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IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD No. 791251

HERBERT E. STEWART

Appellant

v.

BASS CONSTRUCTION COMPANY, INC., ET AL.

Appellees

JOINT APPENDIX

James A. Eichner,
1809 Staples Mill Road
P. O. Box 6855
Richmond, Virginia 23230

Counsel for Appellant

John M. Oakey, Jr.
1400 Ross Building
Richmond, Virginia 23219

Counsel for Appellees

LAWYERS PRINTING COMPANY 7th & Franklin Bldg. Richmond, Virginia 23219 (804) 648-3664

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MOTION FOR JUDGMENT

1. On or about August 13, 1976, at a lagoon located to the rear of 1850 Commerce Road, in the City of Richmond, Virginia, plaintiff was caused to suffer severe and permanent injuries due to the negligence of defendants, as set out more specifically herein.

2. At that time and place, the defendant BARRY D. GEORGE was the agent, servant and employee of defendant BASS CONSTRUCTION CO., INC., and was then and there acting within the scope of his employment.

3. At the request of plaintiff's employer, the defendant BASS CONSTRUCTION COMPANY was engaged to move a certain aerator from a lagoon located to the rear of 1850 Commerce Road.

4. The defendant BASS CONSTRUCTION CO., INC. sent to that location its agent, servant and employee, defendant BARRY D. GEORGE for the purpose of moving the said aerator with a crane.

5. When attempting to move the said aerator, defendants so carelessly, recklessly and negligently operated the said crane that the boom of the said crane was caused to hit high tension wires overhead, the voltage from which struck the plaintiff.

6. As a result, plaintiff was caused to suffer permanent injuries; has suffered and will suffer in the future pain of body and mind; has incurred and will incur in the future medical and related expenses; and has been deprived of earnings

and earning capacity.

WHEREFORE, plaintiff demands judgment against the defendants, jointly and severally, in the sum of TWO HUNDRED FIFTY THOUSAND DOLLARS ($250,000.00), plus interest and costs.

Trial by jury is demanded.

HERBERT E. STEWART

BY: _____

Filed: 2-3-78

WILBUR C. ALLEN
Allen, Allen, Allen & Allen
1809 Staples Mill Road
Richmond, VA 23230

Attorneys for plaintiff

MOTION TO DISMISS AND SPECIAL PLEA
OF WORKMEN'S COMPENSATION

Come now the defendants, Bass Construction Co., Inc. and Barry D. George, and move the Court to dismiss this action on the grounds that the sole jurisdiction is vested in the Industrial Commission of Virginia by reason of the following:

1. At the time of the accident referred to in the motion for judgment, the plaintiff and the defendants were engaged in the same occupation, trade and business.

2. Under §65.1-29, 30 and subsequent sections, the plaintiff is prohibited from suing either of the defendants and his sole right to recovery lies under the workmen's compensation statutes of Virginia. Section 65.1-40 excludes any rights he might have against either of these defendants.

WHEREFORE, said defendants move the Court to dismiss this action on the grounds that the sole rights of the plaintiff to recover for his injuries lie under the workmen's compensation statutes of Virginia and this Court has no jurisdiction to proceed further.

BASS CONSTRUCTION CO., INC.
and BARRY D. GEORGE

By Counsel

McGUIRE, WOODS & BATTLE
1400 Ross Building
Richmond, Virginia 23219

By /S/ JOHN OAKEY, JR.
John M. Oakey, Jr.

CERTIFICATE

I hereby certify that a true copy of the foregoing motion to dismiss and special plea of workmen's compensation was mailed, postage prepaid, to Reginald P. Morris, 1809 Staples Mill Road, Richmond, Virginia, counsel for the plaintiff, on this the 15th day of February, 1978.

/S/ JOHN OAKEY, JR.

John M. Oakey, Jr.

Virginia:

In the Circuit Court of the City of Richmond, Division 11,

the 26th day of March 19 79

Herbert Stewart, Plaintiff	)	
against	)	OPINION FROM THE BENCH
	)	(Case No. A-282-L)
Bass Construction Company, Inc., et al Defendants	)	

Stewart, the plaintiff, is employed by Federal Paper Board Company, a manufacturer of paperboard in Richmond, Virginia. Bass Construction Company, Inc. is a general contractor who, among other things, owns a number of cranes which they use in their own business or hire out with a driver or operator to others.

