FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20006

April 7, 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	
v.	:	Docket No. VINC 79-154-PM
CEMENT DIVISION, NATIONAL GYPSUM COMPANY	:	

DECISION

The broad question before us is when may a violation of a mandatory safety or health standard properly be found to "significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard" under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (Supp. III 1979)(the 1977 Mine Act). That question is important because violations of such a nature, together with a mine operator's "unwarrantable failure" to comply with a mandatory safety or health standard or together with an operator's engaging in a "pattern of violations", will trigger the withdrawal order sequences of sections 104(d) and 104(e) of the 1977 Mine Act, respectively. 1/

1/ Sections 104(d) and 104(e) provide as follows:

(d)(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

(footnote 1 cont'd)

The interpretation of the "significant and substantial" provisions is before us in the context of a civil penalty proceeding. The facts

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(2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

(e)(1) If an operator has a pattern of violations of mandatory health or safety standards in the coal or other mine which are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards, he shall be given written notice that such pattern exists. If, upon any inspection within 90 days after the issuance of such notice, an authorized representative of the Secretary finds any violation of a mandatory health or safety standard which could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, the authorized representative shall issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

(2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of any violation of a mandatory health or safety standard which could significantly and substantially contribute to the cause and effect of a coal or other mine health or safety hazard. The withdrawal order shall remain in effect until an authorized representative of the Secretary determines that such violation has been abated.

(3) If, upon an inspection of the entire coal or other mine, an authorized representative of the Secretary finds no violations of mandatory health or safety standards that could significantly and substantially contribute to the cause and effect of a coal or other mine health and safety hazard, the pattern of violations that resulted in the issuance of a notice under paragraph (1) shall be deemed to be terminated and the provisions of paragraphs (1) and (2) shall no longer apply. However, if as a result of subsequent violations, the operator reestablishes a pattern of violations, paragraphs (1) and (2) shall again be applicable to such operator.

(4) The Secretary shall make such rules as he deems necessary to establish criteria for determining when a pattern of violations of mandatory health or safety standards exists.

[Emphasis added.]

of the case are briefly as follows. Between April 18, 1978, and May 9, 1978, Mine Safety and Health Administration (MSHA) inspectors issued eleven citations under section 104(a) of the Act to the Cement Division, National Gypsum Company. The citations involved alleged violations of various mandatory safety standards. With respect to each of the citations, the inspectors checked a box on the citation form that described the particular violation as being "significant and substantial".

The Secretary of Labor subsequently filed a petition for assessment of civil penalties with the Commission. Following an evidentiary hearing, the administrative law judge upheld ten of the eleven citations and assessed penalties accordingly. In addition, the judge found that nine of the ten violations were of a "significant and substantial" nature. 2/ In making those significant and substantial findings, the judge reviewed prior Board of Mine Operations Appeals case law and the 1977 Mine Act legislative history, and reluctantly agreed with the Secretary's position that a violation is of a significant and substantial nature if it presents more than a remote or speculative possibility that any injury or illness may occur—only purely "technical" violations or those with only a remote or speculative chance of any injury of illness occurring could not be cited as significant and substantial.

National Gypsum sought Commission review on the ground that the judge's interpretation of the involved significant and substantial provisions is overly inclusive. 3/ It did not, however, seek review

2/ We do not mean to mislead by use of the phrase "significant and substantial"; we use it merely for convenience as a short-hand for the complete statutory language, i.e., a violation of such nature as "could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard."

3/ Specifically, National Gypsum sought review of the significant and substantial findings made with respect to each of the following violations:

Citation No. 288294. This citation involved a violation of 30 CFR §56.9-87. The reverse back-up alarm signal on a bulldozer was not operating properly.

Citation No. 288295. This citation involved a violation of 30 CFR §56.4-9. A foreign substance had come into contact with duct insulation, causing the insulation to smolder. The duct was approximately four to six inches away from an adjacent walkway.

Citation No. 288296. This citation involved a violation of 30 CFR §56.12-32. A paddle switch junction box, located near an elevated walkway, was not covered by an electrical plate.

Citation No. 288297. This citation involved a violation of 30 CFR §56.11-1. A walkway adjacent to a conveyor belt contained up to twenty-four inches of spillage and presented a tripping hazard. The walkway was elevated thirty to forty feet above the ground.

Citation No. 288298. This citation involved a violation of 30 CFR §56.12-34. A 200-watt light bulb positioned above an elevated walkway was not protected by a guard.

(footnote 3 cont'd)

of the judge's findings of violation or of the penalties assessed. We granted National Gypsum's petition for discretionary review, and heard oral argument. 4/

Upon careful consideration of the question before us, we hold that the interpretation of the significant and substantial provisions applied by the judge is erroneous. Rather, for the reasons that follow, we hold that a violation is of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.

