

262VA641



In The
Supreme Court of Virginia

RECORD NO. 002735

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

Appellants,

v.

MICHAEL A. SHEPHERD,

Appellee.

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CERTIFIED ORIGINAL

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

MICHAEL A. SHEPHERD,

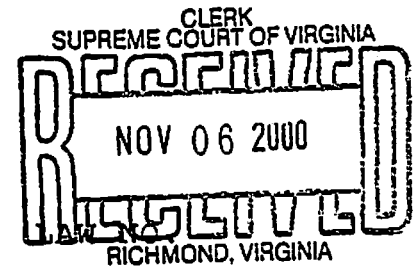
Plaintiff,

v.

W. B. MEREDITH, II, INC.,

et al.,

Defendants.



CL98-2952

TRANSCRIPT OF PROCEEDINGS

Virginia Beach, Virginia

July 25, 2000

DAY 6

Before:

THE HONORABLE A. BONWILL SHOCKLEY, Judge,

and a Jury

TAYLOE ASSOCIATES, INC.

Registered Professional Reporters

FILED

Telephone: (757) 461-1984

SEP 5 2000

Norfolk, Virginia

-1238-

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23 Also Present: Michael Shepherd, Margaret

24 Davis, Robert Bosley, and Scott Doverspike

25

I N D E X

WITNESS

4	ON BEHALF OF ATLANTIC:	Dir.	Cro.	Red.	Rec.
5	S. Nicholas	1165	1174	1175	1176
6		--	--	1176	--
7	G. Cooper	1177	1206	1226	--
8	S. Doverspike (Surreb.)	1359	1364	--	--
9	ON BEHALF OF W. B. MEREDITH:				
10	R. Bosley	1232	1277	1326	--
11	ON BEHALF OF THE PLAINTIFF:				
12	M. Seoane (Reb.)	1331	1349	--	--

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17	18	Chart		1199
18	19	Answers to Request for Admissions		1232
19	20	August 15, 1996 report		1240
20	21	September 22, 1996 report		1240
21	22	Safety Program		1242
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1 (Met, pursuant to adjournment of July 25,
2 2000, at 9:30 a.m.):

3 THE COURT: Are we all set?

4 MR. NORRIS: Just so you know, I have one
5 very short witness and then my last witness and I
6 would like to introduce into evidence the responses
7 to requests for admission which I propounded in this
8 case.

9 MR. SMIRCINA: No objection.

10 (The jury was returned to the courtroom.)

11 STEVEN NICHOLAS, called as a witness by
12 and on behalf of the Atlantic Welding, having been
13 first duly sworn, was examined and testified as
14 follows:

15 DIRECT EXAMINATION

16 BY MR. NORRIS:

17 Q. Good morning, sir.

18 A. Good morning.

19 Q. Tell us your name, please.

20 A. Steven Nicholas.

21 Q. How are you employed?

22 A. I'm employed by Virginia Carolina Steel,
23 Incorporated. I'm vice president.

24 Q. What is Virginia Carolina Steel?

25 A. We are a steel fabricator engaged in the

1 fabrication and delivery of structural steel.

2 Q. The jury has heard testimony from a man
3 named Ed Shelton with Virginia Steel. Is Virginia
4 Steel a different company from Virginia Carolina
5 Steel?

6 A. Yes, it is.

7 Q. How long have you been with Virginia
8 Carolina Steel?

9 A. Thirteen and a half years.

10 Q. How long have you been the vice
11 president?

12 A. Approximately five years.

13 Q. Can you tell us a little bit about your
14 experience in the steel business say beyond high
15 school?

16 A. Yes. I attended college at West Virginia
17 Institute of Technology where I received a degree in
18 civil engineering technology. I received a degree
19 in civil engineering technology from West Virginia
20 Institute of Technology and I was employed for ten
21 years with Union Boiler Company in Nitro, West
22 Virginia as an estimator and inspector for a steel
23 fabrication shop.

24 Q. What did you do as an inspector?

25 A. Basically inspecting steel as it's being

1 fabricated to assure that it conforms to the
2 drawings and specifications.

3 Q. So did you obtain experience reviewing
4 steel erection drawing and specifications?

5 A. Yes.

6 Q. Did you have to examine welds?

7 A. Yes, to some extent, not as a destructive
8 or nondestructive testing but just as visual
9 inspection to see that they conform to size and
10 length of the weld required.

11 Q. Did you have experience in that job
12 looking at tack welds?

13 A. Yes.

14 Q. Do you know what a tack weld looks like?

15 A. Yes.

16 Q. How long were you with Union?

17 A. Ten years.

18 Q. And what did you do after that?

19 A. I left there because they closed the
20 fabricating plant and I came to Virginia Beach with
21 an offer for employment with Virginia Carolina
22 Steel.

23 Q. What year was that?

24 A. 1986.

25 Q. What did you do for Virginia Carolina

1 Steel when you first came with them?

2 A. I was chief estimator.

3 Q. What does an estimator do?

4 A. We take the contract plans and
5 specifications and prepare bids for jobs.

6 Q. Briefly what's involved in that process?
7 What do you -- how are plans and specifications
8 important in bidding the job?

9 A. That's the architect and engineer's
10 intent. They show their intent of how they want the
11 steel manufactured and erected.

12 Q. When you prepare an estimate do you have
13 to consider how much labor will be involved?

14 A. Yes.

15 Q. And how much equipment would be involved?

16 A. Yes.

17 Q. And how much time it will take to do the
18 work?

19 A. Time and material, yes.

20 Q. How long were you an estimator with
21 Virginia Carolina?

22 A. I still serve in that function. So I
23 have been.

24 Q. In your employment with Virginia
25 Carolina, do you ever get out in the field?

1 A. Yes. I also serve as a project manager
2 now for several jobs.

3 Q. What does a project manager do?

4 A. The project manager's job is to
5 coordinate all the aspects of the job as they relate
6 to Virginia Carolina Steel, making sure submittals
7 are made on time, material is ordered and received
8 in the shop in time to meet schedules. It is
9 fabricated and delivered and also coordinate the
10 erection of the steel with the general contractor.

11 Q. In your over 20 years of experience in
12 the steel industry have you had exposure to the use
13 of girts in steel erection?

14 A. Yes.

15 Q. Do you know what girts are?

16 A. Yes.

17 Q. Are you familiar with how plans and
18 specifications call for the placement and erection
19 of girts?

20 A. Yes.

21 Q. Do you have familiarity with how they are
22 actually placed and aligned in the field?

23 A. Yes.

24 Q. Are you familiar with other steel
25 erectors in this community and how they go about

1 their work?

2 A. Yes, I am.

3 Q. Mr. Nicholas, are you familiar with the
4 Dam Neck job with where the accident that gave rise
5 to this litigation occurred?

6 A. Yes.

7 Q. When did your company first become aware
8 that that was a potential job?

9 A. It would have been right after the
10 bidding, within a few days after the bidding. We
11 were usually made aware of who the general
12 contractor, the apparent low is, and at that time we
13 try to get in touch with that general contractor and
14 make sure if we feel that we were the low steel
15 bidder that they commit to us to give us the
16 contract.

17 Q. Your company bid on this job?

18 A. Yes, we did.

19 Q. What did you obtain from either the
20 general contractor or the owner in order to bid this
21 job?

22 A. Plans and specifications.

23 Q. And have you reviewed those plans and
24 specifications?

25 A. Yes, I have.

1 Q. Who prepared the plans and
2 specifications?

3 A. They were prepared by an architect and
4 engineer hired by the owner.

5 Q. Who is the owner?

6 A. The United States Navy.

7 Q. And were the plans and specifications
8 reasonably precise drawings and specifications as
9 they relate to design and installation methods?

10 A. Yes, they were.

11 Q. Now, were you awarded the bid on this
12 job?

13 A. Yes.

14 Q. Did you enter into a contract?

15 A. Yes.

16 Q. Who was your contract with?

17 A. W. B. Meredith.

18 Q. Now, after you were awarded the contract
19 did you sub out the erection portion of your
20 contract?

21 A. Yes, we did.

22 Q. Was that with Atlantic Welding &
23 Fabricating?

24 A. Yes.

25 Q. Did you ever enter into any written

1 contract with Atlantic?

2 A. On this particular job I don't believe we
3 did, no.

4 Q. Did you provide Atlantic Welding with the
5 plans and specifications for the job?

6 A. Yes, we did.

7 Q. Did you have occasion from time to time
8 to visit the job site to review the work?

9 A. Yes.

10 Q. Did you see whether the work that was
11 being performed by Atlantic conformed with the plans
12 and the specifications provided by the owner?

13 A. Yes.

14 Q. Did the plans and specifications require
15 any method of securing the girts prior to their
16 final placement and final welding?

17 A. No.

18 Q. Did the plans and specifications require
19 that the girts be bolted in any place by any means?

20 A. No.

21 Q. Or clamping in place?

22 A. No.

23 Q. Did they require that they be maintained
24 in hoists before final welding?

25 A. No.

1 Q. Did the plans and specifications place
2 any requirements on the steel erection contractor to
3 rope off the area in which he was working or cordon
4 off his area in any way?

5 A. No.

6 Q. In your experience who typically has the
7 responsibility to determine whether an area on a
8 construction site is cordoned off or roped off?

9 A. That would be the contractor,
10 superintendent.

11 Q. The general contractor?

12 A. Yes.

13 Q. Did the work that was performed by
14 Atlantic Welding & Fabricating on this job conform
15 with the government's plans and specifications?

16 A. Yes, it did.

17 Q. I'm going to show you a photograph marked
18 Plaintiff's Exhibit 15.

19 MR. SMIRCINA: Your Honor, may we
20 approach just a minute before he goes into this?

21 (A conference was held at the bench.)

22 BY MR. NORRIS:

23 Q. This is a blowup of a photograph which
24 has been marked as Plaintiff's Exhibit 15. Have you
25 seen this photograph before, sir?

1 A. Yes, I have.

2 Q. Do you see marks at the end of this girt?

3 A. Yes, I do.

4 Q. What do those appear to you to be?

5 A. Appear to be --

6 MR. AUFENGER: I would have an objection
7 for the record for the reasons we discussed at the
8 sidebar.

9 THE COURT: Suffice to say the reason was
10 not supplied in discovery and we talked about that
11 and I will go ahead and overrule the objection.

12 THE WITNESS: It appears to be a burn
13 mark from the weld.

14 BY MR. NORRIS:

15 Q. Would this be called a tack weld?

16 A. Yes.

17 MR. NORRIS: That's all I have.

18 CROSS-EXAMINATION

19 BY MR. AUFENGER:

20 Q. The plans and specifications that you
21 said that you received and you gave to Atlantic,
22 those did not address the safety aspects of erecting
23 the steel; isn't that true?

24 A. That's true, yes.

25 Q. And, in fact, the plans and

1 specifications did not address the minimum standards
2 for safe steel erection; isn't that true?

3 A. Yes.

4 Q. That's because the plans and
5 specifications aren't for that purpose; isn't that
6 true?

7 A. Yes.

8 MR. NORRIS: Thank you.

9 REDIRECT EXAMINATION

10 BY MR. NORRIS:

11 Q. I'm going to show you what's been marked
12 as Defendants' Exhibit 9, Mr. Nicholas. Do you
13 recall that sheet being at the beginning of the
14 structural steel specifications for the contract?

15 A. Yes, I do.

16 Q. Do you see that the contract incorporates
17 certain industry standards?

18 A. Yes, I do.

19 Q. Are you familiar with those industry
20 standards that are promulgated by the American
21 Institute of Steel Contractors?

22 A. Yes.

23 Q. Are those set forth in this book?

24 A. Yes, they are.

25 Q. And don't these industry standards speak

1 to who is responsible for safety during steel
2 erection?

3 A. Yes. They do in that manual, yes.

4 MR. NORRIS: That's all I have.

5 MR. AUFENGER: I have two follow-up,
6 please.

7 RE CROSS-EXAMINATION

8 BY MR. AUFENGER:

9 Q. The book that you were just showed is not
10 the exclusive book or authority on safe steel
11 erection, is it?

12 A. That's correct.

13 Q. And, in fact, there are other authorities
14 like OSHA, like the Army Corps of Engineers that
15 also imposes upon an individual's obligation to
16 erect safe steel; isn't that true?

17 A. Yes.

18 MR. NORRIS: Can I have a last bite at
19 the apple?

20 THE COURT: Do you want to save hers
21 after?

22 MS. SPENCE: I have no questions.

23 REDIRECT EXAMINATION

24 BY MR. NORRIS:

25 Q. Are you aware of any OSHA regulation that

1 requires a steel erection contractor to temporarily
2 secure a girt before final placement?

3 A. No.

4 Q. Are you aware of any other industry, Army
5 Corps of Engineers or any other governmental
6 regulation that requires a steel erection contractor
7 to temporarily secure a girt before final placement?

8 A. No.

9 Q. Are you aware of any such regulation,
10 OSHA or otherwise, that requires a steel erection
11 contractor to cordon off his work while he is
12 placing steel girts?

13 A. No.

14 MR. NORRIS: That's all I have.

15 THE COURT: You are excused. Have a nice
16 day.

17 MR. NORRIS: I would call Mr. Cooper.

18 GORDON COOPER, called as a witness by and
19 on behalf of the Atlantic Welding, having been first
20 duly sworn, was examined and testified as follows:

21 DIRECT EXAMINATION

22 BY MR. NORRIS:

23 Q. Good morning, sir.

24 A. Good morning.

25 Q. Can you tell us your name?

1 A. Gordon Mark Cooper.

2 Q. Did you ask me to give you a little cup
3 of water?

4 A. I sure did.

5 Q. Why is that?

6 A. I take antihistamines for allergies. It
7 really dries me out.

8 THE COURT: If you need anymore during
9 the proceedings, let me know.

10 BY MR. NORRIS:

11 Q. Mr. Cooper, what do you do for a living?

12 A. I am a vocational rehabilitation
13 counselor.

14 Q. What is a vocational rehabilitation
15 counselor?

16 A. We provide services to injured and
17 disabled individuals to return them to work. We
18 coordinate services, provide case management
19 services, provide counseling, testing, evaluation,
20 placement services, job development services,
21 postemployment services. The goal of the program is
22 to take an injured or disabled worker and return
23 them to the work force.

24 Q. How long have you been doing that?

25 A. Thirty years.

1 Q. Tell the jury about the qualifications
2 you've obtained to enable you to do what you do.
3 Where did you go to school?

4 A. I went to undergraduate, University of
5 East Tennessee, received my bachelor's degree in
6 general psychology. Attended East Tennessee
7 University for my Master's degree in counseling and
8 attended the doctoral program at Virginia
9 Commonwealth University where I completed 54 credit
10 hours in experimental social psychology which is the
11 general field that also encompasses work psychology
12 and work behavior.

13 Q. What did you do when you completed your
14 education?

15 A. Which part of the education?

16 Q. Well, tell us what your first practical
17 experience in vocational rehabilitation was in
18 employment?

19 A. I started in the field in 1970 with the
20 Virginia Commission, what was then known as the
21 Virginia Commission for the Visually Handicapped.
22 It's now the Virginia Department for the Visually
23 Handicapped. They provide vocational rehabilitation
24 services to the visually handicapped and blind
25 handicapped. I started as a field counselor. I

1 covered seven counties going out in the field
2 working with the blind and visually handicapped and
3 rehabilitation services. I worked as a
4 rehabilitation counselor, field counselor for the
5 Commission for two years and was promoted to senior
6 rehabilitation counselor I think in 1972 and was
7 again promoted to assistant State supervisor for
8 vocational rehabilitation services in 1973.

9 Q. How long did you remain with the State?

10 A. A total of six years.

11 Q. Where did you go work then?

12 A. In January of 1977 I left the Virginia
13 Commission for the Visually Handicapped to go into
14 private practice and I have been in private practice
15 ever since.

16 Q. Where is your private practice?

17 A. It's in Newport News.

18 Q. Do you practice in the Tidewater,
19 Virginia area?

20 A. Yes.

21 Q. Have you been in this area since 1977?

22 A. I have been.

23 Q. I had an office in Richmond when I first
24 started in 1979 or '80 I believe it was. I also
25 opened an office in Hampton and worked two offices.

1 In 1986 I moved full time to Newport News and have
2 been in Newport News ever since.

3 Q. Are there licensing requirements to do
4 the work that you do?

5 A. There are certification requirements to
6 do the work that I do and I do have licenses and
7 certifications.

8 Q. What types of certifications have you
9 obtained?

10 A. I have been certified as a rehabilitation
11 counselor by the National Commission on
12 Rehabilitation Commission since 1974. That requires
13 recertification every five years by taking a test or
14 by continuing education requirements. I have been
15 licensed as a professional counselor by the Virginia
16 Department of Health Professions since 1979. I have
17 been certified by the United States Department of
18 Labor as a rehabilitation counselor since 1984, and
19 I have been certified as a rehabilitation provider
20 by the Virginia Department of Health Professions
21 since 1995 which is the first year that such
22 certification was initiated.

