

# 2010 Annual Report to Congress



**2010**

## ANNUAL REPORT TO CONGRESS

**OFFICE OF THE OMBUDSMAN**

for the

**Energy Employees**

**Occupational Illness**

**Compensation Program**



U.S. Department of Labor

Photos courtesy of the U.S. Department of Energy.



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**U.S. Department of Labor**

Ombudsman  
Energy Employees Compensation Program  
Washington, D.C. 20210



**MAR 14 2011**

The Honorable Joseph R. Biden, Jr.  
Vice President of the United States  
The White House  
Washington, DC 20500

Dear Mr. Vice President:

I am pleased to present the 2010 Annual Report of the Ombudsman for the Energy Employees Occupational Illness Compensation Program of the U.S. Department of Labor. This Report is submitted in accordance with 42 U.S.C. §7385s-15(e).

Sincerely,

A handwritten signature in black ink, appearing to read "Malcolm D. Nelson".

Malcolm D. Nelson  
Ombudsman for the Energy Employees  
Occupational Illness Compensation Program

Enclosure

**U.S. Department of Labor**

Ombudsman  
Energy Employees Compensation Program  
Washington, D.C. 20210



**MAR 14 2011**

The Honorable John A. Boehner  
Speaker of the United States House of Representatives  
H-232 – The Capitol  
Washington, DC 20515

Dear Speaker Boehner:

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Enclosure



## SECTION 1 **ACKNOWLEDGEMENTS**

**A**s we reflect upon our work over the past year, it quickly becomes evident that our success in accomplishing our mission, as well as our ability to produce this annual report, was greatly enhanced by the assistance that we received from various agencies, organizations, and individuals. Accordingly, we want to take a moment to extend our thanks to the agencies, organizations and individuals who assisted us during the year.

First and foremost, we want to thank the claimants, family member, lay representatives, attorneys, and other interested parties who contacted us this year with their grievances, concerns, questions and requests for assistance. We greatly appreciate the willingness of individuals to telephone, e-mail, send facsimiles; mail; or attend one of our outreach events in order to discuss their concerns with us. In addition, we want to extend a sincere thank you to everyone who referred a claimant to our Office. Your support is essential in ensuring that people are aware of our Office.

A sincere thank you is also extended to the Division of Energy Employees Occupational Illness Compensation (DEEOIC) for their prompt and thorough responses to our multitude of inquiries. Our ability to assist claimants is truly enhanced by the cooperation that we receive from the DEEOIC. Moreover, we would like to acknowledge the staffs of the District Offices and the Resource Centers and thank them for their prompt attention to our many inquiries and questions. We sincerely appreciate all of the assistance that these offices provided, including the assistance that they rendered to help ensure the success of our town hall and other outreach meetings.

I would also like to thank the Department of Energy's, Office of Health, Safety and Security for the detailed responses to the many matters that we forwarded to them. We also want to thank the Department of Energy for providing us with the opportunity to attend several overviews of their processes for checking records. These overviews improved our understanding of this process, and thereby facilitated our ability to answer inquiries related to these matters. A hearty thank you is also extended to the Former Worker Medical Screening Program and the Center for Construction Research and Training for inviting us to participate in their town hall meetings; for their willingness to participate in our town hall meetings; as well as for all of the assistance provided on individual claims.

Similarly, I want to thank the National Institute for Occupational Safety and Health (NIOSH), especially the Division of Compensation Analysis and Support for all of the assistance that they extended throughout this year. The recent expansion of our authority to include Part B significantly increased the number of inquiries that we forward to NIOSH, yet even with this increase, there has not been any diminution in the speed or the thoroughness of the responses provided by NIOSH.

A very big thank you must also be extended to the Ombudsman to NIOSH. Ms. Denise Brock continues to provide our Office with tremendous assistance with Part B claims, especially where the issues involve dose reconstruction or Special Exposure Cohorts. Ms. Brock's willingness to share her knowledge, as well as her spirit of cooperation is greatly appreciated.

Moreover, let me acknowledge and thank the Joint Outreach Task Group for their cooperation and assistance. This joint effort by the Department of Energy; the Department of Labor; the National Institute for Occupational Safety and Health; the Ombudsman to NIOSH; the Former Workers Medical Screening Programs; and this

## SECTION 1

Office has significantly improved the information available to claimants and has resulted in an “one stop shop” – a single forum where claimants can address many of their EEOICPA related concerns.

I would also like to take this opportunity to extend a thank you to the staff of the U.S. Justice Department’s Radiation Exposure Compensation Program. Because of the potential link between the Radiation Exposure Compensation Act and the EEOICPA, there are times when the assistance of that office is required, and the members of that staff are always more than willing to help.

Last, but certainly not least, I want to extend a very big thank you to the staff of the Office of the Ombudsman for Energy Employees Occupational Illness Compensation Programs. It is an honor to work with a staff that is so committed to their job – and who perform their job in such a professional manner.

In great measure, the success of this Office depends on the trust that others show by referring claimants to us; on the willingness of claimants to contact us; and on the support and cooperation that we receive from the other agencies/organizations involved with this program. If I did not mention you or your agency/organization by name, please accept my sincere thanks for the assistance that you extended.

### SECTION 1.1 History of the EEOICPA

Studies that began as early as 1939 of the atom and nuclear fission, resulted in the Manhattan Project, a.k.a. the Manhattan Engineer District (MED), the codename for a project created on August 13, 1942, during the midst of World War II, to develop an atomic bomb. While many people associate this project with testing conducted in the desert and on remote islands, the truth is that the Manhattan Project involved 14 sites extending from Rochester, New York to Berkeley, California.<sup>1</sup> Over time, the effort to develop and produce atomic weapons grew into an industry that ultimately employed hundreds of thousands of individuals in over 350 facilities located in almost every state in the United States. Estimates suggest that at one point this project employed more than 600,000 workers in the production and testing of nuclear weapons.<sup>2</sup>

The work performed at these sites often involved exposure to radioactive materials as well as toxic substances. Concerns for the health and safety of these workers led to the October 2000 enactment of the Energy Employees Occupational Illness Compensation Program Act as Title XXXVI of Public Law 106-398, the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001.

As enacted in 2000, there were two “parts” to the Energy Employees Occupational Illness Compensation Program Act (EEOICPA), Part B and Part D. Part B, which is administered by the Department of Labor provides compensation and/or medical benefits/medical monitoring to certain employees and their eligible survivors if they suffer from cancer that is at least as likely as not caused by radiation exposure, or if they suffer from chronic beryllium disease; beryllium sensitivity; or silicosis.

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1] The MED was established in 1942 and in 1947 its functions were transferred to the Atomic Energy Commission (AEC). In 1974 the AEC was abolished and the Energy Research & Development Administration (ERDA) was created. Subsequently, in 1977, the ERDA became the Department of Energy.

2] See United States Government Accountability Office, Report to Congressional Requesters: ENERGY EMPLOYEES COMPENSATION – Additional Oversight and Transparency Would Improve Program’s Credibility, March 2010, GAO-10-132.

Under Part D, Congress directed the Department of Energy (DOE) to provide claimants with assistance in obtaining state-based workers' compensation. Unfortunately, there were obstacles that prevented the DOE's efficient administration of Part D. For example, because of the years that had lapsed since their exposures, many claimants found it difficult to link their illness to work-related toxins.

In 2004 Congress responded to these difficulties by repealing Part D and enacting § 3161 of Public Law 108-375, which established a new Part E as a federal compensation scheme for DOE contractors and subcontractor employees. This law also directed the Secretary of Energy to provide all applicable records, files and other data to the Secretary of Labor, and mandated that the DOL prescribe regulations and begin to administer the new Part E program within 210 days of enactment. On May 26, 2005, DOL prescribed interim final regulations, thereby meeting the 210 day deadline imposed by Congress.

## SECTION 1.2 The Office of the Ombudsman

Public Law 108-375 which was enacted by Congress in 2004 also created an Office of the Ombudsman (the Office). Pursuant to this law, the Secretary of Labor was urged to take appropriate action to ensure the independence of the Office within the Department of Labor, including independence from the other officers and employees of the Department of Labor engaged in activities related to the administration of the provision of the EEOICPA. See 42 U.S.C. § 7385s-15(d). The Secretary of Labor appointed the first Ombudsman in February 2005, and the Office submitted its first report to Congress covering calendar year 2005 on February 15, 2006.

When created in 2004, the Office was scheduled to sunset on October 28, 2007. However, in January 2007, Congress passed the National Defense Authorization Act of 2008 extending the Office until October 28, 2012. Moreover, while the Office initially only had authority with respect to claims filed under Part E of the EEOICPA, the National Defense Authorization Act for Fiscal Year 2010 expanded the authority of the Office to include Part B of the EEOICPA.

The statute outlines three duties for the Office:

1. To provide information on the benefits available under Part B and Part E and on the requirements and procedures applicable to the provision of such benefits;
2. To make recommendations to the Secretary regarding the location of resource centers for the acceptance and development of claims for benefits under Part B and Part E; and
3. To carry out such other duties as the Secretary shall specify.

See 42 U.S.C. § 7385s-15(c).

In addition to these specified duties, the statute also provides that the Office is to submit an annual report to Congress setting forth:

- a) The number and types of complaints, grievances, and requests for assistance received by the Office during the preceding year, and
- b) An assessment of the most common difficulties encountered by claimants and potential claimants during the preceding year.

## SECTION 1

See 42 U.S.C. § 7385s-15(e).

In order to accomplish its three enumerated duties and to ensure that it is able to submit an annual report to Congress, the Office engages in the following activities:

- **Receives complaints, grievances and requests for assistance** – The Office is contacted via the telephone; facsimiles; e-mails; mails; and is directly approached by individuals; attorneys; lay representatives; congressional staff members, and others with complaints, grievances, and requests for assistance. The issues discussed with us involve every aspect of the EEOICPA claims process and are not limited to complaints from individuals whose claims were denied. Rather, it is quite common to receive complaints from individuals inquiring how to file a claim; individuals encountering difficulties with pending claims; as well as individuals whose claims were accepted, but who nevertheless are experiencing difficulties with the claim process.
- **Engages in outreach** – The Office conducts its own outreach events and attends outreach events sponsored by other agencies/organizations. These events provide the Office with the opportunity to speak with large numbers of individuals, as well as the opportunity to engage in one-on-one conversations with claimants. In order to enhance our outreach efforts we continue to coordinate many of our efforts with the Joint Outreach Task Group. These joint outreach efforts are an excellent opportunity to explain the services provided by the various agencies involved with the EEOICPA. Claimants also appreciate that these joint efforts are an opportunity to interact with multiple agencies at one time.
- **Clarifies/explains documents and procedures** – The EEOICPA tends to be a very complicated program. The outcome of many claims is based on technical medical, scientific and/or legal concepts. Many claimants do not fully understand these concepts and/or do not know how to respond to documents phrased in such technical terms. Further adding to the complicated nature of this program are the many nuances found throughout this program. Many claimants find it impossible to sort through all of the rules and exceptions found in the EEOICPA. Moreover, while tools have been developed to assist claimants with their claims, many of these tools are online. As a result, we are contacted by claimants who do not have access to the internet asking us to provide them with the data provided by these tools, and by claimants who are not internet savvy, asking for assistance in navigating these sites.
- **Provides assistance** – Most claimants who contact our Office do not simply want to report a complaint. Rather, most claimants also want assistance with their claim. This assistance can range from asking our Office to explain a word or decision; to asking for a copy of information that the claimant cannot access on the internet; to requesting assistance locating records and/or evidence. Mindful of the limits of our authority and resources, we assist claimants to the extent that we are able.

During the course of calendar year 2010, the Office sponsored two town hall meetings, one in Idaho Falls, Idaho (Idaho National Laboratory) and the other in Kansas City, Missouri (the Kansas City Plant).<sup>3</sup> We also sponsored a traveling resource center in St. Petersburg, Florida (the Pinellas Plant). In addition, we attended and participated in town hall meetings and/or traveling resource centers in:

- o Denver, Colorado (Rocky Flats)
- o Amarillo, Texas (the Pantex Plant)
- o Sante Fe, New Mexico (Los Alamos National Laboratory)
- o Albuquerque, New Mexico (Sandia National Laboratory)
- o Las Vegas, Nevada (the Nevada Testing Site)
- o Amherst, New York (Bethlehem Steel Corp. facility in Lackawanna, N.Y.)
- o Simi Valley, California (Downey Facility and De Soto Avenue Facility)
- o Lynchburg, Virginia (BWX Technologies Inc)
- o Livermore, California (Lawrence Livermore National Laboratory)
- o Emeryville, California (Lawrence Berkeley National Laboratory)

We also participated in a number of training sessions and conferences. As we have in previous years, we attended the annual meeting of the Worker Health Protection Program and this year had the opportunity to also attend the annual meeting of the Office of Rural Health Policy (Radiation Exposure Screening and Education Program). We also participated in training offered by NIOSH as well as training offered by the Ombudsman to NIOSH. We look forward to continuing to work with these and other groups to assist the EEOICPA claimants.

In response to the recent expansion of our authority, we developed a brochure that addresses the eligibility requirements for Part B and includes an expanded discussion of the Part E eligibility requirements. Efforts are underway to distribute this new brochure as broadly as possible. Moreover, because many claimants still do not have a firm understanding of the EEOICPA and its many nuances, the Office continues to explore the development of additional brochures that address/clarify various aspects of the program.

Consequently, as we enter calendar year 2011, we continue to explore new tools and will continue to work with other agencies and organizations as we strive to provide information and assistance to the claimants and potential claimants who contact our Office.

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<sup>3</sup>] Town hall meetings include presentations that address the EEOICPA and the role of the various agencies involved with the program. The presentations are followed by a question and answer period and then the attendees have an opportunity to meet one-on-one with representatives from the various agencies. Traveling resource centers focus on providing an opportunity for one-on-one discussions.

## SECTION 1

### SECTION 1.3 Introduction

The cumulative combined statistics for Part B and Part E as of December 31, 2010, clearly reveal that there are claims paid under this program. (See the appendix for all of the EEOICPA's statistics for calendar year 2010).

Combined Part B and E Summary			
		CLAIMS	CASES
Applications Filed		207,222	140,256*
Covered Applications Filed		158,265	113,840
Total Compensation Paid	Payments	66,090	49,019
	Total Dollars	\$5,915,139,362	
Total Medical Bills Paid	Total Dollars	\$659,674,597	
Total Compensation + Medical Bills Paid		\$6,574,813,959	

\*A total of 82,373 unique individual workers are represented by the 140,256 cases reported.

Moreover, each year the Division of Energy Employees Occupational Illness Compensation (DEEOIC), as well as the other agencies involved with this program, continues to develop new tools designed to assist claimants with the processing of claims. For instance this year the DEEOIC, in conjunction with the Department of Energy, announced the unveiling of the expanded Site Exposure Matrices (SEM). The goal of the expanded SEM is to make it easier to identify interrelationships between buildings, work processes and exposure to toxic substances – a complaint that had been directed at SEM prior to this expansion.

Nevertheless, in spite of the vast amounts of monies paid and the many tools developed to assist claimants, this Office continues to receive complaints, grievances and requests for assistance by claimants, representatives, congressional staff members and attorneys.

In the tables that follow, we set forth the numbers and types of complaints; grievances; and requests for assistance received during the preceding year. Following these tables, we provide an assessment of the most common concerns brought to our attention. In providing these assessments, it is our goal to provide the reader with insights into the causes and nature of these issues, as well as to describe the problems that arise as a result of these issues. Because each claim is unique, a discussion of each issue brought to our attention is impossible. Nevertheless, we believe that the discussion that follows reflects the most common complaints; grievances; and requests for assistance that the Office of the Ombudsman received in calendar year 2010.

## SECTION 2 TABLES

The following tables detail the number and types of complaints; grievances; and requests for assistance received by the Office during the past year. Table 1 details the number of complaints according to the nature of the complaint. Table 2 expands on Table 1 by identifying the specific issues included within each category of complaints and classifies each issue as statutory; regulatory or administrative. Table 3 details the number of complaints that we received from the various DOE facilities. Table 4 sets forth the town hall meetings held in 2010 and details the number of attendees at each event.

