

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 III OF V

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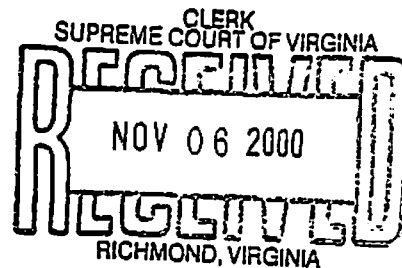
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VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH



MICHAEL A. SHEPHERD,

Plaintiff,

v.

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

Defendants.

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AT LAW NO.

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TRANSCRIPT OF PROCEEDINGS

Virginia Beach, Virginia

July 21, 2000

Day 4

Before: THE HONORABLE A. BONWILL SHOCKLEY, Judge,

and a jury

TAYLOE ASSOCIATES, INC.

Registered Professional Reporters

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Norfolk, Virginia

FILED

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I N D E X

WITNESSES

ON BEHALF OF THE PLAINTIFF:	Direct	Cross	REd	REc
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John Rymiszewski	669	690	710	--
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1 track them down. Step to the back, please, ladies and
2 gentlemen.

3 (The jury withdrew from the courtroom.)

4 (Recess taken.)

5 THE COURT: And we have our witnesses?

6 MR. SMIRCINA: My witness is here, and
7 Mr. Shepherd just is coming back from the bathroom
8 right now.

9 THE COURT: I will sort of get them
10 situated while he is on the way coming back.

11 MR. SMIRCINA: Sure.

12 (The jury returned to the courtroom.)

13 THE COURT: All right. Your next
14 witness, please.

15 MR. SMIRCINA: Mr. Allen Walker.

16 ALLEN HAGAN WALKER, called as a witness
17 on behalf of the Plaintiff, having been first duly
18 sworn, was examined and testified as follows:

19 THE CLERK: Be seated.

20 DIRECT EXAMINATION

21 BY MR. SMIRCINA:

22 Q. Good morning, Mr. Walker. Would you
23 please state your full name for the record?

24 A. Allen Hagan Walker.

25 Q. How old are you, Mr. Walker?

1 A. Thirty-one.

2 Q. Mr. Walker, what do you do for a living?

3 A. I am a driver and an operator for
4 Tidewater General Products.

5 Q. Delivery and operator of what?

6 A. A boom truck. The one in the picture.

7 Q. As a matter of fact, the boom truck
8 involved in the accident you use now, don't you?

9 A. Yes.

10 Q. How long have you been a boom truck
11 operator?

12 A. Since 1988. Eleven years it has been. I
13 didn't work for the company.

14 Q. What are your duties as a boom truck
15 driver? What do you do day-to-day, various aspects of
16 your job?

17 A. Get to the yard, when the truck is
18 loaded, strap it down, drive the truck to the job, get
19 the boom set up, find out where the material goes, and
20 pretty much stock the drywall into the building.
21 Usually it is drywall. It is not always drywall.

22 Q. You say stock the drywall in the
23 building. Does that entail lifting and carrying
24 drywall yourself?

25 A. Yes.

1 Q. Is that a daily thing for you?

2 A. Yes. I carry drywall every day.

3 Q. How did you come -- how often during the
4 day do you carry drywall?

5 A. I would say more than half the day.

6 Q. Now, this drywall that you carry, does it
7 come in various sizes and dimensions?

8 A. Yes.

9 Q. And various weights, as well?

10 A. Yes.

11 Q. What would be a typical amount of
12 drywall, you might say, on eight-foot board if it is
13 five-eighths? How much would be carried at a time
14 when it was five-eighths of an inch thick?

15 A. You would say maybe 160 pounds. It would
16 be -- it comes in two-piece bundles. I want to say
17 about 80 -- 70 to 80 pounds per sheet.

18 Q. Do you have to carry it in bigger forms
19 of drywall?

20 A. Yeah. Actually we normally carry a 12
21 foot.

22 Q. How much does 12 foot weigh at time?

23 A. You're carrying two sheets at a time so
24 it is 224 pounds.

25 Q. You wouldn't carry this alone, would you?

1 A. No. You carry it with a partner.

2 Q. And how many hours a day do you think
3 you're carrying such sheets of drywall?

4 A. Out of a 12-hour day probably four to six
5 hours -- at least six hours of carrying drywall.

6 Q. Would that include -- what do you
7 carry -- would you carry it up stairs? Would you
8 carry it on level ground? How would you carry it?

9 A. You do carry it up steps. Not that
10 often. Normally you put it in a window or carry it
11 to, let's say, the back of the house and setting it
12 down, something like that. But you do carry it up
13 steps. You do have -- sometimes you have to walk
14 maybe around the back of a building, something like
15 that.

16 Q. Is this -- the job you do now, is it the
17 same job Mike Shepherd did prior to his accident?

18 A. Yes, it is.

19 Q. How did you come to work for Tidewater
20 Interior Products?

21 A. I used to work for Capital Building
22 Supplies in Vienna, which is owned by the same people
23 who own Tidewater Interior Products. And I just
24 transferred down here.

25 Q. Did Michael come down here before you?

1 A. Yes, he did.

2 Q. Do you have any knowledge as to why they
3 wanted him to come down here?

4 MR. NORRIS: Objection, Your Honor.

5 MR. SMIRCINA: I asked him does he have
6 any knowledge.

7 MR. NORRIS: Well, Your Honor, it calls
8 for hearsay of some management personnel in the
9 company of why they transferred.

10 THE COURT: Actually it might have been a
11 statement of the plaintiff. I am going to let him
12 answer why he knows. Just tell us why, not what.

13 BY MR. SMIRCINA:

14 Q. Why do you know -- I will just move it
15 on. It is easier. And when you came down here to
16 Tidewater to work for Tidewater Interior Products, how
17 many years have you worked as a boom truck operator
18 already?

19 A. I would say seven years.

20 Q. Now, I am going to go into now how you
21 are paid for this job. And I realize it is a personal
22 question. How do you get paid to do your work?

23 A. Well, piecework. I get paid for each
24 piece I deliver, each piece of drywall or mud or metal
25 stud.

1 Q. And this would depend on -- how much you
2 deliver in a day would depend on how much you get paid
3 for that day?

4 A. Yes, it does.

5 Q. How would you characterize your job in
6 terms of physical exertion?

7 A. Extremely hard.

8 Q. Did you -- were you ever familiar with
9 the plaintiff, Michael Shepherd, how he worked? Was
10 he a hard worker prior to the accident?

11 A. Yes, he was.

12 Q. Does he still work hard?

13 A. Yeah. The job he does, he works hard.
14 He is not -- no longer a boom operator. He no longer
15 carries board. But what he does --

16 Q. How many hours -- do you know how many
17 hours a week he works?

18 A. I would say 60.

19 Q. Does he work more hours than you?

20 A. I don't actually know. I don't actually
21 know.

22 Q. Do you think he works more hours than
23 you?

24 MR. NORRIS: Objection, Your Honor. The
25 witness just said he didn't actually know how many

1 hours Mr. Shepherd works.

2 THE COURT: Sustained. You are going to
3 have your client testify.

4 BY MR. SMIRCINA:

5 Q. How many hours a week do you work now?

6 A. Roughly 60 hours.

7 Q. Now, when you say piecework, have your
8 wages varied over the years depending on how busy the
9 company was or how busy you were?

10 A. You mean my wages, my yearly wages or the
11 amount that I am paid per piece?

12 Q. Both. Per piece first.

13 A. No. Per piece, it has pretty much been
14 the same. Yearly wages has changed depending on how
15 much work we have, stuff like that.

16 Q. Now, when you first came down here to
17 Tidewater, were you hired down here as a boom crane
18 operator and drywall deliverer?

19 A. Yes.

20 Q. Was Michael senior to you at that point?

21 A. Yes.

22 Q. When Michael got hurt, did they change
23 your status within the company?

24 A. Yes, it did.

25 Q. How did it change your status in the

1 company?

2 A. I had to take on more responsibility. I
3 was the most experienced driver at that time so I
4 became -- I got most of the bigger loads. I had a lot
5 more responsibility.

6 MR. SMIRCINA: All right. Your Honor, I
7 wonder if I could have these three exhibits marked. I
8 guess we could mark it as a unitary exhibit.

9 THE COURT: Has counsel seen it?

10 MR. SMIRCINA: Yes. They have seen it.

11 THE COURT: That will be fine. I will be
12 happy to staple them together.

13 MR. SMIRCINA: These are the W-2s.

14 MR. NORRIS: I am going to add '96 to
15 it. Do you want to make it all one exhibit?

16 MR. SMIRCINA: Why not, if you want to
17 use it that way.

18 (The document referred to was marked as
19 Plaintiff's Exhibit No. 26, and received into
20 evidence.)

21 THE COURT: So W-2s for '96, '97, '98,
22 and '99.

23 BY MR. SMIRCINA:

24 Q. Allen, I have got a document that has
25 been marked as Plaintiff's Exhibit Number 26 for

1 identification and entry into the court. Would you
2 look at those four pieces of paper and tell me if you
3 recognize them?

4 A. Yes. They are all my W-2s.

5 Q. 1996, would you read to the jury the
6 amount of your taxable wages for that year?

7 A. 33,820.

8 MR. NORRIS: I didn't hear. I am sorry.

9 THE WITNESS: 33,820.

10 BY MR. SMIRCINA:

11 Q. 33,820 is the money you made from
12 Tidewater Interior Products that year?

13 A. Yes. This is six months.

14 Q. Would you please flip over and look at
15 the next page in 1997? Is that the year that you
16 first started taking over Michael Shepherd's
17 responsibilities at Tidewater?

18 A. Yes.

19 Q. What were your wages for that year?

20 A. Taxable income, \$78,240.25.

21 Q. What were your social security wages that
22 year?

23 A. This one, 81,310.32.

24 Q. Now, that is a huge jump. Why is it that
25 you made so much money that year?

1 A. My position in the company changed and we
2 were short a truck so --

3 Q. So, in other words, you worked an unusual
4 amount of hours that year?

5 A. Yes.

6 Q. At least until another truck came on
7 line?

8 A. Yes.

9 Q. Do you remember when that truck came on
10 line, how far into the year?

11 A. I want to say it was a couple of months.
12 I really don't know exactly.

13 Q. That would have been, then, in the late
14 winter, perhaps?

15 A. Late winter, what do you mean?
16 February. Yes. Something like that.

17 Q. All right. Did you work seven days a
18 week during that year?

19 A. Yeah. I had worked seven days a week.

20 Q. Would you please turn over for 1998 and
21 read what were your taxable social security wages for
22 that year?

23 A. \$67,662.31.

24 Q. And the figure right here for Medicare,
25 wages, and tips?

1 A. \$75,147.03.

2 Q. And that reflects your earnings for 1998?

3 A. Yes.

4 Q. Why the decrease in pay from 81,000 down
5 to 75,000?

6 A. I started working less hours.

7 Q. Why did you decide -- was that a
8 voluntary decision on your part?

9 A. Yeah.

10 Q. Would you please look at 1999? And what
11 would you say are the Medicare, wages, and tips on
12 that W-2 form?

13 A. 71,705.35.

14 Q. Again, do you think you worked fewer
15 hours from '98 to '99?

16 A. Yes, I did.

17 Q. And for '99, about how many hours a week
18 do you think that \$71,705 encompasses? How many hours
19 a week do you think you have to do to make that?

20 A. Sixty, maybe as many as 65.

21 Q. But you don't get paid by the hour, do
22 you?

23 A. No, I don't.

24 Q. So you worked 60 hours a week carrying
25 board. You get paid by how much board you carry,

1 right?

2 A. Yes.

3 Q. Or deliver, rather?

4 A. Yes.

5 Q. Whether it takes you 60 hours or 70
6 hours?

7 MR. NORRIS: Your Honor, he is leading
8 the witness.

9 MR. SMIRCINA: I am just trying to get
10 through it, John.

11 THE COURT: Overruled for what this is.
12 Go ahead.

13 BY MR. SMIRCINA:

14 Q. Whether you work 70 hours or 60 hours,
15 you -- your pay depends on how much drywall you
16 deliver?

17 A. Yes, it is.

18 MR. SMIRCINA: I move for admission of
19 this document into evidence.

20 THE COURT: Are my initials on there? I
21 think I went ahead and did that because it didn't seem
22 like there was going to be an objection.

23 MR. SMIRCINA: Yes, you did.

24 MR. NORRIS: No objection.

25 BY MR. SMIRCINA:

1 Q. Now, Allen, you say Mike is a hard
2 worker; is that correct?

3 A. Yes.

4 Q. Did you ever observe him when he was a
5 boom crane operator? Did you ever work with him
6 directly?

7 A. Yes, I did.

8 Q. Did he seem to enjoy his work?

9 A. Yes.

10 Q. Did he seem to work hard at the work?

11 A. Yes, he did.

12 Q. Is it your belief or do you have an
13 opinion as to whether he had any intention of not
14 continuing to do the same work?

15 A. No, I didn't -- I never had any
16 indication that he didn't intend on doing it.

17 Q. And you believe -- is it your belief
18 right now -- do you have an opinion as to right now
19 whether or not if he were still a boom truck operator
20 he would work as hard as you do?

21 MR. NORRIS: Objection, Your Honor.

22 THE COURT: Sustained. If you want to
23 rephrase the question. But I don't understand even
24 what "work as hard as you do" means. Length of time?

25 BY MR. SMIRCINA:

1 Q. Would Michael be able to work -- is it
2 your opinion that Michael, had he not been injured at
3 work, would be able to deliver as much drywall as you
4 do now?

5 A. Yes. At least as much now.

6 Q. Do you think he would be willing to
7 deliver as much drywall as you do now?

8 A. Yes, he would.

9 MR. NORRIS: Objection, Your Honor.

10 THE COURT: Sustained. He can't testify
11 as to what is in somebody else's mind.

12 BY MR. SMIRCINA:

13 Q. You say that -- you say that you took
14 over Michael's position in the company when Michael
15 got hurt; is that true?

16 A. Yes, I did.

17 Q. Do you believe that Michael would still
18 be in your position in the company had he not been
19 hurt?

20 A. Yes, he would.

21 Q. When I ask you what seniority means in
22 terms of a boom truck operator, what effect does that
23 have on your jobs that you get?

24 A. A senior driver gets the bigger jobs.
25 They're the first one to get the work when times are

1 slow or anything like that, the senior driver would
2 still get most of the work..

3 Q. And at the time Michael Shepherd was
4 hurt, he was the senior driver?

5 A. Yes, he was.

6 Q. Now, I am going to ask you questions,
7 Allen, about the photographs here. So if you would,
8 come on down from the stand with the judge's
9 permission.

10 THE COURT: That is fine. You are going
11 to need to speak up, though, because you don't have a
12 microphone.

13 THE WITNESS: Okay.

14 BY MR. SMIRCINA:

15 Q. Did there after -- I will opire to you
16 that these have been identified as pictures showing
17 the scene after the accident involving Michael
18 Shepherd. Do you have a memory of that accident
19 scene?

20 A. Yeah. I went there the next day to pick
21 the truck up.

22 Q. Were you there on the day of the
23 accident, let me ask you that?

24 A. Yes. I showed up after it happened.

25 Q. What did you observe at that time? Does

1 this accurately resent the scene that you saw?

2 A. Yeah. Actually, I never actually got
3 onto the base. I was probably 20 to 25 yards from
4 where the truck was sitting, would be my guess.

5 Q. And why couldn't you get on the base?

6 A. I didn't have my ID with me. But when I
7 got there, the fire trucks were there, the ambulance
8 was there.

9 Q. And did there come a time that you came
10 to look at the site the next day?

11 A. Yes, I did.

12 Q. When you got there, what did you do?

13 A. I was there to pick up the truck, take it
14 in, you know, assess -- well, I had to assess the
15 damage, see what was wrong with it, what it was going
16 to take that we could pick it up. There was also a
17 mechanic there.

18 Q. If you want to tell the jury, what was
19 wrong?

20 A. The main problem is this right here is
21 the boom seat. It is -- it was knocked down by the
22 beam. So all of the controls and everything were all
23 bent up.

24 Q. Is this a picture of the boom seat?

25 A. Yes. This is it.

1 Q. Would you point out to the jury what
2 particular aspects of the boom seat were in a state of
3 disrepair?

4 A. The boom seat should be sitting up
5 higher. The way the boom is sitting, it should be, I
6 would say, on 45 -- it is down at a lean. You can't
7 even sit in it like that.

8 Q. What about the control handles, what do
9 those control handles do?

10 A. Move the arms of the crane, this part,
11 this part.

12 Q. What does this -- is this the control
13 that is damaged?

14 A. Not that one. This one is.

15 Q. What does that one control do?

16 A. The stick part of the boom right here.

17 Q. It moves it up and down, left and right?

18 A. Yes.

19 Q. Were you able to examine the boom arm
20 itself?

21 A. Yeah. I noticed -- I don't see it on a
22 better picture. Right here. This hose right here,
23 these wires shouldn't be down that far.

24 Q. What do those wires control?

25 A. There is a lockout device or a computer

1 like on the boom and it registers how much weight
2 you're picking up. If you pick up too much weight, it
3 won't allow you to do it.

4 Q. Is there any damage that you can see to
5 this boom arm on this photograph?

6 A. No. Not really. Not other than the --
7 in those hoses.

8 Q. What is wrong with those hoses?

9 A. Not the hoses. That is the same ones. I
10 was talking about with the wires.

11 Q. I see some black stuff on the boom arm.
12 Does that have anything to do with this?

13 A. What is that?

14 Q. Right down here on Exhibit Number 4,
15 there seems to be --

16 A. No. I don't think that has anything to
17 do with this.

18 Q. Did you ever examine the boom arm of the
19 crane to see if there was any impact point between the
20 boom arm and the beam that fell on Michael Shepherd?

21 A. I didn't notice any.

22 Q. Did you look?

23 A. No. But I still run the truck today. I
24 have looked at that.

25 MR. NORRIS: Objection, Your Honor. Your

1 Honor, I object.

2 THE COURT: Overruled.

3 MR. NORRIS: Your Honor, if I might.

4 THE COURT: Overruled, Mr. Norris. Go
5 ahead and answer the question.

6 BY MR. SMIRCINA:

7 Q. Have you examined the boom arm since to
8 see whether or not there was any damage to it?

9 A. There is nothing wrong with the boom arm
10 itself.

11 Q. Now, these forks down here on Plaintiff's
12 Exhibit 2, they seem to be up in the air. What would
13 be the cause of that, in your estimation?

14 A. That could be any number of things. When
15 the beam stayed down, it hit these controls. This --

16 MR. NORRIS: I object, Your Honor. This
17 is pure speculation, absolute, pure speculation.

18 BY MR. SMIRCINA:

19 Q. Why would --

20 THE COURT: Rephrase the question,
21 please.

22 BY MR. SMIRCINA:

23 Q. If the fork is in that position, if the
24 boom isn't in up, would they sit automatically in a
25 position the way that are in Plaintiff's Exhibit 2?

1 MR. NORRIS: If Your Honor please, this
2 witness testified he was not there when the accident
3 happened, and for him to opine how the boom got in the
4 position it was on the date of the accident is
5 absolute speculation.

6 MR. SMIRCINA: No, it isn't.

7 THE COURT: Are we talking about the boom
8 or the control?

9 MR. SMIRCINA: I am talking -- I am
10 trying to get -- I am trying to point out that this
11 boom arm -- this boom handle was damaged. And I am
12 asking -- I am trying to get him -- get whether or not
13 the forks are off the ground because the boom handle
14 was damaged.

15 MR. NORRIS: He can't testify to that,
16 Your Honor.

17 THE COURT: I am going to let him see if
18 he knows to answer the question.

19 BY MR. SMIRCINA:

20 Q. Do you know why those forks would be off
21 the concrete ground like that?

22 A. I would say because when the beam hit the
23 controls --

24 MR. NORRIS: Your Honor, the man was not
25 there. He didn't see what happened.

1 THE COURT: Mr. Norris, overruled. You
2 can cross-examine him. Go ahead and answer the
3 question again in case somebody missed it.

4 BY MR. SMIRCINA:

5 Q. Why is it in your opinion that those
6 forks would be off the concrete ground?

7 MR. NORRIS: Your Honor, this opinion
8 evidence was not identified in discovery.

9 THE COURT: Mr. Norris, I am going to
10 overrule, and I am going to let him answer this
11 question.

12 THE WITNESS: I am going to say the forks
13 were probably in that position because when the beam
14 hit the controls, anything could have happened to
15 the boom.

16 BY MR. SMIRCINA:

17 Q. Okay. What other damage was done to the
18 seat that you see? It doesn't -- is it attached the
19 way it should be?

20 A. No. This hole right here is where a bolt
21 should be. It should be bolted into the side of the
22 crane. It should be bolted into this side of the
23 crane.

24 Q. About how -- I see a ladder on the side
25 of this truck. About how many times a day do you

1 think you go up and down that ladder in the course of
2 a normal working day?

3 A. I never count it, but I would say about
4 40.

5 Q. Is it -- how far is that drop off between
6 the bottom rung and the ground?

7 A. I would say about two feet.

8 Q. Have you observed whether or not Michael
9 Shepherd has problems climbing up and down that
10 ladder?

11 A. No. I haven't.

12 Q. Okay. All right. Mr. Walker, you can go
13 back up on the stand now. Have you observed Michael
14 Shepherd operating the boom truck before?

15 A. Yes.

16 Q. How would you rate him in terms of
17 competency in operating that boom truck?

18 A. He is an excellent operator.

19 Q. Have you observed many other boom truck
20 operators?

21 A. Yes.

22 Q. Where would you rate Michael Shepherd in
23 terms of his ability to operate the boom truck
24 compared to other operators?

25 A. One of the best I have seen.

1 Q. Now, Mr. Walker, it has been testified
2 that there were three to four inches of clearance
3 between the top of the boom arm and the bottom of the
4 steel beam. I would like you to take that as a given.
5 Had you been operating the boom truck that day, would
6 you have attempted to deliver the drywall into that
7 second floor?

8 MR. NORRIS: Objection, Your Honor.

9 THE COURT: Sustained.

10 BY MR. SMIRCINA:

11 Q. With three to four inches of clearance
12 between the bottom of the boom arm -- the top of the
13 boom arm and the bottom of the steel beam, would that
14 be an accepted clearance for you to try to off-load
15 drywall into the second story of a building?

16 A. Yes, it is.

17 Q. Is that a daily occurrence as to how much
18 you use -- how much clearance -- you have that amount
19 of clearance?

20 A. Yes. We have limited spaces all the
21 time.

22 Q. Is this part and parcel of your job? Is
23 that why you get paid what you do?

24 MR. NORRIS: Object to the leading, Your
25 Honor.

1 THE COURT: Sustained.

2 BY MR. SMIRCINA:

3 Q. Do you do this on a daily basis?

4 A. Yes, I do.

5 Q. Do you believe that is part of the reason
6 why you --

7 MR. NORRIS: Object to the leading.

8 THE COURT: Sustained. Mr. Smircina,
9 rephrase the question.

10 BY MR. SMIRCINA:

11 Q. On a daily basis, you operate this boom
12 crane, correct?

13 A. Yes, I do.

14 Q. How many times a week do you think you
15 boom into an area with three or four inches of
16 clearance?

17 A. I would say every day. Generally, we're
18 booming in windows in houses and stuff like that.
19 Those windows are 52 to 54 inches. Half of the
20 drywall is usually 48 inches. So you're constantly
21 booming into a tight space.

22 Q. Is it unusual that the boom arm might
23 strike something while you are off-loading material?

24 A. No. It happens. It is not an everyday
25 occurrence, but it happens.

1 Q. When it happens, what is the concern with
2 hitting the boom arm against part of a building or a
3 steel beam? What is your concern?

4 A. Generally, it will break the hoses.
5 Worrying about tearing my truck up. So I try not to.

6 Q. Have you ever hit a steel beam before
7 when you were operating?

8 A. Yes, I have.

9 Q. What happened?

10 MR. NORRIS: Objection, Your Honor.

11 BY MR. SMIRCINA:

12 Q. Did the beam come down?

13 MR. NORRIS: Your Honor, I object to
14 that.

15 THE COURT: Sustained.

16 BY MR. SMIRCINA:

17 Q. Have you ever knocked a beam off a
18 building?

19 A. No, I haven't.

20 Q. Have you ever struck a steel beam?

21 A. Yes, I have.

22 MR. SMIRCINA: And I don't have anything
23 further, ma'am.

24 THE COURT: Cross-exam, Ms. Spence.

25 MS. SPENCE: Thank you.

CROSS-EXAMINATION

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BY MR. NORRIS:

Q. We're fighting over you, Mr. Walker.

Mr. Walker, let me make sure I understand. You weren't there when this accident happened, right?

A. No. I was not there until after it happened.

Q. You didn't see -- okay. You didn't see how the girt -- you know what a girt is, that steel beam?

A. I am assuming you're talking about the beam.

Q. You didn't see that slide down the crane, did you?

A. No, I didn't.

Q. You didn't see what portion of the controls the girt hit if it hit the controls at all, did you?

A. I saw it the next day, not when it happened.

Q. Yeah. But the next day when you saw it, sir, it wasn't touching any part of the controls, was it?

A. No. But I know what position the boom seat should be in and how the controls should look.

1 Q. Do you know whether people got up on
2 there after the boom fell?

3 A. No, I don't.

4 Q. You don't know if anybody got up here and
5 moved the controls, do you?

6 A. They wouldn't stay if you did move them.

7 Q. Sir, do you know if anybody got up here
8 after the accident and checked the controls and looked
9 at them and touched them and moved them?

10 A. No, I don't.

11 Q. You can't tell us whether the beam hit
12 the controls or not, can you?

13 A. Yeah. You can see it in the picture.

14 Q. You can see the controls in a certain
15 position?

16 A. You can see the controls are bent, and
17 they weren't bent.

18 Q. Do you know maybe whether they got bent
19 by Mr. Shepherd yanking or pulling on them trying to
20 get out of the seat?

21 A. No, I don't.

22 Q. Do you know for sure whether whatever
23 moved or bent the controls made the forklift go up,
24 down, back or forth?

25 A. No. I believe I said that -- I said if

1 the beam did hit the controls, the boom could have did
2 anything.

3 Q. And you don't know what they did, do you?

4 A. No, I don't.

5 Q. Now, do you have to get any kind of a
6 license from the State of Virginia to operate this
7 boom truck?

8 A. No.

9 Q. You don't have to pass any tests that the
10 State of Virginia or some official organization gives
11 you to be able to operate a boom truck, right?

12 A. No.

13 Q. Now, I think you said that you work in
14 tight fits all the time?

15 A. Uh-huh.

16 Q. You have to say yes or no.

17 A. Yes.

18 Q. This was a tight fit, wasn't it?

19 Mr. Shepherd had three or four inches to move that
20 material in and out. That is a tight fit, isn't it?

21 A. Yes.

22 Q. And when you come to work for Tidewater
23 Interior Products, are you trained on how to operate a
24 boom?

25 A. No. I had already been a boom operator

1 before I came to Tidewater Interior Products.

2 Q. Do you know if Tidewater Interior
3 Products has a training program on how to operate a
4 boom?

5 A. No, I don't.

6 Q. Have you ever seen a Tidewater Interior
7 Products manual on how to operate the boom?

8 A. No.

9 Q. You're not supposed to hit things when
10 you operate a boom, are you?

11 A. No. You shouldn't.

12 Q. You say it happens all the time. You
13 drive a car?

14 A. No. I said it happens sometimes.

15 Q. Do you drive a car?

16 A. Yes, I do.

17 Q. You're not supposed to speed, correct?

18 A. Correct.

19 Q. Do you speed?

20 A. I don't see what that has to do with it.

21 Q. Well, if you're speeding and you hit
22 somebody else's car, it is your fault, isn't it, even
23 though you might do it from time to time?

24 MR. AUFENGER: Judge, he is calling for
25 legal conclusions. It could be a number of reasons

1 why an accident happened. It is not a legitimate
2 question.

3 THE COURT: Sustained.

4 BY MR. NORRIS:

5 Q. Mr. Walker, you're a hard worker, aren't
6 you?

7 A. Yes.

8 MR. NORRIS: Your Honor, I would like to
9 see the exhibits here.

10 BY MR. NORRIS:

11 Q. All right. Now, Mr. Walker, in 1996, you
12 only worked a half a year with Tidewater Interior
13 Products, correct?

14 A. That is correct.

15 Q. And your '96 W-2 shows what you made in
16 that half year, right?

17 A. That is right.

18 Q. You made \$33,820 in a half a year, right?

19 A. That is correct.

20 Q. So if you had worked a whole year, you
21 would have made \$67,640?

22 A. No. I probably would have made more than
23 that if I had been a whole year at Tidewater Interior
24 Products.

25 Q. So if you had worked the whole year for

1 Tidewater Interior Products in 1996, you would have
2 made more than \$67,000?

3 A. I think so. I mean, that is clear
4 speculation.

5 Q. Do you know how much Mr. Shepherd made in
6 1996?

7 A. No, I don't.

8 Q. You were doing the same thing in 1996,
9 when you were operating the boom that Mr. Shepherd
10 was, right?

11 A. In 1996.

12 Q. The second half of 1996.

13 A. No. I was working with Mr. Shepherd for
14 I would say the first month or so getting him --
15 operating the boom off and on full time.

16 Q. Were you doing piecework in '96?

17 A. Yes, I was.

18 Q. And Mr. Shepherd was doing piecework in
19 '96?

20 A. Yes.

21 Q. So if you were both doing the same thing
22 and you made more money than he did in 1996, is it
23 because you worked more?

24 A. Yeah. I guess.

25 Q. Sure. Whether you're working piecework

1 or hourly work, the more you work, the more you get
2 paid, right?

3 A. Yeah. Well, the more you have
4 opportunity.

5 Q. Sure. If you worked ten hours in a day,
6 you can move more drywall than you can if you worked
7 eight hours that day; don't you agree with that?

8 A. Yeah. You have opportunities. Yes.

9 Q. So if you both did the same job and you
10 made more money, you were moving more drywall than he
11 was and probably you were working more hours, weren't
12 you?

13 A. No. I wouldn't say that. When I came
14 there in '96, and we were working together, we were
15 pretty much -- we were on the same job a lot of times.
16 So I don't see how I could have been moving more
17 material.

18 Q. Well --

19 A. And as far as what he made, I mean,
20 evidently he didn't make it through the whole year.
21 He got hurt in what, November? I don't know what he
22 made that year.

23 Q. Your boss is Mr. Rymiszewski?

24 A. Yes.

25 Q. And he keeps the hours that you both work

1 and what you were both paid, right?

2 A. Yeah. I am sure he does.

3 Q. All right. Now, after Mr. Shepherd got
4 hurt, you made a bunch of money in '97, didn't you?
5 You made \$78,000?

6 A. Yes.

7 Q. And that is because you worked a lot of
8 hours, isn't it?

9 A. Yes.

10 Q. Weren't you working 70- and 80-hour weeks
11 sometimes in 1997?

12 A. Yeah. I averaged probably 70 hours.

13 Q. And sometimes you worked as many as 80
14 hours a week, didn't you?

15 A. I have had 80-hour weeks. Yeah.

16 Q. And part of the reason for that is one of
17 the trucks was out of commission, right, for a time?

18 A. Yeah. I would say two or three months it
19 was out.

20 Q. And part of the reason for that is
21 Mr. Shepherd wasn't driving a boom truck, right?

22 A. Well, we were short a truck and operator.

23 Q. So you had to work a lot more hours in
24 '97, than you ever had to work in '96, right?

25 A. Yeah. I guess the first part of the

1 year.

2 Q. And you made a lot more money because of
3 that, didn't you?

4 A. Yeah. I made more.

5 Q. Now, I think you told us in '98, then,
6 your income dropped back to 67- -- \$67,662; is that
7 right?

8 A. Yes.

9 Q. And that is because you didn't want to
10 work as many hours in '98 as you had been working in
11 '97, you made the decision to cut back; is that
12 right?