The position advanced by the Secretary--that a violation is of a significant and substantial nature, so long as it poses more than a remote or speculative chance that an injury or illness will result, no matter how slight that injury or illness--would result in almost all violations being categorized as significant and substantial. Such an interpretation would be inconsistent with the statutory language and with the role we believe the significant and substantial provisions are intended to play in the enforcement scheme.

The Secretary's mechanical approach would leave little, if any room for the inspector to exercise his own judgment in evaluating the hazard presented by the violation in light of the surrounding circumstances. Yet, the statutory language contemplates more and is comparable to the burden placed upon the inspector when he determines that an imminent danger exists pursuant to section 107. Section 104(d)(1) provides that if an inspector finds a violation "and if he also finds that ... such violation" is of a significant and substantial nature he shall include such finding in the citation. We believe that the inspector's independent

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(footnote 3 cont'd)

Citation No. 288826. This citation involved a violation of 30 CFR §56.12-34. A light bulb above a band-saw in the carpenter's shop was not protected by a guard.

Citation No. 288827. This citation involved a violation of 30 CFR §56.4-33. The valves on oxygen and acetelyne cylinders (used for welding) were left open while not in use. There were also ignition sources nearby.

Citation No. 288566. This citation involved a violation of 30 CFR §56.11-1. An accumulation of limestone, up to two feet deep and thirty feet long, prevented safe access to a conveyor belt.

Citation No. 288567. This citation also involved a violation of 30 CFR §56.11-1. A six-inch by eight-inch hole was observed by the inspector in the lower end of an elevated walkway.

4/ The American Mining Congress filed a brief and participated in the oral argument as amicus curiae. In general, it agreed with National Gypsum's position that the judge's interpretation of the involved significant and substantial provisions is too expansive.

judgment is an important element in making significant and substantial findings, which should not be circumvented. 5/

Interpreting the significant and substantial language in sections 104(d) and (e) to encompass almost all violations would render that language virtually superfluous. The language could be eliminated altogether with nearly no change in the categories of situations that would give rise to withdrawal orders under sections 104(d) and (e). We do not believe that Congress intended the significant and substantial provisions to be mere surplusage. Section 101(a) of the Act provides that the Secretary is to adopt mandatory health and safety standards "for the protection of life and prevention of injuries." Thus, the violation of a standard presupposes the possibility, however remote, of contribution to an injury or illness. The language of section 104(d) clearly indicates, however, that a significant and substantial finding is to be made in addition to a finding of a violation; something more than the violation of a standard itself is required. 6/ Thus, the interpretation urged by the Secretary, which would result in virtually all violations that may contribute to an injury being categorized as significant and substantial, would be inconsistent with the two-fold finding required by section 104(d). On the other hand, the interpretation we have made gives substantive meaning to the significant and substantial language, rather than rendering it superfluous, and is consistent with the two-fold finding required by section 104(d).

The interpretation argued by the Secretary would have an untenable effect on the implementation of section 104(e)'s "pattern" provisions. Sub-section (e)(1) provides that an operator can be subjected to withdrawal orders if it has a pattern of significant and substantial violations and is so notified by the Secretary. If a violation of a significant and substantial nature is found within 90 days of that notice, a withdrawal order is to be issued. If that occurs, any other violation of a significant and substantial nature found thereafter likewise results in the issuance of a withdrawal order. Thus, under the Secretary's interpretation of the significant and substantial provision, once found to have a pattern of violations (of almost any nature), an operator would face continual

5/ This contrasts sharply with MSHA's current practice. Inspectors involved in this case testified that they automatically marked all violations significant and substantial except technical violations. This practice is in accord with the instructions issued to them by MSHA's Administrator for Metal and Nonmetal Mine Safety and Health in a memorandum dated July 5, 1979, that provides in part: "MSHA's position on 'significant and substantial' violations continues to be that all violations of mandatory standards are 'significant and substantial' except those violations posing no risk of injury at all, purely technical, or bookkeeping violations, or those violations which pose risks having only a remote or speculative chance of happening."

6/ Section 104(d) says that if the inspector finds a violation and "if he also finds" that violation to be of a significant and substantial nature, he shall include that additional finding in the citation.

shutdown for almost all subsequent violations that occur in its mine, until the pattern notice is lifted. Yet, subsection (e)(3) provides that the pattern is terminated only upon an inspection of the entire mine that discloses no violations of a significant and substantial nature. If the Secretary were correct that almost all violations are of a significant and substantial nature, most mines would never be relieved of withdrawal order liability under the pattern provisions, particularly large mines, no matter how diligent in improving safety practices, for as a practical matter an inspection of the entire mine will rarely, if ever, disclose no violations. No matter how hard an operator worked to eliminate and prevent violative conditions, it would rarely be totally successful. Section 104(e) would, in such circumstances, take on a wholly punitive character; it would serve as continued punishment for a pattern having occurred in the first instance, rather than serving as an incentive to improve safety conditions. We simply do not believe that section 104(e) is intended to operate in such a manner.

