

**IN THE CIRCUIT COURT OF RALEIGH COUNTY,  
WEST VIRGINIA**

**IN THE MATTER OF ADMINISTRATIVE  
SUBPOENAS ISSUED BY THE  
WEST VIRGINIA OFFICE OF MINERS'  
HEALTH, SAFETY & TRAINING TO  
RICK FOSTER, RICK NICOLAU,  
GARY MAY, JAMIE FERGUSON,  
ELIZABETH CHAMBERLIN  
AND WAYNE PERSINGER.**

Misc. Action No. \_\_\_\_\_

**MOTION TO QUASH SUBPOENAS ISSUED FOR IMPROPER PURPOSE**

Movants, by counsel, and in accordance with Rule 45(b)(1) of the West Virginia Rules of Civil Procedure, hereby respectfully move this Honorable Court to quash the administrative subpoenas issued by the Director of the West Virginia Office of Miners' Health, Safety & Training ("OMHST"), commanding the movants to appear and provide testimony in connection with an investigation of the April 5, 2010 accident at Upper Big Branch Mine on the grounds that OMHST did not issue the subpoenas for a proper, legislatively-authorized purpose. In short, OMHST is invoking compulsory process in order to allow the federal Mine Safety and Health Administration to circumvent limits placed on its investigative authority by the United States Congress. This Court must not countenance such an abuse of process, and should grant movants relief from it by quashing the subpoenas.

**BACKGROUND**

On April 5, 2010, a catastrophic accident at Upper Big Branch Mine ("the Mine") in Montcoal, West Virginia, took the lives of 29 Performance Coal Company employees and

injured several others.<sup>1</sup> The federal Mine Safety and Health Administration (“MSHA”) promptly took control of the Mine and soon commenced an accident investigation. Consistent with past practice and the limits of its statutory authority, MSHA sought interviews, on a voluntary basis, of numerous persons, including of personnel of Massey Energy Company (“Massey Energy”) and various of its subsidiaries, including Massey Energy and Performance Coal Company (“Performance Coal”) personnel, on a voluntary basis.

From the outset of its investigation, MSHA made inflammatory public statements about Massey Energy’s and Performance Coal’s operation of the Mine. MSHA indicated and implied that the Mine had suffered its catastrophic accident because of safety violations and avoidable hazards. MSHA has a substantial and immediate interest in making such allegations in order to deflect its own potential responsibility for the tragedy, in view of specific operational requirements MSHA had imposed on the Mine as part of its routine and continuous oversight of the Mine.

In August 2010, MSHA grew restless with the pace and consistency of appearances by witnesses it invited for voluntary interviews. Accordingly, MSHA importuned OMHST to issue subpoenas compelling the attendance and testimony of those persons sought for the remaining interviews.

Ronald L. Wooten is Director of the West Virginia Office of Miners’ Health, Safety & Training (OMHST), an agency of the State’s government that is based in Charleston County, West Virginia, and which is governed by W.Va. Code § 22A-1-1, *et seq.* Citing § 22A-1-

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<sup>1</sup> Massey Energy Company owns Performance Coal Company.

4(b)(2), the Director, has issued numerous subpoenas to the Movants, all of whom are employees and/or officers of Massey Energy and/or its subsidiaries.

