

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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July 19, 1996

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 94-57
Petitioner	:	A.C. No. 46-01968-04121
v.	:	
	:	Blacksville No. 2 Mine
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 94-366
Petitioner	:	A.C. No. 46-01968-04149 A
v.	:	
	:	Blacksville No. 2 Mine
SAMUEL J. MCLAUGHLIN, employed by	:	
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	
	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 94-368
Petitioner	:	A.C. No. 46-01968-04148 A
v.	:	
	:	Blacksville No. 2 Mine
J.T. STRAFACE, employed by	:	
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 94-384
Petitioner	:	A.C. No. 46-01968-04150 A
	:	
v.	:	Blacksville No. 2 Mine
	:	
ROBERT WELCH, employed by	:	
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: James B. Crawford, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner;  
Elizabeth S. Chamberlin, Esq., Consol Incorporated, Pittsburgh, Pennsylvania, for Consolidation Coal Company;  
Stephen D. Williams, Esq., Steptoe & Johnson, Clarksburg, West Virginia, for Consolidation Coal Company.

Before: Judge Barbour

These are civil penalty proceedings brought by the Secretary of Labor (Secretary) pursuant to sections 105(d) and 110(c) of the Federal Mine Safety and Health Act of 1977 (Mine Act or Act) (30 U.S.C. " 815(d) and 820(c)). In Docket No. WEVA 94-57 the Secretary alleges that Consolidation Coal Company (Consol) violated four mandatory safety standards for underground coal mines at its Blacksville No. 2 Mine, an underground bituminous coal mine located in Monongalia County, West Virginia. The Secretary further alleges that all of the violations were significant and substantial (S&S) contributions to mine safety hazards and were the result of Consol=s unwarrantable failure to comply with the standards.

In Docket Nos. WEVA 94-366, WEVA 94-368 and WEVA 94-384, the Secretary alleges respectively that the mine=s superintendent, J.T. Straface, its assistant superintendent, Samuel J. McLaughlin, and its foreman, Robert Welch, ~~A~~knowingly@ violated one of the mandatory safety standards alleged in Docket No. WEVA 94-57 (30 U.S.C. ' 75.1101-23(a)) and that each individual is liable personally for a civil penalty.

Consol and the individuals deny the alleged violations. In addition, the individuals assert that if the violation with which

they are charged did occur, they did not knowingly violate it.

Pursuant to notice, a hearing was conducted in Fairmont, West Virginia, at which the parties presented testimony, documentary evidence and oral argument. During the course of the hearing Consol and the Secretary agreed to settle three of the alleged violations. Counsels explained the settlements on the record and I approved them (Tr. 1048-1053). I will confirm the approvals at the close of this decision.

GENERAL BACKGROUND  
AND  
ISSUES

On March 15, 1993, a fire occurred in the belt drive area of the 16-M longwall section of the mine. The Secretary contends that Consol violated '75.1101-23-(a) in that it did not withdraw persons affected by the fire outby affected areas as required by the mine's adopted and approved program of evacuation procedures.

The principal issues with regard to Consol are whether the alleged violation occurred, whether it was S&S, whether it was unwarrantable, and, if a violation is found, the amount of any civil penalty that must be assessed in light of the statutory civil penalty criteria set forth in section 110(i) of the Act (30 U.S.C. '820(i)).

The principal issues with regard to each individual are whether the alleged violation occurred, whether the individual knowingly authorized, ordered, or carried it out, and, if so, the amount of any civil penalty that must be assessed taking into account the applicable statutory civil penalty criteria.

STIPULATIONS

The parties stipulated as follows:

1. The Blacksville [No. 2] Mine extracts minerals and has products which enter and/or affect commerce, [and] is thereby under the jurisdiction of the [Mine Act].

2. [Consol] is a mine operator, as defined under Section 3(h) of the Mine Act, [and] is a[n] ... operator of the Blacksville [No. 2] Mine.

3. [T]he Administrative Law Judge has jurisdiction ... under Section 105 of Mine Act.

4. [T]he assessment of the [c]ivil penalties in this proceeding will not affect the operator's ability to continue in business and the individual agents have the ability to pay their respective assessed penalties.

5. [Consol] is a large mine operator. At its [m]ine it employs approximately 440 underground miners and approximately 76 surface miners on three production shifts (Tr. 11-12).

#### THE SECRETARY-S POSITION AT TRIAL

Counsel for the Secretary contended the evidence would show that on March 15, 1993, Consol violated its approved and adopted program of evacuation procedures in that it did not withdraw miners off the 16-M longwall section when a fire occurred at the section's belt drive area. Further, the named individuals knew about the fire, but did nothing to insure that the affected miners were evacuated. (Tr. 15-16)

#### CONSOL-S POSITION AT TRIAL

Counsel for Consol maintained that the fire was discovered by the belt transfer man. He reported it to the tippie operator, who reported it to the dispatcher. The dispatcher immediately began notifying the affected crews and other mine personnel. The fire lasted for only a few minutes. By the time the 16-M section crew was ready to evacuate the section, the fire was out.

The charged individuals did nothing wrong. The mine foreman, Welch, told the crew not to evacuate because the fire was out (Tr. 17-18). The assistant superintendent, McLaughlin, did not even reach the belt drive until after the fire was extinguished. The superintendent, Straface, immediately implemented the mine evacuation plan upon learning of the fire. Only after the fire was out was implementation of the plan stopped (Tr. 18-19).

There was no violation of section 75.1101-23(a)(1), there was no unwarrantable failure on Consol's part, and none of the individuals knowingly ordered, authorized, or carried out a violation (Tr. 20).

#### THE TESTIMONY RAYMOND STRAHIN

Raymond Strahin, a federal coal mine inspector for the last

19 years, is a mine ventilation specialist. As such, he reviews operators' ventilation plans and fire fighting and fire evacuation programs and recommends to the MSHA district manager that the programs be approved or disapproved (Tr. 23).

Strahin described the ventilation system of the 16-M longwall section as consisting of four entries, two of which carried intake air and two of which carried return air. The belt entry was the closest entry to the longwall face (Tr. 31-32). It carried return air from the face. The air flowed outby and turned into a crosscut. The belt did not turn at the crosscut, but continued straight down the belt entry to the belt drive and the transfer point. At the transfer point, the belt dumped onto the mother belt. From the transfer point and belt drive to the crosscut leading to the regulator, the belt entry carried intake air. At the crosscut, the return air from the longwall face mixed with the intake air from the transfer point and belt drive and the mingled air passed through a regulator and into the main return. (Tr. 71-72)

In Strahin's opinion, if the fire at the belt drive had spread, it would have moved toward the face until it got to the point where the air from the transfer point mixed with the air coming down the belt entry. From there, the fire and smoke would have moved toward the regulator (Tr. 71-72, 74, 97-98). However, if enough time passed and the fire developed unchecked, the fire and smoke could have intensified and traveled toward the face. Strahin observed that the course of a fire cannot be predicted always (Tr. 107). The first ten minutes are crucial to its control. After that, it can burn out of control (Tr. 75).

Strahin estimated that on March 15, 1993, the velocity of the air in the belt entry ranged from 100 feet per minute to 300 feet per minute, the larger figure being the velocity closer to the regulator and the lower figure being the velocity at the transfer point (Tr. 37-38). However, Strahin agreed that the velocity of the air traveling from the transfer point over the belt drive and to the regulator could have been as low as 75 feet per minute (Tr. 78).

Strahin also agreed that air pressure in the belt entry was lower than in the track entry. For this reason if air leaked between the belt and track entries, the leaked air would travel from the track entry into the belt entry (Tr. 94). Therefore, smoke in the belt entry most likely would stay in the belt entry and travel out the return (Tr. 94).

There was a box check in a portion of the belt entry that

was ventilated by intake air. (Tr. 36) The box check was constructed of cinder blocks. There was an opening in the center of the blocks for the belt. In addition, there was a door on the side to provide access to the belt (Tr. 75-76). The box check restricted and slowed the velocity of the air that flowed toward the face (Tr. 36-37, 75).

Strahin testified that on March 15, 1993, there were two types of fire detection systems in place on the 16-M section belt entry, a heat sensor system and a carbon monoxide (CO) detector system (Tr. 41). The heat sensors were suspended from the roof, a foot or two over the belt, and were installed every 125 feet along the belt entry, from the longwall tailgate outby (Tr. 65). There was an alarm box for the heat sensors near the face at the stage loader. The alarm was used to alert the longwall crew if the heat sensors were activated (Tr. 101).

On March 15, most of the CO detector system was installed and functioning. The CO sensors were hung about half way between the belt and the roof (Tr. 80). There was an alarm on the surface that sounded when the CO reaching a certain level (Tr. 42-43, 110, 111).

Although the CO detector system was almost completely in place, Consol was relying primarily on the heat sensor's system (Tr. 42). Consol could not rely officially on the CO sensor system until a petition for modification allowing its use was approved and took affect (Tr. 43). Consol had applied for the modification and Strahin investigated Consol's petition (Tr. 77).

Strahin identified the approved and adopted program of evacuation that was in effect on March 15, (Gov. Exh. 4). Strahin had reviewed the program and recommended to the MSHA district manager that the agency approve it (Tr. 82). It was approved as written by Consol (Tr. 83).

Part II.A.&B. of the program applied to the fire sensor system. Part II.A.&B. was ~~A~~In effect until implementation of Petition for Modification, Docket No. M-90-155-C@ (Gov. Exh. 4 at 4). Part II.C. of the program applied to the CO monitor system. Part II.C. was ~~A~~In effect after implementation of Petition for Modification, Docket No. M-90-155-C@ (Gov. Exh. 4 at 5). Strahin did not believe that the petition for modification was implemented on March 15 (Tr. 84-85). Therefore, he believed that the portion of the program relating to fire alarm systems under which Consol was operating when the fire occurred ~~A~~probably@ was the part for the fire sensor system, and not the part for the CO monitor system. (Gov. Exh. 4 at 4-5; Tr.86).

As Strahin interpreted Part II.A.&B., when a fire sensor alarm went off, persons in the affected area were required to be immediately withdrawn to a location outby the affected area (Tr. 45; Gov. Exh. 4 II.A.2.at 4). Further, if a fire was confirmed but an alarm was not activated the plan still required affected miners to be evacuated (Tr. 106). Strahin stated that no matter how the fire was brought to Consol's attention, the plan had to be followed and affected miners had to be evacuated outby the fire (Tr. 71, 112-113, see also Tr. 46, 50).

Strahin also testified concerning a portion of the program which stated in the event of a fire, one of the duties of the longwall foreman was to notify all personnel on the section about the fire and to see that they were outby it and were accounted for (Gov. Exh. 4 VII B.1.a.-b. at 7-8; Tr. 47). Strahin agreed that notification was one of the most important things to be done in a fire situation. Normally, miners were notified by telephone. They were alerted to come to the telephone by a visual or audible signal (Tr. 91-92). On the M-16 section, the signal was a flashing light. It was normally activated by the dispatcher (Tr. 92).

Finally, Strahin testified that he had investigated a fire that occurred at the belt drive in another mine. A 10 to 15 minute delay in notifying the crew after the fire was discovered contributed to some of the crew suffering smoke inhalation injuries (Tr. 51-52). In another fire at a different mine, the crew had become separated and miners had died as a result. In Strahin's view, that was why it was important the miners on a section be gathered together and be evacuated together (Tr. 87-88).

#### GARY KENNEDY

Gary Kennedy was the day shift headgate man on the 16-M section. With him were Harold Zupper, Harold McClure, Ron Griffin, Richard Talkie and Marvin Fischer.

Kennedy stated that on March 15, he was working at the headgate, about 5,000 feet from the belt transfer point (Tr. 120-121,205). Around 12:30 p.m., he received a telephone call from the tipple man. The tipple man told Kennedy that the belt drive was on fire. Although Kennedy did not know at the time, Danny Ammons, who was working at the belt transfer, had reported the fire to the tipple man (Tr. 138).

Kennedy had suspected a problem at the belt drive because

the belt had quite running shortly before the tippie man called.

There was a fire suppression system at the belt drive that, when activated, stopped the belt and sprayed it with water. Kennedy speculated that the fire suppression system had shut down the belt (Tr. 154, see also Tr.67).

While Kennedy was talking to the tippie man, the heat sensor system alarm at the tail piece started to beep and the red light on the alarm started to flash (Tr. 121-122). Activation of the alarm confirmed there was a fire on the belt line (Tr. 122).

