Background

My name is Ken Silver. I am an Assistant Professor of Environmental Health at East Tennessee State University. From 1997 to 2003 I lived in New Mexico. In 1999, as a consultant to an environmental health project at the University of New Mexico, I sat down with Mr. Ben Ortiz, a former Los Alamos worker made ill by toxic chemical exposures, to review his medical and exposure records. On seeing the names and affiliations of prestigious doctors and scientists who had examined him ten years earlier, and attributed his respiratory and neurological illnesses to job exposures, I thought "Why wasn't he compensated a long time ago?" We built a mailing list of people in New Mexico with similar concerns. Through action alert postcards, phone banking, op-eds, a private meeting of families with Dr. David Michaels, and two large public meetings, we generated grassroots support for the legislative efforts of New Mexico political leaders in passing EEOICPA, the compensation law that is the subject of today's hearing.

Overview

In my testimony today I call for increased Congressional oversight of the activities of both DOL and NIOSH in administering this program. Administrative costs are exorbitant in comparison to the outcomes achieved. If the claimant community were getting what was expected, no one would begrudge the agencies a few extra dollars for administration. But worker knowledge is not being incorporated into radiation dose reconstructions. Close-out interviews are perfunctory. Site profiles do not reflect workers' concerns. Conflicts of interest are ignored. Quite incomprehensibly, historical occurrence reports, which represent a highly valuable source of information on workers' past exposures to radiation have been underutilized. The 2006 report of the DOL Office of the Ombudsman listed the top three concerns of claimants to be: 1) Difficulties in Proving Causation Issues; 2) Difficulties in Retrieving Employment, Exposure and Medical Records; and 3) Concerns About Claimant Interactions with DEEOIC Personnel. These problems are illustrated through three cases at Los Alamos, two of them Part E claims. Greater public oversight and involvement are recommended by means of: a Part E Advisory Board to DOL; initiatives to expand independent occupational medicine services at DOE sites; and funding for public interest participation.

Congressional Oversight is Needed

109th Congress. This committee and this Congress have a duty to pick up where the 109th Congress left off in conducting oversight of the EEOIC program. The House Subcommittee on Immigration, Border Security and Claims held four oversight hearings between March and December 2006. Chairman John Hostettler summarized the oversight committee's findings: "Backroom manipulation" had occurred in a program which was "supposed to assure workers the deceit was over and their government was finally going to do right by them." He said "those tasked with implementing the program" "need to be exposed for what they've done." And he encouraged continued Congressional oversight: "The babysitting of these individuals must continue."

Those of you in Washington who work on these issues are already familiar with the Office of Management and Budget's notorious pass-back memo which laid out five policy options for ratcheting down on the Advisory Board on Radiation and Worker Health (ABRWH) and its independent contractor, as well as the public petition process for membership in the Special Exposure Cohort (SEC).

Outside of Washington, we had an "Ah-ha" moment upon learning of the pass-back memo. Until then we couldn't comprehend why a rising New Mexico labor leader and an outstanding public health physician were about to be removed from the Board. And it seemed Orwellian that anyone would raise conflict-of-interest issues about the only group of outside analysts hired to work on this issue in the public interest, SC&A, the audit contractor to the Advisory Board on Radiation Worker Health (ABRWH). Meanwhile, conflict of interest statements for the site profile team members at Los Alamos were not posted on the web, as required by the official conflict of interest policy. Further, we were puzzled by a turnabout in Resource Center personnel from barnstorming tours of signing up claimants to publicly rationalizing the denial of claims in terms of "saving tax dollars." And we saw few claims being paid at sites like Los Alamos.

In skimming the document trove in Part V of the House Subcommittee hearings I noticed that chapters of the Los Alamos site profile (the Technical Basis Document or "TBD") were provided to DOL months before they were made available to the public. In fact, we had to wait until just two weeks before a meeting in June 2005, where Los Alamos workers and advocates were to discuss the site profile with NIOSH and ORAU, for the chapter on external dosimetry to be made available to us. But DOL had its copy a year earlier (e-mail from J. Kotsch to P Turcic, February 10, 2004). The reason for the delay is now obvious. DOL was concerned about passages in a draft version which described DOE dosimetry techniques as "inadequate" and old monitoring methods at Los Alamos as "primitive" and working conditions as "deplorable by present-day standards."

DOL got its way: none of this language is in the final public version. Because DOL's role in the program is supposed to be that of a neutral adjudicator of claims, I must ask: When did DOL become known for its specialized expertise in health physics or the histories of DOE facilities? In one fell swoop, DOL program managers undermined the transparent process Congress intended *and* put at risk the reputation of NIOSH for scientific independence and responsiveness to labor concerns, which the agency rightly earned prior to EEOICPA.

This calls for a response from Congress that is much sterner than "babysitting."

110th Congress. I require my students who are researching any environmental or occupational health policy issue to read and cite Congressional committee hearings. They are the holy writ of the people's business. One Congress may talk about an issue, but they always leave a record in case the next one is ready to take action. The five volumes compiled by the House Subcommittee in the last Congress tell an important story about this part of the people's business.

So as this committee establishes its agenda for oversight of the EEOICPA program, I hope you'll begin where the House Subcommittee hearings left off. Your first order of business should be to secure all of the loose-leaf binders of internal documents which DOL assembled under threat of subpoena, but which House Subcommittee staff were only allowed to take notes on.

