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SUPREME COURT OF VIRGINIA

APR 18 2001

In The Supreme Court of Virginia

RECORD NO. 002735

**ROBERT BOSLEY
and
W.B. MEREDITH, II, INC.,**

Appellants,

v.

MICHAEL A. SHEPHERD,

Appellee.

APPENDIX – VOLUME II OF V

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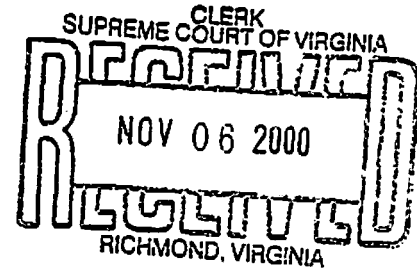
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VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH



MICHAEL A. SHEPHERD,

Plaintiff,

v.

W. B. MEREDITH, II, et al.,

Defendants.

AT LAW NO.

CL98-2952

TRANSCRIPT OF PROCEEDINGS

Virginia Beach, Virginia

July 19, 2000

Day 2

Before: THE HONORABLE A. BONWILL SHOCKLEY, Judge,
and a jury

 TAYLOE ASSOCIATES, INC.

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1 (Met, pursuant to adjournment on July 18,
2 2000, at 9:13 a.m.):

3 THE COURT: Good morning, everyone.
4 Judge West will probably be in in a few minutes. I
5 thought maybe I should come on in.

6 You-all provided some interesting reading
7 last evening. I think the issues really come by way
8 of the motions in limine. And they are in the file.
9 And they will speak for themselves. But I think sort
10 of the narrow issues that need to be decided at this
11 point in time are -- so that we know what is going to
12 be presented to the jury are argued to the jury at
13 this point in time. That was or is the issue of the
14 negligence per se and what of Mr. Burg's opinions
15 would come in.

16 After reading all of the cases, which
17 kind of go around in a big circle -- and I have
18 noticed our own supreme court in their January
19 decision didn't seem to want to decide anything that
20 they didn't have to. So they seemed to have reserved
21 the very issues that we have here today. We probably
22 would have all been happier if they had gone ahead and
23 decided them.

24 For better or worse, in looking at the
25 way everything has been going, I am going to make the

1 ruling that the defendant -- or that the plaintiff is
2 not among the covered class as anticipated under the
3 OSHA regulations. I am doing that for several
4 reasons.

5 I don't find it completely definitive as
6 to the workmen's compensation definition. I don't
7 think that negligence, because we have defined him
8 under the workmen's compensation issue as not a
9 statutory employee. I don't think that is absolutely
10 binding. I think some of the reasoning under which he
11 was found not to be a statutory employee applies in
12 this situation.

13 And the Colorado case, while I understand
14 is not binding on this court, I think some of the
15 reasoning in that is pretty valid. I don't know that
16 I need -- you all are much more familiar with this
17 issue than I was when I first started, so I don't know
18 that I need to go back through all of that. It just
19 seems to me that we would be opening up the class to a
20 much larger group than what the act was intended to
21 protect.

22 If you read through the duties of the
23 employer about training employees and setting up
24 things, it is all -- it is all in the context of
25 employees and the idea that it is somebody that they

1 have got some control over, sending them to classes or
2 setting up programs for them. In this situation, we
3 don't have the situation where they have the same kind
4 of control over the employee. They are not doing the
5 employer's business. And that sort of jives with the
6 definition of the reason that they are not a statutory
7 employee. They are not doing the employer's business.

8 So for better or worse, he is not a
9 statutory -- he is not a -- within the protected
10 class. Once I make the determination that he is not
11 within the protected class, while there is some
12 divergence of opinion, it is my ruling that the
13 persuasive argument is that there is no negligence,
14 per se.

15 And then we get into the next issue of
16 what do we do with -- is the evidence that the act was
17 violated admissible as evidence along with other
18 evidence that the defendants may have been negligent
19 separate from the pro se negligence? And it seems to
20 me -- and I kind of went around the block. I think
21 Colorado went a bit far in saying that it wasn't
22 admissible at all.

23 And I read the plaintiff's briefs about
24 the differences between strict negligence and
25 negligence, per se, and negligence and I think it

1 basically comes down to, once you bounce it out of the
2 category of negligence, per se, you have got
3 defenses. It may be one thing that you can look at as
4 far as possible negligence on the defendants' part but
5 they may have defenses to it. It may not have been a
6 reasonable time period in which to tie it. I mean,
7 there is all kind of factual questions for which
8 defenses would arise.

9 And I was sitting there trying to
10 envision the instruction that you could give, and it
11 is sort of the instruction, if you find that they
12 violated the code section, you can find them negligent
13 unless you find from the evidence that they are not
14 negligent, which is one of sort of the typical
15 instructions with that kind of thing that would be
16 offered. And I think that that would be valid under
17 the evidence and where we are in this case.

18 So now as to specific testimony of the
19 expert, I was going to ask you all -- and I don't know
20 that I was clear, and I guess it is a factual
21 question -- was there -- did OSHA ever issue -- I
22 thought I heard somebody say something about a letter.

23 MR. SMIRCINA: In this case, it was
24 investigated by the regional officer in charge of
25 instruction, their office at Oceana, and both

1 Mr. Bosley and a contractor, Gary Godfrey, were
2 removed from the job in working on any projects at
3 Oceana. And that was about the extent as far as that
4 was concerned. Whether there were OSHA violations, I
5 don't believe there ever were -- I have never seen any
6 evidence of any. And I have asked the people involved
7 and I have not heard of any evidence of any citations.

8 MR. NORRIS: OSHA wouldn't even have
9 investigated the incident because it occurred on a
10 federal project on federal property. So there was no
11 OSHA investigation, no OSHA citation.

12 THE COURT: And that was the federal act
13 that you were talking about?

14 MR. SMIRCINA: Well, what happened, yes.
15 The construction projects under the Department of
16 Navy, the office in charge, goes under the office
17 safety manual, which is an analogous provision to
18 OSHA. I mean, there are certain analogies to it. It
19 is framed the same way or in similar terms.

20 And what the Navy -- what Manny Seoane,
21 one of the witnesses, is going to say is all of these
22 standards apply to Navy construction projects and
23 we -- when we do an investigation, we take the
24 strictest standard. If it is stricter in the Army
25 manual, you use the Army Corps. Or if it is stricter

1 in OSHA, we use that.

2 OSHA provides the minimum standard of
3 care nationwide; however, under the general duty to
4 follow in the Army Safety Manual, the Army safety
5 manual's terms never go to a lower standard of care
6 than OSHA. That is the best way I can say it.

7 THE COURT: Okay. You just mucked up the
8 water back over again.

9 MR. NORRIS: Your Honor, here is the
10 problem: The plaintiff has admitted in response to my
11 request for admissions that the Army Corps manual that
12 these Navy investigators relied upon did not apply to
13 this work. That is admitted in this case now. Now,
14 all that is left is the general catchall safety
15 provision, which is in OSHA and which is parroted in
16 the Army Corps manual that people shouldn't get hurt
17 on your workplace.

18 THE COURT: Which is really no difference
19 than keeping premises reasonably safe without even
20 having a regulation.

21 MR. NORRIS: But if all the plaintiff
22 has -- and this is all the plaintiff has told us that
23 he has -- is that the beam fell down and because it
24 fell down and injured Mr. Shepherd, this wasn't a safe
25 workplace and you should have done more to keep it

1 secure. We don't know how much more you should have
2 done, but you should have done more. That is strict
3 liability. And I believe it was the Pike case, if I
4 am not mistaken, that said you can't use OSHA
5 standards to create strict liabilities, just because
6 there is an accident doesn't mean that you haven't
7 provided a safe enough workplace.

8 And so the point I was trying to make
9 both in my motion in limine before Judge Cannon and
10 yesterday with you is the plaintiff has told us
11 nothing in discovery that they have outside of this
12 one catchall OSHA provision of any local standard for
13 steel erection that we failed to follow the brief of
14 which proximally caused the accident. All they have
15 told us is you don't adequately secure the beam either
16 in a hoist by a temporary weld or by bolting or some
17 combination of those, all of which are required by the
18 Army Corps of Engineer Manual, which the plaintiff
19 admits doesn't apply.

20 So there has been no disclosure to us
21 that in Tidewater, Virginia, most steel erection
22 contractors, when setting girts, use a tack weld of
23 one and one-quarter inch in the center of the girt at
24 both ends of the girt. Because those welds will
25 withstand a force of 2,500 pounds per square inch.

1 And that is the standard in Tidewater. And your
2 welds, if you did any at all, were only one-eighth of
3 an inch, they weren't on the center of the girt, and
4 they could only withstand -- do you see the point I am
5 trying to make?

6 There is no evidence that the plaintiff
7 can present of a breach of a standard that results in
8 negligence. And the only standard that they can rely
9 on under OSHA or the Army Corps of Engineers is you
10 have to have a safe workplace. Well, that is okay as
11 a starting point, but you have to have expert
12 evidence. Because this is beyond the scope of what a
13 typical jury can fathom. This is something technical.
14 This isn't the speed of a car.

15 THE COURT: Well, I guess that is the
16 question, isn't it? Do you need expert testimony or
17 can you just use the jury's common sense as to what is
18 a safe condition and what is not safe?

19 MR. NORRIS: Judge, do you know what the
20 safe condition of girt is? Do you know how much of a
21 weld is needed? Do you know how much weld would
22 resist the force of a boom that can lift 6,000 pounds
23 of materials? Is that within your common knowledge?
24 I don't think so. It was not in mine until I spent a
25 year in this case.

1 THE COURT: If you walk into a food store
2 and they set up a display, you don't have an expert
3 talk about how much force it takes somebody to bump
4 into it to fall over on you.

5 MR. NORRIS: But, Judge, we are not
6 talking about a carton of milk. We are talking about
7 a 1720-pound steel pipe that is very difficult for me
8 to handle a ten-inch section of it. And I don't think
9 this jury, from walking into a grocery store, knows
10 what is reasonable for a steel erector to keep that
11 thing in place from a boom.

12 And that is the issue, what is a
13 reasonable standard of care? They have to have
14 something to go on. They can't speculate. It is not
15 enough to tell them that, well, you have got to do
16 something more than you did, but we don't know how
17 much more you needed to do.

18 THE COURT: Well, let me see. Ms. Spence
19 is standing up, since we are on that side of the
20 argument. I assume you are going to say something,
21 too?

22 MS. SPENCE: Yes, Your Honor. The thing
23 that -- I can understand the Court's ruling that a
24 violation of an OSHA regulation could be some evidence
25 of negligence. If we were talking about a specific

1 regulation that said there was something you should
2 do, there are all kinds of regulations that say you
3 have to have bolts here, you have to have a rope
4 there, you have to have signs here, it can't be more
5 than so many feet before you have to wear safety
6 belts. There is no such regulation that would violate
7 it.

8 And to allow them to mention OSHA just to
9 say that we had a duty to provide a safe workplace is
10 prejudicial. And it is because OSHA and "OSHA
11 violation" brings up it is basically just trying to
12 make strict liability around the back door and that
13 is --

14 THE COURT: Well, it would be depending
15 on how you instruct the jury with it. It could be
16 depending on instructions that you give them. I mean,
17 the question at this point is: Can any evidence come
18 in of a violation?

19 MS. SPENCE: I think evidence can come
20 in, certainly. If they have got opinion that matches
21 the evidentiary standards of Virginia law, an opinion
22 can come in that it was not safe to do A, B, C, and
23 D. But I don't think that they can come in and say it
24 violates OSHA because the accident happened.

25 MR. SMIRCINA: Well, essentially what the

1 expert says is that OSHA provides guarantees and the
2 Army Corps of Engineers Manual provides a guarantee
3 for every worker to have a safe workplace. What we
4 are saying is this beam was not secured. That is an
5 inherently unsafe condition.

6 Both the general contractor and the steel
7 erection subcontractor know about -- should or do know
8 about this or created the condition or exposed
9 Mr. Shepherd to the condition; therefore, they are
10 under a duty to make sure that he is not exposed to
11 the condition or that beam is secured or people are
12 warned away. That is how the interplay between what
13 the evidence is and what the law is. The duty is that
14 you cannot expose Michael Shepherd to an inherently
15 unsafe condition.

16 THE COURT: And the problem is you didn't
17 plead it that way.

18 MR. SMIRCINA: Well, the general safety
19 regulations are pled. The government safety
20 regulations are pled.

21 THE COURT: This should have been pled as
22 a premises liability case. That is what it is.
23 Somebody went on the property and they -- and the
24 people that had control of the property knew or should
25 have known from your point of view that there was an

1 unsafe condition that existed and should have taken
2 some action that they didn't take. And that is what
3 the duty arises from.

4 MR. SMIRCINA: The pleadings do state
5 that, anyway, in general terms. I do think that
6 covers all aspects of it. We did plead under OSHA. I
7 mean, we did plead under the Army Corps of Engineers
8 safety manual. We do lay out the duty that is
9 involved. We do lay out that they knew or should have
10 known about the duties, that they should have obeyed
11 the duties, that they should have controlled the
12 creation of those conditions. At that point, that is
13 a premises liability pleading, as well. That is a
14 premises liability pleading.

15 THE COURT: Well, for better or worse, I
16 am going to let the evidence in and we will deal with
17 it when we deal with the instructions.

18 MR. SMIRCINA: Thank you, ma'am.

19 THE COURT: All right.

20 MR. SMIRCINA: Well, let's -- I don't
21 want to have a problem, and so I think we ought to
22 have a real good parameter of what Mr. Burg can
23 mention and not mention.

24 THE COURT: When is he going to testify?

25 MR. SMIRCINA: Tomorrow morning. And we

1 have Manny Seoane coming in -- as a matter of fact,
2 Mr. Taraba walked into the courtroom. He is one of
3 the witnesses, as well. And I probably shouldn't have
4 let him, but I would have had to discuss it with him,
5 anyway.

6 MR. NORRIS: Well, Your Honor, I am going
7 to make a motion to exclude Mr. Taraba from testifying
8 at this trial.

9 MR. SMIRCINA: He walked in. We were in
10 the middle of talking.

11 THE COURT: Okay. I am going to ask him
12 to step out in the hall and wait and we will be with
13 him, then I am going to find out what it is that he is
14 going to testify about.

15 MR. SMIRCINA: Mr. Taraba was a
16 construction representative of this site on behalf of
17 the regional and he was in charge of construction at
18 Oceana. He gets many projects. He is like the go
19 between between the general contractor and the ROICC
20 office in order to have problems solved, issues
21 discussed, whatever. He has no independent
22 responsibility for safety. He is not going to testify
23 about anybody's responsibility for safety. He is a
24 fact witness.

25 THE COURT: Fact witness.

1 MR. SMIRCINA: He is a fact witness.

2 THE COURT: Motion to exclude him is
3 overruled.

4 MR. SMIRCINA: I am not going to be
5 asking him any opinions about the accident.

6 THE COURT: I will read the transcript of
7 the expert in more detail in the meantime and we will
8 set down where we go with what he said. Suffice us to
9 say, in opening, I am not going to exclude in the rest
10 of opening and from your opening the mention of the
11 OSHA and violation of the OSHA regulation. How far we
12 let the witness go on testifying, we will further
13 define when we get there.

14 And now we need to look at the
15 transcript.

16 MR. AUFENGER: May I approach, Your
17 Honor?

18 THE COURT: Sure.

19 MR. AUFENGER: Here is the original copy
20 of the transcript.

21 THE COURT: All right. This is
22 Dr. O'Connell's transcript first. And I assume he is
23 a witness for the plaintiff.

24 MR. AUFENGER: Yes, ma'am.

25 THE COURT: And we have a videotape

1 THE COURT: That is fine. Whatever is
2 comfortable.

3 MR. SMIRCINA: We will work on that.

4 DIRECT EXAMINATION

5 BY MR. SMIRCINA:

6 Q. What is your name, sir?

7 A. Jonathan McGowan, Junior.

8 Q. And what do you do for a living, sir?

9 A. Superintendent with Wenger Tile and
10 Plaster.

11 Q. What kind of a business is Wenger Tile
12 and Plaster?

13 A. Drywall, metal studs.

14 Q. What do you do with them?

15 A. Construction on them, commercial
16 buildings.

17 Q. How long --

18 A. Sealing partitions.

19 Q. How long have you been doing this?

20 A. Since '73.

21 Q. What positions have you held with Wenger
22 Tile? What do you do for them now?

23 A. Superintendent.

24 Q. So, in other words, you are the boss on
25 the job --

1 A. Correct.

2 Q. -- for Wenger Tile?

3 A. Yes.

4 Q. Now, on November 14th, 1996, were you
5 working at a construction site aboard the Dam Neck
6 Naval Base here in Virginia Beach?

7 A. Yes, I was.

8 Q. What were your duties at that time?

9 A. The same. Oversee the job site for my
10 trade.

11 Q. Who was the -- who was the general
12 contractor on the job site?

13 A. W. B. Meredith.

14 Q. And who were the steel erectors on the
15 job site?

16 A. Atlantic Welding.

17 Q. The defendants here today?

18 A. (Witness nodding head.) Yes.

19 Q. All right. And who was the
20 superintendent on that job?

21 A. Robert Bosley.

22 Q. And when did you start to work on that
23 project, sir? Several months before?

24 A. I don't believe it was several months.
25 It seems like we might have started late fall,

1 somewhere around there. It has been a long time. I
2 can't tell you exactly.

3 Q. Now, Mr. McGowan, I am going to ask you
4 to speak up just a little bit because some people
5 might not hear as well as you do. And I would like
6 you to step down from the witness box, with the
7 judge's permission, so that we can go over a few
8 things.

9 THE COURT: That is fine. I don't need
10 to see. The jury needs to see.

11 MR. SMIRCINA: Okay.

12 BY MR. SMIRCINA:

13 Q. Now, Mr. McGowan, on November 14th, 1996,
14 were you to receive a load of material from Tidewater
15 Interior Products?

16 A. Well, actually they do the ordering from
17 the office, and I am really not aware of when it is
18 going to be there until it shows up, because a lot of
19 times they will say it is going to be there, but for
20 whatever reason they couldn't make the delivery
21 whatever day.

22 Q. Had you received deliveries at this job
23 site from Tidewater Interior Products prior to this
24 time?

25 A. Yes.

1 Q. At the time, on November 14th, 1996, did
2 you know Michael Shepherd?

3 A. No.

4 Q. Had you ever seen him before?

5 A. Uh-uh.

6 Q. You have to say yes or no.

7 A. No. I am sorry.

8 Q. Now, on the 14th of November 1996, did a
9 delivery truck come from Tidewater Interior Products
10 to deliver material to you?

11 A. Yes, it did.

12 Q. About what time of day did they come?

13 A. It was late in the day. I would say
14 somewhere towards two-thirty or so. It was after
15 lunch.

16 Q. It was after lunch. What time do you get
17 off work?

18 A. Three-thirty.

19 Q. Did -- and when Tidewater Interior
20 Products arrived with their truck, what did you do?

21 A. When they arrived with their truck,
22 normally what happens is they will have someone from
23 the truck come and try and locate me, then I will go
24 down to the truck and meet them. And I usually find
25 the superintendent and find out where we are supposed

1 to put the stuff.

2 Q. And did that happen this day?

3 A. Yes.

4 Q. Where on this job site did the truck pull
5 up originally? We have a -- first, we have a plan
6 down here of the job site. This I will say to you, if
7 you would agree, is the corner of the building where
8 the accident ultimately occurred.

9 A. Yes.

10 Q. Where did the truck first pull up?

11 A. It seems to me it was in the front of the
12 truck, right in this area right here.

13 Q. And where was the -- where was one of
14 Meredith's and the superintendent's job trailer in
15 relation to where the truck was?

16 A. Directly behind it within 25 feet or so,
17 50 feet.

18 Q. And did a representative from Tidewater
19 Interior Products come to discuss the off-loading of
20 this material with you?

21 A. Yes.

22 Q. And was Mr. Bosley present at that time?

23 A. Yes.

24 Q. Where did that discussion take place?

25 A. Next to the truck.

1 Q. The truck. And the truck being parked
2 around in here?

3 A. Uh-huh. Right in this area here.

4 Q. Point with your finger, sir, because your
5 glasses cover a large area.

6 A. I am sorry. Right in this area.

7 Q. And what was said by you to Mr. Bosley?

8 A. There was an area right down here where
9 we previously had unloaded some drywall or sheeting
10 and we had since used some on the first floor, which
11 left an area where we could restock in that one area.
12 We had work to do on the second floor prefabbing some
13 panels, and I told him that we were going to finish
14 filling up this area here, then we were going to go to
15 the second floor overtop of this area, put what we
16 could get in there, and then we were going to
17 distribute the remainder across the second floor of
18 the front of the building where we could get it.

19 Q. What do you mean -- what do you mean
20 where you could get it?

21 A. There was -- at the time, there was some
22 equipment and there was double girts and different
23 things in the way where you couldn't get the forks of
24 the truck into the building.

25 Q. If you were to look down here --

1 MR. SMIRCINA: Can everybody see that?

2 THE COURT: If you can't, you are free to
3 stand up or step down.

4 MR. SMIRCINA: Let me move them, Your
5 Honor.

6 THE COURT: All right.

7 MR. SMIRCINA: That might be a little
8 easier. It gets a little cumbersome.

9 BY MR. SMIRCINA:

10 Q. First of all, do these pictures
11 accurately represent the scene of the accident
12 immediately after the accident occurred?

13 A. I would say so. Yes.

14 Q. And this accident happened on 14 November
15 1996, aboard the Dam Neck Naval Base?

16 A. Yes.

17 Q. All right. Was this the truck that
18 Michael Shepherd drove up?

19 A. Yes.

20 Q. And on the first floor, where in relation
21 to the accident site was the off-loading originally
22 done on the first floor?

23 A. This is the accident site here -- right
24 here in this little -- I believe the first loads were
25 in the bottom right here. And then we went up on top

1 of the second floor from there and then moved in this
2 direction.

3 Q. Was the configuration of the second floor
4 area where you first off-loaded toward the center of
5 the building or the center of the side of the building
6 with two beams or with one beam, do you recall?

7 A. It would have to be with one beam because
8 you wouldn't be able to get to this area here. It is
9 just impossible to get that through there.

10 Q. When you say "get to this area," you mean
11 the boom couldn't get in there?

12 A. Exactly.

13 Q. What did Mr. Bosley say to you when you
14 told him of your plans to off-load the material at
15 various sites that you have indicated?

16 A. He had no objection.

17 Q. How do you know he had no objection?

18 A. He didn't say that he had an objection.
19 He said okay.

20 Q. Now, were there what is called safety
21 cables on the second deck?

22 A. Yes.

23 Q. What is a safety cable?

24 A. It is a wire cable that is -- you can see
25 it right here. It is usually strung from column to

1 column to keep people from backing off of a building
2 or falling off of the building.

3 Q. And that would be clear around the
4 building in various sections?

5 A. Around the entire perimeter of the second
6 floor. Correct.

7 Q. And the purpose of that is to prevent
8 people from falling?

9 A. Yes.

10 Q. On the off-loading on the first floor
11 toward the center of the building, did the off-loading
12 go uneventfully?

13 A. Yes. There was no problems.

14 Q. Was this a routine matter for you?

15 A. Yes. Routine.

16 Q. Do boom trucks often deliver you your
17 material and off-load it using a boom crane, for lack
18 of a better word?

19 A. Yes.

20 Q. Was there anything unusual about the way
21 Michael Shepherd operated the boom crane?

22 A. Not at all.

23 Q. Either on the first area where he
24 off-loaded off the ground floor?

25 A. No.

1 Q. What about the second floor?

2 A. No.

3 Q. When Mr. Bosley gave his assent to you
4 off-loading it in that area, did he mention anything
5 about whether the girts were secured in any way?

6 A. No.

7 MS. SPENCE: I am going to object, Your
8 Honor. He didn't say that Bosley gave his assent to
9 off-load in that area. He said that Bosley gave his
10 assent to distributing the material across the second
11 floor.

12 THE WITNESS: Per the truck.

13 THE COURT: Rephrase the question as to
14 what the evidence was, please.

15 BY MR. SMIRCINA:

16 Q. Where did Mr. Bosley tell you to off-load
17 the material on the second floor? Or better yet,
18 where did you ask him to off-load the material?

19 A. He didn't tell me. I told him what my
20 plans were, which is normal procedure. When they
21 come, I normally find the superintendent. And the
22 reason that I find the superintendent is because I
23 don't want to put material in the way of somebody
24 else's work that is coming. I went to him to
25 coordinate with him to make sure I wasn't going to be

1 in anybody's way.

2 Like I told you, they were going on the
3 first floor, then they were going up on the second
4 floor overtop of that, and then I was going to
5 distribute with -- the truck was going to distribute
6 material where I could get it into the building across
7 the face of the second floor, headed towards this
8 section.

9 Q. Did Mr. Bosley voice any objection to
10 your plans?

11 A. Not at all.

12 Q. And the off-loading then commenced on the
13 first and second floors?

14 A. Yes.

15 Q. What happened to the safety cable? Was
16 there a safety cable on the first location you
17 off-loaded on the second floor, do you recall?

18 A. Yes.

19 Q. And who took that down?

20 A. The helper on the truck, which would be
21 Scott Hewitt, I believe.

22 Q. You mean an employee of Tidewater
23 Interior Products?

24 A. Correct.

25 Q. Did he receive permission from Mr. Bosley

1 to do that?

2 A. He went down to ask him. Now, I wasn't
3 present when he asked him.

4 Q. Could you have off-loaded the material
5 had the safety cable been there?

6 A. Sometimes there is enough slack in it
7 where you can pull it down to the floor. But in my
8 opinion, I think it would be better that they take it
9 down.

10 Q. Therefore, the safety cable had to come
11 down for the off-loading to occur?

12 A. I would say so. Yes.

13 Q. Why did you pick this particular area to
14 off-load?

15 A. That was the only remaining site that we
16 had access to from the building.

17 Q. There was no other place on the part of
18 the building where the truck was where you could
19 off-load this?

20 MR. NORRIS: Objection. He is leading
21 the witness, Your Honor.

22 THE COURT: Sustained. That means he is
23 going to ask you a new question.

24 THE WITNESS: Well, all right. Go
25 ahead.

1 BY MR. SMIRCINA:

2 Q. You off-loaded the material on the second
3 deck down in the midline of the building, correct?

4 A. Uh-huh.

5 Q. How much material did you put there, do
6 you recall?

7 A. I can't recall at the time.

8 Q. Was it a considerable amount of material?

9 A. It was a fair amount. Yes. One of the
10 reasons that we moved down to this area right here, as
11 you can see, there is a pallet of seems to be conduit
12 right here. I couldn't have gotten through here right
13 here, anyway, because of the double girts right
14 there. There wasn't enough room. But as you go this
15 way, there was other things in the way. I believe
16 there was some air handling equipment towards the
17 mechanical room. There was reasons why we couldn't
18 get into these areas down there. This was the next
19 available side as we moved east.

20 Q. Why did you need the material on the
21 second floor?

22 A. That is where we were doing the prefab
23 panels that were going to be installed after the
24 precast material was installed.

25 Q. Where you off-loaded material on the

1 second floor toward the midline of the building, was
2 it of the same dimensions --

3 A. Yes.

4 Q. -- as the area where the accident
5 ultimately happened?

6 A. Actually, it was coming through the side.
7 This was actually a little harder to get into, I
8 believe.

9 Q. Was the configuration, such that there
10 was, only one steel girt going across?

11 A. Yes. There was only one steel girt.

12 Q. Now, when he off-loaded on the areas on
13 the first and second floor before moving to the
14 accident site, did you ever see him touch a girt?

15 A. I didn't see him.

16 Q. How long was he down in the area toward
17 the midline of the building?

18 A. Just giving an estimate, somewhere --
19 maybe a half an hour.

20 Q. Now, in order to get down here to
21 off-load the material where the accident ultimately
22 occurred, did he have to move the truck?

23 A. Yes.

24 Q. How far did he have to move that truck?

25 A. Well, the plan will do. Well, you see

1 where the location is now where he was? And he was up
2 in this area right here. So I would say just about
3 half the length of the building.

4 Q. And that would be a rough estimate, 75
5 feet?

6 A. I don't see any numbers on it right now.
7 I can't recall exact distance. I imagine that would
8 be fair. Yes.

9 Q. And where did this truck park in relation
10 to the trailer that Meredith used on the site? Can
11 you tell by the pictures where the Meredith trailer
12 would be on the site?

13 A. I wouldn't imagine he couldn't be more
14 than a hundred feet away from it. It was almost
15 directly across from this area in the building right
16 here, just across the road.

17 Q. And are these the materials you were to
18 receive, what is in the lower photograph?

19 A. The sheeting. Correct.

20 Q. When you went up to the -- when he
21 pulled -- how did he get the truck back down to the
22 accident site?

23 A. I would imagine he just drove it back
24 there. I wasn't watching him when he moved the truck
25 itself.

1 Q. And where were you when he began to
2 off-load material at the accident site?

3 A. I was standing right between the sheeting
4 here and that column right there, about maybe six or
5 seven feet back off the side of the building.

6 Q. Is that picture in the upper right-hand
7 corner as you look at it a fair representation of what
8 was on the second floor immediately after the
9 accident?

10 A. Yes.

11 Q. Can you point out to the jury where you
12 were standing in relation to the boom arm of the
13 crane?

14 A. Between this column and the arm of the
15 crane and back off about in line with the corner of
16 that sheeting right there.

17 Q. How far away from the steel girt do you
18 think you were?

19 A. Maybe eight, nine feet at the most.

20 Q. All right. Explain, if you would,
21 exactly what Michael Shepherd was doing in operating
22 the boom truck to put material up on the second
23 floor. Can you explain?

24 A. Best I can. He picks it up with that
25 boom with the forks and he brings it up into the

1 building and he operates it.

2 Q. These forks?

3 A. Yes. And he -- he does what he does. He
4 brings it through between the area between the girt
5 and the floor, brings it back over here and sets it
6 down, comes back out and gets another load.

7 Q. How many times had he gone into the
8 building prior to the girt falling upon him?

9 A. Twice.

10 Q. So he had moved it in?

11 A. Yes.

12 Q. And moved it out?

13 A. Yes.

14 Q. Moved it back in again?

15 A. Yes.

16 Q. And when he moved out again, what did you
17 see happen?

18 A. As he was moving out again, one of the
19 things that I noticed that they have to do is they
20 have to raise and lower it just a little bit of that
21 boom as they are bringing the thing out. Okay. He
22 got underneath the girt right here and didn't make any
23 sounds or anything. All of a sudden, I looked and it
24 had raised up off the clip. And I don't know if he
25 pushed it or it just lifted it. But it didn't make

1 any noise. And I saw it teetering on top. And next
2 thing I know, it started to roll down.

3 Q. Is there a photograph on these -- on
4 these boards that would indicate what part of the boom
5 arm you saw the girt in contact with?

6 A. I believe it was this area right up in
7 here.

8 MR. NORRIS: I can't see that, Blair.

9 THE COURT: You can set that one up on
10 top of the easel.

11 MR. SMIRCINA: Let me get the other
12 easel, ma'am, and it will be a lot easier all the way
13 around.

14 THE COURT: That is fine.

15 BY MR. SMIRCINA:

16 Q. Would you please repeat your answer for
17 the jury as to what part of the boom arm do you think
18 came in contact with the girt?

19 A. I believe it was this right here, up
20 here.

21 THE COURT: Can counsel over there see or
22 are we all craning our necks here?

23 MR. SMIRCINA: I don't really know how to
24 do this.

25 THE COURT: Mr. Norris, if you want to

1 step over on this side up on this end of the box, and,
2 Ms. Spence, if want to do that, that is fine since
3 they are tilted a little bit this way.

4 MS. SPENCE: Thank you, Your Honor.

5 BY MR. SMIRCINA:

6 Q. I believe you said -- go ahead and show
7 for the benefit of counsel and the jury.

8 A. I believe it was this area right in here.

9 Q. This would be where the yellow and black
10 come together?

11 A. Yes.

12 Q. And how would you characterize the manner
13 in which Mr. Shepherd was operating his boom crane at
14 the time of the incident?

15 A. He was careful and responsible. I saw no
16 problem with his operation whatsoever.

17 MR. NORRIS: Your Honor, I am going to
18 object to the question for lack of foundation.

19 MR. SMIRCINA: I asked him to
20 characterize it.

21 THE COURT: Well, why don't you lay the
22 foundation for where he was and what he saw before.

23 MR. NORRIS: But does he have experience
24 operating a boom that he can testify as to what is
25 careful operation?

1 THE COURT: Sustained. Place some more
2 foundation.

3 THE WITNESS: I have seen enough jobs
4 where I know if somebody is running into anything or
5 if they are not running into things.

6 BY MR. SMIRCINA:

7 Q. Let me just ask the question this way:
8 How many times have you seen a boom crane operator do
9 a job substantially similar to this?

10 A. Hundreds.

11 Q. Based on that, do you have a pretty good
12 appreciation of what a boom truck operator can do with
13 a boom crane?

14 A. Yes.

15 Q. Did you see anything unusual or out of
16 the ordinary about the operation by Michael Shepherd
17 of the boom crane?

18 A. No.

19 Q. Anything departing from what you see on
20 an everyday basis?

21 A. No.

22 Q. What happened after you saw the boom in
23 contact with the beam? What happened?

24 A. Like I said, it teetered at the top. And
25 before I could even say anything, it started to slide

1 down the boom. And Michael was sitting in the chair
2 at the base of the boom. And I saw it sliding right
3 towards this area of his body. And it looked like he
4 was starting to try to get up. And at that point, I
5 can't tell you what happened after it came in contact
6 with him because we all took off, headed down the
7 ladders. Hewitt headed for Michael.

8 I had just saw an ambulance pass on this
9 road right here, passed the building. And a lot of
10 times he comes through here and he parks at one of
11 these buildings right here that you can see in the
12 picture right around the corner. And I was hoping
13 that I could go and grab him and maybe he could get
14 there quicker than them making phone calls while the
15 other ones made the phone calls. He wasn't there. So
16 I returned back to the site. And I never did go over
17 there to see Mike.

18 Q. Mr. McGowan, in your experience, have you
19 ever seen a boom arm strike any part of a structure
20 while off-loading material?

21 A. Oh, yeah. All the time.

22 Q. It is a common occurrence?

23 A. I mean, you're not supposed to be banging
24 into anything, but it is a common occurrence.

25 Q. If you -- you have characterized the

1 contact between the boom arm and the girt as a
2 brushing. This contact -- if you had known this girt
3 could have come down with this degree of contact,
4 would you have gone anywhere near it?

5 A. If I knew that girt was not secured, I
6 would not --

7 MR. NORRIS: Objection, Your Honor. I am
8 going to object to the question.

9 THE COURT: Sustained.

10 BY MR. SMIRCINA:

11 Q. Did you have any idea that -- whether the
12 girt was secured or not?

13 A. I was under the impression that it was
14 secure.

15 MR. NORRIS: Your Honor, I -- Your Honor,
16 I move that answer to be stricken as nonresponsive.
17 He said he was under the impression.

18 THE COURT: Well, you can cross-examine
19 him. Overruled. The answer will stand.

20 THE WITNESS: I don't speak well.
21 Sorry.

22 BY MR. SMIRCINA:

23 Q. Have you ever seen when a boom arm hits a
24 steel girt, a girt come down before?

25 A. No.

1 Q. Have you ever seen one since?

2 A. No.

3 Q. Would you have expected that degree of
4 contact to be able to bring down the girt?

5 A. No.

6 MR. NORRIS: Objection, Your Honor.

7 THE COURT: Sustained.

8 BY MR. SMIRCINA:

9 Q. Immediately after the accident, you say
10 you went and ran and got an ambulance?

11 A. I went after an ambulance. He had just
12 crossed this road right here heading back to these
13 buildings, which is routine. We see them do it all
14 the time. But they normally stop back there. I don't
15 know what they do. He wasn't on a call or anything.
16 But they normally stop back there to see -- I don't
17 know who they are seeing back there. But -- and that
18 is what I was after. I was hoping he was still there.

19 Q. Did you ever speak to Robert Bosley again
20 after this incident?

21 A. Certainly.

22 Q. Did you ever discuss this incident?

23 A. Yeah. We discussed it.

24 Q. Do you recall any of the particulars of
25 the conversation?

1 A. There was nothing out of the ordinary.

2 Q. Was this area in any way sectioned off or
3 cordoned off, prohibiting you from off-loading?

4 A. No.

5 Q. Were you warned in any way that it could
6 be dangerous --

7 A. No.

8 Q. -- for you to off-load your material
9 there?

10 A. No.

11 Q. Had you been warned, would you have
12 off-loaded the material there?

13 A. Absolutely not.

14 Q. Had the area been cordoned off, would you
15 have gone into the area?

16 A. I would have gone and asked why it was
17 cordoned off.

18 Q. When you came back to the construction
19 site after getting the ambulance, did you see Michael
20 Shepherd?

21 A. No.

22 Q. Had he been taken away already?

23 A. I have no idea. I didn't want to go down
24 there and see. I actually thought he was killed in
25 the accident at first.

