
SECRETARY OF LABOR,

Complainant,

v.

LAMPSON INTERNATIONAL, LTD.,

Respondent.

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OSHRC Docket No. 00-0289

ORDER

This matter is before the Commission on a direction for review entered by Chairman Thomasina V. Rogers on August 2, 2001. The parties have now filed a Stipulation and Settlement Agreement disposing of all issues on review. Accordingly, the Stipulation and Settlement Agreement is approved

FOR THE COMMISSION

/s/

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Date: January 15, 2002

00-0289

2002 OSHRC No. 1

NOTICE IS GIVEN TO THE FOLLOWING:

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UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

ELAINE CHAO	:	
SECRETARY OF LABOR,	:	
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Complainant,	:	
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v.	:	OSHRC Docket No. 00-0289
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LAMPSON INTERNATIONAL, LTD.,	:	
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Respondent.	:	
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STIPULATION AND SETTLEMENT AGREEMENT

I

The parties have reached an agreement on the settlement and disposition of all outstanding issues in this proceeding currently pending before the Commission.

II

It is hereby stipulated and agreed by and between the Complainant, Secretary of Labor, and the Respondent, Lampson International, Ltd. (Lampson), that:

1. Complainant hereby withdraws Item 3 of Citation I in Docket No. 00-0289 for a violation of 29 C.F.R. § 1926.550(b)(2).

2. Complainant finds that, with respect to the subject Lampson L TL 1500 Series IIIA Transi-Lift Crane, a maximum load rating of 85% of tipping load is appropriate. As a result, the Occupational Safety and Health Administration (OSHA) agrees that a maximum load rating of 85% of tipping load should be regarded as a *de minimus* violation of 29 C.F.R. § 1926 .550(b)(2). Further, if, during the course of any future inspection, OSHA detects a situation or condition concerning a Lampson Transi-Lift® Crane system comprised of two independently

powered load platforms, one of which acts as a mobile foundation for the boom and mast and the other as an individually powered, self-propelled counterweight carrier, which could possibly result in a citation for a violation of ANSI B30.5-1968 § 5.1.1.1 as incorporated by reference in 29 C.F.R. § 1926.550(b)(2) related to the maximum load rating of 85% for such cranes, as incorporated by reference in 29 C.F.R. § 1926.550(b)(2), the Secretary will only cite for violations that do not take into account the specifications of ANSI B30.5-1968 § 5.1.1.1 paragraph (d) (OSHA and Lampson agree that 29 C.F.R. § 1926.550(b)(2) does not incorporate by reference subsequent editions of the ANSI standard)

3. Complainant hereby amends Citation 1, Item 1 (a) to delete, in the alternative, a violation of 29 C.F.R. § 1926.550(b)(2) and amend the citation to read:

Miller Park, Milwaukee, Wisconsin: The manufacturer's chart capacities do not consider effect of wind on the suspended load. On July 14, 1999, prior to the pick of the 4R Block 3 the employer did not adequately consider the effect of wind on the suspended load on the manufacturer's chart capacities of the LTL 1500 Series A Transi-Lift crane.

4. Complainant hereby amends Citation 1, Item 1 (d) to delete, in the alternative, a violation of 29 C.F.R. § 1926.550(b)(2).

5. Respondent hereby withdraws its Notice of Contest for Citation 1, Item I (a), as amended herein, Citation 1, Item I (d), Citation 1, Item 2 for a violation of 29 C.F.R. § 1926.550 (a)(19), and Citation 1, Item 3 for a violation of 29 C.F.R. § 1926.550(b)(2).

6. Complainant hereby amends Citation 1, Item 2, to read as follows:

29 C.F.R. 1926.550 (a) (19): All employees of others were not kept clear of loads about to be lifted and of suspended loads:

a. Miller Park, Milwaukee, Wisconsin: Employees of others were not kept clear of the 4R Block 2 while it was suspended during the morning of the pick and in the early afternoon.

b. Miller Park, Milwaukee, Wisconsin: Iron workers employed by others installing the counterweights were not kept clear of 4R block 3 while it was suspended during the morning of the pick.

7. Respondent hereby agrees to pay a penalty of \$12,600 by submitting its check, made payable to the U.S. Department of Labor, Occupational Safety and Health Administration, to the Milwaukee Area Office within 45 days from the date of this agreement.

8. Each party agrees to bear its own fees and other expenses incurred by such party connection with any stage of this proceeding.

9. Complainant and respondent understand and stipulate that this Agreement has been entered into solely for the purpose of economically resolving disputes between the Secretary and

Lampson under the provisions of the Occupational Safety and Health (OSH) Act of 1970, and that Lampson is not making any admission against its interests in any private civil litigation pending or which may later be brought as a result of the accident at Miller Park, Wisconsin, on July 14, 1999. The agreements, statements, stipulations and actions shall not be used for any other purpose except for subsequent proceedings and matters brought by the Secretary of Labor directly under the provisions of the Act.

10. Respondent states that no authorized representatives of affected employees have elected party status.

11. The parties agree that this Stipulation and Settlement Agreement is effective upon execution.

12. Respondent certifies that a copy of this Stipulation and Settlement Agreement was posted at its main office on the 17th day of December, 2001, pursuant to Commission Rules 7 and 100, and will remain posted for a period of ten (10) days.

Dated this 10th day of December, 2001.

Respectfully submitted,

HOWARD M. RADZELY
Acting Solicitor of Labor

JOSEPH M. WOODWARD
Associate Solicitor for
Occupational Safety and Health

DANIEL J. MICK
Counsel for Regional Trial Litigation

/s/

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/s/

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SECRETARY OF LABOR,
Complainant,

v.

LAMPSON INTERNATIONAL, LTD.,

Respondent.

OSHRC DOCKET
NO. 00-0289

APPEARANCES:

Kevin Koplín, Esq., and Andrea L. Phillips, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois

Donald H. Carlson, Esq., Crivello, Carlson, Mentkowski & Steeves, S.C., Milwaukee, Wisconsin

Before: Administrative Law Judge Robert A. Yetman

DECISION AND ORDER

This is a proceeding arising under §10c of the Occupational Safety and Health Act of 1970, 29 U.S.C. §651, *et seq.* (the "Act") to review citations issued by the Secretary of Labor pursuant to §9(a) of the Act and a proposed penalty issued pursuant to §10(a) of the Act.

