

**JOINT REPORT ON BACKLOG
REDUCTION**

Submitted by:

**The Federal Mine Safety and Health Review
Commission**

And

The United States Department of Labor

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Introduction

In Senate Report No. 113-71 (July 11, 2013) of the Senate Committee on Appropriations, the Secretary of Labor (DOL) was directed, in conjunction with the Federal Mine Safety and Health Review Commission (FMSHRC) to:

Provide a joint report to the Committee on Appropriations of the House of Representatives and the Senate for reducing the number of pending cases and average case processing times to appropriate levels by the end of fiscal year 2015. The report should fully explain how such levels were determined. It should also establish goals and metrics for determining when the levels will be achieved and how they will be maintained in the future.

This is the report of FMSHRC and DOL to the Senate and House Appropriations Committees on reducing the number of cases in contest, as well as the average case processing times, to appropriate levels by the end of fiscal year (FY) 2017. The report outlines the work that FMSHRC and DOL (through the Mine Safety and Health Administration (MSHA) and the Solicitor of Labor (SOL)) have done to reduce the number of pending cases. This includes the original “targeted backlog” (active cases contested between October 1, 2007 and February 28, 2010) and the “overall caseload” (the total number of cases currently pending before FMSHRC, including the “targeted backlog”) through September 30, 2014; the work we are doing to reduce the number of pending cases; and DOL’s and FMSHRC’s separate projected goals for overall caseload and processing times for contested cases by the end of FY 2017.

Pursuant to Chapter 7, Title I, 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 FMSHRC, and other purposes related to mine safety. In their Joint Operating Plan to Congress, dated September 7, 2010, FMSHRC and DOL identified citations that were contested on or after October 1, 2007, through February 28, 2010, and defined that group of contested cases as the targeted backlog. This “targeted backlog” (which was a subset of the total trial level inventory) was made up of 10,424 penalty cases involving 64,267 citations.

Congress first appropriated these funds in the 2010 Supplemental Appropriations Act. Starting in FY 2012, Congress authorized the use of DOL and FMSHRC appropriations to fund their backlog activities. FMSHRC and DOL have made sound investments with the funding provided by the Congress, making significant strides in the ongoing effort to reduce the number of pending contested violations. The agencies developed a joint operating plan to attack the targeted backlog. The plan included the use of specialized litigation teams (with initially 89 term and temporary SOL employees (74 attorneys) who were hired in 2010-2011) to staff the MSHA Litigation Backlog Project (Backlog Project) and provide legal advice, conduct litigation and participate in global settlements to resolve some cases. These SOL employees worked hand-in-hand with the MSHA

technical advisors who provided expert mining knowledge concerning issues raised in the cases, and case settlement authority for MSHA.¹ FMSHRC increased the number of Administrative Law Judges from nine to 20 using a combination of additional permanent and senior Judges, part-time senior Judges, and loaner Judges. A law clerk and a legal assistant (total of 18 additional employees) were provided for each Judge. The Docket Office was expanded by seven contractor positions to provide more efficient receipt and processing of cases. Using strategies outlined below, DOL and FMSHRC have worked to reduce both the number of pending cases to a steady state and the length of time it takes to resolve contested cases.

Backlog Reduction and Case Processing Times

Targeted Backlog

MSHA data shows that by the end of FY 2011, the first full year in which the Backlog Project was operational, the “targeted backlog” was reduced from 10,614 penalty cases involving 64,267 citations to 2,750 cases involving 19,728 citations. The reduction of 7,674 penalty cases and 44,539 citations was over twice the number predicted in MSHA’s operating plan. In FY 2012, the “targeted backlog” was reduced to 876 cases involving 5,247 citations; and in FY 2013, levels decreased to 317 cases involving 1,587 citations. These reductions were accomplished in a little over 3 years. As of the end of FY 2014, 132 cases involving 735 citations remained in the “targeted backlog,” a 99 percent reduction from the beginning of the Backlog Project. The “targeted backlog” did not include new citations issued by MSHA, which operators continued to contest. The table below outlines the progress in reducing the “targeted backlog.”