1 Q. And you were upset?

2 A. Yes.

3 Q. Just a few more questions. Had you seen
4 any welding done in the area of the building where the
5 accident occurred, either on the first deck or the
6 second deck that day?

7 A. I really wasn't paying any attention to
8 them. Where I was that day was inside the building on
9 the first floor, down on the interior framing.

10 Q. Did you notice any welders at work in the
11 immediate area of the accident, first or second deck,
12 prior to the accident?

13 A. Like I said, I didn't pay attention. I
14 know there was no one on the second floor.

15 Q. Is this the seat Michael Shepherd was
16 sitting in at the time of the accident?

17 A. Yes.

18 MR. SMIRCINA: I don't have anything
19 further.

20 BY MR. SMIRCINA:

21 Q. Prior to the accident, did you appreciate
22 any danger at all of where the plaintiff ultimately
23 got hurt -- of where the plaintiff ultimately got
24 hurt?

25 A. No.

1 Q. Did you determine, other than talking to
2 Mr. Bosley about where you were going to off-load, if
3 it was safe, if these girts were welded, if it was
4 safe in any way for you to off-load there?

5 A. Like I was saying before, I had no reason
6 to believe that they were not welded. I have never
7 been in a situation where steel was sitting in an area
8 like that where it was known to me that it was not at
9 least tack welded.

10 Q. Did anyone tell you whether the girt was
11 not secured?

12 A. No.

13 MR. NORRIS: Objection to the question,
14 Your Honor. It is hearsay what somebody may have told
15 him.

16 MR. SMIRCINA: I am just asking whether
17 or not anyone told him whether or not the girt was
18 secured.

19 THE COURT: Overruled.

20 BY MR. SMIRCINA:

21 Q. Did anyone?

22 A. No.

23 Q. Now, you say the boom went in and out
24 twice prior. Okay. And it was on the second time
25 coming back out that the girt came down; is that

1 correct?

2 A. Yes.

3 Q. Did you notice any other contact prior to
4 that time on this level on this area between the boom
5 arm and the girt?

6 A. No, I didn't notice anything.

7 Q. Did you hear any contact --

8 A. No.

9 Q. -- between the boom arm or the girt?

10 A. No.

11 Q. Was there a meeting called the next day
12 between the people who were involved in the accident
13 yourselves?

14 A. Not with me.

15 Q. Do you know whether there was a meeting
16 between principals involved?

17 A. Yes. I read a report at some time that
18 there was a meeting that took place where they had a
19 report that was written by the government. But I
20 wasn't invited to it.

21 MR. SMIRCINA: I don't have any further
22 things at this time. Thank you, Mr. McGowan.

23 THE COURT: Did you want him to stay down
24 with the photographs for cross-examination? Do you
25 want him to step back on the stand?

1 MS. SPENCE: He can stay down right
2 there, Your Honor.

3 THE COURT: All right.

4 CROSS-EXAMINATION

5 BY MS. SPENCE:

6 Q. Hi. You can stand here.

7 THE COURT: I don't think counsel will
8 mind if you put -- rest something on their table, will
9 they, Mr. Smircina? Do you mind if Ms. Spence uses
10 the corner?

11 MR. SMIRCINA: No. Not at all. I am
12 sorry.

13 THE COURT: I think that puts you out of
14 the line of fire a little better.

15 MR. SMIRCINA: Do you want me to move
16 them down a little?

17 MS. SPENCE: Maybe that will make it a
18 little easier to see if I back them up.

19 MR. SMIRCINA: Yes.

20 BY MS. SPENCE:

21 Q. Good morning, Mr. McGowan.

22 A. Hi.

23 Q. Is it fair to say that where he was
24 making this delivery would be considered a tight fit?

25 A. Yes.

1 Q. And he had just enough room to skim his
2 boom past?

3 A. Yes.

4 Q. Every single time he went in, he came
5 close to touching?

6 A. I would imagine.

7 Q. He was pulling his boom out when the
8 accident happened?

9 A. Yes, ma'am.

10 Q. And a metal portion of the boom touched
11 the girt; is that correct?

12 A. I imagine that part was metal.

13 Q. The yellow part?

14 A. Yeah. Like I said, it was in this area
15 right here.

16 Q. And it actually lifted the girt off the
17 brackets?

18 A. It tilted it. Yes.

19 Q. And you're aware that that girt weighs
20 1720 pounds?

21 A. I heard that it was somewhere between 2-
22 and 3,000. But it sounds like a fair --

23 Q. So the contact was sufficient to lift
24 that kind of weight?

25 A. Yes.

1 Q. And then you said it wobbled back and
2 forth a little bit?

3 A. It teetered just a little bit on here
4 right as it -- right as it came off the clip, I guess,
5 because of the angle and the boom and all of that.
6 This thing is equipped with round edges. It teetered
7 up there for just a second, and it started to roll
8 down. As far as lifting that thing up right there,
9 that thing is capable of lifting 6,000 pounds. So
10 that was no big deal to that.

11 Q. It would even be capable of breaking a
12 tack weld, wouldn't it?

13 A. If you put enough force on it. Yes. And
14 the other thing is that he wasn't lifting the entire
15 weight of the girt, being that it was over in this
16 area right here. He couldn't lift more than half of
17 the weight since it was bearing on the other column.

18 Q. Anyway, it teetered back and forth?

19 A. Yes, ma'am.

20 Q. And slid down?

21 A. Yes, ma'am.

22 Q. But you never heard the noise?

23 A. It never made a noise.

24 Q. I have a few questions that aren't going
25 to require the pictures. Do you want to go sit back

1 down and come back in a little bit or stay there or
2 whatever?

3 A. It doesn't matter. Whatever you want me
4 to do.

5 Q. Why don't you just stay there. You use
6 drywall virtually throughout the building on this
7 project, right?

8 A. Yes, ma'am.

9 Q. And after delivery, your employees have
10 to spread the sheets of material around where you are
11 going to use them?

12 A. Yes, ma'am.

13 Q. That means they have to carry it to
14 different rooms and walls where it is needed?

15 A. Yes, ma'am.

16 Q. When suppliers deliver it to the second
17 floor, then you employees don't have to carry it up
18 the stairs?

19 A. Yes, ma'am.

20 Q. And that saves production time?

21 A. Yes, ma'am.

22 Q. And not having to carry it across the
23 building saves time, too?

24 A. Yes. But that is going to have to take
25 place no matter where you put them.

1 Q. Well, you told Bosley you were going to
2 put -- excuse me. Let me get the diagram.

3 MR. NORRIS: It is over there, Fay.

4 MS. SPENCE: Where is the big one?
5 Because I can't see that one and I am right here.
6 There it is. Thank you.

7 BY MS. SPENCE:

8 Q. You told Mr. Bosley you were going to
9 make first-floor deliveries in this area, right? You
10 were going to have him off-load here?

11 A. I am trying to figure out where I am at.
12 I am not familiar with this drawing. This looks like
13 a site plan that shows the roads and the curbs.

14 Q. It does. This is where the accident
15 happened?

16 A. This is the outline of the building.
17 Right.

18 Q. Yes.

19 A. Not to scale. Okay. I am just trying to
20 orient myself.

21 Q. It was in this area where you were going
22 to have that material off-loaded on to the first
23 floor?

24 A. I guess.

25 Q. Let me refresh your memory. I don't want

1 you guessing.

2 A. Well, I will tell you what, just move
3 this over just a little bit and I can point to this
4 drawing here, which is the one I am used to using all
5 the time and then --

6 Q. Well, you used this drawing at your
7 deposition?

8 A. And I had the same problem then. I told
9 them the same thing if you read my deposition. And I
10 told them that this was a transformer pad, that this
11 was an -- outside of the building, basically, and that
12 these were curbs and roads. And if we can go to an
13 architectural drawing, I can give you a more precise
14 location or you can leave that right there. But this
15 one is upside down.

16 Q. Yes. It was in this area?

17 A. Yes, ma'am.

18 MR. AUFENGER: Judge, I apologize. But I
19 am not sure if all of the jurors can see. And just
20 the way I guess it is being presented, it won't just
21 be now, it will be each witness. And I don't know if
22 it would be appropriate if they wanted to kind of get
23 closer together and move over in the middle. If they
24 don't, that is fine.

25 THE COURT: Can everybody see?

1 MR. AUFENGER: Thank you, Judge.

2 BY MS. SPENCE:

3 Q. I tell you what, I will put this one on
4 this easel. You would agree from the shape of the
5 building that this is where --

6 A. Yes. I can relate to that now. Yes.

7 Q. Okay. And you specifically talked with
8 Bosley about this specific location on the first
9 floor?

10 A. Along with others. Yes.

11 Q. And you specifically talked to him about
12 going to the second floor in the same place?

13 A. Yes.

14 Q. And then you told them you were going to
15 distribute it across the second floor where you could
16 do it, yes or no?

17 A. With the machinery.

18 Q. You used the words "with the machinery"?

19 A. We are talking about where we were going
20 to place it with the truck. Anything that we would
21 distribute across our floor would have been done the
22 next day, because I would have had to get laborers on
23 the job to do that.

24 Q. But the words "you were going to use it"
25 was you were going to distribute it across the floor?

1 A. Then. That day.

2 Q. You never discussed this location -- this
3 specific location with Mr. Bosley?

4 A. I discussed this whole area of the second
5 floor. We were going to be moving this direction,
6 towards the east. I didn't know exactly which holes
7 we were going to be able to get it in because I had to
8 get up on the second floor and see what was in the
9 way.

10 Q. Do you remember giving your deposition in
11 this matter?

12 A. Uh-huh.

13 Q. Are you saying that Bosley didn't tell
14 you to put material there or just that you don't
15 remember him telling you that?

16 A. I am telling you he did not tell me not
17 to put material there. Never was I ever told not to
18 be in this area right here.

19 Q. I am on Page 72, Lines 3 through 5.

20 Question: Now, you have said that Bosley
21 didn't tell you not to put material in that location?

22 Answer: That I can remember.

23 Was that your testimony, sir?

24 A. Where is this again?

25 Q. Lines 3 through 5. Right there. Did I

1 read that correctly?

2 A. That is what I just said. He did not
3 tell me not to put material in that location.

4 Q. That you can remember was your answer.

5 A. Well, that is what I remember right now.
6 What I can remember. I basically said what I just
7 said in there.

8 Q. You saw people welding girts on the
9 second floor that day, didn't you?

10 A. I wasn't paying any attention. Like I
11 said, I was on the first floor, working inside the
12 building.

13 Q. The paragraphs will refresh your memory.
14 I am on Page 46, and I am starting at Line 13.

15 Let me ask the question this way: Had
16 you ever observed anybody welding on any of the girts
17 on the second floor prior to this delivery?

18 Answer: Yes.

19 Question: Where was that activity taking
20 place?

21 Towards the back of the building.

22 A. But when you just asked that question,
23 you asked me if it was that same day. Now, I have
24 seen them back there welding. I don't know whether it
25 was the same day or not.

1 Q. Had you seen any welding taking place on
2 any of the girts in front of the building where this
3 delivery took place on the second floor?

4 I don't recall anything on the front of
5 the building.

6 A. That is correct.

7 Q. And you testified earlier today you
8 really weren't paying attention to what the welders
9 were doing?

10 A. That is correct.

11 Q. You don't even know how long the girt had
12 been there?

13 A. It had been there, I would say, at least
14 a day, maybe more. But exactly, I can't tell you
15 exactly how long it had been there.

16 Q. You really weren't paying much attention
17 to what the steel erection people were doing, were
18 you?

19 A. No. It is not my responsibility.

20 MS. SPENCE: It wasn't your
21 responsibility. Please answer any questions from
22 Mr. Norris.

23 BY MR. NORRIS:

24 Q. Might as well stay put, Mr. McGowan.
25 This photo up here in the right-hand corner shows the

1 drywall that was being off-loaded by Mr. Shepherd,
2 doesn't it?

3 A. Yes.

4 Q. It looks like there is a stack of them
5 and then a space and a stack underneath?

6 A. Yes.

7 Q. Is a stack of drywall called a hack of
8 drywall?

9 A. Yes.

10 Q. So this photo shows two hacks of drywall,
11 correct?

12 A. Yes.

13 Q. How much does a hack weigh?

14 A. I don't know exactly. I would imagine
15 that each sheet is somewhere 50, 60 pounds and there
16 was probably 26 sheets in a hack.

17 Q. What is your best estimate of what they
18 weigh?

19 A. That was my best estimate.

20 Q. Well, I didn't do the math. Would it
21 weigh more than a thousand pounds, a hack?

22 A. I would say.

23 Q. Okay. So the boom was lifting at least a
24 thousand pounds with every lift, right?

25 A. I believe in this area right here that he

1 was lifting two at a time.

2 Q. Two at a time. So he was lifting 2,000
3 pounds?

4 A. I would say so.

5 Q. Okay. Well, you may have just answered
6 my next question. I think you said he went in once,
7 made a delivery. So did he deliver both of these
8 hacks that we can see on one delivery?

9 A. I believe so. Yes.

10 Q. Because it looks like this picture was
11 taken after the accident happened, right?

12 A. Uh-huh.

13 Q. Can you tell how many hacks had been
14 delivered?

15 A. I believe there was two more hacks back
16 in this area here.

17 Q. Okay. And would that have been delivered
18 by Mr. Shepherd?

19 A. Yes.

20 Q. Do you think that the two more hacks were
21 delivered with one loading operation?

22 A. From what I remember, yes.

23 Q. Now, I know you told us that what is
24 supposed to happen is that when he brings the load in
25 and he sets it down, this joint of the boom should

1 lower before it comes out, right?

2 A. I can't really tell you that.

3 Q. Well, tell me what you saw. You were
4 standing eight feet away, right?

5 A. Uh-huh.

6 Q. And didn't you -- didn't you tell us that
7 one -- how much room was there between the bottom of
8 the floor and where this girt had been before the
9 accident happened?

10 A. I would say it is eight feet or less.

11 Q. Okay. So he is -- he has got this boom
12 extended, right --

13 A. Uh-huh.

14 Q. -- where the forklift is?

15 A. (Witness nodding head.)

16 Q. What is the distance from the bottom of
17 that forklift to this black and yellow part?

18 A. I have no idea. All I know, it was a
19 fairly tight squeeze.

20 Q. It was a tight squeeze. Wasn't a whole
21 lot of room left from the top of the boom and the
22 bottom of the beam when it was in place, right?

23 A. Well, it was sitting on the floor. There
24 was plenty of clearance. But, like I said, you have
25 to raise and lower that thing as you are coming out.

1 Q. And that is what I am asking you. He
2 raised it and lowered it in that kind of a fashion,
3 didn't he?

4 A. I don't know exactly what controls he
5 used or exactly what part. But I know that this right
6 here is lifting up and down off the ground.

7 Q. Right. In other words, for him to get
8 through. Okay. Well, the first time he did it after
9 he set the hack down when he pulled the boom out --

10 A. Uh-huh.

11 Q. -- he came underneath of the girt, right?

12 A. Yes.

13 Q. Now, was Mr. Hewitt standing up there
14 with you?

15 A. Yes.

16 Q. Mr. Hewitt was Mr. Shepherd's coworker,
17 right?

18 A. Correct.

19 Q. Now, did you see the boom touch the girt
20 after the first hack was delivered?

21 A. I didn't see anything.

22 Q. Would you disagree with Mr. Hewitt if
23 Mr. Hewitt said that he touched it the first time he
24 delivered the material?

25 A. He said that he touched it with the

1 metal? I would have to disagree because I don't
2 remember that at all.

3 Q. Would you disagree if any part of this
4 boom touched the girt the first time a hack was
5 delivered?

6 A. Like I said, if it was a metal part that
7 I saw lifted it up, this area right in here, if that
8 actually touched, I would have to disagree because I
9 don't recall seeing that at all.

10 Q. That is not what I am asking you. I am
11 asking you if you disagree if any part of the boom,
12 hoses, plastic, metal, any part of the boom, would you
13 disagree if Mr. Hewitt said that Mr. Shepherd touched
14 that girt before the girt slid down the boom?

15 A. If it was something like a hose or
16 something, I couldn't disagree. I am just saying the
17 metal parts.

18 Q. Okay. But what you saw was when the boom
19 was brought back after the second delivery, this metal
20 part lifted some portion of the girt up, correct --

21 A. Correct.

22 Q. -- free of the brackets it was sitting
23 on, right?

24 A. Correct.

25 Q. And that is what caused it to slide down

1 the crane?

2 A. Yes.

3 Q. Okay. Now, would you agree with me --
4 how long had you all been on the job? How long had
5 Wenger been on the job?

6 A. I can't tell you right now. I would
7 guess about maybe a month. That is just a guess.

8 Q. And I think you answered in your
9 deposition that in that month or so, you had seen
10 these girls being placed before this day, right?

11 A. Yes.

12 Q. Did you ever raise any objection at any
13 safety meeting about the manner in which the girls
14 were being placed?

15 A. No.

16 Q. In fact, there was a safety meeting that
17 very day, wasn't there?

18 A. I don't recall.

19 Q. I want to show you a document and ask if
20 you can identify that document. Do you recognize that
21 document, Mr. McGowan?

22 A. Yeah. It is a safety meeting.

23 Q. What is the date of the safety meeting?

24 A. On here it says the 14th.

25 Q. Of November?

1 A. Yes.

2 Q. 1996?

3 A. Yes.

4 Q. The date of this accident?

5 A. Uh-huh.

6 Q. Did you sign the document as attending?

7 A. I am sure I did.

8 Q. Okay.

9 A. I just can't -- yes. I am on there.

10 Q. Where is your signature?

11 A. Right here.

12 Q. You just pointed to this signature right
13 here?

14 A. Uh-huh.

15 Q. In fact, the topic of the safety meeting
16 was National Safety Week, right?

17 A. I don't recall. Like I said, I don't
18 recall the meeting.

19 Q. You didn't raise any complaints at that
20 meeting about the condition of the girts or the way
21 that Atlantic was doing its work at this meeting?

22 A. I had no idea they were not welded, so I
23 had no reason to raise a complaint.

24 Q. Well, to this day, Mr. McGowan, you don't
25 have any idea whether this girt was welded or not, do

1 you?

2 A. I am pretty sure it was not.

3 Q. Well, Mr. McGowan, in all the time that
4 you rushed out to get an ambulance and help, did you
5 look at the beam that fell?

6 A. I looked at it the next day.

7 Q. Did you look at this portion of the beam?

8 A. I recall seeing that in photographs.

9 Q. Well, you are not a welder, are you, sir?

10 A. No. I have been around them before.

11 Q. You can't sit here and tell this jury
12 that you examined this beam and the angle it was
13 sitting on to determine whether or not there was a
14 spot weld on the beam before this boom tilted it
15 loose, right?

16 A. Well, first this thing --

17 Q. Mr. McGowan, I have asked you a
18 question. I would like you to answer my question.

19 A. Repeat it, please.

20 Q. You didn't examine this beam and the
21 angle it was sitting on to see if there was a spot
22 weld in place before the accident happened, did you?

23 A. No, I didn't.

24 Q. Now, you never observed any Atlantic
25 employees anywhere around you while this off-loading

1 material was going on?

2 A. No, I did not see them.

3 MR. NORRIS: That is all I have, Your
4 Honor.

5 THE COURT: Anything on redirect?

6 MR. NORRIS: Your Honor, I am sorry. I
7 would like to offer the safety meeting as Atlantic
8 Exhibit 1.

9 THE COURT: Is there any objection?

10 MR. SMIRCINA: None, Your Honor.

11 (The document referred to was marked as
12 Defendants' Exhibit No. 1, and received into
13 evidence.)

14 REDIRECT EXAMINATION

15 BY MR. SMIRCINA:

16 Q. Would you agree with me that this piece
17 of angle iron corresponds to what is up there on the
18 beam?

19 A. Yes.

20 Q. And you would agree that the 30-foot-long
21 steel beam, 29 feet, four-inch-long steel beam, was
22 sitting on a bracket like this?

23 A. Yes.

24 Q. On both ends of these columns?

25 A. Yes.

1 Q. Have you ever examined beams or brackets
2 for signs of welding --

3 A. No.

4 Q. -- prior to receiving a delivery?

5 A. No.

6 Q. Do all of these pictures -- well, let me
7 go through the pictures one by one. Is this picture
8 an accurate representation -- all four of these
9 accurate representations of the accident scene --

10 A. Yes.

11 Q. -- immediately after the accident?

12 A. Yes.

13 Q. Would you say that this document, this
14 drawing here is what it purports to be, which is a
15 first-floor finish plan of the building at Dam Neck?

16 A. Uh-huh.

17 Q. All right. Would you say that this
18 picture accurately represents the second floor site
19 where you were standing when Michael Shepherd was
20 injured?

21 A. Yes.

22 Q. These two pictures, though, look
23 different than these pictures, in that there is a
24 string at the upper part of the two vertical beams
25 connecting them and the safety wire that you spoke of

1 earlier is back up. But other than that, is that
2 accurate?

3 MR. NORRIS: Your Honor, this is leading.

4 MR. SMIRCINA: I am just trying to --

5 THE COURT: Is there going to be an
6 objection to these photographs coming into evidence?
7 Because I think that is where we are going.

8 MR. NORRIS: No, ma'am.

9 THE COURT: Then why don't you hand them
10 to me and I will number them.

11 MR. SMIRCINA: That is fine.

12 THE COURT: Just peel them off from the
13 backing and I will number each one of them.

14 MR. SMIRCINA: That is all I wanted to
15 do.

16 THE COURT: If Mr. Norris or Ms. Spence
17 has any objection to any of them, let us know. If
18 not, Mr. Bjorkman can go ahead and just put
19 Plaintiff's Number 1 through whatever on them and they
20 will come in.

21 MR. SMIRCINA: That will be fine. That
22 is all I was doing, Your Honor.

23 MR. AUFENGER: Judge, there are 15
24 photographs being offered at this time.

25 THE COURT: Mr. Norris, you don't have

1 any objection to the little diagram or any of the
2 photographs?

3 MR. NORRIS: No, ma'am.

4 THE COURT: Ms. Spence?

5 MS. SPENCE: No, ma'am.

6 THE COURT: I am not going to have him do
7 them in any particular order. We will do it for the
8 record afterwards because you have been kind of
9 referring to them all around, if that is all right and
10 if you need to go back and clear up the record.

11 MR. SMIRCINA: That is fine, ma'am.

12 THE COURT: Let's make the little diagram
13 Number 1, and we will go from there.

14 MR. SMIRCINA: That is fine.

15 THE COURT: And just for this witness's
16 sake, do you need this witness?

17 MR. SMIRCINA: No, we don't.

18 THE COURT: So he can be excused? Do you
19 need him on call?

20 MR. NORRIS: Can I ask one more question
21 of the witness?

22 THE COURT: Any objection?

23 MR. SMIRCINA: No, judge.

24 RECROSS-EXAMINATION

25 BY MR. NORRIS:

1 Q. Mr. McGowan, does the boom truck make
2 noise?

3 A. The engine revs up of the truck and the
4 boom itself will make a rattling noise if he is
5 shifting it. The forks and the metal parts cling
6 together. But he can also operate it without making a
7 noise.

8 Q. But at the time it was off-loading the
9 hacks and doing the operation, wasn't the boom truck
10 making a noise?

11 A. The engine was running. Yes.

12 MR. NORRIS: That is all.

13 THE COURT: Thank you. You are excused.
14 And you don't need him on call?

15 MR. AUFENGER: Judge, it will be better
16 to have him not excused.

17 THE COURT: The difference is you are
18 free to leave today but you are not free to talk about
19 the case as long as it is going on. And if they need
20 you, they know where to call you to ask you to come
21 back. All right. Have a nice day.

22 So that we understand about numbering on
23 exhibits, we didn't ask about defendants' exhibits.
24 Mr. Norris asked me to mark as Defendants' Number 1.
25 Do you want them numbered individually as to each

1 out in the hall.

2 DARRELL ASHLEY, called as a witness on
3 behalf of the Plaintiff, having been first duly sworn,
4 was examined and testified as follows:

5 THE COURT: We took apart the displays
6 and we are trying to put them back together before we
7 get started.

8 DIRECT EXAMINATION

9 BY MR. SMIRCINA:

10 Q. Good morning, Mr. Ashley. Would you
11 please state your name and state your business address
12 for the jury, please?

13 A. Name is Darrell Ashley. I work for
14 Wenger Tile and Plastering.

15 Q. And how long have you worked for Wenger
16 Tile and Plastering?

17 A. Seven years.

18 Q. What do you do for Wenger Tile and
19 Plastering?

20 A. I am a foreman.

21 Q. And a foreman does what for Wenger Tile?

22 A. We basically supervise the crew.

23 Q. Were you working with John McGowan at the
24 Dam Neck job site that is the subject of this lawsuit
25 on the 14th of November 1996?

1 A. Yes, I was.

2 Q. And that was here in Virginia Beach,
3 Virginia?

4 A. Right.

5 Q. And what were you doing that day
6 immediately prior to Michael Shepherd arriving on the
7 scene?

8 A. I don't recall exactly what I was doing,
9 to be honest with you. That is four years ago. I
10 think we were doing some framing inside of the
11 building.

12 Q. And did there -- had you ever met Michael
13 Shepherd before that date?

14 A. I had seen him on -- probably on other
15 jobs delivering material, I am sure.

16 Q. And his employer was Tidewater Interior
17 Products?

18 A. Tidewater Interior Products. Yes.

19 Q. What time do you recall Mr. Shepherd
20 arriving?

21 A. I think somewhere around two-thirty,
22 quarter to three. I am guessing. It was towards the
23 end of the day. We quit at three-thirty.

24 Q. And what happened when he arrived? Did
25 you go to greet him?

1 A. I really don't recall exactly. Normally
2 when they arrive, what we do, we will walk down and
3 get with them on where we are going to put the
4 material.

5 Q. Did that happen this day?

6 A. I am sure I walked down. I don't know if
7 I directly talked to him or not. I don't recall that.

8 Q. Do you recall talking to either
9 Mr. McGowan or Mr. Bosley about where material was
10 going to be off-loaded?

11 A. I had talked to John about it. I am sure
12 of that. We get together and talk about where we are
13 going to place material on the job.

14 Q. John McGowan, the man who just testified?

15 A. Right.

16 Q. At any time on that afternoon, did you
17 speak to Mr. Bosley about where the material was to be
18 off-loaded?

19 A. I don't recall whether I did or not, to
20 be honest with you. I have talked to him sometime
21 during that time because, you know, like, John has
22 seniority over me. He basically runs the job. And I
23 am sort of second in command when we are on the same
24 job together.

25 Q. Where was it decided that the material

1 that Tidewater Interior Products was bringing to the
2 site was to be off-loaded? Do you want to come down?

3 MR. SMIRCINA: May he come down, Your
4 Honor?

5 THE COURT: Sure.

6 THE WITNESS: Decided between as far as
7 between John and Bosley or John and myself or --

8 BY MR. SMIRCINA:

9 Q. We will go through all of them quickly.

10 A. I don't recall. Like I said, recall
11 talking to Bosley.

12 Q. All right.

13 A. I know where we needed the material.

14 Q. Where did you need the material and where
15 did the material begin to be off-loaded?

16 A. Let me see if I can see. I don't think
17 you have any pictures here where we started.

18 THE COURT: There is a diagram.

19 BY MR. SMIRCINA:

20 Q. We have a diagram. Here. This is a
21 floor finish plan.

22 A. Right. Well, like I say, this is -- this
23 is -- is this the second floor plan here? The first
24 floor?

25 Q. The first floor.

1 A. Anyway, this is a one-story part of the
2 building here. On the first floor, we unloaded
3 through these doors into the building and set the
4 sheeting around -- probably around the elevator area
5 here somewhere.

6 Q. And did there come a time when you
7 unloaded on the second deck?

8 A. Yeah. We unloaded some up top. I don't
9 recall exactly where we went through to the second
10 deck.

11 Q. When you say where you went through, what
12 do you mean?

13 A. As far as into the building to set the
14 material down. I know there were a lot of units
15 upstairs like this mechanical room overtop, the
16 bathroom is on the second floor. And we -- there was
17 no way really to get in there. There was a lot of air
18 conditioning units and things sitting around.

19 Q. How many -- how many hacks of drywall
20 would you say were unloaded on the first floor, do you
21 recall?

22 A. I don't recall. I don't even know how
23 many sheets they brought out that day exactly, you
24 know. Probably a truckload.

25 Q. And what about on the second floor, do

1 you recall?

2 A. No.

3 Q. Did there come a time when material was
4 to be off-loaded at another site on the second floor?

5 A. Meaning after we finished putting
6 material here, did we move somewhere else?

7 Q. Yes.

8 A. Yes. We moved down to this spot here.

9 Q. Would you agree that this picture, which
10 is Plaintiff's Exhibit Number 10, represents a
11 photograph of the area where you off-loaded on the
12 second floor?

13 A. That is the place.

14 Q. And is this the accident site where
15 Michael Shepherd ended up occurring?

16 A. Right.

17 Q. Please tell me what you recall seeing at
18 the time of Michael Shepherd off-loading. What went
19 on?

20 A. As far as when he first started or --

21 Q. All the way through.

22 A. Okay. He set the truck up, put the out
23 riggers down to keep the truck level. He came up,
24 brought in one hack, set it down, went back out,
25 picked up another hack, came back in, set it down and

1 was retrieving the boom of the truck when the tube --
2 when it touched the tube and the tube slid down the
3 boom on the truck and knocked him off the truck.

4 Q. You saw the boom touch the girt?

5 A. Yeah.

6 Q. Did you hear it?

7 A. No.

8 Q. Did it make any noise at all?

9 A. No noise at all.

10 Q. At any time, did you appreciate any
11 danger where you were unloading?

12 A. You mean before the accident happened?

13 Q. Before the accident happened.

14 A. No. I mean, after the accident I did,
15 because I checked and there was some other tubes there
16 that I saw that weren't welded. So we got everybody
17 out of the area, you know.

18 Q. All right. When he pulled the boom out,
19 what did you see happen next?

20 A. He must have been sort of in the center
21 of it because when he -- when it touched it, it lifted
22 it up and it sort of teetered a little bit. And the
23 boom, as you can see, has two parts to it. See right
24 here, this exhibit here?

25 Q. He is looking at Plaintiff's Exhibit

1 Number 3.

2 A. This is not as steep as this. So it was
3 sitting right up here teetering. It slid slowly,
4 headed off to that side. And when it got to here, it
5 picked up speed, slid down, hit the -- well, hit the
6 chair where it used to be. Right here is where the
7 chair was. It was sort of slanted like this, hit the
8 chair. And from what I could tell, it looked like it
9 pivoted around and stuck in the ground.

10 Q. So you are looking at Plaintiff's Exhibit
11 Number 8 and describing where it came down the boom
12 arm?

13 A. Right. As you see the boom here -- here
14 is the beam. The boom was crossways like this coming
15 down. It struck the chair, and I guess Mike, and it
16 pivoted around. And this thing came down and stuck in
17 the ground. This end landed on top of the truck bed.

18 Q. Does Picture 10, Plaintiff's Exhibit 10
19 show the final resting position of the beam?

20 A. As far as I remember unless it was -- you
21 know, that is where it was, I think, when we left that
22 day. I think these pictures were taken the next day.
23 I am not sure.

24 Q. Okay. What happened after that? What
25 did you see happen to Michael Shepherd?

1 A. Well, I seen the beam -- I mean, the girt
2 or whatever you want to call it, the steel tubing
3 here. I saw Mike get up like this, like he was trying
4 to get out of the chair because it was coming at him
5 and I guess it hit him. And the next thing I knew, it
6 just knocked him to the ground.

7 Q. Do you recall whether he landed on his
8 back or on his front?

9 A. I couldn't tell. When I got down -- when
10 I got down there, he was sort of twisted up, I think,
11 laying on his back. But he had dirt in his mouth
12 where his head had gone in the dirt.

13 Q. Were his eyes closed?

14 A. He looked at me but -- so I guess his
15 eyes -- I don't think they were closed when I got
16 there. But when I got there, he looked at me. His
17 eyes were open when I looked down at him.

18 Q. How long did it take you to get down?

19 A. I would say no longer than maybe a
20 minute, I guess. The steps were -- okay. Let me go
21 back to this. We were unloading here. I believe
22 there were some stairs over there where I had to go
23 all the way back this way, go down the steps, and then
24 come back around. And in the meantime hollering for
25 somebody to call for an ambulance. So I may -- it

1 probably took me a minute or so.

2 Q. When he was moving the boom arm there and
3 out off-loading the sheet rock, how much space was
4 there between the top of the girt and the bottom of
5 the -- the bottom of the girt and the top of the boom
6 arm?

7 A. I would say -- I don't know. Maybe six
8 or eight inches.

9 Q. Now, have you seen boom trucks
10 off-loading material on job sites before?

11 A. Yeah. Sure.

12 Q. Have you seen them fit in areas where
13 there is only six or eight inches of clearance?

14 A. Sure. If it will fit, you put it in
15 there. Yeah.

16 Q. So that is a common occurrence in your
17 line?

18 A. Yeah. Sure.

19 Q. What part of the boom arm did you think
20 the girt was resting upon when you first saw it begin
21 to teeter-totter? Number 3, if you would.

22 A. I believe you see -- there is the highest
23 part right here. I believe that is the part where it
24 sort of lifted it. And I think once it lifted it just
25 a small amount. It was only sitting on a piece of

1 angle iron the same width as the beam itself.

2 Q. This piece of angle iron, it was sitting
3 on right here?

4 A. This was welded to the column. Say the
5 column was over here. The beam was sitting here. So
6 once it lifted it just a little, you know, it was off
7 balance and gravity just sort of took over and brought
8 it towards him.

9 Q. And you at no time heard any contact
10 between the boom arm --

11 A. No. That is what was so strange about
12 it.

13 Q. -- and the girt?

14 A. There was no boom or bang or anything
15 like that. It touched it and up it went.

16 Q. Did you determine prior -- beforehand
17 whether or not this girt was welded to the brackets,
18 this bracket?

19 A. We never paid any attention to it.

20 Q. Would it be usual for you to pay
21 attention to that?

22 A. No.

23 Q. Why wouldn't it be?

24 A. Well, it would be like coming in here and
25 wondering whether or not construction -- any jobs

1 under construction, steel studs is up there. We
2 usually feel like it is stabilized or secure, like I
3 said. If we would have known that it could have come
4 off on the inside of the building as easy as it went
5 on the outside of the building -- because there was
6 nothing to stop it from either direction.

7 Q. And where were you standing looking at
8 Plaintiff's Exhibit Number 2, in that photograph?

9 A. I guess we were -- John and I were right
10 back in this area. After he had set the second hack
11 down and was backing out you -- we sort of walked over
12 to the edge to watch him back it. So we were right to
13 the edge probably from me to you to where the truck
14 and boom was.

15 Q. So you were only the distance of six to
16 eight feet?

17 A. Probably five to eight feet.

18 Q. From the girt?

19 A. Yeah. You can see how close the sheeting
20 is to the edge of the building. We didn't try to go,
21 you know, into the center of the building. We got it
22 up and set it in as close to the edge as possible.

23 Q. Why did you pick this spot to off-load
24 material?

25 A. Basically the only spot that was clear.

1 You can see around this side of the building. It was
2 full of door frames. This side he had conduit. Plus
3 over here, the boom wouldn't fit over here. There was
4 only one beam. That was the top beam. There was no
5 intermediate beam here. And we were able to get the
6 boom under it and get it down there. The other end of
7 the building was just a big stairway. This end here
8 was all open, big tower, cathedral ceiling.

9 Q. You say that you went down and you saw
10 Michael Shepherd. What was his appearance when you
11 came down to see him after he had fallen?

12 A. Well, like I said, he was sort of -- from
13 what I remember, he was sort of twisted up a little
14 bit and, you know, laying in the dirt.

15 Q. What was the appearance of his face, if
16 you recall?

17 A. He had a mouth full of dirt and his eyes
18 had dirt in them. He wasn't moving or saying
19 anything.

20 Q. What did you do? Did medical personnel
21 come shortly thereafter?

22 A. Yeah. They were there pretty quick. And
23 I think -- I am not sure who showed up first. But
24 some of the -- you know, like I said, some of the Navy
25 personnel showed up. It is in a compound where the

1 security gate is maybe 50 yards from there and there
2 is Navy personnel everywhere, you know. It didn't
3 take them long to get there.

