

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

## STRATEGIC PLAN 2007-2012

### MISSION

The Federal Mine Safety and Health Review Commission (“Commission”) is an independent adjudicatory agency charged with resolving disputes arising from the enforcement of occupational safety and health standards in the nation’s mines. Under its enabling statute, the Federal Mine Safety and Health Act of 1977 (“Mine Act”), as amended, the Commission does not regulate the mining industry, nor does it enforce the Mine Act; those functions are delegated to the Secretary of Labor acting through the Mine Safety and Health Administration (MSHA). The Commission’s mission is to provide just, speedy, and articulate adjudication of proceedings authorized under the Mine Act, thereby enhancing compliance with the Act and contributing to the improved health and safety of the nation’s miners.

As the principal author of the Mine Act declared:

It is our hope that in fulfilling its responsibilities under the Act, the Commission will provide just and expeditious resolution of disputes, and will develop a uniform and comprehensive interpretation of the law. Such actions will provide guidance to the Secretary in enforcing the Act and to the mining industry and miners in appreciating their responsibilities under the law.<sup>i</sup>

### BACKGROUND

The Commission carries out its responsibilities through trial-level adjudication by the Commission’s Office of Administrative Law Judges (ALJs) and appellate review of ALJ decisions by a five-member Commission appointed by the President and confirmed by the Senate. Most cases involve civil penalties assessed against mine operators by MSHA and address whether the alleged safety and health violations occurred, and, if so, the appropriate sanctions to be imposed. Other types of cases involve mine operators’ contests of mine closure orders, miners’ complaints of safety or health related discrimination, miners’ applications for compensation after a mine is idled by a closure order, and review of disputes between MSHA and underground coal mine operators relating to those operators’ mine emergency plans.<sup>ii</sup>

Once a case is filed with the Commission, it is given a docket number and referred to the Chief Administrative Law Judge (Chief ALJ). Thereafter, litigants in the case must submit additional filings before the case is assigned to an ALJ. To expedite the decisional process, the Chief ALJ may rule on certain motions and, where appropriate, issue orders of settlement, dismissal, or default. Otherwise, once a case is assigned to an individual judge, that judge is responsible for the case and rules upon motions and settlement proposals, schedules the case for hearing, holds the hearing, and issues a decision based upon the record. An ALJ's decision that is not reviewed becomes a final, non-precedential order of the Commission.

The 5-member Commission provides administrative appellate review based on the record. It may, in its discretion, review decisions issued by ALJs when requested by a litigant, or it may, on its own initiative, direct cases for review. The Commission's decisions are precedential and appeals from the Commission's decisions are to the federal circuit courts of appeals.

## **KEY CHALLENGES**

As an adjudicatory agency, the Commission's fulfillment of its mission is in large part influenced by the prerogatives of the parties that practice before it. This circumstance arises from the unique procedural structures created by the Mine Act itself. For example, the Mine Act provides that a mine operator may challenge an enforcement action, e.g., a citation or closure order, within 30 days of receipt thereof. At that point, however, MSHA will not have had time to propose an appropriate civil penalty as a sanction for the citation or order. That process may take weeks or months following the initial enforcement action.<sup>iii</sup> Consequently, the Mine Act also allows the mine operator to defer challenging the citation or order until it has been assigned a proposed penalty assessment by MSHA. At that point the case can then proceed on the issue of whether the alleged violation occurred and, if so, the appropriate civil penalty to be assessed for that violation.

Nevertheless, operators often file the initial contest even though they intend to wait until the proposed civil penalty is issued. At that point, the two proceedings are consolidated and the matter proceeds to settlement or trial. The operator's initial contest, however, has historically been carried on the Commission's docket as a pending unresolved case. That practice obviously leads to confusion regarding the Commission's productivity with respect to the disposition of cases at the ALJ level. For this reason, the Commission has determined that, unless the operator seeks to proceed with the litigation before a proposed penalty is issued, the Chief ALJ should defer the assignment of an operator contest to an ALJ until such time as MSHA arrives at a proposed civil penalty, the operator notifies MSHA that it intends to contest the penalty, and MSHA in turn notifies the Commission of that fact. This change in the

Commission's docket record keeping more accurately represents the status of pending cases and allows the Commission's ALJs to focus their efforts on those matters wherein all relevant issues have been fully joined.<sup>iv</sup>

The scope of the Commission's mission has been significantly expanded by the passage of the MINER Act in June of 2006. That statute amends the Mine Act and vests the Commission with the responsibility for resolving disputes over the contents of mine emergency plans adopted by underground coal mine operators and submitted to MSHA for review and approval. The MINER Act imposes tight deadlines on the Commission and its judges with respect to these proceedings, and the Commission has expeditiously adopted procedural rules for carrying out Congressional intent.<sup>v</sup> Nevertheless, this new jurisdiction will tax the resources of the Commission's Office of ALJs. Moreover, given the structure of the MINER Act, the Commission's responsibilities in this area will not necessarily dissipate once the initial round of emergency plans are developed, reviewed, and, if necessary, litigated. The statute calls for the periodic updating, review, and approval of mine emergency plans and the adoption of new technologies in underground communications and disaster response. As this process evolves, the Commission anticipates that its role as arbiter in the plan adoption and approval process will be a significant and ongoing responsibility.

