



Testimony

Before the Committee on Energy and
Natural Resources, U.S. Senate

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**ENERGY EMPLOYEES
COMPENSATION**

**Obstacles Remain in
Processing Cases Efficiently
and Ensuring a Source of
Benefit Payments**

Statement of Robert E. Robertson, Director
Education, Workforce, and Income Security Issues





Highlights of [GAO-04-571T](#), testimony before the Committee on Energy and Natural Resources, U.S. Senate

Why GAO Did This Study

The Department of Energy (Energy) and its predecessor agencies and contractors have employed thousands of people in the nuclear weapons production complex. Some employees were exposed to toxic substances, including radioactive and hazardous materials, during this work, and many subsequently developed illnesses. Subtitle D of the Energy Employees Occupational Illness Compensation Program Act of 2000 allows Energy to help its contractor employees file state workers' compensation claims for illnesses determined by a panel of physicians to be caused by exposure to toxic substances in the course of employment at an Energy facility.

Congress mandated that GAO study the effectiveness of the benefit program under Subtitle D of this Act. This testimony is based on GAO's ongoing work on this issue and focuses on four key areas: (1) the number, status, and characteristics of claims filed with Energy; (2) the extent to which Energy policies and procedures help employees file timely claims for these state benefits; (3) the extent to which there will be a "willing payer" of workers' compensation benefits, that is, an insurer who—by order from or agreement with Energy—will not contest these claims; and (4) a framework that could be used for evaluating possible options for changing the program.

www.gao.gov/cgi-bin/getrpt?GAO-04-571T.

To view the full product, including the scope and methodology, click on the link above. For more information, contact Robert E. Robertson at (202) 512-7215 or robertsonr@gao.gov.

ENERGY EMPLOYEES COMPENSATION

Obstacles Remain in Processing Cases Efficiently and Ensuring a Source of Benefit Payments

What GAO Found

During the first 2 ½ years of the program, ending December 31, 2003, Energy had completely processed about 6 percent of the more than 23,000 cases that had been filed. Energy had begun processing of nearly 35 percent of cases, but processing had not yet begun on nearly 60 percent of the cases.

While Energy got off to a slow start in processing cases, it is now processing enough cases that there is a backlog of cases waiting for review by a physician panel. Energy has taken some steps intended to reduce this backlog, such as reducing the number of physicians needed for some panels. Nonetheless, a shortage of qualified physicians continues to constrain the agency's capacity to decide cases more quickly. Consequently, claimants will likely continue to experience lengthy delays in receiving the determinations they need to file workers' compensation claims.

GAO estimates that more than half of the cases associated with Energy facilities in 9 states that account for more than three-quarters of all Subtitle D cases filed are likely to have a willing payer of benefits. Another quarter of the cases in these 9 states, while not technically having a willing payer, have workers' compensation coverage provided by an insurer that has stated that it will not contest these claims. However, the remaining 20 percent of cases lack willing payers and are likely to be contested, which means that many of these cases may be less likely to receive compensation. Because of data limitations, these percentages provide an order of magnitude estimate of the extent to which claimants will have willing payers. The estimates are not a prediction of actual benefit outcomes for claimants.

In this testimony, GAO also provides a framework for evaluating potential options for changing the program to address the willing payer issue. This framework includes a range of issues that would help the Congress assess options if it chooses to change the current program. One of these issues in particular—the federal cost implications—should be carefully considered in the context of the current federal fiscal environment.

Mr. Chairman and Members of the Committee:

I am pleased to be here today to update the information we provided in our November 21, 2003 testimony before you on our work regarding the effectiveness of the benefit program under Subtitle D of the Energy Employees Occupational Illness Compensation Program Act of 2000 (EEOICPA). This legislation was designed to provide assistance to contractor employees in obtaining compensation for occupational illnesses. Congress mandated that we study this issue and report to the Senate Committees on Energy and Natural Resources and Appropriations and the House Committees on Energy and Commerce and Appropriations.

For the last several decades, the Department of Energy (Energy) and its predecessor agencies and contractors have employed thousands of individuals in secret and dangerous work in the nuclear weapons production complex. Over the years, employees were unknowingly exposed to toxic substances, including radioactive and hazardous materials, and studies such as one commissioned by the National Economic Council have shown that many of these employees subsequently developed serious illnesses. EEOICPA established two programs to help secure compensation for employees who developed occupational illnesses or for their survivors. Congressional Committees, as well as individual Members of Congress, claimants, and advocates have raised concerns regarding Energy's processing of claims and the availability of benefits once claims have been decided.

Enacted as title XXXVI of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, which was signed into law on October 30, 2000, this legislation has two major components. Subtitle B provides eligible workers who were exposed to radiation or other toxic substances and who subsequently developed illnesses such as cancer and lung disease a one-time payment of up to \$150,000 and covers future medical expenses related to the illness. The Department of Labor administers these benefits, payable from a compensation fund established by the same legislation. Subtitle D allows Energy to help its contractor employees file state workers' compensation claims for illnesses determined by a panel of physicians to be caused by exposure to toxic substances in the course of employment at an Energy facility.

My testimony today reflects our ongoing review of the effectiveness of Energy's implementation of Subtitle D. Our work is focused on four key areas: (1) the number, status, and characteristics of claims filed with Energy; (2) the extent to which Energy policies and procedures help

employees file timely claims for state workers' compensation benefits; (3) the extent to which there will be a "willing payer" of workers' compensation benefits; that is, an insurer who—by order from, or agreement with, Energy—will not contest these claims; and (4) a framework that could be used for evaluating possible options for changing the program in the event that there may not be willing payers of benefits.

In summary, as of December 31, 2003, Energy had fully processed about 6 percent of the more than 23,000 cases received. Most of the fully processed cases had been found ineligible because of either a lack of employment at an eligible facility or an illness related to toxic exposure. While Energy got off to a slow start in processing cases, it is now processing enough cases that there is a backlog of cases waiting for review by a physician panel. The agency has taken some steps to reduce this backlog; nonetheless, a shortage of qualified physicians continues to constrain Energy's capacity to decide cases more quickly. In the meantime, Energy has not kept claimants sufficiently informed about the delays in the processing of their claims as well as what claimants can expect as they proceed with state workers' compensation claims.