23 Q. Have you authored or published any works
24 in your field?

25 A. Yes, I have.

1 Q. Can you tell us briefly?

2 A. I have a chapter in a textbook
3 Contemporary Field Work Practices in Rehabilitation
4 and a piece of another chapter in that same
5 textbook. I have two articles published in the
6 Journal of Applied Rehabilitation Counseling. I
7 have an article published in the Journal of
8 Rehabilitation, an article published in the NCDB
9 News, which is a periodic publication of the
10 National Center for the Deaf & Blind in New York.

11 Q. I'll stop you there. How about teaching,
12 do you teach in your field?

13 A. I have.

14 Q. What type of teaching have you done?

15 A. I taught one year as -- both these are
16 adjunct faculty, although I did teach high school
17 before I did go into rehabilitation. I taught
18 psychology at high school. I taught one year at
19 John Tyler University. I taught psychology of work
20 and I taught introductory psychology and I taught
21 one semester at VCU and that was educational
22 psychology.

23 Q. Do you lecture in your field?

24 A. I do seminars and presentations, yes.

25 Q. Have you received any awards or honors in

1 your field?

2 A. Phi Kappa Phi.

3 Q. What is Phi Kappa Phi?

4 A. Phi Kappa Phi is kind of like a minor
5 Pi Beta Kappa. You have to be in the top ten
6 percent of your graduating class to earn Phi Kappa
7 Phi.

8 Q. Do you have a specialty within your
9 field?

10 A. I work with all types of disabilities and
11 injuries.

12 Q. Do you have experience with disabilities
13 related to work-induced trauma?

14 A. Work-induced trauma?

15 Q. Trauma that occurred on the work site,
16 injuries?

17 A. Oh, yes. Yes.

18 Q. How much experience do you have in that
19 area?

20 A. Twenty-three years.

21 Q. Do you have experience administering
22 tests to your patients to evaluate their work skills
23 and employment capabilities and earning capacities
24 and so forth?

25 A. I do.

1 Q. Do you have experience interpreting test
2 results?

3 A. On the tests that I administer, yes.

4 Q. Your Honor, I would offer Mr. Cooper --
5 let me ask you have you qualified as an expert
6 witness in courts in the Commonwealth of Virginia
7 before?

8 A. Several times, yes.

9 MR. NORRIS: I would offer Mr. Cooper as
10 an expert witness in the field of vocational
11 rehabilitation.

12 MR. SMIRCINA: No objection.

13 THE COURT: All right.

14 BY MR. NORRIS:

15 Q. Mr. Cooper, you are here today, I have
16 hired you today to come and testify in this court.
17 Have you done that before?

18 A. To testify in this court?

19 Q. In any court, get involved in litigation?

20 A. Yes.

21 Q. Be an expert witness?

22 A. Yes.

23 Q. How much of your practice is involved in
24 litigation?

25 A. In terms of volume, certainly no more

1 than five percent. In fact, that's probably a
2 stretch.

3 Q. Do you testify for plaintiffs and
4 defendants?

5 A. I have, yes.

6 Q. Your livelihood is not dependent on being
7 witnesses in cases?

8 A. Thank God, no.

9 Q. Now, at my request did you review
10 materials related to the plaintiff in this case,
11 Michael Shepherd?

12 A. I did.

13 Q. What types of things have you reviewed
14 about him?

15 A. Let me refer to that, but I'm -- it's
16 depositions that have been provided to me, medical
17 reports, pay records for him, the employer, Social
18 Security records, W-2's, answers to interrogatories.

19 Q. Did you review any reports or testing
20 results performed by a Charles DeMark?

21 A. Yes, I did.

22 Q. Do you know who Charles DeMark is?

23 A. Oh, yes.

24 Q. Did you review records that were prepared
25 by a Dr. Sautter?

1 A. Yes.

2 Q. Do you know who Dr. Sautter is?

3 A. Yes, I do.

4 Q. Did you review their collective records
5 pertaining to Mr. Shepherd?

6 A. I did.

7 Q. Including testing of him?

8 A. The testing that was provided by
9 Dr. Sautter?

10 Q. Right.

11 A. Yes.

12 Q. Did you review the work capacity
13 assessment test performed of Mr. Shepherd by
14 HealthSouth?

15 A. Yes.

16 Q. And did you review the medical records of
17 Dr. O'Connell?

18 A. Yes.

19 Q. Did you review the physical therapy
20 records that pertained to the plaintiff?

21 A. Some of them, yes.

22 Q. Now, did you personally see Mr. Shepherd?

23 A. Yes. I did have the opportunity to meet
24 with Mr. Shepherd, to interview him and to do some
25 vocational testing with him.

1 Q. When was that?

2 A. The exact date I'm not exactly sure.

3 Q. What was your purpose in interviewing
4 Mr. Shepherd and testing him?

5 A. To get a better sense of what his
6 capacities, his abilities and so forth were.

7 Q. Now, did you obtain a history either from
8 Mr. Shepherd or from the records you reviewed of his
9 employment history?

10 A. Both, yes.

11 Q. And his history before the accident
12 happened?

13 A. Yes.

14 Q. And what information did you obtain about
15 what Mr. Shepherd's employment history was and his
16 earning history?

17 A. What information did I obtain?

18 Q. Yes. What is your understanding of how
19 he has been employed and what kind of money he
20 makes?

21 A. It's my understanding that Mr. Shepherd
22 won't go back -- he did some landscaping work for
23 his father. I believe he worked for a landscaping
24 company. I don't know if that was his father's
25 company or another company where he learned to work

1 some heavy equipment like backhoes and scrapers --
2 there's that word again -- graders and tractors.
3 Subsequent to that -- he classifies himself
4 basically as a truck driver, has been driving trucks
5 since 1987 of various types. He learned how to
6 drive and operate the boom truck as I understand it
7 in 1987 and since 1987 he's more or less been
8 employed by the same employer as I understand it.
9 The company he was working for in '87 I believe was
10 bought out by GMS, Gypsum Management, and the name
11 changed. Gypsum Management also owns Tidewater
12 Interior Products. He worked up in the Vienna area,
13 the Virginia area, prior to moving down here in I
14 believe it was December of '95.

15 There was a short period of time that he
16 left his company in Northern Virginia to go work for
17 another company, GDC I believe was the name of it,
18 still driving the truck, contaminated refuse or
19 contaminated dirt I believe it was. It appeared to
20 be a local haul or short haul type of occupation,
21 but he returned to his previous company and maybe
22 that was returned to his previous company in
23 December of '95 and then transferred down in early
24 '96.

25 Q. What's he been doing down here since '96?

1 A. Up until the accident he was pretty much
2 operating, working in the boom truck.

3 Q. Did you obtain from him some description
4 of what activity is involved in operating a boom
5 truck?

6 A. It's, of course, driving the truck and
7 off-loading materials which variously could be
8 Sheetrock or other types of building materials using
9 the boom and place the materials in a designated
10 spot. It could be outside the building or
11 preferably inside the building if possible and then
12 moving the material from one point to another point,
13 wherever a contractor wants the material moved.

14 Q. How would he have to move the material
15 from one point to another point?

16 A. It's my understanding from the interview
17 that it was -- either the interview or perhaps it
18 was from Mr. Shepherd's deposition. I don't
19 recall -- he and a helper would lift the Sheetrock
20 onto the cart if possible and move the material with
21 the cart.

22 Q. Is this material heavy?

23 A. Yes, it is.

24 Q. And to operate the boom did you acquire
25 any information as to whether he had to climb a

1 ladder?

2 A. He had to climb a ladder to get to the
3 boom truck in order to operate it, yes.

4 Q. Is it a hard job physically?

5 A. The operation of the boom is not a hard
6 job physically. The movement of the material
7 certainly can be and often is.

8 Q. Were you aware that Mr. Shepherd was
9 injured on the job?

10 A. Yes.

11 Q. Did you know when that occurred?

12 A. November 14, 1996.

13 Q. Were you aware that he was out of work
14 for a period of time?

15 A. Yes.

16 Q. Do you recall how long that was?

17 A. I believe he returned in I believe it was
18 early March of the following year.

19 Q. Do you recall or did you obtain
20 information from him what he's been doing since the
21 accident?

22 A. Well, when he returned to work he had an
23 office job for a while. Then he went back on the
24 boom truck and found he was unable to work that and
25 he was given another job where he now drives a large

1 truck loaded with product which has a forklift on
2 the rear. So he delivers the product by truck and
3 then delivers it on site with a forklift.

4 Q. Do you know how Mr. Shepherd was being
5 paid before the accident when he was down here in
6 Virginia Beach operating the boom truck?

7 A. Piece rate.

8 Q. What does that mean?

9 A. He was paid -- even though he is given an
10 hourly rate, that's the way it's quoted on the wage
11 and hour sheets, he is actually paid by the amount
12 of material that he delivers.

13 Q. Are you aware of how he is being paid
14 driving a truck and a forklift at the current time?

15 A. He is being paid hourly.

16 Q. Now, did you review the wages that
17 Mr. Shepherd actually earned during his work
18 history, and I show you now Defendants' Exhibit
19 Number 8. Do you recognize Defendants' Exhibit
20 Number 8?

21 A. The Social Security records, yes. I have
22 seen these.

23 Q. Did you also review available W-2's for
24 Mr. Shepherd and I'm showing you now Defendants'
25 Exhibit 7?

1 A. Yes. I have seen those, too.

2 Q. Did you also review W-2's for one of
3 Mr. Shepherd's co-worker, Mr. Allen Walker?

4 A. Yes.

5 Q. And did you have available to you payroll
6 documents prepared by Mr. Shepherd and Mr. Walker's
7 employer, and I'm showing you Defendants' Exhibits
8 Number 4 and 5?

9 A. Yes. I have seen these, too.

10 Q. Now, did you have any tax returns for
11 Mr. Shepherd?

12 A. I believe I saw some tax returns, yes.

13 Q. Do you think you had tax returns for all
14 of the years?

15 A. No. I know I did not.

16 Q. Are you aware that Mr. DeMark has issued
17 a report and he has now testified to this jury that
18 Mr. Shepherd has -- used to be able to make \$78,000
19 a year before the accident happened, were you aware
20 of that?

21 A. \$78,000?

22 Q. Yes. Do you remember Dr. DeMark's
23 report?

24 A. I thought it was \$75,000.

25 Q. \$75,000. I beg your pardon.

1 A. I'm aware of that.

2 Q. Are you aware that Mr. DeMark has
3 suggested that now the plaintiff is not able to make
4 more than \$52,000 because of the accident?

5 A. Yes. I'm aware of that.

6 Q. Do you agree with those opinions?

7 A. No, I don't.

8 Q. Why not?

9 A. First Mr. DeMark says that the wage
10 earning potential is \$75,000 prior to the accident.
11 Mr. Shepherd never earned anywhere close to \$75,000
12 a year.

13 Q. Have you prepared based on your review of
14 the records before you some charts that might be
15 helpful for the jury?

16 A. Yes.

17 Q. Let me ask you to come down here,
18 please. What chart have you prepared?

19 A. This is a chart of Mr. Shepherd's actual
20 wage earnings from 1987 to 1999. You can see that
21 in -- excuse me, 1988. Remember 1987 is when
22 Mr. Shepherd first started driving the boom truck.
23 In 1988, this is the first year after he started
24 driving the boom truck, he made \$35,700; the next
25 year he made \$39,800; in 1990 he made \$38,300; then

1 the next year, 1991, he made \$42,700; then he made
2 \$48,800 in 1992; in 1993 he made \$55,500; and in
3 1994 he made \$55,700; then in 1995 he made \$39,900;
4 in 1996 which is the year he was injured, he made
5 \$51,000.

6 Q. In 1996 he only worked until November
7 14th of 1996 --

8 A. Excuse me. 1996 he worked until the date
9 of his injury which was November the 14th.

10 Q. That's what I meant to say.

11 Q. And according to the Social Security
12 report --

13 A. These are rounded off. He actually
14 earned \$50,900 and some change. I rounded these
15 figures off for the sake of clarity. Now, the three
16 years after -- you will notice there is something
17 here approaching \$75,000.

18 Q. Let me stop you. Up to this point in
19 time, this black line, is this all piece rate?

20 A. I don't know. I don't know how he was
21 paid in Northern Virginia. I don't know.

22 Q. Did he tell you he was being paid piece
23 rate in Virginia Beach?

24 A. Yes.

25 Q. Which of these years are in Virginia

1 Beach?

2 A. That would be actually '96 when he first
3 came to Virginia Beach, '96. Now, in the three
4 years after the injury, 1997 in the red, 1997, 1998
5 and 1999, we have 1997, the year after the injury,
6 earnings of \$57,500.

7 Q. Are you aware that in 1997 his employer
8 was paying him on a rate that was determined by what
9 he earned before the accident?

10 A. That is correct, yes. In 1998 he earned
11 \$56,200 and in 1999 he earned \$52,100. You will
12 notice earnings after the injury are higher than
13 earnings before the injury on the average.

14 Q. Well, Mr. DeMark has told us that
15 Mr. Shepherd has a diminished earning capacity
16 because of the accident. Do you agree?

17 A. In terms of wage?

18 Q. Yes.

19 A. No. Absolutely not.

20 Q. Now, what if Mr. DeMark used as his --
21 for his opinion, the fact that Mr. Walker, one of
22 the plaintiff's co-workers, was able to make \$75,000
23 or more as a piece rate worker, wouldn't that
24 influence your opinion?

25 A. No. I'll show you why.

1 Q. What would you need to consider before
2 comparing those two employees?

3 A. Well, obviously there are a large number
4 of things that need to be considered. One of the
5 primary things you need to consider is how much each
6 of the employees is working. Are they working the
7 same or are they working differently. This chart
8 shows the comparative hours work between Mr. Walker
9 in the black and Mr. Shepherd in the red.

10 Q. Did you obtain these hours from the
11 payroll records from Mr. Shepherd and Mr. Walker's
12 employer?

13 A. Yes, I did.

14 Q. 1996 hours are annualized. They are
15 prorated for the year.

16 Q. Why is that?

17 A. Mr. Shepherd, of course, did not work the
18 entire year. That's the year he was injured so he
19 did not work the last month and a half, or
20 approximately six weeks of the year.

21 Q. How did you come up with an annual figure
22 for him?

23 A. Took the number of hours that he actually
24 worked during the year, divided that by the number
25 of weeks he actually worked and multiplied it by 52

1 to get an annualized number of hours. Mr. Shepherd
2 actually worked 2,290 hours in 1996. That's
3 annualized to 2,617. Mr. Walker did not come to
4 Tidewater Interior Products until mid July of 1996,
5 so he did not work the entire year either. He
6 actually worked 1,552 hours or for approximately 18
7 weeks -- I shouldn't say 18 weeks. It's 5.33
8 months, total of 23 weeks for the year. If you
9 annualize that, Mr. Walker worked 3,493 hours in
10 1996 or he would have if he continued to work the
11 entire year. As you can see, though, Mr. Walker
12 worked 1,552 hours in the 5.33 months' time span,
13 Mr. Shepherd only worked 2,290 actual hours in the
14 ten and a half month work span.

15 Q. Has Mr. Shepherd ever worked as many
16 hours as Mr. Walker?

17 A. No, never has. In 1997, this year we can
18 sort of toss out. This is the year that
19 Mr. Shepherd returned to work and he only worked
20 1,848 hours. We would not expect him to have worked
21 more than that in his year after the injury. We can
22 sort of toss that. However, Mr. Walker's hours you
23 will see continued to remain very high, 3,369
24 hours. Let me remind you that an average work year
25 is 2,080 hours. That's a 40-hour workweek, 52 weeks

1 a year, 2,080 hours.

2 Q. Mr. Shepherd was working more than an
3 average workweek before he was even injured, right?

4 A. Oh, yes, certainly. In the last year for
5 which we have records -- I do not have records for
6 1999, so I can't comment on 1999. In 1998
7 Mr. Walker continued to work over 3,000 hours, he
8 worked 3,274 hours total. 1998 Mr. Shepherd is back
9 on the job. He is now driving the truck and he
10 worked 2,857 hours. Again, at no time did
11 Mr. Shepherd's and Mr. Walker's hours worked ever
12 coincide.

13 Q. If a worker is being paid on a piecemeal,
14 do the number of hours he works affect his pay?

15 A. They are computed, the hours are computed
16 and the total pay that he gets is divided by the
17 number of hours to give him an hourly rate.

18 Q. I didn't ask the question well. If a
19 worker works more hours, would you expect them to
20 move more material?

21 A. Yes.

22 Q. And would he make more money because of
23 that on a piece rate?

24 A. Yes. Of course.

25 MR. NORRIS: Your Honor, we would like to

1 offer these two charts as defendants' next two
2 exhibits.

