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September 4, 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	)	CIVIL PENALTY PROCEEDING Docket No. VA 2013-169-M A.C. No. 44-00082-309415
v.	)	Docket No. VA 2013-191-M A.C. No. 44-00082-312088
LHOIST NORTH AMERICA OF VIRGINIA, INC., Respondent	)	Mine: KIMBALLTON PLANT #1

DECISION AND ORDER

Appearances: Willow E. Fort, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, TN for the Petitioner

Charles H. Morgan, Alston & Bird, LLP, Atlanta, GA for the Respondent

Before: Judge Rae

This case is before me upon petitions for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(d).

A hearing was held in Blacksburg, VA. The parties submitted post-hearing briefs which have been considered. The docket consists of one citation and four orders that arose out of a two-day inspection made by Mine Safety and Health Administration ("MSHA") inspector Billy Joe Ratliff[1] which commenced on October 10, 2012. For the reasons set forth below, I find the Secretary has met his burden of proof on all cited violations as issued.

FACTUAL BACKGROUND

The parties stipulated that: 1) Lhoist was the operator of the Kimballton Plant #1, Mine ID No. 44-00082; 2) The Kimballton Plant #1 is a "mine" as that term is defined in Section 3(h) of the Federal Mine Safety and Health Act ("Mine Act" or "Act"), 30 U.S.C. § 802(h); 3) The products of the mine entered commerce, or the operations or products thereof affected

[1] Billy Joe Ratliff has been a certified mine inspector for nine years. He is also a trained accident investigator and spent five years in law enforcement on several police and sheriff's departments. He also has nine years of mining experience including working with explosives. Tr. 12-17. He had been inspecting the Kimballton mine since 2005. Tr. 21.

commerce, within the meaning and scope of Section 4 of the Act, 30 U.S.C. § 803; 4) Lhoist is an "operator" as defined in Section 3(d) of the Act, 30 U.S.C. § 802(d); 5) Lhoist's operations and this mine are subject to the jurisdiction of the Act; 6) The hearing of these dockets is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Sections 105 and 113 of the Act; 7) Inspector Ratliff was acting in his official capacity and as an authorized representative of the Secretary when he issued the citation and orders; 8) True copies of the citation and orders were served on Lhoist as required by the Mine Act; 9) The total proposed penalty for the dockets herein will not affect Lhoist's ability to continue in business; 10) The Proposed Assessment (Form 1000-179 (MSHA)) contained in Exhibit A attached to the petition accurately sets forth the size of respondent in production tons or hours worked per year, the size of respondent of the mine at which the violations were issued, the total number of assessed violations in the preceding 24 month period, and the total number of production days for the preceding 24 month period; 11) The Secretary's copies of the citation and orders are authentic; 12) The Secretary's exhibits are authentic copies; 13) Respondent's copies of the citation and orders are authentic; and, 14) Respondent's exhibits are authentic. Joint Ex. 1.

The Kimballton mine is the deepest underground limestone mine in the country and has been in operation since 1947. Some areas of the mine are 2300 feet deep and the individual tunnels range between 100 and 125 feet tall. Tr. 188-9. The entries are approximately 45 feet wide and 35 feet in height. The limestone is mined by explosives. The normal blasting cycle begins with loading the blasting rig with ANFO, which is a solid explosive agent consisting of essentially fertilizer and diesel fuel. The rig pulls up under the bulk tank and the ANFO is released into a large steel tank which is also known as the ANFO pot located at the rear of the rig. The blasting rig is then driven to the face that is to be blasted where the ANFO is pumped through a hose from the pot using compressed air into the holes drilled into the face of the stone. The rig is equipped with a boom and a basket which raises the miner up to feed the ANFO into the holes drilled on the upper part of the face. Tr. 43. The rig then moves on to the next face to be loaded for blasting. Once the shot is made, the loose material is then loaded onto haul trucks and brought to an underground crusher. It is then transported by conveyor up the slope and out to an exterior storage area. Tr. 29. At the completion of the cycle, the rig is then brought to a wash-down area for cleaning. The mine operates in two shifts; the evening shift is responsible for drilling and blasting the face in order to provide ample time for dust and gases raised during the blasting to settle before mining continues on the day shift. Tr. 27-35. Typically, this mine uses a Getman blasting rig on which the ANFO pot is welded and bolted on the rear of the vehicle. Tr. 50, 177, 182. At the time these violations were found, the mine was using a different vehicle as a blasting rig.

In response to an anonymous hazard complaint, MSHA Inspector Billy Joe Ratliff went to the Kimballton mine. He did not find any hazards as a result of the complaint; however, while there, he requested a meeting with all miners in the underground 10 East lunchroom to discuss another issue. A rank-and-file miner told Ratliff to take a look at the truck being used as a blasting rig which was parked directly outside. Tr. 169. What Ratliff found was a Ford F-250 pickup truck that had an ANFO pot rigged in the bed with a compressor hitched behind the truck. Tr. 41-2. He learned upon further investigation that on October 4th the transmission on the Getman blasting rig had given out. Management directed the employees on Monday, October 8th to rig the pickup as a blasting rig. This was accomplished by placing an ANFO pot that had

been taken off an old Volvo blasting rig directly behind the cab of the truck and tying a series of climbing ropes, straps, and ratchets around the pot. Tr. 52, 105, 108-12. The pot was a large cylindrical tank positioned in an upright manner with the top extending several feet above the roof of the truck. Ex. S-3 p.3 Photo.

