

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, 10th FLOOR  
5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

March 31, 1998

|                        |   |                               |
|------------------------|---|-------------------------------|
| GEORGES COLLIERS INC., | : | CONTEST PROCEEDINGS           |
| Contestant             | : |                               |
| v.                     | : | Docket No. CENT 97-26-R       |
|                        | : | Citation No. 4366607; 11/7/96 |
| SECRETARY OF LABOR,    | : |                               |
| MINE SAFETY AND HEALTH | : | Docket No. CENT 97-27-R       |
| ADMINISTRATION (MSHA), | : | Citation No. 4366608; 11/7/96 |
| Respondent             | : |                               |
|                        | : | Docket No. CENT 97-28-R       |
|                        | : | Citation No. 4366609; 11/7/96 |
|                        | : |                               |
|                        | : | Docket No. CENT 97-29-R       |
|                        | : | Citation No. 4366610; 11/796  |
|                        | : |                               |
|                        | : | Docket No. CENT 97-30-R       |
|                        | : | Citation No. 4366611; 11/7/96 |
|                        | : |                               |
|                        | : | Docket No. CENT 97-31-R       |
|                        | : | Order No. 4366591; 11/5/96    |
|                        | : |                               |
|                        | : | Docket No. CENT 97-32-R       |
|                        | : | Order No. 4366592; 11/5/96    |
|                        | : |                               |
|                        | : | Docket No. CENT 97-33-R       |
|                        | : | Citation No. 4366593; 11/6/96 |
|                        | : |                               |
|                        | : | Pollyanna No. 8 Mine          |
|                        | : | Mine ID No. 34-01787          |
|                        | : |                               |
|                        | : | Docket No. CENT 97-34-R       |
|                        | : | Citation No. 4366594; 11/6/96 |
|                        | : |                               |
|                        | : | Docket No. CENT 97-35-R       |
|                        | : | Citation No. 4366595; 11/6/96 |
|                        | : |                               |
|                        | : | Docket No. CENT 97-36-R       |
|                        | : | Citation No. 4366596; 11/6/96 |
|                        | : |                               |

|                        |   |                               |
|------------------------|---|-------------------------------|
|                        | : | Docket No. CENT 97-38-R       |
|                        | : | Citation No. 4366598; 11/6/96 |
|                        | : |                               |
|                        | : | Pollyanna No. 9 Mine          |
|                        | : | Mine ID No. 34-01790          |
|                        | : |                               |
| SECRETARY OF LABOR,    | : | CIVIL PENALTY PROCEEDINGS     |
| MINE SAFETY AND HEALTH | : |                               |
| ADMINISTRATION (MSHA), | : | Docket No. CENT 97-69         |
| Petitioner             | : | A. C. No. 34-01787-03514      |
| v.                     | : |                               |
|                        | : | Docket No. CENT 97-112        |
| GEORGES COLLIERS INC., | : | A.C. No. 34-01787-03520       |
| Respondent             | : |                               |
|                        | : | Pollyanna No. 8 Mine          |
|                        | : |                               |
|                        | : | Docket No. CENT 97-90         |
|                        | : | A. C. No. 34-01790-03501      |
|                        | : |                               |
|                        | : | Pollyanna No. 9 Mine          |

**DECISION**

Appearances: Madeleine T. Le, Esq., and David C. Rivela, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;  
Elizabeth Maxine Christian, Esq., Oklahoma City, Oklahoma, for Respondent.

Before: Judge Hodgdon

These consolidated cases are before me on Notices of Contest and Petitions for Assessment of Civil Penalty filed by Georges Colliers, Inc., against the Secretary of Labor, and by the Secretary, acting through her Mine Safety and Health Administration (MSHA), against Georges Colliers, respectively, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 815. The company contests the issuance to it of two orders and 10 citations. The petitions allege 17 violations of the Secretary=s mandatory health and safety standards and seek penalties of \$5,899.00. For the reasons set forth below, I affirm all of the orders and citations, approve the parties' agreement on 15 of the orders and citations, and assess penalties of \$5,399.20.

A hearing was held on December 2, 1997, in Ft. Smith, Arkansas. The parties also submitted post-hearing briefs in the cases.