Failure to continue the aggressive oversight activities begun in the last Congress will permit trends unfriendly to claimants to continue. SEC petitions that have been ostensibly approved could be subjected to upwardly creeping criteria for proving membership in the cohort. How will families of deceased Los Alamos construction workers employed prior to 1976 obtain documentation that places their loved one at one of the technical areas that is included in the SEC, when we know that most construction workers typically worked "everywhere"? Widows of construction trade workers, many of them now elderly, were among the main intended beneficiaries of former State Representative Harriet Ruiz's successful SEC petition. Will the Los Alamos SEC become a redux of Y-12, where claimants now have to furnish evidence of the specific buildings their loved ones worked in more than 60 years ago?

Will competent attorneys avoid a program that provides insurance-like benefits – but only if a claim meets increasingly tort-like standards of proof?

In my testimony I make several suggestions for reforms. These are:

(p. 6) Copies of the documentation specific to the claim used by the dose reconstructor should be routinely provided to Part B cancer claimants

(p. 6) Claimants should also have a right to seek repeated extensions to 60-day requirement of signing the OCAS-1 form.

(p. 10) Occurrence reports collections at DOE facilities hold the potential for a portion of dose reconstructions to be based on primary documentation.

(p. 10) DOL regulations could be revised to allow claimants who receive a probability of causation of 40 to 49% to submit expert medical opinion on the causation issue.

(p. 12) DOL's adoption of an electronic records management system is an important area for Congressional oversight.

(p. 15) Allow coverage of non-cancerous diseases known to be caused by levels of ionizing radiation encountered in occupational settings, such as benign brain tumors and polycythemia vera.

(p. 16) Ensure that the Part E Advisory Board (see below) has purview under the statute to independently audit all aspects of claims management by DOL, including (but not limited to) the training and performance standards of claims examiners.

(p. 17) Revise DOL regulations so Part E benefits can be paid to the estate of a claimant who dies before a pending claim is resolved (through the appeals level).

(p. 17) An independent Subtitle E board should be created by amending the statute.

(p. 18) Adopt authorizing legislation for technical assistance and advocacy grants for EEOCPA activities.

(p. 19) The purview of the DOL Office of the Ombudsman should be expanded to include Part B claims. Explicitly authorize the Ombudsman to "advocate" for claimants.

(p. 19) Physically locate a representative of the Ombudsman's office in each of the DOL Resource Centers.

(p. 19) Intra- and extramural funding mechanisms should be created for CDC to provide technical assistance to claimants' physicians and claimants' organizations involved in the development of causation evidence for Part E and Part B.

(p. 19) Incentives should be created for graduates of occupational medicine residency programs to practice in rural and community clinics near DOE facilities.

ADMINISTRATIVE COSTS ARE EXORBITANT IN RELATION TO OUTCOMES ACHIEVED

Program statistics in a recent presentation by OCAS (the Office of Compensation, Analysis and Support) point to a program that is fundamentally broken. From 2001 to 2007 NIOSH has received $280 million to perform dose reconstructions. NIOSH work has resulted in total payments to claimants of $869,000,000. Administrative costs are therefore equal to 32.2% of payments (about one-third). Members of this committee are more familiar with the comparable administrative expense rate for other entitlement programs. For SSDI it's 2.5%. The average cost per case was $14,534 per dose reconstruction.

DOL has rejected 4,726 cases, or about one-quarter (24.5%), and sent them back to NIOSH to be reworked, mainly because NIOSH updated its methods without redoing the earlier cases.

GAO will have more to say about these numbers. But clearly, despite an unlimited budget, the two agencies responsible for the program don't agree on what is valid in one-quarter of the cases. Little surprise then that many claimants have lost faith in how the program is being administered.

WORKER KNOWELDGE IS NOT BEING INCORPORATED INTO RADIATION DOSE RECONSTRUCTIONS

Close-out Interviews are Perfunctory and Lack Quality Controls

A key step in the processing of an EEOICP claim is the close-out interview when the claimant must sign the OCAS-1 form. This completes the gathering of facts from the claimant for dose reconstruction. The next step is administrative review by the DOL, where the probability of causation is determined. Decisions to award or deny compensation can hinge on the close-out interview.

Survivor Claimants. At Cold War era nuclear facilities, spouses and children of employees have little knowledge of the work that was done. Spouses with claims are often elderly, with nowhere to turn for documentation of exposure-related issues. An illustrative case is Gertrude Finley's claim, one of the first filed in New Mexico in 2001, for her husband's death due to non-Hodgkin's lymphoma (see below). From Knoxville, TN Kathy Bates told her family's Kafka-esque story to the House Subcommittee. It begins with her mother receiving a preliminary dose reconstruction for the wrong person, not her deceased husband. She followed a NIOSH case worker's instructions to discard the report, only to receive a call a short time later from another case worker who was bent on conducting the close-out interview, before the report on the correct person was even in-hand. After several years of continued back-and-forth, they are now in the midst of their third dose reconstruction with NIOSH.

SC&A Study. But survivor issues are not the only concern. The ABRWH's auditor, Sanford Cohen and Associates, recently issued a report based on auditors listening in on three close-out interviews. In two cases specific information provided by the claimants was ignored. No attempt was made to obtain reports or review data. In essence, the claim's fate was already sealed, but the claimant didn't know it.

The auditors found "potential for inconsistency and arbitrariness in how concerns are researched, communicated and resolved." Most shocking is that key decisions are made by personnel called "HP Reviewers" who, in fact, lack health physics qualifications or experience in dose reconstruction The auditors recommend that HP Reviewers at least make detailed notes about what was done to address claimants' concerns that are raised in close-out interviews.

