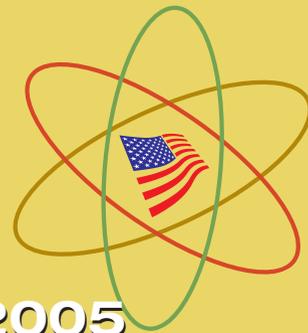


OFFICE OF THE OMBUDSMAN
ENERGY EMPLOYEES OCCUPATIONAL ILLNESS
COMPENSATION PROGRAM, PART E



2005

FIRST ANNUAL REPORT

T O C O N G R E S S



U.S. DEPARTMENT OF LABOR

**OFFICE OF THE OMBUDSMAN
ENERGY EMPLOYEES OCCUPATIONAL ILLNESS
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FIRST ANNUAL REPORT ^{**2005**}
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U.S. DEPARTMENT OF LABOR

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U.S. Department of Labor

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



February 15, 2006

The Honorable Richard B. Cheney
President of the Senate
Washington, DC 20515

Dear Mr. President:

I am pleased to present the First Annual Report of the Ombudsman for Part E of 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 "Donald G. Shalhoub".

Donald G. Shalhoub
Ombudsman for Part E

Enclosure

U.S. Department of Labor

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



February 15, 2006

The Honorable J. Dennis Hastert
Speaker of the House of Representatives
Washington, DC 20515

Dear Mr. Speaker:

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Sincerely,

A handwritten signature in black ink, appearing to read "Donald G. Shalhoub".

Donald G. Shalhoub
Ombudsman for Part E

Enclosure

A Message from the Ombudsman

Part E of the Energy Employees Occupational Illness Compensation Program Act was passed by Congress to compensate American workers who put their health on the line to help fight the Cold War. Many of these workers developed cancer and other serious diseases because they were exposed to radiation, as well as some of the most deadly toxic substances known to modern man, in the course of doing their jobs. They and their families have paid dearly for their role in protecting our democracy; the purpose of this program is to acknowledge their sacrifice and to compensate them in some small way for all they've lost.

When Congress repealed Part D and enacted Part E of the Energy Employees Occupational Illness Compensation Program Act in October, 2004, effectively transferring responsibility for administration of contractor employee compensation from the Department of Energy (DOE) to the Department of Labor (DOL), it also made provisions for creation of the Office of the Ombudsman for Part E matters. Congress directed that the Office of the Ombudsman was to be an independent office, located within the Department of Labor, and charged it with a three-fold mission:

- To conduct outreach to claimants and potential claimants;
- To make recommendations to the Secretary of Labor on where to locate Resource Centers for the acceptance and development of claims;
- To submit an Annual Report to Congress by February 15, setting forth the number and types of complaints, grievances and requests for assistance received by the Ombudsman, and an assessment of the most common difficulties encountered by claimants and potential claimants under Part E (42 U.S.C. § 7385s-15(e))*.

*Please consult the Appendix for the number and types of comments received by the Office of the Ombudsman; numbers and types of comments received are also listed in the section headings of this Report.

What follows is that Report. Secretary of Labor Elaine L. Chao appointed me to be the Ombudsman for Part E on February 24, 2005; my most significant efforts in my first year as Ombudsman have been focused on providing outreach to Part E claimants and potential claimants, to let them know what benefits may be available to them under Part E, and what procedures must be followed to obtain these benefits. In order to discharge that duty, I undertook the following tasks:

- Established and staffed an independent office within the Department of Labor, as required by law.
- Traveled across the country to Town Hall Meetings during the Spring, Summer and Fall of 2005, to inform claimants and potential claimants of the benefits available under Part E, and the procedures that must be followed to obtain them.
- Met dozens of claimants at these Town Hall Meetings and heard, firsthand, of their concerns and difficulties in obtaining Part E compensation.
- Developed a website listing general information about the Office of the Ombudsman, including contact information, at: **www.dol.gov/eeombd**.
- Set up a toll-free number (1-877-662-8363) and an e-mail address (**Ombudsman@dol.gov**) for claimants' ease of contacting this Office.

As a result of these personal contacts and several hundred letters, e-mails and telephone conversations, claimants have expressed their concerns, or registered their complaints with this Office about various aspects of the Part E compensation program. These comments range from concerns with the statute itself, to its implementing regulations, and its general administration. What follows is a short summary of those comments.



Donald G. Shalhoub, Esq.
Ombudsman for Part E

Executive Summary

GENERAL STATUTORY PROVISIONS

NOTE: Claimants did not limit the expression of their concerns to just those aspects of the Energy Employees Occupational Illness Compensation Program which could be addressed administratively. Rather, some of their complaints concerned provisions of the legislation itself, which only Congress can address. Accordingly, the legislation-based concerns discussed in this Report are presented with the understanding that the Department of Labor has no authority to resolve any such concerns.

1. “Adult Children” Are Not Qualified Survivors

Under Part E, there are three general categories of eligible claimants: 1) Covered employees who have a covered illness; 2) Spouses of covered employees; and 3) Children of covered employees who, at the time of their parent’s death, were younger than 18 years of age, younger than 23 years of age and full-time students, or any age and incapable of self-support. In contrast to Part B, in which adult children can receive compensation, Part E adult children who survive a covered employee or the covered spouse, are not eligible to receive the compensation to which their parent would have been entitled (42 U.S.C. § 7385s-3(c) and (d)). This has resulted in a significant number of adult children (72) of covered employees contacting this Office to register their complaint over what they view as the inherent inequity of defining them out of eligibility for Part E compensation. Many such adult children have spoken eloquently of the hardship they endured in caring for their dying parent and the personal and financial sacrifice they gladly made to care for their terminally ill mother or father; they emphasize that they did it for love, with no expectation of reward. By the same token, they argue that since Part E compensation would have been available to them had they been minors, it is all the more appropriate for them to be eligible in light of the care they provided and the

sacrifices they made. This is exacerbated by virtue of the fact that many occupational diseases are characterized by latent manifestation, *i.e.*, symptoms and death do not occur until 20 or more years after exposure. In a great many cases, this makes it almost impossible for a child of a covered employee to be younger than 18 years of age when the parent dies. The legally pure justification for their ineligibility, *i.e.*, that they were not dependents at the time of their parent's death, does not mitigate the injustice they perceive.

Several adult children with historical knowledge of EEOICPA have observed that “adult children” were ineligible under Part B, until Congress changed the statute (Public Law 107-107, § 3151(a)(4)(A)). They question why Congress has permitted the same situation to be repeated under E, and ask whether it will be rectified.

2. Qualified Survivor's Death Prior to Award Vitiates Claim

A subset of the “adult children” comment pertains to adult children whose parent dies after a meritorious Part E claim is filed but before the award is paid. Under Part E, successful claimants must be living in order to receive their payment of compensation, so that if a surviving spouse files a claim and then dies before it is adjudicated in his or her favor, the award is not paid. Since the surviving child does not qualify under the statutory definition of “covered child,” he or she is not entitled to receive the benefits to which the recently deceased parent would have been entitled. For example, due to the long delays in the processing of Part D claims by DOE (followed by the 2004 amendments to EEOICPA), many spouses of deceased employees have been waiting for extended periods of time (up to four years) to be awarded what is now Part E compensation, and some of these spouses have died before awards could be paid. In several cases, the death has occurred shortly before the check was to be issued, heightening the anomaly of this situation. In cases such as these, the adult children who have contacted this Office have expressed the sentiment that their Government, through its own lack of due diligence, is denying them what they feel has become a “vested” benefit.

3. Many Claimants Will Exceed the \$250,000 Cap on Part E Compensation

Under Part E, covered employees receive an award of compensation made up of two components: 1) Wage Loss; and 2) Medical Impairment. Wage Loss is paid at the rate of either \$10,000 per year or \$15,000 per year, depending on the extent of lost wages resulting from the covered condition, and terminates after a covered employee reaches normal Social Security retirement age. Medical Impairment is paid at the rate of \$2,500 for each percent of

impairment, based on the AMA's *Guides to the Evaluation of Permanent Impairment*. The maximum amount of compensation payable to covered employees for both Wage Loss and Medical Impairment is \$250,000. Several claimants (5) have stated that they will exceed the cap based on years of Wage Loss alone. These claimants have expressed the concern that the \$250,000 cap on Part E benefits will not *fully* compensate them for their total years of wage loss, and will not compensate them *at all* for their permanent physical impairment. These claimants are typically covered employees who became totally disabled as a result of their work early in their careers and have been receiving Social Security Disability Insurance benefits since then.

The maximum amount that wage loss compensation can be calculated at is \$15,000 per year (42 U.S.C. § 7385s-2(a)(2)(B)(ii)). At this rate, only about 16 years of wage loss can be compensated before reaching the \$250,000 cap (\$15,000 x 16 years = \$240,000). As a result, any employee who becomes unable to work prior to reaching 49 years of age (Social Security Retirement age of 65 years prior to a 1938 birth date *minus* 16 years = 49), will not receive compensation commensurate with his or her years of lost wages.

REGULATORY BURDENS

1. Difficulty Finding Pertinent Exposure and Medical Records

Despite the fact that the Part E program is promoted as being claimant-friendly, it is clear that the burden of proving exposure and causation ultimately rests with the claimant (20 C.F.R. § 30.111). With the exception of the Special Exposure Cohort (SEC) designation, there are no presumptions, irrebuttable or otherwise, as to exposure or causation. As a result, many claimants are saddled with the burden of attempting to obtain pertinent exposure and medical records from more than 50 years ago.

A significant number of claimants (30) have expressed frustration at the lack of records concerning the covered employee's exposure to toxic substances. Their frustration stems from their recognition that in many cases, records were not maintained at the time of exposure, or if made, were lost or destroyed. In other cases, it stems from recognition of having worked for a series of contractors, who, if they compiled records at all, did not preserve them for subsequent contractors. Based on these tenets, many claimants feel that their burden of producing pertinent exposure and medical records is an insurmountable one.

