

Final Report on the
Targeted Caseload
Backlog Reduction Project

Submitted by:

The Federal Mine Safety and Health Review
Commission

And

The United States Department of Labor

November 14, 2011

Introduction

This is the final report of the Federal Mine Safety and Health Review Commission (FMSHRC or “Commission”) and the Department of Labor (DOL or “Department”) on the targeted case backlog reduction project described in the Joint Operating Plan submitted to Congress on September 7, 2010. This report will first summarize the overall caseload reduction achievements under the project since its inception, and conclude with a report on the activities of the agencies in the fourth and final quarter of the project, April 29 through July 28, 2011.

Pursuant to Chapter 7 of Public Law 111-212, the “Supplemental Appropriations Act, 2010” (“Supplemental”), DOL received an appropriation of \$18,200,000 and FMSHRC received an appropriation of \$3,800,000, both of which were 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 was 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 was 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.

Although the supplemental funding expired on July 28, 2011, the Commission’s full level of effort dedicated to caseload reduction under the Supplemental continued through September 30, 2011. The Commission used FY 2011 funding to carry over staff initially brought on with supplemental funding for the final two months of FY 2011.

DOL was also able to continue backlog reduction project efforts through the end of FY2011. Section 1807 of Title VIII of the full-year Continuing Resolution enacted on April 15, 2011, stated:

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 transferred \$2,000,000 to the Departmental Management account for use by SOL for the continued funding of the case backlog reduction project through September 30, 2011. With this additional funding SOL was able to continue operating the project through September 30, 2011 and to implement certain enhancements, including the addition of a number of short-term FTE, to handle more of the cases before the Commission. MSHA also utilized \$750,000 of its full-year CR funding for backlog reduction activities through September 30, 2011, including additional contract clerks.

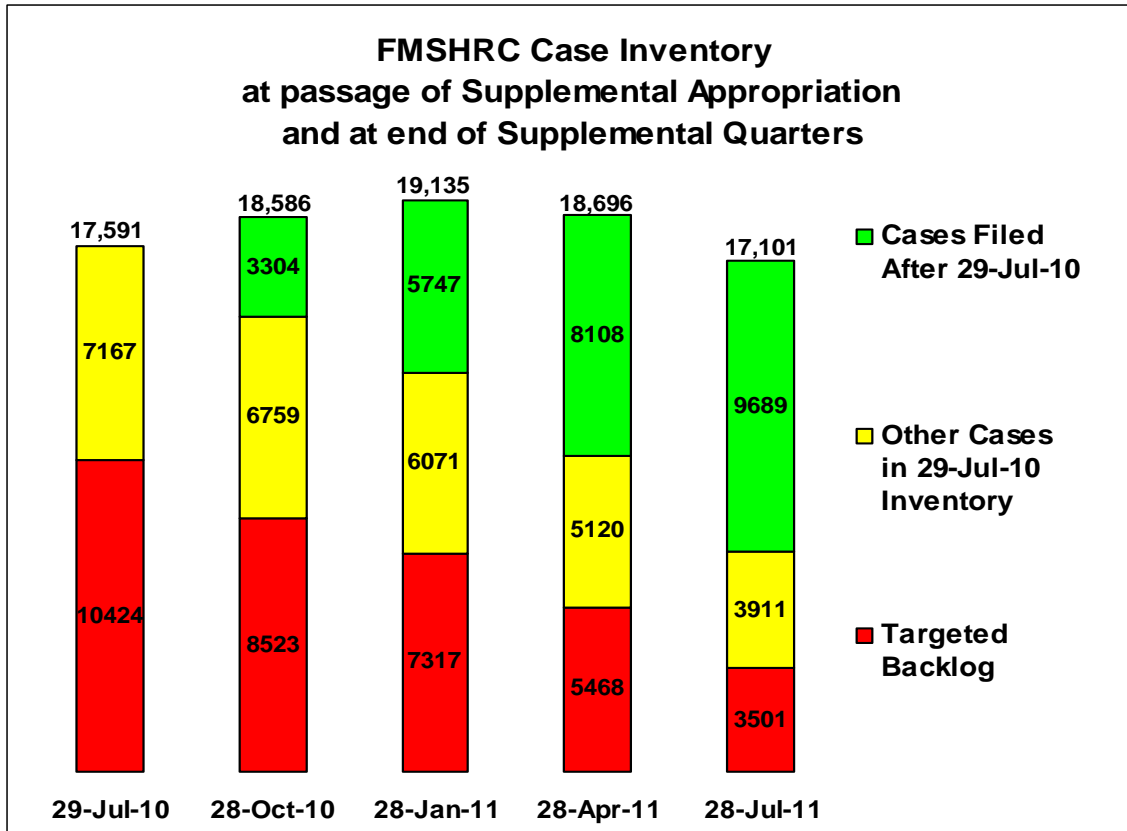
Report on Overall Caseload Reduction Achievements **Under the Joint Operating Plan**

