

U.S. DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

Judge's
FILED JAN 12 1982

RAYMOND J. DONOVAN)
SECRETARY OF LABOR)
U. S. DEPARTMENT OF LABOR) NO. 81-111
Plaintiff,)
v.)
WILLIAM MAYNARD AND)
BEECHTREE COAL COMPANY, INC.)
Defendants.)

PLAINTIFF'S PRELIMINARY TRIAL
MEMORANDUM

Pursuant to the standing order of this court dated September 22, 1980, Raymond J. Donovan, Secretary of Labor, United States Department of Labor, plaintiff in the above-captioned matter, hereby submits his preliminary trial memorandum.

I

JURISDICTION OF THE COURT

This court has both jurisdiction and venue over this case pursuant to section 21(d) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 921(d), as incorporated by section 422(a) of the Black Lung Benefits Act (Act), 30 U.S.C. § 932(a), and pursuant to section 424(b)(4)(A) of the Act, 30 U.S.C. § 934(b)(4)(A). Defendant Maynard, the last reported owner of Beechtree Coal Co., Inc., is a resident of this judicial district; defendant Beechtree Coal Co., Inc. has its main business office in this judicial district.

II

KIND OF ACTION

This is an action to enforce a compensation order issued against the defendant Beechtree Coal Co., Inc. in an administrative proceeding under the Black Lung Benefits Act, 30 U.S.C. § 901 et seq. Plaintiff also seeks to enforce a lien which has arisen in favor of the United States pursuant to section 424(b)(2) of the Act, 30 U.S.C. § 934(b)(2).

III

STATEMENT OF FACTS

On December 1, 1978, Clinton Adams (hereinafter "claimant") filed a claim for black lung benefits for disability due to pneumoconiosis arising out of his employment as a coal miner. The Department of Labor developed medical evidence which established claimant's entitlement to benefits under the Act. Pursuant to the applicable regulations, the Department of Labor initially determined that Beechtree Coal Company, Inc., P.O. Box 3000, Pikeville, Ky, 41501, was the responsible coal mine operator liable for benefits in this case. Beechtree Coal Company Inc. (Beechtree) was notified at the above address of its potential liability for the claim and of its right to controvert any facts and to request a hearing. No response was ever received from Beechtree, although a certified mail receipt reflects that Beechtree received such notice on April 5, 1979.

On June 14, 1979, Deputy Commissioner Ratliff of the Department of Labor issued a proposed decision and order (called an Award of Benefits) stating that Mr. Adams was entitled to benefits commencing as of December 1, 1978, to be paid by Beechtree Coal Company. This decision and order was sent by certified mail to defendant Beechtree Coal Company at the address provided by that company and admitted in its answer as correct; that address being: P.O. Box 3000, Pikeville, Ky, 41501. A certified mail receipt for this document was returned signed by Billy R. Maynard dated June 15, 1979. Again, no response was received from Beechtree and this Award, therefore, became final and effective on July 14, 1979, thirty days after issuance. 20 CFR § 725.419(d).

Because of Beechtree's failure to comply with the compensation order, the plaintiff has, pursuant to section 424 of the Act (30 U.S.C. § 934), made payments to the claimant, Mr. Adams, from the Black Lung Disability Trust Fund. As of January 1, 1982, the

amount of those payments totalled \$15,938.70 and continues to accrue at the rate of \$439.80 per month, plus interest through October 1, 1982, and thereafter at the rate provided by law. Plaintiff demanded repayment of these monies by letter dated December 22, 1980, sent to defendants at P.O. Box 3000, Pikeville, Ky, 41501. A certified mail receipt was returned for this letter dated December 31, 1980, signed by Cheryl Ann Gilliam (DOL Complaint Exhibit "E"). Defendants again failed to respond to this demand for payment. Plaintiff then brought this suit to enforce this compensation order and to recover the sums due and owing to the Trust Fund.

The separate answers filed by both the defendants are identical, and essentially state that they have insufficient knowledge on which to admit or deny the above-described facts. In addition, defendants admit that Beechtree Coal Company is a corporation which engaged in coal mining and had an address of P.O. Box 3000, Pikeville, Ky, 41501. They deny that defendant Maynard was ever a principal officer of the defendant Beechtree Coal Company at any time that Mr. Adams was employed there. Defendants also deny that the Award of Benefits issued by Deputy Commissioner Ratliff dated June 14, 1979, was ever served upon them.

IV

ISSUES OF LAW

The only issues before this court are: (1) whether the Deputy Commissioner's order dated June 14, 1979, was made and served on defendants in accordance with law, and (2) whether the defendants have failed to pay the amounts due after demand.

The statutory bases for the plaintiff's right to recover the sums paid to claimant from the Trust Fund and to seek enforcement of the compensation order arise from both section 21(d) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 921(d), and section 424(b) of the Black Lung Benefits Act, 30 U.S.C. § 934(b).

Section 21(d) of the Longshoremen's and Harbor Workers' Compensation Act, allows the Secretary of Labor to apply to the appropriate Federal district court for enforcement of a final compensation order when the responsible coal mine operator has refused to pay. That section states that the only issues in such an action are whether the order was made and served in accordance with law. See Marshall v. Barnes and Tucker Company, 432 F. Supp. 935 (W. D. Pa, 1977). The decision and order in the case at bar was both made and served in accordance with law. Thus, plaintiff is entitled to an order enforcing the compensation order.

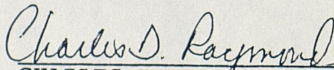
In addition, when an operator refuses to reimburse the Trust Fund, after demand, a lien arises in favor of the United States for the entire amount the operator is required to pay pursuant to section 424(b)(2) of the Black Lung Benefits Act. This lien attaches to all assets of the operator. Since defendants herein have failed to reimburse the Trust Fund for the amounts paid claimant on their behalf, plaintiff is entitled to an order enforcing the lien which has arisen in favor of the United States.

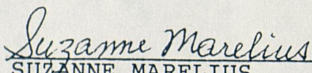
For the reasons stated above, plaintiff is entitled to the relief requested in the complaint filed in this matter.

Respectfully submitted,

T. TIMOTHY RYAN, JR.
Solicitor of Labor

DONALD S. SHIRE
Associate Solicitor


CHARLES D. RAYMOND
Co-Counsel for Black Lung Benefits


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Attorneys for the Director, Office
of Workers' Compensation Programs

Louis DeFalaize
United States Attorney

By: C. Cleveland Gambill
C. Cleveland Gambill
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Plaintiff's
Preliminary Trial Memorandum was served by mailing same to:

Hon. Joseph Justice
P.O. Box 50
Pikeville, KY 41501

this the 11th day of January, 1982.

C. Gambill
C. Cleveland Gambill
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

RAYMOND J. DONOVAN
Secretary,
U.S. Department of Labor

Plaintiff,

v.

BEECHTREE COAL COMPANY, INC.

Defendant.

CIVIL ACTION FILE NO. 81-111

BRIEF IN SUPPORT OF THE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
AND IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. STATEMENT OF THE CASE

On July 1, 1981, plaintiff, the Secretary of Labor, instituted this action against defendants, William Maynard and Beechtree Coal Company, Inc., (hereinafter "Beechtree") seeking to enforce a compensation order issued against Beechtree in an administrative proceeding under the Black Lung Benefits Act (Act), 30 U.S.C. § 901 et seq. Plaintiff also seeks to enforce a lien which has arisen in favor of the United States pursuant to section 424(b)(2) of the Act, 30 U.S.C. § 934(b)(2). Jurisdiction and venue are predicated upon section 21(d) of the Longshoremen's and Harbor Workers' Compensation Act (Longshoremen's Act), 33 U.S.C. § 921(d), as incorporated by section 422(a) of the Act, 30 U.S.C. § 932(a), and upon section 424(b)(4)(A) of the Act, 30 U.S.C. § 934(b)(4)(A).

Beechtree filed its answer on August 25, 1981. On that same day, in lieu of an answer, defendant Maynard filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). Plaintiff filed a response to the motion on October 14, and the motion to dismiss was denied by the Court in an order dated October 29, 1981. A separate answer was then filed on November 2, 1981, by defendant Maynard.

