

Second Quarterly Progress Report:
Targeted Caseload
Backlog Reduction

Submitted by:

The Federal Mine Safety and Health Review
Commission

And

The United States Department of Labor

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Introduction:

This is the second quarterly progress report by the Federal Mine Safety and Health Review Commission (FMSHRC or “Commission”) and the Department of Labor (DOL or “Department”) on the status of the case backlog reduction project described in the Joint Operating Plan submitted to Congress on September 7, 2010. This report covers the period of October 29, 2010 through January 28, 2011.

Pursuant to Chapter 7 of Public Law 111-212, the “Supplemental Appropriations Act, 2010,” the Department received an appropriation of \$18,200,000 and the Commission received an appropriation of \$3,800,000, both of which are available for one year from the date of enactment (July 29, 2010 through July 28, 2011) for the purpose of reducing the existing case backlog before the Commission, and other purposes related to mine safety.

Of the \$18,200,000 provided to DOL, \$10,940,750 is being utilized by the Office of the Solicitor (SOL) to undertake additional litigation and related legal work to reduce the case backlog. The remaining \$7,259,250 has been transferred to the Mine Safety and Health Administration (MSHA) to be used in the backlog reduction effort and for the investigation of the Upper Big Branch Mine disaster.

FMSHRC Quarterly Activities

Obligations of Supplemental Funds and Additional Staffing for FMSHRC:

During the period of October 29, 2010 through January 28, 2011, the Commission obligated \$929,646 of supplemental funding, of which \$593,229 was for salaries and benefits, and \$336,417 for operational expenses, travel, office space, supplies, equipment, and start up costs for its new satellite office on H Street, NW in Washington, DC. The Commission cancelled its previous space agreement in Rosslyn and shifted funding to the more cost effective H Street location, which resulted in savings of \$197,280. Ten staff members are now stationed at the H Street office.

As of January 28, 2011, the Commission had obligated a total of \$2,211,528 from its supplemental appropriation.

Case Processing and Targeted Backlog Case/Citation Dispositions:

The targeted backlog addressed by these quarterly reports is made up of the 10,424 penalty cases pending at the Commission on July 29, 2010 that had been contested on or after October 1, 2007 through February 28, 2010.¹ From October 29, 2010 through

¹ Some of those cases are more complex, and therefore DOL will not assign them to supplemental staff. However, the agencies have agreed that all penalty cases contested during the identified time period will be included in the targeted backlog, regardless of where they are assigned in DOL.

January 28, 2011, FMSHRC disposed of 1,206 targeted backlog cases involving 7,001 citations.

Case Priorities:

FMSHRC's Office of Administrative Law Judges (OALJ) continues to prioritize cases involving fatalities, injuries, flagrant violations, emergency response plans, and discrimination complaints. Commission judges will give backlog cases with a high number of unwarrantable failure citations/orders the highest priority and cases with a large number of significant and substantial citations the second highest priority. The SOL team leaders identified 547 of these priority backlog cases. As of January 28, 2011, 461 of those cases have been assigned, and 46 have been disposed of.

Administrative Actions to Facilitate Disposal of Cases

- 1. Global Settlements and Calendar Calls:** FMSHRC is working to increase the number of dispositions through global settlement conferences and calendar calls. Both are proving to be highly effective ways of expeditiously disposing of cases, in that they require the parties to engage on the issues early in the process. Both global settlement conferences and calendar calls involve more than one docket; however, they differ in a number of ways.

Global settlement conferences are meetings presided over by an ALJ, scheduled for the express purpose of discussing settlements. The conferences are held either in-person, or via conference call, and those cases that do not settle are scheduled for hearing at a future date. During the reporting period, 13 global settlement conferences were scheduled, involving 113 cases and 714 citations. As of the end of the period, 75 of these cases, involving 600 citations, had reached settlement.

Calendar calls are hearings scheduled in one location sequentially during a specified timeframe, generally one or two weeks. During this reporting period, 19 calendar calls were scheduled, involving 144 cases and 1003 citations. As of the end of the quarter, the vast majority of those cases were still pending. Since these calendar calls are all scheduled for later in the year, it is likely that many more of the cases involved will be disposed of as their scheduled hearing dates approach.

- 2. Rulemaking:**

Simplified proceedings rule: On December 28, 2010, the Commission published in the Federal Register a final Simplified Proceedings rule. *See* 75 Fed. Reg. 81459. The final rule sets forth procedures that simplify and streamline the processing of certain civil penalty proceedings. The major differences between the simplified procedures set forth in the final rule and conventional procedures are that, under the simplified procedures:

- answers to petitions for assessment of penalty are not required;
- motions are eliminated to the greatest extent practicable;
- early discussions among the parties and the Commission Administrative Law Judge are required to narrow and define the disputes between parties;
- parties are required to disclose certain materials early in the proceedings;
- discovery is not permitted except as ordered by the Judge;
- interlocutory appeals are not permitted; and
- post-hearing briefs are not allowed, except as ordered by the Judge.

