

Third 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 third 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 January 29, 2011 through April 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.

In addition, section 1807 of Title VIII of the full-year Continuing Resolution enacted on April 15, 2011, states:

Notwithstanding section 1101, the level for “Department of Labor, Mine Safety and Health Administration, Salaries and Expenses” shall be \$363,843,000, of which up to \$3,000,000 shall be available to the Secretary of Labor to be transferred to “Departmental Management, Salaries and Expenses” for activities related to the Department of Labor’s caseload before the Federal Mine Safety and Health Review Commission

Pursuant to that authority, MSHA is utilizing approximately \$750,000 for its case backlog reduction project activities and is transferring \$2,000,000 to the Departmental Management account to be used by SOL for the continued funding of the case backlog reduction project through September 30, 2011. This additional funding will enable SOL to continue operating the project through September 30, 2011, and to implement certain enhancements, including the addition of a number of temporary FTE to handle a greater number of cases before the Commission. The implementation of many of these enhancements is planned to be initiated during the current quarter of the project.

FMSHRC Quarterly Activities

Obligations of Supplemental Funds and Additional Staffing for FMSHRC:

During the period of January 29 through April 28, 2011, the Commission obligated \$1,299,673 of supplemental funding, of which \$593,229 was for salaries and benefits, and \$706,444 for operational expenses, travel, office space, supplies, equipment, and contract staff.

As of April 28, 2011, the Commission had obligated a total of \$3,511,201 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 January 29, 2010 through April 28, 2011, FMSHRC disposed of 1,850 targeted backlog cases involving 11,190 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 April 28, 2011, 325 of those cases were assigned to a judge, 203 had been disposed of, and 19 remained unassigned.

Administrative Actions to Facilitate Disposal of Cases:

1. Global Settlements and Calendar Calls:

FMSHRC is continuing to utilize measures such as global settlement conferences and calendar calls to dispose of cases expeditiously. 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, 15 global settlement conferences were scheduled,

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

involving 120 cases and 680 citations. As of the end of the period, 105 of these cases, involving 584 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, 2 calendar calls were scheduled, involving 5 cases and 14 citations. As of the end of the quarter, all of those cases were still pending. However, since these calendar calls are all scheduled for later in the year, it is likely that some of the cases involved will be disposed of prior to their scheduled hearing dates

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. 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, and the first cases eligible for this streamlined process have been identified.

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. The final rule took effect on December 30, 2010. Under the 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.

3. Electronic Filing:

The Commission submitted a report to Congress on March 23, 2011, describing the options, costs and timelines associated with this project. 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. The Commission's FY 2012 Congressional Budget Justification includes \$1 million in FY 2012 to procure and implement e-case filing and management. In the interim, the Commission is working to identify pilot projects to increase the use of technology in case handling.

DOL Quarterly Activities

Allocation of the DOL Appropriation:

Between January 29, 2011 and April 28, 2011, DOL records reflect that SOL obligated approximately \$3,410,218 for this project, of which \$2,414,632 was for staff salaries and benefits, and \$995,586 was for office space, equipment and supplies, and other operational expenses.

Between January 29, 2011 and April 28, 2011, MSHA obligated approximately \$717,000 for work on cases in the targeted backlog, of which \$641,000 was for staff salaries and benefits, and \$76,000 was for operational expenses; and approximately \$1,588,000 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 continued to be fully operational through this quarter. Approximately 83 term and temporary employees were on board as of April 28, 2011. The vast majority are attorneys. These on board employees include the additional 6 FTE referenced in the second quarter progress report. Staffing distribution is as follows: Arlington: 10.5; Atlanta: 10; Nashville: 19; Denver: 25; Philadelphia: 15.5; as well as 1 staff in Dallas, 1 in SOL's Mine Safety and Health Division, and 1 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 for the period from July 29, 2010 through April 28, 2011 is about 71.85.

Because of the additional funding that SOL is receiving through the transfer of \$2,000,000 from MSHA (as discussed above), it is contemplated that 15-20 additional temporary staff will be hired across most of the SOL backlog offices in the immediate future, which will raise the effective FTE usage rate for the project to about 92.33 FTE, pending further attrition.

In addition, as reported in the second quarterly progress report, 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 FY 2010 supplemental backlog reduction funds, as well as some of the additional \$2,000,000 in FY 2011 funds, to the ongoing targeted backlog reduction work of those staff.

