

UNITED STATES DEPARTMENT OF LABOR

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ADVISORY BOARD ON TOXIC SUBSTANCES
AND WORKER HEALTH

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MEETING

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THURSDAY

APRIL 28, 2016

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The Advisory Board met at the
Department of Labor, 200 Constitution Ave, N.W.,
Washington, D.C., at 8:30 a.m., Steven Markowitz,
Chair, presiding.

MEMBERS**SCIENTIFIC COMMUNITY:**

JOHN M. DEMENT
MARK GRIFFON
KENNETH Z. SILVER
GEORGE FRIEDMAN-JIMENEZ
LESLIE I. BODEN

MEDICAL COMMUNITY:

STEVEN MARKOWITZ, Chair
LAURA S. WELCH
ROSEMARY K. SOKAS
CARRIE A. REDLICH
VICTORIA A. CASSANO

CLAIMANT COMMUNITY:

DURONDA M. POPE
KIRK D. DOMINA
GARRY M. WHITLEY
JAMES H. TURNER
FAYE VLIENER

DESIGNATED FEDERAL OFFICIAL:

ANTONIO RIOS

PRESENTERS

JEFF KOTSCH, Senior Health Physicist and Unit

Chief, Medical and Health Science

RACHEL LEITON, Director, DEEOIC

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P-R-O-C-E-E-D-I-N-G-S

8:44 a.m.

CHAIR MARKOWITZ: So, let's get started. Ms. Gibson, in the back? Ms. Gibson, can you hear me? Okay, thank you. I was just checking the mic.

Welcome. This is the third day of the Advisory Board on Toxic Substances and Worker Health. Sorry for the delay. We had a little problem with the WebEx.

For those of you who are participating remotely, you can still reach us on -- through the phone. If you want to see the PowerPoint presentations, or otherwise participate, you will need to send us an email, and then we will give you instructions on how to connect with us. Is that right, Tony?

MR. RIOS: Yes.

CHAIR MARKOWITZ: Thank you. Today is Worker's Memorial Day. So, we recognize the many thousands of workers who -- actually, each year over 4,000 workers who die from traumatic

1 fatalities, and some multiple of that who die
2 from chronic occupational illnesses.

3 We will do that by 10:30, between
4 10:30, which is our scheduled break, it will --
5 we'll prolong it until 11:00. There is a
6 ceremony and some speakers downstairs. Ms.
7 Duronda Pope is going to speak, our Board Member.

8 So, we will break at 10:30, and those
9 of you who wish to attend that, where it -- do
10 you know where it is exactly?

11 MR. RIOS: The Great Hall.

12 CHAIR MARKOWITZ: The Great Hall,
13 wherever that is, okay, but we'll -- must --
14 we'll find it.

15 So, let's quickly do introductions,
16 and then we'll proceed from there. Dr. Laura
17 Welch.

18 MEMBER WELCH: Laurie Welch. I'm the
19 medical director of the Building Trades Medical
20 Screening Program, which is one of the DOE funded
21 former worker programs, and I'm an Occupational
22 Medicine Physician.

1 MEMBER TURNER: James Turner from the
2 Rocky Flats Nuclear Weapons Plant, near Denver,
3 Colorado, diagnosed with chronic beryllium
4 disease in 1990.

5 MEMBER POPE: Duronda Pope, United
6 Steel Workers, also a former 25 years Rocky Flats
7 former worker.

8 MEMBER WHITLEY: Garry Whitley, a
9 former worker from Y-12 National Security
10 Complex.

11 MEMBER DOMINA: I'm Kirk Domina. I'm
12 the employee advocate for the Hanford Atomic
13 Metal Trades Council in Richland, Washington.

14 MEMBER VLIENER: Faye Vliener, former
15 Hanford worker, injured worker claimant.

16 MEMBER SOKAS: Rosemary Sokas.
17 Occupational Physician, Professor and Chair of
18 Human Science at Georgetown University School of
19 Nursing and Health Studies.

20 CHAIR MARKOWITZ: Steven Markowitz,
21 Professor at City University of New York,
22 Occupational Medicine, Physician and

1 Epidemiologist.

2 MEMBER SILVER: Ken Silver, Associate
3 Professor of Environmental Health in the College
4 of Public Health at East Tennessee State
5 University.

6 MEMBER CASSANO: Victoria Cassano,
7 Occupational Physician, former Naval Under Sea
8 Medical Officer, Radiation Health Officer and
9 former VA head of radiation physical exposures
10 and environmental health service.

11 MEMBER BODEN: Les Boden. I'm a
12 Professor in the Department of Environmental
13 Health at Boston University School of Public
14 Health.

15 MEMBER DEMENT: John Dement, Professor
16 at Division of Occupational and Environmental
17 Medicine, Duke University Medical Center.

18 MEMBER GRIFFON: Mark Griffon,
19 Occupational Safety and Health Consultant.

20 MEMBER REDLICH: Carrie Redlich. I'm
21 an Occupational Medicine and Pulmonary Physician
22 and Professor of Medicine and Director of the

1 Yale Occupational Environmental Medicine Program.

2 MEMBER FRIEDMAN-JIMENEZ: George
3 Friedman-Jimenez. I'm an Occupational Medicine
4 Physician and an Epidemiologist at Bellevue/NYU
5 Occupational Environmental Medicine Clinic.

6 MR. RIOS: And I'm Tony Rios. I am the
7 Designated Federal Officer for the Advisory
8 Board.

9 Also for those folks that are on the
10 phone that did want to join us through WebEx, the
11 Chair asked that you email us. I just wanted to
12 give you our email address.

13 That's energyadvisoryboard@dol.gov.
14 That's located on our website, but I just wanted
15 to make sure everyone had it.

16 CHAIR MARKOWITZ: So, next we're going
17 to discuss the fourth area that Department of
18 Labor has asked us to provide recommendations on,
19 as a Board, and I'd just like to read from our
20 charter what the assignment is before we begin
21 the session.

22 "The Board shall advise the Secretary

1 of Labor, with respect to the work of industrial
2 hygienists and staff physicians and consulting
3 physicians of the Department, and reports of such
4 hygienists and physicians to ensure quality,
5 objectivity and consistency."

6 So, with that, I'd like to invite Mr.
7 Jeff Kotsch, who is a Senior Health Physicist and
8 Unit Chief of the Medical and Health Science to
9 come and present. Welcome.

10 I'd also like to welcome back Ms.
11 Leiton.

12 MR. KOTSCH: Up front, I'll apologize.
13 I'm suffering through allergy season. I don't
14 know if anybody else has that affliction, but
15 anyway. So, if you see me sniffing up here,
16 that's what it is.

17 I think we are -- is it audible now or
18 -- okay.

19 I think they've all started, all our
20 previous presenters have started with an
21 introduction of their background. Unfortunately,
22 I haven't been with DOL as long as most of these

1 people. I only started a little bit after the
2 program started. You know, I started in August
3 of 2001.

4 Out of graduate school, I went to work
5 with the Nuclear Regulatory Commission. That was
6 back in '78, and ended up in a group, a licensing
7 group that actually did uranium milling
8 licensing, which was interesting and actually,
9 has come back in the loop because one of the
10 things that we cover is uranium milling, milling,
11 mining and ore transporting, as part of Section 5
12 of the RECA.

13 When TMI came around, I got drafted
14 because there weren't that many -- interestingly
15 enough, there weren't that many health physicists
16 in the NRC as you would have expected.

17 So, I got drafted into the emergency
18 response center and then continued from there,
19 working on reactor related things, until '81,
20 when I left, and joined a commercial nuclear
21 power plant in Southern New Jersey and headed up
22 the Central Radiological Protection Support Group

1 for that, through the 80's, essentially.

2 In the early 90's, I joined a small
3 consulting firm in the D.C. area. We did a lot
4 of DOL and some NRC work, I mean, sorry, DOE, and
5 I was fortunate to probably visit all of the --
6 major DOE facilities, as well as a number of the
7 minor ones, doing nuclear safety assessments for
8 what was then the defense programs and also
9 later, the environment safety and health group.

10 So, I got to go to Rocky -- one of the
11 first things I did was, I went to Rocky Flats and
12 participated in the review for the startup of the
13 707 Building where they did plutonium pit
14 production.

15 Unfortunately, that facility was never
16 allowed to go into operation. It did similar
17 things for K reactor at Savannah River, the
18 replacement tritium facility done there, and a
19 bunch of other -- they call them vulnerability
20 assessments throughout the DOE complex for
21 uranium and plutonium, and that gets me to the
22 point of where I joined DOL in August of 2001.

1 Since then, initially, obviously I
2 came in as a health physicist for the Part B
3 program, when they took over Part E, or when Part
4 E implemented, they added staff. We added --
5 well, the members of our staff include a
6 toxicologist, actually with a PhD, but she also
7 likes to say that she's an occupational
8 epidemiologist, because she has an MPH in that.

9 We had, sadly passed away, our medical
10 director last -- early last year, and so, we rely
11 now on a -- the OWCP medical director, as we hire
12 a new medical director, and I think the intention
13 is to have that core group sit in OWCP, but to be
14 available to us, and certainly the OWCP medical
15 director is, and has always been, very accessible
16 to us for, you know, questions that we have.

17 The latter half of the presentation
18 will get into, you know, the CMC contract, but
19 the first part will be the IH, and the industrial
20 hygiene portion, and we have -- and don't let me
21 -- let me just start with the presentation.

22 I think you have it -- or the talking

1 points. Actually, I was tempted, since we've
2 actually discussed, I think, most of the things
3 I'm going to discuss through Rachel's and John's
4 and Rhonda's presentations. I was almost tempted
5 to just say let's go straight to questions, but
6 I'm sure I'm not going to get away with that.

7 So, anyway, we'll just step through
8 this. We can probably step through it a little
9 more quickly. I have a couple things that you may
10 not have seen, and go on from there.

11 But anyway, as it says in the
12 overview, basically, we're to establish -- the
13 overview provides the basis of what -- you know,
14 the activities for the industrial hygiene, and
15 actual -- actually, the medical reviews
16 encompasses.

17 To show evidence of potential or
18 plausible exposure of toxic substances, evidence
19 of covered DOE along with evidence of covered DOE
20 contractor, subcontractor or employment under the
21 RECA Act, which is what we've talked about
22 before.

1 The regulatory requirements there, the
2 first one comes from 20 CFR Part 30.23 -- or
3 231(d), and it talks about establishing
4 employment-related exposure to a toxic substance.

5 So, proof of exposure to the toxic
6 substance, that -- that is present, and then it
7 talks about the site exposure matrix -- matrices
8 being used as a basis for determining the
9 presence of the toxins, and the second portion of
10 that is the same citation except that the -- the
11 second -- I'm sorry, 20 CFR 20.231(d)(2) and it
12 talks about essentially, what goes into a review
13 for toxic substance, the nature, frequency and
14 duration of the exposure, evidence of the
15 carcinogenic or pathogenic properties, the
16 opinion as a qualified physician, and other demo
17 -- other evidence that demonstrates the
18 relationship to a particular toxic substance and
19 the claimed illness.

20 The industrial hygiene process.
21 Currently, we have three industrial -- a
22 certified industrial hygienist. Two are Feds --

1 are Federal employees, one is a contractor
2 employee, and the CIH's review and evaluate the
3 historical occupational safety and health data,
4 which may or may not include, and often doesn't,
5 specific -- employee specific industrial hygiene
6 monitoring data, along with the application of
7 the specialized knowledge that they bring to --
8 to the review, relating to the field of
9 industrial hygiene.

10 The process, and I think we've done
11 this before, the process starts with the claims
12 examiner in the field, obviously, identifying
13 that an exposure issue is present.

14 The CE basically formulates the
15 question as far as the potential for the
16 exposure, using the site exposure -- exposure
17 matrix, or matrices, the SEM and the case file
18 that frames -- and the information in the case
19 file to frame the question, and there are sub-
20 bullets there including obviously, the things
21 that they -- they need to address, the facility
22 exposure records, the DAR request from DOE, which

1 may or may not contain a number of things, which
2 we may get into later, and some of the things
3 that show up here.

4 Obviously, one of the things they're
5 looking for is employment information, but
6 sometimes they will find, not related to the E
7 side, but to the B side, obviously records for
8 dosimetry, which NIOSH also gets, because they do
9 similar requests on their side, for the B side.

10 Sometimes we're lucky and, especially
11 at Savannah River site and the Rocky Flats Plant,
12 where we get actual documents that reference the
13 employee by name and discuss their -- their --
14 yes, their employment activities as a maintenance
15 mechanic or a laborer, or whatever it is, or if
16 there are multiple positions, it discusses those,
17 their acts -- their work activities, the types of
18 things they're exposed to, heavy metals or
19 whatever solvents or whatever it is.

20 That is actually useful, especially
21 since it's specific to the individual.

22 The occupational health questionnaire,

1 which it comes from the resource center
2 interviews, again which are conducted either in-
3 person or via the phone.

4 Those are useful because if you're
5 talking obviously to the worker, because you --
6 because you're getting their input. Yes,
7 obviously if it's a survivor situation, whether
8 it's the spouse or the children, that information
9 is generally of less value, simply because they
10 were not aware of all the things that their
11 father or mother did at the facility and because
12 of the security restrictions, a lot of those
13 things, you know, they may never have talked
14 about those things at home anyway.

15 Obviously, the employee records, the
16 verified affidavits of coworkers and other
17 people, the former -- DOE former worker program
18 screening records, if they're available, the
19 NIOSH site profiles, which generally, they don't
20 get into, but do provide some information, since
21 they're created for the B side, occasionally has
22 some information.

1 Any evidence that the employee
2 submits. Sometimes they do indeed submit
3 supplemental information, you know, to describe
4 their work, or they may submit it after they've
5 had the interview, if they've thought of
6 something else or if the CE perhaps asks for
7 additional information, to expand on something
8 they said in their OHQ, and any other information
9 that they might submit, as it -- concerning toxic
10 exposures at the site.

11 All this gets rolled into what they
12 call the Statement of Accepted Facts, so, which
13 we'll go through. I'll hand out one in a few
14 minutes and we can just run through that quick,
15 and you'll see what information that contains.

16 So, that comes in. It's reviewed by
17 -- and we -- we have quite a few of those. It's
18 reviewed by our lead industrial hygienist, to
19 make sure the quality of it is what we need to
20 perform the review that we -- we don't need the -
21 - that the question is properly posed and things
22 like that.

1 Initially, when the review is
2 performed, the -- they'll -- whoever is doing --
3 whichever the industrial hygienist that's doing
4 the review, assuming that the question is --
5 appears to be appropriate for the medical
6 condition and things like that, they'll re-run
7 the SEM, check, you know, to make sure that
8 that's properly done. Often, that is done fairly
9 early, even before it's transmitted to the other
10 IH's to review, and to ensure that we've got the
11 proper toxins that are identified for the medical
12 condition.

13 MS. LEITON: The SOAF is an area that
14 we constantly are reviewing because that's -- as
15 we've talked about earlier in the week, that's an
16 -- that's something that is reviewed by the IH.
17 It's reviewed by the CMC.

18 So, we've tailored it. In some ways,
19 we'll tailor it to a referral to an IH versus a
20 referral to a CMC, and it's something that we're
21 currently still looking at and working with our
22 district offices to see if there is like -- if

1 there is maybe a formulaic process for referring
2 cases to our IH. That would -- because it's
3 still kind of a struggle I think for -- since we
4 have so many different claims examiners, to
5 ensure consistency with this.

6 So, we're trying more and more every
7 year to make it as consistent as possible, with
8 regard to what we include in the information that
9 goes to the IH, what information that the claims
10 examiners claim, but also, what is attached to
11 it.

12 So, just wanted to let you know,
13 that's something that's ongoing. I mean, it's
14 been a constant and it's -- but it's -- we do
15 evaluate it regularly to make sure that it's
16 still consistent with what we need to be using it
17 for.

18 MR. KOTSCH: And even format-wise, I
19 mean you'll see, actually one format, but it's
20 not even the common format that we use when I
21 hand out the example, but we are, I think in a
22 current effort to actually overhaul the OHQ, so

1 any input you could provide -- yes, would be
2 useful.

3 I'm sorry, that was the OHQ, but even
4 the SOAF's, you know, we're always looking at
5 those things too.

6 The SOAF is used obviously, to
7 transmit information for -- it could be for a
8 medical review. Obviously, it's a different one
9 than you'll see today, which is an IH one,
10 they're also used to transmit requests for
11 toxicology reviews or even health physics reviews
12 on the B side.

13 So, that -- it's a common mechanism
14 that is used for basically all the inputs to the
15 specialists in our group.

16 So, anyway, basically now that they've
17 redone -- they've done a SEM run again, to check
18 that and talk with the CE if they need to. We
19 have no direct interaction with the claimants.
20 If there were any, that would go through the CE.
21 We tap in sometimes occasionally to the folks
22 that support the SEM contract, some of their

1 health -- industrial hygienists, if we need some
2 specific information that might have been in SEM,
3 or we think that is in SEM, or should be in SEM.

4 Obviously, sometimes there are
5 deficiencies in SEM that we can find, that we'll
6 identify and transmit over to them, and sometimes
7 they'll see things that we've missed.

8 So, anyway, the IH renders an expert
9 opinion in the form of a memorandum, which we'll
10 see a copy of, that addresses the issues as
11 specifically as possible. It addresses the
12 specific question which is posed by the CE, just
13 as for a medical one, you address the specific
14 question -- the CMC addresses the specific
15 question, and employs their specialized training
16 to make findings, based on the evidence in the
17 file, and there you see the things.

18 You know, you address obviously, the
19 toxic substance -- I'm sorry, toxic substance,
20 employee history, the medical condition and then
21 apply that in a -- hopefully, and communicate --
22 or I'm sorry, communicate that in a clearly

1 understandable, written narrative.

2 So, at this point, I want to do two
3 things. We can hand out the -- Carrie is not
4 here, okay.

5 We can hand out the copies of the --
6 it's in that brown folder, just for the examples,
7 and the other thing we can do is have -- do you
8 want to talk now? And to have Doug Pennington
9 talk about our new IH contract.

10 MR. PENNINGTON: Good morning,
11 everyone. Again, my name is Douglas Pennington.
12 I am the Deputy Director of the Energy Program.
13 I've spoken to you briefly before, and I
14 appreciate the opportunity to do it again.

15 I am going to give you a very brief,
16 unlike everyone else, I've been with the Energy
17 Program and OWCP since July of 2015. So, I am
18 exceptionally new.

19 I came here though with 20 years of
20 experience in the insurance industry, as a state
21 insurance regulator, and working for CMS for the
22 last five years, and so, I bring a variety of

1 experience.

2 I am here to basically tell you that
3 we're very excited to announce that effective
4 3:00 p.m. yesterday, we executed a contract with
5 Banda International Group to perform certified
6 industrial hygienist work on our behalf. They
7 will be supporting the three industrial
8 hygienists that Jeff was mentioning previously,
9 our two staff and one contractor.

10 Their primary role will be supporting
11 all of these referrals that our claims examiners
12 have been making, and so, as previously mentioned
13 in the week, we do currently have a back-log that
14 they will be working towards eliminating as
15 quickly as possible, while also taking on new
16 industrial hygiene referrals.

17 So, since this contract was literally
18 executed yesterday afternoon, we will be in the
19 process of implementing and training and getting
20 all of that up to date over the next couple of
21 weeks. But we wanted to let you know that this
22 was something we were very excited about.

1 Banda, just so that you know, brings
2 years of experience in industrial hygiene
3 activities, working for the National Nuclear
4 Security Administration, the Department of
5 Energy, various subcontractors of the Department
6 of Energy, and various private nuclear
7 facilities.

8 So, these -- this organization is and
9 provides a great deal of industrial hygiene
10 expertise in the nuclear facility world, which is
11 obviously something that excites us greatly. So,
12 it should hopefully reduce the training curve
13 that they're going to have to suffer through.

14 So, thank you very much, and have a
15 good day.

16 MR. KOTSCH: Thank you.

17 MS. LEITON: So, I think the timing of
18 this is really good, in terms of, we're
19 establishing the board and the guidance that you
20 provide, we can also relay to them. I think it's
21 a good starting point. So, I'm going to turn it
22 back over to Jeff.

1 MR. KOTSCH: Okay, so, what I've
2 handed out has three parts to it. The first two
3 parts are, in essence, I tried to hopefully
4 redact it completely, and maybe over-redacted in
5 some cases, but just to protect the innocent or
6 whatever.

7 The first two parts that are stapled
8 together are basically what we get -- or in this
9 example, what we received from the CE.

10 Now, this can -- this is a little bit
11 more than we normally receive, but sometimes a
12 little bit less.

13 Like I mentioned, when we have
14 Savannah River site cases or Rocky Flats cases,
15 we often get those additional documents about
16 employment -- you know, work activity
17 descriptions, employment descriptions for, you
18 know, if it's a maintenance mechanic or a welder
19 or laborer, or whatever it is, you know, which
20 again, we find useful.

21 Unfortunately, I was trying to look at
22 this particular file and see if I could find the

1 medical -- the SOAF that went to the CMC, but I
2 couldn't find it. I don't think I actually --
3 because of the dates on this thing it was
4 developed yet, but I was trying to -- I was
5 hoping I could get, you know, the complete flow-
6 through, the question that they pose and the SOAF
7 to the CMC, but I failed on that one, but I think
8 ultimately, we can -- yes, we can get copies of
9 those kinds of things.

10 So, anyway, the first one, which is
11 the two pages is basically the -- it's called the
12 IH referral, but it really, in essence, is what
13 we also call the SOAF. This one has a little
14 different format than many of the other ones you
15 see, which are primarily in the more of a textual
16 format, but it gives you the essence of what --
17 you know, what's contained in what we call an IH
18 referral or a SOAF or an IH review.

19 It starts with the demographic
20 information on the employee, medical information,
21 employment information, including, you know,
22 obviously dates of employment, position, work

1 position.

2 The number four is the -- the list of
3 toxins, and you'll notice in this one, initially
4 they came up with a long list, a longer list than
5 the three questions -- or the three toxins that
6 they ultimately requested to be reviewed, and in
7 the next package, you'll see that -- but we'll
8 get to that in a second.

9 I just included the email that they
10 sent to one of our industrial hygienists, on how
11 they whittled that down.

12 So, they present the three toxins and
13 then basically present the question, and then on
14 the following pages is just the -- it's basically
15 a summary of the employment again, and the right-
16 most column, the potential toxic exposures comes
17 from their assessment in SEM. They put the --
18 the facility and the labor category and the
19 medical condition, and then they start coming up
20 with conditions.

21 So, anyway, in the second package, the
22 first thing is just what they submitted, was

1 actually a couple of emails on how the -- how the
2 longer list of 13 was basically reduced down to,
3 I guess is it three or four? So, I think it's
4 three. So. Sure.

5 MEMBER WELCH: So, you know, I was
6 saying, well, is this a claims examiner or is
7 this a supervisor or is this a --

8 MR. KOTSCH: No.

9 MEMBER WELCH: -- because it's sort of
10 like -- I'd recommend that your IH referral ask
11 for exposure evaluation.

12 So, just to -- it helps me understand
13 the process.

14 MR. KOTSCH: This email?

15 MEMBER WELCH: Yes.

16 MR. KOTSCH: I'm sorry, yes. This --
17 the top one is from our industrial hygienist.
18 Actually, our contractor industrial hygienist,
19 back to the -- to the CE.

20 Yes, the -- well, it has CE -- well,
21 I'm sorry. You know how emails go? They go back
22 to front kind of thing.

1 So, the --

2 MEMBER WELCH: Oh, okay.

3 MR. KOTSCH: -- I guess my redacting

4 --

5 MEMBER WELCH: Okay.

6 MR. KOTSCH: -- the top of the second
7 page was essentially the email from the CE to the
8 industrial hygienist, you know, the one with --

9 MEMBER WELCH: Asking him to narrow
10 down --

11 MR. KOTSCH: -- asking him to narrow
12 down the 13, the 13 toxins, and then the top one,
13 I guess by over-redacting it, it loses something,
14 and then top one is then the recommendation back
15 from the industrial hygienist, back to the claims
16 examiner.

17 MEMBER REDLICH: So, somebody is
18 asking -- so someone is -- thinks that it will be
19 helpful to know which of these is the major
20 exposure or what is the --

21 MR. KOTSCH: Yes.

22 MEMBER REDLICH: -- question?

1 MR. KOTSCH: Yes, we have a -- one of
2 the -- just because we get so many of these in,
3 until we had the contractors yesterday, we get so
4 many referrals, we've kind of said, try to limit
5 it to no more than seven for each particular job
6 category.

7 So, when they come up with 10 or 15
8 toxins or something, it may be a result of the
9 fact that they didn't properly do the SEM surge,
10 or it may just be a fact that there is
11 potentially, you know, 10 or 15 toxins in there.

12 So, then we ask them to talk to our
13 industrial hygienists and see if they can whittle
14 it down to some lesser number.

15 Now, if that's not possible, we will
16 -- it -- we will, you know, run all of those
17 toxins. But if we can reasonably limit it down
18 to the more -- you know, essentially the more
19 important ones, that's the goal.

20 MEMBER REDLICH: So, as an
21 occupational pulmonary specialist who does mainly
22 diagnosing things, like work-related COPD, having

1 five specific toxins versus more general
2 information, the type of work processes, we don't
3 diagnosis occupational COPD based on like
4 measurements of phosgene.

5 The literature is -- that supports the
6 association is for exposures to fumes, dust,
7 vapors, and it's not one specific substance.

8 So, I'm not sure what that effort
9 accomplishes by making it a shorter list.

10 MS. LEITON: So, when we refer the --
11 we used to have -- if you look in the SEM, you'll
12 see this broad list of possible things people
13 could be exposed to, and when we refer it to an
14 IH, what we do is, we explain to the IH, what we
15 believe that the person's potential exposure may
16 have been and ask them to tell us the root and
17 nature of exposure, so that we can then go to the
18 physician with that information in mind.

19 So, that's the way that when we refer
20 it to an IH, we're asking them to opine on that
21 particular -- this person was in this job. We
22 narrow it down because we're not going to give

1 them 25 different toxic substances, especially if
2 they've talked to an IH, talked about the job
3 categories, talked about the length of
4 employment, the IH is really -- these other ones
5 are not going to be as relevant.

6 So, these are the four that you would
7 want to have us focus on. That's the way our
8 referral process works.

9 CHAIR MARKOWITZ: Dr. Dement?

10 MEMBER DEMENT: I guess what's missing
11 for me on this process is what the worker
12 actually gave you on their occupational history.

13 MR. KOTSCH: I'm sorry, this is coming
14 up then.

15 MEMBER DEMENT: Okay. So, none of
16 these things are in what was said to the -- IH,
17 well, we'll come to that.

18 MR. KOTSCH: Yes, it's attached. It's
19 just coming up in the -- behind a document. I
20 just happen to put this -- this email in there
21 first.

22 So, anyway, so, after the email, which

1 was the first three pages, comes the SEM run, and
2 this is for an electrician, which he -- and
3 that's just a printout of it. That's what the CE
4 submitted in support of the -- and then they
5 submitted another one for a welder. This
6 particular individual, I think welded for like
7 four months of the -- of his employment.

8 Then where it says -- where it says --
9 I'm sorry, and then there is one page where it
10 says EEOICPA party DAR requisition. That is -- a
11 lot of times, that -- the first page of the --
12 whatever the document dump that comes in, and
13 that basically is a report back from DOE as to
14 what they found or couldn't find, and not all
15 those records may be attached to what comes into
16 the IH.

17 MS. LEITON: If there is anything
18 substandard in the records, it would be included.

19 MR. KOTSCH: Yes, so, at this point,
20 if there were -- if it was a more recent
21 employment and there was -- and they were able to
22 find monitoring data, say in the 90's or 2000's,

1 that would be submitted too.

2 That is a rare event that we don't
3 often see any kind of monitoring data. It comes
4 in with the SOAF.

5 So, then the page after that --

6 CHAIR MARKOWITZ: I'm sorry, which
7 page are we on?

8 MR. KOTSCH: Okay, now, we're at --
9 I'm sorry, I should have probably numbered these
10 guys. This page? I'm sorry, I should have
11 numbered these pages.

12 So, we're probably about what? Eight
13 or nine pages in. It's titled 'Energy Employees
14 Occupational Illness Compensation Program,
15 Occupational History Interview', or often called
16 the Occupational Questionnaire.

17 So, anyway, this is the first page of
18 what's often called the OHQ or the OHI, the
19 occupational history interview, or the
20 questionnaire.

21 This is -- I know there is an effort
22 in the policy branch, to review this -- to either

1 review and revise this document too.

2 This is the information that's
3 basically taken in at the resource center, again,
4 either in person or over the phone.

5 So, it starts off with basically the
6 name of the employee and whoever the interviewee
7 was. It could be this -- it could be the actual
8 worker or it could be, you know, one of the
9 survivors.

10 It goes through Section 2, which is a
11 health history, tobacco and alcohol use, non-DOE
12 work history. This is the second page of that.

13 Section 5 is now the third page,
14 beginning to talk about DOE work employment, and
15 listing out the facility -- I mean, the
16 contractors or subcontractors and the years of
17 employment.

18 The B section of that, which starts at
19 the bottom is basically the -- if they
20 participated in a former worker screening
21 program.

22 The next page is Section 5C, the labor

1 category. There is an extensive list that runs
2 on for -- well, at least two pages, that talks
3 about, you know, the different categories and the
4 labor years of employment.

5 So, those, as appropriate, are
6 checked, if not, you know, something else is
7 added at the end, if the particular title doesn't
8 show up.

9 The next page is Section 5D, again,
10 just giving the union affiliation. Section 6,
11 which is the work areas, which is important for
12 us as -- or important for the industrial
13 hygienists.

14 You'll note at the top it talks about
15 the frequency box and assigns numbers from one to
16 five, five being the most -- basically, daily
17 employment, one being -- essentially doing an
18 activity or presence in that building for a month
19 or less.

20 Then the box in the lower -- you know,
21 basically lists the facilities, PUREX and PFP and
22 East and West K areas and things like that, the

1 different buildings, and we'll go on tank farms
2 and can be amended if it's even longer than that.