**Settled Dockets and Citations**

At the beginning of the hearing, counsel for the Secretary announced that the parties had settled all of the citations in Docket Nos. CENT 97-69, including the citations contested in Docket Nos. CENT 97-29-R, CENT 97-30-R and CENT 97-33-R, and CENT 97-90, including the citations contested in Docket Nos. 97-34-R, 97-35-R, 97-36-R and 97-38-R. The agreement provides for a 20 percent reduction in the penalties assessed in each docket. Later during the case, the parties agreed to settle Citation Nos. 4366277, 4366280, 4366591 and 4366592 in Docket No. CENT 97-112. The agreement provides for a 10 percent reduction in the penalties for those citations.

After considering the parties representations, I concluded that the settlements were appropriate under the criteria set forth in section 110(i) of the Act, 30 U.S.C. ' 820(i), and informed the parties that I would approve the agreements. The provisions of the agreements will be carried out in the Civil Penalty Assessment section and the order at the end of this decision.

With the settlements, an order in Docket No. CENT 97-26-R and an order and citation in Docket No. CENT 97-112 remained to be contested. They are Order Nos. 4366607 and 4366609 and Citation No. 4366608.

### **Contested Matters**

#### ***I. Background***

The Pollyanna No. 8 Mine is an underground coal mine in Le Flore County, Oklahoma. The mine is an underground continuation of a surface mine. It is entered through portals cut into the high wall left by the surface mine. The mine continues underground on a decline from the portals. There are five portals into the mine. Portals 1 and 5 have fans in them which pull air and gases out of the mine. Portal 2 is for the belt line. Portals 3 and 4 provide intake air to the mine and also serve as a means of entry.

Portals 1 and 5 have Aweak wall@stopplings at their entrances. The stopplings consist of two cinder block and concrete walls with a space in between them. The walls are constructed so that in the event of an explosion in the mine, the walls will give way, releasing the pressure of the explosion, so that the fans will not be damaged and can be quickly rehabilitated and put back into use to ventilate the mine for rescue efforts. There are two walls so that opening the door in one will not affect the air pressure in the mine. Thus, to exit through those portals one has to open the inner door, enter the cubicle between the two walls, close the inner door and then open the outer door and go out.

On November 7, 1996, MSHA Inspectors Kendell Whitman, Bob Cornette and Jimmy Stewart went to the mine to inspect for smoking materials as part of a nationwide MSHA A smoke-out@campaign. Whitman and Cornette entered the mine through Portal 3 and proceeded to the working section to carry out the inspection.

It had rained heavily, approximately six to eight inches total, for several days prior to the inspection, although it was not raining on the day of the inspection. As he came out of the mine, Inspector Whitman observed water standing in front of Portals 1 and 5 and running into Portal 3. He also observed large amounts of water in front of the portals behind an earthen berm. The water was beginning to seep through the berm and the berm itself was so saturated that when he walked on it, he sank in up to his knees. Based on his observations, Inspector Whitman issued a 107(a) imminent danger order, 30 U.S.C. ' 817(a), Order No. 4366607, a 104(a) citation, 30 U.S.C. ' 814(a), Citation No. 4366608, and a 104(d)(2) order, 30 U.S.C. ' 814(d)(2), Order No. 4366609.

## II. Findings of Fact and Conclusions of Law

### A. Order No. 4366607

Order No. 4366607 states:

The following conditions constitute an imminent danger to the 10 miners working in the underground coal mine. The flood water from the open strip pit was full of water, the water level is higher then [*sic*] the elevation of the return, belt and intake portals. The flood water is running into the #1 return portal accumulating in front of the Aweak walled stopping,@the level was even with the top of the stopping. The water from the strip pit was running into the return portal and intake. The water is running back into the bottom of the main entries accumulating water in large amounts. If the Aweak walled stopping@were to fail, it would cause large amounts of water to flow into the mine trapping the miner[s] in the 1<sup>st</sup> right section by blocking the escapeways with water.

(Govt. Ex. 10.)

Section 107(a) of the Act states:

If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons . . . to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist.