This situation is exacerbated for those Part B claimants who work at facilities granted SEC status, but who are not covered by the SEC because their radiogenic cancer is not one of the 22 specified in Part B. The SEC designation of facilities (in addition to the four specified in the Act) is granted, based in part, on a finding that the exposure records necessary to enable the National Institute for Occupational Safety and Health (NIOSH) to perform a Dose Reconstruction are not available. SEC claimants suffering from radiogenic cancers have noted in particular that while their cancer may be as deadly as any of the 22 cancers specified in Part B, they will not be able to establish a 50% Probability of Causation (PoC) under either Part B or E, for the same reason that formed the justification for approving the SEC — no available records.

2. Concerns Regarding the Use of NIOSH Dose Reconstruction for Part E Claims

Under Part B, entitlement to benefits as a result of radiogenic cancer requires a determination concerning the probability that a cancer was caused by exposure to radiation at a covered site. A claimant's employment and exposure records and other information relevant to radiation exposure are reviewed by NIOSH to estimate the amount of radiation he or she received at a covered employment. If the Probability of Causation (PoC) is determined by DOL (using a NIOSH developed computer program) to be 50% or greater, an eligible claimant is awarded benefits. The Program Agency proposes to use this same analysis to determine causation under Part E for cancers solely caused by radiation. The Agency explains in the Preamble to the Interim Final Rule why it decided to utilize the NIOSH Dose Reconstruction process for radiogenic cancers in Part E as well as Part B. (70 Fed. Reg. 33590, 33593-594 (June 8, 2005)).

A number of claimants (28) have registered the following concerns regarding the Program Agency's proposed use of NIOSH Dose Reconstruction to determine causation for radiogenic cancers in Part E:

- The dose reconstruction process takes too long, and otherwise eligible claimants may die while waiting for a result.
- Agency should use linear model recently cited with approval by the National Academy of Sciences instead of NIOSH model.
- Information provided to NIOSH regarding work history is oftentimes not accounted for in NIOSH dose reconstructions.

- Claimants' employment at multiple covered facilities is not always reflected in dose reconstruction.
- NIOSH should include copies of the documentation used to conduct the dose reconstruction when it sends out its findings.
- NIOSH quarterly reports have been mistaken by individuals as the NIOSH dose reconstruction itself, since they are so lengthy.

3. Probability of Causation Requirement Is Too High

Under Section 7385s-4(c)(1) of EEOICPA, a DOE contractor employee is determined to have contracted a covered illness through exposure at a DOE facility if —

- (A) it is at least as likely as not that exposure to a toxic substance at a DOE facility was a significant factor in aggravating, contributing to, or causing the illness; and
- (B) it is at least as likely as not that the exposure to such toxic substance was related to employment at a DOE facility.

DOL's Interim Final Rule states that DOL will use HHS' regulatory guidelines at 42 C.F.R. Part 81 (Guidelines for Determining Probability of Causation under the Energy Employees Occupational Illness Compensation Program Act of 2000) in determining whether "it is 'at least as likely as not' that exposure to radiation at a DOE facility or RECA section 5 facility, as appropriate, was a significant factor in aggravating, contributing to, or causing the employee's radiogenic cancer claimed under Part E." DOL further states, "For cancer claims under Part E, if the PoC is less than 50% and the claimant alleges that the employee was exposed to additional toxic substances, OWCP will determine if the claim is otherwise compensable pursuant to § 30.230(d) of this part." (See 20 C.F.R. § 30.213). In other words, a PoC of 50% or greater is required in order for DOL to find that exposure to radiation at a DOE or RECA facility caused or contributed to a radiogenic cancer. DOL's Preamble to the Interim Final Rule states the Agency's reasons for deciding to utilize the 50% or higher PoC requirement for radiogenic cancers in Part E as well as Part B. (70 Fed. Reg. 33590, 33593-594 (June 8, 2005)).

Several claimants (9) have contacted the Office of the Ombudsman to complain generally that the 50% or greater PoC requirement for radiogenic cancers in Part E is too high and/or, more specifically, that it is contrary to the statutory language directing the agency to accept Part E claims if, among other things, 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 illness*” (emphasis added) (42 U.S.C. § 7385s-4(c)(1)(A)).

The individuals who question the regulation’s consistency with the statute maintain that the “significant factor” language in Part E indicates that Congress intended the Agency to use a lower threshold than in Part B, which includes the “at least as likely as not” language but not the “significant factor” clause, and for which the Agency has established a PoC percentage of 50% or greater. The argument is that by using the same percentage in E as in B, the agency has given no meaning to the additional “significant factor” clause. These individuals suggest that the “significant factor” language was added by Congress to reflect a lower standard of causation utilized in Part D, and that Congress intended the Agency to use a 10%-40% threshold in Part E rather than 50%.

CONCERNS REGARDING GENERAL ADMINISTRATION OF PART E

1. Communications With District Offices are Confusing

In the course of developing a claimant’s file in order to adjudicate the claim, District Offices correspond with claimants if they need additional information. When a Recommended Decision is issued, it is forwarded to the claimant with a notice of their appeal rights. Such correspondence is not always clearly written, and may not be understood by the claimant. As a consequence, a significant number of claimants (53) have called this Office for assistance in understanding what the correspondence they receive from District Offices means. As discussed at length in the body of this Report, the confusion concerns deadlines for taking appeals from Recommended Decisions, timelines for submitting additional information to District Offices, and what type of information is required to appeal an adverse decision. In this regard, there is also confusion regarding the effect of the 60-day waiver provision which accompanies the Recommended Decision. In addition, correspondence frequently includes citations to the law or regulations without accompanying text, which does not facilitate comprehension.

Part B claimants frequently contact this Office for assistance, though the services of the Office of the Ombudsman are statutorily authorized for use by Part E claimants only. Part B claimants often do not discern a difference between Parts B and E, finding the two programs to be indistinguishable. Claimants have expressed their concern about not being sure whether



they have a filed a Part B and/or a Part E claim; this confusion is sometimes due to unclear communication from the District Offices.

2. The Processing of Claims Has and Will Take Too Much Time

The delay attendant to the processing of claims is one of the most common complaints this Office has received regarding Part E. Many claimants who would be covered by the new Part E had previously filed their Part D claims with the Department of Energy, some as early as 2001. When Congress assigned the Part E program to the Department of Labor in October, 2004, 25,000 of these claims were still pending. Claimants who originally filed with the Department of Energy under Part D are frustrated at the years that have gone by without their claim being adjudicated. Claimants now think they will have to wait several more years as a result of the transfer. Many of the claimants are elderly; some are dying. This fact, combined with their recognition that their adult children will not be eligible survivors, has resulted in the perception among the claimants who have contacted this Office on this matter (48) that the agency is delaying the payment of benefits in an effort to “wait them out,” *i.e.*, wait for them to die. Recently, we have received an increasing number of calls from claimants who are being told by District Offices that Claims Examiners are still being trained on how to perform certain calculations.

3. Claims Examiners Do Not Always Return Calls

In the Part E program, the amounts of compensation are significant, many claimants who have filed under Part D have already been waiting for several years, the constituency is, by definition, sick and elderly, and compensation can only be paid to living claimants (42 U.S.C. § 7385s-3(c)). Based on the foregoing, it is not unreasonable for claimants to make regular telephone inquiries to check on the status of their pending claims. A significant number of claimants (23) have contacted this Office to complain that their calls to their Claims Examiners are not always being returned. When calls are returned, it is often by a different Claims Examiner, only recently assigned to the claim, who has no in-depth familiarity with the file, and is unable to provide current information.

4. District Offices Do Not Provide Enough Services

Claimants are ultimately responsible for obtaining information sufficient to establish their claim. As a general rule, this means obtaining employment, exposure and medical records to prove the various elements of their claims (20 C.F.R. § 30.111). Congress directed the DOE

and the DOL to undertake appropriate action to retrieve documents needed to adjudicate a claim (42 U.S.C. § 7385s-10(c)(2)). However, despite representations that the Part E program is claimant-friendly, many claimants have felt that they were on their own when it came to obtaining employment records and exposure records in support of their Part E claim. These claimants felt that the District Offices were not helpful in unearthing relevant information.

Similarly, a significant number of claimants (23) are encountering great difficulty in finding qualified physicians to perform medical impairment ratings, and have recommended that each District Office develop a list of qualified physicians whose impairment ratings will be acceptable to the Program Agency.

Likewise, claimants whose personal physicians are unwilling to accept the Medical Benefits Card are upset to find that there is not a general list of accepted providers that they can consult to find a physician who will accept the card.

EMERGING TRENDS

During its first year of administration of Part E, the Program Agency has focused on paying clear-cut claims, which could be paid directly from the statute, without the need to consult implementing regulations. This strategy facilitated compensation of eligible claimants as quickly as possible. The means used to accomplish this objective was to pay claims for which neither a Wage Loss calculation nor a Medical Impairment rating was required. Since these were the two components that comprised Part E compensation awards to living employees, this meant that no living employees would be paid in the first instance. The Program Agency has now begun to turn its attention to compensating living employees, which means having to implement procedures to deal with these two issues. This Office has recently begun to receive inquiries on both of these matters.

With respect to Medical Impairment ratings, there appear to be very few physicians who meet the requirements stated in the Interim Final Rule and Procedure Manual who will qualify to perform impairment ratings which the Program Agency will find acceptable (20 C.F.R. § 30.901(b); DEEOIC Procedure Manual E-900(4)(b)). We anticipate receiving many more inquiries and requests for assistance with respect to this issue in the coming year.