Kennedy testified that he had been trained to respond to an alarm by going to an intake air entry and moving to a point outby the fire area (Tr. 136). Kennedy shut off the alarm, disconnected the power at the longwall face, and called the miners along the face on the face telephone system (Tr. 123, 125, 141).

There were two telephone systems at the headgate, one connected the longwall face with the belt transfer point and the tippie. The other connected the headgate with points along the face. In addition to these two systems, a telephone system connecting the longwall section to all parts of the mine was located in the track heading by the dinner hole (Tr. 148). To notify the crew of something, the mine dispatcher either called on the mine system or called the tippie operator, who, in turn, called the crew (Tr. 149).

Kennedy told the miners to assemble at the headgate because there was an emergency (Tr. 123). Tim Nester, the section foreman, was not in the face area. He previously had walked down the belt entry to conduct a preshift examination of the belt (Tr. 131-132). However, Zupper, McClure, and Griffin appeared at the headgate. Freeland, the longwall coordinator and a management employee, was missing. Kennedy asked where he was. Zupper said that Freeland had gone down the tailgate entry to check spad readings. Kennedy stated that he would go and find Freeland and that he and Freeland would walk outby the fire via the tailgate entry. Zupper stated that the other members of the crew would exit via the intake escapeway, on the tailgate side of the longwall (Tr. 125, 142).

Kennedy found Freeland at the tailgate end of the longwall. (Tr.126) He told Freeland that there was a fire at the belt drive transfer. Each man picked up a self rescue device and together they proceeded down the tailgate entry, through a door at the crib line and out the track entry (Tr. 127, 143). Kennedy believed that while he and Freeland was walking out of the



section, the rest of the crew also was walking out via the intake escapeway (Tr. 128)

It took about 20 to 25 minutes for Kennedy and Freeland to reach the mouth of the 16-M section (Tr. 129, 143). Once there, Kennedy and Freeland walked to the site of the fire. Several jeeps were parked in the area. Tim Nester was there and someone told Nester to take Kennedy and Freeland back to the 16-M section because the fire was out (Tr. 131-132).

Kennedy looked at the fire site. He saw McLaughlin Akind of like kneeling down@ (Tr. 131). According to Kennedy, McLaughlin had Aa little red hose like he was washing off the bottom belt@ (Id., 157-158). In addition to Nester and McLaughlin, Kennedy saw Ammons in the area (Tr. 131).

Kennedy did not see any hot coals, steam, or smoke (Tr. 150). Ammons told Kennedy that when he opened the door to the belt drive, he saw the fire blazing and went to the telephone to report the fire. When he returned to the belt drive, the fire had been extinguished by the fire suppression system (Tr. 151-152).

Kennedy stated he noticed a charred smell and could see where the belt had Aburned@ (Tr. 132). The bottom belt was Ablistered@ and Amelted@ (Tr. 153-154). Kennedy agreed that given the ventilation system of the longwall, any smoke produced by a fire would have moved away from the face and the longwall section crew (Tr. 146).

Kennedy, Freeland and Nester took a jeep back to the longwall section. When they reached the section, they found the other crew members there. Kennedy was surprised because when he left the section the crew was getting ready to evacuate (Tr. 133-134).

Kennedy and the crew discussed the fire and Consol=s response. As the crew was talking about what had happened, Zupper stated that it was Welch who told him the fire was out and that the crew should stay on the section.

Kennedy recalled someone saying the situation could have been similar to one at another mine where miners were told the fire was out and were sent back to their section only to perish subsequently because the fire was not out (Tr. 133).

RONALD GRIFFIN

Ronald Griffin, the shield man on the 16-M longwall section, testified that on March 15, he was working at the face pulling shields when he received a telephone call from Kennedy. Kennedy told him there was a fire at the belt drive (Tr.160, 172). Zupper and McClure also were working at the face. The three miners left the face together (Tr. 172). They walked approximately 300 feet, past the headgate and into the track entry where Griffin saw the strobe light blinking by the mine telephone. He picked up the telephone and Welch told him to gather the crew and to stay there (Tr. 161-162, 174). At this time Zupper, McClure, and Talkie were in the vicinity (Tr. 178). Nester was Adown the belt@ (Tr. 175).

Griffin went back to the face area and told the rest of the crew what Welch had said (Tr. 160-162, 173, 177). After Kennedy left to look for Freeland, Zupper went to the mine telephone to advise management that the rest of the crew was leaving the section by walking down the intake. Griffin stated that he did not know with whom Zupper spoke, but that the group was held up leaving while Zupper was on the phone. According to Griffin, after he hung up, Zupper advised the group that the fire was out, and the group remained on the section. (Tr. 163-164, 180).

Griffin stated that if miners were not assigned to fight a fire, they were trained to evacuate by walking down an intake entry and proceeding outby the fire. The group discussed this and talked about what they should have done (Tr. 167, 181). In Griffin's opinion, A[w]e should have just gone ahead and taken off. We shouldn't have even looked back, we shouldn't even have been on the phone. We should have just went ahead outby@ (Tr. 181).

HAROLD ZUPPER, JR.

Harold Zupper, Jr., the day shift shear operator on the 16-M section, was working at the face with McClure on March 15. Shortly after noon, Kennedy called Zupper on the face telephone system and told him there was a fire at the belt drive (Tr. 185, 198). Zupper and McClure walked off the face and the two met Kennedy at the headgate (Tr. 199). The belt was not running (Tr. 209).

Zupper told Kennedy that Freeland and Nester were not at the face (Tr. 200). Zupper suggested to Kennedy that he try to find Freeland while the rest of the crew evacuated the section (Tr. 185).

Zupper, Talkie, and Griffin discussed the situation with the rest of the crew. Ultimately, the crew decided to take the track

entry out, because the track entry was on fresh air and a vehicle was there that they could ride. The crew started down the entry.

After a few minutes, McClure suggested they go back, telephone the dispatcher, and tell him the route that they were taking (Tr. 186, 191, 203).

Zupper and McClure went back to the mine telephone. On his way to the telephone, Zupper heard mine superintendent Straface paging mine foreman Welch over the telephone pager unit (Tr. 189-190, 204). Up to this time Zupper had not spoken to Welch, Straface, or McLaughlin, and he had no idea what they had been doing (Tr. 205).

Zupper got on the telephone and spoke with Welch, who told him that the fire was out (Tr. 186). Welch stated the crew should stay together on the section (Tr. 186-187). Zupper believed that Welch was at the dump, approximately five miles from the 16-M section (Tr. 188-189). After receiving Welch's instruction, the crew remained on the section (Tr. 189).

A short time later, Nester arrived. Zupper thought Nester was surprised that the crew was still on the section (Tr. 189, 212). However, Zupper did not know whether Nester was aware the crew had been informed that the fire was out (Tr. 212).

Zupper had worked with Welch for 25 years and trusted him. When Welch told Zupper the fire was out, Zupper did not doubt it. He did not feel that his safety was in any way endangered (Tr. 207-208). Nevertheless, the crew discussed the fire and Consol's response to it. They specifically talked about another mine where the crew had remained on the section and died because they mistakenly thought the fire was out (Tr. 194, 213, 216).

Zupper agreed that on March 15, the air that ventilated the belt was traveling away from the face. Therefore, any smoke along the beltline would not have moved toward the face (Tr. 211). Although Zupper thought the crew should have been evacuated outby the fire, he never complained to Welch or to Nester about the incident (Tr. 212, 214-215).

#### HAROLD McCLURE

Harold McClure, the day shift shearer operator's helper, was working at the face with Zupper on March 15 (Tr. 219). McClure's testimony regarding how he learned of the fire and the subsequent actions of the crew mirrored Zupper's (Tr. 220-222). McClure stated that he was unaware of to whom Zupper spoke on the

telephone and that he did not know who told Zupper to have the crew stay on the section (Tr. 222).

McClure stated the miners were concerned about whether or not the fire really was out when they subsequently discussed the incident (Tr.225). As McClure understood the approved and adopted program, even if a fire was out, the crew was supposed to evacuate (Tr. 227).

#### RICHARD ALLEN TALKIE

Richard Allen Talkie, the day shift longwall mechanic on the 16-M section, was working at the longwall face on March 15 (Tr. 229-230). Talkie's testimony about how he learned of the fire and the subsequent actions of the crew essentially was the same as Zupper's and McClure's, except that Talkie did not believe the crew actually started down the intake entry (Tr. 220-222). Rather, according to Talkie, before the crew could begin to evacuate, they were told by Zupper to stay put, that the fire was under control (Tr. 231, 235).

With regard to damage caused by the fire, Talkie stated that he was told by a beltman, whose name he could not recall, that 30 feet of the belt was scorched and blistered. However, Talkie did not see the belt (Tr. 237).

#### KENNETH STEWART

Kenneth Stewart was the dispatcher at the mine. As the dispatcher, one of his duties was to coordinate communication with mine personnel in the event of a mine emergency (Tr. 239). If the emergency was a fire, he was supposed to get miners out by the fire as safely and quickly as possible (Tr. 240).

Stewart explained that in the dispatcher shanty where he worked there were three different telephone systems -- the mine telephone, the trolley telephone and the city telephone (Tr. 252). To communicate with management personnel and miners, Stewart used the mine telephone system and the trolley system (Tr. 241).

Stewart testified that the March 15 fire was reported to him by the tippie man. Stewart tried to page the 16-M section by using the mine telephone system. As Stewart put it, he "hollered at the section a couple of times" (Tr. 243, 253). When he did not receive an answer, he turned on the flashing light located above the mine telephone. He also activated a similar light on the 17-M section (Tr. 254). In addition, Stewart called

McLaughlin over the trolley telephone and told him about the fire. Stewart estimated that McLaughlin was about a mile and a half to two miles away from the 16-M section. McLaughlin got in a jeep and headed for the fire (Tr. 249-250).

Stewart then called Straface and told him there was a fire in the mine. (At this time, Straface was in either the superintendent's office or the mine foreman's office. Stewart was not sure which.) Straface got on the mine telephone and Stewart heard him Aholler@ at Welch, who was at the dumping point, near the bottom of the shaft. Stewart stated that he did not know if Straface realized Stewart was still on the line and was listening (Tr. 246).

According to Stewart, Straface asked Welch what was going on. Welch replied that Stewart was handling the situation. Straface told Welch to take over (Tr. 247). Stewart understood this to mean he was supposed Ato get the hell off the phone@ (Id.). Stewart was upset and would have Apunched [Straface] in the mouth@ if he could, because Straface Awas taking over my job@ (Tr. 264-265). Stewart did not know if the crew was ever evacuated outby the belt drive area (Tr. 250-251).

#### DANNY AMMONS

Danny Ammons was in charge of the belt transfer area of the 16-M section. His duties required him to check the belt tailpiece from time to time (Tr. 268). Early in the afternoon of March 15, Ammons received a telephone call from Kennedy, who asked Ammons to take the slack out of the belt at the tailpiece.

To do this, Ammons had to go to the belt drive area (Tr.269). To reach the tailpiece, Ammons walked along the belt entry, crossed an overcast and proceeded to a second overcast. At the overcast there was an airlock within a set of doors. Ammons went through the first door and entered the air lock. The belt ran through the airlock (Tr. 292). He noticed smoke and haze around the belt. The belt had quit running and Ammons speculated that it was slipping on its rollers and the resulting friction was producing the smoke or haze (Tr. 284-285). Ammons opened the second door and saw more smoke. Almost at the same time, there was a sudden flare of flames. According to Ammons, A[i]t exploded like gasoline would@ (Tr. 272). Although the fire could have been in existence before Ammons opened the second door (Tr. 304), he speculated that when he opened it, a bust of oxygen caused the fire to intensify and flames to erupt (Tr. 295).

Ammons returned to the belt transfer area and called the tipple to report the fire. He was not sure with whom he spoke

(Tr. 273). Ammons asked the person at the tippie to notify the dispatcher and Awhoever else they needed to notify@ (Tr. 274).

Returning to the fire, Ammons traveled up the track entry. He reached a door leading to the belt entry. Ammons opened the door and noticed smoke that extended from the roof half way to the floor. He also saw the legs of a person walking through the smoke. It was Nester (Tr. 275-276, 300).

