UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. BASIC ENERGY SERVICES, LP, Respondent.	DOCKET NO. 16-0367

Appearances:

Christopher D. Lopez-Loftis, Esq., U.S. Department of Labor, Office of the Solicitor, Dallas, Texas
For Complainant

Steven R. McCown, Esq., Earl M. Jones, III, Esq., Sean M. McRory, Esq., Littler Mendelson, PC
For Respondent

Before: Administrative Law Judge Brian A. Duncan

DECISION AND ORDER

Procedural History

On July 23, 2015, Respondent's mobile well-servicing rig tipped over while its employees were attempting to remove a piece of pipe that had become stuck in an oil well thousands of feet under ground. Two employees were seriously injured and another, who was positioned 60 feet up in the derrick, was killed. Complainant assigned Compliance Safety and Health Officer ("CSHO") Wayne Eyerly and James Nelson, a technical analyst from the OSHA Salt Lake City Technical Center, to perform an inspection of the worksite. CSHO Eyerly and Mr. Nelson arrived at the worksite a week-and-a-half after the accident occurred. Based on CSHO Eyerly's and Mr. Nelson's observations and recommendations, Complainant issued a *Citation and Notification of Penalty*, alleging that Respondent committed a serious violation of

29 U.S.C. § 654(a)(1), also referred to as the general duty clause, with a proposed penalty of $7,000. Respondent timely contested the *Citation*, which brought the matter before the Occupational Safety and Health Review Commission pursuant to Section 10(c) of the OSH Act.

This case was originally set for trial on December 6, 2016; then continued, at the request of the parties, to March 9, 2017. On March 9, 2017, the trial began but was quickly recessed because two key witnesses, Johnny Mullins and Michael Brown, refused to comply with trial subpoenas issued by this Court.[1] Both parties also raised multiple discovery issues and claims of prejudice for the first time at trial. (Tr. 78-106).

On March 29, 2017, Complainant filed a motion to enforce the subpoenas. Therefore, the matter was referred to the Department of Justice, who has authority to pursue the enforcement of OSHRC subpoenas before the appropriate U.S. District Court. *See* 29 C.F.R. § 2200.65(f). It took nearly 10 months for the DOJ to authorize the enforcement action and refer the matter to a local U.S. Attorney's Office. On February 27, 2018, the U.S. Attorney filed a petition to enforce the administrative subpoenas served on Mullins and Brown in the Eastern District of Texas. This Court further issued an order compelling Mullins and Brown to testify at a commencement of this trial on March 1, 2018.

When the trial was reconvened on March 1, 2018, however, Mullins and Brown again failed to appear. In lieu of waiting for Mullins and Brown, the Court heard testimony from the only other witness called by the parties: James Nelson. (Tr. 140). By the conclusion of Nelson's testimony, neither Mullins nor Brown had appeared. Therefore, the Court ordered the trial be recessed again while the subpoena enforcement action progressed before the District Judge in the Eastern District of Texas. (Tr. 282-294).

[1] Served by Complainant on February 28, 2017 and March 2, 2017.

On April 17, 2018, Respondent filed a *Petition for Interlocutory Review* based on the repeated trial delays and a claim of prejudice resulting from those delays. The matter was not accepted by the Commission for review, resulting in a *de facto* denial of the petition on May 18, 2018. *See* 29 C.F.R. § 2200.73(b).

On December 3, 2018, the Eastern District of Texas District Court issued an *Order to Show Cause* to Mullins and Brown regarding their failure to appear at the OSHRC trial. Ultimately, on April 8, 2019, Brown and Mullins withdrew their previously lodged objections to the OSHRC subpoenas. Therefore, on April 10, 2019, the District Court issued an order directing Mullins and Brown to appear before this Court "at such reasonable time and place as the ALJ may set, and then and there testify."

On June 7, 2019, the conclusion of this trial was conducted in Tyler, Texas, wherein both Mullins and Brown appeared and gave testimony. No additional witnesses were called by either party. Both parties timely submitted post-trial briefs for consideration.

Jurisdiction & Stipulations

The parties stipulated that the Commission has jurisdiction over this proceeding pursuant to Section 10(c) of the Act and that, at all times relevant to this proceeding, Respondent was an employer engaged in a business and industry affecting interstate commerce within the meaning of Sections 3(3) and 3(5) of the Act, 29 U.S.C. § 652(5). (Tr. 15). *See Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005).

