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SOL (MSHA) V. LANG BROTHERS
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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 PROCEEDING

Docket No. WEVA 90-48
A.C. No. 46-01968-03502

v.

Docket No. WEVA 90-58
A.C. No. 46-01968-03503

LANG BROTHERS, INC.,
RESPONDENT

Blacksville No. 2 Mine

DECISION

Appearances: Wanda M. Johnson, Esq., Office of the Solicitor,
U.S. Department of Labor, for the Secretary of
Labor (Secretary); Gregory A. Morgan, Esq.,
Young, Morgan and Cann, Clarksburg, West Virginia,
for Lang Brothers, Inc. (Lang Brothers).

Before: Judge Broderick

STATEMENT OF THE CASE

In March and December 1989, Inspector George H. Phillips of the Mine Safety and Health Administration reviewed the registers kept by Consolidation Coal Company (Consol) of the contractors working at Consol's Blacksville No. 2 Mine. Lang Brothers was included on the register, having been engaged in cleaning out and plugging gas wells which penetrated the coal seam within the subject mine. The inspector conducted spot inspections of Lang Brothers operation including its drilling equipment and issued a number of citations for violations of mandatory safety standards promulgated under the Mine Act. The Secretary seeks civil penalties for these alleged violations. On motion of the Secretary, the two dockets were consolidated for the purposes of hearing and decision. Pursuant to Notice, the consolidated case was called for hearing in Morgantown, West Virginia, on May 30, 1989. George H. Phillips and Lloyd Alvarez testified on behalf of the Secretary; Glenn Andrew Lang and Calvin Lofton testified on behalf of Lang Brothers. Both parties have filed post-hearing briefs. I have considered the entire record and the contentions of the parties and make the following decision.

FINDINGS OF FACT

1. Lang Brothers is a heavy construction company, a major part of whose business involves drilling new gas wells and repairing existing wells for gas companies (approximately 50 percent of its work), and cleaning out and plugging abandoned wells for coal mine operators (the other 50 percent).

2. Lang Brothers has had "blanket contracts" with Consolidation Coal Company (Consol), each covering a calendar year wherein Lang Brothers agrees to clean and plug gas wells for Consol pursuant to "purchase orders" for each well to be plugged. Such a blanket contract existed for the calendar year 1989. Lang has plugged wells at different Consol mines since about 1980. It has also done the same work for about five other coal operators.

3. Consol owns and operates an underground coal mine whose portal is in Monongalia County, West Virginia, and which extends underground in the states of West Virginia and Pennsylvania, called the Blacksville No. 2 Mine.

4. Effective August 19, 1980, the Mine Safety and Health Administration (MSHA) issued an order granting Consol's petition for modification of the requirements of 30 C.F.R. 75.1700 requiring it to establish and maintain barriers around oil and gas wells in the Blacksville No. 2 Mine. In lieu of establishing and maintaining such barriers, Consol was permitted to clean the wellbore and to seal the coalbed from the surrounding strata at the affected wells by plugging the wells from below the coalbed to the surface.

5. In March of 1989, pursuant to a purchase order from Consol and instructions from Consol's engineer, Lang Brothers reopened, cleaned out and plugged well No. B2-233 located in Pennsylvania. Consol had received a permit from the state of Pennsylvania for this work. Lang then brought its equipment to the site, including a drill rig, a water pump and water tanks, and a bulldozer.

6. With this equipment, Lang cleaned out the existing well and plugged it with cement. The well penetrates and extends below the coal seam. Well No. B2-233 extended more than 1370 feet below the surface. The coal seam was from 674 feet to 682 feet below the surface.

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7. The land on which the equipment was positioned to clean and plug the wells was apparently not owned by Consol. Consol and Lang had to obtain the landowners' permission to enter and perform the necessary work. The land of course was above the coal mine being operated by Consol.

8. On March 20, 1989, Federal mine inspector George Phillips went to the Blacksville No. 2 Mine office and asked to see the contractor's register. Lang Brothers name appeared on the register, and Inspector Phillips proceeded to the area in which they were engaged in cleaning and plugging gas well No. B2-233. He issued a citation charging a violation of 30 C.F.R. 77.1710(i) because the bulldozer was provided with rollover protection but did not have seat belts.

9. In December 1989, pursuant to another purchase order from Consol and instructions from Consol's engineer, Lang reopened, cleaned out and plugged well No. B2-278. Consol had applied for and received a permit from the state of Pennsylvania for this work. Thereafter Lang brought its equipment to the site and commenced the operation.

10. Well No. B2-278 extended more than 3000 feet below the surface. The coal seam was from 802 feet to 808 feet below the surface.

11. On December 4 and December 12, 1989, Inspector Phillips in the course of inspections of Lang's operation at well B2-278, issued five citations, two alleging violations of 30 C.F.R. 77.404(a) because of a defective cylinder pressure gauge and inoperative rear lights on a bulldozer, one alleging a violation of 30 C.F.R. 77.503 because of damaged insulation on a welder cable, one alleging a violation of 30 C.F.R. 77.1110 because of a defective fire extinguisher at the oil storage station, and one alleging a violation of 30 C.F.R. 77.410 because of a defective backup alarm on a bulldozer.