In its operation, Federal (Stewart's employer) has a lagoon in which are situated a number of aerators necessary for their work. One of these aerators broke down and was disconnected from its anchor by an employee of Federal who had employed Bass to lift the same from its lagoon, the aerator being actually connected to the crane by one of Federal's employees. Stewart was present with still a third Federal employee giving hand signals to the operator of the crane as to how to lengthen or shorten the cable for the purpose of lifting the aerator from the lagoon. The aerator was to be placed upon one of Federal's trucks, taken into Federal's premises, repaired and reinstalled by Federal. In all fairness, it must be said that the operator of the crane does not claim to have seen Stewart give him any instructions, nor does he claim that he was following any instructions given by Stewart. I cite this fact as being important only to show that Stewart felt that he had a duty and a right to instruct Bass.

During the course of the lifting of the aerator, the boom of the crane came in contact with a high tension electrical wire and plaintiff, Stewart, was injured.

Defendant, Bass, claims that they were not strangers to the employment, but were taking a small but necessary part in work commonly and ordinarily done by Federal, to-wit: removing its aerators from the lagoon, repairing them and replacing them in the lagoon. Plaintiff claims on the other hand that they were strangers to the employment and are, therefore, liable to him in tort.

The cases on this question are numerous and the modern tendency seems to be a move towards a more liberal construction of the act in favor of plaintiffs, and this Court has so held very recently; however, the Court is of the opinion that in this case the portion of the work being done by Bass was a minuscule part of the overall job of Federal in unanchoring, lifting, transporting, repairing and replacing the aerators and that the crane operator to all intents and purposes became the employee of Federal for the sole purpose of lifting the aerator from the lagoon in order to enable them to carry on an ongoing and repetitive process in which they were normally and regularly engaged.

The Court is, therefore, of the opinion that the plea of the defendant, Bass, should be sustained, to all of which action of the Court the plaintiff by counsel objected and excepted.

Counsel are to prepare and submit a proper order sustaining the plea and making this opinion a part of the record.

March 26, 1979

Judge

cc: James A. Eichner, Esquire
John M. Oakey, Jr., Esquire

FINAL ORDER

The plaintiff having filed a motion for judgment and the defendants having filed a motion and special plea objecting the the jurisdiction of the Court on the ground that the plaintiff's sole remedy at law is under the workmen's compensation laws of Virginia, and on plaintiff's motion to strike said motion and plea, and

The Court having heard the evidence presented by the parties and having fully considered both written and oral arguments of counsel and having delivered its opinion orally at the conclusion of the hearing, and the Court having determined the plaintiff's sole remedy is under the workmen's compensation law of Virginia, it is, therefore, ORDERED:

That the defendants' motion to dismiss is sustained and plaintiff's motion to strike is overruled, and the action is dismissed with prejudice to which action the plaintiff objects and excepts on the grounds that plaintiff did not fall within the "umbrella" of the Virginia Workmen's Compensation Act as to defendants as stated by the Court orally; that plaintiff was an "other party" as to defendants within the meaning of said Act and opinions construing it; that application of the Act to the facts by the trial court herein deprived plaintiff of trial by jury, of his property without due process of law, and of equal protection of the laws, in violation of Article I, Section II of the Constitution of Virginia, and of the Fourteenth Amendment to the Constitution of the United States, as stated in plaintiff's motion to strike, defendant's motion to dismiss and special plea.

The transcript of the evidence heard July 6, 1978, has heretofore been filed with the Clerk below.

The transcript of oral argument and the Court's oral opinion of March 26, 1979, will be hereafter filed with the Clerk.

Said transcripts, and the Court's written opinion dated March 26, 1979, are hereby made a part of the record herein.

The Clerk shall send attested copies of this order to all counsel of record.

A Copy,

Teste : IVA R. PURDY, Clerk

by: Joyce C. Snead
Deputy Clerk

ASSIGNMENT OF ERROR

The trial court erred in sustaining defendants' motion to dismiss and special plea, and in overruling plaintiff's motion to strike them.

QUESTIONS INVOLVED IN THIS APPEAL

1. Was plaintiff an "other party" within the meaning of the Workmen's Compensation Act so that he could bring an action against a subcontractor of his employer and its employee?

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

DIVISION II

HERBERT STEWART

vs.

BASS CONSTRUCTION COMPANY, INC., et al

Complete TRANSCRIPT of a Motion relative to the above, when heard on July 6, 1978, beginning at 9:00 a.m., before The Honorable William E. Spain, Judge.