Accompanied by Nestor, Ammons retraced his steps to the air lock doors. Ammons and Nester put on self rescue devices and entered the air lock (Tr. 278). One of the sprays of the fire suppression system was on and the fire was out (Tr. 279, 291, 304). Ammons estimated that only a few minutes had elapsed since he first saw the fire (Tr. 296).

Ammons and Nester did not go too close to the site of the fire because it was wet. While they waited, miners and management personnel arrived (Tr. 285). McLaughlin was among the management personnel (Tr. 285). Freeland and Kennedy also were present (Tr. 286). As Ammons recalled, McLaughlin took a hose and started spraying Asome hot coals and stuff@ (Tr. 286).

Ammons noticed some badly scorched brattice boards and about 40 feet of blistering on the bottom of the belt (Tr. 287, 297). Ammons believed that if the fire suppression system sprays had not activated, the fire would have gotten out of control (Tr. 289).

Ammons stayed in the area for about an hour. He and other miners kept checking the coal under the belt to make sure that there was no heat and that the fire did not restart (Tr. 309).

Ammons stated that as part of the fire training he received at the mine, he knew that miners were supposed to evacuate to an area outby the fire (Tr. 289). Regarding the direction in which the smoke from the fire traveled, Ammons agreed that it went through the regulator and out the return (Tr. 301).

#### TIMOTHY NESTER

Timothy Nester, the foreman of the 16-M section, was conducting a preshift examination of the belt line on March 15 (Tr. 731). As he approached a point inby the regulator, he noticed the belt slowing, and then it stopped (Tr. 718-719). About the same time, Nester saw smoke coming through the box check and traveling toward the regulator. Nester prepared to leave the entry and was about to do so when he saw Ammons (Tr.

313-314, 720).

He and Ammons walked to a door that lead to the belt drive area. When they opened the door, Nester saw layered smoke and water spraying but no open flames (Tr. 315, 721, 723). They checked both sides of the belt to determine the extent of the problem (Tr. 316), but they did not examine the belt all of the way to the longwall face (Tr. 729). Nester estimated that five to fifteen minutes passed before other miners, including McLaughlin, arrived (Tr. 319). Nester called Straface (Tr. 319). Straface wanted to know what the situation was. Ammons told Straface that the fire was out and that Aeverything was okay@ (Tr. 320, 725).

Nester had to leave the belt drive area to make the call, and when he returned he saw Kennedy and Freeland. Nester asked Kennedy where the other longwall miners were, and Kennedy stated that he did not know (Tr. 321). Nester assumed the other crew members had evacuated the section (Tr. 322).

Subsequently, Nester, Kennedy, and Freeland went back to the longwall section where they found the other miners (Tr. 323). Nester stated that although he was surprised to see the crew, he would not have been Aif I knew when and at what time they knew the fire was out@ (Tr.322).

Nester stated that if he had been on the longwall section and had been notified of the fire, he would have immediately evacuated the crew. He was trained to follow this procedure (Tr. 323-324). He stated, A[i]f we know where the fire is located [our responsibility] is to get outby that point@ (Tr. 324-325). However, if he was notified subsequently that the fire was out and if the crew was not yet outby, he would not have evacuated them (Tr. 324).

#### MICHAEL AYERS

Michael Ayers was the president of the union local and a member of the mine safety committee. He did not work at the mine on March 15. When he came to work on March 16, Zupper complained to him that there had been a fire on March 15, and that the longwall crew had been stopped from evacuating. Ayers testified that the crew was concerned because the fire fighting evacuation program required miners Ato evacuate and go outby@ the fire if they received a fire signal at the headgate (Tr. 327; see also Tr. 329). In addition, the crew was supposed to notify the dispatcher that they were leaving, advise the dispatcher how many miners were in the group, and state the route they were taking

(Tr. 329).

According to Ayers, on March 15, the fire sensor system was the primary means of fire detection and the CO monitor system was secondary, but Consol's miners were trained to respond to either system (Tr. 329).

MARVIN FISCHER

Marvin Fischer did electrical and mechanical work on the day shift. As part of his job, Fischer worked on the CO monitor system (Tr. 347). Fischer stated that there was a CO sensor over the belt drive so that the air coming across the drive would hit the sensor (Tr. 351, 357, 359). The next sensor was located at the regulator, approximately 100 feet from the belt drive (Id.). Given the location of the sensors, Fischer believed that if there was a fire at the belt drive, the CO monitor system would have detected it and triggered an audible alarm at the CO monitor system station, which was located in the main mine office building, adjacent to the offices of mine management officials (Tr. 351-353). In his opinion people in those offices would have heard the alarm (Tr. 354).

SPENCER SHRIVER

Spencer Shriver is an electrical engineer and an MSHA mine inspector. Shriver conducts electrical inspections, as well as evaluates petitions for modification of standards. Shriver learned of the March 15 fire on March 17, when he was told about it by miners' representatives. (Tr. 362-363).

Shriver went to the mine office to check the CO monitor system print-out. At the office Shriver encountered Elmer Brooks, the mine's maintenance supervisor, who told Shriver that he had heard the CO system alarm on March 15, had called the dispatcher, and had told the dispatcher there was a fire alarm on the 16-M belt drive (Tr. 364, 375-376). Brooks also told Shriver that the audible alarm was confirmed by the CO system computer print-out (Id.).

When Shriver looked at that print-out, it showed that a fire warning indeed had been given. (The system gives a warning when CO reaches a level between 10 and 15 parts per million.) The print-out showed a reading of 11 parts per million, which, in a few seconds, rose much higher (Tr. 365).

Later that day, Shriver spoke with Danny Ammons. Ammons told Shriver how he discovered the fire. Shriver's description



of what Ammons said essentially tracked Ammons' testimony.

Shriver also spoke with Kennedy about the fire. Shriver's description of what he was told by Kennedy followed Kennedy's testimony. Similarly, Shriver's description of what Zupper told him paralleled Zupper's testimony (Tr. 369, 451, 453, 497), except that Zupper did not want to identify to Shriver the person who directed the crew to stay on the section. He would not tell Shriver whether the person was from management or was a rank and file miner (Tr. 373).

Nevertheless, Shriver came to believe that Welch was the person who had directed the crew to stay. Shriver's belief was based on a conversation he overheard. On March 24, 1993, another MSHA inspector asks Welch if Welch knew who told the crew to stay on the section and Shriver heard Welch reply that he, Welch, did (Tr. 385).

Shriver described the conversation this way:

We were in a small room where the inspectors put their gear on, and I had heard some mention that the person who had called the section and told them to stay there was Mr. Welch, but he was pretty highly regarded by the rank and file people and they didn't want to name him.

\* \* \* \*

I wondered how we could determine who did call the people and ... Welch was standing in the doorway. And [the other inspector] says, very easily. He says, hey, Bob who called the 16-M section during the fire the other day and told them not to leave. And ... Welch said, well, I did (Tr. 457).

Shriver also maintained that subsequent to this conversation Welch again specifically stated that he told the crew to stay on the section (Tr. 471-472). Shriver therefore was of the opinion that Welch knowingly ordered, authorized, or carried out a violation of the evacuation program (Tr. 502).

Shriver was asked his views about whether or not McLaughlin knowingly failed to withdraw the affected miners. Shriver acknowledged that he did not speak with McLaughlin regarding his response to the fire. Shriver did not know where McLaughlin was when the fire occurred, or if McLaughlin had given any orders regarding the fire (Tr. 414-415). Nor did he know when

McLaughlin first reached the site of the fire (Tr. 470-471, 490).

When he was asked if he believed McLaughlin knowingly ordered, authorized, or carried out the violation alleged, he replied, "I really don't have any information that would indicate that he did" (Tr. 501).

With regard to Straface, Shriver stated that he did not know for sure where Straface was when the fire occurred, but he assumed that Straface was not underground. Shriver recalled Straface describing what the company did regarding the fire and stating that he was prepared to bring water cars to the scene (Tr. 415). This indicated to Shriver that Straface knew about the fire (Tr. 473).

In a later meeting with MSHA that involved Shriver and Straface, Shriver remembered Straface saying that the company had made a mistake. Shriver interpreted this to mean that Straface conceded Consol should have evacuated the miners from the section (Tr. 473-474, 502). However, he also agreed that he did not ask Straface what he meant and that during the meeting Straface argued vehemently that the company had done nothing wrong (Tr. 491-492).

Shriver testified that after interviewing the miners regarding the incident, he saw MSHA Inspector McDorman, who told Shriver that MSHA had learned enough to justify citing Consol for a violation of section 75.1101-23 in an order issued pursuant to section 104(d)(2) of the Act. The violation consisted of "having a fire and failing to evacuate the crew" (Tr. 369-370). (McDorman issued the order, and Shriver reviewed its contents and countersigned it (Gov. Exh. 6; Tr. 370-371, 405).)

Shriver believed that Consol violated Part II.A.2. of the fire evacuation program, which stated if a fire sensor system alarm occurred, persons in the affected area would be notified and would be immediately withdrawn to a location outby the affected area (Gov. Exh. 4 at 4; Tr. 377). Based upon what Kennedy told him, Shriver concluded that the fire sensor system alarm had indeed gone off on the 16-M section (Tr. 377). Shriver was asked what he understood "the affected area" to be. He responded that it was the 16-M belt drive, since that was the area involved in the fire (Tr. 376).

With regard to Part II.C. of the program, the part relating to the CO monitor system, Shriver maintained that Consol was required to follow it (Tr. 472-473). Shriver stated:

At the time I assumed that [Part II.C.] did apply,

since ... as I recall, ... [The CO monitor system] ... had been ... partially installed for ... at least a year ... the only thing they had left to ... install ... was the final sensor up at the section ... and a[n] ... out station. So in all intents and purposes, the system was installed (Tr. 447-448).

Shriver also stated that as he understood the program, once a foreman or any management person knew there was a fire on a section, the person's first responsibility was to insure the crew was evacuated outby the affected area (Tr. 481).

[A]s I read the plan, on belts, whether it's a fire sensor alarm or CO monitor alarm ... the plans calls to immediately withdraw the people to a location outby the affected area.

\* \* \* \*

If [the fire is] of a sufficient magnitude to set off one of these alarms, then the way I read it, the crew should be withdrawn ... . [T]he potential hazard of a fire out of control and the rapidity with which fire can get out of control, I think that's what causes these plans to be so demanding in getting the people off the sections and then figuring out what's wrong (Tr. 499-500).

It did not matter whether the fire lasted five seconds or fifteen minutes, the crew had to be evacuated (Tr. 500-501).

Regarding Consol's negligence in allegedly violating the program, Shriver agreed with McDorman that it was **A**high. Management officials knew of the fire yet directed the crew to remain on the section (Tr. 373).

Shriver believed the alleged violation was caused by Consol's unwarrantable failure because **A**management ... told the people to stay on the section even after a clear fire alarm had been sounded (Tr. 404). Later, Shriver was asked if during the investigation he learned whether any management person at the mine actually knew that the fire alarm system had activated. Shriver responded, **A**n]ot the point sensor fire alarm, no (Tr. 411).

Shriver described the alleged violation as **A**extremely serious and potentially disastrous (Tr. 387). Consol had experienced past fires at its mines and one, at the Blacksville No. 1 Mine, had resulted in fatalities (Tr. 386-387). He stated

that the decision not to evacuate because the fire was out was **A**fraught with great danger@ (Tr. 387). He explained, **A**[w]hen that decision had been made, no one had really walked the belt to see if any burning material had been carried back into ... the belt entry and possibly started another fire@ (Tr. 387).

RICHARD McDORMAN

Richard McDorman was the regular inspector for MSHA at the Blacksville No. 2 Mine. In that capacity, he inspected all areas of the mine. McDorman was not at the mine on March 15, but he went on March 17. Shriver was also at the mine that day.

When Shriver told McDorman he had received a complaint about a fire at the belt drive, the two inspectors began an investigation (Tr. 505-506).

While he was still above ground, McDorman looked at the on-shift examination book for March 15. The book contained no reference to a fire (McDorman subsequently issued a citation for failing to report a **A**hazardous condition@ in the book (Tr. 508).)

McDorman then went underground to the 16-M section to talk with the crew. Zupper told McDorman there had been a fire, and he described how he learned of the fire and the crew's response to the fire. McDorman's description of what Zupper told him essentially paralleled Zupper's testimony, except that Zupper would not tell McDorman the name of the foreman who told the crew to remain on the section (Tr. 509-510, 535-536).