- Movant Rick Foster is a resident of Boone County, West Virginia and is employed at facilities in Raleigh County, West Virginia. He received a subpoena on September 13, 2010 purporting to compel him to testify on September 16. On September 15, on behalf of Mr. Foster, his counsel sent a letter to counsel for OMHST objecting to the authority of OMHST to issue the subpoena, and requesting that the agency withdraw the subpoena. Mr. Foster did not appear on September 16.
- Movant Rick Nicolau is a resident of Raleigh County, West Virginia and is employed at facilities in Raleigh County, West Virginia. He received a subpoena at approximately 5 p.m. on September 15, 2010, purporting to compel him to testify the next day, September 16, 2010 at 8:30 a.m. On September 16, on behalf of Mr. Nicolau, his counsel sent a letter to counsel for OMHST objecting to the authority of OMHST to issue the subpoena, and requesting that the agency withdraw the subpoena. Mr. Nicolau did not appear on September 16.
- Movant Gary May is a resident of Boone County, West Virginia and is employed at facilities in Raleigh County, West Virginia. He received a subpoena on September 7, 2010, purporting to compel him to testify on September 17. On September 16, on behalf of Mr. May, his counsel sent a letter to counsel for OMHST objecting to the authority of OMHST to issue the subpoena, and requesting that the agency withdraw the subpoena. Mr. May did not appear on September 17.
- Movant Jamie Ferguson is a resident of Raleigh County, West Virginia and is employed at facilities in Raleigh County, West Virginia. He received a subpoena on September 15, 2010 purporting to compel him to testify on September 22. In email correspondence on September 16 and in a September 20 telephone conference with counsel for OMHST, on Mr. Ferguson's behalf, his counsel objected to the authority of OMHST to issue the subpoena, and requested that the agency withdraw the subpoena.
- Movant Elizabeth Chamberlin is a resident of Pennsylvania and is employed at facilities in Raleigh County, West Virginia. On her behalf, on September 14, 2010, counsel for Ms. Chamberlin accepted service of a subpoena purporting to compel her to testify on September 22. On September 20, on Ms. Chamberlin's behalf, her counsel sent a letter to counsel for OMHST objecting to the authority of OMHST to issue the subpoena, and requesting that the agency withdraw the subpoena. On September 21, Ms. Chamberlin's counsel notified OMHST counsel that Ms. Chamberlin was contemplating seeking judicial relief from the subpoena. Counsel for OMHST responded by indicating that OMHST does not intend to withdraw its subpoena to her.

- Movant Wayne Persinger is a resident of Raleigh County, West Virginia and is employed at facilities in Raleigh County, West Virginia. He received a subpoena purporting to compel him to testify on September 23.

(Exhibit A: Subpoenas Issued to Rick Foster, Gary May, Jamie Ferguson, Elizabeth Chamberlin and Wayne Persinger.)

OMHST issued the subpoenas pursuant to a statute authorizing it to issue subpoenas for hearings, but it is apparent from the subpoenas that the state agency does not intend to hold a hearing. More important, OMHST issued the subpoenas not to serve legitimate interests but to create for MSHA an opportunity to compel testimony in a non-public setting, which Congress has deemed to be excessive or inappropriate authority and process for this federal agency. By doing so, the Director abused his subpoena power in order to expand federal investigators' access to compelled, sworn testimony beyond what Congress has authorized. OMHST's decision to act as MSHA's instrument is all the more unjust and unreasonable given MSHA's vested interest in the investigation of Upper Big Branch explosion, and its determination to cast blame for the accident on Performance Coal and its employees, and away from MSHA and its employees. Accordingly, the subpoenas are *ultra vires*, unreasonable and oppressive, and they subject Movants to undue burden. For these reasons, set forth in greater detail below, the Court should quash the subpoenas.

### ARGUMENT

Before the Court may enforce administrative subpoenas, the agency must meet its burden to prove that:

- (1) the subpoena is issued for a legislatively authorized purpose,
- (2) the information sought is relevant to the authorized purpose,
- (3) the information sought is not already within the agency's possession,
- (4) the information sought is adequately described, and
- (5) proper procedures have been employed in issuing the subpoena.

*Feathers v. West Va. Bd. of Medicine*, 562 S.E.2d 488, 493 (W.Va. 2001). The agency cannot satisfy these standards in this instance. As a preliminary matter, the subpoena gives no indication that it seeks information relevant to an authorized purpose and indeed fails to describe at all the information the agency seeks. This alone is grounds for the Court to quash the subpoena. In any case, the available evidence makes clear that the agency cannot have issued the subpoena for a legislatively authorized purpose.

**A. The Subpoena Is Improper Because the Authority Upon Which OMHST Relies Does Not Authorize It to Compel Testimony Behind Closed Doors**

The subpoenas must be quashed because they are *ultra vires* in that the legislature has not authorized OMHST to issue subpoenas for non-public testimony, which is exactly what the subpoenas in question anticipate. The Administrative Procedures Act (APA) provides that only a clear legislative directive grants an agency authority to issue subpoenas. See W. Va. Code § 29A-5-1(b); see also, W. Va. Code § 29A-7-1; *W.V. Human Rights Comm'n v. Moore*, 186 W. Va. 183, 186, 411 S.E.2d 702, 706 (1991) (“The state Administrative Procedures Act does not, in and of itself, grant the authority to agencies to issue subpoenas. Rather, such authority is recognized if it is expressly granted by statute.”). This principle is precisely why a court must “guard[ ] the power of subpoena jealously.” *Huntington Human Relations Comm'n v. Realco, Inc.*, 175 W. Va. 24, 26, 330 S.E.2d 682, 685 (1985).