Factual Background

Respondent was hired by Mid-States Petroleum to remove a section of oil pipe that had become stuck roughly 7,500 feet below the wellhead. (Tr. 353, 384, 450). Respondent worked with a tool hand named George Ogle, who was employed by Knight Tools, which provides

specialty tools to aid in the removal of stuck pipe. (Tr. 365–66). The operation was overseen by a company man, Stewart Luce, who represented Mid-States at the wellsite. (Tr. 366, 421). Respondent's on-site crew consisted of Michael Brown (Rig Supervisor/Tool Pusher), Johnny Mullins (Rig Operator), Justin Turner (derrick hand), and two other derrick hands. (Tr. 337, 421, 450).

The process of removing a piece of stuck oil pipe down the well is commonly referred to as "fishing," and the piece of stuck pipe is referred to as the "fish". (Tr. 317–19). Respondent provided what is known as a mobile workover rig, which was used as the fishing pole, so to speak, to reel in the fish.[2] (Tr. 323). The rig being used at this site, a series 750, had a hydraulic actuated mast,[3] which extended 120 feet up in the air from the rear of the mobile unit, and had a 300,000-pound lifting capacity. (Tr. 149, 326–28). Once the rig was positioned over the wellhead, it was anchored to a base beam, which is a solid piece of steel, measuring roughly 85 feet long, 4 feet wide, and at least 6–12 inches thick. (Tr. 328–30). The derrick had three main employee work areas: the "goat stand," where the rig operator, Mullins, was positioned; the rig floor, where the two derrick hands worked; and the elevated tubing board, where derrick hand Justin Turner, was stationed. (Tr. 337–38, 344, 354). The rig operator raised and lowered the pipe string by controlling elevators attached to the mast. (Tr. 319–20, 344). The rig floor hands used a set of tongs to separate sections of pipe, known as "stands",[4] as they came out of the wellhead. (Tr. 344). The derrick hand who was positioned on the tubing board, roughly 60 feet

2. According to Mullins, a servicing rig serves two functions: completion and workover operations. (Tr. 319). This case focuses on workover operations, which are implemented when something goes wrong at the well, such as a stuck piece of pipe. (Tr. 319).
3. The mast is also referred to as the derrick. (Tr. 322).
4. An individual section of pipe is referred to as a "joint", whereas two pieces of pipe attached by a collar are referred to as a "stand". (Tr. 342). A joint is typically 31.5- to 32.5-feet long. (Tr. 431). Thus, a stand is roughly 65-feet long, which explains the position of a derrick hand in a 60-foot tall perch. (Tr. 431)

above the rig floor, took the individual pipes that had been lifted out of the wellhead and placed them in a rack stand. (Tr. 191–93, 344, 357; Ex. C-4 at 7, 12).

Brown's crew arrived at the wellsite at 3:00 p.m. on July 22, 2015, the day before the rig collapse. (Tr. 347). They set up the mobile servicing unit and the night crew started putting pipe into the hole until 7:00 a.m. the next morning, at which point Brown's crew took over after conducting its safety meeting, filling out a job safety analysis, and attaching a new weight indicator. (Tr. 345, 348–49). After 3–4 hours of running pipe down the hole, Brown's crew had reached the stuck section of pipe (aka "fish") (Tr. 350). As part of the fishing operation, the night crew, with the assistance of Ogle, had attached a piece of equipment to the bottom hole assembly (BHA) known as an overshot.[5] (Tr. 317, 339, 349, 413). The overshot was designed to latch onto the fish, so it could be freed and pulled upward to the ground surface. (Tr. 319). At this point in the process, there was 7,500 feet, or approximately 96,000 pounds, of pipe (including the BHA) down the well, which Mullins referred to as the "work string" or "pipe string." (Tr. 340, 353).

Once Mullins latched onto the fish, he loaded the "jars", which were compressed hydraulic rims inside of a cylinder on the BHA that apply an impact, or jolt, to the stuck fish.[6] (Tr. 351–52). Mullins increased the upward pull weight on the pipe string to 120,000 pounds, which caused the jars to be set off. (Tr. 351). At that point, the fish remained stuck in place, so Mullins reloaded the jars and increased the string pull weight to 170,000 pounds. (Tr. 351–52). According to Mullins, when the jars were released again at 170,000 pounds, the stuck section of pipe/fish came loose. (Tr. 351–52). None of Respondent's employees were working on the rig

5. The BHA is the first thing sent down the well. (Tr. 414).
6. According to Mullins, this "jolt" shakes the entire servicing rig, not merely the portion of the pipe below the surface. (Tr. 363–64).

floor or on the elevated tube board during this first release of stuck pipe. (Tr. 354). After they "caught the fish", the three derrick hands climbed up on the rig to various positions to begin pulling out the work string and busted pipe. (Tr. 353–54).

