THE U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES
PUBLIC HEALTH SERVICE
CENTERS FOR DISEASE CONTROL AND PREVENTION
NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH

convenes the

SECOND PUBLIC MEETING ON

PROPOSED SPECIAL EXPOSURE COHORT PROCEDURES

The verbatim transcript of the Town Hall Meeting held at the Sharonville Convention Center, Sharonville, Ohio, at 7:00 p.m. on July 25, 2002.

NANCY LEE & ASSOCIATES
Certified Verbatim Reporters
P. O. Box 451196
Atlanta, Georgia 31145-9196
(404) 315-8305

P R O C E E D I N G S

DR. NETON: Okay. Good evening, ladies and gentlemen. There's plenty of room, so I encourage anyone who's seated back more than four or five rows to move forward. It looks like we've got a lot of seating capacity for this evening.

Welcome to the public meeting of the Department of Energy/Health and Human Services proposed rule that outline the procedures for dealing with the petitions that will be used to add special -- add classes of workers to the Special Exposure Cohort.

If you haven't done so thus far, I would encourage you to please register at the table outside the front door, either -- on your way out probably would be a good time to do that.

My name is Jim Neton, and I'll serve as a moderator this evening for this session. I'm an employee of the National Institute for Occupational Safety and Health, and am the Health Science Administrator located within the Office of Compensation Analysis and Support based here in Cincinnati.

I'm also the technical manager over the dose

reconstruction process involved with the Energy Employees Compensation program. So I have somewhat of a dual role this evening. I'll also be answering questions of a technical nature related to dosimetry activities and particularly related to the Special Exposure Cohort, which is the subject of this evening's meeting.

With me this evening are two additional people that I'd like to introduce at this time. To my right is Ted Katz, who's also of the National Institute for Occupational Safety and Health. And seated in the first row right in front of me is Roberta Mosier, who is here with us from the Department of Labor. Roberta is the Deputy Director of the Division of Energy Employees Occupational Illness Compensation. As you may know, the Department of Labor actually administers the overall program, the quotes and provisions included in the Act.

The purpose of this meeting is to provide NIOSH the opportunity to present and discuss these procedures that we published in the *Federal Register* on June 25th. And those procedures are to be used by NIOSH, as I previously mentioned, and consider petitions from classes of workers

who want to be added to the Special Exposure Cohort. And Ted will be addressing this shortly with a presentation this evening.

During the meeting, we welcome questions from everyone in attendance. All comments made during the meeting will be recorded and considered in finalizing the rule. Transcripts of the meeting are being taken by a court reporter who's present with us this evening. And the transcript will be available for viewing on our web site, and we expect those to be completed within a couple weeks.

We also encourage written comments on this rule that can be submitted to the regulatory docket via several means that are described in the fact sheet that's contained at the back of the room. There's several means one can use to get their comments into the docket. All written comments will be included in the regulatory docket and also published on our web site.

In addition to the fact sheets that are back there, we have a couple other pieces of information. I believe there's copies of the *Federal Register* notice that was issued on June 25th. There's also copies of the overheads that

Ted will be using in his presentation this evening. So please avail yourself to those, as you see fit.

I would like to take a moment to point out that the purpose of this meeting is to address the Special Exposure Cohort Rule. And we really don't have the resources available this evening to discuss specific questions related to claims that have been filed in the program. If you'd like to inquire about the status of claims, we do have an 800 number available for you to call, and that number is listed in the receipt letter that you should have received from your claim in the program.

Now I'd just like to briefly go over the format for the meeting this evening. After these introductory remarks, we'll hear a presentation, as I mentioned, from Ted, that outlines the procedures that are contained in the proposed rule.

I do ask that you hold your questions until Ted has finished and completed his prepared remarks so we can get through it, and then after Ted's presentation is over, we will entertain questions for clarifications on the presentation

at that time.

We are recording this, so we'd like you to use the microphones when you ask questions this evening. So once Ted's completed his presentation, just queue up behind the nearest -- microphone nearest to your seat.

We would also like to ask that you identify yourself for the record and state your affiliation before you talk, so that can be put into the record as well.

I do ask also only one person at a time speak. It's been our experience it is very difficult for a court reporter to capture two simultaneous conversations.

After the question and answer session on the rule, then we'll open the meeting for comments, general comments on the rule. And the meeting is scheduled to last until 9:00 o'clock. It looks like we have a small enough crowd that it should be more than adequate to accommodate everyone's comments this evening. If it becomes an issue, we may have to issue some partition time among people. But we'll play that by ear as we go.

Once everyone has provided comments and had their questions answered on the rule, and if

there is time available, then we will open the meeting up to more general comments on the Energy Employees Compensation Program. But only until after we've completed the main purpose of the meeting, which is to discuss the Special Exposure Cohort Rule.

After the meeting concludes, NIOSH staff, we will stay behind and be available to answer any questions that you might have that couldn't have been addressed during the course of the meeting.

So at this point, are there any questions on anything I've said so far before we get started?

[No responses]

DR. NETON: No. Okay, good.

At this point, then, I'll turn the meeting over to Ted, who will provide us his presentation on the rule.

MR. KATZ: Okay. So what I'm going to do -- and I'm going to try to keep it to less than half an hour, maybe 25 minutes -- is walk you through, in effect, the rule from the petitioners' perspective to help you -- this may help raise some issues you may want to ask questions about to get a clarification about how the rule will work, and then help you with making comments, if

you have comments about what we have here to help us improve the rule.

And just for anyone who doesn't understand, this is a proposed rule. It has no effect of law. We can't use it in this form. We'll have to issue a final rule at that point, and we'll actually be able to take petitions.

So I'm going to give you some background first. I'm not sure if this is necessary for many of you, but it may be for some, just so we're starting from the same place.

I'll talk about the cohort that exists already, because EEOICPA -- that's what I call it, the way I pronounce the Energy Employees Occupational Illness Compensation Program Act -- established the Special Exposure Cohort and named four groups to be in it at the outset. These are the three gaseous diffusion plants and a nuclear test site in Amchitka, Alaska.

