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SOL (MSHA) V. BLACKJACK 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 Proceedings Docket No. BARB 78-705-P A/O No. 15-09816-03001
v.	Docket No. BARB 79-185-P A/O No. 15-09816-03004
BLACKJACK COAL COMPANY, INC., RESPONDENT	Docket No. BARB 79-270-P A/O No. 15-09816-03005 No. 1 Surface Mine Docket No. KENT 79-60 A/O No. 15-11680-03001 Docket No. KENT 79-204 A/O No. 15-11680-03002 No. 3 Surface Mine

DECISION

Appearances: Darryl A. Stewart, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee,
for Petitioner Larry Cleveland, Esq., Frankfort,
Kentucky, for Respondent

Before: Judge Cook

I. Procedural Background

The Mine Safety and Health Administration (Petitioner) filed petitions for assessment of civil penalties in Docket Nos. BARB 78-705-P; BARB 79-185-P, BARB 79-270-P, KENT 79-60, and KENT 79-204, on September 25, 1978, December 20, 1978, January 31, 1979, June 18, 1979, and July 20, 1979, respectively. The petitions were filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1978) (1977 Mine Act), and allege a total of 24 violations of various provisions of the Code of Federal Regulations. Answers were filed by Blackjack Coal Company, Inc. (Respondent).

The parties stipulated that the cited violations occurred, and also entered into stipulations addressing five of the six statutory penalty assessment criteria set forth in section 110(i) of the 1977 Mine Act for each of the violations. Pursuant to notices of hearing, the hearing was held on May 9, 1980, in Lexington, Kentucky, with representatives of both parties present and participating. Evidence was presented addressing the sole issue not covered by the stipulations, i.e., the effect of a civil penalty on the mine operator's ability to continue in business. The record was left open until July 7, 1980, to permit Respondent to file a copy of its 1979 Federal income tax return, a copy of the decision in a case pending at the time before an Administrative Law Judge of the National Labor Relations Board, In re Blackjack Coal Company, Inc., and Garland W. McWhorter, Case No. 9-CA-14343, and copies of any judgments entered against Respondent between May 9, 1980, and July 7, 1980. On July 14, 1980, Respondent filed a letter indicating that such documents would not be filed.(FOOTNOTE 1)

A schedule for the submission of posthearing briefs was agreed upon on May 9, 1980. Briefs were due on or before August 12, 1980. On July 25, 1980, Respondent filed a memorandum and proposed findings of fact and conclusions of law. On August 11, 1980, Petitioner filed a recommendation regarding the assessment of civil penalties.

II. Violations Charged

A. Docket No. BARB 78-705-P

Citation/Order No.	Date	30 C.F.R. Standard
8-0016	1/11/78	77.1303(d) 77.1301(c)(2)
123413	4/11/78	77.1605(b)
123414	4/11/78	77.1605(b)
123415	4/11/78	77.410
123416	4/11/78	77.1713(c)

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123417	4/11/78	77.1102
123418	4/11/78	77.410
123419	4/11/78	77.410
123420	4/11/78	77.410
123421	4/11/78	77.410
123422	4/11/78	77.1713(c)
123423	4/11/78	77.1605(a)

B. Docket No. BARB 79-185-P

Citation No.	Date	30 C.F.R. Standard
144085	8/15/78	77.410
144086	8/15/78	77.1104

C. Docket No. BARB 79-270-P

Citation No.	Date	30 C.F.R. Standard
144087	8/15/78	77.1301(c)(5)

D. Docket No. KENT 79-60

Citation No.	Date	30 C.F.R. Standard
142473	12/4/78	77.410
142474	12/4/78	77.1109(c)(1)
142475	12/4/78	77.1102
142476	12/4/78	77.1301(c)(5)

E. Docket No. KENT 79-204

Citation No.	Date	30 C.F.R. Standard
737401	2/5/79	77.1605(b)
737402	2/5/79	77.410
737403	2/6/79	77.1110
737404	2/6/79	77.1606(c)

III. Witnesses and Exhibits

A. Witnesses

Respondent called as its witnesses Burl Black, its project manager; Bobbie Jean Black, its president, bookkeeper, and sole stockholder; and John Avent, a certified public accountant.

Petitioner did not call any witnesses.

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B. Exhibits

(1) Petitioner introduced the following exhibits in evidence:

M-1 is a copy of Order No. 8-0016, January 11, 1978, 30 C.F.R. 77.1303(d).

M-2 is a copy of the termination of M-1.
M-3 is a copy of Order No. 123413, April 11, 1978, 30

C.F.R. 77.1605(b), and a copy of the termination thereof.

M-4 is a copy of Order No. 123414, April 11, 1978, 30 C.F.R. 77.1605(b), and a copy of the termination thereof.

M-5 is a copy of Citation No. 123415, April 11, 1978, 30 C.F.R. 77.410, and a copy of the termination thereof.

M-6 is a copy of Citation No. 123416, April 11, 1978, 30 C.F.R. 77.1713(c), and a copy of the termination thereof.

M-7 is a copy of Citation No. 123417, April 11, 1978, 30 C.F.R. 77.1102, and a copy of the termination thereof.

M-8 is a copy of Citation No. 123418, April 11, 1978, 30 C.F.R. 77.410, and a copy of the termination thereof.

M-9 is a copy of Citation No. 123419, April 11, 1978, 30 C.F.R. 77.410, and a copy of the termination thereof.

