

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 18, 1998

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

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Docket No. KENT 97-197

ARCH OF KENTUCKY

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BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1994) (AMine Act@). At issue is the decision by Administrative Law Judge Avram Weisberger that Arch of Kentucky (AArch@) violated 30 C.F.R. ' 75.1403-6(b)(3)¹ by failing to adequately maintain the sanding devices on a mantrip. 20 FMSHRC 73, 75-78 (Jan. 1998) (ALJ). The Commission granted Arch's petition for discretionary review challenging the judge's determinations that it violated section 75.1403-6(b)(3) and that the alleged violation was significant and substantial (AS&S@). For the reasons that follow, we affirm the judge's decision.

I.

Factual and Procedural Background

Arch operates the No. 37 mine, an underground coal mine in Lynch, Kentucky. *Id.* at 74. Just after midnight on February 4, 1997, eight miners, at the end of their shift, boarded the No. 14 mantrip at the L-15 section of the mine. *Id.*; Tr. 156; Pet. Ex. 1 at 1. The mantrip traveled on steel tracks. Tr. 25. Miners Kenneth Russell, Kenneth Bolling, Vass Mellon, and William Carter

¹ Section 75.1403-6(b)(3) provides, in pertinent part, that Aeach track-mounted self-propelled personnel carrier should . . . [b]e equipped with properly installed and well-maintained sanding devices.@

sat in the outby passenger compartment facing the direction of travel. 20 FMSHRC at 74; Jt. Ex. 2. Miners Otis Holcomb, Charlie Walker, Bill Toliver, and Billy Boggs sat in the inby passenger compartment facing the rear of the mantrip. 20 FMSHRC at 74; Jt. Ex. 2. Tony Cox, the mantrip operator, sat in a compartment in the middle of the mantrip between and above the two passenger compartments. Jt. Exs. 2 & 3. Plexiglas windows in the outby compartment allowed passengers to look forward in the direction of travel and allowed some of them, if they turned in their seats, to see the seated operator from his shoulder level and above. Tr. 27, 37, 61, 183-84.

The No. 14 mantrip had a hand-controlled service brake to slow or stop the vehicle and a hand-controlled parking brake. Tr. 178-79. It also had sanders to provide traction to slow the mantrip, to prevent it from sliding on wet tracks, and to help it climb steep grades. 20 FMSHRC at 74. When activated, a sander released sand through a 2-inch opening onto the surface of the tracks in front of the wheels. Tr. 112. The mantrip had four sanders, one located above each wheel, that were controlled by the operator using hand levers. 20 FMSHRC at 74; Jt. Ex. 3. One lever operated the two outby sanders and the other lever operated the two inby sanders. Tr. 139-40, 193.

As the No. 14 mantrip traveled out of the mine on February 4, it entered a dip under an overcast.² 20 FMSHRC at 74. It was not able to climb out of the dip even though Cox attempted to activate the sanders. *Id.* He reversed the mantrip and successfully passed through the dip on his second attempt. *Id.* The mantrip continued its outby journey and, as it rounded a bend in the tracks, Cox and the passengers in the outby compartment saw the light of an approaching battery locomotive. *Id.*; Tr. 40, 58, 73, 96. Cox applied the brakes but the mantrip began to slide on the wet tracks and collided with the locomotive. 20 FMSHRC at 74; Tr. 91-92.

As a result of the collision, Russell suffered a fractured lower leg, Carter received spinal injuries, and Bolling suffered a fractured ankle and two injured vertebrae. Tr. 41, 62-63, 93; Pet. Ex. 1 at 6. Immediately after the accident, Cox ran inby for help and encountered another mantrip about to make its second attempt to pass through the dip going outby. Pet. Ex. 1 at 1; Tr. 105. The passengers on the mantrip included Shelby Brewer, an MSHA inspector, who was at the mine taking dust samples. 20 FMSHRC at 74; Tr. 102, 104-05. Inspector Brewer ran forward to the accident scene and then rode the No. 14 mantrip outby as it took the injured miners approximately 1000 feet to the mine portal. 20 FMSHRC at 74; Tr. 106.