SOL Litigation Activities to Address Backlog Cases:

The focus of backlog project offices solely on FMSHRC backlog cases has permitted concentrated use of litigation tools. Offices have worked closely with MSHA technical

advisors (TAs) to research and prepare backlog cases for settlement conferences and trials. Project managers have used a variety of litigation strategies for managing the workload, including motions for prompt trials, strategic pretrial motions and motions for summary judgment. Both formal and informal discovery mechanisms, including depositions, have been used by attorneys to develop the record. In some matters, penalties have been negotiated above the level proposed by the agency. In one such case, MSHA inspectors – after securing the operator’s surface phones to prevent advance warning of the inspection -- observed violations of the methane and dust control plan, and MSHA proposed a cumulative penalty of \$34,352. After backlog attorneys conducted discovery, including an expert witness deposition, and prepared the case for trial with help from the inspectors, the operator agreed to settlement with an increased civil penalty of \$70,000.

The fact that the case backlog reduction project includes thousands of cases has enabled SOL backlog project attorneys to leverage the volume of cases assigned to backlog project offices to reach resource-saving global settlements. For example, backlog offices have consolidated certain cases involving a single operator and assigned those matters to a single backlog attorney, filed motions requesting assignment of cases involving the same operator to one judge, requested settlement conferences, and discussed settlement of large numbers of cases with a single opposing counsel. Settlement of multiple cases involving one major coal operator is a good example of the success of this effort. SOL case backlog reduction project attorneys in Philadelphia are working with the operator’s corporate safety director to settle the vast majority of the dockets involving the operator within the scope of the entire backlog project. This settlement covers 13 mines and encompasses approximately 163 dockets, and over 1,000 citations. In a similar settlement, the Nashville backlog project office consolidated 20 backlog dockets involving another operator with 20 recent dockets that were still assigned to the MSHA district office, and the operator agreed to a proposed settlement of \$1,400,000 for the combined case.

Backlog project attorneys have identified legal and policy issues in certain backlog cases and developed strategic recommendations for improved future enforcement. For example, in one case backlog attorneys recommended that one aspect of an MSHA handbook could be clarified to facilitate mine operator compliance and enforcement. In another case, the backlog project office’s careful review revealed that the Army and a government contractor had been disposing of World War II munitions at three mines. The backlog project alerted MSHA to this situation and – in settling the case – included a nationwide notification requirement under which the contractor must now inform MSHA of the presence of Army munitions at any coal mine at which it has a contract.

MSHA Activities:

The MSHA staff distribution for the targeted backlog is as follows:

- 2 Coal technical advisors (TAs) in Philadelphia
- 1 Coal TA in Arlington

- 1 Coal and 1 M/NM TAs in Atlanta
- 1 Coal TA in Nashville
- 2 Coal and 1 M/NM TAs in Denver

In addition, MSHA is adding staff to assist with the growing number of non-targeted backlog cases. As of April 28, 2011, 5 technical specialists have been hired to assist conference litigation representatives on non-targeted backlog cases in Coal Districts 2, 4, 5 and 6, and twelve clerical staff were hired to work in the Metal and Non-metal districts to assist conference litigation representatives, including supporting the orderly transfer of metal-non-metal cases to the backlog project.²

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. As reported in the Second Quarterly Progress Report, MSHA redirected \$2.1 million from planned backlog activities to help offset costs of the Upper Big Branch investigation. MSHA also expanded 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 is being used to fund overtime for the Conference and Litigation Representatives (CLRs) and inspectors, 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 67,300 citations comprise the total targeted backlog of all citations contested between October 1, 2007 and February 28, 2010. As was reported in our first and second quarterly reports:

- From July 29, 2010 through October 28, 2010, the project resulted in the disposition of 1,901 cases involving 8,901 citations.
- From October 29, 2010 through January 28, 2011, the project resulted in the disposition of an additional 1,206 cases involving 7,001 citations.

As is reflected in the FMSHRC portion of this report above, between January 29, 2011 and April 28, 2011, SOL and MSHA disposed of 1,850 additional cases and 11,190 additional citations, for a total of 4,957 cases and 27,092 citations during the first three quarters of this project. Therefore, assuming the rate of disposition achieved during the third quarter of this project continues, approximately 6,600 cases and 36,000 citations will have been disposed of by July 29, 2011, which is about 63 % of the total initial targeted case backlog of 10,500 cases, and about 54% of the total number of 67,300 citations. With the passage of the full-year Continuing Resolution for FY 2011, SOL and MSHA's backlog project is funded through September 30, 2011, and the project remains on track to exceed our expectations for disposition of cases and citations.

