

Agency Response to Draft Report

U.S. Department of Labor

Assistant Secretary for
Employment Standards
Washington, D.C. 20210



October 30, 2008

MEMORANDUM FOR ELLIOT P. LEWIS
Assistant Inspector General
For Audits

FROM: *Victoria A. Lipnic*
VICTORIA A. LIPNIC

SUBJECT: Audit of the Energy Employees Occupational Illness
Compensation Program
Report No. 04-08-004-04-437

Thank you for the opportunity to comment on the Office of the Inspector General's (OIG) audit report regarding the performance of the Energy Employees Occupational Illness Compensation Program (EEOICP) claims adjudication process.

Summary Response

We concur with the central finding of the report that the EEOICP's decisions are based on evidence and in accord with the law and implementing regulations, and specifically that a former claims examiner's allegations of impropriety in the Seattle district office were totally without merit. These are important findings in light of the questions raised by various parties as to whether EEOICP claims processing was being accomplished fairly and in accord with law. We are gratified that OIG's case reviews confirmed the Office of Worker's Compensation Programs' (OWCP) own evaluation of its case work practices via its annual accountability review process.

However, we do not concur with the report's conclusions under Objective Two: 'Does DOL have a system in place to ensure that claims are adjudicated as promptly as possible and claimants are kept informed?' The report makes significant errors and omissions which result in mischaracterizing the EEOICP's systematic efforts to accomplish both timeliness and effective communications.

Based on a review of a sample of decisions reached in 2006 and 2007, the report concludes that EEOICP cases continue to take several years to reach a final decision, and that DOL does not have a system in place to ensure prompt adjudication. However, that conclusion for Part B is based almost entirely on data that incorporates the extremely long NIOSH dose reconstruction process, over which DOL has no authority or control. Further, the data presented for Part E does not discuss the history of that program's evolution and does not acknowledge the intensive and ongoing EEOICP efforts to expedite Part E claims, and

therefore, misrepresents the trends in timeliness for Part E. More broadly, the report does not acknowledge the substantial changes the EEOICP has made in both its adjudication processes and its performance management systems to address the dramatic program shifts that have occurred.

Contrary to the report's findings, the EEOICP has made real strides in reducing the timeframes to decide both Part B and Part E cases. Initial processing of claims in the district offices has met the EEOICP's key GPRA average days goals for each year except FY 2002, at the inception of the program, and we met these goals again in FY 2008. The FY 2009 targets for average duration for initial processing will be significantly reduced for both Part B and E, in part because we succeeded this year in resolving virtually the entire aged backlog of cases in our district offices. Likewise, timeliness of DOL's final adjudication process has been steadily improved throughout the seven-year history of the program, with nearly 93 percent of claims receiving final decisions within program target timeframes in FY 2008. These positive trends reflect the impact of DOL's effective, and continuously improved, tracking and program performance management systems. They are certainly not compatible with the OIG finding that "DOL does not have an effective system to ensure that claims are processed and adjudicated as promptly as possible."

Errors Regarding DOL/EEOICP's Relationship with HHS/NIOSH for Part B cases

With respect to the National Institute for Occupational Safety and Health (NIOSH) component, the report misconstrues the relationship between the EEOICP and NIOSH. Although DOL is identified as the "lead agency" by Executive Order 13179, the Department of Health and Human Services (HHS)/NIOSH has independent legal authority and responsibility for its portion of the Act, and DOL/EEOICP is given no authority or responsibility to oversee or guide HHS/NIOSH's activities. While EEOICP's timeliness goals do incorporate data received from the Department of Energy (DOE), this is not the case for information derived from NIOSH's dose reconstruction process. The NIOSH dose reconstruction process is an entirely stand-alone activity, which reaches its own independent conclusion for each case, typically after a period of years at NIOSH. While that outcome ultimately feeds into the EEOICP's adjudication process for affected cases, attempting to incorporate time spent at NIOSH into DOL's timeliness goals would vastly distort the information and so overwhelm the time at DOL as to render the goals useless as a measurement of DOL's efforts. In addition, in part because the NIOSH process must continually reflect new factual and scientific information, it has undergone continual and significant changes over the years, making any attempt by the EEOICP to project the timeliness of dose reconstructions extraordinarily difficult.