² An overcast is defined as A[a]n enclosed airway that permits an air current to pass over another one without interruption.@ American Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 384 (2d ed. 1997).

Approximately 20 minutes after the accident, Inspector Brewer and Bob Anderson, a miner's representative, examined the No. 14 mantrip on the surface. 20 FMSHRC at 74. Anderson operated a sander lever but no sand was released. *Id.* Inspector Brewer inspected the sander boxes and found they were half full and the sand inside was compacted. *Id.* According to Inspector Brewer, the sand in a sander box has to be dry and loose in order to release through the 2-inch opening and fall on the track. *Id.* at 74-75; Tr. 112. Anderson tagged out the mantrip and moved it to the mine's repair shop. Tr. 107. Inspector Brewer told James Vicini, Arch's safety manager, that he might issue a citation to Arch because the sanders on the mantrip were not working. Tr. 161.

On the night of the accident, Vicini started an accident investigation which lasted three or four weeks. Tr. 159-60, 171. He recorded the results of the investigation in an accident report (the Arch report). Pet. Ex. 1. On the morning of February 4, William Johnson, an MSHA inspector and accident investigator, arrived at the mine and spoke to Vicini and some miners, including Cox, about the accident. Tr. 117-18, 122. At approximately 10:00 a.m., Johnson examined one outby sander and one inby sander on the No. 14 mantrip and found that the sander boxes were half full and the sand inside was compacted. 20 FMSHRC at 75. On February 21, Johnson issued Citation No. 4581310 to Arch, alleging an S&S violation of section 75.1403-6(b)(3). Jt. Ex. 5. Citation No. 4581310 charges that the sanding device provided on the No. 14 Brookville diesel track-mounted self-propelled personnel carrier was not working when the No. 14 mantrip collided with the No. 25 battery powered track-mounted motor. *Id.* Arch contested the citation and the matter proceeded to hearing before Judge Weisberger.

The judge held that Arch was responsible for an S&S violation of section 75.1403-6(b)(3). 20 FMSHRC at 75-78. Based on the eyewitness testimony of the miners in the outby passenger compartment of the mantrip and on the supporting testimony of the MSHA inspectors, he concluded that the sanders did not function properly prior to the accident. *Id.* at 75-76. The judge did not assign significant weight to the hearsay testimony of Vicini that Cox told him that the sanders were working when he came out of the dip, in part because Arch did not call Cox to testify and did not indicate that he was not available to testify. *Id.* The judge dismissed as too speculative Arch's claim that the sanders became compacted after the accident due to exposure to water. *Id.* at 75. He also dismissed, for lack of any supporting evidence, Arch's claim that the mantrip had been inspected before the accident and found to be in working order. *Id.*

The judge assessed Arch a penalty of \$1019, finding the gravity of the violation relatively high and the operator's negligence moderate. *Id.* at 78. Arch subsequently filed a petition for discretionary review, challenging the judge's decision.

II.

Disposition

Arch contends that the judge's findings that it violated section 75.1403-6(b)(3) and that

the violation was S&S are not supported by substantial evidence. A. Br. at 1. It claims that the judge erred in relying on the testimony of the miners and MSHA inspectors about the condition of the sanders. *Id.* at 8-11. According to Arch, the judge committed prejudicial error by (1) failing to accord sufficient weight to Vicini's hearsay testimony about Cox's out-of-court statements, (2) disregarding the Arch report which it claims fell within an exception to the hearsay rule, and (3) preventing Arch from questioning Inspector Johnson during cross-examination about what Cox told him concerning his use of the sanders before the accident. *Id.* at 7, 11-15; A. Reply Br. at 6-8. Arch contends that the judge did not adequately weigh evidence that the sanders functioned properly immediately before the shift on which the accident occurred. A. Br. at 9-10; A. Reply Br. at 5. It also argues that the judge erred when he concluded the alleged violation was S&S because the Secretary failed to prove that (1) the violation occurred, (2) its contribution to the danger of a collision was significant and substantial, and (3) it caused the collision. A. Br. at 17-19; A. Reply Br. at 8-9.

