

May 2004

**ENERGY
EMPLOYEES
COMPENSATION**

**Even with Needed
Improvements in Case
Processing, Program
Structure May Result
in Inconsistent Benefit
Outcomes**





Highlights of [GAO-04-516](#), a report to Chairman, Committee on Finance, U.S. Senate

Why GAO Did This Study

Subtitle D of the Energy Employees Occupational Illness Compensation Program Act of 2000 allows the Department of Energy (Energy) to help its contractors' employees file state workers' compensation claims for illnesses determined by a panel of physicians to be caused by exposure to toxic substances while employed at an Energy facility.

This report examines the effectiveness of the benefit program under Subtitle D 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 that—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.

What GAO Recommends

Energy generally agreed with GAO recommendations that the agency take additional steps to expedite the processing of claims through its physician panels, enhance its communications with claimants, improve its case management data and its capabilities to aggregate these data to address program issues, and consider developing a legislative proposal to address the willing payer issue.

www.gao.gov/cgi-bin/getrpt?GAO-04-516.

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

Even with Needed Improvements in Case Processing, Program Structure May Result in Inconsistent Benefit Outcomes

What GAO Found

During the first 2½ 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 nearly 35 percent of the cases, but processing had not yet begun on nearly 60 percent of the cases. Further, insufficient strategic planning and systems limitations complicate the assessment of Energy's achievement of goals related to case processing, as well as goals related to program objectives, such as the quality of the assistance provided to claimants in filing for state workers' compensation.

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. 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.

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 the cases in these 9 states lack willing payers and are likely to be contested. This has created concerns about program equity in 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. These estimates could change as better data become available or as circumstances change, such as new contractors taking over at individual facilities. 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. While not recommending any particular option, GAO provides a framework that includes a range of issues to 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 and projected federal fiscal environment.

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Abbreviations

CMS	Case Management System
EEOICPA	Energy Employees Occupational Illness Compensation Program Act
NIOSH	National Institute for Occupational Safety and Health

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G A O

Accountability * Integrity * Reliability

United States General Accounting Office
Washington, DC 20548

May 28, 2004

The Honorable Charles E. Grassley
Chairman, Committee on Finance
United States Senate

Dear Mr. Chairman:

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 exposed to toxic substances, including radioactive and hazardous materials, and studies have shown that many of these employees subsequently developed serious illnesses. The Energy Employees Occupational Illness Compensation Program Act (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, with 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 while employed at an Energy facility. Individuals may apply for and receive benefits under both programs since benefits are not offset against each other.

You asked that we study the effectiveness of the benefit program under Subtitle D of EEOICPA in assisting employees of Energy's contractors in obtaining compensation for occupational illnesses. In addition, in the conference report for the 2003 appropriations for Energy, the conferees

directed that we study this issue (see GAO-04-515). We focused our work 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 that—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 to the extent that there may not be willing payers of benefits.

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. We determined that the data we used were sufficiently reliable for our purposes by performing electronic testing for obvious errors in accuracy and completeness, reviewing available documentation, and interviewing agency officials and contractors knowledgeable about the data. We also reviewed the provisions of, and interviewed officials with, the workers' compensation programs in 9 states, which account 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. We conducted our review from April 2003 through April 2004 in accordance with generally accepted government auditing standards. For a more complete explanation of our methodology, see appendix I.

Results in Brief

During the first 2½ years of the program, ending 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. Less than 1 percent of all cases had received a determination by a physician panel, a document needed to pursue a workers' compensation claim under this program. In addition, Energy had not begun processing on nearly 60 percent of the cases it has received. Insufficient strategic planning and systems limitations complicate the assessment of Energy's achievement of goals related to case processing, as well as goals related to program objectives, such as the quality of the assistance provided to claimants in filing for state workers' compensation.

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. 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.

More than half of the cases associated with Energy facilities in the 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 for 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 the cases in these 9 states 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 claims will have willing payers. The estimates are not a prediction of actual benefit outcomes for claimants. Further, these estimates could change as better data become available or as circumstances change, such as new contractors taking over at individual facilities. For example, the contract for environmental cleanup at a facility in Kentucky will expire on September 30, 2004, and it is unclear at this point how the subsequent contractor will deal with the claims of employees of prior contractors. If the change in contractors results in these claims being contested, our overall estimate of the cases that are likely to be contested could increase to 33 percent. For all claimants, actual compensation is not certain because of additional factors such as the rules in the state workers' compensation programs or contractors' uncertainty on how to compute the benefit.

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 and projected federal fiscal environment.

We are making several recommendations to Energy to help improve its effectiveness in assisting Subtitle D claimants in obtaining compensation for occupational illnesses. Specifically, we are recommending that Energy take additional steps to expedite the processing of claims through its physician panels, enhance the quality of its communications with claimants, improve the quality of its case management data and its capabilities to aggregate these data to address program issues, and consider developing a legislative proposal to address the willing payer issue. In commenting on a draft of this report, Energy indicated that the agency had already incorporated several of our recommendations and will aggressively tackle the remainder. However, Energy did not specifically comment on each recommendation. In addition, Energy highlighted initiatives either planned or underway that pertain to our recommendations. Energy's comments are provided in appendix II.