M-10 is a copy of Citation No. 123420, April 11, 1978, 30 C.F.R. 77.410, and a copy of the termination thereof.

M-11 is a copy of Citation No. 123421, April 11, 1978, 30 C.F.R. 77.410, and a copy of the termination thereof.

M-12 is a copy of Citation No. 123422, April 11, 1978, 30 C.F.R. 77.1713(c), and a copy of the termination thereof.

M-13 is a copy of Citation No. 123423, April 11, 1978, 30 C.F.R. 77.1605(a), and a copy of the termination thereof.

M-14 is a copy of Citation No. 144087, August 15, 1978, 30 C.F.R. 77.1301(c)(5), and a copy of the termination thereof.

M-15 is a copy of Citation No. 142473, December 4, 1978, 30 C.F.R. 77.410, and a copy of the termination thereof.

M-16 is a copy of Citation No. 142474, December 4, 1978, 30 C.F.R. 77.1109(c)(1), and a copy of the termination thereof.

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M-17 is a copy of Citation No. 142475, December 4, 1978, 30 C.F.R. 77.1102, and a copy of the termination thereof.

M-18 is a copy of Citation No. 142476, December 4, 1978, 30 C.F.R. 77.1301(c)(5), and a copy of the termination thereof.

M-19 is a copy of Citation No. 737401, February 5, 1979, 30 C.F.R. 77.1605(b), and a copy of the termination thereof.

M-20 is a copy of Citation No. 737402, February 5, 1979, 30 C.F.R. 77.410, and a copy of the termination thereof.

M-21 is a copy of Citation No. 737403, February 6, 1979, 30 C.F.R. 77.1110, and a copy of the termination thereof.

M-22 is a copy of Citation No. 737404, February 6, 1979, 30 C.F.R. 77.1606(c), and a copy of the termination thereof.

M-23 is a copy of Citation No. 144085, August 15, 1978, 30 C.F.R. 77.410, and a copy of the termination thereof.

M-24 is a copy of Citation No. 144086, August 15, 1978, 30 C.F.R. 77.1104, and a copy of the termination thereof.

(2) Respondent introduced the following exhibits in evidence:

R-1 is a complaint and notice of hearing in the case of In re Blackjack Coal Company, Inc., and Garland W. McWhorter, Case No. 9-CA-14343 (NLRB, Region 9).

R-2 is a certified copy of a security agreement entered into between Respondent and Southern Explosives Corporation.

R-3A is a copy of a civil summons and complaint in the case of Ford Motor Credit Company v. Blackjack Coal Company, Inc., Case No. 79-CI-11200 (Circuit Court, Jefferson County, Kentucky).

R-3B is a notice pertaining to R-3A dismissing the proceeding for lack of venue and jurisdiction.

R-3C is a notice of appeal pertaining to R-3A.

R-4 is a copy of a civil summons and complaint in the case of Kentucky Machinery, Inc. v. Blackjack Coal Company, Inc., Case No. 80-CI-01885 (Circuit Court, Jefferson County, Kentucky).

R-5 is a copy of the complaint in the case of Brandeis Machinery and Supply Corporation v. Blackjack Coal Company, Inc., Case No. 79-CI-06950 (Circuit Court, Jefferson County, Kentucky).

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R-6 is a copy of the civil summons and complaint in the case of Progressive Insurance Agency v. Blackjack Coal Company, Inc., Case No. 80-CI-0580 (Circuit Court, Franklin County, Kentucky).

R-7 is a certified copy of a default judgment entered against Respondent in the amount of \$3,631.45, plus interest and costs, in the case of Clark GM Diesel v. Blackjack Coal Company, Case No. 80-CI-0296 (Circuit Court, Franklin County, Kentucky, filed April 9, 1980).

R-8 is a certified copy of a default judgment entered against Respondent in the amount of \$38,749.15, plus interest and costs, in the case of C.I.T. Corporation v. Blackjack Coal Company, Inc., et al., Case No. 80-CI-0072 (Circuit Court, Franklin County, Kentucky, filed February 14, 1980).

R-9 is a copy of a summary judgment entered against Respondent in the amount of \$129,933.27, plus interest and costs, in the case of Associates Commercial Corporation v. Blackjack Coal Company, Inc., Case No. 79-CI-09609 (Circuit Court, Jefferson County, Kentucky, filed March 10, 1980).

R-10 is a certified copy of a default judgment entered against Respondent in the amount of \$1,578.30, plus interest and costs, in the case of Cummins Diesel Sales of Louisville, Inc. v. Blackjack Coal, Inc., Case No. 80-CI-0445 (Circuit Court, Franklin County, Kentucky, filed April 29, 1980).

R-11 is a document styled "Blackjack Coal Company - Litigation."

R-12 is a certified copy of a state tax lien in the amount of \$2,281.68 filed against Respondent on December 21, 1979.

R-13 is a certified copy of a Federal tax lien in the amount of \$27,148.68 filed against Respondent on March 31, 1980.

R-14 is a copy of Respondent's consolidated balance sheet as of December 31, 1979.

R-15 is a copy of Respondent's 1978 Federal corporation income tax return.

R-16A is a letter dated November 14, 1979, from Gregory T. Stafford, credit manager, General Electric Credit Corporation, to Mrs. Bobbie Jean Black.

R-16B is a copy of a notice of public sale.

R-16C is a letter dated September 14, 1979, from Gregory T. Stafford, credit manager, General Electric Credit Corporation, to Respondent.