Attachment A shows the relative durations for all Part B cases decided as of September 30, 2008, which either required both EEOICP and NIOSH processing, or EEOICP processing only. The latter cases have been adjudicated within an average of 266 days, versus an average of 1,200 days for NIOSH-involved cases. The EEOICP has performance goals for reducing the processing time for each of the three components it controls: initial preparation of a case before referral to NIOSH, completion of the recommended decision after NIOSH's dose reconstruction is complete, and issuing the final decision. With the

exception of the period between 2005-2007, which was negatively impacted by the creation of the Part E program and our receipt of a huge backlog of cases from the DOE's former Part D program, the EEOICP has been able to gradually and progressively reduce those time frames. During the years covered by the OIG's sample, had the EEOICP focused on attempting to reduce the overall duration of cases, including the NIOSH duration, progress (or lack of it) against that goal would have had no relationship to the EEOICP's timeliness efforts, and the global measure would not have any bearing on the effectiveness of our efforts to improve our own processes.

The report's finding that the EEOICP is remiss in not tracking in detail and communicating with claimants about the internal processing stages of the NIOSH dose reconstruction activity is similarly not supportable. As already noted, NIOSH's processes are wholly independent, and NIOSH communicates extensively and directly with claimants while they are engaged in their process. Any attempt by the EEOICP to track, monitor and duplicate that communication would be duplicative and wasteful. It would also create additional confusion for claimants, introduce multiple opportunities for mis- and cross-communication errors, and generate disputes between the agencies. Claimants are already overwhelmed with the complex information provided by NIOSH and the EEOICP; to further complicate that flow of information with an additional, overlapping layer would be extremely counterproductive.

In sum, the report treats the legally and operationally separated NIOSH and EEOICP processes as if they were a unified system. We fully acknowledge that the interface between the EEOICP and NIOSH is complex and difficult for claimants to understand, but DOL has no authority to unilaterally absorb or unify the two systems without legislative change.

Errors Regarding Part E

The report likewise asserts that Part E processing is untimely, citing average time frames to reach a final decision of three or more years. However, the report's analysis of Part E durations is wrong, as demonstrated in its discussion of the small sample of cases presented in Table 5, p. 24. One of the report's most serious errors is that its Table 5 discussion fails to note that the Part E program was not created until October 2004, and that 42 of the 46 cases displayed in the table suffered the greater part of their delay with DOE, not DOL.

The report also erroneously suggests that the somewhat reduced durations for 2004 and 2005 cases resulted from the maturation of the program at the EEOICP. This is incorrect because the earlier years' claims simply lingered longer at DOE under the former Part D program. No valid assessment of the current trend in timeliness of Part E adjudication can be made based on an analysis that includes the time cases were pending at DOE under another piece of legislation that was subsequently repealed. Thus, it is reasonable to conclude that the EEOICP was only able to make timely decisions on cases after it was given the statutory responsibility for Part E.

Further, the report makes a passing reference (in Exhibit 1, not in the body of the report) to the Site Exposure Matrices. EEOICP has developed this important automated tool to assist Part E claimants and EEOICP staff in documenting exposures and medical causation. Its ongoing enhancement has allowed EEOICP staff to greatly expedite Part E claim development in a large portion of cases.

Following are a number of more specific concerns or suggested corrections regarding the report, as well as our responses to the report's individual recommendations.

Detailed Responses

- 1. The report errs in displaying EEOICPA benefit payments (Table 2, p. 16). Total benefits as of September 2, 2008 exceeded \$4.2 billion, not \$3.7 billion.**
- 2. Page 17 of the report indicates that 32% of claims included in its “statistical sample” of 140 were administratively closed.**

OWCP is unsure of the basis for this specific claim. In fact, OWCP data for all claims filed during the life of the program shows that only 7.6% have been administratively closed.