Reductions in “Targeted Backlog”

As of:	Targeted Backlog	
	Number of Cases	Number of Citations
March 31, 2010	12,307	73,821
September 30, 2010	9,029	57,817
September 30, 2011	2,750	19,728
September 30, 2012	876	5,247
September 30, 2013	317	1,587
September 30, 2014	132	735

Source: MSHA Standardized Information System

Overall Caseload

¹See the previous Joint Reports on Backlog Reduction submitted by FMSHRC and DOL. Since the end of FY 2013, SOL has maintained its MLBP staff at 44 temporary and term FTE working on the project, along with 6 MSHA technical advisors.

By the end of FY 2010, FMSHRC statistics show that the overall caseload rose to a high of over 18,000 cases. With backlog reduction resources provided by Congress, and along with other efforts, DOL and FMSHRC have continued to reduce the overall caseload.

At the end of FY 2011, the caseload had been reduced to fewer than 16,000 cases; in FY 2012 to about 13,000 cases; and in FY 2013 to about 7,600 cases. By the end of FY 2014, the overall caseload was at about 6,200 cases.

FMSHRC data also indicates the average days from contest to decision peaked at 546 days in FY 2011, declining to 459 by the end of FY 2014.

The following chart shows the overall caseload and case processing times since the beginning of the Backlog Project:

Overall Caseload & Case Processing Times

FY Ending	Number of Cases in Contest	Avg. Days Contest to Decision
September 30, 2010	18,190	517
September 30, 2011	15,830	546
September 30, 2012	12,982	541
September 30, 2013	7,612	463
September 30, 2014	6,278	459

Source: FMSHRC

FMSHRC Backlog Activities

FMSHRC has faced great challenges in recent years, as its trial caseload within the Offices of the Administrative Law Judges (OALJ) increased dramatically. From FY 2000 through FY 2005, the average number of new cases filed was about 2,300 per year with the average number of pending cases at about 1,400. However, beginning in FY 2006 the number of new cases filed increased steadily as did the number of pending cases. In FY 2009 there were about 9,200 new cases filed with over 14,200 cases pending at year end.

As of July 29, 2010 (when the Supplemental Appropriations Act was enacted giving DOL and FMSHRC funds for one year to reduce the backlog), FMSHRC had a total of 17,591 cases in its trial-level inventory.

Supported by the FY 2011 continuing resolutions, as well as the FY 2010 Supplemental Appropriation, FMSHRC took a number of steps to dispose of cases more efficiently and to reduce the backlog. Most importantly, FMHSRC established new offices and hired

additional personnel to tackle the backlog, including six new full time equivalent judges and the staff to support their work. In addition, based upon successful practices used to reduce the backlog, the OALJ reorganized in FY 2014 and realigned staff resources by providing each of the 15 Administrative Law Judges with one permanent law clerk and one legal assistant.

In addition to the targeted case Backlog Project with DOL, FMSHRC promulgated two final rules in FY 2011, both aimed at streamlining the adjudicatory process:

- **Settlements:** On November 30, 2010, FMSHRC published in the Federal Register a final rule on settlement procedures. The goal of the rule is to make the settlement of cases more efficient and to produce judicial economy, by requiring that parties who file motions to approve settlement submit a proposed order approving settlement with the motion.
- **Simplified Proceedings:** On December 28, 2010, FMSHRC published in the Federal Register a final Simplified Proceedings rule setting forth procedures that simplify and streamline the processing of certain civil penalty proceedings.

FMSHRC also actively explored the implementation of an electronic case management system to increase the speed and efficiency with which cases are processed. On March 23, 2011, it submitted a report to Congress describing the options, costs and timelines associated with this project. An electronic case management system procurement was initiated in FY 2012 and implemented in FY 2014. This system permits electronic filing, fully electronic case files, electronic assignment and distribution of cases, case tracking and other utilities. In anticipation of this new system, the FMSHRC initiated pilot projects to increase the use of technology in case management that helped to identify and ameliorate potential barriers to e-filing.