On January 12, 2000, Respondent, Lampson International, LTD (Lampson), was issued a serious citation alleging four serious violations with subparts and a willful citation alleging two willful violations with subparts as a result of an inspection of a fatal accident involving a crane collapse which occurred on July 14, 1999 in Milwaukee, Wisconsin. Respondent filed a timely notice contesting the alleged violations and, in answering the complaint filed by the Secretary of Labor, admits that it is a corporation engaged in a business affecting interstate commerce. However, Respondent denies that the Review Commission has jurisdiction of this matter on the ground that it was not an employer within the meaning of the Act. Respondent generally denies the remaining allegations in the complaint.

Background

Pursuant to a contract with the Southeastern Wisconsin Baseball Park District, the joint

venture of Huber, Hunt, Nichols, Clark and Henzinger (HCH) began construction of a major league baseball stadium known as Miller Park during 1998 in Milwaukee, Wisconsin. HCH, as general contractor, subcontracted the assembly and placement of a retractable steel roof for the stadium to Mitsubishi Heavy Industries of America (MHIA). MHIA, in turn, subcontracted various work activities related to the construction and placement of the roof to approximately 15 subcontractors, including Respondent Lampson.

Respondent is engaged in the business of manufacturing and leasing cranes for construction projects throughout the world. It maintains a fleet of over 300 cranes available for lease. Although MHIA had leased a number of cranes from Respondent for the Milwaukee worksite, the crane relevant to this matter is known as a Transi-Lift 1500 and named "Big Blue." Transi-Lift cranes are specialized cranes designed for the largest and heaviest lifts. The cranes were originally designed and manufactured by Respondent during the late 1970's and currently there are seven Transi-Lift cranes in existence. Big Blue, the crane relevant to this case, was specially designed and manufactured during 1993 for a three-year heavy lift bridge project in England (Exh. C-17 Lampson deposition Tr. 13). The crane was assembled on a barge without crawlers to perform the work activities at that site. The Milwaukee stadium jobsite was only the second job for Big Blue.

Big Blue arrived disassembled at the Milwaukee jobsite. The components of the crane had been placed on approximately 100 trucks for delivery and assembled over a six-week period (Tr. 1051,1057). Unlike conventional crawler cranes, Big Blue sits upon two sets of crawlers with a platform, known as the stinger, connecting the crawlers. The distance between the center lines of the crawlers is 120 feet and the boom extends to approximately 580 feet in the air (Exh. R-14).

Respondent's sales literature describes the Transi-Lift as follows:

"The Lampson Transi-Lift is a patented crane configuration featuring high capacity characteristics of fixed stiff leg or luffing derrick equipment coupled with the mobility and flexibility of a conventional crawler crane. Transi-Lift is capable of all lift crane functions including hoist boom, swing, and travel with loads. Transi-Lift was innovated and developed by Lampson in response to ever-increasing heavy lift load requirements associated with a rigging system imposing minimum impact and disruption to other construction jobsite work areas, activities and schedules" (Exh. R-14).

The crane designation, 1500, means that it has a potential lifting capacity of 1500 tons (3,000,000 pounds) (Exh. C-17, Tr. 18). The crane requires four crew members. Each crawler has an operator to independently move each crawler when maneuvering the crane and a hoist operator to manipulate the boom mast and load. Because of the large size and configuration of the crane, the operators are unable to see each other. Thus, a "flagger" supervisor is required to coordinate the activities of the operators

via radio (Tr. 1005). The hoist operator and the flagger, in particular, are highly skilled and experienced individuals (Tr. 1032). Indeed, the flagger supervisor and hoist operator generally work as a team (Exh. C-17, Tr. 162). Allen Watts and Fred Flowers, the flagger and hoist operator involved in this matter had worked as a team for eighteen years (Tr. 625,626). In the event that the hoist operator or flagger supervisor is replaced on a job, the remaining member of the team will also be replaced (Exh. C-17, Tr. 162).

As of July 14, 1999, Big Blue had successfully completed approximately ten heavy lifts at the worksite (Tr.151). On that date the crane was scheduled to lift a large section of the roof consisting of steel trusses and designated as 4R3. The dimensions of 4R3 were approximately one hundred ten feet wide, two hundred to two hundred twenty feet long and thirteen feet high with a shape similar to a curved aircraft wing (Tr.154,595, Exh. C-12(b)). The piece weighed 913,000 pounds with add-ons such as cable, headache ball, etc., contributing an additional 32,400 pounds to the load to be lifted (Tr.176). The maximum capacity of the crane as configured on that day was 1,040,000 pounds. The total weight to be lifted was 97% of capacity (Tr.176).

Big Blue's crew on July 14, 1999 consisted of Lampson employees Frederick Flowers, hoist operator, Steven Aldrich, mechanic and crawler operator and Allen Watts, flagger and supervisor. Mr. Daniel Finucan, an employee of subcontractor Danny's Construction, was the second crawler operator. The lift was one of the more difficult and complicated lifts at Miller Park (Tr.630). Lifts of this nature are generally scheduled months in advance (Tr.53). Engineering drawings for the rigging attaching the load to the crane had been completed by a Lampson employee and a prelift conference was held on the morning of the lift with all key individuals in attendance (Tr.158,159). Big Blue commenced the lift at approximately 9:30 a.m. and traveled approximately 400 feet with the load a few feet above the ground (Tr.162). At 5:15 p.m., with the load approximately 300 feet in the air, the crane and load collapsed striking and fatally injuring three employees in a manbasket which was suspended from another crane. Crawler operator Flowers was thrown from the operator's position and injured (Tr.755).

Discussion

As a threshold issue, Respondent argues that it was not an employer within the meaning of the Act and, therefore, should not have been cited for any safety violations which may have been committed at the jobsite. In support of its argument, Respondent points to the Supreme Court decision *Nationwide Mutual Insurance Co. v. Darden* 503 U.S. 322 (1992), for the proposition that the term "employee" under the Occupational Safety and Health Act must be construed by using common law

tests¹ The court set forth the elements of the test as follows:

“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.”

Nationwide supra at 323.

By applying the common law test for establishing an employment relationship, Respondent asserts that controlling weight must be given in this case to (a) the contractual terms between the parties and (b) who exercised control over the workers operating the crane (Respondent’s brief, pages 20-29). With respect to the “contract,” Respondent points to the lease agreement between Respondent and MHIA wherein Respondent leased “Big Blue” to MHIA. The lease is known as a “bare lease” (Tr.1046-1047,1049; R-1) and Respondent specifically relies upon portions of paragraphs thirteen and fourteen of the document to support its position that, for purposes of this case, it was not an employer within the meaning of the Act (Respondent’s Brief p. 24). The relevant portions of the contract relied upon by Respondent are as follows:

13. REPAIRS AND OPERATION COSTS: [L]essee shall maintain the equipment and its attachments or devices in good, safe operating condition in accordance with manufacturer specifications. . . . This includes all safety related devices such as load indicating devices, anti-two block devices, electronic boom angle indicators, etc.

