FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

25 JUL 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings
	:	Docket Nos. BARB 77-266-P
	:	BARB 76X465-P
v.	:	
	:	No. 4 Mine
JIM WALTEK RESOURCES, INC.,	:	Brookwood, Tuscaloosa County, Alabama
COWIN AND COMPANY, INC., Respondents	:	

DECISIONS

Appearances: J. Philip Smith, Trial Attorney, U.S. Department of Labor, Arlington, Virginia, for the petitioner;
Robert W. Pollard, Esq., Birmingham, Alabama, for the respondent, Jim Walter Resources, Inc.;
William H. Howe, Esq., Washington, D.C., for the respondent, Cowin and Company, Inc.

Before: Judge Koutras

Statement of the Proceedings

These proceedings are consolidated civil penalty proceedings filed under sections 109(a)(l) and 109(c), of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §§ 819(a)(l) and (c), charging the respondents with an alleged violation of mandatory safety standard 30 C.F.R. § 77.1903(b), for failure to use certain ANSI standards as a guide during shaft construction. The petitions for assessment of civil penalties filed against the respondents seek civil penalty assessments for the alleged violation which was cited in a section 104(b) notice of violation issued by MSHA mine inspector Robert K. Kuykendall on June 16, 1975. The notice issued after an investigation of a fatal accident which occurred on June 9, 1975, at the production shaft being constructed by respondent Cowin and Company at respondent Jim Walter Resources, Inc., No. 4 Mine, located at Brookwood, Tuscaloosa County, Alabama. (Jim Walter Resources, Inc., was formerly known as U.S. Pipe.)

On January 19, 1976, MSHA filed petitions for assessment of civil penalty, pursuant to section 109(c) of the 1969 Act, against two individual

employees of Cowin and Company: Earl Hosmer (BARB 76-211-p) and James Hosmer (BARB 76-212-P). Each of these individual respondents moved for dismissal on the ground that the underlying notice was invalid since it had been improperly issued to Cowin and Company, an independent contractor. By order dated April 20, 1976, MSHA was allowed to withdraw the petitions without prejudice.

On July 20, 1976, MSHA Issued a modified notice, naming Jim Walter Resources as the operator instead of Cowin and Company. Then, on August 2, 1976, MSHA again filed petitions for assessment of civil penalty pursuant to section 109(c), this time against Cowin and Company, Earl Hosmer (BARB 76X466-P and James Hosmer (BARB 76X467-P). More than a year later? on July 13, 1977, MSHA filed a petition for assessment of civil penalty, pursuant to section 109(a) of the 1969 Act, against Jim Walter Resources (BARB 77-266-P).

By order dated December 20, 1977, all four cases were consolidated for hearing. Subsequently, the two individual respondents who were employees of Cowin paid penalties agreed upon with the Office of Assessments, and were dismissed by me as parties on May 19, 1978.

Jim Walter Resources remains as a respondent, against which penalties are sought pursuant to section 109(a) of the 1969 Act. Cowin remains as a respondent, under MSHA's theory that as a corporation and independent construction contractor, Cowin may be penalized under section 109(c) of the 1969 Act for knowingly authorizing, ordering, or carrying out a violation of the Act charged to Cowin's coal mine operator customer, Jim Walter Resources.

After several continuances at the request of the parties, hearings were held at Birmingham, Alabama, on May 16 and 17, 1978, and the parties appeared and were represented by counsel. Posthearing proposed findings and conclusions, with supporting briefs, were filed by the parties, and on October 19, 1978, I rendered decisions wherein I vacated the citation and dismissed the cases. Thereafter, on November 21, 1979, the Commission reversed my decisions and remanded the cases to me for further adjudication in accordance with the remand order. Subsequent to the remand, respondents filed an appeal in the U.S. District Court of Appeals for the District of Columbia Circuit seeking review of the Commission's decision reversing my decisions. By order of the court on January 30, 1980, the appeal was voluntarily dismissed without prejudice pursuant to Rule 42(b), F.R. App. P., and the cases were redocketed pursuant to the original Commission remand and are now before me for further adjudication.

The basis for my original vacation of the notice of violation issued in these proceedings was my belief that by failing to apprise the respondents of the specific ANSI standards allegedly not used as a guide, MSHA deprived the respondents of any reasonable opportunity to know the specific charges against them and deprived the respondents of a full and fair opportunity to defend said charges. As pointed out by me at page 37 of my October 19, 1978, decision:

Forcing an operator to forage among the detailed, technical, and I might add, somewhat confusing standards which have not been revised for some 18 years, to ascertain precisely what he is being charged with is basically unfair, particularly in a case where an operator is charged under section 109(c) with a knowing violation.

And, at page 41:

[W]here a respondent is charged with a knowing violation, specificity should be the touchstone of any notice issued to an operator charging him with a violation.