In this case, the subpoenas state they are for the purpose of conducting “investigative interviews,” and purport to require Movants to testify at the “Mine Academy” – an MSHA facility – at 1301 Airport Road, Beaver, West Virginia. They note that only OMHST, MSHA, and Governor Manchin’s Independent Investigation Team will participate. However, OMHST

has not invoked authority permitting it to compel testimony in an investigative proceeding in the non-public setting the subpoena anticipates.

West Virginia Code § 22-1-4(b)(9) is specifically limited by its plain language to public hearings. The provision authorizes the Director to “call or subpoena witnesses, for the purpose of *conducting hearings* into mine fires, mine explosions or any mine accident.” (Emphasis added.) On its face, the code section does not allow OMHST to compel testimonial appearances outside of public scrutiny. Pursuant to the APA and cases construing it, the Court should disallow OMHST’s attempt to circumvent the limits placed on its authority by the legislature.

The fact that the agency invokes nothing more than section 22-1-4(b)(9) by itself conclusively demonstrates that the subpoenas exceed the legislative authority of OMHST. Several other facts undercut any confidence that OMHST is performing its role in this matter independently and in a manner consistent with proper practice, and demonstrate that it has issued the subpoenas for purposes that exceed its authority. Accordingly, regardless of what statute the agency has invoked or could invoke, the Court should quash the subpoenas.

**B. The Subpoenas Are Improper Because OMHST Has No Authority to Subpoena Witnesses to Expand the Reach of Federal Power and Advance Federal Investigations**

It is apparent that MSHA has inveigled OMHST to serve as MSHA’s stalking horse in this matter, a role the State of West Virginia neither has nor could assign to the state agency. The closed-doors, transcribed interviews of Upper Big Branch employees conducted under OMHST-issued Section 22-1-4(b)(9) subpoenas to date have been conducted predominantly by representatives of MSHA. The statement in the recent subpoenas indicating that MSHA will participate in the testimony OMHST seeks to compel confirms that this practice will continue. Exh. A. MSHA has made public its wish to subpoena witnesses. In August of this year,

MSHA's coal administrator, Kevin Stricklin, noted in the press that some witnesses had declined to participate in voluntary interviews – as of course was their right. See “Massey Officials to be Subpoenaed in Inquiry, Pittsburgh Tribune Review,” August 12, 2010. On MSHA's behalf, Mr. Stricklin explained: “We were wasting time,” so “we decided we're going to subpoena everybody. . . .” *Id.* (emphasis added).

Yet, MSHA has not issued subpoenas for these interviews; only OMHST has done so. It is apparent that there is only one reason for this: MSHA cannot issue subpoenas for these interviews. MSHA has no authority to compel the appearances of witnesses for closed-door interviews in connection with its accident investigations. *United States v. Consolidation Coal Co.*, 560 F.2d 214, 219 n.10 (6th Cir. 1977) (noting that the Secretary of Labor's subpoena power is limited to “compelling the production of records and witnesses at public hearings”); see 30 U.S.C. § 813(b) (“The Secretary may, after notice, hold public hearings and may sign and issue subpoenas for the attendance and testimony of witnesses and production of relevant papers, books and documents and administer oaths.”). Indeed, MSHA's Accident/Illness Investigation Procedures Handbook PHOO-I-5, at Ch. 3, VI.J., p. 31, specifically states that in connection with an accident investigation, “witness interviews are completely voluntary, and a witness may refuse to answer any question or may terminate the interview at any time.” It is obvious that MSHA has induced OMHST to exceed and abuse its authority in order to end-run limits the U.S. Congress placed on the federal agency's authority. The use of OMHST authority in this manner is offensive and improper, and calls into question the fundamental fairness of this proceeding.<sup>2</sup>

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<sup>2</sup> The Director also is enabling the Governor's Independent Investigation Team, an *ad hoc* entity with no subpoena or investigatory authority, to interrogate witnesses subpoenaed by the Director under § 22A-1-

(continued...)