Los Alamos Ironworker. Ron Chavez, a member of Ironworkers' Local 495, has been treated for non-Hodgkin's lymphoma. He worked at Los Alamos from 1994 to 2000. With his claim pending, in September 2007 he requested from NIOSH copies of his dosimetry data as well as the educational background of the dose reconstructor assigned to his case. He alleges that a manager surprised him by threatening to turn that very

phone call into the close-out interview. Mr. Chavez felt this was an arbitrary attempt to close-out his claim prematurely. [*]

Administrative Reform. Copies of the documentation specific to the claim used by the dose reconstructor should be routinely provided to Part B cancer claimants. This would provide a simple check on sloppy close-out interviews harming claimants' interests. This documentation should be provided long before the close-out interview takes place. Claimants would then have an opportunity to generate and pursue leads to additional information, or seek independent technical assistance in critically analyzing the data.

Regulatory Reform. Claimants should also have a right to seek repeated extensions to 60-day requirement of signing the OCAS-1 form.

Technical Basis Documents do not Reflect Workers' Concerns

The problem of assessing the probability that a given cancer was caused by or contributed to by radiation exposure can be approached using at least four types of knowledge:

1. radiation dosimetry data
2. models
3. historical knowledge of processes, operations and occurrences
4. expert opinion

The current system used by NIOSH is heavily weighted toward radiation dosimetry data and models (#1 and #2), despite serious misgivings in the wider scientific community. While the Technical Basis Documents (site profiles) compile some historical knowledge of processes and operations, they are deficient in the use of occurrence reports. As described below, this deficiency serves to exclude the first-hand knowledge of workers. In the end, the reliance on dosimetry data and models tilts the site profile away from a workers' perspective. Site managers are considered "experts." As a result, site profile documents rely heavily on written Standard Operating Procedures (SOPs) which delineate how radiation "ought" to have been measured. Workers' expertise is seldom represented on ORAU site profile teams; their insights into what actually occurred is given short shrift.

Worker Submissions Ignored. In December 2003, worker Glenn Bell provided NIOSH and ORAU with two documents (accompanied by release forms) pertaining to historical

[*] Mr. Chavez did receive his dosimetry data. He notes that it shows a zero for the first quarter of 2002. That strikes him as implausible: he still has his badge from that quarter. His last day of work was February 4, 2002. He never turned in his dosimetry badge. To his way of thinking, this casts doubt on the rest of his dosimetry data, which is entirely comprised of zeros. "My buddies have the same thing," he told me. "Zeros all the way through."

operations and processes in the Y-12 complex at Oak Ridge. Mr. Bell believed they contained facts which could introduce a few more claimant-friendly assumptions into dose reconstructions for Y-12 claimants. He reiterated his concerns at the January 2006 meeting of the ABRWH in Oak Ridge. Yet the documents remain "under review" by ORAU. The facts they contain have not yet been incorporated into the site profile for dose reconstructions at Y-12. Mr. Bell wonders how many other key documents have been ignored.

Conflicts of Interest Ignored. The Los Alamos site profile was developed by a 19-member team, a majority of whom are current or former Los Alamos employees with responsibility for radiation safety. In testimony before the House Subcommittee on Immigration, Border Security and Claims on May 4, 2006 Congressman Tom Udall expressed concern over the fact that conflict of interest disclosure statements had not been posted on the ORAU website for eight of these ten team members. More than a year later, the situation has changed – for the worse. None of the ten current or former Los Alamos employees have disclosure statements posted at the current time.

Occurrence Reports Not Fully Utilized. Site profiles are based mainly on the written SOPs for radiation monitoring which were prepared by management at each DOE site. "SOPs" are written expressions of how radiation doses "ought" to have been measured. They do not document how it actually was measured under upset or accidental conditions in the field. Many workers recall incidents in which SOPs were ignored due to expediency, time pressures, or inadequate staffing.

In contrast to SOPs, occurrence reports document what actually happened under abnormal conditions, when workers are most likely to have been overexposed. These reports could provide an important antidote to NIOSH's over-reliance on idealized SOPs and the perspective of facility managers in the site profiles.

At the June 2005 meeting between ORAU and former Los Alamos employees in Espanola, it was noted that the site profile contained no information from the LANL historical occurrence reports collection. This is a collection of paper reports, memoranda and monitoring data which documents hundreds of radiation spills, leaks, environmental releases and worker contamination episodes from 1946 to 1990. Part of my doctoral dissertation research was based on reports of off-site environmental release contained in this collection. For each occurrence in which radioactive contaminants escaped off-site, I found roughly five times as many reports which involved worker-only contamination. Elsewhere I have estimated that there are likely to be hundreds of "worker only" occurrence reports from the era of the Manhattan project through the 1980's.

POTENTIAL USEFULNESS OF OCCURRENCE REPORTS

Numerous workers and survivors have voiced frustration upon reviewing their supposedly "complete" medical and exposure records from DOE facilities, only to find key pieces of documentation missing – occurrence reports, finger ring dosimetry data, internal bioassay results, etc.. This problem could be addressed by a more aggressive

approach by NIOSH in utilizing historical occurrence reports collections at DOE facilities. Occurrence reports contain individual identifiers such as names, employee identification numbers and group affiliation. These reports could be used to improve the quality of dose reconstructions in several ways.

First – and most obviously – the listing of an individual's employee identification number in an occurrence report is conclusive evidence of the worker's presence at an incident where a dose was likely incurred, a dose which may not be documented elsewhere. This applies particularly to internal radiation doses received in contamination incidents which took place before internal bioassay programs were fully implemented.

Second, in cases where the claimant (or interviewee) describes an incident but is unable to provide precise dates, occurrence reports should be mined in pursuit of contemporaneous documentation. For example, an individualized docket notebook was compiled by an advocacy group for an EEOICPA leukemia claimant at Los Alamos using a "Surrogate Incident Report" form. Its purpose was to alert dose reconstructors to the possible availability of documentation for incidents which the worker recalled from memory. The claim was ultimately awarded under Parts B and E.

