United States of America
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**
1244 Speer Boulevard, Room 250
Denver, Colorado 80204-3582

Phone: (303) 844-3409 Fax: (303) 844-3759

| | |
|---|---|
| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>D-J'S WELL SERVICE AND ROUSTABOUT, INC.,<br>Respondent. | OSHRC DOCKET NO. 05-1619 |

APPEARANCES:

For the Complainant:
Charles Hairston, Esq., U.S. Department of Labor, Office of the Solicitor, Dallas, Texas

For the Respondent:
Marvin Jones, Esq., Christine Stroud, Esq., Sprouse Shrader Smith, P.C., Amarillo, Texas

Before: Administrative Law Judge: James H. Barkley

## DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651-678; hereafter called the "Act").

At all times relevant to this action, Respondent, D-J's Well Service, Inc. (D-J's) provided roustabouts and equipment to oil field operators in and around Stinnett, Texas (Tr. 26-30, 37). D-J's admits it is an employer engaged in a business affecting commerce, and is therefore subject to the requirements of the Act.

On June 21, 2005, a crew furnished by D-J's to an oil field operator, Baker/MO Services, Inc. (Baker), was re-leveling a pump jack on Baker's Riley G-16 lease. The top heavy pump jack became unbalanced, tipped over and crushed Jerry Deaver, a member of the crew. Upon learning of the fatality, the Occupational Safety and Health Administration (OSHA) initiated an inspection of the accident. As a result of that inspection, OSHA issued a citation to D-J's alleging violation of §5(a)(1) of the Act. By filing a timely notice of contest D-J's brought this proceeding before the Occupational Safety and Health Review Commission (Commission). A hearing was held in Amarillo, Texas on March 29, 2006. Briefs have been submitted on the issues and this matter is ready for disposition.

## Alleged Violation of §5(a)(1)

Serious Citation 1, item 1 alleges:

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 to employees in that employees were exposed to the condition(s) listed below:

> a) On June 21, 2005, employees of D-J's Well Service took a Cabot T-base pumping unit loose from its base and placed it onto shoring timbers, without attaching it firmly to anything else. Before doing this, they chained the bull gear to prevent the counterweights from traveling, after attaching one counterweight to a truck-mounted pole hoist. When they released the chain by hoisting the counterweights, one employee was pushing on the drive bells to prevent the counterweights from moving, which placed him in their zone of travel. When he released the belts, the swinging counterweights were suspended from only one side, which had the effect of overbalancing the unit and causing it to topple over. Employees were thus exposed to the recognized hazards of being caught underneath falling equipment and being struck by or caught between the swinging counterweights and the rest of the pumping unit.
>
> Exposure to these hazards could have been avoided by:
> 1. Attaching both counterweights to the hoist with a sling, which would have permitted better control of the counterweights and avoided the need to have anyone holding their drive belts to restrain them.
> 2. Proper maintenance of the brake system on the pumping unit, which would have helped prevent unintended movement of the counterweights.
> 3. Attaching the pumping unit to a steel skid base or concrete pad, which would have significantly reduced the likelihood of it tipping over.
> 4. Chaining the beam to a frame member instead of a moving assembly, so that the chain would have been easier to detach.

In order to prove a violation of section 5(a)(1) of the Act, the Secretary must show that: (1) a condition or activity in the workplace presented a hazard to an employee, (2) the hazard was recognized, (3) the hazard was likely to cause death or serious physical harm, and (4) a feasible means existed to eliminate or materially reduce the hazard. The evidence must show that the employer knew, or with the exercise of reasonable diligence could have known, of the violative conditions. *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1991-93 CCH OSHD ¶29,617 (Nos. 86-360, 86-469, 1992). D-J's stipulates that the conditions described in the citation constitute a recognized hazard, and that feasible means were available to abate the hazard (Tr. 8, 134). That the hazard was likely to cause death cannot be disputed where, as here, it resulted in a fatality. The parties agree that the sole issue for consideration is whether employees exposed to the hazard were employees of D-J's, or, as maintained by Respondent, were employees of Baker, for whom they were performing work at the time of the accident.

## Facts

On June 21, 2005, a two man crew from D-J's, consisting of a wench truck operator, Charles Watson, and his assistant, Jerry Deaver, was assigned to re-level a pump jack on Baker's Riley G-16 lease (Tr. 30-31, 35, 105). Charles Watson had been working exclusively on Baker's drill sites for approximately two years pursuant to a 2003 Master Service Agreement between D-J's and Baker. Deaver had been working with Watson for several months (Tr. 36). The service agreement states, *inter alia*, that D-J's agrees to act as an independent contractor, providing Baker with "labor, supervision, materials, equipment, tools, supplies and manufactured articles" (Tr. 68, 87, 100, 155; Exh. C-10, p. 1). The contract states that:

> . . . neither Contractor [D-J's] nor anyone employed by Contractor or its subcontractors shall be deemed for any purpose to be the employee, agent, servant, or representative of Baker in the performance of any such Work. Baker shall have no direction or control over Contractor or its employees and agents except in the results to be obtained.

