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SOL (MSHA) V. S.A.M.COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

Civil Penalty Proceeding
Docket No. SE 81-21
A.O. No. 40-01148-03009 F

v.

S.A.M. COAL CO. INC.,
RESPONDENT

No. 1 Tennessee Strip

DECISION

Appearances: Thomas A. Grooms, Attorney, U.S. Department of Labor,
Nashville, Tennessee, for the petitioner Daniel J. Tribell,
Esquire, Middlesboro, Kentucky, for the respondent

Before: Judge Koutras

Statement of the Case

This proceeding concerns proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), charging the respondent with two alleged violations of certain mandatory safety standards found in Part 77, Title 30, Code of Federal Regulations. Respondent filed a timely answer and notice of contest and a hearing was convened at Knoxville, Tennessee on February 2, 1982.

Issues

The principal issues presented in this proceeding are: (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposal for assessment of civil penalties filed in this proceeding, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether

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the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, P.L. 95-164, 30 U.S.C. 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).
3. Commission Rules, 29 CFR 2700.1 et seq.

Discussion

The conditions or practices allegedly constituting violations of the mandatory safety standards cited by the inspector in this case are set out in the following citations (Exhibits P-2 and P-3):

Section 107(a) citation 0736755, August 6, 1980, cites a violation of 30 CFR 77.1001, and the condition or practice is described as follows:

Loose unconsolidated material (rock) is present along the highwall. The wall is approximately 250 feet long and 50 feet high. Observed in the No. 1 pit during a fatal accident investigation.

Section 104(a) citation 0736757, August 6, 1980, cites a violation of 30 CFR 77.1713, and the condition or practice is described as follows:

Evidence indicated that inadequate onshift examinations were being made. The highwall on each end of the accident scene was obviously hazardous and the conditions were not recorded in the record book.

The inspector modified the citation on August 12, 1980, to include the following condition:

The person making the on-shift examination and filling out the record book was not certified in the State of Tennessee.

Stipulations

The parties stipulated that respondent is subject to the Act, that any penalty assessed will not adversely affect its ability to remain in business, and that respondent's prior history of violations consists of five citations as listed in an MSHA computer print-out (Exhibit P-1; Tr. 4).

Testimony and evidence adduced by the petitioner

MSHA Inspector Lawrence Spurlock testified that he has some 26 years experience in the coal mining industry and has served as an MSHA inspector for eleven years. His experience includes the inspection of surface mines and the investigation of accidents involving high walls. He confirmed that he conducted an accident investigation at the subject mine in August 1980, and did so after the respondent advised MSHA that a fatal accident had occurred at the mine. He also confirmed that as a result of that investigation he issued the two citations which are the subject of this proceeding. He issued the section 107(a) withdrawal order because loose unconsolidated material was still present after the accident occurred (exhibit P-2; Tr. 7-12). He also prepared an accident report and a copy was served on the respondent (exhibit P-4). He indicated that the accident occurred on August 5, 1980, and he identified several photographs which were taken at the time (exhibits P-5 through P-21; Tr. 12-31).

Mr. Spurlock testified that the accident victim was killed when part of the high wall collapsed on him and his drill rig while he was working under it drilling boreholes into the ground to facilitate the construction of a drainage ditch, and he identified the scene of the accident as depicted in photographic exhibits P-6 through P-10, and he estimated the width of the part of the wall which collapsed as 25 to 30 feet wide, and that the weight of the rock material which fell as approximately 100 tons (Tr. 18). With regard to the loose material which he cited in his order, Mr. Spurlock referred to photographic exhibit P-7 and drew a red circle around the area in the photographic where he believed the loose material was present. He also identified similar areas of loose unconsolidated materials as well as areas described as "cracks" in exhibits P-9 and P-10 (Tr. 19-20), as well as in exhibit P-11 (Tr. 21-22). Exhibit P-14 depicts the area from which the rock fell and it also shows "overhanging material created after the wall collapsed" (Tr. 25).

Mr. Spurlock testified as to several cracks which he observed along the top of the high wall, but he did not know what caused them. However, he stated that they were present in the part of the wall which was left standing after the collapse, and the cracks may have been caused by drilling or blasting (Tr. 28). He believed that the accident may have been caused by the vibration of the drill in the pit near the high wall, and he believed that the mine operator should have removed loose material from the wall as the pit was being developed (Tr. 35). Proper procedures call for removal of loose materials so that the wall is sloped "back toward the hill in at a proper angle of repose order to keep it from overturning on a person" (Tr. 35-36). Mr. Spurlock believed the wall was "pretty straight" at a 90 to 95 degree angle, and he identified a copy of the respondent's "ground control plans" as submitted to MSHA (Exhibit P-18, Tr. 40). The plan contains the operator's procedures for scaling high walls and contains a requirement that the angle of repose for the high wall be 85 degrees or less (Tr. 41). Mr.

Spurlock did not believe that the wall in question had been properly scaled because "there was too much loose, unconsolidated material still present on the wall" (Tr. 41).

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Mr. Spurlock stated that the respondent advised him during his investigation that the wall in question had been scaled by means of a power shovel. However, he determined that the shovel had not been used on the day of the accident and that it was parked on the spoil bank some 3/4 of a mile from the accident scene undergoing repairs (Tr. 42). Further, the respondent advised him that the shovel had not been used for some three or four days prior to the collapse of the wall (Tr. 42).

Mr. Spurlock testified as to the second citation which he issued for a violation of section 77.1713, and confirmed that he did so after checking the mine record books for August 5, 1980, and failing to find an entry for loose unconsolidated materials. Since he found such material present on August 6, 1980, which he believed constituted an obvious violation of section 77.1001, he also believed that a competent on-shift examiner would have discovered those conditions (exhibit P-3; Tr. 45-46). He explained that part of the mine is located in the State of Tennessee and part in Kentucky, and that the portion of the mine which he cited is located in Tennessee and the on-shift examiner was not certified in that state, but was certified in Kentucky (Tr. 46).

On cross-examination, Mr. Spurlock testified as to certain drill holes found at the top of the high wall, but he did not know when they were drilled, nor did he know the condition of the area when they were drilled. The order which he issued was terminated by another inspector, possibly the day after it was issued, and he was not present when it was terminated. In addition, he was not in the pit, nor did he inspect it, prior to the day of the accident (Tr. 49). He was acquainted with "hill seams", which he described as separations which are dry and sometimes wet, and he conceded that it was possible that some were present in the area where the rock materials fell out from the wall. He also conceded that the "cracks" he observed were "natural" cracks (Tr. 51).

Mr. Spurlock conceded that the loose materials which he cited the day after the accident were conditions that existed after the rock fall in question, and that the overhanging area was what was left after the wall fell (Tr. 55). He also described in an area of unconsolidated material which he identified in photographic exhibits P-10, as unconsolidated material that had nothing to do with the collapse of the wall and was away from the fall area (Tr. 55-56). He had no idea as to the angle of repose of the area from where the rock fell prior to the fall (Tr. 57), but did observe "teeth" marks present on the high wall from the shovel (Tr. 57). As for the second violation concerning the record book entry, he conceded that he did not observe the area in question on the day of the accident, August 5, and did not know what the foreman may have observed at that time (Tr. 58).

