

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

~1372

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

~1373

"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)

3

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

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).

~1375

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 twoway 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

~1376

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

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

L. Clair Nelson, Commissioner

5 Chairman Ford did not participate in the consideration or disposition of this matter.