In reviewing these tables, there are some factors that must be kept in mind:

1. Claimants rarely present their concerns in a manner that is easy to categorize.
2. Claimants generally do not contact us with just one complaint. Instead, most claimants contact us to discuss an event or encounter. Based on claimant's recount of this event or encounter, we endeavor to identify specific issues.
3. In order to fully explain their complaints, many claimants find it useful to provide us with the history underlying their claim. Thus, in the course of a conversation, the claimant may address multiple issues, some of which are issues that have been resolved. To the extent that it is possible, in detailing the number of complaints received in a year, we endeavor to focus on those issues directly related to the claimant's current concern. For instance, while reporting a current problem involving his/her impairment rating, the claimant may refer to previous obstacles encountered when establishing employment. Since the claimant's current concern involved his/her impairment rating, this is the issue counted in our table of complaints. Nevertheless, while it is not included in the table of complaints, we would include the issues associated with establishing employment in our assessment of complaints.
4. One claimant may have more than one complaint. In such instances, each complaint is counted separately.
5. There are many instances where the claimant simply wants a direct answer to a question. Consequently, there are many instances where we answer the question posed to us and do not acquire sufficient information to include this contact in our data-base. This is especially true at town hall meetings, where the pace and volume of contacts can be so overwhelming that it is impossible to accurately record every complainant that we receive.

## SECTION 2

### SECTION 2.1 **TABLE 1 - Complaints by Nature**

COMPLAINT	NUMBER
Covered Employment	53
Covered Facility	10
Covered Illness	41
Eligibility of Survivors	25
Exposure Issues (general)	36
Dose Reconstruction	85
Special Exposure Cohorts	34
Causation	110
Impairment/Wage Loss	36
Medical Benefits Card	18
Reconsideration/Reopening	23
Offset/Coordination of Benefits	5
Other Statutory Concerns	19
Processing of Claim Takes Too Long	39
Interactions with DEEOIC	173
Concerns with Representative	9
Consequential Illness	9
Requests for Assistance	296
Issues Involving RECA	5
Misc.	93
<b>TOTALS</b>	<b>1119</b>

**SECTION 2.2 TABLE 2 - Complaints by Category [Statutory; Regulatory; or Administrative]**

- Statutory Issues: directly address the statute as written, or the interpretation of that statute.
- Regulatory (Procedural) Issues: address a specific regulation or procedure promulgated by one of the agencies involved with the administration of the EEOICPA.
- Administrative Issues: involve the actual administration and implementation of this program.

<b>COMPLAINT</b>	<b>#</b>	<b>COMMENTS</b>	<b>STATUTORY/REGULATORY/ ADMINISTRATIVE</b>
Covered Employment	53	Definition of covered employee ..... 19 Difficulty establishing status as covered employee..... 34	Statutory Statutory/Administrative
Covered Facility	10	Definition of covered facility	Statutory
Covered Illness	41	Must be a diagnosed illness..... 35 Diagnosis of sarcoidosis ..... 2 Take home toxins..... 4	Regulatory Regulatory Statutory
Eligibility of Survivors	25	Eligibility of children..... 22 Legal custody ..... 1 Common law spouse ..... 2	Statutory Statutory/Regulatory Administrative
Exposure Issues (general)	36	Difficulty locating exposure records ..... 14 Accuracy of exposure records ..... 22	Statutory/Administrative Administrative
Dose Reconstruction	85	Questions results ..... 85 (Part B = 71; Part E =14)	Statutory/Regulatory/Administrative
Special Exposure Cohorts	34	Statutory/Administrative	Statutory/Regulatory/Administrative
Causation	110	Difficulty establishing causation..... 86 Difficulty linking death to toxins ..... 24	Statutory/Regulatory/Administrative Statutory/Regulatory/Administrative
Impairment/Wage Loss	36	Impairment..... 28 Wage Loss ..... 8	Regulatory/Administrative Regulatory/Administrative
Medical Benefits Card	18		Administrative
Reconsideration/ Reopening	23		Administrative
Offset/Coordination of Benefits	5		Statutory/Regulatory/ Administrative
Other Statutory Concerns	19	Cap on benefits ..... 2 Death nullifies/reduces award ..... 5 Other ..... 12	Statutory Statutory Statutory/Regulatory/Administrative
Processing of claim takes too long	39		Administrative

## SECTION 2

COMPLAINT	#	COMMENTS	STATUTORY/REGULATORY/ ADMINISTRATIVE
Interactions with the DEEOIC	173		Administrative
Concerns with representatives	9		Statutory/Administrative
Consequential Illnesses	9		Regulatory/Administrative
Requests for assistance	296		Statutory/Regulatory/Administrative
Issues involving RECA	5		Statutory/Regulatory
Misc.	93		Statutory/Regulatory/Administrative

### SECTION 2.3 TABLE 3 - Complaints by Facility

This table provides the number of known complaints; grievances; and requests for assistance from individual facilities. Unfortunately, for various reasons, some claimants prefer not to provide us with identifying information. Consequently, the actual number of complaints from former employees of various facilities may be higher than the numbers reported in this table.

	Facility Name	NUMBER	2010 Town Hall Meeting Held in Vicinity
1	Albuquerque Operations Office	1	X
2	Amchitka Island Nuclear Explosion Site	3	
3	Ames Laboratory	4	
4	Argonne National Laboratory – East	2	
5	Bendix Aviation (Pioneer Division)	3	
6	Bethlehem Steel	9	X
7	Brookhaven National Laboratory	4	
8	BWX Technologies	1	X
9	Dow Chemical Company	1	
10	Downey Facility	2	X
11	Feed Materials Production Center	1	
12	Fermi National Accelerator Laboratory	2	
13	Fernald	11	
14	General Electric Company	2	
15	General Steel Industries	2	
16	Grand Junction Operations Center	2	

	Facility Name	NUMBER	2010 Town Hall Meeting Held in Vicinity
17	Hanford	15	
18	Huntington Pilot Plant	1	
19	Idaho Falls	5	X
20	Idaho National Engineering Laboratory	15	X
21	Iowa Ordnance Plant	10	
22	Kansas City Plant	25	X
23	Lake Ontario Ordnance Works	1	
24	Lawrence Berkeley National Laboratory	1	X
25	Lawrence Livermore National Laboratory	4	X
26	Los Alamos Medical Center	1	X
27	Los Alamos National Laboratory	23	X
28	Machlett Laboratories	1	
29	Mallinckrodt Chemical Co./Destrehan Street Plant	4	
30	Misc.	72	
31	Mound Plant	7	
32	Nevada Test Site	32	X
33	Norton Company	1	
34	Nuclear Materials and Equipment Corp. (NUMEC)	1	
35	Oak Ridge (general)	12	
36	Oak Ridge (Y-12)	11	
37	Oak Ridge (K-25)	9	
38	Oak Ridge Institute for Science Education	1	
39	Oak Ridge (X-10)	11	
40	Pacific Proving Ground	1	
41	Paducah Gaseous Diffusion Plant	6	
42	Pantex Plant	26	X
43	Piketon Facility	3	
44	Pinellas Plant	40	X
45	Portsmouth Gaseous Diffusion Plant	21	
46	Rocky Flats	21	X
47	Sandia National Laboratory	9	X
48	Santa Susana Field Laboratory	5	
49	Savannah River Site	17	
50	Simonds Saw and Steel Company	2	

## SECTION 2

	Facility Name	NUMBER	2010 Town Hall Meeting Held in Vicinity
51	Speedring, Inc. (Culman, AL.)	1	
52	Spencer Chemicals Company (Jayhawks Works)	1	
53	St. Louis Airport Storage Site (SLAPS)	1	
54	United Nuclear Corp.	3	
55	Various Uranium Mines	10	
56	Weldon Springs Plant	3	
	<b>TOTALS</b>	<b>483</b>	

### Section 2.4 Listing of Town Hall Meetings for Calendar Year 2010

Each year the Office of the Ombudsman hosts and attends a number of town hall and other outreach events. In many instances, conversations that begin at these outreach events continue in the ensuing days. Where a conversation continues beyond that initial discussion at the outreach event, those contacts are included in the counts provided in the earlier tables. However, because of our focus on assisting claimants, we find it extremely difficult to count every contact at these events. Nevertheless, we take care to note the complaints and issues raised by these individuals. Consequently, the discussions and contacts at these outreach events are incorporated into the assessments of the various issues discussed in this report.

	Site	# of Meetings	# of Attendee (approximate)
1	St. Petersburg, FL	Traveling Resource Center	100
2	Idaho Falls, ID	2	175
3	Kansas City, MO	2	100
4	Rocky Flats (Denver, CO)	2	175
5	Santa Fe, NM (Los Alamos)	2	75
6	Albuquerque, NM (Sandia Lab)	1	110
7	Las Vegas, NV (Nevada Test Site)	Traveling Resource Center	130
8	Amherst, NY (Bethlehem Steel)	2	75
9	Simi Valley, CA (Downey and De Soto facilities)	Traveling Resource Center	30
10	Lynchburg, VA (BWX, Technologies)	Traveling Resource Center	140
11	Livermore, CA (Lawrence Livermore)	2	70
12	Emeryville, CA (Lawrence Berkeley Lab)	1	10
13	Amarillo, TX (Pantex)	2	160
14	Joliet, IL (Blockson Chemical)	Traveling Resource Center	40

## SECTION 3 SUMMARY OF REPORT

Throughout the year, we receive complaints that address every aspect of the EEOICPA claims process. Consequently, we receive complaints that question the statute, the regulations and policies implementing the statute, as well as the general administration of this program. Moreover, the complaints that we receive come from claimants, family members, attorneys, lay representatives, as well as congressional staff members.

While each case is unique, there are six themes that continue to resonate with many of the complaints that we receive. In spite of the nature and/or the source of the complaint, at least one of these six themes underscores most of the concerns that are brought to our attention. Therefore, a discussion of these six themes provides an effective summary of the many complaints, grievances, and requests for assistance that we received during the course of this year. Our use of these themes to summarize this report is further bolstered by the positive comments that we received in response to our reference to many of these themes in our 2009 report. The six themes are:

1. The program does not meet the expectations of the claimant.
2. The EEOICPA can be very complicated.
3. The program is not fair; “claimant-friendly” and the burden placed on claimants is too high, especially considering the circumstances surrounding most claims.
4. The EEOICPA does not recognize the secrecy surrounding this work.
5. The assistance offered by the program is not sufficient.
6. There is little (or no) trust shown to claimants

### 1. The Program Does Not Meet the Expectations of the Claimants

Many claimants believe that the EEOICPA was designed to compensate all workers who were physically present at facilities associated with the U.S. nuclear weapons program. Unfortunately, as written the EEOICPA only covers certain employees (and certain survivors of these employees), and covers these workers for work performed at certain facilities associated with the U.S. nuclear weapons program. Consequently, there are employees such as military personnel, federal employees of agencies other than the Department of Energy, and others who were present at these facilities, but who are not covered under the EEOICPA. As such, we are routinely contacted by employees with a similar concern – these employees note that they worked at the same sites and were exposed to the same toxins as those covered under the EEOICPA and thus argue that it is unfair that they are not covered under the EEOICPA. Often adding to the frustration of these employees is the fact that no one can direct them to another program designed to compensate them for the illnesses they suffer as a result of their employment at these facilities.

Claimants also assert that when the EEOICPA was created, they never imagined that the burden of proof would be placed on them to prove employment, exposure, and causation. Some claimants contend that since employment and exposure records should have been maintained by the government and/or the employer, the burden should be on the government and/or the employer (and not the employee) to establish these facts. Some claimants also question the need to establish a link between their illness and exposure to these toxins. These claimants believe that since it is well established that many of these toxins were harmful, simply establishing an illness and exposure to one of these toxins ought to be sufficient to establish entitlement to compensation and/or benefits.

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### 2. The EEOICPA Can Be Very Complicated

Claimants often contact our Office looking for simple, straight-forward rules to guide them in processing their claim. All too often, however, the rules and procedures applicable to the EEOICPA are not simple or straight-forward. The resolution of an EEOICPA claim may involve very complex scientific, medical or legal concepts. Unfortunately, many claimants do not have the resources (i.e., access to the internet) or the ability (i.e., declining health or other issues) to effectively research these issues.

In addition, the rules governing the EEOICPA are dispersed among the statute, the regulations, the EEOICP Procedural Manual, EEOICP Bulletins and EEOICP Circulars. Some claimants complain that it is very difficult to identify all of the rules that may be applicable to a claim. A frequent frustration that we encounter arises when a claimant believes that he/she has complied with all of the rules only to have their claim denied (or the case returned to them) because of some previously unknown rule.

Further adding to the complexity of this program are the many nuances in the law. For example, under the EEOICPA, the general rule is that if a employee dies and the eligible spouse files a successful survivor's claim, compensation is paid to the eligible spouse, and this is true even where in addition to the spouse there are surviving children. However, an exception exists where the employee dies leaving a surviving spouse as well as at least one child who is not the recognized natural or adopted child of the eligible spouse. In that situation, one half of the survivor compensation goes to the eligible spouse and the other half is made in equal shares to each child of the employee who qualifies as a surviving child. See 42 U.S.C. §§7384s(e) and 7385s-3(c).

Another aspect of the EEOICPA that continues to cause confusion involves the fact that there are a number of agencies involved with the EEOICPA and each agency has responsibility for a different aspect of the program. As an example, many claimants become confused when they file their claim with the DOL, yet if it is a cancer claim, they start to receive correspondence from NIOSH (who performs the dose reconstruction). It is not unusual to speak with claimants who refer to earlier conversations, but have no idea whether that conversation was with the DOL, DOE or NIOSH.

### 3. The Program Is Not Fair; Is Not “Claimant-Friendly” And The Burden Placed On Claimants Is Too High

We are contacted by claimants who believe that the EEOICPA, as well as the administration of this program, fails to fully appreciate how difficult it can be to locate employment, exposure and/or medical records. Numerous comments suggest that it is not fair, “claimant-friendly” and/or it is too high of a burden to expect claimants to locate records related to employment that occurred so many years ago. This view is often compounded by the belief that it was the obligation of the employer and/or the government to maintain these records. Claimants argue that placing the burden of proof on them does not recognize that: (a) most people keep records for a limited period of time; (b) hospitals are only required to maintain records for 10 years; (c) many records were destroyed (by the government or the employer) in the normal course of record management; (d) the records that do exist often are not accurate; (e) prior to the creation of this program, very little was known about the toxins at these facilities and thus it is unrealistic to expect older medical records to address exposure to these toxins; and (f) many contractors and subcontractors took their records with them.

A number of claimants also believe that the EEOICPA does not adequately recognize that claims are often pursued while the employee is ill. Some claimants argue that it is not very “claimant friendly” to require “sick” employees to actively engage in locating necessary records. Similarly, many surviving family members consider it unfair to have instructed their loved ones not to talk about their employment and to now place the burden on these survivors to establish employment and/or exposure.

In addition, some claimants allege that the rules and procedures that govern this program provide DOL with the “upper hand.” For instance, claimants argue that it is not fair that the determination of which cases go to a referee, as well as the selection of the referee is entirely within the discretion of the DOL. Similarly, claimants frequently tell us that it is unfair that they are provided with very definite periods of time within which to submit evidence (usually 30 to 60 days) while the DOL often operates without any apparent time limitations.

#### **4. The EEOICPA Does Not Recognize The Secrecy Surrounding This Work**

On more occasions than we can count, we asked an employee if he/she could document where he/she worked or the toxins to which he/she were exposed and the employee responded with a stern reminder that these were secret facilities and that the employees took a vow to maintain that secrecy. Workers assure us that it was the nature at these facilities not to ask a lot of questions and as a result employees simply performed the work that they were directed to perform. Claimants often cannot believe that they are now expected to provide documentation that establishes where they worked or the toxins to which they were exposed.

In addition, where documents exist, some claimants question the accuracy of these documents. We routinely encounter workers who assure us that there are accidents or mishaps that are not reflected in existing records. In light of: (1) the secrecy that surrounds most of these facilities; (2) the fact that oftentimes records are missing or incomplete; and (3) the fact that in some instances there are questions as to the accuracy of the records that do exist, some claimants question whether it is possible to fairly adjudicate claims.

Recently, it has come to our attention that there are some claimants, who to the detriment of their claim, continue to adhere to this vow of secrecy. During the course of this year, we encountered some former employees who admitted that in providing information for their claim, they deliberately withheld information that they deemed too sensitive.<sup>4</sup>

#### **5. The Assistance Offered By The Program Is Not Sufficient**

The Department of Labor, as well as the other agencies involved with the EEOICPA provide direct assistance to claimants and have developed tools to assist claimants. Without a doubt there are claimants who have taken advantage of these tools and assistance. Nevertheless, we encounter some claimants who are not aware that these tools and assistance are available. Other claimants have contacted us to report that they found these tools inadequate.