Third, exposures resulting from incidents which were never documented, but are described in sufficient detail by interviewees, could be quantitatively modeled using similar incidents that are documented in an occurrence reports collection.

Fourth, radiation dosimetry records do not capture information on dermal contact with radioactive materials. However, many occurrence reports do provide detailed information about levels of contamination on workers' clothing, shoes and skin.

Example: Clean-up Crews at Los Alamos. Phillip Schofield, a former plutonium glove box worker and facility inspector at LANL, provided a compelling rationale for relying more on occurrence reports than on individuals' badge data in some cases. When a spill occurred, many employees would be summoned to clean it up. On several occasions Mr. Schofield was one of those employees. Stationed at the entrance to the room was a radiation control technician (RCT) who would collect the radiation badge of each entering clean-up worker. That's right: each worker removed his badge and handed it to the RCT. The rationale was that if the badge became contaminated with bulk quantities of radioactive dust or liquid, then it would give an inaccurate measurement of the dose to the individual.

The standard procedure for estimating each clean-up worker's dose was to use the RCT as a proxy for everyone on the job. A problem arises when the RCT remained stationed at the door for most of the clean-up: the RCT had less potential for exposure than the actual clean-up crew. Thus, individuals' official dosimetry records will represent an underestimate of the true dose received. This bias may be partially remedied by incorporating environmental measurements and other facts from occurrence reports into individual dose reconstructions in the four ways described above.

Example: Clean-up Workers at Oak Ridge Y-12. Large spills of radioactive liquids at the Y-12 plant during World War II triggered a standard procedure in which clean-up crews first built retaining structures and then recovered the spilled materials. Survivors of two of the men doing this work believed that their claims, both for colon cancer, would be covered by the Special Exposure Cohort for Y-12. However, under recent interpretations of this SEC, the families have been presented with an additional burden. They are now required to provide direct evidence of the handling of radioactive materials or employment in a specific building – sixty years ago. Attorney Bob Warren of Black Mountain, North Carolina obtained an affidavit from a priest to one of the workers who remembers his parishoner's clothing have been burned due to contamination incurred on one clean-up operation. However, DOL has indicated to Attorney Warren that the affidavit is insufficient evidence of contact with radioactive materials.

This is precisely the kind of situation in which access to historical occurrence reports collections at the covered facilities would give families a reasonable opportunity to meet EEOICP's often murky standards of evidence.

CD-ROM of Los Alamos Occurrence Reports

I am pleased to announce public distribution of a CD-ROM containing more than 350 Los Alamos occurrence reports. For many years these were for "official use only." The Centers for Disease Control's Los Alamos Historical Documents Retrieval and Assessment Project (LAHDRA) has made these documents available to the public for the first time. Individual identifiers have been removed. If a claimant recalls an incident but lacks documentation, then there is a possibility that it is contained on this disk. The disk has been indexed and formatted for quick retrieval.

Twenty copies of the disk were placed in the mail yesterday to key stakeholders in New Mexico: cancer claimants, workers, widows and advocates on EEOICPA issues, along with a few journalists who cover the issue. Copies will also be provided to the five Congressional offices representing New Mexicans.

This collection is incomplete, however. The LAHDRA project is concerned with off-site releases of radioactive materials. The occurrence reports on this disk were selected on that basis, but many of them happen to have entailed worker exposure as well. The "Total List" file includes dates and a few details on numerous worker-only incidents for which the actual occurrence reports are not yet available.

Importantly, each site in the DOE complex is likely to have a similar collection of historical occurrence reports which could be helpful to EEOICP claimants. Only in later years were these kinds of reports digitized. At Los Alamos occurrences after 1990 are in an online system.

Primary Documentation to Verify Workers' Knowledge

A key area of ongoing oversight on the EEOICP issue is the extent to which NIOSH dose reconstructions have taken account of information other than individuals' official radiation dosimetry records. Are NIOSH and ORAU really tapping into workers' knowledge? Is this knowledge being incorporated into site profiles (TBDs) and individuals' dose reconstructions? SC&A's audit of close-out telephone interviews suggests otherwise. Rather than dismissing workers' recollections as "anecdotal" information, are NIOSH and ORAU aggressively searching for confirmatory evidence in historical occurrence reports collections? A truly "claimant friendly" dose reconstruction process would leave no stone unturned in locating documentation to verify workers' knowledge.

Administrative Reform. Occurrence reports collections at DOE facilities hold the potential for a portion of dose reconstructions to be based on primary documentation. Use of primary documentation could serve as a quality check on dose reconstructions performed with internal dosimetry data which some DOE sites have provided only after long delays and re-formatting.

MEDICAL OPINION IN PART B

Another source of expert opinion which is not yet accommodated in assessing the probability of causation under Part B is that of physicians who have diagnosed and treated the individual claimant. It is not unprecedented for a cancer specialist to submit a written opinion asserting the work-relatedness of a claimant's cancer, but the claim to be denied because dosimetry data and models produced a probability of causation of less than 50%.

Administrative/Legislative Reform. DOL regulations could be revised to allow claimants who receive a probability of causation of 40 to 49% to submit expert medical opinion on the causation issue. This claimant-friendly reform would represent a candid admission of the imprecision of Probability of Causation determinations made from dosimetry data and models. In these borderline cases, medical opinions of sufficient probative value could tip the balance in the claimant's favor.

