FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

December 13, 1996

BUCK CREEK COAL, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. LAKE 94-288-R
	:	Citation No. 4259175; 5/25/94
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. LAKE 94-465-R
ADMINISTRATION (MSHA),	:	Citation No. 4262128; 6/14/94
Respondent	:	
	:	Docket No. LAKE 94-498-R
	:	Citation No. 4261759; 6/16/94
	:	
	:	Docket No. LAKE 94-500-R
	:	Citation No. 4261737; 6/17/94
	:	
	:	Docket No. LAKE 94-504-R
	:	Citation No. 3862537; 6/19/94
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	:	Docket No. LAKE 94-505-R
	:	Citation No. 3862538; 6/19/94
	:	
	:	Docket No. LAKE 94-507-R
	:	Citation No. 3862540; 6/19/94
	:	
	:	Docket No. LAKE 94-508-R
	:	Citation No. 3862709; 6/19/94
	:	
	:	Docket No. LAKE 94-517-R
	:	Citation No. 3859801; 6/19/94
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 94-669
Petitioner	:	A.C. No. 12-02033-03636
v.	:	
	:	Buck Creek Mine
BUCK CREEK COAL, INC.,	:	
Respondent	:	
	:	

BUCK CREEK COAL, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. LAKE 94-526-R
	:	Citation No. 3859804; 6/21/94
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. LAKE 94-527-R
ADMINISTRATION (MSHA),	:	Citation No. 3861581; 6/21/94
Respondent	:	
	:	Docket No. LAKE 94-535-R
	:	Citation No. 3861587; 6/22/94
	:	
	:	Docket No. LAKE 94-537-R
	:	Citation No. 4259236; 6/22/94
	:	
	:	Docket No. LAKE 94-538-R
	:	Citation No. 4259237; 6/22/94
	:	
	:	Docket No. LAKE 94-543-R
	:	Citation No. 4267424; 6/22/94
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 94-670
Petitioner	:	A.C. No. 12-02033-03637
v.	:	
	:	Buck Creek Mine
BUCK CREEK COAL, INC.,	:	
Respondent	:	
	:	
BUCK CREEK COAL, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. LAKE 94-546-R
	:	Citation No. 4261765; 6/23/94
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. LAKE 94-547-R
ADMINISTRATION (MSHA),	:	Citation No. 4261904; 6/23/94
Respondent	:	
	:	Docket No. LAKE 94-548-R
	:	Citation No. 4262129; 6/23/94
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	:	Docket No. LAKE 94-552-R
	:	Citation No. 4261906; 6/26/94
	:	
	:	Docket No. LAKE 94-555-R
	:	Citation No. 4261962; 6/28/94
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	: Docket No. LAKE 94-556-R
	: Citation No. 4386113; 6/28/94
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	: Docket No. LAKE 94-558-R
	: Citation No. 4261882; 6/29/94
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	: Docket No. LAKE 94-562-R
	: Citation No. 4386114; 6/30/94
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	: Docket No. LAKE 94-569-R
	: Citation No. 4261910; 7/1/94
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	: Docket No. LAKE 94-571-R
	: Citation No. 4261486; 7/2/94
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	: Docket No. LAKE 94-574-R
	: Citation No. 4261912; 7/5/94
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	: Docket No. LAKE 94-580-R
	: Citation No. 4267449; 7/6/94
	:
	: Docket No. LAKE 94-582-R
	: Citation No. 4050833; 7/7/94
	:
SECRETARY OF LABOR,	: CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:
ADMINISTRATION (MSHA),	: Docket No. LAKE 94-671
Petitioner	: A.C. No. 12-02033-03638
v.	:
	: Buck Creek Mine
BUCK CREEK COAL, INC.,	:
Respondent	:

DEFAULT DECISION

Before: Judge Hodgdon

These cases are before me on Notices of Contest filed by Buck Creek Coal, Inc., Petitions for Assessment of Civil Penalty filed by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), against Buck Creek pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petitions allege 28 violations of the Secretary's mandatory health and safety standards and seek penalties of $8,200.00. For the reasons set forth below, I find the company in default, affirm the orders and citations, and assess penalties of $8,200.00.

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

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[1] Because of the number of cases involving Buck Creek, Docket No. LAKE 94-72 was designated as the master docket for filings in any of the cases. However, this decision identifies, in the caption, the specific docket numbers of the cases involved.

I am aware that Buck Creek is apparently in bankruptcy. However, filing a petition in bankruptcy does not automatically 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 "[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 "[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 Nos. 4259175, 4262128, 4261759, 4261737, 3862537, 3862538, 3862540, 3862709 and 3859801 in Docket Nos. LAKE 94-288-R, LAKE 94-465-R, 94-498-R, LAKE 94-500-R, LAKE 94-504-R, LAKE 94-505-R, LAKE 94-507-R, LAKE 94-508-R, LAKE 94-517-R and LAKE 94-669; Citation Nos. 3859804, 3861581, 3861587, 4259236, 4259237 and 4267424 in Docket Nos. LAKE 94-526-R, LAKE 94-527-R, LAKE 94-535-R, LAKE 94-537-R, LAKE 94-538-R, LAKE 94-543-R and LAKE 94-670; and Citation Nos. 4261765, 4261904, 4262129, 4261906, 4261962, 4386113, 4261882, 4386114, 4261910, 4261486, 4261912, 4267449 and 4050833 in Docket Nos. LAKE 94-546-R, LAKE 94-547-R, LAKE 94-548-R, LAKE 94-552-R, LAKE 94-555-R, LAKE 94-556-R, LAKE 94-558-R, LAKE 94-562-R, LAKE 94-571-R, LAKE 94-574-R, LAKE 94-580-R, LAKE 94-582-R and LAKE 94-671 are **AFFIRMED**. Buck Creek Coal Inc., or its

successor,[2] is **ORDERED TO PAY** civil penalties of **$8,200.00** within 30 days of the date of this decision. On receipt of payment, these proceedings are **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

Distribution:

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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)

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[2] According to a July 19, 1996, news release, issued by the United States Attorney for the Southern District of Indiana, the company is now known as Indiana Coal Company.