A frequent issue that we encountered this year involved claimants who were surprised to discover the limits of the available tools and assistance. For instance, while the DOL verifies employment, there are instances where

<sup>4</sup> There is a process whereby if an EEOICPA claimant deems it necessary, they can be interviewed by a government employee who possesses the appropriate security clearance. Many of the claimants who contacted us were not aware of this process. Moreover, even when made aware of this process, most of the claimants with whom we talked displayed a reluctance to utilize this resource.

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employment records are not complete. Accordingly, in spite of the assistance provided by the DOL, there are times where the claimant must locate the necessary records to establish employment.<sup>5</sup>

### **6. There Is Little (Or No) Trust Shown To Claimants**

There are instances where employment and exposure records cannot be located. When this occurs, claimants are encouraged to locate other evidence that can document the necessary fact. Where they are unable to locate other relevant evidence, some claimants attempt to establish these necessary facts by submitting “self” affidavits that they prepare. Unfortunately, under the EEOICPA the unsubstantiated affidavit of a claimant is not sufficient. Some claimants view this as “questioning” their honesty. These claimants contend that they were trusted to work at these secret sites and note that they maintained this secrecy for years – often refusing to tell even their own spouses and children about their employment. Therefore, these claimants question why these “self” affidavits are not sufficient to establish employment and exposure, especially where evidence to the contrary (and sometimes any evidence) does not exist.

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5] We encounter instances where frustrations arise because the claimant first became aware of the limits of this assistance (or the limits of the tools) when the limitation was noted in the decision denying their claim

## SECTION 4 COVERAGE

We are contacted by some claimants who believe that the EEOICPA covers every employee who worked at a site associated with the U.S. nuclear weapons program. In reality, however, the EEOICPA only covers certain employees who worked at specific sites. As a result, we receive a number of complaints and grievances involving issues concerning who is covered; what facilities are covered; and/or what illnesses are covered.

### SECTION 4.1 Not every claimant is covered

The chart below outlines the employees covered under the EEOICPA.

Part B	Part E
Department of Energy contractor	Department of Energy contractor
Department of Energy subcontractor	Department of Energy subcontractor
Approved RECA Section 5 claims	RECA Section 5 uranium miner; miller; ore transporter
Employees of Atomic Weapons Employer	
Employees of Beryllium Vendor <sup>6</sup>	
Department of Energy employee	

Chart 1

We were contacted during the course of the past year by employees who assert that they were employed at sites involved with the U.S. atomic weapons program, yet they are not covered under EEOICPA. A few of the instances brought to our attention include:

- Workers employed for subsidiaries of atomic weapons employers, as well as employees who worked as contractors for atomic weapons employers.
- Civilian Department of Defense employees who worked at the Brookhaven National Laboratory and at the Johnston Atoll.
- A union business agent who was required to have a physical presence at a Department of Energy facility.

These employees, as well as many others, assert that they worked side by side with employees who are covered, and suffered exposure to the same dangerous toxins, and thus cannot understand why the EEOICPA excludes them from coverage. Many of these employees also find it troubling that no one is able to provide them with a rationale for their exclusion.

Often adding to the frustration of many of these employees is the fact that no one is able to direct them to other programs that might compensate them for their illnesses. We are aware of claimants who endeavored to pursue state workers compensation claims, yet were barred by that state's statute of limitations. In addition, while a few federal employees reported success pursuing a claim under the Federal Employees Compensation

6] A "covered beryllium employee" includes any government employee (as defined in 5 U.S.C. § 8101(1)) exposed to beryllium in the performance of duty at any DOE facility or beryllium vendor facility.

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Act (FECA), we are aware of others who encountered difficulties attempting to process a FECA claim. Some of these employees reported that it was difficult, if not impossible, to acquire any assistance in processing their FECA claim.

### SECTION 4.2 Differences In Coverage Under Parts B and E

There are two “Parts” to the EEOICPA, Part B and Part E. While there is some overlap, each “Part” compensates for different illnesses and covers different workers. The differences between Part B and Part E continue to be a source of confusion, and thus the reason for a number of the complaints that we receive.

The following chart identifies the illnesses covered under Part B and Part E:

Part B	Part E
<ul style="list-style-type: none"> <li>• Any cancer (other than chronic lymphocytic leukemia) at least as likely as not caused by radiation exposure.</li> <li>• Chronic Beryllium Disease</li> <li>• Chronic Silicosis (only if employed during mining of atomic weapon test tunnels in Nevada or Alaska)</li> <li>• Beryllium Sensitivity</li> </ul>	<ul style="list-style-type: none"> <li>• Any occupational illness for which exposure to a toxic substance was at least as likely as not a significant factor that caused, aggravated, or contributed to such illness</li> </ul>

Chart 2

This next chart identifies the workers covered under each “Part” of the EEOICPA:

Part B	Part E
<ul style="list-style-type: none"> <li>• Department of Energy Contractor</li> </ul>	<ul style="list-style-type: none"> <li>• Department of Energy Contractor</li> </ul>
<ul style="list-style-type: none"> <li>• Department of Energy Subcontractor</li> </ul>	<ul style="list-style-type: none"> <li>• Department of Energy Subcontractor</li> </ul>
<ul style="list-style-type: none"> <li>• Approved RECA Section 5 claims</li> </ul>	<ul style="list-style-type: none"> <li>• RECA Section 5 uranium miner; miller; ore transporters</li> </ul>
<ul style="list-style-type: none"> <li>• Beryllium Vendors<sup>7</sup></li> </ul>	
<ul style="list-style-type: none"> <li>• Atomic Weapons Employers</li> </ul>	
<ul style="list-style-type: none"> <li>• Department of Energy Employee</li> </ul>	

Chart 3

7] A “covered beryllium employee” includes any government employee (as defined in 5 U.S.C. § 8101(1)) exposed to beryllium in the performance of duty at any DOE facility or beryllium vendor facility.

Some of the most common complaints concerning the differences in coverage between Part B and Part E include:

- Employees of: (1) beryllium vendors; (2) atomic weapons employers; as well as (3) the Department of Energy, all of whom are covered under Part B, constantly question why they are not eligible for benefits under Part E. Some of these employees also question why they are covered under Part B if their cancer is caused by radiation exposure, but not covered under Part E if their cancer is related to exposure to other toxins.
- Many people commonly refer to Part B as the “cancer” program. As a result, we encounter DOE contractors and subcontractors who are not aware that even if their cancer claim is denied under Part B, they may still be eligible to file a claim for cancer under Part E.<sup>8</sup>

Further complicating the coverage issue is the fact that there are distinctions in coverage even within Part B. The chart below focuses on Part B and illustrates the distinctions in coverage within this “part.”

Part B claimant				
	Cancer	Chronic Beryllium Disease	Beryllium Sensitivity	Silicosis
DOE Employee	X	X	X	X
DOE Contractor	X	X	X	X
DOE Subcontractor	X	X	X	X
Atomic Weapons Employer	X			
Beryllium Vendors		X	X	

Chart 4

Claimants complain that these distinctions are not easily discernible when you read the statute and further observe that these distinctions are not widely publicized.<sup>9</sup>

8] Initially claimants were required to specify whether they were filing a Part B and/or a Part E claim. Unfortunately some DOE contractors and subcontractors did not realize that they were eligible to pursue a cancer claim under both Part B and Part E. Now, the DEEOIC automatically reviews a cancer claim filed by a DOE contractor or subcontractor under both Part B and Part E. In addition, the DEEOIC attempted to identify previously denied Part B DOE contractors and subcontractors to ensure that they were aware that they could also pursue a claim under Part E. Nevertheless, as stated above, we occasionally encounter claimants who are not aware of this fact

9] For instance, the statute does not specifically state that under Part B employees of atomic weapons employers are only covered for cancer. Rather in outlining the compensation to be provided, section 7384s (a)(1) refers to compensation for covered employees. Section 7384I, in turn, defines “covered employee” to mean: (a) a covered beryllium employee; (b) a covered employee with cancer; and (c) to the extent provided in the statute, a covered employee with chronic silicosis. It is only when you review these terms that it becomes evident that while employees of atomic weapons employers satisfy the definition of a covered employee with cancer, they do not satisfy the definition of a covered beryllium employee or a covered employee with chronic silicosis. See 42 U.S.C. §§ 7384I and 7384s.

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### SECTION 4.3 Covered Facility

In order to be considered a “covered employee,” the employee must also have worked at a covered Department of Energy facility. The statute defines a “Department of Energy facility” as:

*...any building, structure, or premise, including the grounds upon which such building, structure, or premise is located—*

- (A) in which operations are, or have been, conducted by, or on behalf of, the Department of Energy (except for buildings, structures, premises, grounds, or operations covered by Executive Order No. 12344, dated February 1, 1982 (42 U.S.C. 7158 note), pertaining to the Naval Nuclear Propulsion Program); and*
- (B) with regard to which the Department of Energy has or had —*
  - (i) a proprietary interest; or*
  - (ii) entered into a contract with an entity to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services.*

42 U.S.C. §7384l(12).

There are claimants who are surprised to discover that although they worked at a site associated with the nuclear weapons program, their specific work site does not meet the statutory requirement for a covered facility. Many of these claimants are of the opinion that any facility associated with the nuclear weapons program ought to be a covered facility. We also encounter instances where only a portion of a work site is designated as a “Department of Energy facility.” In response to these situations, some claimants assert that: (a) their work was not limited to certain areas of these complexes, rather they worked all over these facilities; and/or (b) the toxins generated by these DOE work sites did not “stop” at some imaginary line.

- The arguments noted above are the precise arguments that we continue to hear from former employees of the Santa Susana Field Laboratory who question why only Area IV of that facility is designated as a “Department of Energy facility.” Some employees note that even though they were not “assigned” to work in Area IV, they were frequently directed to enter Area IV. Others assert that the toxins generated by Area IV permeated the entire complex.
- A portion of the Bannister Complex in Kansas City is designated as a “Department of Energy facility,” while the other “portion” is occupied by other governmental agencies. Some of the employees of these other governmental agencies question whether they were exposed to toxins generated by the operations of the DOE facility.

During the course of this year, we also received complaints involving the requirement that in order to be a “Department of Energy facility,” the DOE must have or had a proprietary interest or entered into a contract with an entity to provide management and operations, management and integration, environmental remediation services, construction, or maintenance services. See 42 U.S.C §7384l(12). Some of the concerns that we encountered include:

- **Not a party to these contracts:** Some claimants do not consider it fair that the burden is placed on them to establish the existence of a contract between their employer and the DOE, especially since they were never a party to these contracts and in most instances, prior to the filing of their claim they never had any reason to even inquire as to the existence of these contracts.

- **What is needed to establish the existence of a contract:** This year we received complaints concerning the evidence required to establish the existence of a contract between the DOE and an employer. In a couple of instances, claimants located documents which he/she believes established a contract with the DOE, but were disappointed when the DOL did not accept this evidence. Since there was no other evidence in the record addressing the existence of a contract (and thus no evidence to contradict the evidence submitted by the claimant), these claimants believe that the evidence they located should have been sufficient to establish a contract between the DOE and the employer. These claimants also contend that the DOL utilized a very stringent standard in evaluating their evidence.

## SECTION 4.4 Locating Evidence of Employment

High on the list of the common complaints that we receive are complaints/grievances involving the difficulties encountered locating employment records. Whenever a claimant files a claim, the DOL attempts to verify the employment and in doing so seeks information from the DOE and its contractors. Unfortunately, the quality and quantity of existing employment records varies from site to site. Accordingly, some claimants contact us when the DOL is unable to verify employment. Some of the reasons that employment cannot be verified include:

- **Employers took the records with them.** We encounter instances where the employer maintained employment records and copies of these records were never provided to the government. As a result, where these employers are now out of business or otherwise unavailable, some claimants find it difficult to locate records of their employment. In other instances, even though the employer is still in existence, some claimants discover that these employers did not retain employment records.<sup>10</sup>
- **Records that exist are limited:** We encounter instances where claimants assert that there are “gaps” in existing records. Moreover, while many facilities have records documenting employment by contractors, in many instances records addressing employment by subcontractors do not exist, or are very limited.
- **Records destroyed:** Documents such as gate records were often deemed routine and thus destroyed in the normal course of record retention protocols.
- **Existing records are insufficient.** We encounter instances where even though existing records indicate that the employee worked for a particular employer, these records are not deemed sufficient to establish that the employee specifically worked for this employer at a DOE facility. For example, while records may establish that the employee was employed by F.H. McGraw, a known contractor at the Paducah Gaseous Diffusion Plant, these records may not be deemed sufficient to establish that the employee was specifically employed by F.H. McGraw at the Paducah facility.

As noted above, even where records exist, most facilities have few records addressing employment by subcontractors. During the year, we encountered a number of individuals who are adamant that they worked at a covered site as a DOE subcontractor, yet even though they are able to describe in detail the nature and location of their work, their claims were denied because these claimants cannot locate sufficient evidence to establish covered employment.

<sup>10</sup>] The DOE is working on an “Access to and Ownership of Records” clause to be inserted into current and future contracts. The intent of this clause is to require contractors/subcontractors to provide copies of certain records such as personnel and industrial hygiene monitoring to the DOE upon termination. As of the submission of this report, this clause has not been finalized.

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This year we also encountered some claimants who contend that they were not credited with all of the employment that they or their loved ones performed. Some of these allegations involve instances where it is argued that in spite of what is documented in existing records, the employee engaged in employment that is not reflected in these records. There are other instances, however, where employment is alleged at multiple sites, but the evidence only documents employment at some of these sites.<sup>11</sup> Some of these instances of employment at multiple sites involve couriers who contend that because of the nature of their jobs, they routinely visited different facilities. In one case, the amount of time that the courier spent at various sites is critical since in order to be eligible for a SEC class, the family must establish that the employee worked for at least 250 days at SEC work sites. Unfortunately, while there is no doubt that the employee worked as a courier and thus had a presence at multiple sites the family is experiencing difficulty trying to establish the amount of time that the employee spent at any particular site.

As noted, some claimants find that adequate employment records do not exist. As a result, some claimants attempt to submit affidavits prepared by colleagues. During this year, a number of claimants contacted us to complain that the affidavits that they submitted were not accepted due to what they believe are “technicalities.” The question often directed to us is, “how exact could you be in discussing employment that occurred 50 years ago?”

Nevertheless, while we encounter instances where claimants are not successful in establishing employment, there have been instances where the persistence of the claimant was rewarded.

- In one instance, because of the claimants continued insistence, the DOL continued to search and was able to locate records supporting additional employment.
- In another instance, as the claimant reports, because he “left the employer on good terms and still knew people at the job,” he was able to go the job site and persuade the staff to search further. Ultimately, additional employment records were located.

The problems associated with locating employment records are often magnified when the employee is deceased and thus it is the survivors who are searching for these records. Since the employee usually did not talk about his/her job, many survivors tell us that they have no idea where to even start a search for employment records. Comments that we receive suggest that it is unfair for the government to have instructed these workers not to discuss his/her employment, and now for the government to place the burden on the survivors to locate evidence of this employment.

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11] In our experience, it is not uncommon for an employee to have worked a multiple sites.

## SECTION 4.5 Diagnosed Illness

In order to be eligible for benefits and/or compensation under the EEOICPA the employee must have a diagnosed covered illness. The requirement for a diagnosed illness has been the subject of a number of complaints brought to our attention this year.

- **Must be a diagnosis, not a list of symptoms:** Some claimants do not understand the need for a diagnosed illness, and thus pursue claims where the medical evidence simply contains a list of symptoms. We are also contacted where claimants believe that their physician made a specific diagnosis, but the DOL determines that the doctor merely provided a list of symptoms. Another situation that we encounter involves instances where the medical screening provided by the Former Workers Medical Screening Program yields abnormal findings and as a result, the claimant is advised to file an EEOICPA claim and to follow up with his/her treating physician. Since he/she was advised to file an EEOICPA claim, many claimants assume that the abnormal findings are sufficient to constitute a covered illness under the EEOICPA. As a result, some claimants are both disappointed and confused when they file an EEOICPA claim only to be informed that the abnormal findings are not sufficient to constitute a covered illness. The disappointment and confusion is prompted by the fact that some claimants do not make (or understand) a distinction between the DOE and the DOL with respect to the EEOICPA and thus cannot understand why on one hand the government suggested that they file an EEOICPA claim while on the other hand the government determines that the abnormal findings are not sufficient to support an EEOICPA claim.

Our Office discussed with the DOE the fact that some claimants inaccurately believe that the results of the medical screenings provided by the Former Workers Medical Screening Program are sufficient to constitute a covered illness under the EEOICPA. The DOE responded to these concerns by indicating that with very few exceptions, the results of the screening are not intended as a specific diagnosis of an illness; follow-up medical testing is usually required in order to make a diagnosis.