And with certain provisions included, employees at these four facilities, they have to meet certain requirements. For example, at the gaseous diffusion plants they have to have had a job which they could have been badged, if they weren't badged. And there's limited other

requirements.

But provided they meet those requirements and they incur one of 22 specified cancers -- that's what they're termed in the law -- if they incur one of these cancers and they incur the cancers in the right time period -- there are certain conditions related to that, as well -- but then they meet the standard for being compensated under EEOICPA.

And the important point to make here is that Department of Labor, in their cases, does not have to determine whether their cancer was as likely as not caused by radiation, which means they don't have a dose reconstruction done for them, and the Department of Labor doesn't do something called determine probability of causation. It's a presumptive finding that their cancer is related to radiation for all these members.

So what's the purpose of this rule? This rule was -- Congress and the Administration realized that in addition to the four groups that were included by Congress to the cohort, there may be other groups out there of employees of DOE or the AWEs, the Atomic Weapons Employers, for

whom it is also not possible to estimate their dose with any accuracy; and hence, should be considered to be added to the cohort.

And EEOICPA assigned this responsibility to make additions, consider additions, to the President, who then turned this responsibility over to the Secretary of Health and Human Services -- NIOSH, National Institute for Occupational Safety and Health where we work, that's a part of Centers for Disease Control, which is a part of the Department of Health and Human Services.

So this task came down to us to do, sort of the horse work of this job. But the responsibility still lays with the Secretary of Health and Human Services to make determinations about adding to the cohort.

EEOICPA also didn't leave it completely vague, the censored requirements that we were to consider before we would add a class to the cohort. And they had two criteria, substantive criteria that are requirements that a petition for a class would have to pass before it could be added: First, if NIOSH could not estimate radiation doses of the employees with sufficient

accuracy, feasibility do that; and the second, that it's reasonably likely that the radiation doses endangered the health of the employees. So we have to determine that we can't do dose reconstructions, and moreover that the radiations that they were likely exposed to could possibly have caused cancer among them.

EEOICPA also requires the procedures related to going about adding classes, three of these. First, the classes must petition to be added to the cohort. Second, that HHS must obtain the advice of the Advisory Board on Radiation and Worker Health in making these decisions as to add the class to the cohort.

Now, the Advisory Board is a Presidentially appointed board of experts. It is comprised of physicians with experience with radiation and health, with scientists in that field, and with workers or worker representatives. So those three groups are to be represented on this Board. And this Board has been up and running, I think since February, and is an advisory body to the Secretary of Health and Human Services on all its responsibilities. But this is, of course, a very important one.

The third requirement is that Congress gave itself a window of 180 days after the Secretary of Health and Human Services makes a decision, if he makes a decision to add a class to the cohort, to consider that decision before it becomes effective. And I'll explain more about what that means practically later in the presentation.

So let me now just tell you a little bit about from the start, from the get-go, what we have in consideration in producing these procedures, that the Secretary was tasked to produce in considering to add classes. Of course, when we consider these requirements I just told you about that were in EEOICPA, we also considered the procedures that are serving cancer claimants that are not in the cohort now. And by that I mean we consider what goes on with dose reconstructions under another HHS rule, 42 CFR Part 81, and what's required. But determining probability of causation, that's under 42 CFR Part 82.

Our goal is really simple: We want fair and we want openly considered decisions. So we wanted to be certain that petitioners and the public could see very well how these decisions

are made, what they're based upon, and opportunity for participation in the process.

The last point I just want to make is that we also considered -- and this is really just a contextual point to make -- the addition of classes to the cohort to be a grave, a very sort of weighty decision to add a class, for the reason that if we add a class to the cohort those individuals in the class that they incur cancer, they can only be specified for the 22 cancers covered under EEOICPA, the Special Exposure Cohort.

So, for example, if you have skin cancer and you're out at the Special Exposure Cohort, you cannot be compensated as a member of the Special Exposure Cohort. Likewise, for prostate cancer.

So what we get into now is run through the procedures themselves as they've been set up, how these would work. First of all, we had to determine, define who could petition. And we scoped this as broadly as possible. So one or more covered employees and/or their survivors can petition.

It's entirely dissimilar from what would happen in a class action suit, where you would

have to get together members of the class and they would have to sign on, in effect. This, a single individual who's part of the class or a survivor of that individual can petition. And secondly, a union who represents currently or in the past represented employees can bring a petition as well.

How do you petition? Decide whether you can meet the petitioning requirements, which I will discuss in a moment; complete and submit a petition form from NIOSH. You will get this from NIOSH. You will be able to do this electronically on the web without a piece of paper moving at all, or we'll provide petition forms in paper form too. And as you'll see, we'll be there to assist you in your petition as well.

What are the petition requirements that you have to meet? Now, the major point to make here is that they differ and depend on a very important factor, which is whether or not we have already attempted to do a dose reconstruction for the petitioner or a member of the class already and were unsuccessful, were unable to do dose reconstruction, in effect, because the records

available weren't adequate to do the dose reconstruction.

If we have done this, if we've already attempted to do a dose reconstruction and we determine we can't, we are going to encourage you to petition on behalf of a class because there are likely to be plenty of other workers in your same shoes for whom we can't do a dose reconstruction. So we're going to encourage you to do that.

We're going to provide you with the petition form to do that. And there's very little for you to do in terms of then making that petition. Really all you have to do is indicate on that petition form that you need a petition on behalf of a class, that NIOSH was unable to complete a dose reconstruction for you. And that's the only substantive thing you have to do on the form, to check the box saying we couldn't do it, and provide otherwise -- you just provide them information that may be for administrative purposes, contact information and so on. No other requirements.

Now, there's the other case where you have not attempted -- submitted a claim for

compensation and had a finding from us that we couldn't do a dose reconstruction. And this provision was really developed with having in mind that it is not a requirement for a class to have members that already have incurred cancer to be able to petition, just as the existing Special Exposure Cohort doesn't include only people with cancer. It's anybody in the class that can't get compensated until -- they can't make a claim for compensation until they incur cancer, but they're already members of the Special Exposure Cohort for the existing Special Exposure Cohort.

