TESTIMONY OF CHAIRMAN MARY LU JORDAN

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

BEFORE THE COMMITTEE ON

EDUCATION AND LABOR

ON

REDUCING THE GROWING BACKLOG OF CONTESTED MINE SAFETY CASES

February 23, 2010

Mr. Chairman, Mr. Ranking Member, and Members of the Committee:

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 am very grateful to this Committee for its recognition of the increased case backlog facing our agency, and for its interest in identifying solutions to ensure the speedy adjudication of mine safety cases.

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 "Mine Act"). 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 is responsible for deciding whether the alleged violations of the Mine Act or a mandatory safety regulation issued by MSHA occurred, as well as the appropriateness of the proposed penalties. Other types of cases heard by the Commission 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.

The Commission's administrative law judges decide cases at the trial level. The five-member Commission provides administrative appellate review. Currently, we have four

Commissioners. A fifth Commissioner has been nominated to serve by the President, and his nomination is pending before the Senate.

When I became Chairman last August, I was confronted with a growing caseload - a dramatic departure from the steady caseload trend that existed during my first term as Chairman (from 1994 until 2001), and for the several years following when I served as a Commissioner.

For example, during the four years from FY 2002 through FY 2005, the 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. Currently, there is a backlog of approximately 16,000 cases.

A comparison of new case filings during these same two time periods is also 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.

What prompted this unprecedented number of new cases? While we cannot answer that question with complete certainty, we believe that certain statutory and regulatory changes that occurred within the last four years have played a role in this influx of new cases.

First, as a result of the Sago, Aracoma and Darby mine disasters in 2006, Congress enacted the Mine Improvement and New Emergency Response Act of 2006 (the "MINER Act"), which was signed into law on June 15, 2006. The MINER Act established new and stronger civil sanctions for violations of the Mine Act, including minimum penalties for an operator's unwarrantable failure to comply with the statute or mandatory safety and health standards, and a new penalty for "flagrant conduct" by a mine operator.

Second, in response to the MINER Act, MSHA in March 2007 revised its civil penalty regulations, which resulted in significant increases in the amounts of money assessed in civil penalties proposed by the agency. In addition, in June 2007, MSHA announced an initiative to more vigorously enforce the provision of the Mine Act that permits mine closure orders to be issued when an operator has a pattern of recurrent significant and substantial ("S&S") violations at a mine. These types of violations generally involve more dangerous situations than other citations.

While it is difficult to know with complete certainty the implications of these individual events on the Commission's caseload, we do know that the result of this influx of new cases has led to a slower disposition for most of our cases. The vast majority of our cases result in settlements. These settlements must be reviewed by a judge who must then issue an order approving or disapproving the proposed resolution. The average number of days it took to dispose of these cases increased from 178 days in FY 2006 to 401 days in FY 2009.

When I became Chairman, I learned that the tremendous increase in new cases had created a bottleneck in the case assignment phase of our process. By the time cases could be assigned by the Chief Judge, they were already a year old. The Chief Judge and I discussed ways that the process could be streamlined. We realized that, as we unclogged the assignment process, we would need some additional clerical help to get the assignment orders out to the parties and to create the case files. We brought in temporary contractors to help the docket office accomplish this. Due in large part to the assistance of contract clerical help, we have made progress in reducing the number of cases waiting to be assigned to a judge.

Unclogging the assignment phase meant that the bulge of backlogged cases would now move down the pipeline to the judges' desks. Judges' dockets have increased dramatically. From FY 2004 to FY 2008, each judge's docket averaged 176 cases. That number jumped to 366 cases in FY 2009. To date in FY 2010, the number of cases assigned to each judge has risen to an average of 746.

The Commission's judges are hardworking and conscientious, and they are understandably concerned about the delays this increased caseload may cause. However, because of the number of incoming cases, some judges have felt the need to issue a prehearing order advising the parties that their case would not be set for hearing for at least a year.

Under the Commission's budget for FY 2010, the Commission plans to add four new administrative law judges to our current roster of 10 judges. We also plan to add four law clerks

to our current staff of five clerks (these are law school graduates who assist the judges). We will also be hiring four additional clerical assistants. The Commission has started the competitive procurement process with GSA for additional space to accommodate the anticipated increase in staff for FY 2010. These measures will allow us to slow the rate of growth of our backlog, although the backlog will continue to grow throughout FY 2010. We will also be adopting a number of procedures that would allow the new judges to tackle the case backlog without significant impacting DOL or its Solicitor's Office, such as having current judges concentrate on writing decisions for hearings which have already been held and also having new judges focus on the backlog of settlements.

