

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO: 82-470

RAYMOND J. DONOVAN, Secretary
of Labor, United States
Department of Labor

PLAINTIFF,

VS. PRELIMINARY MEMORANDUM
AND MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

McAND MINING, INC.

DEFENDANT.

* * * * *

I. JURISDICTION OF THE COURT

This Court has jurisdiction of the within action pursuant to
30 U.S.C. §820(j)(Supp. IV 1980):

Civil penalties owed under this Act shall accrue to the United States and may be recovered in a civil action in the name of the United States brought in the United States District Court for the district where the violation occurred or where the operator has its principal office. Interest at the rate of 8 percent per annum shall be charged against a person on any final order of the Commission, or the court. Interest shall begin to accrue 30 days after the issuance of such order.

II. KIND OF ACTION

Civil action to collect monies owed the United States of America by reason of assessment of civil penalties against defendant by agents of the Mine Safety and Health Administration; U.S. Department of Labor, pursuant to 30 U.S.C. §815(a) (Supp. IV 1980):

If, after an inspection or investigation, the Secretary issued citation or order under the section 104, he shall, within a reasonable time after termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed under section 110(a) for the violation cited and that the operator has 30 days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. A copy of such notification shall be sent by mail to the representative of the miners in such mine. If within 30 days from the receipt of the notification

issued by the Secretary, the operator fails to notify the Secretary that he intends to contest the citation or the proposed assessment of penalty, and no notice is filed by any miner or representative of miners under subsection (d) of this section within such time, the citation and the proposed assessment of penalty shall be deemed a subject to review by any court or agency. Refusal by the operator or his agent to accept certified mail containing a citation and proposed assessment of penalty under this subsection shall constitute receipt thereof within the meaning of this subsection.

III. STATEMENT OF FACTS

Defendant is the operator of: Mine No. 15-09727 of McAnd Mining, Inc., located at Racoon, Pike County, Kentucky with coal mines subject to the Act and with principal offices located in Pikeville, Kentucky, within the jurisdiction of this Court. Defendant is the operator of: Mine No. 15-09727 of McAnd Mining, Inc., P.O. Box 147, Racoon, Kentucky 41556, with principal offices at C-4, Box 194, Pikeville, Kentucky, 41501; both the mine locations and the principal office being within the jurisdiction of this Court.

Defendant received and accepted service of the proposed civil penalty assessments issued to it by the Secretary of Labor, but failed to contest said proposed assessments within thirty (30) days. Accordingly, pursuant to section 105(a) of the Act, 30 U.S.C. 815 (a), said proposed assessments became final orders of the Federal Mine Safety and Health Review Commission.

IV. ISSUES OF SUBSTANTIVE LAW

A. Issues: None

B. Discussion:

As can be determined from a review of the prior sections

hereof, there are no substantive legal issues to be determined by the Court herein. The statutes relied upon by the United States of America are explicit and specific in the language as to the method that the Defendant must employ in contesting any penalty assessments. See 30 U.S.C. §815(a). When, as in the case here, the Defendant fails to pursue the administrative review of the penalty assessment, those assessments become final non-reviewable orders. 30 U.S.C. §815(a). The District Court has no authority to reverse the administrative decision, rather is required to enter judgment in favor of the United States as prayed for in the Complaint filed herein. See Marshall v. West Virginia Rebel Coal Company, Inc., Pikeville Civil Action No. 80-101 (E.D.KY. entered February 20, 1981), and Marshall v. Janeco Coal Co., Inc., London C.A. No. 79-236 (E.D.KY. entered September 21, 1981).


V. ISSUES OF PROCEDURAL LAW

None

Respectfully submitted,

LOUIS DEFALAISE
UNITED STATES ATTORNEY

By:


KARL L. ANDERSON
Assistant U.S. Attorney

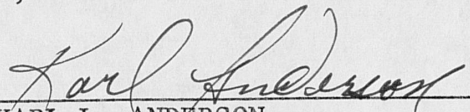
Of Counsel:
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Boulevard
Arlington, Virginia 22203
Telephone: (703) 235-1171

CERTIFICATE OF SERVICE

I the undersigned hereby certify that a true copy of the foregoing Memorandum was served by delivering personally to:

Hon. Herman W. Lester
Combs and Lester, P.S.C.
207 Caroline Avenue
Pikeville, Kentucky

This the 15th day of June, 1983.