3 THE COURT: Did we decide -- I started to
4 number the one we talked about before and I didn't
5 number it before.

6 MR. AUFENGER: I would have an
7 objection. I think they are fine for demonstrative
8 purposes and they were never shown to plaintiff's
9 counsel as exhibits. They have never been
10 identified.

11 MR. NORRIS: I don't think we ever showed
12 exhibits to each other.

13 THE COURT: The new rule requires it.
14 The old one doesn't. 17 and 18.

15 (The documents were marked by the Court
16 as Defendants' Exhibits 17 and 18, and received into
17 evidence.)

18 BY MR. NORRIS:

19 Q. Mr. Cooper, do you have an opinion
20 whether it's fair to compare Mr. Shepherd to
21 Mr. Walker to determine whether Mr. Shepherd has any
22 loss of wages or diminished wage loss in the future?

23 A. Do I think it's unfair?

24 Q. Yes, sir.

25 A. Yes, I do.

1 Q. Why?

2 A. Because I've already demonstrated
3 Mr. Shepherd and Mr. Walker are two different
4 workers. They work at different rates. Mr. Walker
5 obviously has worked more hours than Mr. Shepherd,
6 and you can expect if someone works more hours they
7 are going to make more money.

8 Q. Now, when you interviewed Mr. Shepherd,
9 did he express to you why he didn't want to operate
10 or couldn't operate a boom truck?

11 A. Yes. He did. I asked him specifically
12 why was it he was unable to return to his previous
13 job, and he mentioned he couldn't lift the weights.
14 He said he could lift a hundred pounds and he could
15 carry 50 pounds but specifically as to the boom
16 truck he said he had a fear of returning to that
17 type of job, that a similar accident might recur.

18 Q. Mr. Cooper, in your experience have
19 people who have been injured on the work site been
20 fearful, is that an uncommon experience?

21 A. I honestly don't run across that kind of
22 fear that often.

23 Q. Do you know whether therapy is available
24 for that kind of fear?

25 A. Oh, sure.

1 Q. Did you ask Mr. Shepherd if he sought any
2 kind of therapy or counseling of any kind?

3 A. I did. He said no.

4 Q. Did he offer you any justification for
5 why he hadn't?

6 A. No.

7 Q. If Mr. Shepherd had come to you for
8 vocational rehabilitation services, would you have
9 recommended therapy for him?

10 A. I would have, yes, if that was a problem.

11 Q. Now, what's a work capacity assessment?

12 A. It's an evaluation that's conducted by a
13 physical therapist and occupational therapist to
14 determine at what capacity an individual is able to
15 work, what types of physical things they can and
16 cannot do in terms of work.

17 Q. Mr. Cooper, I want you to assume that
18 when Mr. DeMark testified to the jury he drew a
19 little listing of the various work ratings for all
20 the jobs that might be available out there for
21 people and he said that Mr. Shepherd was only
22 available to do light duty, possibly some types of
23 medium work, light or medium. Do you agree with
24 that opinion?

25 A. No.

1 Q. Did Mr. Shepherd have a work capacity
2 assessment for him done?

3 A. Yes, by HealthSouth.

4 Q. What did HealthSouth determine that
5 Mr. Shepherd was able to do as far as these work
6 classifications?

7 A. I believe HealthSouth specifically said
8 that he was released for very heavy work with
9 frequent lifting of 60 pounds.

10 Q. Did Dr. O'Connell agree with that
11 opinion?

12 A. Yes, he did.

13 Q. Do you agree that there are these five
14 classifications of work?

15 A. Oh, yes.

16 Q. What is very heavy work defined as?

17 A. Very heavy work is occasional lifting of
18 over 100 pounds and frequent lifting of over 50
19 pounds.

20 Q. I want you to assume that the plaintiff's
21 employer has testified in this courtroom that he
22 would let Mr. Shepherd return to being a boom
23 operator on a piece rate and wouldn't require him to
24 lift and carry the drywall. Do you have any opinion
25 whether aside from this fear aspect Mr. Shepherd is

1 capable under those conditions of returning to his
2 former employment?

3 A. Unless a medical specialist or expert has
4 said he can't climb a ladder, I see no reason why.

5 Q. Did the work capacity assessment
6 determine whether Mr. Shepherd could climb stairs
7 and ladders?

8 A. As far as I know that's what the report
9 said, he could. There were only two possible
10 difficulties listed besides the lifting limit of 60
11 pounds frequent, very heavy and that was walking
12 along uneven surfaces and crouching.

13 Q. Now, are you aware of when Mr. DeMark
14 asked for Mr. Shepherd to be seen by Dr. Sautter?

15 A. I don't know the exact date. It was
16 something like three years after the accident I
17 believe, but I don't remember the exact date.

18 Q. Based on your evaluation of Mr. Shepherd
19 and the records pertaining to Mr. Shepherd, did you
20 see any need for Mr. Shepherd to be seen by
21 Dr. Sautter?

22 A. If Mr. Shepherd had been referred to me
23 in a vocational rehabilitation program and had I
24 administered some of the tests which I normally do
25 as part of my vocational rehabilitation process that

1 Dr. Sautter administered, specifically the Wechsler
2 Adult Intelligence Scale, I would have seen nothing
3 out of the ordinary that would have suggested to me
4 that Mr. Shepherd be referred for a
5 neuropsychological evaluation. I often administer
6 that test and if I see anything out of the ordinary
7 on that test I will make a recommendation that my
8 client be further evaluated for a neuropsychological
9 evaluation. I did not see anything in the Wechsler
10 Adult Intelligence Scale that was administered by
11 Dr. Sautter that I would have taken as need for such
12 a referral.

13 Q. How did Mr. Shepherd do on the test that
14 Dr. Sautter gave him?

15 A. On the subscales he did from I believe
16 low average to superior and overall on the test he
17 did average.

18 Q. How did he do on your test?

19 A. I administered the Wide Range Achievement
20 Test which is a test of basic skills, arithmetic,
21 reading and spelling and I administered a Vocational
22 Interest Inventory. On the WRAT, Wide Range
23 Achievement Test, he scored I believe above high
24 school level on reading, at the seventy-third
25 percentile, and at the eighth grade in terms of

1 spelling and arithmetic.

2 Q. How would you classify Mr. Shepherd's job
3 security based on the information available to you?

4 A. His job security with Tidewater
5 Interior?

6 Q. Yes.

7 A. From everything I have heard and seen and
8 read, I think his job security is excellent.

9 Q. And how would you describe the wages he
10 is able to earn as a truck driver in our economy
11 today in this area of the country?

12 A. They are certainly comparable to what he
13 has been earning and can be higher. I did just a
14 little -- not a lot of research but I occasionally
15 have had clients that I worked with in the past few
16 years that have actually become truck drivers and I
17 have some old information and I looked at some new
18 information that I had in terms of what truck
19 drivers are actually earning. Now, of course, this
20 isn't the average. These are the better paying jobs
21 but obviously these better paying jobs exist. If he
22 were earning let's say 41 cents a mile, and there
23 are many trucking companies that will pay 41 cents a
24 mile -- trucking companies will pay in a number of
25 different ways, they'll pay by the mileage, they'll

1 pay by the hour, they'll pay a percentage of the
2 load, or they'll pay some combination of all of
3 those. Let's say a trucker was earning 41 cents a
4 mile, and these are under the new DOT guidelines.

5 Q. What does DOT mean?

6 A. Department of Transportation. These are
7 the new DOT guidelines. If say a trucker was
8 working five days a week, driving five days a week,
9 and getting 41 cents a mile he could earn
10 conservatively between \$57,500 and \$63,300 a year.

11 Q. Is that more than Mr. Shepherd ever made
12 before this accident happened?

13 A. The \$57,000 isn't, but the \$63,000
14 certainly is.

15 Q. Now, based on everything you told us, do
16 you have an opinion whether Mr. Shepherd has
17 suffered a future wage loss as a result of this
18 accident?

19 A. He has suffered no future wage loss.

20 MR. NORRIS: Answer questions of any
21 other counsel.

22 CROSS-EXAMINATION

23 BY MR. SMIRCINA:

24 Q. Good morning, Mr. Cooper.

25 A. Good morning.

1 Q. Mr. Cooper, those truck driving jobs you
2 just mentioned, they were over-the-road trucking
3 jobs, not local delivery jobs; isn't that correct?

4 A. Not exactly. The 41 cents a mile, yes,
5 but I have other trucking jobs that I haven't
6 mentioned yet that are local, regional.

7 Q. Can you name me one job in the Tidewater
8 area that delivers building materials to building
9 sites that you can make \$57,000 a year at \$15.10 an
10 hour in the trucking industry? Is there one job?

11 A. I haven't looked at that.

12 Q. Because the job doesn't exist, does it?

13 A. I don't know.

14 Q. Well, you would think you would find that
15 out for this, wouldn't you?

16 A. Not necessarily.

17 Q. I have a chart here as well. It's just
18 the figures that I've been testifying to just to
19 clarify some things. In 1997, which is the year
20 after the accident, Michael Shepherd worked only 11
21 months; isn't that correct? He came back to work at
22 the end of January, started in February?

23 A. I believe that's correct.

24 Q. And this was based on his average weekly
25 wage for the three weeks before the accident over 52

1 weeks; isn't that correct?

2 A. It sounds correct.

3 Q. So this \$57,000 figure would actually be
4 another month's work higher which would be
5 approximately \$5,000 more; wouldn't that be right?

6 A. My mind doesn't work mathematics that
7 quickly.

8 Q. Let's say it would be just under \$5,000
9 then. If he didn't work a month, you divide \$57,000
10 by 11 and come out with about five?

11 A. Yes.

12 Q. So that would be about \$62,500 for that
13 year, isn't that correct, on a 12-month year?

14 A. I don't know if that's correct or not.
15 I'm seeming to recall that for the 13 months after
16 the accident he was receiving pay from his employer
17 equal to what he earned prior to the accident.

18 Q. Through testimony were you aware -- I
19 will ask you that John Rymiszewski, his employer,
20 stated that he paid him on a weekly basis throughout
21 the year of 1997 the amount of money he made on a
22 weekly basis averaged the three months prior to his
23 injury; is that your recollection?

24 A. I'll accept that if that's the
25 testimony.

1 Q. So this \$57,538 is 11 months' wages based
2 on the piece work he was making in September,
3 October and November of 1996; is that right?

4 A. I guess that's right. I don't have
5 access to the testimony. I'll have to take your
6 word for it.

7 Q. If I'm recounting it correctly. So are
8 you aware that Tidewater Interior Products had just
9 started their business on January 1st, 1996?

10 A. I wasn't sure if they started their
11 business or they changed the name for the business,
12 but, yes.

13 Q. So the business for the first six months
14 of the year the testimony has been was slow and
15 there were limited customers. Were you aware of
16 that?

17 A. I gathered so from the hours that
18 Mr. Shepherd worked the first part of that year.

19 Q. So his 1996 income would be significantly
20 reduced because there wasn't as much work at the
21 start of the work year and he was paid piece rate;
22 would that be a fair assumption?

23 A. Possibly.

24 Q. And the testimony was also that he was
25 guaranteed a certain amount of money in 1996 until

1 such time as his piece rate would exceed the
2 guarantee. Were you aware of that?

3 A. I was aware that Mr. Walker's pay was
4 that way. I was not aware that Mr. Shepherd's pay
5 was that way.

6 Q. And Mr. Walker came down toward the -- in
7 August -- July, 1996?

8 A. That's correct.

9 Q. And then he began working piece rate and
10 doing the same job or working with Michael Shepherd;
11 isn't that correct?

12 A. Yes.

13 Q. So in 1997 that figure has absolutely no
14 relation at all to what he could make now as a truck
15 driver because the pay is computed completely
16 differently by Tidewater Interior?

17 A. For 1997, that's the year after his
18 injury. I'll agree to that.

19 Q. So in 1998 you are aware that his pay
20 changed to \$15.10 an hour, are you aware of that?

21 A. I didn't know that it changed to. I
22 thought that was what his rate was. When it
23 averaged out I thought that's what his rate actually
24 was, \$15.10 an hour.

25 Q. Well, I will aver to you that this has

1 been in early 1998 he started being paid \$15.10 an
2 hour.

3 A. He started being paid by the hour.

4 Q. And his rate to your knowledge was
5 \$15.10?

6 A. Right.

7 Q. How much is that on a 40-hour workweek?

8 A. I haven't multiplied it out.

9 Q. I will say to you it's a little over
10 \$600. Multiplied by 52 weeks a year what do you
11 come out to?

12 A. That's \$31,200.

13 Q. So if he made \$56,179 in '98 based on
14 \$15.10 an hour, wouldn't he have to work almost more
15 than \$25,000 worth of overtime hours for that year?

16 A. Yes.

17 Q. And if he was not -- those overtime hours
18 were not available to him, what would his pay be for
19 the year?

20 A. If he did not have the overtime hours, it
21 would be \$31,000.

22 Q. \$31,200 would you agree?

23 A. Yes.

24 Q. In the meantime the business it has been
25 testified had been building and for the year 1997

1 admittedly Allen Walker worked an almost amazing
2 amount of hours, I will grant you that. Is that
3 true?

4 A. Yes, he did.

5 Q. About 1,300 more than the average worker
6 in America?

7 A. Yes.

8 Q. And that would come out to approximately
9 how much more a week, about 24, 25 hours more a
10 week?

11 A. He testified he was working 70-, 80-hour
12 weeks, yes.

13 Q. It may not be that much, but that's a lot
14 of hours. I'll grant you that. But here in 1998 he
15 reduced his hours to more manageable hours, would
16 you agree?

17 A. Yes.

18 Q. At that more managable level, which he
19 testified was between 65 and 70 hours a week, what
20 was that amount that he made?

21 A. \$75,147.

22 Q. On that money -- for that year he
23 mentioned that he worked about 60, 65 hours a week
24 and you would say that Michael Shepherd had \$25,000
25 worth of overtime for the year; isn't that correct?

1 A. Yes.

2 Q. \$25,000 worth. If he is making \$15.10 an
3 hour and he is being paid time and a half, that
4 comes out to \$22.65 an hour, doesn't it?

5 A. Sounds right.

6 Q. At \$22.65 an hour into \$25,000, that
7 means he is working about 1,100 hours of overtime a
8 year. Doesn't that sound about right to you?

9 A. Like I say, my head doesn't work figures
10 that quickly.

11 Q. Well, that would be about a 60-hour
12 workweek, wouldn't it, same as Allen Walker?

13 A. If you take the same figures that I
14 presented on these charts and divided by 52 and it
15 will give you the same thing.

16 Q. That's true. Now, for 1999 I will aver
17 to you the testimony was that Michael Shepherd is
18 now making \$52,000 a year so he got less overtime in
19 1999 than '98; wouldn't you say?

20 A. Yes.

21 Q. But Allen Walker's pay went down another
22 \$4,000. Would you say that Michael's ability to
23 make money is declining since he lost the piece rate
24 job?

25 A. Not necessarily.

1 Q. It would have been \$62,000 here if he
2 worked a 12-month year piece rate even in the months
3 before the accident. Didn't we say that?

4 A. We don't know exactly what he would have
5 earned if he had been working. The 62 merely is the
6 amount of money he would have received if they had
7 paid him for the full 12 months.

8 Q. And the full 12 months based on what he
9 made on a weekly basis multiplied?

10 A. For the year. If he had been actually
11 working, we don't know what he would have made.

12 Q. He could have made \$81,000, couldn't he?

13 A. He could have made \$55,000 as well.

14 Q. Not likely since he made 57.

15 A. Your speculation.

16 Q. But he made \$57,000 on the 11 months
17 because of his employer's generosity, didn't he?

18 A. I think you said it right there, because
19 of his employer's generosity. We don't know what he
20 would have made if he had actually been working and
21 whatever that would have been is pure speculation.

22 Q. Would you agree that this \$76,000
23 represents the average Walker made for the three
24 full years since Michael Shepherd's accident?

25 A. I will accept that.

1 Q. You will accept that Michael Shepherd has
2 made an average \$55,000 over the three full years
3 since the date of the accident?

4 A. I will accept that as correct as well.

5 Q. Were you aware that Dr. O'Connell, his
6 orthopedic surgeon, has given the opinion that
7 Michael Shepherd cannot go back to his previous
8 occupation as a boom crane operator and drywall
9 hauler? Were you aware of that?

10 A. As a boom crane operator.

11 Q. And drywall hauler?

12 A. No. I wasn't aware of that.

13 Q. Wouldn't that be important to your
14 opinion?

15 A. Well, certainly.

16 Q. And you are aware, of course, that the
17 requirements of a boom truck operator for Tidewater
18 Interior Products is not only to operate the boom
19 but also to be able to lift and carry over many
20 hours a day 100 pounds of drywall at a time?