While the workers' compensation claims from about 80 percent of the cases associated with major Energy facilities in 9 states are not likely to be contested by employers or their insurers, actual compensation is not certain. This figure is based primarily on the method of workers' compensation coverage used by the Energy contractors and is not an estimate of the number of cases that will ultimately be paid. Specifically, slightly more than half the cases associated with facilities in the 9 states are likely to have a willing payer of benefits and another quarter of the cases, while not having willing payers, have workers' compensation coverage provided by an insurer that has stated that it will not contest the claim for benefits. However, the remaining 20 percent of cases lack willing payers and are likely to be contested, which means that many of these cases may be less likely to receive compensation. Because of data limitations, these percentages provide an order of magnitude estimate of the extent to which claimants will have willing payers. The estimates are not a prediction of actual benefit outcomes for claimants.

Various options are available to improve payment outcomes for the cases that receive a positive physician panel determination, but lack willing payers under the current program. If it were decided that the program should be modified, the options for changing it range from adding a federal benefit to the existing program for cases that lack a willing payer to designing a completely new program. Congress would need to examine

these options in terms of several issues, including the source, method, and amount of the federal funding required to pay benefits; the length of time needed to implement changes; the criteria for determining who is eligible; and the equitable treatment of claimants. In particular, the federal cost implications of these options should be carefully considered in the context of the current federal fiscal environment.

To perform our review, we analyzed data extracted from Energy's Subtitle D case management system for applications filed through June 30, 2003, and again through December 31, 2003.¹ We also reviewed the provisions of, and interviewed officials with, the workers' compensation programs in nine states with Energy facilities accounting for more than three-quarters of Subtitle D cases filed, and we interviewed the contractors operating the major facilities in these states. In addition, we conducted site visits to three Energy facilities in Oak Ridge, Tennessee, the state with facilities accounting for the largest number of Subtitle D claims. We also interviewed key program officials and other experts. Although our review is continuing, we conducted our work for this testimony from April 2003 through March 2004 in accordance with generally accepted government auditing standards.

Background

Energy oversees a nationwide network of 40 contractor-operated industrial sites and research laboratories that have historically employed more than 600,000 workers in the production and testing of nuclear weapons. In implementing EEOICPA, the President acknowledged that it had been Energy's past policy to encourage and assist its contractors in opposing workers' claims for state workers' compensation benefits based on illnesses said to be caused by exposure to toxic substances at Energy facilities.² Under the new law, workers or their survivors could apply for assistance from Energy in pursuing state workers' compensation benefits, and if they received a positive determination from Energy, the agency would direct its contractors to not contest the workers' compensation claims or awards. Energy's rules to implement the new program became

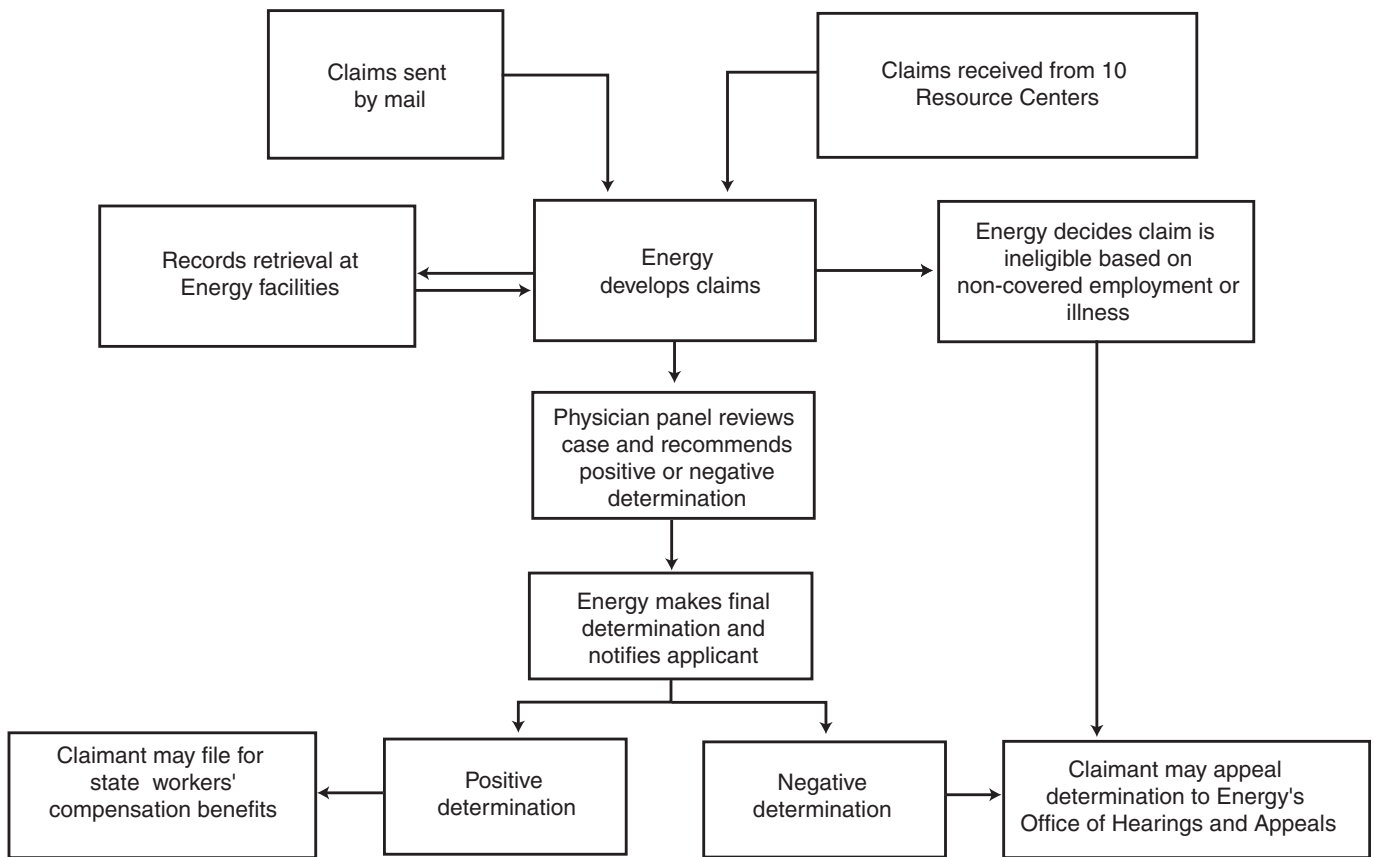
¹We collected data as of this date to enable us to assess the reliability of Energy's data by (1) performing electronic testing for obvious errors in accuracy and completeness, (2) reviewing available documentation, and (3) interviewing agency officials and contractors knowledgeable about the data. We determined that the data elements used were sufficiently reliable for our purposes.