12. On May 1, 1989, coal mine inspector Lloyd Alvarez inspected the plugging operations at well B2-233, and on January 16, 1990, he inspected the plugging operations at well No. B2-278.

13. At the time well B2-278 was cleaned and plugged, Consol was cutting through the coal seam about 300 feet from the well. The record does not indicate how far the coal mining operation was from well B2-233 at the time it was cleaned and plugged.

14. Lang concedes that the plugging operation itself is subject to MSHA inspection. Lang has an MSHA I.D. number as an independent contractor.

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15. Lang concedes that if it is subject to the Mine Act, the conditions and practices cited in the citations involved here were present or occurred, and constituted violations of the Mine Act as alleged.

ISSUE

1. Whether Lang's operations in cleaning and plugging gas wells under contract with an underground coal mine operator are subject to the provisions of the Mine Act?

STATUTORY PROVISIONS

Section 3(d) of the Act provides:

(d) "operator" means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine.

Section 3(h) of the Act provides:

(h)(1) "coal or other mine" means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this Act, and Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment;

(2) For purposes of titles II, III, and IV, "coal mine" means an area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite from its

natural deposits in the earth by any means or method, and the work of preparing the coal so extracted, and includes custom coal preparation facilities;

Section 4 of the Act provides:

SEC. 4. Each coal other mine, the produce of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act.

CONCLUSIONS OF LAW

In the Otis Elevator cases (11 FMSHRC 1896, "OTIS I"; 11 FMSHRC 1918, "OTIS II" (1989), appeals docketed Nos. 89-1712 and 89-1713 (D.C. Cir. Nov. 20, (1989)) the Commission held that Otis Elevator Company which examined and maintained elevator equipment at an underground coal mine under contract with the coal mine operator, was an independent contractor performing services at a mine and thus was subject to the Mine Act.

The Commission found Otis subject to the Mine Act because (1) its activities were an integral and important part of the coal extraction process; (2) Otis' employees worked at the mine site and were exposed to many of the same hazards as the employees of the mine operator; (3) Otis had a continuous presence at the mine site.

The activities of Lang Brothers, in cleaning and plugging the gas wells for Consol, constitute an integral and important part of Consol's extraction process. Consol was obliged to clean and plug the wells in accordance with the modification petition in order to mine through the area where the well penetrated the coal seam. If Consol did the work itself, there could be no doubt that the work was part of the mining process. There should be no different conclusion because it contracted out the work. Lang admits that the plugging operation itself is subject to MSHA inspection. But the cleaning and plugging constitute a single process, and both are necessary to Consol's mining activity.

Lang's operations were not at the mine site per se, but were performed on land above the mine and involved an operation which penetrated the coal seam.

The two projects involved in these proceedings were of relatively short duration. Lang did not have a "continuing presence" at the subject mine, but approximately 50 percent of its work involved cleaning and plugging gas wells for coal mine operators. It could therefore be said therefore to have a continuing presence in coal mine related work.

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Section 3(d) of the Act defines operator to include "any independent contractor performing services or construction at such mine." But as the Commission stated in OTIS I, not all independent contractors are operators. "[T]here may be a point, at least, at which an independent contractor's contact with a mine is so infrequent or de minimis that it would be difficult to conclude that services were being performed." National Indus. Sand Ass'n v. Marshall, 601 F.2d 689, 701 (3rd Cir. 1979).

In the case of Old Dominion Power Co. v. Donovan, 772 F.2d 92 (4th Cir. 1985), relied upon by Lang, the Court held that a public utility which monitored an electric substation at a mine site, was not an operator under the Act, since it did not have a continuing presence at the mine. The relationship of Lang's activities involved here to the coal mining process is much more direct than the power company's activities in Old Dominion. About 50 percent of Lang's work is for coal mines as contrasted to the extremely small percentage of the power company's work. Although Lang's employees were not in the mine itself, they operated heavy equipment which penetrated the mine atmosphere and directly and substantially affected the extraction process. Most importantly, their work was directly related to the safety of the miners, since improper plugging of a gas well could cause methane leaking into the mine as the extraction of the coal progressed and could result in an underground ignition or explosion. I conclude that Lang's contact with the mine was neither "infrequent or de minimis".

Therefore, I conclude that Lang, by virtue of the services it provided Consol and the importance of those services to Consol's coal mining operation, falls within the definition of operator in the Mine Act and is, therefore, subject to its jurisdiction.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED:

1. Citations 3100560 issued March 3, 1989, and 3311069, 3311070, 3311071, issued December 4, 1989, and 3311624 and 3311625 issued December 12, 1989, are AFFIRMED;

2. Respondent shall within 30 days of the date of this decision pay the following civil penalties for the violations found to have occurred.

CITATION	PENALTY
3100560	\$ 39.00
3311069	39.00
3311070	39.00

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3311071	39.00
3311624	39.00
3311625	39.00

\$234.00

James A. Broderick
Administrative Law Judge

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FOOTNOTES START HERE

1. There is some confusion in the record as to whether the well was located in Pennsylvania or West Virginia, since Respondent's Exhibit 4 is an affidavit of plugging and filling a gas well on a West Virginia form. The date of this form however, is March 1990. The record seems to show that both wells involved in this case opened on Pennsylvania land.