McDorman stated that he and Shriver jointly issued the contested order to Consol for violating its fire fighting and evacuation program (Tr. 511; Gov. Exh. 6A). McDorman indicated in the body of the order that five persons were affected by the alleged violation because he believed that number was not evacuated (Tr. 513). Further, he found the alleged violation was S&S because he knew of other belt fires in mines and of the results of those fires (Tr. 517).

Regarding the gravity of the alleged violation, he thought the miners were subjected to the hazards of entrapment, of smoke inhalation, and of CO poisoning. Fires at other mines had resulted in miners dying from these causes (Tr. 515). Failing to evacuate affected personnel was dangerous because if the fire had gotten out of control, and intensified, it could have disrupted normal ventilation and smoke could have reached the face (Tr. 582-583, 590). Finally, because of Zupper's statement that a foreman said not to evacuate, McDorman found that mine management was highly negligent in failing to get the crew out by the fire

(Tr.516,525,571). Mine management was responsible for following its fire fighting and evacuation plan (Tr. 521-522).

Subsequent to issuing the contested order, McDorman and Shriver modified it in several respects. One of the modifications indicated that the alleged violation also included a failure to withdraw the crew on the 17-M section (Gov. Exh. 6A at 4). McDorman explained that the escape route for that section traveled outby the 16-M belt drive. Because the crew on the 17-M section was inby the fire, they should have left the section and moved outby the fire (Tr. 518). Another modification changed the number of persons affected by the alleged violation from five to ten -- the number of miners working on both sections (Gov. Exh. 6A at 4; Tr. 519-520).

McDorman believed that Consol violated Part II.A.2. of the program, the part concerning the steps Consol had to take when the fire sensor alarm system was activated (Gov. Exh. 4 II A.2. at 4). Under Part II.A.2., persons in the affected area were required to be notified and to be immediately withdrawn to a location outby the area (Tr. 522-523). However, McDorman stated that he would have charged Consol with a violation even if the fire sensor alarm had not been activated, provided management had known there was a fire (Tr. 537).

McDorman did not know if the petition for modification allowing reliance on the CO monitor system was implemented on or before March 15 (Tr. 555-556). Nonetheless, he believed Consol also violated the CO monitor system part of the program, because a CO alarm sounded, but the crew was not withdrawn (Gov. Exh. 4 Part II.C.; Tr. 523).

Finally, McDorman believed Consol violated the part of the program that concerned the duties of the longwall section personnel (Gov. Exh. 4 VII.B. at 8). Specifically, McDorman referenced section VII B.1.b., which required management to A[s]ee that all [longwall section] personnel are on the outby side of the fire and [are] accounted for@ (Gov. Exh. 4 at 8; Tr. 584). McDorman stated the requirement applied whether the fire was at the face or was outby the section (Id.). (However, later he appeared to agree that this part of the plan was more applicable when of a fire occurred in the face area (Tr. 554-555).)

With regard to McLaughlin's involvement with the fire, McDorman stated that he had no knowledge regarding whether McLaughlin knowingly ordered, authorized, or carried out the violation (Tr. 587). With regard to Welch's involvement, the

only thing McDorman knew was that Welch told Griffin to get the crew together and stay together (Tr. 562). With regard to Straface's involvement, Stewart told McDorman that Straface was on the mine telephone and that he prevented Stewart from doing his job (Tr. 563). McDorman never discussed Stewart's comments with Straface (Tr. 566).

#### HARRY C. VERAKIS

Harry C. Verakis is an MSHA supervisory engineer. He also has worked for MSHA as a supervisory physical scientist (Tr. 595-597). Part of Verakis' work for MSHA has involved the study of conveyor belt fires. He has participated in both large and small scale studies to determine what happens during such fires (Tr. 594-595). Verakis is the author of "Reducing the Fire Hazard of Mine Conveyor Belts," a paper that he presented at a mine ventilation symposium in 1991 (Gov. Exh. 8; Tr. 598).

Verakis testified that the studies in which he participated revealed that an entry air velocity of 300 feet per minute is the optimum for flame propagation (Tr. 606). Verakis agreed that on the 16-M section there was a lower velocity of air at the belt transfer point. However, rather than reduce the hazard, Verakis believed the velocity gave the fire a better chance to intensify (Tr. 610). In Verakis' opinion, if the fire was fairly intense it could have moved from the belt drive, up the entry, and toward the face (Tr. 638).

An additional hazard from the fire was that smoke and toxic gases could have leaked into the track entry and moved toward the face (Tr. 612-614). However, Verakis admitted that the pressure differential between the track heading and the belt heading could have affected whether the smoke and fumes reached the face and that he did not know what the pressure differential was (Tr. 634-635).

In Verakis' opinion, many variables dictated a fire's development and because of a fire's inherent unpredictability, miners always should be evacuated out by a fire (Tr. 613).

Verakis estimated that the March 15 fire produced temperatures of at least a couple of thousand degrees Fahrenheit, temperatures sufficient to cause the conveyor belt, brattice material, and boards to burn. He further noted that these materials give off toxic fumes as they burn (Tr. 621-622).

Verakis later agreed, however, that the conveyor belt could have become blistered by the heat without catching fire, and that he did not know if the belt actually had burned (Tr. 641-642).

In explaining the sudden burst of flames that Ammons saw upon opening the door at the belt drive, Verakis testified that there could have been a flashover caused by the friction of the belt rubbing against the belt drive drum. The rubbing could have loosened rubber and fabric particles from the belt and these particles, when mixed with the coal dust that usually is present at the belt drive, could have ignited suddenly. (Tr. 1034-1035).

CRAIG YANAK

Craig Yanak, who testified on Consol's behalf, was the company's regional supervisor for dust and noise control. Part of his duties involved the gathering of information for fire fighting and evacuation programs. He was extensively involved in the development of the fire fighting and evacuation program that was in effect on March 15 (Tr. 676-677). With regard to the part of the program relating to the fire sensor system (Part II. A.&B.) Yanak agreed that it was supposed to remain in effect until the petition for modification was implemented. After implementation of the petition, the provisions relating to the CO system (Part II.C.) were supposed to take effect.

Yanak identified a letter from Consol to MSHA dated September 15, 1994, which stated that Consol was implementing the petition for modification effective that date (Exh. R. 3; Tr. 678-679). This letter was acknowledged by the MSHA district manager on September 26, 1994 (Resp. Exh. 4; Tr. 681-682). Therefore, in Yanak's view, on March 15, 1993, Consol was not operating under Part II.C. of the plan (Tr. 679-681).

Yanak explained the structure of the approved and adopted program by stating that there were only two parts of the program whose effect was conditioned upon a timetable:

[W]e have two system here that we're addressing [in the plan]. One of them is a ...[fire] sensor system. And one part is a CO monitoring system.

\* \* \* \*

Either one or the other is going to be in effect. One will be in effect prior to the implementation [of the petition for modification]. The other would be in effect after the implementation. But all other parts of the plan [are] in effect regardless of whether its implemented or not implemented (Tr. 684).

ROBERT CHURCH

Robert Church, who testified for Consol, was the company's regional safety inspector. Church investigated and reported on the March 15 fire. According to Church, he determined from speaking with the people who were present at the belt transfer area that the fire lasted from one and one-half to two minutes. It resulted in the blistering of the belt in one area and the charring of two brattice boards. Because of the damage, the belt had to be spliced. Also, the grooves on the drive rollers were slightly damaged (Tr. 692-693, 707).

Church testified that the CO sensor printout indicated CO rising from 11 parts per million to a much higher level in a matter of seconds (Tr. 693). In addition, the CO monitor system gave an audible warning. He determined that Elmer Brooks, the maintenance supervisor, heard the warning and Church believed that Straface heard it as well. Straface's office was located about 20 feet from the alarm (Tr. 705). Stewart was notified of the CO monitor alarm, but he already knew about the fire (Tr. 693).

Church believed that Stewart was in the process of evacuating the mine and getting water cars to the area when the fire was extinguished (Tr. 694). Straface told Church that all of this occurred within three to five minutes (Id, 796).

Church accompanied Shriver during Shriver's March 17, investigation of the fire. Church did not recall what he told Shriver about the fire (Tr. 708).

In Church's opinion, the miners were not evacuated because:

[T]he fire was extinguished prior to everyone even being notified there was a fire. And once the fire was extinguished and we were assured there were no further problems, we [saw] no reason to continue with the evacuation (Tr. 711).

According to Church, the fact that miners were not withdrawn under these circumstances was consistent with the policy then in effect at the mine (Tr. 712).

JOHN SWEETER

John Sweeter, a day shift foreman, testified for Consol. On March 15, he was outby the face on the 17-M section when a member of the crew told him Stewart was on the telephone yelling



Asomething about a fire@ (Tr. 735). Sweeter and the miner ran to the telephone and Stewart called the dispatcher who advised Sweeter that there was a fire at the 16-M belt drive. Stewart told Sweeter he was notifying others in addition to Sweeter and that he had water cars coming to the scene (Tr. 736). Sweeter sent the miner back to the 17-M section crew with instructions to tell them of the fire, to get the crew together, and to have them go to the telephone and contact the dispatcher (Id.).

Sweeter got in a jeep and headed for the 16-M belt drive. On the way, he called Stewart on the trolley phone to tell him he was going to the scene of the fire, and Stewart told him the fire was out (Tr. 737, 751). (Sweeter estimated that perhaps two minutes elapsed between the time he first called the dispatcher and the time he was told the fire was out (Tr. 738, 745).)

When Sweeter reached the belt drive he observed blistering on the belt, but Sweeter did not recall how much of the belt was affected (Tr. 746-747). He also noticed that some boards were charred (Tr. 746).

Sweeter confirmed that the 17-M section was inby the 16-M section in terms of ventilation. He stated that if there was a fire at the 16-M section, Aand it's still in progress,@ it would have been prudent to withdraw the crew on the 17-M section outby the fire (Tr. 749, see also Tr. 748-749). He stated he did not know if the 17-M crew was withdrawn (Tr. 749-750).

#### CHARLES BANE

Charles Bane, the company's regional manager of safety, testified for Consol. He was in charge of safety at Consol's northern West Virginia mines. His duties included the development of safety plans and policies for the company and he oversaw the Company's compliance with federal and state rules and regulations (Tr. 753). Bane helped develop and submit to MSHA the mine's program of evacuation (Gov. Exh. 4; Tr. 756-757, 761).

Blane described Consol's policy respecting Part II.A.&B. of the program. He explained that when the cause of a fire sensor alarm was unknown, Consol treated the situation as though there was a fire (Tr. 767). He stated, A[i]f we have an alarm and we don't know the reason for it -- we assume that with the fire alarm we have a fire ... [W]e respond to those alarms@ (Tr. 765, 774 ).

He further explained, in effect, that if an alarm was activated and Consol knew first-hand that there was no fire, (for

example, Consol knew the alarm was a mistake); or, if an alarm was activated and Consol knew that although there had been a fire, it was extinguished, Consol would consider that information and not require miners to evacuate (Tr. 779-780). This was what he intended when he wrote the program (Tr. 780). According to Bane, the program contained an underlying and unstated assumption that for Consol to take action under the program there had to be an ongoing fire.

Counsel for the Secretary questioned Bane about this:

Q. [T]hroughout this plan there is one emphasis and that is when a fire is discovered and its location known, the responsible foreman and those that have the responsibility are to get their people out by the fire; is that not correct?

A. I don't think anybody would deny that. If we have an ongoing fire, yes, sir, we would get everybody out by as soon as possible.

Q. It doesn't say anything in here about an ongoing fire, it's just a fire.

A. I don't think anybody would deny that. If we have an ongoing fire, yes, sir, we would get everybody out by as soon as possible.

\* \* \* \*

Q. Out by the fire?

A. If it continues to burn, yes, sir (Tr. 789-790)

Bane summarized why, in Consol's view, it did not violate the program: [T]he fire was put out before the people ever got gathered. So [at] that point, there was no longer a fire, so then there's not an evacuation process (Tr. 794).

Finally, as the author of the plan, Bane maintained that Part VII applied only if the fire occurred on the section (Tr. 786). That was why certain assignments were specified in Part VII for various miners of the section crew (Tr. 787).

ROBERT WELCH

Welch testified on behalf of and himself Consol. He stated that on March 15, he was working near the bottom of the portal

shaft, at the dumping shanty. This is the area where miners entered and left the mine and where coal was lifted from the mine (Tr. 809). Welch's duties that day were to monitor and coordinate with the dispatcher, Stewart, the availability of mine cars that shuttled coal from the longwall sections (Tr. 810). At the dumping shanty Welch communicated throughout the mine and to the surface by using the mine telephone. He also had access to the trolley radio telephone system (Tr. 811-812).

