

CCASE:

MSHA V. JIM WALTER RESOURCES

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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.

November 6, 1981

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

Docket Nos. BARB 77-266-P
BARB 76X465-P

v.

JIM WALTER RESOURCES, INC.

and

COWIN AND COMPANY, INC.

DECISION

The issue presented in these cases is whether 30 CFR §77.1903(b) is a mandatory safety standard. Section 77.1903(b) provides: The American National Standards Institute, "Specifications For The Use of Wire Ropes For Mines," M 11.1-1960, or the latest revision thereof, shall be used as a guide in the use, selection and maintenance of wire ropes used for hoisting.

For the reasons that follow, we hold that this standard imposes no mandatory duty on an operator.

The events leading to the issuance of notices of violation of §77.1903(b) occurred on June 9, 1975. Cowin and Company, an independent contractor, was sinking a production shaft at Jim Walter Resources' Brookwood No. 4 Mine. One of the tugger ropes that operated a "clam shell" used in excavation broke. More than 1026 feet of wire rope fell to the shaft bottom, striking and killing a Cowin employee.

After a hearing an administrative law judge determined that the notices of violation lacked the required specificity and deprived the respondents of reasonable notice as to the violation charged. The judge vacated the notices of violation and dismissed the petitions for assessment of a penalty. We reversed his decision because the operators had not demonstrated prejudice from the lack of specificity. In remanding for further proceedings, we also instructed the judge to address the threshold question of whether §77.1903(b) is a mandatory standard for which a civil penalty must be assessed if it is violated. 1 FMSHRC 1827, 1830 (1979).

On remand the judge held that whether or not §77.1903(b) is mandatory depends upon which ANSI standards are alleged not to have been used as a guide. 2 FMSHRC 1890 (1980). In the judge's view, if the underlying ANSI standards are mandatory, then §77.1903(b) is mandatory and a

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penalty must be assessed for a violation thereof. The judge also held that if the underlying standards are advisory, as he concluded those referred to by the Secretary in these cases were, then §77.1903(b) is advisory and no penalties could be assessed. Accordingly, he vacated the notices of violation and dismissed the petitions for assessment of a penalty.

On review of this decision, the Secretary argues that §77.1903(b) is a mandatory standard that at a minimum requires consultation with the specified ANSI standards. The purpose of this requirement, he asserts, "is to ensure a process" by which an operator, having consulted a leading national authority on the subject, will make an informed choice regarding selection and use of wire ropes. The Secretary urges that in the present cases the Commission need not decide whether §77.1903(b) requires that individual ANSI sections be followed. Rather, he submits that the Commission should hold that the operators here did not comply with even the minimum requirements of §77.1903(b) by not consulting the ANSI standards. The Secretary admits that "reasonable persons may differ as to whether a given ANSI standard is mandatory or advisory". 1/ He believes, however, that this fact supports his position, rather than detracts from it. In sum, the Secretary claims that the judge's interpretation of §77.1903(b) renders the words "shall be used as a guide" "utterly superfluous."

Jim Walter and Cowin argue that §77.1903(b) is advisory because it incorporates advisory industry standards. The operators rely on an introductory paragraph of the ANSI standards at issue which states: "The existence of [an ANSI] 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." The operators also argue "the frequent

1/ We agree with the Secretary that reasonable people can differ on whether a particular ANSI section is mandatory or advisory. The following 1960 ANSI standards, which were in effect at the time these notices were issued, and to which the Secretary referred in these cases, illustrate this problem:

ANSI Standard 6.3.1.1 states:

It is essential that the tread diameters of sheaves and drums be

liberal. The recommended diameters should be at least as large as those listed in Table 36, Column 1. It is inadvisable to operate with minimum diameters below those in Column 2. On large mine hoist installations using 6 x 19 rope, the head sheaves are sometimes set as high as 90 times the rope diameter.

