

First Quarterly Progress Report:
Targeted Caseload
Backlog Reduction

Submitted by:

The Federal Mine Safety and Health Review
Commission

And

The United States Department of Labor

December 20, 2010

Introduction:

This is the first 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 July 29, 2010 through October 28, 2010.

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, all of which is available for one year from the date of enactment (July 29, 2010) 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 (\$4,451,000) and for the investigation of the Upper Big Branch Mine disaster (\$2,808,250).

FMSHRC Quarterly Activities

Obligations of Supplemental Funds and Additional Staffing for FMSHRC:

As of October 28, 2010, the Commission had obligated a total of \$1,281,882 of supplemental funding, of which \$655,573 was for salaries and benefits, and \$626,309 was for operational expenses, travel, office space, supplies, and equipment, and start up costs for its new office in Pittsburgh, PA.

The Commission’s Pittsburgh office opened on September 20, 2010, and as of the end of the reporting period, seven staff members are currently stationed at that office. The Commission has reconsidered its intention to rent space from the MSHA in Rosslyn, Virginia, and is currently exploring other options in the Washington, D.C., metropolitan area.

As of October 28, 2010, FMSHRC has fully staffed the positions identified in the Joint Operating Plan.

Judges: Six Administrative Law Judge (ALJ) full time equivalencies (FTE) have been filled in two categories.

- Four FTE have been filled by senior judges (judges who have retired from federal service) who can serve for 12 to 18 month terms (pursuant to 5 U.S.C. § 3323(b)(2) and 5 C.F.R. § 930.209).

- Two FTE have been filled by loaned judges, obtained via the ALJ Loan Program administered by the Office of Personnel Management (OPM) (pursuant to 5 U.S.C. § 3344 and 5 C.F.R. § 930.208). FMSHRC has obtained loaned judges from the Environmental Protection Agency (EPA), the Occupational Safety and Health Review Commission (OSHRC), the United States Postal Service (USPS), Housing and Urban Development (HUD) and the Federal Trade Commission (FTC).

The Commission decided against hiring permanent judges, referred to by the OPM as “incumbent judges,” with funds from the supplemental appropriation.

Law clerks: Six new law clerks have been hired as temporary appointments. Two are assigned to the Pittsburgh office and the remaining four are in the Washington, D.C., office.

Legal assistants: Three new legal assistants have been brought on-board as contract employees.

Senior Executive Service (SES) position: The Bureau of the Public Debt (BPD) (which provides FMSHRC with human resources support) advertised through USAJobs for an SES detail. As a result of this advertisement, FMSHRC selected a highly qualified Executive who is on board and actively working on case backlog issues.

Attorney advisor: One additional attorney has been hired for the Commission’s Office of General Counsel.

Case Processing and Targeted Backlog Case/Citation Dispositions:

As of July 29, 2010, FMSHRC had a total of 17,591 cases in its inventory. FMSHRC identified 10,424 of those cases as being in the targeted backlog defined in the Joint Operating Plan.¹ As noted in the Joint Operating Plan, certain penalty cases contested on or after October 1, 2007 through February 28, 2010 are considered by DOL to be priority litigation matters. Because these cases are more complex, DOL will not assign them to supplemental staff and therefore they will not be included in the targeted backlog. Therefore, the number of cases in the targeted backlog is subject to change as DOL identifies those priority litigation cases. Any such reduction in the targeted backlog will be noted in subsequent quarterly progress reports. From July 29, 2010 through October 28, 2010, FMSHRC disposed of 1,901 targeted backlog cases involving 8,901 citations.

¹ The remaining 7,167 cases were either filed subsequent to February 28, 2010, or are not penalty cases. (The targeted backlog includes only penalty cases.)

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 are putting together lists of these high priority cases, which should help Commission judges expedite this process. The lists will be sent to the individual judges in cases that have been assigned to judges and to the chief judge's office/docket office in cases that are currently unassigned. Calendar call cases (involving specific operators or specific geographic areas) will also be prioritized.