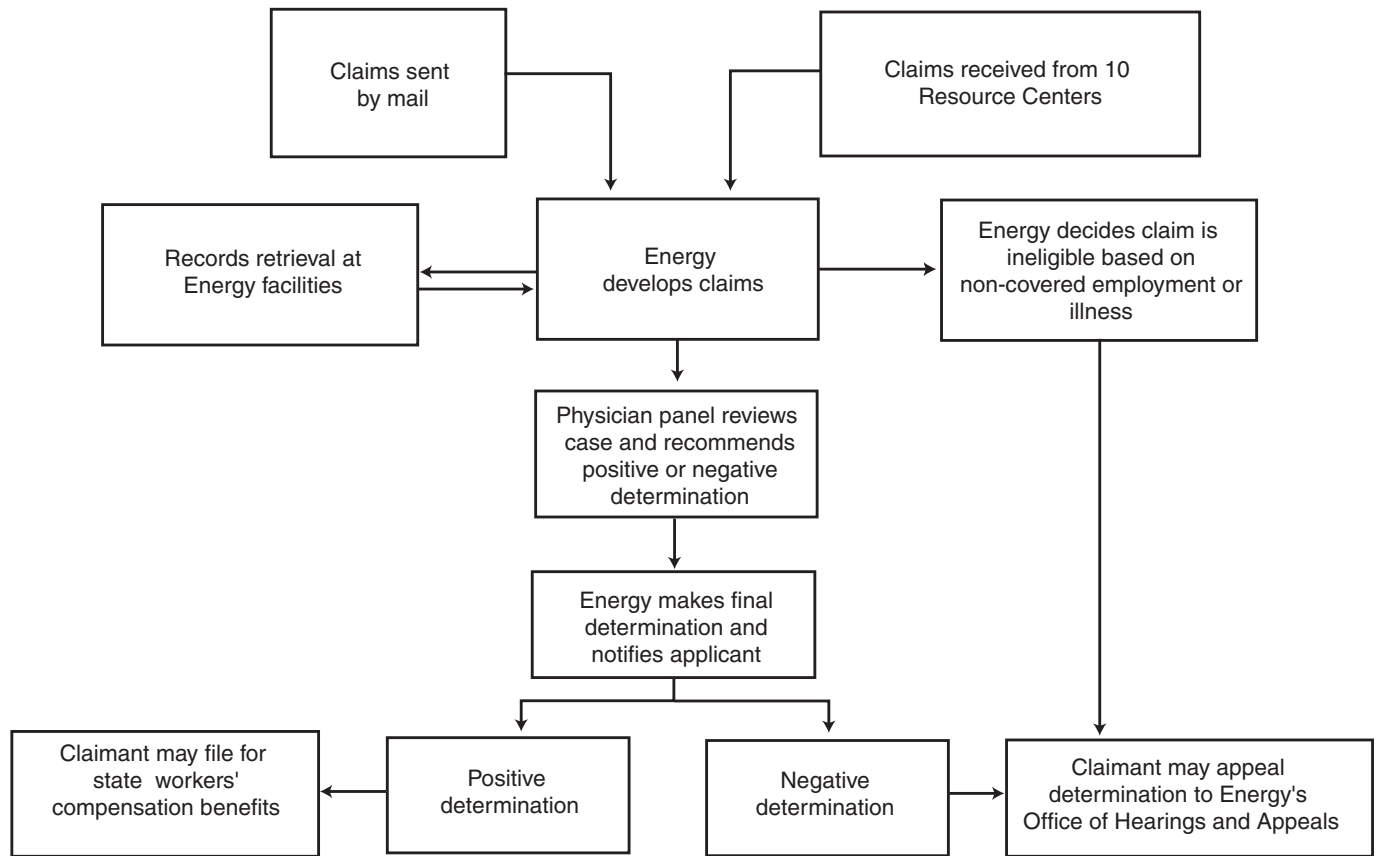
Background

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.¹ 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 effective in September 2002, and the agency began to process the applications it had been accepting since July 2001, when the law took effect.

¹Executive Order 13179, December 7, 2000.

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 the onset of disease symptoms, but within 20 years of exposure to radiation or asbestos.

EEOICPA allows Energy, to the extent permitted by law, to direct its contractors to not contest the workers' compensation claims filed by Subtitle D claimant who received a positive determination from a physician panel. 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. The Subtitle D program does not affect the normal operation of state workers' compensation programs other than limiting the ability of Energy or its contractors to contest certain claims; Energy does not have authority to expand or contract the scope of any of these state programs. Thus, actions taken by Energy or its contractors will not make a worker eligible for compensation under a state workers' compensation system if the worker is not otherwise eligible.

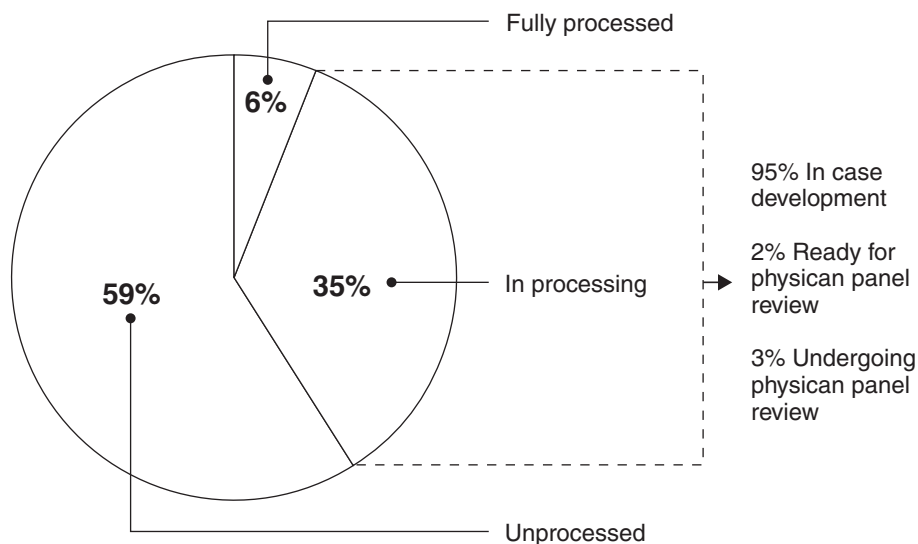
Energy Has Processed Few Cases, and Insufficient Strategic Planning and Data Collection Complicate Program Management

As of December 31, 2003, Energy had completely processed about 6 percent of the more than 23,000 cases that had been filed, and the majority of all cases filed were associated with facilities in 9 states. Energy had begun processing on nearly 35 percent of cases, but processing had not begun on nearly 60 percent of the cases. Assessment of Energy's achievement of case processing goals is complicated by systems limitations. Further, these limitations make it difficult to assess the achievement of goals related to program objectives, such as the quality of the assistance given to claimants in filing for state workers' compensation.

