

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

January 8, 1997

BUCK CREEK COAL, INC., : CONTEST PROCEEDINGS
Contestant :
v. : Docket No. LAKE 94-255-R
: Citation No. 3862187; 6/1/94
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH : Docket No. LAKE 94-257-R
ADMINISTRATION (MSHA), : Citation No. 3862188; 6/1/94
Respondent :
: Docket No. LAKE 94-268-R
: Citation No. 4056453; 5/31/94
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: Docket No. LAKE 94-295-R
: Citation No. 4259841; 5/28/94
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: Docket No. LAKE 94-296-R
: Citation No. 4259842; 5/28/94
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: Docket No. LAKE 94-297-R
: Citation No. 4259843; 5/28/94
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: Docket No. LAKE 94-298-R
: Citation No. 4259845; 5/28/94
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: Docket No. LAKE 94-377-R
: Citation No. 4262302; 5/20/94
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: Docket No. LAKE 94-381-R
: Citation No. 4262306; 5/20/94
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: Docket No. LAKE 94-392-R
: Citation No. 4262318; 5/31/94
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: Docket No. LAKE 94-393-R
: Citation No. 4262319; 5/31/94
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: Docket No. LAKE 94-409-R
: Citation No. 4262370; 5/23/94
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: Docket No. LAKE 94-410-R

: Citation No. 4262371; 5/23/94
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: Docket No. LAKE 94-411-R
: Citation No. 4262373; 5/23/94
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: Docket No. LAKE 94-452-R
: Citation No. 4262124; 6/11/94
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: Docket No. LAKE 94-461-R
: Citation No. 4262126; 6/13/94
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: Docket No. LAKE 94-467-R
: Citation No. 4261555; 6/14/94
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: Docket No. LAKE 94-468-R
: Citation No. 4261556; 6/14/94
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: Citation No. 4261559; 6/14/94
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: Docket No. LAKE 94-472-R
: Citation No. 4261560; 6/14/94
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: Docket No. LAKE 94-473-R
: Citation No. 4261561; 6/14/94
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: Docket No. LAKE 94-474-R
: Citation No. 4056790; 6/14/94
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: Citation No. 4056794; 6/14/94
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: Citation No. 4056795; 6/14/94
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: Citation No. 4056796; 6/14/94

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: Citation No. 4056797; 6/14/94
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: Citation No. 4056799; 6/14/94
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: Citation No. 4056800; 6/15/94
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: Citation No. 4262077; 6/15/94
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: Citation No. 4258862; 6/16/94
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: Citation No. 4258863; 6/16/94
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: Citation No. 4261566; 6/16/94
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: Citation No. 4261758; 6/16/94
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: Citation No. 4261901; 6/17/94
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: Docket No. LAKE 94-506-R
: Citation No. 3862539; 6/19/94
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: Citation No. 3862710; 6/19/94
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: Citation No. 3826719; 6/20/94
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: Citation No. 3859802; 6/20/94
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: Citation No. 4259234; 6/20/94
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: Citation No. 3861582; 6/21/94
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: Docket No. LAKE 94-572-R
: Citation No. 4261951; 7/2/94
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: Docket No. LAKE 94-573-R
: Citation No. 4050832; 7/5/94
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: Citation No. 4267448; 7/6/94
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: Citation No. 3847802; 7/7/94
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: Citation No. 4286052; 8/9/94
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: Docket No. LAKE 94-703-R
: Citation No. 3844461; 8/18/94
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: Docket No. LAKE 94-717-R
: Citation No. 4386056; 9/6/94
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: Citation No. 4260207; 10/7/94
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: Docket No. LAKE 95-65-R
: Citation No. 4260192; 10/12/94
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: Docket No. LAKE 95-66-R
: Citation No. 4260193; 10/12/94
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: Docket No. LAKE 95-72-R
: Citation No. 4262571; 10/12/94
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: Docket No. LAKE 95-82-R
: Citation No. 4260215; 10/26/94
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: Docket No. LAKE 95-141-R
: Citation No. 4259852; 11/22/94
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: Docket No. LAKE 95-153-R
: Citation No. 9941923; 11/29/94

DEFAULT DECISION

Before: Judge Hodgdon

These cases are before me on Notices of Contest filed by Buck Creek Coal, Inc., pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 815. With the exception of Docket Nos. LAKE 95-63-R, LAKE 95-65-R and LAKE 95-66-R, all of the notices pertain to violations for which either no civil penalty has been assessed or Buck Creek has not contested the penalty proposed. For the reasons set forth below, I find the company in default, affirm the orders and citations, and dismiss the Notices of Contest.