R-16D is a letter dated September 14, 1979, from Gregory T. Stafford, credit manager, General Electric Credit Corporation, to Respondent.

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R-16E is a notice of public sale.

R-16F is a letter dated November 14, 1979, from Gregory T. Stafford, credit manager, General Electric Credit Corporation, to Respondent.

R-17A is a letter dated November 12, 1979, from the collection manager, General Electric Credit Corporation, to Respondent.

R-17B is a letter dated September 24, 1979, from the district credit manager, Associates Commercial Corporation, to Respondent.

R-17C is a letter dated February 29, 1980, from the collection manager, General Electric Credit Corporation, to Respondent.

R-17D is a letter dated February 29, 1980, from the collection manager, General Electric Credit Corporation, to Bobbie Jean Black.

IV. Issues

Two basic issues are involved in the assessment of a civil penalty: (1) did a violation of the mandatory standards 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) Respondent is subject to the provisions of the 1977 Mine Act (Tr. 125).

(2) The parties stipulated the qualifications of John Avent, certified public accountant (Tr. 60).

(3) The alleged violations occurred as cited in each of the five cases styled Blackjack Coal Company, Inc., Docket Nos. BARB 78-705-P; BARB 79-185-P; BARB 79-270-P; KENT 79-60; and KENT 79-204.

(4) Respondent will not contest the occurrence of the violations at the hearing.

(5) Respondent is a small operator and its average annual production for 1979 was 234,020 tons (Tr. 9-12).

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(6) Respondent does not appear to have an excessive history of previous violations. The history of previous violations for the 2 years preceding the most recent violations in each case is as follows:

a. BARB 78-705-P: Forty-six violations were cited of which 45 were paid for the period from January 12, 1976, to January 11, 1978.

b. BARB 79-185-P: Fifty-nine violations were cited of which 41 were paid for the period from August 16, 1976, to August 15, 1978.

c. BARB 79-270-P: Fifty-nine violations were cited of which 41 were paid for the period from August 16, 1976, to August 15, 1978.

d. KENT 79-60: Four violations were cited of which none have been paid for the period from December 5, 1976, to December 4, 1978.

e. KENT 79-204: Six violations were cited of which none have been paid for the period from February 6, 1977, to February 5, 1979.

(7) In attempting to achieve rapid compliance, Respondent demonstrated normal good faith as to all except six violations. Respondent demonstrated rapid good faith as to six of the violations listed below:

BARB 78-705-P: Citation Nos. 123418, 123419, 123420, 123421, 123422, and 123423.

(8) All of the violations except one were the result of ordinary negligence. One violation, Citation No. 8-0016, in Docket No. BARB 78-705-P, was the result of gross negligence.

(9) The gravity of each violation expressed in terms of the degree of seriousness is as follows:

a. BARB 78-705-P: All of the violations except four are serious. Citation Nos. 123417 and 123418 are moderately serious and Citation Nos. 123416 and 123422 are not serious.

b. BARB 79-185-P: Citation No. 144086 is serious and Citation No. 144085 is moderately serious.

c. BARB 79-270-P: Citation No. 144087 is serious.

d. KENT 79-60: Citation Nos. 142474 and 142476 are serious and Citation Nos. 142473 and 142475 are moderately serious.

e. KENT 79-204: Citation No. 737401 is serious and Citation Nos. 737402, 737403 and 737404 are moderately serious.

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

The parties stipulated that the violations occurred as cited and also entered into stipulations as to the negligence of the mine operator, the gravity of the violations, and the mine operator's demonstrated good faith in attempting to achieve rapid compliance after notification of the violations. These stipulations are reflected in the findings of fact set forth in this section of the decision.

1. Docket No. BARB 78-705-P

Order No. 8-0016 was issued on January 11, 1978, and cites Respondent for violations of mandatory safety standards 30 C.F.R. 77.1301(c)(2) and 30 C.F.R. 77.1303(d)(FOOTNOTE 2) as follows:

Explosives such as dynamite, detonating cord, anfo and blasting caps were being stored in a vehicle with flammable liquid fuel. 77.1301(c)(2). The explosives were allowed to become wet, frozen, and deteriorated from severe weather conditions. 77.1303(d). The vehicle with the explosives was located within the maintenance area where employees and an open flame exists.

(Exh. M-1). The violations were serious, Respondent demonstrated gross negligence, and Respondent demonstrated normal good faith in attempting to achieve rapid compliance.

Citation No. 123413 was issued on April 11, 1978, and cites Respondent for a violation of mandatory safety standard 30 C.F.R.

77.1605(b) in that "[t]he No. 1 Pay Loader (140) refuse truc was operating in the No. 2 Pit without brakes" (Exh. M-3). The violation was serious, Respondent demonstrated ordinary negligence, and Respondent demonstrated normal good faith in attempting to achieve rapid compliance.

Citation No. 123414 was issued on April 11, 1978, and cites Respondent for a violation of mandatory safety standard 30 C.F.R.

77.1605(b) in that "[t]he No. 2 Pay Loader (140) refuse truc was operating in No. 2 Pit without brakes" (Exh. M-4). The violation was serious Respondent demonstrated ordinary negligence, and Respondent demonstrated normal good faith in attempting to achieve rapid compliance.

Citation No. 123415 was issued on April 11, 1978, and cites Respondent for a violation of mandatory safety standard 30 C.F.R.