ANSI standard 5.2.1 states in part:

Wire rope should be handled so that it is neither twisted nor untwisted. Care must be exercised in handling to avoid "kinking" of the wire rope...

The difficulty of determining whether an ANSI section is mandatory or advisory has been alleviated somewhat by the 1980 revision of ANSI Standards For Wire Rope for Mines, ANSI M 11.1-1980. The new ANSI standards generally use either "should" or "shall" and section 1.5 provides:

Mandatory and Advisory Rules. In this standard, the word "shall" is to be understood as denoting a mandatory requirement; the word "should" is advisory in nature and is to be understood as denoting a recommendation.

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use of terms such as 'should be', 'recommended', and 'advisable' throughout these [ANSI] sections" show that they are not mandatory. They further assert that mere incorporation of the "advisory" standards into §77.1903(b) can not change them from advisory to mandatory and that if the ANSI standards were intended to be mandatory, a substantive modification has occurred without resort to proper rulemaking procedures. They note that §77.1903(b) is unusual in containing the phrase "use[] as a guide" and argue that this shows an intent to maintain the ANSI standards as advisory. 2/ Finally, Jim Walter and Cowin reject the Secretary's argument that the standard at least imposes a mandatory duty to consult the ANSI standards. They assert this requirement would be meaningless and unenforceable. For example, they note that two operators who employ identical wire rope practices would be subject to different enforcement treatment depending on whether they had "consulted" ANSI before implementing their practices. We hold that §77.1903(b) imposes no mandatory duty and, therefore, cannot be the basis for assessment of a civil penalty. The standard provides that ANSI standards "shall be used as a guide in the use, selection and maintenance of wire ropes used for hoisting." The phrase "shall be used as a guide" is, at best, ambiguous. It contains mandatory language, i.e., "shall be used", but the requirement imposed is use of ANSI standards "as a guide". We believe that in common usage a "guide" is something less than a mandatory requirement to be followed. 3/ Although safety and health standards are to be construed liberally, any resultant interpretation must be reasonable in order to be upheld. Hanna Mining Co., 3 FMSHRC 2045, 2048 (1981). In light of the ambiguous language of §77.1903(b) and the ambiguous nature of many of the underlying ANSI

standards, we find the Secretary's attempt to derive an enforceable mandatory duty from the standard to be unreasonable. 4/ The fault with the standard lies in its wording. It does not adequately inform an operator of a duty that must be met. This fault can easily be remedied by the Secretary through rulemaking and we urge him to do so. 5/ This case emphasizes the need for mandatory standards for wire ropes.

2/ Other regulations incorporate industry developed standards and require compliance with those standards rather than their "use as a guide." See, e.g., 30 CFR §§75.518 1; 77.506; 77.516, (National Electric Code); 30 CFR §§75.1101-7(a), 75.1103 2(b), 75.1107 3(b) (National Fire Code).

3/ Webster's Third New International Dictionary (1971), provides that a "guide" is: "c. something (as a guidebook, signpost, or instruction manual) that provides a person with guiding information."

4/ We agree with the Secretary that an operator's consultation with recognized authorities on safe work practices is desirable. Without a corresponding duty to implement suggested work practices after consultation, however, any desired safety return seems extremely tenuous when measured against the practicalities of enforcement.

5/ We note that the Secretary may have already begun this process. On April 28, 1981, he announced his intention to revise the current wire rope standards and to include specific requirements for the installation, use, inspection, maintenance, and removal of wire ropes 46 Fed. Reg. 2389 (1981). We also note that the Secretary has solved similar problems with other standards through rulemaking. For example, 30 CFR §§55.19 20. 56.19-20, and 57.19-20 formerly provided that the ANSi specifications at issue in this case "should be used as a guide." In a general revision, these standards were revoked and many other provisions were expressly made mandatory. 44 Fed. Reg. 48490 (1979).

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Accordingly, we affirm the judge's decision dismissing the petitions for assessment of penalties insofar as it is consistent with this opinion.

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