Although the administrative processes in these cases are streamlined, hearings remain full due process hearings, as they are under conventional procedures. The final rule became effective on March 1, 2011.

Settlement procedure rule: On November 30, 2010, the Commission published in the Federal Register a final rule on settlement procedures. *See* 75 Fed. Reg. 73955. Under the final rule, parties who file motions to approve settlement are required to submit a proposed decision approving settlement with the motion. The final rule generally requires the filing party to submit the motion and proposed order electronically. The goal of the new rule is to make the settlement of cases more efficient and less time-consuming for Commission judges. The final rule took effect on December 30, 2010.

Electronic Filing:

FMSHRC continues to explore electronic products and system designs to replace or upgrade its current data management system. Ultimately, a new or upgraded system will permit electronic filing, fully electronic case files, electronic assignment and distribution of cases, automated notifications to parties, case tracking and other utilities. In order to ensure that FMSHRC is aware of the systems available in the marketplace and to ascertain an accurate price range for implementation of the system, FMSHRC published a Request for Information (RFI) in FedBizOpps on November 24, 2010. The RFI asked vendors to inform the Commission about market solutions that could fulfill the requirements identified in the RFI, demonstrate the experience of the vendor in providing secure electronic filing systems to federal agencies, and provide price information for implementing the solution. The Commission submitted a report to the Congress on March 23, 2011, describing the options, costs and timelines associated with this project.

DOL Quarterly Activities

Allocation of the DOL Appropriation:

Between October 29 and January 28, DOL records reflect that SOL obligated approximately \$1,714,716 for this project, of which \$1,308,797 is for staff salaries and benefits, and \$405,919 is for office space, equipment and supplies, and other operational expenses.

Between October 29 and January 28, MSHA obligated approximately \$320,123 for work on cases in the targeted backlog, of which \$261,233 was for staff salaries and benefits, and \$58,890 was for operational expenses. As of January 28, MSHA obligated approximately \$686,874 in supplemental funding for the Upper Big Branch mine disaster accident investigation and internal review. Additional charges for the investigation are expected to be recorded before the end of the current calendar quarter.

Additional Staffing for SOL and MSHA:

The five new offices SOL established during the first quarter of this project to handle the backlog reduction litigation (Nashville, Denver, Atlanta, Philadelphia, and Arlington, Virginia) have been fully operational through this quarter. Approximately 80 additional temporary or term employees were hired by the end of the second quarter of operation of this project. The vast majority are attorneys. Staffing distribution at present is as follows: Arlington: 10; Atlanta: 8; Nashville: 17; Denver: 23; Philadelphia: 15; as well as 1 staff in Dallas, 1 in SOL's Mine Safety and Health Division, and 2 administrative staff in SOL's national office. The term and temporary FTE usage rate (defined as one full-time staff person for one full year) in the project is about 70.5.

Because the cost of those FTE and other project costs have been lower than SOL initially projected, SOL is in the process of hiring an additional 6 temporary staff to increase the project's overall level of effort and prepare for expected attrition among the term and temporary staff as the remaining period of funding grows shorter. It is contemplated that these additional staff will be hired across most of the SOL offices, and will raise the effective FTE usage rate for the project to about 72.5 FTE, pending further attrition.

In addition, SOL is ensuring the continuing concentration of its existing regional staff on disposition of these targeted backlog cases by applying up to \$1,100,000 of SOL's backlog reduction funds to the ongoing targeted backlog reduction work of those staff.

The MSHA staff distribution as of January 28, 2011 is as follows:

- 2 Coal technical advisors (TAs) in Philadelphia
- 1 Coal TA in Arlington
- 1 Coal and 1 M/NM TA in Atlanta
- 1 Coal TA in Nashville
- 1 Coal and 1 M/NM TA in Denver

In addition, four clerical staff were hired as of that date to work in the Metal and Non-metal districts, including supporting the orderly transfer of metal-non-metal cases to the backlog project.

The costs of the UBB investigation are not only higher than anticipated due to the length and scale of the investigation, but have now extended beyond the December 31, 2010 date in the original plan. At the same time, MSHA is projecting a surplus of supplemental funding for its role in the "backlog project," given the scope of MSHA's

current role under the joint operating plan. This surplus is attributable to slower than expected spending in the first and second quarters of the backlog project during the start-up phase of the program and significant savings in inspector overtime and travel costs originally anticipated for the project. While these costs are expected to ramp up now that staff has been hired and as hearings are scheduled, spending will not increase to a rate at which MSHA will obligate all the funds transferred to it for the backlog project.