77.410 in that "[t]he 560 Huff end-loader working in No. 2 pit automatic reverse alarm was inoperative in that it did not give an audible alarm when put in reverse"

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(Exh. M-5). The violation was serious, Respondent demonstrated ordinary negligence, and Respondent demonstrated normal good faith in attempting to achieve rapid compliance.

Citation No. 123416 was issued on April 11, 1978, and cites Respondent for a violation of mandatory safety standard 30 C.F.R.

77.1713(c) in that "[a] daily record book was not being kept at this mine of hazardous conditions (No. 2 Pit)" (Exh. M-6). The violation was not serious, Respondent demonstrated ordinary negligence, and Respondent demonstrated normal good faith in attempting to achieve rapid compliance.

Citation No. 123417 was issued on April 11, 1978, and cites Respondent for a violation of mandatory safety standard 30 C.F.R.

77.1102 in that "[t]he above ground fuel tank in No. 1 Pit was not posted with signs warning against smoking and open flames" (Exh. M-7). The violation was moderately serious, Respondent demonstrated ordinary negligence, and Respondent demonstrated normal good faith in attempting to achieve rapid compliance.

Citation No. 123418 was issued on April 11, 1978, and cites Respondent for a violation of mandatory safety standard 30 C.F.R.

77.410 in that "[t]he 90 Huff Pay Loader end-loader working in No. 1 Pit auto reverse alarm was inoperative in that it did not give an audible alarm when put in reverse" (Exh. M-8). The violation was moderately serious, Respondent demonstrated ordinary negligence, and Respondent demonstrated rapid good faith in attempting to achieve rapid compliance.

Citation No. 123419 was issued on April 11, 1978, and cites Respondent for a violation of mandatory safety standard 30 C.F.R.

77.410 in that "[t]he Galion road grader's automatic reverse alarm was inoperative in that it did not give an audible alarm when put in reverse" (Exh. M-9). The violation was serious, Respondent demonstrated ordinary negligence, and Respondent demonstrated rapid good faith in attempting to achieve rapid compliance.

Citation No. 123420 was issued on April 11, 1978, and cites Respondent for a violation of mandatory safety standard 30 C.F.R.

77.410 in that "[t]he Massey Ferguson front-end-loader (L-0123 working in No. 1 pit, automatic reverse alarm was inoperative in that it did not give an audible alarm when put in reverse" (Exh. M-10). The violation was serious, Respondent demonstrated ordinary negligence, and Respondent demonstrated rapid good faith in attempting to achieve rapid compliance.

Citation No. 123421 was issued on April 11, 1978, and cites Respondent for a violation of mandatory safety standard 30 C.F.R.

77.410 in that "[t]he TD 25 dozer (Serial No. YM 3150) working in No. 1 pit, automatic reverse alarm was inoperative in that it did not give an audible alarm when put in reverse" (Exh. M-11). The violation was serious, Respondent demonstrated ordinary negligence, and Respondent demonstrated rapid good faith in attempting to achieve rapid compliance.

Citation No. 123422 was issued on April 11, 1978, and cites
Respondent for a violation of mandatory safety standard 30 C.F.R.
77.1713(c) in tha

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"a daily record book was not being kept at this mine of hazardous conditions (No. 1 Pit)" (Exh. M-12). The violation was not serious, Respondent demonstrated ordinary negligence, and Respondent demonstrated rapid good faith in attempting to achieve rapid compliance.

Citation No. 123423 was issued on April 11, 1978, and cites Respondent for a violation of mandatory safety standard 30 C.F.R.

77.1605(a) in that "[t]he Damco rotary rock drill windows were cracked and broken to the extent it affected the visibility of the operator" (Exh. M-13). The violation was serious, Respondent demonstrated ordinary negligence, and Respondent demonstrated rapid good faith in attempting to achieve rapid compliance.

2. Docket No. BARB 79-185-P

Citation No. 144085 was issued on August 15, 1978, and cites Respondent for a violation of mandatory safety standard 30 C.F.R.

77.410 in that "[t]he audible automatic reverse warning device is inoperative on the 560 Hough front-end-loader in that it will not give an alarm when put in reverse. The 560 Hough is being operated in the strip pit area" (Exh. M-23). The violation was moderately serious, Respondent demonstrated ordinary negligence, and Respondent demonstrated normal good faith in attempting to achieve rapid compliance.

Citation No. 144086 was issued on August 15, 1978, and cites Respondent for a violation of mandatory safety standard 30 C.F.R.

77.1104 in that "[a]ccumulations of combustible materials such as boxes and paper are located at the explosives magazine" (Exh. M-24). The violation was serious, Respondent demonstrated ordinary negligence, and Respondent demonstrated normal good faith in attempting to achieve rapid compliance.

3. Docket No. BARB 79-270-P

Citation No. 144087 was issued on August 15, 1978, and cites Respondent for a violation of mandatory safety standard 30 C.F.R.

77.1301(c)(5) in that "[t]he explosive magazine located next to the maintenance area is not grounded" (Exh. M-14). The violation was serious, Respondent demonstrated ordinary negligence, and Respondent demonstrated normal good faith in attempting to achieve rapid compliance.

4. Docket No. KENT 79-60

Citation No. 142473 was issued on December 4, 1978, and cites Respondent for a violation of mandatory safety standard 30 C.F.R.