APPEARANCES:

ALLEN, ALLEN, ALLEN & ALLEN,
1809 Staples Mill Road, Richmond, Virginia,
By: James A. Eichner, Esquire, Counsel for the Plaintiff;

McGUIRE, WOODS & BATTLE,
1400 Ross Building, Richmond, Virginia,
By: John M. Oakey, Jr., Esquire, Counsel for the Defendants.

filed w/ Div II 7/19/78

HERBERT E. STEWART, the plaintiff, called as an adverse witness by the defendants, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. OAKEY:

Q Would you please state your name?

A Herbert E. Stewart.

Q Mr. Stewart, you are the plaintiff in the lawsuit that we are here in court today about, is that correct?

A Yes, sir.

Q You were injured on August the 13th, 1976, is that correct?

A Let's see. It was '76 or '77. I think it was '77.

MR. OAKEY: I believe it says '76 in the motion for judgment, Jim. Does that look right? I just want to have the record correct.

MR. EICHNER: I believe that's correct.

BY MR. OAKEY: (Continuing)

Q Well, you were injured as an employee of

Federal Paper Board, is that correct?

A Right.

Q Now, how long have you worked for Federal Paper Board?

A Nine and a half years.

Q Are you back working now?

A No, sir. I'm retired.

Q You're retired now?

A I'm retired now.

Q Okay. What type of work did you do in August of 1976? What was your position with Federal Paper Board?

A Mechanic.

Q You were a mechanic?

A Yes, sir.

Q And as a mechanic, what type of work did you do?

A General mill maintenance of motors and pumps and machinery.

Q Does this mean that you repaired motors and machinery?

A Some motors, yes, and machinery.

Q Okay. Now, as I understand it, Federal Paper Board had several aerators, is that correct?

A Approximately nine.

1 Q What were these aerators used for?
2 A To clean the water pollution from the
3 lagoons. You see, we couldn't put our water back in the water
4 because of the pollution. We had to use the aerators to kick
5 the water up to put oxygen in the water so we could repump
6 it back through to recycle it.
7 Q One of these aerators were being lifted
8 out of the lagoon when you were injured, is that correct?
9 A Right.
10 Q And this particular aerator, why was it
11 being lifted out of the lagoon?
12 A The motor had burned up on it some time
13 previous, maybe a week before, three or four days. I'm not
14 sure, but it had been sitting down there for three or four
15 days.
16 Q Were you to repair that motor?
17 A I don't know whether we would have done it
18 or not. Probably, we would have. It just depends on what
19 shape it was in. If it was the bearings, we would have done
20 it, but if it was the wiring, we would have carried it over
21 to Westinghouse or to some motor repair place.
22 Q Would you have taken it apart and looked
23 at it to determine what had to be done to it?
24 A Someone would.
25 Q All right. Would you have done that?

A I can't say, because I could have been on another job. I have done it, yes.

Q You have done it?

A Yes.

Q All right. Now, who was responsible for taking it out?

A Bass Construction Company.

Q Now, who decided that it would be taken out?

A Well, I got my orders from the Maintenance Superintendant, but it could have came down from the engineer, but I got my orders from the Maintenance Superintendant.

Q What were your orders?

A To take the truck, two men, go down and pick up the boat, bring the aerator back to the mill with only a two and a half ton truck, and then, try to get back without getting it throwed off.

Q So, you were going down there with a crane?

A No. The crane was already down there.

Q The crane was already down there?

A Yes, sir; sitting down there with the boom as we got down to the aerator.

Q Now, who anchored the aerator?

A The electrician unhooked it.

Q Tell me what you have to do to unhook it.

A Well, you have to go out to the boat. The wires run out in the water maybe a hundred yards, two hundred yards, and there is a wire running down to it, and on some of them, the wires run under the water, and he went down and disconnected the wire.

Q Was this electrician an employee of Federal Paper Board?

A Right.

Q He was one of your coemployees?

A Yes.

Q All right. Now, he had to go down and unhook the wire?

A Right.

Q Was there more than one wire, or was there just one wire?

A Well, there is a ground with a positive and negative to it.

Q Okay. Was it hooked to electric wires?

A Yes.

Q Is it also anchored?

A Yes, it was anchored.

Q So, you had to unhook two electric wires and the anchor chain?

A Yes.

Q Okay. Was this done before you arrived?

A Yes, sir.

Q All right. Did you know that it would be done when you got down there?

A No, sir.

Q All right. So, on some occasions, have you been there when it was being done?

A I've been there sometimes when it was being done and sometimes when it was already done.

Q And this particular time when you were injured, it had already been done, is that correct?

A (Shaking head affirmatively)

Q You have got to answer.