3 If there is any additional information
4 that the interviewee wants to add, they add that
5 at the bottom of that section. Section 7 is the
6 PPE, protection -- personal protective equipment.
7 That's used or supplied and those things are
8 checked off accordingly, and then they can
9 describe other things there, or add additional
10 comments, if they want.

11 Section 8 is the exposure information,
12 and then now they start to get into possible
13 lists of toxins, and you see the ones that are
14 checked -- checked off there, at least as
15 suspected of being potentially exposed.

16 There is a section on high explosives,
17 which we usually don't see much of, unless we're
18 down at the Pantech or something.

19 The next section is radiological.
20 Now, we flip the page again, and this section
21 talks about any major accidents or incidents that
22 there might have been in -- and these things are

1 actually more B related, Part B related, you
2 know, whether they were monitored for radiation
3 exposure or had to do bioassay or something like
4 that.

5 The middle section discusses plastics
6 and adhesive resins, dusts and fibers are at the
7 bottom, and in the last page of -- is the other
8 toxic substances.

9 MS. LEITON: So, this was developed,
10 I think I might have mentioned, back when we
11 first got Part D, and we based it off of some of
12 the questionnaires that were used by Department
13 of Energy at the time, when they were doing the
14 Part D assessments.

15 So, that's why currently, we're
16 looking at it, and you know, rather than asking
17 them, going through a list of toxins, which
18 usually is not a very productive exercise, we're
19 trying to look for ways to modify this form, so
20 that it will actually be more useful and solicit
21 -- elicit the information that we need the most
22 from the claimants, when we're obtaining this

1 information.

2 So, again, any input from the Board on
3 that area would probably be helpful.

4 MR. KOTSCH: So, that -- well, again,
5 that second portion and the first portion, which
6 is the SOAF is, in this case, what was provided
7 by the CE to the industrial hygienist for review.

8 Then the last three pages, or this
9 last three page stapled document is the -- in
10 essence, the industrial hygiene review.

11 Again, it states the question, in the
12 middle of the first page, that the CE posed, as
13 far as the potential exposures, cites the -- just
14 summarizes the background, as far as -- I'm
15 sorry, we're on this one?

16 So, cites the background and
17 summarizes the employment, and then gets into the
18 discussion, essentially toxin by toxin. So,
19 there is three of them there, cement, diesel
20 engine exhaust and then welding fume.

21 It assigns -- this person was employed
22 primarily as an electrician from '77 through

1 2015, but I think -- yes, they're intermittent.

2 So, anyway, the way they do their
3 assessments, obviously Part E side is much more
4 qualitative than the Part B side, where we have
5 at least dosimetry and monitoring data and things
6 like that. So, it's a little more quantitative
7 than the Part E side, where due to the lack of a
8 lot of environmental -- or not environmental,
9 industrial hygiene monitoring, either individual
10 or area, it has, by nature, had to be a little
11 more qualitative.

12 So, essentially, they assigned at
13 levels of either low, medium or high, very
14 qualitative or essentially, incidental exposure,
15 which I don't think we have on this one, and then
16 at some points and more frequent time, they might
17 say at levels not exceeding regulatory standards,
18 which doesn't mean that there wasn't some
19 exposure, but that that exposure was considered
20 to be controlled by whatever regulations were in
21 place below the PELs and things like that.

22 The other thing it provides for each

1 toxin is some estimate or some of what -- what we
2 think the exposure is, or what the industrial
3 hygienist thinks the exposure frequency was,
4 whether it was daily or weekly or monthly, and
5 tries, usually to assign it to some -- some
6 activity that we can glean from the SOAF or the
7 SEM or some other provided information that the -
8 - you know, for work at that site, and then the -
9 - conclusion is just a summary of those things,
10 and then the references are there attached.

11 Are there any questions on -- this is
12 basically, like I said, the submittal of a - - of
13 a referral to the industrial -- hygienist, and
14 then the review.

15 CHAIR MARKOWITZ: Mr. Domina?

16 MEMBER DOMINA: I just got a couple of
17 questions, because I -- I know the guy marked
18 beryllium in the back, and he is an electrician,
19 and it doesn't list as beryllium being in the
20 SEM, because everybody knows that electricians
21 are exposed to beryllium because it's used for
22 non-sparking stuff.

1 You probably have beryllium on that
2 elevator panel out there, where you push the
3 buttons. We found it all over the place like
4 that, and then the other part, this guy spent
5 time in 222S which all of our high level samples,
6 and there is nasty chemicals and everything in
7 there, and I think -- because I have a lot of
8 energy on this IH stuff, because unless you are
9 at the site or know stuff, what goes on there
10 individually, you have no idea what these people
11 are exposed to, and it's just an injustice, in my
12 opinion, that -- because I've spent 33 years at
13 Hanford, that when you have, it looks like that
14 this SEM was updated November 5th of 2015, and
15 you don't even have beryllium listed for an
16 electrician.

17 Then like I said, working at 222S,
18 there is a toxic soup of chemicals there each and
19 every day that the chem techs, to me, they should
20 have listed the chem tech category, because those
21 guys crawl all over that building, you know,
22 whether they're fixing hoods, re-running new

1 equipment.

2 I mean, it's just -- to me, it's a
3 terrible injustice.

4 MS. LEITON: So, this is as -- as we
5 tried to talk about the SEM earlier this week,
6 it's not complete. We haven't been able to go to
7 every site and talk to people at all of the 300+
8 facilities that we have there.

9 But we're always looking to get ideas
10 for how we might be able to get more site
11 specific information that could be added to the
12 SEM.

13 CHAIR MARKOWITZ: Dr. Friedman-
14 Jimenez?

15 MEMBER FRIEDMAN-JIMENEZ: To put it in
16 more scientific terminology, what Mr. Domina
17 said, my question is, have these questions in the
18 questionnaire ever been validated?

19 In other words, if someone says, "I
20 was exposed to plutonium," what's the probability
21 that they were exposed to plutonium, or more
22 importantly maybe, if they say they were not

1 exposed to plutonium, what's the probability that
2 they were not exposed to plutonium?

3 Has that ever been measured in any
4 validation study? Do we know what the -- how
5 well these questions actually reflect the reality
6 of exposure?

7 MR. KOTSCH: Well, if it were
8 plutonium, it would be a little more
9 straightforward, because there would be bioassay
10 data cited, you know, in that particular example.

11 But or there would at least be a lot
12 more monitoring data, beyond -- obviously, you
13 would get the other kinds of chemical toxins.

14 MEMBER FRIEDMAN-JIMENEZ: So, it could
15 be validated against that as opposed to just --

16 MR. KOTSCH: Right, and you know,
17 again, we don't have a lot of IH sampling data,
18 so it's hard to validate some of those things.
19 Obviously, these things are present. There have
20 been reviews at the sites and things like that,
21 as far as the -- we know the -- may not know --
22 we know what things are present at the sites, or

1 least that's what SEM tells us, and it's
2 incorporated into that.

3 But I don't know, that's a --

4 MEMBER FRIEDMAN-JIMENEZ: That's not
5 really my question, it's has there ever been any
6 validation done? Do we know how well or how
7 poorly these questions perform, in terms of the
8 actual exposure, either using bioassay data or IH
9 data, or some other measurement as a gold
10 standard?

11 MR. KOTSCH: Yes, I think the answer
12 to that would be no. Yes, right.

13 CHAIR MARKOWITZ: Dr. Cassano?

14 MEMBER CASSANO: I am still a little
15 bit confused on how things get whittled down from
16 the CE to what you see.

17 I presume that you see all of this.
18 So, let's take COPD off the table for a second,
19 because that's got its own little special
20 problems and I'm not a pulmonologist.

21 But let's go to something that may be
22 a little bit more straightforward, like lung

1 cancer, okay.

2 So, you get this thing from the CE
3 that says asbestos and cement dust or whatever
4 the things are.

5 Do you actually look through all of
6 this and go, "Gee, SEM has cadmium in here, and
7 the CE didn't ask me to evaluate cadmium."

8 Do you then -- do you look at that and
9 then say, "I really need to evaluate cadmium," or
10 not?

11 MR. KOTSCH: Yes, in that case, like
12 I said, we do do the SEM run again, and we will -
13 - if they've missed something that we think that
14 should or not be, but the industrial hygienists
15 look at something and say, "Gee, this is
16 missing," or they're -- like in your case,
17 cadmium or something else is missing, then they
18 usually talk back -- check back with the CE and
19 say, "You know, we think we ought to add this to
20 it," and we'll just either add it to it, or ask
21 them to just add it to the question and resubmit
22 it.

1 MEMBER CASSANO: Okay.

2 MR. KOTSCH: But we will address it.

3 MEMBER CASSANO: So, you do look
4 through all of the evidence?

5 MR. KOTSCH: Yes.

6 MEMBER CASSANO: Okay. Thank you.

7 CHAIR MARKOWITZ: Dr. Dement?

8 MEMBER DEMENT: Well, I am an
9 industrial hygienist, and frankly, I think a lot
10 of this is pure fantasy.

11 There are -- these workers faced a
12 very complex situation, and frankly, this
13 probably would be better off to have been triaged
14 to saying this was an electrician there 25 years,
15 has COPD, just don't bother going to the
16 industrial hygienist because this assessment, you
17 know, he's done the best he can, but he basically
18 has very little data to deal with.

19 So, this sensitivity specificity of
20 this process is just not there.

21 MS. LEITON: So, the reason we had the
22 industrial hygienists review them is because we

1 have so very little specificity. We don't have
2 records that are submitted, that are monitoring
3 for these types of toxic substances.

4 So, our solution was well, since there
5 is -- rather than just say, "Claimant, please
6 provide us with whatever exposure you have and
7 we'll send it to a doctor," and they say, "I
8 don't know what I was exposed to."

9 We send it to a doctor where they're
10 treating and they don't know. Nobody knows.

11 So, you know, it would be -- there
12 would be a lot more denials if we didn't have
13 something.

14 So, we developed this process so we
15 would have something to give to a doctor. Most
16 doctors, as we've talked about earlier this week,
17 aren't willing to just say, "Yes, I believe it's
18 related to their," well, they'll say, "I believe
19 it could be possibly related to their work," but
20 we have very little specificity, and the doctor
21 doesn't know where the rationale is coming from,
22 because there is nothing that we gave the doctor

1 to actually evaluate with regard to that.

2 Now, you know, if what you're saying
3 is, if we just tell them that he worked as a
4 welder for, you know, during these periods of
5 times, and we've talked about doing that, and
6 saying, "We're just going to go to the doctor
7 without that," and we've actually consulted with
8 physicians and saying, "If we were to just go to
9 you and say this person worked at Hanford as a
10 welder during this period of time, can you tell
11 us if it was at least as likely as not he was
12 exposed to toxic substances," and related that
13 these exposures to toxic substances, whatever
14 they may be, is related to their job -- related
15 to their condition.

16 So, that's where the doctors are like,
17 "Well, if you tell me -- you asked me if his job
18 might have been related, sure, maybe," but then
19 we have -- you know, that's where the catch 22
20 comes in, because you're right, we don't have
21 specifics, and yes, the IH has to base it on what
22 the IH can discover without records, and if we do

1 have specific records specific to Hanford or K-25
2 or any of the other facilities, that's great and
3 we can use that, we can send that to the doctor.

4 But if we don't, then the question is,
5 what do we do? Do we just send it to a doctor
6 without any assessment, and have the doctor
7 hopefully figure it out, especially since you're
8 saying at Hanford, there was specific, you know,
9 very detailed exposures they may have had.

10 We don't have that information because
11 we don't have, you know, expertise in every
12 single facility, providing us this information.

13 So, in lieu of that, this is what
14 we've come up with. If we can get a better
15 process or we can get -- you know, we don't have
16 the resources to have experts in every facilities
17 providing us with the type of detail as Mr.
18 Domina talked about over here.

19 So, that's where the struggle is, and
20 this has been the best -- as you said, the best
21 we can do without that level of specificity.

22 CHAIR MARKOWITZ: Ms. Vlieger?

1 MEMBER VLIENER: I think one of the
2 most telling things on this particular OHQ is
3 under the reported PPE, the worker said that he
4 did not wear respiratory protection. It's not
5 checked, not even any of the qualifiers are
6 checked.

7 Yet the reported exposures that he
8 gave during the OHQ were not included in the
9 referral to the IH, and that ends up being a
10 problem a number of ways.

11 So, the veracity of the employer is
12 questioned in their OHQ and it's not even
13 provided to the IH.

14 CHAIR MARKOWITZ: Dr. Welch?

15 MEMBER WELCH: I have a comment on
16 what you were asking, if you allow me to talk
17 about my experience.

18 I mean, one thing to remember is that
19 Mark, how many special exposure cohorts are there
20 now? Hundred and something?

21 CHAIR MARKOWITZ: Hundred.

22 MEMBER WELCH: One hundred fifteen,

1 and those are circumstances where the Radiation
2 Advisory Board has decided that the radiation
3 data is insufficient to do dose reconstruction.

4 Radiation data is -- there is probably
5 much more radiation data than there is toxic
6 exposure data. So, I think that gets you like, a
7 real snapshot the kind of information these guys
8 are dealing with.

9 So, then my question -- I have a
10 question, which is that -- I may be the only one
11 who noticed, the statement of accepted facts has
12 an end date of 1995 in the IH, but you didn't put
13 in the -- what went from the claims examiner to
14 the IH.

15 I mean, I understand that memo, which
16 is in our book. Then the IH didn't actually use
17 that time frame because he talked about his whole
18 exposure, which is fine with me.

19 I understand that, but I was
20 interested in -- then that's what made me realize
21 that the actual like transmission memos we have
22 in here, from the claims examiner to the IH,

1 don't mention that, but he puts it in the
2 statement of accepted facts.

3 So, there must be some -- one other
4 piece of paper he or she -- piece of paper that
5 we -- that we didn't see.

6 MR. KOTSCH: Yes, there is a circular
7 that --

8 MEMBER WELCH: So, they -- so, he
9 knows it automatically?

10 MR. KOTSCH: Yes.

11 MEMBER WELCH: Without the --

12 MR. KOTSCH: Yes.

13 MEMBER WELCH: -- claims examiner
14 having to say --

15 MR. KOTSCH: Yes.

16 MEMBER WELCH: -- limit it to this
17 period of time, okay. Okay, that helps me.

18 Then my last question was, when you
19 were doing your intro, before you got into our
20 handout, it looked as if in every claim, you're
21 going to need a physician opinion, even if it's -
22 - you know, it could be the treating physician's

1 opinion, it could be something that comes from
2 the claimant, and if not, does every claim go to
3 a CMC for a written opinion?

4 MS. LEITON: Not every claim will go
5 to a CMC. It depends on the information we have.

6 I mean, as I -- I believe -- you know,
7 some cases will be denied, based on what we have,
8 if we don't have enough information.

9 But if there is any indication, most
10 -- a lot of cases will go to a CMC, if we have an
11 opinion, but it's an opinion that's not very
12 strong or it's clear the doctor just didn't
13 really have the expertise, then we would refer it
14 to a CMC to get more of a clarification or a
15 better opinion or opinion, based on the
16 experience from that doctor.

17 MEMBER WELCH: And I guess the
18 question -- I had asked this before, but within
19 the system as it currently sits, a claims
20 examiner could make an award without having to
21 send it to the --

22 MS. LEITON: Yes, absolutely, and we

1 encourage that when we can. The struggle is, as
2 we discussed earlier in the week, having the
3 appropriate -- you know, the doctor providing us
4 with a report that fits -- that actually is well
5 rationalized when we get them, and we use them
6 whenever we can.

7 Again, with the circulars that we're
8 trying to use presumptions which would avoid the
9 need to go back to a doctor, because we would be
10 able to say they were here, they have these
11 exposures, we're assuming that their COPD was
12 related, or whatever it may be.

13 MEMBER WELCH: Okay, thanks.

14 CHAIR MARKOWITZ: Dr. Silver?

15 MEMBER SILVER: I've been trying to a
16 draw a line through this that would make it well
17 rationalized, right to the bottom line, where it
18 concludes that his exposures for four months in
19 '77 would have been frequent and ranged from low
20 to moderate levels.

21 The occupational health questionnaire
22 says he had -- it was in the job classification

1 of welder for -- from '77 to '79, so, I don't
2 know where the four months comes from.

3 Then low to moderate, I could make,
4 you know, a work sociology argument that a 19
5 year old right out of his apprentice program --

6 MR. KOTSCH: The SOAF -- in between
7 there, we have to assume that the CE
8 communicated, because we don't have that
9 information, you know, communicated with the
10 employer, to somehow refine that to provide the
11 information in the SOAF, which is basically their
12 summary of what --

13 MEMBER SILVER: But low to moderate,
14 where does that come from?

15 MR. KOTSCH: That's just based on the
16 judgment of the industrial hygienist.

17 MEMBER SILVER: Well, show us
18 something. I mean, you demand a whole lot more
19 detail when a physician is putting something in
20 writing, and here it falls far short of the
21 standard that others are held to when they're
22 outside the DOL.

1 CHAIR MARKOWITZ: Doctor, is there a
2 particular follow up to this, and I would say, in
3 terms of discussing this individual case, to the
4 extent that it reflects larger issues, let's
5 discuss it, otherwise, let's not get it -- it's
6 not a criticism, Dr. Silver, but let's not get
7 into the particulars of this case, only to the
8 extent that it reflects more general issues.

9 I would note that we've got 50 minutes
10 left and you still have the medical section to go
11 through.

12 So, I -- we will continue --

13 MR. KOTSCH: If you'd like, we can
14 take any more questions or I can move onto the
15 medical.

16 CHAIR MARKOWITZ: Well, how long --
17 roughly, how long will the medical presentation -
18 -

19 MR. KOTSCH: Shouldn't take very long.

20 CHAIR MARKOWITZ: Okay, so, let's --

21 MR. KOTSCH: We've gone through most
22 of this, and you know, it's really -- what I was

1 going to present was just a summary of, I think
2 what you've already heard over the past two days.

3 CHAIR MARKOWITZ: Okay.

4 MR. KOTSCH: So, we could actually --

5 CHAIR MARKOWITZ: So, this back and
6 forth is extremely valuable to us, so, we'll
7 continue this, but we want to be cognizant of the
8 time.

9 So, I'm not sure --

10 MR. KOTSCH: I mean, what I provided
11 in this packet --

12 CHAIR MARKOWITZ: Okay.

13 MR. KOTSCH: -- I just provided it
14 more as an example.

15 Now, obviously, we know have issues
16 with, you know --

17 CHAIR MARKOWITZ: Okay, Dr. Sokas?

18 MEMBER SOKAS: So, I have two
19 questions. One is -- and this has to do with the
20 idea of synergy and different exposures.

21 This person -- well, so, this person
22 checked off that he had, in fact, had urine tests

1 done for radiologic exposures, and I don't see
2 any -- I don't know whether or not that was
3 pursued and there was some actual data that was
4 collected. I don't know if it would be through
5 DAR or through some other mechanism.

6 Similarly, the fact that he worked in
7 certain areas where there were concerns about
8 large levels of exposures, were there any -- was
9 there monitoring done? Did DOE have any records
10 of exposures in those areas that would have
11 supported some of this other?

12 So, the one -- that's one question,
13 and then I have one quick one afterwards.

14 MR. KOTSCH: Well, as far as the
15 bioassay, we don't normally get those
16 measurements, especially if they're on the
17 radiological side, and they would have been --
18 they would have been through radionuclides
19 anyway, as far as that goes. Is that what your
20 question was?

21 MEMBER SOKAS: So, additional data,
22 both radio nuclides and --

1 MR. KOTSCH: Yes, I'm sorry, yes.

2 MEMBER SOKAS: -- and so, there isn't
3 a look at whether any of his current exposures
4 could have interacted with potential radiation
5 exposures. So, that is not happening.

6 MR. KOTSCH: No, I mean, that's a
7 question we would pose to see if you --

8 MEMBER SOKAS: Okay.

9 MR. KOTSCH: -- guys could enlighten
10 us more. I know there's not a whole lot of
11 literature on that, other than --

12 MEMBER SOKAS: Okay.

13 MR. KOTSCH: -- the obvious one, which
14 is like the radon and smoke and things like that.

15 MEMBER SOKAS: And then the DAR did
16 not include actual exposure assessment for any of
17 the places that it was --

18 MR. KOTSCH: No, it was -- no, like I
19 said, we -- we normally do not receive much in
20 the way of industrial hygiene monitoring data.

21 MEMBER SOKAS: Okay.

22 MR. KOTSCH: And certainly not in this

1 case.

2 MEMBER SOKAS: So, my final question
3 is that conclusion, who has to interpret that
4 conclusion and how would a claimant -- would it
5 be a claims examiner? Would it be a physician,
6 the treating physician gets that conclusion,
7 because it's kind of un-interpretable right now.

8 MR. KOTSCH: Well, the review goes
9 back to the CE, but then it goes on to the
10 physician.

11 MEMBER SOKAS: Okay, okay.

12 MR. KOTSCH: And we've found that the
13 physicians -- you know, sometimes when they don't
14 get an industrial hygiene review, someone will
15 ask, you know, and they'll send it back and say,
16 "Can we please get their input?"

17 Other people, even if they don't have
18 an industrial hygiene review, think they know
19 about a particular facility and exposure, that
20 they'll go ahead and make their decision based on
21 that.

22 But for the most part, you know, it's

1 our policy to try to send them something, at
2 least some estimate of what we --

3 MEMBER SOKAS: So, can you tell us in
4 this case, how what was interpreted and what
5 happened?

6 MR. KOTSCH: The final outcome?

7 MEMBER SOKAS: Yes.

8 MR. KOTSCH: I don't know that.

9 MEMBER SOKAS: Okay.

10 MR. KOTSCH: Because this is fairly
11 recent. Actually, I grabbed a fairly recent one.
12 Like I said, I was looking for -- yes, I was
13 looking for the --

14 MEMBER SOKAS: Okay.

15 MR. KOTSCH: -- the SOAF that actually
16 referred it to the medical -- to the physician,
17 so I could show you, you know, that next step of
18 it too, but that hasn't, as far as I could tell,
19 at least from the system --

20 MS. LEITON: I don't mean to.

21 MR. KOTSCH: I wasn't done yet.

22 MS. LEITON: I was just thinking, I

1 mean, you know, when you break into sub-groups,
2 there is probably more information we can give
3 you, like for examples, the whole package, and
4 then not only -- but just jumping over to the SEM
5 side, we could also give you a demonstration or a
6 -- have a conversation with the contractor who
7 puts together the SEM documents, who can tell you
8 what goes behind it. He can give you a lot more
9 detail than we can.

10 So, when you break into sub-groups,
11 please let us know if you want that sort of
12 information.

13 CHAIR MARKOWITZ: Mr. Whitley?

14 MEMBER WHITLEY: Garry Whitley. A
15 couple of things.

16 Whoever wrote this article, it says
17 that -- the circular, that says that after 1995,
18 it's not likely that they were -- would be
19 exposed to the chemicals, obviously has never
20 been to the sites, since 1995.

21 Second of all, what you really told me
22 in this case is that as good as the CM is, it's

1 almost like the Bible that you all use. You do
2 use a little bit of other data, but it's -- I
3 know it's the best you've got, but it is very
4 incomplete, and obviously about five times in
5 here, you talked about the SEM and what you've
6 got off the SEM.

7 I mean, we know it's all you've got,
8 but it's not very good.

9 CHAIR MARKOWITZ: We appreciate going
10 over an average case, rather than a perfect or
11 ideal case. So, others? Dr. Redlich?

12 MEMBER REDLICH: If the claimant is
13 still alive, is there an opportunity to get on
14 the telephone and for the industrial hygienist to
15 interview and talk to the person?

16 MS. LEITON: The issue is that we have
17 a lot -- we've got thousands and thousands of
18 claimants.

19 So, we don't have a CATI like they do
20 at NIOSH, where they have individual interviews
21 with the -- even those aren't with the
22 scientists.

1 So, it would require a scientist, the
2 two and a half industrial hygienists we have,
3 calling all of these claimants. We just -- we
4 don't have the resources for that at this point.

5 MEMBER REDLICH: But how much time is
6 spent producing --

7 MS. LEITON: That's about two hours
8 for the occupational history questionnaire, for
9 the research. There's two to four hours,
10 depending on the complexity --

11 MEMBER REDLICH: The industrial
12 hygienist spends two to four hours --

13 MS. LEITON: Okay, so, when you're
14 talking about the questionnaire, when you're
15 talking to the claimant, that takes about two
16 hours for those people to do that.

17 So, the industrial hygienist doesn't
18 have the time to call every claimant and ask them
19 questions. At this point, our researchers don't
20 allow for it.

21 MEMBER REDLICH: No, no, but on the
22 ones that took time for the industrial hygienist

1 to do this analysis and write this report.

2 MS. LEITON: It varies. I don't know
3 exactly how much time it takes him per case.

4 MR. KOTSCH: It obviously varies by
5 the -- you know, the number of -- well, if you
6 want to talk about the complexity of SEM run or
7 the facility or the number of toxins, but it
8 could range anywhere from two to four to six
9 hours.

10 It depends. You know, everything
11 total, you know, the review of the --

12 MEMBER REDLICH: Well, two to four to
13 six hours, you know, maybe 20 minutes on the
14 telephone might actually be more illuminating.

15 MR. KOTSCH: I agree. I think that
16 would be the ideal.

17 MEMBER REDLICH: Yes, it would be.

18 CHAIR MARKOWITZ: Dr. Boden?

19 MEMBER REDLICH: And it might save
20 time on the four to six hours spent on the
21 report.

22 But and then the questionnaire, do

1 they fill this out on their own or is there help
2 filling it out?

3 MR. KOTSCH: The resource centers fill
4 it out, and in fact, the --

5 MEMBER REDLICH: So, this is actually
6 filled out by --

7 MR. KOTSCH: Essentially there is
8 someone --

9 CHAIR MARKOWITZ: It's administered --
10 it's an administered questionnaire.

11 MEMBER REDLICH: It's administered?

12 MR. KOTSCH: That doesn't interview.

13 MEMBER REDLICH: Okay, because there
14 are lots of areas where there is either
15 inconsistency or things are checked like 'yes'
16 exposure to things, but then not filled in like
17 approximate number of years.

18 CHAIR MARKOWITZ: Sure, and I --

19 MEMBER REDLICH: So --

20 CHAIR MARKOWITZ: -- heard an
21 invitation for us to provide input to improve it.

22 MEMBER REDLICH: Okay, so, I didn't

1 realize. So, this is a -- okay, so, there's
2 opportunity, since it's self -- not self-
3 administered, okay, thank you. That was -- you
4 answered --

5 CHAIR MARKOWITZ: Dr. Dement?

6 MEMBER DEMENT: My questions were
7 reflective of that and --

8 CHAIR MARKOWITZ: Okay, all right, Dr.
9 Boden?

10 MEMBER BODEN: So, first of all even
11 though I think we're generally concerned about
12 the quality of the data that you have to work
13 with, I think that we also appreciate that you
14 need to do something more, since the burden is on
15 the claimants to prove their cases, and I think -
16 - I hope that over the next period of time, we
17 can help you make that more effective.

18 I have a question, actually, either
19 for you or for other people who are still
20 currently on the former worker projects.

21 Back in 15 or 20 years ago, I was
22 involved in the Nevada Test Site former worker

1 project, and we did make attempts to use the --
2 the collective intelligence of the people who we
3 interviewed to draw a picture of what exposures
4 looked like at the various sites that they
5 worked, and that seemed to me, to be a really
6 good idea and something that would be useful for
7 you, and I just don't know if there is a
8 connection there, whether other former worker
9 surveillance projects also did things that were
10 sort of like job exposure --

11 CHAIR MARKOWITZ: So, I can answer
12 that --

13 MEMBER BODEN: -- or matrices --

14 CHAIR MARKOWITZ: Steve Markowitz.

15 MEMBER BODEN: Yes.

16 CHAIR MARKOWITZ: All the programs,
17 all the former worker programs at each site did a
18 site profile, and those were published. I mean,
19 they're not published in the literature, but
20 available online, and I'm sure the Department of
21 Labor has been -- you can confirm this, but I
22 believe that you've integrated that into your

1 work, those site profiles.

2 MR. KOTSCH: Yes, we'll need to
3 double-check.

4 CHAIR MARKOWITZ: Okay, okay. Well,
5 anyway, they are readily available from the
6 Department of Energy. Dr. Cassano?

7 MEMBER CASSANO: Well, I wanted to
8 first -- first of all, congratulations on your
9 new contract, but I was sort of interested in
10 learning what kind of training these contracted
11 industrial hygienists are going to get on the
12 various sites and the different exposures that
13 may have been there.

14 MR. PENNINGTON: This is Doug
15 Pennington again.

16 So, most of the contractors actually
17 already have experience with the sites. It's one
18 of the things that was very exciting for us, is
19 that they have experience with virtually all --
20 according to the contractor, virtually all of the
21 DOE sites.

22 So, what we're going to predominantly

1 be working on is our process and training them,
2 as to how -- what we're looking for, how we're
3 looking for it, the mode and modality by which
4 we're getting the information.

5 But as far as the actual information
6 about the site, obviously, they'll be using the
7 SEM like the rest of us, but we're also hoping
8 that they'll be providing their own information
9 and background and knowledge, to help augment our
10 existing database, as well.

11 So, does that answer your question?

12 MEMBER CASSANO: Yes. Thank you.

13 CHAIR MARKOWITZ: We have time to take
14 a couple last questions, and then we'll move on.
15 Dr. Redlich?

16 MEMBER REDLICH: I appreciate how
17 challenging this is. Just to follow up on what
18 Leslie Boden said, as far as sort of the
19 collective knowledge.

20 We have an industrial hygienist who
21 sees patients, when we see them, and the
22 information she provides is qualitative in

1 nature, but extremely helpful, because she has
2 the knowledge, you know, and if she doesn't,
3 she'll ask someone else with the types of
4 industries and processes, the workers.

5 So, frequently, her sort of succinct
6 qualitative assessment of the level of exposures
7 and the -- is extremely helpful, and it's based
8 on her -- when you mentioned, your sort of
9 collective knowledge of the industries in the
10 area over time, or what she's able to get.