21 A. I was under the impression that his
22 employer had agreed that he could return to his work
23 as a boom operator without hauling the drywall.

24 Q. And if that were so do you have any proof
25 at all that if he were just operating the boom and

1 not hauling the drywall that he would be making more
2 money than he is right now?

3 A. I don't have any proof one way or the
4 other he would be making more or less.

5 Q. Would it surprise you that the testimony
6 of the people at Tidewater Interior Products is that
7 they work three-man crews and the three men
8 alternate hauling drywall and that is how they place
9 and move the drywall that they place and deliver to
10 construction sites? Do you know that?

11 A. I'm not sure what the relevance of that
12 is.

13 Q. Well, the relevance of it is this: If
14 you were paid piece work and you have a three-man
15 crew, wouldn't it stand to reason that three men
16 hauling drywall, they would be able to place more
17 rapidly than two men would be?

18 A. That would be true unless they maintain a
19 three-man crew with a driver.

20 Q. And if Michael Shepherd could not be part
21 of that three-man crew, would it be stand to reason
22 that the people working with him would not be able
23 to move and haul as much drywall?

24 A. Unless they continued with a three-man
25 crew plus the driver.

1 Q. Isn't it true that the amount of money
2 that Mr. Walker and the people on his crew get
3 depend on how much they are able to place on the
4 various construction sites at the behest of the
5 purchaser?

6 A. Yes.

7 Q. So in reality the people working with
8 Michael Shepherd would make much less money given
9 the same amount of material to be delivered or they
10 would have to work many longer hours than when they
11 were working with Allen Walker; isn't that correct?

12 A. Possibly.

13 Q. You can't have any argument that if he
14 was making on an average of \$1,158 a week for the
15 three months prior to the accident that for the ten
16 weeks that he was out he lost \$11,500, can you?

17 A. That still confuses me.

18 Q. Now, about the HealthSouth evaluation
19 report, what's your understanding of Mr. Shepherd's
20 physical limitations that point?

21 A. From the HealthSouth?

22 Q. Or from any information you have. What
23 can he or can he not do in your estimation?

24 A. He probably should not be carrying heavy
25 objects across uneven ground. He will have

1 difficulty with crouching because of the pressure it
2 puts on the ball of the foot and his top lifting
3 limit according to the doctor -- now, Mr. Shepherd
4 said it's 100 pounds, but the doctor says 60 so I'll
5 accept what the doctor says, 60 pounds -- and that's
6 my understanding of what his current physical
7 capacities are.

8 Q. But the HealthSouth evaluation said that
9 his lifting capacity was 60 pounds; isn't that
10 correct? Isn't that what the report says?

11 A. The report said very heavy 60 pounds
12 frequent lifting.

13 Q. So he can lift 60 pounds frequently. Did
14 you ever ask Michael Shepherd whether he could carry
15 60 pounds over an extended period of time?

16 A. Sure.

17 Q. What did he say?

18 A. He said his lifting limit and carrying
19 limit, lifting was 100 pounds and he felt his
20 carrying limit was 50 pounds.

21 Q. Did he say he could carry it six hours a
22 day?

23 A. He didn't say.

24 Q. Did you ask whether he could carry it six
25 hours a day?

1 A. No, I did not.

2 Q. Would it surprise you to see that Allen
3 Walker says he frequently has to carry at least that
4 much for six hours a day?

5 A. Currently?

6 Q. Is that true, do you know that, Allen
7 Walker?

8 A. That wouldn't surprise me, no.

9 Q. And the HealthSouth report talked about
10 his ability to climb stairs and you said he would
11 have no problem according to the report climbing
12 stairs; isn't that true?

13 A. The HealthSouth report did not list
14 climbing stairs as a significant problem.

15 Q. What about descending stairs?

16 A. They did not list that as a significant
17 problem.

18 Q. I don't think that's necessarily true.
19 Do you have the information there in front of you?

20 A. I believe I have the HealthSouth report
21 here somewhere, yes. What page?

22 Q. I'm not certain which page to be honest.
23 There is so much paperwork in this trial. Did he
24 report any problem to you that he had problem
25 descending stairs?

1 MR. NORRIS: It's on Page 3.

2 THE WITNESS: Ladder climbing, three
3 rungs, three episodes times six hours, demonstrated
4 five rungs times six hours. Difficulty, yes or no,
5 it says fair with left foot fatigue.

6 BY MR. SMIRCINA:

7 Q. What does it say about coming down the
8 stairs?

9 A. It doesn't as far as I can see.

10 MR. NORRIS: Halfway up, stair climbing.

11 THE WITNESS: Oh, three flights with
12 descending more discomfort.

13 BY MR. SMIRCINA:

14 Q. The ladder of this truck, Plaintiff's
15 Exhibit Number 5, would it surprise you if both
16 Allen Walker and Michael Shepherd have testified
17 that they go up and down that ladder 40 times a day
18 at least?

19 A. No. It wouldn't surprise me.

20 Q. Is there anything in that report that
21 indicates that Michael Shepherd can go up and down
22 that ladder 40 times a day?

23 A. It doesn't address the issue.

24 Q. Isn't there a big drop-off here, about a
25 two-foot drop-off between the bottom rung of the

1 ladder about the ground?

2 A. Looks about two feet.

3 Q. Would it be surprise you to know if
4 Dr. O'Connell said if he had to go up and down that
5 ladder throughout the day he wouldn't be able to do
6 that job?

7 A. If that's what he said, that's what he
8 says.

9 Q. And you have no reason to dispute that?

10 A. I never dispute what a doctor says.

11 Q. Now, we talked in your deposition about
12 the type of truck driving jobs that were available
13 to Michael Shepherd, didn't we? Do you recall that?

14 A. Not specifically, but it's probably
15 there.

16 Q. We were talking, Page 19 of his
17 deposition, and 20, you were saying -- I asked you,
18 "In the third paragraph of your report on Page 4
19 about the question, Mr. Shepherd has experienced
20 loss of access to the labor market as a result of
21 that accident which is the one that is the subject
22 of the litigation" -- what was your answer to that
23 question?

24 A. This is on Page 19?

25 Q. Right here, Page 19, Line 13. What was

1 your answer to that question?

2 A. I said I wasn't sure I understood what
3 you were saying. I wanted you to explain what you
4 were saying there. I see. Just want me to read
5 this?

6 Q. What does it mean? What is his loss of
7 access to the labor market?

8 A. Loss of access to the labor market is the
9 percentage of jobs, the number of jobs or percentage
10 of jobs that an individual is no longer capable of
11 doing because of a specific injury that they might
12 have.

13 Q. What was your opinion about Michael
14 Shepherd's loss of access?

15 A. My opinion was that he had lost from one
16 percent to 29 percent access to the labor market
17 depending on how extensively we looked at the labor
18 market.

19 Q. Well, some jobs would be jobs that
20 Michael wouldn't have worked since he was a very
21 young man, minimum wage type jobs?

22 A. Correct.

23 Q. That's part of the 29 percent; isn't that
24 correct?

25 A. Yes.

1 Q. But then I asked you on Page 21, I asked
2 you on Line 4, "You are saying now, if I hear this,
3 only one out of 100 truck driving jobs is available
4 to him with his limitations; is that what you are
5 saying?" And what was your answer?

6 A. And if you look at my errata sheet I
7 corrected that. It says yes.

8 Q. What do you mean by that?

9 A. I don't mean anything by that because I
10 corrected it on the errata sheet. Either I
11 misunderstood your question or when your question
12 was transcribed in this transcript it was
13 transcribed incorrectly.

14 Q. Again, you have not looked at his 1999
15 wage information; isn't that correct?

16 A. Mr. Shepherd's?

17 Q. Yes, or Mr. Walker's.

18 A. I believe I have Mr. Shepherd's W-2 Form
19 for '99.

20 Q. Now, you have said that -- let me ask you
21 this: Do you disagree with Dr. Sautter that Michael
22 Shepherd suffered a mild closed head injury as a
23 result of this accident?

24 A. I don't disagree.

25 Q. And it is your opinion still despite the

1 discussion we had today that Michael Shepherd has
2 suffered no loss of earning capacity as a result of
3 this?

4 A. He has lost no capacity to earn wages,
5 yes.

6 Q. If the testimony is that Michael Shepherd
7 is now working the same amount of hours as Allen
8 Walker, would you expect him to make as much as
9 Allen Walker now if he was still working at the same
10 job he had prior to the accident?

11 A. If he was working the same number of
12 hours as Mr. Walker and if he was working the same
13 job that Mr. Walker is working?

14 Q. That's the question, would he make the
15 same amount of money or close to it?

16 A. That's hard to say. In Mr. Walker's
17 deposition there are other factors involved in that
18 besides just number of hours. It's how you organize
19 your time, how you train your crew, how well the
20 crew works for you.

21 Q. Whether or not you are senior to the
22 other operator; isn't that the case?

23 A. I don't know if that has anything to do
24 with it or not.

25 Q. At the time of his injury, Michael

1 Shepherd had seniority over Allen Walker as a boom
2 truck operator for Tidewater Interior. Were you
3 aware of that?

4 A. I remember from Mr. Shepherd's deposition
5 I believe that he said he had three or four months'
6 seniority to Mr. Walker, but I don't know that to be
7 true.

8 Q. Would you agree with the testimony that
9 the more senior operators would get the loads that
10 are bigger; therefore, he could move as much drywall
11 working fewer hours?

12 A. I don't know if seniority has anything
13 more to do with it than competence.

14 Q. Would you agree with Michael Shepherd and
15 Mr. Rymiszewski if they said that was true?

16 A. Certainly not. I would agree with them.

17 Q. There is no evidence that you have been
18 shown that Mr. Shepherd had any physical limitations
19 to performing his work prior to this accident?

20 A. I have seen nothing, no.

21 Q. And you would agree that he has severe
22 limitations now?

23 A. He has limitations. I don't know how
24 severe I would call them.

25 MR. SMIRCINA: I don't have anything

1 further.

2 THE COURT: Ms. Spence, do you have
3 questions?

4 MS. SPENCE: No, ma'am, I don't.

5 THE COURT: Mr. Norris, redirect?

6 REDIRECT EXAMINATION

7 BY MR. NORRIS:

8 Q. Mr. Cooper, you remember giving your
9 deposition in my office and Mr. Smircina asked you
10 questions like he did today?

11 A. Yes.

12 Q. Do you remember you were given a
13 transcript of your deposition to read to make sure
14 it was accurate?

15 A. Yes.

16 Q. Do you remember getting with your
17 deposition an errata sheet to make any changes?

18 A. Yes.

19 Q. That should be made?

20 A. Yes.

21 Q. That was done before you came into court
22 today, right?

23 A. Yes, it was.

24 Q. And Mr. Smircina pointed you to your
25 testimony and whether you said yes to a certain

1 question?

2 A. That's correct.

3 Q. Did you change that answer in your errata
4 sheet?

5 A. I certainly did.

6 Q. What is the answer to that question?

7 A. The answer is no.

8 Q. The question again is?

9 A. "And you are saying now if I hear this
10 only one out of 100 truck driving jobs is available
11 to him with his limitations; is that what you were
12 saying?"

13 Q. And you don't agree with that statement?

14 A. No, I don't.

15 Q. Now, you were asked about the work
16 capacity assessment. Does the work capacity
17 assessment list any difficulty for Mr. Shepherd
18 climbing stairs?

19 A. It says no.

20 Q. What kind of stairs is he climbing,
21 what's --

22 A. This looks like they are regular stairs.

23 Q. A flight of stairs?

24 A. A flight of stairs, regular stairs, not a
25 ladder.

1 Q. How many flights did he have to climb for
2 the test?

3 A. Three flights per episode.

4 Q. So if a flight of steps has 12 or 13
5 steps, he is climbing more than 30, almost 40 steps?

6 A. Right.

7 Q. Is that more than the steps on the boom
8 truck?

9 A. Certainly appear to be.

10 Q. Now, you were asked if you agreed that
11 Mr. Shepherd did lose wages for the period of time
12 he was in the hospital and sat home recuperateing
13 and you said you were confused about that. Why are
14 you confused about that?

15 MR. AUFENGER: Judge, if we may approach,
16 please.

17 (A bench conference was held.)

18 BY MR. NORRIS:

19 Q. You said you were confused by that
20 issue. Can you explain to the jury what confuses
21 you?

22 A. I guess I was confused by the time frame
23 more than anything else. It was my understanding
24 and maybe I'm just confused on the issue itself. It
25 was my understanding that the employer paid him for

1 a 13-month period, maybe I'm not exactly sure what
2 that 13-month period is, when it started and when it
3 stopped, but it's my understanding that the employer
4 paid him for a 13-month period based on what his
5 average earnings were prior to the accident and my
6 confusion is just the time frame, nothing more,
7 nothing less.

8 Q. I think Mr. Smircina asked you to agree
9 that because the work -- the company that
10 Mr. Shepherd was working for when he first came to
11 Virginia Beach was new you might expect the hours he
12 worked and the income that he earned in that first
13 year to be less than what he would earn down the
14 road. Do you recall that line of questioning?

15 A. Yes.

16 Q. That's not true at all, is it? Look at
17 Mr. Walker, first year he worked for the company he
18 made the most money?

19 A. Yes.

20 Q. Each successive year he worked for the
21 company he has made less money?

22 A. Yes.

23 Q. Can you do something for me? Let's leave
24 out 1997 because you said that was an unfair year
25 because of the injury and the recuperation. Using

1 1996 and 1998 can you average the hours worked by
2 Mr. Walker?

3 A. Just '96 and '98?

4 Q. Yes, sir.

5 A. That's 3,383.5, rounded off to 3,384.

6 Q. And how many hours for those two years
7 for Mr. Shepherd?

8 A. 2,737.

9 Q. Is the difference 647 hours?

10 A. I haven't subtracted it, but I'll accept
11 that.

12 Q. Divide 647 by 52.

13 A. That's 12.44 hours per week.

14 Q. That's 12 and a half hours every week
15 that Mr. Walker is working more than Mr. Shepherd;
16 isn't that so?

17 A. On the average, yes.

18 Q. Now, how many hours did you determine
19 Mr. Shepherd worked in 1996?

20 A. Let me show you this. It's for the
21 period of time --

22 Q. Do this for me: What I want to do is
23 subtract the number of hours Mr. Shepherd worked in
24 1996 from what he worked in 1998. 240 hours.

25 Q. Divide that by 52.

1 A. That's 4.62 hours.

2 Q. So Mr. Shepherd is only working four more
3 hours per week or less than an hour a day in 1998
4 since the accident than before the accident; is that
5 correct?

6 A. Correct.

7 Q. But Mr. Walker is working how many more
8 hours per week than him, over ten did you tell us?

9 A. Twelve point something, 12 and a half.

10 MR. NORRIS: That's all I have, Your
11 Honor.

12 MR. SMIRCINA: I would move this exhibit
13 be marked into evidence.

14 THE COURT: Any objection?

15 MR. SMIRCINA: All those figures have
16 been testified to, Your Honor.

17 MR. NORRIS: No, no objection.

18 THE COURT: And the witness is excused.

19 (The document was marked by the Court as
20 Plaintiff's Exhibit 30, and received into evidence.)

21 MR. NORRIS: I think I can say something
22 everybody wants to hear. I have one last exhibit I
23 would offer into evidence at this time.

24 MR. SMIRCINA: No objection.

25 MR. NORRIS: And I rest.

1 THE COURT: That's the answers to
2 requests for admissions?

3 MR. NORRIS: Yes, it is.

4 THE COURT: That will be Number 19.

5 (The document was marked by the Court as
6 Defendants' Exhibit 19, and received into evidence.)

7 (The jury withdrew from the courtroom.)

8 (A recess was taken at this time.)

9 (The jury was returned to the courtroom.)

10 MS. SPENCE: I hope the jury will be
11 happy to know, I'm only planning to call one witness
12 at this point, and that's Robert Bosley.

13 ROBERT BOSLEY, called as a witness by and
14 on behalf of W. M. Meredith, II, Inc. and Robert
15 Bosley, having been first duly sworn, was examined
16 and testified as follows:

17 DIRECT EXAMINATION

18 BY MS. SPENCE:

19 Q. Good morning, sir.

20 A. Good morning.

21 Q. Would you tell the ladies and gentlemen
22 of the jury your name?

23 A. Robert J. Bosley.

24 Q. How old are you, sir?

25 A. Forty-two.

1 Q. Are you married?

2 A. Yes.

3 Q. For how long?

4 A. Twenty-one years.

5 Q. Any children?

6 A. Two, a boy and girl.

7 Q. Where do you work now?

8 A. I work for Marlin Development.

9 Q. How long have you been there?

10 A. Three years.

11 Q. What's your job title?

12 A. I'm a project manager.

13 Q. What is a project manager?

14 A. We bid on projects and I'm an estimator
15 and I do all the estimating and coordinating of the
16 subs, putting out the contracts, approving the bills
17 for payment, schedule of values, all the things
18 associated in managing a construction project.