About 6 Percent of Cases Have Been Fully Processed

During the first 2½ years of the program, ending December 31 2003, Energy had fully processed about 6 percent of the more than 23,000 cases it received. The majority of these 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. Of the cases that had been fully processed, 150 cases—less than 1 percent of the more than 23,000 cases filed—had received a final determination from a physician panel. More than half of these determinations (87 cases) were positive. 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 various stages of processing. As shown in figure 2, the majority of the cases being processed were in the case development stage, where Energy requests information from the facility at which the claimant was employed. About 2 percent of the cases in process were ready for physician panel review, and an additional 3 percent were undergoing panel review.

Figure 2: Case status as of December 31, 2003



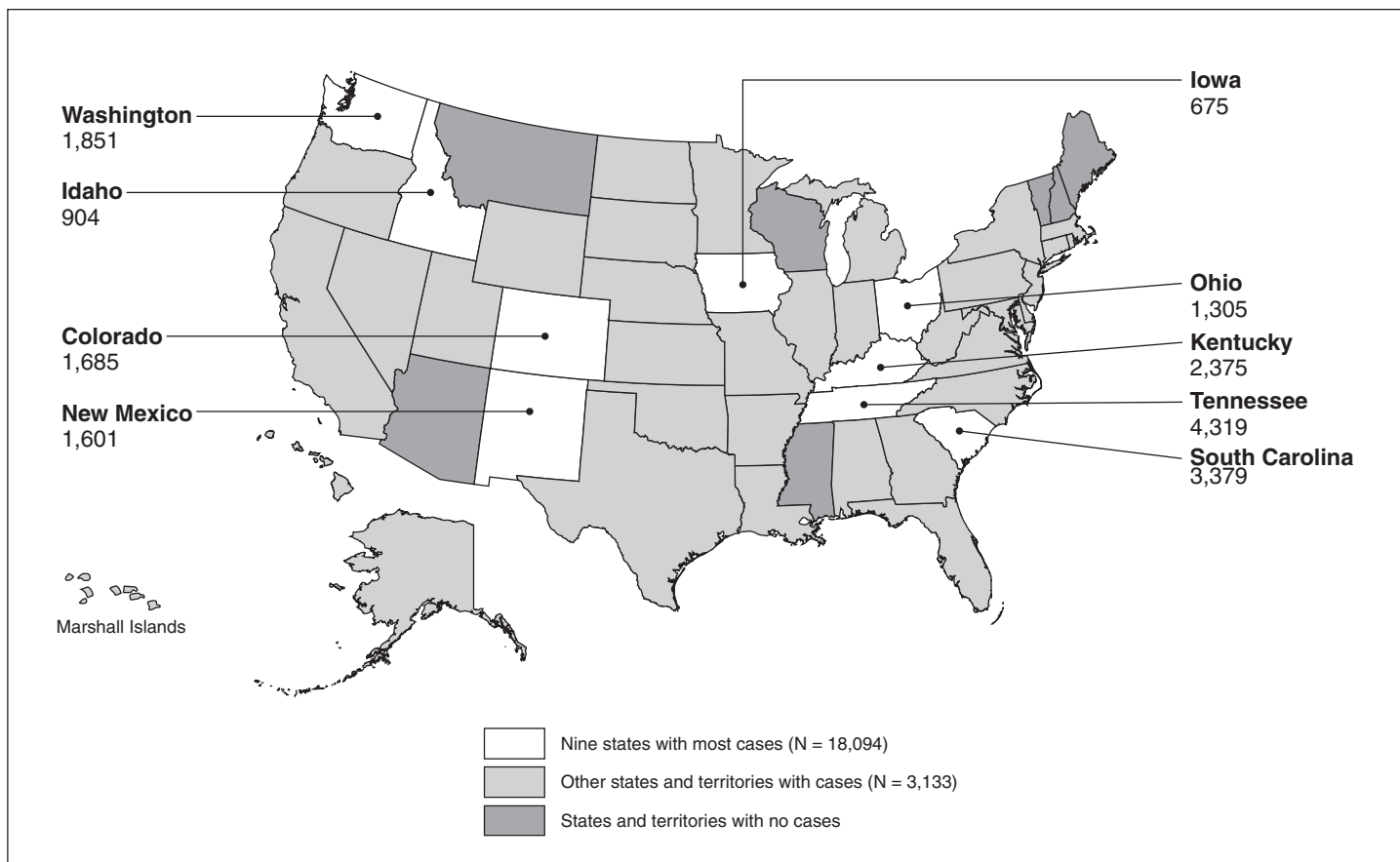
Source: GAO analysis of Energy data.

A majority of all cases were filed early during program implementation, but new cases continue to be filed. More than half of all cases were filed within the first year of the program, between July 2001 and June 2002. However, between July 2002 and December 31, 2003, Energy continued to receive an average of more than 500 cases per month. Energy officials report that they continue to receive approximately 100 new cases per week.

Energy Facilities in 9 States Account for More than 75 percent of Cases

While cases filed are associated with facilities in 43 states or territories, the majority of cases are associated with Energy facilities in 9 states, as shown in figure 3. 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 3: 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.