In lieu of a preliminary trial conference, the parties were ordered to file an agreed statement of facts. On April 19, 1982, the defendants tendered their statement of facts to the Court, and on April 19, 1982, they filed a joint motion for summary judgment with supporting affidavits. The Court granted the defendant's motion for summary judgment on May 6, 1982. On May 13, 1982, plaintiff moved to have this judgment set aside and responded to the statement of facts tendered by the defendants. A hearing was held on the motion to set aside the judgment in Pikeville, Kentucky on June 16, 1982. The Court sustained its grant of summary judgment in favor of defendant William L. Maynard, and set aside the judgment in favor of Beechtree. The plaintiff was granted thirty days within which to file his summary judgment motion.

This motion for summary judgment is made in accordance with the Court's order. For the reasons to follow, plaintiff respectfully submits that there is no material issue of fact in dispute, and that he is entitled to judgment as a matter of law pursuant to Rule 56 of the Federal Rules of Civil Procedure. Furthermore, plaintiff submits that the defendant's cross-motion for summary judgment should be denied.

II. STATEMENT OF FACTS

Clinton Adams (hereinafter "claimant") filed a claim for benefits under the Act on December 1, 1978. The Department of Labor developed medical evidence which indicated that claimant was totally disabled due to pneumoconiosis arising out of his coal mine employment. In accordance with the applicable regulations, Beechtree was determined to be the coal mine operator responsible for the payment of any benefits due the claimant (20 CFR § 725.490, et seq.). By certified letter dated April 4, 1979, the Department of Labor mailed a copy of its initial finding to Beechtree that the claimant was entitled to black lung benefits, and informing Beechtree of its potential liability and right to contest the

claim. This letter was mailed to P.O. Box 3000, Pikeville, Kentucky 41501 (Hartman Affidavit, par. 3). A return receipt for this letter was signed for by Billy R. Maynard (Hartman Affidavit, par. 4). The defendant did not respond to the notice as required by 20 CFR § 725.413, and was therefore deemed to have accepted the initial finding.

In a proposed decision and order (entitled Award of Benefits) dated June 14, 1979, Daryl Ratliff, a deputy commissioner in the Department of Labor, determined that the claimant was entitled to benefits under the Act and that the defendant was responsible for the payment of those benefits. This order was mailed, certified-return receipt requested, to the defendant on June 14, 1979, and, in relevant part, provided as follows:

AWARD

The Beechtree Coal Company, Inc., shall pay to the claimant all benefits due from December, 1978 to the present, and shall thereafter continue to pay benefits to the claimant at the prevailing rate, subject to the limitations of the Act.

The Beechtree Coal Company, Inc., shall provide the claimant with all reasonable and necessary medical treatment required for his pneumoconiosis condition, including the reasonable costs of transportation to obtain such treatment, beginning December, 1978 and continuing in accordance with the provisions of the Act.

(See, Exhibit "C" to the Affidavit of Ralph M. Hartman).

A copy of this proposed decision and order was mailed to Beechtree at P.O. Box 3000, Pikeville, Kentucky 41501. A return receipt for this document was signed for by Billy R. Maynard (Hartman Affidavit, par. 7).

The defendant did not request the Department of Labor to revise the proposed decision, nor did the defendant request a hearing (20 CFR § 725.419(a)) (Hartman Affidavit, par. 7). Accordingly, by operation of law (20 CFR § 725.419(d)), the proposed decision and order became final and effective at the expiration of 30 days from its issuance. The defendant has not commenced benefit payments to the claimant, nor has the defendant

reimbursed the Secretary for the amounts paid the claimant from the Black Lung Disability Trust Fund (Fund) pursuant to 26 U.S.C. § 9501 (Hartman Affidavit, pars. 7 and 8). The plaintiff has made a demand of the defendant to comply with the compensation order and to reimburse the Fund (Hartman Affidavit, par. 10). However, the defendant has failed to pay the amounts due and is presently indebted to the Fund in the amount of \$18,577.50, and continuing at the rate of \$439.80 per month, plus interest (Hartman Affidavit, pars. 9 and 11).

III. ARGUMENT

The Act, together with certain incorporated provisions from the Longshoremen's Act, contains a number of provisions which subject an operator or other employer to penalties for failure to comply with certain of its provisions or for failure to commence and continue prompt periodic payments to a beneficiary. In certain instances the remedies available to enforce those penalties are concurrent, viz., more than one remedy might be appropriate in any given case. Accordingly, if an operator refuses to pay benefits with respect to a claim for which the operator has been adjudicated liable, the Secretary is authorized to pay benefits to the claimant from the Fund. A lien then arises in favor of the United States which may be enforced in an appropriate Federal district court. In any case where benefits are paid from the Fund, the Fund is subrogated to the rights of the beneficiary, and the Secretary may exercise such subrogation rights. See generally, 20 CFR § 725.601 et seq. Interest on payments from the Fund is, of course, also due to the Fund. 30 U.S.C. § 934(b). If the Secretary determines that enforcement of this lien may not be sufficient to guarantee the continued compliance with the terms of a compensation award, the Secretary may, in addition, seek an injunction to prohibit future non-compliance by the operator.

A. The Secretary is Entitled to a Judgment Enforcing the Award.

Pursuant to section 21(d) of the Longshoremen's Act, 33 U.S.C. § 921(d), as incorporated by section 422(a) of the Act, 30 U.S.C. § 932(a), the Secretary of Labor may apply to the appropriate Federal district court for enforcement of a final compensation order which the responsible coal mine operator or other employer has failed or refused to pay.

Section 21(d) provides:

(d) If any employer or his officers or agents fails to comply with a compensation order making an award, that has become final, any beneficiary of such award or the deputy commissioner making the order, may apply for the enforcement of the order to the Federal district court for the judicial district in which the injury occurred (or to the United States District Court for the District of Columbia if the injury occurred in the District). If the court determines that the order was made and served in accordance with law, and that such employer or his officers or agents have failed to comply therewith, the court shall enforce obedience to the order by writ of injunction or by other proper process, mandatory or otherwise, to enjoin upon such person and his officers and agents compliance with the order.

Thus, if the court determines that a final compensation order was made and served in accordance with the Act and regulations, and further finds that the party liable for payment has not complied with the terms of the award, the court shall enforce obedience to the order by writ of injunction or other process.

The compensation order upon which this case is based is a final award by the deputy commissioner awarding continuing benefits to the claimant for total disability due to black lung disease. This order became final on July 14, 1979, after the defendant did not respond to the proposed decision and order. See 20 CFR § 725.419(d). Also, pursuant to 20 CFR § 725.419(d), the defendant's inaction constituted a waiver of all rights to further administrative proceedings, and estops it from raising any defenses to the merits of the underlying claim. The pleadings, together with the affidavit of Ralph M. Hartman, Director, OWCP, establish

that the deputy commissioner's award of benefits to the claimant was both made and served in accordance with the Act and regulations. Both answers of defendant and of former defendant William L. Maynard, president of Beechtree, admit that the mailing address of Beechtree Coal Co., Inc. was P.O. Box 3000, Pikeville, Kentucky 41501. All of the Department of Labor's communications regarding this claim were sent to this address. Certified mail receipts were returned signed by individuals related to or employed by the president and sole owner of Beechtree, William L. Maynard. The address to which all notices were mailed was furnished to the Department of Labor by the insurance carrier of defendant Beechtree.

Throughout the process of evidentiary development and final administrative adjudication, the defendant was notified of the proceedings and informed of its statutory right to participate and challenge any legal or factual matter. Although the defendant accepted the certified mail notices of the pendency and adjudication of the claim, the defendant never participated, raised any defenses on its behalf, or responded to the notices in any fashion. The Secretary of Labor fully complied with the statute and regulations in making and serving the compensation order at issue, and is thus entitled to judgment as a matter of law enforcing the compensation award.

In the only decided case similar to the one at bar, the district court for the Western District of Pennsylvania held that the Secretary of Labor was entitled to summary judgment as a matter of law upon proof that the compensation order was made and served in accordance with the Act and regulations. Marshall v. Barnes and Tucker Company, 432 F. Supp. 935 (W.D. Pa., 1977). In that case, the Secretary brought suit under section 21(d) to enforce an award of benefits under the Act with which the employer had refused to comply. Based upon the undisputed facts that a final award of

benefits had been duly issued against and served upon the employer and that it had refused to pay the claimant as ordered or to reimburse the Secretary, the court granted summary judgment in the Secretary's favor. Although the employer attempted to raise several substantive arguments to the underlying claim, the court held that under section 21(d) it could only enforce the order and could not engage in a review to affirm, modify, suspend or set aside the order. In so holding, the court stated that the "extent of [its] "review" under section 21(d) is to determine not whether the order is in accordance with law, but rather whether it was made and served in accordance with law." Ibid. at 939.

