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SOL (MSHA) V. THREE STAR DRILLING
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDINGS Docket No. LAKE 88-65-M A. C. No. 11-02866-05501
v.	Docket No. LAKE 88-77-M A. C. No. 11-02866-05502
THREE STAR DRILLING & PRODUCTION CORPORATION, RESPONDENT	Docket No. LAKE 88-92-M A. C. No. 11-02866-05503 DAD Well No. 1

ORDER

Appearances: Rafael Alvarez, Esq., Office of the Solicitor, U. S. Department of Labor, Chicago, Illinois, for the Secretary;
James B. Wham, Esq., Richard A. Cary, Esq., Wham & Wham, Centralia, Illinois, for Respondent.

Before: Judge Weisberger

Statement of the Case

The above consolidated cases are before me based upon proposals for civil penalities filed by the Secretary (Petitioner) for alleged violations by the Operator (Respondent) of various safety standards set forth in Volume 30 of the Code of Federal Regulations. The Respondent filed a Motion for Summary Decision, and Petitioner filed a Motion for Partial Summary Decision. Pursuant to a telephone conference call between Counsel for both Parties and the undersigned, at the request of Counsel, I met with Counsel at the site of Respondent's DAD Well No. 1 and observed its vertical shaft, on the morning of October 25, 1988. Pursuant to notice, on October 25 - 26, in Terre Haute, Indiana, and November 29, 1988, in Indianapolis, Indiana, a hearing was held solely for the purpose of allowing the Parties to present argument and evidence on the jurisdictional issues raised by the respective Motions for Summary Decision. At the hearing, Robert Earl Williams, Bernard Martin, and William Melcher testified for Respondent, and Raymond Roesler and Robert L. Ferriter testified for Petitioner. At the hearing, it was clarified by Counsel for both Parties that if the jurisdictional issues were to be decided

in favor of Respondent, then the cases should be dismissed. In the alternative, should the jurisdictional issues be determined in favor of Petitioner, then the cases should be set for hearing on the merits.

At the conclusion of the hearing, Counsel were directed to file Posthearing Briefs and Proposed Findings of Fact 3 weeks after receipt of the hearing transcript. Both Parties requested an extension to file briefs by February 6, and the request was granted. Petitioner filed its Proposed Findings of Fact and Conclusions of Law and Brief on February 8, 1989, and Respondent filed its Proposed Findings of Fact and Conclusions of Law and Brief on February 9, 1989. Subsequently, the Parties requested and were granted an extension until March 16 to file Reply Briefs, and Respondent filed its Answers to Petitioner's Brief on March 20, 1989, and Petitioner filed its Reply Brief on March 21, 1989.

Findings of Fact

1. Respondent, Three Star Drilling and Production Company, is an oil company which owns three oil wells in Illinois. Respondent sells its oil to the oil Producers Association in Springfield, Illinois.

2. Respondent is engaged in an oil recovery project known as the DAD Well No. 1 near Casey, in Cumberland County, Illinois.

3. The DAD Well No. 1 is located in the Siggins Field. Respondent has over 500 wells in this field that are "producers."

4. The Upper Siggins is approximately 300 to 350 feet deep and the Lower Siggins is approximately 500 to 550 feet deep. Between the Upper and Lower Siggins sand is a Stray sand that is approximately 412 to 427 feet deep.

5. Primary and secondary recovery of oil in the Upper Siggins sand, and primary recovery of oil in the Lower Siggins sand have occurred.

6. Primary recovery is by drilling a well from the top of the ground and the result is that the oil gushes out.

7. Secondary recovery is by pumping water into the oil reservoir which forces the oil to come out.

8. Respondent proposes to extract oil from the Siggins oil field by direct access drilling.

9. The DAD Well No. 1 will be developed in two stages:

a. mine shaft sinking;

b. developing oil collector rooms.

10. Respondent began excavating the shaft in October 1986. The shaft is 6 feet wide by 10 feet and 10 inches long, and as of November 29, 1988, reached a depth of 384 feet below the surface.

11. The mine shaft is deepened by drilling holes, loading the holes with explosives, blasting, and loading broken material into a hoist bucket with a Criderman mucking hoist.

12. The shaft is lined with concrete as it is deepened.

13. Employees are able to enter the shaft by riding a cage. The shaft has a ladder with a landing every 30 feet. It is used as an alternative method of exit from the shaft.

14. A blowing system, which delivers approximately 30,000 cubic feet of air a minute into the shaft, has been installed. The shaft has a 16 inch ventilation tube that is anchored to the walls.

15. Respondent has installed a conduit for electricity and a water piping system.

16. All surface equipment such as hoists, hoist drums, cables, and headframes are typical mine shaft equipment.

17. Employees work underground drilling holes, loading the hole with explosives, and loading the muck into a bucket.

18. A 24-foot circular oil collector room connected to the shaft, by a 20-foot tunnel, had been completed at the upper level of the Siggins Sand, 354 feet below the surface.