In order to determine the issues which remain for trial and to determine a schedule for any additional hearings, an informal conference was held in my office on February 12, 1980, and counsel for petitioner and Cowin appeared and participated therein. Although notified of the conference, counsel for respondent Jim Walter Resources, Inc., did not appear, nor did he participate. Subsequently, on February 13, 1980, I issued an order inviting all parties to file any additional pleadings or arguments so as to bring this matter to finality. In response to that order, the parties filed the following pleadings.

February 21, 1980

Petitioner filed a motion for leave to amend its proposals for assessment of civil penalties to charge respondent Cowin as an operator of the mine pursuant to section 109(a) of the 1969 Act, or in the alternative, as a statutory agent of respondent Jim Walter Resources, Inc., pursuant to section 109(c) of the Act. In support of its motion, petitioner asserted that the proposed amendment merely changes the charges as to the legal capacity under which Cowin committed the alleged violation, and if granted, would leave respondent Jim Walter Resources, Inc., charged in Docket BARB 77-266-P as the owner-operator of the mine pursuant to section 109(a), and respondent Cowin in Docket BARB 76X465-P as an operator of the mine pursuant to section 109(a), or, in the alternative, as a statutory agent of corporate operator Jim Walter Resources, Inc., pursuant to section 109(c).

March 6, 1980

Respondent Cowin filed a motion to dismiss the proposal for assessment of civil penalty against it on the ground that, as an independent contractor, it cannot be charged as an agent of corporate operator Jim Walter Resources, Inc., under section 109(c), and in support of its motion, Cowin restated by reference its previous arguments advanced in pages 11 through 16 of its post-hearing brief previously filed in these proceedings, as well as the recent Fourth Circuit decision in Cowin and Company, Inc. v. Federal Mine Safety and Health Review Commisson, et al., No. 78-1825, December 28, 1980.

March 7, 1980

Petitioner filed an opposition to Cowin's motion to dismiss, and in support thereof, relied on its previously filed posthearing brief (p. 15), and the points and authorities set forth in its memorandum in support of Its motion to amend filed February 21, 1980.

March 17, 1980

Respondent Jim Walter Resources, Inc., filed an opposition to petitioner's motion to amend its proposals for assessment of civil penalty, seeking to name Cowin as an operator pursuant to section 109(a) of the 1969 Act. In support of its opposition, respondent Jim Walter Resources, Inc., argued that the Fourth Circuit decision is binding in this case, that the Commission's remand granted no authority for MSHA to seek an amendment of its pleadings, and that the granting of the motion to name Cowin as an operator presents a new theory of "Dual operator's [sic] for one mine." Respondent Jim Walter Resources asserted that there can be but one operator of the mine, and if Cowin is found to be the operator of the mine, Jim Walter Resources, Inc., must be dismissed from the case.

On April 1, 1980, I issued an order ruling on the aforesaid motions filed by the parties, and they are as follows:

1. Jim Walter's motion that it be dismissed as a party-respondent was DENIED.

2. Relying on the Fourth Circuit decision noted above, I GRANTED Cowin's motion to dismiss it as section 109(c) party-respondent and accepted the argument that it may not be charged as a statutory agent of Jim Walter.

3. Cowin's motion to be dismissed as a party-respondent under section 109(a) was DENIED.

4. Petitioner's motion to amend its pleadings to name Cowin as a section 109(a) party-respondent was GRANTED, and petitioner's alternative motion to name Cowin as a statutory agency of Jim Walter under section 109(c) was DENIED.

In addition to the aforesaid rulings, the parties were directed to identify any issues remaining for adjudication by me in accordance with the remand, and were afforded an opportunity to request any additional hearings or conferences, including the submission of any additional arguments in support of their respective positions. Thereafter, on April 7, 1980, respondent Cowin requested that I certify for interolocutory review by the Commission pursuant to Commission Rule 74, 29 C.F.R. § 2700.74(a), a portion of my April 1, 1980, order denying its motion to be dismissed as a party-respondent in these proceedings. I denied the request for certification by order issued April 24, 1980. Subsequently, by petition filed with the Commission on May 5,

1980, Cowin sought interlocutory review by the Commisson of my order denying its request for certification, and on May 12, 1980, the Commission denied Cowin's petition.

Issues Presented

In its original decisions of November 21, 1979, reversing and remanding these cases to me, the Commission stated as follows:

> We accordingly reverse and remand this case for further proceedings. In so doing we note that while numerous standards and regulations have been promulgated in implementation of the 1969 Act, a civil penalty sanction is authorized under section 109(a) only for a violation of a mandatory standard or other provisions of the Act. In addition to the other issues raised, in remanding we instruct the judge to address the threshhold question of whether 30 CFR § 77.1903(b) is a mandatory safety standard for which a civil penalty may be assessed or whether the regulation is merely advisory.

