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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

GATLIFF COAL COMPANY, INC.,
CONTESTANT

v.

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

CONTEST PROCEEDINGS

Docket No. KENT 89-242-R
Citation No. 3178703; 8/3/89

Docket No. KENT 89-243-R
Citation No. 3178704; 8/3/89

Docket No. KENT 89-244-R
Citation No. 3178706; 8/3/89

Docket No. KENT 89-245-R
Citation No. 3178707; 8/3/89

Docket No. KENT 89-246-R
Citation No. 3178708; 8/3/89

Docket No. KENT 89-247-R
Citation No. 3178709; 8/3/89

Docket No. KENT 89-248-R
Citation No. 3178710; 8/3/89

Docket No. KENT 89-249-R
Citation No. 3178711; 8/3/89

Docket No. KENT 89-250-R
Citation No. 3178712; 8/3/89

Docket No. KENT 89-251-R
Citation No. 3178713; 8/3/89

Docket No. KENT 89-252-R
Citation No. 3178714; 8/3/89

Gatliff No. 1 Mine
Mine ID No. 15-04322

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

CIVIL PENALTY PROCEEDINGS

Docket No. KENT 90-100
A.C. No. 15-04322-30530

v.

GATLIFF COAL COMPANY, INC.,
RESPONDENT

Docket No. KENT 90-215
A.C. No. 15-04322-30531

Gatliff No. 1 Mine

DECISION

Before: Judge Melick

These cases are before me upon remand by the Commission on September 25, 1991, following a determination that a violation of the standard at 30 C.F.R. 77.1701 was indeed committed by the Gatliff Coal Company, Inc., (Gatliff). In particular, the matter has been remanded for resolution of "any remaining issues, including whether the violation resulted from the operator's unwarrantable failure, whether it was significant and substantial, and for the assessment of an appropriate civil penalty."

Order No. 3178705, issued pursuant to section 104(d)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," charges as follows:1

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Emergency communications were not available at the Colonel Hollow Job Number 75. Communications with the services that provide emergency medical assistance and transportation were discontinued when the company vehicle with the company radio left the mine property. On 8/1/89, following a serious accident which occurred at approximately 3:20 a.m., employees were required to travel approximately 2-1/2 miles to a public telephone to summons an ambulance.

The cited standard, 30 C.F.R. 77.1701, provides as follows:

(a) Each operator of a surface coal mine shall establish and maintain a communication system from the mine to the nearest point of medical assistance for use in an emergency.

(b) The emergency communication system required to be maintained under paragraph (a) of this section may be established by telephone or radio transmission or by any other means of prompt communication to any facility (for example, the local sheriff, the State highway patrol, or local hospital) which has available the means of communication with the person or persons providing emergency medical assistance or transportation in accordance with the provisions of paragraph (a) of this section.

The facts in this case were summarized by the Commission in its decision as follows:

The facts of this case are largely undisputed. Gatliff Coal Company, Inc. ("Gatliff") owns and operates a surface strip coal mine located in Whitley County, Kentucky known as Gatliff No. 1, Job 75. At about 3:20 a.m. on August 1, 1989 a truck driven by Gatliff employee Boyd Fuson went off an elevated roadway on the mine property and tumbled down a 120 foot embankment. In response to the accident, two Gatliff employees, Donald Hopkins and Richard Gibbs, drove from the mine property to the nearest telephone, which was about two miles away, in order to summon help. There was no telephone at Job 75. Fuson died as a consequence of the accident.

In the investigation that followed, MSHA inspector James Payne issued a 104(d)(1) order charging a violation of 30 C.F.R. 77.1701, because there was no company radio at Job 75 at the time of the accident. According to James Meadors, Gatliff's day shift foreman at the time of the accident, each mine site typically

has three company radios. The company radios are two-way 40 watt radios with sufficient range to reach the Gatliff mine office and are located in the foreman's truck, the mechanic's truck and the lube truck. On the night of the accident, however, there was no company radio on site at Job 75. Meadors testified that he had taken the foreman's truck off the Job 75 site, that the lube truck was at another Gatliff mine site "roughly three miles away, maybe a little more," and that the mechanic's truck had been taken home. At the time of the accident, there was, however, a citizen band radio ("CB radio" or "CB") belonging to the day shift operator of the bulldozer being operated by Mark Hopkins.

John Blankenship, Gatliff's safety director, testified about the operator's emergency notification procedures. He acknowledged that under normal circumstances those procedures consisted of communication via one of the two-way radios back to the mine office, where there was a telephone. Blankenship's signed statement of Gatliff's company policy regarding emergency communications was read into the record:

. . . Gatliff Coal Company, Inc. has a standard operating procedures (sic) of the company's radio communication to be provided on the job in case of emergency. This provides for the job to contact base and base then calls for assistance, base being the guard shack. And this has always been our standard operating procedure.

