

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

SAEJ Enterprises, LLC

Appellant,

vs.

Workforce Safety and Insurance Fund,

Appellee,

SUPREME COURT NO. 20190370

Civil No. 08-2019-CV-01638

REPLY BRIEF OF APPELLANT SAEJ ENTERPRISES, LLC

APPEAL FROM THE SEPTEMBER 25, 2019, DISTRICT COURT ORDER AND
OCTOBER 2, 2019, JUDGMENT AFFIRMING ADMINISTRATIVE LAW JUDGE
ROSELLEN SAND'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
DATED MARCH 25, 2019
BURLEIGH COUNTY DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
THE HONORABLE GAIL HAGERTY JUDGE OF THE DISTRICT COURT

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[1] WSI claims that SAEJ has the right to control the details of the work of the relief pumpers. This is illusory. Under strict and comprehensive federal and state safety laws, *XTO alone* has authority to command safety procedures, hold safety meetings and train workers. XTO's lead pumper alone supervises the activities of the relief pumpers. The work of the relief pumpers is also done *on lands leased by XTO*; the oil company alone is responsible for the site's safety, and alone has the resources to ensure it. This includes training relief pumpers, requiring strict reporting to the lead pumper, and working solely under the directions of the lead pumper. That's why, for example, XTO made the decision that the services of Pat Toomey would no longer be utilized. XTO, not SAEJ is the true power here.

[2] *XTO decides the schedule* of the relief pumpers. *XTO* determines the *rate of pay* of the relief pumpers. *XTO* decides *who may set foot on its leased land* to provide services under the supervision of the lead pumper. The ALJ minimized the preeminent control factors relating to supervision, instructions, and training provided so as to control the details of the relief pumper's work, as reflected in N.D. Admin. Code § 92-01-02-49(1)(b). Instead, the ALJ relied on incidentals, as SAEJ provides orientation for the independent contractors.

[3] The chimeric nature of the alleged right of SAEJ to control the details of the relief pumpers is shown by the brute fact that oil extraction is inherently dangerous. This human marvel of ingenuity can and does cause injury to people who do the work, and environmental damage to the lands and waters where it is extracted. So, oil companies go about the business soberly and safely. They make immense investments in safety. And the oil companies bear the risks of environmental degradation. *See* N.D.C.C.

Chapter 38-08; *see also* ND Admin. Code Chapter 43-02-02; ND Admin. Code Chapter 43-02-03. An oil company's resources, knowledge and ability to formulate extensive safety protocols on a well site as opposed to an MSA holder are "[a]n 800-pound gorilla versus a fly." *The legal structure actually requires that ultimate control over safety be placed in the exclusive hands of the oil companies.* WSI makes no attempt to analyze this absolutely critical and determinative legal fact.

[4] Moreover, each relief pumper had invested considerable sums in their respective businesses, but simply work under an MSA held by an intermediary. An MSA is more cost-effective in the industry; this relieves oil companies of the responsibility to do the paperwork required to hire its own relief pumpers. Rather, oil companies like XTO arrange for MSA holders to serve as middleman, providing a list of contractors who have invested resources of time and money to obtain the skills and tools necessary to do the work. It is significant that in *N.D. Workforce Safety & Insurance v. Larry's On Site Welding*, 2014 ND 81, ¶17, 845 N.W.2d 310, the ALJ "found that safety meetings were not conducted or required by Larry's, but were held by the 'tool pusher or the company man and were held at the rigs.'" *Larry On Site Welding*, 2014 ND 81, ¶6. XTO requires relief pumpers to attend its weekly safety meetings—as was the case for welders in Larry's. And this control element is absolutely critical—for Oil Companies make huge investments and are at significant legal risk if safety protocols are not followed.

[5] Moreover, as here, "[t]he workers provide their own supplies and they have their own equipment, tools and vehicles." *Id.* The Court also noted that Larry's "can discharge them at any time and they can quit at any time." *Id.* Here, it is the oil company, XTO who actually made the decisions to discharge a relief pumper. The

Larry's Court noted that unlike here, *Larry's* On Site Welding had actually taught one person to weld, but like here, the Oil Company employee (tool pusher in that case), directed the work of the welders. *Id.* at ¶7. That's how the oil industry works; intermediaries locate workers and oil companies supervise and direct the work.

[6] In this case, SAEJ has never done *any* training; this case presents a far stronger case of independent contractorship status than do the facts in *Larry's*. Relief contractors here must ensure that they meet any initial quality control requirements of XTO Energy (*i.e.*, possession of the requisite ability and training to perform the services) and make significant investments to acquire the tools and equipment to so engage in the business. The welders in *Larry's* made comparatively small investments. The *Larry's* Court noted that a small investment was required: "Snook and the other similarly situated welders used their own welding equipment, tools, trucks, and paid for their own expenses to reach the respective work sites." *Id.*, ¶22. The contractors here invest in more than just basic tools and clothing as welders do, they buy generators, trucks and campers. As in *Larry's*, the oil companies are the ultimate source of the pay scale and reporting requirements.

[7] The relief pumpers do not wish to be SAEJ employees, and have made significant investments in their own Limited Liability Corporations to ensure this. In its zeal to collect premium on virtually every human being who moves a muscle in North Dakota, WSI has made the employment presumption irrebuttable. In doing so, WSI overrides the precious constitutional right of people and legal entities to enter into binding contracts. The 'right' of SAEJ to control these LLC's is fictive and the Court should reverse.

Dated this 20th day of February 2020.

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for the Claimant/Appellee in the above matter, hereby certifies, in compliance with N.D.R.App.P. 32, that the above brief was prepared with proportionally spaced, 12-point font typeface, and the total number of words in the above Brief, including footnotes, but excluding words in the table of contents, table of authorities, this certificate of compliance, and the certificate of service, totals 1080 words.

Dated this 20th day of February, 2020.

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CERTIFICATE OF SERVICE

[10] I hereby certify that on February 20, 2020, I filed and served the foregoing document on the following by electronic mail transmission, pursuant to Rules 25 and 31 of the N.D.R.App.P.

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