The Wage Loss calculation will require a multi-step process, and the covered employee will be compensated at one of two levels (or both), depending on how great a wage loss he suffered. First, an average salary must be established for use as a baseline against which to measure lost wages. This is done by averaging out the 36-months of annual earnings preceding the illness-induced wage loss. Next, the percentage of actual wages earned, as compared to the baseline salary, must be calculated. Finally, a multiplier of either \$10,000 or \$15,000 per year will be applied to the number of years of wage loss, as follows: \$10,000 for years in which actual wages earned were greater than 50% but less than 75% of the baseline salary; \$15,000 for years in which actual wages earned were less than 50% of the baseline salary; or, a combination of both. Due to the complexity of this calculation, and based on early inquiries, we anticipate that the Wage Loss component of the Part E compensation award to living employees will produce many inquiries and requests for assistance to this Office.

Preface

This Report is Congressionally-mandated to contain “...complaints, grievances and requests for assistance.” (42 U.S.C. § 7385s-15(e)(2)(B)). Consequently, this Office does not receive, and this Report does not contain, comments that are generally complimentary of Part E program administration. However, to give this Report balance, it is important to acknowledge a number of background facts surrounding the 2004 repeal of Part D and creation of Part E, and the ensuing transfer of Part D claims from DOE to DOL.

On the very first day that the transfer of responsibility from DOE to DOL for administering workers’ compensation EEOICPA claims was effective, DOL opened its doors with a backlog of 25,000 new (formerly Part D) claims, inherited from DOE. As a result, DOL did not have the luxury of a four-year grace period in which to develop a measured, sustained expansion of its Part B infrastructure to handle this new program. In addition to these 25,000 old claims, DOL received 11,000 new Part E claims during the course of its first year administering the program.

Under Part E, some types of survivor claims were clearly payable based on direction in the statute. Realizing that many claimants had been waiting for as long as three years to receive compensation, the Program Agency began paying these claims even before the Part E implementing regulations were promulgated.

This approach is commendable, particularly in view of the fact that Congress did not expect the Program Agency to begin making payments until it issued its regulations, and gave the Program Agency a 210-day timeframe in which to accomplish this.

In addition to paying those claims it could, the Program Agency charted several other labor-intensive courses. Simultaneously with paying clear-cut

survivor claims, it began developing an Interim Final Rule (“Rule”), scheduling two rounds of Town Hall meetings across the country, and hiring and training several hundred Claims Examiners to develop Part E claims. The Agency promulgated the Rule on May 26, 2005, thus meeting the 210-day deadline Congress had set. The first round of Town Hall meetings were held in early 2005 to explain to claimants and potential claimants the differences between Parts D and E; the second round of meetings were held in the Spring, Summer and Fall of 2005, to review the Agency’s newly promulgated regulations. Finally, in terms of production, the Program Agency reviewed all 25,000 transferred Part D claims, and as of mid-December, 2005, had issued 2,749 Recommended Decisions under Part E; 2,380 of those have become final, including 1,991 decided in favor of the claimant, resulting in payment of over \$254 million in Part E compensation. These challenges and accomplishments should be considered along with the problems outlined in this Report.

INTRODUCTION

The Office of the Ombudsman was established by Section 3686 of Subtitle E, Contractor Employee Compensation, in an amendment to the Energy Employees Occupational Illness Compensation Program Act (EEOICPA), as part of Public Law 108-375, the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005.

Section 3686(e) requires the Office of the Ombudsman to submit to Congress an Annual Report addressing the number and types of complaints, grievances, and requests for assistance received by the Ombudsman under Subtitle E during the preceding year, as well as an assessment of the most common difficulties encountered by claimants and potential claimants under Subtitle E during the preceding year. Please consult the Appendix for the number and types of comments received by the Office of the Ombudsman; numbers and types of comments received are also listed in the section headings of this Report.

I. Legislative History of EEOICPA Prior to Part E

Before the enactment of Subtitle E in October 2004, Public Law 106-398, the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, authorized Parts B and D of the Energy Employees Occupational Illness Compensation Program. The Department of Labor (DOL) began its administration of Part B on July 31, 2001, and in the past four-and-one-half years has made more than 16,000 payments of \$150,000 each, totaling \$1.3 billion.



Part D was enacted in 2000, with its administration entrusted to the Department of Energy (DOE). Under Part D, Congress directed the DOE to provide claimants with assistance in obtaining state-based workers' compensation. By the end of 2003, more than 23,000 applications had been filed with the Department of Energy (DOE) for benefits. Yet, after more than two years had passed, the Government Accountability Office (GAO) found that less than 10% of submitted claims had been fully processed and more than half had not been considered at all (General Accounting Office, *Energy Employees Compensation: Even with Needed Improvements in Case Processing, Program Structure May Result in Inconsistent Benefit Outcomes*, Report GAO 04-515, May 28, 2004).

Several major obstacles prevented efficient administration of Part D. First, many of the illnesses for which compensation was claimed are characterized by latent manifestation — the onset of symptoms occurred more than twenty (20) years after exposure to the toxic substance. As many DOE contractors and subcontractors lost, destroyed, or simply did not maintain their employees' employment or medical monitoring records for adequate periods to assess possible exposures, this made proving causation extremely difficult. Second, even in cases in which employees or their eligible survivors were able to prove causation, it was not always possible to find the employer. State Workers' Compensation claims are paid by employers, not the Federal Government, so the ultimate success of a Part D claim depended on the existence of a solvent employer able to pay benefits. America's nuclear weapons program began in 1939. After the passage of sixty years, many DOE contractors were no longer in business, causing what became known as the "willing payor" problem. Thus, even the most tenacious claimants — those able to prove employment, exposure, illnesses and causation — at the end of the process were often left with a hollow victory, when their awards could not be paid, because their employer had ceased doing business.

II. Enactment of Part E

In the wake of oversight hearings held in 2003 and 2004 before the Senate Energy & Natural Resources Committee, and following investigations conducted by the GAO, Congress repealed Part D and enacted Public Law 108-375, which established a new federal compensation scheme for DOE contractor employees in Part E, to be administered by the Secretary of Labor. Claimants who had met the eligibility criteria under Part D were thus assured of a federal payment of compensation under the newly enacted Part E.

Public Law 108-375 also directed the Secretary of Energy to provide all applicable records, files and other data to the Secretary of Labor and mandated that the Department of Labor

issue regulations and begin administering the new Part E program within 210 days of enactment (Public Law 108-375, § 3681(e)). The Conference Report accompanying the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 urged the Secretary of Labor to appoint an Ombudsman within 120 days of enactment. (Conference Report 108-767 accompanying H.R. 4200). On February 24, 2005, Secretary of Labor Elaine L. Chao appointed Donald G. Shalhoub, Esq., a career government attorney, as Ombudsman for Part E of EEOICPA

The office created to administer EEOICPA at the Department of Labor, the Division of the Energy Employees Occupational Illness Compensation (hereinafter, “DEEOIC” or “Program Agency”) also met its congressional deadline — by issuing an Interim Final Rule on May 26, 2005. The DEEOIC has received more than 500 comments from the public on its rule, and is now in the process of considering those comments.

In the fifteen months since enactment of Public Law 108-375, the DEEOIC has added hundreds of staff to its four district offices in Jacksonville, Florida; Cleveland, Ohio; Seattle, Washington; and Denver, Colorado, to begin to develop the 25,000 transferred claims from the Department of Energy and to begin processing the more than 11,000 new Part E claims filed directly with the DOL.

As of mid-December, 2005, 36,442 Part E claims were in the process of being developed by the DEEOIC. Of this number, a total of 2,749 recommended decisions have been approved and issued to claimants; 2,380 of those decisions have become final; over \$254 million has been paid for 1,991 cases.

DEEOIC had also established twelve Resource Centers, strategically placed in the 48 contiguous states and Alaska¹ to assist potential claimants by: supplying information about Part B and Part E of EEOICPA; answering questions about the process for applying; assisting with locating medical and work records; helping claimants with medical payment reimbursement issues; conducting initial employment verification; taking occupational histories; and, by supplying claimants with application forms and helping claimants to complete them. This usually involved an intake interview with the claimant, often lasting more than two hours.

¹The Anchorage Resource Center was operated by the Center to Protect Workers’ Rights, through a grant from DOE to the DOE Former Worker Screening Program. It was operated by the Laborers’ International Union, which no longer wanted to conduct this function. The Resource Center has been closed, and its territory has been assigned to the Hanford Resource Center.



Many claimants have made it clear to the Office of the Ombudsman that they have relied on the Resource Centers to help navigate the process of applying and being considered for compensation under Part E. At the inception of Part B, DEEOIC management and its contractor attempted to open Resource Centers in the general vicinity of those nuclear weapons facilities which they anticipated would produce the highest numbers of claims. They also made an effort to fill Resource Center management and staff positions with former managers and personnel from contractors for these same nuclear facilities. As a result, Resource Center staff often had a pre-existing personal or professional relationship with claimants they served, or at a minimum, an institutional knowledge of the processes that were found at those facilities, which helped them provide assistance.

By late 2004, DEEOIC had begun approving claims for Part E claimants who had received approvals under Part B; by early 2005, DEEOIC had scheduled Town Hall meetings to be held across the country to explain the changes from Part D to Part E. The first round of meetings were initially held to inform the public of the existence of Part E, to state who was eligible, and to explain what process would be used to consider eligibility. Once the Rule was issued in May, DEEOIC staff returned to hold a second round of meetings across the country to explain what was in the Rule and how it affected eligibility.

DEEOIC staff were frequently joined by Resource Center staff to assist those claimants and potential claimants who attended the meetings by providing application forms and information. Staff from the responsible District Office would also attend these meetings to provide claimants with information about the status of their specific claims and to answer questions from claimants. Staff from the National Institute for Occupational Safety and Health (NIOSH) were often in attendance at the meetings to provide information to claimants about the radiation Dose Reconstruction process, discussed later at pages 12-13 in this Report.