Because the pickup truck was significantly smaller than the Getman rig the manner in which it was used in the blasting sequence was very different from the norm. It was too small to pull under the bulk tank to load the ANFO into the pot. Instead, the truck was being driven to the face that was to be blasted where it was met by a flatbed truck carrying 50 pound bags of ANFO. Tr. 48, 74. The ANFO bags were handed off from one miner standing on the flatbed truck to a miner standing on the rear of the pickup truck and then the miner lifted the bags overhead and poured the ANFO by hand into the pot through a funnel located at the top of the tank. Tr. 48, 63, 74-6. In order to access the funnel, the miners were standing on the side rails of the pickup truck's bed or on the roof of the truck. Tr. 64. The truck was used in this fashion on the night of October 8th. The next morning a miner put in a work ticket for a safe way to load the pot because the tank was too tall and the bags had to be lifted overhead. Tr. 201; Ex. R-5. Mine Manager Luxbacher[2] called down to the repair shop to ensure this work order was being fulfilled and a small platform was placed in the truck bed before it was used again on the night of the 9th. *Id.* The miners informed Ratliff, however, that they continued to stand on the rails and roof of the truck because the platform, or step, would shift and slide under their feet. Tr. 64. They also stood on the side of the truck when the ANFO bags were being transferred from the flatbed to the pickup truck because they could not reach out far enough from the platform. Tr. 74.

Based upon his observations of the pickup truck and the conversations with the miners, Ratliff issued one citation and five orders discussed herein.

LEGAL PRINCIPLES

Significant and Substantial/Gravity

A significant and substantial ("S&S") violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d). A violation is properly designated S&S "if, based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). As is well recognized, in order to establish the S&S nature of a violation, the Secretary must prove: (1) the underlying violation; (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 will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *see also Buck Creek Coal Co., Inc.*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

[2] Luxbacher has been mine manager for five years and has been in the mining industry for ten years. He is a graduate of Virginia Polytechnic Institute and State University with a degree in mine engineering. Tr. 187-90.

It is the third element of the S&S criteria that is the source of most controversies regarding S&S findings. The element is established only if the Secretary proves "a reasonable likelihood the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985). An S&S determination must be based on the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.*, 10 FMSHRC 1125 (Aug. 1985); *U.S. Steel*, 7 FMSHRC at 1130.

The S&S nature of a violation and the gravity of a violation are not synonymous. The Commission has pointed out that the "focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996).

Negligence/Unwarrantable Failure

Negligence is conduct which falls below the standard of care established under the Mine Act. Under the Act an operator is held to a high standard of care and is required to be on the alert for conditions and practices that may cause injuries and to take necessary precautions to prevent or correct them. 30 C.F.R. § 10.0(d). High negligence is defined as when "[t]he operator knew or should have known of the violative condition or practice, and there were no mitigating circumstances." 30 C.F.R. § 100.3 Table X.

In *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001), the Commission reiterated the law applicable to determining whether a violation was the result of an unwarrantable failure:

> The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991) ("*R&P*"); *see also* [*Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995)] (approving Commission's unwarrantable failure test).
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> Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000) . . . ; *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14

FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol,* 22 FMSHRC at 353. Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998).

It is not necessary to find that all factors are relevant or deserving of equal weight in order to determine that a violation is unwarrantable. *IO Coal*, 31 FMSHRC 1346, 1351 (Dec. 2009); *Eastern Associated Coal Corp.*, 32 FMSHRC 1189 (Oct. 2010).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Citation No. 8639930

This safe access Section 104(d)[3] citation was written in accordance with 30 C.F.R. § 57.11001 which requires that all working places have a safe means of access provided and maintained. It was issued because a safe means of access to load the ANFO pot on the Ford F-250 pickup truck was not provided. The miners were using the roof, side rail or unsecured step without handrails to load the 50 pound bags of ANFO into the top of the tank. Ratliff noted in his citation that the truck had been used in this fashion since October 8, 2012 and that this was not the first time the tank had been used on the back of the truck.

Ratliff assessed the gravity of the violation as reasonably likely to result in a fatal accident to one miner, S&S, and the result of high negligence. He issued the citation as an unwarrantable failure to comply with the standard because Luxbacher was aware of the danger and allowed the pickup truck to be put into service. Ex. S-1. The Secretary has proposed a specially assessed civil penalty in the amount of $11,900.00.

In addition to the previously stated facts, Ratliff considered several additional facts in issuing this citation. As he testified, the ANFO pot was loaded at the face where lighting was poor. Tr. 61-2. The bed of the truck had a plastic liner which made the unbolted step (or platform) shift easily when a miner stepped on it. An employee told Ratliff because of the way the platform was positioned in the truck bed, the miner on the truck would have one foot on the side rail and one foot on the unsecured shifting platform in order to reach for the bag of ANFO being passed to him from the flatbed truck. Tr. 75. When a miner was lifting bags overhead, this platform became an elevated working place. Neither a handrail nor fall protection was provided. Tr. 60, 72-3. Additionally, because ANFO contains diesel fuel, it can be slippery if spilled. There was residue in the bed of the truck apparently from spillage. Tr. 59-68. All of

[3] Section 104(d) of the Mine Act states in relevant part, "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 a nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health standard, 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."

these factors led to the inspector's determination that the miners did not have safe access to the ANFO pot creating a slip and fall hazard in violation of this standard.