- 3. Table 4 on page 23 of the report (showing the average number of days for Part B claims processing) misrepresents the timeliness of DOL adjudication of these cases.**

Although the data is described as a “statistical sample,” the 16 cases which are represented as “Claims that did not require NIOSH dose reconstruction” are shown as averaging several years to complete. This is a startling outcome in light of DOL statistics for such cases. For all Part B claims adjudicated by DOL (2001 to 2008), the average time to issue a final decision for cases not requiring a NIOSH dose reconstruction is 266 days (see attachment A).

Based on that disparity, DOL requested and received a list of the 16 claims that are represented on Table 4 as claims that did not require NIOSH dose reconstruction. Thirteen of the 16 cases were, contrary to the table, actually sent to NIOSH to receive a dose reconstruction, and the overwhelming bulk of the delay for each of those 13 cases was incurred at NIOSH. Two other claims were administratively closed and then reopened years later, but the table inappropriately included all the intervening time in the calculation of duration.

- 4. The report mischaracterizes DOL’s timeliness goals for initial processing. The report states (p. 25 and elsewhere) that “the timeliness goal for initial processing of a claim is nearly a year.”**

In fact, DOL has set differing goals for initial processing in different fiscal years, reflective of the then current state of the two parts of the program (large initial

backlogs, the expectation of workoff of old cases, etc.). For FY 2008 the GPRA goal for Part B was an average of 226 days, and final result was 164 days. For Part E the goal was 290 days, and actual performance was 284 days. The goals for FY 2009 will be lowered further, in recognition that most of the older cases have now been resolved and the inventory is therefore “younger.” This is a complex, evolving program, and while we continue to work to speed processing, occupational disease cases will always be time-consuming to develop.

- 5. The report asserts that DOL is unable to effectively inform a claimant that their claim has been administratively closed by NIOSH because DOL does not track the progress of claims while being processed at NIOSH (p. 29).**

This is incorrect. In fact, NIOSH formally notifies the EEOICP when they determine that a case should be administratively closed. Upon such NIOSH notification, the EEOICP contacts the claimant or next of kin to inform them of any steps necessary to avoid an administrative closure, or that the claim will be administratively closed.

- 6. The OIG obtained and reviewed certain DOL case tracking reports, and identified from them 17 instances where payment had been delayed (p. 29).**

Some of those cases were unfortunately delayed despite having been flagged on these management reports, however, since FY 2003 97.6% of the almost 38,000 payments were made timely, i.e., within the program’s targeted goal of 15 days from receipt of form EN-20 (the last piece of documentation required from the beneficiary). As evidence of further progress, you should be aware that 99% of the payments issued in FY 2008 met that important standard.

Responses to OIG Recommendations

Recommendation No. 1: Establish a comprehensive system to track all claims from point of application through final decision and payment. Such a system should account for all steps in the claims intake, development, adjudication, and payment process, regardless of the agency handling the processing. This system should be used consistently by all District Offices to better manage and prioritize work.

Response: For the reasons discussed above, the EEOICP tracks only the overall progress of cases that have been transferred to NIOSH, not internal NIOSH stages. Also, the EEOICP does not track overall case resolution times (including NIOSH time). Given the delays inherent and institutional in NIOSH dose reconstruction development and our lack of statutory authority to affect change in that process, any attempt by DOL to implement a NIOSH case-tracking protocol would be wasteful and prove fruitless. DOL already works with NIOSH where possible to expedite work in the program, but dedicating DOL resources to an interagency tracking effort

would neither improve our ability to serve our claimant population nor lead to improvements in NIOSH performance. DOL can compute overall case durations, but they would have little or no operational utility as GPRA or operational goals absent a restructuring of the program by legislation.