These Town Hall meetings, with staff from the DEEOIC, the responsible District Office, Resource Center and NIOSH, were generally well-attended by many claimants who had filed for Parts B and E (and D before its repeal). Both during and at the conclusion of these meetings, DEEOIC staff answered questions for several hours, resulting in many claimants or potential claimants being informed about the next steps to be taken to process or initiate their existing or potential claims.

III. The Office of the Ombudsman and This Report

Since being appointed by Secretary of Labor Elaine L. Chao in February, 2005 to serve as Ombudsman for the EEOICPA Part E program, I have received numerous comments regarding various aspects of the Part E program, and have spent many hours talking to claimants and their families about their concerns. I was invited by and joined Program Agency representatives at the Town Hall meetings held across the country with interested persons in the Spring, Summer and Fall of 2005 to discuss the Part E Rule. Much of the data and information presented below is based on conversations I had with claimants at those meetings, as well as hundreds of phone calls and written and electronic correspondence, over the past ten months. The comments this Office has received have expressed concern over several of the general statutory provisions of Part E, the Interim Final Rule, and/or the general administration of the program.

For purposes of presenting this information to Congress in accordance with Public Law 108-375, the topics in the following pages have been divided into three sections: 1) General Statutory Provisions; 2) Regulatory and Procedure-Based Concerns; and 3) General Administration. This Report covers the ten-month time period from February 25, 2005 through December 31, 2005.

IV. Summary of Comments Received Regarding General Statutory Provisions of Part E

NOTE: Claimants did not limit the expression of their concerns to just those aspects of the Energy Employees Occupational Illness Compensation Program which could be addressed administratively. Rather, some of their complaints concerned provisions of the legislation itself, which only Congress can resolve. The legislation-based concerns discussed in this Report are presented with the understanding that the Program Agency has no authority to resolve any such concerns.

Claimants have contacted the Office of the Ombudsman in connection with:

- The Ineligibility of Adult Children (72 comments)
- Qualified Survivor's Death Prior to Award Vitiates Claim (5 comments)
- The \$250,000 Cap on Part E Benefits (5 comments)
- Site Profiles (2 comments)
- Other Definitional Issues (6 comments)

Ineligibility of Adult Children

Under Part E, and in contrast to Part B, adult children who survive a covered employee or the spouse, are not eligible to receive the compensation to which their parent would have been entitled (42 U.S.C. § 7385s-3(c) and (d)). This has resulted in a significant number of adult children of covered employees contacting this Office to register their complaint over what they view as the inherent inequity of defining adult children out of eligibility for Part E compensation. Many of these adult children received Part B compensation. The fact of their eligibility under Part B, and subsequent ineligibility under Part E, heightens their sense of injustice. These same adult children have written and spoken eloquently of the hardship they endured in caring for their dying parent and the personal and financial sacrifice they gladly made to care for their terminally ill mother or father; they have related their personal stories of how they often supported one or both parents during a work-related illness by taking time off from their work for extended periods, to provide round-the-clock care in the final months or years of life. They emphasize the fact that they did it for love, and with no expectation of compensation. These adult children argue that because Part E compensation would have been available to them had they been minors, it is all the more appropriate for them to be eligible in light of the care they provided and the sacrifices they made.

Their frustration is exacerbated by the fact that many of the occupational diseases which afflicted their parent are characterized by latent manifestation — symptoms and death do not occur until 20 years after exposure. This makes it almost impossible, in a great many cases, for a child of a covered employee to be younger than 18 years of age when the parent dies. The legally pure justification for their ineligibility, *i.e.*, that they were not dependents at the time of their parent's death and therefore not eligible under the plain terms of the statute, does not mitigate the injustice they perceive.

Several adult children with historical knowledge of EEOICPA have observed that “adult children” were ineligible under Part B, until Congress changed the statute (Public Law 107-107, § 3151(a)(4)(A)). They question why Congress has allowed the same situation to be repeated under E, and ask whether it will be rectified.

Qualified Survivor's Death Prior to Award Vitiates Claim

A subset of the “adult children” comment pertains to adult children whose parent, a covered employee, dies after a meritorious Part E claim is filed but before the award is paid. Under Part E, successful claimants must be living in order to receive their award of compensation, so

that if a surviving spouse files a claim but then dies before it is adjudicated in his or her favor, the award is not paid. Since the surviving child does not qualify under the statutory definition of “covered child,” he or she is not entitled to receive the benefits which were due to the recently deceased parent. Given the long delays in the processing of Part D claims by DOE, followed by the repeal of Part D and the 2004 amendments to EEOICPA, many spouses of deceased employees have been waiting for long periods of time (up to four years), to be awarded what is now Part E compensation. In several cases, the claimant’s death has occurred shortly before the check was to be issued, heightening the anomaly of this situation. Adult children whose living parent has a Physicians Panel approval under the old Part D, or an accepted claim under Part E, whose parent then dies before payment can be made, are outraged to discover that the approved compensation cannot be paid to them or to the parent’s estate. In cases such as these, the adult children who have contacted this Office have expressed the sentiment that their Government, through its own lack of due diligence, is denying them what they feel has become, by then, a “vested” benefit.

The \$250,000 Cap on Part E Benefits Does Not Provide Adequate Compensation

Under Part E, covered employees receive an award of compensation made up of two components: 1) Wage Loss; and 2) Medical Impairment. Wage Loss is paid at the rate of either \$10,000 per year or \$15,000 per year, depending on the extent of lost wages resulting from the covered condition and terminates after a covered employee reaches normal Social Security retirement age. Medical Impairment is paid at the rate of \$2,500 for each percent of impairment, based on the AMA’s *Guides to the Evaluation of Permanent Impairment*. The maximum amount of compensation payable to covered employees for both Wage Loss and Medical Impairment is \$250,000. Several claimants have stated that they will exceed the cap based on years of Wage Loss alone. These claimants have expressed the concern that the \$250,000 cap on Part E benefits will not *fully* compensate them for their total years of wage loss, and will not compensate them *at all* for their permanent physical impairment. These claimants are typically covered employees who became totally disabled as a result of their work early in their careers and have been receiving Social Security Disability Insurance benefits since then.

The maximum amount that wage loss compensation can be calculated at is \$15,000 per year (42 U.S.C. § 7385s-2(a)(2)(B)(ii)). At this rate, only about 16 years of wage loss at the maximum rate can be compensated before reaching the \$250,000 cap (\$15,000 x 16 years = \$240,000). As a result, any employee who becomes unable to work prior to reaching 49 years



of age (Social Security Retirement age of 65 years prior to a 1938 birth date *minus* 16 years = 49), will not receive compensation commensurate with his or her years of lost wages.

In recognition of this inadequacy, claimants have recommended bifurcation of the two components of a claim for covered employees, *i.e.*, separation of the Wage Loss component from the Medical Impairment component. Their rationale has been that former workers who have years of wage loss sufficient to reach the Part E cap of \$250,000, without the addition of medical impairment compensation, should be paid — based on years of proven Social Security disability. They have also noted that the establishment of a medical impairment is much more time consuming, from the initial point of gathering the required medical evidence, to the final calculation. For both reasons, they believe Wage Loss should be calculated and paid separately from Medical Impairment ratings.

DEEOIC's early practice had been not to allow deferral on the part of the claim which had not been developed. Consequently, payment for Wage Loss would be delayed until Medical Impairment could be rated, even though the Wage Loss alone may exhaust the \$250,000 cap. However, the Part E Procedure Manual has now addressed this problem, and permits bifurcation of claims in appropriate cases (Part E Procedure Manual, Chapter E-800.10).

Definition of a "Covered Employee" is Too Narrow

The Office of the Ombudsman has received several calls and complaints from individuals who do not meet the statutory definition of a covered employee. Typically, these individuals have not been employed at the covered facility, but have made onsite deliveries to the facility on a regular basis. Such employees are excluded from coverage under Part E.

These complainants have described their employment as characterized by exposure to the same hazards over time as those to which covered employees were exposed. At least one has complained of being onsite at the time of a fire and explosion, with a noticeable deterioration in his health thereafter. Some have requested that there be greater flexibility in the definition of a covered employee under Part E to accommodate employees who were present at a site at a time when there was a significant release of radiation.

Site Profiles Are Inaccurate

Site Profiles are documents developed by NIOSH, to help fill in gaps in a Part B claimant's radiation exposure history. Whenever reliable exposure information from a covered facility is discovered, it is added to the Site Profile for that facility. For claimants with incomplete

exposure information, data from the Site Profile is used to facilitate the development of a reliable Dose Reconstruction. For radiogenic cancer caused exclusively by exposure to radiation, the Program Agency uses the same Dose Reconstructions prepared for Part B claims to determine causation under Part E. Inaccuracies in Site Profiles will, therefore, affect both Part B and Part E claims.

Claimants have contacted the Office of the Ombudsman to express their reservations about the accuracy of Site Profiles. Covered Part E employees and families who recognize the paucity of radiation exposure records at worksites, particularly those dating back to World War II, have contacted this Office to express their concern about the wisdom of using Site Profiles in Dose Reconstructions. Specifically, employees who may have moved from location to location on a daily basis within the same facility, or on an *ad hoc* basis over a span of years, are concerned that Site Profiles covering only one portion of a facility result in unacceptably compromised Dose Reconstructions.

Definition of Covered Spouse is Inflexible

The Office of the Ombudsman was contacted by a claimant who had cared for a former worker at considerable personal and financial expense for many years, while the former worker's health deteriorated. They eventually got married, but the former worker died less than one year after their marriage. Hence, the widow did not meet the statutory definition for a covered spouse under Part E. She contacted us to register her complaint about what she perceived to be the artificiality of the one-year of marriage requirement.

