

Massey Energy sued by families of Upper Big Branch disaster victims

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As the federal investigation into the Upper Big Branch (UBB) mine disaster continues, three lawsuits filed earlier this month charge Massey Energy with operating its mine in a “willful, wanton and recklessly unsafe manner.”

The suits were filed on behalf of the families of Joe Marcum and Adam Morgan, who were among the 29 miners killed in the April 5, 2010 mine explosion, and Stanley Stewart, who barely escaped that day. Tim Bailey, the lawyer who filed the suits in the Boone, West Virginia circuit court, described the UBB as a “catastrophe waiting to happen” given its “abysmal safety record” and “staggering number of safety violations.”

The suits come on the heels of an announcement by the company that settlements have been reached with seven other families who lost loved ones in the disaster. Details of the settlements were not made public, but Massey reported it offered the families \$3 million. Two other lawsuits, filed by the families of deceased miners William Griffith and Ronald Lee Maynor, are currently pending.

The new suits cite findings of the US Mine Safety and Health Administration (MSHA) that the deadly explosion was the product of coal dust which was allowed to accumulate to unsafe levels. Coal dust buildup is typically mitigated with crushed limestone, or “rock dust,” but the UBB was found not to be properly treated with the material. MSHA also found that water nozzles used to control coal dust and prevent sparks were not working. Massey has denied the accuracy of MSHA’s findings on coal dust levels and dismissed outright the relevancy of the inoperable water nozzles.

The lawsuits accuse Massey of placing “production and development pressures...on the mine managers at the mine and on the miners themselves” when they fell behind because of flooding and roof control. “As a result of production demands,” alleges one of the suits, “the non-production work such as rock dusting, replacing and repairing the woeful condition of the longwall units’ water sprays and bits was not performed even though mine safety laws require such work to be conducted upon discovery of the conditions.”

Massey’s former CEO Don Blankenship was not named as a defendant, nor were any individuals of the company’s board of directors. However, the suits accuse Blankenship of having been personally aware of the mine’s unsafe condition, and note that the board of directors “undertook duties and responsibilities” for mine safety when they settled with shareholders over the disaster.

As the one year anniversary of the disaster approaches, federal investigators are prosecuting relatively minor actors in the tragedy in order to give the appearance that the government is now more aggressive in its oversight. However, the inability and unwillingness to prosecute those truly responsible such as Blankenship and other members of upper management proves that coal bosses will be allowed to continue dangerous operations with impunity. One year after the deadliest US mine disaster in 40 years, no one has been held accountable.

In his statement to the House of Representatives on July 13, 2010,

Stanley Stewart, the only surviving miner involved in the legal actions, commented, “In my years of working for Massey, I feel they have taken coal mining back to the early 1900s, using 3 principles: fear, intimidation and propaganda.” Stewart, who has a total of 34 years experience mining, concluded that the disaster “should never have happened in America today. The April 5th explosion was a 1920s style explosion and we should be beyond that. The only reason 400 men weren’t killed is the mechanization used in coal mining today.”

Last week, former Massey employee Thomas Harrah was charged by federal officials with using a fake foreman’s license and lying to investigators. Although he was not present on April 5, 2010, Harrah performed at least 228 mine safety examinations at the UBB under a forged license from January 2008 to August 2009. Harrah is only the second person to be charged as a result of the ongoing investigation. Each of the charges against him carries a potential sentence of five years in prison and a \$250,000 fine.

Last month, federal prosecutors indicted UBB security chief Hughie Elbert Stover for making false statements to federal agents when he denied he had provided underground workers with advance warning about the arrival of inspectors. He is also charged with obstructing a federal investigation when he ordered thousands of security documents from the UBB destroyed. Stover pled not guilty on March 15 to the charges. A trial is set for April 25. (See “US: Massey official charged with cover-up of Upper Big Branch mine disaster”)

Harrah was licensed by the state to work as an underground coal miner, but he lacked the certification as a foreman. In fact, records show that he failed the test required for such certification when he took it. Mine foremen must be licensed by the state in West Virginia in order to supervise other miners and perform essential pre-shift and on-shift safety checks. However, while foreman certification is the jurisdiction of the state, foremen can be charged with a felony if they sign federal mine safety reports under a false license.

According to the *Charleston Gazette*, Harrah failed his foreman’s test in August 2007 but began working as a foreman, using a false license number at the UBB in December 2007. On June 6, 2009 he attended a required continuing education training session conducted by Massey at its Marfolk Coal operations, where he signed in under a foreman certification number belonging to someone else. When the session’s roster was sent to the state to give credit to the attendees, state officials recognized the discrepancy.

Harrah transferred to Massey’s Slip Ridge Cedar Grove Mine in August 2009. However, he was only able to conduct about six safety examinations on August 13 and 14 before West Virginia state investigators caught up with him. Harrah left Massey after state investigators questioned him on his qualifications as a foreman.

The West Virginia state Office of Miners’ Health, Safety & Training’s (MHS&T) director, Ron Wooten, filed a formal petition to permanently

revoke Harrah's underground miner's license in October 2009. On March 2, 2010 Harrah appeared before the state's Coal Mine Safety Board of Appeals (CMSBA), which rejected MHS&T's move for permanent revocation, instead imposing a year's suspension.

In his testimony before the board, Harrah said Massey officials had "been pushing [him] into this bossing stuff" and that they accepted at face value him showing up one day with a foreman's license. In explaining his procurement of the fake license, Harrah testified that two Massey officials, Jason Whitehead and Rick Hodge, provided him with a phone number to call after taking his foreman's test to obtain his results. When he called the number, Harrah said a foreman's certification number was faxed to him; a foreman's card later showed up in the mail.

