TESTIMONY

Before

The United States Senate

Committee on Health, Education, Labor, and Pensions

Hearing on

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

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

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

Energy Employees Occupational Illness Compensation Program Act

EEOCIPA was established to address the work-related cancers and other illnesses suffered by the thousands of men and women who helped build and maintain our nation's nuclear weapons starting during World War II and continuing into the present time. Especially during the early years of the program, these people worked under very difficult conditions. They worked under tight deadlines using new manufacturing processes that involved handling very dangerous materials, often with minimal protection from exposure to dangerous radioactive elements. They also worked under great secrecy, facing severe criminal penalties for any breach of secrecy. Often they were given very minimal information about the materials that they worked with and the potential health consequences of their exposures.

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

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

Is the Program Claimant Friendly?

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

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

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

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

trained to do these procedures to understand. Many of procedures require considerable judgment on the part of the person doing the dose reconstruction about how to apply these procedures to an individual case. Many claimants question the fairness of these methods and extrapolations and whether the methods and assumptions are appropriate for their individual case.

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

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

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

Conversely, those being interviewed may be led to believe that important information about their exposures is actually not important because they were not asked about it in the interview.

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

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

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

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

A related issue concerns the timeliness of the SEC petition evaluation process. Once NIOSH approves an SEC petition, NIOSH staff usually complete their evaluation of the SEC petition within the required 180 days. However, the evaluation of these petitions often takes a much longer time period. Foe example, a petition regarding the Rocky Flats plant qualified in June of 2005; NIOSH's evaluation report was received in April of 2006; and the Board's final recommendation was made in July of 2007. A petition for

the Fernald facility in Ohio qualified in April of 2006; an evaluation report was published in October of 2006; and that evaluation report is still being reviewed by the Board. Similarly, a petition for the Blockson facility in Illinois qualified in March of 2006; a second NIOSH evaluation report was produced in July of 2007; and that evaluation report is still being reviewed by the Advisory Board. There are many reasons for the delays including the complexity of these sites and the long time periods involved in these petitions. However, often the review of NIOSH's technical reports by the Advisory Board or its contractor finds significant deficiencies that need to be addressed. These lead NIOSH to revise the technical documents used for that site which can involve considerable time to search for additional documentation and to make such revisions. This is frustrating for the petitioners and very confusing as the methods being used for dose reconstruction at that site are continually changing. Individual dose reconstructions are being delayed while this review is under way. The long review benefits the claimants by helping to improve the dose reconstruction process, but the long time period and the technical complexity of the review and deliberations are quite frustrating for the petitioners and claimants.

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

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

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

2. *Improve the Process for Review and Participation by Petitioners and Worker Representatives.* Although NIOSH has taken some steps to provide better input by SEC petitioners and worker representatives in the review of their technical documents, better efforts are needed. The current technical documents are largely based on input from people who managed the radiation monitoring programs at these facilities. In addition to a transparent and stringent conflict of interest program, NIOSH needs to ensure that SEC petitioners and worker representatives have adequate opportunity to review and provide input on the documents that are used in evaluating SEC decisions and conducting dose reconstructions. NIOSH's past practice has often been to meet with those representatives after the documents were completed. In fact, the Board has often been presented with SEC evaluation reports for sites where NIOSH has never held a public meeting to get input on their recommendations. NIOSH needs to continue to address this problem. In particular, NIOSH should assure that SEC petitioners and others involved in that process have full and timely access to all of the information that is being used for making decisions about a petition.

3. *Improve the timeliness of the Program.* This is the most difficult problem to address. Due to the complex technical nature of the program and the time and effort required to find and process past monitoring records, it is difficult to speed

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

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