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 or calendar calls. 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. Calendar calls, on the other hand, are hearings scheduled in one location sequentially during a specified timeframe, generally one or two weeks. During this reporting period, 13 calendar calls were scheduled, involving 105 cases and 699 citations. The vast majority of the cases were disposed as a result of the scheduled calls. Only 20 cases (involving 116 citations) are still pending.

- 2. Rulemaking:**

Simplified proceedings rule: FMSHRC anticipates publishing a final rule in December 2010.

Settlement procedure rule: The interim rule took effect on May 27, 2010. FMSHRC intends to publish a final rule in November 2010. In addition, FMSHRC has made forms for proposed orders available on its website and is working with parties to address any technical difficulties.

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 is exploring the option of publishing a Request for Information (RFI) in FedBizOpps. This RFI would ask 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 will submit a report to the Congress no later than January 29, 2011 that will provide a more detailed description of the options, costs and timelines associated with this project.

DOL Quarterly Activities

Allocation of the DOL Appropriation:

Between July 29 and October 28, SOL obligated approximately \$2,151,053 for this project, of which \$1,096,569 is for staff salaries and benefits, and \$1,054,484 is for office space, equipment and supplies, and other operational expenses. Included in the total amount obligated is \$897,909 for project staff salaries and benefits in non- project FY 2010 general funds. In order to ensure that the agency initiated this project as quickly as possible, SOL utilized those general FY 2010 funds in August and September, 2010, prior to the receipt of the apportionment and allotment of the FY 2010 supplemental appropriation funds.

Between July 29 and October 28, MSHA obligated approximately \$2,433,740 for work on cases in the targeted backlog, of which \$2,002,178 was for staff salaries and benefits, and \$431,562 was for operational expenses. These costs were met through FY 2010 and FY 2011 general funds, as work on these cases was part of MSHA's existing targeted backlog work which included case resolution and litigation-related activities necessary to dispose of citations that could be resolved prior to the transfer of cases to SOL and the receipt of the apportionment and allotment of the FY 2010 supplemental appropriation funds. Now that the bulk of the remaining targeted backlog cases have been transferred to SOL, this regular work of Conference Litigation Representatives and other MSHA personnel will largely be directed at non-targeted backlog cases before FMSHRC. Consequently, going forward, MSHA's targeted backlog project salary and operational costs related to the Technical Advisors referenced elsewhere in this report will be met through supplemental funding. MSHA anticipates the spending of supplemental funding to accelerate during the course of the project with the recruitment, selection and hiring of Technical Advisors essentially complete and as inspector overtime costs for case preparation and hearing attendance increase as hearings are scheduled.

As of October 28, MSHA obligated approximately \$2,351,921 for the Upper Big Branch mine disaster accident investigation and internal review. Of this amount, approximately \$1,725,080 was charged to the supplemental appropriation.

Additional Staffing for SOL and MSHA:

As of October 28, as is described in greater detail below, SOL has established five new offices to handle the backlog reduction litigation: in Nashville, Tennessee; Denver, Colorado; Arlington, Virginia; Atlanta, Georgia and Philadelphia, Pennsylvania. Approximately 70 additional temporary or term employees have been hired thus far for this project. The vast majority are attorneys. Training for the new staff has been undertaken to familiarize them with FMSHRC issues, case processing methods, and mining methods. The SOL attorneys and other staff are now engaged in the initial stages of litigating the targeted backlog matters.

SOL has hired the following categories of staff:

Nashville, Tennessee:

- Reassigned 1 supervising attorney.
- 12 staff attorneys.
- 4 support staff.

Atlanta, Georgia

- 5 attorneys
- 1 law clerk
- 2 support staff

Arlington, Virginia:

- 1 supervising attorney.
- 6 staff attorneys.
- 2 law clerks
- 1 support staff.

Philadelphia, Pennsylvania

- 1 supervising attorney
- 11 staff attorneys
- 2 support staff

Denver, Colorado:

- 1 supervising attorney.
- 15 staff attorneys.
- 1 law clerk
- 5 support staff

As of October 28, MSHA has hired five re-employed annuitants and reassigned two current employees to work as Technical Advisors on the backlog project. Of these seven, two advise SOL on Metal/Nonmetal cases and five are working on Coal cases. One additional Technical Advisor for Coal will begin work in Denver on October 31, 2010.