Luxbacher testified that he reviewed the repair ticket submitted by a miner on the morning of October 9th requesting a safe means of accessing the pot. He called the repair shop to ensure the platform would be available on that night shift. Tr. 199-200. It is his position that providing the platform made access to the pot safe at least as of the night of October 9th. *Resp.'s Post-Hearing Br.* He stated that he "believed" that the bags were only lifted to chest height but he was not "positive" of that. Tr. 221. He also testified that before Ratliff arrived at the lunchroom and saw the truck, he (Luxbacher) climbed into the bed of the pickup truck to inspect it for ANFO residue and cleaned ANFO pellets that had spilled around the top of the pot. Tr. 205. Luxbacher also confirmed that he was well aware that this F-250 pickup truck had been used in the same manner as a blasting rig in the past and that he issued the order to the foreman to put the system back on the truck when the Getman rig was taken out of service. Tr. 195.

I reject Lhoist's position that the violation was abated with the installation of the platform. A reasonable person would recognize that the miners still had to lift the bags overhead to load the pot which necessitated standing on an unsecured platform and standing on the side rails and the roof of the truck. The violation has been established.

In Ratliff's opinion, this violation was S&S. The platform was not bolted or otherwise properly secured in the bed of the truck. The bed liner was made of plastic which caused the platform to slip under the weight of the miner's feet. ANFO was spilled creating a slippery surface as well. The lighting was poor and the bags were heavy. There were straps, ropes, hoses and other material cluttering the area. A miner could easily lose his balance, slip, or trip when stepping on this wobbly platform or the roof or sides of the truck resulting in a head injury from striking the corners of the truck or pieces of equipment in and around it. Tr. 73. Breaks, bruises and sprains were also reasonably likely consequences of a fall. Tr. 74.

An inspector's opinion of an S&S violation is entitled to substantial weight. *Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995). Based upon the circumstances present here, I find the inspector to be credible and his opinion is supported by the evidence. I find this violation to be S&S.

The gravity of this violation is very serious. The hazard created by management put the miner filling the ANFO pot at a substantially likely risk of a fatal injury.

The inspector marked the negligence involved in this violation as high because management directed the miners to rig up the pickup truck in this manner. It had been done before in the same way. This was confirmed by Luxbacher at trial. Tr. 195. Blaster Darrell Haymore testified that he had been the one to rig it in this manner on October 8th and knew how to do it because he had done it the same way before. Tr. 173. Miners Gregory Parcell and Melvin Whitaker also confirmed that it had been in service in this condition during two night shifts before Ratliff issued the violations and it was taken out of service. Tr. 176, 180.

I do not find the installation of the platform a mitigating factor for the reasons set forth above. High negligence is appropriate.

The Secretary has assessed this violation as unwarrantable failure. Lhoist had notice that the transmission on the Getman rig was failing at least as early as October 4th and took no action

to procure a rental from any source. Ex. R-4. Indeed, Luxbacher testified that he made no efforts to do so prior to the citation being issued to Lhoist. Tr. 219-20. There were numerous cords, ropes and other items coupled with spillage of ANFO in the bed of the truck which posed an obvious slip and trip hazard that had been uncorrected. In fact, the truck had been used in the same manner in the past and was ordered by Luxbacher to be put back in service without any modifications. Additionally, this was the seventh unsafe access violation issued at this mine putting Lhoist on notice that greater compliance efforts were necessary. Tr. 84.

Lhoist admits that safe access "may have been lacking" on the night of October 8th but having been made aware of the issue on the morning of the 9th it took prompt action to install the step, or platform, after a miner had requested a safe means of access. This prompt response does not rise to the level of aggravated conduct in its opinion. *Resp.'s Br. at 9.* Alternatively, it argues that if access to the pot remained unsafe thereafter, Luxbacher was unaware of it and the violation was not obvious. There were no further complaints from the miners and he used it himself and did not notice any problems with it. Tr. 207; *Resp.'s Br. at 10.* I find this argument troubling. Management is held to a higher standard of care than the rank-and-file miner. It should not wait for a miner to make a safety complaint or to be injured before it becomes aware of a hazard such as this. Management should be ever vigilant for such hazards and be proactive in eliminating them. It would have been obvious to even a lay person that the manner in which the ANFO pot was set up on this truck posed a serious risk of injury. The pot was filled through a funnel or cone located at the top which was positioned several feet above the roof of the truck. Ex. S-9 p.8 photograph. It was readily apparent that in order for the miners to pour the 50 pound bags of ANFO into the pot they would have to climb on the side and/or roof of the truck to do so. The truck was employed throughout the night shift of October 8th in this condition. Luxbacher was also aware that it had been rigged the same way in the past and he should not have waited until a miner came forward to complain about the unsafe manner in which they were working.

Ronald Munsey[4] was the night shift foreman at the time of this inspection. It was his responsibility to direct the location of the shots, check readings, and supervise the men. Tr. 88. He should also have been aware of the manner in which the miners were accessing the pot.