77.410 in that "an automatic warning device which would give an audible alarm when such equipment is put in reverse was not provided on the Fiat-Allis 745-C end loader, which was loading coal in Pit 001" (Exh. M-15). The violation was moderately serious, Respondent demonstrated ordinary negligence, and Respondent demonstrated normal good faith in attempting to achieve rapid compliance.

Citation No. 142474 was issued on December 4, 1978, and
cites Respondent for a violation of mandatory safety standard 30
C.F.R. 77.1109(c)(1) in that

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"[p]ortable fire protection was not provided on the Fiat-Allis 745-C end loader which was loading coal in the No. 1 Pit" (Exh. M-16). The violation was serious, Respondent demonstrated ordinary negligence, and Respondent demonstrated normal good faith in attempting to achieve rapid compliance.

Citation No. 142475 was issued on December 4, 1978, and cites Respondent for a violation of mandatory safety standard 30 C.F.R. 77.1102 in that "[s]igns warning against smoking and open flames was [sic] not posted on or near the 1,000 gallon above ground diesel fuel storage tank located in the No. 1 Pit" (Exh. M-17). The violation was moderately serious, Respondent demonstrated ordinary negligence, and Respondent demonstrated normal good faith in attempting to achieve rapid compliance.

Citation No. 142476 was issued on December 4, 1978, and cites Respondent for a violation of mandatory safety standard 30 C.F.R. 77.1301(c)(5) in that "[t]he metal magazine which was used to store explosives in was not electrically bonded and grounded" (Exh. M-18). The violation was serious, Respondent demonstrated ordinary negligence, and Respondent demonstrated normal good faith in attempting to achieve rapid compliance.

5. Docket No. KENT 79-204

Citation No. 737401 was issued on February 5, 1979, and cites Respondent for a violation of mandatory safety standard 30 C.F.R. 77.1605(b) in that "[t]he 400 Hough end loader working in Pit 001 was not provided with adequate brakes, in that when the brakes were tested on level surface at approximately 5 miles per hour the loader would not stop" (Exh. M-19). The violation was serious, Respondent demonstrated ordinary negligence, and Respondent demonstrated normal good faith in attempting to achieve rapid compliance.

Citation No. 737402 was issued on February 5, 1979, and cites Respondent for a violation of mandatory safety standard 30 C.F.R. 77.410 in that "an automatic warning device which shall give an audible alarm when the equipment is put in reverse was not provided on the 25 International dozer working in the No. 1 Pit" (Exh. M-20, Tr. 136). The violation was moderately serious, Respondent demonstrated ordinary negligence, and Respondent demonstrated normal good faith in attempting to achieve rapid compliance.

Citation No. 737403 was issued on February 6, 1979, and cites Respondent for a violation of mandatory safety standard 30 C.F.R. 77.1110 in that "[s]everal portable fire extinguishers throughout the Pit 001, was [sic] not provided with a permanent tag attached to the extinguishers showing the date of examination" (Exh. M-21). The violation was moderately serious, Respondent demonstrated ordinary negligence, and Respondent demonstrated normal good faith in attempting to achieve rapid compliance.

Citation No. 737404 was issued on February 6, 1979, and

cites Respondent for a violation of mandatory safety standard 30 C.F.R. 77.1606(c) in that "[t]he 85-ton Rimpull rock truck (Company No. 1) hauling refuse in the No. 1 Pit was not provided with a mirror on the right side of the truck, therefore

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hindering the operator's view when in reverse motion" (Exh. M-22). The violation was moderately serious, Respondent demonstrated ordinary negligence, and Respondent demonstrated normal good faith in attempting to achieve rapid compliance.

C. Size of the Operator's Business

The parties stipulated that Respondent is a small operator and that its average annual production for 1979 was 243,000 tons (Tr. 9-12).

D. History of Previous Violations

The parties stipulated that Respondent does not appear to have an excessive history of previous violations. As relates to Docket No. BARB 78-705-P, Respondent had 45 violations for which assessments were paid from January 12, 1976, to January 11, 1978. As relates to Docket Nos. BARB 79-185-P and BARB 79-270-P, Respondent had 41 violations for which assessments were paid from August 16, 1979, to August 15, 1978. As relates to Docket No. KENT 79-204, Respondent did not have any violations for which assessments were paid from February 6, 1977, to February 5, 1979. As relates to Docket No. KENT 79-60, Respondent did not have any violations for which assessments were paid from December 5, 1976, to December 4, 1978.

E. Effect of a Civil Penalty on the Operator's Ability to Continue in Business

Respondent commenced business in January of 1976 (Tr. 19). The company terminated its mining operations in October of 1979, with the exception of certain reclamation activities (Tr. 14), and had no employees as of the date of the hearing (Tr. 16). According to the testimony of Mr. Burl Black, who served as Respondent's project manager, additional reclamation activities were expected to continue until approximately September of 1980, at a cost of approximately \$20,000 (Tr. 17). Respondent's balance sheet (Exh. R-14) shows that a \$15,000 reserve has been earmarked for reclamation activities (see also Tr. 64).

Respondent was set up as a corporation, and Mrs. Billie Jean Black, the wife of Burl Black, was the sole stockholder as of the date of the hearing (Tr. 38). Neither Mr. Black nor Mrs. Black own any other coal companies, nor do they have any interest whatsoever in any other mining operations (Tr. 27). Additionally, Respondent does not own and does not have an interest in any other business, does not have any interest in or maintain any coal rights, and does not own any land (Tr. 57). According to Mrs. Black, Respondent is insolvent (Tr. 39).