The MINER Act also establishes new and stronger civil sanctions for violations of the Mine Act, including minimum penalties for an operator's unwarrantable failure to comply with the statute or the mandatory safety and health standards, and a new penalty for conduct deemed "flagrant."<sup>vi</sup> In response to the MINER Act, MSHA has revised its civil penalty regulations, which will result in significant increases in the amount of civil penalties proposed by the agency. MSHA has also indicated that it will increase the exercise of its authority to issue closure orders at mines that have demonstrated a "pattern" of "significant and substantial" violations of the Act and the mandatory safety and health standards.<sup>vii</sup> These statutory and regulatory initiatives are expected to increase the number of operator contests filed with the Commission and may affect the number of cases that go to hearing rather than to settlement.

As a result of these legislative and regulatory changes, the Commission has experienced a dramatic rise in the number of contest cases filed by mine operators. Indeed, the number of cases filed with the Commission has risen from 2440 filed in FY 2005 to 3360 filed in FY 2006. The FY 2007 total far exceeded the FY 2006 numbers with a total of 4,097 new cases filed. In the first two months of FY 2008, the Commission received over 1,100 cases, and the Commission anticipates that the number of new contests will continue to increase significantly over the coming years.<sup>viii</sup>

At the appellate level, the Commission's workload is determined predominately by the number of appeals filed by the parties. Although acceptance of an appeal is discretionary, the percentage of cases denied review has not varied significantly. In addition, while the number of appeals may vary, the Commission has not been able to

discern a clear relationship between the trial caseload and the number of petitions for appellate review it receives. It should be noted that recent Mine Act jurisprudence adopted by the D.C. Circuit Court of Appeals that circumscribes the Commission's scope of review of MSHA policy may also affect the Commission's review docket.<sup>ix</sup> Nevertheless, the Commission expects that its workload will increase significantly from prior years, thus making it more challenging to attain the Commission's goal of timely adjudication at the trial and appellate levels.<sup>x</sup>

In FY 2006-07, the Commission undertook a complete review and revision of its procedural rules in an effort to reflect evolving case law and to otherwise clarify and improve the rules. It can be expected that these changes may engender some litigation activity as new procedures replace old ones, but this activity should be minimal.

Finally, the tragic events of September 11, 2001, and recent natural disasters underscore the need for a government agency to assure that its records are secure and replicable in the event that physical files are destroyed or become otherwise inaccessible. The Commission must therefore establish an electronic data system that stores all key documents away from the Commission's offices in such a way as to allow Commission personnel to access those documents in order to carry out the Commission's mission.

To meet these anticipated challenges, the Commission must streamline its case handling procedures, redirect its financial and human resources, and encourage efficiency and timeliness among the parties who practice before it. Accordingly, the Commission has adopted a set of goals for the next five years that, if achieved, will ensure that the Commission continues to carry out its mission in a just, efficient, open, and credible manner.

## STRATEGIC GOALS

In view of the recent and continuing upsurge in its caseload, the Commission must continually reassess its strategic goals in light of changing circumstances. Therefore, the Commission will establish benchmarks as part of its overall strategic plan, but it will also revisit and evaluate those benchmarks as part of its annual performance and budget planning activity.

The annual performance plan will clearly explain the role of each Commission activity as set forth in the Commission's budget. The plan's specific objectives, adjusted to reflect policy determinations and resource allocations in the annual budget process, will serve as intermediate steps in the Commission's overall efforts to successfully accomplish the goals of this strategic plan.

Accordingly, in order to achieve its mission, the Commission sets forth the following strategic goals:

**I. Ensure expeditious, fair, and legally sound adjudication of cases at the trial and appellate levels.**

**Objective—Ensure Timely Issuance of Decisions**

***Performance Goals—Trials:***

Manage the case assignment process to assure that initial filings and response time frames are adhered to, resulting in case assignment averages that are less than the time frames in the Commission's procedural rules.

Issue decisions on more than 90 percent of the cases in which hearings are held within 180 days of receipt of post-hearing briefs.

Issue more than 90 percent of all settlement decisions within 60 days of receipt of settlement motions.

Decide more than 90 percent of all cases within 15 months of assignment to an ALJ.

Decide, on average, all cases, within 365 days from receipt by the Commission.