DOL Backlog Activities

SOL: Litigation Activities to Address Backlog Cases

Under the Backlog Project, SOL developed specialized litigation teams in separate temporary offices that work closely with MSHA Technical Advisors (TAs) to research and prepare backlog cases for settlement conferences and trials. The success of the Backlog Project is due in part to the pairing of TAs with SOL attorneys. The TAs, armed with considerable technical expertise and a full understanding of MSHA's enforcement policies and priorities, are able to assist attorneys in case evaluation and decisions regarding settlements in significant cases on behalf of the agency. They are also authorized to approve settlements reached by SOL attorneys, a function otherwise reserved for MSHA's District Managers. The Nashville, Philadelphia and Denver offices of the Backlog Project are currently each staffed with two TAs.

Initially, the Backlog Project offices focused exclusively on a group of cases identified above as the "targeted backlog," but starting in FY 2012, due to the success of the

project, they began working on contested cases transferred from the MSHA offices. In FY 2013, MSHA transferred about 2,200 cases to the Backlog Project, and in FY2014, it transferred about 2,400. In FY 2015, MSHA will transfer 2,350 cases to those offices.

Since the sole focus of the Backlog Project is on MSHA contested cases, Backlog attorneys have been able to concentrate their efforts on litigation tools designed for these kinds of cases. 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 addition, MLBP attorneys have been able to leverage the volume of cases assigned to backlog project offices to reach resource-saving global settlements involving multiple cases. As noted earlier with the transfer of cases from MSHA's Conference Litigation Representatives (CLRs) to the Backlog Project, DOL is building greater capacity and CLR offices are able to handle more of the less complicated contested cases.

SOL attorneys in the Regional offices continue to identify legal and policy issues in certain cases and develop strategic recommendations for improved future enforcement. SOL continues to assist CLRs with legal and procedural issues that arise. In addition, permanent SOL staff from SOL's existing regional offices continue to handle more complicated MSHA cases including those involving accidents, injuries, or fatalities; cases involving closure orders; pattern of violations cases and imminent danger orders. Finally, SOL is incorporating "lessons learned" from the Backlog Project, particularly regarding global settlements, in the SOL Regional offices.

DOL: Actions to Reduce the Contested Caseload

DOL has taken a number of actions to reduce the contested caseload. For example, in January, 2012, MSHA introduced new procedures for conducting pre-contest conferences. All of MSHA's coal and metal nonmetal districts participate in these conferences, which are granted at the discretion of the District Manager. As of June 30, 2015, MSHA had conferenced nearly 15,000 violations. Of those that were conferenced, 54 percent were not contested.

MSHA has also been implementing enforcement and other initiatives that are improving compliance by mine operators and resulting in fewer contested citations. These include administrative and regulatory changes to the Pattern of Violations (POV) process to rein in chronic violators, and outreach and collaboration with MSHA stakeholders to improve compliance with MSHA's mandatory safety and health standards.

In the more than 30 years since the passage of the Mine Safety and Health Act of 1977, which provided that mine operators with a pattern of significant and substantial violations be subject to closure orders for areas of the mine affected by those violations until the mine receives a clean inspection, MSHA had never successfully placed a single mine on a POV. In 2010, MSHA took a critical first step to reform the POV enforcement program by revising the POV screening criteria. This new criteria gave the agency additional enforcement tools to use at mines with a history of violating safety standards. This was

followed in 2013, by the issuance of a final POV rule to further strengthen MSHA's procedures and place the responsibility for monitoring POV status on the mine operator.

Mine operators are paying more attention to their compliance with mandatory safety and health standards to avoid accruing a history of violations that could lead to a mine being placed on a POV. MSHA conducts a quarterly review of mines that underwent the POV process, and these reviews show that these mines have subsequently improved their performance and continue to do so.

Since April, 2010, MSHA has also been conducting impact inspections at mines meriting increased agency attention and enforcement due to their poor compliance history or particular compliance concerns.

MSHA's *Examination of Work Areas in Underground Coal Mines for Violations of Mandatory Health or Safety Standards* final rule, which was effective on August 1, 2012, requires mine operators in underground coal mines to identify and fix hazards and violations before MSHA shows up at a mine to conduct its inspections.

MSHA's outreach and collaboration with its stakeholders to assist operators in complying with MSHA standards are also helping to drive down the number of violations. By way of illustration, for metal and nonmetal mines, MSHA published a guarding policy (Guarding I and II) regarding mobile equipment and a fall protection policy that uses OSHA's 6-foot rule as guidance. Since initiating the guarding policy in FY 2010 through FY 2014, guarding violations were down 43 percent. MSHA's policy on fall protection went into effect in FY 2013 and through FY 2014, fall protection violations declined by 12 percent.