According to Mullins, the subsequent pipe removal was a slow process because there was a bend towards the bottom of the well hole where the pipe turned laterally for 3,000 to 4,000 feet. (Tr. 355). Mullins testified it took nearly an hour-and-a-half to remove 15 to 16 stands of pipe from the well, because they had to occasionally move the string up and down in order to move the stands past the bend.[7] (Tr. 355, 359). The extracted stands were placed in the rack by Turner, who was aloft in the mast. (Tr. 357). During this part of the process, the weight indicator showed the rig pulling with roughly 85,000 to 100,000 pounds of force, which accounted for the approximate 96,000 pound string weight, and the additional force needed to get the stands past the bend in the hole. (Tr. 359, 425). Mullins testified it was not unusual to have fluctuations of a few thousand pounds above the string weight. (Tr. 388). Rig Supervisor Brown was in his truck during the initial removal of pipe sections. (Tr. 361).

Once Respondent's crew had removed 15 to 16 stands of pipe, it got stuck again. (Tr. 360). At this point, Mullins called Brown and the Knight Tool rep, Ogle, to come to the Rig Operator station. (Tr. 360). Both Ogle and Brown watched Mullins work the string up and down a few times, unsuccessfully trying to free this second stuck pipe/fish. (Tr. 360). Brown confirmed this during his trial testimony, indicating that pipe stand number 17 is the point at which "it got real stuck." (Tr. 433).

Ogle then told Mullins to increase the pull weight to 120,000 pounds and set off the jars again. (Tr. 361). At that point, Mullins asked Brown if they could get Justin Turner down from

7. This is one area where Mullins' and Brown's testimony differed. According to Brown, extracting the first 15 stands of pipe only took 10–15 minutes. (Tr. 477).

the elevated tube board above the rig. (Tr. 362). Ogle told Mullins and Brown: "You know we already pulled the 170[k]. This is not nothing up there he's not used to. Don't worry about it." (Tr. 363). Mullins again asked Brown what he should do, and Brown told him to listen to Ogle. (Tr. 363). Mullins followed those instructions and pulled until the indicator read 120,000 pounds of force and set off the jars, which caused a "big jolt" to the rig. However, it did not free the stuck pipe. (Tr. 363). At this point, the Mid-States company man, Luce, made his way up to the Rig Operator's position. (Tr. 365). Also at that time, the two other derrick floor hands got down off the rig. (Tr. 366–68).

Rig Operator Mullins was then accompanied by Ogle, Luce, and Brown, while derrick hand Justin Turner was still 60 feet up above the rig floor on the elevated tube board. (Tr. 366). Ogle directed Mullins to increase the rig pulling force to 140,000 pounds, at which point Mullins told his supervisor Brown again, "We need to get Justin down." (Tr. 369). After Ogle said it would be all right, Brown told him to proceed, leaving Turner up in the mast. (Tr. 369). Mullins slowly increased the force of the pull to 140,000 pounds, but it still failed to free the stuck pipe. (Tr. 370). Ogle and Luce then told him to increase the pull to 160,000 pounds. (Tr. 370). Mullins again asked his supervisor Brown to bring Justin Turner down off the rig. (Tr. 370). In response, Ogle told him, "If you're that worried about Justin, you need to holler up there and tell him to hold onto something." (Tr. 370). Mullins looked to Brown, who was standing right next to him and told him: "Just do what they're saying." (Tr. 371). Ogle followed this by mocking Respondent's crew for being too timid and called them derogatory names. (Tr. 371). Following the instructions he was given, Mullins slowly increased the rig pull force to 160,000 pounds, at which point they noticed the front end of the rig lifting up off the ground. (Tr. 372-373).

According to Mullins, the pipe then broke free, and the rig fell back toward the ground, and flipped over on its side. (Tr. 373).

Though Brown and Mullins agreed on many facts during the trial, there were some discrepancies. When Brown testified, he confirmed that Mullins asked to remove Turner from the mast before they lifted to 120,000 pounds, but claimed they did not set off the jars during the time Turner was in the elevated platform. (Tr. 434–35). Once they reached 120,000 pounds of force, Brown also confirmed that Mullins again asked if they could remove Turner from the elevated derrick platform. (Tr. 425). Brown also confirmed that Ogle referred to Mullins in a derogatory way after voicing his concerns, and that Luce, the company man, just laughed. (Tr. 426). Brown also confirmed that he told Mullins they were "still good right now", and with Turner still on the elevated platform, directed Mullins increase the pull weight to 130,000 pounds, then 140,000 pounds, then 150,000 pounds. (Tr. 426).