Likewise, we wanted to have an avenue for people to petition before they had even incurred cancer. But there are, hence, different substantive requirements they have to meet for them to petition. And by substantive, there need to be real grounds for them to make a petition. So in their case, we need them to define a class to start with.

If we couldn't do your dose reconstruction you don't have to define the class, as there are others who may be in your shoes. But in this case you have to define the class, facility, job titles, duties. It may be everyone in that

facility. It could be whatever, but you have to define that.

And then documenting the reasons to believe there was a health-endangering radiation exposure. And these could differ substantially. It may be that they were short-term from radiation effects, high levels of radiation that you conducted in, and that would suffice to say that there was substantial radiation exposure. So you don't have to have that as an element. It could be that you just define, are able to define the sources of radiation exposure, circumstances of those, radiation protection shortcomings.

And then thirdly, document reasons to believe that doses could not be estimated with sufficient accuracy. And we're not requiring you to make a case that dose reconstructions cannot be done. We're simply requiring you to show that there is a problem with records being available on radiation exposures there, that you've made a real effort to determine that dose reconstructions might not be able to be done.

So those are the requirements. And then the next step here is will your petition be considered? Have you met the requirements?

Well, I've already said if we couldn't do your dose reconstruction that's all you need to show in that case. So if we weren't able to complete your dose reconstruction your petition meets the requirements; it will be evaluated.

There'll be a question in the other cases where we haven't attempted the dose reconstruction, whether it does meet those requirements. We'll evaluate your petition, and you will receive a report, a recommended decision from the Secretary of HHS, saying that -- you will receive a recommended decision either way.

But the case where it matters is where the Secretary would say, we don't think your petition passes muster. And we'll identify what the problems are with the petition. And NIOSH will be available to help you address that, and you can address that. But you'll have 30 days to revise the petition.

And at that point -- so from that point forward, HHS would make the final decision. And HHS will not make this decision independently on its own. It will obtain the advice of -- That will obtain the advice of the Advisory Board on Radiation and Worker Health in these cases. So

this is an independent body that advises HHS.

Now, how will NIOSH evaluate your petition? You pass; you've met the requirements. The first thing NIOSH will do, we'll obtain information and records from DOE and other sources -- from the petition, from co-workers at the site, from all sources possible, possibly from health studies that have been done at that site.

I don't know how many of you are aware that NIOSH has, for about a decade, been responsible for doing health research at the DOE facilities, looking at radiation and cancer and other health effects as well. So we've learned about DOE record systems. We've learned a lot about how operations work at the DOE facilities, although we are learning a lot more, as this program develops, than we knew. But we've learned a lot, we know a lot about this. That's the reason for that, that these responsibilities under EEOICPA were tasked to NIOSH.

But we'll be getting information records from DOE and other sources like our health research, for example. And the first thing will be determining whether dose reconstructions are feasible.

And the second element -- and these relate to the Congressional requirements -- will be determining what the potential radiation dose levels were, and whether they were likely to have endangered health.

And lastly, out of doing that evaluation research, we will then define class or classes of employees that -- let me explain that. In the case where we couldn't do a dose reconstruction for you, we already said in that case we're defining the class anyway. So we're going to see how many people were in your shoes, in effect, all right; and how many people couldn't have dose reconstructions.

But in the case where you petition -- the other case, where you petition where we haven't attempted a dose reconstruction, in that case you will define the class initially. But to do this research we may find out, in fact, there were a lot more employees that should have been in -- employee types that should have been identified and weren't identified in your petition, and add those, in effect, to the class.

We also may find that despite the fact you identify the class of this scope, perhaps part of

that class is actually different. Either we have records that allows dose reconstruction for a part of that class, or perhaps their radiation exposures weren't similar to the rest of the class you initially define. So you may end up having, for example, two classes, really, at the end of our process versus the one that you petition for.

And then we'll report results to petitioners and the Board.

Now let me explain a little bit more about the NIOSH evaluation performed, and then go on to the next steps with what the Board does and the Secretary of HHS.

So first question, how will NIOSH determine potential radiation dose levels? You already have a situation right -- you have a situation where you think you have a real paucity of records. But we'll evaluate. We'll get all the information that's available from all these sources and make a determination as to radiation sources potentially present based on all the information, everything people know, as well as are reflected in the records, both, and their possible qualities and the possible

characteristics of employee exposures and the use or non-use of radiation protection measures.

So we will still have to make a determination based on whatever information is available about these things. But of course, as you understand, it's a very rough determination compared to doing a dose reconstruction. And then NIOSH technical staff will judge whether the radiation doses could have reached the level determined likely to endanger health. And I'm going to explain more about that now.

How do we interpret "endanger health" in this case? Well, we interpret it as the minimum dose of radiation reasonably likely to cause specified cancers. Let's look narrower, in saying "endanger health" is the reason why we do that. Specified cancers are the only health outcome for which workers can be compensated as members of the Special Exposure Cohort. Any other kind of health outcome has no bearing in terms of compensation and being a member of the Special Exposure Cohort. And secondly, we have a means to estimate the likelihood that a cancer has arisen based on a radiation exposure.

Points I want to make about this, the

minimum dose level that we've determined, I'm not talking about a one minimum dose level for all petitions. This would be determined for each petition. It would differ likely for each petition. And the reason it would differ is because this depends, in part, on the source of radiation and the quantity of radiation, the source of radiation and the type of radiation exposures, the type of cancers that's related to those radiation exposures, characteristics of the class, when cancers could have been incurred after radiation exposure, and other factors.

And NIOSH technical staff will calculate the minimum dose using factors, all these factors, factors that are favorable to the petition, that are more likely to result in the petition being granted. And I want to sort of exemplify that. One of the factors that's very important is what type of cancer you consider that's related to those radiation exposures. And we'll be using the cancers that are most readily caused by the type of radiation exposure that occurred, which will mean a low threshold, instead of maybe in terms of a dose, a dose requirement for the petition to be granted.