The interpretation we have placed upon the significant and substantial provisions is, we believe, consonant with the statutory language and with the overall enforcement scheme. The provision involved applies to violations that "could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." Although the Act does not define the key terms "hazard" or "significantly and substantially", in this context we understand the word "hazard" to denote a measure of danger to safety or health, and that a violation "significantly and substantially" contributes to the cause and effect of a hazard if the violation could be a major cause of a danger to safety or health. 7/ In other words, the contribution to cause and effect must be significant and substantial.

7/ Webster's Third New International Dictionary, unabridged, 1971, in part defines "hazard" as follows:

> ... 2a: an adverse chance (as of being lost, injured, or defeated): DANGER, PERIL ... b: a thing or condition that might operate against success or safety: a possible source of peril, danger, duress, or difficulty ... c: a condition that tends to create or increase the possibility of loss....

Black's Law Dictionary, 5th ed., 1979, refers to "hazard" in part as "a danger or risk lurking in a situation which by change or fortuity develops into an active agency of harm...." The word "significant" is defined in Webster's in part as follows:

> ... 3a: having or likely to have influence or effect: deserving to be considered: IMPORTANT, WEIGHTY, NOTABLE ... c: probably caused by something other than mere chance ....

"Substantial" is defined in part as "... 1c: being of moment: IMPORTANT, ESSENTIAL ... 4a: being that specified to a large degree or in the main." Id.

Section 104(d) says that to be of a significant and substantial nature, the conditions created by the violation need not be so grave as to constitute an imminent danger. (An "imminent danger" is a condition "which could reasonably be expected to cause death or serious physical harm" before the condition can be abated. Section 3(j)). At the other extreme, there must be more than just a violation, which itself presupposes at least a remote possibility of an injury, because the inspector is to make significant and substantial findings in addition to a finding of violation. Our interpretation of the significant and substantial language as applying to violations where there exists a reasonable likelihood of an injury or illness of a reasonably serious nature occurring, falls between these two extremes--mere existence of a violation, and existence of an imminent danger, the latter of which contains elements of both likelihood and gravity. As already noted, this interpretation does not render the significant and substantial language superfluous, is consistent with the two-fold finding required by section 104(d), and requires a meaningful judgment by the inspector in each case. It also is consistent with a sensible enforcement scheme under section 104(e).

Our interpretation is also more consistent with the Act's overall enforcement scheme, which generally provides for the use of increasingly severe sanctions for increasingly serious violations or operator behavior. For example, the violation of any mandatory standard requires issuance of a citation and assessment of a monetary penalty. Sections 104(a) and 110(a). If, after having the violation brought to its attention by issuance of the citation, the operator does not abate the violation within the prescribed period, the more severe sanction of a withdrawal order is required, and an even greater monetary penalty may be assessed. Sections 104(b) and 110(b). Under section 104(d), if a violation occurs as to which significant and substantial and unwarrantable failure findings are made, further unwarrantable failure violations will trigger automatic withdrawal orders--the shutdown is immediate; the operator will not first be given an opportunity after citation to abate. Similarly, the same consequences occur under section 104(e) if, after a pattern of significant and substantial violations is established, further violations of a significant and substantial nature occur. We believe that the more severe sanctions under these sections are aimed at more serious conduct by operators who have demonstrated a less than diligent regard for compliance with the mandatory safety and health standards under the Act. 8/ Interpreting the significant and substantial provisions as we have is more consistent with this enforcement scheme than the interpretation advanced by the Secretary.

Finally, in interpreting the significant and substantial provisions to apply to violations where there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature, we have carefully examined the relevant

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8/ If a condition exists that is so serious to safety or health so as to constitute an imminent danger, section 107 provides for an immediate shutdown, regardless of the operator's behavior and without an opportunity to first abate.

legislative history, including the Senate Report. 9/ We found those references contradictory, at times directly at odds with the Act's language, and thus not helpful in resolving the issue before us. On

9/ The Senate Committee in relevant part stated:

> Unwarranted failure closure orders
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> Section [104(d)] contains another sanction, carried over from the Coal Act ...; the unwarranted failure closure order. Like the failure to abate closure order of section [104(b)], the unwarranted failure order recognizes that the law should not tolerate miners continuing to work in the face of hazards resulting from conditions violative of the Act which the operator knew of or should have known of and had not corrected.
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> ... Section 104(c) [of the Coal Act] provides that where an inspector finds a violation which, while not causing imminent danger, could "significantly and substantially contribute to the cause and effect of a mine safety or health hazard" (the so-called "gravity" test), and where the violation was the result of the operator's "unwarrantable failure" to comply with the Act, the inspector shall so note such findings in his notice of violations....
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> The Interior Board of Mine Operations Appeals has until recently taken an unnecessarily and improperly strict view of the "gravity test" and has required that the violation be so serious as to very closely approach a situation of "imminent danger", Eastern Associated Coal Corporation, 3 IBMA 331 (1974).
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> The Committee notes with approval that the Board of Mine Operations Appeals has reinterpreted the "significant and substantial" language in Alabama By-Products Corp., 7 IBMA 85, and ruled that only notices for purely technical violations could not be issued under Section 104(c)(1).
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> The Board there held that "an inspector need not find a risk of serious bodily harm, let alone death" in order to issue a notice under Section 104(c)(1).
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> The Board's holding in Alabama By-Products Corporation is consistent with the Committee's intention that the unwarranted failure citation is appropriately used for all violations, whether or not they create a hazard which poses a danger to miners as long as they are not of a purely technical nature. The Committee assumes, however, that when "technical" violations do pose a health or safety danger to miners, and are the result of an "unwarranted failure" the unwarranted failure notice will be issued.