²Executive Order 13179 of December 7, 2000.

effective in September 2002, and the agency began to process the applications it had been accepting since July 2001, when the law took effect.

Energy's claims process has several steps. First, claimants file applications and provide all available medical evidence. Energy then develops the claims by requesting records of employment, medical treatment, and exposure to toxic substances from the Energy facilities at which the workers were employed. If Energy determines that the worker was not employed by one of its facilities or did not have an illness that could be caused by exposure to toxic substances, the agency finds the claimant ineligible. For all others, once development is complete, a panel of three physicians reviews the case and decides whether exposure to a toxic substance during employment at an Energy facility was at least as likely as not to have caused, contributed to, or aggravated the claimed medical condition. The panel physicians are appointed by the National Institute for Occupational Safety and Health (NIOSH) but paid by Energy for this work. Claimants receiving positive determinations are advised that they may wish to file claims for state workers' compensation benefits. Claimants found ineligible or receiving negative determinations may appeal to Energy's Office of Hearings and Appeals.

Figure 1. Energy's Claims Process



Source: GAO analysis of Energy Claims Process.

Each of the 50 states and the District of Columbia has its own workers' compensation program to provide benefits to workers who are injured on the job or contract a work-related illness. Benefits include medical treatment and cash payments that partially replace lost wages. Collectively, these state programs paid more than \$46 billion in cash and medical benefits in 2001. In general, employers finance workers' compensation programs. Depending on state law, employers finance these programs through one of three methods: (1) they pay insurance premiums to a private insurance carrier, (2) they contribute to a state workers' compensation fund, or (3) they set funds aside for this purpose as self-insurance. Although state workers' compensation laws were enacted in

part as an attempt to avoid litigation over workplace accidents, the workers' compensation process is still generally adversarial, with employers and their insurers tending to contest aspects of claims that they consider not valid.

State workers' compensation programs vary as to the level of benefits, length of payments, and time limits for filing. For example, in 1999, the maximum weekly benefit for a total disability in New Mexico was less than \$400, while in Iowa it was approximately \$950. In addition, in Idaho, the weekly benefit for total disability would be reduced after 52 weeks, while in Iowa benefits would continue at the original rate for the duration of the disability. Further, in Tennessee, a claim must be filed within 1 year of the beginning of incapacity or death. In contrast, in Kentucky a claim must be filed within 3 years of either the last exposure to most substances or onset of disease symptoms, but within 20 years of exposure to radiation or asbestos.

Energy Has Processed Few Cases And Insufficient Strategic Planning And Data Collection Complicate Program Management

As of December 31, 2003, Energy had completely processed about 6 percent of the more than 23,000 cases that had been filed. Energy had begun processing of nearly 35 percent of cases, but processing had not yet begun on nearly 60 percent of the cases. Insufficient strategic planning and systems limitations complicate assessment of Energy's achievement of case processing goals. Further, these limitations make it difficult to assess achievement of other broader goals, related to program objectives, such as the quality of the assistance given to claimants in filing for state workers' compensation.

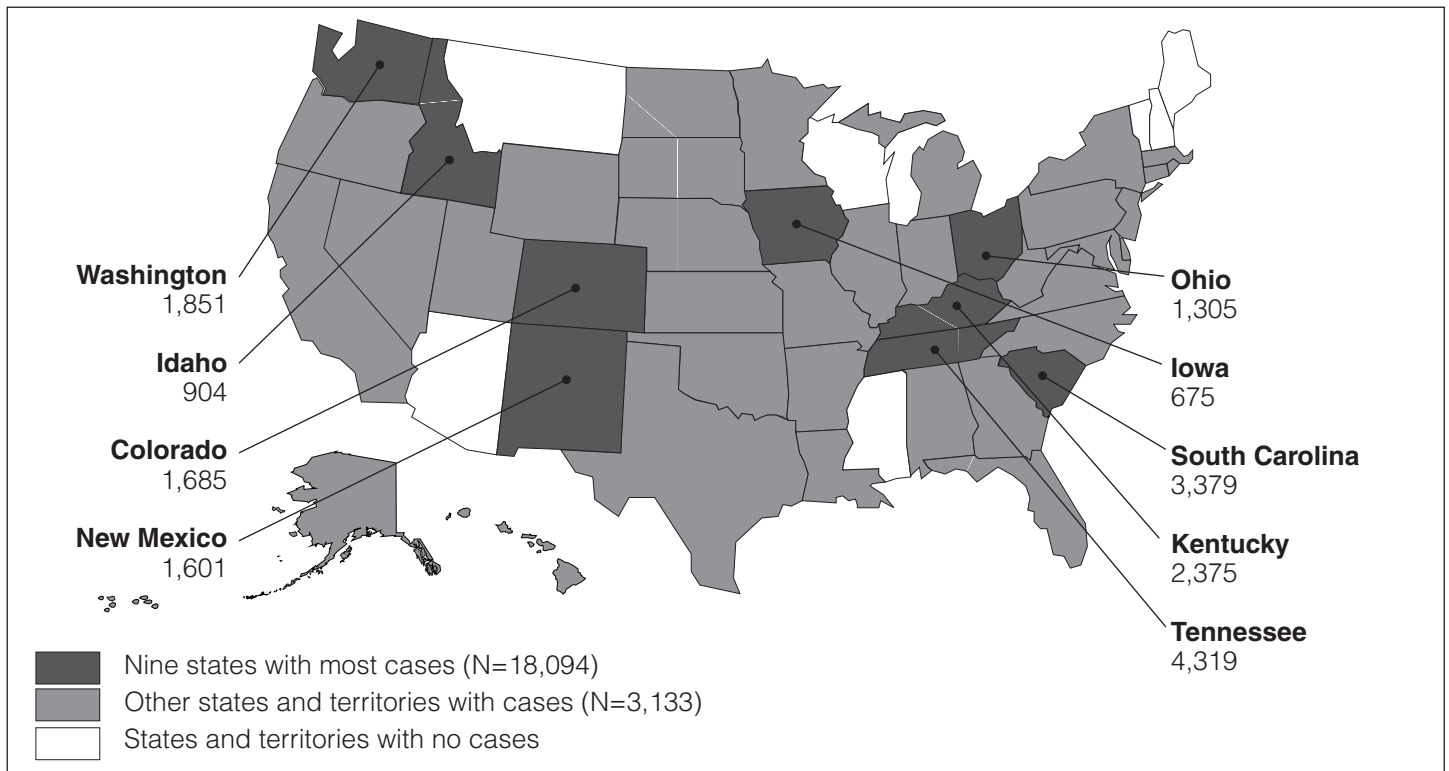
Energy Has Fully Processed about 6 Percent of Its Cases