What happens after NIOSH goes through this process and produces this report? The Board reviews the NIOSH report. And then the Board, at this point, they may ask us to go back and do more work, and they say you haven't gone far enough with this, in which case we may be doing that. They'll advise us on that.

Petitioners can participate in this Board. It's going to be a public meeting that the Board considers a petition. So you can attend. You can make public comments, just as you can at this meeting.

And then the Board will prepare a report that will advise -- this is its role, to advise the Secretary of Health and Human Services of a decision here, whether or not to add the class and what the definitions of the class are. And they'll have to then explain what the basis of their recommendation is, again on the same parameters that were required by the statute.

HHS then will, based on the NIOSH report, based on the Board's advice, come to a decision to add or deny adding one or more classes, as it might be. Petitioners will have 30 days then to contest the decision, and there'll be an

administrative process to address that contest if that arises.

And then there'll be a final decision by the Secretary of HHS. And if it's positive, that final decision goes to Congress, as I said earlier. And Congress has 180 days in which they might either expedite the decision, meaning -- these people have cancer, and if Congress has the opportunity -- it's going to depend on the timing and so on -- they might expedite it so that they don't have to wait 180 days for it to become an effective decision, because it won't be effective until those 180 days have expired or Congress has acted. Likewise, Congress has the right to reject the decision of the Secretary of HHS.

And then once classes are added, NIOSH, of course, will work hard with other agencies and with other parties, organizations to get the word out to members of the class that they are part of an added class to the Special Exposure Cohort.

Now there's a final provision in this rule for cancelling a cohort addition or modifying a cohort addition. Now this would arise in a case where we're going through records at the facility and we stumble on, for example, stumble on

records that allow us to do dose reconstructions, where we thought we could. And this has occasionally arisen, where records get discovered that no one knew existed, the trail was lost on them at some point in history.

In that case, we would at that point -- after going through a deliberative process in which, again, the public would have an opportunity to participate -- and the Board would advise us. But if we make a decision ultimately to the Secretary of HHS to cancel a class, at that point claimants, members of that class who'd want a claim, would come in with a regular cancer claim and still would have a dose reconstruction. They would have probably of causation determined, they would go that route. They would not go to the Special Exposure Cohort route, of course.

Now, some of you may wonder when you can petition. Right now, as I said, we're under notice of proposed rule making. This is not effective. You can't petition. You can petition when the procedures are final, and this is unlikely before the beginning of 2003, January or so.

What has to happen before then is we need to

get all the public comments, your comments and all. We have to deliberate over those and make decisions as to what the final rule is going to look like, and it may change depending on the public comments. And then it has to go through, of course, just like the original proposal, it has to go through levels of government up to be cleared for it to be published. And that is a somewhat lengthy process. So that's why we think really before early January it's unlikely that you'll have an effective rule out.

Final points: One, if you have cancer, we encourage you to become a claimant now, not to await these procedures. As I explained with how these procedures work, if you are a claimant, a cancer claimant, your claim will come to us. We'll attempt to do a dose reconstruction. If we can't do a dose reconstruction, you've already done -- in effect, we've done together -- the horse work for deciding whether your petition should be evaluated in this. Really, you'll have saved a lot of time, in effect, that way. You've made half the case already for the petition.

And we are very much interested in your comments. But first, before you start

commenting, I would love to have, if you have questions that you want me to clarify, questions about things I've said you want me to clarify, let me take those first.

And then each of you, again, if you can come to the mike and identify yourself -- this is necessary for the recording -- that would be great. There are three mikes. Any of these will do.

MR. ALVIS: Jim, I'm Charlie Alvis. I was former fire and safety inspector at Fernald. I helped start the place up, and I worked there till '92.

Are you familiar with the different types of film badges that they have? Jim, do you?

DR. NETON: Yes, we are. We're familiar with the badge, the changes in the technology of the badges over time, the film badge, and then it went to the thermoluminescent dosimeter sometime in the '80s.

MR. ALVIS: And none of them were digital?

DR. NETON: No, sir, that's correct.

MR. ALVIS: None of them. In other words, you'd receive 500 millirems a day. You receive that every day for 30 days till they changed the

badge. You would still only show 500 millirems. It would have to go above 500 to show any more than that; is that not right, Jim?

DR. NETON: I'm not quite sure that I --

MR. ALVIS: Well, I am, yeah.

DR. NETON: They typically respond incrementally to radiation exposure.

MR. ALVIS: How many criticalities have we had at Fernald?

DR. NETON: To my knowledge, none.

MR. ALVIS: That is absolutely right. And that is what it would take to get a mass -- that -- if there's 1,000 millirems to make a -- in the film badges, like I say, if they took you off of this job while, say, at 500, and put you on another one that was 400, you wouldn't have 1,000.

So this is all false, what you're basing this on, or what you people are conceding is how you can come up with something like this. Because all of the records -- I can remember a few that was overexposed, and they might have laid their badge on something.

Can you recall the incident at Paducah where the gentleman died of overexposure? He was paid

off, his wife was, July the 31st of this past year, just handed a check for $150,000.

DR. NETON: Was he a member of the Special Exposure Cohort?

MR. ALVIS: Well, he was --

DR. NETON: It sounds like if he received $150,000, he may have been part of the Special Exposure Cohort.

MR. KATZ: Yeah.

DR. NETON: I might say, what we are talking about here is actually relevant to the Special Exposure Cohort. If the need is determined, and we do evaluate every dosimetry program that the badges were not capable of measuring what they were intended to, then that would be grounds for pursuing possibly the Special Exposure Cohort.

MR. ALVIS: Well, they knew this. They knew this. And now when they go over them, nobody's going to receive the overdosage.

DR. NETON: Well, the -- I will --

MR. ALVIS: There's the radon gas and the thoron gas.

DR. NETON: Right. And --

MR. ALVIS: We had that out there, and they didn't even have an instrument that could read it

until 1985, '86.