11 It seems that that would be a very
12 helpful --

13 MS. LEITON: Is this -- so, the
14 physician is doing this?

15 MEMBER REDLICH: There is a --

16 MS. LEITON: You said an industrial
17 hygienist.

18 MEMBER REDLICH: -- trained industrial
19 hygienist who also, when we take a history, also
20 takes an occupational history, and you know, is
21 able to better interpret what five years of
22 welding at, you know, this particular site means,

1 or under what -- or an electrician, you know, the
2 typical electrician at 'x' site did in that time
3 frame, that is extremely helpful.

4 MR. KOTSCH: I think all our
5 industrial hygienists would love to be able to
6 have the time and the opportunity to do that.

7 I didn't include an example in here,
8 but sometimes we do actually get, you know,
9 written pages from a particular worker, that will
10 say, in detail, you know, "This is what I did,"
11 nitty-gritty-wise, and they will be putting in
12 there, all kinds of toxins and chemicals and work
13 activities that they did, which gives the
14 industrial hygienist a really clear picture of
15 what -- you know, what that actual interview --
16 interviewee, or you know, the worker was doing,
17 which is unfortunately, a rarer event than the
18 norm, kind of thing.

19 But it would be akin to that, being
20 able to actually physically speak with them.

21 CHAIR MARKOWITZ: So, one last
22 question or comment from Dr. Dement, and then

1 we'll move on, and Board Members, if you could
2 put your name card in a horizontal position, if
3 you don't have a question, that would help.

4 MEMBER DEMENT: Just one comment --

5 CHAIR MARKOWITZ: There's just too
6 many questions.

7 MEMBER DEMENT: -- and it has to do
8 back to this, and I think it's an excellent
9 point.

10 From an industrial hygiene
11 perspective, the real driver of the exposure is
12 not the job title, it's not necessarily the
13 building that they're doing it in, or that some
14 complex chemicals can be there, or other
15 exposures for the workers.

16 It's the task that's being done, and
17 so, the more you can have this questionnaire
18 that's being developed, really get down to task
19 and the narrative part is useful, but you can --
20 you can drive that by having specific tasks that
21 we -- we already know are important for many
22 different trades, and have those as part of it.

1 But the more you can get to tasks, we
2 found over and over again, that that's a driver
3 of exposure. We get often, based on frequency of
4 doing tasks, generate a qualitative assessment of
5 their -- of the magnitude of life time exposure,
6 that's useful for predicting health effects.

7 MR. KOTSCH: I think our folks would
8 agree. I mean, one of things with SEM is that it
9 will list the building, it may list the toxins,
10 but there could be a huge building, it could be
11 all kinds of toxins in there, whether the actual
12 worker, in his work activity, encountered those
13 things, you know, is a question and --

14 MS. LEITON: The revisions to OHQ
15 hopefully can capture that better, and more
16 succinctly and asking the right questions is a
17 huge piece of it, I'm sure.

18 CHAIR MARKOWITZ: Dr. Friedman-Jimenez
19 has a very short question. Very quickly.

20 MEMBER FRIEDMAN-JIMENEZ: Just adding
21 onto what Dr. Redlich said.

22 We also have an industrial hygienist

1 in our clinic, and I would say that maybe 10 or
2 20 percent of our patients, where there is a real
3 question about exposure, she will talk to the
4 patient and get more details. It saves a lot of
5 time for the physician, and it really improves
6 diagnosis.

7 I would say that you probably won't
8 need to do this in the great majority of people,
9 but those for which there is a question, I think
10 it's extremely helpful.

11 MS. LEITON: Yes, I think it would be
12 fantastic. Maybe we can just get all the
13 physicians to hire industrial hygienists, and we
14 can refer all our cases there. I think that
15 would really help our process.

16 CHAIR MARKOWITZ: Now, Mr. Kotsch, if
17 you could continue.

18 MS. LEITON: So, I'd just -- about the
19 CMC process and the medical referral.

20 Most, if I'm looking at the bullets
21 that we have, I think pretty much, we've covered
22 it, and I just don't want to -- in the interest

1 of time, I thought I'd just let you know that we
2 talk about the CMC, what they look at. We've
3 talked about this before.

4 Diagnosis, causation, impairment,
5 sometimes the date of diagnosis, consequential
6 injuries, treatment and clarification.

7 Those are the main reasons we refer
8 cases, and I think we kind of covered that
9 earlier this week, and you know, sometimes
10 they're essential. We use them when we can't get
11 enough information from the treating. Again, I
12 think we've pretty much covered that.

13 So, rather than belabor this, I guess
14 we'd rather use the time to take questions about
15 anything regarding our medical reviews, unless
16 you'd rather -- if something particular you'd
17 like us to go over.

18 CHAIR MARKOWITZ: Well, if you could
19 go over where you -- where, on the screen there,
20 national office reviews and accountability
21 reviews, just describe a little bit of that, how
22 that works.

1 MR. KOTSCH: Okay. So, then the page
2 after that, which talks about the national
3 office's reviews, there was a review in February
4 of 2015. The CMC and second opinion and medical
5 specialist audit, basically as indicated there,
6 reviewed the quality of the district office
7 inputs to the physicians, and then the quality of
8 the medical review and the opinion.

9 Again, this was performed by the --
10 couple of members of the policy -- the larger
11 policy group, and overall, they found that in the
12 essence of things, they found that the results
13 were satisfactory, as far as both the input and
14 the return from the physician.

15 I know one of the issues that they had
16 with the referrals essentially was, sometimes
17 they were not rigorous, always rigorously
18 approached, you know, where they could have maybe
19 resolved the issue, the CE could have resolved
20 that issue before they sent it to the physician.

21 So, maybe some of those were -- you
22 know, were sent without complete, but this often

1 happened, you know, you completely work through
2 the system, and generally, the referrals that
3 come back from the -- not the referrals, the
4 reports that come back from the physicians are in
5 compliance, essentially, with the elements of the
6 contract, as well as when we had our physician
7 here, they were all usually well-written and not
8 a problem.

9 When they are identified as a problem,
10 they will recycle back through the contractor, to
11 correct the problem.

12 But a lot of times, or not a lot of
13 times, but sometimes, if there was an issue, it
14 might have been -- maybe a reference wasn't cited
15 -- or references weren't cited, the physician
16 just made the opinion without citing anything,
17 you know, as far as a reference, which we prefer
18 and is required by the contract, at least they
19 try to provide some references, as to why -- you
20 know, why they made the particular decision.

21 The account -- the annual
22 accountability reviews do like as mentioned in

1 there, do contain a component, but that just
2 touches on the CM report -- CMC reports and does
3 the case record demonstrate appropriate use of
4 the opinion of the treating physician, CMC or the
5 specialist, meaning the industrial hygienist or
6 the toxicologist.

7 Again, that was considered to be a
8 satisfactory finding, and I think that's it for
9 that section, right?

10 MS. LEITON: Questions?

11 MR. KOTSCH: I'm sorry, I meant, then
12 there is just the -- the performance,
13 essentially, contract performance types reviews
14 that are conducted.

15 CHAIR MARKOWITZ: So, can I request
16 that we receive a copy of the QTC contract? Not
17 -- again, not interested so much is the
18 administrative or financial aspects, but in the
19 scope of work and the requirements of the people
20 who work under that contract.

21 MS. LEITON: Yes, I've written that
22 down.

1 CHAIR MARKOWITZ: And also a copy of
2 the 2015 audit?

3 MS. LEITON: Yes, I've got that --

4 CHAIR MARKOWITZ: And that process.

5 MS. LEITON: -- written down, as well.

6 CHAIR MARKOWITZ: Okay.

7 MS. LEITON: We'll get back to you.

8 PARTICIPANT: And the annual
9 accountability review.

10 CHAIR MARKOWITZ: And the annual
11 accountability reviews. In essence --

12 PARTICIPANT: Is that the same thing?

13 MS. LEITON: No.

14 CHAIR MARKOWITZ: And any other
15 relevant material that the Board might deem
16 necessary.

17 MS. LEITON: Sure.

18 CHAIR MARKOWITZ: And I don't think
19 you can argue with that language. Comments or
20 questions? Dr. Friedman-Jimenez?

21 MEMBER FRIEDMAN-JIMENEZ: In your
22 audit, how often did you find that the CMC or the

1 SECOP got a case established that would have
2 otherwise been denied, because the treating
3 physician wrote a weak letter or said that this
4 may be related, or the probability of causation
5 was judged low?

6 In what percent of the cases would
7 those denials be overturned and made into
8 established cases by the secondary -- second
9 opinion or CMC?

10 MS. LEITON: So, we don't have that
11 percentage. We would have -- I don't know if we
12 can even run a report on that. I can see if we
13 can run a report on it.

14 But I -- you know, we do review these
15 for that, to make sure they're not all denials or
16 all acceptances, you know, like one doctor does a
17 particular thing.

18 We do find that -- often, we find that
19 the CMC will find in the favor of the claimant,
20 and we'll be able to accept that case.

21 Again, in terms of percentage, I don't
22 have one, but I would say it's pretty balanced.

1 In some of the analysis we've done, I don't think
2 it's really high, one way or the other.

3 CHAIR MARKOWITZ: Dr. Welch?

4 MEMBER WELCH: I actually -- I think
5 that audit is available on your website or
6 somehow I've -- the 2015 audit, because I think I
7 saw the -- I had a link to it from somewhere, no?

8 MS. LEITON: I don't know.

9 MEMBER WELCH: Maybe it's a prior one
10 then. There is -- I think --

11 MS. LEITON: There might be something
12 up there.

13 MEMBER WELCH: So, it's a prior --

14 MS. LEITON: I'll find out.

15 MEMBER WELCH: I think I read a prior
16 audit that looked at, you know, did the CMC's
17 form -- do they get the right questions and are
18 they actually answering the questions of the
19 claims examiner?

20 MS. LEITON: We'll look for it. Thank
21 you.

22 MEMBER WELCH: But we'll see them

1 where we see one, and in terms of your question,
2 isn't it the case, Rachel, you're not -- the
3 claims examiners aren't saying, "Well, we're
4 going to deny this, but we'll send it to the
5 CMC." They're saying, "We don't have enough
6 information, so we're sending it to the CMC."

7 So, that -- so, you can't really
8 answer that question of how many would have been
9 a denial in the absence of the CMC, because they
10 don't complete the case, if they don't have that
11 information.

12 MS. LEITON: Right. The question we
13 could answer possibly would be after we go to the
14 CMC, how many are accepted.

15 The problem with that is, it could be
16 other factors. The reason for acceptance could
17 have been, we got more information or something
18 else.

19 So, it's really hard -- it would be
20 difficult to actually be able to pin it to the
21 actual report that came from a CMC. You know,
22 the other way would be to look at all the CMC

1 reports and see how many times they said 'yes'.

2 That would be a pretty daunting task.
3 I'm not sure we could do it, but we'll look at
4 it.

5 CHAIR MARKOWITZ: So, can I suggest to
6 the Board Members that they look at page six and
7 seven of the handout --

8 MS. LEITON: Yes, I was just going to
9 --

10 CHAIR MARKOWITZ: -- because these are
11 --

12 MS. LEITON: -- go through those if
13 you want to.

14 CHAIR MARKOWITZ: These are on the --
15 beginning on the screen, there is a lengthy list
16 of areas in which the Department is requesting
17 our assistance or our input.

18 I don't think we should necessarily go
19 through all of them. Some of them are quite
20 obvious or self-explaining. This is in the
21 handout.

22 PARTICIPANT: This is in Tab --

1 CHAIR MARKOWITZ: I'm sorry.

2 MS. LEITON: Last two pages of the
3 handout.

4 CHAIR MARKOWITZ: Section 9.

5 MS. LEITON: It says advice and
6 assistance.

7 PARTICIPANT: It should be the last
8 page in the briefing book.

9 MS. LEITON: Well, the last two pages.

10 CHAIR MARKOWITZ: So, let me start
11 this off. The issue of presumptions, you have
12 come to agreement on some presumptions, and those
13 aren't right -- statutory -- I mean, those aren't
14 statutory or for that matter, regulatory. Those
15 are the level of policy, okay, and that is an
16 acceptable route in the future, as we think about
17 presumptions.

18 MS. LEITON: Correct.

19 CHAIR MARKOWITZ: Okay, the -- one of
20 the items you have here is the matrix of
21 consequential illnesses. That seems like a small
22 task, but it's probably quite large.

1 Do you have any such matrix at present
2 that you use?

3 MS. LEITON: We have something in the
4 procedure manual that they refer to, when they're
5 looking at -- is this the -- this is for
6 consequentials?

7 CHAIR MARKOWITZ: Right, right.

8 MS. LEITON: Oh, no. I'll show you
9 what we have. I'll point it out.

10 We have some things, like related to
11 CBD and certain things you can assume if they
12 have CBD, that you would probably be paying for,
13 things like that.

14 So, I'll provide you with the link to
15 that, to those specific assumptions we've got in
16 there, or at least guidance that we have in
17 there.

18 CHAIR MARKOWITZ: And have you
19 encountered repeatedly with other common
20 diagnoses?

21 MS. LEITON: Yes. There are -- yes,
22 we've found that there are other -- the answer is

1 yes.

2 CHAIR MARKOWITZ: Okay, thank you.

3 MS. LEITON: I would like to point out
4 on this advice and assistance, I forgot, we were
5 going to -- we should have -- we were going to
6 walk through it, but I know that we're running
7 short on time, and most of it is self-
8 explanatory.

9 I think the last one is the big one,
10 and we may have discussed this earlier in the
11 week.

12 But the circulars, they've been a
13 question or a source of consternation for a while
14 since we've published them, and so, I'd really
15 like the opinion of the Board on the relevance of
16 these circulars.

17 You know, we do have a program
18 memorandum that explains one of them, I believe
19 it explains the Circular 1506. So, we'll make
20 sure that's available. It's on our website, but
21 I think it's our only program memoranda that
22 talks about why we came up with this, how we came

1 up with this.

2 It's my understanding from many
3 conversations we've had, that while it may be
4 true, what we're saying, that there may be
5 circumstances within the DOE complex, where it
6 shouldn't apply or wouldn't apply.

7 So, you know, we're open to
8 suggestions on both of these circulars, whether -
9 - you know, what we should do with them, whether
10 we should have them there at all, whether they
11 should be revised or whatever.

12 So, you know, I know it's a big issue
13 and it's something that's important to us, and
14 we're willing to take whatever comments and
15 thoughts you have on it. I know Mr. Whitley
16 mentioned them earlier.

17 MR. RIOS: Just FYI, I'd be -- the
18 Circular 1506 and program memoranda are in
19 Section 8 of your briefing book.

20 MS. LEITON: Thank you, and if you --
21 as you go through these and once you have your
22 committee, if you have questions about what we

1 meant by this, or if you have follow up,
2 obviously let us know.

3 CHAIR MARKOWITZ: I'm not sure that
4 actually, the post 1995 circular issues belong,
5 necessarily in this committee, which is looking
6 at the IH medical expertise. It may belong
7 elsewhere, but we'll figure that out.

8 I have a question actually about the
9 item just above that.

10 The generalization of prior IH and CMC
11 findings, depending adjudication actions. Are
12 you talking about using your own data, your own
13 decisions, as you go along in the program, in
14 order to be able to feed back into your future
15 decision making? Is that what that refers to?

16 MR. KOTSCH: Yes, and in fact, that
17 one ties to the bulleted item that's two above
18 it. They're kind of linked, to try to come to
19 some, you know, presumptive type analyses in
20 these kinds of things, if there are cases where
21 we can better group these, you know, by
22 activities.

1 MS. LEITON: So, we did start looking
2 at trying to look where we've had the most -- you
3 know, either acceptances or looking at -- can we
4 look at this particular type of welder or we can
5 look at this particular type of job category or
6 process or something, and where can we actually
7 make some leaps, and based on the experience in
8 the program, because we have been doing these for
9 10 years, I don't know -- you know, but
10 evaluating that sort of trend is what this is
11 about.

12 CHAIR MARKOWITZ: Dr. Welch? Okay.

13 MR. KOTSCH: Yes, I mean, the bulk of
14 our -- obviously, the bulk of our medical
15 conditions are -- the largest piece are lung-
16 related to COPD's and things like that. The next
17 big chunk are the skin cancers, things like that,
18 and then we get into some of the renal diseases
19 and then it starts to tail off there, as far as
20 which one would come next.

21 So, things that we can, you know,
22 presumptively associate with those things would

1 be helpful.

2 MS. LEITON: This actually goes to one
3 of the questions that was raised earlier this
4 week, about finding the biggest -- the cases that
5 we have the most of, like you were indicating
6 lung diseases.

7 If we look at lung diseases, how many
8 -- you know, what processes and job categories
9 could go with that? That would be -- we could
10 maybe make assumptions on.

11 Taking the largest chunk and going
12 down, because that's where the biggest impact
13 would be.

14 CHAIR MARKOWITZ: Dr. Cassano?

15 MEMBER CASSANO: Just a comment on
16 presumption, since I have a little bit of
17 experience dealing with them.

18 Presumptions are always a two-step
19 process. There is a presumption of exposure,
20 based on whether you -- what you did and/or where
21 you worked, and then there is a presumption that
22 if you are exposed to something, it is presumed

1 that your disease, if you have the proper
2 disease, was caused or aggravated or whatever, by
3 that exposure.

4 One -- failing one -- failing the
5 first part of that, i.e., there is no presumption
6 of exposure, if you can prove exposure, then the
7 second part of the presumption should still
8 stand, and what I see a lot of is that well, they
9 don't -- they fail the presumption of exposure,
10 so therefore, we cannot treat this as a
11 presumptive disease.

12 But you need to be able to accept
13 exposure evidence that proves exposure outside of
14 the presumption, to get to the second point.
15 That's the only comment.

16 CHAIR MARKOWITZ: Dr. Welch? Dr.
17 Welch?

18 MEMBER WELCH: I'm thinking about the
19 four tasks that we have and in some ways it's --
20 this is a -- this decision about what's work-
21 related under the law is a process that's not
22 easily divided into this, this, this and this.

1 So, we have one that's exposure
2 assessment, one that's claims process, one that
3 is the use of the consultants.

4 I just want to make sure that maybe
5 every group is addressing the question of the
6 causal relationship, because it comes in, in some
7 ways it -- those are -- it's like the -- it's the
8 mission, the goals and the objectives, and we're
9 kind of at the -- the tasks are sort of designed
10 at the objectives level, but I think we have to
11 keep thinking that the goal is to help Department
12 of Labor determine work-relatedness, which
13 requires a diagnosis, exposure, exposure
14 relationship.

15 Because when I was looking at your --
16 at these -- some of these tasks that you have
17 here, they don't fall easily into any one
18 particular group.

19 So, I think rather than each group
20 think -- that's just my suggestion, each group
21 thinking somebody else is dealing with that, I
22 think if there is something that seems to

1 overlap, everybody should be talking about it,
2 because in the end, we're going to come together
3 and talk about it as a Board, but that's
4 something -- you take that --

5 CHAIR MARKOWITZ: All right, I agree.
6 I agree and let me just say that when people here
7 discuss causation, what they really mean is
8 aggravation, contribution and causation. That's
9 shorthand.

10 But the exposure disease connection is
11 -- actually, informs each of the tasks. So, yes,
12 each committee needs to keep that in mind, in
13 terms of addressing that. Dr. Dement?

14 MEMBER DEMENT: One quick question,
15 and it has to do with -- my question has to do
16 with the last case that we just reviewed.

17 Just opining about exposure, refer to
18 some specific task that these individuals would
19 have done. For example, electrician, they drill
20 concrete and they test diesel engines.

21 But those are not on the history form.
22 Did he just know that? Is there someplace -- is

1 there someplace -- it is in the SEM? Where would
2 you find this?

3 MR. KOTSCH: Well, some of that I
4 think is just based on the fact that we've been
5 doing these things for 10 years and --

6 MEMBER DEMENT: Yes, his personal
7 experience.

8 MR. KOTSCH: Yes, experience as well
9 as, you know, maybe there was information from a
10 -- in the reference that are attached to the --
11 the review, but also, from -- maybe from some
12 other case, where you had an electrician doing
13 things and they figured it was probably -- you
14 know, they would be doing similar tasks, kind of
15 things.

16 MEMBER DEMENT: These are legitimate
17 tasks.

18 MR. KOTSCH: Yes.

19 MEMBER DEMENT: It's just that there
20 are many, many others.

21 MR. KOTSCH: Certainly, there is
22 always -- you know, you could -- you know, you

1 can't always list 10 or 15. It's just a couple.
2 I mean, it would be an attempt to just to try to
3 associate it with some kind of -- you know,
4 something within a -- with a task.

5 CHAIR MARKOWITZ: So, what -- my question to
6 the Board is, we do need to save a few minutes to
7 form a committee, and the question is, do we need
8 this further discussion or is it better to spend
9 the time asking questions? Do we need further
10 discussion before we form a committee? Just
11 think about it for the moment, while Mr. Turner
12 asks his question.

13 MEMBER TURNER: I'm an electrician
14 also. I was looking and I didn't see anything on
15 there about PCB's, that he would have come into
16 contact with PCB's quite frequently.

17 CHAIR MARKOWITZ: Okay.

18 MS. LEITON: Yes, as I said, I mean,
19 we will look in the SEM for the exposures and any
20 other information we have a particular case file,
21 when we're adjudicating these.

22 CHAIR MARKOWITZ: So, Mr. Domina, yes.

1 MEMBER DOMINA: I just have a couple
2 of comments for the Board and for them on that
3 Circular 1505 and 1506, because you look at the
4 time frame that this is -- this was done, and I
5 know money was short at that time, and so, we're
6 in the middle of a contract. The major
7 contractor was Westinghouse.

8 So, any time you're going to put in a
9 program and say arbitrarily, everything is going
10 to get safer, they're going to ask for a request
11 for equitable adjustment from the Department of
12 Energy, for more money.

13 So, there should be flow down for
14 that, because maybe they did it on some DOE
15 sites, but I'll guarantee you, they didn't do it
16 at Hanford, and that's just my comment.

17 CHAIR MARKOWITZ: Okay, okay. So, are
18 there further comments, actually about this
19 particular area, this task or about the committee
20 work here?

21 So, do we have any volunteers for the
22 committee? Is this -- yes, this is Committee 4D.

1 Okay, let me just get this down. Let's see.

2 Kirk, Garry, I'm sorry, Mark, okay.

3 So, aside from here I have George and
4 Mark. Anybody else from this side of the table?
5 Okay, and I've got -- and any volunteers to
6 chair? Okay, okay, great, okay, Rosemary.

7 Okay, so, we have Rosemary Sokas, Faye
8 Vlieger, Kirk Domina, Garry Whitley, Mark Griffon
9 and George Friedman-Jimenez. Okay, good.

10 So, we can -- were there any
11 additional points you wanted to make? We have a
12 few minutes, actually. Any additional points in
13 this request for assistance that you wanted to
14 emphasize?

15 MS. LEITON: No, just that we are --
16 you know, as you -- we do recognize that this is
17 complicated and there are holes. So, that's why
18 our list is so long, and I do also recognize that
19 this list can cross over your various sections.

20 But it -- this is the -- our biggest
21 struggle, and it always has been, in terms of how
22 best to make these determinations and so, the

1 biggest thing I would say is just, I think that
2 the discussions we've had are on point and I
3 think that there are areas that we can really use
4 whatever guidance you can provide us, and we
5 would like to make sure that if you -- as you go
6 along, if you -- you know, we're going to look at
7 this big list of tasks already, but we are
8 willing to have like our SEM administrator, the
9 person who actually looks at the -- does the work
10 of inputting the SEM, come and do -- like a call
11 with you, or something like that, because I think
12 that might be really valuable.

13 So, if there are resources like that,
14 that we can provide or even maybe discussions
15 with our IH, those are things that we're willing
16 to offer.

17 So, thank you all very much. I think
18 this week has been really valuable and I think
19 that you've got a long task ahead of you, but
20 we're here to help, and we appreciate again, any
21 guidance that you provide to us, will benefit the
22 program, will help everybody help the claimants

1 and I think it would be a really good next few
2 years. Thank you.

3 CHAIR MARKOWITZ: Dr. Sokas?

4 MEMBER SOKAS: Thank you, and I just
5 wanted to kind of repeat what Dr. Markowitz said,
6 about anything we might possibly want, please
7 give it to us, but specifically, some redacted
8 evaluations by physicians from different areas,
9 in addition to the actual reviews that have been
10 done, would be very helpful, as well as, if
11 you're in the process of revising any of the
12 materials, like the health questionnaire, that
13 any thoughts you have or drafts or things that
14 you would like us to consider, the more explicit
15 you can be with us, the better we can provide
16 thoughts and comments back.

17 CHAIR MARKOWITZ: So, thank you very
18 much, Mr. Kotsch and Ms. Leiton for this session.

19 So, we're going to -- we don't have a
20 break for another 12 minutes. So, we're going to
21 turn to the proposed rule changes, particularly
22 since we're going to take an extra long break and

1 lose 15 minutes to that process.

2 So, yesterday, just to refresh your
3 memory, we were discussing a particular item
4 number six, we're going to come back to the --
5 we're going to go through the rest of the
6 proposed changes, discuss them and then we'll
7 come back to the ones that we did yesterday and
8 vote on them.

9 So, if we could look at number six and
10 this -- we were beginning to discuss this. This
11 is on page 55 of the proposed rule changes.

12 So, for anybody on the phone, I just
13 want to let you know that the proposed rule
14 changes are available on the website of the -- of
15 this Board, in case you're not able to connect
16 through WebEx. You could also -- you could find
17 it on our website.

18 So, we're at page 55 and we're looking
19 at Section 30.405, which deals with the issue of
20 the claimant's request to change physicians.

21 So, let me re-read the draft
22 recommendation, which is the Board notes that the

1 added language does not clarify what the
2 claimants need to produce, and finds it
3 implausible that claimants can provide medical or
4 factual evidence in support of a request to
5 change physicians.

6 The Board recommends that claimants be
7 permitted to change physicians without requesting
8 permission from OWCP.

9 So, I would just -- I guess we're open
10 for comments about this. I have just a -- start
11 off by saying a couple of things.

12 First of all, we really didn't
13 understand what was behind this proposed change,
14 what problem is being addressed by it, by
15 changing the criteria or the -- or requiring
16 additional clarification for the request for
17 changing physicians.

18 There is probably a specific problem
19 that this is addressing, and we thought that this
20 was very broad language to solve a specific
21 problem, and that solving that problem, that
22 specific problem would probably be better done by

1 addressing the specific issues of that problem,
2 rather than creating broad language that would
3 affect all claimants, really.

4 Secondly, there are many reasons
5 people change physicians and some of them may
6 seem not so important. They don't -- they're not
7 a question of medicine. They're not a question of
8 factual evidence. They're questions of
9 preference. They're questions of being unable to
10 communicate with the doctor or reach the doctor's
11 office or the like, or any number of issues that
12 probably arise fairly frequently in the
13 healthcare system.

14 So, then to go through a process where
15 you need to request a change of physician seems
16 quite burdensome actually.

17 So, the draft recommendation says that
18 basically that claimants should be permitted to
19 change without requesting change from OWCP.

20 Other comments? Dr. Boden?

21 MEMBER BODEN: So, since the pre-
22 change rule actually required requests as well,

1 and since our recommendation may not be fully
2 accepted, I think that we should also add
3 something to the effect that the change requires
4 evidence that is inappropriate or that's too
5 narrow for changes to be -- for claimants to be
6 required to provide. That's not the right
7 language, but I -- in other words, I think we
8 should add something that says not only that we
9 think that the old rule was not too good, but
10 that the change makes it worse.

11 CHAIR MARKOWITZ: So, you're
12 essentially saying that if the -- a program
13 retains, as it does, it going to enable --
14 retains the process of requesting permission to
15 change physicians, then that process should not
16 be made more burdensome?

17 MEMBER BODEN: Correct.

18 CHAIR MARKOWITZ: Okay.

19 MEMBER BODEN: Thank you.

20 CHAIR MARKOWITZ: Dr. Friedman-
21 Jimenez?

22 MEMBER FRIEDMAN-JIMENEZ: I would be

1 in favor of just keeping it simple and saying
2 personal preference is a legitimate reason for
3 changing physicians. The Board recommends that
4 the claimants be permitted to change without
5 requesting permission.

6 Just say that it's legitimate, right
7 out.

8 MEMBER CASSANO: So, the language then
9 would be to keep sufficient and then to add a
10 statement that says that personal preference
11 should be considered a sufficient reason for
12 changing treatment physician?

13 CHAIR MARKOWITZ: So, here we need to
14 -- we need to see the --

15 MEMBER CASSANO: Yes.

16 CHAIR MARKOWITZ: -- go back to the
17 proposed rule, page 55.

18 MEMBER REDLICH: In the current era,
19 practices are -- physician's practices are being
20 brought up and moved around and they're group
21 practices and you know, the idea that you're
22 staying with one physician, even if you wanted

1 to, and so, there is just so much changing of
2 doctors, and it's really hard from when you're
3 outside, to even know if it's a new doctor or a
4 different doctor or just that doctor's partner,
5 who is covering, and I just think you're -- and
6 even -- it isn't even clear.

7 Like as a referring doctor, I'm trying
8 to find out who referred me the patient, and I
9 can't even figure it out, and so, I mean, there's
10 just a lot more of switching doctors that is out
11 of people's control.

12 CHAIR MARKOWITZ: Yes, go ahead, Mr.
13 Whitley.

14 MEMBER WHITLEY: I think it's just
15 like she said about the CE's. They change CE's
16 all the time, not because DOL changes them. They
17 leave, they come, they go, they change.

18 I think you should be able to change
19 doctors and you should have to notify them you
20 changed it, and that's the end of it.

21 PARTICIPANT: See, that's what I was
22 thinking.

1 PARTICIPANT: Right.

2 CHAIR MARKOWITZ: Right, right, right.

3 So, go ahead, Dr. Welch.

4 MEMBER WELCH: Well, we were kind of
5 sticking with the concept that we either had to
6 edit the changes or go back to the old language.