Brown testified that once they reached 150,000 pounds, contrary to Mullins' testimony, that he told the two floor hands and Turner to get off the rig. (Tr. 426). Brown further testified that he was arguing with Luce about Turner coming down from the derrick tube platform, just as the rig started lifting off of the ground. (Tr. 427).

The Court found Mullins' testimony to be more credible than Brown's. Mullins was at the controls of the rig the entire time, and had first-hand knowledge of the rig pull settings and progressions. Although Brown claimed that jars were not set off again at 120,000 pounds, the Court specifically credits Mullins over Brown on this issue. Mullins testified very specifically, that Ogle told him to re-set the jars at 120,000 to try to free this second "fish." Mullins was the one specifically responsible for re-setting those jars and increasing the pull pressure to set them off. Given the impact that jarring had on the rig, Mullins' testimony regarding the jars explains

both his heightened concern for Turner's safety, as well as the floor hands' subsequent decision to vacate the rig floor, at a point when Brown, Ogle, and Luce seemed to be comfortable with the employees' locations and working conditions.

The Court also notes that Mullins' testimony was consistent throughout, whereas Brown hedged or changed his testimony in some areas. For example, when Brown was asked what constituted a "normal pull" for the rig, he testified that it was equal to the weight of the work string/pipe string below the rig, which is how Mullins described it. (Tr. 388, 469–71). However, in response to questions from Respondent's counsel, Brown changed his testimony to suggest that a "normal" pull could far exceed the weight of the work string/pipe string. (Tr. 482–83). Such variation in testimony suggests, in part, that Brown's may have been motivated by his desire to show he had made appropriate supervisory decisions under the circumstances.

As the rig collapsed, Mullins and Brown were thrown from the walkway they were using to try to escape. (Tr. 377). When he regained consciousness underneath the toppled rig, Mullins was covered in hot oil. (Tr. 378). He subsequently underwent multiple surgeries as a result of his injuries. Turner, who was still on the elevated platform above the rig floor throughout all of these events, was killed in the collapse. (Tr. 381). Brown was found on top of plastic chemical tanks with iron and wire guidelines laying across him. (Tr. 381–82). Brown had to be life-flighted to the nearest hospital, where he underwent multiple surgeries. (Tr. 382–83).

OSHA began its investigation on August 4, 2015, approximately a week-and-a-half after the accident. (Tr. 146). Complainant sent CSHO Wayne Eyerly from the Oklahoma City Area Office and James Nelson, an engineer and consultant with the OSHA Technical Center, to inspect the site. Nelson was called in to provide technical support for the inspection based on his previous participation in investigations involving oil and gas wells. (Tr. 144–45). At this point in

time, the rig remained in the same position it was in after it had fallen on July 23, 2015. (Tr. 148; Ex. C-4).

The inspection was limited. Nelson and Eyerly took pictures and asked questions of the company representatives that were on site, but did not conduct interviews of any individuals involved in the accident itself. (Tr. 149–50, 160–61). Accordingly, in support of their determination that a violation occurred, Nelson and Eyerly relied heavily upon statements provided to police officers after the accident. (Tr. 164, 166). Based on their investigation, Complainant determined that Respondent violated Section 5(a)(1) of the Act when it engaged in unusually hard pulls while Justin Turner was on the derrick's elevated tube deck, 60 feet above the rig floor.

Discussion

Citation 1, Item 1

> Complainant alleged a serious violation of the Act in Citation 1, Item 1 as follows:
>
> Section 5(a)(1) of the Occupational Safety and Health Act of 1970: The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm during an oil and gas services rig fall over event:
>
> At the worksite: On or about July 23, 2015, employees working within an oil and gas service rig were not removed from the derrick prior to applying unusual loading on the rig.
>
> Among others, one feasible and acceptable means of abatement would be to comply with American Petroleum Institute (API) 54, Recommended Practice for Occupational Safety for Oil and Gas Well Drilling and Servicing Operations, Chapter 9.

Citation and Notification of Penalty at 6.