DR. NETON: I understand what you're saying. We do take into account these, what's known as the missed dose, where we evaluate the program and add back in dosage that could not have been detected by the monitoring program.

In addition, we do interview every single claimant, and we obtain from you the impression or your feelings for what the program could or could not have done. And that is considered in the dose reconstruction as well. We're doing the best we can with that. The more we --

MR. ALVIS: Well, I think that if you want to include Fernald with Miamisburg, Richland, Oak Ridge, then your beryllium would be the main stage at Miamisburg. We had beryllium at Fernald and used it. That was the repository for it. But it wasn't used as much as it was there. But you're being exposed to gasses, thoron, radon, chemicals of all sorts.

I think that they're trying to categorize you, and they don't know how to categorize you.

This one here seems like it's just a big thing, that we're going to look on paper here and see if you were exposed. You went through this,

Jim, in Amchitka. How many did you find overexposed?

DR. NETON: No one was overexposed.

MR. ALVIS: Right.

DR. NETON: There were some people that had measurable exposures, though.

MR. ALVIS: Yeah, right. Thank you.

DR. NETON: Okay. Thank you for your comments.

Any other comments on the SEC proposed rule? Questions? Clarifications?

MR. RAY: Why wasn't nuclear -- when you mention that in cohorts -- can only be compensated for specified cancers, right?

MR. KATZ: What was the -- excuse me? Was the question when will you be compensated for specified cancers?

MR. RAY: Say you add a cohort.

MR. KATZ: You --

MR. LEWIS: You added a cohort. When you add a cohort --

MR. KATZ: When you add a cohort, that's exactly right, you can only be compensated for specified cancers.

MR. RAY: So that --

MR. KATZ: Maybe can you write your question for --

MR. LEWIS: He'll fix it.

DR. NETON: If you could write the question, maybe --

MR. KATZ: -- then someone else can read it for you.

MR. LEWIS: He can fix it. It's fixed.

DR. NETON: Okay. Can you speak into the mike too, cause that will help us. Thank you.

MR. RAY: Well, what I was trying to compare was Special Cohorts now, so anybody that's not in the Special Cohort could go for dose reconstruction. Okay. Now if you're going to have a cohort, then only those specified cancers would be covered, right?

MR. KATZ: That's correct.

MR. RAY: Now, what are you going to do with people that are already in the Special Cohort that do not have the specified cancer?

MR. KATZ: Thank you. That's a very good question. And that is different, because people who are already in the specified -- in the Special Exposure Cohort, excuse me -- who do not have a specified cancer, they will come to us

through the Department of Labor. If the Department of Labor determines that you do not have a specified cancer but you're part of the Special Exposure Cohort, they will come to us, to NIOSH, for a dose reconstruction, and we will attempt to do a dose reconstruction.

So, and if we can do a dose reconstruction, then the Department of Labor would take the next step of determining probability of causation. And then you could be compensated, even though you're part of the Special Exposure Cohort. And the important distinction here is those groups were added to the Special Exposure Cohort by Congress by different procedures than what we're proposing here.

So we didn't make initially a determination that we couldn't do a dose reconstruction for any people at those sites.

MR. RAY: So in essence, what you're saying, that in a Special Cohort other cancers, if you can't do a dose reconstruction, then there's no compensation available, right?

MR. KATZ: That's exactly true.

MR. RAY: Okay. And then when you talk about radiation you're talking more than just

penetrating radiation, right?

MR. KATZ: Yes. Well --

DR. NETON: More than what radiation?

MR. KATZ: More than penetrating radiation.

DR. NETON: Yes, internal exposure --

MR. KATZ: Yes.

DR. NETON: -- as well as external.

MR. KATZ: Both. Both internal and external.

MR. LEWIS: Sam Ray.

DR. NETON: Sam Ray.

MR. KATZ: Please, please, come up to the mike.

MR. ALVIS: You can't hear me?

MR. KATZ: No, it's just that for our recorder it's very important, that's all.

MR. ALVIS: Oh, I'm sorry. I just got a letter back from the state -- I mean from Cleveland, and I've got till August the 2nd. I won my state against the case -- case against the state for airway obstructions, both large and small.

They threw it out in Cleveland. Some little girl came on the telephone and said they -- if you think you're going to get this $150,000,

you're not going to get it. And I thought this was really nice, you know. She probably just graduated. But what I'm saying is, was too many people that don't know what they're talking about are involved in this.

DR. NETON: Are you talking about a claim for beryllium sensitivity?

MR. ALVIS: I'm talking about I got that test ran, and really Fernald should have been included in that Miamisburg deal. That's what I'm saying. They're not categorizing it like they should.

MR. KATZ: It's just unclear to us, who are the "they" in this case? Who --

MR. ALVIS: Well, the Cleveland board that this letter's from. I got it right here, if you want to look at it.

DR. NETON: But did you file a claim for --

MR. ALVIS: I sure did.

DR. NETON: Not --

MR. ALVIS: Yes, sir, I was the first to file one.

DR. NETON: Not for radiation, but beryllium exposure.

MR. ALVIS: Those words weren't even

mentioned until what, a year ago? And I filed a long time before that.

DR. NETON: Did you file with the Department of Labor?

MR. ALVIS: Yes.

MR. KATZ: But the conditions for the Department of Labor for which you can be compensated here --

MR. ALVIS: Right.

MR. KATZ: -- are beryllium, silicosis, and -

MR. ALVIS: Well, that's what I'm saying, they categorized this, and this was fine for Miamisburg. They have silicosis, other things like that, and there don't have to be coal dust to be silicosis. And I tried to explain to them that UO 3, UO 4, that all the UO 3, UO 2, all of them has silicon in it. And I was kicked out.

They led you to believe that all you had to do was file. Then when I got all the lists back -- I just got a letter back from my lung, and I've got -- I'll bring this to you like this. Miamisburg, cancer and beryllium. The man overexposed at Paducah, that was radiation, nothing about silicosis.