13 A. Yes, I did.

14 Q. Okay. And I take it you kind of liked
15 that work load because in '99, you made about the same
16 amount of money? Aren't your wages in '99, \$64,848?

17 A. Yes.

18 Q. Now, when you're sitting up in the chair
19 of a boom truck, Mr. Walker, and you're operating the
20 controls, it is not physically hard to do it, is it?

21 A. No. I wouldn't say it is physically
22 hard.

23 Q. And I think you told us that when you're
24 carrying the eight-foot sheets, they weigh about 70 or
25 80 pounds a piece; is that right?

- 1 A. Uh-huh. Per sheet.
- 2 Q. And you're carrying them with another
- 3 man; is that right?
- 4 A. Yes.
- 5 Q. So the two of you have to lift and carry
- 6 about 80 pounds each, 70 to 80 pounds each?
- 7 A. Yes.
- 8 Q. If you're carrying two sheets at a time?
- 9 A. Yes.
- 10 Q. And if you're carrying the big 12-foot
- 11 sheets, you would have to carry about 120 pounds each,
- 12 right?
- 13 A. Right.
- 14 Q. If you only carried one of the big
- 15 sheets, you would both be carrying about 60 pounds,
- 16 wouldn't you?
- 17 A. Yeah. If you carried one sheet, you
- 18 would.
- 19 Q. Do you use a spotter on your jobs?
- 20 A. Yes, we do.
- 21 Q. What is the purpose of the spotter?
- 22 A. To help direct you in and out especially
- 23 in areas where you can't see as easy.
- 24 Q. If a spotter goes like that to you, what
- 25 do you do?

1 A. Stop.

2 Q. You stop the movement of the boom, right?

3 A. Yes.

4 Q. That is a signal to you that there might
5 be some danger if you keep moving, right?

6 A. Yes.

7 Q. Now, when you're operating a boom, is it
8 important to keep your eye on the spotter?

9 A. Yes.

10 Q. And is it important for the spotter to
11 keep his eye on the boom?

12 A. You also have to keep your eye on the
13 boom. The spotter is there to assist you. You
14 can't -- I wouldn't say necessarily they can tell you
15 everything. You need to, you know, look yourself,
16 too, to be sure.

17 Q. You have to pay close attention, don't
18 you --

19 A. Yes.

20 Q. -- when you're operating that boom,
21 right?

22 A. Yes.

23 Q. Because you don't want to damage the
24 boom, right?

25 A. Right.

1 Q. And you don't want to damage anything
2 that you're working around, either, do you?

3 A. No.

4 Q. So you have got to pay close attention to
5 your spotter and your boom to avoid hitting things,
6 don't you?

7 A. Yes.

8 MR. NORRIS: That is all I have.

9 THE COURT: Ms. Spence.

10 MS. SPENCE: Thank you, Your Honor.

11 BY MS. SPENCE:

12 Q. Good morning, Mr. Walker.

13 A. Good morning.

14 Q. Now, you indicated that you're operating
15 the truck now that Mr. Shepherd used to operate?

16 A. Yes, I am.

17 Q. But you didn't get it right away, it had
18 to be fixed?

19 A. Right.

20 Q. It was out of commission for several
21 months, wasn't it?

22 A. I don't remember how -- exactly how
23 long. It was down for a while.

24 Q. It was gone for a while?

25 A. Yes.

1 Q. So the condition that it is in today
2 isn't the condition it was in immediately after the
3 accident?

4 A. No, it isn't.

5 Q. When you arrived to deliver materials, it
6 is not customary for you to talk to the general
7 contractor, is it?

8 A. No, it is not.

9 Q. And not normal for the superintendent of
10 the general contractor to concern himself with your
11 material delivery while you are there?

12 A. No, he didn't.

13 Q. And if the superintendent does concern
14 himself with your delivery or say something to you, it
15 is for a reason, right?

16 A. Right.

17 Q. If the general contractor asks you to
18 off-load material at a certain place, you wouldn't
19 off-load it somewhere else without discussing it with
20 that general contractor or his representative, would
21 you?

22 A. No. If he specifically gave me a certain
23 place to come in and I needed to come in somewhere
24 else, I would talk to him about it first.

25 Q. It is the subcontractor that tells you

1 where he wants the material?

2 A. Yes, he does.

3 Q. And how you get it there is your
4 decision?

5 A. Most of the time, yes.

6 Q. Because you are the professional?

7 A. Yes.

8 Q. If someone, whether it be the sub or the
9 general, suggested that you off-load at a certain
10 area, you would look at the area you had been asked to
11 deliver and check it out to make sure it was safe,
12 wouldn't you?

13 A. Yes.

14 Q. And if you didn't think it was a safe
15 place to off-load, you would discuss your concerns
16 with the person who wanted it there?

17 A. Yes.

18 Q. You have already said it is a better
19 practice not to hit things when you are off-loading
20 materials with the boom?

21 A. Definitely. It is not really any reason
22 to hit things or no reason why you would want to.

23 Q. That is true.

24 A. It happens but you want --

25 Q. The more room you have, the less chance

1 you are going to hit something?

2 A. True.

3 Q. And three to four inches isn't a lot of
4 room, is it?

5 A. No. I would say it is sufficient but it
6 is not a lot of room.

7 Q. Where Mr. Shepherd was working that day,
8 it was -- it was a close fit, right?

9 A. Yes.

10 Q. And it certainly is not something you
11 would want to try if you didn't have a spotter
12 standing closer to it than you were, right?

13 A. I wouldn't say I wouldn't do it without a
14 spotter because judging from the picture he was
15 probably only 25 feet from where he was booming into.
16 So I couldn't say I wouldn't do it with three or four
17 inches. If it was an inch clearance or something like
18 that, then he definitely needs a spotter. But three
19 or four inches, you can see that from 20 feet, I think
20 you can.

21 MS. SPENCE: Permission to approach.

22 THE COURT: Yes.

23 BY MS. SPENCE:

24 Q. Page 25. Do you remember giving your
25 deposition June 21st of this year?

1 A. Yes.

2 Q. I am going to start at Line 6 and ask if
3 I am reading your testimony correctly. Is three to
4 four inches enough room to unload hacks of drywall,
5 three to four inches of clearance?

6 Answer: Yeah. I would say it is enough
7 room as long as you have spotters. It is not
8 something you want to try without -- well, depending
9 on what your situation is, it is not something you
10 really want to try if you don't have anybody standing
11 closer to it than you are, you know, guiding you in
12 and out.

13 Is that your testimony?

14 A. Can I see it again?

15 Q. Sure.

16 A. Yeah. That is my testimony. I also just
17 said that from 20 feet away, three to four inches is
18 sufficient.

19 Q. It is sufficient but you would want a
20 spotter?

21 A. Yeah.

22 Q. Now, you don't personally know how good
23 or experienced a spotter Hewitt was, do you?

24 A. Excuse me?

25 Q. You don't know how good a spotter Hewitt

1 was at the time of the accident, do you?

2 A. No, I don't.

3 Q. And the reason you would want to try to
4 avoid hitting anything is you don't want to damage
5 your boom?

6 A. True.

7 Q. You don't want to damage the building?

8 A. True.

9 Q. The boom is capable of doing that,
10 damaging the building?

11 A. Yes. It can especially -- mainly on like
12 a finished product. I would say a finished window or
13 something like that where you have to pull the window
14 out, you have finished the window, something like
15 that, the boom can damage that very easily.

16 Q. And the boom itself can get damaged
17 fairly easily, too, can't it, especially the hydraulic
18 hoses?

19 A. The hoses. Yes. They are flexible. But
20 it doesn't take a whole lot.

21 Q. If you did your job right with three to
22 four inches of clearance and a spotter, you shouldn't
23 hit the beam, should you?

24 A. Three to four inches, no, you shouldn't
25 hit it.

1 MS. SPENCE: Thank you.

2 THE COURT: Anything else on redirect?

3 REDIRECT EXAMINATION

4 BY MR. SMIRCINA:

5 Q. Did you ever determine yourself whether
6 these controls to this boom crane were damaged?

7 A. I didn't hear what you said.

8 Q. Did you ever determine for yourself
9 whether the controls on this boom crane were damaged
10 in the accident of November 14th, 1996?

11 A. Did I determine that for myself?

12 Q. Yes.

13 A. Yes. That is how I think they got
14 damaged.

15 Q. Were they damaged?

16 A. At the time of the accident?

17 Q. Right.

18 A. Yes.

19 Q. How did they work? I mean, are they
20 spring loaded? Are they levers? What are they? How
21 do these controls work?

22 A. They are levers. They move forward,
23 backwards, side to side. There is not a spring in
24 them, but they do come back to their own -- come back
25 to the original position.

1 Q. When you observed the seat on the day
2 after the accident, did you determine whether or not
3 that control was broken?

4 A. Yeah. I would say it was bent, not
5 necessarily broke.

6 Q. When that control is bent or moved, what
7 happens to the arm of the boom crane?

8 MR. NORRIS: Your Honor.

9 MR. SMIRCINA: He ran -- he is an
10 operator.

11 MR. NORRIS: Respectfully, Your Honor, he
12 is asking for opinion evidence that was never
13 disclosed in discovery.

14 MR. SMIRCINA: It is not opinion.

15 THE COURT: Overruled, Mr. Norris. Go
16 ahead and answer the question.

17 BY MR. SMIRCINA:

18 Q. As an operator, do you know what happens
19 to the arm of the boom crane when you move the
20 right-hand lever on the boom seat?

21 A. Yes. It moves it.

22 Q. What does?

23 A. It moves the secondary -- the secondary
24 boom, the second part, the part that is still
25 partially in the building.

1 Q. Which handle are you -- point up and
2 point to the jury showing the picture. Which boom?

3 A. This is the right-hand lever. It moves.

4 Q. Which part of the boom arm?

5 A. This part of the boom. And it opens and
6 closes the forks.

7 Q. And that part is damaged?

8 A. Yes, it is.

9 Q. Thank you. About the sheet rock that you
10 deliver, you say you delivered in two sheets. Are
11 they attached together somehow?

12 A. Yes.

13 Q. Would it make any sense to deliver one
14 sheet at a time?

15 MR. NORRIS: Objection, Your Honor.

16 THE COURT: Sustained. Do you want to
17 rephrase the question?

18 BY MR. SMIRCINA:

19 Q. Do you deliver one sheet at a time
20 without breaking apart the wrapping around the sheets?

21 A. No. You can't. It would take twice as
22 long to deliver one sheet at a time. I wouldn't see
23 any reason to do that.

24 Q. Would that diminish your pay?

25 A. Yes, it would.

1 Q. In answer to Ms. Spence's question to
2 your -- Ms. Spence's questions to you about the
3 spotter, all right, you say in your answer that
4 depending on what your situation is, you might want a
5 spotter with three or four inches of clearance. What
6 situation would it depend upon?

7 A. The distance that you boom. And, like,
8 that was the second floor. So you're not too far away
9 from it. You can pretty much see it. If you're
10 booming to the third floor, something like that,
11 you're looking up over your head, you can't see it
12 nearly as well. It could be the same amount of
13 clearance, but you're not going to be able to see it
14 as well.

15 Q. You're not going to be able to gauge the
16 distance between the boom arm and whatever you're
17 booming it into?

18 A. Exactly.

19 Q. If the seat -- can you determine from
20 those pictures where relative to the second deck
21 Michael Shepherd was sitting while he was booming the
22 material in?

23 A. I would say just below it. It looks like
24 the second deck is about -- the boom seat is 12 feet
25 and a half, roughly say 12, 12, six. The second deck

1 looked like it was about 14 feet, something like that,
2 maybe a foot and a half above it. So he has got
3 pretty good eye-level. He is not at eye level but he
4 is close enough where he could see it.

5 Q. Would he have a good perspective to the
6 boom arm relative to the steel beam?

7 A. Yes, I think so.

8 Q. Mr. Norris went through the W-2 -- your
9 W-2 forms with you, and I think he might have misled
10 you a little bit and not given accurate information to
11 the jury.

12 MR. NORRIS: Objection, Your Honor.

13 MR. SMIRCINA: May I continue?

14 THE COURT: Go ahead and answer the
15 question.

16 BY MR. SMIRCINA:

17 Q. When you were making your wages, I see in
18 Box 13 -- what is that?

19 MR. NORRIS: What year is that, please?

20 MR. SMIRCINA: 1997, John.

21 BY MR. SMIRCINA:

22 Q. Box 13, what does it say? What does the
23 figure say there in your 1997 wages?

24 A. It says \$3,066.07.

25 Q. And what would that figure indicate to

1 you, do you know?

2 A. That is the money we put into the 401(k)
3 for retirement.

4 Q. So your actual wages for the year would
5 be the \$78,000 plus the \$3,000?

6 A. Yes, it would.

7 Q. For 1998, what is the figure in Box 13?

8 A. \$7,484.72.

9 Q. And that would be what again?

10 A. Money I put into the 401(k), untaxable.

11 Q. So your actual earnings for that year
12 would be \$67,662.31 plus the \$7,484.72?

13 A. Yes, it would.

14 Q. And that equates to more than \$75,000?

15 A. Yes, it would.

16 Q. For 1999, would you please read the
17 figure in Box 13? What is that figure?

18 A. \$6,857.23.

19 Q. And what is the figure in Line 1 saying
20 the wages, tips, and other compensation?

21 A. \$64,848.12.

22 Q. So total earnings for a year would total
23 \$71,705.35?

24 A. Yes, it would.

25 MR. SMIRCINA: Thank you, Mr. Walker.

RECROSS-EXAMINATION

BY MR. NORRIS:

Q. Mr. Walker, does your --

THE COURT: Wait, Mr. Norris. They get to go last. You don't.

MR. NORRIS: No, ma'am. He has gone into new areas.

THE COURT: No, he hasn't.

MR. NORRIS: Your Honor, I would like to recross-examine him outside of the hearing of the jury. I have got to preserve the record, Your Honor.

THE COURT: Mr. Norris, sit down, please. Sit down, please. Would you have the witness wait outside, please? Mr. Walker, have a seat out in the hall, please. Your next witness.

MR. SMIRCINA: John Rymiszewski.

JOHN RYMISZEWSKI, called as a witness on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SMIRCINA:

Q. Thank you for coming today. What is your name and your business address, please?

A. My name is John Rymiszewski.

Q. Would you please spell that for the court

1 reporter?

2 A. Sure. R-y-m-i-s-z-e-w-s-k-i. The name
3 of the company is Tidewater Interior Products. We're
4 at 401 Naval Base Road, Norfolk, Virginia.

5 Q. What do you do for Tidewater Interior
6 Products?

7 A. Currently, I am the vice-president and
8 joint manager of the company.

9 Q. What does that business do?

10 A. We're strictly a specialty drywall
11 supplier. We supply materials for the drywall
12 contracting business.

13 Q. And when did that business open?

14 A. 1995, November. But actual operations
15 did not start until January of '96.

16 Q. Did the company -- is it affiliated with
17 any other companies?

18 A. We are affiliated -- I guess the best way
19 to explain it, we are an entity within our own
20 selves. There is a corporation called Gypsum
21 Management Supply based out of Atlanta, and out of
22 that company, there are about 37 to 39 different
23 entities within themselves that operate as their own
24 business.

25 Q. What is your educational background?

1 A. I went to Duke University, graduated with
2 a degree in political science back in 1989.

3 Q. Do you know the plaintiff in this case,
4 Michael Shepherd?

5 A. Yes, I do.

6 Q. How long have you known Mr. Michael
7 Shepherd?

8 A. Since 1991, '92.

9 Q. And how long has he worked for Tidewater
10 Interior Products?

11 A. He came over from a sister company of
12 ours, Capital Building Supply in Northern Virginia,
13 back in December of '95. Mike had been an employee
14 there since 1987, if I am not mistaken. And we hired
15 him and he transferred to our company in December of
16 '95.

17 Q. Was there a special reason you wanted
18 Michael Shepherd to work for Tidewater Interior
19 Products?

20 A. Well, I just -- with opening up a new
21 location such as ours and as small as we were when we
22 first started, I wanted to hire the best possible
23 candidates that I could get. And Mike just happened
24 to be available. And I had asked him -- spent the
25 time back in probably October sitting down with him

1 and talking about his opportunities and what he could
2 do down in the Tidewater area with me.

3 Q. All right. And what was -- what job did
4 you hire him for?

5 A. I hired him as a boom operator, truck
6 driver.

7 Q. And what are the duties of a boom truck
8 operator?

9 A. There are multiple duties. The first way
10 to explain it is he has got to be a commercial
11 driver -- licensed driver. And that means driving
12 rigs that are 26,000 pounds or over to and from job
13 sites.

14 The second facet of his job is actually
15 operating the crane on a daily basis. That means
16 operating a crane to maneuver material in and out of
17 buildings from the ground to a building and actually
18 from the ground actually onto a truck.

19 The third facet of his job is carrying
20 material along with the other guys that are on his
21 truck. And that is maneuvering material within the
22 building wherever the customer wants.

23 Probably the fourth aspect is being the
24 actual team leader on that truck and providing the
25 camaraderie and leadership to the other two guys that

1 are on his truck.

2 Q. How does a boom truck operator get paid
3 by your company?

4 A. Right now we pay our employees that are
5 on the trucks that deliver the sheet rock, boom truck
6 specifically, a piece rated -- piecework rate.

7 Q. Why is that your policy as opposed to
8 paying them an hourly wage?

9 A. One thing that we found is by paying guys
10 hourly is that incentive is not there for them to make
11 additional money. And what we have decided and have
12 come up with, not only within our company but within
13 the market industry, is that piecework rates schedules
14 that allows the employees that operate the cranes and
15 that deliver the material to gain incentives for
16 delivering more material out on a job site on any
17 given day.

18 Q. Does the boom truck operator as opposed
19 to the sheet rock hauler get paid more money?

20 A. Yes.

21 Q. Now, had you seen Michael Shepherd
22 operate a boom crane before?

23 A. Yes.

24 Q. How would you characterize his
25 performance and abilities in operating a boom crane

1 prior to the accident?

2 A. I guess the easiest way to explain to me
3 is he is the best boom operator that I have ever seen
4 operate a crane. And this dates back from knowing --
5 first getting to know him back in 1991 and working in
6 the streets of downtown Washington, D.C.

7 Q. So you were happy to have him come down
8 and work for you?

9 A. Oh, absolutely.

10 Q. Now, I am going to direct your attention
11 now and probably have you come down, Mr. Rymiszewski,
12 to look at some pictures that we have prepared after I
13 get this set up again. When did you first arrive on
14 the site of the accident on 14 November 1996, about
15 what time of day?

16 A. From my recollection, about four-thirty,
17 five o'clock in the evening.

18 Q. Had the accident already occurred?

19 A. Yes.

20 Q. Does this picture fairly represent what
21 the accident scene looked like?

22 A. Yes.

23 Q. What did you do that day at the accident
24 scene?

25 A. Basically, looked at what damage was done

1 to the actual truck, where Mike actually fell after
2 being hit.

3 Q. And from your asking around and
4 investigating, what did you determine?

5 MR. NORRIS: Objection, Your Honor.
6 Calls for pure hearsay.

7 THE COURT: Overruled.

8 THE WITNESS: What did I see?

9 THE COURT: Yes. You can answer the
10 question.

11 THE WITNESS: Okay. What I saw -- the
12 first thing that came to my mind was how it could have
13 happened knowing that the beams were already up there.
14 And I guess the second thing that I noticed is the
15 beam itself where it actually landed and how close it
16 landed to him next to the truck and the amount of time
17 that it took for that beam to slide down the crane
18 itself, how fast it could have actually happened.

19 BY MR. SMIRCINA:

20 Q. When you say how could it have happened,
21 what do you mean?

22 A. Well, a typical job site situation, you
23 always check out the job site before you get started.
24 And we actually -- just asking the information while I
25 was at the job site. That is not the only area that

1 we actually stocked. That was the actual last area of
2 the job that we stocked. The first portion of the job
3 is stocked to the left of that, which I am sure those
4 guys checked to see if everything was secure.

5 MR. NORRIS: Objection, Your Honor.

6 THE COURT: Don't speculate. Just
7 testify about what you know.

8 BY MR. SMIRCINA:

9 Q. Did there ever come a time where you
10 examined the boom truck itself for damage?

11 A. Preliminary just checking the actual
12 crane operator seat at the job site, and then the
13 crane actually had to be manually brought back down
14 into its cradle by a truck repair company.

15 Q. Why is that?

16 A. Because of the damages that were done to
17 the actual crane seat and to the hoses that it had to
18 be manually done with a separate pump to get the crane
19 back into the cradle. So those were the only
20 preliminary inspections I could do. The other
21 inspections were done the day after, once the truck
22 was brought to our location.

23 Q. And when you inspected the truck once it
24 was brought to your location, what damage did you find
25 on the truck?

1 A. Again, the biggest damage that I saw was
2 the actual crane seat itself and the hoses along the
3 top of the crane.

4 Q. This crane seat?

5 A. Yeah.

6 Q. Was there any damage, other than to the
7 hoses on the boom arm, to the boom arm itself?

8 A. No. The only damages that actually were
9 there were scratches from the beam that -- from
10 sliding down the crane.

11 Q. You saw no debits in the boom arm?

12 A. No.

13 Q. Not the secondary boom arm?

14 A. No.

15 Q. Not the primary boom arm?

16 A. No.

17 Q. Did you ever examine anything else at the
18 site?

19 A. Looked at the edge of the beams to see if
20 it was actually secured.

21 Q. Okay. Did you look at this beam here?
22 Is that the beam you are talking about?

23 A. Yeah. Yes.

24 Q. Now, John, I am going to show you some
25 more pictures. And I am going to opire to you that

1 other witnesses have testified that this picture
2 represents this side of the beam and this picture
3 represents this side of the beam. When you say you
4 looked at the beam, what did you look at? What part
5 of the beam did you look at? All of it?

6 A. All of it. The only thing I couldn't see
7 was the actual underside of this beam, because it was
8 in the ground.

9 Q. You mean the side that would be on the
10 far side of this picture?

11 A. Correct.

12 Q. And did you examine this entire beam?

13 A. Yes.

14 Q. Did you see any evidence of welding at
15 all?

16 A. Not to my recollection. No.

17 Q. On this beam, this side of the beam,
18 which is up here, did you see any evidence of welding?

19 A. No.

20 Q. Did you notice those two black marks on
21 the beam?

22 A. Not to my recollection.

23 Q. All right. John, you can sit back up
24 there. Now, you said when you came to the scene, you
25 were questioning about how it happened because the

1 beam was already up there. What did you mean by that?

2 A. Well, with Mike being a very good
3 operator, you look at the area that he actually
4 stocked the material through. And you never second
5 guess decisions that an operator makes because he is
6 the one that is actually out on the job site. And
7 that is why I was so confused as to how could this
8 have actually happened with Mike being the type of
9 operator that he is.

10 Q. Who else was there at the scene when you
11 got out there that afternoon?

12 A. I know Scott Hewitt was there at the job
13 site. I do not recall if Allen Walker was actually
14 there or if he was there after the fact.

15 Q. Now, Mr. Rymiszewski, do you know how
16 drywall comes delivered to your company?

17 A. Yes.

18 Q. Do you know how you deliver it to job
19 sites?

20 A. Yes.

21 Q. How much does a hack of half-inch eight
22 foot drywall weigh?

23 A. Eight foot would probably run about 22-,
24 2300 pounds.

25 Q. How much would two sheets together weigh?

1 A. Probably around 120 pounds.

2 Q. How much would five-eighth board eight
3 feet long weigh?

4 A. Two sheets?

5 Q. Two sheets.

6 A. About 180 to 200 pounds.

7 Q. Are there any other types of board that
8 your company delivers to people?

9 A. Eight foot is just one length of board.
10 It gets a little bit more confusing because we carry
11 eight-, nine-, ten-, 12-foot board, which increases
12 the actual weight of the material.

13 Q. Is it the -- how is it that the drywall
14 haulers haul the sheets of sheet rock?

15 A. Particularly there is a couple of ways.
16 Walking it with another -- with another partner.

17 Q. How many sheets at a time do they carry?

18 A. Typically a bundle, which is two sheets.

19 Q. Is there any way to carry just one at a
20 time without breaking the bundle apart?

21 A. No.

22 Q. Continue, please.

23 A. Second, of course, is putting it on a
24 drywall cart, and that means pull it off the actual
25 forks by hand, sitting it on a cart, and putting six

1 to 12 bundles on a cart and carting it to wherever it
2 needed to go.

3 Q. What is your policy -- what is your
4 policy about service as far as delivering it to the
5 customers? What is it that you want your people to
6 do?

7 A. I guess the difference between what we do
8 as a specialty drywall yard versus, say, a Home Depot
9 or a Lowe's do-it-yourself center, they have a
10 delivery truck as compared to what we do is we
11 actually put the material where the customer wants
12 it. It doesn't necessarily need to be a drywall
13 contractor. It can be a homeowner doing
14 reconstruction in the house. We will put the material
15 where the customer requests.

16 Q. And that is why you have teams of people
17 moving this as opposed to just a forklift truck?

18 A. Correct.

19 Q. John, in a typical day as general manager
20 of the company, do you know how much the truck of,
21 say, Allen Walker would deliver in a day, how much
22 weight in terms of drywall?

23 A. I venture to say anywhere between 80- and
24 115-, 120,000 pounds.

25 Q. You mean between 40 tons and 60 tons?

1 A. Yes. Yeah. That is about right. Two
2 thousand pounds.

3 Q. So, physically, either by the boom truck
4 or manually being carried, the three workers together
5 deliver anywhere from 40 to 60 tons of drywall a day?

6 A. Correct.

7 Q. Now, if Michael Shepherd were physically
8 unable to carry and walk the amount of weight involved
9 in carrying this sheet rock, would that alone cause
10 you to change his job operating a boom truck? In
11 other words, if he can't walk with the board, does
12 that alone disqualify him from operating a boom truck?

13 A. No.

14 Q. What is it about Michael's condition now
15 to your knowledge that makes him unable to operate a
16 boom truck?

17 MR. NORRIS: Your Honor, I object. This
18 is beyond this witness's expertise.

19 THE COURT: You need to lay a little bit
20 more foundation with this witness, please.

21 BY MR. SMIRCINA:

22 Q. Do you know what Michael Shepherd's
23 injuries were in the accident?

24 A. He injured his leg.

25 Q. Has he ever complained to you about his

1 ability to carry drywall?

2 A. Yes.

3 Q. Has he said to you that -- has he said
4 whether or not he feels he can continue to do the
5 duties, say, that Allen Walker has with your company
6 now?

7 A. Yes, he has.

8 Q. What is his answer to that?

9 A. Well, his biggest concern is getting up
10 and down on the crane. You have a ladder that you
11 have to get up and down on, which constitutes five to
12 seven steps, and then one step at the end. And you're
13 looking at walking up and down this ladder probably
14 anywhere between 40 and 75 times a day just to get the
15 material -- just to get off the crane to help the
16 other two guys on a truck.

17 Secondly, of course, is the fear factor
18 of actually operating the crane again. Mike has
19 expressed his fear of actually operating the crane,
20 thinking that something else might happen in the
21 future.

22 Q. Has he said to you whether or not he can
23 carry drywall as he did before the accident?

24 A. He says that he cannot.

25 Q. Now, before the accident, how did he get

1 paid?

2 A. He was on a piecework rate.

3 Q. All right. Now, your company just
4 started in '96. How did business progress for you?

5 A. Well, we actually grew probably anywhere
6 between 10 and 15 percent per year as a company, just
7 building customer base and getting more and more bids
8 as the years progressed.

9 Q. So in November of 1996, you really only
10 had operators for ten months?

11 A. Yes.

12 Q. And at that time, was business beginning
13 to pick up?

14 A. Beginning to. Yes.

15 Q. Did business continue to pick up the
16 following three years into the year 2000?

17 A. Yes. We have continually grown our
18 business over the last four years.

19 Q. After Michael Shepherd got hurt, he --
20 when did he come back to work, do you recall?

21 A. If I am not mistaken, it was somewhere
22 near the beginning of March of '97.

23 Q. How did you pay him at that time?

24 A. What we ended up doing was paying him an
25 hourly rate -- 40-hour salary rate based on the

1 average of what he had been making prior to his
2 accident.

3 Q. So you made -- let me see if I understand
4 that. You say you gave him a 40-hour week; is that
5 correct?

6 A. Uh-huh.

7 Q. But the 40-hour-week wage was his average
8 for a week before the accident?

9 A. Yes.

10 Q. Is that correct?

11 A. Correct. Or for those ten months prior
12 to the accident.

13 Q. So whatever he made throughout 1997 would
14 have been his average weekly wage in 1996?

15 A. Correct.

16 Q. Is that correct?

17 A. Correct.

18 Q. Did there come a time that you changed
19 his pay scale -- his pay rate and scale?

20 A. If I am not mistaken, it was probably
21 December of '97, right at the beginning of '98. We
22 had moved locations and Mike's attendance,
23 punctuality, had started to suffer, and at that time
24 he was already six months into driving the
25 tractor-trailer for us.

1 Q. So he changed his job?

2 A. Yes. What we ended up doing was
3 purchasing a tractor-trailer for the company, knowing
4 that we could at least use Mike's abilities elsewhere
5 rather than just in the office, put him on a
6 tractor-trailer, so at least we could use his CDL
7 status.

8 Q. And 1997, do you know what his average
9 weekly wage was, do you have any recollection?

10 A. Not off the top of my head. No.

11 Q. But it was his average for the ten months
12 weekly in 1996; is that correct?

13 A. Correct.

14 Q. Do you know what his hourly rate is now?

15 A. I believe it is 15.10 an hour.

16 Q. And this is what you pay him to operate a
17 tractor-trailer as opposed to a boom truck?

18 A. Correct.

19 Q. His duties as a tractor-trailer driver,
20 what are they?

21 A. What he does right now is he delivers
22 material to a job site for the actual boom crane and
23 would assist in unloading it with a forklift so that
24 the crane doesn't have to spend the time to unload it.

25 Q. Your company seemed to have been

1 unusually generous to Michael Shepherd. Why was that?

2 A. He is a good employee.

3 Q. Now, in your opinion, based on what he
4 does now and what he did before, does he have the
5 opportunity to make as much money as he did prior to
6 the accident?

7 A. No.

8 Q. Why not?

9 A. The opportunity is there, but it is
10 incentive based and, again, it is an incentive-based
11 program for him and with him not having that
12 opportunity, he is now a regular hourly employee.

13 Q. You're speaking of the piecework?

14 A. Yes.

15 Q. In other words, he is no longer paid
16 piecework?

17 A. No, sir.

18 Q. But he seems to make an unusual amount of
19 money even still?

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

22 BY MR. SMIRCINA:

23 Q. Do you know what his income was for 1999
24 by any chance, any approximation?

25 A. If I am not mistaken maybe 54-.

1 Q. At \$15 an hour at a 40-hour week, that is
2 \$600 a week, what does that equal to for a year?

3 THE COURT: \$31,408.

4 BY MR. SMIRCINA:

5 Q. \$31,000. How does he make over 50,000 a
6 year?

7 A. Overtime hours.

8 Q. So your company --

9 A. Bonuses.

10 Q. Does he request the overtime?

11 A. Yes.

12 Q. Do you have an opinion as to whether or
13 not Michael Shepherd would have continued to operate
14 the boom truck had he not been hurt, been a boom crane
15 operator?

16 A. Yes.

17 Q. Do you have an opinion as to how hard he
18 would have worked?

19 MR. NORRIS: Objection, Your Honor.

20 THE COURT: Sustained the way the
21 question was phrased.

22 BY MR. SMIRCINA:

23 Q. Had he not been hurt, would he have
24 continued to work as a boom crane operator?

25 A. Yes.

1 Q. And how would he have been paid
2 continuing as a boom truck operator?

3 A. Piecework.

4 Q. If he worked the same amount of hours as
5 he does, now earning 15.10 an hour as a boom truck
6 operator, would you expect him to make considerably
7 more money?