² Six of these clerical staff were hired to assist with the transfer of targeted backlog cases to SOL. They are now supporting CLRs in their work on non-targeted backlog cases.

Through March 31, 2011, which represents the first eight months of the project, SOL attorneys and MSHA CLRs recovered over \$36 million in penalties in targeted backlog cases with final FMSHRC decisions. Additionally, SOL backlog attorneys have taken the legal actions necessary to reach settlement agreements that should result in the recovery of additional penalties of over \$7 million following the Commission's disposition of the settlement motions filed by SOL.

Between March 1, 2010 and April 28, 2011, there were 10,067 new penalty cases docketed, including 51,152 contested citations. In about 14 months, a time frame 48% as long as the 29 month time frame of the targeted backlog (October 1, 2007-February 28, 2010), approximately 54% as many cases and 49% as many citations were contested. This suggests that the rate of increase in cases and citations has continued during the period since February 28, 2010.³ Therefore, MSHA continues to devote 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.

SOL and MSHA, working with the DOL Office of the Chief Evaluation Officer, have contracted for an evaluation study of the MSHA Litigation Backlog Project (MLBP). The purpose of the study is to evaluate the best practices and the lessons learned from the MLBP with a focus on identifying practices and procedures above and beyond simple staff hours that can be applied on an on-going basis to MSHA litigation.

Conclusion

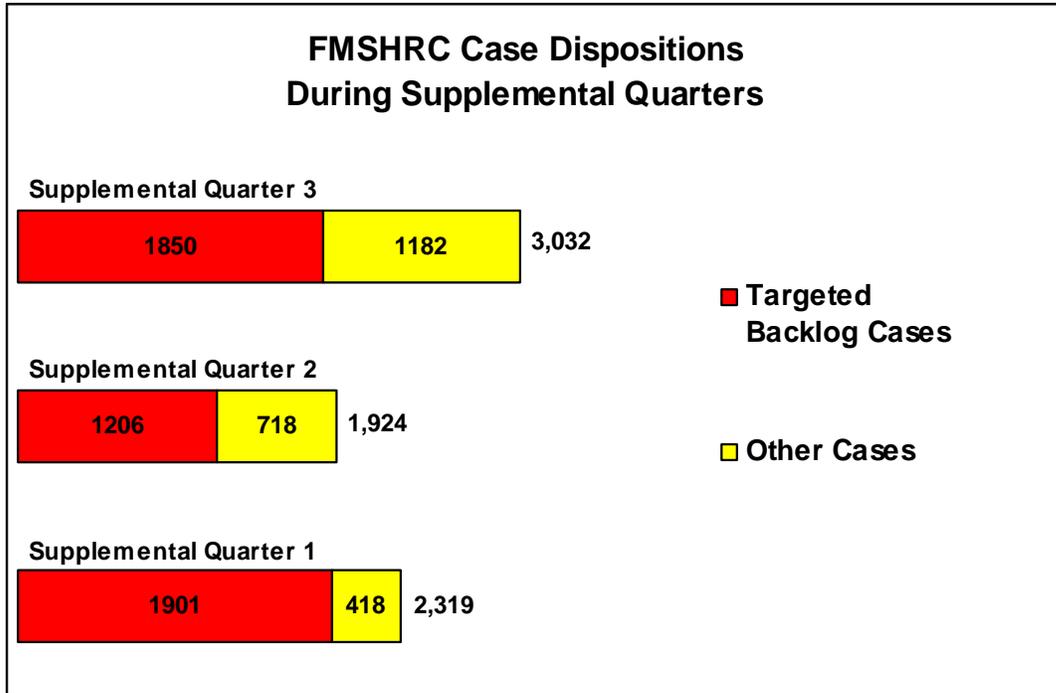
The Commission and DOL continue to make significant strides in the ongoing effort to reduce the targeted case backlog. In the first quarter, both agencies opened new offices and hired additional staff to tackle the backlog. Despite the transaction time involved in starting new offices and hiring new employees, significant progress was made on disposition of cases in the targeted backlog.