DR. NETON: Right.

MR. ALVIS: 26 percent of my lungs is gone, 80 percent of my heart's gone. And yet I'm out as of August the 2nd, because they gave me 30 days to get a beryllium blood test. And you know how long it takes to get a beryllium test?

MR. KATZ: No, I don't. I'm sorry.

MR. ALVIS: It can't be run in the State of Ohio. It has to be sent to Denver, Colorado. And it takes about four months to get it. They wanted it in 30 days. I have the letter there if you want to read it.

MS. MOSIER: I'd be glad to talk to you about your case after some of the other folks have a chance to ask questions.

MR. ALVIS: Okay. I've asked enough.

MS. MOSIER: Yeah, we can easily give extensions of time frames if you need more time to gather evidence.

MR. ALVIS: Well, I had so many, still have them; I'm not getting any answers.

MR. KATZ: Just for the record, that's Roberta Mosier from the Department of Labor who was just speaking.

DR. NETON: Okay. Any other comments?

questions?

MR. TABOR: I guess that leaves me.

DR. NETON: Yeah.

MR. TABOR: I'm Robert Tabor, Fernald Atomic Trades and Labor Council. I worked at the Fernald Plant. I'm a 21-year veteran employee there. And I'm also one of the union leadership individuals.

And I want to discuss a little bit or make a comment concerning the Special Exposure Cohort relative to unions petitioning and possibly get some clarification. But before I do, there's a couple other comments that I want to make. I have a bunch of stuff here, but it's way too long to spend the time to read on. And I probably will be submitting something officially that would be the equivalent of giving this as a public verbal testimony.

But a few of the comments that I would like to make for the record would be that NIOSH encourages a worker to complete the dose reconstruction before submitting a petition for the Special Exposure Cohort status. This process would prolong the claim for years; at least that's how I see it. There are some things in

there that would allude to the fact that this could go on for a lengthy amount of time.

Another comment that I have would be if a worker does not file for dose reconstruction, NIOSH's rule requires them to prove a negative, if I can put it in that way, that it is not feasible to estimate his or her dose with sufficient accuracy. In other words, NIOSH's rule requires them to prove a negative by requesting dose information from DOE or its contractors showing that they suffered medical harm, or proving that the materials they were using were dangerous.

Another comment would be NIOSH's procedure is a case-by-case method that provides little guidance on how a worker should receive or ensures a worker any accountability in the process.

And a fourth comment would be NIOSH assumes that the dose or exposure information will be available. And that's not necessarily the case.

And the fifth comment would be NIOSH's rule creates a higher burden of proof for the new SEC petitions than for the statutory SECs at the gaseous diffusion plants at Paducah, Portsmouth,

and Oak Ridge.

Now with that in mind, I don't know how Fernald kind of got left out of the scheme of things. But for the record, the things that happened at Fernald or the type of work that Fernald did, and the kind of exposures that or the kind of hazards that the people were exposed to, are not a whole lot different than what you would find at Paducah or what you would find at Portsmouth. And there's many of us that believe the employees at Fernald should have been considered as part of the initial cohort group. But of course, I guess at this particular point in time, the way the law reads they're not included in this.

But I'd like to just simply point out that those employees at the Fernald plant, quite frankly, aren't any different than those employees at Paducah and at Portsmouth. Take this into consideration, that the products that Paducah made came to Fernald. The same product that those people were exposed to down there is the same product that our employees at Fernald were exposed to. Even though you might have some difference in the processes, I would say that the

way people were exposed is not a whole lot different.

And the same is true of products from Portsmouth. We interfaced with both of those plants with the same materials they handled; and yet the employees at the Fernald Plant were not given consideration for the initial original Special Exposure Cohort.

So this leaves us with the situation of applying for, I guess in some situations, a Special Exposure Cohort through the process that's now proposed. The only thing of it is that as I said here, NIOSH's rule creates a higher burden of proof for the new SEC petitions than for the statutory SECs at the gaseous diffusion plants in Paducah, Portsmouth, and Oak Ridge.

So I find this to be, I guess I would say, it seems to me somewhat unfair, or there's not equity in the process.

And we have some -- there's some other things. I was looking over my notes here. Maybe if I -- let me see here. Here's one I did want to mention. This is a little bit different from what I was talking about.

The introduction section of 83.2, I believe that states that the initial claim of the claimant must be denied by the DOL, since the compensation for cancer claim -- let me see here -- since the compensation for cancer, a claim not based on the cohort provision, requires the completion of NIOSH dose reconstruction. I believe that's the rule.

The comment to that would be the rule makes it clear that this introductory statement is misleading. A claimant does not need to apply through DOL for compensation to secure SEC status. This sentence should be corrected to reflect that fact. You need to give some thought to that, unless you've got some feedback for me.

MR. KATZ: You wanted to -- before you go on, I'd like to just respond to one of your comments here, just because I think that clarification's needed for people. But you also said you had a comment about unions petitioning.

MR. TABOR: Oh, well, I guess what I -- it's not real, real clear in my mind exactly how to go about that. I am researching that and reading the rules on that, inasmuch as I think that you have to specify a number of things for that

particular class. And I'm not certain that that petition is submitted the same way as an individual petition would be petitioned or not.

MR. KATZ: Okay. So let me respond to that first.

MR. TABOR: Okay.

MR. KATZ: That petition would be submitted just as it would be -- let me speak clearly -- submitted by an individual. So it's the same, the same requirements for a union as they would be for an individual -- absolutely the same, same process, same consideration would be given.

Let me also clarify, though, something, a statement you made that we're requiring the petitioner to prove a negative, that we are requiring the petitioner to prove that dose reconstructions cannot be done, is what you were trying to say, I think. And we are not requiring petitioners to prove that dose reconstructions can't be done. That's a burden that's on our shoulders, not the petitioners.

The petitioner is, in effect, being required simply to show some diligence in having made an effort to determine whether there is a records problem that would lead us to believe there might

be a basis for considering a petition, so that there's some grounds for considering a petition.