8 A. Yes.

9 Q. Does he work as hard now in terms of
10 hours worked as he did prior to the accident?

11 A. Absolutely.

12 Q. Are you aware of whether or not Michael
13 Shepherd has tried to be a boom crane operator since
14 the accident?

15 A. Some things I am not aware of when they
16 are out on job sites. I have heard that he has gone
17 on boom trucks, especially on residential homes. But
18 whether or not he does it on a consistent basis, I do
19 not know.

20 Q. But he does not get paid --

21 A. No.

22 Q. -- piecework, no matter what?

23 A. No.

24 Q. Do you know whether or not he has tried
25 to carry drywall since the date of the accident as he

1 did before the accident?

2 A. Has not.

3 Q. Has not tried or does not do it?

4 A. Does not do it.

5 Q. How much weight is there in a 12-foot
6 section of drywall that is delivered -- a bundle of
7 drywall that is delivered?

8 A. Half inch is probably about 180 pounds.
9 Five-eighths four thick would probably be about 240.

10 Q. And two people at a time have to carry
11 this board?

12 A. Yes.

13 Q. There is no way to balance it otherwise?

14 A. No.

15 MR. SMIRCINA: I don't have anything
16 further at this time, Your Honor.

17 CROSS-EXAMINATION

18 BY MR. NORRIS:

19 Q. Good morning, Mr. Rymiszewski.

20 A. Good morning, sir.

21 Q. How is my pronunciation?

22 A. It is fine.

23 Q. Mr. Rymiszewski, when you got to the site
24 the day of the accident to examine things, I think
25 what you told us was that today you don't recollect

1 having seen these marks on the beam, am I right, that
2 is what you said today?

3 A. Correct.

4 Q. Unless I am being too much of a lawyer,
5 that is something different from saying I know those
6 marks weren't there, I remember they weren't there.
7 Are you saying absolutely, a hundred percent that you
8 got up on the truck and checked that beam and saw that
9 they weren't there?

10 A. Being at eye level -- with the beam being
11 at my eye level, I don't recall actually seeing them
12 there.

13 Q. Okay.

14 A. So I couldn't tell you. You have to
15 understand, it was some time ago.

16 Q. You didn't get up on the truck to look
17 for it, though, right?

18 A. No. Not with it being eye level. I
19 didn't need to.

20 Q. If it -- let's assume something for a
21 minute. Let's assume it wasn't there when you were at
22 the accident at four-thirty and let's assume these
23 pictures were taken by a Navy photographer the day of
24 the accident or even let's assume the pictures were
25 taken the next day. That means that somebody came

1 onto this site and put some kind of a mark on the beam
2 after the accident happened, right?

3 MR. AUFENGER: Judge, he is asking the
4 witness to speculate.

5 THE WITNESS: Possibly.

6 THE COURT: Sustained. He can testify to
7 what he knows.

8 BY MR. NORRIS:

9 Q. Well, was the area secured?

10 A. Yes.

11 Q. It was a sealed building, wasn't it?

12 A. I don't know if it was actually a sealed
13 building but the actual area was secured through
14 caution tape, accident-scene tape.

15 Q. Were you aware there were surveillance
16 cameras on this site?

17 A. I was not aware. I was aware of two
18 things, that I could not take pictures for my own
19 benefit and I was not allowed on the second floor.

20 Q. So somebody with the Navy was watching
21 what you did and told you what you could and couldn't
22 do, right?

23 A. At the gate, the Navy said I couldn't
24 bring a camera out.

25 Q. Now, do you recall that the other end of

1 the beam looked like this when you were there?

2 A. It looks to be the case. Yes.

3 Q. Did you brush away this dirt and look at
4 it?

5 A. No.

6 Q. Let's assume for a minute that there is
7 nothing under this dirt, okay, in the way of a burn or
8 a tack.

9 A. Uh-huh.

10 Q. Do you think somebody would have been
11 dumb enough to fake a weld on one end and not the
12 other?

13 MR. AUFENGER: Judge, once again, that is
14 speculation.

15 THE COURT: Sustained.

16 BY MR. NORRIS:

17 Q. Now, Mr. Rymiszewski, does your company
18 have a safety manual for the safe operation of a boom?

19 A. Yes.

20 MR. NORRIS: This is the prior
21 Rymiszewski deposition exhibit.

22 MR. AUFENGER: Okay.

23 BY MR. NORRIS:

24 Q. Is this the manual, sir?

25 A. Yes, it is.

1 Q. And what is the purpose of the manual?

2 A. One for training and two for going back
3 to take a look at it to see if there is anything that
4 people need to comprehend and learn over time that
5 they might have forgotten.

6 Q. Was Mr. Shepherd trained by your company
7 how to operate a boom?

8 A. No, he was not.

9 Q. In 1996, did you use the techniques in
10 this manual to train boom operators?

11 A. Yes.

12 Q. Would you turn to Page 6? Do you see --

13 MR. NORRIS: Your Honor, may I stand over
14 his shoulder?

15 THE COURT: Sure.

16 BY MR. NORRIS:

17 Q. I am not trying to invade your space
18 here. Does Page 6 of your training manual have
19 operating rules?

20 A. Uh-huh.

21 Q. Okay. And does this page deal with
22 moving the load?

23 A. Yes.

24 Q. And you see under Subpart B, During the
25 lifting, care shall be taken --

1 A. Yes.

2 Q. -- that -- and read Number 2.

3 A. Load boom and other parts of the crane.

4 Do not contact any obstruction.

5 Q. Is that, in fact, proper method for the
6 operation of a boom that you are not to come into
7 contact with fixtures around the boom?

8 A. Correct.

9 Q. Now, would you expect that your
10 employees -- you expect your employees to operate your
11 boom safely, don't you?

12 A. Yes.

13 Q. And you don't want them to damage the
14 boom?

15 A. No.

16 Q. And you don't want them to damage any
17 structures that they are off-loading around?

18 A. No.

19 Q. So you don't want them to hit anything?

20 A. No.

21 Q. And they shouldn't hit anything, should
22 they?

23 A. Correct.

24 Q. And is one of the ways you try and avoid
25 that is to have spotters work with your operators?

1 A. Correct.

2 Q. And do the spotters stand on a
3 second-story lift up on the second floor?

4 A. Yes.

5 Q. And are they supposed to keep an eye on
6 both the boom and any obstructions around the boom?

7 A. Yes.

8 Q. And are they supposed to assist the boom
9 operator to avoid collisions or contact with the
10 obstructions?

11 A. Yes. With the use of hand signals.

12 Q. And is one of those hand signals a closed
13 fist?

14 A. If I am not mistaken there is -- I guess
15 the best way to explain it is everyone has -- there is
16 a universal set of hand signals. Everyone varies off
17 of those universal sets of hand signals.

18 Q. Is there some signal for a spotter to
19 give the operator to tell him to stop movement?

20 A. Two of them.

21 Q. What are they?

22 A. The first one is one arm up and down. To
23 stop suddenly is two arms up and down.

24 Q. So the record will be clear, you have
25 just held one arm and then both arms parallel to the

1 ground and move them kind of like in a wing-flapping
2 motion?

3 A. Correct.

4 Q. Are those both the signals or is there
5 one other signal to stop?

6 A. Again, those are actually universal
7 signals. Different crews have different methods and
8 different ideas. As long as it is within an
9 understanding between the boom crane operator and his
10 crew, that is acceptable.

11 Q. Now, should the spotter keep his
12 attention directed to the boom while the boom is in
13 movement?

14 A. Yes.

15 Q. And if the spotter sees the boom come
16 into contact with the building, should he give a
17 signal to stop?

18 A. Yes.

19 Q. And should the boom operator be watching
20 the spotter as well as the boom for signals like that?

21 A. Yes.

22 Q. And the controls that you have talked
23 about, if he sees a signal to stop, can he immediately
24 stop the boom?

25 A. Yes, he can.

1 Q. Now, I think you told us on direct that a
2 pieceworker can make more than an hourly worker; is
3 that right?

4 A. Correct.

5 Q. Now, isn't it true that an hourly worker
6 could make more than a pieceworker?

7 A. Possibly. Yes.

8 Q. It depends on how hard the pieceworker is
9 working and it also depends on how hard the hourly
10 worker is working?

11 A. Correct.

12 Q. Now, does your company keep payroll
13 records for its employees?

14 A. Yes.

15 Q. And have you kept those records from '96
16 through the present?

17 A. Yes.

18 Q. And did you keep them for Mr. Shepherd?

19 A. Yes.

20 Q. And did you keep them for Mr. Walker?

21 A. Yes.

22 Q. And do these records indicate how much
23 they were paid?

24 A. Yes.

25 Q. And does it also indicate the number of

1 hours they worked?

2 A. Yes.

3 Q. And I would like to show you two separate
4 sets of records. The first, do you recognize this as
5 being your company's payroll records for Michael
6 Shepherd for the years 1996 through -- I believe we
7 have them from you through --

8 A. '98. Through '98.

9 Q. -- through 1998. All right. Are those
10 the records kept by your company in the ordinary
11 course of business for Mr. --

12 THE COURT: I don't think there is any
13 objection.

14 MR. SMIRCINA: Those are the records. It
15 is not the actual records. It is an activity report.

16 BY MR. NORRIS:

17 Q. And it reflects the payments made to
18 Mr. Shepherd and the hours worked?

19 A. Yes.

20 Q. And are -- is there a similar record for
21 Mr. Walker?

22 A. Correct. It is.

23 MR. NORRIS: Your Honor, we would offer
24 these as defendants' next two exhibits, the first one
25 being Mr. Shepherd, the next one being Mr. Walker.

1 MR. AUFENGER: If I can just take a quick
2 look at them.

3 MR. SMIRCINA: Now, Your Honor, these are
4 activity reports and not actual records. And I can
5 tell you from the deposition that we did that they are
6 extremely confusing to understand and read and unless
7 we are going to go --

8 THE COURT: That may very well be, and
9 that is the defendants' problem. If he wants to put
10 in a confusing exhibit, we will leave it up to him.
11 But they are records kept and there is no question as
12 they reflect whatever they reflect.

13 MR. SMIRCINA: Yes, ma'am.

14 THE COURT: 4 was being -- going to be --

15 MR. NORRIS: Mr. Shepherd.

16 THE COURT: Mr. Shepherd's.

17 (The documents referred to were marked as
18 Defendants' Exhibits No. 4 and 5, and received into
19 evidence.)

20 THE COURT: 5 will be Mr. Walker's.

21 BY MR. NORRIS:

22 Q. Have you done any of your own independent
23 comparison between Mr. Walker and Mr. Shepherd to
24 compare the number of hours each of them worked both
25 before and after the accident?

1 A. No.

2 Q. Now, I am going to hand you a document,
3 which is a social security summary of Mr. Shepherd's
4 wages over the past several years. And you can see
5 that the wages are summarized in the second column?

6 A. Uh-huh.

7 Q. Would you agree with me Mr. Shepherd's
8 wages are actually higher in '97 and '98, than they
9 were in 1996, when the accident happened?

10 A. Yes.

11 Q. Now, on your W-2s for your employees, is
12 there a box indicated for a contribution to your
13 company's retirement plan?

14 A. 401(k) plan.

15 Q. Your company has a 401(k)?

16 A. Yes, sir.

17 Q. Does the employer make contributions to
18 the 401(k)?

19 A. I believe he does.

20 Q. So on the W-2, the very first box shows
21 an employee's wages, does it not?

22 A. Uh-huh.

23 Q. And those wages are actually based on the
24 amount of hours the employee works or the amount of
25 piece rate the employee is paid, right?

1 A. Total gross. Yes.

2 Q. But what is in the 401(k) box is
3 dependent in part on how much an employer contributes
4 to the plan in any given year?

5 A. Correct.

6 Q. So it is not related to hours worked or
7 pieces moved, is it?

8 A. No.

9 Q. Now, the boom truck, you told us about
10 the levels on it that operate the boom.

11 MR. NORRIS: Do you need to see this?

12 THE COURT: No.

13 BY MR. NORRIS:

14 Q. These levels control the movement of the
15 boom, I take it, up, down, left, right?

16 A. Up, down, left, right, zone in scope,
17 out, and maneuvers at the end of the crane.

18 Q. Mr. Rymiszewski, does this boom have a
19 foot level on it?

20 A. Two of them.

21 Q. And do the foot levels act as a
22 secondary, kind of a back up and must be depressed in
23 order for the levels to operate the boom?

24 A. Different -- actually two pedals operate
25 different things. The two controls operate different

1 things. And it varies between truck, actually how the
2 operator likes to use and operate their crane, and
3 their foot pedals in operation.

4 Q. Well, for this particular truck were
5 there foot pedals?

6 A. Yes.

7 Q. And would a foot pedal have to be
8 depressed in order to activate the boom?

9 A. A certain movement of the boom. Yes.

10 Q. So you couldn't tell just from looking at
11 the levels what movement may have been -- caused the
12 boom to move unless you knew how and when the foot
13 pedal was activated, correct?

14 A. Say that again.

15 Q. Well, can you tell about a movement of a
16 boom only by looking at the level? Wouldn't you also
17 have to know whether the -- which level was depressed
18 and how it was depressed?

19 A. Yes. But I would like to add to that
20 that.

21 MR. NORRIS: Your Honor, I --

22 THE COURT: Let him finish his answer.
23 Go ahead and finish.

24 THE WITNESS: All of the levels and
25 pedals are all retractable so whatever level was

1 actually pushed, it goes right back into its original
2 space.

3 BY MR. NORRIS:

4 Q. Right. So if Mr. Shepherd jumped off the
5 seat, that foot pedal would come up, wouldn't it?

6 A. Yes.

7 Q. Right. And the foot pedal needs to be
8 down to further activate the boom, doesn't it?

9 A. A particular movement. I don't know
10 which one.

11 Q. That is right. Now, Mr. Shepherd is an
12 excellent boom operator. You told us that, correct?

13 A. Yes.

14 Q. And he is a good employee?

15 A. Yes.

16 Q. Would you agree with me that his position
17 with your company is secure?

18 A. Very secure.

19 Q. Mr. Rymiszewski, if a worker is working
20 piecemeal, it is to his advantage to move as much
21 drywall as possible in any given day, true?

22 A. True.

23 Q. The more drywall he moves, the more money
24 he makes?

25 A. Opportunity for more money. Yes.

1 Q. And you have told us that part of his job
2 is to actually lift and carry the drywall?

3 A. Yes.

4 Q. And would you agree that that takes
5 time -- takes some amount of time --

6 A. Yes, it does.

7 Q. -- once the drywall has been off-loaded
8 to move it to where the sub -- drywall subcontractor
9 wants it?

10 A. Yes.

11 Q. And the more time he spends carrying the
12 drywall, the less time he has to go move another load
13 somewhere else?

14 A. Yes.

15 Q. So a boom operator can save time and move
16 more drywall and make more money if he puts drywall on
17 the second floor rather than putting it on the first
18 floor and having to carry it up flights -- up steps to
19 the second floor, right?

20 A. You would need to walk it up the steps if
21 the foreman says he wants it on the second floor. It
22 is easier just to boom it to the second floor.

23 Q. It is easier, isn't it?

24 A. It is not easier. It is just the way we
25 do things.

1 Q. It is easier to have it on the second
2 floor if that is where it is ultimately going to wind
3 up than for it to be on the first floor and have to
4 carry it up there?

5 A. For the subcontractor.

6 Q. No.

7 A. It is easier --

8 Q. For your crew.

9 A. For our crew. Why would I buy a \$180,000
10 truck if I was going to walk it up the steps? That is
11 why we have those types of trucks.

12 Q. You're not following me. Let's assume
13 for some reason that Mr. Shepherd had to off-load on
14 the first floor.

15 A. Okay.

16 Q. It would take him more time and more
17 effort to then have to carry it to the second floor
18 than if he were able to load it on the second floor,
19 wouldn't it?

20 A. Yes, it would be. But as I explained,
21 Mike is a good enough employee to find the information
22 out from the subcontractor where the material actually
23 has to go to make his own deduction whether it has to
24 go on the first floor or the second floor.

25 Q. Okay. Now, as far as Mr. Shepherd

1 finding out information, do you agree that boom
2 operators do have a responsibility to find out
3 information about an area where they are going to be
4 off-loading to make sure the area is safe for
5 off-loading, the boom operators have that
6 responsibility?

7 A. Yes. They ask the general areas where
8 the material needs to be stocked, though.

9 Q. And they have a responsibility to ask
10 questions to make sure it is safe to do that?

11 A. Yes.

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

13 THE COURT: Ms. Spence.

14 MS. SPENCE: Let me check, Your Honor. I
15 might not have much more.

16 BY MS. SPENCE:

17 Q. Good morning, sir.

18 A. Good morning.

19 Q. You have already identified this document
20 as the boom operator --

21 A. Yes.

22 Q. -- safety manual. And it is published by
23 your parent company?

24 A. Yes, ma'am.

25 Q. And all of your employees are required to

1 read it and sign a letter saying that they have read
2 it?

3 A. Yes.

4 Q. And that would include Mr. Shepherd?

5 A. Yes.

6 MS. SPENCE: Your Honor, I offer this in
7 as the next defense exhibit.

8 THE COURT: Number 6.

9 MR. SMIRCINA: It has already been
10 introduced.

11 THE COURT: Actually, you want with -- it
12 was referred to but it hadn't been offered.

13 (The document referred to was marked as
14 Defendants' Exhibit No. 6, and received into
15 evidence.)

16 MR. AUFENGER: That is fine. That is
17 fine. No objection.

18 THE COURT: That is Number 6.

19 BY MS. SPENCE:

20 Q. You have operated boom trucks some
21 yourself, haven't you?

22 A. Yes, ma'am.

23 Q. And when you operated a boom crane, if
24 you were off-loading material into a tight fitting
25 place, you looked to see what obstructions you risked

1 coming into contact with?

2 A. Yes, ma'am.

3 Q. And checked yourself to make sure that
4 those obstructions were secured?

5 A. Yes.

6 Q. And how they were secured?

7 A. Yes.

8 Q. And that is the same thing you would do
9 today if delivering into a tight space?

10 A. Yes, ma'am.

11 Q. Cost you about \$6,000 to get your boom
12 truck repaired, right?

13 A. Yes, ma'am.

14 Q. Wenger Tile has a revolving account with
15 your company, right?

16 A. Yes, they do.

17 Q. They are a good customer?

18 A. Yes.

19 Q. They order supplies on a daily basis?

20 A. Yes.

21 Q. And pick up material from you five or six
22 times a day?

23 A. Uh-huh.

24 Q. And you make deliveries to their job
25 sites two or three times a week?

1 A. Uh-huh.

2 MS. SPENCE: Thank you. That is all I
3 have.

4 THE COURT: Redirect.

5 REDIRECT EXAMINATION

6 BY MR. SMIRCINA:

7 Q. Have you operated this particular boom
8 crane before?

9 A. No.

10 Q. Are you certain of what all of the
11 controls do?

12 A. No.

13 Q. If your worker is on a job site to
14 deliver sheet rock, and they get permission to go into
15 a certain area by the superintendent, would you assume
16 that that area is free of hazards --

17 A. Yes.

18 Q. -- to their work?

19 A. Yes.

20 Q. Would you believe that if you were told
21 that you could off-load in an area where a piece of
22 overhanging steel is, would you presume that the
23 superintendent had given you permission to be in that
24 area and off-load in an area that that steel beam was
25 secured?

1 A. Yes.

2 MR. NORRIS: Your Honor, I object to the
3 question. That is the ultimate issue for the jury.

4 MR. SMIRCINA: No, it isn't.

5 THE COURT: No, it isn't, either. Go
6 ahead and answer the question.

7 BY MR. SMIRCINA:

8 Q. Is the answer to that question yes?

9 A. Yes.

10 Q. So you would presume that if the
11 superintendent allowed your employees to off-load in
12 an area with overhanging steel, that that is perfectly
13 okay?

14 A. Yes.

15 MR. NORRIS: Your Honor, he is leading
16 the witness.

17 THE COURT: It has been asked and
18 answered.

19 MR. SMIRCINA: I am finished with my
20 redirect, Your Honor.

21 THE COURT: I am going to ask the witness
22 to sit in his chair for a minute. Ladies and
23 gentlemen, we are going to take a short recess. Do
24 you want to step in the back, please.

25 (The jury withdrew from the courtroom.)

1 THE COURT: I am going to reconsider my
2 ruling on letting Mr. Norris ask the witness outside
3 another question about that W-2 form, but we have got
4 the boss here sitting in the chair. I do not want any
5 confusion or any misinformation because he made an
6 appropriate objection about the information to go to
7 the jury.

8 And there seems to be a question about
9 what information includes his earnings, albeit, his
10 earnings that he took his part out to put in the
11 401(k) or whatever it is versus can you just add that
12 number to his wages or does that include some of the
13 employer's contribution. If it does, Mr. Norris is
14 right, and that was his objection. And I am not
15 trying to steal his thunder. You can't just add those
16 two numbers together to come up with the number.

17 MR. SMIRCINA: It is my understanding,
18 having talked to the witness, that the number in Box
19 13 is his contribution to the 401(k).

20 THE COURT: He can ask this witness, and
21 then if we need to, we can have that other witness to
22 clear it up.

23 MR. NORRIS: I did ask.

24 MR. SMIRCINA: No, you didn't.

25 THE COURT: Actually, he did, and he said

1 it contained both. And I just want to make sure that
2 that really was his answer and ask a little further.

3 THE WITNESS: It actually now contains
4 both. It is actually his own contributions.

5 THE COURT: Mr. Norris, if you want to
6 inquire of the witness another question or two, that
7 is fine.

8 MR. NORRIS: Out of the hearing of the
9 jury?

10 THE COURT: Well, they are out for now.
11 Yes. That is why I excused them.

12 MR. NORRIS: How does your 401(k) plan
13 work, sir? There is an employee contribution, isn't
14 there?

15 THE WITNESS: Yeah. But the only -- the
16 employee contribution is taken out of your gross
17 wages.

18 MR. NORRIS: But there is --

19 THE COURT: Where is the exhibit? Let me
20 see the W-2 form.

21 THE WITNESS: Employer matching only
22 comes through in their 401(k) statements.

23 THE COURT: You give them a separate
24 statement with your amount of contribution on it?

25 THE WITNESS: Correct.

1 THE COURT: Your testimony is, for
2 instance, that one -- and I am not trying to jump the
3 gun, but that is their wages to get their total
4 earnings from what they worked. Now, looking at 1996,
5 how would you determine that from this? How would you
6 determine their total?

7 THE WITNESS: Their actual total work, if
8 I am not mistaken, would be taking the 401(k)
9 contributions and adding it to it.

10 THE COURT: So this is only what they
11 earned, which was what I thought, which is why I
12 sustained your objection. You can inquire further.
13 That is the way our checks work.

14 THE WITNESS: The only -- the only way we
15 ever see what our employer contributions are -- you
16 have got to understand. This is a corporate thing at
17 this point. We get a statement from the financial
18 company that handles the 401(k) plan.

19 THE COURT: And they send you the
20 statements?

21 THE WITNESS: Yes. On a quarterly basis.

22 THE COURT: After counsel has conferred,
23 is that still an issue on defense side?

24 MR. NORRIS: I don't know yet. May I ask
25 a couple of questions?

1 THE COURT: Yes, you may.

2 MR. NORRIS: Mr. Rymiszewski, do you
3 prepare the information that is used for the W-2
4 forms?

5 THE WITNESS: Do I specifically? No.

6 MR. NORRIS: Is there some person in your
7 company most knowledgeable about that?

8 THE WITNESS: Yes. Our bookkeeper. But
9 I can tell you, she will attest to the same thing. I
10 am not speculating. I am just telling you that that
11 is what happens. I've got a hundred dollars -- just
12 to give you an example, I get a hundred dollars taken
13 out a week for my 401(k) contribution on my W-2 form.
14 If you want the records, I can have them faxed to
15 you. I have \$5200 shown as contributions.

16 THE COURT: For 52 weeks. There is
17 nothing else on there. All the W-2 shows -- I am not
18 trying to take over here, but it is an issue -- and I
19 understand it is an important one because of the
20 difference in wages. I am not trying to get in the
21 position to testify.

22 But any W-2 I have ever seen, if they pay
23 your insurance premium, it shows up on another as
24 imputed income to you, but it is only for your taxes
25 and what you are taxed on. And that is why the

1 employee's part -- the employer's part isn't going to
2 show up on there, because you are never taxed on it.

3 Now, having said all of that and from
4 what I have heard and I think -- Mr. Norris, you -- if
5 there is anything else you want to ask Mr. Walker to
6 make your record, fine. But I am going to leave my
7 rulings stand, and that is basically for the reasons I
8 have stated. If you want to call him in and ask him a
9 couple questions -- they drove together, didn't you?

10 THE WITNESS: No.

11 THE COURT: You did not come together.
12 Well, he is out there. If you want to put anything
13 else on the record --

14 MR. NORRIS: No, ma'am.

15 THE COURT: And you are excused.
16 Mr. Walker is excused. And let's all take five
17 minutes.

18 MR. SMIRCINA: Your Honor, might we -- he
19 is the next witness, and he is going to take much more
20 than an hour. And we might as well break for lunch.

21 THE COURT: No. Let's get through as
22 much as we can.

23 MR. SMIRCINA: Okay.

24 (Recess taken.)

25 THE COURT: All right. Bring the jury

1 out. Now, I am happy for you when you get to a
2 point -- if your direct is going to take more than 50
3 minutes, I am happy for you when you see a good
4 breaking point between one part of his testimony and
5 another part of his testimony if it is quarter to or
6 ten till, I am happy for you to say, I think this is a
7 good place to break. And me and Mr. Aufenger can kind
8 of keep an eye on the clock for you and kind of see
9 where you are going. I am not going to stop you in
10 mid question.

11 (The jury returned to the courtroom.)

12 THE COURT: Plaintiff's next witness.

13 MR. SMIRCINA: Michael Shepherd to the
14 stand, please.

15 MICHAEL SHEPHERD, called as a witness by
16 and on his own behalf, having been first duly sworn,
17 was examined and testified as follows:

18 DIRECT EXAMINATION

19 BY MR. SMIRCINA:

20 Q. Good morning, Michael. How are you
21 feeling today?

22 A. Good morning. Fine.

23 Q. What is your name?

24 A. Michael Shepherd.

25 Q. Are you the plaintiff in this case?

1 A. Yes.

2 Q. Michael, what was your occupation prior
3 to November 14th, 1996?

4 A. Boom operator.

5 Q. And what is your occupation now?

6 A. CDL driver.

7 Q. Would you please tell the jury where you
8 grew up and where you got educated and a bit about
9 your work history, please?

10 A. I grew up in Northern Virginia. I went
11 to high school at Bethlehem Baptist Christian Academy,
12 had two years of college at Liberty Baptist College.
13 And you said about my work history?

14 Q. Well, where did you first start working
15 after you got out of school?

16 A. I went to work for my stepfather in the
17 family business for a while and just had to get out of
18 the family business, so I went to work for a landscape
19 company for ten months or so. And a friend of mine
20 told me about an opportunity to go work where he was
21 working, Metro Building Supply. And I have been there
22 pretty much ever since.

23 Q. Metro Building Supply is Capital?

24 A. Metro was bought out by a company called
25 GMS, which is the same owners we have right now,

1 Tidewater.

2 Q. When did you learn to operate a boom
3 crane?

4 A. 1987. End of 1987.

5 Q. And did you -- were you a boom truck
6 operator from 1987 until you were hurt in 1996?

7 A. Yes.

8 Q. Tell me how you were trained to operate a
9 boom crane.

10 A. I was trained by other operators. When I
11 was training, they would send other operators --
12 experienced operators with us and just basically teach
13 us how and the dos and don'ts of operating a boom
14 truck.

15 Q. What are some of the dos and don'ts of
16 operating a boom truck?

17 A. Some of the basic stuff is operating with
18 people around you or near you, operating over other
19 equipment or cars, just basic stuff like that, they
20 would start you off at.

21 Q. And how many times a week do you think
22 you operated a boom truck? Was it an everyday thing?

23 A. Every day usually six days a week.

24 Q. How many times a week do you think you
25 would make a delivery of the sort that you did on

1 November 14th, 1996, operating the boom, putting the
2 material in and out of the building?

3 A. Can you ask that again?

4 Q. How many times a week prior to the
5 accident throughout your working history as a boom
6 crane operator do you think you made a delivery using
7 the boom arm of the crane like you did the day you
8 were injured?

9 A. Hundreds of times. Weekly. I mean,
10 every week. It depended on how many job sites I went
11 to. You asked how many different jobs?

12 Q. Right.

13 A. We could go on five to ten different jobs
14 a day. It would be a different situation on every
15 job.

16 Q. What were some of the situations you had
17 encountered?

18 A. Residential jobs, stocking a house. I
19 did mostly commercial jobs, which is like the one
20 where the accident happened.

21 Q. Why did you do mostly commercial jobs?

22 A. After the first couple of years of my
23 operating a boom, I was sent to mostly commercial jobs
24 because of my experience and expertise and just
25 know-how of commercial jobs, how the customers wanted

1 it stocked, and just the operating of the boom.

2 Q. Would you say that operating a boom crane
3 is something that came naturally for you?

4 A. Yes, it did. I operated a lot of
5 different equipment.

6 Q. What other kinds of equipment have you
7 operated during your work history?

8 A. Forklifts, backhoes, any kind of farm
9 tractors, different types of cranes other than a boom
10 truck. We would have other things at our job.
11 Electric pallet jacks that we use to stock drywall.
12 Just all different types of heavy equipment.
13 Bulldozers.

14 Q. And what kind of vehicle do you operate
15 now in your job?

16 A. The equipment I operate is a forklift. I
17 drive a tractor-trailer, and I operate a forklift that
18 is attached to the back of it.

19 Q. What kind of -- do you have to get any
20 certifications or anything along those lines in order
21 to be able to operate a forklift or a crane or
22 whatever?

23 A. For the forklift, we have forklift
24 training at my job that you have to pass a class. We
25 just had that. It was sometime last year. We had it

1 to be certified to operate a forklift for our company.

2 Q. Now, Michael, how did you come to get to
3 Tidewater Interior Products, down here working for
4 them?

5 A. I was approached by my boss, now John
6 Rymiszewski, and Mike Anderson, which is his boss.
7 They asked me if I would like to transfer, they would
8 like me to transfer as to -- the way they put it, they
9 were considering opening this new location.

10 Q. And where were you working at the time?
11 In northern Virginia?

12 A. Yes. In Vienna, Virginia. And finalized
13 that they were going to open this new location. This
14 was once -- before they finally decided to open it,
15 they asked me to consider it. Once they decided to
16 open this location, they came to me again and asked me
17 if I would transfer for a year to get things started
18 and train people.

19 Q. And you were hired to be a boom crane
20 operator for this new company, Tidewater Interior
21 Products?

22 A. Yes.

23 Q. When did you first start working for
24 Tidewater Interior Products?

25 A. It was near Thanksgiving of '95, from

1 what I recall. I can't remember if it was before
2 Thanksgiving or after Thanksgiving of 1995.

3 Q. And how were you paid at that time? How
4 were you to be paid when you first started working
5 there?

6 A. When I first started myself,
7 Mr. Rymiszewski and Mr. Anderson sat down, and we knew
8 that we weren't going to be doing any deliveries when
9 we first opened, just because, you know, we didn't
10 have any business much to start with. So we came up
11 with a dollar amount that they would pay me as a
12 minimal. And so that is what were -- the 1st from
13 November, I would say, until midsummer of '96, I
14 basically was receiving that minimum pay.