7 So, I think the suggestion, and I
8 can't remember if Tori made it or not, that we
9 eliminate all the changes and then under B, say
10 OWCP will approve the requests if it determines
11 the reasons submitted are sufficient, and
12 personal preference is a sufficient reason.

13 So, we're kind of editing that spot,
14 that had new language added, which seems like
15 something we can do.

16 PARTICIPANT: Yes, we're substituting
17 language for --

18 MEMBER WELCH: For our current
19 language, and then we just reject all the other
20 changes.

21 CHAIR MARKOWITZ: Can we move that?

22 MEMBER WELCH: Yes, that -- I think

1 that may be the best we can do, given the
2 requirement and comment on the current proposed
3 changes.

4 CHAIR MARKOWITZ: Okay, go ahead, Dr.
5 Boden.

6 MEMBER BODEN: I think we should
7 probably go down.

8 I think it's worth our making the
9 statement of principle, that workers should be
10 allowed to change physicians without needing
11 approval, which can also be a long and daunting
12 process.

13 But then we should say that our
14 recommendation is to reject the change.

15 CHAIR MARKOWITZ: Dr. Cassano?

16 MEMBER CASSANO: The only other
17 comment I have is, I'm still a little bit
18 concerned about the use of referrals to multiple
19 specialists or sub-specialists, because there is
20 nothing in here that seems to -- it sounds like
21 you can only have one treating physician, and I'm
22 trying to figure out if we need language that

1 says, referrals are specifically exclude -- okay,
2 specifically -- or referrals from the treating
3 physician to other -- any other specialists are,
4 you know, allowed, ad libitum almost under the
5 statute. I don't know if we need that.

6 MEMBER FRIEDMAN-JIMENEZ: Are we
7 supposed to be there at 10:30?

8 CHAIR MARKOWITZ: Yes, it's 10:27.

9 MEMBER CASSANO: Yes.

10 CHAIR MARKOWITZ: Yes, in one minute,
11 we'll close. Go ahead.

12 MEMBER VLIEGER: As a claimant, I can
13 tell you that I have my general practitioner,
14 kind of the umbrella doctor, and then I have the
15 specialists, and to date, I haven't had problems
16 changing when doctors have moved.

17 But they have required me to justify,
18 you know, that you're changing doctors and why.

19 So, as a claimant, I can tell you that
20 I have more than one treating physician,
21 depending on the body part involved.

22 CHAIR MARKOWITZ: We're going to take

1 a break now. We'll reconvene at 11:00. Thank
2 you.

3 (Whereupon, the above-entitled matter
4 went off the record at 10:30 a.m. and resumed at
5 11:00 a.m.)

6 CHAIR MARKOWITZ: We are going to
7 start again. Greg, can you hear me in the back?
8 Good, thank you. I don't mean to interrupt,
9 much.

10 Okay, we're reconvening the Board
11 meeting. We're missing a couple of members, but
12 we need to proceed. So, let's continue.

13 The WebEx, Mr. Rios has an
14 announcement about the status of the WebEx.

15 MR. RIOS: So, this morning, we had --
16 we were notified that the link on our website was
17 broken for the WebEx. That has since been
18 repaired, and we also asked this morning that if
19 you're still having trouble, although several
20 people have logged on and confirmed that it's
21 working, but if you're still having trouble,
22 please send us an email to

1 energyadvisorboard@dol.gov. Thank you.

2 CHAIR MARKOWITZ: So, if we could
3 bring up the draft recommendation, we were
4 discussing changing the physicians, and I changed
5 the language at the break, I think to reflect the
6 -- so, let's take a look at this. Let me read
7 it.

8 "Board notes that the added language
9 does not clarify what the claimants need to
10 produce and finds it implausible that claimants
11 can provide medical or factual evidence in
12 support of a request to change physicians."

13 "The Board recommends that the
14 proposed changes be eliminated and be replaced by
15 the following."

16 "The claimant may cite personal
17 preference as a valid reason to change
18 physicians."

19 "The language of 30.405(c) should be
20 changed in accordance with this recommendation."

21 So, if you look at the -- look at the
22 book on the proposed changes, you'll see that

1 there's a B and there's a C, and they both have
2 parallel changes that are proposed.

3 So, additional comments, discussion
4 about this?

5 Okay, is there -- let me ask -- let me
6 raise a question.

7 We say that the Board finds it
8 implausible that claimants can provide medical or
9 factual evidence. Sometimes they can, but can
10 routinely provide? Should we add some qualifier
11 like that?

12 MEMBER CASSANO: We could say that it
13 places an undue burden.

14 CHAIR MARKOWITZ: No, well, that's
15 different -- that's different thought, actually.
16 Dr. Friedman-Jimenez?

17 MEMBER FRIEDMAN-JIMENEZ: Maybe
18 someone with more diplomatic skills than I can
19 suggest alternative language, but I would say
20 it's inappropriate to ask for medical and factual
21 evidence to support a request to change
22 physicians, but that obviously, isn't polite to

1 put in the document.

2 MEMBER FRIEDMAN-JIMENEZ: Well,
3 whether it's polite or not, there are instances
4 at which it's plausibly appropriate. So, I
5 wouldn't endorse that language. Yes, Dr. Boden?

6 MEMBER BODEN: So, this does not
7 include something that says that claimants --
8 that the Board believes that claimants should
9 generally be allowed to change physicians without
10 requesting permission from -- without requesting
11 permission.

12 CHAIR MARKOWITZ: So, the current
13 regulation requires --

14 MEMBER BODEN: Yes.

15 CHAIR MARKOWITZ: -- requesting
16 permission. All right, so that sentiment then is
17 -- doesn't address the change. It addresses the
18 current regulation --

19 MEMBER BODEN: Yes.

20 CHAIR MARKOWITZ: -- and I see your
21 point. So, at the end of the first sentence, we
22 could follow that with, this is our rationale

1 part, so to speak. We could add another
2 sentence, which would say what?

3 MEMBER BODEN: The Board believes that
4 claimants should be able --

5 CHAIR MARKOWITZ: I'm sorry, I'm
6 sorry. Can we just go up to the previous
7 paragraph, and where it says -- you know, right
8 there, right, and --

9 MEMBER BODEN: The Board believes that
10 claimants should be able to change physicians
11 without approval or -- period? Without approval
12 of OWCP or whatever. Just --

13 CHAIR MARKOWITZ: Okay, so other
14 comments? So, we have a motion?

15 MEMBER BODEN: Yes, could I suggest
16 that that be the first sentence because the
17 second sentence is the one that the recommended
18 change follows from.

19 CHAIR MARKOWITZ: Sure. Sure, if we
20 could move that up.

21 MEMBER FRIEDMAN-JIMENEZ: I move that
22 we accept this language.

1 CHAIR MARKOWITZ: Second? Okay, so,
2 discussion. Dr. Silver?

3 MEMBER SILVER: We may not get exactly
4 what we want, and I remember in our conference
5 call, one of the doctors had an impassioned
6 argument about changing oncologists on a timely
7 basis. Was that Dr. Cassano or Dr. Sokas, and I
8 am just wondering if a sentence underlying the
9 urgency of that specific issue would satisfy that
10 participant's concern, but if she's not here --

11 CHAIR MARKOWITZ: Well, let me say
12 that if they really accepted our recommendation
13 that the personal preference was -- then it
14 should be a very expedited procedure.

15 MEMBER SILVER: Right.

16 CHAIR MARKOWITZ: And there shouldn't
17 be delays because there is very little to look,
18 once that request is recorded.

19 MEMBER SILVER: I agree, but like I
20 said, we may not get exactly what we want, and
21 then there is this exigent case that someone felt
22 impassioned about.

1 CHAIR MARKOWITZ: Okay, so you want to
2 propose a friendly amendment, in terms of
3 particular language addressing this point?

4 MEMBER CASSANO: There was some
5 language that was in our group, about the fact
6 that if it were not approved within two weeks,
7 that it would be automatic -- that it's
8 automatically approved.

9 MEMBER SILVER: And that is -- I'll
10 drop it, if the person who was the motive force
11 isn't here. So.

12 MEMBER BODEN: Yes, I think we should
13 keep it in.

14 CHAIR MARKOWITZ: Further discussion?
15 Yes?

16 MEMBER VLIEGER: You all may not be
17 aware of the time limits that DOL allows
18 themselves to answer letters in. Thirty days is
19 considered a timely response. That's pretty much
20 a standard under the program, 30 days is
21 considered a timely response.

22 CHAIR MARKOWITZ: Other comments? So,

1 we're going to take a vote. Do we need to read
2 this again for -- prior to taking a vote?

3 Okay, so, all those in favor of this
4 motion? Okay, all those opposed? Any
5 abstentions?

6 Okay, so, all members present voted in
7 favor. There were 13 members present. Okay, we
8 could move to the next proposed change.

9 Okay, so, here we're referring to, I
10 think it's page 30. It's Section 30.206(a).
11 It's page 31 at the top, and Dr. Cassano, if you
12 could just read.

13 MEMBER CASSANO: This is how a
14 claimant -- how a claimant proves that the
15 employee was a covered employee exposed to
16 beryllium dust particles or vapors in their
17 performance of duties?

18 Sub-paragraph A, proof of employment,
19 strike out 'at' or physical presence at a DOE
20 facility, or a -- and strike -- they struck out
21 'facility owned, operated or occupied by
22 beryllium vendor'.

1 So, it now reads, "Proof of employment
2 or physical presence at a DOE facility or a
3 beryllium vendor facility, as defined in 30.5(j),
4 and we should probably go back to that.

5 CHAIR MARKOWITZ: So, the 30 -- I just
6 -- I have it in front of me.

7 So, on page 14, 30.5(j) recommends
8 that new language that says, "Beryllium vendor
9 facility means a facility owned and operated by a
10 beryllium vendor."

11 Okay, so, let's turn to the
12 subcommittees for their committee comments on
13 this proposed change. Mark?

14 MEMBER GRIFFON: Yes, our subcommittee
15 basically said that we proposed the broader
16 definition of owned, operated or occupied by, as
17 the beryllium vendor.

18 CHAIR MARKOWITZ: Laurie?

19 MEMBER WELCH: We didn't really
20 understand the impact of the change, although I
21 think we did hear in the course of the meeting
22 today, that it would eliminate a lot of

1 facilities. So, I would defer to Mark's group,
2 who had more information.

3 CHAIR MARKOWITZ: Dr. Silver?

4 MEMBER SILVER: Ditto what Dr. Welch
5 just said. That was our sentiment.

6 CHAIR MARKOWITZ: So, any comments
7 from the Board members?

8 So, the draft recommendation reads,
9 "The Board is uncertain about the reason for the
10 apparent narrowing of beryllium-using sites and
11 is concerned that the change might unnecessarily
12 limit benefits to beryllium exposed workers who
13 should be eligible for the program." Comments?

14 So, I would take no we're not --
15 unlike some of our other recommendations we're
16 talking about, we're not proposing language, and
17 we're not really -- we don't really make
18 regulations.

19 But in this case, we're expressing
20 concern and pointing -- making a particular
21 point, rather than suggesting particular
22 language, but that seems appropriate to me.

1 So, are there any other comments? So,
2 I need a motion. Dr. Boden? Okay, second? Dr.
3 Cassano.

4 So, any other discussion? Okay, so,
5 the motion I just read it, so I don't think I
6 need to re-read it, but all those in favor, if
7 you could raise your hand, and all those opposed?
8 Any abstentions?

9 So, the 13 present members of the
10 Board vote in favor of this recommendation.

11 We're going to move to the next
12 proposed change, which is on page 64. I'm sorry,
13 65, and this is Section 30.509(c) and --

14 MEMBER CASSANO: Sorry. This is about
15 what addition of the AMA guidance was used.

16 OWCP only makes determinations based
17 on rationalized medical evidence in the case file
18 that is sufficiently detailed and meets the
19 various requirements for the many different types
20 of determinations possible under, strike out 'AMA
21 guides' and replace that with 'fifth edition of
22 the American Medical Association's guides to the

1 evaluation of permanent impairment (AMA's
2 guides)'.
3

4 Therefore, the -- well, I don't need
5 to read this. Therefore, the OWCP will only make
6 a determination for a deceased covered Part E
7 employee to the medical evidence or records, to
8 satisfy the pertinent requirements of the AMA
9 guides in Sub-Part J and its parts.

10 CHAIR MARKOWITZ: Excellent. Thank
11 you. So, essentially, it's specifying the fifth
12 edition of the guides, and the committee
13 comments, subcommittee comments? Dr. Silver?

14 MEMBER SILVER: Reflecting Les Boden's
15 amendment after the conference call, codifying
16 the fifth edition in the regulation may reflect -
17 - may reduce OWCP's flexibility in using future
18 editions of the AMA guides.

19 The citation to the specific edition
20 of the guides belongs in the procedures manual,
21 and that will obviate the need for future Federal
22 Register notices for updates.

CHAIR MARKOWITZ: Mr. Griffon?

1 MEMBER GRIFFON: Yes, our group did not
2 comment on this section. We left it to others.

3 CHAIR MARKOWITZ: Okay, and Dr. Welch.

4 MEMBER WELCH: I think the sixth
5 edition is so detrimental to workers, that I'd
6 rather they be stuck with the fifth forever, than
7 have someone argue in court they should be using
8 the sixth. So, I like this language.

9 CHAIR MARKOWITZ: All right.

10 MEMBER WELCH: The fifth edition, as
11 you might know, Les, pretty much cuts impairment
12 in half for the same worker presenting evaluated
13 under the fifth and sixth.

14 So, maybe eventually there will be a
15 seventh but -- so, that was -- the comment from
16 our group was, we like this change.

17 CHAIR MARKOWITZ: Dr. Cassano?

18 MEMBER CASSANO: The only -- and I
19 recognize the whole issue with the sixth edition
20 and how draconian it sort of is.

21 The only reason I made that
22 recommendation was that if you really want to

1 move to the seventh or the eighth or the ninth
2 edition, it's going to take you about four years
3 to get there because it requires the regulatory
4 change and all of that stuff.

5 So, if they can set some precedent in
6 procedure that says -- stipulates fifth edition,
7 but that the regulation says the -- the current
8 issued approved by DOL, the current edition of
9 AMA guides approved DOL, that will allow them to
10 move to a future edition without having to go
11 through the rigmarole of a Federal Register
12 regulatory change.

13 That was the only point that I was
14 making.

15 CHAIR MARKOWITZ: Dr. Redlich? No?
16 Okay, any other comments?

17 So, the draft recommendation is the
18 Board notes that codifying fifth edition in a
19 regulation may reduce OWCP's flexibility in using
20 future editions of AMA guides, citation to a
21 specific edition of the AMA guides in the DEEOIC
22 procedures manual will obviate the need for new

1 regulations to adopt updated guides.

2 So, comments? Revisions?

3 MEMBER BODEN: Just to clarify. I
4 think we have two different positions here,
5 right?

6 So, we -- one position says we
7 shouldn't change --

8 CHAIR MARKOWITZ: Right.

9 MEMBER BODEN: -- and the other
10 position says that we should.

11 So, we need to -- my comment is, I
12 think that we need to figure it out, and just
13 Laura, for you -- my comment that made a change,
14 the original one said something about -- that
15 sounded like we approved of the AMA guides, and
16 all of this. I don't --

17 CHAIR MARKOWITZ: All right.

18 MEMBER WELCH: Well, I mean, I think
19 it's not a medical question. It's a strategic
20 question, and I think this statement is fine, and
21 then the agency can decide whether they want it
22 in the regulation or the procedure.

1 So, I mean, I'm fine with this, even
2 though it's not exactly what I would have said,
3 because I think it's a -- it's pointing out that
4 there is a decision to be made. It doesn't say
5 they shouldn't do it. It says may reduce their
6 flexibility. That's fine with me.

7 So, I'd move to accept this language.

8 CHAIR MARKOWITZ: By the way, this is
9 just draft language. This can be changed by --
10 very easily. Other comments? Ms. Vlieger?

11 MEMBER VLIEGER: My only concern would
12 be in a less favorable client, if we leave it
13 open to interpretation with the procedure, a
14 procedure is more easily changed than a
15 regulation.

16 So, I would rather have the stop-gap
17 of having an approval process, than allowing a
18 procedural change to readily change something
19 less favorable work environment.

20 MEMBER CASSANO: And I'm not married
21 to my position, so, I can -- I will not be hurt
22 if we just decide to trash it.

1 CHAIR MARKOWITZ: Ms. Vlieger, are you
2 saying that you would prefer to see it fixed in
3 regulation, the use of the fifth guide?

4 MEMBER VLIEGER: That's correct. I
5 would prefer to see it fixed and then that --
6 that's a back-stop for the workers, I think.

7 CHAIR MARKOWITZ: So, what should we
8 do in terms of the language? Dr. Boden?

9 MEMBER BODEN: Fifth? So, I would
10 propose that we reject the -- the suggested
11 change.

12 So, in other words, that we not offer
13 -- reject the one that's on the board, which says
14 that they shouldn't specify the fifth edition,
15 and let the -- and leave it as is, right.

16 CHAIR MARKOWITZ: So, just to clarify,
17 leave as is the proposed changes?

18 PARTICIPANT: Yes.

19 CHAIR MARKOWITZ: In other words to
20 essentially --

21 MEMBER BODEN: To not make --

22 CHAIR MARKOWITZ: To make the --

1 MEMBER BODEN: The Board make --

2 CHAIR MARKOWITZ: Make no

3 recommendation about these --

4 MEMBER BODEN: Correct, yes.

5 CHAIR MARKOWITZ: -- changes.

6 Comments? So, is there a -- so, we don't need to

7 -- I guess we would just strike this as a

8 recommendation. So, there is no new language for

9 us to look at.

10 So, if someone wants to make a motion

11 to that effect. Okay, Dr. Cassano makes the

12 motion and Dr. Boden seconds it.

13 So, discussion, and what's in play

14 here now is for us essentially, not to comment on

15 this proposed change.

16 No discussion? Let's take a vote.

17 All those in favor of --

18 PARTICIPANT: No comment.

19 CHAIR MARKOWITZ: Actually, there is

20 no -- there is no vote, because we're choosing

21 not to make a recommendation, not make a

22 statement, so there is no vote needed.

1 But I would -- the sense of the group
2 seems to be in favor of this lack of
3 recommendation.

4 Okay, let's move to the next one,
5 okay. This is regarding wage loss benefits, and
6 I neglected to have done what Mr. Rios asked me,
7 which is to cite where in the Board's charter,
8 our address of these proposed changes falls
9 within our scope, and the wage loss benefit
10 really -- we're going to address, has to do with
11 really -- for the most part, the Cartier around
12 causation, and assembling the evidence and making
13 the link between exposure and disease, which
14 falls within -- certainly, within A and B of our
15 scope.

16 So, let's move to -- it's 30.806.

17 Okay, it's page 96.

18 The question is whether this is --
19 it's a lot of new language here, it's a whole --
20 it's a page really of new language, and the
21 question is whether we actually need to read this
22 out loud, in order to proceed. What's that, Mr.

1 Griffon?

2 MEMBER GRIFFON: Aren't we just
3 talking about the 806 at the bottom of the page?

4 CHAIR MARKOWITZ: Right here, right?

5 MEMBER GRIFFON: Eight-zero-five is
6 the one.

7 CHAIR MARKOWITZ: Okay, so, let's read
8 806, and we'll just confirm.

9 MEMBER CASSANO: Okay, 806. What kind
10 of medical evidence must the claimant submit to
11 prove that he or she lost wages due to covered
12 illness?

13 OWCP requires -- and this is all new
14 language, that is replacing it.

15 OWCP requires the submission of
16 rationalized medical evidence, of submission of
17 probative value -- of sufficient probative value
18 to convince the fact finder that the covered Part
19 E employee experienced a loss of -- in wages, in
20 his or her trigger month, due to a covered
21 illness.

22 It asks medical evidence based on a

1 physician's fully explained and reasoned
2 decision, see Section 30.805(a)(3).

3 A loss in wages in the trigger month
4 due solely to non-covered illness matters, such
5 as a reduction in force or voluntary retirement
6 is not proof of compensable wage loss under Part
7 E.

8 CHAIR MARKOWITZ: So, if you could
9 also read 30.805(a)(3).

10 MEMBER CASSANO: "What are the
11 criteria for eligibility for wage loss benefits
12 under Part E?"

13 A Sub-3 says, "The wage loss in the
14 trigger month was caused by the covered Part E
15 employee's covered -- was covered -- Part E
16 employee's covered illness, i.e., that he or she
17 would have continued to earn wages in the trigger
18 month from that employment but for the covered
19 illness."

20 CHAIR MARKOWITZ: Okay, thank you.
21 So, comments from the committees? Mr. Griffon?

22 MEMBER GRIFFON: Yes, I said that our

1 committee was okay with that language. But I
2 think it also -- I said that our committee was
3 okay with the changed language, but also, prior
4 to this, we had commented on these questions of
5 probative evidence, in our previous comments.
6 So, I don't think we repeated those concerns.

7 CHAIR MARKOWITZ: Dr. Welch?

8 MEMBER WELCH: Our committee thought
9 it was important that the concept that the
10 covered illness could contribute to retirement,
11 as well as cause the retirement. There could be
12 multiple factors, and there needs to be some
13 assessment of the role of the covered illness,
14 and I actually think our comments are well
15 covered in what you've proposed there.

16 CHAIR MARKOWITZ: Dr. Silver?

17 MEMBER SILVER: We too ran out of
18 juice, but in written comments, subcommittee
19 members questioned what rationalized means,
20 suggested a simplification that OWCP require
21 submission of medical evidence based on a
22 physician's fully explained and reasoned

1 decision, etcetera, etcetera, and also that the
2 work 'convince' is a bad word. It implies the
3 fact finder a priori does not believe that there
4 is a sufficient disability to incur wage loss.

5 CHAIR MARKOWITZ: So, comments from
6 Board members? Dr. Cassano?

7 MEMBER CASSANO: Yes, I think the idea
8 about convince was basically to say instead of
9 convince, but of sufficient probative value for
10 the fact finder to determine that, rather than
11 the term 'convince'.

12 CHAIR MARKOWITZ: Okay, other
13 comments? So, hold that language for the moment,
14 while we read the draft recommendation.

15 "The Board recommends that wage loss
16 should be compensated if the covered illness
17 contributed to retirement."

18 For example, a worker was told work
19 was no longer available, due to his covered
20 illness and that the worker took early
21 retirement.

22 The Board recommends that the phrases,

1 "Was caused," and "But for," in Sections
2 30.805(a)(3) be replaced by the spirit of the
3 standard of "aggravated, contributed to or
4 caused", that appears in the EEOIC Act.

5 That is, if the covered illness
6 aggravated, contributed to or caused the health
7 problems associated with wage loss in the trigger
8 month, then the wage loss should qualify for
9 benefits.

10 The Board recommends that the phrase
11 that contains the term "rationalized" in line
12 three of 30.806 be simplified to, "OWCP requires
13 submissions of medical evidence based on a
14 physician's fully explained and reasoned
15 decision."

16 I'm not sure that's simplification,
17 but it's a brief re-statement. So, are there
18 comments? Dr. Cassano?

19 MEMBER CASSANO: I would just add --
20 well, I don't know -- I'm okay with that, but I
21 would make an amendment to that, to actually
22 recommend changing the language of 'convince' to

1 what I said before.

2 CHAIR MARKOWITZ: I'm sorry? So, can
3 you then provide us some language --

4 MEMBER CASSANO: Yes.

5 CHAIR MARKOWITZ: -- that we can use
6 and --

7 MEMBER CASSANO: So, the language
8 would be, OWCP requires the submission of
9 rationale or reasoned medical evidence, however
10 you want to say that, of sufficient probative for
11 the fact finder to determine that the covered
12 Part E employee's experience and loss in wages
13 with his or her true -- trigger month due to the
14 covered illness.

15 So, replace 'convince', 'to convince',
16 to 'convince the fact finder to probative value
17 for the fact finder to determine 'whether'.

18 CHAIR MARKOWITZ: Okay, so, Kevin if
19 --

20 MEMBER CASSANO: No.

21 CHAIR MARKOWITZ: No, yes, you needed
22 to specify to Kevin, exactly what the language

1 is.

2 MEMBER CASSANO: Okay.

3 CHAIR MARKOWITZ: So?

4 MEMBER CASSANO: Okay, so, OWCP
5 requires submission of reasonable and medical
6 evidence based -- no, it's above that.

7 PARTICIPANT: Why don't you make it a
8 fourth paragraph?

9 MEMBER CASSANO: No, it's the first
10 part of that paragraph.

11 OWCP requires the submission of
12 reasoned medical evidence of sufficient probative
13 value --

14 PARTICIPANT: Direct him on the page,
15 where you want him to put the cursor.

16 MEMBER CASSANO: Okay, the cursor goes
17 under -- to be simplified -- see, it doesn't work
18 with this new simplified language.

19 CHAIR MARKOWITZ: So, do you want to
20 just replace the word 'convinced' with
21 'determined', essentially?

22 MEMBER CASSANO: Value to -- value for

1 the fact finder to determine, is what I want, to
2 have -- in that first line.

3 But then it conflicts with what that
4 change is on the top.

5 CHAIR MARKOWITZ: Well, if the
6 significance of the proposed change is really
7 just to address the word 'convinced', convince --

8 MEMBER CASSANO: Right.

9 CHAIR MARKOWITZ: -- and change it to
10 determined -- soften it to 'determined' then --

11 MEMBER CASSANO: But then it's in the
12 wrong spot.

13 CHAIR MARKOWITZ: Well, then we don't
14 have to probably worry about it, if it -- if it
15 being in the wrong spot doesn't affect the
16 meaning, then we don't have to worry about that.
17 We can just say -- because we're not rewriting
18 the regulation -- proposed changes, right? So,
19 we're just making proposals.

20 MEMBER CASSANO: Okay.

21 CHAIR MARKOWITZ: So, we can simply
22 say that the Board recommends that the word

1 'convince' be --

2 MEMBER CASSANO: Changed.

3 CHAIR MARKOWITZ: -- replaced by the
4 word 'determine' or whatever word you're -- so,
5 if we could just add that right there, that the
6 Board recommends. Yes, that's correct.

7 So, the word 'convince'. The word
8 'determine'.

9 PARTICIPANT: These are past tense.

10 CHAIR MARKOWITZ: Right, right.

11 PARTICIPANT: Convinced and
12 determined.

13 MEMBER CASSANO: Or allow the fact
14 finder to determine. So, replace 'convince' with
15 'allow the fact finder to determine', that's
16 fine.

17 CHAIR MARKOWITZ: Yes. Okay, so,
18 before 'determine', just move it back -- just say
19 'allow' --

20 MEMBER CASSANO: Allow the fact finder
21 to determine.

22 CHAIR MARKOWITZ: Right. Right, in

1 the quotes, right, allow.

2 MEMBER CASSANO: I'm getting lost.

3 Allow the fact finder to determine.

4 MEMBER BODEN: So, you've got this --
5 so, once you're done with that, if you go back to
6 where it says 'convince'.

7 MEMBER CASSANO: It says 'convince the
8 fact finder'.

9 MEMBER BODEN: You want to say
10 'convince the fact finder'.

11 MEMBER CASSANO: Convince the fact
12 finder. Thank you.

13 MEMBER CASSANO: So, if we -- if we go
14 two paragraphs up to where the -- it says 'the
15 spirit of the standard', the spirit is not the
16 right word. Well, we could say intent. That's
17 better than spirit, but it's --

18 MEMBER CASSANO: The language --

19 CHAIR MARKOWITZ: -- the aggravated,
20 contributed cause is not the intent. That's the
21 --

22 MEMBER CASSANO: That's the language.

1 CHAIR MARKOWITZ: That's the language.
2 Right? Right. So, we could say by the language
3 of the --

4 PARTICIPANT: Yes.

5 CHAIR MARKOWITZ: Now --

6 PARTICIPANT: This one right here?

7 MEMBER CASSANO: Yes.

8 CHAIR MARKOWITZ: That's correct.

9 Okay, then the one line up, if you can just go
10 one line up, go to the left and remove DOL.
11 Comments?

12 I think -- someone want to read this
13 one last time, as the proposal then on this? Is
14 there a motion?

15 MEMBER SILVER: I'll make it, but
16 after one minor editing change.

17 The very last line, replace with the
18 phrase.

19 CHAIR MARKOWITZ: Yes, yes, okay.

20 MEMBER SILVER: I make a motion that
21 we accept this -- okay.

22 CHAIR MARKOWITZ: Okay.

1 MEMBER SILVER: Ready? Make a motion
2 that we put forward this language in our
3 comments.

4 CHAIR MARKOWITZ: Second? So, can
5 someone read this, so that we hear it once again?

6 MEMBER CASSANO: Designated reader
7 here. "The Board recommends that wage loss
8 should be compensated if covered illness
9 contributed to the retirement, e.g., a worker was
10 told work was no longer available due to his
11 covered illness and that the worker took early
12 retirement."

13 "The Board recommends that the phrases
14 'was caused' and 'but for' in Section 3.805(a)(3)
15 be replaced by the language of the standard of
16 aggravated, contributed to or caused, that
17 appears in the EEOIC Act."

18 "That is if the covered illness
19 aggravated, contributed or caused the health
20 problems associated with wage loss in the trigger
21 month, then the wage loss should qualify for
22 benefits."

1 "The Board recommends that the phrase
2 contains the term 'rationalized' in line three of
3 30.806, be simplified to OWCP requires submission
4 of medical evidence based on the physician's
5 fully explained and reasoned decision of
6 sufficient probative value, to convince the -- to
7 -- of sufficient probative value to allow the
8 fact finder to determine," and what that
9 eliminates in there is that parenthetical
10 statement that says, "Due to a covered illness,
11 i.e., medical," blah, blah, blah, blah.

12 MEMBER BODEN: So, the word
13 'simplified' should be just changed?

14 MEMBER CASSANO: Right.

15 MEMBER BODEN: It's not simplified?

16 MEMBER CASSANO: Well, yes, it is
17 simplified because you -- you're repeating it and
18 then you have a parenthetical phrase, which comes
19 out.

