

United States Senate

WASHINGTON, DC 20510

November 12, 2010

James Malcolm Melius, M.D., Dr. P.H.
Chairman
Advisory Board on Radiation and Worker Health
4676 Columbia Parkway MS: C-46
Cincinnati, OH 45226

Dear Dr. Melius,

We are writing today on behalf of the sickened nuclear weapons workers from the Linde Ceramics facility in North Tonawanda, NY. These sickened workers have been petitioning the National Institute for Occupational Safety and Health (NIOSH) for compensation under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA) pursuant to the Special Exposure Cohort (SEC) program since March 2008. We strongly urge the Advisory Board to recommend the approval of both Linde SEC petition 00107 and Linde SEC petition 00154 without further delay.

We would like to raise two specific concerns regarding the evaluation process that are central to ensuring timely and fair evaluation of claimant petitions. First, we are concerned about the dismissal of the 180 days requirements for evaluation of SEC petitions and submission of a recommendation to the Advisory Board. Many claimants with whom we are working have spent years awaiting responses to their request for evaluation of their claims, and as many are sick and elderly, ensuring timely evaluation is paramount. Second, we are concerned about the Division of Compensation Analysis and Support's (DCAS) use of inaccurate site profiles in their evaluation process. Many claimants petitioned the Department of Labor (DOL) to have their claims reopened because DCAS revised the site profile in November 2008; nearly all of those requests were denied within months of the release of that revised site profile.

The issue of timeliness is critical to the process, which is why Congress mandated a 180 day response to petitions in the underlying law. If the Advisory Board indeed believes that the specific 180 day deadline mandated within 42 USC §7384q and 42 CFR §83.13 is not a binding prescription then the Advisory Board must ensure that any changes to the original November 2008 Evaluation Report are not used by DCAS to justify recommending the denial of the Linde SEC petition. Instead, any and all changes in DCAS's analysis after the 180 day deadline elapses should only be used to revise Site Profiles. Those documents would be used solely for determining individual dose reconstruction claims for workers diagnosed with non-presumptive radiogenic cancers. The Advisory Board needs to adopt a clear and consistent policy that will safeguard the need for timeliness within the SEC program without harming the petitioner class itself. Adopting such a policy would allow DCAS to investigate ongoing issues about specific work sites without compromising the petitioner's right to a timely evaluation of their SEC petition. Any claimant favorable information developed by DCAS can then be incorporated into site profile revisions to help individual claimants with non-presumptive radiogenic cancers receive more accurate dose reconstruction evaluations. Ignoring the specific prescriptions within the Act should not be used as a vehicle to justify DCAS's policy of favoring the individual dose reconstruction program over the SEC program.

Assessing the viability of this Linde SEC petition based upon anything beyond the November 2008 Evaluation Report would disregard the very reason why Congress created this remedial compensation program in the first place. The Advisory Board must recommend the approval of Linde

SEC petition 00107 because (1) DCAS has altered their SEC analysis repeatedly after frequent criticism from this Board's technical contractor and (2) DCAS has never addressed worker exposure potentials in the Linde underground tunnels.

In addition, the DCAS refusal to re-open cases as site profiles are repeatedly revised is troubling for claimants. DCAS relies upon Site Profiles to perform dose reconstruction evaluations. The Linde site profile is still a work in progress. This flawed document will need to be revised for a fifth time in just five years. It fails to address even the most basic issues raised in the November 2008 Evaluation Report. Moreover, tunnel exposure issues were addressed neither in the November 2008 revised Linde site profile nor in the November 2008 Evaluation Report. This is true despite the fact that DCAS has known about potential worker exposure since January 2006. All four previous versions of the Linde site profile have been incomplete and inaccurate. Yet, DCAS has been using these inaccurate site profiles to evaluate dose reconstruction claims since 2005.

The goal of timely compensation has been abandoned simply because SEC petition evaluations often uncover significant deficiencies in site profiles. When such extreme uncertainty prevents DCAS from revisiting previously denied claims because site profiles need to be repeatedly revised then DCAS should recommend the approval of an SEC petition pursuant to 42 CFR §83.14. Such a recommendation is justified when claimant favorable dose reconstructions cannot be completed in a timely manner.

DCAS should not create endless uncertainty as to when and if they will re-evaluate previously denied claims. DCAS's policy of favoring the individual dose reconstruction program over SEC approval is unfairly penalizing Linde claimants that deserve to have their claims re-evaluated independently of the SEC evaluation process. This unjust Catch 22 paradigm calls for swift action by this Advisory Board.

Preserving timeliness is fundamental to this claimant favorable, remedial compensation program. The Linde SEC petitioners and individual Linde claimants have been unfairly denied timely and fair compensation time and again. We strongly urge DCAS to recommend the approval of both Linde SEC petitions pursuant to 42 CFR §83.14.

Most importantly, the Advisory Board must right this wrong and recommend the approval of Linde SEC petition 00107 and Linde SEC petition 00154. The Linde workers have waited far too long for justice.

Thank you for your attention to this critical request. If you should have any questions, please do not hesitate to contact Anne Fiala in Senator Schumer's office at 202-224-6542 or Ben Rosenbaum in Senator Gillibrand's office at 202-224-4451.

Sincerely,



Charles E. Schumer
United States Senator



Kirsten Gillibrand
United States Senator