During the first 2 ½ years of the program, ending December 31, 2003, Energy had fully processed about 6 percent of the more than 23,000 claims it received. The majority of the fully processed claims (about 5 percent of all cases) had been found ineligible because of either a lack of employment at an eligible facility or an illness related to toxic exposure. In the last 6 months of 2003, Energy more than tripled the number of cases receiving a final determination from a physician panel, from 42 to 150. These 150 cases represent less than 1 percent of the more than 23,000 cases filed.

While cases filed are associated with facilities in 43 states or territories, the majority of cases are associated with Energy facilities in 9 states. Facilities in Colorado, Idaho, Iowa, Kentucky, New Mexico, Ohio, South Carolina, Tennessee, and Washington account for more than 75 percent of

cases received by December 31, 2003. The largest group of cases is associated with facilities in Tennessee.

Figure 2. Distribution of Cases by Employee's Last Energy Facility Worked



Source: GAO analysis of Energy data.

Note: Facility information is missing or unknown for 1,859 cases.

A majority of all cases were filed during the first year of program implementation, but new cases continue to be filed. Nationwide, the number of cases filed increased by 22 percent in the last 6 months of 2003 from fewer than 19,000 to more than 23,000. However, the rate of increase in cases filed was not uniform across the 9 states with facilities that account for more than three-quarters of all cases. For example, cases associated with facilities in Washington increased by 8 percent during the 6-month period while cases in New Mexico increased by 34 percent and cases in Ohio increased by 80 percent.

As of the end of calendar year 2003, Energy had not yet begun processing nearly 60 percent of the cases, and an additional 35 percent of cases were in processing. The majority of cases being processed were in the case development stage, where Energy requests information from the facility at which the claimant was employed. Of the cases still in processing, about 2 percent were ready for physician panel review and 3 percent were undergoing panel review.

Energy reports that, in recent months, it has considerably accelerated the rate at which it is completing the development of cases that are ready for physician panel review. Since our testimony in November 2003, Energy's case development process has met the agency's goal of completing the development on 100 cases per week, which is considerably higher than the average of about 30 cases per week it was completing in September 2003. Moreover, since our prior testimony, Energy has also completed a comprehensive review of its Subtitle D program that resulted in a plan that identifies strategies for further accelerating its case processing. This plan sets a goal of eliminating the entire case backlog by the end of fiscal year 2006 and is dependent, in part, on Energy's shifting additional funds into this program.

Insufficient Strategic Planning and Data Collection Limit Energy's Ability to Determine Whether Program Goals Are Being Met

Insufficient strategic planning regarding system design, data collection, and tracking of outcomes has made it more difficult for Energy officials to manage some aspects of the program and for those with oversight responsibilities to determine whether Energy is meeting the goal of providing assistance in filing for workers' compensation. The data system used by Energy to aid in case management was developed by contractors without detailed specifications from Energy. Furthermore, the system was developed before Energy established its processing goals, and the changes Energy implemented to improve its ability to track certain information have resulted in more recent status data being not completely comparable with older status data.

Because it did not adequately plan for the various uses of its data, Energy lacks some of the information needed to analyze how cases will fare when they enter the state workers' compensation systems or to track their outcomes. Specifically, it is difficult for Energy to predict whether willing payers of workers' compensation benefits will exist using case management system data because the information about the specific employer for whom the claimant worked is not collected in a format that can be systematically analyzed. Since employers are liable for workers' compensation coverage, specific employer information is important in

determining whether a willing payer exists. In addition, while Energy has not been systematically tracking whether claimants subsequently file workers' compensation claims or the decisions on these claims, Energy now plans to develop this capability.

**A Shortage of
Qualified Physicians
To Issue
Determinations
Delays Filing of
Workers'
Compensation Claims
And Claimants May
Receive Inadequate
Information To
Prepare Them To
Pursue These Claims**

Energy was slow in implementing its initial case processing operation, but it is now processing enough cases so that there is a backlog of cases awaiting physician panel review. With panels operating at full capacity, the small pool of physicians qualified to serve on the panels may ultimately limit the agency's ability to produce more timely determinations. Claimants have experienced lengthy delays in receiving the determinations they need to file workers' compensation claims and have received little information about claims status as well as what they can expect from this process. Energy has taken some steps intended to reduce the backlog of cases.

**The Ability to Produce
More Timely Decisions
May Be Limited by the
Small Pool of Qualified
Physicians and Gaps in
Information They Need to
Quickly Decide Cases**

Additional resources have allowed Energy to speed initial case development, and it has been processing enough cases to produce a backlog of cases waiting for physician panel review. However, the limited pool of qualified physicians for panels may continue to prevent significant improvements in processing time. Under the rules Energy originally established for this program that required that each case be reviewed by a panel of 3 physicians and given the 130 physicians currently available, it could have taken more than 13 years to process all cases pending as of December 31, without consideration of the hundreds of new cases the agency is receiving each month.³ However, in an effort to make the panel process more efficient, Energy published new rules on March 24, 2004,

³This 13-year estimate assumes that none of the pending cases would be determined ineligible on the basis of noncovered employment or illnesses because we did not possess a sufficient basis for projecting the number of pending cases that would be determined ineligible in the future.

that re-defined a physician panel as one or more physicians appointed to evaluate these cases and changed the timeframes for completing their review. In addition, the agency began holding a full-time physician panel in Washington, D.C. in January 2004, staffed by physicians who are willing to serve full-time for a 2- or 3-week period.

