

CCASE:  
MSHA V. POCAHONTAS CONSTRUCTION  
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION  
WASHINGTON, D.C.  
May 18, 1981  
SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
Petitioner ) Docket No. WEVA 81-109-M

v.

POCAHONTAS CONSTRUCTION COMPANY  
Respondent

#### DIRECTION FOR REVIEW AND ORDER

The administrative law judge's Order of Default issued on April 8, 1981, is directed for review. 30 U.S.C. § 823(d)(2)(A)(ii)(IV). The issue is whether, under the circumstances presented, the judge's finding that Respondent failed to respond to a Show Cause Order and waived its right to a hearing is appropriate.

On December 12, 1980, the Secretary of Labor filed a Petition for Assessment of Civil Penalty against Pocahontas Construction Company, seeking penalties totaling \$122.00 for three alleged violations of the Act. No answer was filed. On March 4, 1981, the chief administrative law judge issued an order to Pocahontas to show cause, within 15 days, why it should not be deemed to have waived its right to a hearing and why the proposed penalties should not be entered as a final order of the Commission and collection procedures initiated. The record does not disclose any proof that service of this Order was actually made on Pocahontas. On April 8, 1981, the judge issued an Order of Default finding Pocahontas failed to respond to the Show Cause Order issued March 4, 1981, holding Pocahontas in default, assessing the proposed penalties of \$122.00 as the final order of the Commission and ordering payment within 30 days. On April 20, 1981, Pocahontas filed its Motion to Set Aside Order of Default alleging, in part, that it had no knowledge of the March 4, 1981 Order to Show Cause, that it had been denied due process and that it be allowed a hearing. Pocahontas' motion is accepted as a timely petition for discretionary review.

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Although Respondent failed to file an answer to the Secretary's Petition for Assessment of Civil Penalty as provided by Commission

Rule 2700.28, before the entry of any Order of Default, Commission Rule 2700.63(a) requires "an order to show cause shall be directed to the party." A Show Cause Order does not serve its intended purpose if not received by the party required to respond. Here, Respondent alleges it did not receive the show cause order of March 4, 1981, and there is no proof in the record to the contrary. Under these circumstances a serious question of service arises and we are not prepared to summarily rule whether service in fact was made. In view of the fact that entry of a default judgment is harsh and a dispute exists as to receipt of the order to show cause precipitating the judgment, we are of the opinion that the matter should be remanded. Accordingly, the judge's Order of Default is vacated and the case is remanded for further proceedings.