4 Q. And you had to sign in in order to get
5 onto the site?

6 A. Right. Navy SEAL bases are a closed
7 section. You have to have clearance and all to even
8 get in there.

9 Q. At any time did you inspect the girt
10 itself that had fallen on Michael Shepherd?

11 A. Yeah. We took a look at it to find out
12 why it had come off of there.

13 Q. Well, what part of the girt did you look
14 at?

15 A. Pretty much the whole thing.

16 Q. Do you recall -- would you agree with me,
17 Mr. Ashley, that what is in Plaintiff's Exhibit 15 --

18 A. Uh-huh.

19 Q. -- would correspond to this end of the
20 beam on Plaintiff's Exhibit 11?

21 A. Right. It looks pretty much the same.

22 Q. And would you agree with me or do you
23 agree that what is in Plaintiff's Exhibit 14 would be
24 this facing of the beam at the far end on Plaintiff's
25 Exhibit 11?

1 A. Right. Exactly. Right. This end and
2 this end. Yeah. That is the end that would have been
3 sitting on the angle. That is the side that would
4 have been sitting on the angle if they are saying this
5 was sitting on the angle, if that is what you are
6 saying.

7 Q. So either end of this 29-foot four-inch
8 steel tube was resting on this much angle iron?

9 A. Right. Some of the -- some of the other
10 tubes I noticed after I went back had an angle on top
11 and on bottom.

12 Q. But this one did not?

13 A. No. You can see where it was sitting.
14 There was just the single angle iron there.

15 Q. Would this be a fair representation,
16 which is in Plaintiff's Exhibit 13 and 12?

17 A. Right. That is it.

18 Q. That is the appearance of it
19 immediately -- that is the appearance of it after the
20 beam was removed from it by the boom?

21 A. Right.

22 Q. Did you ever go up to look at the angle
23 iron to see if there was any evidence of welding?

24 A. I didn't go back up there that day, I
25 don't believe. It was like three o'clock and I gave a

1 statement to some police officer there and we were
2 ready to get out of there.

3 Q. But you said you looked at the girt that
4 fell?

5 A. Right.

6 Q. Did you see those burn marks in
7 Plaintiff's Exhibit 13 at the time?

8 A. I don't recall seeing them. I can't say
9 they weren't there, but I don't recall seeing them.

10 Q. Did you see -- look to see if any other
11 girts in the immediate area were secured?

12 A. Yeah. Yeah. And I don't remember which
13 ones they were. There been some in the area.

14 MR. NORRIS: Objection, Your Honor.

15 BY MR. SMIRCINA:

16 Q. Do you recall examining other girts after
17 the incident with Michael Shepherd?

18 MR. NORRIS: Objection, Your Honor.

19 MR. SMIRCINA: What is the objection?

20 THE COURT: What is the basis of the
21 objection?

22 MR. NORRIS: The issue is whether this --
23 the condition of this girt that fell.

24 MR. NORRIS: That is entirely relevant,
25 Your Honor. Your Honor, I would like to approach.

1 THE COURT: Overruled. Go ahead and
2 answer the question.

3 BY MR. SMIRCINA:

4 Q. Do you recall whether or not you examined
5 other girls?

6 A. Yes I do.

7 Q. This building --

8 A. As a matter of fact -- and I don't know
9 the guy's name I pointed it out to, one of the Navy
10 guys who came over. And I showed him. And he went up
11 and looked. And he acknowledged the fact that there
12 were several other girls that weren't welded. And the
13 reason I did that is because I didn't want anyone else
14 in the area -- you know, the whole area was -- as far
15 as I was concerned at that point was unsafe.

16 Q. Did anyone from Meredith or Atlantic
17 Welding ever tell you that this girl was not secured?

18 A. No.

19 Q. Did anyone from Atlantic or Meredith tell
20 you it was secured?

21 A. No.

22 Q. Would you have expected Mr. Bosley to
23 have told you or Mr. McGowan had the beam not been
24 secured?

25 MS. SPENCE: Objection to what his

1 expectations were.

2 THE COURT: Sustained.

3 MR. SMIRCINA: I don't have any further
4 questions of the witness.

5 THE COURT: Ms. Spence.

6 MS. SPENCE: Thank you, Your Honor.

7 THE COURT: Are you going to be able to
8 see?

9 MS. SPENCE: I may need to come around to
10 use that diagram.

11 CROSS-EXAMINATION

12 BY MS. SPENCE:

13 Q. Good morning or good afternoon, sir.

14 A. Good afternoon.

15 Q. You and Mr. McGowan made the decision
16 where to have that material off-loaded, correct?

17 A. I am not sure if I made -- one of us made
18 the decision. I guess we probably got together on it.
19 Yeah.

20 Q. And you needed material on the second
21 floor?

22 A. Sure.

23 Q. If you had off-loaded on the first floor,
24 your workers would have had to carry the drywall up
25 the stairs to the second floor?

1 A. Not necessarily. There are times when we
2 send material -- if we can't get that on the floor, we
3 will borrow the bricklayers' forklift and do it like
4 that. We don't necessarily have to carry it up
5 there. We don't have to carry it by hand, not always.

6 Q. Do you recall giving a deposition in this
7 case back in -- on May 20th, 1999, last year?

8 A. Not really. I don't know what date it
9 was. But I remember giving a deposition.

10 Q. Fair enough. I am looking at Page 22,
11 starting at Line 9. Make sure I am reading this
12 correctly.

13 Why did it need to be off-loaded on the
14 second floor as opposed to the first floor?

15 Answer: Because that is where the walls
16 were at that we were hanging it on, up on the second
17 floor. If we had -- if we had had it off-loaded on
18 the first floor, we would have had to carry it up the
19 steps by hand.

20 A. Right. That is not chiselled in stone.
21 Like I say, sometimes we can borrow a forklift.
22 Sometimes we have to carry it. Of course, we are
23 going to do whatever is the easiest.

24 Q. Right.

25 A. That is what they make machines for.

1 Q. And you don't like to make your employees
2 carry sheeting up the stairs?

3 A. I don't like to. I mean --

4 Q. You prefer --

5 A. It depends on whether I am mad at them or
6 not.

7 Q. Fair answer. Okay. If the material is
8 put on the second floor in one place and it is needed
9 on another part of the floor, then your employees have
10 to move it; is that correct?

11 A. Yes.

12 Q. And they might carry it with two people
13 carrying it?

14 A. They use a cart.

15 Q. And they could use a cart?

16 A. Yeah.

17 Q. And that is what you usually do?

18 A. It depends.

19 Q. Pretty much you have to?

20 A. Fifty-fifty. Sometimes you carry it.

21 Q. You have to distribute it around after
22 you have gotten it on the floor?

23 A. Right.

24 Q. Now, you and Mr. McGowan or one of you
25 chose this corner where the accident happened to

1 off-load on the second floor?

2 A. Right.

3 Q. Because that is where you needed the
4 material?

5 A. Well, that is where we needed material on
6 the second floor and that was the only access to the
7 second floor.

8 Q. Well, didn't you also off-load on the
9 second floor over --

10 A. That area was full. There was a lot of,
11 like I say, air conditioning units. We put as much as
12 we can in that area. And you can see there was still
13 quite a bit left on the truck. What was the remainder
14 wouldn't fit in that area.

15 Q. When you and Mr. McGowan made the
16 decision to off-load here at the southeast corner
17 where the accident happened, Bosley wasn't part of
18 that conversation, was he?

19 A. I don't recall that he was or not.

20 Q. But you don't think he was?

21 A. He was -- repeat the question.

22 Q. Was Bosley involved in that conversation
23 with you and Mr. McGowan?

24 A. I don't remember him being involved in
25 the conversation with me about where to put the

1 material.

2 Q. Okay. And you don't personally know
3 whether anyone from your company talked with Bosley,
4 do you, from your own personal observation?

5 A. I don't recall that I did.

6 Q. Now, after you had finished off-loading
7 in the first area that you worked at, Mr. Shepherd had
8 to move his truck to this other area, right?

9 A. Correct.

10 Q. And that was about 80 or a hundred feet
11 away?

12 A. Maybe a little farther.

13 Q. A little farther?

14 A. I guess. Yeah.

15 Q. Now, safety is part of your job, too,
16 isn't it?

17 A. Yes. It is part of everybody on the job,
18 everybody working there. It is part of everyone's
19 job.

20 Q. That is correct. Okay. And you're a
21 foreman?

22 A. Right.

23 Q. You generally coordinate with other
24 trades on the job site to make sure you don't get in
25 each other's way, right?

1 A. Sometimes we will go to the
2 superintendent instead of going to the trade because,
3 you know, sometimes you are at odds with the trade and
4 the superintendent is supposed to be running the job
5 and he is overhead, in charge of the job.

6 Q. But assuming there is no problems between
7 you and the other trades, you usually coordinate with
8 the trade, don't you?

9 A. I don't. It changes from job to job and
10 from delivery to delivery. Nothing is set in stone.
11 There is no set thing as far as that.

12 Q. I am looking again at your deposition
13 transcript, Page 18.

14 A. Okay.

15 Q. And I am starting on Line 20 where you
16 were explaining one of your answers. That is still
17 part of an answer.

18 If you think it is going to be in
19 someone's way, you coordinate with the other trades
20 and say, hey, if we put this here, is it going to be
21 in your way, or whatever.

22 Is that your testimony?

23 A. If you see here, it says normally that is
24 what we do.

25 Q. That is what I was asking. Normally you

1 coordinate with the other trades?

2 A. That is what I say, normally that is what
3 we do.

4 Q. You knew that Atlantic Welding people
5 were working around the building that day?

6 A. I knew they were at the job site. I
7 didn't know where they were working.

8 Q. You didn't know what they were working
9 on?

10 A. Steel erection.

11 Q. But you didn't know specifically what
12 they were working on?

13 A. No.

14 Q. And you don't know if anyone from your
15 company ever told Atlantic Welding employees that you
16 were having materials delivered to the southeast
17 corner?

18 A. We don't have to go to them to deliver
19 materials, so I don't know if anybody told them.

20 Q. And you just assumed that the steel beams
21 had been welded?

22 A. Yeah. We normally assume that the
23 building is secure. You know, there are people
24 walking under it. There are no ropes around the
25 perimeter. There was nothing there to say don't go in

1 the area. So, yeah, we assumed that everything was
2 safe.

3 Q. You know what a tack weld looks like?

4 A. Sure.

5 Q. But you didn't look to see if they were
6 welded?

7 A. No.

8 Q. And you didn't ask anyone?

9 A. No.

10 Q. And you didn't ask the welders in the
11 area what they were working on?

12 A. There were no welders in the area that I
13 saw.

14 Q. On the second floor?

15 A. Anywhere in that area where the accident
16 took place.

17 Q. You have run into Mr. Shepherd a couple
18 of times on job sites after this accident, haven't
19 you?

20 A. I have seen him a couple times, I think
21 at least once. I don't know. About a couple.

22 Q. And one of the times you ran into him, he
23 was working on a boom truck?

24 A. I think so.

25 Q. Operating a boom?

- 1 A. I think so.
- 2 Q. And you asked him how he was?
- 3 A. I am sure I did.
- 4 Q. Do you remember him showing you the scar
5 on his leg?
- 6 A. I believe I seen it, but I don't remember
7 when it was.
- 8 Q. But you remember that you were really
9 surprised to see him working on a boom truck again?
- 10 A. To be sitting in that seat. Yeah. I
11 don't know that I could have done it.
- 12 Q. Fair enough.
- 13 A. After seeing a beam come cracking down at
14 your head, I would have been kind of afraid to get
15 up. Maybe I would have been a little gun-shy.
- 16 Q. But he was up there?
- 17 A. When I saw him. Yeah.
- 18 Q. Now, the boom he was operating on the Dam
19 Neck project that day can lift approximately 6- to
20 10,000 pounds?
- 21 A. I don't know.
- 22 Q. You don't know?
- 23 A. I am just -- yeah.
- 24 Q. You were guessing?
- 25 A. Are you telling me that?

1 Q. I am basing it on what you said in your
2 deposition, if you want to go back to the deposition.

3 A. I probably guessed. I probably made a
4 guess at that time.

5 Q. But that boom came in contact with the
6 tube?

7 A. Yes.

8 Q. I am going to show you what has been
9 marked as Plaintiff's Exhibit Number 3.

10 A. Okay.

11 Q. The yellow part of the boom came in touch
12 with the tube, right?

13 A. Move your finger. I believe it was the
14 end of it here. I don't know if it was the yellow
15 part. Like I said, I was standing over on this side,
16 so I couldn't see which was yellow and which was black
17 from where I was standing.

18 Q. Looking at your deposition on Page 36,
19 Lines 18 through 21, at that time you pointed to the
20 yellow part of the boom as the part that contacted the
21 girt; is that correct?

22 A. Is this the question?

23 Q. Yes.

24 A. All right.

25 Q. And your answer was correct?

1 A. Whoever asked the question, they are the
2 ones who said it was yellow. I don't know. They
3 pointed to the yellow part of the boom.

4 Q. You pointed to the yellow part of the
5 boom inside of the black circle which you have circled
6 on the picture?

7 A. Maybe it was the yellow part. It was the
8 end of the boom.

9 Q. The yellow part is metal, right?

10 A. Yeah. I would think so. Steel.

11 Q. And it was not the hydraulic hose that
12 came in touch with the boom, was it?

13 A. Are you asking me if the hydraulic hose
14 could have pushed it off?

15 Q. Right.

16 A. I would have thought that it would have
17 bent the hose. It is just a rubber hose.

18 Q. Exactly. You believe the boom is what
19 you saw come in touch with the girt?

20 A. Yeah. The boom did touch the girt.

21 Q. And it lifted it up off the bracket?

22 A. Basically. Yeah.

23 MS. SPENCE: Thank you. I don't have any
24 other questions for you, sir.

25 THE COURT: Mr. Norris.

1 BY MR. NORRIS:

2 Q. Mr. Ashley, how much does a hack of
3 drywall weigh?

4 A. What size drywall?

5 Q. The size that was being off-loaded.

6 A. Sheeting?

7 Q. Yes, sir.

8 A. I don't know. I would guess about -- we
9 guessed that before. What did we come up with at the
10 deposition?

11 Q. I will tell you that I think you came up
12 with 1820 pounds. Does that sound --

13 A. I don't know. If you read the
14 deposition, four or five of you-all were trying to
15 figure out what it was. And I don't know if we ever
16 came up with the correct answer.

17 Q. Here is what we did. You told us there
18 are 26 sheets in a hack?

19 A. That is my guess. The full hack is 26
20 sheets, I guess.

21 Q. Are these full hacks?

22 A. They look to be.

23 Q. And I think you told us they weighed
24 about 70 pounds a sheet?

25 A. Right. That is just another guess. I

1 never weighed one.

2 Q. So we multiplied 26 by 70 and came up
3 with 1820?

4 A. Okay.

5 Q. Does that sound fair, 1820?

6 A. I don't know if that is the correct
7 math. I never did the math. Is that the correct
8 math?

9 MR. SMIRCINA: Close enough.

10 THE WITNESS: Sure. Whatever. I don't
11 know.

12 BY MR. NORRIS:

13 Q. Now, how many hacks did Mr. Shepherd
14 deliver before he hit the beam, hit the girt?

15 A. How many he put inside at that point?

16 Q. Yes, sir.

17 A. I don't know. Like I said, we didn't --
18 I didn't recall exactly before, but we looked at the
19 pictures and it looked to be -- it looks like two
20 there, I believe.

21 Q. This is two hacks right here?

22 A. Yeah. I can't really tell. Do you have
23 any better pictures?

24 Q. Maybe.

25 A. I can't tell if that is sitting on the

1 floor or if it is sitting on dunnage. Okay. That is
2 one.

3 Q. Actually here. Look at this one. This
4 is one hack sitting on top of another hack, isn't it?

5 A. Do you have any pictures -- yeah. It
6 looks like there is one hack sitting on top of
7 another.

8 Q. Let's tell the jury what dunnage is.

9 A. It is scrap sheet that you set on the
10 floor so when they set the sheeting there they pull
11 the fork out from under it.

12 Q. And you also put dunnage not only on the
13 floor but in between hacks?

14 A. Yeah. You have to.

15 Q. Let me see if I can find a little better
16 picture, because I think we can find a picture of one
17 hack placed on top of another hack. This is a
18 photograph taken from inside the building looking out.
19 So was one hack placed on top of another hack?

20 A. Well, there is -- two hacks could have
21 come in at the same time.

22 Q. Well, that is what I am asking you. You
23 were there. I wasn't. How did he do it?

24 A. I don't recall exactly -- normally if it
25 is something that light, they will bring in two hacks

1 at a time.

2 Q. Well, you mentioned there was one
3 delivery and a retraction and a second delivery and a
4 retraction. And I am trying to find out --

5 A. I think there is some more pictures here
6 that show somewhere where there was another hack,
7 maybe behind this hack. I don't really recall.

8 Q. Is it your recollection that he brought
9 in two deliveries? And if these are one hack on top
10 of another, that would come in all at one time.

11 A. It could have. I didn't say it did. I
12 don't know. I do recall he came in, set something
13 down, went back out, came back in, set another hack
14 down. I don't know if it was one hack or a double.
15 And then he was on his way out the second time when he
16 contacted the boom.

17 Q. Well, if one of these weigh 1800 pounds
18 and he brought in a double hack, he was moving 3200
19 pounds of material; is that right?

20 A. I don't know. I guess.

21 Q. Now, you were telling us how if you
22 thought that girt wasn't welded up there, you wouldn't
23 have felt safe, right?

24 A. Right.

25 Q. Well, now, the girt weighs -- will you

1 take my word for it that the girt ways over 1700
2 pounds?

3 A. Sure. I thought I saw in writing that
4 they weigh 1700 pounds.

5 Q. That girt is sitting on two brackets. It
6 is not going to jump up off of there, is it?

7 A. I don't believe steel jumps. No.

8 Q. It has to be knocked off, doesn't it?

9 A. It can be pushed off. It doesn't have to
10 be knocked off.

11 Q. Do you think you could push a 1700 pound
12 girt off of the bracket?

13 A. I wouldn't think so.

14 Q. So something of at least enough force,
15 enough strength has got to be able to move the
16 1700-pound girt off its brackets to put you in danger,
17 doesn't it?

18 A. Say that again.

19 Q. Well, if you do not feel safe, for this
20 girt to come down on you, something has got to move it
21 off of there, it is not going to jump off on its own,
22 is it?

23 A. Have you ever been in a building when
24 they are building it?

25 Q. You can answer my question.

1 A. I can answer your question.

2 Q. Something has got to move the girt off of
3 the brackets to put you in danger, right?

4 A. Something has got to move the girt off of
5 the brackets for it to come off of there. Yes.

6 Q. If it doesn't come off of there, you are
7 not in danger, right?

8 A. If I am not in the area, I am not in
9 danger.

10 Q. But as long as it stays on the brackets,
11 you are okay, right?

12 A. That is -- yeah. You want to say that --
13 yeah. If it didn't fall off and hit me, I am okay.

14 Q. Would you agree with me that somebody
15 operating a boom is not supposed to hit a girt?

16 A. I am sure they brush -- the girt has
17 brushed the floor, you know. I mean, it is not a
18 scientific thing, you know. It is construction. It
19 is not a finished product.

20 Q. Mr. Ashley, would you agree with me that
21 the boom is not supposed the hit the girt?

22 A. I couldn't agree with you on that. No.

23 Q. You cannot?

24 A. No.

25 Q. Do you remember you were asked that

1 question by me earlier?

2 A. I believe I was.

3 Q. Did you give me a different answer?

4 A. I might have. It was -- that was a
5 deposition.

6 Q. Yeah. Well, you were under oath at your
7 deposition, weren't you?

8 A. I told the truth to the best of my
9 knowledge, same thing as I am doing now.

10 Q. On Page 51, I asked you: You agree with
11 me, Mr. Ashley, that the boom is not supposed to be
12 lifting these tubes? What did you answer?

13 A. It says, I would agree. It shouldn't
14 be. It shouldn't damage -- it shouldn't damage the
15 tubes. That is what I said.

16 Q. So you agreed it is not supposed to hit
17 that girt, is it?

18 A. It is not supposed to damage the girts.
19 I don't think it is supposed to hit it. If it does
20 hit it, normally it is not a big deal. Like I have
21 said, if it was secured in place, I don't think it
22 would have made any difference.

23 Q. Well, it is just speculation on your part
24 when you say secured. You know what a tack weld is?

25 A. Yes. I know what a tack weld looks like.

1 Q. And the tack weld looks like what is in
2 this picture, doesn't it, the picture that has now
3 been marked Exhibit 15, I believe?

4 A. No. That looks like a burn. It doesn't
5 look like a tack weld.

6 Q. Are you a welder, sir?

7 A. No, I am not.

8 Q. You are a drywall man?

9 A. I have done some welding.

10 Q. You are not a welder, are you?

11 A. No, I am not.

12 Q. You have done no calculations on the
13 force required to break a weld, have you?

14 A. No, I haven't.

15 Q. Now, you said you went with some Navy guy
16 and went around and saw all kind of girts that weren't
17 welded; is that right?

18 A. I didn't say all kinds. I said I thought
19 there was two or three I showed him.

20 Q. Did you determine whether this weld --
21 this girt had been welded?

22 A. Yeah. We -- I think we determined at
23 that point that had not been welded.

24 Q. So you specifically went and looked at
25 this beam with a Navy man?

1 A. I saw it on the ground when I was down
2 there by Mike and looked at it.

3 Q. Did you tell the Navy man that it wasn't
4 welded?

5 A. I believe I did. You can probably get my
6 statement from him.

7 Q. Well, guess what? I have got your
8 statement to him. Do you recognize this document,
9 Mr. Ashley?

10 A. Sure, I do.

11 Q. Now, when we took your deposition, you
12 never told us in your deposition, did you, sir --

13 A. I don't know.

14 Q. -- that you checked this beam and
15 determined it hadn't been welded, did you, sir?

16 A. I don't know. Was I asked the question?

17 Q. Yes, sir.

18 A. What was my answer?

19 Q. You said you had never observed this girt
20 specifically to see if it had been welded.

21 A. I don't know. Read it. I don't know.
22 Let me see my deposition.

23 Q. Tell me where you have written that in
24 your statement. Is this the statement that you gave
25 to the Navy inspector?

1 A. This was a statement I gave 10, 15
2 minutes after the accident happened. I gave them a
3 quick what I saw happened, you know. That was it.

4 Q. Did you put in your writing a statement
5 to the Navy inspector that the girt had not been
6 welded and that there were other girts on this project
7 that were not welded? Yes or no. Did you put that in
8 your statement?

9 A. No. Not on here.

10 MR. NORRIS: Your Honor, I would like to
11 offer this as Defendants' Exhibit 2, please.

12 (The document referred to was marked as
13 Defendants' Exhibit No. 2, and received into
14 evidence.)

15 BY MR. NORRIS:

16 Q. Now, you stated in your direct
17 examination that Mr. Shepherd had, I think you said,
18 six to eight inches to maneuver from the top of the
19 boom to the bottom of the girt. Was that your
20 testimony?

21 A. I think it is around there.

22 Q. But that is not what you told us in your
23 deposition, was it?

24 A. I don't know. You tell me what I said in
25 my deposition. I really don't.

1 Q. All right.

2 A. I am sure it was -- everything I told you
3 was a guess. I didn't measure anything.

4 Q. Well, do you think you had a better feel
5 for measurements and whatnot when you gave your
6 deposition on May of 1999, than you do today in July
7 of 2000?

8 A. I don't know.

9 Q. Have you gone out there since May and
10 done some measurements?

11 A. No.

12 Q. Well, on Page 29 of your deposition, I
13 asked you at the bottom of the page, So there is --
14 what is the word I am looking for? There is a cushion
15 of maybe four inches, give or take, for the boom to
16 maneuver between the girt and the floor?

17 And you said, Give or take. Yeah. I
18 would say that.

19 A. Yeah. Four inches you said. Okay.

20 Q. Well, eight inches is twice four inches,
21 isn't it?

22 A. We are not talking about one mile, two
23 miles. We are talking about four inches, eight
24 inches.

25 Q. Well, what did I ask you next?

1 I said, It was a pretty tight squeeze?

2 And you said, You could say that it was
3 tight.

4 A. And then I go on to say, We have had them
5 deliver stuff where there is an inch over there and
6 got it in there. It depends on how good the operator
7 is.

8 Q. Are you telling the jury that this wasn't
9 a tight squeeze?

10 A. Compared to what? I don't understand
11 where you are coming from. A tight squeeze, what do
12 you mean by tight squeeze?

13 Q. Well --

14 A. You have got to explain to me what you
15 mean by a tight squeeze.

16 Q. Well, did he have to kind of jimmy the
17 boom up and down to get it in and out?

18 A. Yeah. I would say so. I mean, that is
19 the way they operate the boom. You know, you work it
20 in there.

21 Q. Would you agree with me that if the boom
22 operator isn't paying close attention to the boom and
23 the girt -- did he have a spotter?

24 A. Yeah. There was a spotter up there.

25 Q. And was the spotter giving him signals?

1 A. I believe so. I am not a hundred percent
2 sure.

3 Q. Was the spotter watching the girt?

4 A. I don't know what the spotter was looking
5 at. I guess he was. I am sure. You have to ask him
6 that.

7 Q. Well, if the spotter were to tell us that
8 Mr. Shepherd made contact with this girt two or three
9 times before it fell, would you have any reason to
10 disagree with that if he told you he made contact with
11 it?

12 A. I don't know if he did or not. I believe
13 I saw the hoses maybe touch it a couple of times.
14 Well, it went in and out once. I saw the hose touch
15 it once. What he saw, I don't know.

16 Q. So he had made contact with it before?

17 A. With the rubber hose.

18 Q. Now, you told us -- you pointed out to me
19 in your deposition, you said half an inch is enough?

20 A. Sure. If it will go in there, it is in
21 there.

22 Q. And you told us he had six to seven
23 inches in your deposition. You agree with me, four
24 inches give or take?

25 A. Uh-huh.

1 Q. What is your testimony today? He had
2 between -- how much room did he have?

3 A. I don't know. I would say between --
4 repeat that again. You're twisting me around again,
5 trying to get me confused.

6 Q. I don't want to do that.

7 A. I have seen it done with a half an inch
8 to four inches.

9 Q. You're telling me you have seen people do
10 it with as little as a half inch?

11 A. Yeah.

12 Q. When you were asked the question about
13 Mr. Shepherd, you said he had some six to eight
14 inches?

15 A. Yeah.

16 Q. In your deposition, I said, When you did
17 the calculations four inches, give or take.

18 And you said, Yeah. Four inches, give or
19 take.

20 A. Give or take. You didn't say how much
21 give or take.

22 Q. Four to eight inches?

23 A. A few.

24 Q. Well, if you have seen people do it with
25 a half inch and Mr. Shepherd had four to eight inches,

1 he had a spotter there watching him, he shouldn't have
2 hit that girt, should he?

3 A. Shouldn't have? I don't know. Shouldn't
4 as far as who is concerned? As far as you are
5 concerned?

6 Q. As far as anybody is concerned.

7 A. If the girt was welded in place, it never
8 should have moved.

9 Q. That is not my question.

10 A. Well, that is my answer.

11 Q. That he only needs a half an inch?

12 A. I didn't say that he only needs a half an
13 inch. I didn't say half an inch was everybody's
14 clearance. People can shoot a bullet and get the
15 bull's-eye and some people can't make the bull's-eye.
16 If you are close to the bull's-eye, you are still a
17 pretty good shot. It is not any set -- when I said a
18 half inch of clearance, if you can get it in there,
19 you are darn good.

20 Q. Well, let me see if you will agree with
21 me about this. If you are operating equipment that
22 can lift over 3,000 pounds of material and you have
23 already touched some steel beams before, don't you
24 think you ought to be careful not to hit them?

25 A. Not to hit them with what?

1 Q. Not to hit them with your boom if you
2 have hit them before. Don't you think you ought to be
3 careful not to try to hit the beam?

4 A. I am sure he didn't try to hit the beam.

5 MR. NORRIS: That is all I have, Judge.

6 THE COURT: Anything else on redirect?

7 MR. SMIRCINA: Yes, ma'am.

8 REDIRECT EXAMINATION

9 BY MR. SMIRCINA:

10 Q. I have a photocopy of what has been
11 introduced as the defendants' exhibit, your statement
12 in the case. Why don't you read it to the jury,
13 please?

14 A. All right. It says, I was on the second
15 floor. I was on the second floor observing gyp
16 sheeting being placed on the floor. When the boom was
17 backed away from the building, it brushed the steel
18 tube and the tube slid down the boom, hitting the
19 operator across the face and chest --

20 Q. And then you signed?

21 A. -- knocking him to the ground. And then
22 I signed it.

23 Q. At the time you gave that statement to
24 the Navy officer or whoever it was, had you inspected
25 the other beams?

1 A. No. That is what I was going to do. I
2 don't believe I had gone back upstairs at that time.

3 Q. Had you inspected the beam that fell at
4 that time?

5 A. I didn't inspect anything, actually. I
6 looked at it. I didn't inspect. I am not an
7 inspector. You know what I am saying? I did look at
8 the beam. And that was my thought at the time, you
9 know, right away that, yeah, it wasn't welded, it
10 wasn't tacked. There was no other reason for it to
11 come off of there.

12 Q. Okay. Now, going back to Mr. Bosley,
13 when you were off-loading on the second floor at the
14 previous location, not the site of the accident, did
15 you ever see Mr. Bosley in the area?

16 A. I don't -- I don't recall. Like I said,
17 it was just another day there until the accident
18 happened, you know. And I had seen him throughout the
19 day and any day. He is in and out of the building.

20 Q. Mr. Norris has made much of how Michael
21 Shepherd was operating the crane. How would you
22 characterize his operation of the crane that day?

23 A. As far as I would say he did a good job,
24 you know. Like I say, I am not saying when he -- I
25 have seen them deliver stuff within a half an inch.

1 Okay. That is on a finished job. We have to go to
2 places where we go to a house and tack a window and
3 bring the stuff in without hitting the finished
4 product.

5 This is a rough building. You have no
6 finished product. People are running into steel
7 tubes. People are running into -- there are forklift
8 operators, bricklayers are still around, you know,
9 bumping into the steel tube. So it never comes
10 dislodged, comes down into somebody's face or chest
11 bumping into it.

12 MR. SMIRCINA: I have got nothing
13 further. Thanks.

14 THE COURT: Thank you. You don't need
15 him on the stand for anything else, do you?

16 MR. SMIRCINA: We don't, ma'am.

17 THE COURT: You are excused. Have a nice
18 day.

19 THE WITNESS: Okay. I had moved since
20 the subpoenas were issued and I didn't get any of the
21 three. But was I subpoenaed by the other two
22 attorneys?

23 THE COURT: Does anyone need him? Is he
24 released by you all?

25 MR. NORRIS: Yes, ma'am.

* * *

1 And we are ready for the plaintiff's next
2 witness.

3 MR. SMIRCINA: Mr. Christopher Scott
4 Hewitt, please.

5 THE COURT: It is Christopher Scott
6 Hewitt.

7 CHRISTOPHER SCOTT HEWITT, called as a
8 witness on behalf of the Plaintiff, having been first
9 duly sworn, was examined and testified as follows:

10 THE COURT: Is that microphone clicking
11 in and out?

12 MR. SMIRCINA: On the last witness.

13 THE COURT: Was that just me before
14 lunch? Is the -- is it the volume switch that is
15 doing that?

16 THE CLERK: I am not sure if that one is
17 operating correctly.

18 THE COURT: Let's see if everyone can
19 hear you in one level.

20 THE WITNESS: Yes, ma'am.

21 DIRECT EXAMINATION

22 BY MR. SMIRCINA:

23 Q. Would you please state your name for the
24 jury?

25 A. Christopher Scott Hewitt.

1 Q. How old are you?

2 A. Twenty-five.

3 Q. And where do you work, and what do you
4 do?

5 A. I work for Tidewater Interior Products,
6 and I am a stocker.

7 Q. How long have you known Michael Shepherd?

8 A. Almost four years.

9 Q. Do you have any education beyond high
10 school?

11 A. Yes.

12 Q. What is that?

13 A. Two semesters at Coastal Carolina.

14 Q. And what do you do? What are you exactly
15 as a stocker for Tidewater Interior Products? What do
16 they do?

17 A. I put the building materials inside the
18 buildings or houses.

19 Q. All right. How long have you been
20 working with Michael Shepherd prior to this accident?

21 A. About a month.

22 Q. And on November 14th, 1996, were you
23 working with Michael Shepherd at Dam Neck construction
24 site in Virginia Beach?

25 A. Yes, sir.

1 Q. How did you enter the site?

2 A. We drove in through the main gate and we
3 made a left and drove down and there was another
4 security gate, like a guard office, off to the left.
5 We had to give them our IDs to get badges. And then
6 we proceeded into the site.

7 Q. And what did you do when you first got
8 into the site?

9 A. We got out of the truck and started
10 looking for the guys for Wenger Tile.

11 MR. SMIRCINA: Your Honor, I would
12 request that he come down, because I am going to start
13 using all of the various exhibits.

14 THE COURT: Sure.

15 MR. SMIRCINA: And I am going to try to
16 position them so people can see them.

17 THE COURT: Do you understand that our
18 little headphones are working now?

19 A JUROR: Very soft-spoken.

20 THE COURT: Do you want to try those?

21 A JUROR: Yes. Maybe.

22 THE COURT: Karen came in at lunch and
23 said that that is supposed to be fixed now. So we
24 will see how that goes.

25 THE BAILIFF: Adjust the volume as you

1 need it.

2 THE COURT: Shall I talk and make some
3 kind of test? Can you hear me any better with that or
4 not with that?

5 A JUROR: I am going to see. Wait until
6 he starts talking.

7 BY MR. SMIRCINA:

8 Q. Scott, I would first like to direct your
9 attention to Plaintiff's Exhibit Number 1, the drawing
10 up in the upper right-hand corner as you face it. And
11 I would ask you to indicate to me where it is Mike
12 Shepherd -- first, was Mike Shepherd driving the
13 truck? Let me ask you that.

14 A. Yes, sir.

15 Q. Did he always drive the truck?

16 A. Yes, sir.

17 Q. Did you ever drive the truck?

18 A. No, sir.

19 Q. Where did he first park? On this
20 diagram, I will opire to you that this is the accident
21 site. Do you recall?

22 A. It is hard for me to tell. I know what
23 the building looks like. I can't really tell from
24 looking at the print.

25 Q. If this "X" corresponds to this, where on

1 this diagram would you have parked the truck?

2 A. I believe we -- for this area or for our
3 first --

4 Q. First site.

5 A. The first initial set up, I would say we
6 were in this area right here.

7 Q. What did you do when you got out of the
8 truck?

9 A. Looked for the guys for Wenger Tile.

10 Q. Were those the two gentleman that were
11 testifying this morning?

12 A. Yes.

13 Q. Did you speak to them?

14 A. Yes, sir.

15 Q. Had you ever delivered to Wenger Tile
16 personnel before on other jobs?

17 A. Yes, sir.

18 Q. And what did you -- you said you were
19 looking for them. What were you looking for them for?

20 A. For them to tell us where to put the
21 materials.

22 Q. Is that usual?

23 A. Yes, sir.

24 Q. Okay. Did you find them?

25 A. Yes, sir.

1 Q. What did you say to them?

2 A. Asked them where the materials needed to
3 go.

4 Q. And what happened next?

5 A. We were discussing on the materials where
6 they went. And we were getting ready for that.

7 Q. Did you ever speak to the defendant,
8 Robert Bosley?

9 A. Yes, sir.

10 Q. And who was Robert Bosley to you at that
11 point?

12 A. He was a superintendent.

13 Q. In charge of the construction site?

14 A. Yes, sir.

15 Q. Did you have a conversation with him?

16 A. Yes, sir.

17 Q. What was that conversation about?

18 A. It involved the steel safety cables on
19 the second floor.

20 Q. Would you please point out a steel safety
21 cable if you see one in any of these photographs?

22 A. I can. This hanging piece right here.

23 Q. All right. You're pointing on
24 Plaintiff's Exhibit Number 10 to a piece of steel wire
25 extending down from the vertical post toward the

1 center line. Did those cables go all the way across
2 toward the vertical post?

3 A. Yes, sir.

4 Q. Did you hear any conversation between
5 anybody else and Mr. Bosley?

6 A. No, sir.

7 Q. Okay. What happened then?

8 A. We began to off-load materials on the
9 first deck.

10 Q. You mean on the first floor of this
11 structure?

12 A. Yes, sir.

13 Q. Where in relation -- looking at
14 Plaintiff's Exhibit 10, how far down from the accident
15 scene did you first start unloading?

16 A. Say maybe 40, 50 feet.

17 Q. How many of these sections beyond?

18 A. About two sections over.

19 Q. Okay.

20 A. I am not real sure on what -- how long
21 the beam was.

22 Q. What you were unloading there, is that
23 where Wenger Tile wanted the material?

24 A. Yes, sir.

25 Q. What did you do to get set to deliver the

1 material on the first floor, do you recall?