V. Summary of Comments Received Regarding General Regulatory Provisions of Part E

Claimants have contacted the Office of the Ombudsman in connection with:

- Claimants' Burden of Retrieving Employment and Exposure Records (30 comments)
- The Unreliability of Dose Reconstructions (28 comments)
- The 50% Probability of Causation Requirement (9 comments)
- Delay of Wage Loss Calculations (24 comments)
- Scarcity of Doctors Who Will Accept the Medical Benefits Card (10 comments)
- Difficulty of Finding a Physician to Do a Medical Impairment Rating (23 comments)

Claimants' Burden of Retrieving Employment and Medical Exposure Records Is Too Onerous

Claimants have registered various complaints with the Office of the Ombudsman concerning the difficulty of providing employment and medical records in support of their claims. The complaints fit into three categories: 1) Inability to retrieve missing records that claimants believe will strengthen their case; 2) Understanding clearly who is responsible for producing what records; and 3) Questioning the credibility of existing records.

A large number of complaints vocalized at Town Hall meetings, in e-mails and in phone calls, concern the absence of employment records and medical information from the employment sites. Claimants have pointed out that many of these facilities are no longer operational, and in some cases, have not been for decades; and that if records were kept at all, that they were not well-maintained or preserved. They have also expressed the same concern about the feasibility of obtaining their own medical records, due to physicians retiring or dying, and clinics and hospitals moving or closing.

In cases in which dosimetry badges were worn, the readings from those badges may be missing. In cases in which claimants have had yearly medical screenings at work, the results of those screenings are often not available. In some cases, basic employment information about job duties, various positions held, and toxic substance exposures in those positions, is missing.

Former workers and families have also mentioned that the frequent changing of contractors and subcontractors at covered facilities, sometimes as frequently as year-to-year, made record retention difficult if not impossible. Claimants have commented that changes in contractor ownership, mergers, and acquisitions have also had an adverse effect on record retention.

Former workers and families have called to express their confusion about whether they or their government is responsible for compiling the records needed to adjudicate a claim. Once they understand that the claimant has the burden of producing records sufficient to sustain a viable claim, many view the evidentiary requirement as unfair, and the burden as insurmountable.

This is true both in cases where a radiogenic cancer is the Part E covered illness, and in some cases where the covered illness was caused, contributed to, or aggravated by exposure to a toxic substance. As to radiogenic cancers, claimants have expressed grave reservations over being able to produce radiation exposure records that would be adequate to establish a Probability of Causation of 50% or more. Claimants who are required to go through the Dose

Reconstruction process to prove their claims regard it as a significantly flawed process, both because accurate records may not have been kept at the time of their employment, and because Site Profiles, which are documents being developed by NIOSH to cover gaps in claimants' exposure histories, do not contain complete exposure information. Similarly, those claimants who do not have radiogenic cancers but who may have another covered illness caused by exposure to toxic substances in the workplace, have also contacted this Office to register their complaints over the difficulty of meeting their evidentiary burden. These claimants have argued that producing evidence of exposures to toxic chemicals is particularly burdensome, because unlike instances in which dosimetry badges may have been worn to measure exposure to radiation, nuclear facilities did not monitor exposure to toxic substances.

Some who have contacted the Office of the Ombudsman have questioned the credibility of information collected from covered facilities. In some cases, this is due to reservations they harbor about the truthfulness or conscientiousness of managers and supervisors at facilities who were entrusted with collecting and maintaining exposure information. In other cases, their reservations are based on recorded dosimetry readings showing the absence of any radiation exposure on days during which they were aware of being exposed to releases of radiation.

Dose Reconstructions Are Unreliable

The Office of the Ombudsman received comments on Dose Reconstructions from applicants who have had Dose Reconstructions done for their Part B claims and are also applying for Part E compensation for a radiogenic cancer. If there is no additive or synergistic effect from toxic substance exposure, the Part B Dose Reconstructions will be used to establish causation under Part E. These comments often focus on the confusion caused by the process used for Dose Reconstruction and the interpretation of results, as well as the extended time required to complete Dose Reconstructions.

Claimants have contacted this Office to question the reliability of Dose Reconstructions. Among the issues they have raised is the reliability of Dose Reconstructions performed for exposures which occurred in the 1940's and 1950's, when dosimetry readings were not taken, or were taken only when radiation levels rose above a threshold. They stated that these readings failed to capture the cumulative effect of radiation exposure on target organs. Similarly, claimants have also questioned the accuracy of assessing the impact of radiation on an internal organ, while simultaneously being exposed to other toxic chemicals which might have had a synergistic effect on absorption of radiation. Several claimants have referenced the relatively recent National Academy of Sciences study, which suggests that a linear model, rather



than a threshold model, be used for demonstrating the effects of radiation (*Health Risks From Exposure to Low Levels of Ionizing Radiation*, Committee to Assess Health Risks from Exposure to Low Levels of Ionizing Radiation, National Research Council, 2005). Claimants have suggested that this model be developed as a basis for determining PoC.

Furthermore, many claimants have expressed confusion about the purpose of the 60-day waiver period at the end of the Dose Reconstruction process. At the time claimants are given their draft Dose Reconstruction Report by NIOSH, they are notified that they have 60 days to certify that they have completed providing information and that the record for Dose Reconstruction should be closed. These claimants are uncertain about how agreeing to the waiver affects the adjudication of their claim by DOL.

Finally, claimants are uncertain about whether there are any available means for challenging either the methodology or the results of Dose Reconstructions, and if so, how they can be appealed. Claimants have received correspondence stating that 20 C.F.R. § 30.318(b) of the Rule prohibits challenges to Dose Reconstruction results. This stated prohibition has left claimants wondering how they can obtain reconsideration of a Dose Reconstruction and the grounds for requesting reconsideration. Claimants have also asked us for guidance when attempting to appeal Dose Reconstruction results as to whether new evidence should be presented to the NIOSH officials who conducted the Dose Reconstruction or whether it should be presented to the Final Adjudication Board.

50% Probability of Causation Is Too High

Under § 7385s-4(c)(1) of EEOICPA, a DOE contractor employee is determined to have contracted a covered illness through exposure at a DOE facility if —

- (A) it is at least as likely as not that exposure to a toxic substance at a DOE facility was a significant factor in aggravating, contributing to, or causing the illness; and
- (B) it is at least as likely as not that the exposure to such toxic substance was related to employment at a DOE facility.

DOL's Interim Final Rule states that DOL will use HHS' regulatory guidelines at 42 C.F.R. Part 81 (Guidelines for Determining Probability of Causation under the Energy Employees Occupational Illness Compensation Program Act of 2000) in determining whether "it is 'at least as likely as not' that exposure to radiation at a DOE facility or RECA section 5 facility, as appropriate, was a significant factor in aggravating, contributing to, or causing the employee's

radiogenic cancer claimed under Part E.” DOL further states, “For cancer claims under Part E, if the PoC is less than 50% and the claimant alleges that the employee was exposed to additional toxic substances, OWCP will determine if the claim is otherwise compensable pursuant to § 30.230(d) of this part.” (See 20 C.F.R. § 30.213). In other words, a PoC of 50% or greater is required in order for DOL to find that exposure to radiation alone at a DOE or RECA facility caused or contributed to a radiogenic cancer. DOL’s Preamble to the Interim Final Rule states the Agency’s reasons for deciding to utilize the 50% or higher PoC requirement for radiogenic cancers in Part E as well as Part B. (70 Fed. Reg. 33590, 33593-594 (June 8, 2005)).

Many claimants have contacted the Office of the Ombudsman to complain generally that the 50% or greater PoC requirement for radiogenic cancers in Part E is too high and/or, more specifically, that it is contrary to the statutory language directing the agency to accept Part E claims if, among other things, 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 illness*” (emphasis added) (42 U.S.C. § 7385s-4(c)(1)(A)).

The individuals who question the regulation’s consistency with the statute maintain that the “significant factor” language in Part E indicates that Congress intended the Agency to use a lower threshold than in Part B, which includes the “at least as likely as not” language but not the “significant factor” clause, and for which the Agency has established a PoC percentage of 50% or greater. The argument is that by using the same percentage in E as in B, the agency has given no meaning to the additional “significant factor” clause. These individuals suggest that the “significant factor” language was added by Congress to reflect a lower standard of causation utilized in Part D, and that Congress intended the Agency to use a 10%-40% threshold in Part E rather than 50%.

The Medical Benefits Card Is Not Widely Accepted

Claimants who have been determined to have a covered condition under Part E are issued a Medical Benefits Card. This card provides health insurance coverage for treatment related to the covered illness. The cost of their treatment is billed directly to the DOL, provided the physician will accept the card. Payment for medical treatment for covered illnesses, regardless of the amount, is not charged against the \$250,000 maximum for Part E benefits. While claimants have expressed their appreciation for the coverage, they have also expressed several related concerns. For instance, claimants do not always understand what benefits are available



to them, where to turn to find an explanation of the card's benefits, how to use it, and where they can find a physician who will accept the card in payment for services. In short, there is no readily available information on benefits and no list of approved providers to which claimants can refer. Many claimants have also expressed confusion over whether the covered Part E employee is responsible for ensuring direct payment to providers or in getting reimbursed for services the employees have paid for themselves. While DEEOIC has much of this information in their Rule and the Part E Procedure Manual, covered employees have had a difficult time finding it in those documents, and are unaccustomed to looking for medical coverage information by searching through federal regulations and manuals.

Claimants who have had some experience with managed care plans and who are familiar with the level of control exerted over physicians and providers they have access to under these plans, believe that they should contact the Department of Labor before seeking specific treatment to ensure that the particular treatment is covered. However, claimants have found it difficult to get answers to their questions. Covered Part E employees have contacted the Office of the Ombudsman to find out how to locate approved providers.

Some claimants have recommended that the Agency establish a toll-free number devoted exclusively to providing answers to insurance-related questions; these claimants have suggested that such a service would be very beneficial to those who have Medical Benefits Cards. They have stated that this would be beneficial to Part E claimants who have questions about what benefits are covered and which providers they can use or simply to be able to get forms and paperwork. Such a toll-free line would also afford treating physicians and other providers a means to find out more about the medical benefits program, such as how to submit charges for services rendered, and a schedule of payment amounts for certain procedures.