DOL does, however, utilize workload reports that track the internal progress of case adjudications, for all stages through payment. These reports are constantly evolving and are refined as necessary. The planned implementation of a Unified Energy Case Management System (UECMS) will allow for even more effective means of monitoring of case progress and ensuring timely outcomes.

Recommendation No. 2: Establish improved interagency agreements with all Federal partner agencies that specify expectations and the details of work to be performed.

Response: As the Audit Report notes (p. 26, referencing a cooperative effort with DOE to coordinate information gathering procedures), DOL has established and maintained informal interagency agreements with its partner agencies since program inception. The DEEOIC's Procedure Manual (Chapter 2-400) documents the cooperative arrangement with the Department of Energy to promote the efficient verification of employment status. This chapter outlines the target timeframes DOL and DOE have agreed to, and provides instruction to claims examiners regarding the procedure for development of employment criteria. Other portions of the Procedure Manual (and multiple Bulletins and Circulars) document the extensive and detailed agreements reached with NIOSH on a wide range of issues, including each Special Exposure Cohort class designation.

DOL will explore the potential for developing formal Memoranda of Understanding with the other agencies (DOE, DOJ, and HHS) which have EEOICPA responsibility under the Executive Order.

Recommendation No. 3: Establish an overall performance measure for the timeliness of processing claims from point of application to final decision and payment, as well as delineating more milestones and goals for the initial processing phase.

Response: For the reasons described above, DOL does not concur with the recommendation to establish an overall timeliness goal that includes NIOSH processing time.

DOL has considered developing and tracking additional milestones within our initial processing phase, but has determined that the existing approach is more efficacious. For example, interim timeliness goals for completion of employment verification and/or medical evidence or exposure documentation would be inefficient in that they would require more data entry with little payoff. Since there are many different types of EEOICPA

claims which require differing development approaches, a meaningful categorization of the interim stages of the various types of claims would create a substantial additional burden and could detract from actual claims processing.

Instead, DOL has focused on improvements that can be tailored to each claim, regardless of the issues involved. Claims examiners have the ability to create an individualized claims monitoring system by utilizing the call-up feature in ECMS to alert themselves (and supervisors) of pending deadlines for specific cases. This process will be improved with the introduction of the UECMS.

Recommendation No. 4: Expand Resource Centers' responsibilities to include helping claimants obtain evidence to support claim and better educate the claimant on requirements for eligibility, as well as screening out more claims that do not meet eligibility requirements.

Response: The Resource Centers' responsibilities have grown incrementally over time and have always included helping claimants obtain evidence relevant to their claim, educating claimants on eligibility requirements, explaining the medical evidence necessary for a claim, and a number of other tasks. We will continue to work to improve the efficacy of the Centers' intake and education processes.

However, we cannot concur with the recommendation that the Centers serve as a filter to screen out cases unlikely to involve an eligible claimant. While the Centers provide information that might lead a claimant to decide against filing, to direct the Centers to pre-judge eligibility and attempt to block the filing of apparently ineligible claims would be contrary to the letter and spirit of the EEOICPA. This is because the Centers, which are staffed by contractor employees, lack the authority to make benefits decisions on behalf of the DOL.

As shown in Attachment B, one major type of invalid application – Part B claims for diseases other than the three conditions covered by that Part – is no longer a significant problem. Attachment C shows that the other major category – Part E claims from ineligible (typically “adult children”) survivors – may remain an issue. However, the potential eligibility of such individuals requires some level of adjudication, and cannot be accomplished via screening by contractor staff in the Centers, who, as stated above, do not have such authority. We will evaluate whether an expedited evaluation by our district office staff could speed the resolution of these claims.

Recommendation No. 5: Pursue multiple sources of information required to develop and/or verify evidence to establish a claim simultaneously, rather than one source at a time.