As a result of these initiatives and other activities, compliance overall is improving and from FY 2010-2014, the annual number of total violations cited by MSHA dropped 30 percent. This was accompanied by a decline in the percentage of citations contested from a high of 27 percent in FY 2010 to 20 percent in FY 2014.

Projections for the Contested Trial Caseload for FY 2017

While DOL and FMSHRC project that the average case processing time will be reduced by FY 2017, the Agencies disagree on the extent of the reduction. As a result, this Report provides both projections.

DOL's Projections for Case Resolution Times

Based upon historical data by fiscal year, which includes the rates at which penalties were contested and disposed, and with the current level of funding and staff, DOL and MSHA have projected that by the end of FY 2017, at most the case processing times could be reduced to an average of 332 days.

DOL applauds FMSHRC’s aspiration of reducing the average case processing time to 200 days, as outlined below. However, DOL believes this projection is overly optimistic and is based on receiving increased funding, as well as on the assumption that even if the case load is reduced to pre-2007 levels, processing times will also decrease to pre-2007 levels. DOL believes that the current cases involve more complex issues, e.g. flagrant violations and POV, and much higher penalties that will require greater processing time than the FY 2006 caseload. The average penalty assessed in FY 2006 was \$240.00 and the average penalty assessed in FY 2014 was \$828.00, over three times as much. In addition, litigation by its nature is unpredictable. It may be possible that, based on discovery, a relatively new penalty case can be settled within one month. On the other hand, another relatively new penalty case just filed could have a discovery schedule extending through admissions, interrogatories and depositions over the course of 9 months due to scheduling issues between the attorneys and the judge. The filing of a motion for summary judgment—a relatively common litigation occurrence-- or a motion for interlocutory review—a less common occurrence, but a possibility nonetheless -- could also substantially increase the time until a final ALJ decision by many months. Finally, the vigorous representation of the Secretary by DOL and the equally vigorous representation of mine operators by private counsel are other “unknown” quantifiers that cannot be estimated with any degree of accuracy in order to arrive at “average” times. Consequently, DOL believes instead that its projections paint a much more realistic picture of case processing times through FY 2017.

MSHA Projections for Case Processing Times

FY Ending	Number of Cases in Contest	Avg. Days to Contest to Decision
Projected 9/30/2015	5,500	401
Projected 9/30/2016	4,200	366
Projected 9/30/2017	3,500	332

Source: Cases in Contest – FMSHRC; Avg Days Contest to Decision – Extrapolated from MSHA’s Data

FMSHRC’s Projections for Case Resolution Times

The Commission, having set the goal of returning pendency to pre-backlog levels, is well aware of the challenge of reducing pendency as well as the resources necessary to accomplish this challenge. The pendency figures have fluctuated throughout 2015 as some of the Commission’s oldest cases are disposed, which raises the pendency figure for 2015, but will result in a lower pendency figure for 2016 and 2017.

The Targeted Average Days Contest to Disposition are FMSHRC strategic goals. FMSHRC has adopted pendency as the main performance factor for caseload. Pendency is defined as the average number of days between case creation and case disposition at the trial level. FMSHRC has established ambitious pendency targets for each fiscal year. These targets were estimated based upon historical workload data from before the FY

2009 surge and take into account the realigned structure that provides 15 Administrative Law Judges (ALJs) each staffed with a law clerk/attorney advisor and a legal assistant.

Average case disposition pendency remained fairly constant from FY 2001 through FY 2006 averaging 230 days. Starting in FY 2007, there was a significant increase in new cases, and the pendency rose to a high of 546 days in FY 2011. FMSHRC predicts that case pendency will continue to drop until it reaches an average of 200 days at the end of FY 2017.