DOL RESOURCE CENTERS AND REGIONAL OFFICES

The offices of the EEOICPA program most frequently encountered by claimants are Resource Centers and DOL's district offices. Claims examiners are located in the district offices. Abundant evidence indicates that neither of these points of contact is living up to a standard of "claimant-friendly."

In the 2006 "…Report to Congress" by the Office of the Ombudsman, the top three categories of claimants' concerns were:

1. Difficulties in Proving Causation Issues
2. Difficulties in Retrieving Employment, Exposure and Medical Records
3. Concerns About Claimant Interactions with DEEOIC Personnel

These issues are illustrated in detail by the experiences of:

1. Ben Ortiz, a former Los Alamos electromechanical technician, whose on-the-job exposure to chemicals led to his "medical termination" from Los Alamos in 1989 with reactive airways dysfunction syndrome (RADS) and chronic solvent encephalopathy;

2. Alex Smith, a former Los Alamos chemical technician and machinist who was diagnosed with mercury poisoning in 1948 and suffered neuropsychiatric conditions in the ensuring years; and

3. Gertude Finley, the 86 year old widow of Jack Finely who died from non-Hodgkin's lymphoma after working for Los Alamos in the transport of shipments of nuclear weapons and radioactive materials.

1. <u>Ben Ortiz</u>

Espanola Office to Claimant: Congressional Constituent Services Will Delay Your Claim. Ben Ortiz was among of the first former Los Alamos workers to file a claim under EEOICPA, having been the principal grassroots organizer in the New Mexico campaign for the law's passage in 1999. (See "Background" above). He received a favorable determination for his respiratory ailments from a DOE Physician's Panel under Subtitle D. Except for limited medical coverage, by the end of 2006 he had not yet received benefits under Part E. Mr. Ortiz should be eligible for wage loss and impairment benefits.

In early 2007 the Espanola Resource Center proffered a startling explanation for the delays in DOL's processing of Mr. Ortiz's claim. Repeated involvement by constituent services staff from Congressional offices had delayed the claim. Each time Congressional staff got involved, the explanation went, Mr. Ortiz's paper file was sent from the regional office to DOL headquarters in Washington, D.C. where specialists in responding to Congressional inquiries would take charge. Without the paper file in hand, claims personnel in the regional office would stop working on the case.

If there is truth to this explanation, it is an embarrassing admission of DOL's limited infrastructure for smoothly administering claims under a program with a high degree of Congressional interest. The old saw about a dolt who "Can't walk and chew gum at the same time" comes to mind.

Oversight. DOL's adoption of an electronic records management system, however belated, is an important area for Congressional oversight.

Regional Offices and Claims Examiners. In 2005 I assisted Mr. Ortiz and Marla Gabaldon (his daughter and authorized representative), in compiling a three-ring loose-leaf binder of medical and exposure documentation. Each item was cross-referenced to specific paragraphs and clauses in DOL's regulations for Subtitle E causation and wage loss determinations. Included in the notebook was a medical report from a nationally recognized occupational medicine specialist who evaluated Mr. Ortiz in 1990 at the University of California San Francisco. Also included were neurocognitive tests performed by a specialist, who trained at the Environmental Sciences Laboratory of Mt. Sinai Hospital in New York. Excerpts from Mr. Ortiz's symptom diary in the months leading up to his medical termination were also included.

The 3-ring binder was submitted by Congressman Tom Udall's staff to the DOL's Denver office in September 2005. In periodic conference calls held during the next several months, Mr. Ortiz and his daughter were unable to ascertain where in the DOL bureaucracy the notebook wound up.

A changing cast of claims examiners has not helped. Mr. Ortiz estimates he has had at least six different claims examiners since DOL took over administration of the program. On a recent conference call he was told that DOL had not received his documentation of wage loss. In fact, Mr. Ortiz's IRS tax returns for the years in question (1986-1989) had been submitted by Congressman Udall's office to DOL months earlier. "And," his daughter writes in an e-mail, "as if that wasn't bad enough, during the phone conference they are flipping through the file to find the stuff they've asked us for. The claims examiners are not examining the files."

She continues: "Information he has gotten from the Resource Center is incorrect. Most recently he was misinformed about the impairment rating. He'd been told that if he signed a waiver, then a DOL medical consultant would use the information already *in his file* to develop the impairment rating. We later learn that my dad would need to *send in* documentation for the impairment rating."

When I last saw Ben Ortiz in August he mentioned that the Resource Center was asking him to submit the standard form affirming that he is not receiving SSDI. He clearly remembers already having submitted this form to the Resource Center months ago.

2. Alex Smith

1948 Mercury Poisoning. Senator Bingaman and staff are familiar with the case of Mr. Alex Smith of Albuquerque, (thanks to excellent constituent services provided by the Senator's office and by Congressman Tom Udall). When Mr. Smith testified at the March 18, 2000 field hearing in Espanola, convened by then Assistant Secretary of Energy Dr. David Michaels, he recounted how he and several co-workers were diagnosed with mercury poisoning in 1948 by Dr. Harriet L. Hardy. She ordered the crude mercury still they were operating in K-Stockroom to be shut down. Then she took the men to

medical grand rounds in Los Alamos to teach local doctors about the signs and symptoms of mercury poisoning. Among these signs was the classic blue line in the workers' gums.