15 Q. And what was that minimum pay?

16 A. \$910 a week.

17 Q. But after the summer of '96, business
18 began to pick up?

19 A. Once we got to a point where John was
20 telling me along -- when we started -- once we got up
21 to another business, he was -- not himself, but John
22 Rymiszewski, his brother, which works for us, was kind
23 of keeping a lookout on keeping my piecework accounts
24 and what deliveries we made. Once it was getting up
25 to where it was close to meeting my \$910 minimum, he

1 said, once it averaged out, started getting higher
2 than that -- than that, he would start paying me
3 piecework once he realized that I could make more
4 than, you know, 910 a week.

5 Q. Did that arrangement suit you?

6 A. Yes.

7 Q. Why did it suit you?

8 A. Because I knew once we picked up the
9 customers we thought we would after they realized what
10 kind of service we gave them and we started picking up
11 more customers, I can make a lot more money.

12 Q. And you continued to work on piecework
13 from midsummer '96 until the date of the accident?

14 A. Yes, sir.

15 Q. Well, Mike, I am going to bring you down
16 here now to the pictures. And we are going to go
17 through some of this stuff.

18 MR. SMIRCINA: If I could have a moment,
19 Your Honor, because I think there is going to be quite
20 a few things I may want to have him comment on, and I
21 might as well set it up.

22 BY MR. SMIRCINA:

23 Q. Now, Mike, obviously you have been
24 sitting through the whole trial here. Is this the
25 truck you were operating on 14 November 1996?

1 A. Yes.

2 Q. Is this the same truck you had been
3 operating since you began working for Tidewater
4 Interior Products?

5 A. No, it is not. When I started, the first
6 truck we received was just a flat bed without a boom.
7 I drove that. I would say it was three or four weeks
8 before we received our first boom truck.

9 Q. Okay. How long had you been operating
10 this truck prior to the accident?

11 A. That particular truck, I believe we
12 received it, I want to say April of '96, somewhere
13 around there.

14 Q. And you were assigned to this truck?

15 A. Yes. That was my truck. No one else
16 drove it.

17 Q. I know we were talking a lot on this.
18 And this will kind of get hard for you sometimes. But
19 what did you do when you first came to the SEAL
20 compound? What happened?

21 A. To the compound or to the building?

22 Q. Well, both. Go right ahead. You're
23 entering Dam Neck Base. What happens?

24 A. I went into Dam Neck, the main base --
25 through the main gate. Then we were given directions

1 how to get to this job. We pulled up. There was
2 another guard shack or checkpoint. Left our IDs
3 there, pulled on -- the guard facility is probably a
4 hundred yards from this building. He pointed over --
5 he told us that is where we needed to go. So I pulled
6 onto the job site, parked the truck.

7 Mr. Hewitt got out, and I got out. I was
8 looking around the site to see all of the possible
9 locations we could stock the material.

10 Q. Where did you park -- where did you park
11 your vehicle initially, looking at this exhibit that
12 we have used before, do you recall?

13 MR. SMIRCINA: Can everybody see?

14 THE WITNESS: I don't think it comes into
15 view on this one. The other one, the bigger one that
16 was out early, I think I might be able to show on
17 that.

18 BY MR. SMIRCINA:

19 Q. Is this the one you're referring to?

20 A. Yeah. It still doesn't. It was right
21 along this area somewhere.

22 Q. How far would that be down in relation to
23 the accident scene if you were looking at the
24 building? Was it down this side of the building you
25 parked or down this side of the building you parked?

1 A. To the left of here, over this way. When
2 I pulled out, I would be facing the ocean. The ocean
3 is behind the truck here.

4 Q. When you stopped the truck, who was with
5 you, by the way, on your truck that day?

6 A. Scott Hewitt.

7 Q. Was he the only other person with you?

8 A. Yes.

9 Q. So when you stopped the truck, what did
10 you do and what did Mr. Hewitt do?

11 A. I got out. And, like I said, I was just,
12 like, looking around the job site, looking for ways to
13 get in, anything that would be in our way, just the
14 basic overview.

15 Q. Is that what you did normally when you
16 arrived at the job site?

17 A. Yeah. That would -- the operator, the
18 first thing he would do is look at all of your
19 possibilities of stocking the drywall. Mr. Hewitt
20 went to look for a rep with Wenger Tile, who we were
21 delivering to.

22 Q. Now, we have some pictures here. What
23 were you delivering to Wenger Tile that day? This
24 material here?

25 A. Gypsum. It is similar to drywall, but it

1 is used exterior. It is brown -- this stuff. This
2 was going to a different job. The gypsum was going to
3 this job.

4 Q. So did there come a time that Mr. Hewitt
5 said that he had found a representative of Wenger
6 Tile?

7 A. Yes. I believe they walked out the
8 building.

9 Q. Did you speak to them at that time?

10 A. I don't remember if I spoke to both of
11 them together or not. It was Mr. -- I think it was
12 Mr. Hewitt. Scott approached me and told me where we
13 needed to go to put the material.

14 Q. And, to your knowledge, Scott had
15 received this information from Mr. McGowan?

16 A. Yes. The superintendent with Wenger.

17 Q. Did you have a discussion with Mr.
18 McGowan about whether to off-load the drywall when you
19 first pulled up?

20 A. No. I don't believe I had a discussion
21 with him.

22 Q. Okay. What was discussed? What was the
23 plan?

24 A. Mr. Hewitt pointed out -- if I can use
25 that?

1 Q. Sure. Stand over by the jury.

2 A. Okay. At this point, the truck was still
3 facing this way, or I just pulled into the job site.
4 We were standing over in here outside the building.
5 He pointed to an area that was in this area, I
6 believe. On the first floor, we needed to put
7 material. And so I --

8 Q. Move a little bit because some of them
9 can't see.

10 A. So I said, okay. So there was a power
11 line going across here and I believe a -- some type of
12 utility box or something near this power line. So I
13 had to pull the truck in this way, basically turn in
14 here and make a U-turn, come back up -- the building
15 this way -- to get on the inside of the power line so
16 I could operate. If I pulled the truck in directly
17 this way when I picked the boom up, it would hit the
18 power line. So I had to be parallel with the building
19 and the power line.

20 Q. Okay. What were you -- what did you
21 determine as to where you were going to off-load it?
22 You were going to off-load it where and where?

23 A. The first area I was told is the first
24 floor in this area and this way in here right in this
25 area.

1 Q. Did you proceed to do that?

2 A. Yes. We started unloading the first
3 floor right there. And I think I had put one lift in
4 or was getting ready to put one lift in or set it
5 down. And the superintendent -- I didn't know at the
6 time, but I saw someone approach Mr. Hewitt, and I
7 stopped operating the boom. I don't know. I didn't
8 see him.

9 Q. Would that be the superintendent,
10 Mr. Bosley?

11 A. I believe Mr. Bosley approached
12 Mr. Hewitt. So I stopped operating, climbed down to
13 see if there was a problem or what he wanted. And
14 Mr. Bosley, he was the only one, wanted to make sure
15 we put the material off to the side, to leave an
16 opening for the brick masons to get his block in
17 there.

18 Q. This would have been on the first floor
19 location?

20 A. On the first floor. Yeah.

21 Q. When did you first learn that you were to
22 off-load material on the second floor?

23 A. Shortly after that.

24 Q. How did you obtain that information?

25 A. Mr. Hewitt told me, I guess, between his

1 conversation with Mr. -- the Wenger superintendent,
2 how much material they wanted in the first floor. And
3 Mr. Hewitt told me that is enough, that is what they
4 want there and you can go directly upstairs above that
5 area.

6 Q. What preparations had to be made in order
7 to put material on the second floor?

8 A. The only thing that needed to be done --
9 I looked up. The only thing that needed to be done
10 was to take the safety cable down.

11 Q. What is a safety cable?

12 A. It is for the protection of falling, keep
13 people inside of the building from falling, or if they
14 trip, keep them from falling outside the building.
15 Like this cable here. Can you-all see that?

16 Q. Was there a safety cable across the area
17 on the second floor where you first intended to
18 off-load on the second floor?

19 A. Yes.

20 Q. How did it come down?

21 A. I told Mr. Hewitt -- he didn't have much
22 experience at the time, so I told him to ask the
23 superintendent for permission to take the cable down,
24 that we needed to take the cable down to put drywall
25 in that area.

1 Q. Is that usual?

2 A. Yes.

3 Q. Why wouldn't you just take it down?

4 A. You need permission to take that safety
5 cable down. I mean, everybody needs to know or
6 someone needs to know that you are going to take that
7 cable down.

8 Q. Did you see Mr. Hewitt talking to
9 Mr. Bosley about this matter?

10 A. Yes. I could see them talking.

11 Q. Could you hear the conversation?

12 A. No. I couldn't hear them.

13 Q. What happened next?

14 A. Mr. Scott Hewitt approached me and asked
15 me about taking the cable down, said he got
16 permission. So I gave him two wrenches and explained
17 to him how to take the cable down. I didn't know if
18 he -- he hadn't been on my truck long, so I just
19 explained it to him real quick that he needed two
20 wrenches and how to do it, take the cable down.

21 Q. Well, what happened next?

22 A. He went up, took the cable down. I
23 picked up more material off the truck and boomed it
24 inside, set it inside the second floor.

25 Q. Do you remember, on the opening on the

1 second floor, did it more resemble this opening or the
2 opening that this one was with just one beam across?

3 MR. AUFENGER: Which exhibit?

4 BY MR. SMIRCINA:

5 Q. Plaintiff's Exhibit 10. I am pointing to
6 two beams between two vertical columns or one beam
7 between a vertical column.

8 A. It was like this, with one beam. And I
9 believe, to the best of my recollection, where I was
10 set up, I had to come in at a slight angle, also,
11 underneath the girt.

12 Q. How much clearance was there between your
13 boom arm and the girt down here where you off-loaded
14 on the second floor?

15 A. The first location on the second floor?

16 Q. Right.

17 A. Three to four inches.

18 Q. Is that usual in your line of work to try
19 and get material in through with such a clearance?

20 A. It is very common. It happens daily.

21 Q. How much did you off-load on the first
22 location on the second floor?

23 A. I am not sure of the number of sheets. I
24 know that I put the boom inside and retracted it twice
25 out of there. I don't know if I put two lifts each

1 time or one at a time or one lift one time or two the
2 next.

3 Q. You mean sometimes you might just move
4 one of these hacks, like on Plaintiff's Exhibit 2, and
5 sometimes you might move two at a time?

6 A. Right. It depends on the number of
7 sheets they want in that area and how much we can fit
8 in that area.

9 Q. Well, however did it be determined that
10 you were going to stock elsewhere on the second
11 building -- on the second floor of the building?

12 A. We ran -- the first location on the
13 second floor that we started stocking, we ran out of
14 room. There was all kind of material right there.
15 They wanted to get some material -- whatever material
16 they could down there, just so they could have some
17 down towards this end of the building.

18 Q. At any time while you were off-loading on
19 the second floor in the first location, did you notice
20 the presence of the defendant Robert Bosley, the
21 superintendent from Meredith?

22 A. I saw him a few times walking around the
23 job site.

24 Q. Did he know that you were off-loading
25 material on the second floor directly above where you

1 had off-loaded on the first floor?

2 A. I would say so. I saw him walking around
3 on the second floor. When we were unloading the first
4 site on the second floor, I saw him walking around on
5 the second floor.

6 Q. Well, you said that you needed permission
7 to take down the safety cable before you could
8 off-load in that area?

9 A. Right.

10 Q. How do you know you had or somebody else
11 had permission to have the safety cable come down?

12 A. Mr. Hewitt, when he asked him, I could
13 see him when he was talking to him about taking the
14 cable down. He pointed down to that area, also. So
15 Mr. Hewitt asked him to take the cable down off of
16 there, also.

17 Q. So the conversation between Mr. Hewitt
18 and Mr. Bosley took place where about the safety
19 cables?

20 A. It was on the second floor. I think
21 Mr. Hewitt went up -- he was either looking for him or
22 looking to where we need to put material in. I
23 believe that took place on the second floor.

24 Q. And it is your recollection that Scott
25 Hewitt was gesturing down toward the far end of the

1 building?

2 A. He pointed to that end, because
3 Mr. Hewitt told him we need to start here and put some
4 more material down toward this end of the building.
5 So I told him, when he asked him to take that cable
6 down, to ask for any other spots we need to take it
7 down. So I saw him point to that end of the building.

8 Q. Now, what did you have to do to get the
9 truck down to the area of the building where you were
10 going to off-load?

11 A. I put the boom away in the driving
12 position, retracted the stabilizers.

13 Q. Are the stabilizers on these photographs?

14 A. This is probably the best one. This
15 telescopes out from the truck approximately six feet
16 on either side. One comes out each side. And then a
17 cylinder pushes the pad straight down.

18 Q. Is this the -- is this -- this yellow
19 object, is that a --

20 A. Yeah. That is a hydraulic cylinder. It
21 pushes a 15-by-15-inch pad down on the ground. It
22 will actually lift the whole truck up off the ground.

23 Q. And what is the purpose of the stabilizer
24 other than --

25 A. To keep it from rocking or tipping over.

1 Q. What else did you have to do in
2 preparation for unloading on the second deck?

3 A. I had to move the truck. I had to back
4 the truck up.

5 Q. When you backed the truck up, were there
6 any obstacles in your way?

7 A. No. There was nothing behind me.

8 Q. So you're saying the power lines and the
9 phone pole and so forth were toward me on the
10 photograph in Plaintiff's Exhibit 10?

11 A. They were pretty much parallel with the
12 south side of the building.

13 Q. And this is the south side of the
14 building on Plaintiff's Exhibit 10?

15 A. Right. They were like, say -- they were
16 probably about where this cameraman is standing, over
17 top of him running this way.

18 Q. Is this the number one concern when you
19 are operating?

20 A. In fact, there is a telephone pole right
21 there. It is running that way.

22 Q. That is on Plaintiff's Exhibit Number 9,
23 there is a phone pole there?

24 A. Yes.

25 Q. And you were worried about operating the

1 boom crane in proximity to power lines?

2 A. Right. I had to get far enough away from
3 that. We shouldn't operate within ten feet of a power
4 line.

5 Q. When your truck arrived down here and you
6 prepared for unloading, did you notice the presence of
7 anyone working on the first floor in that immediate
8 area?

9 A. Yes, I did.

10 Q. Where were they working and who were
11 they, if you would point to Plaintiff's Exhibit Number
12 8?

13 A. I saw one gentleman, which I believe was
14 probably a laborer for the masons, moving some blocks
15 inside the building over here. I also saw a welder
16 over on this corner and another welder walking around
17 the ground out here.

18 Q. Where was it, you say?

19 A. The east side of the building.

20 Q. You say a welder was working on the
21 southeast corner of the building?

22 A. Yes. He was on a ladder, in fact, this
23 ladder right here, welding.

24 Q. Let me make sure the jury can see this.
25 Mike, please point out where you saw the laborer, the

1 welder.

2 A. The welder was standing on this ladder,
3 welding on this piece of metal right here.

4 Q. Is that underneath the roof deck of the
5 first deck?

6 A. Yeah. It is inside the building. You
7 can see it is offset here. There is another picture
8 that shows it. It is about two feet or so, that is
9 inset where these beams are. So it is actually inside
10 the slab of the first floor.

11 Q. Is it your usual and customary practice
12 to look for people around you when you operate?

13 A. Yes. That is one of my first safety
14 rules.

15 Q. Is it one that you followed in this case?

16 A. Yes. I followed it. There was no one
17 outside of the building.

18 Q. Is that your standard procedure to look
19 around?

20 A. Yes. We have to keep an eye out for --
21 while we are operating, too. Some people just walk
22 right out of the building beneath you and don't
23 consider that there might be something above their
24 head.

25 Q. So when you got to the second deck, who

1 was up on the second deck awaiting the delivery of the
2 drywall, do you recall?

3 A. My helper, Scott, the two gentlemen with
4 Wenger Tile.

5 Q. John McGowan and Darrell Ashley?

6 A. John McGowan, Darrell Ashley.

7 Q. The ones who testified earlier in this
8 trial?

9 A. Yes.

10 Q. Now, Mike, describe what you do when you
11 move a boom arm into an area like this. What is it
12 you are doing, and how does it work? Explain to the
13 jury.

14 A. Well, you start picking up a hack off the
15 truck, swing -- in this case, I would swing
16 counterclockwise to the building, then I would -- once
17 I get over here and start telescoping into the
18 building, I would be just watching the floor and
19 watching the room above, the space above, and
20 basically just shoot it right into the opening.

21 Q. Explain telescoping to the jury, if you
22 will, using this picture, Plaintiff's Exhibit Number
23 2.

24 A. Telescoping.

25 Q. Is there a better picture?

1 A. There is a different one that they can
2 see better.

3 Q. Here you go. Let's look at Plaintiff's
4 Exhibit Number 3. Would that help?

5 A. Yeah. Telescoping inside, this arm here,
6 this yellow arm -- there are four more sections. This
7 block on the end of the boom here are four sections of
8 the boom that come out. And they come out, like my
9 helper explained, basically like an antenna on a car
10 would slide out, each section comes out, starts off
11 big and gets smaller and smaller, each section, and
12 just shoots straight out like an antenna.

13 Q. And what is attached to that telescope?
14 Can you tell by looking at this photograph?

15 A. The fork assembly is attached right here
16 and hangs down from the last or the smallest
17 telescope.

18 Q. So when you were loading -- how many of
19 these hacks of drywall did you put in on the first
20 delivery into this side?

21 A. I believe it was two hacks at a time, two
22 lifts at a time.

23 Q. Was there any indication that there was a
24 problem at all?

25 A. None. It was the same as the first

1 location on the second floor, the other end of the
2 building.

3 Q. At any point in time, were you ever
4 forbidden from entering and using this area to
5 off-load drywall?

6 A. No.

7 Q. Had anyone told you, including the
8 superintendent, that you were not authorized to enter
9 this area to off-load drywall?

10 A. No.

11 Q. Was the area marked off in any way
12 indicating it was off limits to you to unload your
13 drywall?

14 A. No.

15 Q. On the second delivery, tell me, if you
16 will, what you remember happening.

17 A. I did it the same as I did the first.
18 Like I said, I picked up off the truck, put it
19 inside. No problems. I set it down, was retracting
20 the boom, I hear Mr. Hewitt yell at me.

21 Q. At any time, did you hear the boom hit
22 the steel beam?

23 A. No. I didn't hear any banging, any
24 noise, anything out of the ordinary.

25 Q. At any time, did you feel anything as

1 though your boom was striking the steel beam?

2 A. No. I mean, when my boom -- when you're
3 operating that boom, you're holding on to the metal
4 controls.

5 Q. Why don't you use Number 7 to illustrate?

6 A. You're holding on to these, what we call
7 joysticks. These are two of the controls. This is
8 one -- the left joystick. That is the right joystick.
9 The foot pedals are here and here. So when you're
10 operating, all of this is connected to metal, which is
11 all connected by metal.

12 So when you're operating it, your fork
13 assembly -- like this was touching the floor, when the
14 forks come down and touch the floor, it is like a
15 vibration. You can feel when it touches something.
16 So anything your boom -- any part of the metal part of
17 the boom, when you're operating, when it touches
18 something, you will feel it either through your foot
19 pedals or through your hand joist controls.

20 Q. When you are pulling the boom out, tell
21 me what you're doing moment by moment. I imagine it
22 doesn't take one or two seconds. I imagine it takes
23 longer than that. Tell me the procedure you're doing
24 while you're pulling it out. What are you doing to
25 the joysticks?

1 A. At this point when I am pulling it out --
2 it is basically one control. It may be a slight
3 adjustment. This would have been retracting the
4 telescopes, which is just a foot pedal. You put your
5 heel down.

6 Q. Which foot pedal?

7 A. It would be your right foot pedal. You
8 push the heel down, and that would retract it. Push
9 the top one, it would expand it. So all of this -- at
10 this point, all I was doing was retracting the
11 telescopes.

12 Q. Now, Mike, have you hit steel before with
13 your boom?

14 A. Oh, yeah.

15 Q. Is that an unusual occurrence?

16 A. Not unusual.

17 Q. How often would you say it happens?

18 A. Just to hit steel or --

19 Q. Just to hit steel. How many -- if you
20 deliver into this site a hundred times, how often do
21 you think you might hit the steel with your boom?

22 A. To touch it, I might touch it ten times
23 out of a hundred just to touch it.

24 Q. Do you think -- what kind of impact did
25 you feel, if any, between the boom arm and the steel

1 beam?

2 A. I felt none. I didn't feel any
3 resistance. Couldn't hear anything. I felt nothing
4 through my controls.

5 Q. When you have hit steel beams before,
6 have you felt resistance?

7 A. Yeah. I felt --

8 Q. What do you mean?

9 A. You feel resistance. You can feel the
10 touch -- the actual -- when you're operating, you feel
11 the touch of bumping something or the forks bumping or
12 either your boom -- the side of your boom touching
13 something. You can -- it comes directly through it.
14 It is all metal. It comes through directly. You can
15 feel anything.

16 Q. Well, we are at the point now where Scott
17 has yelled your name. What do you see?

18 A. He yelled my name. I looked at him. And
19 he was pointing up towards the beam.

20 Q. And what did you see at that time?

21 A. I looked at the beam and the beam was
22 moving towards me.

23 Q. Describe, if you can, what you saw the
24 beam do, using Plaintiff's Exhibit Number 8.

25 A. I guess the best way to explain it is

1 once he yelled my name, I looked up, saw the beam
2 moving. It was almost teeter-tottering or bouncing,
3 maybe a little of both, as it was coming towards me.
4 So I started to get up out of my seat and jump up onto
5 the bed of the truck. I had what you call an exit.

6 Q. Let you look at Number 9 here.

7 A. This one is good.

8 Q. That is fine.

9 A. When you enter the boom, you get on --
10 this side is the way to get in the seat, actually. So
11 when it is in a driving position, this would be swung
12 around. You come up to the ladder and step on here.
13 So at this position, this was swung around. So there
14 is no -- once you step off this, this is where you
15 rest your feet. If you're not even, you are just
16 sitting on the seat. So there is nothing to step down
17 to. I would have to jump down to the bed.

18 So when I saw it coming, I started to
19 jump off onto the bed of the truck. But the beam was
20 bouncing and teetering, and I couldn't decide which
21 way it was going to fall. So I hesitated on jumping
22 to the bed because it might have fell eventually -- as
23 it ended up, it did fall into the bed of the truck.
24 That is why I didn't jump off into the bed of the
25 truck. I hesitated.

1 By this time, it had reached this point.
2 And once it hit this point, it is more of an angle.
3 It came at me so fast. I was -- I just tried to jump
4 off there, off the back.

5 Q. What were you thinking at the time?

6 A. I thought I was going to die is what --
7 that is what I thought.

8 Q. You said that you looked up when Scott
9 yelled and pointed up. Where were your eyes
10 immediately before Scott yelled?

11 A. I believe I was looking right here at the
12 corner at the forks and the concrete slab. While I am
13 doing this, I am looking up and down, back and forth
14 all in this area, see if there is room at the bottom
15 or room at the top.

16 Q. What is the last thing you remember prior
17 to falling?

18 A. Well, once it hit me, I could see a --

19 Q. Well, where? What part of your body did
20 the boom hit?

21 A. I believe it caught me in the lower legs
22 and basically smashed my legs, in between my legs,
23 would have been standing on this platform here. And
24 when it came down --

25 Q. He is pointing to a platform on

1 Plaintiff's Exhibit 7, the close-up of the seat
2 assembly.

3 A. When it came down, at this point, it is
4 far more of an angle or leaning more towards this
5 side. So when it came down, it brushed -- it just hit
6 right in here at this angle. I don't know how to do
7 this with these pictures. It is hard to explain.

8 Q. Well, let's see if you see any pictures
9 here that you could use.

10 A. Actually, two pencils might work, or two
11 pens, to explain what angle I remember coming down
12 at. Say this is the main of the boom arm right here.
13 It came down -- it was teetering on the first -- on
14 the secondary section. Once it hit the main arm here,
15 it started leaning more towards this way and coming
16 down more like that. So when it hit me --

17 Q. So you mean it came down like this and
18 came down with the side towards the left-hand portion
19 of the picture in Plaintiff's Exhibit 10 and rotated
20 clockwise and down?

21 A. I would say that would be rotating
22 slightly counterclockwise.

23 Q. Counterclockwise?

24 A. This end, I believe, is one end up here.
25 The end that came up here ended up here.

1 Q. Okay.

2 A. So I am saying it teetered.

3 Q. Show the beam -- show the beam on Number
4 10.

5 A. Okay. It teetered on the first --
6 secondary section, and then once it hit the main arm,
7 it came down a lot faster and more like this. I think
8 maybe this end of the beam hit the slab here and spun
9 it that way. So it came down almost -- by the time it
10 hit me, it was almost the same angle it is here.

11 Q. What is the last thing you remember prior
12 to hitting the ground?

13 A. I just -- when it hit me, it kind of spun
14 me around, and I could see the ground and the edge of
15 the truck. I was hoping I didn't hit the edge of the
16 truck. And all I can remember seeing is a picture of
17 my two kids in my mind. I thought I was gone. I
18 thought I was dead.

19 Q. Where did you land, do you know?

20 A. I would say in this area somewhere. I am
21 not sure. I just remember when I came off, I could
22 see the ground and the edge of the truck, hoping I had
23 missed the edge of the truck.

24 MR. SMIRCINA: Your Honor, at this point,
25 I would be starting to talk about the medical aspect

1 of his injuries, and I think this would be a good
2 place to stop.

3 THE COURT: To break for lunch. All
4 right. You can sit back down in your seat. We are
5 going to go ahead -- and we knew we weren't going to
6 get all the way through Mr. Shepherd's testimony. So
7 this is a good time to break for lunch, ladies and
8 gentlemen.

9 If you want to leave your pencils. If
10 you need to get anything from the jury room, help
11 yourself. If you have everything you need, if you go
12 downstairs, the deputy will meet you downstairs in the
13 jury room at about ten minutes to ten. Have a nice
14 lunch.

15 (The jury withdrew from the courtroom.)

16 THE COURT: We will see everybody then at
17 about ten minutes to two.

18 (Luncheon recess taken.)

19 (Afternoon session:)

20 MR. SMIRCINA: We would like to put
21 Mr. Shepherd back up in the witness box.

22 THE COURT: Before the jury comes out, so
23 we're not tripping.

24 (The jury returned to the courtroom.)

25 THE COURT: It looks like we are all

1 seated.

2 BY MR. SMIRCINA:

3 Q. Mr. Shepherd, prior to your being struck
4 and falling, do you remember the last time you saw
5 Robert Bosley prior to your injuries?

6 A. The last time I saw him was when he was
7 walking into his trailer.

8 Q. Where were you when you saw him walk into
9 his trailer?

10 A. I was setting up in my truck, setting the
11 stabilizers.

12 Q. At which location?

13 A. At the accident site.

14 Q. Now, I have in my hand Plaintiff's
15 Exhibit 10. Where in relation to your truck did you
16 see Mr. Bosley going into his trailer? Where is the
17 trailer in relation to your truck is a better way of
18 saying it?

19 A. It would be more to the front of the
20 truck and directly south, probably 50, a hundred feet
21 away from the truck.

22 Q. And how long were you booming in and out
23 of the building before the accident? From the time
24 you set your stabilizer -- from the time you say you
25 saw him until the time of the accident, how long was

1 it?

2 A. I say 10 or 15 minutes.

3 Q. You say that you were falling. Do you
4 know where your body was positioned as you fell? Were
5 you falling on your back? Were you falling on your
6 front?

7 A. I just remember falling face first.

8 Q. What is the last thing you remember?

9 A. Seeing the ground. And I can -- like a
10 flash of a picture of my kids in my mind and that was
11 it.

12 Q. Were you knocked unconscious by the
13 impact with the ground?

14 MR. NORRIS: Objection, Your Honor.

15 MR. SMIRCINA: On what grounds?

16 MR. NORRIS: I don't know that an
17 individual knows the answer to that.

18 THE COURT: Overruled.

19 BY MR. SMIRCINA:

20 Q. What do you next -- were you knocked --
21 go ahead. Were you knocked unconscious by your impact
22 with the ground?

23 A. Yes.

24 Q. What is the next thing you remember?

25 A. When I came to, I looked up. And

1 Mr. Hewitt, my helper, was leaned over top of me, like
2 knelt down over top of me.

3 Q. What was he saying to you? Could you
4 understand him?

5 A. I don't -- I can't remember anything he
6 was saying to me. I remember asking him how the truck
7 was, if the truck was okay.

8 Q. What else were you doing, if anything?

9 A. I was trying to remove some sand from my
10 mouth when I came to. My mouth was full of sand.

11 Q. What happened next?

12 A. The next thing I remember were other
13 people standing around, looking down at me. And I was
14 just in and out, looking around.

15 Q. When you say in and out, what do you
16 mean?

17 A. I can't remember much of the time I was
18 on the ground other than my feet getting cold and
19 people standing around me looking down at me.

20 Q. Did there come a time you received
21 medical attention?

22 A. Yes. While I was on the ground, yes.

23 Q. What happened? Were you taken by
24 ambulance to the hospital?

25 A. Yes.

1 Q. Which hospital did you go to?

2 A. Virginia Beach General.

3 Q. Do you remember anything about the ride
4 to the hospital in the ambulance?

5 A. Yeah. I kept asking the paramedics --
6 even while I was on the ground at the scene and once I
7 was in the ambulance, I kept asking the paramedics to
8 get me something to rinse out my mouth or clean out
9 the sand from my mouth. I remember that. And just I
10 could see them standing overtop of my legs, doing
11 something to my legs. But I kept complaining about
12 the sand in my mouth mostly.

13 Q. You said your legs felt cold. Did they
14 have any other feeling?

15 A. Not at that point. They were just really
16 cold and like a numbness.

17 Q. What do you remember about being in the
18 emergency room at the hospital?

19 A. The same thing, a lot of doctors standing
20 around, checking me out. I was -- my legs were very
21 cold. I remember asking to warm my feet up somehow.
22 I think they put a blanket over my feet. It wasn't
23 helping. But that, and Dr. Doxey, I believe, was
24 looking at my wound.

25 Q. Well, in general, what injuries did you

1 receive in this incident? What were your injuries?

2 A. My left foot was crushed, my right ankle
3 was broke, I had a part of my leg missing is what it
4 looked like to me, just a chunk out of my leg, my face
5 was sore and swollen.

6 Q. Did you have any other injuries?

7 A. I think some minor little scratches, I
8 think, on my elbows and arms.

9 Q. All right.

10 A. That is all I can think of.

11 Q. Were you hospitalized overnight?

12 A. Yes.

13 Q. Mike, tell us, in brief, what happened in
14 the weeks -- in the weeks that followed. When did you
15 get out of the hospital?

16 A. The following day. It was late in the
17 day, I believe, that they let me go from the hospital.
18 And once I got home, I was basically restricted to a
19 couch.

20 Q. Were you able to walk?

21 A. No. I couldn't walk at all. I wasn't --
22 I could barely stand still on crutches. Because even
23 just standing still, to put my right leg down, which I
24 was allowed to put some minor pressure on -- the
25 doctor told me toe pressure, which basically was

1 enough to help keep my balance. And sometimes I
2 couldn't do that.

3 Q. Could you put any weight at all on your
4 left foot?

5 A. Not at all on my left foot.

6 Q. Were either of your legs casted?

7 A. Both of them were casted. Like they
8 couldn't put a real cast on my right leg. It had to
9 be removable.

10 Q. Why?

11 A. Because of where my wound or the
12 laceration in my leg was, it had to be removable to
13 get to that to clean it and change the dressing.