**Objective—Ensure Timely Issuance of Decisions**

***Performance Measures—Trials:***

Manage the case assignment process to assure that initial filings and response time frames are adhered to, resulting in a decisional process that falls within the time frames in the Commission's procedural rules.

***Performance Goals—Appeals:***

All Commission cases will be assigned before briefing is completed.

All Commission cases will be decided within 18 months of receipt.

The average age of substantive decisions will be maintained at 12 months or less.<sup>xi</sup>

**II. Manage the Commission's human resources, operations, facilities, and IT systems to ensure a continually improving, effective, and efficient organization.**

**Objective—Ensure Organizational and Management Effectiveness**

***Performance Goals:***

At least every three years review and revise the strategic plan through annual performance goals, objectives and performance measures to assure public awareness, and to guide individual and organizational efforts.

**Objective—Provide Effective Information Technology Systems**

***Performance Goals:***

Maintain and enhance secure electronic information systems for case management, legal research, management operations support, public access to data through the internet, and continuity of the Commission's operations during national emergencies or natural disasters which may disrupt normal office operations. Ensure that the Commission's IT structure is maintained according to the latest recommendations of the National Institute of Standards and Technology (NIST) with respect to the security of the agency's network. Move aggressively to a system of "paperless" filing and records management.

## **Objective—Sustain a High Performing Workforce**

### ***Performance Goals:***

Recruit, train, and retain a diverse workforce of skilled, highly motivated employees to effectively and efficiently accomplish the Commission's mission.

## **STRATEGIES FOR ACHIEVING GOALS AND OBJECTIVES**

The adjudicative and managerial goals and objectives set forth above can be achieved through an integrated set of strategies that build on current Commission programs and initiatives. For example, the Commission now provides same day electronic audio recordings of oral arguments and decisional meetings on its web site. The Commission anticipates that in the near future such web site access will be provided in real time. Likewise, the Commission is currently overhauling its case management system so that all case files will be stored electronically. That system will ultimately allow parties to file all documents electronically as well.

Working from the premise that fair and expeditious decision making and efficient agency management go hand in hand, the Commission adopts the following strategies to implement the strategic goals and objectives identified above:

### **1. Prioritize the Decisional Process**

The Commission will continue to concentrate on its oldest cases at both the trial and appellate levels. Through the use of enhanced automated case tracking systems, it will identify each case as it proceeds through the decisional process at both the trial and appellate levels. Periodic review of the status of each case against predetermined time standards will identify those cases that may need additional attention. Judges and Commissioners can thereby prioritize their work to facilitate the issuance of opinions.

The Commission will also continue to review at the trial and appellate levels new cases that may be susceptible of quick resolution. Through early identification in the adjudicatory process, these cases are most often disposed of by the Chief ALJ at the trial level and through expedited drafting and decisional procedures at the appellate level. Additionally, the Commission plans to promulgate regulations governing case settlement procedures and anticipates establishing a corps of retired ALJs who, on a contract basis, will supervise settlement negotiations in those cases determined to be likely candidates for settlement.

The Commission will reestablish its law clerkship program to provide research and drafting assistance to its ALJs and assist in the efficient management of each judge's docket.

The Commission will continue at the trial level to use "calendar calling" where cases involving an individual company are grouped together. Pre-hearing initiatives such as conference calls with the parties will continue to be utilized to settle or narrow issues.

## **2. Maintain and Enhance an Information Technology Program**

Integral to achieving its objectives, the Commission decision makers and support personnel must have a modern computerized information technology system. This system is necessary to produce Commission decisions, to ascertain immediately the status of any case on the Commission's docket, to research issues electronically from various legal data bases and to provide public access to the Commission's decisions and procedures. The system must also assure that appropriate Commission personnel have ready access to all data necessary to carry out their responsibilities during emergencies.

The Commission's strategy for improving its information technology is to:

Continue to maintain and enhance the case tracking system.

Increase the availability of new Commission decisions by electronically distributing its decisions and immediately posting them on the Commission's website.

Maintain a secure website, accessible to the disabled, containing Commission policies, procedures, and a searchable database of Commission decisions dating back to the Commission's inception.

Provide a secure computer network infrastructure with up-to-date hardware and software to facilitate the Commission's electronic data processing needs.

Arrange for offsite electronic storage of the Commission's database according to a Continuity of Operation Plan (COOP) and provide access to material in that database, as appropriate, by authorized Commission personnel.

Aggressively move toward the electronic filing of documents by those parties appearing before the Commission with the goal of establishing a "paperless" adjudicative system.<sup>xii</sup>

### **3. Improve Human Resources Management**

The Commission's strategy for improving its human resources management is to:

Conduct a human resources management program to assure that a diverse, highly qualified workforce is adequately trained and accountable in performing the mission and objectives of the agency.

Reestablish the Commission's law clerkship program beginning in FY 2008 with the hiring of four full-time law clerks for terms of two years each.