Response: Especially since the inception of Part E, DOL has continually updated its procedures to speed initial processing of all claims, and has sought ways to efficiently pursue multiple information development efforts simultaneously. The delays in employment verification cited in the report have been significantly addressed by these changes, as indicated in attachments D and E. Beginning in September 2005, the Resource Centers were directed to initiate employment verification and occupational history development at the inception of each claim. The Centers begin this process by first explaining the requirements of the law to each claimant and assisting in gathering required evidence, including employment and medical evidence. Once the district office receives a claim, the claims examiner commences immediate concurrent development actions to obtain any additional employment, exposure, or medical evidence needed for that claim. DEEOICP will continue to streamline its development procedures. For example, upcoming procedural changes will expedite Part E wage loss and impairment claims by initiating evidence-gathering earlier in the overall process.

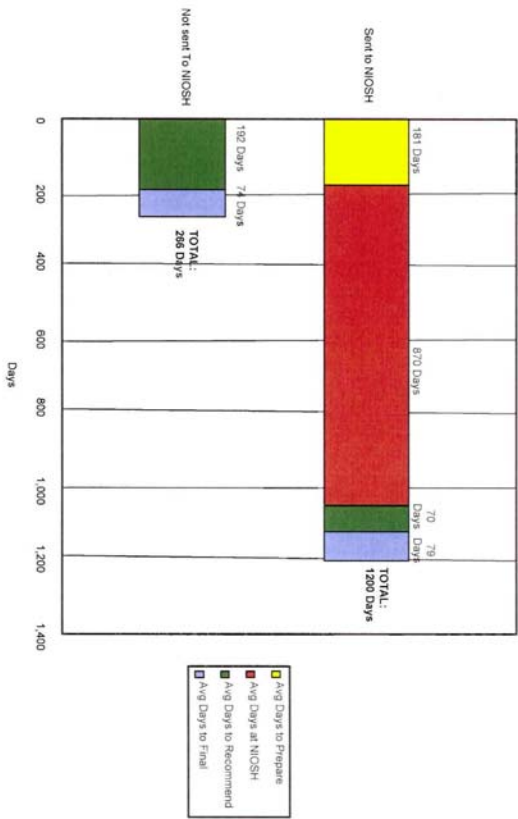
Recommendation No. 6: Increase contact with claimants to keep them informed of the status of their claim and information and/or actions needed to complete their claim. Automate communications and use electronic exchange of information with partner agencies, and to the extent possible, with claimants.

Response: DOL concurs with the need to continually improve its communication with claimants. Because of the need for maximum speed in starting up both Part B in 2001 and Part E in 2005, DOL had no choice but to base its claims processing system on the traditional paper case file. Efforts continue to upgrade the automation of the program, including the development of the Unified ECMS which will replace the current legacy system (which had been developed to provide basic support under essentially emergency time constraints). Upon deployment of UECMS DOL will have a platform that will support the future development of much more substantial electronic communication, such as case imaging and internet access to case status.

