal force."¹⁰⁵ This means "[g]iven two sets of conflicting testimony of equal probative value, the examiner should find the facts to be those which give the benefit of the doubt, as to which is the more accurate account, to the Claimant."¹⁰⁶

Similarly, medical evidence need not meet the most stringent standard of proof. The medical opinion of a physician supporting causal relationship does not have to reduce the cause or etiology of a disease or condition to an absolute medical certainty.¹⁰⁷ The opinion of a physician supporting causal relationship must be one of reasonable medical certainty that the condition for which compensation is

¹⁰⁴ 20 C.F.R. § 10.110(a).

¹⁰⁵ Federal (FECA) Procedure Manual, ch. 2-0809.3c (1984).

¹⁰⁶ FECA PM ch. 2-0809.10d(3) (1984). While the true doubt rule has been found inapplicable to two other workers' compensation statutes administered by OWCP, i.e., *Maier Terminals, Inc. v. Director, OWCP*, 992 F.2d 1227 (3d Cir. 1993) (Longshore and Harbor Workers' Compensation Act); *Greenwich Collieries v. Director, OWCP*, 990 F.2d 730 (3d Cir. 1993), *aff'd sub nom. Director, OWCP v. Greenwich Colliers*, 512 U.S. 267 (1994) (Black Lung Benefits Act), these decisions were based upon the fact that proceedings under those Acts are governed by § 554 of the Administrative Procedure Act (dealing with adjudications). FECA proceedings are not governed by § 554 of the APA, *see* 5 U.S.C. § 8124(b)(2).

claimed is causally related to Federal employment and such relationship must be supported with affirmative evidence, explained by medical rationale and be based upon a complete and accurate medical and factual background of the Claimant.¹⁰⁸

Burden of proof represents the necessity or duty of affirmatively proving a fact or facts in dispute; it is the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the adjudicator.¹⁰⁹ In the law of evidence the term "burden of proof" encompasses two different concepts, i.e., the "burden of persuasion" which does not shift and requires the moving party to establish all the elements of his case; and, the "burden of going forth with the evidence" which shifts between the parties as a case proceeds.

While a Claimant for benefits has the ultimate burden of persuasion, it is well established by Employees' Compensation Appeals Board (ECAB) case law that DFEC shares in the burden of going forward with the evidence. Proceedings under the FECA are not adversarial in nature¹¹⁰ and DFEC is not a disinterested arbiter. While Claimants have the ultimate burden of persuasion to establish entitlement to compensation,¹¹¹ DFEC shares responsibility in the development of the evidence,¹¹² particularly when such evidence is of the character normally obtained from the

¹⁰⁷ See *Kenneth J. Deerman*, 34 ECAB 641 (1983).

¹⁰⁸ See *Margaret A. Donnelly*, 15 ECAB 40 (1963); *Morris Scanlon*, 11 ECAB 384 (1960).

¹⁰⁹ *Black's Law Dictionary* (5th Ed. 1979) at 178.

¹¹⁰ See e.g., *Rebel L. Cantrell*, 44 ECAB 660 (1993); *John J. Carlone*, 41 ECAB 354 (1989); *Walter A. Fundinger, Jr.*, 37 ECAB 200 (1985); *William J. Cantrell*, 34 ECAB 1233 (1983); *Michael Gallo*, 29 ECAB 159 (1978); *Gertrude E. Evans*, 26 ECAB 195 (1974); *Mary A. Barnett (Frederick E. Barnett)*, 17 ECAB 187 (1965).

¹¹¹ 20 C.F.R. § 10.110(a).

¹¹² *Elaine K. Kreyborg*, 41 ECAB 256 (1989); *Dorothy L. Sidwell*, 36 ECAB 699 (1985).

employing establishment or other government source.¹¹³ DFEC has an obligation to see that justice is done.¹¹⁴ The ECAB has stated that once DFEC has begun investigation of a claim, it must pursue the evidence as far as reasonably possible,¹¹⁵ particularly when such evidence is in the possession of the government employing establishment and is, therefore, more readily accessible to the Office.¹¹⁶

The question for consideration is what level of proof is necessary to sustain a Claimant's burden of persuasion? Is it preponderance of the evidence, clear and convincing evidence or beyond a reasonable doubt?

Preponderance of evidence is evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which, as a whole, shows that the fact sought to be proven is more probable than not.¹¹⁷

Clear and convincing evidence is that measure of evidence which will produce in the mind of the adjudicator a firm belief or conviction as to the facts alleged. It is an intermediate standard, being more than the preponderance, but not to the level of such certainty as is required by the beyond a reasonable doubt standard of a

¹¹³ See *Robert A. Redmond*, 40 ECAB 796, 800 (1989); *Willie James Clark*, 39 ECAB 1311, 1319 (1988); *Henry Ross, Jr.*, 39 ECAB 373, 377 (1988); *Leon C. Collier*, 37 ECAB 378, 379 (1986); *Russell Martin Dawson*, 32 ECAB 1998, 2004 (1981); *Robert M. Brown*, 30 ECAB 175, 178 (1978); *Ruth A. Hussey*, 9 ECAB 292, 295 (1957).

¹¹⁴ See *Gary L. Fowler*, 45 ECAB 365, 373 (1994); *Isidore J. Gennino*, 35 ECAB 442, 448 (1983); *William J. Cantrell*, 34 ECAB 1233 (1983); *Stephen H. Calkins, Jr.*, 32 ECAB 1406, 1411 (1981); *Russell F. Polhemus*, 32 ECAB 1066, 1069 (1981); *Gertrude E. Evans*, 26 ECAB 195, 200 (1974); *Mary A. Barnett (Frederick E. Barnett)*, 17 ECAB 187, 189-90 (1965); *Eminiano V. Dela Rosa*, 17 ECAB 164 (1965); *John R. Lance*, 13 ECAB 330 (1962); *Annie M. Able*, 13 ECAB 252 (1962); *William N. Saathoff*, 8 ECAB 769 (1956); *Roy L. Hinckley, Sr.*, 5 ECAB 197, 199-200 (1952); *Joel C. Webb*, 4 ECAB 79, 84 (1950).

¹¹⁵ *Monroe Fears*, 43 ECAB 608, 611 (1992); *Leon C. Collier*, 37 ECAB 378 (1986).

¹¹⁶ *Debbie J. Hobbs*, 43 ECAB 135, 143 (1991); *Willie James Clark*, 39 ECAB 1311, 1319 (1988).

criminal case.¹¹⁸

Beyond a reasonable doubt is that level of evidence which fully satisfies, and entirely convinces to a moral certainty. It is the level of evidence necessary for a criminal conviction.¹¹⁹

The Employees' Compensation Appeals Board has pointed out the following well-established principle concerning the interpretation of evidence:

a compensation award may not be based upon speculation, surmise or conjecture; or stated differently, the award must be based upon evidence, and where an inference, deduction or conclusion is drawn, there must be evidence to support such inference, deduction or conclusion. The evidence required, however, is only that necessary to convince the adjudicator that the conclusion drawn is rational, sound and logical. It is not necessary that the evidence be so conclusive as to suggest causal connection beyond all possible doubt in the mind of a medical scientist.¹²⁰

It appears, therefore, that a Claimant must meet his or her burden of proof by a preponderance of the evidence.¹²¹

However, DFEC has increased a Claimant's burden of proof by requiring the submission of evidence which meets the beyond a reasonable doubt standard. DFEC routinely discredits the medical evidence submitted by Claimants because the report is not "so conclusive as to suggest causal connection beyond all possible doubt in the mind of a medical scientist." Similarly, DFEC does not apply the "true

¹¹⁷ *Black's Law Dictionary* (5th Ed. 1979) at 1064.

¹¹⁸ *Id.* at 227.

¹¹⁹ *Id.* at 147.

¹²⁰ *Ronald L. Wilson*, 43 ECAB 271, 275 (1991)(emphasis added). *Accord Shirolyn J. Holmes*, 39 ECAB 938 (1988); *Laura Garcia*, 32 ECAB 1336 (1981); *Sherwood R. McCartney*, 9 ECAB 129 (1956); *Elizabeth Maypothor*, 5 ECAB 604 (1953).

¹²¹ "That amount of evidence necessary for the plaintiff to win a civil case. It is that degree of proof which is more probable than not." *Black's Law Dictionary* (5th ed. 1979) at 1064.

doubt" rule to factual evidence submitted by Claimants and gives greater weight to the factual statements of employing agencies.

Manipulation of the Factual Evidence

Although DFEC continually states that claims processing under the FECA is nonadversarial, the facts suggest otherwise. DFEC acts in collusion with employing agencies to reduce or deny compensation.

For example, Director, DFEC Markey has been informed that the San Antonio, Texas Post Office is having injured employees file a disclaimer which states: "I do not desire to file a form CA-1 [notice of injury] or have medical treatment at this time for the injury sustained on" This disclaimer is not on a form approved by DFEC nor does it contain language which would protect an injured employee's right to compensation and continuation of pay. In fact Director Markey was informed that the use of this improper form caused continuation of pay to be denied. Furthermore, this disclaimer appears to be a violation of 18 U.S.C. § 1922 which makes it a criminal offense to withhold a report of injury.¹²² Apparently DFEC has taken no action to address this clear violation despite a 1995 report from the Department of Labor's Inspector General noting that:

[c]ommunications indicating that some Postal Service officials may have hindered, delayed or discouraged the filing of compensation claims and notices of traumatic injury/occupational disease in violation of the Federal Employees' Compensation were not consistently . . . referred for investigation when appropriate.¹²³

¹²² See n.185 *infra* and accompanying discussion.

¹²³ See n.182 *infra* and accompanying text.

I brought to Director Markey's attention a case in which the Philadelphia Post Office had filed a false statement in an effort to prevent an eligible Claimant from receiving benefits. Director Markey personally reviewed the case and acknowledged that it had been done. However, he cautioned me, in the presence of my supervisor that, "for the good of your career you should never state this in a public forum or in any of your decisions." I told him that him that he was seriously mistaken if he thought that it was a secret that employing agencies are submitting false information. Both Director Markey and my supervisor laughed. This is evidence of clear collusion between DFEC and the U.S. Postal Service. There is other evidence of this collusion.

The Postal Inspection Service aggressively investigates cases of injured employees receiving long-term disability benefits. These investigations seek to uncover evidence of fraud. However, despite the significant resources devoted to this effort, the Postal Inspection Service has actually uncovered very little fraud. At a March 30, 1998, oversight hearing before the House Workforce Protections Subcommittee (Chair Ballenger, R., NC), representatives from the U.S. Postal Inspection Service testified that they had successfully prosecuted only 5 cases of fraud, dealing with receipt of FECA benefits, in the prior year.¹²⁴

Nevertheless, the Postal Inspection Service relentlessly investigates FECA

¹²⁴ In the period July 1, 1995, to June 30, 1996, the U. S. Postal Service was billed for approximately 30% of the total benefits paid (\$547.1 million of \$1.8 billion total). The number of injuries reported in FY96 was 175,052. The number of recipients on the periodic roll in FY96 was 58,329. Using the Postal Service's chargeback percent as a reasonable estimate of its share of these cases means that there were approximately 70,014 Postal Service cases in FY96. Therefore the number of fraud cases successfully prosecuted in 1997 was .007% of the number of U.S. Postal Service cases

Claimants. In the course of these investigations, it prepares detailed reports, many of which contain unsupported circumstantial evidence and conclusory memorandums. Despite the fact that very few of these reports lead to convictions, the Postal Inspection Service submits them to DFEC in an effort to deny claims. District Offices accept these investigation reports at face value and use them to reduce or terminate benefits.¹²⁵ However District Offices will not accept investigative reports compiled in connection with other proceedings, *e.g.*, complaints to the Equal Employment Opportunity Commission, where there has been no final decision. It is clearly inequitable to accept Postal Inspection Service investigative reports, in cases where there has been no final decision, and not accept EEOC investigative reports.

Perhaps the most devastating area in which manipulation of the factual evidence occurs is in preparation of the Statement of Accepted Facts (SOAF). According to the DFEC Procedure Manual (PM) “[t]he SOAF is one of the most important documents a Claims Examiner (CE) prepares. Because the outcome of a claim may depend on its completeness and accuracy, the SOAF must clearly and fairly address the relevant information.”¹²⁶ The Procedure Manual further provides

- a. The SOAF is the written summary of the CE's findings of facts pertinent to resolving a particular medical issue. Proper identification of the necessary information should result in a complete and accurate

in FY96.

¹²⁵ Hearing Representatives evaluate the credibility of these reports and only accept them when their reliability and probative value have been established. However, Mr. Dennis Mankin tried to order Hearing Representatives to accept these reports without question despite strenuous objections from Hearing Representative.

¹²⁶ FECA PM ch. 2-809.2 (1995).

statement.

b. The SOAF provides a frame of reference for the physician reviewing the medical evidence and/or examining the Claimant. It allows the physician to place the medical questions posed in the larger context of the mechanism of injury, the requirements of the Claimant's job or the conditions which prevailed in the workplace. It may also provide the physician with a chronology of events after the injury.

c. The SOAF is also the means by which factual findings which are the sole responsibility of the CE, are separated from medical findings and opinions, which are the province of the medical professional. This separation of function will insure that the CE does not inadvertently make medical decisions. Similarly, properly drawn SOAFs should preclude physicians from making their own findings of facts.¹²⁷

Before the Procedure Manual chapter on Statements of Accepted Facts was revised in 1995, it contained the following explicit instructions on how to apply the "true doubt" rule:

Giving the benefit of the doubt is the resolution in the Claimant's favor of a conflict in evidence when the evidence truly supports two opposing conclusions with equal force. Such instances are rare, and the examiner may find that further development of the facts or closer scrutiny of the evidence allows a clear conclusion to be drawn. An examiner should not be reluctant, however, to grant the benefit of a doubt to the Claimant, since doing so is entirely consistent with the underlying purpose of compensation law.¹²⁸

However, these instructions were eliminated in 1995 when this chapter of the Procedure Manual was revised. FECA Transmittal No. 95-27 (June 1, 1995), which disseminated the revisions, explained the changes in the following terms: "[t]he text of this chapter has been streamlined, and references to other parts of the PM and to ECAB decisions have been added or updated." The term "streamlined" does

¹²⁷ FECA PM ch. 2-809.4 (1995)

¹²⁸ FECA PM ch. 2-809.3c (1984)(emphasis added).

not convey the true extent of how this important chapter was substantively changed.

As noted above, in commenting on the development of the evidence, the Employees' Compensation Appeals Board (ECAB) has stated that proceedings under the FECA are not adversarial in nature and that DFEC is not a disinterested arbiter.¹²⁹ While a Claimant has the ultimate burden of persuasion, DFEC shares the responsibility in going forward with the evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government source. DFEC has an obligation to see that justice is done. The ECAB has also stated that once DFEC has begun investigation of a claim, it must pursue the evidence as far as reasonably possible.

In addition to eliminating any discussion of the "true doubt" rule, the revised chapter has also de-emphasized the Claims Examiner's responsibility to assist in the development of the evidence and the obligation to see that justice is done. Prior to its revision the SOAF chapter contained the following explicit instructions regarding the responsibilities of the Claims Examiner in developing and evaluating the factual evidence:

Whenever possible, the examiner should assist in the development of the claim by recognizing the best source of needed information and by counseling the Claimant and other parties to the claim how the information can best be provided.¹³⁰

¹²⁹ See n.99 *supra* and accompanying text.

¹³⁰ FECA PM ch. 2-809.5e (1984) (emphasis added). This obligation to assist in the development of the evidence is consistent with ECAB case law and is reflected in the current regulations: "The Office may, in its discretion, undertake to develop either factual or medical evidence for determination of the claim." 20 C.F.R. § 10.110(b).

(2) In the absence of evidence to the contrary, the statements of the Claimant are to be accepted as factual. The fact that the Claimant is an interested party who stands to benefit from the acceptance of the claim may not be used to discredit his/her statements. Credible contrary evidence may consist of testimony from others who are in a position to dispute the facts as presented by the Claimant or by internal logical inconsistencies in the Claimant's statements when compared with the known circumstances of a claim.

(3) Given two sets of conflicting testimony of equal probative value, the examiner should find the facts to be those which give the benefit of the doubt, as to which is the more accurate account, to the Claimant.¹³¹

The revisions to the SOAF chapter have allowed this document to change from a written summary of the evidence into a biased evaluation of the facts. This effort is directly contrary to established case law and is another example of how DFEC does not treat Claimants in a fair and equitable manner.

DFEC's response to requests from Claimants and their attorney to review the SOAF, and questions being sent to the second opinion physician (SECOP), is revealing. In an October 21, 1997, letter, Director, DFEC Markey wrote:

the [SECOP] procedure does not contemplate that a copy of the Statement of Accepted Facts or questions asked of a second opinion physician be provided to a Claimant or representative as a matter of course. Such a provision may result in needless questions, confusion and sometimes disputes, thereby slowing the adjudication process and delaying, in some cases, timely payment of due compensation.

As with his response to the pre-hearing remand recommendation,¹³² Director Markey once again responds with conclusory statements and irrelevant objections. In discussing the responsibilities of the Claims Examiner (CE) during preparation

¹³¹ FECA PM ch. 2-809.10d (1984).

¹³² See n.88 *supra* and accompanying text.

of the SOAF, the Procedure Manual states:

[w]hen allegations are made or conflicting evidence is received, the CE must provide the interested parties an opportunity to comment on the testimony and offer evidence to refute the testimony. In addition to ensuring that the facts are known to the parties, the process is also a useful vehicle for developing the claim, refining the issues for the CE, and assisting in the resolution of conflicts prior to making findings of facts.¹³³

It appears to be a distinction without a difference to distinguish the period before the preparation of the SOAF from the period after its preparation, for purposes of obtaining Claimant input. If providing Claimants with an opportunity to review the SOAF would be helpful in “ensuring that the facts are known to the parties . . . [and] refining the issues for the CE,” what is the objection? Giving Claimants this opportunity is especially important since “[t]he SOAF is one of the most important documents a Claims Examiner (CE) prepares.”

However, Director Markey states that doing so “may result in needless questions, confusion and sometimes disputes.” What questions are needless when their purpose is to clarify the factual evidence? What disputes are needless when their purpose is to insure that the SOAF is accurate and complete? “Because the outcome of a claim may depend on its completeness and accuracy, the SOAF must clearly and fairly address the relevant information.”¹³⁴ Fairness and equity demand that every effort be employed to guarantee this.

Director Markey also alleges that legitimate questions and disputes will slow the adjudication process and delay the timely payment of compensation. This

¹³³ FECA PM ch. 2-809.5d (1995).

concern is strange coming from a program which routinely engages in practices which slow the adjudication process and delay the timely payment of benefits.

The flawed procedures employed in developing SOAFs also have significant repercussions on development of the medical evidence since

[t]he SOAF provides a frame of reference for the physician reviewing the medical evidence and/or examining the Claimant. It allows the physician to place the medical questions posed in the larger context of the mechanism of injury, the requirements of the Claimant's job or the conditions which prevailed in the workplace. It may also provide the physician with a chronology of events after the injury.¹³⁵

Manipulation of the Medical Evidence

DFEC's handling of medical evidence is unfair and inequitable. It weighs the medical evidence to determine which opinion has the most probative value. However, as noted above, DFEC routinely discounts medical evidence submitted by Claimants since it does not establish causal relationship beyond a reasonable doubt.

DFEC further diminishes the Claimant's medical evidence by resorting to paid consultants (second opinion physicians or SECOPS) who produce medical reports which include opinions requested by DFEC solely to deny claims. These SECOPs base their opinions on flawed SOAFs and leading questions from Claims Examiners. Although the Act requires DFEC to obtain a third opinion when there is any disagreement between the SECOP and the Claimant's physician, DFEC has characterized this as "a time-consuming process which is not always necessary." It avoids its statutory obligation by investing the SECOP's opinion with exaggerated

¹³⁴ FECA PM ch. 2-809.2 (1995).

¹³⁵ FECA PM ch. 2-809.4b (1995).

weight and, through spurious reasoning, by diminishing the weight of the Claimant's medical evidence. DFEC has adopted its questionable policy by ignoring a clear statutory mandate.

As presently written, § 8124 of the Federal Employees' Compensation Act¹³⁶ states: "[i]f there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."

However, when passed in 1916,¹³⁷ § 22 of the Federal Employees' Compensation Act read: "[t]hat in case of any disagreement between the physician making an examination on the part of the United States and the employee's physician the commission shall appoint a third physician, duly qualified, who shall make an examination."¹³⁸

This language remained undisturbed until 1966, when Title 5, United States Code, was re-enacted "codifying the general and permanent laws relating to the organization of the Government of the United States and to its civilian Officers and employees."¹³⁹ As recodified, § 22 became part of 5 U.S.C. § 8123(a). It then read:

[i]f there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.

Section 7, of Pub. L. 89-554, stated:

¹³⁶ 5 U.S.C. § 8123(a)

¹³⁷ An Act of September 7, 1916, ch. 458, 39 Stat. 742.

¹³⁸ 39 Stat. 747, § 22 (codified at 5 U.S.C. § 771) (emphasis added).

¹³⁹ Pub. L. No. 89-554, 80 Stat. 378 (1966).

(a) The legislative purpose in enacting sections 1-6 of this Act is to restate, without substantive change, the laws replaced by those sections on the effective date of this Act. . . .

* * *

(e) An inference of a legislative construction is not to be drawn by reason of the location in the United States Code of a provision enacted by this Act of by reason of the caption or catchline thereof.¹⁴⁰

Therefore, the phrase “disagreement” in present § 8123(a) cannot be a substantive change from the phrase “any disagreement” used in § 22 of the 1916 Act and later codified, with *de minimis* change, at 5 U.S.C. § 8123. This means that “[i]f there is [any] disagreement between the physician making an examination on the part of the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.”

Where statutory language is clear and unambiguous, it must be applied as written.¹⁴¹ Where a statute is silent or ambiguous, courts will defer to an agency’s legal interpretation where it is a permissible interpretation.¹⁴² The language of current § 8123(a) is clear, unambiguous, and, as noted above, has been in the Act since it was passed.

¹⁴⁰ 80 Stat. 631 (emphasis added).

¹⁴¹ *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992)(In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute’s meaning, in all but the most extraordinary circumstances, is finished.)

¹⁴² *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-3 (1984)(When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, as always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.)

Despite this clear statutory mandate, however, the Procedure Manual contains the following instructions:

[t]he findings or opinions of [the SECOP] will often differ from those of the claimant's attending physician. If of equal weight, the differing opinions would constitute a conflict requiring referral to a third physician. This is a time-consuming process¹⁴³ which is not always necessary. Frequently a decision can be reached by weighing the medical evidence of record without referral to a referee specialist.¹⁴⁴

Efforts to "weigh the medical evidence" have resulted, by inductive reasoning, in abuses of the impartiality of the system. By seeking to invest the opinion of the SECOP with greater weight, in an effort to avoid the statutory requirement to obtain a third, impartial opinion, Claims Examiners have distorted the meaning of medical reports. Director, DFEC Markey promotes these abuses. He and members of his staff routinely travel around the country, to DFEC District Offices, encouraging Claims Examiners to ignore the requirements of § 8123(a) of the FECA. He does this by encouraging Claims Examiners to find that the opinion of the SECOP has more weight than the opinion of the treating physician.

One unforeseen, but nonetheless significant, result of this use of the SECOP's opinion to deny benefits has been to reduce the pool of available physicians. Claims Examiners, in an effort to enhance the opinion of the SECOP routinely send follow-up questions to the doctor. These questions are often leading and just as often designed solely to elicit information which can then be used to deny the claim for compensation. Many physicians consider these questions to be an intrusive burden.

¹⁴³ Another example of DFEC's headlong efforts to quickly adjudicate cases at the expense of an appropriate evaluation of all the evidence.

Indeed, they consider the whole process to be of questionable impartiality. Because of these concerns, many doctors have stopped treating Federal workers' compensation patients. Thus the pool of available doctors has shrunk to those who will give the District Offices the opinion they want. This undermines the impartiality of the system and is another reason why the District Offices should follow the statutory mandate to obtain the opinion of a third physician.

In response to numerous complaints about DFEC's development of the medical evidence Chairman William D. Ford, of the House Committee on Education and Labor, asked the General Accounting Office (GAO) to review how OWCP obtained and used medical evidence. Even though GAO evaluated DFEC's physician selection process and found it unbiased, its report¹⁴⁵ was deeply flawed and of questionable relevance.

GAO examined cases where benefits were terminated during fiscal years 1991 and 1992. However these periods were prior to full implementation of DFEC's Periodic Roll Management (PRM) Project (April 1992) and Quality Case Management (QCM) procedures (FY94). Table 3, above, documents that the number of SECOPs have increased dramatically since calendar year 1994.¹⁴⁶ DFEC has continually implemented its policy of weighing the medical evidence to avoid what it described as the "time-consuming" process of obtaining an impartial medical examination. As the number of cases reviewed increased, the number of SECOPs

¹⁴⁴ FECA PM ch. 2-810.9h.

¹⁴⁵ *Federal Employees' Compensation Act: No Evidence that Labor's Physician Selection Processes Biased Claims Decisions* Report GAO/GGC-94-67 (1994)

also increased. Table 3 contains data which supports a positive correlation between the number of QCM cases and the number of SECOPs. Similarly, according to the data summarized in Table 2, above, the number of cases reviewed by the PRM Project increased dramatically after 1994. Both these increases are positively correlated with the number of hearing requests. Since FY94, the H&R remand rate has averaged approximately 40%, indicating that the quality of the decisions was poor.

GAO identified its universe as those cases which were closed and benefits terminated during fiscal years 1991 and 1992. This resulted in a universe of 4,126 cases. However, during fiscal years 1994 and 1995, DFEC reduced or terminated benefits in 4,900 periodic roll cases. This one category of cases represented a 19% increase in the total terminations during the period evaluated by GAO. Between FY94 and FY95, the number of SECOP scheduled shows a positive correlation with the number of periodic roll cases which had benefits reduced or terminated.

GAO only analyzed cases in which impartial medical examinations (IMEs) were conducted when determining whether DFEC repeatedly used the same physicians for examinations. However, since DFEC has emphasized that IMEs are not necessary, more terminations are based upon the use of SECOPs. Analyzing which physicians DFEC uses for SECOPs would be more relevant to the determination of whether DFEC repeatedly uses the same physicians.

Finally, GAO restricted its universe to closed cases where benefits were

¹⁴⁶ Up 240%.

terminated. This neglects those cases where benefits were terminated based upon the improper use of a SECOP and the termination was overturned on appeal. Cases of this type would still be open. As noted in Table 4, above, the remand rate has averaged 45% over 9 years. This means that a large numbers of these terminations, based upon the improper use of SECOPs, were actually incorrect.

For these reasons, I believe GAO's conclusions are no longer valid. Furthermore, it appears questionable whether GAO's conclusions were valid when made. As noted above, GAO's universe was skewed and did not present an accurate picture of the total process of using SECOPs. Also, GAO did not sample open cases which had a SECOP. During fiscal years 1991 and 1992, the average remand rate was 47%. Therefore, during those years, where the termination of benefits was based upon the improper use of a SECOP, nearly 50% of the decisions were overturned and benefits reinstated. In addition, since DFEC was encouraging Claims Examiners to avoid using IMEs, GAO erred in only sampling bills paid to IMEs when determining whether DFEC repeatedly used the same physicians.

Questionable procedures used to develop the factual and medical evidence have contributed to large numbers of improperly denied cases¹⁴⁷ and have caused the unfair reduction of benefits through suspect wage-earning capacity determinations.

¹⁴⁷ In FY96 DFEC received 10,500 serious injuries. It also received 7,991 hearing requests and 830 requests for written record review (ROR) for a total of 8,821, which represents 84% of the serious injuries reported. These requests resulted in 5008 merit decisions (56%) of which 2234 (43%) were remands. Remanded cases represented 21% of the serious injuries reported. As noted above, this does not represent the total number of erroneous decisions. See e.g. n.77 *supra* and accompanying text.

Flawed Wage Earning Capacity Determinations

If a Claimant is partially disabled, compensation is paid based upon the difference between the date of injury payrate and the Claimant's wage-earning capacity which

is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings of the employee do not fairly and reasonably represent his wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity as appears reasonable under the circumstances is determined with due regard to--

- (1) the nature of his injury;
- (2) the degree of physical impairment;
- (3) his usual employment;
- (4) his age;
- (5) his qualifications for other employment;
- (6) the availability of suitable employment; and
- (7) other factors or circumstances which may affect his wage-earning capacity in his disabled condition.¹⁴⁸

Once a District Office determines, based upon medical evidence which can be unfairly obtained, that a Claimant is not totally disabled,¹⁴⁹ it will proceed to establish the Claimant's earning capacity.

An employing agency may also develop medical evidence, through fitness-for-duty examinations, to establish that a Claimant is only partially disabled. Based upon this medical evidence, an agency may offer the injured employee alternative employment¹⁵⁰ or limited duty.¹⁵¹ The employing agency sends any offer of

¹⁴⁸ 5 U.S.C. § 8115(a)

¹⁴⁹ "When a permanently disabled employee who cannot return to the position held at the time of injury due to the residuals of the employment injury has recovered sufficiently to be able to perform some type of work, the employee must seek suitable work either in the Government or in private employment." 20 C.R.F. § 10.124(d).

¹⁵⁰ "A specific alternative position which is available within the agency and for which the agency has furnished the employee with a written description of the specific duties and physical

alternative employment or limited duty to the District Office for a suitability determination. The offer must be in writing and include, among other things, a description of the duties to be performed and the specific physical requirements of the position and any special demands of the workload or unusual working conditions.

The District Office evaluates the suitability of the position, taking into account the Claimant's physical condition and the duration of the employment offered. If the position is found to be suitable, the District Office advises the Claimant in writing of the suitability determination and gives the Claimant 30 days to either accept the job or provide a written explanation of the reasons for refusing it. All of the foregoing is the responsibility of the District Office and cannot be delegated to the employing agency. The Claimant's wage-earning capacity is then determined based upon the wages of the suitable alternative position.

Pursuant to § 8104(a) of the FECA, DFEC may direct a disabled employee to undergo vocational rehabilitation. If, in the opinion of the District Office, the Claimant, without good cause, fails or refuses to apply for or participate in the vocational rehabilitation process, the District Office may reduce prospectively the Claimant's compensation based upon "what would probably have been the employee's wage-earning capacity had there not been such failure or refusal."¹⁵² Where the failure or refusal occurs in the preliminary stages of the vocational

requirements." 20 C.F.R. § 10.123(c)(1).

¹⁵¹ Duty which accommodates the restrictions and limitations imposed on the employee by the injury. 20 C.F.R. § 10.123(c)(2).

rehabilitation effort and the District Office cannot determine what the Claimant's wage-earning capacity would have been, the District Office will assume that

the vocational rehabilitation effort would have resulted in a return to work with no loss of wage earning capacity, and the Office will reduce the employee's monetary compensation accordingly. Any reduction in the employee's monetary compensation under this provision shall continue until the employee in good faith complies with the direction of the Office.¹⁵³

When vocational rehabilitation is not feasible, the Claimant's wage-earning capacity is determined based upon a position deemed suitable but not actually held, a so-called "constructed" wage-earning capacity. Selection of this position will employ the factors listed in § 8115(a) of the FECA.

Where no vocational rehabilitation services were provided, DFEC's Rehabilitation Specialist (RS) will provide a report which includes 2 or 3 jobs which are medically and vocationally suitable for the Claimant. The report will include the job number from the Department of Labor's *Dictionary of Occupational Titles* and how the specific vocational preparation for the jobs selected were achieved. The RS will also comment on whether the job is reasonably available in the Claimant's commuting area.¹⁵⁴

The Claims Examiner is responsible for determining whether the medical evidence establishes that the Claimant is able to perform the job, taking into consideration medical conditions due to the work-related injury or disease and any

¹⁵² 5 U.S.C. § 8113(b).

¹⁵³ 20 C.F.R. § 10.124(f)

¹⁵⁴ FECA PM ch. 2-8014.8b.

pre-existing medical condition.¹⁵⁵ Once the Claims Examiner determines that the job is suitable, the CE provides the Claimant with a pre-reduction notice and gives the Claimant 30 days to respond.

As with so many of DFEC's procedures, the wage-earning capacity determination process has many areas susceptible to abuse. As discussed above, the medical evidence may be selectively developed and evaluated to show that the injured employee is capable of performing some work. DFEC's Strategic Goal of reducing the number of "lost production days" has made this an important objective.

Once the medical evidence establishes that the Claimant is not totally disabled, a District Office RS will select positions for a "constructed" wage-earning capacity determination. In many cases the Claimant is not qualified for the position. However, the RS can state that the position is suitable and reasonably available in the Claimant's commuting area without providing any corroborating evidence. The Procedure Manual states that "[b]ecause the RS is an expert in the field of vocational rehabilitation, the CE may rely on his or her opinion as to whether the job is reasonably available and vocationally suitable."¹⁵⁶ After a hearing, however, the RS's opinion will be rejected unless there is a basis for the opinion. DFEC is improperly using the unverified opinions of Rehabilitation Specialist to unfairly reduce or terminate benefits.

Employing agencies also have a financial incentive to develop medical evidence which establishes that a Claimant is only partially disabled. Based upon

¹⁵⁵ FECA PM ch. 2-8014.8d.

this evidence an agency will make an offer of alternative employment. However, although that District Office is required to make a suitability evaluation of the position it does not do so in many cases. Instead the District Office will rely on the agency's statement that the position is suitable. The employing agency often will not make a written offer of alternative employment. Instead, the agency will assure the District Office that they can provide a position which accommodates the Claimant's residual disability. However, without a written job offer, the agency can, and often does, force the Claimant to perform other, medically unsuitable duties. One important reason that wage-earning capacity determinations are reversed when appealed is that the medical evidence does not establish that the Claimant can perform the selected job.

Another important reason that wage-earning capacity determinations are reversed is inappropriate job selection. As noted above, DFEC is improperly using the unverified opinions of Rehabilitation Specialist to unfairly reduce or terminate benefits. However a Claimant is unable to challenge the suitability of the position selected since the opinion of the RS is presumptively valid. Once the position is identified and the Claimant is told it is suitable, he or she has no alternative but to take the position and appeal.

In FY92, DFEC carried out a pilot test of early interventions in disability cases using registered nurses to visit injured employees and in assist in their medical case management and early return to work.

¹⁰⁶ FECA PM ch. 2-814.8b(2).

The assigned nurse contacts the injured worker, the worker's physician, and the employer to determine the worker's treatment, prognosis, and potential for return to light or full duty. In most cases, nurses are expected to help the worker get back to work in 120-180 days. When the worker is back at work, the nurse follows his or her progress for a period of 60 days.¹⁵⁷

Early nurse interventions became an important part of the Quality Case Management (QCM) procedures. The FY94 *Report* described QCM in the following manner

[t]he guiding principle of this new approach . . . is early, active management of the case through staff teamwork, leading to return to light or alternative work if possible. If intervention by the occupational health or rehabilitation nurse does not lead to return to work, the case is expected to move quickly to medical and vocational evaluation. If evaluation supports a wage-earning capacity, the injured worker is advised that OWCP judges him or her to be partially disabled, and that benefits will be adjusted¹⁵⁸

In the FY92 *Report*, DFEC stated

[t]he DFEC rehabilitation program grew significantly after 1986 when the division began to emphasize rehabilitation services in preference to earning capacity determinations not based on actual employment. In the intervening years, the program went from serving 3,574 workers in 1986 to serving 10,401 in 1992.¹⁵⁹

However, by FY93, DFEC was once again using its rehabilitation program to establish estimated earning capacities. The FY93 *Report* stated:

[w]orking through private rehabilitation counselors, the rehabilitation specialist evaluates the workers' skills and experience and the potential job market to arrive at an estimated wage-earning capacity potential, and a plan to place the worker, perhaps after a period of training.¹⁶⁰

¹⁵⁷ FY96 *Report* at 37.

¹⁵⁸ FY94 *Report* at 17 (emphasis added).

¹⁵⁹ FY92 *Report* at 13.

¹⁶⁰ FY93 *Report* at 13.

This change in strategy is reflected in the data summarized in Table 7. As the number of nurse interventions increased, the number of rehabilitations decreased. This strategy appears to be based upon the fact that nurse interventions cost less per cases than rehabilitations.¹⁶¹

Table 7: Relationship between Nurse Interventions and Hearing Requests

Year	Injuries	Interventions		Rehabilitations		Hearing Requests	ROR Requests	Remand Rate
		Cases	Remploys	Cases	Rehabs			
1993	107167	9883	691	9883	1000	6710	544	45%
1994	113722	5530	1541	7778	1018	6703	583	40%
1995	105483	10574	3275	6465	893	7250	806	38%
1996	100064	14235	4623	6049	842	7991	830	43%

As with the PRM project and QCM procedures,¹⁶² increased implementation of early nurse interventions is positively correlated with an increase in hearing requests, *i.e.*, early nurse interventions increased by 44% from 1993 to 1996, while hearing requests, including requests for written record reviews, increased by 22% during the same period. After spiking in 1994, injuries during this period dropped by 7%.

The true success of early nurse intervention has not been validated. As with so many other initiatives, DFEC has not reported meaningful statistics. For example, DFEC states

[w]ith more comprehensive use of nurse services, and attention to these [initial periods of disability], the FEC nurse program helped the office resolve 73 percent of disability cases within one year of the date

¹⁶¹ See FY96 Report at 38 (data showing average cost per case dropping as the number of cases receiving return-to-work services increased).

¹⁶² See Tables 2 and 3, *supra*.

that disability began. Several offices began to meet the second goal, that of resolving 90 percent within two years.¹⁶³

However, what does the term "resolved" mean? Although nurses are required to follow the injured employee's progress for a period of 60 days, DFEC has not reported what this monitoring reveals. Furthermore, DFEC does not report how many of these "resolutions" were successful, *i.e.*, how many of these return-to-work efforts were sustained on appeal and how many injured workers actually remain employed. The return to work success could be measured by determining how many of the Claimant receiving early nurse intervention services suffer a recurrence of disability. Similarly, it would be worthwhile to know how many Claimants actually find early nurse intervention to be better service since this is one of the reasons DFEC implemented the process.¹⁶⁴

DFEC Tightens the Screws

Rather than address some of its systemic problems, DFEC has proposed regulations which would actually exacerbate the problems.¹⁶⁵ Section 10.150(b)¹⁶⁶ of the current regulations states

In the administration of the Act, the Office has one general policy, which is to follow and to adhere to the principles of workers' compensation law as stated in the opinions of the Supreme Court, the Federal Circuit Courts of Appeal, and the District Courts of the United States, as they may appropriately be applied or have been determined

¹⁶³ FY96 Report at 38.

¹⁶⁴ "To provide better service to Claimants and effect cost savings as well, DFEC instituted new case management procedures in 1993. . . . They rely heavily on the use of registered nurses under contract to OWCP to work with [] Claimants and their physicians to clarify the nature and extent of injury-related disability." *Id.* It would also be useful to know how Claimants' physicians view this service.

¹⁶⁵ 62 Fed. Reg. 67,120 (1997) (to be codified at 20 C.F.R. pt. 10).

¹⁶⁶ 20 C.F.R. § 10.150(b) (1996).

by the Employees' Compensation Appeals Board (ECAB) to apply in like situations arising under the Act. In addition, decisions and opinions of the judicial tribunals of the several States furnish principles of law of general applicability in the specialized field of workers' compensation, which form parts of the foundation of general principles relied upon in the application and interpretation of the Act. The Office applies the provision of the Act applicable in respect to a particular case or situation, to the extent that such provision can readily be applied without extrinsic aid, but where such aid is necessary the source thereof is the body of principles embodied in authoritative decisions of the courts and the ECAB within such well-recognized branch of the law.

DFEC proposes to drop this language as unnecessary.¹⁶⁷ DFEC wants to further divorce itself from the general concept of workers' compensation and the equitable principles which form the basis for this remedial social covenant.

As noted above, injured employees are not given enough time to submit necessary information. As a result their claims are prematurely denied and this results in an inevitable remand. The current regulations state

If a Claimant initially submits supportive factual and/or medical evidence which is not sufficient to carry the burden of proof, the Office will inform the Claimant of the defects in proof and grant at least 30 calendar days for the Claimant to submit the evidence required to submit the evidence required to meet the burden of proof.¹⁶⁸

Director, DFEC Markey has already acknowledged that District Offices are not complying with this regulation. Furthermore, it is obvious that 30 days is too short a period. Acting Director Hallmark testified that the 30 day period would be extended for good cause. However, rather than modify the regulation to incorporate

¹⁶⁷ 62 Fed. Reg. 67,121.

¹⁶⁸ 20 C.F.R. § 10.110.(b).

the good cause extension, DFEC instead has shortened the period. The proposed regulation states

If the Claimant submits factual evidence, medical evidence, or both, but OWCP determines that this evidence is not sufficient to meet the burden of proof, OWCP will inform the employee of the additional evidence needed. The Claimant will be allowed up to 30 calendar days to submit the evidence required.¹⁶⁹

Where 30 days had been the minimum time period allowed for the submission of evidence, it has now become the maximum. As noted above, it does not appear reasonable to grant injured employees less time to submit evidence when they already have insufficient time.

Similarly, when DFEC intends to reduce or terminate benefits, the proposed regulations state

OWCP will provide the beneficiary with written notice of the proposed action and give him or her 30 days to submit relevant evidence or argument to support entitlement to continued payment of compensation. This notice will include a description of the reasons for the proposed action and a copy of the evidence upon which OWCP is basing its determination. Payment of compensation will continue until any evidence or argument submitted has been reviewed and an appropriate decision has been issued, or until 30 days have elapsed if no additional evidence or argument is submitted.¹⁷⁰

The proposed regulations further state: "OWCP will not grant any request for an extension of this 30-day period."¹⁷¹

With respect to the development of evidence, DFEC has chosen to neglect its obligation to see that justice is done by sharing in the burden of going forward with

¹⁶⁹ Section 10.121 at 62 Fed. Reg. 67,143 (emphasis added).

¹⁷⁰ Section 10.540(a) at 62 Fed. Reg. 67,156.

¹⁷¹ *Id.*, Section 10.541(a).

the evidence. In the preamble to its proposed regulations DFEC states:

The discussion of development of claims by OWCP found in current § 10.110(b) has been omitted from the proposed regulations. This discussion has proven to be misleading, and was mistakenly assumed to be a commitment by OWCP to undertake development, despite the fact that it only describes what OWCP may, on an ad hoc basis, do even though the burden of proof to establish the elements of the claim is on the Claimant at all times.¹⁷²

The FECA is remedial legislation and DFEC is charged with insuring that injured employees are treated in a fair and equitable manner. Since proceedings under the FECA are not adversarial, principles of equity demand that DFEC not act as a disinterested arbiter but assist Claimants with the development of their claims. This assistance does not replace the Claimant's ultimate burden of persuasion but represents DFEC's duty to see that justice is done.

In addition to stiffening a Claimant's burden of persuasion, DFEC has eliminated its own burden of proof for rescinding acceptance of claims. It is well established by ECAB case law that once DFEC accepts a claim, it has the burden of justifying termination of modification of compensation.¹⁷³ This holds true where DFEC later decides that it has erroneously accepted a claim for compensation. To justify rescission of acceptance, DFEC must establish that its prior acceptance was erroneous based on new or different evidence or through new legal argument and/or rationale.¹⁷⁴

¹⁷² 62 Fed. Reg. 67,121.

¹⁷³ See *Frank J. Mela, Jr.*, 41 ECAB 115 (1989); *Harold S. McGough*, 36 ECAB 332 (1984).

¹⁷⁴ See *Laura H. Hoexter (Nicholas P. Hoexter)*, 44 ECAB 987 (1993); *Alphonzo Walker*, 42 ECAB 129 (1990), *petition for recon. denied*, 42 ECAB 659 (1991); *Beth A. Quimby*, 41 ECAB 683 (1990); *Roseanna Brennan*, 41 ECAB 92 (1989), *petition for recon. denied*, 41 ECAB 371, (1990); *Daniel E. Phillips*, 40 ECAB 1111 (1989), *petition for recon. denied*, 41 ECAB 201 (1990).

In *Daniel E. Phillips*¹⁷⁵ the ECAB held that in order to reopen and rescind its prior acceptance of a claim, DFEC "must establish that its prior acceptance was erroneous through new or different evidence and that it is not merely second-guessing the initial set of adjudicating officials." In *Roseanna Brennan*¹⁷⁶ the ECAB indicated that DFEC was obliged to "[introduce] new evidence, legal arguments, and rationale which justify its rescission" of the prior acceptance. In *Beth A. Quimby*¹⁷⁷ the ECAB stated: "to justify a rescission of acceptance of a claim, [DFEC] must show that it based its decision on new evidence, legal arguments and/or rationale."

The proposed regulations eliminate this requirement noting: "[t]he ECAB reached [its] conclusion without specifying any statutory or regulatory basis for this limitation. Its only rationale was its opinion that reopening a decision should not become a surreptitious route for OWCP to readjudicate a claim."¹⁷⁸ DFEC states that the proposed regulation "adopts the long-standing position of the Director [OWCP] that the plain language of section 8128(a) authorizes the Director, without pre-condition, to review a decision 'at any time.'"

It is questionable whether DFEC has the authority to limit the jurisdiction of the ECAB to review the actions of the Director in rescinding the acceptance of claims. Section 8149 of the FECA describes the authority of the Secretary with regard to the ECAB. This authority has not been delegated, along with the other

¹⁷⁵ 40 ECAB 1111 (1989), *petition for recon. denied* 41 ECAB 201 (1989).

¹⁷⁶ 41 ECAB 92 (1989), *petition for recon. denied* 41 ECAB 371 (1990).

¹⁷⁷ 41 ECAB 683 (1990).

powers of the Secretary under the FECA, to the Director, OWCP. Similarly, the principle of *stare decisis* would appear to deprive DFEC of the authority to question the legitimacy of ECAB case law in this manner.

The current regulations permit postponement of hearing for good cause.

However, the proposed regulations state:

Once the oral hearing is scheduled and OWCP has mailed appropriate written notice to the Claimant, the oral hearing cannot be postponed at the Claimant's request for any reason, unless the hearing representative can reschedule the hearing on the same docket (that is, during the same hearing trip).

This proposal is another example of how DFEC continues to curtail the rights of injured employees. According to data published in the FY96 *Report*, of the 6,885 hearing dispositions in FY96, 1,877, or 27%, were disposed of on procedural grounds. That means, 27% of hearing requests did not make it to hearing, which is a very high number. In 1966, when the FECA was amended to provide an injured employee with the right to an oral hearing, the Senate noted

The existing law permits the Secretary to make a decision, solely on written evidence and reports, and does not provide a forum for an aggrieved Claimant to present evidence. This bill gives the Claimant the right to request a hearing on his claim before a representative of the Secretary.

The hearing process is informal, and the Secretary is not bound by the rules of evidence or the Administrative Procedure Act. The purpose of this amendment is to give the Claimant the opportunity to be heard and support his claim by evidence.¹⁷⁸

Therefore, the proposed regulation, denying postponements, appears inconsistent with the intent of the FECA to grant an injured employee the right to an oral

¹⁷⁸ 62 Fed. Reg. 67,127.

hearing.

Furthermore, the termination procedures, which grant an injured employee only 30 days to respond, appear constitutionally infirm. It is well-established that compensation benefits are a property right protected by the due process provisions of the fifth amendment. The Supreme Court has declared that it would look at three factors to decide what due process requires in a given situation:

First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through any procedure used, and the probable value, if any, of additional or substitute safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute requirement would entail.¹⁸⁰

For FECA recipients, there is a great risk of erroneous deprivation. As noted above, in Table 4, the average remand rate has consistently been 45%. In addition, 27% of Claimant's who request a hearing fail to obtain one for procedural reasons. In addition, the proposed regulation would eliminate postponements, in favor of written record reviews, which will increase the numbers of Claimants who are deprived of an oral hearing. All these factors suggest that providing injured employees with an inflexible 30 day period to respond to a pre-termination notice is a denial of due process.

DOL Not Prepared to Ask Hard Questions

The abuses detailed above are well known to both Deputy Director, OWCP Hallmark¹ and Director, DFEC Markey since they receive a steady stream of

¹⁷⁹ S. Rep. No. 1285, 89th Cong., 2d Sess. 2 (1966), reprinted in 1966 USCCAAN 2430, 2431.

¹⁸⁰ *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976).

complaints from members of Congress and others. However, rather than rectify the source of these complaints, Deputy Director, OWCP Hallmark and Director, DFEC Markey send misleading responses to these inquiries. This occurs because of the manner in which such correspondence is prepared in the Department.

All letters sent to the Department regarding a specific program are referred to that program to draft a response. For example, letters sent to Secretary of Labor, which complain about these abuses, are referred to OWCP and DFEC to prepare a response. Often these responses are less than candid and no one in the Department verifies their accuracy. Even letters to the President, concerning OWCP abuses, are answered by OWCP personnel. In most cases, these replies are drafted by the same individual about whom the complaint is made. The Department's Inspector General also receives complaints about the program and includes unverified input from OWCP in its reply.

The Department's Inspector General has a less than objective relationship with OWCP officials. In written testimony presented at a September 30, 1997, oversight hearing before the House Subcommittee on Workforce Protections, Inspector General Masten candidly admitted

I would like to take this opportunity to acknowledge the good working relationship and the cooperation between my office and OWCP. While many program agencies within the Department of Labor sometimes view the OIG as an adversary, OWCP has consistently worked with us to improve the efficiency of the FECA program and decrease the level of fraud and abuse. My office often receives complaints about the program, primarily from Claimants dissatisfied with the handling of their claim. OWCP has been responsive to addressing these complaints and taking appropriate action.

I question whether the Department's Inspector General has the requisite impartiality and commitment to investigate the serious abuses of Claimants' rights which DFEC perpetrates.

For example, at the request of the Manager, Injury Compensation, U.S. Postal Service and the Director, OWCP, the Postal Inspection Service and the Department's OIG jointly conducted a review of DFEC's administration of the Act with respect to United States Postal Service (USPS) employees.¹⁸¹ The executive summary of this report noted:

Communications indicating that some Postal Service officials may have hindered, delayed or discouraged the filing of compensation claims and notices of traumatic injury/occupational disease in violation of the Federal Employees' Compensation Act were not consistently brought to the attention of OWCP managers and/or referred for investigation when appropriate. As a result, improper USPS practices have not been addressed in some instances through timely OWCP management actions and statutory penalties have not regularly been invoked, when appropriate, to protect employees' rights under the Act.¹⁸²

The OIG's Report made the following recommendation to the Deputy Assistant Secretary for Workers' Compensation:¹⁸³

Ensure that OWCP provides guidance to claims examiners and supervisors to elevate recurring problems to management and/or training and outreach staff to facilitate technical assistance or management resolution with employing agency officials, as appropriate.¹⁸⁴

However, the USPS continues to hinder injured employees from receiving their just

¹⁸¹ OIG Report Number 04-SPO-95-OWCP (May 10, 1995).

¹⁸² *Id.* at 4 (emphasis added).

¹⁸³ Deputy Director Hallmark was Acting Deputy Assistant Secretary at the time.

¹⁸⁴ OIG Report at 32.

compensation. As noted above, the San Antonio Post Office has injured employees file an improper notice of injury. DFEC officials know of these abuses and have done nothing about them. The OIG has failed to monitor DFEC to insure that "improper USPS practices have [] been addressed . . . through timely OWCP management actions and statutory penalties have . . . been invoked, when appropriate, to protect employees' rights under the Act."

OWCP "Heal Thyself"

The March 1998 issue of the National Council of Field Labor Locals' newsletter the *Courier* contained an article titled "OWCP: DOL's Own Sweatshop." This article commented on the terrible working conditions in DFEC District Offices noting:

Regardless of location, OWCP workers' complaints have a familiar ring of hopelessness and resignation. Claims Examiners face impossible backlogs. Offices are crammed with paper and cramped together.

The May 1998 *Courier* contained letters from Claims Examiners noting

[W]hat a sham the "DOL Model Workplace" is. Isn't it amazing that DOL, the agency that penalizes the private sector for abusing their employees, allows the abuse of their own employees to go unchecked. What hypocrisy!

and

Our union needs to request a congressional investigation of OWCP nationwide in order to expose that the DOL model workplace is nothing but a lie. Not only are workers overwhelmed with the volume of work . . . we deal with racism and sexism, preferential management practices, unfair labor practices, incompetency of the managers . . . intolerable and hostile working conditions, the "good ole boy network," the manipulation of data used by management to report to Congress, a program running rampant with abuse of benefits, etc. . . This is not

the way the streamlined and improved federal government is supposed to work.

What is more, not only do OWCP and DFEC managers create abusive working conditions, they also abuse their employees who sustain work-related injuries.

All compensation cases for DOL employees are handled by the Kansas City District Office. This Office recently established a special unit to handle claims from DFEC employees. These employees report that their claims are not being treated in the same manner as cases from non-DFEC employees.

Possible Solutions

Enforce Section 19 of OSHA

Compensation costs are a direct result of injuries sustained. Reducing the number of injuries will inevitably result in lowering compensation costs. Section 19 of the Occupational Safety and Health Act states, in relevant part:

(a) It shall be the responsibility of the head of each Federal agency to establish and maintain an effective and comprehensive occupational safety and health program which is consistent with the standards promulgated under section 6. The head of each agency shall (after consultation with representatives of employees thereof)—

- (1) provide safe and healthful places and conditions of employment, consistent with the standards set under section 6;
- (2) acquire, maintain, and require the use of safety equipment, personal protective equipment, and devices reasonably necessary to protect employees;

The Federal government is not a model employer. In fact, the Federal workplace is dangerous. Rather than focusing attention on efforts to inhibit claims and to reduce or terminate compensation benefits, employing agencies should concentrate on making their workplaces less dangerous. This is something all agencies can begin immediately and not wait for DFEC action.

Enforce 18 U.S.C. § 1922

Section 1922 of the criminal code states:

Whoever, being an officer or employee of the United States charged with the responsibility for making reports of the immediate supervisor specified by section 8120 of title 5, willfully neglects, or refuses to make any of the reports, or knowingly files a false report, or induces, compels, or directs an injured employee to forego filing of any claim for compensation or other benefits provided under subchapter I of chapter 81 of title 5, or any extensions or applications thereof, or willfully retains any notice, report, claim, or paper which is required to be filed under that subchapter or any extensions or application thereof, or regulations prescribed thereunder, shall be fined under this title or imprisoned not more than one year or both.¹⁸⁵

As noted above, the U.S. Postal Service, with the complicity of DFEC officials, has filed false information in cases and has failed to submit required reports and induced injured employees to forego the filing of necessary reports. The U.S. Postal Service is not the only agency involved in this type of behavior. DFEC should be more aggressive in addressing agency abuses.

Consideration should be given to strengthening § 1922 by including the following language, taken from 33 U.S.C. § 931(c):

A person including, but not limited to, an employer, his duly authorized agent, or an employee of an insurance carrier who knowingly and willfully makes a false statement or representation for the purpose of reducing, denying, or terminating benefits to an injured employee, or his dependents . . . shall be punishable by a fine not to exceed \$10,000, by imprisonment not to exceed five years, or both.

Provide More Realistic Time Frames for Submission of Evidence

It is obvious that the 30 day time frame for submitting evidence in response to deficiency notices and termination notices is too short. Since the 30 day period is

not mandated by statute, and since it has caused significant numbers of claim to be improperly denied, it appears that selection of this 30 day period was arbitrary and capricious and represents an abuse of DFEC's discretion.¹⁸⁶

DFEC should monitor how long it actually takes to send deficiency notices and receive the requested information. DFEC should also monitor how long it takes to submit evidence in response to a termination notice. Based upon this data DFEC should establish a more realistic time frame for submission of evidence. This will eliminate premature decisions which inevitably result in remands. It will also prevent injured employees from being wrongfully deprived of benefits.

Involve Claimants in Developing Statements of Accepted Facts

Since the Statement of Accepted Facts (SOAF) is one of the most important documents a Claims Examiner prepares and since the SOAF has a profound impact on the development of the medical evidence, Claimants should have more opportunity to comment on the accuracy of this document.

Prior to its use, District Offices should be required to send the SOAF to the Claimant and the employing agency for comment. The comments from the employing agency should be submitted to the Claimant for response. After obtaining this input, District Offices will be in a better position to create a fair and equitable Statement of Accepted Facts. This would remove even the impression of manipulation of the factual evidence.

¹⁸⁵ Title 18, U.S.C. § 1922.

¹⁸⁶ This impression is reinforced by DFEC's broad interpretation of the 30 day period for releasing hearing decisions mandated by § 8124(b)(1) of the FECA. See n.93 *infra* and accompanying

Develop Medical Evidence in Nonadversarial Manner

DFEC routinely contracts with the same physicians to provide second opinion medical reports (SECOP). It then relies on the opinions from these physicians to reduce or terminate benefits. This does not appear to be fair or equitable. Section 8123(a) of the FECA requires DFEC to obtain a third opinion when the opinion of its SECOP disagrees with the opinion of the Claimant's physician. The legislative history of this provision does not reveal its purpose. However, this provision may have been put in the Act to protect Claimants by preventing the Government from denying claims using medical evidence it obtained using its vastly superior resources. This interpretation is certainly consistent with the Act's humanitarian purpose and also is consistent with the well established rule that the FECA, as a remedial statute, should be broadly and liberally construed in favor of the employee to effectuate its purpose and not in derogation of the employee's rights.¹⁸⁷

DFEC should comply with the statute and appoint a third physician when there is any disagreement between the SECOP and the Claimant's treating physician. This will remove even the impression manipulation of the medical evidence.¹⁸⁸

Take Steps to Prevent Erroneous Decisions

As noted above, 45% of cases which receive a merit decision from Hearings and Review are remanded. A majority of these cases are remanded prior to hearing. Since pre-hearing remand cases represent a significant amount of work, the claims

discussion

adjudication process should be reengineered so that these cases are more easily handled. Resolving these cases with a smaller expenditure of H&R resources will result in a reduction of the time needed to hold a hearing and render a decision, thus providing better customer service.¹⁸⁸

As noted above, in a significant number of pre-hearing remand cases evidence has been submitted between the date of the District Office's decision and the date of the remand. A better utilization of resources would have the more than 450 District Office Claims Examiners¹⁸⁹ resolve these cases, prior to the hearing date, rather than H&R's 25 Hearing Representatives. As noted above, these cases represent 2.6 person years of work for H&R; however, having District Office Claims Examiners handle these cases would involve, at most, 2 additional cases¹⁹⁰ per Claims Examiner per year.

Requiring a District Office to reconsider its decision based upon evidence submitted prior to hearing will also encourage District Offices to set a more reasonable time frame for the submission of additional evidence. This will insure that all relevant evidence is in the file when the decision is made. Having all the relevant evidence in the case record will increase the overall quality of decisions and reduce the remand rate. Reducing the remand rate will mean that the right decision was made in a timely manner so that compensation and medical benefits

¹⁸⁷ See n.99 *supra* and accompanying text.

¹⁸⁸ Query: Why doesn't DFEC's Strategic Plan contain a goal to reduce the remand rate and increase the timeliness of hearings?

¹⁸⁹ As stated in Acting Director, OWCP Hallmark's September 30, 1997 written testimony.

¹⁹⁰ The number of additional cases would in fact be lower, since not every Claimant submits additional evidence prior to the hearing.

could be promptly paid, which, as Acting Director Hallmark told the Workforce Protections Subcommittee on September 30, is the purpose of the FECA.

The process for handling cases where a hearing request has been received should be modified as follows:

- a. All requests for a hearing would be forwarded to H&R, where they would be recorded by date and hearing city. The case would remain in the District Office.
- b. Approximately 1.5 months prior to the date the case is assigned to a Hearing Representative for a hearing, the case would be requested from the District Office.
- c. District Offices would be obligated to reconsider its decision based upon any evidence submitted prior to sending the case to H&R. This would be required in every case¹⁹¹ and not just those in which the Claimant specifically requests a reconsideration.
- d. In order to monitor compliance, the DFEC Accountability Review Standards should be specifically modified to include a standard dealing with pre-hearing remands.

DFEC's Strategic Plan should be modified to include the following Strategic Goal and Objectives

Strategic Goal: "Reduce the overall remand rate by enhancing adjudicatory efficiency and quality."

a. Objective 1: "Reduce the number of cases which require remand by the Branch of Hearings and Review and the Employees Compensation Appeals Board."

Current Performance should be measured by actual remands by H&R and the ECAB.

Annual Goals: i)to reduce the pre-hearing remand rate by 5% each year until it reaches 10% of overall H&R remands, and ii)to reduce the H&R and ECAB remand rate annually until it reaches 10%.

¹⁹¹ Pursuant to the authority granted by § 8128(a) of the FECA.

Based upon data contained in OWCP's *Annual Report*, and summarized in Table 5 above, H&R needs additional staff to handle the existing workload. In the alternative, the incoming workload must be reduced. Otherwise, the backlog, which would have taken 16.4 person years to eliminate at the end of FY 1996, will only increase. The H&R backlog has, in fact, increased by an average of 807 cases per year over the past 5 years. Reengineering the adjudication process, as recommended above, will help address the increasing H&R backlog and allow the hearing process to be completed in less than the 8 months it currently takes. Resolving contested cases sooner will also lessen the amount of work needed to maintain the case pending resolution.

Move the Branch of Hearings & Review to the Office of the Secretary

DFEC officials routinely interfere with the impartiality of the hearing process. Regional Directors and District Directors call Director, DFEC Markey and complain about decisions. California Regional Director Donna Onodera called Director Markey to complain about my decisions which severely criticized abuses in the San Francisco District Office. She reportedly told Director Markey that she never wanted me to come to California to hold hearings. Thereafter, Director Markey began harassing me. This is clearly inappropriate.

Director Markey should be prevented from interfering with the hearing process. He should be prevented from reviewing the decisions of Hearing Representatives. To prevent DFEC interference, the Branch of Hearings and Review should be moved to the Office of the Secretary of Labor. This is where the

Employees' Compensation Appeals Board is located. This would remove even the impression of improper interference with the hearings process.

Furthermore, the regulations, or at a minimum the procedures, should be specifically revised to clarify that the Director, DFEC does not have the authority to modify the decisions of a Hearing Representative under § 8128(a) of the FECA. As noted above, DFEC officials who are dissatisfied with the decisions of Hearing Representatives simply have the decision reversed. This clearly subverts the impartiality of the hearing process. The authority of the Director, OWCP, as delegatee of the Secretary of Labor, "to review an award for or against payment of compensation at any time" should not be redelegated to DFEC. This authority should remain with the Director which would remove even the impression of impropriety.

DFEC Should Treat Injured Employees Fairly and Equitably

DFEC should recommit to its mission of providing "swift benefit delivery . . . people-oriented administration . . . and nonadversarial procedures for adjudicating and managing claims." This will insure "that injured or disabled employees of all covered departments and agencies, including those of the United States Postal Service [are] treated in a fair and equitable manner."

Mr. USHER. Thank you, Mr. Chairman.

Mr. Chairman, Congressman Davis, and distinguished members of the subcommittee, I too would like to express my appreciation for the opportunity to be here today and share with you some of my experiences in my 23 years of employment with the Office of Workers' Compensation Programs.

There are at last count, I believe, 11 district offices that provide initial adjudication of the injury claims filed by Federal employees. Prior to 1966, the only appeal right was to request reconsideration by the district office or to appeal directly to the Employees Compensation Appeals Board. The Employees Compensation Appeals Board is not part of the Office of Workers' Compensation Programs, it operates under the Office of the Secretary of Labor. The decisions issued by the Appeals Board serve as precedent for the claims examiners in the district offices and for the hearing representatives in addressing these claims, since the claims are not, by statute, allowed to go into civil court.

I have 5½ years experience as a claims examiner in the Boston district office, and upon application and presumably for good work performed, I was selected and promoted to the position of hearing representative January 11, 1981. So that gives me 5½ years as a district office claims examiner and 17½ years, as of this month, as a hearing officer.

My observations follow. The hearing program is held out to the public, to the injured Federal employees, to Members of Congress as a viable appellate remedy for the injured Federal employee dissatisfied with an initial decision. That has not been my experience in too many of the cases. The emphasis since the day I walked through the door in January 1981 at the Branch of Hearings and Review has always been affirmation, affirm the district office decision whenever possible. It is probably critical to observe here, Mr. Chairman, that the hearing representative in performing his or her assigned function does not enjoy judicial independence. The statute itself provides for review by the Secretary of Labor and that is where we get into problems, in my opinion.

Some of the policy decisions issued by management at Hearings and Review and higher levels over the course of the years of my involvement as a hearing representative, have been to really skew some of the statistics to which Mr. Perez made reference. The hearing representatives have, for approximately 10 years now, been forbidden to remand a case before hearing, where the issue is an overpayment. No matter how erroneous the decision is, no matter how egregiously written, no matter how much the decision is not consistent with the evidence of record, we are not allowed to remand before hearing an overpayment issue. And I should explain the hearing representative's position description gives the hearing representative the requirement to review a certain number of cases upon assignment and then to decide what should properly be done with these cases. One of the hearing representative's alternatives is if the decision issued by the district office is not proper, then the record is remanded to the district office with instructions to review the evidence, do some more case development and issue a de novo decision. That could be either pay the claim or issue a proper denial, whatever the circumstances of the case may require.

After a period of time, I would gather toward the late 1980's if memory serves, the no remand before hearing policy was expanded to include psychiatric claims, that is claims filed by injured Federal employees based upon emotional conditions and disability, and then to include fact of injury cases. The office has also adopted—these were internal policies at the Branch of Hearings and Review the no remand before hearing.

The office, effective June 1, 1987, also changed the regulations which govern the office in its administration of the compensation act. The foremost effect upon the hearing process was to give the employing agencies an appeal right in the compensation process, which the statute does not give them. The employing agency is now, as of June 1, 1987, allowed to send an observer to the hearing, to receive a copy of the transcript of the hearing, and to enter comments into the hearing record for consideration of the hearing representative. The agencies, particularly the Postal Service and the military services, have availed themselves of this opportunity and they do appear at the hearings quite frequently.

The management at the Branch of Hearings and Review assiduously protects this employing agency appeal right which is granted to them only by the office's own regulations. Most recently, there was an instruction from the Chief, Branch of Hearings and Review, that he had received a complaint from one employing agency who had four injured employees scheduled for the 1-week trip to a particular city and the employer claimed that it would have been more convenient for the employer to have all these cases scheduled on one day. The hearing representatives—and I must commend those of my colleagues here who did respond to this suggestion—unleashed a firestorm of discontent over that instruction, saying the hearing is, first, for the injured employee, the first thing you do when you set a hearing schedule is consider the distance the injured employee must travel to the hearing. You must consider the complexity of the issue, what is the likelihood that the hearing is going to take more than 1 hour or it will take less than 1 hour. The fact is that the representative sent by the employer is in a pay status, they are doing the job that they are paid to do, whereas the injured employee is not. He either has to take a day of leave, if he is so fortunate to have returned to work, or he has to come up with his own expense money to travel to the hearing site. It is just an example of the bias, in my opinion, that is being showed toward the employing agencies by the people that manage the program designed for the injured employees.

There are changes published in the Federal Register of December 23, 1997, proposed changes, which would further act to the detriment of the injured Federal employee. The proposals would be to expand the Director—and I would note for the record here, Mr. Chairman, the Director for Federal Employees Compensation is not himself here today. That is Mr. Thomas Markey. The proposed changes in the regulations would expand the Director's authority to review any case that he decided to review, whether the benefits had been denied or whether benefits had been awarded, and issue a favorable or an unfavorable decision. Those regulations say that this decision of the Director, FECA, to review a case is not subject

to appeal, it is only subject to the regulation that says that he can do this at any time.

The proposed changes in the regulation would also preclude the injured employee's entitlement to request postponement of the scheduled hearing. If his attorney has a conflict with another court date, perhaps a workers' compensation hearing under a State statute or a longshore or harbor workers statute, the attorney would call in and request that the case be postponed. The proposed changes in the regulations will absolutely say there is no excuse, you will not be granted a postponement of your scheduled hearing.

If you cannot make it when it is scheduled, the only opportunity you will have would be to ask the hearing representative if you can be fit in during a vacancy during the same week. That is our policy now, sometimes that happens and we do that, but that is not always possible. If the hearing representative cannot grant the claimant and the attorney an alternative hearing date during the same hearing trip, the only alternative available to the claimant will be to go with a written record review, wherein he loses the opportunity for a face-to-face hearing before a representative of the office.

There is also an internal policy change at Hearings and Review lately not to allow people to withdraw their request for a hearing without prejudice. Many of these injured employees have EEO complaints or legal proceedings working under other venues and they enter what seems to me to be a legitimate request to hold off on their workers' compensation hearing, they think they might prevail before EEO, or the arbitrator on their union grievance they feel is going to rule in their favor. That would constitute significant material and germane evidence for their appeal under the compensation act. What we are being told now is you will not grant this request for withdrawal, you, the Federal injured worker, will either proceed to hearing—if you withdraw, you have lost your right to a face-to-face oral hearing before a representative of the Director.

Of particular significance is the role of the Director of Federal Employees Compensation himself. He is involved in the decision-making process of each and every individual hearing representative in the Branch of Hearings and Review. He sits in the Branch Chief's office every day and reviews cases—reviews decisions issued by hearing representatives. Frequently this situation results in a hearing representative being called into the Branch Chief's office for a discussion, either a discussion with the Director himself, or for written instructions either presented by the Director or through the Branch Chief to change the decision. Lest there be some confusion among the parties here that this does not happen or has not happened in the past, I will testify to you, Mr. Chairman, that in the last staff meeting attended by the hearing representatives, the Director for Federal Employees Compensation sat in the front of the room and said I will continue to review your decisions, and that is a quote. There is no mistake here, he is in that office every day reviewing decisions by the hearing representatives, and that review is not always—very seldom, I would add—favorable to the injured employee seeking redress on appeal.

If the hearing representative should be disinclined to comply with the Director's expressed wishes, there is then a policy of sub-

jecting that hearing representative to petty and vindictive treatment on future decisions submitted wherein you receive written instructions on how to change your decision, to remove this from your decision, to add this. And then, of course, since you have not prepared a proper decision, this requirement for you to rewrite your decision will subsequently be used against you, to your detriment, in the performance evaluation process.

The history of the branch is legendary—

Mr. HORN. I just wonder, before you leave that point, would you mind if we inserted in the record the memorandum of December 21, 1997, to you from Robert W. Barnes, the Chief, branch of Hearings and Review?

Mr. USHER. Not at all.

Mr. HORN. All right, without objection, it will be put in the record at this point.

Mr. USHER. Thank you, sir.

[The information referred to follows:]

U.S. Department of Labor

Employment Standards Administration
Office of Workers' Compensation Programs
Division of Federal Employees' Compensation
Washington, D.C. 20210



File Number: A12-122747
A12-157328

December 21, 1997

Memorandum to: William Usher
Hearing Representative

From: Robert W. Barnes
Chief, Branch of
Hearings and Review

I am returning the above referenced claims to you for preparation of a proper determination.

I found a great deal of the language that you used in your decision to be inappropriate. Regardless of your frustration with a district's office processing of a claim, the hearing decision is not the appropriate forum to berate the Office staff. I have blocked out language that I found to be unacceptable in the attached copy of your decision. You should delete these comments from your corrected work product.

Further, it is totally inappropriate for you to voice your differences of opinion with Office policy in a hearing decision. You are employed as a hearing representative for the Director; and, as such, it is your responsibility to determine whether decisions on appeal are in keeping with program policies and procedures. Hearing representatives do not set policy. Your use of the typing contractor's time to prepare a statement of your beliefs regarding Office policy represents a misuse of tax dollars. You are warned that any further incidence of expression of your personal disagreement with Office policy in a decision or official correspondence with our public will result in a disciplinary action.

I have also marked three comments you made where you indicate that you are not going to address the decision at hand on its merits. For you not to make a merit decision, either favorable or unfavorable, is a disservice to the claimant. In case 12-122747, the district office did follow one of the options afforded by the prior hearing representative and you should determine whether the decision rendered was correct - did the Office meet its burden to terminate medical benefits on the basis that the work-related component of the accepted condition had ceased? I believe it did. Deciding the emotional illness claim will be more complex, and will require doubling of all claims.

I have rewritten your decision to include removing the inappropriate language and making it a merit decision. Attached a copy of such for your use or in the alternative, you should prepare an appropriate decision within the time standards allotted for a decision rewrite.

Working for America's Workforce

Mr. USHER. There is a rather unfortunate history of the branch in the 17½ years that I have been there of decisions issued by hearing representatives which are favorable to the injured employees being withheld, withheld not only from the injured employee, but knowledge that the decision has not been issued has been withheld from the hearing representative himself or herself, and the decisions are held for periods of months. And to my personal knowledge, one of my decisions was held for 4 months before it was returned to me with instructions to rewrite it in a manner less favorable to the injured employee.

I would think, Mr. Chairman, that in an appeals process, the appearance of impartiality is as important as the fact of impartiality. The Director for Federal Employees Compensation who administers the Branch of Hearings and Review also administers the 11 district offices throughout the country. He is in effect instructing the hearing representatives not to remand the cases—not to remand decisions issued by the offices under his supervision. This is clearly a breach of any sense of decorum or impartiality. I would argue from my perspective, Mr. Chairman, that once you have lost the appearance of impartiality, any argument as to the fact of impartiality will not be persuasive.

The Branch of Hearings and Review, over the past several years has in fact become only an expanded district office rather than an appellate facility. It is now the servicing office for the Employees Compensation Appeals Board, medical billings are paid out of the Branch, compensation payments are made. Adverse decisions are issued by claims examiners now employed in the Branch of Hearings and Review and these adverse decisions that are issued by the claims examiners, which should more properly be issued by district offices, then come under the jurisdiction of the hearing representative. So I have had to hold a hearing on a decision issued by my colleague sitting less than 15 yards away from me in the office. There is no appearance of impartiality there, Mr. Chairman.

The hearing representatives are frequently told at staff meetings that we are not bound by the common rules of evidence, when in fact that language is contained in section 8124 of the statute which makes reference to the hearing representative being able to conduct the hearing without rules of formal procedure, but in a manner best suited to the interest of the injured employee. We are also told that the injured employees or the claimants, which are the actual subjects of this hearing, Mr. Chairman, do not get judicial review. These are quotes from people in management, either in the Office of Workers' Compensation Programs or in Hearings and Review itself. These people do not get judicial review, and therefore, we are under no obligation to give unsympathetic claimants any sympathetic consideration.

There is a problem that affects me in the performance of my job as a hearing officer holding appellate hearings with the district offices. Any rational system of claims adjudication would have all the hard work done at the initial level of adjudication. The rush to judgment, as I believe it is called—if I may back up, Mr. Chairman—so that there would be a pyramid with all the essential claims adjudicatory work being done at the initial level. When the case comes to appeal, you are confined—the injured employee, his

attorney, and the hearing representative are confined to the significant issue upon which the claim has been denied.