2 A. Helped unstrap the truck and get ready
3 for Mike to boom it into the building.

4 Q. Did there come a time when you were done
5 stocking materials on the first floor?

6 A. Yes, sir.

7 Q. What did you do then?

8 A. Went up to the second floor.

9 Q. Is there anything you had to do before
10 you started off-loading material on the second floor?

11 A. Yes, sir. I had to get the wrenches from
12 Mike and ask him how to take the cable down.

13 Q. Well, who gave you permission to take
14 down the cable?

15 A. The superintendent gave me permission.

16 Q. What did you do? Did you ask him to take
17 the cable down?

18 A. Yes, sir. I asked him when I was on the
19 first floor if I could take the cable down. I
20 believe -- I would say it was to the right on the
21 second floor if I was inside the building to take that
22 safety cable down to put the materials on that deck.

23 Q. And what did he say to you?

24 A. He said as long as you put the cable
25 back.

1 Q. At this point in time, did you appreciate
2 that you had any type of danger at all?

3 A. No, sir.

4 Q. Was there -- well, what did you do next?

5 A. Went up to the second floor and began to
6 put materials in that second -- on the second floor.

7 Q. Did there come a time when you realized
8 that you were going to have to put material elsewhere
9 on the second floor?

10 A. Yes, sir. We discussed materials going
11 to, I guess -- I don't know which corner it is, but
12 this side of the building.

13 Q. And who did you have that discussion
14 with?

15 A. The guys with Wenger Tile. And, again, I
16 asked the superintendent, because I needed that safety
17 cable down.

18 Q. You pointed to this specific area?

19 A. Yes, sir.

20 Q. Why did you point to that specific area?

21 A. Because that is where the material needed
22 to go and that is the cable I needed down.

23 Q. And what did Mr. Bosley say to you, if
24 anything?

25 A. As long as I put that safety cable back.

1 Q. During the time you were off-loading --
2 and where did that conversation take place?

3 A. On the second floor while we were doing
4 the materials.

5 Q. On the original site on the second floor
6 where you off-loaded?

7 A. Yes, sir.

8 Q. Did Mr. Bosley at any time tell you that
9 you could not off-load material in this area?

10 A. No, sir.

11 Q. And you remember specifically asking him
12 to take the cable down?

13 A. Yes, sir.

14 Q. And do you believe he clearly understood
15 that you were going to off-load material there?

16 A. Yes, sir.

17 Q. Tell me what happened when you got up to
18 the second deck and the site where the accident
19 happened.

20 A. When we reached the second side, Mike had
21 to back the truck out on the first section and back it
22 up and pull it in straight to get to this point here
23 to load material.

24 Q. Is that the truck you were using that
25 day?

1 A. Yes, sir. And Mike pulled in. I was
2 still on the second floor taking the cable down. And
3 Mike began to boom the materials inside for me.

4 Q. Now, Scott, was there only one steel beam
5 there or were there two in the opening where you were
6 putting --

7 A. There was only one.

8 Q. So the first time he went in and out, how
9 many of these hacks of drywall did he put in at a
10 time?

11 A. He put two hacks of drywall in at a time.

12 Q. So how many were up there after the first
13 load?

14 A. Two of them.

15 Q. Two of those hacks?

16 A. There were two.

17 Q. And when he pulled the boom on out, okay,
18 describe how that works.

19 A. Make -- I can make it simple, I suppose.
20 You would suck the scope in.

21 Q. What is the scope? Point out the part of
22 the boom that -- where the scope comes out. Perhaps
23 this picture down here, Plaintiff's Exhibit Number 2,
24 can explain that.

25 A. The scope would be right up at the top

1 here. It just projects out like -- almost like an
2 antenna. Just like an antenna.

3 Q. And this serves to move the drywall
4 farther into the building?

5 A. Yes. That gives you more reach.

6 Q. The first time he retracted the telescope
7 and moved the boom on out, did any part of the boom
8 arm apparatus hit the girt?

9 A. The hoses.

10 Q. Would you please point out the hoses?

11 A. These hoses right here.

12 Q. Did that make a sound?

13 A. No.

14 Q. What happened next?

15 A. Mike reached down for the other two
16 hacks, swung them in. He sat them down. And as he
17 was coming out, me and the two gentlemen from Wenger
18 Tile were just having a conversation as I was giving
19 him signals. I turned around. They had said
20 something about how good Mike was. And I turned
21 around and answered. And when I just turned my head
22 back around, the beam was off.

23 Q. Was it off of these brackets?

24 A. Yes, sir.

25 Q. Is this the bracket it was sitting on,

1 something similar to this?

2 A. Yes, sir.

3 Q. How far off the brackets was it when you
4 realized it was off it?

5 A. I would say about six to seven inches.

6 Q. What part of the boom was it resting
7 upon? Do you see a picture?

8 A. Actually, it was resting on the end part
9 of where the scope and the secondary meet. So where
10 the black piece is. I don't know if you can see it.
11 Where the black piece is here and the yellow piece
12 where they meet.

13 Q. He is looking a Plaintiff's Exhibit 8 at
14 the very end of the yellow point where there is a
15 black part to it; would that be a fair statement? Let
16 me see if we have got a better picture yet. What
17 happened next?

18 A. I yelled down to Mike. And the beam was
19 sliding down the -- sliding down the boom arm. And
20 Mike had just -- when he heard me, got up and turned,
21 and then the beam just hit him across, I would say,
22 from the knee down maybe to the top of the eye and
23 knocked him out of the chair. And I ran.

24 Q. Where did he land on Plaintiff's Exhibit
25 9? Do you have any clue?

1 A. Probably landed right in here about --
2 say about 13 feet away from the truck, approximately.

3 Q. Okay. Now, when he was moving in and out
4 with the telescope, okay, how much clearance was there
5 between the bottom of the steel girt and the top of
6 the boom arm of the crane?

7 A. Approximately about six inches.

8 Q. Is that an unusual amount of clearance to
9 use when you are off-loading material onto the second
10 floor of a structure?

11 A. No, sir.

12 Q. Is that an everyday occurrence?

13 A. Yes, sir.

14 Q. Was there anything unusual about how
15 Michael Shepherd was operating the boom truck that
16 day?

17 A. No, sir.

18 Q. How fast was the boom arm moving as he
19 was retracting it?

20 A. It was moving very slow.

21 Q. Is that usual?

22 A. Yes.

23 Q. Now, you say that Michael either hit or
24 jumped down to the ground. What did you do?

25 A. I ran over to a ladder and just jumped

1 from the second floor to the first floor and then ran
2 out to Mike.

3 Q. What was his condition when you first saw
4 him?

5 A. Well, Mike was laying face down. And I
6 had rolled him over. And his face was full of blood,
7 had sand all over his face, his eyes were closed.

8 Q. And what were you saying to him?

9 A. I don't really remember what I said. I
10 just know I was yelling at him, trying to get him up.

11 Q. Did he respond at first?

12 A. Not at first.

13 Q. Is it your opinion that he was
14 unconscious?

15 MR. NORRIS: Objection, Your Honor.

16 THE COURT: Sustained.

17 BY MR. SMIRCINA:

18 Q. What was his state of consciousness?

19 MR. NORRIS: Objection, Your Honor.

20 BY MR. SMIRCINA:

21 Q. Was he awake?

22 A. No, sir.

23 Q. Now, what did you do next?

24 A. I was still yelling at Mike. And it took
25 a little bit. And he finally answered me, asked me if

1 the truck was all right.

2 Q. Is there any time you saw the defendant
3 Robert Bosley?

4 A. Yes, sir. He got to Mike second, behind
5 me.

6 Q. And what was he doing at the time?

7 A. I really wasn't paying him any attention.

8 Q. Please describe again for the jury the
9 physical appearance of Michael Shepherd when you first
10 saw him.

11 MR. NORRIS: Objection, Your Honor.

12 BY MR. SMIRCINA:

13 Q. Was he bleeding?

14 MR. NORRIS: Objection, Your Honor.

15 THE COURT: What is the basis of your
16 objection?

17 MR. NORRIS: Asked and answered.

18 THE COURT: The basis of the objection is
19 asked and answered, and he is correct. Sustained.

20 BY MR. SMIRCINA:

21 Q. Was he bleeding?

22 A. Yes, sir.

23 Q. How did his face look?

24 A. Covered with blood and sand.

25 Q. All right. What did you do next?

1 A. Everyone started crowding around. And I
2 found John from Wenger Tile had come back over. And I
3 told him I needed to go back to Allen Walker, because
4 he was on another site on the base doing a job.

5 Q. Allen Walker would be who?

6 A. He is another boom operator.

7 Q. Did you actually see the boom arm strike
8 the girt immediately before it fell?

9 A. No, sir.

10 Q. Did you hear the boom arm strike the girt
11 immediately before it fell?

12 A. No, sir.

13 Q. How often do you use this -- you still
14 work on this truck, don't you?

15 A. Yes, sir.

16 Q. How often do you use this truck to
17 off-load materials? On a daily basis?

18 A. Yes, sir.

19 Q. Is it unusual for an operator to hit an
20 object with the boom arm while off-loading material?

21 A. No, sir.

22 Q. Was this section prior to -- I see there
23 is safety tape here on Plaintiff's Exhibit Number 10.
24 Is that correct?

25 A. Yes, sir.

1 Q. Was that safety tape there before you
2 started to off-load the material?

3 A. No, sir.

4 Q. Was there any warning of any kind given
5 to you or to anyone else in your immediate area that
6 you know of to stay out of the area of the accident?

7 A. No, sir.

8 Q. Were you told one way or the other
9 whether the steel beam was secured?

10 A. No, sir.

11 Q. Did you investigate prior to off-loading
12 whether the steel beam was welded or secured in any
13 fashion?

14 A. No, sir.

15 Q. In short, was this area prohibited to you
16 in any way?

17 A. No, sir.

18 Q. Does Plaintiff's Exhibit Number 7 denote
19 the damage done to the seat of the boom truck by the
20 steel beam?

21 A. Yes, sir.

22 Q. How does it normally look?

23 A. It sits straight, parallel to the ground.

24 Q. So when the beam came down, did it strike
25 the seat? Did you see it?

1 A. Yes, sir. Yes, sir.

2 Q. And what damage was done to it? Did you
3 ever inspect the damage?

4 A. Yes. There is a metal bar that covers
5 your shins to connect right in here, so when you are
6 sitting down, so you can grab on to. And it ripped
7 that completely off. And it had pushed the lines back
8 and messed the joysticks up.

9 Q. What do the joysticks control, do you
10 know?

11 A. They control the boom arm.

12 Q. Is there damage to the joysticks that you
13 can see in the picture?

14 A. No, sir.

15 Q. Okay. Now, a boom truck operator --
16 okay. You can sit back up there for the time being.
17 Would you characterize your job as a very heavy labor
18 job?

19 A. Yes, sir.

20 Q. How much do you think you lift in a day?
21 How long are you on your feet hauling drywall?

22 A. Minimum of 13 hours a day.

23 Q. And how do you get paid?

24 A. I get paid piecework.

25 Q. Which means what?

1 A. However much drywall I load throughout a
2 day, that is how I get paid.

3 Q. Does each member of your truck get the
4 same rate of pay?

5 A. No, sir.

6 Q. Who gets more?

7 A. The driver.

8 Q. You mean the driver, who also is the boom
9 operator?

10 A. Yes, sir. The driver who runs the --

11 Q. So your pay is dependent, then, is it
12 not, on how much material you move off your truck in a
13 given week?

14 A. Yes, sir.

15 Q. How physically do you do your job?

16 A. When the boom swings the material to the
17 opening, if we unload it by hand, we physically pull
18 the drywall off with the crane forks and carry it into
19 the building or sit it on a cart and place it where it
20 needs to go.

21 Q. Is there a lot of climbing and walking
22 associated with your job?

23 A. Yes. Going between floors.

24 Q. Does the boom truck operator -- you now
25 work with Allen Walker, do you not?

1 A. Yes, sir.

2 Q. Does the boom truck operator help you
3 carry the sheet rock?

4 A. Yes, sir.

5 Q. And does that make the work go --

6 A. It goes faster.

7 Q. And, therefore, you can move more
8 material?

9 A. Yes, sir.

10 Q. How many boom crane operators have you
11 seen in your four years at Tidewater Construction --
12 Tidewater Interior Products, rather?

13 A. Say at least ten.

14 Q. And where would you place Michael
15 Shepherd in terms of ability amongst those ten?

16 A. I would put Mike at the top.

17 Q. Even now?

18 A. Even now. I still say Mike is better
19 than a lot of people.

20 Q. Has he tried to operate the boom truck
21 since the date of the accident, to your knowledge?

22 A. Yes, sir.

23 Q. Does he still haul drywall? Does he
24 still haul drywall, walk with it, carry it?

25 A. He has done it.

1 Q. But he does not -- he no longer operates
2 a boom truck?

3 A. No, sir.

4 MR. SMIRCINA: I don't have anything
5 further.

6 THE COURT: Ms. Spence.

7 MS. SPENCE: Thank you, Your Honor.

8 CROSS-EXAMINATION

9 BY MS. SPENCE:

10 Q. I am going to move up here because I
11 can't see you at all from my table. How are you this
12 afternoon?

13 A. Fine. How are you?

14 Q. First thing you did when you arrived on
15 the scene was to look for the Wenger Tile people?

16 A. Yes, ma'am.

17 Q. And that is what you usually do?

18 A. Yes, ma'am.

19 Q. You look for the subcontractor for
20 delivering material to?

21 A. Yes, ma'am.

22 Q. You wouldn't normally look for the
23 general contractor, the superintendent, unless you
24 couldn't find your subcontractor, right?

25 A. Yes, ma'am. Or if there is a sign posted

1 outside before you enter a job site.

2 Q. Okay. At the time you arrived, you
3 didn't even know who the general contractor was,
4 right?

5 A. No, ma'am.

6 Q. No, ma'am, you didn't know?

7 A. I didn't know who the general contractor
8 was.

9 Q. Okay. And on November 14th, you were
10 delivering to Wenger Tile?

11 A. Yes, ma'am.

12 Q. And Wenger Tile people told you where to
13 deliver the drywall?

14 A. Yes, ma'am.

15 Q. They even told you how many hacks to
16 unload in each particular area, right?

17 A. Yes, ma'am.

18 Q. The first place that -- can you see this
19 diagram?

20 A. Not really.

21 Q. Why don't you come on down. Sorry.

22 A. It is all right.

23 Q. This being the corner where the accident
24 happened --

25 A. Yes, ma'am.

1 Q. -- the first place you were unloading
2 material was down here with the one in it, right?

3 A. Yes, ma'am.

4 Q. And you put the number of hacks there
5 that Wenger Tile asked you to put there?

6 A. Yes, ma'am.

7 Q. Now, you could have put more there,
8 couldn't you?

9 A. Yes, ma'am.

10 Q. There was room for more. Okay. You only
11 stopped because Wenger Tile directed you to put the
12 rest somewhere else?

13 A. Yes, ma'am.

14 Q. The next area you delivered to was right
15 above this area on the second floor?

16 A. Yes, ma'am.

17 Q. And you put the number of loads there
18 that Wenger Tile asked you to put in there?

19 A. Yes, ma'am.

20 Q. And you could have put more loads in that
21 section, couldn't you?

22 A. Yes, ma'am.

23 Q. But Wenger Tile told you to put it over
24 here in this area, the third delivery spot?

25 A. Yes, ma'am.

1 Q. And you do this to make Wenger's job
2 easier, right, put the material where they want it?

3 A. Just do what I am told.

4 Q. Fair enough. But don't you do it so they
5 won't have to carry the drywall as far or so you won't
6 have to carry it as far, depending on who has to do
7 the carrying?

8 A. Yes, ma'am.

9 Q. Now, Mr. Bosley came over and spoke with
10 you while you were here in this area, correct?

11 A. The first floor.

12 Q. The first floor?

13 A. Yes, ma'am.

14 Q. But that was after your conversation with
15 the Wenger Tile people about where they wanted the
16 material?

17 A. Yes, ma'am. I never spoke with them
18 except for the safety cable on the first floor.

19 Q. On the first floor?

20 A. Yes, ma'am.

21 Q. And you asked them if you could take the
22 safety cable down?

23 A. Yes, ma'am.

24 Q. He asked where you were going with the
25 material?

1 A. Yes, ma'am.

2 Q. And you pointed directly up to the next
3 floor, didn't you?

4 A. Yes, ma'am.

5 Q. Directly up. Okay. Now, once you were
6 off-loading in this area over here, you never saw
7 Bosley over there, did you, in this corner?

8 A. No, ma'am. Not in the corner.

9 Q. And you never told them that you were
10 moving your truck over here?

11 A. No, ma'am.

12 Q. Okay. You can sit back down. You don't
13 know whether anyone was working on the first floor
14 underneath the delivery area, do you?

15 A. No, ma'am.

16 Q. You weren't paying attention to that?

17 A. No, ma'am.

18 Q. The Wenger Tile people didn't tell you
19 that there were people working there?

20 A. No, ma'am.

21 Q. And you didn't ask them if people were
22 working there?

23 A. No, ma'am.

24 Q. They didn't tell you that they had any
25 safety concerns?

1 A. No, ma'am.

2 Q. You didn't ask them if there were any
3 safety issues?

4 A. No, ma'am.

5 Q. You didn't ask the superintendent whether
6 anyone was working underneath the delivery area?

7 A. No, ma'am.

8 Q. And you didn't ask anybody if the metal
9 tubes were welded?

10 A. No, ma'am.

11 Q. Now, a boom operator tries to avoid
12 contact between the boom and the steel frame, doesn't
13 he?

14 A. Yes, ma'am.

15 Q. You're not supposed to hit it?

16 A. No, ma'am.

17 Q. Now, I believe today you testified that
18 he was on the second delivery when he had this
19 accident --

20 A. Yes, ma'am.

21 Q. -- in this corner. Didn't you previously
22 testify that he had previously delivered three loads
23 into this southeast corner and that it was on the
24 fourth load that he was withdrawing the boom that he
25 had the accident?

1 A. Yes, ma'am.

2 Q. You got confused?

3 A. I knew it was four hacks up there and we
4 did two at a time.

5 Q. But basically every time in that area
6 that you saw him move the boom through there, you saw
7 the hydraulic hoses come in contact with that girt?

8 A. Yes, ma'am.

9 Q. The first time that the hoses came in
10 contact with the girt, you didn't see the girt move at
11 all?

12 A. No, ma'am.

13 Q. In fact, at no time when you saw just the
14 hydraulic hose come in contact with the girt did it
15 move?

16 A. No, ma'am.

17 Q. And you indicated that you were talking
18 to the Wenger Tile people and then you looked back,
19 the beam was up, already out --

20 A. Yes, ma'am.

21 Q. -- already off the bracket? So you
22 didn't actually see it come off?

23 A. No, ma'am.

24 Q. You indicated you had been working for a
25 part of Mike's team for about three weeks, a month

1 before this happened?

2 A. Yes, ma'am.

3 Q. And you had just started working with
4 Tidewater Interior Products shortly before that?

5 A. Yes, ma'am.

6 Q. You were responsible for giving hand
7 signals to Mike, weren't you?

8 A. Yes, ma'am.

9 Q. One purpose of signals is to let him know
10 if he is going to hit something?

11 A. Yes, ma'am.

12 Q. You have a signal for stop?

13 A. Yes, ma'am.

14 Q. And that is this?

15 A. That is close your fists.

16 Q. Close your fists. You didn't use that
17 signal when his hydraulic hose touched the boom the
18 first time, did you?

19 A. No, ma'am.

20 Q. And you didn't bring it to his attention
21 at all that he had made contact with the beam, did
22 you?

23 A. No, ma'am.

24 Q. And you never signaled him to stop to
25 avoid contacting the beam with his boom?

1 A. No, ma'am.

2 MS. SPENCE: That is all the questions I
3 have for you. Thank you.

4 THE COURT: Mr. Norris.

5 BY MR. NORRIS:

6 Q. Mr. Hewitt, you remember giving a
7 deposition in the case last year sometime, May of '99?

8 A. Yes, sir.

9 Q. Okay. Do you remember you were under
10 oath?

11 A. Yes, sir.

12 Q. Tried to answer those questions as best
13 you could?

14 A. Yes, sir.

15 Q. You have changed a few things today,
16 haven't you, from that deposition?

17 A. (Witness shaking head.)

18 Q. You don't think so. Okay. Well, you
19 told us in the deposition that there were four
20 deliveries, four hacks. Today you think that there
21 were two hacks?

22 A. No, sir. I know there was two hacks.

23 Q. Do you remember in your deposition,
24 though, you said that every time Mr. Shepherd brought
25 the boom out, there was some contact between the boom

1 and the girt? Is that still your testimony?

2 A. Yes, sir.

3 Q. Okay. Now, I think you said that the
4 amount of clearance between the bottom of the girt and
5 the top of the boom was six inches?

6 A. Yes, sir.

7 Q. Did you tell us a smaller distance in
8 your deposition?

9 A. I am not sure.

10 Q. Let me show you your deposition at Page
11 43. I am asking you some questions here.

12 How much clearance did he have?

13 And you said, You're asking me how close
14 the top of the crane was to the beam?

15 And I said, To the bottom of the girt.

16 You said, To the bottom of the girt?

17 And I said, Yes.

18 And you said, About three inches.

19 Today you said about six inches. Which
20 was it?

21 A. Well, to me it is like this, about like
22 this. I can't tell distance.

23 Q. It was kind of a tight squeeze, though,
24 wasn't it?

25 A. Yes, sir.

1 Q. Now, you were talking to the Wenger
2 people about what a good boom operator Mr. Shepherd
3 was?

4 A. Yes, sir.

5 Q. And the next thing you knew, the girt was
6 six inches -- it had moved six inches?

7 A. Yes, sir. It was off the --

8 Q. And there was contact between the boom
9 and that girt?

10 A. Yes, sir.

11 Q. Okay. If you hadn't been talking to the
12 Wenger people, if you had been looking at the girt and
13 the boom the whole time, and if you would have gone
14 like that as soon as you saw it start to move, that
15 girt might not have come off the clip, right?

16 A. I can't say that.

17 Q. I thought you said when you saw it off
18 six inches, you yelled down to Mike?

19 A. Yes, sir.

20 Q. Did you get Mike's attention?

21 A. Yes, sir. I had Mike's attention.

22 Q. But when you yelled at him, he wasn't
23 looking up at you, was he?

24 A. Not at first. No.

25 Q. Now, today at trial, you told us you went

1 down to Mr. Shepherd and he was lying face down and
2 his eyes were closed and he wasn't awake. Is that
3 what you told us?

4 A. Yes, sir.

5 Q. Do you remember me asking you about that
6 in your deposition?

7 A. I don't remember you asking me his
8 condition.

9 Q. Let's see what I asked you. On Page 62
10 of your deposition, I said, All right. You yelled to
11 the plaintiff. The boom slid down and hit him. What
12 happened next?

13 You said, I jumped down to the first
14 floor and went over to Mike.

15 I said, Did Mike say anything to you at
16 all?

17 And you said, Ask me how the truck was.

18 Anything else he said?

19 You said, Got sand in his mouth. About
20 it.

21 Did you tell me that you turned him over
22 and he wasn't awake?

23 A. No, sir. You didn't ask. You asked me
24 did he say anything.

25 Q. Now, did you ever see Mr. Ashley walk up

1 and check the girts to see if the girt that fell had
2 been welded or not? Do you know who Mr. Ashley is?

3 A. No, sir.

4 Q. You are not able to say whether or not
5 that girt had a weld on it, are you?

6 A. No, sir.

7 MR. NORRIS: That is all I have.

8 THE COURT: Any on redirect?

9 MR. SMIRCINA: Yes, ma'am.

10 REDIRECT EXAMINATION

11 BY MR. SMIRCINA:

12 Q. When you were up on the second deck on
13 the second site where the accident happened, Scott,
14 did you ever look down directly beneath where the boom
15 was operating?

16 A. Yes, sir.

17 Q. Did you see anyone working down there
18 under -- directly underneath the boom arm or where the
19 truck was?

20 A. I can't really say.

21 Q. All right. Now, I asked you earlier
22 whether you had ever gone up to investigate whether
23 this girt was secured or not. Why didn't you?

24 A. I would just figure that if it was an
25 unsafe area, they would not let us in it, it would be

1 blocked off by tape, something would be there.
2 Because all the time on job sites, if you are not
3 supposed to go in a certain area, they have it blocked
4 off. It says do not enter. It has something strung
5 around it. That means you do not go in that area.

6 Q. And you recall specifically asking
7 Mr. Bosley that you're -- telling Mr. Bosley that you
8 are going to take the safety cable down in the area
9 where the accident occurred?

10 A. Yes, sir.

11 Q. Did he make any mention of safety cable?

12 MR. NORRIS: Your Honor, this has been
13 asked and answered.

14 THE COURT: It has been asked and
15 answered. That is not appropriate redirect.

16 MR. SMIRCINA: I have nothing further.

17 MR. NORRIS: Your Honor, I will admit to
18 you I forgot to ask one question of the witness.

19 THE COURT: Then he may have redirect on
20 that one question.

21 RECROSS-EXAMINATION

22 BY MR. NORRIS:

23 Q. Mr. Hewitt, do you still play golf with
24 Mr. Shepherd since this accident happened?

25 A. I have played golf once.

1 THE COURT: Is this witness excused or do
2 you need him to remain?

3 MR. SMIRCINA: I think he can be excused.

4 THE COURT: You may leave. Thank you.
5 Your next witness.

6 MR. SMIRCINA: Steve Taraba.

7 STEPHEN C. TARABA, called as a witness on
8 behalf of the Plaintiff, having been first duly sworn,
9 was examined and testified as follows:

10 DIRECT EXAMINATION

11 BY MR. SMIRCINA:

12 Q. Good afternoon, sir. Would you please
13 state your name to the jury?

14 A. My name is Stephen C. Taraba.

15 Q. And what is your occupation, sir?

16 A. My occupation is construction
17 representative.

18 Q. What is a construction representative,
19 and whom do you work for?

20 A. I work for the United States Navy of
21 Construction Representative Workers for the resident
22 officer in charge of contracts. I am in particular at
23 Oceana Naval Air Station. And I provide surveillance
24 for the government and give advice for the contractor.

25 Q. Surveillance for the government. You

1 were the construction representative on the Dam Neck
2 construction site for the construction of the special
3 forces Amphibious Operations Support Building?

4 A. Yes.

5 Q. And who was the general contractor on
6 that contract?

7 A. W. B. Meredith.

8 Q. Who was the superintendent for that job?

9 A. Robert Bosley, and then later on an
10 individual named Robert Sansum.

11 Q. And who were the steel erectors on that
12 project, do you remember?

13 A. The steel erectors were Atlantic Welding.

14 Q. Now, on 14 November 1996, did you become
15 aware that there was an accident involving my client,
16 Michael Shepherd, aboard the Dam Neck installation?

17 A. Yes.

18 Q. Was it at this construction site?

19 A. Yes.

20 Q. How did you come to find out about this?

21 A. I was paged. I carry a pager. And I was
22 informed by the contractor's quality control
23 representative, who was a Dennis Cullin. And I
24 believe that is junior.

25 Q. And how soon after you got the message

1 did you arrive at the construction site?

2 A. At the time, if I remember where I was
3 when I got the page, I was somewhere between Dam Neck
4 and Oceana. And I would say within 15 minutes to a
5 half hour, perhaps.

6 Q. When you got -- what are your duties on
7 the construction site? I mean, what do you actually
8 do for them? I mean, do you have more than one? Tell
9 the jury a little bit about it.

10 A. The resident officer in charge of
11 contracts has a number of different contracts at
12 Oceana, Dam Neck, Campostella, Little Creek Annex,
13 Dare County, Fentress Airfield. And being the amount
14 of people that we are over at the time, somewhere
15 between five and six construction representatives were
16 assigned a number of projects to provide quality
17 assurance for the government.

18 Q. What does quality assurance for the
19 government mean?

20 A. Quality assurance is in this particular
21 case for W. B. Meredith's job; he enters into a
22 contract with the government and he provides a quality
23 control representative and a superintendent. The
24 government's contract is with the prime contractor,
25 not with any other subcontractors.

1 Q. And what is the general contractor
2 responsible for?

3 A. In our eyes, the general contractor is
4 responsible for providing those two individuals
5 quality work, work that is produced on time, and a
6 safe work site.

7 Q. All right. When you arrived, what did
8 you observe?

9 A. When I first arrived at the job site, I
10 think I went to the contractor's trailer.

11 Q. Where was the contractor's trailer?
12 Perhaps these pictures --

13 A. Approximately a hundred yards south of
14 the building that was being built.

15 Q. All right. Was the trailer within the
16 gates around the construction site? You know, you had
17 a fence around this construction site.

18 A. No. It was not within the gates.

19 Q. And that is where you met whom at that
20 construction trailer?

21 A. I don't remember exactly who.

22 Q. Do you recall speaking to Robert Bosley
23 that day at all?

24 A. I probably did. I don't remember what
25 was said.

1 Q. What did you -- when you got there, what
2 was the condition of the site where the accident had
3 happened?

4 A. Generally speaking?

5 Q. Generally speaking.

6 A. I probably remember going inside the
7 compound through the gate, past the guards, to where
8 this particular mobile truck crane was. And there was
9 no injured party there at the time. That person,
10 whoever he was -- and I am assuming it is Mr. Shepherd
11 there, if that is Mr. Shepherd -- he had already been
12 taken to the hospital by either an ambulance or some
13 sort of rescue truck.

14 Q. Was the yellow tape you see in
15 Plaintiff's Exhibits -- I can't read the numbers from
16 back here -- 10, 9, and 8 that you see on these
17 pictures, was that yellow tape up at the time you
18 arrived?

19 A. I don't think it was. Because I thought
20 that I remembered asking either the contractor, either
21 Mr. Bosley or Mr. Cohen, to get some of this yellow
22 electrical tape. They use it for putting in
23 excavations. I believe that I had asked them to do
24 that. And if they couldn't find some that perhaps --
25 ask the facility the -- I don't think that that tape

1 was around that site at the time when I first got
2 there.

3 Q. And you believe you got there how long
4 after the accident occurred?

5 A. I don't know. Because I don't know what
6 time the accident did occur. And I don't know how
7 long before I was paged that it occurred.

8 Q. Fair enough. Did you -- as a
9 construction representative, do you have any
10 responsibility for doing an investigation as to why
11 this happened?

12 A. Not myself. No.

13 Q. Who would have been responsible for that?

14 A. It would have been up to the management
15 of our office to decide who that might be.

16 Q. Do you know who it ended up being?

17 A. I believe the following day an
18 individual, Manny Seoane, who also works for the same
19 people that I do, he has a different job title. I
20 believe he is an engineering tech. I don't believe he
21 is a construction representative. And he is what we
22 in our office think of as a safety specialist.

23 Q. Now, how late were you at the job site
24 that day?

25 A. If I remember correctly, it was getting

1 near dusk or close to the sun setting.

2 Q. And by the time you left, had the site
3 been secured in any way?

4 A. Yes. The site -- I had specifically told
5 Mr. Bosley to make sure that he contacted the owner of
6 that particular piece of equipment, that it was not to
7 leave the job site that evening, and to tell all of
8 his personnel not to enter or go into the area where
9 the accident had occurred or be anywhere near where
10 the accident had occurred.

11 Q. Did you observe anyone welding any of the
12 steel members after the accident?

13 A. Yes.

14 MR. NORRIS: Objection, Your Honor. All
15 actions taken after the accident would be unrelated.

16 THE COURT: Sustained.

17 BY MR. SMIRCINA:

18 Q. What did you observe as to what was on
19 the structure after the accident?

20 A. After the accident mostly --

21 MR. NORRIS: Your Honor, I am going to
22 object.

23 THE COURT: Sustained.

24 MR. SMIRCINA: We would like to come up,
25 Your Honor. May we approach, Your Honor?

1 THE COURT: Sure.

2 MR. AUFENGER: Just briefly.

3 (A discussion was held off the record.)

4 BY MR. SMIRCINA:

5 Q. Who else was on the job site at five in
6 the afternoon to your recollection?

7 A. The superintendent, the quality control
8 representative, and members of Atlantic Welding.

9 MR. SMIRCINA: I have nothing further,
10 Your Honor.

11 THE COURT: Are you going to go first,
12 Mr. Norris?

13 MR. NORRIS: I am going to go first for a
14 change, Your Honor.

15 THE COURT: All right.

16 CROSS-EXAMINATION

17 BY MR. NORRIS:

18 Q. Mr. Taraba, your job is quality control,
19 correct?

20 A. No.

21 Q. Sorry. Tell me again your job?

22 A. Quality assurance.

23 Q. Quality assurance. Does that mean you
24 have to be familiar with the plans and specifications
25 for a job?

1 A. Yes.

2 Q. And does that mean you were familiar with
3 the plans and specifications for this Dam Neck job?

4 A. Yes.

5 Q. And would that include the plans and
6 specifications that cover the erection of steel?

7 A. Somewhat.

8 Q. Would you agree with me that plans and
9 specifications for this project did not require the
10 use of bolts for the attachment of the girts to the
11 building?

12 A. I don't recall that.

13 Q. Do you recall whether or not the plans
14 and specifications speak to any specific hoists that
15 have to be used?

16 A. I am not the quality control
17 representative on the project. I am quality
18 assurance. Quality assurance is making sure that the
19 contractor is. Quality control representative makes
20 sure that those things are done.

21 Q. And did you make sure that the
22 contractor's quality control representative looked
23 after those types of things?

24 A. I made sure that the quality control
25 representative was on the site each day.

1 Q. Okay. And were you aware that the
2 Meredith quality control man filled out reports daily
3 concerning quality control issues on the project?

4 A. Absolutely.

5 Q. And did you have to review those?

6 A. Yes.

7 Q. And did those quality control reports
8 include work done by Atlantic Welding?

9 A. Yes.

10 Q. And was there ever a quality control
11 report for Atlantic Welding where the report indicated
12 that Atlantic Welding was not installing girts in
13 accordance with the contract documents?

14 A. I never saw any such document.

15 Q. And you were -- yourself were on the job
16 daily, were you not?

17 A. My job as quality assurance
18 representative for the government, since we have more
19 than one particular job that we take care of, is only
20 to be at the job site a minimum of once a week. There
21 were days and occasions because of other jobs where
22 you could not get to that particular job. So I can't
23 say that I was there daily.

24 Q. You were there frequently?

25 A. Yes.

1 Q. And you were there while steel was being
2 set in place and erected?

3 A. Yes.

4 Q. Now, when you arrived at the scene, do
5 you recall that the Navy photographer had already
6 taken pictures of the area?

7 A. I believe I -- I was told that he had. I
8 don't remember seeing him; although, I may have seen
9 him up on the second floor.

10 Q. When you arrived on the date of the
11 accident, did you make people aware of who you were?

12 A. There wasn't anybody that I knew of that
13 was on the job site who may not have known who I was
14 due to my frequent visits to the job site.

15 Q. Were you ever present on the job site
16 when representatives of Wenger Tile were there?

17 A. Sure.

18 Q. As far as you know, the people from
19 Wenger Tile knew that you were the quality assurance
20 representative from the government?

21 A. Yes. I believe that is true.

22 Q. Did any representative of Wenger Tile
23 come up to you and point out to you specific areas or
24 on this specific girt where a weld was absent?

25 A. With Wenger Tile?

1 Q. Yes.

2 A. No.

3 MR. NORRIS: That is all I have, Your
4 Honor.

5 THE COURT: Ms. Spence.

6 MS. SPENCE: Let me just look at one
7 thing, Your Honor. I may not have any questions.
8 Just a few.

9 BY MS. SPENCE:

10 Q. Good afternoon, sir.

11 A. How are you doing?

12 Q. Were you present at the preconstruction
13 meeting in April of 1996?

14 A. I don't remember.

15 Q. Okay. I am looking here at meetings -- I
16 mean, minutes at that meeting.

17 MS. SPENCE: Permission to approach the
18 witness.

19 THE COURT: Yes.

20 BY MS. SPENCE:

21 Q. Indicates that as the -- our job would
22 have been to provide daily job site coordination?

23 A. That is true. And I am on this list.

24 Q. You were, in fact, present at the job
25 just about daily, weren't you?

1 A. Pretty much.

2 Q. You would have authority to stop the job
3 if you saw something unsafe going on, wouldn't you?

4 A. Yes.

5 MS. SPENCE: Thank you. That is all I
6 have.

7 THE COURT: Anything else for the
8 moment?

9 MR. SMIRCINA: For the moment, I have one
10 more question or just a couple of follow-up questions.

11 REDIRECT EXAMINATION

12 BY MR. SMIRCINA:

13 Q. You said that nobody from Wenger Tile
14 pointed out the boom to you, whether it was welded or
15 not; is that correct? Was that your testimony to
16 Mr. Norris?