Workers filed the majority of cases, and cancer is the most frequently reported illness. Workers filed more than 60 percent of cases, and survivors of deceased workers filed about 36 percent of cases. In 2 percent of the cases, a worker filed a claim that was subsequently taken up by a survivor. Cancer is the illness reported in nearly 60 percent of the cases.

Diseases affecting the lungs accounted for an additional 15 percent of the cases. Specifically, chronic beryllium disease and/or beryllium sensitivity were reported in 7 percent of the cases, 8 percent reported asbestosis, and less than 1 percent claimed chronic silicosis.

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 goals for processing claims. The data system Energy uses 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 did not collect sufficient information to track Energy's progress in meeting these goals. While recent changes to the system have improved Energy's ability to track certain information, these changes have resulted in some recent status data being not completely comparable with older status data. In addition, Energy will be unable to completely track the timeliness of its processing for approximately one-third of the cases that were being processed as of December 2003 because key data are not complete. For example, Energy established a goal of completing case development within 120 days of case assignment to a case manager. At least 70 percent of the cases for which case development was complete were missing dates corresponding to either the beginning or the end of the case development process—data that would allow Energy officials to compute the time elapsed during case development.

Energy has not been sufficiently strategic in identifying and systematically collecting certain data that are useful for program management. For instance, Energy does not track the reasons why particular cases were found ineligible in a format that can be easily analyzed. Systematic tracking of the reasons for ineligibility would make it possible to quickly identify cases affected by policy changes. For example, when a facility in West Virginia was determined to be only a Department of Energy facility and not also an atomic weapons employer, it was necessary for Energy to identify which cases had been ruled ineligible because of employment at the West Virginia facility. While some ineligibility information may be stored in case narratives, this information is not available in a format that would allow the agency to quickly identify cases declared ineligible for similar reasons. Ascertaining the reason for ineligibility would at best require review of individual case narratives, and indeed, Energy officials report that it is sometimes necessary to refer back to application forms to

find the reasons. As a result, if additional changes are made that change eligibility criteria, Energy may have to expend considerable time and resources determining which cases are affected by the change in policy.

In addition, because it did not adequately plan for the various uses of its data, Energy lacks some of the data needed to analyze how cases will fare when they enter the state workers' compensation systems. 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. In addition, basic demographic data such as the age of employees is not necessarily accurate due to insufficient edit controls—for example, error checking that would prevent employees' dates of birth from being entered if the date was in the future or recent past. Reliable age data would allow Energy to estimate the proportion of workers who are likely to have health insurance such as Medicare.

Insufficient tracking of program outcomes hampers Energy's ability to determine how well it is providing assistance to claimants in filing claims for state workers' compensation benefits. Energy has not so far systematically tracked whether claimants subsequently file workers' compensation claims or the decisions on these claims. However, agency officials recently indicated that they now plan to develop this capability. In addition, Energy does not systematically track whether claimants who receive positive physician panel determinations file workers' compensation claims, nor whether claims that are filed are approved, or paid. Furthermore, unless Energy's Office of Hearings and Appeals grants an appeal of a negative determination, which is returned to Energy for further processing, Energy does not track whether a claimant files an appeal. Lack of information about the number of appeals and their outcomes may limit Energy's ability to assess the quality and consistency of its decision making.

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.

Sufficient Cases Have Not Always Been Available for Physician Panel Review, but Energy Has Increased the Pace of Its Case Development Processing

Energy's case development process has not always produced enough cases to ensure that the physician panels were functioning at full capacity, but the agency is now processing enough cases to produce a backlog of cases waiting for panel review. Energy officials established a goal of completing the development of 100 cases per week by August 2003 to keep the panels fully engaged. However, the agency did not achieve this goal until several months later.

Energy was slow to implement its case development operation. Initially, agency officials did not have a plan to hire a specific number of employees for case development, but they expected to secure additional staff as they were needed. When Energy first began developing cases, in the fall of 2002, the case development process had about 8 case managers. With modest staffing increases, the program quickly outgrew the office space used for this function. Though Energy officials acknowledged the need for more personnel by spring 2003, they delayed hiring until additional space could be secured in August. By November 2003, Energy had more than tripled the number of case managers developing cases, and since that month the agency has continued to process an average of more than 100 cases per week to have them ready for physician panel review.

Energy transferred nearly \$10 million in fiscal year 2003 funds into this program from other Energy accounts. Further, after completing a comprehensive review of its Subtitle D program, the agency developed 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 calendar year 2006 and depends in part on shifting an additional \$33 million into the program in fiscal year 2004, to quadruple the case-processing operation. With additional resources, Energy plans to complete the development of all pending cases as quickly as possible and have them ready for the physician panels. However, this could create a larger backlog of cases awaiting review by physician panels. Because a majority of the claims filed so far are from workers whose medical conditions are likely to change over time, building this backlog could further slow the decision process by making it necessary to update medical records before panel review.

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

Even though additional resources have allowed Energy to speed initial case development, the limited pool of qualified physicians for panels may limit Energy's capacity to decide cases more quickly. 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.² However, in an effort to make the panel process more efficient, Energy published new rules on March 24, 2004, that re-defined a physician panel as one or more physicians appointed to evaluate these cases and changed the timeframes for completing their review. Under the new rule, a panel composed of a single physician will initially review each case, and if a positive determination is issued, no further review is necessary. Negative determinations made by a single physician panels will require review by one or more additional single-physician panels. In addition to revising its rules, 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.

²This 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.

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.³ 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 said that he was uncertain about the effect of the change in qualifications on the number of available physicians. In addition, the 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, Energy officials recently submitted to the Congress a legislative proposal to eliminate the current cap on the rate of pay and also expand Energy's hiring authority.

³In 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.