A What did you say?

Q At this particular time, when you got down there, that had already been done, is that correct?

A Yes.

Q All right. Now, did you go down there in the truck?

A No, sir.

Q How did you get down there?

A I drove a pickup down there.

Q All right. Was this the pickup you were going to bring the aerator back in?

A No, sir.

Q You drove another pickup down there?

A No. The truck we brought the aerator back on was a two and a half ton truck. The aerator weighed about two thousand pounds.

Q All right, sir. So, you drove another truck then?

A Yes. The electrician and myself drove the pickup, and the third man, my helper, he drove the number 3 truck.

Q What is his name?

A John Friend.

Q Mr. Friend took the truck that was going to bring the aerator back on?

A He was going to bring the aerator back.

Q Okay. Why did the electrician go down there?

A To help me load the boat.

Q Load the boat?

A We had to load the boat and take it back to the mill.

Q Okay. When you went down there, were you to make sure it got loaded correctly?

A I was. My orders was to take the pickup and the number 3 truck. The crane was down there waiting for me.

Q Wait a minute. You said your orders included taking the pickup and the number 3 truck?

A Yes, not me, but my helper. I was to send the truck.

Q You were to send the truck? So, the guy that was driving the truck was under you?

A John Friend.

Q And he was under you?

A Yes, sir. He was my helper.

Q So, you were to take the pickup and the number 3 truck and go down to where the aerator was located?

A Right.

Q And then, what were your orders to do?

A My orders were to see that the aerator got back to the mill and was blocked up on the truck. It had to be blocked up and secured. I was to see that it got back to the mill without being dumped somewhere on the road.

Q Okay. What was the electrician's name?

A Randy Jarrell.

Q Now, when you got down there, did Randy -- was he the one that hooked the hook of the crane into the aerator's eye?

A Yes, sir.

Q All right. He hopped up on the aerator, which was still in the water, didn't he?

A No. He and John Friend got on the boat, went out to the aerator, and I gave them a handline. The aerator was unconnected, but it was sitting out in the water.

Q All right.

A When I went out, I fed a handline to it, and I lifted the aerator up close to the shore. John Friend, he jumped off the aerator, came on around -- no, because he was on the boat. Randy was on the aerator. John brought the boat around to the lower end of the truck. He got off and tied the boat up.

Q All right.

A Well, I pulled the aerator on up as close as I could get it. I handed Randy the two shackles and steel straps.

Q Did you have the shackles and hand them to Randy?

A I handed them to him from the shore of the water. He shackled it up.

Q Randy then shackled it up?

A Right.

Q Okay. This handline that you referred to, was that attached to the boat or the aerator?

A No. It's just a little handline. We just roll it up and carry it when we go.

Q After you got the aerator, the crane was

lifted to lift it up and place it on the truck, is that correct?

A Right.

Q When it got in the truck, would there have been somebody in the truck to make sure it was sitting right?

A John Friend had got around and got on the back of the truck.

Q He was on the back of the truck?

A Right.

Q And he was your helper?

A Right.

Q So, was it your duty to make sure it was loaded on that truck properly?

A It was my duty, after the aerator was sitting on the truck, to see that it was secured, strapped down and blocked up to where it would not fall off. It's rough driving down there because there are a lot of boulders and all down there.

~~Q I've been down there. It's rough.~~

~~A Right.~~

Q You would then take the aerator back to the shop, is that correct?

A Up to the back door of our maintenance office shop.

Q How would you get it out of the truck?

A With a forklift.

1 Q A crane wouldn't take it out of the truck?
2 A No.
3 Q Did you ever use a crane to take it out
4 of the truck?
5 A No, I didn't. We always used a forklift.
6 Whenever we got them on the truck, we had a forklift that I
7 could lift them off with.
8 Q Okay. Then, once you lifted it off, would
9 you put it in the shop and inspect it?
10 A We wouldn't most of the time unless it
11 was real small. We had large ones and small ones. If it was
12 a large one, we would set it off at the back door, block it up,
13 and the engineers would go around and check it.
14 Q All right.
15 A That would be our plant engineer.
16 Q Then, if any work needed to be done on it --
17 A He would make out a work order of what was
18 to be done.
19 Q And he or some other mechanic would do
20 the work?
21 A Yes. I think there are 17 of us there.
22 You never go on the same job twice.
23 Q Okay. The aerator and the trucks and
24 the crane were all on Federal Paper Board property, I assume?
25 A Right.