14 Q. Describe the wound to your leg. How did
15 it appear to you?

16 A. It was -- I don't know -- like raw meat
17 or -- I don't know. I couldn't look at it for a long
18 time.

19 Q. When do you first remember looking at it?

20 A. It was probably two to three weeks after
21 the accident.

22 Q. You mean you never looked at the wound
23 between the time you got out of the hospital and when
24 you went two or three weeks later?

25 A. No. I didn't want to look. I could see

1 part of it because it is on the outside of my leg. I
2 could look down and see a section of my leg missing.
3 And the way my wife described it, I could tell from
4 her reaction when she looked at it.

5 Q. How do you know her reaction when she
6 looked at it?

7 A. She kind of like looked away, didn't want
8 to look at it at first. And that made me not want to
9 look at it. I couldn't see down in it from the angle
10 from -- if you were standing and looking down, I could
11 see a section missing, but I couldn't see inside the
12 wound.

13 Q. How was that wound treated in the weeks
14 afterwards?

15 A. Twice daily and an in-home nurse would
16 come.

17 Q. Was that Ms. Brun that testified earlier?

18 A. Yes. Ms. Brun. She would come, take the
19 cast off, another wrap off. And there was that -- I
20 believe an extra small splint overtop of that wrap or
21 just underneath that wrap that helped -- from where
22 the temporary or the removable cast would touch
23 against the wound to help keep some of that pressure
24 off of it.

25 Then she would take the wrap off, take

1 all of the gauze out that was stuffed in there, and
2 use -- I believe it was saline, like a quart size of
3 saline solution, rinse it out. Sometimes she would
4 pull some stuff out. I don't know exactly what that
5 was.

6 Q. Did that hurt?

7 A. Sure. It really hurt when she pulled the
8 gauze out, because I guess where the wound was trying
9 to heal, trying to scab or trying to heal, it would
10 stick to the gauze and pull a lot of just ugly-looking
11 stuff out with it.

12 Q. How large was the wound when you first
13 looked at it a couple of weeks after the accident?

14 A. From my angle before I got a really good
15 look at it. After a couple of weeks, it was probably
16 this big, around just a hole that size.

17 Q. Has it left a scar?

18 A. Yes.

19 MR. SMIRCINA: Your Honor, I am going to
20 ask that the jury be able to view the scar on
21 Mr. Shepherd's right leg.

22 THE COURT: He will probably need to step
23 down to do that.

24 BY MR. SMIRCINA:

25 Q. Why don't you step on down. Right here.

1 Are you able to put your foot up on that table?

2 THE COURT: Well, how about if he stands
3 at the end, where the steps are?

4 MR. SMIRCINA: That will be better.

5 THE COURT: And that way I want to look
6 over everybody's shoulders and counsel can step over
7 there if they like to.

8 THE WITNESS: From this angle you can
9 see, I guess.

10 MR. AUFENGER: Can you move it?

11 THE WITNESS: And this, I still have this
12 problem when I move my ankle or put pressure on it,
13 the part that is -- it will poke out here. It is
14 really soft. But if I flex my foot at all, it will
15 poke out.

16 THE COURT: We can do this in two groups,
17 too, if a couple of you want to come up front and then
18 you can switch spaces just so everybody gets a chance.
19 BY MR. SMIRCINA:

20 Q. Okay. Thank you, Mike.

21 THE COURT: I didn't mean to cut off the
22 testimony. Did everybody get a chance to see to their
23 satisfaction?

24 BY MR. SMIRCINA:

25 Q. Mike, how did you -- if you couldn't

1 walk, how did you move around your house and go to the
2 rest room?

3 A. I had to crawl on my hands and knees.

4 Q. How long did that last?

5 A. A couple of weeks before I could be
6 confident and put enough pressure on my right foot to
7 keep my balance and use the crutches.

8 Q. Did there come a time when your -- when
9 your wound began to heal and you were able to walk
10 more freely?

11 A. Yeah. Like I said, it was probably a
12 couple of weeks after the accident where I --

13 Q. How long were you out of work?

14 A. Two-and-a-half months.

15 Q. So you --

16 A. Three months.

17 Q. So you believe you went to work when?
18 End of January, start of February?

19 A. Right about the end of January.

20 Q. 1997?

21 A. Yes.

22 Q. And you were hurt 14 November 1996?

23 A. Yes.

24 Q. Are you claiming that you lost wages
25 during that period of time?

1 A. Yes. I lost wages.

2 Q. Now, Mike, during the two-and-a-half
3 months you were out of work, describe the course of
4 your recovery in brief terms for the jury. Describe
5 the course of your recovery, physical recovery during
6 the two-and-a-half months you were out of work.

7 A. Do you mean as far as --

8 Q. Did you gradually get better? Did you
9 get better all at once? What happened?

10 A. I would say improvement was slow. It
11 just took a long time before I could, like I said, put
12 pressure on my right foot. And then seemed like after
13 I could feel comfortable on crutches and move around,
14 it was a month or more after that where I could
15 actually put weight on my left foot. So just to get
16 around was very difficult.

17 MR. SMIRCINA: Now, Michael, I have in my
18 hand two bills that I want to be marked for
19 identification, Your Honor, plaintiff's exhibits next
20 in order.

21 THE COURT: 27 and 28. Has counsel seen
22 those?

23 MR. SMIRCINA: It is At Home Health Care
24 and HealthSouth.

25 BY MR. SMIRCINA:

1 Q. While the judge is marking those
2 exhibits, Michael, did there come a time when you
3 undertook some physical therapy?

4 A. Yes.

5 Q. Where was that physical therapy held?

6 A. At HealthSouth.

7 Q. How long did you go to the physical
8 therapy, do you recall?

9 A. I believe I was in therapy approximately
10 between two and three months. I don't really recall
11 exactly how long I was in therapy.

12 Q. What kind of things did they do for you
13 at therapy?

14 A. Mostly stretching exercises, trying to
15 get some more motion back, mostly my ankle.

16 (The documents referred to were marked as
17 Plaintiff's Exhibits No. 27 and 28, and received into
18 evidence.)

19 THE WITNESS: Because there wasn't much
20 at all they could do for my foot.

21 BY MR. SMIRCINA:

22 Q. I have -- your left foot, you mean?

23 A. Right. Correct.

24 Q. I have in my hand what has been marked
25 Plaintiff's Exhibit Number 28 for identification. I

1 would ask if you recognize that paperwork there and if
2 you would tell the jury what it is?

3 A. This is from At Home Care.

4 Q. And is that the bill to treat -- for the
5 home health nurse to come and treat you while at your
6 home?

7 A. Yes.

8 Q. Is that because of the accident on
9 November 14th, 1996?

10 A. Yes.

11 MR. SMIRCINA: I move for the admission
12 of this bill into evidence.

13 THE COURT: Thank you.

14 BY MR. SMIRCINA:

15 Q. Then I have in my hand what is
16 Plaintiff's Exhibit 27 for identification. I would
17 ask you to look at it and tell me what that -- tell
18 the jury what that document is.

19 A. It is from HealthSouth Rehab.

20 Q. And what is that document for?

21 A. It is for rehabilitation I went through.
22 It is a bill for it.

23 Q. Is that because of the accident on
24 November 14th, 1996?

25 A. Yes.

1 MR. SMIRCINA: I move for the admission
2 of 27 and 28, Your Honor.

3 THE COURT: Okay.

4 BY MR. SMIRCINA:

5 Q. Now, Michael, before we talk about the
6 affect of your injuries on your life, what was your
7 life like before the incident? What did you do
8 day-to-day, physically?

9 A. I had a very active life, physical life.
10 As far as work went, I would work anywhere from 10 to
11 12, 10 to 14 hours a day, actually, like Mr. Walker
12 testified, carrying drywall, operating a boom truck
13 all day. I would leave work three to four days a week
14 and go play basketball for three or four hours at a
15 time, that or play tennis. I didn't play much golf,
16 more towards the basketball and tennis, that or it is
17 always doing something.

18 Q. Did you have any problems with strength
19 or endurance?

20 A. No. Not at all.

21 Q. Now, how have the injuries you received
22 in this accident compromised those qualities in your
23 life?

24 A. I feel like I can't do hardly anything
25 compared to what I used to do physically or my

1 activities.

2 Q. Can you run like you did before the
3 accident?

4 A. I would say about half the speed. Or if
5 I can, some days I will be in pain, where I can't
6 actually run or don't want to.

7 Q. What discomfort, if any, to your legs and
8 feet are as the result of this accident on a daily
9 basis?

10 A. Every day is different. One day this
11 week I got out of bed and my ankle was hurting like I
12 twisted it. I didn't do anything to it. I just woke
13 up in the morning and my ankle was hurting. Or I can
14 get out of bed and the first step I take might be
15 painful, and I know then it is going to bother me the
16 rest of the day. I just don't know when it is going
17 to happen.

18 Q. How long can you walk before your legs
19 and feet start hurting?

20 A. It depends. Most of the time, 20 minutes
21 or so. And if I step on something wrong, it could be
22 less than that.

23 Q. What do you mean, stepped on something
24 wrong? What are you talking about?

25 A. Like with my foot, if I step on --

1 Q. Which foot?

2 A. My left foot. If I step on a rock or a
3 curb or a step uneven or step on the wrong spot like
4 on the ball of my foot, that would cause pain. And my
5 ankle is -- most of the time with steps or uneven
6 ground, it will cause pain.

7 Q. Did you enjoy the physical activities you
8 had prior to the accident?

9 A. Yeah. I would almost just look for any
10 opportunity to do something as far as sporting
11 activities.

12 Q. Did you think you were slowing down? How
13 old were you at the time of this accident?

14 A. Thirty-one.

15 Q. What is your date of birth?

16 A. 1/25/65.

17 Q. So you're 31, and you weren't slowing
18 down a bit?

19 A. No. Not at all.

20 Q. What now overall do you think has been
21 the effect of these injuries on your physical
22 conditioning?

23 A. Can you say that again?

24 Q. What effect did these injuries have, if
25 anything, on your physical conditioning?

1 A. I feel like I am not in shape now or
2 can't get back into the shape I was. Just, I can't do
3 cardiovascular stuff that would keep me in shape. I
4 just feel like not the man that I used to be.

5 Q. What other problems have you had since
6 the accident that you relate to the injuries you
7 received in the accident?

8 A. One of my main concerns is memory loss.
9 People at work will -- like my dispatcher, for
10 instance, will have to remind me of job sites that I
11 know I have been to 10 or 15 different times. But I
12 can't remember how to get there. And they will be
13 like, well, you were there two days ago. I don't
14 remember.

15 Either that or sometimes when I try to
16 explain myself I know what I want to say, but the --
17 the words I want to choose, it is just hard to put
18 them together sometimes, picking the right word. I
19 know the word. It is like I can't pull it out.

20 Q. Were your functions this way prior to the
21 accident or have they changed as a result of the
22 accident?

23 A. I wasn't this way before. My thinking
24 was a lot quicker, my reactions.

25 Q. Have there been any changes in your

1 personality as a result of this accident, do you
2 think, your emotional state?

3 A. I am more, I guess, sensitive. I am
4 not -- I used to be a happy-go-lucky type. Now I am
5 more subdued and things annoy me a lot quicker and
6 things like that.

7 Q. Why haven't you sought some counseling
8 for these problems?

9 A. I think it is the fact that I have a hard
10 time -- I am a little stubborn. I have a hard time
11 accepting the fact. I don't want to accept the fact
12 that I am slower now. And it is just hard to accept.

13 Q. Are you talking about physically or
14 mentally?

15 A. Mentally. I have to accept the physical
16 part of it. I live with that every day and I see it
17 and feel it.

18 Q. Now, Mike, because of your injuries, are
19 you able to work as a boom truck operator, do the job
20 that Allen Walker does for Tidewater Interior
21 Products?

22 A. No.

23 Q. Why can't you do it?

24 A. Mentally, I am just -- I don't know. If
25 you had a 1700-pound beam coming to you and almost

1 kill you, that takes a lot to get over something like
2 that. I was operating a boom for a long time and
3 never had anything like that happen. That and the
4 actual physical part of carrying drywall or pushing a
5 drywall cart, load it with drywall, that and going up
6 the ladder. It is just a lot of things, a lot of
7 reasons that I can't do that.

8 Q. Have you tried to do it since the
9 accident?

10 A. Yes, I have.

11 Q. How many times have you tried? What have
12 been the results?

13 A. I have probably tried it -- the actual
14 carrying of drywall, I probably tried it four or five
15 times. And one time, the longest span that I could do
16 it, I believe, was about five minutes. Other times I
17 tried it, as soon as the weight of the drywall hit my
18 hands, I just had to let go, I had to set it down
19 right there.

20 Q. Why?

21 A. I couldn't walk with it because of the
22 pressure on -- mostly on my left foot. I took a step,
23 my weight plus the weight of the drywall in my hands
24 was putting so much more pressure on my foot that, you
25 know, my big toe doesn't flex as much to take a step.

1 That causes more pressure on my bigger toe than -- my
2 big toe on my left foot, and it causes pain.

3 Q. Would you do the job that Allen Walker
4 has now with Tidewater Interior Products if you could?

5 A. I would like to be doing it. I would
6 like to be making more money.

7 Q. Well, let's talk about the money then.
8 What was your average weekly wage in the weeks
9 immediately preceding the accident?

10 A. Immediately preceding?

11 Q. No. Just an average of the months before
12 the accident. What were you making a week?

13 A. About \$1150.

14 Q. And were you being paid by the hour then
15 or by piecework?

16 A. By piecework.

17 Q. And when you were out of work ten weeks,
18 did you get paid by Tidewater Interior Products?

19 A. No.

20 Q. Are you claiming that as a wage loss in
21 this case?

22 A. Yes.

23 Q. Now, when you came back to work, what did
24 they have you do?

25 A. Basically answer the telephone. That was

1 pretty much it. Answer the telephone and just do some
2 paperwork. That was about it.

3 Q. This was because -- had you been released
4 to full duty when you first went back to work?

5 A. No. I was released to light duty.

6 Q. And how much did they pay you at that
7 time?

8 A. John had decided, I guess because of my
9 time in the company, what I have done for the company,
10 that he would pay me an average of the last -- I think
11 he went by the last 14 weeks or three months prior to
12 my accident, that he would pay me that amount while I
13 was recovering.

14 Q. Per week?

15 A. Per week.

16 Q. So while this arrangement persisted, you
17 were being paid \$1150 per week when you returned to
18 work?

19 A. Yes.

20 Q. And the John you're referring to was John
21 Rymiszewski?

22 A. Rymiszewski.

23 Q. So for the year 1997 -- I would ask you
24 to look at this document, which I am aware is your
25 social security statement from the social security

1 administration. Would you tell the jury what you made
2 in 1996 first?

3 A. '96. \$50,911.

4 Q. And you didn't work the last 45 days of
5 that year, did you?

6 A. No.

7 Q. When did business start picking up for
8 Tidewater Interior Products in 1996?

9 A. I would say mid year. About the time
10 that I started actually getting paid piecework and
11 came off of my minimum salary. So when I started
12 actually picking up some business and started making
13 enough to be more than the 910 a week that I was
14 guaranteed.

15 Q. Now, you say you were out of work in
16 January '97, and went back to work in February of '97?

17 A. It was the beginning of February, I
18 think.

19 Q. And you were being paid how much a week?

20 A. \$1158.

21 Q. And would you please tell the jury what
22 your social security earnings were for the year 1997?

23 A. \$57,538.

24 Q. And did your job change in 1997?

25 A. Part of the way through the year it

1 changed.

2 Q. To what?

3 A. I went from light duty, working in the
4 office. Once I could get around on my crutches a
5 little better -- I was still on crutches when I
6 started back at work. They would have me do little
7 errands like, say, go get lunch for the office or go
8 check a job out, you know, to see if we had any
9 problems on it stocking it.

10 After that -- I did that for a couple of
11 months, and I was still in therapy at the time with
12 HealthSouth. After that, I would just -- it was
13 about, let's see, I would say June or July that I was
14 finally released to put enough pressure on my left
15 foot to push on the clutch to drive the truck.

16 Q. And what arrangements did -- what did
17 Tidewater Interior Products make you do then?

18 A. At that point, I would just take
19 materials out to other crews, just take -- drive the
20 truck out to them, and they would stock it.

21 Q. When did you stop being a boom crane
22 operator?

23 A. A full time one, from the date of the
24 accident.

25 Q. When did you become a tractor-trailer

1 with a forklift driver? When did you start doing
2 that?

3 A. I believe that was July of -- I think
4 July of '97.

5 Q. Did there come a time when the manner in
6 which you were paid was changed?

7 A. Yes. January 1st of '98.

8 Q. What was that change?

9 A. It was changed from the salary that John
10 decided to pay me. He ended up paying me that salary
11 for the full year of '97 up until January 1st of '98.

12 Q. Well, you didn't work in January of '97,
13 did you?

14 A. No.

15 Q. So it was from February 1 to the end of
16 the year?

17 A. From the time I went back to work in '97
18 to the end of '97, he paid me that salary.

19 Q. So that 57,000 --

20 A. 57,000.

21 Q. -- is for 11 months?

22 A. Right.

23 Q. And '98 your wages changed?

24 A. Right. January 1st of '98, he put me on
25 an hourly rate.

1 Q. What was your hourly rate?

2 A. \$15.10.

3 Q. Is that your hourly rate now?

4 A. Yes.

5 Q. Well, Mike, 15.10 an hour is 600 a week,
6 which is a little over 30,000 a year. How do you make
7 the money you make now?

8 A. I worked a lot of overtime. If my
9 deliveries are done -- which I don't have as many
10 deliveries as boom crews because they are more
11 specialized and they can do a lot more different
12 things than I do. So if I get my deliveries done,
13 come back to the office, and if there is anything else
14 to be done, I ask to do it or they will ask me if I
15 want to do anything extra.

16 MR. SMIRCINA: Ma'am, could I have this
17 marked, please?

18 THE COURT: Is there going to be any
19 objection with marking it in?

20 MR. NORRIS: No, ma'am.

21 MS. SPENCE: No, Your Honor.

22 THE COURT: So it is 29.

23 (The document referred to was marked as
24 Plaintiff's Exhibit No. 29, and received into
25 evidence.)

1 BY MR. SMIRCINA:

2 Q. So in 1998, when you started making 15.10
3 an hour, with the overtime you discussed, what were
4 your wages for that year?

5 A. '98?

6 Q. For 1998.

7 A. 56,179.

8 Q. So how many hours a week did you have to
9 work in order to make that amount of money?

10 A. Sixty-five to 70.

11 Q. And then in 1999, your pay has remained
12 the same, has it not, in terms of an hourly rate?

13 A. Correct.

14 Q. It hasn't gone up, has it?

15 A. No. It stayed the same.

16 Q. Hasn't gone down, has it?

17 A. No.

18 Q. I would like you to look at the document
19 that has been marked as Plaintiff's Exhibit 29 and ask
20 you to look at that document.

21 A. Uh-huh.

22 Q. What are your total earnings for that
23 year?

24 A. 52,093.

25 Q. Now, how much money do you contribute a

1 week to your 401(k) plan?

2 A. \$20.

3 Q. And where is that reflected there?

4 Fifty-two weeks in a year. Where is the \$20
5 contribution a week?

6 A. In Box 13.

7 Q. So that \$52,000 figure that you just
8 mentioned includes that \$1,040; is that correct?

9 A. Yes.

10 Q. Mike, do you think you will ever be able
11 to work as a boom crane operator again?

12 A. No.

13 Q. Why not?

14 A. To put it in a word, I am scared to is
15 the first thing that comes to mind.

16 Q. Well, you could physically, even with
17 your fear, still operate the controls of the boom,
18 couldn't you?

19 A. Yeah. I could operate it.

20 Q. Well, why is it, then? Is it other
21 things besides your fear that keeps you from doing
22 Allen Walker's job?

23 A. Yeah. I physically can't do it. I
24 can't -- I simply can't walk with that much weight.

25 Q. Okay. How does your foot feel today,

1 your left foot? How does your left foot feel?

2 A. At this moment, it feels okay.

3 Q. What about your right leg, your right
4 ankle?

5 A. It is a slight soreness in my right
6 ankle.

7 Q. Mike, you say you can't carry that
8 weight. How much weight actually has to be carried by
9 a person who is Scott Hewitt -- say you're working
10 with Scott Hewitt. How much are you going to be
11 carrying at a time, how much drywall are you going to
12 be carrying at a time?

13 A. With myself and another person?

14 Q. Right.

15 A. Each time we carry a bundle, I would be
16 carrying anywhere from say 100 to 120 pounds.

17 Q. You mean that would be your half of the
18 weight?

19 A. My half of the bundle. There is one
20 other thing that I don't think John or Allen mentioned
21 it because we're not supposed to do it but sometimes
22 it has to be done.

23 Q. What is that?

24 A. Sometimes we have to carry a bundle by
25 ourselves. If -- like a lot of residential houses,

1 the rooms are small and there are certain windows that
2 come out. And if you can't make a turn out of that
3 room to bend a drywall around the corner, one person
4 will pull it off the forks, hand it to another person,
5 pass it through a set of studs if you can't get
6 through if there is a wire going across. So we do
7 that sometimes, too.

8 Q. Is it your belief that if you were a
9 steel -- a boom operator, you would make much more
10 money?

11 A. Yes.

12 Q. Why do you believe that?

13 A. I work around them every day. I see what
14 they make. I know what they do. I know what Allen
15 Walker makes. We have been friends for a long time.
16 And I see the amount of work he does. Basically I
17 know how much money he brings home. I know how much I
18 make.

19 Q. Do you think if you were still physically
20 capable, you would be making that much money?

21 A. Yes.

22 MR. SMIRCINA: One moment, Your Honor.

23 BY MR. SMIRCINA:

24 Q. Michael, I am going to bring pictures
25 back up so you can describe how this boom actually --

1 this seat actually worked, what was involved, if you
2 could explain to the jury. What is the -- this is a
3 picture taken the day of the accident, evidently.
4 What do you see is damaged to that seat?

5 A. Well, this is just -- these armrests are
6 tore loose. This whole section here, this is all
7 connected between -- from here to the -- from the foot
8 controls, all of this, and the seat is one basic
9 piece, which is bolted up to this tower on the boom.
10 You see a hole here where a bolt is missing? This
11 bolts up to here. And it has been knocked back down
12 and at an angle back this way. See, this joystick has
13 been bent backwards, also.

14 Q. What affect would that have on the boom
15 arm itself?

16 A. This control right here -- might be
17 another picture -- it controls the secondary -- the
18 secondary arm. This control here on the right
19 controls this arm here, the up and down. If you pull
20 back on it, it raises it -- pushes forward on it,
21 lowers that arm. If you move it from side to side,
22 move it towards the outside, it does what we call
23 closes the torque assemblies. So, in other words,
24 the forks, they are laying flat. If it pushes this
25 towards the outside, it would curl the forks up like

1 this. If you push inside, it would open them up.

2 Q. Where is that in relation to where it
3 normally is, that right-hand joystick?

4 A. It is bent backwards. You see, this one
5 is tilted forward right here. This one is almost
6 straight up. They come from the factory with tilt
7 forward. They lean forward and make it more
8 comfortable for you.

9 Q. Any other damage to this crane seat --
10 this boom crane seat that you see?

11 A. That is all I can see in this picture
12 other than these -- this part of the computer, this
13 tube was pushed back. It should be more forward.

14 Q. Okay. Now, Michael, you have mentioned
15 that if you made a hundred deliveries with this boom
16 arm that there could be some kind of contact between
17 the boom arm and with something you were trying to
18 load into how many times out of a hundred?

19 A. I would say maybe ten.

20 Q. Well, what kind of contact do you mean?
21 Do you mean banging in? Do you mean brushes? What do
22 you mean?

23 A. I mean just brushing into it or just
24 touching it.

25 Q. Had you ever knocked a steel member down

1 before?

2 A. No.

3 Q. Had you ever received any training from
4 the boom truck manufacturer about this product that
5 you were using?

6 A. Yes. That was in '91 or '92 when we
7 received our first -- the company I was working for
8 used to use strictly Apprentice name brand boom, and
9 we decided to switch and try the Foceys just to try
10 something different. We heard they were better. So
11 myself and my partner, at the time, were receiving a
12 shipment of it. We were going to be operating the
13 first Focey we received. So when it was delivered,
14 like I said, it was in '91 or '92 when we received the
15 first one, an expert -- in fact, he helped in the
16 production of the Focey boom, delivered it himself
17 from Kansas City and spent a day with us going over
18 every part of the boom.

19 Q. Was this a Focey boom you were using?

20 A. Yes.

21 Q. In addition to climbing -- you said you
22 can't go up and down the ladder of the boom truck.
23 How many times a day do you think you go up and down
24 the ladder?

25 A. Fifty or 60. I would say that is a

1 minimum. Some days it might be more than that.

2 Q. Is that -- what bothers you the most
3 about trying to do this job?

4 A. That really bothers my left foot putting
5 pressure on the ball of my foot. It is painful. Just
6 ladders in general bother it.

7 Q. Well, you have mentioned you are afraid
8 to operate the boom, you can't walk with the drywall,
9 and you can't get up and down the ladder very easily
10 without pain?

11 A. Right.

12 Q. Which of the three is the worst, in your
13 mind?

14 A. I would say they are all equal.

15 Q. You said that when you came to a job
16 site, you would look around to see where you can
17 off-load the drywall. What are you doing?

18 A. Just taking an overview, looking for
19 dangers or actual spots that we have room to get in,
20 just an overall look of the job site just to check out
21 all of the possibilities of delivering the material.

22 Q. So it is a safety issue with you?

23 A. It is safety.

24 MR. NORRIS: Your Honor, he is leading.

25 THE COURT: Sustained.

1 BY MR. SMIRCINA:

2 Q. Why do you do all of those things?

3 A. Like I said, we are taking an overview as
4 far as where we can put it, any obstacles that may be
5 in the way, just anything that could be a danger or a
6 safety issue.

7 Q. What did you assume regarding the girt
8 before -- in the area where you got injured before you
9 began off-loading?

10 A. I assumed it was like any other of the
11 thousands of jobs I have been to that there was no
12 problem with it being unsecured.

13 Q. Well, what was the reason for that
14 assumption in your mind?

15 A. The reason is we asked for permission to
16 take the safety cable down and it is an automatic
17 assumption that if you ask to take the cable down in a
18 certain area that are all in different sections that
19 it is fine to be working in that area. Take a safety
20 cable down, that means you are going to be working in
21 that area.

22 Q. When you say you liked to play basketball
23 beforehand, what is the difference in how you play
24 basketball for recreation now as opposed to before?
25 What can't you do now that you could before?

1 A. Mostly just shoot around. I used to play
2 pick up, full court games. And we would play pretty
3 much constant for two or three hours at a time. I
4 have tried since. I just love -- I used to love
5 playing and still like playing basketball. So I go
6 out and shoot around or play a little half-board games
7 or whatever, horse stuff like that.

8 Q. Is there any difference in how you walk
9 now compared to before?

10 A. I have a slight limp. After the
11 accident, of course, I had a really bad limp. It
12 took, I would say, almost a year to get to where I
13 felt like I was walking almost normal. But I feel
14 like I don't have a limp now, but everyone tells me I
15 have a limp.

16 Q. Are you embarrassed by any of your
17 injuries?

18 A. Some things bother me. Like at work guys
19 will pick at me a little bit about my memory loss and
20 stuff like that. And also one of the biggest problems
21 is I am trying to think of the right words to say for
22 someone. I will know the words or the word -- a lot
23 of times one word in particular.

24 MR. NORRIS: I am sorry, Your Honor. I
25 think this has been gone through.

1 THE COURT: It has been, but I am going
2 to let him finish his answer.

3 BY MR. SMIRCINA:

4 Q. Okay.

5 A. It will be one word in particular that I
6 know -- I know I have had enough education where I
7 know I know this word, I have used it before, I
8 understand what it means, but I cannot think of this
9 word at this moment. And it is very frustrating.

10 Q. One last question, Mike. If you had been
11 told that that girt was not secure up on that bracket,
12 would you have gone anywhere near that area to
13 off-load your drywall?

14 A. No, I wouldn't have. I could have been
15 given an option. I have actually set some steel beams
16 like that before with my boom -- I could have picked
17 the beam up with my boom and taken it down if I was
18 aware.

19 Q. And the area in no way was off limits to
20 you?

21 A. No.

22 MR. SMIRCINA: I don't have anything
23 further.

24 CROSS-EXAMINATION

25 BY MS. SPENCE:

- 1 Q. Good afternoon, sir.
- 2 A. Good afternoon.
- 3 Q. You got married in '99, didn't you?
- 4 A. Yes. October.
- 5 Q. Did you take any time off, go anywhere
- 6 special?
- 7 A. I took a week off. Just went to -- went
- 8 to South Carolina, Myrtle Beach, and Charleston.
- 9 Q. That is nice. And you say you have two
- 10 children?
- 11 A. Yes.
- 12 Q. How old are they?
- 13 A. Nine and eight. I mean nine and seven.
- 14 Sorry.
- 15 Q. Nine and seven. So at the time of this
- 16 accident, they were five and two?
- 17 A. Correct.
- 18 Q. Your marriage -- you had just separated
- 19 from your wife within a few months before you moved
- 20 down here; is that correct?
- 21 A. I separated with my wife in March of '95.
- 22 Q. Okay. When did you -- when was the
- 23 divorce filed?
- 24 A. I don't remember the exact date when it
- 25 was filed. She filed it.

1 Q. She filed it?

2 A. Uh-huh.

3 Q. But it was finalized in '99?

4 A. Yes.

5 Q. Maybe about May of '99?

6 A. I believe it was April or May.

7 Q. I want to talk to you first about who you
8 spoke to and who gave you instructions on the job site
9 that day. My favorite diagram. Can you see that,
10 sir?

11 A. Yeah.

12 Q. Because if you can't, you are welcome to
13 come down.

14 A. Okay.

15 Q. You spoke with Mr. Bosley yourself on the
16 first floor, didn't you?

17 A. Yes.

18 Q. And that was over in this location, the
19 first floor place where you were off-loading?

20 A. Right.

21 Q. And he showed you where on the first
22 floor he wanted the material?

23 A. No. He didn't show us exactly where he
24 wanted it. He showed me where he did not want to
25 block.

1 Q. He showed you two possible places, one
2 side or the other, right --

3 A. Correct.

4 Q. -- that he wanted it in one of those two
5 places?

6 A. In his words, he said he did not want to
7 block his mason workers.

8 Q. And he wanted you to put it in one of
9 those two places on the first floor?

10 A. All I remember is him showing me where he
11 didn't want it.

12 Q. That was the only time you spoke with him
13 before the accident, am I correct?

14 A. Correct.

15 Q. And you mentioned that you saw him
16 walking around on the job site?

17 A. Yes.

18 Q. And you saw him walking around when you
19 were unloading over here on the second floor?

20 A. Yeah. On the second floor back in
21 towards the middle of the building.

22 Q. Towards the middle of the building?

23 A. Uh-huh.

24 Q. You never saw him over in this side of
25 the building while you were there, did you, the

1 southeast corner where the accident happened?

2 A. No. When I moved down there, I saw him
3 going into his trailer.

4 Q. And you can't say if he looked in your
5 direction or saw you?

6 A. When he was going to his trailer, or when
7 I was down at that end?

8 Q. When you were down at that end.

9 A. Well, I can't say. He had to walk by my
10 truck to get to his trailer.

11 Q. Exhibit 2. I am showing what has been
12 marked as Plaintiff's Exhibit 2. There was a double
13 fence around the building there, wasn't there?

14 A. Yes.

15 Q. And the trailer was on the other side of
16 that fence, wasn't it?

17 A. No.

18 Q. Out here?

19 A. No.

20 Q. You're saying the trailer was not outside
21 the fence?

22 A. Correct. It was inside -- inside the
23 fence on the job site side.

24 Q. Do you remember Mr. Taraba testifying
25 that it was outside the fence?

1 A. Yes.

2 Q. You disagree with that?

3 A. He had a trailer on the outside of the
4 fence, one of his trailers.

5 Q. So the one outside the fence isn't the
6 one you saw him going into?

7 A. No.

8 Q. Okay. Other than on the first floor when
9 you were speaking to Mr. Bosley, you took the
10 remaining instructions from either McGowan or Hewitt;
11 am I correct?