On May 23, 1980, in response to my order of April 1, 1980, directing the parties to identify the issues remaining for adjudication on remand, respondent Cowin filed the following statement of issues:

> (a) Whether 30 CFR § 77.1903(b) is a mandatory safety standard for which a civil penalty may be assessed or whether the regulation is merely advisory?
>
> (b) Whether the Secretary has bypassed applicable MSHA regulations and prejudiced Cowin by charging it as an operator at the administrative hearing stage, thereby denying Cowin access to MSHA's penalty assessment procedures?
>
> (c) If 30 CFR § 77.1903(b) is a mandatory safety standard, was there a violation of that standard, as alleged by petitioner?
>
> (d) If a violation occurred, what is the amount of the civil penalty which should be assessed?

On May 21, 1980, petitioner filed its response to my order of April 1, 1980, and identified the issues as follows:

> (a) Whether 30 CFR § 77.1903(b) is a mandatory safety standard for which a civil penalty may be assessed under section 109(a)(l) of the Federal Coal Mine Health and Safety Act of 1969, or whether the regulation is merely advisory.
>
> (b) If 30 CFR 77.1903(b) is a mandatory safety standard, whether the violation of said standard as charged against each of the respondents in fact occurred at the No. 4 Coal Mine.

(c) If so, the amount of civil penalty which should be assessed against each of the Respondents pursuant to section 109(a)(l) of the Federal Coal Mine Health and Safety Act of 1969.

Discussion

Although given ample opportunity to do so, respondent Jim Walter Resources, Inc., has failed to respond to any of my post-remand orders and has apparently opted not to file any additional arguments or to request any further hearings. Under the circumstances, I can only. conclude that it has waived its right to present any additional defense with respect to its position in this matter as a party-respondent, and any decision that I render in these dockets insofar as it may affect Jim Walter Resources is made on the basis of the record presently before me. With respect to the remaining parties, they are in agreement that these cases may now be decided by me without further hearings on the basis of the present record, including all of the additional arguments filed by the parties after the Commission's remand on November 21, 1979.

Findings and Conclusions

Is 30 C.F.R. § 77.1903(b) a mandatory safety standard or merely advisory?

Section 77.1903(b) states as follows: "The American National Standards Institute, 'Specifications For The Use of Wire Ropes For Mines,' M 11-l-1960, or the latest revision thereof, shall be used a guide in the use, selection, installation, and maintenance of wire ropes used for hoisting."

Respondent Cowin argues that section 77.1903(b) is not a mandatory standard for which a civil penalty may be assessed, but merely an advisory standard which incorporates the voluntary ANSI guidelines and recommendations. In support of this assertion, respondent states that the ANSI wire rope standards incorporated by section 77.1903(b) were developed as recommendations and that the specific ANSI sections relied on by the petitioner as the basis for the alleged violation are also written in advisory terms. Respondent also argues that section 77.1903(b) did not change the ANSI standards from advisory to mandatory by incorporating them as a guide, and that the advisory language of the standards "should be," "recommended," and "advisory" are retained totally intact.

In support of its arguments, respondent cites the testimony of MSHA technical specialist Fred Williams during the hearings (Tr. 332-334), and concludes that it is evident that the drafters of section 77.1903(b), including Mr. Williams, deliberately chose not to use the mandatory 'shall," but rather, intended to leave it up to each contractor to use its judgment to determine which recommendations to follow. Respondent also points out that since the wording of section 77.1903(b) differs from that of any other section of Subpart T in that it is the only section which provides that a standard shall be used as a guide, while the other sections set forth

specific standards that must be met, it is evident that section 77.1903(b) was intended to retain the advisory character of the ANSI standards.

Respondent cites two cases decided under the Occupational Safety and Health Act, Pan American Airways, 1975-1976 OSHD 20,674 (hay 5, 1976), and Edward Hines Lumber Co., 1976-1977 OSHD 21,136 (September 29, 1976), in support of its argument that where ANSI standards have been the source for regulations under OSHA they have been found to be advisory and not mandatory, and quotes from the opinion of OSHRC Commissioner Moran in Pan American that "A violation of the Act's general duty clause cannot be predicated on a regulation which is no more than a recommendation."

Finally, respondent argues that the petitioner's assertion that while the particular ANSI standards themselves may not be mandatory, it is nevertheless mandatory for an operator to use them as a guide is a totally artificial distinction that contorts the meaning of the term "mandatory" and invites arbitrary application of section 77.1903(b). Even under the petitioner's theory, respondent maintains that a company may adopt wire rope practices which do not conform with the ANSI recommendations as long as the company uses those standards as a "guide." Respondent suggests that this means that under the petitioner's theory, whether or not a penalty is assessed does not depend upon whether the company's practices conformed with identifiable mandatory standards, but depends upon whether the practices were sufficiently guided by the ANSI recommendations. Thus, if two companies adopted the same wire rope practices which did not conform with the ANSI recommendations, the company that used the recommendations for guidance would not be subject to a penalty, but the company that did not use them as a guide would be subject to a penalty. Respondent concludes that the Act did not intend such arbitrary results, and that since the ANSI standards underlying section 77.1903(b) are advisory only, section 77.1903(b) is not a mandatory safety standard for which a penalty may be assessed.