Q Okay. This aerator is a pollution control device that Federal Paper Board has, is that correct?

A Yes. We did have about nine or ten of them, I think.

Q And the whole purpose of those is to have less pollution in the water that Federal Paper Board uses to produce their materials?

A Right.

Q Do you know whether this is required by some federal law or something?

A Well, no, it's not. I don't think it's clear, but I wouldn't say that. I don't think it's necessary. They don't require it. We do it for our own benefit.

Q I see. It's done for Federal Paper Board's own benefit?

A Yes, to keep the water from souring.

Q And this is the water --

A It's recycled water.

Q That the Federal Paper Board uses in it's process?

A Yes.

Q Okay. The whole purpose of getting this crane out was because it had broken down, and you needed to repair the aerator and put it back, is that correct?

A Well, it had been broken down for several

days. I don't know how long the motor had been running, but we always keep a spare.

Q I see. Were you going to put the spare in at that time?

A No, I don't think so. They had already put the spare in, I think, a day or two ahead of time.

Q So, what you planned to do was to take it out to see if you couldn't fix it?

A Yeah.

Q And that is what you were doing at this particular time, seeing that it was loaded out, loaded in, and taken back?

A Right.

MR. OAKLEY: That's all I have.

THE COURT: Mr. Eichner.

CROSS-EXAMINATION

BY MR. EICHNER:

Q How long had Federal Paper Board been operating at this location? Do you know?

A You mean the company or the aerators?

Q The company.

A The company had been there, let's see, since '58, I think. They went into production, and I'm not positive, but I think it was either in '58 or '59. They went into production down there at 1st and Hull.

Q And how long had you worked for Federal Paper Board?

A I went with them in 1968, October 21st.

Q When you first went to work in 1968, did Federal Paper Board have any aerators?

A No, sir.

Q On the property?

A No, sir.

Q Do you know about when they first started using them?

A Well, they had been using them approximately six years.

Q Six years from when?

A The last six years.

Q Okay. What is the business of Federal Paper Board Company? What was it as of the date you were injured?

A What kind of business were they in?

Q Yes.

A Strictly cardboard. I mean, paper pulp.

Q What do they manufacture at this plant?

A Pulp, paper and cardboard.

Q Was this product produced by the Federal Paper Board plant here before these aerators were introduced?

A Yes, sir.

Q You are drawing workman's compensation, are you not?

A Yes, sir.

Q What company is paying you workman's compensation?

A American Mutual.

Q Is that Federal Paper Board's company?

A Yes, sir.

Q Do you know what business Bass Construction is in?

A Well, I'm not positive, but I think it's construction and heavy equipment.

MR. EIGHEY: Okay. That's all I have.

1 MR. OAKEY: I have no further questions.
2
3 WITNESS STOOD ASIDE
4
5 THE COURT: Who is your next witness?
6 MR. OAKEY: I would call Mr. Bass.
7
8
9 ROBERT B. BASS, a witness called on behalf
10 of the defendants, having been duly sworn, testified as
11 follows:
12 DIRECT EXAMINATION
13 BY MR. OAKEY:
14 Q Would you state your name and occupation,
15 sir?
16 A I'm Robert B. Bass, Vice President of
17 Bass Construction Company.
18 Q Okay. Mr. Bass, does the Bass Crane
19 Service that Bass Construction has come under your jurisdic-
20 tion?
21 A Yes.
22 Q How long has Bass Construction Company
23 had the Bass Crane Service approximately?
24 A We got our first machine in approximately
25 1956 or '57.

1 Q Have you done work for Federal Paper
2 Board?
3 A Yes.
4 Q Do you know how long you have been doing
5 work for them?
6 A Our crane service or construction work?
7 Q The crane service.
8 A We have been doing crane service a long
9 time for them.
10 Q For what purposes have you furnished
11 crane service to Federal Paper Board that you know of?
12 A For several different types of working
13 projects. Of course, this one that we have been discussing
14 this morning, we furnished the crane service for this, and we
15 have furnished crane service for unloading other types of
16 equipment and material, and we have furnished crane service
17 that they have used in conjunction with certain maintenance
18 and repair work that they have done at the plant.
19 Q Let's just specifically go to these
20 aerators. Was there any written contract pertaining to these?
21 A No.
22 Q How would this come about?
23 A Someone at Federal Paper Board, usually
24 a foreman, supervisor, or I guess whoever is in charge of the
25 particular area of work involved, would call our office for

1 a crane.

2 Q And what would you do?

3

4 THE COURT: Are these the cranes with the

5 long booms that you used to keep over here at

6 19th and Bainbridge?