The DOE also reviewed the results letters provided to claimants to ensure that these letters did not give the impression that the findings are intended as a diagnosis.

- **What is cancer:** While many of the terms used in the EEOICPA are defined in the statute, the statute does not contain a definition for the term “cancer.” One claimant argued that in light of the “claimant-friendly” intent of the EEOICPA the term “cancer” ought to be defined broadly to include benign tumors. In response, the DOL indicated that in general it relies on the medical evidence presented in the case to determine whether there is a diagnosis of cancer. Where the medical evidence provides clear evidence of a disease diagnosed as cancer, the DOL accepts the medical evidence. If the evidence is equivocal or if there is some other basis for questioning whether an illness is cancer, the DOL turns to the National Cancer Institute to resolve the issue.<sup>12</sup>

<sup>12]</sup> According to the DOL, where the treating physician does not opine that the benign tumors are cancer, simply submitting general articles probably will not be of much value. On the other hand, if the treating physician opined that the benign tumors are “cancer,” the DOL would consider whether a referral to the National Cancer Institute was appropriate.

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- **Criteria for pre 1983 chronic beryllium disease:** In defining the term “established chronic beryllium disease” the statute makes a distinction between diagnoses before January 1, 1993, and diagnoses on or after that date. In order to diagnose chronic beryllium disease (CBD) before January 1, 1993, the statute requires:

*(i) occupational or environmental history, or epidemiologic evidence of beryllium exposure; and*

*(ii) any three of the following criteria:*

- (i) Characteristic chest radiographic (or computed tomography (CT)) abnormalities*
- (ii) Restrictive or obstructive lung physiology testing or diffusing lung capacity defect.*
- (iii) Lung pathology consistent with chronic beryllium disease.*
- (iv) Clinical course consistent with chronic beryllium disease.*
- (v) Immunologic tests showing beryllium sensitivity (skin patch or beryllium blood test preferred).*

See 42 U.S.C. §7384l(13)(B).

There have been a number of complaints this year that addressed the criteria for establishing pre-1993 CBD by x-ray evidence. In particular these arguments focus on the language requiring “[c]haracteristic chest radiographic...abnormalities.” The DOL has consistently interpreted this language as requiring chest radiographic abnormalities characteristic of CBD. See the EEOICPA Procedural Manual, Chapter 2-1000, subchapter 6. There are claimants, however, who disagree with the DOL’s interpretation. These claimants assert that the statute does not require the x-ray to be “characteristic of chronic beryllium disease” and thus argue that any x-ray abnormality is sufficient to meet the criteria for pre-1993 CBD.

This matter has been discussed with the DOL on numerous occasions and the DOL is adamant that its interpretation is consistent with the Act. Yet, some claimants and representatives are just as adamant in their belief that the DOL’s interpretation is not consistent with the Act. As a result, in spite of the DOL’s consistent interpretation of this provision, we continue to encounter pending claims, and hear of new claims that are filed, where the basis for the claim is the assertion that any abnormality is sufficient to meet the pre-1993 criteria for x-ray evidence of CBD.<sup>13</sup>

- **Presumption of chronic beryllium disease:** On September 4, 2008, DEEOIC issued the EEOICPA Circular NO. 08-07. This bulletin notified all DEEOIC staff that a diagnosis of sarcoidosis is not medically appropriate if there is a documented history of beryllium exposure. Rather, in these situations, the diagnosis of sarcoidosis should be considered a diagnosis of chronic beryllium disease.<sup>14</sup>

Following the issuance of this circular, the DEEOIC reviewed all previously denied claims to identify those impacted by this presumption. However, some claimants question the thoroughness of the DEEOIC’s review and contend that a proper review would have resulted in a reversal of the denial of their claim. Up until this year, in every instance when a case raising this allegation was brought to our attention, after further review the DEEOIC concluded that the evidence did not support a reversal of the denial and thus concluded that the presumption had been properly applied. This year, however, there was one instance where at the insistence of claimant’s representative the DEEOIC reviewed the case and determined that, in light of Circular NO. 08-07, the presumption should have applied and thus the previous denial should have

13] As of now, the only way to challenge this interpretation is to appeal to federal court. However, to our knowledge, to date no case challenging DOL’s interpretation has been appealed to federal court.

14] The Circular further noted that the application of this presumption in the adjudication of claims would differ between Parts B and E.

been reversed. This recent case has bolstered the concerns raised by those who question the thoroughness with which the DEEOIC reviewed previously denied claims to identify those impacted by Circular NO. 08-07.<sup>15</sup>

- **Chronic beryllium disease and lung lavages:** Another issue brought to our attention this year involves diagnosing CBD in post 1993 cases. The crux of the problem is that in order to diagnose post-1993 CBD a claimant must produce an abnormal beryllium lymphocyte proliferation test (BLPT) in addition to one of the following: (i) a lung biopsy showing granulomas or a lymphocytic process consistent with chronic beryllium disease; (ii) a computerized axial tomography scan showing changes consistent with chronic beryllium disease; or (iii) pulmonary function or exercise testing showing pulmonary deficits consistent with chronic beryllium disease. 42 U.S.C. §§7384l (8) and (13).

In post-1993 cases where there is an abnormal BLPT, a lung lavage is one of the three (3) options provided in the statute for diagnosing CBD. However, in spite of the three options, there are some medical institutions that tend to require a lung lavage in order to diagnose CBD.<sup>16</sup> A representative from one of these institutions conceded that their institution often asked claimants to undergo a lung lavage in order to accurately diagnose and treat CBD. What concerned some individuals who contacted us is that a lung lavage involves the washing of the lungs with saline or mucolytic agents and everyone agrees that this is not a pleasant process. Thus, some claimants and representatives take exception that claimants are required to undergo this process, especially since the statute allows for less intrusive alternatives. There are a couple of issues related to these complaints:

- a. It is alleged that personnel associated with the DEEOIC and/or the Resource Centers specifically directed claimants to providers known to require lung lavages. Both the DEEOIC and the Resource Centers maintain that it is their established policy not to direct claimants to specific providers. Both also strongly suggest that if anyone is aware of personnel directing claimants to specific providers, this matter should be brought to their immediate attention. [A related concern involving a listing of providers is discussed below at subsection d].
- b. Claimants also allege that in adjudicating claims, the DEEOIC requires a lung lavage in order to accept a claim for CBD and/or applies stricter scrutiny where a diagnosis of CBD is not based on a lung lavage. The DEEOIC avers that in reviewing claims for CBD it adheres to the statute and regulations and thus a claim for CBD is accepted whenever there is probative evidence that meets any of the statutory options for diagnosing CBD. Some claimants believe that while this may be the stated policy of the DEEOIC, there are individual claims examiners who exhibit a preference for claims that contain a lung lavage – or who seldom find evidence of CBD probative if the claim does not contain a lung lavage. In one instance recently brought to our attention, a claims examiner issued a letter that can be interpreted as indicating that the DMC is requiring a lung lavage in order to diagnose CBD. The DOL has a different interpretation of this letter.
- c. The DEEOIC notes that in post-1993 cases, in order to diagnose CBD the claimant needs an abnormal BLPT and must meet one of three other criteria. However, where the BLPT is normal or borderline, a post-1993 CBD claim can still be accepted if the lung tissue biopsy confirms the presence of

<sup>15</sup>] Discussions with the DEEOIC confirm that this case was identified as one potentially impacted by Circular 08-07, yet for reasons that cannot be determined, a full review of this case was not performed.

<sup>16</sup>] A lung biopsy is one of the three (3) options for diagnosing CBD in post 1993 cases where there is an abnormal BLPT. The DEEOIC Procedural Manual includes a lung lavage within the definition of a lung biopsy. See EEOICP Procedural Manual, Chapter 2-1000, subchapter 7.

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granulomas consistent with CBD.<sup>17</sup> Therefore, where a post-1993 claim does not have a positive BLPT, the claimant will in fact be advised of the need to produce either a positive BLPT or lung tissue biopsy (which could be a lung lavage) confirming the presence of granulomas.

- d. Former employees of DOE facilities are eligible for free screening provided by the Former Worker Medical Screening Program. If the screening yields abnormal results, the employee is advised to follow up with a physician and is provided a list of providers. Although, employees are provided with this list, they are not required to utilize the services of the physicians on this list. Rather, employees are free to utilize the physician of their choice. Unfortunately, some claimant believe that they must seek treatment from a physician on this list, and this causes a problem since some of the providers on this list are those who tend to require lung lavages. In response to these concerns the DOE reviewed this list to ensure that it clearly informs claimants that these are only suggestions - claimants are free to seek treatment from the physician of their choice. In spite of the DOE's response, some claimants also suggest that this list ought to be annotated to identify those physicians who, in spite of the statute, routinely require a lung lavage.

Some representatives continue to assert that there are DOL representatives who provide claimants with a list of CBD providers. As noted earlier, the DOL asserts that it does not direct claimants to specific providers and thus does not provide a list of providers. Any such list ought to be brought to the attention of the DEEOIC.

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<sup>17</sup> The statute provides that for a post-1993 CBD diagnosis, it is necessary to present an abnormal BLPT in addition to a least one of the other three tests to establish a compensable claim. However, because it was recognized that when a patient is being treated with steroidal medicines, the BLPT may return a normal or borderline result, a programmatic decision was made by the DEEOIC to permit an exception. Therefore, in claims that contain a normal or borderline BLPT, the claims examiner may nevertheless accept the claim for CBD if the lung tissue biopsy confirms the presence of granulomas consistent with CBD.

## SECTION 5 SURVIVOR ELIGIBILITY

Where the employee is deceased, certain survivors may be eligible to receive compensation. However, there are issues that arise when trying to determine if a family member is an eligible survivor.

### SECTION 5.1 Survivor Eligibility Under Part E

Another distinction that continues to be the subject of many complaints/grievances is the difference in the eligibility requirements for survivors under Part B and Part E. The chart below outlines the eligible survivors under Part B and Part E.

Part B	Part E
Eligible Spouse	Eligible Spouse
Children (regardless of age)	Child, who at the time of employee's death was: 1. Under the age of 18; 2. Under the age of 23 & a full time continuous student; or 3. Any age if medically incapable of self-support
Parents	
Grandchildren	
Grandparents	

Chart 5

At every town hall meetings that we attend, a common complaint that we receive concerns the fact that under Part B any child, regardless of age, can be an eligible survivor, while under Part E only certain specified children are eligible survivors. Siblings who do not meet the eligibility requirements of Part E often contend that they were the ones who made the sacrifices to care for the sick parent. While these children stress that they did not render these services in the expectation of being compensated, they nevertheless find it unsettling that in spite of their sacrifices they are the ones excluded from coverage. Claimants contact us seeking an explanation for this distinction and are disappointed to discover that the statute does not provide any explanation for this difference in coverage between Part B and Part E.

Other complaints involving the differences in coverage between Part B and Part E include:

- Arguments that it is unfair to have waited until many employees had passed away before establishing Part E and then to place such severe limitations on the eligibility of surviving children. (Some claimants suggest that this limitation is an attempt to limit the number of claims that will be paid).
- A number of instances where claimants informed us that the decision to compensate certain siblings while other siblings were not compensated resulted in family strife.

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### SECTION 5.2 Step Children

The existence of step children is another instance of an exception to the rule. Generally under the EEOICPA if the employee is deceased and there is a surviving eligible spouse, compensation is paid to the spouse. This is true even where the employee dies leaving both a spouse and children. The exception to this rule arises where there is a surviving spouse plus at least one child of the covered employee who is living and who is not a recognized child or adopted child of the surviving spouse. In these instances, one half of the compensation is paid to the surviving spouse and the other half is paid to each child of the covered employee who is living and meets the other requirements outlined in the statute.<sup>18</sup>

- Some claimants contend that this exception is not well known. We were contacted by surviving spouses who were surprised when they only received one half of the compensation. Some of these claimants were even more surprised to discover that the reason for the reduction in compensation was the existence of step children.
- While claimants appreciate the DEEOIC's diligence in endeavoring to resolve the eligibility of these children, there were instances this year where claimants asserted that the DEEOIC's diligence was overbearing. Some claimants reported that even after informing the DEEOIC that they did not know how to contact these step children (and in some instances had no relationship with these step children), DEEOIC personnel continued to contact these claimants asking them to provide information on the whereabouts of these children.
- Even where this exception potentially applies, if there are no children who meet the other requirements for eligibility, the surviving spouse is paid the other half of the compensation. Therefore, one can understand why a surviving spouse has an interest in the status of a claim filed by a child. We were contacted, however, by a few surviving spouses who complained that the DEEOIC would not provide them with any information on the claims filed by these potentially eligible children. The DEEOIC cites privacy concerns as the reason for not providing this information.<sup>19</sup>

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18] Under Part B if there is a surviving spouse plus at least one child of the covered employee who is living and who is not a recognized child or adopted child of the surviving spouse, then one half of the compensation is paid to the surviving spouse and the other half is paid to each child of the covered employee who is living and a minor at the time of payment. 42 U.S.C. §7384s(f). Under Part E one half of the payments are made to the covered spouse and the other half is made in equal shares to each child who meets the requirements for Part E coverage who is living at the time of payment. 42 U.S.C. §7385s-3(c)(3).

19] Nevertheless, in a case involving multiple siblings, one sibling complained that personal information submitted to establish his/her eligibility had been shared with other siblings who had also filed claims. This claimant alleges that these other siblings abused this information. In this instance, the DEEOIC argued that it was necessary to include this information in documents that would be shared with all siblings

## SECTION 6 OTHER STATUTORY ISSUES

### SECTION 6.1 Compensation May Be Nullified or Reduced

Under Part E, if the DOE contractor employee dies prior to the payment of compensation, then compensation for contractor employees shall not be paid. Instead, the eligible survivor of that employee must file a claim for survivor benefits. See 42 U.S.C. §7385s-1(2). Unfortunately, while the maximum compensation under Part E for contractor employees is \$250,000, the compensation for a claim filed by an eligible survivor ranges between \$125,000 and \$175,000. Further adding to this problem is the fact that under Part E only certain family members are included as potentially eligible survivors (mainly the surviving spouse as well as children who at the time of the employee's death were either: (a) under the age of 18; (b) under the age of 23 and a full time student; or (c) and age, if medically incapable of self support).

Accordingly, we are contacted by people who are anxious to have their claims resolved as quickly as possible – many of these people are concerned that their potential compensation will be reduced or nullified if the employee (and sometimes the survivor) passes away prior to the payment of compensation. Therefore, some claimants become anxious when there are delays in the processing of their claim. Moreover, this anxiety is not limited to family members. We also hear from employees who tell us of their desire to maximize the money that they will “leave their family.”

Unfortunately, there are instances where the employee passes away prior to the payment of compensation, sometimes affecting the compensation that is paid to the eligible survivor. Some claimants have expressed their belief that since the delay in the processing of their claim was the result of actions (or inactions) by the DEEOIC, the claimant should not suffer any reduction or nullification of compensation. [Note: complaints concerning the DEEOIC's procedures for expediting claims where the claimant is terminal are discussed at section 10.1].

### SECTION 6.2 Prohibition Against Receiving Compensation for Cancer Under RECA and EEOICPA

Section 7385j provides that with the exception of individuals who receive, or have received, \$100,000 under Section 5 of the Radiation Exposure Compensation Act (RECA), 42 U.S.C. §2210, an individual may not receive compensation or benefits under the EEOICPA for cancer and also for compensation under the RECA. We are approached by claimants who contend that when they accepted RECA compensation, they were not aware of this prohibition. In response to our inquiries, the Department of Justice (DOJ) asserts that all claimants are informed that receipt of RECA compensation could impact the receipt of benefits under the EEOICPA.

In one instance the claimant asked if it was possible to return the RECA compensation and to instead file a claim under the EEOICPA. We discussed this matter with the DOJ who informed us that to allow a claimant to return the money received under RECA in order to qualify for EEOICPA compensation would violate Section 7385j of the EEOICPA. In spite of this response from DOJ this claimants maintains that when he/she opted to receive RECA compensation, the medical bills related to his/her illness were mounting and at that time it seemed unlikely that he/she would qualify for eligibility for compensation under the EEOICPA. Subsequently,

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however, a new Special Exposure Cohort class was established, thereby greatly increasing the possibility that he/she would be eligible for compensation under the EEOICPA. Unfortunately, since he/she already accepted compensation under RECA, the statute prohibits this claimant from receiving compensation under the EEOICPA, and it has been determined that he/she cannot return the RECA compensation in order to qualify for EEOICPA compensation. This claimant does not believe that it is fair to hold him/her to a determination made when circumstances were so drastically different.