S. Rep. 95-181, 95th Cong., 1st Sess., at 30-31 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 618-619 (1978) ("Legis. Hist."). The Senate Report states that the meaning of the significant and substantial provisions as established in section 104(d)(1) is also to be applied to section 104(e). See Legis. Hist. at 620-621.

the one hand, the Senate Report seems to support the Secretary's position when, in discussing the significant and substantial provisions, it states that it is "the Committee's intention that the unwarranted failure citation is appropriately used for all violations, whether or not they create a hazard that poses a danger to miners as long as they are not of a purely technical nature." Legis. Hist. at 619. On the other hand, this passage is directly contrary to the significant and substantial language in the Act. The Act requires that a "hazard" be present, yet the Senate Report states that there need not be a "hazard." Furthermore, other portions of the Senate Report refer to the significant and substantial provisions as the "gravity test", which connotes consideration of both the seriousness of an injury and the likelihood of its occurrence. 10/ Statements on the Senate floor by Senators Harrison Williams (then-Chairman of the Senate Committee on Human Resources) and Richard Schweiker (author of section 104(e)) during debate on the section 104(e) pattern provisions are also contrary to the Secretary's position and to that portion of the Senate Report quoted above. 11/ Thus, we did not find the legislative history a reliable or helpful aid in discerning Congress' intended interpretation of the significant and substantial provisions. 12/ Neither the interpretation argued by the Secretary nor the interpretation we adopt here today is compelled or precluded by the legislative history; that history simply is not dispositive.

10/ Cf., 30 CFR §100.3(e).

11/ Senator Williams stated that section 104(e) is aimed at patterns of violations "which could significantly and substantially affect the health and safety of miners." 123 Cong. Rec. S. 10204 (daily ed. June 20, 1977). Senator Schweiker stated that significant and substantial violations are violations "of a serious nature;" 123 Cong. Rec. S. 10279 (daily ed. June 21, 1977). He said that "no closure order [under section 104(e)] is filed until after the owner is given notice that he has established a pattern and then only if he has another violation of a serious nature." Id. (emphasis added.)

12/ The Senate Report also endorses the Board of Mine Operations Appeals decision in Alabama By-Products Corporation, 7 IBMA 85. Because we find the Senate Report to be contrary to the statutory language and other legislative history, and to be internally inconsistent, we do not believe that decision is controlling. In any event, we think it has been misread and misapplied. In Alabama By-Products, the Board rejected its earlier view that in order to support a significant and substantial finding under the 1969 Coal Act, the hazard presented had to be so serious "as to very closely approach a situation of 'imminent danger'." Rather, the Board stated that "an inspector need not find a risk of serious bodily harm let alone death" before a significant and substantial finding could be made. At the other end of the spectrum, the Board stated that violations that are purely technical in nature and which pose no threat of causing an injury or illness could not support a significant and substantial finding. We do not read the Board as having held that all such violations must be cited as significant and substantial. The Board stated that the question was one in each case for the exercise of reasonable judgment by the inspector dependent on the peculiar facts and circumstances of each case. The Board also stated that defining significant and substantial as a "reasonable possibility of danger to the health and safety of the miners" was "fairly close to the mark in our opinion." Thus, the Board seems to have tried to define a category of violations that could not be cited as significant and substantial, not defining a category of violations that must be so cited.

For the foregoing reasons, the decision of the administrative law judge is reversed and the case is remanded for further proceedings consistent with this opinion.

Richard V. Backley, Chairman

Frank F. Nystrom, Commissioner

Marian Pearlman Nease, Commissioner

Commissioner Lawson, dissenting;

The majority's opinion herein would discount evidently successful administration of the Federal Coal Mine Health and Safety Act of 1969 (as amended in 1977) in determining when a violation may be found to be "significant and substantial" under the 1977 Act.

The decision under review upholds clearly applicable precedent since Alabama By-Products, 7 IBMA 85 (1976). The administrative law judge's finding is that a violation is of a significant and substantial nature if it presents more than a remote or speculative possibility that any injury or illness may occur, and only purely technical violations or those with only a remote or speculative chance of any injury or illness occurring may not be cited as significant and substantial.

