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SOL (MSHA) V. ISLAND CREEK 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. HOPE 79-197-P A/O No. 46-01863-03003
v.	Pond Fork Mine
ISLAND CREEK COAL COMPANY, RESPONDENT	

DECISION

Appearances: James H. Swain, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner
William K. Bodell, II, Esq., Island Creek Coal Company, Lexington, Kentucky, for Respondent

Before: Judge Cook

I) Procedural Background

On January 16, 1979, the Mine Safety and Health Administration (Petitioner) filed a petition for assessment of civil penalty against Island Creek Coal Company (Respondent) in the above-captioned proceeding. The petition was filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a)(1978)(1977 Mine Act), and alleges violations of two provisions of the Code of Federal Regulations. An answer was filed on February 12, 1979.

Notices of hearing were issued on June 19, 1979 and July 13, 1979. A continuance was granted at the Respondent's request on July 5, 1979. The hearing was held on August 16, 1979 in Bluefield, West Virginia. Representatives of both parties were present and participated.

A schedule for the submission of posthearing briefs was agreed upon after the presentation of the evidence. However, difficulties experienced by counsel necessitated a revision thereof. Under the revised schedule, briefs were due by October 19, 1979, and reply briefs were due by November 5, 1979.

The Respondent and the Petitioner filed posthearing briefs on October 19, and October 25, 1979, respectively. The Respondent filed a reply brief on November 5, 1979, and the Petitioner filed a response to the reply brief on November 13, 1979.(FOOTNOTE 1)

II Violations Charged

Citation No.	Date	30 CFR Standard
20053	6/19/78	75.302-1
21804	7/13/78	75.200

III Evidence Contained in the Record

A) Stipulations

The stipulations entered into by the parties are set forth in the findings of fact, infra.

B) Witnesses

The Petitioner called as its witness Billy R. Browning, an MSHA inspector.

The Respondent called as its witnesses Arvel Gartin, a section foreman at the subject mine; Tony Turyn, director of safety for the Respondent's Island Creek Division; and Douglas White, the day shift mine foreman at the subject mine.

C) Exhibits

1) The petitioner introduced the following exhibits into evidence:

M-1 is a copy of both Citation No. 20053, June 19, 1978, 30 CFR 75.302-1 and the termination thereof.

M-2 is a document styled "Assessed Violation History Report-Two Year Summary by Mine" compiled by the Directorate of Assessments. This document

contains information on the history of violations for which the Respondent had paid assessments between July 20, 1976 and July 19, 1978.

M-3 is a copy of both Citation No. 21804, July 13, 1978, 30 CFR 75.200 and the termination thereof.

M-4 is a drawing produced during the hearing by Inspector Browning during his testimony relating to Citation No. 21804, July 13, 1978, 30 CFR 75.200.

2) The Respondent did not introduce any exhibits into evidence.

IV Issues

Two basic issues are involved in the assessment of a civil penalty (1) did a violation of the 1977 Mine Act occur, and (2) what amount should be assessed as a penalty if a violation is found to have occurred? In determining the amount of civil penalty that should be assessed for a violation, the law requires that six factors be considered: (1) history of previous violations; (2) appropriateness of the penalty to the size of the operator's business; (3) whether the operator was negligent; (4) effect of the penalty on the operator's ability to continue in business; (5) gravity of the violation; and (6) the operator's good faith in attempting rapid abatement of the violation.

V Opinion and Findings of Fact

A) Stipulations

1) Island Creek Coal Company owns and operates the Pond Fork Mine and both are subject to the jurisdiction of the 1977 Mine Act. (Tr. 5)

2) The Administrative Law Judge has jurisdiction over this proceeding pursuant to section 105 of the 1977 Mine Act. (Tr. 5).

3) Inspector Billy R. Browning was a duly authorized representative of the Secretary at all times relevant hereto (Tr. 5).

4) Island Creek Coal Company is a large operator and a civil penalty assessment herein will not affect its ability to continue in business. (Tr. 5).

5) Island Creek Coal Company mines over ten million tons per year, and the Pond Fork Mine mines from fifty to sixty thousand tons a year. (Tr. 89).