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 most of 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 Informed Claimants about the Status of Their Claims and Subsequent Aspects of the Process

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 acknowledgment letters it sent shortly after receiving applications and the point at which it began to process claims. Since nearly half of the claims filed in the first year of the program remained unprocessed as of the 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 October 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.

In addition, claimants may not receive sufficient information about what they are likely to encounter when they file for state workers' compensation benefits. For example, 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. 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.

Energy officials recently indicated that they plan to test initiatives to improve communication with claimants. Specifically, they plan to conduct a test at one Resource Center that would provide claimants with additional information about the workers' compensation process and advice on how to proceed after receiving a positive physician panel determination. In addition, they plan to begin contacting individuals with pending claims this summer to provide information on the status of their claims.

While Workers' Compensation Claims for a Majority of Cases Are Not Likely to Be Contested, Actual Compensation Is Not Certain

Our analysis shows that a majority of cases associated with Energy facilities in 9 states that account for more than three-quarters of all Subtitle D cases filed are not likely to be contested. However, the remaining 20 percent of cases lack willing payers and are likely to be contested. These percentages provide an order of magnitude estimate of the extent to which claimants will have willing payers and are not a prediction of actual benefit outcomes for claimants.

A Majority of Cases in 9 States Are Not Likely to Be Contested

The workers' compensation claims for the majority of cases associated with major Energy facilities in 9 states⁴ are likely to have no challenges to their claims for state workers' compensation benefits. Specifically, based on 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. In these cases, self-insured contractors 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 data limitations, these percentages provide an order of magnitude estimate of the extent to which claimants will have willing payers.⁵ 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, and Energy's direction to them to not contest claims that receive a positive physician panel determination will be adhered to. 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 could result in a payment that might otherwise have resulted in a denial of a claim, for reasons such as failure to file a claim within a specified period of time. Similarly, the informal agreement by the commercial insurer with the contractors at the two facilities that constitute 25 percent of the cases to pay the workers compensation claims will more likely result in payment, despite potential grounds to contest

⁴The 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.

⁵Because 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. While we believe that the first two assumptions would not affect the proportions shown in each category, the third assumption could result in an underestimate of the proportion of cases lacking willing payers to the extent that some workers may have been employed by subcontractors that used commercial insurers or state funds for workers' compensation coverage. Some subcontractors use these methods of workers' compensation coverage because they may not employ enough workers to qualify for self-insurance under some state workers' compensation programs.

under state law. However, since this 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.

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 pretrial motions filed by the opposing attorney, it would be 2 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 its orders to contractors would have a limited effect. For instance, an Ohio Bureau of Workers' Compensation official said that the state would not automatically approve a case with a positive physician panel determination, but would evaluate each workers' compensation case carefully to ensure that it was valid and thereby protect its state fund. Furthermore, 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.

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	Paducah Gaseous Diffusion Plant, Kentucky ^a	2,133	
			Los Alamos National Lab, New Mexico	1,380	
			Oak Ridge K-25, X-10, and Y-12 Plants, Tennessee	4,115	
			Hanford Site, Washington	1,798	
			Subtotal	9,426	55 %
No ^b		Commercial policy, insurer will follow contractors' instructions to not contest	Idaho National Engineering Lab, Idaho	849	
			Savannah River Site, South Carolina	3,375	
			Subtotal	4,224	25 %
Subtotal				13,650	80 %
Contests likely					
No		Commercial policy	Rocky Flats Plant, Colorado	1,630	
No		State fund	Portsmouth Gaseous Diffusion Plant, Ohio	862	
			Feed Materials Production Center, Ohio	286	
			Mound Plant, Ohio	91	
No		No current contractor	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.

^bThis insurer is technically not a willing payer since it 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 for workers' compensation. However, the insurer has stated that it will follow contractors' instructions to not contest these claims.

These estimates could change as better data become available or as circumstances change, such as new contractors taking over at individual facilities. For example, the contractor currently performing environmental cleanup at the Paducah Gaseous Diffusion Plant will not re-compete for this work when its contract ends on September 30, 2004. Energy is soliciting proposals for a new contract to continue the cleanup work and has indicated that the new contractors will not be required to take on the responsibility for the workers' compensation claims filed by employees of former contractors. While Energy has proposed that the current clean up contractor continue to handle the claims of their employees and those of prior contractors under another of its contracts with the agency, it is unclear at this point whether the current contractor will be able to arrange for continuing coverage of these claims without securing workers' compensation coverage through commercial insurance. Unless the current contractor can continue to self-insure its workers' compensation coverage for these claims, the Paducah cases shown in table 1 would have to be moved to the category in which contests are likely. As a result of this single change in contractors, the proportion of cases for which contests are likely could increase from 20 to 33 percent.

Multiple Factors Make Compensation Not Certain

In contrast to Subtitle B provisions that provide for a uniform federal benefit that is not affected by the degree of disability, various factors may affect whether a Subtitle D claimant is paid under the state workers' compensation program or how much compensation will be paid. Beyond the differences in the state programs that may result in varying amounts and length of payments, these factors include the demonstration of a loss resulting from the illness and contractors' uncertainty on how to compute compensation.

Even with a positive determination from a physician panel and a willing payer, claimants who cannot demonstrate a loss, such as loss of wages or unreimbursed medical expenses, may not qualify for compensation. On the other hand, claimants with positive determinations but not a willing payer may still qualify for compensation under the state program if they show a loss and can overcome all challenges to the claim raised by the employer or the insurer.

Contractors' uncertainty about how to compute compensation may also cause variation in whether or how much a claimant will receive in compensation. While contractors with self-insurance told us that they plan to comply with Energy's directives to not contest cases with positive determinations, some contractors were unclear about how to actually determine the amount of compensation that a claimant will receive. For example, one contractor raised a concern that no guidance exists to inform contractors about whether they can negotiate the degree of disability, a factor that could affect the amount of the workers' compensation benefit. Other contractors will likely experience similar situations, as Energy has not issued written guidance on how to consistently compute compensation amounts.