To address the need for additional UBB investigation funding, as well as these lower spending projections for backlog project activities, MSHA is redirecting \$2.1 million that is currently budgeted for inspector overtime to participate in case preparation and backlog hearings to help offset costs of the Upper Big Branch investigation. It is also expanding the use of supplemental funding to make available approximately \$1.1 million to increase resources to address the rapidly growing number of non-targeted backlog cases contested after February, 2010. The \$1.1 million will be used to fund overtime for the Conference and Litigation Representatives (CLRs) and inspectors; in coal, hiring annuitants to serve as Technical Specialists assisting CLRs on cases; and additional clerical support for CLRs in Metal and Nonmetal.

DOL Case Processing Activities:

Approximately 66,000 citations were originally estimated in the Joint Operating Report as the total targeted backlog of all citations contested between October 1, 2007 and February 28, 2010. As a result of more refined records review, the total targeted backlog has been revised to be approximately 67,300. As was reported in our first quarterly report, from July 29, 2010 through October 28, 2010, the targeted backlog reduction project resulted in the disposition of 1,901 cases involving 8,901 citations.

As is reflected in the FMSHRC portion of this report above, between October 29, 2010 and January 28, 2011, SOL and MSHA disposed of 1,206 additional cases and 7,001 additional citations, for a total of 3,107 cases and 15,902 citations during the first two quarters of this project. Therefore, assuming the rate of disposition achieved during the second quarter of this project continues, approximately 5,519 cases and 29,904 citations will have been disposed of by July 29, 2011, which is about 53% of the total initial targeted case backlog of 10,500 cases, and about 44% of the total number of 67,300 citations.

For the first two quarters of the project, SOL attorneys recovered approximately \$13 million in penalties, and they have taken the legal actions necessary to reach settlement agreements that will result in the recovery of additional penalties of approximately \$10 million following the Commission's disposition of the settlement motions filed by SOL.

Between March 1, 2010 and January 28, 2011, 8,006 new cases including 41,501 citations were contested. Therefore, in about 11 months, a time frame 38% as long as the 29 month time frame of the targeted backlog (October 1, 2007 – February 28, 2010), approximately 44% as many cases and 40% as many citations were contested.² This

² There were 18,373 cases with 104,295 violations contested between 10/1/2007 and 2/28/2010.

suggests that the rate of increase in cases and citations has continued during the period since February 28, 2010. Therefore, MSHA is devoting a larger portion of the available backlog reduction funding to addressing disposition of the non-targeted backlog, and SOL is ensuring that the entire \$400,000 in funding for non-targeted backlog cases is expended.

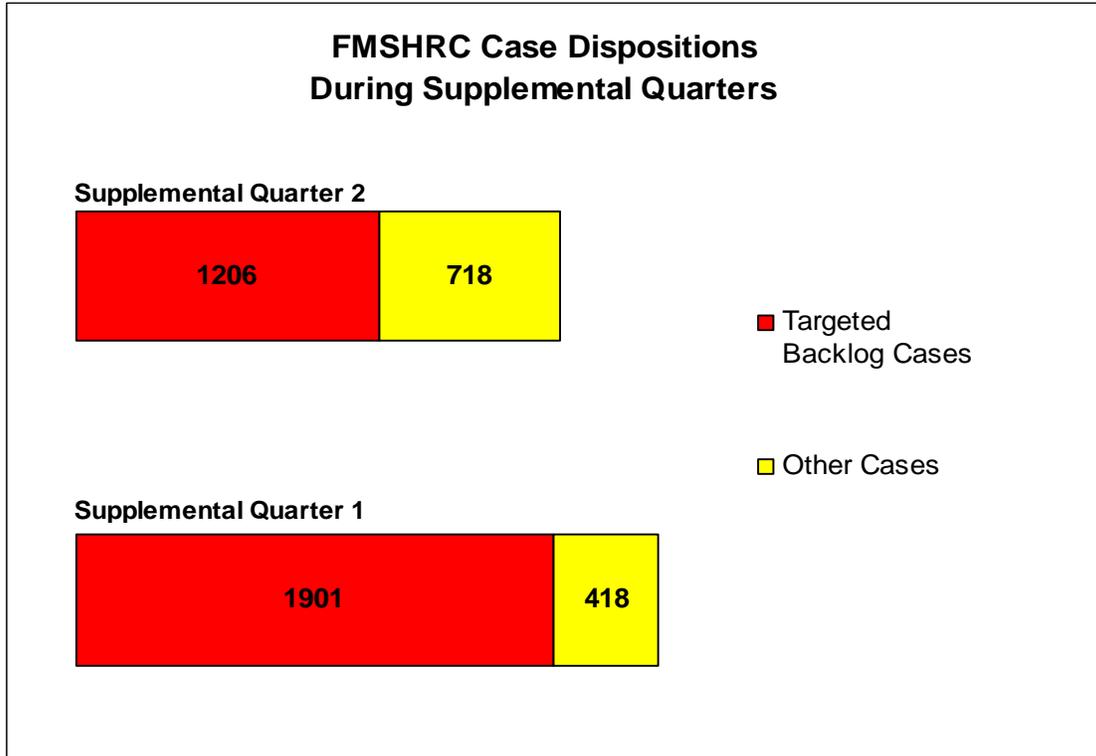
Conclusion

The Commission and DOL have made significant strides in the continuing effort to reduce the targeted case backlog. In the first quarter, both agencies opened new offices and hired additional staff to tackle the backlog. Even with this focus on start-up, significant progress was made on disposition of cases in the targeted backlog.