Mr. Spurlock testified that the conditions were abated by blasting down the remaining highwall area where the fall occurred (Tr. 69), and he reiterated that he had never observed the high

wall area in question prior

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to the day of the accident. He also indicated that the respondent had never previously been cited for any similar violations, and to his knowledge had no problems with controlling the high walls prior to the accident in question (Tr. 72). His rationale for issuing the second violation is stated as follows (Tr. 76):

JUDGE KOUTRAS: But there is no question in your mind that Mr. Spurlock issued the second citation because of what I have just recited, that he believed that the accident resulted from an obvious hazardous condition on the high wall which should have been detected by the on-shift Examiner.

MR. GROOMS: I believe that that is correct, is it, Mr. Spurlock?

JUDGE KOUTRAS: Is that right?

THE WITNESS: Yes.

Harold C. Copeland testified that he is employed by the State of Tennessee as a mine inspector and that is presently engaged in duties connected with the training of state mine inspectors. He also owned a strip coal mine for about a year and is familiar with high walls. He confirmed that he was called to the mine in question the day after the accident and coordinated his inspection with MSHA's inspection of the accident scene. He identified exhibits P-4 and P-5 as photographs of the scene of the accident, and also identified photographs which he took during the inspection (Exhibits P-14 through P-17, P-21; Tr. 77-80).

Mr. Copeland testified that the conditions depicted in exhibit P-15 show loose overhanging rock and major vertical cracks. The loose rock on top of the highwall area depicted in the photograph are hazardous, but he did not know about the cracks shown because "there is no way to tell what those cracks lead to" (Tr. 81). When asked what should have been done about the wall, he replied "if it was this way before there was men working under, it should have been scaled down and cleaned up. The loose rock should have been taken off of it" (Tr. 81). Referring to the cracks which appear in exhibit P-21, he indicated that they may have been caused by prior blasting, but that there was no way to know for sure (Tr. 82). The present cracks however, would present a danger of the rock falling, but he did not know if they were from the area where the original fall had taken place (Tr. 83).

Mr. Copeland expressed an opinion that the fatality was caused by falling rock, and he conceded that the loose rock which he observed was present after the accident occurred. However, from his experience, he did not believe that the high wall which he observed the day after the accident would have looked any different the day before (Tr. 90).

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On cross-examination, Mr. Copeland confirmed that he did not see the accident area prior to the fall and had no way of knowing whether the cracks he described were present at that time (Tr. 95). He also indicated that certain drilled holes which were located 50 or 75 feet away from the immediate fall area and were not charged may have been due to faults in the rock, but he did not know when the holes were drilled (Tr. 97-98).

Wayne Farmer testified that he is a field representative for the State of Tennessee Labor Department, but has worked in underground and surface strip mining since 1944. He was part of the investigation of the accident in question, and identified the loose unconsolidated materials shown in exhibits P-5, P-6, and P-14 and P-15 (Tr. 107). While he did not know why the wall in question fell, since it did fall, he believed that it was due to unconsolidated rock (Tr. 108). He agreed with Mr. Copeland's conclusions as to why the wall fell (Tr. 109).

On cross-examination, Mr. Farmer conceded that he saw none of the rock prior to the fall, did not know when any of the holes in question were drilled, and did not know how much of the rock fall may have changed the adjacent area after the fall because "I wasn't there" (Tr. 109). He also conceded that it was possible for the mine foreman to inspect the wall immediately before the fall and come to the conclusion that it appeared all right to him, but not to him (Farmer) when he looked at it (Tr. 117).

Testimony and evidence adduced by the respondent

Charles Woodall testified that he has been employed by the respondent for about a year and half, and has worked around strip mines for about 34 years. He stated that he is a shovel operator and on the day of the accident was working in the pit during the second shift from 3:00 to 11:00 p.m. He described the procedure for stripping the pit and stated that he scaled the high wall in question by taking "everything down that is loose that you can pull down as you go" (Tr. 128). All loose materials are taken down with the shovel and in all the years he has served as a shovel operator stripping pits and walls he has never had an accident and has "never had a machine tore up" (Tr. 129). He indicated that he scaled the high wall in question during his shift and thought it was safe enough to work in the pit. He would not have continued to work in the pit if he did not believe it was safe, and company policy dictates that no one is required to work in unsafe areas. He has always been instructed to inform his supervisor or foreman if he believes an area is unsafe and he has no fear of any reprimand for leaving an unsafe work area (Tr. 130). Mr. Woodall stated that the 2400 Lima Shovel which he operated was the only one used in the pit in question and it was not out of service on the day of the accident but it was taken out for repairs after the pit was cleaned up (Tr. 131).

On cross-examination, Mr. Woodall stated that the shovel may have been taken out of the pit the day after the accident, but that he did not drive it out. After examining photographic exhibits P-9 and P-10,

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Mr. Woodall stated that the wall did not look the way the pictures show it on the day of the accident since it did not appear in that condition when he left the pit area (Tr. 131-133). He indicated that all loose material is scaled with the shovel and any material that cannot be taken down by the shovel is not "loose material". He also indicated that it was possible that from the time he completed scaling the wall until the fall the rock could have been "working", but in the 34 years he has worked in the pits prior to the accident he has never known of anyone being struck by a rock falling off a high wall (Tr. 135).

In response to bench questions, Mr. Woodall stated that he could not recall when he last scaled the high wall which fell prior to the accident, but his guess was that it would have been two days before. The wall is scaled with the bucket attached to the boom of the shovel, and it will extend some 30 to 35 feet. The walls are scaled as the pit is opened up and as the shovel moves in and out of the lifts (Tr. 135-139). He indicated that he did not observe the high wall in question after the accident, and that he was working in another area when the accident occurred. He did not return to the area where the accident occurred until a week or two later (Tr. 141).

Jack Miracle testified that he is employed as a strip mine foreman and while he is not presently employed by the respondent was employed as a shovel operator during August 1980, and he operated a shovel for five or six years prior to that time. He stated that he and Mr. Woodall operated the shovel in the pit where the accident occurred. He worked the day shift and stated that the high walls were scaled and cleaned as the pit was being stripped. He described the procedures he followed for scaling and stripping, and indicated that the entire high wall was scaled during the time he was stripping the pit. He also indicated that he took the shovel out of the pit during the last shift the evening before the accident and parked it some 500 feet away, and it was his understanding that it would be overhauled. In his opinion, nothing was left to be done in the pit when he removed the shovel and he observed no unsafe conditions in and about the high wall at the time the shovel was brought out. However, he did not return to the accident area after the fatality occurred (Tr. 141-145).

Mr. Miracle stated that based on his 18 years' experience in and around strip mine pits, he observed nothing about the highwall in question at the time he last observed it when he moved the shovel out which would lead him to conclude that it was not safe. He had worked with the accident victim for some six years and considered him to be a safe worker, and Mr. Miracle indicated that he would not hesitate to leave a pit area if he believed it were unsafe. He was close to the scene of the accident after the wall fell and observed rock from the fall laying in the pit and that any overhanging rock which may have been present "wasn't hanging there before the fall" (Tr. 147). The pit was completely finished when he moved the shovel out and no additional scaling is done before the coal is actually hauled out (Tr. 148).