Since all of the material facts are undisputed in the present case, and since there is no question that the defendant has refused to comply with the deputy commissioner's order dated June 14, 1979 which was made and served in accordance with law and has become final, the Secretary is entitled to judgment as a matter of law enforcing the compensation award.

B. The Secretary is Entitled to a Judgment Enforcing the Lien Created in Favor of the United States.

In 1978, Congress substantially amended the Act in order to achieve the generalized purpose of shifting the economic burden of the payment of black lung benefits to the coal industry. To help accomplish this end, Congress enacted the Black Lung Benefits Revenue Act of 1977, P.L. No. 95-227, 92 Stat. 11 (Feb. 10, 1978) (Revenue Act) which, inter alia, created the Black Lung Disability Trust Fund to finance the payment of certain black lung benefits.

Among other things, section 9501 of the Internal Revenue Code requires the Fund to pay benefits if there is no responsible coal mine operator, or if the operator liable for the payment of benefits is in default. Pursuant to section 424, if the Secretary of Labor determines (in accordance with the Act and applicable regulations) that a coal mine operator or other employer is

responsible for the payment of certain benefits, and the operator fails or refuses to pay those benefits thus triggering payments from the Fund, then the coal mine operator becomes obligated to reimburse the Fund for all payments made to the claimant. 30 U.S.C. § 934(b)(1). If the operator refuses to reimburse the Fund, after demand therefor, a lien arises in favor of the United States for the entire amount the operator is required to pay. This lien attaches to all assets of the operator and is given generally the same status as a Federal tax lien.*/

If the operator initiates administrative or judicial appeals in accordance with the Act (and regulations), the lien does not attach until the termination of the review proceedings. Section 424(b)(4) authorizes the Secretary of Labor to bring a civil action in the appropriate Federal district court to enforce the lien created where the operator refuses or neglects to reimburse the Fund for the amounts previously paid on the operator's behalf. 30 U.S.C. § 934(b)(4).

As in the case of an enforcement action under section 21(d) of the Longshoremen's Act, the only issues in an action to enforce a lien under section 424(b) of the Act is whether the administrative order triggering payments from the Fund was made and served in accordance with law, and whether the defendant has failed to pay, after demand. Although a party may challenge the Secretary's computation as to amounts due, the merits of the underlying claim are not at issue. See, 20 CFR § 725.603.

*/ Section 424(b)(2), which creates this lien, provides:

(2) If any operator liable to the fund under paragraph (1) refuses to pay, after demand, the amount of such liability (including interest), then there shall be a lien in favor of the United States for such amount upon all property and rights to property, whether real or personal, belonging to such operator. The lien arises on the date on which such liability is finally determined, and continues until it is satisfied or becomes unenforceable by reason of lapse of time.

Since it is clear that the defendant has not reimbursed the Fund for benefits paid to the claimant pursuant to the compensation award of Deputy Commissioner Ratliff and, as previously noted, the award was made and served in accordance with the applicable regulations, the Secretary is entitled to a judgment enforcing the lien created in favor of the United States by section 424(b)(2) of the Act. The Affidavit of Ralph M. Hartman, Director, establishes the amount of that lien as \$18,577.50, which represents the amount paid to the claimant from the Fund, plus interest (20 CFR § 725.608) (Hartman Affidavit, par. 8).

C. The Defendant is Not Entitled to Summary Judgment.

The defendant maintains in its brief in support of its motion for summary judgment that it was never "actually served" the several notices which plaintiff sent of the underlying claim for benefits. The defendant contends that its address was P.O. Box 2785, Pikeville, Kentucky 41501, as set forth in its articles of incorporation, and that since the pertinent documents were not sent to that address, it was never "actually served." The defendant does not contend that it had no notice of the claim of Clinton Adams but instead seeks to shield itself behind the technicalities of service of process under Kentucky law.

The evidence of record establishes that proper notice of the claim was given to the defendant at its business address and that the Secretary fully complied with the requirement as to service. The notices of the claim herein consist of the initial finding of entitlement and the award of benefits. Both letters, as well as a subsequent demand letter, were sent to the official address of Beechtree, P.O. Box 3000, Pikeville, Kentucky 41501, by registered mail and signed receipts were returned to plaintiff. Two of these receipts were signed for by Billy R. Maynard, the son of William L. Maynard, the president and owner of the defendant corporation. The letter demanding payment was signed for by Cheryl Ann Gilliam, a

current employee of William L. Maynard. The address, P.O. Box 3000, Pikeville, Kentucky 41501 was provided to plaintiff by the defendant's insurer, Old Republic Insurance Company (see Affidavit, Exhibit "E"). The regulations at 20 CFR §§ 725.494 and 726 et seq. require that potential responsible coal mine operators carry insurance and that the insurer maintain a current record of such policies with the OWCP. It was both reasonable and proper for the plaintiff to mail all notices to the address thus provided by the defendant's carrier, especially since the registered mail to that address was accepted and receipts returned. Furthermore, the address to which all notices were mailed was admitted by defendant as a proper mailing address in paragraph 3 of its answer which reads in part as follows:

[I]t admits that the Defendant, Beechtree Coal Company, is a corporation and, for a short time, was engaged in the business of mining coal and had a mailing address of P.O. Box 3000, Pikeville, Kentucky 41501, within the jurisdiction of this Court.

Similarly, the former defendant William L. Maynard, president and owner of Beechtree, admitted the same fact in his answer, paragraph 3. Therefore, there is no dispute that the relevant notices were properly served on the defendant.

Finally, the defendant has misconstrued the "made and served" requirement of the statute to mean that formal service (as in the case of process) is required. The regulations governing the administrative adjudicatory process only contemplate that notice of claims be mailed to companies in a fashion reasonably calculated to reach that company. 20 CFR § 725.412(b). The plaintiff herein has acted reasonably and responsibly in meeting this requirement by mailing the notices of the underlying claim by registered mail to the address provided by the defendant's insurance carrier. Thus, the defendant's motion for summary judgment, based upon lack of service of the underlying compensation order, is ill-founded and the motion should be denied.

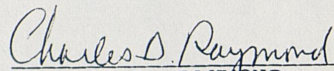
IV. CONCLUSION

For the reasons stated above, plaintiff's motion for summary judgment should be granted and defendant's motion for summary judgment should be denied.

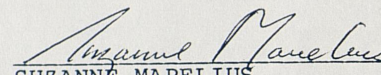
Respectfully submitted,

T. TIMOTHY RYAN, JR.
Solicitor of Labor

DONALD S. SHIRE
Associate Solicitor



CHARLES D. RAYMOND
Co-Counsel for Black Lung Benefits



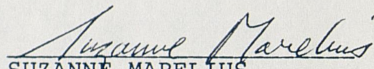
SUZANNE MARELIUS
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Suite N-2620
Frances Perkins Building
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 357-0398

Attorneys for the Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on JUL 13 1982, copies of the Plaintiff's Motion for Summary Judgment, Brief in Support of Plaintiff's Motion for Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment, and the supporting Affidavit including the attachments thereto were served by mail, postage prepaid, on the following:

Joseph Justice
P.O. Box 50
Pikeville, KY 41501


SUZANNE MARELIUS
Attorney
U.S. Department of Labor

PS Form 3811, Aug. 1978

● SENDER: Complete items 1, 2, and 3. Add your address in the "RETURN TO" space on reverse.

1. The following service is requested (check one):

Show to whom and date delivered. _____

Show to whom, date, and address of delivery. _____

RESTRICTED DELIVERY
Show to whom and date delivered. _____

RESTRICTED DELIVERY.
Show to whom, date, and address of delivery. \$ _____
(CONSULT POSTMASTER FOR FEES)

2. ARTICLE ADDRESSED TO:
Beechtree Coal Company A
Clinton Adams Pi 407-22-8237

3. ARTICLE DESCRIPTION:

| REGISTERED NO. | CERTIFIED NO. | INSURED NO. |
|----------------|---------------|-------------|
| | 573383 | |

(Always obtain signature of addressee or agent)

I have received the article described above.