MR. TABOR: Okay.

MR. KATZ: Okay. Thank you very much.

DR. NETON: Any other comments?

MS. BINGHAM: Eula Bingham, University of Cincinnati. I think I heard you say that a worker can opt out of a Special Exposure Cohort. You said that for the ones that are statutory. It theoretically could be possible for a worker to opt out and decide not to be included amongst a group of workers who are in a Special Exposure Cohort that, let's say, his union puts together, depending on the type of cancer that person has, right?

MR. KATZ: Well --

MS. BINGHAM: So there will be -- you can opt out?

MR. KATZ: Well, the opting out, the problem with classes that are added by us to the cohort is they're added on the basis that we cannot do dose reconstructions --

MS. BINGHAM: Okay. You say you --

MR. KATZ: -- in part.

MS. BINGHAM: Okay. But maybe that person

doesn't want to be in it to begin with, and you are able to find the information. Depending on the kind of cancer --

MR. KATZ: Right.

MS. BINGHAM: Okay. Let's say there are a group of workers who describe a situation like the following: We went in to a job and we got badges. At the end of the day we took those badges off and threw them in a box. Next day we went back to the job and they passed the badges out. And I got Joe's today, and Mike's the next day. How many times will that have to happen, you think, based on what you know about the reconstruction, for that to be that you really couldn't do their dose reconstruction? Give me a clue.

The reason I'm asking some of these specific things is there's some considerable decisions to be made by workers. If you are a -- if you have lung cancer and have ever smoked, you might as well forget it unless you're in a Special Exposure Cohort, from what I know about dose reconstruction.

DR. NETON: Well, that's not necessarily true.

MS. BINGHAM: Well, it's not necessarily. But you have to have a whopping dose for a long time.

DR. NETON: That's -- which has occurred in the early-on days of operation of Department of Energy facilities to some extent. But in more recent --

MS. BINGHAM: Right.

DR. NETON: -- recent time periods you are correct, the doses are much lower.

MS. BINGHAM: Right.

DR. NETON: The original question on how many times the badges would have to be exchanged in that method for a dose reconstruction not to be possible is somewhat difficult to answer. But I think I can say that the badges are our first line of inquiry.

MS. BINGHAM: Well, 25 percent? Half the time?

DR. NETON: Well, we would -- the badge -- we have several methods of evaluating exposure to the workers.

MS. BINGHAM: Right.

DR. NETON: The badges are the first line because they tend to be the most, we believe, the

most accurate depiction of their exposures.

Given that we couldn't assume that anyone's badge was worn by an individual, we would say that's probably not a good indicator of their exposure. So we would back off and start looking for air monitoring results. Did they have dosimeters in the area? Can we get a clue as to any magnitude or level of the dose that was in that facility?

Then our third line would be to go and look at evaluation of radiation survey results that were taken with portable survey readers.

If all those lines of inquiry were exhausted, then yes, we would say we can't do a dose reconstruction.

MS. BINGHAM: You look at the kind of -- the contaminant?

DR. NETON: Well, right, the source material. Is there one gram of material that people are working with, or a ton? And that would be the last line.

And then if we couldn't determine that, that's only the first condition for a Special Exposure Cohort -- that is, the dose reconstruction can't be done. But the second,

and as important part, is that the health must have been endangered by that potential exposure.

So then we get into the bracketing scenario. How large could that dose have been, given that we don't know much about it? Is it an order of magnitude of the calculation that we would use? And if that appeared to be sufficient to have led to a probable causation of 50 percent or greater, then that would qualify.

MS. BINGHAM: Let me just say this for the record. I'm asking these questions not just for my own edification, but I think that being an old regulator, as you know, it's very difficult for workers to read these regulations. And they'll have to get somebody in the union. They'll have to get a lawyer to help them out, because for some people it's to their advantage, let's say, to be in a Special Cohort. Let's say if you have lung cancer, by and large it probably is, and have smoked.

Someone needs to, when you finalize that rule, come up with some of this explanation so that, let's say, a labor rep someplace can pull those things out and can help groups of workers and facilities make decisions.

I know NIOSH feels like most of this is their responsibility. But, boy, they're going to really get hit in the head and blamed for some things that they'll think they're not responsible for.

I would say the more you can put in the final rule, your justification you put in the *Federal Register* to explain the cause and effect, and if you do this, if you do that, the better off you'll be. Because otherwise it'll be -- it's going to all get turned over to attorneys. And some of them will be anyway, and I don't think that's the way it's -- this compensation was ever planned. That's all.

DR. NETON: Okay, thank you.

MR. KATZ: Thank you.

DR. NETON: I would say that related to the previous question that we're not asking the claimants to prove that dose reconstruction can't be done, but merely point us in the right direction. We need to have a starting point, and that's really what we intend to do here.

MR. TABOR: I've got a question --

MR. KATZ: Bob, please come to the mike.

MR. TABOR: Okay.

MR. KATZ: Thank you.

MR. TABOR: Bad leg. Bad back. Bob Tabor again. If you have a situation -- well, let's back up a second. Let's take Fernald, and let's go back. I started at Fernald in 1981. When I got there, there was very little as I recall, and it wasn't even mandatory to wear respiratory protection. Shortly there was optional or opportunities to optionally wear respiratory protection.

Now 1981, when you consider the fact that there was employees there that had worked there probably close to 30 years prior to my coming there, and I was quite familiar with the operations there of being a maintenance person, have seen a lot of the operations that took place. And I've seen those days of the type of things that those folks were exposed to when there was absolutely no protection provided whatsoever -- a lot of oxide airbornes, as far as creosol, black oxides.

I guess what I'm looking at is in those days I don't believe that you had exposures going on like that. I'm not so sure that even -- what am I trying to say -- the badging at that time, that

they were even -- that was even being tracked back in the early days.

So maybe Charlie can even answer that. I don't know, did they initially have badges way back in those days?

MR. ALVIS: Yeah, they changed them, Bob, over the years.

MR. TABOR: Okay.