Most cases in the Commission's trial level inventory are penalty cases, in which a mine operator challenges a civil penalty that MSHA has proposed for the violation described in a citation or order. Other types of cases include contest cases, involving an operator's contest of the issuance of a citation or order; discrimination cases in which a mine employee alleges that s/he suffered an adverse employment action as a result of engaging in a safety-related activity protected under the Mine Act; challenges to orders to close a mine; miners' requests for compensation after a mine has been idled by a closure order; and disputes arising over the review and approval of mine emergency response plans.

As of July 29, 2010, when the Supplemental Appropriations Act of 2010 was enacted, the Commission had a total of 17,591 cases in its trial-level inventory. In their Joint Operating Plan to Congress, the Commission and the Department identified citations that were contested on or after October 1, 2007, through February 28, 2010, and defined that group of citations and their related penalty cases as the targeted backlog. This targeted backlog was made up of 10,424 penalty cases involving 64,267 citations. The agencies developed the joint operating plan to attack the targeted backlog.

The Commission and DOL made sound investments with the supplemental funding provided by the Congress, and have made significant strides in the ongoing effort to reduce the targeted case backlog and to decrease the overall case inventory. In the first quarter of the Supplemental period, both agencies opened new offices and hired additional staff to tackle the backlog. Despite the transaction time involved in starting new offices, and hiring and training new employees, significant progress was made on the disposition of cases, particularly those cases in the targeted backlog. Nevertheless, new cases continued to be filed, and by the end of the second quarter, the total number of trial level cases at the Commission had reached 19,135.

However, in the final six months of supplemental funding, the Commission and DOL successfully reversed the trend of a rapidly and continually growing caseload, and as of the expiration of the funds, the total case inventory had dropped to 17,101 cases, despite an influx of 11,412 new cases filed during the Supplemental period.

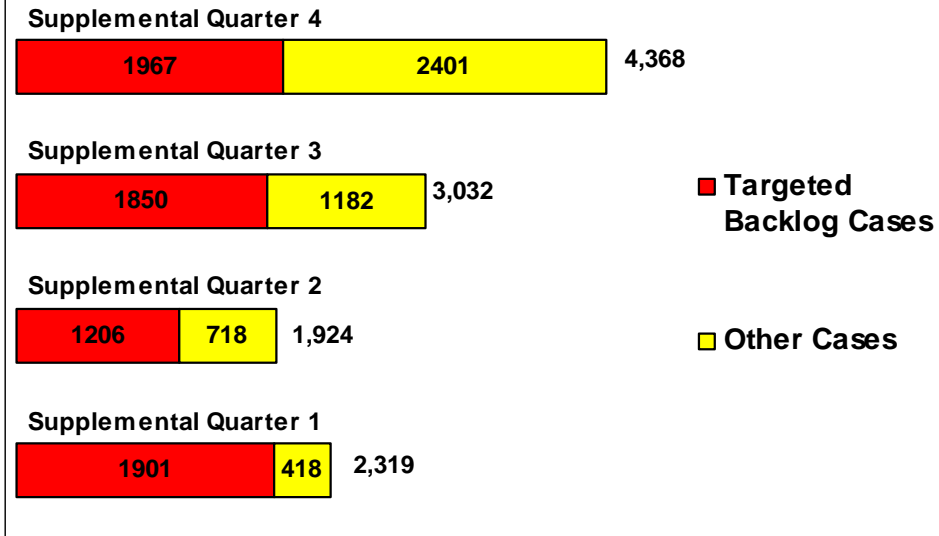


* Note: The targeted backlog includes only penalty cases filed within a certain timeframe. FMSHRC’s total case inventory also includes other types of cases, such as cases contesting the issuance of a citation or order, and discrimination proceedings.

In the year following enactment of the Supplemental, 11,643 cases were disposed of, including two-thirds of the cases in the targeted backlog. In the Joint Operating Plan to Congress, the Commission had anticipated it would be able to dispose of between 10,040 and 10,240 cases during the Supplemental period. The actual case disposals of 11,643 during the Supplemental period exceeded the original goal by 12 to 14 percent. As illustrated by the chart below, most of those cases were disposed of in the final two quarters.

The high number of case disposals in the last two quarters of the Supplemental period indicates that the additional staff and efficiency improvements implemented by the two agencies have had a direct and positive impact on productivity. As the backlog project progressed, DOL allocated additional backlog project resources to help address the growing number of new cases in FMSHRC’s case inventory. This adjustment contributed to the increase of non-targeted cases disposed of in the 4th Quarter, as illustrated in the table below. By effective allocation of resources, DOL achieved this increase without compromising the disposal rate of targeted cases.