(Exh. C-10, p. 2).

The re-leveling project was initiated by Cody Nolan, an employee of D-J's, who was working as a "pumper" for Baker (Tr. 10, 57, 120-21). With his partner, a Baker employee, Cody Nolan ensured that the 70 gas and oil wells to which he was assigned ran properly. In addition, the pumpers treated and sold the oil (Tr. 121, 125, 139-40). Cody Nolan supervised no employees, and was not part of Charles Watson's crew, though he was assisting Watson and Deaver at the time of the accident and was exposed to the cited hazard (Tr. 124, 126-29, 132-33).

In his capacity as pumper for the Riley G-16 lease, Cody Nolan informed Baker about the pump jack leaning to one side. He filled out a Material/Service Requisition, noting that the "pump jack needs releveled to stop rod lines hitting stuffing box & to straighten rods" (Tr. 57, 127; Exh. C-7). The requisition was submitted to Baker's production foreman, Larry Denton (Tr. 153, 185). Denton told Nolan to shut down the well and filled out a purchase order for a crew to reset the pumping unit (Tr. 60, 71, 150, 157-58; Exh. C-8). He then completed a job safety analysis worksheet (Tr. 71, 158; Exh. C-9). The job safety analysis, which was provided to Watson on June 21, 2006, set forth the sequence of tasks to be performed by the D-J's crew, and listed the potential hazards associated with each step (Tr. 71, 158; Exh. C-9). The means of avoiding each identified hazard were also set forth (Tr. 158; Exh. C-9). Specifically, Denton identified a "crush hazard" associated with resetting the unit and removing the winch line, and recommended that employees stand clear of the load (Exh. C-9).

Though Denton was not on the Riley G-16 site during the re-leveling project, he issued specific instruction to Watson and Deaver (Tr. 61, 160-62, 180-81). He met with the D-J's crew the morning of June 21, 2005, and described the best way to level the pump jack (Tr. 63, 88). The crew was directed to pick up railroad ties on the way out to the pumping unit, to cut the bolts holding the pump jack to its concrete base, and to place the ties under the pump jack to level it out (Tr. 31, 44, 57, 77). Denton told Watson and Deaver that the best way to place the ties would be to lift the pump jack one end at a time (Tr. 63). Watson had no discretion in the means of performing the task, he could not have leveled the pump jack in any other manner without clearing it with Denton (Tr. 78, 88-89, 181, 200-01). Watson had never used railroad ties to level a pump jack before June 21, 2005 and was uneasy about the job assignment (Tr. 92-94). Watson did not protest, however, as Denton had 25-26 years of experience in the oil business, and was familiar with the hazards involved with resetting pumping units (Tr. 92-94, 203, 207-09). Watson had only four years of experience, and felt it would be improper to tell Denton how to do the job (Tr. 93-94).

In describing his duties, Watson stated that he reported to D-J's every morning to pick up his truck, then proceeded to see Larry Denton at Baker, where he received his instructions for the day's work (Tr. 67-68, 103). Watson acted mainly as a mechanic, repairing gas and oil lines (Tr. 83-85). Though Watson did not think of Denton as his supervisor, Denton decided whether to issue a work order to Watson for any suggested repairs (Tr. 127). He not only assigned Watson's tasks, he provided direction on how some jobs might be accomplished; sometimes Denton would observe and direct Watson at his work sites (Tr. 69, 72, 104, 176, 179). Denton could also assign extra work as necessary, for which Watson would be paid overtime (Tr. 103, 113). Denton expected roustabouts from D-J's to be able detect general hazards at a well site, to be familiar with and be able to operate their own equipment and to be able to use the tools they provided (Tr. 205). Denton, however, was in the best position to identify and assess the particular hazards to which his roustabouts would be exposed on each job (Tr. 193). He did not consult with D-J's about the nature of the jobs he assigned to Watson or the other roustabouts (Tr. 193). He expected the roustabouts to contact him if they encountered an unexpectedly hazardous condition (Tr. 206).

Wesley Nolan, D-J's vice president, testified that approximately 50% of D-J's business is with Baker (Tr. 212, 234). After acquiring the contract to operate the subject leases, Baker approached D-J's about providing them with equipment and manpower (Tr. 215). Every week Baker sent D-J's purchase orders for roustabouts and equipment, a "pulling unit" or rig, and a cleaning lady (Tr. 216). The employees provided would fill out work tickets, which were collected daily; each week D-J's would send Baker an invoice (Tr. 217-20). D-J's did not know where Baker would send the crews on a daily basis, or what they would be doing (Tr. 222-23). D-J's had no authority to tell Baker's crews where or how to do their work

(Tr. 223). The only contact D-J's had with the crews was when Will Langley brought them Gatorade or tools (Tr. 223).

