

## The Civil Penalty Case Backlog at the Federal Mine Safety and Health Review Commission: What's to Be Done?

Judith E. Rivlin, Associate General Counsel  
United Mine Workers of America

*In 2005, MSHA civil penalties totaled \$25 million; in 2007, the total was \$75 million, and in 2008, almost \$200 million. Operator contests of MSHA enforcement actions and proposed penalties have substantially increased and matters are being contested at rates faster than the current system for review has been able to effectively process. What are the factors contributing to this increase and what avenues currently exist to address it more effectively? This panel will consider the problem and discuss why enforcement actions, as well as penalties have risen; why the cumulative enforcement and penalty systems under the Mine Act and regulations is a factor; what the Mine Safety Act requires in terms of civil penalty assessment and fair adjudication; how are both enforcement and due process to be assured; how might cases be processed more expeditiously; what specific solutions might be attempted; can a larger dialog over and above formal litigation help?*

Since the MINER Act was signed into law in 2006, MSHA's civil penalties have multiplied many times over, and operator contests have mushroomed. All parties agree on these fundamental facts. However, some disagree about whether the backlog itself constitutes a problem, or whether the backlog interferes with miners' health and safety.<sup>1</sup>

While it would be preferable to have agreement about whether the backlog itself represents a problem, most of us would agree that resolving disputes sooner rather than later is helpful: the sooner any disputed facts are identified and conflicts about them addressed, the more likely those directly involved will be both available and able to remember what happened; and resolving disputes about whether certain conduct does/not comply with an operator's legal duties clarifies what MSHA can properly require, helping operators with their compliance obligations.

At the same time that the *amount* of assessed penalties increased, as delineated in the introduction to this Panel, so did both the number and the rate of contested cases. *Most* of the increase is attributable to the coal industry, as opposed to metal/non-metal: for each of the five years immediately *before* the MINER Act (2000-2005), only 5-7% of coal mine civil penalties lead to contest cases being filed with the Commission, whereas for the last three years (2007-2009), the rate dramatically increased to 18%, 30% and 31%, respectively. For metal/non-metal, the increases went from 5-8% (of penalties contested) from 2000-2005, to 11%, 14% and 21% for the last three years. While an increase in contested cases was anticipated based on the

---

<sup>1</sup> On February 23, 2010, the House of Representatives' Committee on Education and Labor held a Hearing on "Reducing the Backlog of Contested Mine Safety Cases." Cecil Roberts, President of the United Mine Workers of America, asserted the case backlog at the Federal Mine Safety and Health Review Commission adversely affects miners' health and safety, while Bruce Watzman, Senior Vice President for Regulatory Affairs of the National Mining Association, contended the operators' enhanced contest rate does not jeopardize miners' health and safety. See: <http://edlabor.house.gov/hearings/2010/02/reducing-the-growing-backlog-o.shtml#more>.

MSHA's improved enforcement and the higher penalty structure the MINER Act required, the scale of that increase exceeded expectations.

Neither the increased caseload, nor the Commission's growing backlog, shows any sign of abating. In fact, unless immediate and significant remedial action is taken to address this problem, the Commission's backlog will render meaningless many of the reforms Congress clearly intended to address with its passage of the MINER Act. This is because the higher penalty structure was intended to make penalties more meaningful, *not* just a cost of doing business.

The Union worked hard to have the MINER Act enacted and hailed its passage as the dawn of a new day to improving coal mine health and safety. However, the increased protections are being subverted by the huge contest rate that has overwhelmed the government's ability to deal with its caseload, as well as by MSHA's established practice of reducing assessments when operators contest them. *While operators are entitled to their due process, we cannot accept the status quo whereby the government is not able to effectively carry out the directives of the MINER Act. As it stands, miners' health and safety is adversely affected by the operators' high contest rates and the related backlog of cases at the Commission.*

The existing system rewards operators that file contests. While this is not a new development, with the new and higher penalty structure operators have increasingly availed themselves of the contest procedure as a means of reducing the costs attributable to their mine health and safety violations. This happens in many ways. One example is that when contested citations are tied up in the Commission backlog there is delay to the enhanced penalties that are supposed to apply for repeat violations. While Congress expected the enhanced penalty structure would motivate operators to avoid having repeat violations, operators have been able to avoid the higher penalties for their subsequent violations simply by delaying the final order for their prior violations, thereby obfuscating the fact that the same violations have since been repeated.