19 Q. Where did you work on November 14th of
20 1996?

21 A. I worked for W. B. Meredith, II,
22 Incorporated.

23 Q. How long did you work there?

24 A. I believe about three years.

25 Q. And what was your job title?

1 A. Project superintendent.

2 Q. How many Navy projects did you work on as
3 superintendent while working for Meredith?

4 A. Five.

5 Q. Did any of those projects before Dam Neck
6 involve steel erection?

7 A. Some, yes.

8 Q. How about tube steel or girts?

9 A. Yes.

10 Q. Describe your construction employment
11 experience before Meredith.

12 A. I started off as a laborer in
13 construction when I was in high school and went on
14 to learn the trade of carpentry. In about 1979 or
15 '80 I started my own company called Contempra
16 Building Corporation and we did carpentry, decks.
17 Did that through the '80s, and in the early '90s I
18 started getting into some commercial work with W. B.
19 Meredith and other contractors in the area where we
20 did a lot of commercial carpentry work as well.

21 Q. While running Contempra did you supervise
22 other trades or coordinate projects?

23 A. When I was in Contempra sometimes my
24 company would be hired and be a prime sub on the job
25 and I would be hired to supervise the job also, be

1 paid a fee if you would to run the job for the
2 general contractor.

3 Q. What kinds of projects did you supervise?

4 A. One of the projects was a Navy project at
5 Norfolk Naval Shipyard. We renovated some old
6 buildings there that I was a prime sub on and I
7 oversaw the other trades.

8 MR. AUFENGER: Judge, I have an objection
9 to certainly the admissibility of these documents
10 and even the reference to the documents. They are
11 not related in any way. They are not related in any
12 way to this job site and the accident at hand.

13 MS. SPENCE: These are letters of
14 commendation from the Navy to W. B. Meredith
15 regarding Mr. Bosley's performance on a prior
16 project.

17 THE COURT: How recent in time?

18 MS. SPENCE: The letters are dated in '94
19 and '95 and they were the project he was on
20 immediately before the '96 Dam Neck project. Given
21 Mr. Burg's testimony that he was incompetent, I
22 think this is important to contradict.

23 THE COURT: They talked about the other
24 letters. I don't know if they are necessarily to be
25 introduced, but I think he can look at them and

1 testify to them.

2 MR. AUFENGER: Thank you, Judge.

3 BY MS. SPENCE:

4 Q. Can you identify these?

5 A. Yeah. These are attaboys I received for
6 a job I did at Building N-23. That's what I would
7 call them.

8 Q. Did you have a good rapport with the CON
9 rep on that job?

10 A. Very good.

11 Q. Were you functioning as both
12 superintendent and QC officer on that job?

13 A. Yes, and also I was in the position of
14 management on that job. I was negotiating change
15 orders. It was a big renovation for a Three Star
16 Admiral and they wanted to expedite things swiftly
17 so my project manager at the time gave me the okay
18 to go ahead and negotiate change orders with the
19 Navy and everything else to help expedite the job.

20 Q. Now I want to ask you a little bit about
21 W. B. Meredith, Inc. How big is the company?

22 A. At the time I believe we had about 15, 18
23 employees. For the amount of work we did it was a
24 small company.

25 Q. Primarily a family company?

1 A. It was like a family, yes.

2 Q. What type of work does W. B. Meredith
3 normally engage in?

4 A. Primarily commercial and a lot of
5 government work.

6 Q. As a general contractor?

7 A. Yes, ma'am.

8 Q. Who owns the company?

9 A. W. B. Meredith, II.

10 Q. How old is he?

11 A. I believe he is 80 now.

12 Q. How old was he at the time of the Dam
13 Neck project?

14 A. Seventy-six. I know that because I went
15 to his seventy-fifth birthday just prior to that.

16 Q. How involved was Mr. Meredith in the
17 project?

18 A. I was one of the fortunate ones. I was
19 on his daily tour. He would come by daily.

20 Q. What is Ms. Davis' position with the
21 company?

22 A. Well, she is his main man if you would.
23 I would say she is vice president, but she was his
24 eyes and ears in the office and took care of his
25 business for him.

1 Q. How long has she been with the company?

2 A. I'm going to say I think it's been quite
3 a while, 15, 20 years if I'm not mistaken. I'm not
4 sure, though.

5 Q. Who was the QC for Meredith on the Dam
6 Neck project?

7 A. Dennis Cullen, Sr. at the beginning and
8 Dennis Cullen, Jr. came in after we got the job
9 rolling.

10 Q. What were the QC's job responsibilities?

11 A. Quality control. They would make sure I
12 would do what's on the plans and specs for Meredith.

13 Q. How did he document inspections?

14 A. Well, we had a Contractor's Daily Report
15 that we had to fill out every day for the Navy. I
16 would fill out one side and he would fill out the
17 back side. One side pertained to production and the
18 job and the other side would pertain to the quality
19 of work and to making sure that all the materials
20 met the specs.

21 Q. And do you know how many projects that
22 Mr. Cullen had worked as a QC on?

23 A. I do not. No, I don't.

24 Q. Did Mr. Cullen document if there were
25 problems on the job site?

1 A. Yes. Absolutely.

2 Q. Permission to approach. I don't want to
3 overwhelm the jury any more than they have been
4 overwhelmed with paper so I certainly haven't chosen
5 all of the events, but are these examples of times
6 that Mr. Cullen indicated problems with the work?

7 A. Yes. Those are some of his comments on
8 his report, yes.

9 MS. SPENCE: I'm going to ask the Court
10 to mark these so we can --

11 THE COURT: If you are talking about
12 Mr. Cullen and we talk about Cullen, Jr. and
13 Mr. Cullen, Sr. --

14 BY MS. SPENCE:

15 Q. Would these have been Mr. Cullen, Jr.?

16 A. Yes. Mr. Cullen, Sr. was there at the
17 start of the job. When the job really got into
18 production, that's when Junior stepped in.

19 MR. AUFENGER: Judge, if I could look at
20 them more closely. I didn't know she was going to
21 introduce them.

22 MR. NORRIS: Can I note the dates?

23 MS. SPENCE: 8-15-96 and 9-22-96.

24 MR. AUFENGER: No objection, Your Honor.

25 Thank you.

1 THE COURT: Do you have any problem with
2 me stapling the two together and marking them as one
3 exhibit?

4 MS. SPENCE: Yes, Your Honor. I hate to
5 do it but they are dealing with different things. I
6 need them marked separate.

7 THE COURT: Then the August one will be
8 Number 20 and the September one will be 21.

9 (The documents were marked by the Court
10 as Defendants' Exhibits 20 and 21, and received into
11 evidence.)

12 BY MS. SPENCE:

13 Q. I'm going to show you what's been
14 admitted into evidence as Defense Exhibit Number 20
15 and ask you what work problems Mr. Cullen noted on
16 that date?

17 A. Well, the contractor report says the
18 initial work problem was "Check steel erection.
19 Approximately six columns out of alignment.
20 Conflict in adjustment, anchor bolts on column lines
21 D4-2 and B-2."

22 Q. And in the block that said "Preliminary
23 work was done correctly," what did he put right next
24 to where you were just reading, the top line?

25 A. No. It was not done correctly.

1 Q. And now I'm showing you Exhibit 21, and
2 this is dated September 22. Did Mr. Cullen notice a
3 safety problem that day?

4 A. Yes, he did.

5 Q. And what was it?

6 A. "Tried to install electric manhole.
7 Could not proceed with events. Too dangerous," and
8 what they were, I don't recall.

9 Q. Mr. Cullen remained the QC on the project
10 all the way to the end, didn't he, as far as you
11 know?

12 A. Yes, ma'am.

13 Q. He wasn't removed from the job?

14 A. Not to my knowledge, no, ma'am.

15 Q. And he was a competent QC officer, wasn't
16 he?

17 A. Yes. He was my check. He checked me
18 over pretty good.

19 MR. AUFENGER: Judge, no objection. We
20 are not agreeing that it was complied with, but no
21 objection to what their policy was.

22 THE COURT: If there isn't any objection,
23 then I assume the witness is going to identify it.
24 Any reason I can't mark it 22?

25 MR. AUFENGER: That would be a good

1 idea.

2 THE COURT: Exhibit 22.

3 (The document was marked by the Court as
4 Defendants' Exhibit 22, and received into evidence.)

5 BY MS. SPENCE:

6 Q. Mr. Bosley, what was W. B. Meredith's
7 safety policy?

8 A. To maintain a safe workplace for all
9 involved on the job.

10 Q. Was that important to Mr. Meredith and
11 the company?

12 A. Very important.

13 Q. The judge has just handed you Exhibit
14 Number 22. What is that?

15 A. It appears to be our company's safety
16 program.

17 Q. Who all got copies of that?

18 A. All of the employees of the company.

19 Q. It was like a handbook?

20 A. Yes, it was.

21 Q. What safety references were kept on site?

22 A. We had weekly safety meetings. We had
23 obviously in -- we had the Army Corps manual, safety
24 manual, on site. We kept the OSHA regulations on
25 site. We tried to stay up on all aspects of safety

1 to the best that we could.

2 Q. Did Mr. Burg ever ask for a copy of the
3 company's safety policy?

4 A. Not to me, no, ma'am.

5 Q. Did he ever talk to you about whether
6 Meredith had a safety policy?

7 A. No, he did not.

8 Q. Did he ever talk to you about what safety
9 program, if any, you had on the Dam Neck project?

10 A. I've never spoken with Mr. Burg.

11 Q. So he never asked you about any of that?

12 A. No.

13 Q. What safety program did you have in
14 effect on Dam Neck?

15 A. We had our own company safety policy
16 along with all the other regulations that were
17 required as far as OSHA and the Army Corps manual.

18 Q. What did that include in terms of safety
19 and meetings?

20 A. Well, when we had a preparatory meeting
21 obviously any new trades coming on the job, we would
22 make sure that we went over all the safety
23 requirements of all their personnel, hard hats, work
24 boots being tied off, we had weekly safety meetings
25 to keep everybody fresh in their mind that we want

1 to keep a good safe workplace, and if there's any
2 safety concerns we would have special meetings. I
3 would pull a sub off if I saw a sub violating any
4 safety aspects. If certain people weren't wearing
5 their hard hats, for example, give them a warning,
6 give them two warnings, and after that it's I'm
7 going to start removing people from the job and that
8 was my position.

9 Q. And you were responsible for insuring
10 safety compliance, right?

11 A. Everybody is.

12 Q. Including you?

13 A. Yes, especially me.

14 MS. SPENCE: I want to show you two more
15 Contractor Production Reports that you completed
16 dated October 15, '96 and November 12, '96. Your
17 Honor, I would ask that these be introduced as a
18 single exhibit.

19 (The documents were marked by the Court
20 as Defendants' Exhibit 23, and received into
21 evidence.)

22 BY MS. SPENCE:

23 Q. You mentioned a special safety meeting
24 with subs. On this document, 23, there are two
25 different dates. What safety meetings out of the

1 ordinary did you document on those dates?

2 A. It looks like 10-15 I had a safety
3 meeting with Atlantic Welding concerning the tying
4 off of men being up high.

5 Q. What does that mean?

6 A. When you are erecting steel or not even
7 erecting steel, roofing, anything high that you have
8 a fall danger, if you don't have a rail around you
9 you need to have a personal harness on and you need
10 to be attached to the building typically with a
11 cable running through the middle of the building and
12 you would have a lanyard and you would be tied off.
13 A lot of personnel don't like to do that sometimes.
14 You have to remind them that's part of the
15 requirements.

16 Q. Would that be basically a safety belt?

17 A. That's correct.

18 Q. What was the next date?

19 A. 11-12. It looks like we had another
20 safety meeting with Atlantic Welding, again, with
21 tying off. Once again, it's not just Atlantic
22 Welding. It's a difficult thing to enforce as well
23 as hard hats and work boots. People just have a way
24 of setting things down and you've got to always be
25 on them on a daily basis to do what they are

1 supposed to do.

2 Q. Now, are these all the special safety
3 meetings you ever held on the job?

4 A. No. We would have weekly safety meetings
5 and there are other things that occurred.
6 Excavating, for example, one of our subs wasn't
7 sloping the banks back far enough. I had to have a
8 safety meeting with him to make sure he is doing
9 what he is supposed to do. Weekly safety meetings.

10 Q. As far as special safety meetings go,
11 this is just an example?

12 A. Yes, ma'am.

13 Q. Did you ever have to have a meeting with
14 Atlantic Welding regarding any safety in the methods
15 of performing the actual erection?

16 A. No, I did not.

17 Q. Were they safe workers?

18 A. Yes. We covered that really a lot in the
19 preparatory meeting because Steve Taraba is very
20 adamant about steel erection. Apparently it seemed
21 like he had problems before and he gave me an
22 outline of all the things to really go over with
23 Atlantic. They were good about that.

24 Q. This has been marked as Defense Exhibit
25 1. It's dated November 14, '96, the day of the

1 accident. What is this?

2 A. It's one of our weekly safety meetings
3 that I held on the job.

4 Q. I notice that there is weekly safety
5 meeting for the construction industry and some
6 information on National Safety Week. Where does
7 that information come from?

8 A. We subscribe to a weekly publication of
9 safety and the office would get it and disburse it
10 to the superintendents and that would be the topic
11 of the week. Even though it may not pertain to
12 what's going on during the job, we would always try
13 to roll the topic into our job and obviously it was
14 an open discussion for everybody if they had any
15 concerns or complaints about safety.

16 Q. And you had a different topic every week?

17 A. Yes.

18 Q. What are some of the topics that were
19 covered?

20 A. Fall hazards, excavation, use of hand
21 tools. There's just -- you can go on and on.

22 Q. Safety is an ongoing concern?

23 A. Safety is every day. It's a dangerous
24 profession.

25 Q. What time would you usually have your

1 safety meetings?

2 A. Typically like to hold them in the
3 morning before everybody gets set up. I didn't want
4 to disrupt their day so we hold them in the morning
5 typically.

6 Q. Would that be true on 14 as well?

7 A. I would think so, yes.

8 Q. What is a preparatory meeting?

9 A. Preparatory meeting is a meeting with the
10 subcontractor, typically with the head of the
11 subcontractor, the contract guy and/or the foreman
12 who is going to do the work -- and foreman. We
13 would meet prior to the work starting. Say if I was
14 doing a job now and I was going to have a carpentry
15 crew come out next week, for example, I would meet
16 with the carpentry company and its foreman. We
17 would talk about the methods of the work, the
18 sequence of the work, if they are providing
19 materials how we would handle the bringing in of the
20 material on the job, discussing the laydown areas of
21 them, where they would get power from, who would be
22 responsible for what, and then safety was a big
23 issue because everybody else is watching about that
24 and we have to make sure that we comply 100 percent.

25 Q. Who is generally present for the meeting

1 other than you and the foreman for the
2 subcontractor?

3 A. Well, in this case the QC would be
4 present also.

5 Q. And how about a Navy rep?

6 A. Sometimes.

7 Q. Did Steve Taraba come to the prep meeting
8 on August 12th of '96 that you had with Atlantic
9 Welding?

10 A. I don't think so.

11 Q. Did he give you anything to discuss at
12 that meeting?

13 A. Lots.

14 Q. Can you give us an example?

15 A. He is very concerned about the lifting of
16 steel, the unhoisting, the bolting aspect of the
17 beams themselves. We have columns that were 25 foot
18 in the air that would be bolted to the ground that
19 would be standing vertically, to make sure that we
20 have those bolted and in place prior to taking the
21 hoist straps off and any horizontal members that we
22 had a minimum standard of bolts in my mind as well
23 as Dennis' mind that needed to be installed prior to
24 taking off the straps, the spreading of the bar
25 joists, how we were going to maintain them being

1 secure up there, the decking when it was swung into
2 place. I thought we pretty well talked about the
3 whole aspect of the job.

4 Q. Did you cover everything Taraba wanted
5 you to cover at that meeting?

6 A. Yes.

7 Q. What was the sequence of erection if you
8 will that the steelworkers were going to be
9 following on the steel erection portion of this job?

10 A. The steel erectors, you get to the point
11 of the job where you have one trade working and
12 that's their space. So we try to sequence the job
13 so we can get the structure up and running if you
14 would to where we could get other trades involved.
15 So what we talked about was getting the mainframe of
16 the building up and the deck for the second floor so
17 we could pour the concrete on that and then we put
18 the roof on and then we start with the miscellaneous
19 steel, you know, in a nutshell.

20 Q. What's the first part of getting the
21 frame of the building up?

22 A. You shoot grades so you have elevations
23 for columns and then you are going to stand columns
24 which are the vertical uprights at the beams and
25 that the beams and everything rest on. As you start

1 standing columns, you come in and start dropping in
2 beams and that would tie the structure together to
3 give it more stability. After you get a certain
4 portion on, you start putting in bar joists to put
5 them in a safe manner. If they were bundled up we
6 might use tie wire to keep them from sliding one end
7 to the other.