Early Retirement. Mr. Smith told the March 2000 hearing about how he suffered neuropsychiatric problems in the ensuing years, leading to his early retirement from LANL in early 1982. Although he repeatedly cited the earlier mercury poisoning episode in discussions with Lab doctors, and requested documentation of the incident, none was provided by the Lab medical department. Maybe the Lab doctors didn't know where to look for the documentation. Or, more likely, the institution's restrictive practices governing access to documentation of the health impacts of Lab operations barred the doctors from furnishing this important personal health data to Mr. Smith. Plain and simple, in Mr. Smith's words, a "cover-up" took place. At the time of his early retirement, he recalls feeling like the Lab doctors were intimating he might be a little crazy, as if he'd made up the whole incident.

"Smoking Gun" Evidence. At the May 2002 field hearing at the Convento in Espanola, where DOE Assistant Secretary Beverly Cook was called to account for Subtitle D's dismal performance, Mr. Smith held up the 1948 memos for all to see that he wasn't crazy. (Shortly after his March 2000 testimony I found Dr. Hardy's memoranda about the 1948 mercury poisoning episode in an online DOE data base. The episode is also described in her autobiography and older editions of her textbook). Congressman Udall's staff assisted him in filing a Privacy Act request with DOE to obtain one of the memos with his name unredacted. Despite this "smoking gun" evidence, Subtitle D produced nothing of benefit to Mr. Smith.

Medical Records. Congressional intervention again led in 2006 to LANL releasing Mr. Smith's supposedly "complete" medical record. An item-by-item comparison of this file the one initially released to the Espanola Resource Center upon Mr. Smith filing his claim in 2002 reveals a striking difference. Only with the Congressional intervention did Mr. Smith receive Dr. Hardy's original hand-written clinical notes dated February 19, 1948 in which she first suspected mercury poisoning. However, Mr. Smith has not yet obtained a report cited elsewhere in his record which is likely to contain the results of the urinalyses he remembers Dr. Hardy ordering. Her textbook account of the episode refers to the urinalyses. But her autobiography recounts battles with classification officers over disclosing uses of mercury at the Lab.

Soon upon leaving Los Alamos, Dr. Hardy published an article in Physics Today to alert the nascent atomic energy industry to the hazards of mercury. It does not mention the episode in K-Stockroom.

Wage Loss Claim. Mr. Smith's Subtitle E claim was initially rejected by DOL. But with the help of Albuquerque attorneys Robert Maguire and Matt Hoyt, on appeal in March 2007 Mr. Smith won a Recommended Decision for payment of wage loss. Key pieces of evidence were reports from occupational medicine and neurotoxicology specialists at a Boston area institution. Mr. Smith traveled there at his own expense.

3. Gertrude Finley

The case of Gertrude Finley of Albuquerque, now 86 years old, is illustrative of the problems faced by survivors with cancer claims under Part B. Her husband Jack Finley worked from 1961 to 1977 as a Security Shipment Specialist responsible for escorting shipments of nuclear weapons and radioactive materials. Mr. Finely was diagnosed with non-Hodgkin's lymphoma in 1990. The Finley's were among the first families in New Mexico to file a claim on July 8, 2001.

Ms. Finley is represented by Attorney Margret Carde of New Mexico Legal Aid (which is an indication of the widow's financial situation). Attorney Carde has prepared a six-page, 50-item chronology of letters, form-filings, phone calls and reports.[*] It is punctuated by involvement by Senator Bingaman's staff. On one level, Ms. Finley is one of the lucky ones: only once did she receive correspondence addressed to the wrong person (a "Mr. Spencer").

In October 2003, a computer-assisted telephone interview was conducted with Mrs. Finley who, according to Attorney Carde, had "no idea of what Jack did because he worked in a classified area." The dose-reconstruction proceeded, with Mr. Finley's multiple skin cancers also included.

On August 1, 2005 she received a Recommended Decision . In the "Finding of Fact" section, point #7 states:

> "It was shown that Jack Finley's non hodgkins lymphoma, basal carcinoma of the left ear and right hand, and multiple squamous cell carcinomas were 50% or greater probability (more likely than not) caused by his occupational radiation exposure during his employment with DOE."

But then point #8 states:

> "The probability of causation for the non hodgkins lymphoma, basal carcinoma of the left ear and right hand, and multiple squamous cell carcinomas diagnosed on various dated [sic] from 1990 through 2001 was determined to be 42.69%."

Fortunately, Mrs. Finley has an attorney to try to figure out what exactly this means, and to address other inconsistencies and omissions. The Recommended Decision was remanded by the Final Adjudication Branch. A revised dose reconstruction led to the conclusion that further research and analysis would not produce a level of radiation dose resulting in a probability of causation of 50% or greater." Ms. Carde had two conference

[*] The 50-item chronology of a widow's interactions with the EEOIC program over seven years brings to mind the words of Labor Secretary Willard Wertz. Testifying before a hearing of the Joint Committee on Atomic Energy in 1967 about the failure of all levels of government to address job hazards to uranium miners he said: "It is a record, nevertheless, of literally hundreds of efforts, studies, meetings, conferences and telephone calls – each of them leading only to another – most of them containing a sufficient reason for not doing anything then – but adding up over a period of years to totally unjustifiable 'lack of needed consummative action.'"

calls with a NIOSH representative to question why the second dose reconstruction resulted in a lower probability of causation than the first dose reconstruction, despite the evidence of two additional new cancers.

Other Illustrative Cases. Consistent with the Finley family's confusing "Recommended Decision," in which points #7 and #8 were frankly contradictory, a worker advocate at Oak Ridge says: "I've yet to see a Recommended Decision without mistakes in it."

A compelling example of mismanagement of a claim is that of pancreatic cancer in an Oak Ridge construction worker on whose dose reconstruction report employment at K-25 for most of the 1970's is listed. Clearly, this employee was eligible for inclusion in the SEC for K-25. A dose reconstruction wasn't even necessary. This is further evidence of the "gross ineptitude" cited at the November 15, 2006 House Subcommittee hearing which resulted in members of the SEC at the Nevada Test Site having their claims needlessly delayed by dose reconstruction.