Indeed, any investigative proceeding dominated by MSHA concerning the Mine is suspect on its face because, from the start, MSHA has leapt to conclusions, and sought to deflect the public's attention from its own role in designing the safety systems in place in the Mine. MSHA has made relentless and entirely self-serving efforts to impugn Massey Energy and Performance Coal ever since the accident itself. For example, MSHA announced only one day after the accident that the explosion could have been prevented. *See, e.g.*, Ken Ward, Jr., "Mine disaster update: News from briefing," Coal Tattoo Charleston Gazette Blog, April 6, 2010 (quoting MSHA's Kevin Stricklin as stating that "[i]t's quite evident that something went very wrong here," and "[a]ll explosions are preventable. It's just making sure you have things in place to keep one from occurring.").

At a time of great tragedy and confusion, MSHA immediately sought very publicly to assign blame and to distance itself from its own responsibility for the conditions that may have caused or contributed to the disaster. Well before any conclusions could have been legitimately reached, MSHA emphasized to the President of the United States and the press the role operators can play in minimizing risk and Massey's record of safety violations, clearly insinuating that Massey had failed in this case:

Mine operators use methane drainage and adequate ventilation to minimize methane concentrations. Operators can add sufficient rock dust to counter the explosive potential of coal dust. Operators can eliminate ignition sources, like electrical equipment that shed sparks. Barriers can suppress propagating explosions to mitigate their effects. But while mitigation efforts are laudable, the best approach is to prevent mine explosions from occurring in the first place.

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(continued)

4(b)(9). The members of the Governor's team have no more legal authority to interrogate Movants pursuant to an OMHST subpoena than does MSHA.

“Briefing by the Department of Labor, Mine Safety and Health Administration on Disaster at Massey Energy’s Upper Big Branch Mine-South,” *available at* [http://www.msha.gov/PerformanceCoal/DOL-MSHA\\_president\\_report.pdf](http://www.msha.gov/PerformanceCoal/DOL-MSHA_president_report.pdf).

The reason for MSHA’s rush to judgment is obvious. As Massey has publicly stated, MSHA played a major role in the design of the ventilation plan in place on April 5, when a section of the Mine exploded. In a widely quoted open letter, Massey stated that it “is important to note that the longwall at UBB was not operating with the same ventilation system that it began with in September 2009. MSHA required [Massey] to change that system and we complied.” April 26, 2010 Open Letter from Massey Energy Company, *quoted in* Ken Ward, Jr., “Massey Energy begins full-court press in wake of worst mining disaster in 40 years,” Coal Tattoo Charleston Gazette Blog (April 26, 2010). The company stated that it had discovered

1. that MSHA required several changes since that date that made the ventilation in this area more complex;
2. that the volume of fresh air to the face was significantly reduced during this period;
- and 3. that our engineers resisted making the changes, in one instance to the point of shutting down production for two days, before agreeing to MSHA’s ventilation plan changes.

*Id.* To date, the agency has not specifically addressed publicly Massey’s response that “MSHA rejected the company’s proposed plans to rectify mine conditions and instead required the ventilation change.” *See id.* MSHA obviously has an interest in deflecting attention from its own role in designing the ventilation plan in place at the time of the explosion. One reporter’s observations that MSHA’s website about the explosion omits key material are consistent with this:

It’s important to note that, while MSHA has posted some mine ventilation plan documents from Upper Big Branch on its Web site, the site is missing many important records — such as documents about any proposed mine ventilation plan changes that

MSHA rejected. MSHA has received FOIA requests for these records, along with many questions about them, but has declined thus far to produce any of that information. But somehow, a memo outlining MSHA's position and its response to Massey finds its way into the hands of a Washington, D.C.-based AP reporter ... HmMMM.

Ken Ward, Jr., Coal Tattoo Charleston Gazette Blog, "MSHA, Massey continue PR war over mine disaster," (June 22, 2010).

In short, MSHA itself is an interested party in the most acute sense of that term, and has advocated its own defense and its self-serving disparagement of Performance Coal and Massey Energy since day one. MSHA cannot be trusted to play a neutral, objective or positive role in any review of this matter. The State of West Virginia could not possibly have intended OMHST to participate in public relations battles between federal agencies and mining companies, and did not authorize OMHST to loan out its subpoenas to MSHA in order to make West Virginia coal company employees pawns in such disputes.

