CCASE:
SUNBEAM V. SOL (MSHA)
DDATE:
19800129
TTEXT:

Significant and Substantial

The "significant and substantial" provision found in section 104(d) of the 1977 Act is identical to that found in section 104(c) of the 1969 Act. In interpreting the meaning of this provision under the 1969 Act, the former Interior Board of Mine Operations Appeals in Eastern Associated Coal Corporation, 3 IBMA 331 (1974), took a rather restrictive view of the test of "significant and substantial" when it held that a violation could significantly and substantially contribute to the cause and effect of a mine safety or health hazard if the evidence shows that the condition or practice cited as a violation posed a probable risk of serious bodily harm or death, 3 IBMA 355. The Board noted that "if we thought that the hazard in question had only a speculative possibility of occurring, we would of course conclude otherwise." (Emphasis added.)

In Zeigler Coal Company, 4 IBMA 139 (1975), the Board reexamined its prior interpretation of the term "significant and substantial" and characterized it as a "phrase of art," 4 IBMA 154; and at 4 IBMA 156 stated as follows:

> If we were to give each of the words of that clause an ordinary meaning, it would become a superfluous truism; by definition, the violation of any mandatory standard could significantly and substantially contribute to the cause and effect of a mine safety or health hazard. However, since it is plain that the Congress intended by these words to enact one of several discriminating criteria designed to separate those violations that merit 104(c) treatment from those that do not, such a literal interpretation would be squarely at odds with the apparent congressional intent. Such interpretation would render the phrase nugatory when the Board is obliged under the usual norms of statutory construction to give meaning to all the terms of a statute. Sutherland, Statutes and Statutory Construction, | 46.06 (4th ed. 1973).

Commenting on its prior Eastern Associated Coal Corporation decision, the Board stated further at 4 IBMA 160, 161:

> Against this background and in order to give effect to all the statutory terms, we held and still believe that the clause "%y(3)5C could significantly and substantially contribute to the cause and effect of a mine safety or health hazard %y(3)5C" is a phrase of art. The key word of that clause is "hazard" which in our view refers not to just any violation, but rather to violations posing a risk of serious bodily harm or death. The part of the clause which reads "%y(3)5C could significantly and substantially contribute to the cause and effect %y(3)5C" states a probability requirement, designed in our opinion, to prevent application of section 104(c) to largely speculative "hazards."

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In Alabama By-Products Corporation, 6 IBMA 168 (1976), the Board affirmed a judge's decision vacating two section 104(c)(1) withdrawal orders issued pursuant to the 1969 Act. The judge held that the underlying notice was improperly issued because the violation cited did not pose a "probable risk of serious bodily harm or death" and therefore did not meet the "significant and substantial" test previously laid down in Eastern and Zeigler. In affirming the judge's decision, the Board rejected the UMWA arguments that the definition of "significantly and substantially" should be given its ordinary meaning which needs no definition and that the Board's construction of the term only deters the violation of a few of the mandatory health and safety standards while the UMWA's "ordinary meaning" construction of the term would deter violations of many more mandatory standards.

In Alabama By-Products Corporation, 7 IBMA 85, November 23, 1976, the Board reconsidered its prior determinations and construction of the term "significant and substantial," and it did so on the basis of the D.C. Circuit Court of Appeals' decision in International Union, United Mine Workers of America (UMWA) v. Kleppe, 532 F.2d 1403 (1976), cert. denied, sub nom. Bituminous Coal Operators' Association, Inc. v. Kleppe, 429 U.S. 858 (1976), reversing Zeigler Coal Company, supra, and holding that there was no implied gravity prerequisite for the issuance of a section 104(c)(1) withdrawal order. Noting the asserted narrowness of the court's holding and its silence on the Board's construction of "significant and substantial," the Board nevertheless held that the court's opinion had broader implications and compelled a change in the Board's prior construction, and it stated as follows at 7 IBMA 92:

> The reason that the appellate court's holding and supporting reasoning is important here is quite simply that our construction of the "significant and substantial" language in section 104(c)(1) was the product of virtually the same reasoning that the Court rejected in reversing Zeigler. When we construed that language to mean "probable risk of serious bodily harm or death," we disregarded the plain semantical meaning of that phrase in favor of a more restrictive reading of the statutory words which fitted in with our overall concept of the enforcement scheme. The emphasis of the D.C. Circuit on literalism which promotes wider operator liability and its rejection of our holding and the underlying reasoning in support thereof have undermined the "probable risk" test completely. An honest reading of the Court's opinion thus compels us to overrule Eastern Associated Coal Corp. %y(3)5C, and Zeigler Coal Company, %y(3)5C insofar as they validate the "probable risk" test. ÕFootnote omitted.Ê

The Board's reconstructed interpretation of the term "significant and substantial," as enunciated in its second Alabama By-Products' decision, is set forth at 7 IBMA 94 as follows:

> Section 104(c)(1), it should be recalled, mandates the issuance of a notice when an inspector finds that "%y(3)5C a

violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard %y(3)5C." Our position now is that these words, when applied with due regard to their literal meanings, appear to bar issuance of notices under section 104(c)(1) in two categories of violations, namely, violations posing no risk of injury at all, that is to say, purely technical violations, and violations posing a source of any injury which has only a remote or speculative chance of coming to fruition. A corollary of this proposition is that a notice of violation may be issued under section 104(c)(1) without regard for the seriousness or gravity of the injury likely to result from the hazard posed by the violation, that is, an inspector need not find a risk of serious bodily harm, let alone of death. ÕEmphasis in original.Ê

Commenting on the enforcement ramifications of its new interpretation, the Board stated as follows at 7 IBMA 95:

> The inspector's judgment as to whether a given violation is "%y(3)5C of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard %y(3)5C" must be reasonable. The reasonableness of such a judgment is dependent upon the peculiar facts and circumstances of each case, and it is up to an Administrative Law Judge initially, and the Board ultimately, to determine whether an inspector was reasonable in so finding in any given case.
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> We recognize that our interpretation today means that federal coal mine inspectors have a very wide area of discretion to issue section 104(c) notices with all the attendant liability to summary withdrawal orders which necessarily follows upon even the most trivial of violations after issuance of such a notice. However, with the present controversy is viewed in the reflected light cast by the D.C. Circuit on section 104(c) in UMWA v. Kleppe, supra, no other conclusion can sensibly be drawn.

Considering the foregoing judicial evolution of the construction of the term "significant and substantial," I conclude and find that practically all or most violations occurring at a mine are of a "nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard," except in two categories:

1. Those violations which pose no risk of injury at all, such as the so-called "purely technical violations"; and

2. Those violations which pose a source of injury which has only a remote or speculative chance of happening.

Further, it also seems clear that the term can apply to a violation without regard to the seriousness or gravity of any injury for which the violation poses a risk of occurrence, that is, there need not be a finding that the violation poses a risk of serious bodily injury or death for the term to apply.

The present construction of the term "significant and substantial" as it evolved in the aforementioned cases is favorably reflected in the legislative history of the 1977 Act as follows:

> 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).
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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. No. 181, 95th Cong., 1st Sess., 31 (1977).

Docket No. PITT 79-210
Citation No. 229432, 30 CFR 77.1607(cc)

30 CFR 77.1607(cc) states as follows: "Unguarded conveyors with walkways shall be equipped with emergency stop devices or cords along their full length."

The citation issued in this case charges that the No. 1 wash belt was not provided with emergency stop devices or cords along the belt walkway. The inspector testified that he issued the citation because the conveyor mm