The majority would, however, overturn this decision to hold "...that a violation is of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." The mine inspector would be required to determine the seriousness of the hazard contributed to by the violation in terms of the potential injury or illness presented. In addition, he would be obligated to consider the likelihood of the injury or illness occurring.

The appellee's position is also found wanting by my colleagues since this "would result in almost all violations being categorized as significant and substantial".

The majority's concern is also expressed with the effect that the interpretation argued for by the Secretary, that is, existing law, would have on what are categorized by section 104(e) as "pattern" violations.

Conceding that the Act does not define the key terms "hazard" or "significantly and substantially" the majority would nevertheless "understand" the word "hazard" to denote a "measure" of danger to safety or health, and that a violation "significantly and substantially contributes to the cause and effect of a hazard if the violation could be a major cause of a danger to safety or health." [Emphasis added].

They aver that their interpretation "...is also more consistent with the Act's overall enforcement scheme, which generally provides for the use of increasingly severe sanctions for increasingly serious violations or operator behavior". But most important, the majority ignores the legislative history by stating it to be "...contradictory, at times directly at odds with the Act's language, and thus not helpful in resolving the issue before us".

I must disagree, since the majority's opinion in this case would mistakenly engraft upon the Act various adjectival conditions not a part of the statute itself. The central statutory language now before us provides that:

> If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act.... [Section 104(d)(1); emphasis added].1/

1/See also Section 104(e)(1): "If an operator has a pattern of violations of mandatory health or safety standards in the coal or other mine which are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards, he shall be given written notice that such pattern exists. If, upon any inspection within 90 days after the issuance of such notice, an authorized representative of the Secretary finds any violation of a mandatory health or safety standard which could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, the authorized representative shall issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated." [Emphasis added].

Nowhere in the statute is there any qualification of the operative language "...that...such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard...."

Nor do the words of the statute anywhere reflect any intent to narrow or restrict such violation to one where, "...there exists a "reasonable likelihood" that the hazard contributed to would result in an injury or illness of a "reasonably serious" nature.

The majority's tampering will add to the statute words of limitation which will require every mine inspector to make judgments, not only as to the "likelihood" of the effects of the hazard, and the "reasonable[ness]" of that "likelihood", but will as well demand medical predictions be made as to whether a hazard will result in an injury or illness of a "reasonably serious" nature. Must the inspector henceforth determine, not only whether the roof is safe or unsafe, but whether the unconscious miner who is the victim of a roof fall has suffered 'merely' a concussion, or a fractured skull? Would only the hazard in the latter case, under the majority's rationale, be one which is significant and substantial?

We will now have a "one toe, two toe" formula, a distinction based not upon mining but upon the extent of the injury and medically unforeseeable consequences. Are we, this Commission or its judges, or the inspectors at the mine thereby better equipped to render the judgments which will be required under this formulation? In an admittedly somewhat imprecise area, does this highly qualified and subjective articulation represent an improvement over existing practice? Neither our predecessor, BMOA, nor the Congress, has suggested such a change is feasible, desirable or in accord with their respective understandings of the language or purpose of the Act.

In summary, the standard proposed by the majority would in reality measure the significance and substantiality of the violation after the fact, and add to the Act numerous highly subjective variables, among them the magnitude of the potential injury, the (unspecified) circumstances surrounding the violation, and the post hoc accuracy of the inspector's medical judgment as to the effect[s] of the hazard.

The majority's suggested standard would be even more impossible of application in those cases in which mandatory health standards are violated, as contrasted with those which regulate only safety.

In the Federal Coal Mine Safety Act Amendments of 1965 (amending the 1952 Coal Act), where the term "significant and substantial" first appeared, such referred only to violations "of such nature as could significantly and substantially contribute to the cause or effect of a mine explosion, mine fire, mine inundation, or man-trip or man-hoist accident." [30 USCA 473(d)]. [Emphasis added]. In the 1969 Act (i.e., section 104(c) of the 1969 Act, in all relevant respects identical to section 104(d) in the 1977 Act), the Conference Committee substituted the word "hazard" for "accident", thus since at least 1969 clearly including health as well as safety within the purview of this section.

While one might well question the significance and substantiality of a single exposure to coal dust, or radon daughters, or noise, for example, the adverse, even lethal cumulative effects of these exposures is beyond dispute.

The regulations which limit miners' exposure to radon daughters, for example, express such limitation in terms of calendar year exposure.2/ A single exposure may consequently be either significant and substantial, or not, under the majority's criteria. This is not only meaningless but one which would require the forecasting ability of an oncologist, not a mine inspector, nor I suggest this Commission. Nor is this an isolated example. Exposures to noise and the permissible limits to which miners may be exposed are time specified,3/ and the adverse health effects thereof obviously based on cumulative exposure.