Utilize retired ALJs as settlement judges on a contract basis to facilitate the resolution of cases that can be disposed of short of a full trial-type hearing.

### **4. Promote Employee Accountability**

Employee accountability in an adjudicative agency presents unique challenges in that ALJs and Commissioners are not subject to individual performance standards. Nevertheless, the Commission will strive to achieve the goals of its strategic plan and annual performance plan by:

Providing all employees with copies of the strategic plan, annual performance plans, and annual accomplishment reports.

Including accountable goals in individual performance standards where appropriate.

Appropriately monitoring individual performance, adjusting individual workloads, and assisting with work assignments as appropriate.

Disseminating to employees monthly reports on the progress in achieving the Commission's goals and objectives.

## **PROGRAM EVALUATION**

The Commission will evaluate its progress toward accomplishing its strategic goals through analysis of the results of its performance measures and through a continual reassessment of its workload and the needs of the parties that it serves. Program strengths and weaknesses will be assessed to determine alternative courses of action. The Commission will use the results of these evaluations to develop the

annual performance goals and objectives which will focus the Commission's activities for the year.

## ENDNOTES

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- i. Statement of Senator Harrison Williams (Chairman), *Hearing on the Nomination of Members of the Federal Mine Safety and Health Review Comm'n Before the Senate Comm. on Human Res.*, 95th Cong., 1 (1978).
- ii. The Commission's responsibility for reviewing disputes over the contents of mine emergency plans derives from the MINER Act, Pub. L. No. 109-236, 120 Stat. 493, which was passed and signed into law in June of 2006 in response to a series of coal mine disasters that occurred earlier in 2006.
- iii. Section 105(a) of the Mine Act requires MSHA to notify a mine operator of the civil penalty to be imposed "within a reasonable time" after the citation or order upon which it is based is issued. 30 U.S.C. § 815(a). The District of Columbia Circuit Court of Appeals has ruled that the Secretary's views on what constitutes "a reasonable time" supersede those of the Commission. *Sec'y of Labor v. Twentymile Coal Co.*, 411 F.3d 256, 262 & n.1 (D.C. Cir. 2005). Thus, a case may be delayed before even reaching the Commission because of the need to wait for the Secretary to propose a penalty for the alleged violation at issue in the case.
- iv. *Marfork Coal Co.*, 29 FMSHRC 626 (Aug. 2007). As that decision provides, if an operator can demonstrate that the stay of its contest should be lifted and that the contest should proceed prior to the issuance of the proposed civil penalty, the operator can file a motion to lift the stay for that purpose. *Id.* at 636.
- v. See 30 C.F.R. 2700.24; 72 Fed. Reg. 2187 (Jan. 18, 2007) (final rules); 71 Fed. Reg. 40654 (July 18, 2006) (interim rules).
- vi. MSHA's guidelines for implementing the flagrant violation penalty are contained in the agency's Procedural Instruction Letter No. 106-III-4, issued October 26, 2006.
- vii. That authority is derived from section 104(e) of the Mine Act, 30 U.S.C. 814(e).
- viii. Other court decisions may result in additions to the Commission's caseload. For example, a challenge to MSHA's health standards for the use of diesel-powered equipment in underground metal/nonmetal mines was recently denied by the D.C. Circuit Court of Appeals in *Kennecott Greens Creek Mining Co. v. MSHA*, 476 F.3d 946 (2007). This could result in an increase in the Commission's caseload as MSHA and the operators seek resolution of issues relating to the interpretation and application of

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the new standards.

ix. See *Sec'y of Labor v. Twentymile Coal Co.*, 411 F.3d 256 (D.C. Cir. 2005); *Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151 (D.C. Cir. 2006); *Sec'y of Labor v. Spartan Mining Co.*, 415 F.3d 82 (D.C. Cir. 2005); *Sec'y of Labor v. National Cement Co. of California*, 494 F.3d 1066 (D.C. Cir. 2007).

x. The Commission's appellate docket in recent years has experienced an upsurge in requests to reopen proceedings where a mine operator has been held in default for failure to respond to orders issued in civil penalty cases. The Commission has worked diligently to educate mine operators, particularly small mine operators, that their filing of a contest against the initial citation or order does not excuse them from their obligation to respond to the Secretary's subsequent petition for civil penalty filed with the Commission. Likewise, ongoing negotiations between operators and MSHA do not relieve operators of their obligations to respond to Commission orders. Nevertheless, when defaults do occur and operators ask that the proceedings be reopened, their requests are evaluated by the Commission under the criteria set forth in Rule 60(b) of the Federal Rules of Civil Procedure.

xi. Time frames do not include periods during which a case has been stayed.

xii. The Commission will, of course, continue to accommodate the needs of pro se litigants who may not have the capability to submit all filings electronically.