Despite Luxbacher's claims that he was unaware that the step failed to eliminate the safe access violation, he admitted that on October 10th, he climbed aboard the pickup truck, inspected the cone, or funnel, at the top of the pot and cleaned spilled ANFO material from it. He therefore had to have been aware that the platform was not bolted or otherwise properly secured to the bed of the truck allowing it to move underfoot. He also would have to have noticed that the platform did not alleviate the miners' need to reach overhead and lean forward to access the funnel. *See* photograph at Ex. S-3 p.3. In fact, on cross-examination he as much as admitted this fact. Tr. 221. Further, he was aware, or should have been, that the bags of ANFO were being brought to the face on a flatbed truck and were being handed across the back of the flatbed to the miner on the pickup. As the miners interviewed by Ratliff described it, this would require the miner loading the pot to perform a balancing act with one foot on the unsecured step and one on the side of the truck to transfer the bags from the flatbed to the pickup truck. They told Ratliff that the platform would wobble and shift as they performed this maneuver. Clearly they were still concerned for their safety as one miner suggested to Ratliff that he take a look at the truck while it was parked by the lunchroom. Tr. 169. The night foreman would have been present during

[4] Munsey was deceased at the time of this hearing.

the blasting cycle and would certainly have been aware that the platform was not providing them with safe access to the pot. Tr. 87-8. Luxbacher's claim that management was unaware of the violation and that it was not obvious after the platform was installed is not credible.[5]

Placing the platform in the bed of the truck did not make access to the pot safe. It also was not a reasonable attempt to abate the violation. Having been made aware that the miners were concerned for their safety in loading the ANFO pot, it would have been prudent and reasonable for Luxbacher or the night foreman to have inspected the step on the 9th to insure it was properly installed and secured before the truck was used on the second night. It also would have been reasonable for management to contact one of the companies that leased blasting rigs to obtain another until the Getman was repaired. Ratliff testified that he contacted Austin Powder and Orica and was told a rig with a driver could be rented which would have been a safer option than rigging the ANFO pot on the back of a pickup truck. Tr. 57. Another way to have abated the violation would have been to cease blasting until the repairs could have been made to the Getman rig. In any event, putting an unsecured step that wobbled and shifted underfoot in the back of the pickup truck that did not alleviate the need to lift heavy bags overhead and climb on the side or roof of the pickup truck cannot be considered a reasonable step to abate the violation.

The combination of factors that made this violation obvious also posed a high degree of danger to the miners. In the event a miner should trip on the many obstacles located on and around the tank or slip on the roof or side rails of the truck or lose his balance when stepping on the platform that wobbled and shifted underfoot, there was a very high degree of probability that a serious injury would result. As the inspector testified, there were sharp corners and hard objects in the area such as a toolbox, the tow hitch, the platform itself, and the ground below that could cause fatal head injuries or other serious injuries.

The violation did not exist for a brief period of time as suggested by the Respondent. This was the second time management had put this make-shift rig into service. It had been used this second time on the night of October 8th and 9th in this violative condition. It would have been used again on the 10th and for an untold number of nights thereafter had it not been for Ratliff's intervention. Taking into consideration that this was the second time it was used in this manner without the danger being recognized or remedied coupled with the very short time in which it would take for a miner to lose his balance and fall suffering a serious or fatal injury, the amount of time miners were exposed to the violative condition was excessive. Furthermore, in a situation where the violation existed for a relatively brief period of time, the high degree of danger posed by the hazardous condition and its obvious nature may still lead to an unwarrantable failure determination. This is especially so when management is involved in creating the danger. *Sec'y of Labor v. Midwest Material Co.*, 19 FMSHRC 30 (Jan. 1997); *Capitol Cement Corp.*, 21 FMSHRC 883 (Aug. 1999).

[5] In assessing Luxbacher's credibility, I have also considered the fact that at the time of this hearing a Section 110(c) investigation was pending which could result in subjecting him as an individual to civil penalties for knowingly authorizing, ordering, or carrying out a violation under the Mine Act.

The inspector noted on his citation that Lhoist had received seven prior safe access violations, which I deem sufficient to have put them on notice that greater efforts at compliance with this standard were necessary.

For all of the above reasons, I find that this violation is an unwarrantable failure to comply with the safe access standard.

Order No. 8639931

This Section 104(d) order was issued in violation of 30 C.F.R. § 57.13011 which requires all air receiver tanks be equipped with one or more automatic pressure-relief valves and indicating pressure gauges which accurately measure the air pressure in the tank. This ANFO tank had neither gauge on it although it did when it was on the Volvo rig.

The inspector assessed the gravity as reasonably likely to result in a fatal accident, S&S, affecting two miners with high negligence. Ex. S-4. The Secretary has proposed a civil penalty in the amount of $4440.00.

Lhoist admits to the violation and contests only the unwarrantable failure designation.

Ratliff testified that the compressor hitched behind the truck sends air into the ANFO pot where it pushes the explosive agent through the tank into the hoses and delivers it to the drilled blast holes. The relief gauge and the indicating gauge are both designed to prevent the receiving tank from rupturing in the event of over pressurization. The former off gasses excess pressure while the latter provides an accurate reading of the amount of pressurized air in the tank. Ratliff was told by a miner that he had asked Luxbacher when transferring the tank from the old Volvo rig to the pickup whether the "pop-off" valve was needed. Luxbacher responded in the negative. Tr. 97. Luxbacher denies any recollection of this. Tr. 208. The tank was equipped with these two gauges when it was on the Volvo rig but they were removed and based upon Luxbacher's direction, were not put back on. Tr. 97, 103.