What has happened through the management practices of the supervisors at OWCP, however, is that the pyramid has become inverted. The district offices are cranking out decisions, as they tell you themselves, in an extremely timely fashion, but they are not addressing any of the issues. So when the injured employee requests a hearing, he now has to come to hearing on every element of the claim. The hearing officer becomes the first person to make the initial adjudication on the merits of the claim rather than performing his assigned function of hearing the appeal and issuing an appellate decision.

Having been performing as a hearing representative since January 11, 1981 except for 3 or 4 years out when I myself acted as a manager at Hearings and Review, I would estimate that I've held approximately between 1,500 and 2,000 hearings in every area of the country. There are themes that come out of that experience, they are consistent, they are unwavering. My colleague, Mr. Perez, has mentioned one of them, the district offices have no contract with their injured employees or no—if you ask the injured employees trying to contact the district offices, they will say that it cannot be done. It is not done in writing and it is not done in telephone responses. The attorneys that I have met and the union representatives that I have met over the course of my career will tell me that their most pressing concern is the lack of the hearing representative's ability to issue a decision based upon the law, the argument and the evidence, rather than office policy which changes so often. It seems that every time there appears to be a loophole in the law so that more injured employees can file successful claims, the policy is changed to exclude that loophole.

One particularly egregious office policy, in my opinion, Mr. Chairman, came into effect in March 1991 when the district offices were advised by their own procedure manual that cases would not be combined. And frequently many Federal employees, especially those with long careers who do physical work such as employees for the Postal Service or employees for our military facilities, as opposed to chair-bound desk warriors—these people suffer multiple injuries over the course of their Federal careers. Many times they are under the care of the same physician. Many times it is the same part of the body that has been injured. Many times there are overlapping issues in the claims.

For 5 years, between March 1991 and 1997, the district offices were encouraged not to combine the records and that the claims examiner in the district office would look at one claim only, whereas the claimant, his attorney, and his union representative were arguing you cannot adjudicate this claim in isolation, you must look at the broader picture.

Our claim is that it is the series of employment injuries that have occurred over the years that is leading to the present claim for disability. That although he may have recovered from his back injury to the point that, sure, he could go to work because of the back injury, but he still has permanent residual partially disabling effects from his leg injury, which is in a separate claim. The claims examiner in the district office using tunnel vision will issue an ad-

verse decision which is consistent with the evidence in one file but it is not consistent with the claim as presented or the evidence in all the claimant's files. That office policy was only changed despite the complaints over the years by the hearing representatives, that policy was only changed when the Employees Compensation Appeals Board told management at the national office of OWCP that it could no longer—it could no longer make intelligent decisions on piecemeal claims.

Frequently there is a problem with the district office's refusing to follow a hearing representative's favorable decision to an injured employee. There are several potential courses of action here. Either they will ignore it or they will write back to their supervisor, the Director for Federal Employees Compensation, Mr. Markey, and complain about the hearing representative's decision, or they will place such obstructions in the path of the injured employee that the intended result from the hearing representative, who has heard the case on appeal or who has remanded the record before hearing on appeal, the intended result of the hearing representative is never achieved.

The results show a marked difficulty based upon my experience in 17½ years with this organization, many district offices blatantly and categorically refuse to honor the injured employee's appointment of a union representative or an attorney. They will not send the attorney copies of correspondence. The motivation can only be speculated upon here, perhaps to dispose of the viability of appeal if the representative does not know the claim has been denied. This is all too common an occurrence in certain district offices.

I have also heard complaints from union representatives and not so much attorneys but attorneys also, that the employing agencies have created such a hierarchy of injury compensation offices within the employing agency itself, not talking about the Office of Workers' Compensation Programs, that the injured employee is required to submit his evidence to his initial injury compensation specialist who then sends it to an injury compensation office at another facility who then sends it to another injury compensation office. By the time the information gets into the file, it is too late, the file before the office claims examiner, it is too late and the claim has been denied for lack of evidence. Or the other alternative is that the evidence submitted by the injured employee is lost somewhere in the process.

Mr. HORN. We have to stop at that point and go to questions and we will give you a chance to bring out some of the other things.

Mr. USHER. Thank you, Mr. Chairman.

[The prepared statement of Mr. Usher follows:]

Testimony of William Arland Usher Before The House
Subcommittee on Government Management, Information and
Technology, July 6, 1998 in Long Beach, Ca.

- I THE BRANCH OF HEARINGS AND REVIEW
- II THE DISTRICT OFFICES
- III THE EMPLOYING AGENCIES

I

My name is William Arland Usher. After completion of military service and requirements for a B.A. Degree in Political Science, in July of 1975 I was selected on the basis of a competitive examination for employment with the United States Department of Labor, Employment Standards Administration, Office of Workers' Compensation Programs, Division of Federal Employees' Compensation in Boston, Mass. as a Claims Examiner. The position in the District Office involves the initial adjudication of claims to benefits filed by Federal civil employees and their dependents, under the provisions of the Federal Employees' Compensation Act (5 U.S.C. 8101 et seq.) for injuries sustained in the performance of duty.

Over the course of the ensuing years, I received timely promotions to the journeyman level of the Claims Examiner

position, and, upon application, was eventually selected for the position of Hearing Representative, for the Director, at the National Office of Workers' Compensation Programs in Washington, D.C. The Hearing Representative position at the National Office level addresses the request for a hearing before a representative of the Office submitted by a claimant not satisfied with the initial decision of the Claims Examiner in the District Office. In general, the Hearing Representative determines whether a hearing is necessary to address the District Office decision on appeal, holds such a hearing, and issues an appellate decision. These hearings are held under the provisions of the Statute at 5 U.S.C. 8124. It is salient to observe here that the Hearing Representative does not enjoy judicial independence.

I have been employed as a Hearing Representative, for the Director, OWCP from January 11, 1981 through the present.

When I joined the Branch of Hearings and Review in January, 1981, the Branch consisted of a Branch Chief, and approximately 12 Hearing Representatives who considered the position to require professional dedication to the concept that the hearing process was designed for the benefit of the claimant/injured employee. Even at that time, however, Hearing Representatives were discouraged by the Branch Chief from remanding cases before hearing, and advised to take the case to hearing and "...fix..." whatever deficiency may have been present in the District Office decision.

Over the ensuing years, this "...anti-remand policy..." (before hearing) on the part of management at Hearings and Review has hardened to the point that it now includes remands after hearing. The greater majority of the Hearing Representatives have concluded that affirmation of the District Office decision is what management wants, and that proceeding to hearing and affirming the decision on appeal will not be contested by management, whereas a decision wholly or partly favorable to the claimant will lead only to conflict with management.

Further, changes in the Regulations governing the Office in its administration of the Act (20 CFR 10.131-10.135 - effective June 1, 1987) particularly with regard to the hearing process, have allowed the Federal employing agencies, previously limited to participation only in the initial adjudication of the claim by the District Office, to now actively participate in the appeals process, specifically the hearing process.

Office policy has, de facto, granted the Federal employing agencies appeal rights from Office decisions which they do not enjoy by Statute. Management policy at Hearings and Review assiduously insures that the Employing Agencies appeal rights are fully protected by the Hearing Representatives.

Title 20, Code of Federal Regulations, section 10.135, effected June 1, 1987, makes the following provision.

"...the employing agency shall be afforded the opportunity to have an agency representative in attendance at the hearing and/or to request that it receive a copy of the hearing transcript...Where the employing agency requests that it receive a copy of the hearing transcript, the agency will be allowed 15 days following release of the transcript to submit comments or additional material for inclusion in the record. Any comments or materials submitted by the agency are subject to review and comment by the claimant within 15 days following the date the Office sends any such agency submission to the claimant."

Several points require consideration here.

The Statute, at 5 U.S.C. 8124(b) clearly mandates that the hearing process is to constitute a remedy for the aggrieved claimant/injured employee who has received an adverse decision from the District Office. "...the claimant is entitled to present evidence in further support of his claim." While the Statute specifically provides for the participation of the employer in the initial stages of adjudication of the claim by the District Office [viz: 5 U.S.C. 8118(b) (1); 8119; 8120; 8126(4)], the statute makes no provision for the employing agency to participate in the hearing process. Rather, the Statute provides that the Hearing Representative "...may conduct the hearing in such a manner as to best ascertain the rights of the claimant."

It should also be noted here that it is not only the

claimant/injured employee who has a vested interest in the outcome of the claim to compensation. The Federal employing agency also has a rather significant stake in the outcome. If the claim is approved and benefits awarded, the Office authorizes the Treasury Department to issue checks from the Employees' Compensation Fund to the appropriate parties for wage loss compensation, medical treatment, monetary awards for permanent impairment, vocational rehabilitation expenses, etc. These amounts are then "...charged back..." to the employing agency, requiring reimbursement to the Fund.

While logical argument might be presented in support of agency participation in all aspects of the adjudicatory process while the case is before the Office, and while such argument as might be germane and reasonable would require consideration, the June 1, 1987 changes in the Regulations, now in effect for 11 years, have worked to the disadvantage, even derogation, of the claimant's rights under the Statute.

While presumably not intended by the regulatory changes, those changes have altered the hearing process from a non-adversarial proceeding to a hybrid system of appeal which works to the disadvantage of the claimant and his representative, who are entirely unfamiliar with the concept, and to the advantage of the employer, who has a vested interest in devoting resources (resources greater than those available to the claimant) in support of the employer's position that rejection of the claim should be affirmed.

Frequently, the employer will send to the hearing as agency observer a specific supervisor who has been implicated by the claimant as the basis for the claim, whom the claimant alleges is the perpetrator of harassment, disparate treatment, retaliation or other abusive behavior. Such actions on the part of the employer can only be seen as attempts to intimidate the claimant from pursuing the claim on appeal. I have personally brought this specific issue to the attention of management at the Branch of Hearings and Review, to no end. The situation persists.

Frequently, the employer will send more than one person to "...observe..." the hearing. On most occasions, this action by the employer is either benign or neutral (i.e. training of new personnel/injury compensation specialists, etc). On many occasions, however, the employer will send as "...observers..." to the hearing several persons who are, in succession, the claimant's immediate supervisors, involved in disciplinary or other personnel action against the claimant. This action too can only be understood as an attempt by the employer to intimidate the claimant with regard to his appeal under the Compensation Act.

Also, whereas the regulatory changes allow the claimant a 15 day period within which to respond to agency comments and submissions upon review of the hearing transcript, to my personal knowledge and experience the claimant was, in the past, advised, in written correspondence from the Branch of Hearings and Review accompanying the claimant's copy of the transcript, that he was

allowed only 7 days for response. To my personal knowledge and experience, all parties to the hearing are now advised, by written correspondence from the Branch accompanying the hearing transcript, of the employer's 15 day period for submission of evidence/argument into the hearing record, but the claimant's opportunity for rebuttal is not mentioned. This subtle change in policy has been in effect for an unknown period.

In addition to allowing the employing agency to participate in the hearing process via Regulatory change, Office management has also, over the years, effected other internal policy changes which work to the disadvantage of the claimant during the appeals process.

The first of these changes occurred during the early 1980's, when the Hearing Representatives were instructed that all overpayment decisions issued by the District Offices must proceed to hearing, and that none would be remanded, no matter how inappropriate, unfair or erroneous the decision might be. The Hearing Representative has been required to proceed to hearing, conduct evidentiary development which should more properly have been completed before the initial decision on the claim, and to remedy whatever deficiencies are present in the District Office decision.

This "...no remand on overpayment issues..." policy has subsequently been expanded to include fact of injury issues, as

well as performance of duty issues in psychiatric claims.

This "...no remand before hearing..." policy on those issues essentially deprives the claimant of the entitlement to receive a proper decision on the claim upon first adjudication, but rather requires the claimant, in a large number of cases, to exercise an appeal right in order to receive a proper decision on the evidence submitted and the merits of the claim.

This sad fact of life has come to pass, as the night follows the day, since once the District Offices became aware that Hearing Representatives were not allowed to remand before hearing cases involving issues of overpayment, fact of injury, and psychiatric conditions, the quality of decisions issued by the District Offices on those issues has predictably plummeted.

This policy is also detrimental to the claimant in another aspect. A case involving any of the above issues, not properly decided by the District Office upon initial adjudication, either due to error of fact or law or due to misinterpretation of or failure to properly consider the evidence, would, in the normal course of events, on appeal be remanded to the District Office by the Hearing Representative with specific instructions for evidentiary development and issuance of a de novo decision. Such de novo decision as instructed by the Hearing Representative frequently results in acceptance of the claim and payment of benefits. Alternatively, should the de novo decision once again be

adverse, the claimant may then proceed with the appeal from a proper decision with a narrower focus on the issues and, at least arguably, a more viable appeal.

To the contrary, management policy currently in effect at Hearings and Review frequently requires the claimant to receive an improper decision from the District Office, exercise an appeal right, (i.e. request a hearing), wait until the hearing is scheduled, proceed to hearing, and await the Hearing Representative's decision. Unless the claimant is unusually astute and/or fortunate, the Hearing Representative, in most cases, will not be able to reverse the District Office Decision and award benefits, but rather will be compelled by the evidence to do what he or she would have done upon initial review of the record, if not for management's policy of "...no remands before hearing...", i.e. vacate the District Office decision and remand the record for further evidentiary development and a de novo decision on the merits.

The claimant, in such an all too common scenario, loses anywhere from 6 to 18 months (longer in some instances) in the process without a proper decision and the only advantage to any party is that the Office at large can claim that the District Office issued a timely (albeit improper) decision upon initial adjudication.

Management at the Branch of Hearings and review is ostensibly

represented by the Branch Chief. However, the Director, Federal Employees' Compensation, who is the Branch Chief's immediate superior, sits at the Branch Chief's desk, on an almost daily basis (a day missed is rare), conducting an intensive review of the Hearing Representative's decisions which have been prepared for release. The Director's review frequently results in the Hearing Representative who issued the decision being called into the Branch Chief's office for a "discussion" with the Director (or in the Hearing Representative's absence, being issued written instructions), particularly in the circumstance of a remand, either before or after hearing, wherein the Director compels a change or alteration in the decision. Should the individual Hearing Representative involved in such a "discussion" with the Director be of such age, experience, and integrity so as to decline compliance with the Director's expressed wishes in the matter of a particular decision, that Hearing Representative is then frequently subjected to a bureaucratic and vindictive series of instructions on issuing subsequent decisions which have nothing to do with the merits of the claim. These communications are received either directly from the Director, or through his amanuensis, the Branch Chief. These communications are then utilized by the Branch Chief in the performance evaluation process to the detriment of the Hearing Representative.

No criticism of the District Office decision is allowed to appear in the Hearing Representative's decision, no matter how poor the quality of the decision or how instructive the criticism. The

policy appears to be that if the problem is not mentioned, it does not exist.

The hearing process is asserted by FEC management to offer the claimant a viable opportunity to prevail in the matter of the claim on appeal. The likelihood that the injured employee will prevail on appeal at hearing, however, is subject to adverse influence, directly and indirectly in the person of the Director, FEC himself.

Within the National Office of Workers' Compensation Programs, the Director, FEC, administers not only his own Office, which includes the Branch of Hearings and Review, but also administers the 11 District Offices of Workers' Compensation Programs throughout the country which make the initial determinations on Federal injury compensation claims. It is perhaps not overly pedantic here to reiterate the point that, on appeal, many of these claims from the District Offices come to hearing, and many of the hearing decisions are subject to the Director's influence upon the Hearing Representative.

The Director of each of the 11 District Offices is under the supervision of the Director, FEC at the National Office. The Branch of Hearings and Review is also under the supervision of the Director, FEC. The District Directors have not only a vested interest in complaining to the Director, FEC about cases remanded by the Hearing Representatives, but also have a direct pipeline for venting these complaints, and as experience has demonstrated over

the years, are not loathe to avail themselves of the opportunity. When the District Directors complain about a decision of the Hearing Representative, the Director, FEC exerts his influence upon the Hearing Representative to modify or alter the decision.

It was, in fact, precisely such a scenario that led to the "...no remand before hearing..." policy on overpayment, fact of injury and psychiatric claims, as discussed above. The District Offices, during the 1980's, were issuing decisions of such abysmal quality on those three issues that the greater majority of those cases on appeal were remanded by the Hearing Representatives upon initial review. The District Directors complained to the Director, FEC who, in a sense, granted injunctive relief to the District Directors by forbidding the Hearing Representatives from remanding cases involving those issues prior to hearing.

It should carefully be noted here that this action of the District Directors and the Director, FEC was not based upon any dedication to the rights of the injured employee seeking benefits under the Act, nor out of any calling to a sense of altruism in the administration of remedial legislation.

Rather, the number of remands before (and, to a lesser extent, after) hearing have a direct and indirect impact upon the evaluation of the performance of the District Directors, as rated by the Director, FEC, and upon the evaluation of the performance of the Director, FEC as rated by his own superiors.

The obvious questions which need to be asked here with regard to the "...no remand before hearing policy..." are "Who benefits from the policy...who suffers from the policy?"

Further, some employing agencies have also established their own "...pipeline..." to the Director, FEC. Employers dissatisfied with a decision of the Hearing Representative favorable to the claimant, for which the employer is thereby obligated to incur the costs of disability, medical treatment, vocational rehabilitation, etc., have developed the practice of maintaining a relationship with the Director, FEC toward the end of securing his influence over the Hearing Representative and/or the decision issued. It has become all too common for a decision issued by the Hearing Representative, based upon full consideration of the evidence, argument and testimony, favorable to the claimant, to be "...called back..." by the Director's Office, held for a number of months, before it is returned to the Hearing Representative for rewrite with a different conclusion, or reissued by another employee of the Director's Office with the result desired by the employer.

Attorneys and union officials representing claimants to benefits under the Act, as well as claimants themselves, have, for as long as I have been a Hearing Representative, protested against the lack of independence of the Hearing Representative to issue a decision based on the evidence and argument only, rather than a decision consistent with Office policy, and the readily apparent lack of impartiality in the hearing process.

Attorneys and union officials, as well as many Hearing Representatives, have raised objection to the seemingly incestuous relationship between the District Offices, the employing agencies, and the Branch of Hearings and Review, particularly since, for the past several years, several claims examiners have been employed in the Branch. This policy has largely eliminated any sense of distinction between the appellate Branch of Hearings and Review and the District Offices at large. The claims examiners, ostensibly brought into the Branch to "assist" the Hearing Representatives, are actually performing independent adjudicatory actions, which are in turn subject to appeal. Recent instructions from Branch management to consider the convenience of the employer in scheduling the claimant's hearing has led to a storm of protest from the Hearing Representatives, including one documented assertion that such actions by management give credence to the to the widely held suspicion that "...the employers are running the program..."

Staff meetings and training sessions involving the Hearing Representatives have displayed one remarkably consistent theme. The Hearing Representatives have been repeatedly instructed that "...we are not bound..." by the normal rules of evidence, and that, in reference to the claimants, "...these people do not get judicial review..." The clear and consistent instruction from management has been that, if there is a dispute as to the facts between a claimant and his employer, particularly in a case involving a sanction (i.e. forfeiture of entitlement), the argument of the employer should prevail. During these meetings/sessions, the Hearing

Representatives have been instructed that, since the normal rules of evidence do not apply, "...unsympathetic claimants..." should not receive any consideration.

II

Office policy with regard to initial evidentiary development and adjudication at the District Office also works to the disadvantage of the claimant. Upon receipt of the claim, the District Office claims examiner writes to the claimant, advising of the type of evidence necessary to support the claim. The examiner then sets an unrealistically narrow time frame for the receipt of such evidence.

In one resulting scenario, the time frame passes, the claim is denied (essentially for burden of proof/lack of evidence), the required evidence makes its way to the claim folder after the denial is issued, the claimant receives the decision and requests a hearing, and the case is received in the Branch of Hearings and Review on appeal with sufficient evidence to either accept the claim or make a decision on the merits.

In a second similar scenario, the claimant receives the decision, protests that required evidence was in fact submitted, and is advised by the examiner that the evidence was received too late to be considered and the only recourse is to appeal. In many such instances, the evidence is date stamped as having been received in the District Office either prior to or concurrent with the date of the decision, but apparently was "...not in file..."

The claimant then appeals, and the record is received in the Branch as above.

(In a third, rarely occurring scenario, the examiner does review the evidence received after the decision is issued, and properly advises the claimant that the evidence is insufficient to establish the claim, and properly advises of the availability of appeal.)

While the Hearing Representative would presumably not see the cases where the examiner vacated the denial of the claim based upon evidence received after the decision was issued, sufficient numbers of cases reflecting the first two scenarios are received in the Branch so as to reflect a disturbing trend.

The claimant is being required to exercise an appeal right in order to receive a merit decision on the claim (i.e. a decision based on the evidence submitted). The initial adjudication of the merits of the claim is being conducted at the appellate level.

In a rational process, the "pick and shovel work" of adjudication would be done at the initial (District Office) level and a rejection of the claim would be based on a narrow issue: causal relationship, performance of duty, length of disability, etc. The case may then proceed to hearing on that narrow, focused issue, toward which the evidence/argument may be directed.

What is actually occurring, however, in an ever increasing number of cases in the first two scenarios above, is that, given the unrealistic time frames set by the District Office for the initial submission of evidence, the merits are not being addressed in the initial decision. Both the claimant and the Hearing

Representative are required to inclusively address all the evidentiary requirements for the claim on appeal and the Hearing representative makes the initial decision on the merits.

Office policy with regard to the combining of case records has also worked to the detriment of the claimant.

Many Federal employees with long careers suffer multiple injuries, particularly those who perform physical labor. In many such circumstances, the injuries are to the same parts of the body, the claimant is under the care of the same physician for more than one of the injuries, more than one of the injuries presents continuing total or partial disability, and/or the substance of the claim being pursued involves the ongoing combined effects of two or more of the injuries. In such a set of circumstances, the only fair and reasonable (as well as practicable) approach to the adjudication process is to combine the pertinent case records so that the claim, in its entirety, can be understood and decided.

In March of 1991, however, the Office changed its policy with regard to combining records. This policy, set forth in the Office's own Procedure Manual, instructed the District Offices that it was "...occasionally necessary..." to combine case records, but that such combining "...should be avoided if possible..." A specific subsection heading in the Manual is entitled "Case Doubling Can Be Avoided".{FECA Transmittal 91-22, dated March, 1991}

During the five years in which this change in policy was in effect, individual Hearing Representatives protested that the failure of the District Offices to combine appropriate records, in accordance with the established policy, constituted, at best a most

dismal squandering of Office resources, and at worst, a seemingly deliberate attempt by the Office as a whole to obfuscate the process whereby the claimant might receive a full and fair adjudication of the claim.

The policy nonetheless remained in effect. In numerous instances the District Offices developed, adjudicated and rejected claims through self imposed "tunnel vision", restricting consideration to the case immediately at hand only, and ignoring other significant and materially relevant case files. A particular case might come before a Hearing Representative on appeal, who, dependent upon the evidence contained therein, might or might not recognize the significance of other, uncombined files. If the Hearing representative is able to secure the other pertinent files prior to the hearing, the result is most frequently a remand to the District Office for consideration of all pertinent records and a merit decision on the claim as a whole. If the Hearing Representative learns of other pertinent injury files only from the claimant at the hearing, the result is quite frequently the same.

In either case, the claimant has been denied entitlement to a decision on the entire claim as presented, the District Office, with official sanction, has abrogated its responsibility to address the entire claim presented, and the claimant is forced, once again, to utilize an appeal right to receive an initial and proper adjudication of the claim. The delay and expense visited upon the claimant in such circumstances is inestimable.

This recalcitrant Office policy was not changed until 1997, and then only upon intervention by the Employees' Compensation

Appeals Board. Combining pertinent case records is now "...encouraged..."{FECA Transmittal 97-10 dated February, 1997}

During the tenure of this policy, the refusal of the District Offices to combine pertinent case records resulted in not only infliction of hardship upon the claimant and squandering of Office resources in general, but in my own experience, two outstanding examples of the folly of the policy.

In one specific case, an injured employee received an overpayment of over \$47,000 when payments made in one file were duplicated in another.

In a second specific case, a claimant seeking benefits based upon the combined effects of multiple injuries has been required to pursue each case separately at the District Office level and to appeal each case separately. This claimant and his attorney have already appeared before multiple Hearing Representatives on separate cases and may well be required to repeat the process many times.

III

Claimants who reside in or near the urban areas where the District Offices are located have at least the opportunity to visit the Office and discuss the progress/outcome of the claim with an Office claims examiner on a face to face basis. Most of the injured employees who seek benefits under the Act, however, do not enjoy such access. Of the estimated two thousand hearings which I have held over the past seventeen and one half years, for the greater

majority of those claimants the hearing was the first opportunity to meet face to face with a Representative of the Office to discuss the claim. This presents the Hearing Representative with a unique opportunity to interact with a broad range of injured Federal workers from all areas of the Country, from all Federal agencies and from all sectors of society. From the perspective of those seventeen and one half years, several universal themes consistently emerge with regard to the injured worker's experiences with (1) the District Offices and (2) the employing agency.

The claimants bitterly complain about the lack of responsiveness by the District Offices to telephone inquiries and written correspondence. They also note the frustrating complexity of dealing with several different claims examiners over short spans of time during the tenure of the claim.

Claimants and their union representatives employed by the Postal Service and military facilities consistently, almost to the point of predictability, describe efforts by supervisors and other agency officials to delay (if not outright lose) injury reports, medical and factual evidence, and other claims documents. Agency requirements that claims paperwork proceed through several levels of an injury compensation hierarchy, it is argued, results in either delay of submission of required evidence to the District Office to the point that the claim is denied, or disappearance of the evidence.

Mr. HORN. I am now going to yield to Mr. Davis to begin the questioning.

Mr. DAVIS. Mr. Perez, let me start with you. Are you a hearing representative now or are you a claims examiner?

Mr. PEREZ. I have been reassigned to the Division of Longshore and Harbor Workers' Compensation, another office in the Office of Workers' Compensation Programs.

Mr. DAVIS. OK. But you have been both through your times?

Mr. PEREZ. Yes, I started out as a claims examiner and worked in FECA for many years. I worked in the longshore program for many years and I was a hearing representative up until my reassignment.

Mr. DAVIS. Let me see if I understand this right, really from both your perspectives, it is that a lot of the claims examiners' decisions are getting a high turnover rate on hearing on remand and everything else. They are driven by a different criteria to an extent to try to limit the number of claims, and when you go to an independent hearing examination, perhaps you get more information, take a closer look at it and come up with a little bit different direction in many of these cases. Is that part of the frustration though, that the first level of review, the compensation managers who are looking at this, the claims examiners, are just not looking at the whole picture and are really driven, if not by quotas, by policies that make it difficult to find in favor of the claimant?

Mr. USHER. I believe so. I believe that was my intent in presenting my testimony today, with respect to the district office.

Mr. DAVIS. I think both of you—do you say the same thing, Mr. Perez?

Mr. PEREZ. Mr. Davis, I would like to point out that the OWCP has elevated the timely decisionmaking process to the most important level. They never comment on how accurate these decisions are. In order to achieve a decision within 45 days, as I explained in my testimony, the claims examiner gets the claims, any deficiencies in the claim he writes to the claimant and asks for the additional information. The letter is not released the same day it is dated and the claimant certainly does not receive it when it is dated, there is a time lag in there. The regulations specifically state that the injured employee is entitled to at least 30 calendar days, which they are not getting.

You know, Mr. Markey has indicated that the requirement for timely adjudications militate against granting frivolous extensions. Mr. Davis, this puts DFEC the division right on the horns of a dilemma. If in fact, these timely adjudications within the 45 days are correct and based upon all of the evidence, why then are 45 percent of them being overturned. If in fact, the time is insufficient—

Mr. DAVIS. You would almost be better flipping a coin.

Mr. PEREZ. Yes. If in fact the time is insufficient and the evidence comes in later, then the case is remanded after hearing, then there is something wrong with the time period. But either way, there is something wrong with the system.

Mr. DAVIS. When we talk about it being remanded, are most of those being remanded in the employee's favor?

Mr. USHER. I would say that is difficult to say. It is in a sense in the employee's favor if he gets a better decision first time

around. If the evidence has come into the file at Hearings and Review and the evidence supports the claim, the decision would be reversed. But frequently the issues are more complicated than will allow reversal. Either the claims examiner has missed a point of law or new evidence has come into the file which is good enough to require further development, but not good enough to pay the claim.

Mr. DAVIS. But let me ask you both this, do claims examiners tend to be a little harsher on employee claims than hearing examiners; is that fair to say?

Mr. USHER. I will utilize my own words, if I may, Mr. Davis. I believe there is an anticlaimant bias in each of the district offices, based upon my experience.

Mr. DAVIS. Mr. Perez, what do you think?

Mr. PEREZ. Yeah. It is regrettable that there is so much work, so much stress, there is a bunker mentality, the claims examiners feel like they are being bombarded and they get in a very defensive mode. I do not believe these claims examiners are bad people, I do not think that they are making decisions to deliberately deprive people of benefits.

Mr. DAVIS. Do you think the timeline drives them to some extent?

Mr. USHER. Yes, sir.

Mr. PEREZ. I think so.

Mr. USHER. They are making timely decisions—

Mr. DAVIS. Because we want a fast answer, we sacrifice sometimes a correct answer.

Mr. PEREZ. Yes, I think that is correct. These time standards just cut the claim off.

Mr. DAVIS. Let me ask something we have found out in my own observation. Is there a huge turnover on claims examiners? Do they sit there for many years or are they usually looking for something else to do?

Mr. USHER. There is a huge turnover.

Mr. DAVIS. And that has got to hurt. If you have got someone who has done this for 20 years and gets an understanding of the rules and the regulations and what is likely to be remanded, you are likely to get a different set of decisions than somebody who is here for a short period of time and is going to be judged more on how quickly they move their docket along than—

Mr. USHER. That is precisely the point. The claims examiners have figured out what management wants, management wants timely decisions. So they get timely decisions.

With regard to your point about retention of the employees, the people in my experience that you would want to retain are the first people to leave, and the people you would want to leave are the people who stay.

Mr. DAVIS. Quickly, what can we do to improve that?

Mr. USHER. I am sorry?

Mr. DAVIS. What is the GS level we are talking about for most of these examiners?

Mr. USHER. Claims examiners in the districts, I believe start at grade 5 and go to grade 11 journeyman. There is a grade 12 supervisor—

Mr. DAVIS. A grade 5 could be making a decision in other words?

Mr. USHER. Theoretically on certain issues of limited complexity, at first, until they progress through the chain of command. But I will tell you, Mr. Davis, that is not what happened with me as a grade 5 in the Boston district office. I was making decisions on death claims.

Mr. PEREZ. Mr. Davis, there is a June 29 letter which was sent by claims examiners in the Chicago district office. They indicate that in the last 12 months, 27 people have left this office, and that is a very high turnover rate.

Mr. DAVIS. Out of how many does the office have?

Mr. PEREZ. I do not know that exact number, but I am sure we could provide that. In the union magazine for the National Council of Field Labor Locals, it describes OWCP as DOL's own sweatshop, and there have been many letters written by claims examiners who are very unhappy with the working conditions in the district offices. Essentially a sweatshop where people are on quotas and productions. This was brought to management's attention and they essentially blew off the concerns of the employees.

[The information referred to follows:]

Jun 7 10 00 AM '98
U.S. DEPARTMENT OF LABOR
WASHINGTON, D.C.

June 29, 1998

U.S. Senator Carol Mosley-Braun
708 Hart Senate Office Bldg
Washington, D.C. 20510-1303

Dear Senator Mosely-Braun,

We the employees of the Chicago, Il. Office of the U.S. Dept of Labor - OWCP, need your help. We've enclosed copies of letters that appeared in the NCFLR Courier (Union Newsletter). The Chicago OWCP office is just as bad, if not worse. No one in the Chicago office would have dared to have written letters like that and signed their names! All the hypocrisies mentioned in the letters hold very true for the Chicago office.

We have management that show blatant favoritism and make decisions based on personal preferences. In the last 12 months, 27 people left this office. This is not counting the contract people that have left. They are too numerous to keep track of. We have an RD that simply lets supervisors do whatever they want. There is no such thing as "team" work here. It's management versus the employees. The supervisors don't get their work done, they simply pass it on to employees under them to do. Then these employees fall behind in their work and then are penalized.

A congressional investigation of OWCP must be done to expose and change these work conditions!

Thank you for any help. It will be appreciated.

OWCP employees

CC: S. Hallmark, U.S. DOL
T. Markey, U.S. DOL
Speaker of the House, U.S. Congress

Letters to the Editor

Denver Speaks Out

I just finished reading and discussing with my co-workers, the article in the March, 1998 Courier. Overall, the article brought out the office's feelings on the workload and workplace here in Denver. Although the article did not bring out the fact that the journey level examiners are only GS-11s, this is the most pressing issue here in Denver.

It was interesting to note that another office in DOL, as pointed out in another article in the same newsletter, reported more DOL employees being upgraded.

As the UM partner in an office without a steward, most of the claims staff comes to me with their concerns. I share their concern that DOL has continued to overlook OWCP Claims Examiners for upgrade to GS-12. The work is at the least very challenging. The workload is stifling. The workplace is an occupational injury waiting to happen.

We, the claim staff, fully support any efforts of the NCFL to push for upgrading. Most of my co-workers have expressed an interest in doing whatever it takes to get this accomplished. (Some, I think are afraid to say anything they perceive as being trouble-making.)

Again, thanks for helping bring this situation to the forefront.

*John L. Sullivan, UM Partner
Claims Examiner, Denver OWCP*

Hypocrisy

Thank you! Thank you! Thank you for your wonderful article in the NCFL Courier. You are right on target but unfortunately you have merely touched the tip of the iceberg. What about the sexism, racism, preferential management practices and incompetency in the supervisory staff that are endemic to OWCP? These are things that employees in the Denver office have to deal with on a daily basis in addition to being swamped with an unrealistic caseload. Morale! We simply don't know what the word means anymore. The union needs to push for a congressional investigation of OWCP nationwide. This is the only way to expose, to the entire country, what a sham the "DOL Model Workplace" is. Isn't it amazing that DOL, the agency that penalizes the private sector for abusing their employees, allows the abuse of their own employees to go unchecked. What hypocrisy!

Paula Brieding

Don't Forget

I was happy to see OWCP finally receive recognition for the "Important Work" performed. I was surprised FECA's red headed stepchild, OWCP Longshore Division, was not mentioned. Despite budget reductions and loss of personnel due to attrition, the Longshore Division performance remains outstanding. Oh yes, I forgot to mention each claims examiner maintains over 1,000 (one thousand) lost time cases. Move over FECA.

*Michael Brewer
OWCP/L&H*

Hold Management Accountable

Bravo! As a GS-11 Claims Examiner employed in the Denver OWCP office for nearly 10 years (and a federal employee for almost 18 years) it is about time for this program to be held accountable for what it does to its own federal workers and how it manages benefits program. Since you have let part of the cat out of the bag, let's release the whole animal.

Our union needs to request a congressional investigation of OWCP nationwide in order to expose that the DOL model workplace is nothing but a lie. Not only are workers overwhelmed with the volume of work (and not even rewarded for such overwork with GS-12 level pay) we deal with racism and sexism, preferential management practices, unfair labor practices, incompetency of the managers (in this office there are three Claims sections, each with a GS-13 "supervising" four to eight Claims Examiners, most of whom are journey level GS-11s) intolerable and hostile working conditions, the "good ole boy network", the manipulation of data used by management to report to Congress, a program running rampant with abuse of benefits, etc. Each of these very illegal activities should be revealed to Congress and the American taxpayers. This is not the way the streamlined and improved federal government is supposed to work. This is actually a graphic example of how work and workers should not be managed. In fact, if private industry were to manage a business like this program operates, they'd go bust.

The top level managers of this program, to include regional and district directors, are part of the sham and should be held accountable for the abuse and mismanagement of this program. No more lying and cheating, and covering up. Please, help!

Kim Macklin

E-Mail Addresses

Would it be possible to list the e-mail addresses for each executive committee member and each VP in the courier under their addresses & phone numbers? I think it should be a part of their name and address because each of them has an e-mail address.

Rosalyn Bradley

Good Suggestion

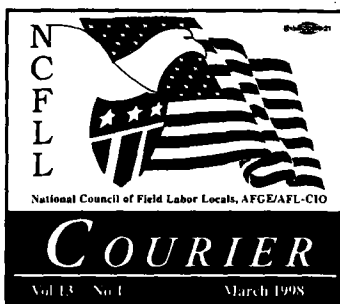
Quick response, but one comment: There are government owned jobs and all correspondents should write to: *regional office* - report, not internal union business.

Address letters to the editor to: Editor, NCFL Courier, C/O Kenefick Communications, 141 East Lake Dr, Annapolis, MD 214503. E-mail: gregk141@aol.com

300 OFCCP EOSs to Move to GS 12

An estimated 70 percent of Equal Opportunity Specialists employed by the Office of Federal Contract Compliance Programs (OFCCP) became eligible for promotions to GS-12 in mid-March as a result of efforts by the NCFLL. Individual EOS personnel will have to demonstrate the ability to perform at the Grade 12 level and have time in grade in order to move into the GS-12 level.

See 'Union Wins,' page 3



OWCP: DOL's Own Sweatshop

"DOL doesn't have to go far to find sweatshops. Management can visit any of the nine OWCP offices nationwide," declares Frank Dancy, NCFLL Vice President in Jacksonville, FL., whose territory includes one of the most desultory OWCP shops in the nation.

Hundreds of cases come through the door at Jacksonville each day. The new ones are stacked on top of the average caseloads numbering in the hundreds for each of the 80 claims examiners at that location.

See 'OWCP,' page 4



Council Meets With Harnage

Review Organizing Opportunities

Organizing opportunities and support for AFGE political action programs were key topics when the Executive Board of the National Council met with AFGE President Bobby Harnage for a wide-ranging day-long session on February 6.

Harnage invited the Council to meet with him and key headquarters staff as part of the transition program Harnage launched shortly after he was sworn in to fill the remainder of the late John Sturdivant's term.

Harnage encouraged the Council to develop an organizing plan to qualify for organizing grants in line with the program adopted by the AFGE Conven-

tion in Anaheim last year.

The NCFLL delegation was headed by Executive Vice President Ron Yarman. "President Harnage has indicated that he wants to establish additional roles for Councils within AFGE," Yarman said.

The Council expects to produce an organizing plan which will include targeted DOL agencies and specially-crafted messages to be mailed to the homes of workers. Those plans will be coupled with the tried and true organizing techniques that AFGE has been using for a long time, such as lunch and learn sessions, Yarman said.

The Council officers took the

opportunity to make their individual contributions to the AFGE Political Action Committee, with individual officers contributing up to \$500 in personal checks to the union's fund.

Yarman, who contributed \$500 to the AFGE PAC out of his pocket, said the union's top officers have made it a practice to make sizable annual contributions to AFGE/PAC. "We are proud to set the example for NCFLL members. We couldn't expect them to support the program if we were not already doing so ourselves."

The NCFLL has issued a call to all

See 'Council Seeks,' page 3

OWCP: A Neglected Agency Doing Important Work Under Trying Conditions

'OWCP' from page 1

"The work here is tedious and made more so by its precise and legal nature," Dancy says, adding: "Claims examiners are required to be proficient in the interpretation of legal and medical documents and to possess extraordinary administrative, organizational and communications skills."

Claims examiners operate in near obscurity because they service injured federal workers, a constituency that doesn't have many friends in high places, either.

Regardless of location, OWCP workers' complaints have a familiar ring of hopelessness and resignation.

"Claims Examiners face impossible backlogs. Offices are crammed with paper and cramped together," said Roger Jackson, NCFLL Vice President in Kansas City where another major OWCP office is located. In addition to its geographic work load, the Kansas City office handles all DOL compensation claims.

The union and management are

working together on one of the recurrent problems at OWCP: the proliferation of paper. That problem has been made a priority of reinvention at the agency by OWCP Administrator Shelby Hallmark, Jackson said. Hallmark has

authorized Dancy to assign union stewards to work with management to develop a smoothing process for handling claims.

DOL recently indicated an increased interest in making some other changes within OWCP after DOL Deputy Secretary Kitty Higgins toured the San Francisco OWCP operation. The deputy accepted the union's invitation to tour the warren of



Claims Examiner Mark Wiechman works out of this Jacksonville cubicle.

cubicles that is the regional office of OWCP in San Francisco. She appeared struck by the tiny workstations, the mountains of paper and the union's depiction of stresses that accompany this work.

Local Vice President Mike Powers and Chief Steward Barbara Brandt accompanied Higgins on the tour.

In OWCP From Frying Pan to Fire New Assignment System Makes Work 'Intolerable'

Solving problems always looks easy from the top levels of management. At the workaday level, where people like Claims Examiner Edward Gugliucci toil, solutions from on high can sometimes be worse than the problems they are intended to solve.

A recent OWCP decision to take away local management's discretion in assigning cases to claims examiners is a case in point. A quick tour of any OWCP office provides a convincing argument that cooperation and adaptation between local management and union representatives is a good idea. Yet, top management has apparently decided to can that idea and go for the old, discredited option of sending orders down from on high.

Gugliucci works at OWCP's Columbus, Ohio office where he, like hundreds

of his colleagues nationwide, deals with compensation claims from federal workers. As Gugliucci and others explain it, there are two categories of claims — traumatic injuries, which are typically car accidents, falls, or injuries related to obvious, specific events; and occupational conditions — more difficult and time-consuming cases — related to exposure to environmental conditions, such as overuse of limbs, heart conditions, or long-term damage where the connection between the work environment and the employee's medical problems are more difficult to document.

Recently, OWCP offices nationwide received an edict that, undoubtedly, was intended to smooth out the workflow and permit the agency to move to a totally automated system of work assignments. Trouble is, as Gugliucci explained, the

effect was the reverse.

Top management in Washington told local managers that they would no longer be permitted to use their own discretion and assign cases in packages with proportionate numbers of complex and simple cases mixed together. The old practice assured that individual claims examiners could expect a standardized work load. The new practice is supposed to be totally random. Each case is assigned to the next examiner in line, regardless of the complexity of the case, or the workload facing an individual examiner.

"This new strategy will unfairly burden CEs and create an intolerable work environment. Hell, it isn't so great working here to begin with," Gugliucci says.

Mr. DAVIS. I think what we need to hear, and we will hear from management later—what we need to hear is if they do not have the resources, we have got to make up our mind, do we give them the resources? This may be resource driven and we are getting just a series of decisions here that are not fair. That may be part of the problem, we will find out as we move forward.

Mr. USHER. I have always felt that in my experience.

Mr. DAVIS. Well, you have been around for a long time, you have been doing this for a long time at different levels. How have you seen this getting better or worse over the last decade?

Mr. USHER. I think some changes have been made that have had an impact upon the office's ability to handle greater number of cases. I have seen no changes that enable the process to function more fairly for all employees. They do more for some but not for all.

Mr. DAVIS. Let me ask about these computer deliveries. We talked about some of this is computer driven, I think. To some extent then how you fill out your claim, how you actually fill it out and the boxes you check or however you do this is going to dictate the outcome?

Mr. PEREZ. Well, the fact of the matter is that the majority of injuries are not serious and they can be looked at based upon the evidence on the form. You know, the OWCP is relying on the judgment of the employing agencies. The employing agency, if they do not dispute the case and it involves no lost time or a small amount of time, well the office does not look at that until a dispute comes up later. So when the case comes in, if all the data is on the injury report, they code it as, previously, administratively unreviewed, but now they have changed that for political purposes to say administratively review. That case goes directly to the file, it does not even go to a claims examiner.

Mr. DAVIS. Go ahead.

Mr. USHER. Thank you, sir. There are many instances too where the employing agency, whether by accident or design, provides the injured employee with the wrong form, which just delays the process interminably.

Mr. DAVIS. Of course. Let me ask this. What percent of the claims that you see, that go up to the appeal, the hearing level, are really without merit?

Mr. USHER. Well, I am assigned 315 cases a year.

Mr. DAVIS. We talked about fraud, that is a different issue, that is a higher level, but sometimes people will file things for—it is not fraudulent, but it really does not have merit once you look at it. Just a ball park.

Mr. USHER. I would take the standard if somebody takes the trouble to sign an affidavit that contains criminal penalties on a notice and claim form, they believe they have a valid claim. Whether I share that belief or not is another story. I would say that the system is cluttered, really cluttered to a large extent by claims for psychiatric illness that are not due to the employment, but they are due to the employment as a whole including the employee's life circumstances that he brings into his employer's ambit.

We spend a lot of time on those type of claims and they tend to be time-consuming, particularly on appeal because the attorneys

have figured out that they are not going to get the type of decision at the district office that they are going to get at Hearings and Review. They are going to get into a small room with one individual, a court reporter and they can look them right in the eye and they can have at least an hour, more if they need it, to make their best argument on the claim. That is how Hearings and Review is impacted by that caseload.

Mr. DAVIS. Is there any gaming on the psychiatric, as you look at that, where people are finding a system where they can get benefits that maybe the statute—

Mr. USHER. No, the psychiatric claims are extremely difficult to prove, under the guidelines issued by the Appeals Board, which in effect is our supreme court, since the cases do not go anywhere else.

Mr. DAVIS. Right.

Mr. USHER. There is some really straight-forward guidance on how you apply—what the evidentiary tests are and how you apply those tests to the factual and medical evidence. And a psychiatric claim is very difficult to establish.

I will tell you this also, sir. It is a very difficult claim to deny because you have to consider all the evidence, if you do not want to give an appearance that you just are looking at the case and saying no, it is no good. These types of cases tend to grow, they tend to grow from perhaps an inch thick at the district office to sometimes a foot or 2 feet thick on appeal, when the people want to get everything they can into the record in support of their position. Those decisions are very time-consuming.

Do I see out and out fraud? Yes. Do I see it every time I go to a particular city? No. But I do not see—there is enough fraud certainly in the program, human nature being what it is, that we should be concerned about it and should address it, but I do not see that as the major problem with this program.

Mr. DAVIS. The major problem I glean from both your testimonies is that in the district offices, first time up, the claims examiners just are not getting all—they are driven by the time instead of sometimes by—if they had a little longer, they had other things, giving a fair decision. And you see a lot of that on the hearings that you do.

Mr. USHER. Yes, sir, I do.

Mr. DAVIS. And you could do 100 things to try to change this and maybe make this better, maybe we could all agree, but one thing that we could do better is to try to get the cases at that level better examined and get a better decisionmaking process. Is that a fair—

Mr. USHER. That would be my first step, sir. Extend those time limits and give the people the chance to get their evidence into the file and have the initial adjudicator make the initial decision on the merits of the claim.

Mr. DAVIS. Make a better decision, then you may not get as many hearings.

Mr. USHER. They may not pay the claim, but then if the claimant decides to take that issue to appeal, he then has an hour of focus. It is denied on one aspect or another of a particular claim, but not on all of them, not lack of evidence.

Mr. DAVIS. You know, I was the head of our county government in Fairfax before I came to Congress and we had a lot of different boards and agencies and of course, from a county perspective, you always wanted to pay out as little as you could because it had budgetary impact. But we learned over the longer period that if you handled these cases right below, you get a reputation after awhile that the decisions are good and you build on that track record. It sounds like we do not have that track record right now with the current—

Mr. USHER. It is 180 degrees opposite, sir. There is no emphasis on doing the job right the first time.

Mr. DAVIS. So they do not get any credit when it comes to the benefit of the doubt, we made this decision, we are likely to be right—from your experience.

Mr. USHER. I would think so, sir.

Mr. DAVIS. Mr. Perez, do you concur with that?

Mr. PEREZ. Yeah. You know, in addition to changing the time-frames, I think there should be more specific guidance given to claims examiners about the relative burdens involved in proving their case. The act and its remedial legislation, the case law consistently states it should be liberally and broadly construed in favor of the claimant. That is not to say you should give away the store. However, most of these injured employees are blue collar workers, they are not articulate in writing. And I think the office—and that is well established by case law—is in a position where they are supposed to help the injured employee perfect their claim.

Mr. DAVIS. Do most of them have attorneys by the time they get to your level?

Mr. PEREZ. Well, the office practice discourages that.

Mr. DAVIS. So a lot do not, a lot of them are just up there on their own.

Mr. PEREZ. Yes.

Mr. USHER. Yes, sir.

Mr. DAVIS. I have got a lot of other questions, but I am going to give Mr. Horn a chance to go through this, and we have other panels too. But let me just say to both of you I appreciate you coming forward and sharing your views with us.

Mr. HORN. Let me follow up on Mr. Davis' last question. Based on your experience, take me up the hierarchy as to the filing of the claim and how many days you feel would be appropriate based on your experience. Let us start with step one.

Mr. PEREZ. Well, in one of my recommendations to the office, Mr. Chairman, I suggested they do a survey to find out exactly how long it takes. I do not really know. I do know that 45 days is not sufficient, based upon the number of prehearing remands.

Mr. HORN. Is it 45 working days or 45 calendar days?

Mr. PEREZ. Calendar days.

Mr. HORN. Calendar days.

Mr. PEREZ. I do not believe that is sufficient and I believe there should be an opportunity for extensions on this. You know, if someone gets an attorney and the attorney says well, I need a little more time, the office says no, we are not going to give you an extension. Well, that is plainly wrong. I cannot see why they are rushing these things to judgment.

Mr. HORN. OK, it is 45 days to file your claim after the incident?

Mr. PEREZ. No, you are supposed to file written notice of injury with your supervisor within 30 days and normally that occurs. You notify your supervisor, he gives you the form, you file a notice of injury, give it to the employer, the employer submits it to the OWCP district office, it comes to the district office, it goes through the computer check which we talked about before. If it is non-serious, it goes to the file and just sits there. If it is more serious, it gets assigned to a claims examiner in this quality case management project. They develop the evidence, they render a decision and then the claimant has various appeal rights—request a hearing, request an appeal to the Employees Compensation Appeals Board, or he or she can request reconsideration. At that point, the case diverges based upon what appellant—

Mr. HORN. Well at the beginning then of this process, how many days have elapsed, which includes the employer, the Federal agency's right to append their particular version of the situation?

Mr. USHER. That varies I believe widely. Some employers are scrupulous about getting the notice of injury to the district office in a timely manner. Others unfortunately are not so scrupulous.

The timeframe for office reaction to a notice and claim form can only run realistically from the time the office receives the notice and claim form. There may be other avenues to prompt the employing agencies to get it to the office more quickly.

Mr. HORN. OK. Now is that within the 45 days or is that post the 45 days?

Mr. USHER. Frankly, Mr. Chairman, I do not know. I do not manage the program.

Mr. HORN. We will get it from the administration, but I am just curious since you are in a key part of this—

Mr. USHER. I would think it begins upon receipt of the notice and claim in the district office.

Mr. HORN. OK. That is when the clock starts running.

Mr. USHER. I would think so, sir.

Mr. HORN. All right. Now at that point, they can mark that they want a hearing officer or what, do they try to go directly to the Compensation Board? What is the choice there, is it based on severity of injury?

Mr. USHER. The CA-1, the notice of injury, hits the district office.

Mr. HORN. Right.

Mr. USHER. It then requires adjudication by an office claims examiner or, as we have seen, if the right boxes are checked on the form, it is just put in the file as not a serious type of injury that requires attention. The claims examiner will then write a letter to the injured employee saying all right, this is the type of factual evidence you need to prove your claim, this is the type of medical evidence you need. You have 14 days to submit that. Now unfortunately, the claims examiner's letter, if my experience is any guide, will go into a bin with every other claims examiner's letters, sitting on the floor of the district office. Then it will probably be carried downstairs in the Federal building to the main post office or the main mail facility in that Federal building. So that by the time it

gets into the actual mail delivery system, the injured employee has probably lost several days already.

Then let us say the injured employee gets his letter and he goes to his doctor and he gets his doctor's report and he sits down and he answers the examiner's questions and he puts them in an envelope and he mails it back to the district office. The reverse holds true, it may come into a post office box or a central mail facility with every other piece of mail coming into the district office that day and by the time it gets distributed to the office examiner, the 14 days may have elapsed—in fact, they frequently have.

Mr. HORN. Well, I can understand that and we will ask the administration the same questions.

So then what are our options here, going to the full Board or a hearing examiner?

Mr. USHER. The next step for the injured employee if his claim is denied is to either request reconsideration, a hearing, a written record review or take the case to the Employees Compensation Appeals Board. What happens frequently is the case comes across a hearing officer's desk and there is the evidence, there is the evidence sufficient not only to adjudicate the claim on its merits, but to pay the claim. And it has been 6 to 8 months at this point since the office has received the notice and claim form. And the injured employee has to make whatever arrangements he can possibly make to cover any period of absence from work that was caused by the injury or any medical expenses that have been incurred by the injury, for a missing piece of paper that should have been received and adjudicated on the first go-around on the case.

Mr. HORN. Now do you find as hearing examiners, there is any attempt made by the administration of this program to take into account just what you are telling me? Because it is just common sense how you set up a management hierarchy and get people's paper processed in a fair and equitable way.

Mr. USHER. To answer your question, Mr. Chairman, I have not seen any such efforts.

Mr. HORN. And you have been there through three or four different administrations?

Mr. USHER. Yes, Presidential administrations.

Mr. HORN. So it does not seem to matter whether they are Democrats or Republicans, liberals or conservatives, they just act the same way?

Mr. USHER. I do not believe this is a political problem, Mr. Chairman. This is just a workload problem and a management problem addressing the workload.

Mr. HORN. Well, what is the trigger that sends that claim into the full Board as opposed to a hearing examiner?

Mr. USHER. The claimant's request. He has—

Mr. HORN. That alone triggers it?

Mr. USHER. He has a variety of appeal rights he can take. Normally, in the normal course of events, the claimant would want to have a hearing first because he can come and sit down and look at someone face-to-face, which he may not have the opportunity to do unless he lives in a large urban area serviced by a district office. But frequently the hearing gives him the opportunity to come in

and sit down, even if it is off the record. We can resolve a lot of these problems off the record, and we do resolve them.

But it is an evidentiary hearing. He can come in, he can discuss what is the reason that this claim was denied. You can tell him, lack of medical evidence, your doctor did not address the question of causal relationship; or lack of factual evidence, you have not established what went on in your workplace that caused your condition. He can have the record held open by the hearing officer for 30 days after the hearing. This is an evidentiary hearing, he has had the opportunity to remedy the defects in his claim.

If at that point, the hearing officer is unable to write a favorable decision, he can then go to the Board. Now the Board will not accept new evidence. Their rules of procedure preclude accepting new evidence.

Mr. HORN. Even that that came up when he was talking to a hearing examiner?

Mr. USHER. No, it would be the hearing officer's decision that is before the Board, to include the full hearing record that served as the basis for that decision.

Mr. HORN. Oh, OK. Now compare the hearing examiner in this particular agency with what you know about administrative law judges' practice in other agencies of the Federal Government? How parallel is the hearing examiner role to an administrative judge role?

Mr. USHER. In many ways, similar. In one very remarkable respect, dissimilar, sir. The hearing representative gets 315 cases a year, gets no clerical help and has no assistants to assist in the preparation of the decisions.

Mr. PEREZ. Mr. Chairman, I would like to point out that these hearings are not held in accordance with the Administrative Procedure Act and those rules do not apply. That is probably the most significant distinction between hearing representatives and administrative law judges, is the formality of the process.

Mr. HORN. Now in the case of administrative law judges and hearing examiners, you noted earlier and we all know that the article 3 judiciary have a number of things you do not have, such as tenure for life, and yours is on an appointment or what? What is your situation? Are they pleasure appointments?

Mr. USHER. You are selected for a position—you apply for and are selected for a position as you would be for any other position. It is carried under the claims examiner series, but it is paid at a higher grade level.

Mr. HORN. It is under the civil service?

Mr. USHER. Yes, sir.

Mr. HORN. And so you would have the protections of the civil service.

Mr. USHER. Yes, sir.

Mr. HORN. Could you be fired by anyone within the agency, and if so, who would have that authority?

Mr. USHER. That is an interesting question, Mr. Chairman. I have been fired. [Laughter.]

I was fired by the Director for Federal Employees Compensation.

Mr. HORN. And then what?

Mr. USHER. I am still on the payroll through the 17th of this month. If and when the action becomes final, I will take appropriate action to protect my own interests, sir.

Mr. HORN. Now, have any other hearing examiners been fired?

Mr. USHER. No, several have been transferred.

Mr. HORN. Transferred to what?

Mr. USHER. To policy positions in the national office itself.

Mr. HORN. I see. Is that a promotion or a demotion?

Mr. USHER. You could look at that both ways.

Mr. HORN. If it is in Bozeman, MT, maybe it is a demotion.

Mr. USHER. It is certainly a reduction in the workload.

Mr. HORN. Yeah.

Mr. USHER. If you have any pride in the work that you do, and a sense of integrity, then it is definitely not a promotion.

Mr. HORN. So in essence, when you receive that hearing examiner appointment, you are like a career civil servant in the position. Now is there ever a grade raise that goes on, or are you at a set salary with practically what you entered?

Mr. USHER. The position is a 12/13. You enter as a grade 12 and presumably based upon performance, you achieve the full journeyman level of the position.

Mr. HORN. OK, now is there anything else besides—and you are saying perhaps the administrative law procedures ought to apply—

Mr. PEREZ. I am not necessarily advocating that because, you know, under—and as I discuss in my testimony, claims are handled under the true doubt rule and there has been litigation in two other acts administered by OWCP which indicates that under the Administrative Procedure Act, the true doubt rule is inconsistent with the relative burdens of proof allocated by the Administrative Procedure Act. I think that the Federal Employees Compensation Act was designed to be less formal, because in reality many of these workers are not that sophisticated and the office is supposed to be in a situation where they are to assist the claimant in perfecting his or her claim.

I think to put in the Administrative Procedures Act, formal hearing procedures, would make it more complicated, it would make it more adversarial because the office could no longer then only look at the claim from the claimant's perspective, they would have to consider evidence from the agency, hearings would become more adversarial than they already are.

Mr. HORN. So it would require an attorney to be present for one of the parties and that would lead to expense, or what?

Mr. PEREZ. Well, the expense is normally, under the American rule, borne by the individual parties, there is no fee shifting. But yes, it would make them much more adversarial, much more complicated, and I think much more time-consuming.

Mr. HORN. If the claimant comes with an attorney, what are the rules in terms of the agency, do they then have someone from the general counsel's office sit in on the hearing, or what?

Mr. PEREZ. It depends.

Mr. USHER. They can. Normally, the agency will send a personnel specialist or someone who works for the agency in the field of injury compensation. But if you get into the area of a claim for

an emotional disability and there is also an EEO complaint with liability pending on the part of the employer perhaps under a different venue, frequently we will see an attorney from the employing agency come, just to protect the employing agency's rights. But the attorney in that situation only observes the workers' compensation hearing and receives a copy of the transcript.

Mr. HORN. So it is not an attorney from the Office of Solicitor in the Department of Labor, it is from where—the agency where the injury occurred.

Mr. USHER. That would be the situation, Mr. Chairman.

Mr. HORN. Go ahead, Mr. Davis, please.

Mr. DAVIS. What is the GS rating for the hearing examiners?

Mr. USHER. The hearing representative?

Mr. DAVIS. Yes.

Mr. USHER. GS-12/13.

Mr. DAVIS. So you are 12 and 13 and the decisions you are reviewing were made anywhere from 5 to 11, basically?

Mr. USHER. In some cases grade 13's, in some cases it could be the regional Director who may be a grade 15 or 14.

Mr. DAVIS. You can review that as well, OK.

Mr. USHER. It just depends on who signed the decision. Usually it is either a claims examiner, which would go through grade 11, or a supervisor in the district office, which would be either a grade 12 or grade 13.

Mr. DAVIS. Mr. Perez, explain to me the 72 percent of traumatic lost time cases were processed without claims examiner reviews. Can you explain what you mean by that?

Mr. PEREZ. That is a statement that comes from OWCP's own report. In their fiscal year 1992 annual report, the office, you know, talked about new procedures they were introducing to lighten the claims examiner's workload. When the case is created, you know, the person who is creating the case, looks at it to see if there is information on it and then when the case is created, it is assigned a computer code. The computer code for these cases, these uncomplicated, no lost time or minor lost time cases, get this code which was called administratively unreviewed.

Mr. DAVIS. The code then cranks out what should happen to it?

Mr. PEREZ. Yeah, it determines—

Mr. DAVIS. Dollar amount, time, whatever—

Mr. PEREZ. \$1,500 medical bill limit and controversion. The case then goes to the file, for instance. If there is no further activity in the case, it just is quietly closed. If, for instance, medical bills exceed \$1,500, a code comes up and it is sent to a claims examiner for review.

Mr. DAVIS. If I wanted to appeal that, I could do that?

Mr. PEREZ. Well, since—only the claimant has right of appeal. Normally you would only appeal an adverse decision, and if your case was not being disapproved, you would have no real basis for appeal. That is one of the technicalities here. You may only appeal a formal decision, one in which the Secretary or his designee has made findings of fact and issued a written decision with appeal rights. Those are the only kinds of decisions you can appeal.

Mr. DAVIS. OK, but if this is a minor case, I get my fingers mashed, I have to go and do it, I am back to work, lose a week's

time, send it in, the computer cranks. If I do not like the result of that as a claimant though, I have the right to move up.

Mr. PEREZ. Oh, sure. I mean, for instance, you smash your finger and 6 months later you realize that you have some traumatic arthritis, you do not have full use of the thumb. You can file a claim for what is called schedule award, and yes—

Mr. DAVIS. So I have my right to pursue it and the computer is really just an efficient way of trying to get rid of—take some cases away from claims examiners that do not need to look at them.

Mr. PEREZ. Yeah, there is nothing wrong with that. But certainly creating the impression that these are being approved is really not correct.

Mr. DAVIS. Well, they are—

Mr. PEREZ. They have not been disapproved.

Mr. DAVIS. Yeah. Well, they are approved automatically. I mean, they have a procedure where they do not have to waste a claims examiner's time.

Mr. USHER. Where that procedure does not work is where the medical billing exceeds \$1,500. And the district offices there have a tendency to—what would happen in that case is the bills would come in, they have already reached the limit that they can pay without looking at the merits of the claim. They then sit down, now they have to look at the merits of the claim 6 months later. So now the claimant receives a letter from the claims examiner, and what they are trying to do there is adjudicate the claim that should have been adjudicated the first time it came through the door. It is much more difficult for the employee to establish his entitlement there.

Yes, there is a significant argument to be made for handling that number of cases in that fashion. But when those cases that are not going to stay administratively closed resurface, they are significant problems to handle.

Mr. DAVIS. I was intrigued by one thing you said and maybe I did not understand it. On these hearing dates, first of all they set a hearing date and you either make the hearing date or you do not, and I know it is tough sometimes if the attorney has got a conflict.

That is the way it works in the eastern district of Virginia, where I practiced law. That is why they call it the rocket docket, but it is how you keep things moving. I have seen court systems just bog down where anybody who needs a continuance, wants it to can have an attorney sign this or that and—you know, to keep this flowing smoothly for the beneficiaries of this, you want to keep it flowing. I do not know where you draw the line and I appreciate you calling it to our attention, the fact that it is fairly rigid in terms of how the dates go and that there will be instances where people may not get their choice of attorneys. But the tradeoff is one that I think, particularly when you have thousands of claims to process, may not be that bad.

Mr. USHER. My only reservation there would not be about the efficiency of refusing to grant postponement, but it is a piece of social remedial legislation and the hearing is supposed to be part of an appellate process to protect the injured employee's rights. If you want to be efficient without a heart and soul, I would say that is the way to go.

Mr. DAVIS. Being efficient sometimes helps people too, they are waiting for their money, they do not know what is going on. I could take you back to some of the veterans' appeals that we get that just take years and years. You get the right decision, but you are waiting 6, 7, 8 years sometimes. I do not know where you find the right balance, and I think this is really a fact-finding hearing where we are trying to find all of that.

Mr. USHER. Right.

Mr. DAVIS. The same if you have—one agency has four claims, what is wrong with trying to hear them all in 1 or 2 days so they do not have to send somebody else, if you can do that and the claimants are not adversely affected. I guess that is the key decision.

Mr. USHER. I would suspect that the claimants would be adversely affected, just in terms of distance, unless they all live in New York City. But it is not going to be the people in management at Hearings and Review who are going to decide where all these claimants live in relation to the hearing site. That is going to be left to the hearing representative and that is a further administrative burden that I would suggest is prohibitive, sir.

Mr. DAVIS. Yeah, but you cannot blame the agency for trying to save their per diem and everything else.

Mr. USHER. But again, the significant point that I would make is that the agency representative is in a pay status and the injured employee is not.

Mr. DAVIS. Right.

Mr. PEREZ. Mr. Davis, I would like to just suggest something.

Mr. DAVIS. Yes.

Mr. PEREZ. You talked about bogging down the system and the legitimate agency concern, OWCP's concern to keep these cases moving. Well, the thing that really has bogged down the system is the enormous number of prehearing remands. These are the cases that are either facially incorrect or evidence has come in between the date of denial—and if you look at the data—

Mr. DAVIS. But that is driven by the time to a great extent, is it not?

Mr. PEREZ. Yeah. But actually what is clogging the system is enormous numbers of these improperly denied cases are coming into Hearings and Review and they are lengthening the whole decision process and then making it to such a degree that management has elected to eliminate postponements in an effort to keep the cases moving. Whereas I suggest that eliminating these prehearing remand cases would have the same effect and thereby not depriving injured employees of an oral hearing, which was put in the act specifically for that purpose. Congress recognized that many of these are inarticulate, blue collar workers, who cannot successfully prosecute their claims in writing.

Mr. DAVIS. So these are not people with slick lawyers up there waiting to get a percentage.

Mr. PEREZ. Yes. And you want an opportunity to listen to this person, hear them present their own evidence. This was put in the act in 1966, 50 years after the act was passed. So Congress believed that it was important to provide this for injured employees.

Mr. DAVIS. OK. Let me ask you this, you do not know of any bonuses or anything on number of claims or quotas or anything. Is this more informal talk or is there any smoking gun here that this is in fact a policy?

Mr. PEREZ. Well, the regional Directors report on their success in handling these quality case management cases. Their performance is based on that.

Mr. DAVIS. Is it based on time or result, based on the timeliness?

Mr. PEREZ. I think result.

Mr. DAVIS. Really?

Mr. PEREZ. I will not swear to that, but I have seen copies of monthly reports submitted by regional directors to Mr. Kerr and Mr. Hallmark. The first item on the list is quality case management cases. Now why is that up front? I think it is because the office has this strategic goal of lowering the number of lost time days and everyone is focusing on that. And to the extent that the actions of the district office achieve that goal, certainly there is going to be some favorable performance evaluation involved in that. But as for actual quotas, I have heard that exists, I have not seen any evidence of it.

Mr. DAVIS. You know, it is funny, in our District Committee, which Mr. Horn serves on that I chair, we have gotten everyone up saying there is no quota on tickets and then all of a sudden we find out there is. It is one of these things, I do not know if it is ever written down, but we will ask them when we get a chance to question them. Obviously that would be very bad public policy at a minimum, if not illegal.

But you feel just because of the nature of the reports, that helps drive it, and the incentives that come down.

Mr. PEREZ. I think so, Mr. Davis. Regrettably, we were not able to get any claims examiners to come forward, because they are afraid of retaliation and intimidation. These are the individuals who are on the front line and could provide direct testimony on what directions are being given to them. But believe me, these individuals are very afraid of coming forward.

Mr. DAVIS. OK, thank you very much.

Mr. HORN. I thank you for that line of questioning. That is very helpful and, as you said, we will follow it up with the administration when they come before us on panel three.

Just a few questions for the record, and we might say to you as we will to other witnesses, we will keep the record open and if something comes to you on the way home or whatever, please feel free to put it in the form of a letter and we will put it in the record at the appropriate place. I think some of the parts you read in a previous exchange, Mr. Perez, we would like copies of that to put in an appropriate place, without objection.

But let us look a minute at—do most claimants who have had benefits terminated or denied by OWCP, do they respond in any attempt to ascertain why the action is taken?

Mr. PEREZ. Well, Mr. Chairman, Mr. Markey, who is the Director of the DFEC, has told me that 40 percent of people whose benefits are terminated do not respond. Now that is an incredible number. I asked him why are they not responding. He said well, we just do not know.

Well, Mr. Chairman, I suggest that when you have such an enormous number of people whose benefits are being denied and there is very little fraud in the program, we would want to know why they are not responding. But apparently the program is not interested, they are just interested in terminating the benefits.

Mr. HORN. Have you seen any evidence that an agency has hindered or discouraged the injured employee to file a claim for benefits?

Mr. PEREZ. Yes, Mr. Chairman. The Postal Inspection Service petitioned the Department of Labor's inspector general to investigate handling of claims under the act. As a result of that investigation, the Department's IG found that the Post Office was in fact—I do not mean to single out the Post Office, but this was an examination—the IG did find that officials at the Post Office were hindering the timely submission of timely forms. As a matter of fact, in April 1998, a hearing representative brought to the attention of Mr. Markey the fact that the San Antonio post office was encouraging injured employees to file nonstandard forms, forms which essentially were disclaimers, which is plainly inconsistent with the act and illegal under Title 18 of the U.S. Code.

This was brought to management's attention, I do not believe that they took any aggressive action, as the IG recommended they do, to notify the employing agencies that this was wrong and to notify the claims examiners that if they see more instances of this, they should immediately report it. I do not believe that DFEC and OWCP are being aggressive enough in curtailing the agencies' abuse in these areas.

And like I said, I do not mean to single out the post office, I think many agencies do this.

[The information referred to follows:]

APR 16 1998

Memorandum for : Thomas Markey, Director

Thru: Robert Barnes, Chief

From: Diane M. Sorensen *DM*.

Attached is a copy of a disclaimer that is being used by the San Antonio, Tx. post office in lieu of filing DOL form CA-1.

This has led to many problems for the claimant and the agency (it gives the claimant the impression they can get medical treatment at any time in the future). I had three claims with this disclaimer which results in Cop being denied as not timely as well as creating problems to establish Fact of Injury.

There is no need for the form since the CA-1 goes in the personnel folder if the is a no-time-lost, no medical-treatment injury.

No agency representative was present at these hearings but I feel they should be advised to discontinue the use of this form.

1	INJURY COMPENSATION		Comment
2	10410 FERRIN BEITEL SAN ANTONIO TX 78284-3444		See Me
3			As Requested
4			Information
5			Read and Return
			Read and File
			Necessary Action
			Investigate
			Recommendation
			Prepare Reply

FROM: INJURED EMPLOYEE AUG 26 1996 Extension 650-1610/02
OFFICE Room No.

Date: INJURY COMPENSATION

Remarks:

I DO NOT DESIRE MEDICAL TREATMENT AT THIS TIME FOR INJURY SUSTAINED ON:

8 22 96 / Joel Estala
(Day - Month - Year) / NAME OF SUPERVISOR INFORMED

I RESERVE THE RIGHT TO SEEK MEDICAL ATTENTION AT A LATER DATE SHOULD THE SITUATION ARISE.

Christopher, Andrew Christopher, Andrew
PRINT NAME (Employee Signature)

I injured my Right Shoulder
(part of body, i.e., left arm, right thumb, right knee, lower back)

on 8/22/96 1540, while doing Moving Double Stacked Cases
Date/Time Activity Done

at check in the mail AUG 23 1996
Location/Place of Injury INJURY COMPENSATION SAN ANTONIO, TX 78284

JAN 22 1997

INJURY COMPENSATION
SAN ANTONIO, TX 78284-3444
USPS

8/25/96
 Again, by 8/25/96
 Cf to impaga 11/1/96

INJURY COMPENSATION OFFICE ROUTING SLIP		Dept. Office or Room No.	Approval Signature Comment See Me As Requested Information Read and Return Read and File Necessary Action Investigate Recommendation Prepare Reply
To:	INJURY COMPENSATION		
1	10610 PERKIN BEITEL		
2	SAN ANTONIO TX 78284-9444		
3			
4		Forwarded to OWCP	
5			
From:	HERITAGE ENERGY EMPLOYEE 702 RICHLAND HILLS DE OFFICE SAN ANTONIO TX 78245-9998	DEC 21 1994 Injury Compensation Office San Antonio, TX 78284-9444	Estimate No. 650-1610/02 Room No.
Date:			
Remarks:	S-14-94		
<p>I DO NOT DESIRE MEDICAL TREATMENT AT THIS TIME FOR INJURY SUSTAINED ON:</p> <p style="text-align: center;"><u>13 5 94</u> (Day - Month - Year)</p> <p>I RESERVE THE RIGHT TO SEEK MEDICAL ATTENTION AT A LATER DATE SHOULD THE SITUATION ARISE:</p> <p style="text-align: center;"><i>Jerry M. Harkin</i> (Employee Signature)</p> <p>I injured by <u>RIGHT KNEE</u> (part of body, i.e., left arm, right thumb, right knee, lower back)</p> <p>on <u>5-13-94 1345</u>, while doing <u>DELIVERING MAIL</u> Date/Time Activity Done</p> <p><u>WAS GETTING INTO VEHICLE SLIPPED AND HIT RIGHT KNEE</u> at <u>247 CV PRGSS GARDEN</u> Location/Place of Injury</p>			
			RECEIVED DEC 16 1994 INJURY COMPENSATION

"ACHIEVING SAFETY EXCELLENCE IS NO ACCIDENT"

Edwin A

7/25/96

TO: INJURY COMPENSATION OFFICE

DISCLAIMER

I DO NOT DESIRE TO FILE A FORM CA-1 OR HAVE MEDICAL TREATMENT AT THIS TIME FOR INJURY SUSTAINED ON:

Monday 7/25/96
(DAY/MONTH/YEAR)

I RESERVE THE RIGHT TO COMPLETE A CA-1 AT A LATER DATE SHOULD THE SITUATION ARISE.

Robert A. Collins
EMPLOYEE'S SIGNATURE

Mr. HORN. I met with a local chapter of Federal injured workers and I just went down the line one day and listened to each one as to what their case was, what agency for which they worked, and there was no question that the post office was a real problem. In one case, they wouldn't even give the person the forms on which to file the claim, which I think is outrageous.

Now does that ever come up in cases before you?

Mr. USHER. Oh, yes. Yes, Mr. Chairman. The problem employers, from my perspective, would appear to be the Postal Service and the military facilities. Problems of course exist across the Government as a whole, but most of the problems of the nature that you are suggesting come from the post office and the military facilities. And it is not only just the initial filing of the claim, although we can start there. I have had people testify that the supervisor says oh, yeah—when the injury is verbally reported to the supervisor, the claimant asks for a CA-1 and the supervisor says well I will get it for you in a little bit. The claimant has to go back repeatedly, repeatedly. If the supervisor goes off shift, the next supervisor may or may not take the initiative to provide the form.

The corollary to that problem, however, is the provision of the wrong form. It is complicated enough that there has to be one form to report a traumatic injury, one form to report an occupational illness, and one form to report a recurrence of a previously established injury. If the wrong form is provided, it just delays the process invariably.

The other aspect of that problem, Mr. Chairman, is not only in providing the appropriate form upon the request of the injured employee and promptly filing the form, I have had people at hearings testify that when they tried to track down what happened to their injury report, they found it in the shop drawer, the supervisor's drawer in the shop. A further aspect of that problem is the forwarding of subsequent evidence when the district office writes and says this is what you need to prove your claim, or when the claimant gets the forms completed by his doctor and wants to forward them on to the office, he is required to do that through his employer.