Shortly after noon, Welch heard a signal that sounded when the dispatcher set off emergency warning lights somewhere in the mine (Tr. 813-814). Welch immediately thought something major had gone wrong. He picked up the telephone and listened. He heard nothing. He paged the dispatcher and asked him what had happened. Stewart responded that there was a fire at the 16-M belt drive. (Tr. 815)

Welch testified that he told Stewart to turn other emergency lights on and to send a water car to the area. Welch also advised Stewart that he would stay on the line and when miners responded to the lights he would tell them about the fire and let Stewart know which miners had responded (Tr. 815).

The first person with whom Welch spoke was either Griffin or Zupper; Welch could not recall which. He told the person that there was a fire at the belt drive and that the person should get everyone on the section together and call back (Tr. 817). It was important to gather the crew so that its members would not separate and go in different directions.

Not more than five minutes later, Griffin called Welch (Tr. 820, 841). Welch asked Griffin if everyone on the crew was together. Griffin responded, "No, not yet," and Welch again stated that everyone should be brought together and then he should be called back (Tr. 820). Welch was asked by counsel for the Secretary why he did not tell the crew to evacuate. He replied, "At the least you put on to a person in a situation like this ... the better off you are" (Tr. 840).

In the meantime, Stewart activated emergency lights in other sections of the mine, and other crews began to come on the telephone line and ask what had happened. Welch testified that he and Stewart responded to the inquiries by telling the other miners to stand by, that there was a problem (Tr. 821).

Also, Straface called Welch. According to Welch, Straface asked what was being done with respect to the problem (Tr. 857-858). Welch advised Straface that he and Stewart "had things

under control@ (Tr. 849). Welch maintained that at the time he spoke with Staface, he was taking the steps necessary to evacuate the 16-M crew, in that he had notified them of the situation and advised them to prepare to evacuate (Tr. 851).

Before Welch heard again from the miners on the 16-M section, the tippie operator stated over the telephone that the fire was out. Shortly thereafter, there was a second call over the line. It was either Nester or Ammons. Whomever it was confirmed that the fire was extinguished (Tr. 823).

Subsequently, Zupper called. He told Welch the crew was with him and that they were ready to leave the section. Welch replied, A[t]he fire is out ... just stay in fresh air and monitor the telephone@ (Tr. 823, 841). Welch testified he was satisfied that the crew was no longer in danger. Welch stated the only reason he did not tell the crew to evacuate was because he believed the fire was out (Tr. 825-826). He also stated that, although he could have ordered the crew to evacuate outby the site of the fire, he was concerned about the miners= physical condition and the possibility that if they had to move at a fast pace one or more of them might have had a heart attack and that he would have caused it (Tr. 823-824, 843). At no point subsequent to the fire did any member of the crew complain that Welch had not ordered them to evacuate the section; nor did Stewart complain (Tr. 827-828).

Welch did not ask anyone about the extent of the fire or about its effect on the ventilation of the longwall section. If the fire had created a problem with the ventilation he was sure he would have been notified by Stewart or by someone on the section (Tr. 844-845).

From his position in the dumping shanty, Welch had no knowledge as to whether or not a heat sensor system alarm and/or a CO monitor system alarm was activated (Tr. 826).

Welch also testified that at the time of the fire McLaughlin was in another part of the mine, a good distance away from the 16-M belt drive. After Welch heard Stewart tell McLaughlin there was a fire on the belt drive, he heard McLaughlin respond that he wanted to go to the fires site (Tr. 829). While McLaughlin was in route, Welch heard McLaughlin call Stewart and ask if the water cars were on their way (Tr. 830). A short time later Welch heard Stewart tell McLaughlin that the fire was out. McLaughlin replied that he still wanted to go to the area. The last thing Welch heard was McLaughlin stating he was at the belt drive (Tr. 831).

JOHN STRAFACE

Straface testified on behalf of himself and Consol. According to Straface, he first became aware of the fire on the 16-M section when Stewart notified him over the telephone (Tr. 860). Straface called Welch at the dumper shanty and asked if Welch knew anything about the situation. Welch replied that Stewart had told him the same thing (Tr. 860-861).

Straface stated that he assumed the worst. As a result, he wanted the full mine evacuation plan to be implemented (Tr. 861). As Straface recalled, he was told either by Welch or Stewart, that the 16-M section and the 17-M section crews had been notified of the fire and Straface requested that the entire mine be notified (Tr. 861-862, 904). Further, Straface asked if water cars were on the way to the belt drive and was told that had been taken care of. Straface stated that he put Welch in charge of monitoring the situation and taking care of the evacuation (Tr. 863). Straface denied that he ever told Stewart to stay off the mine phone system (Tr. 864).

On cross-examination, Straface stated that he did not give specific instructions to Welch or anyone else concerning the 16-M section or any other section, rather, his instructions were simply to initiate the evacuation (Tr. 889).

According to Straface, McLaughlin called him on the trolley telephone, and wanted to know if water cars were on their way to the belt drive. Straface told McLaughlin that everything was taken care of and to go to the fire (tr. 891).

After that, Straface monitored the mine telephone system on and off (Tr. 888). At one point he overheard Welch tell someone from the 16-M crew to get the crew together and to call back. Straface did not disagree with this (Tr. 894-895). Straface did not talk to the crew; he did not interrupt to say that once the crew got together they should go out by the fire. He just assumed it would happen (Tr. 865, 890).

A short while later, he overheard Ammons tell someone that the fire was out. Straface believed that Ammons was talking to Stewart (Tr. 865, 888). Straface stated that he wanted to speak with Nester in order to verify the fire was extinguished. Nester called him and stated that the fire was out, that there was no longer a problem, and that everything had been taken care of (Tr. 865). Later, he also overheard a conversation in which Welch told someone from the crew that the fire was out and to stay by

the phone (Tr. 866). Straface did not say anything. He believed that Welch had given the crew the right instructions (Tr. 867, 895-896).

Straface went underground about 30 to 45 minutes after learning that the fire was out (Tr. 868). When he arrived at the belt drive, Straface observed damage to the belt. Approximately 40 to 50 feet outby the belt drive, the belt was blistered and some of the rubber had bubbled up@ (Tr. 868-869). In addition, there was damage to some wooden boards used for guarding (Id.).

Subsequent to the fire, Stewart spoke with Straface. Stewart was upset that his duties had been taken away. Straface stated:

He felt that ... he was not given the right to direct the underground communication and traveling. I told [Stewart] that I think that he did his job properly and that I did my job properly. That if there was a problem underground and I was available, that I was going to help him and monitor what he did and if I didn't think what he was doing was right, I would change it. If I felt what he was doing was proper, that would be fine. But I was in charge of the coal mine, I would be ultimately responsible for the results of the incident and if it was going to be done right or wrong, I wanted to ... [know] about it, I'd make the decision (Tr. 876).

Straface denied that he ever told Stewart to stay off the telephone (Tr. 876). He asserted that he asked Welch to monitor the situation because:

There are other people working in the [mine] besides the people on the production section. And it's very difficult for one person to try to find 150 people. So it would seem proper to have more than one person trying to ... make sure that everybody was evacuated and that we didn't leave somebody on the belt line shoveling the belt somewhere .... I just wanted more than one person to monitor what was going on (Tr. 885-886).

During cross-examination Straface was asked why the affected miners were not evacuated outby the fire, and he replied:

They didn't evacuate because the fire was out .... It was a timing situation that by the time they gathered, [and] they called and notified that they were

gathered and leaving, the fire was out (Tr. 882).

Straface believed there was not a violation of the approved and adopted program of evacuation procedures because:

[I]f there's a fire, we evacuate. If there's an unknown situation, if there's a fire alarm that's unknown, we evacuate. If the situation becomes known, you react to the known (Tr. 902).

Here, he had know that the fire was out.

SAMUEL McLAUGHLIN

McLaughlin testified that he became aware of the fire when he was on the other side of the mine. A miner said that Stewart was trying to reach him on the trolley telephone. McLaughlin went to his jeep to speak with Stewart and Stewart told him there was a fire on the 16-M belt drive. McLaughlin jumped in the jeep and asked Stewart for clearance to travel to the 16-M section (Tr. 907). McLaughlin estimated that he was approximately 15 to 25 minutes away from the section (Tr. 908).

At a main junction, McLaughlin left the jeep to throw a rail switch. A mine telephone was near the switch. McLaughlin picked up the telephone and Ahollered@ for the dispatcher. Straface, not Stewart, came on the telephone and McLaughlin asked if the crews had been notified of the fire and if water cars were ready. Straface responded that these things had been taken care of (Tr. 909).

McLaughlin resumed his trip to the section. Before he reached the belt drive, Stewart came on the trolley telephone and told McLaughin to take his time, that the fire was out (Tr. 910).

Once at the belt drive, McLaughlin got out of the jeep near an overcast. Nester and several other mines were there. McLaughlin did not ask where the crew from the 16-M section was (Tr. 926-927). Nor did he ask if the belt had been patrolled for fire from the point of the fire inby to the longwall face (Tr. 927). McLaughlin entered the belt drive area. The sprinkler was off and there was no smoke. However, when he approached the belt drive he could smell charred wood (Tr. 916).

After his examination of the belt and the belt drive, McLaughlin went to the telephone by the belt transfer area. He called Straface and told him about the damage (Tr. 920).

McLaughlin was asked by counsel for the Secretary whether he agreed that the fire evacuation program required Apeople to be withdrawn ... out by that fire immediately@ once a fire was known to exist. McLaughlin replied it did (Tr. 930).

JOHN LEVO

John Levo, the ventilation foreman at the mine, testified on behalf of Consol. Levo stated that on March 15, he was with McLaughlin, on the other side of the mine, when Stewart called and stated that he wanted to talk to McLaughlin because there was a fire on the 16-M section. Levo got McLaughlin and they left in a jeep for the section (Tr. 934). At the point where a switch had to be thrown, McLaughlin got out of the jeep and called someone on a telephone. Levo did not hear the conversation (Tr. 935).

Levo and McLaughlin resumed their travel. Along the way, Stewart called over the trolley telephone and stated that the fire was out, that there was no emergency, but that they should continue on to the section (Tr. 936).

It took approximately 20 to 25 minutes to reach the section. Once there, McLaughlin left the jeep and walked to the belt drive. Levo parked the jeep and he too walked to the belt drive. Levo did not observe anything that was flaming, or smouldering, or hot (Tr. 937). The area was wet from the fire suppression system (Tr. 955).

DONALD MITCHELL

Donald Mitchell, a self-employed mining consultant specializing in ventilation, mine fires, and mine explosions, testified on behalf of Consol (Tr. 956). Mitchell is a recognized authority on mine fires and at the time of the hearing, he was completing the third edition of a book entitled Mine Fires. Mitchell described the book as a Abest seller@ in the mining industry (Tr. 961). In addition, Mitchell was instrumental in introducing CO monitor systems to the United States. Mitchell was permitted to testify as an expert with respect to mine fires, mine ventilation, and CO monitor systems (Tr. 961-962).

Mitchell described the air pressure differential between the 16-M section track entry and the 16-M section belt entry (Tr. 967). He stated that at the overcast, the track entry pressure was six-tenths of an inch higher than the belt entry pressure. Along the rest of the belt entry, the track entry pressure also was higher. The difference measured between four-tenths of an



inch to three-tenths of an inch. Mitchell believed the pressure differential dictated how smoke would travel.

According to Mitchell, it was virtually impossible for smoke to pass from the belt to the track entry and to the face. Because of the difference in the pressure, if air leaked between two entries it would flow from the track entry into the belt entry, not the other way around. Therefore, smoke would stay in the belt entry and would exhaust through the regulator and the return.

The only way smoke could travel to the face was if massive roof falls stopped ventilation in the belt entry. Then, the smoke would have no place to go but back into the track entry and up the entry to the face (Tr. 970, 973). However, in Mitchell's opinion, it would take a fire of significant intensity and of up to ten hours duration to cause such roof falls (Tr. 970, 1031).

Mitchell did not believe that on March 15, the crew on the 16-M longwall section was in any danger from smoke or CO (Tr.970).