Reports of specific aspects of MSHA's conduct in relation to the interviews conducted under the joint arrangements between OMHST and MSHA only further demonstrate the lack of fairness in these proceedings. The subpoenas state that MSHA and Governor's Independent Investigation Team will "participate" in the interviews. Exh. A. This assertion far understates the role MSHA is likely to play. To date, in voluntary interviews, MSHA has not been merely "participating;" rather, it has been conducting the interviews. For instance, MSHA has conducted most of the questioning, and MSHA, not OMHST, has scripted the protocol for these interrogations – appropriately called "Attendance at MSHA Accident Investigation Witness Interviews in Connection with the Upper Big Branch Mine Disaster." (*See* Exhibit B, May 7, 2010 Letter from Robert Wilson, Esq. to Chris Pence, Esq. and David Hardy, Esq., enclosing the MSHA Protocol.) The MSHA protocol limits attendance at the interviews pursuant to the

discretion of MSHA, not OMHST. These facts undercut any argument that OMHST plans to conduct the new wave of interviews for its own, legislatively-authorized ends.

The terms of the MSHA protocol and other features of interviews to date further demonstrate MSHA's ulterior motives. The protocol purports to condition the attendance of certain personal representatives for witnesses upon *MSHA's* satisfaction that the witness is adequately and ethically represented. This obtrusive and presumptuous arrogation of an ethical watchdog role can serve only to undercut the witnesses' confidence in their chosen legal representation and thus limits their counsels' effectiveness, to the detriment of the witnesses. Moreover, MSHA and the State made but then broke promises of witnesses' access to transcripts of interviews – even as MSHA reportedly provided those records, without prior witness review, to federal criminal authorities. Finally, MSHA reportedly has instructed witnesses not to share with others the content of their interviews.

Soon after Mr. Stricklin made his above-quoted public comment on August 12 about the desirability of compelling witness testimony, the first OMHST subpoenas issued, ordering individuals to report to MSHA's "Mine Academy." Not surprisingly, the same MSHA protocols and MSHA dominance described above have marked these purportedly compulsory interviews. By participating in – and apparently driving – these compelled interviews, MSHA is acting in flagrant disregard for constraints placed on it by Congress. OMHST has no authority to enable this end-run on federal agency boundaries, and OMHST ought not to be permitted to do so.

Through OMHST subpoenas, MSHA has raised the stakes for witnesses in this investigation. MSHA reportedly is delivering to federal criminal authorities transcripts of "interview" testimony that witnesses have not been afforded an opportunity to review, pursuant to a protocol which permits MSHA, but not the witnesses, to retain verbatim transcripts of the

interviews and to release unilaterally what is said in interviews. Simultaneously, MSHA officials make public statements advocating investigation of company personnel by federal criminal authorities. *See* Howard Berkes, “Massey Exec’s Access To Mine After Blast Questioned,” National Public Radio (Sept. 20, 2010), <http://www.npr.org/templates/story/story.php?storyId=129609425>. Were witnesses subject to subpoenas for testimony issuing as part of a properly conducted criminal investigation, they would be entitled to constitutional and procedural protections that the OMHST procedure does not afford. *See, e.g.*, Fed. R. Crim. P. 6(e); U.S. Attorney Manual § 9-11.151. OMHST oversteps its authority by aiding MSHA’s effort to effectively expand the power of federal criminal investigators by providing them with compelled testimony not directly subject to these protections.

#### **CONCLUSION & REQUEST FOR HEARING**

The integrity and reliability of any investigation that yields its authority and prerogative to MSHA is critically damaged. By allowing an interested party to convert the OMHST investigatory process to its own selfish purposes, the state agency frustrates the performance of the very statutory function underlying such an inquiry. The Court should permit neither Movants nor OMHST to be used as pawns in MSHA’s abuse of its own authority, especially because the damage that could be done by allowing OMHST to proceed cannot be undone. For all of these reasons and such others as may be stated in a hearing on this matter, Movants respectfully request that this Court excuse the Movants from appearing and quash OMHST’s subpoenas. Movants request a hearing and an opportunity to present and compel evidence in support of this motion.