I had the case of a lady who was injured at Mare Island Naval Shipyard. They put her in a modified duty position, she had an upper extremity problem from keyboarding activity, I believe. For her modified duty position, they put her in the injury compensation office and she testified at the hearing which I held that when the injured workers would come in to inquire about the progress of their claim, she would go to the filing system to find their folder, and she would find all the forms in that folder, the forms had never been forwarded to the district office for adjudication. They were held by the employing agency.

We have testimony at hearings that the injured employee turns in his medical reports to the injury compensation office of his employer and then when he asks what did you do with these forms, he is told that they were sent to the Department of Labor. Well, can I have a copy of your—the injury compensation file that you maintain, and the answer is no. And this comes from injured employees as well as from their union representatives. It is very difficult sometimes for the injured employee to ensure that the claim

and the supporting documentation is in fact being forwarded through the employer to the district office for adjudication.

Mr. HORN. Now the purpose of forwarding it to the employer and through the employer is, I assume, to get the employer's side of this in the package that goes to the Labor Department?

Mr. USHER. I believe there is some requirement that the employer imposes upon the injured employee that all documentation has to come through. Now some of these forms, some of the claim forms themselves require certification by the employer. So there is a valid reason for going through the employer.

But frequently we hear testimony that the injured employee is advised by his supervisors that he must submit any subsequent documents which do not require completion by the employer through the injury compensation office.

Mr. HORN. Now is the form the same form in every Federal agency, or does each agency write its own form?

Mr. USHER. The forms are universal.

Mr. HORN. I just wonder why we do not have a 1-800 number directly to the Workers' Compensation Program and simply bypass that operation and say send me the forms.

Mr. USHER. That suggestion, a similar suggestion, Mr. Chairman, has been made, but for efficiency of operation—the suggestion has been made by hearing representatives such as myself—for efficiency of operation, we should close the district offices and have one central office that would provide uniform adjudication for the entire country.

Mr. PEREZ. Mr. Chairman, if I could point out, we discussed earlier this process which OWCP has developed for handling these minor lost time injuries. A lot of that relies on the agency looking at things, and they certainly have a legitimate role to play in this. That is provided for in the regulations and we certainly do not want to diminish that role. But title 18 of the U.S. Code makes it a criminal offense for a responsible officer to fail to forward required information. And I believe that this should be more aggressively enforced. I realize that this section of the Code is not under the jurisdiction of DFEC, however, something should be done to make these individuals in the employing agency who improperly hold up these forms, responsible.

Mr. HORN. I could not agree with you more. I was outraged when I heard about that post office situation. I have heard of enough about the post office and one of our colleagues that chairs the Post Office Subcommittee which is also under the Government Reform and Oversight full committee, I have talked to him about it and his feeling was there is just sort of a military mind that is in there and there is also bonuses paid when they do not have too many injuries and all the rest of it. So there are a lot of things at work here and I would hope that the inspector general would nail something like that.

Well, let me move to just a couple more to round out what we are looking for here. This might have been asked at one level, let me ask it another way. What external factors may influence the adjudication of compensation claims operations at the district office level? What are we talking about there in external factors? Are there external factors above that district office?

Mr. PEREZ. I am not that familiar with operations at the district office. It has been many, many years since I have worked there. From the impression I get, these claims examiners are locked to their desk and just are trying to move these things as quickly as possible. I do not know how much pressure is being put on them by say the agency calling the district office head who then comes to the claims examiner. I think a certain amount of that goes on, but I just do not believe it is happening at that level.

Now at Hearings and Review, that is a different story. There are a lot of external pressures put on hearing representatives by the agency itself, OWCP, by employing agencies dissatisfied with decisions. So there is a lot of improper pressure exerted on Hearings and Review.

Mr. HORN. Any further questions, Mr. Davis? Any further questions, counsel?

[No response.]

Mr. HORN. We thank you both very much for coming and sharing your experiences with this panel. It has been very helpful, and both of your statements were among the best I have seen before this committee and we hold more investigations than any subcommittee in the House or the Senate. So we thank you for that hard work that you gave us and we are going to put it to good use in the report on this area. So thanks so much.

Mr. USHER. Thank you for the opportunity, Mr. Chairman.

[Applause.]

Mr. HORN. Next will be panel two, and it will be—we are lining up the material here in the order of the agenda you have. Mr. Sammy Lopez, supply technician for the VA starts here. Howard Miyashiro, letter carrier, U.S. Post Office, will be next. Anthony Burelli, marine electrician, Long Beach Naval Shipyard, U.S. Marine Corps retired, at the end there before the podium. Roger Euchler, letter carrier, U.S. Post Office; and Susan Yake, dietician, U.S. Naval Hospital, Bremerton, WA. Next will be Rachael Santos, postal manager, U.S. Postal Service, and we have Mr. Joseph Jackson, Mail Handlers Union compensation coordinator. OK, I think we have got everybody if Mr. Jackson is here.

Ladies and gentlemen, if you would stand, we will administer the oath.

[Witnesses sworn.]

Mr. HORN. All seven witnesses have affirmed, the clerk will note, and we will simply begin if you would summarize your case. They are very moving on the written documents, but summarize your case in 5 minutes, if you would, and then we will go to questions for all of you. So we will start with Mr. Lopez, who I introduced already. Well, he can describe himself and the agency where he works. Go ahead, Mr. Lopez.

STATEMENTS OF SAMMY LOPEZ, SUPPLY TECHNICIAN, VETERANS ADMINISTRATION; HOWARD MIYASHIRO, LETTER CARRIER, U.S. POSTAL SERVICE; ANTHONY BURELLI, MARINE ELECTRICIAN, LONG BEACH NAVAL SHIPYARD, U.S. MARINE CORPS, RETIRED; ROGER EUCHLER, LETTER CARRIER, U.S. POSTAL SERVICE; SUSAN YAKE, DIETICIAN, U.S. NAVAL HOSPITAL, BREMERTON, WA; RACHAEL SANTOS, POSTAL MANAGER, U.S. POSTAL SERVICE; AND JOSEPH JACKSON, MAILHANDLERS UNION COMPENSATION COORDINATOR

Mr. LOPEZ. I work for the Veterans' Hospital, Long Beach.

Thank you, Mr. Chairman and members of the subcommittee for giving me this opportunity to express my concerns over the application of the Federal Employees Compensation Act for injured Federal workers. I would like to relate a personal experience I encountered as a Federal injured worker with the hope that positive reform can be achieved to ensure other Federal injured workers will be treated with dignity and will be able to obtain the timely medical assistance and compensation to which they are entitled.

On June 16, 1994, I sustained an injury to my left ankle, neck and head, which caused permanent pain in my shoulder, back, neck, arms, hands, and left ankle.

As a Federal employee, I followed the existing procedures to properly process my work-related injury claim. I was not afforded the full rights under FECA as an injured employee. At every step of the process, I was met with resistance from my employing agency and Federal agency responsible for safeguarding my FECA rights, the Office of Workers' Compensation Programs.

Three months after my injury, I was advised that the employing agency agent, Arline Rubin, directed medical staff personnel to alter the physician's orders that had placed me off work, and instead provide light duty status. This caused unnecessary aggravation and stress and interfered with my relationship with my supervisor at work and my physician. This agent continued similar behavior where she would contact other physicians that I was referred to and insinuated that I was perpetuating fraud and that I should be returned immediately to work. She disseminated similar information to my work supervisor.

On multiple occasions I attempted to contact the OWCP directly to discuss my claim and to obtain some information on how long it will take my doctors to receive a response to their request for authorization. They never returned my calls. OWCP is not responsive to the general public.

As a result of my work-related injury, I had to liquidate my savings, cash in my savings bonds, and borrow money from my friends and relatives to exist. This change in lifestyle adversely affected the management of my diabetes. I was no longer able to exercise due to the ankle injury and my diet suffered tremendously as a result of not having the proper finances to purchase adequate food. Moreover, my physician did not receive timely responses from OWCP to his request for medical authorization. This delay hindered the ability of my physicians to perform medical tests and render timely medical intervention.

As a result of the extreme difficulty I was experiencing, I requested the assistance of Representative Stephen Horn. Shortly after his inquiry to the Department of Labor, Office of Workers' Compensation Programs, I received three separate documents from OWCP, postmarked February 28, 1995, which were dated December 22, 1994, January 15, 1995, and February 24, 1995. It seemed they were trying to catch up with my case by backdating their correspondence. The first letter dated December 22 informed me that my case was accepted for multiple contusion sites, head contusion. The second letter dated January 15, 1995 indicated that an appointment has been made for me to determine the relationship between my condition and factors of my employment as well as any residuals of the accepted conditions due to my work injury. The third letter explained that OWCP had assigned a registered nurse to assist me in my recovery from my work-related injury. I never saw or spoke to the nurse consultant. I wonder how much she received in compensation for the assistance she did not provide.

I finally received an OWCP compensation check on March 13, 1995 for \$7,846.07. This represented 9 months of compensation. Even then, the OWCP failed to provide the proper medical authorization to my physician to perform the necessary surgery required for my recovery.

Shortly after OWCP's acceptance of my claim and the receipt of the compensation, an agent of my employing agency, Arline B. Rubin, actively requested OWCP to discontinue my compensation and obtain restitution of possible inappropriate payments in the past distributed. Her zealous approach as a VA OWCP manager was never in the interest of the injured employee. She did everything in her power to interfere with my ability to convalesce, obtain compensation and obtain the appropriate medical surgery, which I am entitled to as a Federal injured employee under FECA.

Part of the difficulty with OWCP claims process is the administrative burden which is placed on the physicians charged with providing medical care. On multiple occasions, my doctors placed me off duty. The OWCP would send multiple requests to the physicians asking to justify their decision. They would continue demanding medical reports until the doctors would just get upset. OWCP would overrule the physicians' orders and deny compensation for the same period of disability. In essence, OWCP claims examiners would question the medical judgment of a medical doctor. In my particular case, it is apparent that the doctors who attempted to provide care were correct. The OWCP examiners render decisions without having the medical educational background to fully understand the physician's rationale.

In September 1995, as a result of my congressional representative, I received authorization from OWCP to see and receive treatment from Dr. Ronald W. Smith, M.D., orthopedic surgeon. On July 30, 1996, 26 months after the date of injury, I finally received the surgery which was initially requested in 1994 by my first specialist.

Although the surgery was a success, the delay in treatment coupled with the financial and emotional stress associated with this claim exacerbated my diabetic condition. Prior to 1994, my vision was great, I was in good physical shape. I jogged 7 to 12 miles a

day prior to work and participated in several marathons. As a result of the lack of control of my diabetes, today I am legally blind in my left eye and I am suffering with end stage renal disease. According to my private physician, this is a direct residual result of my work-related injury. Due to the fact that I am not able to exercise and control my diet in addition to the enormous stress and harassment I was subjected to as an injured Federal worker. Currently, without a kidney transplant, my prognosis is poor.

When I returned to duty at Long Beach VA Medical Center, as a union representative I had the opportunity to witness the employing agency's attitude toward Federal injured workers. For the most, the OWCP claims were referred to as frivolous or fraudulent claims. The goal was to have the employee return to work as soon as possible, regardless of medical status. The methods employed by the agent responsible for this objective was often questionable. The relationship between the employing agency and OWCP seemed to work in tandem to deny claims and medical attention. If the two agencies expended the same amount of energy and worked together in the best interest of the injured worker, the length of my employee absence would have been minimal.

As a result of my end stage renal failure, I was placed on disability retirement and now live on half the amount of income. This is difficult. OWCP continues to deny the association of my work-related injury to my current condition. Although there remains several issues outstanding with OWCP in regard to lapses of compensation payment, I have concluded that the administrative process does not serve the interests of the injured worker and will only add to my frustration.

Documentation to substantiate my statement is available upon request.

Thank you.

Mr. HORN. Well, we thank you. That is the Long Beach Veterans' Administration Hospital, I take it.

Mr. LOPEZ. Yes.

Mr. HORN. Well, we thank you for that detailed story. That is shameful that they did not act sooner.

We now have Mr. Howard Miyashiro. Please begin.

[The prepared statement of Mr. Lopez follows.]

Sammy Lopez
Post Office Box 91042
Long Beach, CA 90803
July 6, 1998

**Statement of Sammy Lopez
before the
Subcommittee on Government Management, Information and Technology
of the
House Committee on Government Reform and Oversight
on the
Federal Employees' Compensation Act**

Thank you Mr. Chairman and members of the subcommittee for giving me this opportunity to express my concern over the application of the Federal Employees' Compensation Act towards Injured Federal Workers. I would like to relate the personal experience I encounter as a Federal Injured Worker, with the hope that positive reform can be achieved to ensure other federal injured workers will be treated with dignity and will be able to obtain the timely medical assistance and compensation to which they are entitled.

On June 16, 1994 I sustained an injury to my left ankle, neck and head. Which has caused permanent pain in my shoulder, back, neck, arms, hands, and left ankle. As a federal employee I followed the existing procedures to properly process my work related injury claim. I was not afforded my full rights under FECA as a injured employee. At every step of the process I was met with resistance from my employing agency and the federal agency responsible for safe guarding my FECA rights, the Office of Workers Compensation Programs.

Three months after my injury I was advised that the employing agency's agent, Arline Rubin, directed medical staff personal to alter the physicians orders that had placed me off work, and instead provide light duty status. This caused unnecessary aggravation and stress and interfered with my relationship with my supervisor at work and my physician. This agent continued similar behavior where she would contact other physicians that I was referred to and insinuated that I was perpetuating fraud and that I should be returned to work immediately. She disseminated similar information to my work supervisor.

On multiple occasions I attempted to contact the OWCP directly to discuss my claim and to

obtain some information on how long it will take for my doctors to receive a response to their request for authorization. They never returned my call. OWCP is not responsive to the general public.

As a result of my work related injury I had to liquidate my savings, cash in my savings bonds, and borrow money from friends and relatives to exist. This change in lifestyle adversely affected the management of my Diabetes. I was no longer able to exercise due to the ankle injury, and my diet suffered tremendously as a result of not having the proper finances to purchase adequate food. Moreover my physician did not received timely responses from the OWCP to his request for medical authorization. This delay hindered the ability of my physicians to perform medical tests and render timely medical intervention.

As a result of the extreme difficulty I was experiencing I requested the assistance of Representative Stephen Horn. Shortly after his inquiry to the Department of Labor, Office of Workers Compensation Programs I received three separate documents from OWCP postmarked February 28, 1995 which were dated December 22, 1994, January 15, 1995 and February 24, 1995. It seemed they were trying to catch up with my case by backdating their correspondence. The first letter dated December 22 informed me that my case was accepted for multiple contusions sites, head contusion. The second letter dated January 15, 1995 indicated that an appointment has been made for me to determine the relationship between my condition and factors of my employment as well as any residuals of the accepted conditions due to my work injury. The third letter explained that the OWCP had assigned a Registered Nurse to assist me in my recovery from my work related injury. I never saw, or spoke to the Nurse Consultant. I wondered how much she received in compensation for the assistance she did not provide.

I finally received a OWCP compensation check on March 13, 1995 for \$7,846.07. This represented 9 months of compensation. Even then the OWCP failed to provide the proper medical authorization to my physician to perform the necessary surgery required for my recovery.

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FECA.

Part of the difficulty with the OWCP claims process is the administrative burden which is placed on the physicians charged with providing medical care. On multiple occasions my doctors placed me off duty. The OWCP would send multiple requests to the physician asking to justify his decision. They would continue demanding medical reports until the doctors would just get upset. OWCP would overrule the physician's orders and deny compensations for the same periods of disability. In essence, OWCP claims examiners would question the medical judgment of a medical doctor. In my particular case, it is apparent that the doctors who attempted to provide care were correct. The OWCP examiners render decisions without having the medical educational background to fully understand the physician's rationale.

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Although the surgery was a success, the delay in treatment coupled with the financial and emotional stress associated with this claim exacerbated my diabetic condition. Prior to 1994 my vision was great, I was in good physical shape. I jogged 7 to 12 miles a day prior to work and participated in several marathons. As a result of the lack of control of my Diabetes, today, I am legally blind in my left eye, and I am suffering with End Stage Renal failure. According to my private physicians this is a direct residual result of my work-related injury. Due to the fact that I was not able to exercise and control my diet in addition to the enormous stress and harassment I was subjected to as an injured federal worker. Currently, without a kidney transplant my prognosis is poor.

When I returned to duty at the Long Beach VA Medical Center, as a Union Representative I had the opportunity to witness the employing agency's attitude towards the federal injured worker. For the most part the OWCP claims were referred to as frivolous or fraudulent claims. The goal was to have the employee return to work as soon as possible, regardless of medical status. The methods employed by the agency responsible for this objective were often questionable. The relationship between the employing agency and the OWCP seemed to work in tandem to deny claims, and medical attention. If the two agencies expended the same amount of energy and worked together in the best interest of the injured worker the length of my employee absence would have been minimal.

As a result of my End Renal Stage Failure, I was placed on disability retirement and now live on half the amount of income, this is difficult. The OWCP continues to deny the association of my work related injury to my current condition. Although there remains several issues outstanding with OWCP in regards to lapses of compensation payment. I have concluded that the administrative process does not serve the interest of the injured worker and will only add to my frustration.

Documentation to substantiate my statement is available upon request.

Mr. MIYASHIRO. Good morning, Honorable Steve Horn, fellow committee members, and the honorable Members of Congress, the Senate, and the public.

My name is Howard Miyashiro. I make the following statement.

In 1973, I was employed by the U.S. Postal Service in a career position as a letter carrier. On March 2, 1984, I filed an approved claim with the Office of Workers' Compensation Programs for a work-related injury from carrying excessive weight over a prolonged period of time, which permanently damaged my shoulder and neck and my back.

On August 4, 1984, I was verbally terminated from my position due to the injuries. My approved claim was closed by my employer and I was left injured with no medical care or compensation. It took 2 years of hard work before OWCP accepted my claim again.

The events that occurred since the day I was terminated can only be described as hellish nightmare. My claim has been accepted and denied over and over again. I have consistently been subject to procedural errors, conflicts created by OWCP in collusion with my employer. It is evident OWCP engaged in widespread contract corruption in the medical examination and vocational programs. For example, every time I was in need of medical care or surgery, OWCP required me to be examined by one of their appointed physicians, who wrote fraudulent medical reports on behalf of OWCP for the purpose of taking away my rights to benefits and medical care.

As a result of this bureaucratic nightmare, I have still not recovered from my injuries. Now chronic and irreparable, I am doomed to live with the pain for the rest of my life. It has also caused unnecessary financial hardship for me and my family.

Due to the latest action of OWCP, by offering me an arbitrary job position 2,500 miles away from my place of residence, I was recently forced to file for bankruptcy to save my home from going into foreclosure. It was evident that this job was an ill-conceived effort to take away my rights to be reinstated where I permanently live. Without exploring job opportunities within my commuting area, on March 30, 1996, OWCP terminated my benefits schedule award and any future reinstatement with the agency, simply because I could not afford to relocate.

As long as OWCP, the division of the U.S. Department of Labor, continues its conspiracy and collusion with the Federal employers of the United States, injured workers will be denied legitimate claims, violating their rights to compensation, medical care, and rehabilitation.

It is up to you honorable men and women to ensure that the laws you pass are in fact being enforced, to ensure that OWCP does not engage in fraud and abuse of injured workers, and to make sure that the Federal employers, in my case the U.S. Postal Service, can no longer enjoy unfettered access, special privileges in processing adjudication and maintenance of claims by OWCP. It is appalling that the OWCP, which exists to serve the injured workers, provides no assistance to the workers in their pursuit of their rights. In the end, such corrupt entity becomes a costly tax burden for everyone. It is up to this committee to ensure that justice, fairness, and honesty prevail.

Thank you very much.

Mr. HORN. Well, we thank you. Your full statement, of course, will be in the record as if read, without objection, because it is very detailed and we thank you for summarizing it.

We are going to ask the agency involved to give us their report also on all of your cases, especially if they are still open. So we appreciate very much the detail with which you went into this. That is a tragic situation you have gone through.

We have to move then to the next witness, which is Mr. Burelli, who will identify himself, and please proceed.

[The prepared statement of Mr. Miyashiro follows:]

**Testimony and Case History
In the Matter of Howard Y. Miyashiro**

OWCP File # A15-34332

Date of Injury: March 2, 1984

Agency: United States Postal Service

In October 1973, Howard was employed as a mail carrier for the U.S. Postal Service in Kailua, Hawaii. In early 1983, he was assigned a walking route, delivering letters and magazines to businesses and residents. He enjoyed the walking and carried the mail in a push cart. In March 1983, his cart was removed for "security reasons" although there had never been an incident concerning the safety of the mail.

In October 1983, Howard's route expanded by several miles. As the mail volume increased, so did his working hours; from eight hours per day to almost twelve hours per day. It was especially difficult during the Christmas season when the bulk of mail doubled, and sometimes tripled in volume. From 0930 to 1730, Howard constantly carried 30 to 50 pounds of mail on his shoulder. His repeated requests for a push cart were ignored by Management, including his Post Master.

In January 1984, Howard started to feel stiffness and discomfort in his neck, both shoulders, particularly in the left shoulder, and in his back. For two months, he used a folded towel on his left shoulder to alleviate the pressure from the weight of the mailbag. From March 2, 1984, Howard began to suffer from a deep pain in his neck, shoulders and back and two weeks later, he was unable to get out of bed. He could not move his head and his neck was in excruciating pain.

Howard was examined by his family physician, Dr. James Tsuji who speculated that Howard was suffering from "cervical strain" and recommended one week of bed rest. He also recommended massage therapy. No X-rays were taken. Howard filed a Workmens' Compensation claim with the Office of Workers' Compensation Programs, the U.S. Department of Labor and his injury was accepted as work related.

Howard received treatments from Mr. Kazuo Muraoka, a licensed massage therapist, one hour per week for a total of nine weeks. Although he felt better for an hour or so after each visit, his entire body would be on pain again. While undergoing treatment, Howard was placed on light duty at work.

On May 14, 1984, the U.S. Postal Service scheduled a Fitness-for-Duty examination with Dr. Rowlin Lichter, appointed by the U.S. Postal Service. Dr. Lichter verbally abused Howard and accused him of lying about his injury. His medical opinion was that Howard's back pain was congenital and therefore not compensable. His conclusion was that Howard was no longer fit for postal duties.

Based on Dr. Lichter's report, Howard was verbally terminated from his position on August 4, 1984. On the morning of August 4, as soon as Howard punched in at 0700, he was called into his Postmaster's office, Mr. Harry Higa, who told Howard that he had no longer a position for him because of his injury, and that he was terminated as of that hour. He told Howard to punch out and not to return. Howard had no choice but to clock out at 0800. He was escorted to the time clock and to the door. In the conversation with Mr. Higa, Howard was told that this order of termination came from "higher-ups," and that he, Mr. Higa, could not do anything about it. It was later on discovered that this order actually came from Mr. Arthur Dubois, Injury Compensation Supervisor at the U.S. Postal Service in Honolulu. Howard was forced to seek medical retirement at age 34. The termination was improper because of the following reasons:

- 1. He was verbally terminated and not given a letter of termination, nor informed about his appeal rights;*
- 2. He was already an accepted injured worker at the time of termination;*
- 3. He had Veteran's Preference from serving in Vietnam from 1968 to 1972.*

Howard was not aware of his rights as he had never been in this situation before. He was neither aware that his employer, the U.S. Postal Service, had closed his claim with the OWCP on the day of termination. He never received a written letter of termination from the OWCP, nor did his claims examiner, Mr. David Essley, inform him about his appeals right.

For the next 21 months, Howard tried to reopen his claim with the OWCP. In 1986, the OWCP once again approved of his claim (with help from U.S. Senator Daniel Inouye) and Howard's new physician, Dr. Gerard Dericks, received approval from the OWCP for arthroscopic surgery of the left shoulder. Surgery was performed in August 1986. During the surgery, Dr. Dericks discovered a tear in the rotator cuff which he repaired with a metallic staple. It was expected that this new method called "staple to bone" would improve his shoulder condition. However, it caused a secondary medical dilemma instead, but which was not diagnosed until 1988.

About two weeks after the surgery, Howard's new claims examiner, Mr. Shane Wulff from the District Office in San Francisco, called Howard and told him that "his shoulder condition was not work related and therefore the OWCP was not responsible for any payments." The OWCP also denied any further treatment of his shoulder, which included post-surgery care, which was of essence in regards to his recovery according to Dr. Dericks. His claim was denied again due to the fact that the U.S. Postal Service had appealed his claim (the surgery), languishing in Washington, D.C. for the next 14 months. In the meantime, Howard was denied medical care for his shoulder which caused a consequential injury which took nine years to be accepted by the OWCP. By that time, in 1995, his shoulder was forever destroyed.

In October 1986, Howard and his family moved to Las Vegas, Nevada as he was told by the Injury Compensation Supervisor at the U.S. Postal Service, Mr. Arthur Dubois, that he would never be reinstated in Hawaii. By this time, Howard was financially ruined after having survived on \$495.00 per month from his retirement fund

for two years with a wife and two small children. He talked to his claims examiner, Mr. Shane Wulff, who approved of the move, and who also informed Howard that as long as he stayed within the Western Region, which included Nevada, he would be reinstated with the U.S. Postal Service wherever he would be residing at the time of recovery.

Upon his arrival in Las Vegas, Howard contacted Dr. Andrew Welch, recommended by Dr. Dericks. Dr. Welch was very concerned about Howard, who had not received any medical care of his shoulder since the surgery. He immediately requested authorization for treatment from the OWCP, but his request was denied due to the appeal filed by the U.S. Postal Service. However, the OWCP approved treatment of his neck and back and for those injuries Howard received physical therapy twice a week. It should be known that it was very difficult for Dr. Welch to treat only the neck and back without involving the shoulder.

In February 1988, the shoulder injury was once again accepted as work related. Dr. Dericks was finally paid for the 1986 surgery and Dr. Welch got approval to treat Howard's shoulder. By this time, however, Dr. Welch felt that he was unable to deal with the policies set by the OWCP and dropped Howard as his patient.

Unable to find a orthopedic physician in Las Vegas who was willing to become embroiled with the OWCP, Howard and his family moved to Cypress, CA in June 1988 where they still reside. Howard contacted Dr. Bruce Watanabe who immediately requested approval for treatments. Howard felt this was the best medical care received to date. Dr. Watanabe ordered CT scans, revealing a disc bulge which was impinging on the cervical cord, causing the neck pain and stiffness. He also ordered an MRI for the lower back which revealed soft bone tissue on the lower spine which X-rays had missed (by Dr. Lichter in 1984). In the event that exercise, physical therapy and ultrasound treatments did not improve his condition within 6 months, Dr. Watanabe recommended shoulder surgery to remove the metallic staple, and maybe the fusing of the lower back. However, Dr. Watanabe feared the injuries had turned chronic in nature due to lack of medical care.

As a result of Dr. Watanabe's medical opinion, the OWCP scheduled a second medical opinion with Dr. Nussdorf in September 1988. Dr. Nussdorf was appointed by the OWCP and the purpose for this examination was to dispute Howard's own physician, Dr. Watanabe. Howard had to wait 5 hours in a small examination room, and not allowed to leave in order to aggravate Howard. This is a known technique used by many physicians appointed by the OWCP. By creating frustration and aggravation during the examination gives the physician an opportunity to declare the injured worker emotionally unstable. This is later on used against the claimant which can be seen on and off in Howard's case. As soon as Dr. Nussdorf came in, he immediately became verbally abusive and accused Howard of lying about his injuries. In his report, Dr. Nussdorf stated that Howard's injuries were of the type associated with football, and not carrying a mailbag. It should be noted that Howard never played football. The examination consisted of heel walking, limb measurements, reflexes and hand gripping. However, none of these tests were performed by Dr. Nussdorf, but by a male and a female whose identities are not known. There was no time that Dr. Nussdorf examine Howard's injuries. He spent less than 30 minutes with Howard, and refused to look at the MRI and CT scans which Howard had been told to bring. He merely placed them on the floor and stated that "X-rays were more reliable." Although Dr. Nussdorf never examined Howard, his medical opinion was that "his left shoulder and cervical complaints are as a result of repetitive trauma on the job in 1984" (sic).

The OWCP did not accept Dr. Nussdorf's medical opinion, and in December 1988, they scheduled another medical evaluation for Howard with Dr. Frederick Reed, also appointed by the OWCP. Although Dr. Reed was a so-called Referee physician, with no office of his own, this was a clear case of "doctor-shopping," an improper action by the Office. It was a repeat of Dr. Nussdorf's examination: heel walking, limb measurements, and hand gripping. As in Dr. Nussdorf's so-called examination, Dr. Reed did not examine Howard. Before he was allowed to see Dr. Reed, he was forced to

submit to take a picture, solely of his face. When he asked the nurse why, he was told that it was a requirement by the doctor who kept a facial picture of all his patients in their files because he never sees them more than once. This didn't make sense to Howard who feared that his picture would end up in the OWCP for some unknown reason. (It was later on discovered that Dr. Reed only accepted patients for evaluations from the U.S. Department of Labor and State Insurance which made his report biased and should have been removed from his case file as requested in his appeal in 1993.) In his verbal examination, Dr. Reed asked Howard only two questions: "Do you have a lawyer?" and to name all the physicians involved in his case, including their full street addresses. When Howard failed to recall the number of Dr. Welch's street address, Dr. Reed used this in his report and stated that "...he has, in fact, great difficulty remembering any significant data." It should also be noted that Dr. Reed had never read Howard's medical records. In his report he stated: "*just who performed the 1986 surgery is unknown.*" Instead, he based his opinion on a Dr. Becker, an Orthopedic Psychiatrist appointed by the OWCP, but who had never met Howard.

Contrary to Dr. Nussdorf, Dr. Reed declared Howard 100% well. In his report he stated that Howard was perfectly capable of returning to his duties as a mail carrier, and that he was not in any need of treatment, neither a candidate for surgery, nor vocational rehabilitation. Dr. Reed denied all evidence in reference to the MRI and CT scans and stated in his report. "*All in all, Mr. Miyashiro is a healthy 38 year old male.*"

Dr. Watanabe became outraged at Dr. Reed's report and recommended proceeding with the shoulder surgery for the removal of the staple.

Based on Dr. Reed's medical opinion, on April 21, 1989, Howard received a letter of proposed termination from the OWCP. Howard immediately requested an extension which was approved. Dr. Watanabe also received approval for six weeks of pre-surgery therapy of the left shoulder. Although the OWCP approved the pre-surgery therapy, in the last week of therapy, the request for surgery was denied. They also denied any further

medical treatment and told Dr. Watanabe to cease all communications with Howard (as told by Dr. Watanabe).

In August 1989, the OWCP closed Howard's claim based on Dr. Reed's report. In the letter of termination, they stated that "Dr. Watanabe was given the least weight because it supported the claimant." The three physicians who were weighted equally over Dr. Watanabe consisted of the following:

1. *one who had never seen Howard;*
2. *one who did not subscribe to modern diagnostics;*
3. *one who had not read Howard's medical file, but who totally agreed with the opinion of a doctor who had never met Howard.*

The OWCP ordered Howard to seek reinstatement at the nearest U.S. Postal Service within 30 days. Howard contacted the Long Beach Post Office immediately. He gave them a copy of the letter from the OWCP which stated that he was 100% well and should be reinstated. However, the Long Beach Post Office told Howard that before he could be reinstated, he must first undergo a Fitness-for-Duty Exam which was scheduled on October 26, 1989. Even though the OWCP had declared Howard to be completely healthy, the Long Beach Post Office refused to reinstate Howard and stated in their letter: "Based on medical evidence, we have no position within your physical limitations. Postal employment would place your personal health and safety in jeopardy"(sic).

The Long Beach Post Office instructed Howard to submit their letter to the OWCP for the purpose of reopening his claim since he still qualified as an injured worker. They also informed him that once his injuries were resolved, he could seek reinstatement with them again. However, the OWCP refused to reopen his claim, basing their decision solely on Dr. Reed's report, saying that he was completely healthy.

The OWCP informed Howard that if he wanted to reopen his claim, he should submit new medical evidence. In 1989, Howard was examined by Dr. Kent. In 1990, he was examined by Dr. Rabinovich. In 1991, by Dr. Turner. In 1992 and 1993, he was examined by Dr. Liu and Dr. Kay. It should be noted that all physicians listed above are Specialists in the Field of Orthopedics. In addition, Dr. Turner, Dr. Liu, and Dr. Kay are all of Professorial rank, specializing in shoulder injuries. Dr. Turner teaches orthopedics at the University of California, San Francisco and the U.S. Navy Orthopedic Residency Program at the Naval Hospital, Oak Knoll, California. Dr. Liu and Dr. Kay both teach orthopedics at the University of California, Los Angeles. All are also authors of several publications on the topic of shoulder injuries.

The OWCP denied every medical report submitted by Howard. All requests for reconsideration, and one appeal by the ECAB, were denied. The OWCP refused to acknowledge any other physician but Dr. Reed, a retired Orthopedic physician. This created a Catch-22 situation for Howard, having been told by the OWCP to return to work because he was supposedly completely healthy, but on the other hand, he was told by the U.S. Postal Service that he was physically unfit for work because of his injuries. In short, he became a victim of negative bureaucratic obfuscation.

In August 1993, Howard filed a second appeal with the Employees' Compensation Appeals Board. He submitted all new medical reports and evidence to the fact that Dr. Reed was not an impartial physician as stated by the OWCP (he would not accept private patients, or work related injuries in the private sector). It had been discovered that the medical firm that Dr. Reed worked for, Graystone Medical Associates, was owned by Mr. Cox who had a contract to do medical evaluations for the OWCP. Therefore, the OWCP did not pay Dr. Reed for the evaluation of Howard, but to Graystone Medical Associates which made this medical report invalid.

His case was docketed by ECAB in November 1993, and a oral hearing was scheduled for June 15, 1994. Howard's wife and representative, Kerstin, pointed out

several improper actions and technical errors by the OWCP which were recognized by the Board during the hearing. When the Board asked the OWCP attorney for a clarification of several technical errors and improper actions, she merely stated: "I have no defense." Based on the evidence presented, and the lack of defense, the Board should have rectified Howard's case right away.

The Board took over four months to make a decision. However, the Board did not finalize his case. Instead, the Board remanded Howard's case back to the OWCP in San Francisco and gave the District Office full discretion to determine Howard's case.

On November 4, 1994, Howard filed a Motion for Reconsideration based on the fact that the Board had not made a final decision based on the evidence presented. Under 5 USC 8149 it clearly states that the ECAB shall make a final decision on appeals taken from determinations and awards with respect to claims of employees.

Howard's case was pending with the Board to January 18, 1995. However, already on January 5, 1995, Howard received a letter from a Dr. Pad Krishna in Lakewood, CA which stated that the OWCP had scheduled a medical evaluation for him on January 17, 1995. A letter "Statements of Accepted Facts" regarding his claim had already been sent to Dr. Krishna on December 29, 1994 in which the Ms. C. Connor asked for a Second Medical Opinion. In her letter she stated in bold print: *"It is significant to note that Dr. Nussdorf and Dr. Reed (the second opinion and the Referee physicians) both noted the placement of the staple based on X-rays; and neither physician felt that placement of the staple was a problem at the time of their evaluations in 1988 and 1989" (sic).*

On January 6, 1995, Howard received a letter, dated January 3, 1995, from Ms. C. Connor, Senior Claims Examiner at the OWCP which confirmed the appointment at 1400 on January 17, 1995. She stated: " **This appointment is necessary to determine the relationship between your condition and factors of your employment the extent and degree of any disability or residual effects of your work related condition**" (sic).

Howard's representative called Ms. Connor to ask what was going on as his case was still pending with the Board in Washington, D.C. However, Ms. Connor denied that she had any knowledge of Howard's case. She informed Kerstin that she was indeed not a claims examiner, but an instructor at the OWCP and had nothing to do with claims, or scheduling medical exams. She explained that she was not even in the same department as the claims examiners. Yet, Howard had a signed letter from her which she adamantly denied that she had written and signed. Furthermore, Howard found several letters in his case record written by Ms. C. Connor. If Ms. Connor is not a Claims Examiner, this most certainly indicates fraud by the Office. Since no one knew who had actually scheduled this appointment for Howard, it required several phone calls to find someone who could explain this action (as Howard had not yet been assigned a claims examiner due to the fact that his case had not been released back to the District Office). Finally, Kerstin spoke to Claims Examiner Mr. Al Lopez, who had no clue of Howard's case. Yet, he knew that an appointment had been made with Dr. Krishna. She asked him how they could order Howard for a medical evaluation if his case had not yet been finalized in Washington, D.C. Mr. Lopez could not answer that question. Nevertheless, he strongly suggested that Howard should keep his appointment. It was evident that the OWCP attempted to deny his claim, without a claims examiner involved, before the final decision from the Board.

On January 10, 1995, Kerstin called Dr. Krishna's office to confirm the examination. His office informed her that they had not received any medical records of his case. Kerstin explained to his office that since his case was still pending with the Board, no records could be released. However, she told his office that she would bring in his MRI and CT scans the next day.

On January 11, 1995, when Kerstin arrived at Dr. Krishna's office, the nurse/receptionist told her that the OWCP had mailed his records which had arrived that morning. Kerstin asked to see which medical records the OWCP had provided Dr.

Krishna. Howard's case file consisted of 14 medical reports, but what Dr. Krishna had received from the Office was only two medical reports, those of Dr. Reed and Dr. Nussdorf, appointed by the OWCP. All the other medical reports, such as those from Howard's own physicians, as well as the reports by physicians appointed by the OWCP, had not been submitted. Again, this was an improper action by the OWCP; influencing an Impartial Medical Specialist by submitting only two fabricated medical reports. It was clearly an attempt of causing a conflict in his case.

On January 13, 1995, Kerstin called the Board and was informed that Howard's case was still pending, that his case file had not yet been released back to the District Office. On January 17, 1995, Howard was examined by Dr. Krishna. While Howard was under the impression that Dr. Krishna was going to examine all his injuries, neck, left shoulder and back, as stated in the letter from the OWCP, Dr. Krishna told Howard that he was ordered by the OWCP to only examine the shoulder. This was contrary to Howard's letter from Ms. Connor which stated ... "any disability or residual effects....." The OWCP's letter to Howard did not specify shoulder only.

On January 18, 1995, Kerstin spoke to the Secretary of the Board, Mrs. McKenna, who informed her that Howard's case was still pending with the Board. Kerstin told Mrs. McKenna that the OWCP in San Francisco had ordered Howard for a medical evaluation the day before, and that the doctor had received medical reports of his case. Mrs. McKenna told Kerstin that it could not be possible for the District Office in San Francisco to supply the doctor with Howard's records, as his case was still pending, and therefore out of their jurisdiction. She told Kerstin that under no circumstances could the Board release his records while his case was pending, nor could there be any copies made of his case file. Mrs. McKenna could not explain what had occurred and told Kerstin that she would talk to one of their staff attorneys who called already the next day.

On January 19, 1995, Ms. Valerie Evans Harrell called and introduced herself as the Supervisor of the Staff Attorneys at the Board. She told Kerstin that the Board had

issued an Order for the Motion for Reconsideration (which was filed November 4, 1994) in the afternoon of January 18, 1995, and that Howard should soon receive a copy of the Decision.

Mrs. Evans'Harrell could neither explain what was going on with the OWCP and the scheduled medical evaluation by Dr. Krishna. She told Kerstin that the Board has no control over the District Offices, but this seemed to be an improper action by the OWCP. She suggested that Howard should file a new appeal in order to raise this issue with the Board. However, that would take another two years of waiting. The medical records submitted to Dr. Krishna were in fact improper copies; a violation of the Privacy Act. On January 24, 1995, Howard received a copy of the Board's Decision which stated: "Accordingly, **IT IS ORDERED** that the petition for reconsideration be and it hereby is denied" (sic).

On February 6, 1995, Howard received a copy of Dr. Krishna's report from the OWCP. The report clarified Howard's left shoulder injury and the issue of causation "*a repetitive mechanical stress on the left shoulder due to loads carried as a mail carrier in 1984, and the placement of the staple in 1986 causing tendinitis and further aggravation of the impingement of the rotator cuff.*" However, the OWCP did not accept his findings and wrote a second letter to him which stated: "**However, this Office requires further clarification of the major issue currently pending on this case**" (sic). Dr. Krishna's reply to the OWCP supported Howard in his claim and once again, for the fourth time, his left shoulder injury was accepted. However, the OWCP did not accept it as the original injury as of 1984, or a residual dilemma from the 1986 surgery, but as a "consequential injury found on April 20, 1993" which was the date of Dr. Kay's report. When Howard later on received a copy of his case record from the OWCP, he found two letters from the OWCP to Dr. Krishna. In a letter dated December 29, 1994, Ms. C. Connor stated: "*In reviewing Dr. Linn's and Dr. Kay's 1993 reports carefully, it is clear that these two physicians continue to assert that the claimant has had ongoing shoulder problems since*

his original period of disability in 1984. They both attribute the claimant's shoulder condition to his employment, which ended in 1984, 9 years prior to the evaluations. As an additional possibility Dr. Liu and Dr. Kay suggest that the placement of the staple may be contributing to his present problems. They have provided some reasons based on the placement of this staple. They both state that regardless of whether the claimant chooses to have the staple removed, the claimant would still be disabled due to his shoulder. It is crucial to keep in mind that the Board did not rule that Dr. Lui and Dr. Kay's conclusion (that the claimant has had ongoing residuals of his shoulder condition) was of sufficient probative value to create a conflict with Dr. Reed. In fact, this particular opinion is no different than the numerous physicians who have attempted, unsuccessfully to establish that the claimant has had ongoing shoulder problems causally related to his employment. The only issue under development at this time is whether beginning in 1993 the evidence establishes that the placement of the staple was somehow causing a new and different problem" (sic). Already on May 3, 1989, Dr. Watanabe diagnosed a "subacromial impingement syndrome" due to the placement of the staple which he had requested to remove, but had been denied by the OWCP. Furthermore, on May 23, 1991, Dr. Turner diagnosed "rotator cuff tendinitis and impingement of the left shoulder due to the staple in the shoulder." In a second letter dated February 1, 1995, from Claims Examiner Ms. Bicek to Dr. Krishna, he was asked again to determine a "different medical condition of the shoulder." However, Dr. Krishna did not find a new, or a different condition of his shoulder. The surgery in May 1995 by Dr. Kay proved that Dr. Krishna was indeed correct in his diagnosis, just as Dr. Watanabe, Dr. Turner, Dr. Lui and Dr. Kay. At the same time, it also provided evidence to the fact that Dr. Reed was a farce in 1988 when he concluded that the placement of the staple was not a problem, or that Howard had no further residuals related to his employment work duties.

Howard's claim was accepted on March 15, 1995. As soon as his claim had been approved, the OWCP threatened Howard in a letter that he would not receive any compensation, including retroactive payments, until a surgery of shoulder had been scheduled.

On May 22, 1995, Howard underwent open-shoulder surgery performed by Dr. Kay. Although this surgical procedure was not expected to last more than an hour, the surgery took five hours to complete. The metal staple, which had destroyed his tendons, was finally removed. Due to his condition, Howard had to spend two nights at the Century City Hospital. Almost a month later on, on July 17, 1995, Ms. Marie Cram, a Registered Nurse at the U.S. Postal Service in San Bruno, sent a faxed message to Howard's claims examiner Ms. Bicek, and demanded to know why the surgery had been approved. In her faxed note she stated: "*Surgery was never authorized and I want to know why it's being performed*" (sic). This certainly indicates the collusion between the OWCP and USPS. Ms. Bicek responded back right away and told Ms. Cram that "*ECAB had remanded on specific issue of shoulder surgery/pin removal*" (sic). Ms. Cram stated that she would review his case next time she comes to San Francisco. It is a known that case records are being removed, sometimes for weeks, from the OWCP which creates interference to impartiality, and a lack of security of case files.

From March 15 to May 22, 1995, Howard made several attempts, via fax and certified mail, to contact the District Director of the OWCP, Mr. Ed Bounds. Howard requested an answer to why his claim had not been restored back to August 1989, and why it no longer included his neck and back injury. Mr. Bounds did not reply. Howard then contacted U.S. Senator Barbara Boxer's office who made an inquiry on his behalf. Mr. Johnny Dawkins, Supervisory Claims Manager at the OWCP, responded in a letter dated May 8, 1995: "**There is no medical or factual basis for compensation prior to the consequential injury found April 20, 1993.**" Howard provided Senator Boxer with proof of his lie: two medical reports, one dated 1989 by Dr. Watanabe and another

medical report dated 1990 by Dr. Rabinovich. It should also be known that the OWCP reimbursed Howard in 1995 for all medical expenses, parking fees, and mileage relating to his shoulder injury between August 1989 and April 20, 1993. The question is, how could Mr. Dawkins state that there were no medical or factual basis for compensation within this time frame when they had all the medical reports which were paid by the Office?

On September 14, 1995, Howard wrote to Mr. Thomas Markey, Director at the U.S. Department of Labor in Washington, D.C. In his letter, Howard asked for a Special Hearing by the National Office to resolve these issues. His certified letter was received by Mr. Markey on October 16, 1995. However, by early December Mr. Markey had not yet responded. On December 7, 1995, U.S. Congresswomen Patsy Mink wrote a letter on behalf of Howard to Mrs. Ida Castro, Assistant Deputy Secretary of U.S. Department of Labor and asked for a clarification of these issues. By January 12, 1996, Mrs. Castro had not yet replied to Mrs. Mink who once again wrote to Mrs. Castro. Mrs. Castro finally responded in a letter to Mrs. Mink, dated January 26, 1996, but gave no clarifications of the issues requested to be resolved, or why Mr. Markey had never replied. Instead, Mrs. Castro stated in her letter that Howard had received a letter dated October 25, 1995, which had "*invited Mr. Miyashiro to submit medical evidence regarding his left shoulder condition.*" Needless to say, Howard never received this letter. However, this letter was later on found in his case record from the OWCP. It was found unsigned with no proof of mailing. He also found a note from Mrs. Castro to Mr. Dawkins, the Supervisory Claims Examiner at the OWCP in San Francisco, the same individual who had denied Howard his retroactive benefits from 1989 to 1993, the reason why it had reached the desk of Mrs. Castro. In her O-mail note, she asked Mr. Dawkins to draft her a letter, ready to sign, to Mrs. Mink regarding Howard's case.

On February 5, 1996, after receiving the letter from Mrs. Mink, well within the one year time limit from the denial of retroactive benefits, Howard filed for a

Reconsideration with the Office in San Francisco. He once again submitted the same medical evidence, between August 1989 and April 1993, which he had already mailed twice to them during the spring/summer of 1995. The Office had 90 days to make a decision. In this case, the Office should have made a decision on or before May 8, 1996. In the meantime, however, Howard had to request for a hearing in his case as the OWCP terminated his benefits as of March 30, 1996. Howard patiently waited 29 days, from March 30th, 1996, to request a hearing so that the Office would have time to make a decision in his request for reconsideration. However, Howard received a letter from OWCP, dated May 7, 1996 (one day from the 90th day), in which the Office informed him that his case had been transferred to the Branch of Hearings and Review in Washington, D.C. It stated in the letter that since Howard had requested a hearing, they were unable to make a decision in his case. On May 14, 1996, Howard contacted the Branch of Hearings and Review who told him to fax them a letter, asking them to remand his case file back to the Office so that a decision could be made before his case reached a Hearing Officer. Howard faxed the letter immediately. On May 22, 1996, Ms. Ivy Thomas at the Branch of Hearing and Review called Howard and informed him that their office would make the decision, instead of the Office in San Francisco. She told Howard that the decision would be made within seven days and that his case had been assigned to a claims examiner, Mr. Gary Clemons. No decision was made within seven days. In the following week Howard discovered that Mr. Clemons was no longer at the Branch of Hearings and Review.

On June 10, 1996, on behalf of Secretary Reich, Mr. Shelby Hallmark, Acting Director at the U.S. Department of Labor in Washington, D.C. wrote a letter to U.S. Congressman Steven Horn of Long Beach, CA: *"In regard to the claim for a consequential condition, Mr. Miyashiro asked that his case be returned to the San Francisco District Office so that his request for reconsideration can be adjudicated. This course of action, however, would delay substantive action on his request for a hearing on*

the termination decision. OWCP has therefore assigned the request for reconsideration to a Senior Claims Examiner in the OWCP's Branch of Hearings and Review, where the case is currently located. This examiner will be someone other than the Hearing Representative assigned to the reemployment issue. The issue of reemployment will be fully addressed in the context of the hearing, and nothing which follows should be construed as affecting the outcome of either this hearing or Mr. Miyashiro's reconsideration request. Each case is considered on its merits, based on the law and the facts of the case. During the summer of 1996, Howard contacted the Branch of Hearings and Review, inquiring about the status of his request for reconsideration in regards to the retroactive benefits. However, the Branch of Hearings and Review finally told him that they didn't rule on initial decisions, that such requests were only handled by the District Office. Howard faxed them the letter from Mr. Hallmark which clearly stated who was going to make that decision. Nonetheless, no decision was ever made in his request for reconsideration. An appeal was filed on this issue with the ECAB in January 1997.

Regarding his neck and back injury: on June 16, 1995, Howard received a letter from the Office which stated that they had accepted his claim for the neck and back injury. Based on this letter, Howard was examined on July 5, 1995, by Dr. Robert Pashman, a spine specialist at the Spine Institute in Los Angeles, CA. He immediately requested approval for MRI as Howard's scans from 1988 were too old. However, the Office denied his request and informed Dr. Pashman that Howard's neck and back injury were not accepted. On July 16, 1995, Howard received a letter from his claims examiner which stated that the Office had made a mistake by approving his back and neck injury. Howard was denied appeals right. On March 8, 1996, well within the one year time limit from the denial of his appeals right, Howard filed a request for reconsideration. However, the OWCP never responded to this request. Since the return of his case file in late October 1996, Howard called the OWCP numerous times to find out what happened to his two requests for reconsideration. No one ever returned his calls. In November

1996, U.S. Congressman Steven Horn of Long Beach, CA wrote a letter of inquiry on behalf of Howard to the OWCP in San Francisco. Howard finally received a letter, dated December 19, 1996, from a Reconsideration Examiner, Ms. Betsy Miller. She denied his two requests on the ground that Howard had not filed his requests in a timely manner. She stated in her letter that Howard's right for reconsideration began to run on October 28, 1994. What Ms. Miller failed to understand was that these two issues were not part of the appeal in 1993, but were issues that developed some time after the Board's decision in 1994/1995. The first issue concerning retroactive benefit developed in March 1995 and the second issue developed in July 1995. It is evident that the Office grossly erred in their calculation as to when Howard's right to request for reconsideration began.

From the time of the surgery in May 1995 to October 20, 1995, Howard received physical therapy three times per week. On October 20, 1995, Dr. Kay declared Howard permanent and stationary and left medical treatments open for the future. He also submitted all his paperwork to the Office, including the OWCP-5 Form which dealt with work restrictions. Howard was looking forward to return to work and get on with his life.

In mid January 1996, Howard received a letter, dated January 11, 1996, from the Vocational Rehabilitation Supervisor at the Office which stated that Howard had been assigned a Rehabilitation Counselor, Ms. Cynthia Ward. Her position was to help Howard to get back to work at the U.S. Postal Service. In the meantime, however, Howard received a letter from a Ms. Marie Cram, at the U.S. Postal Service, Regional Office in San Bruno, CA. Her certified letter was dated January 4, 1996, but Howard did not receive it until January 19, 1996 (as stamped on the envelope). In her letter, she ordered Howard back to work at his original station in Kailua, Hawaii, on January 27, 1996. By this time, Howard and his wife owned a home in Cypress, CA. It was impossible for Howard and his family to move back to Hawaii on one week notice. According to FECA, he should have been offered a 30 day notice. Howard wrote back to Ms. Cram on January 20, 1996, and asked for a 30 day extension. On January 31, 1996,

Howard received a second letter from Ms. Cram in which she gave an extension to February 2, 1996, which only gave him two days to make a decision. She stated: *"You are expected to return the job offer and/or report to Honolulu by February 2, 1996 for the job offer, unless you have given accepted reason for an extension. A refusal to respond to the job offer by February 2, 1996 is considered the same as a job refusal."*

She also ordered Howard to report to Dr. Brian Tang, Postal Contract Physician in Long Beach, CA at 0800 on February 1, 1996, for a medical evaluation and a drug-screening test, even though Howard had not yet accepted or rejected the job offer. No physical exam was ever performed. Howard was subjected to a drug-test and was told by the office staff that he was a "Special Handling Case," therefore he was not permitted to walk by himself, or carrying his own file, like the others who were there for the same reason. A couple of weeks later on, Howard requested a copy of the result of the drug-test, but was denied by Dr. Tang's office. He was told that it was an order from the U.S. Postal Office in San Bruno, CA not to release this information to him.

On February 2, 1996, Howard mailed a letter to Ms. Cram in which he told her that he was unable to make a decision since he had not yet received the Relocation Packet, nor had he heard from his claims examiner. Ms. Cram accused Howard of "playing games" and she also accused Howard's mailman of throwing away his mail. The following day, however, Howard received a letter from his claims examiner, Ms. Jane Bicek, who gave Howard 30 days from the date of her letter, February 1, 1996, to make a decision. Yet, on February 8, 1996, Howard received a third letter from Ms. Cram which stated that he had up to February 9, 1996, which gave him only 1 day to make a decision. Unless Howard could give a good cause for rejecting this job offer, she stated that he would lose his compensation, Schedule Award, and any future reinstatement with the U.S. Postal Service.

From the first appointment with his Rehabilitation Counselor, Ms. Ward, it was evident that her purpose was not to help Howard in returning to the U.S. Postal Service,

but to put pressure on Howard to either accept or reject the job offer in Honolulu. She called him day and night and asked him if he had made a decision. Finally Howard told her not to call anymore as he had 30 days to make up his mind. When Howard asked her for her assistance in finding work where he lived, she merely told him that he would have to look for himself, that she worked under the direction of Ms. Cram, even though Ms. Ward was under contract with the U.S. Department of Labor, who paid her \$65.00 per hour.

The Law clearly states that injured workers must be offered a position where they reside, not to exceed 40 miles and/or 1 hour commuting time. However, moving back to Hawaii would cause a great financial burden for him and his family. It should also be known that the U.S. Postal Service had just opened a new plant, just 10 minutes away from his residence. According to the APWU President, Mr. Cantu (Orange County) and APWU National Representative Mr. Norman Wright (Los Angeles County) there were several openings available for Howard (since that time, there have been hundreds of openings available). In spite of this information, the OWCP in collusion with the USPS, refused to search for job opportunities in the County of Los Angeles, and Orange County, CA.

In a letter dated February 13, 1996, Howard informed Ms. Bicek that he was financially unable to accept this job offer unless the U.S. Postal Service would pay for all the expenses involved in order to re-establish himself and his family in Hawaii. He explained that he had recently purchased a home in Cypress, CA and could not sell without a loss: that his two children, age 16 and 17, were well established in school. His 17 year old son had already been accepted to the California State University at Long Beach for Fall 1996 under Federal Student Aid, and a State University Grant. His wife could not easily find employment, especially since her company didn't have any offices in Hawaii. He explained in his letter that if he had to move back to Hawaii, he would never be able to purchase a home again due to the increased real estate value since his move in

1986. He would not even be able to find affordable housing, renting a home solely on his income as a mail carrier, as rent would be the same, or higher than his monthly mortgage in Cypress, CA. He enclosed a "Hawaii Real Estate Market Analysis" which showed that the average home remained around \$350,000 for a single family home. Howard also provided Ms. Bicek with evidence of the high cost of education in Hawaii. The tuition fee at the University of Hawaii was in 1996 \$2,500 per semester, compared to Cal State Long Beach at \$908.00 per semester. Neither of Howard's children would be able to proceed with their education in Hawaii. With only \$2,000 in savings, such a move to Hawaii with his family and three dogs would be financially prohibitive.

In his letter, he also quoted FECA 2-814 which states that the claims examiner should consider the availability of the employment which is usually evaluated with respect to the area where the injured employee resides at the time the determination is made, rather than the area of residence at the time of the injury. In this case, Ms. Bicek did not consider anything of the above, but merely followed the directions of Ms. Cram at the U.S. Postal Service.

As advised by Ms. Bicek, Howard contacted Mr. Bill Cole, Financial Analyst at the U.S. Postal Service in San Bruno, CA. Mr. Cole verbally stated to Howard that it *"didn't required a financial wizard to figure out that this job offer would be financially impossible"* since the post office would only pay for airline tickets, moving of household goods, including one car, and 30 days of temporary lodging. Howard would not even be able to financially survive for one month, having to pay his mortgage in Cypress and rent after 30 days in Hawaii. Howard and his family would be destitute. (Due to the waiting of decisions from the OWCP and ECAB from 1996 to the present, Howard and his wife had to file for bankruptcy in early 1998 in order to save their home in Cypress.)

Howard was offered a job within his physical capabilities. However, the offered position required that he and his family relocate from California to Hawaii after ten years away from the Islands. Even though the U.S. Postal Service would pay for the

transportation and 30 days of temporary lodging, the OWCP did not consider whether the relocation was financially prohibitive. According to FECA concerning Agency Job Offers, it states in Section 6c(1) that "*other factors in addition to those outlined in section 5f should be considered in evaluating reasons offered for refusal, such as, the cost of relocation is financially prohibitive.*" In previous cases, the ECAB have found that the phrase "*cost of relocation*" necessarily includes the cost of finding affordable housing in a new area and not merely the actual cost of moving. It is evident that the OWCP did not consider the costs involved in establishing a new residence. For example, with only \$2,000 in savings, Howard would not have the funds to transport two additional cars, his pets and quarantine in Hawaii, or have any funds for the first month rent and a security deposit (usually the last month rent), to pay for the hook-up of utilities, car insurance, and all other normal requirements in order to establish a home. He also pointed out that the Relocation Packet did not include relocation to Alaska and Hawaii which was never recognized by the OWCP.

Ms. Bicek denied all his reasons. In her letter she stated that his children could live on their own, not considering that his children were still minors. She stated that Howard's lack of savings was not a valid reason for refusing the job offer (after the OWCP had financially devastated his life over the years). Concerning the financial obligation of his home, she merely stated that the Agency would pay transportation of a "mobile home." But, Howard does not own a mobile home. Consequently, Howard's benefits were terminated on March 30, 1996 on the ground that he refused acceptable work.

Furthermore.....

On April 29, 1996, Howard requested a hearing with the Branch of Hearings and Review in Washington, D.C. as such requests must be filed within 30 days. The issue was based on the termination and improper restoration, not being offered a job within his

commuting area. U.S. Congressman Stephen Horn of Long Beach, CA forwarded Howard's request for a hearing to the U.S. Secretary of Labor, Mr. Robert Reich, on May 10, 1996.

Thanks to Congressman Horn, the Branch of Hearings and Review expedited the hearing date which was scheduled already on July 18, 1996, in the Federal Building, Los Angeles, CA. The Hearing Officer was Mr. Joe Baumgartner. Howard's wife and representative presented the same evidence and reasons and clearly pointed out why this relocation would be financially prohibitive. She used the case of Ricardo G. Contreras in which the ECAB had found that the Office had improperly determined that the appellant was not entitled to compensation because he refused to accept a valid job offer due to financial hardship. However, Mr. Baumgartner used the case of Carl N. Curts who had refused a relocation job offer from Olympia, WA to San Diego, CA. which was not of the same nature, or issue as in Howard's case. The difference was that Mr. Curts used medical reasons for not being able to move. He stated that his children were emotionally unstable; there were nonemployment-related medical conditions, such as his wife was suffering from leukemia, diabetes and depression. Mr. Curts and his family didn't want to move to San Diego because of the high crime rate in that area. In this case, the appellant preferred to live in the State of Washington. He was unable to provide sufficient medical evidence to prove that he was unable to perform the offered clerk position, or that there were medical reasons for not returning to San Diego. In Mr. Curt's case, it was not a matter of being financially incapable of relocating from one place to another. Yet, Mr. Baumgartner stated in his decision that Howard's reasons for declining the job offer were the same as in Mr. Curts case, as it involved only his preference for his current place of residence, rather than financial concerns. Howard received the decision of denial on October 26, 1996, dated October 17, 1996.

During the summer of 1996, Howard received a letter from Mr. Clemons at the Branch of Hearing and Review. In his letter, dated June 19, 1996, he informed Howard

that he may be eligible for a Schedule Award and that he should see his physician for a determination of the degree of his shoulder injury. This was indeed unexpected as Howard's claims examiner, Ms. Bicek, had stated in her letter in March 1996 that he had forfeited his right for a Schedule Award because he had rejected the job offer in Honolulu. However, all the necessary forms and instructions were attached to the letter. The letter also stated that the medical report had to be completed and returned to the Branch of Hearings and Review within 30 days. He advised Howard that if the requested medical evidence was not submitted within 30 days, there would be no basis for computing an award, and no further actions would be considered. It should be known that it is not an easy task to locate a physician who is willing to make such a determination of calculating a degree of injury according to the AMA Guidelines. Of all the doctors Howard called (about 15 orthopedics, including UCLA), Dr. Krishna was the only one willing to do it, but only after his scheduled vacation in July. The completed medical report was forwarded in the last moment to Mr. Clemons in July 1996. However, Dr. Krishna had not been permitted by the U.S. Department of Labor to calculate the percentage - only to rate the measurements according to the AMA guidelines. Kerstin called Mr. Clemons and asked him why the doctor had not been allowed to give the percentage. Mr. Clemons informed Kerstin that their office would conclude the percentage based on the measurements in the report.

It spells out very clear in the Federal Employee Compensation Act Manual that the physician must include a percentage rate based on his measurements. Kerstin called Dr. Houston at the AMA in Chicago (who specializes in the Guidelines) and asked him who should determine the percentage rate. Dr. Houston informed her that the examining physician is the one who must calculate the percentage.

In September 1996, Kerstin called Mr. Clemons and asked about the status of the Schedule Award. She was told that Howard's medical file had been forwarded to their District Medical Advisor for an evaluation. Howard received a letter dated October 9,

1996, which merely stated that since Howard had been subjected under a penalty code on March 25, 1996 (for rejecting the job offer in Hawaii), he was not entitled to a Schedule Award.

On January 17, 1997, Howard filed two new appeals with ECAB, one for the wrongful termination/improper job restoration, and the other for the retroactive pay from 1989 to 1993. In conformance with the Board's Rules of Procedure, a copy of the Application for Review was served on the Director of the OWCP who was allowed 60 days, as of February 13, 1997, to forward the case record to the Board which should been received by April 13, 1997. However, when Kerstin called the Board on July 11, 1997, the Board had not yet received Howard's case file. His case record was finally received by the Board in the following week. It is expected that his oral hearing will take place in January 1999.

Mr. BURELLI. Yes, my name is Anthony Burelli, presently residing in Westminster, CA. My former employer was the Department of the Navy, Long Beach Naval Shipyard from March 1992 to March 1994. My former occupation was journeyman marine electrician. Reason for leaving: terminated due to disability. My prior employment was McDonnell Douglas C-17 program, and my occupation was avionics/electrical systems technician. My reason for leaving there was just a RIF. I am a veteran of the Vietnam era, 1969 to 1972 with the U.S. Marine Corps. I have a high school education, 2 years of college, plus USMC avionics and electronics.

Though the following information appears lengthy, it represents a shallow endless summary of the nightmare which this injury has escalated into.

Soon after the layoff from the McDonnell Douglas C-17 program, I applied for the Long Beach Naval Shipyard advertised electrician positions. I was interviewed and hired.

Eventually I was assigned to the major overhaul of the U.S.S. *Peleliu*. My primary duties focused on the RAM, Sea Whiz, and TAS radar. As overhaul progressed, duties expanded into CIC and Engineering. Toward completion, I was asked to participate in a 5-day sea trial scheduled for February 1, 1993 through the 5th. Due to repercussions of not participating, I decided it was in my best interest to participate.

On February 3, I sustained an injury to my left knee. The onset of severe swelling and progressive pain prompted me to see the U.S. Naval medical officer on board. Due to the severe swelling, he cut my pant leg to view the injury. Suspicion of blood clotting prompted the Naval physician to restrict me to 24-hour bed rest for the duration of sea trial. My immediate superior elected to ignore the physician's strict 24-hour bed rest and directed me to continue working.

On the evening of February 3, the medical officer felt it was necessary to locate me, making sure, in his words, I was still alive. On February 4, additional swelling, discoloration, and cramping prompted the medical officer to request an air lift back to Long Beach Naval Shipyard, however, the flight deck was not certified. I explained the reason for the additional swelling was due to the supervisor directing me to continue working. The medical officer confronted my superior and explained the immediate danger and consequences involved.

Upon return to the Long Beach Naval Shipyard, the medical officer instructed me to have somebody take me to the dispensary. There, I was seen by Dr. Edgar Brionnes, who immediately ordered x rays and administered pain medications. Dr. Brionnes indicated negative bone damage; however, his immediate concerns were fears of blood clotting and tissue damage, recommending an MRI and Doppler vein scans. He instructed me to return home and return on the following Monday to be examined by Dr. Wanda Lopez, whose immediate response was to have me seen by an orthopedic specialist and recommended an MRI with venogram.

Dr. Lopez notified the Long Beach Naval Shipyard compensation office to obtain an appointment with medical group under contract with the Long Beach Naval Shipyard. The compensation clerk scheduled the appointment for February 10 and instructed me to

continue regular duties until appointment. On February 8, 1993, it was necessary to have me escorted back to the dispensary due to inability to walk. Dr. Lopez was completely unaware of the instructions to return me to regular duty which caused further damage to the left leg. She then placed me on 24 hour bed rest until appointment date with Dr. Mizuguchi.

On February 10, 1993, I was seen by Dr. Tomoji Mizuguchi. His immediate response was to request authorization for diagnostic tests; however, I did not receive these authorizations until February 19, then scheduled for the 22nd. According to Dr. Mizuguchi, his office is instructed by the Long Beach Naval Shipyard compensation office to return Long Beach Naval Shipyard employees to work until results of testing are completed, regardless of diagnosis or recommendations of physicians.

The March 3, 1993 appointment with Dr. Mizuguchi indicated the results of the MRI testing were positive, having a tear of the posterior horn in the medial meniscus, ganglion cyst, and possible bone fragments. Dr. Mizuguchi submitted the MRI results, along with a second request for venogram prior to surgery for fear of blood clot formations, thrombophlebitis. Deep vein studies with Doppler were requested; however, only a sonogram testing was authorized. Surgery was requested on March 3, 1993 but not received until approximately April 28, 1993, scheduling surgery for May 3. Positive results of diagnostic tests prompted Dr. Mizuguchi to return me to work, restricted to light duty, modified duties only until surgery. Additionally, he recommended that if modified duties could not be accommodated, I would be placed on workers' compensation and sent home to avoid further injury and damage.

After surgery, Dr. Mizuguchi indicated only 6 weeks was allocated by the Long Beach Naval Shipyard for post-op physical therapy, where at such time I was to return to work regardless of prognosis. Dr. Mizuguchi indicated due to the extensive damage in the knee and suspicion of deep vein thrombophlebitis, recovery may take 8 months to 1 year, providing his recommendations for treatment and physical therapy were followed with no outside interference.

From May 4, 1993, to June 22, 1993, attendance at physical therapy produced negative results due to continuing complications. Dr. Mizuguchi requested deep vein diagnostic testing with Doppler; however, it was never authorized by the shipyard.

With continuing complications, I scheduled additional appointment with Dr. Mizuguchi on July 1, 1993. During this appointment, he indicated discontinuing his 20-year practice and returning to Japan, and this would be his last visit, referring me to another physician. He assumed the Long Beach Naval Shipyard informed me of his departure, however, the compensation clerk denied knowledge of this.

Additionally, she insisted I see another physician with the same group. I wanted to choose a physician of my own and her response was due to the location of your injury occurrence, the Department of Navy would not assume responsibility for the injury, medical treatments and medication. You must remain under the care of our physicians. I also submitted my health insurance eligibility papers and her immediate response was once injured, you are no longer

eligible for health insurance enrollment through the Federal Government. To date, my family does not have any type of health insurance coverage thanks to the Long Beach Naval Shipyard compensation clerk. By the time I discovered all information given me was totally erroneous, health insurance enrollment period expired.

Soon after contacting union representative about this situation, I decided it was time to get educated about regulations and laws. In a letter dated July 19, 1993, addressed to the Department of Labor, OWCP claims examiner, I elected to exercise my right to a physician of my choice. In a letter dated July 30, the OWCP claims examiner authorized the change of physician.

On August 13, Dr. Richard Mulvania held initial evaluation, reviewing medical records with physical examination and concluded that due to continuing complications of the left knee and leg, additional diagnostic testing was necessary. He requested the authorization for second MRI, however, did not receive it until August 25 and then scheduled it for August 29. The results of MRI received September 7, at which time, Dr. Mulvania evaluated and explained extensive damages of the left knee which consisted of horizontal cleavage tear of the medial meniscus extending from the anterior to posterior horn, transverse tear in the middle one-third of the lateral meniscus with excessive shredding. Dr. Mulvania submitted the results of the test along with recommendations for immediate surgery and requested authorization for surgery. After numerous phone calls from the doctor's office staff, the claims examiner finally authorized it on October 25, 1993, and then scheduled for November 3, 1993.

October 29 was my last day of work prior to surgery on November 3. I phoned the claims examiner at OWCP to ensure that paperwork for compensation was received. The claims examiner indicated she had not received documents from the Long Beach Naval Shipyard compensation clerk. At that point, I encouraged her to contact the Long Beach Naval Shipyard compensation office to inquire. I also forewarned her about the abusive claims clerk and suggested speaking with a supervisor. The OWCP claims examiner called me back and explained her ordeal with Long Beach Naval Shipyard clerk and apologized to me for her disbelief and hoped she did not make animosities between myself and the compensation clerk worse.

On November 8, I was taken to Dr. Mulvania's office due to excessive cramping in the lower left leg, swelling, discoloration, tenderness, and inability of weight bearing. Exam indicated symptoms of thrombophlebitis, prompting Dr. Mulvania to recommend emergency care and immediate deep vein studies. Doppler studies indicated deep vein thrombophlebitis. Dr. Bassam Assassa was asked to assume treatment and placed me in the hospital for 9 days. Released from the hospital, I continued to be monitored by Dr. Assassa on anticoagulants. Post-op physical therapy for knee postponed pending treatment for blood clots. Began physical therapy on January 5.

On April 4, 1994, I received a letter from the Long Beach Naval Shipyard. It was an SF-50 NOPA. I was being terminated from employment due to disability. Following this letter, I began a combined 4-year process with MSPB and EEOC.

Additionally, I was assigned to a nurse through OWCP nurse intervention program. However, after several inquiries and confrontations with the compensation branch concerning terminated employment, the nurse was abruptly withdrawn from my case. However, her detailed report indicated the employing agency never had made a bona fide attempt to accommodate medical restrictions and never had any intentions of returning me to some type of job.

On June 17, 1994, in a visit to Dr. Mulvania, I was diagnosed with cellulitis of the left leg with no lymphangitis, secondary to periostosis, directly related to the phlebitis. Physical therapy was halted until the spreading cellulitis was under control; however, the residuals of the cellulitis left severe scarring.

Due to numerous therapy authorization denials, I have deteriorated and it has affected both hips, causing lost range of motion in left knee and hips with excessive pain and joint degeneration.

In a January 25, 1995, narrative medical report from Dr. Mulvania to the claims examiner indicating severe depression and anxiety symptoms, the recommendation for psychological treatments would reduce the effects of depression and anxiety and further delay in authorizing needed medications was unnecessary.

On December 27, 1995, I was taken to the emergency unit at Pacifica Hospital and placed in ICU for 3 days due to severe chest pains, an irregular heart rate, and labored breathing.

A January 5, 1996, narrative medical report from Dr. Michael Carlos, cardiologist, mentions the onset of psychological conditions such as anxiety, depression, excessive stress, and strongly recommended psychological treatments.

An April 2, 1996, second opinion medical report from Dr. John Brown, examining physician for OWCP, concurs with Dr. Mulvania and also emphasizes the need for psychological treatments due to his diagnosed symptoms of severe depression, anxiety, and stress from the traumatic injury.

In February 1996, I was forced to seek psychological help for the escalating depression, anxiety, and panic attacks. The current treating psychologist is Dr. Carl Wells. Additionally I was advised to apply for Social Security disability and Medicare. Numerous orthopedic examinations along with diagnostic testing have since supported the deteriorating hip joints and can be unequivocally credited to the injury of February 3, 1993.

On April 2, 1997, I was examined by Dr. Warren Taff, psychiatrist and OWCP second opinion physician. Dr. Taff concurred with Dr. Wells' treatment, however recommended antidepressants as well as antianxiety medications.

The above medical information is based on documented accurate facts during the history of the claim, and supplies no information concerning hidden agenda, nonmedical administrative adverse practices. All information can be supported by documents upon request.

Thank you.

Mr. HORN. Well, we thank you. Now it took 4 years I guess from the actual injury to get the kind of help you needed, is that correct?

Mr. BURELLI. Approximately 4 years. The hidden agendas in between that caused a lot of internal family problems, prompting the psychological. And it continues, it has not lessened. To date, with

my case, I have seen 21 doctors and they all concur, all reports concur, from Lieutenant Scanal aboard the U.S.S. *Peleliu* to present. And it has not ceased, but yet I have had stigmatizing labels and categorized as a fraud, even though all these medical reports state unequivocally that the information gathered from diagnostic tests and professional doctors is accurate and true. And according to the law, you are granted an OWCP claim as long as the medical evidence supports this. Well, I do not know how much more support they need, you know. What is it that they want? This is what I am looking for.

Mr. HORN. That is a good question, we will see if we can procure the answers sometime today or later.

Roger Euchler is a letter carrier with the U.S. Postal Service. Mr. Euchler.

[The prepared statement of Mr. Burelli follows:]

June 28,1998

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SUMMARY

Though the following information appears lengthy, it represents a shallow endless summary of the nightmare which this injury has escalated into.

Soon after layoff from the MCDONNELL DOUGLAS C-17 program, I applied for LBNS advertised Electricians positions, interviewed and hired.

Eventually assigned to the major overhaul of the USS Peleliu. Primary duties focused on the RAM system, Sea Whiz and TAS radar. As overhaul progressed, duties expanded into CIC and Engineering. Towards completion I was asked to participate in the 5 day sea trial scheduled for February 1,1993 to February 5,1993. Due to repercussions of not participating I decided it was in my best interest to participate.

On February 3,1993 I sustained an injury to my left knee. The onset of severe swelling and progressive pain prompted me to see the U.S. Naval medical officer onboard. Due to severe swelling, he cut pant leg to view injury. Suspicion of blood clotting prompted the naval physician to restrict me to 24hr best rest for the duration of sea trial. My immediate superior elected to ignore the physicians strict 24hr bed rest and directed me to continue working. On the eve of February 3, the medical officer felt it was necessary to locate me making sure, in his words, "you were still alive". On February 4, additional swelling, discoloration and cramping prompted the medical officer to request an air lift back to LBNS however the flight deck had not been certified. I explained the reason for the additional swelling was due to supervisor directing me to continue working. The medical officer confronted my supervisor and explained the immediate danger and consequences involved.

