

ENERGY EXPERT: ISSUES IN FOCUS

A quarterly review of disputes and complex issues in the hydrocarbon production and processing industries

Baker & O'Brien, Inc.

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Who Has Construction Safety Responsibilities – the Owner or the Contractor?

Litigation, North America

By Mel Sinuefield, P.E.

As part of an oil terminal construction project, the Owner hired a Contractor to erect a cone-roof firewater storage tank at the site. As one would imagine, construction of a tank requires work at height – along with its attendant fall hazards.



A welder and his helper were attaching tank roof rafters from the tank wall to a roof support center pole. The construction procedure called for them to perform their work at the center pole from inside a manlift basket at a height of approximately 60 feet. Rather than working in the manlift, the workers found it easier to work on a surface attached a few feet below the top of the center pole.

The construction procedure called for welding the rafters from the walls to the center pole in such a sequence that they would alternate quadrants of the tank. Instead, the workers welded one rafter after the other in a clockwise progression around the tank top. After they had completed about a third of the way around, the center column, where the two workers were standing, collapsed to the floor. When the workers had previously left their manlift to stand on the center column surface, they did not attach their fall arrest harnesses to the manlift. Consequently, they both fell to the ground and were killed by the impact of the fall.

Often in personal injury cases, a breach is claimed of the Occupational Safety and Health Act General Duty Clause. The General Duty Clause states that each employer shall furnish a place free from recognized hazards to each of its employees. Here, Baker & O'Brien was asked to opine on the Owner and Contractor safety responsibilities for control of work and for knowledge of the safety hazards associated with the work. We reviewed depositions and construction documents, including contract requirements, to determine the responsibilities for: 1) the method of construction; and 2) worker safety during the construction activity. We also assessed which of the parties had awareness or knowledge about potential hazards with execution of the construction. Finally, we considered if the responsible parties acted in a reasonable and prudent manner in establishing a safe work environment in which to perform their work.

The Baker & O'Brien consultant was the designated expert for court proceedings and provided an expert opinion in a written report.

Not In My Back Yard

Litigation, North America

By Charles Kemp



As urbanization has continued to grow around previously remote oil and gas facilities that have operated for decades, municipalities often rezone these areas to be used for recreation and planned residential purposes. In such cases, oil and gas facilities often continue to operate as a “legal non-conforming use.”

In some jurisdictions, a municipality may require the termination of a legal non-conforming use by one of two alternatives: 1) it can eliminate the use immediately by payment of just compensation; or 2) it can require removal of the use without compensation following a reasonable

amortization period. In most cases, local courts have determined whether the amount of time given to a property owner to terminate a non-conforming use was a reasonable amortization period for recoupment of its investment. Since the value of a business depends to a great extent upon its future income, the amortization period is often a point of contention between the municipality and a business that operates as a legal non-conforming use.

In one such case, Baker & O'Brien was asked to determine an amortization period for the assets of an oil and gas producer. In determining the amortization, we considered the total capital investment, revenues, and operating expenses since inception of operations at the site more than 40 years ago. It was also necessary to determine a fair return on investment for the business. Our consultants also considered the recovery of costs to relocate the facilities outside of the municipality, the abandonment of field development opportunities, and whether the amortization period would be different for a company that purchased the oil and gas facilities after they had been deemed to be a legal non-conforming use. The conclusions of our investigation were presented in an expert report and in local public hearings.

Dominoes?

Insurance Claim, Asia Pacific

By Don Flessner

An ammonia producer claimed that damages to its processing equipment occurred from three related failures, connected by proximate cause, and should be treated as a single loss under its policy. The insurance policy defined proximate cause as “an unbroken chain of causation uninterrupted by any new and intervening cause.” Upon initial examination, the insurers disputed that the three events were, in fact, related.

Baker & O'Brien was engaged to determine if the three events were reasonably connected by proximate cause, as defined in the insurance policy. Our investigation focused on the technical circumstances to determine if the three events were related by location, time, equipment, process design, or operating procedures. Since the events

occurred over a period of three months, it was also necessary to determine if damage from each event subsequently impaired operations or resulted in unplanned maintenance. Finally, we examined the record to assess the possibility of any new and intervening cause that may have broken the chain of causation between the events.



Our consultants evaluated design documents, incident reports, piping and instrumentation diagrams, and plant operating records to determine whether the three events were separate or linked

by proximate cause. The findings from this work were summarized in an expert report, reviewed with other experts, and presented to the parties.

Consulting Support for Complex Commercial Disputes

When faced with complex commercial disputes in the energy-related industries, clients often turn to Baker & O'Brien for its independent and objective support. For over 25 years, the firm's consultants have employed their engineering knowledge, industry experiences, and commercial acumen to provide assistance on a wide range of matters. Our project experience includes disputes involving operational incidents, standards of care, asset valuation, commercial supply terms, product quality, large engineering and construction projects, and intellectual property.

Our clients include many of the world's largest law firms, insurance providers, and operating companies. Law firms rely upon Baker & O'Brien to evaluate

technical and commercial aspects of a case and provide expert testimony. Our analyses, conclusions, and expert testimony have been heard by judges, juries, and arbitration panels around the world. On insurance matters, clients rely upon Baker & O'Brien's assistance for investigation of industrial accidents and quantification of resultant property damage and business interruption losses. We are also called upon to assist insurers in subrogation actions by evaluating causation theories and claims for damages.

We welcome the opportunity to discuss our qualifications in more detail as they relate to your specific area of interest.

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