8 Q. Can you-all see the form, Activity Hazard
9 Analysis? At the prep meeting on August 12th of
10 1996 did you discuss the principal steps involved in
11 erecting the columns?

12 A. At length, yes.

13 Q. Did you analyze the potential hazards?

14 A. Absolutely.

15 Q. Did you develop specific controls for how
16 you were going to handle those hazards?

17 A. Yes.

18 Q. What controls did you develop for the
19 column erection?

20 A. To make sure that the bolts were placed
21 and torqued down to a proper tension so when the
22 hoisting strap was removed that it would stay erect.

23 Q. How does one of those vertical columns
24 differ from the girt that's involved in this case?

25 A. Well, the vertical columns, there were

1 several different types of vertical columns, we had
2 I-beam columns, tube steel columns. They are
3 standing erect instead of horizontal.

4 Q. Were the erection procedures different?

5 A. Yes, because we had to bolt them in place
6 prior to taking the straps off.

7 Q. Because of the type of member it was?

8 A. Yes, the way they were fastened. Yes,
9 ma'am.

10 Q. Did you discuss the equipment that would
11 be needed?

12 A. Yes.

13 Q. What equipment was needed?

14 A. They were going to use cranes. They had
15 a crane. They had a boom truck crane if you would,
16 similar to the Sheetrock truck but it had a cable on
17 it with a headache ball if you would and they also
18 were going to use a forklift.

19 Q. Did you check on the inspection
20 requirements for that equipment?

21 A. We had to have it certified prior to
22 coming on the job.

23 Q. After the vertical columns, what was the
24 next phase of the steel erection?

25 A. Well, you wouldn't necessarily set all

1 the vertical columns. What you would do is set a
2 series of six or eight columns and then tie it in
3 with the horizontal members to help give it
4 stability.

5 Q. What are they?

6 A. Those are the beams that would hold the
7 floor if you would.

8 Q. Are they solid?

9 A. Solid I-beams, yes, ma'am.

10 Q. Did you identify the process and steps in
11 the process for erecting those I-beams?

12 A. Yes, ma'am.

13 Q. Did you analyze for possible hazards?

14 A. Yes, we did.

15 Q. What hazards did you see from erecting
16 the I-beams?

17 A. We were concerned with, first of all,
18 obviously them being secured in place which was done
19 with the bolts, and if there were six bolts we
20 wanted to make sure there was at least a bolt or two
21 at each end tightened off before the hoisting was
22 left off. Another thing is making sure no worker
23 left bolts at the top of the beams to be knocked off
24 on somebody. Those were the concerns at the time.

25 Q. What controls did you discuss for

1 minimizing those hazards?

2 A. To make sure that we cleared the tops of
3 the beams after every set and that nothing was left
4 on there and that there was no fall hazards and
5 obviously we would be concerned with the tying off
6 of the personnel at the time and their tools to
7 themselves. Those were all discussed.

8 Q. I guess you wouldn't want a steelworker
9 leaving a ten-pound maul on top of an I-beam, would
10 you?

11 A. Luckily those weren't needed, but a
12 wrench falling ten foot could hurt somebody
13 significantly.

14 Q. What was the next phase after the
15 horizontal members?

16 A. Then we would swing the bar joists into
17 place and they would come in bundles and they are
18 typically strapped together and we set them in place
19 and we basically get all the columns and beams up
20 sitting in the bays. They were either secured in
21 the bays -- this was a big thing with Steve -- to be
22 secured in the bays with tie bar or rope or
23 something so they couldn't shift to one end or the
24 other until they were ready to be what's called
25 shaken out. That's where they cut everything loose

1 and put them on the marks and tack weld them in
2 place.

3 Q. For those like myself who are totally
4 unfamiliar with it, what is the floor joist?

5 A. It's actually a bar joist. It's the
6 member that would go from say beam to beam. The bar
7 joist would span the beam and I am sure everybody
8 has seen them in Food Lion or what have you. They
9 are the bar joists, the webbing in them. If you
10 ever look up at some of your supermarkets, those are
11 the bar joists.

12 Q. Did you discuss the potential hazards in
13 that activity?

14 A. Absolutely.

15 Q. You already told us some of the safety
16 measures you took to minimize those hazards?

17 A. Yes.

18 Q. What would be next after the spreading of
19 the bar joists?

20 A. We were trying to get the concrete floor
21 poured on the second deck prior to putting anything
22 on the roof so we could use a pump truck. So they
23 would be running metal decking and that's big
24 sheets. The biggest thing on the metal decking that
25 we talked about was the wind being able to catch a

1 piece of metal decking and have it fly across the
2 job site, when they weren't spreading the deck that
3 it was tied down properly. Those were I believe the
4 only hazards we discussed.

5 Q. What did you discuss next on August 12th?

6 A. Then we go up and do the same thing on
7 the floor on the roof, same situation.

8 Q. Same thing for the next part of the
9 building?

10 A. Yes.

11 Q. Did you discuss miscellaneous steel?

12 A. That's known as everything other than the
13 backbone of the building is called miscellaneous
14 steel, and that's even a line item in their budget
15 which would be called purlins. I believe in this
16 they have been calling them girts all along, the
17 purlins, the bridging, the steel that might be
18 necessary for a wall attached to a certain
19 location. That would be miscellaneous steel as
20 opposed to let's say structural steel.

21 Q. I think I heard the miscellaneous steel
22 described yesterday as finishing touches. Would you
23 agree with that characterization?

24 A. That's basically the bulk of their
25 contract is done when they are down to miscellaneous

1 steel.

2 Q. Did you discuss that miscellaneous steel
3 at the August 12th meeting?

4 A. No. It was so far down the way. No one
5 could sit at that meeting I don't think and know in
6 their mind what procedures would be performed at
7 that time.

8 Q. Did you discuss the procedures for
9 erecting the girts later on closer in time to when
10 they were to be installed?

11 A. Yes.

12 Q. What was your understanding of the
13 methods to be used?

14 A. I think we all heard it several times,
15 but the whole deal was to make sure we ended up with
16 a flat plane for the precast to sit on. That was a
17 big, big issue because there was a sequence of
18 methods that we had to work together on to get to
19 that point.

20 Q. What was your understanding of how those
21 girts would be secured during that process?

22 A. Well, they were given an area to work at
23 and they would be given a wall at a time. I don't
24 remember exactly their starting point but it
25 correlated with how we were to receive the precast

1 panels. The precast was the outside of building. I
2 wanted to make sure we had those areas ready when
3 the precast is ready. Once again, we are trying to
4 maintain a schedule, that they could start following
5 behind. They would take a wall section and that
6 would be their area to work. They would set the
7 tube steels on the brackets while they were working
8 and they might set two or three in a series and they
9 would pull their strings and tack weld them into
10 proper position so they can move on to production
11 weld.

12 Q. Did you consider them secure even before
13 the tack weld was applied?

14 A. I consider them very secure, yes.

15 Q. Why?

16 A. It's just dead load, down weight. They
17 are sitting on brackets. They were in that area
18 working. It was their area to work. There was no
19 other -- there was nothing that would knock them
20 off.

21 Q. I take it then that as far as securing
22 those that these girts were differently situated
23 from the types of structures that had to be bolted?

24 A. Yes, they were. They were just resting
25 and welded into place. They weren't bolted.

1 Q. And why?

2 A. They were sitting on a saddle if you
3 would.

4 Q. So absent an external interference they
5 weren't going anywhere?

6 A. No. They weren't going anywhere.

7 Q. What risks did you discuss in that
8 erection process?

9 A. My concerns at that time was when they
10 were flying this steel and setting in the brackets,
11 that's where I thought the majority of the risk
12 would lie.

13 Q. Did you also consider interference from
14 other trades?

15 A. They had their own area to work at.
16 There was no other trades in those areas.

17 Q. Why?

18 A. Because they are flying steel overhead.
19 You don't operate overhead people that are working.

20 Q. Weren't you also concerned with after the
21 girts were set, not having other people working in
22 that area?

23 A. Not as much at that time, but they would
24 never leave an area without it being tack welded and
25 then I wasn't concerned.

1 Q. But with the tack weld were you
2 concerned?

3 A. No.

4 Q. Did you make sure no one else worked in
5 those areas when you scheduled?

6 A. Yes. They would have their own place to
7 work.

8 Q. And you discussed this in advance, didn't
9 you?

10 A. Yes.

11 Q. Whose suggestion was it to make sure you
12 didn't have other trades working in that area?

13 A. My suggestion I believe.

14 Q. And who did you discuss this with before
15 the girts started being assembled?

16 A. I would say probably their foreman.

17 Q. Mr. Godfrey?

18 A. Yes.

19 Q. So you analyzed the hazards of this steel
20 erection project?

21 A. Absolutely.

22 Q. Did you fill out a form like this?

23 A. No, ma'am.

24 Q. Why not?

25 A. It was never asked of me.

1 Q. Had you worked on other Navy projects as
2 a super where that form was not required?

3 A. Yes, ma'am.

4 Q. Can you tell us which ones if you
5 remember?

6 A. Building N-23 at Norfolk Naval Base. I
7 did two hangar renovations, Hangar 404 and Hangar
8 500. They were never asked of me. I can't say they
9 weren't required but they were never asked of me.

10 Q. And N-23 you mentioned, isn't that the
11 one you got those two letters of commendation on?

12 A. Yes, ma'am.

13 Q. Did Steve Taraba ever ask you for an AHA
14 form like that?

15 A. No, ma'am.

16 Q. When is the first time anyone ever
17 complained about the lack of a written form?

18 A. I believe it was after the accident.
19 That's when it all came to light that I have not
20 filled out these forms.

21 Q. At the meeting after the accident?

22 A. Yes, the meeting.

23 Q. The meeting.

24 A. The meeting.

25 Q. What is this?

1 A. It's an Army Corps of Engineers handbook.

2 Q. What all does this thick book cover?

3 A. It covers anything from digging a hole to
4 overhead power lines to steel erection to -- if it's
5 been done, it's in there.

6 Q. And did you consult that book to
7 determine the hazards while you were evaluating the
8 steel erection process?

9 A. And with every other trade, yes.

10 Q. So it covers a lot more than the AHA
11 form?

12 A. I didn't even know it was in that book.

13 Q. Let me ask you if you had filled out that
14 written form for steel erection at the August 12th
15 '96 meeting, would you have discussed anything
16 other than what you discussed?

17 MR. AUFENGER: I don't think he can
18 answer that. He admitted he didn't fill out the
19 form.

20 THE COURT: Overruled.

21 BY MS. SPENCE:

22 Q. Would you have discussed anything
23 different?

24 A. I thought we were pretty thorough in our
25 discussion of the safety aspects.

1 Q. Would you have filled it out any
2 differently?

3 A. No.

4 Q. If you had filled out an AHA form
5 specifically for the steel erection, would you have
6 discussed anything differently?

7 A. No.

8 Q. Would you have done anything differently
9 on the job in terms of the procedure?

10 A. No. There was no other way to do it.

11 Q. What precautions did you take to prevent
12 injuries while Atlantic Welding was erecting the
13 girts?

14 A. By designating their work space. As far
15 as Atlantic Welding's personnel or the personnel on
16 the job as a whole?

17 Q. Personnel on the job as a whole?

18 A. By designating their own work space as
19 far as this application was concerned.

20 Q. Why not rope off the area?

21 A. Because it was their area. How are they
22 going to work around ropes with forklifts and
23 everything else? They are working in that area.
24 They need to access that area with equipment and
25 ladders.

1 Q. So roping it off would have prevented
2 them from getting into it as well or made it more
3 difficult?

4 A. It would have made it more difficult,
5 sure.

6 Q. Was rope required by OSHA?

7 A. I'm sure in certain aspects, yes. I
8 would have to rope off a hole if it was left open.

9 Q. Was roping around this girt installation
10 required by OSHA?

11 A. Not to my knowledge, no, ma'am.

12 Q. By the Army Corps of Engineers manual?

13 A. Not the way I read it, no, ma'am.

14 Q. Who was authorized to work in the
15 southeast corner of the building where this accident
16 happened, right here? Who was authorized to work
17 there on November 14, '96?

18 A. That's where Atlantic Welding was working
19 on the purlins or the girts. Excuse me.

20 Q. Who assigned them to that area?

21 A. That was their next area. I guess that
22 would be me.

23 Q. Was anyone else authorized to be in that
24 area?

25 A. I believe there were some masons setting

1 up inside underneath the second floor in that area.
2 But they were well inside the building. That was
3 the closest other trade that was there.

4 Q. When were you advised that Wenger was
5 having a shipment of drywall delivered on November
6 14th?

7 A. The day before.

8 Q. Who told you?

9 A. John McGowan.

10 Q. Did you-all have a discussion as to where
11 to off-load it?

12 A. Yes, we did.

13 Q. What did you tell him?

14 A. The first floor wasn't really -- you had
15 all these tube steels everywhere. So we left some
16 areas open so we had easy access. There were a lot
17 of things going on on the second floor. There was
18 elevator equipment, block, so we left an area in
19 this area which I believe is a lower roof deck and
20 then this wall would carry all across. We left the
21 girts out there so we could access this area here.
22 When we took the cable down, you would have a low
23 roof below so there was no fall hazards. It was a
24 safe place to unload.

25 Q. Where did you tell him to off-load his

1 material?

2 A. Pointed.

3 Q. First floor or second floor?

4 A. Both areas, first and second floor, both
5 floors.

6 Q. In that location only?

7 A. Certainly.

8 Q. What did he indicate to you about where
9 he was going to need drywall on the second floor?

10 A. Needed it everywhere.

11 Q. Did he ever say that he was going to
12 off-load in other locations?

13 A. No, ma'am.

14 Q. Did he ever indicate that he planned to
15 have a boom truck in the southeast corner?

16 A. No.

17 Q. Did he ever ask permission to have a boom
18 truck off-load anywhere other than where you
19 instructed?

20 A. No.

21 Q. How specific were you on telling him
22 where to off-load?

23 A. I was standing right there while they
24 were off-loading. I thought it was pretty clear
25 where the designated loading area was. They were

1 off-loading there. I didn't think I had to be any
2 more specific than that.

3 Q. So you were actually present when they
4 started off-loading?

5 A. Yes, I was.

6 Q. Where were they off-loading?

7 A. I believe they were on the first floor
8 still.

9 Q. Where you told them to?

10 A. Yes.

11 Q. Did you ever tell them not to go to the
12 southeast corner?

13 A. No. I did not tell them not to. I
14 thought it was pretty clear where they were to
15 off-load at.

16 Q. How long had Wenger Tile been on the job?

17 A. Been there probably about six weeks.

18 Q. Had they received any prior material
19 deliveries during that six weeks?

20 A. Yes, lots.

21 Q. Had they ever disregarded your
22 instructions on where to off-load before?

23 A. Not in front of me anyways.

24 Q. Not that you know of?

25 A. Not that I know of, no, ma'am.

1 Q. Did you ever learn later that they had
2 disregarded your instructions previously before
3 November 14th?

4 A. No, I hadn't.

5 Q. Did you ever see Mr. Shepherd's boom
6 truck on the project on November 14th?

7 A. Yes, I did.

8 Q. Where was the truck? The truck was in
9 this area right here where you had authorized?

10 A. Yes, ma'am.

11 Q. Did you ever see it at any other location
12 before the accident?

13 A. No, I did not.

14 Q. Was he off-loading at the time you saw
15 it?

16 A. Yes.

17 Q. Where?

18 A. In the southwest corner where I
19 authorized.

20 Q. On the first floor?

21 A. I believe they were still on the first
22 floor, yes, ma'am.

23 Q. Do you recall any conversation with
24 Mr. Shepherd or with his spotter, Mr. Hewitt, before
25 the accident?

1 A. I really don't, no, ma'am.

2 Q. What about the safety cable, did you
3 authorize anyone to take a safety cable down?

4 A. No, I did not.

5 Q. Was there a safety cable in the area
6 where you authorized delivery?

7 A. No. That cable was down that day because
8 we were taking other deliveries. It was where we
9 were loading the building from. If it hadn't had a
10 roof below it we would have to put it up immediately
11 after any delivery. Since we had a roof there, we
12 were able to drop it and leave it until the end of
13 the day.

14 Q. What you mean is the first floor stuck
15 out further than the second floor?

16 A. Yes.

17 Q. What did you do after you observed the
18 off-loading on the first floor in process?

19 A. I believe I made my rounds on the job.
20 It was getting in the afternoon. I headed over to
21 our main trailer to start on my daily reports and
22 paperwork that I have to do.