The breathing of coal dust, perhaps the greatest single health hazard to which coal miners are exposed 4/ is also cumulatively deadly, but presumably of little significance to the miners' lungs if exposure is limited to a day or a week.

2/See (e.g.) 30 CFR 57.5.38: "Mandatory. No person shall be permitted to receive an exposure in excess of 4 WLM in any calendar year."

30 CFR 57.5,39: "Mandatory. Except as provided by standard 57.5-5, persons shall not be exposed to air containing concentrations of radon daughters exceeding 1.0 WL in active workings."

3/ 30 CFR 56.5-50: "...Permissible Noise Exposures

Duration per day, hours of exposure	Sound level dBA, slow response
8	90
6	92
4	95
3	97
2	100
1 1/2	102
1	105
1/2	110
1/4 or less	115...."

4/See 30 CFR 75.400 to 75.403.1.

The majority's factual premises are also inaccurate. Currently, and for at least the last five years, a violation is evaluated as "significant and substantial" so long as it poses more than a remote or speculative chance that an injury or illness will result. The majority's apprehension that continuing under this criteria "would result in almost all violations being categorized as significant and substantial", is not borne out by the record. To the contrary, as counsel for the American Mining Congress here conceded at oral argument, only 62 percent of all coal mine violations were characterized as significant and substantial. This hardly rises to the level of "almost all violations."5/

Beyond the logical frailty of the majority's interpretation of the statute is the violence done to the intent of Congress, unambiguously expressed in the legislative history of the 1977 Act.

The Senate report accompanying the Act discusses those cases which have interpreted "significant and substantial":

> The Interior Board of Mine Operations Appeals has until recently taken an unnecessarily and improperly strict view of the"gravity test" and has required that the violation be so serious as to very closely approach a situation of "imminent danger", Eastern Associated Coal Corporation, 3 IBMA 331 (1974).
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> The Committee notes with approval that the Board of Mine Operations Appeals has reinterpreted the "significant and substantial" language in Alabama By-Products Corp., 7 IBMA 85, and ruled that only notices for purely technical violations could not be issued under Sec. 104(c)(1). The Board there held that "an inspector need not find a risk of serious bodily harm, let alone death" in order to issue a notice under Section 104(c)(1).

5/While, at least for the first quarter of 1979 to which this operator points, a much higher percentage of metal and non-metal citations were categorized as "significant and substantial", this, if representative data (it is not a part of the record below, but was secured by this operator from MSHA apparently in response to a verbal request) reflects only one calendar quarter's data within a very limited (less than one year) experience of the Secretary with metal and non-metal mines, as contrasted with over ten years' experience with coal mine inspections. [American Mining Congress Brief, Appendix B; Oral Argument, TR-45].

> The Board's holding in Alabama By-Products Corporation is consistent with the Committee's intention that the unwarranted failure citation is appropriately used for all violations, whether or not they create a hazard which poses a danger to miners as long as they are not of a purely technical nature. The Committee assumes, however, that when "technical" violations do pose a health or safety danger to miners, and are the result of an "unwarranted failure" the unwarranted failure notice will be issued". [S. Rep. 95-181, 95th Cong., 1st Sess., at 31 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 619 (1978).

Reinforcing that Congressional intent is the Conference Report which accompanied the Act as passed:

> The conference substitute conforms to the Senate bill. While a notice may be based on the existence of a pattern of violations of one standard or of a number of different standards it is the intention of the conferees that the pattern can be based only on violations of standards that "significantly or substantially contribute to the cause and effect of a mine safety and health hazard". After the notice of the existence of a pattern although an order could be issued under this provision for a violation which is not one which makes up the pattern, the violation which results in the issuance of the order must be one which could "significantly or substantially contribute to the cause and effect of a miner safety and health hazard". Thus, just as the pattern may not be based merely on violations of technical standards, the order under this section cannot be based on violations of technical standards. [Legis. Hist., supra, at 1326-1327]. [Emphasis added].

The Congress has thus clearly and expressly rejected the BMOA Eastern Associated Coal Company case, 3 IBMA 331, 355 (1974), which held that the violation must pose "a probable risk of serious bodily harm or death", and was rejected by the BMOA itself in Alabama By-Products, (supra).

In discrediting the Eastern case, the BMOA in Alabama, (supra) interpreted "significant and substantial" to preclude substantial and significant citations under 104(d)(1) only when no risk of injury is posed, and the violation poses a source of injury which has only a remote or speculative chance of occurring.

Congress, therefore, in following the BMOA's lead and rejecting the test posed by Eastern, charted no new path, but concurred in the view that Eastern was wrong because of the BMOA's essential equation there of "significant and substantial" with "imminent danger". For this reason alone, the majority's decision and its regressive return to the Eastern test should be rejected. Their extended discourse on the Senate Committee's Report

and the Senate's claimed misreading of Alabama, (supra) is, with all due respect, irrelevant. Even if the Committee misread Alabama, the Committee's Report provides a clear indication as to Congress' own understanding of the significant and substantial clause, as indeed was found to be the case by the judge herein. [ALJ Decision at 6].