Respondent submitted extensive documentation outlining its financial posture, including a copy of its 1978 U.S. Corporation Tax Return; its balance sheet as of December 31, 1979, prepared without audit; certified copies of judgments and state and Federal tax liens secured against it; and various letters from creditors notifying Respondent as to the repossession

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of designated equipment and, in some instances, follow-up notifications subsequent to sale of the equipment apprising Respondent as to the results of the sale and the deficiency balance due. Additionally, documents were submitted as relates to legal actions pending against Respondent before the State courts in Kentucky and the National Labor Relations Board as of the date of the hearing.

Respondent's 1978 U.S. Corporation Income Tax Return listed total income in the amount of \$4,505,662, and total deductions in the amount of \$4,628,119, yielding a loss for tax purposes in the amount of \$122,537.

Schedule M-1 of the tax return contains a reconciliation of income per books with income per return. The entries show a net loss per books in the amount of \$171,955, and an expense recorded on the books, but not deducted on the return, in the form of a \$49,918 "new jobs credit." The two figures, when combined, yield the \$122,537 loss referred to above.

Schedule L of the tax return contains a balance sheet setting forth Respondent's financial posture in terms of assets, liabilities and stockholders' equity as follows:

ASSETS

	Beginning of Taxable Year	End of Taxable Year
1. Cash (overdraft)	\$ 84,028	(\$244,582)
2. Trade notes and accounts receivable, less allowance for bad debts	29,250	212,802
3. Inventories	22,500	22,500
4. Government obligations		
5. Other current assets	144,758	470,806
6. Loans to stockholders		
7. Mortgage and real estate loans		
8. Other investments		
9. Buildings and other depreciable assets, less accumulated depreciation	1,395,103	3,200,740
10. Depletable assets, less accumulated depletion		
11. Land (net of any amortization)	36,500	36,500
12. Intangible assets (amortizable only), less accumulated amortization		
13. Other assets	118,829	293,913
14. Total assets	\$ 1,830,968	\$ 3,992,679

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LIABILITIES AND STOCKHOLDERS' EQUITY

15. Accounts payable	\$ 302,777	\$ 489,354
16. Mortgages, notes, bonds payable in less than 1 year	829,905	1,770,493
17. Other current liabilities	32,132	
18. Loans from stockholders		
19. Mortgages, notes, bonds payable in 1 year or more	397,060	1,461,435
20. Other liabilities (reclamation)	46,805	45,980
21. Capital stock	2,000	2,000
22. Paid-in or capital surplus	1,886	1,886
23. Retained earnings--appropriated		
24. Retained earnings--unappropriated	293,403	296,531
25. Less cost of treasury stock	(75,000)	(75,000)
	\$1,830,968	\$3,992,679

Respondent's unaudited balance sheet as of December 31, 1979, sets forth Respondent's financial posture in terms of assets, liabilities and stockholders' equity as follows:

ASSETS

Current Assets:

Accounts receivable \$ 123,088

Total Current Assets \$ 123,088

Fixed Assets:

Equipment \$ 263,422

Furniture and fixtures 9,331

Total 272,753

Less: accumulated depreciation 186,571

Total Fixed Assets - Book Value \$ 86,182

TOTAL ASSETS \$ 209,270

LIABILITIES AND STOCKHOLDER'S EQUITY

Current Liabilities:

Cash overdraft \$ 66,175

Accounts payable - trade 386,027

Severance and reclamation taxes payable 16,385

Accrued payroll and payroll taxes 2,421

Mortgages payable - equipment 126,000

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Notes payable - equipment	569,745	
Reserve for reclamation expenses	15,000	
Total Current Liabilities		\$1,181,753

Stockholder's Equity:

Capital stock	2,000	
Paid-in surplus	1,886	
Retained earnings (deficit)	(901,369)	
Less: Cost of treasury stock	(75,000)	
Total Stockholder's Equity		(972,483)
(Deficit)		

TOTAL LIABILITIES AND STOCKHOLDER'S EQUITY		\$209,270
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According to Mr. John Avent, the certified public accountant who prepared both the tax return and the balance sheet, \$2,180 of the \$123,088 in accounts receivable has been collected and the balance has been assigned to the Rogers Oil Company in exchange for a fuel oil debt that is included in the accounts payable (Tr. 62-63). Mr. Avent testified that the items of equipment that remained in Respondent's possession had a book value of \$86,182, (FOOTNOTE 3) and have mortgages against them totaling approximately \$126,000 (Tr. 63-64). (FOOTNOTE 4) All other equipment has been repossessed (Tr. 39-40). (FOOTNOTE 5) Deficiency balances on

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the notes after resale of equipment repossessed in 1979 are listed on the balance sheet under mortgages payable and notes payable (Tr. 95-96, 99). Judgments have been entered against Respondent in the amount of \$173,892.17, plus court costs and interest (Exhs. R-7, R-8, R-9, R-10). These judgments involve items which are listed on the December 31, 1979, balance sheet under accounts payable or under notes payable (Tr. 77-78). (FOOTNOTE 6) A state tax lien was filed on December 21, 1979, for \$2,281.68 in coal severance taxes, and a Federal tax lien was filed on March 31, 1980, for \$27,148.68 (Exhs. R-12,

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R-13). Additional legal proceedings were pending against Respondent on the date of the hearing (Exhs. R-1, R-2A-3C, R-4, R-5, R-6).(FOOTNOTE 7)

According to Mr. Avent, Respondent showed a taxable income during 1977. In 1977, the business was in good condition and made a "good amount of money." Accordingly, Respondent purchased additional mining equipment in 1978 (Tr. 94). It appears that Respondent's financial decline was attributable to the costs of reclamation, increasing costs for supplies, and the declining market price of coal (Tr. 14-15, 95).