The President's 2011 budget request of $13.105 million, representing a 27 percent increase, will allow the Commission to stop the backlog from increasing. We will be able to add four more judges, which will bring our total to 18. We also plan to hire nine additional law clerks so that each judge will have the assistance of a law clerk, and each judge would share an administrative assistant with another judge.

But more resources are only part of the answer. In addition to increased staffing, we have, over the last several years, reviewed and are continuing to examine our entire case adjudication system to determine how we can streamline procedures via administrative and rulemaking changes. We are identifying specific points where unnecessary delays occur, and formulating solutions to address each of these problems.

We examined our caseload and determined that approximately 20% of our cases involved a challenge to the underlying MSHA enforcement action – the issuance of a citation or order. These are commonly called "contest cases." Since an operator almost always subsequently files a case challenging the penalty related to that enforcement action, the contest case is usually subsumed into the penalty case. Consequently, we announced a policy in August 2007 under which the Chief Administrative Law Judge automatically stays each of these contest cases until its accompanying civil penalty is proposed by the Secretary. At that point, the contest case and the civil penalty case are consolidated and assigned to a judge. (If the operator needs an expedited hearing on the contest case, it can file a motion with the Chief Administrative Law Judge to lift the automatic stay). Because of our policy of staying cases, we no longer have to issue orders in the contest cases, which are duplicative to those filed in the parallel penalty proceeding.

Because over 90% of Commission cases are ultimately settled and the statute requires that settlements be reviewed and approved by a judge, much of the Commission's resources is used to process settlement motions and issue orders approving settlement. Within the next few days, the Commission will publish an amendment to its procedural rules requiring the parties to submit a draft settlement order when they file a motion to approve settlement in most cases. The rule will require most of these submissions to be filed electronically. The implementation of this rule will reduce the amount of time that it takes for the Commission to dispose of settlement motions and provide the Commission with valuable experience in its move towards an electronic filing system.

We are also contemplating a "calendar call" system, wherein one judge is assigned numerous cases from the same operator, and meets with the parties with a goal of settling as many cases as possible, if appropriate. This system was used successfully by a former Commission Chief Judge many years ago, and we believe the time may be ripe to reinstate this program.

Revisions to our procedural rules have also been discussed with an eye towards streamlining the adjudication process and eliminating unnecessary filings. We are investigating whether we should eliminate the requirement that an operator file an answer to the formal penalty petition, which the Secretary files with the Commission. We will need to weigh the potential for streamlining the processing of cases against the potential for encouraging more cases to enter the system. We are also exploring ways to simplify or even eliminate the penalty petition that the Secretary files with the Commission.

We are enthusiastic about initiating a "simplified procedures" process similar to the one in effect at the Occupational Safety and Health Review Commission. In cases placed on this track, which would be the simpler cases the Commission receives, discovery and post-trial briefs could be severely limited, and interlocutory review might be abolished. We have begun the research and discussion necessary to embark on a rulemaking regarding such a system.

Additionally, we are considering changes to our procedures for those cases which will not be placed on the "simplified procedures" track. These changes would be partially based on the Federal Rules of Civil Procedure. They could include such things as utilizing uniform Pre-Hearing Orders, requiring parties to make initial disclosures of basic information early in the litigation process, and standardizing pre-trial conferences with the judge. We are also focusing on procedural changes that would not require DOL or mine operators to expend significant additional resources.

In FY 2008, the Commission upgraded to a new electronic case tracking system, which provides the Commission the ability to track the various stages of each case that it receives. Another potential 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.

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 quickly.

We are keenly aware of Congress' concern that the penalty provisions of the Mine 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. Indeed, the legislative history of the Mine Act emphasizes that "[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).

Moreover, 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 standards or violate them.

We recognize that several important enforcement provisions of the Mine Act depend upon a determination of an operator's history of violations. These include the amount of the penalty, and possible withdrawal orders for a pattern of violations that could significantly and substantially contribute to a safety or health hazard. These provisions are not applicable until a violation becomes "final," which occurs only at the completion of the Commission's review process. Thus, if case decisions are delayed, the ability of MSHA to effectively enforce the Act may be inhibited.

Over the years this Committee has played a key role in ensuring miner safety. I look forward to working with you to remedy this problem, and thank you once again for this opportunity to testify on this issue.