MR. ALVIS: But I don't think they improved them.

MR. TABOR: Okay. Well, let's say that with those type of exposures and with the very, very crude technologies of those days, you really, in my estimation, would have a hard time saying, okay, do we have any evidence evolve that we found some dose reconstruction on?

Well, here's my point. If you had a group of people, let's say 29 out of 30, that didn't qualify or you couldn't do dose reconstruction on because of the type of things that I just mentioned, but you have one over here that you can, where does that leave the situation or the class for petitioning, like if I was to petition on behalf of the union for the class of employees?

I know there's going to be some that absolutely will qualify, where they say you cannot really do a dose reconstruction on these people because the length of time they worked there and the way we went about detecting that stuff. But then later on in years, Jim, like when I came there, you'd probably have a hard time in my case -- I probably would. I'm just saying that probably if they did a dose reconstruction on me, there'd probably be enough evidence to do that. But I'm not so sure there'd be enough evidence for somebody who started in 1951 or 1952.

MR. ALVIS: I don't think there is.

DR. NETON: We have a lot of latitude in establishing a class. It can be as small as one person and as large as the entire facility, or somewhere in between, of course. So in your particular example, we would have to evaluate the work processes. And the one person who wasn't exposed very high, clearly sounds like he was doing something different, would not be included in that class.

Let's take an example. Chemical operators may be a class. That's an example of a type of

job function that may be a class. And we also -- and correct me if I'm wrong -- we can set the dates for when that class is valid. So we can say up through 1982, you had to have been employed prior to 1982 and been a chemical operator and worked in Plant Five, something like that.

So it all depends upon the circumstances that we find when we go to investigate the petition.

MR. TABOR: Okay. Well, that gives me some better information. Because we can look at certain groups and certain sections of folks in the operation, not necessarily, say, petition for the entire membership, you might say, of the site?

DR. NETON: That's exactly right. In the example that you provided it probably was insoluble material, the lung may be the most highly exposed organ. So we would use that organ in our calculation from an internal perspective to determine if the probability was as likely as not that cancer could have been caused by these levels of exposures, albeit unknown, but somehow graphable within a certain magnitude.

MR. TABOR: Well, that lends some clarity for me. Thank you.

MR. KATZ: That's for dose reconstruction you're talking about?

DR. NETON: No, I'm talking about establishing a class.

MR. KATZ: We use the most radiogenic cancer.

DR. NETON: For the -- well, most radiogenic or most-exposed related. So in that particular case -- I'm giving an example. The cancer would vary. But if it was an inhalation exposure to a uranium insoluble, more likely the most radiogenic cause of cancer would be, should be, lung cancer. But I'd have to validate that.

MR. KATZ: And likewise, Bob, in your example, in terms of you think practices haven't changed over time, you would probably want to define the period of time as part of the class.

MR. LEWIS: Hi. I'm Mark Lewis from PACE International Union. I was noticing in Section 83.16, describes how the Secretary would cancel a final decision to add a class to the cohort or modify a final decision to reduce the scope of a class the Secretary had added to the cohort.

My question is, based on dose reconstruction, and later on it says if they can find dose reconstructions for the cohort, this Section 83.16 describes how you can reverse that. And I want to know what would happen to people who already may have been awarded the money and the compensation, and then how would they go about finding out those other records so they can do dose reconstruction? You've got somebody to take a look into reconstructing the dose, even after the cohort's been added.

MR. KATZ: So let me -- I'm not sure I understood the second part of the question right. But how would we cancel if you've already --

MR. LEWIS: Just say somebody's had a radiological cancer.

MR. KATZ: Yes.

MR. LEWIS: They've been added, the class has been added to the cohort, okay. So --

MR. KATZ: Right.

MR. LEWIS: -- the people worked here in Fernald, they get awarded to be in the Special Cohort. Maybe a few of them's been compensated. Then somehow, someway, you can reconstruct the dose? What mechanism is in place for this to

happen? And is there somebody working in the organization continually trying to work on doses? After 180 days is it done, or what's -- What's the purpose of 83.16?

MR. KATZ: So now I understand you right. Let me explain that. It's not that after we add a class to the cohort that we will go searching for records to try to cancel the class from being added to the cohort.

But we're going to be, as you know, we're going to be doing dose reconstructions perpetually from now till the end of time. And in the course of doing dose reconstructions we are going to run into records. We're going to learn about records that we didn't know existed. And it's at least a substantial probability that we will turn -- records will turn up or DOE will turn up some records at some point that they didn't realize they had in some building somewhere, in some boxes somewhere, or what have you.

But it would only be in those circumstances where this arises, where we find ourself with records that tell us very clearly we can do dose reconstructions where we had added a class, that

we would then begin the process of deciding whether we should remove that class. So it wouldn't be -- there would be no hunt to attempt to cancel classes, but this would happen spontaneously.

MR. LEWIS: What would happen to the people that's already been compensated?

MR. KATZ: So that, and the second part of your question, what would happen to the people who have already been compensated? And this is really a question for the Department of Labor, because they're the ones who have to determine what happens in that circumstance for people who have already been compensated.

Roberta, do you want to take that question?

MS. MOSIER: Sure. We have not yet determined what we will do under those circumstances. This rule came out after our rule. And we have an interim firewall in place right now. So this is something that we would need to think about.

I think if we were to declare an overpayment or something like that, there are rules that apply to that that would -- we'd have to consider the person's financial situation and things like

that. But we have not yet established what we would do under those circumstances. So that's still an open question.

MR. KATZ: Thank you, Roberta.

DR. NETON: Okay. Additional comments? questions? Going once.

[No responses]

DR. NETON: Okay. If there are no more additional comments or questions, that completes the formal portion of the meeting. We do appreciate you all coming here this evening, taking the time out to comment on this rule.

As I indicated earlier, NIOSH staff will be available for a short time after the meeting to talk to people individually if they have additional questions.

Again, thank you for coming, and have a safe drive home.

(Whereupon, the meeting was adjourned at 8:23 p.m.)

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