17 A. I believe the testimony was any beams,
18 not this particular one.

19 Q. Did anybody else point out any particular
20 beams to you that weren't welded?

21 A. Yes.

22 Q. Who was that person?

23 A. I think it -- it was the foreman for the
24 electrical contractor subcontractor on this particular
25 project.

1 Q. And where were those?

2 MR. NORRIS: Your Honor, he is being
3 asked about an incident that happened more than a
4 month before this accident. I would ask that the jury
5 be excused and we voir dire the witness.

6 THE COURT: What are we talking about?

7 MR. SMIRCINA: He just asked him on the
8 day of the accident whether or not anybody from Wenger
9 Tile found any beams that were insecure. I asked did
10 anyone else and he said yes.

11 THE COURT: On the day of the accident?

12 THE WITNESS: Not on the day of the
13 accident.

14 THE COURT: Then I am going to strike --
15 sustain the objection and strike the answer and you
16 are to disregard the answer.

17 BY MR. SMIRCINA:

18 Q. All right. On the day of the accident,
19 then, did anyone point out to you any beams on the
20 site, other than the one that had fallen, that were
21 unwelded?

22 A. No.

23 Q. Did you ever investigate this beam? Did
24 you ever look at this beam?

25 A. No.

* * *

1 MS. SPENCE: Thank you. That is all I
2 have.

3 THE COURT: Anything else on redirect?

4 MR. AUFENGER: If I could approach and
5 see the records very briefly. That is all, Your
6 Honor. I have no further questions.

7 THE COURT: This witness is excused.
8 Thank you. Have a nice day.

9 MR. AUFENGER: That is the plaintiff's
10 last witness for today.

11 THE COURT: Ladies and gentlemen, I think
12 we will call it a day today. If you need to retrieve
13 anything from the back, help yourself. If not, if you
14 would be downstairs by 9:15, so we can get started by
15 9:30. We will try and get started right on time. You
16 have a nice evening. If you would like to leave the
17 deputy your pads and pens, he will keep those for you
18 until tomorrow.

19 (The jury withdrew from the courtroom.)

20 THE COURT: Maybe we ought to talk about
21 the deposition for a few minutes. I have a couple of
22 questions. I have been sitting here reading through
23 it, and since it is going to be your deposition, kind
24 of cross-examining. It is not as if he was called and
25 say give me your qualifications and the basis for all

1 of this. I am kind of curious, and maybe I have just
2 missed it. Do you all have copies of it with you?

3 MR. AUFENGER: We are getting it right
4 now.

5 THE COURT: And actually it may not be,
6 but then we get about the part of the standard until
7 towards the end. And I am at Page 71. And I am just
8 getting to that now. I got to the part about the Army
9 manual, which -- let's see. I have got a tab on here.
10 Let's see. It looks like that is on the bottom of
11 Page 66. Now, it may be somewhere else that I have
12 missed. Is there -- let me ask the plaintiff a couple
13 of questions. Are you -- you want to offer this
14 person as an expert, and he is going to base his
15 opinions on a standard that is established through
16 blank.

17 MR. SMIRCINA: What he says is that OSHA
18 is a performance-based standard that the employer, any
19 employer, in this case the general contractor, must
20 provide a safe workplace. There are analogous
21 provisions in the Army safety manual. He is saying
22 that the workplace isn't safe, that the employer has a
23 duty to recognize that certain things are hazardous,
24 that these hazardous things, like steel erection, for
25 example, should be analyzed -- the hazards analyzed

1 and determine what actions to be taken to avoid
2 accidents. This wasn't done.

3 THE COURT: Specifically, how do we get
4 to OSHA as what he believes is the standard of general
5 practice in Virginia?

6 MR. SMIRCINA: It is the minimum standard
7 nationwide for any work site, the OSHA standard. He
8 is going to say that the actions that were taken or
9 not taken to either secure this beam, cordon off the
10 area --

11 THE COURT: I know that part.

12 MR. SMIRCINA: That is it.

13 THE COURT: But because the federal
14 statute is being qualified in Virginia, does it apply
15 on this particular job site on a military base, on a
16 federal installation?

17 MR. SMIRCINA: Yes, it does.

18 THE COURT: He will testify to that?

19 MR. SMIRCINA: So will Manny Seoane, for
20 that matter, that OSHA is the law. So is the Army
21 Corps of Engineers manual. They are both the law.

22 THE COURT: Anybody on the other side
23 want to say anything about those particular questions
24 that I asked?

25 MR. NORRIS: Yes, ma'am. If you look at

1 his testimony on Page 78, starting at 77, basically he
2 admits in those two pages that he can't name a single
3 contractor in Virginia who keeps girts and safety
4 hoists until final welding, that he can't disagree
5 with Mr. Shelton that Virginia Steel Contractors don't
6 keep the girts until -- and safety hoists until final
7 welding, and that if Mr. Shelton says that that is not
8 what is done in Virginia, that is okay with him.

9 He further testifies that the lack of
10 weld is not an OSHA violation. He says it on Page 22.
11 He says it is not an OSHA violation to comply with the
12 plans and specs, which do not require bolts. He says
13 that on Page 24. He says on Page 26, he doesn't know
14 what degree of welding would be required by OSHA. He
15 says on Page 30, he doesn't know what would be needed
16 to comply with OSHA. And then I quote, "All I know is
17 it came down."

18 He says that on Page 30, he can't say
19 with certainty that bolts, slings, or welds would have
20 prevented the accident. He says on Page 66, that
21 there is no specific OSHA regulation about a girt
22 being secured. He says on Pages 73 and 74, that there
23 is no specific OSHA regulation about hoists, welds, or
24 bolts. He says on Page 67, that the Army Corps
25 standards did not apply. And on Page 90, he says that

1 under OSHA, we don't guarantee the plaintiff's
2 safety. And on Page 92, he says that only an engineer
3 could say what amount of bolting or welding would have
4 prevented this girt from coming down.

5 So he is not capable he admits of saying
6 that. Now --

7 THE COURT: Basically, in a nutshell, his
8 opinion is if they weren't going to bolt it so it
9 didn't fall down, they should have marked it off and
10 noted that it was a problem?

11 MR. NORRIS: Yes.

12 THE COURT: And basically he can't say
13 that they should have bolted it or they shouldn't have
14 bolted it, but if they were going to chose not -- it
15 was their choice how they made the workplace safe.
16 And one way to make it safe is to anchor it down. And
17 I think they did do that. The other way to make it
18 safer is to make sure nobody wandered in there. And
19 we are sort of back to, whether you call it OSHA
20 standards or anything else, what is reasonable under
21 the circumstances at that job site to keep people
22 safe, which isn't much of a different standard than
23 what the reasonably prudent builder would do under
24 similar circumstances. So we are sort of arguing
25 apples and oranges here.

1 MR. SMIRCINA: The reason Mr. Burg is
2 important is that he will say that what is necessary
3 to be done here is that workers on this job site under
4 the national standard have to be protected from
5 exposure to falling objects. That wasn't done here.
6 There has been a violation of the national standards.
7 Or he can just say it is a violation, it is not a safe
8 site. He can also say this is just not a safe
9 situation, period. He doesn't necessarily have to
10 refer --

11 THE COURT: And his training and
12 expertise, it doesn't matter whether it is OSHA or not
13 OSHA. That is what it comes down to.

14 MR. SMIRCINA: This is an unsafe
15 condition.

16 THE COURT: And your expert is going to
17 say that the trade and practice is obviously to keep
18 the workers safe. They don't want their workers not
19 safe. And the custom is whatever they are going to
20 say it is.

21 MR. SMIRCINA: And then the jury can
22 decide.

23 THE COURT: And the magic word is
24 "OSHA." And that was -- I sort of came to that
25 conclusion last night looking up the case law about

1 the per se negligence. And then you're really -- I
2 think I sort of said it this morning. If I didn't say
3 it clearly, you're really getting back to what is
4 necessary to keep people from getting crushed by beams
5 on a job site.

6 MR. SMIRCINA: Right. And I take issue
7 with Mr. --

8 THE COURT: But it is what the jury
9 thinks is reasonable.

10 MR. SMIRCINA: And I take issue with
11 Mr. Norris saying that the Army Corps of Safety
12 Engineers manual does not apply. A specific provision
13 concerning the steel girts, I-beams does not apply.
14 Absolutely, he is going to say, if questioned, that
15 the Army Corps of Engineers safety manual, the general
16 safety requirements apply because every person on that
17 Army Corps of Engineers government work site has to be
18 protected from serious bodily harm, as well.

19 THE COURT: Well, it seems to me just
20 from the point of argument's sake and if this goes
21 anywhere from here that you don't need the OSHA regs
22 because I have already said you can't have it, per
23 se. And you all are on a lot stronger ground for
24 him to give his opinion as a safety expert that
25 it was an unsafe condition, regardless of what you

1 call it and that they should have done -- either
2 nailed it down somehow or they should have put tape
3 around it.

4 And mentioning those magic words "OSHA"
5 doesn't get you anywhere any better or any worse than
6 whether you put them in or get them out. They get
7 upset because you mention OSHA. And everybody
8 thinks -- juries strike me as being reasonably
9 intelligent. And they're instructed that that doesn't
10 mean any more or any less and you have got to find
11 that the defendants were negligent and that this isn't
12 any automatic negligence because of anything that -- I
13 mean, we are going to get there at the same place. As
14 usually happens, these things shake out as the case
15 goes on.

16 MR. SMIRCINA: Well, clearly that was
17 what we were after, Your Honor. I mean, I won't deny
18 that. What about using any of these provisions and
19 cites? I mean, he can say that the national -- he
20 can't even say that the national standard is every
21 worker on a work site should be protected from serious
22 bodily injury?

23 MR. NORRIS: Not worker. Employee.

24 MR. SMIRCINA: He is going to say
25 worker. He is going to say every worker. He is going

1 to say that is the standard, because that is what he
2 believes. He believes if you are on a work site --
3 you have said that the purposes --

4 THE COURT: I have made a ruling that
5 that is not the law in Virginia. Now, you may need to
6 talk to him about that so that he says that things
7 like job sites are supposed to be safe and leaves it
8 at that. We don't need him giving opinions about who
9 is covered and who is not covered or who they -- it is
10 not his job to talk about who they owe a duty to. It
11 is his job to testify about what should be a safe work
12 area.

13 MR. SMIRCINA: Or he needs to say that
14 they violated -- that the people that are responsible
15 for erecting the steel have a duty to tell the general
16 contractor what is going on, that this is not -- that
17 this is up there and it is not secured. And if they
18 don't do that, they violate a duty. If they are out
19 there working when Michael Shepherd is working and see
20 him or should see him, they should tell him.

21 THE COURT: Just ask him his opinion
22 about what needs to be on a work site. You are going
23 to get his credentials. They are going to get to
24 cross-examine him on why and how generally is it
25 done. I read your questions of him. You are going to

1 get your bite at him, too. I am not going to limit
2 what he says. I am just telling you --

3 MR. SMIRCINA: Don't say the word
4 "OSHA."

5 THE COURT: I am not going to say that to
6 you. But he needs to understand that that is not the
7 end all and the be all in the case and that it doesn't
8 mean any negligence, per se, and that it isn't going
9 to be, if they broke the rule, they are automatically
10 negligent. That is not the rule of this case. And
11 you need to figure out what you need to ask him and
12 what you need to get from him to get in what should
13 have been a safe workplace in this case.

14 MR. SMIRCINA: All right.

15 MR. AUFENGER: Judge, does it make any
16 difference to the Court that -- and I think,
17 fortunately for the plaintiff, this is a provision
18 that was actually in the contract. It is part of the
19 contract. You have the offer and acceptance. And
20 that goes on to say this is the Army Corps of
21 Engineers safety regulation.

22 THE COURT: Is that in the contract?

23 MR. AUFENGER: In the contract. It
24 goes --

25 THE COURT: Between the --

1 MR. AUFENGER: Absolutely. -- between
2 the plaintiff and the defendant Meredith. This is
3 part of the contract on this building. And it goes on
4 to say, in order to provide -- this is part of the
5 safety manual now --

6 MS. SPENCE: Is this the manual or the
7 contract that is on there?

8 MR. AUFENGER: It is the clause
9 incorporated in the contract.

10 MS. SPENCE: If you introduce the
11 contract, that is fine.

12 MR. AUFENGER: We are going to introduce
13 the contract. And it not only provides for the
14 protection of the life and health of the employees,
15 but Meredith has agreed to provide for the life and
16 health of other persons on the job site. It includes
17 everybody.

18 THE COURT: If that is in the contract
19 and that is the contract between the parties --

20 MR. NORRIS: That is not my contract,
21 Your Honor. I don't have a contract. I have an oral
22 agreement with the subcontractor to Meredith.

23 THE COURT: Then we are going to have to
24 instruct this jury very carefully if you stay in it
25 past motions to strike as to what duties are owed by

1 each defendant and what they have to do to breach
2 those duties or what allegedly they did to breach, if
3 you find such and such happened, then you can find
4 that they -- you know, you are just going to have to
5 be careful how you instruct them.

6 I mean, I know that makes your life
7 difficult, Mr. Norris, but I am sure you can rise to
8 the occasion. I don't know how else to do it. It is
9 part of the contract. They are a defendant in the
10 case. If it is their responsibility on the job to do
11 that, who knows, maybe the evidence that is going to
12 be at some point in time that asked you-all to do
13 something that you didn't do because it was
14 ultimately their responsibility that they delegate it.
15 I don't know the answer to that. But there is where
16 we are.

17 And I don't know how to do it any better
18 than that. And I hope that gives you all enough
19 guidance on how to proceed. All right. I mean, the
20 key is what happened and what they should have done,
21 not the labels you put on. Now, if that is in the
22 contract, fine. If it is from somewhere else, fine.
23 I am not -- I mean, I told you I wasn't going to
24 exclude it. But that isn't your strongest argument,
25 as I see it, for whatever that is worth. And you may

1 end up sandbagging yourself in the long run with it
2 because it is a little unsettled.

3 MR. SMIRCINA: More than a little. It
4 could have been settled in January.

5 THE COURT: Well, those things happen. I
6 guess we are all told not to open our mouths any more
7 than we have to. And they seem to be the masters of
8 that.

9 MR. SMIRCINA: Yes, ma'am.

10 THE COURT: I can name you a lot of other
11 areas that the same thing comes through here, the
12 medical bills issue, among others, that we see all the
13 time.

14 MR. AUFENGER: That has been clarified a
15 little bit, though, Judge.

16 THE COURT: Yes. It has. But it
17 has taken a long time and a lot of false starts and
18 a lot of -- you know when you can get around doing
19 it.

20 Do you need anything else for tonight?

21 MR. AUFENGER: No, ma'am.

22 MR. SMIRCINA: No.

23 THE COURT: We will see you in the
24 morning.

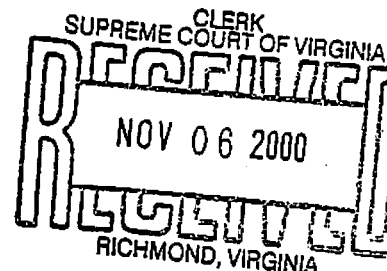
25 (The proceedings were adjourned at 4:44

**Plaintiff's Exhibits Nos. 2-16
May be Found at the Clerk's Office of
Supreme Court of Virginia**

1 VIRGINIA:

2 IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

3
4 CERTIFIED ORIGINAL



5
6 MICHAEL A. SHEPHERD,)

7 Plaintiff, (

8 v.)

AT LAW NO.

9 W. B. MEREDITH, II, et al., (CL98-2952

10 Defendants. (

11
12 TRANSCRIPT OF PROCEEDINGS

13 Virginia Beach, Virginia

14 July 20, 2000

15 Day 3

16
17 Before: THE HONORABLE A. BONWILL SHOCKLEY, Judge,

18 and a jury

19
20
21
22 TAYLOE ASSOCIATES, INC.

23 Registered Professional Reporters

24 **FILED** Telephone: (757) 461-1984

25 SEP 5 2000

Norfolk, Virginia

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I N D E X

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Frank Burg	417	426	--	--
	436	455	481	483
Patrick W. O'Connell, M.D. (by videotape)				
	486	--	--	--
Brad Doxey, M.D.	490	508	516	--
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EXHIBITS

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* * *

1 proceeding? And your next witness.

2 MR. SMIRCINA: Manual Seoane, please.

3 MANUAL SEOANE, called as a witness on
4 behalf of the Plaintiff, having been first duly sworn,
5 was examined and testified as follows:

6 DIRECT EXAMINATION

7 BY MR. SMIRCINA:

8 Q. Good morning, sir. Would you please
9 state your name for the jury?

10 A. Manual Seoane.

11 Q. And, Mr. Seoane, what do you do?

12 A. I am a construction representative,
13 safety engineering technician with the Naval
14 Facilities Engineering Command, Atlantic division,
15 here in Norfolk, Virginia.

16 Q. And what are your job duties and how long
17 have you been doing them?

18 A. I have been -- I have got 29 years in
19 this year. Part of my duties are construction
20 inspection-type work, quality assurance, and my major
21 part of my duty is safety inspections, safety
22 training, safety investigations in case there is an
23 accident.

24 Q. Do your duties require you to be
25 conversant with the terms of the contract which

1 concern accident prevention and safety between the
2 Department of Navy and the general contractor?

3 A. Yes.

4 Q. How many accident investigations have you
5 conducted during your employment with your command?

6 A. In 29 years, I would say at least a
7 hundred. Some were large. Some were small.

8 Q. Are you involved in the training of other
9 individuals in your occupation concerning construction
10 site safety rules and regulations in the Department of
11 Navy projects?

12 A. Yes. Weekly and also a monthly basis.

13 Q. Is there a body of safety rules under
14 which you evaluate the parties involved in
15 construction site accident investigations?

16 A. Yes.

17 Q. What are those rules and where are they
18 expressed?

19 A. The Army Corps of Engineers safety manual
20 and we use OSHA when applicable and in the local
21 regulations.

22 Q. Do all construction projects undertaken
23 under the authority of NAVFAC Engineering Command
24 operate under the same set of safety rules and
25 regulations?

1 A. Yes, sir.

2 Q. Would that include the Dam Neck
3 construction project, which is the subject of this
4 suit?

5 A. Yes, sir.

6 Q. All right. I have in my hand a
7 document. It is approximately five pages. I will ask
8 you to have that -- mark that with a yellow marker, as
9 well. What does that document purport to be?

10 A. It is the FAR clauses of our contracts.
11 Every contract is awarded a FAR clause as part of the
12 contract. There is many various FAR clauses. For my
13 concern, the FAR clause would be the safety aspect of
14 it. But it deals with the product, materials,
15 workmanship, and so on.

16 Q. What is a FAR clause?

17 A. It is a federal acquisition regulation.
18 It is something the contractor is required to follow.
19 You have the contract specifications, which is
20 basically site specific for the contract. But the FAR
21 clause encompasses all -- each contract.

22 Q. Is this a part of the contract in this
23 case between W. B. Meredith, II, and the Navy?

24 A. Yes, sir.

25 Q. I would ask you to turn to the top of

1 Page 5.

2 MR. SMIRCINA: Your Honor, may I be
3 indulged to move some of these materials around?

4 THE COURT: Yes.

5 BY MR. SMIRCINA:

6 Q. I am going to try to position this so you
7 can see it, Mr. Seoane. Perhaps I can put it over
8 there. It might be easier today with this particular
9 one. Mr. Seoane, is the provision at the top of Page
10 5 the same -- I would like you to -- I would like you
11 to mark in with a magic marker on the top of Page 5
12 the contract provision denoted A in parentheses. I
13 would ask that you read it out loud, if you would.

14 A. In order to provide safety controls for
15 the protection to the life and health of employees and
16 other persons, the prevention of damage to property,
17 materials, supplies, and equipment and for avoidance
18 of work interruptions in the performance of this
19 contract, the contractor shall comply with all
20 pertinent provisions of the Corps of Engineers Manual
21 EM385-1-1 entitled Safety and Health Requirements
22 manual as amended and would also take or cause to be
23 taken such additional measures as the contracting
24 officer may determine to be reasonably necessary for
25 this purpose or for purposes.

1 Q. I would like you now to examine this blow
2 up and ask you if that is the same provision as you
3 just read?

4 A. Yes.

5 Q. Now, Mr. Seoane, you have a last name
6 like mine that is kind of hard to pronounce, if you're
7 not thinking, anyway. What, if anything, does that
8 contract provision obligate the general contractor on
9 the Dam Neck construction site to do?

10 A. To comply with the 385.

11 Q. And the 385 is?

12 A. Is, again, the safety manual.

13 MR. SMIRCINA: Ma'am, I would ask that
14 that particular provision be marked by you.

15 THE COURT: We are up to Number 20.

16 MS. SPENCE: Your Honor, I object to a
17 single clause of the contract being singled out of the
18 context of the remainder of the contract. If he wants
19 to put the whole contract in, that is fine.

20 MR. SMIRCINA: We're happy if they want
21 to make it a record.

22 MR. AUFENGER: It is two boxes. We were
23 given the contract by defense counsel in discovery.
24 If they want the whole contract to come in, that is
25 fine. But it may be more --

1 MS. SPENCE: I am talking about the whole
2 five pages.

3 MR. AUFENGER: That is coming in.

4 THE COURT: The whole section?

5 MS. SPENCE: Yes. The whole.

6 MR. AUFENGER: We are not going to
7 introduce the board.

8 THE COURT: The board is not going to
9 come in. Do you have a copy?

10 MR. SMIRCINA: Absolutely. Right here,
11 ma'am.

12 THE COURT: That is fine. We will mark
13 the five pages as Number -- Plaintiff's 20, and I will
14 staple those together.

15 MR. SMIRCINA: Thank you, ma'am.

16 (The document referred to was marked as
17 Plaintiff's Exhibit No. 20, and received into
18 evidence.)

19 MR. SMIRCINA: Your Honor, I am going to
20 give a copy of this provision to Mr. Seoane to refer
21 to, as well.

22 THE COURT: That is fine.

23 BY MR. SMIRCINA:

24 Q. Turn again to Page 4 and 5. Is that the
25 same provision, Mr. Seoane? I don't think it is.

1 MR. SMIRCINA: May I proceed, Your
2 Honor?

3 THE COURT: Yes.

4 BY MR. SMIRCINA:

5 Q. On Subsection B on that page on Page 5,
6 what does it say about the obligation of the general
7 contractor to the Navy concerning this construction
8 project?

9 A. It says the contractor will maintain an
10 accurate record of and will report to the contracting
11 officer in the manner and on the forms prescribed by
12 the contracting officer all accidents resulting in
13 death, traumatic injury, occupational disease, and
14 damage to property, materials, supplies, and equipment
15 incident to work performed under this contract.

16 Q. And would you please mark that with a
17 yellow magic marker, too?

18 THE COURT: Let me trade you. You take
19 the exhibit, and I will take the copy.

20 THE WITNESS: Okay.

21 BY MR. SMIRCINA:

22 Q. Now, Mr. Seoane, do you have knowledge
23 concerning a construction accident which occurred
24 November 14th, 1996, involving my client aboard the
25 Dam Neck Naval base in Virginia Beach, Virginia?

1 A. Yes, I do.

2 Q. Do you know who the general contractor
3 was on that site?

4 A. W. B. Meredith.

5 Q. And do you know who the steel erection
6 sub-subcontractor was?

7 A. I would have to look back at it. If I
8 can go through some -- if I can look in here on my
9 statement. I have got a copy of it.

10 Q. Go right ahead. Is there something that
11 will refresh your recollection?

12 A. Yes.

13 THE COURT: Counsel, is there any
14 dispute?

15 MR. NORRIS: About?

16 MR. SMIRCINA: The admissibility of those
17 FAR clauses in the contract.

18 THE COURT: No. What was your last
19 question?

20 MR. SMIRCINA: He just can't recall the
21 name right now.

22 THE COURT: Can we help him out with
23 that?

24 MR. NORRIS: Yes. That is fine.

25 BY MR. SMIRCINA:

1 Q. Was it Atlantic Welding and Fabricating?

2 A. Yes. I knew it was Atlantic but I
3 couldn't think of the whole name.

4 Q. I know you have always referred to it as
5 Atlantic. How did you become aware of this
6 construction accident?

7 A. I was notified by the personnel -- not
8 the officer in charge but the head civilian. They had
9 sent me an e-mail or a telephone call and said that
10 they had an accident the evening before. I didn't get
11 that until the morning I went into work. I get in
12 about six-thirty, read my e-mails. I had called them
13 up, told them that I would be on my way.

14 Q. Would that be November 15, 1996, the day
15 after the accident?

16 A. Yes. It was the day after.

17 Q. What did you do then?

18 A. Well, I went out to the site and talked
19 to Dennis Cullen. At that time, he was the head
20 civilian in the office, and Dan Luper, who is the
21 supervisor of the construction representative. They
22 gave me a brief rundown of what happened. I was then
23 taken by one of the other construction representatives
24 off to the job site, where I met with the
25 superintendent, CPC representative.

1 Q. Do you know their names? Who was the
2 superintendent on the site?

3 A. Yes. I can get that, again, here. When
4 I went to the site, Mr. Bosley.

5 Q. Mr. Robert Bosley?

6 A. Yes, sir. And Dennis Cullen was the CPC
7 representative at the time.

8 Q. Did you speak to Mr. Bosley about the
9 incident?

10 A. Yes.

11 Q. What did he say had happened?

12 A. Well, at that time, again, reading from
13 my statement -- this is four years ago -- when I
14 arrived at the site at probably about seven-thirty,
15 like I said, I met with Mr. Gilbert and met with the
16 other superintendent for -- the supervisor for the
17 construction representatives. Then I got to the job
18 site. Upon my arrival, I spoke to the contract
19 superintendent, Robert Bosley, and the contract CPC
20 representative.

21 MR. NORRIS: Excuse me, Your Honor. It
22 appears the witness is just reading from a statement.
23 I don't think a proper foundation has been made to
24 refresh --

25 THE WITNESS: I can go from memory.

1 THE COURT: Do you want to ask him what
2 it is?

3 BY MR. SMIRCINA:

4 Q. What is it you're reading from?

5 A. What I am reading from is my report --
6 investigation report that I turned in to the Atlantic
7 division.

8 Q. Did you make that the day of your
9 investigation at the site of the accident?

10 A. Yes, I did.

11 Q. Does it accurately reflect the comments
12 and representations made to you by all people you
13 spoke to at the job site?

14 A. Yes, sir.

15 Q. Does it accurately reflect your
16 conclusions concerning the matter?

17 A. Yes, sir.

18 MR. SMIRCINA: May I proceed, Your
19 Honor?

20 THE COURT: John.

21 MR. NORRIS: I don't think he asked if he
22 has an independent recollection today.

23 THE COURT: Actually, he volunteered that
24 information. I don't know if you heard him say it has
25 been four years, I don't remember, let me look.

1 MR. NORRIS: I beg your pardon, Your
2 Honor. I did not hear that.

3 THE COURT: That was kind of a
4 parenthetical.

5 BY MR. SMIRCINA:

6 Q. Do you have an independent recollection
7 of the incident?

8 A. Like I say, it was four years ago. And
9 to get the names -- I meet hundreds and hundreds of
10 people every year, superintendents, foremen, laborers,
11 carpenters. It is hard to keep all of those names in
12 there.

13 Q. Did Mr. Bosley explain what had happened
14 to you?

15 A. Yes. At that time, he explained that the
16 girt had fallen down, injured a person that was at the
17 site. He said -- gave me an approximate time of when
18 it happened.

19 He said that he went out to the site,
20 drywall truck was there delivering materials. He had
21 asked the man to put it on the first floor. As
22 Mr. Bosley and Mr. Cullen returned to the trailer,
23 they heard a loud crashing noise. They looked. They
24 saw people running towards the vehicle that was there,
25 the truck that was unloading. They went back. A

1 steel girt had fallen and struck this person.

2 Q. What did you ask him concerning the steel
3 girt that injured Michael Shepherd?

4 A. I asked if it had been positioned and
5 tacked in place and the response from both Mr. Bosley
6 and Mr. Cullen was yes, it was.

7 Q. When you say whether it was positioned
8 and tacked in place, what do you mean?

9 A. Well, positioned, I mean between two
10 steel columns. There is clips resting -- clips that
11 the girt would have sat upon. And it would have
12 spanned the two columns. Those were the clips.
13 Tacked into position means temporarily fastened.

14 MR. SMIRCINA: May Mr. Seoane come down,
15 Your Honor?

16 THE COURT: Yes.

17 BY MR. SMIRCINA:

18 Q. So when you got to the job site, my
19 understanding -- can you see everybody -- you said
20 that Mr. Bosley said that the steel beam had not been
21 tacked or had been tacked?

22 A. He said it was. Yes.

23 Q. Had been tacked into place. Well, what
24 did you do next?

25 A. The first thing to the site -- we have

1 gone through accidents similar to this before -- went
2 out and I looked at the steel girt. And, again, I
3 looked up at the clips.

4 Q. Are these pictures accurate
5 representations of the steel girt that you viewed that
6 morning?

7 A. The positions are. But I do not remember
8 this being put on there.

9 Q. Is the face of this beam -- looking now
10 at Plaintiff's Exhibit Number 9, can you determine
11 which end of the girt --

12 A. Yes.

13 Q. -- that these -- that this picture
14 represents?

15 A. The end up on the vehicle.

16 Q. So Plaintiff's Exhibit Number 15
17 represents the end of the girt that I am pointing to
18 on Plaintiff's Exhibit Number 9?

19 A. Yes.

20 Q. And Plaintiff's Exhibit Number 14, would
21 you point out for the jury where --

22 A. The end laying in the dirt.

23 Q. All right. Now, you say you examined
24 this girt. What did you find?

25 A. No signs of a tack weld on it. Mentioned

1 it at the time to the superintendent of QC that I
2 didn't see any tack welds on it. Offered that we
3 would go up and look at the clips to see if there were
4 any tack welds, any kind of sign of anything on there.

5 Q. How did you get up to the brackets?

6 A. To get to the second floor, I don't
7 remember how we climbed up, but they had a temporary
8 stairwell there and we could have went up a ladder.
9 But then we did place a ladder to climb up to take a
10 look at the clips.

11 Q. Did the clip appear like this to you,
12 more or less?

13 A. Basically.

14 Q. Was there any evidence in your mind of
15 any welding done to that clip?

16 A. No, sir.

17 Q. On either end?

18 A. At either end.

19 Q. And these clips correspond in Plaintiff's
20 Exhibit 13 and 12 to the exhibit -- to the clips that
21 you can see in Plaintiff's Exhibit Number 8 on either
22 vertical support column?

23 A. Yes.

24 Q. And those were the brackets upon which
25 this steel girt rested --

1 A. Yes, sir.

2 Q. -- prior to it falling?

3 A. Yes, sir.

4 Q. To whom did you speak next, do you
5 recall?

6 A. Yeah. At that time, the foreman or
7 superintendent for Atlantic was there. I asked him
8 what happened.

9 Q. Do you recall his name? Is there
10 something that would refresh your recollection?

11 A. If I could look again.

12 Q. Go ahead.

13 A. Mr. Peter Godfrey.

14 Q. Peter Godfrey?

15 A. Yes.

16 Q. And he represented himself to you as the
17 foreman for Atlantic Welding and Fabricating?

18 A. Yes, sir.

19 Q. What did you ask him and what did he say
20 to you?

21 A. Well, I asked about the clips, about the
22 girt, why it wasn't welded and tacked in place. He
23 said they were trying to stay ahead of the other
24 trades, so they had placed the girts in position to
25 set them up on top of the clips and was going to come

1 back later, run a string line on it to get them all
2 lined up nice and even, and at that time they would
3 have gone back and welded them into position.

4 Q. What did you mean, stay ahead of the
5 other trades?

6 A. Well, there is more than just iron work.
7 It is working on the facility. They are bringing
8 drywall out. They may have been ready on the first
9 floor for drywall. On this picture, you can see they
10 are trying get some framing done on the first floor.
11 Contractors are in a production mode. They try to
12 keep things rolling and going. His intent was to get
13 all of the girts up there, come back later, get the
14 girts up to get around the building. In his mind it
15 would have probably been quicker, I guess.

16 Q. So this, according to the foreman, was
17 not tack welded?

18 A. Right. He said it hadn't been tacked.

19 Q. Did he mention whether it was secured in
20 any other manner?

21 A. No. It was not secured.

22 Q. Had the area been secured from injury to
23 any other personnel while the beam was unsecured?

24 A. Not at that time. As of that day, there
25 were people, as a matter of fact, that morning, that

1 were up there from Atlantic, tacking it and welding in
2 the girts on the second deck.

3 Q. Do you know whether --

4 MR. NORRIS: Your Honor, I object to what
5 Atlantic was doing the day after the accident.

6 MR. SMIRCINA: I will move on, Your
7 Honor.

8 BY MR. SMIRCINA:

9 Q. Did your investigation reveal any
10 evidence that Michael Shepherd, my client now, that
11 this beam was unsecured prior to it falling upon --

12 MR. NORRIS: Objection to the question,
13 Your Honor. The witness can't speculate to whether
14 Mr. Shepherd knew a day after the accident.

15 MR. SMIRCINA: I asked him whether his
16 investigation revealed whether he knew about it.

17 THE COURT: Overruled.

18 BY MR. SMIRCINA:

19 Q. Did your investigation reveal whether
20 Michael Shepherd knew anything about the steel girt
21 being unsecured?

22 A. No.

23 Q. Did your investigation reveal whether any
24 employee of Wenger Tile, the drywall subcontractor of
25 this case, knew this girt was unsecured prior to his

1 being injured?

2 A. No, sir.

3 Q. Did you arrive at a conclusion as to why
4 the steel beam fell?

5 A. It hadn't been tacked into position and
6 secured. Witness reports said that the -- that
7 Michael had eased the arm out and brushed up against
8 it. And it hit me as odd because every time it was
9 brushed it wasn't -- it was impacted, said it brushed
10 against it, slid down the boom, and it struck
11 Mr. Shepherd.

12 Q. What is the danger of leaving a girt
13 unsecured at that level on a construction site?

14 A. Anyone that is working around it, under
15 it, in the vicinity, there is a lot of equipment that
16 is out on the job sites, whether it be this piece of
17 steel or any other piece that is left suspended over
18 this, anybody that came in contact with the steel
19 column could have been hit, banged into it with a
20 forklift, or anything, that piece would come down,
21 cause injury, if not death.

22 Q. Do you have an opinion as to whether
23 leaving the girt unsecured after placing it on those
24 brackets was a violation of the safety provisions of
25 the Army Corps of Engineers safety manual?

1 A. Yes.

2 Q. What is that opinion?

3 A. It is unsafe.

4 Q. Why is it unsafe?

5 A. Again, it is a heavy member. It has got
6 to probably weigh somewhere between a ton, a little
7 over a ton. Left suspended above people, people are
8 working below it, anybody could strike it, whatever
9 the circumstances. The possibility of it falling
10 down, whether it being a possibility of injuring
11 people, it is a necessity to have it tacked or secured
12 into place.

13 Q. Now, we have -- we have mentioned
14 earlier, or I am going to ask you now, what does the
15 term job hazard safety analysis mean or activity
16 hazard analysis mean to you?

17 A. It is a requirement of the Corps of
18 Engineers safety manual on a construction site. There
19 are many trades that are out there working, people
20 that aren't familiar with all the safety hazards on
21 the job. So the Corps of Engineers requires that the
22 subcontractor that is performing each particular phase
23 of work would put a hazard analysis together.

24 He would mentally walk through the job
25 and look at all the particular hazards that they are

1 aware of, whether it be fall protection, personal
2 protective equipment for the people that wear hard
3 hats, glasses and so on, any specialty that might need
4 to be done. Maybe they are doing some cutting and
5 burning, maybe they would discuss having a fire watch
6 there. Again, if it's fall protection, a personal
7 fall protection person on the business. It goes over
8 the hazards.

9 Q. Would an unsecured steel beam be a hazard
10 that should be included in the job hazard analysis?

11 A. Yes, sir.

12 Q. Is that required under the Army Corps of
13 Engineers safety manual?

14 A. Yes, sir.

15 Q. I would ask that you look at the
16 provisions I have on the board there. I would like
17 you to read 01.A.09.

18 A. Before beginning each activity involving
19 a type of work presenting hazards not experienced in
20 previous project operations or where a new work crew
21 or subcontractors are to perform the work, an activity
22 hazard analysis shall be prepared by the contractors
23 performing the work activity. And it says see Figure
24 1-1 for the outline of the analysis.

25 Q. Is 1-1 beneath there?

1 A. Yes, sir.

2 Q. Now, it's not that it has to be in any
3 particular model, but what is this?

4 A. That is a basic description of when they
5 have the principle steps that they are going to be
6 doing, the activity itself, which would be structural
7 steel erections, principle steps you are going to
8 use. And on each step, they will look at the
9 potential hazards. You may have a half a dozen, a
10 dozen, or more, depending on the activity. On the
11 principle steps, you will address each one of your
12 potential safety hazards and then a recommended
13 control.