12 A. Correct.

13 Q. And you put four hacks on the first
14 floor?

15 A. I believe it was three or four.

16 Q. And you stopped putting on the first
17 floor because Wenger only wanted four hacks there?

18 A. That is the amount they needed on the
19 first floor.

20 Q. And you consider it your job to put
21 material where the customer wants it?

22 A. It is my job. Yes.

23 Q. Fair enough. And Wenger Tile was your
24 customer?

25 A. Yes.

1 Q. And your company had done business with
2 Wenger Tile off and on plenty of times before?

3 A. Before the accident, like I said, it
4 hadn't been a long customer relation. We hadn't been
5 open that long. We had delivered to them before this.

6 Q. Your business is very competitive, isn't
7 it, building supplies?

8 A. Yes.

9 Q. When you moved to the second floor still
10 over here directly above the first floor, you
11 off-loaded another four or five hacks. And didn't the
12 Wenger Tile people tell you exactly how many hacks to
13 put in each area?

14 A. They didn't directly tell me that. I
15 believe they were speaking with Mr. Hewitt.

16 Q. So they told Hewitt and --

17 A. Right. Right.

18 Q. -- and he could communicate with you,
19 this is all they want here?

20 A. Right.

21 Q. And weren't you already off-loading
22 material on the second floor over here before anyone
23 ever mentioned to you moving down here?

24 A. Can you say that again? Was I already
25 unloading in that area?

1 Q. You were already unloading on the second
2 floor, about finished unloading on the second floor
3 before anyone told you they were going to want you to
4 move down and unload over here, right?

5 A. I don't remember if we were almost done
6 or just getting started.

7 Q. You were already on the second floor?

8 A. We were on the second floor.

9 Q. So it was well after your conversation
10 with Bosley on the first floor?

11 A. Uh-huh.

12 Q. That is a yes?

13 A. Yes.

14 Q. Now, I want to ask you a little bit about
15 some of the damages you're claiming. You first saw
16 Dr. Sautter about your closed-head injury in May or
17 June of 1999?

18 A. Correct.

19 Q. And it was Charles DeMark who recommended
20 that you see him?

21 A. Correct.

22 Q. And DeMark is not a doctor, medical
23 doctor?

24 A. Not that I know of.

25 Q. He is a vocational consultant that your

1 lawyer sent you to?

2 A. Correct.

3 Q. And, in fact, your first meeting with him
4 was in your lawyer's office?

5 A. No.

6 Q. With DeMark?

7 A. I don't believe it was.

8 Q. Okay. Well, Dr. Sautter made some
9 recommendations for you, didn't he?

10 A. Yes.

11 Q. Have you ever read the book Five Weeks to
12 Healing Stress?

13 A. No, ma'am.

14 Q. But he did recommend that?

15 A. Yes.

16 Q. And you haven't taken the class at the
17 memory clinic he recommended?

18 A. No.

19 Q. And you haven't gone to the pain
20 management sessions he recommended?

21 A. No.

22 Q. Has he or any other health care provider
23 ever discussed with you that antidepressant medication
24 usually clears up memory problems?

25 A. No.

1 Q. You haven't seen anyone to be treated for
2 your depression?

3 A. No.

4 Q. Let me approach. It will be a little bit
5 easier if we will be looking at the same thing. Your
6 total income for 1996 was \$47,271.18?

7 A. For '96.

8 Q. For '96.

9 A. Yes. I agree.

10 Q. And that was for the whole year through
11 November 14?

12 A. Correct.

13 Q. Is there a delay in your paychecks?

14 A. One week.

15 Q. Okay. So that would have actually
16 included a paycheck up through November 21, then?

17 A. For some reason, I don't remember
18 receiving my paycheck for the week of the accident. I
19 don't know what happened, if they forgot to file it or
20 maybe they were too worried about me. I don't know.
21 I just don't remember receiving it.

22 Q. In 1997, your total wages were
23 \$57,538.20?

24 A. Correct.

25 Q. You would agree that is \$10,000 more than

1 you made in '96?

2 A. Correct. And that is from February until
3 the end of the year.

4 Q. So that is just 11 months?

5 A. Correct.

6 Q. And we don't seem to have your '98 W-2,
7 but the social security administration statement says
8 that they were 56,179?

9 A. That seems right.

10 Q. And '99 was \$52,093.16?

11 A. Right.

12 Q. Now, this has your earnings basically
13 from the time you started working, doesn't it, your
14 social security administration report?

15 A. It looks like -- yeah. From the time --
16 yeah.

17 Q. And you started working with the boom
18 truck in 1987?

19 A. Correct.

20 Q. And you were up in Northern Virginia
21 then?

22 A. Right.

23 Q. And at that time in 1987, you made
24 \$9,160; in '88, you made 35,000?

25 A. Right.

1 Q. In '89, you made 39,000?

2 A. Correct.

3 Q. In '90, you made 38,000?

4 A. Correct.

5 Q. 1991 you made 42,000?

6 A. Correct.

7 Q. '92 you made 48,000?

8 A. Correct.

9 Q. '93 you made 55-?

10 A. Correct.

11 Q. '94 you made 55-?

12 A. Correct.

13 Q. '95 you made 39-?

14 A. Correct.

15 MS. SPENCE: Your Honor, I would like to
16 offer the tax W-2 forms as one exhibit.

17 THE COURT: That is number 7.

18 (The document referred to was marked as
19 Defendants' Exhibit No. 7, and received into
20 evidence.)

21 MR. SMIRCINA: No objection, Your Honor.

22 THE COURT: Actually, I am assuming from
23 both sides if I don't hear one by now that there isn't
24 one.

25 MS. SPENCE: And social security.

1 THE COURT: Number 8.

2 MS. SPENCE: Thank you.

3 (The document referred to was marked as
4 Defendants' Exhibit No. 8, and received into
5 evidence.)

6 BY MS. SPENCE:

7 Q. Mr. Shepherd, as far as jobs, you like
8 your work, don't you?

9 A. My job I do now or -- well, yes.

10 Q. And you don't have any plans to change
11 your occupation?

12 A. No.

13 Q. And you haven't been out looking for any
14 other jobs?

15 A. No.

16 Q. You graduated from high school in '83?

17 A. Yes.

18 Q. And you went to a private school?

19 A. Yes.

20 Q. And you attended college for two years?

21 A. Yes.

22 Q. Studying business administration?

23 A. Yes.

24 Q. I am going to transition now. I want to
25 talk to you about the things that you did the day of

1 the accident and what your duties are as a crane
2 operator. When you moved to the southeast corner here
3 you saw workers on the first floor?

4 A. Yes.

5 Q. And you saw at least one worker welding
6 in the corner?

7 A. Yes.

8 Q. You didn't know what they were welding?

9 A. I could see what he was welding. I don't
10 know what it was called. I just call it a beam.

11 Q. Or a girt?

12 A. Or a girt. In fact, I believe that was a
13 header is what would be considered what he was
14 welding. It is overtop of the door frames.

15 Q. Okay. You didn't talk to the welders?

16 A. No.

17 Q. You didn't tell them you were there?

18 A. No.

19 Q. You didn't check to see if they were
20 planning on moving out of that area or stepping
21 outside the building to weld on the outside?

22 A. I didn't ask if he was. If he did, I
23 would have stopped operating.

24 Q. And even though you saw him welding on
25 one of those beams, you assumed that the other beams

1 were already welded?

2 A. Yes.

3 Q. One of the safety rules is not to operate
4 with other people near your crane, right?

5 A. Underneath.

6 Q. Underneath the boom?

7 A. Underneath exposed.

8 Q. And that rule is emphasized a lot?

9 A. Yes.

10 Q. The welder who was welding, was he
11 wearing a welding mask?

12 A. Yes.

13 Q. And I believe Mr. Norris has one here.
14 It looks like this?

15 A. It looked like that.

16 Q. Have you ever worn one of these?

17 A. Yeah.

18 Q. You can't see much of anything except
19 through this little glass, right?

20 A. It is pretty much darkness. I would say
21 it is like wearing two pairs of sunglasses compared to
22 one.

23 Q. And it totally cuts off your peripheral
24 vision?

25 A. Yes.

1 Q. But it keeps you from going blind from by
2 that bright light?

3 A. Yeah.

4 Q. And you didn't know if they were going to
5 be moving to another position, the welders?

6 A. The welders, no.

7 Q. You try not to hit anything with your
8 boom when you're delivering material, don't you?

9 A. Yes.

10 Q. You don't want to damage the building?

11 A. Correct.

12 Q. And you know from experience that your
13 boom can damage steel?

14 A. Yes.

15 Q. Your boom has bent a six-inch steel beam
16 one time; isn't that correct?

17 A. Correct.

18 Q. You don't want to damage your crane boom,
19 either?

20 A. Yes.

21 Q. And you certainly don't want to damage
22 your hydraulic lines or your computer?

23 A. Any part of the crane you don't want to
24 damage.

25 Q. And you don't want to get hydraulic fluid

1 everywhere and mess up even more?

2 A. That or cause damage to the building with
3 hydraulic fluid.

4 Q. You will agree with me that a hydraulic
5 hose alone can't excerpt enough force to lift or
6 dislodge a 1700-pound girt, don't you?

7 A. I agree with that.

8 Q. Only a pound or two of resistance would
9 move the hydraulic hose?

10 A. The one I have given, yes, singled out.

11 Q. And you know your boom could lift the
12 weight of that beam?

13 A. Yes. By itself, yes.

14 Q. If totally retracted, your boom can lift
15 9,000 pounds, right?

16 A. Retracted -- retracted and folded.

17 Q. Folded. In the position it was in, it
18 can lift 6,000 pounds?

19 A. Correct.

20 Q. But your boom was almost completely
21 retracted before the accident?

22 A. I think it was almost completely.

23 Q. And Hewitt was your spotter?

24 A. Yes.

25 Q. I think you have already said he wasn't

1 very experienced yet, you were still teaching him?

2 A. I would say he was inexperienced. Yes.

3 Q. His job was to watch you while you were
4 retracting your boom, wasn't it?

5 A. Yes.

6 Q. And to signal you directions?

7 A. More to be a spotter than signal me on
8 that position on that.

9 Q. Well, what is the use of the -- being a
10 spotter if he can't signal you for what he is --

11 A. He is to watch for hitting things, not to
12 actually guide me in. In that position, I can pretty
13 much see every part that is involved, every part of
14 the boom and every part of the building. It is only
15 20 feet away.

16 Q. But he is supposed to let you know if you
17 hit something?

18 A. He is an extra set of eyes.

19 Q. An extra set of eyes. He is supposed to
20 let you know if you hit something or if you're going
21 to hit something? Probably by the time you hit
22 something you probably already know or should know it?

23 A. I would know it.

24 Q. But you didn't know it this day?

25 A. Didn't feel it.

1 Q. But you definitely came in touch with it?

2 A. It came in touch with me.

3 Q. Well, you don't think it just jumped off
4 the brackets, do you?

5 A. No.

6 Q. You had come in contact with the beam?

7 A. I don't know. I didn't feel it. I still
8 don't know how it came off.

9 Q. Hewitt had only been working with you two
10 or three weeks?

11 A. I would say for three to four weeks.

12 Q. But you didn't usually keep your eyes on
13 him unless he yelled to get your attention?

14 A. No. I was still looking at him. I
15 would -- I would be -- the only time I would look at
16 him is if he came to my view, if he moved directly in
17 front of me like in front of where the forks were, I
18 would stop and look at him.

19 Q. If you -- if you saw him or you were
20 looking at him, you were not operating the crane, you
21 would stop?

22 A. Correct.

23 Q. The only time he yelled for your
24 attention was after the girt was already on its way
25 down?

1 A. I believe once he said he saw it move.

2 Q. And when you looked up, it was teetering?

3 A. When I looked -- the first time I looked
4 up and saw it, it was already sliding down the boom
5 towards me.

6 Q. And you didn't hear the slide?

7 A. Maybe a noise sliding.

8 Q. But it was metal?

9 A. Correct.

10 Q. On metal?

11 A. Uh-huh.

12 MS. SPENCE: Okay. I don't have any
13 other questions for you. Please answer anything of
14 Mr. Norris.

15 THE WITNESS: Okay.

16 THE COURT: Shall we take a five-minute
17 break? Let's take a little stretch. I imagine we
18 will be a few minutes with this. Ladies and
19 gentlemen, do you want to step into the back?

20 MR. NORRIS: Your Honor, since the
21 witness is in the middle of examination, can I --

22 THE COURT: He is not going to talk to
23 anybody about his testimony. He is just going to take
24 a stretch.

25 (The jury withdrew from the courtroom.)

1 (Recess taken.)

2 (The jury returned to the courtroom.)

3 THE COURT: All right. Are we all set to
4 pick up? Mr. Norris, I think we are ready.

5 MR. NORRIS: Yes, ma'am. Thank you.

6 BY MR. NORRIS:

7 Q. Mr. Shepherd, you seem to have a pretty
8 good recall of the events that happened back in
9 November of '96?

10 A. I have a fair recollection of it, I would
11 say.

12 Q. Your memory is working pretty good today?

13 A. I think I remember things better before
14 the accident than post-accident.

15 Q. Have you understood all of the questions
16 that have been asked of you so far today?

17 A. I would say yes.

18 Q. Have you had any trouble thinking of the
19 right words to say to answer any of the questions
20 today?

21 A. Yes. I have stumbled a couple of times.

22 Q. Now, Mr. Hewitt was your spotter on the
23 day of the accident?

24 A. Spotter or helper.

25 Q. When Ms. Spence asked you if he was

1 supposed to give you hand signals to help guide your
2 boom, did you disagree with that?

3 A. I said this incident he didn't actually
4 need to give me hand signals as far as going in and
5 out. I could see the boom going in and out. He was
6 there as an extra set of eyes.

7 Q. Well, weren't his hand signals to be used
8 by you, along with your eyes, to prevent you from
9 making contact with anything?

10 A. I would say yes.

11 Q. Okay. Now, as I recall Mr. Hewitt's
12 testimony and your testimony, I think you both agreed,
13 Mr. Hewitt yelled to you and you looked up at him when
14 he yelled to you, correct?

15 A. Correct.

16 Q. And when you looked up at Mr. Hewitt
17 after he yelled at you, that is the first you noticed
18 a problem with the beam, correct?

19 A. He was pointing at the beam when I looked
20 up.

21 Q. When you saw the beam after he yelled at
22 you, it was already on your boom teetering?

23 A. Correct.

24 Q. So when you began your operation, do you
25 agree that that girt was on the clips?

1 A. Yes.

2 Q. So from the time Mr. Hewitt yelled at you
3 to the time you looked at the girt and saw it already
4 on your boom -- already up here on your boom right
5 where the black and the yellow meet --

6 A. I couldn't tell from my angle if it was
7 on the black and yellow. I could see it resting on
8 top. I am looking straight down.

9 Q. -- whatever that period of time, the girt
10 went from on the clips to on your boom without you
11 seeing it get there, right?

12 A. It may have still been on the clips,
13 also.

14 Q. But you never saw your boom get
15 underneath the girt and put it into the position where
16 it was teetering, you didn't see that happen until Mr.
17 Hewitt yelled at you?

18 A. Correct.

19 Q. Now, would you agree with everybody
20 that -- well, would you agree that you had about three
21 to four inches of clearance that day?

22 A. Yes.

23 Q. And I think you have told us that if you
24 do this operation a hundred times, you are going to
25 make some kind of contact ten times?

1 A. That is what I said.

2 Q. Ten percent?

3 A. Correct.

4 Q. So you figure that there is a ten-percent
5 chance when you off-load this material that you are
6 going to come into contact with something?

7 A. Sure. Ten-percent chance that my hoses
8 could touch it.

9 Q. And, in fact, did you know that you had
10 already touched the girt the first time you off-loaded
11 a hack of material?

12 A. I knew a hydraulic line touched it.

13 Q. So you knew that in the three to four
14 inches of clearance you had, you were making some
15 contact with that girt from the first time you
16 off-loaded the hack?

17 A. The hoses were, yeah.

18 Q. And you're not supposed to damage your
19 hoses, are you? You're not supposed to make contact
20 when you off-load, are you?

21 A. I didn't damage the hoses.

22 Q. But you're not supposed to make contact,
23 are you? Isn't that in the TPI manual?

24 A. Correct.

25 Q. So you had already known from your first

1 delivery that you had done something you don't really
2 want to do?

3 A. Can you rephrase that?

4 Q. Well, I thought you had told us that when
5 you deliver material, you don't want to make contact
6 between the building and your hoses?

7 A. Not with the metal.

8 Q. And you had already done that, hadn't
9 you?

10 A. Not with the metal. How would -- not
11 with the metal part of my boom is what I am saying.

12 Q. Well, does the TPI boom manual say it is
13 only the metal that is not supposed to make contact?

14 A. I can't remember if it says just the
15 metal or hoses or it may say any part.

16 Q. Doesn't it say that during lifting, care
17 shall be taken that load, boom, and other parts of the
18 crane do not contact any obstructions? Isn't that
19 what the manual says?

20 A. That is what it says.

21 Q. So that would include your hydraulic
22 hoses, wouldn't it?

23 A. They would be in that category.

24 Q. So the first time you delivered that
25 first hack, you had already done something that the

1 manual tells you you ought not to do?

2 A. Correct.

3 Q. But you went ahead with the second load,
4 nonetheless?

5 A. Correct.

6 Q. Now, you saw a welder down on the first
7 floor, southeast corner, right?

8 A. Yeah. Southeast corner.

9 Q. And he had his mask on. And he was
10 welding at the time, right?

11 A. Right.

12 Q. And you said that these welding masks
13 look like this?

14 A. Right.

15 Q. And it is like wearing two pairs of
16 sunglasses?

17 A. That is a way to describe it.

18 Q. Will you put this on for me, sir?

19 A. Sure. Do you want it down?

20 Q. Please. Can you see me?

21 A. No.

22 Q. Can you see whether I am holding my hand
23 up?

24 A. No.

25 Q. You can't see a thing, can you?

- 1 A. I can see light coming up through here.
- 2 That is about it.
- 3 Q. But you cannot see me?
- 4 A. No, sir.
- 5 Q. You can take it off now. Now, I want you
- 6 to tell me a little bit more about the way you operate
- 7 your boom. These are some pictures that were taken by
- 8 Atlantic the day after. And I will represent to you
- 9 that this line was put up before the pictures were
- 10 taken to show where the top of the girt would have
- 11 been.
- 12 A. Uh-huh.
- 13 Q. And here is the clip where the bottom of
- 14 the girt would have been. Okay?
- 15 A. Right.
- 16 Q. Do you agree with me that a portion of
- 17 your boom, at least when this picture was taken, is in
- 18 the space where the girt used to be?
- 19 A. No.
- 20 Q. You don't agree with that?
- 21 A. No, I don't. That is a bad angle.
- 22 Q. How about this picture, is that a better
- 23 angle?
- 24 A. No. You can't see the string line.
- 25 Q. Well, do you disagree that your girt and

1 your boom came into contact?

2 A. No, I don't disagree with that.

3 Q. So didn't your boom come into the space
4 that was being occupied by the girt?

5 A. I suppose it had to.

6 Q. Yes. And it came into contact with the
7 girt as you were withdrawing it, right?

8 A. Correct.

9 Q. Now, this portion of the boom in this
10 picture has kind of like a joint or a knuckle here,
11 doesn't it?

12 A. Right. That is just a pin going across.

13 Q. But does this pin allow this section of
14 the boom to move at angles?

15 A. Which section?

16 Q. Does this section of the boom --

17 A. Does it raise up and down?

18 Q. Yes, sir.

19 A. Yes.

20 Q. So when you withdrew your boom, if this
21 section had been at a lower angle, it would have
22 missed the girt?

23 A. That is not correct.

24 Q. Well, you're not saying it was impossible
25 to miss the girt? You did it the first time, didn't

1 you?

2 A. Did what the first time?

3 Q. When you off-loaded the hack and brought
4 out the boom, the metal part of the boom didn't touch
5 the girt the first time?

6 A. Correct.

7 Q. Well, when you brought it out the second
8 time, could you have angled it in a way to have
9 avoided touching the girt?

10 A. I went in the same and came out the same
11 as I did the first time.

12 Q. Are you saying --

13 A. The same angles, everything.

14 Q. Are you saying that it was impossible to
15 miss the girt on your way out?

16 A. Was it impossible?

17 Q. Could you have maneuvered the controls of
18 the boom to make the fork or the part of the boom
19 lower in relation to the girt when you withdrew it?

20 A. From the pictures -- the position it is
21 in the pictures?

22 Q. No, sir. From your knowledge of the
23 scene and of the events.

24 A. The lowest I could position it from the
25 girt is what I was saying, three to four inches of

1 clearance.

2 Q. Okay. Well, what I am asking you is what
3 part of your boom could you have made three to four
4 inches lower? That is what I am asking.

5 A. At that point right there, none of it.
6 Because the forks are on the concrete slab.

7 Q. So if the forks are resting on the slab,
8 this part of the boom can't go any lower than it is?

9 A. It can still go lower but it is hard to.

10 Q. That is what I am trying to ask you.
11 Could this part have gone an inch or two or three
12 inches lower while the fork is on the floor?

13 A. Yes.

14 Q. Now, Mr. Shepherd, you told us that when
15 you first got to the scene, you kind of eyeballed the
16 area, you looked at the area for things that might be
17 important to you and you saw a mason underneath the
18 building, I guess, what, in here somewhere?

19 A. It is not when I pulled onto the job site
20 when I saw him.

21 Q. At some point in time, did you see
22 workers doing some work in the first floor of the
23 building?

24 A. Yes.

25 Q. Okay.

1 A. I saw a worker.

2 Q. And didn't you tell us that the reason
3 you want to look for that is because one of those
4 workers might walk out from under the building
5 underneath where you are off-loading your materials?

6 A. Correct. You have to watch out
7 underneath you.

8 Q. And you don't want them to get hurt, do
9 you?

10 A. No.

11 Q. If something fell off your boom and fell
12 onto somebody else underneath you, they would get
13 hurt, wouldn't they?

14 A. Right.

15 Q. So you don't want that to happen?

16 A. No.

17 Q. Did you cordon off the area around your
18 truck, Mr. Shepherd --

19 A. No.

20 Q. -- to keep people out of the area where
21 you were off-loading?

22 A. No.

23 Q. But you wanted somebody to cordon off the
24 area around where they were doing their work to
25 protect you?

1 A. There was no one working in this area.

2 Q. You said you saw two people in the area
3 doing work.

4 A. On the first floor. They were both doing
5 work on the first floor.

6 Q. Well, they would have to be on the first
7 floor to be able to walk underneath your boom,
8 wouldn't they?

9 A. Yeah.

10 Q. And if they had walked underneath your
11 boom and something fell off your boom, it could have
12 hurt them, couldn't it have?

13 MR. AUFENGER: Judge, if it please the
14 Court, I would have an objection right now. I don't
15 understand the relevance. I am trying to understand
16 the relevance of what someone else in the area, if
17 they had walked under the boom -- that didn't happen,
18 and I don't see the relevance as to his operation of
19 the crane as it relates to his injury under the facts
20 of the case.

21 THE COURT: I know you don't, but I am
22 going to let Mr. Norris continue to try to make his
23 point. Go ahead.

24 MR. AUFENGER: Thank you, Judge.

25 BY MR. NORRIS:

1 Q. You didn't cordon off this area around
2 your boom truck to keep people out of the area where
3 you were loading your material, did you?

4 A. No. I did it visually.

5 Q. You were just assuming that everybody was
6 going to stay where they were and not move?

7 A. No. I didn't assume. I always assume
8 someone is going to walk underneath me. That is why I
9 keep a lookout for them.

10 Q. Now, Mr. Shepherd, isn't it true that in
11 the 15 years that we have records of your income,
12 starting with 1985, the most you have ever made has
13 been after the accident happened?

14 A. Yes.

15 Q. You never made as much money driving a
16 truck or operating a boom before the accident as you
17 have made since the accident?

18 A. Correct.

19 Q. And did we ask you for your tax returns
20 for some of these years so we could look at your
21 income and your expenses?

22 A. I believe so.

23 Q. Did you give us your tax returns?

24 A. No. I think I had copies of my W-2s that
25 I turned in.

1 Q. Well, you didn't give us tax returns
2 because you never filed them, did you?

3 A. Yes. I filed taxes.

4 Q. Didn't you fail to file tax returns for
5 1997 and 1998?

6 A. And 1995.

7 Q. Now, you were asked about the various
8 reasons you won't go back to your old job. Isn't the
9 only reason you don't operate the boom truck
10 anymore -- the reason is because of your fear?

11 A. No.

12 Q. Isn't that what you told me when I took
13 your deposition on Page 57?

14 A. Your question is: The only reason I
15 don't operate a boom truck, is that the question?

16 Q. Isn't fear the biggest reason that -- the
17 mental part of it that you --

18 A. It is a reason.

19 Q. Isn't it the biggest reason?

20 A. I would say they are all equal.

21 Q. When I asked you about this in your
22 deposition, I asked you, So is the real reason you
23 fear being a boom operator the mental aspect of it and
24 not the physical? And you said, Part of it. And I
25 asked you, Is that the biggest reason? And you said,

1 I would say yeah. Isn't that what you told me in your
2 deposition?

3 A. It appears to be.

4 Q. But you have not sought any treatment or
5 counseling for your fears?

6 A. Correct.

7 Q. And you told us that is because you're
8 kind of stubborn?

9 A. In a way, I get myself hardheaded or
10 stubborn.

11 Q. You would rather these jurors give you
12 the money that you feel you can't earn anymore than
13 you take the initiative and get the counseling that
14 you could use to overcome those fears; isn't that so?

15 A. That counseling is not going to heal my
16 injuries where I can carry drywall.

17 Q. When did you last play a round of golf?

18 A. It was, I would say, three months, two to
19 three months.

20 Q. Did you play 18 holes?

21 A. Yes.

22 Q. In 1998, did you get a vacation from
23 Tidewater Interior Products?

24 A. You get two weeks a year.

25 Q. Two weeks vacation. Okay. Now, you told

1 us that before the accident, you and your employer
2 assumed you were making \$1150 a week?

3 A. I think 1158 was the exact amount.

4 Q. Now, you get two weeks vacation. So
5 you're actually working 50 weeks a year, right?

6 A. Right.

7 Q. Your wages for 1998 were 56,179, weren't
8 they?

9 A. Correct.

10 Q. If I take 56,179 and divide it by 50
11 weeks, how much were you making a week in 1998?

12 A. That includes my -- that 56,000 includes
13 my vacation. I get paid vacations.

14 Q. Right. So for the 50 weeks that you
15 actually earned your income, right -- for the 50 weeks
16 you worked --

17 A. Uh-huh.

18 Q. -- how much were you getting paid those
19 weeks?

20 MR. AUFENGER: Judge, I would object. I
21 think it is misleading and not a fair illustration.
22 He has paid --

23 THE COURT: He has -- he has gotten paid
24 vacation?

25 MR. AUFENGER: Part of his job.

1 THE COURT: And if he is paid for the two
2 weeks that he is off, then he is receiving money for
3 52 weeks. Yes.

4 MR. NORRIS: Well, Your Honor, wouldn't
5 that be for redirect?

6 THE COURT: Well, I think the objection
7 was to the accuracy of the question, and I think I
8 have to agree. I am going to sustain the objection.

9 MR. NORRIS: Could I have a moment,
10 please?

11 THE COURT: Yes.

12 MR. NORRIS: That is all I have, Your
13 Honor.

14 THE COURT: Anything on redirect?

15 MR. SMIRCINA: Yes, please.

16 REDIRECT EXAMINATION

17 BY MR. SMIRCINA:

18 Q. Mike, in 1995, you were making
19 considerably less than you did in 1996. Why was that?

20 A. I had taken a leave of absence from
21 Capital Building Supplies, the company I transferred
22 before Tidewater. I just took about four months off
23 and went to work for another company and made, I would
24 say, about half as much as I would if I would have
25 stayed at Capital during those four months.

1 Q. What years have you not filed taxes for
2 today?

3 A. 1995, the year of my separation. Once we
4 were separated, my wife and I, she had all of the
5 paperwork from our house as far as the payments were
6 made, basically all of the tax paperwork. And now,
7 once we were separated, she apparently lost most of
8 our paperwork, and it was just a mess.

9 Q. Did you have taxes withheld throughout
10 those years?

11 A. Pardon me?

12 Q. Did you have taxes withheld from your pay
13 all those years?

14 A. Yes.

15 Q. When you filed your taxes, have you ever
16 failed to receive a refund once the taxes have been
17 filed?

18 A. I have always every year received a
19 refund.

20 Q. When you speak about being a boom
21 operator and the fear, that is the fear of actually
22 operating the boom?

23 MR. NORRIS: Objection to leading, Your
24 Honor.

25 THE COURT: Sustained.

1 BY MR. SMIRCINA:

2 Q. When you are operating a boom, are you
3 fearful?

4 A. Yes. I mean --

5 Q. And now are you fearful when you operate
6 the boom?

7 A. Yes. I am not comfortable at all. After
8 this accident, it is just -- there is no comfort level
9 that I can reach.

10 Q. But Allen Walker's job isn't merely
11 operating that boom, is it?

12 MR. NORRIS: Object to leading, Your
13 Honor.

14 BY MR. SMIRCINA:

15 Q. Is Mr. Walker's job simply operating the
16 boom crane?

17 A. No, it is not. He has a lot of other
18 things he has to do.

19 Q. Are those things that Mr. Walker can do
20 things that you can do?

21 A. No. I mean, I can't carry drywall. I
22 can't push drywall, which we have to push it on carts
23 a lot. Carry it up or down steps, obviously not. Go
24 up and down a ladder, definitely can't do that all
25 day. Just some of the things that is involved with

1 being an operator.

2 MR. SMIRCINA: I don't have anything
3 further.

4 THE COURT: He may step down?

5 MR. SMIRCINA: You can step down. Yes,
6 ma'am, he may.

7 THE COURT: Thank you, sir. You are free
8 to take your seat.

9 Any other evidence?

10 MR. AUFENGER: No, Your Honor. The
11 plaintiff rests.

12 THE COURT: Counsel, approach.

13 (A discussion was held off the record.)

14 THE COURT: Ladies and gentlemen, there
15 is some legal issues that I need to take up with
16 counsel, and since it is approaching quarter to four
17 on a Friday afternoon, I am sure you would like to be
18 out doing something else for the rest of the
19 afternoon, what little bit is left. And for the
20 weekend, I will tell you to have a nice weekend.

21 Monday morning, if you would, be back
22 downstairs at about 9:15 like we have been doing this
23 week. I think that has worked out already. I think
24 that gets you in the parking lot in time to get
25 parking spaces. I never know how busy it is going to

1 be down there.

2 If you want to give the deputy your
3 books, and we will keep them safe during the weekend,
4 your pads. If you need to, get anything from the
5 back. If you have everything you need, have a nice
6 weekend. Thank you.

7 (The jury withdrew from the courtroom.)

8 THE COURT: Do you need a minute?

9 MR. NORRIS: No, ma'am. I don't. I have
10 been thinking about this motion for a month. And I
11 have to tell the Court how disheartened I am that you
12 have already told the jury when to come back on
13 Monday.

14 But be that as it may, Your Honor, I am
15 not trying to be melodramatic here or anything, but
16 I take this motion very, very seriously in that I
17 think the evidence came out in this trial exactly as I
18 predicted in the motion in limine and my argument to
19 Judge Canada and in the argument to you at the
20 commencement of this case.