In the second and third quarters, the project has continued in full and robust operation, has achieved a successful level of productivity, and is producing further significant reductions in the targeted backlog. DOL also is undertaking vigorous actions to ensure effective use of the additional FY 2011 funding for the continuation of the project to reduce the backlog through September 30, 2011. However, both the Commission and DOL also continue to be concerned that the number of citations being contested since the February 28, 2010 – the end of the targeted backlog period – is resulting in an increasing overall caseload, despite efforts by the Commission and the Department to address both the targeted and non-targeted backlog.

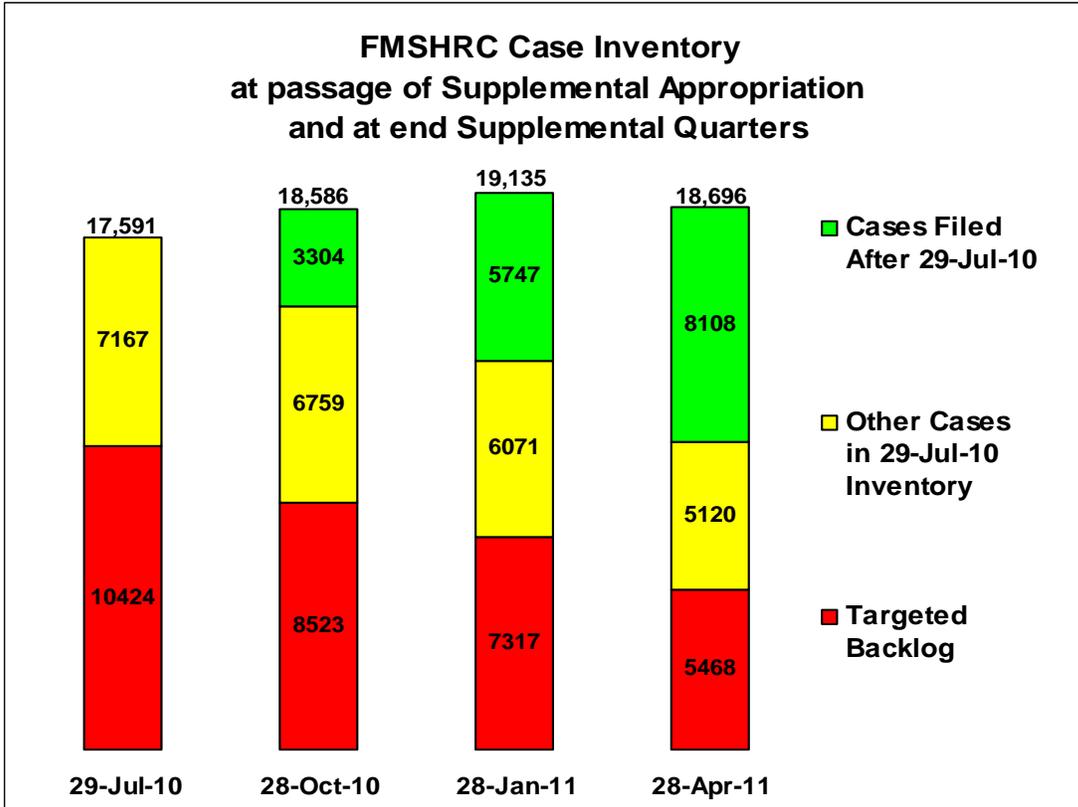
³ There were 18,373 cases with 104,295 violations contested between October 1, 2007 and February 28, 2010.

APPENDIX TO THIRD QUARTERLY REPORT
ON CASE BACKLOG REDUCTION

During the third quarter of the Supplemental Appropriation, FMSHRC disposed of 3,032 cases. As reported in this Quarterly Report, 1,850 of these dispositions were from the targeted backlog. The remaining 1,182 cases were either non-targeted cases in the FMSHRC inventory as of July 29, 2010 or cases filed since July 29, 2010.



The chart below illustrates FMSHRC’s case inventory as of the passage of the FY 2010 Supplemental, and at the end of each supplemental quarter. As a result of the high number of dispositions during the third quarter, the total number of cases pending before the Commission at the end of this quarter was lower than at the end of the second quarter. Nevertheless, as of April 28, 2011, the inventory of cases before the Commission was higher than it was when the Supplemental Appropriation was passed, due to the 8,378 cases that had been filed subsequent to July 29, 2010. Two hundred seventy (270) of these newly-filed cases had been disposed of by the end of this quarter.



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