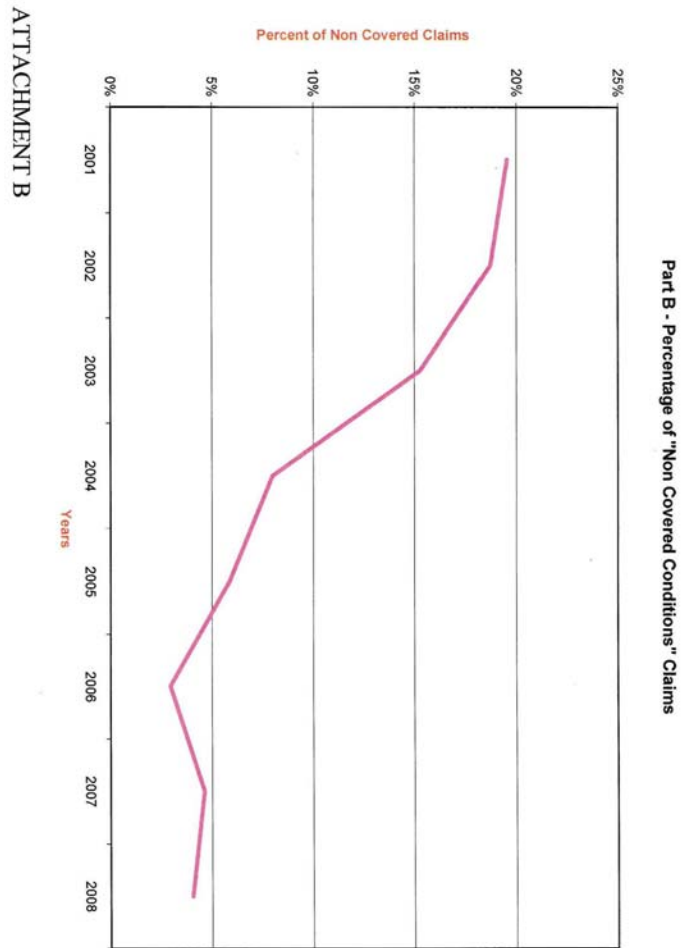
In the interim, the EEOICP is making significant progress towards improved claimant communications. The Resource Centers serve as points of contact for the majority of claimants, and have been given increasing roles over time, such as the addition this year of the responsibility to aid claimants in resolving medical bill payment issues. Further, the EEOICP is currently planning to give the Centers increased access to ECMS information to allow them to provide more detailed case status information to all claimants.

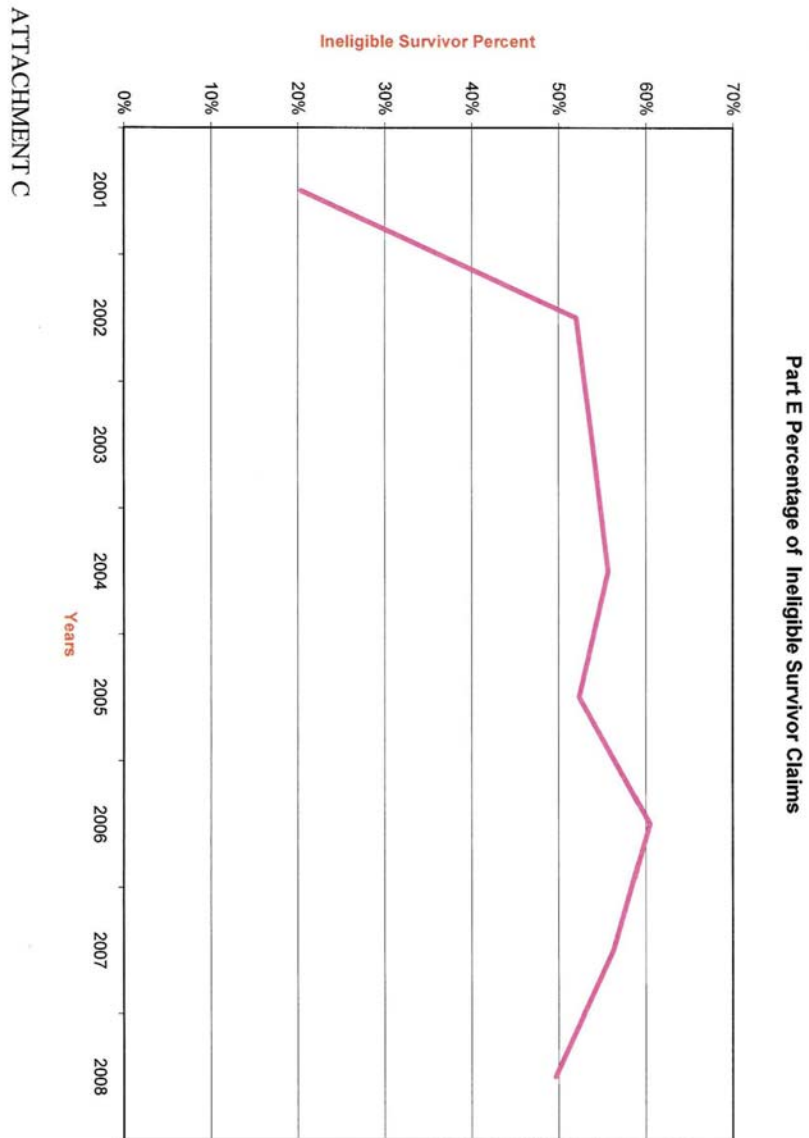
DOL does not concur, however, in the suggestion that we should begin communicating routinely regarding the status of activities being conducted by NIOSH while the case remains at NIOSH. As discussed, this would both duplicate NIOSH communications and introduce additional confusion and opportunity for error.