14. SUPPLYING OPERATORS: [S]hould the Lessor loan any operators or other workmen for the equipment, they shall be employees of the Lessee under Lessee’s exclusive jurisdiction, supervision, and control during the rental period, and the Lessee shall also pay them such traveling expenses, board and lodging as may be agreed between the Lessee and Lessor. The Lessee shall provide and pay for all wages, workmen’s compensation insurance, fringe benefits, and pay all payroll taxes required by law applying to such operator and workmen. . . .Lessor does not represent, warrant or guarantee to Lessee or anyone that Lessor supplied equipment

¹ Section 3(6) of the Act defines “employee” as “an employee of an employer who is employed in a business of his employer which affects commerce.” The Supreme Court has described a similar definition in the Employee Retirement Security Act as “completely circular and explains nothing” *supra* at 323.

operators have been properly trained or instructed to operate the leased equipment. Accordingly, all Lessor supplied equipment operators shall become Lessee's responsibility and shall be tested and pre-qualified by Lessee to determine their competency, experience and reliability to operate the leased equipment.

(Respondent's Brief p. 24,25)²

It is undisputed that Frederick Flowers, Steven Aldrich and Allen Watts were long-time employees of Respondent and remained on Respondent's payroll during the Miller Park project. It is also undisputed that Daniel Funican was employed by Danny's Construction Company and was in training as a crawler operator pursuant to union requirements. Nevertheless, Respondent insists that Watts, Flowers and Aldrich were "loaned" employees under the exclusive control of MHIA pursuant to section 14 of the lease and the crane was leased to MHIA under the exclusive control of MIHA pursuant to section 13 of the lease. Moreover, Flowers, Aldrich and Watts remained on Lampson's

² Sections 13 and 14 read in their entirety as follows:

13. REPAIRS AND OPERATION COSTS: Lessee agrees to inspect the equipment upon taking delivery. Lessee's failure to notify Lessor in writing of any deficiencies in the equipment within twenty-four (24) hours after taking delivery or such other period of time as may be mutually agreed upon in writing is Lessee's acknowledgment that the equipment was, when delivered, in good, safe and serviceable condition and fit for its intended use. Lessee shall maintain the equipment and its attachments or devices in good, safe operating condition in accordance with manufacturer specifications and shall bear the cost thereof, including protection against freezing, corrosion or other abnormal exposure. This includes all safety related devices such as load indicating devices, anti-two block devices, electronic boom angle indicators, etc. Lessor does not warranty or guarantee the accuracy or reliability of these devices or that they will remain functional throughout the rental term. Lessee assumes all responsibility for use of such devices. Lessee shall not incur any liability or expend any money for Lessor's account, nor shall Lessor become liable to Lessee for any costs incurred by Lessee. Title to all parts, materials and supplies furnished to the equipment become the property of the Lessor.

All accessories or attachments not listed herein or necessarily includable as part of the equipment shall be furnished by Lessee at its own expense.

14. SUPPLYING OPERATORS: Unless otherwise mutually agreed in writing the Lessee shall supply and pay all operators for the leased equipment during the rental period and shall employ only competent, experienced, knowledgeable, and reliable personnel who will operate and maintain the equipment. Should the Lessor loan any operators or other workmen for the equipment, they shall be employees of the Lessee under Lessee's exclusive jurisdiction, supervision, and control during the rental period, and the Lessee shall also pay them such traveling expenses, board and lodging as may be agreed between the Lessee and Lessor. The Lessee shall provide and pay for all wages, workmen's compensation insurance, fringe benefits, and pay all payroll taxes required by law applying to such operators and workmen. Lessee agrees to indemnify Lessor against and hold Lessor harmless from all liability for wages, taxes, insurance contributions, other such payments, benefits under any workmen's compensation or similar expenses, respecting Lessee's employment of such personnel Lessor does not represent, warrant or guarantee to Lessee or anyone that Lessor supplied equipment operators have been supplied equipment operators shall become Lessee's responsibility and shall be tested and pre-qualified by Lessee to determine their competency, experience and reliability to operate the leased equipment.

payroll, according to Respondent, at the request of MHIA “for union reasons” (Tr. 1054, Resp. Brief p. 24). As further evidence that MHIA was the employer, Respondent asserts that the Lampson flagger/supervisor originally assigned to Miller Park, Milo Bengston, was “fired” by MHIA and replaced by another Lampson “loaned” employee, Allen Watts (Tr.306,379-380,568,241-242). In addition, the MHIA superintendent on site, Victor Grotlisch, had authority to directly supervise the work activities of the loaned employees (Tr. 1025-1030) and the MHIA safety director, Wayne Noel, was responsible for “the safety supervision of activities of the loaned employees” (Tr.84,669, Resp. Brief p. 12).

Respondent, in its memorandum of law, lists specific instances which it believes supports the conclusion that MHIA rather than Respondent was the employer of Flowers, Aldrich and Watts:

1. MHIA had the ability to demobilize and remobilize the Transi-Lift crew depending on work conditions (Tr.321,323, R-71).
2. MHIA controlled the number of hours the crane crew spent on the jobsite (Tr.334-336,560).
3. Invoices prepared by Lampson for hours worked by the crew were paid by MHIA.
4. MHIA controlled the communication of the crane crew with other contractors (Tr.364).
5. MHIA “fired” loaned employee Milo Bengston.
6. MHIA was “involved” in hiring loaned employees (Tr.359).
7. The MHIA supervisor, Victor Grotlisch, had authority to supervise the Big Blue crew (Tr.1028-1030).
8. Supervisor Watts was required to report to MHIA on all maintenance records, inspection records, submittal of documentation for safety and OSHA requirements and overall scheduling and coordination (Tr.216-217).
9. MHIA directed the means, methods and the details of the crane’s operation (Tr.1019-1020).