The compressor itself is equipped with a regulator which shuts the compressor down when it gets up to a certain pressure. It is also equipped with a one-way back pressure relief valve which would prevent any pressure that exceeds the capacity of the compressor from over pressurizing it. Neither protects the ANFO pot from being over pressurized. Tr. 99. The ANFO tank was re-plumbed and reconfigured with different fittings and hoses when it was installed on the pickup. As a result, there would be no way to know what its maximum pressure capacity was. A recertification and rating would be needed to make this determination. Tr. 100-2. Striking the proper balance between the two components was now left up to chance. I find under continued normal mining operations, an over pressurization and rupture of the tank was reasonably likely to occur. Should the tank rupture, it could impale someone or the compression could cause a miner to fall and strike his head or other body part against hard objects in the immediate vicinity causing a fatal or serious injury. Tr. 95-6.

I find the evidence is sufficient to satisfy the *Mathies* criteria.

The gravity of this violation is very serious, affecting two miners.

Negligence/Unwarrantable Failure

Lhoist contests the unwarrantable failure assessment, addressing three points. First, Luxbacher testified that he did not consider the ANFO pot an air receiver tank. He did not know or have reason to know that the tank did not have the gauges or that they were needed. Secondly, the tank was in service for just two days before it was removed from service. Lastly, the Secretary did not meet his burden of proving the elements of an unwarrantable failure. The inspector offered no testimony regarding his reasons for designating this violation as unwarrantable.

The Secretary argues that although the inspector determined that the operator acted with high negligence, the evidence as a whole supports a finding of a complete disregard for the safety of the miners. *Sec'y's Br. n.6.* In fact, the inspector stated that he felt the negligence was high because the operator was aware of the missing gauges when a miner asked Luxbacher if the pop-off gauge was needed. It was an unreasonable belief on the part of Luxbacher that it was not. Tr. 103. I find no mitigating factors present to reduce the high negligence.

With respect to unwarrantable failure, I find the operator knew or should have known that the ANFO tank was an air tank and that the violation existed. Luxbacher has his mine engineering degree from Virginia Polytechnic Institute and State University. As an engineer, it should come as no surprise to him that a tank that receives air from a compressor is an air receiver subject to this mandatory standard. Additionally, as a mine manager, he is responsible for complying with the mandatory standards of the Act. Section 57.13015 requires that all air receivers be inspected by a qualified inspector with records kept available for the Secretary. The ANFO pot, whether mounted on the pickup truck or on the other blasting rig, would be subject to this inspection and record keeping requirement. The mine manager is charged with having knowledge of this provision and complying with it. This requirement, coupled with the fact that the pot had these gauges on it before it was removed from the Volvo rig, confirms that Luxbacher, at the very least, should have known this piece of equipment was an air receiver requiring the two gauges. His claim that it just didn't occur to him detracts greatly from his credibility. On the other hand, Ratliff's testimony is credible and establishes that management was aware of this violation. I also find that in addition to being known to management this violation was knowingly authorized by management.

The danger posed by not having the pressure relief valve in particular is obvious. It is common knowledge that a contained tank that receives pressurized air, water or gas is subject to explosion if it becomes pressurized beyond its tolerance level. Safety measures are critical to prevent this from occurring. The relief valve performs this function. The indicator gauge would normally also contribute a measure of safety by providing a visual reading of the pressure in the tank. In this case, however, the tank was reconfigured so that there was no way to determine its safe working pressure. Knowing how much pressure was in it would not, by itself, provide sufficient warning of its being over-pressurized, making this violation additionally aggravated. The danger posed by a tank of this size blowing apart requires little elaboration. Ex. S-9 p.1-12. The miner loading the tank would be standing within inches of it during the blasting cycle.

The absence of the gauges was also obvious. Because the two gauges were an integral and critical component of the tank their absence would be readily apparent to one using or

inspecting the tank. Their absence certainly became apparent to management when a miner asked management whether the pop-off valve should be put back on.

The violation existed for two night shifts before Ratliff interceded and this rig was taken out of service. An explosion of an over-pressurized tank can happen in an instant. Using this rig for one shift was excessive; two was unfathomable. Had Ratliff not interceded, there is no doubt it would have been used until the transmission work on the Getman rig was completed. I find the violation, under the specific circumstances of this case, was extensive and existed for an unreasonably long period of time without any action taken to abate the violation.

Absent in the record is any evidence of mitigation by the Respondent. The unwarrantable failure is appropriate.

Order Number 8639932

30 C.F.R. Section 57.14100(b) states "defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons." This order was written because the inspector found that the ANFO tank was not properly secured to the truck creating a hazard to persons. Specifically, he recorded that climbing straps, rope, and a ratchet strap were wrapped around the top of the tank and had become loose. There was also a loose fitting at the top of the tank through which 120 psi of air was being pushed.

The violation was marked as reasonably likely to result in a permanently disabling injury to one person, S&S, and the result of high negligence. Ratliff also found it to be an unwarrantable failure on the part of Luxbacher. This standard had been cited six times in the preceding two years. Ex. S-7. The Secretary proposes a penalty in the amount of $16,400.00.