19. Respondent used a roof bolting machine to install roof bolts in the tunnel and oil collector room.

20. Respondent's plan for drilling involved the horizontal drilling of a number of holes in the walls of the oil collector room into the Siggins Sand formation. These 3 1/2-inch diameter horizontal holes will continue for a distance of approximately 800 feet. Each horizontal hole will be drilled, capped, and regulated by a remote control valve with a switch located in the hoist room or at the top of the shaft, both of which are located above ground. These horizontal drill holes will be connected to

a common line running to a sump, and any oil flowing into the sump will then be pumped to the surface by a pump actuated by remote control from above ground. No oil will run out of the horizontal drill holes into the sump with men underground. Nor will there be men underground when the oil is pumped from the sump to the surface.

21. DAD Well No. 1, is still under construction and there has been no oil produced nor drilling for oil commenced as of November 22, 1988, the date of the last evidentiary hearing. No product from DAD Well No. 1 has been sold to anyone.

22. The excavation of the oil collector room required that employees work underground.

23. After the development of the oil collector rooms, Respondent's employees might have to periodically work underground to replace pumps, unclog pipes, and drill long holes. During these procedures, the remote control valves, regulating the oil flow in the horizontal holes, will be shut off, and no oil will be extracted.

24. The State of Illinois Division of Mines and Minerals has ordered Respondent to comply with Chapters 13, 14, and 19 of the Health and Safety Rules and Regulations found in the 1985 Illinois Revised Statute, Chapter 96 1/2, paragraph 544023.3.

Issues

1. Whether Respondent's operation at DAD Well No. 1 is a mine as defined in the Federal Mine Safety and Health Act of 1977.

2. Whether Respondent's operation at the DAD Well No. 1 affects commerce.

3. Whether the Federal Mine Safety and Health Act of 1977 is preempted by the 1985 Illinois Revised Statute, Chapter 96 1/2 Paragraph 5440 23.3.

Discussion

I.

In evaluating whether Respondent's operation at the DAD Well No. 1 is subject to the Federal Mine Safety and Health Act of 1977 (the Act), and regulations promulgated thereunder, reference must be made to section 3(h)(1) of the Act which, as pertinent, defines a mine as . . . "lands, evacuations, underground passage ways, shafts, slopes, tunnels and workings,

structures, facilities, equipment, machines, tools, or other property . . . on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such materials from their natural deposits in nonliquid form, or if in liquid form, with workers underground, ... "

It appears to be Respondent's main argument that lands, shafts, and equipment used in extracting liquid minerals, are not to be considered a mine unless workers are underground during the time when the liquid minerals are being extracted. Respondent then argues that the operation herein can not be considered a mine, inasmuch as the evidence clearly establishes that no oil will be extracted when workers are underground. In this connection, the record indicates that oil is not produced or extracted while men are underground engaged in construction of the shaft, horizontal holes, or collector rooms. Indeed, no oil will be produced until construction is completed. Also, once production has commenced, no workers will have any regular tasks underground. Should a worker have to go underground on occasion to replace a pump, all valves will be first closed from above ground, stopping the extraction of oil before men actually go underground.

It is manifest that the language of section 3(h)(i), supra, does not clearly compel a conclusion, based on a plain reading of its words, that in order for an operation to be subject to the Act and be considered a mine, workers must be underground during the time when the liquid mineral is being extracted. The language of section 3(h)(i), supra, is also capable of being interpreted as encompassing in the definition of a mine, as in the case at bar, shaft and various equipment used in extracting liquid minerals with the additional requirement that workers be underground at sometime during the operation, but not necessarily concurrent with the limited activity of the oil being led into the pumps and pumped to the surface. Inasmuch as section 3(h)(i), supra, is capable of more than one construction, I place considerable weight on the legislative history of the Act, in determining how to interpret section 3(h)(i), supra. In this connection I note that Congress clearly intended that the coverage of the Act be as broad as possible. I find most instructive the following language, contained in the legislative history of the Act, with regard to Congressional intent to make the coverage of the Act as broad as possible. "The Committee notes that there may be a need to resolve jurisdictional conflicts, but it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act." (S. Rep. No. 181, 95th Cong., 1st Sess. 14 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 602 (Legis. Hist.). I thus conclude that to adopt the

narrow construction urged by Respondent would be violative of Congressional intent. Indeed, taking into account the very strong Congressional declaration, as contained in section 2 of the Act, that, with regard to the purpose of the Act, its first priority ". . . must be the health and safety of its most precious resource - the miner;", it would not seem logical for one working underground here in the construction of the shaft or one of its collector rooms, or in the replacing of a pump, not to be covered by the protections afforded in the Act, merely because the worker was not present concurrent with the physical pumping of the oil to the surface. It is clear that the shafts and collector rooms, where workers are presently located underground, are being developed for the purpose of extracting oil.(FOOTNOTE 1) I thus conclude that Respondent's operation at DAD Well No. 1 is a mine within the purview of the Act.

II.

