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GATLIFF COAL V. MSHA  
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September 25, 1991  
GATLIFF COAL COMPANY, INC.

v. Docket Nos. KENT 89-242-R, etc.

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

**BEFORE: Backley, Doyle, Holen and Nelson, Commissioners  
DECISION**

BY THE COMMISSION:

In this consolidated contest and civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. • 801 et seq. (1988) (the "Mine Act"), we are called upon to determine whether a means of emergency communication that existed at the time of an accident constituted an established and maintained emergency communication system under 30 C.F.R.

- 77.1701. Commission Administrative Law Judge Gary Melick vacated the section 104(d)(1) order issued in connection with the alleged violation. 13 FMSHRC 368 (March 1991)(ALJ). For the reasons set forth below, we reverse the judge's conclusion that the standard was not violated and remand the case to the judge for further proceedings.

I.

## Factual and Procedural Background

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. 1 Tr. 49. According

1 The word *lamb* with

77-1791-E The standard provides:

to James Medors, Gatliff's day shift foreman at the time of the accident, each mine site typically has three company radios. The company radios 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. Tr. 151. On the night of the accident, however, there was no company radio on site at Job 75. Tr. 156. 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. Tr. 150, 154, 156. 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. Tr. 216. 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. (Footnote 2)

Tr, 222.

(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.

<sup>2</sup> We note that, although Blankenship signed the statement under protest, his protest was not because of any claim that the statement was inaccurate, but because he felt that signing it was tantamount to stating that Gatliff did not

have the procedure in place. Tr. 221-223.

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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.

Tr. 150, 154.

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. Tr. 217. 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.

Tr. 217.

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. Tr. 220.

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 mind to use it to summon help. Tr. 158, 162. 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. Tr. 163-165. When asked why he did not use the CB to reach another Gatliff job site the night of the accident, Hopkins stated he was

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"just scared." Tr. 165. He further stated 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. Tr. 164.

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. Tr. 53. 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. Tr. 54, 55, 61.

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.

The Secretary filed a petition for discretionary review challenging the judge's determination that the emergency communication system existing at the time of the accident satisfied the requirements of the standard.

## II.

### Disposition of Issues

The Secretary contends that 30 C.F.R. • 77.1701 is violated when a mine's established means of emergency communication is removed from a mine site. The Secretary argues that the established means of communication at Job 75 was the two-way radio in the foreman's truck and not the CB system. The miners knew only of the two-way radio as the emergency communication system; CB radios were personal, not company, equipment and were brought to work by some miners so that they could talk with other equipment operators. To underscore her contention that the CBs were not part of an "established" system the Secretary observes that, when the emergency in this instance arose, the miners did not use their CBs, but instead went in search of a telephone.(Footnote 3)

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The Secretary asserts as a separate basis for error that a CB radio could not be a substitute for the two-way radio system because it entailed unnecessary multiple-step emergency communication procedures, which were more

time consuming and less reliable than the two-way radio. The Secretary did not assert before the administrative law judge that unnecessary multiple-step emergency communication systems were prohibited by the standard. The issue first appears in the Secretary's Petition for Discretionary Review and again, in amplified fashion, in her brief before the Commission. Gatliff responded

to the issue in opposing the Secretary's Petition for Discretionary Review and noted that "[t]he judge made his determination based on the regulations, not on some obscure implication now Gatliff argues that the communication system did not fail on the date of

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Gatliff argues that the communication system did not fail on the date of the accident, it simply was not used. Gatliff contends that the CB system constituted an established alternate method of emergency communication, which it originally established and installed. At one time Gatliff supplied its miners with CB radios at the site but discontinued the practice due to thefts. It continued to provide cable and antennae to those miners who brought their own CBs. The fact that the miners did not use the CB system in the emergency should not be confused or equated with the separate concept of whether the system was established and maintained. It notes that the miners knew that CBs were available and that Gatliff knew they were being used. Gatliff argues that the CBs constituted an alternate system satisfying • 77.1701

There is substantial evidence in the record to support the judge's findings that CB communication from Job 75 to the lube truck at Job 74 was technically possible on the date of the accident, and that the lube truck's two-way radio could have reached the mine office, which was equipped with a telephone. The issue in this case, however, is whether this alternate system satisfies 30 C.F.R. • 77.1701. On its face the standard makes clear that the onus is upon the operator, not its employees, to establish and maintain the emergency communication system.

"Establish" means "to make secure or firm ... to cause to be recognized or accepted ... to introduce and enforce.

"Maintain" means "to preserve or keep in a given existing condition, as of efficiency or good repair."

Webster's II New Riverside University Dictionary (1984).

Gatliff has acknowledged that its standard procedure was to have a company two-way radio on the job as its emergency communication system and that this system worked by having the job site make contact with the base, which in turn called for assistance. Tr. 216. Gatliff also acknowledges that their standard (two-way radio) procedure was not in place at Job 75 on the night of the accident. Tr. 156. Gatliff Br. at 8, 9. It agrees that its standard operating procedure involved having at least one vehicle with such two-way radio at each mine site and admits that this procedure was not followed when the foreman's truck left the Job 75 site at the start of the

suggested by the Secretary." Statement in Opposition to the Secretary's Petition for Discretionary Review at 4.

section 113(d)(2)(A)(iii) of the Mine Act provides: "Except for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an

opportunity to pass." Not having been presented before the judge, this issue of law is not properly before the Commission and we decline to entertain it. See Union Oil Company of California, 11 FMSHRC 289, 301 (March 1989), Climax

Molybdenum Co., 1 FMSHRC 1499, 1500 (October 1979).

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shift on July 31. Id. at 8. Thus the two-way radio system was clearly not maintained as required by section 77.1701. However, Gatliff asserts that the alternate "CB system" was also its established and maintained system.

The CB system was undeniably a voluntary system adopted by the miners utilizing their personal CB radios. Tr. 54, 154, 162, 219. The operator initially introduced CBs but effectively abandoned their use in favor of two-way radios. Tr. 219. The operator did not enforce the use of CBs and there is no evidence that the operator told employees that the CB system was an alternate emergency system. During Inspector Payne's investigation no one suggested that there was an alternate emergency communication system. Tr. 61. Blankenship admitted that the miners had never been told "per se" to use the CBs, but after the accident they were instructed to use them. Tr. 217, 220. This failure to instruct miners in the use of the CB radios as an emergency communication system weighs against a conclusion that the alternate system was established and maintained.

The fact that the CBs were the miners' personally owned equipment, not Gatliff's, and that miners were free to decide whether to bring CBs to work, is also inconsistent with the standard's requirement that the emergency communication system be operator established and maintained. That the operator knew that its employees were routinely using CBs, did not disapprove of their use, and aided this practice to the extent of providing cable and antennae for them does not amount to sufficient involvement to constitute operator establishment and maintenance of the system.

In conclusion, we hold that because the CB system was neither operator established, nor operator maintained, it did not satisfy the requirements of section 77.1701. Accordingly, we reverse the administrative law judge's determination that no violation occurred. We remand the case to him for resolution of any remaining issues, including whether the violation

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resulted from the operator's unwarrantable failure, whether it was significant and substantial, and for the assessment of an appropriate civil penalty.<sup>4</sup>

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner

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<sup>5</sup> Chairman Ford did not participate in the consideration or disposition of this matter.