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MSHA V. GATLIFF COAL
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket Nos. KENT 90-100
	:	KENT 90-215
v.	:	KENT 89-242-R through
	:	KENT 89-252-R
GATLIFF COAL COMPANY, INC.	:	

BEFORE: Holen, Chairman; Backley, Doyle and Nelson, Commissioners

DECISION

BY: Holen, Chairman; Backley, and Doyle, Commissioners

This consolidated contest and civil penalty proceeding, which arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988)(the "Mine Act" or "Act"), involves the emergency communication standard set forth at 30 C.F.R. 77.1701.(Footnote 1) This matter is before the Commission for a second time. The Commission's initial decision reversed the administrative law judge's decision and held that the standard had been violated. 13 FMSHRC 1370 (September 1991). On remand, Commission Administrative Law Judge Gary Melick determined that the violation was neither significant and substantial

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1 The standard provides:

Section 77.1701 Emergency communications; requirements.

> (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.
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> (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.

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("S&S") nor an unwarrantable failure to comply.(Footnote 2) 13 FMSHRC 1641, 1647 (October 1991). The Secretary of Labor timely challenged those determinations and the Commission granted review. For the reasons that follow, we reverse the judge's finding that the violation was not S&S, affirm that the violation was not an unwarrantable failure and remand for reassessment of an appropriate civil penalty.

I.

Factual Background and Procedural History

Gatliff Coal Company, Inc. ("Gatliff") owns and operates a surface coal mine, known as Gatliff No. 1, Job 75, in Whitley County, Kentucky. 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. Two Gatliff employees drove from the mine property to the nearest telephone to summon help. Fuson died as a consequence of the accident.

Because there was no company radio at Job 75 at the time of the accident, the Mine Safety and Health Administration (MSHA) issued Gatliff a section 104(d)(1) order charging a violation of 30 C.F.R. 77.1701.

Gatliff typically maintains three company radios at the mine site. The 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. Tr. 151. Gatliff's standard emergency notification procedure consists of communication via the two-way radios back to the mine office, where there is a telephone. On the night of the accident, however, no company radios were on the job site. Tr. 156.

Before the judge, Gatliff asserted that, although no two-way radio was present at Job 75 at the time of the accident, a CB radio was present. Gatliff argued that use of the CB radio would have enabled the miners to make contact with a nearby Gatliff mine site (Job 74) that did have such a two-way radio on its lube truck. The judge found that the CB radio constituted an "alternate" emergency communication system. 13 FMSHRC 368. The Commission rejected that conclusion:

> 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

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2 The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. 814(d)(1), which, in pertinent part, distinguishes as more serious in nature any violation that "could significantly and substantially contribute to the cause and effect of a ... mine safety or health hazard...." The unwarrantable failure terminology is also taken from section 104(d)(1) of the Act, which, in pertinent part, distinguishes those violations of mandatory health or safety standards "caused by an unwarrantable failure of [an] operator to comply with such mandatory health or safety standards...."

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.... 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.

> ... [B]ecause the CB system was neither operator established, nor operator maintained, it did not satisfy the requirements of section 77.1701.

13 FMSHRC 1375.

Upon remand, the judge determined that the violation was not S&S and that it did not result from the operator's unwarrantable failure.

II.

Disposition of Issues

A. Whether the violation was significant and substantial

The Commission established its test for determining whether a violation is significant and substantial in Mathies Coal Co., 6 FMSHRC 1 (1984). There the Commission set forth the elements the Secretary must prove to demonstrate that a violation is significant and substantial:

> In order to establish that a violation of a mandatory safety standard is significant and substantial ... 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.

Id. at 3-4.

The judge, after setting forth the Commission's Mathies test for evaluating whether a violation is significant and substantial, focused his analysis upon the third element of the test and the Commission's decision in

U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574 (July 1984). In addressing the likelihood of injury in terms of continued mining operations, he stated:

> 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.

13 FMSHRC 1647.

The judge also relied upon the presence of a CB radio at the mine site:

> 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.

Id.

The Secretary contends that the judge erred in his S&S analysis (1) by factoring into his conclusion that the absence of the two-way radio was an aberrant situation that would not ordinarily have existed under normal mining operations, (2) by holding that the violation would not continue into the future, and (3) by relying upon the presence of the CB radio as an available alternative means of communication in the event of an emergency. Sec. Br. at 6, 8. For the reasons stated below, we agree that the judge erred in his determination that the violation was not S&S.(Footnote 3)

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3 We note that the Secretary also urged that the judge's non S&S finding should be reversed on the basis that the emergency communication standard is one of a class of standards that are applicable only when an underlying emergency (such as the truck accident in this instance) has already occurred and therefore, for such standards, the occurrence of the underlying emergency should be presumed. This argument was not presented below and consequently the administrative law judge was not afforded an opportunity to pass on it. For the reasons stated in Beech Fork Processing, Inc., 14 FMSHRC 1316 (August 1992) we do not consider this aspect of the Secretary's challenge. See also section

In U.S. Steel, the Commission said:

> a determination of "significant and substantial" must be made at the time the citation is issued (without any assumptions as to abatement), but in the context of "continued normal mining operations."

