

From: Ojeda, Stephanie

Sent: Thursday, June 25, 2009 9:15 PM

To: Blankenship, Don L.; Adkins, Chris; Harvey, Shane; Suboleski, Stan

Cc: Davis, Sandra

Subject: Report on Meeting with Bill Ross Regarding MSHA Violations -- CONFIDENTIAL -- ATTORNEY-CLIENT PRIVILEGED

Attachments: REPORT OF JUNE 17 MEETING MSHA VIOLATIONS.pdf

Attached is a report of my June 17, 2009 meeting with Stan Subolesky and Bill Ross.

Chris asked that Stan and I discuss with Bill his opinion on violations and penalty assessments and our relationship with MSHA in general. Although I would not normally provide a report of this length, I thought it was necessary given the importance of the issue and the detail provided by Bill.

Let me know if you have questions.

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MASSEY COAL SERVICES, INC.

CONFIDENTIAL – ATTORNEY CLIENT PRIVILEGED
COMMUNICATION/PRIVILEGED AND CONFIDENTIAL

MEMORANDUM

TO: Don Blankenship

CC: Chris Adkins
Shane Harvey

FROM: Stephanie Ojeda

DATE: June 25, 2009

SUBJECT: Report of June 17, 2009 Meeting with Bill Ross Regarding MSHA Violations

On Wednesday, June 17, 2009, Stan Suboleski and I talked with Bill Ross to get his opinion regarding Massey's relationship with MSHA. The meeting was called in response to an e-mail from Chris Adkins requesting responses to the following questions regarding violations:

- What can we do better?
- Where are we failing?
- What are Ross' biggest concerns?
- What training do we need to put in place?
- How can we reduce our violations?
- Does he think MSHA is biased towards us?
- If so what makes him think so?
- What can we do to have a better relationship?

Bill has taught classes at 10 Massey operations and his answers to some extent reflect what he has heard and seen at these classes. Bill became so concerned about the comments that he has heard and about the number and type of citations that Massey had been receiving that sometime in April, 2009, Bill wrote a rough "statement" of his concerns. He shared this statement with us.

Bill has also met with his old colleagues since coming to Massey. He believes that MSHA and Massey have an almost warlike atmosphere. MSHA changed in 2005 when penalties increased and inspectors' enforcement increased.

When Bill was with MSHA, he tried to treat all companies equally. Massey was by far the largest company and created the most work for District 4. Bill stated that District 4 viewed Massey as a "conglomerate".

What follows are Bill's responses to the questions noted above:

How can we do better?

We need to change how we do business. Massey has its own protocol, its own way of mining coal. Many of Massey's old timers are gone and many who remain do not have the knowledge or skills needed to do a good job. The rules of mining have changed, but we and the way we do business have not.

Many in Massey do not take MSHA seriously. MSHA has the tools needed for enforcement and will use what it feels is necessary. If Operator B doesn't get around to everything, but usually tries to have things in order, MSHA will not view this as bad and the penalties will be written in a way that is less onerous. But, if a company is perceived as arrogant and defiant, as Massey often is, MSHA will stop production and/or levy high fines to try to get their attention or stop a particular practice. MSHA wants to see that an operator is making an effort to do the right thing.

Massey lacks knowledge at the foreman level. Our foremen often don't even know the part of the law that they have violated. Once the violation is written, it becomes someone else's problem; the foremen have no involvement in calculating the potential penalty and following through with the violation, and don't learn from the experience. We need more feedback to see if they have learned from their training.

The foremen and superintendents also need to be involved in the planning process, and need to be held responsible for noncompliance.

The pattern of violations was written into the law to take care of renegades and outlaw operators who had no intention of complying with the law. Now it is being used for defiant operators, as Massey is often perceived to be. The attitude at many Massey operations is "if you can get the footage, we can pay the fines."

Bill has talked to many members and their biggest complaint is lack of manpower. He is told that the people in production at Massey are multi-taskers. They are given 4 or 5 jobs to do, but they are never given the time to do any of them well. Most say that if they had the opportunity, they would leave because of the long hours and because they are given more to do than they can reasonably get done.