21 I don't think -- let me back up. The
22 motion for judgment alleges negligence. It alleged
23 initially, in addition to negligence, that my client
24 violated certain unnamed government regulations. Now,
25 those regulations were never referred to in the

1 plaintiff's case in chief because the plaintiff
2 learned in discovery that they did not apply. And so
3 the plaintiff then shifted his case to an OSHA case
4 relying on the blanket every employer must provide a
5 safe workplace case.

6 Now, the evidence was that that
7 requirement was incorporated into a contract by the
8 incorporation of a FAR and that that contract existed
9 between the government and W. B. Meredith. First
10 thing I will point out to the Court is no contract has
11 ever been introduced in the plaintiff's case in chief.
12 The only thing that the plaintiff has offered in
13 evidence is a page or two of some FAR regulations.

14 Necessarily, the plaintiff has not
15 introduced any contract or agreement of any kind by
16 which Atlantic Welding and Fabricating was accepted or
17 was obligated to comply with any FAR regulation, with
18 any Army Corps of Engineers manual, with any OSHA
19 regulation. There is no evidence that my client was
20 bound contractually to any -- to that general catchall
21 safety clause.

22 Now, so for negligence, then, there must
23 be some duty which my client owed to the plaintiff.
24 And that duty, in this case, must be defined by some
25 standard, some standard of care recognized in the

1 community.

2 Now, the case of Mann versus Clowser,
3 which I will tell the Court was not a personal injury
4 case, it was not a third-party case. It was a case by
5 an owner against a contractor and the contractor's
6 defense for defective workmanship. And the
7 contractor's defense was, well, you have to show that
8 I didn't do my work in a workmanlike fashion. And the
9 Virginia Supreme Court upheld the jury instruction
10 which defined workmanlike fashion as being that in the
11 community. The supreme court in that case, and in
12 many cases since, have said you must look to the
13 community standards to see if work is not done in a
14 workmanlike fashion.

15 Now, in this case, for the plaintiff to
16 establish the breach of duty, it must have established
17 a standard of care recognized in this community. Now,
18 the plaintiff's evidence from Mr. Burg, their safety
19 expert, was, one, he relied on the general language in
20 the FAR regulations, which were never imposed upon my
21 client. He never testified that, absent a contractual
22 obligation, that these general requirements are the
23 standards in Virginia. He is only familiar with one
24 contractor in Virginia who performed two steel
25 erection jobs and could not testify if either of those

1 jobs involved the activity which we are alleged to
2 have done negligently in this case.

3 So there is absolutely no evidence before
4 this Court of what the standard of care in Virginia is
5 for the safe erection of a girt. We only have
6 Mr. Burg's conclusory statement that, based on OSHA,
7 one must do two things, secure the girt so it won't
8 fall or cordon off the area.

9 Now, as to the first, Mr. Burg said he
10 has no opinion whether the girt was adequately
11 secured. He had done no calculations. An engineer
12 would have to do that he said. He doesn't know what
13 force was exerted against it. So he is unable to
14 say what type of securing would have been adequate.
15 And he said it really is irrelevant to my opinion, I
16 don't care whether the girt was tack welded or not.
17 That was his statement on cross.

18 He rests his opinion on, aside from
19 whether the girt was secured, there was no cordoning
20 off of the area. He further admitted on
21 cross-examination that my client would need to be
22 apprised that there was a delivery that was going to
23 take place in the area to have some responsibility or
24 obligation to either seek permission to cordon or to
25 recommend cordoning. There is no testimony before the

1 Court that, under the contract between the parties --
2 and I have an oral obligation, not a written one --
3 that my client had any right to cordon off the area,
4 that that was standard practice for steel erectors.

5 Mr. Burg did not say that steel erectors
6 in Virginia normally cordon off areas where a girt is
7 not ready for final alignment. In fact, the
8 plaintiffs, in their answers to request for admission,
9 have admitted that my client had no contractual
10 obligation to cordon off the area. Furthermore,
11 Mr. Burg says that it is the general contractor who
12 has the responsibility for coordinating all of the
13 work, for coordinating delivery, for insuring the
14 overall safety of the project.

15 So the first basis of the motion to
16 strike is an absence of negligence. There is no
17 evidence before the Court that we breached a duty to
18 the plaintiff. That duty must be measured by the
19 applicable standard of care. And Mr. Burg was not
20 able to testify that we breached an applicable
21 standard of care.

22 The second basis for the motion to strike
23 is there is no evidence that could even get to the
24 jury on causation. None of the plaintiff's witnesses
25 have testified what would have been necessary to

1 secure the girt to prevent the accident. A jury is
2 not permitted to speculate on causation. No one has
3 testified that a minimum weld of one-and-a-quarter
4 inches located in the center of the girt and in the
5 center of the clip was necessary to prevent minimal
6 force from moving the girt.

7 We don't know how much force was
8 exerted on the girt. We know how much force the
9 boom could have exerted. We know the weight of the
10 girt. But no one has testified that, but for a weld
11 of a certain-type diameter and location, this accident
12 would not have occurred. No one has testified about
13 the minimum weld necessary under the circumstances or
14 a certain type or amount. So causation is totally
15 left to conjecture and speculation.

16 Thirdly, the plaintiff's evidence, as a
17 matter of law, establishes contributory negligence.
18 Mr. Walker said you shouldn't hit things with the
19 boom. Mr. Seoane said you shouldn't hit things with
20 the boom. Mr. Rymiszewski said you shouldn't hit
21 things with the boom. And he further said you should
22 take affirmative steps to check the area, ask
23 questions, make sure that the structure is secure.
24 Mr. Burg said that he would expect a foot of
25 clearance. That is what he as a safety expert would

1 expect.

2 The plaintiff testified that he was not
3 watching his spotter at the time he made contact with
4 the girt, that his first knowledge that the girt was
5 dislodged and teetering was after the spotter had
6 called to him. And everyone has testified that a boom
7 operator must keep an eye, not only on the spotter,
8 but on the boom itself to make sure it doesn't come
9 into contact.

10 Everyone has admitted that if you do the
11 work properly, you shouldn't hit anything. The only
12 evidence you have received from the plaintiff to
13 countercontrib is it happens all the time.

14 And, Your Honor, the point I unartfully
15 tried to make on cross-examination was motorists speed
16 all the time. But if they speed and they have a
17 collision, it is not a defense to say, I speed all the
18 time. Everyone else was speeding. Speeding happens.
19 You should expect me to speed.

20 THE COURT: I only smile because I hate
21 to think how many times I sit here and hear that
22 excuse. And I am sorry to ruin your train of thought.

23 MR. NORRIS: Well, it isn't an excuse.

24 THE COURT: And it isn't. I am sorry. I
25 just had to smile.

1 MR. NORRIS: The point I am trying to
2 make, Judge, is it is not okay to hit things ten
3 percent of the time. The safety manual says avoid
4 contact with any part of the boom.

5 Everybody has said this was a tight fit.
6 It required extra care, extra duty, extra safety,
7 extra precautions. It required the spotter to pay
8 special attention, which brings me to the fourth basis
9 for the motion to strike, and that is this accident
10 was proximately caused solely by the intervening
11 negligence of Mr. Hewitt.

12 Mr. Hewitt, if he had been watching the
13 boom and the girt, could have stopped the operation on
14 the first loading operation when he said he saw
15 contact. Contact is forbidden by the company manual.
16 It is not supposed to happen. Once he saw it, he had
17 an obligation to make sure Mr. Shepherd was aware of
18 it and to stop the operation and to find another way
19 to do it.

20 On the second operation, he was talking
21 to someone. He wasn't watching the boom. He didn't
22 see the boom until it had already -- excuse me. He
23 didn't notice the contact until the girt had moved six
24 inches. He said that if he had given the stop signal
25 when he first saw the girt begin to move, that the

1 boom could have been stopped instantly, and admitted
2 that if he had done that, this accident might not have
3 happened. That is intervening, superceding
4 negligence, which was the proximate cause of the
5 accident. And even if the Court thinks that there is
6 evidence of negligence in this case, it would relieve
7 any negligent parties of responsibility.

8 Now, there is no evidence in this case
9 that Atlantic Welding was aware of this off-loading
10 operation, none. The only evidence we have is the
11 plaintiff's testimony that he saw an Atlantic welder
12 with a mask down welding. And he admitted that you
13 can't see a thing through that mask. Without any
14 evidence that we were told there was going to be a
15 delivery in the area, that we knew about it and that
16 we failed to take some precaution to alert people to
17 the problem, I don't see negligence.

18 The evidence further is unrefuted that we
19 set this girt the way we had set all of the girts
20 before it. Our work was subject to daily inspections
21 by both the general contractor and the Navy, that we
22 were never cited for doing the work improperly, we
23 were never requested to cordon off work when we were
24 at that stage of the process.

25 There is a certain course of conduct

1 between the parties, and there is absolutely no
2 evidence that we failed to do something that the owner
3 of the project, that the general contractor of the
4 project required in the way of safety. There is no
5 evidence that we failed to do something that other
6 steel erection contractors normally do in similar
7 circumstances. There is no evidence that we were
8 aware of the off-loading. And according to Mr. Burg,
9 if we are not aware of it, we can't take any action to
10 make it a more safe area.

11 And I know that the Supreme Court of
12 Virginia chastises trial courts for keeping cases from
13 the jury, but there are an equal number -- I don't
14 know -- about equal. But there is plenty of cases out
15 there that tell trial courts you can't let the jury
16 speculate.

17 The plaintiff has a burden of proof, not
18 only on negligence, but on causation. And the mere
19 happening of this accident, Judge, is not evidence of
20 negligence. And Mr. Burg admitted that OSHA does --
21 just because there is an accident, doesn't mean that
22 there is an OSHA violation. And I think that is what
23 we have here, Judge, is we have -- the girl fell,
24 because it fell, you were negligent -- necessarily,
25 you must have been negligent. But that is not enough.

1 And I ask the Court to strike the evidence as to my
2 client.

3 THE COURT: Why don't we let plaintiff's
4 counsel respond since each one of you are going to
5 have your own issues on the motion to strike.

6 MR. AUFENGER: First, if I may approach,
7 Judge. We have --

8 THE COURT: And while you are doing that
9 and catching your breath, let me ask, we are finished
10 with the exhibits. Do you want to collect everything
11 and take it back to my office and make sure you have
12 everything while you're looking for --

13 MR. AUFENGER: That is fine. And I would
14 like to look for a case, as well.

15 THE COURT: I would like to read it while
16 you're checking it. I am sorry. I have got two -- I
17 think I have got two copies of the same thing.

18 MR. SMIRCINA: No. There is two
19 different ones, ma'am.

20 THE COURT: Why don't we both read.

21 MR. SMIRCINA: There should be two
22 different ones.

23 THE COURT: It may be. I just looked at
24 the -- here is the other one.

25 MR. SMIRCINA: There is two different

1 briefs, one is on contrib and one is on duties in the
2 common law. Are there two different documents,
3 ma'am?

4 THE COURT: Yes.

5 MR. SMIRCINA: Your Honor, may my client
6 go to the rest room?

7 THE COURT: Absolutely. Any of them are
8 excused if they want to be. Actually, these aren't
9 signed that I have. One of them is and one of them is
10 not. Do you want to sign it?

11 MR. SMIRCINA: I will sign it, ma'am.

12 MR. NORRIS: I have just read the brief
13 for the first time. May I make a couple of comments?

14 THE COURT: You can, but it is sort of
15 their turn to argue. I am assuming they are going to
16 speak of it.

17 MR. AUFENGER: Yes, ma'am. We would like
18 to speak.

19 MR. NORRIS: Yes, ma'am. I am sorry.

20 THE COURT: I am assuming I know the
21 answer because you haven't handed it up to me already,
22 but you don't happen to have the case, the Figgs?

23 MR. AUFENGER: I have Figgs and Ritter.
24 I don't have a copy of Figgs. I have a copy for the
25 Court, but it is the only --

1 THE COURT: We can get -- we can have an
2 extra photocopy of it made.

3 MR. SMIRCINA: Do you need Ritter, as
4 well, ma'am?

5 THE COURT: Probably.

6 MR. AUFENGER: And I do have a copy. At
7 least I have one that defense counsel can share.

8 THE COURT: I tell you what, since this
9 is a little thicker and we are both probably going to
10 have to read these, why don't you give me the one you
11 have and let's make one, two, three copies of them so
12 that counsel has them and I have them maybe while we
13 are talking.

14 MR. AUFENGER: And, Judge, in addition,
15 we do have Caldwell. We have tort second Hallstead.

16 THE COURT: Everything that you have got,
17 why don't you put in a pile and I will give it to the
18 deputy. Did everybody go? Debbie is gone,
19 secretaries, too. Ask Judge Padrick to make the
20 photocopies since he sent everybody home.

21 MR. NORRIS: Judge, can he make some
22 copies of the cases that I am going to use, as well?

23 THE COURT: Sure. Let's see how far we
24 can get without the copies. It is sort of clear that
25 I know everybody would like to know these answers to

1 these before we get out of here today, but it is now
2 ten minutes after four, and I am hoping we can get
3 everybody's argument in. I don't know that I would
4 anticipate me giving you my wisdom, whatever that is,
5 this afternoon, but I would like to take this home
6 with me and think about it. Sometimes after a night's
7 sleep, you think of things you didn't think about and
8 read what you have got and digest it. So go ahead.

9 MR. AUFENGER: That is fine. Thank you,
10 Your Honor. May it please the Court, I would like to
11 address the argument that was just made on behalf of
12 Atlantic, and it will probably overflow a little bit
13 into Meredith.

14 THE COURT: And I will incorporate the
15 arguments into everything, but I think it is cleaner
16 to do it this way.

17 MR. AUFENGER: Sure. I do, too. And I
18 think initially Mr. Norris addresses the evidence of
19 negligence. And I believe that his argument has
20 basically been one of comparing apples to oranges. He
21 has continued to and vigorously argue that his
22 standard for erecting steel has not been varied under
23 the facts. But what he has failed to include and
24 failed to consider is the standard of safety involved
25 with the erection of that steel.

1 Now, I read yesterday -- and I have been
2 trying to find the actual cites, but it was an AmJur
3 cite that I read out to the Court yesterday, which
4 stood for the proposition that a violation of OSHA or
5 other law, which would include the Army Corps of
6 Engineers, when enacted for the safety of the public,
7 can be used as a violation of those -- of any of
8 those, can be used as evidence of negligence, and can
9 be used, further, as the standard of negligence, and,
10 more importantly as to this argument, the standard of
11 care.

12 And certainly there has been an abundance
13 of testimony from Mr. Burg, as well as Mr. Seoane,
14 that the standard of care for the safety of
15 Mr. Shepherd was not done by Atlantic. And there is
16 an abundance of that evidence.

17 And the standard of safety, as it has
18 been testified to, is Atlantic had the responsibility
19 to secure that beam or to warn off that area. And the
20 evidence is that that beam was exposed, it was not
21 cordoned off, there was no one there to warn, and
22 there is no evidence whatsoever in the record that
23 anyone gave Mr. Shepherd any notice or that there was
24 any evidence of notice all over that entire work site.
25 In fact, the evidence is to the contrary, that there

1 was, in fact, no evidence.

2 Your Honor, if it please the Court, as to
3 Atlantic in the brief that we have submitted, there
4 are two of them, one being the two motions to strike,
5 oppositions to those that were presented to the Court.
6 The first, as to whether or not a subcontractor or a
7 sub subcontractor, as Atlantic would like to call
8 itself, as to whether or not there is liability for
9 their actions or inactions.

10 And I would point out to the Court the
11 case of Ritter, and that is a Virginia Supreme Court
12 case. And it is quite uncommon when we find a case
13 that is so close on this issue. And we have found it,
14 fortunately, the Virginia Supreme Court cite I was
15 looking for, that is 200 Va. 736, 1959 case. And
16 in that case -- I recited the facts in the brief -- on
17 Page 6 of the decision of the Court it says Ritter --
18 and Ritter in this case was the contractor. But it
19 says Ritter and all other persons constructing the
20 crossover, irrespective of Ritter's agreement with the
21 railroad, that they had a common-law duty to guard the
22 hazardous situation created by the worker for the
23 protection of the safety of the persons lawfully using
24 the premises.

25 There is uncontroverted evidence that

1 Michael Shepherd was lawfully on the premises. There
2 is uncontroverted evidence that Atlantic certainly was
3 and other persons constructing the operation and
4 operation of this business -- or excuse me -- this
5 building. There is no need for privity between the
6 contract irregardless of whether or not the
7 subcontractor has a contract directly with the
8 contractor or with the owner of the premises. Every
9 entity that is working on a construction site owes a
10 common-law duty of care, which has been abundantly
11 testified to as breached on behalf of Atlantic.

12 Now I would like to move to causation.
13 Of course, we have another brief that has been
14 submitted to the Court on that. Obviously on issues
15 of causation, on contributory negligence, on issues
16 on -- as well as negligence itself, those issues are
17 invariably the purview of the jury. Generally -- not
18 generally. The law is that the weight at this point
19 in time, based on the defendants' motions, the
20 evidence of the plaintiff is considered in the light
21 most favorable to the plaintiff.

22 And as to causation, the evidence is
23 overwhelming that this girt was not secured and that
24 Atlantic and Meredith had a duty to warn off or cordon
25 off. And that was not done. So as to causation, it

1 is pretty clear. They breached their duty of care.
2 And the fact that it was not secured and the fact that
3 they were not -- he was not warned off, that is the
4 plaintiff, that is the causation. That is what caused
5 his injury.

6 Now, as to contributory negligence, that
7 was, I believe, the third issue brought up by
8 Mr. Norris. Certainly that is an issue that is
9 generally the purview -- for the purview of the jury.
10 And there is no evidence whatsoever that Mr. Shepherd
11 acted unreasonable for a boom truck driver under the
12 circumstances that we have before the Court,
13 particularly when he has a right to assume under the
14 laws of Virginia that this girt was safe, that there
15 was no laws being violated by leaving that girt
16 unsafe, and he had a right to assume, once he was
17 under the impression that he was in this area properly
18 after he had reasonably instructed his coworker to get
19 permission, which is what the evidence was, that they
20 were in this area rightfully and willfully.

21 And there is no evidence that they were
22 told not to be in this specific area. There is no
23 evidence that Michael Shepherd acted unreasonably or
24 appreciated the risk and, therefore, cannot be
25 contributorily negligent.

1 As to a proximate cause and whether
2 Mr. Hewitt may have been a superceding cause, that is
3 actually, in my opinion, close to an absurd argument.
4 Certainly, the negligence of another is not imputed to
5 Michael Shepherd. And in this case, you have also
6 heard Michael Shepherd tell you that he was not solely
7 relying on that spotter or that helper, as he called
8 it, that because of his location in his seat as he was
9 putting in the sheet rock and booming it back out,
10 that he was only 20 feet away, he had very clear
11 visibility, unobstructed visibility, and he was able
12 to see the clearance himself and felt comfortable with
13 it.

14 So for those reasons, he certainly,
15 number one, was not contributory negligent and, number
16 two, even if there was a momentary eyes taking off of
17 the load by Mr. Hewitt, there is no evidence that
18 would have actually prevented the injury, anyway. He
19 yelled immediately, and it was already coming down the
20 boom.

21 And for those reasons, we would ask as to
22 Atlantic and certainly as to Meredith that the motion
23 to strike be denied.

24 And if I may just briefly address
25 Meredith.

1 THE COURT: You want to let Ms. Spence
2 argue? And I think she probably has some things to
3 say that Mr. Norris didn't say. Mr. Norris, do you
4 want to respond to that before?

5 MR. NORRIS: Yes, please. Thank you,
6 Judge. Judge, the Ritter case, I haven't read the
7 case yet, but I have read the intro, this brief
8 commentary of it. A contractor leaves some
9 obstruction on a railroad track.

10 Now, the little I can glean from the case
11 really points out the difference in this case. In
12 this case, there is no evidence that Atlantic Welding
13 did or failed to do something other than what it was
14 required to do under the contract documents, the plans
15 and specifications. In Ritter, obviously, the
16 contract documents don't say store your materials on
17 the railroad track. The contract in Ritter probably
18 doesn't speak to the railroad track at all.

19 In our case, the only evidence that you
20 have that the jury has is from step one to step
21 infinity, we followed the work in accordance with the
22 plans and specifications. This isn't a case where we
23 took our girt and put it in a wrong area and it fell
24 and injured somebody because it was in the wrong
25 area. I agree that the law in Virginia is that, if I

1 negligently perform any contract, I am liable in
2 tort. But there is no evidence in this case that we
3 negligently performed the contract. The only evidence
4 is Mr. Burg saying that, under OSHA, your girt must be
5 secured. I can't say by how much. Or you must cordon
6 off the area. And I can't say that you have to cordon
7 off the area if you don't know there is a delivery.
8 So Ritter is not applicable to this case.

9 The case that we cited in our motion in
10 liminie out of the Fourth Circuit, which I know isn't
11 Virginia, but it is the Fourth Circuit -- now, it was
12 interpreted South Carolina law. But in that case, the
13 Trower case, the court refused to rely on OSHA as
14 evidence of a standard of care. Remember, the Court
15 has already ruled that OSHA can't be negligent, per
16 se, in this case.

17 What the plaintiff is arguing is the OSHA
18 safety regulation establishes the standard of care.
19 The Fourth Circuit Court of Appeals in Trower have
20 very strenuously -- 522 F.Supp 782 -- said you can't
21 do that. The defendant Brunswick cannot be held to a
22 higher standard of care than is required by the common
23 law of negligence. As explained, OSHA does not create
24 a duty of compliance to the OSHA standards on the part
25 of Brunswick in regards to a nonemployee such as the

1 plaintiff.

2 It is the opinion of this Court that the
3 admission of any evidence of the OSHA violations would
4 be highly prejudicial to this defendant. So the
5 Fourth Circuit has said that you can't use OSHA as the
6 standard of care.

7 The case I am asking the court to review
8 in addition to Mann v. Clowser is the case of
9 Morrison-Knudsen Company versus Alton Bruce Wingate.
10 That is a Supreme Court of Virginia case at 255
11 Va, 169. There a contractor was sued by a third
12 party for slipping and falling on some steps that the
13 contractor erected on the ground, that the steps
14 didn't have slip-proof kind of texture, they didn't
15 have the right texture.

16 And the supreme court in that case
17 considered the following arguments -- and forgive me
18 for reading at length. On appeal, the defendants --
19 and this is me -- argued that actionable negligence
20 requires proof of a legal duty to exercise ordinary
21 care for the safety of another person, a breach of
22 that duty and an injury proximately resulting from the
23 breach. The defendants say that the plaintiff was
24 required to establish, by the use of expert testimony,
25 what duty they owed him as designers and general

1 contractors, yet, the plaintiff failed to produce such
2 expert testimony. Furthermore, the defendants submit
3 there was no showing they breached any duty they owed
4 the plaintiff. He produced no evidence to show that
5 the trowell finish was unfit or unsafe for use on an
6 exterior landing or that the trowell finish
7 constituted a defect in the premises.

8 Now, in this case -- and I am going to
9 quote some more in a minute -- the plaintiff got a
10 jury verdict. So this case went up in appeal where
11 the defendant was asking the Court to overturn a jury
12 verdict. The Court went on, For purposes of this
13 discussion, we will assume, without deciding that the
14 plaintiff is correct in his assertion, that expert
15 testimony was not required to prove what duty the
16 defendants owed him, and we will agree with the
17 plaintiff that the defendants owed him the duty of
18 ordinary care, yet, there remained upon the plaintiff
19 the burden of showing a breach of that duty by
20 producing evidence of a nonexpert nature establishing
21 the trowell finish on the stairway constituted what
22 the plaintiff calls a hazardous condition, which they
23 failed to repair.

24 The difficulty with this argument is that
25 the burden was not on the defendants to show that they

1 complied with industry standards or building codes.
2 If any were applicable, rather, the burden was upon
3 the plaintiff to show that the defendants deviated
4 from the applicable -- excuse me -- from the standard
5 of ordinary care either by failing to observe
6 applicable trade customs and building code provisions
7 or by some other default in the case. Furthermore,
8 the Court noted the evidence shows that the plans and
9 specifications were approved and that the stairway was
10 erected with a smooth finish of concrete in accordance
11 with those plans and specifications.

12 The supreme court overturned the
13 plaintiff's verdict. And I think that is the argument
14 at least I am trying to make to you, Judge, is that
15 there has to be evidence of what the standard in
16 Virginia is. And Mann versus Clowser says, in the
17 building industry -- to determine if you have done
18 your work properly in the building industry, you have
19 got to look to the community standards.

20 There is no evidence that a steel
21 contractor in Virginia, when it temporarily sets a
22 girt, must either use a certain type of weld or that
23 there must be a certain type of cordoning. The only
24 evidence that we have from Mr. Burg is it should have
25 been cordoned. That is a general contractor

1 responsibility, especially if -- well, he said it is
2 both responsibilities, but not if the subcontractor is
3 unaware of the delivery of the material.

4 And I think the Morrison-Knudsen case is
5 so different from Ritter because in Morrison-Knudsen,
6 like our case, there is no evidence we deviated from
7 the plans and specification. In Ritter, this
8 contractor is putting material on the railroad track.
9 He is deciding where he is going to store his
10 material. That is not called for in his contract that
11 you are supposed to store your material on a railroad
12 track. I don't think you can compare those two
13 situations.

14 MR. AUFENGER: Just briefly, Judge. It
15 is not called for in the contract that they are
16 supposed to cordon off the area if they create an
17 unsafe condition. And in this case, we have
18 Atlantic. They are the ones that erected the steel.
19 They are the ones that created the hazard. They had
20 an obligation to do it and to erect it in a safe
21 manner. And that is what they neglected to do.

22 Now, this is not an OSHA violation case.
23 At least that is where we are right now based on the
24 Court's rulings because it is a -- at this point, it
25 is a common-law duty that both -- or all three of the

1 defendants had; however, OSHA is the minimum -- sets
2 the minimum standard of care for the safe erection of
3 steel in the United States, in Virginia, and in the
4 Tidewater area, and where -- and on the Dam Neck Naval
5 Base where this accident happened. And it is the
6 community standard -- the minimum community standard
7 in Virginia.

8 And that is what the testimony is in this
9 case as how it has been presented by, not only
10 Mr. Burg, but by Mr. Seoane and, therefore, it was
11 presented and, therefore, it is relevant as to the
12 trial case that defense counsel has mentioned. And,
13 rightfully so, not being a Virginia case and a
14 District Court of South Carolina case, that case is
15 distinguished clearly. They were talking about the
16 issue of negligence, per se. And that has already
17 been ruled on by the Court; although, when I have the
18 opportunity, I would like to make a motion on my own
19 to strike the evidence as to the defense in this case
20 on the basis of their negligence, per se, for
21 violating OSHA and the Army Corps of Engineers, which
22 I am doing now briefly, but I will have a greater
23 opportunity at another time. Thank you.

24 THE COURT: Yes, ma'am.

25 MS. SPENCE: Thank you, Your Honor. May

1 it please the Court, on behalf Mr. Bosley and W. B.
2 Meredith, I also move to strike the evidence.

3 The first grounds for my motion is that
4 the evidence established plaintiff's contributory
5 negligence as a matter of law. Not a single witness
6 who testified failed to admit that the standards of
7 care for a crane operator is that he is not to hit the
8 structure on the building. And as Mr. Norris pointed
9 out, just because everybody does it or it happens all
10 the time doesn't make it not negligent. It is
11 negligent.

12 He hit the building when he wasn't
13 supposed to. And, furthermore, by his own testimony,
14 he failed to see what was there to be seen. If he had
15 the visibility that he is claiming that he had and so
16 he didn't really need the spotter, then he was
17 supposed to see when his boom came in touch with that
18 girt. And he didn't see -- he didn't see it happen.
19 He didn't see it until it was already teetering.

20 That is a failure to see what should have
21 been seen. That is negligence. Reasonable people
22 could not differ on that.

23 The second grounds for my motion -- well,
24 let me continue on the contrib. The third aspect on
25 the contrib negligence that was shown,

1 Mr. Rymiszewski, Mr. Seoane, Mr. Burg, everyone who
2 testified knowledgeable regarding the cranes also said
3 that the plaintiff had a duty to make sure the area he
4 was delivering to was safe.

5 And I submit to the Court, when you see a
6 welder welding on a girt, that as a matter of law, it
7 is not safe to assume that the other girts have
8 already been welded. At a minimum, it wouldn't have
9 been too hard to ask is everything secure over here.
10 And if you're welding on something, that means
11 something is not secure, maybe I should check on this.
12 He should have checked for his own safety. That is
13 part of his job.

14 The second part of my motion to strike is
15 based on a proximate cause issue. Not only is there a
16 lack of evidence regarding what kind of tack weld
17 would have been sufficient, the evidence from
18 plaintiff's own experts is that a tack weld would not
19 necessarily even have prevented -- Seoane said the
20 boom could break a tack weld. The contact with the --
21 between the boom and the girt could have broken the
22 tack weld. He couldn't say that a tack weld could
23 have prevented the accident. Mr. McGowan said that he
24 knew that a boom could break the tack weld.

25 So as a matter of law, any failure to

1 "adequately" weld the beam could not be the proximate
2 cause of this accident. The boom coming in contact
3 with the beam is the proximate cause of the accident,
4 the sole proximate cause.

5 Another causation argument comes in
6 regard to the activity hazard analysis under the Army
7 Corps of Engineers manual. I first note that that was
8 a contractual duty that these defendants owed to the
9 Navy. That was not a duty that they owed to the
10 plaintiff, the duty to exercise ordinary care
11 absolutely. But to use the failure to have their
12 safety discussion itemized in writing as opposed to
13 having done it verbally is not a proximate cause of
14 this accident. It may be whatever you would want to
15 consider it in terms of between Meredith and the Navy,
16 but it is not a breach of any duty of ordinary care
17 owed to the plaintiff.

18 And I will also adopt Mr. Norris's
19 argument on the intervening cause. Mr. Hewitt was
20 exceptionally candid with the Court about his failure
21 to pay attention and that, had he done so, the
22 accident might have been prevented, probably would
23 have been prevented because the boom could stop
24 immediately.

25 MR. AUFENGER: Judge, if I may start with

1 the last argument first, and that is basically the
2 superceding or intervening cause.

3 THE COURT: And I am happy to adopt what
4 you said in response to Mr. Norris. If you want to
5 add anything else, that is fine.

6 MR. AUFENGER: That is fine. And I
7 will. But just briefly, what they are trying to do is
8 they are attempting to shift responsibility, which is
9 totally improper. It is just not something you can do
10 if it is against public policy.

11 As to the contributory negligence,
12 proximate cause, causation, I will adopt all of those
13 previous arguments made because I believe they can
14 apply -- they both go -- as to my response, it goes to
15 Meredith as well as to Atlantic. But without any real
16 new argument on those issues, those issues are jury
17 issues, and we would ask that you submit those issues
18 to the jury.

19 As to the liability of the general
20 contractor, Meredith, in accepting the contract with
21 the Navy to build this building, they agreed
22 contractually to comply with the Army Corps of
23 Engineers safety manual. And that manual -- I take
24 that back. Not the manual. But the provision of the
25 contract itself is not for the benefit -- the

1 provision that we are talking about is not for the
2 benefit of the Navy, but it is specifically for the
3 benefit of the employees and other persons on the job
4 site.

5 So Meredith has contractually agreed to
6 not just protect the government but to protect others.
7 And they agreed to that when they undertook to build
8 this building and to accept the money for building the
9 building and to comply with the Corps of Engineers
10 manual EM385-1-1. And that is a provision in the
11 contract. And, therefore, not only do they have a
12 common law duty, but they have contractually obligated
13 themselves to act reasonably and to do what is
14 necessary to safeguard against dangerous injury,
15 serious injury as occurred in this case.