The Eichler Family of Knoxville, TN won a remand from a DOL administrative law judge of a Recommended Decision to deny compensation for Dr. Eugene Eichler's testicular cancer and for a fatal brain tumor. DOL rejected the brain tumor because of a medical report which identified the brain tumor as a "meningioma." In DOL's view that meant it was "histologically benign." Pointing to another medical report which described it as "malignant" the judge remanded, explicitly citing the claimant-friendly intent of the law. She also ordered a closer look at Dr. Eichler's employment history which is especially well-documented. Yet in April 2006 the brain tumor was again rejected for coverage. There is no record of colleagues and co-workers whose names were provided to the dose reconstructors ever having been contacted. And the family feels the employment history has been disregarded. As for the testicular cancer, a second dose reconstruction was of no avail, because it used almost the exact same information as the first one.

Reform. Amend Part E to allow coverage of non-cancerous diseases plausibly caused by levels of ionizing radiation encountered in occupational settings, such as benign brain tumors and polycythemia vera.

The chair of the Beryllium Support Group at Y-12 (Oak Ridge) reports some of his members have complained of rudeness on the part of claims examiners. Equally distressing are cases in which claims examiners are ignorant of basic facts about common occupational diseases. In an Oak Ridge case of CBD which was ultimately fatal due to cor pulmonale, the worker advocate representing the claimant was dismayed to find that the claims examiner was unaware of the cardiac complications of CBD. "It not the claims examiner's fault," the advocate says. "He just didn't know. He wasn't trained."

In a case of asbestosis in a construction worker who had never worked anywhere but Hanford, another worker advocate voiced frustration over having been told by a claims

examiner she would "have to prove" that asbestos exposure occurred at Hanford. Asbestos was ubiquitous in large nuclear and industrial facilities during the era in question – a fact which is obvious to students of occupational health.

An occupational health professional at a DOE facility describes the DOL program as a "nightmare" for employees of the site who have beryllium sensitivity or CBD. "Lost files" and "long delays" are even affecting claims which are fully supported by the DOE site contractor. Claimants "overwhelmingly can't get through" or "get a response" from the district DOL office. This perspective was shared with me on the condition that I not name the facility. (Occupational health professionals are not immune to job retaliation). Suffice it to say that this institution and its staff are not accustomed to being ignored. What happens to claimants who have less formal education when they submit documentation about their claims to DOL?

Legislative Reform. Ensure that the Part E Advisory Board (see below) has purview under the statute to independently audit all aspects of claims management by DOL, including (but not limited to) training and performance standards for claims examiners.

Implications for Other Claimants

"Concerns about Claimant Interactions with DEEOIC Personnel" was the third-ranked issue identified by the 2006 report of the Office of Ombudsman. Frequent changes in claims examiners and changes in the district office to which a claim is assigned were cited in the report. Loss of documents and duplicative requests to submit paper work were also cited. This is especially cruel in view of the causation standard for Part E:

> "by a preponderance of evidence the type of toxic substance(s) they were exposed to, when and where this exposure(s) took place, and the extent and time period that the exposure(s) took place."

Even claimants who meet this standard cannot be assured that their records won't go missing.

The experiences of Ben Ortiz and Alex Smith are not isolated incidents. That these difficulties affected claimants who were so visible in the campaign for passage of EEOICPA, and have worked closely with Congressional constituent services, makes one shudder to think how claimants with lower public profiles are being treated. Their best hope may be to find legal counsel when their claim is denied, and try to prevail on appeal.

What has become of the hundreds of other claimants who could not gain access to "smoking gun" or contemporaneous documentation of their exposures and illnesses? What about those who did not have written, occupational diagnoses from internationally recognized physician-scientists, backed up by evaluations performed by specialists using the latest methods of clinical and neurobehavioral testing? What about claimants who

can't pay out of pocket for specialized medical evaluations? Or those whose first language isn't English? Or those who didn't receive effective constituent services from their Congressional offices?

What happens in those households at the end of a long, drawn out process of retrieving records from a DOE contractor, submitting documentation to DOL, and the system responds with "What medical and exposure records?"

It is not surprising to hear from claimants' advocates that many of the intended beneficiaries of the program are simply giving up. The hurdles have simply become too difficult for an increasingly elderly claimant population.

Regulatory/Legislative Reform. Revise DOL regulations so Part E benefits can be paid to the estate of a claimant who dies before a pending claim is resolved (through the appeals level). Under current law, nothing is paid when an elderly claimant passes on. This will remove the perverse incentive, real or perceived, that DOL has to stall in order to contain program benefit costs.

PART E ADVISORY BOARD TO DOL

A key lesson from the first six years of EEOICPA implementation is that an independent oversight board can keep government agencies that have been charged with carrying out a "claimant-friendly" program from going astray. Through its external review and oversight functions, the ABRWH has provided essential checks and balances on the activities of NIOSH staff. The Board's meetings have also brought needed transparency to the dose reconstruction process. Especially illuminating have been the special projects conducted by the Board's auditor, Sanford Cohen and Associates.

Meanwhile, DOL's implementation of Subtitle E has occurred with no independent oversight. Determinations of occupational disease causation are being made routinely by claims examiners and district medical consultants. Few of the guideposts used to make these determinations are publicly available. Nor have the qualifications of the district medical examiners been subjected to outside evaluation.