Upon return to LBNS, the medical officer instructed me to have somebody take me to the dispensary. There I was seen by Dr. Edgar Brionnes. He immediately ordered X-rays and administered pain

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medication. Dr.Brionnes indicated negative bone damage however his immediate concerns were fears of blood clotting and tissue damage recommending MRI and Doppler vein scans. He instructed me to return home and return on the following Monday to be examined by Dr. Wanda Lopez.

Dr.Lopez immediate response was to have me seen by a Orthopedic Specialist and recommended a MRI with Veinogram. Dr. Lopez notified the LBNS compensation office to obtain an appointment with medical group under contract with the LBNS.

The compensation clerk scheduled the appointment for February 10,1993 and instructed me to continue regular duties until appointment. On February 8,1993, it was necessary to have me escorted back to dispensary due to inability to walk. Dr.Lopez was completely unaware of my instructions to return to regular duties which caused further damage to left leg. She then placed me on 24hr bed rest until appointment date.

On February 10,1993 I was seen by Dr.Tomoji Mizuguchi. His immediate response was requesting authorization for diagnostic tests however did not receive authorization until February 19 then scheduled for February 22,1993. According to Dr.Mizuguchi, his office is instructed by the LBNS compensation office to return LBNS employees to work until results of testing are completed regardless of diagnosis or recommendations of physicians. The March 3,1993 appointment with Dr.Mizuguchi indicated the results of the MRI testing were positive having a tear of the posterior horn in the medial meniscus, ganglion cyst and possible bone fragments. Dr.Mizuguchi submitted MRI results along with second request for veinogram prior to surgery for fear of blood clot formations,thromboplebitis. Deep vein studies with Doppler were requested however only sonogram testing was authorized. Surgery was requested on March 3,1993 but not received until approximately April 28,1993 scheduling surgery for May 3,1993. Positive results of diagnostic prompted Dr.Mizuguchi to return me to work,restricted to lite modified duties only until surgery. Additionally, he recommended if modified lite duty could not be

accommodated, I would be placed on workers compensation and sent home to avoid further injury damage.

After surgery, Dr. Mizuguchi indicated only 6 weeks was allocated by the LBNS for post-op physical therapy were at such time I was to return to work regardless of the prognosis. Dr. Mizuguchi indicated due to the extensive damages to my knee and suspicions of deep vein thrombophlebitis recovery may take 8 months to 1 year, providing his recommendations for treatments and physical therapy were followed with no outside interference.

From May 4, 1993 to June 22, 1993 attendance at physical therapy produced negative results due to continuing complications. Dr. Mizuguchi requested deep vein diagnostic testing with Doppler technology however it was never authorized by LBNS. With continuing complications I scheduled additional appointment with Dr. Mizuguchi for July 1, 1993. During this appointment he indicated discontinuing his 20 year practice and returning to Japan and this would be my last visit referring me to another physician. He assumed the LBNS informed me of his departure however they neglected informing prior to initial appointment. I approached the LBNS compensation clerk and she denied knowledge of this. Additionally, she insisted I see the another physician within the same group. I wanted to choose my own physician. Her response was "Due to the location of injury occurrence and extent of the injury FECA regulations do not permit you to chose a physician. In order for the DON to assume responsibility for injury, medical treatments and medication you must remain under the care of our physicians". I also submitted my Health insurance eligibility papers. Her immediate response was "Once injured, you are no longer eligible for health insurance enrollment through the Federal Government." To date, my family does not have any type of health insurance coverage thanks to the LBNS compensation clerk. By the time I discovered all information given to me was totally erroneous, health insurance enrollment period expired.

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Soon after contacting union representatives about this situation I decided it was time to get educated about procedures, laws, regulations concerning my injury. In a letter dated July 19,1993 addressed to the U.S. D.O.L. OWCP claims examiner I elected to exercise my right to a physician of my choice. In a letter dated July 30,1993 the OWCP claims examiner authorized the change of physician.

On August 13,1993 Dr. Richard Mulvania held initial evaluation reviewing medical records with physical examination and concluded that due to continuing complications of the left knee and leg additional diagnostic testing was necessary. He requested the authorization for the second MRI however did not receive it until August 25,1993 then scheduled MRI August 29,1993. Results of MRI received September 7,1993 at which time Dr.Mulvania evaluated and explained the extensive damages of the left knee which consisted of: horizontal cleavage tear of the medial meniscus extending from the anterior to the posterior horn. transverse tear in the middle one-third of the lateral meniscus with excessive shredding.

Dr.Mulvania submitted results of diagnostic tests along with recommendations for immediate surgery and requested authorization for surgery.

After numerous phone calls from the Doctors office staff, the claims examiner finally authorized surgery October 25,1993 then scheduled for November 3,1993.

October 29,1993 was last day of work prior to surgery on November 3,1993. I phoned the claims examiner at OWCP to insure paperwork for compensation was received. The claims examiner indicated she not receiving documents from LBNS compensation clerk. At that point I encouraged her to contact LBNS compensation to inquire. I also forewarned about the abusive claims clerk and suggested speaking with a supervisor. The OWCP claims examiner called me back and explained her ordeal with LBNS compensation clerk and apologized to me for her disbelief and hoped she didn't make the animosities between myself and compensation clerk worse.

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On November 8, 1993 I was taken to Dr. Mulvanias office due to excessive cramping lower left leg, swelling, tenderness, discoloration and inability of weight bearing. Exam indicated symptoms of thrombophlebitis prompting Dr. Mulvania to recommend emergency care and immediate deep veins studies. Doppler studies indicated deep vein thrombophlebitis. Dr. Bassam Assassa was asked to assume treatment placing me in the hospital for 9 days. Released from hospital November 17, 1993 I continued to be monitored by Dr. Assassa while on anticoagulants. Post-op physical therapy for knee postponed pending treatments for blood clots. Began physical therapy January 5, 1994.

On April 1, 1994 I received a letter from the LBNS. In it was form SF50 NOPA. I was being terminated from my employment due to disability. Following this letter I began a combined 4 year process with MSPB and EEOC.

Additionally I was assigned a nurse through OWCP nurse intervention program. However after several inquiries and confrontations with the compensation branch concerning terminated employment, the nurse was abruptly withdrawn from my case. However her detailed report indicated the employing agency never made a bona fide attempt to accommodate medical restrictions and never had any intentions of returning me to some type of job.

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Due to numerous therapy authorization denials, I have deteriorated and it has effected the hips causing lost range of motion in left leg, knee and hips with excessive pain and joint degeneration. In a January 25, 1995 narrative medical report from Dr. Mulvania to the OWCP claims examiner indicated severe depression and anxiety symptoms. The recommendation for psychological treatments would reduce the effects of depression and anxiety and further delay in authorizing needed medications was unnecessary.

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On December 27,1995 I was taken to emergency unit at Pacifica Hospital and placed in ICU for 3 days due to severe chest pains irregular heart rate and labored breathing.

In a January 5,1996 narrative medical report from Dr.Michael Carlos cardiologist, mentions the onset of psychological conditions such as anxiety and depression and excessive stress and strongly recommended psychological treatments.

In an April 2,1996 2nd opinion medical report from Dr.John Brown examining physician for OWCP, concurs with Dr.Mulvania and also emphasizes the need for psychological treatments due to his diagnosed symptoms of severe depression and anxiety and stress from the traumatic injury.

In February 1996, I was forced to seek psychological help for the escalating depression, anxiety and panic attacks. The current treating Psychologist is Dr.Carl Wells,Phd. Additionally, I was advised to apply for SSD and medicare. Numerous orthopedic examinations along with diagnostic testing have since supported the deteriorating hip joints and can be unequivocally credited to the injury of February 3,1993. On April 2,1997 I was examined by Dr.Warren Taff, psychiatrist and OWCP 2nd opinion Physician. Dr.Taff concured with Dr.Wells treatments however recommended anti depressants as well as anti anxiety medications.

The above medical information is based on documented accurate facts during the history of this claim and supplies no information concerning hidden agenda, non medical administrative adverse practices. All information can be supported by documentation upon request.

Pursuant to 28 USCS ss 1746, I declare under penalty of perjury that the above information is true, correct to the best of my knowledge and belief.

Anthony Burrelli

June 28,1998

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The following testimony is based on actual occurrences and facts from Date of Injury: February 3,1993 to present. It incorporates the March 1996 brief scenario letter to Congressman Horns office.

February 3,1993

Lt. Scannell-Naval medical officer issued me a hand written prescription for strict 24hr bed rest with left leg elevation. I submitted it to my immediate supervisor who blatantly ignored it and directed me to continue working. I filed a complaint against him however it was never addressed.

Why was it necessary for this supervisor to deliberately ignore a physicians medical order especially after the medical officer spoke with him about the danger and consequences of a possible blood clot also why did LBNS condone this action? Obviously, the medical officer suspected extensive knee damage however blood clotting of any sort deserves prompt serious attention even at the precautionary level. I believe the supervisors actions were totally unacceptable and in all probability made a serious condition worse at most jeopardized my life by sending me back to work.

February 5,1993

Dr.Edgar Brionnes examines left knee damage however serious concerns prompted him to recommend Doppler vein studies for fear of a blood clot in lower left leg. His medical report included this recommendation when submitted to LBNS compensation office however it was never addressed. This was the second of 4 physicians to recommend this diagnostic test. Why did the LBNS compensation office ignore these recommendations when they were coming from their physicians?

February 8,1993

Dr.Wanda Lopez examines left knee and lower left leg. Without hesitation contacts LBNS compensation office and expresses serious concerns about possible blood clotting with the onset of cramping,

discoloration and inability to apply weight. She recommends being transported to St.Marys Medical center for immediate diagnostic testing however only received the February 10,1993 appointment for Dr. Mizuguchi and instructs Dr. Lopez to return me to regular duties until appointment date. This is 3 of 4 physicians to express serious concerns with a possible blood clot and to recommend deep vein studies as precautionary measure and once again LBNS fails to give any attention to serious medical opinion. Why was it necessary to ignore diagnosis and recommendations from a Physician qualified to diagnose and attempt prompt efficient medical care? Additionally, in lieu of the serious concerns of the Dr.Lopez the LBNS instructed her to return me to work with no restrictions.

February 10,1993

Sally Wilson, the LBNS compensation clerk instructs me to pick up the documents necessary to see Dr.Mizuguchi, also identifies herself as my claims representative for the duration of the claim. Dr. Tomoji Mizuguchi with the Long Beach Orthopedic Group which was under contract with the LBNS, examines the injury and excessive swelling and discoloration of he left leg and knee. He immediately recommended MRI and Doppler diagnostic test. He submitted his examination report, recommendations for diagnostic testing and request for left knee surgery if needed same day as exam. The Doctor went on to explain the" LBNS procedures instruct him to return patients to LBNS regular duty until scheduled testing and results". Even though Dr.Mizuguchi phoned the LBNS compensation office for verbal authorization he was denied and told they would contact his office with authorization. Once again LBNS compensation office defied medical recommendations and delayed authorization for 9 additional days to February 19,1993 then scheduling for February 22 with results due by March 3,1993 adding a total of 19 days working regular duties with a blood clot and injured left knee. Why would Ms Wilson deliberately ignore and neglect recommendations of 4 medical Doctors ?

Simple review of the 4 episodes above will indicate blatant violations with FECA, title 20 cfr and possible civil rights violations not to mention complete disregard for human life under medical care. Ms Wilson should have been held accountable for abusing her authority ignoring physicians medical opinion during an emergency situation and lack of basic common sense. When approached about this she explained that, "her superiors instructed all compensation clerks to handle injury claims this way due to most injury claims are fraudulent!". I emphasized extreme unacceptable opinions towards these actions and held that office ,her and the supervisors directly responsible for the unnecessary extensive damage to my leg. Her response was "there is nothing you can do about it. We are in control of all medical and you have no rights". Apparently that encounter produced reverse results whereas she didn't authorize surgery until April 28,1993 then scheduling for May 3,1993.

May 4,1993

From May 4,1993 to June 22,1993 I attended Physical Therapy and utilized sick leave to cover 6 weeks post-op recovery however due to continuing complications my left leg and knee deteriorated making me dependent on crutches and knee brace.

Once discovering Dr.Mizuguchi was leaving I called Ms Wilson and requested a change of physician a second time. She refused stating "I was not permitted to select a doctor due the occurrence and extent of the injuries. FECA regulations do not permit you to chose a physician. In order for the DON to continue accepting responsibility I must remain with their physicians".

Why was it necessary to blatantly lie and violate the FECA? The continuing complications should have alerted a higher authority to authorize examination from a specialist however Ms Wilson became a major part of the problem instead of part of the solution and unfortunately I end up as the victim.

Why was it necessary for Ms.Wilson to blatantly lie about my eligibility for medical insurance?

June 19,1993

I composed a letter to Ilene Padar, OWCP claims examiner assigned to my claim. I was exercising my right to a physician of my choice and emphasized the sincere request for a prompt authorization response however it took 11 days to authorize this request. I am not sure why even though I spoke to her first she explained it had to be in writing sent to US DOL, OWCP.

June 20,1993

Follow up visit with Dr.Mizuguchi. He explained LBNS compensation clerk instructed him to return me to work. Reluctant to release me for regular duty he insisted I be placed in a modified lite duty position due to continuing complications or he would place on workers compensation. He also requested authorization for further diagnostic test with Doppler technology for 3rd time. Request was never addressed.

June 22,1993

Returned to LBNS compensation office to report in and I was sent to the Electrical/Electronics department where I was more the qualified for bench work however I was told the supervisor of the department was not allowing injured lite duty personal to work in the building. I was then forced to solicit myself to the transportation department as a dispatcher. The supervisor accepted my medical restrictions and appreciated a dependable employee.

June 29,1993

Received authorization for change of physician.
Scheduled next available appointment with Dr.Richard Mulvania for August 13,1993.
Initial evaluation and examination Dr.Mulvania recommended MRI for the knee. When asked about the severe swelling I explained past procedures of the LBNS compensation office and lack of authorization for further testing or physical therapy and was left in the present condition.
On or about August 15,1993 his report along with request for the authorization for MRI was submitted VIA fax.

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Additionally, a staff member phoned San Francisco OWCP office and left message for Ilene Padar claims examiner requesting the authorization as soon as possible, however the claims examiner felt it was necessary to delay authorization for an additional 12 days then it was scheduled for August 29,1993.

September 7,1993

Results of MRI explained by Dr.Mulvania. He explained the extensive damages of left knee and appeared confused due to prior knowledge of a previous surgery 4 months ago.

The question here is: Why was there so much extensive damage to the knee while the surgery report and procedure of Dr. Mizuguchi indicated repairs to the left knee had been completed and successful? I have been waiting 5 years for an answer to that question.

Dr.Mulvania submitted results of the MRI, his diagnosis and recommendations along with the authorization for a second surgery.In addition to faxing the information, Dr.Mulvania had staff member phone Ilene Padar numerous times in an attempt to secure an authorization as soon as possible due to the serious extent of the injury. Ms Padar responded on October 25,1993 after numerous phone calls which were never returned. Surgery was then scheduled for November 3,1993

*Simple review of the injury history thus far would reveal some startling facts about OWCP procedures, claims handling, medical facts, reponse time and most important the consequences a person suffers because of them.

October 29,1993

Final day of work prior to November 3 surgery.

I phoned OWCP claims examiner and discovered being transfered to another claims examiner, Carol Clayton.

As always claims examiners always try to treat claimants less then favorable. I went on to explain my finical status and to fax my election to utilize whatever sick time Vs Fed employees compensation

due to not trusting Ms Wilson to send paperwork in for compensation.

She explained the difference and suggested using Fed compensation instead. Ms Clayton also volunteered to call Ms Wilson in hopes of having her send papers promptly. I forewarned her concerning Ms Wilson and she went on to explain Ms Wilson and that compensation office operate under OWCP guidelines. She phoned me back and explained the abusive ordeal with Ms Wilson and apologized hoping she didn't make it worse for me.

The next subject was compensation and what equation was used to formulate payment based on the second surgery being a continuing injury or a recurrence. Ms Clayton insisted it was a continuing injury and based my compensation payment on date injury occurred. I objected due to it being a recurrence of the original injury plus I remained employed without a break in service from June 22,1993 to October 29,1993, plus 1 level and 2 grade increases and the applicable colas in between. I offered to forward proof however Ms Clayton refused to look at it.

November 8,1993

Complications in left leg and knee caused an emergency Doctors visit. Upon examination Dr.Mulvania immediate concern and diagnosis was the possibility of a blood clot and immediately sent me to Pacific Hospital Emergency and ordered Doppler deep vein studies. The test revealed dual blood clots lower left leg moving. Dr.Mulvania was informed and immediately had me admitted into hospital where Dr.Bassam Assassa agreed to assume responsibility for medical care. Dr. Assassa explained the danger of the blood clots. I explained several physicians previously diagnosed possible blood clots however testing was never authorized. He went on further to mention, " with blood clots that are moving, waiting for authorization to proceed with the test is unacceptable. A person could be deceased while waiting therefor that is why Dr.Mulvania sent you here.

Why was my life permitted to be placed in jeopardy or compromised

because of a claims examiner unnecessary delay in responding, or blaten neglect and ignorance or lack of common sense? Who would of been held accountable for the negligence and blatant irresponsible, incompetent actions?

Ms Wilson refused to respond to numerous phone calls from me and when finally contacted she was extremely abusive and hostile. Ilene Padar at OWCP refused to comment only stating that she was just doing her job!

Ms Clayton questioned the validity of Dr.Mulvanias diagnosis and prognosis and at first would not allow payment to hospital, staff or Dr.Assassa due to being unconvinced the blood clot developed from the knee surgery. Additionally, Ms Clayton elected to delay authorization for all medications including Coumadin for the treatment of clots. Dr.Assassa and Dr.Mulvania were forced to place phone calls to Senior claims examiners to authorize medications and payments.

Since when does a claims examiner have the authority to make medical decisions with a persons life? The FECA procedure manual does not state nor was it developed with the intentions to give authority to a claims examiner to make medical decisions. Its a total atrocity to condone such actions. I do not believe the AMA would entertain such actions.

Would any member of this committee entertain the idea of a claims examiner making medical decisions on his/her critical care conditions?

It is indeed a frightful thought however OWCP is notorious for these type of primitive practices. One could only imagine the outrageous amount of people whom have already suffered undue consequences due to these actions.

November 17,1993

Released from hospital however remained under care and monitored by Dr.Assassa until January 1994.

Began physical therapy January 5,1994

April 1, 1994

Letter from LBNS contained form 50 NOPA. I was terminated from employment effective March 24, 1994. Terminated due to disability. Following this letter I began a combined 4 year process with MSPB and EEOC.

Claire Haydu-RN was assigned to my claim through the OWCP nurse intervention program however was abruptly removed after several inquiries into employment termination and confrontations with Ms Wilson. Her detailed report supported my EEOC case however I was denied due process and Discovery rights.

June 17, 1994

Diagnosed with cellulitis directly related to surgery and caused by effects of thrombophlebitis.

Medications for cellulitis turned in however not authorized. Called OWCP claims examiner and discovered being transferred to Mike Hummer.

Mr. Hummer can be credited with deliberately not authorizing physical therapy for a 6 week interval. In fact the loss of therapy for that period made recovery impossible and caused unnecessary, irreversible damage which may have accelerated hip joint deterioration.

Due to Mr Hummer never returning phone calls from me, therapy personnel and doctors staff, I was forced to seek help from Congressman Horns office. I have never recovered from that and probably never will.

Mr Hummer also had very primitive harassment methods with insults, disrespect to Physicians, Pharmacist and physical therapist. Mr. Hummer would utilize FECA and other laws against you but never abided by the laws. It took weeks to get needed medications authorized.

In July 1994 I contacted Mr Hummer in order to ask if he was aware of a DOL task force calling claimants and asking questions. He told me he had no knowledge of any task force and not to call him for that type of information again.

After numerous phone calls from this task force I decided to find out where they were located due to them claiming I am never home

and trying to evade them and if I don't return their call my compensation benefits would be sanctioned for not cooperating. On July 15, 1994 I showed up at the Marriott in Torrance California waited 3 hrs and approached Lawrence Laronge, AFOSI. After dinning and drinking Mr. Laronge was not ready to write a creditable report however he made a valiant effort.

The next morning I received a phone call from the supervisor of the task force Pat Huddy thanking me for being the only claimant out of 250 to surprise them with a visit. Ms Huddy also mentions the fact that Mr. Hummer gave them the wrong address on me and apologized for the messages left on my recorder.

What was an Air Force officer doing writing a OWCP report on me if he was only assigned as an escort for protection for Ms Huddy and others? And if your going to do a report the information should be correct and true.

January 25, 1995

Response letter to Mr Hummer from Dr. Mulvania indicates Mr. Hummer obviously must have questioned the Doctors competency and ethics when following AMA guidelines on injuries. Also Mr. Hummer insinuates Dr. Mulvania is not qualified to diagnose severe depression in his patients with traumatic injuries. This was not the first time Mr Hummer applied his primitive tactics on a physician.

January 30, 1995

A letter from the Physical Therapy business office expressing apologies for not being able to treat me due to Mr. Hummers tainted ethics. It appears Mr. Hummer wanted to retaliate against Dr. Mulvania for the Letter dated January 25 ,1995 by calling Physical Therapy and issuing a directive not to follow Dr. Mulvania prescription for therapy for he will no longer authorize any more physical therapy.

Due to deteriorating while waiting for Mr. Hummer to return phone calls I was forced to approach Congressman Horns office again for help in recovering physical therapy.

Soon after Mr.Hummer was replaced with L.H.LEE.

In December 1995 Ms Lee arraigned an appointment with a second opinion.

I responded with request for a copy of the questionnaire for the second opinion Physician prior to appointment.

Ms Lee didn't think I was entitled to the questionnaire and refused to send it. I was forced to call Senior claims examiner and quoted FECA laws. Ms Lee sent questionnaire and SOAF however I objected to both for being inaccurate, incomplete and leading.

December 26,1995

Taken to Pacifica Hospital emergency room for severe chest pains irregular heart rate, labored breathing. Placed in ICU for 3 days. While in ICU, my wife was trying to find out what had happened to compensation check. Numerous phone calls to Ms Lee without one response forced my wife to contact Congressman Horns office in an attempt to locate missing funds. Once released from ICU, I phoned OWCP and complained about her not responding to the concerns of my wife. She had complained to her superior and to Mr. Horns office about my wife being hostile towards her however neglected to mention deliberately ignoring phone messages that concerned lost or stolen government funds.

Soon after this episode my claim was transferred to another claims examiner.

January 29,1996

Transferred to John Flaherty claims examiner.

His letter dated January 31, 1996 blatantly denying documentation concerning recent psychological problems, denying he was aware of the 3 day ICU admittance. However Mr. Flaherty issued me another claim number and authorized payment of the 3 day ICU. Given all the factors of orthopedic and psychological conditions Mr. Flaherty determined it was necessary to move forward with the Voc Rehab process even though Dr.Michael Carlos recommended this process be halted and psychological treatments be granted for severe stress and anxiety due to traumatic injury and further complicated bureaucratic hardships.

However Mr. Flaherty elected to ignore a 4th physicians recommendation for medical treatments and decided to move forward with Vocational Rehab process as ordered by Rick Sheridan OWCP Voc Rehab Specialist.

Like the other claims examiners, Mr. Flaherty and Mr. Sheridan quickly responded with authorization letters and verbal communications to quickly throw me into the "job dumping" voc rehab program however it takes weeks to have medications and therapy authorized by Mr. Flaherty. It appears OWCP does not mind paying a voc rehab counselor \$65.00 per hour with \$5000.00 maximum for 2 years for this nonproductive program. If OWCP was so concerned about returning me to work then they should have intervened when terminated after all the Federal Government is supposed to be model employers for disabled and handicap workers? It really doesn't take a genius to see whats wrong with this picture and where priorities are and funds being spent.

As for Mr. Flaherty, his expertise in taking bits and pieces of medical information from text in medical reports to formulate justifiable rationale to throw people into programs such as this or to deliberately deny and delay claims processes or procedures is extremely blatant and obviously condoned or induced by OWCP.

Since Mr. Flaherty has assumed responsibility of my case he has been confronted on numerous occasions VIA certified letters concerning unnecessary delays for authorizations, discovery of his own fabricated inaccurate information, ongoing primitive intimidation tactics and method of making medical decisions. To date, Mr. Flaherty has not responded to 5 letters. In a recent conversation with Mr. Flaherty, my wife expressed concerns over a recent cola raise which I was notified of but didn't receive. Mr. Flaherty decided to take the opportunity to intimidate my wife by complaining about how much money OWCP has invested in me with sharp criticism directed towards Dr. Mulvania and Dr. Carl Wells. Mr. Flaherty has no business discussing anything other addressing the cola problem which happens to be included in his real duties. The job discription of a claims examiner does not include interrogation.

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So far all claims examiners have questioned why this injury has continued to escalate into the nightmare which it is. Maybe they should take a look at past adverse actions of each previous examiner. Instead of becoming part of the cost effective solution they have all contributed to become primary part of continuing problems.

In closing , please allow me to reiterate on this information being a shallow description of past events. Describing every thing which has happened over a 5 year period would require twice as much time and paperwork to develop. What I have presented paints a dismal but true picture of what OWCP has escalated into and the severe adverse consequences if one is not aware. Developing new laws will not even serve as quick fix because the laws which are currently in place are violated as we gather today. OWCP operates on it own set of regulations, directives, transmittals and procedures. Claims examiners are trained to avoid FECA and title 20 cfr. Why create more laws and regulations if the existing laws and regulations are ignored? You are Politicians not magicians, therefore a magical quick fix is not realistic however you could begin by taking a serious look at H.R.1544- Federal Agency Compliance Act for avenues of applicability to support FECA.

I am not educated in political law or politics nor do I claim to have answers on the reform of OWCP I can only describe it as a " laboratory experiment which has grown larger then its creator, answers to *NOBODY* and leaves a path of human destruction".

I sincerely encourage this committee to utilize all of its capabilities, intelligence and power to develop a way to reform OWCP.

In advance, thank you for your time and efforts,

Anthony Burrelli
Anthony Burrelli

Mr. EUCHLER. Yes, Mr. Chairman, my name is Roger Euchler and I would like to thank you for the opportunity to appear before you and tell the problems that I have been experiencing with my workmen's compensation claim.

My claims are in relation to two incidents that happened at my place of work, the post office in Huntington Beach, CA. The first incident occurred on May 11, 1997, an incident that was stressful to me to the extreme.

An individual that I will call homophobic disrupted the work room floor yelling and screaming at the top of his lungs. I was eventually able to determine that he was directing this tirade at me, only 5 feet away. To this day, I do not know what it was that had set him off. That was not what was stressful to me.

It is what management did next that was upsetting. I was immediately pulled off the floor and told to knock it off. I tried to make the supervisor understand that I did nothing to warrant such an attack, but she did not seem to care. Afterwards, when the supervisor had concluded a discussion with this individual, I was again pulled off the floor and directed specifically to "leave John alone." I again reiterated my ignorance of what could have set him off and I was further then directed not to speak for the rest of the day.

I was also told that should an incident such as this happen again, that management would discipline me. By the end of the morning, I was in such a state that I requested to go home. The following morning, at management's insistence, I was directed to their medical contract clinic. I complied and saw their doctor and he placed me on light duty and I returned to my supervisor. She then called the doctor back and directed him to remove my medical restrictions, to which he complied.

During all this, I repeatedly requested a CA-1 to file an on-the-job injury and she refused for 11 days until finally I was given one to fill out and return to the supervisor.

To make a long story short, this minor incident had blown up into a typical example of management's dysfunction. That does not surprise me, but what did surprise me was the bill that I got from the contract clinic for \$350 for the medical treatment I received. I referred the clinic to the supervisor who had directed me to them. She feigned total ignorance of the incident and had no idea what they were talking about. The only proof I had was the CA-1 stub that I had received when I filled it out on the 22d of May.

The only recourse available for me was to file a grievance with my union. It has taken a year to conclude that she never filed the CA-1 at all, so there would not be an OWCP case file for workmen's compensation to refer to to pay the bill.

It is management's responsibility to maintain a stress-free environment. She failed. It was the supervisor's responsibility to conduct an investigation to at least find out what had happened. She refused. It is management's job to provide a CA-1 form upon request by an employee, without delay. That is stipulated by law. Yet she does not believe that she has to. It was her responsibility to process the CA-1 to the proper authority to establish that the clinic gets paid, the employee gets paid, and to create a proper OWCP case file.

It has been my experience over the last 14 years that this incident is not unique. Mismanagement such as this happens all the time. The reason why there is such a habitat of mismanagement is because there is no punishment for management. They perform their abuses with impunity, there is nothing anyone can do to stop them—not the union, not the Labor Department, not OSHA, not the courts—no one.

The second incident occurred on July 15, 1997 while I was delivering mail on my route. I was ordered by station manager Dorothy Farrington to overload my pushcart with advertisement circulars. I was told failure to do so would lead to discipline. I also was instructed to use a defective pushcart by my immediate supervisor Brian Keith. Failure to do so would result in the catchall charge of failure to follow instructions.

Although I informed the supervisor that the pushcart was hurting me, he made it quite clear to me that he did not care. He then further ordered me to continue using it. I was literally ordered to injure myself. It resulted in a back injury that put me off work for several days and subsequently I have been fired from my job for this incident.

I filled out a CA-1, but was denied the form stub at the bottom of the page. Despite station manager Dorothy Farrington's intimidating behavior in trying to refuse me the opportunity to see my doctor of choice, I insisted and just went anyway. Since I had checked the option of continuation of pay, I naively believed that I was protected by the Federal Employee's Compensation Act. I had no idea the lengths to which Ms. Farrington would go to subvert my OWCP claim.

I was denied adequate time to recover with doctor-ordered physical therapy. While on prescribed bed rest, Dorothy would call me repeatedly and have instructions sent by special delivery, ordering me to return to work, in spite of the injury, with a threat of discipline for being AWOL.

All of my attempts at following the correct procedure at guaranteeing my protections under the Federal Employees Compensation Act were thwarted by Dorothy Farrington. She sabotaged the procedure to compensate me for my time off work. She ordered the personnel involved specifically not to allow me any time for this pay period on my paycheck. My station manager blocked every facet of protection made available to me under the act. The only thing I am sure of so far is that the contract clinic was reimbursed for the medical treatment I received, but I was not. The only recourse available to me was to file a grievance with my union, the National Association of Letter Carriers. Today, I am still waiting for this to be adjudicated.

I am not here today to point the finger at the Office of Workmen's Compensation. It has been my personal experience over the last 14 years and several on-the-job injuries that FECA is necessary and has responded very well to my needs. Without FECA, management at the Post Office would take advantage of its absence and look upon its repeal as an opportunity, an opportunity to weed out its employees the Post Office does not like. It would not be fair to let the Postal Service manipulate its employees, as in my case, to injure themselves and then dispose of them. It would not be fair

to let the Postal Service use dog bites as an excuse to discard hard-working employees who were unfortunate enough to have been bitten. Safety is the weapon of choice at Huntington Beach Post Office. Do not hand management what it would consider a golden opportunity to throw injured employees out the door.

Without the protection of FECA, management would gleefully replace senior, higher-wage earners with lower paid temporary employees. I urge the members of the panel to work at improving FECA, not dismantle it. Strengthen the penalties for managers who fail to file OWCP claims properly. Start giving the union the ability to bring charges against supervisors who violate the contract repeatedly and with impunity. Give postal management a boss who will discipline its own, because unless supervisors, managers and postmasters are held to the same standard as labor, they will continue to mismanage and mistreat employees with absolute impunity. Strengthen the Federal Employees Compensation Act, do not dismantle it. [Applause.]

Mr. HORN. We thank you very much for that statement.

Susan Yake is a dietitian at the U.S. Naval Hospital, Bremerton, WA.

[The prepared statement of Mr. Euchler follows:]

**Statement of Roger Euchler Relating the Homophobic Events that
Occurred on May 11 & 12, 1997 With Supervisor Toni Kaiwick &
John Hendricks**

This statement relates to the incidents that occurred on Friday and Saturday, April 11th and 12th, 1997. After I punched in and checked my vehicle, I was casing my mail and having a 'mild conversation' with Carrier Christine (adjacent to my case, behind me) when suddenly John Hendricks screamed in as loud a voice as he could, "Okay, okay! Knock it off, already! I'm not gonna put up with it!" He was looking down at his case while he screamed this, so I was confused as to who he was directing this at, until he looked up and directly at me. I said, "I know your not talking at me that way!" To which he pointed behind me and said, "No, at...."

Confused, I continued to case mail, but was directed by Supervisor Toni to go into her office. She interrogated me as to what I did to John Hendricks to get him so excited. I confessed "confusion and ignorance" as to what was bothering him and added that I wasn't sure who he was directing his tirade at. She instructed me to return to my case. She then instructed John to her office. Upon his return I was redirected back to her office and told, "John is disturbed by the noises you're making and I am instructing you to stop it." I told her I didn't know what she was talking about and requested her to conduct an investigation and interview the other carriers in the vicinity to find out what, if anything I did to warrant this attack. She declined. She told me that, "Everyone is talking too much and I'll hold a stand up to stop it."

I returned to my case and cased mail. 20 minutes later, while in a conversation with Becky, I was confronted with John Hendricks screaming at the top of his lungs, "Knock it off! Quit making those girly sounds!" Supervisor Toni was right there when this happened. Again confused as to who he was yelling at I asked, "Who the hell are you talking to?" (He again was facing the ground.)

Carrier Dick Spindler stepped out of his case and apologized to John saying, "Sorry John, that was me. I was making noises." To which John replied venomously, "Oh, that's ok Dick it's not you. . . it's *him*!" Pointing directly at me with a murderous glare! I immediately felt threatened, but was ordered by Supervisor Toni to go upstairs while she talked to John. I complied and was shortly directed to her office. She then informed me that, 'John doesn't like the, animal noises and voices you make and to stop it!' Again I requested that she to talk to the other carriers to see what it was that I had done to warrant such a reaction from John. She declined, but promised she would hold a *stand up*. I asked her if she heard anything from me to warrant such an attack. She admitted that she hadn't. I asked her if she was aware that John Hendricks is a "Homophobe?" She again confessed that she, 'suspected as much.' I was directed to my case (8 feet away from John) and continued to work.

For the next four hours, I waited for her to ask other carriers: she did not ask any of them. I waited four hours for her to conduct her *stand up*: she did nothing of the sort. I waited four hours while listening other carriers (i.e. Cory, Dick, Cathy, Mr. Wilson, Danny Dam) making noises, mooring like a cow, talking loudly and generally have a good day of congenial banter. They were having a nice day. I, meanwhile, was stifled into silence due to the threat of both Supervisor Toni and another possible attack from John Hendricks: *not* a nice day!

I felt that I was solely being held responsible for John's behavior. The simple "band-aid" that Toni put on this incident was placed directly on my mouth. "Well, there, it's fixed, everything's fine!" Did she conduct a stand up? No. Did she conduct an investigation? No! What did she do? She left the office for a meeting! That's more important. She left, what I would call, an unresolved situation with me 8 feet away from a hostile homophobe, who presented a real physical threat to me, should I make the mistake of uttering the slightest whimper. But he had a nice day, because he got what he wanted: me muzzled. I was experiencing the following symptoms: nausea, rapid heartbeat, sweating, shaking hands, headache, pounding heartbeat. I asked supervisor Ron where Toni was and he told me she had left. I then requested a CA-1 and Carrier Dick to speak with him in the office. I related the whole incident to him and he expressed

surprise, because Supervisor Toni had not told him any of it! **Not....a.... word!** Dick Spindler generally confirmed my version of events. I asked to be sent home due to stress. Ron said, "No problem!"

I left. The following morning I called in sick as I had not had a minute of sleep throughout the entire night. Clerk John was there, but told me to call back and speak directly to the supervisor now. This was a new procedure, unfamiliar to me. I told him, "No." Toni called me 5 minutes later, and left a message on my machine. I called her immediately and told her I wasn't well enough to come in to work. She directed me to get a Doctor's note or to report to work and see their Doctor. I couldn't get hold of my Doctor for several hours. I was told he was unavailable. I opted to report to work and see Management's Doctor. As soon as I was in Toni's office, I was told, "What took you so long! I expect you to conduct yourself in a professional manner and you're being very disrespectful and discourteous to me!"

I reminded her that her standard of "courteousness" was a far cry from mine. She accused me of raising my voice and ordered me to stop it! I was directed upstairs to wait. After a short wait, she sent me to the Clinic. After a couple of hours, x-rays, and an EKG, I related my story to the Doctor. He confessed some confusion as to what he was supposed to do about it, but wrote a note for me to give to Toni. He prescribed "a change of environment" and gave me tranquilizers, and further put me on restricted duty: Straight 1 hour of activity, and no fine manipulation of the hands, no lifting more than 10 pounds and I believe no operation of a motor vehicle.

Toni didn't like any of that and after a short screaming match, directed Clerk Barb to the office. I asked, "What is she doing here?" Toni snapped back, "Because I want her to be here!" I got up from my chair and requested a Union representative and reminded Toni that it was improper for her to bring in a fellow employee to be privy to a discussion with me. I further informed her that I would not tolerate her violating the contract in this manner and refused to be present any further! I walked out leaving her screaming in rage, "I order you! I instruct you!" I waited at my case for them to be through. Shortly thereafter, Barb came out and told me that she'd see me now. I returned to find Toni trying to configure the speakerphone for an open conversation with another Supervisor, Paul Mendoza. Soon all three of us were yelling. They, trying to make me understand that I am responsible for everything and that they don't understand what my problem was. I was feeling very threatened: by being beat up on by two supervisors and I tried to leave. Toni screamed at me, "I order you to provide a Doctor's note and you are not to leave, because you can work! You are not to leave without authorization!" She then related the Doctor's restrictions to Paul, leaving out the one hour restrictions, fine manipulation of the hands and driving restrictions. I went over to her and took the paper out of her hands and read all those restrictions to Paul. She then directed me to case up mail. I reminded her that *her* Doctor has restricted my duty to, not include, fine manipulation. She ordered me upstairs. I went. After an hour, I was told to return. She informed me that the Doctor has rewritten the restrictions to her satisfaction. The portion she liked was the return to duty. The portion she didn't like was the prescribed, "change of environment."

So, I was ordered to NOT return to work without my Doctor's note. I asked her, "What do you need another note for? You're ignoring your own Doctor's instructions AND ordered him to change his recommended restrictions to suite you better! So what is it that my Doctor can do that you would honor?"

She professed she didn't know, all that she knew was that she couldn't provide a different area for me. They refused to move John away from me, but offered me the option to move. I then pressed her for a list of options of where can I be moved to, and she immediately changed her mind and refused to consider that option at all. I told her that I felt that I was being held responsible for this whole thing. She stated that I was. I reminded her that it was John's threat and her inaction that put me in this state. She then stated, "What incident? What are you talking about?"

I was shocked! I reminded her of the fit John threw. She didn't remember any of it. It never happened. "All I know is there was a loud ruckus on the floor and you were in the middle of it!" I filled out a 3971 and left...thoroughly disgusted!

Statement of Roger Euchler Relating the Events to the Homophobic Incident With Carrier John Hendricks and Supervisor Toni Kaiwick

This statement is in regards to the events occurring the week after the incident of April 11, 1997 (John Hendrick's "Homophobic," psycho-tirade/attack upon me). I repeatedly requested a CA-1 or CA-7 with the intent of filing an on-the-job injury and request for *Continuation Of Pay* status. I was repeatedly denied. With the revelations and admitted lack of responsibility that Toni Kaiwick confessed to during the discussion that she, Union Steward "Bernie" and I had on April 17, 1997, I was supposed to be provided the form I requested. The current policy is that no CA-form is present at Beach Center Station, but held at the Main office and a call is put in to the Main Office when one is needed. As it stands now, that could take over a week of time. When reminded by Steward Bernie that, "A form has to be provided when it's requested." Toni said, "well, it is. As soon as a call is made to the main office and they get it here." Bernie reiterated, "You are required to provide a CA-Form when it is requested." Supervisor Toni said she would comply with my request. On Friday, April 18th I again requested a CA-form that would allow me to apply for *Continuation of Pay*. I was put off with, "yeah...later!" After completing my street duties I found on my ledge a CA-2. A form that denies me the option of requesting *Continuation of Pay*. I saw the Post Office's Doctor. I was put into this "state" while on the clock, and at work. Only to be put off by management's lack of commitment and responsibility again! They continually deny me anything that the contract allows me.

At the discussion with Bernie and Toni, I was told of a scheduled meeting with the new O.I.C of Huntington Beach, Arnel. I had filed a 1767 with a statement attached. As of this date I have yet to receive a reply. I asked for and was assured by Supervisor Toni that I would have Union Representation made available to me from the Main Office, and NOT Toni Patron as he was assigned the task of representing John Hendricks. He can't represent both of us, against each other. The morning of the scheduled meeting I was reminded by Toni Kaiwick of it taking place later on. I again reminded her of her stated commitment to provide me with Union Representation from the Main Office. She paused, got a confused look on her face and said, "No, you don't need one, Toni Patron is here." I again reminded her that Patron is representing John Hendricks and cannot also represent me in this matter. She turned and said, "I don't care, we are only obliged to provide you with whom we see fit. You don't have a choice. Tough!" I then stated clearly for her to hear, "I refuse to participate in this meeting!" Later, when Arnel (the O.I.C.) came and Toni requested my presence in her office. I repeated for her clearly, "I told you I refuse to participate in this clear violation of the contract by forcing me into your office without Union representation!" To which she replied, "I don't care, I order you into my office!" Forced to comply with Frau Bergomeister's orders, I followed her to her office.

She informed Arnel snarling, "Roger had to be ordered in here against his wishes." John Hendricks, Tony Patron, Toni Kaiwick, and Arnel were all there...except for a Union Steward to represent me! I was forced to be a party to a "discussion" with the O.I.C. of Huntington Beach, and 3 witnesses present. I sat down and Arnel started his...whatever. I ignored it as it was a violation of my contractual rights; Being denied Union Representation. I do remember a threat he made, "If this happens again I will assign discipline!" So, if John decides to "go homophobic" on me again (for no reason whatsoever) I can expect to be disciplined. Management just can't accept the notion that homophobes don't use any impetus from the victim to attack. I was NOT a willing participant in this incident. I was the *victim*, and I have been repeatedly punished for it ever since by management.

By Ms. Kaiwick's own admission the day before in front of Union Steward Bernie she stated, "Roger, I know that John Hendricks is a homophobe! I know that, but that's just something that you are going to have to learn to deal with!" Clearly she feigns ignorance on what to do on this subject. That I am more clearly qualified to handle it myself. I agree. I *am* more qualified than the supervisor, but I am not the supervisor. She is. It is *her* responsibility to provide me with a hostile-free environment. She refuses to do so!

There were other statements made by Toni Kaiwick in the meeting with Bernie. When pressed to provide any action that she claims to have done about the incident. She admits to doing nothing more than hold a "stand up" over 24 hours after the incident. When asked to provide details of the incident. She confesses to, "not knowing much. I only know that there was a ruckus on the floor. I wasn't on the floor to know what was going on." (During two attacks...where and what was she doing?) When asked if she conducted an investigation and interview anyone on the floor at the time or since then, she confesses, "No, I didn't conduct an investigation...you weren't here!" When reminded that all the other witnesses were here, and that my presence wasn't required. She only says, "oh." When reminded that an entire week has gone by, she has no clear picture as to what happened relating to the incident, she held 1 stand up 24 hours after the incident, and neglected to conduct an investigation, I asked, "Do I have it right? Is that all you did?" She mumbled, "yes." I added, "You made me responsible for what John did to me, and then you walked away, right?" She then stated, "Roger, I know John is a homophobe. I know that, but that's just something your going to have to learn to deal with!"

Roger Euchler
535 W. 4th St., Ste. #305
Long Beach, Ca. 90802-2197
(562)436-8026

Beach Center Station
Huntington Beach, Ca. 92648

Disability Benefits for Employees Under the Federal Employees' Compensation Act (FECA)

The FECA, which is administered by the Office of Workers' Compensation Programs (OWCP), provides the following benefits for covered employees:

- (1) Compensation for pay for disability resulting from traumatic injury or illness, not to exceed 45 calendar days. (To be eligible for benefits under this provision, the employee or contractor acting as a contractor must file Form CA-1 within 30 days following the injury, however, in special occupational injury cases, the time period can be extended up to 90 working days. The form is not filed within 30 days, but within 90 days, may be acceptable for continuation of pay.)
- (2) Payment of medical costs for expenses incurred after the 45 days if disability persists beyond such period.
- (3) Payment of up to \$1000 for benefits in connection with certain medical, physical, or functional of the body, such as loss or use of an eye or limb, loss of vision, etc., or for a total or partial loss of the hand, foot, or neck.
- (4) Vocational rehabilitation and related services where necessary.
- (5) Full medical care from either Federal medical officers and hospitals, or private hospitals or physicians, at the employee's choice, Section 8, 28 of the Act from the place of injury, a site of employment, or elsewhere having a reasonable distance to travel for medical care; however, when treatment from the place of employment is more appropriate, physicians or medical facilities.

At the time an employee applies for a following a traumatic injury, he or she may receive continuation of pay or the 45-day or annual leave available to him or her. However, if the employee's employer continues the employee's pay, the day must not be subtracted from the 45-day period.

- (1) The 45-day period of pay for disability begins on the date of the traumatic injury or the date that disability has been determined.
- (2) The OWCP services that pay should be terminated on:
- (3) The expiration of 45 calendar days following the date of injury.

If disability continues, or if the employee's pay has exceeded 45 days, and the employee wishes to file a compensation claim, Form CA-2, with supporting medical evidence, must be filed with OWCP. For annual continuation of income, the form should be filed within 90 days of the date of the injury. Form CA-2 and a supporting OWCP when the employee returns to work, disability benefits, or the 45-day period expires.

For additional information, you may request a governing the administration of the FECA, Office of Federal Regulations, Title 29, Chapter 101, Chapter 101 of the Office of Personnel Management, Washington, D.C.

Information for the Employee

In accordance with the Privacy Act of 1974 (5 U.S.C. 552a) and the Federal Employees' Compensation Act (FECA) (5 U.S.C. 8101-8102), you are hereby notified that (1) The Federal Employees' Compensation Act, as amended (5 U.S.C. 8101, et seq.), is administered by the Office of Workers' Compensation Programs of the U.S. Department of Labor. In accordance with this responsibility, the Office maintains and retains a personal information on disabled and their immediate families. (2) The information will be used to determine eligibility for one or a number of benefits provided under the Act. (3) The information collected by this form and other information collected is used to: your compensation claim may be verified through computer systems. (4) The information may be given to report, BADA, and local offices for use in determining and for other benefit purposes in accordance with routine use established by the Department of Labor in a Federal Register. (5) Failure to furnish or to provide information may delay the process or result in an unfavorable decision or a reduced level of benefits. (6) Disclosure of a coded postal routing (CPM) number, the fact that a source such as a doctor will not reveal a name or identity, or the number of employees to whom an individual may be entitled. Your SSN may be used to use and information about you from all agencies and others who know you, but only as authorized by law or otherwise. (7) The information collected by this form is used for statistical, periodic, and computer matching to benefit and payment files.

ROGER ECHLER

Name of Member of Family

(1) Acknowledged as member of Member of Injury and Disability

Name of covered employee

4-11-97

Address of Member of Family, Day, etc.
414 GARDNER - BOSTONING BEACH - CA 90008.

(Signature)
Roger Echler

Signature of Official Scouter

Title

4-08-97
Date (Mo., Day, Yr)

Local Supervisor's Report: Please complete information requested below:

Supervisor's Report

1. Agency's full address of reporting office (include city, state, and ZIP Code) (Check agency type)
 U.S. POST OFFICE
 316 OLIVE - BEACH CENTER STATION OSHA Site Code

2. Employee's duty station (Street address and ZIP Code) ZIP Code
 WASHINGTON BEACH - CA - 92648-9498
 316 OLIVE ZIP Code

3. Regular work hours From 07:30 a.m. To 4:00 a.m. p.m. 20. Regular work schedule Sat. Mon. Tues. Wed. Thurs. Fri. Sat.

21. Date of injury Mo. Day Yr. 10/11/97 23. Date case received Mo. Day Yr. 10/12/97 22. Date stopped work Mo. Day Yr. 10/11/97 Time a.m. p.m.

24. Date pay stopped Mo. Day Yr. 10/11/97 25. Date 45 day period began Mo. Day Yr. 10/11/97 26. Date returned to work Mo. Day Yr. 10/16/97 Time 07:30 a.m. p.m.

27. Was employee injured in performance of duty? Yes No (If "No," explain)

28. Was injury caused by employer's unsafe conditions, instructions, or attempt to injure self or another? Yes No (If "Yes," explain)

29. Was injury caused by third party? Yes No (If "Yes," give name of third party) 30. Name and address of third party (include city, state, and ZIP Code)
 EMPLOYEE - JOHN HENDRICKS
 SUPERVISOR - TONI KAWICK

31. Name and address of physician (List previous address case number city, state, ZIP code) 23. First date medical care received Mo. Day Yr. 10/11/97
 FAMILY CARE MEDICAL
 18502 BEACH BLVD SUITE 23
 WASHINGTON BEACH - CA - 92648-9992 34. Do medical reports and/or employee in question file report? Yes No

32. Does your knowledge of the facts about this injury agree with statements of the employee and/or witness? Yes No (If "No," explain)
 EMPLOYEE STATED REASON UPON LOSS BECAUSE SUPERVISOR DID NOT DO ANYTHING.

35. If the employing agency considers continuation of pay was the cause in case, SENT TO FAMILY MEDICAL FOR EVALUATION DOCUMENTATION STATE EMPLOYEE COULD WORK.

36. Pay rate when employee stopped work \$ Per

Signature of Supervisor: Toni Kawick

A supervisor who knowingly certifies to any false statement, misrepresentation, concealment of fact, etc., in respect of this claim may also be subject to appropriate federal criminal prosecution.

I certify that the information given above and that furnished by the employee on the reverse of this form is true to the best of my knowledge with the following exceptions:

TONI KAWICK
 (Name of Supervisor) Toni Kawick
 SUPERVISOR C/A. Date
 Supervisor's Title OSHA Form

28. Filing instructions: EVALUATION ONLY No lost time and no medical expenses: Place this form in employee's medical folder 101-28-01 No lost time, medical expenses incurred or expected: forward this form to OWCCT Lost time covered by state, LWOP, or CUI: forward this form to OWCCT First aid injury

DOCTOR'S FIRST REPORT OF OCCUPATIONAL INJURY OR ILLNESS

Within 60 days of your initial examination, for every occupational injury or illness, send this report to Industrial of the employer (only if self-insured). Return to the a copy of this report to the state or local health department. In the case of occupational or occupational poisoning, send two copies of this report directly to the Division of Labor Statistics and Research, P.O. Box 500, San Francisco, CA 94101. And notify your local health officer by telephone within 24 hours and by sending a copy of this report within seven days. For a supply of this form, please call (415) 557-1968.

1. INSURER NAME AND ADDRESS
 DDBA Indemnity Corporation 15431 Gale Al02 City of Industry, CA 91715

2. EMPLOYER NAME
 USPS Beach Center

3. ADDRESS No. and Street City State Zip
 516 Olive St. Huntington Beach, CA 92647

4. Nature of business (e.g., food manufacturing, building construction, writer of women's dresses)

5. Physician NAME (Print name, address, phone, full name)
 DDBA, DDBA

6. Date of Exam Date of Report 7. Date of Ill. Day Yr
 04/11/97 04/11/97 04/11/97

8. Address No. and Street City State Zip 9. Telephone number
 1506 E. 5th St. Ft. Lauderdale, FL 33302 (562) 438-8026

10. Occupation (Check one) 11. Social Security number
 Letter Carrier 516-74-1766

12. Address No. and Street City State Zip
 516 Olive St. Huntington Beach, CA 92647

13. Date and hour of injury Mo. Day Yr Hour
 04/11/97 7:30 AM

14. Date and hour of first appearance of symptoms Mo. Day Yr Hour
 04/12/97 12:00 PM

15. Have you (or your firm) previously reported injury? Yes No

Describe in detail the nature of the injury or illness. If possible, describe measures designed to minimize responsibility, liability or fault of a patient in cases of occupational injury or illness. Do not check either box to indicate occupational injury or illness unless you are certain. Describe how the accident or exposure happened (if occupational, physical or chemical, use relevant information from California Code of Regulations, Title 8, Section 139500.1, to describe the exposure). If a hostile or threatening environment, a homophobic co-worker threatened one or two occasions and there was no investigation or follow-up. I'm being held responsible for his behavior. No sleep last night.

16. SUBJECTIVE SYMPTOMS (Describe the nature, onset, duration, location and character of symptoms. Patient states he has "pressure on my chest," rapid heart, shaking, nausea and complains of being exhausted due to lack of sleep.

17. OBJECTIVE FINDINGS (List all signs and symptoms. Physical exam: General: Patient is cooperative and a physical exam is slightly elevated. He is alert and appearing to be in slight distress and displays an anxious posture. Vital signs: Pulse: 76. R/P: 120/74. Resp: 18. Chest: normal in configuration and no crackles on palpation. Lungs: Clear to normal inspiration and expiration. A X-ray and laboratory tests (flow if done or pending) Chest and ECG within normal limits.

18. DIAGNOSIS (List occupational illness, specify etiologic agent and duration of exposure.) Chest or lung complaints involved? Yes No
 Occupational asthma, by.

19. Are your findings and diagnosis consistent with patient's account of injury or onset of illness? Yes No
 If "No," please explain.

20. Is there any pre-existing condition that may have caused or contributed to the injury or illness? Yes No Pre-existing depression and chronic if you please explain. Treatment by personal physician.

21. What other occupational illness cases (include date if known) are reported?
 1. Asthma. 25 mg one three times per day \$20. 2. Patient has been placed on modified work status as of 04/12/97.

If further treatment required, specify treatment: Follow-up at this facility. Estimated duration 04/15/97

22. If hospitalized or hospitalized, give date of admission and location Date Mo. Day Yr Estimated stay
 None

23. WORK STATUS Is patient able to perform usual work? Yes No
 If "No," patient can return to: Mo. Day Yr
 Regular work 4/12/97 Specify restrictions SEE STATUS SHEET.

Doctor's Signature DALLMAN Date 4/18/97 CALL NUMBER 647865
 Doctor Name and Degree (Please Type) D. RINDON CHESTNUT, M.D. INS NUMBER 33-0108057
 Address 12582 Beach Blvd. Ste. 23 Huntington Beach, CA 92648 Telephone Number (714) 964-4448

Roger Eustler
1/27/70

19a (continued). Breath sounds are clear and normal bilaterally, symmetrical with no evidence of wheezing, rales or rhonchi. Heart: Regular rhythm without murmur, gallops or rubs. Negative CVA tenderness. Neurological exam: Patient appears to be normal in appearance and behavior. Affect and Mood: Affect is normal. Mood is overall mild to agitated. Sensorium and cognition: Level of alertness: Alert. Ability to concentrate: appropriate orientation is achieved. Content: There does not appear to be an suicidal or homicidal ideation, feelings of hopelessness, hallucinations or delusions. Thinking process appears to be normal and without loose associations, blocking, or circumstantiality.

Notice of Claim for Compensation

U.S. Department of Labor Employment Standards Administration Office of Workers' Compensation Programs



Complete all items 1 - 36 below. Do not complete shaded area. See bottom section 36. Agency (Supervisor or Compensation Specialist) (To Complete shaded boxes a, b, and c.

1. Name of employee (Last, First, Middle): **Fraser Roger N.**

2. Social Security Number: **516241786**

3. Date of birth: **1/1/57** Sex: Male Female Puerto Ric

4. Home telephone: **562/436-8036**

5. Grade or position and of injury level: **See**

7. Employee's home mailing address (Include city, state, and ZIP code):
**Roger (Rob-Jur) Frasier
1808 East 7th St., Apt #2
Long Beach, CA 90802**

8. Dependents:
 Wife, Married
 Children under 18 years
 Other

9. Place where injury occurred (e.g., 3rd floor, Main Post Office Bldg., 12th & Pine)
Beach Center Station, Workroom floor, Huntington Beach, Ca. 92648

10. Date injury occurred: **4/11/97** Time: **7:35** AM AM PM
11. Date of this notice: **4/21/97**

12. Employee's occupation: **mail carrier**

13. Cause of injury (Describe what happened and why) (See attached):
I am a gay man, and a co-worker "went ballistic" on me. He is a homophobic. I got stressed out when met. responsible!

14. Nature of injury (Identify body part and the part of the body, e.g., fracture of wrist):
**Completely stressed out, nausea, headache, shaking
no sleep at all! Wanted to hurl.**

15. I certify, under penalty of law that the injury described above was sustained in performance of duty as an employee of the United States Government and that it was not caused by my violation of Federal, State or local laws, rules or applicable provisions, over my immediate supervisor. I hereby claim medical treatment, if needed, and the following, as checked below, while disabled for work:

Continuation of regular pay (RCP) not to exceed 45 days and compensation for wage loss if disability for work occurred beyond 45 days if my claim is denied. I acknowledge that the continuation of my regular pay shall be charged to sick or annual leave, or be deemed an overpayment within the meaning of 5 USC 5584.

Sick leave/Annual leave

I hereby authorize any physician or hospital for any other person, institution, corporation, or government agency to furnish any desired information to the U.S. Department of Labor, Office of Workers' Compensation Programs for its official, representative. This authorization also provides any official representative of the Office to examine and to copy any records containing the:

Signature of employee or person acting on his/her behalf: **Roger N. Frasier** Date: **4-21-97**

Any person who knowingly makes any false statement, misrepresentation, or omission of fact or any other act of fraud in obtaining compensation or provided by the FECA or who knowingly accepts compensation to which he or she is not entitled is subject to civil or administrative remedies as well as felony criminal prosecution and may, under appropriate circumstances, be punished by a fine or imprisonment or both.

Have your supervisor complete the receipt attached to this form and return it to you for your records.

16. Signature of witness (Describe what you saw, heard, or know about the injury)

Name of witness	Signature of witness	Date signed
Address	City	State ZIP Code

Family Care Medical Associates
 13382 Beach Blvd, Ste 23A
 Huntington Beach, CA 92648
 Office Phone (714) 964-4448
 BILLING DEPT. (714) 673-7000

Account Number: EUC00000

Page: 1

Charges or Payments After
 10-10-97 Will Appear
 On Next Statement

\$ Amount Enclosed

Roger Eucher
 1595 E. 5TH Street #8
 Long Beach, CA 90802

Date	Description	Document	Charges	Credits
04-12-97	Office - New E/M Comprehensive	971010	122.27	
04-12-97	Cheer Krew	971010	25.00	
04-12-97	Sig With Append	971010	93.00	
04-12-97	Supplies	971010	50.00	

*See attached
 Contact your employer*

**NO PAYMENT HAS BEEN RECEIVED
 FROM THE INSURANCE CLAIM
 WE FILED FOR YOU.**
 This amount is now due and
 payable by you.

IF YOU HAVE ANY QUESTIONS REGARDING YOUR ACCOUNT
 PLEASE CONTACT OUR BILLING DEPARTMENT.
 (714) 673-7000 MONDAY-FRIDAY.

PLEASE REMIT

Current	30 Days	60 Days	90 Days	Total Detail	Balance Due
305.27	0.00	0.00	0.00	305.27	305.27
				Past Due	0.00
				Total Balance	305.27

NOTICE OF REJECTED BILL

- a. **TAX ID MISSING OR INVALID**
Provider's nine (9) digit EIN (Federal Tax ID) number must be accurate on the bill.
- b. **MEDICAL PROVIDER CANNOT BE IDENTIFIED**
Provider's complete billing name and full billing address (zip code required) must be accurate on the bill so we know where to send payment.
- c. **NO CASE FILE**
OWCP has no record of a case for your patient on the given date of injury. Contact the patient or the employer for further information.
- d. **BILL INCOMPLETE OR NOT ON FORM 1500**
Submit bill on a legibly itemized, completed Form HCFA-1500/OWCP-1500.
- | | | | |
|--------------|---------|---|---|
| Note: | Item 11 | - | Enter OWCP (FECA) case number. |
| | Item 24 | - | Itemize bill. "Balance forward" charges cannot be considered. |
| | | - | Itemize by AIAA CPT-4 code (only one code to a line). |
| | | - | Use inclusive "bracket" dates for a single service or series of identical services (same CPT-4 code). |
| | | - | For a series of identical services, enter the total number of services in column G, DAYS OR UNITS. |
| | | - | If more than six (6) CPT-4 codes are applicable to the bill, use additional copies of Form 1500 to continue itemization or attach a sheet that provides the itemization in the same format as Form 1500 requires. |
| | Item 25 | - | Enter 8-digit EIN (Federal Tax ID) number. |
| | Item 31 | - | Provide signature with degree or credentials (stamps accepted). |
| | Item 33 | - | Enter complete billing name and address (with zip code). |
- e. **BILL NOT ON UB-92, UB-92 OR EQUIVALENT**
Hospital, medical centers, and ambulatory surgical centers must submit bill on standardized UB-92, UB-92, or equivalent.

RETURN THE CORRECTED BILL TO OWCP AT:
P.O. Box 193798
San Francisco, CA 94119-3798

If, after reviewing this letter, your bill, and the attachment, you still have questions, call our claims telephone number at (415) 676-4000. To speak with a Bill Resolution Clerk, press 0 and then 1. You will be asked to enter the last digit of the bill's OWCP case number to reach the appropriate Bill Resolution Clerk.

Send Original Documents: Send all bills, receipts, or receipts/attachments, EOB returns, and fee appeals to OWCP at the above address. Send medical reports (do not send with bill), medical/surgery authorization requests (write "MED AUTH" below the return address on the envelope), and other case-specific documents/correspondence to the P.O. Box address for the Claims Section with jurisdiction over the bill's mailing address zip code (see back).

ADJ: Now, when you call our claims number, you can use our Interactive Voice Response (IVR) system to obtain automated information regarding the status of medical bill payments and physical therapy authorizations. If there is an authorization available regarding the bill you are calling about, OWCP has either not processed it, or it has not yet been entered into the computer system.

Thank you for sending Federal Injured workers. Maximum benefit will sent to P.O. Box 193798 and postage payment. Upon receipt of the corrected itemized bill, we will consider the bill for payment.

United States Department of Labor
Office of Workers' Compensation Programs

Division of Federal Employees' Compensation
San Francisco, CA 94119-3798

Statement of Roger Euchler as to the Events on July 15, 1997

On July 14, 1997 I was told by Supervisor Myrtle Moss to not use my Pushcart the following day and to give it to the Supervisor. On July 15 I informed 204-B Brian what Myrtle wanted, and for me to use Carrier Corey's pushcart. The week before while Steward Gary Balcom was at Beach Center Station for Station Manager Dorothy's investigation I was instructed by her to not break up my bundles of circular's anywhere except when they're, "as needed." This presented problems with Corey's pushcart.

Corey's pushcart was so far out of alignment I couldn't push it in a straight line. If I were to push it and let it steer me, it would go in a complete circle in the parking lot. I was forced to apply pressure straight down to lessen the load in front. Walk at a 30° angle to apply pressure from the left side, and continue pushing it forward to make it go somewhat straight. I did this for 45 minutes and could definitely feel pressure right in the center of my lower back. I called 204-B Brian at 2:00 o'clock to inform him of the situation, that it was hurting me. To further suggest he bring me my own pushcart, as it never hurt me it just had a funky brake. I wasn't given the opportunity. He said, "I order you to continue using the cart." I told him I would be calling the Union to tell them of his instructions. He said, "While your at it why don't you tell them that the regular carrier that uses that cart has no problems with it! You be sure to tell them that!" I did. I contacted steward Jesse at the hall and told him of the situation. He then called and confirmed the instruction from 204-B Brian. I called him a few minutes later and he verified that I was to, "use the pushcart, because that's their instructions."

An hour and a half later at 3:30 p.m. 204-B Brian strolled up and said with a smile, "Wha's up?" I demonstrated for him the condition of the pushcart. He admitted that the pushcart was out of alignment. He asked me, "What do you want to do." After a discussion I told him, "I am injured." He told me to, "pack it up and I'll take you to the Dr." After X-ray's and examination by Dr. Quack, we then had a personal discussion which I won't go into here. He told me that I had a mild back strain and gave me limited duties. Those duties included the restrictions of only a couple of hours of: lifting, carrying, pushing, etc. After reading his restrictions I informed him he was fired and then refused any further treatment by him.

After returning to the office I told 204-B Brian that I would not be in the following day as I need time to make an appointment and see my Dr. of choice; my Dr. He told me, "You have to come in tomorrow. You have to finish this by writing a statement and fill out forms." I told him, "no thank you." and left. I returned a moment later to find Station Mgr. Dorothy and him and asked to have a paper to make a statement. This was where the fun began. Dorothy said, "No, you are to return to work tomorrow and work." I told her I needed time to see my Dr. for this accident. She said, "I order you to come in tomorrow." I said, "No and I need a paper to write a statement." She turned to 204-B Brian and said, "Brian do not give him a paper!" I said, "Are you refusing to give me an opportunity to see my Dr. of choice?" She said, "Yes!" Gleefully and with a flash of a smile. I leaned in to her and said, "Oh really." At that point carrier Becky came around the corner and I asked her if she heard what Dorothy had said? She replied, "no" so I requested Dorothy to repeat herself. She said, "no." I looked at 204-B Brian and repeated my request for a piece of paper. She snapped, "don't give him one!" But he did anyway. They both walked away while I sat down and hurriedly wrote a synopsis of the days events. I went to her office and gave 204-B Brian the statement and left. I returned a moment later and requested a OWCP 5 Form. Brian handed one to me and I left. During the night I didn't sleep very well. I awoke the next morning feeling sick. I also felt nausea, had a migraine, tired, shaking and my back was killing me. I called in sick. I'm not refusing Dorothy's direct order; I called in sick!

Roger Euchler
535 West Fourth Street, Sweet #305
Long Beach, Calif. 90802-2197
(562)436-8026
Veteran

Beach Center Station Post Office
Huntington Beach, Calif. 92648

**Statement of Roger Euchler as To the Events Surrounding
On-The-Job Injury Dated July 15, 1997**

After the "accident" that I had with my pushcart the week before, I was told to leave my pushcart with the supervisor and use Carrier Corey's Pushcart the following day on the 15th. I related this to 204-B Brian and he switched them. With the specific and unique instructions from Station Mgr Dorothy Farrington, directing me to, "not break up my circular bundles and rubber band them in the parking lot." I (and I alone) am directed to not break them up on the street until, "as needed." This put a burden on the pushcart as it made the bundles too big. I couldn't manage a balance in the baskets with the burden of Dorothy's directive. But, I followed the instructions of my Manager!

Once loaded up I quickly realized that the pushcart was defective. It was so far out of alignment; I could push it in a complete circle within an intersection. I had to push down on the handle to maintain less weight on the front. I additionally had to lean at a 30 degree angle towards the right of the pushcart as it was difficult to maintain a straight line. I *also* had to push it forward to get it to proceed to the next stop! I felt a significant pressure on the center of my lower back. 40 minutes later (at 1:00 p.m.) I reached a public phone and called my supervisor, 204-B, Brian. I related my problem with the pushcart and informed him that, "it was hurting me." I was going to suggest that he retrieve my pushcart to me as it had never hurt me, it just had a funky brake. I wasn't given the opportunity. He said, "I order you to continue using that pushcart and deliver the mail!" I informed him that, "I was forced to call the Union Hall and they'll verify that instruction as it is a hazard to my safety and health." He retorted back to me, "Fine! Then also tell them that the regular carrier has never complained about that pushcart! Tell them that also!" I did just that. What Mr. Brian doesn't realize is that Carrier Corey doesn't have my back.

At 3:30 p.m. 204-B Brian pulled up and asked, "Wha's up?" I demonstrated the defective cart for him and he tried it and he admitted that, "yeah, it pulls to the right all right." He asked me what I wanted to do. I informed him that I am injured. He told me to pack it in and he'll take me to a Dr. We did. At the office I requested a CA-1 (with the *Continuation of Pay* option). It took several attempts of Brian handing me the incorrect form (i.e. one's that did *not* have the C.O.P option). But I finally got one. I filled it out and checked the box.

We went to the P.O.'s "quack" Dr. and I fired him afterwards as inadequate to my needs and certainly looking only for the P.O.'s interests. Upon our return to the P.O. Dorothy and I got into an ugly little scene. She kept on insisting I return to work tomorrow and work. I on the other hand kept on requesting time to see my, "Dr. of choice." She refused. I requested a piece of paper to follow my supervisor's instructions and, "fill out a statement." She refused and further ordered Brian to not hand me the piece of paper. He did anyway. I filled it out, requested a OWCP-5 Form (restricted duty checklist) and left.

The following morning I called in sick. Later in the day I went to my Dr.'s office and received medical attention. He gave me light duty, a prescription of medication, a referral for Physical Therapy and further directed me to, "not return to work until the following Monday, the 21st." On Friday, I called in to remind Brian that I wouldn't be in. He asked me about my flu. I reminded him that I didn't say that I had the flu, he did. An hour later I received a call from Station Mgr. Dorothy Farrington directing me to, "return to work as my Dr. says I can work, and that I am in a AWOL status." Whereupon she hung up on me. I found out the Dr.'s note to Dorothy was insufficient as it neglected to include the date I was to return to work. I got an addendum to those restrictions to include instructions for me to, "not to return to work until Monday, the 21st due to an on-the-job-injury." (see document)

Dorothy received that fax at 11:30 a.m. on Friday the 18th. She subsequently had Brian call me twice. She called me once and sent a maintenance man; Larry Smith to my home to place in my mailbox an express letter (see enclosure) demanding I, "return to work." In direct violation of my Dr.'s instructions to remain immobile at home until Monday the 21st. I feel these communications from Mgt. was harassment, and unnecessary. I called the Union Hall and got them to verify those instructions as true. Dorothy didn't care what instructions I got from my Dr. She didn't care that her instructions would put me at further risk of injury. She was looking for an excuse to deny me

Continuation of Pay and to punish me. I additionally called and talked to Tom Manetta at the Main Office as the Postmaster was unavailable. He instructed me to, "stay home, if you have a Dr.'s note directing you to do so! Do not come in until Monday!"

It's Sunday night and we'll get to see what Dorothy has plotted for me tomorrow.

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Statement of Roger Euchler Relating to the Events Surrounding My Injury on 7/15/97 and the Denial of C.O.P. by Station Mgr. Dorothy Farrington

All events concerning this incident are related to the on-the-job injury that occurred on 7/15/97 with the defective pushcart that I was ordered to utilize. Statements about that incident have already been submitted. Immediately after the injury and prior to reporting to the Post Office's Dr. I filled out a CA-1 and checked the box, "C.O.P.-Continuation of Pay." I subsequently have filled out 3971's for the 16th, 18th, 19th, Monday the 21st and Wednesday the 23d for missed days and my Dr.'s prescribed Physical Therapy. All of which have been denied by Station Mgr. Dorothy Farrington. I repeat ALL. She has single handedly refused to even process my claim for C.O.P. for the reason of...? I have no idea. She disputes the documentation from my Dr. as, "being insufficient." She never requested for me to provide more documentation until a week later on Thursday the 24th, when I found out that my paycheck was short 2 days. The current pay period for August 8th has already been made "short" as Dorothy has denied and prevented processing for all my 3971's. What did she do with my CA-1, and subsequent 3971's?

Dorothy had Steward Bernie and I report to her in her office on Thursday the 24th. It is at this meeting that she informed me that my Dr.'s note putting me off work as insufficient. The reason she gave me was that it was considered, "insufficient," by her standards. She wanted to know the reason why I was completely disabled and what was the Dr.'s rationale? She then directed me to use my own sick leave. She further informed me that, "Only workman's comp has the authority to approve C.O.P. Didn't you know that Roger?" she smiled. Obviously pleased with herself. She has assigned a "due date," by August 1, 1997. If as she says, "only workman's comp has the authority", then who gave her the authority?

I then later in the day went to see the Postmaster, Dave Lyman. Upon hearing my request for a money order for my sick leave request on a 3971 (for the dates of 7/16 & 7/18/97) He wanted to know the reason why. I explained that Dorothy had denied my C.O.P. on the CA-1, and 3971's I had filled out. He replied, "She can't do that! She doesn't even have the authority to do that. She's not even being asked. Only injury comp has the authority to be involved with approving or disapproving C.O.P." "Yet", I replied, "She is, and she has shorted my paycheck 2 days and the next payday I am short several days and C.O.P. for my prescribed physical therapy."

When Dorothy had the discussion with Bernie and I she further informed me that my requested C.O.P. for my prescribed physical therapy from my Dr. of record and choice will not be paid. She arbitrarily decided that I wouldn't be paid C.O.P. for the time it takes me to get there. She has directed me to return home to get out of uniform and directly go to the therapist. She has directed me further that I am not to leave the building for my lunch. I am to stay in the Office and after lunch I can leave for the therapist, after returning home to get out of uniform. She has decided arbitrarily that an hour of use I took on Monday and Wednesday is to be, "on your own time. You can apply for sick leave for that time if you wish." I don't understand her instructions, reasoning or basis for any of this. She is ordering me to return home to get out of uniform, she is directing me that I am to be held prisoner in the office for my own lunch,

and she is further directing me that I am to do all of this on my own time, because...? No reason given other than she just feels like it. What does Dorothy do with my completed and timely

3971's and CA-1??????

204-B Brian has stated that he takes my forms and processes them to the Main Office after I sign them and hand them to him. Dorothy intervenes and blocks them from being processed somehow. Leaving me without any hint that anything is wrong. She waited until the day before payday to hit me with a shorted paycheck because it's considered fun by her. She did all this intentionally and spitefully.

Sorry to back track, but on Monday the 21st when I requested to leave for my therapy, 204-B Brian accepted my 3971 without any direction, instruction or further requirement regarding my use of C.O.P. He accepted my 3971, signed it and processed it to the main office. But on Wednesday the 23d I was informed by Myrtle Moss that I am, "not to leave the building until after my lunch." I was flabbergasted. "Why?" I asked. "You are taking too much time," she replied. Dorothy was present during all of this with her eyes flashing and her face beaming with pleasure. I didn't understand. "But work out all the time it takes for me to get home, get out of uniform and eat, before I even go to therapy." I intended to leave by 12:15 or 12:30 pm. It takes me half an hour to get home to Long Beach. I eat lunch: half an hour, (that's 1:15 to 1:30) It further takes me 20-25 minutes to drive up to my therapists office adjacent to the airport. That makes it 2:00 o'clock. I am to be there by 2:15. What is the problem." Myrtle seemed confused (like she doesn't understand Dorothy's reasoning and instructions to do this to me either!) "All I know is you take too much time." I replied that, "I am not prepared to have lunch here anyway, as I didn't bring any food. On Monday Brian never told me any of this, so I assumed that everything was kosher. Are you instructing me to remain here without any food, or money to get food. I need to eat!" This got very ugly as I was very upset. I had recently experienced a loss of a dear friend. The service was just the day before on Tuesday the 22d. Mgt. was aware of this as I had informed Myrtle of it and requested to leave early for the service. I admit that I got loud and angry. "This takes the cake, she wants to muck around with my lunch!" To make a story short, Myrtle agreed to let me leave for my lunch, but that, "from now on I am to remain in the building for it." Will wonders ever cease?

