

CCASE:

MSHA V. COWIN

DDATE:

19811106

TTEXT:

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

November 6, 1981

SECRETARY OF LABOR

MINE SAFETY AND HEALTH)
ADMINISTRATION (MSHA)

Docket Nos. HOPE 76-210-P
HOPE 76-211-P
HOPE 76-212-P
HOPE 76-213-P

v.

COWIN AND COMPANY, INC,

DECISION

This case was initiated under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §801 et seq. (1976)(amended 1977) ("the Coal Act"). We directed for review the question: Whether 30 CFR §77.1903(b) is a mandatory safety standard. 1/ For the reasons expressed in our decision in *Jim Walter Resources and Cowin and Company, _____ FMSHRC _____* (BARB 77 266-P, etc., November 6, 1981), we hold that it is not.

We also reject the Secretary of Labor's claim that this question is not properly before us in this case. The Secretary asserts that Cowin did not challenge the mandatory nature of §77.1903(b) in its petition for review of the administrative law judge's first decision in this matter. Therefore, the Secretary argues that the issue of the validity of §77.1903(b) became final forty days after the judge issued his first decision and can not now be addressed. 30 U.S.C. §823(d). The Secretary also asserts that, in examining the issue, the Commission would exceed the scope of the remand from the Fourth Circuit. *Cowin and Co. v. FMSHRC*, 612 F.2d 838 (4th Cir. 1979). We do not believe the Fourth Circuit foreclosed consideration of whether §77.1903(b) is mandatory. In its decision, the Court stated, "[W]e think the administrative record should be reopened, to avoid any possible prejudice, for the submission of additional relevant evidence and arguments before Cowin's civil liability is determined and penalties can be assessed...." 612 F.2d at 841. Because the Court's direction to remand allowed the administrative law judge to hear additional arguments, we find that Cowin properly raised the issue of the mandatory nature of the standard before the judge. In view of this, and because Cowin's petition for discretionary review presented the question of whether the standard is mandatory, that issue is properly before us on review.

1/ 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.

~2494

Furthermore, in light of our decision in Jim Walter Resources, it
would be manifestly unjust to refuse to reach the issue. To do so
would mean that Cowin would be assessed penalties totalling \$16,000
for violating a standard that we have found imposes no mandatory duty.
Accordingly, the decision of the administrative law judge is
reversed and the petitions for assessment of penalties are dismissed.

~2495

Distribution

William H. Howe, Esq.
Loomis, Owen, Fellman, & Coleman
2020 K Street, N.W.
Washington, D.C. 20006
Michael McCord, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203
Administrative Law Judge Joseph Kennedy
FMSHRC
5203 Leesburg Pike, 10th Floor
Falls Church, Virginia 22041