

## The Civil Penalty Case Backlog from the Government's Perspective

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### How did we get here?

The current MSHA case backlog now hovers at approximately 16,000 cases consisting of more than 80,000 violations pending before the Federal Mine Safety and Health Review Commission (Commission). This backlog is directly, though not solely, related to a steady rise in the number of cases contested from 10,036 in 2006 to 46,526 in 2009. This increase can most readily be attributed to an increase in the number of citations issued by MSHA along with an increase in proposed penalty amounts.

In the wake of the Sago and Aracoma tragedies, Congress directed MSHA to enhance its inspection program. Congress increased MSHA funding for the specific purpose of ensuring full compliance with the Mine Act's requirement that all mines receive regular inspections – four complete inspections for all underground mines and two complete inspections for surface mines. Congress took this step because MSHA had not been achieving this statutorily mandated goal.

MSHA used the additional funding from Congress to increase the number of inspectors. This resulted in an increase in the number and quality of inspections. As a result, the number of inspections rose from 21,705 in CY 2007 to 23,882 in 2008, a 10% increase, and 21,999 in CY 2009, a 1% increase from 2007.

In CY 2006, MSHA cited 140,000 violations and proposed \$35.1 million in civil penalties. That year, operators contested 7% of violations representing 35% of the proposed penalties. Strikingly, in CY 2009, the number of violations cited by MSHA increased to 175,000 with proposed penalties totaling \$141.2 million. The passage of the Mine Improvement and New Emergency Response (MINER) Act of 2006, and MSHA's commitment to conduct all statutorily mandated inspections has resulted in a 30% increase in the number of citations issued. By contrast, the dollar-value of associated penalties proposed increased from \$35 million in 2006 to 167.5 million in 2009. This steep increase in proposed penalties reflects the MINER Act's enhanced penalties for violations designated as

“flagrant” as well as the statutory minimums set for Part 50 immediate notification and 104(d) violations.

It is important to note that during the period of increased enforcement in 2008 and 2009, the mining industry achieved record improvements in mine safety. In 2008, mining deaths reached an all-time low of 52. 2009 proved to be an even better year as the mining industry had even fewer fatalities.

## **Moving Forward**

Together, MSHA and the Office of Solicitor have identified a number of structural changes that could potentially help improve the contested case process. The goal of any changes made must be to reduce the current backlog along with the contest rate in order to prevent future backlogs. The following options represent those identified as having the greatest potential for reducing the backlog:

### **I. Industry Responsibility for Mine Safety**

MSHA will evaluate ways to improve the use of effective mine safety and health management programs by mine operators. In particular, MSHA will be looking at mine operators that may be subject to the application of the Pattern of Violations under Section 104(c) of the Mine Act. Specifically, MSHA will work with the mining industry to develop training materials to aid compliance by mine operators. While MSHA recognizes the need to partner with industry to develop strategies to make mines safer and healthier, ultimately, the operators bear the responsibility to “find and fix” hazardous conditions. This proactive approach to mine safety and health should result in fewer violations being issued.

### **II. Simplification of Citation/Order Writing Form**

Simplification of the citation/order writing form is another approach MSHA is considering to address the backlog. In most of the contested cases before the Commission, the issue is not whether a violation occurred. Instead, the dispute is usually over the gravity of the violation, or the degree of negligence attributable to the mine operator. The current citation and order writing form requires the issuing inspector to make clear distinctions in evaluating gravity and negligence. Such distinctions are often hard to make given the subtle differences, if any, among the choices. Therefore, MSHA is considering ways to make the evaluation and writing of citations and orders by inspectors simpler and ultimately more objective, clear and consistent. We believe that simplifying this form would reduce the number of issues for dispute.

### III. Pre-penalty Safety and Health Conferences

Another approach to addressing the backlog is a change to the current Safety and Health conference process. Until February 2008, MSHA held these conferences prior to the assessment of a civil penalty. Once the conference was concluded, MSHA's Office of Assessments would assign a penalty taking into consideration any modifications made to the violation as a result of the conference. Disputes resolved during pre-penalty Safety and Health conferences do not require approval by the Commission. However, in March 2009, MSHA implemented the Enhanced Safety and Health conference. This conference requires mine operators to first contest the proposed penalty before a conference is held. Disputes resolved during this post-penalty conference require the approval of the Commission thereby increasing the backlog and the number of days to disposal of the case. A review of both conferences has led to the conclusion that the best approach is to hold the Safety and Health conference before the penalty is proposed or contested. In order to be effective, operators must fully participate by providing evidence to support their position on why a violation should be modified or vacated for consideration. A more effective use of the conference process should result in fewer cases being contested before the Commission.

