

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON

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TERESA L. DEPPNER, CLERK
U.S. District Court
Southern District of West Virginia

UNITED STATES OF AMERICA

v.

CRIMINAL NO. 2:12-00050

GARY MAY

I N F O R M A T I O N

The United States Attorney Charges:

Background

At all relevant times:

1. Performance Coal Company, Inc. ("Performance"), was a corporation engaged in the business of operating an underground coal mine near Montcoal, Raleigh County, West Virginia, known as the Upper Big Branch mine ("UBB" or the "Mine"), the products and operations of which affected interstate commerce. As such, Performance was an "operator" within the meaning of 30 U.S.C. § 802(d), and Performance and UBB and persons employed at Performance and UBB were subject to the provisions of the Federal Mine Safety and Health Act of 1977 (the "Mine Act") and to the regulations promulgated thereunder. Performance was a wholly owned subsidiary of Massey Energy Company.

2. The Mine Safety and Health Administration ("MSHA") was an agency of the United States and of the United States Department of Labor (DOL), and was responsible for the

enforcement of the Mine Act and the promulgation and enforcement of federal regulations related to mine safety and health, codified in Title 30 of the Code of Federal Regulations.

3. Among the mine safety and health requirements promulgated and enforced by MSHA and applicable to UBB were the following:

a. Certain areas of the Mine were required to receive a quantity of ventilating air (measured in cubic feet per minute) that was sufficient to dilute, render harmless, and carry away flammable, explosive, noxious, and harmful gases, dusts, smoke, and fumes. 30 CFR 75.325.

b. In any part of the Mine where coal was actively being extracted (a "working face"), an approved ventilation control device (typically specialized, heavy material called "line curtain," which is used to direct the flow of air in mines) had to extend to within 10 feet of the deepest point of mine penetration. 30 CFR 75.330. This requirement is designed in part to ensure that enough air reaches the deepest point of mining to prevent dangerous buildups of explosive gases and dusts, as well as the inhalation of coal dust, a health hazard.

c. Certain significant changes in the Mine's ventilation could be made only if all persons not involved

in making the change had been removed from the Mine; and only if electric power had been removed from, and mechanized equipment was shut down in, the areas of the Mine affected by the change. 30 CFR 75.324. This requirement was intended, in part, to prevent explosions from unexpected effects of the ventilation change.

d. Coal dust and loose coal fragments were required to be kept cleaned up and not allowed to accumulate. 30 CFR 75.400. This requirement was intended to prevent accumulations of combustible material that could fuel an explosion.

e. Rock dust - incombustible, pulverized limestone spread in coal mines to prevent explosions - was required to be applied in most areas of the Mine to within at least 40 feet of any working face. 30 CFR 75.402. At every location in the Mine where rock dust was required, at least 65% of the total dust present (rock dust, coal dust, and other dust) was required to be incombustible. 30 CFR 75.403. In certain areas of the mine, at least 80% of the total dust present was required to be incombustible. Id.

f. In all parts of the Mine where persons worked or traveled, the roof of the Mine was required to be supported or controlled in accordance with the Mine's MSHA-approved

roof-control plan, to prevent the roof from falling. 30 CFR 75.220. Roof falls can cause serious injury and death.

g. Every machine used to extract or load coal was required to be equipped with a methane monitor that monitored levels of explosive methane gas and that automatically de-activated the machine if a methane concentration of 2% or more developed. The methane monitor also was required to de-activate the machine if the monitor was not operating properly. 30 CFR 75.342.

h. Mine personnel were required to examine various areas of the Mine at regular intervals to confirm, among other things, that ventilation requirements were being met and that no hazardous conditions existed. Any hazardous conditions discovered were required to be corrected, with both the hazard and the corrective action recorded in an examination record book that was available for MSHA officials to inspect. 30 CFR 75.360-64.

i. Levels of respirable dust were required to be tested in various locations at regular intervals in order to determine compliance with legal limits on such dust. 30 CFR 70.100-.200. Respirable dust can cause black lung disease.

4. As part of MSHA's regulatory and enforcement efforts, and pursuant to its statutory authority, MSHA mine inspectors made periodic, unannounced inspections of the Mine to ensure compliance with mine health and safety laws and to impose penalties for violations of those laws. Violators were subject to civil and criminal penalties under the Mine Act. During these inspections, MSHA mine inspectors would and did issue citations, which penalized a violation of mine health and safety laws but allowed the Mine to continue operating, and orders, which were rarer than citations and, in addition to penalizing a violation of mine health and safety laws, required the Mine or a part of the Mine to stop operating until the violation was corrected. It was prohibited for any person to give advance notice of an MSHA inspection.

5. Mine safety and health laws were routinely violated at UBB, in part because of a belief that that following those laws would decrease coal production. These violations included violations of the laws described in paragraph 3. If these routine mine safety and health violations were detected by MSHA, the resulting citations and orders could result in coal production being stopped until the violations were corrected, in addition to monetary penalties. Furthermore, the issuance of citations and orders by MSHA, particularly certain kinds of

serious citations and orders, moved the Mine closer to being classified as a mine with a pattern or potential pattern of violations. That classification would have resulted in increased scrutiny of the Mine by MSHA and in MSHA's issuance of additional serious citations and orders.