By December 31, 1979, Respondent had total assets in the amount of \$209,270, of which \$120,908 had been assigned to Rogers Oil Company as of the date of the hearing, and of which the equipment represented by a book value of \$86,182 had been mortgaged for approximately \$126,000, as of the date of the hearing. Total current liabilities were listed at \$1,181,753. Respondent showed \$296,531 in retained earnings on its 1978 tax return, a figure which had dropped to a minus \$901,369 as of December 31, 1979, a net change of minus \$1,197,900.

In view of the foregoing, it is found that the assessment of civil penalties in the amounts proposed by the Office of Assessments will adversely affect Respondent's ability to remain in business or to re-establish itself in such business.

VI. Conclusions of Law

1. Blackjack Coal Company, Inc., and its No. 1 and No. 3 Surface Mines have been subject to the provisions of the Federal Coal Mine Health and Safety Act of 1969 and the 1977 Mine Act at all times relevant to these proceedings.

2. Under the Acts, the Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, these proceedings.

3. All of the violations charged are found to have occurred as alleged.

4. 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 Conclusions of Law

Respondent submitted a memorandum and proposed findings of fact and conclusions of law. Petitioner submitted a recommendation regarding the assessment of civil penalties. Such filings, 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 these cases.

VIII. Penalties Assessed

Upon consideration of the entire record in these cases and the foregoing findings of fact and conclusions of law, I find that the assessment of penalties is warranted as follows:

A. Docket No. BARB 78-705-P

Citation/Order No.	Date	30 C.F.R. Standard	Penalty
8-0016	1/11/78	77.1303(d)	\$ 75
		77.1301(c)(2)	50
123413	4/11/78	77.1605(b)	50
123414	4/11/78	77.1605(b)	50
123415	4/11/78	77.410	10
123416	4/11/78	77.1713(c)	5
123417	4/11/78	77.1102	5
123418	4/11/78	77.410	10
123419	4/11/78	77.410	10
123420	4/11/78	77.410	10
123421	4/11/78	77.410	10
123422	4/11/78	77.1713(c)	5
123423	4/11/78	77.1605(a)	5

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B. Docket No. BARB 79-185-P

Citation No.	Date	30 C.F.R. Standard	Penalty
144085	8/15/78	77.410	\$ 10
144086	8/15/78	77.1104	15

C. Docket No. BARB 79-270-P

Citation No.	Date	30 C.F.R. Standard	Penalty
144087	8/15/78	77.1301(c)(5)	\$ 50

D. Docket No. KENT 79-60

Citation No.	Date	30 C.F.R. Standard	Penalty
142473	12/4/78	77.410	\$ 10
142474	12/4/78	77.1109(c)(1)	5
142475	12/4/78	77.1102	5
142476	12/4/78	77.1301(c)(5)	50

E. Docket No. KENT 79-204

Citation No.	Date	30 C.F.R. Standard	Penalty
737401	2/5/79	77.1605(b)	\$ 25
737402	2/5/79	77.410	10
737403	2/6/79	77.1110	5
737404	2/6/79	77.1606(c)	5
			Total \$485

ORDER

Respondent is ORDERED to pay civil penalties in the total amount of \$485 within 30 days of the date of this decision.

John F. Cook
Administrative Law Judge

~FOOTNOTE_ONE

1 This letter, dated July 7, 1980, states, in part, as follows:

"I have waited until this last day in hopes of acquiring such items; however, I am unable to forward these at this time. Surprisingly, no further actions have been taken by the plaintiffs in the cases in which Blackjack is defendant and so there have been no additional Judgments entered since [May 9, 1980]. When the NLRB action came on for hearing in Jackson, Kentucky on May 14, 1980, it was learned that the Administrative Law Judge assigned to the case was ill and the same was required to be rescheduled for July 28, 1980, and so no decision has yet been reached in that case. Finally, although Blackjack's accountant has been urged to complete the 1979 Federal Tax return

for this purpose, the same has not yet been completed and filed, and so this also is unavailable. Thus, although it was honestly felt on May 9, 1980 that these items could be submitted as requested, it now appears Blackjack must be denied the evidentiary advantage of these documents."

~FOOTNOTE TWO

2 Although Order No. 8-0016 cites Respondent for two violations, the Office of Assessments proposed a penalty only for the violation of 30 C.F.R. 77.1303(d).

~FOOTNOTE THREE

3 Mr. Avent was unable to express an opinion as to the actual value of the equipment (Tr. 100).

~FOOTNOTE FOUR

4 Southern Explosives Corporation has a \$76,780.97 security interest in the following items: One International Harvester Dozer, Model TD25C, Serial No. 2450; one Hovulette & Streeter truck scale, Serial Nos. 7809 and 0169; one Coleman, Model MH400L, portable light tower, with Deutz diesel engine and Lima generator, Serial No. L-509; one Coleman, Model MH400L light plant, Serial No. L 129; and one Coleman, Model MH400L, light tower, Serial No. 134 (Exh. R-2). An additional piece of equipment, a Massey Ferguson loader, Serial No. 1854800123, is pledged to Farmer's Bank and Capital Trust Company on a \$50,000 chattel mortgage (Tr. 39-40, 72-73, Exh. R-14, p. 3). Additionally, Respondent has a 1979 Chevrolet pickup truck against which there is no security interest or mortgage (Tr. 41).