KARL L. ANDERSON
ASSISTANT U.S. ATTORNEY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO: 82-470

RAYMOND J. DONOVAN, Secretary
of Labor, United States
Department of Labor

PLAINTIFF

VS.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

McAND MINING, INC.

DEFENDANT.

* * * * *

Plaintiff moves the Court as follows:

That it enter pursuant to Rule 56 of the Federal Rules of Civil Procedure, Summary Judgment in Plaintiff's favor for the relief demanded in the Complaint on the ground that there is no genuine issue as to any material fact, and that Plaintiff is entitled to judgment as a matter of law.

This motion is based upon

- (a) The pleadings;
- (b) The attached certified copies of the complete administrative records of the civil penalty orders listed in Exhibit "A" included with the Complaint;
- (c) The attached affidavit; and
- (d) Sections 105(a) and 110(j) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(a) and §820(j) (Supp. IV 1980).

Respectfully submitted,

LOUIS DEFALAISE
UNITED STATES ATTORNEY

By Karl L. Anderson
KARL L. ANDERSON
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 82-470

RAYMOND DONOVAN, Secretary
United States
Department of Labor,

PLAINTIFF,

VS.

AFFIDAVIT

McAND MINING, INC.,

DEFENDANT.

COMMONWEALTH OF KENTUCKY
COUNTY OF FAYETTE

I, Karl L. Anderson, having been first duly sworn under oath, do hereby
depose and say the following:

1. I am an Assistant United States Attorney for the Eastern District of
Kentucky and in such capacity represent the plaintiff in the above-entitled
action.

2. Based on the assessment records in my office, I hereby verify that
defendant was given notice of the civil penalty assessments listed in Exhibit "A"
attached to the Complaint, that defendant failed to contest said assessments
within thirty (30) days after service thereof, that said assessments accordingly
became final orders of the Federal Mine Safety and Health Act of 1977, and the
sum certain claimed in the complaint, namely \$7,032.00 plus interest at the rate
of 8 percent per annum accruing 30 days after the final order date of the Federal
Mine Safety and Health Review Commission, is the correct amount of civil penalty
debt due and owing by defendant under section 110 (j) of the Act.

Karl L. Anderson
KARL L. ANDERSON

Subscribed and sworn to before me by Karl L. Anderson, this 25th day of
May, 1983.

Glenda P. Glas
Notary Public

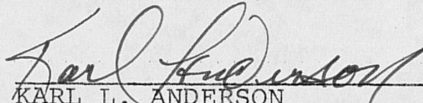
My Commission Expires: June 28, 1986

CERTIFICATE OF SERVICE

I the undersigned hereby certify that a true copy of the foregoing Motion for Summary Judgment was served by delivering personally to:

Hon. Herman W. Lester
Combs and Lester, P.S.C.
207 Caroline Avenue
Pikeville, Kentucky

This the 15th day of June, 1983.


KARL L. ANDERSON
ASSISTANT U.S. ATTORNEY

TO: Judge
FROM: Donald
DATE: 6-16-83
RE: 82-470
Raymond J. Donovan v. McAnd Mining Inc.

PC, Friday, 6-17-83, at 10:30

Synopsis: This is your basic action for the collection of civil penalties for assessments that have become final. The assessments for violations total \$7,032.00

Pending Motions:

1. Plff has moved for S/J, and filed his memo in support thereof.

Comments:

1. Plff has submitted a proposed order and judgment on his S/J motion. I assume the Court will rule on this motion at the PC.
2. Plff has filed his memo for S/J, but has failed to file a PC memo.
3. Def. has tendered a PC memo. It was untimely.

Let it be filed

does ~~to deny it now~~

*(1) affidavit by Anderson
noting assessment given
No Contest.*

*Assessment entered & final
(2) no Contest - Affidavit .??.?*

*Don
Hermon*