In Mitchell's opinion the March 15 fire was of a low intensity (Tr. 985, 1016). He estimated that it produced temperatures of more than 200E F but of less than 380E F, the temperature at which conveyor belting ignites (Tr. 977). An intense fire would have left more evidence than bubbling on the belt and charring on the brattice boards (Tr. 1017).

Mitchell believed the fire was caused by friction at the belt drive when the belt slipped around the drum (Tr. 992, 993).

This raised the temperature on part of the belt to above 280E, and the belt bubbled (Tr. 992). In his view, the only things that actually burned were the brattice boards. They were white pine, which, according to Mitchell, burns at the relatively low temperature of 200E (Tr. 992-993). The wood, being the most ignitable substance in the area, was smouldering and when Ammons opened the door, the increased air caused the boards to flare up (Tr. 993-995).

RESOLUTION OF THE ISSUES  
DOCKET NO. WEVA 94-57  
THE CONTESTED VIOLATION

<u>ORDER NO.</u>	<u>DATE</u>	<u>30 C.F.R.</u>
3118640	3/17/93	75.1101-23(a)

The order states, in pertinent part:

The fire fighting plan and evacuation plan was

not followed at 16M section on 3-15-93. A fire occurred at the 16M belt drive at approximately 13:15 hrs. Mine management did not assure that those persons ... in the affected area be immediately withdrawn outby ... the affected area. The ... workers did not leave the section .... This presents the hazard of entrapment due to fire, smoke inhalation, and/or carbon monoxide poisoning. Management is responsible for insuring that the provisions of this plan be complied with and in this case did not insure that 16M Section was evacuated. Gov. Exh. 6A at 1).

#### THE STANDARD

Section 75.1101-23(a) requires an operator of an underground coal mine to Aadopt a program for the instruction of all miners in...proper evacuation procedures to be followed in the event of an emergency@. The standard also requires the program to be approved by the MSHA district manager. In addition, section 75.1101-23(a)(1)(i) requires that the approved program include Aa specific fire...evacuation plan designed to acquaint miners...with procedures for..[e]vacuation of all miners not required for fire fighting activities[.]@

The standard is one of several that require an operator to adopt and the Secretary to approve safety-related plans and programs (see e.g. 30 C.F.R. ' 75.200 (mine roof control plans), 30 C.F.R. ' 75.370 (ventilation plans), 30 C.F.R. '75.1702 (smoking prevention programs)).

It is an axiom of mine safety law that the provisions of such required plans and programs, once adopted and approved, are enforceable as though they are mandatory safety standards (see, Zeigler Coal Co. v. Kleppe, 536 F.2d 389 (D.C. Cir. 1976) (provisions of ventilation plan enforceable as mandatory standards); Zeigler Coal Company, 2 IBMA 216 (1973) (provisions of roof control plan enforceable as mandatory standards)). Thus, once an evacuation program has been adopted by an operator and approved by the district manager pursuant to section 75.1101-23(a), the operator is required to comply with its provisions and the provisions are enforceable as mandatory safety standards.

#### INTERPRETATION OF THE PROGRAM

The Commission has made it clear that when determining whether there has been compliance with an approved and adopted program, a judge must look at the words of the program as written. However, the judge may not read the words in isolation

so as to render any part of the program meaningless or superfluous. Rather, the words of a particular provision must be interpreted consistent with the program as a whole and consistent with program's purpose. (It is well established that the provisions of the same document must be read and interpreted consistently with each other and that effect must be given to each part of a document to avoid making any word meaningless or superfluous@ (Mettiki Coal Corporation, 13 FMSHRC 3, 7 (January 1991); see also Shamrock Coal Company, 5 FMSHRC 845, 848-849 (May 1983)).

Moreover, although the Secretary's approval is required for a program to take effect, the program is first and last the operator's. The operator drafts it and the operator implements it. The operator's duty of authorship carries with it a concomitant duty of precision. Therefore, as a general rule, the author-operator will not be heard to argue that imprecise wording or drafting permits a result inconsistent with the overall safety objectives of the program.

#### RELEVANT PARTS OF CONSOL'S PROGRAM

The subject program implemented the regulation by setting forth evacuation procedures miners and management were required to follow upon the activation of a fire sensor system alarm (Gov. Exh. 4 II.A.&B. at 4); upon activation of the CO monitor system (Id. II.C. at 5); and by setting forth fire fighting and evacuation procedures that were required to be followed by specified mine personnel in the event of a fire (Id. III - VII at 5-8). The efficacy of the provisions relating to the fire sensor system and the CO monitor system was conditioned upon implementation of the petition for modification that authorized reliance upon the CO monitor system. The fire sensor system provisions were to be in effect until implementation of the petition, and the CO monitor system provisions were to be in effect after implementation.

There was confusion among the Secretary's witnesses regarding whether Consol was required to follow the provisions relating to the CO monitor system on March 15. Inspector McDorman did not know if the petition for modification had been implemented on or before March 15, and therefore he could not say whether Consol was required to follow Part II.C. (Tr. 555-556). Inspector Strahin thought that Consol probably was not required to follow Part II.C. (Tr. 84-86). On the other hand, Inspector Shriver stated that for all intents and purposes, the [CO monitor] system was installed@ and Consol should have followed the requirements relating to that system (Tr. 446-448).

Similar confusion was not evidenced by Consol. Yanak stated categorically that Consol was not required to follow Part II.C. because the petition for modification had not been implemented. Yanak pointed to a letter dated September 15, 1994, in which he advised the MSHA district manager, on behalf of Straface, that the CO monitoring system was installed and in operation in compliance with the petition. He also noted the district manager's September 26, 1994, acknowledgment of the letter (Resp. Exhs. 3 and 4).

Just as an operator cannot be heard to argue that imprecise or poorly drafted language permits a result at odds with the overall safety objectives of a required program, so MSHA, cannot be heard to argue that clear language it has approved does not mean what it says. The program specifically conditioned the effectiveness of its fire sensor system requirements and of its CO monitor system requirements upon the implementation of the petition for modification. Therefore, both parts cannot have been in effect simultaneously (see Tr. 684). Yanak's testimony that the MSHA district manager's response of September 26, 1994, was an acknowledgment by MSHA that Consol had implemented the petition for modification on September 15, 1994, was not refuted by the Secretary (Tr. 682). Given this, and given the fact that Yanak's interpretation of the letters was eminently reasonable, I find that in fact the petition for modification was implemented within the meaning of the program on September 15, 1994.

Therefore, I conclude that on March 15, 1993, Consol was required to comply with the provisions of the program relating to the fire sensor system and not with the provisions relating to the CO monitoring system. Further, since no other parts of the program were conditioned upon a subsequent event, I conclude all of the rest of the program was in effect on the date of the fire.

#### CONSOL'S GENERAL AND SPECIFIC DUTIES TO EVACUATE MINERS

Having considered the program then in effect, I conclude further that on March 15, Consol had both general and specific duties to withdraw affected miners to a safe location outby the fire immediately upon indication of the existence of a fire.

Several provisions in the program implied the general requirement. Part II.A.1. required the withdrawal of persons in affected areas, except those needed to fight the fire, when the fire sensor system alarm was activated and upon the positive identification of a fire. Part II.B.2. required the withdrawal of affected miners to a safe area when the fire sensor system

trouble alarm was activated, even before the existence of a fire was confirmed. Part III.A.1. and Part III.A.5. required the dispatcher or other responsible person to alert all personnel inby the fire to the fire's location and to proceed with their evacuation. Part VII.A.1. required continuous miner section foremen to see that all section personnel were on the outby side of a fire and Part VII.B.1.b. placed the same duty on the foremen of longwall sections. (Consol's argument that part VII applied only if a fire was located on a section, is based on a much too restrictive reading of the program. Under it, a section foreman would have no duty to remove his or her crew from harms way if a fire occurred immediately outby the section, a result that clearly is at odds with the safety purposes of the program.)

When these provisions are read together, it is clear to me that the overall intent of the program was to remove miners inby a fire, or inby a suspected fire, from the affected area to a safe location outby. This overall intent implied a duty to act in order to further the purpose of the program--the protection of miners from the various hazards that can attend entrapment by fire. Consol's general duty is consistent with this purpose.

In addition to the general duty to evacuate affected miners inby a fire, the program imposed upon Consol the specific duties referenced above, the most pertinent of which was the duty to **A**immediately withdraw to a location outby the affected area@ all persons in the affected area upon activation of a fire sensor system alarm (Gov. Exh. 4 II.A.2. at 4).

#### THE FACT OF VIOLATION

The parties agree there was a fire at the 16-M belt drive on March 15, and I credit the testimony of Kennedy that he knew of the fire both from being advised orally by the tipple operator and by the activation of the fire sensor system alarm (Tr. 121-122). I note especially that Kennedy's testimony the alarm activated was consistent with what he told Shriver within days of the incident (Tr. 377, 410, 451). It is also clear that mine management--especially Straface, Welch, and Sweeter--found out about the fire within minutes of the tipple operator learning of it.

I further credit the consistent testimony of Zupper and the other members of the crew that they gathered and were ready to exit outby the fire, as they had been trained to do (Tr.125, 126, 142, 144). I find that in so doing the crew was preparing to withdraw **A**outby the affected area@ in conformance with the program.

Consol did not dispute Talkie's testimony that the crew's evacuation was halted by instructions from Zupper (Tr. 235). Nor did it dispute that Zupper's instructions came as a result of a directive from Welch that the crew should stay on the section because the fire was out (Tr. 186-187). I note, as well, that Zupper's version of events was essentially consistent with Welch's own testimony of what happened (Tr. 823, 841). I also believe Welch's testimony that prior to telling Zupper not to evacuate the crew, he twice spoke with Griffin over the telephone but that he did not instruct Griffin, or anyone else for that matter, to evacuate outby the affected area (Tr. 820).

Nor were the miners on the 16-M Section the only ones not withdrawn from an affected area. The facts establish that the crew of the 17-M section was not withdrawn as required. McDorman stated his belief that the 17-M section was inby the 16-M belt drive and therefore was an area affected by the fire (Tr. 518). He testified that he amended the order to include the 17-M section after talking to Ayers and determining that the 17-M section crew was not evacuated (Tr. 518; Gov. Exh. 6A at 4). Consol did not challenge McDorman's belief. Moreover, Sweeter agreed that at the time the fire started, the 17-M section was inby the 16-M section in terms of ventilation (Tr 748-749).

The existence of the fire, the fact that crew members of 16-M and 17-M sections were in affected areas inby the fire, the fact that the fire sensor alarm sounded on the 16-M section, the fact that mine management knew there was a fire, and the fact that miners on both sections were not evacuated outby the affected areas, establish that Consol violated its general duty immediately to withdraw the affected miners of the 16-M and 17-M sections to a safe location outby upon indication of the existence of a fire and its specific duty under Part II.A.2. to withdraw the 16-M section miners outby when the fire sensor alarm activated. Therefore, I conclude that Consol violated the standard as charged.

In finding the violation, I reject Consol's contention that extinguishing the fire negated its duty to evacuate the crews. The program could have but did not state that any member of mine management could halt or otherwise cancel an evacuation because a fire had been extinguished and, as I have observed, the program was first and last the operator's. (See Gov. Exh. 4 V.A. (by implication permitting mine superintendent not to evacuate entire mine if fire is controlled.))

Moreover, I am persuaded that denying such a defense to

Consol best effectuates the overall purpose of the plan. The miners were aware of a fire at another mine that had rekindled and cost miners their lives (Tr. 133,194,213,216.) They were rightly concerned about being caught in a similar situation. As Shriver noted, the fact that the fire was extinguished did not mean that potential ignition sources, which could have started another fire, had not been carried in by the immediate area of the fire (Tr. 387). Prudence mandated that those in the affected areas be evacuated and that areas in by the fire be thoroughly examined before miners were permitted to return to their duties.

Finally, I recognize that Charles Bane testified he intended the withdrawal requirements of the program to apply only when there was an active fire (Tr. 789). I also recognize that he did not state as much in the program. If there were proposed provisions of a program in dispute, the Secretary had the duty to negotiate in good faith with the operator (Jim Walter Resources, Inc., 9 FMSHRC at 907). But, the Secretary could not have been expected to negotiate over things Consol intended but did not state. If Consol now wishes its program to include a provision allowing it to halt, or not to initiate, the evacuation of miners if a fire is extinguished, it should include such a provision in a revised program and submit it to MSHA for approval.