SIGNATURE Addressee Authorized agent

4. DATE OF DELIVERY
6-15-79

5. ADDRESS (Complete only if requested)

6. UNABLE TO DELIVER BECAUSE:

CLERK'S INITIALS

6-14-79

U.S. POST OFFICE
SULLY, MISSOURI
JUN 15 1979

Affidavit Exhibit "D"

0-104770

1. Mine Operator **Beechtree Coal Co., Inc.**
 2. Address P.O. Box 3000 **Pikeville** **Pike** **Kentucky** **41501**
Street City County State Zip

3. Policy Number **Former Coverage** 4. Policy Dates a. Beginning b. Expiration
BC-41147 **BC-38148** **5-23-78** **5-23-79**

Report is made of this issue of approved form of policy and endorsement under the Federal Coal Mine Health and Safety Act of 1969, as amended.

5. Coverage is provided for operations in the following States **Kentucky**

6. Insurance Carrier **Old Republic Insurance Company** **DO NOT WRITE HERE**
 7. Address **P. O. Box 8128** **OWCP No.**
Lexington, KY 40503 **Cancel Date**
 8. Authorized Signature for Carrier W. N. Ward/DC

Completed card should be forwarded to the U. S. Department of Labor, Office of Workmen's Compensation Programs, Washington, D. C. 20210.

(COMPLETE REVERSE SIDE)

FORM CM 921

N

6-104970

1. Mine Operator **BEECHTREE COAL CO., INC.**
 2. Address **P.O. BOX 3000** **PIKEVILLE** **PIKE** **KY.** **41501**
Street City County State Zip

3. Policy Number **BC-38148** 4. Policy Dates a. Beginning b. Expiration
2-13-78 **5-23-78**

Report is made of this issue of approved form of policy and endorsement under the Federal Coal Mine Health and Safety Act of 1969, as amended.

5. Coverage is provided for operations in the following States **KY**

6. Insurance Carrier **Old Republic Insurance Company** **DO NOT WRITE HERE**
 7. Address **P. O. Box 8128** **OWCP No.**
Lexington, KY 40503 **Cancel Date**
 8. Authorized Signature for Carrier W. N. Ward/TT

Completed card should be forwarded to the U. S. Department of Labor, Office of Workmen's Compensation Programs, Washington, D. C. 20210.

(COMPLETE REVERSE SIDE)

FORM CM 921

N

Affidavit Exhibit "E"

22 DEC 1980

Mr. Bill Maynard
Beechtree Coal Company, Inc.
P.O. Box 3000
Pikeville, KY 41501

Re: Clinton Adams v. Beechtree Coal Company, Inc.
OWCP No. 407-22-8237

Dear Mr. Maynard:

Pursuant to the Decision and Order of Deputy Commissioner Daryl E. Ratliff which became final on July 14, 1979, the claimant in the above-captioned case was awarded Black Lung benefits. Beechtree Coal Company was identified as the responsible coal mine operator liable for payment of benefits and received notice of all action taken in regard to this claim as provided by the Black Lung Benefits Act and implementing regulations. Beechtree Coal Company has failed to respond to any and all correspondence from the Office of Workers' Compensation Programs. The Black Lung Disability Trust Fund therefore instituted interim payments to the claimant pending Beechtree Coal Company's assumption of their legal responsibility. This claim has now been forwarded by the Director, Office of Workers' Compensation Programs, for enforcement action.

Section 424(b) of the Black Lung Benefits Act, Title IV of the Federal Mine Safety and Health Act, as amended, 30 U.S.C. § 901 et seq. (hereinafter referred to as the "Act") governs repayment to the Fund and contains penalty provisions should an identified responsible operator fail to pay the amount of their liability upon demand. Specifically, § 424(b)(2) of the Act authorizes a lien to arise in favor of the United States for the amount due the Fund upon all property and rights to property belonging to the responsible operator. A civil action may then be brought to enforce this lien pursuant to Section 424(b)(4) of the Act. The regulations governing enforcement of liability can be found at 20 CFR §§ 725.601 through 725.621 (1978). These sanctions are exercisable at the Director's discretion with consideration given to the interests of the claimant as well as those of the Fund. (20 CFR §

Affidavit Exhibit "F"

725.601(c)). Once an operator or carrier has been determined by the deputy commissioner to be liable for the payment of benefits to a claimant, payments must begin within 30 days of a final order. (20 CFR § 725.530). Since well over 30 days have elapsed from the deputy commissioner's award of benefits, a 20% additional compensation penalty is being assessed as a result of your company's failure to promptly pay this claim. (20 CFR § 725.607).

In addition, your company may be found liable for 6 percent simple annual interest on all past due benefits computed from the date on which such benefits were due and payable, as well as on any penalty added to compensation benefits due and owing. The 6 percent interest payment in this case would be made directly to the Fund as outlined in 20 CFR § 725.608(b).

Should Beechtree Coal Company fail to begin prompt periodic payments to the named claimant and make full restitution to the Fund, the statute and regulations authorize the Secretary of Labor to seek appropriate action, see, e.g., 20 CFR § 725.603 and Section 424(b) of the Act.

The United State Department of Labor, Division of Coal Mine Workers' Compensation, found Mr. Adams entitled to benefits effective December 1, 1978 and continuing. As of December 1, 1980, the Trust Fund has paid out a total of \$10,842.30 in benefit payments to the claimant. This compensation is continuing at a rate of \$419.60 per month subject to the guidelines set forth in the Act. Deputy Commissioner Ratliff also found Beechtree Coal liable for all reasonable and necessary medical treatment required for claimant's pneumoconiosis condition. These amounts have not been paid and thus remain due and owing.

The Director, Office of Workers' Compensation Programs, also has an additional sanction available in this case, as it is unclear from our records whether or not Beechtree Coal Company is insured. Section 423 of the Act requires that an operator be insured in a manner set forth in 20 CFR § 725.494; and the penalty for failure to insure is found at 20 CFR § 725.495 and reads as follows:

- (a) Any employer required to secure the payment of benefits under the act and § 725.494 which fails to secure such benefits shall be subject to a civil penalty to be assessed by the Secretary of Labor of not more than \$1,000 for each day during which such failure occurs; and in any case where such employer is a corporation, the president, secretary, and treasurer thereof shall be also severally liable for such civil penalty as herein provided for the failure of such corporation to secure the payment of benefits; and such

president, secretary, and treasurer shall be severally personally liable, jointly with such corporation, for any payments or other benefits which may accrue under the act in respect to any injury which may occur to any employee of such corporation while it shall so fail to secure the payment of benefits as required by the Act.

If your company has purchased insurance or qualifies as a self-insurer, please contact our office immediately. It is important that we be made aware of the correct status of Beechtree Coal Company. Because our records indicate you may have been insured by Old Republic Insurance Company at one time, we are forwarding a copy of this letter to them.

We would appreciate receiving a reply to this letter within 30 days and thereby avoid the necessity of resorting to judicial intervention.

Sincerely,

Laurie M. Streeter
Associate Solicitor
for Employee Benefits

cc: Mr. D. L. Rutter

CB:S.MARELIUS:cma
12-17-80

SENDER (Company and No. 1, 2, and 3)
 Add to address in RETURN TO if you
 desire

1. The following service is requested (check one)
 Show to whom and date delivered.....
 Show to whom, date and address of delivery.....
 RESTRICTED DELIVERY
 Show to whom and date delivered.....
 RESTRICTED DELIVERY
 Show to whom, date, and address of delivery.....

(CONSULT POSTMASTER FOR FEES)

2. ARTICLE DELIVERED TO:
 Mr. Bill Mynard
 Beechtree Coal Co.
 P.O. Box 2000
 Pikeville, Ky. 41501

3. ARTICLE DESCRIPTION (See
 REGISTERED NO. CERTIFIED NO. INSURED NO.

170574

(Always obtain signature of addressee or agent)
 I have received the article described above
 SIGNATURE *Chris Frank Mynard*
 DATE OF DELIVERY 12-31-80
 ADDRESS (Minimum only if registered)

UNABLE TO DELIVER BECAUSE: CLERK'S INITIALS

☆GPO 1979 284-348

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 81-111

RAYMOND J. DONOVAN,
Secretary, U.S.
Dept. of Labor

PLAINTIFF

VS.

ORDER OF
SUMMARY JUDGMENT

WILLIAM MAYNARD
and
BEECHTREE COAL COMPANY, INC.

DEFENDANTS

* * * * *

Plaintiff instituted the above-styled action to obtain from defendants reimbursement of monies which plaintiff paid to defendants' former employee in black lung disability benefits. Defendants contend that they never received notice of plaintiff's final order, which held defendants liable and which plaintiff seeks to enforce by this action.