Thus, according to Respondent, the relationship between MHIA and Lampson’s loaned employees satisfies the common law test for establishing an employer-employee relationship between MHIA and the loaned employees. Moreover, the terms of the lease and the control exercised by MHIA, as demonstrated above, support the conclusion that Lampson was not an employer at the Miller Park

project. Respondent relies upon the finding of the Seventh Circuit Court of Appeals in *Secretary of Labor v. CH2M Hill, Inc.*, 192 F.3d. at 721:

While perfunctory language that does not represent the true responsibilities of a particular employer should not absolve it from complying with the regulations, language exempting an employer from particular responsibilities that the facts confirm the employer does not actually retain cannot be casually thrown aside. Contracts represent an agreed upon bargain in which the parties allocate responsibilities based on a variety of factors. To ignore the manner in which the parties distributed the burdens and benefits is contrary to our notion of contract law. . . . The Secretary and Commission cannot ignore the fact that parties to a contract bargained for one to maintain safety responsibilities and for the other to refrain from such responsibility. (*Citations omitted*)

According to Respondent, the terms of the lease and the control exercised by MHIA at the worksite are sufficient to support the conclusion that MHIA, rather than Respondent, was the “employer” of the Big Blue crew members within the meaning of the Act.

Complainant, however, argues that the actual responsibilities and conduct of the parties at the worksite are the determining factors rather than the language in the lease agreement which, according to Complainant, did not reflect the actual intent of the parties nor the actual conditions existing at the worksite (Complainant’s Reply Brief p. 2). In support of this argument, Complainant points to a number of factors which, in Complainant’s view, supports the conclusion that once having been given an assignment by MHIA, such as lifting piece 4R3, Respondent controlled the work activity required to complete the assignment. These factors are (1) flagger/superintendent Watts inspected Big Blue; (2) Watts completed the “critical lift plan” for lifting 4R3; (3) Watts participated in conducting the pre-lift meeting at which time he explained the manner in which the lift would be conducted; (4) Watts calculated the crane’s capacity for the lift and determined the procedure for lifting the piece; (5) he supervised the rigging of the piece and the attachment of a concrete counter weight to the piece; (6); Watts checked the ground conditions to ensure that the crane was level; (7) Watts “choreographed” every move of the lift and directed the activities of the other crew members and (8) Respondent’s employees engineered the rigging for 4R3. Finally, Respondent’s employees had extensive experience and skill in the operation of cranes similar to “Big Blue” and Allen Watts had the authority to stop or decline to initiate an unsafe lift.

Complainant relies heavily upon the Commission decision in *Vergona Crane Co.*, 15 BNA OSHC 1782 (1992) as support for the proposition that “conduct and not contract determines employer status under the OSH Act: (Reply Brief p.3). In that case, considering facts similar to the instant matter, the Commission concluded, notwithstanding language contained in a “bare lease” agreement

leasing a crane operated by Respondent Vergona's employees, that the actual control exercised by Respondent through its employees at the worksite supported the conclusion that Vergona was properly cited as the employer responsible for certain violations which occurred at the worksite. Complainant argues that the unique nature of Big Blue required highly skilled operators and only Respondent's employees possessed the necessary skills to operate the crane (Complainant's Reply Brief p. 4,5).

Based upon the record in this matter it is concluded that Respondent was the employer of Frederick Flowers, Steven Aldrich and Allen Watts for all relevant times at the Miller Park worksite. First, notwithstanding the language contained in paragraph 14 of the bare lease *supra*, it is clear that Respondent Lampson chose the employees who were responsible for the operation of Big Blue. William Lampson, Respondent's President testified as follows:

Q. How did you decide which Lampson people were going to be assigned to the Miller site project if, in fact, you did?

A. I participated in the decision. We have a number of superintendent-type people that are qualified to be assigned to these projects, as well as a number of qualified operator-mechanic types that are qualified, and those were people that were available that were qualified.

Q. Were your choices of people reviewed? Was the choice of employees subject to any review by Mitsubishi? Were they provided with CV's? Did they have any discussions with you whether these people were good enough?

A. I do not recall that, if they asked for resumes or not.

Q. When you determine what (sic) people you are going to supply to these clients, crane operators were obviously important?

A. Yes.

Q. What about crawler operators, is that always part of the package?

A. Not as critical. Depends on the capabilities of the customers and their employees.

Q. Was it your intention to supply crawler operators for this job?

A. Just the one. (Exh. C-17; Tr. 91)

According to Lampson, whether a crane is leased to a customer with or without a crew depends upon the sophistication of the equipment and the talent of the customer. A conventional crane would be leased without an operator if the customer had the "talent" to operate the crane (Exh. C-17,

Tr. 37). However, it is clear that Transi-lift cranes and “Big Blue” in particular are extraordinary cranes designed and constructed for the heaviest and most unique load lifts. Since Respondent designed and manufactured these cranes, its employees possess the most operational experience on a national and international basis (Exh. C-178; Tr. 88-89). The MHIA supervisor on site, Victor Grotlisch, stated that he had no prior experience with a Transi-lift and was not qualified to supervise the operation of the crane. Indeed, according to Grotlisch, MHIA “could not rent this crane without the operation of Lampson. The crane was not available to us. It was never presented to us unoperated. The only way Lampson would provide that piece of equipment to Mitsubishi was operated” (Tr. 209).

An illustration of the control that Respondent maintained over the crew of Big Blue is the “Milo Bengston” incident. According to Mr. Lampson, Milo Bengston was one of his most experienced flagger/supervisors for Transi-Lift cranes. Mr. Bengston was originally assigned as the flagger for Big Blue at Miller Park and Randy Miese was assigned as hoist operator. Conflicts developed between MHIA superintendent Grotlisch and Mr. Bengston and numerous requests were made by MHIA to Lampson for Mr. Bengston to be removed from the jobsite. Mr. Lampson was reluctant to remove Mr. Bengston because of his expertise (Exh C-17; Tr. 96-104). However, Lampson stated “I could tell (MHIA) to go to hell. ‘If he (Bengston) goes, the machine goes, too,’ and then fight about it. I did not think that was appropriate. We had another superintendent available that was certainly capable of doing it” (C-17, Tr. 106). Lampson replaced Bengston with Allen Watts. His hoist operator, Randy Miese, was also replaced by Frederick Flowers who had worked frequently with Allen Watts as hoist operator for the Transi-Lift.³

Although the Supreme court in *Nationwide Mut. Ins. Co. supra* listed a number of elements that must be considered to establish a common law test for an employer-employee relationship, the Court also stated “Since the common-law test contains no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive” (503 US at 324). Moreover, although contract language should not

³ There are frequent references by Respondent’s counsel to the fact that MHIA had “fired” Milo Bengston from the jobsite and, in effect, terminated his services with Respondent. However, William Lampson, Respondent’s President, testified that Mr. Bengston was not “fired.” Lampson stated, “It was not a matter where Milo was fired. He was just taken off of this jobsite. He knew he had a home with us regardless, and I told him that. Allen (Watts) did not come here with a fear if he spoke up he would get his ass fired, because Milo didn’t

get his ass fired. He (Milo) got replaced to go to another location. It was a change of personnel, not a termination of somebody” (C-17; Tr. 110). Although Bengston was offered continued work by Respondent, he decided to take some time off to build a house in Montana (C-17; Tr. 107).

