



**TESTIMONY OF CHAIRMAN MARY LU JORDAN
FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

BEFORE THE SENATE COMMITTEE

ON APPROPRIATIONS

**SUBCOMMITTEE ON LABOR, HEALTH AND HUMAN
SERVICES, EDUCATION AND RELATED AGENCIES**

**INVESTING IN MINE SAFETY:
PREVENTING ANOTHER DISASTER**

May 20, 2010

Chairman Harkin, Senator Cochran, and Members of the Subcommittee:

Thank you for the opportunity to testify on the case backlog currently facing the Federal Mine Safety and Health Review Commission. My name is Mary Lu Jordan, and I am Chairman of the Commission. On behalf of the Commission, I want to thank the Committee for its interest in identifying the resources needed to ensure the speedy adjudication of mine safety cases by eliminating the Commission=s current case backlog.

Of course the need to eliminate the backlog has taken on even more crucial significance since the tragic explosion at the Upper Big Branch Mine on April 5, 2010. All of us at the Commission are profoundly saddened by the deaths of the miners there, and our thoughts are with their families, friends, and the surviving miners.

The Federal Mine Safety and Health Review Commission is an independent adjudicatory agency that provides administrative trial and appellate review of legal disputes arising under the Federal Mine Safety and Health Act of 1977 (the AMine Act@). The Commission=s administrative law judges decide cases at the trial level. The five-member Commission provides administrative appellate review. Currently, we have a full complement of Commissioners, as our fifth member, Patrick Nakamura, was sworn in at the beginning of this month.

The majority of cases that come before the Commission involve civil penalties proposed by the Department of Labor's Mine Safety and Health Administration (MSHA) to be assessed against mine operators. The Commission's administrative law judges are responsible for deciding whether the alleged violations of the Mine Act or a mandatory safety or health standard or regulation issued by MSHA occurred, as well as the appropriateness of the proposed penalties. To determine the penalty, the judges must make findings on a number of issues, including the seriousness of the violation and the negligence of the operator. Other types of cases heard by the Commission's administrative law judges include contests of MSHA orders to close a mine for health or safety reasons, miners' charges of discrimination based on their complaints regarding health or safety, and miners' requests for compensation after being idled by a mine closure order.

Since the day I became Chairman of the Commission again last August, I have been working with my staff to address our case backlog. As of April 30 of this year, we had a backlog of 16,580 cases. (As I mentioned previously, most of these are penalty contests, although approximately 20% of them are contests of underlying citations, which typically are stayed and then consolidated with the related penalty cases). In that backlog of pending cases are 9,650 cases (58%) under 1 year of age, 5,346 cases (32%) that are 1-2 years of age, and 1,584 cases (nearly 10%) over 2 years of age. This significant case backlog is a marked departure from our historical caseload figures.

For example, during the four years from FY 2002 through FY 2005, the annual caseload ranged from approximately 1300 to 1500 cases. In comparison, during the subsequent four years, from FY 2006 through FY 2009, the caseload climbed from approximately 2,700 to over 14,000 cases.

A comparison of new case filings during these same two time periods is also very instructive. From FY 2002 to FY 2005, the annual number of cases filed showed only a minimal increase, going from about 2,100 to 2,400 new cases per year. The figures after that paint a completely different picture, with case filings going from 3,300 new cases in FY 2006 up to approximately 9,200 new cases in FY 2009.

Due to the backlog, the age of cases that the Commission decides has increased. For example, in FY 2008, 72% of the cases were decided by administrative law judges within one year, 23% were decided within 1-2 years, and 5% of the cases were over 2 years old by the time they were issued. In FY 2010 (as of April 30), cases under one year of age constituted 25% of decided Commission cases, 62% were from 1-2 years old, and 13% of decided cases were over 2 years. We expect this lengthening trend to continue as long as an extensive case backlog remains. The attached graph shows the dramatic increase in the average number of days it took our judges to dispose of cases between FY 2001 and the first seven months of FY 2010.

Moreover, our judges' dockets have increased dramatically. We assigned more cases, which moved the bulge of the backlogged cases to our judges' desks. From FY 2004 to FY 2008, each judge's docket averaged 176 cases. That number jumped to 366 cases in FY 2009. As of April 30, 2010 (before our new judges were hired), the number of cases assigned to each judge was, on average, 601.

The Commission's current case backlog has significant ramifications. When Congress passed the Mine Act, it expressed concern that the penalty provisions of the Act cannot operate as an effective deterrent if there is an unduly long period of time between the violation and the payment of a penalty. The legislative history of the Mine Act emphasizes that A[t]o be effective and to induce compliance, civil penalties, once proposed, must be assessed and collected with reasonable promptness and efficiency.@ S. Rep. No. 95-181, at 43 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 631 (1978).

Furthermore, an issue frequently raised since the explosion in West Virginia is that several important enforcement provisions of the Mine Act depend upon a determination of an operator's history of violations. Penalties are calculated based, in part, on the operator's history of violations. Moreover, MSHA's ability to issue a withdrawal order because of a pattern of violations under section 105(e) of the Mine Act is not applicable under MSHA's regulations, 30

C.F.R. ' 104.3(b), until a violation becomes Afinal,@ which occurs only at the completion of the Commission=s review process. Thus, if case decisions are delayed, MSHA=s ability to effectively enforce the Act is inhibited.