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Ms. YAKE. Thank you, chairman and other members of the committee. I appreciate the opportunity to speak before you.

I have worked for the Navy for 11 years and until 1992 when a very dangerous mental health patient was assigned to work down the hall from me, I did not have much trouble at all. This mental health patient had a history of strangling people, had a police record, had stalked women, and decided that I would be his next victim.

In an effort to try to controvert my case, the Navy tried to prove it did not happen on Government ground. They tried to prove that it was a private relationship. I never would have even had contact with this man if I had not worked at Naval Hospital, Bremerton. I spent the last 6 years trying to prove this.

At my EEOC hearing, they brought back my stalker to testify and he testified that the contact that he had with me was at the hospital on hospital grounds. Still, OWCP has ruled that it did not have to do with my work.

I even told the Navy about a woman that he had raped across town and I told them—I did not know that he had strangled other people at the time when I told them he was trying to strangle me, they acted like it was his word against mine. At my EEOC hearing, this man, when he was asked if he had ever strangled people before, started listing names.

They blamed my religion and violated my freedom of religion. You will see an outline of that in my report, with I think some outrageous facts, and I did give you some documents to prove that.

Right after my supervisor was asked by the EEOC counselor to apologize to me for comments, she compared my church leader to David Koresh of Waco fame. Instead of apologizing, she rudely told me that I was too sensitive. About an hour later, I was exposed to a chemical—it was a floor stripper chemical that had injured other employees, that had sent them into an asthma attack. I also have reactive airway disease.

I started having breathing problems and had to go up to the ER for treatment. Instead of approving my claim like the other employees in the hospital had been approved, they controverted it, refused to let me file a claim, saying it was a personal injury. They failed to protect me from further injury until the union filed an unfair labor practice and sent representatives to the safety/management meeting. This took a process of about 9 months. Any time I could have been exposed again and been in danger, it is life-threatening for me. The other employee that was exposed actually was in ICU for 3 days after exposure to the same chemical.

I did request a hearing from my first claim when I was stalked and I asked for my representative to be at the hearing, and the hospital purposely prevented my representative from having leave approved so that he could go to the hearing.

Mr. HORN. Excuse me, but I want to make sure. It is the representative of the union?

Ms. YAKE. The union vice president was named as my representative for the hearing. I had requested him. His name is Andy Anderson. You will see in the documents that he has written quite a few documents for me. He also represented me in part of my EEOC paperwork that I have had too.

I asked in the appeal process to be evaluated by a psychiatrist or doctor and never was evaluated by anybody with OWCP. My medical insurance is through Group Health and they did not send me to anybody, even though I had requested. They did not take it real seriously until my second injury, psych injury, which happened in 1995.

In retaliation for some whistleblowing activities, four individuals called me in a meeting and interrogated me for an hour and a half to 2 hours, to the point where I had a breakdown that night. Group Health really knew it was serious then and had me evaluated. I paid for a counselor on my own since 1992. Both the counselor and Group Health came up with the same diagnosis, that I have severe post-traumatic stress disorder.

When I reported sexual harassment, it was around the time of Tailhook and the attitude of the Navy was they did not want to hear about it. Because there were a number of cases in our hospital that were mishandled, the commanding officer was relieved of command, and there were quite a few people angry with the sexual harassment victims over this. It took years for the anger to kind of settle down. Most of the people who were there at the time have left, that were in the Navy, and so I do not have it so bad now. But at the time, my work environment was very hostile.

My supervisor took steps to shut me up and tried to prevent me from going to an official investigation. That was part of my original injury. It was also named in my second injury in 1995 that had to do with mental stress.

I asked for a hearing and the hearing was before Mr. Perez that was here today. He heard the evidence both from me and from my union representative, who was first hand witness of quite a few things that I talked about in my claim. He wrote a decision in my favor, but that decision was never approved because Thomas M. Markey ordered him not to, in writing, approve my case.

Mr. HORN. Do you have copies of that correspondence at all?

Ms. YAKE. Yes, I have the inside memo from Thomas M. Markey and I have the decision. It has been provided to you already.

Mr. HORN. Without objection, it will be at this point in the record.

[The information referred to follows:]

U.S. Department of Labor

Employment Standards Administration
 Office of Workers' Compensation Programs
 Division of Federal Employees' Compensation
 Washington, D.C. 20210



File Number:

SEP 10 1997

MEMORANDUM FOR: JOSEPH PEREZ
 HEARING REPRESENTATIVE

FROM: THOMAS M. MARKEY
 DIRECTOR FOR
 FEDERAL EMPLOYEES' COMPENSATION

SUBJECT: SUSAN YAKE (A14-0307645)

A review of the file shows numerous contradictions in the evidence presented by the claimant, including that relied on by you when you made your findings that the meeting which took place was abusive. Given the totality of circumstances, however, I do not find that the evidence supports your position, especially since the evidence you point to is itself suspect.

The claimant alleged that she sustained an injury as a result of a meeting which was held between two individuals in the supervisory chain, herself and her union representative. She alleged the meeting was abusive. The record contains extensive evidence relating to an earlier claim relating to alleged sexual harassment at work, which was apparently denied because the claimant's activities arose outside of and were imported in to the work place. She also submits as evidence selective parts of various EEO and whistleblowing actions. The medical documentation is very slim, but physicians diagnose post-traumatic stress syndrome, depression and reference paranoid personality disorder.

You find the claimant's testimony about the hearing to be credible and conclude the meeting was abusive, noting among other things the claimant's statement that "hateful and profane language" had been used against her during the meeting. The agency's submissions were found to lack credibility, in part because they provided only a redacted copy (with names of witnesses removed)

to the claimant, even though "it was obvious" that the agency had conducted an investigation and made findings. You construe "lack of candor" against the agency, especially since "it is in sharp contrast to the Claimant's credible testimony." You dismiss the statement of the only management witness still employed as "self-serving" because:

- "[the manager] states that the meeting began at approximately 12:30 pm and concluded at approximately 1:30 pm," which you say conflicted with the claimant's statements and other evidence. In fact, the manager's sworn affidavit stated that "at approximately 12:30" the supervisor asked the claimant to come in to the other supervisor's office for meeting which the claimant had requested, but the union representative was not immediately available, and that "At 1:00 or thereabouts, [the union representative] said he was ready to have the meeting and wanted to know what the meeting was about . . ." and then discussed starting the meeting with the claimant. Clearly, you have inaccurately represented the supervisor's statement, then used the manufactured error to undermine the supervisor's credibility.

- The claimant disputed the diagram of the office, submitting purchase requisitions signed by the supervisor as proof that the office was not as diagrammed. (The evidence does verify this inaccuracy.)

- A statement of the union representative present at the meeting sustains her description. This statement, and one made to the agency investigator do corroborate part of the claimant's statement. This same statement also directly contradicts a significant portion of the claimant's testimony. All parties to include another union representative and the claimant all admit that the union representative present at the meeting had been heavily criticized by the claimant and the union. In the hearing, the claimant states (p.36, l.21) "Well the first attack was Loren Jones [the union representative present at the meeting]" and "[Loren Jones] launched right in to me:" (p., 37, l.2) and again (p. 38, l. 18) in describing Mr. Jones' tone: "Real angry and very profane. He was the one that cussed so bad. Lord's name in vain, four-letter words. And he's known in that kind of language, I mean, he talks like -- like that. But this was much worse than he usually did it."

In the statement by Mr. Jones, however, Mr. Jones states that "This was the single most hostile meeting I have ever been witness to, and though I am no fan of Ms. Yake myself, I felt that this meeting was subverted by the two first line supervisors . . ." . Outside of the reference contained in that statement, there is nothing indicating his own feeling toward the claimant, and he does not describe his activities as anything other than keeping the meeting focused on the agenda.

Either one believes the claimant or this individual, but not both for the testimony at the hearing contradicts this statement. Thus Mr. Jones appears to be guilty of the same self-serving criticism that you level against the supervisor. It is ironic that you would use this statement to support the claimant's credibility, and indeed you quote at length from the statement to support your position.

- The claimant herself mischaracterizes testimony at EEO hearings and the resignations of the various other parties during her testimony. She claims, for example that her condition of post-traumatic stress disorder was established at an EEO hearing, when the only thing the transcript shows is that there was testimony that she suffered from this condition. She also stated that the supervisor, the secretary, the EEO officer and another supervisor had been demoted or resigned in the face of some unnamed scandal, which may or may not have been the subject of an Office of Special Counsel investigation. Even one of her own witnesses contradicts her characterizations (p. 59, l. 10), which are in any case unsupported by any evidence. Moreover, the agency was as anxious to obtain the OSC report as was the claimant, indicating they had nothing to fear from the report. Given the documented mischaracterizations of the claimant concerning her EEO and other actions, it is not plausible to ascribe credibility to her characterization of the OSC report. I note that you did write requesting the report, but heard nothing. There is no evidence that you called the OSC attorney to whom you were directed by the claimant in her last letter. Without the report itself, there is no basis to make presumptions.

You nevertheless have found the claimant completely credible and have concluded that the agency acted abusively. While the evidence submitted by the agency is not particularly persuasive, evaluating the claimant's testimony in the context of the entire file, I would not be able to say she met her burden and making a finding such as you do is not supported by the record. Please change your decision accordingly.

U.S. Department of Labor

EMPLOYMENT STANDARDS ADMINISTRATION
 OFFICE OF WORKERS' COMPENSATION PROGRAMS
 BRANCH OF HEARINGS AND REVIEW
 P.O. BOX 3717
 WASHINGTON, D.C. 20013-7117



DECISION OF THE HEARING REPRESENTATIVE

In the matter of the claim for benefits under the Federal Employees' Compensation Act (5 U.S.C. §§ 8101-8151) of SUSAN J. YAKE, Claimant; Employed by DEPARTMENT OF THE NAVY. Case Number A14-307645. Hearing was held on APRIL 21, 1997, in SEATTLE, WASHINGTON.

The issue is whether the Claimant sustained an injury arising out of and in the course of the performance of her regular duties. For the reasons discussed below, the April 30, 1996, letter decision is REVERSED.

The Claimant was employed as a Dietitian by the Department of the Navy, Naval Hospital, Bremerton, Washington, on and prior to June 23, 1995. On that date, the Claimant alleged that she had a harassing meeting with Ms. Colleen Dougan, Mr. Roger Meester, Ms. Charlene Terry and Mr. Loren Jones. On July 5, 1995, the Claimant filed Notice of Occupational Disease and Claim for Compensation with her employing stating that she suffered from Post Traumatic Stress Disorder with Panic Attacks. She claimed that the meeting on June 23, 1995, triggered another panic attack.

In a statement accompanying her claim the Claimant wrote that the June 23, meeting was called to discuss the phone policy in her department. The Claimant alleged that the meeting lasted for 1 1/2 hours during which she was subjected to extremely hostile accusations. She alleged that she was repeatedly accused of being unprofessional and rude and that she was strongly criticized for contacting her Union representative regarding an EEOC hearing. The Claimant stated that hateful and profane language was directed at her. The Claimant wrote that, after seeing her last patient that day, she felt overwhelmed by tears and later that evening finally broke down.

The employing agency did not dispute the Claimant's account of this meeting. The District Office made no findings regarding the June 23, 1995 meeting. Never-the-less, by letter decision dated April 30, 1996, the District Office denied the claim for compensation on the grounds that the Claimant had not sustained an injury arising out of and in the course of the performance of her regular duties.

The Claimant disagreed with that decision and made a timely request for an oral hearing before a Representative of the Director, Office of Workers' Compensation Programs. The Claimant appeared for the hearing and was represented by Mr. Richard Anderson. The employing agency was represented by Ms. Patricia Huddy.

Workers' compensation law is not applicable to each and every injury or illness that is somehow related to employment. There are situations where an injury or an illness has some connection with employment, but nevertheless does not come within the concept or coverage of workers' compensation. Similarly, there are distinctions as to the types of situations, giving rise to an emotional condition, which will be covered under the Federal Employees' Compensation Act. Where the disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability comes within the coverage of the Act.¹ Emotional reaction to situations in which an employee is trying to meet his or her position requirements are compensable.² On the other hand, there are injuries that have some kind of causal connection with the employment but are not covered because they have not arisen out of the employment.

An employee's emotional reaction to an administrative or personnel matter is not, in general, covered under the Act and would normally be considered as self-generated.³ Although administrative and personnel matters are generally related to employment, they are functions of the employer and not duties of the employee. Coverage under the Act may only be afforded for administrative functions of the employer if the Claimant establishes that the employer erred⁴ or acted abusively in carrying out its administrative function.⁵ In determining whether the employing establishment erred or acted abusively, the Office must consider whether it acted unreasonably.⁶ There must

¹ *Manuel W. Vetti*, 33 ECAB 750 (1982).

² *George F. Kennedy*, 35 ECAB 1151, 1155 (1984); *Joseph A. Anatal*, 34 ECAB 608, 612 (1983). See also *George A. Johnson*, 43 ECAB 712, 716 (1992); *Mary Joan Coppolino*, 43 ECAB 988, 991 n. 10 (1992).

³ See *Jimmy Gilbreath*, 44 ECAB 555 (1993); *Michael Thomas Plante*, 44 ECAB 510 (1993); *Apple Gate*, 41 ECAB 581 (1990); *Joseph C. DeDonato*, 39 ECAB 1260 (1988).

⁴ See *Mary Alice Cannon (Aubrey B. Cannon)*, 32 ECAB 1235 (1991).

⁵ *Thomas D. McEuen*, 42 ECAB 566, 572-3 (1991).

⁶ *Frederick D. Richardson*, 45 ECAB 454 (1994).

be evidence that the employing establishment acted unreasonably in an administrative capacity. However, it is not necessary to establish that the employing agency intentionally acted unreasonably or abusively. Error arising from a misunderstanding by the employing establishment is sufficient to constitute a compensable factor of employment.⁷

This claim involves a meeting held on June 23, 1995, during regular business hours at the employer's premises to discuss a matter related to the performance of the Claimant's regular duties. As such, the meeting was an administrative or personnel matter.

At the hearing, the Claimant testified extensively regarding this meeting. I found the Claimant to be a very credible witness and I accept her testimony as truthful.

The employing agency has extensively investigated the circumstances surrounding this meeting. However, the employing agency has been less than forthright in disclosing the results of its investigation. For example, the Claimant submitted a heavily redacted copy of a July 8, 1996, report of an investigation conducted by the Department of the Navy.⁸ It is obvious that the agency made findings regarding what happened at this meeting, but these findings have been withheld. I will construe the agency's lack of candor against it. Particularly since it is in sharp contrast to the Claimant's credible testimony.

In its response to the transcript the agency stated that it was

able to find only one person other than Ms. Yake, who was present at the June 23, 1995, meeting. Roger Meester, Head of Food Services Division at the hospital, was in attendance at the meeting. All other attend[ees] have left the agency. Mr. Meester was asked to provide a statement of his recollection of the events which occurred leading up to, and during the meeting.

I find it peculiar that the agency was unable to find the other attendees. Never-the-less, I have reviewed Mr. Meester's statement, together with the Claimant's comments on the statement, and find that Mr. Meester's statement is self-serving

⁷ See *Margreate Lublin*, 44 ECAB 945 (1993); *Richard J. Dube*, 42 ECAB 920 (1991).

⁸ *Abe E. Scott*, 45 ECAB 164, 173 (1993).

⁹ Exhibit 5.

and less than accurate. For example, Mr. Meester states that the meeting began at approximately 12:30 pm and concluded at approximately 1:30 pm. In her June 1, 1997, response to the agency's comments, the Claimant pointed out that the meeting lasted more than 30 minutes and did not begin before 1:45 pm. She submitted a copy of her work roster for the day which indicates that she saw patients at 12:30 and 1:00 pm and had no patient scheduled for 2:00 pm.

The Claimant also disputed Mr. Meester's diagram of his office. She noted that the furniture depicted in the diagram was not ordered until 2 months after the June 23, 1995, meeting and was not installed until after November 22, 1995.

I find these inaccuracies surprising in view of the fact that Mr. Meester took notes at the meeting. Mr. Meester's inability to be accurate, regarding matters easily verifiable by external sources, casts in doubt his recollection of the other events at this meeting.

In its heavily redacted July 8, 1996, report, the Department of the Navy made the following finding of fact

[] stated that [] and [] were very abusive towards Susan in the 23 Jun 95 meeting and stated that [] felt [] is playing childish games with Susan. States that no profane language was used against Susan by []. (enclosure 3).

Enclosure (3) consists of "Interview notes of Loren Jones dtd 28 Jul 95, 06 Dec 95, and 02 Feb 96." These notes apparently support the Claimant's statement that the meeting was abusive. In a May 28, 1997, statement, submitted by the Claimant with her response to the agency's comments on the transcript, Mr. Loren A. Jones wrote

At the second meeting in June 1995, I again met with Mrs. Yake and her supervisor Colleen Dougan, who had Food Service Supervisor Roger Meester taking notes for the meeting held in his office. The office was very crowded with racks, shelves, food service equipment, lockers, file cabinets, and we were all squeezed against Roger Meester's desk. The Union stewards would often ask him why didn't he get rid of all the junk or get new furniture, but at this time he still had an assortment of large bulky things around the office, taking up at least half the available space. I sat next to Mrs. Yake across from Mr. Meester, and Colleen Dougan was between Susan Yake and the door. The meeting began about 1:45 PM and continued until approximately

3:45 PM when it adjourned. For the last part of the meeting Colleen Dougan's friend and office secretary Charlene Terry also attended to chastise Mrs. Yake for problems she alleged were caused by Mrs. Yake. At the start of the meeting Roger Meester said that he was present to make sure that good notes were taken, and he waved his clipboard under Mrs. Yake's nose. It is common knowledge to myself and the other Union stewards that Roger has repeatedly threatened all his personnel there that if he got any grief, then he would get them, and then he would wave his pen or clipboard around. We knew that this meant he would retaliate by going through HRO Bangor to punish or fire employees he had a grudge against.

From this point on I had trouble keeping the meeting focused on the agenda, and I knew that what the Agency had expressed to Andy and myself about improving the workplace, and trying to settle long standing workplace problems would not occur. Colleen Dougan had little interest in exploring the issues agreed to by higher level management, because she took a hostile, accusatory, and vengeful approach towards Mrs. Yake. Roger Meester soon lost his impartial note taking duties, to himself ask questions of Mrs. Yake about why she did this or that, and he opened other lines of discussion with the support of Colleen Dougan. Colleen Dougan's attitude was inflexible to every remedy or relief sought by Mrs. Yake, and Ms. Dougan was soon standing over her, with her fist and finger under her nose on numerous occasions. Again I remind you that this woman appears to weigh 300 pounds or more, and is a very angry person in this situation. After some time trying to reconcile positions to no avail, Charlene Terry came in after knocking at the door to deliver something to Roger Meester, and she stayed at the request of Colleen Dougan and Roger Meester to add her views on why she thought Mrs. Yake was not a team player, and was totally wrong. Mrs. Yake's opinions were often ignored and it was stated by Roger and Colleen that they did not have to agree to anything she said or wanted, in words to that effect. This was the single most hostile meeting I have ever been witness to, and though I am no fan of Mrs. Yake myself, I felt that this meeting was subverted by the two first line supervisors from the intent agreed to with the Director for Administration (Union/Management Liaison Officer) and Commander Gibson, who had agreed for this remedy and reconciliation to continue. Management's position here was to not deal with the issues or the facts, to

ignore evidence to the contrary, and to accuse Mrs. Yake at every opportunity of being the chief cause of so much unnecessary misery to themselves.

Following this meeting I had a bitter and painful conversations with my friend and brother steward, Andy Anderson, who was outraged at what he thought was the unnecessary and deliberate harm caused to Mrs. Yake. He said that Colleen Dougan was fully and properly aware of the stress limitations placed upon Mrs. Yake by her physician. Andy felt Colleen and Roger went out of their way to take a meeting from it's intended positive and constructive purpose and turn it into threatening and abusive one. It was my hope to make a breakthrough in getting issues resolved, and I did not intend this to result in the breakdown of Mrs. Yake as did occur. After this I affirmed to Andy and I told the Agency that in the future Andy would have to made available for any meeting requested involving Mrs. Yake as he had more knowledge of her medical condition and the prevention of abuse that could harm her.

Lastly I want to address specifically comments made by Roger Meester in his affidavit to OWCP.

1) Bill Washburn was not called by the Agency to hold this meeting with Mrs. Yake; it was arranged between the Agency command structure and myself, with the knowledge of Andy Anderson, who passed along additional information to me before the meetings. We also spoke after each meeting.

2) Susan Yake did not request these meetings, she did agree to them to help cooperate with an Agency Director and Command level request, that along with the Union's support, she might be able to reduce problems in her working environment

3) There wasn't any Herman Miller type modern furniture in Roger Meester's office as of June 1995. It was still overcrowded with professional kitchen equipment, food items, clean laundry, a desk, several chairs, file cabinets, lockers, and other items too numerous to mention. Mrs. Yake was against one file cabinet and Roger Meester's desk, I was seated next to her, and to her left was Colleen Dougan.

4) There was a great deal of anger expressed towards Mrs. Yake by Colleen Dougan, some by Roger Meester, and by Charlene Terry. Colleen Dougan raised her voice

numerous times, and arose from her chair to stand over Mrs. Yake several times, while shaking her fist and finger in her face.¹⁰

Generally, "fact of injury" consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred. The second component is whether the employment incident caused a personal injury and generally this can be established only by medical evidence.¹¹

I find that the agency erred, and acted abusively and unreasonably in an administrative or personnel matter. This constitutes a compensable factor of employment. Therefore, the Claimant has satisfied the first prong of the fact of injury test.

In a medical report dated June 29, 1995, Dr. Steven M. Savlov, a licensed, clinical psychologist, diagnosed the Claimant as suffering from 1) post-traumatic stress disorder; 2) major depressive episode, moderate to severe; and, 3) panic and anxiety disorder, severe. Dr. Savlov stated that the Claimant saw him after, what she described as,

a very abusive traumatic event at her work on Friday, June 23rd. The patient works as a dietician at the Naval Hospital and according to the patient she was verbally attacked by her immediate supervisor, a secretary who has been assigned to watch over her, as well as another individual who was not in her department.

Dr. Savlov noted that the Claimant had pre-existing post-traumatic stress disorder with which she had been coping until the June 23rd meeting.

In a report dated July 21, 1995, Dr. Michael S. McManus stated that the Claimant was "being seen today for a follow-up depression and anxiety exacerbated by work place stressors, particularly relationship and treatment by immediate supervisor and certain co-workers." He diagnosed the Claimant as suffering

¹⁰ Mr. Jones advised the Office of Special Counsel (OSC), during its investigation of the June 23, 1995, meeting, that the Claimant's written minutes of the meeting were an accurate account. An OSC investigator took affidavits from participants at the June 23, meeting and opined that the Claimant was treated in a harassing matter during the meeting. This provides further corroboration of the Claimant's Account of the meeting.

¹¹ Gary L. Fowler, 45 ECAB 365, 370 (1994).

from: 1) depressive episode with associated anxiety versus adjustment disorder with depression and anxiety; 2) possible post-traumatic stress disorder; and, 3) possible paranoid personality disorder. In a report dated September 21, 1995, Dr. McManus wrote that the Claimant was being seen for follow-up major depressive episode and post-traumatic stress disorder secondary to chronic ongoing difficulties/stressors at work place.

Causal relationship is a medical issue, and can only be established by medical evidence.¹² The medical evidence to establish causal relationship, generally is rationalized medical opinion evidence. Rationalized medical evidence is medical evidence that includes a physician's rationalized opinion on whether there is a causal relationship between the claimant's diagnosed condition and the established incident or factor of employment. The opinion of the physician must be based on a complete factual and medical background of the claimant,¹³ must be one of reasonable medical certainty,¹⁴ and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the established incidents or factors of employment.¹⁵

Although the medical evidence in this case fails to include a rationalized opinion on causation, the medical evidence does support that the Claimant's condition of major depression and post-traumatic stress disorder were materially aggravated subsequent to the June 23, 1995, meeting. Both Dr. Savlov and Dr. McManus specifically relate the Claimant's condition to workplace stressors including this meeting. Taken as a whole, and in the absence of contradictory medical evidence, it is sufficiently supportive of the claim that further development of the evidence is warranted.¹⁶

¹² *Mary J. Briggs*, 37 ECAB 578, 581 (1986).

¹³ *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).


¹⁴ *See Morris Scanlon*, 11 ECAB 384, 385 (1960).

¹⁵ *See William E. Enright*, 31 ECAB 426, 430 (1980).

¹⁶ *Kay L. Boynton*, Docket No. 94-2540, slip op. 2 (September 6, 1996). *See also Curtis A. Waldrip*, Docket 94-2561, slip op. 2 (September 6, 1996) (The Board remanded a case for further medical development where there was an uncontroverted inference of causal relationship.); *John J. Carlone*, 41 ECAB 354, 358 (1989) (Board found the evidence submitted by appellant which contains a history of injury, an absence of any other noted trauma, and an opinion that the condition found was consistent with the original injury is sufficient, given the absence of any opposing medical evidence, to require further development of the record.).

The April 30, 1996, letter decision is hereby REVERSED. I find that the agency erred, and acted abusively and unreasonably in its handling of the June 23, 1995, meeting. The case is REMANDED to the District Office for preparation of a comprehensive Statement of Accepted Facts (SOAF). This SOAF must include a description of the June 23, 1995, meeting which incorporates the Claimant's account of the meeting, to the extent that it is corroborated by Mr. Jones' statement quoted above, and the finding that the agency erred, and acted abusively and unreasonably in handling the meeting. The District Office should then refer the Claimant, the SOAF, and copies of the relevant medical evidence, to an appropriate specialist for a medical opinion on the nature and extent of the Claimant's condition and its relationship to the June 23, 1995, meeting.

Based upon the augmented medical record, the District Office should render a *de novo* determination on entitlement.


JOSEPH M. PÉREZ, ESQ.
HEARING REPRESENTATIVE
for
Director, Office of
Workers' Compensation Programs
Washington, D.C.

DATED: 7-29-97

Mr. HORN. Please proceed.

Ms. YAKE. This so outraged both of the Senators from the State of Washington that they took action. In my second hearing on the same claim, I had another hearing on the 3rd of March of this year. Senator Slade Gorton sent one of his staff to be at the hearing. He was so alarmed over what has been going on with OWCP claims, he has other constituents in our area that have had the same problem.

I was told by Mr. Barnes of the U.S. Department of Labor that my claim would be expedited because of the length of time that it has not been decided, that claim I still have no decision and it has been over 120 days. One of the things that is holding it back is my agency has an investigation about the same incident. My husband was so outraged about how we had been treated that he wrote to the commanding officer. That was back in 1995. They did assign an investigation because of inquiries from my Congressman, who is Congressman Rick White, and both of the Senators. The investigation was completed in 1995, but the CO delayed releasing that report for over a year. Meantime, I was——

Mr. HORN. Excuse me, is that commanding officer still there?

Ms. YAKE. No, he has left and they promoted him to admiral. [Laughter.]

Ms. YAKE. Everybody——

Mr. HORN. Was he sitting on the case, to your knowledge?

Ms. YAKE. He was sitting on the case——

Mr. HORN. Until he got promoted to admiral. I assume that is why he was sitting on the case. No——

Ms. YAKE. He was sitting on the case, probably hopefully he would get transferred before it hit, but the Office of Special Counsel came to investigate this same incident. They came onsite at the hospital three times. They asked Captain Johnson, who was the Commanding Officer at the time, four times to settle my case, it was a whistleblowing violation. He finally did when the senior attorney had to come to explain to him that he would be legally accountable, along with the rest of the chain of command all the way down, that was there at the time when I was injured.

My doctor told me not to go back to work and I told him I could not not work, I would lose my house and a few other things, so I needed to continue working. So he asked for reasonable accommodations and the hospital would not give me reasonable accommodations. They kept me working in the same environment. So my doctor restricted how long I would be working during the day, so he held me to like 4 hours.

I continued to have extreme retaliation. The paperwork will show that. In fact, my counselor could not decide what injured me more, the stalker with the repeated sexual assaults or my supervisor who had harassed me so badly that Bill Washburn, who was a union steward who witnessed it and he is a veteran of Vietnam and Korea, said he had never been in more hostile meetings in his life.

Mr. HORN. What did the union do about it?

Ms. YAKE. They filed 22 unfair labor practices, they helped me tremendously with my EEOC cases, they acted as representatives, they wrote witness letters. They have helped me tremendously and still we have not gotten too far.

Mr. HORN. Now the stalker is still there?

Ms. YAKE. The stalker was being discharged from the military because he was too dangerous to work on the ships. He was throwing things at people and strangling coworkers there too, which I think is outrageous—

Mr. HORN. And the Navy did nothing about this?

Ms. YAKE. Oh, they told him that he had to have an escort when he was at the hospital. But this man is so extremely psychologically unbalanced, that to get the attention of his last victim, he ran out in front of a moving vehicle. This man did not obey a restraining order that I had and I saw him at the hospital and I kept telling them that he was there and they would not believe me. They ordered me not to talk to my witnesses, I had eye witnesses of him being in my work area. I had witnesses of the abuse that I suffered at the hospital.

Eventually what happened is during the Office of Special Counsel investigation, my supervisor and a secretary resigned their civil service careers, and that was at the point where my supervisor was going to go up for a promotion but she never got it because of this.

Mr. HORN. She never got it because of this, because she was willing to testify for you, or what?

Ms. YAKE. Well, she was doing some illegal things. She was working an outside job on Government time and I had reported this and management was not paying any attention to it. And during the investigation of my work area, it was discovered that that was in fact the truth.

Mr. HORN. So they did take action on that incident, but not the stalker.

Ms. YAKE. They did finally. The stalker bothered me for a year and a half and now he is outside of my work area, he moved out of the State. So I do not have problems with him now.

Mr. HORN. Do you know if he is still employed by the Federal Government.

Ms. YAKE. He got a job at Hanford right after that, nuclear—
[laughter.]

Mr. HORN. I am well aware of Hanford.

Ms. YAKE. They have given him an honorable discharge. I do not know where he is now, I have no idea. As long as he is not bothering me, I am not concerned. I did my part.

Mr. DAVIS. Well, we are not comforted if he is using nuclear power either.

Ms. YAKE. This is not the only case that we have had the Navy give very dangerous stalkers and people who have raped women honorable discharges. I think that that has to be stopped, because then they can go out in the community and start all over again. I was under terror 24 hours a day. It was not just at work. I was getting calls at home, my husband would screen the calls.

My husband went to the hearing with me for the restraining order. I was in terror and there was—now we do not have dangerous people working alongside of us, but I cannot see how the Navy says that they are not responsible for my injury when they assigned someone so dangerous to work down the hall from me.

Mr. HORN. Did either of the Senators or Representative White ever write the Secretary of the Navy about this case?

Ms. YAKE. Yes, I sent the information to Senator Orrin Hatch too and he actually wrote to—let me see who was it—it was the head legal person in the Navy, Mr. Honigman.

Mr. HORN. Was it the Judge Advocate of the Navy?

Ms. YAKE. I am not sure of his title, but I actually gave you a copy of the correspondence that he wrote to the Navy. This same man is the one that is holding up a report. There is a report that would just prove my case—

Mr. HORN. Who is sitting on that now?

Ms. YAKE. The Navy will not release an uncensored copy. They will give me a copy that page after page after page, there is just a signature on it. All the good stuff is covered up.

Mr. HORN. Well, let us have the staff pursue that with the Secretary of the Navy before he retires, he is about to retire. [Laughter.]

We will see if we cannot get those documents. So will you give staff a citation for the specific document because we have to be very precise on it.

Ms. YAKE. I have the legal description of it in one of my papers that I provided. I sent you about—

Mr. HORN. Is that the one, the T.F. Friedman, Esquire?

Ms. YAKE. Yes.

Mr. HORN. Assistant to the General Counsel of the Navy.

Ms. YAKE. Right.

Mr. HORN. OK, we will follow up on that and get the documents for the record.

Ms. YAKE. Now the Navy criticizes me for saying that I won the Office of Special Counsel investigation. Part of the settlement was that I could not release the settlement to anybody, but I could release it to your subcommittee. When you read that, you will find out that they did rule in my favor because of all the things that they gave to me.

Now the reason why the commanding officer would not sign the agreement at first is because he wanted me to give up my EEO cases without any compensation, before he would sign that agreement. That is ridiculous.

Mr. HORN. This is the commanding officer now?

Ms. YAKE. No, Captain Johnson.

Mr. HORN. Before he was admiral.

Ms. YAKE. Right. I think it is outrageous that he made admiral with all the things that went on during the time that he was at the hospital.

Mr. HORN. Well, you know, those nominations to admiral by the President go before the U.S. Senate and since you had written Senator Hatch and you said Senator Gorton and the other Senator from Washington were both interested, it seems to me that would have been a great time to send it to the Armed Services Committee, but I guess you probably did not know he was even up for admiral yet.

Ms. YAKE. I knew he was trying, I thought that it would not go through after all the paperwork that we had and all the problems we had with him. Even holding up that report, my Congressman and my Senators wanted that Lieutenant Franz report and they waited over a year.

Mr. HORN. Well, it is too bad one of them did not issue a subpoena out of their committee or something, to deal with it, because they cannot deny the Congress that information. They can try, they do it every day, I mean we have people look us right in the eye and under oath and all the rest of it say "gee, we do not know anything about it, we have lost the file, et cetera."

So we will follow up and get that document.

OK, go ahead.

[NOTE.—The document referred to is held in the files of the subcommittee.]

Ms. YAKE. So I have three claims that were all controverted by the Navy. None of them have been approved.

Mr. HORN. That EEO claim that Captain Johnson tried to say he would not do anything for you unless you dropped that claim, that is still active?

Ms. YAKE. Those have been denied. The second one was denied because I told—my supervisor was restricting my EEO activities and tried to prevent my representative from being at the pre-hearing telephone conference. When I called the Judge and told him that was going on, he did not believe me and I told him that I had been denied representation before in an OWCP hearing, and he thought that was a lie. So he ruled against me strictly on that fact.

Mr. HORN. Which judge are we talking about?

Ms. YAKE. Administrative Judge Carroll.

Mr. HORN. Is this James Carroll?

Ms. YAKE. Yes.

Mr. HORN. Who made the EEOC decision.

Ms. YAKE. Right. And the only reason he ruled against me was because he did not believe me when I told him that was going on.

Now you will see in my paperwork too, in 1992, we did not have e-mail, but in 1995, we did and I have e-mail proving that my supervisor was restricting my EEOC activities in preparing for my hearing, including some e-mail between my representative's supervisor and my supervisor, delaying time to prepare for that hearing. She thought that 15 minutes was enough time to prepare for an EEOC hearing, and she only gave me approval to talk to him during my break time.

Mr. HORN. Well, I hope you have written a whole series of letters about these people and we will see if we can get them in their personnel files. The Navy used to, 30 years ago, have a very good civilian personnel operation. You and others have made me convinced it has gone steadily downhill.

Ms. YAKE. Well, we have some severe problems at Bangor with our Human Resources Office. Norm Hill was interviewed by the Office of Special Counsel for up to 2 hours, and sweat was coming down his neck and he kept tugging on his collar. I do not know what they were asking him, but he had pulled some real—and he is kind of the master mind of what they have done to me, that is who the Commanding Officer was getting his advice from.

I think we really need to look into these matters of how they run that Human Resources Office. They delayed even filing my claim—we have heard about that with other people. They delayed filing my third claim for over 2 months, they held it. I got it to be re-

leased by calling the Seattle Office of Workers' Compensation, told them what was going on and they called the agency and told them that they were going to take action if it was not turned in within the week. I then got my card within a week.

Mr. HORN. OK. That is a very helpful statement. A very sad one, but very helpful in terms of what can be done with it by the subcommittee, so we thank you for sharing your story with us and coming all the way from Bremerton to do so.

Now we have Ms. Rachael Santos, who is postal manager, U.S. Postal Service.

[The prepared statement of Ms. Yake follows:]

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27 June 1995

Subcommittee On Government Management, Information, And Technology
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Dear Honorable Members of Congress ,

Thank you for this opportunity to share my experiences with the Workers' Compensation Program with you and to testify in front of your subcommittee on 6 July 1998 in Long Beach, California. I appreciate the important work your subcommittee does to safeguard our human rights and monitor Government operations and agencies.

I was first injured in 1992 when I was stalked by a dangerous mental patient named Thomas Mason from the Naval Hospital where I work who was diagnosed with Intermittent Explosive Personality Disorder. Between November 1991 and January 1992, Mason was on medical hold status at the hospital. Mason had been assigned to work down the hall from me. His personality disorder is described in the Diagnostic Criteria From DSMIV as:

A. Several discrete episodes of failure to resist aggressive impulses that result in serious assaultive acts or destruction of property.

B. The degree of aggressiveness expressed during the episodes is grossly out of proportion to any precipitating psychosocial stressor.

C. The aggressive episodes are not better accounted for by another mental disorder and are not due to the direct physiological effects of a substance or a general medical condition.

At my EEOC hearing on September 28, 1994, I proved sexual harassment and sexual assault by this man, Thomas Mason. This man had a history of strangling people. Thomas Mason testified that he met me at the hospital and Administrative Judge Carroll ruled that Mason's contact with me was in the context of the work environment. On February 19th of 1992 Mason had his hands on my neck and was threatening to choke me if I did not go to bed with him, which I did not. This occurred on the Naval Hospital parking lot as I was on my way to go home from work. Another time at the MWR gym on hospital grounds, a co-worker, Kim Hopper, saw Mason grab my breasts with both of his hands. She went to the Navy JAG Officer at the time, Lt. Bolaney, to make a statement, but Lt. Bolaney refused to take a statement from her. (see Q6)

Three times on the 21st of February 1992 Thomas Mason came to my work site for the day which was at the Women, Infants, and Children Clinic at Jackson Park Chapel. Mr. Mason was in a full blown rage and demanded he have contact with me. I was very afraid of him and my co-workers were frightened as well. They all wrote witness

statements for the work related injury claim (see B4, B5, B6). The case number is A14-0275656 and was filed 22 July 1992 (see D2).

Thomas Mason tried to blackmail me by saying that people had seen us together and knew we were in love. Mason said that he could get me fired and that he was real good friends with the Commanding Officer of the Hospital, Captain McKee. I contacted my supervisor, Colleen Dougan, on the 25th of February. I told her about his threats about trying to get me fired, his visits to the hospital, the day at WIC, and the continuing phone calls at home and at work. (see Q6 and Q7)

February the 26th 1992, Chief John Vaughan was concerned after taking some of Julie Mason's messages (Thomas Mason's wife) that I had a fatal attraction problem from Thomas Mason. When I refused to take a phone call from the Julie, she left a message with John that said, "sexual predator does not exist, both Carmen and Lisa lied. When confronted, could not deny it". (see B8)

March 4th 1992 Julie Mason called me at work and left a message that she was planning on divorcing Tom. My supervisor, Colleen Dougan, told the secretary, Charlene Terry, that she did not wish for me to have contact with the Masons at work. I had contacted the Command Master Chief who referred me to the JAG officer, Lt Bolaney. The JAG officer confirmed that Tom Mason was indeed dangerous and recommended that I get a restraining order. I left work that day and filed for a restraining order. The restraining order was granted on 12 March 1992. Both Julie and Tom appeared and argued that the order should not be granted. Both of them were ordered not to come to the hospital without an escort, but that did not stop them.

Three of the women Mason was harassing received many hang up calls 24 hours a day (see statements from Glenda Baily and Lisa Mapes, B7 and B10). Iris Kellum, who work a few yard from Food Service as a cashier, saw Thomas Mason near my office door in the May of 1992 after the restraining order was issued. He was unescorted. Iris remembered him because she too had been harassed by Mason when he worked on our floor of the hospital (see B1 and B2).

On the 28th May of 1992 Tom and Julie were at the hospital without an escort which was in violation of the restraining order. I became fearful and suffered an anxiety attack at work directly related to being stalked by Thomas Mason. I had left shoulder pain, dizziness, nausea, and irregular heartbeat. I saw Dr. Bresaw who worked at Group Health Urgent Care. Dr. Bresaw told me to "get the hell out of Kitsap County where you will be safe". I missed one day of work. When I reported my fears and health concerns to Colleen Dougan, she did not want to approve any time off from work. Colleen Dougan (my supervisor), Lisa Batt (EEO Counselor), CDR Alexander (second line supervisor), and Lt. Bolaney (Legal Officer) met with me. I told them that I felt unsafe at work and had continued to receive phone calls and contact with the Masons. I told them about my heart reacting the day Masons were at the hospital. CDR Alexander said that I would "not be a victim if I did not act like one". She was concerned that this affected me having to take a day of sick leave and they didn't want it to happen. I was told that if I missed any more work due to the problems I was having with Thomas Mason, my evaluations would be down graded. I was ordered to see the CEAP Counselor, Richard Sleeper. Colleen Dougan arranged for the appointment on 17 June 1992.

I received a Record of Counseling for going to my CEAP appointment as ordered on the 17th of June 1992 (see N1, N2, N3). Colleen Dougan charged me with being gone from work without permission and falsely accused me of having my schedule cleared. I was formally counseled on June the 19th. I told Richard Sleeper, the CEAP Counselor, what had happened. He spoke with Colleen Dougan who acted to him like she would correct the mistake. She did not. Richard Sleeper wrote statements to the fact the Dougan made the appointment, ordered me to go to the appointment, and that he heard me tell the Food Management staff where I was going. Because of Sleeper's letters, U.S. Department of Labor's hearing decision concerning OWCP claim #A14-275656 on page 5 ruled that the June 17th, 1992 Letter of Counseling was "an erroneous personnel action by the claimant's supervisor" (see D24). Still this record of counseling has been used against me by the agency at my formal EEOC Hearings in September 29th 1994 and August 22nd 1995 and my other OWCP cases.

I went up the chain of command to the Commanding Officer of the hospital. All levels of the Command were more interested in protecting the rights of the Mason family than my safety at the work place. Captain McKee, the CO, tried to coerce me to say that I met Tom Mason at church and that this was a private matter. He succeeded in getting Lisa Batt (EEO counselor), Colleen Dougan (my supervisor), CDR Alexander (head of Ancillary Services), and Lt. Bolaney (JAG officer) to support him in this falsehood.

Written evidence in the EEO document of Lisa Batt dated 25 January 1993 (see A2) proves that I was asked to stop going to my church. On that last page of the document, it reads, "She (Susan Yake) appears unwilling to change phone number or church activities. She does not require EEO assistance at this time". This document so alarmed Senator Orrin Hatch that he wrote a letter to Steven S. Honigman of the United States Navy General Counsel. Senator Orrin Hatch wrote, **"A parallel tragedy has been the handling of this problem by the Navy JAG, The Navy Equal Employment Office, and Ms. Yake's superiors. Rather than conducting a fair and complete investigation, they have repeatedly attacked Ms. Yake's integrity and religious beliefs, blaming Ms. Yake's beliefs for her assailant's behavior. This is evidenced by reports from the Navy EEO and the Navy JAG. Ms. Yake has informed me that the EEOC and JAG reports are replete with inaccurate statements and characterizations and has provided me with documentation supporting her position"**. This conduct against my religion have been evaluated from the standpoint of a reasonable person taking into account the particular context in which it occurred. Senator Orrin Hatch clearly saw the actions as discriminatory and has asked the Navy to take action. The Navy's official response was that it would be taken care of in the EEOC system, yet Steve S. Honigman, U.S. Navy General Counsel, **refuses to release uncensored official investigative reports that would prove my case.** (see P23)

Lisa Batt had her own motive for writing misleading statements in her EEO reports concerning my sexual harassment case. She had been excommunicated from the Church of Jesus Christ of Latter Day Saints ("Mormon", the church in which I belong) for immoral sexual acts with young men. I discovered this fact when I hired an attorney by the name of Dale A. Magnuson to review my legal case against the U.S. Navy. (see A5) When he saw Lisa Batt's name on her report he told me that she was one of the most immoral women he had ever met. Keith Hawkes who was sexually harassed and was

forced into an affair with Lisa Batt, offers pictures for proof. He verified that Lisa Batt was excommunicated from the Mormon Church (see his letter A3) Andy Anderson, Union Vice President of AFGE Local #48, witnessed her inappropriate behavior on the job and testifies to this fact in his letter (see A4). I also know of two other men who were harassed by her to have sex. They wisely refused to become involved with her. One of the men reported the sexual harassment and his complaints were ignored. In 1992 when everyone had to be trained in sexual harassment, Lisa Batt was assigned to conduct the eight hour training session where we heard about the "Zero Tolerance" policy. She was given the Civilian of the Year Award that year. This is an outrage and a gross example of the corruption in the EEO system, and of the atmosphere of abuse at Naval Hospital Bremerton.

Other actions that violated my Freedom of Religion were on the part of the JAG Officer (Lt. Bolaney), and the NIS Special Agent (Mark Fedorko). These actions demonstrated conduct which was discriminatory. **Lt. Bolaney demanded that I quit going to church and told me "God is not worth it", this fact was mentioned in my first EEO complaint.** (see Q3) Lt. Bolaney warned me that he would deny it under oath. There were no other witnesses to his negative comments against the Mormon religion. All three of the official reports from EEO, Legal, and NIS blame the behavior of Mason as originating in the Mormon church even though I had testified otherwise. The reports surfaced during the fact finding phase for my EEOC hearing and just minutes before the starting of the hearing as in the case of the NIS report. All of these documents have been included in the documents I provided to the Subcommittee On Government Management, and Information, and Technology (see the complete documents in A2) These incidents along with the comments and retaliation of Colleen Dougan show sufficiently patterned and pervasive unlawful actions by representatives of the Naval Hospital.

During 1992 and 1993 my supervisor, Colleen Dougan made ridiculing remarks concerning my religion. **On the 16th of March 1993, Ms. Dougan compared the founder of my religion, Joseph Smith, to David Koresh of Waco fame.** David Koresh at that time was being accused in the press of having sex with the children and a number of women in his compound. On page 254 and 255 of the EEOC bench decision, Judge Carroll makes reference to Ms. Dougan's admitted comment drawing a parallel or comparison between the Mormon Church and David Koresh. **Judge Carroll states "That is a comment that is certainly understandably offensive to the Complainant".**

On the 24th of March, Colleen Dougan had been asked to apologize to me about the remark she had made to me concerning my church leader. Instead of apologizing, she blamed me on being too sensitive and treated me in a hostile manner. Just an hour later on the 24th of March in 1993, I was exposed to the floor stripper fumes. According to the Naval Hospital's Industrial Hygienist, Mr. Boyd, these fumes are the most toxic chemical used in the hospital for people who have asthma. I am officially classified as handicapped due to my Reactive Airway Disease or asthma.

When I was exposed to the fumes, I suffered a severe asthma reaction and had to be taken to the emergency room. **Ms. Dougan blocked me from filing a Workmen's Compensation claim until after the Union filed an Unfair Labor Practice.** (see E4) **After the order was issued to allow me to file my claim, Ms. Dougan controverted it**

claiming that I was just suffering from a personal illness and that the claim was not filed in a timely manner. The case number of this complaint is A14-0284449. She refused to correct the work hazard to prevent my re-exposure and deliberately deleted the problem from the safety minutes in the Quality Assurance meeting in June of 1993. Another employee who works for the Naval Hospital named Gwen Jennings was hospitalized twice in Intensive Care after her exposure to the same floor stripper fumes. Both her OWCP claims were approved and action was taken to prevent further exposure to her on the floor that she works in the Naval Hospital. Six months later after the Union again had to intervene. A year after the on the job injury, the Naval Hospital Safety Manager, Dan Dahl, arranged that the floor stripper would not be used during the day time in my work area to safeguard my health. My allergist from Group Health was outraged! (see E1 to E13)

On July of 1993 the Seattle office of OWCP denied my claim # A14-284449 for exposure to the floor stripper fumes. On 3 August 1993 I explained what the agency had unlawfully done to controvert the claim. On 15 January 1994, OWCP issued the final denial ignoring the unethical actions of Colleen Dougan and her neglect to protect me from further life threatening exposure to chemicals.

Naval Hospital Bremerton wanted the U.S. Department of Labor to believe that the sexual harassment I suffered at work was not work related in order to controvert my claim from 1992 #A14-275656. The contact I had with Thomas Mason was on hospital grounds. It is outrageous a known a sexual predator and person with a history of strangling people would be allowed to work independently in a public hospital. Lisa Batt, the EEO Counselor at Naval Hospital in 1992, wrote a report claiming that I had met Thomas Mason at the church I attend. This false story continued to be reported by the Navy until Thomas Mason himself verified in the Summer of 1994 during the preparation for the EEOC Hearing that he met me at the Naval Hospital in November of 1991. He also said that his contact with me was on the hospital grounds, not in the civilian community as the Navy had claimed. **Judge Carroll at the September 1994 EEOC Hearing ruled that the sexual harassment was work related as it did acquire during working hours at my work sites and that Thomas Mason was legally recognized as my co-worker. (see Q6)**

Captain Bajuk, a Navy JAG Officer was assigned by RADM Riddell (see O1 - O11) conduct an investigation of sexual harassment at the Hospital. The investigation started on the 15th of July 1992 concluded on September 10th 1992. On the 14th of July, CDR S D Rogers was posted on the doors of the hospital the announcement of the investigation. Ms. Dougan was having frequent meetings with Captain McKee (the officer being investigated) during July of 1992 concerning what to do with me. She admitted this to Andy Anderson, the Vice President of the Union when he reported to her that I needed medical attention after one of the sexual assaults. Ms. Dougan aggressively attempted to interfere with the Captain Bajuk Investigation of the sexual harassment problem by physically blocking me from viewing the announcement. When I could not read the phone number from the announcement to call for an interview in the investigation, I called the Commanding Officer's office and got the information from his secretary. Ms. Dougan than tried to prevent me from receiving the messages of my interview appointment with Captain Bajuk.

Colleen Dougan prepared three Records of Counseling that week. (see N1 - N6 and Q13 for the history surrounding the retaliatory punishment) She planned to give two of them to me before I had a chance to be interviewed by Captain Bajuk. The first was for talking to the Federal Women's Program Manager about the sexual harassment problem even though official policy of the Federal Women's Program is to help victims of sexual harassment. The second one was for using the phone for private business. (the private business was calling the investigation team to set up an interview) On the Record of Counseling I was criticized for being gone attending the interview when Ms. Dougan wanted to issue the reprimands. Dougan wanted to intimidate me with more bogus discipline. The third was for seeking medical treatment at Group Health.

After my injury from the sexual assault in July of 1992. I was refused treatment at the Bangor Medical Clinic. (see O2) When I had worked seven hours bleeding and in pain, I was punished for seeking medical treatment outside of work. Mr. Anderson had notified my supervisor, Colleen Dougan, that I had left for a medical emergency. Andy Anderson, the Union Vice President, had seen me doubled over in pain and white as a ghost at the Bangor Medical Clinic. When my health care providers wrote letters so I could get off work to recuperate, Dougan called Janet Spencer, my private counselor, tried to convince her to change assessment of my condition. Janet Spencer verified this fact in her letter written on 11 February 1998 (see 16) and testified to it at the 22 August 1995 EEOC hearing. (see 17) When I returned to work, Dougan gave me three written reprimands as a welcome back. This is how Naval Hospital Bremerton retaliated against me for testifying against the Commanding Officer Captain McKee. (for more information on the Records of Counseling, see EEOC documents Q7 and Q13 and D10)

The Captain Bajuk Investigation report found that sexual harassment did occur at the hospital and that there was a general lack of military discipline. As you can see from the Navv News Release dated September 10, 1992, (see O3) the Commanding Officer, Captain McKee was relieved of command. The general attitude of the hospital staff was sympathetic to the Commanding Officer. This was right in the middle of the Tailhook Scandal and there were a number of people angry at me for hurting a member of the "good old boys' club". As you can imagine, Naval Hospital was in the news from mid-July until mid-September 1992. I was viewed as the enemy.

I requested a copy of the Bajuk report under the Freedom of Information Act. (see O4 - O6) I eventually received a censored copy plus the documents involving my testimony. (see O7) I was shocked to find that Lisa Batt and others in Management had renamed the gym where I met Thomas Mason and declared it off the hospital grounds in attempt to sabotage my OWCP claim. I wrote a letter to RADM Riddell in an effort to get the situation corrected. (see O9 - O11) I have included a map of the hospital grounds as they were in 1992 and have marked the key locations that have to do with my 1992 work related injury. (see O8) Even though the error was obvious, it was never corrected.

I had been away from work the 16th of July until the 10th of August which included two weeks sick leave and some vacation time. As soon as I was out of Kitsap County my medical problems subsided. When I returned to work on the 10th of August, I took sexual harassment class from Lisa Batt. The very next day the phone calls continued. I contacted Master Chief Johnson, who is in charge of security. She tried to get Naval

Investigative Services to tap my phone, but Special Agent Mark E. Fedorko from Naval Investigative Services refused. The calls continued until Mid-October of 1992 when Tom Mason was discharged and moved out of the area.

I had a history of getting Outstanding on my evaluations. For the next four years until Colleen Dougan resigned I was rated only Fully Successful.

On 17 December 1992, the Seattle Office of OWCP wrote at letter asking for more information concerning my injury claim #A14-275656. The hospital also received a letter requesting more information. Colleen Dougan called me at home during my Christmas break and told me that I was not allowed to talk to any of the witnesses for my OWCP claim, that Lt. Bolaney, the JAG Officer was supposed to do that. I thought that it was not correct to restrict me from talking to people with whom I worked. I called the Seattle Office of OWCP and asked them if I could be prohibited from talking to witnesses. They wrote me a letter on 12 January of 1993 stating that I could gather statements on my own time. (see D5 - D7) I answered the information request letter on 5 February 1993 and sent support statements of evidence that contact with Mason was work related. Many of them were stamped as received on 12 Feb. 1993 by OWCP and included documents A7, B4, B5, B8, and D10. In my letter I requested a copy of my OWCP file. (see D9) A7 was a letter written by Bishop Klemm confirming to OWCP that I did not meet Thomas Mason at church because Thomas was not attending.

In an effort to controvert my OWCP claim, Colleen Dougan wrote a letter trying to prove my injury was not work related and claimed it did not happen at the Naval Hospital. She supported the notion that it was a private relationship originating at church. She refuted the idea that I was getting calls or contact from Masons at work. I received the letter just as the deadline to introduce additional supportive statements was ending. I was upset by the false statements written by Dougan and spoke with Doug Campbell about it briefly during February 16th, 1993. D13 documents that I was granted an extension on 16 February to end on March 8, 1993. Steve, my husband, and I wrote statements concerning Dougan's remarks on the 15 February and mailed them that week. Richard Sleeper, CEAP counselor, wrote a letter confirming that the Record of Counseling on 17 June 1992 was based on false information and Dougan knew it. But before OWCP could review Richard's letter, they denied my claim on 4 March 1993 before the extension date. (see D15) And they failed to provide me with a copy of my case file as requested in writing and by phone.

On 21 March 1993 Andy Anderson from the Union writes a letter in support of my injury. I request in writing a OWCP hearing and named Andy Anderson as my representative. (see D16, D17, D18) The Human Resources Office at Bangor is informed that Andy Anderson would be my representative at the OWCP hearing. (see D19) Documents concerning my OWCP case are sent to Mr. Anderson from OWCP proving they were aware he represented me. (see 26 March 1993 document D20) I had continued difficulties getting a copy of my case file from OWCP and wrote two letters, one on 2 April 1993 and another on 23 June 1993. (see D21 and D22)

Around Christmas of 1993 the notice of the OWCP hearing arrived to both Andy Anderson and myself. He informed this supervisor, Lt. Sims right away of his legal responsibilities to attend the hearing. Andy and Lt. Sims both are aware that Andy was assigned to teach a class that day. Two other employees including Lt. Sims are qualified

to teach the class. Lt. Sims delayed answering Andy's repeated requests. Just a few days before the hearing Andy Anderson submitted a leave slip. Lt Sims communicated repeatedly with Human Resources Office at Bangor Subase. Right after a phone call from HRO, Lt. Sims disapproved the leave slip for the hearing. See in the Transcript for the 12 January 1994 OWCP Hearing (D23) that Andy was not in attendance at the hearing. When I arrived, the OWCP Hearing Representative asked me where my personal Union representative was. When I told him that the agency had denied him leave to come to the hearing, the Hearing Recorder, Edward Miller, told me that it was against the law. Mr. Miller is willing to confirm this fact and his address and phone number on the document list under D23. This denial of representation had an adverse impact on my hearing because my Union Representative was not there to confirm and support my case.

This was a continued pattern in my regular Union and EEO activities. (see L1 to L18) If being denied a representative at the OWCP hearing wasn't bad enough, Colleen Dougan obstructed giving me time to prepare for my EEOC hearing in the Summer of 1995. When Andy Anderson, also my representative for the EEOC hearing, was about to be restricted from attending the prehearing telephone conference with Judge Carroll, I called the Judge. He did not believe the agency would do such a thing and decided for that reason that I was not credible, which lead to a denial of my EEOC case (R3). In 1992 I did not have E-mail, but in 1995 I did. Documents L7 to L13 prove the obstruction, time, date, and who is guilty of obstruction of my legal rights. Especially note L11 and L17. Andy Anderson had his personnel file cleaned out after Lt. Sims was transferred and found direct E-mail between Ms. Dougan and Lt. Sims plotting to limit my time with Andy Anderson for preparation of my EEOC hearing.

On 23 March 1994 the Decision of the Hearing Representative denied my claim because the agency had supported Colleen Dougan's abusive actions. One of the Records of Counseling and refusal to let me call the Union on government phones was ruled "an erroneous administrative action". I asked for reconsideration in writing on the 20th of March 1995. Another denial of my claim was written on 5 April 1995 as OWCP considered my evidence "repetitious and irrelevant". I appealed on 27 June 1995 and received a notice of appeal on 15 July 1995. On 12 October 1995 a notice of intent to issue final decision was written by OWCP. It was not until 24 June 1998, three years after my appeal and six years after filing my injury claim case # A14-275656 that the final decision and order was issued. (see D31) Michael J. Walsh, Michael E. Groom, and A. Peter Kanjorski ruled that none of my evidence was "sufficient to warrant merit review of the Office's decisions".

After going through the full process of an OWCP injury claim with the U.S. Department of Labor, I find the following to be true: As the law is written, it appears fair and just for all concerned. But as OWCP implements and executes the law, it is overly cumbersome, legalistic, and overwhelming. The U.S. Department of Labor unfairly acts as an arm of the agency.

My last OWCP claim # A14-307645 involves a case which should be cut and dry because there have been two official investigations concerning my injury on 23 June 1995. The Navy investigation was conducted by Lt. Franze after a Congressional inquiry resulted from my husband's letter to Captain Johnson, the Commanding Officer of Naval Hospital in 1995. My husband wanted to know why I had been abused so badly at work.

Colleen Dougan (my supervisor), Roger Meester (Head of Food Service at the time), and Doug Campbell (EEO Counselor) had been over heard in the galley plotting retaliation against me because of my whistleblowing activities. I had exposed that Colleen Dougan was working an outside job on government time (J10, J11, J12, J13), Roger Meester was falsifying information on an employee in retaliation and processing his termination (J17), Doug Campbell had tried to obstruct my EEO activities and rights and I had testified in an official investigation against him. (J15, J18, J19, J20) Colleen had been asked by her supervisor, CDR Gibson, if she was working an outside job and she denied it. In an attempt to restrict me from gathering more evidence about her other job, Dougan wrote an E-mail restricting me from answering the phone. She also ordered my phone calls not to be transferred to my in-house phone. This action resulted in two of my patients being unable to reach me during emergency situations. One was having a stroke and the other was a new diabetic with her first insulin reaction. When I questioned the phone policy, Dougan and Meester used it as an opportunity for retaliation. They conducted an abusive meeting in a small room with four hostile people verbally abusing me and physically intimidating me non-stop for close to two hours. Just as they called me into the room, Doug Campbell left the area. Loren Jones told me at the time that the five of them had been talking about me. (Dougan, Meester, Campbell, Charlene Terry the secretary, and Jones)

Because the agency was not penalized for their support of Colleen Dougan's discriminatory actions, she continued in her abusive retaliation until Passover Day of 1996 when Colleen Dougan resigned. Her outrageous actions finally caught up to her and the agency. The Office of Special Counsel came to Naval Hospital Bremerton on three separate visits and found evidence of Whistle Blower Violations by Colleen Dougan, Roger Meester, Charlene Terry (the secretary who testified against me), CDR Gibson (Dougan's supervisor who failed to correct her actions) and the Commanding Officer, Captain Johnson, who was well aware of Dougan's actions. Both Union Steward Andy Anderson and myself had filed reports since the CO's arrival. He had also seen the investigative report completed by Lt. Franze in 1996. An OSC settlement provided some restitution for the retaliation suffered by me in 1995 and 1996. This resulted from the OSC investigation pertaining to retaliation regarding use of phones, abusive meetings, abusive treatment, unfair disciplinary actions, unequal opportunity for training, supplies and equipment. Colleen Dougan's explanations were proven false. Dougan was found to have been working an outside job on government time. Her schedule for the outside job was sometimes relayed by message on the office phone. Charlene Terry later resigned in June 1996 after she failed to stop harassing me and was found to have covered for Dougan's illegal actions. My patients verified Charlene's abusive and down right mean actions. Both Charlene Terry and Colleen Dougan have given up their civil service careers. (see K1 - K23)

Doug Campbell was no longer our EEO Counselor and Norm Hill, from HRO at Bangor Subbase, was not allowed to advise the hospital how to treat their employees. I remember one afternoon when Ellen Booth and Bob Calvert from the Office of Special Counsel needed a document from me. That afternoon they were questioning Norm Hill about the advice he provided the CO in managing me and my problems at work. They were in a conference room for almost 2 hours. Norm Hill had sweat dripping down his

neck and he kept tugging at his collar. He had been the master mind behind HRO's support of Colleen Dougan's abusive retaliation. I know that he would have been in serious trouble if the OSC case had not settled. But management and HRO said Norm and Doug got promoted. If that is true that these men got promoted after all the violations of human rights they committed, action needs to be taken to correct rewarding them after their mistreatment of Federal Employees at Naval Hospital Bremerton.

In July of 1995, I was diagnosed with Post Traumatic Stress Disorder by a clinical psychologist, Steve Savlov Ph. D., at Group Health. I have experienced extreme anxiety and depression as well as the inability to sleep due to continuous and frequent nightmares. The nightmares in 1995 are all related to hostile scenes of Colleen Dougan abusive treatment of me. My nightmares in 1992 to 1994 were of the hostile work place, Thomas Mason in the act of strangling me, repeated scenes of the sexual assault and the sexual harassment at the Naval Hospital and the parking lot. My GI problem returned with sharp pains just as I experienced in 1992. My asthma and heart problems again became uncontrollable, even with the medications that are usually effective (inhalers and verapamil). The Occupational Health doctor, Michael McManus, MD, at Group Health stated after seeing some of my third party documentation from independent witnesses that he believed my work environment was "toxic". He was concerned for my emotional, mental, and physical health if I continued to work at Naval Hospital Bremerton. He asked that reasonable accommodations be made by the hospital for me to work outside the Nutrition Department before I could return to work.

Both CDR Gibson (Colleen Dougan's supervisor) and Colleen Dougan refused to provide reasonable accommodations. I was forced out on sick leave and was given leave without pay for the hours that I did work related projects after checking in at Naval Hospital's Occupational Health Clinic during the time I was waiting for my work area assignment. On the 3rd of July after I had reported in at the Naval Hospital's Occupational Health Clinic, CDR Gibson had ordered me verbally over the phone to report to work on the 6th of July. These practices are against labor laws when I am not provided reasonable accommodations for a safe work place and punished for following direct orders.

Dr. McManus allowed me to return to work only 4 to 6 hours per day to minimize my exposure to my abusive boss, Colleen Dougan. I had appointments with either Dr. Savlov or Dr. McManus every seven to fourteen days. The summary of the treatment they give me has been provided to the Office of Workers' Compensation Programs by Group Health. I was diagnosed with Post-traumatic stress disorder as a direct result of the retaliation I had suffered at the hands of her supervisor, Colleen Dougan. This condition has physically and mentally impaired me to the point that I was unable to work in the Nutrition Department. On page 230 of Judge Carroll's EEOC bench decision, he ruled that I had established that I was a person with a disability based on the expert witness of Janet Spencer that I do indeed suffer from Post Traumatic Stress Disorder. It was Janet Spencer's opinion that the PTSD is a direct result of the abuse I had suffered at work from Colleen Dougan. Because I was treated so badly by Ms. Dougan, Janet Spencer (my counselor) testified that she did not know if Mason or Dougan contributed to my PTSD injury more. Because of the severe and long retaliatory actions of Dougan, she said that my injury is much more extensive than it would otherwise have been.

During 1995 I wrote, "I suffer traumatic stress disorders with nightmares. My war zone has been in my work place I was attacked with harassing phone calls and stalked by a dangerous man who assaulted me. My friend's cars are tampered with and damaged. Andy Anderson's brakes were greased, and other attempts have been made to hurt him. Those who try to help me are retaliated against (Andy Anderson and Holly Mattox) and those who persecute me are rewarded with money (those at Bangor Medical Clinic who obeyed the order from CDR Karlin to not talk to Vicki Gentry and myself received a \$250 cash award), performance awards (this years Civilian of the Year, Carolyn Eliseuson, spied for CDR Karlin who violated my Freedom of Speech), or increased opportunities and training (look at the training graph for the Nutrition Department 1991 to 1995). My face has been spit upon and doors slammed in my face. I have been falsely accused, ridiculed, and denied opportunities and training. I have had to bear the costs emotionally, mentally, physically, and financially. I have suffered obscene abuse and tremendous persecution. Only my faith in God gave me the strength to continue".

Not all Officers at Naval Hospital ignored the abusive actions of Colleen Dougan. After CDR Gibson failed to give me reasonable accommodations after my injury on 23 June 1995, Captain Jensen replaced him as Director of Ancillary Services. Captain Jensen moved me out of the Nutrition Department until after Dougan resigned. He communicated with Lt. Franze and found that I really had been abused. He took action to stop further abuse including barring Dougan from the hospital grounds after she resigned from her job.

The CO of the hospital thought since Dougan was gone I could be moved back into the Nutrition Department. I was offer the Department Head position, but turned it down because I was ordered by my doctors not the have contact with any of the abusive people who injured me at the meeting in June of 1995. That did not stop them from assigning Meester to be my boss. (see M9 - M16 and P6) You will clearly see why the employees in the kitchen do not want to around Roger Meester. He has been deemed a danger to others and locked up involuntarily in a mental institution. (see M16) He has continued to retaliate against me causing my last PTSD assessment to be at the severe level determined by Steven M. Savlov Ph.D., Clinical Psychologist from Group Health. (see H2 - H4) Gabby, the new secretary, said that Meester recently talked about "taking care of the problems in the kitchen" with his gun (see M15).

My OWCP Case #A14-307645 is not going any better than the first case. HRO delayed it being filed for over 2 months. Dougan controverted it as usual. And when I finally got a decision in my favor, the leaders in the U.S. Department of Labor ordered Mr. Joseph Perez to rule against me. (see F19)

OUTLINE OF CLAIM # A14-307645

- 23 June 1995 Susan Yake injured by abusive meeting held at Naval Hospital Bremerton
- 23 June 1995 Susan Yake seen by Group Health and referred to psychologist who diagnosis Post-Traumatic Stress Syndrome
- 6 July 1995 Susan Yake files OWCP claim for injury on 23 June 1995
- 21 July 1995 Susan Yake finishes written report concerning her injury, HRO refuses to process her claim or except her written report

- 11 Sep 1995 Seattle office of OWCP orders HRO to process Susan's claim
- 30 April 1996 Susan Yake's OWCP claim of 23 June 1995 injury is denied and Susan requests a hearing
- 4 April 1997 During the Office of Special Counsel investigation, Colleen Dougan resigns from her job when evidence is uncovered that Dougan was working an outside job on government time and acting in retaliation against Susan Yake for reporting it to members of Congress and the Senate
- 21 April 1997 Susan Yake's OWCP case is heard in Seattle before Joseph Perez, a Hearing Representative from the U.S. Department of Labor, Washington DC
- 18 April 1997 After seven months of negotiations, Captain James A. Johnson, the Commanding Officer of Naval Hospital Bremerton signs a settlement agreement with Susan Yake after the OSC reports evidence of Whistle Blower Violations linked with the injurious meeting of 23 June 1995, meeting which lead to the OWCP claim of Susan Yake. Compensations directly related to the injury claim are awarded to Yake, but not allowed to be disclosed as a contingency of the agreement
- 23 May 1997 Even after the OSC found evidence of retaliation and illegal behavior of management against Susan Yake, the Human Resources Office at Bangor Subase writes a bogus report against Susan Yake's OWCP claim, they get Roger Meester to write an affidavit so full of lies that Joseph Perez describes it as "inaccurate and self-serving"
- 1 June 1997 Susan Yake wrote a response to HRO's report against her claim and supplies the following supportive documents:
1. Evidence and proof Roger Meester's furniture was ordered after 23 June 1995 meeting and was not install until November of 1995
 2. 28 May 1997 Loren Jones, first-hand witness of abusive meeting of 23 June 1995 which verified Susan Yake's recollection of the meeting. He also verified it to the OSC
 3. 2 June 1997 -Andy Anderson, Susan Yake's representative at the OWCP hearing, writes a rebuttal to HRO's report against the OWCP claim
 4. Documentation from Susan Yake's Psychologist concerning the OWCP claim and request for protection from contact with Roger Meester
 5. Proof that Roger Meester is not Department Head of Nutrition and Food Service as he falsely claims
- 19 June 1997 Ellen Booth from the OSC writes a document to be sent to Joseph Perez at the U.S. Dept. of Labor in support of Susan Yake's claim
- 29 July 1997 Joseph Perez writes a decision in favor of Susan Yake's OWCP claim

- 10 Sep 1997 Thomas M. Markey, Director for Federal Employees' Compensation writes a memo to Joseph Perez criticizing his decision regarding the Yake claim. According to Perez, he was asked to rewrite the decision against Susan Yake and other claims. He refused. Mr. Perez reported the situation to the U.S. Dept. of Labor Inspector General. See Luckett Case at end of documents.
- 18 Sep 1997 **Joseph Perez was demoted and reassigned by Shelby Hallmark. Susan Yake's case was assigned to Mr. Duncan who was to write the claim against Yake. This is illegal as he was not at the hearing and cannot judge the credibility of Susan Yake. See Luckett Case.**
- Oct - Nov 1997 IG investigation is active. IG contacts Eric Earling at Senator Gorton's Bellevue Office. 425-451-0234
- 15 Jan 1998 Senator Slade Gordon gets a "we did not do anything wrong" letter from OWCP and claims it is perfectly legal to assign a Hearing Representative who did not hear Susan Yake's case to rule on her claim
- 4 Feb. 1998 Susan Yake is offered a new OWCP hearing
- 3 Mar 1998 Susan Yake attends new hearing with her representative, Andy Anderson, Eric Erling from Senator Gorton's office attends the hearing
- as of 28 June there is no ruling on the 2nd OWCP hearing on this claim which is past due

Thank you for holding the hearings concerning the actions of the U.S. Department of Labor. I hope that you will receive the co-operation you need to improve the process and make it more fair and equitable to all concerned.

In the past six years it has felt like it would take an act of Congress to make my life normal again. If it is in your power to do so, I would greatly appreciate it if you also took the following actions to help me find resolution to my problems at Naval Hospital Bremerton:

1. Obtain an uncensored copy of the Lt. Franze Investigative Report provide it to U.S. Department of Labor and the EEOC to be used as evidence in support of my cases with those agencies. The request should be directed to:

T. F. Fredman, Esq.
Assistant to the General Counsel of the Navy (FOIA)
2211 South Clark Place
Arlington, VA 22244-5103

The report to be requested concerning the investigation by Lt. Franze is titled:

NUTRITION - CASE NUMBER 01-95 and has 24 pages plus enclosures 1 through 65
The FIRST ENDORSEMENT is dated 05 February 1996 and final report is dated 8 Jul 96
The report is identified by the numbers: 5830 Ser. 00A14/01901 and is signed by J.A. JOHNSON, the Commanding Officer of Naval Hospital Bremerton

2. Seek disciplinary action for government ethics violations for Roger Meester (Naval Hospital Bremerton, Norm Hill and his HRO workers who wrote the reports against my claims after the OSC investigation settlement agreement was signed

Ask that strong action be taken to clean up the Human Resources Office at Bangor Subase in Silverdale, Washington.

3. Request a copy of the report written by Ellen Booth from OSC which was sent to the U.S. Department of Labor and furnish it to EEOC to be included as evidence in both my cases. Ellen Booth, the Investigator from the Office of Special Counsel, can be reached at (510) 637-3460. Senior Attorney, Bruce Fong, can be reached at the same number.

5. In Judge James Carroll's EEOC decision (R3), he admits that the reason that he did not rule in my favor was that he did not believe me when I told him that I had been denied representation at a hearing in the past because the Navy had not allowed Andy Anderson to go to my OWCP hearing. I claimed that I was having a similar problem with the EEOC hearing. You have in the case file evidence that this was in fact true as documented by Andy Anderson. Further evidence of this fact can be verified by Edward Miller, the court recorder for the OWCP hearings held in Seattle, Washington. He told me at my first OWCP hearing that denial of representation at an OWCP hearing was against the law when I showed up alone for my hearing. Please take action to correct Judge Carroll's misconceived decision.

4. Encourage the EEOC and the U.S. Department of Labor to settle my claims and cases as soon as possible considering the new evidence that supports the fact of my allegations against the Navy.

5. I want the Naval Hospital to furnish me with furniture in my office that matches and functions normally. I was given the leftover and discarded furniture that other departments did not want anymore when I moved offices. The broken furniture in my office has put me at risk of injury when it breaks off the wall and the old chairs are very bad for my back.