The Secretary responds that the judge's decision is supported by substantial evidence. S. Br. at 9, 24. She contends that the eyewitness testimony of four miners and the testimony of two MSHA inspectors indicate that the sanders were not working properly prior to the accident. *Id.* at 9-14. She argues that the judge correctly found that Vicini's testimony about what Cox told him was hearsay testimony and correctly gave it less weight than the eyewitness testimony of the miners. *Id.* at 16-18. The Secretary asserts that there is no evidence to support Arch's claims that the sand became compacted after the accident. *Id.* at 14-15. She contends that the judge was right to disallow Arch's question on cross-examination to Inspector Johnson, concerning what Cox had told him about the sanders, because it had already been testified to by other witnesses and because it went beyond the scope of the Secretary's direct examination. *Id.* at 20-21. Furthermore, she argues that even if the judge did err in disallowing the question, it only amounted to harmless error. *Id.* at 19-22. The Secretary also argues that the judge did not err when he found Arch's violation to be S&S, and asserts that proof that the violation caused the collision was not required to show that the violation was S&S. *Id.* at 22-23.

A. Violation

At issue in this case is whether the judge's conclusion that the sanding device on Arch's mantrip was not functioning when the mantrip collided with a locomotive (20 FMSHRC at 75-76) is supported by substantial evidence.³ We conclude that it is.

³ When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). In reviewing the whole record, an appellate tribunal must consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (Jan. 1997) (quoting *Universal Camera Corp. v.*

NLRB, 340 U.S. 474, 488 (1951)). So long as substantial evidence supports the judge's findings, the Commission does not substitute a competing view of the facts for the view the ALJ reasonably reached, even where some record evidence supports that competing view. *Donovan ex rel. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 92 (D.C. Cir. 1983).

Both post-accident inspections of the sanders indicated they were not working properly. Although Arch claims that no one inspected the mantrip until 10 hours after the accident (A. Br. at 5, 7), Inspector Brewer testified that he inspected the vehicle approximately 20 minutes after the accident. 20 FMSHRC at 74. He found that the sander boxes were half full, the sand inside was compacted, and the sand looked like it hadn't been running through the opening. Tr. 108. When Inspector Johnson inspected the mantrip later that morning, he found similar conditions. Tr. 124.⁴

In crediting the testimony of Brewer and Johnson, the judge rejected Arch's claims that the sand in the sanders may have become compacted after the accident from exposure to rain or when the mantrip drove through a water hole at the mine portal. 20 FMSHRC at 75. Inspector Brewer testified that the small water hole at the mine portal had been pumped down when the mantrip drove through it and that it should not have affected the sanders. Tr. 110. The record also contains no evidence that the mantrip was exposed to rain during the 20 minutes it was on the surface before it was inspected by Inspector Brewer or, if it had rained during that time, that the rain had entered the sander boxes. Tr. 109. Inspector Brewer testified that the tops of the sanders were covered with lids. *Id.*⁵ The judge also rejected Arch's argument that the sanders on the No. 14 mantrip had been inspected just before the shift on which the accident occurred and had been found to be functioning properly. 20 FMSHRC at 75; Tr. 195-97. The judge reasoned that Arch provided no evidence based on personal knowledge concerning the pre-shift condition of the mantrip. 20 FMSHRC at 75.

⁴ We note that both inspectors had extensive experience both in the mining industry and with MSHA. Tr. 99-100, 119. We also note that Inspector Johnson had a working knowledge of mantrip sanders and had special training in accident investigation. Tr. 117-18, 120-21.

⁵ Arch also argues that, because the sander boxes were found to be half full of sand after the collision, the other half of the sand must have been used on the tracks before the accident. A. Br. at 9-10. However, there is nothing in the record from which such an inference could be drawn, such as evidence that the sander boxes were more than half full with sand when the mantrip began its outby trip just after midnight on February 4, or evidence that sand was found on the tracks after the accident.

