Testimony
Before the Committee on Health, Education, Labor, and Pensions

United States Senate

EEOICPA: Is the Program Claimant Friendly For Our Cold War Heroes?

Statement of

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

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

Progress to Date

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

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

Dose Reconstructions

As of October 16, 2007, DOL has referred 25,492 claims to NIOSH, and NIOSH has returned 17,280 of these claims to DOL with a completed dose reconstruction. Of the remaining claims, NIOSH has returned to DOL 1,466 claims for a determination of SEC eligibility; DOL has "pulled," or taken back, 648 claims for various reasons; and there are 971 claims with completed dose reconstruction reports, which are currently being reviewed by claimants. This leaves approximately 20% of the claims at NIOSH in an active status.

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

considers completion of the oldest claims in the system to be a top priority so claimants can have their cases resolved.

Special Exposure Cohort

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

Service to Claimants and Petitioners

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

Claimant Resources

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

Worker Outreach

NIOSH continues to proactively conduct worker outreach. In an effort to obtain input on program technical and procedural approaches, NIOSH has sponsored

77 worker outreach meetings, five town hall meetings, and four public meetings. NIOSH has held five dose reconstruction workshops to explain the dose reconstruction process to workers, union officials, and claimant advocates. NIOSH also has held six SEC worker outreach meetings to collect information specific to preparation of a NIOSH SEC evaluation report.

Improved Communications Products

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

- probability of causation fact sheet,
- SEC fact sheet,
- residual contamination fact sheet,
- technical documents used in dose reconstruction fact sheet,
- dose reconstruction fact sheet,
- overview of the dose reconstruction process,
- detailed steps in the dose reconstruction process,
- glossary of terms, and
- answers to frequently asked questions.

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

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

Addressing Uncertainty

NIOSH is committed to resolving uncertainties in all aspects of NIOSH's work in the program in a manner consistent with the Act, the Executive Order, and the rules developed through public rulemaking. Based on the Act's direction that the

purpose of the program is to provide "timely, uniform, and adequate compensation" and the statement in Executive Order 13179, which allocates responsibilities among agencies under the Act, that compensation should be "compassionate, fair, and timely," the HHS procedures for dose reconstruction (contained in 42 C.F.R. pt. 82) address the need for efficient processes to better serve claimants. The Preamble of the dose reconstruction procedures, which were promulgated through public rulemaking procedures and took into consideration comments from the public and the Board, "give the benefit of the doubt to claimants in cases of scientific or factual uncertainty or unknowns." The SEC rule (42 C.F.R. pt. 83) reiterates that the Act intends for the program to provide "timely compensation" and "uniform, fair, scientific consideration." I will now briefly discuss several examples of methods that NIOSH has incorporated to give the benefit of the doubt to claimants to account for uncertainty in dose reconstructions, probability of causation (POC), and the SEC process.

Dose Reconstruction

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

- use of factors that would yield the highest estimated dose when there are equally plausible scenarios; for example, assuming that a worker is directly next to the exposure source instead of a further distance away;

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

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

Probability of Causation

The Act mandates that all POCs must be established at the 99th percentile confidence interval. The use of the 99th percentile confidence level is the most

significantly claimant-favorable aspect of the program. NIOSH built upon this foundation in establishing the POC guidelines (42 C.F.R. pt. 81) for DOL. DOL uses these POC guidelines, along with dose reconstruction information provided by NIOSH, to determine the POC for a given claim. Using the 99th percentile confidence interval, as opposed to the median or average POC value, means it is unlikely that an individual could have developed cancer covered by the program and not be compensated.

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

Special Exposure Cohort

The SEC process likewise has many provisions to assist petitioners. NIOSH offers assistance to petitioners in preparing submissions and throughout the SEC process. As previously indicated, two full-time staff are dedicated to assisting petitioners in the SEC process. Further, if information that is needed to evaluate a petition will not be available in a timely manner, the SEC rule allows NIOSH to determine that such information is not available for purposes of the evaluation,

allowing the petition to move forward. SEC petitions also receive careful review by the Advisory Board, which analyzes the NIOSH petition evaluation report, obtains input from petitioners, and spends numerous hours assessing whether information is adequate to estimate radiation dose with sufficient accuracy. In the SEC rule, NIOSH provided petitioners with two opportunities for administrative review of non-favorable decision. Finally, as mentioned earlier in the testimony, NIOSH may initiate an SEC petition if NIOSH determines that there is a lack of data to estimate radiation doses with sufficient accuracy, placing less burden on affected claimants.

Oversight of NIOSH's Application of the Science

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

reviewing NIOSH's dose reconstruction estimates, site profile documents, and SEC petition evaluations.

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

Summary

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

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