Thank You Again

Truthfully,

Susan York RD 00 CDE LLC

**OUTLINE OF THE REPORT FOR THE
SUBCOMMITTEE ON
GOVERNMENT MANAGEMENT, INFORMATION,
AND TECHNOLOGY**

PROOF OF EEO VIOLATIONS

- A. Evidence of Violations of Freedom of Religion**
1. Outline of documents sent to Susan Yake's Senators and Congressman asking for corrective action to be taken - see action requests
 2. Evidence of religious discrimination - on page 260 of the EEOC case file is **a report written by Lisa Batt, the EEO Counselor who criticizes Susan Yake in writing for not changing her church activities**
 - 2d. Show Lt. Baloney, the Naval Hospital JAG officer's hand written assessment of Susan Yake's sexual harassment problem with Mason,
 - a. he assumed that Susan Yake had an affair with her stalker,
 - b. he judged her as being mentally insane, "at least 2 nuts"
 - c. he comes right out and **judges religious involvement** when it was work related as later testified by Mason, himself at the EEOC hearing
 - 2e. Documents Thomas Mason's personality disorder as **intermittent explosive disorder**, in other words **dangerous**, possible criminal violations of sexual assault, **even though he was dangerous and had been accused of sexual assault, Mason was released to be on liberty enabling him to stalk his victims 24 hours a day**
 - 2f. U.S. Naval Investigative Service Report falsely claiming relationship with Mason developed at church - also shows that **NIS failed in a simple investigation** to uncover a pattern of assaults committed by Thomas Mason even though they were given names of other victims, **Mason had a criminal record with long history of assaults, convictions, and mental illness diagnosis associated with violent behavior**
 3. Letter written by Keith A. Hawkes who had an affair with **Lisa Batt, the EEO Counselor, when she was his supervisor**, Documents that Lisa attempted to promote Hawkes, when one the Lisa's subordinates discovered the planned illegal promotion, she threaten to file an EEO complaint against Lisa in 1990 because of her illegal and immoral activities **The letter confirms that Lisa Batt was excommunicated from the Mormon Church which is the church that Susan Yake belongs to**
 4. 23 January 1995 letter written by Andy Anderson documenting how and why Lisa Batt was an unfit EEO Counselor and perjury committed by Colleen Dougan - **This one is a real eye opener**
 5. EEOC Appeal list that has the name of the attorney who can verify that **Lisa Batt was excommunicated from the Mormon church for immoral sexual activity with young men her daughter's age**
Dale A. Magnuson (360) 698-1688

6. Letter from church leaders of the Church of Jesus Christ of Latter Day Saints (Mormon) verifying that Susan Yake did not meet and/or associate with Tom Mason at church and siting actions taken to assure Susan's safety at church after the restraining order in March of 1992
 7. 14 January 1993 letter from Bishop Klemm confirming to OWCP that Susan did not meet Thomas Mason at church because he seldom attended
- B. Witness Statements in Evidence of Sexual Harassment
1. Iris Kellum Declaration for EEOC hearing verifies Thomas Mason was in Susan Yake's work site unescorted after the restraining order, also confirms hostile work environment with associated with EEO case and retaliation activities by Colleen Dougan and Charlene Terry
 2. Another statement by Iris Kellum dated 9 Nov 1994
 3. 2 March 1993 written statement from Kim Hopper who confirms Thomas Mason harassed Susan Yake during work hours, Kim herself was also harassed by him, that Kim witnessed him grabbing Susan's breasts with both of his hands at the gym on hospital grounds, when she told the JAG Officer, Lt. Bolaney, about the incident, Lt. Bolaney refused to take a statement. Received by OWCP on 9 Mar 1993
 4. 19 January 1993 letter from Teddi H. Cruise confirming Thomas Mason harassing and stalking Susan Yake at work in the WIC clinic during working hours - received by OWCP on 12 Feb 1993
 5. 29 January 1993 note from Lynn Stough confirming Thomas Mason's visits to Susan Yake at the WIC clinic on 21 February 1992
 6. 9 March 1993 Niki Craine's account of the Mason's repeated visits to the WIC clinic during and after working hours
 7. 30 Dec 1993 Letter from Lisa Mapes outlining some of the harassments, assaults, and retaliation she and her family suffered from the Masons, Tells of how she learned about Thomas Mason's involvement with Susan Yake and fear and concern for all the women this man and his wife have victimized - confirms Mason making odd phone calls
 8. 11 January 1993 written statement by John Vaughan who worked at the Naval Hospital gym where Thomas Mason first approach Susan Yake, John relays an incident where Julie Mason called Susan Yake at the gym, Susan would not talk to Julie, Julie left a message "sexual predator does not exist, both Carmen and Lisa lied. When confronted could not deny it"
 9. 12 Jan 1993 statement from the Command Master Chief, Inboden
 10. 5 November 1994 statement from Glenda Baily outlining how she was sexually harassed by Thomas Mason and also received hang up calls, told how Colleen Dougan blamed Susan Yake for Mason's actions and others called Susan the "nut in Nutrition" after she reported the sexual harassment, when Glenda reported the hang-up calls she was receiving from Mason to the Navy, the chief said, "Isn't this a Mormon thing"

- C. Evidence of Retaliation
1. 26 June 1995 statement from William and Kathy Uzonyi, patients from Naval Hospital Bremerton, concerned about how Susan Yake was treated in Nutrition Department
 2. 5 December 1993 statement from Dutch and Marilyn Ford that Colleen Dougan tried to get them to find fault with the care Susan Yake had given them on 3 May 1993 (the day the EEO case went formal)
 3. 7 June 1995 - Vincent Eldridge statement for EEOC hearing
 4. 6 June 1995 - Loren Jones statement confirming false claims that Susan Yake tardy by Colleen Dougan when it was not true
 5. 3 August 1995 statement by Loren Jones outlining examples of how management has treated Susan Yake different than other employees and fail to bargain in good faith by breaking agreements with the union
 6. Milton Bates statement of how Charlene Terry interfered with Susan Yake's job duties and behaved rudely (she later lied about the incident)
 7. 9 June 1995 Kelly Shine's account of the hostile work environment He is mentioned in Iris Kellum's declaration (B1 and B2)
 8. 25 January 1995 statement by Monica Law verifying that she had been assigned to spy on Susan Yake by Colleen Dougan - that she was told she no longer had to do so because Charlene Terry had been assigned
 9. 5 June 1995 declaration from Bill Washburn, a union Steward who experienced the extremely 2 hostile meetings with Dougan abusing Susan Yake - He testified under oath of that fact at the 1995 EEOC hearing
 10. 28 June 95 Ter-Lue Dolyniuk account of hostile work environment and angry behavior of Colleen Dougan
 11. EEO Complaint of 14 September 1994 includes examples of Colleen Dougan's interference with official EEO meetings and hearing and illegal letter of reprimand - Colleen Dougan's interference with EEOC telephone conference mentioned
 12. 20 Nov 1994 EEO complaint #6 on retaliation for EEO activities
 13. 13 November 1994 notice to EEO Program Manager of EEO complaint
 14. 28 November 1994 EEO complaint that was never investigated by the agency
 15. 11 March 1995 report to the EEOC which resulted in the Office of Special Counsel Investigation

U.S. DEPARTMENT OF LABOR WORKERS' COMPENSATION CASES

- D. OWCP Case #A14-275656 of 17 April 1992
1. Restraining order against Thomas and Julie Mason dated 4 March 1992
Received by OWCP 12 Feb 1993
 2. Compensation Claim for injury of 17 April 1992 for sexual harassment
filed 22 July 1992 received 24 July 1992 at OWCP
 3. Documentation for injury claim written by Susan Yake in July 1992
 4. Copies of OWCP injury cards with case numbers for 2 cases:
Case 14-275656 of 17 July 1992 mailed 3 Aug 1992
Case 14-307645 of 23 June 1995 mailed 11 Sep 1995
 5. 17 Dec 1992 letter from OWCP asking for more information
Colleen Dougan called Susan Yake at home during her Christmas
break and told her that Susan was not allowed to talk to any of her
witnesses, that the JAG Officer, Lt. Bolaney would be gathering all
the information for the claim
 6. Note from OWCP file verifying Lt. Bolaney involvement in OWCP
claim (highly unusual for a JAG to work against an injury claim)
Dated 23 Dec 1992
 7. 12 Jan 1993 follow up letter from Seattle office of OWCP to Susan Yake
in response to phone call in which Susan asked about prohibiting her from
talking to witnesses
 8. 19 Jan 1993 letter written by Colleen Dougan in an effort to controvert
Susan Yake's OWCP claim, contains many inaccurate statements
 9. 5 Feb 1993 letter written by Susan Yake in answer to OWCP letter of
17 Dec 1992 - stamped received 28 June 1993 but mailed with documents
sent before 12 Feb 93 - last line requests a copy of OWCP file
Clearly documents that contact with Mason was work related
 10. 7 Feb 1993 letter from Andy Anderson from the Union in support of claim
received by OWCP 12 Feb 1993 - documents hostility by Colleen
Dougan and Navy's actions to cover up sexual harassment
 11. 15 Feb 1993 letter from Steven Yake to OWCP concerning false
statements in Colleen Dougan's letter of 19 Jan 1993 (D8)
 12. 15 Feb 1993 letter from Susan Yake to OWCP concerning false
statements in Colleen Dougan's letter of 19 Jan 1993 (D8)
Letters stamped received 28 June 1993
 13. Documentation of how and when Susan Yake asked for an extention
on sending additional information on claim - Niki Craine from
Seattle Office of OWCP granted extention on 16 Feb 1993
Denial of Claim was issued on 4 March, 4 days prior to extention date
 14. 26 Feb 1993 hand written letter from Richard Sleeper confirming
Colleen Dougan's record of counseling dated 17 June 92 that Susan
Yake was gone from work without permission was false + copy of
record of counseling dated 17 June 92 (see D24 for ruling on this action)
 15. 4 March 1993 Decision on OWCP claim received 9 March 1993 (see D13)

16. 21 March 1993 letter from Andy Anderson of the Union disagreeing with 4 March 1993 Decision on OWCP claim (see details)
17. 22 March 1993 Request for an OWCP hearing and naming of Andy Anderson as Susan Yake's representative
18. Designation of Representative signed by Susan Yake on 22 March 1993 and receive by OWCP on 31 March 1993
19. Documentation from Karen Sprinkle who worked at HRO Bangor with OWCP claims, dated 31 March 1993 and 1 April 1993 - proves agency was informed that Andy Anderson would be Susan Yake's representative at the OWCP hearing, also outlines problems of OWCP not returning phone calls or answering written requests - **Andy Anderson wants you to know that he told his supervisor, Lt. Sims 2 to 3 weeks before the hearing that he was representative and had legal responsibilities to attend the hearing, Andy Anderson and Lt. Sims were aware that Andy was assigned to teach a class that day, Lt. Sims refused to answer Andy's request even though two others were qualified to teach the class (including Lt. Sims), Lt. Sims had been talking to HRO at Bangor just before she refused to approve the leave slips for the hearing that Andy Anderson had turned in several weeks before the hearing date**
20. 26 Mar 1993 notice that OWCP case file was sent to Washington DC, Note copy was sent to Andy Anderson
21. 2 April 1993 letter from Susan Yake requesting copy of case file, also notifying OWCP that Andy Anderson was Susan's representative, Stamped received 7 April 1993
22. 23 June 1993 letter requesting copy of case file from Washington DC and outline of difficulties in getting requests answered, Stamped received 28 June 1993
23. Transcript of OWCP hearing held on 12 Jan 1994 and proof Andy Anderson was not able to attend hearing, Edward Miller who was the court recorder at all 3 of my OWCP hearings told Susan that day that denial of representation was against the law, Andy Anderson told the management of the hospital the same thing and they did not think it was a problem, Edward Miller can be reached at 1-253-845-1636 His address is 1112 6th Ave S.W. Puyallup, WA 98371
24. 23 March 1994 Decision of Hearing Representative ruling against Susan Yake mainly because the agency had supported Colleen Dougan's abusive actions - did recognize that 17 June 1992 personnel action for seeing Richard Sleeper as directed by Colleen Dougan was in error and that Dougan's directive to in 15 July 1992 for Susan to have to use pay phone to call the union was "an erroneous administrative action" This ruling did not stop the agency from using the 17 June 1992 personnel action against Susan Yake repeatedly in legal actions for the next 4 years
25. 28 Oct 1994 Memo from HRO to Susan Yake
26. 20 Mar 1995 reconsideration of decision letter from Susan Yake to OWCP

27. 5 April 1995 answer to reconsideration letter (D26) denial of claim
 28. 27 June 1995 letter of appeal of (D27) from Susan Yake
 29. 15 July 1995 notice of appeal of claims being processed
 30. 12 October 1995 notice of intent to issue final decision
 31. 24 June 1998 U.S Dept. of Labor Final Decision **DENIAL**
received 27 June 1998
- E. OWCP Case #A14-284449 of 24 March 1993
1. 1 Feb 1991 Memo from Colleen Dougan proving evaluation of air quality in Nutrition Clinic, 2 Feb 1991 notice that air quality tests completed which lead to conclusion that air circulation was poor, 4 Feb 91 memo from Susan Yake documenting allergy problems at work and Dougan being upset about inquiries to obtain material safety data sheets as requested by Yake's Allergist at Group Health
 2. **Injury claim for exposure to floor cleaners and floor strippers on 24 March 1993 - injury occurred just one hour after Colleen Dougan criticized Susan Yake for being too sensitive about Dougan's comparison of Joseph Smith to David Koresh - Dougan refused to let Susan Yake file injury claim because Dougan said that it was a "personal health problem" - Union took action to get agency to allow filing of claim - Dougan controverted the claim for not being reported within 30 days when it was her actions that prevented the claim to be filed - file date 16 June 1993**
 3. Emergency report from 24 March 1993 of injury
 4. 24 May 93 Unfair Labor Practice filed in order to be able to file injury claim - agency settled by letting claim be filed, but immediately supported controversion of the claim
 5. 6 July 1993 denial of injury claim
 6. 3 Aug 1993 letter to OWCP by Susan Yake explaining injury claim
 7. 3 Dec 1993 Memo from safety manager verifying Susan Yake had requested MSDS of chemicals used to clean floors
 8. Part of the Material Safety Data Sheets
 9. 12 Jan 1994 Safety Minutes where Bill Washburn voiced concern over safety issues of floor strippers being used during working hours
 - 10 & 11 15 Jan 1994 denial of claim
 12. 4 Feb 1994 letter from Group Health Allergist voicing concerns about Naval Hospital's lack of concern over safety issue involving chemical fumes, Additional documentation of Susan Yake's reactive airway disease
 13. EEO Issues of 1994 listing controverted OWCP claim as one of issues and sighting how other employee with exact same injury was supported in her claim (Gwen Jennings, nurse on 5th floor of hospital)

- F. OWCP Case #A14-307645 of 23 June 1995
1. OWCP claim for injury on 23 June 1995, written 5 July, filed 6 July
Signed by supervisor, Colleen Dougan on 7 July 1995
Received by Human Resources Office 12 July 1995
13 July 1995 Dougan writes memo for Yake to turn documentation in to her
 - 2a. 14 July 1995 answer to Dougan's request to have documentation given directly to her - Susan Yake under direct order from her doctors to not have contact with Dougan (see H2) Agrees to have documents sent to HRO - on 21 July 1995 gives a copy of the documentation to Group Health and hand carries the documents to HRO at Bangor - HRO refuses documents and insists Susan Yake give them directly to Colleen Dougan against doctor's orders - HRO refuses to process claim - Susan Yake calls Seattle office of OWCP around the 11th of Sep 1995 and informs them of the problem - OWCP calls HRO and tells them that the U.S. Dept. of Labor will take action against the agency if they do not file the claim within the week - Susan Yake gets card with claim number in the mail on 18th Sep 1995
 - 2b. Cover page of OWCP documents delivered to Commanding Officer's office on 26 Sep 1995 as marked in right hand corner - Yake asked that her copy be signed as delivered
 3. Susan Yake's written report of 23 June 1995 injury without support documents
 4. Listing of Support documents sent with F3 to OWCP and agency
 5. 24 January 1996 letter from OWCP requesting further documents from Susan Yake and Naval Hospital Bremerton
 6. 19 Feb 1996 - Susan Yake's answers to 24 January 1996 inquiry letter from OWCP
 7. 30 April 1996 letter from OWCP disallowing claim
 8. 27 May 1996 - Susan Yake's written request for oral hearing
 9. 11 June 1996 - Robert Barnes letter acknowledging request for hearing
 10. 11 March 1997 notice from OWCP of hearing for 21 April 1997
 11. 3 April 1997 letter outlining witnesses for hearing from Susan Yake to OWCP - requests Lt. Franze report and OSC report be subpoenaed as evidence for the hearing
 12. 7 May 1997 letter from Joseph Perez granting extension to agency for submission of agency comments concerning the hearing transcripts
 13. 13 May 1997 letter of correction of transcripts of hearing written by Susan Yake and sent to Joseph Perez
 14. 13 May 1997 letter from Dr. Savlov outlining how work related stress and continued hearings have affected Susan Yake's health and life
 15. 14 May 1997 letter to Joseph Perez from Susan Yake sent with documents requested at the hearing
 16. 19 May 1997 letter from Joseph Perez requesting information from OSC concerning Susan Yake's whistleblowing case settlement

17. 23 May 1997 bogus agency comments concerning the hearing transcripts, As to the whistleblowing settlement being in Susan Yake's favor, see for yourself by looking at the actual settlement (K21) What did the agency receive compared to Susan Yake?
Roger Meester's sworn affidavit was so full of false statements that Joseph Perez stated in his decision that Meester's statement was "self-serving and less than accurate" (see F19 pages 3 & 4)
On page 5 the agency quotes Judge Carroll's statement about Susan Yake's credibility - **The Judge erred in that he did not believe that the agency had truly denied Susan Yake representation at an official hearing. You have the proof that Susan Yake was denied representation at her first OWCP hearing (see L 17 and D 23) Judge Carroll failed to ask Andy Anderson if Susan Yake's claims were true. Judge Carroll was prejudice against Susan Yake before the EEOC hearing in 1995 because he failed to recognize a real concern for violation of legal rights express in a phone call with Susan Yake concerning the pre-hearing telephone conference.**
18. 1 June 1997 Susan Yake's and Andy Anderson's rebuttal and supportive documents of the bogus agency comments concerning the hearing transcripts **READ THESE DOCUMENTS THAT EXPOSE THE PATTERN OF LIES THE AGENCY TELLS CONCERNING THIS CLAIM AND EEOC ISSUES AS WELL**
Loren Jones letter was left out of report as Susan Yake could not find it - U.S. Dept. of Labor had it in the case file as documented by Joseph Perez in his decision of July 1997 (see F 19 pages 4, 5, and 6)
19. **29 July 1997 decision in favor of Susan Yake's OWCP claim written by Joseph Perez with valid reasons why, 10 Sep 1997 internal memo dated 10 Sep 1997 from Thomas M. Markey to Joseph Perez criticizing the decision on Susan Yake's OWCP case, A copy of the Luckett case which puts the assignment of another hearing representative to rule on an OWCP case when the hearing representative did not hear the case or testimony is in legal question**
20. 15 Jan 1998 letter from OWCP to Senator Slade Gorton concerning the Senator's inquiry of the U.S. Dept. of Labor's handling of Mitch Anderson's and Susan Yake's OWCP cases, the letter acknowledges that the agency does resign other hearing examiners to issue decisions based on the record only - argues that it is not illegal
21. 4 Feb 1998 letter to Susan Yake from OWCP offering new hearing, Susan Yake called OWCP and spoke with Mr. Barnes who promised to expedite the decision of the case due to the fact of the delay and apologized for taking so long in the process
22. 11 Feb 1998 notice of OWCP hearing for 3 March 1998
23. 21 Mar 1998 correction letter for OWCP hearing transcripts
NO DECISION AS OF 27 JUNE 1998

MEDICAL RECORDS

- G. Medical Records from Group Health and Naval Hospital Occupational Health
1. 22 July 1992 written by Susan Yake's doctor, Timothy Symonds, recommending 2 weeks off work due to stress of sexual harassment
 2. EKG done during panic attack when Susan Yake was being actively stalked by Thomas Mason
 3. 6 Jan 1993 letter from Dr. Timothy R. Symonds to OWCP documenting that Susan Yake's anxiety, palpitations, and feeling threatened are related to her work related stress (see proof OWCP received document 31 March 1993)
 4. 18 Feb 1994 occupational health note for Naval Hospital Health record documenting work related stress
 5. 8 June 1995 Declaration from Linda Day, Occupational Health Nurse
 6. 22 Feb 1994 note from Dr. Symonds documenting work related stress and release from work to recover
 7. Limitation notice from Dr. McManus, Group Health Occupational Health dated 19 Oct 1995 to 7 Nov 1995
 8. Partial record of Group Health Medical records during 1995 through 1997 Many documented examples of health issues related to work related stress (see documentation next to red dots)
 9. Group Health Letter dated 20 Sep 1996 that Yakes will be billed for the many appointments relating to occupational health and mental appointments if OWCP claims are not approved
- H. Statements from Steven M. Savlov, Ph.D., Clinical Psychologist
1. Proof that Susan Yake is not paranoid dated 22 Jan 1996, This statement was requested by the agency on 22 Jan 1996 by Lt. Franze during the investigation of Food Service, Susan Yake provided it to Lt. Franze the next morning on 23 Jan 1996
 2. **15 Aug 1995 Mental Health report including 29 June 1995 evaluation and testing following abusive meeting 23 June 1995 leading to filing of OWCP claim - see recommendation that Susan Yake not have any contact with the individuals involved in the abusive meeting**
 3. **26 June 1996 note recommending Susan Yake not have contact with Mr. Roger Meester - this note was written because Susan Yake learned that Mr. Roger Meester had been assigned to be her new supervisor - This note was faxed to OSC and they intervened on Susan's behalf**
 4. 26 Feb 1998 letter written in preparation for OWCP hearing documenting **worsening symptoms of Post Traumatic Stress Disorder after Roger Meester harassed Susan Yake at work - anxiety range now severe**

- I. Statements and Sworn Testimony from Janet L. Spencer, M.A.
1. 16 July 1992 letter recommending two weeks off work due to harassment at work and continued work related stress (OWCP received 8 Feb 1992)
 2. 8 Feb 1993 letter documenting that 2 weeks off work were due to work related stress (OWCP received 12 Feb 1993)
 3. 3 Jan 1994 letter documenting how work related stress and harassment has affected Susan Yake including MMPI test results used in EEOC hearing
 4. 30 June 1995 letter advising Susan Yake to have husband call to work for her to avoid any contact with people who have abused her at work
 5. 25 April 1995 letter describing long term affects of unresolved issues from work related stress and how it has affected Susan Yake's health, projections into the future outcome of how the on the job injuries will affect her life
 6. **11 Feb 1998 letter with statement that Colleen Dougan had called Janet Spencer in 1992 in an effort to get Janet to retract her letter recommending that Susan Yake take 2 weeks off work due to work related stress (see I 1)**
 7. Sworn testimony of Janet Spencer at 22 Aug 1995 EEOC hearing **Page 48 contains statement about Colleen Dougan calling Janet Spencer in effort to have Janet change her professional opinion of her letter recommending that Susan Yake take 2 weeks of in July 1992 (see I 1)**
Discussed work related causes of Post Traumatic Stress Disorder at the EEOC hearing - See bench decision (see R 3 pages 252 & 253)

U.S. OFFICE OF SPECIAL COUNSEL WHISTLE BLOWING CASE

- J. Whistle Blowing Activities Which Lead to 23 June 1995 Retaliation Meeting
1. Andy Anderson Letter dated 22 February 1994 of abuses in work place
 2. Susan Yake's letter dated June 9, 1994 requesting an unbiased EEO Counselor with good reasons for such a request
 3. Susan Yake's letter dated 10 June 1994 outlining retaliation
 4. Susan Yake's letter dated June 29, 1994 informing the EEO Officer of dissatisfaction with the EEO Counselor, Doug Campbell
 5. Answer from HRO to Susan Yake's 29 June letter (dated 7 July 94)
 6. Andy Anderson's letter concerned deliberate pattern of personal abuse by Colleen Dougan toward Susan Yake dated 14 June 1994
 7. **Letter from Senator Orrin Hatch to U.S. Navy General Counsel, Mr. Honigman dated August 16, 1994 asking him to take action to fix Susan Yake's EEO problems at Naval Hospital Bremerton, Mr. Honigman later was the person who denied an uncensored copy of the Lt. Franze report to Senator Patty Murray (see P 23)**
 8. Susan Yake's letter dated Aug 29, 1994 to Senator Slade Gorton
Note page 2 outlines **Navy's refusal to supply requested documents**

9. Announcement of Inspector General visit to Naval Hospital for 13-24 March 1995
10. Susan Yake's report to Inspector General's Team March 1995 reporting major issues of concern in EEO system at the Naval Hospital and the obstruction in approving OWCP claim involving floor stripper on March 24, 1993
11. Graph of training showing discrimination in training costs.
12. Report written by Susan Yake to Director of EEO of the DON at the Pentagon concerning EEO practices and abuses at Naval Hospital Bremerton and the Human Resources Office at Bangor Subase
13. Susan Yake's Mothers' Day letter to Congress on May 14, 1995 reporting **This letter is a must read.** It is the letter that lead to the Office of Special Counsel being contacted by Congressman Rick White's office after his staff member, Ryan Peede, contacted people at Naval Hospital Bremerton to check to see if the information in the letter was true.
14. **Report of Failure to Investigate an EEO Complaint - Navy denied problem**
15. Andy Anderson letter dated 17 April 1995 officially announcing that the union no longer recognizes Doug Campbell as the EEO Counselor
16. 10 May 1995 letter from CO acknowledging Andy Anderson letter 17 Apr
17. Support letter for Edward Valkenaar which lead to Roger Meester wanting to retaliate against Susan Yake (dated June 1, 95) see M3 for background
18. Andy Anderson's letter to HMCM Johnson who conducted an official investigation concerning Doug Campbell and EEO practices at NHB, **The full report of HMCM Johnson's Investigation can be requested under FOIA, Andy Anderson strongly recommends Congress do so**
19. Susan Yake's report for HMCM Johnson's investigation on Doug Campbell **Contains information on Freedom of Religion violations and EEO activities in connection with the Colleen Dougan controversy of the injury claim of 24 of March 1993 (exposure to floor stripper chemicals/asthma) and example of injury claim of another Naval Hospital employee who had the same injury twice and her injury claim was supported and approved. It also tells date of filing of EEO case when Doug Campbell told Susan Yake that he would do everything in his power to make sure she lost her case and how he purposely had tried to obstruct her from filing in a timely manner. Tells how Doug Campbell on 6 June 1995, had learned that Susan Yake had reported that Colleen Dougan was working an another job on government time. (Edward Valkenaar had told Doug Campbell)**
20. Questions and answers from official interview with HMCM Johnson on 18 May 1995, **See example of shredding or disposing of EEO files**
21. **6 June 1995 E-mail message from Colleen Dougan restricting Susan Yake from answering phone**

22. 21 June 1995 E-mail between Susan Yake and Colleen Dougan where Dougan refuses to have Susan Yake's phone calls transferred to her phone line so Susan can talk with her patients who call. This policy of Dougan caused two emergency medical calls to be ignored (patient having a stroke and pregnant woman having severe insulin reaction) before the 23 June 1995 retaliation meeting leading to OWCP claim
- K. U.S. Office of Special Counsel Documents
1. March 28, 1995 acknowledgment of Susan Yake filing OSC complaint, information sent : failure to investigate EEO complaint letter (C14)
 2. April 5, 1995 letter from Susan Yake to OSC - see example of isolation by restriction of phone use in Food Service Department - Dougan had ordered in-house only phone so Susan could not make outside calls, This action restricted Susan's ability to communicate with patients
 - 3 & 4 Letters between Susan Yake and OSC during Summer 1995
 5. Susan Yake's letter dated October 9, 1995 to OSC outlining unequal and discriminatory practices at Navy Hospital Bremerton
 6. Report of Failure to Investigate an EEO Complaint #7
 7. 1 Nov 1995 notice from OSC of investigation on whistleblowing violation
 8. 2 Nov 1995 notice Kathryn A. Milligan assigned to OSC investigation
 9. 7 Nov 1995 OSC letter confirming conversation about leave without pay status while Susan Yake is waiting for reasonable accommodation position away from Colleen Dougan
 10. Proof of plans for onsite visit for OSC investigation Dec 1995
 11. 8 Dec 1995 letter from Susan Yake to OSC to answer investigation questions concerning work assignments and evaluations
 12. 2 Jan 1996 letter from OSC proving Naval Hospital asked for extension to complete internal investigation before settlement is reached
 13. 4 March 1995 letter from OSC proving NHB stalling in providing Lt. Franze Investigation Report to OSC (Report was not completed until 8 July 1996)
 14. 9 June 1996 letter from Susan Yake to OSC to answer questions concerning what she would like to have in whistleblowing violation settlement agreement, **pages 3 & 4 outline safety issues in the work place, page 5 documents that Ralph Cook knew that Colleen Dougan had lied at the EEOC hearings (he represented the agency against Yake and worked for the Human Resources Office at Bangor)**
 15. 2 July 1996 letter from OSC proving onsite visit that day at Naval Hospital Bremerton (note new investigator assigned as Kathryn A. Milligan had retired)
 16. Copy of first settlement agreement faxed to Naval Hospital Bremerton on 8 Aug 1996, **Captain James A. Johnson refused to sign the settlement unless Susan Yake gives up her two EEOC cases without being compensated, (see Steven Yake letter P12)**
 17. 3 Sep 1996 letter from OSC proving another onsite visit to NHB

18. 28 Feb 1997 letter from OSC proving that Senior Attorney, Bruce Fong began working on the case
19. 30 June 95 E-mail documenting Colleen Dougan's failure to provide adequate training and access to a computer forcing Yake to either do work at home or fail to complete assignments (see censored Lt Franze report for more evidence of this fact P15)
20. 4 Mar 1997 E-mail written by Susan Yake when she found out that the computer that had been ordered for her was given to someone else, CDR Becker, Director of Administration made sure that both dietitians were provided with computers after reading the E-mail
21. **18 April 1997 final settlement of whistleblower violations, Susan Yake has not released this document to anyone else, not even Steven Yake and Andy Anderson, Susan Yake discloses to document to the Subcommittee on Government Management, Information, and Technology with the understanding that this falls under an administrative order in an official Congressional investigation**
22. 29 April 1997 update from OSC with proof of settlement
23. 12 May 1997 letter from Washington DC OSC with proof of settlement and official closing of the case
24. 19 June 1997 fax sheet and letter that proves **OSC released document to U.S. Dept. of Labor concerning whistleblower violation settlement**, Susan Yake had to return all copies of the document to OSC
Document showed that Colleen Dougan was questioned about working an outside job on government time by CDR Gibson and denied the fact that was later proven in the Lt. Franze investigation, it also confirms that Loren Jones who attended abusive meeting on 23 June 1995 confirmed Susan Yake's testimony of what happened that day (see request for document in letter from Joseph Perez F17) (see J 21 & J22 which ties the restriction in use of the phones E-mail to being sent immediately after Colleen Dougan was asked about illegally working another job on government time - this was in OSC report given to Joseph Perez for OWCP case)

UNION

- L. Evidence of Obstruction of Union and EEO Activities
 1. Unfair Labor Practice which was filed after Colleen Dougan violated Susan Yake's Weingarten rights and wrote a formal letter of reprimand against Yake
 2. Unfair Labor Practice was settled when Andy Anderson convinced upper management that the Weingarten violation would win in an investigation. Management agreed to remove the letter of reprimand if Susan Yake signed the work leave agreement dated 12 July 1993, Dougan signs agreement to remove letter of reprimand, but keeps it and continues to use it against Susan Yake in legal proceedings

3. Andy Anderson's report to CO about Colleen Dougan continuing to obstruct, delay, and deny Union/Employee Rights - 29 Sep 93
4. Susan Yake's issues for 12 September 1994 EEO telephone conference
5. Andy Anderson's proposed FLRA Charge issues - documents that Colleen Dougan violated Unfair Labor Practice agreement by keeping the letter of reprimand 3 Oct 94 (See L1 & L2)
6. Susan Yake's letter to Sandy Edmonds documenting problems in the EEO system including Colleen Dougan's attempt to block EEOC pre-hearing conference in Sep 1994 and EEO hearing dates as well
7. E-mail showing how Dougan delays and restricts Union and EEOC preparation time, 1 week later and still no time approved, notice Dougan thinks 15 mins of break time is adequate for EEO meeting
8. E-mail of continuing problems trying to get time approved to prepare for EEOC hearing
9. E-mail notice to management 26 July 95 of EEOC telephone conference- also proof Yake trip to Hawaii was canceled due to EEOC hearing
10. E-mail proving meeting with Andy Anderson obstructed until 3 Aug 95
11. **E-mail proof between Colleen Dougan and Lt. Sims that Dougan and Sims were limiting Susan Yake's Union and EEOC activities dated 3 Aug 95**
12. **E-mail again proving obstruction of EEO activity dated 4 Aug 95**
13. E-mail between Susan Yake & Dougan about time off for EEOC hearing
14. Proposed Unfair Labor Practice notice dated 25 Sep 95 from Andy Anderson concerning Dougan restricting Susan Yake's union activities
15. Note from Dougan proving limit of 45 mins. for union meeting 25 Sep 95
16. Note from Lt. Sims, Andy Anderson's supervisor, restricting his time for the official investigation by Lt. Franze of the Food Service area, This is the same report Steve Yake asked for under FOIA
17. **Letter written by Andy Anderson verifying that he was denied by Lt. Sims the time off to represent me in my first OWCP hearing, it also confirms that Judge Carroll did not believe this fact was true, also that Andy Anderson was also originally denied leave to attend the pre-hearing conference, because Judge Carroll did not believe these facts, he ruled against Susan Yake in her EEOC hearing**
18. Proof Evelyn Wiggle was told by Dougan not to clear Yake's schedule for EEOC activities, this lead to Yake's schedule to be booked during official EEOC meetings

M. Reasonable Accommodation Problems

1. Letter date 26 June 95 by Andy Anderson to Colleen Dougan concerning the hostile meeting of 23 June 1995 which lead to an OWCP claim
2. Letter dated 30 June 1995 by Susan Yake requesting reasonable accommodations to return to work

3. Proof that Meester and Dougan lied about other employees work as well and took action to retaliate against them (Andy Anderson's letter concerning Valkenaar dated 24 July 1995)
4. Note by Andy Anderson documenting communication with Colleen Dougan on 2 Aug 95 concerning reasonable accommodations for Susan Yake
5. Notes by Susan Yake taken for 13 Nov 1995 meeting where reasonable accommodations were finally granted by placing Susan Yake in the Radiology Department
6. Letter from Andy Anderson dated 08 Jan 96 documenting interference with reasonable accommodations
7. E-mail documentation of Charlene Terry's interference with reasonable accommodations dated 11 Jan 1996
8. E-mail documentation of Charlene Terry's interference with reasonable accommodations dated 11 Mar 1996
9. **Note from Dr. Savlov that Susan Yake not have professional contact with Roger Meester dated June 26, 1996**
10. **Proof Roger Meester was assigned to be Susan Yake's supervisor in E-mail communication dated 25 June 1996**
11. **E-mail dated 26 June 1996 asking who decided to make Roger Meester Susan Yake's supervisor, CDR Zuckerman answers that he did, Office of Special Counsel take action to reverse commands assignment of supervisors the next day (see fax info on M9)**
12. Evidence that Roger Meester continues to interfere with Susan Yake's professional job anyway he can (including putting patients in danger) 14 Aug 1997
13. E-mail sent to all in the Navy Hospital on the E-mail system after Roger Meester was caught falsifying time cards again dated 30 Jan 1998
14. Proof that even though Roger Meester is not Susan Yake's supervisor, he still has the nerve to initial her time cards dated 2-14-98
15. Letter from Marian (Gabby) Lujan dated 25 February 1998 outlining abuses she witnessed Susan Yake endure at work, Gabby is now secretary for Food Service, note the **Meester's talk about taking care of the problems in the kitchen with his gun, this was reported to the union by four separate people in 1998**
16. Letter written by Mark Austin dated February 28, 1998 outlining how **Meester was illegally promoted to management, Meester's mental health and substance abuse problems including being deemed a danger to others** - Mark Austin was the person who signed Meester out of Kitsap Mental Health Services who wanted to keep Meester locked up for six months (also see his first hand witness of abuse Susan Yake suffered at the hands of Dougan and Charlene Terry)

- N. Records of Counseling involved in EEOC and OWCP Hearings
1. Record of Counseling dated 17 June 92
 - 2 & 3 Written statements from Richard Sleeper verifying that charges of Susan Yake being gone from work were bogus and Dougan knew it all along
 4. Record of Counseling dated 15 July 92 (interference with official Navy investigation) Bajuk Sexual Harassment
 5. Record of Counseling dated 16 July 92 (see reconsideration letter for EEOC case in file R)
 6. Record of Counseling dated 10 July 92 (see reconsideration letter for EEOC case in file R)
- READ EEOC RECONSIDERATION (Q13) to understand fully the retaliation and false accusations in these personnel actions**

NAVY INVESTIGATIONS

- O. Sexual Harassment Investigation of Naval Hospital Bremerton 1992
1. Susan Yake's statement in sexual harassment investigation July 92
 2. Addition to Yake's statement in sexual harassment investigation
 3. Press Release of Sexual Harassment Investigation and information on how to get a copy of the report under Freedom of Information Act
 4. - 6. Letters of request for copy of Sexual Harassment Investigation
 7. Partial Copy of Captain Bajuk's Sexual Harassment Investigation
 8. Map of Naval Hospital Grounds in 1992
 9. **Susan Yake's letter to RADM Riddell concerning inaccurate statements in Captain Bajuk's Sexual Harassment Investigation and report of continuing EEO problems at Naval Hospital Bremerton**
 10. Response letter from RADM Riddell
 11. Navy's findings on complains in Susan Yake's letter (#9)
- P. Food Services Investigation Case Number 01-95 - Lt. Franze Report
1. Steven Yake's letter to CO after Susan Yake was abused in meeting on June 23, 1995 by Dougan, Meester, Loren Jones and Charlene Terry
 2. Captain J. A. Johnson's acknowledgment letter of Steven Yake's letter
 3. Memo announcing investigation of the Food Service Department
 4. Documentation by Susan Yake concerning Food Service Investigation and Roger Meester's interference with that investigation
 5. Captain Johnson's promise letter to respond to Steven Yake inquiry date 13 October 1995
 6. Susan Yake's documentation on hostile work environment 13 October 95
 7. Response of Freedom of Information request November 23, 1995
 8. Acknowledgment of Steve Yake's 23 June 1996 letter by RADM H. F. Herrera claiming RADM Center has jurisdiction
 9. Steve Yake's letter of 23 June 1996 to Captain Johnson criticizing him for not completing the investigation promised concerning the hostile meeting of 1 year earlier which injured his wife, Susan Yake - **his concerns that Susan will be working with Roger Meester again**
 10. Acknowledgment of Steve Yake's 23 June 1996 letter by Naval Hospital

11. Captain Johnson answers Steve Yake's letter and reports that Dougan has resigned 4 Apr 96 (during the Office of Special Counsel Investigation)
12. Steve Yake's letter to the Admiral complaining about unanswered Freedom of Information Requests and **Captain Johnson's refusal to settle the OSC case dated Oct 20, 1996**
13. Partial denial of Freedom of Information Request of Lt. Franze Report
14. Andy Anderson's release for FOIA request
15. **Censored 2nd Copy of Lt. Franze Report dated 8 July 96 leased to Yake 10 January 1997**
16. Letter of instruction to Steven Yake on FOIA appeal dated 30 Dec 96
18. Susan Yake's release for FOIA request dated Dec 11, 1996
19. Steven Yake's FOIA appeal dated Dec 12, 1996
20. Dec 27, 1996 acknowledgment of FOIA appeal
21. CDR D. M. White's letter which came with Censored Lt Franze Report Jan 10, 1997
22. Final denial of FOIA appeal by Navy to Steven Yake dated Feb 27, 1997
23. **May 29, 1997 letter to Senator Murray concerning the Lt. Franze Report Denies request for uncensored copy of Lt. Franze Report by Steven S. Honigman, General Counsel of the Navy**
- 24,25 Two letters written by Susan Yake which contain a legal description of the Lt. Franze Report

EEOC CASE OF SEXUAL HARASSMENT

- Q. EEOC # 380 94 8104X Docket # 01951770
1. Outline of Yake's plans of discussion in meeting with CO on 23 June 92
 2. First letter taken to EEO Counselor Doug Campbell - refused as he insisted Susan Yake mediate with Dougan - **he set the date of mediation after the deadline to file EEO complaint**
 3. Susan Yake filed a timely EEO complaint using this letter - with Andy Anderson witnessed **Doug Campbell tell Susan Yake that he would do everything in his power to make sure she lost her case**
 4. Susan Yake's letter of refusal to alternate dispute resolution with explanation
 5. Charlene Terry's sworn testimony at the EEOC hearing - left Susan in the parking lot frozen in fear when stalker was approaching - caught giving bogus statements about Yake's training schedule
 6. Bench Decision by Judge James Carroll - did prove sexual harassment
 7. EEOC Appeal dated January 20, 1995
 8. Support Documents for EEOC Appeal
 9. DON Final Agency Decision
 10. Susan Yake's letter to EEOC dated January 24, 1995
 11. Susan Yake's letter to EEOC dated 25 Feb 1995
 12. EEOC Decision dated 1-5-98 no mention of perjury charges in appeal
 13. **Susan Yake's statement in support of reconsideration of EEOC Decision**

EEOC CASE ON CONTINUING RETALIATION

R. EEOC # 380 95 8075X Docket # 01961045

1. Declaration by Susan Yake for EEO Investigation
2. Notice of Acceptance of Discrimination Complaint
3. Bench Decision by Judge James Carroll
4. E-mail of 25 July 1995 proving Yakes had to reschedule trip to Hawaii
5. E-mail of 27 July 1995 proving notice of trip rescheduled
6. **Andy Anderson's Memo "Concern over EEOC hearing" proofs of perjury**
7. **Andy Anderson's Memo asking for corrective action of perjury**
8. **EEOC Appeal dated December 10, 1995 with much proof of perjury**
9. DON Final Agency Decision
10. Susan Yake's letter to EEOC outlining problems with EEOC hearing
11. Susan Yake's letter to EEOC discussing OSC and Lt. Franze report
12. EEOC Decision signed Feb 20 1998
13. Susan Yake's statement in support of reconsideration of EEOC Decision

Ms. SANTOS. Honorable Chairman Horn, Mr. Davis, counsel, distinguished guests, and your staff, I want to publicly thank very, very much, Mr. Welton Lloyd, for the tremendous job he has done in putting this hearing together.

To lighten up a little bit of the hearing, I specifically told him that I was going to bring my ruler, because like Moses, we have been—all the Federal injured workers, we have been suffering for a long, long time out in the desert and we look at this committee as the hope and the Red Sea to part us out of this conspiracy that has been going on between our agencies. And also, the next time, you use a ruler on anything at home or anything, I want you to think of what Rachael has said. We want not just promises, but we really want results to be measured, and hopefully it will be a full measure. So I ask you to remember this symbolism.

Mr. HORN. I am glad it is in inches and not in meters. [Laughter.]

Ms. SANTOS. You know, we will not say we are measuring Pinnocchio but we will keep that in mind.

If I may be permitted to deviate a little bit from the first witness, Mr. Euchler, as having very personal knowledge of the Huntington Beach office, the particular manager that you referred to, Dorothy Farrington—amazingly this committee should be aware of that she herself filed a workers' compensation claim and when the shoe is on the other side, how they yell. Same thing for the postmaster, now he is in Los Angeles, they had him in LaPuente. He came from Royal Oaks where all of the murders occurred and he was the person responsible on the time of duty that those incidents happened. Then the famous Gordon Deepen, the manager of human relations, the person who went all the way to district court to sit in my Federal court with Hon. Terry Hatter to, you know, I guess vindicate the Postal Service, filed his own workers' compensation case for stress and eventually now, thank God, was demoted. So I have lived a little bit to see some of these evil people that have done so much to other workers, come to fruition.

The personal secretary of my then district boss, Hector Godinez, Jenny Cowan at Huntington Beach, could not have had a more perfect crown of glory, no controversion of her claim, no problems, sailed through, favoritism. Those are things to remember in the testimony of this gentleman, because I lived to see it and witnessed it, and I offer that in addition to his testimony.

Myself, as a manager for the U.S. Postal Service, was a victim of severe violence. I note, Congressman, that outside it was passed three pages, there was a fourth page, which was my bio and attached to it I also had the memorandum note that was stuck to my file. I hope you have that before you, and in addition to my highlighted evidence, I have highlighted that in yellow for your convenience. I see we both wear glasses, so it is easier to pick up.

If you need, I will eventually resubmit all of these for the committee, because of the time, I was only able to submit one original. That I believe will guide you.

The memo, the reason I specifically picked that memo was I wanted you to see how long it has been since Hon. Austin Murphy had headed the committee prior to your tenure in Congress. And shortly—and I believe it was a claims examiner was issued this

memorandum note, it says "Charlene, please expedite", dated July 24, there was no date on it, it says "very sensitive case. This woman will probably be called to testify with Murphy's committee if he holds hearings. Call me."

Mr. HORN. To whom is Murphy, is that a Federal—

Ms. SANTOS. They are referring to Austin Murphy, who was in Congress.

Mr. HORN. All I have is July 24, what year is this?

Ms. SANTOS. Whenever Austin Murphy was in tenure, the years have gone so long, that is why I referred to Moses, I mean it is like we are still lost in the desert. That is why we had asked you and pleaded with you to please hold hearings.

Without having to really repeat what I have submitted in writing to the committee, I will kind of just give an overview and bring some points that were not included in my written statement and will reduce those to another written statement as an addendum.

But like the young lady next to me, Ms. Yake, I was physically assaulted, basically for blowing the whistle about a child labor law violation at the city of Industry postal facility. Unlike Kathy Lee, I did not make the point with Robert Reich for labor law violations, but that is what in essence led up to it.

Mr. HORN. Let me just clear this up though. Murphy apparently was in Congress before I ever arrived there.

Ms. SANTOS. Yes.

Mr. HORN. Did you get a chance to testify before his committee?

Ms. SANTOS. I was contacted by that committee and I did testify before Hon. Congressman Frank McCloskey at the San Diego hearing that was held several years ago, as a result of some of the killings that occurred down there. I will try to find and resubmit to you the testimony that was submitted there. And I also testified in writing to another congressional hearing in Washington regarding more postal violence.

Mr. HORN. The one you did several years ago, let us say 1992 or before, was I think the full Committee on Post Office and Civil Service, was that not what it was called at that time?

Ms. SANTOS. Yes.

Mr. HORN. In 1995, we split that committee up—

Ms. SANTOS. That is correct.

Mr. HORN [continuing]. And they are two of our subcommittees now, one civil service, one post office.

Ms. SANTOS. And I will say this, Congressman Frank McCloskey also personally reiterated to me his frustration with the whole FECA process in the U.S. Department of Labor. I am just sorry that he was, you know, not re-elected. We lost a wonderful Member of Congress and to him I am very grateful.

I happen to be a constituent of Hon. Esteban Torres from east Los Angeles. We both graduated from Garfield High School, by the way.

Mr. HORN. He is a fine member, we are sorry to see him retire.

Ms. SANTOS. Yes, he is. I am losing my godfather, so I look to you, Congressman Horn, for hope.

Mr. HORN. Well, I have a lady who is 92 who says she considers me her son without benefit of inheritance, so I take it you are attaching the same provision there, right?

Ms. SANTOS. Touching lightly on what we are here for is knowledge in the access of our claims, and this is what led to, on October 24, 1995, I went to Washington, DC, because I had gone to San Francisco and Mr. Ed Bounds had me waiting in San Francisco until about 5 minutes to 5, at the end of the day. I was escorted there with a person that I had selected to do representation for me regarding my claim, and we were there to gain knowledge of the files. Well, it is this problem that has arisen and not only just with myself, but I guess claimants across the country that came to light.

I was told by Mr. Bounds that he was sorry that we would have to leave the building, but that my files had been sent to Washington, DC and I quickly informed him well, that is no problem, I will fly personally to Washington to review them, as I was in preparation of preparing my discovery for U.S. District Court Judge Terry Hatter.

So when I arrive in Washington, DC—I am only 4 foot 11 inches, I have gained a little bit of weight now, but I do not really think I am that big of a threat to the Department of Labor or anyone in the Federal Government—I arrived there dressed as I am in my suit and little purse, nothing really of any merit. I was met by some big black burly guards at the U.S. Department of Labor in Washington and I announced who I was, asked permission, because I had requested an appointment through the proper procedure. Well, one of the guards says, “Well, we are sorry, Ms. Santos, we have specific instructions that you are not to enter the building.” And I said, “Well, what is the reason?” He says, “Well, we have orders here from Robert Barnes and you are not allowed in the building.” And I said, “Well, this is beyond belief, I was given directions and asked permission and I was told to come here.” Sorry. So I was physically ejected from the building, this big guard came and grabbed me and literally removed me from the building.

Well, thank God that as the years had passed, I really looked at the Capitol literally, and I ran across the street to the Capitol to see Esteban. And Esteban was still at his desk working, by the way, diligently there. I guess you guys do not get overtime. I walked in crying and he says what is wrong, Rachael. I said you are not going to believe this, Congressman, I have just experienced what the Constitution really means, now I know that exercising your first amendment right can be very costly.

He personally picked up the phone and called Mr. Barnes’ office over there. Barnes had left for the day and that troubled Esteban and he said, “Well, this is interesting why he has left and I am still here working as a public servant.” He asked for a return phone call and then the next day, they said we apologize and please have Ms. Santos immediately report to the Department of Labor, and he arranged it. Unfortunately I was only given about 15 minutes of access of time.

The reason they were so nervous, Congressman Horn, is because in those files—and by the way, they had quickly sanitized them. In that memo that you now have, all of these tidbits that I had seen as the years had gone by were no longer in the files. I said ah, this is good, I have got to tell this to Judge Hatter.

So this is what arose, there were memos between the Solicitor of Labor, Frank Faragasso, telling we need more time, find any ex-

cuse that we can, we need delays in this case. We are planning on terminating her benefits, filing motions to dismiss. This is all before that so-called due process of time where you are supposed to have a reason why you terminate a claimant's case. And Faragasso had intimidated hearing representative, Mr. Joe Baumgardner, because Mr. Baumgardner had reversed Mr. Faragasso's wrongful termination and denial of my claim.

I got injured in February 1985, continued working until September 18, 1986, and they made me file for a recurrence claim. From 1986 to 1990, I received absolutely no money. Even from the very beginning, I filed an occupational and a traumatic injury claim with the U.S. Department of Labor. The city of Industry employees who are the key people who impeded my claim, amongst others, and you have now finally been validated.

There is another employee relations employee, Virginia Malone, and I specifically point her out because you will see in the memorandum there was an American Postal Workers arbitration decision which was very critical, indicating the violations of this agency mandating that employees must go to these doctors first before they go to any employees. I was in management at that time and we were sent to many workshops and conferences or meetings, internal memos, that all of these claims for injuries when they came to us as the initial supervisor, that we had to controvert them. Well, this is against the law. It is not the department or agency that makes the decision, it is the Department of Labor.

Ms. Malone has no college degree, to my knowledge, was the daughter of the custodian, and was there by personal favor of Art Montoya, who I witnessed when she was put into power. She has never managed or supervised any employees, which perhaps maybe if she had, she would have a better understanding of how you treat people. It has now become an abuse of power with her and people like when they had Gordon Deepen and many others.

The injury comp at the city of Industry were Heather Hildebrandt, Cathy Sutton, Richard Sarno, Manuel Botello and of course we have one up at the region, Marie Cram, which is a very egregious individual. Mr. Rich Edmond, who they had as health and safety person, Elaine Baker who is another claims, I believe from the Los Angeles area. I think she is now retired. But I think she is now an employee of the U.S. Department of Labor, so it is now really a conflict of interest that they leave one agency and then they go work for the other and they still continue to jockey these issues.

I ask the committee to please ask the Postal Service and the Department of Labor to make you an outline or a matrix so you can follow how many people handle the claim from the minute the injury occurs until the time it is finally adjudicated, from both agencies. And it is important that you know, and I ask you to visit—do not just take it from us—go visit some of these work sites, for two reasons. Go look at how they keep the files, like in the post office and at the Department of Labor. There are two separate files, they have all these love letters that they write to each other and memos all the time, to prove the collusion and the jockeying, which is completely against the statutes and the regulations.

Nobody gets continuation of pay, that is just an illusion for anyone to believe that when you get injured that you will receive that. It is a punishment. The minute you file, you are instantly assigned a U.S. postal inspector because your claim is a fraud and they have hired some new additional postal inspectors in that case.

Another problem is the doctors, oh, that is a whole bunch, and we say M.D. stands for making dollars, and boy do they make dollars.

Kaiser who is a notorious HMO here in southern California, oh, we are sorry, we get your money, but we cannot write reports for you to the Department of Labor or your agency, oh, no, that is beyond our capacity. That needs to change.

This is kind of hilarious what happened to me during the initial—I was sent to several doctors, the first one, Ed Walker, which was a very elderly doctor, like about 92 years old, took about 5 months—Congressman Torres was really frustrated as to why my case was not moving along, and he cursed the staff out, he said nobody was to bother him, he cursed out the Department of Labor. So then they sent me to this other doctor and this doctor promised that within a week, he would try to review the matter and have a report. That doctor's name was Robert Fauget. He was paid in excess of over \$3,000 and I also saw another billing from the Department of Labor's files that said \$760. That doctor, I have no idea what he looks like, what his voice is, I have never seen that doctor and yet he received payment for that amount of money.

I was given a questionnaire to fill out and during the perusal of it, I noticed there were some questions asked that were only specific for female. Specifically it asked, do you have hot flashes, have you had an abortion. Being a feminist, I said, "well, wait a minute, there is no questions here for men, have you had a penile implant"—there was not Viagra then. And I mean all that kind of stuff and I said, "this is ridiculous, this is beyond the scope of what a medical examination for a job injury is about." So I kind of protested and it was just an ordinary secretary and she said, "if you do not answer every question on these pages, you may not see this doctor." I said, "will you put that in writing?" She said, "well I am not and if you do not leave this room, I am going to call the guards." That cost me 2½ years delay more in my case.

Finally, they sent me to Dr. Thomas Preston from the U.S. Department of Labor. After everything I had suffered, that doctor went through voluminous documents, everything, vindicated me. I had been penned by these subordinates of both the post office as a paranoid lady who had I guess grand illusions. How could you have grand illusions when someone physically assaults you? I continued working, by the way, Congressman Horn. I still got the mail out that day, so beyond rain, wind, sleet and everything, no matter whether I was still assaulted, the mail went out that day, at a great price. The U.S. Postal Inspection Service never came to my aid. I called my higher boss at home that day and he is the one—the man that assaulted me, the most discipline he got was a letter of warning that lasted in his file for 6 months, and of course Virginia Malone made sure that that was pulled eventually.

Mr. HORN. What has happened to that individual, is he still with the post office?

Ms. SANTOS. Oh, he is still there very much in power, he got a higher level promotion. I have been out almost 13 years, Congressman Horn, and because of Frank Faragasso's recent denial when I went to Washington, he terminated my benefits, because they wanted to send me to another doctor. I said wait a minute, the FECA says she can work, she is ready, willing and able to work, we have got the post office doctors saying she can work, Dr. Thomas Preston says she can work, except not with those people that tried to kill her or assaulted her, just put her in another location. And they said oh, no, we do not do transfers. And I said that is baloney. Here, they have told Mr. Miyashiro, he has to go back to Hawaii, there are thousands of job positions open that he could quickly be accommodated.

As a manager, I can attest to you, and this is since I was from Los Angeles, the minute you filed a workers' comp, you punished them, put them on graveyard, the worst assignments. You would really be appalled. They would bring little trays of rubber bands, they would have you making balls with rubber bands. They would have you patching up torn mail. If you were intelligent and you wanted a promotion, oh, no, you filed a workers' comp, you may not work overtime, you may not seek promotion. Something needs to be done.

I also ask that the Americans with Disabilities Act be amended to include all Federal workers and that would include yourself and your staff, because we are not included. My godfather, Congressman Torres, was not able to get like the Brady bill, I wanted him to get a Santos amendment to the whistleblowers bill to include it, to include all postal workers.

I have looked at the Office of Special Counsel and I have heard all of the horror stories, but I ask you—and I made those as one of my recommendations—that would be also important that whistleblowers be extended to all, and that means at every level.

Although it is interesting that in some of the violence and in some of the profiles, that at the highest levels, and this includes Postal Board of Governors, by the way, because I brought this to Dr. Del Junko's attention and absolutely nothing was done and now we have an inspector general. At least one of my recommendations came true about the inspector general, but who do they report to? To Postal Board of Governors, who do absolutely nothing. So it is a dilemma.

Mr. HORN. Did you write to the chairman of the Postal Board of Governors?

Ms. SANTOS. I went personally and met with Dr. Del Junko, who is here in Los Angeles, practicing medicine, by the way.

Mr. HORN. And what did they do?

Ms. SANTOS. Nothing. He told me to hire an attorney. That was about the extent of it.

As far as judicial review, there have been, Congressman Horn and Mr. Davis and legal counsel, yes, there are. It is such a fine silk thread for constitutional review. As brave as I am, I am in there, I am hanging, you know. I mean if worse comes to worse, I may really pursue this to the ninth circuit and ask for certiorari, but, you know, when do little people like myself get reviewed by the Supreme Court. It is almost nil. But there have been cases also

that have finally made it to the Supreme Court, but I think it was FDIC versus Meyer, took the right, and I believe the lead opinion was Clarence Thomas, from little ordinary people, oh, no, we cannot have you suing the Federal Government because of sovereign immunity. So that needs to be readdressed also, and the only way to do it is to come back again to Congress for those reforms.

Mr. HORN. You have got about 1 minute to go here.

Ms. SANTOS. I commend Federal workers like Michael Suto and now deceased Hon. G. Cholakis from New York, whose memorandum opinions have given me the new resurgence and hope to believe that there can be accountability in a Federal court or in a judicial hearing such as are being held here. I also believe that I would like to recommend very serious to the Department of Labor members here and to Mrs. Alexis Herman, who is also little. I am just sorry I did not really get to meet Mr. Reich, who was just my size, and maybe things would have worked in a different direction. But I challenge them to conduct a symposium throughout the country, to come out and reach many of the Federal workers and work with us. I also want to commend Karen Taylor, and I believe she is still with the Department of Labor, deceased member Al Kline, Gordon Kempe who was a former claims examiner, Mr. Joe Baumgartner and Ms. Donna Fuchiwaki from the San Francisco office. There are some good employees in the Department of Labor that do try to help us.

Mr. HORN. If you will leave a copy with the reporter, we will make sure the spelling is correct, because I take it you have it in front of you there.

Ms. SANTOS. Right. I do not know if you have any questions.

Mr. HORN. Well, we are going to wait until everybody is done. Some of you, we have picked up something just to clarify the record and it has led to longer and longer, but that is our fault, because we want a clean record.

I am going to have to call now on your friend to your left there, and that is Mr. Joseph Jackson is the Mailhandlers Union compensation coordinator, and where are you based, Mr. Jackson?

[The prepared statement of Ms. Santos follows:]

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July 1, 1998

FAKED TO: (202) 225-2373

Stephen Horn, Chairman
Honorable Members of the
Subcommittee on Government Management,
Information, and Technology
c/o Mr. Wilton Lloyd, Staff Member
2157 Rayburn House Building, Room B 373
Washington, D.C. 20515-6143

Re: July 6, 1998 Long Beach, California Investigative Hearing, to examine the DOL FECA OWCP Administrative process and timeliness to adjudicate a Federal injured employees compensation claim submitted to the Secretary of Labor.

Witness: Rachael V. Santos, USPS Postal Manager, Santa Ana District

Honorable Congressman Steve Horn and Members of the Subcommittee and guests,

Thank you for inviting me to this hearing. My name is Rachael V. Santos, I am a USPS Manger from the Santa Ana California District and I have been an employee for well over 26 years. I ask that you grant me Congressional whistle Blowing Protection for my testimony and evidence presented today, because my Department of Labor files had a stick on note that read... "Charlene, please expedite, dated 7/24 (with no year date), Very sensitive case, this woman will probably be called to testify with Murphy's committee if he holds hearings, Call me!"

So you can see that the years have past since Mr. Austin Murphy left the Capital and things are still bad with the Department of Labor and in need of reform and oversight. Why was the Department of Labor so afraid of my testimony? Well Charlene, whom I believe is still with the DOL can now make her report... that I finally did testify to this subcommittee.

On behalf of all Federal injured workers across this Country, I urge this subcommittee to take immediate legislative action to reform the DOL FECA OWCP claims process due to the abuses by several high level employees in the positions of over sight in the Department of Labor. We have waited a long time for these hearings to be held because we were told that they had to conduct more GAC studies that did not resolve anything and the abuses continue to this very day. We are very disappointed with the delays of conducting these hearings and outright lies and "empty promises" made to us who have been injured while in the performance of federal service. We hope that this investigation will proceed if many of you are not selected in your Districts and many federal employees believe that this hearing is nothing but a political smoke screen that will only result in more piles of reports and the DOL will continue to commit violations as business as usual. We want you to introduce legislation to reform the DOL OWCP Federal Compensation Act, or do away with the Department of Labor and have a private insurance company take over the claims, such as is being done in the state workers compensation program. We ask that criminal charges be brought against many of the key DOL and Federal employer agency employees who will be named at this hearing for deliberate constitutional abuses and obstruction of justice in delaying claims and abuse under color of law in violation of the oath of office taken to uphold the laws.

I have submitting evidence to the subcommittee that is self explanatory to prove that there are problems with the U.S. Department of Labor Office of Workers Compensation Program claims process and the adjudication of claims.

I can attest that as a USPS Manager, that we were given supervisor workshops in which we were told that we had to controvert and deny all on the job injury claim forms from employees. We were told to take the employee first to a USPS doctor before the employee had a chance to go to his or her own doctor. I brought this fact and evidence to the U.S. Department of Labor shortly after I filed a work injury claim. I have submitted a copy of a USPS management directive to all Postmaster, directors and tour superintendents suggesting them to continue to encourage employees who are injured on the job to utilize USPS designated contract medical facilities. There was a APWU arbitration grievance that was filed concerning these violations being committed by the USPS, unfortunately there is no over sight of said abuses and of course when the USPS management violates the law no one gets fired and instead they get merit increases.

The former Santa Ana Postal District Manager, Mr. Hector Godinez was investigated for said on the job abuses of federal injured workers and conflict of interest with a medical group that was set up to make sure that postal employees used said medical clinic to help to USPS reduce it's medical costs of injuries. What is most amazing is that when former Postmaster Jefferson Wilson from San Francisco, California suffered from stress and filed a claim, the USPS contacted his doctor to get him to write a medical report that would be in favor of the USPS agency. A MSPB Administrative law Judge, F. Lamont Liggett determined and ruled that Mr. Wilson was coerced to retire and ordered that he be reinstated as Postmaster of San Francisco. The subcommittee can read the details in the evidence submitted.

During the performance of my Federal employment in 1985, I was assaulted for having blown the whistle on serious postal violation concerning a child performing timekeeping and payroll duties that caused my employees to have there pay roll paid in error. I also reported the selling of drugs and a gambling pool that was being conducted in the USPS facility by both management and the employees.

Postal violence and the numerous assaults and on the job murders across the country in Federal employment should concern this committee that eventually result in a FECA claim.

The following problems need to be looked into by the subcommittee in order to correct the problem that we Federal workers are having with U.S. Department of Labor and the USPS:

1. There needs to be legislation to amend the Whistle Blowers Act to add and include protection for "all" postal employees, who are presently not covered.
2. The Department of Labor needs a 1-800 telephone system to be set up for all OWCP offices to provide services to the injured workers who in many cases do not have money to pay for long distance telephone costs to get information on their claim.
3. I request that the entire FECA and Title 5 be done away with as is presently written because it does not grant proper due process of law on time limits for a claim to be processed. I can attest to this because it took well over five years from the day of my injury to get my claim approved and several years before I actually got paid. The DOL has terminated my cases several times and I had to fight to get reversal and the way the DOL defeats any claim is by sending employees to a selected "stable" doctor who is on a panel to defeat the injured workers claim. We need Federal and State wide reform to have the ability to change the use of these type of medical examinations and have over site for any abuse. The DOL Hearing Representatives are claim examiners that do not have any legal training in the law and rule for their employer who pays their check.
4. Amend the OPM Health and Life Insurance regulation that charges and bills a Federal employee for retroactive payments for such plans even when NO services or benefits were ever provided. The OPM

system at present is tantamount to fraud because the insurance carriers are getting money for no benefits provided. I brought this problem to Congress representative Ackerman, Eleanor Holmes and OPM to no avail so this subcommittee should be able to fix this problem. There needs to be a provision that protects the injured worker from not being cut off for any medical service after being off due to a work related injury. This is when a person needs medical and life insurance.

5. We request that a DOL branch office be opened in the Los Angeles Area to help handle the large volume of claims from this area as it takes San Francisco too long to process a claim and they could share office space in any Federal Building in the area.

6. I recommend that an employee booklet and video be developed to be given to every employee who is hired into federal service so that they can be aware of their rights when injured. I also request that a special HOT LINE number be created to answer questions of any injured worker who has a present OWCP claim in the system, until this subcommittee reforms and amends the present system.

7. The Federal agencies should not handle any part of a work injury claim, but should be handled by an independent insurance company such as in state works compensation.

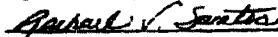
8. Take criminal actions against any doctors who bill the DOL for services not performed. I was sent to Dr. Robert Paguet who never examined me and billed the DOL in excess of over \$8,000.00 and did not write a report or perform any service. Many doctors are billing on a standard form that needs to be updated and no claim should be paid for any service, unless signed by both the claimant and doctor. The appointment times needs to be looked into, because doctors are getting paid for a one hour appointment and many injured workers are lucky if the doctor spends more than five minutes.

I hope that the above suggestion help this subcommittee. If I can be of any assistance please call or write to me.

Thank you for having conducted this hearing. We look forward to some immediate and positive results that will help many federal injured employees across the United States.

I declare that the above testimony is true and correct under penalty of perjury.

Dated: 7-1-98


 MICHAEL V. SANTOS

Mr. JACKSON. Good afternoon, Congressman. I was formerly the compensation coordinator for the Western Region of the Mailhandlers Union and I am currently on medical retirement from the U.S. Postal Service, and I additionally sustained an injury on duty at the U.S. Postal Service resulting in a permanent impairment of the left arm and shoulder. I also served with the U.S. Marines in Vietnam in 1968 and 1969 and I have been working in a voluntary capacity since my retirement. Thank you.

Mr. HORN. You have been working now for the Mailhandlers?

Mr. JACKSON. Yes, I had, up until about 18 months ago, in a voluntary capacity. Although the employing agency tried to portray it as though I was being compensated, the payroll records and accounting records will support myself.

Mr. HORN. You have heard the testimony of some of your colleagues who worked for the Postal Service.

Mr. JACKSON. Yes, sir.

Mr. HORN. Is your sense of how they treated you the same as those that have already testified?

Mr. JACKSON. Yes, but before I address that, Mr. Chairman, I would like to do one thing. I would like to thank personally, Mr. Perez and Mr. Usher, for documenting and articulating what many Federal employees throughout America know to be factual. [Applause.]

Mr. HORN. Well, we appreciate your very thorough statement, Mr. Jackson, and it will be a vital part of the record.

I will ask my colleague, Mr. Davis, do you have some questions for those on the panel?

Mr. DAVIS. Well, I do and I will try to make them as generic and not as specific as possible, because I think each of you has nailed down the specifics of your particular cases in your testimony and in your complete statements, which I have read in each case, which are in some cases very, I think, lengthy and well documented.

Let me ask this, when you have conflicting medical opinions, given the fact that all of these physicians are supposed to be specialists, how is the reaction, is it generally construed that if they can find an opinion against you, that is the one that the examiners are going to take and the department is going to take? Anybody want to start with that?

Mr. LOPEZ. Yes, in my case, they had two physicians give an independent opinion and they used the one that was not favorable to me. And I submitted the ones that were and they were never dealt with.

Mr. DAVIS. In one case, I remember reading the physician—I guess Ms. Santos, yours were?

Mr. EUCHLER. It was in my case. I saw the post office's physician and the supervisor instructed him to remove the restrictions, and he did. It was like oh, sure.

Mr. DAVIS. And there was—in Ms. Santos' case, the guy billed the Government a lot of money and never saw you.

Ms. SANTOS. Right.

Mr. DAVIS. That is the kind of examination—it is good money, I guess.

Mr. EUCHLER. I guess the doctor got his oneupence because he was not paid.

Ms. SANTOS. What is more hilarious is the new or the other doctor that they sent me to, Dr. Preston, wholeheartedly reviewed the entire file and agreed with the original post office doctor, my doctors and another doctor that I was ready and prepared to go back to work, but just not with those people and he wholeheartedly recommended that they please agree to transfer me to another location, but this is because of postal management.

A gentleman by the name of Brian Gillespie who is the head of the human resources, who also impeded another gentleman's case by the name of Melvin Buckingham, and that case went all the way to the ninth circuit. Unfortunately he was black, gay, had AIDS, and he just resigned. He had nobody. Had he ever met some of us here, he would have had some hope. Those are the tragic cases.

I do not know whether you are aware of it, but we do not get compensated attorney fees if we go out and hire somebody, and I reiterated to the hearings rep that most of us who have no legal knowledge of any of this, we have no idea of any of these, where you find this and any of this information, have no power to represent ourselves before the Department of Labor.

Mr. DAVIS. So even if you prevail, there is no attorney's fees?

Ms. SANTOS. No. There was some——

Mr. DAVIS. We have in the State of Virginia, I used to do some of this, if you win, you get a little bit, it is not much.

Mr. EUCHLER. From what I understand of the act though, if you do get a lawyer to represent you in an OWCP case, there is a cap on it and the lawyer takes that cap, that includes the disability benefits. So if he is paid, the person that is injured gets nothing. So the lawyer is the one that gets the money.

Mr. DAVIS. That is the way it works sometimes out there in the at large system too, but I understand.

Ms. SANTOS. And there is abuse. Here in California, there was only about two or three attorneys practicing for the entire area and we have heard horror stories.

Mr. DAVIS. Let me let Mr. Horn go on. Again, our purpose here is to get a record, we will try to get some followup on each of your cases as well as maybe what we can do to keep other cases like this from occurring and make sure that procedurally they are done correctly.

I would just add, Mr. Lopez, what a very moving start you gave to these hearings. I am still a marathon runner, I identified with a lot of your problems. In fact your back pain, saying it was congenital, I had one of those issues, they said I would never run again and I am running again. Someone was able to take care of me in that situation, but I know what the fine line is between handling these things in a timely manner and doing them correctly.

I think sometimes people who are looking through these cases, they have so many, they have time limits that are pressing them, it is easy to forget you are dealing with individuals and an individual's life, and how making the right or wrong decision in a timely manner can affect that person. Each of you in your own way have brought this back into terms of how these decisions can determine the future for somebody and their life and family and people around them. So in each case, I just appreciate everybody taking

the time to come out here today and share those with us and I know the committee will followup.

Mr. Horn, thank you.

Mr. HORN. I thank the gentleman.

Let me ask Mr. Miyashiro here, as I noted in your attachments there, you said by this time, however, Dr. Welch felt that he was unable to deal with the policies set by OWCP and dropped you as a patient. What were some of the policies that were worrying him?

Mr. MIYASHIRO. Well, at the time he was treating me, I had three injuries: my back, my neck, and my shoulder. And my shoulder was in appeal in Washington, DC, after the surgery in 1986. The appeals board in Washington, DC, wrote back to Dr. Welch that he only can treat my neck and my lower back and Dr. Welch told them it was impossible because all three had to be treated at once. So he did not want to be involved in the bureaucracy and he just said you just do the physical therapy and then find someone else.

Mr. HORN. Was that an M.D. that was making that decision, or who signed the document that said he can only treat the neck and the lower back?

Mr. MIYASHIRO. It was somebody from the ECAB office, appeals board.

Mr. HORN. Did the person have a medical degree?

Mr. MIYASHIRO. I do not think so.

Mr. HORN. I will ask staff to check that and find out if they are practicing medicine without a license. We see this all the time with insurance companies, with Medicare, you name it. Everybody is telling the doctor what to do when it is the doctor that is a specialist and knows what to do. And sometimes they have people with some health care experience, it might be a nurse, and nurses do a lot to save lives in hospitals and all that, but the question is how much knowledge does one have that overrules one that has been a specialist all their life, and especially if you are dealing with things that are very difficult to deal with, which the back and the spinal column is one of them.

Let me ask you generally now, does the Office of Workers' Compensation Programs provide employees with an assistance service program with counselors to guide the injured employee in filing compensation claims?

Ms. SANTOS. No.

Mr. HORN. Did any of you have any help from anybody in that agency?

Ms. SANTOS. No.

Mr. HORN. So you have just got to file the claim, put it through your employing agency and hope that it is put in the mail to get to the OWCP.

Mr. EUCHLER. Mr. Chairman, I like to consider myself an aware employee in the post office, but most of my peers—and they are supposed also to continue delivering their route and do their jobs on a daily basis. Whenever there is a case, they usually just shine it off and just take the sick leave when they do not have to, or take the time off and just try and get their job back. To get further compensated with workmen's comp, they just do not bother, it is just too much of a bureaucracy for them to deal with.

Mr. HORN. To your knowledge, are the supervisors paid more if they do not have any claims filed under their jurisdiction?

Mr. EUCHLER. There is a secret bonus system and that is prevalent to every supervisor. The number crunching is what their concern is, if they have a supervisor that has more accident claims on their shift or for the employees under their charge, then they get a bonus, but it will be less than the bonus of the supervisor in the next bay whose number of accidents would be less.

Mr. HORN. So they are paying more for no evidence of injuries than they pay those who do have evidence of injuries.

Mr. EUCHLER. Yes. But they will still get paid a bonus, I mean it is automatic.

Mr. HORN. Now do you feel that the OWCP, if it had provided you with benefits for prompt treatment, you would have been able to return to work?

Mr. EUCHLER. Yes.

Mr. HORN. This is one of the gripes I hear from a lot of injured workers that, you know, we would like to get that opinion so we can get the matter treated so I can come back to work. And you did not have anybody with that attitude, I take it.

Mr. LOPEZ. No.

Mr. HORN. I do not see anybody raising their hand.

Mr. JACKSON. Mr. Chairman, one of the problems at the original inception of the case is the management of the information. The employing agencies—what they have been doing for some time now is, for lack of a better term, manipulating the information—the employing agencies are communicating directly with the injured employee's doctor, requesting that medical information be sent to the employing agency. The employing agencies, the injury comp people have 3 days of training, they are not qualified under FECA to evaluate medical evidence. So a lot of us in the field feel that where OWCP is derelict in assisting these agencies is simply by their silence, they will not enforce the provisions of FECA.

We then address the issue of nonpayment of physicians under the Prompt Payment Act. FECA says that when a case is accepted, you have a year for the physician to be reimbursed or within a year if the case is accepted at a later date. But they are engaging in half truths to these doctors because they are saying you exceeded the 1 year, but they did not tell them the greater truth, that the 1 year is applicable even if it is 8 years later. So now the physicians do not want to treat the Federal employees and consequently you have maybe four lawyers in all of southern California who will even touch these cases, because they are receiving the same treatment.

So it begins with the employing agency. You take a 20-year employee who has never been injured or a new employee who has never been injured and he gets hurt and the procedures say that the unit supervisor is supposed to give him a notice of injury or at least advise him. What often occurs is the unit supervisor will tell these people here, put in for sick or annual leave. Thus seeming like a nice guy, but the greater truth is he has taken his eye off the filing of a claim.

Well, suppose the person is later totally disabled, like Long Beach Shipyard, and he loses his career. He has lost his career be-

cause of an injury on duty, he cannot sue. And now he is really stuck.