7 WITNESS BASS: Yes, Sir.

8

9 BY MR. OAKEY: (Continuing)

10 Q Is this a mobile crane?

11 A These are mobile cranes and they come

12 with an operator. They would call us for the equipment. They

13 would tell us something about what they were going to do with

14 it in order for us to know what size crane to send them if

15 they didn't know themselves. In this case, they may or may

16 not have said "We intend to take an aerator out," but they

17 usually gave us the size load that they intended to pick up

18 and the radius that they were going to be operating in, be-

19 cause this is important information to know in order to get

20 the right size crane on the job.

21 Q All right. When you send a crane to

22 Federal Paper Board, what instructions does the operator have?

23 What is he to do?

24 A He is to report to whoever called for the

25 crane.

Q Who would give him the instructions on what he was specifically to do?

A Whoever called for the crane. I mean, whoever is in charge of the work on the project.

Q And would that be a Bass employee or --

A No. In this case, it would be a Federal Paper Board Company employee.

MR. OAKEY: All right. That's all I have.

THE COURT: Mr. Eichner.

CROSS-EXAMINATION

BY MR. EICHNER:

Q Let me see now, Mr. Bass. What is the main business of Bass Construction Company?

A We are general contractors. We do industrial and commercial buildings.

Q All right. How much of your business, of your gross receipts, would you say comes, approximately, from the crane operation, and how much comes from the general construction work?

A I'm going by memory.

Q Your best effort.

A It would be a very small small percentage. I believe our gross receipts on the cranes would be something

1 like $300,000.00 a year, and our volume in our construction
2 business would vary from $6 million to $10 million.
3 Q How many cranes does Bass Construction -
4
5 THE COURT: That's doing pretty good to
6 be located on Ramcat Alley, isn't it? It's the
7 only alley in South Richmond with a name.
8 MR. OAKEY: I'll have to write that one
9 down.
10
11 BY MR. EICHNER: (Continuing)
12 Q This was a self-powered traveling crane,
13 is that right?
14 A Yes, sir. It was a mobile truck and a
15 self-propelled crane.
16 Q Has Bass Construction Company ever been
17 in the paper manufacturing business?
18 A No, sir.
19
20 MR. OAKEY: It would depend on what you
21 mean, writing papers or what?
22 THE COURT: Filling out forms?
23 MR. OAKEY: I think every lawyer is a
24 paper manufacturer.
25

BY MR. EICHNER: (Continuing)

Q Who is your workmen's compensation with, Mr. Bass, for Bass Construction?

A Liberty Mutual.

Q And your liability insurance is with Aetna, is that correct?

A Aetna, yes.

Q Aetna Casualty and Surety?

A I'm not real sure, sir.

MR. OAKEY: That's correct.

MR. EICHNER: I have no further questions. Thank you, Mr. Bass.

MR. OAKEY: That's all.

WITNESS STOOD ASIDE

MR. OAKEY: I would call Mr. George, Judge. He's my last witness.

THE COURT: All right.

1
2
3 BARRY GEORGE, a witness called on behalf
4 of the defendants, having been duly sworn, testified as
5 follows:
6 DIRECT EXAMINATION
7 BY MR. OAKEY:
8 Q Would you state your name and address?
9 A I'm Barry George, 3509 Woodmere Drive,
10 Richmond, Virginia.
11 Q Mr. George, where are you employed at the
12 present time?
13 A Philip Morris.
14 Q And where were you employed in August
15 of 1976?
16 A Bass Construction Company.
17 Q And what type of work did you do?
18 A Crane operator.
19 Q Mr. George, were you operating the crane
20 when this accident occurred, which is the subject of this
21 lawsuit?
22 A Yes, sir.
23
24 THE COURT: I have only had a chance to
25 briefly follow the file. The allegation, though,

1 is that there was negligence allowing the boom to
2 come in contact with a high tension wire, which
3 caused an electric shock to the plaintiff?
4 MR. OAKEY: Yes, sir.
5 THE COURT: All right.
6 MR. OAKEY: For purposes of this motion,
7 I didn't think we really needed to go into that.
8 So, that's why I had not.
9 THE COURT: Certainly, but it's well to
10 understand what we're talking about.
11 MR. OAKEY: Without knowing it, it's hard
12 to understand what we've been talking about so far.
13
14 BY MR. OAKEY: (Continuing)
15 Q Mr. George, how long had you been operating
16 the crane at that time for Bass?
17 A Approximately three and a half years.
18 Q All right. Now, do you recall how you
19 received your assignment that particular day to go to Federal
20 Paper Board?
21 A Through the dispatcher.
22 Q And where was the dispatcher located?
23 A Well, we had a building on 21st and Porter
24 Street, and his office was in there.
25 Q Did you receive that then by some written