The biggest complaint of the foreman is that they are continually forced to operate with skeleton crews. In addition to being a boss and an examiner, they are forced to also act as a worker. If they need nine men, they are given five and are still expected to produce big footage.

Massey suffers from the Big Four violations: ventilation, clean up, roof control and electrical. Bill thinks that having a class and doing a good job on these four main areas would get rid of 75% of Massey's violations. Bill recorded the following quote from a class attendee: "We are like robots. Everything is laid out for us, but we aren't given the manpower to actually do it." And "we are told to run, run, run until we get caught; when we get caught, then we will fix it."

Bill noted that a good operation has both good production and low violations. Massey's only controls are on limiting man-hours and keeping cost per ton low. With sufficient manning, it seems that Massey could get tons up so that cost would still be okay and violations would come down as well.

He works a lot with engineering. Engineers are often too busy to get underground. When he was with MSHA and an engineer from Massey would show up for a meeting, Bill would ask him to bring someone from production with him. However, his experience was that the production guys from Massey only came when the mine was threatened with closure.

During his classes, he has been told by many that they would not work for Massey if there was an alternative. They hate 10 and 12-hour days. No one at Massey appears to be listening to the foremen. Many of the foremen told him that, knowing what they now know, they would never have become a foreman.

Where are we failing?

We have too many inexperienced people in key positions – too many young superintendents and mine foremen. We have mine managers directing foremen to do things that are not correct.

MSHA people are like the general public. They read the papers and get the impression that Massey is an outlaw company. When Bill was with MSHA, he was continually asked why inspectors weren't cracking down on Massey.

Some of our problems are that P-2 policies that apply to ventilation are not respirable dust friendly. Massey has lost 12 to 18 deep cut plans this year because of this issue.

In addition, Massey is plainly cheating on dust sampling at some of its operations. It ranks in the top 10 in the submission of low-weight-gain dust samples, and this has gotten MSHA's attention in Arlington. One MSHA employee Bill spoke with mentioned that it's only a matter of time before MSHA begins special investigations and possible criminal investigations related to Massey's dust sampling.

We have not learned from our mistakes. In 2006, MSHA sent out letters warning that dust was a problem and that companies should pay attention to this problem. In 2007, follow-up letters went out. Yet Massey has not changed anything. There is still no oversight on dust sampling. Sampling is run by the face foreman, many or most of whom do not even know what is in the ventilation plan. They are told to run dust samples today, and to do whatever is needed to come into compliance. 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.

Bill thinks this comes back to lack of personnel. They 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. The foremen never know what the amount of the citations are, and are unaware that they are building a track record at that mine. The cycle just seems to continue and never get better.

What are his biggest concerns?

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. After making the promise, the job is turned over to company presidents, but they are never given authority for the manpower needed to get the job done, and they are already overloaded even without more extra jobs. There is no follow-up to make sure that the promise to MSHA has been kept.

Within MSHA, all mines or companies are given an informal rating of 1-10. This is based on its NFDL rate and violation history. Massey has a good NFDL, but a terrible violation history and so it is rated very low. Inspections are targeted to companies with a bad "rating".

In addition, MSHA does not like Massey because it is arrogant and pushes back. Often, the attitude of Massey is "we know better than you."

Bill is not sure why we fail so often, why we can't keep the belts clean, etc. At MSHA it does not help when we say one thing and then do another. Bill believes that if we kept our promises and were trustworthy, and if we improved our compliance record, then we would see relief in the pressure from MSHA.

We also don't use our resources properly. We have engineers, but most Massey engineers simply draft the plans that their president tells them to. Often, the production managers at the mine are given no input into the plans. We seem to have a huge communication gap between engineering, top company management and the mines. Bill was told by one class attendee: "If I try to do things right, I'll get fired. I just keep my mouth shut and do what I am told."

In the past, Massey foremen were forbidden from talking to inspectors. This raised suspicions at MSHA that they were hiding something. This suspicion has not gone away. The attitude that this one-time "policy" instilled in Massey's foremen also has not gone away.