6 FMSHRC at 1574.

The Mathies test requires evaluation of the violation at the time of citation, including an examination of the risk of serious injury, given the presence of the violative condition in normal mining operations. In contrast, the judge determined that under continued normal operations the absence of the two-way radio was an aberrant situation. 13 FMSHRC at 1647. He misapplied the third element of the Mathies test in inferring that the violative condition would cease. Accordingly, the judge erred.

In his S&S analysis the judge also relied upon the presence of an employee-owned CB radio at the mine site on the evening of the accident. The judge characterized the radio as an:

> ... alternative means of communication [that] was available at the time at issue from the mine to the nearest point of medical assistance in the event of an emergency.

13 FMSHRC at 1647.

As the Commission stated in its earlier decision, use of CB radios was a voluntary system adopted by the miners utilizing their personally owned radios. There was no evidence in the record that the operator instructed employees to consider CB radios an alternate emergency communication system, nor were the miners trained in the use of CB radios as an emergency communication system. We noted further that the miners were free to decide whether to bring CBs to work and, thus, the CBs did not meet the standard's requirement that the emergency communication system be operator established and maintained. 13 FMSHRC at 1375. The miners did not use the CB at the time of the emergency, but instead drove off the mine property to reach a telephone. The Commission having concluded that the CB radio was not an operator established and maintained emergency communication system, it was error for the judge to consider the CB radio to be an alternate emergency system.

Applying the Mathies analysis to these facts, we conclude that the violation was significant and substantial. First, there was a violation of

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3(...continued)
113(d)(2)(A)(iii) of the Act, 30 U.S.C. 823(d)(A)(iii), which provides, in pertinent part, that "[e]xcept 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.

30 C.F.R. 77.1701; no operator established two-way radio was present at the mine site. Second, there was a discrete safety hazard or measure of danger to safety created by the violation; the absence of the two-way radio created a delay in responding to the accident because miners had to leave the property to seek help. The record demonstrates that the third and fourth elements, a reasonable likelihood that the hazard contributed to would result in an injury and a reasonable likelihood that the injury would be of a reasonably serious nature, were established. Accordingly, we hold that, under these circumstances, the violation was significant and substantial.

B. Whether the violation resulted from the operator's unwarrantable failure

The Commission has explained that unwarrantable failure is:

> aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. Emery Mining Corp., 9 FMSHRC 1997, 2004 (December 1987); Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007, 2010 (December 1987). This determination was derived, in part, from the ordinary meaning of the term "unwarrantable failure" ("not justifiable" or "inexcusable"), "failure" ("neglect of an assigned, expected or appropriate action"), and "negligence" ("the failure to use such care as a reasonably prudent and careful person would use, characterized by "inadvertence," "thoughtlessness," and "inattention"). Emery, supra. 9 FMSHRC at 2001. This determination was also based on the purpose of unwarrantable failure sanctions in the Mine Act, the Act's legislative history, and on judicial precedent.

Drummond Co., Inc., 13 FMSHRC 1362, 1366-1367 (September 1991).

In addressing whether the violation was unwarrantable, the judge stated:

> [I]n 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.

13 FMSHRC at 1647.

The Secretary, citing Emery, 9 FMSHRC 1997, 2003-04, asserts that conduct constitutes unwarrantable failure if the operator "knew or should have known" that the conduct would result in a violation. Sec. Br. at 11. Noting that the Commission earlier held that the two-way radio was the only

established and maintained means of emergency communication, the Secretary contends that:

> ... the foreman, who had full management responsibility for overseeing events at the site, `knew or should have known' that his conduct would violate [the standard] and would leave the miners with no adequate means of summoning assistance if, as indeed happened, one of them suffered a serious injury.

Sec. Br. at 11. On this basis the Secretary asserts that the foreman's removal of the two-way radio from the mine site was unwarrantable. Id. at 12.

Gatliff, like the Secretary, points to Emery for its authority. The operator takes issue with what it views as the Secretary's out-of-context use of the "should have known" language in Emery, noting that the Secretary's position would equate unwarrantable failure with ordinary negligence. Gatliff notes that in Emery the Commission distanced itself from the interpretation urged by the Secretary. Gatliff Br. at 6, citing Emery, 9 FMSHRC at 2004.