Energy and NIOSH officials have taken steps to expand the number of physicians who would qualify to serve on the panels and to recruit more physicians, including some willing to work full-time. While Energy has made several requests that NIOSH appoint additional physicians to staff the panels, such as requesting 500 physicians in June 2003, NIOSH officials have indicated that the pool of physicians with the appropriate credentials and experience is limited.⁴ The criteria NIOSH originally used to evaluate qualifications for appointing physicians to these panels included: (1) board certification in a primary discipline; (2) knowledge of occupational medicine; (3) minimum of 5 years of relevant clinical practice following residency; and (4) reputation for good medical judgment, impartiality, and efficiency. NIOSH recently modified these qualifications, primarily to reduce the amount of required clinical experience so that physicians with experience in relevant clinical or public health practice or research, academic, consulting, or private sector work can now qualify to serve on the panels. NIOSH has revised its recruiting materials to reflect this change and to point out that Energy is also interested in physicians willing to serve on panels full-time. However, a NIOSH official indicated that only a handful of physicians would likely be interested in serving full-time on the panels.

Energy officials have also explored additional sources from which NIOSH might recruit qualified physicians, but they have expressed concerns that the current statutory cap on the rate of pay for panel physicians may limit the willingness of physicians from these sources to serve on the panels. For example, Energy officials have suggested that physicians in the military services might be used on a part-time basis, but the rate of pay for their military work exceeds the current cap. Similarly, physicians from the Public Health Service could serve on temporary full-time details as panel physicians. To elevate the rate of pay for panel physicians to a level that is consistent with the rate physicians from these sources normally receive,

⁴In March 2004, Energy requested additional physicians from NIOSH that would result in tripling the number of full-time equivalent physicians in 2004 and increasing the number of full-time equivalent physicians by a factor of 6 in 2005.

Energy officials plan to develop a legislative proposal that will modify the current cap on the rate of pay and would also expand Energy's hiring authority.

Panel physicians have also suggested methods to Energy for improving the efficiency of the panels. For example, some physicians have said that more complete profiles of the types and locations of specific toxic substances at each facility would speed their ability to decide cases. While Energy officials reported that they have completed facility overviews for about half the major sites, specific site reference data are available for only a few sites. Energy officials told us that, in their view, the available information is sufficient for decision making by the panels. However, based on feedback from the physicians, Energy officials are exploring whether developing additional site information would be cost beneficial.

Energy Has Not Sufficiently Communicated Case Status and Expectations about the Process to Claimants

Energy has not always provided claimants with complete and timely information about what they could achieve in filing under this program. Energy officials concede that claimants who filed in the early days of the program may not have been provided enough information to understand the benefits they were filing for. As a consequence, some claimants who filed under both Subtitle B and Subtitle D early in the program later withdrew their claims under Subtitle D because they had intended to file only for Subtitle B benefits or because they had not understood that they would still have to file for state workers' compensation benefits after receiving a positive determination from a physician panel. After the final regulations were published in August 2002, Energy officials said that claimants had a better understanding of the benefits for which they were applying.

Energy has not kept claimants sufficiently informed about the status of their claims under Subtitle D. Until recently, Energy's policy was to provide no written communication about claims status between the acknowledgement letters it sent shortly after receiving applications and the point it began to process claims. Since nearly half of the claims filed in the first year of the program remained unprocessed as of December 31, 2003, these claimants would have received no information about the status of their claims for more than 1 year. Energy recently decided to change this policy and provide letters at 6-month intervals to all claimants with pending claims. Although the first of these standardized letters sent to claimants in the fall of 2003 did not provide information about individual claims status, it did inform claimants about a new service on the program's redesigned Web site through which claimants can check on the status of

their claim. However, this new capability does not provide claimants with information about the timeframes during which their claims are likely to be processed and claimants would need to re-check the status periodically to determine whether the status of the claim has changed.

Claimants may not be given sufficient information as to what they are likely to encounter when they file for state workers' compensation benefits. Energy's letter to claimants transmitting a positive determination from a physician panel does not always provide enough information about how they would go about filing for state workers' compensation benefits. For example, a contractor in Tennessee reported that a worker was directed by Energy's letter received in September 2003 to file a claim with the state office in Nashville when Tennessee's rules require that the claim be filed with the employer. The contractor reported the problem to Energy in the same month, but Energy letters sent to Tennessee claimants in October and December 2003 continued to direct claimants to the state office. Finally, claimants are not informed as to whether there is likely to be a willing payer of workers' compensation benefits and what this means for the processing of that claim. Specifically, advocates for claimants have indicated that claimants may be unprepared for the adversarial nature of the workers' compensation process when an insurer or state fund contests the claim.

Workers' Compensation Claims For a Majority of Cases Are Not Likely to be Contested

The workers' compensation claims for the majority of cases associated with major Energy facilities in 9 states⁵ are likely to have no challenges to their claims for state workers' compensation benefits. Specifically, based on additional analysis of workers' compensation programs and the different types of workers' compensation coverage used by the major contractors, it appears that slightly more than half of the cases will potentially have a willing payer—that is, contractors that will not contest the claims for benefits as ordered by Energy. Another 25 percent of the cases, while not technically having a willing payer, have workers' compensation coverage provided by an insurer that has stated that it will not contest these claims and is currently processing several workers' compensation claims without contesting them. The remaining 20 percent of cases in the 9 states we analyzed are likely to be contested. Because of

⁵The cases in these 9 states represent more than three-quarters of the cases filed nationwide. The results of our analysis cannot necessarily be applied to the remaining 25 percent of the cases filed nationwide.

data limitations, these percentages provide an order of magnitude estimate of the extent to which claimants will have willing payers.⁶ The estimates are not a prediction of actual benefit outcomes for claimants.