These cases are several in a long line of proceedings involving Buck Creek.¹ At various times during the past two

¹ Because of the number of cases involving Buck Creek, Docket No. LAKE 94-72 was designated as the master docket for

years proceedings in these cases have been stayed pending the outcome of criminal actions brought by the U.S. Attorney against the company. The criminal cases were completed in the spring of this year when the company pleaded guilty to all 12 counts of the indictment against it.

On May 1, 1996, counsel for the Secretary served Interrogatories and a Request for Production of Documents on the Respondent. On June 24, counsel filed a Motion to Compel stating that Buck Creek had received the discovery requests on May 3, but had not responded to them. Consequently, the Secretary requested that the company be compelled to respond to the requests and that if the company did not respond to the requests a default decision be issued in the proceedings. Buck Creek did not respond to the Motion to Compel.

Based on the Secretary's unopposed motion, an Order Compelling Response to Discovery Requests was issued on July 29, 1996. Buck Creek was ordered to respond to the Secretary's discovery requests within 21 days of the date of the order. The company was further cautioned that **A[ff]ailure to respond will result in the issuance of an Order of Default, without the issuance of a prior Order to Show Cause.**@

The order was sent by Certified Mail-Return Receipt Requested to Chuck Shultise, President of Buck Creek; Randall Hammond, Mine Superintendent; and Terry G. Farmer, Esq., the company's bankruptcy counsel. Return Receipt Cards have been received from all three indicating that the order was received on either July 31 or August 1.

On September 17, 1996, the Secretary filed a Motion for an Order of Default stating that as of that date the company had not responded to the discovery requests. Therefore, the Secretary requested that an order of default be issued. Buck Creek has not responded to the motion.

I am aware that Buck Creek is apparently in bankruptcy. However, filing a petition in bankruptcy does not automatically

filings in any of the cases. However, this decision identifies, in the caption, the specific docket numbers of the cases involved.

stay proceedings before the Commission or foreclose an entry of judgment against the company. 11 U.S.C. ' 362(b)(4); *Holst Excavating, Inc.*, 17 FMSHRC 101, 102 (February 1995); *Secretary of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 12 FMSHRC 1521, 1530 (August 1990).

Commission Rule 59, 29 C.F.R. ' 2700.59, states that A[i]f any person, including a party, fails to comply with an order compelling discovery, the Judge may make such orders with regard to the failure as are just and appropriate@ Commission Rule 66(a), 29 C.F.R. ' 2700.66(a), requires that A[w]hen a party fails to comply with an order of a Judge . . . an order to show cause shall be directed to the party before the entry of any order of default or dismissal.@

In view of the Respondent's consistent failure to respond to the Secretary's discovery requests or motions regarding the requests, I concluded that issuing an order to show cause before issuing a default decision in these cases would be a futile act. Consequently, I warned the Respondent in the order compelling discovery that failure to respond would result in default without going through the motion of issuing an order to show cause. The Respondent's subsequent failure to respond to the order compelling responses to the discovery requests or the Secretary's motion for default demonstrate that that conclusion was correct. Furthermore, by putting the warning in the order and sending it Certified-Return Receipt Requested, the requirements of Rule 66(a) were complied with.