14 Q. Is this directly out of the Army Corps of
15 Engineers safety manual?

16 A. Yes, sir.

17 MR. SMIRCINA: Your Honor, I would like
18 to move both of these documents into evidence, have
19 them marked and moved into evidence.

20 THE COURT: 21 and 22. Do you want to
21 mark the boards?

22 MS. SPENCE: Your Honor, I am going to
23 not object to the form, but I object to the provisions
24 of the Army Corps of Engineers manual coming in
25 without including the whole section and then, again,

1 also because instructing the jury on what the law is
2 is the Court's responsibility, not for a witness to
3 identify.

4 THE COURT: Well, as far as the whole
5 provision, I don't know how long it is and I don't
6 know if there are other parts that apply. You are
7 welcome -- I mean, if it is five pages like the other
8 one, that is not a problem. If it is lengthy, that
9 may be a problem if there is a lot of extraneous
10 information. If you want to put in any parts of it
11 yourself, you're welcome to.

12 As to the objection as to the law, that
13 is correct. But it has already been testified that
14 this witness has sufficiently identified these at this
15 point, and I am going to let them come in now. You
16 want the whole --

17 MS. SPENCE: I do want that whole
18 section, not the whole Army Corps of Engineers manual,
19 but the whole section pertaining to the safety. I
20 think it is five -- actually three pages.

21 MR. SMIRCINA: Your Honor, if we could
22 substitute at a later time, I could find one that is
23 not marked upon, a clean copy of it, if I have it.

24 MS. SPENCE: That would be fine.

25 THE COURT: So it is going to be one

1 exhibit, three pages.

2 MR. SMIRCINA: Three to four pages. But
3 it will be one exhibit.

4 THE COURT: I will make a note now. It
5 will be Exhibit 21.

6 (The document referred to was marked as
7 Plaintiff's Exhibit No. 21, and received into
8 evidence.)

9 MR. SMIRCINA: I am sorry, Your Honor,
10 for the confusion.

11 THE COURT: That is fine. I just want to
12 put it in my notes. With the number of exhibits, I
13 just don't want to lose track. So what I am marking
14 is Section --

15 MR. SMIRCINA: It is going to be the
16 general provisions of the Army Corps of Engineers
17 safety manual. It is about five pages long. It is an
18 introductory clause.

19 THE COURT: That includes this 01.A.09,
20 among others.

21 MR. SMIRCINA: Yes, ma'am. Thank you,
22 ma'am. All right. Mr. Seoane, let me go over this
23 with counsel for just a second to make sure that
24 the -- tell me what you don't want in.

25 MS. SPENCE: This is fine. This is what

1 I want. That is good.

2 MR. SMIRCINA: Here it is, Your Honor.

3 Thank you, ma'am.

4 BY MR. SMIRCINA:

5 Q. Now, Manning, under the Army Corps of
6 Engineers safety manual, who is required to do this
7 activity hazard analysis?

8 A. Well, the subcontractor should have the
9 input in it and give it to the prime contractor
10 superintendent for review. Once it is reviewed, they
11 have looked at it and they have agreed on it, they
12 would review it then with the employees that are
13 working on that particular phase of work. But it is
14 the subcontractor who initiated through the prime
15 contractor.

16 Q. Why is this provision required?

17 A. To prevent accidents, the best of the
18 ability that the -- that we can do. The Corps of
19 Engineers for the Atlantic division who I work for use
20 that document to help cut back. It is a history of
21 things that have gone in and they have incorporated an
22 activity hazard analysis. Years ago they didn't use
23 one, but things have changed over the years.

24 Q. You can have a seat back up there. Thank
25 you, Mr. Seoane. Now, can you just say within a

1 reasonable degree of certainty whether it is the
2 accepted custom practice for a steel erector on a
3 government construction site --

4 MR. NORRIS: Objection, Your Honor.

5 THE COURT: All right. Let him finish
6 his question, please.

7 MR. NORRIS: Well, Your Honor, I need --
8 I already know the question.

9 THE COURT: Well, I don't. So would you
10 let him finish it, please?

11 BY MR. SMIRCINA:

12 Q. Is it the accepted custom and practice
13 for a steel erector on a government project to perform
14 a safety activity hazard analysis prior to initiating
15 the work?

16 A. Yes, sir.

17 MR. NORRIS: Your Honor, I have an
18 objection, and this is what I was afraid of.

19 THE COURT: And your objection is?

20 MR. NORRIS: My objection is that this
21 witness has not been identified as an expert witness
22 on the standard of care.

23 MR. SMIRCINA: He has been identified.

24 MR. NORRIS: Your Honor, I would like to
25 argue this out of the hearing of the jury.

1 THE COURT: We probably need to look at
2 some type of report. Ladies and gentlemen, why don't
3 you take a brief break in the back.

4 (The jury withdrew from the courtroom.)

5 MR. NORRIS: Your Honor, may I approach,
6 please?

7 THE COURT: I assume you have some
8 interrogatories.

9 MR. NORRIS: This is the identification
10 by the plaintiff of Mr. Seoane's expert opinions. It
11 says he will render opinions in accordance with his
12 report. His report makes no mention of standards of
13 care, none.

14 MR. SMIRCINA: It talks about job hazard
15 analysis and that it wasn't done here.

16 MR. NORRIS: It wasn't done here. But
17 there is nothing in his report that says what erectors
18 normally do.

19 MR. SMIRCINA: In his deposition, which
20 was also made by agreement part of his expert
21 testimony, Mr. Norris questions him for no less than
22 20 pages about the job hazard analysis. He was fully
23 aware of the job hazard analysis. He was fully aware
24 that it was required by the sub subcontractor on this
25 project. Mr. Seoane is rendering no different opinion

1 than he did at his deposition, and the opinions should
2 be allowed in.

3 MR. NORRIS: The questions posed to Mr.
4 Seoane at his deposition was whether or not this
5 contractor performed an activity hazard analysis or
6 something similar to it. He was not asked about
7 standards in the industry with respect to activity
8 hazard analysis because it wasn't identified as his
9 expert opinion.

10 MR. SMIRCINA: He has already stated,
11 ma'am, that this is required on every government
12 project by every subcontractor --

13 THE COURT: It is a different question --

14 MR. SMIRCINA: -- who is doing the work.

15 THE COURT: -- than what you asked him.
16 We all know that the question you asked him was a
17 different question. And if it wasn't asked that way
18 or if he wasn't listed as somebody who was going to
19 testify that way, it is different. It is like the
20 treating physician not being allowed -- not named for
21 causation and not being asked the question. And, yes,
22 they have all kinds of opinions and somebody can ask
23 them, but they weren't identified for causation, then
24 they don't get to testify about causation.

25 And he was identified as a person that

1 was going to testify about his report. Evidently, it
2 wasn't in his report.

3 MR. SMIRCINA: His report is right
4 there. Yes, it is in his report. It says a job
5 hazard was required. His report is what he has been
6 looking to to refresh his recollection. Mr. Norris
7 was provided that at the time. It is all -- it is all
8 in his report. He is testifying nothing different
9 than what it says in his report.

10 MR. NORRIS: I would like for counsel to
11 quote for the Court the language in the report that
12 talks about standards in the industry.

13 MR. SMIRCINA: The contractor --
14 subcontractor was --

15 MR. NORRIS: What page, please?

16 MR. SMIRCINA: This is the second page of
17 the report. And also the deposition, as well. A
18 preparatory meeting was held and an activity hazard
19 analysis was not written. The subcontractor and the
20 prime contractor did not make it known to the drywall
21 truck operator that the girt was not secured, et
22 cetera. That is what he says about the safety hazard
23 analysis. Mr. Norris questions him about it
24 completely throughout the deposition testimony of Mr.
25 Seoane last year, completely. This is no surprise.

1 THE COURT: It may not be a surprise what
2 he says, but it may be a surprise how you planned on
3 using it. And we all know that there are specific
4 areas of questions and specific uses for things.
5 Whether he is aware of the information or not, he came
6 to trial prepared that you didn't have this witness to
7 testify about causation. Now, why should you get to
8 change that now?

9 No, he is not going to get to testify.
10 He can testify about what was in his report. He can
11 testify the way it is in his report.

12 MR. SMIRCINA: Okay. That is fine. That
13 is fine.

14 MR. NORRIS: Your Honor, I would like the
15 jury instructed that the last question is beyond the
16 scope of his --

17 THE COURT: Is stricken from the record
18 and that there will be another question. Let's bring
19 him back.

20 MR. SMIRCINA: I just note the exception
21 to your ruling, Your Honor, just for the record.

22 THE COURT: I don't take it personal.

23 MR. SMIRCINA: Fine, ma'am. I don't.

24 (The jury returned to the courtroom.)

25 THE COURT: All right. The last question

1 that was asked was objected to. And I am going to
2 sustain the objection to the question and it is
3 stricken from the record. And I do believe the
4 witness did get an answer out, and that is stricken,
5 also.

6 BY MR. SMIRCINA:

7 Q. Was this activity hazard analysis
8 required to be done by Atlantic Welding and
9 Fabricating?

10 A. Yes, sir.

11 Q. Now, Mr. Seoane, are you aware in your
12 line of work what a contractor significant incident
13 report is?

14 A. Yes, sir.

15 Q. Is that part of the contract that the
16 contractor shall make such a report?

17 A. Yes, sir.

18 Q. Would you please look at the provisions
19 in the contract that said that the FAR clauses with
20 Exhibit 20?

21 MR. SMIRCINA: Would you mark this, Your
22 Honor, next in order?

23 THE COURT: Yes. This is the incident
24 report?

25 MR. NORRIS: Let's make sure we are all

1 looking at the same one.

2 MR. SMIRCINA: Contractor significant
3 incident report.

4 THE COURT: Two pages.

5 MR. SMIRCINA: Yes. That is it.

6 MR. NORRIS: No objection.

7 THE COURT: All right. 22 is the
8 incident report.

9 (The document referred to was marked as
10 Plaintiff's Exhibit No. 22, and received into
11 evidence.)

12 THE COURT: Are we sure we want this to
13 come in the way it is? I am looking at the bottom
14 right-hand corner.

15 MR. SMIRCINA: Well, that is --

16 MS. SPENCE: You're right. That does
17 need to be redacted, Your Honor.

18 MR. SMIRCINA: I need -- if you could, it
19 is really on the second page of the report. If you
20 would identify the second page of the report.

21 THE COURT: We can use some magic marker
22 on that, if that is all right.

23 MS. SPENCE: That is fine.

24 MR. SMIRCINA: That is fine with me,
25 ma'am.

1 THE COURT: All right.

2 BY MR. SMIRCINA:

3 Q. Mr. Seoane, while we're waiting, what is
4 the general contractor's responsibility concerning the
5 activity hazard analysis?

6 A. Well, he would insure that they do have
7 an activity hazard analysis prior to beginning that
8 phase of work.

9 MR. SMIRCINA: Do you want to come up and
10 look at it, in case there is anything else you want
11 redacted? I will show it to them. Can you look at
12 that, John and Fay, and see if there is anything else
13 that you want redacted?

14 MR. NORRIS: Your Honor, typically it is
15 better to make a reproduction of the marker, because I
16 can still read it.

17 THE COURT: That is fine.

18 MR. SMIRCINA: We will do that prior to
19 publishing it to the members of the jury.

20 MS. SPENCE: Thank you.

21 THE COURT: I can convince Mr. Bjorkman
22 to make a photocopy when we are finished with it.

23 BY MR. SMIRCINA:

24 Q. What is a contractor significant incident
25 report, Mr. Seoane?

1 A. If there is an accident, whether it is a
2 personnel accident or maybe a piece of equipment or
3 material accident, they would make out a report, give
4 a summary according to a sheet and answer all of the
5 pertaining questions to it, and submit it to the
6 contracting officer. And he would forward it on to
7 the Atlantic division safety.

8 Q. I have in my hand a document. I would
9 ask you to look at it. It has been marked Plaintiff's
10 Exhibit 22. And tell me what it purports to be.

11 A. It is the contractor's significant
12 incident report for the incident that happened on
13 November 14th, 1996.

14 Q. And who is responsible for making that
15 document?

16 A. The contract superintendent.

17 Q. Who is Robert Bosley in this case?

18 A. Yes, sir.

19 Q. Does his name appear at the bottom
20 left-hand corner of the first page of that document?

21 A. Yes, it does.

22 Q. Would you please turn to the second page
23 of that document? Would you please go to the middle
24 of the page, reading the section that is entitled job
25 hazard analysis, and read it for the jury?

1 A. Job hazard analysis, was the lack of
2 inadequate IAWEM385-1-1, Section 018, activity hazard
3 analysis a contributing factor?

4 Q. And what is the next question on that
5 document?

6 A. Was the site specific and address the
7 type of work operations concerned where the mishap
8 occurred?

9 Q. And what is Mr. Bosley's answer to those
10 questions?

11 A. Not applicable.

12 Q. Is that your opinion that it was not
13 applicable to this case, to this incident?

14 A. No, sir.

15 Q. Does this document also purport all other
16 factors that might have been involved in the
17 accident? What is the purpose of the report, let me
18 ask it that way?

19 A. Well, the superintendent after their
20 investigations, they fill a report out. Again, they
21 give it to the contracting officer, which would be --
22 at that time in January, that would be Dennis Copper,
23 who is gone now, they would forward it on to the
24 Atlantic division. The Atlantic division would take
25 the document. In this case, it is handwritten. The

1 Atlantic safety director would then type all of the
2 information in. It would go into our file, it would
3 go to the NAVFAC file, it goes through distribution,
4 basically. Not the names, but as -- we take it as a
5 lesson learned, what happened on the project, how can
6 we try to prevent it again.

7 MR. SMIRCINA: I move for the admission
8 of this document into evidence, as well.

9 THE COURT: We will make a photocopy of
10 that.

11 MR. SMIRCINA: I would like to mark this
12 document now, as well, ma'am.

13 MR. NORRIS: No objection.

14 (The document referred to was marked as
15 Plaintiff's Exhibit No. 23, and received into
16 evidence.)

17 THE COURT: This is 23.

18 BY MR. SMIRCINA:

19 Q. Mr. Seoane, I would like you to look at
20 what has been marked as Plaintiff's Exhibit Number 23
21 for identification and ask you what that document
22 purports to be?

23 A. It says on top WBM. It says preparatory
24 inspection.

25 Q. Does it concern this project?

1 A. I have to match the contract number. At
2 the top, it does say that it is the amphibious
3 operations support building, and that would be
4 correct.

5 Q. What is the date of that document?

6 A. 8/12/96.

7 Q. What does it purport to say was done at
8 that meeting, that preparatory meeting?

9 A. Meeting date, scope of work, structural
10 steel, coordination with other trades, plumbing,
11 concrete, electric, that they reviewed the
12 specification shop drawings, contract drawings,
13 material, storage, and installation instructions, work
14 methods, testing requirements, inspection
15 requirements.

16 Q. What does it say, if anything, about
17 safety?

18 A. Under work methods, went over safety
19 requirements.

20 Q. Would that document constitute the job
21 activity hazard analysis that we have been discussing?

22 A. No, sir.

23 Q. Why would it not?

24 A. It is not site specific. It doesn't go
25 into detail.

1 MR. SMIRCINA: I move for admission of
2 this document into evidence, Your Honor.

3 THE COURT: I think I initialed it when
4 you handed it up. I didn't hear an objection to it.

5 MR. SMIRCINA: Do you keep the exhibits,
6 Your Honor?

7 THE COURT: Today they are sort of in a
8 strange order. You can leave them up on that front
9 shelf or you can leave them where I can reach them.
10 We will collect them at the end and make sure they are
11 all in order.

12 MR. SMIRCINA: Yes, ma'am. I would like
13 to have again -- I think you took this document back.

14 THE COURT: The program management
15 document I have here. I have a copy of the --
16 Mr. Bjorkman was making a photocopy of the handwritten
17 sheet.

18 MR. SMIRCINA: That is what I need,
19 ma'am.

20 THE COURT: Do you have a copy if you
21 just want the witness to refer to it in the meantime?
22 It is Exhibit 22. Is there another copy? He will be
23 back in just a second.

24 MR. SMIRCINA: I will wait if you don't
25 mind, Your Honor. I will wait. It will be easier.

1 BY MR. SMIRCINA:

2 Q. Mr. Seoane, while we are waiting, you
3 mentioned -- you mentioned welding earlier and that
4 these black marks, that you did not see them on the
5 beam that day?

6 A. I didn't remember seeing them on the beam
7 that day. But, again, when I went out, did my
8 investigation, I had talked to Mr. Bosley and to the
9 representative from Atlantic and said there were no
10 tack welds on that piece of steel.

11 Q. So you were looking for tack welds on
12 the -- you were looking for evidence of welding on a
13 piece of steel?

14 A. Yes.

15 Q. What is your background of welding?

16 MR. NORRIS: Objection, Your Honor.
17 Objection, Your Honor.

18 MR. SMIRCINA: Your Honor, I am not going
19 to go. I am just getting in front of the jury what
20 his experience of welding is. I am not going to ask
21 him an opinion on the ultimate issue. I am not going
22 to --

23 MR. NORRIS: Your Honor, it is not
24 relevant if he is not going to ask his opinion and he
25 can't --

1 MR. SMIRCINA: He inspects welds all the
2 time.

3 THE COURT: Overruled.

4 BY MR. SMIRCINA:

5 Q. What is your experience with welding?

6 A. As a construction representative, we
7 aren't certified welders, but we have gone through
8 training, through observation of what a good weld
9 would be and appearance on the exterior of it. Again,
10 we can look at the interior of the weld. That is done
11 through a radiation process.

12 MR. NORRIS: Objection, Your Honor.
13 Objection, Your Honor. The witness is trying to
14 volunteer an opinion.

15 THE COURT: Just answer the question.

16 BY MR. SMIRCINA:

17 Q. How many times have you inspected welds
18 or evidence of welding on any construction sites?

19 A. Again, hundreds of times. It is a lot.

20 Q. One more question about Plaintiff's
21 Exhibit 22. I would like you to read the part that
22 says management in the middle of the page.

23 A. Management, Did a lack of accurate
24 supervision constitute -- contribute to the accident?
25 Was adequate information provided at the

1 preconstruction meeting?

2 Q. And what was Mr. Bosley's response to
3 that question?

4 A. Not applicable.

5 Q. Do you agree with that?

6 A. No, I don't.

7 MR. SMIRCINA: I have no further
8 questions.

9 THE COURT: Mr. Norris go first or
10 Ms. Spence. Mr. Norris.

11 CROSS-EXAMINATION

12 BY MR. NORRIS:

13 Q. Good morning, Mr. Seoane.

14 A. Good morning.

15 Q. Mr. Seoane, you are familiar with the
16 contract documents, correct?

17 A. In part. Yes.

18 Q. You agree with me, don't you, that there
19 is no contract between the Department of the Navy and
20 Atlantic Welding and Fabricating? Do you agree with
21 that?

22 A. Yes, sir.

23 Q. Would you agree with me, then, that these
24 FAR regulations that are incorporated into the
25 contract have been incorporated into the contract with

1 W. B. Meredith?

2 A. Yes, sir.

3 Q. And are you aware of any written
4 agreement that Atlantic Welding and Fabricating signed
5 agreeing to be bound by any of these provisions?

6 A. We are not privy to that information.

7 Q. Well, you have a file, right?

8 A. Uh-huh.

9 Q. You don't have anything where Atlantic
10 Welding has said we agree to be bound by these FAR
11 provisions, do you?

12 A. I do not. I don't have a complete file.

13 Q. Have you seen anything like that, sir?

14 A. No. Because it is out of our job
15 description to look for them.

16 Q. Now, would you agree with me, sir, that
17 irrespective of whether these provisions are in a
18 contract or not, not every single accident that
19 happens on a job site necessarily means that there is
20 a violation of FAR? Would you agree with that?

21 A. Could you explain it a little bit
22 farther?

23 Q. Do you conceive of the possibility that
24 on a construction site an accident can happen even
25 though people try to work safely?

1 A. Am I able to expound? Because it is hard
2 to answer.

3 Q. Can you just answer that yes or no?

4 A. Sure. Well, I can't answer that yes or
5 no because there is different circumstances. It is an
6 open -- it is an open question.

7 Q. Yes. It is an open question. Let me ask
8 it this way: Do you think that every single time an
9 accident happens on a construction site somebody must
10 have violated the FAR safety regulations?

11 A. No.

12 Q. So not every single accident that happens
13 is a violation of FAR, is it?

14 A. No. That is why we do our
15 investigations.

16 Q. You're in charge of safety for this
17 particular project; is that right?

18 A. No. I am a safety technician at that
19 time, safety technician for the Atlantic division.
20 There is a person over me, Mr. Bill Garrett. He
21 encompasses all of the Atlantic division, Europe, all
22 of the Middle East. But I have the Tidewater area.
23 But I am not assigned specifically to any contract.
24 If it is an accident, then I am called upon to go out
25 and investigate.

1 Q. Well, this project was within your
2 jurisdiction; is that a fair statement?

3 A. Yes. Only if there is an accident.

4 Q. And you went out and you investigated and
5 you issued a report; is that right?

6 A. Yes, sir.

7 Q. Do you have your report in front of you?

8 A. Yes, I do.

9 Q. Now, turn to the second page of your
10 report, first paragraph.

11 A. Okay.

12 Q. Now, I think you said you made this
13 report what, the day you went out there?

14 A. Yes, sir.

15 Q. Which would be the very day after the
16 accident?

17 A. (Witness nodding head.)

18 Q. In your report, did you say that you
19 asked the Dam Neck security if I could have someone
20 from their office take a few more pictures for me?

21 A. Yes, I did.

22 Q. And did you further say, The security
23 people took photos of the clips and the girt as well
24 as the overall location of the accident scene? Is
25 that what your report says?

1 A. Yes. That is what my report says.

2 Q. So you're stating in your report that the
3 security people took photographs of the clips. And by
4 clips you were speaking of these metal angles or
5 brackets that the girt was on?

6 A. Yes.

7 Q. Do you agree?

8 A. Yes.

9 Q. When you wrote your report, you had
10 already climbed up on a ladder and looked at that
11 clip, right?

12 A. Yes.

13 Q. And you didn't see any evidence of a
14 tack?

15 A. No.

16 Q. So you had them take a picture, right?

17 A. I asked them when I left the site because
18 I couldn't take any pictures. That is a standard
19 procedure for us to do, ask them to do so.

20 Q. Well, your report says the security
21 people took photos of the clips. That is what your
22 report says, right?

23 A. Yes.

24 Q. Have you to this day seen a photograph of
25 this clip showing a lack of any tacks?

1 A. The photograph right there.

2 Q. This photograph?

3 A. Uh-huh.

4 Q. You can tell from this photograph there
5 is no tack?

6 A. Yes.

7 THE COURT: Does that have a number?

8 MR. NORRIS: This is Plaintiff's Exhibit
9 13.

10 THE COURT: Okay.

11 THE WITNESS: (Witness nodding head.)

12 BY MR. NORRIS:

13 Q. Can you see the top of the angle on this?

14 A. The top wouldn't have any purpose
15 whatsoever because if they tack welded that, that girt
16 would have been laying -- you have got a clip there.
17 But the girt would be laying on top of it. The edge
18 that is exposed here in the photograph is where the
19 tack weld would have been applied.

20 Q. And you can see -- on this photograph,
21 you can see clearly enough on the edge of this clip to
22 say that there is no tack?

23 A. Yes.

24 Q. Okay. So this is the photo that you
25 represented was taken by the security people?

1 A. I didn't see any photographs until
2 months -- actually longer than months later. The
3 accident happened in 1996, and I was deposed in 1999.

4 Q. Well, if I represent to you, sir, that
5 the Navy photographer who took all of these pictures
6 said he took them the same day, would you have any
7 reason to disagree with that?

8 A. Would I have any reason? If he has
9 stated it, I am not going to say whether he is right
10 or wrong. I asked to take pictures following.

11 Q. And, in fact, do you know that these
12 pictures were taken the day before you arrived, the
13 day of the accident?

14 A. I have no idea.

15 Q. Okay. Well, you can -- this picture
16 accurately, you think, represents the clip?

17 A. (Witness nodding head.)

18 Q. But you don't think this picture
19 accurately represents the beam?

20 A. I am saying that is not a tack weld on
21 there. I was told it was a tack weld.

22 Q. No, sir.

23 A. That is the beam. That is definitely the
24 beam.

25 Q. Did you observe the marks in this

1 photograph when you did your investigation?

2 A. I don't remember seeing marks on them.

3 Q. Are you saying the marks weren't there?

4 A. I am saying I don't remember seeing marks
5 on there. So if you want to say they weren't, yeah, I
6 say they weren't. I did not see any on there.

7 Q. So are you saying that this picture of
8 the clip is accurate but this picture of the beam is
9 inaccurate?

10 A. Yes.

11 Q. So what you're saying, then, is if a Navy
12 photographer took these pictures all at the same time
13 the day before you arrived, that he got a good picture
14 of the angle but a bad picture of the beam?

15 A. I am saying the angle was a good
16 picture. The -- what is on the beam -- can I explain
17 why I am saying this?

18 Q. No, sir. I don't want you to expound. I
19 want to ask you: Are you saying that the mark on the
20 photograph, assuming it was taken the day before you
21 got there, had disappeared the next day when you
22 looked at the beam?

23 A. I am not saying that. I could have
24 overlooked that because I was looking for a tack.

25 Q. That is what I am asking you, sir. So

1 you admit that you might not have observed these marks
2 on these beams when you did your investigation?

3 A. It is possible. I don't know. I do not
4 remember seeing them there.

5 Q. You might have overlooked them, correct?

6 A. Possibility.

7 Q. Okay. You, sir, are how tall?

8 A. About five feet nine.

9 Q. And this end of the beam was angled up
10 against the bed of the boom truck, was it not?

11 A. (Witness nodding head.) Yes, sir.

12 Q. You did not get up on the boom truck to
13 look at the beam, did you?

14 A. I stood next to the truck.

15 Q. You did not get up on the boom truck and
16 look at the beam?

17 A. No.

18 Q. Now, Mr. Bosley and Mr. Cullen, the
19 quality control representative of Meredith, told you
20 that the beam had been tack welded?

21 A. Yes.

22 Q. And I believe one of the exhibits
23 introduced was the contractor significant incident
24 report, which was filled out and turned in the day of
25 the accident, correct?

1 A. I am not sure if that was turned in the
2 day of the accident or when it was turned in.

3 Q. Well, it is dated the day of the
4 accident?

5 A. Dated. Yes.

6 Q. And is there a description of how the
7 accident happened?

8 A. Yes.

9 Q. And does the incident report indicate
10 that the beam or the girt was not tack welded?

11 A. Can I read this?

12 Q. Yes, sir.

13 A. It makes no reference.

14 Q. Now, when you went up on the ladder to
15 look at the clip, was Mr. Bosley with you?

16 A. Like I stated during the deposition, it
17 was two people, and I am not sure who went up the
18 ladder to look at it at the time. But Mr. Bosley did
19 go out to the site at the time to look at this girt
20 and the clip.

21 Q. But didn't you testify in your deposition
22 that either Mr. Bosley or Mr. Cullen or both of them
23 was with you when you went up the ladder?

24 A. Yes.

25 Q. Okay. So you would expect them to

1 confirm that that is what happened?

2 A. Uh-huh.

3 Q. If they are telling the truth?

4 A. Yes.

5 Q. Okay. Now, you talked to a Mr. Godfrey,
6 a representative of Atlantic, correct?

7 A. Yes.

8 Q. Mr. Godfrey was the foreman?

9 A. Yes.

10 Q. Did you ask Mr. Godfrey where he was
11 working that day?

12 A. The day of the accident or the day of the
13 investigation?

14 Q. Yes, sir. The day of the accident.

15 A. I don't remember.

16 Q. It is not in your report, is it?

17 A. I don't believe so.

18 Q. Now, did you ask to speak to the worker
19 who set the beam?

20 A. No.

21 Q. So you never spoke to Mr. Brock, did you?

22 A. No, I did not.

23 Q. Now, the FAR regulation, I am looking at
24 Subpart C --

25 THE COURT: I have got a copy of it. Do

1 you have it?

2 BY MR. NORRIS:

3 Q. Do you have it, Mr. Seoane?

4 THE COURT: Look and see if there is a
5 yellow sticker.

6 THE WITNESS: Yes, ma'am.

7 BY MR. NORRIS:

8 Q. Look at Subpart C, Mr. Seoane.

9 A. Okay.

10 Q. It says the contracting officer. Who is
11 the contracting officer?

12 A. That would be the commanding officer out
13 at Oceana.

14 Q. Will notify the contractor. That would
15 be W. B. Meredith, correct?

16 A. Yes, sir.

17 Q. Of any noncompliance with the foregoing
18 provisions and the action to be taken. Now, prior to
19 the date of this -- when did this project start?

20 A. I have no idea.

21 Q. We just talked about a preconstruction
22 meeting with Atlantic that happened in August of '96.
23 Would it be a fair statement that this project had
24 been going on as of the date of the accident for at
25 least a couple of months?

1 A. Yes.

2 Q. September, October, some part of
3 November?

4 A. Yes, sir.

5 Q. And in that two to two-and-a-half months,
6 did the contracting officer -- prior to the date of
7 the accident, did the contracting officer for the Navy
8 notify the contractor, W. B. Meredith, of
9 noncompliance on the part of Atlantic Welding with any
10 safety regulation incorporated by this provision?

11 A. There was nothing in the files. No.

12 Q. Then if you go farther down it says, If
13 the contractor fails or refuses to comply promptly,
14 the contracting officer may issue an order stopping
15 all or part of the work until satisfactory corrective
16 action has been taken. Did the contracting officer
17 ever stop work on this project prior to this accident
18 for any noncompliance by Atlantic with any safety
19 provision in the FAR?

20 A. I have no idea. I only went out there
21 for just this accident.

22 Q. Now, I think you testified that Atlantic
23 Welding was required to supply an activity hazard
24 analysis. Is that your testimony?

25 A. Yes.

1 Q. But required by the contract?

2 A. By the Army Corps of Engineers manual,
3 which is part of the contract.

4 Q. But there is no contract between the
5 government and Atlantic Welding and Fabricating,
6 correct?

7 A. Right. That is up to the --

8 Q. So there is no contract whereby Atlantic
9 Welding was required to supply an activity hazard
10 analysis, was there?

11 A. The contract is the EN385 between the
12 contractor, subcontractor, and the government.

13 Q. No, sir. No, sir. I beg to differ.
14 Your contract was with W. B. Meredith?

15 A. That is right.

16 Q. You have no documents signed by Atlantic
17 Welding and Fabricating agreeing to provide you with
18 an activity hazard analysis, do you?

19 A. No.

20 Q. Now, when this accident happened and you
21 sent your report in, a letter was issued from the
22 Department of the Navy signed by Lieutenant Commander
23 Andrew M. Ash; is that correct?

24 A. Yes. I think so.

25 Q. In fairness to you, do you recognize this

1 letter, sir?

2 A. Yes. This letter was signed after we had
3 a meeting in the office.

4 Q. And did Lieutenant Commander Ash have the
5 benefit of your investigation?

6 A. He had my report that was turned in the
7 Friday before.

8 Q. And so you would have told Lieutenant
9 Commander Ash that my client violated EM3851-1,
10 wouldn't you?

11 A. No. Because I didn't speak to him.

12 Q. Well, did your report indicate that my
13 client violated 385-1?

14 A. My report -- I don't think it -- I don't
15 see in my report that it mentioned anything about 385.

16 Q. You saw Lieutenant Commander Ash's
17 letter, did you not?

18 A. Yes, I saw it. But I saw it four years
19 later.

20 Q. And you worked under Mr. Gilbert; is that
21 correct?

22 A. No, sir.

23 Q. Mr. Gilbert is in another department?

24 A. Yes. He went to Oceana. I worked at the
25 shipyard.

1 Q. When you reviewed that letter, my client
2 was only told that they violated that portion of
3 EM385-1, which dealt with the erection of steel
4 members; isn't that so?

5 A. Uh-huh. Yes, sir.

6 Q. Okay. My client was not told in the
7 letter from the Department of the Navy that they
8 violated this provision right here, were they?

9 MR. AUFENGER: Judge, at this time, I
10 would interpose an objection. The witness has
11 indicated he read this letter four years later, a
12 number of years later. He hasn't indicated that he
13 relied on that letter for any basis. It is hearsay.
14 BY MR. NORRIS:

15 Q. Well, was that letter in your file?

16 A. No, sir.

17 Q. All right. I will withdraw that
18 question, save it for another witness.

19 THE COURT: Thank you.

20 BY MR. NORRIS:

21 Q. Now, I think I heard you say, Mr. Seoane,
22 that the beam fell down because it wasn't tacked in
23 place. Was that your statement on direct?

24 A. Yes. One of the causes for it. Yes.

25 Q. It wasn't tacked?

1 A. (Witness nodding head.)

2 Q. Okay. Now, you are not a structural
3 engineer, correct?

4 A. No, sir.

5 Q. And you have not done any calculations to
6 determine the amount of force that was placed by the
7 boom on the beam just prior to the accident, have you?

8 A. No, sir.

9 Q. And you have not made any calculation to
10 determine what size tack would have resisted the force
11 placed on the girt by the boom, have you?

12 A. No, sir.

13 Q. And, in fact, when I took your
14 deposition, you told me, didn't you, that you are
15 unable to say that a weld would have prevented this
16 accident -- that a tack weld?

17 A. Yes. Depending on the size of the weld.

18 Q. And that is your opinion today, isn't it,
19 that you can't say to this jury that a tack weld would
20 have prevented this accident, can you?

21 A. No. I mean, again, I can't -- I don't
22 certify welds, so I couldn't say that.

23 Q. All right, sir. Mr. Seoane, do your
24 safety concerns extend to the field of the operation
25 of booms?

1 A. Yes.

2 Q. Would you agree with me that safety
3 requirements are such that a boom operator should make
4 sure he has sufficient room to off-load his load
5 before doing so?

6 A. Yes.

7 Q. Would you agree with me that a boom
8 operator should make sure he doesn't come into contact
9 with a building when he is off-loading a load?

10 A. Yes.

11 Q. Would you agree with me that a boom
12 operator should have a spotter in a case where there
13 is a tight squeeze to keep an eye on both the boom and
14 any obstructions to avoid contact?

15 A. Yes.

16 Q. Would you agree with me that a spotter
17 should keep his eye on the boom and any obstructions
18 and not be talking to people and not looking at the
19 operation when it occurs?

20 A. Yes.

21 Q. When you did your safety investigation,
22 did you talk to the spotter?

23 A. All of the personnel involved in the
24 accident, they weren't there that day. I was told the
25 statements had been taken prior, their statements

1 would be submitted. So I never saw their statements.

2 Q. Were any statements submitted?

3 A. Other than with security submitted, which
4 we saw and, again, in 1999 after the accident.

5 Q. Well, did anybody bother, as it turned
6 out, to interview the spotter for Mr. Shepherd?

7 A. I have no idea, because I didn't see the
8 statements and I didn't do that part of the
9 investigation.

10 Q. So the only report that was issued to the
11 Navy laid absolutely no fault, no responsibility
12 whatsoever on the boom operator and the spotter for
13 the boom operator, correct? You didn't investigate
14 that aspect of it, did you?

15 A. Yes, I did.

16 Q. Tell me where in your report.

17 A. No. You asked me if I did. It is not
18 here, but you just asked me a question if I did. When
19 I got to the site to do an accident investigation, I
20 looked at the boom truck, I talked to the people that
21 were there, the superintendent, the CPC, and the
22 foreman, and I asked what happened. I tried to get it
23 compiled together with what went on. They did explain
24 he was up on the second floor and as he was backing
25 the load out, it brushed up against the girt and the

1 girt came down. So, yes, I did have concerns about
2 that truck.

3 Q. Did any of the people you talked to tell
4 you that, in fact, the girt moved six inches before
5 the spotter even noticed it?

6 A. No, sir.

7 Q. Does that sound safe to you, sir, that
8 the boom could come into contact with a girt and move
9 it six inches before the spotter even noticed it?

10 MR. AUFENGER: Your Honor, if it please
11 Court, I have an objection. And that objection would
12 be that defense counsel is misleading the jury by
13 taking the focus away from what Michael Shepherd may
14 or may not have done and he is directing it towards
15 this spotter.

16 THE COURT: Overruled.

17 MR. NORRIS: Thank you, Your Honor.

18 BY MR. NORRIS:

19 Q. Wouldn't that be of interest to you when
20 you investigated this accident from a safety
21 standpoint, sir?

22 A. Yes. Yes.

23 Q. Did you get an activity hazard analysis
24 from Wenger Tile?

25 A. No, sir.

1 Q. Well, shouldn't Wenger Tile have filled
2 out one of these documents, thinking of the possible
3 risks that might be associated to the off-loading of
4 their material?