Wage Loss Calculations Are Unreasonably Delayed

The first prong of a compensation award to a covered employee is a Wage Loss calculation. The calculation is based on the extent of wage loss the covered employee experiences, and paid at the rate of either \$10,000 or \$15,000 for each covered year until the covered employee reaches normal Social Security retirement age, up to a maximum of \$250,000. As previously stated, calculations for Wage Loss claims of living employees were deferred until the interim final rule was published. This has caused covered employees to begin inquiring when they could expect to receive compensation. The Program Agency developed a Wage Loss calculation formula during the Summer, and began training Claims Examiners on its

implementation shortly thereafter. No Wage Loss awards have been paid to living employees as of December 31, 2005, prompting claimants to call this Office to complain about the amount of time which has passed since Claims Examiners began telling them, at first, that the Agency was in the process of developing a Wage Loss calculation formula, and next, that the Claims Examiners were in training to learn how to implement this formula. Claimants stated having frequently been given this explanation for delays from early Summer through late Fall. In addition, claimants have also indicated that they have had to request a Wage Loss calculation and that it was not being done automatically. Claimants have also stated that Wage Loss is often an inadequate means for compensation in cases in which there are long latency periods, since, in addition to being unable to work, they were also accumulating substantial medical expenses. For cases in which claimants became unable to work early in their careers, claimants have told us that there is often no need to delay payment to do an impairment rating because cumulative years of Wage Loss alone will exceed the \$250,000 cap.

Difficulty of Finding a Physician to Do a Medical Impairment Rating

The second prong of a compensation award to a covered employee is compensation for a Medical Impairment. Medical Impairment compensation is paid at the rate of \$2,500 for each percentage point of permanent impairment, as determined by the AMA's *Guides to the Evaluation of Permanent Impairment*. A critical issue raised by claimants in correspondence with the Office of the Ombudsman is the inability to find physicians who meet the criteria set by the DEEOIC who qualify to do an impairment rating. These criteria are spelled out both in the Rule and in the Procedure Manual (20 C.F.R. § 30.901(b), DEEOIC Procedure Manual E-900(4)(b)). The Rule requires the physician to be board-certified in the specialty of the covered condition. The Procedure Manual requires that the physician also meet the requirements of certification for the American Board of Independent Medical Examiners and/or the American Academy of Disability Evaluating Physicians.

When claimants had approached a physician who specialized in their covered illness and requested that he perform an impairment rating, the physician responded either that he did not meet the criteria or was not interested in performing an impairment rating.

Claimants have pointed out that a search of the ABIME and AADEP websites for board-certified physicians who specialize in occupational conditions common to nuclear weapons facilities' employees — for example, pulmonologists — reveals few or no members.

Though the Rule and the Procedure Manual for Part E offer the claimant the option of finding



a physician to do an impairment rating, or of having the DEEOIC select a physician, claimants have contacted this Office to suggest changing the criteria so their own physician or specialist would be allowed to perform an impairment rating. Claimants argue that such a change would be sensible for at least two reasons: first, the change would lead to performance of the most accurate impairment rating due to the treating physician's familiarity with the case; and, second, would likely produce savings for the program given the inefficiencies of having a physician who has never seen a claimant do the impairment rating, and the likelihood of the personal physician being within a reasonable geographical proximity, so as not to have the claimant incur travel costs. If this change is not made, claimants have recommended that each District Office develop a list of qualified physicians whose impairment ratings will be acceptable to the Program Agency.

It is often only after learning and then communicating the criteria to physicians for performing impairment ratings that they discover the stringency of the criteria and the need to continue searching for a physician who can meet the program's requirements. As with other medical care provider shortages, claimants have emphasized that the difficulty in locating a physician who meets the criteria for conducting medical impairment ratings is exacerbated in more rural, remote areas of the country. These are locations that frequently suffer from shortages of medical care providers of all types regardless of credentials, and they also happen to be the areas where the nuclear weapons facilities that exposed workers to radiation and toxic substances were and are located.

In cases where claimants cannot find a qualified physician to perform an impairment rating, and opt to use one selected by the Program Agency, they question whether the impairment rating the physician renders can be challenged by the introduction of new evidence at any stage in the review of a claim before a final decision is issued. In other words, does their acceptance of the physician selected by the Program Agency preclude them from objecting to the rating he or she places on their impairment. Though claimants are not routinely supplied with a report of how their impairment rating was calculated, the Procedure Manual states that evidence of probative value can be submitted to the Final Adjudication Branch for consideration.

Some claimants have questioned the reasonableness of requiring that a medical condition be at "maximum medical improvement" as stated in the Rule before an impairment rating can be performed (20 C.F.R. § 30.911(a)). They have stated that there is a broad range of impairment levels that stretch between reaching maximum medical improvement and being terminally ill. Claimants believe that many of the illnesses caused by toxic substance exposures

are subject to continuous progression, and, therefore, may never be deemed to have reached maximum medical improvement.

VI. Summary of Comments Received Regarding General Administration of Part E

Claimants have contacted the Office of the Ombudsman in connection with:

- Documents From District Offices Concerning Adjudication of Claims Are Often Confusing (53 comments)
- The Delays Attendant to the Processing of Claims (48 comments)
- The Frequent Changes in Claims Examiners (10 comments)
- Claims Examiners Not Returning Calls (23 comments)
- The Program Agency Does Not Provide Enough Explanatory Materials; Outreach Efforts Need To Be Preceded By Explanatory Information (4 comments)

Documents From District Offices Concerning Adjudication of Claims Are Often Confusing

Part B claimants frequently contact this Office for assistance, though the services of the Office of the Ombudsman are statutorily authorized for use by Part E claimants only. Part B claimants often do not discern a difference between Parts B and E, finding the two programs to be indistinguishable. Claimants have expressed their concern about not being sure whether they have a filed a Part B and/or a Part E claim. At Town Hall meetings, DEEOIC staff have noted that potential claimants should simply fill out a claim form and let the District Office decide if the claim should be considered under Part B, Part E, or both parts. This has led to some confusion among claimants, as to what they are applying for, and how to monitor the status of their claim.

For instance, claimants with claims pending under both Parts B and E have noted that when they receive written correspondence from District Offices, it is not always clear whether the correspondence pertains to Part B or Part E. Similarly, Recommended Decisions do not clearly state whether they are being rendered under Part B or E, resulting in confusion among claimants who have pending claims under both Parts. Furthermore, when a final decision is made on a Part B claim, applicants have noted that the District Office does not always inform



those who are eligible for Part E of the potential for applying. Others have expressed surprise upon being notified in writing that they have been enrolled in Part E, of which they knew nothing before getting the correspondence, and knowing little more than the fact of their enrollment after receiving the correspondence.

In several cases, this confusion has had a deleterious effect on the ability of the Office of the Ombudsman to provide effective assistance to Part E claimants who are uncertain as to whether they are claiming under Part B or E. Especially in cases involving Dose Reconstructions under Part B, where the potential exists for proving a Part E claim based in whole or in part on the Part B Dose Reconstruction, the inability to get information from DEEOIC hamstrings the ability of this Office to provide meaningful assistance.

Claimants are also confused by technical parts of correspondence from the District Office. In particular, time limits are one of the leading sources of confusion to claimants. Most confusing is the 60-day limitations period for challenging Recommended Decisions, and its accompanying waiver provisions. The waiver provision affords claimants who are satisfied with the compensation they have been awarded in their Recommended Decision the opportunity to forego their appeal rights, and not wait 60 days before receiving payment. The confusion arises because the waiver form does not clearly state whether the claimant is waiving his rights under Part B, waiving his rights to future benefits under Part E, or whether he can waive the 60-day waiting period for illnesses found to be covered and preserve appeal rights for conditions not accepted for coverage. Some claimants have noted that the 60-day waiver provision should be rewritten or more fully explained so that they understand what they are waiving and what ramifications that action has on the future processing of their case.

Claimants have also stated to this Office that certain provisions in Recommended Decisions, particularly those dealing with the kind of specific information they must provide in order to appeal, cannot be fully understood without help from a lawyer. Claimants have noted that many of the citations are to statutory or regulatory sources, and cannot be easily understood; they have suggested that the cited statutory or regulatory text be included.

The Processing of Claims Has and Will Take Too Much Time

One of the most common complaints the Office of the Ombudsman has received regarding Part E concerns the amount of time it takes to process a claim. Claimants who originally filed with the Department of Energy under Part D are frustrated at the years that have gone by without their claim being adjudicated. With the repeal of Part D and the assignment for

administering the new Part E to the Department of Labor, some claimants now think they will have to wait several more years for their claim to be adjudicated as a result of the transfer. This has resulted in the perception among some claimants who contact this Office that the agency is delaying the payment of benefits in an effort to “wait them out,” *i.e.*, wait for them to die. This perception has been keenly felt by covered employees, due to the Program Agency’s decision to compensate eligible survivors under Part E first, with living, former employees to follow.

Wage Loss calculations and Medical Impairment ratings are the two components of a Part E compensation award for living employees. Many covered employees have been anxiously awaiting Wage Loss determinations under Part E. Their requests for the status of this calculation were first met by assertions from Claims Examiners that they were waiting for the National Office to develop a formula, and next, that they are being trained on its implementation. These claimants have complained to us that the longer the “in-training” explanation is used, the less credibility it conveys.

Much of the same frustration applies to delays in calculating Medical Impairments. As a result, claimants have urged bifurcation of their claims. That is, if their cases have a completed Wage Loss calculation but not a Medical Impairment rating, then a partial disbursement should be made with the balance to follow. This is especially significant in cases for which there are no eligible survivors once the covered employee dies.