1 method or oral communication?
2 A Oral communication.
3 Q He told you what to do?
4 A Yes, sir.
5 Q Specifically, what were you told to do?
6 A To report to Federal Paper and find out
7 what they wanted moved.
8 Q Can you remember whether they told you
9 what was to be moved before you went down there or not?
10 A No, sir; I can't. I don't know whether
11 they said specifically an aerator or what.
12 Q Did you then drive down to Federal Paper
13 Board?
14 A Yes, sir.
15 Q And what did you do when you got down
16 there?
17 A Well, I went down to the back of the
18 building, and they said they had to go down to the lagoon,
19 and I went down there to pick the aerator up.
20 Q Do you know whether the truck was there
21 when you got there or whether it came afterward or whether
22 you went with it? Tell me to the best of your recollection.
23 A I thought I followed the truck down
24 there and set the crane up when they backed the truck up to
25 the back of my crane.

Q Okay. Now, tell the Judge specifically what you did as far as setting the crane up and everything.

A Well, I backed it up to the area that the aerator was located in.

Q Where was the aerator?

A It was next to the bank.

Q Was it in the water or not?

A Yes, it was in the water. Let's see. I set the crane up, and there's a process that you have to go through in order to ensure that the crane doesn't tip over when you swing the boom around. I had to stand down and put down the outriggers. Then, I got the choker shackles and handed them to Mr. Stewart.

Q All right. What are the shackles for?

A Bolting the strap to the aerator.

Q All right. Did you ever get on the aerator?

A No, sir.

Q Who took care of hooking it up to the aerator?

A Randy.

Q Is he the one that Mr. Stewart has referred to?

A Right.

Q Did you get out of the crane after that?

A No. I didn't have any reason to get out of the crane.

Q All right. At what point did the accident occur?

A In the process of lifting the aerator out of the water.

Q Where was Mr. Stewart at that time?

A He was leaning up against the crane.

Q What were you going to do once you got it out of the water?

A I was going to set it on the truck so they could take it back for repairs.

Q Had you taken one of these aerators out before?

A Yes, sir.

THE COURT: Did anybody give you any hand signals or any verbal signals or anything of that nature, and if so, who?

WITNESS GEORGE: Well, no, sir. It was close enough to where if any communication was needed, we could do it by talking. It was pretty much cut and dried, you know, just taking the aerator and putting it on the truck.

BY MR. OAKEY: (Continuing)

Q Who told you when it was hooked up?

A Well, you could just see that it was ready to hook up. You just dropped the hook down to them.

Q And who actually hooked it up?

A Randy, the fellow out on the aerator.

Q At what point did he leave the aerator?

A When it hit the wires, when the boom hit the wires.

Q Was he on the aerator when you were lifting it?

A Yes.

Q Was he supposed to be on the aerator?

A No. He was in the process of -- he was getting ready to jump off of it, and it was more or less done simultaneously.

Q Had you started lifting when you hit the wires?

A Yes.

Q How far had you lifted the aerator out of the water?

A Well, no. I was getting ready to come up out of the water. What I was doing was booming up to get straight over.

Q Okay. Well, the first time that you lifted an aerator out of the water, what instructions were you given by Federal Paper Board employees?

A Just to pick it up and to put it on the truck.

Q Was that the same as this time?

A Yes, sir.

Q Did you have any further responsibility after it was on the truck? Did you have to do any further task?

A Well, I have followed the truck back to the back of the plant and lifted them off the truck and set them on the blocks that Mr. Stewart was referring to.

Q This particular aerator was a Federal Paper Board aerator, right?

A Yes, sir.

Q Did you have any conversation with Mr. Stewart during this operation?

A Not that I can recall.

MR. OAKEY: That's all I have.

THE COURT: All right, sir.

CROSS-EXAMINATION

BY MR. EICHNER:

Q What is your address, Mr. George?

A 3509 Woodmere Drive.

Q Woodmere?

A Woodmere.

Q Spell that, please?

A W-o-o-d-m-e-r-e.

Q All right, sir. What kind of work do you do at Philip Morris?

A I'm a technician in Research and Development, working with experimental blends of tobacco.

