

Jury deliberations continuing in trial of former Massey Energy CEO

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Jury deliberations are taking place after federal prosecutors and defense attorneys delivered closing arguments in the case against former Massey Energy CEO Don Blankenship. Blankenship headed Massey when an explosion ripped through the company's Upper Big Branch (UBB) mine in West Virginia on April 5, 2010, killing 29 miners. It was the worst coal mine disaster in nearly four decades.

Federal prosecutors rested their case against Blankenship on Monday and defense attorneys declined to call any witnesses. Federal prosecutors have called some 27 witnesses to make their case over the past five weeks, since the trial opened in Charleston, West Virginia.

However, Blankenship is not being tried for the mass murder at UBB, despite four separate investigations into the explosion identifying Massey's criminal corporate culture, which placed coal production ahead of safety, as a source of the disaster.

Instead, Blankenship faces up to 30 years if convicted on charges that he conspired to violate federal mine health and safety laws in the years leading up to the disaster, as well as charges that he lied to the US Securities and Exchange Commission (SEC) and investors about the company's safety record in the explosion's aftermath.

Late last month, Chris Blanchard, a key witness for federal prosecutors, testified over seven days. Blanchard was the president of Performance Coal Company, a Massey subsidiary and operator of UBB. He reached an immunity agreement with U.S. Attorney Booth Goodwin and provided testimony to the grand jury that was instrumental in indicting Blankenship last year.

"There was an understanding that a certain number of safety violations were going to be written that could have been prevented," Blanchard testified, according to the *Charleston Gazette-Mail*. "I believe there was an understanding that it was less money to pay the fines for the safety violations than the cost of preventing the violations." When asked if Blankenship participated in this understanding, Blanchard answered, "I think he shared the same opinion."

In previous testimony by US Mine Safety and Health Administration (MSHA) data analyst Tyler Childress, the prosecution showed that between January 2008 and April 2010, UBB was cited by MSHA for federal health and safety violations 836 times, 311 of which were classified as significant and substantial (S&S), where there existed a "reasonable likelihood" of serious injury. Over the same period, UBB was issued 59 unwarrantable failure orders, where sections of the mine were shut down due to "aggravated conduct constituting more than ordinary negligence."

Blanchard discussed some of the serious yet preventable safety violations which plagued UBB, such as cleaning up excess coal and coal dust, especially around conveyor belt lines where the risk of fire

is heightened; spreading limestone rock dust to render coal dust inert in the case of an explosion; and maintaining adequate ventilation to remove dangerous gases such as methane and provide underground miners with enough fresh air.

According to Blanchard, UBB's appalling safety record was a product of inadequate staffing for the aggressive production quotas demanded by Blankenship and Massey's upper management. "If we had hired more coal miners, we could have prevented some of the violations," Blanchard told the court. "Given lower production constraints and more staff, the majority of violations probably could have been prevented."

According to the *Gazette-Mail*, Blanchard testified that had UBB employed the additional miners required to perform the routine maintenance required to avoid the hundreds of repeated federal safety violations, it would have cost Massey about \$625,000 a year—about one day's worth of coal produced by the UBB longwall.

Instead, Massey was pushing production and cutting staff on the eve of the disaster. In testimony given earlier by Blanchard's former administrative assistant Lisa Williams, the prosecution demonstrated that Massey cut 17 workers at UBB in late March 2010, less than two weeks before the explosion.

To underscore the preventability of the safety violations, the prosecution had Blanchard discuss what happened in December 2007 after MSHA notified UBB that it was under review as a potential pattern of violation (PPOV) mine. The designation gave Massey 90 days to develop and enact a plan to drastically reduce its non-compliance with federal health and safety standards or risk being designated a POV mine.

Since a POV designation would trigger additional oversight from MSHA and directly threaten production at UBB, Massey took the threat seriously, hired additional miners, and reduced its federal citations by 44 percent in the first three months of 2008. As Blanchard explained, however, once MSHA removed UBB from the PPOV list in March 2008, the additional miners gradually assumed production positions and the safety problems returned.

When cross-examined, Blanchard denied he ever conspired with Blankenship to violate federal safety standards or thwart MSHA inspectors. Moreover, over the course of five days defense lawyers used Blanchard to present a series of memos, reports, and emails aimed at showing Massey and Blankenship were serious about safety, while belittling MSHA violations as subjective and inevitable in the operation of a coal mine.

When the frustrated U.S. Attorney Steve Ruby finally got the chance to conduct a re-direct examination of Blanchard, he threatened Blanchard by asking if he was familiar with the charge of perjury.

Ruby then led Blanchard back through testimony he had given to the grand jury last year.

After having Blanchard read for the jury Massey's 2008 SEC filing showing \$50 million in profit for the year, the *Gazette-Mail* reported the following exchange:

Ruby: "Was it enough?"

Blanchard: "Enough what?"

Ruby: "Enough profit."

Blanchard: "It was profit, sir. I can't answer that question."