In addition, Congress intended that the case processing mechanism operate efficiently so that operators who dispute MSHA=s interpretation of a standard may obtain a speedy resolution. With a large and growing backlog of cases at the Commission, operators often do not know in a timely manner whether their practices comply with mandatory safety or health standards or violate them.

Today, I want to update you on steps we have taken to reduce this backlog, and on the work that remains to be done. Mindful of the recent mine disaster, we are determined to speed up our case processing to afford prompt, effective adjudication to the parties who appear before us.

In terms of our actions to date, we have, pursuant to our \$10.358 million budget appropriation for FY 2010, added four new administrative law judges to our previous roster of 10 judges. Three have already joined the Commission and the fourth will arrive next week. Under that appropriation, we also added four new law clerks to our current staff of five clerks to assist our judges.

If our funding remains at this level with this staffing (14 judges, 9 law clerks and 9 legal assistants) for the rest of FY 2010, we project a case backlog of approximately 18,200 cases by the end of this fiscal year. Thus, this level of funding would permit the backlog to grow. However, the President's 2011 budget request of \$13.105 million, representing a 27 percent increase over our FY 2010 appropriation, would stem the growth in the backlog, once the new judges are trained and gain experience under the Mine Act. We would be able to add four more judges, which would bring our total to 18. We also could hire nine additional law clerks so that each judge would have the assistance of a law clerk, and each judge would share an administrative assistant with another judge.

As you know, the President has committed to reducing the backlog. There are different ways to meet this goal. For example, immediately increasing the number of administrative law judges to 26 would cost roughly an additional \$5.3 million above the FY 2010 appropriation and the President's 2011 Budget. At this level, we estimate that, assuming our current case intake levels remain constant, we could reduce the number of cases in the Commission's backlog to less than 9,200 within three years. Additionally, policy and process changes under consideration by the Commission—some of which I will discuss later—could allow us to more quickly reduce the backlog and case processing time.

If supplemental funding is provided, we recognize that we would need to hire new judges quickly. Yet at the same time, if and when the backlog is reduced to an acceptable level, we may not need as many judges. We have identified two methods to achieve these goals: first, we have formally requested the Office of Personnel Management to ask other agencies to temporarily loan administrative law judges to us. As of right now, the Office of Personnel Management has approved three judges who could work for us on a temporary and intermittent basis. Second, we would recruit senior administrative law judges - judges who have retired from federal service - to work for the Commission for a limited period of time.

In addition, we are mindful of the training needs of new judges, particularly those with no Mine Act experience. To that end, we have initiated a training program in which our senior judges assist the newly hired judges in learning about Commission case adjudication and procedures. Also, by expanding the number of law clerks, we will provide additional support for our judges.

But more resources are only part of the answer. In addition to increased staffing, we are continuing to examine our entire case adjudication system to determine how we can streamline procedures via administrative and rulemaking changes.

For instance, because over 90% of Commission cases are ultimately settled, we have looked at ways to make that process more efficient, as much of the Commission's resources are used to process settlement motions and issue orders approving settlement. Until recently, the parties filed a motion to approve settlement, but the Commission's judges drafted the settlement order in each settled case. On April 27, 2010, the Commission published an amendment to its procedural rules requiring the parties to submit a draft settlement order with their motion to approve settlement. 75 Fed. Reg. 21987. Furthermore, the rule requires almost all of these submissions to be filed electronically. These changes should reduce the resources expended by the Commission judges in resolving settlement motions.

We are also initiating a simplified procedures process similar to the one in effect at the Occupational Safety and Health Review Commission. The rules for cases placed on this track, which would be the simpler cases the Commission receives, would provide for mandatory early disclosure of information and documents by the parties, and early prehearing conferences with a judge. Additionally, discovery and post-trial briefs would be severely limited, and interlocutory review is abolished. We submitted this proposed rule to the Federal Register on May 11, 2010 for notice and comment.

In FY 2008, the Commission instituted a new electronic case tracking system, which allows us to more efficiently track the various stages of each case that we receive. Another

ongoing project involves the electronic filing of cases and case documents. The Commission is currently reviewing requirements for the electronic filing process to determine the best approach for implementing such a system. One of our Commissioners is currently leading the project team working on this endeavor. The team's initial work has been to visit and survey other adjudicative agencies which have electronic filing systems in place in order to gather information about how long it would take to institute such a system and the costs involved.

Finally, it is important to note that both a significant increase in the number of Commission judges (with the concomitant increase in the number of cases decided) and some of the changes we are proposing in our administrative and rulemaking arenas will impact MSHA and the Office of the Solicitor. We are committed to working cooperatively with them to ensure that adjudication under the Mine Act may, once again, proceed swiftly.

We will continue to explore modifications to our procedural rules and case management procedures that might enable cases to move more quickly through the Commission. We are committed to examining any and all ideas that can assist in adjudicating cases more rapidly.

Over the years this Committee has played a key role in ensuring that we receive sufficient funds to protect miner safety. I look forward to working with you to remedy the problem of our

case backlog and in identifying the resources needed to address it and thank you once again for this opportunity to testify on this issue.