As shown in table 1, the contractors for four major facilities in these states are self-insured, which enables Energy to direct them to not contest claims that receive a positive medical determination.⁷ In such situations where there is a willing payer, the contractor's action to pay the compensation consistent with Energy's order to not contest a claim will override state workers' compensation provisions that might otherwise result in denial of a claim, such as failure to file a claim within a specified period of time. Similarly, the agreement by the commercial insurer for the workers at the two facilities that constitute 25 percent of the cases to pay the workers compensation claims will mostly likely also supercede such state provisions. However, since the insurer is not bound by Energy's orders and it does not have a formal agreement with either Energy or the contractors to not contest these claims, there is nothing to guarantee that the insurer will continue to process claims in this manner.

⁶Because of data limitations, we assumed that: (1) all cases filed would receive a positive determination by a physician panel, (2) all workers lost wages because of the illness and were not previously compensated for this loss, and (3) in all cases, the primary contractor rather than a subcontractor at the Energy facility employed the worker.

⁷EEOICPA allows Energy, to the extent permitted by law, to direct its contractors not to contest such workers' compensation claims. In addition, the statute prohibits the inclusion of the costs of contesting such claims as allowable costs under its contracts with the contractors; however, Energy's regulations allow the costs incurred as the result of a workers' compensation award to be reimbursed in the manner permitted under the contracts.

Table 1. Extent to Which Cases Will Potentially Be Contested in 9 States

Likely Outcome	Willing Payer Available?	Types of Workers Comp. Coverage	Energy Facility, State	Number of Cases as reported in Energy data	Percentage of Cases in Category
Contests are Not Likely					
	Yes	Self-insurance	<ul style="list-style-type: none"> Paducah Gaseous Diffusion Plant, Kentucky ^a Los Alamos National Lab, New Mexico Oak Ridge K-25, X-10, and Y-12 Plants, Tennessee Hanford Site, Washington 	2,133 1,380 4,115 1,798	55 %
			Subtotal	9,426	
	No	Commercial Policy, Insurer Will Follow Contractors Instructions to Not Contest	<ul style="list-style-type: none"> Idaho National Engineering Lab, Idaho Savannah River Site, South Carolina 	849 3,375	25 %
			Subtotal	4,224	
			Subtotal	13,650	80 %
Contests Likely					
	No	Commercial policy	<ul style="list-style-type: none"> Rocky Flats Plant, Colorado 	1,630	
	No	State Fund	<ul style="list-style-type: none"> Portsmouth Gaseous Diffusion Plant, Ohio Feed Materials Production Center, Ohio Mound Plant, Ohio 	862 286 91	
			Subtotal	1,239	
	No	No Current Contractor	<ul style="list-style-type: none"> Iowa Ordnance Plant, Iowa 	645	
			Subtotal	3,514	20%

Source: GAO analysis of Energy data and interviews with current contractors and state officials.

Note: The table includes the cases from the facilities in these states with the largest number of cases filed but does not include the remaining 693 cases (4 percent) from other facilities in these states.

^aA total of 2,370 cases have been filed for the Paducah Gaseous Diffusion Plant, which has been operated since July 1998 by a private entity that leases the facility. Energy recently decided that workers who have only been employed by this private entity, and not by the prior contractors who operated the facility, will not be eligible for the program. An Energy contractor performing environmental cleanup at the site also employs workers at the facility. This contractor is responsible for the workers' compensation claims filed by its employees as well as those filed by employees of the contractors who operated the facility prior to July 1998. We apportioned 90 percent of the cases filed for the Paducah facility (2,133) to the cleanup contractor because the facility was run by the prior contractors for about 90 percent of its years in operation. We apportioned the remaining 10 percent of the cases (237) to the private entity and do not show these cases in the table, due to Energy's decision that claims filed by the entity's workers would be ineligible for the program. However, this apportionment involves some uncertainty because the clean up contractor has not had an opportunity to analyze the effects of Energy's policy decision.

About 20 percent of cases in the 9 states we analyzed are likely to be contested. Therefore, in some instances, these cases may be less likely to receive compensation than a comparable case for which there is a willing payer, unless the claimant is able to overcome challenges to the claim. In addition, contested cases can take longer to be resolved. For example, one claimant whose claim is being contested by an insurer was told by her attorney that because of discovery and deposition motions by the opposing attorney, it would be two years before her case was heard on its merits. Specifically, the cases that lack willing payers involve contractors that (1) have a commercial insurance policy, (2) use a state fund to pay workers' compensation claims, or (3) do not have a current contract with Energy. In each of these situations, Energy maintains that it lacks the authority to make or enforce an order to not contest claims. For instance, an Ohio Bureau of Workers' Compensation official said that the state would not automatically approve a case, but would evaluate each workers' compensation case carefully to ensure that it was valid and thereby protect its state fund. Further, although the contractor in Colorado with a commercial policy attempted to enter into agreements with prior contractors and their insurers to not contest claims, the parties have not yet agreed and several workers' compensation claims filed with the state program are currently being contested.

Several Issues Should Be Considered in Evaluating Options for Improving the Likelihood of Willing Payers

Various options are available to improve payment outcomes for the cases that receive a positive determination from Energy, but lack willing payers under the current program. If it chooses to change the current program, Congress would need to examine these options in terms of several issues, including the source, method, and amount of the federal funding required to pay benefits; the length of time needed to implement changes; the criteria for determining who is eligible; and the equitable treatment of claimants. In particular, the cost implications of these options for the federal government should be carefully considered in the context of the current federal fiscal environment.

Options for Changing the Current Program

We identified four possible options for improving the likelihood of willing payers, some of which have been offered in proposed legislation. While not exhaustive, the options range from adding a federal benefit to the existing program for cases that lack a willing payer to addressing the willing payer issue as part of designing a new program that would allow policymakers to decide issues such as the eligibility criteria and the type and amount of benefits without being encumbered by existing program structures. A key difference among the options is the type of benefit that would be provided.

Option 1—State workers’ compensation with federal back up. This option would retain state workers’ compensation structure as under the current Subtitle D program but add a federal benefit for cases that receive a positive physician panel determination but lack a willing payer of state workers’ compensation benefits. For example, claims involving employees of current contractors that self-insure for workers’ compensation coverage would continue to be processed through the state programs. However, claims without willing payers such as those involving contractors that use commercial insurers or state funds likely to contest workers’ compensation claims could be paid a federal benefit that approximates the amount that would have been received under the relevant state program.