Then Ruby had Blanchard read from the company's 2009 filing showing \$100 million in profit and repeated the line of questioning. "Was that enough profit?" Ruby asked. "Again, sir, I can't answer that question," Blanchard replied.

Earlier this month the prosecution also called another key witness, Bill Ross. Ross took a position with Massey in April 2008 after a 32-year career as an inspector and ventilation expert with MSHA. Ross was a much-anticipated witness because of the warnings he had given Massey and Blankenship about safety in the two years before the explosion at UBB.

In a June 2009 memo drafted by in-house Massey lawyer Stephanie L. Ojeda, Ross's safety concerns were presented to Blankenship, Massey vice president Chris Adkins, and other company officials. The memo presents a damning picture of a reckless company, dismissive of MSHA and federal safety regulations, understaffed and concerned only with coal production. Upon taking the stand, the prosecution walked Ross through each line of the memo.

"Bill has often heard in my travels around Massey, 'We have been told to run, run, run no matter what. We will fix it [hazards] when they [MSHA] find it,'" the memo states. "The attitude at many Massey operations is 'if you can get the footage, we can pay the fines.'"

Such sentiments directly support the conspiracy charge against Blankenship that the prosecution is seeking to establish. At another point in the memo, Ross explains, "They [foremen] feel that their job is to run big footage and when they are given citations the company will simply negotiate and pay the amount of the fine."

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In Ross's view, "...[T]his is no way to run a coal mining business. When we received one violation, it means that we have failed." Frustrated, Ross warned ominously: "Does anyone look at their [citations'] cost? Does anyone care? Does it matter to anyone? Sooner or later, we will pay the price, especially if there is a serious injury or a fatality."

"I thought, if we took this seriously, things would change," Ross testified about the memo. "Normally, a mine that has a lot of serious violations, it has a lot of injuries, fatalities," he told the jury. "We were getting a lot of violations and I was concerned about it."

The memo notes that relations between Massey and MSHA had deteriorated to a warlike status. "Many in Massey do not take MSHA seriously," it stated. At the same time, "Massey has no reputation for integrity at MSHA and its image is low. MSHA has questions about Massey's honesty. We continually make promises to them, but never have enough personnel to follow through."

"Massey has a worse track record than many other companies," Ross complained in the memo. "The inspectors continue to find repeat violations; Massey never improves. This leads the inspectors to conclude that Massey just doesn't care."

"Bill has talked to many members and their biggest complaint is lack of manpower," the memo states. "The biggest complaint of the

foremen is that they are continually forced to operate with skeleton crews. ... If they need nine men, they are given five and are still expected to produce big footage."

The memo also provided evidence regarding the specific charge that Blankenship conspired in the falsification of coal dust sampling at UBB, a regulation aimed at protecting miners from contracting the deadly occupational disease known as black lung. "In addition, Massey is plainly cheating on dust sampling at some of its operations," the memo states. "There is still no oversight on dust sampling," Ross complained. "In his classes, some of the foremen have admitted that they cheat on dust sample day. They feel that in doing so, they are carrying out what they were told to do."

In a phone conversation played earlier for the jury, Blankenship can be heard dismissing black lung as "not an issue in this industry that's worth the effort they put into it."

Ross testified that the memo led to a meeting between him and Blankenship at which Ross suggested that Massey hire one additional miner for each working sections in all its mines to focus on addressing safety issues for which the company was routinely cited, such as cleaning up loose coal and spreading limestone rock dust.

According to Ross, Blankenship questioned the cost of such a plan and if Massey could afford it. "When the meeting was over and I was getting ready to leave," Ross told the jury, "I said, 'Mr. Blankenship, [there's] one thing you can't afford to have happen.'" When Blankenship asked what that was, Ross replied, "You can't afford to have a disaster."

Blankenship was clearly worried about the memo. Ross explained for the jury how Ojeda told him to mark each page of his memo as "confidential" and how the instructions "DO NOT COPY OR DISTRIBUTE" were added to the final draft submitted to Blankenship. The prosecution also played a telephone recording of Blankenship expressing concern about the existence of the memo. "It's bad because, for example, if that was a fatal today or if we had one, it'd be a terrible document to be in discovery," Blankenship is heard saying.

In response, Massey did launch a "Hazard Elimination Program" in August 2009; however, the initiative was not backed by a surge in mine personnel and thus resulted in little change to the status quo. On January 7, 2010, less than four months before the UBB disaster, Ross complained in a memo that over the first three days of the new year Massey had already received 188 citations and orders. "Can a company allow this practice to continue? When are we going to get serious about violations?" he asked.

"We are six months into the 'Hazard Elimination Program' and our performance results show no signs of acceptance!" Ross complained a few weeks later in a memo to Ojeda on January 29. "We continue to set up our mines to FAIL!" He noted that he had heard that "morale is lower than ever because 'The Hazard Elimination Program' was just like any other, just words.... And the Company wasn't serious as to doing the right thing!"



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