The judge also based his conclusion that the sanders were not maintained in working order on his findings that Cox attempted to use the sanders in the dip but they did not work. *Id.* at 75-76. Russell testified that, as the mantrip was attempting to pass through the dip, he called to Cox to use the sanders and he saw Cox operating the sander lever. Tr. 21-22, 26-27, 29. Russell said that he heard a clunking sound, just metal against metal coming from directly behind him where the sanders were located in the mantrip, and he inferred from this sound that Cox had activated the sanders. Tr. 27-28. He testified that the sanders were not effective because their activation did not create traction and the mantrip slid backwards into the dip. Tr. 20, 22, 28-29.

Bolling testified that some of the miners on the mantrip called to Cox to use the sanders when they were trying to get through the dip and that Cox replied, "I am, I am, I am." Tr. 59. Bolling said he saw Cox using the sander lever but, in his opinion, the sanders were not operational because they did not provide any traction. Tr. 59-60. Carter claimed that, as a passenger on a mantrip, he knew if the sanders were being operated because they were located immediately behind the passengers' compartment and he could hear them being activated. Tr. 89. He also claimed to know when the sanders were being activated because he could tell if the sand from the sanders was producing traction between the wheels and the tracks. Tr. 86. Carter said that, when the mantrip tried to pass through the dip, it just slid back down even though he could hear Cox activating the sanders. Tr. 88-89. However, he also testified that it usually took a mantrip two or three attempts to get through the dip. Tr. 88.

We also note that Russell claimed the mantrip began to slide on the wet tracks on the bend just before the accident. Tr. 36-37. Although he saw Cox using the sanders, he inferred that they were not working because he did not feel any traction and the mantrip did not slow down. Tr. 37, 39-40. He claimed that Cox locked the brakes but the mantrip continued to slide until it collided with the locomotive. Tr. 37.

Bolling testified that the mantrip started to slide just before the accident and did not slow down before the collision. Tr. 61. He said that he heard someone tell Cox to activate the sanders and he heard Cox reply that he was activating them. Tr. 62. He also saw Cox operating the controls but could not tell if he was specifically operating the sanders. Tr. 61-62. Mellon claimed that the mantrip began to slide just before the accident. Tr. 73. Instead of slowing down, he said the mantrip continued to speed up, as if the sanders were not working, until it hit the locomotive. Tr. 73-74.

Carter claimed that, just before the accident, Cox applied the brakes and the mantrip began to slide. Tr. 91. He believed that Cox then activated the sanders because they were immediately behind him and he could hear the metal to metal sound they made when they were activated. Tr. 91-93. He stated that he did not know if the activated sanders released any sand onto the tracks. Tr. 91. However, he claimed that the mantrip did not slow down as it should have done if sand was falling on the tracks and providing traction. Tr. 91-92.

Arch offered contrary evidence that the sanders did lay down sand in the dip, and that Cox

did not have time to apply them thereafter. Vicini testified that Cox told him that he activated the sanders and Alaid sand down@while traveling through the dip. Tr. 168-69. According to Vicini, Cox claimed that the sanders worked at the dip because he heard the Akind of squeal@that he believed occurs when sand from the sanders causes traction between the wheels and the tracks. Tr. 169; Pet. Ex. 1 at 8. Vicini testified that Cox told him that, at the bend immediately before the accident, he applied the brakes but did not have time to use the sanders.⁶ Tr. 186, 202. Vicini also said that when he asked Cox, Walker, Holcomb, and Tolliver about the sanders shortly after the accident, none of them told him that the sanders had failed to work. 20 FMSHRC at 75-76; A. Br. at 8.