The tank was not welded or bolted to the bed of the truck in the usual fashion as confirmed by Lhoist's witnesses. Tr. 177, 182. It was held in place by a series of climbing ropes, regular rope and tightening ratchets. The ends of the ropes were secured with some fashion of knots which Ratliff described as "granny knots" similarly used to tie shoe laces. One end of the rope was attached to a tool box in the bed of the truck. Tr. 112. The ratchet was wrapped around the top of the tank and hooked into itself. Tr. 105-16; Ex. S-3 and Ex. S-9, photographs. The straps and ropes were loose and the tank moved easily as did the fittings supplying the pressurized air to the tank, according to Ratliff. The straps and ropes were soaked in ANFO which could decrease their load bearing capacity and no one Ratliff spoke at the scene was able to tell him the load rating for the straps and ropes which was of concern to him as well. Tr. 107, 118. The truck is driven inside the mine creating a danger of the tank falling out of the truck during transportation injuring persons in the area, in Ratliff's opinion. Tr. 118-19.

Ratliff reached the conclusion that the condition created a defective piece of equipment which posed a danger to miners in the event it fell off the truck while moving or tipped while a miner was leaning against it. Ratliff was aware that the truck had been used in this manner on the night of the 8th and 9th and was ready to be used again on the 10th had he not interceded. Miners Darrell Haymore, Gregory Parcell, Melvin Whitaker, Jr., and Steven Chandler, all Lhoist witnesses, confirmed this information. Tr. 172-4; 176-8; 180-2; 185.

Lhoist argues that a violation has not been proven. It claims that Ratliff's basis for concluding defects existed was purely speculative because he was not aware of the load rating

for the climbing straps or whether they would deteriorate or weaken when exposed to ANFO. He also could not properly identify the type of knot used on the ropes. *Resp.'s Br. at 12-13.* Luxbacher testified that the McMaster-Carr chart lists nylon as resistant to oil and grease and therefore these ropes were capable of holding the tank in place. He admitted on cross-examination that the information given on that website does not say the rope is resistant to ANFO. In fact, the McMaster-Carr chart Luxbacher referred to states that fibrous nylon rope material is resistant to rot and mildew; it says nothing about oil and grease. It also states that all nylon ropes can stretch and lose strength when wet. *See www.Mcmaster.com, fibrous rope material.* Luxbacher described the knots Ratliff called "granny knots" as "water knots" which as a former climber he knows are strong climbing knots. Tr. 212. The water knot, however, is designed to join two pieces of rope together, not to loop around an object and tie back onto itself as was done here. It is also known to slip requiring inspection before each use. In climbing, it is known as the death knot for its fallibility. *See www.Wikipedia.com, water knots.* Luxbacher further admitted that he did not know if the ropes used on the pot were used or new. Tr. 222-3. He was also not aware of their load rating. Tr. 223.

It is not necessary to consult these reference materials, however, to determine that Ratliff's opinion was far more than speculative. The photographs introduced by the Secretary make clear to even a lay person, let alone someone familiar with the mining industry as Ratliff is, that the ANFO pot was rigged up in a make-shift manner. The ropes and straps were wrapped and looped in a haphazard fashion through and around various hoses, the framework of the unsecured platform, the tank and other objects in the truck bed. The ends of the ropes were frayed and damaged. Ex. S-9. Additionally, Ratliff observed first-hand that the ropes and straps were loose from use and the pot was able to be moved easily. Although Luxbacher claimed he did not notice the tank was unstable when he cleaned ANFO off it on the 10th, Steven Chandler, Lhoist's witness, confirmed that the tank had tilted and had some movement. Tr. 212, 185. Miners Gregory Parcell and Melvin Whitaker, Jr., testified that they felt bolting and welding the tank was more secure than tying it with these straps and ropes. Tr. 178, 182. I find Lhoist's argument unpersuasive.

Lhoist also argues that the truck was out of service when Ratliff observed it and there was no evidence that it would not have been corrected prior to use. I find this argument also fails. The truck was in the same condition it had been in since management told Haymore and another miner to rig it up on the 8th. Tr. 172-4. The truck was rigged and ready for use on the 10th as well. In fact, it was not until Ratliff found the violations on the 10th that the afternoon shift foreman called Luxbacher to tell him they would need to take it out of service, as Luxbacher testified.. Tr. 206. Based upon these facts, the truck was available for use and was not out of service. A piece of equipment can be inspected and cited as long as it is not tagged out and parked for repairs. *Alan Lee Good, an individual doing business as Good Construction,* 23 FMSHRC 995, 997 (Sept. 2001). As long as a piece of equipment is available for use, it must comply with MSHA safety standards. *Ideal Basic Indus., Cement Div.*, 3 FMSHRC 843, 844 (Apr. 1981).

Next, Respondent raises the notice requirement. As noted above, this violation would have been apparent to a lay person. The photographs depict a tower of a tank extending far above the roof of the truck's cab haphazardly looped and tied with frayed ropes and straps tied to unsecured objects in the bed of the truck. It appears to be off balance without being secured in all directions. Lhoist states that each of its miners who appeared as witnesses are competent and

experienced and each testified that the tank did not pose a hazard. I recognize that these witnesses were well aware they were called to support the Respondent's position. I also take notice of the fact that each of them on cross-examination admitted that they would have been more comfortable with the tank being welded and bolted to the bed as was done with the other rigs. I find this more telling than their assertions that it was safe. It also bears repeating that a miner told Ratliff to take a look at the truck when it was parked outside the lunchroom. Clearly, the miners had concerns for their safety. The standard to be applied here, as Respondent notes, is whether a reasonably prudent person familiar with the mining industry would have recognized that the manner in which this tank that was loose and tilting was tied up posed a hazard and would have removed it from service. *La Farge North America,* 35 FMSHRC 3497 (Dec. 2013). The answer to that is resoundingly, yes.