23 Q. How many different trades were working on
24 various parts of the building that day?

25 A. I'm going to say at least five or six if

1 I can remember correctly.

2 Q. Which trades?

3 A. I know there were masons, we had heating
4 and air contractor there, the drywall contractor was
5 there, the electricians were on site, the plumbers
6 may have been there, I don't recall. That's pretty
7 much summarizes it.

8 Q. And you are responsible for coordinating
9 and overseeing all those trades?

10 A. Yes.

11 Q. I'm going to show you this photo marked
12 as Defendants' Exhibit 13. Where was the Meredith
13 trailer?

14 A. Our main trailer, our office trailer is
15 outside the compound here. There's a double fence
16 there. You have to go out the gate at this end and
17 all the way around that trailer. The right side was
18 Dennis' side. The left side was my side. We also
19 had a trailer inside the compound but that was just
20 storage and we had a phone line there, but no
21 paperwork or anything.

22 Q. Which trailer were you in when you
23 learned about the accident?

24 A. The outside trailer.

25 Q. How long had you been in there before the

1 accident?

2 A. Fifteen, 20 minutes.

3 Q. What were you doing in there?

4 A. Filling out my daily reports.

5 Q. Because the accident happened close to
6 the end of the day?

7 A. Yes, ma'am.

8 Q. What time is work scheduled to end?

9 A. Most of the trades left at 3:30.

10 Q. What did you do when you learned about
11 the accident?

12 A. I got in my golf cart and got over to the
13 site as fast as I could.

14 Q. You had a golf cart?

15 A. Yes. It was just too far to the trailer
16 to walk back and forth. I would spend all day doing
17 that. The company issued me a golf cart to drive
18 back and forth.

19 Q. What was Mr. Shepherd doing when you
20 arrived?

21 A. When I arrived the boom truck was at the
22 opposite end where I designated them to off-load at
23 and Mr. Shepherd was on the ground.

24 Q. Was he doing anything?

25 A. He was trying to get up.

1 Q. What did you do?

2 A. I tried to calm him down and keep him
3 still until the paramedics showed up.

4 Q. Had you ever seen the boom truck in that
5 location before you came out after the accident?

6 A. No, ma'am.

7 Q. What would you have done if you had seen
8 it there?

9 A. I would like to know why they were going
10 against my authorization, why they were moving over
11 there.

12 Q. Would you have told them to move?

13 A. After seeing what other trades were doing
14 in that area and who was working in that area, maybe
15 not. I can't say that.

16 Q. But it was certainly not where you
17 authorized them to be?

18 A. No.

19 Q. Did you speak to Mr. McGowan after the
20 accident?

21 A. I'm sure I did.

22 Q. What did you ask him?

23 A. I think my first reaction was, "Why are
24 you over in this area?"

25 Q. What did he say?

1 A. He said that they had too much drywall to
2 have to carry it all the way down to the other end
3 of the building by hand.

4 Q. Did you ever speak to Mr. Godfrey after
5 the accident?

6 A. I'm sure I did.

7 Q. Do you remember anything he told you
8 about whether the girt was tacked or not?

9 A. I don't remember.

10 Q. Did you ever look at the girt, at the
11 angle to see if it appeared to be welded?

12 A. The girt was right there on the truck and
13 I do remember seeing a burn spot on there.

14 Q. And what did that look like to you?

15 A. It appeared to be a tack weld.

16 Q. These are August 14 and September 23rd
17 Contractor Production Reports. Don't mean to be
18 backtracking on you, but before I forget I wanted to
19 put a few other of your contractor reports into
20 evidence.

21 THE COURT: 24 is August 14th and 25 is
22 September 23rd.

23 (The documents were marked by the Court
24 as Defendants' Exhibits 24 and 25, and received into
25 evidence.)

1 BY MS. SPENCE:

2 Q. In the one that's been marked Exhibit 25,
3 dated September 23rd, what safety actions did you
4 take that day as noted on your report?

5 A. New welders on site and talked with them
6 about safety belts and being tied off when welding,
7 et cetera.

8 Q. So even though you had a prep meeting,
9 whenever new welders would come on site you would do
10 the same thing?

11 A. I would try to address any new employees
12 on site about safety, yes, ma'am.

13 Q. And August 14th, what were your remarks
14 on that date, on Exhibit 24?

15 A. The electricians were putting in big
16 electrical bank ducts and I had to stop work on the
17 electrical manholes. "Working too close to a power
18 line. Unsafe. Will schedule power outage." They
19 had a crane and were digging and were right next to
20 the power line. I was concerned about the crane
21 hitting the power line so we called in and had an
22 outage so the whole power line was shut down for the
23 time of the work so they could operate safely.

24 Q. Did you meet with Manny Seoane the day
25 after the accident?

1 A. Yes.

2 MS. SPENCE: This is the Contractor
3 Production Report for November 15, '96, the day
4 after the accident. I would ask that it be marked
5 as Exhibit 26.

6 (The document was marked by the Court as
7 Defendants' Exhibit 26, and received into evidence.)

8 BY MS. SPENCE:

9 Q. Under "Safety Actions Taken. Safety
10 Inspections Conducted," what did you note in your
11 report?

12 A. "Walked job with Manny. We reviewed all
13 aspects of safety. Looked pretty good and he
14 recommended that we clean the job up more."

15 Q. And what did they mean by clean up?

16 A. Just debris.

17 Q. Did you observe Mr. Seoane looking at the
18 angle clips?

19 A. I don't remember.

20 Q. Did you observe him looking at the girt
21 on the ground?

22 A. I'm sure he did. Like I said, I'm not
23 sure what he was looking for.

24 Q. Did you conduct the full inspection with
25 him while he was there?

1 A. I walked with him, yes.

2 Q. Did you ever get up and look at the angle
3 clips with him?

4 A. No, I did not.

5 Q. You were ultimately at the meeting the
6 following Monday removed from this job?

7 A. Rapidly, yes.

8 Q. Do you know if Mr. Meredith fought the
9 decision as Mr. Doverspike did for Mr. Godfrey?

10 A. I believe he did, yes.

11 Q. Were you reassigned to work somewhere
12 else?

13 A. Yes. I was reassigned within our company
14 to work somewhere else.

15 Q. Did you stay with the company?

16 A. No, I did not.

17 Q. When did you resign?

18 A. It was shortly after all this.

19 Q. Within the same -- within November?

20 A. I'm sure it was.

21 Q. Why did you resign?

22 A. They didn't have any other projects for
23 me to supervise. All the other projects they had
24 superintendents on and they offered me a job as a
25 carpenter and I've come too far to put my nail bag

1 back on, so I decided it would be best if I looked
2 for work elsewhere.

3 Q. Did Mr. Meredith ever ask you to
4 reconsider?

5 A. Yes.

6 Q. Were you or Meredith ever cited for any
7 OSHA violation on Dam Neck as a result of
8 Mr. Shepherd's accident?

9 A. No, we were not.

10 MS. SPENCE: Please answer any questions
11 from counsel.

12 CROSS-EXAMINATION

13 BY MR. AUFENGER:

14 Q. Mr. Bosley, before we get started you
15 indicated that to you a girt is a purlin; is that
16 correct?

17 A. Yes.

18 Q. So when I use the word "girt" we know
19 what we're talking about?

20 A. Yes.

21 Q. Now, currently you are a project manager,
22 correct?

23 A. Yes, sir.

24 Q. And that's estimating basically for
25 nonheavy construction, correct? You are not doing

1 major heavy construction work like buildings that
2 were involved in this accident, are you?

3 A. Just different members, sure, building
4 four-story apartment complexes.

5 Q. Before your work for W. B. Meredith you
6 were a carpenter for 17 years, correct?

7 A. Yes, sir.

8 Q. And it was your carpentry business and
9 you called it Contempra Building Corporation; is
10 that right?

11 A. Yes, sir.

12 Q. And you would agree that you did mostly
13 residential work, correct?

14 A. For a good period of time, yes.

15 Q. You rarely if ever did heavy construction
16 like building that we have in this case; isn't that
17 true?

18 A. Yes, sir.

19 Q. And it's true that in those 17 years of
20 experience in the carpentry business that you never
21 had any steel erection experience, correct?

22 A. No. That's not true.

23 Q. Are you sure about that?

24 A. Well, as far as erecting big buildings
25 like that, yes, but even in houses they have I-beams

1 that we would have to erect.

2 Q. But I asked you -- the specific question
3 that I asked you in court was the same question that
4 I asked you in your deposition, and if I may
5 approach.

6 THE COURT: What page for counsel?

7 MR. AUFENGER: Page 8, Line 20.

8 BY MR. AUFENGER:

9 Q. Question is "Okay. With Contempra
10 Building did you have any steel erecting experience
11 with that company," and your answer was?

12 A. No, sir.

13 Q. Isn't it true that you had never been a
14 supervisor or superintendent on a job of new
15 construction like the one regarding this accident?

16 A. Yes.

17 Q. So you had no experience in that,
18 correct, in supervising a job new construction like
19 this specific job we are here today about?

20 A. This specific job, yes.

21 Q. And isn't it true that this is the first
22 job where you were a superintendent on new
23 construction where steel framing was being done with
24 the use of steel girts like in this case?

25 A. New construction, yes.

1 Q. And steel girts being used like the ones
2 that were being put up in this case?

3 A. In new construction, yes.

4 Q. Do you know how long it was that you were
5 working on the Dam Neck project before you were
6 fired?

7 A. I wasn't fired.

8 MS. SPENCE: Objection.

9 THE COURT: Sustained.

10 BY MR. AUFENGER:

11 Q. Before you were removed off by the
12 government? I apologize.

13 A. I believe three, four months if I
14 remember correctly.

15 Q. And your job was to supervise, correct?

16 A. Yes, sir.

17 Q. And your job was to coordinate the
18 trades, correct?

19 A. Yes, sir.

20 Q. Your job was to stage the construction,
21 correct?

22 A. Yes.

23 Q. Now, that would include scheduling the
24 work on the job, correct?

25 A. Yes, sir.

1 Q. That would include the delivery of
2 material like Sheetrock, correct?

3 A. Through my drywall contractor, yes.

4 Q. And I think you previously indicated in
5 your deposition that it included the scheduling, the
6 manpowering and the daily dos and don'ts. Do you
7 remember using those words?

8 A. Yes, sir, I do.

9 Q. So your job was to see that things that
10 aren't supposed to happen don't happen, correct?

11 A. That's correct.

12 Q. And you agree that you had the overall
13 responsibility for the safety on this job, correct?

14 A. Yes, sir.

15 Q. And would you also agree that you had to
16 be able to appreciate and realize all of the danger
17 involved in activities in order to safeguard against
18 those activities?

19 A. Yes, sir.

20 Q. Now, in all of your prior experience you
21 had never seen the erection of steel girts like the
22 one that injured Mr. Shepherd; isn't that true?

23 A. Have I ever supervised or ever seen?

24 Q. Excuse me one second. Seen?

25 A. I've seen construction of this before.

1 Q. If I may approach, Page 16, Line 21,
2 question, "Okay. Let me go back to your prior
3 experience for a minute. In all of your prior
4 experience that you were kind of detailing for me
5 had you seen this type of work being done before,
6 and what I mean is the placing of steel girts like
7 this in a multilevel commercial building before?"
8 What was your answer?

9 A. My answer at the deposition was no.

10 Q. No what?

11 A. "No, I have not."

12 Q. Are you changing your answer in court
13 today?

14 A. Everybody has seen the erection of steel
15 driving down the road.

16 Q. Why did you answer it this way in your
17 deposition under oath?

18 A. I was thinking as superintendent,
19 thinking if I was superintendent.

20 Q. Are you telling us here today in court
21 that you were familiar with the means and methods of
22 erecting these particular type of steel girts before
23 this job started?

24 A. Before the job started, no, sir.

25 Q. So you hadn't seen it done before the job

1 started?

2 A. I have seen it done, but I wasn't the
3 superintendent on the job.

4 Q. And you weren't familiar with how it was
5 to be erected before this job started, true?

6 A. No.

7 Q. No what?

8 A. No, I have not seen it.

9 Q. Isn't it true that before this job
10 started since you weren't familiar with the process
11 that you could not have recognized the safety
12 hazards involved in the erection of the steel girts?

13 A. True.

14 Q. Did you know that on your job that the
15 steel girts were at times being left up for eight
16 and ten hours at a time?

17 A. Yes, I did.

18 Q. That didn't give you any concern?

19 A. No, sir.

20 Q. Are you sure you knew that that was being
21 done?

22 A. Yes, I am sure.

23 Q. You are positive?

24 A. Yes. I would say I am positive.

25 Q. So you knew that these girts were being

1 put on their erection clips and left for an extended
2 period of time before they were tack welded,
3 correct?

4 A. Yes, I did.

5 Q. You didn't take any precaution and didn't
6 give any concern to that; isn't that true?

7 A. My precautions were designating the work
8 area to Atlantic Welding.

9 Q. And it would have given you no concern if
10 these girts were left up overnight; isn't that true?

11 A. I don't see where they would have gone
12 anywhere.

13 Q. So you've heard testimony here today even
14 from Meredith's own expert that it would not be
15 appropriate to leave those girts up overnight
16 without tack welding them or securing them in in
17 some way, and you disagree with that expert
18 testimony, don't you?

19 A. No. You asked me if I had any concerns.

20 Q. Okay. You explain it then.

21 A. First of all, it was never left more than
22 eight hours because Atlantic Welding only worked
23 eight hours. So the beams may have been untack
24 welded anywhere from two to eight hours. They did
25 tack weld at the end of the day and made sure their

1 work was secure. Secondly, overnight I don't see
2 anything that would affect those beams short of a
3 collision which did cause this.

4 Q. How about the next morning when the job
5 starts if someone were to go in that area, wouldn't
6 that be --

7 A. If they weren't on a piece of machinery
8 or something that could dislodge the --

9 Q. To be short with this, you disagree with
10 the expert that it wouldn't be appropriate if it was
11 left overnight?

12 MS. SPENCE: I object. That's a
13 different question.

14 THE COURT: Sustained.

15 BY MR. AUFENGER:

16 Q. Would it surprise you or did it surprise
17 you that the Navy inspection reflected that three to
18 six girts like the one that injured Mr. Shepherd
19 were left up not tack welded or secured in any way?

20 A. I did not know that.

21 Q. That doesn't give you any concern here
22 today, does it?

23 A. Sure it would.

24 Q. Isn't it your job to know that as having
25 general responsibility for safety of everyone on

1 that workplace?

2 A. My job is to know that I have a competent
3 sub performing its work as we discussed. We have a
4 lot of checks and balances. Is it my job to go look
5 at every girt to make sure it's been tack welded? I
6 don't think so.

7 Q. Are you now saying that it wasn't your
8 responsibility but you didn't have an incompetent
9 sub because you didn't know that information?

10 A. I'm sorry. Repeat that?

11 Q. I'll go on to the next question. You
12 would agree that no area of this building was roped
13 off or cordoned off in any way, correct, at the time
14 of this accident?

15 A. No. I would not.

16 Q. Were there areas that were cordoned off
17 at the time of this accident?

18 A. Yes, there were.

19 Q. Were they in the southwest corner where
20 this accident happened?

21 A. The southeast corner. Well, there was an
22 open manhole outside the building and also the
23 elevator pit was roped off at the time if I'm not
24 mistaken.

25 Q. I'm talking about the building and the

1 structure itself, was there any part of the building
2 structure?

3 A. Not on the outside, no, unless you want
4 to call the safety rails being cordoned off, but
5 that's for fall protection.

6 Q. You agree it's your responsibility to
7 make sure that no one other than the steel erectors
8 were working in the area where they were erecting
9 these girts, correct?

10 A. That was the ultimate goal.

11 Q. That was your ultimate responsibility,
12 correct?

13 A. No. It was everybody's responsibility to
14 follow instructions.

15 Q. My question was that was your ultimate
16 responsibility, correct?

17 A. Yes. I would say so.

18 Q. Now, there was a preparatory meeting, if
19 I may approach, on August 12th, 1996 and I'll show
20 that to you, Plaintiff's Exhibit 23, and you
21 discussed before the jury that you were there at
22 this meeting, correct?

23 A. Yes, sir.

24 Q. And that you discussed the preparation of
25 a number of things, correct?

1 A. Lots of things, yes, sir.

2 Q. You never discussed at that meeting or at
3 any other meeting the specific erection, the methods
4 and manners of erecting this girt, the one that
5 struck Mr. Shepherd?

6 A. No. That's not true.

7 Q. So it's your testimony that you
8 previously discussed the safety regarding the girt
9 and the type of girts that injured Mr. Shepherd?

10 A. Previous of this meeting or --

11 Q. No, before this accident?

12 A. Yes, we did.

13 Q. When was that?

14 A. I don't know, sir.

15 Q. Where is the document to show that? Out
16 of all this stuff defense counsel has pointed out to
17 you saying you've done this for safety and this for
18 safety, where is the one that talked about --

19 A. We are talking about the miscellaneous
20 steel on the project. We are down to the last 15
21 percent of the steel.