## SECTION 7 ISSUES RELATED TO EXPOSURE TO TOXINS

In order to be entitled to benefits under the EEOICPA, the employee must have been exposed to toxins. Claimants are often surprised to discover that issues concerning exposure are not as straight-forward as they anticipated.

### SECTION 7.1 Locating Evidence of Exposure/Accuracy of Evidence

The DOL has developed a tool known as the Site Exposure Matrices (SEM) to assist claimants with their claim. (See discussion at section 7.2). One of the principle features of SEM is its listing of all of the toxins verified as having been onsite and used at DOE and RECA sites. Yet there are limits to SEM. Consequently, in spite of SEM, many claimants still find it necessary to establish the specific toxins used at their work site. Accordingly, we receive a number of complaints that involve problems associated with locating evidence of exposure. Many of the problems that we hear are common complaints that are repeated throughout this report:

- **Records destroyed or never kept:** When searching for exposure records, some claimants find that employers took the records with them; records were never maintained; and/or records have been destroyed. A common complaint questions the fairness of placing the burden on claimants to establish exposure when the relevant records no longer exist.
- **Secrecy:** Claimants remind us that it was part of the culture of these sites not to ask questions. Accordingly, many claimants tell us that they simply do not know all of the toxins to which they were exposed.
- **Existing records not accurate:** Where exposure records exist, some claimants question the accuracy of these records. Some claimants contend that their actual day-to-day activities bear little resemblance to the job description used by the DOL and NIOSH. Some employees assure us that while records list them as working in one building, in reality they worked at various locations. Similarly, some claimants take exception with records that indicate that certain toxins were only used in certain areas – these claimants assure us that the use of some toxins was much more wide-spread than recorded in official documents. In addition, we routinely hear assertions suggesting that in order to reduce the recorded levels of radiation exposure it was common to be ordered, during parts of the day, to remove one's dosimetry badge.
- **Accidents minimized:** Some claimants contend that it was common practice to minimize or ignore accidents. There are instances where after reviewing existing records, claimants assure us that these records either minimize or completely ignore accidents and other mishaps to which they were exposed.

Some claimants contend that if existing records do not establish exposure to toxins, it is often extremely difficult to establish exposure. Consequently, these claimants contend that, where the DOL and the DOE cannot locate the necessary records, it is unfair to expect that they will be able to locate these documents. In addition, other claimants argue that where they are able to locate evidence addressing exposure, this evidence ought to be accepted, especially where evidence to the contrary does not exist.

## SECTION 7

### SECTION 7.2 Site Exposure Matrices/Exposure

SEM is a repository of information on toxic substances present at DOE and Radiation Exposure Compensation Act (RECA) sites covered under Part E. (Also see discussion at section 8.2). One of the main features of SEM is its listing of all of the toxins verified as having been onsite and used at these DOE and RECA sites.

In previous reports we noted that many claimants criticized SEM because it simply provided a listing of all of the known toxins onsite and used at a site. Unfortunately, these lists could be extremely long (some contained over 700 toxins – the list for the Hanford sites contains 2829 toxins). Because these lists did not identify the buildings/areas where these toxins were used, some claimants told us that these lists were not very helpful. In many instances these complaints were fueled by the belief that the government had the ability to “simplify” these lists – i.e., to provide a list that identified the toxins used at particular areas/buildings. It was therefore great news this year when the DOL announced the unveiling of the expanded SEM. This expanded SEM is the culmination of efforts by the DOL and the DOE to provide more information on SEM. As a result of these efforts, in addition to the listing of all of the toxins present and used at a site, the expanded SEM also includes:

1. Toxic substance information
2. Toxic substances by alias or property
3. Toxic substance by chemical property
4. Health effect information
5. Toxic substance by disease or health effect alias
6. Disease or health effect by alias
7. Site history
8. Onsite location by alias
9. Area information
10. Facility information
11. Building information
12. Process information
13. Process by alias
14. Labor category information
15. Labor category by alias
16. Incident information

Without question, the expanded SEM provides a large volume of information and provides this information in a more useful format. Nevertheless, we continue to receive complaints concerning SEM:

- **The accuracy of SEM:** Throughout this year claimants contacted us to suggest that SEM does not list all of the toxins used at a particular site or does not list all of the toxins to which employees who worked in certain areas, buildings or labor categories were exposed. Some claimants believe that the failure to identify all of the toxins to which they were exposed not only impacts the reliability of SEM, but also the reliability of decisions based on information contained in SEM.
- **Updating SEM:** Some claimants complain that while it is possible to submit information to be added to SEM, all too often information submitted by claimants is not accepted. In response, the DEEOIC notes that there are some instances where information submitted by a claimant was ultimately relied upon to update SEM. However, there are some claimants who report that they never received a response to their submissions. In addition, in a few other instances, while the DOL reviewed claimant’s submission and

concluded that it was not sufficient to warrant an update to SEM, the claimant continues to argue that the DOL: (1) did not provide a reason for refusing to accept their submissions or (2) applied a very high bar in reviewing these submissions. As with many other issues involving the EEOICPA, some claimants believe that where other records cannot be located, the evidence that they submit ought to be accepted.

- **Limits of SEM:** Many claimants are not aware that there are very definite limits to SEM. Thus, since SEM purports to list the toxins verified as having been onsite and used at various DOE facilities, many claimants believe that if SEM lists the toxin as having been used at a facility, then exposure to this toxin is conclusively established. Unfortunately, SEM is not that straight-forward.

The information on SEM reflects summaries of information contained in articles and documents. However, in order to fully understand SEM, one needs to review these documents and articles. As an example, while SEM may list a toxin as having been present and used at an area, it may ultimately be determined that the employee did not have “sufficient” exposure to be a factor in his/her illness. [This issue is discussed in further detail at section 8.3]. This is precisely what happened to an employee who worked as an administrator. Because SEM shows that this employee worked with toxins that are linked to his/her illness, this employee believes that he/she has the requisite exposure. Nevertheless, the DEEOIC determined that the employee’s exposure was not “significant” enough to have contributed to the illness. In light of the paucity of records, as well as questions concerning the accuracy of existing records, this employee is troubled by this result.

As a result of the questions and concerns that claimants raise regarding SEM, some claimants argue that:

- o If SEM lists a toxins as present and used at a particular site/building/area (or labor category), then it should be accepted that those who worked at that site/building/area; (or labor category) were exposed to this toxin.
- o In the alternative, some claimants contend that the articles and documents underlying SEM ought to be identified and made available on SEM.

## SECTION 7.3 Other Issues Related to Exposure

- SEM is a web-based tool. Unfortunately some of the claimants who contact us do not have access to the internet; some have limited access; and others are not comfortable with computers and/or the internet. Accordingly, some claimants are not able to take advantage of SEM.<sup>20</sup>
- During the course of this year, we were contacted by couriers, as well as a personnel officer (who visited multiple sites) who contend that because of the transient nature of their work, it is extremely difficult to locate exposure records for all of the sites where they had a presence. In at least one instance, since one site was deemed the “assigned” site, there are exposure records for this site. However, exposure records for the other sites where this employee worked cannot be located.

<sup>20]</sup> In fact it is not unusual for our Office to be asked to provide a claimant with copies of pages of SEM.

## SECTION 8

### SECTION 8 CAUSATION

In order to be eligible for benefits under both Part B and Part E, the illness must be linked to exposure to toxins at work. Under Part B, the illness must be caused by exposure to radiation, beryllium or silica. In cancer claims pursued under Part B, causation is established by a dose reconstruction, unless the claimant is a member of a SEC class. On the other hand, eligibility under Part E requires that it be at least as likely as not that exposure to a toxic substance was a significant factor in aggravating, contributing to, or causing the employee's illness or death. Many claimants tell us that satisfying the burden of establishing employment and/or exposure can be problematic. These same claimants assure us that satisfying the burden of establishing causation is even more daunting.

#### SECTION 8.1 Dose Reconstruction

Dose reconstructions are intended to characterize the occupational radiation environment to which workers were exposed using available worker and/or workplace monitoring information. If radiation exposure in the workplace environment cannot be fully characterized based on available data, default values based on reasonable scientific assumptions are used as substitutes. Where a dose reconstruction is performed, entitlement to compensation is based on the probability that the worker's cancer was "at least as likely as not" related to his/her exposure to ionizing radiation during employment at a covered facility. Responsibility for conducting dose reconstructions has been given to NIOSH's Division of Compensation Analysis and Support (DCAS, formerly known as OCAS, the Office of Compensation Analysis and Support).

To help explain dose reconstructions, NIOSH developed a video that provides a basic understanding of dose reconstructions and the overall dose reconstruction program. Individuals can view this video by accessing NIOSH's website or they can request a hard copy of this video.

While NIOSH performs the dose reconstruction, the results of the dose reconstruction are forwarded to the DOL who determines the probability of causation. In determining the probability of causation the DOL uses a computer software application developed by NIOSH in collaboration with the National Cancer Institute. The online version of this computer software application, NIOSH-IREP, is available on the NIOSH/DCAS website.

Throughout this year, we talked to claimants who viewed the dose reconstruction video, as well as one claimant who accessed the online version of NIOSH-IREP. These claimants still had questions after accessing these tools.

Other complaints concerning dose reconstructions include:

- **The length of time that it takes to perform a dose reconstruction:** While we only see a fraction of the cases submitted for dose reconstruction, in our experience it currently takes approximately one year to perform most dose reconstructions. Figure 1 on NIOSH's website at "NIOSH Program Area: Dose Reconstruction" indicates that in FY 2008 it took an average of 204 days to process a dose reconstruction. Yet, we encounter some instances where the dose

**NIOSH recognizes that there are concerns with the amount of time that it takes to perform dose reconstructions and indicates that it is working to shorten the time that it takes to perform dose reconstructions.**

reconstruction takes much longer. Figure 3 on NIOSH's website at "Dose Reconstruction" indicates that as of January 1, 2009, there were 503 dose reconstructions at NIOSH pending for greater than 2 years. See <http://www.cdc.gov/niosh/ocas/ocasdose.html>. Accordingly, the amount of time that it takes to perform a dose reconstruction continues to be a major complaint.

- **Methodology of dose reconstructions.** While the dose reconstruction process is very complicated, there are some claimants who have researched this process and in light of their findings have questions concerning the methodology of dose reconstructions. The regulations implemented by the DOL, however, specifically provide that the methodology used by the Department of Health and Human Services (NIOSH) in arriving at reasonable estimates of the radiation doses received by an employee, as well as the methodology used by the DOL to determine if a claimed cancer was at least as likely as not related to covered employment is binding on the DEEOIC's Final Adjudication Branch. Accordingly, a challenge of the methodology of a dose reconstruction will not be addressed by the DOL. [Note: the Final Adjudication Branch will consider objections concerning the application of these methodologies]. See 20 C.F.R. §§ 30.318(b) and (c).

Since the DEEOIC will not consider challenges to the methodology of dose reconstructions, some claimants attempt to raise their concerns with NIOSH.<sup>21</sup> In our experience, while NIOSH endeavors to answer questions, some claimants are not satisfied with the answers provided by NIOSH.

- **Data used to perform dose reconstruction.** As discussed in section 7.2, many claimants question the accuracy of exposure records used to perform the dose reconstruction. Claimants contact us to assert that existing records do not record all of their exposures to radiation. In addition, we routinely are assured that in the course of the day it was common for employees to be directed to remove their dosimetry badges. Some claimants also contend that existing records do not reflect all of the accidents that occurred or minimize the severity of these accidents. Many of the claimants who contact us believe that accurate consideration of these accidents and mishaps would significantly increase their dose reconstruction.<sup>22</sup>
- **Use of co-worker data and/or surrogate data:** If there is little or no personal exposure information, NIOSH uses information from technical documents such as technical basis documents; site profile documents; technical information bulletins and data from other workers at the site to fill in the areas where the personal exposure information is lacking. When information for a particular facility needs to be supplemented to adequately characterize the workplace exposure conditions, the model may incorporate non-facility-specific data (surrogate data).

Some claimants firmly believe that anytime personal exposure information is not available, claimants ought to be eligible for SEC coverage. Claimants assert that each job was unique and thus argue that even among employees in the same labor category and/or working at the same site, there are significant differences that affect the levels of exposure.

21] For many claimants because it can be time consuming; financially expensive; and often requires experienced legal counsel, appealing these matters to federal court is not viable option.

22] In response to a probability of causation of less than 50%, some claimants endeavor to locate evidence documenting additional days or months of exposure (or evidence documenting an additional accident). To the chagrin of many of these claimants, it has been the experience of this Office that consideration of an additional accident or establishing a few more days or months of exposure usually does not significantly change the results of the dose reconstruction.

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These concerns are heightened when the data used for the dose reconstruction is not specific to their site. We are contacted by claimants who believe that the differences in the work environments (and the specific work performed) are too great to use data from one site to accurately determine the dose reconstruction of an employee at another site.

Accordingly, some claimants have no confidence in dose reconstructions that utilize data from other employees at the same site, as well as data from similar employees at other sites.

- **Supplementing Exposure Information:** We receive a number of complaints alleging that information provided to NIOSH was not considered. Some of these allegations involve instances where information was not submitted to the appropriate agency, i.e., information that should have been submitted to the DOL, was instead submitted to NIOSH. Nevertheless, there are many other instances where information properly submitted to NIOSH does not result in a change in the dose reconstruction. In many of these instances the claimant contends that evidence is relevant and substantial, yet NIOSH determines that the evidence does not significantly impact the dose reconstruction.

In some instances the claimant's expectation as to the impact of additional information does not materialize. We are aware of a number of instances where claimant's endeavored to establish additional exposures only to be disappointed that this additional exposure did not substantially impact the dose reconstruction.

- **Partial Dose Reconstruction:** Where a SEC class of employees is designated, but the specific case does not meet the criteria for compensation under the SEC, a partial dose reconstruction is performed by NIOSH.<sup>23</sup> However, since the addition of the SEC class was determined because some data was unusable, NIOSH can only reconstruct a portion of the dose. NIOSH considers these partial dose reconstructions as complete (and a best estimate given that all reliable data available was used). However, since it is conceded that some data is unusable, we have heard from some claimants who question the value and accuracy of partial dose reconstructions. This is the precise argument raised by the surviving child of a former worker of the Nuclear Materials and Equipment Corporation (NUMEC) of Apollo, Pennsylvania. Since NUMEC was granted an SEC on the basis that sufficient records did not exist to perform a dose reconstruction, this claimant questions why, when he does not qualify for the SEC, NIOSH now has sufficient records to perform a partial dose reconstruction.<sup>24</sup>
- **How can dose reconstruction be so low:** Many claimants contact us with a general disagreement with the results of their dose reconstruction. Citing to the factors such as the fact that they did not wear protective clothing; that they were present when a particularly "bad" accident occurred; and/or the length of time that they were exposed to radiation, some claimants question how their dose reconstruction can result in such a "low" number. Claimants also speak with each other and compare dose reconstructions. Accordingly, some claimants question why the dose reconstruction can be so different for individuals who worked side by side and developed the same cancer.

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23] The case may not meet the criteria for compensation under the SEC because the specific employee may not have one of the qualifying cancers listed for the SEC and/or does not meet the employment criteria for the SEC class.

24] The SEC for NUMEC covers all atomic weapons employees who worked at NUMEC between January 1, 1957 and December 31, 1983.

- **Dose reconstructions involving some Part E claims:** There were a couple of instances this year where claimants argued that scheduling their Part E cancer claim for a dose reconstruction resulted in further delaying the claim. In these instances the claimants were fairly confident that his/her Part E cancer claim would be accepted based on exposure to toxins other than radiation. Consequently, these claimants questioned the need to wait (an additional year) for the completion of the dose reconstruction before reviewing the merits of their Part E cancer claim.
- **Overestimates:** Overestimates continue to trouble many claimants. Because accurately estimating an employee's exposure can be time consuming NIOSH makes assumptions on dose estimates that are favorable to the claimant in order to simplify the dose reconstruction process. One assumption is to significantly over-estimate the exposure based on the highest levels of exposure observed or possible for the facility. This approach is based on the assumption that if the claim is not compensable using these significantly over-estimated exposure estimates no further refinement to the dose reconstruction is required.

Complaints sometimes arise when a subsequent dose reconstruction is necessary. Anytime a new cancer is reported to NIOSH, the dose reconstruction is reworked to include the new cancer. If the new cancer creates a potentially compensable case, the dose reconstruction is refined using more probable and precise exposure estimates – and this refined estimate often will be lower than the significant overestimates used in the initial dose reconstruction. Accordingly, we see many instances where the subsequent dose reconstruction using the more probable and precise exposure estimates results in a probability of causation (PoC) that is lower than the earlier PoC based on overestimates.