FMSHRC Case Dispositions During Supplemental Quarters



Report on Fourth Quarter Activities

This is the fourth and final quarterly progress report by the Commission and DOL on the status of the case backlog reduction project described in the Joint Operating Plan submitted to Congress on September 7, 2010. This progress report covers the period of April 29, 2011 through July 28, 2011.

FMSHRC Quarterly Activities

Obligations of Supplemental Funds and Additional Staffing for FMSHRC:

As of July 28, 2011, the Commission had obligated a total of \$3,788,434 from its supplemental appropriation, of which \$1,181,419 was for salaries and benefits, and \$2,607,015 was for operational expenses, travel, office space, supplies, equipment, and contract staff.

Case Processing and Targeted Backlog Case/Citation Dispositions:

The targeted backlog addressed by this quarterly report consists of the 10,424 penalty cases pending at the Commission on July 29, 2010, that had been filed on or after October 1, 2007 through February 28, 2010. From April 29, 2010 through July 28, 2011, FMSHRC disposed of 1,967 targeted backlog cases involving 11,079 citations.

Case Priorities:

FMSHRC's Office of Administrative Law Judges (OALJ) prioritizes cases involving fatalities, injuries, flagrant violations, emergency response plans, mine closures, and discrimination complaints. Commission judges have given targeted backlog cases with a high number of unwarrantable failure citations or orders the highest priority, and cases with a large number of significant and substantial citations the second highest priority. Early in the project, the SOL team leaders identified 547 priority backlog cases. As of July 28, 2011, 308 of those cases had been disposed of, 228 had been assigned to a judge but had not yet been disposed of, and 8 had settlement motions pending before the Chief Judge. In the remaining three priority backlog cases, show cause orders had been issued because the operator failed to file a timely answer. If a party does not respond to a show cause order, the case is defaulted.

Administrative Actions to Facilitate Disposal of Cases:

1. Global Settlements and Calendar Calls:

FMSHRC has utilized 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, 17 global settlement conferences were scheduled, involving 99 cases and 854 citations. As of the end of the period, 77 of these cases, involving 706 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, 12 calendar calls were scheduled, involving 77 cases and 241 citations. As of the end of the quarter, 64 of the cases, involving 211 citations, had been resolved. It is anticipated that some of the remaining cases will reach settlement 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 setting forth procedures that simplify and streamline the processing of certain civil penalty proceedings. *See* 75 Fed. Reg. 81459. The final rule became effective on March 1, 2011. Although the administrative processes in these cases are streamlined, hearings remain full due process hearings, as they are under conventional procedures. The Commission and DOL are currently refining the criteria under which cases will be selected for this streamlined process.

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 goal of the rule is to make the settlement of cases more efficient and less time-consuming for Commission judges. The rule requires that parties who file motions to approve settlement 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. Between December 30, 2010, when the final rule took effect, and July 28, 2011, an estimated 6,130 settlement motions had been filed with the Commission pursuant to this new procedural rule.

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 to procure and implement e-case filing and management.

In the interim, the Commission has initiated pilot projects to increase the use of technology in case handling that will help to identify and ameliorate potential barriers to e-filing. For example, the Commission is working with the Department of Labor to conduct a pilot for DOL to file petitions with the Commission electronically, as the vast majority of cases require the Secretary of Labor to file a petition with the Commission.

DOL Quarterly Activities

Allocation of the DOL Appropriation:

As of July 28, 2011, SOL obligated approximately \$10,841,936 for this project, of which \$7,707,972 was for staff salaries and benefits, and \$3,133,964 was for office space, equipment and supplies, and other operational expenses. These totals do not include an additional \$897,909 in previously reported expenditures for staff salaries and benefits from SOL non-project general funds for FY2010. As noted in the first quarterly report, to achieve early initiation of the project, SOL utilized general FY2010 funds in August and September 2010 before receipt of the apportionment and allotment of the FY2010 supplemental appropriation funds for this project.

As of July 28, 2011, MSHA obligated \$7,235,798 of the \$7,259,250 available under the Supplemental, of which \$2,280,116 was for work on cases in the backlog (\$1,521,334 was for staff salaries and benefits, and \$758,782 for operational expenses), and \$4,955,682 for the Upper Big Branch mine disaster accident investigation and internal review.

SOL Activities:

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) continued to be fully operational through this quarter. Approximately 89 term and temporary employees were on board as of July 28, 2011. The vast majority were attorneys. Staffing distribution was as follows: Arlington: 12; Atlanta: 14; Nashville: 19; Denver: 24; Philadelphia: 17; 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 July 28, 2011 was about 72.81.