The judge erred in considering the presence of a miner's CB radio as an alternative means of emergency communication. Consequently, he also erred in viewing the CB radio as a mitigating factor in evaluating whether the violation was unwarrantable. Nonetheless, the judge's finding that the absence of the two-way radio was attributable to ordinary negligence is supported by the record.

While it is true that the foreman drove off the mine property in the truck with the two-way radio in it, there is no evidence in the record that this was due to anything beyond inadvertence. Indeed, at trial no evidence was elicited on the foreman's state of mind, or on the custom, practice or circumstances surrounding the removal of the two-way radio from the mine site. See Tr. 148-156.

Although the foreman's actions may have been negligent, the Commission has explained that negligence and unwarrantable failure are not synonymous terms:

> The terms "unwarrantable failure" and "negligence" are distinguished in the Mine Act. A finding by an inspector that a violation has been caused by an operator's unwarrantable failure to comply with a mandatory health or safety standard may trigger the increasingly severe enforcement sanctions of section 104(d). 30 U.S.C. 814(d). Negligence, on the other hand, is one of the criteria that the Secretary and the Commission must consider in proposing and assessing, respectively, a civil penalty for a violation of the Act or of a mandatory health or safety standard. 30 U.S.C. 815(b)(1)(B) & 820(i). Although the same or similar factual circumstances may be included in the Commission's consideration of unwarrantable failure and negligence, the concepts are

> distinct. See Quinland Coals, Inc., 7 FMSHRC 1117, 1122 (August 1985); Black Diamond Coal Co., 9 FMSHRC 1614, 1622 (September 1987). Nevertheless, as explained in Emery, [9 FMSHRC 1997] and Youghiogheny & Ohio, [9 FMSHRC 2007] aggravated conduct constitutes more than ordinary negligence for purposes of a special finding of unwarrantable failure. "Highly negligent" conduct involves more than ordinary negligence and would appear, on its face, to suggest an unwarrantable failure. Thus, if an operator has acted in a highly negligent manner with respect to a violation, that suggests an aggravated lack of care that is more than ordinary negligence.

Eastern Associated Coal Corp., 13 FMSHRC 178, 186 (February 1991).

There is substantial evidence in the record to support the judge's conclusion that the foreman's actions constituted no more than ordinary negligence. Thus, we affirm that the violation was not unwarrantable.

C. Civil Penalty

Following the Commission's earlier remand, the judge, after finding the violation to be neither S&S nor unwarrantable, modified the order to a section 104(a) citation and assessed a civil penalty of $50. Although we have affirmed the judge's holding that the violation was not unwarrantable, we have reversed his finding as to S&S. Accordingly, this matter is remanded for reassessment of the civil penalty in light of our determination that the violation was S&S.

III.

Conclusion

For the foregoing reasons, we reverse the judge's finding that Gatliff's violation of 30 C.F.R. 77.1701 was not significant and substantial, affirm the judge's determination that the violation was not unwarrantable, and remand for the assessment of an appropriate civil penalty.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Commissioner Nelson, concurring in part and dissenting in part:

I must dissent solely with regard to the majority's affirmation of the ALJ's determination that the violation did not constitute unwarrantable failure. Such affirmation seemingly results more from concern with fine points in preceding decisions than with concern for basic fundamentals expressed in the Mine Act with regard to miner safety.

Our governing statute states at the outset (in Section 2(d) and (e)) that the operator of a mine -- with the assistance of the miners -- has primary responsibility to prevent the existence of unsafe conditions and practices in the mine. Section 2(g) authorizes the Secretary of Labor to promulgate mandatory safety standards to protect the safety of every miner.

Here we have a mandatory safety standard requiring the operator to establish and maintain a communication system for use in an emergency. The essential component of the communication system established for use at this mine site, i.e., a two-way radio, was removed from the site by a foreman and never returned during some nine hours prior to the occurrence of an accident resulting in a fatality.

The majority observes that evidence in the record indicates only that the foreman acted inadvertently in removing the two-way radio from the mine site where the accident occurred nine hours later. (In fact, it is abundantly clear that the absence of a two-way radio persisted through one shift and into another shift, unless the shift periods exceeded eight hours.)

My observation is to the effect that the record clearly demonstrates highly negligent conduct on the part of the mine operator in failing to provide requisite attention to the training of supervisory employees in order to assure compliance with an extremely important safety standard requiring the presence of an emergency communication system at this mine site. The absence of a fundamentally essential component of the requisite emergency communication system for a period of at least nine hours sufficiently establishes, in my view, highly negligent conduct constituting unwarrantable failure on the part of this operator.

L. Clair Nelson, Commissioner