be ignored as an element to be considered as part of the analysis, “the question as to what responsibilities a particular defendant maintained should turn on a factual inquiry *based upon a review of the record* including the language of the contract” *CH2M Hill, Inc. v. Herman* 192 F.3d 711, 721 (7th Cir. 1999) (*Emphasis supplied*). The record of this matter reveals that the crane known as “Big Blue” is unique in relation to other cranes and designed by Respondent to accomplish the heaviest and most difficult lifts. Since Respondent designed, manufactured, and owned all seven of the Transi-Lifts in existence, the only people experienced in the operation of the crane were employed by Respondent (Tr. 378,329).⁴ The record supports the conclusion that Respondent would decline to lease a Transi-Lift without Lampson personnel as the flagger/supervisor and hoist operator. In this case, Mr. Finucan was assigned reluctantly as a crawler operator because of a union requirement (Tr. 486-487). As stated by supervisor Bengston regarding the crawler operator “[i]t’s not something we like to do. We’d just as soon bring our own operators, but sometimes the union won’t let us” (Tr. 288).

Respondent also provided other support services for the Miller Park project. For example, Lampson engineer, John Bozing was assigned to produce rigging drawings for the heavy lifts, assist in the evaluation of site conditions relating to lifts and “assist in the coordination of engineering elements to allow that the picks take place” (Tr. 358). Randolph Stemp, a Lampson engineer, prepared the load charts for Big Blue at the worksite (Tr. 733). The load chart contained the crane’s rated capacity figures as well as the manufacturer’s specifications regarding the use of Big Blue (Exh. C-5). Moreover, during the course of the Miller Park project, ten of Respondent’s employees were assigned to the worksite to perform various work activities and remained on Respondent’s payroll (Exh. R-24). Supervisor Watts was responsible for the safe completion of the lift and the safety of the crane crew members (Tr. 668-669).

Because of the specialized knowledge and experience required to supervise and operate Big Blue for heavy lifts, as in this case, it is clear, once having been given the lift assignment, that the lift was controlled by Lampson employees including the authority to decline to commence the lift or to abort the lift for reasons of safety (Tr. 657, Exh. C-3, p. 3). As for MHIA, the record supports the conclusion that, once having given the lift assignment, that company relied upon the specialized expertise of Respondent’s employees to safely complete the lift. Accordingly, Respondent, through its employees, maintained control of the work activities of Big Blue and retained responsibility for the

⁴ Flagger/supervisor Watts has over 20 years’ experience with cranes and supervised the heaviest single lift ever made by a crawler crane. He has “made” approximately 20,000 lifts throughout the United States and in Korea, Japan, Algeria, Sweden, Norway, Britain, Scotland and Venezuela (Tr. 648).

safe operation of the crane and its crew members. *See: Vergona Crane* 15 BNA OSHC 1782 (1992).⁵ Thus, Respondent was an employer of employees at the Miller Park project within the meaning of the Act.

Citations Issued

On January 12, 2000, Complainant issued Willful and Serious citations to Respondent. By motion dated June 21, 2000, Respondent sought partial summary judgment as to Serious citation 1, items 3 and 4 and Willful citation 2, item 1. By cross motion dated June 30, 2000, Complainant sought partial summary judgment for Serious citation 1, item 3 and opposed Respondent's motion as to Serious citation 1, item 3 and Willful citation 2, item 1. Complainant declined to respond to Respondent's motion regarding Serious citation 1, item 4. A Decision and Order was issued by the undersigned on July 20, 2000 granting Respondent's motion for partial summary judgment for Serious citation 1, item 4. The remainder of Respondent's motion for partial summary judgment and Complainant's cross motion for summary judgment were denied without prejudice. The Decision and Order is incorporated herewith and made a part of this Decision and Order. Complainant withdrew Serious citation, Item 1c and Willful citation, Item 1 prior to the trial of this matter. Serious citation, Item 1(b) was withdrawn by Complainant at the hearing (Tr. 796). Complainant also amended Serious citation, Item 3 as an Other-Than-Serious violation and amended Willful citation, item 2 to read in the alternative as a Serious violation within the meaning of the Act. The alleged violations remaining in dispute as set forth in the citations are as follows:

I. Serious Citation 1, Item 1(a)

29 CFR 1926.550(a)(1): The employer did not comply with manufacturer's specifications and limitations applicable to the operation of the LTL 1500 Series III A Transi-Lift crane:

- (a) Miller Park, Milwaukee, Wisconsin: The manufacturer's chart capacities do not consider effect of wind on the suspended load. On July 14, 1999, prior to the pick of the 4R block 3 the employer did not consider the effect of wind on the suspended load on the manufacturer's chart capacities of the LTL 1500 Series III A Transi-Lift crane.⁶

IN THE ALTERNATIVE

⁵ Respondent's counsel repeatedly made reference at the hearing to Respondent's employees as "borrowed employees." However, in *Frohlick Crane Service v. OSHRC* 521 F.2d 628, the Tenth Circuit Court of Appeals, in a case similar to the instant matter stated "[w]e do not believe it necessary to get involved in any discussion as to the law of "borrowed employees." That is a term which frequently appears in cases where tort liability arising out of an industrial accident is at issue. . . . This is not a tort case." *supra* at 631.

⁶ The Secretary amended this item by deleting the phrase "at the time of and during" after the words "prior to" in the second sentence.

29 CFR 1926.550(b)(2) as follows: The conditions described in Items a and d violate American National Standards Institute, B30.5-1968, Section 5-1.1.1(d) which requires that the user of the crane take into account such factors as wind, ground conditions and careful operation of the crane on the effectiveness of stability factors on the load rating of the crane.

The standard cited by Complainant reads in its entirety as follows:

§1926.550 Cranes and derricks.

(a) *General requirements.* (1) The employer shall comply with the manufacturer's specifications and limitations applicable to the operation of any and all cranes and derricks. Where manufacturer's specifications are not available, the limitations assigned to the equipment shall be based on the determinations of a qualified engineer competent in this field and such determinations will be appropriately documented and recorded. Attachments used with cranes shall not exceed the capacity, rating, or scope recommended by the manufacturer.