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On cross-examination, Mr. Miracle stated that the area depicted in photographic exhibit P-9 away from the rock fall itself resembles the condition of the wall when he left it. However, he believed the areas circled in red on the photograph which have been characterized as "cracks" are in fact "offsets" in the wall. He confirmed that he was at home when the accident occurred and that he performed no work with the shovel on the day of the accident. He believed that the last time he took the shovel out was on the Monday evening prior to the accident, but was not absolutely sure. He also confirmed that no scaling was done after the shovel was taken out of the pit (Tr. 152).

In response to bench questions, Mr. Miracle viewed photographic exhibits P-7, P-10, and P-15, and stated that what appears to be overhanging rock is shown in exhibit P-15, but that "it may be laying back on the wall 15 to 20 feet" (Tr. 154). If it were small rock, the shovel boom could reach it since it is 67 feet high, and when extended to its full length it could reach a distance of 75 feet. Although he could not describe the highwall as shown in the pictures, he stated that he would not want to work under it after the accident occurred because "the fall must have disturbed it when it fell out" (Tr. 156).

J. B. Huddleston, mine superintendent, testified that he has 17 years of strip mining experience and has operated shovels and other related equipment during this time. He was the superintendent on August 5, 1980, when the accident occurred and was a personal friend of the accident victim David Crawford. Mr. Woodall, and Mr. Miracle were good shovel operators, and Mr. Crawford had always been a competent and safe worker.

Mr. Huddleston stated that he worked in the pit in question on the Saturday before the accident and the shovel was not there. He believed the shovel may have been moved out of the pit the previous Thursday or Friday. He also indicated that once the tripping is completed with the shovel, trucks and loaders are brought in to haul out the coal and the coal cleaning machine comes in and cleans up the coal. The pit and wall looked good to him when he worked it on Saturday and "everything looked solid" (Tr. 160). At the time of the accident, Mr. Crawford was drilling in the pit near the base of the highwall, and he did not believe that Mr. Crawford would have exposed himself to any hazard had there been any observable dangerous conditions present. Prior to the accident, no one had ever been injured from any dangerous highwall situation and he believed the accident occurred when a hill seam in the wall slipped and fell off (Tr. 165-166).

Mr. Huddleston testified that drilling and blasting near and at the top of the high wall had taken place prior to the accident and he described the procedures followed during this process. Loading operations ceased after the accident, but the holes which

had been drilled and charged were shot the next day (Tr. 169).

On cross-examination, Mr. Huddleston confirmed that the order was abated and terminated after the highwall in question was blasted down (Tr. 171). Referring to exhibit P-9, Mr. Huddleston stated that the wall

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after the accident did not look the way it did the previous Saturday. The exposed "jagged-like" rock and signs of hill seams shown in the photograph were not present prior to the accident and the wall appeared smooth and "there was nothing loose that you could see on it" (Tr. 175). Referring to exhibit P-21, he could not tell whether there were "cracks" in the wall area shown because he did not go to that area and what appears to be cracks may be an open place in the ground (Tr. 179).

In response to a question concerning the condition of the highwall as stated by the inspector in his citation, and as depicted in exhibits P-7, P-10, and P-15, Mr. Huddleston stated as follows (Tr. 181-182):

A. Yes, he was correct that there had been loose stuff on the wall because it was there.

Q. You could see that, is that what you are saying to me now in those pictures, that you can see loose unconsolidated rock?

A. Yes.

Q. Along that high wall?

A. Yes, it looks to be.

* * * * *

Q. (By Mr. Tribell) Between the time this rock fell out, whatever the condition was created, if any, at that time and the next day when the Inspector came out there, there was nothing done, we pulled out after we got Mr. Crawford out; was any work performed in there?

A. None at all.

Q. Was the area barricaded and guarded?

A. Barricaded and locked so that nobody wouldn't go in.

Q. In other words, if there had been any condition created by this happening, we would not have attempted to correct it before the inspector came on the job?

A. No, not at all. What was there was there, and it it was to be faced, and even if there had of been, I wouldn't have had anything to do about it because it was there and everybody could see it, you know, whatever is done is done in my opinion. I didn't "straighten it out" or nothing, I wouldn't have had it done.

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Mr. Huddleston indicated that the length of the entire highwall was approximately 500 feet but only the part immediately above the fall which had been drilled was blasted down to abate the citation. The entire wall was eventually taken down months later (Tr. 185-186).

Dallas Shackelford testified that he is the former owner of the S.A.M. Coal Company, and since August 1980, has served as general manager in charge of all coal production. He was at the mine when the accident occurred, and he viewed the pit and highwall the previous Thursday and Friday and it looked safe to him. He also observed the high wall while in the pit loading coal on the morning of the accident and observed no cracks or other dangerous conditions (Tr. 187-189). Three or four men and equipment were working under the highwall at any given time and he observed nothing that would lead him to believe they were in danger. The shovel was taken out of the pit for repairs, and a week before the accident he had discussed the need to repair the motor with the mine superintendent (Tr. 190).

Mr. Shackelford testified that he arrived at the scene of the accident five or ten minutes after the wall fell, and after taking some measurements concluded that the drill rig and accident victim were approximately 40 feet from the base of the wall when it fell on them. He indicated that the portion of the wall which fell "tumbled" and "pitched" out approximately 50 feet. He was personally acquainted with the accident victim and considered him to be one of the safest employees. The company has had a good safety record, and no prior accidents have ever occurred in connection with the highwalls. All employees are directed not to work in unsafe areas and to consult with their boss if they encounter dangerous conditions (Tr. 193).

Eddie Haley testified that he has been employed by the respondent as a drill foreman for about three years. He confirmed that he had drilled the holes depicted in the top of the highwall in question and stated that they were drilled before the highwall was created. He has never drilled such holes from a distance of 30 inches from the edge of any highwall, and while he observed the highwall from the top, he had never gone down into the pit. While at the top of the wall he never observed any loose or unconsolidated material, nor has he ever observed any unsafe conditions there. He was acquainted with the accident victim and knew him to be a safe worker who would never have been in the pit if he thought it was dangerous (Tr. 198-201).

Joe Wyatt testified that he is employed by the respondent as a drilling and blasting foreman, was so employed at the time of the accident, and he discovered the victim after the section of the highwall fell. Mr. Wyatt indicated that he had been in and around the pit area before the accident and the walls "looked good to me from the top side and the bottom down in the pit when we scuttled it with the shovel" (Tr. 202). The only difference he observed in the wall after the accident was in the area where the rock fell out. The shovels were operating in the pit and the walls were stripped and scaled. He explained that some of the

drill holes were loaded, but the shot was delayed a day because of the accident (Tr. 203).

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Mr. Wyatt testified that when the accident occurred all of the men left the mine site, and he disagreed that loose and unconsolidated material was on the highwall in question (Tr. 204).

Robert Marcum testified that he has worked around strip mines for 18 years and is employed by the respondent as a foreman. On the day of the accident he was the second shift foreman. He and the first shift foreman, David Ellison consulted with each other during the shift change and together they checked out all of the work areas. This is the normal practice during the shift change. They checked the pit and highwall area where the accident occurred and they left it ten minutes before the accident. They observed no conditions which they thought was dangerous, and he had been in the pit previous to the accident supervising the loading and cleaning of coal. In his opinion, the rock fall in question was caused by a hill seam and that loose, unconsolidated rock did not cause the rock fall of such magnitude. He had observed the shovel operator stripping and scaling the highwalls and believes that it was a good job (Tr. 209).