16 I would like to address liability for
17 negligence. Supervision -- and I am reading from 13
18 AmJur 2nd 136 -- where a general contractor is in
19 control of the structure or premises, he is liable to
20 employees or other contractors rightfully on the
21 project for injury sustained by them because of his
22 negligent supervision. Thus, a general contractor may
23 be liable to an employee of another contractor on the
24 project for injuries resulting from the general
25 contractor's negligence in the adoption of the -- a

1 dangerous plan of work in the failure to supervise
2 properly the order or very important coordination of
3 the work or in some specific order to the employee by
4 a superintendent or by the general contractor himself,
5 which places the employee in a dangerous condition.

6 And in this case, we have an abundance of
7 evidence that Mr. Bosley did not do an activity hazard
8 analysis. And, certainly, it is reasonable to
9 believe, because this injury was foreseeable and
10 because that girt was unsecured, that my client would
11 be injured. And for that reason, and for all of
12 those, we ask that you deny Meredith's motion to
13 strike.

14 THE COURT: And just -- I think I know
15 the answer to this. But Mr. Bosley is in this as the
16 employee and acting within the scope of his
17 employment?

18 MR. AUFENGER: Correct. In fact, that
19 has been admitted. In the motion for judgment, that
20 was admitted in the grounds of defense.

21 THE COURT: There is no independent?

22 MR. AUFENGER: Correct.

23 MS. SPENCE: May I respond briefly, Your
24 Honor? I am not disputing that the general contractor
25 had a duty to use ordinary care and that he had

1 assumed contractual duty to use ordinary care to
2 supervise and protect the safety, that is, to use
3 ordinary care. What I am disputing is that this
4 activity hazard analysis is part of that duty to use
5 ordinary care. That is just --

6 THE COURT: Or failure. Okay. Basically
7 the, per se, failing to do the hazard activity, while
8 one might argue that failing to do some of the things
9 that might be included in it could be a -- that could
10 be his duty to perform some of the items that one
11 might include in there, but the mere failure of not
12 doing the written form --

13 MS. SPENCE: Yes. Is not, as a matter of
14 law, a proximate cause of this accident.

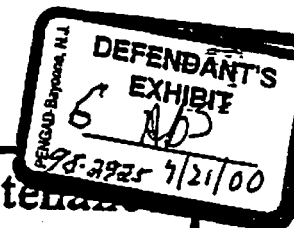
15 THE COURT: I don't know that I heard the
16 plaintiff argue that.

17 MR. AUFENGER: I am not. That is not
18 part of our motion to strike, either. Maybe I should
19 add it to it.

20 THE COURT: You all have done a great job
21 on this, and have -- I know we're in it this far now
22 and sometimes the adrenaline gets going, but I do
23 appreciate the time and effort everybody has put into
24 it. And everybody is doing their jobs. I think we
25 could all use a weekend to rest and to read. I will

1 take this home with me and have an answer for you
2 Monday morning. But I would be prepared for any
3 possibility Monday morning, any and all
4 possibilities. Monday morning, 9:30.

5 (The proceedings were adjourned at 4:43
6 p.m., to be reconvened on July 24, 2000 at 9:30 a.m.)
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Policy: **Boom Crane Operation and Maintenance**
Page 1 of 13

Applies to: All employees working on or around boom crane trucks
References: ASME/ANSI B30.22 (through Addenda D-1992)

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Policy Statement: No person shall operate a boom crane without first having been trained in the safe manner in which to perform their work. Only trained, authorized, and safety-conscious operators shall be permitted to operate boom cranes.

No other employee shall work in the vicinity of or in conjunction with the operation of a boom crane without first having been trained in the safe manner in which to perform their work.

Policy: Boom Crane Operation and Maintenance Page 2**Operator Qualifications**

1. Boom crane operation shall be limited to personnel with the following minimum qualifications:
 - a. Designated persons (previously trained, experienced, and authorized operating personnel);
 - b. Trainees under the direct supervision of a designated person;
 - c. Maintenance and test personnel (when necessary to perform their duties);
 - d. Crane inspectors.
2. *Minimum age:* 18 years
3. *Primary physical requirements* Operators must be able to:
 - a. Work in extreme weather conditions (heat/cold, high/low humidity, rain/snow, bright sunlight, etc.);
 - b. Climb and descend boom crane ladder, 15 and more times a day;
 - c. Sit and operate hydraulic controls for several minutes at a time, 15 and more times a day;
 - d. See clearly the entire area around a fully extended crane;
 - e. Have adequate hearing.
4. *Other physical requirements:*
 - a. Ability to distinguish colors, if color differentiation is required;
 - b. Normal depth perception and field of vision;
 - c. Vision of 20/30 Snellen in one eye and 20/50 Snellen in the other, with or without corrective lenses.
 - d. Evidence of physical defects or emotional instability which could render a hazard to the operator or others, or which in the opinion of the medical examiner could interfere with the operator's performance, may be sufficient cause for disqualification. In such cases, specialized clinical or medical judgments and tests may be required;

Operator Qualifications (continued)

4. *Other physical requirements (continued)*
 - e. Evidence that an operator is subject to seizures or loss of physical control shall be sufficient reason for disqualification. Specialized medical tests may be required to determine these conditions;
 - f. Operators and operator trainees should have normal reaction time, manual dexterity, coordination, and no tendencies to dizziness or similar undesirable characteristics.
5. In addition to the above listed requirements, the operator shall:
 - a. Demonstrate the ability to comprehend and interpret all labels, operator's manuals, safety codes, and other information pertinent to correct, safe crane operation;
 - b. Possess knowledge of emergency procedures and implementation of same;
 - c. Demonstrate the ability to operate the specific type of equipment;
 - d. Be familiar with applicable safety regulations;
 - e. Understand responsibility for maintenance requirements of the crane;
 - f. Be thoroughly familiar with the crane and its control functions;
 - g. Understand the operating procedures as outlined by the manufacturer;
 - h. Have the ability to adequately judge distances and weights correctly;
 - i. Possess knowledge of universal crane flagging signals.
6. Operators shall be required by the employer to pass a practical operating examination and a knowledge test. Qualifications shall be limited to the specific type of equipment for which examined.

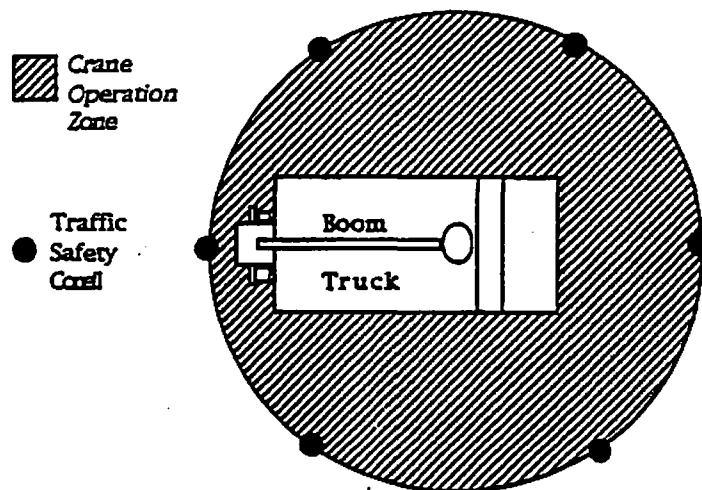
Policy: Boom Crane Operation and Maintenance Page 4**Helper Qualifications**

1. *Minimum age:* 18 years
2. *Principal physical requirements:*
 - a. Repetitively grasp, lift, carry, push, pull, bend and squat with up to 125# in one hand, up and down steps, around corners and around and over small obstacles;
 - b. Be able to work in extreme weather conditions (heat/cold, high/low humidity, rain/snow, bright sunlight, etc.);
 - c. Perform these duties without posing a direct threat to the health and safety of himself or others in the workplace or on jobsites.
3. In addition to the above listed requirements, the helper shall:
 - a. Possess knowledge of emergency procedures and implementation of same;
 - b. Be familiar with applicable safety regulations;
 - c. Have the ability to adequately judge distances correctly;
 - d. Possess knowledge of universal crane flagging signals.

Operating Rules

1. *Authorized Operations* Operators shall not use the crane to lift or otherwise handle another person's property, or to perform any work other than that assigned him by his supervisor and written on company invoice (Exceptions may be granted, but operators must first call in to receive permission from management.).
2. *Crane Operation Zone* Prior to operation, 36" tall traffic safety cones shall be placed around each boom crane truck to mark the operational area of the crane and warn others to stay away. Two of the cones shall be placed directly in front of and directly behind the truck. The other cones shall be placed in such a manner as to keep people away from the area of operation, but not so far away from the truck that a reasonable person would not comprehend their purpose.

In certain situations it may be necessary to use the safety cones (or safety cones with barricade tape) to direct vehicular or pedestrian traffic, or to otherwise block off work areas so that no one will be hurt in the event of a crane failure or dropped load.



3. *Size of Load*
 - a. No crane OR wallboard fork assembly shall be loaded beyond the rated load except for test purposes.
 - b. The load to be lifted must be within the rated load capacity of the wallboard fork assembly AND the crane in its existing configuration.
 - c. The weight of the load may not exceed the rated load capacity of the wallboard fork assembly OR the rated load of the crane at the radius at which the load is to lifted.

* (Revised 9/95)

Operating Rules (continued)

4. *Moving the Load*

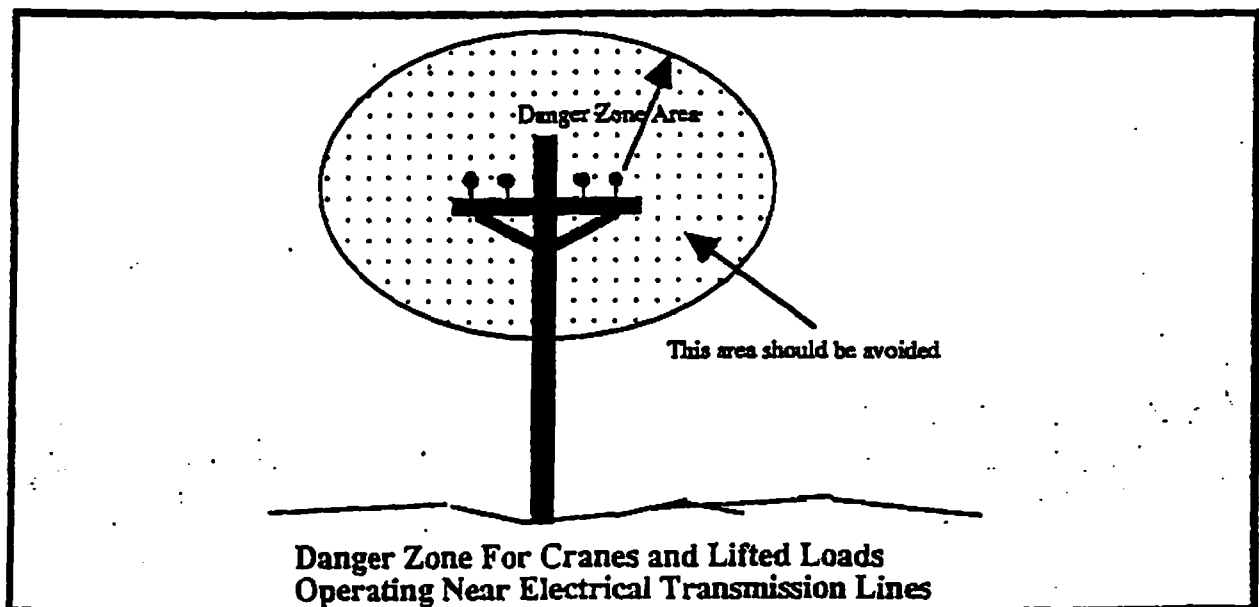
- a. The operator shall determine that:
 - 1) The crane is level and, where necessary, the vehicle is blocked properly;
 - 2) The load is well secured and balanced before it is lifted more than a few inches;
 - 3) Means are provided to hold the vehicle stationary while operating the crane.
- b. During lifting, care shall be taken that:
 - 1) There is no sudden acceleration or deceleration of the moving load;
 - 2) Load, boom, and other parts of the crane do not contact any obstruction.
- c. Cranes shall not be used for dragging loads sideways or to grab stationary objects in order to move the truck.
- d. Operators shall not use the crane to lift or lower people, and no lifting, lowering, swinging, or traveling shall be done while a person is on the crane.
- e. The operator shall not carry loads over people, and no person shall be permitted to stand or pass under a suspended load.
- f. Stabilizers shall be extended and set firmly on the ground. They shall not be used to level or "jack" the vehicle off the ground. Blocking under stabilizers shall be:
 - 1) Strong enough to prevent crushing of the underlying material;
 - 2) Of such thickness, width, and length as to completely support the stabilizer pad.
- g. Footing under all tires or individual stabilizer pads should be firm and level. Where such footing is not otherwise supplied, it should be provided by timbers, cribbing, or other structural members to distribute the load so as not to exceed the allowable bearing capacity of the underlying material.
- h. In transit, the boom shall be carried in the fully stowed position, secured by retainer pin or binder strap.
- i. When rotating the crane, sudden starts and stops shall be avoided. Rotational speed shall be such that the load does not swing out beyond the radius at which it can be controlled.
- j. The operator shall use a flagman whenever he cannot direct his load by visual means.

Operating Rules (continued)

5. Operating Near Electric Power Lines

Important: This policy assumes that no contact can be made under normal delivery conditions with overhead electric power lines carrying more than 50 kilovolts. High voltage lines over 50 kV are typically uninsulated and carried on towers and extremely tall poles, with the voltages reduced at transformer stations prior to distribution through the residential, commercial, and industrial area power lines that normally line city streets. No operation shall be performed around high voltage lines over 50 kV without the assistance of the local power company.

- a. No employee shall touch a power line, or use any item to push one or move one out of the way, to facilitate movement of a truck or crane.
- b. **Minimum Clearances**
 - 1) In transit with no load and boom lowered, employees shall maintain a minimum clearance of 4 feet between any portion of their delivery vehicle and any overhead power line.
 - 2) Operators shall not operate a boom crane or load within 10 feet of any overhead power line (the "Danger Zone" - see diagram below), including temporary construction power lines from meters into buildings (Consideration must also be given to the possibility of electric wires swaying in the wind, in which case more distance from the wires should be maintained.).



Policy: Boom Crane Operation and Maintenance Page 8

Operating Rules (continued)

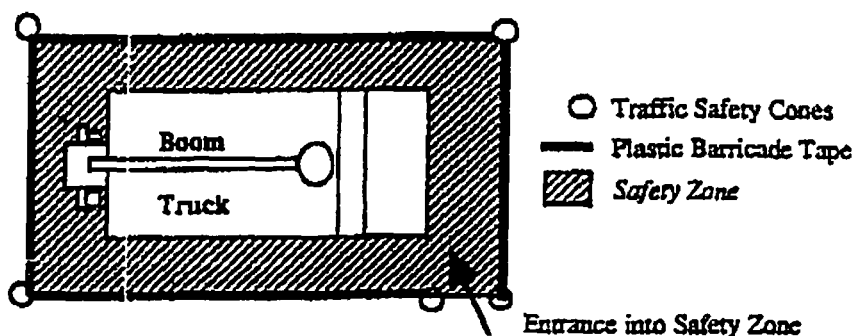
5. b. Operating Near Electric Power Lines, Minimum Clearances (continued)

- 3) For each additional 1000 feet over the altitude of 3300 feet, the minimum clearance shall be increased by at least 3%.¹ For example:

Altitude(ft)	Minimum Clearance	Altitude(ft)	Minimum Clearance
4300	10'4"	9300	12'0"
5300	10'7"	10,300	12'4"
6300	11'0"	11,300	12'8"
7300	11'3"	12,300	13'0"
8300	11'7"	13,300	13'5"

- 4) The danger zone may be entered *only if*:
- The lines have been de-energized and visibly grounded at point of work *by the utility company*, or
 - Insulating barriers, not a part of or an attachment to the crane or truck, have been erected *by the utility company* to prevent physical contact with the lines.²

- c. **Erection of Physical Barriers** Whenever a power line is within operating reach of the crane, a minimum of five (5) orange traffic safety cones, 36" tall, shall be placed around the boom truck, with plastic barricade tape securely fastened to the tops of the cones in such a way as to keep anyone from touching the truck and to establish a physical barrier around the truck (see diagram below). *No one shall enter this barricaded area while the crane is in operation.*



- d. No materials or equipment shall be stored, even temporarily, under a power line for later lifting by a boom crane.

¹ National Electrical Safety Code, ANSI C2-1990, section 234 F4.

² In cases where the utility company installs an insulating barrier on the line, the crane still must not come in contact with the barrier.

Operating Rules (continued)

5. *Operating Near Electric Power Lines* (continued)

- e. *Helper responsibilities.* It shall be the sole duty of the helper to watch the position of the boom crane while it is in operation to give timely warning to the operator when the boom does not maintain the minimum clearance from the power line. Operators and helpers shall make sure they each understand the communication signals they will use before commencing operations.

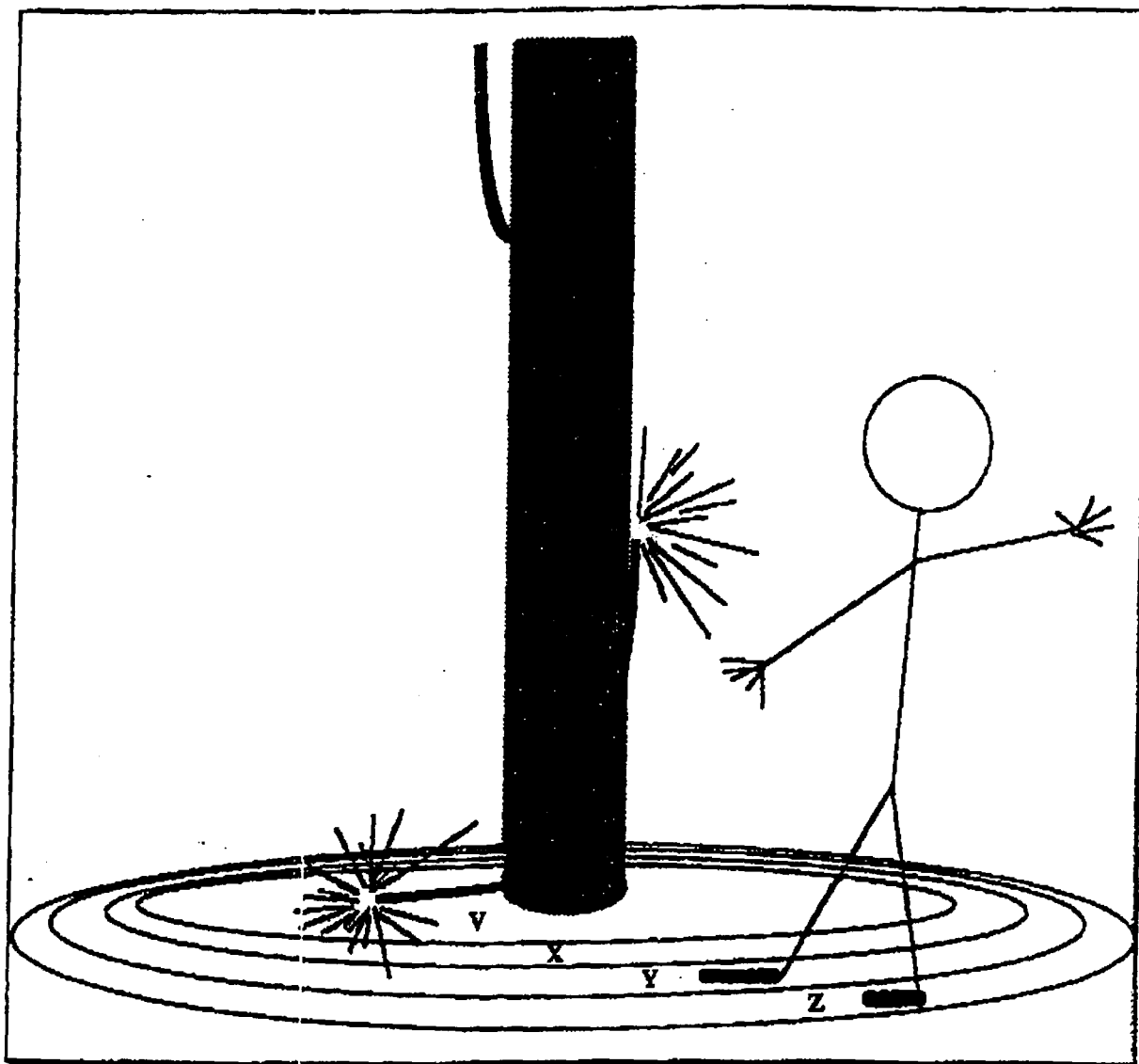
- f. *In The Event of Contact With Power Line* Should a power line be contacted, the boom crane operator should attempt to remove the crane from the line. If unable to do so and there is no immediate danger, the operator should not move from his position. He shall warn others to stay away from the area.

If threat of fire or other serious danger necessitates leaving the crane, be *extremely* careful - you must not touch the truck and the ground at the same time, land with your feet separated, or fall over. Doing any of these things could be fatal. Jump clear and land with your feet together. Run, don't walk, so that both feet do not touch the ground at the same time, or hop away from the point of contact with your feet together (see Ground Gradient diagram, Page 9A).

Anyone on the ground in the immediate vicinity of the truck at the time of contact must not move or touch anything until the line is de-energized. If threat of fire or other serious danger necessitates leaving the scene, the person on the ground must run, not walk, so that both feet do not touch the ground at the same time, or hop away from the point of contact with feet together.

If a person should become electrically energized, no one shall attempt to rescue or aid the person until the victim and the area are de-energized. Any rescue attempt before de-energizing the power line and the crane will make the would-be rescuer a victim also.

6. *Electrical Storms* Crane operations shall cease immediately at the first indication of lightning or thunder, and power line safety practices, including the barricading of the truck with traffic safety cones and barricade tape, shall be implemented and maintained for the remainder of the load. Crane operations may resume after a minimum mandatory wait of 15 minutes after the last occurrence of lightning or thunder in the area.

Policy: Boom Crane Operation and Maintenance Page 9A**Electric Power Line Situations: *Ground Gradient***

The ground becomes electrified around the point of electrical contact in a rippling pattern known as "ground gradient". As you move away from the point of contact, the voltage drops progressively. However, if one foot is at y voltage and the other at z voltage, the difference in voltage will cause a flow of electricity through the body. Run, don't walk, so that both feet will not touch the ground at the same time, or hop away from the point of contact with your feet together.

Boom Crane Maintenance

1. Inspection and maintenance of boom cranes shall be in accordance with current manufacturer recommendations and the current standards of ASME/ANSI B30.22 (see attached).
2. *Operator Responsibilities* Crane operators shall be:
 - a. Trained in the inspection and maintenance of their crane(s) by qualified service personnel;
 - b. Required to record (or designated maintenance personnel shall be required to record) an inspection on their crane at least weekly. Items which adversely affect the safety of the crane shall be reported in writing and shall be repaired before the crane is placed in service;
 - c. Required at the beginning of each shift, and before operation, to inspect their cranes and fork assemblies (including forks, table, rotator motor, etc.) for cracks, deformations, damage, and wear, and to review the previous inspection report.
3. Supervisors shall verify the operational status of each crane by carefully reviewing all written reports, and they shall have repairs affecting the safety of operation of the crane performed before placing the crane back in service.
4. *Required Records* Each crane shall have its own maintenance file. Each file shall consist of an inspection and maintenance log, copies of all in-house and outside vendor work orders for services performed, and inspection reports. Files shall be retained where the crane is either housed or maintained for a period of at least 2 years and for 6 months after the crane leaves the control of the employer.

Written inspection reports of each crane's operational condition shall be made at least weekly. These reports shall be retained for 3 months from the date they were prepared. In addition, each crane fork assembly shall *specifically* be inspected each quarter for structural defects, cracks, and wear, and a written report made of same.

Policy: Boom Crane Operation and Maintenance Page 11

Boom Crane Maintenance (continued)

Section 22-2.1 — Inspection

22-2.1.1 General. The manufacturer shall furnish operation and maintenance information.

22-2.1.2 Inspection Classification

(b) (a) *Initial Inspection.* Prior to initial use, all new, altered, or modified cranes shall be inspected by a designated person to ensure compliance with provisions of this Standard.

(b) *Regular Inspection.* Inspection procedure for cranes in regular service is divided into two general classifications based upon the intervals at which inspection should be performed. The intervals in turn are dependent upon the nature of the critical components of the crane and the degree of their exposure to wear, deterioration, or malfunction. The two general classifications are herein designated as "frequent" and "periodic" with respective intervals between inspections as defined below:

(1) frequent inspection — daily to monthly intervals;

(2) periodic inspection — one to twelve-month intervals, or as specifically recommended by the manufacturer.

(c) Inspections shall be performed by designated personnel.

22-2.1.3 Frequent Inspection

(a) Items such as the following shall be inspected for defects at intervals as defined in para. 22-2.1.2(b)(1) or as specifically indicated, including observation during operation for any deficiencies which might appear between regular inspections. Any deficiencies, such as those listed, shall be carefully examined and determination made as to whether they constitute a hazard:

(1) control mechanism: for maladjustment interfering with proper operation — daily, when used;

(2) control mechanisms: for excessive wear of components and contamination by lubricants or other foreign matter;

(3) safety devices for malfunction;

(4) all hydraulic hoses, particularly those which

flex in normal operation of crane functions, should be visually inspected once every working day, when used;

(5) hooks and latches for deformation, chemical damage, cracks, and wear. Refer to ASME/ANSI B30.10; (b)

(6) rope reeving for compliance with crane manufacturer's specifications;

(7) electrical apparatus for malfunctioning, signs of excessive deterioration, dirt, and moisture accumulation;

(8) hydraulic system for proper oil level and leaks — daily;

(9) tires for recommended inflation pressure, cuts, and loose wheel nuts;

(10) connecting pins and locking device for wear and damage.

22-2.1.4 Periodic Inspection

Complete inspections of the crane shall be performed at intervals as generally defined in para. 22-2.1.2(b) depending upon its activity, severity of service, and environment. These inspections shall include the requirements of para. 22-2.1.2 and in addition, items such as the following. Any deficiencies, such as those listed, shall be examined and determination made as to whether they constitute a hazard:

(a) deformed, cracked, or corroded members in the crane structure and carrier;

(b) loose bolts, particularly mounting bolts;

(c) cracked or worn sheaves and drums;

(d) worn, cracked, or distorted parts such as pins, bearings, shafts, gears, rollers, and locking devices;

(e) excessive wear on brake and clutch system parts and linings;

(f) crane hooks inspected for cracks;

(g) travel steering, braking, and locking devices, for malfunction;

(h) excessively worn or damaged tires.

(i) *Hydraulic and Pneumatic Hose, Fittings, and Tubing Inspection*

(1) evidence of leakage at the surface of the flexible hose or its junction with metal end couplings;

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(2) blistering or abnormal deformation to the outer covering of the hydraulic or pneumatic hose;

(3) leakage at threaded or clamped joints that cannot be eliminated by normal tightening or recommended procedures;

(4) evidence of excessive abrasion or scrubbing on the outer surface of a hose, rigid tube, or fitting. Means shall be taken to eliminate the interference of elements in contact or otherwise protect the components.

(j) Hydraulic and Pneumatic Pumps and Motors Inspection

- (1) loose bolts or fasteners;
- (2) leaks at joints between sections;
- (3) shaft seal leaks;
- (4) unusual noises or vibration;
- (5) loss of operating speed;
- (6) excessive heating of the fluid;
- (7) loss of pressure.

(k) Hydraulic and Pneumatic Valves Inspection

- (1) cracks in valve housing;
- (2) improper return of spool to neutral position;
- (3) leaks at spools or joints;
- (4) sticking spools;
- (5) failure of relief valves to attain or maintain correct pressure setting;

(6) relief valve pressures shall be checked as specified by the manufacturer.

(l) Hydraulic and Pneumatic Cylinders Inspection

- (1) drifting caused by fluid leaking across piston;
- (2) rod seals leaking;
- (3) leaks at welded joints;
- (4) scored, nicked, or dented cylinder rods;
- (5) damaged case (barrel);
- (6) loose or deformed rod eyes or connecting joints.

(m) *Hydraulic Filters.* Evidence of rubber particles on the filter element may indicate hose, "O" ring, or other rubber component deterioration. Metal chips or pieces on the filter may denote failure in pumps, motors, or cylinders. Further checking will be necessary to determine origin of the problem before corrective action can be taken.

(n) Labels are to be in place and legible.

22-2.1.5 Cranes Not In Regular Use

(a) A crane which has been idle for a period of 1 month or more, but less than 6 months, shall be given an inspection conforming with the requirements of paras. 22-2.1.2 and 22-2.4.2(b).

(b) A crane which has been idle for a period of over 6 months shall be given a complete inspection conforming with the requirements of paras. 22-2.1.2, 22-2.1.3, and 22-2.4.2 before being placed in service.

22-2.1.8 Inspection Records. Dated records for periodic inspection should be made on critical items such as brakes, crane hooks, ropes, hydraulic and pneumatic cylinders, and hydraulic and pneumatic relief pressure valves. Records should be kept available to an appointed person.

Section 22-2.2 — Testing

22-2.2.1 Operational Tests

Prior to initial use, all new, altered, modified, or extensively repaired cranes shall be tested for compliance with the operational requirements of this section, including functions such as the following:

- (a) load lifting and lowering mechanisms;
- (b) boom lifting and lowering mechanisms;
- (c) boom extension and retraction mechanisms;
- (d) swing mechanisms;
- (e) safety devices;
- (f) operating controls comply with appropriate function labels.

Operational crane test results shall be made available to an appointed person.

22-2.2.2 Rated Test Load. Prior to initial use, altered, modified, or extensively repaired cranes shall be load tested by or under the direction of an appointed person.

(a) Test loads shall not exceed 110% of the manufacturer's load ratings.

(b) Written reports shall be maintained showing test procedures and confirming the adequacy of repairs.

Section 22-2.3 — Maintenance

22-2.3.1 Preventive Maintenance

(a) A preventive maintenance program based on the crane manufacturer's recommendations should be established. Dated records should be maintained.

(b) It is recommended that replacement parts be obtained from the original equipment manufacturer or be of at least equal quality.

22-2.3.2 Maintenance Procedure

(a) Before adjustments and repairs are started on a crane, the following precautions shall be taken as applicable:

- (1) crane placed where it will cause the least interference with other equipment or operations;
- (2) all controls at the "off" position;
- (3) starting means rendered inoperative;
- (4) boom lowered to the ground if possible or otherwise secured against dropping;

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(5) relieve hydraulic oil pressure from all hydraulic circuits before loosening or removing hydraulic components.

(b) Warning or "out of order" signs shall be placed on the crane controls.

(c) After adjustments and repairs have been made, the crane shall not be returned to service until all guards have been reinstalled, trapped air removed from hydraulic system (if required), safety devices reactivated, and maintenance equipment removed.

22-2.3.3 Adjustments and Repairs

(a) Any hazardous conditions disclosed by the inspection requirements of Section 22-2.1 shall be corrected before operation of the crane is resumed. Adjustments and repairs shall be done only by designated personnel.

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

- (1) functional operating mechanism;
- (2) safety devices;
- (3) control systems.

(c) Repairs or replacements shall be provided as needed for operation. The following are examples:

(1) critical parts of functional operating mechanisms which are cracked, broken, corroded, bent, or excessively worn;

(2) critical parts of the crane structure which are cracked, bent, broken, or excessively corroded;

(a) (3) crane hooks showing defects described in para. 22-2.1.3(a)(5) shall be taken out of service. Repairs by welding are not recommended.

(d) Instructions shall be provided by the manufacturer for the removal of air from hydraulic circuits.

22-2.3.4 Lubrication. All moving parts of the crane, for which lubrication is specified, should be regularly lubricated per the manufacturer's recommendations and procedures.