In crediting the Secretary's evidence over Vicini's testimony on behalf of Arch, the judge noted:

Vicini indicated that he had interviewed [several] miners who were passengers in the mantrip at issue, and that none of them told him that the sanders did not operate. . . . They told him that the track was slick. However, Arch did not proffer the testimony of any of these miners, nor did it indicate that any of them were not available. I thus do not accord much weight to this hearsay testimony of Vicini. On the other hand, I observed the demeanor of Carter, Bolling, and Russell and found their testimony credible

20 FMSHRC at 76. The judge also noted that Arch did not call Cox or the other miners interviewed by Vicini, or indicate that they were unavailable to testify. *Id.*

We do not find Arch's evidence of sufficient weight to overturn the judge's conclusion that the testimony of the Secretary's witnesses was more credible than Cox's. In reaching this conclusion, we are guided by the principle that a judge's credibility determinations are entitled to great weight. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). We conclude that Arch has not offered Acompelling reasons to take the xtraordinary step= of reversing the judge's credibility determination.@ See *Fort Scott Fertilizer-Cullor, Inc.*, 19 FMSHRC 1511, 1516 (Sept. 1997) (quoting *Hall v. Clinchfield Coal Co.*, 8 FMSHRC 1624, 1629 (Nov. 1986)).

⁶ The Arch report contains no information as to whether or not Cox used the sanders at the bend just before the collision. Pet. Ex. 1.

Arch also argues that the judge erred by failing to address in his decision Cox's statements recounted by Vicini in the Arch report, which the operator contends falls within the business records exception to the hearsay rule. A. Br. at 11-12. We note, however, that hearsay rule exceptions are largely irrelevant in a Commission proceeding, in which hearsay evidence is admissible.⁷ 29 C.F.R. § 2700.63(a); *Mid-Continent Resources, Inc.*, 6 FMSHRC 1132, 1135-36 (May 1984). In fact, the judge admitted the report into evidence (Pet. Ex. 1), it having been offered by the Secretary for the purposes of cross-examining Vicini, the author of the report C whose testimony regarding Cox's statements to him about the sanders the judge expressly discredited. 20 FMSHRC at 75-76. We find that the judge also implicitly discredited the report (*see Fort Scott*, 19 FMSHRC at 1516 (recognizing implicit credibility finding of judge)), and justifiably omitted it from his analysis.

We agree with Arch (A. Br. at 12-16), however, that the judge erred during the hearing by sustaining an objection by the Secretary to the following question posed by Arch's counsel to Inspector Johnson on cross-examination: "When you talked to Mr. Cox, isn't it true that he told you that he had used the sanding device shortly before the accident?" Tr. 143. The Secretary objected to the question on the grounds that it was hearsay and that it was covered by the informer's privilege. *Id.* The judge's reasons for sustaining the objection were (1) the actions of Cox had already been testified to by other witnesses, (2) the question did not relate to anything that Inspector Johnson said on direct examination, and (3) Cox's answer to the question "Appears to be covered by informer's privilege." Tr. 144.

Contrary to the judge's ruling, the question put to Inspector Johnson was worded broadly enough to encompass actions by Cox that were not testified to by the previous witnesses. Nor do we agree with the judge that the question did not relate to matters testified to on direct examination. Inspector Johnson was asked on direct if he talked to anyone at the mine during his inspection. He answered: "I talked with the C both the men [sic] that was operating the mantrip and the gentleman that was operating the [locomotive]." Tr. 122. This opened the door to Arch's later question on cross-examination concerning part of that conversation. *See United States v. Hitchmon*, 609 F.2d 1098, 1100-01 (5th Cir. 1979) (holding that trial judge improperly restricted cross-examination of subject matter raised on direct examination).