On cross-examination, Mr. Marcum confirmed that he had previously executed an affidavit for respondent's counsel which indicated that he had observed a hill seam in the wall with dirt and mud between sections of rock, and that this is what caused the rock to separate and the wall to fall (Tr. 211-212). He confirmed that he observed this condition on the day of the accident, and he also confirmed that Mr. Ellison kept his own shift examination books and that he (Marcum) kept his own. He did not know whether Mr. Ellison was making his on-shift examination at the time he accompanied him, nor did he know about any entries that Mr. Ellison may have made in his book (Tr. 215).

Mr. Marcum stated that he was in the pit about five minutes making his inspection of the highwall and that it does not take long to drive in and out of the pit. He did not go to the top of the highwall because his men were not expected to work in that area for weeks after the accident, and he had no way of knowing whether Mr. Ellison would be making his own on-shift examination at that time (Tr. 216). Mr. Marcum stated further that he was in Mr. Ellison's truck when he went to the pit to see how the accident victim was doing and they were there about four or five minutes, and neither he nor Mr. Ellison went to the top. He does not know whether this was Mr. Ellison's on-shift examination and he does not know why Mr. Ellison was not certified in Tennessee as a mine foreman, but that he (Marcum) is certified in both places (Tr. 220).

Referring to exhibit P-9, Mr. Marcum identified an area along the highwall which appears to contain loose, unconsolidated material, but he could not state whether the fall caused that condition. He also confirmed that he observed the dirt and mud in the hill seam when he returned to the pit after the accident, and that he saw "the dirty streak right where the hill seam was" (Tr. 222-223).

Findings and Conclusions

Fact of Violations

Citation No. 0736755, August 6, 1980, 30 CFR 77.1001

30 CFR 77.1001 provides as follows:

Loose hazardous material shall be stripped for a safe distance from the top of pit or highwalls, and the loose unconsolidated material shall be sloped to the angle of repose, or barriers, baffle boards, screens, or other devices be provided that afford equivalent protection.

Section 77.1000, requires a mine operator to establish and follow a ground control plan for the safe control of all highwalls and pits, and section 77.1000-1, requires the filing of a copy of the plan with MSHA. The respondent's plan which was in effect at the time of the accident in question was filed with MSHA on October 16, 1979, (exhibit P-18), and the equipment used for the scaling of the highwall, as well as the means for doing this is stated as follows in the plan:

Highwall will be brought down by the dozers and high lifts and scaling needing to be done will be done by 2400 Lima Shovel.

In addition, the plan reflects the anticipated height of the highwall to be 60 feet, the maximum height as 80 feet, and the proposed angle of the highwall is shown as 85 degrees or less. Further, I take note of the fact that the respondent is not charged with a violation of its ground control plan. Inspector Spurlock includes no such "finding" in his accident report (exhibit P-4), and petitioner does not assert any violation of section 77.1000.

During the course of the hearing, respondent's counsel argued that there is no evidence presented that loose, unconsolidated rock or material was present along the entire 250 feet of the highwall. Conceding the existence of loose and overhanging rock after the fall, counsel asserts that these conditions were the obvious result of the fall. Further, since the inspector only required the highwall area which remained in the immediate vicinity of the fall to be blasted down to abate the citation, respondent's counsel further suggests that even if loose rock was present prior to the fall, it obviously was confined to that area and not to the other areas testified to by the inspector during the hearing well after the fact. Counsel also suggests that there is a strong inference that the only reason the citation issued was because a fatality had occurred, and he emphasizes the point that the testimony and evidence presented by his witnesses reflects that the highwall in question was scaled of all loose unconsolidated rock prior to the fall and that inspections of the highwall revealed no obvious hazardous conditions (Tr. 233-235).

Petitioner's counsel argued that the evidence he presented clearly established that after the fall loose unconsolidated rock material was left on the highwall, and that these conditions constitute a violation of the cited safety standard. As to the condition of the highwall prior to the fall, counsel concedes that there is no direct evidence that loose unconsolidated materials were present on the highwall. However, counsel asserts that there is circumstantial evidence that loose unconsolidated materials were present and that these conditions caused the rock fall in question. Counsel asserts further that it is not credible that only the portion of the wall which fell out was loose and unconsolidated and that the remaining portion away from the wall was in any better condition. Counsel stated that "it is only reasonable to assume that this entire distance here was in poor shape, and that that was the cause of the wall to fall out" (Tr. 237). When asked whether he meant the entire 250 feet of highwall, counsel responded "at least portions along that way, as you get closer to the rock fall, obviously you get into the question of what came first" (Tr. 237).

With regard to the proposed \$10,000 assessment for an alleged failure to scale the wall, counsel conceded that the fact that a fatality occurred prompted that initial assessment amount by MSHA (Tr. 237). Conceding that the highwall area was isolated after the fall and that no one was working in that area at the time the citation issued, counsel nonetheless supported the proposed assessment as follows (Tr. 238).

MR. GROOMS: In some sense, you could argue that this was an assessment, that is, in the sense that assessment took these circumstances; but based on the Inspector saying in his Inspector's Statement that there was a fatality associated or related to this violation, now clearly then the Inspector believed, and it is our position, that the circumstances, the state of that wall circumstantially supports the theory that the fatality was caused by the poor condition of that wall.

The parties do not dispute the fact that the rock which fell from the highwall and caused the fatality constituted a "massive" fall (Tr. 225). This conclusion is supported by the testimony of witnesses which described the extent of the fall as encompassing a total volume of approximately 100 tons of rock which fell from an area of the wall which was approximately 25 to 30 feet wide and approximately 50 feet high, and from the photographic exhibits taken shortly after the accident showing the rock mass which covered the drill as well as the victim. Inspector Spurlock's accident investigation report contains a finding that "loose overhanging material was present for a distance approximately 250 feet" (pg. 3, exhibit P-4). The citation (exhibit P-2), described the highwall as being 250 feet long, but the loose unconsolidated material is described as being "present along the highwall". In his narrative statement describing the gravity of the violation, Mr. Spurlock states that the accident occurred "due to the walls not being evaluated properly".

When read together, the highwall conditions described by the inspector in the citation, accident report, and narrative statement are lacking somewhat in clarity. It is difficult to determine from these documents precisely what the inspector had in mind when describing the parameters of the loose rock and materials which may have been present on the highwall in question. A reading of those documents suggests that loose unconsolidated rock materials were present on the highwall when the inspector viewed the pit and wall area after the accident, but it is far from clear to me whether his concern was with the entire 250 feet along the top of the highwall, or simply that 25 to 30 foot area from where the rock fell, including the immediate edges on both sides of the wall. In addition, it is not clear to me whether the inspector intended to cite the respondent for conditions which may have existed before the highwall collapsed, or whether his intent was to cite a violation for the conditions of the highwall which existed at the time he viewed the area after the fall.