Although the dose reconstruction report informs the claimant when a dose reconstruction is based on overestimates, many claimants overlook or do not fully understand this notice. Consequently, we hear from claimants who are understandably upset when their subsequent dose reconstruction based on multiple cancers now results in a lower PoC than the earlier PoC which was based on only one cancer. This disappointment is especially great when the overestimated dose reconstruction resulted in a PoC that was close to 50% - thus leading the claimant to believe that the addition of the second cancer would yield a PoC of 50% or greater.

- **Reworks of dose reconstructions:** We encounter claimants who are not aware that the diagnosis of an additional cancer prompts a new dose reconstruction. Similarly, some claimants who we encounter do not realize that they ought to include all cancers when filing a claim.

## SECTION 8.2 Special Exposure Cohorts (Causation)

As a rule, a dose reconstruction is performed for all cancer claims. The exception to this rule is where the employee qualifies for a Special Exposure Cohort (SEC) which allows eligible claimants to be compensated without the completion of a dose reconstruction or a determination of the probability of causation.

The EEOICPA originally established four (4) SEC classes which included employees who worked on Amchitka Island, Alaska and employees who worked at gaseous diffusion plants in Paducah, Kentucky; Portsmouth, Ohio;

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or Oak Ridge, Tennessee.<sup>25</sup> However, EEOICPA also authorized the Secretary of Health and Human Services to add other classes of employees to the SEC. As of November 22, 2010, HHS had added 68 additional SEC classes to the four (4) statutory classes.

In order to qualify for compensation as a member of an SEC class, a covered employee must have worked for a specified period of time at an SEC work site, and must have developed at least one of 22 “specified cancers.” While the SEC process is intended to ease claimant’s burden in establishing entitlement, we receive a number of complaints addressing this process. Here are some of the more common complaints:

- **How are SECs selected:** A number of claimants question the process for establishing classes of SECs. These claimants do not understand why some sites have a SEC class while the petition for other SECs were denied.
- **All sites should be SECs:** Because complete exposure records often do not exist and because some claimants question the accuracy of the exposure records that do exist, some claimants have expressed their belief that all sites ought to be SECs. These individuals tend to have little confidence in the dose reconstruction process and therefore believe that the SEC process would be a fairer system.
- **The 22 cancers:** There are 22 specified cancers covered under the SEC. Some claimants question why only these 22 cancers are covered for purposes of SECs.<sup>26</sup> We especially hear from claimants who question why prostate cancer and skin cancer are not included as “specified cancers” for purposes of SECs.
- **Chronic lymphocytic leukemia:** The statute specifically excludes chronic lymphocytic leukemia (CLL) as a SEC cancer. Some claimants have submitted recent literature that challenges the notion that CLL is not a radiogenic cancer.<sup>27</sup> This literature has been under review by NIOSH for some time.<sup>28</sup> There are claimants who are very anxious to resolve this matter.
- **250 Days:** In order to qualify for compensation as a member of an SEC class, the covered employee must have worked for a specified period of time at an SEC work site. In most instances this specified period of time is 250 days. We have encountered situations where claimants found it difficult to establish 250 days of work at SEC work sites. While some claimants encounter difficulties establishing the 250 days because employment records were lost, destroyed, or never kept in the first place, there are some other obstacles that are unique to the SEC process:

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25] With respect to the four (4) SECs established by the EEOICPA, employees had to be diagnosed with a specified cancer and have worked at gaseous diffusion plants in Paducah, Kentucky; Portsmouth, Ohio; or Oak Ridge, Tennessee for a total of at least 250 days before February 1, 1992 and were monitored for radiation exposure with dosimetry badges or had jobs with similar exposures to those monitored or were employees who worked before January 1, 1974, on Amchitka Island, Alaska and were exposed to radiation related to the Long Shot, Milrow or Cannikin underground nuclear tests. See 42 U.S.C. § 7384(14).

26] The specified cancers for purposes of the SECs are defined in the statute at 42 U.S.C. § 7384(17). Thus, this is not a list created by NIOSH or the DOL – rather this listing is established by the statute.

27] Section 7384(17) specifically excludes chronic lymphocytic leukemia (CLL) as a SEC cancer. 42 U.S.C. § 7384(17). Regulations promulgated by NIOSH exclude CLL from dose reconstructions.

28] We referred to the submission of this literature challenging the notion that CLL was not a radiogenic cancer two years ago in our 2008 Annual Report to Congress.

- Workers with a presence at multiple sites, often find it difficult to establish the length of time that they spent at any one site. Consequently, these workers may find it difficult to establish that they spent a total of 250 days at SEC work sites.
  - An employee worked at the Sandia Lab in Albuquerque which does not have a SEC class. However, this employee worked with metal samples taken from ground zero of a blast conducted at the Nevada Test Site (NTS), which has an SEC class. To date this employee has been unsuccessful with his argument that for purposes of adjudicating his claim he should be included in the SEC class for NTS.
- **Specified time periods:** An SEC covers work performed during specified periods of time. We have been contacted by claimants who argue that it is unfair to exclude them from inclusion in the SEC class simply because they “miss” the time period by a few days or few months.

Similarly, certain cancers are included as “specified cancers” provided that onset was at least a specified time after initial exposure. For example, brain cancer is a specified cancer provided that the onset was at least five (5) years after the initial exposure. A number of claimants have complained that the DOL is too rigid in adhering to these onset dates. These claimants argue that the duration and intensity of their exposure should be considered in determining whether they qualify for the SEC. Thus, a claimant with brain cancer argued that an onset four (4) years after initial exposure should be sufficient when you consider the intensity and duration of her exposure.

- **SEC process takes too long or results in delay of case:** This year we heard from a claimant who is very concerned with the length of time that the SEC petition for United Nuclear Corporation has been pending. This petition was received on June 19, 2008, and currently is with an Advisory Board work group.

In another instance, the dose reconstruction was delayed for almost two years while issues involving a possible SEC class were addressed. [Ultimately, an SEC class was established for this site, BWX Technologies, Inc., in Lynchburg, Virginia]. Throughout this delay, one claimant made it clear that her main concern was access to the medical benefits that would come with a favorable resolution of her claim. On more than one occasion as this delay continued, this claimant unsuccessfully tried to find a way to receive interim medical benefits pending the resolution of these issues.

- **Problem with the recent SEC for the Mound Plant.** A new SEC class was established for the Mound Plant in August 2010. Unfortunately, after the DOL began to make payments to members of this SEC class, technical issues concerning the criterion for this SEC were identified. These issues affect inclusion in this class. As such, the DOL is currently reviewing all cases in the class. In the meantime, we are aware of instances where certain siblings received compensation prior to the identification of these technical issues while other siblings have not received compensation. Those siblings who have not received compensation question whether the resolution of these issues will result in the denial of their claims. On the other hand, those who have received compensation question whether they ultimately may be required to return this compensation. Currently, the DOL is unable to say how long it will take to resolve this matter.

### SECTION 8.3 Part E Causation

Part E covers any illness or death (including an illness or death related to cancer or beryllium) where it is “at least as likely as not” that exposure to a toxic substance was a significant factor in aggravating, contributing to, or causing the employee’s illness or death. We are told by many claimants that it can be extremely difficult to find evidence linking certain illnesses to particular toxins.

- **Causation and SEM:** In addition to the listings of toxins present and used at DOE facilities, SEM also contains a listing of approximately 130 illnesses and for each of these illnesses identifies the toxins linked to that illness. Nevertheless, SEM is a summary of information contained in articles and documents (see discussion at section 7.2). Therefore, in order to fully understand SEM, one must consider the articles and documents that underlie SEM. For instance, while SEM may show a link between an illness and a toxin, the underlying articles and documents may indicate that this illness arises after long term exposure.

While the DEEOIC has been consistent in its application of SEM, we continue to encounter claimants, representatives, and others who are surprised to discover that even though SEM shows a link between an illness and particular toxins at work, in most instances they still have to submit medical/scientific evidence addressing causation. Some claimants who contact us contend that if SEM shows a link then it ought to be conclusively accepted that a link is established. Others have argued that the information within SEM should be accepted as fact unless the government is able to produce evidence to the contrary. Still other claimants have suggested that the articles and documents that underlie SEM and used by claim examiners ought to be available on SEM for public review.

The complaints concerning the limitations of SEM are often heightened when the employee is deceased. A number of survivors have assured us that in their experience if issues, such as exposure and causation, were not addressed in medical reports prepared while the employee was living most physicians are reluctant to address these issues post-mortem. This problem is exemplified by a case where the worker died from chronic renal failure. While SEM clearly links chronic renal failure to specific toxins to which the employee was exposed, the claim was denied because DOL determined that exposure to these toxins was not a significant factor in causing; contributing to; or aggravating the employee’s chronic renal failure. Because the employee died approximately twenty years before the passage of the EEOICPA, the surviving family members are unable to locate a physician who will address the possibility that the death was linked to exposure to any of these identified toxins.

- **Difficult to locate medical evidence addressing causation:** There are some illnesses for which there is a wealth of information addressing the link to various toxins. Unfortunately, there are many other illnesses for which there is little or no medical evidence addressing the possible link with specific toxins. Claimants believe that it is not fair to place the burden on them to establish a link when everyone knows that there is little or no medical evidence addressing these issues. Some of these claimants argue that if medical studies are necessary to establish a link, the government ought to sponsor these studies. Moreover, some claimants question the need to establish causation. These claimants believe that even without specific studies, it is obvious that many of these toxins were dangerous. Accordingly, these claimants argue that in the spirit of being “claimant-friendly,” it should be assumed that exposure to these dangerous toxins was at least as likely as not a significant factor in aggravating, contributing to, or causing their illnesses.

Some survivors also complain that prior to the passage of the EEOICPA there was no reason (and because of the lack of available information, no way) they or their loved ones could have developed adequate evidence addressing causation. Accordingly, these survivors contend that requiring them to now come forward with evidence addressing causation places a near impossible burden on them.

- **Little guidance provided in developing evidence on causation:** A common complaint that we receive involves situations where a claimant submits medical evidence addressing causation and in response the claim is denied or returned to the claimant for further development. While some claimants tell us that it can be frustrating when their claim is denied (or returned for further development), these claimants often confide that the real problem arises when they try to get their physician to supplement these reports. We hear of instances where physicians become frustrated, and in one instance flatly refused, when asked to supplement a previously written report. As a result, claimants tell us that it would be more efficient and less stressful if the DOL provided (in advance) more guidance or samples outlining what will constitute an acceptable medical report.
- **The Synergistic Effects:** Some claimants find it very troubling that SEM does not address the possibility that an illness is the result of a combination of ionizing radiation and multiple chemical exposures (the synergistic effect). The DOL acknowledges that SEM does not address synergy, but asserts that this is because currently there is not sufficient peer reviewed medical literature to support such information. Nevertheless, the DOL asserts that it will consider evidence of synergy that is submitted by the claimant. Unfortunately, for most claimants the time and expense needed to develop evidence of synergy is prohibitive. This is another instance where claimants argue that the expense of developing the necessary studies should be borne by those who exposed them to these dangers (i.e., the government and/or the employers).

A few claimants report that they were able to locate what they believe is credible evidence of synergy, yet this evidence was not accepted. Similar to arguments raised by others, these claimants believe that the standard for accepting such evidence is too demanding.

### SECTION 9 IMPAIRMENT/WAGE LOSS

DOE contractor and subcontractor employees found eligible for compensation under Part B may also be eligible for compensation for impairment and/or wage loss under Part E. However, the potentially eligible employee must make a written request for this compensation. While the DEEOIC and the Resource Centers have endeavored to notify those Part B claimants who may be eligible for compensation for impairment and/or wage loss under Part E, we continue to encounter some claimants who are not aware of their potential eligibility for this compensation.

With respect to Part E claims filed by living workers, if the worker establishes that he/she was a DOE contractor or subcontractor employee who contracted a covered illness through exposure to toxic substances at a covered DOE facility, a decision will issue finding the worker eligible for benefits. At that point, the worker will receive a medical benefits card which the employee can use to pay medical bills related to the covered illness. This determination of eligibility for benefits does not, however, result in the payment of compensation. Rather under Part E, entitlement to compensation in claims filed by living workers is based on the level of impairment and/or wage loss due to the covered illness.<sup>29</sup> As with Part B, a written request to the DOL is necessary in order to trigger a determination that the Part E claimant is entitled to compensation for impairment and/or wage loss.

- **Impairment:** An impairment award is monetary compensation for the permanent loss of function of a body part or organ, specific to the accepted illness/condition, and is determined by a qualified physician using the American Medical Association's (AMA) Guide to the Evaluation of Permanent Impairment, 5th Edition (the Guide).
- **Wage Loss:** Wage loss compensation is payable for those years worked before Social Security Administration regular retirement age during which wage loss occurred as a result of the accepted condition/illness.

In previous years we encountered many claimants who were not aware that a written request to the DOL was necessary in order to trigger a determination of entitlement to compensation for impairment and/or wage loss. However, the DOL and the Resource Centers initiated efforts to ensure that, where appropriate, claimants were notified of their eligibility to file for impairment and/or wage loss compensation. Nevertheless on occasion, we still encounter claimants who have no inkling that they may be potentially eligible for compensation for impairment and/or wage loss. In addition, we also occasionally encounter claimants who are not aware that they can request a re-evaluation of an impairment rating every two years.<sup>30</sup> Other issues that we encountered this year involving impairment and/or wage loss include:

- Claimant has five (5) skin cancers. In performing the impairment rating, the physician uses the Combined Values Chart found in the Guide to arrive at an impairment rating of 19%. Subsequently, based on an e-mail conversation with the President of the American Board of Independent Medical Examiners, the DEEOIC

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29] Under Part E, if a claim filed by an eligible survivor is approved, compensation ranging from \$125,000 to \$175,000 is paid depending upon the level of proven wage loss. The exception to this is where the employee files a Part E claim but dies before compensation is paid and the employee's death occurred solely from a cause other than the covered illness of the employee. In this situation, the survivor of that employee may elect to receive the amount of contractor employee compensation that the employee would have received if the employee's death had not occurred before compensation was paid. 42 U.S.C. §7385s-1(2)(B).

30] A new evaluation may be requested whenever the DOL accepts a new illness that increases a claimant's impairment.

determines that the physician erred in his application of the Combined Values Chart and should have strictly relied on Table 8-2 of the Guide to determine the totality of the effect that the skin cancer had on the patient. The claimant disagrees with the DEEOIC and firmly believes that the rating provided by his/her physician is correct.

- Claimant asserts that for financial reasons, he/she continued to work in spite of the pain associated with his/her illness. This claimant is upset that he/she is not entitled to wage loss for the period prior to the cessation of work. Claimant maintains that he/she should be compensated for continuing to work in spite of the pain.
- A number of instances where claimants believe that the impairment rating did not adequately consider all of the covered illnesses.

# SECTION 10 OTHER ADMINISTRATIVE MATTERS

## SECTION 10.1 Interactions with the DEEOIC

Throughout the claims process, claimants and/or their representatives interact with DEEOIC personnel. These interactions usually begin when the claim is filed with the Resource Center.<sup>31</sup> Once the Resource Center completes its initial development, the claim is forwarded to one of the four District Offices for processing. For reasons, many of which we discuss throughout this report, these interactions can be stressful. Here are some of the complaints that we receive concerning interactions with the DEEOIC:

- **Prefer to interact with DOL personnel face-to-face:** A continuing complaint that we hear involves the lack of direct contact with those who process claims. Since they live in the vicinity of the Resource Center some claimants are able to go to these centers and directly discuss their claims with the staff. Unfortunately, once the case is forwarded to the District Office, correspondence usually occurs via letters; telephone; and/or facsimile.<sup>32</sup> Some claimants would prefer to interact directly with the individual handling their claim. Many claimants also believe that they are better served if they first establish a rapport with the staff person handling their claim.
- **Rude/Insensitive comments:** This year, a number of claimants and representatives contacted our Office to complain about rude or insensitive comments/behavior of representatives of the DOL. In some instances, it appears that a comment may have been well intentioned, but not well received – for example, while trying to expedite the claim of a terminally ill claimant, the DOL representative purportedly asked a family member, “how much longer do you expect [the claimant] to live?”

