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SOL (MSHA) V. LANG BROTHERS, INC.
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FEDERAL MINE SAFETY AND HEALTH REVIEW
1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006
September 24, 1991
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)
v. Docket Nos. WEVA 90-48
WEVA 90-58
LANG BROTHERS, INC.

BEFORE: Backley, Doyle, Holen and Nelson, Commissioners
DECISION
BY THE COMMISSION:
In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. • 801 et seq. (1988)(the "MineAct" or"ACT"), we are asked to decide whether certain gas well cleaning and plugging operations of Lang Brothers, Inc. ("Lang") were subject to thejurisdiction of the Mine Act and whether, in performing these operationS, Lang was an independent contractor within the Act's definition of "operator." Commission Administrative Law Judge James A. Broderick concluded that, on the facts of this case, the gas well cleaning and plugging operations in question were subject to the Mine Act and that Lang was an independent contractor-operator under the Act. 12 FMSHRC 1690 (August 1990)(ALJ). For the reasons that follow, we affirm the judge's decision.
I.
Factual and Procedural Background
The salient facts ooe this case are undisputed. Lang is a heavy construction company, approximately half of whose business involves drilling of new gas wells and the repairing of existing wells for gas companies. The remainder involves the cleaning and plugging of gas wells for coal mine operators. The focus of this proceeding is on Lang's cleaning and plugging of two gas wells located in an area scheduled for development as part of the Blacksville No. 2 Mine, a large underground coal mine owned and operated by Consolidation Coal Company ("Consol"). Mining within 300 feet of an oil or gas well is prohibited by 30 C.F.R. • 75.1700.1 However, the Department of
FOOTNOTE 1

Section 75ù1700, which repeats section 317(a) of the Mine Act, 30 U.S.C. • 877(a), provides:
Oil and gas wells.
~414
Labor's Mine Safety and Health Administration ("MSHA"), in a Decision and Order dated July 18, 1980 ("Decision and Order"), granted Consol's petition for modification, filed pursuant to section 101(c) of the Mine Act, 30 U.S.C. • 811(c). That Decision and Order released Consol from the 300-foot requirement with respect to oil and gas wells in the Blacksville No. 2 Mine so long as the wells were cleaned and plugged. The modification allowed Consol to mine through the area of the wells on the condition that it clean the wellbores and plug the wells from below the coal bed to the surface, as well as meet various specific conditions for the plugging of the wells.
Consol contracted with Lang, an independent contractor, to clean and plug the gas wells in its mines. The contract was on an annual basis and renewable. Under the contract, Consol issued Lang a supplemental "purchase order" for each gas well to be cleaned and plugged. Pursuant to the contract, Lang obtained an operator's identification number from MSHA and was required to provide the necessary mine safety training to its employees in order to comply with the provisions of the Mine Act and applicable rules and regulations.
The purpose of cleaning and plugging the gas wells is to ensure that natural gas does not seep through the well into a mining area and create a safety hazard. If a gas well was left unplugged or was improperly plugged, gas could leak into an adjacent mine during the extraction of coal and result in an underground ignition or explosion. After a well is closed by plugging, it is no longer usable as a gas producer.
Typically, before Lang proceeds to do such work for Consol, Consol obtains a plugging permit from the state and makes appropriate arrangements with the affected surface landowner for access to the gas well. Lang builds roads to gain access to the site, if necessary, sets up the drilling rig at the surface site of the gas well, and moves the other necessary equipment, such as a "mud pump," water tanks, and a bulldozer to the site. Lang then
[Statutory Provisions]
Each operator of a coal mine shall take reasonable measures to locate oil and gas wells penetrating coalbeds or any underground area of a coal mine. When located, such operator shall establish and maintain barriers around such oil and gas wells in accordance

with State laws and regulations, except that such barriers shall not be less than 300 feet indiameter, unless the Secretary or his authorized representative permits a lesser barrier consistent with the applicable State laws and regulations where such lesser barrier will be adequate to protect against hazards from such wells to the miners in such mine, or unless the Secretary or his authorized representative requires a greater barrier where the depth of the mine, other geologic conditions, or other factors warrant such a greater barrier.
END OF FOOTNOTE
~415
does the cleaning and plugging, performs reclamation activities at the site, and removes its equipment. A gas well is cleaned out by removing the well casing from the surface down to the gas production zone. Lang does not dig or drill through, the earth or the coal. Rather, Lang sends its tools down through the existing well borehole and cleans out any debris. Lang takes out whatever has fallen into the borehole such as caved-in earth, or debris. Plugging involves filling the well borehole with expandable cement. Sec. Exh. 4.