The *Charleston Gazette-Mail*, which obtained an audio recording of the hearing, reported that Harrah was ready to admit to using the fake license but insisted several times against the allegations that he forged the foreman's card. "Really and truthfully, I didn't forge any papers," Harrah testified. "They're saying I forged it, but I didn't. I didn't know the number was somebody else's when I was using it. It's got my name on that card, but I don't know how it got there. I'm in a little bit of a guilty way, because I should have known better than that."

On December 30 last year, a federal case against Harrah was filed in a US District Court, but the presiding judge, R. Clarke VanDervort, sealed all records related to the case pending the filing of formal charges or motions for their release.

For the current indictment, federal authorities are using Harrah's signature under a false license number on a December 16, 2008 safety examination report at the UBB to charge him with falsifying required mine safety documents. He is also accused of lying to the FBI and MSHA agents on October 22, 2010 when he repeated how he obtained the license by calling the phone number provided him.

"These statements and representations were false, fictitious and fraudulent," federal authorities wrote in their charges against Harrah. "Thomas Harrah had not been instructed by the Performance Coal Company [Massey subsidiary] officer to call any telephone number after he failed the examination, and in fact defendant Thomas Harrah invented the foreman's certification number he used to sign the pre-shift and on-shift examination books at the Upper Big Branch Mine."

Given what Harrah's testimony last year suggests—that fake foreman licenses are being supplied to miners who are not qualified—one would expect an investigation to be launched to determine if the claims had any validity to them. However, the chairman of the CMSBA, Clinton Smith, refused to take the matter any further claiming that board members could hear only cases that are before them. "There was nothing put to us that indicated that it was some sort of vast conspiracy or something else going on," Smith said. "I don't remember there being any testimony about those individuals being involved in any other such incidents."

This is dishonest on multiple accounts. Smith heard a case against Jason Whitehead in October 2009 in which inspectors cited him in August 2008 for "reckless and willful disregard of mandatory health and safety standards," alleging he "directed five workers along with [himself] to work and travel past two rockfalls...which were unsupported." The CMSBA overturned the citation and \$200 fine on the grounds that the move was his "judgment call" to make.

Whitehead was eventually promoted by Massey to director of underground improvement at the UBB, a position he held on April 5, 2010 when the explosion occurred. A federal investigation is looking into Whitehead's and Performance Coal President Chris Blanchard's activity underground for several hours following the blast. The incident was noted in one of the new lawsuits against Massey.

"Blanchard and Whitehead traveled to such deep areas of the mine," alleges one of the suits, "that they were at or in close proximity to the longwall section which has now been designated by both the regulatory

agencies and defendants as the ignition site and where vast amounts of critical evidence were located."

This gave Blanchard and Whitehead "first-hand knowledge that the explosion had killed all of the miners underground," claims the suit. However, the two did not "fully inform the appropriate regulatory agency representatives, nor did they inform the families as they kept vigil on the mine site." The suit filed on behalf of Marcum's family concludes, "The conduct of these defendants was extreme, outrageous, beyond the bounds of decency, atrocious and intolerable" causing "emotional distress... beyond that which any reasonable person should be expected to endure."

Massey has defended the actions of Blanchard and Whitehead saying the two were risking their own lives to save those of other miners. In August, Whitehead was promoted by Massey to vice president for underground operations. Last December, Jason Whitehead was one of at least 15 Massey officials, including Don Blankenship, who refused to testify in the investigation into the disaster. (See "Massey CEO refuses to testify at hearing into Upper Big Branch mine disaster")

It is clear that Harrah and UBB security chief Stover are among the low-hanging fruit in the investigation, who are to be made scapegoats for Massey, the coal industry at large, and the regulatory agencies themselves.

CMSBA chairman Smith and other regulatory officials see firsthand the widespread instances of license forgery in the coal industry. On March 8, three men pled guilty in US District Court to forging foreman licenses and lying to federal investigators. Chad J. Ferrell of Nettie, Luke W. Pugh of Jane Lew, and Neil A. Hansen of Alkol conducted hundreds of key mine safety examinations in West Virginia's Mason, Nicholas, and Wyoming counties using fake licenses.

Ferrell performed 489 mine safety examinations between September 2008 and June 2009 at the Poplar Ridge Mine in Webster County, WV. The mine is run by Brooks Run Mining, a subsidiary of Alpha Natural Resources which is currently in the process of acquiring Massey Energy. In settling with the state, Ferrell's mining license was permanently revoked. Pugh performed 387 mine safety examinations under a fake license between June 2007 and April 2009 at the Pleasant Hill Mine in Randolph County, WV. The mine is operated by Carter Roag Coal Co. He was caught when he submitted his fake license number to state officials investigating a death which occurred on his crew. Hansen is accused of performing five safety examinations under a forged foreman's license at Big River Mining in Mason County, WV.

In December, the CMSBA also suspended the mine licenses of Craig W. Belcher and Scott E. Jeffrey, both charged with using forged foremen's licenses while working for Massey. Belcher worked at Massey subsidiary Spartan Mining in Wyoming County, WV in January 2009 where he performed safety exams for four days in late January before being caught. Jeffrey was charged with using a forged mine electrician's card to get hired at Massey subsidiary Power Mountain Processing in Nicholas County, WV.



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