Dated: September 21, 2010

Respectfully submitted,

*Nicholas S. Preservati*

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*Counsel for Movant Rick Nicolau*

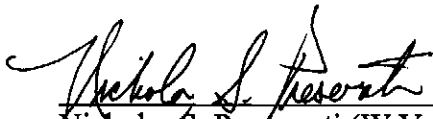
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Tel: (304) 347-3684  
*Counsel for Movant Gary May*

**CERTIFICATE OF SERVICE**

I, Nicholas S. Preservati, do hereby certify that I have served a true and exact copy of the foregoing **Motion to Quash Subpoenas Issued For Improper Purpose** upon the following via U.S. Mail, certified, return receipt and facsimile on the 21<sup>st</sup> day of September, 2010, addressed as follows:

Ronald L. Wooten, Director  
Office of Miners' Health, Safety &  
Training  
1615 Washington Street, East  
Charleston, West Virginia 25311  
304.558.1282

Barry L. Koerber, Esq.  
Assistant Attorney General  
Office of the Attorney General  
1615 Washington Street, East  
Charleston, West Virginia 25311  
304.558.1282  
*Counsel for the Office of Miners'  
Health, Safety & Training*



Nicholas S. Preservati (W.Va. Bar No. 8050)  
Joseph L. Jenkins (W.Va. Bar No. 9680)  
Preservati Law Offices, PLLC  
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304.346.1431  
304.346.1744 *facsimile*  
*Counsel for Jamie Ferguson*

# Exhibit A



State of West Virginia  
Joe Manchin III, Governor

WV Office of Miners' Health, Safety & Training  
Ronald L. Wooten, Director  
1615 Washington Street East • Charleston, West Virginia • 25311-2126  
Telephone 304-558-1425 • Fax 304-558-1282  
[www.wvminersafety.org](http://www.wvminersafety.org)

RECEIVED  
STATE COURT CLERK  
2010 SEP - 7 PM 3:00

IN THE MATTER OF:

THE INVESTIGATION OF THE  
APRIL 5, 2010 MINE EXPLOSION  
AT UPPER BIG BRANCH MINE.

SUBPOENA

TO: Rick Foster  
14491 Coal River Road  
Seth, WV 25181

You are hereby **COMMANDED**, pursuant to W. Va. Code Section 22A-1-4(b)(9), to appear and give testimony regarding the above referenced investigation on September 16, 2010 at 1:00 p.m. in classroom 121 at the Mine Academy located at 1301 Airport Road, Beaver, West Virginia 25813.

Given under my hand this 2<sup>nd</sup> day of September, 2010.

  
Ronald L. Wooten, Director



**State of West Virginia**  
**Joe Manchin III, Governor**

WV Office of Miners' Health, Safety & Training  
Ronald L. Wooten, Director  
1615 Washington Street East • Charleston, West Virginia • 25311-2126  
Telephone 304-558-1425 • Fax 304-558-1282  
[www.wvminersafety.org](http://www.wvminersafety.org)

RECEIVED  
MINE HEALTH SAFETY TRAINING  
29 SEP -7 FH 2:40

**IN THE MATTER OF:**

**THE INVESTIGATION OF THE  
APRIL 5, 2010 MINE EXPLOSION  
AT UPPER BIG BRANCH MINE.**

**SUBPOENA**

**TO: Gary May**  
**P.O. Box 145**  
**Comfort, WV 25049-0145**

You are hereby **COMMANDED**, pursuant to W. Va. Code Section 22A-1-4(b)(9), to appear and give testimony regarding the above referenced investigation on September 17, 2010 at 8:30 a.m. in classroom 121 at the Mine Academy located at 1301 Airport Road, Beaver, West Virginia 25813.

Given under my hand this 2<sup>nd</sup> day of September, 2010.

  
Ronald L. Wooten, Director

- 
- Region One • 14 Commerce Dr., Suite 1 • Westover, West Virginia 26001 • Telephone 304-258-3268 • Fax 304-258-3278
  - Region Two • 691 Stewart St. • Welch, West Virginia 24801-2311 • Telephone 304-433-8451 • Fax 304-433-2100
  - Region Three • 187 Panco Court, Suite 2 • Donnyville, West Virginia 26028 • Telephone 304-393-7889 • Fax 304-393-7828
  - Region Four • 669 Industrial Dr. • Oak Hill, West Virginia 26001-9714 • Telephone 304-466-0100 • Fax 304-466-4088



**State of West Virginia**  
**Joe Manchin III, Governor**

**WV Office of Miners' Health, Safety & Training**  
**Ronald L. Wooten, Director**  
1615 Washington Street East • Charleston, West Virginia • 25311-2126  
Telephone 304-558-1425 • Fax 304-558-1282  
[www.wvminesafety.org](http://www.wvminesafety.org)