Legislative Reform. An independent Subtitle E board should be created by amending the statute. Its role will be to provide external review and oversight of the DOL's occupational disease determinations, coverage of consequential conditions, and overall implementation of Part E. Like the ABRWH, members would be selected from relevant disciplines (i.e., epidemiology, toxicology, occupational medicine) and sectors (claimants, workers, health professions, government agencies).

PUBLIC INTEREST PARTICIPATION

Claimants face many high hurdles in accessing and interpreting records, seeking diagnoses, and advocating for themselves. The nature of the preparation work is similar to a tort case, while the benefits are comparable to an insurance program. The statute contains caps on legal fees. These factors may discourage competent attorneys from getting involved. Further, many DOE sites are located in remote rural regions of the country where occupational medicine practitioners with a worker orientation are hard to find. After several years of being out of work due to chronic illnesses, few claimants can afford to travel to see big city "occ docs." Union locals at DOE sites that have closed down are no longer able to assist claimants due to obvious resource limitations. Technical assistance on responding to the intricacies of dose reconstruction and Part E causation standards is generally unavailable through the DOL Resource Centers.

The Ombudsman's office at DOL is the subject of many favorable comments from the community of claimants' advocates. At a minimum Congress should expand the Ombudsman's purview to Part B claims. Administratively, DOL should physically locate a representative of the Ombudsman's office in each of the DOL Resource Centers so they are available to trouble-shoot and advocate for claimants at any step of the process. Another simple enhancement would be to routinely inform and assist claimants with Privacy Act requests for DOE records.

However, as part of the very institution they are expected to keep watch over, the Office of the Ombudsman can only go so far in advocating for change. Broader problems can be addressed by a technical assistance grants program for claimant advocacy organizations and incentives for graduates of occupational medicine residency programs to practice near DOE sites (see below).

Technical Assistance Grants. Congress needs to remind the agencies responsible for administering this program that the public's interest on occupational health issues is often best articulated by advocacy organizations. Funding of these organizations for claimant education, commenting on agency regulations, petitioning for SEC status, and traveling to important meetings is essential. The disparity between the multi-million dollar contract for dose reconstruction services and many claimants' subsistence on fixed incomes is glaring. People who have "gone without" often have ideas for reducing wasteful government spending. But to have a voice, they must be able to get to the meeting fully prepared, ideally as part of an organization of like-minded citizens who are willing to extend a helping hand.

At the second House Subcommittee oversight hearing on May 4, 2006 Congressman Tom Udall voiced support for a technical assistance program.

Legislative Reform. Congress should adopt authorizing legislation for technical assistance and advocacy grants for EEOCPA activities.

Legislative Reform. The purview of the DOL Office of the Ombudsman should be expanded to include Part B claims. Explicitly authorize the Ombudsman to "advocate" for claimants.

Administrative Reform. Physically locate a representative of the Ombudsman's office in each of the DOL Resource Centers so they are available to trouble-shoot and advocate for claimants at any step of the process.

OCCUPATIONAL MEDICINE SERVICES.

In the 2006 Ombudsman's report the top-ranked concern under Subtitle E was "Difficulties Proving Causation Issues." Several areas are ripe for reform to make Subtitle E more claimant-friendly on causation issues.

The Ombudsman's report correctly notes that many claimants shy away from allowing DOL doctors to make causation determinations. However, when they go to their physician of choice, it quickly becomes apparent that the evidentiary requirements under Part E are beyond the expertise of many doctors. "DOL wants verse and script in my doctor's opinion," says a former Los Alamos worker with radiation dermatitis and apparent multiple chemical sensitivity. "It's beyond his expertise, and that of most doctors, to apply the AMA Guidelines to occupational illnesses," he said.

Although considerable occupational health expertise resides in NIOSH, the agency currently does not have a program of technical assistance to physicians who are developing EEOIC claims. Applicable resources may also reside in ATSDR and NCEH.

Communities around DOE facilities are often described as "company towns." Physicians in private practice have little to gain -- and much to lose -- by lending their credibility to EEOIC claims.

Legislative and Administrative Reform. Intra- and extramural funding mechanisms should be created for CDC to provide technical assistance to claimants' physicians and claimants' organizations involved in the development of causation evidence for Part E and Part B.

Legislative Reform. Incentives should be created for graduates of occupational medicine residency programs to practice in rural and community clinics near DOE facilities. These incentives should be tenable only at clinics that are independent of the DOE site. One such incentive might more flexible visas for foreign nationals who have completed OEM residencies in the U.S..

MEDICAL CARE

Because I am not trained in the clinical sciences, I do not try to assist claimants who are experiencing problems with the medical coverage provided by EEOICPA. However, I would be remiss if I did not draw the committee's attention to two cases of beneficiaries whose requests for home health care were grievously delayed by DOL. Requests from the family of George Hackworth (84 years old) of Tennessee fell on deaf ears as he deteriorated with terminal colon cancer. DOL verbally denied the request for care and called the family on the day Mr. Hackworth died to inform them that the doctor's order for skilled nursing services was "unnecessary."

Submitted for the record is a letter from Greg Austin of Professional Care Management. His company responded to the Hackworths' desperate pleas and did provide several days of care, while waiting for the authorization which never came from DOL. Mr. Austin's letter describes another cancer case in which the "request for home health care lay pending authorization for 197 days with the DOL despite having all the required documentation to make a decision."

Acknowledgement

I want to publicly express the deep respect and gratitude many people concerned with nuclear worker issues feel for the tireless and often miraculous work of Richard Miller, previously of the Government Accountability Project. If every occupational health issue had a Richard Miller, "That'd be alright." (As in the song by Alan Jackson). Those who work on Capitol Hill are fortunate to have him as a colleague now.