On December 7, 1981, there was filed in this action a joint motion by all parties that a conference previously scheduled be continued on grounds "that this case may be appropriate for resolution by way of summary judgment and the parties are in the process of preparing said motion to be filed with the Court."

On January 19, 1982, the Court ordered the parties to file any motions and/or cross-motions for summary judgment by April 19, with fifteen days thereafter allowed for responses. At the end of that time period, the record was to stand submitted for a decision.

The above-described deadline has now passed.

Defendants have moved for summary judgment, supporting their motion with a memorandum of authorities and with

various exhibits and affidavits. Plaintiff has not responded to defendants' motion.

Plaintiff has not filed a summary judgment motion of his own.

Therefore, this action stands ready for decision on defendants' summary judgment motion.

In the Court's opinion, defendants have shown enough to challenge the existence of the material fact issue of proper notice to them that they had been finally determined liable for payments to the employee involved here. It appears from defendants' submissions that they are entitled to judgment as a matter of law. The regulations covering "enforcement of final awards", such as the award which plaintiff seeks here to enforce, read:

If the court determines that the order was made and served in accordance with law, and that such operator or other employer or its officers or agents have failed to comply therewith, the court shall enforce obedience to the order . . .

20 C.F.R. §725.604. Defendants challenge whether plaintiff complied with the service requirement, a prerequisite to enforcement of the order against them.

Defendants have challenged the substance behind plaintiff's pleadings by the proper vehicle of a summary judgment motion. It falls to plaintiff, thereafter, to show the Court that it can attempt to show that very basic prerequisite of notice to defendants that plaintiff had found them liable.

When a motion for summary judgment is made and supported, . . . an adverse party may not rest upon the mere allegations or denials of his pleading, but his response . . . must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Rule 56(e), Federal Rules of Civil Procedure.

Because the Court believes summary judgment to be "appropriate" here, the Court will follow the directive of Rule 56 and will enter judgment summarily in defendants' favor.

The Court is not called upon to address defendants' fifth amendment challenge to the statute and regulations under which plaintiff sought to enforce his order.

Accordingly, the Court having been sufficiently advised,

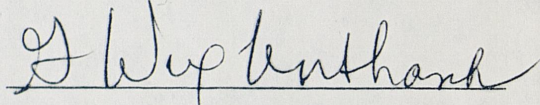
IT IS HEREBY ORDERED

That defendants' motion for summary judgment be SUSTAINED:

That final judgment be ENTERED in favor of defendants and against plaintiff; and

That this action be STRICKEN from the docket

On this 6th day of July, 1982.



G. WIX UNTHANK, JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

PIKEVILLE

Civil Action No. 81-111

RAYMOND J. DONOVAN,
Secretary, U.S. Dept.
of Labor,

PLAINTIFF

VS:

O R D E R

BEECHTREE COAL CO., INC.

DEFENDANT

The unopposed motion of plaintiff for amendment of the judgment entered in this action on 26 August 1982 moves the court to amend the judgment award from \$13,360.50, the amount originally sought in the complaint, to \$19,017.30, based on the continuing disbursements to claimant by the Secretary in the amount of \$439.80 per month through August 1982, and to require that defendant pay directly to claimant Clinton Adams the sum of \$439.80 until the claimant's death or cessation of his disability. Plaintiff further moves the court to award interest on past due amounts from the date of the award of benefits to claimant at the rate of 6% simple interest until January 1982, then from 1 January 1982 at the rate of 15%, and thereafter at the rate established by §6621 of the Internal Revenue Code of 1954. However, pursuant to the provisions of Section 302 of the Federal Courts Improvement Act of 1982, P.L. 97-164, 96 STAT.55, effective 1 October 1982, civil money judgments awarded in the district courts will bear interest at a rate equal to the coupon issue yield equivalent of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of judgment. This rate, as 30 September 1982, is 10.41%.

Plaintiff's motion is well taken as to the past due amounts and as to the continuing obligation of defendant to make payments directly to claimant Clinton Adams in the amount of \$439.80 each month. Interest on pre-judgment amounts from the date of award of benefits to claimant Clinton Adams shall be at 6% per annum simple interest to date of this judgment. 20 C.F.R. §725.608. Post-judgment interest shall be at the rate of 10.41% per annum simple interest until paid. Pre- and post judgment interest are payable to the Secretary, per 20 C.F.R. §725.608. The court being sufficiently advised,

IT IS HEREBY ORDERED, ADJUDGED That the judgment and the record thereof should be, and hereby is, amended to read as follows:

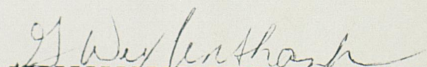
That plaintiff shall have judgment against defendant in the amount of \$19,017.30, and for any and all other disbursements made from and after August 1982 by plaintiff to claimant Clinton Adams based on claimant's award of benefits dated 14 June 1979 for which defendant should refuse or fail to pay.

That defendant is liable for payment directly to the claimant the amount of \$439.80 per month from and after the date of award of benefits based on the award of June 1979 and until claimant's death or the cessation of his disability, less any reimbursements of same paid to plaintiff.

That prejudgment interest on past due amounts shall be at the rate of 6% per annum from date of award of benefits to claimant until date of this order; thence at the rate of 10.41% until paid.

That this is a final judgment upon all of the issues between the plaintiff and Beechtree Coal Company, Inc and this action is STRICKEN from the court's docket.

This 15th day of October 1982.



G. WIX UNTHANK, JUDGE

Judge -
Mr Carr
Called will
be about 15-20
minutes late -
M.

Judge:

This is that case where Joe Justice said he tried to get the other side's input on the joint fact statement you ordered them to produce. So Joe tendered his facts & we deemed them to be the joint statement.

Joe also filed a supported s/j motion in time. Pltff didn't respond & we granted Joe's As s/j.

Now pltff wants us to set aside the s/j & let him file a response & let him also file his own s/j motion.

TO: Judge
FROM: Maggie
DATE: 15 June 1982
RE: Civil #81-111

DONOVAN, Secty of Labor, v. WILLIAM MAYNARD
and
BEECHTREE COAL COMPANY

Hearing on motion, Wednesday, 11:00

The motion by plttf is that we amend our judgment entered herein:
a summary judgment against plttf in favor of defts.

Plaintiff wants us to

1. schedule arguments on summary judgment motions, (we formerly granted defts their summary judgment w/out hearing)
2. vacate the judgment against plttf
3. grant plttf leave to file his own summary judgment motion.

Plaintiff quarrels w/ our granting defts summary judgment because:

1. there are unresolved issues of fact which plaintiff has not been given an opportunity to raise
2. our deeming one party's offer toward joint fact statement to actually be the parties' joint factual statement was wrong, since plaintiff justifiably relied on a history of our granting time extensions and since plaintiff figured we'd grant him a time extension for working on the joint fact statement. "Plaintiff had no basis on which to presume that plaintiff's request for an extension would be denied."

In denying the extension of time, we cited the parties to an earlier order in which we said there'd be no further continuances granted. Plaintiff argues that the order about continuances shouldn't have given them notice that they might not get every time extension they asked for on things other than conferences.

Plaintiff says he assumed the Court would follow the time schedule it ordered:

Joint statement of facts - 3/19/82
Summary judgment motions - 4/19/82
Responses to s/j motions - fifteen days after motion.

Plaintiff quarrels w/ what we did:

Sustained defts' motion for extension on joint statement, when defts said plttf wasn't doing his part in coming up w/ the statement- 4/9/82

After no word from plttf, deemed defts draft of a fact statement to be the parties' ordered joint statement - 4/23/82 *(more than 1 mo. after they should have had it done.)*

Granted defts summary judgment (their motion was filed 4/19/82) on 5/6/82 after there was no response by plttf to defts' summary judgment motion, which motion was satisfactorily supported.

I don't think we did anything wrong. The question now would seem to be: do the submissions of the parties show that there is such a material issue that we should set aside the summary judgment and reinstate the case?

JOSEPH W. JUSTICE
ATTORNEY AT LAW
338 MAIN STREET
PIKEVILLE, KENTUCKY

March 16, 1982

Mr. Donald S. Shire
Associate Solicitor for
Employee Benefits
U.S. Department of Labor
Office of the Solicitor
Washington, D.C. 20210

RE: Donovan v. Beechtree Coal Co., Inc.
C.A. No. 81-11, OWCP No. PI 407-22-8237

Dear Mr. Shire:

Enclosed please find ^{4 of} copies Agreed Statement of Facts for your signature if you are in agreement with these Statements.