Petitioner takes the position that section 77.1903(b) is a mandatory rather than an advisory safety standard, and argues that not only was 30 C.F.R. § 77.1903(b) properly promulgated as a mandatory safety standard pursuant to the rulemaking procedures of the 1969 Act, but respondent Cowin actively participated in said rulemaking proceedings (p. 19 of Petitioner's Posthearing Brief, filed August 28, 1978). Moreover, petitioner asserts that respondent Cowin specifically stated in its shaft-sinking plans (submitted to and approved by MESA) that it would comply with the mandatory safety standard under 30 C.F.R. § 77.1903(b); i.e., it would use the ANSI Standards ("Specifications For The Use of Wire Ropes For Mines," M11.1-1960) as a guide in the use, selection, installation, and maintenance of wire ropes used for hoisting at the mine construction site (pp. 6-7 of Petitioner's Posthearing Brief).

In response to respondent's assertions that section 77.1903(b) should be deemed advisory because the incorporated ANSI standards therein consistently use only the words "should be," "recommended," and "advisable," rather than mandatory words for their application, petitioner states that this is simply not true and points out that sections 5.2.1, 6.3.1.1, and 6.3.1.2 are the

most important ANSI standards which respondent failed to use as a guide in this case, and that section 5.2.1 states that "care must be exercised in handling to avoid kinking of the wire rope," etc; section 6.3.1.1 starts out by stating that "it is essential that tread diameters of sheaves and drums be liberal," etc; and section 6.3.1.2 starts by stating that "it is essential that head, idler, knuckle, and curve sheaves and grooved drums have grooves which support the rope properly." Petitioner asserts that it was the use of the K4UL tugger hoist wire rope with an undersized sheave and undersigned drum which caused the kinking, crushing and breaking damage to said rope which in turn led to its failure and the fatal accident (pp. 5 and 8-14 of Petitioner's Posthearing Briefs).

Regarding respondent's reliance on the Pan American Airways and Edward Hines Lumber Co., cases, supra, petitioner submits that these cases are clearly distinguishable from the instant proceedings in that in Pan American Airways the regulation in question (use of the color yellow to mark tripping and similar physical hazards), which was derived from an ANSI Standard, was held to be unenforceable because it failed to tell the employer which objects were required to bear the caution markings, and thus amounted to a recommendation only. However, petitioner maintains that the important distinguishing factor of that case is that the Secretary of Labor had adopted the ANSI standard involved as a mandatory safety standard pursuant to section 6(a) of the Occupational Safety and Health Act of 1970 (the "OSH Act"), without following the rulemaking procedures provided for under section 6(b) of said Act. In this same connection, petitioner cited the later OSHA case of Kennecott Copper Corporation, 1976-1977 OSHD par. 20,860 (July 8, 1976), wherein the Occupational Safety and Health Review Commission specifically held that the Secretary of Labor's adoption of an ANSI standard (concerning scaffold guarding) as a mandatory standard, by changing the word "should" to "shall", was improper for failure to follow the rulemaking procedures under section 6(b) of the OSH Act.

In Edwind Hines Lumber Co., supra, the second OSHD case cited by respondent, petitioner asserts that it involved a standard which provided that "power controls and operating controls should be located within easy reach of the operator," and it was held to be advisory only because the language was not revised to make the standard mandatory when it was adopted from the ANSI source. Petitioner submits that this case is also distinguishable from the one at bar since 30 C.F.R. § 77.1903(b) specifically uses the word "shall" and therefore is clearly mandatory.

In summary, petitioner maintains that section 77.1903(b) is clearly not voluntary or advisory because it specifically states that the ANSI standards, "Specifications For The Use Of Wire Ropes for Mines," M11.1-1960, shall be used as a guide in the use, selection, installation, and maintenance of wire ropes for hoisting. This regulation is obviously a mandatory safety standard and was properly promulgated as such pursuant to the rulemaking procedures of the 1969 Act.