On the basis of the facts presented in this case, separation of those conditions which may have caused the highwall to collapse, and those conditions which the inspector believed constituted a violation at the time he issued the citation is no easy task. Significantly, since none of the inspectors who testified observed the condition of the highwall prior to the fall, petitioner's case concerning hazardous conditions rests on speculation and inferences based on what they observed after the event. On the other hand, respondent's defense that the highwall which fell had been scaled and contained no readily observable hazardous conditions is supported by the testimony of several witnesses who were in the pit and highwall area immediately prior to the fall.

The citation issued on August 6, 1980, was issued the day after the fatal fall of rock material from the pit highwall. The inspector had been summoned to the scene, and during his investigation of the accident issued the citation which states on its face that "loose unconsolidated material (rock) is present along the highwall". The inspector described the wall in the citation as being approximately 250 feet long and 50 feet high, and he states that he observed the conditions during his fatal accident investigation. Although no other conditions are described on the face of the citation issued at the time of the event, at the hearing held on February 2, 1982, the inspector identified several photographs taken during his investigation and he described several areas along the highwall as "cracks" and "overhanging materials" as well as loose unconsolidated materials. However, he also testified that the cracks were present in the highwall area which remained after the fall, and that the overhanging material was created after the wall collapsed.

With regard to the assertion that the respondent failed to properly scale the highwall, the inspector testified that he reached this conclusion after observing loose unconsolidated rock still present on the highwall after the fall. He also identified

other areas along the highwall containing unconsolidated material, but conceded that these areas were away from the fall area and had nothing to do with the rock which fell. He also conceded that he did not view the highwall in question prior to the fall, had no

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knowledge as to the condition of the wall prior to the fall, had no idea as to the angle of repose of the highwall prior to the fall, and was not present when the conditions he cited were abated. Although he indicated that he observed "teeth" marks made by the shovel in the highwall, his conclusion that the wall was not scaled was based on the fact that the shovel was not in the pit area on the day of the accident and he determined during his investigation that the shovel had not been used in the pit for the three or four days prior to the accident.

With regard to the existence of "hill seams" in the highwall, the inspector conceded that it was possible that some were present in the highwall area which had fallen, and he also conceded that some of the cracks which he described may have been "natural". He reiterated that the fact that the loose unconsolidated materials which existed, and which he observed after the fall, constituted an obvious violation of section 77.1001.

State mine inspector Copeland, who accompanied the MSHA inspector during the accident investigation did not view the wall prior to the fall and had no knowledge of its condition. His testimony regarding the existence of loose rock on the wall is based on observations made after the fall and while he expressed an opinion that the wall would not have looked any different before the fall, he had no basis for making that judgment other than his "experience". In these circumstances, since I believe that the massive fall of rock which occurred was a rather unusual event, particularly in light of the extent of the fall, I reject the notion that anyone may rely on "past experience" to support a conclusion that the highwall area which fell probably looked the same way the day before the fall. As for the cracks which he observed, Mr. Copeland conceded that he had no way of knowing what caused them, and he candidly conceded that he could not state whether the cracks presented a hazard because there was no way to tell where they led to.

As for the testimony of state mine inspector Farmer, he too conceded that he had no knowledge of the condition of the wall prior to the fall, and while he agreed with Mr. Copeland's conclusion that loose unconsolidated material caused the fall, his conclusion in this regard, as well as that of Mr. Copeland is simply based on the fact that "it did fall".

Petitioner's arguments

In addition to the arguments presented during the course of the hearing, in its posthearing brief petitioner argues that the fatal accident was caused by the respondent allowing the highwall in question to deteriorate over a period of several days, during which time its scaling and stripping shovel was absent from the pit. Petitioner maintains that the inspector issued the section 107(a) withdrawal order the day after the fatal rock fall when he observed loose and unconsolidated material along the entire length of the highwall during the course of his accident investigation, and in support of this contention, petitioner has

cited certain testimony by the inspector, as well as several photographs of the highwall taken at the time of the investigation. Further, petitioner

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asserts that the inspector cited a violation of section 77.1001, because the highwall had not been sufficiently scaled or sloped to the required 85 degree angle of repose. Petitioner cites the inspector's testimony that the wall was vertical and overhanging, and at an angle of from 90 to 95 degrees, and that the wall which fell and crushed the victim was identical to a column which bulged out from the highwall is shown in photographic exhibit P-8.

Petitioner also relies on the testimony of mine superintendent Huddleston that the shovel used for scaling was moved out of the pit on the previous Thursday or Friday prior to the accident which occurred on Tuesday, August 5, 1980, as well as the testimony of the inspector that the wall was probably "working" two or three days before the fall, and the testimony of the shovel operator Woodall that the wall could have been working during the time the shovel was removed, to support a theory that the removal of coal requiring heavy front end loaders and trucks to pass near and under the wall, as well as vibration from the victim's drill, during this time caused the deteriorating wall to collapse.

Finally, petitioner cites the testimony of respondent's witnesses who expressed concern about the conditions of the wall as depicted in MSHA's photographs, and asserts that respondent's suggestion that the collapse of the wall was caused by undetectable "hill-seams" should be rejected as sheer speculation based on no credible evidence or testimony.

Respondent's arguments

In addition to oral argument made at the hearing, respondent argues in its brief that the inspector's decision to issue the citations in this case was dictated by the fact that a fatality occurred. Conceding that a dangerous condition existed prior to the accident, respondent maintains that such a condition was not apparent to the accident victim, the mine foremen, or any other employees in the area in question.

With regard to the photographs introduced by MSHA during the hearing, respondent maintains that they contribute nothing constructive to this case since they can be, and in this case are, deceptive, especially as to depth, the lay of land, etc., and simply do not give an accurate idea of the way the area looked, even at the time they were taken.

With regard to Inspector Spurlock's "evaluations" as reported in his accident investigation report, respondent makes the following comments:

1. Respondent concedes that foreman David Ellison directed the accident victim to drill a series of holes in the bottom of the pit near the highwall.

2. Regarding the conditions of the highwall as reported by the inspector in his report, respondent maintains that the highwall had, in fact, been scaled properly as testified to by the operators, foreman, and other mine employees. As for the alleged cracks in the wall, respondent asserts that they resulted from the fall and that the respondent had no control over this condition.

3. With regard to the existence of certain drill holes at the top of the highwall and the inspector's belief that the weight of the drill may have weakened the highwall, respondent points out that this assumption was proved to be completely erroneous because the holes were drilled before the highwall was even created and that it is impossible to operate a drill within 3 to 5 feet of the highwall due to the way a drill must be set up and braced for drilling.

4. Concerning the purported statement by foreman Ellison that the shovel normally used for scaling the highwall had been out of service for repairs for five days, respondent states that the evidence proved that the shovel had not been taken out of service until it had completely stripped the pit, scaled the highwall, and completed its job in that area. It then left the pit under its own power, in an operating condition, and the shovel operators described how they scaled the highwall as the pit was stripped down.

5. Respondent agrees with the statement that foreman Ellison and second shift foreman Robert Marcum observed the drilling operation approximately five minutes before the accident and that both men stated that they observed no hazardous conditions at that time.