This pendency is derived from the expected pendency for case dispositions with hearing and without hearing. The pendency for cases with hearings is predicted at 510 days. This is based upon a review conducted for FMSHRC by the National Center for State Courts that proposed a trial-level time standard of 540 days for penalty cases with hearing. FMSHRC has lowered that standard to 510 days due to efficiencies created by the electronic case management system. FMSHRC has determined that the pendency for cases without hearing (which comprise 94% of all cases) should average 190 days. This results in an overall pendency for all cases of 200 days. This is in line with the average pendency of 230 days in the pre-surge period before FY 2007.

FMSHRC predicts that there will be 3,300 cases on hand at year end FY 2017. This is based upon the FY 2015 estimated new cases of 6,000, and DOL’s determination that this number should hold steady, as citations issued and contest rate are predicted to remain constant from FY 2015 to FY 2017. With a prediction of 6,000 new cases per year, and the current FMSHRC authorization of 15 ALJs, this equates to 400 case dispositions per year per ALJ, a 30% increase over the pre-FY 2007 disposition rate. This increase is supported by the increased staffing ratio structure that provides each ALJ with a law clerk/attorney advisor and a legal assistant.

FMSHRC’s Projections for Case Processing Times

FY Ending	Number of Cases in Contest	Targeted Avg. Days Contest to Decision
9/30/2015	4,452	425
9/30/2016	4,200	300
9/30/2017	3,300	200

The OALJ will be able to reduce the number of cases on hand by temporarily increasing the dispositions per year. This is due to the continued ability of the OALJ to field backlog teams consisting of additional law clerks and an additional settlement attorney. It is projected that these positions can be supported through FY 2016 to allow the number of cases on hand to be reduced to 3,300 by FY 2017. At that point, FMSHRC estimates that the number of dispositions will equal the number of new cases.

FMSHRC: Appellate Cases

The five-member FMSHRC provides administrative appellate review. Review of a judge's decision by the FMSHRC is not automatic and requires the approval of at least two Commissioners.

Although the focus of this report is on the trial level cases within the OALJ, FMSHRC has seen a dramatic increase in the number of filings for appellate review. The increased number of penalty cases at the OALJ has resulted in a dramatic increase in substantive cases being appealed. The OALJ increase started in FY 2008, and the corresponding increase in appellate level substantive cases began in FY 2009 and continued through FY 2014.

The trend of an increased number of petitions being filed for appellate review is likely to continue for the foreseeable future. In FY 2008, 8 petitions for review of judges' decisions were filed, and 4 petitions were granted. In FY 2014, 32 petitions were filed and 19 were granted.

The increase in cases filed has resulted in an increased number of cases on hand at the appellate level. In FY 2009 there were eight cases on hand. In FY 2013, there were 69 cases on hand at year end. FMSHRC has adopted the goal of 19 substantive cases on hand by year end FY 2016.

There has also been an increase in the pendency of appellate cases. Pendency is defined as the elapsed time from when FMSHRC has granted review of a petition for discretionary review (PDR) or a petition for interlocutory review (PIR) until a decision is issued.

FMSHRC has adopted a goal of 12 months for pendency of appellate cases. The matters to which this goal applies are significant cases with many presenting issues of first impression under the Mine Act. Many cases raise issues that have not been resolved by prior decisions of FMSHRC or the courts, or the cases involve the interpretation of safety and health standards and regulations promulgated by the MSHA. In addition, time is expended by the Commission in the review of Petitions for Discretionary Review that are not granted and the review of Petitions for Temporary Reinstatement.

Strategic Objective: Ensure timely issuance of decision for appellate cases

Performance Goal	2015 Target	2016 Target	2017 Target
Average time to issuance of decision	31 months	21 months	12 months

FMSHRC projects that the goal of 12 months pendency can be reached by FY 2017. To reach that goal, FMSHRC has established internal milestones for case completion, and monitors the status of those milestones on a monthly basis. FMSHRC has also taken action to increase staffing. The FY 2014 appropriation provided for an additional three

attorney-advisors in the Office of the General Counsel; those positions have been filled. The FY 2016 President's Budget requests an additional three counsel-attorney positions in the Offices of the Chairman and Commissioners. These would be temporary positions to assist the Commissioners in deciding cases over the next three years.

In conclusion, using additional funding from Congress, DOL and FMSHRC have made great strides in reducing the backlog of contested cases pending before FMSHRC. Going forward, we will continue to work toward achieving our goals for case backlog and pendency.