Conviction upheld of CEO who oversaw West Virginia mine disaster

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A three-judge panel of the Fourth US Circuit Court of Appeals reaffirmed the conviction of former Massey Energy CEO Don Blankenship last month. Blankenship is currently serving a one-year prison term in California for conspiring to violate federal mine health and safety laws.

Blankenship's defense team appealed his conviction on four grounds, all of which were rejected by the court in an opinion authored by Judge James Wynn. "After careful review, we conclude the district court committed no reversible error," wrote Judge Wynn. "Accordingly, we affirm."

Blankenship headed Massey when the Upper Big Branch (UBB) mine in West Virginia exploded on April 5, 2010 and took the lives of 29 coal miners. It was the worst coalmine disaster in nearly four decades. During Blankenship's decade-long tenure as CEO of Massey, some 52 coalminers were killed at the company's operations.

Although four separate investigations exposed the recklessness of Massey's UBB operations, Blankenship was not charged with the disaster or the 29 deaths. Rather, he was indicted by a grand jury in November 2014 on four counts of conspiracy to willfully violate federal mine safety laws and regulations, conspiracy to defraud mine safety regulators, making false statements to the US Securities and Exchange Commission (SEC), and engaging in securities fraud. The two conspiracy charges were later combined and a three-count Superseding Indictment issued in March 2015, to which Blankenship pled not guilty.

Following a six-week trial, Blankenship was convicted in December 2015 on the conspiracy charges, but acquitted on the charges that he lied to the SEC and investors. In April 2016, Blankenship was sentenced to one year in prison and a $250,000 fine, the maximum permitted for what was a misdemeanor charge under law. He has been imprisoned since last May. He is scheduled to be released on May 10, 2017.

Blankenship's defense team argued that US District Judge Irene Berger erred by not dismissing the case outright because the charge of conspiracy to "routinely violate federal mandatory mine safety and health standards" did not cite the specific mine safety regulations he was conspiring to violate. However, the appeals court found that the general description of the offense in the indictment was sufficient because it was based on the actual language of the law and was accompanied by thirty pages of specific factual evidence.

During the trial, the prosecution presented data from the US Mine Safety and Health Administration (MSHA) showing that between January 2008 and April 2010, UBB was cited 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." This evidence was bolstered with testimony from about a dozen former UBB miners and employees confirming the appalling working conditions in the mine.

The court also rejected Blankenship's appeal that he should have been allowed the opportunity to re-cross examine one of his coconspirators, Chris Blanchard, president of Performance Coal, the operator of UBB for Massey. The opinion explained that Blanchard's statement during redirect that Blankenship had told him it was "cheaper to break the safety laws and pay the fines" than to comply, in fact raised no "new matter" but merely elaborated on previous testimony and other evidence presented by the prosecution, including memoranda instructing supervisors to "run coal" and not "worry about ventilation or other issues."

The most significant portion of the appeal hinged on

the term “willfully” and Judge Berger’s instruction to the jury that Blankenship’s criminal willfulness could be satisfied if the jury found he showed a “reckless disregard” for the mine health and safety regulations violated.

In justifying the broader interpretation of willfulness, Judge Wynn cited several precedents and wrote, “Put differently, a ‘long history of repeated failures, warnings, and explanations of the significance of the failures, combined with knowledge of the legal obligations, readily amounts to willfulness.’”

It was on this issue that three coal associations in Illinois, Ohio and West Virginia filed an amicus brief. The associations stated they “cannot sit idly by and allow the expansion of criminal law to the point that mere involvement of company management in certain affairs can serve as a basis, in whole or in part, for criminal prosecution.”

After complaining that “Coal and petroleum producers are unequivocally the most heavily regulated industries in the nation,” the associations point to additional requirements imposed by the generally toothless Dodd-Frank Act, which require the reporting of mine-by-mine totals of violations and orders issued by MSHA, even for subsidiaries and operators, in their Security and Exchange Commission (SEC) filings.

Expressed here is the fear that the Dodd-Frank rules and the Blankenship conviction will compel mining executives to have detailed information of their safety records and that they will be criminally liable for failing to act upon that knowledge. This would undermine one of the chief means through which corporate management has traditionally insulated itself from criminal liability associated with reckless operations.

The issuance of citations, the coal associations continue, is “an unavoidable fact of mining coal” and is “based upon the opinion of any given inspector.” Thus, they argue, “The number of citations received by any given mine can be a misleading indicator of overall regulatory and safety compliance” because “Even the most compliant operators are issued citations given the strict liability imposed under the [Mine Safety] Act.” Therefore, they claim, “the very fact that citations are issued does not mean there were violations, and the very fact that there are violations do not necessarily evince bad conduct.”

“Operating a coal mine is a difficult venture that presents tough decisions for its managers, who are required to navigate a regulatory minefield in order to operate a successful company,” the brief asserts. “Those decisions, especially with respect to production, safety, and regulatory compliance, may at times be imperfect, prone to second-guessing, and, despite best intentions, even incorrect. However, those decisions should not lead to criminal liability unless it is proven beyond a reasonable doubt that the individual possessed the ‘evil purpose’ necessary to establish that the conduct was illegal, not just general knowledge of the effects of broad regulatory involvement [emphasis added].”

This was contradicted by the legislative record, wrote Judge Wynn, which showed that Congress’s intent in enacting the Mine Safety Act in 1977 was that it “believed the penalties available under the Coal Act [Federal Coal Mine Health and Safety Act of 1969] had proven insufficient to deter safety violations.”

“Congress imposed enhanced penalties in the Mine Safety Act,” the judge declared, “to deter mine operators from choosing to prioritize production over safety compliance on grounds that it was ‘cheaper to pay the penalties than to strive for a violation-free mine.’”

Over the past several decades, the energy giants have increasingly been given a free hand by Democrats and Republicans alike to undermine past safety regulations. The elimination of occupational safety and health and environmental standards is at the center of the “pro-growth” economic policies of Donald Trump. While posturing as a champion of coal miners, Trump has selected as his commerce secretary Wilbur Ross, the billionaire who owned the Sago Mine where 12 West Virginia miners were killed in 2006 due to widespread safety violations.

As the *World Socialist Web Site* insisted from the start, far from being rogue entities in an otherwise healthy industry, “Massey and its CEO Don Blankenship are not aberrations. They are true representatives—perhaps more open than others—of the business model of American capitalism.”