I have met many people from your district who were in—somebody in the audience can tell you, I believe it was building 91 in Long Beach Shipyard, hundreds of people—

Mr. HORN. Mr. Burelli wants to—knows that. Can he interject for a minute?

Mr. JACKSON. Yes.

Mr. HORN. Go ahead, Mr. Burelli.

Mr. BURELLI. Mr. Horn, I have got to tell you, first of all, I am relieved knowing that a level 5 claim examiner handled my medical condition for the past 4 years. That really makes me feel good.

The second part of it is dealing with this shop 91, which was totally developed with the idea of being able to say we attempted to provide reasonable accommodation. Their idea of reasonable accommodation was to set an injured employee down, who is all drugged up head to toe, and have him sort through papers that are put in trash bins. I am talking about confidential, some could be from the weapons department, secret papers that should have been shredded, OK? This was part of my EEO case and it was part of the documented evidence, which was true, and it was—due process was denied me. But I was assigned to this shop 91, which had no definite—in other words, it was not a paint shop, it was just for injured employees. It was a place for them to dump you and then later terminate you. Basically that is what it come down to.

So my SF-50 has on it unequivocally terminated, disability. But there was not a physician up to that point that had me disabled. The employing agency disabled me. OK? They disabled me without a physician's report stating this. Even their own physicians questioned the fact that they had never addressed blood clotting and where they made the recommendations.

Personally I want to know who would have been held accountable if I would have died because nobody addressed the blood clotting? The doctors have recommendations on paper. My supervisor? No, he was dodging the Department of Defense's accusations of 500 electrical discrepancies and he could care less. So the people at the shipyard along with OWCP, you know, they just coerce together. I mean this is what they do. It is a job dumping technique, one you are injured, you are a liability. It does not matter what kind of history, whether you are WS, what grade level you are, does not matter, has nothing whatsoever to do with it.

At the same time they were giving me termination papers, I got a performance award. OK? I had an impeccable work record with that place, I did not miss any days except a week of flu that I caught on the *Peleliu* working in the air conditioning. I mean I had no background of anything wrong, they had no reason. I was more over-qualified for most of their electronic gear being it was 20 years old. So why not put me on a bench job.

They job dump you and that is the same methods they use in their bogus vocational rehabilitation programs. Paying a voc rehab counselor contractor \$65 an hour, guaranteed \$5,000 over a 2-year period to sit behind a desk and make a decision on your life by flipping through Yellow Pages trying to find a company that will take you for 90 days. The hottest thing going is a video clerk, OK? This

is great. The only technical experience handling millions of dollars worth of equipment for the military and then I become a video clerk? That is just great, you know. But they do not focus on the medical part.

Mr. HORN. How many of you—you have heard Mr. Burelli's views on it and you have heard Mr. Jackson's, Mr. Euchler, how many of you have had a similar experience where it was hard to get the doctors and you had a vocational rehabilitation counselor that apparently did not do you much good—how many—

VOICE. I was ordered for a fitness for duty and was told I was totally disabled and Mr. Usher thought it was a bunch of hooey.

Mr. HORN. Well, how about those on the panel here? Is your experience pretty much what Mr. Burelli's is?

Mr. MIYASHIRO. Well, I think I can top him one. My vocational rehab counselor just wanted to find out if I was going to accept the relocation job offer in Hawaii, nothing else. I sat in her office 1 hour. A few days later she called me at home, at 7 o'clock in the evening, and asked me if I had made a decision yet.

Mr. BURELLI. Mr. Horn, can I explain—between the two voc rehab counselors I have seen, I do not think there is a combined 4 hours, but both of them received astronomical amounts of money for phone calls and conversations I never had with them. On top of it, they would not sign a travel voucher for me because I had to go to them; for 30 cents a mile, they refused to do that. When they asked me what I wanted to be when I grew up, I said I want to be a vocational rehab counselor for \$65 an hour. You know what, they thought I was a hostile witness. I cannot understand why, I gave them an honest answer. I have always complied, but nobody has ever addressed the fact that I have a college education, I could sit behind a desk and flip through a yellow phone book and place people at jobs that do not exist. For \$65 an hour, I will give Casper a job, OK? But let us look at the reality of it. You are talking about expenses and cost-effective ways? What is cost-effective about that?

Recently my wife called because of a COLA raise we did not receive and tried to talk to the claims examiner who has a very abusive attitude. He in turn turned it around and asked her or told her what an expense I have been for the U.S. Department of Labor's OWCP program, what an expense I have been. And they could not figure out why. Just simple review, if you look at the records, will show you why. So I mean why was she subjected to this kind of abuse. She called for a reason, to find out why we were shown that we were getting a deduction instead of an adduction of a COLA raise. There is no need for him to go into telling my wife how much of an expense I have been, what a problem I have been. And he is not the only one. I mean the past claims examiners have all been part of this whole deal. I mean they have caused this. So look at the source, do not look at the patient, look at the source of why it happened and that is where it is credited.

The bogus vocational rehabilitation programs, they are meaningless, they have nothing to do with anything. The prostitution doctors that they hire, what do they do, all they are doing is shopping for an opinion in their favor. Show me a physician that will get paid two and a half times the regular physician is going to say

something adverse and he will not be working for OWCP. [Applause.]

Mr. HORN. I take it you have all had the same experience, you can say.

Ms. SANTOS. Congressman Horn, we would like to bring to your attention that there was a recent increase, by the power of a pen, a claims examiner could instantly refer you to a rehab who they pay \$5,000 from the get up and go, but that amount has been increased. I am not sure if it is \$15,000 now and beyond that then it goes to I believe the regional or—the San Francisco director could probably inform you on that.

A point for your consideration regarding medical, it was item No. 4 in my suggestions and recommendations, and this was shot up to Eleanor Holmes Norton, the minute that you are off your job at the end of the 365th day, OPM has regulations both for health and life insurance that you are instantly terminated, you lose both benefits. You have to pay for it out of your own pocket and if you are not working, it creates a real hardship on any family. In my case after 5 years, I had to retroactively pay those benefits, even though I never received them, and we hope that those reforms can be made to help protect us.

When else in your life do you need health and life insurance coverage is when you are disabled.

Mr. HORN. Any further questions?

Mr. DAVIS. No.

Mr. HORN. The gentleman from Virginia does not have any further questions and neither do I, so we thank this panel for its cases. It is sad to see cases that each of you have gone through and it is sad to think that fellow public employees are part of the problem in terms of how they treat other public employees. You have made some very interesting suggestions here, such as looking at some of the so-called human relations training that some of the services and different Federal agencies have had, and just what kind of understanding of people when they go in and when they come out and are they making a difference. Your cases would say they are not making much difference. So sad as that is, we will pursue those matters down the line during the next year.

We thank each of you for coming and sharing your own personal story. It has been very enlightening to say the least. Thank you for coming. [Applause.]

The next panel is panel three which is Michael Kerr, Deputy Assistant Secretary of Labor, Director, Office of Workers' Compensation Programs, accompanied by Shelby Hallmark, Deputy Director, Office of Workers' Compensation Programs.

Just so I get the name and title correctly, my sheet does not have you on it, is—do you pronounce it—

Ms. ONODERA. Onodera.

Mr. HORN [continuing]. Onodera, and what is your first name?

Ms. ONODERA. Donna.

Mr. HORN. Donna, D-o-n-n-a?

Ms. ONODERA. Yes.

Mr. HORN. And your title?

Ms. ONODERA. Regional Director, San Francisco.

Mr. HORN. OK, so let us all stand and raise your right hand.

[Witnesses sworn.]

Mr. HORN. The clerk will note that all three witnesses have affirmed, and we will begin with Michael Kerr, the Deputy Assistant Secretary, Office of Workers' Compensation Programs, part of the Employment Standards Administration, U.S. Department of Labor. Welcome, Mr. Kerr.

STATEMENT OF MICHAEL KERR, DEPUTY ASSISTANT SECRETARY OF LABOR, DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, ACCOMPANIED BY SHELBY HALLMARK, DEPUTY DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS; AND DONNA ONODERA, REGIONAL DIRECTOR, SAN FRANCISCO OFFICE, OFFICE OF WORKERS' COMPENSATION PROGRAMS

Mr. KERR. Thank you very much.

I have Shelby Hallmark here with me and Ms. Onodera. I think I would like to say a couple of things and then I think Shelby wants to say a couple of things.

You have my testimony, I believe I will not read it, that we should just submit it for the record.

Mr. HORN. Well, it is automatically in the record, but if you could summarize it, we would appreciate it.

Mr. KERR. Well, I would say that there are three points that are important in it. One is that this is an organization that is undergoing change and has, we believe, become somewhat good at undergoing change. It is one of the organizations in the Department of Labor that has first thought about and used the Government Performance and Results Act.

The second thing in my testimony that I think is important about the organization is that it does now quickly approve the vast majority of claims. We get about 170,000 claims a year, about 20,000 of them initially are denied, about 5,500 of those initial claims then go into the appeal process that we have been talking about here today.

We think the organization is getting better. We think that despite some of the things that have been said here today, it is an organization that is supportive of Federal workers. I have recently taken on this position, partly because of my interest in the way this organization has been managed and partly because of my interest in this being an organization that when it talks about what it does well, talks about its employees. It is important for me to hear what I did hear today.

We will review each of the cases of the people who testified here today and when we do that, I will think about two questions. One is whether these cases were handled in accordance with our policies and procedures and the second, which is always the more interesting one, is whether these cases raise questions about changes that we should make in those policies and procedures.

In terms of the first panel, the testimony that has been submitted for the record is rather lengthy and I would say to the committee that we will respond in writing to some of the quite serious charges that are made in that testimony. Some of the charges in the testimony have been sent to the Secretary and to the Assistant Secretary who I report to and I understand that they have asked

the IG to look into and the IG has reported on its analysis of some of those charges. But there is much more in the document before the panel that I saw this morning and we will look into the charges that are in that document.

The other thing I would like to——

Mr. HORN. I take it in both those, I commend you for looking into it and I commend you for analyzing it. I assume we can have the final result and put it in the record of this hearing.

Mr. KERR. We will try and do it in 3 weeks.

Mr. HORN. OK. We will keep it open, if you need another week or two. Let us face it, this thing has gone on for years and we are trying to get closure. We appreciate your help in getting closure, I am delighted you sent it to the Secretary and the Assistant Secretary. I did write a personal note to Secretary Reich oh, about 2½ years ago, I said you should know I am intending to investigate this situation, maybe you can take some time to clean it up. I do not know whether he did or not frankly, but he left office probably a few months after I wrote that note.

Mr. KERR. Not because of the note.

The other thing I would like to respond to briefly is the opening statements that you made and that Congressman Davis made. Responsiveness, good communications, answering questions, getting through to our offices, our district offices on the telephone, getting responses to letters that are written, these are all concerns that are shared at every level of my organization. When I talk to claims examiners, they worry about it; when I talk to district directors, they worry about it; when I talk to regional directors, this is on their mind; and when I talk to other people in the Department of Labor above me, they have this problem. Our stakeholders, the union that I meet with, and the agencies that we meet with, all are concerned about this. The surveys that I have read that this agency has put out over the last several years, have this as the No. 1 issue.

We have done some things, it is a much discussed problem. There are real resource issues involved here. There are different experiments in different regional offices about how best to handle incoming calls, how best to make sure that people's letters are responded to and that they get the right stuff in writing. It is a problem that needs to be resolved. I think it is especially critical in an organization that thinks of itself as one that is undergoing change and is trying to revise its way of doing business.

I know, because I have asked about it recently, that there are similar problems with congressional offices getting in touch with us and not just the two members who have raised it here. I am going to talk to people in what we call District 25, which is the district office in the Washington, DC area when I get back and when I go to San Francisco to meet with Donna's staff later this week, I will have this issue on my agenda.

I will tell you, given my initial forays into this organization, that the people who want this problem solved the most are the claims examiners. There are about 500 of them, they operate out of our district offices, they make thousands of adjudications a year. Most of them are GS-11 claims examiners or GS-12 senior claims examiners. They answer millions of phone calls and letters every year,

they are expected to know and to apply a significant body of knowledge fairly and consistently day in and day out.

They are the people whose work it is who are directly responsible for the fact that so few cases are appealed, the 170,000 claims, 20,000 get denied, 5,500 initially go to hearings and appeals or to reconsideration or to ECAB. This group of people, I think, should get credit for the work they do. They do it quickly and I think, by and large, they do it accurately. They make mistakes. Some of those mistakes are inexcusable. That is why we have an appeals process, that is why we have a process that reviews their work in district offices, through the accountability review process that we use in which the offices are evaluated by people outside of their offices.

I think that it is fair for me to say, after talking to some of these people, that to characterize their work as anticlaimant is unfair. To accuse them of willingly working in an organization that is progressively biased against claimants is simply not an accurate picture of what they do and how they feel about their work—where they feel their work fits in the U.S. Government and in the society as a whole.

With respect to Hearings and Review, keeping in mind I believe that it is a narrow window on the adjudication process in the district offices, it is not surprising that the workload at Hearings and Review went up in the 1990's. OWCP at the beginning of the 1990's had just pulled itself out of a terrible backlog of work. This is a paper file operation, as people have said, files fill shelves in district offices, but in the 1980's, files were piled in corners, they were not being reviewed, adjudications were not being made. And as OWCP pulled itself out of this terrible backlog and began to turn to its other responsibilities under the law—under the law, we are required to help the partially disabled seek and accept work, we are required to see that people recover and that they return to work, and that if they do not, that they leave the permanent rolls. In the 1990's, as OWCP pulled itself out of this situation in which nobody was getting adjudications, and adjudications were getting done, the look at the long-term rolls, which has been called PRM, and the decision understanding that initially cases can be very, very complicated, the decision as people became disabled and had problems doing the jobs they did before to set up the quality case management structure, which did lead us into a situation in which more decisions were being made that people might appeal. People were being asked to change something they had done a long time ago, people were being asked to look at a change in their life and maybe that change required a change in the kind of employment that they might do, and people questioned those kinds of questions about themselves.

I think Hearings and Review suffered from that increase in case-load from the beginning of those two processes. I do not know because I have not asked, whether the evidence is that decisions that people made under PRM and quality case management are different than the initial adjudication decisions. We can ask those questions. But I do know that the total number of cases in our appellate bodies, year by year, assuming that 5,500 approximately are from initial adjudications, is about 17,000–18,000 cases in ap-

peals. That is reconsiderations, ECAB, and Hearings and Review. Given the large number of incoming cases, given the number of people on the long-term rolls, given the number of decisions that the claims examiners make day by day in Donna's office and in District 25 and other district offices across the country, it is not a damming number from the point of view of the program and from the point of view of its current structure.

I have talked to the director of Hearings and Review. I do think some things need to be done in Hearings and Review. At the moment, I do not think they are structural. I think there is a backlog problem that needs to be dealt with and I have put it in the performance agreement for the people who run Hearings and Review. I think there is a timeliness issue in Hearings and Review having to do with cases where the medical evidence comes in before the file is mailed or cases where medical evidence comes in as the file reaches us. And I am prepared to talk with the various stakeholders of OWCP and with the staff of OWCP about if there is some way we can work on situations in which the case is really not complicated, there is new medical evidence, and that medical evidence could have been dealt with earlier, to keep them from getting caught in the 8 or 9 month work in Hearings and Review.

I guess those are my thoughts listening here today, listening to you, listening to the two panels, in addition to the testimony that I submitted. I have Shelby Hallmark here with me, he is the Deputy Director of the Office of Workers' Compensation Programs, he has been the acting Director of the Office of Workers' Compensation Programs when there has not been a political supervisor. He is at the moment spending about half of his time helping the Department and the Secretary write the strategic plan for the Department under the GPRA act and I think that is a testimonial to the kinds of changes that OWCP has gone through over the last few years.

Donna Onodera has been the Regional Director in San Francisco now for 9 years, 9½ years, prior to that she was the District Director in San Francisco. So she has a lot of experience here in this State. She has 182 people working for her, she gets about 40,000 claims a year, she has got 13,000 claims on the long-term rolls and a lot of experience with this program.

I think Shelby wants to say a couple of things, if I have not used all of our time.

[The prepared statement of Mr. Kerr follows:]

STATEMENT OF
T. MICHAEL KERR
DEPUTY ASSISTANT SECRETARY
OFFICE OF WORKERS' COMPENSATION PROGRAMS
EMPLOYMENT STANDARDS ADMINISTRATION
UNITED STATES DEPARTMENT OF LABOR

before the

SUBCOMMITTEE ON
GOVERNMENT MANAGEMENT, INFORMATION, AND TECHNOLOGY
COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT
UNITED STATES HOUSE OF REPRESENTATIVES

July 6, 1998

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today and appreciate this opportunity to discuss the administration of the Federal Employees' Compensation Act (FECA) by the Department of Labor's Office of Workers' Compensation Programs (OWCP).

FECA is the workers' compensation program which provides benefits to the nearly three million Federal employees in 72 different agencies who sustain an injury in the performance of duty anywhere in the world. Because OWCP recognizes the extreme importance of this protection to Federal workers, we try to provide those benefits when they are due as quickly as possible. At the same time we try to offer a full range of medical and rehabilitation services to return injured employees to productive work at the earliest date possible. Each year OWCP receives 170,000 injury notices. We maintain high standards for timely decision-making, prompt payment of wage loss claims and medical

bills, and are especially proud of the high number of workers successfully returned to work.

The importance of this valuable benefit for Federal employees is underscored when a dramatic event, like the Oklahoma City bombing, occurs. OWCP went on site within twenty-four hours, provided assistance to families of those killed, authorized medical care, begin compensation benefits within days, and assigned local nurses to assist the injured. Although the intensity of service, which was unquestionably appropriate in Oklahoma City, may not be available, the same benefits are available to any Federal employee who suffers a disabling injury in the line of duty.

In general, I believe our record shows we do a very good job, and that we are evolving and improving in measurable ways, thanks to the high quality, hard work of our employees.

Our Regional Director for the west coast region, Donna Onodera, is here with me today should you wish to ask her about issues specific to the administration of the program here in California.

Ms. Onodera has a staff of 182 people in two offices in San Francisco and Seattle, who handle about 40,000 new claims each year from an eight-state region and manage about 22 percent of our long-term disability cases, or some 13,000 additional cases.

The core of front-line workers for the Federal workers' compensation system are the over 500 claims examiners around the country. Every day they have to use good judgment to balance the demands of prompt responsive service to claimants, and responsible and fair administration of the law.

It is the nature of large administrative systems that problems develop; such problems are inevitable, but they must be managed when they are identified. Congress, through oversight committees such as this, and through the treatment of constituent concerns, plays an important role in this process. As Deputy Assistant Secretary for Workers' Compensation, I am glad to listen to the concerns expressed here and to work with the committee to respond to them.

Since the topics of this hearing include timeliness issues and the delays that can be incurred in the FICA adjudicatory process, I would like to present some general statistics to put these issues into the context of the entire stream of claims OWCP processes. In FY 1996 about 170,000 new injuries were reported, and about 148,000, roughly 88%, were approved on the basis of the initial claim submission. For the vast majority of FECA claimants, this means quick payment (within 28 days of our receipt) of medical bills and, if necessary, payment of wage-loss claims within 14 days of our receipt so that there is no interruption in the injured employee's income when their pay

stops. 94% of workers who have accidents receive an initial decision within 45 days, while there is a longer time period (up to 180 days for complex occupational disease cases) is necessary to deal with situations requiring more evidentiary development.

A small percentage of cases (12% in 1996) are denied on the basis of the initial submission. In a still smaller number of cases, claims that are ultimately found to be bona fide had been initially denied because sufficient information had not been provided. In 1996 about a quarter (5,500) of the claimants whose cases were denied went on to exercise one or more of the three appeals avenues available to them, and about 2,000 of those individuals, a little more than one percent of the initial 170,000 injured workers, obtained eventual approval, in many cases because they provided additional evidence on reconsideration or appeal.

The relatively small percentage of cases reaching the appellate process are a testimonial to the work of our front-line claims examiners in the district offices. We believe our current standards for timeliness of adjudication and reconsideration (90% of which are decided within 90 days) represent a good balance between the need for prompt responses and the development of the evidence, and our actual performance in these areas is good. We are not meeting our goals relating to timeliness of resolution appeals at the two highest appeals levels. As the organization

responsible for the oral hearings process, we have already implemented a series of measures to reduce the backlog in that area and to speed decision-making.

Since the 1980's OWCP has evolved into an organization able to respond to changing circumstances and to recognize the need to intelligently adjust its policies, procedures, and resource commitments. For example, in 1991 OWCP took a new look at the claimant's ability to produce evidence when the exposure to a work hazard had occurred over time. The claimant was not always able to extract good information from the employer, or obtain the kind of medical evidence needed regarding the relationship between an injury and the work. OWCP completely revised the procedures in such cases, directing claims examiners to streamline factual development and to direct and assist the claimant in getting the needed medical evidence. Examiners were directed to go straight to the claimant's physician to obtain needed evidence, rather than write letters to the claimant, and encouraged to accept the attending physician's well-rationalized opinion, initiating a referral only where the attending physician was not providing medical evidence on the claimant's behalf. These were sensible changes which both streamlined the process and helped claimants receive a fair result.

In the mid-80's OWCP realized that although new injury claims were being approved quickly on the basis of the evidence,

claims examiners felt obliged to request further evidence when it was time to issue the compensation payment, and too often claimants went without income for too long a time. The program worked hard to change this approach, and for the last fifteen years, the great majority of payments have been made within 14 days of receipt of the wage loss claim from the agency.

In the last few years it has become apparent that in spite of our now excellent record of timeliness in claims adjudication and payment, claimants, agencies, and medical providers cannot always get their questions answered immediately by calling our offices. We instituted a two-day response standard nationally last year, directed our offices to address their communication strategy through union/management partnerships, and we invested substantial resources in better equipment. Although that problem is not solved, we are looking at different approaches, using internal teamwork to make improvements and will eventually solve it.

Over the last eight years, consistent with the Americans with Disabilities Act, we have adopted a new approach with respect to the management of disability claims. Research shows that if an injured person is left in isolation, with no contact from the supervisor, little activity or employment, and unfocused or passive medical attention, even a minor injury can lead to years of disability. The likelihood that a person will resume

work after an injury drops precipitously after six months off the job- regardless of the nature of the injury.

Accordingly, in 1992, we began contracting with registered nurses to visit our claimants, talk with their doctors, and work with agencies to identify light duty that was safe for partially disabled workers to do. Even if their employing agency does not communicate with the employee, OWCP now does. We used to write legalistic letters; now we call or visit.

We are committed to change to improve our quality and to meet expectations in a changing world. We have a strategic plan that looks forward to where we want to be, and sets realistic steps for getting there. Our goals are: (1) return to work; (2) service to injured workers; (3) fiscal integrity; and (4) partnership with customers and stakeholders. We have identified concrete indicators to provide a quantifiable measure of our accomplishment of these goals. After consultation with our employee unions, we are about to move into another period of change in accordance with this plan, in which document imaging, electronic transmission of injury notices and medical bills, better telephone equipment, and a "smarter," more efficient, automated system will help examiners make better decisions, manage their work better, and answer callers' questions more quickly and completely.

All change is hard. Most of our staff is open to change and actually welcome new opportunities to be of service. But with any change, some people are less comfortable, and not everyone agrees with the new direction. I am told that in 1985 some claims examiners thought we were urging them to pay benefits too quickly; they wanted to nail down every piece of evidence. Similarly, some people now think that helping people get back to work is a disguised means of denying people benefits to which they are entitled. We do not agree, and the vast majority of our staff and the people around the world who are concerned with disability issues do not agree. The Congress which passed the Americans with Disabilities Act and the President who signed the Executive Order establishing the Task Force for the Employment of Adults with Disabilities -- composed of Cabinet agency heads and chaired by the Secretary of Labor -- do not agree.

I have listened attentively to the panels today. There appears to be honest disagreement regarding some aspects of the administration of the program. We encourage open discussion, but we believe our views on these issues are legally sound and reflect proper management decisions. In addition, Mr. Chairman, I can assure you that we will work with you and your staff to improve this program.

We believe we have a good benefit program for Federal workers that is efficiently run, and we want to make it better.

Mr. HORN. I will tell you one thing we do not have are the résumés on each of you, somehow that slipped up.

Mr. KERR. We can do that.

Mr. HORN. I would just like you to tell us now orally about your background, Mr. Kerr, so we get a feel for what you have been doing over the last 15–20 years.

Mr. KERR. Fifteen or twenty years—came to Washington in 1973 to work for the American Federation of State, County and Municipal Employees. I did political and legislative work for that organization at a time in which it was an urban union of about 300,000 members.

During the Carter administration, I worked for about 3 years, half of it in the old Executive Office Building, for a lady named Esther Peterson, who did the consumer protection work for President Carter. After that, when Pat Harris went from HUD to what was then HEW, I went over to HEW and ran the congressional liaison office in the Office of the Assistant Secretary in charge of legislative affairs.

After that, I went back to school—I have a masters degree in city planning and I went back and I did the course work for a doctorate. Like many people, I did not finish.

Mr. HORN. Long ago, we all called Washington the city of unwritten dissertations.

Mr. KERR. There you go.

I went back to AFSCME. AFSCME had then become a much larger organization, almost 2 million members. I went back into the legislative office, but quite frankly my job was to deal with institutional issues.

Mr. HORN. Was Bill Welch with them?

Mr. KERR. Yes.

Mr. HORN. Old friend, assistant to Senator Hart when I was on the Hill.

Mr. KERR. Well, I worked for Bill, I worked for Bill twice at AFSCME.

Mr. HORN. He is a good man.

Mr. KERR. I worked for him—he is the guy that brought me to Washington and when I went back to AFSCME after the Carter administration, I went back to work for him again. He is now retired, he is in Maine, I would be delighted to say hello.

Mr. HORN. Do.

Mr. KERR. What I did for AFSCME was institution building, the place had grown very quickly, it had tremendous numbers of workers that it had to represent. It needed institutions in each of the States and the cities where it represented people, that had qualified staff. I spent some time working on those issues.

This administration, I came to work for Bob Reich, the Secretary of Labor as his Executive Secretary at the beginning of the administration. My job, which is—part of my job now in OWCP, quite frankly, was to reach out to the career side of the department, and ask what is a good idea, what is a bad idea, what do we need to know, how do these organizations work. You can only change so many things, what is a good list of things to work on. When he left, I helped Secretary Herman set up her office, but said that 4 years

working in the fish bowl was enough and so I am now in the Office of Workers' Compensation Programs.

That may be more than you wanted to hear, but you asked. I do not have that written down anywhere, but I will be glad to give you a résumé.

Mr. HORN. You have a very good background to deal with this particular problem.

Mr. KERR. I like to think that is right.

Mr. HORN. I wish you well on that. I was formerly administrative assistant to the Secretary of Labor James B. Mitchell. There were only two of us in his office then, the executive assistant and the administrative assistant. I suspect there are now 50.

Mr. KERR. Well—

Mr. HORN. All cabinet offices have grown substantially.

Mr. KERR [continuing]. We did not have that many. We did say to Secretary Reich that you have the opportunity to recreate the Department in your office, that is probably a bad idea, the Department is out there, let us work with it.

Mr. HORN. Well, my Secretary is the first one that ever got some order out of the Department of Labor. In other words, he looked at it not as the bureau of apprenticeship, of training, but what are we doing for human resources, manpower, so forth, and pulled them together that way, which had never been done before. It came as a shocking surprise in the Department of Labor. But that is essentially what it is now.

Mr. KERR. Uh-huh.

Mr. HORN. Well, Regional Director Onodera, do you want to give us a little bit of your background and then tell us your reaction to what you have heard today and what problems you see as a regional director?

Ms. ONODERA. OK. I have been with the Department of Labor for 26½ years. I started in the clerical ranks and I became a claims examiner. I have worked probably in more jobs than anyone in the OWCP, I worked as a claims examiner, a technical assistant, supervisory claims examiner, what used to be the Chief of Claims which is now the Assistant District Director, I was a District Director and then became the Regional Director. And this has all been in the San Francisco region and office, so I have never left the area.

As far as my reaction today, I am disturbed by what I have heard, but I do want to say that during my whole career with the Department of Labor as a claims examiner, our whole job and what we have always taught our claims examiners is we are the impartial adjudicator of the facts. Often it is very difficult when you have conflicting information and it is a difficult job of a claims examiner to look at the information on both sides and make the decision. Some cases are more difficult than others, you have got multiple issues and complicated issues. Some are not as easy as others and there are timeframes as discussed earlier. But it is good to keep in mind there are two types of injuries.

One is the traumatic injury in which now the timeframe for adjudicating those traumatic injuries is 45 days, those are the slips, the falls, the single incident types of injuries. And then we also have the occupational disease type of injuries where there are claims for

stress-related diseases, et cetera, and generally occur over a period of time. That timeframe is different for adjudicating than the traumatic injuries, and that timeframe is 6 months or 180 days. So it is important for the office to make sure we are analyzing and looking at all the evidence, but we do give claims examiners more time to adjudicate the more difficult cases.

As far as—I think there were issues about the 30-day time limits, claims examiners giving injured workers 30 days to submit evidence. That is generally after the claims examiners have looked at the information, gathered necessary evidence and in their opinion, the evidence is not there to accept the case. So after all of that time, they give a time limit so that the case does not go on and on and on. It is generally very reasonable, and as far as extensions, we do look at cases, requests for extensions on a case by case basis. We look at the merits of the request and make determinations, and they—we either accept them sometimes or reject them, depending on the validity of the request.

Mr. HORN. Now what is the role you have with the hearing examiners?

Ms. ONODERA. I have no role in that, that is—

Mr. HORN. That is beyond the regional stage?

Ms. ONODERA. Right, yes, it goes to Washington, DC once we make the decision, and if there is an appeal or a request for a hearing, then it goes to Washington, DC, and then that goes into Mr. Hallmark and Mr. Kerr's area.

Mr. HORN. OK. Mr. Hallmark, why don't you tell us a little bit about your background. Shelby Hallmark is Deputy Director, Office of Workers' Compensation Programs.

Mr. HALLMARK. Good afternoon, Chairman.

I have been with the Department of Labor since 1980 in a series of progressively more complicated positions, if you will, including the last 8 years with the Office of Workers' Compensation as either the Deputy or the Acting Director, and now again the Deputy.

I would just like to add, if I can, with respect to the comments that Mr. Kerr and Ms. Onodera made, regarding timeliness. I would like to go back and comment on a point that Mr. Davis made, which was that in any system of our complexity, there have to be tradeoffs and balances made in setting up how the systems are run. And while the 45-day discussion that we had previously may seem, in a given individual's case, to be an arbitrary timeframe, for that larger group of people we want to accomplish a timely response, and in some cases the timely response may not even be, as was mentioned today, to look at the case. So we set different timeframes for different activities. I think on the whole that works pretty well. Some of the witnesses that you heard from panel one today see cases in their capacity as hearing representatives where problems arise. But as Mr. Kerr was suggesting, that is a fairly narrow slice of the larger pie and so what you see is perhaps a concentrated issue.

One other point I would like to make in that regard is that while we have 45-day timeframes for adjudication of certain kinds of injuries or 90 days or 180 days for other types, none of our timeframes are 100 percent and in every case, claims examiners are expected and in fact exhorted to use their own common sense to make

decisions about how much time ought to be used in a given case. So there is no claims examiner out there who has a 100-percent requirement that every case must be resolved. Obviously they try to meet the timeframes, but they should and do use common sense and I think that is actually a common occurrence.

Someone suggested this morning that we are interested only in timeliness. This program, as Mr. Kerr mentioned, in the 1980's, had an absolute nightmare of paperwork and timeliness became a very serious issue, just because we needed to be able to stay on top of the workload.

We are certainly now in a much better position to enhance and work on quality and one of our goals is to do that very thing, and we have emphases going on.

We were talking about accountability reviews earlier. We look at our caseloads, we look at the cases and the adjudications and we are on record as one of our GPRA goals to increase the quality in a measurable fashion with respect to those cases that are sampled statistically and measured over time. So we are not sacrificing getting it right the first time for simply timeliness. We are trying to balance all of those issues and I think making progress toward that. Obviously, as we have heard today, there are cases where that does not work as we would like to see it work. There are cases where we need to do a better job, there are certainly cases where we need to communicate much more effectively than we have been able to do.

Our claims examiners answer millions of phone calls a year, but they do not answer enough, and we are working hard on that, both at the national level and at the local levels. But we think we are making improvements and we believe that programs like the Quality Case Management Program, which is one of our major initiatives, and the use of nurses, if done properly by OWCP, could resolve a lot of the problems that we heard about this morning.

In many of the cases there was poor communication between OWCP and the employing agency or between the employing agency and the individual employee and their doctor. The very purpose of our nurse program is to get a person in who is medically knowledgeable, able to facilitate discussions and work between those parties to try to resolve problems; to get these issues resolved early so that they do not become long, frustrating, combative kinds of situations. We believe that is actually working now. Many of the cases we have heard today were injuries that occurred before we had that system in place and made it work the way we hope to make it work; and we are continuing to work to improve it.

So we are trying to be, I believe, a responsible and positive, proactive organization. I think we are getting much better at that mission and will continue to work with you and the other Members of Congress to accomplish that.

Mr. HORN. Well, I thank you for that statement. Can you give me a little bit more on the background that leads to how we can solve this problem? Did you come up through that sort of area?

Mr. HALLMARK. I am not clear about which particular problem.

Mr. HORN. Well, I am thinking of the communications problems. What I listened to this morning, people—we have had not just in your agency, but the employing agency where we clearly have some

problems as to how facilitating they are when the incident first occurs.

Mr. HALLMARK. Exactly.

Mr. HORN. They are on the ground floor.

Mr. HALLMARK. Right. This is a program and one of the—I hate to keep reiterating GPRA, I happen to be, as Mr. Kerr mentioned—

Mr. HORN. That is fine, this subcommittee has jurisdiction in that area, we are very strong on GPRA.

Mr. HALLMARK. I am a partisan of it because I believe that it focuses on things that we ought to be focused on, which is results in terms of service to the people that our programs are aimed at. I believe that the problem that has existed in this program and other places in government is that Government agencies operate within their own turfs and have not worked well together to figure out what is the real need and what needs to be accomplished for this injured worker. So oftentimes you hear in stories like some of the ones we have heard today that people feel they were not treated well by their agency, they do not understand what has happened with respect to what OWCP has decided, there does not appear to be a communication going on between any of these individuals, or people believe that it is somehow conspiratorial. I frankly do not believe in the conspiracy theories because we often do not have time to even have those conversations, much less conspire.

I do not mean to be facetious about that, but I think in fact one of our goals—we have four strategic goals and one of those is to work in partnership with both the employing agencies and the employee union representatives. Both of whom we meet with frequently to try to administer this program, that must, of necessity, work between what the agency does and what OWCP does in a more effective way. We try to resolve problems where a supervisor is clearly not aware of their responsibilities or has the wrong impression about how they should be interacting with the claimant's doctor and the kinds of problems that we have heard of this morning.

So those are issues we are trying to address by such things as tripartite training sessions where we get both employee unions and employing agency representatives who are charged with this responsibility together with our claims staff to talk about whose responsibility is what. We do not want to be creating more problems between employees and employers. In fact, we think we can work, and I think are beginning to work, to resolve some of those problems. The Postal Service is our biggest customer, clearly it is an area where we need to work. We believe the Postal Service needs to work with us and they are to a much greater extent becoming cooperative with us in the recent years.

Mr. HORN. What do you do when you see an obvious foul up in one of the employing agencies? Does that trickle up the line of your hierarchy where either hearing examiners—well, let me start, claims examiners or hearing representatives look at that file and they say what a mess. This is the problem that you heard and I have heard of others where they do not even give them the forms in one particular post office. What do you do about that?

Mr. HALLMARK. Well, as I believe one of the earlier witnesses pointed out, we are not an enforcement agency and we do not have the capacity to specifically tell the Postal Service you must do X, Y, or Z. Obviously there are criminal penalties, the Justice Department has I believe never enforced any of those penalties in this particular program.

Mr. HORN. What is that criminal law that would prevail here?

Mr. HALLMARK. There is a provision in the FECA which points to the Federal criminal statutes with regard to a supervisor's responsibility for submitting claims.

We work very hard on that point. We have—and in fact some of the cases that you heard today show that our claims examiners in the district offices are attempting to encourage and educate and in some cases fairly strongly jawbone with agencies which are failing to do what they are obliged to do. And I think that is an ethos and a culture that is out there throughout our district offices. There are cases where we learn that individuals in supervisory responsibility are just flagrantly misbehaving. We are working with the national representatives of those agencies to try to address that.

For example, a couple of years ago, we encouraged and in fact sort of jawboned our own IG into having a joint study with the Postal Inspection Service to address those very issues, and I can tell you there were some fairly contentious discussions about the scope and findings of that study. We continue to be concerned about it and obviously where we hear of a situation where an agency is doing something that we consider to be outside the pale, we will go to that agency at the national level and attempt to get redress.

Mr. HORN. That is what I had hoped you would say, and then the question is at what level do you inform the agency of what is going on there? In other words, a lot of these cases are post office, did you ever write the late now former, now departed Postmaster General of the United States and say hey, you have got a problem and here are a few of them?

Mr. HALLMARK. We had discussions with Mr. Kenneth Hunter who at the time I believe was the head of the Postal Inspection Service. I am not aware that we wrote directly to Mr. Runyon, but we have worked at the highest levels in terms of their officials responsible for this and we deal directly with the individual who is charged with this program nationwide, on a regular basis, and with his staff.

Mr. HORN. I guess my attitude would be I would deal with the chief executive of the organization. I was a university president for 18 years and I wanted to see the bad news, not just the good news, and that makes a difference. I had an open door to anybody who wanted to walk through it, and I think that makes a difference. But often nobody wants to tell the boss at the top the bad news, just give him good news. And unfortunately too many Government organizations as well as private organizations are run that way. Now with a private organization, if they do it long enough, they are out of business. In a Government organization, they do not go out of business no matter how bad they are unless Congress just says hey, enough is enough.

So I would suggest that you copy the chief executive or write them the letter and copy your friends in the Postal Inspection, because some of these inspection services are not doing the job they should be doing and they do not want to have the bad news. [Applause.]

And I am thinking obviously of the Naval Investigative Service, we have seen what a mess that was on a number of areas, and unless somebody moves in on them and says come on, folks, we are here to serve the client and people, we are not here to have them exist to serve us. I think if they do not take that impression, that is what a lot of these agencies have, and you have got to just break that culture. The new Commissioner of the Internal Revenue Service, who I think is one of the finest appointees I have seen lately, he has got his hands full. He has got 102,000 people, they have had an attitude problem, a lot of them, most of them are very fine people, but they have also had lousy management for years, nobody that knew how to manage any organization and hopefully he can turn that agency around. And that is what you are going to have to do. [Applause.]

Mr. KERR. To respond to your question at a slightly different level, one of the things that I said to this group when I came over was OK, you now have a Deputy Assistant Secretary as a political appointee, what do you want me to do, and they talked to me about this problem with the agencies. What they said was it would be helpful if you would use your title and your office to start calling people above the people that we talk to in some of these agencies. They said it would be helpful if you could talk to the Deputy Secretary at the Department of Labor about raising issues having to do with agency performance and workers' comp with the President's Management Council. It would be helpful to us—and this is the staff talking to me—if we had a voice above the people who return our calls in agencies outside of the Department of Labor. I have started to do the education of the people above me and to talk about what kinds of issues we could raise. The agency outreach and jawboning is something that we do not really expect the claims examiners or the senior claims examiners to do, it is not in their performance agreement. It is in Donna's, it is in the district directors' under the regional directors, it is in mine, and it is in Shelby's, and I think we need to do more.

To give you a sense of how we think about it, the staff has talked to me about what I should say when I talk to people in other agencies about workers' comp and how they should relate to us. And I have three things in front of me here and I think they are illustrative of what the problems are and the fact that we have no authority to make these agencies work one way or another.

First, they tell me, tell the agencies to stop trying to do our job. [Applause.]

It is a conflict of interest, it slows cases down, it delays our knowing about an injury and the claimant has a right to their own doctor and not to talk to somebody in the agency. [Applause.]

So the first sort of thing I got told by the staff was these agencies are trying to do our job, we have got to figure out a way to start communicating and tell them to stop doing it.

The second thing that they asked me to say was tell them to get their reports to us in a complete and a timely fashion. A lot of injured employees come to us from the agencies without complete information, not the employees, the forms we get from the agencies, and they come late, which means in some cases somebody is no longer on the payroll. This is unfair to the claimants, my staff says to me it also makes our job a lot tougher. If we call somebody about talking to a rehab specialist or about how they are doing or about coming in to talk to a nurse and they have been off the payroll for a month, they are mad at us. The Government is all one organization, we happen to be on the other end of the line. So the second thing that I have been asked to talk to the agencies about is not so much what they do in terms of their own feelings about workers' compensation, but get us the forms, get them in time, make sure they are complete, so that when we are talking to people, they do not already feel like they have been mistreated.

Third, they tell me to say to them stop, talk to your managers about the fact that in too many cases, they try to distinguish between deserving and undeserving workers' comp claims. It is not something the agency's managers ought to be doing, it is not something my claims examiners do or ought to be doing. It is our job to look at the medical evidence, to look at the law, and to make an adjudication, it is not the agency's.

So they are beginning to make appointments for me and I am beginning to talk to the front office about how we talk to the agencies, but from my point of view, this is one of the first things that I was talked to about by the staff when I got here and I think that the testimony here today by the second panel certainly reinforces my desire to follow through on this.

Mr. HORN. Well, I am delighted to hear that. [Applause.]

Let me read you a paragraph that I am sure you heard from Mr. Usher, who is a hearing representing, "Further, some employing agencies have also established their own 'pipeline' to the director, FECA. Employers dissatisfied with the decision of the hearing representative favorable to the claimant for which the employer is thereby obligated to incur the costs of disability, medical treatment, vocational rehabilitation, et cetera, have developed a practice of maintaining a relationship with the director, FECA, toward the end of securing his influence over the hearing representative and/or the decision issued. It has become all too common for a decision issued by the hearing representative based upon full consideration of the evidence, argument and testimony favorable to the claimant to be 'called back' by the director's office, held for a number of months before it is returned to the hearing representative for re-write with a different conclusion or reissued by another employee of the director's office with the result desired by the employer."

Is that a true statement?

Mr. KERR. I do not know that it is. I said at the beginning I would go through Mr. Usher's testimony and Mr. Perez' and look into this. I think Shelby has something he wants to say.

Mr. HALLMARK. Yes. There were a number of comments about the director of the FECA program, Mr. Markey. He started as a claims examiner in this program in 1972 and worked his way up, as Donna did. I do not think there is an individual in that program

who is more dedicated to the notion of making appropriate factual determinations and following the law and procedures. He is not one who is anxious to be influenced by Federal agencies. In fact, I think there are Federal agency representatives at some of the highest levels who will tell you that he is a very pugnacious individual who wants to not be persuaded about those kinds of issues.

Mr. Markey does, however, have the responsibility of reviewing hearing representative's decisions as part of the process. That is, as was commented on earlier this morning, not a hidden review, that is a part of the structure and established process, and he does it. My understanding is that very few cases in fact are sent back for revision, and extraordinarily rare is it the case that a decision goes back for a different outcome as opposed to revisions to increase the clarity of the presentation or rationale explanation.

Mr. HORN. Well I take it you are the deputy director, is that not true, Mr. Hallmark?

Mr. HALLMARK. Yes, sir.

Mr. HORN. Do you ever see the director that is just going through these things and saying reject that one, reject that, approve that? I mean he has not spent the time on it the hearing examiner has. How much time is given by the director to this?

Mr. HALLMARK. The director's review goes primarily to the issue of the degree to which the decision is clear and can be understood. Many of these decisions, as was testified to this morning, result in a remand to the district office with some new instructions as to further development. It is his desire that those instructions be clear, that the claims examiner or the district office be able to follow those instructions, and that the decisions follow the policy and procedures that all claims examiners, including hearing representatives, in that branch are obliged to follow.

No, he does not substitute his view with respect to the judging of credibility of witnesses, but he does perform, in some instances—as I say, it is a very small percentage of cases—he does perform a review of the legal rationale, if you will.

Mr. HORN. Mr. Kerr, do you have any problem or comment on that?

Mr. KERR. The only comment I will make, as the Secretary's representative in OWCP now, is that it is the Secretary's authority that is passed down through the assistant secretary and through me—

Mr. HORN. Is that in a particular directive within the department?

Mr. KERR. Yeah, there are Secretarial orders—

Mr. HORN. Why do you not just file it for the record at this point without objection.

Mr. KERR. OK.

Mr. HORN. So we have the hierarchy and the various papers authorizing you to do things.

[The information referred to follows:]

Sunnyvale, CA; Arthur Andersen L.L.P., San Jose, CA; Arthur D. Little, Inc., San Francisco, CA; Center for Information Technology and Management, Berkeley, CA; CrossRoute, Redwood Shores, CA; Cyberbusiness Association Japan, Tokyo, JAPAN; Cyberspace, Orem, UT; Dacom Corporation, Seoul, KOREA; Daimler Benz Research and Technology, Palo Alto, CA; Defense Information Systems Agency, Reston, VA; Earthweb Inc., New York, NY; Electronic Purchasing Information Corporation, New York, NY; E-Stamp Corporation, Palo Alto, CA; Fablink, Colorado Springs, CO; First Technology Federal Credit Union, Beaverton, OR; France Telecom, San Francisco, CA; Freddie Mac, McLean, VA; GTE, Needham, MA; GC Tech, New York, NY; Internet Business Group (IBG), Bedford, NH; ICASST Communications Inc., Mountain View, CA; iCat Corporation, Seattle, WA; Idea Center Inc., Las Vegas, NV; InReference Inc., Sunnyvale, CA; Institute of the Future, Menlo Park, CA; Internet Profiles (IPRO), Palo Alto, CA; Lizard Communications Inc., Santa Clara, CA; Logistics Advantage, Atlanta, GA; Mediakola, San Jose, CA; Mercentris Inc., Lisle, IL; MFF Australia, Adelaide, AUSTRALIA; Mitsubishi Electric Corporation, Tokyo, JAPAN; MPACT Immedia Systems, Livonia, MI; NACHA/Wesney, San Bruno, CA; nCipher Limited, Cambridge, ENGLAND; NCR, Lincoln, NJ; Netgroup, New York, NY; NIA, Oakland, CA; National Institute of Standards and Technology (NIST), Gaithersburg, MD; Nortel, Ottawa, Ontario, CANADA; Northern Telecom (Nortel), Research Triangle Park, NC; Novalink Technologies Inc., Fremont, CA; NTT Data Communications, Palo Alto, CA; Partner, Salt Lake City, UT; Paylinx Corporation, St. Louis, MO; Portland Software, Portland, OR; Seqqara Systems, Sunnyvale, CA; Seoul Web Society, Seoul, KOREA; Signal Internet Technologies, Pittsburgh, PA; Skornia Law Firm, San Jose, CA; Software Forum, Palo Alto, CA; Supply Tech, Ann Arbor, MI; Terisa Systems, Los Altos, CA; Underwriters Laboratories Inc., Santa Clara, CA; U.S. Web, Santa Clara, CA; VeriSign, Mountain View, CA; WhoWhere?, Mountain View, CA; WIZnet-Worldwide Internet Solutions Network Inc., Delray Beach, FL; WorldPoint Interactive Inc., Solana Beach, CA; and Xcert Software, Vancouver, British Columbia, CANADA.

The following organizations have joined the Consortium as In-Kind Members: Council of Better Business Bureaus, Arlington, VA; Gray, Carv, Ware & Friederich, Palo Alto, CA; and

Internet Business Group (IBG), Bedford, NH.

The following Sponsor Members have canceled their memberships: Allan-Bredley Company Inc., Albuquerque, NM; NYNEX Corporation, Middletown, MA; Delphi Internet Services Corporation, Cambridge, MA; InterNex Information Services, Menlo Park, CA; Avex Electronics Inc., Huntsville, AL; D.E. Shaw & Co., L.P., New York, NY; and First Interstate Bancorp, Los Angeles, CA.

The following Associate Members have canceled their memberships: Concurrent Technologies Corporation, Oakland, CA; Intercom-University of Virginia, Computer Science Department, Charlottesville, VA; Tradewinds Technologies Incorporated, Winston-Salem, NC; IEEE Computer Society, Washington, DC; European Union Bank, Antigua, WEST INDIES; Los Alamos National Laboratory, Los Alamos, NM; Frontier Technologies Corporation, Macon, WI; Nihongo Yellow Pages Inc., San Jose, CA; Dun & Bradstreet, Westport, CT; Arroyo Seco/Fore Play Golf, South Pasadena, CA; CyberMark Inc., Washington, DC; Process Software Corporation, Frammingham, MA; Danish International Inc., Sunnyvale, CA; Internet Shopping Network, Menlo Park, CA; and Nanotech, San Francisco, CA.

The following companies have changed their memberships from Associates to In-Kind: I/Pro, Palo Alto, CA; and Vanderbilt University, Nashville, TN.

No other changes have been made in either the membership or planned activities of the Consortium. Membership remains open and the Consortium intends to file additional written notifications disclosing all changes in membership.

On June 13, 1994, the Consortium, as Smart Valley CommerceNet Consortium Inc., filed its original notification pursuant to § 6(a) of the Act. The Department of Justice published a notice in the Federal Register pursuant to section 6(b) of the Act on August 31, 1994 (59 FR 45012).

The last notification was filed with the Department on August 17, 1995. A notice was published in the Federal Register on December 18, 1995 (60 FR 65068).

Constance K. Robinson,
Director of Operations, Antitrust Division,
IFR Doc. 96-33309 Filed 12-31-96; 8:45 am
BILLING CODE 4410-11-01

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Semiconductor Research Corporation

Notice is hereby given that, on December 6, 1996, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. § 4301 et seq. ("the Act"), Semiconductor Research Corporation ("SCR") has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership status. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, AG Associates, Analogy, Inc., and IntelliSense Corporation are no longer members of the joint venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and Semiconductor Research Corporation intends to file additional written notification disclosing all changes in membership.

On January 7, 1985, Semiconductor Research Corporation filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the Federal Register pursuant to Section 6(b) of the Act on January 30, 1985 (50 FR 4281).

The last notification was filed with the Department on October 16, 1996. A notice was published in the Federal Register pursuant to Section 6(b) of the Act on December 6, 1996 (61 FR 64371).
Constance K. Robinson,

Director of Operations, Antitrust Division,
IFR Doc. 96-33310 Filed 12-31-96; 8:45 am
BILLING CODE 4410-11-01

DEPARTMENT OF LABOR

(Secretary's Order 6-96)

Delegation of Authorities and Assignment of Responsibilities to the Assistant Secretary for Employment Standards and Other Officials in the Employment Standards Administration

December 27, 1996.

1. Purpose. To delegate authorities and assign responsibilities to the Assistant Secretary for Employment Standards and other officials in the Employment Standards Administration.

2. Directives Affected. This Order repeals and supersedes Secretary's Order 1-93 (Employment Standards), in

addition, this Order cancels Secretary's Orders: 2-93, 3-93, 4-93, 6-94 (previously superseded in part by Secretary's Order 1-96), 2-95, and 1-96. Finally, this Order cancels my Notice published in the *Federal Register* at 61 FR 31164 (June 19, 1996).

3. *Background.* This Order, which repeals and supersedes Secretary's Order 1-93, constitutes the generic Secretary's Order for the Employment Standards Administration. Specifically, this Order delegates authorities and assigns responsibilities to the Assistant Secretary for Employment Standards and other officials in the Employment Standards Administration as delineated in subparagraphs 3.a.-d. below. All other authority and responsibility set forth in this Order were delegated or assigned previously to the Assistant Secretary for Employment Standards in Secretary's Order 1-93, and this Order continues those delegations and assignments in full force and effect, except as expressly modified herein.

a. *Exchange of Authorities Between the Assistant Secretary for Employment Standards and the Assistant Secretary for Occupational Safety and Health.* This Order, in conjunction with Secretary's Order 6-96, effects an exchange of particular authorities and responsibilities between the Assistant Secretary for Employment Standards and the Assistant Secretary for Occupational Safety and Health. The exchange was tested in a pilot project for Region VI established by Secretary's Order 6-94 (extended by Secretary's Order 1-96), that granted these assistant Secretaries limited concurrent authority to enforce certain environmental and public health-related whistleblower protection laws, which had been delegated to the Employment Standards Administration (ESA) under Secretary's Order 1-93, on certain laws establishing labor standards affecting field sanitation and migrant housing, which had been delegated to the Occupational Safety and Health Administration (OSHA) under Secretary's Order 1-90. The pilot project resulted in a determination that the respective agencies would make better use of their program expertise, and, therefore, that the Department of Labor would more effectively and efficiently utilize its resources, by a permanent transfer of specific enforcement activities between the Assistant Secretaries for ESA and OSHA.

Accordingly, this Order grants the Assistant Secretary for ESA authority under the Occupational Safety and Health Act of 1970, 29 U.S.C. 551 et seq., to enforce compliance by agricultural employers with, and to

develop and issue compliance interpretations regarding, the standards on: (1) Field sanitation, 29 C.F.R. 1928.110; and (2) temporary labor camps, 29 C.F.R. 1910.142, as described in subparagraph 4.a.(22)(b) of this Order. (See subparagraph 4.a.(22) of this Order.) Secretary's Order 6-96 grants the Assistant Secretary for OSHA authority to investigate and resolve allegations of discriminatory actions taken by employers against employees in violation of the following statutory whistleblower protection provisions: (1) Section 1450(i) of the Safe Drinking Water Act, 42 U.S.C. 300f-9(i); (2) Section 211 of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. 5851; (3) Section 110(a)-(d) of the Comprehensive Environmental Response Compensation and Liability Act of 1980, 42 U.S.C. 9610(a)-(d); (4) Section 507 of the Federal Water Pollution Control Act, 33 U.S.C. 1367; (5) Section 23 of the Toxic Substances Control Act, 15 U.S.C. 2622; (6) Section 7001 of the Solid Waste Disposal Act, 42 U.S.C. 6971; and (7) Section 322 of the Clean Air Act, 42 U.S.C. 7622.

b. *Delegation to the Assistant Secretary for Employment Standards: Certain Authorities of the Former Assistant Secretary for the American Workplace.* This Order delegates to the Assistant Secretary for ESA certain authorities of the former Assistant Secretary for the American Workplace, relating principally to the Office of Labor-Management Standards, as set forth in Secretary's Order 2-93. This Order thereby cancels a temporary delegation in my Notice published in the *Federal Register* at 61 FR 31164 (June 19, 1996). Thus, the Assistant Secretary for ESA shall become the legal successor to the residual authorities and responsibilities of the former Assistant Secretary for the American Workplace. (See subparagraphs 4.a.(23)-(28) of this Order.)

c. *Delegation to the Assistant Secretary for Employment Standards, the Wage and Hour Administrator, and the Regional Administrators: Authority To Issue Administrative Subpoenas.* In *Cudahy Packing Co., Ltd. v. Holland*, 315 U.S. 357 (1942), the Supreme Court ruled that the Wage and Hour Administrator of ESA could not delegate his subpoena authority under the Fair Labor Standards Act to other officials. However, pursuant to Reorganization Plan No. 6 of 1950, reprinted in 5 U.S.C. App., which was authorized by the Reorganization Act of 1949, all functions of the Administrator and other officers of the Department of Labor were transferred to the Secretary. The

Reorganization Plan authorized the Secretary, in turn, to authorize any officer, agency, or employee of the Department to perform any function of the Secretary.

In 1984 Congress expressly ratified Reorganization Plan No. 6 of 1950, see Public Law 98-632 (Oct. 19, 1984), reprinted in 5 U.S.C. 906 note, which thus has the full force and effect of law. Pursuant to this authority, this Order delegates to the Assistant Secretary for ESA, the Wage and Hour Administrator, and the regional administrators, specific authority to issue administrative subpoenas under Section 9 of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 209; Section 5 of the Walsh-Healey Public Contracts Act, 41 U.S.C. 39; Section 4(a) of the McNamara-O'Hara Service Contract Act, 41 U.S.C. 353(a); Section 612(b) of the Migrant and Seasonal Agricultural Worker Protection Act of 1983, 29 U.S.C. 1862(b); Section 8(b) of the Employee Polygraph Protection Act of 1988, 29 U.S.C. 2004(b); Section 105 of the Family and Medical Leave Act of 1993, 29 U.S.C. 2616; and Section 8(b) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 687(b), with respect to the authority delegated by this Order. (See subparagraphs 4.a.(1)-(3), (6), (9), (21), (22); 4.b.(1); and 4.c. of this Order.)

d. *Delegation to the Assistant Secretary for Employment Standards, the Wage and Hour Administrator, and the Deputy Assistant Secretary for Federal Contract Compliance: Authority To Invoke a Claim of Privilege.* This Order delegates to the Assistant Secretary for ESA, the Wage and Hour Administrator, and the Deputy Assistant Secretary for Federal Contract Compliance, specific authority to formally invoke any necessary governmental claim of privilege arising from the functions of the Wage and Hour Division and the Office of Federal Contract Compliance Programs (this authority was delegated previously to the Wage and Hour Administrator and the Deputy Assistant Secretary for Federal Contract Compliance in Secretary's Orders 3-93 and 4-93, respectively). This Order continues in effect the guidelines, set forth in these earlier Orders, for asserting a formal claim of privilege. (See subparagraphs 4.b.(2) and 4.d. of this Order.)

4. *Delegation of Authority and Assignment of Responsibility.* a. *The Assistant Secretary for Employment Standards is hereby delegated authority and assigned responsibility, except as hereinafter provided, for carrying out the employment standards, labor standards,*

and labor-management standards policies, programs, and activities of the Department of Labor, including those functions to be performed by the Secretary of Labor under the designated provisions of the following statutes:

(1) The Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 201 *et seq.* (FLSA), including the issuance thereunder of child labor hazardous occupation orders and other regulations concerning child labor standards, and subpoena authority under 29 U.S.C. 209. Authority and responsibility for the Equal Pay Act, Section 6(d) of the FLSA, were transferred to the Equal Employment Opportunity Commission on July 1, 1978, pursuant to the President's Reorganization Plan No. 1 of February 1978, set out in the Appendix to Title 5, Government Organization and Employees.

(2) The Walsh-Healey Public Contracts Act of 1936, as amended, 41 U.S.C. 35 *et seq.*, except those provisions relating to safety and health delegated to the Assistant Secretary for Occupational Safety and Health or the Assistant Secretary for Mine Safety and Health. The authority of the Assistant Secretary for ESA includes subpoena authority under 41 U.S.C. 35.

(3) The McNamara-O'Hara Service Contract Act of 1968, as amended, 41 U.S.C. 351 *et seq.*, except those provisions relating to safety and health delegated to the Assistant Secretary for Occupational Safety and Health. The authority of the Assistant Secretary for ESA includes subpoena authority under 41 U.S.C. 353(a).

(4) The Davis-Bacon Act, as amended, 40 U.S.C. 276a *et seq.*, and any laws now existing or subsequently enacted, providing for prevailing wage findings by the Secretary in accordance with or pursuant to the Davis-Bacon Act; the Copeland Act, 40 U.S.C. 276c; Reorganization Plan No. 14 of 1950; and the Tennessee Valley Authority Act, 16 U.S.C. 831.

(5) The Contract Work Hours and Safety Standards Act, as amended, 40 U.S.C. 327 *et seq.*, except those provisions relating to safety and health delegated to the Assistant Secretary for Occupational Safety and Health.

(6) Title III of the Consumer Credit Protection Act, 15 U.S.C. 1671 *et seq.*

(7) The labor standards provisions contained in Sections 5(i) and 7(g) of the National Foundation for the Arts and the Humanities Act, 20 U.S.C. 954(i) and 958(g), except those provisions relating to safety and health delegated to the Assistant Secretary for Occupational Safety and Health.

(8) The Migrant and Seasonal Agricultural Worker Protection Act of

1983, 29 U.S.C. 1801 *et seq.*, including subpoena authority under 29 U.S.C. 1802(b).

(9) The Employee Polygraph Protection Act of 1988, 29 U.S.C. 2001 *et seq.*, including subpoena authority under 29 U.S.C. 2004(b).

(10) The Federal Employees' Compensation Act, as amended and extended, 5 U.S.C. 8101 *et seq.*, except 5 U.S.C. 8149, as it pertains to the Employees' Compensation Appeals Board.

(11) The Longshore and Harbor Workers' Compensation Act, as amended and extended, 33 U.S.C. 901 *et seq.*, except 33 U.S.C. 919(d), with respect to administrative law judges in the Office of Administrative Law Judges; 33 U.S.C. 921(b), as it applies to the Benefits Review Board; and activities pursuant to 33 U.S.C. 941, assigned to the Assistant Secretary for Occupational Safety and Health.

(12) The Black Lung Benefits Act, as amended, 30 U.S.C. 901 *et seq.*

(13) The affirmative action provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. 4212, except for monitoring of the Federal contractor job listing activities under 38 U.S.C. 4212(a) and the annual Federal contractor reporting obligations under 38 U.S.C. 4212(d), delegated to the Assistant Secretary for Veterans' Employment and Training.

(14) Sections 501(a), 501(f), 502, and 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 791(a), 791(f), 792, and 793; and Executive Order 11758 ("Delegating Authority of the President Under the Rehabilitation Act of 1973") of January 15, 1974.

(15) Executive Order 11246 ("Equal Employment Opportunity") of September 24, 1966, as amended by Executive Order 11375 of October 13, 1967; and Executive Order 12086 ("Consolidation of Contract Compliance Functions for Equal Employment Opportunity") of October 5, 1978.

(16) The following provisions of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. 1101 *et seq.* (INA): Section 218(g)(2), 8 U.S.C. 1188(g)(2), relating to assuring employer compliance with terms and conditions of employment under the temporary alien agricultural labor certification (H-2A) program; and Section 274A(b)(3), 8 U.S.C. 1324A(b)(3), relating to employment eligibility verification and related recordkeeping.

(17) Section 212(m)(2)(E) (ii) through (v) of the INA, 8 U.S.C. 1182(m)(2)(E) (ii) through (v), relating to the complaint, investigation, and penalty provisions of the immigration process for

users of nonimmigrant registered nurses (*i.e.*, H-1A visas).

(18) The enforcement of the attestations required by employers under the INA pertaining to the employment of nonimmigrant longshore workers, Section 256 of the INA, 8 U.S.C. 1286(c)(4) (B)-(F); and foreign students working off-campus, 8 U.S.C. 1184 note; and enforcement of labor condition applications for employment of nonimmigrant professionals, Section 212(n)(2) of the INA, 8 U.S.C. 1182(n)(2).

(19) Joint responsibility and authority with the Assistant Secretary for Employment and Training for enforcing the Equal Employment Opportunity in Apprenticeship and Training requirements, as identified in Secretary's Order 4-90.

(20) Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.*, and the regulations at 41 CFR Part 60-742.

(21) The Family and Medical Leave Act of 1993, 29 U.S.C. 2601 *et seq.*, including subpoena authority under 29 U.S.C. 2616.

(22) The Occupational Safety and Health Act of 1970, 29 U.S.C. 551 *et seq.*, to conduct inspections and investigations, issue administrative subpoenas, issue citations, assess and collect penalties, and enforce any other remedies available under the statute, and to develop and issue compliance interpretations under the statute, with regard to the standards on:

(a) Field sanitation, 29 CFR 1928.110; and

(b) temporary labor camps, 29 CFR 1910.142, with respect to any agricultural establishment where employees are engaged in "agricultural employment" within the meaning of the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. 1802(3), regardless of the number of employees, including employees engaged in hand packing of produce into containers, whether done on the ground, on a moving machine, or in a temporary packing shed, except that the Assistant Secretary for Occupational Safety and Health retains enforcement responsibility over temporary labor camps for employees engaged in egg, poultry, or red meat production, or the post-harvest processing of agricultural or horticultural commodities.

The authority of the Assistant Secretary for Employment Standards under the Occupational Safety and Health Act with regard to the standards on field sanitation and temporary labor camps does not include any other agency authorities or responsibilities, such as rulesmaking authority. Such

authorities under the statute are retained by the Assistant Secretary for Occupational Safety and Health.

Moreover, nothing in this Order shall be construed as derogating from the right of States operating OSHA-approved State plans under 29 U.S.C. 667 to continue to enforce field sanitation and temporary labor camp standards if they so choose. The Assistant Secretary for Occupational Safety and Health retains the authority to monitor the activity of such States with respect to field sanitation and temporary labor camps.

(23) The Labor-Management Reporting and Disclosure Act of 1959, as amended, 29 U.S.C. 401 et seq.

(24) Section 701 (Standards of Conduct for Labor Organizations) of the Civil Service Reform Act of 1978, 5 U.S.C. 7120; Section 1017 of the Foreign Service Act of 1980, 22 U.S.C. 4117; Section 220(a)(1) of the Congressional Accountability Act of 1995, 2 U.S.C. 1351(a)(1); and the regulations pertaining to such sections at 29 C.F.R. Parts 457-459.

(25) Section 1209 of the Postal Reorganization Act of 1970, 39 U.S.C. 1209.

(26) The employee protection provisions of the Federal Transit law, as codified at 49 U.S.C. 3333(b), and related provisions.

(27) Section 408 (a), (b), (c), and (e) of the Rail Passenger Service Act of 1970, 49 U.S.C. 508 (a), (b), (c), and (e).

(28) Section 43(d) of the Airline Deregulation Act of 1978, repealed and reenacted at 49 U.S.C. 42101-42103.

(29) Such additional Federal acts that from time to time may assign to the Secretary or the Department duties and responsibilities similar to those listed under subparagraphs (1)-(28) of this paragraph, as directed by the Secretary.

b. *The Wage and Hour Administrator of the Employment Standards Administration is hereby delegated authority and assigned responsibility to:*

(1) Issue administrative subpoenas under Section 9 of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 209; Section 6 of the Walsh-Healey Public Contracts Act, 41 U.S.C. 39; Section 4(a) of the McNamara-O'Hara Service Contract Act, 41 U.S.C. 353(a); Section 512(b) of the Migrant and Seasonal Agricultural Worker Protection Act of 1983, 29 U.S.C. 1862(b); Section 5(b) of the Employee Polygraph Protection Act of 1988, 29 U.S.C. 2004(b); Section 106 of the Family and Medical Leave Act of 1993, 29 U.S.C. 2618; and Section 8(b) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 657(b), with respect to the authority delegated by this Order.

(2) Invoke all appropriate claims of privilege, arising from the functions of the Wage and Hour Division, following his/her personal consideration of the matter and in accordance with the following guidelines:

(a) *Informant's Privilege* (to protect from disclosure the identity of any person who has provided information to the Wage and Hour Division in cases arising under the statutory provisions listed in subparagraph 4.a. of this Order that are delegated or assigned to the Wage and Hour Division): A claim of privilege may be asserted where the Wage-Hour Administrator has determined that disclosure of the privileged matter may: interfere with the Wage and Hour Division's enforcement of a particular statute for which that Division exercises investigative or enforcement authority; adversely affect persons who have provided information to the Wage and Hour Division; or deter other persons from reporting violations of the statute.

(b) *Deliberative Process Privilege* (to withhold information which may disclose predecisional intra-agency or inter-agency deliberations, including: The analysis and evaluation of facts; written summaries of factual evidence; and recommendations, opinions, or advice on legal or policy matters; in cases arising under the statutory provisions listed in subparagraph 4.a. of this Order that are delegated or assigned to the Wage and Hour Division): A claim of privilege may be asserted where the Wage-Hour Administrator has determined that disclosure of the privileged matter would have an inhibiting effect on the agency's decision-making processes.

(c) *Privilege for Investigative Files* compiled for law enforcement purposes (to withhold information which may reveal the Wage and Hour Division's confidential investigative techniques and procedures): the investigative files privilege may be asserted where the Wage and Hour Administrator has determined that disclosure of the privileged matter may have an adverse impact upon the Wage and Hour Division's enforcement of the statutory provisions that have been delegated or assigned to the Division in subparagraph 4.a. of this Order, by: Disclosing investigative techniques and methodologies; deterring persons from providing information to the Wage and Hour Division; prematurely revealing the facts of the Wage and Hour Division's case; or disclosing the identities of persons who have provided information under an express or implied promise of confidentiality.

(d) Prior to filing a formal claim of privilege, the Wage and Hour Administrator shall personally review: All the documents sought to be withheld (or, in cases where the volume is so large all of the documents cannot be personally reviewed in a reasonable time, an adequate and representative sample of such documents); and a description or summary of the litigation in which the disclosure is sought.

(e) In asserting a claim of governmental privilege, the Wage and Hour Administrator may ask the Solicitor of Labor or the Solicitor's representative to file any necessary legal papers or documents.

c. *The Wage and Hour Regional Administrators of the Employment Standards Administration are hereby delegated authority and assigned responsibility to issue administrative subpoenas under Section 9 of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 209; Section 5 of the Walsh-Healey Public Contracts Act, 41 U.S.C. 39; Section 4(a) of the McNamara-O'Hara Service Contract Act, 41 U.S.C. 353(a); Section 512(b) of the Migrant and Seasonal Agricultural Worker Protection Act of 1983, 29 U.S.C. 1862(b); Section 5(b) of the Employee Polygraph Protection Act of 1988, 29 U.S.C. 2004(b); Section 106 of the Family and Medical Leave Act of 1993, 29 U.S.C. 2618; and Section 8(b) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 657(b), with respect to the authority delegated by this Order.*

d. *The Deputy Assistant Secretary for Federal Contract Compliance of the Employment Standards Administration is hereby delegated authority and assigned responsibility to invoke all appropriate claims of privilege, arising from the functions of the Office of Federal Contract Compliance Programs (OFCCP), following his/her personal consideration of the matter and in accordance with the following guidelines:*

(1) *Informant's Privilege* (to protect from disclosure the identity of any person who has provided information to OFCCP in cases arising under an authority delegated or assigned to OFCCP in subparagraph 4.a. of this Order): A claim of privilege may be asserted where the Deputy Assistant Secretary for Federal Contract Compliance has determined that disclosure of the privileged matter may: interfere with an investigative or enforcement action taken by OFCCP under an authority delegated or assigned to OFCCP in subparagraph 4.a. of this Order; adversely affect persons who have provided information to

OFCCP, or deter other persons from reporting violations of the statute or other authority.

(3) *Deliberative Process Privilege* (to withhold information which may disclose predecisional intra-agency or inter-agency deliberations, including: the analysis and evaluation of facts; written summaries of factual evidence; and recommendations, opinions or advice on legal or policy matters; in cases arising under an authority delegated or assigned to OFCCP in subparagraph 4.a. of this Order): A claim of privilege may be asserted where the Deputy Assistant Secretary for Federal Contract Compliance has determined that disclosure of the privileged matter would have an inhibiting effect on the agency's decision-making processes.

(3) *Privilege for Investigative Files* compiled for law enforcement purposes (to withhold information which may reveal OFCCP's confidential investigative techniques and procedures): The investigative files privilege may be asserted where the Deputy Assistant Secretary for Federal Contract Compliance has determined that disclosure of the privileged matter may have an adverse impact upon OFCCP's enforcement of an authority delegated or assigned to OFCCP in subparagraph 4.a. of this Order, by: Disclosing investigative techniques and methodologies; deterring persons from providing information to OFCCP; prematurely revealing the facts of OFCCP's case; or disclosing the identities of persons who have provided information under an express or implied promise of confidentiality.

(4) Prior to filing a formal claim of privilege, the Director shall personally review: All the documents sought to be withheld (or, in cases where the volume is so large that all of the documents cannot be personally reviewed in a reasonable time, an adequate and representative sample of such documents); and a description or summary of the litigation in which the disclosure is sought.

(5) In asserting a claim of governmental privilege, the Deputy Assistant Secretary for Federal Contract Compliance may ask the Solicitor or the Solicitor's representative to file any necessary legal papers or documents.

e. *The Assistant Secretary for Employment Standards and the Assistant Secretary for Occupational Safety and Health* are directed to confer regularly on enforcement of the Occupational Safety and Health Act with regard to the standards on field sanitation and temporary labor camps (see subparagraph 4.a.(22) of this Order),

and to enter into any memoranda of understanding which may be appropriate to clarify questions of coverage which arise in the course of such enforcement.

f. *The Chief Financial Officer* is assigned responsibility, in accordance with applicable appropriations enactments, for assuring that resources associated with the programs and functions of the Occupational Safety and Health Administration and the Office of Labor-Management Standards are reallocated and transferred to ESA, as appropriate, in an orderly and equitable manner.

g. *The Assistant Secretary for Administration and Management* is assigned responsibility to assure that any transfer of resources effecting this Order is fully consistent with the budget policies of the Department and that consultation and negotiation, as appropriate, with representatives of any employees affected by this exchange of responsibilities is conducted. The Assistant Secretary for Administration and Management is also responsible for providing or assuring that appropriate administrative and management support is furnished, as required, for the efficient and effective operation of these programs.

h. *The Solicitor of Labor* shall have the responsibility for providing legal advice and assistance to all officers of the Department relating to the administration of the statutory provisions, regulations, and Executive Orders listed above. The bringing of legal proceedings under those authorities, the representation of the Secretary and/or other officials of the Department of Labor, and the determination of whether such proceedings or representations are appropriate in a given case, and delegated exclusively to the Solicitor.

5. *Reservation of Authority and Responsibility.*

a. The submission of reports and recommendations to the President and the Congress concerning the Administrative Orders listed above is reserved to the Secretary.

b. Nothing in this Order shall limit or modify the delegation of authority and assignment of responsibility to the Administrative Review Board by Secretary's Order 2-98 (April 17, 1996).

c. Except as expressly provided, nothing in this Order shall limit or modify the provisions of any other Order, including Secretary's Order 2-90 (Office of Inspector General).

6. *Redelegation of Authority.* The Assistant Secretary for Employment Standards, the Chief Financial Officer, the Assistant Secretary for

Administration and Management, and the Solicitor of Labor may redelegate authority delegated in this Order.

7. *Effective Dates.*

a. The delegation of authority and assignment of responsibility set forth in subparagraphs 4.a.(23)-(26) of this Order shall be effective upon publication in the Federal Register.

b. All other delegations of authority and assignments of responsibility set forth in paragraph 4, above shall be effective on February 3, 1997.

Robert E. Reich,

Secretary of Labor.

[FR Doc. 96-31385 Filed 12-31-96; 6:46 am]
 SMALL COOP ACT-ES-21

(Secretary's Order 6-96)

Delegation of Authority and Assignment of Responsibility to the Assistant Secretary for Occupational Safety and Health

December 27, 1996.

1. *Purpose.* To delegate authority and assign responsibility to the Assistant Secretary for Occupational Safety and Health:

2. *Directives Affected.* This Order repeals and supercedes Secretary's Order 1-90 (Occupational Safety and Health). In addition, this Order cancels Secretary's Orders 6-94 (previously superseded in part by Secretary's Order 1-96) and 1-96.