In March 1989, Consol issued Lang a purchase order to reopen, clean out and plug Well B2-233, located in the Pennsylvania area of the Blacksville No. 2 Mine. Consol obtained a permit from the Commonwealth of Pennsylvania for this work and Lang brought its equipment to the site. The well extended more than 1,370 feet below the surface and passed through the mine's coal seam, situated approximately 675 feet below the surface.

On March 20, 1989, MSHA inspector George Phillips went to the Blacksville No. 2 Mine office and asked to see the contractors' register, which the operator is required to maintain pursuant to 30 C.F.R.• 45.4. Lang's name appeared on the register, and Inspector Phillips went to the area in which Lang was cleaning Well B2-233. Phillips issued Lang a citation charging a violation of 30 C.F.R. • 77.1710(i), because Lang's bulldozer did not have seat belts. Phillips also concluded that the violation was of a significant and substantial nature. There is no indication in the record as to how far Consol's coal mining operation was from Well B2-233 at the time the well was being cleaned and plugged.

In December 1989, pursuant to another purchase order, Consol directed Lang to clean out and plug another gas well located in the Pennsylvania area of the Blacksville No. 2 Mine, Well B2-278.

Consol obtained a state permit for this work and Lang brought its equipment to the site and started work. Well B2-278 extended more than 3,000 feet below the surface and passed through the mine's coal seam, situated approximately 800 feet below the surface.

On December 4, 1989, while Lang was cleaning Well B2-278, Inspector Phillips issued Lang three citations, one alleging a violation of 30 C.F.R. • 77.404(a) because of a defective cylinder pressure gauge; one alleging a violation of 30 C.F.R. • 77.503 because of damaged insulation on a welder cable; and one alleging a violation of 30 C.F.R. • 77.1110 because of a defective fire extinguisher at the oil storage station. On December 12, 1989, Phillips again inspected Well B2-278 and issued two more citations, one alleging a violation of 30 C.F.R. • 77.404(a) because of two inoperative rear lights on a bulldozer, and one alleging a violation of 30 C.F.R. • 77.410 because of a defective automatic warning device on a bulldozer. Phillips also concluded that these violations were of a significant and substantial nature. At the time the citations were issued, Consol was mining about 300 feet from the well.

The Secretary subsequently proposed civil penalties for all of the alleged violations and the matter proceeded to an evidentiary hearing before Judge Broderick. Before the judge, Lang argued that its operation was not subject to the Mine Act. According to Lang, it was merely plugging wells

~416

drilled for production of gas. Lang contended that it was not working at a mine and asserted that it was not in any way involved in extraction of minerals in nonliquid form but, rather, was engaged in a gas-related activity. It also argued that it had no contact with Consol's miners. Lang submitted that it was subject to the Occupational Safety and Health Act of 1970, 29 U.S.C. • 651 et seq. (1988)(the OSHAct). Lang further argued that even if its operation was subject to the Mine Act, it was not an "operator" within the meaning of the Act, Lang conceded, however, that if it were deemed an operator under the Mine Act, the cited violations occurred.

In his decision, Judge Broderick concluded that Lang was an independent contractor-operator under the Mine Act and was subject to the Mine Act's jurisdiction. The judge gave special emphasis to the Commission's decisions in Otis Elevator Company, 11 FMSHRC 1896 (October 1989) ("Otis I"), and Otis Elevator Company, 11 FMSHRC 1918 (October 1989) ("Otis II"), in which the Commission held that an independent contractor examining and maintaining elevator equipment at underground coal mines was an operator under the Mine Act. (The judge issued his decision before the Commission's Otis I

and Otis II decisions were affirmed by the United States Court of Appeals for the District of Columbia Circuit. Otis Elevator Co. v. Secretary & FMSHRC, 921 F.2d 1285 (1990).) Applying the Commission's Otis test, the judge found:

> The activities of Lang Brothers, in cleaning and plugging the gas wells for Consol, constituted 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 wells penetrated the coal seam. If Consol did the work itself, there could be no doubt that it was part of the mining process.