5 A. Absolutely. That would have been, again,
6 through the contract superintendent, who would have
7 given the activity hazard analysis to the government.

8 MR. NORRIS: May I have one moment, Your
9 Honor? That is all I have, Your Honor.

10 THE COURT: Ms. Spence.

11 MS. SPENCE: Very briefly, Your Honor.

12 BY MS. SPENCE:

13 Q. Good morning, sir.

14 A. Good morning.

15 Q. Now, you indicated that the problem with
16 the report of the preparatory meeting on August 12th
17 of '96 was that it wasn't specific in writing down the
18 specific hazards that were discussed?

19 A. Yes.

20 Q. But you certainly aren't saying that they
21 didn't discuss those specific hazards, you just don't
22 know?

23 A. It is not documented. And if there are
24 no documentation signatures, as far as we are
25 concerned, it is just hearsay.

1 Q. But you can't dispute that they verbally
2 discussed it?

3 A. No, I couldn't.

4 Q. And you're not saying that putting it in
5 writing would have prevented the accident, are you?

6 A. Judge, the questions that are being asked
7 are hard for me as a safety person to respond. If I
8 give a yes or no, that is misleading.

9 Q. Let me ask it this way --

10 MR. AUFENGER: Judge, I would just that
11 he have the opportunity to explain his answer.

12 THE COURT: Counsel will get a chance to
13 follow up with you after this side is finished, so
14 they will get the last set of questions. So answer as
15 best you can.

16 THE WITNESS: Sure.

17 BY MS. SPENCE:

18 Q. Let me put it this way: Don't accidents
19 happen even when there are written activity hazard
20 analyses?

21 A. Yes, ma'am.

22 Q. Now, the con rep has some responsibility
23 for making sure that he has an AHA on file, doesn't
24 he?

25 A. I have been instructed by the Atlantic

1 division on this. This is just to what I have done
2 out there for my investigation for the contractor.
3 All I can tell you is that they are quality assurance
4 representatives. They are not responsible for the
5 contract. This contract superintendent has a copy of
6 the contract. The contract site construction workers
7 have a multitude of jobs to look at during the day,
8 unlike the superintendent, who has one.

9 Q. But the con rep can stop the job if he
10 hasn't received what he thinks is necessary for
11 safety?

12 A. Yes, he could.

13 Q. And do you still have the EM385-1-1 in
14 front of you?

15 A. That one?

16 THE COURT: I think it is up here on my
17 shelf.

18 MS. SPENCE: Here it is. Thank you.

19 BY MS. SPENCE:

20 Q. I am looking at 01A09B on Page 3.

21 A. Just B.

22 Q. Just B. You have discussed the general
23 and the A before. B, work will not begin until the
24 hazard analysis has been accepted by the government's
25 designated authority and discussed with all engaged in

1 the activity including the contractor, subcontractors,
2 and the government's on-site rep?

3 THE COURT: I think that is a question,
4 is that what it says, and I think we just need a yes
5 or no.

6 THE WITNESS: Yes.

7 BY MS. SPENCE:

8 Q. He nodded. I realize that doesn't help
9 the record much. Thank you, sir.

10 THE COURT: You can put that down below
11 or just rest it on top.

12 BY MS. SPENCE:

13 Q. The boom operator hit the girt, didn't
14 he?

15 A. Witness statements taken by security
16 said, yes, he brushed against the girt and it came
17 down.

18 Q. You remember giving your deposition in
19 this case back in October of '99, right?

20 A. Bits and pieces. Yes.

21 Q. You remember you showed up for it?

22 A. Yes.

23 Q. I am looking at Page 42, starting at Line
24 12. What is your understanding of what caused this
25 girt to come loose off the clip?

1 Answer: From the reports and talking to
2 the people that were on the scene, superintendent in
3 the QC, right, as well as the witness statements that
4 we have in front of us, that as this -- as the
5 individual was placing the drywall, the boom of the
6 truck, as he was positioning it and drawing back, hit
7 the girt and it slid down and hit him.

8 Was that your testimony?

9 A. (Witness nodding head.)

10 MR. NORRIS: Could he vocalize that
11 answer? I am sorry.

12 THE WITNESS: Yes. I am sorry.

13 THE COURT: Unfortunately in this
14 situation, we have to say yes and no because the court
15 reporter doesn't --

16 THE WITNESS: Kind of throwing something
17 at me.

18 BY MS. SPENCE:

19 Q. And then on 44, starting at Line 3,
20 question: So he did hit it, didn't he?

21 And your answer: Apparently, yes, he
22 did?

23 A. (Witness nodding head.) Yes.

24 Q. And then on Page 52, starting at Line 5,
25 question: Okay. And you agree that there was a

1 collision between this boom and this girt?

2 And your answer: Yes. The boom and the
3 girt?

4 A. Yes.

5 Q. An operator is not supposed to collide
6 with the girt, is he?

7 A. No.

8 Q. And, again, referring to Plaintiff's
9 Exhibit 21, the EM3851-1, I am asking you to look at
10 Section 01A.03.

11 A. Read it?

12 Q. Yes.

13 A. Each individual employee is responsible
14 for complying with applicable safety requirements or
15 the described safety applicable to prevent and
16 avoiding an accident.

17 Q. So each employee is responsible for his
18 own safety?

19 A. Yes.

20 MS. SPENCE: That is all I have. Thank
21 you.

22 THE WITNESS: Your Honor, do you want
23 this?

24 THE COURT: Any other questions from
25 anything on redirect?

1 MR. SMIRCINA: Yes, ma'am.

2 REDIRECT EXAMINATION

3 BY MR. SMIRCINA:

4 Q. Mr. Seoane, you have stated that Atlantic
5 Welding and Fabricating was required to perform a
6 safety hazard analysis?

7 A. Yes.

8 Q. Why are they required?

9 MR. NORRIS: Objection, Your Honor.

10 BY MR. SMIRCINA:

11 Q. Why are they required?

12 MR. NORRIS: Your Honor, I have an
13 objection.

14 THE COURT: And the basis of it is?

15 MR. NORRIS: There is no contract between
16 my client and the government requiring an activity
17 safety hazard analysis. The only requirements are
18 what the government places on the general contractor.

19 MR. SMIRCINA: That is not true, Your
20 Honor.

21 MR. NORRIS: This witness cannot testify
22 to a question of law, which is for the Court alone to
23 decide, whether contractually my client had that
24 obligation.

25 THE COURT: I think the question was the

1 reason for the document. Is that -- do you want to
2 restate the question for me?

3 MR. SMIRCINA: Okay. I asked why is
4 Atlantic required to do the safety hazard analysis.

5 MR. NORRIS: Same objection, Your Honor.

6 THE COURT: Why does the document require
7 the subcontractor to make a safety check?

8 BY MR. SMIRCINA:

9 Q. Why does the -- answer that question.
10 That is better than mine.

11 A. In the Corps of Engineer Safety manual
12 under the definition of the activity hazard analysis
13 and who is to prepare it, it states that the
14 superintendent on a particular phase of work, being a
15 subcontractor, would prepare the activity hazard
16 analysis and give it to the contract superintendent.
17 On that basis that is in there, that is where our
18 enforcement would come in. So the manual says the
19 contractor be -- the subcontractor who is going to do
20 that particular phase of work is the person that would
21 make out, fill out, prepare the hazard analysis.

22 Q. While working on a government site and
23 specifically on this government site --

24 A. Yes, sir.

25 Q. -- was Atlantic Welding and Fabricating

1 required to follow the provisions of the Army Corps of
2 Engineers safety manual?

3 MR. NORRIS: Objection, Your Honor. That
4 is a question of law for the Court alone.

5 MR. SMIRCINA: No, it is not. It is a
6 question of fact that this man knows.

7 THE COURT: Well, we already know there
8 is a subcontractor. It says subcontractors. We don't
9 need to go any further.

10 MR. NORRIS: Your Honor, we are a sub
11 subcontractor. We have no written contract with
12 anyone.

13 THE COURT: Calm down, Mr. Norris. Have
14 a seat. I have sustained your objection. Do you have
15 another question?

16 BY MR. SMIRCINA:

17 Q. Is it a foreseeable risk that a boom
18 truck operator --

19 MR. NORRIS: Objection, Your Honor.

20 THE COURT: Sustained.

21 BY MR. SMIRCINA:

22 Q. In evaluating this accident, you said
23 that you regarded the boom truck hitting the girt; is
24 that correct?

25 A. Could you please state that again?

1 Q. When you were evaluating this accident
2 and performing your accident investigation, did you
3 consider -- did you consider the fact that the boom
4 truck arm brushed against the steel girt?

5 A. Yes.

6 Q. All right. Is such an event foreseeable
7 upon a construction site?

8 MR. NORRIS: Objection, Your Honor.

9 THE COURT: Sustained.

10 MR. SMIRCINA: I don't have anything
11 further, Your Honor.

12 THE COURT: And this witness is excused?

13 MR. SMIRCINA: As far as we are
14 concerned, ma'am.

15 THE COURT: Have a nice day. Thank you.

16 MR. AUFENGER: Judge, in the likelihood,
17 although rare as it may be, that we need to bring him
18 back for rebuttal, we would like to reserve --

19 THE COURT: You are free to leave. And
20 they have your phone number if they need you. The
21 only thing I am going to require is, until the trial
22 is over, that you not talk to anybody about it, in
23 case they do need to call you and have you come back.

24 THE WITNESS: Yes, Your Honor.

25 THE COURT: And next witness.

1 MR. NORRIS: Your Honor, may I suggest
2 something, please?

3 THE COURT: You may suggest something.

4 MR. NORRIS: May I suggest that I voir
5 dire him first, and then I will have a motion, and
6 then the Court --

7 THE COURT: Well, they are still going to
8 be entitled to make the record. So six or one-half
9 dozen. Go ahead and go through what you want to do.
10 You can voir dire him. Whether I grant the motion or
11 don't grant the motion, it is whether the jury is
12 going to hear some for the preliminary.

13 MR. NORRIS: But if you grant the motion,
14 they may need to voir dire more on the record.

15 THE COURT: They can go back and go
16 through the preliminary.

17 DIRECT EXAMINATION

18 BY MR. AUFENGER:

19 Q. State your full name.

20 A. It is Frank Burg, B-u-r-g.

21 Q. And where do you reside? What do you do?

22 A. I reside in Woodstock, Illinois. I am an
23 occupational safety and health consultant.

24 Q. Where have you been employed in the past?

25 A. I worked for the U.S. Department of

1 Labor, OSHA, for almost 18 years.

2 Q. An in what capacity?

3 A. I started out as a compliance officer
4 doing inspections, and I advanced to a journeyman
5 compliance officer where all I did mostly were
6 fatality investigations, accident investigations.

7 Q. Do you now teach OSHA safety to OSHA
8 safety personnel?

9 A. Yes. I teach OSHA compliance officers at
10 their national training institute. I teach at the
11 national safety consult. I teach at the associated
12 general contractors. I have taught at probably 50
13 universities around the country. And I also teach for
14 my clients, which are primarily construction, general
15 contractors, or construction subcontractors.

16 Q. Do you teach safe steel erection?

17 A. Yes. In fact, every week practically I
18 teach steel erection. It is usually a one-hour or a
19 two-hour segment of all the courses that I teach. But
20 I also teach a steel erection course. You know, in
21 itself, one course that is devoted to steel erection.

22 Q. Mr. Burg, do you have an opinion as to
23 whether Michael Shepherd, as defined by OSHA, is an
24 employee?

25 A. Yes. There is no doubt in my mind

1 whatsoever that he is an employee under OSHA.

2 Q. And have you reviewed documents regarding
3 this case, including depositions and other evidence
4 performed by me?

5 A. Yes.

6 Q. And why do you feel he is an employee
7 that falls within the protected class of OSHA
8 employees?

9 A. Well, OSHA defines employee quite broadly
10 and, in fact, they have four specific designations of
11 what an employer is that could have an employee.

12 Q. And for the purposes of OSHA and OSHA
13 protection for an employee, would you indicate in
14 which of those four categories he would be an employee
15 for the purpose of Meredith Construction Company, the
16 general contractor in this case?

17 A. Well, if he has a working relationship to
18 do the construction project and then is exposed to a
19 hazard or a danger on that project, OSHA would
20 consider him to be covered under the act.

21 Q. Now, as to another defendant in this
22 case, Atlantic, in short, how do you feel or what is
23 your opinion as to Michael Shepherd being an employee
24 of Atlantic for the purposes of the act?

25 A. Well, as I started to say earlier, there

1 is four different types of employers that OSHA speaks
2 to. The first one is the controlling employer. That
3 is someone that has command and control of the work
4 site, usually an owner or a general contractor.

5 Q. All right.

6 A. There is also a potential for exposing
7 employer. That is an employer that exposes either his
8 or her employees to hazards or somebody else's
9 employees to hazards. The next one is creating
10 employer. That is an employer that creates hazards
11 for his or her own employees or for other employees on
12 the job site. And the last one is correcting
13 employer. And that is an employer who specifically
14 has been designated to correct hazards on the job site
15 and fails to do so.

16 Q. Now, as to those four definitions that
17 you have just given us, which of those four apply to
18 Atlantic, the subcontractor?

19 A. Well, in my view, Atlantic was the
20 creating employer in that they created this hazard by
21 not securing this particular piece of metal or
22 cordoning off the area to make sure no one else was
23 exposed to the unsecured girt.

24 Q. Now, as to these four definitions of
25 employees for the purpose of OSHA protection, where

1 does that come from? Where are you taking that from?

2 A. It is a compliance directive. It is
3 called the multi-employer work-site policy. It is
4 what they call a CPL. And it is issued to compliance
5 officers as instructions on how to enforce the law.

6 Q. Is it part and parcel of the OSHA law?

7 A. Well, it is part and parcel to the
8 enforcement of the OSHA law.

9 Q. Have you formed an opinion based on what
10 you have reviewed in this case as to whether or not
11 the defendant Meredith violated OSHA?

12 A. Oh, most definitely. They are the
13 controlling employer. They are in the best position
14 to implement and enforce and communicate the safety
15 and health program. They have various parties that
16 work at the job site. We call them subcontractors.
17 And their work activities have to be staged and
18 coordinated in such a manner that we don't have
19 accidents and injuries. They clearly have that
20 responsibility.

21 Q. And specifically what provision of OSHA
22 did Meredith violate?

23 A. Well, there is a -- there is several.
24 But the one in particular is 192616, which are the
25 rules of construction. And those -- at the end of

1 that paragraph, if you read it, it says that the prime
2 contractor, which would be Meredith in this case, has
3 an indelible responsibility for the safety program at
4 the work site.

5 Q. What is the general safety provision or
6 the general duty clause of OSHA and how does that
7 relate to Meredith?

8 A. Well, the general duty clause in OSHA is
9 especially important. It is what congress enacted was
10 a duty that congress gave to the department of labor
11 for the protection of America's work force. Basically
12 what it says is that a worker can come to work and be
13 exposed to a bump or a scratch but that there is a
14 protection for workers, that they will not be exposed
15 to death or serious physical harm. And actual wording
16 of the standard or the act is that the workplace will
17 be free -- that is their word -- from recognized
18 hazards that could cause death or serious physical
19 harm to employees. And I, of course, think that is
20 what this case is about.

21 Q. Now, when you say you think that is what
22 this case is about, is it your opinion, based on what
23 you have reviewed in this case, that the risk involved
24 was foreseeable?

25 A. Yes. This is a very well-recognized

1 hazard. In fact, the second or third cause of
2 fatality in construction is falling objects. And so,
3 you know, being someone that has been in the field for
4 32 years, I have seen this again and again. And so
5 the general duty clause is -- to me, is quite
6 definitely applied to this case in that there must be
7 protection from falling objects.

8 Q. All right. Mr. Burg, I would like to
9 direct your attention to Atlantic, another defendant
10 in this case. Do you have an opinion as to whether
11 Atlantic violated the OSHA laws of provisions?

12 A. Yes, they did.

13 Q. And for what reason, if at all different
14 from Meredith's violations?

15 A. Well, they're specifically charged with
16 placing this girt. This is a heavy object that, if
17 not secured, can fall and maim or kill employees. So
18 they have two choices. They either should secure it
19 so it won't fall, or cordon off the area so that
20 employees are not exposed to it in the event that it
21 does fall. And my review of all the documents in this
22 case indicates that they didn't do that.

23 Q. So what specific provision, if any, did
24 Atlantic violate in your opinion of the OSHA code?

25 A. Well, they're an exposing employer and a

1 violating employer, and there are specific standards
2 that -- including the general duty clause. But there
3 are others under 1926.20 and 21. And those things say
4 basically there has got to be a safety program,
5 hazards have to be evaluated and corrected for
6 employees, and also that they have to have competent
7 persons inspect the work to make sure that accidents
8 don't happen.

9 I might also add that specifically in
10 this case, they had the Army Corps of Engineers'
11 requirements, and in their handbook, they specifically
12 talk about having an analysis -- what I call a job
13 hazard analysis of each operation. And if they had
14 had such an analysis, this wouldn't have happened. No
15 safety person or safety professional or competent
16 person that I know of would allow an unsecured girt to
17 be placed in a location where it could fall and injure
18 an employee.

19 Q. You indicated that a job hazard analysis
20 would be required by the Army Corps of Engineers and
21 you have reviewed that information in the case. Is it
22 also required under OSHA?

23 A. Yes. Well, they call it an activity
24 analysis at the corps. They call it inspections of
25 job sites, equipment, and materials under Subpart C in

1 OSHA. But the whole idea of safety is to determine
2 what can cause accidents before they cause accidents;
3 in other words, evaluate potential dangers. And that
4 is how you do it.

5 Q. Is OSHA something that is required on
6 this particular job site to be followed?

7 A. Yes. It is the law. It is the federal
8 law.

9 Q. Is it the law in Virginia?

10 A. It is the law everywhere in the United
11 States.

12 Q. Has Virginia adopted through OSHA,
13 basically OSHA verbatim?

14 A. Yeah. I know they did. In fact, when I
15 teach around the country, especially at the training
16 institute, I get people from all over the country.
17 And I know that I have trained, for example, the
18 compliance officers that work for the State of
19 Virginia. They have been in my class. And I recall
20 that in preparing for the class that I reviewed the
21 Virginia state plan and that they had adopted the
22 OSHA -- federal OSHA requirements verbatim.

23 Q. And is it your opinion that OSHA
24 represents the minimum standard of care for the -- for
25 safe steel erection?

1 A. Well, I exactly agree with that. That is
2 the right way to say that. OSHA is a minimum.
3 Sometimes you have to go beyond OSHA to actually meet
4 the requirements of the act to provide that safe
5 workplace.

6 Q. And do you know the customs and practices
7 of steel erection as it relates to safe steel erection
8 in Virginia?

9 A. I better. A lot of people rely on me to
10 know these customs and practices and hire me to assure
11 that their companies have a safe workplace. And I
12 have had one fairly large general contractor in
13 Virginia as my client.

14 Q. And have you visited steel construction
15 in Virginia?

16 A. I have. Yes.

17 Q. Have you witnessed in Virginia the
18 construction of steel members?

19 A. I have. Yes.

20 MR. AUFENGER: That is all I have, Your
21 Honor.

22 THE COURT: Mr. Norris.

23 CROSS-EXAMINATION

24 BY MR. NORRIS:

25 Q. Mr. Burg, you are not an engineer?

1 A. I am a safety engineer.

2 Q. Are you a civil engineer?

3 A. No, I am not.

4 Q. Are you a structural engineer?

5 A. No, I am not.

6 Q. Are you a licensed steel erection
7 contractor?

8 A. No, I am not.

9 Q. Are you a licensed contractor?

10 A. No, I am not.

11 Q. You have no personal experience in the
12 Commonwealth of Virginia erecting steel?

13 A. I personally have not erected steel.
14 That is correct.

15 Q. You are not a welder?

16 A. I am not.

17 Q. You were educated and received a degree
18 as a psychologist; is that correct?

19 A. Industrial psychologist.

20 Q. You are not a metallurgist?

21 A. No.

22 Q. You have offered no publications in the
23 field of steel erection?

24 A. That is correct.

25 Q. Now, your only exposure to steel erection

1 in Virginia was through a contractor called Horgon
2 Martone, correct?

3 A. That is correct.

4 Q. And you were acting as a safety
5 consultant, correct?

6 A. That is correct.

7 Q. And none of the work that you were
8 involved with performed by Horgon Martone involved
9 setting horizontal steel members?

10 A. That is not true.

11 Q. Do you recall giving me a deposition in
12 May of this year?

13 A. Yes.

14 Q. Do you recall whether I asked you if any
15 of the experience you had with Horgon Martone in
16 Virginia involved setting horizontal members?

17 A. I believe my answer was that I didn't
18 specifically remember watching the setting of the
19 horizontal members, but a structural steel erection
20 was ongoing at the time that I visited that job site.

21 Q. I direct your attention to Page 72 of
22 your deposition. I asked, When you observed Horgon
23 Martone doing steel erection work, did any of the work
24 involve setting horizontal steel members? You said, I
25 don't recall. It probably did.

1 A. That is right.

2 Q. Wasn't your testimony that you didn't
3 really recall?

4 A. Well, I guess the best way for me to
5 respond to that is that steel erection activities were
6 ongoing at that time. I don't specifically recall
7 whether they were erecting horizontal members at that
8 time.

9 Q. Nor can you recall whether that job
10 involved hoists, the use of hoists?

11 A. That is correct.

12 Q. Nor can you recall whether that job
13 involved tack welds or spot welds?

14 A. That is correct.

15 Q. And, in fact, the presence of a tack weld
16 on this girt that fell is not relevant to your opinion
17 one way or another, is it?

18 A. That is correct.

19 Q. And you can't name a single Virginia
20 contractor who keeps girts in hoist prior to final
21 placement, can you?

22 A. That is correct.

23 Q. And you can't dispute testimony which is
24 expected from Mr. Ed Shelton that that is not the
25 practice in Virginia, can you?

1 A. That is correct.

2 Q. And you cannot dispute Mr. Shelton's
3 opinion that it is not the practice in Virginia that
4 some other bolting is required prior to final
5 placement, can you?

6 A. I have got to respond to these questions
7 by saying that I am a safety professional. I work on
8 providing a safe and helpful workplace for steel
9 erectors, not specifically on their techniques.

10 Q. Correct. And you cannot testify,
11 therefore, what the standard practice is in either
12 Tidewater, Virginia, much less the Commonwealth of
13 Virginia, for the temporary securing of girts before
14 final placement, can you?

15 A. I can testify as to the safe work
16 practices.

17 Q. No, sir. My question is you cannot, from
18 personal experience and knowledge, testify to what the
19 standard practice in Virginia is used by steel
20 erection contractors for temporary securing of girts
21 prior to final placement?

22 A. I don't agree with that.

23 Q. Wasn't that your testimony in your
24 deposition?

25 A. Well, if you say what they do in

1 Virginia, you know, the majority of the time, would I
2 be aware of what they do in one specific location,
3 probably not. But the custom and practice for steel
4 erection is described and prescribed by OSHA and by
5 the Corps of Engineers.

6 Q. I am not asking you what is prescribed by
7 OSHA. You have told us your experience in Virginia
8 was with Horgon Martone; is that correct?

9 A. That is correct.

10 Q. And from that experience, you can't
11 recall whether any horizontal girts were placed in any
12 of those activities, wasn't that your testimony?

13 A. Well, there are horizontal girts there.
14 I didn't see them placed.

15 Q. So you cannot testify to this Court what
16 the standard practice in Virginia actually is, not
17 what it is supposed to be, but what it actually is, as
18 far as the temporary securing of girts before final
19 placement?

20 A. I don't agree with that. The standard
21 practice in the State of Virginia by law has to be the
22 same as it is in other states.

23 MR. NORRIS: He is not responding to my
24 question, Your Honor.

25 THE COURT: Well --

1 MR. SMIRCINA: He just did.

2 MR. NORRIS: No.

3 THE COURT: He has responded to your
4 question. Ask another question. You have got the
5 record here. And I know where this is going. And
6 you're arguing apples and oranges. But go ahead and
7 finish your questions.

8 BY MR. NORRIS:

9 Q. Can you name me one job in Virginia that
10 you personally observed the placement of steel girts?

11 A. No.

12 MR. NORRIS: That is all I have.

13 THE COURT: Anything, Ms. Spence?

14 MS. SPENCE: No, Your Honor.

15 THE COURT: Are we all set with the
16 record?

17 MR. SMIRCINA: Yes, ma'am.

18 MR. NORRIS: Your Honor, you have ruled
19 that the witness cannot testify to the specific OSHA
20 violations. The law in Virginia is -- and I cite the
21 Court to the case of Mann versus Clause, and I will
22 give the Court that case.

23 THE COURT: I have ruled that he cannot
24 testify, that it is not the law of this case, that
25 this is not a violation of an OSHA regulation as per

1 se.

2 MR. NORRIS: Right. Right.

3 THE COURT: And the basis for that is
4 that in Virginia, this court's ruling is it is not --
5 he is not considered an employee under what we can
6 find in Virginia and actually, believe it or not,
7 under some decisions in federal jurisdictions. There
8 is a split. So OSHA regulations may say one thing,
9 but the courts aren't necessarily in agreement with
10 that.

11 MR. NORRIS: Judge, if we don't have
12 negligence, per se, then the plaintiff is left with
13 common law negligence, which is a duty and a breach of
14 that duty. The duty in a case like this, according to
15 the Virginia Supreme Court, must be established by a
16 standard that is set in the area where the work is
17 performed. It is not a national standard. And this
18 witness is unfamiliar with the Virginia standard for
19 the placement and securing of girts.

20 THE COURT: But you are defining the
21 issue as the standard of how to put a girt in, and the
22 issue in this case is not the standard of how to put a
23 girt in and did they violate that standard. The issue
24 is what is the standard for safety in the situation.
25 One of the ways you can get to safety is by securing

1 it. Another way you can get to safety is by marking
2 it and keeping people out of it. And the issue is did
3 they take some action? Not a specific action of
4 securing a girt, did they take some action as required
5 to provide for safety in this situation?

6 MR. NORRIS: As required by what is my
7 point?

8 THE COURT: As required by OSHA is a
9 statute in Virginia.

10 MR. NORRIS: That only protects
11 employees.

12 MR. AUFENGER: Judge, if I may, this may
13 help considerably. And I am relying on 57 AmJur 2nd
14 186. It says Government or industry safety
15 standards. Safety standards promulgated by government
16 and other safety organizations such as -- and it lists
17 OSHA, American National Standards Institute, National
18 Safety Counsel, the Consumer Safety Commission, and
19 other similar bodies may constitute relevant evidence
20 in regard to the standard of care in a particular
21 case --

22 MR. NORRIS: Does it cite Virginia
23 authority?

24 MR. AUFENGER: Hold on. Provides -- it
25 goes on to say in part -- to provide a support for

1 expert testimony concerning proper standards of care.
2 Such standards are not controlling, but merits much
3 consideration as evidence of strong policies to afford
4 protection of personnel or working --

5 THE COURT: What we have is a battle of
6 experts. You are saying that that is the standard of
7 care. Your expert is saying it isn't the standard of
8 care, something else is. And we have got both sides.
9 You have made your motion. I am overruling it. We
10 are not belaboring this anymore. You have made
11 records. You have wrote briefs. I have heard it all.
12 Period.

13 Let's bring the jury in and we will
14 inquire of the witness.

15 MS. SPENCE: For the record, I join in
16 Mr. Norris's motion.

17 THE COURT: Thank you.

18 (The jury returned to the courtroom.)

19 THE COURT: All right. Who is going to
20 inquire?

21 MR. SMIRCINA: I will inquire, ma'am.

22 FRANK BURG, called as a witness on behalf
23 of the Plaintiff, having been previously duly sworn,
24 was examined and testified as follows:

25 DIRECT EXAMINATION

1 BY MR. SMIRCINA:

2 Q. Mr. Burg, I am going to sit for the time
3 being. Would you please state your name for the jury
4 and give your business address?

5 A. My name is Frank Burg. That is B-u-r-g.
6 I am at 11516 Country Club Road in Woodstock,
7 Illinois.

8 Q. What is your business or profession?

9 A. I am a safety and health consultant.

10 Q. What is a safety and health consultant?
11 What do you do?

12 A. I try to prevent injuries and fatalities
13 in the workplace. So I do inspections or audits of
14 workplaces. I also spend a considerable amount of my
15 time training. I do training in the field for
16 construction workers. And I also do training for
17 other safety and health professionals.

18 Q. What is your educational background and
19 work experience? Please enlighten the jury.

20 A. I have always wanted to be a safety man
21 or a safety professional since I was young. I have
22 done everything I could think of to become a safety
23 professional including studying industrial psychology
24 and ergonomics in college.

25 And then the first chance I had was to be

1 an inspector or a compliance officer for the State of
2 Wisconsin, where I went to school. I took a job
3 there. And then when I had an opportunity to go to
4 federal OSHA, which is Occupational Safety and Health
5 Administration, that is the part of the department of
6 labor that has the responsibility to protect
7 employees' rights, I took a job there. And I was only
8 going to stay for six months but I ended up staying
9 for almost 18 years.

10 In the course of my 18 years with OSHA, I
11 started off as a compliance officer in training and
12 worked my way up to be a journeyman compliance
13 officer. When you are a journeyman compliance
14 officer, you do mostly fatality investigations and
15 accident investigations.

16 After that, I got promoted to be the head
17 of a recognition program that OSHA has. It was called
18 the Voluntary Protection Program or the VPP program.
19 And my job was to go to construction sites and to
20 general industry and identify companies who had the
21 very best safety programs and then OSHA would give
22 them an award, you know, a compliment for doing what
23 they are doing.

24 Following that, I was -- had an
25 opportunity to become tunnel coordinator for OSHA in

1 Chicago. There had been a number of fatalities in the
2 tunnels in the Midwest, and they needed someone to
3 coordinate their safety and health efforts. And so I
4 took that job.

5 And then after being tunnel coordinator,
6 I had an opportunity to take a job at the national
7 training institute for OSHA. They were starting a
8 construction branch. And they were going to conduct
9 construction training for the inspectors and also for
10 the safety professionals around the country and around
11 the world and also for employers. And so I took a job
12 there in the construction branch of OSHA's national
13 training institute. I started off teaching the
14 tunneling course, of course, because that is where I
15 had come from.

16 And I had an opportunity to go and get
17 additional education and training. And the first one
18 I did was a concrete course after that. And then I
19 did a fall protection course and a scaffolding
20 course. And then I did a health hazard in
21 construction course. I did a steel erection course.
22 I did a cranes and rigging course. And after being
23 there for four years, I taught pretty much every
24 course that they had there, not only in construction,
25 but also in general industry, when I had an

1 opportunity.

2 One day while I was teaching a class for
3 the private sector safety professionals that come to
4 the institute for training, at the end of the class, a
5 gentleman from the back came up and told me he was
6 going to hire me. And I, after almost 18 years with
7 the government, wasn't ready to leave the government,
8 but he made me an offer I couldn't refuse. He gave me
9 way more money than I was making and also gave me the
10 opportunity to be responsible for a large construction
11 company called Fishback & Moore. At that time, they
12 were the largest electrical subcontractor in the
13 country. And they were also a general contractor on a
14 couple of projects.

15 I was responsible for 320 job sites
16 around the country. And that was a big
17 responsibility, because they had no safety program or
18 safety director or safety budget. And it turned out
19 that the company was pretty well broke because it had
20 been involved in a leverage buy out and most --

21 MR. NORRIS: Your Honor, I hate to
22 interrupt this fascinating saga, but can we get to the
23 witness's qualifications?

24 THE COURT: We appreciate it, Mr. Burg,
25 but let's -- Counsel, want to ask him some specific

1 questions?

2 MR. SMIRCINA: Sure.

3 BY MR. SMIRCINA:

4 Q. Have you conducted safety training audits
5 of clients here in Virginia?

6 A. I have.

7 Q. And have you conducted safety training
8 for businesses which perform the erection of steel?

9 A. I do. Yes.

10 Q. How often do you do it?

11 A. I would say every month, maybe twice a
12 month.

13 Q. Have you ever conducted safety training
14 for general contractors?

15 A. I do that on a regular basis.

16 Q. And in your occupation, are you involved
17 with the training of other individuals in your
18 occupation concerning construction site safety rules
19 and regulations?

20 A. Yes. I teach the instructor's course for
21 construction in many locations, including the OSHA
22 national training institute, national safety counsel,
23 associated general contractors, and what they call
24 educational resource centers, which are mostly
25 universities, trade associations, and unions that have

1 the authority to teach the instructor's course.

2 Q. What types of information did you review
3 and rely upon in forming your opinions concerning this
4 matter?

5 A. Well, all of the depositions, the
6 testimony that was provided to me, the complaint.
7 There was a big stack of material that I reviewed.

8 Q. Are you the chairman of any safety
9 committees?

10 A. Yes. I am the chairman of ANSI. That is
11 the American National Standards Institute. And I am
12 the chairman of what they call A10.28. And that is
13 the standard where work platforms are suspended from
14 cranes and derricks. And I -- on my committee, we
15 spend several years reviewing and revising that
16 standard. And about a year and a half ago, our
17 revised standard was published and accepted by ANSI.

18 Q. What is your business now in general?
19 Describe what you do with your time, your business
20 time.

21 A. Well, more than 50 percent of my time is
22 spent either doing audits or conducting training.
23 Training is a large portion of my business. Up to 50
24 percent has now been involved in expert testimony.

25 Q. And were you hired by me and my firm in

1 this case?

2 A. Yes.

3 Q. And what were you hired to do, what
4 exactly?

5 A. Well, to review all of the materials and
6 render opinions about whether there were safety and
7 health violations that caused this unfortunate
8 accident.

9 Q. Do you testify only for plaintiffs?

10 A. No. I intentionally don't do that. I
11 had some advice from people who had preceded me in the
12 safety and health profession --

13 MR. NORRIS: Objection, Your Honor.

14 BY MR. SMIRCINA:

15 Q. Do you just testify for plaintiffs?

16 A. No. I keep it 50/50.

17 Q. Between plaintiffs and defendants?

18 A. Yes, sir.

19 Q. In the process of doing your work, did
20 you form any opinions concerning the actions of either
21 or both the general contractor, Meredith, and the
22 steel erection subcontractor in this case?

23 A. Yes.

24 Q. Will the opinions you express today be
25 rendered to a reasonable degree of certainty in your

1 field of expertise?

2 A. Yes.

3 MR. SMIRCINA: I tender him as an expert
4 in the field of workplace safety.

5 THE COURT: Did you wish to question?

6 MR. NORRIS: Well, Your Honor, subject to
7 the objections made out of the hearing of the jury, I
8 defer at this time.

9 THE COURT: Okay. Ms. Spence, did you
10 want to ask anything?

11 MS. SPENCE: I would like to reserve
12 questions for cross-examination.

13 THE COURT: All right. He is qualified
14 as a health and safety specialist.

15 BY MR. SMIRCINA:

16 Q. Health and workplace safety specialist;
17 would that be accurate, Mr. Burg?

18 A. Yes.

19 Q. Thank you. Mr. Burg, there are minimum
20 safety standards -- construction site safety which you
21 relied upon in forming your opinions?

22 A. Yes, there are.

23 Q. What are those standards and where are
24 they expressed?

25 MR. NORRIS: Your Honor, I will try and

1 limit these objections, but I object because they are
2 not limited to the Commonwealth of Virginia.

3 MR. SMIRCINA: I am going to get to that.

4 THE COURT: Overruled. Everybody needs
5 to do what they need to do. Go ahead.

6 THE WITNESS: Well, the law comes from
7 OSHA. It is promulgated by congress. It is the law
8 of the land. And basically what it says in the act --
9 the OSHA Act is that --

10 MR. NORRIS: Your Honor, I am going to
11 object to references to OSHA for the reason that the
12 plaintiff is not an employee protected by OSHA.

13 THE COURT: Thank you. Overruled.

14 MR. SMIRCINA: I --

15 THE COURT: I understand that but --

16 MR. SMIRCINA: All I want to do is move
17 the examination along. We can agree for the record
18 that he wants to object to anything he says about
19 OSHA. I will allow the objection to stand so that the
20 examination can go on. That is what I would like to
21 do. If he does not want to do that, he can keep
22 hopping up and down.

23 MR. NORRIS: That is fine.

24 MS. SPENCE: May I also reserve the
25 same?

1 MR. SMIRCINA: Of course, Ms. Spence.

2 MS. SPENCE: Thank you, sir.

3 BY MS. SPENCE:

4 Q. What are those -- what is OSHA?

5 A. In the OSHA Act, it says that if you work
6 as an employee for someone -- if you have -- if there
7 is an employee or employee relationship of some
8 kind -- and it is very broad under the OSHA Act what
9 that relationship is -- you can get a bump or a
10 scratch but there is two things you are not allowed to
11 have, death or a serious physical harm. The law says
12 these words, that the workplace has to be free from
13 recognized hazards which could cause death or a
14 serious physical harm.