S&S

I find this violation was properly marked as S&S. The tank had become visibly loose and tilted after it was used on two shifts. The truck was used throughout each night shift driving to and from the faces and the wash down station. Miners leaned up against it and climbed all around it to pour the ANFO into the top of the pot to ready the shots. Under continued normal mining operations, had it not been for Ratliff's interception, the straps and ropes would have continued to loosen and deteriorate. It was reasonably likely that it would either fall during transportation or fall or tilt when leaned up against or bumped into by a miner filling the pot. This is in turn would cause a miner to be struck or pushed off balance causing serious injuries such as head injuries, broken bones, sprains, and cuts.

The gravity is serious and would cause injury to at least one miner.

Negligence/Unwarrantable Failure

The violation was created by management when Luxbacher ordered the pickup truck to be rigged in the same manner in which it had been in the past. He supplied the straps that were used but did not determine their load capacity or ensure that only new ones were used. It was not only apparent to Ratliff that they were loose allowing the tank to move creating an unsafe condition. Lhoist's witnesses were well aware that the tank was tilting and was not secured in place. Management did nothing to ameliorate or mitigate the hazard. It acted with high negligence.

In addition to management creating this obvious and very dangerous hazard to the miners, Lhoist had been cited seven previous times under this standard putting them on notice that greater efforts at compliance were necessary. It existed through two night shifts and was to be used on a third shift. In view of the fact that after two shifts, the ropes and straps had already loosened allowing the tank to tilt and move easily, the condition existed for a significant period of time already. Nothing was done in mitigation of this hazard before the order was issued.

Unwarrantable failure is supported by the evidence.

Order Number 869933

In relevant part, 30 C.F.R. § 57.6202(a)(4) requires that all vehicles containing explosive material have at least two dry-chemical fire extinguishers onboard. This violation was charged because there was one extinguisher located behind the rear seat in the cab of the truck. The order

was written as reasonably likely to result in permanently disabling injuries to one miner, S&S with high negligence, and an unwarrantable failure to comply. Ex. S-10. The proposed penalty is $2,000.00.

The Respondent argues that this standard was not violated because the second extinguisher was located on the compressor trailer which was attached behind the truck. It provides no legal basis for this statement.

The language of the standard speaks for itself. It requires the vehicle containing the explosive material have two extinguishers, not the vehicle including any trailers or other pieces of equipment that may be attached thereto. The purpose of the standard is to provide two readily accessible extinguishers as a means of escape in the event of a fire. Two are required to because there are often two miners operating a blasting rig who may need to evacuate or suppress a fire. *The Safety Standards for Explosives at Metal and Nonmental Mines,* 56 Fed. Reg. 2070, 2078 (Jan. 18, 1991). At hearing, Luxbacher testified that he "would have thought maybe they would have thrown a second in since they put the ANFO pot on it. It wasn't something I thought to check for." Tr. 230. It is clear from Luxbacher's testimony that he was aware of the requirements of this standard but did not care enough to ensure it was complied with. This violation has been established.

S&S

The Respondent has presented no argument regarding the S&S designation of this violation. I find that the lack of the second fire extinguisher contributed to a discrete hazard of the miners not being able to suppress and escape a fire on or near this vehicle carrying explosive material. Injuries sustained in a fire would be at least permanently disabling. The event of a fire is presumed in this instance. *Consolidation Coal Co.*, 35 FMSHRC 2326 (Aug. 2013). The S&S nature of the violation has been established.

The gravity is serious and could result in smoke inhalation and burns to the miner loading the ANFO pot and the miner on the flatbed truck delivering the ANFO at the face.

Negligence/Unwarrantable Failure

Luxembacher displayed a complete and reckless disregard for the safety of the miners exemplified by his statement that he didn't even think to check the truck for the fire extinguishers. Clearly, his concern was not for the safety of the miners but was focused on uninterrupted production of stone. Respondent's claim that he was not aware of the violation, that it existed for a short period of time and that it was promptly abated is not supported by the credible evidence of record. The importance of the fire extinguishers on a vehicle containing blasting materials is critical. Luxbacher ordered this truck to be jury rigged for blasting service. That he did not take it upon himself to make an inspection of the rig before it was used on October 8th to ensure it complied with all relevant safety standards is inexcusable. Monthly inspections for fire extinguishers are mandatory and he was aware that as of the last one this truck had only one onboard. Tr. 225. The danger posed by a fire in the presence of explosive materials is extremely high. Luxbacher stated that he found ANFO pellets in and around the pot when it was parked outside the lunchroom which is an area where smoking allowed. Clearly, Respondent was not enforcing the need to keep the truck clean. There is no doubt that the truck was still in service and was to be used in its present condition again on the night of October 10th.

Lhoist did nothing to abate this condition. Ratliff's issuance of the violations is what caused the truck to be taken out of service. Abatement requires the operator take action to eliminate the hazard before the inspector discovers the violation. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 17 (Jan. 1997); *Utah Power & Light Co.*, 11 FMSHRC 1926, 1933-34 (Oct. 1989).

Based upon a totality of the circumstances, I find that high negligence and unwarrantable failure to comply with the standard are appropriate.

Order Number 8639934

The pickup truck lacked any warning signs that it contained explosive material, in violation of 30 C.F.R. § 57.6202(a)(5), which requires such warning signs to be visible from each approach. The narrative portion of the violation includes the statement that Luxbacher told employees that the signs were not necessary. The gravity is marked as reasonably likely to result in permanently disabling injuries to one miner, S&S and the result of high negligence and an unwarrantable failure to comply. Ex. S-13. The proposed penalty is $9,300.00.