To establish a violation of the general duty clause, Complainant must prove "(1) a condition or activity in the workplace presented a hazard; (2) the employer or its industry recognized the hazard; (3) the hazard was causing or likely to cause death or serious physical

harm; and (4) a feasible and effective means existed to eliminate or materially reduce the hazard." *S.J. Louis Constr. of Tex.*, 25 BNA OSHC 1892, 1894 (No. 12-1045, 2016). Citing to the American Petroleum Institute's Recommended Practice 54, Complainant alleges Respondent violated the general duty clause by attempting an unusual pull to free a piece of stuck pipe while employees were on the servicing rig, thereby creating falling and struck-by hazards. Respondent argues that Complainant failed to establish a violation because: (1) he did not define what "unusual loading" is and, therefore, did not establish the existence of a hazard; (2) he did not establish Respondent or the well servicing industry recognized such a hazard under the circumstances presented in this case; and (3) he failed to show Respondent had adequate time to abate the hazard once it became aware of the hazard.

The term "unusual", which is used twice in the cited API Recommended Practice, is not specifically defined by the API. However, the Court finds that Respondent was aware that pulling on a piece of stuck pipe, at the increased levels involved in this case, with the use of jarring, resulted in unusual loading on the rig and created a hazard for the employee on the elevated tube stand. Thus, Respondent should have removed Turner from the rig before the pulling force was increased to 120,000 pounds and the jars were set off. Accordingly, consistent with the discussion below, the Court finds Respondent violated the general duty clause as alleged by Complainant.

The Conditions Created a Hazard for Employees

"[H]azards must be defined in a way that apprises the employer of its obligations and identifies conditions or practices over which the employer can reasonably be expected to exercise control." *Pelron Corp.*, 12 BNA OSHC 1833, (No. 82-388, 1986) (citing *Davey Tree*, 11 BNA OSHC 1898, 1899 (No. 77-2350, 1984)). A hazard is a "condition that creates or

contributes to an increased risk that an event causing death or serious bodily harm to employees will occur." *Baroid Div. of NL Indust., Inc.*, 660 F.2d 439, 444 (10th Cir. 1981). If the evidence shows that a practice could result in serious physical harm "upon other than a freakish or utterly implausible concurrence of circumstances", then Complainant has established the existence of a hazard. *See Nat'l Realty & Constr. Co., Inc. v. OSHRC*, 489 F.2d 1257, 1265 n.33 (D.C. Cir. 1973).

The original basis for Complainant's claim of a hazard is the API RP 54, Chapter 9, which states: "During instances of unusual loading of the derrick or mast, such as when making any unusually hard pull, only the driller or other essential supervisory personnel should be on the rig floor, and no one should be in the derrick, mast, or cellar." (Ex. C-10 at § 9.2.11). Complainant argues that Respondent's crew engaged in unusual loading when it left its employees—other than Mullins—on the rig floor and in the mast while it pulled and jarred on the second pipe that had become stuck. Respondent contends that Complainant failed to establish this element in two ways: (1) he failed to define "unusual", such that he could characterize Respondent's activities as hazardous; and (2) the weight indicator only showed a pull of 160,000 pounds, which is well below the 300,000-pound capacity of the rig and, thus, not unusual. The Court agrees with Complainant.

The hazardous condition resulted from a confluence of employee location and specific rig operation; namely, that employees (other than the Rig Operator) should not have been on the rig *while* it engaged in "an unusually hard pull". In other words, an unusually hard pull is not, of itself, a violative condition. It only becomes so when employees are located *on the rig derrick, mast, or cellar* during such activity. As it turns out, Respondent's own safety policy contains a prohibition that is similar, but more detailed, than API RP 54. (Ex. C-18 at p. 23, No. 17).

According to Respondent's policy, "Crews are to be off the rig floor, out of the cellar, and out of the derrick when the following operations are being conducted: unseating a pump, un-landing tubing, pulling the first joint of tubing, ***jarring or pulling on stuck pipe, and when more than normal pulling force is required***." (*Id.*) (emphasis added). Respondent was engaged in both highlighted activities in the time period leading up to the rig collapse. The Court finds "more than normal" (Respondent's policy term) and "unusually hard" (API's term) express the same concept, albeit in slightly different ways.