While not directly affecting compensation amounts, a related issue involves how contractors will be reimbursed for claims they pay. Energy uses several different types of contracts to carry out its mission, such as operations or cleanup, and these different types of contracts affect how workers' compensation claims will be paid. For example, a contractor responsible for managing and operating an Energy facility was told to pay the workers' compensation claims from its current operating budget. The contractor said that this procedure may compromise its ability to conduct its primary responsibilities. On the other hand, a contractor cleaning up an Energy facility under a cost reimbursement contract was told by Energy officials that its workers' compensation claims would be reimbursed and, therefore, paying claims would not affect its ability to perform cleanup of the site.

Several Issues Could 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 and projected 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 Act⁶ 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

⁶The 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.

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 worker's illness was related to his employment,⁷ 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 method 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

⁷Under 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.

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 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.⁸

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 replace 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.

⁸An 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 mentioned earlier, 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.⁹ 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.

⁹Under 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.

	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
Equity of outcomes within Subtitle D					
Within states	Similar cases in the same state could receive differing benefits depending on willing payer.	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.
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.	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.	Open for consideration— Depends on type of benefit and eligibility criteria.

Source: GAO analysis.

Conclusions

More than 3 years after the passage of EEOICPA, few claimants have received state workers’ compensation benefits as a result of assistance provided by Energy. While Energy has eliminated the bottleneck in its claims process that it encountered early in program implementation—the initial development of cases—in doing so it has created a growing backlog of cases awaiting review by a physician panel. In the absence of changes that would expedite this review, many claimants will likely wait years to receive the determination they need to pursue a state workers’ compensation claim. In the interim, their medical conditions may worsen, and claimants may even die before they receive consideration by a state program. While Energy has taken some steps designed to reduce the backlog of cases for the physician panels, it is too early to assess whether these initiatives will be sufficient to resolve this growing backlog.

Whether they ultimately receive positive or negative determinations, claimants deserve complete and timely information about what they could achieve in filing under this program, what the claims process entails, the status of their claims, and what they are likely to encounter when they file for state workers’ compensation benefits. Without complete information, claimants are unable to weigh the benefits and risks of pursuing the process to its conclusion. Indeed, given that the majority of claimants have also filed for benefits under Subtitle B and many may have already received decisions on those claims, some claimants may not be aware that

they still have a Subtitle D claim pending. Further, given the limited communication from Energy since their claims were filed, some claimants may be unaware that resources are being expended developing their claims. Finally, because Energy does not currently communicate to claimants what they are likely to encounter when they file for state benefits, claimants may be unprepared for what may be a difficult and protracted pursuit of state benefits.

Energy may be hindered in its ability to improve its claims process and evaluate the quality of the assistance it is providing to claimants in this program using the data it currently collects. Energy may also be unprepared to provide the analysis needed to inform policymakers as they consider whether changes to the program are needed because it does not systematically track the outcomes of cases that are appealed or the outcomes of claims that are filed with state workers' compensation programs. Finally, Energy will be limited in its ability to provide complete and accurate information to claimants regarding the status and outcomes of their claims without good data.

Even if all claimants were to receive timely physician panel determinations stating that the workers' illnesses had likely been caused by their employment with Energy, some may never receive state workers' compensation benefits. The lack of a willing payer may delay the receipt of benefits for some claimants as insurers and state fund officials challenge various aspects of the claim. For other claimants, the challenges raised in the absence of willing payers may ultimately result in denial of benefits based on issues such as not filing the claim within the time limits set by the state program—issues that would not be contested by willing payers. This disparity in potential outcomes for Subtitle D claimants may warrant the consideration of changes to the current program to ensure that eligible claims are paid without undue delay and that there is a willing payer for all claimants who would otherwise be eligible.

Recommendations for Executive Action

To improve Energy's effectiveness in assisting Subtitle D claimants in obtaining compensation for occupational illnesses, we recommend that the Secretary of Energy:

- in order to reduce the backlog of cases waiting for review by a physician panel, take additional steps to expedite the processing of claims through its physician panels and focus its efforts on initiatives designed to allow the panels to function more efficiently. For example, Energy should pursue the completion of site reference data to provide physicians with more

complete information about the type and degree of toxic exposures that may have occurred at each Energy facility.

- in order to provide claimants with more complete information, expand and expedite its plans to enhance communications with claimants. These plans should focus on providing more complete information describing the assistance Energy will provide to claimants, the timeframes for claims processing, the status of claims, and the process that claimants will encounter when they file claims for state workers' compensation benefits.
- in order to facilitate program management and oversight, develop cost-effective methods for improving the quality of the data in its case management system and increasing its capabilities to aggregate these data to address program issues. In addition, Energy should develop and implement plans to track the outcomes of cases that progress through the state workers' compensation systems and use this information to evaluate the quality of the assistance it provides to claimants in the Subtitle D program. Such data could also be used by policy makers to assess the extent to which this program is achieving its goals and purposes.
- in order to reduce disparities in potential outcomes between claimants with and without willing payers, consider developing a legislative proposal for modifying the EEOICPA statute to address the willing payer issue. When assessing different options, several issues such as those discussed in this report should be considered, including the purpose and type of benefit, eligibility criteria and equity of benefit outcomes, and effects on federal costs.

