

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 10, 2009

MOUNTAIN COAL COMPANY, LLC,	:	CONTEST PROCEEDING
Contestant	:	
	:	
v.	:	Docket No. WEST 2007-409-R
	:	Citation No. 7291353; 3/26/2007
	:	
SECRETARY OF LABOR,	:	West Elk Mine
MINE SAFETY AND HEALTH	:	Mine Id. 05-03672
ADMINISTRATION, (MSHA),	:	
Respondent	:	
	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2008-129
Petitioner	:	A.C. No. 05-03672-128598
	:	
v.	:	
	:	West Elk Mine
MOUNTAIN COAL COMPANY, LLC,	:	
Respondent	:	

ORDER CORRECTING CLERICAL ERROR IN DECISION

On October 16, 2009, I issued a decision on the merits in these cases. (31 FMSHRC 1220). In the decision, I held that the Secretary established a violation of section 75.1725(a), as alleged in Citation No. 7291353, but I determined that the Secretary did not establish that the violation was of a significant and substantial nature (“S&S”).

The Secretary has filed a motion to correct a clerical error in the decision. She moves that the decision be amended to reflect the fact that, at the start of the hearing, she agreed to amend the citation to delete the S&S determination. (Tr. 7). She asks that my discussion of the S&S issue on page 19 of the decision be modified to reflect her concession that the citation was not S&S. (31 FMSHRC 1238). In response to the motion, Mountain Coal stated that it did not object to the motion but asked that the amended decision include my discussion of the gravity criterion and some of the S&S discussion. The Secretary does not object to this request.

For good cause shown, the motion is **GRANTED**, in accordance with the authority vested to me under 29 C.F.R. §2700.69(c). Page 19 of my October 16, 2009, decision (31 FMSHRC 1238) is **STRICKEN** from the decision and is replaced by the modified page attached to this order. In all other respects, the decision in these cases remains unchanged.

Richard W. Manning
Administrative Law Judge

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RWM

MOUNTAIN COAL COMPANY, WEST 2007-409-R & WEST 2008-129

This page replaces page 19 of the decision issued by Judge Manning on October 16, 2009
31 FMSHRC 1220, 1238

hose replacement policies to make sure that the policies are sound and are understood by its maintenance personnel. It also may want to consider reducing its policies to writing.

2. Significant and Substantial; Gravity; Negligence.

At the start of the hearing, the Secretary agreed to modify the citation by deleting the inspector's S&S determination. (Tr. 7). I find that this modification is reasonable. The hoses were in the back walkway, which is behind the leg cylinders. Miners do not work in that area. The back walkway is a confined area where it is difficult to move around.⁵ The most common reason for anyone to be in the back walkway is to conduct a permissibility inspection, when the supply hoses are not pressurized, or to replace a hose. As stated above, miners are generally not near the supply hoses when they are pressurized as the shields are moved. Angel testified that a miner would have to be within inches of a hose in order to sustain an injury from the resulting spray. The return hydraulic hoses, which are always pressurized during production, operate at 100 to 200 psi. The return hoses were rated at 5,800 psi and they have four layers of wire braiding. In addition, the miners working along the long wall typically wear protective clothing, as described above. This clothing would protect them from injury. I credit the testimony of Kunde on this issue.

I find that the gravity was low because, if a hose were to leak hydraulic fluid, it is unlikely that anyone would be seriously injured as a result. An injury from a fluid injection or from a whipping hose was unlikely. The most likely injury would be from a slip and fall on a deck plate that was covered with spilled hydraulic fluid.

I also find that Mountain Coal's negligence was low. I credit the company's evidence that it has been using the same criteria for determining when a hydraulic hose should be replaced.

⁵ In a previous decision, I determined that "[e]ven a small individual would have difficulty walking along the 'back walkway' [in a longwall section at the West Elk Mine]." *Mountain Coal Co.*, 26 FMSHRC 853, 855 (Nov. 2004). That finding is equally applicable here.