The Defendant

6. Defendant GARY MAY ("MAY") began working at UBB in or about February 2008 as a Mine Foreman. In or about October 2009, MAY was promoted to Mine Superintendent, and he held that position through and including April 5, 2010. During his time as Mine Foreman at UBB, MAY exercised control and authority over, at various times, at least three room-and-pillar mining sections and a longwall mining section. During his time as Superintendent at UBB, MAY exercised control and authority over a portion of the Mine that included, at various times, two room-and-pillar mining sections and an area that was being prepared for longwall mining on or around April 5, 2010, when an explosion at UBB interrupted that preparation.

The Conspiracy

7. Beginning no later than February 2008 and continuing through and including April 5, 2010, MAY, together with others known and unknown, unlawfully, willfully, and knowingly combined, conspired, confederated, and agreed together with each

other to defraud the United States and an agency thereof, to wit, to hamper, hinder, impede, and obstruct by trickery, deceit, and dishonest means, the lawful and legitimate functions of DOL and its agency, MSHA, in the administration and enforcement of mine health and safety laws at UBB.

Object of the Conspiracy

8. The objects and purposes of the conspiracy were to hamper, hinder, impede, and obstruct the lawful government functions of DOL and MSHA in the administration and enforcement of mine health and safety laws at UBB.

Manner and Means

9. It was a part of this conspiracy that MAY, together with others known and unknown, would and did give and authorize and cause to be given to persons at UBB advance notice of MSHA inspections, knowing and intending that the persons receiving this advance notice would conceal and cover up violations of mine health and safety laws that otherwise would result in citations and orders issued by MSHA. MAY, together with others known and unknown, would and did use code phrases to give this advance notice of MSHA inspections, in order to conceal from MSHA the fact that such advance notice was being given.

10. It was further a part of this conspiracy that MAY, together with others known and unknown, upon receiving advance

notice of MSHA inspections at UBB, would and did conceal and cover up, and authorize and cause the concealing and covering up of, violations of mine health and safety laws that otherwise would result in citations and orders issued by MSHA.

11. It was further a part of this conspiracy that MAY, together with others known and unknown, did falsify and authorize and cause the falsification of examination record books at UBB.

12. It was further a part of this conspiracy that MAY, together with others known and unknown, upon learning that an MSHA inspection was about to take place in a certain area of the Mine, would and did alter, and authorize and cause the alteration of, the ventilation system of the Mine to direct additional air to the area where the inspection was to take place, in order to conceal and cover up the quantity of air that normally reached that area of the Mine.

Overt Acts

13. In furtherance of the conspiracy, and to effect the illegal objects thereof, the following overt acts, among others, were committed in the Southern District of West Virginia:

a. On many occasions on various dates between February 2008 and April 5, 2010, MAY, together with others known and unknown, gave and authorized and caused to be

given to persons at UBB advance notice of MSHA inspections, knowing and intending that the persons receiving this advance notice would conceal and cover up violations of mine health and safety laws that otherwise would result in citations and orders issued by MSHA.

b. On many occasions on various dates between February 2008 and April 5, 2010, MAY, together with others known and unknown, upon receiving advance notice of MSHA inspections at UBB, concealed and covered up, and authorized and caused the concealing and covering up of, violations of mine health and safety laws that otherwise would result in citations and orders issued by MSHA.

c. On numerous occasions between around February 2008 and April 5, 2010, MAY, together with others known and unknown, instructed persons working at UBB regarding code phrases that were to be used to give advance notice of MSHA inspections at UBB, and regarding the meanings of those phrases.

d. On an occasion between February 2008 and April 5, 2010, MAY ordered a known person to falsify examination record books by omitting from the record books a hazardous condition, to wit, water of a depth that made it unsafe to travel a certain area of the Mine.

e. On an occasion between February 2008 and April 5, 2010, MAY, knowing that MSHA was about to sample the level of respirable dust in a certain area of the Mine, surreptitiously redirected additional air to that area of the Mine to conceal and cover up the quantity of air that would have reached that area of the Mine under normal conditions.

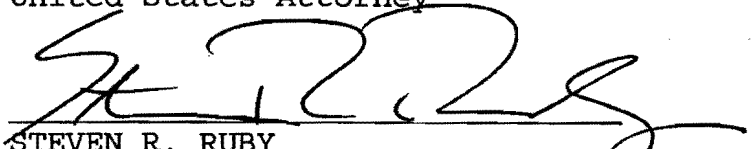
f. In or around February 2010, the legally mandated methane monitor on a continuous mining machine at the Mine stopped operating properly, which caused the continuous mining machine to be automatically deactivated as required by law. MAY caused and ordered the electrical wiring in the methane monitor to be altered to defeat the legally mandated automatic shut-off mechanism, allowing the continuous mining machine to be operated for several hours without a functioning methane monitor.

In violation of Title 18, United States Code, Section 371.

UNITED STATES OF AMERICA

R. BOOTH GOODWIN II
United States Attorney

By:


STEVEN R. RUBY
Assistant United States Attorney