Q How many times do you think you went to the Federal Paper Board plant to lift aerators out of the water?

A I would say approximately three to four times.

Q On the day of Mr. Stewart's accident, did you ever complete your work of loading that aerator on the truck?

A No, sir, I didn't.

Q Did you go back later and do that?

A No, sir.

HERBERT E. STEWART, the plaintiff, called on his own behalf, having previously been duly sworn, testified as follows.

DIRECT EXAMINATION

BY MR. EICHNER:

Q Mr. Stewart, on the day of this accident, state whether or not the crane was in place when you arrived on the scene.

A Yes, sir.

Q Okay.

A Mr. Musick told me to go ahead, that the crane was waiting for me. So, when we got there, he had to run his boom around to the right-hand side of the door and run it out about 14 feet high, which was high enough, and then, I believe he had his monorail part of the way out.

Q Mr. Stewart, during your years with the Federal Paper Board Company, did Federal own any cranes at all?

A No, sir.

Q On the premises of this plant?

A None at all.

Q During your years there, did employees of Federal ever lift an aerator out similar to this?

A With what we had?

Q Yes, sir.

A No, sir. We didn't have anything that would even go down there except a two and a half ton truck.

Q And during all your years at the plant, what organization did the job of lifting aerators out of the water when it was necessary?

A Well, we did use Williams Crane Company down here. On one occasion, I remember working with Mr. Williams myself, but we got Mr. Bass when we could get him. We would always prefer him first, but in cases where he was tied up, we would get Williams Crane Company.

Q On the occasion of your accident, did you give any orders to Mr. George, the crane operator of Bass?

A No, sir. The only orders I gave him, he couldn't see from where he was in the truck, in the cab of the crane, and when Randy hooked the aerator up, I motioned for him to come up, not his boom, just his cable, to shorten his cable up to the boom.

We were at water level, which was approximately two feet all over, and you wouldn't have but three and a half feet at the top. Four feet would have been all he would have had to raise it to swing it around.

I gave him a little sign to come up. He got about three and a half, four feet, out of the water, and

I motioned for him to come around there. He said he didn't see no hand signals, but I did, whether he saw it or not, and I motioned for him to swing it around, to just swing his boom around, and I walked from the side door, and I was walking around, and as far as I know, I was still walking when he jumped over and hit me in the hand. I was walking over to the front of the aerator to get it lined up to set it on the back of our truck.

MR. DICKNER: That's all the questions I have.

THE COURT: Mr. Oakey.

CROSS-EXAMINATION

BY MR. OAKEY:

Q Mr. Stewart, as I understand what you just said, you did give some hand motions to Mr. George?

THE COURT: I understood him to say the crane operator couldn't see at that point, and you were giving him motions to shorten it?

WITNESS STEWART: No, Your Honor, sir. We have a water level --

THE COURT: Didn't you say you gave him motions to shorten the crane up?

1 WITNESS STEWART: No, the cable.
2 THE COURT: The cable?
3 WITNESS STEWART: Yes, sir.
4
5 BY MR. OAKEY: (Continuing)
6 Q Because the crane operator could not see
7 it?
8 A He couldn't see.
9 Q He couldn't see that it needed to be
10 shortened, and that's what you were telling him to do?
11 A Shorten it up to where he could see the
12 aerator.
13 Q I see. This was given to the crane
14 operator?
15 A Yes.
16 Q All right. As I understand it, you say
17 the crane was there when you arrived?
18 A Yes, sir.
19 Q But, he couldn't start doing anything
20 until you got there, could he?
21 A He was waiting for us. The only thing
22 he had to do was run his boom around to the right and return
23 his monorail. I think he had his monorail part of the way
24 in anyway.
25 Q But, he needed you to hook it up, and he

1 couldn't do it by himself, could he?
2 A He needed someone to hook the shackles up
3 and tighten it up, you know, to get it set level.
4
5 THE COURT: And the man that did that
6 was your helper?
7 WITNESS STEWART: The man that done that
8 was my helper. I watched him do it to see that it
9 was secured right.
10
11 BY MR. OAKEY: (Continuing)
12 Q He was actually under your supervision?
13 A Who was that?
14 Q Your helper.
15 A No, the electrician wasn't. Me and him
16 worked together, but he was in his department, and I was in
17 mine.
18 Q But, at this specific time, you were
19 doing the same task, weren't you, getting the aerator out of
20 the water?
21 A Oh, yes.
22 Q You were working together at that time?
23 A Yes, sir.
24
25 MR. OAKEY: I think that's all I have.