ORDER

Based on the above, I find the Respondent, Buck Creek Coal, Inc., **IN DEFAULT** in these cases. Accordingly, Citation No. 3862187 in Docket No. LAKE 94-255-R, Citation No. 3862188 in Docket No. LAKE 94-257-R, Citation No. 4056453 in Docket No. LAKE 94-268-R, Citation No. 4259841 in Docket No. LAKE 94-295-R, Citation No. 4259842 in Docket No. LAKE 94-296-R, Citation No. 4259843 in Docket No. LAKE 94-297-R, Citation No. 4259845 in Docket No. LAKE 94-298-R, Citation No. 4262302 in Docket No. LAKE 94-377-R, Order No. 4262306 in Docket No. LAKE 94-381-R, Citation No. 4262318 in Docket No. LAKE 94-392-R, Citation No. 4262319 in Docket No. LAKE 94-393-R, Citation No. 4262370 in Docket No. LAKE 94-409-R, Citation No. 4262371 in Docket No. LAKE 94-410-R, Order No. 4262373 in Docket No. LAKE 94-411-R, Citation No. 4262124 in Docket No. LAKE 94-452-R, Citation No. 4262126 in Docket No. LAKE 94-461-R, Citation No. 4261555 in Docket No. LAKE 94-467-R, Citation No. 4261556 in Docket No. LAKE 94-468-R, Citation No.

4261557 in Docket No. LAKE 94-469-R, Citation No. 4261558 in Docket No. LAKE 94-470-R, Citation No. 4261559 in Docket No. LAKE 94-471-R, Citation No. 4261560 in Docket No. LAKE 94-472-R, Citation No. 4261561 in Docket No. LAKE 94-473-R, Citation No. 4056790 in Docket No. LAKE 94-474-R, Citation No. 4056792 in Docket No. LAKE 94-476-R, Citation No. 4056793 in Docket No. LAKE 94-477-R, Order No. 4056794 in Docket No. LAKE 94-478-R, Citation No. 4056795 in Docket No. LAKE 94-479-R, Citation No. 4056796 in Docket No. LAKE 94-480-R, Citation No. 4056797 in Docket No. LAKE 94-481-R, Citation No. 4056798 in Docket No. LAKE 94-482-R, Citation No. 4056799 in Docket No. LAKE 94-483-R, Citation No. 4056800 in Docket No. LAKE 94-485-R, Citation No. 4258861 in Docket No. LAKE 94-486-R, Citation No. 4261562 in Docket No. LAKE 94-487-R, Citation No. 4261563 in Docket No. LAKE 94-488-R, Citation No. 4261564 in Docket No. LAKE 94-489-R, Order No. 4262077 in Docket No. LAKE 94-491-R, Citation No. 4258862 in Docket No. LAKE 94-493-R, Citation No. 4258863 in Docket No. LAKE 94-494-R, Citation No. 4261566 in Docket No. LAKE 94-496-R, Citation No. 4261758 in Docket No. LAKE 94-497-R, Citation No. 4261901 in Docket No. LAKE 94-501-R, Order No. 4262079 in Docket No. LAKE 94-502-R, Citation No. 3862539 in Docket No. LAKE 94-506-R, Citation No. 3862710 in Docket No. LAKE 94-509-R, Citation No. 3862711 in Docket No. LAKE 94-510-R, Citation No. 3862712 in Docket No. LAKE 94-511-R, Citation No. 3862713 in Docket No. LAKE 94-512-R, Citation No. 3862714 in Docket No. LAKE 94-513-R, Citation No. 3862715 in Docket No. LAKE 94-514-R, Order No. 3862716 in Docket No. LAKE 94-515-R, Citation No. 4259232 in Docket No. LAKE 94-518-R, Citation No. 4259233 in Docket No. LAKE 94-519-R, Citation No. 3826719 in Docket No. LAKE 94-521-R, Citation No. 3859802 in Docket No. LAKE 94-522-R, Citation No. 4259234 in Docket No. LAKE 94-523-R, Citation No. 3861582 in Docket No. LAKE 94-528-R, Citation No. 3862720 in Docket No. LAKE 94-529-R, Citation No. 3861583 in Docket No. LAKE 94-531-R, Citation No. 3861584 in Docket No. LAKE 94-532-R, Citation No. 3861585 in Docket No. LAKE 94-533-R, Citation No. 3861586 in Docket No. LAKE 94-534-R, Citation No. 3861588 in Docket No. LAKE 94-536-R, Citation No. 4261568 in Docket No. LAKE 94-539-R, Citation No. 4261567 in Docket No. LAKE 94-540-R, Citation No. 4261569 in Docket No. LAKE 94-541-R, Citation No. 4261570 in Docket No. LAKE 94-542-R, Citation No. 4267425 in Docket No. LAKE 94-544-R, Citation No. 4267426 in Docket No. LAKE 94-545-R, Order No. 4261905 in Docket No. LAKE 94-550-R, Citation No. 4261944 in Docket No. LAKE 94-553-R, Citation No. 4261881 in Docket No. LAKE 94-557-R, Order No. 4261951 in Docket No. LAKE 94-572-R, Order No. 4050832 in Docket No. LAKE 94-573-R, Order No. 3037099 in Docket No. LAKE 94-576-R, Citation No. 4054808 in Docket No. LAKE 94-577-R, Citation No. 4054809 in Docket No. LAKE 94-578-R, Citation No. 4267448 in Docket No. LAKE 94-579-R, Citation No. 3847802 in Docket No. LAKE 94-586-R, Order No. 4267450 in Docket