Section 3(j) of the Act, 30 U.S.C. ' 802(j), defines **imminent danger** as **the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.**

Inspector Whitman testified that he issued the imminent danger order because the amount of water and saturated mud that had collected in the surface mine pit in front of the portals, along with the water already flowing into the mine, led him to believe that an inundation of the mine was impending. He explained that the only way out of the mine was through the five portals and that the mine pitched downward from the portals before it turned back up at the first right panel. He said: **If the water is pouring in there, and a person can be walking up there and the water would come in, and he would be trapped. The water would wash him away.** (Tr. 80.)

The inspector also testified that if the mine were inundated and a miner attempted to get out of the mine through the doors in the weak wall stoppings, the water collected in front of the stoppings, which was higher than the top of the door in the stopping, would rush in when the outer door was opened, trapping the miner between the two walls of the stoppings and drowning him. He further related that the night before the company had had a large diesel powered pump pumping at the opposite end of the pit to lower the water level, but that the pump had broken down and instead of waiting until the pump was repaired to get the water down to a safe level, **they allowed the miners of this coal mine to go underground in what I feel is a dangerous situation . . . .** (Tr. 82.)

The Commission has held that: **To support a finding of imminent danger, the inspector must find that the hazardous condition has a reasonable potential to cause death or serious injury within a short period of time.** *Utah Power & Light Co.*, 13 FMSHRC 1617, 1622 (October 1991). *Accord Blue Bayou Sand and Gravel, Inc.*, 18 FMSHRC 853, 858 (June 1996). The Commission has further held that:

In reviewing an inspector's finding of an imminent danger, the Commission must support the inspector's finding **unless there is evidence that he has abused his discretion or authority.** An inspector abuses his discretion, making a decision that is not in accordance with the law, if he orders the immediate withdrawal of miners in circumstances where there is not an imminent threat to safety. An inspector is granted wide discretion because he must act quickly to remove miners from a situation he believes is hazardous.

*Id.* (citations omitted).

The Respondent argues, in effect, that the inspector did not make a reasonable investigation of the surrounding facts, stating that **he should have taken one or two hours after issuing the order to take measurements or surveys to determine if there was sufficient standing waters to inundate the mine and cause permanent injuries or fatalities.** (Resp. Br. at 11-12.) This argument fails for two reasons. In the first place, the issue in an imminent danger situation is

what the inspector knew at the time he issued the order, not what he should have done afterward. In the second place, if the inspector felt that he had time to spend an hour or two taking measurements and surveys then there was no imminent danger.

The company's other arguments concerning the imminent danger order are also rejected. The assertions that there were no men working near Portal 1, that there were two other escape ways, that there were two additional portals, that there was no indication of a build-up of explosive gases and that there was no indication that the fan and ventilation system at Portal 1 or at any other location of the mine was not working, even if true, are not relevant to the issue of whether the mine was threatened by flooding.

I find that the inspector made a reasonable investigation of the surrounding facts. The large amounts of standing water in the area, the fact that water completely covered the exit door from the weak wall stopping at Portal 1, the fact that the mud berms were saturated and that water was already running into Portal 3 and the fact that the pump was no longer working all support the inspector's conclusion that an inundation of the mine was imminent. Accordingly, I conclude that Inspector Whitman did not abuse his discretion in this instance and affirm the 107(a) order.

B. Citation No. 4366608

Citation No. 4366608 alleges a violation of section 75.310(d), 30 C.F.R. ' 75.310(d), and states:

This citation is issued in conjunction with the imminent danger order #4366607. Due to the large amount of rain fall in the mine area the night before (11/06/96), the open strip pit water level is higher than the intakes, returns and the belt portals. The water was allowed to accumulate in large amounts in front of the #1 return entry portal sealing it off with water. The level of water total[ly] covered the Aweak walled stopping,@used as a pressure relieve [sic] for the #1 fan. The water in front of the weak walled explosion stopping would not relieve the pressure from an explosion in accordance with the design of the stopping, due to the large amount of water build up in the front.

(Govt. Ex. 5.)

Section 75.310(d) requires that: AWeak walls and explosion doors shall have cross-sectional areas at least equal to that of the entry through which the pressure from an explosion underground would be relieved. A weak wall and explosion door combination shall have a total cross-sectional area at least equal to that of the entry through which the pressure from an explosion underground would be relieved.@ In short, the regulation requires that the weak wall completely fit into the entry so that the entire entry is filled in.