However, there are many other instances where a claimant alleges that rude or snide comments were made. In addition, we have also heard from some claimants who believe that delays in returning telephone calls or responding to correspondence is a deliberate attempt to discourage (or punish) certain claimants and/or representatives.<sup>33</sup> In response to these allegations, the DOL usually turns to the notes in its file to provide a somewhat different version of events. In many of the instances, the DOL suggests that there has been a misunderstanding regarding what was actually said.

We continually review the complaints that we receive alleging rude or insensitive comments, and to date based on our review we have identified only one discernible pattern – many of these complaints are raised by the same complainants (this issue is discussed below).

Nevertheless, what is clear to us is that when some claimants contact the DEEOIC (and sometimes the Resource Centers) they are often already confused and/or under stress. Such situations often provide an atmosphere where a statement can be misinterpreted or a comment is not worded very “artfully.”

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31] A claim may also be filed directly with the DEEOIC.

32] Some claimants have told us that the District Offices discourage communication via e-mails.

33] As in previous years, we tend to receive more complaints concerning interactions with the Seattle, Denver and Jacksonville District Offices (and fewer addressing the Cleveland District Office), however this may reflect the fact that in general we tend to receive more inquiries concerning the Seattle, Denver and Jacksonville District Offices and less concerning Cleveland

Based on our review, some of these allegations of rudeness concern claims where the DOL has made a determination, yet the claimant (or the representative) disagrees with this determination and continues to pursue the matter with the DEEOIC. Some of these “stalemates” can be virtual tinderboxes. Consequently, opportunities for misunderstandings definitely exist. The DEEOIC (including the Resource Centers) are adamant in asserting their commitment to provide claimants and potential claimants with professional and courteous service. Thus, to ensure that the DEEOIC (and the Resource Centers) live up to this commitment, we encourage claimants; potential claimants; and representatives to continue to bring their complaints to our attention.

- **Allegations of bias towards certain representatives:** As noted above, in reviewing the allegations involving interactions with DEEOIC personnel, the only discernible pattern that we identified was the fact that we receive a sizable percentage of these complaints from the same lay representatives. One representative contacted us to complain about an alleged conversation between the DEEOIC and the claimant wherein the DOL personnel purportedly questioned the capabilities of this representative. At least five other representatives have contacted us multiple times suggesting that actions (or inactions) by the DOL indicate a bias against these representatives (and/or their clients). Some of the specific complaints that we hear include allegations of inappropriate comments made [often to the claimant] questioning the abilities of the representative; assertions of rude comments; and assertions that the DEEOIC constantly delays or applies a higher standard to claims filed by these representatives. We also receive some complaints concerning the actions and inactions of some of the Resource Centers as well.

In response to these allegations of bias, the Resource Center and/or the DEEOIC both vehemently deny any bias against any claimant or representative. In some instances the DEEOIC suggests that what is being labeled as a “delay or “questionable conduct” is in actuality procedures necessitated by the fact of the case. In addition, there have been some circumstances where the DEEOIC suggests that it was the representative who was rude or disrespectful to the DOL staff.<sup>34</sup> Nevertheless, we continue to receive these complaints.

When we asked these representatives what might be done to address this issue, one suggestion was the option to occasionally allow for a change in the claims examiner. These representatives understand that changing claims examiners should not be the norm, nevertheless they also believe that there ought to be recognition that sometimes two people just are not able to “work together.” Accordingly, some of these representatives believe that there should be a procedure where a request for a new claims examiner will be considered. Some of these representatives believe that they have experienced instances where a new claims examiner was warranted.

- **Change in claims examiner:** Some claimants believe that the processing of their claim was impeded by the change of the claims examiner. Even though the correspondence with the claims examiner is generally via telephone, letters, and facsimile, many claimants still endeavor to establish a rapport with the claims examiner. Thus, claimants are often disappointed when they attempt to contact the claims examiner only to discover that a new claims examiner has been assigned to their claim. In response, the DEEOIC notes that when a claims examiner resigns, retires, or is promoted, it is necessary to reassign their cases. In any event, many claimants would prefer that the DEEOIC take the initiative to immediately notify a claimant when a new claims examiner is assigned to their case.

<sup>34</sup>] There have also been instances where the DOL asserts that any delay was caused by the failure of the representative to adhere to established procedures.

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- **Processing of claims takes too long:** The length of time that it takes to process claims continues to be a major concern of many of the claimants who contact our Office. Since claimants are aware that the death of the employee could result in a reduction or nullification of the compensation that will be paid, perceived delays are often viewed very negatively. In addition, many claimants tell us that in light of their illnesses, they have experienced financial set backs. Thus, the compensation and/or medical benefits that come with the acceptance of a claim are desperately anticipated.

With respect to Part B claims, a majority of the issues related to delays in the processing of claims involve cases that require a dose reconstruction. Currently the need to perform a dose reconstruction adds approximately one year to the processing of a claim.<sup>35</sup> There are instances, however, where the requirement to perform a dose reconstruction can delay a case even longer. For instance:

- Claim forwarded for dose reconstruction, but then issues arose concerning whether a SEC class should be added for the facility. The claim was pending for approximately 3 years while these issues were addressed. (Ultimately the SEC class was approved).
- A dose reconstruction is pending for approximately three years while the approach for the dose reconstruction is determined.
- In another instance, a claimant has been waiting for approximately two years while the SEC petition for the United Nuclear Corporation undergoes review.

With respect to Part E claims, there has been an overall decrease in the average amount of time it takes for a claimant to receive a decision. As a result, we now see claims where the claimant files a claim; receives a recommended decision; and receives a final decision all within one year of the initial filing. Unfortunately, many of the claims that are brought to our attention have a much more prolonged history. Many of the factors that delay the processing of a claim have already been discussed, but just to name a few:

- Some claims are delayed while the claimant endeavors to locate evidence addressing employment; exposure; and/or causation.
  - Claimants sometimes submit evidence only to have that evidence returned for further development. [Claimants argue that it would be more efficient if more guidance was provided in advance].
  - Instances of extended delays caused by the need to re-create lost or misplaced documents.
- **Terminally ill claimants:** The EEOICP Procedural Manual provides for the priority processing of claims where the claimant is end-stage terminally ill. See EEOICP Procedural Manual, Chapter 2-033, subchapter 13. Unfortunately, we encounter some claimants who were not aware of this provision.

Moreover, this provision instructs DEEOIC personnel to use “sound judgment in determining if priority handling is warranted.” Over the course of this year, we encountered instances where the claimant (or representative) believed that they had submitted sufficient evidence to establish an end-stage terminally ill condition, and thus took exception with the DEEOIC’s request for additional information to establish this fact.

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35] According to statistics provided by NIOSH, the average number of days to process a dose reconstruction in 2008 was 204 days. Statistics provided by DEEOIC indicate that where the case was not sent to NIOSH, the average time to process all Part B cases (for all cases with final decisions issued through September 30, 2010) was 260 days

Another area of confusion concerns the processing of a claim once it is determined that the claimant is in the end-stage of an illness. Some individuals believe that if a claimant is in the end-stage of an illness, compensation and benefits are automatically paid. This is not true. Rather pursuant to the Procedural Manual, once it is determined that a claimant is in the end-stage of an illness, the entire adjudication process is to be expedited, and therein lies the problem. On the one hand, where all of the necessary evidence addressing an impairment rating had been submitted prior to the DEEOIC's receipt of notice of the claimant's terminal illness, the claim was expedited and the claimant received his/her compensation within a few days. On the other hand, there have been instances where when notified of the claimant's terminal illness, the claim was awaiting the submission of evidence addressing a requisite element of entitlement. In some of these instances, even though the claim was expedited, the processing of the claim still took time.<sup>36</sup>

- **More explanation in decisions:** Some claimants complain that in denying their claim, the DOL did not clearly explain the reasons for rejecting evidence. Many claimants contend that a clear understanding as to why evidence is not accepted is essential in order to develop subsequent evidence that does not contain the same flaws. We encountered a number of instances this year where the case was reviewed by a District Medical Consultant (DMC). Unfortunately, reports prepared by DMCs are not automatically provided to claimants (the claimant must request a copy of the report). Thus, we are aware of situations where a decision relied on findings by a DMC, yet because the decision did not fully explain the findings of the DMC, the claimant found it very difficult to discern the rationale for the decision. Many claimants also report similar problems when it comes to requesting reconsideration and/or re-opening of their claim. Some claimants have reported that since the decision did not adequately explain the reasons for the denial, they were at a loss to develop additional evidence that would be sufficient to support a request for reconsideration or a request to re-open a claim.

This issue has been discussed with the DEEOIC and over the past couple of years we have seen the fruit of efforts to enhance the reasoning contained in decisions. However, some claimants still contact us with complaints that involve “older” decisions where the rationale is not clear. Moreover, while efforts have been put forth to address this issue, we are still contacted by some claimants who receive decisions, but find it hard to discern the reasoning and rationale for the ultimate findings.

- **DMC reports only provided upon request:** There are instances where the DEEOIC seeks input from a DMC. Where a DMC is utilized, the claimant can request a copy of the DMC's report – the DMC report is not automatically provided to the claimant. This matter has been discussed with the DEEOIC who noted that they would advise claimants of their right to request a copy of this report. Nevertheless, we continue to encounter claimants who are not aware that they have the right to request a copy of the DMC report.
- **Questions concerning the evidence presented to DMCs:** Some claimants question whether the DEEOIC provides DMCs with all of the available medical evidence. In response the DEEOIC asserts that all evidence in the file is provided when a case is referred to a DMC.

<sup>36]</sup> When informed by the DOL that a claimant is terminal, where the necessary information is available, NIOSH will expedite the completion of the dose reconstruction. If the necessary information is not available, NIOSH expedites its efforts to obtain this information.

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In other instances, claimants assert that the question presented to the DMC was too limited. Many of these claimants believe that if the question presented to the DMC were broader (or posed differently) the DMC may have come to a different conclusion.

- **Use of referees:** Where a conflict exists between the medical evidence, the DEEOIC shall appoint a third physician to make a “referee examination.” The EEOICP Procedural Manual requires that the person appointed to perform this examination be someone qualified in the appropriate specialty who conforms to the standards regarding conflicts of interest adopted by the OWCP. Some claimants have questioned whether some of the individuals selected by the DEEOIC to serve as referees possessed the necessary qualifications to resolve the specific issue in controversy. In addition, some claimants question whether the fact that the DEEOIC has sole discretion to select referees places these “referees” in a position where they are “beholden” to the DEEOIC.
- **Notice of changes to the program:** Since the creation of the EEOICPA, there have been changes that affect the administration of this program. For example, while the statute initially established four (4) SECs, as of November 22, 2010, 68 additional SEC classes had been added. This year we received a number of complaints asserting that it was very difficult to stay apprised of changes affecting the EEOICPA. Claimants note that the law, policies, and procedures applicable to the EEOICPA are dispersed among the statute, the regulations, EEOICP Final Bulletins, EEOICP Final Circulars, and/or the EEOICP Procedural Manual. Some claimants have told us that it is very difficult to constantly monitor each of these documents for changes and updates.

The DEEOIC asserts that in all instances where there is a change in law (or procedure) previously denied claims are reviewed in order to identify those potentially impacted by this change. However, some claimants have contacted us to: (1) question the thoroughness with which the DEEOIC reviewed previously denied claims to identify those impacted by changes; (2) assert that where the review by the DEEOIC determines that the case is not impacted by the change, the claimant never receives any notice (and thus never knows that the review was performed); and (3) assert that this policy only affects claims that were previously denied and thus has no impact where a previous claim has not been filed.

In one instance brought to our attention, a lay representative contacted us with what was initially described as a change in the DEEOIC’s policy involving the reimbursement of medical expenses where the claimant paid the medical expense, but died prior to the reimbursement of these expenses.<sup>37</sup> Ultimately, the DEEOIC explained that there had not been a change in the policy, and thus informed our Office that where a claimant files a claim, and then dies, any post-filing bills unpaid at that time will be paid. Nevertheless, this lay representative points out that since he/she was unable to locate any written policy clearly articulating this procedure, there was no way to know of the correct procedure, and thus no way for him/her to determine how to proceed once the claimant had passed away. This lay representative firmly believes that a written policy on this matter ought to be established.

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<sup>37</sup>] The use of the word “change” when responding to the inquiries posed by both the lay representative and this Office caused both the lay representative and this Office to believe that there had been a change in the policy and/or procedure involving the payment of reimbursements in these situations.

## SECTION 10.2 Medical Benefits Card/Medical Services

Under both Part B and Part E, employees whose claims are accepted, are entitled to medical treatment for the covered illness. [With the exception of those found eligible for beryllium sensitivity under Part B, who are entitled to medical monitoring]. This year, we encountered a number of issues related to the medical card and the payment of medical bills. A few of these issues include:

- Bills not paid because of an incorrect ICD-9 code used by the hospital. In one such instance, the claimant called the EEOICP Medical Bill Question Toll Free number and was informed that the hospital needed to call the EEOICP toll free number. The hospital, however, insisted that the DOL contact them. Ultimately, this matter was brought to the attention of the DEEOIC who resolved the issue by contacting the hospital.
- Claimant was not reimbursed in full for a bill that he/she directly paid. It was ultimately determined that the reason that claimant was not fully reimbursed was because the service was viewed as an office visit, not the specific procedure he/she had actually undergone. To resolve this matter claimant was advised to submit an itemized statement of the bill.
- Claimant entitled to medical benefits is also determined to have \$2300 in offsets. Claimant schedules treatment for the covered illness, but hospital refuses to provide treatment until treatment is authorized. Initially the DEEOIC states that it will not authorize treatment until the \$2300 offset is depleted. This matter is discussed with the DEEOIC who ultimately devises a way for claimant to pay the \$2300 to the hospital and receive the necessary authorization. [Note: this claimant was always willing to pay the \$2300].
- Instances where claimants reported that their physicians refused to accept the medical card. In such instances, per the DEEOIC's request, our Office instructed these claimants to contact the DEEOIC who, in turn, discussed with the physician the procedures for enrolling in this program.

There are a wide range of medical services that an employee with a covered illness may require. For instance:

- A claimant lives in a house that does not have electricity, running water, or heat. The child of this claimant contacts us when the treating physician recommends that electricity, running water and heat would facilitate his treatment of this claimant.
- As a result of a covered illness, claimant needs a transplant. However, before claimant can be placed on the transplant list, he/she is required to have dental work performed and must make physical changes to an existing bathroom.

Recently a claimant approached us with a concern involving the DOL regulation that provides that where there is entitlement to medical services, covered employees are entitled to receive all medical services necessary to treat his/her occupational illness or covered illness retroactive to the date the claim for benefits was filed. See 20 C.F.R. §30.400(a). In this particular case, in December 2009, while in the hospital, the claimant was diagnosed with a covered illness. However, due to the hospitalization, it was not until late January 2010 that the claimant was able to file his/her claim. Applying section 30.400 (a) the DOL has denied the employee's request for reimbursement for medical services rendered prior to the filing of the claim. The claimant contends that this regulation does not reflect a "claimant-friendly" attitude. The claimant asserts that he/she is being penalized for being in the hospital when the illness was discovered and argues that as a result of this regulation, the government is not paying for medical services that are clearly related to the covered illness. However, the statute clearly provides that "[a]n individual receiving benefits under this section shall be furnished those benefits as of the date on which that individual submitted the claim for those benefits in accordance with this subchapter." 42 U.S.C. §7384t (d) and §7385s-8.

## SECTION 10

### SECTION 10.3 Medical Screenings Not Available for Employees of Atomic Weapons Employers

The National Defense Authorization Act of FY 1993, Section 3162, charged the DOE with providing ongoing medical screening exams to all former DOE federal, contractor and subcontractor employees who may be at risk for occupational disease based on their exposures at DOE sites. Thereafter, the DOE began to provide beryllium sensitization screening to former employees of now defunct DOE beryllium vendors who were employed with these companies while they performed work for the DOE. The DOE's intent was to ensure that workers who no longer have an employer to turn to for beryllium disease testing can receive this important screening.

While attending a meeting of former workers of BWX, Technologies, Inc, in Lynchburg, Virginia it was brought to our attention that the government does not provide free medical screenings to the former workers of atomic weapons employers. Some of these employees questioned why others former workers are provided screening but former workers of atomic weapons employers are not offered this valuable service.

Coverage of beryllium vendor employees and employees of atomic weapons employers were not specified in Section 3162 of the Defense Authorization Act of 1993, which required that DOE provide medical screening to its former workers. The DOE has, therefore, focused the bulk of its medical screening efforts on those who were employed at DOE facilities.

### SECTION 10.4 Attorney Fees

We continue to receive comments that suggest that the limitations placed on the awards of attorney fees discourages some legal and lay representatives from accepting EEOICPA claims. It is argued that due to the length of time (and the work) required on some claims, the current limits on the amounts that a representative can receive are too low.