12 FMSHRC at 1694. The judge also determined that Lang had a continuing presence in mine-related work, since approximately 50% of its work involved cleaning and plugging gas wells for coal mine operators. Id.

The judge also distinguished Old Dominion Power Co. v. Donovan, 772 F.2d 92 (4th Cir. 1985). He emphasized the high percentage of Lang's work done for coal mines and noted:

> 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.

12 FMSHRC at 1695. The judge concluded that Lang's contact with the mine was neither infrequent nor de minimis. Id.

~417

The judge affirmed all of the citations and assessed civil penalties totaling $234. 12 FMSHRC at 1695. The Commission granted Lang's subsequent petition for discretionary review, which challenges only the judge's jurisdictional rulings. On review, Lang asserts that the gas wells it cleans and plugs are not mines, that it is not a mine operator, and that jurisdiction over its activities is with the OSHAct, not the Mine Act.

II.

Disposition of Issues

A. Whether the well sites and Lane's operations were subject

to the Mine Act

We begin with the question whether the well sites and Lang's operation at the sites were subject to the Mine Act as part of a "coal or other mine" or "coal mine" within the meaning of section 3(h) of the Act, 30 U.S.C. • 802(h).

Lang argues that the gas wells in question did not constitute a "coal or other mine" under the Mine Act: Citing the definition of "coal or other mine" in section 3(h)(1) of the Act, Lang argues that it was not involved in the extraction of nonliquid minerals and that, insofar as "liquid" minerals are concerned, the Act's definition applies only to "extract[ion] with workers underground," a condition not present here. 2 Lang argues that its work involved no contact with the coal bed other than passing through it via the borehole, while going down to the gas producing strata. Lang adds that its workers were not exposed to the hazards of mining and that they never came

FOOTNOTE 2

Section 3(h)(1) states:

"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....

30 U.S.C. • 802 (h)(1). A similar definition of "coal mine" is contained in section 3(h)(2) of the Mine Act. 30 U.S.c, • 802(h)(2).

END OF FOOTNOTE

~418

into contact with any miners. In short, from Lang's perspective, its concern was "the proper cleaning and plugging of a natural gas well, not with coal miningù" Lang Br. at 17.

As Lang acknowledges, the legislative history of the Mine Act makes clear that a broad reading is to be given to the definition of a mine. The Senate Committee stated:

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 the Act be given the broadest possible interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion ooe 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., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 602 (1978). Judicial precedent also indicates that the Nine Act's definition of mining is to be broadly interpreted in favor of coverage. See, e.g., Donovan v. Carolina Stalite Co., 734 F.2d 1547, 1551-55 (D.C. Cir. 1984); Marshall v. Stoudt's Ferry Preparation Co., 602 F.2d 589, 592 (3rd Cir. 1979) cert. denied, 444 U.S. 1015 (1980). While we recognize, as the D.C. Circuit Court of Appeals in Carolina Stalite observed, "[i]t is clear that every company whose business brings it into contact with minerals is not to be classified as a mine within the meaning of section 3(h)" (734 F.2d at 1551), for the reasons that follow we hold that Lang's activities, in this instance, are subject to the Mine Act.

In reaching our decision, we focus on the relationship between Lang's operations at the well sites and the extraction process at Consol's mine, to determine whether there is a sufficient relationship between the activity in question and the extraction process for statutory coverage to apply. Precedent does not require that Lang itself be engaged in extraction. See Carolina Stalite Co., 6 FMSHRC 2518, 2519 (November 1984).

Lang casts its activities as being concerned only with the proper cleaning and plugging of gas wells. Lang's work at the well sites, however, was integrally related to Consol's extraction of coal. Cf. Carolina Stalite, 734 F.2d at 1551. The sole purpose of Lang's cleaning and plugging contract with Consol was to facilitate Consol's extraction of underground coal. If the wells were not plugged, Consol would not be permitted, because of section 75.1700 supra, to mine within 300 feet of the wells. Plugging them permitted Consol to extract more coal, since it could mine the affected coal instead of having to stay at least 300 feet away from the gas wells.