I am attaching all documentation that I have supporting the Statement of Facts that I have prepared. If there are additional Statement of Facts that you feel necessary, please relate them to me by phone and I will try to give you an immediate response.

I am asking the Court to extend our time from March 13, 1982, until April 1, 1982, which will give you some time to make a determination if you can agree to these stipulated facts.

Very truly yours,

Joseph W. Justice

JWJ/nj

Enc.

C
O
P
Y

Corrected on original Copy

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

Action No. 81-111

RAYMOND J. DONOVAN,
Secretary, U.S.
Dept. of Labor

PLAINTIFF

vs.

ORDER OF
SUMMARY JUDGMENT

BEECHTREE COAL COMPANY, INC.

DEFENDANT

Clinton Adams (hereinafter referred to as "claimant") filed a claim for benefits under the Black Lung Act (Act), 30 U.S.C. §901 et seq., on 1 December 1978. The Department of Labor determined that claimant was totally disabled due to pneumoconiosis arising out of his coal mine employment, some of which was with defendant. Defendant was determined to be the coal mine operator responsible for the payment of any benefits due the claimant and, by certified letter dated 4 April 1979, the Department of Labor mailed a copy of its initial finding to the Defendant that the claimant was entitled to black lung benefits, and informed defendant of its potential liability and right to contest the claim.

This letter was mailed to P.O. Box 3000, Pikeville, Kentucky 41501. A return receipt for this letter was signed for by Billy R. Maynard, the son of William M. Maynard, past officer, director and part-owner of Beechtree and president at the time of the mailing. The defendant did not respond to the notice as required by 20 C.F.R. §725.413, and was therefore deemed to have accepted the initial finding.

In a proposed decision and order (Award of Benefits) dated 14 June 1979, the Department of Labor determined that the claimant was entitled to benefits under the Act and that the defendant was responsible for the payment of those benefits. The order provided, in part, that

The Beechtree Coal Company, Inc., shall pay to

the claimant all benefits due from December, 1978 to the present, and shall thereafter continue to pay benefits to the claimant at the prevailing rate, subject to the limitations of the Act.

The Beechtree Coal Company, Inc., shall provide the claimant with all reasonable and necessary medical treatment required for his pneumoconiosis condition, including the reasonable costs of transportation to obtain such treatment, beginning December, 1978, and continuing in accordance with the provisions of the Act

A copy of this proposed decision and order was mailed to Beechtree at P.O. Box 3000, Pikeville, Kentucky 41501. A return receipt for this document was signed for by Billy R. Maynard on 5 April 1979.

The defendant did not request the Department of Labor to revise the proposed decision, nor did the defendant request a hearing. Accordingly, by operation of law (20 C.F.R. §725.419(d)), the proposed decision and order became final and effective at the expiration of 30 days from its issuance. The defendant has not begun to pay benefits to the claimant, nor has the defendant reimbursed the Secretary for the amounts paid the claimant from the Black Lung Disability Trust Fund (Fund) pursuant to 26 U.S.C. §9501. Plaintiff has made a demand of the defendant to comply with the compensation order and to reimburse the Fund. However, plaintiff has failed to pay the amounts the Secretary alleges is due, \$18,577.50 as of July 1982 and continuing at the rate of \$439.80 per month, plus interest.

This matter is now before the court on cross-motions for summary judgment on the limited issue whether the order of award of benefits of 14 June 1979 was made and served on defendant in accordance with law. Marshall v. Barnes and Tucker Company, 432 F.2d 935 (W.D. Pa. 1977).

Defendant raises in its answer generally-phrased constitutional questions but never further argues or addresses the issue in specifics, relying most heavily on the defense of not having received notice of the administrative proceedings and the resulting

award of benefits. Not having shown by fact and authority how constitutional considerations rendered the proceedings invalid, the court considers the administrative processes and the results thereof to be in accordance with law, and so finds.

The issue of notice remains.

Beechtree was incorporated under the laws of the Commonwealth of Kentucky on 21 December 1974. The initial agent for service of process was Mack Maynard with a mailing address of box 2785, Pikeville, Kentucky 41501. The corporation records on record here are sparse, but they indicate that William Maynard was elected Vice-President and that Mack Maynard was elected President and Secretary / Treasurer at that time. Similar results were reached at the annual meeting of the Board of Directors on 3 December 1976, and on 5 December 1977, the record reflects that William Maynard had purchased the shares of Mack Maynard to become the sole owner of Beechtree, its president, and agent for service of process. Beechtree had not been dissolved as of 30 July 1982, and the Secretary of State of the Commonwealth of Kentucky had not been advised by defendant of the change of its agent for service of process. William Maynard has been president of Beechtree since 5 December 1977.

Plaintiff filed a response to defendant's tendered statement of facts and submitted as a fact, not contested, that P.O. Box 2785 Pikeville, Kentucky, given above as the chartered address of Beechtree's process agent, Mack Maynard, was also the mailing address of M & M Toyota, Inc., the employer of Cheryl Ann Gilliam, and partly owned by William Maynard, and a place where one could reasonably expect to find him, therefore.

Cheryl Ann Gilliam signed on 31 December 1980 a certified return receipt for a 22 December 1980 letter from the plaintiff addressed to Bill Maynard, Beechtree Coal Co., Box 3000, Pikeville, Ky 41501. Defendant has not denied that she is an employee of M & M Toyota, and therefore by extension, an employee of William Maynard.

Plaintiff states that P.O. Box 3000 was the address given to the Department by an insurance firm doing business with the defendant, and this is not contested. Further, defendant does not reveal the actual address of Beechtree or its service of process agent if it is other than P.O.Box 3000. Only two mailing addresses are of record: P.O. Box 2785, the address of the previous service of process agent, and P.O. Box 3000, the address revealed to plaintiff by a firm providing a service to defendant and thus in a position to know. Defendant having failed to properly advise the Secretary of State, and thus the general public of which plaintiff is a part, plaintiff was entitled to rely on the best information available to the Department.

Any difficulty in service of process was due to defendant's failure to advise the Secretary of State of the change of service of process agents and his proper mailing address. This, and the actual circumstances of the mailing and receipt of the subject notices described above, gives defendant little or no ground to deny receipt of notice of the administrative proceedings and order of award of benefits, and the court finds that defendant did have such notice.

The court finds further that defendant has failed to pay the amounts claimed, that these amounts are correctly stated and are due and payable to plaintiff as claimed, and that plaintiff has the lien asserted which it may enforce in accordance with appropriate law.

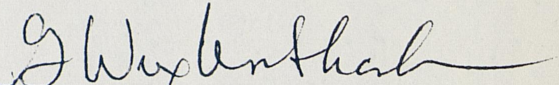
The decision of the Secretary must stand and be AFFIRMED, and the court being sufficiently advised,

IT IS HEREBY ORDERED

1. That Plaintiff's motion for summary judgment be SUSTAINED.
2. That defendant's motion for summary judgment be DENIED.
3. That final judgment be entered in favor of PLAINTIFF and against defendant for the amounts due and the relief sought.

4. That this action be STRICKEN from the docket.

This the 25th day of August 1982.


G. WIX UNTHANK, JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 81-111

RAYMOND J. DONOVAN,
Secretary of Labor

PLAINTIFF

VS.

ORDER

BEECHTREE COAL COMPANY, INC.

DEFENDANT

* * * * *

The Court has considered plaintiff's motion filed on July 15, 1982, and has reviewed the time schedule on which the parties are operating as regards the pending summary judgment motions, and, having been sufficiently advised,

HEREBY ORDERS

That plaintiff's motion be SUSTAINED,

That, within 15 days of the date on which this order is filed, defendant respond to plaintiff's interrogatories,

That, within 10 days following defendant's response, plaintiff make any necessary amendment in (or supplement to) his support for his summary judgment motion, and

That, within the 10 days following any such amendment or supplement, defendant make any final response, after which time the Clerk of the Court is directed to resubmit the record.

This order is entered this 17th day of July, 1982.

G. WIX UNTHANK, JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 81-111

RAYMOND J. DONOVAN,
Secretary, U.S.
Dept. of Labor

PLAINTIFF,

VS:

J U D G M E N T

BEECHTREE COAL
COMPANY, INC.

DEFENDANT.