Claims Examiners Do Not Always Return Calls/Assignment of Claim Examiners Frequently Changes

Beyond concerns about the length of time taken to process claims, claimants have also been frustrated in their routine attempts to contact their Claims Examiner in District Offices. A significant number of claimants have contacted this Office to complain that their calls are not always being returned. When calls are returned, it is often by a different Claims Examiner, only recently assigned to the claim, who has no in-depth familiarity with the file. One claimant recently told this Office that she had counted 12 Claims Examiners with whom she has worked over the past five years, which, to be fair, would also include those assigned to her Part B claim. While this may be an extreme case, it has raised concern in the minds of two claimants who have contacted this Office about the effect the recurrent reassignment of Claims Examiners has on the confidentiality of a claimant’s medical information.



Though recognizing and acknowledging that staff in District Offices began work on October 28, 2004 with 25,000 claims inherited from the Department of Energy and have continued to receive a growing number of Part E applications since then, claimants often draw the inference that the assignment of a new Claims Examiner means: “I am starting over from scratch.” This sentiment is particularly strong among those claimants who initially filed under Part D with the Department of Energy, in many cases as far back as 2001.

The Program Agency Does Not Provide Enough Explanatory Materials; Outreach Efforts Need To Be Preceded By Explanatory Information

Claimants have noted that their burden of establishing causation would be facilitated by providing a step-by-step procedure for their personal physician to follow in providing useful information to the District Office. Treating physicians in areas where covered facilities are located are generally not well-versed in how to relate workplace exposures to causation of illness. In one instance in which the physician was attempting to give a diagnosis that established causation, he reported that it was “not unlikely” that the workplace exposure caused the condition, instead of “at least as likely as not,” which are the words of the statute. Claimants have stated that this step-by-step process would also be helpful to their physicians if an impairment rating is needed. Several claimants have indicated that this would avoid unnecessary delays in the processing or consideration of claims in cases where District Offices request claimants to provide more medical information to establish causation.

Some claimants have recommended that a package of materials be prepared that could be used as an introduction to the EEOICPA program with information as to who is covered, how to apply, and how claims are processed. Similarly, claimants are encountering great difficulty in finding qualified physicians to perform Medical Impairment ratings, as discussed in this Report on pages 16-17. Likewise, claimants whose personal physicians are unwilling to accept the Medical Benefits Card are upset to find that there is not a general list of accepted providers available that they can consult to find a physician who will accept the card.

The Program Agency has conducted Town Hall meetings in various regions of the country — at times and venues to ensure that all claimants and potential claimants are afforded an opportunity to learn about the new Part E and changes that have been made to its administration in the months after enactment of the law; claimants have expressed their appreciation to this Office for that outreach.

Conversely, claimants have also noted the complexity of the statute in comments made to this Office at these same Town Hall meetings. Claimants have expressed appreciation for the efforts of Program Agency staff to inform the Town Hall meeting audiences of all of the intricacies of Part E, and have acknowledged the difficulty of trying to give applicable information to all those in attendance. At the same time, claimants feel overwhelmed by the amount of information presented to them at the Town Hall meetings. Many told the Office of the Ombudsman that the presentations were too technical and unhelpful; a few walked out shortly after the start of these meetings after reaching the same conclusion.

Claimants have recommended that providing them with an introductory package of materials to review prior to attending a Town Hall meeting would be more advantageous than distribution of FAQ's at the meeting and would help counter their feeling of being overwhelmed by technical information. Some felt they had to digest too much information at the meeting, and that, as a result, they were missing some key points.

Others expressed a need for more attention to be paid by the DEEOIC staff to their individual claims. While these claimants appreciated the efforts of the DEEOIC staff in staging the Town Hall meetings, they also felt that there was a point beyond which the broader meetings were less effective, and that more interactive meetings, such as Open Houses at District Offices, would be more beneficial.

Resource Centers Have Been Helpful

One of the Ombudsman's specified duties is to make recommendations to the Secretary of Labor regarding the location of Resource Centers. (42 U.S.C. § 7385s-15(c)(2)). Prior to my appointment in February 2005, Resource Centers had been established in eleven key locations: 1) Oak Ridge, Tennessee; 2) Portsmouth, Ohio; 3) Anchorage, Alaska²; 4) Denver, Colorado; 5) Idaho Falls, Idaho; 6) Paducah, Kentucky; 7) Las Vegas, Nevada; 8) Espanola, New Mexico; 9) Savannah River, South Carolina; 10) Hanford, Washington; and 11) Livermore, California. It was the sense of the Congress, stated in Public Law 108-375, that a Resource Center was needed in Western New York or Western Pennsylvania, to provide assistance to the significant number of claimants in that region. This Resource Center was established in Amherst, New

²The Anchorage Resource Center was operated by the Center to Protect Workers' Rights, through a grant from DOE to the DOE Former Worker Screening Program. It was operated by the Laborers' International Union, which no longer wanted to conduct this function. The Resource Center has been closed, and its territory has been assigned to the Hanford Resource Center.



York on July 25, 2005. The number and location of Resource Centers, at this time, seems adequate and appropriate to serve the Part E claimant population.

This Office has received very favorable comments about the helpfulness of staff at the Resource Centers. Resource Center staff were actively involved at Town Hall meetings across the country, providing information, assistance, and claims acceptance. It should also be noted that the Program Agency was scrupulous in its effort to recruit personnel who had been formerly employed at the covered nuclear facility to staff its Resource Centers. Staffing Resource Centers with these personnel provided two advantages: first, Resource Center staff had pre-existing personal or professional relationships with many of the claimants; and second, Resource Center staff usually had an institutional knowledge of the facilities' processes, which helped them guide the claimant through the Part E process. This arrangement appears to be a mutually beneficial one, for both claimants and the Program Agency.

Claimants have reported to this Office that staff from Resource Centers have made regular lengthy trips to see claimants in person to help them complete claim forms with supporting documentation. Overall, they believe the establishment of Resource Centers and staffing decisions there have resulted in high-quality, effective customer service.

ASSESSMENT OF COMMON DIFFICULTIES AND CONCLUSION

Congress has directed that the Annual Report contain “an assessment of the most common difficulties encountered by claimants and potential claimants under Part E (42 U.S.C. § 7385s-15(e)(2)(B)). In addition, the legislative history to Part E provides that “[t]he conferees also expect the Ombudsman to make recommendations the Ombudsman considers appropriate for the improvement of the practices of DOL in administering subtitle E of EEOICPA.” (Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 Conference Report to accompany H.R. 4200, H.R. Rep. No. 108-767 (2004)). The assessment required by Congress, as well as recommendations to improve the administration of Part E, as required by the conferees, follows.

All of the comments and concerns discussed in this Report have been communicated by telephone, telefax, e-mails and letters to this Office, as well as in personal conversations I have had with claimants at 35 Town Hall meetings. A common thread in these comments is general confusion regarding a complex statutory program. I would encourage the EEOICPA program to continue the outreach efforts it has been conducting across the country, as I have witnessed first-hand the success the Program has had in reaching claimants and providing relevant information. I would suggest, however, that the EEOICPA program discontinue its Town Hall format, and instead provide well-publicized Open Houses at District Offices and Resource Centers across the country, which would permit claimants to personally meet agency personnel and discuss the status of their individual claims.

I would also encourage the EEOICPA program to focus on improving communications between claimants and the District Offices. It appears that much of the information being imparted by the District Offices is not being clearly understood by claimants, who subsequently call this Office in an attempt to make sense out of the answers they have received. After this initial year of administering the Part E program, the Program Agency might want to consider ways in which designated and knowledgeable District Office personnel are freed up to focus on providing clear and consistent explanations of the program, including explanations of the procedures for assignment of Claims Examiners and case handling. In this way, claimants will understand not only the status of their claim, but how their claim will be handled. It has been my experience that many claimants merely want to know generally what to expect in the process, rather than to have a specific question about the program answered.



Another matter related to communications with District Offices deals in general with customer service. Claimants who are sick and elderly, and anxious for their claims to be adjudicated, feel there is no corresponding sense of urgency in their Claims Examiners. This is manifested by delays in response to, or failure to return, telephone calls, as well as the recurring reassignment of Claims Examiners. While the main responsibility of a Claims Examiner should be to process claims, a fair balance needs to be struck between this responsibility and their customer service role.

The Program Agency is embarking on its second year of administering EEOICPA Part E compensation. This will mark the start of delivery of benefits to living employees, whose award will be comprised of a Wage Loss and Medical Impairment component. I would urge the Agency to send out a mailing to potentially eligible claimants, outlining the sequence of when this next category of claims will be developed, in very general terms. Many of the requests for assistance this Office receives are pleas for very general information. Claimants may not be satisfied with the proposed timeline, but they will at least know what to anticipate.

Finally, I would encourage the Program Agency to publish a Final Rule on the EEOICPA program as quickly as possible. As explained in this Report, claimants have expressed concern over many aspects of this program. The Agency's final statement on the administration of its program in the form of a Final Rule will bring conclusion for many of these individuals on what has been a long process. Publication of a Final Rule will also permit the EEOICPA program to proceed in a consistent manner with the handling of the many Part E claims currently pending before it.

In the coming year, I look forward to having the opportunity to work cooperatively and collegially with the Program Agency, within the bounds of my independence, to improve the delivery of Part E compensation to eligible recipients, in the timely and uniform manner envisioned by Congress.