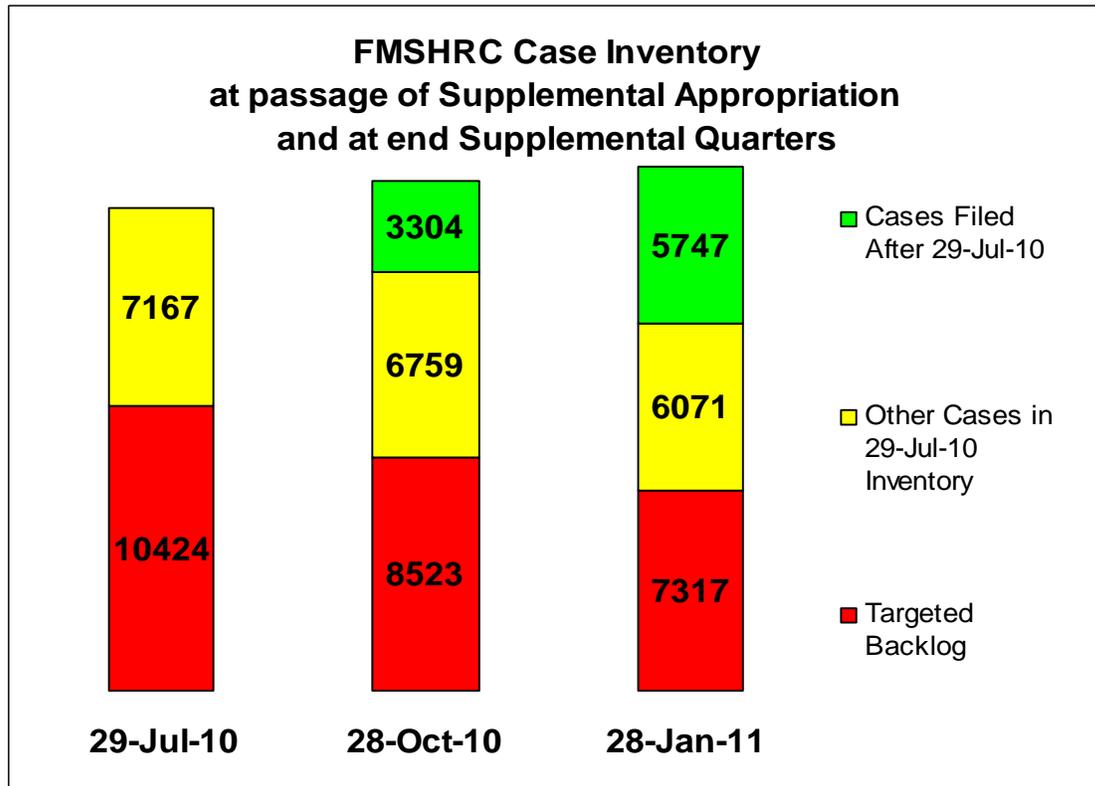
In the second quarter, the project has been in full and robust operation, has achieved a successful level of productivity, and is producing further significant reductions in the targeted backlog. However, both the Commission and DOL are concerned that the number of citations being contested since the end of the targeted backlog period (February 28, 2010), is resulting in an increasing non-targeted caseload, despite efforts by the Commission and the Department to address this growing caseload, as well as the targeted backlog.

APPENDIX TO SECOND QUARTERLY REPORT
ON CASE BACKLOG REDUCTION

During the second quarter of the Supplemental Appropriation, FMSHRC disposed of 1,924 cases. As reported in this Quarterly Report, 1,206 of these dispositions were from the targeted backlog. The remaining 718 cases were either non-targeted cases in the FMSHRC inventory as of July 29, 2010 or were cases filed after that date.



The chart below illustrates that, despite a significant number of dispositions in the quarter, the FMSHRC case inventory grew to 19,137 as a result of 5,787 cases that were filed subsequent to July 29, 2010. Forty of those newly-filed cases had been disposed of by January 28, 2011.



* Note: Targeted backlog includes only penalty cases. Other categories of FMSHRC's case inventory include contest and other cases, as well as penalty cases.