Consol filed its petition for modification for the purpose of allowing it to mine completely through the coal adjacent to oil and gas wells in the vicinity of the Blacksville No. 2 Mine. MSHA's

the petition sets forth detailed conditions for plugging (including cleaning) such wells. Consol contracted with Lang to do the work in compliance with the MSHA-prescribed procedures. MSHA's Decision and Order also sets forth procedures for Consol to follow when mining through a plugged oil or gas well area in order to ensure the safety of the miners. Lang's cleaning and plugging work directly affected the safety of miners. Gas leaks into the mine could result in a fire or explosion. In fact, Lang acknowledges that cleaning and plugging gas wells is clearly part of coal mine safety." PDR at 10; L Br. at 13. Lang also acknowledged before the judge that plugging gas wells is "important to" and "directly concerned with mine safety." Tr. 12, 15. We agree with the judge that if Consol had done the plugging work itself, there would be no serious question that the work was part of the mining process.

Lang recognizes that "MSHA inspectors do and properly do come and satisfy themselves that the wells are plugged in accordance with MSHA regulations." Tr. 15, 122. Lang notifies MSHA when it is ready to plug wells. Tr. 59. MSHA oversees the cementing phase of plugging operations at such wells in accordance with the terms of its decisions granting petitions for modification. Tr. 54,59, 75-76, 122. Indeed, Lang concedes MSHA's jurisdiction over its work of plugging gas wells. Tr. 122. In our view, there is no reasonable basis for Lang's assertion that, while MSHA may regulate well plugging, it may not regulate the other related steps involved in such work, including setting up its operation to carry out these various tasks.

We reject Lang's claim that its operation site is nothing more than "an area of land from which minerals are extracted in liquid form" and thus not a "mine" under section 3(h)(1) of the Act. This is not a case about the extraction of minerals in liquid form. Rather, it is about the extraction of coal and Lang's actions to facilitate its safe removal. Although section 3(h)(I) excludes from the statute's coverage some areas where "minerals are extracted in liquid form," Lang does not argue that the wells in question were producing gas at the time that it was working at the sites. Although the record is not entirely clear as to whether the wells had been formally abandoned prior to Lang's work, Consol's and Lang's intent certainly was to ensure that the wells would no longer produce gas. Thus, we conclude that Lang was not working in an area from which liquid minerals were being extracted within the meaning of the statute.

Accordingly, Lang's operations were, as the judge found, "an integral and important part of Consol's extraction process." 12

FMSHRC at 1694. Thus, we conclude that the gas well sites and Lang's operations at those sites, under the facts involved in this case, were subject to the coverage of the Mine Act.

B. Whether Lang is an operator under the Mine Act

Lang additionally argues that, in performing the services in question, it was not an independent contractor-operator within the meaning of the Mine Act because its contact with Consol's mine was de minimis and unrelated to

~420

Section 3(d) of the Mine Act expanded the definition of operator5 under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. • 801 et seq. (1976)(amended 1977), to include "any independent contractor performing services or construction at such mine.5 In its Otis decisions, the Commission concluded that an independent contractor performing elevator maintenance and repair operations at underground coal mines constituted an operator within the meaning of the Act. Otis I, II FMSHRC at 1902; Otis II, 11 FMSHRC at 1923. The Commission indicated, however, that "not all independent contractors are operators under the Mine Act, and that `there may be a point ... aùt 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.'" Otis I, 11 FMSHRC at 1923, quoting Nat'l Indus. Sand Ass'n v. Marshall, 601 F.2d 689, 701 (3rd Cir. 1979). Citing Nat'l Indus. Sand Ass'n, supra, and Old Dominion, supra, as proper authority for determining when an independent contractor is an operator, Lang asserts that its contact with Consol's mine is so infrequent and de minimis that it does not amount to the performance of services. Further, in Lang's view, this activity does not amount to being engaged in the extraction process for the benefit of the owner or lessee of the property (in this case, Consol).

We conclude that the judge's determination that Lang was a statutory operator is amply supported by the record. In cleaning and plugging the gas wells, Lang performed services clearly related to the extraction process, at what amounted to a surface work area of Consol's Blacksville No. 2 underground coal mine. The overriding purpose of the plugging work was to ensure that gas did not seep into the mine afterùConsol mined through the area. Lang's work thus directly affected the safety of miners involved in the extraction of coal.

Notwithstanding the relatively limited period - - seven to ten days during which Lang provided services at the mine to clean and plug a well, we conclude that the contact was not de minimis. An independent contractor's presence at a mine may appropriately be measured by the significance of its presence, as well as by the

duration or frequency of its presence. The judge found that Lang's operation "constitute[d] an integral and important part of Consol's extraction process." 12 FMSHRC at 1694. Further, Lang had a "blanket contract" with Consol to clean and plug gas wells under specific purchase orders, and had plugged wells at different Consol mines since 1980 or 1981.