Agency Comments and Our Evaluation

We provided a draft of this report to Energy for comment. In commenting on the draft report, Energy indicated that the agency had already incorporated several of our recommendations and will aggressively tackle the remainder. However, Energy did not specifically comment on each recommendation. In addition, the comments highlighted several initiatives either planned or underway that are designed to improve the Subtitle D program. Several of these initiatives address issues raised in our report for which we recommended changes. In particular, Energy agreed with our findings regarding problems with communications with Subtitle D claimants and outlined the steps the agency has planned to correct these problems. Further, Energy agreed with our finding that there was not a system in place to track the outcomes of workers' compensation claims filed with the state programs and indicated that the agency has recently initiated such a system, as we recommended. Finally, the comments provide more recent information about the agency's progress in processing Subtitle D claims and reiterate the agency's plan for eliminating

the backlog of claims by 2006. Energy's comments are provided in appendix II. Energy also provided technical comments, which we have incorporated as appropriate.

Copies of this report are being sent to the Secretary of Energy, appropriate congressional committees, and other interested parties. The report will also be made available at no charge on GAO's Web site at <http://www.gao.gov>. If you have any questions about this report, please contact me at (202) 512-7215. Other contacts and staff acknowledgments are listed in appendix III.

Sincerely yours,

A handwritten signature in black ink that reads "Robert Robertson". The signature is written in a cursive, flowing style.

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

Appendix I: Scope and Methodology

To determine the number of cases filed under Subtitle D, the status of these cases and characteristics of claimants, we used administrative data from Energy's Case Management System (CMS). Energy does not publish standardized data extracts from this system, so we requested that Energy query the system to provide customized extracts for our analysis. The first extract contained data on the status and characteristics of cases filed between July 2001 and June 30, 2003. The second extract was obtained as an update and contained data related to cases filed between July 2001 and December 31, 2003.

Because multiple claims can be associated with a single case, Energy's system contains data at two levels — the case level and the claim level. For example, if both the widow and child of a deceased Energy employee file claims, both claims will be associated with a single case, which is linked to the Energy employee. At the case level, the system contains information about the Energy employee, such as date of birth and date of death (if applicable), the facilities at which the employee worked, and their dates of employment and the status of the case as it moves through the development process in preparation for physician panel review. At the claim level, CMS contains information related to the individual claimants, such as the date the claim was signed and the claimant's relationship to the Energy employee.

The extracts provided by Energy contain case-level data, for the most part. Data elements that are collected at the claim level were reported at the case level in our files. For example, the system includes a claim signature date for each claim. In our case-level file, Energy provided the earliest signature date, so that we would know when the first claim was signed. Illness data are also collected at the claim level. In our case-level file, Energy provided all the illnesses claimed by all claimants. We then aggregated the illness data to determine which illnesses were claimed on each case.

We interviewed key Energy officials and contractors and reviewed available system documentation, such as design specifications and system update documents. Once the first data extract was received from Energy, we tested the data set to determine that it was sufficiently reliable for our purposes. Specifically, we performed electronic testing to identify missing data or logical inconsistencies and reviewed determination letters for cases that had physician panel determinations. We then computed descriptive statistics, including frequencies and cross-tabulations, to determine the number and status of cases received as of June 30, 2003.

When we received the second data extract, containing data through the end of calendar year 2003, we matched it to the first one to determine how many additional cases had been received between July 1, 2003, and December 31, 2003, and to determine if any cases were missing. We determined that some cases (less than 2 percent) that had been in the first extract were missing from the second file. We consulted with Energy contractors and determined that one case had been accidentally omitted from the query results and that the remaining cases had been dropped from CMS because they were duplicate cases or had been determined to be non-Subtitle D cases. This is possible because the Resource Centers use the CMS system to document incoming cases for both Subtitle B and Subtitle D. Energy contractors provided a replacement file that included the case that had been inadvertently dropped. They also reported that there were still a small number of duplicate cases identified in CMS, and hence in our data extract, but that Energy had not yet decided which cases to retain. Since Energy officials had not yet decided which case records to retain and which to delete at the time of our extract, we decided to leave the cases identified as duplicates in our analysis file.

We reviewed available system documentation, performed electronic testing and reviewed determination letters for cases that had physician panel determinations to determine that the data contained in the second extract was sufficiently reliable for our purposes. During our electronic testing, we discovered a discrepancy between the December 31, 2003, status information included in our file and the December 31, 2003, status information reported by Energy on its Web site. On further discussion with Energy officials and contractors, we determined that when running the query, Energy contractors had calculated the December 31, 2003, status information using the wrong field in the database. Energy contractors gave us a third data file containing the correct status information that we then appended to the analysis file. We then computed additional descriptive statistics, including frequencies and cross-tabulations to determine the number and status of cases received as of December 31, 2003.

To determine the extent to which Energy policies and procedures help employees file timely claims for state workers' compensation benefits, we reviewed Energy's regulations, policies, procedures, and communications with claimants. In addition, we interviewed key Energy officials and contractors at Energy facilities. We also interviewed panel physicians and contractors responsible for case development. In addition, we interviewed advocates, claimants, and officials at the National Institute for Occupational Safety and Health. Finally, we conducted site visits to three

Energy facilities in Oak Ridge, Tennessee—the state accounting for the largest number of Subtitle D cases.

To estimate the number of claims for which there will not be willing payers of workers' compensation benefits, we reviewed the provisions of workers' compensation programs in the 9 states that account for more than three-quarters of the cases filed. The 9 states are: Colorado, Idaho, Iowa, Kentucky, New Mexico, Ohio, South Carolina, Tennessee, and Washington. The results of our analysis cannot necessarily be applied to the remaining 25 percent of the cases filed nationwide. Because 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. While we believe that the first two assumptions would not affect the proportions shown in each category, the third assumption could result in an underestimate of the proportion of cases lacking willing payers to the extent that some workers may have been employed by subcontractors that used commercial insurers or state funds for workers' compensation coverage. Some subcontractors use these methods of workers' compensation coverage because they may not employ enough workers to qualify for self-insurance under some state workers' compensation programs. We also interviewed Energy officials, key state workers' compensation program officials, workers' compensation experts, private insurers, and the contractors operating the major facilities in each of the states to determine the method of workers' compensation coverage these facilities used.