**IN THE MATTER OF:**

**THE INVESTIGATION OF THE  
APRIL 5, 2010 MINE EXPLOSION  
AT UPPER BIG BRANCH MINE.**

**SUBPOENA**

**TO: Jamie Ferguson**  
**c/o Nick Preservati, Esq.**  
**Preservati Law Offices PLLC**  
**P.O. Box 1431**  
**Charleston, WV 25325**

You are hereby **COMMANDED**, pursuant to W. Va. Code Section 22A-1-4(b)(9), to appear and give testimony regarding the above referenced investigation on September 22, 2010 at 8:30 a.m. in classroom 121 at the Mine Academy located at 1301 Airport Road, Beaver, West Virginia 25813. The West Virginia Office of Miners' Health, Safety and Training, the Mine Safety and Health Administration, and the Governor's Independent Investigation Team will participate in the interview.

Given under my hand this 15<sup>th</sup> day of September, 2010.

  
Ronald L. Wooten, Director



**State of West Virginia**  
**Joe Manchin III, Governor**

**WV Office of Miners' Health, Safety & Training**  
**Ronald L. Wooten, Director**  
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**IN THE MATTER OF:**

**THE INVESTIGATION OF THE  
APRIL 5, 2010 MINE EXPLOSION  
AT UPPER BIG BRANCH MINE.**

**SUBPOENA.**

**TO: Elizabeth Chamberlin**  
**% Phillip T. Inghima, Esq.**  
**Crowell & Moring LLP**  
**1001 Pennsylvania Avenue, NW**  
**Washington, DC 20004**

You are hereby **COMMANDED**, pursuant to W. Va. Code Section 22A-1-4(b)(9), to appear and give testimony regarding the above referenced investigation on September 22, 2010 at 1:00 p.m. in classroom 121 at the Mine Academy located at 1301 Airport Road, Beaver, West Virginia 25813. The West Virginia Office of Miners' Health, Safety and Training, the Mine Safety and Health Administration, and the Governor's Independent Investigation Team will participate in the interview.

Given under my hand this 14<sup>th</sup> day of September, 2010.

  
Ronald L. Wooten, Director



**State of West Virginia**  
**Joe Manchin III, Governor**

WV Office of Miners' Health, Safety & Training  
Ronald L. Wooten, Director  
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**IN THE MATTER OF:**

**THE INVESTIGATION OF THE  
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**SUBPOENA**

**TO: Wayne Persinger**  
c/o James Cagle, Esq.  
Law Office of James Cagle  
1018 Kanawha Blvd., East  
Suite 1200  
Charleston, WV 25301-2827

You are hereby **COMMANDED**, pursuant to W. Va. Code Section 22A-1-4(b)(9), to appear and give testimony regarding the above referenced investigation on September 23, 2010 at 1:00 p.m. in classroom 121 at the Mine Academy located at 1301 Airport Road, Beaver, West Virginia 25813. The West Virginia Office of Miners' Health, Safety and Training, the Mine Safety and Health Administration, and the Governor's Independent Investigation Team will participate in the interview.

Given under my hand this 14<sup>th</sup> day of September, 2010.

  
Ronald L. Wooten, Director

- 
- Region One • 14 Commerce Dr., Suite 1 - Westover, West Virginia 26001 • Telephone 304-285-3268 • Fax 304-285-3278
  - Region Two • 891 Stewart St. - Welch, West Virginia 24801-2311 • Telephone 304-433-6421 • Fax 304-438-2190
  - Region Three • 137 Peach Court, Suite 2 - Danville, West Virginia 26005 • Telephone 304-289-7823 • Fax 304-369-7826
  - Region Four • 850 Industrial Dr. - Oak Hill, West Virginia 25901-9714 • Telephone 304-489-6100 • Fax 304-469-4089

# Exhibit B

**U.S. Department of Labor**

Mine Safety and Health Administration  
1301 Airport Road  
Room D-200  
Beaver, West Virginia 25813-9426

May 7, 2010

Chris Pence, Esq.  
David Hardy, Esq.  
Allen Guthrie McHugh & Thomas, PLLC  
500 Lee Street East, Suite 800  
Charleston, WV 25301

VIA ELECTRONIC MAIL

Re: Investigation of explosion that occurred on April 5, 2010 at  
Performance Coal Company's Upper Big Branch Mine-South  
Witness interviews

Dear Mr. Pence:

This letter is to confirm our discussion yesterday concerning the protocols that will apply to the initial interviews to be conducted by the accident investigation team. As set forth in the attached document titled "Attendance at MSHA Accident Investigation Witness Interviews in Connection with the Upper Big Branch Mine Disaster," attendance during the initial witness interviews will be limited to the listed individuals. These protocols have been designed to best preserve the integrity of the interview process. These protocols apply to the initial witness interviews and not to the public hearing forums which will be held at a later date. Please feel free to contact me or Derek Baxter if you wish to discuss this matter further.