FOOTNOTE 3

Section 3(d) of the Mine Act provides:

"operator" means an 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.

30 U.S.C. • 802(d).

END OF FOOTNOTE

~421

Our holding today is consistent with Nat'l Indus. Sand, Old Dominion, and the D.C. Circuit's Otis decision. Nat'l Indus. Sand involved the Secretary of Labor's promulgation of training regulations. As relevant here, the Third Circuit was addressing the Secretary's authority to "include fewer than all independent contractors as operators for purposes of the training regulations." 601 F.2d at 701. The Court noted that "[t]here may be a point, at least, at which an individual contractor's contact with a mine is so infrequent or de minimis, that it would be difficult to conclude that services were being performed." (Emphasis added). Id. The Third Circuit viewed de minimis contact as a level at which it would be difficult to conclude that services were being performed, and noted that Congress intended to, include those engaged in the extraction process for the benefit of the owner or lessee. 601 F.2d at 701-03. Clearly, Lang is performing services for the benefit of Consol as part of the extraction process. Indeed, the services are so critical that without them Consol would be prohibited from extracting coal in these areas.

In Old Dominion, the Fourth Circuit adopted the Nat'l Indus. Sand analysis of the Third Circuit, and concluded that the appropriate analysis is whether the independent contractor substantially participates in mining activities. 772 F.2d at 97. Since the Fourth Circuit found that Old Dominion Power Company's "only contact with the mine is the inspection, maintenance, and monthly reading of a meter for the purpose of sending a bill to a mine company for the sale of electricity,5 there was not, in the Court's view, substantial participation in mining activities. 772 F.2d at 96.

In its opinion affirming the Commission's Otis decisions, the

D.C. Circuit held that section 3(d) of the Act "does not extend only to certain `independent contractor[s] performing services ... at [a] mine1; by its terms it extends to `any independent contractor performing services ... at [a] mine.'1 Otis, 921 F.2d at 1290 (emphasis in original). However, the court expressly noted that its decision did not address "whether there is any point 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.'5 921 F.2d at 1290 n.3 (citation omitted).

For the reasons set forth above, we conclude that substantial evidence and applicable legal principles support the judge's determination that, in performing the services in question, Lang was an independent contractor- operator within the meaning of the Act.

C. Whether Lang's activity is subject only to the Occupational Safety and Health Act

Reasserting its earlier argument concerning the Mine Act's section 3(h) "liquid/nonliquid" distinction, Lang argues that oil and gas drilling are not subject to the Mine Act. Land states that its operations here are no different, from a health and safety standpoint, than are other oil and gas drilling operations. Lang. Br. at 16-18. While Lang acknowledges that section 4(b)(I) of the OSHAct precludes Occupational Safety and Health Administration ("OSHA") jurisdiction if another agency exercises statutory authority, it maintains that there is no Mine Act statutory authority in this

~422

instance.

We reject Lang's argument that its activity is properly regulated under the OSHAct. Coverage under the OSHAct is exempted pursuant to section 4(b)(I) of the OSHAct, 29 U.S.C. • 653(b)(1), which states in pertinent part:

> Nothing in this chapter shall apply to working conditions of employees with respect to which other Federal agencies ... exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

As set forth earlier in this decision, we have determined that Lang's Consol-related operations fall within the section 3(h) definition of "coal or other mine" and that, with respect to these activities, Lang comes within the ambit of the term "operator" under section 3(d). Further, we also note that, in this instance, MSHA has exercised statutory authority to prescribe and enforce "standards or regulations" affecting the operation in question. MSHA's Decision and Order created, in effect, a new safety standard

dealing with the cleaning and plugging of gas wells involving Consol's mine. Under 30 C.F.R. • 44.4(c), an operator must comply with the conditions in an order granting a petition for modification, and the violation of such conditions is equivalent to a violation of any other safety standard. See also Int. U. UMWA V. FMSHRC, 931 F.2d 908, 909 (D.C. Cir. 1991).

III.

Conclusion

On the foregoing bases, we affirm the judge's decision.4

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

Clair Nelson, Co

FOOTNOTE 4

Chairman Ford did not participate in the consideration or disposition of this matter.

END OF FOOTNOTE