Time to Process Part B EEOICPA Claims NIOSH Dose Reconstruction Cases vs. Cases Never Sent to NIOSH

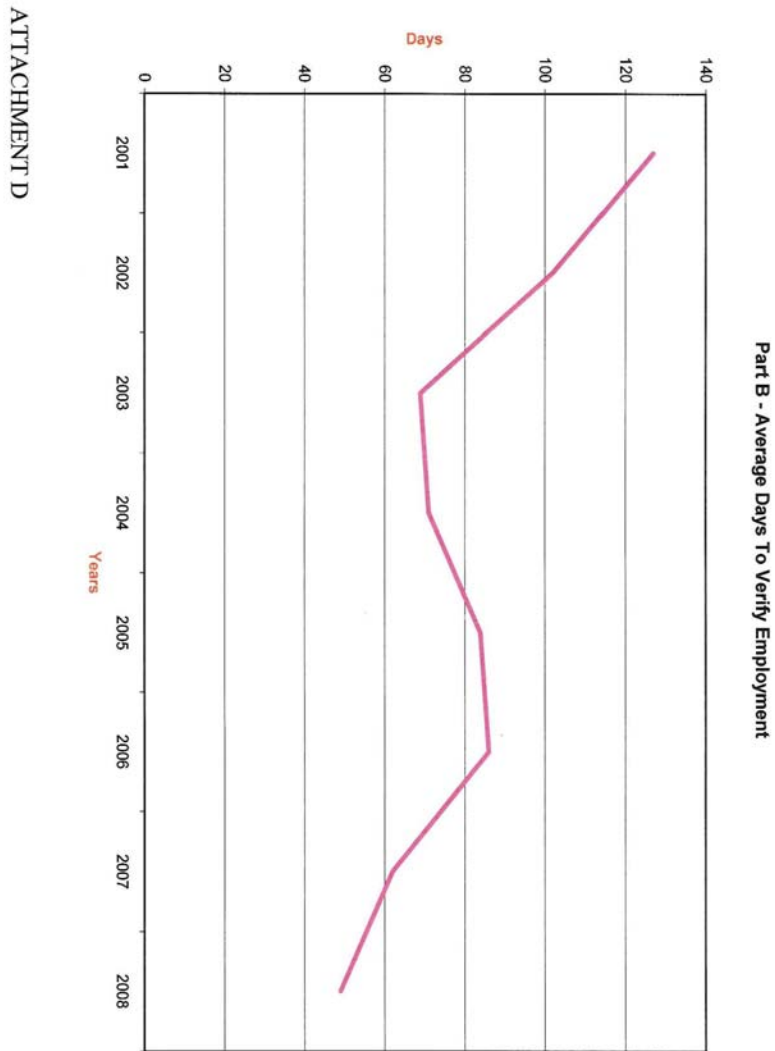


- Average Processing Time for all Part B claims from date of filing through final decision date – for all claims with final decisions issued through September 30, 2008
- Cases sent to NIOSH for dose reconstruction took 1,200 days
- Cases never sent to NIOSH took 266 days