No. LAKE 94-587-R, Citation No. 4267451 in Docket No. LAKE 94-588-R, Citation No. 4267452 in Docket No. LAKE 94-589-R, Citation No. 4259795 in Docket No. LAKE 94-613-R, Order No. 4259800 in Docket No. LAKE 94-622-R, Order No. 4260061 in Docket No. LAKE 94-625-R, Order No. 4260063 in Docket No. LAKE 94-627-R, Citation No. 3843969 in Docket No. LAKE 94-639-R, Citation No. 4286052 in Docket No. LAKE 94-672-R, Order No. 4260034 in Docket No. LAKE 94-699-R, Order No. 3844461 in Docket No. LAKE 94-703-R, Order No. 4386056 in Docket No. LAKE 94-717-R, Citation No. 4260186 in Docket No. LAKE 95-37-R, Citation No. 4260187 in Docket No. LAKE 95-38-R, Citation No. 4260188 in Docket No. LAKE 95-39-R, Order No. 4260207 in Docket No. LAKE 95-63-R,² Citation No. 4260192 in Docket No. LAKE 95-65-R,³ Order No. 4260193 in Docket No. LAKE 95-66-R,⁴ Order No. 4262571 in Docket No. LAKE 95-72-R, Order No. 4260215 in Docket No. LAKE 95-82-R, Order No. 4259852 in Docket No. LAKE 95-141-R, and Citation No. 9941923 in Docket No. LAKE 95-153-R are **AFFIRMED** and the Notices of Contest are **DISMISSED**.

T. Todd Hodgdon

² This order was affirmed in a Default Decision encompassing Docket No. LAKE 95-214 issued on November 1, 1996. *Buck Creek Coal, Inc.*, 18 FMSHRC 1925 (November 1996).

³ This citation was affirmed in a Default Decision encompassing Docket No. LAKE 95-111 issued on December 27, 1996. *Buck Creek Coal, Inc.*, 18 FMSHRC ____ (December 1996).

⁴ This order was affirmed in a Default Decision encompassing Docket No. LAKE 95-206 issued on November 1, 1996. *Buck Creek Coal, Inc.*, 18 FMSHRC 1925 (November 1996).

Administrative Law Judge

Distribution:

Rafael Alvarez, Esq., Office of the Solicitor, U.S. Department of Labor, 230 S. Dearborn St., 8th Floor, Chicago, IL 60604
(Certified Mail)

Mr. Chuck Shultise, President, Buck Creek Coal Co., Inc., RR5, Box 203, Sullivan, IN 47882 (Certified Mail)

Mr. Randall Hammond, Superintendent, Buck Creek Coal Co., Inc., 2156 S. County Rd., 50 West St., Sullivan, IN 47882 (Certified Mail)

Terry G. Farmer, Esq., Bamberger, Foreman, Oswald, & Hahn, 708 Hulman Bldg., P.O. Box 657, Evansville, IN 47704 (Certified Mail)

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