B) Occurrence of Violations, Negligence, Gravity and Good Faith

1) Citation No. 20053, 6/19/78, 30 CFR 75.302-1

MSHA Inspector Billy R. Browning conducted a spot inspection

of the Respondent's Pond Fork Mine on June 19, 1978 (Tr. 10-12). He arrived at the

mine at approximately 3:50 p.m. and entered the mine with the evening shift at approximately 4:00 p.m. (Tr. 12-13). He testified that the shifts at the Pond Fork Mine change at 4:00 p.m. (Tr. 13). He arrived on the section at approximately 4:30 p.m. (Tr. 21). At 4:55 p.m., he issued the subject citation alleging a violation of mandatory safety standard 30 CFR 75.302-1 as follows:

> The line brattice and check curtain were not properly installed and maintained from the last open crosscut out to within 10 feet of the point of deepest penetration in the 014-04 unit in that the line brattice was terminated 20 feet outby the point of deepest penetration in the No. 6 entry, 27 feet outby the point of deepest penetration in the No. 5 entry and the line brattice and check fly were nailed to the roof in the No. 3 and 4 entries.
>
> (Exh. M-1; see also Tr. 13).

The inspector's testimony is in accord with the statements contained in the citation. (Tr. 13-14, 30-35). In addition, he testified that the check flies and line brattices were rolled up and nailed to the roof in the Nos. 3 and 4 entries. (Tr. 31-33). As relates to the No. 3 entry, they were rolled up for a distance of approximately 32 to 34 feet (Tr. 31-32). His testimony indicates that line brattice had been installed to within 8 feet of the "toe of the coal." (Tr. 31). As relates to the No. 4 entry, they were rolled up for a distance of approximately 30 feet (Tr. 33-34).

The ventilation plan identified the area as a working section (Tr. 13.)

The testimony of both Inspector Browning and Mr. Arvel Gartin, the evening shift section foreman, establishes that coal was not being cut, mined or loaded from the working faces in any of the four subject entries between the time the inspector and the evening shift miners arrived on the section and the time the citation was issued. (Tr. 22, 29, 36, 43). In fact, there was no power on the section while the inspector was present (Tr. 36, 41-42).

The first question presented is whether the above-stated facts establish a violation of 30 CFR 75.302-1 occurring on the June 19, 1978, second shift at the Pond Fork Mine. For the reasons set forth below, I answer this question in the negative.

The Petitioner argues that an interrelationship exists between 30 CFR 75.302-1 and 30 CFR 75.302(a) whereby the former must be interpreted as defining an area of the mine and not time periods during the mining process. The Petitioner correctly observes that 30 CFR 75.302(a) is merely a verbatim restatement in the Code of Federal Regulations of section 303(c)(1) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 863(c)(1) (1970) (1969 Coal Act). Section 303(c)(1) of the 1969

Coal Act was unchanged by the enactment of the 1977 Mine Act. Compare 30 U.S.C. 863(c)(1) (1970) and 30 U.S.C. 863(c)(1) (1978). According to the Petitioner, the statutory

provision requires the continuous use of line brattice inby the last open crosscut. The Petitioner then argues that the sole construction of 30 CFR 75.302-1 consistent with the statutory language is that 30 CFR 75.302-1 further clarifies the distance requirements for hanging line brattice in areas where coal is being cut mined or loaded. (Petitioner's Posthearing Brief, pp. 5-7). Thus, according to the Petitioner, a violation of 30 CFR 75.302-1 can occur absent actual cutting, mining or loading operations at a given working face.

The Respondent disagrees, arguing that 30 CFR 75.302-1 describes not only an area of the mine, but also specifies activities which must be in progress before the 10 foot rule applies. The Respondent argues that the regulation is clear and requires little interpretation. The Respondent submits that the purpose of the regulation is to assure that cutting, mining or loading, which constitute activities requiring greatest protection from dust and methane concentrations, are not conducted when curtains are farther than 10 feet from the face. According to the Respondent, the regulation seeks to assure proper ventilation at the face during these crucial operations, not at all times. (Respondent's Posthearing Brief, pp. 2-3; see also Respondent's Reply Brief).