Finally, petitioner argues that section 77.1903(b) has been in effect now for over 9 years, having been published in final form in the Federal

Register on May 22, 1971 (36 F.R. 9364), and that under the 1969 Act, neither the Interior Board of Mine Operations Appeals nor an administrative law judge had the power to invalidate-a regulation promulgated by the Secretary of the Interior. This power resided solely in the U.S. courts. Buffalo Mining Company, 2 IBMA 226 (1973); Peabody Coal Company, 4 IBMA 137 (1975). Petitioner asserts that under section 101(d) of the Federal Mine Safety and Health Act of 1977, the exclusive means of challenging the validity of a mandatory health or safety standard is by filing a petition in the appropriate U.S. Court of Appeals prior to the 60th day after such standard has been promulgated, and that this obviously applies to new or revised standards promulgated under the 1977 Act. As for the mandatory health and safety standards promulgated under the 1969 Act, section 301(b)(l) of the Federal Mine Safety and Health Amendments Act of 1977 specifically provides that said standards shall remain in effect until such time as new or revised standards are issued by the Secretary of Labor under the new 1977 Act.Thus, under the old law (the 1969 Act) and under the new law (the 1977 Act), the exclusive power to invalidate a mandatory health or safety standard lies within the U.S. courts. No court challenge of 30 C.F.R. § 77.1903(b) has been filed by either respondent herein, or by anyone else for that matter, and said mandatory safety standard has been specifically continued in effect by the Amendments Act of 1977. Accordingly, petitioner submits that the Commission and its administrative law judges lack authority to declare the subject regulation invalid.

During the course of the prior adjudication in these proceedings, the arguments presented by the parties addressed the issue of whether section 77.1903(b) was a validly promulgated standard, and whether the ANSI requirements were validly incorporated by reference as part of the requirements of that section. In its posthearing brief filed with me on August 28, 1978, respondent Cowin conceded that the ANSI wire rope standard was an integral part of section 77.1903(b), and its argument that this section is invalid was limited to the contention that the ANSI standards were invalidly incorporated by reference because of lack of proper notice and failure by the Director of the Federal Register to give his approval to their incorporation as part of section 77.1903(b). This contention was originally raised by respondent Jim Walter in a motion to dismiss filed August 15, 1977, which I denied on September 21, 1977, and again when I rendered by decisions.

In my findings and conclusions made in my original decisions of October 19, 1978, I found that section 77.1903(b) was a validly promulgated standard and that the ANSI standards were validly incorporated by reference as part of that section (Decision, pp. 24-25). Further, I also discussed the fact that Cowin conceded that the ANSI standards were an integral part of section 77.1903(b), that it participated in the proposed rulemaking proceedings when the standards found in Part 77 were being proposed as mandatory safety standards before the Department of the Interior, that Cowin's shaft-sinking plans submitted to the Department prior to the issuance of the notice of violation included certain assurances by Cowin that it will comply with the requirements of section 77.1903(b), and that Cowin had never taken exception or complained that the ANSI standards were not incorporated by reference in section 77.1903(b). In addition, I also took note of the fact that part

of J of Jim Walter's prior history of violations included four separate instances wher where it had been cited for violations of section 77.1903(b), and paid the civi civil penalties assessed for those violations (Decision, p. 25; Exh. G-25).

When these proceedings were before the Commission on the appeal taken by the petitioner with respect to my original decision, respondent Cowin characterized section 77.1903(b) as "a mandatory safety standard,, (p. 5 of Brief, filed January 8, 1979, p. 1422 of Commission's official record). In arguing that the practical effect of the notice of violation served on Cowin in these Proceedings was to charge it with violating the ANSI standards, Cowin again conceded that 'these standards are incorporated, by reference, into 30 C.F.R. § 77.1903(b)" (p. 7 of Brief). Further, during the course of the May 16, 1978, hearing, Cowin's counsel asserted that notwithstanding the opinions of the witnesses with respect to the interpretation and application of section 77.1903(b), 'the standard speaks for itself * * * and should stand on Its own right,' (Tr. 265). As for the intentions of the rulemakers when they promulgated the standard, Cowin's counsel again asserted that "whatever the intention and opinion of the rulemaker, the standard has to speak for itself,, (Tr. 269).

The 1969 USA Standards M11.1-1960 dealing with the specifications for and use of wire ropes for mines, Exhibit G-8, contains the following introductory language explaining the intent of the standards:

> A USA Standard implies a consensus of those substantially concerned with its scope and provisions. A USA Standard is intended as a guide to aid the manufacturer, the consumer, and the general public. The existence of a USA Standard does not in any respect preclude anyone, whether he has approved the standard or not, from manufacturing, marketing, purchasing, or using products, processes, or procedures not conforming to the standard. USA Standards are subject to periodic review and users are cautioned to obtain the latest editions. Producers of goods made in conformity with a USA Standard are encouraged to state on their own responsibility in advertising, promotion material, or on tags or labels, that the goods are produced in conformity with particular USA Standards. [Emphasis added.)

In further explanation of the work of the American National Standards Institute, the last page of Exhibit G-8 contains the following pertinent statement: 'The Standards Institute provides the machinery for creating voluntary standards. It serves to eliminate duplication of standards activities and to weld conflicting standards into single, nationally accepted standards under the designation "American National Standards." [Emphasis added.]

The 1977 ANSI standards for Base Mounted Drum Hoists, Exhibit R-2, states as follows, at page 2, section V:

Mandatory rules of this Standard are characterized by the use of the word "shall". If a provision is of an advisory nature it is indicated by the use of the word "should" and is a recommendation to be considered, the advisability of which depends on the facts of each situation.