#### S&S AND GRAVITY

A S&S violation is described in section 104(d)(1) of the Mine 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" (30 C.F.R. ' 814(d)(1)). 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 Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co, 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "S&S" as follows:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety contributed to be the violation, (3) a reasonable likelihood that the hazard contributed

to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

See also Austin Power Co. v. Secretary, 861 F.2d 99, 104-105 (5th Cir. 1988) (approving Mathies criteria).

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129 (August 1985), the Commission stated as follows:

We have explained further that the third element of the Mathies formula requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury. @ U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Co., Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

The question of whether any particular violation is S&S must be based on the particular facts surrounding the violation (Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogeny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987)). Further, any determination of the S&S nature of a violation must be made in the context of continued normal mining operations (National Gypsum, 3 FMSHRC 327, 329 (March 1981); Halfway, Incorporated, 8 FMSHRC 8 (January 1986)).

The Secretary has established that there was a violation of the mandatory safety standard. Further, he has established that the violation contributed to a discrete safety hazard. There was a fire at the belt drive and the miners on the 16-M section and the 17-M section were not withdrawn outby the fire. McDorman accurately described the hazard contributed to by the failure to withdraw the miners. There was the danger that the fire would intensify and would block the miners escape, or that smoke or toxic fumes from the fire would be carried inby and suffocate the miners before they could remove themselves from danger (Tr. 515).

In addition, there was an added hazard that after the fire was extinguished at the belt drive, no one fully examined the belt line to determine if ignition sources had been carried inby (Tr.387). Failing to evacuate the miners obviously contributed to the hazard they faced.



Thus, the Secretary proved three of the four elements necessary to establish the S&S nature of the violation. However, he failed to establish that there was a reasonable likelihood that the hazard contributed to would have resulted in an injury.

The fire either was out when the miners on the 16-M and 17-M were not withdrawn or was extinguished shortly thereafter. Because the fire was extinguished so quickly, it was not reasonably likely that the fire at the belt drive would have intensified had normal mining operations continued.

Further, even if the fire was rekindled up the belt, it was not reasonably likely that the fire would have resulted in injury because there were heat sensors and CO monitors along the belt that again would have detected the presence of another fire, and made its rapid extinguishment likely. Thus any fire was likely to be of short duration and not of major intensity.

Further, given the ventilation system, it was not reasonably likely that the smoke and fumes would have gone to the face of either section. McDorman agreed that the ventilation system normally would have carried smoke and toxic fumes away from the section and out the return (Tr. 582-583, 590). Mitchell, who essentially concurred with McDorman, persuasively and more fully explained that the air pressure differential between the track entry and the belt entry made it very unlikely that smoke ever would have traveled from the belt entry to the faces, barring a fire of ~~A~~major intensity@ and of up to 10 hours duration (Tr. 970, 973, 1031). (Verakis= contrary opinion (Tr. 612, 613, 614), was undercut when he agreed the pressure differential between the track and belt entries could have affected the ability of smoke and fumes to move into the track entry and that he did not know what the pressure differential was (Tr. 634-635).) Therefore, I conclude that an examination of the particular facts surrounding the violation of section 75.1101-23(a) precludes finding that the violation was S&S in nature.

However, those same facts do not preclude finding the violation was very serious. It is not incongruous for a non-S&S violation to be serious in nature. I note Chief Administrative Law Judge Paul Merlin's admonition that the term ~~AS&S@~~ is not synonymous with the concept of gravity (Consolidation Coal Co., 10 FMSHRC 1702, 1704 (December 1988)) and Administrative Law Judge William Fauver's careful explanation of the difference between the two concepts (Harlan Cumberland Coal Co., 12 FMSHRC 134, 140-141 (January 1990)). As Judge Fauver stated:

[Some violations] are serious because the safety

and health standard involved is an important protection for the miners. Important safety ... or health standards are such, if they are routinely violated or trivialized substantial harm would be likely at some time, even if the likelihood that a single violation will cause harm may be remote or even slight.... Other mine safety ... violations are serious because they may combine with other conditions to set the stage for a mine accident or disaster (12 FMSHRC at 141).

To state that the standard Consol violated involved an important protection for the miners is profoundly to understate the matter. The evacuation of the miners could have meant the difference between life and death. It was possible an ignition source could have been carried elsewhere in the mine, and in such a situation, Consol's failure could have set the stage for a major disaster. Or, to put the matter another way, all possibility of a disaster could have been prevented if Consol had complied with its program's withdrawal requirements and thus with the standard. For these reason I conclude that Consol's failure in this regard was very serious.

#### UNWARRANTABLE FAILURE AND NEGLIGENCE

Unwarrantable failure is Aggravated conduct, constituting more than ordinary negligence, by a miner operator in relation to a violation of the Act@ (Emery Mining Corporation, 9 FMSHRC 1997 (December 1987)); Youghioghny & Ohio Coal Co., 9 FMSHRC 2007 (December 1987). Unwarrantable failure is characterized by such conduct as Areckless disregard,@ Intentional misconduct,@ Indifference@ or a Aserious lack of reasonable care@ (Emery 9 FMSHRC at, 2003-04). Moreover, the Commission has examined the conduct of supervisory personnel in determining unwarrantable failure and recognized that a heightened standard of care is required of such individuals (See Youghioghny 9 FMSHRC at 2010-11; Peabody Coal Co., 14 FMSHRC 1258, 1261 (August 1992)).

I have concluded that under its approved and adopted program, Consol had both general and specific duties immediately to withdraw affected miners upon indication of the existence of a fire, that is, once it knew or had reason to believe there was a fire. Consol only could Aknow@ about the fire through its officials, and the evidence overwhelming establishes they knew about the fire, knew miners were affected, and in the face of their knowledge, deliberately failed to order the miners outby.

When evaluating Consol's knowledge, I do not attribute much importance to Shriver's statement that he did not learn during

his investigation that management personnel were aware the fire system alarm had been activated. Nor do I find compelling Welch's testimony that he did not know whether or not a fire sensor system alarm activated (Tr. 414, 826). Whether or not management personnel, including Welch, actually knew that the alarm went off, they knew through other means of the existence of the fire.

For example, Welch knew of the fire because Stewart told him as much (Tr. 815). Once he knew, the program required that he give priority to the withdrawal the miners. Yet, Welch did not immediately insist the miners evacuated outby the fire. Rather, according to his own testimony, he told Stewart to turn on the alarm light and to send water cars to the area (Tr. 820). In substituting his priorities for those of the approved program, Welch, and through Welch, Consol, exhibited an intentional disregard of the requirements of the program as it applied to the miners on the 16-M section.

Further, before Welch was told the fire was extinguished, he twice spoke with Griffin. He did not advise Griffin that the miners on the 16-M section should move outby the fire (Tr. 535, 562, 817, 820). Instead, Welch concentrated his instructions to the crew on the need to gather together. Although all of the witness who were asked agreed it was important for the miners to exit as a group (see, e.g., Tr. 87-88, 209, 329), Welch also had a responsibility on behalf of Consol to instruct the crew to evacuate outby the affected area, and he did not meet that responsibility. His excuse, that **A**the least you put on a person in a situation like this ... the better off your are,**@** is really no excuse (Tr. 840); and his professed concern about the crew's physical condition and putting too much strain on the hearts of the crew members by ordering an evacuation is simply not credible (Tr. 823-824; 843).

Like Welch, Straface also knew of the fire. Straface found out about it from Stewart and from the CO monitor system alarm. Straface assumed responsibility from Stewart for coordinating management's response to the fire, something one might well expect of a mine superintendent. Straface testified that he **A**assumed the worst**@** and that he wanted the entire mine notified and the full evacuation plan put into effect (Tr. 861). However, although he knew of the fire and took full responsible for the company's reaction to it, and although he knew that there were miners inby the fire, he never ordered the miners to evacuate the affected areas.

Straface's failure, like Welch's, was inexcusable. As highly

placed supervisory personnel, both had a heightened standard of care with regard to miners who were in by the fire. By failing to order the miners to leave the affected area, they, and therefore Consol, exhibited a serious lack of reasonable care toward the miners and unwarrantably failed to comply with the adopted and proved program.

Unwarrantable failure likewise was exhibited toward the miners on the 17-M section. Straface clearly knew that there were miners on the 17-M section, yet he did not inquire whether they were evacuated. Further, day shift foreman Sweeter, who was out by the face of the 17-M section knew of the fire, yet did not order, or even discuss, their evacuation (Tr. 736, 748-750). In view of the program's withdrawal requirements and the fundamental importance of the requirements to miners' safety, these lapses represented more than ordinary negligence.

Virtually all of the Consol personnel who testified, attempted to excuse their failure to comply by asserting there was a policy at the mine that required an ongoing fire for miners to evacuate, (Tr. 709-710, 711-712, 790). I have rejected this excuse, and given the fact that the program does not address this ~~A~~policy and given the program's many references to withdrawal when a fire is signaled or confirmed, I conclude that this is not a situation where Consol exhibited a reasonable, good faith belief it was in compliance with its program, and hence did not unwarrantably fail to comply (see Southern Ohio Coal Co., 13 FMSHRC 912, 919 (June 1991), citing Utah Power and Light Co., 12 FMSHRC 965, 972 (May 1990). In other words, Consol did not show that it believed leaving the crew in the affected area was the ~~A~~safest method of comply[ing] with the mandate that they be removed (Southern Ohio Coal Co., 13 FMSHRC at 919).

Finally, because unwarrantable failure is more than ordinary negligence, in unwarrantably failing to meet its obligations under section 75.1101-23(a), Consol acted negligently as well.

#### HISTORY OF PREVIOUS VIOLATIONS

A computer printout of the assessed violations at the Blacksville No. 2 Mine for the 24 months prior to the date of the subject violation indicates that a total of 907 violations were cited and that one was a violation of section 75.1101-23 (Gov. Exh. 1). While the total number of violations is large, the number of violations of the standard at issue is small. The Secretary did not argue that the history of previous violations was such as to increase any penalty otherwise assessed, and I conclude that it should not (Tr. 658-661). However, because the

overall number of previous violations is large, I also conclude that the history is not such as to decrease any penalty otherwise assessed.

SIZE

The parties stipulated that Consol is a large operator (Tr. 12). Accordingly, the penalty assessed should be commensurate with its size.

ABILITY TO CONTINUE IN BUSINESS

Consol did not argue that the amount of any penalty assessed would adversely effect its ability to continue in business, and I conclude that it will not.

GOOD FAITH ABATEMENT

The violation was abated when the provisions of the approved and adopted program were discussed with all of the foremen and miners (Gov. Exh 6a). In the context of the violation, the discussion constituted good faith abatement.

CIVIL PENALTY ASSESSMENT

The Secretary proposed a civil penalty of \$5,000 for the alleged violation. Having considered the statutory civil penalty criteria, and in view of the fact that the violation was not S&S but was nonetheless very serious and was caused by Consol's unwarrantable failure to comply, I assess a civil penalty of \$4,000.

INDIVIDUAL CIVIL PENALTIES  
DOCKET NO. WEVA 94-366

<u>ORDER NO.</u>	<u>DATE</u>	<u>30 C.F.R.</u>	<u>PROPOSED PENALTY</u>
3118640	3/17/93	75.1101-23	\$4,500

The Secretary alleged that McLaughlin, as assistant mine superintendent, was aware of the requirements of the program and that a fire occurred, yet failed to withdraw the affected miners. However, after considering the testimony offered at the hearing, the Secretary moved to dismiss the section 110(c) allegations against McLaughlin. The Secretary stated:

Although McLaughlin did not insure that miners were withdrawn from section 16-M outby the fire, the evidence adduced at trial is insubstantial to indicate

that ... McLaughlin participated in or was in a position to know of ... Welch's order to the 16-M section crew to stay on the section after the fire had been identified. Thus, the evidence adduced at trial indicates that ... McLaughlin had little reason to know whether or not the MSHA approved mine an evacuation plan had been violated (Motion to Dismiss 2-3).

McLaughlin and Consol did not oppose the motion.

The case is the Secretary's to bring and the Secretary's to prosecute. I do not question the Secretary's judgement in this regard. Indeed, I note that two of the Secretary's key witnesses, inspectors Shriver and McDorman, testified they found no evidence that caused them to believe that McLaughlin knowingly violated section 75.1101-23(a) (Tr. 507, 587).

The motion is GRANTED.