Likewise, this Administration's willingness to utilize - for the first time - MSHA's powerful "pattern of violations" enforcement tool becomes frustrated when citations are caught up in the Commission's backlog. MSHA's determination that a mine has a "pattern of violations" carries *much* more serious consequences, including the likely withdrawal of miners, and a mine must have an inspection free of S & S (significant and substantial) violations in order to get off of the "pattern." Again, having delay in the resolution of alleged violations diminishes MSHA's ability to use its full range of enforcement tools.

One way to reinstate the deterrent effect Congress intended for repeat violations or "patterns," would be for MSHA to identify the operations that *would* be subjected to higher penalties *if* the Commission were to uphold their pending citations. MSHA would need to alert

the Commission of the relative urgency of resolving these citations, and the Commission would need to move these cases more quickly to finality through use of a priority system. We understand that MSHA plans to review its pending cases involving operators with a significant number of S & S violations and may consider seeking to expedite those cases that could facilitate a more meaningful application of its “pattern of violation” enforcement tool. We support this effort and, if it results in the speedier resolution of such S & S violations, believe it will help reduce some adverse consequences of the substantial backlog.

Another problem is that when operators have challenged MSHA citations and proposed penalty assessments, they routinely see a reduction to their penalties. This occurs both at the MSHA “conference,” as well as once a case is referred to litigation. And it’s not because the citations were not valid in the first place, as some operators claim. Instead, the reductions generally occur because the mine inspector who issued the citation rarely attends the conference to explain the reason for the citation (because he has other assignments), leaving the conferencing officer with no first-hand knowledge of the conditions cited. As a result, conferencing officers routinely reduce or abate citations. That the underlying citations were generally valid is supported by trial results: for penalties related to S & S and unwarrantable failure citations - the two most common categories - that were litigated before a Commission ALJ in FY 2009, only 4-11% were dismissed or withdrawn.

Since early 2008, MSHA conferences have generally been held only after a proposed penalty already issued, whereas before then conferences were routinely held earlier in the process - after the citation issued but before the penalty was assessed. From his recent testimony before the House Education and Labor Committee, we understand that Assistant Secretary Main is considering reinstating pre-penalty conferences, in an effort to resolve more disputes and at any earlier stage. While we are not inherently opposed to pre-penalty conferences, they must be conducted differently than they were before. In particular, we suggest that *if* MSHA will reinstate pre-penalty conferences as a regular practice, then it should provide a means for inspectors to be able to better support their citations. We also think it would be helpful if an attorney from the Solicitor’s Office would be assigned to work with conferencing officers so they could help identify the litigation strengths and weaknesses before any adjustments would be made. With these changes, the routine practice of whittling away at the citations should cease.

Further, to the extent there are agreements made at a conference, it is essential that those agreements be deemed final and binding, with a mutual waiver of any right to appeal the matter to the Commission. For example, if the parties agree that instead of 15 employees having been potentially affected only ten were, then the operator should not be permitted to re-open that issue - at least not absent extraordinary circumstances and the discovery of facts not previously knowable. The same rule should apply for likelihood and gravity of possible injury, relative negligence, and all the other factors that bear on a penalty.

It would also be helpful to speedy case resolution if there would be an earlier exchange of relevant information by and among all parties. This would facilitate a more focused case development, regardless of whether settlement is feasible at conference or later. This should begin with the post inspection closeout meetings, at which the parties should engage in a full and open exchange of what the inspector found. The parties should try to resolve any factual discrepancies then and there, to reduce factual disagreements later on. After the inspection, all parties should be given access to pertinent notes and records, and at any early stage in any proceedings. As this could occur before litigation is initiated and before discovery rules attach, for this to work would require the parties to exercise their good faith. But, having inspection notes and employer records exchanged prior to a conference would make it much more efficient and productive.