The Petitioner characterizes the Respondent's interpretation as misconstruing the intent of the two provisions and as directly contrary to the Congressional directive that newly promulgated regulations cannot reduce existing levels of protection. (Petitioner's Posthearing Brief, pg. 7 citing Sen. Rep. No. 95-181, 1977 U.S. Code Cong. and Admin. News 3401 at 3411); see also section 301(a) of the 1969 Coal Act, 30 U.S.C. 861(a) (1970) and section 301(a) of the 1977 Mine Act, 30 U.S.C. 861(a) (1978).

Although an interrelationship exists between the two provisions, I disagree with the Petitioner's interpretation of that interrelationship. I conclude that the ten foot requirement contained in 30 CFR 75.302-1 applies only when coal is actually being cut, mined or loaded from the working face.(FOOTNOTE 2)

30 CFR 75.302 addresses ventilation of the working face and provides, in part, as follows:

> (a) Properly installed and adequately maintained line brattice or other approved devices shall be continuously used from the last open crosscut of an entry or room of each working section to provide adequate ventilation to the working faces for the miners and to remove flammable, explosive, and noxious gases, dust, and explosive fumes, unless the Secretary or his authorized representative permits an exception to this

> requirement, where such exception will not pose a hazard to the miners. When damaged by falls or otherwise, such line brattice or other devices shall be repaired immediately.

30 CFR 75.302-1, addresses the installation of line brattice and other devices and provides, in part, as follows:

> (a) Line brattice or any other approved device used to provide ventilation to the working face from which coal is being cut, mined or loaded and other working faces so designated by the Coal Mine Safety Manager, in the approved ventilation plan, shall be installed at a distance no greater than 10 feet from the area of deepest penetration to which any portion of the face has been advanced unless a greater distance is approved by the Coal Mine Safety District Manager of the area in which the mine is located.

Thus, the two provisions collectively establish the following general requirements: Properly installed and adequately maintained line brattice or other approved devices must be continuously used from the last open crosscut of an entry or room of each working section(FOOTNOTE 3) to provide adequate ventilation to the working faces.(FOOTNOTE 4) However, when coal is actually being cut, mined or loaded from the working face, the line brattice or other approved device used to provide ventilation to that working face must be installed at a distance no greater than 10 feet from the area of greatest penetration to which any portion of the face has been advanced.

30 CFR 75.302-1(a) simply sets forth a detailed requirement for the installation of the line brattice in relation to working faces from which coal is actually being cut, mined or loaded. It cannot be concluded that the regulation, by delimiting its coverage to areas of actual cutting, mining or loading, violates the Congressional mandate prohibiting the promulgation of regulations according less protection to the miners than is provided by the interim mandatory safety standards.

In view of the fact that neither cutting, mining nor loading of coal had occurred on the second shift, it cannot be found that a violation of 30 CFR 75.302-1 occurred on the second shift. (FOOTNOTE 5)

The second question presented is whether the allegations contained in the petition for assessment of civil penalty are sufficient to charge a violation of 30 CFR 75.302-1 occurring on the June 19, 1978, day shift.

The inspector testified that the cited conditions in the four subject entries had been present while coal was being produced on the June 19, 1978, day shift. He did not observe any mining activities on the day shift because he was not present in the mine at that time. (Tr. 24). Rather, he testified as an expert basing his opinion on inferences drawn from observations in the four entries. (Tr. 14-15, 24-25, 27-28, 30-35).

The Respondent contends that the allegations contained in the petition are inadequate to allege a violation occurring on the prior shift. (Respondent's Posthearing Brief, pp. 4-5).

It is clear that the Petitioner's case centered on a violation allegedly occurring on the second shift as evidenced by both the evidence presented at the hearing and the arguments set forth in the Petitioner's posthearing brief. Counsel for the Petitioner argued only at the hearing that if actual cutting, mining or loading is required to support a violation of 30 CFR 75.302-1, then the reasonable inferences drawn from the inspector's observations would support a finding that a violation had occurred on the prior shift. (Tr. 92-97). The argument is not specifically reasserted in the Petitioner's brief.