There is a vacancy remaining in the Atlanta office and MSHA is working on hiring for that position. In addition, MSHA is in the process of hiring six clerical support staff to assist SOL in preparing cases. The estimated entrance on duty date for these six hires is January 3, 2011.

The current MSHA FTE distribution is as follows:

- 2 Coal FTE in Philadelphia
- 1 Coal FTE in Arlington
- 1 M/NM FTE in Atlanta
- 1 Coal FTE in Nashville
- 1 Coal and 1 M/NM FTE in Denver

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 stated above, from July 29, 2010 through October 28, 2010, the backlog reduction project has resulted in the disposition of 1,901 cases involving 8,901 citations.

In the Joint Operating Plan, DOL also provided a projected number of disposals of targeted backlog citations for the time period between July 29 and September 30, 2010. That projection was between 580 and 680 citations and it has been exceeded. During that time period, 1,991 citations (involving 390 cases) from the targeted backlog were finally disposed of through SOL's efforts. Additionally, MSHA's Conference Litigation Representatives (CLR's) were able to dispose of 4,569 citations (985 cases) during the same time period.² Thus, a total of 6,560 citations (1,375 cases) were disposed of by DOL between July 29 and September 30, 2010.

A graphic reflecting the status of citation disposition is included as the DOL Appendix to the First Quarterly Report at the end of this document.

Conclusion

The Commission and DOL have made an effective start in the 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.

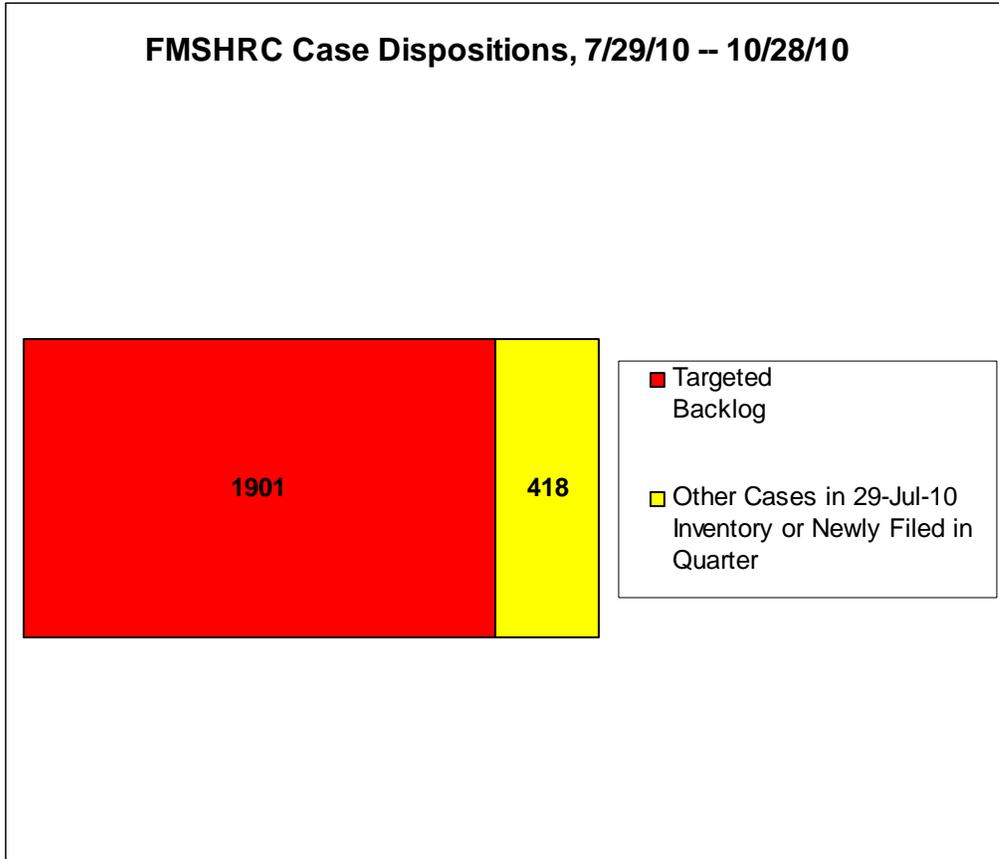
DOL and FMSHRC intend to meet the following schedule for future quarterly reports:

² CLRs are responsible for handling those contested violations before the Commission that do not involve complex or novel legal issues. Their workload is generally comprised of violations that do not include accidents, fatalities, flagrant violations, or pattern of violations litigation.

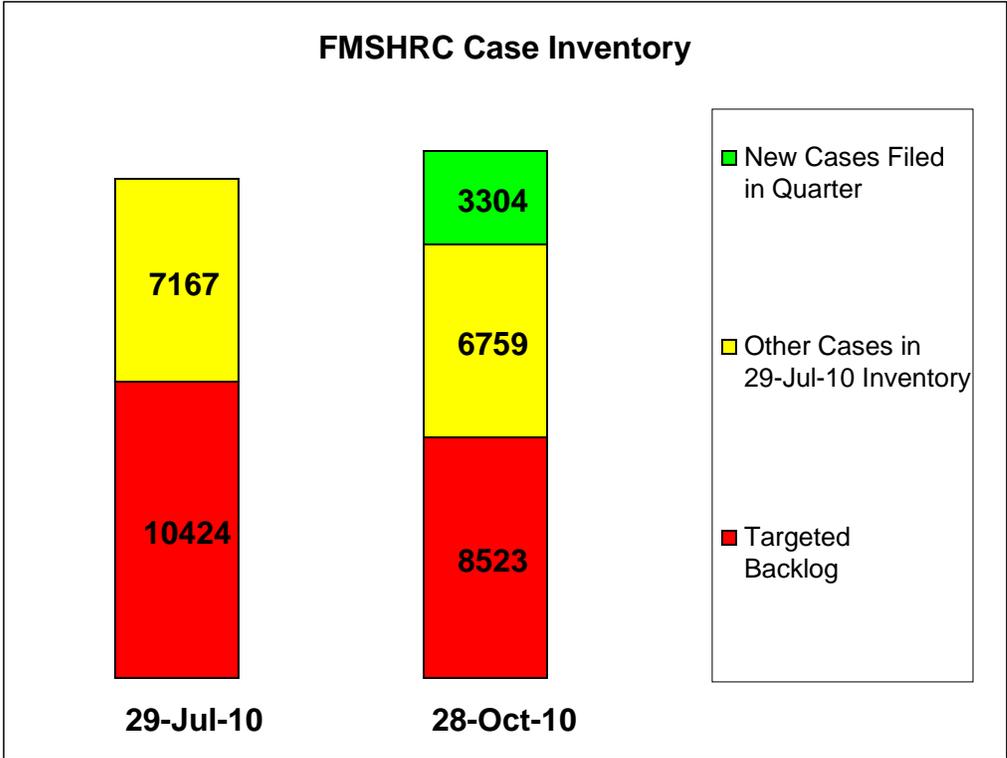
Quarter 2: Oct 29 – Jan 28, Submit report no later than Feb 28;
Quarter 3: Jan 29 – Apr 28, Submit report no later than May 27;
Quarter 4: Apr 29 – July 29, Submit report no later than Aug 29.

FMSHRC APPENDIX TO FIRST QUARTERLY REPORT
ON CASE BACKLOG REDUCTION

During the first quarter of the Supplemental Appropriation, FMSHRC disposed of 2,319 cases. As reported in this Quarterly Report, 1,901 of these dispositions were from the targeted backlog. The remaining 418 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 this significant number of dispositions in the quarter, the FMSHRC case inventory grew to 18,586 as a result of 3,314 new cases being filed during the quarter.



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

DOL APPENDIX TO FIRST QUARTERLY REPORT