Beyond these obvious reasons for leaving well enough alone, it must be remembered that when an operator has placed itself in the 104(d) 'chain' provided for by the statute,6/ it is as a result not only of "significant and substantial" findings, but as a consequence also of an unwarrantable failure determination. Although the requirement of "unwarrantable failure" is not necessary in pattern (section 104(e)) violations, the Secretary has thus far promulgated no regulations implementing 104(e), to explain how and when a "significant and substantial" finding will translate into a so-called "pattern" violation. The maxim "If it's not broke, don't fix it", could well have as a corollary: "If the case is not before you, don't decide it."

This makes even more startling the majority's willingness to leap in to correct the hypothetical spectre of "continual shutdown", the consequence of a pattern of violations. For, as conceded by the counsel for the Secretary in oral argument in this case:

> "The Secretary hasn't issued a notice pattern yet. The Secretary hasn't issued a withdrawal order based on a notice of pattern yet. We haven't got a case that presents that yet and I don't believe the Commission should engage in this unwarranted speculation that the National Gypsum invites you to do, that we will not be able to effectively administer the Act if this definition of significant and substantial is adopted." [Oral Argument, TR-36].

In short, not one "pattern" notice has yet been issued and the rules to establish criteria for the existence of a pattern as required by section 104(e)(4) have yet to be promulgated.

6/104(d)(1) further provides: "...If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated". [Emphasis added].

What this demonstrates about the enforcement of section 104(e) of the Act may well raise one's eyebrows, but it can hardly be maintained, given this record, that any operator has reason to fear a 104(e) based closure of its mine. The adoption of all-encompassing rules to be applied to cases not yet--perhaps never--to be before us is both judicially premature and the unwise rendering of a judgment in a vacuum, before any experience or factual context exists within which to make such a decision. We should not promulgate rules for deciding non-existent cases which are not now and may never be before us.

Beyond the majority's encroachment on the statute and the legislative history, they would also appear to have erred semantically. "Significantly and substantially" are adverbs, which beyond argument modify "contribute", not "hazard", as was indeed necessarily conceded by counsel for the operator on oral argument. [Oral Argument, TR-23, 49, 50]. To recast the statute in terms of the significance or substantiality of the hazard, and the predicted result thereof, is simply not in accord with either the English language or the language of the Act.

The structure of the 1977 Act also reflects a considered and progressive pattern of sanctions unrelated to the seriousness of the injury, but rather focused on the operator's knowledge and frequency of violation, the mine operators' efforts toward abatement, and the efficacy of such efforts. In short, increasingly strong remedies for increasingly serious violations. Under the statute:

(1) Section 104(a) treats with the issuing of citations which may be with or without significant and substantial findings, and the fixing of abatement times for 'simple' violations of the Act, or mandatory health or safety standards promulgated thereunder.7/

(2) Section 104(b)) specifies the action to be taken if a 104(a) violation has not been abated within the period of time originally fixed, or as subsequently extended, and the action to be taken by the inspector (issuance of a limited withdrawal order from the area affected) in that circumstance.

(3) Section 104(d) provides for the issuance of citations if the violation is of such nature as "could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard," and if the violation is caused by an "unwarrantable failure" of the operator to comply with mandatory health and safety standards. Further, if during the same or any subsequent inspection within ninety days, the inspector discovers another unwarrantable failure violation, whether or not that violation is significant and substantial, a withdrawal order shall issue.

7/In fact, all the citations issued in the case under review were issued under Section 104(a) with significant and substantial findings.

4) Under 104(e), if an operator is a habitual violator and has a "pattern" of (significant and substantial) violations, it is given written notice that such pattern exists, and, upon any inspection within 90 days after that notice issues, the finding of an additional significant and substantial violation will trigger a withdrawal order.

(5) Under section 107(a)8/ the ultimate sanction of immediate mine closure (either in whole or in part) is imposed if the existing condition is one whose consequences are so grave that safe operation of the mine cannot be had until after the condition has been abated.

(6) Finally, section 108(a)(2) authorizes the Secretary to seek immediate injunctive relief if the pattern of significant and substantial violations persists, or the operator otherwise refuses to comply with any order or decision issued under the Act.

The quarrel of the majority with the "technical/non-technical" distinction also appears to be, upon examination, semantic. At least since Alabama By-Products, (supra), it would appear that this is merely the Secretary's shorthand--perhaps inartful--articulation of the judgment to be made when a citation with significant and substantial findings is to be issued.9/ That is, when the violation poses no risk of injury at all, or is a bookkeeping violation, or poses a risk which only has a remote or speculative chance of occurring, it is "technical", and no significant and substantial citation will issue.