The difficulty with the regulatory language shall be-used as a guide lies in the fact that it lends itself to a somewhat ambiguous application. For example, if an operator refers to a particular ANSI standard as a guide but then decides not to adopt or follow it and Instead follows the manufacturer's specifications, which may be different from the ANSI guides, is he in violation? Since the ANSI standards are incorporated by reference as part of section 77.1903(b), may the ANSI standards characterized as "recommendations" also be considered Incorporated as "recommendations' thereby rendering them advisory? Conversely, may the incorporated ANSI standards which use the language "shall" be considered mandatory? Further, one may conclude that the language in section 77.1903(b), 'shall be used as a guide,' is mandatory, but that any reference to or reliance on any specific ANSI standards may be considered advisory depending on the wording of the particular standard. Arguably, for purposes of a civil penalty assessment, the regulatory language "shall be used as a guide" may support a penalty assessment If it is established that a mine operator failed altogether to use any of the standards as guides. Conversely, a valid argument could be made that if MSHA relies on any specific incorporated ANSI standard to support a proposed penalty assessment, it must first establish that the incorporated standard relied on to support a civil penalty is couched in mandatory rather than advisory terms. And, if it is determined that the specific incorporated ANSI standard relied upon to support a penalty assessment is advisory rather than mandatory, it would logically follow that the fact that it was not used as a guide would be irrelevant. To hold otherwise would place an operator in a position of being subjected to a civil penalty for failing to use as a guide an advisory ANSI standard, which standing alone could not serve as the basis for a civil penalty assessment.

The foregoing situations Illustrate the problem presented by the nebulous language of subsection (b), and in my view it would have been more desirable to simply require that the ANSI standards be used without qualification. In other words, deletion of the words "as a guide" would go a long way in clearing up the ambiguity. An inference may be made that since there is no statutory authority vested in the American National Standards Institute to promulgate binding mandatory safety standards pursuant to the Act, MSHA incorporated them by reference as a matter of expediency rather than proposing and promulgating them through the rulemaking process and then adopting them individually as part of Title 30, Code of Federal Regulations. However, it would appear from the record here presented, that even though recognizing the ambiguous language, MSHA nonetheless opted not to incorporate any specific mandatory language as part of section 77.1903(b). What it did was to incorporate the entire ANSI requirements as guides whether they applied to shaft construction or not, and this conclusion is illustrated by the testimony of MSHA's witness Fred Williams, a participant in the drafting of the particular

standard in question (Tr. 331-336, May 17, 1978, hearing). Mr. Williams stated that the ANSI standards were not incorporated as regulations because 'anyone in the shaft sinking business knows which ones to pick out and apply" (Tr. 334). However, he candidly admitted that the manner in which the particular wire rope in question in this case was installed on the drum is not covered by an ANSI standard, and he indicated that respondent should probably have been charged with a violation of section 77.1907(d), since the rope in question was not installed in accordance with that standard (Tr. 271).

A further illustration of the confused application of the ANSI requirements in this case is reflected in the testimony of Inspector Kuykendall with regard to the asserted safety factor of 5 to the rope which broke. He conceded that there are no ANSI standards that require such a safety factor (Tr. 185). Further, although MSHA's case is bottomed in part on the contention that the rope may have been installed with 'hand-held" tension and may have been wound in the "wrong direction," thereby contributing to the alleged crushing and peening of the rope, MSHA's expert witness Alameddin, who conducted the laboratory analysis of the rope and prepared a report of the suspected causes of the rope failure, candidly admitted that the ANSI standards do not prohibit installing a rope with hand-held tension and do not mention winding it in the wrong direction.. He also admitted that in conducting his laboratory analysis, he did not limit his findings to the ANSI standards, and relied on other industry and manufacturers' recommendations in selecting the sheave and drum winches used in conjunction with the rope in question.

In view of the'foregoing discussion, and in order to determine the specific ANSI requirements relied upon by MSHA in support of the alleged violation, reference must be made to that part of the accident report which the Commission believes composes the essential elements of the alleged noncompliance, namely, the ANSI requirements dealing with (1) the minimum ratio of drum or sheave diameter to the rope diameter, and (2) the excessive wear on the wire rope in question and the specific ANSI standards relied on by MSHA. Analysis and discussion of these requirements follows.