3. *Background.* This Order, which repeals and supercedes Secretary's Order 1-90, constitutes the generic Secretary's Order for the Occupational Safety and Health Administration. Specifically, this Order, in conjunction with Secretary's Order 5-96, effects an exchange of particular authorities and responsibilities between the Assistant Secretary for Employment Standards and the Assistant Secretary for Occupational Safety and Health. The exchange was tested in a pilot project for Region VI established by Secretary's Order 6-94 (extended by Secretary's Order 1-96), that granted these Assistant Secretaries limited concurrent authority to enforce certain laws establishing labor standards affecting field sanitation and migrant housing, which had been delegated to the Occupational Safety and Health Administration (OSHA) under Secretary's Order 1-90, and certain environmental and public health-related whistleblower protection laws, which had been delegated to the Employment Standards Administration (ESA) under Secretary's Order 1-93. The pilot project resulted in a determination that the respective agencies would make better

U.S. Department of Labor

Assistant Secretary for
Employment Standards
Washington, D.C. 20210

APR 8 1997

Employment Standards Order No. 97-01

SUBJECT: Redlegation of Authority and Reassignment of Responsibilities to the Assistant Secretary for Employment Standards.

1. Purpose. This Order updates, consolidates, and revises the responsibilities previously found in Employment Standards Order No. 95-02.
2. Authority and Directives Affected. This Order redelegates an exchange of particular authorities and responsibilities between the Assistant Secretary for Employment Standards (ESA) and the Assistant Secretary for Occupational Safety and Health. The Assistant Secretary for ESA is granted authority under the Occupational Safety and Health Act (OSHA) of 1970, 29 U.S.C. 651 et seq., to enforce compliance by agricultural employers with, and to develop and issue compliance interpretations regarding, the standards on: (1) field sanitation, 29 C.F.R. 1928.110; and (2) temporary labor camps, 29 C.F.R. 1910.142, as described in 3.C. 2.n. of this Order. Also redelegated to the Assistant Secretary for Employment Standards are certain authorities of the former Assistant Secretary for the American Workplace, relating principally to the Office of Labor-Management Standards. Finally, this Order redelegates to the Wage and Hour Administrator and the Regional Administrators authority to issue Administrative Subpoenas; and to the Wage and Hour Administrator and the Deputy Assistant Secretary for Federal Contract Compliance authority to invoke a claim of privilege. The above authorities and responsibilities are redelegated from Secretary's Order 5-96. This Order supersedes Employment Standards Order 95-02.
3. Redlegation of Authority and Reassignment of Responsibility. The authority and responsibility assigned by the Secretary of Labor to the Assistant Secretary for Employment Standards for carrying out employment standards programs and activities are redelegated and reassigned as follows:
 - A. The Office of the Assistant Secretary for Employment Standards
 1. The ESA Equal Employment Opportunity (EEO) Coordinator shall report to the Assistant Secretary, and will be responsible for developing, administering and monitoring the implementation of equal opportunity policies and procedures, coordinating and reviewing EEO plans and advising the Assistant Secretary and other ESA managers on the agency's EEO status and necessary corrective actions.

B. The Office of Management, Administration, and Planning

The Director, Office of Management, Administration, and Planning shall report to the Assistant Secretary and is responsible for all planning and management activities including financial management, personnel management, technical training, data processing, management review and internal control, and general administrative services.

C. The Office of the Wage and Hour Administrator

1. The Wage and Hour Division is comprised of all the program employees and their respective offices nationwide, including the Regional Administrators for Wage and Hour.

2. The Wage and Hour Administrator shall report to the ESA Assistant Secretary and is hereby redelegated authority for carrying out the activities delegated to the Assistant Secretary under:

a. The Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 201 et seq. (FLSA), including the issuance thereunder of child labor hazardous occupation orders and other regulations concerning child labor standards, and subpoena authority under 29 U.S.C. 209. Authority and responsibility for the Equal Pay Act, section 6(d) of the FLSA, were transferred to the Equal Employment Opportunity Commission on July 1, 1979, pursuant to the President's Reorganization Plan No. 1 of February 1978, set out in the Appendix to Title 5, Government Organization and Employees.

b. The Walsh-Healey Public Contracts Act of 1936, as amended, 41 U.S.C. 35 et seq., including subpoena authority under 41 U.S.C. 39, except those provisions relating to safety and health delegated to the Assistant Secretary for Occupational Safety and Health or the Assistant Secretary for Mine Safety and Health.

c. The McNamara-O'Hara Service Contract Act of 1965, as amended, 41 U.S.C. 351 et seq., including subpoena authority under 41 U.S.C. 353(a) except those provisions relating to safety and health delegated to the Assistant Secretary for Occupational Safety and Health.

d. The Davis-Bacon Act, as amended, 40 U.S.C. 276a et seq., and any laws now existing or subsequently enacted, providing for prevailing wage determinations by the Secretary of Labor in accordance with or pursuant to the Davis-Bacon Act; the Copeland Act, 40 U.S.C. 276c; Reorganization Plan No. 14 of 1950; and the Tennessee Valley Authority Act, 16 U.S.C. 831.

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e. The Contract Work Hours and Safety Standards Act, as amended, 40 U.S.C. 327, et seq., except those provisions relating to safety and health delegated to the Assistant Secretary for Occupational Safety and Health.

f. Title III of the Consumer Credit Protection Act, 15 U.S.C. 1671, et seq.

g. The labor standards provisions contained in Sections 5(i) and 7(g) of the National Foundation for the Arts and Humanities Act, 20 U.S.C., 954(i) and 956(g), except those provisions relating to safety and health delegated to the Assistant Secretary for Occupational Safety and Health.

h. The Migrant and Seasonal Agricultural Worker Protection Act of 1983, 29 U.S.C. 1801 et seq., including subpoena authority under 29 U.S.C. 1862(b).

i. The following provision of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. 1101 et seq. (INA): Section 218(g)(2), 8 U.S.C. 1188 (g)(2), relating to assuring employer compliance with terms and conditions of employment under the temporary alien agricultural labor certification (H-2A) program; and Section 274A(b)(3), 8 U.S.C. 1324A (b)(3), relating to employment eligibility verification and related recordkeeping.

j. Section (212)(m)(2)(E)(ii) through (v) of the INA, 8 U.S.C. 1182(m)(2)(E)(ii) through (v), relating to the complaint, investigation, and penalty provisions of the attestation process for users of nonimmigrant registered nurses (i.e., H-1A Visas).

k. The enforcement of the attestations required by employers under the INA pertaining to the employment of nonimmigrant longshore workers, Section 258 of the INA, 8 U.S.C. 1288(c)(4)(B)-(F); and foreign students working off-campus, 8 U.S.C. 1184 note; and enforcement of labor condition applications for employment of nonimmigrant professionals, Section 212(n)(2) of the INA, 8 U.S.C. 1182(n)(2).

l. The Employee Polygraph Protection Act of 1988, 29 U.S.C. 2001 et seq., including subpoena authority under 29 U.S.C. 2004(b).

m. The Family and Medical Leave Act of 1993, 29 U.S.C. 2601 et seq., including subpoena authority under 29 U.S.C. 2616.

n. The Occupational Safety and Health Act of 1970, 29 U.S.C. 651 et seq., to conduct inspections and investigations, issue administrative subpoenas, issue citations,

assess and collect penalties, and enforce any other remedies available under the statute, and to develop and issue compliance interpretations under the statute, with regard to the standards on:

(1) field sanitation, 29 C.F.R. 1928.110; and

(2) temporary labor camps, 29 C.F.R. 1910.142, with respect to any agricultural establishment where employees are engaged in "agricultural employment" within the meaning of the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. 1802(3), regardless of the number of employees, including employees engaged in hand packing of produce into containers, whether done on the ground, or on a moving machine, or in a temporary packing shed, except that the Assistant Secretary for Occupational Safety and Health retains enforcement responsibility over temporary labor camps for employees engaged in egg, poultry, or red meat production, or the post-harvest processing of agricultural or horticultural commodities.

The authority of the Assistant Secretary for Employment Standards under the Occupational Safety and Health Act (OSHA) with regard to the standards on field sanitation and temporary labor camps does not include any other agency authorities or responsibilities, such as rulemaking authority. Such authorities under the statute are retained by the Assistant Secretary for Occupational Safety and Health.

Moreover, nothing in this Order shall be construed as derogating from the right of States operating OSHA-approved State plans under 29 U.S.C. 667 to continue to enforce field sanitation and temporary labor camp standards if they so choose. The Assistant Secretary for Occupational Safety and Health retains the authority to monitor the activity of such States with respect to field sanitation and temporary labor camps.

o. Such additional Federal Acts that from time to time may assign to the Secretary or the Department duties and responsibilities similar to those listed under 3.C., as directed by the Secretary.

3. The Wage and Hour Administrator is hereby delegated authority and assigned responsibility to:

a. Issue administrative subpoenas under Section 9 of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 209; Section 5 of the Walsh-Healey Public Contracts Act, 41 U.S.C. 39; Section 4(a) of the McNamara-O'Hara Service Contract Act, 41 U.S.C. 353(a); Section 512(b) of the Migrant and Seasonal Agricultural Worker Protection Act of 1983, 29 U.S.C. 1862(b);

Section 5(b) of the Employee Polygraph Protection Act of 1988, 29 U.S.C. 2004(b); Section 106 of the Family and Medical Leave Act of 1993, 29 U.S.C. 2616; and Section 8(b) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 657(b), with respect to the authority delegated by this Order.

b. Invoke all appropriate claims of privilege, arising from the functions of the Wage and Hour Division, following his/her personal consideration of the matter and in accordance with the following guidelines:

(1) Informant's Privilege (to protect from disclosure the identity of any person who has provided information to the Wage and Hour Division in cases arising under the statutory provisions listed in subparagraph 3.C. of this Order that are delegated or assigned to the Wage and Hour Division). A claim of privilege may be asserted where the Wage and Hour Administrator has determined that disclosure of the privileged matter may interfere with the Wage and Hour Division's enforcement of a particular statute for which that Division exercises investigative or enforcement authority; adversely affect persons who have provided information to the Wage and Hour Division; or, deter other persons from reporting violations of the statute.

(2) Deliberative Process Privilege (to withhold information which may disclose predecisional intra-agency or inter-agency deliberations, including: the analysis and evaluation of facts; written summaries of factual evidence; and, recommendations, opinions, or advice on legal or policy matters; in cases arising under the statutory provisions listed in subparagraph 3.C. of this Order that are delegated or assigned to the Wage and Hour Division): A claim of privilege may be asserted where the Wage-Hour Administrator has determined that disclosure of the privileged matter would have an inhibiting effect on the agency's decision-making processes.

(3) Privilege for Investigative Files compiled for law enforcement purposes (to withhold information which may reveal the Wage and Hour Division's confidential investigative techniques and procedures). The investigative files privilege may be asserted where the Wage and Hour Administrator has determined that disclosure of the privileged matter may have an adverse impact upon the Wage and Hour Division's enforcement of the statutory provisions that have been delegated or assigned to the Division in subparagraph 3.C. of this Order, by: disclosing investigative techniques and

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methodologies; deterring persons from providing information to the Wage and Hour Division; prematurely revealing the facts of the Wage and Hour Division's case; or, disclosing the identities of persons who have provided information under an express or implied promise of confidentiality.

(4) Prior to filing a formal claim of privilege, the Wage and Hour Administrator shall personally review: all the documents sought to be withheld (or, in cases where the volume is so large all of the documents cannot be personally reviewed in a reasonable time, an adequate and representative sample of such documents); and, a description or summary of the litigation in which the disclosure is sought.

(5) In asserting a claim of governmental privilege, the Wage and Hour Administrator may ask the Solicitor of Labor or the Solicitor's representative to file any necessary legal papers or documents:

4. During a vacancy in the position of the Wage and Hour Administrator, and provided no one is serving as Acting Wage and Hour Administrator pursuant to 5 U.S.C. 3346, and provided no one has been detailed to serve as Acting Wage and Hour Administrator pursuant to 5 U.S.C. 3347, the Deputy Wage and Hour Administrator shall report to and be subject to the authority of the Assistant Secretary, and is hereby redelegated authority, except as hereinafter provided, for carrying out the programs and activities redelegated to the Wage and Hour Administrator under Section 3.C.1 of this Order. This redelegation, however, shall not include the following authorities which are reserved to the Assistant Secretary:

a. The authority to issue regulations pursuant to the Administrative Procedure Act, 5 U.S.C. 553, and to issue interpretive bulletins; and,

b. The authority to review decisions of the Deputy Wage and Hour Administrator and issue decisions and orders accordingly with respect to adjustments in liquidated damages under the Contract Work Hours and Safety Standards Act pursuant to 29 CFR 5.8(b).

5. The Regional Administrators for Wage and Hour shall report directly to the Wage and Hour Administrator. Regional Administrators are responsible for regional policy development, program planning, administration and management, resource management, maintaining effective liaison with other Federal and DOL agencies and State/local government agencies, and officials as related to the Wage and Hour programs. They will conduct a regional accountability review program. They are responsible for carrying out within their region plans for administering the wage and salary stabilization and labor disputes program as delegated

in Secretary's Order 23-76. Regional Administrators are contracting officers within their areas of assigned responsibility and are empowered to act under the Department of Labor Manual Series Two, Part 814C(2) to enter into agreements with States to enhance Federal/State cooperative agreements for administering compatible employment standards programs.

6. The Regional Administrators for Wage and Hour are hereby delegated authority and assigned responsibility to issue administrative subpoenas under Section 9 of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 209; Section 5 of the Walsh-Healey Public Contracts Act, 41 U.S.C. 39; Section 4(a) of the McNamara-O'Hara Service Contract Act, 41 U.S.C. 353(a); Section 512(b) of the Migrant and Seasonal Agricultural Worker Protection Act of 1983, 29 U.S.C. 1862(b); Section 5(b) of the Employee Polygraph Protection Act of 1988, 29 U.S.C. 2004(b); Section 106 of the Family and Medical Leave Act of 1993, 29 U.S.C. 2616; and Section 8(b) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 657(b), with respect to the authority delegated by this Order.

D. The Office of the Deputy Assistant Secretary for Workers' Compensation Programs

1. The Office of Workers' Compensation Programs (OWCP) consists of all program employees nationwide and their respective offices, including the Regional Directors for OWCP.

2. The Deputy Assistant Secretary for Workers' Compensation Programs shall report to the ESA Assistant Secretary and is hereby redelegated authority for carrying out the programs and activities delegated to the Assistant Secretary under:

a. The Federal Employees' Compensation Act, as amended and extended, 5 U.S.C. 8101, et seq., except 5 U.S.C. 8149, as it pertains to the Employees' Compensation Appeals Board.

b. The Longshore and Harbor Workers' Compensation Act, as amended and extended, 33 U.S.C. 901, et seq., except: 33 U.S.C. 919(d) with respect to administrative law judges in the Office of Administrative Law Judges; 33 U.S.C. 921(b), as it applies to the Benefits Review Board; and activities pursuant to 33 U.S.C. 941, assigned to the Assistant Secretary for Occupational Safety and Health.

c. The Black Lung Benefits Act, as amended, 30 U.S.C. 901, et seq.

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d. Such additional Federal Acts that from time to time may assign to the Secretary or the Department duties and responsibilities similar to those listed under 3. D., as directed by the Secretary.

3. The Regional Directors for Workers' Compensation Programs shall report directly to the Deputy Assistant Secretary for Workers' Compensation Programs. Regional Directors are responsible for regional policy development, program planning, administration and management, resource management, maintaining effective liaison with other Federal and DOL agencies and State/local government agencies, and officials as relates to the Workers' Compensation Programs. They will conduct a regional accountability review program. Regional Directors are contracting officers within their areas of assigned responsibility and are empowered to act under the Department of Labor Manual Series Two Part 814C(2) to enter into agreements with States to enhance Federal/State cooperative agreements for administering compatible employment standards programs.

E. The Office of the Deputy Assistant Secretary for Federal Contract Compliance Programs

1. The Office of Federal Contract Compliance Programs (OFCCP) shall consist of all program employees nationwide and their respective offices, including the Regional Directors for OFCCP.

2. The Deputy Assistant Secretary for Federal Contract Compliance Programs shall report to the ESA Assistant Secretary and is hereby redelegated authority for carrying out the programs and activities delegated to the Assistant Secretary under:

a. The affirmative action provisions of the Vietnam ERA Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. 4212, except for monitoring of the Federal contractor job listing activities under 38 U.S.C. 4212(a) and the annual Federal contractor reporting obligations under 38 U.S.C. 4212(d), delegated to the Assistant Secretary for Veterans' Employment and Training.

b. Sections 501(a), 501(f), 502, and 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 791(a), 791(f), 792, and 793; and Executive Order 11758 ("Delegating Authority of the President Under the Rehabilitation Act of 1973") of January 15, 1974.

c. Executive Order 11246, ("Equal Employment Opportunity") of September 24, 1965, as amended by Executive Order 11375 of October 13, 1967; and Executive Order 12086 ("Consolidation of Contract Compliance Functions for Equal Employment Opportunity") of October 5, 1978.

d. Joint responsibility and authority with the Assistant Secretary for Employment and Training for enforcing the Equal Opportunity in Apprenticeship and Training requirements, as identified in Secretary's Order 4-90.

e. Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 et seq., and the regulations at 41 C.F.R. Part 60-742.

f. Such additional Federal Acts that from time to time may assign to the Secretary or the Department duties and responsibilities similar to those listed under 3.E., as directed by the Secretary.

3. The Deputy Assistant Secretary for Federal Contract Compliance Programs is hereby delegated authority and assigned responsibility to invoke all appropriate claims of privilege, arising from the functions of the Office of Federal Contract Compliance Programs (OFCCP), following his/her personal consideration of the matter and in accordance with the following guidelines:

a. Informant's Privilege (to protect from disclosure the identity of any person who has provided information to OFCCP in cases arising under an authority delegated or assigned to OFCCP in subparagraph 3.E. of this Order). A claim of privilege may be asserted where the Deputy Assistant Secretary for Federal Contract Compliance has determined that disclosure of the privileged matter may: interfere with an investigative or enforcement action taken by OFCCP under an authority delegated or assigned to OFCCP in subparagraph 3.E. of this Order; adversely affect persons who have provided information to OFCCP; or deter other persons from reporting violations of the statute of other authority.

b. Deliberative Process Privilege (to withhold information which may disclose predecisional intra-agency or inter-agency deliberations, including: the analysis and evaluation of facts; written summaries of factual evidence; and, recommendations, opinions or advice on legal or policy matters in cases arising under an authority delegated or assigned to OFCCP in subparagraph 3.E. of this Order). A claim of privilege may be asserted where the Deputy Assistant Secretary for Federal Contract Compliance has determined that disclosure of the privileged matter would have an inhibiting effect on the agency's decision-making processes.

c. Privilege for Investigative Files compiled for law enforcement purposes (to withhold information which may reveal OFCCP's confidential investigative techniques and procedures). The investigative files privilege may be asserted

where the Deputy Assistant Secretary for Federal Contract Compliance has determined that disclosure of the privileged matter may have an adverse impact upon OFCCP's enforcement of an authority delegated or assigned to OFCCP in subparagraph 3.E. of this Order, by: disclosing investigative techniques and methodologies; deterring persons from providing information to OFCCP; prematurely revealing the facts of OFCCP's case; or disclosing the identities of persons who have provided information under an express or implied promise of confidentiality.

(1) Prior to filing a formal claim of privilege, the Deputy Assistant Secretary for Federal Contract Compliance shall personally review: all the documents sought to be withheld (or, in cases where the volume is so large that all the documents cannot be personally reviewed in a reasonable time, an adequate and reasonable sample of such documents); and, a description or summary of the litigation in which the disclosure is sought.

(2) In asserting a claim of governmental privilege, the Deputy Assistant Secretary for Federal Contract Compliance may ask the Solicitor or the Solicitor's representative to file any necessary legal papers or documents.

4. The Regional Directors for Federal Contract Compliance Programs shall report directly to the Deputy Assistant Secretary for Federal Contract Compliance Programs. Regional Directors are responsible for regional policy development, program planning, administration and management, resource management, maintaining effective liaison with other Federal and DOL agencies and State/local government agencies, and officials as related to the programs of OFCCP. They will conduct a regional accountability review program. Regional Directors are contracting officers within their areas of assigned responsibility and are empowered to act under the Department of Labor Manual Series Two-Part 814C(2) to enter into agreements with States to enhance Federal/State cooperative agreements for administering compatible employment standards programs.

F. The Office of the Deputy Assistant Secretary for Labor-Management Standards

1. The Office of Labor-Management Standards (OLMS) shall consist of all program employees nationwide and their respective offices, including the Regional Directors for OLMS.

2. The Deputy Assistant Secretary for Labor-Management Standards shall report to the ESA Assistant Secretary and is hereby redelegated authority for carrying out the programs and activities delegated to the Assistant Secretary under:

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- a. The Labor-Management Reporting and Disclosure Act of 1959, as amended, 29 U.S.C. 401 et seq.
- b. Section 701 (Standards of Conduct for Labor Organizations) of the Civil Service Reform Act of 1978, 5 U.S.C. 7120; Section 1017 of the Foreign Service Act of 1980, 22 U.S.C. 4117; Section 220(a)(1) of the Congressional Accountability Act of 1995, 2 U.S.C. 1351(a)(1); and the regulations pertaining to such sections at 29 C.F.R. Parts 457 - 459.
- c. Section 1209 of the Postal Reorganization Act of 1970, 39 U.S.C. 1209.
- d. The employee protection provisions of the Federal Transit law, as codified at 49 U.S.C. 5333(b), and related provisions.
- e. Section 405(a), (b), (c), and (e) of the Rail Passenger Service Act of 1970, 45 U.S.C. 565 (a), (b), (c), and (e).
- f. Section 43(d) of the Airline Deregulation Act of 1978, repealed and reenacted at 49 U.S.C. 42101-42103.
- g. Such additional Federal acts that from time to time may assign to the Secretary or the Department duties and responsibilities similar to those listed under 3. F., as directed by the Secretary.

4. Redelegation of Authority: The authority delegated and the responsibilities assigned by this Order may be redelegated and reassigned. Such redelegations must be in writing and a copy submitted to the Assistant Secretary if they are made by the Administrator of the Wage and Hour Division, the Deputy Assistant Secretary for Workers Compensation Programs, the Deputy Assistant Secretary for Federal Contract Compliance Programs, or the Deputy Assistant Secretary for Labor-Management Standards. Delegations made within the programs, either by other national office managers or by the Regional Administrators or Regional Directors, shall be submitted to the Program Head for review and filing. Copies of all redelegations shall also be submitted to the Director, Office of Management, Administration and Planning, for filing (Attention: Division of Financial Management, Branch of Management Review and Internal Control).

5. Reservation of Authority: The submission of reports and recommendations to the Department concerning the policies, procedures, and the administration of Employment Standards programs shall be reserved to the Assistant Secretary for Employment Standards.

6. Effective Date: This Order is effective immediately.
7. Filing: This Order will be retained on file in the Office of Management, Administration and Planning, Division of Financial Management, Branch of Management Review and Internal Control.

Bernard E. Anderson

A handwritten signature in black ink, appearing to read "Bernard E. Anderson", written in a cursive style.

Mr. KERR. The highest form of review in FECA is ECAB which reports to the deputy secretary.

Mr. HORN. Give me the translation of that bureaucratese, please. I do that to the Pentagon regularly. They are exhausted after they have to spell these things out.

Mr. KERR. The Employees' Compensation Appeals Board.

Mr. HORN. Right, OK.

Mr. KERR. It is not part of FECA. It is the highest appellate body for people who want appeals of decisions that were made in the FECA program. It reports to the deputy secretary.

Mr. HORN. How are those Board members selected?

Mr. KERR. I do not know.

Mr. HORN. Are they Presidential nominees?

Mr. HALLMARK. They are not Presidential appointees, they serve at the pleasure, but they are not Presidential political appointees, as such.

Mr. HORN. Are they Secretarial appointees?

Mr. HALLMARK. I believe they are, but again, this is a unit outside of ours and we sort of take care to avoid knowing a whole lot about how that process works.

Mr. HORN. Well, we will get a description in the record of how that Board is selected.

Mr. KERR. As indicated by the first panel, you cannot take new evidence to the Employees' Compensation Appeals Board. You can bring new evidence to Hearings and Review, you can bring new evidence to reconsideration. What the Employees Compensation Appeals Board is concerned about is the policies and procedures of the program.

Hearings and Review is under the director of FECA who is responsible for the policies of FECA. It is absolutely right that he review the work of the people who are under him, just the way Donna Onodera reviews the work of claims examiners, senior claims examiners and district directors who work for her, she is responsible in my mind for their performance.

Tom Markey is responsible for, as far as I am concerned, the backlog in Hearings and Review, and the decisions that are made in Hearings and Review. So long as this is a Secretarial responsibility that has been delegated to OWCP, it is my position that this work needs and ought to be reviewed. I think the review ought to be: Do the employees show that they understand the law and how it ought to be applied? Do they understand that a hearing representative is to listen to a claimant and listen to their position and help them make their position but then apply the law after that position is made, in a fair and just manner with respect to the policies and procedures of the program?

That is Markey's responsibility. He has a policy shop. He has Hearings and Review. He is somebody who looks at the data that we have of how the program is working and brings recommendations on how policies and procedures ought to be changed. He does not have line responsibility over district offices or regional directors. The line responsibility from a district director is to a regional director, Donna on my right. Her line of responsibility is to the deputy director on my left. The management, personnel, budgeting, review and analysis of what goes on in the field in this program

is run out of my office, the initial contact is Shelby and then it is to the regional directors. Tom Markey is not in that chain of command.

Mr. HORN. Well, that is interesting, yet he is titled as the director.

Mr. KERR. He is director of the FECA program. Jim DeMarce is director of the Black Lung program. Joe Olympio is director of the Longshore program. These programs' benefits and responsibilities are all delivered by district office staff, who report to regional directors. The line job in this agency is the regional director and regional directors work with people in longshore, people in black lung, and people in FECA.

Now maybe the three programs should be set up differently, but that is the way they are set up.

Mr. HORN. So who would be the head of the black lung program?

Mr. KERR. Jim DeMarce is head of the black lung program.

Mr. HORN. And that is your counterpart, is that correct, or do they report to you?

Mr. KERR. No, he works for me.

Mr. HORN. OK, that is what I am trying to get straight.

Mr. KERR. OWCP has three programs.

Mr. HORN. Right.

Mr. KERR. Black lung, Longshore and FECA.

Mr. HORN. OK, all three report to you then.

Mr. KERR. The three program heads report to me and they are responsible for the policies in their programs. The staff who carry out the adjudication function in each of those programs report to the regional directors who report through Shelby Hallmark to me.

Mr. HORN. And that is the same regional director or do they have different regional directors?

Mr. KERR. They do not have separate regional directors.

Mr. HORN. OK, so it is going through your network, in the case of the San Francisco office. What do you have, generally west of the Rockies or what?

Ms. ONODERA. It is just California, Arizona, Nevada and Hawaii, and I am acting Regional Director right now for the Seattle region.

Mr. HORN. Yeah, I heard that. Take a raincoat the next time you go up there.

Ms. ONODERA. Yes.

Mr. HORN. I bought three of them in 1 year, forgetting it does rain every day in Seattle.

Let me ask you this, Mr. Kerr, it appears there is a segregation of duties problem at the Office of Workers' Compensation Programs. You administer the Federal Employees Compensation Act by adjudicating claims, then top Officials of the Office of Workers' Compensation Programs review claimant appeal decisions and as our witnesses have stated, change favorable decisions for the claimant in favor of the agency. Why are the Office of Workers' Compensation Programs' officials encouraging the management practice and what do you plan to do about it?

Mr. KERR. OK, that charge has been made and I said I will look into it.

Mr. HORN. OK.

Mr. KERR. I have said in the answer as well that I do not believe there is a conflict of interest. The district directors do not report to the head of FECA.

Mr. HORN. OK, and then we have looked at the OWCP programs' procedures manual for the workers' compensation program, and to be quite honest, the staff found it very voluminous and not particular user-friendly. How do you expect the claims examiners to follow procedures that clearly need to be revised? Is that in the process?

Mr. HALLMARK. The revision of the procedure manual is an ongoing activity. The revised regulations that were mentioned earlier today are an attempt to clarify for the public how the procedures in general, at a higher level, apply in different cases. The procedure manual is an ongoing and complex description of how the program works. There is ongoing training as changes are made to that procedure manual, which are carried out in each of the district offices to ensure that claims examiners have a continuing refreshment as to how the procedures are applied. And claims examiners, of course, get fairly exhaustive training at the front end as to the application of the procedure manual itself.

But we are, as we have been for several years, attempting where we can to streamline procedures and make them simpler where that can be accomplished. But each workers' compensation case, as we have heard this morning, is a complex entity of itself, procedures need to be able to apply to a whole wide range of activities and that is the reason why you have a fairly lengthy document.

Mr. HORN. Does everything in the procedure manual clear the Office of the Solicitor? Do they get their hand in writing it, in brief?

Mr. HALLMARK. I think the answer to that would be that they are aware of procedures that are drafted, there is not a clearance process per se for every procedural change that we do.

Mr. HORN. Well, I think you are lucky. Every time I have found you gave the Solicitor's Office something, it just became more complicated and you need to communicate with the rank and file because they are not attorneys who are claims examiners, right? They are just working their way up the civil service, and I would hope they would have easy instructions to read as to what it is that is expected of them.

Mr. HALLMARK. If I could elaborate, the streamlining activities that I have talked about have been done as partnership activities, where we try to bring front line employees into teams with management officials, to do that very thing, to bring their daily expertise and questions to bear on issues and try to, as much as possible, reduce red tape and clarify and simplify.

Mr. HORN. That is commendable. When did that start?

Mr. HALLMARK. We started that activity back in 1994. We have a continuing ongoing reinvention program.

Mr. KERR. To be fair, the claims examiners agree with you. This is a complicated program, they have to know a lot. It is always hard to apply rules to individual cases and they have raised with us issues of training and refresher and we are looking at them, but it is very complicated on the FECA side. I would say in the other two programs, black lung and longshore, as the new manager, my concern is there is not enough on paper from the national office for

the people who are doing the work in the field. So we need to uncomplicate one a little bit, and we need to complicate the other. In terms of the solicitor's office, the solicitor's office of the Department of Labor is a fairly large law firm. It does have a section which only handles black lung, we are the client for that section. They do not do other work. It has another section that handles only longshore and FECA. There are close relations with those offices, but there is not a sign off relationship.

Mr. HORN. Well, let me yield to my colleague from Virginia for questions, and I might have a few then to end the hearing.

Mr. DAVIS. Thank you, I am going to try to be brief. We have been here a long time and I appreciate you all coming out here and listening to the testimony. I know you are going to get back to some of the specifics that have been raised and that is all really we can ask. I do not think we can sort it out here.

Let me just say one thing, you are known as "the man" in our office, you have been very responsive when we have been able to get to you. It is the people below you as we try to get through sometimes that do not return calls and everything else. I think part of it is the workload, part of it is we are asking people to do a lot and we need to do better. And I think you have indicated that. But I got a note from my office saying that when they have been able to reach you, it has been worth the time because you have been able to work to resolve the questions.

Mr. KERR. Thank you.

Mr. DAVIS. You said most of the claims examiners are 11's and 12's. Are there some 5's and 7's and 9's out there?

Mr. KERR. Yes, there is.

Mr. DAVIS. How does that work and how does the promotion system work?

Mr. KERR. I am not sure of the specifics and Donna and Shelby can help me with this, but most—there are about 500, 400-plus are 11's and 12's, senior claims examiners and claims examiners. There are very few 5's and then the 7 is more a—I would say trainee but I am not certain.

Ms. ONODERA. I would like to answer that. The entry level position of a claims examiner is at the 5/7 level. That is generally where, at that level, we hire the claims examiners and then as they become more experienced and learn more about the program through training, et cetera, they progress on to the 9 and 11 levels. Generally if you have grade 5's and 7's in the program, that means they are trainees, they are fairly new, they are not expected to do the full level of claims examining work until they go get to the 11 level.

Mr. DAVIS. Are they making decisions at that level?

Ms. ONODERA. Yes, they are making decisions and of course, they are always being supervised, depending on what level they are, and their cases are reviewed, not all cases, but the more difficult cases are being reviewed.

So in an office where you have high attrition, you are going to have more lower level claims examiners because we are hiring at the lower levels.

Mr. DAVIS. Let me ask you about the turnover and about the attrition and about what we can do, because I think continuity in

this can make a huge difference. Sometimes people who are experienced, sometimes they have heard similar cases, they understand the procedures a little bit better than those who have not. What can we do institutionally to try to change that and stop the turnover? Is it a question of pay? Is it a question of respect, as was noted by some of the earlier testimony? Is it a question of the working condition and the workload? What do you think?

Ms. ONODERA. I think it is probably all of the above. We are grappling with that problem, especially in the San Francisco office, right now. With the booming economy, work is a little more easy to find and people are leaving at a higher rate right now and we are in partnership with the union to sort of see what can we do. We have done some employee surveys on this and we are all concerned about retention, keeping the good people we have, and we hate seeing them go to the private sector.

Mr. DAVIS. We are having that problem across Government in a lot of our technical areas where the private sector can just outbid us and it is something we are going to have to grapple with, either through civil service changes, significant changes, or there is going to be more outsourcing of some of these jobs. And that is really the dilemma we find ourselves in, and I think we have got to deal within the civil service confines over how you get qualified people and maintain them. It is cheaper to do that than it is to have to hire and retrain somebody else and then come back, and we are going to get more mistakes at the lower level. You try your best not to, but then you can see the effects it has on the people's lives as they move their way up the way.

So any thoughts you have on that as you supplement, I would be really interested, Mr. Chairman, let me just say, in how you can keep and maintain good people here. I think that is one of the problems. Sometimes the decisions you get coming out of this are people who just do not give it the look or do not have the experience in taking a look at some of these individual cases that they might have and then we end up here.

Mr. HALLMARK. Mr. Davis, if I could—

Mr. DAVIS. Yes, please.

Mr. HALLMARK [continuing]. Amplify just for a moment. Our testimony will dwell probably at some length on the fact that our administrative costs are about 4 percent of the total cost of the FECA program. That is a very low percentage ratio compared to State workers' compensation and many other entities that have this kind of workload.

Mr. DAVIS. Where do the other costs go then?

Mr. HALLMARK. The 96 percent go to benefits to injured workers and to medical costs.

Mr. DAVIS. Oh, OK, I see what you are saying.

Mr. HALLMARK. So we pay \$1.9 billion for that and about \$70 million for our administrative costs. There is no question—

Mr. DAVIS. I will not muse what the adjustments could be if you had different claims examiners. And I do not really know enough sitting here today just hearing one set of cases if the payouts are too great or too little. You know, we are hearing from individuals that in some cases I think clearly have had—they are not satisfied with it and it does not sound very good on its face. But there may

be other cases where we are paying out and do not need to and better managers may or may not be able to help out. I do not know the answer to that.

Mr. HALLMARK. Well we believe that this kind of a program requires that cases be reviewed. One of the reasons why we created the Periodic Roll Management Project back in 1992 was to address the fact that cases had been accepted and were not reviewed in sufficient detail.

But we also do not believe, and I would concur with most of the panelists earlier, that this is a program fraught with fraud and that there are large numbers of individuals out there who are basically receiving benefits through deceit—that is not the case.

Mr. DAVIS. Not from the testimony we have heard today, it is not.

Mr. HALLMARK. That is correct. It is the case that we need to have the resources that we need to be able to work with injured workers to avoid the kinds of conflicts, some of which we heard today, to help them get medically treated and provide ways to help them and help their employers find avenues for them to get back to work. That is very time-consuming, labor-intensive activity and I think that some of the turnover issues that Donna was pointing to come from the fact that we get 170,000 cases a year. Some of those we have administratively found ways to handle through computer processes and so on, but a lot of them are cases that are just complex and require careful work.

Mr. DAVIS. Let me ask you this. If you are a claims examiner and you are looking to get promoted over the long term, a 5 to a 7 to a 9 to an 11, to 12 and maybe you want to go to hearing examiner or somewhere else, what are you judged on? Are you judged by how quickly you move that volume out? Is that a pretty important criteria as to what your backlog is, how many cases you have decided, the number of hearings that you maybe get remanded? What are the criteria?

Ms. ONODERA. That may be one part of it, but there are a series of performance standards that we look at. One of them is timeliness of decisions, but the other is and more important, quality.

Mr. DAVIS. And it ought to be, I am not arguing that it should not be, but I just wondered what are the other criteria?

Ms. ONODERA. Quality of the adjudication, responsiveness to the injured parties.

Mr. DAVIS. Who measures the quality?

Ms. ONODERA. The supervisor and managers of the office.

Mr. DAVIS. Does the number of remands you get have any effect on that?

Ms. ONODERA. I do not think that is in the standards right at this point, no, that is not looked at. Although it is in general, we do have a yearly or semiannual accountability review by the national office and district office. Claims examiners who come out and review hundreds of cases to determine the quality of work that is being done in a district office.

Mr. DAVIS. How about the dollars that are saved the Federal Government by not being paid out?

Ms. ONODERA. We do not look at that.

Mr. DAVIS. That is not in any way, shape or form a criteria, is that right? No one has ever been advanced so there is no incentives or bonuses or any promotional dividends to saving government money by your decisions.

Ms. ONODERA. No, not at all.

Mr. HALLMARK. And if I could amplify.

Mr. DAVIS. Yes, please.

Mr. HALLMARK. The procedures that are used to evaluate claims examiners involve the supervisors reviewing cases that those individuals have done, sampling their work. So the major issue is quality with respect to what those decisions are, plus responsiveness, plus timeliness.

Mr. DAVIS. OK. I just add to what the chairman said in terms of if you would take more time to answer some of the—not just the criticisms, but have the Secretary get back to some of the questions posed by the committee. We would like to make this as complete a record as we could, so that we can weigh all sides on the oversight.

Mr. Chairman, that will conclude my questions of this panel. Thank you.

Mr. HORN. Well, thank you very much.

Secretary Kerr, we understand the published documents state that there were 7,991 hearing requests and 2,905 Employees Compensation Appeals Board appeals in fiscal year 1996. Now unless we misread your testimony, we think you noted that only 5,500 exercised one of these two appeal rights, and we just wondered what is the difference and which one is right?

Mr. KERR. I said two things. One is I said in terms of initial adjudication, taking a year, and I believe my shorthand numbers come from 1996 and I actually have two documents here with this broken out. The first number is initial adjudications in a year. Of the caseload that comes in a year, on initial adjudication, what would we expect to go to the appeals process. And that is approximately 170,000 cases, approximately 20,000 denied, 5,500 to the appeals process. And then later, I said—and I do not have that in front of me, let me see if I can find it—

Mr. HORN. Without objection, these charts will be put in the record at this point.

Mr. KERR. Later on in my testimony when I was talking about the impact of the Periodic Roll Management Project and the Quality Case Management Project, I pointed out that in any 1 year, there are 17 to 18,000 cases before ECAB plus Hearings and Review, plus reconsideration. So what I was saying was of what initially comes in a year, about 5,500 go to the appeals process. There are other cases in the appeals process in any 1 year. The number I have in front of me says that in 1997, the total, including the initial adjudication, is about 17 to 18,000. These would be appeals from any kind of the myriad of decisions that are made in Donna's office, for instance, on long-term cases or other questions about cases that were before her. So that the two numbers, one is part of the other, is what I guess I am trying to say in a shorter hand.

Mr. HORN. Good, we will try to sort it out.

Mr. KERR. They are hard to sort out because these things happen over time, but I was trying to paint a picture of the two pieces.

Mr. HORN. And who would have the breakdown of the data for the Employees Compensation Board? We essentially just need to go to them? They keep their own records, I take it.

Mr. KERR. You did ask them some questions and I believe they did—

Mr. HORN. Let me just make sure we are talking about the right data with the right people. Let me ask you, Regional Director Onodera, do we know how often the Office of Workers' Compensation Programs grants extension to claimants and what are the percentages for the San Francisco branch? Do we have any data such as that?

Ms. ONODERA. No, we do not keep that data, we just generally work it on a case-by-case basis.

Mr. HORN. And so nothing is kept at the overall level of OWCP.

Ms. ONODERA. No, just on the case itself.

Mr. HORN. Well, is there anything else you would like to say in relation to what the witnesses testified, that either you are working on or you can improve or what?

Ms. ONODERA. Well, we definitely will be reviewing the cases. We appreciated the—

Mr. HORN. Well, I think the main point is not just the case—that is important because human beings are involved—but the question is we only had a chance to hear seven witnesses. I mean, think of the tens of thousands that maybe could tell us the same thing, and that is what worries me. [Applause.]

So I am hoping you look at it, not just as one case, although we would like to see those resolved obviously in a favorable way, but they reflect people that are out there that did not bring their matter to our attention or we did not select in some way and I think we learned something from these and I just hope that—it sounds like you are interested in getting that job done, Mr. Secretary, so I hope it will be. We will come back to it though.

Mr. KERR. As I said at the beginning, this is something that we want to look at. I think there are, especially in an organization that is trying to change, other kinds of changes that it can add to its list, and we appreciate being able to speak here today, but also to be able to listen.

Mr. HORN. Well, we thank you for coming from San Francisco and Washington, DC.

We are going to end with just an open mic here for about 2 minutes for each person that maybe would like to say something. We are going to swear you in just as we swore others in, so those that have something to say, come on down and just stand in line there. I want to make sure that everybody is in line that wants to be heard because I am going to swear you all in and I do not want to do it individually.

OK, I just want to make sure—last call.

Well, we are going to make it 1 minute. You can—

Mr. DAVIS. Mr. Chairman, the entire statement will be in the record.

Mr. HORN. Entire statement. Raise your right hands.

[Witnesses sworn.]

Mr. HORN. It is limited to that group that is standing, and we will start. I want you to tell us your name and what city you are from.

STATEMENTS OF JERRY DeMAYO; LEIGH BROWN; JAMES HAMADA; STEVEN SPEARE; SYLVIA R. JOHNSON; ROBERT D. MCKENNA; DOROTHY HORLICK; WILLIAM SOTTLE; STELLA BOHLIG; VALERIE DOWNEY; PATRICIA KRAMER; NORMA COLEMAN; BILL HINTZ; AND BARBARA SWEENEY

Mr. DEMAYO. My name is Jerry DeMayo, I live in Lakewood, CA. I am a Navy veteran.

Like Mr. Burelli, I worked at the Long Beach Naval Shipyard and went through the same process he did. Only mine has reached the point now where what they do is—I filed an EEO in contention with my claim. What they do is they run you all the way out of the system until you get to the very end, and then your last choice is to go to Federal court.

Now when I sent in my last appeal to Washington, they did not even look at it, they said present new evidence, which I did. They never looked at it, they just sent back that my reconsideration was denied. So now that puts me in a position of going into Federal court.

I just want to say now that there should be a remedy before we go into Federal court.

Is my time up?

Mr. HORN. I think that is it.

Mr. DEMAYO. I want to thank you.

Mr. HORN. We will keep the record open for a couple of weeks.

Mr. DEMAYO. I just want to thank the panel and thank you, Congressman Horn.

Mr. HORN. You are quite welcome.

Our next speaker. Move the microphone down, so you are speaking into it.

Ms. BROWN. Your Honorable Horn, I am Leigh Brown from Laguna Beach. I am a registered nurse, work at VA Hospital, Long Beach.

I injured my left eye, a patient's secretions splashed in my eye and now my eye is completely blind.

I could not see you, nothing, not even my finger. I filed a workmen's comp within 24 hours and I got the claim, but the workmen's comp discontinued my file—only paid the doctor maybe 6 months or 1 year. I keep seeing the doctor and I pay out thousands of dollars out of my money and I did not do anything but they discontinued my claim.

Later on, I appeal, they say that because I have no proof, and I say all the evidence and the adjuster say your case is one case like the one who claims he had heart attack. I said this is entirely different because the patient's secretions splash in my eyes with every evidence, everything written, every doctor proved. They discontinued and do not pay my claims. Now my eye is completely blind.

I had my claim and I had it rejected and rejected and rejected again. With all this, now I find out what a claim examiner is. I am a registered nurse for 33 years and I worked 21 years in a VA Hos-

pital, I injure my eye which every nurse in the critical care saw it. The patient, the suction canister dropped on the floor while I was carrying it out from the floor when I was a registered nurse in ICU.

Mr. HORN. Thank you.

Ms. BROWN. Everything was discontinued. That is very unfair.

Mr. HORN. Right.

Ms. BROWN. And now I am not only blind—

Mr. HORN. We will followup, we have got your name and address and you can file something else with us.

Ms. BROWN. Definitely I need it, thank you very much.

Mr. HORN. We will try to followup. I assume your case has been followed.

Ms. BROWN. Yes, and appealed, appealed again. I still cannot get through.

Mr. HORN. Have you gone to your Congressman in Laguna Beach?

Ms. BROWN. No, I did not, because every time I was going to do—and I do not know which one to go to, and I am the only sufferer.

Mr. HORN. Well, we will get you in contact with your Congressman.

Ms. BROWN. Thank you very much indeed.

Mr. HORN. You are quite welcome.

Mr. HAMADA. I thank you for the opportunity to address you, Congressman Horn and the help you have given me in the past.

Mr. HORN. Could you give us your name and city?

Mr. HAMADA. My name is James Hamada and I live in the city of Garden Grove, CA.

Mr. HORN. Could you spell the last name?

Mr. HAMADA. H-a-m-a-d-a.

Mr. HORN. Very good.

Mr. HAMADA. I have also submitted a folder to one of your staff members, but I would also like to add that the Office of Workers' Compensation Programs is one of the most mean-spirited persons God ever put on earth. [Applause.]

And I will also say this about them, anybody that would accept a denial from the Office of Workers' Compensation Programs is crazy. This is the reason why—doctors go to school in excess of 20 years and you have this claims examiner, he is going to review your doctor's report. And I do not think that is very fair.

Thank you very much, sir.

Mr. HORN. Thank you. [Applause.]

Mr. SPEARE. Thank you. My name is Steve Speare. I am from Anaheim, CA.

Mr. HORN. That is spelled?

Mr. SPEARE. S-p-e-a-r-e.

Mr. HORN. And the first name?

Mr. SPEARE. Steven with a v.

Mr. HORN. OK.

Mr. SPEARE. I have been diagnosed with Jeremiah's anxiety disorder. Fighting the Department of Labor Office of Workers' Compensation Programs has not given me an opportunity to heal. It made my condition worse. They have almost got me beat because if I die, then they do not have to deal with it any more.

I am not quite 50. In the past year, I have had 1 heart attack and between 10 and 15 mild strokes as a result of contributory stress and aggravation of my diabetes and hypertension. I am not going to die and roll over, I am going to continue to fight, but just like so many other thousands of people, we need help.

Thank you very much.

Mr. HORN. You are quite welcome. We thank you. [Applause.]

Ms. JOHNSON. Sylvia R. Johnson, administrative law representative, certified paralegal.

I am not an injured person.

Mr. HORN. Spell the first name, please.

Ms. JOHNSON. Sylvia R. Johnson.

Mr. HORN. I am just having trouble hearing. Sylvia, is it?

Ms. JOHNSON. S-y-l-v-i-a, I will send you my card.

Mr. HORN. Fine, go ahead.

Ms. JOHNSON. I represent Federal workers, I am not an injured Federal worker.

I did not hear any testimony today from representatives. Unless you have testimony from representatives, you do not have a total picture. You had one representative on the end, unfortunately, he did not get to speak.

I was in the San Francisco office of Donna Onodera last month and they refused to give an injured worker a CA-1 form so that he could file a claim. They told him go back to his agency, he had come from Oakland to San Francisco to get the form. I call that a run-around. I do not see why the Department of Labor cannot hand you out a CA-1 form. They should be laying on the table, you should be able to pick one up. [Applause.]

I raise the issue that you have not raised today—subpoenas. As a representative—I cannot tell you in 1 minute.

Mr. HORN. Finish your thought and then you can write something to us, since you are a representative. We would welcome it.

Ms. JOHNSON. Subpoenas, you are not allowed—the Department of Labor will not issue a subpoena, the Secretary of Labor will not, for the person to bring their own doctor forward. The doctors do not want to testify, they are treating physicians, they are not forensic specialists. They do not want to write rationalizing medical narratives and they do not want to testify. The only way you can get them to a hearing would be to subpoena them. The Department of Labor blanket policy will not issue a subpoena for a treating physician to appear.

Mr. HORN. Well, that is an interesting point they ought to consider if they redo the law.

Ms. JOHNSON. I have others that you are welcome to.

Mr. HORN. We welcome your thoughts. Thank you.

Ms. JOHNSON. May I submit this?

Mr. HORN. Sure, submit it to our clerk there.

Mr. MCKENNA. Good afternoon, Senator Horn—

Mr. HORN. Representative. But go ahead.

Mr. MCKENNA. Representative—sorry.

Mr. HORN. Just give us your name and where you live.

Mr. MCKENNA. My name is Robert D. McKenna.

Mr. HORN. I am sorry, I could not quite hear it.

Mr. MCKENNA. Robert D. McKenna.

I have a complaint with the OWCP that they failed to process my second attempt to get my disability claim started. They delayed it. I submitted this July 10, 1997 and in September 1997, I got a letter back saying that they refused to process or would not process the paperwork because the post office refused to fill out the forms. They said the forms were filled out incomplete on their side. My side was filled out and faxed into their office and yet they would not process it.

Now also Mr. Usher over here heard a hearing, and he had—there was a Dr. Stewart, a government doctor, a fitness for duty by the post office, and he said that his report was not correct, and it was a government doctor.

Mr. HORN. Have you got a copy of that report?

Mr. MCKENNA. I certainly do.

Mr. HORN. Could you give it to our clerk and we will try to follow up with the employing agency on what is the problem.

Mr. MCKENNA. This is a government doctor's report.

Mr. HORN. Yeah, if you do not mind, give it to Mr. Ebert there and let us have the staff follow up on that. Thank you. Next gentleman—or woman. I did not see you, you were down behind that podium.

Ms. HORLICK. I would like to thank you, Representative Horn, for calling Dr. Raymond Worker, the late Raymond Worker, Dr. Ralph Worker, his brother, and conveying your condolences to him about it because I work for Dr. Worker, I work at the VA as a med tech. Also, thank you for the letter to Dr. Neverney.

Mr. HORN. Can we get your name and city?

Ms. HORLICK. Dorothy Horlick and I live in your Congressional District and I have also spoken with Mr. Shinlin several times.

Mr. HORN. How do you spell your last name?

Ms. HORLICK. H-o-r-l-i-c-k.

Mr. HORN. And living in Long Beach?

Ms. HORLICK. Yeah, I work at the VA in Long Beach and I live in the 33d Congressional District.

Thank you for sending a letter to Dr. Deverney. He sent a letter to you recently about his chemo.

Anyway, to get on about the other stuff, just like the EEO was taken out of the individual facility, maybe workmen's compensation should be done the same way, because they ran into problems with things being hushed up. I think you experience a lot of anger from a lot of people.

There is also a lack of information. My brother worked at the shipyard, had an injury, after the injury, they put him in compensation. He was able to get me different rules and stuff that we generally do not have access to. And that is a problem too, it might be part of the solution. If you gave each person information about how the process—not only the claims adjuster but also the individual who is going through the process so maybe they can have a dialog together.

Mr. HORN. That is a good suggestion, to have a book in simple English.

Ms. HORLICK. Yeah, they have stuff out there, the Codes themselves, they have a book "Injury Compensation," but only the claims adjusters get this, so you have—you do not know what you

are dealing with, what kind of—you know, where you are at in the process or even understanding, and so many people say this or they say that and you do not know who is telling you what.

Mr. HORN. I know the feeling, because I used to—and you are right—

Ms. HORLICK. You do not know who to believe.

Mr. HORN [continuing]. Personnel people were the bane of my existence as an executive.

Ms. HORLICK. Oh, yeah, I worked at Cal State.

Mr. HORN. They would not inform people. Say you wanted a position upgrade, you had to say the magic words or nothing happened. And that was crazy. It was magic words to them—

Ms. HORLICK. Jargon.

Mr. HORN. Exactly. They should do it in simple English.

Ms. HORLICK. They should maybe publicize this, this is from the U.S. Department of Labor itself, Employee Standards Administration, Office of Workers' Compensation Programs, Federal Injury Compensation. But the pity is I am getting this all from my brother who worked at the shipyard that is defunct now. But why do I have to get it from him, why could they not have something set up at the facility where you can get information. That might alleviate some of the problems.

Also, I found it interesting—I have had a case since 1992, it just recently went to a hearing appeal. I did not get a letter. OK, from what I gather, the Department does not send certified letters or anything. So the compensation person was down there, but I did not even know I had a hearing. I had no notification. So something with the system has to be done. Part of it probably is information, OK, on both parties' side.

And I guess that is it.

Mr. HORN. Well that is two sensible suggestions.

Ms. HORLICK. Yeah, and maybe when they have the hearings or the appeals or whatever you call it or when your case is going to be heard, maybe do it by certified mail, because I got told, OK, May 8, they wrote a letter, I never got it, the case was heard toward the first 2 weeks in June. Well, that is that and I cannot get another date. I said I was not even notified, I said that is a violation of due process of law. I mean, I would think they have to send certified. When I send letters I send them certified so I know the person got them.

Mr. HORN. You make a good suggestion on that one also.

Ms. HORLICK. Thank you.

Mr. SOTTLE. My name is William Sottle.

First, I want to thank—I live in Placentia—I want to thank Congressman Horn and the panel for a wonderful day. I think we may have some hope here now.

Mr. HORN. Well, I hope you are right.

Mr. SOTTLE. I would like to add to the lady that was just in front of me, this lack of information, just guidelines of what you should expect, how long should you expect to wait for an answer to a telephone call, to a letter, to faxes, completely ignored, you know. A week after that, they have not read their voice mail and that is what they use to block you out.

The other thing is you go to the doctors and they do not have the slightest idea how they are supposed to bill. So this is—without that, their payment is just delayed for months, which just seems unreasonable.

Mr. HORN. Well, I thank you. Any other thoughts you have? Those are good ones.

Mr. SOTTLE. No, it seems like they should have some guidelines. I have seen—they have a question and answer booklet with about 140 questions, but that does not answer the simple little things like I am talking about.

Mr. HORN. Sure. Thank you, appreciate it.

Ms. BOHLIG. I would like to thank you for helping me in the past regarding the delay in obtaining my compensation checks.

Mr. HORN. Could we have your name and city?

Ms. BOHLIG. My name is Stella Bohlig.

Mr. HORN. B-o-l-l-e?

Ms. BOHLIG. B-o-h-l-i-g.

Mr. HORN. Go ahead.

Ms. BOHLIG. You had helped me in the past in obtaining my compensation checks, because they were delayed due to some complication in providing the paperwork from my employing agency.

But recently, as recent as last week, I was trying to obtain some help because my medical care—my claim was disallowed in February of last year due to lack of medical reports from the doctor that I had chosen to provide medical care for me. I had no idea when I initially filed for my injury claim that medical reports, detailed medical reports were very important, as well as good medical care, in turning in a claim to the Department of Labor.

My doctor does not write medical reports. So as a result of that, I was sent to a doctor that your agency hired, and of course that report was—I cannot even describe to you, but when I brought that report to my treating doctor, they were telling me that I have to disregard that report because they were hired by you, they were paid by your agency to say what he wants in the report and there is nothing that they can hold him responsible. There is no integrity in the report and there is nothing, no accountability to that doctor, so far as him releasing me back to work.

I could not obtain a release from my own treating physician and they are saying there is all this other—you have not healed, you are not well, this and that, and then your physician says there is absolutely nothing wrong with you and we even think that your injury is not caused by your work.

So as a result of that, I was disallowed—my claim was disallowed in February of last year. I had looked for another doctor to provide the medical report as well as good medical care, so that I know that I am getting the best care as well as the reports that you require.

And then I have gone through the hearing to appeal my case because it was disallowed. So finally in October, I went to a hearing and then in April, finally the decision of the Department of Labor was turned around in my favor. Now the doctor that wrote that report, which you also hired, had said there that I have to continue my treatment so that I can continue my recovery. As recent as last week, I spoke to a Frank Vergoso, who accused me of playing

games because the physical therapy bill had been up to \$9,000 for a year and a half. He started to say that there was no reason why I should have been in physical therapy for that long period of time and all these other reasons why he did not want to OK my authorization for my physical therapy bill.

What I am trying to say is that the time that it takes to do all this running around and trying to get the proper care is so important for us to recover so we can go back to work. Because who wants to be in this situation? The losses that we have suffered, not just us but our children. They have to sit there and watch us and we have to sit there and pretend like nothing is wrong or that it is going to be OK when it is really not, because this has been like 3 years that I have been going through this.

I have hired a lawyer because I do not know what the rules are. And then the lawyer has got this fee that I have to pay out of what you eventually are going to pay me back. I have lost my home, custody of my children and how much more? How much more will it take for you to hear that—you know you are saying there are all these changes that are in the works—well, let us do the changes now. You are aware of these injustices and these practices that are happening, you are hiring these doctors that we cannot sue, we cannot sue them because they are covered under a blanket of protection. The law was done that way. But if you want us to get honest doctors, you have to in turn send us to honest doctors. And that way we will not have to go through this 3 years of prolonged agony and we are the only one suffering.

Mr. HORN. Thank you very much. I think you have made your point.

Ms. BOHLIG. Thank you. [Applause.]

Ms. DOWNEY. Good afternoon. I wanted to be sure and thank you for helping me this past couple of years. In fact, I have recently received a letter—

Mr. HORN. Can you give us your name and city?

Ms. DOWNEY. OK. My name is Valerie Downey, I live in Lakewood, CA, and I work for the Long Beach Post Office.

You have been doing some inquiries for me, I have still not gotten a final decision at this point. I do have concrete information that the U.S. Postal Service injury compensation, along with the U.S. Department of Labor, along with the American Postal Workers Union are all involved in illegal activity involving FECA, and I would hope that you do look into it because a lot of us are suffering medical treatment because of certain individuals that tend to prevent us from proper care.

Mr. HORN. Well, let me ask you, you say the American Postal Union, that is news to me. That is the first we have heard of that, so tell me on that—the others we know about.

Ms. DOWNEY. OK. In Long Beach, we have what we refer to as a rehab. She was given the job that suited her, she also has a medical background and she writes controversions with management, in conjunction with management to help controvert some of these claims.

Mr. HORN. OK. We will ask about that, I do not know if we can get very far. That is the labor union, is it not, for the workers?

Ms. DOWNEY. American Postal Workers Union, yes.

Mr. HORN. Did they ever think of getting someone else in to represent them, if you do not like how they are representing you now?

Ms. DOWNEY. Yes.

Mr. HORN. Well, seems to me workers should do something, if the one they are paying dues to is not helping them, get somebody else.

Ms. DOWNEY. That is what we are trying to do, that is why I am here today. Thank you.

Mr. HORN. OK.

Ms. KRAMER. Good afternoon. My name is Patricia Kramer, I am from West Hills, CA. I am a clinical coordinator and administrative officer for the West L.A. VA Medical Center.

I was assaulted and battered on the job in one of the offices that I supervise on October 1997, in fact, October 6.

Frank Vergoso turned down my workmen's compensation claim before my 45 days were up. Although my physician faxed in requests for extensions, wrote letters for extension, and I wrote letters for extensions, we were not even given the 45 days.

Mr. HORN. Tell me who Mr. Vergoso is? His name has come up—

Ms. KRAMER. He is a supervisor, as I understand it, from San Francisco Department of Labor.

Mr. HORN. OK, thank you.

Ms. KRAMER. I appealed—I hired an attorney, I appealed the case in March. Today is July 6, I still have not heard from them. Thank you.

Mr. HORN. Thank you.

Ms. COLEMAN. My name is Norma Coleman, I live in Long Beach and I also work at the Long Beach Post Office.

I originally was injured—I have carpal tunnel syndrome in both hands, I have had three surgeries and it has progressed into my elbows and my shoulders and my neck, which has been mentioned in all of the doctors' reports from the very beginning, but still the Department of Labor insists that my now current doctor do paperwork for a new claim in order for me to be paid, which I have been off work part days since March, 2 weeks fully in March and part days since March and I still have not been paid anything.

The claims examiner says that she will send out a letter to my doctor to tell him exactly what she needs in his report, which has not been done. I have talked to her supervisor, who I understand now has been promoted. He has not said anything to my doctor, so my doctor made me permanent and stationary, hoping to get some attention from them, which it has not done any good. So I am put back in the job where I was originally hurt, on a rehab job, which is doing all repetitive hand work and shoulders and there has just been no results. They are not there to help you. They do everything they can to make it hard for you.

Mr. HORN. Now is that mostly at the post office level or at the workers' comp level?

Ms. COLEMAN. I think some of both. My whole file was lost in San Francisco in the beginning at the same time that my supervisor lost all my doctors' reports, keeping me off work. They disappeared at the same time and it took 2 months for that to turn up in San Francisco, and I was threatened to be terminated during

that time, but I did have copies of everything, so I took all of that in and that is what stopped the termination.

Mr. HORN. You had copies and so you finally got the case reviewed again?

Ms. COLEMAN. Yes. And that was after even the post office tried to use things like a hysterectomy as being the cause of my carpal tunnel, which I had to refute in another—go to all my other doctors that said no, that had nothing to do with it.

Mr. HORN. Was that a male making that judgment?

Ms. COLEMAN. No, it was not.

Mr. HORN. I see. I thought maybe you could teach the woman involved the facts of life.

Ms. COLEMAN. I think the women might be a little bit worse than the men actually.

Mr. HORN. Well, thank you, we appreciate your testimony.

Mr. HINTZ. Bill Hintz, I am the director of safety and injury compensation with Branch 1100, National Association of Letter Carriers. Thank you very much for this opportunity to speak before the subcommittee.

Some of the things and considerations that maybe you should think about: First of all, we are not in favor of dismantling the OWCP system as it is now. It needs to be fine-tuned, but dismantling is not the issue.

Second issue is that with the problems with the agencies that you put some judicial teeth into it, if they violate the law, then they should be subject to criminal prosecution.

The other issue is OWCP delays now have caused us some problems with the medical profession because they do not want to treat OWCP cases. The issue is with the doctor saying we do not want to deal with the agency because they are calling us, we do not want to deal with OWCP because of the delays, we are not paid for our services.

And the last issue is suitable employment for the letter carriers and all Federal workers. They put you back into the circumstances that you came out of, saying this is suitable employment. Or, if it was for you, sir, that to go to Congress and deal at 1 o'clock in the morning when none of your constituencies are there. It makes a disruptive impact upon their whole lifestyle and financial issues. Thank you very much.

Mr. HORN. Well, thank you for coming. I thank the staff from the Office of Workers' Compensation Programs for listening to this. We will furnish you the list of addresses and if you would not mind, take a look at those cases, the 15 or some were not cases, but we would appreciate anything you would like to add for the record.

Ms. SWEENEY. Excuse me.

Mr. HORN. Oh, I am sorry, I did not see you there. Go ahead.

Ms. SWEENEY. I am Barbara Sweeney and I am from Brunswick, ME. I also represent—

Mr. HORN. I am sorry, would you repeat the name?

Ms. SWEENEY. Sure. Barbara Sweeney and I am from Brunswick, ME.

Mr. HORN. Yes.

Ms. SWEENEY. And I also represent fedupfeds.org, which is on the Web, which has all the information with workers' compensa-

tion. We have a lot of members and it reads like a textbook manual.

Mr. HORN. What is the name of the group?

Ms. SWEENEY. Fedupfeds.org.

Mr. HORN. Well, what does that stand for in simple English?

Ms. SWEENEY. Federal Employees with Disabilities.

Mr. HORN. OK.

Ms. SWEENEY. And across the board, every single member of ours has experienced the same problems, no matter what branch they are working in and no matter what problem they have, it has always been lack of information, lack of assistance.

In my own case, they did not submit my CA-2 for 14 months, there was never any punishment, I went all the way up through Mr. Runyan and I never received any satisfaction, but I am here to represent all the people and I want to, first of all, commend Mr. Perez and Mr. Usher for standing up and representing and helping the people who serve the Government the most. We provide the service for the Government and yet we are treated as orphan children, and it should not be that way. We should get the respect and help that we need.

And I thank you.

Mr. HORN. Well, thank you for coming. Did you come all the way from Bangor, ME?

Ms. SWEENEY. Yes, sir, Brunswick.

Mr. HORN. Brunswick.

Ms. SWEENEY. And I will be submitting additional testimony.

Mr. HORN. Fine, we would welcome that. Thank you very much.

Mr. DAVIS. Mr. Chairman, let me just thank you for holding these hearings. It has been a long time since anyone in Congress has done this, allowed people to come out and testify, got the agency here to take it down, and I just want to thank you for other members of the committee who could not be here, and myself, for drawing this to our attention. Thank you very much. [Applause.]

Mr. HORN. Well, I thank the gentleman. He is one of the most constructive Members of Congress and I am delighted you could make it out here to participate in this.

Let me thank now our officials from Washington, I think we are all learning a lot. We will send them the list. They have nodded their head that they will be glad to respond to that.

I want to thank now the staff members that have helped prepare this particular hearing, which has been a very complex matter over the last year or two. J. Russell George, down there in what would be the city manager's box practically. J. Russell George, staff director and chief counsel for the Government Management, Information, Technology Subcommittee. The gentleman that was sitting to my left, your right, for most of this hearing was Welton Lloyd, congressional fellow and he has been replaced, because he had to leave, by Mr. Mark Brasher, who comes from this area, the senior policy director to the subcommittee. Matthew Ebert, who is running everything, in terms of the clocks, the addresses, the testimony, and you name it, as clerk. Then Mason Alinger, who is preceding us to another hearing we are going to be giving. He was involved as a staff assistant. We had a number of interns helping us—Betsy Damus, Mark Urciuolo, and David Graff. Connie Seibel

is our district director and I will mention Elizabeth Huna who was here, I saw her earlier, I do not know if she is still here. She is director of—oh, there is Connie, Connie is way in the back, put your hand up, Connie. The best known person in the 38th Congressional District. And Elizabeth Huna is director of our constituent services. Another member of our district office in Lakewood is David Coher, who is down here. He goes to the University of Southern California but he is getting his education on our staff. Bill Warren, the court reporter here, and we thank you, Mr. Warren.

We had great help here from the city hall, Lois Prince is from the Office of City Clerk. Lois Prince was the custodian supervisor. And Michael Hallinan is the sound technician.

So we thank all of you to make this a very worthwhile hearing, and we will actually have a transcript we can read. Thank you very much.

With that, this meeting is adjourned. [Applause.]

[Whereupon, at 3:26 p.m., the subcommittee was adjourned.]

[NOTE.—Due to the volume of submitted material and printing cost considerations, this material will be available for review through the subcommittee.]

[Additional information submitted for the hearing record follows:]

**Statement from U.S. Senator Slade Gorton to the House Government Reform and
Oversight Committee
Subcommittee on Government Management, Information, and Technology
Presented for a Field Hearing on July 6, 1998**

Mr. Chairman, thank you for the opportunity to address the management practices of the Office of Worker's Compensation Programs (OWCP). For several years my office has received many complaints regarding OWCP. Typically, my constituents request assistance when they believe their claim for compensation and/or medical treatment was been unfairly denied or because OWCP routinely fails to return repeated phone calls and written correspondence. In these cases, my office becomes an intermediary and virtually the sole conduit of information to the claimant regarding their own injury claim with OWCP. Months or years of unresponsive dealings with the OWCP frequently result in severe frustration and hostility.

This situation gives cause for great concern. The Office of Worker's Compensation Programs is tasked with not only ensuring that injured federal workers receive proper medical treatment for injuries sustained in the performance of duty but, also with ensuring that such workers receive appropriate compensation for those injuries in the form of back wages and disability awards. Most importantly, OWCP was established to ensure that federal workers are not forced into poverty or bankruptcy as a result of their work related injuries. From the information my office has received it is clear that OWCP is not fulfilling these duties in a significant number of cases. These problems appear to be a pervasive pattern which begin with the interference of OWCP management in the appeals process and which extends down to the routine mishandling of cases by the District Offices.

The testimony and supporting evidence of Mr. Joseph Perez, formerly a Hearing Representative and still an employee of OWCP, convincingly reinforces these conclusions. His arguments are not only well-presented but are also strikingly well-reasoned and provide detailed support of his claims regarding the management practices of OWCP. Mr. Perez handled two of my constituents' cases which had been denied at the District Office level. Upon conducting the appropriate hearings, Mr. Perez deemed these cases to be clear instances of compensable work related injuries. Due to information passed on to my office by my constituents, it appeared there was enough evidence to indicate that top level OWCP management were improperly interfering with the drafting of Mr. Perez's decisions and therefore, the integrity of the appeals process itself. I then asked the Office of the Inspector General (OIG) for the U.S. Department of Labor to investigate. All relevant correspondence is attached.

Of note in my request for an investigation, is the Employees Compensation Appeals Board (ECAB) decision which clearly speaks to the proper role of top OWCP management in the hearing process. That ruling, the *Luckett* decision, in unwavering terms states,

"[a]s much as the Office, or the employing establishment, may disagree with the hearing representative's judgement, the Office may not simply impose its own interpretation of the evidence without regard to the hearing representative's review. *To do so compromises the integrity of the appeals process* [emphasis I added]."

The interference of top level OWCP management in the appeals process, as described by Mr. Perez and as witnessed by my office, directly affected the outcome of my constituents' cases. I find such interference to be completely counterproductive to the impartiality expected of the Hearings and Review Office in reviewing decisions by the District Offices of OWCP.

In these two cases, Mr. Perez drafted decisions favorable to my constituents only to see those decisions overturned by Mr. Markey, Director for Federal Employees Compensation (DFEC), the branch of OWCP which manages the District Offices. Attached is a redacted copy of Mr. Perez's initial draft decision regarding one of these cases and a memorandum, from Mr. Markey to Mr. Perez, micro managing the drafting of a new and altered decision. It is obviously improper for DFEC to have discretion over the approval or disapproval of decisions rendered by hearings representatives. The hearing representative is delegated to hear cases on behalf of the Director of OWCP, not on behalf of DFEC, the organization whose District Offices have issued the decisions that the claimants have appealed to the Office of Hearings and Review. It is illogical that the entity whose decisions are being reviewed should have the opportunity to improperly influence the ruling of the hearing representative.

This type of interference is not unique to these two cases. It is not uncommon for decisions in my constituents' cases to be held for review by DFEC management when the decision is favorable to the claimant. While there are many more procedural problems I could discuss, I would rather briefly mention two of my constituents' cases, handled by the Seattle District Office of OWCP, which typify the procedural problems in the District Offices.

The first case is that of firefighter previously employed at the Naval Shipyard in Bremerton who experienced a major fall from an elevated position of approximately 14 feet while wearing approximately 57 pounds of firefighting equipment. This fall resulted in a number of medical conditions, including a left knee condition, a left ankle condition, a back condition, and a neck condition. The district office accepted the left knee condition but, was untimely in approving appropriate medical treatment for that condition as requested by the treating physician, causing the claimant to wait for approximately one year before approval was granted. This delay resulted in a consequential injury to the claimant's right knee as a direct result of an altered gait and related overuse from the left knee condition. The right knee injury is clearly documented by the treating physician as being consequential, an injury that is undeniably covered under the Federal Employees Compensation Act, yet the district office denied necessary coverage.

The treating physician also clearly stated that the claimant's back condition was a direct result of the work related fall. The district office, however, denied coverage for the back injury based on

the erroneous supposition that the claimant did not verbally express back pain on the day of the injury. While the claimant has clear evidence which contradicts that supposition, the District Office not only refuses to acknowledge that evidence but it continues to hold to the incomprehensible belief that a lack of verbal notification should override the opinion of multiple treating physicians.

The District Office also approved the claimant's original left ankle condition. While treatment has been previously approved and administered, the ankle condition has since worsened and requires further treatment. This treatment is on hold, however, until the completion of surgery of the right elbow, a consequential injury related to physical therapy for previously accepted conditions. Coverage for the right elbow was only accepted by the District Office after a long and contentious process. Since the ankle surgery will require the claimant to use crutches for a significant amount of time following that surgery, the elbow must be completely healed. To date, approval for surgery for the accepted elbow condition is not forthcoming. Should the claimant experience delays in approval of the elbow surgery, similar to the delays in approval for treatment of the left knee condition, the only remaining treatment of the ankle will be fusion, a treatment which will result in significant impairment for the claimant. Finally, the claimant also suffers from an accepted neck condition for which the delay of approval of treatment led to medically documented deterioration.

Of particular frustration to the claimant is the knowledge, as stated repeatedly by her treating physicians, that had OWCP dealt with her work related injuries promptly and approved appropriate treatment, the claimant would have been fit to return to duty as a firefighter shortly after the 1994 incident. Instead, the claimant is currently unemployable due to untreated work related conditions and has furthermore been diagnosed by the treating psychologist as suffering from Post Traumatic Stress Disorder which is *directly related* to the claimant's negative experiences with OWCP. While it would not be proper for me to assess the full medical or psychological nature of the claimant's condition, it is safe to assume that any prudent lay person would evaluate the handling of this claimant's case as totally egregious.

While this case exemplifies instances in which OWCP has failed in its mission to adequately meet its obligation to injured federal workers, I would like to briefly mention another constituent's case that has come to my attention. It is that of a former Department of Veteran's Affairs physician whose OWCP claim contained documents from the employer that the claimant deemed inaccurate, an evaluation with which the Department of Veteran's Affairs would later agree. Those inaccurate documents had resulted in the denial of his injury claim by the District Office and by the Office of Hearings and Review. Following those denials, the VA agreed to remove the documents in question from the agency's record in OWCP's file. OWCP, however, refused such removal and in fact queried the VA as to why they had "capitulated" to the claimant's request. After consultation between the VA and OWCP regarding the matter, the VA attempted to reinsert a document package similar to the original documents of contention into OWCP's file. The claimant responded by taking the VA to court regarding his Privacy Act rights to fair and reasonable information being placed in his file. The VA was found guilty of

violating such rights on 15 counts and the claimant was awarded well over \$100,000 in attorney's fees, damages, and expenses. The VA and OWCP also utilized the time of 10 government lawyers in this case and an untold number of support staff in an inexplicable effort to keep false information in the claimant's file.

OWCP responded to the district court ruling of February 28, 1998 by refusing to comply, a decision which came directly from the office of the Director of OWCP. The claimant filed his injury claim in August 1993. To date, because OWCP refuses to comply with the court's ruling, the claimant's case has not been properly addressed due to inappropriate evidence which remains in the file.

While I could elaborate further on the management practices of OWCP which my office has encountered, I feel the subcommittee's time is best spent hearing from the employees of OWCP who wish to discuss their own agency's flaws and from the injured federal workers who have been unfairly harmed by a system which has failed to meet the fundamental purpose of the FECA. One statistic strikes me as being discouraging. OWCP's own annual report to Congress indicates that 45% of all District Office decisions are overturned when appealed. A success rate of 55% is certainly not one which I would consider exemplary and one which is a clear indicator that OWCP is not fulfilling its appointed duties.

Mr. Chairman, I greatly appreciate this opportunity to testify before your subcommittee. I would like to close with the hope that in reflecting on the information presented at this hearing, its members will consider the cases of my constituents. I believe I have provided clear evidence that the current system for federal worker's compensation claims is badly in need of overhaul. This is a sad testament to our government's treatment of its injured federal workers. We can and should do better. Thank you.

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