I am convinced from all of the evidence and testimony adduced in this case that Inspector Spurlock was primarily concerned about the loose, unconsolidated and overhanging rock which was present at the highwall area after the collapse of the wall. I am further convinced that he issued the imminent danger withdrawal order because of his concern that the condition of the highwall after the fall posed an imminent danger in the event mining were permitted to continue before the conditions which remained were corrected. However, the critical issue presented in this case is not so much the condition of the highwall after the fall, but rather, the conditions which existed prior to the fall and whether proper scaling and removal of rock had been accomplished in accordance with the requirements of the cited safety standard. The fact that an imminent danger may have existed at the time the inspector viewed the

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scene of the accident the day after the wall collapsed during his investigation does not establish that the condition of the wall sometime prior to that event was such as to constitute a violation. After careful consideration of all of the evidence and testimony adduced in this case, I conclude and find that the petitioner has failed to establish by a preponderance of any credible evidence that loose, hazardous, and unconsolidated materials were present along the entire highwall in question prior to the fall, or that respondent had failed to comply with section 77.1001 by failing to strip or scale the entire highwall wall in question.

Inspector Spurlock's conclusion that the entire highwall had not been properly scaled was based in part on his assertion that loose, unconsolidated material was still present on the wall after the massive rock fall. However, he conceded that the loose materials he cited, as well as the overhanging areas, were at the location or in close proximity to that part of the wall which collapsed. In short, it seems obvious to me that his observations concerning the unconsolidated materials still present when he conducted his investigation on August 5th, were in fact observations of loose and overhanging materials which were the direct result of the fall which had occurred the day before, and which were present at or near that location.

A second reason for Inspector Spurlock concluding that the entire highwall was not properly scaled was his determination made during his investigation of the accident that the shovel normally used to scale the highwall had been out of service for repairs for five days prior to the highwall collapse, and that no other equipment capable of scaling the wall was present in the pit when Mr. Spurlock was there. The information concerning the absence of the shovel from the pit area was apparently given to Mr. Spurlock by former pit foreman David Ellison. Mr. Ellison did not testify at the hearing and petitioner did not take his deposition. Since none of the witnesses presented by the petitioner viewed the highwall conditions prior to the fall, petitioner's assertions that the highwall was not properly scaled in based on speculation and assumptions that no scaling of the highwall took place prior to the massive fall which occurred on August 5th. Although state mine inspector Copeland stated that the wall should have scaled, he prefaced his testimony with the remark "if it was this way before". Since he candidly admitted he had never observed the wall prior to the fall, and since it seems obvious to me that his testimony regarding the condition of the wall focused on how it appeared to him after the fall, his testimony as to whether it was in fact scaled is of little or no value. As for state inspector Farmer's testimony, I have given no weight to his inference that since the wall fell it obviously needed scaling.

Respondent's witnesses testified as to the scaling which had been on the highwall prior to the fall. Shovel operator Woodall, a man with 34 years of experience in the pits, testified as to the procedures he follows

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in stripping and scaling a highwall. Although his testimony regarding the work that he performed in the pit indicates that it was done on the shift following the accident, he "guessed" that the last time he scaled the highwall in question was one or two days prior to the fall, and he indicated that the 2400 shovel was the one used to scale the wall and that it was not out of service on that day.

Former shovel operator Jack Miracle testified that he and Mr. Woodall operated the Lima 2400 shovel in the pit area where the fall occurred. Mr. Miracle testified that while he performed no work in the pit the day of the accident, he did work on Monday, the day before the accident, and that he took the shovel out of the pit after the last shift that evening and parked it some 500 feet away for overhaul. He also testified that nothing was left to be done in the pit when he took the shovel out, and he observed no unsafe conditions on the highwall.

Mine Superintendent Huddleston, a personal friend of the accident victim, testified that he was supervising the pit operations on the day of the accident and that he also worked in the pit the previous Saturday and observed nothing which would cause him concern for the integrity of the highwall. Mr. Huddleston did not see the shovel in the pit on Saturday, and he believed that it may have been moved out of the pit the previous Thursday or Friday. Thus, his testimony contradicts the testimony of Mr. Woodall and Mr. Miracle as to when the shovel may have actually been taken out of the pit area.

Drilling and blasting foreman Wyatt and shift foreman Marcum testified that they were both in the pit area in question on the day of the accident, that the highwall appeared to be safe, and they observed no dangerous or hazardous conditions. General Manager Shackelford testified that he observed the highwall the previous Thursday and Friday and it appeared safe. He also stated that he was in the pit on the morning of the accident, observed no cracks or dangerous conditions, observed men and equipment working under the highwall, and observed nothing which would lead him to believe they were in danger.

With regard to the existence of any loose, unconsolidated or overhanging rocks, it should be noted at the outset that the citation issued by the inspector states that such materials is present, and that it was observed during his accident investigation. Although the inspector's accident investigation report contains a finding that the loose materials was present for a distance of 250 feet, the citation simply states that the highwall was that long, but it does not state that the loose materials were present for that entire distance. Further, during his testimony at the hearing, the inspector made frequent references to certain photographs which were taken after the fall at the scene of the accident (exhibits P-5 through P-15), and he relied on those photographs to support his contention that loose materials were present along the highwall. However, a close examination of his testimony, as well as the photographs, leads me to conclude that Mr. Spurlock's concern with the conditions of

the highwall

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focused on what remained of the wall after it fell and not with the conditions of the entire 250 length and breadth of the wall. For example, the inspector identified exhibit P-7 and drew a circle around an area of overhanging loose materials. One of the circles is directly over the fall area, and the other area circled appears to be in close proximity to the fall area.

The inspector also identified several cracks in the highwall, and circled several areas which he believed contained loose, unconsolidated rock, as well as overhangs of rocks and loose materials, as depicted in photographic exhibits P-9 through P-11, and P-14. However, he candidly admitted that some of the cracks along the top of the highwall, as well as the overhanging rocks and loose materials, were present in that part of the highwall which was left standing after the fall had occurred, and the enlarged photographs which he relied on substantiate the fact that the conditions referred to were at or closely adjacent to the area of the wall collapse. He also described some of the "cracks" as natural rock formations, and while state inspector Copeland also alluded to the presence of "cracks", he could not tell what caused them or where they led to and his description of overhanging rock as shown in photographic exhibit P-15 is clearly in reference to a condition left after the rock fall in question.

None of the witnesses who testified for the petitioner in this case had viewed the highwall in question prior to the fall, and it seems clear to me that they had no way of knowing the condition of that wall prior to the massive fall of rock which occurred on August 6, 1980. On the other hand, practically all of the witnesses who testified for the respondent had viewed the conditions of the highwall both before and after the fall, had worked in and around the pit area where the fall occurred, and their consistent testimony is that the highwall at the immediate location of the fall, as well as in the adjacent areas, as depicted in the photographs, simply did not look the same the day before and after the fall. Having viewed these witnesses on the stand during the course of the hearing, I find their testimony to be credible.

Petitioner's reliance on Inspector Spurlock's testimony that the highwall conditions he observed during his accident investigation on August 6th, a day after the fall, were not significantly different from those which prevailed on August 5th, the day before the fall, is rejected. The testimony in this case is that over 100 tons of rock materials fell from a 25 to 30 foot wide section of the highwall which was some fifty feet high and that several locations at the edges of the fall were left with loose, overhanging materials. However, it seems obvious to me that these conditions were the direct result of the fall, and I fail to comprehend how the petitioner can argue that the highwall conditions on both days were the same. Further, the testimony in this case is that the cited conditions were abated after "the loose unconsolidated material (rock) had been shot off, and the hazardous condition no longer exists" (exhibit P-2).