The Interior Board of Mine Operations Appeals observed that timely and adequate notice is necessary to enable a mine operator "to determine with reasonable certainty the allegations of violations charged so that it may intelligently respond thereto and decide whether it wishes to request formal adjudication." Old Ben Coal Company, 4 IBMA 198, 208, 82 I.D. 264, 1974-1975 OSHD par. 19,723 (1975). Additionally, section 5(b)(3) of the Administrative Procedure Act, 5 U.S.C. 554(b)(3) (1978), provides that "[p]ersons entitled to notice of an agency hearing shall be timely informed of * * * the matters of fact and law asserted."

The Respondent was entitled to notice sufficient for it to determine with reasonable certainty the violation charged.

The citation sets forth the time of issuance as 4:55 p.m., June 19, 1978; i. e., approximately 55 minutes into the second shift. No statement is made in the citation alleging that cutting, mining or loading occurred on the day shift in the face areas of the four subject entries with the line brattices and check flys installed at a distance greater than ten feet from the area of deepest penetration. Since the allegations contained in the citation are incorporated by reference into the petition for assessment of civil penalty, the petition can only be construed as alleging a violation occurring on the second shift. Indeed, the evidence adduced by the Respondent was directed toward disproving a violation on the second shift. A review of all the evidence reveals that the question of whether a violation

occurred on the day shift was not tried with the express or implied consent of the parties.

Accordingly, the petition for assessment of civil penalty will be dismissed as relates to Citation No. 20053, 6/19/78, 30 CFR 75.302-1.

2) Citation No. 21804, 7/13/78, 30 CFR 75.200

MSHA inspector Billy R. Browning visited the Respondent's Pond Fork Mine on July 13, 1978 to begin a regular inspection of the mine (Tr. 55-56). He rode into the mine on a jeep and was accompanied by Mr. Douglas White, the day shift mine foreman. (Tr. 56, 75-76). As they were riding through the mine, the inspector observed that a roof fall had occurred in the crosscut in which stopping No. 34 was located (Tr. 57, 63). The roof fall had been corrected by the mine operator sometime prior to the inspector's arrival in the area. (Tr. 59-60). The fall area was supported according to the minimum requirements of the roof control plan, but a new area of deterioration had developed (Tr. 71). The inspector observed indications that a fresh crack had developed, extending to a point 25 or 27 feet inby the fall area along the right rib. (Tr. 57-59, 65). He testified that the crack was tied "directly into the fall area" and that the roof over the track was a somewhat hazardous area as a result of the crack (Tr. 65). A visual estimate revealed that loose and broken roof was present for a distance of six to twelve inches beyond each side of the crack. (Tr. 69-70). The inspector's observations led him to conclude that additional support was required (Tr. 60). The subject citation was issued at 9:30 a.m. encompassing both the roof over the track to the left of the fall area and the crack in the rib (Tr. 65), and states the following:

> The roof over the main line track was inadequately supported in the crosscut intersection located at the No. 34 stopping in that loose and broken roof was present along the right side and signs of cutting was present for a distance of [25 or 27] feet.

(Exh M-3; Tr. 58).

The above-cited conditions observed along the track haulageway (Tr. 61) allegedly constitute a violation of 30 CFR 75.200, which provides, in pertinent part, as follows: "The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs." It is not alleged that the cited conditons constituted a violation of the Respondent's roof control plan. (Tr. 60). However, it is well established that where the evidence is sufficient to establish that the roof or ribs of a mine were not adequately supported to protect persons from falls, it is unnecessary to prove a violation of the roof control plan in order to sustain a violation of 30 CFR 75.200. In Zeigler Coal Company, 2 IBMA 216, 80 I.D. 626, 1973-1974 OSHD par. 16,608 (1973, the Interior Board of Mine Operations Appeals held "that an operator is under a duty to maintain a safe roof irrespective of any roof control plan and that the failure to do so constitutes a violation of [30 CFR 75.200]." 2 IBMA at 222.