Finally, we conclude that the question on cross-examination was not covered by the informer's privilege. This privilege is codified in Commission Procedural Rule 61, which states that "[a] judge shall not, except in extraordinary circumstances, disclose or order a person to disclose to an operator or his agent the name of an informant who is a miner." 29 C.F.R. § 2700.61. The privilege also protects the content of a communication if its disclosure would tend to reveal the identity of the informer. *Asarco, Inc.*, 12 FMSHRC 2548, 2554 (Dec. 1990). The

⁷ Therefore, we need not reach the operator's contention that the Arch report falls within the business records hearsay exception.

informer's privilege, however, does not apply to the question on cross-examination because the operator already knew Cox's identity and that he had communicated with the inspector about the accident. Tr. 122, 142, 185; see *Roviaro v. United States*, 353 U.S. 53, 60 (1957) (holding that privilege does not apply if informer's identity is known); *Secretary of Labor on behalf of Gregory v. Thunder Basin Coal Co.*, 15 FMSHRC 2228, 2236 (Nov. 1993) (finding that informer privilege may be waived if person's identity as informer is known).

Although the judge erred when he sustained the objection, we conclude that his error was harmless. First, Vicini subsequently testified to what Cox said he did with the sanders at the bend immediately before the accident. Tr. 186, 201-02. Moreover, we do not believe that Cox's out-of-court statements to Johnson could have overcome the credited testimony of Carter, Bolling, and Russell concerning Cox's use of the sanders, together with evidence about the condition of the sanders observed after the accident.

In sum, we conclude that, based on the testimony of the two MSHA inspectors that the sanders were not functioning properly before the accident, and the evidence provided by the four miners concerning what took place prior to the accident, the record as a whole contains substantial evidence to support of the judge's decision that Arch violated section 75.1403-6(b)(3) in the manner alleged.

B. Significant & Substantial

The significant and substantial terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. See *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission further explained:

In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard that is, a measure of danger to safety contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Id. at 3-4 (footnote omitted); accord *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).⁸

⁸ Commissioner Marks agrees that this violation is S&S. However, for the reasons set

We have already held that substantial evidence supports the judge's decision that Arch violated section 75.1403-6(b)(3). We reject Arch's argument that, because the judge only examined whether the violation contributed to the hazard of a collision but failed to examine whether its contribution was "significant and substantial," the judge erred in analyzing the second element. A. Br. at 18. In fact, the judge's careful delineation of the four *Mathies* elements, including his finding that the failure to properly maintain the sanders may have led to reduced traction and thereby contributed to the hazard of a collision, resulted in his ultimate conclusion that the violation significantly and substantially contributed to a hazard.

We also reject Arch's contention that, because the judge did not find that the violation caused the collision, he erred in determining that the second *Mathies* element was satisfied. *Id.* at 18-19. Under Commission precedent, the Secretary does not have to show that a violation caused an accident in order to prove that the violation is S&S. *See Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 678 (Apr. 1987) ("In order to establish the significant and substantial nature of the violation, the Secretary need not prove that the hazard contributed to actually will result in an injury causing event."). Finally, insofar as Arch's causation argument can be understood to challenge the judge's determination that the third *Mathies* element was established, we conclude that, based on Arch's failure to maintain the sanders and the mantrip's frequent trips on tracks with downgrades and curves, substantial evidence supports the judge's finding that a reasonable likelihood existed that the failure to maintain the sanders would result in an injury. 20 FMSHRC at 78.

forth in his concurring opinions in *United States Steel Mining Co.*, 18 FMSHRC 862, 868-75 (June 1996), and *Buffalo Crushed Stone, Inc.*, 19 FMSHRC 231, 240 (Feb. 1997), he continues to urge that the ambiguous language of the Commission's *Mathies* test, 6 FMSHRC at 3-4, be replaced with a clear test that is consistent with Congressional intent. On February 5, 1998, MSHA issued a lengthy Interpretative Bulletin, setting forth a new agency interpretation of S&S and announcing that MSHA would challenge the Commission's narrow interpretation of S&S. 63 Fed. Reg. 6012 (1998). However, on April 23, 1998, MSHA suspended that Interpretive Bulletin with little explanation. *Id.* at 20,217. Commissioner Marks is curious as to MSHA's change in position on the S&S question and requests, as he has done so on numerous occasions, that the Secretary promptly advise him on this important issue.

III.

Conclusion

For the foregoing reasons, we affirm the judge's decision that Arch violated section 75.1403-6(b)(3) and that the violation was S&S.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

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