DOCKET NO. WEVA 94-368

<u>ORDER NO.</u>	<u>DATE</u>	<u>30 C.F.R.</u>	<u>PROPOSED PENALTY</u>
3118640	3/17/93	75.1101-23	\$5,000

The Secretary alleged that Straface, as mine superintendent, was aware of the requirements of the program and that the fire occurred, yet failed to withdraw the affected miners.

KNOWING VIOLATION

The Commission has stated the meaning of knowingly as used in section 110(c) of the Act as follows:

Knowingly ... does not have any meaning of bad faith or evil purpose or criminal intent. Its meaning is rather that used in contract law, where it means knowing or having reason to know. A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence.

92 F. Supp. at 780. We believe this interpretation is consistent with both the statutory language and the remedial intent of the ... Act. If a person in a position to protect employee safety and health fails to act on the basis of information that gives him

knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute (Kenny Richardson, 3 FMSHRC 8, 16 (January 1981), aff'd, 689 F.2d 623 (6th Cir. 1982).) (quoting U.S. v. Sweet Briar, Inc., 92 F. Supp. 777 (W.D.S.C. 1950)).

In addition, the Commission has held that to violate section 110(c), the corporate agent's conduct must be Aggravated, i.e., it must involve more than ordinary negligence. Wyoming Fuel Co., 16 FMSHRC 1618, 1630 (August 1994); Beth Energy Mines, Inc., 14 FMSHRC 1232, 1245 (August 1992).

Welch's testimony establishes that before the fire was extinguished, Straface knew of the fire, called Welch and inquired what was being done about it.

Judge: [P]lease tell me when the conversation with ... Straface occurred in the chronology of the telephone conversations that you've had around this [fire] incident?

Welch: [T]he lights had already went off and I had called ... Stewart and talked to him. Stewart was lining up motors to move his water cars and everything getting into position. And sometime in that period,... Straface called and asked what was going on.

Judge: He called you directly?

Welch: Yes, sir. But he had already talked to the dispatcher.

\* \* \*

Judge: And at any point during the conversation, did ... Straface ask you what the problem was on the section?

Welch: No, sir, he knew what the problem was ... .

Judge: He knew there was a fire?

Welch: Yes, sir. (Tr.857-858)

Welch's testimony was thoroughly persuasive, and indeed, Straface confirmed that he first heard of the fire from Stewart (Tr. 860).

Straface's position is that upon learning of the fire he requested that the entire mine be notified of the fire and that he wanted a full evacuation plan of the mine to be implemented (Tr. 861-863). He also asked whether or not water cars were being brought to the scene (Tr. 863, 890). I take Straface at his word. I also accept as fact that Straface did not specifically instruct anyone concerning the evacuation of any section (Tr. 889), that he overheard Welch tell the miners to get together and that he did not interrupt or try to speak with the crew to advise them that once they were together they should evacuate (Tr. 980). Straface simply assumed that they would leave the section (Tr. 980). I further accept as a fact that Welch told Straface that he and Stewart **A**had things under control@, that they were **A**taking care of the problem@, and that Straface assumed this was true (Tr. 849).

I find, however, that Straface's assumptions were not enough to relieve Straface of personal liability. Straface was the superintendent. As Straface recognized, he was responsible for all that went on in the mine. (**A**I was in charge of the coal mine. I would be ultimately responsible for the results of the incident and if it was going to be done right or wrong, I wanted to ... [know] about it, I'd make the decision@ (Tr. 876).)

Despite his assertion that he wanted to know the facts so he could **A**make the decision@, Straface did not take the initiative required. He failed to make the critical and necessary inquiries regarding whether or not the crews had left the sections. Consequently, he did not intervene to make certain they did. As the superintendent, Straface had an especially high standard of care to the company for whom he worked and to the miners who worked for him. That standard meant he was responsible ultimately to make certain there was full compliance with the program. Straface totally failed to meet the standard. In view of the potential dangers presented by the situation -- dangers that fortunately were not realized -- Straface's lack of a proactive response to the fire and his passive monitoring of the responses of others represented aggravated conduct--or put more accurately, represented an aggravated lack of conduct--and lead to his knowing violation of the cited standard.

This is not to say that Straface intentionally disregarded the program. However, an intentional violation is not necessary to establish a **A**knowing@ violation. It is enough that prior to being advised the fire was out, Straface knew that there was a fire, knew miners were in by the fire yet took no action to make certain the miners were withdrawn (Kenny Richardson, 3 FMSHRC at 16).)



In addition, after Straface was informed the fire was extinguished, he heard Welch instruct the crew to stay where they were. He did not correct Welch because he believed Welch gave the crew the right instruction (Tr. 867, 895-896). Straface was wrong, and his high duty of care extended to a correct understanding and implementation of the program. The requirements of the program were not murky, convoluted, or ambiguous with regard to withdrawal in the event of a fire. The program did not contain a provision that withdrawal need not be carried out if the fire was extinguished. By failing to make certain the program was complied with as written, Straface exhibited more than an ordinary disregard of the care he owned the company and the miners.

I therefore conclude that Straface knowingly violated section 75.1101-23(a) and is personally liable pursuant to section 110(c) of the Act.

CIVIL PENALTY ASSESSMENT

This was a very serious violation, and Straface exhibited more than ordinary negligence in failing to insure the affected miners were withdrawn as required. However, the Secretary proposed that both Straface and Consol pay the same penalty for violating section 75.1101-23(a). I find the proposal totally incongruous. Straface is an individual, Consol is a large company. I have assessed Consol a penalty of \$4,000. I conclude that Straface should pay a civil penalty of \$500. In reaching this conclusion, I note there is no suggestion Straface has a history of knowing violations of the Act and regulations.

DOCKET NO. WEVA 94-384

<u>ORDER NO.</u>	<u>DATE</u>	<u>30 C.F.R.</u>	<u>PROPOSED PENALTY</u>
3118640	3/17/93	75.1101-23	\$3,500

The Secretary alleged that Welch, as mine foreman, was aware of the requirements of the program and that a fire occurred, yet failed to withdraw the affected miners.

KNOWING VIOLATION

Welch knew of the fire, and of the fact that the affected miners were not evacuated outby the affected area. He twice instructed the miners to gather and to call him back once they were assembled (Tr. 817, 820), yet Welch said nothing to the miners about evacuating outby the affected area, because, as he

stated, **A**the least you put on a person in a situation like this ... the better off you are@ (Tr. 840).

I conclude that Welch knowingly violated the standard when in the face of certain knowledge of a fire he failed to insure that there was compliance with the general requirement of the program that all miners inby the fire be evacuated. Moreover, when Welch learned the fire was extinguished and he purposefully told the miners to stay on the section, he also knowingly violated the program. The program did not contain a provision allowing the withdrawal of miners to be halted or canceled if the fire was extinguished.

Welch, as mine foreman, had almost as high a duty of care to his employer and to those who worked for him as did Straface. Welch's failure to make certain the program was enforced was more than ordinary negligence. As I have found with regard to Straface, the wording of the program was not obscure, and it was not for Welch to imply into the program preconditions to evacuation the program did not state. I cannot find that Welch had a reasonable belief that failing to make certain the miners left the affected area was permitted under the program.

Further, in the face of the potential danger to the miners, dangers that included the possibility that ignition sources could have been carried inby prior to the fire being extinguished, his excuses for failing to insure withdrawal -- his reluctance **A**to put too much@ on the crew and his fears that evacuation would be a physical strain -- were patently unconvincing (Tr. 840, 823-824, 843).

I therefore conclude that Welch knowingly violated Section 75.1101-23(a) and is personally liable pursuant to section 110(c)of the Act.

#### CIVIL PENALTY ASSESSMENT

This was a very serious violation, and Welch exhibited more than ordinary negligence in failing to insure the affected miners were withdrawn outby the affected areas. The Secretary proposed that Welch pay a civil penalty of \$3,500. As with the proposal for Straface, I find it incongruous that the Secretary proposed Consol pay a penalty of \$5,000 and that the individual mine foreman pay a penalty of \$3,500.

While Welch knowingly violated the standard, and while his duty of care was high, it was not quite as high as the superintendent's. Consequently, I conclude that Welch should pay

a civil penalty of \$400. In reaching this conclusion, I note that there is no suggestion that Welch has a history of knowing violations of the Act and regulations.

SETTLED VIOLATIONS  
DOCKET NO. WEVA 94-57

<u>ORDER NO.</u>	<u>DATE</u>	<u>30 C.F.R.</u>	<u>PROPOSED PENALTY</u>	<u>SETTLEMENT</u>
3122444	4/22/93	75.400	\$5,000	\$4,000

(The parties agreed for the purposes of litigation efficiency to reduce the penalty by \$1,000. The findings set forth in the order remain the same (Tr. 1053).)

<u>ORDER NO.</u>	<u>DATE</u>	<u>30 C.F.R.</u>	<u>PROPOSED PENALTY</u>	<u>SETTLEMENT</u>
3122447	4/26/93	75.370(a)(1)	\$5,000	\$2,000

(The Secretary agreed to modify the negligence finding from high to moderate and to modify the order to a citation issued pursuant to section 104(a) of the Act (Tr. 1050-1051).)

<u>ORDER NO.</u>	<u>DATE</u>	<u>30 C.F.R.</u>	<u>PROPOSED PENALTY</u>	<u>SETTLEMENT</u>
3122415	5/19/93	75.360(g)	\$9,500	\$0

(The Secretary stated that after taking deposition testimony and reviewing further information regarding the allegations, he concluded that there was insufficient evidence to establish the alleged violation. The Secretary moved to vacate the order and the motion was granted (Tr. 1051-1052).)

Each of the settlements was approved on the record. Because I continue to believe the settlements are reasonable and in the public interest, the approvals are CONFIRMED.

ORDER

DOCKET NO. WEVA 94-57

<u>ORDER NO.</u>	<u>DATE</u>	<u>30 C.F.R.</u>
3118640	3/17/93	75.1101-23(a)

The Secretary is **ORDERED** to delete the S&S finding and to modify the order accordingly. Consol is **ORDERED** to pay a civil penalty of \$4,000 within 30 days of the date of this decision.

<u>ORDER NO.</u>	<u>DATE</u>	<u>30 C.F.R.</u>	<u>PROPOSED PENALTY</u>	<u>SETTLEMENT</u>
3122444	4/22/93	75.400	\$5,000	\$4,000

Consol is **ORDERED** to pay a civil penalty of \$4,000 within 30

days of the date of this decision.

<u>ORDER NO.</u>	<u>DATE</u>	<u>30 C.F.R.</u>	<u>PROPOSED PENALTY</u>	<u>SETTLEMENT</u>
3122447	4/26/93	75.370(a)(1)	\$5,000	\$2,000

The Secretary is **ORDERED** to modify the negligence finding from high to moderate and to modify the order to a citation issued pursuant to section 104(a) of the Act. Consol is **ORDERED** to pay a civil penalty of \$2,000 within 30 days of the date of this decision.

<u>ORDER NO.</u>	<u>DATE</u>	<u>30 C.F.R.</u>	<u>PROPOSED PENALTY</u>
3122415	5/19/93	75.360(g)	\$9,500

The Secretary is **ORDERED** to vacate the order.

DOCKET NO. WEVA 94-366

<u>ORDER NO.</u>	<u>DATE</u>	<u>30 C.F.R.</u>	<u>PROPOSED PENALTY</u>
3118640	3/17/93	75.1101-23	\$4,500

Docket No. WEVA 94-366 is **DISMISSED**.

DOCKET NO. WEVA 94-368

<u>ORDER NO.</u>	<u>DATE</u>	<u>30 C.F.R.</u>	<u>PROPOSED PENALTY</u>	<u>ASSESSED</u>
3118640	3/17/93	75.1101-23	\$5,000	
<u>PENALTY</u>				\$500

Straface is **ORDERED** to pay a civil penalty of \$500 within 30 days of the date of this decision.

DOCKET NO. WEVA 94-384

<u>ORDER NO.</u>	<u>DATE</u>	<u>30 C.F.R.</u>	<u>PROPOSED PENALTY</u>	<u>ASSESSED</u>
3118640	3/17/93	75.1101-23	\$3,500	\$400

Welch is **ORDERED** to pay a civil penalty of \$400 within 30 days of the date of this decision.

Upon receipt of payments and modification and vacation of the orders, Docket Nos. WEVA 94-57, WEVA 94-368, WEVA 94-384 are **DISMISSED**.

David F. Barbour  
Administrative Law Judge

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