The alternative pleading, American National Standards Institute standard B30.5-1968, Section 5-1.1.1(d) reads in its entirety as follows:

Section 5-1.1.1

d. The effectiveness of these preceding stability factors will be influenced by such additional factors as freely suspended loads, track, wind or ground conditions, condition and inflation of rubber tires, boom lengths, proper operating speeds for existing conditions, and, in general, careful and competent operation. All of these shall be taken into account by the user.

The gravamen of Complainant's allegation for this item appears to be twofold; first, Respondent violated the manufacturer's 20 mph wind limitation and secondly, wind sail calculations were not made for the piece being lifted (Complainant's brief p. 31,32). With respect to the first allegation, it is identical to the violation alleged at subparagraph (d) of Serious citation, item 1. That alleged violation is discussed *infra*. Accordingly, this item is vacated as duplicative of subitem (d). The surviving allegation is the alternative pleading that Respondent violated ANSI standard 5-1.1.1(d) as adopted by 29 CFR §1926.550(b)(2). The essence of the allegation is the failure of Respondent to conduct a formal wind study to determine the effect of wind upon the suspended load. The ANSI standard cited, however, is remarkable for its imprecision and its failure to provide any guidance to employers subject to its requirements as to what, if anything, must be done to comply with its provisions. *See East Penn Mfg. Co., Inc.* 894 F.2d 640, *Diebold, Inc.* 58F.2d 1327,1335; *Beaver Plant Operations* 2000 CCH OSHD 32,187. The standard cited herein merely requires, *inter alia*, that wind "shall be taken into account" when operating a crane. It is true that the record in this matter contains several references to

the fact that wind studies are often conducted for loads being lifted as a matter of industry practice. However, this matter was not presented nor was it defended as a general duty clause violation (Section 5(a)(1) of the Act). Moreover, reports of wind speed were made by hoist operator Flowers to flagger Watts throughout the lift. Based upon his extensive experience in the operation of cranes for heavy lifts, it is reasonable to infer that Watts took the wind reports “into account” during the lift. Since there is nothing within the four corners of the ANSI standard that requires a formal wind study nor has Complainant cited any standard that requires a wind study beyond what is required by the ANSI standard cited, this item must be VACATED.

II. Serious citation, Item 1(d).

29 CFR 1926.550(a)(1): The employer did not comply with manufacturer’s specifications and limitations applicable to the operation of the LTL 1500 Series III A Transi-Lift crane:

(d) Miller Park, Milwaukee, Wisconsin: The LTL 1500 Series III A Transi-Lift crane has a 20 mph wind rating. On July 14, 1999, during the pick of the 4R block 3 the crane was operated in winds exceeding the manufacturer’s 20 mph wind rating.

There is no dispute between the parties that the load chart developed for Big Blue established a 20 mile per hour wind limitation for the crane without a load (Exh. C-5). The chart had been prepared by Randolph Stemp, an engineer employed by Respondent, and was located at the hoist operator’s position. The load chart also contained the crane’s rated capacity figures as well as the specifications and limitations regarding the crane’s use (Exh. C-5). The capacity figures on the chart are calculated for wind speeds up to 20 miles per hour; however, if the wind exceeds that limit, the chart is no longer valid (Tr. 734,735). Thus, wind speeds exceeding 20 miles per hour reduce the lifting capacity of the crane (Tr. 734,735). Moreover, the wind limitation includes wind gusts (Tr. 588,906,930). Indeed, wind gusts are capable of creating greater stress on the crane than sustained winds (Tr. 601).

The load chart was utilized by Allen Watts to determine the crane’s capacity for the July 14th lift (Exh. C-6, Tr. 628,629). In addition, a wind indicator device known as an anemometer, was placed on the boom of the crane at a height of approximately 175 feet (Tr. 654). The monitor for the device was located in the hoist operator’s cab and Frederick Flowers, the hoist operator, reported the wind speed to Allen Watts approximately every five to ten minutes during the July 14th lift (Tr. 750,759). The lift commenced at approximately 9:15 a.m. and Flowers reported constant wind speeds of 16-20 miles per hour during the morning (Tr. 754). Later in the afternoon Flowers reported wind gusts of 28-30 miles per hour (Tr. 755) with a duration of approximately 15 seconds per gust. The crane and its

load collapsed at approximately 5:15 p.m. For the hour preceding the collapse, Flowers reported the highest wind gusts of the day to Watts; between 28-30 miles per hour.

In order to establish that Respondent failed to comply with the aforesaid standard, the Secretary must prove that (1) the standard applied, (2) the employer failed to comply with the terms of the standard, (3) employees had access to the cited conditions and (4) the Respondent knew, or with the exercise of reasonable diligence, could have known of the violative conditions, *ASTRA Pharmaceutical Products, Inc.* 1981 CCH OSHC 25,578, aff'd 681 F.2d 69 (1st Cir. 1982); *Secretary of Labor v. Gary Concrete Products*, 15 BNA OSHC 1051, 1052, 1991 OSHD 29,344 (1991) *Carlisle Equip. Co. v. Secretary of Labor* 24 F.3d 790 (1994). The burden of establishing these elements rests with the Secretary of Labor. Moreover, the elements must be established by a preponderance of the evidence. *Armor Elevator Co.* 1 OSHC 1409, 1973-74 OSHD ¶16,958 (1973). The Commission has defined "preponderance of the evidence" as "that quantum of evidence which is sufficient to convince the trier of fact that the facts asserted by a proponent are more probably true than false" *Ultimate Distrib Systems, Inc.*, 10 OSHC 1569, 1570 (1982).

The record in this matter substantially supports the conclusion that Respondent violated the standard as alleged. First, there is no dispute that the standard applies to Respondent as the manufacturer and operator of the crane. Secondly, there is substantial evidence on the record that the wind on July 14th exceeded the 20 mile per hour limitation and Respondent's supervisor, Allen Watts, had knowledge of the wind speeds. The hazards presented by wind speeds in excess of 20 mpg, such as tipping hazards, are well known to Respondent's representative (Watts) (Tr. 23-27,31,301) and individuals employed by Respondent were exposed to serious injury or death resulting from those hazards. Based upon the foregoing, this citation item is AFFIRMED as a Serious violation.

Section 17(j) of the Act requires that due consideration must be given to four criteria in assessing penalties: the size of the employer's business, gravity of the violation, good faith and prior history of violations. In *Secretary of Labor v. J.A. Jones Construction Company*, 15 BNA OSHC 2201 (1993), the Commission stated:

These factors are not necessarily accorded equal weight; generally speaking, the gravity of a violation is the primary element in the penalty assessment. *Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1483, 1992 CCH OSHD ¶29,582, p. 40,033 (No. 88-2681, 1992); *AFTRA Pharmaceutical Prods., Inc.*, 10 BNA OSHC 2070 (No. 78-6247), 1982). *The gravity of a particular violation, moreover, depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result.* *Kus-Tum Builders, Inc.* 10 BNA OSHC 1128, 1132, 1981 CCH OSHD ¶25,738 p. 32, 107 (No. 76,2644, 1981).