### IV. Review of the Pattern of Violations Process

MSHA is also reviewing its approach to Pattern of Violations (POV) as applied to operators with a history of "significant and substantial" violations. Currently, MSHA only considers violations that have become final orders of the Commission. Citations and orders that are still in "contest", no matter how egregious, are not considered when enforcing the POV section of the Mine Act. Many operators are now contesting all violations designated "S&S" as a matter of course. These contests have added to the backlog and further delayed enhanced enforcement. MSHA is considering a review of the POV process to determine whether the current approach is the best one for providing timely protection for miners working at mines with high levels of S&S violations. Further, MSHA intends to review pending cases of those operators with significant numbers of "S&S" violations, and where warranted, seek to expedite those cases so that the POV enforcement scheme of the Mine Act is given its intended effect. This approach to handling potential POV's will decrease the backlog by removing the incentive for operators who may choose to contest cases simply for the purpose of delaying a POV finding.

### V. Consistency in Enforcement

MSHA recognizes the need for consistency in enforcement as a way of managing the backlog. Operators that believe they have been unfairly treated are most likely to exercise their right to contest violations. MSHA experienced a significant turnover in its enforcement staff attributable in part to the passage of the MINER Act. The implementation of the MINER Act required inspectors to quickly get up to speed on new standards regarding mine communications and tracking devices, emergency response plans, sealing abandoned areas in underground coal mines etc. The turnover in personnel coupled with new standards to enforce prompted MSHA to further evaluate its consistency in enforcement. To achieve a greater degree of consistency in enforcement, MSHA is committed to ongoing training and review. This training not only includes mine inspectors and Conference and Litigations Representatives (CLR's), but also extends to supervisors. In collaboration with the Office of the Solicitor, MSHA is developing training programs designed to ensure that inspectors are writing "good paper," and are not issuing citations for conditions where there is no violation or where there is a lack of evidence to support the inspector's findings.

CLR's and supervisors will be trained and re-trained on the proper enforcement of mandatory safety and health standards along with gravity and negligence determinations. This training will focus on the application of safety and health standards, agency policy and applicable Commission case law.

With consistent training of inspectors, CLR's and supervisors, MSHA hopes to achieve its goal of consistency in enforcement. This improved consistency will give MSHA and the Solicitor's Office stronger cases to litigate and should reduce the number of cases contested by mine operators.

## VI. Outreach

To complement the enforcement provisions of the Mine Act, MSHA is working to improve stakeholder outreach and education. To that end, MSHA recently launched two major initiatives to curb mining deaths and solicited the support and cooperation of the mining industry stakeholders. One is the "End Black Lung – Act Now" campaign which is aimed at ending the incidence of Pneumoconiosis (better known as "black lung disease") in the coal mining community. The second is the fatality prevention program called "Rules to Live By," which targets the most common causes of mining deaths. These initiatives have been rolled out with the support of the mining industry, labor organizations and other stakeholders. While the implementation of these outreach programs may not have a direct effect on the backlog, we believe that they will result in fewer violations being issued and contested in the long term.

## VII. Possible Commission Reforms

In addition to policy changes MSHA is considering to reduce the backlog, there are some reforms that are within the purview of the Commission. For example, we endorse reforms that will increase the speed with which settlements are approved. Cases awaiting decisions approving settlement make up a part of the current backlog. Accordingly, efforts by the Commission to simplify the process for getting a settlement approved would have a positive effect on reducing the backlog. The use of settlement conferences presided over by a Commission ALJ would also increase the likelihood of settlement. These conferences would assist the parties in simplifying the issues while identifying those areas where there is no real dispute and facilitate settlement.

The implementation of simplified proceedings already used by the Occupational Safety and Health Commission would also be a useful tool in reducing the backlog. Currently, MSHA and SOL devote considerable resources to the pre-trial discovery process and other case preparation for matters that usually settle. A simplified trial process for certain categories of cases would have a significant impact on the time and resources needed for cases to proceed to trial. The Department of Labor fully endorses consideration of this type of reform.

We believe it would be appropriate for the Commission to consider whether there are procedural reforms applicable to all types of cases that could streamline the process and reduce the number of contested cases. For example, uniform disclosure by MSHA of its evidence in support of a citation and by and operator of its grounds and supporting evidence for contesting a citation would create an incentive for the parties to evaluate their positions early in the process.

### **Conclusion**

We understand that simply litigating our way out of the current case backlog is neither a realistic or practical approach to solving the problem. Further, we believe that the ideas presented here can help reduce the backlog issues and assist in preventing further case backlogs going forward. Finally, we are committed to taking all necessary steps to address the backlog because it is an obstacle to ensuring the highest level of safety for our nation's most precious resource – the miner.