The word "technical"--evidently the basis for the majority's unhappiness--has been defined as "a technicality", Webster's Unabridged. This distinction appears as easily understood--indeed better so-than a demarcation founded upon an inspector's or judge's or Commissioner's, inexpert evaluation of (e.g.) the physiological effects of a trauma or radiation upon the health of the victim. As a foundation for meaningful

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8/Section 107(a) provides: "If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c) to be withdrawn from, and to be prohibited from entering such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110."

9/The present formulation is framed negatively (i.e., under what circumstances a significant and substantial violation does not exist) (American Mining Congress Brief, Exhibit "F"). The suggestion that this is somehow of a lesser validity than a positively articulated standard--a distinction without a difference--is merely another attack on Alabama and the language of the Act.

analysis, I can discern no improvement which will result from this alteration of the existing procedure, and no benefit accruing to either the inspector, the miner, or the mine operator. Unless the production of litigation is our goal, I confess that I can ascertain no purpose to this redefinition.

To the extent that curtailing of the inspector's judgment may create a "management problem" (in limiting his discretion not to issue significant and substantial citations) (Oral Argument, TR-42), this would appear to be ill-suited to correction by this Commission, certainly not in the sweeping fashion advocated by the majority.

The record is replete with "agreement" that the inspector's judgment as to what violations are substantial and significant should be large: "...very wide area of discretion..." "reasonable judgment on the facts and circumstances of the case." [Oral Argument, TR-14]; the inspector's "commonsense" [Oral Argument, TR-24]; "reasonable and evenhanded" [Appellant's Brief at 5].

To add to the inspector's burden the medical "likelihood" and "reasonableness" criteria enumerated in the majority's opinion makes even more difficult meaningful inspectorial judgment, a judgment best exercised at the mine where the violation, and the hazard, exists.

Curiously, the majority claims to recognize the necessity for "the inspector to exercise his own judgment in evaluating the hazard presented by the violation in light of the surrounding circumstances. ...We believe that the inspector's independent judgment is an important element in making significant and substantial findings, which should not be circumvented."

However, reverting to the discredited Eastern decision's criteria, found unacceptable by both the BMOA and the Congress, necessarily has the opposite effect, and is less, not more consistent with the statutory scheme set forth above.

I have no quarrel with the inspector exercising the independence of judgment claimed to be the intent of the majority. Indeed, I see no practical alternative. Would limiting this judgment by forcing the inspector to predict the seriousness of the injury--much less the illness--which might befall the hapless miner, be of meaningful assistance to either the miner or the operator? Should the operator's responsibility rise or fall depending upon the durability of his work force? Should the protection of the miner 10/ be tied to the severity of the illness or injury or the likelihood of death?

One must quarrel with the proposition that this Commission is better able to make the majority mandated necessarily medical predictions than the inspector; in truth neither we nor the inspector are, either by training or experience, competent to so forecast.

10/Section 2(a) provides: "The first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource--the miner;"

The majority's claim that large mines and mine operators will be more subject to the threat of closure than small mines also sets up a curious classification. No evidence appears in this record, or elsewhere to my knowledge, in support of the proposition that large mine operators are more prone to violate the Act than are smaller ones. Indeed, the records of the MSHA Assessments Office for the calendar year 1980 reveal that violations per inspection day are greatest for both coal and metal/non-metal mines for the smallest operators, and second greatest in the average number of violations.11/

In any event, no rationale commends itself in support of the idea that large mines, if unsafe, should be given a waiver merely because of size. To the contrary, it would appear as if the large mine operator with its presumably greater resources and sophistication should be better able to assure the safety and health of the miners than the small mine owner.

While the majority is correct in noting that "significant and substantial" is not specifically defined in the Legislative History of the 1969 Act--nor earlier--it has been clearly articulated in the Legislative History of the 1977 Act, and expressly approved by the Congress in Alabama, (supra).

We are bound by this Congressional expression, and the Senate Report's12/ clear adherence to the rationale of Alabama, subsequently and correctly adhered to by the judge in this case. To disregard the Congressional will, the sole authoritative and proper source of the judgment we must render, is in derogation of our duty under the Act. The majority is not in this case merely caulking chinks in the statute, but rather ignoring legislative direction as to the meaning of the words of the Act. Whether or not the inspector or the judge has primary or secondary responsibility for determining whether a violation is "significant and substantial", the controlling criteria is that significant and substantial citations may not be issued only when no risk of injury is posed, or one which has only a remote or speculative chance of occurring. We have been given no authority to weigh injuries, or to determine the possibly serious or fatal consequences of a violation.

The judgment to be made must therefore inevitably be unbounded by facile formulas or quasi-medical constraints. Congress intended to protect the miner from any and all injuries and illnesses resulting from mining, not just from those of a "reasonably serious nature" as espoused by the majority.

I therefore dissent.

A. E. Lawson, Commissioner

11/MSHA Office of Assessment Report,dated January 14, 1981.
12/The House Report is silent on "significant and substantial." Legislative History of the 1977 Act, 376-377, 396-397.

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