~FOOTNOTE FIVE

5 The documents placed in evidence by Respondent set forth the following information as relates to the repossessed equipment: (1) By a letter dated November 14, 1979, Respondent was notified by General Electric Credit Corporation that the equipment covered by Account No. 336397 had been repossessed and would be held for private sale commencing November 26, 1979, absent redemption on or before November 25, 1979. The balance due on the account was \$104,205.08 (Exhs. R-16A, R-16F). (2) On or around December 8, 1979, Respondent received a Notice of Public Sale from Leasing Service Corporation, announcing that three Komatsu crawler tractors, Serial Nos. 15866, 16220 and 16221, would be sold at public auction on December 19, 1979. The notice contains no information as to the balance due on the account (Exh. R-16B). (3) By a letter dated September 14, 1979, Respondent was notified by General Electric Credit Corporation that one 1978 Rimpull Model RD65 rear dump hauler, Serial No. 780104, had been repossessed. The balance due on the account was \$206,440.15. The equipment was sold at a private sale on February 29, 1980, and left a deficiency balance of \$105,811.39 (Exhs. R-16C, R-17C, R-17D). (4) By letter dated September 14, 1979, Respondent was notified that a 1976 International TD25C crawler tractor, Serial No. 5657, had been repossessed. The balance due on the account was \$14,830.15. The equipment was sold at a private sale on October 31, 1979, and left a deficiency balance of \$8,330.15 (Exhs. R-16D, R-17A). (5) On or around September 7, 1979, Respondent received a Notice of Public Sale

from Ford Motor Credit Company announcing that the following items would be sold at public sale on September 27, 1979: One Hough H100C wheel loader, Serial No. 1846; two Hough 560 wheel loaders, Serial Nos. 2226 and 2415; two IHC TD25C crawler tractors, serial Nos. 6396 and 6534; and one Rimpull RD 65 off-road truck, serial No. 780101. The notice contains no information as to the balance due on the account (Exh. R.16E). (6) By letter dated September 24, 1979, Respondent was notified by Associates Commercial Corporation that an International TD25C dozer, Serial No. 6342, and a Rimpull RD65 truck, Serial No. 770116, were sold at a public sale on September 24, 1979, yielding a deficiency balance of \$129,777.04 (Exh. R-17B).

~FOOTNOTE_SIX

6 The judgments against Respondent are identified as follows:

Clark G. M. Diesel v. Blackjack Coal Company, Inc., Franklin Circuit Court, No. 80-CI-0296. Judgment entered April 9, 1980, in favor of Clark for \$3,631.45 plus 6 percent per annum interest from September 29, 1979, and 8 percent interest from April 9, 1980, plus costs.

C.I.T. Corporation v. Blackjack Coal Company, Inc., Franklin Circuit Court, No. 80-CI-0072. Judgment entered February 14, 1980, awarding C.I.T. \$38,749.15 plus interest at rate of 8 percent per annum until paid, plus costs.

Associates Commercial Corporation v. Blackjack Coal Company, Inc., Jefferson Circuit Court, No. 79-CI-09609. Judgment entered March 10, 1980, awarding Associates \$129,933.27, plus interest at rate of 8 percent per annum, plus costs.

Cummins Diesel Sales of Louisville, Inc. v. Blackjack Coal Company, Inc., Franklin Circuit Court, No. 80-CI-0445. Judgment entered April 10, 1980, awarding Cummins \$1,578.30 plus interest at rate of 8 percent from April 29, 1980, until paid, plus costs.

~FOOTNOTE_SEVEN

7 The pending actions are identified as follows:

Ford Motor Credit Company v. Blackjack Coal Company, Inc., Jefferson Circuit Court, No. 79-CI-11200. Dismissed in circuit court, appealed to Kentucky Court of Appeals. Action seeks \$304,541.30 claimed due in account, plus \$10,000 attorney's fees, plus 8 percent interest from July 20, 1980, plus costs.

Kentucky Machinery, Inc. v. Blackjack Coal Company, Inc., Jefferson Circuit Court, No. 80-CI-01885. Action seeks \$11,991.76 plus interest at the rate of 1-1/2 percent per month from January 16, 1980, until date of judgment and 8 percent per annum thereafter, plus costs.

Brandeis Machinery and Supply Corporation v. Blackjack Coal Company, Inc., Jefferson Circuit Court, No. 79-CI-06950. Action seeks following sums claimed due on account plus costs:

1. \$253,211.70 plus interest at rate of 8 percent per annum from September 27, 1979, until date of judgment and 8 percent thereafter.

2. \$127,837.67 plus interest at rate 1-1/2 percent per month from January 9, 1979, until date of judgment and at the rate of 8 percent per annum thereafter until paid.

3. \$8,488.25 plus interest at rate of 1-1/2 percent

per month from July 9, 1979, until date of judgment and at rate of 8 percent per annum thereafter.

Progressive Insurance Company, Inc. v. Blackjack Coal Company, Inc., Franklin Circuit Court, No. 80-CI-0580. Action seeks \$41,047.67 claimed due for insurance and bonds, plus costs and attorney's fees.

In re Blackjack Coal Company, Inc. and Garland W. McWhorter, Case No. 9-CA-14343 (NLRB, Region 9).