Unfortunately, none of the evidence at the hearing went to the issue of whether the weak wall stopping met this requirement. The citation discusses the fact that the water in front of the stopping prevented the stopping from serving its purpose of relieving pressure from an explosion. Indeed, the fact that water built up in front of the stopping, rather than leaking into the mine, would indicate that the stopping complied with this regulation.

The inspector testified that the company violated the regulation because: "When you pile water up in front of it, whether it is two inches or you pile four inches or you completely cover it, you have rendered the purpose of that wall useless. The whole purpose of this is to prevent -- that weak wall is there so it can be blown out by the gases. If I pile a bunch of water in front of it, it is not going to work as adequately as it is designed to work." (Tr. 104.) The Respondent presented no evidence on this issue and argued in its brief only that "no evidence was presented that the weak walls and explosion doors were inoperable." (Resp. Br. at 13-14.)

While none of the evidence is relevant to section 75.310(d), it does go to section 75.310(a)(5), 30 C.F.R. ' 75.310(a)(5), which requires that: "(a) Each main mine fan shall be-- (5) Protected by one or more weak walls or explosion doors, or a combination of weak walls and explosion doors, located in direct line with possible explosive forces." On March 9, 1998, the Secretary filed a Motion to Amend the Citation to allege a violation of section 75.310(a)(5).<sup>1</sup> On March 23, 1998, the Respondent filed an Objection to Secretary's Motion to Amend Citation, Request for Mistrial on Prejudicial Error and Request for New Hearing.

---

<sup>1</sup> On March 3, 1998, I initiated a telephone conference call with the parties and advised them that it did not appear to me that any of the evidence concerned section 75.310(d), but that it did address a violation of section 75.310(a)(5). I asked counsel for the Secretary if she wished to move to amend the citation. In another telephone conference call on March 6, 1998, counsel for the Secretary stated that she did want to file a Motion to Amend the citation. Counsel for the Respondent stated that she objected and would file an opposition.

The Secretary's motion is made pursuant to Fed. R. Civ. P. 15(b)<sup>2</sup> to conform the citation to the evidence.<sup>3</sup> The Respondent objects to the amendment on the grounds that to amend the citation at this stage of the proceedings is prejudicial to the Respondent and that the judge committed prejudicial error by advising the Secretary of the need to amend. In the alternative, the Respondent requests that if amendment is permitted, it be allowed to present additional evidence on the issue. For the reasons that follow, the Motion to Amend is granted and the Respondent's objections and requests are overruled and denied.

The company has not shown how it will be prejudiced as a result of this amendment. It states only that it will be prejudiced because it did not know that section 75.310(a)(5) would be argued and that the Secretary unduly delayed her request to amend and would not have made the motion but for the judge bringing the issue to the Secretary's attention. (Resp. Op. at 4-5.) The Company also argues that the evidence presented at the hearing is arguably relevant to section 75.310(d). No specific prejudice is alleged.

The Respondent did not object to the citation at the hearing as failing to set forth a violation of section 75.310(d). The Respondent did not object at the hearing to the evidence presented by the Secretary as not being relevant to a violation of section 75.310(d). The Respondent did not cross-examine the Secretary's witness concerning the cross-sectional area of the weak wall stopping, although the inspector was cross-examined about the effect of the water

---

<sup>2</sup> Fed. R. Civ. P. 15(b) states: **Amendments to Conform to the Evidence.** When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment . . . .

<sup>3</sup> Commission Rule 1(b), 29 C.F.R. ' 2700.1(b), states that: **On any procedural question not regulated by Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (the Act), these Procedural Rules, or the Administrative Procedure Act (particularly 5 U.S.C. 554 and 556), the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure . . . .**

outside the stopping. It was in response to that questioning that he gave the answer set out above about the weak wall not working as it was designed to work with the water behind it. The Respondent did not present any evidence at the hearing concerning Citation No. 4366608 generally, or whether the weak wall stopping conformed to section 75.310(d) specifically. Finally, the Respondent did not argue in its brief that the evidence failed to establish that the cross-sectional area of the weak wall stopping was at least equal to that of the entry. The company argued only that there was no showing the weak wall stopping was inoperable.