In this case, the gravity of the violation is very high. In view of the complex nature of the lift and the resulting deaths to employees, it is concluded that the maximum penalty of \$7,000.00 must be assessed for the violation.

III. Serious Citation 1, Item 2.

The citation issued to Respondent reads as follows:

29 CFR 1926.550(a)(19): All employees were not kept clear of loads about to be lifted and of suspended loads:

- (a) Miller Park, Milwaukee, Wisconsin: Employees were not kept clear of the 4R Block 3 while it was suspended during the morning of the pick and in the early afternoon.
- (b) Miller Park, Milwaukee, Wisconsin: Iron workers installing the counter weights were not kept clear of 4R Block 3 while it was suspended during the morning of the pick.

The standard set forth at 29 CFR §550(a)(19) reads in its entirety as follows:

All employees shall be kept clear of loads about to be lifted and of suspended loads.

Shortly after the roof section designated as 4R3 had been lifted off the ground, it became clear that a counterweight had to be attached to the piece to ensure that it was at the proper angle for placement (Tr. 631). Without the counterweight, the load would have to be lowered to the ground and re-rigged to insure proper alignment. This process would have taken approximately two to four hours (Tr. 632,663). Instead, Mr. Watts made the decision to attach the concrete counterweight (Exh. C-12(b), Tr. 631) when the load was approximately 8-10 feet above the ground (Tr. 397). Ironworkers attached the counterweight to the load (Tr. 396) and Mr. Watts was present during that time (Tr. 421). Thereafter, it was necessary to rotate the load and that procedure was accomplished by using two forklifts (Tr. 400-402, 446-447). The forklift drivers were required to go beneath the load in order to accomplish this task (Tr. 447-449) and one of the drivers was under the load for approximately 30 minutes (Tr. 449). Mr. Watts was present and observed the rotation to the load (Tr. 633). In its brief, Respondent does not dispute the factual basis for the allegation. It argues, however, that MHIA had authority to control the worksite including the activities of Lampson

employees (Brief p. 28). Thus, according to Respondent, it should not be held responsible for violations which occurred under the general supervision of MHIA.

The issue of Respondent's status as an employer within the meaning of the Act has been discussed *infra*. Thus, Respondent, through the actions of its employee, Allen Watts, is responsible as

an employer for the violation alleged. Accordingly, the violation is AFFIRMED. Since employees were exposed to serious injury or death while working below the suspended load, the item is affirmed as a Serious violation. Moreover, in view of the high gravity factor, the penalty proposed by the Secretary in the amount of \$5,600.00 is assessed for the violation.

IV. Other Than Serious Citation, Item 3

The citation item issued to Respondent reads as follows:

29 CFR 1926.550(b)(2): Section 5-1.1.1 American National Standards Institute B30.51968, Safety Code for Crawler, Locomotive and Truck Cranes adopted by 29 CFR 1926.550(b)(2): Load ratings - Where stability governs lifting performance. The maximum load rating as a % of tipping was rated in excess of the 75% of tipping loads.

(a) Miller Park, Milwaukee, Wisconsin: The Lampson LTL 1500 Series III A Transi-Lift crane was rated at 85% of tipping in excess of the maximum load rating of 75% of tipping loads for a crawler crane without outriggers.

The cited ANSI standard for crawler, locomotive and truck cranes reads in its entirety as follows:

5-1.1.1 Load Ratings - Where Stability Governs Lifting Performance.

a. The margin of stability for determination of load ratings, with booms of stipulated lengths at stipulated working radii for the various types of crane mountings is established by taking a percentage of the loads which will produce a condition of tipping or balance with the boom in the least stable direction, relative to the mounting. The load ratings shall not exceed the following percentages for cranes, with the indicated types of mounting under conditions stipulated in 5-1.1.1-b. and -c.

Type of Crane Mounting	Maximum Load Ratings (%of Tipping Loads)
Locomotive, without outriggers	
Booms 60 feet or less	85
Booms over 60 feet	85*
Locomotive, using outriggers fully extended	80
Crawler, without outriggers	75
Crawler, using outriggers fully extended	85
Truck and wheel mounted without outriggers or	

*Unless this results in less than 30,000 pound-feet net stabilizing moment about the rail, which shall be minimum with such booms.

There is agreement between the parties that all crawler, locomotive and truck cranes are capable of tipping forward if they attempt to lift loads which exceed the weight lifting capacity for the crane (Tr. 901). Upon determining the “tipping capacity” of a crane, the ANSI standard cited above must be applied to determine the maximum weight that may be lifted in relation to the predetermined tipping capacity.

Respondent designed and manufactured the first Transi-Lift during 1978. As previously stated, Transi-Lift cranes sit upon two, rather than one, set of crawlers. Although the Transi-Lift possesses more attributes of a crawler crane than any other crane (Tr. 907), the configuration of the Transi-Lift which places the boom upon a platform connecting the two sets of crawlers, in the opinion of Respondent’s engineers, makes the Transi-Lift more stable than the typical crawler crane (Tr. 911-914). Respondent’s engineer, Randolph Stemp, stated that the Transi-Lift could be rated at 90 - 95% of tipping capacity because of its unique design and high stability (Tr. 901-906, 914). However, because the ANSI standard was published ten years before the Transi-Lift design came into existence, Respondent’s engineers merely referred to the chart entry for crawler cranes with outriggers as the closest applicable rating for the Transi-Lift (Tr. 901-902). Thus, the Transi-Lift was given a load capacity of 85% of tipping because Respondent’s engineers concluded that the rating for crawler cranes with fully extended outriggers most closely described the configuration of the Transi-Lift.

Complainant disputes the conclusion that Big Blue was designed with the equivalent of outriggers (Tr. 624, Complainant’s brief p. 20). However, Complainant failed to present any evidence that the Transi-Lift was less stable than a crane with outriggers fully extended. Nevertheless, the record supports the conclusion that Big Blue was not equipped with outriggers as contemplated by the 1968 ANSI standard. Thus, the Transi-Lift did not comply with the literal requirements of the technical specifications of the ANSI standard as promulgated at that time. Moreover, Respondent declined to seek a variance from OSHA with respect to the 75% load limitation. On this basis, I am constrained to hold that Respondent failed to comply with the literal terms of the standard. However, Complainant has amended this item as an Other-Than-Serious violation, and that amendment has been granted. Based upon the apparent low gravity of this violation, a penalty in the amount of \$100.00 is ASSESSED.