What Training is Needed?

We need to take advantage of the free training available from MSHA and the state. This training focuses on the regulations, the foreman's responsibilities and the penalties for not complying. We have inexperienced foremen, who are so green that they will walk right by a hazard and not recognize it.

We also need training in ventilation and dust control and in good mining methods and practices.

We need to think about how we conduct the training as well. The training that we do is often after a work shift when the guys are tired and just want to get home. It would be better to do this on a Saturday, and even better if we paid them to attend. There is not much enthusiasm for class after a 10 or 12 hour workday. (Bill reported the following quote as it related to one member's attendance in class: "And I ain't going to be allowed to do the right thing anyway.")

How to Reduce Violations

Initially, we have to learn to follow the law. In Bill's classes, foremen often say that they don't know the regulations and never get to see any violations that they have gotten, so they don't learn anything from them.

Secondly, the mine must have enough personnel to maintain the mine and comply with the law. Most members want to do the right thing. They look to upper management to set the standard.

Bill believes that MSHA is citing lots of little things at Massey to get the attention of upper management. MSHA is frustrated (as they were when he was still with them) because it doesn't appear that Massey takes them seriously, as evidenced by presidents and upper managers never coming to the inspection closeout meetings. They show up only when closure is threatened. Bill said that it should not get this point for upper management from a mine to attend a conference.

Massey employees are continually blaming MSHA, but they refuse to fix items that they know are wrong until a citation is issued. Part of this blaming is to cover up for their own failures to fix problems.

Bill mentioned that there is a greater divide between upper management and lower management/workers at Massey than he has observed at other companies. When he was with MSHA, there appeared to be a total lack of concern by upper management of violations.

Bias at MSHA

Bill believes that MSHA is biased against Massey, but he thinks the bias is largely based on Massey's attitude over the years. One indication was the previously mentioned ban on foremen talking to inspectors. Inspectors have also been openly ignored or even laughed at by Massey employees. In addition, Massey pushes back more on inspections and violations.

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

MSHA inspectors read the newspapers too. They get their opinions in part from the media. Massey is also ranked on MSHA's informal "rating" list as a poor company. The ranking is partly determined by the attitude of Massey toward MSHA.

MSHA feels they are doing themselves and the Massey miners good when they issue citations or close the mines at Massey. Massey managers have told MSHA that they would do what MSHA wants and would correct problems, but they seldom follow through.

Massey managers have told Bill that they are allowed to violate the law as long as they run good footage.

The appearance of Massey to the inspectors is that of a company with no particular concern about the law. Massey relies on its safety chiefs rather than its production people for compliance with the law. The image MSHA has of Massey is that of a company who wants to negotiate fines instead of correct or prevent violations.

Even today, Bill has problems getting presidents to look at their mines. The presidents are not getting to the faces enough.

Bill noted that one specific problem is that Massey has no outby people. There is no one to fix outby problems when they go wrong, unless the face people are sent there.

Summary

Massey needs to make a change to show MSHA that it is serious about correcting its problems.

Massey management often does not even know if it is following its plans.

When he was with MSHA, Bill would have loved the opportunity to talk to Massey's upper management.

Massey is not putting its resources in the right places – need more, experienced personnel.

Massey is close to being a very good company; it is better than it appears to outsiders.

Resource allocation is a problem. Chief electricians tell Bill that electricians are acting as foremen and equipment operators and, as a result, are not keeping the equipment maintained. This occurs because the superintendents want it to. Furthermore, there are no maintenance people to perform upkeep outby the face to prevent things from going wrong.

Bill suggests that Massey pick a mine and focus on it to be the model mine for MSHA and the rest of the company. Performance would be a good candidate because it has multiple operating types and needs a lot of work.

We need to convince MSHA that Massey knows what it is doing and that it cares about compliance with the law.

Proper staffing is the key to having a model mine. Massey's standards must also be at least as high as MSHA's. Even though Massey says its S-1/P-2 policies exceed the law, this is not true for some policies (i.e., ventilation and respirable dust).

We have to start at the faces, since 90% of our violations are face violations.