20 CHAIR MARKOWITZ: Okay, so, you read

21 --

22 MEMBER CASSANO: Yes.

1 CHAIR MARKOWITZ: -- the proposal, the
2 motion, right? Okay, comments? Dr. Silver?

3 MEMBER SILVER: The second paragraph,
4 sorry to be the English teacher, aggravated,
5 contributed to or caused.

6 MEMBER CASSANO: Okay.

7 CHAIR MARKOWITZ: I'm sorry, it says
8 --

9 PARTICIPANT: It should say
10 'contributed to' because the act actually says
11 'contributed to'.

12 MEMBER CASSANO: It is -- says
13 'contributed to'.

14 CHAIR MARKOWITZ: I see, it's in the
15 second line.

16 PARTICIPANT: Below that, below it.

17 CHAIR MARKOWITZ: All right.

18 MEMBER CASSANO: Okay, okay. I think
19 the read the 'to', which was the problem.

20 CHAIR MARKOWITZ: Okay, so, is there
21 a proposal to change the word, in the third
22 paragraph, change the word 'simplified' to

1 'changed'?

2 PARTICIPANT: I think it's just
3 clearer that way.

4 CHAIR MARKOWITZ: I think it is an
5 improvement.

6 MEMBER CASSANO: To change it.

7 CHAIR MARKOWITZ: Yes, so, if you can
8 just change it. Okay, other comments or
9 discussion?

10 MEMBER BODEN: I move that we accept
11 this.

12 CHAIR MARKOWITZ: Okay, so, we're
13 going to vote now. All those in favor of this
14 recommendation, raise your hand. All those
15 opposed?

16 Okay, the 14 -- there are 14 members
17 present and all voted in favor of the
18 recommendation.

19 Next we go to page 17. We are making
20 good progress, and this relates to Section
21 30.5(e)(e) under definitions, and the relevance
22 of our attention to this proposed change, in

1 relation to our scope is that this defines --
2 this proposed change relates to who a physician
3 is, what physicians would be included in the Act,
4 and this -- in relation, that are providing
5 medical guidance, which is Task B, and Task D,
6 input into the use of medical experts, makes this
7 relevant to our discussion.

8 So, do you want to read, Dr. Cassano,
9 the proposed change?

10 MEMBER CASSANO: The proposed charge
11 basically says changes -- includes, "Physicians,"
12 'includes' was struck and 'means' was added.

13 "Surgeons, podiatrists, dentists,
14 clinical psychologists, optometrists,
15 chiropractors and osteopathic practitioners
16 within the scope of their practices defined by
17 state law."

18 Then 'the' and then the term
19 'physician includes', and then it -- so, it says,
20 "The services of chiropractors, only to the
21 extent that their reimbursable services," that
22 was all struck, "May be reimbursed to limit --

1 limited treatment consisting of manual
2 manipulation of the spine to correct the
3 subluxation as demonstrated by x-ray to exist."

4 Yes, I mean, it's hard to try to read
5 something --

6 CHAIR MARKOWITZ: That's very nice.
7 Very nice.

8 MEMBER CASSANO: Thank you.

9 CHAIR MARKOWITZ: Reports from the
10 committees? Dr. Welch?

11 MEMBER WELCH: We thought this
12 definition of physician was way too narrow and
13 needs to be expanded. It excludes most of the
14 physicians that would be used as consulting
15 medical providers or treating physicians for
16 these patients.

17 CHAIR MARKOWITZ: Mr. Griffon?

18 MEMBER GRIFFON: We agree with exactly
19 with those comments. We said it's -- should be
20 more inclusive of the -- those that treat
21 patients.

22 CHAIR MARKOWITZ: Dr. Silver?

1 MEMBER SILVER: We thought it should
2 be restored, so the definition reads, "Physician
3 includes surgeons." Medical doctors are
4 understood to be physicians. Later, someone else
5 raised the issue of psychiatrist, but that change
6 would satisfy the concern.

7 Then defining this non-MD provider
8 scope of practice under state law could mean that
9 each examiner will have to look of the scope of
10 practice in each state, in which the claimant is
11 being treated, said one of our doctors.

12 CHAIR MARKOWITZ: Comments from Board
13 members? Okay, so, let me read the draft
14 recommendation.

15 "The Board recommends that 'includes'
16 should be restored to the definition," and read,
17 "Physicians -- physician includes surgeons,
18 etcetera," in order to be more inclusive of
19 physicians who typically treat patients with work
20 related illnesses (for example family practice
21 physicians, internists, etcetera).

22 So, actually what this means is that

1 we are proposing that they not use the new
2 language, and -- right, okay.

3 MEMBER CASSANO: In the first part.

4 CHAIR MARKOWITZ: In the first part,
5 yes. The second part wasn't address by the draft
6 recommendation. I don't know whether there is any
7 desire to address that, but any comments? Dr.
8 Welch?

9 MEMBER WELCH: You know, it's not
10 necessarily our call, but the English in that
11 sentence is -- it needs some editing.

12 I mean, I know what the intent is,
13 intent is to limit the payment to chiropractors
14 to a specific service, but I'm just sort of
15 pointing that out for the record, and I'm sure
16 DOL can fix that, when they do the final.

17 CHAIR MARKOWITZ: Thank you. Other
18 comments? Okay, so, let's take a vote on this.
19 I don't think there's any need to re-read this.

20 All those in favor of this -- of our
21 recommendation, raise your hand. All those
22 opposed? Any abstentions?

1 So, there are 14 members of the Board
2 present, all of whom vote in favor of this
3 recommendation.

4 So, let's move to the next one, which
5 is Item Number 11, which is on page 16, and 16 is
6 part of -- of the definitions 30.5(x)(2)(3).
7 This is the -- where a definition of who a DOE
8 contractor employee is.

9 MEMBER CASSANO: Read? "A civilian
10 employee of a state or federal government agency,
11 if the agency employing that individual is found
12 to have entered into a contract with DOE for the
13 provision of one or more services it was not
14 statutorily obligated to perform, and DOE
15 compensated the agency for those services."

16 "The delivery or removal of goods from
17 the premises of a DOE facility does not
18 constitute a service for the purpose of
19 determining a worker's coverage under this
20 paragraph."

21 CHAIR MARKOWITZ: Okay. So, comments
22 from the various subcommittees? Mr. Griffon?

1 MEMBER GRIFFON: Yes, we basically
2 were concerned about this being too restrictive,
3 that some -- I think the intent was probably to
4 restrict vendors delivering Coke, I've heard that
5 used before.

6 But this is overly restrictive of many
7 other delivery of goods or services -- you know,
8 goods to the sites, including construction and
9 maintenance type work, and the areas where they
10 might be delivering to.

11 We did say, in our subcommittee, we
12 said that the delivery or removal of goods from
13 the premises of the DOE facility does not
14 constitute a service, should be augmented with
15 the following phrase, "Unless a worker can
16 provide factual evidence of exposure to hazardous
17 substances while on the site."

18 I'm not sure -- reflecting on that,
19 I'm not sure I agree with our subcommittee
20 language, but that's what we said in the
21 subcommittee. So.

22 CHAIR MARKOWITZ: All right, that's

1 good.

2 MEMBER GRIFFON: I think that puts the
3 pressure on the worker to -- you know, to prove
4 that they were delivering to an area with
5 hazardous substances, and I think that wasn't
6 necessarily our intent.

7 CHAIR MARKOWITZ: Okay.

8 MEMBER GRIFFON: But that's what we
9 said.

10 CHAIR MARKOWITZ: Dr. Welch?

11 MEMBER WELCH: Yes, I think our
12 committee came up with something similar, which
13 was if the -- if delivery of services or removing
14 the service entails exposure to a hazardous
15 substance, then they should be covered.

16 MEMBER GRIFFON: Right.

17 MEMBER WELCH: But I don't --

18 MEMBER GRIFFON: But it shouldn't mean
19 the worker --

20 MEMBER WELCH: But and so, that could
21 be dealt with by eliminating that sentence
22 because everybody has to demonstrate that

1 exposure to hazardous substance and this is a
2 presumption that delivery doesn't include that,
3 and we don't agree with that.

4 So, I think the recommendation would
5 be -- well, we'll see what Steve had proposed,
6 but we might just recommend deleting that
7 sentence.

8 CHAIR MARKOWITZ: Okay, Dr. Fischer --
9 Silver?

10 MEMBER SILVER: We concur and
11 underline, as someone pointed out, removal tasks
12 are often among the most dangerous, removing
13 hazardous materials.

14 CHAIR MARKOWITZ: Okay, so, comments
15 from the Board members? Yes, Dr. Boden?

16 MEMBER BODEN: Does the Board want to
17 recommend that this change be struck or and so,
18 this is -- looks like a preamble to a suggested
19 change.

20 So, the Board believes that workers
21 who were exposed to hazardous materials, blah,
22 blah, blah, should be included and therefore, the

1 sentence, "The delivery or removal of goods,"
2 blah, blah, blah should be struck from the
3 changes, right?

4 Therefore, the Board recommends that
5 that sentence be struck from the changes.

6 CHAIR MARKOWITZ: Comments?

7 MEMBER CASSANO: Yes, I think we might
8 add to our justification then that those -- that
9 delivery and removal of goods should be
10 evaluated, to determine whether there was
11 hazardous materials involved or exposure to
12 hazardous materials, and that is why we don't
13 want them to regulate -- on a regulatory basis,
14 remove all delivery and removal of goods, if you
15 follow what I'm saying.

16 CHAIR MARKOWITZ: Sure. I mean, the
17 draft recommendation says, "The Board recommends
18 that workers who were exposed to hazardous
19 materials in the course of delivery or removal of
20 goods or materials from a DOE facility should be
21 included in coverage under EEOICP."

22 MEMBER CASSANO: Yes.

1 CHAIR MARKOWITZ: So, it does try to
2 help define a class of workers, who deserve to be
3 included, but not all workers involved with
4 delivery or removal.

5 MEMBER CASSANO: But I think what --
6 they still need to evaluate anyone that delivers
7 and removes, to determine whether it is a --
8 hazardous materials were included, yes?

9 MEMBER DOMINA: My comment to that
10 would be no, for the simple reason is, if you're
11 inside like the fence at DOE, you're under one
12 standard, and then a lot of times, the standard
13 outside the fence is a lot different, which is a
14 lot less, and I don't believe it needs -- you
15 need to leave it alone.

16 I think the whole paragraph needs to
17 be stricken.

18 PARTICIPANT: The whole paragraph or
19 the whole sentence?

20 MEMBER REDLICH: I mean, I agree, I
21 don't think we need the second sentence, because
22 workers should be considered.

1 I agree that we don't need the second
2 sentence, because we should not be excluding
3 those workers, but if someone could explain to
4 me, the first sentence, because I just don't
5 understand it, but I assume it's there for a
6 reason.

7 So, I don't want to approve something
8 that I don't understand.

9 MEMBER CASSANO: I can take a stab at
10 it. I think what it's saying is, even if there
11 was -- if there was a contract, even if the
12 particular task was not included in that
13 statutory language, but the contract -- the
14 employee was paid to provide that service, then
15 they're going to compensate him, even if it
16 doesn't say, this is your particular -- this is
17 the job that this contract was meant to do. You
18 guys may have a better idea.

19 MEMBER VLIENER: So, other
20 departmental employees are covered under this
21 program, if they are -- they were subcontracted
22 by DOE to perform a DOE function on the site.

1 An example would be if they belonged
2 to the Army Corp of Engineers, but they were
3 removing artillery sites from Hanford, for say,
4 they would not be covered because that's an Army
5 Corp of Engineer project, yet they were inside
6 the fence of Hanford and they were a federal
7 employee.

8 There are some strange lines here and
9 they have to look at contracts, to see if they're
10 actually covered as a Federal employee.

11 So, the first part of this covers
12 other departmental employees and whether or not
13 they would be considered DOE and covered under
14 the program.

15 So, some of that language is there for
16 that reason, to define how they would and would
17 not be covered.

18 MEMBER REDLICH: So, it's being more
19 inclusive of who is covered or is it being less
20 inclusive?

21 MEMBER VLIEGER: This changes
22 slightly, the previous language to be more

1 inclusive, but it's very much the same as the old
2 language, than that first line, and the second
3 line I have to object to.

4 There are only so many IH's on a site.
5 There are only so many HPT's on a site. None of
6 them follow truck drivers around. There is not
7 going to be any monitoring data for these people.
8 We're going to be lucky if they have a dosimeter.

9 So, excluding them based on them
10 trying to provide evidence under the statute, or
11 saying, "Well, because you were just a delivery
12 driver," I think is unfair.

13 CHAIR MARKOWITZ: So, it seems to me
14 there are two sentences to this Item Number
15 three. The first sentence, actually stands on
16 its own, and doesn't relate -- doesn't relate to
17 our scope, in terms of what we've been asked to
18 look at, whereas, number two, second sentence is
19 within our scope.

20 So, let's just focus then on the
21 second sentence, which is the delivery and
22 removal of goods. Other comments?

1 So, one way we could address this is,
2 and what we're looking at on the board -- the
3 screen now, the Board recommends, replace
4 'recommends' with 'recognizes' or --

5 PARTICIPANT: Yes.

6 CHAIR MARKOWITZ: -- and then follow
7 that with a sentence, at the end, which says
8 that, "The Board recommends that the sentence
9 beginning with 'the delivery or removal of
10 goods'", right, be eliminated.

11 PARTICIPANT: Good.

12 CHAIR MARKOWITZ: And actually, our
13 real sentiment on this is that this should be --
14 that workers who deliver or remove goods, who
15 have hazard exposures should be included, and
16 those who don't, should not be included, all
17 right, okay.

18 Okay, welcome back, Ms. Pope. So,
19 just to orient you, we're on page 16. We're
20 discussing delivery and removal of goods from --
21 and we're about to take a vote. So.

22 So, let me read this out -- the whole

1 thing out loud, in part, to try to bring Ms. Pope
2 up to -- okay.

3 So, yes, on page -- are you on page
4 16? Okay, yes, so on page 16, you'll see it in
5 the blue paragraph, the last three lines. I'm
6 just waiting a moment until she -- that's okay.

7 Okay, so, we're looking at on page 16,
8 towards the top, Item Number 3, the last
9 sentence, which starts with 'the delivery or
10 removal of goods', and the motion is that -- is
11 the following.

12 The Board recognizes that workers who
13 were exposed to hazardous substances -- materials
14 in the course of delivery or removal of goods, or
15 materials from a DOE facility should be included
16 in coverage by EEOICP.

17 The Board recommends that the sentence
18 beginning with the delivery or removal of goods
19 be eliminated.

20 So, I've lost track a little bit. Do
21 we have a motion to accept this?

22 PARTICIPANT: So moved.

1 CHAIR MARKOWITZ: Okay, so, any
2 further comment on this issue?

3 So, all those in favor of this, raise
4 your hand please. Okay, and all those opposed?
5 Any abstentions?

6 So, there are 15 members present and
7 all voted in favor.

8 We're -- in a minute, we're going to
9 take a break for lunch. I would just say that the
10 Board recognizes that we are, in some instances,
11 recommending specific language for the proposed
12 changes, and that DOL needs to reconcile any
13 language that they might consider adopting from
14 what we've proposed, with language that they
15 already have in other parts of the regulations,
16 that some of which are pre-defined and so, we
17 recognize the need for some reconciliation of
18 that language.

19 We also recognize that there -- our
20 grammar may not be perfect in some of our
21 recommendations, so please forgive that.

22 Finally, that there are other parts of

1 the regulations that may pertain or replicate or
2 mirror the sections that we're looking at, and
3 that we may not have caught every section of the
4 proposed regulations that replicate what we have
5 looked at, and we would hope that our
6 recommendations would also apply to those other
7 sections of the proposed regulations.

8 So, with this, we'll break for lunch
9 and we'll reconvene -- yes, Mark?

10 MEMBER GRIFFON: Just the process,
11 we're going to get back to those couple that we
12 left from last night, right?

13 CHAIR MARKOWITZ: That's right.

14 MEMBER GRIFFON: Okay.

15 CHAIR MARKOWITZ: So, this is -- this
16 is how the rest of the --

17 MEMBER GRIFFON: After lunch?

18 CHAIR MARKOWITZ: This is the rest of
19 -- how the rest of the day will look.

20 We'll take a break. We'll have lunch,
21 and let's return at -- let's return at 12:45
22 p.m., actually, and we'll begin the work on that.

1 At 1:00 p.m., we have a public comment
2 period for 45 minutes, and then we have some
3 additional time, we're going to work on the
4 proposed changes, and we are within our time.
5 We're in good shape, I think. Thank you very
6 much.

7 (Whereupon, the above-entitled matter
8 went off the record at 12:00 p.m. and resumed at
9 12:50 p.m.)

10 CHAIR MARKOWITZ: So, the public
11 comment period will begin shortly, and I just
12 have a message for the people on the phone
13 online.

14 To access the public comment period,
15 you will need to hang up and dial the following
16 number, 1-800-369-3381.

17 That number is 1-800-369-3381, and
18 then you'll need to enter the code 2470553.

19 Again, just to repeat that code,
20 2470553. Thank you.

21 Okay, apparently, we can't -- we're
22 not going to start for five more minutes, the

1 public comment period, because it has to be at
2 1:00 p.m., but we're almost there.

3 So, we're not going to discuss
4 anything substantive at the moment, but I would
5 like to begin to raise an issue that we're going
6 to have to deal with later today.

7 After the public comment period for 45
8 minutes, we're going to return to our --
9 providing our recommendations of input into the
10 DOL proposed regulations. We've made excellent
11 progress, but we still have a little bit more to
12 go. So, we will do that immediate following the
13 public comment period.

14 Then we will begin to discuss
15 logistics around additional meetings in the
16 future.

17 The next meetings will be by the
18 subcommittee, and they will be in the next few
19 months. They will be scheduled by the chairs of
20 the subcommittees, and you need -- you should
21 then communicate with the members of the
22 subcommittee, and just make sure you copy those

1 and myself, so we know what's going on.

2 But once you decide on a time and a
3 date for the subcommittee meeting, DOL needs
4 approximately seven weeks, in order to do what's
5 needed to get it into the Federal Register,
6 etcetera.

7 So, tomorrow, when you go home and
8 begin to schedule these meetings, just think
9 about that seven week gap. The window begins
10 seven weeks from the dates that you're -- or the
11 window begins in relation to seven weeks from the
12 dates that you're looking at. So, just be aware
13 of that when you begin to schedule.

14 You can't -- you couldn't for
15 instance, schedule a meeting right now for May
16 30th, because that is not enough time, right, but
17 you could for probably June 15th.

18 MEMBER SOKAS: Just a question, and
19 we're talking about telephone meetings, right? I
20 mean, that's what we're talking about here.

21 CHAIR MARKOWITZ: That's correct.

22 MEMBER SOKAS: Okay.

1 CHAIR MARKOWITZ: For the
2 subcommittees, yes. Yes, Dr. Welch?

3 MEMBER WELCH: Previously, I
4 understand the plan was the communications to
5 other members of the Board should be directed
6 through the advisory website.

7 Now, that we've decided -- our
8 decision, I think, was to make the subcommittees
9 public, so does that mean we need to do it that
10 way?

11 MR. RIOS: When you say make the
12 subcommittees public, we will post who is in
13 which subcommittee, but are you talking about
14 internal communications between the committee
15 members?

16 MEMBER WELCH: Well, I guess it would
17 help for me to understand how the Chair should
18 manage internal communications among the
19 subcommittee members and manage the meetings,
20 vis-a-vis public access.

21 MR. RIOS: The members of the
22 subcommittees, the chair of the subcommittee can

1 communicate with the other members, with their
2 direct email address, as long as I'm copied on
3 every communication, as well as the Advisory
4 Board email.

5 MEMBER WELCH: Okay.

6 MR. RIOS: It just makes it easier,
7 especially if you're reaching out to your
8 subcommittee and trying to schedule the date.

9 MEMBER SOKAS: Do we have everybody's
10 email?

11 MEMBER WELCH: What's that?

12 CHAIR MARKOWITZ: I'm sorry, what's
13 the question?

14 MEMBER SOKAS: Do we have everybody's
15 email? Do we?

16 MR. RIOS: So, I'll provide the
17 subcommittee chairs with the email addresses for
18 the folks and their subcommittees.

19 MEMBER SOKAS: Okay, thank you.

20 CHAIR MARKOWITZ: But I would
21 encourage you to schedule those subcommittee
22 meetings as soon as possible, given the seven

1 week gap in time and given the fact that after
2 seven-plus weeks, we start to head into summer
3 and people have different schedules during the
4 summer.

5 So, it would be best if you could
6 meet, say in the second half of June, or aim to
7 meet there. Explore those dates. Any other
8 questions about that?

9 Later, we'll discuss the -- our next
10 meeting in person. We won't pick a date here,
11 but we will circulate dates very soon. But I
12 would like to have a discussion a little bit
13 later about where we might like to meet, when we
14 meet in the Fall.

15 The aim is to have another meeting in
16 the Fall, hopefully not too late into the Fall,
17 so we can do our work. Any comments or
18 questions?

19 So, now, I'd like to begin the public
20 comment period. We have four people who have
21 requested time. Three are in person and one is
22 on the phone. We'll have the people in person

1 come first, and I would like to welcome
2 Congressman Ed Perlmutter, Seventh District in
3 Colorado. Thank you.

4 CONGRESSMAN PERLMUTTER: Good
5 afternoon, everybody. It's great to see this
6 Board convened.

7 My name is Ed Perlmutter. I'll be
8 brief in my remarks, because I know that you've
9 already had a long week, and you still have a lot
10 of business to conduct.

11 I'm here today because I wanted to
12 come and thank you personally for taking the time
13 to deal with some very serious matters, that over
14 time, have not been addressed in the way I would
15 like to see them addressed, and I want to thank
16 you all for bringing your experience, your
17 knowledge, your expertise to this Board. It's
18 pretty much an all-star Board, and we're very
19 fortunate to have you considering these matters.

20 As some of you know, I represent the
21 northern and western suburbs of Denver. So,
22 everything between Denver and Boulder, Colorado,

1 which includes the Rocky Flats Plant, and now is
2 a wildlife refuge.

3 Beginning in 1952, the Rocky Flats
4 Plant built the plutonium triggers, or PITS, for
5 our nuclear arsenal. The plant used thousands of
6 chemicals and other materials, including uranium
7 and beryllium, and thousands of workers answered
8 the call from the United States of America, to
9 work at the plant in its decades of operation.

10 I don't need to tell any of you, the
11 wide range of illnesses these and other workers
12 across the country have faced as a result of
13 their service to the country.

14 Congress passed the Energy Employees
15 Occupational Illness and Compensation Act as a
16 way to provide the healthcare and compensation
17 these workers earned and deserved. But it's an
18 understatement to say that the claims process has
19 not gone smoothly.

20 This Advisory Board was a result of
21 recommendations from the Government
22 Accountability Office and the Institutes of

1 Medicine.

2 I worked with Senators Mark Udall and
3 Lamar Alexander, as well as representatives Ed
4 Whitfield and Jared Polis to authorize this
5 Advisory Board to improve transparency and
6 provide more certainty for claimants.

7 This, I'm afraid to say, in this
8 Congress, is a very rare Bipartisan effort, but
9 it's because of the service that the men and
10 women at our nuclear plants provided, that both
11 parties came together on this particular Advisory
12 Board.

13 I can't tell you how proud I am that
14 this Board is meeting and considering these
15 difficult matters, and I'm looking forward to
16 your efforts to improve administration of this
17 very important program for our nuclear workers.

18 Last time I was in this building,
19 Hilda Solis was the Secretary of Labor, and now
20 it is Tom Perez, and I'm happy to see this
21 progress being made with this Advisory Committee.
22 You have some difficult matters to consider. I

1 thank you for taking the time and providing your
2 expertise and your experiences to make this
3 something that I think will be worthwhile for so
4 many people.

5 I want to introduce Jeff O'Neil from
6 my office, and I want to offer up our office as a
7 resource to you, if and when you feel that it's
8 necessary.

9 But thank you for participating in
10 this. Thank you for being here, and I'm glad to
11 see you're convened, and you said you're almost
12 done. So, I'm glad that this kind of talent has
13 been brought to bear on this subject, because it
14 needs it.

15 So, unless you have any questions for
16 me, I just want to say thanks.

17 CHAIR MARKOWITZ: Thank you.

18 MEMBER GRIFFON: Okay, good afternoon
19 and good luck.

20 CHAIR MARKOWITZ: Our next speaker is
21 Donna Hand, who has requested time to speak
22 today.

1 MS. HAND: Long days. I would like to
2 briefly, you know, go through what we went
3 through today.

4 OWCP will consider, okay, this doesn't
5 mean it's mandated and everything, the nature,
6 frequency and duration, evidence of carcinogenic
7 or pathologic properties and an opinion of a
8 qualified physician with expertise and any other
9 evidence that demonstrates the relationship
10 between a particular disease and a toxic
11 substance.

12 You can consider it, but you don't
13 have to have all of it. If one, two or three of
14 it is enough to get that case through, then that
15 should be it.

16 In the original gears in 2005, 2006,
17 2007, 2008 and 2009, the SEM would list all the
18 toxic substance at the site, and then it also
19 lists, let's just say pulmonary disease. I lists
20 -- I think in the very beginning it had 32 toxic
21 substances that had a known causal relationship
22 to COPD.

1 I called up Paragon, Mr. Stainaker,
2 and I said, "Okay, if it's in SEM and there is a
3 toxic substance and it's linked to a pulmonary
4 disease, does it need to go any further?" He
5 said, "No. We have found the causal link."
6 That's it.

7 We do not do aggravation. We do not
8 do contributing to. That's it, and in the
9 beginning, the only time it went to a DMC at that
10 time was if you did not have a diagnosis. You
11 know, you couldn't read the medical reports.
12 That's the only time it went there. The case
13 examiners were making the decisions, and they --
14 you know, so they were able to do it.

15 Now, there seems to be a micro-
16 management type thing coming down, and the Site
17 Exposure Matrix now has gone into the advanced
18 Site Exposure Matrix, and you can go to a labor
19 category and it shows the toxic substance for
20 that and it shows also a building that that labor
21 category worked in.

22 You go to that building where that

1 labor category worked in, there's more toxic
2 substances. You go to that process that that
3 labor category worked in, there's more toxic
4 substances, that wasn't exposed underneath the
5 labor category.

6 Remember, the statute said 'arose out
7 of and due to work-related'. It doesn't go to
8 just, you know, labor categories, and the labor
9 categories in this industries, which is the
10 nuclear weapons industry, is very, very unique.

11 They have expeditors. What's an
12 expeditor? He'll follow the product around,
13 making sure how much time do we have to do. They
14 had to write their own manuals, okay, how much
15 time can you spend a year? You know, now, can we
16 -- you know, quality assurance. Quality
17 assurance followed the whole product through the
18 whole thing, and even today, there's still
19 classified products and classified processes,
20 that cannot be told.

21 So, how can you have an IH say, "Okay,
22 yes, they were exposed to this," when you don't

1 even know what it was? You know, and you can't -
2 - even if they say, "Okay, we can tell you that
3 uranium was involved in this classified process,
4 but we can't tell you the quantity."

5 We can tell you that plutonium is
6 involved in this process, but we can't tell you
7 the quantity. If you don't know the quantity,
8 how do you know how much exposure?

9 As far as claimants are not notified
10 when their file is sent to an IH or a CMC, so,
11 therefore, they're not notified to add in
12 additional information. The only thing they get
13 is the development saying, "This information is
14 not sufficient. We need more information."

15 I sent you my work records. I sent
16 you my medical. You know, so what more
17 information you need?

18 I had a case that was sent to an IH
19 that was from the Pinellas Plant, which closed in
20 1997.

21 Okay, and so, this worker was there,
22 two years at an IH because of that 1995 memo. I

1 had a fight to get it out of that IH. You don't
2 -- and you -- they admitted today, there is no IH
3 records. DOE admits, we don't have IH records,
4 and some of these facilities, similar to the
5 Kansas City Plant, they're tile floor wasn't tile
6 floor. It was wood. It was -- and they had to
7 creosote it every so often. It was all open.

8 Then now, you've got GSA workers,
9 specifically the maintenance workers, would come
10 in because the furnace was all on the DOE side
11 and they'd have to share fixing things.

12 So, you've got air filters,
13 conditioners, everything that's being crossed
14 over through, and plants, environmental plants,
15 especially close out tiger team report,
16 environmental reports, and then I would also go
17 to the Atomic Museum in Las Vegas look up records
18 there, at my own expense, and obtain employment
19 exposures, because this is what they had to do
20 for the neutron generator. This is what they had
21 to do for the neutron tube.

22 They had to blow their own glass.

1 They had steel beds for the milli-tritides. They
2 metalized. You can look at pictures of a worker,
3 the soldering. They're the Kansas City Plant, in
4 a little cubicle. Everything else was open.

5 So, if this information is there, and
6 it's researched and an advocate usually has to
7 find it for the worker, and give it to Department
8 of -- we can't -- we can't establish exposure.
9 We have to send it to an IH.

10 Then hypertension. I got one claimant
11 approved for hypertension. She has a picture of
12 her working there with lead, soldering lead. All
13 the rest of the ones that are also working with
14 lead, and in fact, after a chelation has even
15 lead in their bodies still, denied.

16 I had the same district office
17 consultant, or DMC, out of the Jacksonville
18 office state that a non-Hodgkin's lymphoma will
19 be caused by benzene for a male worker at the
20 Pinellas Plant and a male worker at the Savannah
21 River.

22 But the two female workers who were

1 also diagnosed with non-Hodgkin's, and also
2 exposed to benzene are denied, and it's the same
3 physician.

4 I have where, just because uranium
5 caused kidney disease at Savannah River, doesn't
6 mean it's going to cause kidney disease at Oak
7 Ridge.

8 If you have trichloroethylene that
9 caused kidney cancer, doesn't mean it's going to
10 cause chronic kidney disease.

11 You know, you have Camp Lejeune people
12 just drinking the water for trichloroethylene,
13 where these workers bathed in it. You have, you
14 know, acute exposures from the World Trade
15 Centers, and you have presumptive diseases, and
16 that was acute exposures. We're talking about
17 chronic exposures.