It is obvious from the evidence presented that both parties were proceeding on the facts set out in the narrative of the citation. It is equally obvious that those facts actually allege a violation of section 75.310(a)(5). All of the evidence went to whether the water in front of the weak wall stopping would prevent the stopping from relieving the pressure of an explosion as designed. Thus, all of the evidence presented was concerning the facts alleged in the citation, not the requirements of section 75.310(d), and those facts go to the section of the regulation to which the Secretary seeks to have the citation amended to allege.

With regard to my having alerted the Secretary that she might wish to amend the citation, I did so based on guidance from the Commission. In a similar case where the Secretary had alleged a violation of the wrong section of the regulations, the Commission stated that when the judge discovered the Secretary's error, the judge should have issued an order directing the Secretary to show cause why the citation should not be amended to conform to the evidence and charge a violation of the applicable standard. @ *Faith Coal Co.*, 19 FMSHRC 1357, 1361 (August 1997). While I did not issue an order to show cause, the effect was the same.

The Respondent has not shown prejudice. What little the company did present and argue on the citation went to the facts of the citation, not whether those facts actually set out a violation of section 310(d). I find that the company fully understood the gravamen of the violation charged and knowingly litigated the citation on that basis. Therefore, the Respondent has not been misled and is not entitled to present additional evidence on the issue. Nor is the company entitled to a mistrial. Accordingly, pursuant to Fed. R. Civ. P 15(b), I grant the Secretary's Motion to Amend the citation to allege a violation of section 75.310(a)(5) of the regulations.

Having amended the citation, I find that the Secretary has established that the build up of water behind the weak wall stopping in Portal 1, which completely covered the stopping, meant that the fan in that entry was not protected by a weak wall in direct line with possible explosive forces. Consequently, I conclude that the company violated section 75.210(a)(5) of the regulations.

#### 1. Significant and Substantial

The Inspector found this violation to be significant and substantial. @ A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon the

particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out four criteria that have to be met for a violation to be S&S. See also *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987)(approving *Mathies* criteria). Evaluation of the criteria is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 1007 (December 1987).

As the inspector testified, the purpose of the weak wall stopping is to prevent the fan from being destroyed in the event of an explosion. If the fan is destroyed, there is no way to dilute, render harmless, and carry away any noxious fumes or gases generated by the explosion. Thus, I find that the first two criteria in *Mathies* have been met, there was a violation of the regulations and that violation contributed to a discrete safety hazard in that the fan could be destroyed as a result of the violation and miners be subjected to hazardous fumes and gases.

As is usually the case, whether this violation is S&S rests on the third *Mathies* factor, whether there is a reasonable likelihood that the hazard contributed to will result in an injury. With regard to this element, the evidence indicates that this mine is in the lower Hartshorne seam of coal and liberates a massive amount of methane. The inspector testified that: "Historically every mine that has been on the lower Hartshorne seam at one time or another was blown up due to a build-up of methane and dust." (Tr. 61.) In addition, as previously noted, with the water completely covering the stopping anyone trying to exit through the doors in the stopping would likely be trapped between the walls and drowned.

Accordingly, I find that it was reasonably likely that a mine explosion would occur, destroying the fan and resulting in permanently disabling or fatal injuries resulting from fumes, gas or drowning. Therefore, I conclude that the violation was significant and substantial.

## 2. Negligence

The inspector found the negligence involved in this violation to be high. The evidence that this filling up of the area in front of the weak wall stopping had occurred the night before, that the operator was aware of it, that he had done nothing to alleviate it (perhaps because a pump had broken down), and that miners had been permitted to enter the mine without at least beginning to drain the area supports this finding. Consequently, I conclude that the degree of negligence for this violation is high.