Option 2—Federal workers’ compensation model. This option would move the administration of the Subtitle D benefit from the state programs entirely to the federal arena, but would retain the workers’ compensation concept for providing partial replacement of lost wages as well as medical benefits. For example, claims with positive physician panel determinations could be evaluated under the eligibility criteria of the Federal Employees Compensation Act⁸ and, if found eligible, could be paid benefits consistent with the criteria of that program.

Option 3—Expanded Subtitle B program that does not use a workers’ compensation model. Under this option, the current Subtitle B program would be expanded to include the other illnesses resulting from radiation and toxic exposures that are currently considered under the Subtitle D program. The Subtitle D program would be eliminated as a separate program and, if found eligible, claimants would receive a lump-sum payment and coverage of future medical expenses related to the workers’ illnesses, assuming they had not already received benefits under Subtitle B. The Department of Labor would need to expand its regulations to specify which illnesses would be covered and the criteria for establishing eligibility for each of these illnesses. In addition, since the current programs have differing standards for determining whether the

⁸The Federal Employees’ Compensation Act (5 U.S.C. 8101, *et seq.*) provides workers’ compensation coverage for federal and postal employees, who are not covered by the state programs.

worker's illness was related to his employment⁹, it would have to be decided which standard would be used for the new category of illnesses.

Option 4—New federal program that uses a different type of benefit structure. This option would address the willing payer issue as part of developing a new program that involves moving away from the workers' compensation and Subtitle B structures and establishing a new federal benefit administered by a structure that conforms to the type of the benefit and its eligibility criteria. This option would provide an opportunity to consider anew the purpose of the Subtitle D provisions. As a starting point, policymakers could consider different existing models such as the Radiation Exposure Compensation Act, designed to provide partial restitution to individuals whose health was put at risk because of their exposure even when their illnesses do not result in ongoing disability. But they could also choose to build an entirely new program that is not based on any existing model.

Various Issues Should Be Considered in Deciding Whether Changes Are Needed and Assessing the Options

In deciding whether and how to change the Subtitle D program to ensure a source of benefit payments for claims that would be found eligible if they had a willing payer, policymakers will need to consider the trade-offs involved. Table 2 arrays the relevant issues to provide a framework for evaluating the range of options in a logical sequence. We have constructed the sequence of issues in this framework in terms of the purpose and type of benefit as being the focal point for the evaluation, with consideration of the other issues flowing from that first decision. For example, decisions about eligibility criteria would need to consider issues relating to within-state and across-state equity for Subtitle D claimants. The framework would also provide for decisions on issues such as the source of federal funding—trust fund or increased appropriations—and the appropriate federal agency to administer the benefit. For each of the options, the type of benefit would suggest which agency should be chosen to administer the benefit and would depend, in part, on an agency's capacity to administer a benefit program. In examining these issues, the effects on federal costs would have to be carefully considered. Ultimately, policymakers will need

⁹Under Subtitle B, an individual with specified types of cancer shall be determined to have sustained that condition in the performance of duty if the cancer was at least as likely as not related to employment at a specified facility. Under Subtitle D, a physician panel must decide whether it is at least as likely as not that exposure to a toxic substance in the course of employment was a significant factor in aggravating, contributing to, or causing the illness or death of the worker.

to weigh the relative importance of these issues in deciding whether and how to proceed.

Purpose and Type of Benefit

In evaluating how the purpose and type of benefit now available under Subtitle D could be changed, policymakers would first need to focus on the goals they wish to achieve in providing compensation to this group of individuals. If the goal is to compensate only those individuals who can demonstrate lost wages because of their illnesses, a recurring cash benefit in an amount that relates to former earnings might be in order and a workers' compensation option, either a state benefits with a federal back up or a federal workers' compensation benefit, would promote this purpose. If, on the other hand, the goal is to compensate claimants for all cases in which workers were disabled because of their employment—even when workers continue to work and have not lost wages—the option to expand Subtitle B would allow a benefit such as a flat payment amount not tied to former earnings.

For consideration of a new federal program option, it might be useful to also consider other federal programs dealing with the consequences of exposure to radiation as a starting point. For example, the Radiation Exposure Compensation Act was designed to provide partial restitution to individuals whose health was put at risk because of their exposure. Similar to Subtitle B, the act created a federal trust fund, which provides for payments to individuals who can establish that they have certain diseases and that they were exposed to radiation at certain locations and at specified times. However, this payment is not dependent on demonstrating ongoing disability or actual losses resulting from the disease.

Eligibility Criteria and Equity of Outcomes

The options could also have different effects with respect to eligibility criteria and the equity of benefit outcomes for current Subtitle D claimants based on these criteria. By equity of outcomes, we mean that claimants with similar illnesses and circumstances receive similar benefit outcomes. The current program may not provide equity for all Subtitle D claimants within a state because a claim that has a willing payer could receive a different outcome than a similar claim that does not have a willing payer, but at least three of the options could provide within-state equity. With respect to across-state equity, the current program and the option to provide a federal back up to the state workers' compensation programs would not achieve equity for Subtitle D claimants in different states. In contrast, the option based on a federal workers' compensation model as

well as the expanded Subtitle B option would be more successful in achieving across-state equity.¹⁰

Regardless of the option, changes made to Subtitle D could also potentially result in differing treatment of claims decided before and after the implementation of the change. In addition, changing the program to remove the assistance in filing workers' compensation claims may be seen as depriving a claimant of an existing right. Further, any changes could also have implications beyond EEOICPA, to the extent that the changes to Subtitle D could establish precedents for federal compensation to private sector employees in other industries who were made ill by their employment.

Federal Costs

Effects on federal costs would depend on the generosity of the benefit in the option chosen and the procedures established for processing claims for benefits. Under the current program, workers' compensation benefits that are paid without contest will come from contract dollars that ultimately come from federal sources – there is no specific federal appropriation for this purpose. Because all of the options are designed to improve the likelihood of payment for claimants who meet all other criteria, it is likely that federal costs would be higher for all options than under the current program. Specifically, federal costs would increase for the option to provide a federal back up to the state workers' compensation program because it would ensure payment at rates similar to the state programs for the significant minority of claimants whose claims are likely to be contested and possibly denied under the state programs. Further, the federal costs of adopting a federal workers' compensation option would be higher than under the first option because all claimants – those who would have been paid under the state programs as well as those whose claims would have been contested under the state programs – would be eligible for a federal benefit similar to the benefit for federal employees. In general, federal workers' compensation benefits are more generous than state benefits because they replaces a higher proportion of the worker's salary than many states and the federal maximum rate of wage replacement is higher than all the state maximum rates.