Section 4 of the Act, in essence, provides that a mine whose products enter commerce or whose ". . . operations or products of which affect commerce," shall be subject to the Act. Respondent, based on the uncontroverted evidence of record, argues that inasmuch as its operation, at DAD Well No. 1, is not yet producing any oil, it does not have any product which is entering commerce. The record supports Respondent's contention in this regard. However, Respondent is still under the jurisdiction of the Act if it is established that its operations "affect commerce." In this connection, it appears to be Respondent's argument, that inasmuch as its operation is in a speculative stage, and there is no assurance that oil will ever be produced, it has not been established that its operation has any affect on commerce.

In Godwin v. OSHRC, 540 F.2nd 1013 (9th Cir., 1976), the Court of Appeals was faced with a factual situation similar to the case at bar. In Godwin, supra, the Court had to consider whether the activity of clearing land for the purpose of growing grapes was included within the purview of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.), which provides that, in general, an employee is subject to the Act if his activities "affect commerce," 29 U.S.C. 652(6), which is the same language as contained in Section 4 of the Act. The Court in Godwin, supra, essentially held that the clearing of the land for the purpose of growing grapes will adversely affect commerce if performed under unsafe conditions. The Court, at 1016, supra,

held as follows: "Clearing land is an integral part of the manufacturing of wine, and therefore commerce is affected by the activity." (Emphasis added).(FOOTNOTE 2)

Similarly, in the case at bar, the sinking of the shaft and excavating of the oil collector room, the activities presently being engaged in, are integral parts of the activity of the recovery of oil from the Siggins Field, and as such, commerce is affected by the present activities. (See also, Secretary v. Sun Landscaping and Supply Company 2 FMSHRC 975 (April 1980) (a company that had been in operation for 3 days intending to mine marble, crush it and sell it, and was engaged in crushing marble on the day of the inspection was held to be covered by the Act based upon its current activity and future intentions; see also, Secretary v. Bradford Coal Company, Incorporated, 3 FMSHRC 1567 (June 1981), where it was found that the business of building coal preparation plants was a class of activity the cumulative effect of which affected interstate commerce). I therefore find that Respondent's operation at DAD Well No. 1 does affect interstate commerce, and is thus within the jurisdiction of the Act.

III.

Respondent, in essence, has raised the issue that the regulation of its mine by MSHA is improper inasmuch as the State of Illinois has maintained jurisdiction over the project from its commencement to the present. It is clear that any State of Illinois regulations, with regard to signaling during the operation of the hoist in the shaft, or with regard to any other aspect of Respondent's operation, do not preempt the Act. Section 506 of the Act permits concurrent State and Federal regulation, but under

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the Federal Supremacy Doctrine, a State Statute is void to the extent that it conflicts with a valid Federal Statute. Dixy Lee Ray v. Atlanta Richfield Company, 435 U.S. 151 1978. Accordingly, it is held that Respondent's contention in this regard is without merit.

ORDER

Inasmuch as it is found that Respondent's operation at the DAD Well No. 1 is subject to the jurisdiction of the Act, it is ORDERED that these cases be scheduled for hearing on the merits.(FOOTNOTE 3)

Avram Weisberger
Administrative Law Judge

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FOOTNOTES START HERE
~FOOTNOTE_ONE
1. Although the testimony of Respondent's witness indicates that if ultimately the extraction of oil is proved not feasible, then the shaft and appurtenances, will be used for the storage of waste, it is their present primary purpose, as a first step in the extraction of oil, which is deemed critical.

~FOOTNOTE_TWO
2. The gravamen of Respondent's argument, that its present operations are only speculative and therefore can not affect commerce, was fully considered by Judge Ely, in a concurring opinion, in Godwin, supra. Judge Ely found it "almost inconceivable" for an accident at an early stage of an operation to have a nexus with interstate commerce where any number of circumstances could have prevented the fulfillment of the eventual objective. Indeed, Judge Ely stated as follows: "To me, it is virtually unthinkable that the Founding Fathers could have foreseen the extent to which an increasingly expansive interpretation of the commerce clause could so infringe local authority." (Godwin, supra, at 1017). However, nonetheless, Judge Ely reluctantly concurred in the majority decision and did not feel that he could conscientiously dissent in light of Wickard v. Filburn, 317 U.S. 111, (1942), Farmer's Irrigation Company v. McComb, 337 U.S. 755 (1949), and Hodgson v. Ewing, 451 F.2d 526 (5th Cir., 1971).

~FOOTNOTE_THREE
3. I do not find Respondent's arguments persuasive that the decision herein should not be applied retroactively. Should the finding of jurisdiction be applied only prospectively, the burden already suffered by Respondent, i.e. being caught between the jurisdiction of the State of Illinois and MSHA and being subject to double inspections would not be effected. It is true that as a result of a retroactive application of the Act's jurisdiction, Respondent might become liable for civil penalties for violations of federally mandatory safety standards set forth in 30 C.F.R, et. seq. which allegedly occurred during the retroactive period. However, these penalties should be mitigated, as the record indicates Respondent acted in good faith in believing it was not

subject to the jurisdiction of the Act, and hence did not act with any significant degree of negligence in not conforming with any federally mandated safety standards.

I reject the remainder of Respondent's arguments and find that the overriding purpose of the Act, i.e., the protection of miners, is best furthered by not limiting the jurisdiction of the Act to a prospective application.