18 I want to speak about the wage loss
19 for medical evidence you needed to establish it.
20 It doesn't make sense, if you're already accepted
21 a covered illness, then you've accepted that he
22 was exposed to a toxic substance that caused that

1 illness.

2 So, if you accepted that he caused
3 that illness, that person could no longer do that
4 same job and continue being exposed to that same
5 toxin. He would have to change jobs or he would
6 have had to quit, early retirement, because you
7 should not keep on exposing him to that same
8 toxic substance.

9 But yet, you want to have a trigger
10 month and you want to have medical evidence. I
11 even sat down with a physician. We did exactly
12 what Department of Labor wanted, and did the
13 medical evidence for wage loss. Still denied.

14 Spent \$3,000 of our own money to a
15 physician in Chicago. This doctor was a lawyer,
16 industrial hygienist, and also wrote four books
17 on heavy metal toxicity, so he was an OCC doctor.

18 Is there a link? Is there a substance
19 -- toxic substance that will aggravate,
20 contribute to or cause ulcerative colitis and
21 colon polyps?

22 He looked, researched. Inorganic

1 solvents will, and there are several studies. He
2 included the studies. Ms. Leiton wrote back.
3 Even though his credentials are great, he wasn't
4 specific. So, we can't grant it.

5 I called up the doctor and I said --
6 he said, "As a lawyer, no doctor is going to say
7 that." No doctor is going to tell you what
8 specific chemical will do it.

9 But as the medical doctor, I need more
10 money, because I'm going to do more research.

11 These claimants don't have it. You
12 know, so, we do need a -- as one suggested, a
13 triage. Okay, if it's this, this and this, go
14 ahead and give it to them. If it's more
15 difficult, then yes, give your complex cases to
16 the IH, to the CMC's. But if it's a very simple
17 -- and that's what Congress' intent was, timely,
18 uniform, Administrative Procedure Act, timely,
19 consistent, and that's not what we're having.

20 Here, what, ten years after the last
21 amendment. Two-thousand-six was our final
22 regulations for Part E, and 10 years, and we're

1 still having problems with it. It really doesn't
2 make sense, and it's not fair to these workers,
3 nor their families now, because we're running
4 now, for Pinellas, we've got 600 workers passed
5 away, and out of that 600, 350 of them filed
6 claims and were denied. That's just one
7 facility.

8 I have represented claimants all the
9 way across all the facilities, and we just -- you
10 know, thank you, thank you, thank you for being
11 here, but again, simplified, uniform and I think
12 even during the Congressional Committee reports
13 at the very beginning of this program, there was
14 a -- either a representative or a Senator. He
15 said -- he's an Administrative Law Judge, he
16 said, "Working comp cases are very difficult."

17 Do not make that hurdle difficult for
18 these workers, and everyone agreed. A bipartisan
19 said, "We will not make this hurdle difficult."

20 So, if you're making the medical
21 evidence to be specific, you're making toxic
22 exposure specific, that's ridiculous, and the

1 Paper Reduction Act needs to come in there,
2 because you're making a lot of paperwork.

3 The Federal Employee's Compensation
4 Act was just amended, the regulations were, and
5 they have a new form now too. There is CE -- CA-
6 35, and it says, "Occupational disease or
7 illness," and they have a set check-off plant.

8 The very first step is for the worker,
9 the claimant, to do a little history and it's
10 very -- and the very end of it, then after the
11 history, it goes to the doctor later on, and then
12 at the end it says, "The nature of exposure, was
13 it primary, secondary, intermittent or
14 environmental?"

15 Then the degree. Was it heavy,
16 medium, light or ambient, and the frequency,
17 hours per day. But you just check it off. Very
18 simple.

19 You know, so, why can't it be tweaked
20 to meet this program? You know, the occupational
21 history interview, I don't know. I don't know.
22 I tell all my claimants, "If you don't know, say

1 'unknown'," because believe it or not, those
2 chemicals were there.

3 The two chemicals in Agent Orange, one
4 of them -- one of them though -- one tri-
5 something or other, was in every single facility,
6 and you got cadmium and cadmium compounds. You've
7 got cadmium-109, which is a radioactive compound.

8 So, radiation needs to be addressed
9 under Part E, as well, because the site exposure
10 matrix lists radiation as a toxic substance. The
11 12th Federal report of carcinogens lists
12 radiation, ionizing radiation as a carcinogen, as
13 a toxic substance.

14 Underneath the definition of this Act,
15 it's a toxic substance. So, if it's a toxic
16 substance, at least as likely as not, less than
17 50 percent, more than suspicion, because we know
18 that it will aggravate, contribute or cause cell
19 damage. We know that there is cancer at Stage 0,
20 which is what? At the very, very beginning. It
21 doesn't have to be evasive cancer before they
22 should be underneath this program, and even the

1 BEIR VII and V report even, has stated it will
2 cause benign non-cancer diseases and illnesses.

3 So, you already have all these other
4 Advisory Boards, listing all these illnesses,
5 known to these toxic substances, known to these
6 other work industries. Why are we -- you know,
7 start again at the wheel. Thank you.

8 CHAIR MARKOWITZ: Thank you very much.
9 Next, I should say for people on the phone, if
10 you want to participate in the public comment or
11 make a comment, please let the moderator know.

12 Our next speaker will be -- the last
13 one present will be Stephanie Carroll.

14 MS. CARROLL: Thank you. Okay, well,
15 as you know, I know all about beryllium disease,
16 so I have a lot to say about it.

17 One thing that was under your purview
18 to review was page 32 of the new regulation on
19 chronic beryllium disease, and I just want to go
20 over it, in hopes that someone -- you know, I
21 truly do object to the fact that you don't have
22 more time to comment on these rules, because I

1 think this is very important, and it is changing
2 the intent of Congress and the Act.

3 So, the intent of these changes seem
4 to make it next to impossible for BE workers that
5 meet the previous criteria, previous to these
6 changes, in line with the Act, to be approved.

7 Already, it is very difficult to be
8 approved for an established beryllium illness in
9 this program.

10 I started at page 28, because there
11 was an issue there, but and it's the basis for
12 this statement. Let's see, page 2830.114(c).

13 OWCP will evaluate evidence in
14 accordance with recognized and accepted
15 diagnostic criteria used by physicians, I agree,
16 to determine whether the claimant has established
17 the medical condition in accordance with the Act.

18 You do not have to be diagnosed with
19 chronic beryllium disease or diagnosed with
20 beryllium sensitization, to meet the criteria
21 that's been established by the Act. That is so
22 important, and I think it's very difficult for

1 claims examiners even, to understand what that
2 means.

3 So, when a doctor says, "This person
4 does not have chronic beryllium disease," that in
5 no way should affect a claim examiner's review of
6 the case and understanding that the person has
7 met the diagnostic criteria, set out by Congress,
8 and the whole reason for the EEOICPA in the first
9 place.

10 So, but they just -- they can't put
11 those two things together. A doctor says, "You
12 don't have the disease, but I'm supposed to
13 approve you for beryllium disease." So, it just
14 doesn't happen.

15 Let's see. On page 28, 30.114(b)(3).
16 Okay, this is a change not intended by the Act.
17 It was the only -- it was only consequential
18 injuries that ever required a fully rationalized
19 report to approve the condition.

20 The addition of this requirement for
21 all covered illnesses is not in line with the
22 Act, and allows for CE's to judge the validity of

1 a physician's opinions.

2 Example, I had somebody with chronic
3 beryllium disease for many years. He had signs
4 of pulmonary hypertension. They wouldn't accept
5 that the pulmonary hypertension was secondary to
6 chronic beryllium disease.

7 I had to get a UCLA professor of
8 medicine, he was a cardiologist, write a two page
9 report, describing how chronic beryllium disease
10 could possibly lead to pulmonary hypertension.

11 This refusal to accept pulmonary
12 hypertension related to chronic beryllium
13 disease, pneumoconiosis or any other lung
14 diseases at this point is a cost saving measure.
15 They're trying to reduce the cost of treating
16 pulmonary hypertension, and we all know where
17 pulmonary hypertension leads.

18 So, right about now, it's been about
19 the last year or so, they've done everything they
20 can to refuse pulmonary hypertension.

21 In the procedure manual, there used to
22 be a list of pretty much, accepted conditions

1 related to chronic beryllium disease. They
2 definitely didn't require a well-rationalized
3 medical report from a UCLA professor of medicine
4 and cardiologist to describe how pulmonary
5 hypertension and cor pulmonale, let's see, what
6 else is -- well, see, those, I think that's a
7 pretty good point right there. I think you can
8 all agree that it's not much of a leap to go into
9 those two conditions from chronic beryllium
10 disease.

11 But it's this well-rationalized letter
12 that's going to really get the workers. It's
13 scary, what's happening.

14 So, for covered beryllium illnesses
15 under Part B, medical evidence is set forth in
16 30.207 page 31, and that is also under the
17 purview of the Board.

18 Okay, so, written medical
19 documentation is required in all cases to prove
20 that the employee developed a covered beryllium
21 illness. I just wanted to point that out, and
22 the 30.207 that they -- it looks like they added,

1 "How does a claimant prove a diagnosis of a
2 beryllium disease covered under Part B?" Seems
3 like an innocuous question.

4 What it should read is, "How does a
5 claimant prove that the employee developed a
6 covered beryllium illness?"

7 When they changed the language to,
8 "How does a claimant prove a diagnosis of a
9 beryllium disease covered under Part B," they are
10 now leading us into believe that it is a disease
11 that has to be diagnosed by a physician and now,
12 it doesn't have to just meet the Act's
13 requirements.

14 So, now, there are -- they're
15 massaging us into page 32.

16 Okay, so, okay, did that. Got it.
17 Okay, so, now, I'm on page 32, one, two, two --
18 it looks like D, where they added some language.

19 OWCP will use certain -- or will use
20 criteria in either of these paragraphs of this
21 section to establish the employee developed
22 chronic beryllium disease as follows.

1 It's not developed chronic beryllium
2 disease. It's established a beryllium illness.
3 That's from the Act, but when they describe it
4 this way, it becomes an illness that has to be
5 diagnosed by a doctor.

6 Okay, so now, if you just go down to
7 number two, this is referring to Part B, or not
8 Part B. This is referring to post '93 CBD. The
9 Act has laid out exactly what is needed for that.

10 Now, they've added something else to
11 the Act, another requirement. I don't know how
12 they were able to do this, but number two says,
13 "If the earliest dated medical evidence shows
14 that the employee was either treated for or
15 diagnosed with a chronic respiratory disorder, on
16 or after '93, the criteria set forth in paragraph
17 C1 of this section must be used."

18 Oh, that's interesting. Now, you have
19 to have -- have been treated or diagnosed with a
20 chronic respiratory disorder, before you can even
21 get close to meeting the Act's requirements to
22 establish a beryllium illness, which is establish

1 chronic beryllium disease.

2 They have added to the Act, that you
3 must have been treated or diagnosed with a
4 chronic respiratory disorder.

5 Now, you know most of my clients have
6 been, but to change the requirements of the Act
7 and actually add another requirement, that should
8 be listed in the Act, that is scary. I cannot
9 believe they're doing that.

10 So, if you go back -- just to the top
11 of the page, diagnosis after '93, you have to be
12 beryllium sensitized, and you have to have a lung
13 biopsy, showing granulomas. This is very
14 important, or a lymphocytic process consistent
15 with CBD.

16 Dr. Lee Newman was contracted to help
17 claims examiners determine when they look at a
18 biopsy report, if the lymphocytic process
19 consists of a CBD and the Act, actually exist.

20 So, when they see specific things on
21 the pathology, like a positive BAL,
22 lymphocytosis, which the numbers of lymphocytosis

1 just willy-nilly go up and down in the procedure
2 manual.

3 It used to be for 14 or 15 years, 10
4 percent lymphocytes on lavage was enough to
5 qualify for a lymphocytic process consistent
6 with.

7 They just decided to change it because
8 a CMC said that he didn't agree with that number,
9 and so, Dr. McTier did her investigation, but in
10 her investigation of that requirement, of 10
11 percent, which hundreds of people hopefully were
12 approved based on, now this one claimant is not
13 going to be approved. She said there was nothing
14 in the procedure manual talking about the
15 lymphocytosis numbers.

16 Well, that's funny. Dr. Lee Newman
17 actually describes it. It's peer reviewed. It's
18 got the footnotes and all references, and he
19 determined 10 percent lymphocytes was enough to
20 express a lymphocytic process consistent with
21 CBD, and I have one claim based on that.

22 Now, if somebody doesn't have me as

1 their authorized rep, there is no way at 14
2 percent lymphocytes positive BAL, CT, PFT's,
3 everything else, they'd be able to get approved.
4 They just won't.

5 CHAIR MARKOWITZ: One more minute.

6 MS. CARROLL: Okay, and then a CT scan
7 showing changes, that's fine. Pulmonary function
8 test and exercise test showing pulmonary deficits
9 consistent with chronic beryllium disease.

10 Right now, they do want a doctor to
11 say it's consistent with CBD. I don't believe
12 that the Act required that. It's if you have
13 obstruction, restriction and mixed process or
14 other issues that are showing that you have --
15 that you have pulmonary deficits. That should be
16 enough, and I think that's what Congress meant.

17 So, I would just please, for all of my
18 workers and so many beryllium workers out there,
19 and people that are suffering through all the
20 monitoring and never being diagnosed with CBD, if
21 someone on this Board could make comments on this
22 section, it would really help.

1 I know that my comments are not going
2 to be -- I don't think as respected as comments
3 coming not from the Board, but from people on the
4 Board, it would make a big difference.

5 So, thank you, and if anybody ever has
6 any questions or wants any data on chronic
7 beryllium disease and beryllium workers, I've got
8 150 cases full of treating and site records and
9 exposure records, and I'd be happy to share it
10 with researchers. Thank you very much.

11 CHAIR MARKOWITZ: Thank you. So, our
12 next speaker is by phone. If the moderator could
13 make contact with Madeline Caudill, who has
14 requested five minutes.

15 OPERATOR: She has dialed in at this
16 time.

17 CHAIR MARKOWITZ: Okay, so, moderator,
18 is anyone else by phone requested time?

19 OPERATOR: I don't have anyone cued
20 up. But again, if you have a comment, you may
21 press Star-One, and that will bring you into the
22 queue for your comment, and we'll stand by.

1 CHAIR MARKOWITZ: And I should tell
2 you, if there is anybody else who is actually
3 present in the room and would like to make a
4 comment, you're welcome at this time.

5 So, speaking to the moderator, if you
6 could let us know in the next minute or so,
7 whether anybody else has requested time, I'd
8 appreciate it.

9 OPERATOR: Will do, and again, we're
10 standing by. If you have a comment from the
11 phone, it is Star-One.

12 CHAIR MARKOWITZ: Okay, so, it seems
13 that no one else has additional comments. So,
14 this will be the end of the public comment
15 period. Thank you very much.

16 So, we will now return to our
17 discussion of the proposed rule changes, and
18 which means that we need to bring up on the
19 screen, if you can go back -- we're going back
20 actually, to the three issues that we already
21 discussed yesterday, and we actually have drawn
22 up some proposed language.

1 So, we've had time to think about
2 those, and we're going to review them again and
3 vote on them. So, going back to number one.

4 This is on page -- it's 232(a), page
5 40. I'm sorry, 231(a). It relates to proof of
6 employment.

7 So, let me just say to satisfy the
8 request of my specifying the connection between
9 these proposed rule changes for the next three,
10 and the scope of the Board, that proof of
11 employment, proof of toxic exposure and proof of
12 diagnosis that's relevant to the exposure are all
13 covered within certainly, our Tasks A, B, C and
14 D, I think. So, just to specify that.

15 Does someone want to read this? This
16 is the language we drew up yesterday. I'm sorry,
17 read this out loud.

18 MEMBER CASSANO: Your designated
19 reader will comply here.

20 Thirty-point-two-three-one (a) proof
21 of employment, it's on page 3940 for anyone that
22 can't read the board.

1 "The Board finds that the proposed new
2 language is vague and contradictory. The Board
3 notes that the proposed new language contradicts
4 Section 30.111(c) in a manner that limits the
5 value of affidavits."

6 "If the goal is to increase the
7 likelihood that affidavits are valid, then
8 guidelines on what elements need to be included
9 in an affidavit should be issued to clarify the
10 claimant's task of proving an employment history
11 in the absence of other evidence."

12 "The Board recommends that the
13 proposed rule changes not be made."

14 CHAIR MARKOWITZ: Okay, so, we're open
15 to comments now, discussion. Dr. Boden?

16 MEMBER BODEN: I move that the Board
17 accept the comment as written.

18 MEMBER CASSANO: Second.

19 CHAIR MARKOWITZ: Okay, so it's open
20 to discussion. Dr. Welch?

21 MEMBER WELCH: One of the things I had
22 wanted to do was -- this same language appears in

1 other places.

2 So, it appears in -- and I guess we're
3 going to discuss it in the next section.

4 CHAIR MARKOWITZ: Right.

5 MEMBER WELCH: So, we want to make
6 sure that those two are consistent with each
7 other.

8 CHAIR MARKOWITZ: Right, okay, good
9 point.

10 MEMBER WELCH: And maybe we should --
11 can we look at the 12(b) before we --

12 CHAIR MARKOWITZ: That's a good point.

13 MEMBER WELCH: And now, it's up on the
14 screen. I think so. I mean, I think we can -- we
15 can't really see them together, unless you make
16 the text smaller, but -- good, I think we can,
17 actually.

18 CHAIR MARKOWITZ: Okay. So, Dr.
19 Cassano, could you just read out loud --

20 MEMBER CASSANO: The second one?

21 CHAIR MARKOWITZ: Yes, it's
22 30.11(2)(b), right.

1 MEMBER CASSANO: Right, 30.11(2)(b)
2 evidence of covered employment, it's on page 27.

3 "The Board proposes the following
4 language for this section."

5 "If the only evidence of covered
6 employment is a written affidavit and declaration
7 subject to penalty of perjury by the employee,
8 survivor or any other person, and DOE or another
9 entity either disagrees -- either disagrees with
10 the assertion of covered employment or cannot
11 concur or disagrees with the assertion of covered
12 employment, then OWCP will evaluate probative
13 value of the affidavit under Section 30.111."

14 PARTICIPANT: I don't think the
15 microphone was on.

16 MEMBER CASSANO: I guess I have to re-
17 read it? Sorry. Section 30.11(2)(b) evidence of
18 covered employment on page 27.

19 "The Board proposes the following
20 language for this section." Sub-Item 3.

21 "If the only evidence of covered
22 employment is a written affidavit or declaration

1 subject to penalty of perjury by the employee,
2 survivor or any other person, and DOE or another
3 entity either disagrees with the assertion of
4 covered employment or cannot concur or disagree
5 with the assertion of covered employment, then
6 OWCP will evaluate the probative value of the
7 affidavit under Section 30.111."

8 CHAIR MARKOWITZ: Okay, so, you can
9 see, we tried to conform this second issue, or
10 second item, to the first item, limited by the
11 current language that exists in the second
12 current -- second item, meaning the specific
13 language disagrees or cannot concur or disagree,
14 which is in the current regulation, and not
15 subject to change.

16 So, comments? We should consider these
17 together, I think, because they really are close
18 cousins. Comments? Dr. Welch?

19 MEMBER WELCH: So, the -- what we are
20 in the prior -- in the comment further up, what
21 we're recommending deleting is pretty much, the
22 language that we are proposing for the second

1 part.

2 Now, that's fine, because there is no
3 need to repeat it on subsequent pages, and we can
4 just refer back to that -- that other section.

5 But because we were -- where it says
6 -- if I'm following my -- if my brain is working
7 right.

8 But I -- I still think that the
9 statement -- the discussion we have under the
10 first point that the -- you know, if the goal is
11 to increase the likelihood of affidavits are
12 valued, then guidelines would be helpful.

13 CHAIR MARKOWITZ: Right.

14 MEMBER WELCH: I mean, it's -- it is
15 -- the two are consistent with each other.

16 CHAIR MARKOWITZ: That's right.
17 That's right. I mean, probative -- the probative
18 value term in the second part should refer back
19 to the guidelines that we're recommending in the
20 first part.

21 PARTICIPANT: Okay.

22 CHAIR MARKOWITZ: It should increase

1 the probative value, if the claimant meets the
2 guidelines.

3 Other comments or -- okay, so, we
4 should consider these -- this set -- this really
5 -- of a couple of recommend -- well, really, a
6 single recommendation together.

7 Is there any need to read this out
8 loud?

9 Okay, so, all those in favor, raise
10 your hand. Okay, all those opposed, and any
11 abstentions?

12 So, 15 members of the Board are
13 present all vote in favor of this recommendation.

14 So, next we move to -- it's 30.231(b)
15 which is -- hold on, I'm sorry, 30.231(b) which
16 is proof of exposure to a toxic substance. This
17 is on page 40 of the written version of the
18 proposed rule changes.

19 Does anybody need to see on the
20 screen? Maybe we should just place for a moment
21 -- if you could place for a moment, 231(b) on the
22 screen, mostly for the attendees who don't have

1 the book in front of them.

2 So, to summarize, we don't really need
3 to read this. To summarize, these -- this
4 regulation addresses the sources that OWCP will
5 use to develop a probative thing or obtain
6 probative factual evidence for the purpose of
7 establishing exposure to a toxic substance, and
8 it lists three sources.

9 The first is DOE. DOE former worker
10 program or DOE contractor, essentially. The
11 second is the site exposure matrices and the
12 third is any other entity deemed by OWCP to be
13 reliable.

14 So, if we could now move to our draft
15 recommendation.

16 MEMBER CASSANO: The draft regulation
17 states proof of -- Board recommends that DOL
18 issue guidelines on how OWCP determines
19 reliability of information under this section.

20 The Board recommends that the
21 following language be added to this section in
22 the -- by manner of adding a new number three,

1 number four -- number three and number four.

2 That number three now read,
3 "Occupational history or affidavit obtained from
4 the claimant and/or coworkers," or number four,
5 "Occupational history obtained by a healthcare
6 provider, other than those who are part of the
7 DOE former worker program, or any other entity or
8 source that is deemed by OWCP to provide reliable
9 information to establish that the employee was
10 exposed to a toxic substance at a DOE facility or
11 RECA Section 5 facility."

12 CHAIR MARKOWITZ: Okay, discussion?
13 So, if there is no discussion, can we have a
14 motion?

15 MEMBER CASSANO: Motion to accept.

16 CHAIR MARKOWITZ: And second? So, the
17 motion is to accept this recommendation, and all
18 those in favor? All those opposed? Any
19 abstentions?

20 So, it's 15 members present and 15
21 voting in favor. Very homogenous-minded group.

22 Okay, so, let's move onto the next

1 one, which is establishing diagnosis of covered
2 illness. This is 30.232(a)(1) and (2).

3 MEMBER CASSANO: You have the new --
4 does he have the new language?

5 Okay, just to reiterate what the old
6 -- the proposed language from OWCP was, and this
7 is what the employee must provide to have a claim
8 processed.

9 The language was written medical
10 evidence containing a physician's diagnosis of
11 the employee's covered illness, as that term is
12 defined in Section 30.5(s) and the physician's
13 reasoning for his or her opinion regarding
14 causation, and to any other evidence OWCP may
15 deem necessary to show that the employee has or
16 had an illness that resulted from an exposure to
17 a toxic substance while working at either a DOE
18 facility, etcetera, etcetera.

19 That's not -- okay.

20 CHAIR MARKOWITZ: Okay.

21 MEMBER CASSANO: Yes, there it is.

22 So, new proposed language states -- where did it

1 go?

2 CHAIR MARKOWITZ: It's coming back.

3 MEMBER CASSANO: Okay, sorry. That
4 number one, written medical evidence containing a
5 physician's diagnosis of the employee's illness
6 as that term is defined in Section 30.5, and then
7 Sub-A is if possible, that evidence should
8 contain a statement indicating how/why, let's
9 keep it simple, the physician believes that the
10 employee's illness was caused, contributed or
11 aggravated by the exposure.

12 Sub-Part B says, "If the claimant
13 submits an opinion of a qualified physician, as
14 defined in Section 30.230(d)(3), which provides a
15 rationale for determining that the employees
16 illness was caused, contributed or aggravated by
17 the exposure, then the opinion should be
18 considered probative by OWCP."

19 CHAIR MARKOWITZ: So this -- so, this
20 has some compliment to what we were looking at
21 yesterday, and I'm wondering whether Kevin, you
22 could take the one from yesterday and put it

1 right above this, and see if we need to blend it
2 at all.

3 For instance, right, yes. Yes, that
4 paragraph and -- yes, right up to there, yes. I
5 guess so, yes.

6 I think that we could -- can we remove
7 that --

8 MEMBER CASSANO: Yes, we can remove
9 all that.

10 CHAIR MARKOWITZ: No, no, the first
11 paragraph, right? The question, right, we can
12 get rid of that.

13 MEMBER CASSANO: Yes.

14 CHAIR MARKOWITZ: So, let's now --
15 that's fine there, but let's look at the new
16 language that we've just seen. No, no, scroll
17 down, so we can take a look at the new language
18 first.

19 Well, okay, let me read -- if you
20 could go back up. Let me read the old -- the
21 language we were looking at yesterday, just so --
22 and if you can make it a little bit larger.

1 "The Board recommends that DOL remove
2 the requirement the claimant must produce written
3 medical evidence wherein, the physician describes
4 the 'reasoning' for his or her opinion regarding
5 causation."

6 Now, I'm going to skip over the next
7 paragraph, the italics, that's new. We hadn't
8 seen that yesterday. That was a draft I made to
9 try to address some of the issues, so, I'm just
10 going to stick with what we were doing yesterday.

11 "The Board believes that sufficient
12 expertise and causation of occupational illness
13 is unlikely to be available in DOE communities,
14 and that the time and commitment of physicians to
15 produce such documented report makes this
16 requirement unrealistic and places too great a
17 burden on claimants."

18 Right, so this is -- that's the
19 rationale, right, okay, and then, "In addition,
20 the Board is concerned that any other evidence,"
21 the phrase, "Any other evidence OWCP may deem
22 necessary," is overly broad, unnecessary and may

1 form the basis for adversarial interactions
2 between OWCP and claimants.

3 Okay, so, now, if you can bring up --
4 scroll up, so we can look at the new language.
5 Right.

6 So, I have a question about the (b)
7 where it says, "If a claimant submits an opinion
8 from a qualified physician, which provides a
9 rationale that addresses the core issue of cause,
10 contributed or aggravated, then the opinion
11 should be considered probative."

12 I could imagine instances in which a
13 qualified physician provides a lousy rationale --

14 MEMBER CASSANO: Yes.

15 CHAIR MARKOWITZ: -- and it shouldn't
16 be considered probative.

17 MEMBER CASSANO: But I think the idea
18 of considered probative means that they look at
19 it for probative value, and then they can either
20 accept or reject it.

21 CHAIR MARKOWITZ: So, you mean should
22 be evaluated for probative value?

1 MEMBER CASSANO: Yes. But I think
2 what we were hearing yesterday was that they
3 basically disregarded out of hand, and they're
4 not even looked at for their probative value.

5 So, evaluated for probative value may
6 be better.

7 MEMBER CASSANO: Okay, so, yes, you
8 can take out, Kevin -- if you take out 'should be
9 considered', and or take out 'considered' and
10 just put 'evaluated'.

11 MEMBER WELCH: You could just say 'may
12 be' instead of 'should be'.

13 MEMBER CASSANO: No, then they can
14 turn it -- should be evaluated, may be evaluated
15 --

16 CHAIR MARKOWITZ: Right, it's for
17 probative value, and then take out the -- no --
18 yes, right.

19 MEMBER WELCH: And just the --

20 MEMBER CASSANO: Yes, evaluated for
21 value is just --

22 MEMBER WELCH: Assessed?

1 MEMBER CASSANO: That's why sometimes
2 words end up when you got --

3 CHAIR MARKOWITZ: Another -- this new
4 language omits something that the new proposed
5 regulation addresses, which is on page 41, the
6 new language one, it -- that the claimant must
7 provide "written medical evidence containing a
8 physician's diagnosis of employee's covered
9 illness".

10 So, there, DOE -- I mean, DOL is
11 appropriately requiring medical evidence of the
12 diagnosis, right? Your new language doesn't
13 address that.

14 MEMBER CASSANO: Yes, it does, because
15 it says, "As defined in Section 30.5," and we had
16 a big discussion yesterday about covered illness
17 and the fact that it's a defined term, and that
18 they would have to then -- by saying it's a
19 covered illness, the physician would have to
20 prove that it was a covered illness, and I think
21 the idea was that you wanted any illness under
22 Part E submitted to be at least considered for

1 coverage, correct.

2 CHAIR MARKOWITZ: Okay. So, I would
3 suggest adding after the 30.5(s), an 'and', so
4 it's clear that there are two different pieces --

5 MEMBER CASSANO: Okay.

6 CHAIR MARKOWITZ: -- that are being
7 required, or not required, but the first piece is
8 required and the second piece is if possible.
9 Right there. Yes, right there.

10 MEMBER CASSANO: And?

11 CHAIR MARKOWITZ: Yes, and. Dr.
12 Welch?

13 PARTICIPANT: Should there be a colon?

14 CHAIR MARKOWITZ: No, just adding it.

15 MEMBER CASSANO: Yes.

16 CHAIR MARKOWITZ: Okay. Yes, Dr.
17 Welch?

18 MEMBER WELCH: So, two things, sort of
19 as a friendly amendment.

20 We might want to make (b)(2) instead
21 of (b), because the (a) really relates to the
22 same letter that has the physician's diagnosis,

1 and that refers to a second one.

2 CHAIR MARKOWITZ: Right.

3 MEMBER WELCH: The other thing, and I
4 don't know the answer to this is, the employee's
5 illness as defined in Section 30.5(s), 30.5(s)
6 defines covered illness. So, it has the toxic
7 effect in it.