The Respondent admits the violation and I find the evidence supports such a finding.

S&S

During the blasting cycle, this truck was brought to the face to load ANFO. Once the holes drilled in the face were filled with ANFO, the truck would be taken to the next face where it would perform the same task. At the end of the shift, it would be taken to the 15 East sump area where the residual explosive material would be washed out. Tr. 39-41. As noted above, however, cleaning the truck properly was not done and it was found to have ANFO pellets around the tank when it was parked by the 14 East lunchroom where miners are permitted to smoke. Tr. 137-8. In Ratliff's opinion, there were sufficient ignition sources present from cigarettes to pieces of machinery, steel fittings and the tank which could produce a spark in the presence of the ANFO. All of the elements required for a fire were present. Tr. 145. Without the placards on the truck to identify its contents as explosive, miners would not be warned to keep burning materials away from it. ANFO is a lower class of explosive material making an ignition more likely to result in a fire rather than an explosion. Tr. 144. Because of this Ratliff opined that injuries to a miner would be burns. *Id.* Contributing to the likelihood of such an accident was the exposure presented by having had this truck in service for three days. Tr. 143.

I concur with Ratliff's opinion that under continued normal mining conditions it was reasonably likely given the presence of fuel, air, and spark-producing items that a fire would occur and injuries sustained would be very serious if not fatal. The S&S assessment has been established.

I find the gravity of this violation to be serious.

Negligence/Unwarrantable Failure

I find this violation was the result of high negligence and unwarrantable failure for much the same reasons as in the previous violations. Management directed that the truck be rigged as a blasting rig performing the normal routine of carrying ANFO to the faces and then returning to the sump area for cleanup. Tr. 39-41. It had been in service for two shifts when Ratliff interceded preventing it from being used again on the next shift. Two shifts was far too long a time considering the grave danger posed by a fire fueled by explosive materials.

Luxbacher was fully aware that the blasting rig normally used for this task had reflective warning placards on all four sides. He was asked by a miner if the placards should be put on the pickup truck and he said it was not necessary. Tr. 148. He attempted to explain at hearing that he believed the ANFO would be loaded on the truck at the face where it would be parked behind the blast area sign. He later admitted, however, that he was aware the truck would move from face to face with ANFO onboard as well as to the cleanout area which would take it outside the blasting area. Tr. 225-6. He further testified that he considered the miner's question concerning the placards to be an "inquiry." He explained the difference between an inquiry and a complaint as follows, "Maybe the attention I give the matter, maybe give it a little more attention if it is a complaint." Tr. 225. I find his attempts to downplay the degree of negligence he exhibited underscores his reckless disregard for the miners' safety.

I find Luxbacher's assertions that he was unaware that the platform was unstable and unsecured, that the tank was an air receiver necessitating a pressure gauge and relief valve, that the explosive materials warning signs were necessary, that the truck lacked a second fire extinguisher or that the straps around the tank and the tank itself were loose to be self-serving and not credible. This is particularly egregious coming from an individual with a mine engineering degree from Virginia Tech, a leading institute of higher learning. It is apparent that production was a far greater priority than safety for the miners. Management intentionally and knowingly violated each of the mandatory standards herein exhibiting an unconscionable indifference and complete disregard for its employees.

CIVIL PENALTIES

The Commission has reiterated in *Mize Granite Quarries, Inc.*, 34 FMSHRC 1760, 1763-64 (Aug. 2012):

> Section 110(i) of the Mine Act grants the Commission the authority to assess all civil penalties provided under the Act. 30 U.S.C. § 820(i). It further directs that the Commission, in determining penalty amounts, shall consider:
>
> The operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.
>
> 30 U.S.C. § 820(i).

The Commission and its ALJs are not bound by the penalties proposed by the Secretary nor are they governed by MSHA's Part 100 regulations, although substantial deviations from the proposed penalties must be explained using the section 110(i) criteria. *See Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983). In addition to considering the 110(i) criteria, the judge must provide a sufficient factual basis upon which the Commission can perform its review function. *See Martin Co. Coal Corp.*, 28 FMSHRC 247 (May 2006).

The parties have stipulated that the proposed penalties will not affect the operator's ability to continue in business. They have also stipulated that MSHA Proposed Assessment Form 1000-179 attached to the Secretary's Petition accurately reflects the operator's size, total assessed violations for the 24 months preceding the month the citation and orders herein were

issued and the number of inspection days for the same period. The gravity, negligence and unwarrantable failure to comply with the cited standards are stated within the analysis of each of the violations above. I have taken into account the deterrent effect of civil penalties in comparison to the size of the operator and its overall resources in making this decision. *See Sec'y v. Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1505 (Sept. 1997).

Having considered the six statutory criteria, I assess the following penalties:

Citation No. 8639930 – $11,900.00

Order No. 8639931 – $4,440.00

Order No. 8639932 – $16,400.00

Order No. 8639933 – $2,000.00 (This is a single order in Docket No. VA 2013-169)

Order No. 8639934 – $9,300.00

ORDER

Lhoist is ORDERED to pay a total penalty of $44,040 within 30 days of the date of this order.[6]

Priscilla M. Rae
Administrative Law Judge

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[6] Payment should be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.