The supplemental funding allowed a scale of resources to be brought to bear upon FMSHRC backlog cases that produced results otherwise unachievable during this time period. In addition to allowing for the litigation and settlement of a large volume of cases, the additional resources helped to identify and capitalize on efficiencies in case handling.

The ability to focus SOL's five backlog project offices exclusively on FMSHRC backlog cases permitted the concentrated use of litigation tools, development of efficient approaches to managing MSHA cases, and resolution of a large number of backlogged cases. SOL backlog project offices worked closely with MSHA technical advisors to research and prepare backlog cases for settlement discussions, conferences and trials. Case settlement decisions made by the Technical Advisors based on the strength of

evidence encouraged quick resolution of individual cases and global settlements consisting of large numbers of citations. This coordination enabled strategic case and caseload management decisions that achieved positive results in many individual cases and grouped dockets. Project managers used a variety of litigation strategies to manage and effectively address caseload. Formal and informal discovery mechanisms, including depositions, were intensively used to develop the record and strengthen the posture of cases for potential settlement or successful trial. Comprehensive preparation was combined with short deadlines, an aversion to continuances, and motions for prompt trials, strategic pretrial motions, and motions for summary judgment to move cases and dockets.

In particular, SOL's ability to coordinate the litigation and preparation for trial of a large number of citations made it possible to negotiate global settlements involving significant numbers of citations and in some cases multiple dockets. One of the backlog reduction offices, for example, was able to reach a proposed settlement with a coal mine operator for several dockets involving more than 425 citations for over \$520,000. A settlement of 17 dockets involving just under 200 citations was negotiated for over \$280,000. Another global settlement of 12 dockets involving a single operator – and over 225 citations – was negotiated for over \$60,000, representing a 20% reduction from the original assessed penalties. Another office proposed a global settlement of six dockets and 88 citations with a total recovery of over \$110,000; that settlement, if approved by Commission judges, would affirm 84 of the original 88 citations.

Focused litigation and trial preparation led to case resolutions, with a number of large proposed settlements negotiated on the eve of trial. In one matter, after over 100 citations and orders were set for hearing in August 2011, and SOL attorneys noticed depositions in the matter, the coal mine operator settled for over \$200,000, or 71% of the proposed penalties. In another matter, after extensive settlement negotiations and just two weeks before trial, the parties proposed resolution for all 157 citations at issue for a total penalty amount of over \$110,000. All but 2 citations remained unchanged, and the operator agreed to pay just under 70% of the original assessment.

MSHA Activities:

As of July 28, 2011, the MSHA staff distribution for the targeted backlog was as follows:

- 2 Coal technical advisors (TAs) in Philadelphia
- 1 Coal TA in Arlington
- 1 M/NM TA in Atlanta
- 1 Coal TA in Nashville, plus one CLR detailed to Nashville assist as a TA
- 2 Coal and 1 M/NM TAs in Denver

In addition, MSHA added staff to assist with the growing number of non-targeted backlog cases. As of July 28, 2011 there were 4 technical specialists assisting conference litigation representatives on non-targeted backlog cases in Coal Districts 2 4, 5 and 6. In

addition, 11 clerical staff and 5 technical advisors were working in the Metal and Non-metal districts to assist conference litigation representatives.

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. From July 29, 2010 through July 28, 2011, the project resulted in disposition of 6,924 targeted backlog cases involving 38,171 citations, or 57% of the citations in the targeted backlog. Disposition of citations was substantially greater than the projected disposition during the supplemental funding period of 18,000-22,000 targeted backlog citations. In addition, the resources of both SOL and MSHA that have been directed at the “non-targeted” backlog has increased the disposal rate of non-targeted cases.

Through July 28, 2011, SOL attorneys and MSHA CLRAs obtained judgments for over \$57 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 following the Commission’s disposition of the settlement motions filed by SOL.

Conclusion

In the fourth and final quarter of this project, as well as through the full year of the supplemental funding, the Commission and Department of Labor were able to significantly address the FMSHRC case inventory. FMSHRC’s and DOL’s activities described in this report and prior quarterly reports both resolved individual cases and achieved new efficiencies in resolution of MSHA cases before the Commission. Two-thirds of the 10,424 cases in the targeted backlog – 6,924 – were disposed of. Altogether, 11,643 cases -- targeted and non-targeted – were concluded. Further, in the final six months of supplemental funding, the combined efforts of the Commission and DOL were able to reverse the trend of a growing caseload. As of July 28, 2011, the total inventory of cases pending before FMSHRC had dropped to 17,101, a level lower than the total case inventory at the start of funding.