8 CHAIR MARKOWITZ: Right.

9 MEMBER WELCH: So, you know, it's kind
10 of like I think what we're trying to say is
11 there's both a diagnosis, a medical diagnosis,
12 and then there is the work-relatedness decision.

13 This written medical evidence focuses
14 on the diagnosis --

15 CHAIR MARKOWITZ: Right.

16 MEMBER WELCH: -- of the employees'
17 illness --

18 CHAIR MARKOWITZ: So, would that --

19 MEMBER CASSANO: So, 30 --

20 MEMBER WELCH: -- and necessary --
21 maybe I don't think we should keep in that 'as
22 defined', because then that seems to imply it's

1 the entire covered illness.

2 CHAIR MARKOWITZ: Right. I mean, the
3 -- we could solve that by, in that second line
4 after the one, which says as that term is
5 defined, simply saying the employee's illness
6 that is the subject of the claim, right? That's
7 -- I think that --

8 MEMBER CASSANO: Okay.

9 CHAIR MARKOWITZ: Dr. Friedman-
10 Jimenez?

11 MEMBER FRIEDMAN-JIMENEZ: As I read
12 it, 30.5(s) says that the illness or death
13 resulted from exposure to a toxic substance and
14 doesn't seem to include aggravation or
15 contributing cause.

16 MEMBER CASSANO: Yes.

17 CHAIR MARKOWITZ: Right, right. Yes,
18 maybe --

19 MEMBER CASSANO: That's what we said
20 every time it's mentioned that we --

21 CHAIR MARKOWITZ: Yes.

22 MEMBER CASSANO: It needs to be clear

1 that the -- that they meet the statutory
2 language.

3 CHAIR MARKOWITZ: Right.

4 PARTICIPANT: Because it's mentioned
5 -- that wording --

6 MEMBER FRIEDMAN-JIMENEZ: Are they
7 going to change that? Since it's not part of the
8 changes that are proposed.

9 CHAIR MARKOWITZ: Right, right.

10 MEMBER FRIEDMAN-JIMENEZ: I'm thinking
11 we should just state it outright, rather than
12 referring.

13 CHAIR MARKOWITZ: Right, okay, well
14 that would be a new recommendation, which we can
15 consider after we resolve this.

16 We've gotten rid of the problem here,
17 because we got rid of the reference to 30.5(s)
18 but we can take that up next, actually.

19 So, let's -- the suggestion pending
20 was that we form an Item Number 2, right?

21 MEMBER CASSANO: Instead of (b).

22 CHAIR MARKOWITZ: Right, okay, so, can

1 we do that?

2 MEMBER CASSANO: I'll accept that as
3 a friendly amendment, yes.

4 CHAIR MARKOWITZ: Okay, can you not
5 only accept it, can you create it?

6 MEMBER CASSANO: We can create it.

7 CHAIR MARKOWITZ: Okay, so --

8 MEMBER BODEN: Then there's an (a)
9 without a (b).

10 MEMBER CASSANO: Then there's an (a)
11 without a (b), which is why I did that.

12 MEMBER BODEN: Why not just then, if
13 we're going to make a (2), just have the (a) --

14 PARTICIPANT: Be part of one.

15 MEMBER BODEN: -- be part of one.

16 MEMBER CASSANO: Part of the sentence.

17 MEMBER BODEN: And just not --

18 MEMBER CASSANO: yes.

19 MEMBER BODEN: -- strike the 'and'
20 then and just have the 'if possible', follow the
21 --

22 MEMBER CASSANO: So, claim and if

1 possible, and if possible, if you want to use an
2 Oxford 'and'.

3 CHAIR MARKOWITZ: Okay, okay, okay.
4 So, yes, if -- okay, so, the idea is you take out
5 the "a", right?

6 MEMBER CASSANO: You take out the "a".

7 CHAIR MARKOWITZ: And after the 'and',
8 and comma if possible --

9 MEMBER CASSANO: Yes.

10 CHAIR MARKOWITZ: -- comma, right,
11 okay. Okay, then Kevin, after the 'possible', if
12 you could put a comma, right?

13 MEMBER CASSANO: So, I guess it's not
14 technically an Oxford comma.

15 MEMBER GRIFFON: I hesitate to even
16 raise this question, because I'm worn out.

17 But I mean, this section that we're
18 commenting on, if you look at the header, could
19 be simply reference to covered illnesses.

20 So, even though we're deleting the
21 reference part from that paragraph, that defines
22 covered illness, the whole second phrase is

1 addressing covered illness.

2 MEMBER CASSANO: Well --

3 MEMBER GRIFFON: I don't even think
4 that --

5 MEMBER CASSANO: But I think what
6 they're saying is, eventually it's going to be
7 determined, whether it's covered. So, if you
8 want to establish it as covered illness, you at
9 least have to give them a diagnosis of some
10 illness to be evaluated for covered illness, not
11 that you have to give them a definitively covered
12 illness first, because a lot of people wouldn't
13 know that.

14 CHAIR MARKOWITZ: Right, it's okay,
15 because the proposed change under this 'establish
16 the employee has been diagnosed with a covered
17 illness' is setting out the requirement that you
18 have to prove diagnosis and you've got to prove
19 the causation, essentially, right, or
20 contribution, aggravation, etcetera.

21 That is what the proposed language is.
22 Our proposal is that we agree, you have to prove

1 the diagnosis and that you should consider the --
2 if the physician produces a rationalized report
3 regarding causation, but you don't require it, in
4 order to establish a covered illness.

5 Then obviously there are other -- the
6 CE is including, you know, considering a whole
7 other set of things, the CMC report, the SEM,
8 etcetera, to come to that conclusion. Dr. Welch?

9 MEMBER WELCH: So, as far I could
10 tell, this is the only place in the regulation
11 that talks about making the link to toxic
12 exposure, and Tori and I sort of disagreed about
13 whether to delete the number two, in the proposed
14 language, where it says, "Any other evidence OWCP
15 may deem necessary to show that employee has had
16 an illness resulting from exposure to toxic
17 substance."

18 Because by doing what we did, we're
19 saying that the claimant does not have to provide
20 a rationalized medical opinion on the link with
21 toxic exposure, and then it's implied that that
22 happens in some other way, and maybe that's fine,

1 or maybe we should put in here that then OWCP has
2 to find information to shed light on that
3 question. Do you understand what I'm saying?

4 MEMBER CASSANO: But I think if we put
5 it here, it means that the claimant has to
6 provide whatever other information OWCP may
7 continually ask for, you know, "I want the CT
8 scan. I want the chest x-ray. I want the lab
9 report. I want all of this," to establish this
10 is a covered illness.

11 So, that's why I think it -- it
12 becomes a way to constantly ask for information
13 that the CE may want, not for any real probative
14 reason.

15 You might say that if the above is not
16 available, then OWCP may ask for any other useful
17 information.

18 CHAIR MARKOWITZ: Dr. Friedman-
19 Jimenez, you have something on this particular
20 point or something else? I just want to pursue
21 this discussion -- this -- okay, I'm sorry.

22 MEMBER BODEN: Actually, I have first,

1 something that I can't control myself about, that
2 is incredibly minor, which is that the 'which' in
3 number two should be a 'that'.

4 But aside from that, I do actually
5 have a comment on this.

6 If you look back at the four that was
7 crossed out right above this section, I notice
8 something very interesting. That four -- so,
9 this is directly above the section we're talking
10 about. It's 30.232(a)(4).

11 In that sentence, it talks about --
12 and so, this is what's being replaced by the
13 thing we're talking about.

14 It talks about that the employee has
15 or had an illness, that may have arisen from
16 exposure to a toxic substance, which is really
17 different from that resulted from an exposure to
18 a toxic substance.

19 So, the first one says, "We want
20 evidence to show you that this is kind of in the
21 ballpark of something that we may want to
22 compensate," and the second says that before we

1 proceed, we want something that shows us that
2 this is, and I think those are actually two
3 really different things, and that if we accept
4 something onto that we say deemed necessary to
5 show that the employee may have -- has or had an
6 illness that may have arisen from exposure to a
7 toxic substance.

8 CHAIR MARKOWITZ: So, just to
9 summarize, what he's -- I think you're suggesting
10 is that you actually change the word 'resulted'
11 in item number two, to 'may have arisen'.

12 MEMBER BODEN: Right.

13 CHAIR MARKOWITZ: Yes.

14 MEMBER SOKAS: So, I agree about
15 deleting sub-paragraph two because I think the
16 point of this piece right here is really to show
17 that there is an illness, right?

18 It's not necessarily at this point, to
19 show that there is an illness that's related.
20 You show there is a toxic exposure, then you show
21 there's an illness, and then if -- if you can,
22 under one or two -- you know, (a)(1) or (a)(2)

1 there, link the two, that's great, and it would
2 be helpful if the treating physician can do that
3 or somebody else can do that, but that the burden
4 of doing that does not necessarily fall on the
5 claimant, that the burden for the claimant is to
6 show there is some illness there.

7 Then there are later procedures that
8 can talk about linking the two.

9 CHAIR MARKOWITZ: I'm sorry, Dr.
10 Redlich? Okay, is there a response to Dr. Sokas?
11 Dr. Welch?

12 MEMBER WELCH: Well, I think that in
13 the regulation, I imagine, and I didn't read it
14 thoroughly, so someone should correct me, but I
15 think this is where that relationship is talked
16 about, and it's -- it's not -- and so, it doesn't
17 then say, and the agency has a responsibility to
18 make the determination of causation or work -- by
19 trying to say work-relatedness, because we know
20 what that means.

21 But you know, again, I think I'd have
22 to maybe go through it in more detail, to

1 understand -- even understand how the regulation
2 relates to the processes that are -- I don't know
3 how much has to be specified here or not.

4 So, but it's -- but this section does
5 -- had always -- has always said covered illness,
6 because that was not changed. So, this section
7 was covered illness.

8 But it used to say, if you read the
9 strike through stuff, provide the diagnosis, and
10 then as Les pointed out, provide some information
11 that would suggest that it may have arisen out of
12 employment.

13 CHAIR MARKOWITZ: Well, let me just
14 say that covered illness is two words. One is
15 proving the illness and the other is proving the
16 coverage. So, I think that's what's encompassed
17 by this section. That's the only way it can
18 really be interpreted. Dr. Redlich?

19 MEMBER REDLICH: As just a general
20 statement -- as just a general statement about
21 this whole process.

22 I would like it somewhere -- I feel

1 that it's just inappropriate. This has been in
2 place for years. To suddenly have a rush to edit
3 it, where we don't really understand, it's
4 complicated wording, with all these tracked
5 changes, of who it's actually changing the intent
6 of things, and since a lot of this actually
7 relates to the questions we were asked to
8 address, why you would want to finalize something
9 before we've had a chance to do our homework, and
10 more intelligently address these issues, this
11 just seems out of order and unproductive, because
12 it's going to make something more final, where we
13 haven't even become educated or addressed the
14 questions that we've been asked to address.

15 I don't see what the urgency -- it
16 doesn't sound like claims have been being
17 processed with such great speed, that you know,
18 whether this gets changed now or several months
19 from now.

20 But I'm just confused about this whole
21 process.

22 CHAIR MARKOWITZ: Well, let me just

1 begin to respond just --

2 MEMBER REDLICH: I mean, personally,
3 I would prefer to not comment on this until I was
4 more --

5 CHAIR MARKOWITZ: Right.

6 MEMBER REDLICH: -- up to speed and
7 understood all the issues.

8 CHAIR MARKOWITZ: So, I understand the
9 frustration, and I actually mentioned at the
10 beginning that this was a challenge. The notice
11 of proposed rulemaking has -- is going forward
12 regardless of us.

13 We've been invited to provide some
14 input, some recommendations about the proposed
15 rule changes, which is what we're doing.

16 That train is likely going to move
17 regardless of what we do. So, this is our
18 opportunity.

19 MEMBER REDLICH: So, there isn't an
20 opportunity to delay that rulemaking, that's not
21 possible? I don't know what the rules are. So.

22 CHAIR MARKOWITZ: Yes.

1 MEMBER REDLICH: If it isn't, then you
2 want to make the best of a situation.

3 CHAIR MARKOWITZ: That's what we're
4 doing, I think.

5 MEMBER REDLICH: Okay.

6 CHAIR MARKOWITZ: And I also think
7 that some of these issues, we're going to be
8 visiting, right? As we've been asked to do, over
9 the next period of time, and we'll have more to
10 say, but you know, the proposed rule changes has
11 its own time table. Dr. Welch?

12 MEMBER WELCH: But maybe to make you
13 feel better, there are how many public comments
14 about the website about these rules, 300,
15 something like that?

16 MEMBER REDLICH: Yes.

17 MEMBER WELCH: So, there are people
18 who know more than us, who have commented on this
19 same language.

20 So, in a way, if we're coming out with
21 something similar to 280 of those 300 comments,
22 then we know more than we think we do. You know

1 what I mean?

2 MEMBER REDLICH: I haven't read those
3 comments.

4 MEMBER WELCH: Exactly.

5 MEMBER REDLICH: I haven't done that.

6 MEMBER WELCH: I've only read some of
7 them. So, but --

8 MEMBER REDLICH: But that would be
9 relevant, because I think that there are people
10 who know way more about this than I do, and I
11 would appreciate their input.

12 MEMBER WELCH: Right, and I think --
13 I mean, I think the problem -- what Steve said
14 is, you know, there is a -- there's deadlines for
15 changing -- for regulation --

16 MEMBER REDLICH: That's why I said --

17 MEMBER WELCH: -- and we're stuck with
18 it.

19 CHAIR MARKOWITZ: Having said that, if
20 we feel truly uninformed about a given proposed
21 change, then frankly, we should not provide input
22 because that's not going to be valuable to the

1 process.

2 So, the -- while we might not have all
3 the knowledge and experience we want, we have to
4 have a certain level of comfort with this
5 material in order to be able to provide changes
6 and feel confident that we're being productive.

7 Dr. Dement?

8 MEMBER DEMENT: I guess when our group
9 discussed this, my concern with the changes,
10 there are a lot of changes here.

11 This striking out language has been
12 there for a long time. So, the scenario that I
13 see, that they are shifting from is where I go to
14 a doctor, I have a diagnosis and he says, it may
15 be or could be or it likely is related to work at
16 one of the sites, but it's not at this level of
17 medical written reason report.

18 But the -- the worker still needs the
19 opportunity to file that, to have that case
20 developed through the process over time.

21 I just saw this as completely short-
22 circuiting that and throwing the onus right back

1 on the worker, to have this reasoned report
2 before they get a chance to even develop the
3 case.

4 CHAIR MARKOWITZ: Right.

5 MEMBER CASSANO: And then the language
6 takes that out. The new language --

7 MEMBER DEMENT: It takes it out.

8 CHAIR MARKOWITZ: Right.

9 MEMBER DEMENT: So, my recommendations
10 would be -- why do we need to change language
11 that's already there?

12 CHAIR MARKOWITZ: Yes.

13 MEMBER DEMENT: Just my comment.

14 MEMBER WELCH: I remember yesterday,
15 Faye, didn't you say or someone -- someone on
16 this side of the table was saying you didn't like
17 the old language.

18 So, that would be helpful, because I
19 thought the easiest thing was to go back to the
20 old language, but the -- if there is something
21 wrong with it, we should do that.

22 CHAIR MARKOWITZ: But one solution

1 might be to -- instead of us recommending
2 specific language, which is to express our
3 concern and strong feeling about the problems
4 presented by the new language without necessarily
5 proposing specific language that would replace
6 the proposed --

7 MEMBER REDLICH: I think that's a good
8 approach because there is so many changes in so
9 many places, that we're actually going to find
10 them all and fix them all, so that they're all
11 consistent.

12 I think if we state what our concerns
13 are, that sounds like a good idea.

14 CHAIR MARKOWITZ: So, you want to
15 scroll back up? Sure, I'm sorry.

16 MEMBER VLIEGER: It's taken 10 years
17 to get this bite at the apple. I am really
18 concerned that we're not going to take advantage
19 of it, at least to fix the problems with the
20 employee being required to produce evidence that
21 does not exist in order to establish a claim.

22 CHAIR MARKOWITZ: Thank you. Can you

1 scroll up?

2 MEMBER SOKAS: Can I have a question?

3 CHAIR MARKOWITZ: Sure. Dr. Sokas.

4 MEMBER SOKAS: So, just also a
5 procedural question.

6 I think the other thing that happens
7 when all of the comments are in and it's closed,
8 that in any preamble to any new publication of
9 rules, they have to address the comments that
10 were received and what the determination was made
11 and why, right?

12 So, that all gets done at some point.
13 I just don't know when exactly that gets done.

14 MEMBER CASSANO: I think when they
15 publish the final rule. You don't have a second
16 bite at the apple.

17 MEMBER SOKAS: Okay. What is that
18 time line?

19 CHAIR MARKOWITZ: The time line for
20 the proposed rulemaking?

21 MEMBER SOKAS: Yes.

22 CHAIR MARKOWITZ: I don't -- the

1 comments are closed as of May 9th, I believe, but
2 what happens after -- how long it appears -- the
3 period is after that, I don't know.

4 I don't -- it's not set, I don't
5 think, unless, is there --

6 MR. RIOS: It under-goes a series of
7 reviews.

8 CHAIR MARKOWITZ: Right.

9 MR. RIOS: That are within the
10 department and then over to OMB.

11 MEMBER SOKAS: That's where we get the
12 second bite. We go see OMB.

13 MEMBER WELCH: If you listened to Dr.
14 Michael's this morning, OSHA started the silica
15 rule 18 years ago. So, I mean, there is no --
16 there is no legal requirement to finish it in a -
17 - well, the definition of a timely manner Depends
18 on the eyes of the beholder.

19 So, I mean, this version of the silica
20 rule took -- all the time lines were missed,
21 particularly the OMB part.

22 MEMBER REDLICH: But that's -- there

1 was a lot of industry wanting to delay.

2 CHAIR MARKOWITZ: Okay, so, let's
3 continue here. If you could move the third
4 paragraph to the front -- to the top, and so, it
5 -- no, the one above it, that one, right, just
6 above the -- right. No, no, right below 30.232.

7 So, we start off with our beliefs.
8 The Board believes that sufficient expertise and
9 causation of our case is unlikely to be available
10 in DOE communities, time commitment with
11 physicians to produce such document report makes
12 the requirement unrealistic and places too great
13 a burden on claimants.

14 The Board recommends that DOL remove
15 the requirement that the claimant must produce
16 written medical evidence, wherein the physician
17 describes the reasoning for his or her opinion
18 regarding causation.

19 So, that's -- we're not saying what
20 the language ought to be. We're expressing our
21 clear view on the issue.

22 I think that it -- what's italicized

1 can be removed. Oh, so, yes, it can be removed
2 there.

3 MEMBER BODEN: So, do we also --

4 CHAIR MARKOWITZ: And then we have
5 this additional -- yes, if you could just get rid
6 of that. Thanks, and then additional issue and
7 it -- the Board is concerned that "any other
8 evidence OWCP may deem necessary is overly broad
9 and unnecessary and may form the basis for
10 adversarial interactions between OWCP and
11 claimant".

12 MEMBER BODEN: So, there is where I
13 think my concern about the changing the 'may' to
14 the 'must' or changing the wording 'resulting
15 from' to 'may' to resulting from -- from may have
16 -- arisen from --

17 CHAIR MARKOWITZ: Right.

18 MEMBER BODEN: -- needs to be pointed
19 out.

20 CHAIR MARKOWITZ: Right. Okay. Okay,
21 so, after it says -- after 'claimants', Kevin,
22 keep going down. Right? Next paragraph.

1 The -- the Board recommends that in
2 Section --

3 MEMBER BODEN: I think we should say
4 something that the Board is concerned that the
5 change of language from the -- from the employee
6 has or -- where is it? That may have -- an
7 illness that may have arisen from exposure to a
8 toxic substance, to no --

9 CHAIR MARKOWITZ: Illness that
10 resulted from?

11 MEMBER BODEN: To resulting --

12 CHAIR MARKOWITZ: Right, right.

13 MEMBER BODEN: I'm just looking for
14 the --

15 CHAIR MARKOWITZ: It's number two,
16 line two. Got it?

17 MEMBER BODEN: To show that the
18 employee has or had an illness that resulted from
19 --

20 CHAIR MARKOWITZ: Right.

21 MEMBER BODEN: -- places an extra
22 burden -- an extra, unnecessary burden on

1 claimants.

2 CHAIR MARKOWITZ: To -- an illness
3 that resulted from an exposure to a toxic
4 substance. End of quote.

5 MEMBER BODEN: Right.

6 CHAIR MARKOWITZ: And now, you need to
7 finish the sentence.

8 MEMBER BODEN: Places an unnecessary
9 burden on claimant.

10 CHAIR MARKOWITZ: It's the same
11 sentence, but yes.

12 MEMBER BODEN: Yes.

13 MEMBER WELCH: And maybe it's
14 redundant, but the information about toxic
15 exposure and toxic substances in the current
16 process usually doesn't come from the claimant.
17 They're relying on the site exposure matrix.

18 So, that it's -- this -- maybe we
19 don't have to say anything more than an
20 unspecified -- but the -- a lot -- a lot of the
21 information comes from other sources, the
22 document acquisition request, the SEM and things

1 like that.

2 CHAIR MARKOWITZ: I don't -- that's
3 part of the system. It's handled elsewhere. I
4 don't think we need to address that.

5 I mean, in the previous section, for
6 instance, D, with a list of sources -- so, can we
7 strike the language below that?

8 MEMBER CASSANO: Have we determined --

9 MEMBER BODEN: Let's not strike it
10 yet.

11 MEMBER CASSANO: Yes.

12 CHAIR MARKOWITZ: Yes, yes, no, well,
13 I understand. That's the --

14 MEMBER BODEN: Yes.

15 CHAIR MARKOWITZ: I'm raising the
16 question. I'm not --

17 MEMBER WELCH: The item that's point
18 two, the number two, is not addressed in our
19 comments yet. If we want to add something
20 specific to say that -- or we'll be quiet about
21 that. I think that's worth discussing.

22 I think number one, we've covered,

1 that -- the (a)(1), I think we've covered -- what
2 Kevin just highlighted, I think we've covered
3 that. We've discussed that in our general
4 comments.

5 MEMBER CASSANO: I think --

6 CHAIR MARKOWITZ: Yes, hang on.

7 MEMBER CASSANO: -- the question right
8 now, as I understand it, is whether to just put
9 the concerns in without moving language versus
10 moving language, as well.

11 So, is that a vote at this point or
12 what?

13 MEMBER BODEN: I'd like to hear from
14 the folks who have experience in this, and have
15 concerns about the original language about
16 whether you think it would be better for us to
17 suggest language or to state our concerns.

18 MEMBER WHITLEY: In my opinion, if we
19 don't have time to write the language that we
20 know takes the loop-holes out and makes the
21 claimant have to do a bunch of things to jump
22 through, we'd better be -- be better off to just

1 say what we started to say, that this language
2 needs to be looked at, and we disagree with what
3 they're doing.

4 I don't think that we -- unless we
5 think we can word-smith it to take care of it, I
6 think we'd better off just to show that we're
7 unhappy with it.

8 MEMBER CASSANO: So, you don't think
9 this solves the problem? This language solves
10 the problem.

11 CHAIR MARKOWITZ: You know, I think --

12 MS. POPE: I have a comment.

13 CHAIR MARKOWITZ: I'm sorry, Ms. Pope.

14
15 MEMBER POPE: I am somewhat in
16 agreement with Garry, but I think that if we
17 don't do something, in terms of the language, I
18 don't think it carries as much weight if we just
19 go with putting our recommendations. It just
20 seems like it's a softer approach, opposed to
21 saying that this is what we'd like to see in the
22 language.

1 CHAIR MARKOWITZ: But I -- I don't see
2 where -- the language we're looking at, having
3 this language helps above and beyond, what we
4 have above this, wherein, which we clearly
5 express what we regard as the major problem here,
6 which is requiring, you know, the claimant to do
7 this.

8 MS. POPE: Are you saying in this
9 particular section?

10 CHAIR MARKOWITZ: Right, right, right.
11 You know, can I just ask for some clarification
12 on what number two means, exactly?

13 We're saying what, that OWCP should
14 evaluate the probative value of the physician's
15 rationale? Is that essentially what we're
16 saying?

17 MEMBER CASSANO: Well, if -- what the
18 thinking was, was that you know, if they go
19 through the effort of producing a good -- a
20 medical opinion, with -- from a person with the
21 qualifications that they stipulate in the
22 definitions, that they should at least look at

1 that as potentially probative, rather than just
2 dismissing it out of hand, which is what happens
3 now, because nowhere else in this whole
4 regulation does it state anything about the -- we
5 talked a lot about the fact that the treating
6 physician can't come up with decent -- but if
7 somebody does come up with a decent one, there is
8 nothing that tells the claims examiner, yes,
9 you've got to look at this at least and make a
10 decision as to whether it's probative or not.

11 That's, I guess -- I'm just looking at
12 it from the system.

13 MEMBER VLIEGER: Can we scroll back up
14 to -- can we scroll back up to the previous
15 section and look at the definition of the section
16 and then maybe that will clarify what we're
17 trying to do and not do here?

18 CHAIR MARKOWITZ: So, you want to go
19 back to the proposed rules?

20 MEMBER VLIEGER: No, I just -- the --

21 CHAIR MARKOWITZ: Okay, okay.

22 MEMBER VLIEGER: What we're proposing

1 above.

2 CHAIR MARKOWITZ: Okay.

3 MEMBER VLIEGER: So, 232, the section
4 itself. How does a claimant establish that the
5 employee has been diagnosed with a covered
6 illness?

7 So, there we're establishing the
8 criteria of how to make the diagnosis.

9 MEMBER CASSANO: No, we're
10 establishing what you have -- what a claimant has
11 to provide, and right now, it says they've got to
12 provide all this other stuff, including the
13 rationale, that there is a change in there, and
14 we're changing it back to no, all they need to
15 provide is the physician's diagnosis, and oh, by
16 the way, if there is reasoning or if there is a
17 medical opinion, then you have to provide that.

18 MEMBER VLIEGER: Okay, and then the
19 second section changes this requirement how,
20 where it's saying we're going to consider what
21 the physician statement is that's provided by the
22 employee?

1 MEMBER CASSANO: If it's -- you know,
2 I think let's -- I don't know.

3 What we're saying is that if -- on
4 their definition of a qualified physician, there
5 is a rational opinion that they -- you told us
6 yesterday that it was -- they just -- they don't
7 even look at it but --

8 MEMBER VLIEGER: But with the
9 qualifier at the bottom that says this will be
10 considered -- let's go back down, where you're
11 saying let's look at it as whether it's probative
12 or not, still has the option of being thrown out
13 in its entirety.

14 MEMBER CASSANO: Well, it could be a
15 lousy rationale.

16 MEMBER VLIEGER: Right. But assessed
17 for probative value, I think should be considered
18 probative, unless it doesn't meet the
19 requirement.

20 MEMBER CASSANO: Well, that is what
21 the original language was, considered probative.

22 CHAIR MARKOWITZ: Yes, no, I don't

1 think --

2 MEMBER VLIEGER: I don't think we're
3 going to be able to fix this in one paragraph.

4 CHAIR MARKOWITZ: Yes, I don't think
5 you could say it's by default, the default is
6 that it's -- it's probably a tremendous variation
7 of these physician reports, but we could -- if
8 you go back up, we could address this by saying,
9 at the end of the second paragraph, where -- the
10 second sentence where it says, "The Board
11 recommends that DOL remove the requirements," you
12 could add a sentence -- you don't have to write
13 this yet.

14 But that the Board recommends that if
15 the claimant produces a report that addresses
16 causation, aggravation, contribution, that the
17 Board assess this report for its probative value.

18 In other words, put in something to
19 address the same point, but not give the
20 particular language.

21 MEMBER CASSANO: Yes, so, take number
22 two from the language and put it up there to

1 recommend, that would do it.

2 CHAIR MARKOWITZ: Okay, so, if we
3 could just scroll down, yes. No, not -- number
4 two, and then bring it up and then we're going to
5 --

6 MEMBER CASSANO: You could say the
7 Board recommends that.

8 CHAIR MARKOWITZ: Where? So, right
9 there, right there, yes.

10 MEMBER CASSANO: And then put the
11 Board will also recommend.

12 CHAIR MARKOWITZ: So, the Board --
13 that's actually just dropped in there. Before
14 the 'if', you could say, "The Board recommends."
15 Right.

16 MEMBER CASSANO: I changed that back.

17 CHAIR MARKOWITZ: Okay, we're not
18 there yet. We're not there yet. We'll save
19 that. We'll save that for last, yes. Dr.
20 Silver?

21 MEMBER SILVER: When we were word-
22 smithing too, a little while ago, 'may' was

1 changed because people thought it was too wimpy,
2 to 'should'.

3 In fact, the opposite of 'may' in
4 regulation and legislation is 'shall'. So, let's
5 go all the way. We're just recommending that it
6 'shall'.

7 MEMBER CASSANO: Yes, I'd like to use
8 'shall' a lot.

9 MEMBER SILVER: Yes.

10 MEMBER CASSANO: Yes.

11 MEMBER SILVER: Throw it in there.

12 CHAIR MARKOWITZ: I'm sorry, what is
13 the specific suggestion?

14 MEMBER SILVER: At the very end --
15 where did it go?

16 MEMBER CASSANO: Shall be assessed.

17 MEMBER SILVER: Shall be assessed,
18 rather than should.

19 CHAIR MARKOWITZ: Okay.

20 MEMBER CASSANO: But 'shall' is more

21 --

22 CHAIR MARKOWITZ: Okay, no, hold on.

1 MEMBER SILVER: Aim higher, like our
2 union friends.

3 CHAIR MARKOWITZ: Yes, but just to be
4 clear, we're not -- we're not writing the -- the
5 proposed changes. We're expressing our point of
6 view. So, 'shall' or 'should be' is fine.

7 Can we now get rid of -- if we go --
8 scroll down, Kevin.

9 MEMBER CASSANO: Get rid of that line.

10 CHAIR MARKOWITZ: Yes, (a)(2) and (3),
11 right, those go? Okay, yes.

12 MEMBER CASSANO: And (a) as well, yes.

13 CHAIR MARKOWITZ: Yes. Okay, and you
14 can get rid of -- delete that paragraph too,
15 whatever that was.

16 (Simultaneous speaking.)