In its most recently filed arguments, respondent Cowin identifies the specific ANSI standards relied on by MSHA in support of the alleged violation as: 6.3.1.1; 6.3.1.5.1, .2, .3, and .4; 5.2.1; and 6.5.2.1. Petitioner's posthearing briefs cite the following ANSI standards which MSHA believes were not complied with: 5.2.1; 6.3.1.1, .3; 6.3.1.4.1, .2, .3, and .4; and 6.5.2.1. Respondent argues that the consistent use of the words "should be," "recommended," and "advisable" in these ANSI standards, rather than the mandatory "shall be' clearly reflects that the standards are recommendations and that compliance with them is voluntary rather than compulsory. Respondent maintains that simply incorporating them by reference does not change the advisory nature of the standards and their advisory nature remain totally intact. Petitioner's reply to this argument is that the most important ANSI standards allegedly not followed by respondent, namely 5.2.1, 6.3.1.1, and 6.3.1.2, use such words as 'care must be exercised in handling to avoid kinking of the wire rope"; "it is essential that tread diameters of sheaves and

drums be liberal"; and "it is essential that head, idler, knuckle, and curve sheaves and grooved drums have grooves which support the rope properly." In short, petitioner asserts that the use of such terminology clearly indicates the mandatory rather than advisory nature of the cited ANSI standards.

I have carefully reviewed the specific language of all of the aforesaid ANSI standards relied on by the parties and in each Instance I can,find no language which supports any finding that they are mandatory. As correctly stated by the respondent in its arguments, the use of the words "should be," "recommended," and "advisable" are consistently used. As a matter of fact, I have been unable to find anyplace where the term "shall" is used, and I cannot conclude that the use of words "must" and "essential" render the standards mandatory. Under the circumstances, and after careful review and consideration of the arguments presented by the parties, I conclude and find that the respondent has the better part of the argument. I conclude that the specific ANSI standards relied on by MSHA in support of the alleged violation in this case are advisory guides for voluntary use by the industry. Since they are incorporated by reference as part and parcel of section 77.1903(b), I further find that for enforcement purposes they carry the weight of advisory rather than mandatory requirements for which an operator may be assessed civil penalties for noncompliance. In other words, I conclude that MSHA may not rely on an advisory ANSI standard as the basis for an assessment of a civil penalty, and section 77.1903(b) may not be used to support such a penalty proposal. Although I have consistently concluded that section 77.1903(b) is a validly promulgated standard, the question of whether it ismandatory and may support an assessment of a civil penalty in a situation where MSHA cites it Is, in my view, dependent on whether the facts in any given case establish that the specific incorporated ANSI standard relied on by MSHA is advisory or mandatory and the question of whether an operator's failure to use any ANSI standard as a "guide" amounts to a violation of section 77.1903(b) would likewise be dependent on whether the particular standard which was not so used is couched in mandatory or advisory language. Thus, on the facts of this case, even if I were to make a finding that respondent failed to use any of the ANSI standards as guides, the crucial question would be whether the particular standards themselves are deemed advisory or mandatory. Since I have concluded that they were the former, It matters not that they were not used as guides. Failure to use a nonmandatory ANSI standard incorporated by reference as part of section 77.1903(b), does not in-my view constitute a violation for which a civil penalty assessment may be levied.

ORDER

In view of the foregoing findings and conclusions, IT IS ORDERED that Notice of Violation 2 REK, June 16, 1976, charging a violation of 30 C.F.R. § 77.1903(b), be VACATED, and that the petition for assessment of civil penalties as to the named respondents in these proceedings be DISMISSED.

Additional Findings and Conclusions

Since my findings and conclusions as to whether the cited standard is mandatory or advisory are disposltive of these cases it is not necessary for

me to address the other issues identified by the parties. However, I feel compelled to make findings and conclusions concerning respondent Cowin's contention that it was somehow prejudiced by the failure of MSHA to afford it access to the Part 100 assessment procedures at the time I ruled that Cowin could be named as a party-respondent under section 109(a) of the 1969 Act, and these follow below.

Has the respondent Cowin been denied access to MSHA's Part 100 assessment procedures, and if so, has Cowin been adversely prejudiced in this regard?

Respondent maintains that by permitting the petitioner to amend its pleadings to name Cowin as a section 109(a) party-respondent, it has been denied access to the procedural rights afforded under 30 C.F.R. 100.1 et seq. Respondent points out that these procedures provide that each notice of violation and order of withdrawal shall be reviewed by the Office of Assessments, which shall make a determination as to the amount of the penalty, if any, based on six enumerated criteria (Section 100.2). The operator is then issued an order of assessment (along with work sheets showing how the penalty was computed), and the operator may: (1) pay the penalty; (2) request a conference; or (3) request a hearing (Sections 100.4(b) and (c)). If a conference is scheduled (and it must be arranged if requeested by the operator), the Office of Assessments may reevaluate the penalty based on additional information presented to it, or may decide not to assess a penalty at all. (Section 106). The operator then has the option of paying the penalty or seeking a hearing, where an administrative law judge may make a de novo determination of the amount of penalty to be assessed, if any.