Finally, we took several steps to identify possible options for changing the program in the event that there may not be willing payers of benefits. We reviewed existing laws, regulations, and programs; analyzed pending legislation; and considered characteristics of existing federal and state workers' compensation programs. We also identified the issues that would be relevant for policy makers to consider in implementing these options.

Appendix II: Comments from the Department of Energy



Department of Energy
Washington, DC 20585

MAY 11 2004

Robert E. Robertson, Director
Education, Workforce, and
Income Security Issues
U.S. General Accounting Office
441 G Street, NW
Washington, DC 20548

Dear Mr. Robertson:

Thank you for providing the Office of Worker Advocacy the opportunity to comment on the U.S. General Accounting Office review of the Department of Energy's implementation of the Energy Employees Occupational Illness Compensation Program Act of 2000 (EEOICPA). We have the following comments:

- The Department appreciates and welcomes independent assessments as a way to improve our performance. We believe that the GAO review was balanced, thorough, and constructive, and it was conducted in a very professional manner. We have already incorporated several of the GAO recommendations and will aggressively tackle the remainder.
- GAO commented that DOE was slow to start its implementation of the EEOICPA statute. We acknowledge these problems but note that over the past several months we have made significant progress toward addressing them. In fact, the GAO Report acknowledges our progress in program planning and production over the past six months, yet the statistical analysis of our program only reflects improvements made up to December 31, 2003. We have made significant progress since that time. For instance, Total Cases Completed has increased 78 percent from 1,257 cases on October 31, 2003 to 2,259 cases on April 30. Further, DOE has essentially completed its work on over 5,500 cases (23 percent of its current cases).

In addition, in March 2004, we presented to the Congress our plan to eliminate, by the end of 2006, the current backlog of Part D applications pending at DOE. The Plan involves a combination of changes to our regulations and to our processes, as well as Congressional action on



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legislative changes and on transferring funds to this program from elsewhere in the Department of Energy. The Plan involves four components that, together, should enable us to increase Physician Panel determinations from 35 per week to 310 per week. These four components include:

- **Revised Physician Panel rule** issued as an Interim Final Rule on March 17, 2004. The revised rule is expected to double the productivity of the Physician Panel process, by allowing DOE to change from panels composed of three physicians to panels composed of a single physician while providing for second and if applicable third physician reviews for an initial negative determination.
- **Proposed legislative changes** submitted by the Secretary of Energy to Congress on March 29, 2004 that would amend the EEOICPA statute. This proposed legislation would eliminate the pay cap on physicians serving on physician panels and expand hiring authority for those physicians. If enacted, these changes would significantly increase the supply of physicians willing and able to work on Physician Panels, and would greatly expedite processing of applications.
- **Reprioritization of the processing of applications**, so that we expedite processing of the greatest number of cases and give priority to those applicants we believe are most likely to receive the greatest benefit from the program. Specifically, we have moved those applications relating to beryllium, silica, and asbestos exposure to the front of the queue, as well as those applications which have already received a positive determination from the EEOICPA Part B program. In addition, we are processing applications from living applicants first because of the availability of medical benefits for living applicants in most State workers compensation systems, and are awaiting dose reconstructions for those remaining applications where dose reconstructions are pending from the Part B program.
- **Budget increases** to provide for the contractor support, staff and other resources needed to ramp up the number of Physician Panel determinations from approximately 35 per week today to 310 per week in FY05. Congress has approved \$23.3 million of the original \$33.3 million FY04 appropriation transfer request. However, without the receipt of an additional \$10 million, the Department will not be able to meet its goal to eliminate the entire backlog of applications by the end of CY 2006.

- GAO commented that there have been shortcomings in our communications with Part D applicants--specifically, that applicants were not always provided with complete and timely information about what they could achieve in submitting an application to DOE under this program. We agree. We have implemented a six-month status letter and provided the applicants with a website enabling them to electronically track the status of their case. All Energy Employees Compensation Resource Centers have recently implemented a new counseling program explaining the benefits and limitations of the Part D program to better communicate to potential applicants the realistic expectations for post Panel outcomes. In addition, Resource Center staff are now being trained to provide post Panel counseling to applicants. Finally, a program to reach out to existing applicants called "Close the Gap" is being planned to begin this summer. Through this Close the Gap program, all applicants will receive telephone calls to explain to them the benefits and limitations of EEOICPA Part D.
- GAO commented that DOE was not tracking program outcomes such as whether State workers compensation programs paid benefits to applicants. At the time of the GAO review this was true; however, we have recently initiated such a system that will track:
 1. Whether an applicable contractor has been ordered by the DOE contracting officer to not contest a workers compensation claim,
 2. Whether a Part D applicant has applied for workers compensation benefits,
 3. The status of the State's workers compensation claim processing, and
 4. If a Part D applicant applied for benefits, when a payment is first made, and the amount and types of benefits being paid.

Enclosed are editorial comments that would enhance the factual accuracy of your report.

If you have any questions, please call me at 202-586-7449.

Sincerely,



T.A. Rollow, P.E.
Director
Office of Worker Advocacy

Enclosure

Appendix III: GAO Contacts and Staff Acknowledgments

GAO Contacts

Andrew Sherrill (202) 512-7252
Beverly Crawford (202) 512-4474

Staff Acknowledgments

In addition to the above contacts, Melinda L. Cordero, Mary Nugent, and Rosemary Torres Lerma made significant contributions to this report. Also, Luann Moy and Elsie Picyk assisted in the study design and analysis; Margaret Armen provided legal support; and Amy E. Buck assisted with the message and report development.

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