17 MEMBER WELCH: So, the sub-paragraph
18 two was the one that said OWCP can ask for
19 anything that has an illness resulting from
20 exposure. So, we addressed that.

21 CHAIR MARKOWITZ: We already addressed
22 that.

1 MEMBER WELCH: The illness resulting
2 from exposure, did we? Did we?

3 MEMBER CASSANO: It's down below. The
4 very last sentence. It might be gone already.

5 MEMBER WELCH: Yes, there it is.

6 MEMBER CASSANO: Is it completely
7 gone? There was a little tag sentence at the
8 end. Yes, it's gone.

9 CHAIR MARKOWITZ: Okay, so, now you
10 can -- yes, you can get rid of the one. If you
11 scroll up, we might be able to see the whole
12 thing now. Okay, okay.

13 Okay, okay, so, yes, that's fine. So,
14 there's a motion to approve this. Any second?
15 Yes. Comments? Dr. Redlich?

16 MEMBER REDLICH: When we're done with
17 this one.

18 CHAIR MARKOWITZ: Okay.

19 MEMBER REDLICH: I just needed
20 clarification.

21 CHAIR MARKOWITZ: Okay.

22 MEMBER REDLICH: On something.

1 CHAIR MARKOWITZ: Okay, sure. So, any
2 further comments about this?

3 Okay, so --

4 PARTICIPANT: Can we take one minute
5 for just background on this?

6 CHAIR MARKOWITZ: No, I'm sorry, no.
7 No, that's not allowed. Public comment period is
8 over. Okay, so, any other -- okay, so, we're
9 going to take a vote.

10 All those in favor of this
11 recommendation? Raise your hand. All those
12 opposed? All those abstaining?

13 So, it's there are 15 members present
14 and all vote in favor of this recommendation.
15 Dr. Redlich?

16 MEMBER REDLICH: So, I just need some
17 -- okay, I just need some clarification of our
18 task.

19 In particular, since the committee
20 addressing the issues related to beryllium and
21 lung disease, so --

22 CHAIR MARKOWITZ: I'm sorry, can I

1 just interrupt for one moment?

2 MEMBER REDLICH: Yes.

3 CHAIR MARKOWITZ: There was a -- a
4 request, I think either you or George, to one
5 final issue on the proposed changes, that we
6 wanted to address, which was where -- we're
7 making consistent, in where possible in the
8 regulation, that causation actually refers to
9 aggravation, contribution and causation, that we
10 -- that's the way that we understood.

11 Is this something that we want to --
12 to --

13 MEMBER REDLICH: Yes.

14 CHAIR MARKOWITZ: Okay.

15 MEMBER REDLICH: Yes.

16 CHAIR MARKOWITZ: Okay, so, if we
17 could just handle that, and then get back to this
18 issue.

19 This is a brand new recommendation.
20 There is no language yet for this.

21 MEMBER REDLICH: Not for this
22 specific.

1 CHAIR MARKOWITZ: Right. Yes, this is
2 -- yes, if you could put this into the other
3 draft recommendations.

4 Okay, so, yes, you can take that out.
5 You can take that out. Right. Yes, yes, right
6 there. Okay, okay.

7 So, can someone propose some language
8 here? Okay, okay, yes.

9 MEMBER WELCH: Well, it's right in the
10 middle of the screen. It's close to what we are
11 talking about, right?

12 CHAIR MARKOWITZ: Right.

13 MEMBER REDLICH: Is this the statutory
14 language?

15 CHAIR MARKOWITZ: That's being quoted
16 here? No, this is from the regulations.

17 MEMBER BODEN: So, I'm thinking the
18 first sentence, the Board notes the frequent
19 references in the regulations to "diseases caused
20 by toxic substances".

21 The Board also notes that -- the Board
22 notes the frequent references in the proposed

1 regulations to "diseases caused by toxic
2 substances".

3 The Board also notes that the statute
4 refers to --

5 CHAIR MARKOWITZ: Aggravation,
6 contribution.

7 MEMBER BODEN: -- aggravation,
8 contribution and --

9 CHAIR MARKOWITZ: Causation.

10 MEMBER BODEN: -- causation. We
11 recommend that the -- that the agency examine all
12 references to causation and ensure that they are
13 consistent with the statute.

14 MR. RIOS: Yes.

15 CHAIR MARKOWITZ: Yes, yes, yes.

16 Okay, so, I'm sorry, Les, can you just repeat
17 that?

18 MEMBER BODEN: No. Repeat which part?

19 CHAIR MARKOWITZ: Well, the Board
20 notes that the regulations make frequent
21 references to causation, right?

22 MEMBER BODEN: To causation.

1 CHAIR MARKOWITZ: Right.

2 MEMBER BODEN: The Board also notes
3 that the Act refers to -- here --

4 CHAIR MARKOWITZ: Aggravation,
5 contribution and causation.

6 MEMBER BODEN: The Board, therefore,
7 recommends that the proposed changes in the
8 regulations make changes -- I said it better
9 before.

10 MEMBER WELCH: You did.

11 MEMBER BODEN: I know.

12 MEMBER WELCH: Reflects what?

13 MEMBER BODEN: Right, reflect the
14 language of the Act. Thank you.

15 MEMBER WELCH: Editorial note,
16 aggravation, contribution, causation.

17 MEMBER BODEN: Okay.

18 CHAIR MARKOWITZ: Okay, so, comments?
19 Discussion? Okay.

20 MEMBER WELCH: Move to approve.

21 CHAIR MARKOWITZ: Okay, second? Okay,
22 we don't need to read this because you read this.

1 All those in favor? All those
2 opposed? Any abstentions?

3 Fifteen members present. All vote in
4 favor of the recommendation.

5 So, that concludes our input,
6 comments, recommendations regarding proposed
7 regulations.

8 MEMBER REDLICH: So, I --

9 CHAIR MARKOWITZ: I'm going to double-
10 check, to make sure that we have in fact, voted
11 on all of them, while we move onto other matters.

12 MEMBER REDLICH: Well, I was a little
13 unclear. Certain ones were selected for us to
14 comment and look at, and others were not.

15 So, I'm a little unclear. Were the
16 ones related to Part E the ones that we were
17 commenting on, but not the ones on B or --

18 CHAIR MARKOWITZ: No, the way that --

19 MEMBER REDLICH: How was it sort of
20 picked which --

21 CHAIR MARKOWITZ: Sure, sure.

22 MEMBER REDLICH: -- ones you were

1 focusing on?

2 CHAIR MARKOWITZ: The process was that
3 we're invited to provide input into the proposed
4 changes.

5 We were briefed by DOL about the
6 proposed changes. DOL provided us with guidance
7 as to what they considered to be within the scope
8 and not in the scope of the Board's charter.

9 We were free at any moment to look at
10 any proposed change that we thought was addressed
11 within our scope -- our scope, our charter, and
12 take up that proposed change and examine it and
13 discuss it.

14 So, that was not a -- the -- DOL's
15 input and guidance about what was in or not in
16 our scope was not a requirement. We were, at all
17 times, free to select on our own, what changes
18 and in fact, we discussed that at the briefing.
19 We discussed that on our subcommittee calls, and
20 since that time.

21 So, now, I was the one who came up
22 with the list, the initial list of the things

1 that we've discussed on the subcommittee calls,
2 but again, called for members to add additional
3 proposed changes that they thought we should
4 address.

5 So, that's -- that's where we are
6 today.

7 MEMBER REDLICH: Okay, my brain may
8 have been a little slow in terms of the
9 processing all of this.

10 The reason I'm questioning it is
11 because our task -- one of the major
12 subcommittees is addressing a number of issues
13 around chronic beryllium disease and the benefits
14 under Part B.

15 CHAIR MARKOWITZ: Right.

16 MEMBER REDLICH: And yet, there are
17 sections in this document relating to that, that
18 we haven't really --

19 CHAIR MARKOWITZ: Sure.

20 MEMBER REDLICH: -- or I haven't gone
21 over that carefully, and so, that is a little bit
22 of what my concern is, because that does appear

1 to be under what we have been asked to look at,
2 not just the Part E.

3 CHAIR MARKOWITZ: Right.

4 MEMBER REDLICH: And so, you know,
5 this whole added paragraph, I assume it has
6 impact because that's why it was added, but I'm
7 not really clear fully on it.

8 CHAIR MARKOWITZ: Right.

9 MEMBER REDLICH: And I guess it's a
10 little bit late now to address that, and I
11 suspect public comments have probably addressed
12 it.

13 CHAIR MARKOWITZ: I agree with you,
14 that it could be regarded as within our scope,
15 and we have not discussed it, and I agree with
16 you, it's probably too late to provide input into
17 that.

18 But yes, we are -- as I said before,
19 individual Board members are certainly welcome to
20 look at proposed changes, provide input into the
21 record, DOL's record on comments.

22 So, let's -- we have about 20 minutes

1 before we need to close, and I want to just now
2 move to purely administrative matters, such as
3 the subsequent meetings. Couple of issues.

4 I want to talk about scheduling the
5 subcommittee meetings. If we -- let's say the
6 subcommittees were to circulate dates and agree
7 on a date by, say next Wednesday, come to
8 agreement on a date that they're going to meet by
9 next Wednesday, the earliest that you could meet
10 would be June 22nd, given the seven week delay.

11 So, June 22nd is approaching the end
12 of June. So, my question to the subcommittees
13 is, can we attempt and strive to by next
14 Wednesday, May 4th, come to, within each
15 subcommittee, a mutually agreed upon date for
16 each subcommittee telephone meeting that would
17 occur, essentially, the last week in June? Give
18 or take, I mean, just the -- the approximate time
19 frame.

20 MEMBER SOKAS: So, I mean, it's kind
21 of related, but we're talking -- I mean, I hate
22 to be this picky about it, but if we're talking a

1 two hour phone call as opposed to a two day phone
2 call, that's easier to -- do you see what I'm
3 saying?

4 CHAIR MARKOWITZ: Yes, yes, sure.

5 MEMBER SOKAS: So, what do we think is
6 going to be necessary, because that will help
7 with the scheduling.

8 CHAIR MARKOWITZ: Yes, right. So,
9 that's open for discussion.

10 Mark, you've got some experience here,
11 but different Boards.

12 MEMBER GRIFFON: I was just going to
13 ask, just so we can all get our heads around this
14 a little bit.

15 Can you run through who the committee
16 members -- like the four committees and who is on
17 them? I know I volunteered for two. You know, I
18 know mine. I know mine, but I don't know who
19 else is on it.

20 Then I mean, I would advise that we
21 just caucus on our way out. You know, we have
22 calendars in our hands. It might --

1 Maybe not. Maybe not. Right, right,
2 right.

3 (Simultaneous speaking.)

4 MEMBER CASSANO: Then I presume that
5 the four subcommittees can't meet on the same
6 day, because they're public. So, we have to
7 deconflict --

8 MEMBER GRIFFON: That's right.

9 MEMBER CASSANO: -- those as well.

10 CHAIR MARKOWITZ: So, let me ask, is
11 it -- does a four hour time slot seem reasonable?

12 MEMBER GRIFFON: Yes.

13 CHAIR MARKOWITZ: No, no.

14 MEMBER GRIFFON: Not to exceed, right.

15 CHAIR MARKOWITZ: For the subcommittee
16 to meet.

17 MEMBER GRIFFON: Right.

18 CHAIR MARKOWITZ: No, but that's a --
19 Dr. Welch?

20 MEMBER WELCH: Well, what I was
21 thinking of doing too was, you know, creating a
22 discussion agenda in advance of the subcommittee

1 meeting, and one thing -- one consideration for
2 the group is, I think we all would like some
3 reports from the -- the database, some general
4 information on claims.

5 I mean, some of it is in the annual
6 reports. So, one question is whether we can get
7 anything else before the first subcommittee
8 meeting, if we were doing some records requests,
9 because if it turns out that we could get
10 something in two months, we might have the
11 subcommittee wait a little bit longer.

12 So, you know, I think that it's --
13 four hours is reasonable if we don't have a whole
14 lot to work on. If it turns out we're going to
15 have a lot to work on -- I can't be on a phone
16 call more than four hours. So, you know, I mean,
17 usually by two and a half, I'm ready to go.

18 So, we might want to schedule multiple
19 ones, if we're going to have more to work on.

20 CHAIR MARKOWITZ: Sure, I'm sorry, Mr.
21 Rios has an answer to that question.

22 MR. RIOS: So, from the Agency's

1 perspective, we can try to make anything
2 available to you that you request in advance of
3 your subcommittee meetings.

4 But I don't -- but I don't know if
5 your initial subcommittee meeting was to identify
6 the data that you're going to need. So.

7 MEMBER WELCH: I think we'd be able to
8 identify some of it -- some of it at -- during
9 the course of this meeting. I think we've
10 identified some things that we would like to see,
11 and having it in advance of the subcommittee,
12 might make things move faster.

13 MEMBER REDLICH: The stuff we've
14 already asked for.

15 CHAIR MARKOWITZ: Okay, but the
16 material we've already asked for are already --
17 are reports that -- and audit performances and
18 things --

19 MEMBER WELCH: And percentages of the
20 -- you know, what are the -- yes.

21 CHAIR MARKOWITZ: Okay, yes?

22 MEMBER BODEN: Just a question about

1 that. I know we asked for a whole bunch of
2 things. I didn't write all of them down. I know
3 they'll be in the minutes. Is there a way of
4 somebody's combing the minutes and providing that
5 to us?

6 CHAIR MARKOWITZ: Yes.

7 MEMBER VLIEGER: Didn't the department
8 keep a list as we were going? Yes?

9 MEMBER BODEN: Or either way.

10 MR. RIOS: There is three lists that
11 are going. So, we need to reconcile them, but at
12 the same time, we will look at the recordings.

13 Depending on how quickly you want the
14 list back and how accurate, meaning accuracy is
15 only -- you're only going to achieve that if we
16 listen to the recording.

17 So, do you want to -- do you want us
18 the list of the last two days, and then give you
19 the list, because we can do that.

20 CHAIR MARKOWITZ: No. I would like the
21 -- send me the initial lists, and I will refine
22 them with assistance from Board members, and turn

1 them back to you, and then we can supplement them
2 with any additions from the review of the
3 recording. Yes, Dr. Redlich?

4 MEMBER REDLICH: Could you just
5 clarify, because I'm not that familiar with
6 public meetings, and what communication is okay,
7 between the members or not, as far as -- so,
8 let's say there was a -- for an example, a list
9 of data that I thought would be useful to
10 request, and if I wanted input from the other
11 subcommittee members, is there anything else
12 you'd like to request?

13 Could I send an email to everyone --

14 CHAIR MARKOWITZ: Right.

15 MEMBER REDLICH: -- requesting that or
16 -- I just need some guidance --

17 CHAIR MARKOWITZ: Sure, sure, sure.

18 MEMBER REDLICH: -- on what is
19 considered appropriate.

20 CHAIR MARKOWITZ: Yes. I'm turning
21 that to Mr. Rios.

22 MR. RIOS: So, the rule book said that

1 even for your subcommittee meetings, you don't
2 need to be this transparent.

3 But since you all selected to be as
4 transparent, to have the public participate in
5 everything you deliberate, then you've changed
6 the rule book for yourselves.

7 So, if -- so, the requirements are not
8 that you have to have even the subcommittee
9 meetings in public.

10 With respect to the -- can you send me
11 an email asking for information and can I send it
12 to your subcommittee? Absolutely. But does that
13 conflict with your desire to be transparent? I
14 don't know.

15 But per the regulations, the
16 subcommittee can send me emails. I can send
17 emails to the subcommittee. The subcommittee
18 can have telephone calls without the public
19 notice, but the only thing that I would warn you
20 against is that if you're going to publicly state
21 that the public was -- was capable of witnessing
22 your deliberations, then you want to be

1 consistent in your approach.

2 CHAIR MARKOWITZ: Sure, and let me
3 just say that, yes, we'll have to define some
4 boundaries, because we want an open process and
5 the meetings will be open. That's what we voted
6 on.

7 On the other hand, there is a certain
8 amount of interaction that needs to occur for us
9 to make progress in what we're asked to do,
10 without a two month delay in that.

11 So, what we'll -- we'll have to
12 determine what those boundaries are.

13 So, did we -- did we settle on what
14 time -- how long these subcommittee meetings
15 might be?

16 MEMBER WELCH: Three hours.

17 CHAIR MARKOWITZ: Three to four hours,
18 okay, okay, and it is realistic that by sometime
19 mid next week or sometime next week, the
20 subcommittees might be able to decide on some
21 dates, and so, we can get the process along?

22 Okay, Dr. Friedman-Jimenez?

1 MEMBER FRIEDMAN-JIMENEZ: Would it be
2 possible to do two two-hour meetings instead of a
3 four-hour meeting, because four hours is -- I am
4 suggesting that we have shorter meetings and more
5 frequent, because four hours is a big chunk of
6 the day and really affects the rest of your
7 schedule more.

8 CHAIR MARKOWITZ: Well, I am going to
9 leave that up to the subcommittee chairs to
10 float. Yes, Dr. Silver?

11 MEMBER SILVER: Dr. Markowitz, I don't
12 know if this is helpful, but yesterday, I jotted
13 down three things you wanted the subcommittees to
14 do, define initial issues and scope, define data
15 and information needs, and review and draft
16 initial work plan with time table.

17 So, maybe the chair of each
18 subcommittee could figure out how many hours we
19 need to do those three things. Is there more to
20 it?

21 CHAIR MARKOWITZ: All right, not that
22 I have.

1 MEMBER FRIEDMAN-JIMENEZ: I think
2 there was a report from the data and the data
3 request.

4 CHAIR MARKOWITZ: Right.

5 MEMBER SILVER: The second was -- yes,
6 the second was define data and information needs
7 and review.

8 CHAIR MARKOWITZ: Yes, okay. Okay.

9 MEMBER SILVER: So, rather than pick
10 the time and fill it up, those are the three
11 things we should do and figure out how much time
12 we need.

13 CHAIR MARKOWITZ: Okay, so, let's
14 discuss the Fall meeting. I think that Mr. Rios
15 can float some dates soon, because I know
16 people's calendars begin to schedule up with --
17 some with teaching and other activities.

18 So, that we need considerable notice
19 on the Fall meeting, and we'll just circulate
20 some times.

21 But I -- I favored late September,
22 towards the first half of October, so that we

1 don't get too deep into the Fall, so we can
2 continue some momentum, but we're going to float
3 some dates and it will -- I would recommend a
4 two-day meeting. Not a three-day meeting,
5 because it will be more effective over two days,
6 and we can do as much in two days, except this
7 time, as we could do in three days. Dr. Welch?

8 MEMBER WELCH: I don't know if this
9 would be helpful in terms of the notification
10 issues for the subcommittees, but we might --

11 CHAIR MARKOWITZ: I need to hear this.

12 MEMBER WELCH: We might consider
13 having a regular time for a subcommittee meeting,
14 so that instead of -- you know, for each one,
15 having to go through the notification process,
16 would it be possible to say this subcommittee is
17 going to meet -- is going to call -- have a call
18 on a certain day, and then if we don't have it,
19 we don't have it.

20 We could discuss that in our schedule
21 -- whether that fits people's schedules. But
22 would that help with the Federal Register Notice

1 or would we still have to do a Federal Register
2 Notice for each committee meeting?

3 MR. RIOS: So, let me read you a
4 section in the regulations, okay?

5 It's Section 102-3.160, and it states,
6 "What activities of an Advisory Board are not
7 subject to the notice in open meeting
8 requirements of the Act?"

9 The following activities of an
10 Advisory Committee are excluded from the
11 procedural requirements contained in this sub-
12 part.

13 The first is defined as preparatory
14 work, and it's meetings of two or more advisory
15 committee or subcommittee members convened solely
16 to gather information, conduct research or
17 analyze relevant issues and facts in preparation
18 for a meeting of the Advisory Committee or to
19 draft position papers for deliberation by the
20 Advisory Committee, and so, that was the first,
21 preparatory work.

22 The second is administrative work.

1 Meetings of two or more advisory committee or
2 subcommittee members, convened solely to discuss
3 administrative matters of the Advisory Committee
4 or to receive administrative information from the
5 Federal Officer or agency.

6 So, this -- the administrative work
7 piece, that sub-section says that you can convene
8 two or more advisory committee members to receive
9 information from the agency.

10 MEMBER BODEN: So, I understand that
11 we may not be subject to those rules, but the
12 question of wanting to be open and we need to
13 somehow let people know that they can hear what
14 we're saying --

15 MR. RIOS: Well, the reason I read you
16 that section in the regulation is because that
17 section does not cover subcommittees, and in
18 fact, that regulation covered other activities
19 that two or more members of the parent committee
20 can engage in, and if you -- and I will read you
21 the administrative work section again, because
22 that specifically addresses subcommittee members.

1 So, again, Sub-Section B states
2 administrative work. Meetings of two or more
3 advisory committee or subcommittee members
4 convened slowly -- solely and slowly, to discuss
5 administrative matters of the advisory committee
6 or to receive administrative information from a
7 Federal Officer or Agency.

8 So, your stated desire yesterday or
9 two days ago was to have the subcommittee
10 meetings open to the public. This section that I
11 just read you does not pertain solely to
12 subcommittee meetings, but to administrative work
13 or preparatory work that the committee may engage
14 in.

15 So, it doesn't conflict with your
16 stated purpose, but I just want you to be clear.

17 MEMBER VLIEGER: So, prep work and
18 administrative work is excluded from the public?

19 MR. RIOS: Subcommittee meetings can
20 also be excluded from the public. But your
21 stated desire was to have the public participate
22 in your subcommittee meetings.

1 Right now, you're talking about
2 administrative work and receiving and requesting
3 information from the agency. Can you do that
4 over email? Yes, because the regs allow you to
5 do all of that outside of the public view.

6 MEMBER VLIENER: All right.

7 MR. RIOS: So, the reason I read you
8 that is because I want you to know that it
9 doesn't conflict with your desire.

10 MEMBER REDLICH: So, my --

11 MEMBER WELCH: And the information
12 between ourselves?

13 MEMBER CASSANO: So, I have a follow
14 up question then.

15 The three things that Ken wrote down,
16 as you know, determining an agenda, requesting
17 information and I forget what the third one is,
18 could that be considered preparatory, because I
19 don't know if I want to wait until the middle of
20 June to figure out what my agenda is going to be
21 or to determine what information I'm going to
22 want my subcommittee members to look at, before

1 we deliberate in the middle of June.

2 So, if we can consider that prep work,
3 then we can move on with that, and actually have
4 some deliberation occurring in June, otherwise
5 we've already put ourselves seven weeks behind,
6 to be able to do anything.

7 CHAIR MARKOWITZ: Dr. Welch?

8 MEMBER WELCH: Well, I mean, I think
9 what Tony said is we can -- we, you know, under
10 the Act, these subcommittee actions don't have to
11 meet all the specific requirements of the public
12 notification, but we did decide we want to notify
13 the public.

14 MR. RIOS: Except in this --

15 MEMBER WELCH: And if we want to
16 notify the public by putting it in the Federal
17 Register, then that's the amount of time frame we
18 need.

19 We could do emails and stuff before
20 the meeting, that would get us better prepared
21 for the meeting, but I think we still want to
22 have it published in the Federal Register, so

1 that the public would know the subcommittee
2 meetings are happening. That would be my
3 recommendation, but we could do some additional
4 prep work in advance, if we want to, by email.

5 MR. RIOS: Just to be clear, whenever
6 you communicate with each other, as members of
7 the committee or subcommittee, you have to copy
8 me, yes.

9 CHAIR MARKOWITZ: Okay, anything else
10 on the -- Dr. Redlich?

11 MEMBER REDLICH: An email with the
12 rules would be helpful.

13 MR. RIOS: I can send you all, all the
14 relevant regulations.

15 MEMBER REDLICH: Thank you.

16 CHAIR MARKOWITZ: Okay, so, that
17 covers subcommittee and the advanced notice, and
18 our meeting in the Fall. Let's discuss very
19 briefly, well, I just want to talk about where --
20 not decide on where we're going to meet, but just
21 open the -- the floor to the fact that we may not
22 meet here next time. We may meet in a different

1 location.

2 But is there anything? We have five
3 minutes until we adjourn. Is there anything else
4 that -- on the administrative front that we need
5 to address?

6 If you have any questions about travel
7 or things like that, credit card reimbursement,
8 Mr. Kevin Bird is over here and he can answer
9 your questions. Yes, Mr. Griffon?

10 MEMBER GRIFFON: Just one question.
11 You mentioned the September meeting. Did you
12 want to discuss location? You mentioned that
13 before.

14 CHAIR MARKOWITZ: Yes, yes. But is
15 there anything beyond that?

16 MEMBER GRIFFON: I'm sorry, okay.

17 CHAIR MARKOWITZ: Okay, so, the idea
18 is we could meet here in Washington, or we could
19 meet at a different location. Different location
20 could be presumably -- well, I don't think they
21 put Department of Energy sites in Hawaii much.

22 But there's a lot of logic to being in

1 proximity to --

2 MEMBER TURNER: Denver or Kansas City.

3 CHAIR MARKOWITZ: What's that?

4 MEMBER TURNER: I said Denver or
5 Kansas City.

6 CHAIR MARKOWITZ: Okay, so, to be in
7 proximity to DOE workers, right, so that people
8 can attend and listen and provide public comment.

9 MEMBER SILVER: Could we do a site
10 visit at the same time?

11 CHAIR MARKOWITZ: Okay, so, yes. So,
12 we could -- let's -- if we just start -- I just
13 need your attention, I just need your attention
14 for five more minutes.

15 We could consider a site visit, but in
16 principle, does anyone have any strong feelings
17 about whether we meet in proximity to a DOE
18 community or where the DOE workers are, as
19 opposed to meeting here? Okay, Dr. Welch?

20 MEMBER WELCH: I think we should meet
21 near the sites, if we can arrange that, where the
22 DOE communities, but the communities are

1 primarily, at least the ones we know are located
2 around the specific sites, the big sites, like
3 Oak Ridge and Hanford and Savannah River, and I
4 think we'd get a lot of interest from the public
5 if we met in those areas.

6 CHAIR MARKOWITZ: Okay.

7 MEMBER GRIFFON: Steven?

8 CHAIR MARKOWITZ: Yes, Mark?

9 MEMBER GRIFFON: One other thing that
10 we may consider is where the Radiation Board met
11 for their meeting, because it might be beneficial
12 --

13 MR. RIOS: Your microphone is off.

14 MEMBER GRIFFON: Oh. You know, it may
15 be beneficial to have the meeting in the same
16 location as the Radiation Board, you know, a few
17 days before or a few days after, whatever.

18 Just a thought, or you may want to --
19 not want to conflict with that --

20 CHAIR MARKOWITZ: Right, right.

21 MEMBER GRIFFON: -- because a lot of
22 the same claimants are going to be involved in

1 those meetings.

2 CHAIR MARKOWITZ: Right, right.

3 MEMBER GRIFFON: So, just to check
4 those schedules, yes, and I think we have -- they
5 are meeting, I think in September.

6 CHAIR MARKOWITZ: Right.

7 MEMBER GRIFFON: So, just to -- yes.

8 CHAIR MARKOWITZ: I have a question,
9 actually for Ms. Leiton.

10 If we meet not in Washington, will
11 there be some attendance from people, DOL, your
12 unit, so that we can continue interaction?

13 MS. LEITON: We absolutely plan on
14 attending.

15 CHAIR MARKOWITZ: Okay, great. Okay,
16 great, thank you.

17 MS. LEITON: One other thing, if you
18 don't mind, just we do have to do outreach task
19 groups, and sometimes, you know, we'll go to
20 these locations.

21 So, I don't know if you want to either
22 consider going to where we're going, or again,

1 not going where we're going, to either be -- have
2 that done -- let them be part of this or avoid --

3 CHAIR MARKOWITZ: Right.

4 MS. LEITON: -- you know, whichever
5 conflicts, so we've got to schedule that as well.

6 CHAIR MARKOWITZ: Okay, great. Thank
7 you. We'll look at that schedule.

8 Okay, so, I understand. That settles
9 that. Any other questions before we close? Yes?

10 MS. POPE: Can we have Kevin give a
11 overview of the credit card information?

12 CHAIR MARKOWITZ: Okay, Kevin, you
13 have the floor, to explain the credit card to us.

14 MR. BIRD: So, basically you all have
15 travel reimbursement forms in your packet. Fill
16 those out, or I -- after the conference, we can
17 also email them to you.

18 Just include all your expenses, not
19 including food and meals already reimbursed per
20 diem basis, so that's a flat fee. Provide
21 receipts for anything over \$75, and then you --
22 we will process that, reimburse you and then you

1 will pay that credit card bill. Five days.

2 MR. RIOS: It's five days.

3 MR. BIRD: Just give me your travel
4 reimbursement form within five days from now.

5 MEMBER REDLICH: That's in our packet?

6 MR. BIRD: It is, and I'll email it to
7 everyone, so you have an electronic copy.

8 MEMBER WELCH: Kevin, what about cash
9 receipts?

10 MR. BIRD: Over \$75.

11 MEMBER WELCH: Okay, thank you.

12 CHAIR MARKOWITZ: Okay, so, one last
13 -- if I could have your attention. I would just
14 like to thank numerous people here. Mr. Rios,
15 Ms. Rhodes, Mr. Salandro, who has been back
16 there.

17 Mr. Bird, who is key to many things
18 for us. Also, thank Ms. Leiton and the DOL for
19 not only being extremely informative, but also
20 being very clear about your desire for our input
21 into these various issues. So, we appreciate
22 that.

1 Also, thank the Ombudsman and
2 Ombudsman's office for participating, and thank
3 the hard working members of the Board. The
4 meeting is adjourned.

5 (Whereupon, the above-entitled matter
6 went off the record at 3:00 p.m.)

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C E R T I F I C A T E

This is to certify that the foregoing transcript

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Substances and Worker Health

Before: US DOL

Date: 04-28-16

Place: Washington, DC

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