Respondent argues that since it was originally charged as an agent rather than as an operator, it was not afforded the procedural benefits provided la MSHA's penalty assessment procedures. It was not served with an order of assessment and proposed penalty prepared by the Office of Assessments, and was not afforded the opportunity for a conference where the penalty could have been reevaluated or dropped. By amending the petition at the hearing stage to charge Cowin as an operator, respondent concludes that the petitioner has bypassed the preliminary penalty assessment procedures required under Part 100, and has deprived it of significant procedural benefits. Since the petitioner's failure to follow its own assessment rules and regulations has caused actual prejudice to the respondent by depriving it of significant Procedural benefits, respondent maintains that the petition for assessment of civil penalty should be dismissed, citing United States ex rel Accardi v. Shaughnessy, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954); Brennan v. Gilles and Cotting, Inc., 504 F.2d 1255 (4th Cir. 1974); United States v. Heffner, 420 F.2d 809, 811 (4th Cir. 1969); Atlantic Marlne, Inc. v. Occupational Safety and Health Review Commmission, 524 F2d 476 (5th Cir. 1975); Equal Employment Opportunity Commission v. Hickey-Mitchel Company, 507 F.2d 944 (8th Cir. 1974).

It is clear from the record in this case that the two civil penalty cases filed by the petitioner against the two individual Cowin employees were disposed of by settlement when they paid civil penalties for the violation in

question (Tr. 5, May 16, 1978, hearing). Although respondent agreed to the settlement disposition of those two cases without an admission of guilt, the fact is that the cases were disposed of by settlement and it seems clear to me that respondent Cowin was well aware of the issues and the terms of the settlement. While Cowin did not admit any guilt for the violation, it did agree and concede that the paid settlements for the violation could be considered as part of its history of prior violations (Tr. 6), and since Cowin and MSHA engaged in prehearing discovery, including interrogatories, it seems clear they were not oblivious to the issues presented.

With respect to MSHA's proposal for assessment of a civil penalty against Cowin in this matter, the record reflects that MSHA specifically proposed a civil penalty assessment of $10,000 for the alleged violation, and a penalty of $5,000 against respondent Jim Walter Resources (Tr. 352-353). These proposals were served on the respondents in accordance with the applicable statutory and regulatory procedures, and the respondents filed timely answers contesting the proposed civil penalty assessments.

With respect to the size of Cowin's operations, testimony adduced at the prior hearing reflects that Cowin is a well-recognized shaft construction company and MSHA produced evidence concerning the size of the mining operation in question and the number of employees employed in this operation (Tr. 348).

With regard to the abatement efforts by the respondents, MSHA presented testimpny in this regard (Tr. 349-352), and took the position that the conditions cited were abated in good faith and any increases in any penalty assessment is not warranted because of respondents' failure to timely abate the violation.

With respect to the effect of the proposed civil penalty on respondent Cowin's ability to remain in business, that matter was also covered by the May 16, 1978, hearing and Cowin's counsel stated that while it would affect the respondent's business, it would not affect its ability to continue in business (Tr. 349).

As for respondent's Cowin's prior history of violations, that matter was also covered by the May 16, 1978, hearing (Tr. 342-348) and MSHA's computer printouts reflecting that prior history was received in evidence and is part of the original trial record (Exhs. G-25 and G-26).

In view of the foregoing record, and considering the totality of the circumstances presented in these proceedings, I fail to understand the basis for respondent Cowin's present assertions that it has somehow been prejudiced by MSHA's failure to afford it an opportunity to have the violation considered under Part 100 of MSHA's assessment procedures. In my view, all of the statutory criteria found in section 110 of the Act have been thoroughly presented and considered, and Cowin has had more than ample opportunity to be heard on those criteria. More significantly, I assume that during the course of the prior adjudication of this case, the parties considered the possibility of

a settlement. Since the two individual cases were in fact settled without trial, it seems obvious to me that the reason the present case progressed to the hearing stage was that the parties could not settle it. In short, the case progressed beyond the contest stage and the hearing held on May 16, 1978, was de novo and a complete record was made, including the receipt of testimony and evidence touching on the criteria required to be considered by me before any civil penalty assessments is levied. Further, it is clear that a section 109 civil penalty proceeding is de novo and that the penalty assessed therein is to be determined irrespective of any prior proposed assessment, Boggs Construction Company, 6 IBMA 145 (1976); Black Watch Coal Corporation, 6 IBMA 252 (1976); Peggs Run Coal Company, Inc., 8 IBMA 27 (1977).

In view of the foregoing, I conclude and find that respondent Cowin has been afforded all of its procedural rights during the assessment stage of these proceedings and its arguments to the contrary are rejected.

George A. Koutras
Administrative Law Judge

Distribution:

J. Philip Smith, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203 (Certified Mail)

Robert W. Pollard, Esq., Office of the Corporate Counsel, Jim Walter Resources, Inc., 3300 First Ave. North, Birmingham, AL 35222 (Certified Mail)

William H. Howe, Esq., Timothy J. Parsons, Esq., Loomis, Owen, Feldman, & Coleman, 2020 K St., NW., Rm. 800, Washington, DC 20006 (Certified Mail)