There was no substantial disagreement between Inspector Browning and Mr. White as to the existence of the crack. In fact, Mr. White testified that the crack existed as designated by the inspector on Exhibit M-4. In addition, I am unable to detect any meaningful discrepancies in their testimony material to the issue of whether the conditions described by the inspector establish the area as one in need of additional support. The inspector testified that the crack was an indication of roof deterioration (Tr. 66). I find the inspector's assessment a credible one, especially in view of the presence of loose and broken roof for a distance of 6 to 12 inches on each side of the crack.

Mr. White candidly admitted that it would have been possible for the roof to collapse in the near future, but qualified his assertion by indicating that it would be difficult to affirmatively state that it would or would not have collapsed (Tr. 79). However, he testified that if he had observed the condition without the inspector present, he would have installed supports (Tr. 79). I interpret this testimony as a further indication that prudent mining practice required the installation of additional supports in the cited area.

Therefore, I find that the conditions described by the inspector existed as set forth in both the citation and his above-noted testimony, and that the cited area was not supported or otherwise controlled adequately to protect persons from falls of the roof or ribs.

Accordingly, I conclude that a violation of 30 CFR 75.200 has been established by a preponderance of the evidence.

Negligence of the Operator

The inspector testified that he did not feel that the condition existed as a result of a lack of due diligence or negligence on the operator's part (Tr. 60). He based his opinion on the apparent freshness of the crack. He did not believe that it had been in existence for a very long period of time (Tr. 61). Mr. White shared the inspector's view that the crack appeared fresh, basing his opinion on the absence of rock dust or float dust on it (Tr. 83). He could not express an opinion as to how long the condition had been present (Tr. 83).

Operator negligence is established when the evidence or the inferences drawn therefrom establish that the operator knew or should have known of the condition. The testimony of both Inspector Browning and Mr. White fails to establish that the Respondent had actual knowledge of the condition. Mr. White testified that he did not know the crack existed prior to observing it (Tr. 77). In addition, the inspector testified that if the Respondent had known about the condition it would have undertaken corrective action. He based his opinion on his experience in inspecting the Pond Fork Mine (Tr. 64-65).

Accordingly, I conclude that there has not been a showing of

negligence on the part of the Respondent.

Gravity of the Violation

The length of the crack and the condition of the roof adjacent to the crack have been set forth previously.

As noted previously, the inspector testified that the crack in the rib was tied directly into the fall area (Tr. 65). The inspector testified that the area of the fall was not extremely large. He testified that it was a normal roof fall, entry wide, 4 or 5 feet thick and ten or 15 feet long (Tr. 63). The fall area had been cribbed off (Tr. 63-64). Thus, the fall area was behind the cribs, not in the travelway (Tr. 63-63). Specifically, the inspector testified that when he arrived in the cited area he observed that three cribs had been installed and 3 to 5 additional crossbars had been installed across the roof with 5 by 7 or 6 by 8 square-sawed posts on the left side of the track (Tr. 59-60, 66-70, Exh M-4). The inspector further testified that this support had been installed at the time of the fall (Tr. 59-60).

Mr. White testified that the roof above the main track was in "pretty fair shape." (Tr. 78). He further testified that a hairline crack was present in the roof over the main track extending a bit past where the crossbars had been installed (Tr. 79).

The inspector indicated that the condition was potentially serious. Defective roof is in itself, a dangerous condition (Tr. 61).

The cited area was along a track haulageway. All persons entering the mine's underground workings via the track entry would have been exposed to the condition (Tr. 61).

Accordingly, I conclude that the violation was very serious.

Good Faith in Attempting Rapid Abatement

The condition was abated by installing four 42-inch cribs along the right side of track and seven 5-inch by 7-inch by 14 foot headers against the roof over the track. The headers were supported by five-by 7-inch square-sawed posts located on the left side of the track (Exh M-3, Tr. 58-59). The inspector opined that management took extraordinary steps to abate the violation, based on the fact that Mr. White immediately ordered the supply crew to load, transport and install cribs, crossbars and posts (Tr. 61-62).

Accordingly, I conclude that the Respondent demonstrated good faith in attempting rapid abatement.

C) History of Previous Violations

Exhibit M-2 is a computer printout compiled by the Directorate of Assessments containing information on the history of previous violations for which the Respondent had paid

assessments from July 20, 1976 to July 19, 1978, as relates to the Pond Fork Mine.