Thank you for your continued cooperation in this matter.

Sincerely,



Robert S. Wilson  
Attorney

Enclosure

cc: David J. Hardy, Esq.

**Attendance at MSHA Accident Investigation Witness Interviews  
in Connection with the Upper Big Branch Mine Disaster**

To ensure that MSHA creates an atmosphere that is conducive to carrying out its investigatory responsibilities, protects the integrity of its investigation, and maximizes the effectiveness of its interviews, it is exercising its discretion to limit attendance at witness interviews in connection with its investigation of the Upper Big Branch Mine tragedy.

- Only the following individuals will be permitted to attend an interview of a non-management witness:
  - the witness;
  - the witness' duly authorized personal legal representative;
  - a duly authorized investigator for the State of West Virginia; and
  - U.S. Department of Labor officials.
  
- Only the following individuals will be permitted to attend an interview of a management witness:
  - the witness;
  - the witness' duly authorized personal and/or company legal representative;
  - a duly authorized investigator for the State of West Virginia; and
  - U.S. Department of Labor officials.
  
- While the general rule is that a witness' personal representative must be an attorney, MSHA retains the right to permit, on a case-by-case basis, a witness to be accompanied instead by a personal representative who is not a lawyer, such as a close relative, provided that such attendance is likely to contribute to the effectiveness of the interview and to MSHA's investigation.
  
- Massey Energy Company has acknowledged that its counsel is not providing personal representation to any company employee. The company and its attorneys thus will not be permitted to participate in or attend interviews as the duly authorized personal legal representative of any employee witness.
  
- A personal representative who is directly or indirectly provided or paid by a third party, including Massey Energy Company, may represent a non-management witness at an interview only if doing so does not in any way compromise the representative's duty of loyalty, confidentiality, or professional independent judgment to the witness. Specifically, MSHA will permit such a representative to participate in the interview only if:
  - the representative has the witness' informed and written consent, which reflects that the representative has explained, in person, the risks and advantages of such representation, including any real or potential conflicts of interest. Such written consent shall also reflect that the witness has

been given a reasonable opportunity to consider the risks and reasonably available alternatives of such representation and to raise questions and concerns;

- the third party is prohibited from, in any way, directing, regulating or representing the witness;
- the third party has no current attorney-client relationship with the representative;
- the representative is prohibited from communicating with the third party concerning the substance of the representation;
- invoices are to be processed and paid within the regular course of business, consistent with the manner, speed, and frequency the payer pays its own counsel; and
- the payer of services may not be relieved of its continuing obligation to pay for those services without leave of MSHA.

MSHA may also permit such representation if it determines in other circumstances that the representative's duties will not be compromised by such an arrangement.

- A witness will be considered a "management" witness to the extent that he or she is considered a "corporate party" to this proceeding. In an analogous context, the West Virginia Supreme Court has held that a "corporate party," for purposes of Rule 4.2 of the state's Rules of Professional Conduct, includes only those officials who have the power to bind the corporation in the matter, officials who are responsible for implementing the advice of corporate counsel, or officials whose interests are directly at stake (*i.e.* a member of a class, partners in a partnership, the principal members of a joint venture, and the beneficiaries of an express trust). *See Dent v. Kaufman*, 185 W.Va. 171, 406 S.E.2d 68 (1991); *see also Cole v. Appalachian Power Co.*, 903 F.Supp. 975, 978 (S.D.W.V.1995). Although Rule 4.2 applies only to attorneys, not investigators, MSHA believes it is appropriate to apply the *Dent* test in the circumstances of this investigation.

In practical terms, relatively few employees are likely to be considered "management" under the corporate party test. Officials from Massey Energy Company's corporate headquarters would clearly be considered management, as would the superintendent, president, or safety director at the Upper Big Branch mine. Rank-and-file miners, on the other hand, would clearly be considered non-management. Whether an underground supervisory employee is considered management will depend on the employee's specific responsibilities and the extent to which the employee is authorized to speak or act on the company's behalf.