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The record here confirms the fact the Inspector Spurlock did not issue the abatement or termination, but he did confirm that the citation was terminated after the highwall where the fall occurred was blasted down. Mine Superintendent Huddleston also confirmed that the citation was abated by blasting down the area immediately above the fall, and that the entire wall was eventually taken down months later. These facts support the conclusion that the gravamen of the charge against the respondent is that loose, unconsolidated materials were present along the highwall on August 6, 1980, the day that the inspector conducted his accident investigation, and that he was concerned about those conditions and that they were subsequently abated to MSHA's satisfaction by blasting down that portion of the wall which was left standing after the fall and which contained loose, overhanging rock materials.

In view of the foregoing, I conclude and find that the evidence and testimony adduced in this case does not support a finding that loose, hazardous materials were present on the highwall prior to the fall and that the respondent failed to strip or scale any such materials from the wall. Although the testimony regarding precisely when the shovel used for scaling was taken out of the pit area is conflicting, respondent presented credible testimony that scaling and stripping had been accomplished in the pit area in question prior to the massive rock fall and that the condition of the highwall immediately prior to the fall appeared to be free of any readily observable or detectable hazards to those men and supervisors who were in the area. As for the existence of the loose, unconsolidated and overhanging rock materials which were left after the fall, I cannot conclude that these conditions constituted a violation of the cited standard. Those conditions were the direct result of the fall and the area had been secured, miners were withdrawn, and barricades erected to facilitate MSHA's accident investigation. Given these circumstances, I do not believe that the respondent should be charged with a violation. As indicated earlier, the fact that the remaining conditions may have presented an imminently dangerous condition does not necessarily support a conclusion that a violation of any mandatory safety existed. Under the circumstances, Citation No. 0736755, issued on August 6, 1980, citing a violation of 30 CFR 77.1001, IS VACATED.

Citation No. 0736757, August 6, 1980, 30 CFR 77.1713

30 CFR 77.1713(a) provides as follows:

At least once during each working shift, or more often if necessary for safety, each active working area and each active surface installation shall be examined by a certified person designated by the operator to conduct such examinations for hazardous conditions and any such hazardous conditions noted during such examinations shall be reported to the operator and shall be corrected by the operator.

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Subsection (c) of section 77.1713 requires the certified person making the examination required by subsection (a) to record the conditions of the mine areas that he examined in an approved book maintained at a designated mine area. The certified person is also required to report any hazardous conditions discovered during his examination so that appropriate corrective action may be taken.

Subsection (c) of section 77.1713 requires the certified person making the examination required by subsection (a) to record the conditions of the mine areas that he examined in an approved book maintained at a designated mine area. The certified person is also required to report any hazardous conditions discovered during his examination so that appropriate corrective action may be taken.

The citation charges the respondent with failing to make an adequate onshift examination, and the reasons given for this conclusion on the face of the citation is that "the highwall on each end of the accident scene was obviously hazardous and the conditions were not recorded in the record book". The citation was subsequently modified to include a second charge that "the person making the on-shift examination and filling out the record book was not certified in the State of Tennessee". The term "certified" is defined in pertinent part by section 77.2(m) as "a person certified or registered by the State in which the coal mine is located to perform the duties prescribed by this Part 77".

Petitioner's arguments

Petitioner argues that Inspector Spurlock cited a violation of section 77.1713, because the on-shift examination book for August 5, 1980, showed that the highwall was "okay". Due to "the obvious nature of the bad highwall", petitioner asserts that the inspector concluded that the required inspection was not done, or was incompetently done, and points to the inspector's testimony that in his judgment the wall as he saw it on August 6, 1980, would not have significantly changed so that what he observed on August 6, 1980, should have been apparent to the on-shift examiner on August 5, 1980.

Petitioner argues that Inspector Spurlock cited a violation of section 77.1713 because he interpreted that section as requiring not only an examination of active working areas and active surface installations, at least once on every shift, but also that his examination must be competent, in that it must detect hazardous conditions which then must be reported and corrected, as required by the standard.

Petitioner submits that the inspector's interpretation of section 77.1713 is correct and that it requires the certified person to do more than simply "view" the highwall. Since the standard requires that such areas be examined, petitioner asserts that the Dictionary definition of that word, which states in part "to inspect or test for evidence of disease or abnormality" is

applicable in this case. In addition, petitioner

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relies on the requirement of section 77.1713(c) that the certified person must make a report of the nature and location of any hazardous condition found to be present at the mine in further support of its interpretation of the standard, and cites Judge Stewart's decision in Secretary of Labor v. Bill's Coal Company, Inc., 1 FMSHRC 167 (1979) (Judge Stewart interpreting 77.1713(c)), wherein he stated that:

The operator's failure to record the existing hazards was negligent in that the conditions were visually apparent.

Petitioner submits that Judge Stewart's interpretation of section 77.1713(c) in Bill's Coal Company, Inc. and the interpretation which gives substance to this standard, in general, compels an interpretation consistent with that of Inspector Spurlock's, that the section is violated not only by the complete failure to examine working areas at least once per shift, but also by the failure to carry out these examinations in a competent manner by failing to discover the hazardous conditions that are present.

Petitioner argues further that section 77.1713(a) was also violated when foremen Marcum and Ellison went into the pit to make an examination a few minutes before the accident and failed by their cursory inspection to discover not only the apparent hazards but also the imminent hazard of the rock fall which took place within a few short minutes after this "inspection". In support of this conclusion, the petitioner cites the Commission's decision in Peabody Coal Company v. Secretary of Labor, 1 FMSHRC 1494 (1979), where the Commission stated:

The regulation is broadly worded and requires, among other things, that a designated certified person examine working areas for hazardous conditions as often as is necessary for safety and that any conditions noted be corrected by the operator.

In conclusion, petitioner maintains that section 77.1713(a) was violated when the respondent failed to competently examine the work areas and thus failed to identify the hazardous conditions present there. This occurred, states the petitioner, not only when the first shift foreman Ellison conducted his regular on-shift examination (if it was earlier than the examination conducted with second shift foreman Marcum) but also when Ellison and Marcum again entered the pit shortly before the accident to carry out another examination and failed again to detect the hazards.

Failure to perform adequate inspection and to record hazardous conditions.

The inspector testified that he cited this condition because of his assumption that the accident was caused by a hazard (loose unconsolidated rock) which he believed should have been detected and recorded by shift foreman David Ellison. The citation which

he issued states that "inadequate"

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on-shift examinations were made because the highwall "on each end of the accident scene was obviously hazardous and the conditions were not recorded in the record book". In support of this specification petitioner relies on the testimony of the inspector as well as the notation made on his "narrative statement" recorded at the time that he issued the citation (exhibit P-3), indicating that "The on shift record books showed o.k. in all highwalls, and at the scene of the accident and at another pit loose material was present". The book was not produced at the hearing, nor were any entries for the previous days mentioned.

Mr. Ellison is no longer employed by the respondent and neither party apparently made any attempts to take his deposition. However, second shift foreman Marcum testified that when he and Mr. Ellison were in the pit some ten minutes prior to the rock fall they observed no hazardous conditions. Although Mr. Marcum did not know whether the brief visit to the pit constituted Mr. Ellison's onshift examination, general manager Shackelford and superintendent Huddleston testified that they too were in the pit the morning of the accident, visually observed the highwall, and saw no hazardous conditions present.