During this two year period, the Respondent had paid assessments for 113 violations. Forty-two occurred in 1976, 42 occurred in 1977 and 29 occurred in 1978.

D) Appropriateness of Penalty to Operator's Size

Island Creek Coal Company Mines over 10 million tons per year, and the Pond Fork Mine mines from fifty to sixty thousand tons a year (Tr. 89). Furthermore, the parties stipulated that Island Creek Coal Company is a large operator (Tr. 5).

E) Effect on Operator's Ability to Continue in Business

The parties stipulated that the assessment of any penalty in this proceeding will not affect the Respondent's ability to continue in business (Tr. 5). Furthermore, the Interior Board of Mine Operations Appeals has held that evidence relating to whether a civil penalty will affect the operator's ability to remain in business is within the operator's control, resulting in a rebuttable presumption that the operator's ability to continue in business will not be affected by the assessment of a civil penalty. Hall Coal Company, 1 IBMA 175, 79 I.D. 668, 1971-1973 OSHD par. 15,380 (1972). Therefore, I find that penalties otherwise properly assessed in this proceeding will not impair the operator's ability to continue in business.

IV Conclusion of Law

1. Island Creek Coal Company and its Pond Fork Mine have been subject to the provisions of the 1977 Mine Act at all times relevant to this proceeding.

2. Under the Act, this Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, this proceeding.

3. MSHA Inspector Billy R. Browning was a duly authorized representative of the Secretary of Labor at all times relevant to the issuance of the citations which are the subject matter of this proceeding.

4. The violation charged in Citation No. 21804, 7/13/78, 30 CFR 75.200, is found to have occurred as alleged.

5. The violation charged in Citation No. 20053, 6/19/78, 30 CFR 75.302-1 is found not to have occurred as alleged.

6. All of the conclusions of law set forth in Part V of this decision are reaffirmed and incorporated herein.

VII Proposed Findings of Fact and Conclusion of Law

Petitioner and Respondent submitted posthearing briefs. Respondent submitted a reply brief, and Petitioner submitted a response to the reply

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brief. Such submissions, insofar as they can be considered to have contained proposed findings and conclusions, have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the ground that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

VIII Penalties Assessed

Upon consideration of the entire record in this case and the foregoing findings of fact and conclusions of law, I find that assessment of a penalty is warranted as follows:

Citation	Date	30 CFR Standard	Penalty
21804	7/13/78	75.200	$200

ORDER

The Respondent is ORDERED to pay a civil penalty in the amount of $200 within 30 days of the date of this decision.

IT IS FURTHER ORDERED that Citation No. 20053, 6/19/78, 30 CFR 75.302-1 be, and hereby is VACATED and that the petition for assessment of civil penalty be, and hereby is, DISMISSED as relates to such citation.

John F. Cook
Administrative Law Judge

~FOOTNOTE 1
The Respondent argues that the Petitioner's brief should not be considered in making a decision in the instant case because it was not timely filed. (Respondent's Reply Brief, pg. 1). The Petitioner asserts that such action would be inappropriate because the Respondent has not alluded to having suffered prejudice as a result of the tardy filing. (Petitioner's Response to Respondent's Reply Brief, pg. 1)
In light of the absence of demonstrable prejudice resulting from the late filing, the arguments raised in the Petitioner's posthearing brief will be considered in deciding the instant case.

~FOOTNOTE 2
For a similar interpretation see United States Steel Corporation, MSHA and United Mine Workers of America, Docket Nos. BARB 79-276 and 79-277 (August 10, 1979, Judge Forrest E. Stewart).

~FOOTNOTE 3
""Working section' means all areas of the coal mine from the loading point of the section to and including the working faces." 30 CFR 75.2(g)(3).

~FOOTNOTE 4

""Working face' means any place in a coal mine in which work of extracting coal from its natural deposit in the earth is performed during the mining cycle." 30 CFR 75.2(g)(1).

~FOOTNOTE 5

It is possible that a violation of 30 CFR 75.302(a) (statutory provision) existed. But it is unnecessary to decide such an issue because the petition for assessment of civil penalty does not allege a violation of the statutory provision.