* * * * *

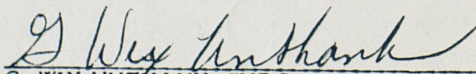
The above entitled cause came on for hearing before this court upon a motion for summary judgment. The court having considered the motion, record, together with statements of the parties thereto, and their counsel, and being advised was of the opinion that the motion was well taken and an order pursuant thereto was filed on the 25th day of August, 1982. Pursuant to same,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

That the plaintiff have judgment in the amount of \$13,360.50, together with interest thereon at the rate of 8% per annum from the date of this judgment until paid.

This is a final judgment upon all of the issues between the plaintiff and Beechtreet Coal Company, Inc., and this action is STRICKEN from the Court's active docket.

This 25th day of August, 1982.


G. WIX UNTHANK, JUDGE

Judge's Cory

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

FILED JUL 15 1982

RAYMOND J. DONOVAN
Secretary,
U.S. Department of Labor

Plaintiff,

v.

BEECHTREE COAL COMPANY, INC.

Defendant.

CIVIL ACTION FILE NO. 81-111

MOTION FOR SUMMARY JUDGMENT

Plaintiff, Raymond J. Donovan, Secretary of Labor, pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, moves for summary judgment in his favor on the grounds that there is no genuine issue as to any material fact, and that he is entitled to judgment as a matter of law. This motion is supported by the pleadings heretofore filed, the affidavit of Ralph M. Hartman, Director, Office of Workers' Compensation Programs, U.S. Department of Labor, and the memorandum of points and authorities submitted contemporaneously herewith.

WHEREFORE, Plaintiff prays that summary judgment be granted in his favor.

So moved, this 13th day of July, 1982.

Respectfully submitted,

T. TIMOTHY RYAN, JR.
Solicitor of Labor

DONALD S. SHIRE
Associate Solicitor

Charles D. Raymond

CHARLES D. RAYMOND
Co-Counsel for Black Lung Benefits

Suzanne Marelius

SUZANNE MARELIUS
Attorney
U.S. Department of Labor
Office of the Solicitor
Suite N-2620
Frances Perkins Building
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 357-0398

Attorneys for the Plaintiff

United States Attorney
for the Eastern District
of Kentucky

By: _____
Assistant U.S. Attorney

FILED JUL 15 1982

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

| | | |
|------------------------------|---|------------------------------|
| RAYMOND J. DONOVAN |) | |
| Secretary, |) | |
| U.S. Department of Labor |) | |
| |) | |
| Plaintiff, |) | CIVIL ACTION FILE NO. 81-111 |
| |) | |
| v. |) | |
| |) | |
| BEECHTREE COAL COMPANY, INC. |) | |
| |) | |
| Defendant. |) | |

AFFIDAVIT

CITY OF WASHINGTON,
DISTRICT OF COLUMBIA:

Personally before me, the undersigned officer duly authorized to administer oaths in the District of Columbia, came Ralph M. Hartman, to me known, who being duly sworn, deposes and states as follows:

1.

I am the Director of the Office of Workers' Compensation Programs (OWCP) for the Employment Standards Administration of the U.S. Department of Labor. In my capacity as the Director of the OWCP, I am responsible for the administration of the federal black lung program by the Department of Labor under the Black Lung Benefits Act (Act), 30 U.S.C. § 901 et seq. In that capacity I am also the official custodian of all reports, records, or other documents filed with the OWCP and maintained at its national office. See 20 CFR § 702.112. I am also authorized to make disbursements from the Black Lung Disability Trust Fund (Fund).

2.

In the course of my duties, I have become familiar with the facts and circumstances involved in the claim of Clinton Adams v. Beechtree Coal Company and Director, OWCP, OWCP No. Pi 407-22-8237,

the file for which is presently in the national office of the OWCP. Accordingly, I have personal knowledge of the matters hereinafter set forth. This affidavit is made pursuant to the provisions of the Federal Rules of Civil Procedure, Rule 56(d), in support of the Secretary of Labor's Motion for Summary Judgment in the above-captioned matter.

3.

On December 1, 1978, Clinton Adams filed a claim for benefits under Part C of the Act. On April 4, 1979, Roger Belcher, a claims examiner in the OWCP, issued a Notice of Initial Finding wherein it was determined that Mr. Adams was eligible for black lung benefits. Pursuant to the applicable regulations, Beechtree Coal Company was found to be the employer responsible for payment of those benefits beginning December 1, 1978. A copy of the Notice of Initial Finding is attached hereto as Exhibit "A."

4.

The Notice of Initial Finding referred to in the preceding paragraph was sent to the defendant by certified mail: c/o Beechtree Coal Company, Inc., P.O. Box 3000, Pikeville, Kentucky 41501. No response to the Notice of Initial Finding was ever filed with the OWCP by the defendant, although a receipt for said notice was returned to OWCP by the U.S. Postal Service. A copy of this receipt is attached hereto as Exhibit "B." Further, the defendant has made no showing of good cause for such failure to respond.

5.

The mailing address of Beechtree Coal Company, Inc., P.O. Box 3000, Pikeville, Kentucky 41501, was provided to the OWCP by defendant's insurance carrier, Old Republic Insurance Company. A copy of the cards returned to OWCP which were filled out by the carrier are attached hereto as Exhibit "E."

6.

In a proposed decision and order (entitled Award of Benefits) dated June 14, 1979, Deputy Commissioner Daryl Ratliff determined that Mr. Adams was entitled to benefits under the Act, and that the defendant was responsible for their payment. A copy of the proposed decision and order is attached hereto as Exhibit "C."

7.

The proposed decision and order referred to in the preceding paragraph was sent to the defendant by certified mail on June 15, 1979. No response to the proposed decision and order was ever filed with the OWCP by the defendant, although a receipt therefor was returned to OWCP by the U.S. Postal Service. A copy of this receipt is attached hereto as Exhibit "D."

8.

Pursuant to the applicable regulation (20 CFR § 725.419(d)), the proposed decision and order became final and effective on or about July 14, 1979, 30 days following the date of its issuance. The defendant, however, did not commence benefit payments to the claimant in compliance with that order.

9.

Commencing December 1, 1978, the Department of Labor instituted benefit payments to Mr. Adams from the Fund on behalf of the defendant in accordance with section 424 of the Act. To date, the Fund has paid benefits to Mr. Adams in the amount of \$18,577.50 (this includes July benefits). Those payments will continue at the rate of \$439.80 per month (or at such rate as may hereafter be prescribed by law) until such time as the defendant commences the payment of benefits in accordance with the above compensation order. In accordance with 20 CFR § 725.608, interest has accrued at the annual rate of 6 percent from December 1, 1978, until passage of the recent amendments to the Black Lung Benefits Act

which provide that the rate shall be 15 percent during calendar year 1982 and thereafter at the rate established by section 6621 of the Internal Revenue Code.

10.

On December 22, 1980, the Department of Labor demanded repayment to the Fund for the benefits theretofore paid the claimant and also requested the defendant to commence benefit payments to the claimant in accordance with the compensation order. A copy of the demand letter is attached hereto as Exhibit "F."

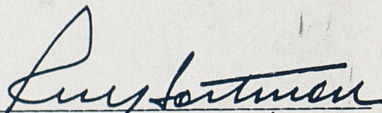
11.

The defendant has failed to comply with said demand and is presently indebted to the Fund in the amount of \$18,577.50 through July 1, 1982, plus interest.

12.

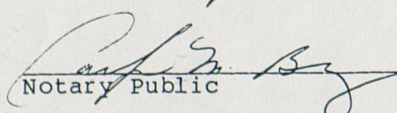
By the authority vested in me, I hereby certify that all of the Exhibits referred to in this affidavit and attached hereto are true and correct copies of the original documents appearing in the official record in the claim of Clinton Adams v. Beechtree Coal Company, OWCP No. Pi 407-22-8237.

FURTHER AFFIANT SAYETH NOT.


RALPH M. HARTMAN, Director
Office of Workers' Compensation
Programs,
United States Department
of Labor

Sworn to and subscribed before me this 9th day of

July, 1982.


Notary Public

My Commission Expires Dec. 14, 1982

My Commission Expires: _____

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
Office of Workers' Compensation Programs
Division of Coal Mine Workers' Compensation

Federal Building
Pikeville, Ky. 41501

APR 04 1979



NOTICE OF INITIAL FINDING

| | |
|-------------------------------------|-------------------------------------|
| Coal Mine Operator | Miner's Name |
| Beechtree Coal Company, Inc. | Clinton Adams |
| Address(St.No.,City,State,Zip Code) | Claimant's Name |
| P.O. Box 3000 | Same |
| | Address(St.No.,City,State,Zip Code) |
| Pikeville, Ky. 41501 | Rt. 1, Box 842K |
| Claim Number | |
| Pi 407-22-8237 | Pikeville, Ky. 41501 |

Enclosed is a copy of a claim for benefits under the Federal Mine Safety and Health Act of 1977, as amended (30 U.S.C. 901 et seq.) with copies of the evidence and documents filed in support of the claim. The claim alleges total disability or death of the above referenced coal miner from pneumoconiosis caused by coal mine employment. We have made an initial finding based upon the submitted evidence that the claimant is entitled to benefits.