Both Cody Nolan and Watson testified that Will Langley at D-J's was their supervisor (Tr. 95, 135). Cody Nolan did not believe that Baker could take disciplinary action against him (Tr. 136-37). Watson stated that when his crew needed special equipment and/or parts, he called Langley (Tr. 95-96). When Watson scheduled a vacation, he did so with Langley (Tr. 96). However, Watson would then inform Denton that he would be out, so that Denton could speak to Langley about a replacement (Tr. 96-97, 102). Watson took the same standard holidays as Baker employees (Tr. 70). While D-J's provided Watson's crew with a truck, wench, and chains, Baker provided the railroad ties for the subject job (Tr. 41). Watson charged other supplies to Baker's accounts in town (Tr. 86). Cody Nolan, Watson and Deaver received their paychecks directly from D-J's (Tr. 64, 135).

Though Larry Denton testified that it was D-J's duty to train its roustabouts, D-J's never provided any specific job direction or performed any safety analysis of the jobs assigned to Baker's crews (Tr. 109-10, 165). Watson originally worked as a roustabout with other D-J's wench operators, Baker's pumpers provided him with on-the-job training after 2003 (Tr. 98-99). Baker conducted "tool box" safety meetings on almost every job site, during which safe methods of working, potential hazards and escape routes were discussed (Tr. 107-08, 111). Denton provided Watson with a job safety analysis for every job (Tr. 75). Cody Nolan had experience as a roustabout, but was trained by Baker to act as a pumper (121, 143, 184). Cody Nolan was expected to attend Baker's end-of-month safety meetings as well as safety meetings held every other Thursday (Tr. 144, 184). Denton testified that Cody Nolan needed to keep abreast of safety procedures specific to his job (Tr. 184).

*Discussion*

The Commission determines an employee's employment status using the common law agency doctrine set forth in *Nationwide Mut. Ins. Co. v. Darden,* 503 U.S. 318 (1992). The *Darden* court held that:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

*Id.* at 322-23. Though all these factors must be considered, the control exercised over the worker(s) remains a principal factor in determining whether a worker is an "employee" for purposes of the Act. *See Clackamas Gastroenterology Assoc., P.C. v. Wells,* 123 S.Ct. 1673 (2003).

In this case, the Master Service Agreement, which ostensibly defines the relationship between D-J's and Baker, does not give Baker the right to control the manner and means by which D-J's crews accomplished their jobs. The contract contemplates that D-J's will provide experienced roustabouts who use their own tools and equipment to independently perform oil field jobs assigned by Baker. In reality, however, the roustabouts provided by D-J's were young laborers with few skills who learned their trades on the job, while under Baker's supervision. Baker provided specific directions to the roustabouts on a daily basis about the work to be accomplished. It's production foreman offered additional suggestions to the roustabouts as needed. Where specialized knowledge or experience was required for a job, training and direction was provided by Baker. The same crews of roustabouts worked exclusively for Baker for the entire period Baker was engaged in its regular business of operating the subject leases. The roustabouts had no discretion to deviate from Baker's instructions in carrying out their tasks. Extra work could be and was assigned by Baker as needed without advance notice to D-J's. The crews had no supervision from D-J's, whose personnel did not know where the crews would be going on any given day, or what they would be doing. Baker's production foreman, on the other hand, was familiar with each job to be performed and provided the crews with safety analyses for every task.

It is clear that the employees on the Riley G-16 lease on June 21, 2005 were Baker employees in every significant respect. While D-J's hired Baker's personnel and cut their paychecks, they exerted no actual control over the roustabout's work conditions. In *Froedtert Mem'l Lutheran Hosp., Inc.*, 20 BNA OSHC 1500, 2004 CCH OSHD ¶32,703 (No. 97-1839, 2004), the Commission discounted the administrative responsibilities of labor agencies, such as payment of wages, tax treatment and provision of employee benefits, where the agency acted merely as a conduit for labor and the hiring party clearly controlled the means and manner in which the employees performed their daily work. Here, as in *Froedtert,* D-J's functions were largely ministerial, while Baker directed the day-to-day activities of the employees D-J's provided. Baker, as the *de facto* employer of its leased employees took on the duties of an employer under the Act and cannot shift those responsibilities merely by adding a provision to the leasing agreement stating that it is not those employees' employer. *See Melancon v. Amoco Prod. Co.,* 834 F.2d 1238 (5th Cir., 1988). It would be unreasonable in this case to hold D-J's, the putative employer, liable for work conditions over which it had not control. Further it would be inappropriate to extend OSHA liability to D-J's merely because Baker, the *de facto* employer, was not cited. *See, MLB Industries,*

*Inc.*, 12 BNA OSHC 1525, 1985 CCH OSHD ¶27,408 (83-0231, 1985)[vacating citation to supplying employer based on finding that borrowing company was the worker's actual employer].

For the reasons set forth above, citation 1, item 1 is vacated.

**ORDER**

1. Serious citation 1, item 1, alleging violation of §5(a)(1) of the Act is VACATED.

/s/
James H. Barkley
Judge, OSHRC

Dated: June 20, 2006