Thus, Gatliff conceded that its standard emergency communication procedure involved using 40 watt two-way radios and that there were no such two-way radios at Job 75 on the night of the accident. However, before the administrative law judge Gatliff took the position that, although no 40 watt two-way radio was present at Job 75 at the time of the accident, CB radios were present, which would have enabled the miners to link up with a different, but nearby, Gatliff mine site (Job 74) that did have such a two-way radio on the lube truck. Foreman Meadors testified that miners routinely communicated by CB radios between the two sites. Safety Director Blankenship stated that the miners at Job 75 could have reached the lube truck at Job 74 by using the CB, but he acknowledged that the miners were never told to use the CBs. In response to

questions from the court, Blankenship testified as follows:

Q. Well, how do you get in touch with the lube truck if you're 3 miles away?

A. With the CB.

Q. Do you understand why these people did not use it?

A. No, I don't.

Q. Were they told to use the CBs?

A. They were never per se told to use the CBs except, you know, they would have radio communication there and someone would get on the company radio and call. Now, how they got ahold of one another to use the company radio to call the guard that was pretty much left to their own discretion.

Blankenship testified that, since the accident, miners have been told to communicate for help the "fastest possible way" and that they have been told to use CBs. Prior to the accident, however, the miners had not been specifically told to use a CB radio or to walk to the mechanic's truck. Blankenship assumed that in an emergency the miners would find the quickest way to get help.

Mark Hopkins testified that, although there was a CB radio on the bulldozer he was operating the night of the accident, it never entered his mine to use it to summon help. ALJ decision at 13 FMSHRC 373. The CBs were used by the miners to give directions, to keep each other company, to communicate with other job sites, and to use if there was something wrong. When asked why he did not use the CB to reach another Gatliff job site the night of the accident, Hopkins stated he was "just scared." He testified further stated [sic] that he was trained, in the event of an emergency, to use either the foreman's truck or the lube truck to make a call for help.

Inspector Payne testified that a CB radio could be used for emergency communication under the standard if there were someone monitoring it on the other end. He noted that the CBs were owned by the employees and that

during his investigation no one told him that there was an alternate emergency communication system.

In his decision the judge noted the undisputed testimony of Inspector Payne that the only radio at Job 75 at the time of the accident was the CB in Hopkins' bulldozer and that this radio had insufficient range to reach either the mine office or medical or police assistance. 13 FMSHRC at 373. The judge further found that the CB at Job 75 could have reached the lube truck at Job 74 and that the lube truck had a radio sufficiently powerful to reach the mine office. On this basis, the judge concluded that the Secretary had failed to prove a violation because the CB radio on the bulldozer at Job 75 was capable of reaching the lube truck radio, which in turn could communicate with the mine office, where a telephone was located. 13 FMSHRC at 374.

In evaluating whether a violation is "significant and substantial" the Commission in Mathies Coal Co., 6 FMSHRC 1 (1984), explained as follows:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety-contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

The question of whether any particular violation is significant and substantial must be based on the particular facts

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surrounding the violation. Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 1007 (1987).

The third element of the formula requires that the Secretary establish "a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury" and that the likelihood of injury must be evaluated in terms of continued normal mining operations. U.S. Steel Mining Co., 6 FMSHRC 1573 (1984); Monterey Coal Co., 7 FMSHRC 996 (1985). The time frame for determining if a reasonable likelihood exists includes the time that a violative condition existed or would have existed if normal mining operations continued. Rushton Mining Co., 11 FMSHRC 1432 (1989). In this case the hazard which the instant standard is designed to protect against is the aggravation of a pre-existing injury or of death due to the lack of prompt medical attention. While this case does not therefore fit neatly within the cited definitions analogies can appropriately be made.

In any event, I conclude that the violation herein was neither "significant and substantial" nor serious. Ordinarily, according to the undisputed evidence, Gatliff maintains as its standard operating procedures, three 40-watt two way radios at each mine site sufficient to call the mine office where there is a telephone. It is further undisputed that these communication systems would meet the cited regulatory requirements. On the night at issue however, for reasons not fully explained, none of the three vehicles having such radios was at this particular location at the mine. It may reasonably be inferred, therefore, that the absence of such a radio was an aberrant situation and would not ordinarily have existed under normal mining operations.

It is also undisputed that alternative means of communication was available at the time at issue from the mine to the nearest point of medical assistance in the event of an emergency. This system was provided by CB radio and two-way radio on the lube truck to the mine office. Under all the circumstances, I do not find that the violation was "significant and substantial" or of high gravity.

In addition, in light of the evidence that ordinarily three two-way radios are present at the mine and that the absence of a radio on the night at issue was anything other than the result of inattention or inadvertence, and that the miners were not left without a means of emergency radio communication, I cannot find that the violation was the result of "unwarrantable failure," or more than simple negligence. Emery Mining Corporation, 9 FMSHRC 1997 (1987) and Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (1987). The order must accordingly be modified to a citation

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under section 104(a) of the Act. In addition, considering all of the criteria under section 110(i) of the Act, I find that a civil penalty of \$50 is appropriate.

ORDER

Order No. 3178705 is modified to a citation under section 104(a) of the Act. Gatliff Coal Company, Inc., is ordered to pay a civil penalty of \$50 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

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FOOTNOTES START HERE

1. Section 104(d)(1) of the Act provides as follows:

"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."