The miner became totally disabled/died on December 1, 1978.
The following person(s), if any, is or was a dependent(s) or survivor(s) of the miner Georgia - spouse; Tony - child
and the claimant is entitled to augmented benefits under Section 412(a) of the Act (30 U.S.C. 922) on behalf of the dependent(s) or survivor(s), if any.

We have reviewed the miner's employment history and in accordance with the Regulations (20 CFR 725.412 et seq.) for determining a responsible operator, have initially found that your company is liable to pay benefits under the Act from December 1978.

You are also liable for the payment of all fees, charges, and other reasonable expenses incurred by the miner/claimant in developing the claim and for such medical examination, treatment, service, medicine and apparatus required by the miner's disability.

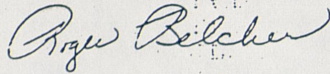
Affidavit Exhibit "A"

If you agree with the initial finding, you should have an authorized officer of your organization sign and return to this Office the Agreement to Pay Benefits (Form CM-941), begin the payment of benefits including any accrued benefit amount in accordance with the rates shown on the attached table (CM-971d) within 10 days of your receipt of this notice, and file the Notice of First Payment of Benefits (Form CM-906) with this Office. The Agreement to Pay Benefits will be used as the basis for the issuance of an Award of Benefits and Order to Pay Benefits.

If you wish to contest the initial finding, you must file a controversion (CM-970) with this office within thirty days of the date of this notice. The record will remain open for an additional period of 30 days unless extended for good cause by the Deputy Commissioner, for the submission of additional evidence, including the examination of the claimant by a physician of your choice.

If you fail to respond within 30 days, you will be deemed to have accepted the initial finding, and this failure shall be considered a waiver of your right to contest this claim unless good cause is shown to excuse such failure (CFR 725.413).

Sincerely,



Claims Examiner

cc: Claimant

Enclosures:

Copy of claim and support documents
Form CM-906, Notice of First Payment of Benefits
Form CM-941, Agreement to Pay Benefits
Form CM-970, Operator Controversion
Form CM-971d, Benefit Rate Table

PS Form 3811, Aug. 1978

● SENDER: Complete items 1, 2, and 3.
Add your address in the "RETURN TO" space on reverse.

1. The following service is requested (check one).
 Show to whom and date delivered c
 Show to whom, date, and address of delivery c
 RESTRICTED DELIVERY
 Show to whom and date delivered c
 RESTRICTED DELIVERY.
 Show to whom, date, and address of delivery \$
 (CONSULT POSTMASTER FOR FEES)

2. ARTICLE ADDRESSED TO:
 Beechtree Coal Company, Inc.
 Clinton Adams Pi 407-22-8237

3. ARTICLE DESCRIPTION:
 REGISTERED NO. CERTIFIED NO. INSURED NO.
 829927

(Always obtain signature of addressee or agent)

I have received the article described above.
 SIGNATURE Addressee Authorized agent
Billy R. Adams

4. DATE OF DELIVERY 4-5-79 POSTMARK
 ADD 5 1979

5. ADDRESS (Complete only if requested):
 MPO
 Pikeville, Ky 41507

6. UNABLE TO DELIVER BECAUSE: CLERK'S INITIALS

RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

4-4-79

☆ GPO: 1978-272-382

No. 829927
 RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
 NOT FOR INTERNATIONAL MAIL
 (See Reverse)

SENT TO
 Beechtree Coal Co., Inc.
 STREET AND NO.
 P.O., STATE AND ZIP CODE

POSTAGE \$

| | | |
|--|---|--------|
| CONSULT POSTMASTER FOR FEES | CERTIFIED FEE | c |
| | SPECIAL DELIVERY | c |
| | RESTRICTED DELIVERY | c |
| OPTIONAL SERVICES | RETURN RECEIPT SERVICE | |
| | SHOW TO WHOM AND DATE DELIVERED | c |
| | SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY | c |
| | SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY | c |
| | SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY | c |
| TOTAL POSTAGE AND FEES | | \$ |
| POSTMARK OR DATE | | 4-4-79 |
| Clinton Adams Pi 407-22-8237 Initial Finding | | |

PS Form 3800, Apr. 1976

Affidavit Exhibit "B"



In the Matter of the Claim for Benefits :
Under the Black Lung Benefits Act :

AWARD OF BENEFITS

Clinton Adams
Rt. 1, Box 842 K
Pikeville, KY 41601
Claimant

Claim No.: P1 407-22-8237

Beechtree Coal Company, Inc.
P.O. Box 3000
Pikeville, KY 41601
Responsible Operator

Such development, examination, investigation and review as is deemed necessary having been completed, and no formal hearing having been requested by any interested party nor deemed necessary pursuant to the Black Lung Benefits Act, hereinafter referred to as the Act, and the Regulations pertaining thereto, the Deputy Commissioner, having duly considered the foregoing, hereby makes the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. That Clinton Adams, born May 1, 1925, hereinafter referred to as the claimant, was employed as a coal miner in the Nation's coal mines for 12 years, from 1950 to 1977;
2. That as a result of the conditions of coal mine employment, the claimant has contracted a severe chronic respiratory disease diagnosed as coal workers' pneumoconiosis, as that term is defined in the Act and the Regulations pertaining thereto;
3. That such severe chronic respiratory disease has caused a breathing impairment of sufficient degree to establish total disability within the meaning of the Act and the Regulations pertaining thereto;
4. That notice of disability and written claim for benefits was timely filed on December 1, 1978;
5. That the Beechtree Coal Company, Inc. is responsible for payments of benefits to the claimant as provided by the Act;

Director's ~~...~~ No. 13

Consisting of 3 pages.

Form CM-1098
Nov. 1978

The following dependents:

| Name | Date of Birth | Relation | Date entitlement ended |
|---|---------------|----------|------------------------|
| Georgia | 03-26-35 | spouse | |
| Tony | 01-16-61 | child | |
| | | | |
| Additional dependents not listed above: | | | |
| | | | |

at the following rates:

| From | To | No. Months | Rate | Total |
|-------|-------|------------|-----------|-------------|
| 12/78 | 05/79 | 06 | \$ 405.90 | \$ 2,435.40 |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| TOTAL | | | | \$ 2,435.40 |

including the following offsets:

| Type | Amount | From | To |
|-----------------|--------|------|----|
| None at present | | | |
| | | | |
| | | | |
| | | | |

and continuing at the monthly rate of \$ 405.90 ;

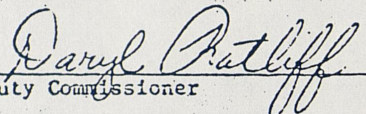
Based upon the foregoing Findings of Fact and Conclusions of Law, the Deputy Commissioner makes the following:

AWARD

The Beechtree Coal Company, Inc. shall pay to the claimant all benefits due from December 1978 to the present, and shall thereafter continue to pay benefits to the claimant at the prevailing rate, subject to the limitations of the Act.

The Beechtree Coal Company, Inc. shall provide the claimant with ~~all reasonable and necessary medical treatment required for his pneumo-~~ ~~niosis condition, including the reasonable costs of transportation to~~ obtain such treatment, beginning December 1978 and continuing in accordance with the provisions of the Act.

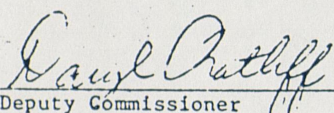
Signed at Pikeville, Kentucky
this 14th day of June, 1979


Deputy Commissioner

ADDENDUM

That Attorney Herbert Deskins, Jr. is a duly appointed representative of this claimant. No application for Approval of a Representative's Fee has been received.

From the total amount of benefits due the claimant, a sum of \$ 0 is withheld for attorney fees. Upon the receipt of the fee application and approval as per the Regulations, any amount of money withheld in excess of the amount approved shall be returned to the claimant. Any amount of fees approved in excess of the amount withheld shall be paid from future benefits to which the claimant is entitled.


Deputy Commissioner