Mullins testified that "more than normal pulling force," per Respondent's safety policy, equates to a pull that exceeds the weight of the pipe string below the rig. (Tr. 388, 391; Ex. C-18 at 23). In other words, a normal pull would mean the weight indicator should provide a reading that is roughly equal to whatever the weight of the pipe string is, including the BHA. This is consistent with Brown's testimony in response to questions from the Court: "normal" pulling force is generally equal to the string weight, which would vary depending on how far down the string has to reach and the type of equipment being used. (Tr. 469-471). In this case, both Mullins and Brown testified that the force necessary to extract the 96,000 pound pipe string (after dislodging the first stuck pipe) was roughly 85–100k pounds, which accounted for minor fluctuations as the first 15 to 16 pipe stands were removed. The Court finds, consistent with Mullins' testimony, that the pull became "unusual" or "more than normal" when the rig pulling force was increased to 120,000 pounds and the jars were triggered. (Tr. 360, 433–34). And further still, since the pipe remained stuck, the pulling force continued to be increase to 170,000 pounds, almost twice the pipe string weight. (Tr. 435). All while Turner remained on the elevated tube board above the rig floor.

Respondent argues that the pull was not unusual because this rig was capable of lifting up to 300,000 pounds, and that Brown had previously been on a rig when it pulled 260,000 pounds. (Tr. 446, 459–60, 482–83). The Court finds that these two facts, in isolation, do not resolve the issue. While the rig may have been capable of pulling 300,000 pounds, the Court finds the prohibition against having employees on the rig while engaged in an "unusual" or "harder than normal" pull relates more to the fact that Respondent's crew, in this case, was jarring stuck pipe at nearly twice the pipe string weight. Under other circumstances, a smooth pull on unstuck pipe, with no need for jarring, at 200,000 pounds of force, might not be considered "unusual" or "more than normal" by a reasonable person familiar with the industry.

These facts further support the conclusion that this pull was "unusual" and "more than normal": (1) Mullins stopped when he was asked to increase the pull weight to 120,000 pounds and set the jars, to call Respondent's Rig Supervisor Brown from his truck to the operator's station, (2) Mullins repeatedly asked his supervisor, Brown, to remove Turner from the elevated platform, based on his understanding that setting off jars and pulling far in excess of the string weight was hazardous, and a violation of company policy; and (3) the two other derrick hand employees decided to get off the rig floor when 120,000 pounds of force, and jarring, failed to free the stuck pipe.

The Court finds that Respondent failed to free its worksite of a hazardous condition for Turner, who continued to work in an elevated platform above the derrick floor while "unusual" and "more than normal" pulling force was applied to stuck oil well pipe. Complainant established the existence of a hazard.

Respondent and Its Industry Recognized the Hazard

A hazard is recognized when either the cited employer or its industry recognizes the risk of harm from the cited conditions. *See Arcadian Corp.*, 20 BNA OSHC 2001, 2008 (No. 93-0628, 2004). Probative evidence of industry recognition includes, amongst other things, voluntary industry standards, such as those published by ANSI, NFPA, and API. *See, e.g., Cargill, Inc.*, 10 BNA OSHC 1398 (No. 78-5707, 1982) (NFPA); Kokosing Constr. Co., 17 BNA OSHC 1869 (No. 92-2596, 1996) (ANSI). Regarding employer recognition, the Commission stated, "While an employer's safety precautions alone do not establish that the employer believed that those precautions were necessary for compliance with the Act . . . precautions taken by an employer can be used to establish hazard recognition in conjunction with other evidence." *Beverly Enters., Inc.*, 19 BNA OSHC 1161 (Nos. 91-3144 et al., 2000) (emphasis added) (citing *Wheeling-Pittsburgh Corp.*, 16 BNA OSHC 1218 (No. 89-3389, 1993); *Waldon*, 16 BNA OSHC 1052 (No. 89-3097), 1993).

The record established that this hazard was recognized by the oil servicing industry as a whole, as well as Respondent specifically. First, Respondent's policy specifically stated that employees shall not be on the rig while setting off jars, pulling on stuck pipe, or engaging in a harder-than-normal pull. (Ex. C-18). The record clearly established that Respondent's crew was engaged in all three of those activities on July 23, 2015. Second, each time he was asked to increase the force of the pull to 120,000 pounds and beyond, Mullins asked Brown to remove Turner from the elevated tube deck. This request was made three different times. This demonstrated Mullins' knowledge and awareness of Respondent's policy, and was specifically directed to the person with authority over Respondent's operations at the well site. Third, the two other deck hands exiting the rig floor after Mullins increased the pull to 120,000 and set off the jars, demonstrated their recognition of the hazard and knowledge of Respondent's policy.

Alternatively, if Brown's testimony that he directed the two floor hands to get off the rig floor at some point is believed, it further demonstrates that Respondent's supervisor recognized the hazard and had knowledge of Respondent's policy. *See Missouri Basin Well Svc., Inc.*, 26 BNA OSHC 2314 (No. 13-1817, 2018) (finding supervisor's recognition of the hazard was imputable to his employer).