For cases not resolved at conference, penalties are often further reduced: not only does the Solicitor's Office offer to reduce the penalties in order to settle, but the Commission ALJ's frequently reduce the proposed penalties. It is *extraordinarily* rare for an MSHA attorney to seek, or a Commission Judge to impose, penalties higher than MSHA's Office of Assessments initially recommend. Indeed, when Judge Miller raised the MSHA assessed fine of \$7,684 to \$10,000 in *Shelby Mining*, (Docket No. SE 2008-667; decision issued Dec. 31, 2009), it was so extraordinary that MSHA issued a press release about the increase. Release Number 10-308-ATL; issued 3/11/10. Indeed, we are aware of only a couple of cases in which ALJs have issued penalties higher than what MSHA assessed. *Spartan Mining*, 29 FMSHRC 465 (2007); *PBS Coals, Inc*, 30 FMSHRC 1087 (2008) (Quecreek). Yet, there is no reason why this should not occur more often and whenever the facts support a higher assessment. This should happen when, for example, it turns out that more miners were actually exposed to the hazard, or the gravity was higher than the inspector initially indicated on the citation.

We previously expressed concerns about the ability of mine operators to abuse the conference system, and our concerns about operator abuse have been validated insofar as the data shows that many operators request a conference for virtually every citation MSHA issues. In fact, we have seen company documents establishing that at least one operator purposely pursued such a strategy. From the very high contest rates of certain operators, we believe that other companies are employing this same tactic, too. It was for that reason that the Union supported MSHA's decision in early 2008 to stop routinely conferencing citations until *after* it assesses the penalty. Even without regular pre-penalty conferences, just *some* operators' action of routinely contesting citations and penalties constitutes the largest portion of the Commission's backlog.

As of August 2009, there were 688 penalty contests that have been pending for at least three (3) years, 877 penalty contests pending for between two (2) and three (3) years, 19,864 penalty contests pending for one (1) to two (2) years, and 42,122 that were filed within one year. As the Commission's 2007-2102 Strategic Plan noted: the legislative and regulatory changes of the MINER Act were *expected* to increase the Commission's caseload. However, when that Strategic Plan was prepared in 2007, the Commission had already experienced a "dramatic rise in the number of contest cases,...and expect[ed] that its workload will increase significantly from prior years, thus making it more challenging to attain the Commission's goal of timely adjudication." Regrettably, though the increased caseload was both expected and realized, until this year the Commission did not attempt to increase its cadre of ALJs to handle its growing workload. While the Commission has had certain time-lines for processing its cases, those no longer bear any relationship to reality. However, getting timely resolution of these disputes is critical to miners' health and safety. While we support the Commission's plan to consider using streamlined procedures like the OSHA Review Commission's "Simplified Proceedings," we are skeptical that they will effect a meaningful reduction to the FMSHRC caseload, as most of the Commission cases involve S & S cases that may not be amenable to such simplified procedures. Nevertheless, we encourage the Commission to see if using these simpler procedures could help resolve even some of its cases.

To address the immediate problem, we support the hiring of many more Administrative Law Judges, along with support staff to maximize their efficiency. We are pleased that the FY10 budget included funding for 4 more ALJs, and that the President's FY 11 budget seeks funding for 18 ALJs. The Union believes that still more will be needed to arrest and reverse the problem. Finally, with the increased rate of contests, MSHA also faces new challenges: it will need additional staff to prepare and defend its cases, both at conferences and at administrative hearings.

The Union celebrates the significantly reduced rate of fatal accidents in the mining industry that distinguished 2009 from other recent years, as well as our more distant mining history. We also support the Obama administration's MSHA that is focusing on enhancing enforcement to reduce the accident rate even further.

The present backlog creates problems for all parties, and certainly does nothing to advance miners' health and safety. We look forward to working cooperatively to try to fix this problem.