Other items discussed

Bill noted that the mine rescue team members have been conducting safety audits of mines. Every audit has resulted in two pages worth of violations. This indicates the extent of the problem.

Bill was so concerned about the problems in Massey that he had written them down, but wasn't sure who to talk to about them. He wants Massey to do well. He is happy to be able to tell someone about the problems that he sees.

He believes that the company presidents or mine superintendents can change things. However, he feels that people at the mines don't believe that Don Blankenship or Chris Adkins really are serious about following the law.

He believes that MSHA is issuing flagrant and unwarrantable violations to Massey to go as high on the corporate level as it can. He believes this will continue unless Massey changes its practices.

When he sees the dust results, he can conclude only that we have not learned anything from our past problems.

After the Aracoma accident, everyone in Massey paid attention to getting everything right. However, this stopped after several months.

Bill recalled that on one of his last trips to the special investigators office, there were 1,500 unwarrantable failure violations in one pile and 600 light-weight dust sample violation reports on another. The prosecutor said that the unwarrantable failures were the top priority, but he was hoping to prosecute some companies for cheating on samples as well.

Another problem at Massey is that the record keeping is just awful. We don't even post our violations, as required.

Bill also notes that MSHA will help us if we ask.

Finally, Bill concludes that Massey mines are viewed as sitting ducks. If an inspector needs to write a few violations, all he has to do is visit a Massey mine.

The following is a summary of other parts of Bill's handwritten notes:

There is a need for good communications. There is a need to relay pertinent information from the president to vice presidents and superintendents and to engineering, and then to the mine level – the mine foreman, section foremen and other bosses. Everyone needs to know when plans are developed or changed, even when it comes from the top. Closing the gap is essential to good business results.

It is hard to fathom why or how we get so many violations and orders, especially since we are supposed to be following our plans, and since, under the law, we are required to be making the necessary examinations that in most cases would reveal both non-compliance with our plans and with the mine regulations.

Where is the communications gap? Do we even care? Where is the oversight by our superintendents and managers? Don't the citations and orders play any part in how well we are doing?

Bill has often heard in my travels around Massey, “We have been told to run, run, run no matter what. We will fix it when they find it.” Bill explains that this is no way to run a coal mining business. When we receive one violation, it means that we have failed. And since 2005, the cost has increased five- or ten-fold.

Does anyone look at their 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.

Here are the main problems that Bill has observed:

1. Foremen do not know the MSHA and state regulations well enough. They also do not see or understand what happens with violations. There is no follow up.
2. There are never enough personnel to run a mine. For a complete coal mine operation, there must be mine maintenance, belt moves, section moves, building of stoppings, and clean up.
3. There is an information/communications gap. Top management does not communicate with mine management. Engineering does not talk to mine management. Plans are submitted but never posted at the mine or reviewed at the mine level. Foremen and crew members never get to comment on them.
4. The big four problems are ventilation and examinations, roof control, clean up, and electrical.
5. P-2 training vs. MSHA and state regulations. P-2 ventilation vs. dust regulations. Not friendly. We are cheating, but why? Mine plans are never evaluated.

More problems Bill noted include:

The company’s reputation for integrity is very low. We have lost our dignity.

We have no honesty when dealing with the agencies.

Our compliance record is not good.

We negotiate our compliance, seeking to reduce costs through conferencing and lawyers.

We blame the agencies for our ineffectiveness.

We are trained to do the right thing, but we are told to do otherwise.

The “cost effective phrase” is: “We will run until we get caught, then we will fix it.” This is because we don’t have the people to keep it right.

Now we are at war – it is Massey versus MSHA.

There is a lack of planning on our part. We fail to foresee obstacles in our mining plans; we fail to see things such as ventilation problems, roof control problems, and water problems.

We would rather get violations, including unwarrantable actions, than wait for approval. This shows a lack of concern for both safety and the law.

Mine level supervisors never see their statistics. They don’t know their number of violations, how many are S&S, how many are “d” orders, what their dust results are. They don’t get to see their plans before they are submitted for approval. They have little or no say so in the development of the plans.