### C. Order No. 4366609

Order No. 4366609 alleges a violation of section 75.380(e) of the regulations, 30 C.F.R. ' 75.380(e). It states:

This citation is issued in conjunction with the imminent danger order #4366607. Due to the large amount of rainfall in the mine area the night before (11/06/96), the open strip pit water level is higher than the intakes, returns and belt portals. The water was allowed to accumulate in large amounts at an elevation greater than the level of the portals. The water from the pit is [*sic*] located next to the portals is flooding allowing the water to obstruct the portal openings. The pit contains a large amount of water. If the weak wall stopping in the #1 return entry or the weakly constructed burms [*sic*] were to fail, the inrush of water would be great, causing 10 coal miners on the 1<sup>st</sup> right section to be trapped underground by water. [Th]is condition might cause death to the miners underground. This mine is on a 8.5% decline slope allowing the water to flow into the mine rapidly trapping the miners below. The bottom of the main entries are already full of standing water adding to the dangerous condition. It is unexcusable [*sic*] of management to allow this condition to exist.

(Govt. Ex. 6.)

Section 75.380(e) requires that: ASurface openings shall be adequately protected to prevent surface fires, fumes, smoke, and flood water from entering the mine.@ For the same reasons that I concluded that the inspector reasonably believed that an imminent danger existed, *see supra* pp. 5-6, I conclude that the company violated this section.

1. Significant and Substantial

The inspector found this violation to be ASignificant and substantial.@ Since this violation was one of the main reasons that the inspector issued his imminent danger order, which I have already affirmed, it logically follows that the violation was S&S. Therefore, I conclude that the company's violation of section 75.380(e) was ASignificant and substantial.@

2. Unwarrantable Failure

This order was issued under section 104(d)(2) of the Act, 30 U.S.C. ' 814(d)(2).<sup>4</sup> The withdrawal order issued under section 104(d)(1), 30 U.S.C. ' 814(d)(1), which served as the

---

<sup>4</sup> Section 104(d)(2) states: AIf a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the

predicate for this order was Order No. 4366277, (Govt. Ex. 1), which the parties agreed to settle by reducing the civil penalty. (Tr. 47-8.)

A 104(d)(2) order requires a showing of ~~unwarrantable failure.~~ The Commission has held 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). ~~Unwarrantable failure is characterized by such conduct as reckless disregard, intentional misconduct, indifference or a serious lack of reasonable care.~~ [*Emery*] at 2003-04; *Rochester & Pittsburgh Coal Corp.* 13 FMSHRC 189, 193-94 (February 1991). *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1627 (August 1994).

The inspector testified that he believed that this violation resulted from the company's unwarrantable failure because:

The operator knew about this condition. He allowed it to exist. He allowed the men to enter the mine.

He knew about it. As we entered the mine, there was [*sic*] men already involved in the pumping process.

The night before that the operator had put out a large diesel-powered pump at the opposite end of the pit.

They knew they had problems with the water. They were trying to pump it. The pump failed them. Rather than wait to get the water pump[ed] down to a safe level, they allowed the miners of this coal mine to go underground in what I feel is a dangerous situation, go underground and work.

(Tr. 82.)

In addition to the potential for the water outside to go into the mine, there is always water inside the mine due to the nature of the seam. This water is continually pumped out by a 450 gallon per minute pump.

The Respondent argues that there was no unwarrantable failure because there was not as much water outside of the mine as the inspector seemed to think that there was. Therefore, the

---

existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) . . . .

company asserts, the mine would not have been inundated and since no miners were working in the vicinity of the entries there was no real danger.

This argument is not persuasive. As the Secretary points out, the entries slope downward, so that even if water did not completely fill up the mine, it would be channeled down the entries to collect at the bottom and would trap the miners in the mine.

I conclude that the operator displayed a serious lack of reasonable care in this instance. Accordingly, I conclude that the violation of section 75.380(e) resulted from the company's unwarrantable failure.

### **Civil Penalty Assessment**

The Secretary has proposed penalties of \$1,000.00 each for Citation No. 4366608 and Order No. 4366609. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act. *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7<sup>th</sup> Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

In connection with the penalty criteria, the parties stipulated that the Pollyanna No. 8 mine produced 1,875 tons of coal in 1996 and that the company demonstrated good faith in abating the violations. (Tr. 14-15.) No evidence was offered as to the company's history of prior violations. Since the Secretary has the burden of presenting this evidence, I find that the company's history of prior violations is not an aggravating factor in this case. No evidence was presented on the effect of the penalties on the operator's ability to remain in business. Since the operator has the burden on this issue, I find that the penalties will not adversely affect the operator's ability to remain in business. For both of the contested violations, I find the operator's negligence to have been high and the gravity of the violations to be serious.

