

CCASE:
MSHA V. SANGER ROCK AND SAND
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
September 19, 1990

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

Docket Nos. WEST 88-275-M
WEST 89-71-M

SANGER ROCK AND SAND

ORDER

BY: Backley, Acting Chairman; Doyle and Nelson, Commissioners

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988) ("Mine Act"), Commission Administrative Law Judge John Morris, in a May 17, 1990 decision, vacated two citations issued to Sanger Rock and Sand ("Sanger") and dismissed the proceeding on the ground that the Secretary of Labor and the Department of Labor's Mine Safety and Health Administration ("MSHA") had failed to comply with section 552(a)(1)(A) of the Administrative Procedure Act, 5 U.S.C. 552(a)(1)(A) ("APA"). On June 11, 1990, the Secretary filed a combined petition for review and motion for summary reversal of Judge Morris' decision. By order issued June 25, 1990, the Commission directed review of the Secretary's petition but stayed briefing pending consideration of the Secretary's motion for summary reversal. Sanger has filed oppositions to both the Secretary's petition for review and motion for summary reversal.

On August 14, 1987, and April 13, 1988, MSHA Inspector Jaime Alvarez issued citations to Sanger for violations of 30 C.F.R. 56.12028 and 30 C.F.R. 56.14007, respectively. Sanger contested both citations. At hearing and in its post-hearing brief, Sanger challenged the validity of the citations on the ground that the Secretary and MSHA had failed to comply with section 552(a)(1)(A) of the APA. That provision provides that each federal agency shall publish in the Federal Register "descriptions of

its central and field organization and the established places at which, the employees ... from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions." Section 552(a) further provides that "[e]xcept to the extent that a person had actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published." 5 U.S.C. 552(a).

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Finding no evidence that the Secretary or MSHA had published the required information, the judge concluded that Sanger had no notice of the inspector's duties and delegated authority or MSHA's central and field organizations. Citing *Rowell v. Andrus*, 631 F.2d 699 (10th Cir. 1980), *United States v. Two Hundred Thousand Dollars (\$200,000) in United States Currency*, 590 F. Supp. 866 (D. Fl. 1984), and *Pinkus v. Reilly*, 157 F. Supp. 548 (D.N.J. 1957), the judge determined that the Secretary's failure to comply with the APA warranted vacation of the citations as invalidly issued.

On review the Secretary has submitted an entry from the United States Government Manual 1989/1990 ("Manual") that refers to MSHA at pp. 406, 409 and 424-25. The Secretary argues that the entry in the Manual constitutes compliance with section 552(a)(1)(A) of the APA since the Manual is designated as a special edition of the Federal Register. See 1 C.F.R. 9.1. In response, Sanger argues that the Manual entry does not sufficiently provide the information required by section 552(a)(1)(A) of the APA.

The manual entry submitted on review was not presented below to Judge Morris, but the Secretary argues that the Commission can take judicial notice of the contents of the Federal Register, citing 44 U.S.C. 1507. However, section 113(d)(2)(A)(iii) of the Mine Act, 30 U.S.C. 823(d)(2)(A)(iii), provides, inter alia, "Except for good cause shown, n assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass."

The legal issues presented on review are jurisdictional in nature and we are mindful of the Secretary's arguments relating to judicial notice of Federal Register contents. Nevertheless, since the Manual entry was not submitted to the judge and since the judge is more appropriately positioned to deal with any factual issues surrounding the sufficiency of the Manual entry vis-a-vis section 552(a)(1)(A) of the APA, we conclude that it is preferable to remand the matter to the judge. The judge shall determine whether the Manual publication satisfies applicable APA requirements. In his reconsideration of this matter, we also direct the judge to determine what effect, if any, section 507 of the Mine Act, 30 U.S.C. 956, has on the issues presented. 1/

1/ Section 507 of the Mine Act provides:

Except as otherwise provided in this Act, the provisions of sections 551-559 and section 701-706 of title 5 of the United States Code shall not apply to the making of any order, notice, or decision made

pursuant to this Act, or to any proceeding for the review thereof.

30 U.S.C. 956.

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Accordingly, we remand the matter to the judge for further consideration of the issues set forth above. 2/

Distribution

Colleen A. Geraghty, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203

James F. Baun, President
Sanger Rock & Sand
17125 E. Kings Canyon Road
Sanger, California 93657

Susanne Lewald, Esq.
Office of the Solicitor
U.S. Department of Labor
71 Stevenson Street, Suite 1110
San Francisco, California 94119

Administrative Law Judge John Morris
Federal Mine Safety & Health Review Commission
280 Colonnade Center
1244 Speer Boulevard
Denver, Colorado 80204

2/ Pursuant to section 113(c) of the Mine Act, we have designated ourselves a panel of three Commissioners to exercise the powers of the Commission in this matter.