This year, we also received a few inquiries concerning the fees charged by some representatives. Some of these inquiries involved matters such as (a) the nature of the fee agreement entered into by the parties; and (b) whether the claimant fully understood the agreement. Issues such as these are outside the scope of our authority to resolve.

On the other hand, a few inquiries asked whether a fee was consistent with the statute. This is another example of where the EEOICPA can be complicated. Many of the inquiries that we receive stem from the fact that Part E does not have its own procedures for attorney fees. Rather, Part E adopts the Part B attorney fee provision.<sup>38</sup> See 42 U.S.C. §§ 7385g and 7385s-9. The problem is that there are differences between Part B and Part E that become manifest when you apply the Part B attorney fee provision to Part E claims. For example, a representative is not allowed to charge more than the following percentages for services connected with a claim:

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<sup>38</sup>] Although the provision is entitled "Attorney fees," the provision refers to the representative of an individual. Consequently, this provision appears to apply to all who represent claimants, not just attorneys

- (1) 2 percent for the filing of an initial claim with OWCP, provided that the representative was retained prior to the filing of the initial claim; plus
- (2) 10 percent of the difference between the lump-sum payment made to the claimant and the amount proposed in the recommended decision with respect to objections to a recommended decision.

20 C.F.R. §30.603 (b). See also 42 U.S.C. § 7385g. A few of the problems that arise with this provision include:

- Charging 2% for the filing of a Part B claim generally is not problematic since if eligible, claimants receive a lump-sum of \$150,000.<sup>39</sup> However, when a Part E claim is filed, the amount of compensation that will ultimately be paid is not certain. Rather one has to wait until there is a decision awarding impairment and/or wage loss to conclusively know the amount of Part E compensation awarded. Suggestions have been raised that there are instances where prior to the award of any Part E compensation some Part E claimants have been charged 2% (sometimes up to 2% of \$250,000) for the filing of a Part E claim. In some of these instances, it is suggested that 2% of \$250,000 was charged for filing a claim even though the ultimate award to the claimant was less than the maximum allowable amount of \$250,000.<sup>40</sup>
- A representative can charge up to ten percent of the difference between the lump sum payment made to the claimant and the amount proposed in the recommended decision. Again, application of this provision generally is not problematic in Part B claims where the claimant files a claim, receives a recommended decision, and then receives a final decision. However, Part E claims involving living workers tend to involve two sets of determinations and thus two recommended and two final decisions. First, there is a recommended and then a final decision addressing eligibility to benefits. If the Part E employee is found eligible for benefits, he/she receives a medical benefits card entitling him/her to medical services. However, at this point the employee does not receive any monetary compensation. Rather, in order to receive monetary compensation, the employee has to file for compensation for impairment and/or wage loss and if such a claim is filed, there will be a recommended, followed by a final decision addressing these issues.

While few Part E cases result in payment of medical expenses only, the fee limitation provision of the statute prohibits a representative from receiving a fee for filing a Part E case until some wage-loss or impairment compensation is paid to the claimant.

Another issue that has come to our attention involves services rendered on claims associated with new SECs. When a new SEC class is established, the DEEOIC identifies those previously denied claims potentially impacted by the new SEC. Those previously denied claims identified as potentially impacted by the new SEC are then reviewed for inclusion in the new SEC. A couple of individuals have contacted our Office expressing the concern that some claimants are not aware that the DOL automatically reviews previously denied claims for inclusion in a new SEC class, and thus when a new SEC class is announced, some claimants assume that they need an attorney to initiate review of their previously denied claim.

39] Most claimants found eligible for Part B benefits receive a lump sum award of \$150,000. The exception is where a claim is accepted for beryllium sensitivity. In such an instance, the claimant does not receive any compensation and is only entitled to medical monitoring. Thus, according to the DEEOIC, a representative cannot receive a fee for filing a case only accepted for beryllium sensitivity.

40] The statute clearly provides that a representative can only receive the specified percentage of the amount the claimant received, not the maximum amount allowed under the statute.

## SECTION 10

However, while it is true that when a new SEC class is established, the DEEOIC identifies potentially impacted claims and reviews them for their inclusion in the SEC: (1) some claimants question the thoroughness with which the DEEOIC identifies the previously denied claims that may be impacted by the new SEC; (2) some claimants are not aware of the procedures that the DEEOIC follows when a new SEC class is established and thus are not aware that their previously denied claim will be reviewed;<sup>41</sup> and (3) if the DEEOIC reviews a claim and determines that it is not impacted by the new SEC, the claimant is not notified (thus there are claimants who contact us because they are not certain if their claims were ever reviewed for inclusion in the new SEC).

### SECTION 10.5 Tax Issues

Each year claimants contact us to complain that they cannot receive a direct answer to their question as to whether compensation received pursuant to the EEOICPA is taxable. Most claimants tell us that in response to their inquiry, they are referred to the applicable provision of the statute. The applicable provision reads:

§7385e. Certification of treatment of payments under other laws

Compensation or benefits provided to an individual under this subchapter –

- (1) shall be treated for purposes of the internal revenue laws of the United States as damages for human suffering...

42 U.S.C. §7385e(1). Most claimants indicate that they are looking for a “yes” or “no” answer to their question, not a reference to a statutory provision that they do not understand. The DEEOIC responds that it is not authorized to provide tax advice and thus does not want to make assertions on issues not within its jurisdiction. Some claimants contend that if the DEEOIC cannot directly answer their question, it ought to at least refer them to someone (or some agency) who can answer these inquiries.

### SECTION 10.6 Take Home Toxins

We continue to encounter individuals who are convinced that the illness suffered by the spouses and/or children of former employees are the result of exposures to toxins that covered employees “brought home” with them. In response to these assertions it is generally noted that there is little, if any, medical literature to support these assertions. Nevertheless, in a few instances, claimants believe that they have uncovered medical literature that supports their contention that the illness suffered by a family member is the result of exposures to toxins “brought home” by the covered employee. However, even if such literature does exist, the statute does not provide for compensation to family members for illnesses that these family members suffer as a result of “take home toxins.”

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41] When a new SEC is established, the DEEOIC often holds a meeting in the general vicinity of the SEC site in order to inform claimants and potential claimants of this new SEC and to answer questions. Claimants who do not live near this meeting location sometimes are not notified of these meetings, and even if notified, often are unable to attend.

## Section 10.7 Retirement Issue

This last issue is not directly related to the EEOICPA. Unfortunately, this claimant is frustrated by the lack of a proper avenue to voice his concern and thus attended one of our town hall meetings to deliver his/her concern. This claimant asserts that he/she is aware that when other DOE facilities were scheduled to close, some employers initiated a policy to add years (sometimes up to three (3) years) to either the age or the service date of employees (especially those employees “close” to retirement) in order to ensure that these employees were eligible for retirement – and thus not negatively impacted by the closing of the facility. This claimant is frustrated that this practice was not extended to the employees of the Pinellas Plant and asserts that as a result, there are employees who were close, but not eligible for retirement when the facility closed. In response, the DOE notes that the decision to enhance the age and/or service date of certain employees was solely within the discretion of the employers. The DOE states that it did not direct or participate in these decisions.

### SECTION 11 CONCLUSIONS

As the statistics outlined in Appendix 11 indicate, there are claimants who are successful in pursuing an EEOICPA claim. Yet, the success experienced by some claimants has little bearing on the issues that confront other claimants. One claimant may find that all of his/her records are available, while another employee may find that very few, if any of his/her records can be located.

Consequently, this year we were contacted by claimants, potential claimants, representatives, and others with questions and complaints concerning the processing of EEOICPA claims. Many of the individuals who contact us find this program to be very complex and some question the level of assistance that is provided by the DEEOIC and the other agencies involved with this program. A common complaint that we hear suggests that the burden of proof placed on the claimants is too high, especially when you consider the extenuating circumstances such as the fact that evidence cannot be located; the belief by some that existing records are inaccurate; and/or medical evidence addressing the link between certain toxins and specific illnesses often does not exist.

Yet, most claimants who contact us are looking for more than a forum to report their complaints, grievances, and requests for assistance. Rather, most of the claimants with whom we encounter want assistance with their claim. To the extent that we are able, this Office endeavors to provide assistance, but there are limitations to the assistance that we can provide.

Some of the complaints that we receive involve issues directly related to the statute. Neither this Office nor the DEEOIC have the authority to amend or revise the statute. Rather, consistent with our mandate, this Office endeavors to utilize this report to bring these matters to the attention of Congress.

Some of the other issues brought to our attention involve regulatory or policy issues. Questions and disputes concerning these issues are discussed with the DEEOIC (or the other responsible agencies). However, if that agency determines that its regulation or policy is consistent with the statute, then resolution of such disagreements generally lies with the federal courts. Unfortunately, for many claimants pursuing these matters in federal court is not the optimum option. An appeal to federal court can be costly, often requires the assistance of someone familiar with the federal court system, and can be a lengthy ordeal. In addition, there are some instances where claimants question whether a court appeal will resolve the relevant issues. In fact, some claimants and representatives maintain that the federal courts may not be the best venue to resolve certain medical and scientific disputes. These claimants contend that some type of advisory board would be a better vehicle to resolve certain technical disputes that arise involving the administration of this program.

Still there are other complaints that address the administration of this program. While some of these complaints ultimately will have to be resolved with an appeal to federal court, there are a number of instances where our Office endeavors to work with the DEEOIC (or the other responsible agency) to resolve these matters. This report has discussed a number of areas where we raised concerns with the DEEOIC, DOE, NIOSH, and/or other agencies and institutions involved in the EEOICPA claims process.

We commend the DEEOIC and the other agencies involved with the administration of the EEOICPA for all of the efforts they have expended with this program. Yet, there is always more that can be done. Here are just a few suggestions that arise from the complaints that we received over the course of this year.

1. As noted in this report, many claimants become disappointed when they discover the limits of some of the information contained on SEM. We recognize that it will take another coordinated effort, but it would assist claimants if the articles, medical opinions, and other medical documents underlining SEM were publicly available.
2. We have heard from federal employees, who are not covered under the EEOICPA, suggesting that little, if any, guidance is available to assist them in filing claims under FECA for illnesses related to work at these DOE facilities. The DOL should consider providing guidance or assistance to these federal workers.
3. During the course of this year, we were provided with a very insightful response explaining why in most cases, even if the SEM shows a link between an illness and a toxin to which the employee was exposed, the employee still needs to submit medical evidence addressing causation. In our experience, there are claimants, representatives, as well as others who are not aware of this fact. It would be helpful if a decision or general guidance explaining this aspect of SEM were available on DEEOIC's website and/or discussed in a brochure that was available for distribution.
4. Similarly, this Office continues to believe that a better understanding of the law and the applicable procedures will help to alleviate many of the concerns that we receive. Unfortunately, as noted in this report, the laws and procedures that govern the EEOICPA are dispersed among the statute, the regulations, the EEOICP Final Bulletins, the EEOICP Final Circulars, and the EEOICP Procedural Manual. Some claimants, representatives and attorneys have told us that it is very difficult to locate and reconcile rules dispersed among so many different documents. More needs to be done to provide simple and concise guidance – in a manner that is easily accessible to the public.
5. Whenever a new claims examiner is assigned to a case, claimant should be provided with immediate notice.
6. We commend the efforts to ensure that decisions are well written and the reasoning is clear. We hope that these efforts continue.

We wish that every complaint that came to our attention was resolved in a manner that was satisfactory for the claimant. Unfortunately, there are some instances where we are unable to accomplish this goal. However, we always pledge to take these matters into consideration when preparing our annual report. Thus, while it is impossible to address each and every complaint, grievance, and request for assistance that we received during the year, we believe that this report provides a comprehensive overview of the most common complaints brought to our attention during the past year.

As we begin 2011, our hope is that no one will have the need to complain about the EEOICPA claims process. However, if any claimant or potential claimant encounters a situation where they need assistance, or if they encounter an issue that they would like to bring to our attention, we are here to assist.

## SECTION 12

### SECTION 12 APPENDIX

Data as of 12/31/2010

[Compensation payment totals updated Friday. Emergency payments updated upon issuance. Medical bill payment totals updated Monday.]

Combined Part B and E Summary		
	CLAIMS	CASES
Applications Filed	207,222	140,256*
Covered Applications Filed	158,265	113,840
Total Compensation Paid	Payments	49,019
	Total Dollars	\$5,915,139,362
Total Medical Bills Paid	Total Dollars	\$659,674,597
Total Compensation + Medical Bills Paid		\$6,574,813,959

\*A total of 82,373 unique individual workers are represented by the 140,256 cases reported.

<b>Part B</b>			
	<b>CLAIMS</b>	<b>CASES</b>	
Applications Filed	113,609	74,589	
Non Covered Applications (show details)	18,256	14,720	
Non Covered Employment	7,182	5,215	
Condition Not Covered	11,074	9,505	
Covered Applications Filed	95,353	59,869	
Recommended Decisions*1			
	Approved	49,174	31,902
	Denied	33,701	22,578
	Total	82,875	54,480
Final Decisions*1			
	Approved	47,907	31,418
	(show details) Denied	31,827	21,616
Survivor Not Eligible	3,186	661	
Cancer Not Work Related *2	20,388	15,109	
Medical Info Insufficient to Support Claim	8,253	5,846	
	Total	79,734	53,034
Compensation Paid			
	Payments	45,350	29,466
	Total Dollars	\$3,724,490,359	

\*1 With regard to covered applications only

\*2 Probability of Causation is less than 50 percent

## SECTION 12

Part E		
	CLAIMS	CASES
Applications Filed	93,613	65,667
Non Covered Applications (show details)	30,701	11,696
Non Covered Employment	4,478	3,718
Survivor Not Covered* <sup>5</sup>	26,223	7,978
Covered Applications Filed	62,912	53,971
Recommended Decisions* <sup>3</sup>		
	Approved	28,399
	Denied	22,784
	Total	51,183
Final Decisions* <sup>3</sup>		
	Approved	27,562
	(show details) Denied	21,682
Cancer Not Work Related* <sup>4</sup>	6,895	6,603
Medical Info Insufficient to Support Claim	14,787	13,765
	Total	49,244
Compensation Paid		
	Payments	20,740
	Total Dollars	\$2,190,649,003

\*3 With regard to covered applications only

\*4 Probability of Causation is less than 50 percent

\*5 Per EEOICPA amendments of 2004, adult children are not covered under Part E.

<b>Part B Cancer Cases - NIOSH and SEC Statistics</b>		
<b>Part B - Status and Location of NIOSH Referrals</b>		
	Cases Referred to NIOSH for Dose Reconstruction (DR)	33,772
Cases Returned by NIOSH that are Currently at DOL		
	With Dose Reconstruction (DR)	26,514
	Without Dose Reconstruction (DR)* <sup>6</sup>	3,992
	Total	30,506
Cases that are Currently at NIOSH		
	Initial Referral to NIOSH	2,540
	Reworks or Returns to NIOSH	726
	Total	3,266

\*<sup>6</sup> Most cases without a DR are cases withdrawn from NIOSH for DOL review and approval based on a new SEC designation. Other reasons for withdrawal include administrative closure, death of claimant.

## SECTION 12

Part B Cancer Cases - NIOSH and SEC Statistics		
<b>Part B - Cases with Dose Reconstruction (DR) and Final Decision</b>		
	Final Decision to Accept and Probability of Causation (POC) 50% or Greater	7,849
	Final Decision to Deny and POC Less Than 50%	14,510
	Total	22,359

Part B Cancer Cases with Final Decision to Accept		
<b>Accepted DR Cases</b>		
	Cases Approved	7,397
	Cases Paid	7,345
	Individuals (Claimants) Paid	10,459
	Amount Paid	\$1,095,122,206
<b>Accepted SEC Cases</b>		
	Cases Approved	12,852
	Cases Paid	12,669
	Individuals (Claimants) Paid	20,774
	Amount Paid	\$1,889,323,926
<b>Cases Accepted Based on SEC Status and POC 50% or Greater*7</b>		
	Cases Approved	452
	Cases Paid	451
	Individuals (Claimants) Paid	573
	Amount Paid	\$67,591,071

\*7 For these cases at least one specified cancer was approved based on SEC employment and at least one other cancer was approved based on the DR process resulting in a POC of 50% or greater.

TOTALS: All Accepted SEC and DR Cases		
	Cases Approved	20,701
	Cases Paid	20,465
	Individuals (Claimants) Paid	31,806
	Total Amount Paid	\$3,052,037,203









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