Taking all of these factors into consideration, I find the penalties proposed by the Secretary to be appropriate.<sup>5</sup> The penalty for each order or citation is as follows:

#### **Docket No. CENT 97-69**

| <u>Order/Citation No.</u> | <u>Proposed Penalty</u> | <u>Assessed Penalty</u> |
|---------------------------|-------------------------|-------------------------|
| 4366582                   | \$ 81.00                | \$ 64.80                |
| 4366589                   | \$ 136.00               | \$ 108.80               |

---

<sup>5</sup> Attached to the Secretary's brief as Exhibit A is a copy of a Decision Approving Settlement issued by Judge Bulluck on January 30, 1998. The decision deals with numerous cases involving Georges Colliers Inc. (lead Docket No. CENT 97-74). The Brief makes no reference to the exhibit. I do not know why it is attached, but I have not considered it in deciding the cases before me or arriving at penalties.

|         |                  |                  |
|---------|------------------|------------------|
| 4366593 | \$ 50.00         | \$ 40.00         |
| 4366610 | \$ 81.00         | \$ 64.80         |
| 4366611 | <u>\$ 157.00</u> | <u>\$ 125.60</u> |
| Totals  | \$ 505.00        | \$ 404.00        |

Docket No. CENT 97-90

|         |                 |                 |
|---------|-----------------|-----------------|
| 4366594 | \$ 128.00       | \$ 102.40       |
| 4366595 | \$ 210.00       | \$ 168.00       |
| 4366596 | \$ 50.00        | \$ 40.00        |
| 4366598 | \$ 50.00        | \$ 40.00        |
| 4366599 | \$ 81.00        | \$ 64.80        |
| 4366600 | <u>\$ 75.00</u> | <u>\$ 60.00</u> |
| Totals  | \$ 594.00       | \$ 475.20       |

Docket No. CENT 97-112

|         |                   |                   |
|---------|-------------------|-------------------|
| 4366277 | \$ 700.00         | \$ 630.00         |
| 4366280 | \$ 700.00         | \$ 630.00         |
| 4366591 | \$ 700.00         | \$ 630.00         |
| 4366592 | \$ 700.00         | \$ 630.00         |
| 4366608 | \$1,000.00        | \$1,000.00        |
| 4366609 | <u>\$1,000.00</u> | <u>\$1,000.00</u> |
| Totals  | \$4,800.00        | \$4,520.00        |

**ORDER**

Accordingly, Order No. 436607 in Docket No. CENT 97-26-R is **AFFIRMED**; Citation Nos. 4366582, 4366589, 4366593, 4366610 and 4366611 in Docket Nos. CENT 97-29-R, CENT 97-30-R, CENT 97-33-R and CENT 97-69 are **AFFIRMED**; Order No. 436659 5 and Citation Nos. 4366594, 4366596, 4366598, 4366599 and 4366600 in Docket Nos. CENT 97-34-R, CENT 97-

35-R, CENT 97-36-R,  
CENT 97-38-R and  
CENT 97-90 are  
**AFFIRMED**;  
Citation No. 4366608  
in Docket Nos. CENT  
97-27-R and  
CENT 97-112 is  
**MODIFIED** to allege  
a violation of section  
75.310(a)(5), instead  
of section 75.310(d),  
and is **AFFIRMED** as  
modified; and Order  
Nos. 4366277,  
4366280, 4366591,  
4366592 and 4366609  
in Docket Nos. CENT  
97-28-R,  
CENT 97-31-R,  
CENT 97-32-R and  
CENT 97-112 are  
**AFFIRMED**.

Georges Colliers Inc. is **ORDERED TO PAY** civil penalties of **\$5,399.20** within 30 days of the date of this decision. On receipt of payment, these cases are **DISMISSED**.

T. Todd Hodgdon  
Administrative Law Judge

Distribution:

Elizabeth Maxine Christian, Esq., P.O. Box 720528, Oklahoma City, OK 73172-0528  
(Certified Mail)

Madeleine T. Le, Esq., Office of the Solicitor, U.S. Department of Labor, 525 South Griffin  
Street, Suite 501, Dallas, TX 75202 (Certified Mail)

/fb