15 Q. Are those standards applicable to the
16 State of Virginia?

17 A. There is no question about that.

18 Q. Is that applicable to a construction site
19 such as the one at Dam Neck Naval Base where Michael
20 Shepherd was injured?

21 A. No question about that.

22 Q. Do you have an opinion as to whether the
23 minimum safety standards in Virginia applicable to
24 steel erection was violated by the general contractor,
25 Meredith, in this case?

1 A. Yes.

2 Q. What is that opinion and why do you hold
3 it?

4 A. Well, Meredith violated the safety
5 requirements of OSHA and Corps of Engineers and
6 national safety consult and associated general
7 contractors and the State of West Virginia because
8 they are the general contractor, they are responsible
9 to coordinate all and examine all of the work
10 activities on the job site for safety. They are the
11 only party that is in a position to make sure that the
12 staging, the coordination, that the safety rules are
13 implemented, communicated, and enforced -- and
14 monitored and enforced at the job site. There is no
15 one else that can do that.

16 And construction is very complex. You
17 have the interaction of all of these various parties
18 and their activities. If you don't have them
19 coordinated, you will have accidents. So they have
20 specific indelible responsibilities to make sure that
21 there is the safety program, that there are safety
22 rules, and that things don't happen such as happened
23 in this case.

24 I like to describe it -- it is like a
25 symphony. You have string instruments. You have wind

1 instruments. You have all different -- maybe you
2 have, you know, violins and oboes, whatever. But
3 there must be a conductor to make sure that they play
4 in harmony; otherwise, you won't have beautiful
5 music.

6 Well, it is not any different in the
7 construction business. You have got the carpenters
8 and you have got plumbers and you have got
9 electricians. You have people delivering materials.
10 You have people moving heavy equipment. If you don't
11 have someone orchestrating the safety program, then
12 you have unfortunate accidents like happened in this
13 case. And they can be avoided.

14 Q. Do you have an opinion as to what, if
15 anything, was required to a general contractor
16 following generally accepted minimal standards in the
17 field of steel erection safety as relates to the
18 installation of a steel girt, which injured Michael
19 Shepherd in this case? What should they have done?

20 A. Well, they are supposed to have a safety
21 program. And as a part of that program, they are
22 supposed to have specific work rules. And part of
23 those work rules are requirements to analyze for
24 hazards before accidents happen. That is very
25 elementary in the safety concept -- in the safety

1 program concept. It is too late when something
2 happens. You have to look and examine the job task
3 and determine what could happen and then act to
4 prevent it from happening. And that didn't happen
5 here.

6 Q. What does the term safety hazard analysis
7 mean to you? Is that what you're speaking of?

8 A. Yeah. They call it job safety analysis
9 or hazard analysis. The Corps of Engineers calls it
10 an activity analysis. But it all really is the same
11 thing. It says, take what you are going to be doing,
12 break it down into the work activities in the
13 left-hand column, in the center column, put down what
14 could happen, what danger is there in doing this
15 activity, and then in the third column, well, what are
16 you going to do to prevent an accident from happening?
17 So it is a very simple process that can be done. And
18 I believe had it been done in this case, we wouldn't
19 be here.

20 Q. Who is required to perform this analysis?

21 A. Well, the general contractor either has
22 to do it or see that it is done. There is nothing
23 that says he or she actually has to do it. But they
24 have to make sure it is done. So they could delegate
25 that to the subcontractor. But if it isn't there,

1 then the general contractor can be held accountable
2 for it for not being done.

3 Q. In your opinion, was an activity hazard
4 analysis, based on your review of the materials and so
5 forth in this case, was it performed in this case?

6 A. I don't believe so. No, sir.

7 Q. Do you have an opinion -- do you have an
8 opinion as to whether the minimal safety standards
9 applicable to Virginia in this construction site were
10 violated by the steel erection people in this case,
11 Atlantic Welding and Fabricating?

12 A. Yes, I do.

13 Q. What is that opinion and why do you hold
14 it?

15 A. I believe they violated OSHA, also. And
16 the reason I say that is they created this hazard.
17 They were the ones closest to this girt. And they
18 were the ones that were in a position to either secure
19 the girt or keep people away from it, one of those
20 two. Either of those two would have prevented this
21 accident from happening. And they failed to do that.

22 Q. Does Atlantic Welding and Fabricating
23 have any obligation to perform an activity hazard or a
24 job safety hazard analysis?

25 A. Yes.

1 Q. Would the minimum safety standards say
2 that the steel girt should have been secured
3 immediately upon placement on the brackets?

4 A. Well, I --

5 MR. NORRIS: I am sorry. I did not hear
6 the question. I am sorry.

7 BY MR. SMIRCINA:

8 Q. Would the minimum safety standards
9 applicable to this construction site that you have
10 discussed, would it require that the steel beam be
11 secured immediately upon its placement upon a bracket
12 like this?

13 A. If there was potential exposure to
14 employees at the lower level, absolutely.

15 Q. If there -- what else could they have
16 done --

17 A. Cordoned off the area.

18 Q. -- to be in compliance with the safety
19 standards?

20 A. They could have cordoned off the area to
21 make sure no employees could be in the area.

22 Q. Do they have any duty, the general
23 contractor, concerning a piece of unsecured steel left
24 on its brackets?

25 A. Absolutely.

1 Q. In your opinion, based on the minimum
2 safety standard applicable to this construction site,
3 did the steel erector subcontractor, Atlantic Welding
4 and Fabricating, have any obligation for safety on
5 this construction site other than following the
6 contract plans and specifications?

7 A. Oh, yes, they did. Certainly they did.
8 They are moving these large structural steel members
9 that could -- if they get loose while under rigging or
10 under load or not secured, can cause severe danger to
11 other employees on the job site. So they have a very
12 important responsibility.

13 Q. You have talked about the fact that they
14 created a hazard on this job site by leaving the beam
15 on the brackets unsecured. Have they done anything
16 else that would violate the minimum safety standards
17 applicable to this construction site in so doing?

18 A. I didn't really understand that question.

19 Q. In addition to creating the hazard by
20 leaving the beam on the girt -- the girt on the
21 brackets, rather, what else are they doing by leaving
22 the girt on the brackets?

23 A. They are exposing employees to an
24 overhead hazard and they also have a responsibility as
25 a correcting employer to make sure that if there is a

1 hazard that it get corrected in some way so it doesn't
2 cause injury or death.

3 Q. Well, it would seem that the general
4 contractor might not have known that -- whether this
5 girt was secured or unsecured. Is that a violation of
6 minimum accepted safety practices in Virginia?

7 A. Well, they are responsible -- the general
8 contractor is responsible in any case. They either
9 have to entrust that responsibility to the
10 subcontractor or if they don't fully trust their
11 subcontractor, then they have to do monitoring
12 themselves to make sure that the specific work rules
13 are followed.

14 Q. Do they also have a responsibility as you
15 have said that the construction site is like a
16 conductor conducting a symphony, would that include
17 coordinating when material and so forth was delivered
18 and placed on the job site?

19 A. They are the only party that is in a
20 position to coordinate and stage the job site.

21 MR. SMIRCINA: One moment, Your Honor.

22 BY MR. SMIRCINA:

23 Q. Now, you have said that the unsecured
24 steel beam on the brackets was an unreasonable risk
25 and a hazard on this job site; is that correct?

1 A. That is correct.

2 Q. What is the risk of leaving it up there
3 unsecured?

4 A. Well, it could be knocked down.

5 Q. All right. And who is responsible to
6 make sure that it is not knocked down or to make sure
7 that nobody can come near it?

8 A. Both the welding contractor and the
9 general contractor.

10 Q. In your opinion, based on your review of
11 the evidence, was the area where this accident
12 happened cordoned off or placed off limits?

13 A. No, it was not.

14 Q. In your opinion based on your review of
15 the records, was Michael Shepherd ever warned that
16 this girt was unsecured on its brackets?

17 A. No, he was not.

18 Q. In your opinion, did the general
19 contractor's representative on the site, Robert
20 Bosley, know whether this girt was unsecured on this
21 job site at the time of the injury?

22 A. Well, he either knew or should have known
23 that it was not secured. It is his responsibility.

24 Q. Why is it that the job hazard analysis
25 might have prevented this accident?

1 A. Well, I think it would have prevented the
2 accident because this is -- this hazard is so
3 recognizable, so well known in construction that it
4 would, at least from my point of view, be impossible
5 to miss it if you analyze the work there. If you did
6 any kind of even a basic analysis of the work activity
7 there the first thing you would think of is are there
8 unsecured members that could fall to the lower level.
9 I can't imagine that being missed.

10 MR. SMIRCINA: May I approach the bench,
11 Your Honor?

12 THE COURT: Uh-huh.

13 BY MR. SMIRCINA:

14 Q. I am holding in my hand Plaintiff's
15 Exhibit Number 23. It has been admitted into
16 evidence. I will represent to you that it has been
17 identified as a preparatory inspection meeting between
18 W. B. Meredith and the steel erector subcontractor
19 Atlantic Welding and Fabricating in this case. Would
20 you please read what is in the middle of the page
21 under the place -- under the section work methods?

22 A. Went over safety requirements.

23 Q. In any way, shape, or form does that
24 constitute the job hazard analysis you have described
25 here today?

1 A. No. That is not even close.

2 Q. And that is the same job hazard analysis
3 that the general contractor is required to see is
4 performed?

5 A. I am sorry?

6 Q. That is the job hazard analysis that you
7 are -- that the general contractor through its
8 representative is required to have done?

9 A. That does not meet the requirements of
10 the required job hazard analysis or the activity
11 analysis by any means.

12 MR. SMIRCINA: I have nothing further,
13 Your Honor.

14 THE COURT: Cross-examination.

15 CROSS-EXAMINATION

16 BY MR. NORRIS:

17 Q. Mr. Burg, you went to school and got a
18 degree as a psychologist?

19 A. Industrial psychologist. That is
20 correct.

21 Q. That was your second degree. Your first
22 degree was in psychology, wasn't it?

23 A. It was in general psychology but with an
24 emphasis on industrial psychology.

25 Q. And then you got a second degree in

1 industrial psychology. What is industrial psychology?

2 A. Well, in my case, it was something called
3 ergonomics.

4 Q. What is ergonomics?

5 A. It is a Greek word. It means work laws,
6 the laws of work. And it is about how employees
7 interact with their work environments and how we can
8 make the work environment accommodate the employee
9 rather than the reverse, the employee having to
10 accommodate the work.

11 Q. Isn't ergonomics supposed to make the
12 work environment more efficient, which proves the
13 business to be productive and profitable?

14 A. It is apparently to make the area more
15 helpful.

16 Q. Now, you never obtained a degree in civil
17 engineering, did you?

18 A. No.

19 Q. So you're not a civil engineer?

20 A. That is correct.

21 Q. And you never obtained a degree in
22 structural engineering?

23 A. That is correct.

24 Q. So you're not a structural engineer?

25 A. That is correct.

1 Q. And you're not a licensed contractor in
2 any state in the nation, are you?

3 A. I am not a contractor.

4 Q. You're certainly not a steel erection
5 contractor, correct?

6 A. I am not a steel erection contractor.

7 Q. You're not a welder?

8 A. I am not a welder.

9 Q. And you're not a metallurgist?

10 A. That is correct.

11 Q. And you have never published any
12 treatises or books or articles on steel erection, have
13 you?

14 A. Well, I have written articles about
15 safety on steel erection.

16 Q. Have you published any books or articles
17 on the proper methods and manners of steel erection?

18 A. I have written articles on the proper
19 safety procedures to be used in steel erection.

20 Q. Did you have a CV, a curriculum vitae?

21 A. I do.

22 Q. And you provided it to us, didn't you?

23 A. Yes, sir.

24 Q. You certainly weren't bashful when you
25 were putting it together, were you? It is one, two,

1 three, four, five, six pages long, correct?

2 A. That looks like my CV.

3 Q. Does it have publications on it listed
4 included?

5 A. Yes.

6 Q. Which of your publications deals with the
7 methods -- proper method of steel erection of the two
8 that you have mentioned?

9 A. Well, this first publication.

10 Q. What is the title?

11 A. It is called -- it is for Professional
12 Safety Magazine, and it is Safety Management, An
13 Approach for the '90s. And that particular article
14 was oriented towards the safety program and all
15 aspects of it. And those ideas that are in that
16 article would apply fully to steel erection.

17 Q. Are you telling this jury that when you
18 wrote this article, Safety Management, An Approach for
19 the '90s, in July of 1991, you dealt with the proper
20 method to secure beams?

21 A. No. I dealt with the job hazard analysis
22 and the activity analysis and how it could be used to
23 make sure that there weren't hazards while beams were
24 being secured.

25 Q. So you're telling us that your article

1 dealt specifically with steel erection?

2 A. Well, no. It more specifically dealt
3 with safety in the industry as a whole, in the
4 construction industry, and in general industry as a
5 whole.

6 Q. Are you telling us that this article made
7 specific mention of steel erection work?

8 A. I don't recall whether it did or not.

9 Q. How about your other article, Managing
10 Workers' Compensation, Human Resources Guide to
11 Controlling Costs, did that deal with steel erection
12 work?

13 A. No, it did not.

14 Q. Did you attempt to list all of your
15 significant publications on your curriculum --
16 six-page curriculum vitae?

17 A. Well, one thing that isn't on there is
18 that I write an article for the Associated General
19 Contractors magazine. And periodically they call me
20 up and ask me to write on specific subjects. And I
21 have written on many subjects for them. And I don't
22 recall specifically whether one of them was steel
23 erection or not, but it wouldn't surprise me if it
24 was.

25 Q. Now, Mr. Burg, you have no hands-on,

1 practical, firsthand experience in the State of
2 Virginia with the proper method of erecting a
3 horizontal steel girt; isn't that so?

4 A. That is not true.

5 Q. Well, do you remember giving a deposition
6 to me in this case?

7 A. I do. Yes.

8 Q. Do you remember me asking you if you have
9 any specific recollection of any job in Virginia that
10 you served as a safety consultant for that dealt with
11 steel girts?

12 A. Well, I --

13 Q. Do you remember me asking about that?

14 A. I recall saying that I did not
15 specifically in the State of Virginia see the
16 placement of a horizontal member; however, I did
17 evaluate steel erection for my client. Horizontal
18 members were there at the time of my review.

19 Q. So isn't your answer you can't tell this
20 jury today of any firsthand experience you had telling
21 a contractor how to set and place and secure a
22 horizontal steel girt?

23 A. I do that for a living every day.

24 Q. Are you saying you do have a recollection
25 of doing that in Virginia with a specific contractor?

1 A. No. Specifically I did not do that one
2 thing that you said in the State of Virginia. You are
3 correct.

4 Q. Now, how much money did you make last
5 year, Mr. Burg?

6 A. Around \$200,000.

7 Q. And 50 percent of that was from
8 testifying in court cases?

9 A. That is correct.

10 Q. So your livelihood is dependent upon
11 coming into court and being a witness?

12 A. Part of my livelihood is, yes.

13 Q. Now, you have told us about all of the
14 stacks of documents that you reviewed to get ready for
15 this case. Did you review the plans and
16 specifications for the job?

17 A. No.

18 Q. Didn't bother to see what the architects
19 and engineers were required as far as the placement of
20 steel?

21 A. It wasn't relevant to my opinions.

22 Q. And you have performed no mathematical
23 calculations in relation to this case, correct?

24 A. That is correct.

25 Q. You have performed no calculations

1 involving stress force or weight for this case,
2 correct?

3 A. That is correct.

4 Q. As a matter of fact, you are unable to
5 tell this jury how much force was excerpted by the
6 boom against this particular girt on the day of this
7 accident, correct?

8 A. That is correct.

9 Q. And you are unable to say what weld, if
10 any, would have been able to resist the impact between
11 the boom and the girt?

12 A. That is correct.

13 Q. In fact, whether or not there was a weld
14 on this beam is totally irrelevant to your opinion,
15 isn't it?

16 A. That is correct.

17 Q. I think you told us that OSHA
18 acknowledges that somebody is going to get a bump or a
19 bruise on a job but it draws the line, I wrote down,
20 at death or serious physical harm; is that correct?

21 A. That is correct.

22 Q. So you're saying that on any job where
23 someone sustains an injury with serious physical harm
24 absolutely necessarily there has been an OSHA
25 violation?

1 A. No. I didn't say that.

2 Q. Okay. So there are situations when
3 somebody can be seriously hurt without an OSHA
4 violation, correct?

5 A. Employee misconduct, act of God. Aside
6 from that, there is an OSHA violation.

7 Q. And I think you said that at the
8 beginning of the job, the contractor should sit down
9 with his subcontractors with a piece of paper in front
10 of them, something that looks like this?

11 A. Right.

12 Q. What is that?

13 A. That is an activity hazard analysis from
14 the Corps of Engineers.

15 Q. And the contractor sits down with his sub
16 and they fill out this piece of paper and they will
17 prevent every single serious injury that can happen on
18 the job except an act of God or employee misconduct,
19 correct?

20 A. Well, I can't say that that would prevent
21 every single accident on the job, but it would
22 certainly prevent most of them.

23 Q. So you can't say that if they had filled
24 out this form, it would have prevented this accident?

25 A. In this case, this unsecured member is so

1 obviously a violation of safety requirements that I
2 don't believe it could be missed. And, in addition,
3 the contract required that this be done and it wasn't
4 done.

5 Q. Were you aware that my client didn't have
6 a contract on this job? Did you -- in that big stack
7 of papers that you reviewed to get ready for your
8 testimony in this case, did you see a contract signed
9 by Atlantic Welding?

10 A. I was referring to Meredith when I said
11 the contract required that. And I presume that
12 Meredith would then require the same provisions from
13 their subcontractor.

14 Q. Who was their subcontractor for steel
15 erection work?

16 A. I don't recall.

17 Q. You don't recall?

18 A. No. I don't recall the name of it.

19 Q. Was it Atlantic Welding and Fabricating?

20 A. I believe that is right.

21 Q. That is what you learned from your review
22 of all the documents that my client had a contract
23 with Meredith?

24 MR. AUFENGER: He didn't say that,
25 Judge. It was a mistaken --

1 MR. NORRIS: I am asking --

2 THE WITNESS: I just know they were a
3 subcontractor.

4 BY MR. NORRIS:

5 Q. To whom? To whom, sir?

6 A. I don't recall.

7 Q. You don't know, do you?

8 A. I just don't recall. I don't know, I
9 guess that is right.

10 Q. Now, how long would it take them to fill
11 out this activity hazard analysis?

12 A. Just a few minutes.

13 Q. A few minutes?

14 A. Yes.

15 Q. And what they would do is they would talk
16 about the dangers of the job and they would write them
17 down on that piece of paper?

18 A. They would analyze the potential dangers
19 for the job.

20 Q. I want you to pretend you're the W. B.
21 Meredith safety inspector and I want you to take a few
22 minutes, if the Court will allow me, and I want you to
23 write down what these men would have written down
24 using your hindsight today. Now, you have the benefit
25 of 20/20 hindsight. Tell us what dangers they would

1 have written down in those couple of minutes that
2 would have prevented all of these accidents from
3 happening. Can you do that for me, sir?

4 A. Well, basically it is we are going to
5 place this girt on this clip. We must either secure
6 it to make sure that it won't fall to the lower level
7 or we will have to cordon off the area and make sure
8 that no employees can be under it.

9 Q. That is two things. What else would you
10 write down on your activity hazard analysis?

11 A. That would be it.

12 Q. That would be it. Well, didn't you know
13 that my client wasn't just erecting girts, it was
14 erecting columns and beams and joints and trusses --

15 A. Well, if you were --

16 Q. -- and roof bracings? Did you -- were
17 you aware of that?

18 A. There would be a different activity
19 analysis for each one of those jobs. If they are
20 using tools and a part of the tool could fall to the
21 lower level, we would have to secure the tool, put a
22 wire around it, make sure each different task is
23 analyzed on its own.

24 Q. So on your piece of paper, if the worker
25 was carrying say a tool, you would write on your piece

1 of paper that this tool had to have a wire around it
2 and what, attached to the worker's belt?

3 A. It would have to be secured in some
4 manner so it didn't fall to the lower level because it
5 could maim or kill someone.

6 Q. So for the sheet of paper that dealt with
7 the girt, you would write down there that it had to be
8 secured when in place -- when placed?

9 A. Right.

10 Q. And the other one was the area would be
11 cordoned off?

12 A. Or.

13 Q. Or cordoned off. And those are the two
14 things you would put on your hazard analysis?

15 A. Yes.

16 Q. What if when the girt was being lifted by
17 a hoist to be set on the girt, the hoist broke because
18 it wasn't properly inspected beforehand?

19 A. Well, you're quite right. If you --

20 Q. But, sir -- but, sir, you didn't write on
21 your activity hazard analysis inspect hoist being used
22 to lift girts. So your activity hazard analysis
23 wouldn't have prevented that accident, would it?

24 A. You know what you are saying doesn't make
25 any sense to me because if you want to tell me --

1 Q. Well, it makes sense to the jury.

2 A. -- in your original example we are going
3 to use a hoist to lift this girt, then, of course, we
4 would analyze the hoist for possible failure.
5 Whatever you want to put in your hypothetical would be
6 a part of the activity analysis.

7 If you want to use a scissors lift, well,
8 then we might back the scissors lift into someone so
9 we want to make sure that the area around the scissors
10 lift is clear. If you are going to use a crane to
11 lift the girt, well, now, the swing radius or the
12 counterweight turn could crush someone between an
13 inanimate object and a counterweight. So we have --
14 the law says barricade the wing radius of the crane.
15 It depends on the example that you gave me what the
16 activity analysis would be.

17 Q. It sounds like you need a crane just to
18 lift the paperwork to file it away. Let me ask you
19 this: You talked about the beam should be secured.
20 You have no opinion -- you are unable to tell us what
21 amount of securing would have prevented this accident,
22 correct?

23 A. Well, it must be secured for anticipated
24 contact.

25 Q. But you are unable to tell us from some

1 calculations you have performed what amount of
2 securing would have prevented this accident?

3 A. You would have to have an engineer
4 determine that. And that is what I would do. I would
5 have an engineer determine that.

6 Q. And that has not been done, has it?

7 A. Well, it wasn't done by your client or
8 Meredith.

9 Q. It hasn't been done by you, has it?

10 A. Well, it is not me that needs to do it.

11 Q. Sir?

12 A. It is your client or Meredith --

13 Q. Has it been done by you?

14 A. -- to make sure it doesn't fall off and
15 hit anyone.

16 Q. Sir, yes or no, you haven't done it, have
17 you?

18 A. I wouldn't be qualified to do it.

19 Q. Now, the other thing you suggested was
20 the area should be cordoned off. Now, were you aware
21 that many of these girls had been set prior to the
22 date of this accident?

23 A. Yes.

24 Q. Would you assume that a representative of
25 the general contractor was on the job site daily and

1 was aware of this procedure?

2 A. There is testimony that there was a
3 representative there on occasion.

4 Q. And did you review what you call safety
5 hazard analysis reports, which were daily reports
6 issued by the general contractor, about the review of
7 work?

8 A. Yes.

9 Q. Would you agree with me that none of
10 those reports called into question the manner in which
11 these members were being set in place?

12 A. Yes.

13 Q. Would it be a fair assumption, then, that
14 if the contractor needed to know to cordon off an
15 area, he would have done it prior to this day on one
16 of those many other examples when a girt was placed?

17 A. Well, like I said, it is two choices,
18 either secure the member or cordon off the area.

19 Q. Were you aware that at any time during
20 the course of construction of the problem this
21 erector -- had Atlantic Welding been asked to cordon
22 off any area?

23 A. As I understand it, Atlantic Welding
24 knows where they are working and that they would have
25 been responsible for determining whether their girt

1 was either secured or the area was cordoned off;
2 otherwise, this same accident would happen again and
3 again.

4 Q. Mr. Burg, I know full well you don't want
5 to answer my questions but I am going to ask you to do
6 it anyway and then maybe these gentlemen will get up
7 and let you conduct the symphony some more.

8 MR. AUFENGER: Judge, I am going to
9 object.

10 THE WITNESS: I will be happy to answer
11 your questions.

12 THE COURT: Mr. Norris, ask your
13 questions, and just answer the question.

14 THE WITNESS: I will answer the
15 question. I am sorry.

16 BY MR. NORRIS:

17 Q. Are you aware that at no time prior to
18 this accident had any area of the project ever been
19 cordoned off for steel erection work?

20 A. As far as I know, it had not been
21 cordoned off.

22 Q. And are you -- do you agree that my
23 client had never been requested to cordon off an area?

24 A. As far as I know, that is true.

25 Q. Now, would you agree with me -- let's

1 assume for a minute that this beam was sitting on the
2 brackets totally unsecured. Would you agree with me
3 that Atlantic should be notified if off-loading is
4 going to take place in the area of this work? If that
5 fact is known to whoever is controlling the project
6 site, wouldn't you agree that they should be advised
7 of that fact?

8 A. Well, I would say that Meredith is
9 responsible for coordinating those activities because
10 that is the interaction of two different
11 subcontractors. So I guess the simple answer would be
12 yes.

13 Q. Thank you, sir. So that if we are
14 unaware on this particular date of this particular
15 off-loading activity, we can't really react to it, can
16 we?

17 A. That is true.

18 Q. Now, you are a safety expert. Does your
19 expertise include safe operation of cranes and booms?

20 A. I teach that.

21 Q. Do you teach what spotters for cranes and
22 booms are supposed to do?

23 A. Yes.

24 Q. What is the spotter for a crane supposed
25 to do for the operator of the crane?

1 A. He or she can be the eyes of the crane
2 operator.

3 Q. Isn't the spotter supposed to prevent a
4 collision between the crane and any objects around it
5 including the building structure?

6 A. Yes.

7 Q. So shouldn't the spotter be keeping an
8 eye on the location of the boom in relation to
9 structures around it?

10 A. Yes.

11 Q. Would it be safe practice for a spotter
12 to be talking to people while an off-loading operation
13 is ongoing and not looking at the boom and its
14 relation to the structure?

15 A. That would not be a good practice.

16 Q. And would you agree that the boom
17 operator should make sure before he off-loads material
18 that he can do it safely?

19 A. Well, he can't see in many cases what is
20 safe or not. He is relying on the spotter.

21 Q. Are you telling me before a boom operator
22 is going to lift over 3,000 pounds of material and fit
23 it into an area where he has by some accounts as
24 little as three or four inches of clearance, that he
25 has no obligation to ask any questions, make any

1 independent investigation of whether it is safe to do
2 it?

3 A. Well, I am not saying that. But he or
4 she --

5 Q. Are you saying he should do that?

6 A. Well, certainly he or she should ask
7 questions and make sure that there has been, you know,
8 a careful determination about the location of the
9 placement of the materials. But after that, he relies
10 or she completely on the spotter as to how to place
11 that load at the desired location.

12 Q. Now, the boom operator shouldn't hit
13 anything when he off-loads his material, should he?

14 A. No.

15 Q. And he shouldn't hit anything when he is
16 retracting his boom after off-loading, should he?

17 A. It should be avoided.

18 Q. And don't you think it should be a safe
19 practice to have at least a foot of clearance for an
20 operation like that?

21 A. I would like to see as much clearance as
22 possible.

23 Q. Did you tell me in your deposition that
24 you would like to see a foot of clearance?

25 A. Yes.

1 MR. NORRIS: May I have a moment, Your
2 Honor?

3 THE COURT: Yes.

4 BY MR. NORRIS:

5 Q. Mr. Burg, Wenger Tile was a subcontractor
6 on the job. Were you aware of that?

7 A. Yes.

8 Q. They were the contractor that was
9 receiving the material being delivered by the
10 plaintiff?

11 A. I recall that now.

12 Q. Does Wenger Tile have an obligation to
13 fill out an activity hazard analysis?

14 A. They could have.

15 Q. Could have or do have?

16 A. As I said before, it is up to the general
17 contractor or either do it themselves or make sure it
18 is done by one they can entrust that responsibility
19 to, the various subcontractors. But in the event that
20 it isn't done, the general contractor gets to be held
21 responsible.

22 Q. Does Wenger Tile have any obligation to
23 the plaintiff to tell him of any potential hazards in
24 the area where there is off-loading?

25 A. They could.

1 Q. Were you aware that Wenger Tile had been
2 working on this job for a long time while steel
3 erection procedures were ongoing?

4 A. Yes.

5 MR. NORRIS: That is all I have, Your
6 Honor.

7 THE COURT: Ms. Spence.

8 MS. SPENCE: Just very briefly.

9 BY MS. SPENCE:

10 Q. Good afternoon, sir.

11 A. Good afternoon.

12 Q. You weren't present at the meeting on
13 August 12, 1996, when they had their preparatory
14 meeting, were you?

15 A. No.

16 Q. So you have no way to dispute that they
17 discussed the procedures, risks, and how to prevent
18 them?

19 A. That is correct.

20 Q. Your problem is that they didn't write it
21 down?

22 A. Well, I -- my problem is bigger than
23 that. If they had done it, I believe this wouldn't
24 have happened.

25 Q. So talking about it wouldn't have

1 prevented it but writing it down would?

2 A. Well, I don't know if they did it at
3 all. I do not believe they would have missed this
4 hazard either verbally or written.

5 Q. You're not saying that accidents don't
6 happen when accident hazard analyses have been written
7 down, are you?

8 A. They are far less likely to happen in my
9 view.

10 Q. But they still happen?

11 A. They do happen.

12 Q. Now, you have indicated that you have
13 always wanted to be a safety person?

14 A. That is correct.

15 Q. The safety of workers is very important
16 to you?

17 A. Yes, it is.

18 Q. Pretty much the safety of the common man?

19 A. That is correct.

20 Q. And a lot of your work deals with
21 focusing on what you think the safety rules should be
22 rather than what they are?

23 A. Well, I would like to answer that the
24 best way I can say that is that safety rules today are
25 what they call performance standards. And what they

1 say is these are the rules we want, not -- they don't
2 say specifically what you have to do to achieve those
3 results.

4 And all safety standards today are very
5 similar to OSHA's general duty clause that says, okay,
6 you're a steel erector, okay, you're a general
7 contractor, you build what you have to build but your
8 responsibility is you build it and you make sure that
9 nobody gets death or serious physical harm. So I
10 think that the rules we have if you look at OSHA or if
11 you look at the Corps of Engineers, associated general
12 contractor safety counsel are adequate and that they
13 represent what you described as my feelings.

14 Q. A lot of your work deals with focusing on
15 what safety rules should be?

16 A. I just don't agree with that. I am
17 sorry.

18 Q. Okay. You recall giving your deposition
19 just a couple of months ago?

20 A. Yes.

21 MS. SPENCE: Permission to approach, Your
22 Honor?

23 BY MS. SPENCE:

24 Q. I am looking at Page 93 starting at Line
25 8. Question: So a lot of your work deals with

1 focusing on what safety rules should be --

2 Answer: I agree.

3 Question: -- not just on what they are?

4 Answer: All safety rules are minimum
5 requirements and employees are expected to go beyond
6 them.

7 Was that your testimony?

8 A. Yes.

9 Q. How big is the OSHA code of regulations?

10 A. It is pretty big.

11 Q. A lot of dos and don'ts?

12 A. Yes.

13 Q. And the only one that you're coming in
14 here today saying that my client, Mr. Bosley, and W.
15 B. Meredith violated was the duty to keep the
16 workplace free of any hazards that caused injury?

17 A. No. I also cited 192616, which
18 specifically says that the prime contractor has an
19 indelible responsibility for safety. I also cited
20 192621B 1 and 2, which requires that there actually be
21 an implemented safety program and that the competent
22 persons inspect the job sites, equipment, and material
23 on a regular basis. And as far as my opinion is, as
24 you well know, is that Meredith failed to do those
25 things and had they done those things, we wouldn't be

1 here.

2 Q. You're not aware of their safety program?

3 A. I can only tell you that their safety
4 program wasn't adequate enough to protect
5 Mr. Shepherd.

6 Q. Because the accident happened?

7 A. No. Because of the facts of the
8 accident.

9 Q. Have you ever even met Mr. Bosley or
10 interviewed anyone at Meredith?

11 A. No, I have not.

12 Q. And, yet, you're coming in here today and
13 saying they were competent?

14 A. I have read their deposition and I also
15 reviewed the facts of the case and I have no doubt
16 that that is true. And, of course, you have to
17 understand what competent means in reference to OSHA's
18 definition.

19 Q. Are you aware that Dennis Cullen, the
20 quality control person for Meredith, did daily
21 inspections and safety reports?

22 A. Well, they weren't adequate if he didn't
23 make sure that overhead girts were secured or that the
24 area was cordoned off because you wouldn't want
25 someone you care about working under those

1 circumstances and neither would I.

2 MS. SPENCE: I don't have anything
3 further.

4 THE COURT: Anything on redirect?

5 MR. SMIRCINA: Yes. Very briefly, Your
6 Honor.

7 REDIRECT EXAMINATION

8 BY MR. SMIRCINA:

9 Q. Mr. Norris questioned you about whether
10 the existence of weld on the beam was not relevant to
11 your opinions in this case. Why is the existence or
12 nonexistence of weld on a beam not significant to your
13 opinions about this workplace safety?

14 A. Well, it is what I said earlier. It is
15 two choices. You either secure the beam, which in
16 this case was a weld, or you move the employees out of
17 the area. It is perfectly okay to set a beam up there
18 unsecured if no employees can get in the area. It is
19 only if you can anticipate that there could be
20 employee exposure that it becomes important to weld
21 the beam. So that is why it didn't really matter.

22 Q. And employees in that case would be any
23 workers on the site such as a material man as was
24 Michael Shepherd?

25 A. Anyone that is working on the site.

1 Q. Now, who created the risk of injury to
2 Michael Shepherd in this case in your estimation?

3 A. Atlantic.

4 Q. And who was responsible for making sure
5 that Atlantic didn't create the risk of injury in this
6 case?

7 A. Meredith.

8 Q. And who was responsible for --

9 MR. NORRIS: Your Honor, these questions
10 were asked and answered.

11 MR. SMIRCINA: And on cross-examination.
12 I am just clarifying the testimony.

13 THE COURT: A little bit.

14 MR. SMIRCINA: Yes, ma'am. I will move
15 on.

16 BY MR. SMIRCINA:

17 Q. Concerning the matter of clearance of the
18 boom arm and the steel girt, given an experienced
19 level of operator and so forth, would an adequate
20 level of clearance be less than a foot in your
21 estimation?

22 MR. NORRIS: Objection, Your Honor.

23 MR. SMIRCINA: You were asking him the
24 questions.

25 MR. NORRIS: Objection. The witness was

1 asked and gave an answer that he would like to see a
2 foot. Now, the plaintiff has not offered him as an
3 expert in this field.

4 THE COURT: He is entitled. You asked
5 the question. He answered it. He is entitled to
6 cross-examine him or basically cross-examine him on
7 redirect.

8 MR. SMIRCINA: Thank you, ma'am.

9 THE WITNESS: As I said in my deposition
10 that was taken previously, I train these operators in
11 my classes and so I get to know them and talk to them,
12 and I know they think three inches is plenty. And I
13 believe they can do it within three inches. But
14 remember, I am a safety guy. I want a safety factor
15 of three or four times. So when I say a foot, that is
16 adding a safety factor in there to avoid any
17 collisions.

18 MR. SMIRCINA: I have nothing further,
19 Your Honor.

20 THE COURT: And this witness is excused?

21 MR. NORRIS: Can I ask one more?

22 RE CROSS-EXAMINATION

23 BY MR. NORRIS:

24 Q. So are you applying your factor of two
25 and three to the defendants, as well? Are you giving

1 us the same factor as you are giving Mr. Shepherd?

2 A. I don't understand that question.

3 THE COURT: I don't understand it,
4 either.

5 MR. NORRIS: I will withdraw it.

6 THE COURT: Have a nice day.

7 THE WITNESS: Thank you very much.

8 THE COURT: Who is your next witness?

9 MR. SMIRCINA: Well, Your Honor, we have
10 an hour-and-a-half deposition of a doctor. We have a
11 doctor coming at two o'clock. We have Dr. Sautter
12 coming at two-thirty. We have Charles DeMark coming
13 this afternoon. I don't think we have a way of going
14 as is. What I am trying to say to you is that I can't
15 fit one in before one o'clock. We had requested the
16 video television.

17 THE COURT: It is outside the door.

18 MR. AUFENGER: It would take an hour, and
19 we would like at leaset an hour and be run complete.

20 THE COURT: Do we have any idea how long
21 direct is, how much --

22 MR. SMIRCINA: Direct would be about 45
23 minutes.

24 THE COURT: And the whole thing is?

25 MR. SMIRCINA: Forty minutes. And double