Respondent does not argue or assert that the rather cursory view of the highwall by Mr. Ellison and Mr. Marcum while driving by the pit area in a truck during the end of the first shift and immediately before the wall collapsed constituted the inspection required by section 77.1713. Inspector Spurlock's accident investigation report (pg. 2) indicates that the accident victim reported for work at the pit in question at 7:00 a.m. on the day of the accident, and the pit was under foreman Ellison's supervision. The report also reflects that Mr. Ellison made an examination of the working areas of the pit and then assigned the workmen to their normal duties. Mr. Ellison entered the pit again at approximately 3:00 p.m. with second shift foreman Marcum, observed the work that had been performed by the accident victim at the base of the highwall, and left the area. Shortly thereafter another individual discovered that a portion of the highwall had fallen on the cab of the drill and that the accident victim had been crushed by the falling material.

Inspector Spurlock conceded that he did not know what foreman Ellison may have observed during his shift, and as previously noted, Mr. Ellison did not testify, and petitioner did not take his deposition. Since Inspector Spurlock had absolutely no way of knowing what Mr. Ellison may have observed when he noted the highwall conditions as "okay", I cannot conclude that Mr. Spurlock is in any better position to conclude that the conditions were in fact hazardous and that Mr. Ellison's failure to observe and record these purported hazardous conditions constituted a violation of section 77.1713. It seems to me before anyone can conclude that the respondent failed to accomplish its required on-shift examination in a "competent" manner because of some failure on its part to discover and record any asserted "hazardous conditions" which may be present it must first be established through competent credible evidence that such hazardous conditions existed and were readily obvious to the

certified person making the examination.

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While I agree with the petitioner's interpretation of what constitutes an examination pursuant to section 77.1713, the evidence and testimony adduced by the petitioner in this case in support of the citation simply does not establish a violation. It seems clear to me that the petitioner's position is that since there was a massive fall of rock from the highwall, the on-shift examiner was somehow derelict in his duty by not recording the hazardous conditions which led to that fall when he conducted his required inspection the day before the fall. However, as previously noted, I have concluded and found that the petitioner did not establish that such hazardous conditions existed and I have rejected petitioner's assertion that the highwall conditions observed by Inspector Spurlock during his accident investigation were not significantly different from those which probably prevailed the day before. Further, as previously noted, the evidence in this case clearly established that some 100 tons of rock fell from a 25 to 30 foot wide section of the highwall, and that the remaining portion of the highwall at or directly adjacent to that fall contained loose overhanging rock materials. It seems obvious to me that these conditions were the direct result of the fall and I fail to comprehend how the petitioner can now argue that the conditions on both days were the same and that they were somehow readily observable and should have been apparent to the on-shift examiner.

In view of the foregoing, I conclude and find that petitioner has presented no credible evidence to support its contention that loose hazardous materials were in fact present on the highwall area which fell or that the person conducting the on-shift examination observed such conditions and failed to record and report them. While it is true that loose unconsolidated rock materials remained on the highwall after the fall and that an overhang was present immediately above the wall area which had fallen out, I am convinced that these conditions were the direct result of the fall. This is also true for the areas described by the inspector as being "on each end of the accident scene". The fact that respondent was only required to blast down that portion of the wall in the immediate vicinity of the fall to abate the citation strongly suggests that this was the area which really concerned the inspector. Since the withdrawal order issued after the accident occurred and the area was barricaded off and no one was working there, the failure to record those remaining conditions does not in my view give rise to any violation of section 77.1713. The purpose of this standard is to alert a mine operator of obvious detectable hazards so that corrective action may be taken, and if necessary, to facilitate the withdrawal of mines from the zone of danger. Accordingly, that portion of the citation which charges a failure to conduct an adequate inspection and record obvious hazardous conditions is VACATED.

Lack of state certification on the part of the on-shift examiner.

The facts in this case reflect that part of the respondent's mining operation is located in the State of Tennessee and part in

the State of Kentucky. The site of the accident took place in that portion of the

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mine which has a Mine "ID" number indicating that it is in the State of Tennessee. Mr. Marcum testified and confirmed that shift foreman Ellison was not certified in the State of Tennessee, but he did not know why. Mr. Marcum is certified in both states, and Inspector Spurlock confirmed that Mr. Ellison was certified by the State of Kentucky. No evidence was forthcoming as to the requirements for certification in these states, and there is nothing in the record to indicate the relative mine expertise required by those jurisdictions before one is "certified". In any event, I believe it is clear from the evidence presented that Mr. Ellison was not certified by the State of Tennessee and since he was required to perform duties at the mine in that state, his lack of proper certification has been established by the petitioner and this specification of the modified citation is AFFIRMED.

History of Prior Violations

Respondent's history of prior violations for the period August 6, 1978 through August 5, 1980, as reflected in the computer print-out (exhibit P-1), shows that the respondent has paid assessments in the amount of \$414 for five citations issued during this 24-month period, none of which are for violations of sections 77.1001 or 77.1713.

On the basis of the record presented in this case I conclude and find that the respondent has a good safety record and that its history of prior violations does not warrant any additional increases in the civil penalties imposed by me on the basis of this criterion. Further, I have considered the fact that the accident which occurred in this case was the first of its kind at the mine and that respondent had not previously been charged with violations connected with pits and highwalls. In addition, the record reflects that prior to the accident in question the respondent had no problems with the highwall in question, and except for the accident, petitioner presented no evidence to reflect that respondent has previously failed to maintain its highwalls and pits free from hazardous materials.

Size of Business and Effect of Civil Penalties Respondent's Ability to Continue in Business.

The record reflects that the respondent employs approximately 140 persons and its annual coal production is approximately 280,000 tons. Its strip mining operation extends into Kentucky and Tennessee, and the mine in question is located in Tennessee and employed approximately 29 persons at the time of the citation (Tr. 223-224). I conclude and find that respondent is a small-to-medium sized mine operator and this is reflected in the penalty assessed by me in this case. Further, the parties have stipulated that any penalty assessment in this matter will not adversely affect respondent's ability to continue in business and I adopt this as my finding.

Gravity

On the facts presented here, I cannot conclude that the failure by the foreman making the examination in question to be certified by the State

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of Tennessee constituted a serious violation. The record reflects that foreman Ellison was certified by the State of Kentucky, and since the mine property crossed both jurisdictions, I assume that a foreman certified by one state is just as competent as one certified by another. Further, absent any evidence by MSHA that the lack of certification was serious per se, I cannot conclude that it was.

Negligence

A mine operator is presumed to know the law. In this case I find that the violation which I have affirmed resulted from the failure by the respondent to exercise reasonable care, and that this constitutes ordinary negligence.

Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude that a civil penalty of \$75 is appropriate for the citation which has been affirmed.
Order

Respondent IS ORDERED to pay a civil penalty in the amount of \$75 within thirty (30) days for a violation of 30 CFR 77.1713(a) as detailed in the section 104(a) Citation No. 0736757, as modified on August 12, 1980. Upon receipt of payment by the petitioner, this case is dismissed.

George A. Koutras
Administrative Law Judge