Additionally, the Court also finds the well servicing industry recognized the hazard at issue. Though Nelson was not qualified as an expert, he did have experience performing investigations of oil and gas rigs and was familiar with the API standards. (Tr. 142). According to him, API RP 54, Chapter 9 applied to the work performed by Respondent at this site. (Tr. 226, 239). Given the similarities between the referenced API standard and Respondent's own safety policy on this issue, the Court agrees. Respondent and its industry clearly recognized this hazard.

The Hazard Caused Serious Injury and Death

Complainant must show that Respondent's employees were "exposed to a hazard likely to cause death or serious physical harm." *Peacock Eng'g, Inc.*, 26 BNA OSHC 1588 (No. 11-2780, 2017). The appropriate standard for assessing this element is "not the likelihood of an accident or injury, but whether, if an accident occurs, the results are likely to cause death or serious harm." *Waldon*, 16 BNA OSHC at 1060. Here, the Court does not need to make a speculative assessment of possible injuries from the hazardous condition. As a result of the mobile rig collapse, one employee died when he fell from the elevated tube deck, and two others received serious injuries, which required hospitalization and multiple surgeries. Accordingly, the Court finds that the violation was properly characterized as serious, since the hazard was likely to cause death or serious physical harm.

Complainant Established Feasible Means to Abate the Hazard

To establish this element, Complainant must "'specify the proposed abatement measures and demonstrate both that the measures are capable of being put into effect and that they would be effective in materially reducing the incidence of the hazard."' *Arcadian Corp.*, 20 BNA OSHC 2001 (quoting *Beverly Enters., Inc.*, 19 BNA OSHC 1161 (No. 91-3144 *et al.*, 2000)). "Feasible means of abatement are established if "conscientious experts, familiar with the industry' would prescribe those means and methods to eliminate or materially reduce the recognized hazard." *Id.* (quoting *Pepperidge Farm, Inc.*, 17 BNA OSHC 1993)). Where an employer has taken steps to abate the recognized hazard, Complainant must show those measures are inadequate. *Alabama Power Co.*, 13 BNA OSHC 1240 (citing *Cerro Metal Prods. Div., Marmon Grp., Inc.*, 12 BNA OSHC 1821, 1822 (No. 78-5159, 1986)).

Complainant established that the proposed abatement would have been adequate, and easy to implement, to address the hazard characterized in the citation. Once Respondent determined that a second piece of pipe was "real stuck";[8] that the pulling force of the rig needed to be increased to 120,000 pounds; and that the jars needed to be re-set for use, derrick hand Turner should have been removed from the elevated tube platform above the derrick floor. Such action would have been consistent with API RP 54, 9.2.11 and Respondent's own safety policy. Instead, despite multiple requests from Rig Operator Mullins to remove him, Turner was left aloft in the tubing board for approximately 20–30 minutes through significant increases in pulling force and jarring. (Tr. 433, 452, 476).[9]

Based on these facts, the Court further rejects Respondent's argument that abatement was infeasible because the hazard purportedly became apparent only a minute or two before the

[8] As described by Rig Supervisor Brown. (Tr. 433).

accident. The hazard did not materialize when the rig started to lift, wobble, and tip. By the terms of the API standard and Respondent's own safety policy, the hazard to Turner arose at the point the rig was no longer capable of removing the pipe string through the application of normal pulling force. Indeed, this was the point at which Brown was called over to the rig controls, and Mullins began his repeated requests to remove Turner from the mast platform. This particular abatement was uncomplicated and required nothing more of Respondent than to follow industry standards, comply with its own safety policy, and listen to its Rig Operator. Turner could have simply been instructed to get off the rig. Accordingly, the Court finds Complainant established a feasible means to abate the hazard.

Respondent's Employees Were Exposed to a Hazard

As discussed above, Turner was exposed to the hazard when he was allowed to remain on the elevated tube platform, 60 feet above the derrick floor, while the rig pulling force was gradually increased to nearly double the pipe string weight, and jars were set off. Employee exposure to the hazard was established.

Respondent Had Knowledge of the Violation

To prove this element, Complainant must show Respondent knew or, with the exercise of reasonable diligence, could have known of the violation. *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1962, 1965 (No. 82-928, 1986). The key is whether Respondent was aware of the conditions constituting a violation, not whether it understood the conditions violated the Act. *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079–80 (No. 90-2148, 1995). Complainant can prove knowledge of an employer through the knowledge, actual or constructive, of its supervisory employees. *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993). If a supervisor is, or should be, aware of a hazardous condition, it is reasonable to charge the

employer with that knowledge. *See Mountain States Tel. & Tel. Co. v. OSHRC*, 623 F.2d 155, 158 (10th Cir. 1980).