Appendix A

Compilation of Comments by Subject/Issue in
The Office of the Ombudsman from
February 24, 2005 to December 31, 2005

General Subject Area	Number of Comments*
STATUTORY	
Ineligibility of Adult Children	72
Illnesses From "Take Home Toxins" Not Compensable	10
Definition of Covered Illness	8
Qualified Survivor's Death Prior to Award Vitiates Claim	5
\$250,000 Cap on Benefits	5
Definition of Covered Employee	5
Site Profiles	2
Miscellaneous Statutory Concerns	6
REGULATORY	
Burden of Retrieving Employment and Exposure Records	30
Unreliability of Dose Reconstruction	28
Delays in Wage Loss Compensation	24
Difficulty in Getting a Medical Impairment Rating	23
Problems with Use of Medical Benefits Card	10
50% PoC Requirement Is Too High	9
Confusion Between Reconsideration and Reopening	2
Miscellaneous Regulatory Concerns	14

Compilation of Comments by Subject/Issue in
The Office of the Ombudsman from
February 24, 2005 to December 31, 2005

General Subject Area	Number of Comments*
ADMINISTRATIVE	
Documents Sent From District Offices Are Confusing	53
Processing of Claims Takes Too Long	48
Claims Examiners Don't Always Return Calls	23
Changes in Assignment of Claims Examiners	10
District Offices Do Not Provide Enough Explanatory Materials/ Outreach Efforts Need To Be Preceded by Explanatory Information	4
Miscellaneous Administrative Concerns	10
REQUESTS FOR ASSISTANCE/INFORMATION	428
	TOTAL = 829

* The statistics captured in this chart represent comments made by 616 claimants and potential claimants. The same person may have made more than one comment in a single contact with this Office. In these cases, separate comments were counted individually. In addition, many of these same comments were made to the Program Agency at the numerous Part E Town Hall meetings it held across the country. I attended 39 of these meetings personally, and had informal discussions with approximately 350 claimants and potential claimants at these meetings. These individuals requested general information and assistance regarding Part E matters. Accordingly, the number of these contacts (350) is reflected in the category of Requests for Assistance/Information.

Appendix B

U.S. Department of Labor

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



FEB - 9 2006

Donald G. Shalhoub, Esq.
Ombudsman for Part E of the Energy Employees
Occupational Illness Compensation Program Act
U.S. Department of Labor
200 Constitution Avenue, NW
Room N-2454
Washington, DC 20210

Dear Mr. Shalhoub:

Thank you for the opportunity to comment on your initial Annual Report to Congress on Part E of the Energy Employees Occupational Illness Compensation Program Act as amended, pursuant to 42 U.S.C. § 7385s-15(e). The Employment Standards Administration, Office of Workers' Compensation Programs, welcomes the Report's efforts to gather and report Part E claimant concerns and issues, and will utilize this information along with customer feedback received via other sources to assess and work to improve its processes and its information dissemination efforts.

We appreciate the acknowledgement in the Report that claimants who are satisfied with its administration of EEOICPA would not be likely to contact the Ombudsman to express those views. We also note that the Report properly characterizes many claimant comments as directed at perceived legislative defects rather than matters within our administrative control. And, we welcome the description in the Report of our extensive efforts shortly after enactment of Part E to inform the claimant population of the scope of the newly enacted Part E, and, to pay as many claimants as possible, even in advance of issuance of interim final regulations.

ESA is concerned, however, that the Report's compilation of complaints may inadvertently confuse the public regarding several issues where we believe the stated concerns are misplaced or not generally applicable to the claimants served by the program.

Since the enactment of Part E, the Office of Workers' Compensation Programs (OWCP) has received a total of nearly 35,000 Part E cases (involving over 45,000 individual claimants) either originally filed with the Department of Energy (DOE) or subsequently filed directly with OWCP. While it is not clear from the figures in the Report how many individuals complained about activities under the control of OWCP, the approximately 600 claimants whose views are discussed in the Report represent a very small and non-random sample of the claimant community. OWCP has made strong efforts to respond to the needs of EEOICPA claimants, and we believe that analysis of the concerns raised by those who contacted the Ombudsman needs to take into account the larger context, and in some cases requires clarification of how existing policies and procedures really work.

One such example is the complaint by certain claimants about not being provided a phone number to make inquiries concerning medical benefits issues. A toll-free number for this purpose is printed on the back of the Medical Benefits card provided to every covered employee whose claim is accepted, and, in the explanatory materials that accompany it. While it is useful for future reference to learn that some individuals have been confused on this point, OWCP believes that providing context to complaints such as this will help prevent the Report from potentially perpetuating misunderstandings among the claimant population. Other issues of this kind are addressed below.

The Report discloses that the Ombudsman has received 23 complaints that claims examiners do not always return phone calls. While it is certainly the case that some claimants have experienced this type of service breakdown, OWCP is working hard to avoid its happening. OWCP carefully tracks phone calls it receives from claimants and holds its employees accountable for meeting program standards for prompt response. In FY 2005, OWCP received 53,164 EEOICPA telephone calls of which 37,060 were responded to at the time of the call. Of the remaining 16,104, which required a return call, over 96 percent were completed within 2 days. The program is striving to improve upon its customer service, and will seek to better those statistics in FY 2006.

The Report suggests that a few claimants believe that OWCP's District Offices do not share their sense of urgency because their claims have been reassigned to new claims examiners. We hope that the public will recognize that such reassignments have been the unavoidable practical response to the addition of nearly 200 new employees during the past year and are part of our effort to expedite case processing. While we understand the concern and impatience of claimants who have been awaiting a decision for several years (first under the Part D program and now with OWCP), we are committed to working as quickly

as possible to resolve these cases, and we are keenly aware of the urgency of claimants who are ill, and in many cases, very elderly.

The Report states that among the 24 complaints received concerning delays in wage-loss benefit determinations were an unspecified number of complaints that claimants must specifically ask for wage-loss benefits. OWCP requires a claimant to request such benefits (any written request is sufficient since no particular form is required) so that the claims examiner will know a formal determination concerning such benefits is necessary, so that OWCP can track that request to ensure claims actions are taken promptly, and to avoid wasting time making determinations for those not claiming such benefits. This is necessary since claimants may be seeking only wage-loss benefits or impairment benefits, both wage-loss and impairment benefits, or medical benefits only.

It appears from the Report that some claimants believe that OWCP has or had a policy requiring all aspects of a covered employee's claim to be decided at once, thus causing a delay in awarding certain benefits while OWCP waited to decide other benefits. OWCP has never imposed such a requirement. Soon after the enactment of Part E, the determination was made to adjudicate any part of a claim for which all the necessary information was available in order to provide claimants with determinations (and benefits when entitled) as soon as possible.

A number of claimants' comments suggested that they believe the entire burden of proof to submit employment and exposure records rests on claimants. However, OWCP and NIOSH systematically gather employment and exposure information from DOE, the Former Worker Medical Screening programs, contractors who employed covered employees, the Social Security Administration, and many other sources. Thus, the vast majority of information used by NIOSH in creating a dose reconstruction is obtained from sources other than claimants. Similarly, most of the employment documentation used by OWCP in determining covered employment is obtained by OWCP from sources other than claimants, and OWCP has compiled an exposure matrix for DOE sites from a variety of sources that will supply toxic substance exposure information for most employees. It should also be noted that no Part E claim was denied based on inadequate evidence of toxic exposure during 2005.

The Report also discusses claimants' complaints about the NIOSH dose reconstruction process, including concerns about NIOSH site profile documents. It is important to understand that in developing site profiles, NIOSH uses claimant-favorable methods to estimate the maximum radiation doses that could have been received by a covered employee by analyzing information such as the source of the radiation or general monitoring data. This information is then used to supplement or in place of inadequate or non-existent personal exposure

records. While certain claimants expressed concerns about the inability to challenge the results of dose reconstruction, in fact, claimants have several opportunities to do so: first upon presentation of their dose reconstruction report by NIOSH, and later, either before OWCP after it receives the dose reconstruction report, or subsequently in a United States District Court.

Another area of concern discussed in the Report is difficulty obtaining physicians qualified to provide impairment evaluations. Under OWCP's procedures concerning this process, claimants have the option of either letting DOL refer them to a qualified physician at its expense (and reimburse them for any necessary travel expenses), or they can have their treating physician or another local physician perform the tests and measurements necessary to calculate an impairment rating, even if that physician is not certified to prepare an impairment evaluation. The results of those tests and measurements can then be forwarded to an OWCP District Medical Consultant or any other physician who does have that certification. The claimant, in the latter case, would not have to be seen by the physician providing the impairment evaluation.

The Report expresses the concern of some claimants that information on medical benefits is not readily available. OWCP has made extensive efforts to inform covered employees whose claims are accepted of the medical benefits available to them and how to obtain them. When such a claim is accepted, the claimant receives a packet of information concerning the medical benefits program along with a benefits card. The packet (as well as the back of the benefits card itself) includes a toll-free number for questions about the program, as well as a description of the types of medical services that are payable with and without prior authorization. Since the claimant is entitled to a choice of being treated by any physician who is licensed to practice medicine, OWCP does not compile a list of "approved" physicians. Finally, some claimants recommended that a toll-free telephone line be established to provide responses to claimants and medical providers on medical benefits questions, apparently not recognizing that OWCP has maintained a toll-free telephone line for this purpose since the inception of the program. We regret that our efforts to explain this aspect of the program have evidently fallen short for the individuals who voiced this concern, and OWCP will redouble its efforts to ensure that information on medical benefits is delivered and made clear.

As noted above, OWCP believes that the Ombudsman has performed a valuable service by compiling concerns about the administration of Part E of EEOICPA from numerous claimants. We hope that the additional information and explanation provided here will assist the readers in evaluating the concerns expressed in the Report, and in assessing the overall performance of the program. We will utilize the concerns and questions presented in the Report to

better focus our efforts to help claimants negotiate the Part E process and better understand their rights and responsibilities.

Sincerely,

A handwritten signature in blue ink that reads "Victoria A. Lipnic". The signature is written in a cursive style with a large initial "V".

Victoria A. Lipnic

Energy Employees Occupational Illness Compensation Program



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OFFICE OF THE OMBUDSMAN
ENERGY EMPLOYEES OCCUPATIONAL ILLNESS
COMPENSATION PROGRAM, PART E
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