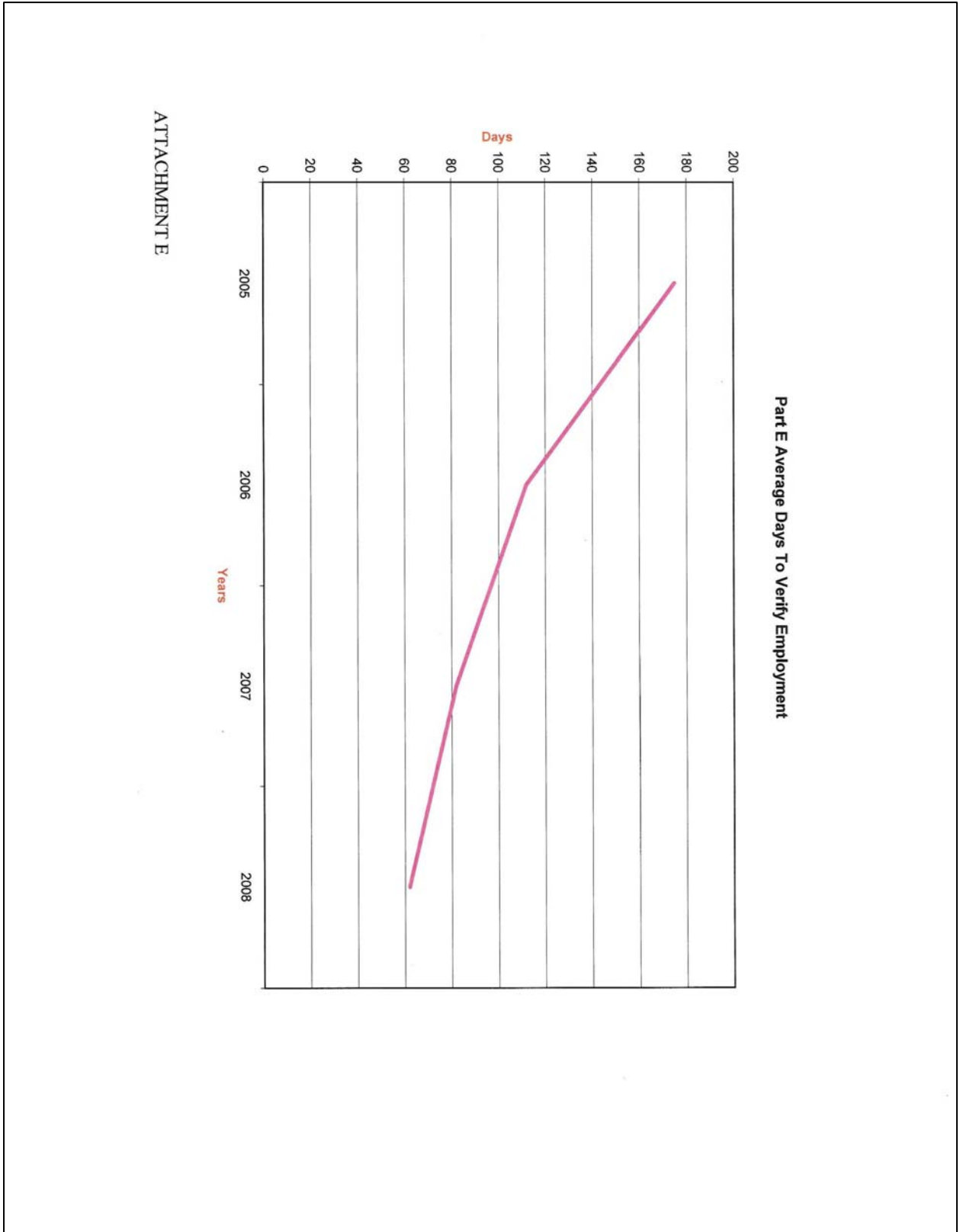




ATTACHMENT C



ATTACHMENT D



ATTACHMENT E

IN ORDER TO REPORT FRAUD, WASTE OR ABUSE, PLEASE CONTACT:

Online: <http://www.oig.dol.gov/hotlineform.htm>

Email: hotline@oig.dol.gov

Telephone: 1-800-347-3756
202-693-6999

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