V. Willful Citation 2, Item 2

The citation item issued to Respondent reads as follows:

29 CFR 1926.550(b)(2): Section 5-2.3.3(b) American National Standards Institute, B30.5-1968, Safety Code for Crawler, Locomotive and truck Cranes as adopted by 29 CFR 1926.550(b)(2): Adjustments were not maintained to assure correct functioning of components:

- (a) Miller Park, Milwaukee, Wisconsin: The load indicator on the LTL 1500 Series III A Trans-Lift (sic) was not calibrated to the manufacturers specifications.

IN THE ALTERNATIVE

29 CFR 1926.550(a)(1): The employer shall comply with the manufacturer's specifications and limitations applicable to any and all cranes.

Section 5-2.3.1 of the cited ANSI standard relates to the maintenance of crawler, locomotive and truck cranes. Section 5-2.3.3(b) reads in its entirety as follows:

- b. Adjustments shall be maintained to assure correct functioning of components.
The following are examples:

1. All functional operating mechanisms.
2. Safety devices.
3. Control; systems.
4. Power plants.

Big Blue was equipped with a load indicator which determined the weight of the load being lifted by the crane. The instrument was manufactured by the Wiley Company and, when properly calibrated, will accurately weight the load with a 4% error factor (Tr. 491,492,514). The weight of the load is displayed on an instrument dial located in the hoist operator's position (Tr. 494). During August 1998, shortly after the crane had been assembled on site (Tr.491,718) mechanic Steven Aldrich and supervisor Milo Bengston calibrated the load indicator. In order to accurately complete the calibration, it was necessary to lift a known weight; Mr. Aldrich attempted to perform the calibration by following the Wiley instruction manual; however, he experienced difficulties with the process. He telephoned a Wiley technician for assistance and remained in telephone contact with that person during the calibration process (Tr. 718-719). In order to complete the calibration, a Grove crane weighing 86,500 pounds was lifted by Big Blue. This weight was considerably less than the weight of 700,000 pounds that the Wiley manual specified as the weight required to be lifted to calibrate the crane (Tr. 726). However, Aldrich informed the Wiley technician of the actual weight being lifted and, with that knowledge, the Wiley technician walked Aldrich through the entire calibration process (Tr. 727). The Wiley technician did not express any concerns to Aldrich about the weight being lifted (Tr. 731). Moreover, after several lifts at various boom radiuses, the weight dial indicated that the device was

accurately recording the weight of the lift (Tr. 723).

The accuracy of the load indicator was further verified to Bengston's satisfaction by the first lifts made by the crane. A known weight of 400,000 pounds was lifted and the weight indicator read 396,000 pounds; well within the 4% tolerance of the instrument (Tr. 516). In addition, two false work trusses weighing 240,000 pounds were lifted and the weight indicator listed their exact weight (Tr. 517). These pieces had been weighed at a weight station in order to obtain a permit to travel on highways (Tr. 521).

According to Mr. Bengston, the Wiley load indicator was properly calibrated and was accurately reading weights within acceptable limits (Tr. 517,519). However, a roof truss subsequently lifted by Big Blue registered on the weight indicator approximately 100,000 pounds less than its weight estimated by MHIA engineers (Tr. 515). Moreover, each of the seven roof trusses lifted by Big Blue under Bengston's supervision registered as weighing less than the estimates calculated by MHIA engineers (Tr. 526). Bengston testified that the estimated weights of the roof trusses calculated by MHIA engineers were wrong (Tr. 518) because, in his opinion, the load indicator had been properly calibrated and tested by lifting known weights (Tr. 515-526).

Complainant argues that the calibration of the load indicator was flawed because the test weight was significantly less than the weight recommended to be lifted by the Wiley technical manual. The inaccurate calibration was verified, according to Complainant, by the inaccurate readings on the load indicator for the roof trusses lifted by Big Blue (Complainant's brief p. 10-12). However, Complainant does acknowledge that two lifts of known weight were accurately recorded by the load indicator within acceptable limits after the calibration (Complainant's brief p. 12).

Based upon the record in this matter, it is concluded that the Secretary has failed to establish by credible evidence that the Wiley load indicator had been improperly calibrated. While it is undisputed that the test weight used to calibrate the load indicator was significantly less than the weight recommended by the Wiley technical manual, it is equally undisputed that a Wiley technician, with full knowledge of the weight being lifted, guided Respondent's employees through the calibration process. Moreover, Complainant acknowledges that loads of known weight were lifted and accurately recorded by the load indicator subsequent to the calibration. Complainant's presentation relies upon the assumption that the estimated weights of the seven roof trusses were accurate, and the low readings indicated on the load indicator were inaccurate as a result of improper calibration. There is nothing on this record, however, from which it may be concluded that the weight of the trusses were actually calculated much less than the calculations made by MHIA engineers were accurate. No witness from MHIA testified that (1) weight calculations were actually conducted by competent engineers or, if

conducted, (2) described the methodology employed to calculate the weight and degree of error, if any. For these reasons, this item must be VACATED.

Findings of Fact and Conclusions of Law

At all times relevant to this matter, Respondent was, and is, an employer within the meaning of the Act and had employees at the Miller Park worksite. Accordingly, Respondent falls within the jurisdiction of the Act and this Commission. All findings of fact relevant and necessary to a determination of the contested issues have been made above. Fed.R.Civ.P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are denied.

ORDER

1. Serious citation 1, item 1(a) is VACATED.
2. Serious citation 1, item 1(b) is WITHDRAWN.
3. Serious citation 1, item 1c is WITHDRAWN.
4. Serious citation 1, item 1(d) is AFFIRMED as a Serious violation and a penalty in the amount of \$7,000.00 is ASSESSED.
5. Serious citation 1, item 2 is AFFIRMED and a penalty in the amount of \$5,600.00 is ASSESSED.
6. Serious citation 1, item 3 is AFFIRMED as an other than serious violation and a penalty in the amount of \$100.00 is ASSESSED.
7. Serious citation 1, item 4 is VACATED (*see* Decision and Order dated July 20, 2000 attached hereto).
8. Willful citation 2, item 1 is WITHDRAWN.
9. Willful citation 2, item 2 is VACATED.

/s/
Robert A. Yetman
Judge, OSHRC

Dated: June 25, 2001