¹⁰An additional within-state equity issue involves the comparative treatment of Subtitle D claimants and all other workers' compensation claimants in the same state.

For either of the two options above, a decision to offset the Subtitle D benefits against the Subtitle B benefit could lessen the effect of the increased costs, given reports by Energy officials that more than 90 percent of Subtitle D claimants have also filed for Subtitle B benefits.¹¹ However, the degree of this effect is difficult to determine because many of the claimants who have filed under both programs may be denied Subtitle B benefits. The key distinction would be whether workers who sustained certain types of illnesses based on their Energy employment should be compensated under both programs as opposed to recourse under only one or the other. If they were able to seek compensation from only one program, the claimant's ability to elect one or the other based on individual needs should be considered.

The effects on federal cost of an expanded Subtitle B option or a new federal program option are more difficult to assess. In many cases, the Subtitle B benefit of up to \$150,000 could exceed the cost of the lifetime benefit for some claimants under either of the workers' compensation options, resulting in higher federal costs. However, the extent of these higher costs could be mitigated by the fact that many of the claimants who would have filed for both benefits in the current system would be eligible for only one cash benefit regardless of the number or type of illnesses. The degree of cost or savings would be difficult to assess without additional information on the specific claims outcomes in the current Subtitle B program. The effects on federal costs for the new federal program option would depend on the type and generosity of the benefit selected.

¹¹Under the current Subtitle B and Subtitle D programs, benefits are not offset against each other.

Table 2. Framework for Evaluating Options to Change the Subtitle D Program

	Current program	Option 1—State workers’ compensation with federal back-up	Option 2—Federal workers’ compensation model	Option 3—Expanded Subtitle B program	Option 4—New federal benefit
Purpose and type of benefit	Varies by state, but generally includes medical treatment and cash payments that partially replace lost wages.	Same as under current state programs.	Still a workers’ compensation benefit, generally includes medical treatment and cash payments that partially replace lost wages.	Same as for current Subtitle B— coverage of future medical treatment and a one-time payment of up to \$150,000 as compensation for disability or death because of exposure to radiation or toxic substance.	Open for consideration.
Eligibility criteria	Vary by state, but generally apply to workers who contract a work-related illness and who lose work time because of the illness.	For federal back-up benefit, should be similar to criteria under current state programs.	Uses criteria of workers’ compensation program for federal employees.	Same as for current Subtitle B claimants who worked for Energy contractors.	Open for consideration— should flow from type of benefit and the nature of the population it is designed to compensate.
Interaction with Subtitle B	Benefits are not offset against each other.	Open for consideration.	Open for consideration.	No interaction issues. Claimants would be eligible for only one payment regardless of number of illnesses. Because there is a large overlap in claimants filing under both programs, this could potentially reduce the total number of claims that would remain to be processed once combined.	Open for consideration. Depends on the nature of the benefit.
Equity of Outcomes within Subtitle D					
within states	Similar cases in the same state could receive differing benefits.	Similar cases in the same state could receive similar benefits regardless of employer.	Similar cases in the same state could receive similar benefits regardless of employer.	Similar cases in the same state could receive similar benefits regardless of employer.	Open for consideration.

	Current program	Option 1—State workers' compensation with federal back-up	Option 2—Federal workers' compensation model	Option 3—Expanded Subtitle B program	Option 4—New federal benefit
across states	Similar cases in different states could receive differing compensation.	Similar cases in different states could receive differing compensation.	Similar cases in different states could receive similar compensation.	Similar cases in different states could receive similar compensation	Open for consideration
Funding source for benefits	Most eligible cases with willing payers will be paid by contractors from contract funds from federal sources.	Same as current program for cases with willing payer, but would need a source for federal back-up benefit.	Would need new federal source	Trust fund already established by Section 3612 of EEOICPA.	Open for consideration—Appropriations or trust fund.
Federal administrator	Energy	For federal benefit, selection criteria should include how quickly agency could implement and how well it was situated to process and pay cases. Energy would still need to secure records for all cases and process claims with willing payers.	Department of Labor/Office of Workers' Compensation administers current program; also administers Subtitle B program. Energy would still need to secure records.	Department of Labor—same as current Subtitle B program.	Open for consideration—depends on type of benefit, experience in administering benefit program, and funding source.
Timeframe for implementation	Program is implemented, but few cases have been completely processed.	Relatively short to implement since it is based on existing program. Infrastructure would have to be established and rules developed to provide for federal benefits that mirror those of the state programs.	Longer than Option 1. Infrastructure in place, but regulations for existing federal workers' compensation program would need to be expanded to cover new benefit.	Longer than Option 1— structure in place to administer existing Subtitle B program—new rules need to be developed for evaluating additional illnesses.	Potentially longest of all options. Depends on administrator and whether infrastructure exists or would need to be built. In either event, need to publish rules and establish procedures.

	Current program	Option 1—State workers' compensation with federal back-up	Option 2—Federal workers' compensation model	Option 3—Expanded Subtitle B program	Option 4—New federal benefit
Federal cost	For cases that are not contested, benefits that are paid will ultimately come from contract dollars from federal sources (Energy and Defense).	Federal costs could increase since benefits for cases without willing payers would be paid directly from federal funds.	Federal costs could be greater than for current program since benefits would be based on the often more generous workers' compensation program for federal workers.	To the extent that the option would ensure a source of benefits, could increase federal costs. However, the extent of these higher costs could be mitigated because many of the claimants who would have filed for Subtitle B and D benefits in the current system would be eligible for only one cash benefit regardless of the number or type of illnesses.	Open for consideration— Depends on type of benefit and eligibility criteria.

Source: GAO analysis.

Mr. Chairman, this completes my prepared statement. I would be happy to respond to any questions you or other Members of the Committee may have at this time.

Contacts and Acknowledgments

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