Brown, Respondent's on-site supervisor, was standing right next to Mullins from the time the decision was made to increase the pulling force to 120,000 and re-set the jars, to the point right before the rig tipped over. (Tr. 372–73). Brown estimated that this lasted approximately 20 minutes. He was specifically aware of the conditions of the rig, the location of derrick hand Turner, and the multiple requests made by Mullins to remove Turner from the rig mast. Rig Supervisor Brown's knowledge is imputed to Respondent. Complainant established employer knowledge of the violative condition. Accordingly, the Court finds Complainant established the *prima facie* elements of the general duty clause violation alleged in Citation 1, Item 1.

Respondent Failed to Prove the Affirmative Defense of Unpreventable Employee Misconduct

In order to prevail on a claim of unpreventable employee misconduct, Respondent must show: (1) it had established work rules designed to prevent the violation; (2) it had adequately communicated those rules to its employees; (3) it had taken steps to discover violations of the rules; and (4) it effectively enforced the rules when violations were detected. *Am. Eng'g & Dev. Corp.*, 23 BNA OSHC 2093, 2096–97 (No. 10-0359, 2012). In other words, it is incumbent upon Respondent to "demonstrate that the actions of the employee were a departure from a uniformly and effectively communicated and enforced workrule [sic]." *Archer-Western Contractors Ltd.*, 15 BNA OSHC 1013 (No. 87-1067, 1991).

During the examination of Brown, Respondent asked whether an employee could be disciplined for his/her failure to exercise stop work authority in a situation that calls for it. (Tr. 462). Complainant objected on the basis that such evidence was irrelevant in light of Respondent's discovery responses, wherein it stated three separate times that "it's not currently

asserting an employee misconduct defense but reserves the right to assert such defense at a later time." (Tr. 463–65); *see also Compl't Br.* at 23–24. Respondent said that it felt compelled to re-assert the affirmative defense at trial, with no prior notice to Complainant or the Court, because Mullins testified he exercised his stop work authority by pausing the operation and asking at various points to have Turner come down from the tubing board. (Tr. 408–409). Respondent, without producing any evidence in support, argued this was inconsistent with deposition testimony Mullins had given in a separate, civil case. (Tr. 465–67). The Court left open the issue of whether the defense was still available to Respondent and directed the parties to address it in their post-trial briefs. (Tr. 467–68).

Although given the opportunity to do so, Respondent did not pursue the matter further in its examination of witnesses or in its post-trial brief. Thus, although Respondent asserted the unpreventable employee misconduct defense in its *Answer*, the Court finds its discovery responses and failure to argue the defense in its post-trial brief are tantamount to abandonment. *Georgia-Pacific Corp.*, 15 BNA OSHC 1127, 1991 CCH OSHD ¶29,395 (No. 89-2713, 1991). Accordingly, the Court rejects any claim of unpreventable employee misconduct by Respondent. Citation 1, Item 1 will be AFFIRMED.

Penalty

In calculating appropriate penalties for affirmed violations, Section 17(j) of the Act requires the Commission give due consideration to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of violations. Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201

(No. 87-2059, 1993). It is well established that the Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *Valdak Corp*., 17 BNA OSHC 1135 (No. 93-0239, 1995); *Allied Structural Steel*, 2 BNA OSHC 1457 (No. 1681, 1975).

Complainant proposed a penalty of $7,000, which, at the time of the citation, was the highest penalty allowed for a serious violation of the Act. Complainant determined that Respondent had roughly 5,000 employees, and therefore, did not reduce the proposed penalty based on the employer's size. (Ex. C-1). Complainant also determined Respondent was not eligible for a reduction based on history because of previous OSHA violations at other jobsites. (Ex. C-3). Further, Complainant declined to apply a good faith penalty reduction. Based on the totality of circumstances discussed above, the Court finds that a penalty of $7,000 for Citation 1, Item 1 is appropriate.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Citation 1, Item 1 is AFFIRMED as a SERIOUS violation of the Act, and a penalty of $7,000 is ASSESSED.

/s/ Brian A. Duncan

Judge Brian A. Duncan
U.S. Occupational Safety and Health Review Commission

Date: December 2, 2019
Denver, Colorado