22 Q. And the miscellaneous steel, you didn't
23 understand the erection of this miscellaneous steel
24 before this job, did you?

25 A. No, but I sure learned a lot about it.

1 Q. We'll get to that in a second. You were
2 learning as you were going on with this job; is that
3 what you are saying?

4 A. I don't know how to wire a house with
5 electrical, but does that mean I can't call an
6 electrical contractor to wire a house for me?

7 Q. It's true that at no time before my
8 client's injury did you ever or to your knowledge
9 anyone ever complete an Activity Hazard Analysis for
10 any activity on this job site?

11 MS. SPENCE: Are you referring to the
12 form or the process?

13 MR. AUFENGER: The form.

14 THE WITNESS: That's correct. I've never
15 filled out one of those AHA forms. It was never
16 asked of me.

17 BY MR. AUFENGER:

18 Q. You know the contract called for you to
19 comply with the Army Corps of Engineers?

20 A. I never saw the contract.

21 Q. You never looked at the contract?

22 A. No. All I saw was the plans and specs.

23 Q. The specs require that, do they not?

24 A. I'm production. All I search myself with
25 the specs is the building of the building. The

1 contract is done by the management.

2 Q. Are you saying that you looked at the
3 specs or you didn't look at the specs?

4 A. I looked at the specs pertaining to
5 building the building. The whole front end of the
6 specs has everything to do with change orders to the
7 contract documents, the bidding procedures. That
8 does not concern me.

9 Q. Did you look at the provision in the
10 specs that required you to comply with the Army
11 safety -- Corps of Engineers safety manual regarding
12 the life and health of employees and other persons?

13 MS. SPENCE: I would ask he be shown the
14 complete document that was taken from so he can know
15 whether it was taken or not.

16 THE COURT: Is it an exhibit?

17 MR. AUFENGER: It's an exhibit.

18 BY MR. AUFENGER:

19 Q. I'm showing you at your attorney's
20 request Plaintiff's Exhibit Number 20. Do you
21 recognize that?

22 A. Yeah. That's a section out of the spec
23 book.

24 Q. Is that one of the documents you reviewed
25 in anticipation and in preparation for this job?

1 A. No, I did not.

2 Q. Why not?

3 A. Once again, I was primarily concerned
4 with building the building. All the front end of
5 the specs if you would is the bidding procedures,
6 the contracts and all the different FRA clauses.
7 Where I got into the specs and the plans is where
8 you break ground. That's what my job was, to build
9 the building. I wasn't responsible for the contract
10 of the job, the bidding of the job, any of those
11 things. I was hired to build the building.
12 Therefore, I started with Section 2000, excavation.
13 I did have the Army Corps handbook on the job, even
14 though I did not read that.

15 Q. And you said to us when you looked at the
16 Army Corps of Engineers safety manual that you
17 didn't even know a Activity Hazard Analysis form was
18 in there?

19 A. No, sir, because I used that book when I
20 would have different trades and I go to the section
21 of the book that would deal with the type of work we
22 were working on and that covered everything to the
23 best of my knowledge.

24 Q. You heard Mr. Seoane with the government
25 and you heard Mr. Burg with the government state

1 that an Activity Hazard Analysis was required on
2 this job?

3 A. I wish it had been asked of me. I would
4 have been glad to fill it out.

5 Q. If you read that contract provision I
6 just showed to you, you would have known that it
7 was.

8 A. That was not my responsibility.

9 Q. Whose responsibility in Meredith's was it
10 if it wasn't yours?

11 A. I would say the project manager who bid
12 the job.

13 Q. He works for Meredith?

14 A. Yes.

15 Q. He didn't tell you?

16 A. He said I had to obey the OSHA
17 requirements and the yellow handbook there which was
18 given to me by Meredith. These were the guidelines
19 and safety guidelines of the project. I didn't have
20 to read it. It was told to me.

21 Q. You would agree that the erection of
22 these girts even though you described them as
23 miscellaneous steel, that would be a new activity,
24 would it not?

25 A. No. It's still part of the structural

1 steel. It was still in the same section of the 5200
2 section.

3 Q. Are you telling us here today had you
4 been asked to do an Activity Hazard Analysis you
5 wouldn't even have done one?

6 A. Yes, sir. If I had been asked to, I
7 would have filled it out. I filled out all the
8 other paperwork required by me.

9 Q. Do you recall -- and I think you said
10 that it was the evening before that Mr. McGowan, the
11 foreman for Wenger Tile, came to you to discuss this
12 specific off-loading of Sheetrock?

13 A. Correct.

14 Q. Are you sure it was the evening before?

15 A. I'm fairly sure because we were always
16 planning for the next day in the afternoon.

17 Q. Don't you recall Mr. McGowan's testimony
18 here in court that it was at the time that the
19 delivery was being made that he came and talked to
20 you?

21 A. He may have said that, but that's not the
22 way it was.

23 Q. So it's your recollection here today that
24 on the date of this accident you never spoke
25 regarding the off-loading of Sheetrock to

1 Mr. McGowan, Mr. Ashley, Mr. Shepherd or Mr. Hewitt?

2 A. No. I didn't say that.

3 Q. Did you speak with them regarding the
4 off-loading of Sheetrock on the day of the accident?

5 A. Yes.

6 Q. Did you speak with Mr. McGowan?

7 A. I believe that's who it was, yes, sir.

8 Q. And he told you where he intended to
9 off-load, correct?

10 A. I told him where he may off-load.

11 Q. Did you tell him where he couldn't
12 off-load?

13 A. No, sir. I didn't know that was
14 necessary.

15 Q. You never told Mr. McGowan, Mr. Ashley,
16 Mr. Hewitt or Mr. Shepherd that they couldn't
17 off-load where this accident happened; isn't that
18 true?

19 A. That's exactly true, yes, sir.

20 Q. You agree, though, that you did authorize
21 the off-loading on the first and second floor?

22 A. In the designated area, yes, sir.

23 Q. And you said that even if you had been
24 asked if they could off-load in the area where the
25 accident happened you may have allowed it?

1 A. After making sure no one was working in
2 that area where they would be off-loading overtop of
3 personnel, yes.

4 Q. But you would have let them off-load with
5 that unsecured girt?

6 A. It was tack welded. If he was skilled
7 enough to place it in that area, I wouldn't have a
8 problem with that.

9 Q. You didn't know whether it was tack
10 welded or not, did you?

11 A. No, sir, I did not.

12 Q. Are you saying that the conversation
13 Mr. Hewitt has testified to when he said he asked
14 you if he could take the security cable down, the
15 safety cable down on the second floor, that that
16 didn't happen or you don't remember if it happened?

17 A. I don't remember it.

18 Q. So it may have happened, you just don't
19 remember it?

20 A. Yes. That could be correct.

21 Q. Now, you have indicated that when this
22 accident happened you were in your trailer; is that
23 correct?

24 A. Yes, sir.

25 Q. And you were doing some paperwork?

1 A. I believe so, yes.

2 Q. And you indicated that Meredith had two
3 trailers but you were in the far trailer; is that
4 correct?

5 A. Yes, sir.

6 Q. What brought your attention to the fact
7 that this accident happened?

8 A. I don't remember if I heard the accident
9 or if somebody told me, but I believe now that I
10 recollect that I heard a loud crash.

11 Q. But you are not certain about that;
12 previously you didn't say that, did you?

13 A. No, I did not.

14 Q. Previously you said someone had actually
15 come to the trailer and told you and that's when you
16 came out?

17 A. Yes.

18 Q. Do you recall previously saying that you
19 thought that your trailer, the one that you say you
20 were in at the time of this injury, was about 500
21 yards away?

22 A. That's probably not too far from the
23 fact.

24 Q. And you said that you jumped into your
25 golf cart and that you would have had to I guess

1 travel through the open fence and come to where he
2 was, correct?

3 A. Yes, sir. That's correct.

4 Q. And you have said that there was a
5 commotion of people around the boom truck and
6 Michael Shepherd was on the ground?

7 A. Yes, sir.

8 Q. You have heard Mr. Brock testify that
9 your trailer was certainly not 500 yards away but
10 was as close as where you are sitting to the door.
11 Do you remember that, sir?

12 A. Yes, sir.

13 Q. Was his testimony wrong?

14 A. No. It was accurate but that was a
15 storage trailer.

16 Q. He said he saw you come out of that
17 trailer?

18 A. He was wrong about that.

19 Q. He could have been wrong about the girt
20 being welded, too?

21 MS. SPENCE: Objection.

22 MR. NORRIS: Objection.

23 THE COURT: Sustained.

24 BY MR. AUFENGER:

25 Q. But he was wrong about which trailer you

1 came out of, correct?

2 A. Yes, he was.

3 Q. Isn't it true that you never inspected
4 the girt or the clips for evidence of weld, that's
5 the girt that injured Mr. Shepherd?

6 A. That is true.

7 Q. Also it's my understanding that you
8 cannot say with any certainty whether or not those
9 two burn marks as you described it reflected in
10 Plaintiff's Exhibit Number 15 were on that girt
11 immediately after it struck Mr. Shepherd?

12 A. I'm sorry. Repeat the question.

13 Q. You cannot say if the burn marks were on
14 the girt at the time of the accident or not, can
15 you?

16 A. No, sir, I cannot.

17 Q. Do you recall this Contractor Significant
18 Incident Report which is Plaintiff's Exhibit 22?

19 A. Yes, sir, I do.

20 Q. You filled that out, that's in your
21 handwriting?

22 A. Yes, I did.

23 Q. And when it asks, and this is the typed
24 portion, "Job Hazard Analysis. Was the lack of an
25 adequate" -- and it lists a section -- "Activity

1 Hazard Analysis a contributing factor? Was it site
2 specific and addressed the type of work operations
3 permitted when the mishap occurred," and what was
4 your response as to whether or not a job Activity
5 Hazard Analysis was adequate?

6 A. It was not applicable. It was never
7 asked of me by the Navy.

8 Q. And I would like to direct your attention
9 down on the same page, same exhibit, Number 9, when
10 it asks "Fully explain what allowed or caused the
11 accident, including direct and indirect causes."
12 What was your answer?

13 A. "The direct cause was using a boom truck
14 to off-load drywall. When retracting boom it
15 knocked off 30-foot tube steel down the boom hitting
16 the operator to ground."

17 Q. When did you fill this out in relation to
18 Michael Shepherd's injury?

19 A. I would say probably the next day. I
20 don't remember. Either that day or the next day.

21 Q. When it asks you, Part B, "What indirect
22 causes there were," what did you put in that?

23 A. "Not applicable. It was directly caused
24 by the boom hitting the beam."

25 Q. I don't see anywhere in there that says

1 it was caused directly or indirectly to him not
2 having authorization to be in this particular area,
3 does it?

4 A. No, sir, it does not.

5 Q. You are not telling the jury here today
6 or you are telling the jury today that is a cause of
7 this accident, aren't you?

8 A. That would have been an indirect cause.
9 If I was thinking clearly I probably should have
10 noted that.

11 Q. You indicated that you knew Manny Seoane,
12 the government safety engineer, was on the scene the
13 next day, correct?

14 A. Yes.

15 Q. And you know that he inspected the
16 particular girt; isn't that true?

17 A. I walked the job with him and I believe
18 he did, yes.

19 Q. You have no reason to not believe that he
20 inspected the girt?

21 A. I would think that's why he was there,
22 yes.

23 Q. Did you see him inspecting the erection
24 clips?

25 A. No, I did not.

1 Q. Did you see him on the second floor in
2 the area of the erection clips?

3 A. I can't remember.

4 Q. Do you remember a ladder being taken out
5 so that as he testified he could look at the
6 erection clips to see if there was any evidence of
7 tack weld?

8 A. No. I don't remember that.

9 Q. You are not denying that he may have done
10 that or he did do that?

11 A. I'm not saying that at all.

12 Q. And you are not saying that Mr. Steve
13 Taraba didn't do anything other than a fair
14 investigation to determine the injury to
15 Mr. Shepherd, are you?

16 A. Steve Taraba?

17 Q. You know Mr. Taraba, do you not?

18 A. Yes.

19 Q. You are not saying he didn't do a proper
20 investigation?

21 A. I would think he would, yes.

22 Q. And you are not saying that Mr. Seoane
23 didn't do a proper investigation, are you?

24 A. No, sir, I'm not.

25 Q. Isn't it true that at the time this steel

1 beam -- these steel girts were being erected that
2 you never knew for any moment that they were not
3 tack welded after they were put on the clips?

4 MR. NORRIS: Your Honor, I don't
5 understand the question.

6 THE WITNESS: I'm sorry. I'm lost.

7 BY MR. AUFENGER:

8 Q. Isn't it true that you thought that these
9 particular girts were tack welded immediately after
10 they were released from the sling?

11 A. No, sir.

12 MR. AUFENGER: If you will give me a
13 moment, Judge. I had lost my way in here.

14 THE COURT: Page?

15 MR. AUFENGER: I'm on Page 87, Line 3.

16 BY MR. AUFENGER:

17 Q. The question was, "If it were not tack
18 welded, would you have roped off the area or
19 prohibited anyone else other than these ironworkers
20 from going into the area," and what's your answer?

21 A. "The beam would not have been released
22 from the sling if it were not tack welded."

23 Q. Isn't that totally inconsistent with what
24 you just told the jury under oath?

25 A. I don't know what led up to that question

1 and I don't know what beams you are talking about.

2 Q. Do you think there's something here that
3 explains that really?

4 A. I don't know.

5 Q. Now, you mentioned Dennis Cullen. He had
6 a completely different job from you, isn't that
7 true, the father or the son, both of them had a
8 totally different job, correct?

9 A. Yes.

10 Q. They didn't have anything to do with the
11 coordination of the trades like you had, correct?

12 A. If there was something that was being
13 done that other trades needed to do prior to, they
14 might.

15 Q. Meredith didn't have any safety policies
16 that related to these specific girls; isn't that
17 true?

18 A. No. Their safety policy was pretty
19 general over the whole as we are generals.

20 Q. Defense counsel has shown you Exhibits
21 22, 23, 24 and 25. All of those exhibits had
22 nothing to do with the securing of these particular
23 girls and the safety in that regard; isn't that
24 true?

25 A. Yes, sir. That is true.

1 Q. Isn't it true that you never had any
2 safety meeting where you specifically discussed the
3 erection and safe means regarding these girts?

4 A. Not specifically, no, sir.

5 Q. And it's my understanding from your
6 testimony that even today you recognize no danger
7 regarding a steel girt that is just sitting on its
8 erection clips; is that true?

9 A. Short of a hurricane, a seismic event or
10 a collision, yes, that's true.

11 MR. AUFENGER: Thank you.

12 THE COURT: It's 1:00, and I imagine that
13 both of you have some lengthy questions, or am I
14 wrong?

15 MR. NORRIS: I have some questions.

16 THE COURT: Let's take a lunch break.
17 You can step down. Please don't discuss your
18 testimony during the lunch break. Have a nice
19 lunch. The deputy will meet you down in the
20 lunchroom about 2:00, 2:05, something like that.

21 (The jury was excused for a luncheon
22 recess.)

23 MR. NORRIS: Point of clarification, am I
24 allowed to ask Mr. Bosley about a question I might
25 ask him as opposed to any testimony that he said?

1 THE COURT: If he was on the stand and we
2 kept going, you wouldn't have a chance to talk about
3 it. I assume you don't want him to or do you care?

4 MR. AUFENGER: We care.

5 THE COURT: Don't talk to him during
6 lunch. If there is something you need clarification
7 about that you want to ask him when we get started
8 before the jury comes out that you don't mind if
9 everybody hears in the courtroom, that's fine.
10 Otherwise we'll see you about five after 2:00.

11 (A luncheon recess was taken at this
12 time.)

13 (The jury returned was returned to the
14 courtroom.)

15 CROSS-EXAMINATION

16 BY MR. NORRIS:

17 Q. Afternoon, Mr. Bosley. Now, Atlantic was
18 a subcontractor to Virginia Carolina Steel; is that
19 right?

20 A. Yes, sir.

21 Q. W. B. Meredith had its contract with
22 Virginia Carolina Steel directly?

23 A. Yes, sir.

24 Q. Now, is it true that you as the
25 superintendent were on the site generally speaking

1 on a daily basis?

2 A. Every day.

3 Q. And it was part of your job description
4 to be aware of the activities on the site on a daily
5 basis?

6 A. Yes, sir.

7 Q. And you were reviewing the activity to
8 make sure that various trades were coordinated, the
9 work was progressing in accordance with schedule and
10 the work was being done generally speaking
11 correctly; is that a fair statement?

12 A. Yes, sir.

13 Q. And assisting you on this job was a
14 Mr. Cullen; is that right?

15 A. Yes.

16 Q. And he is the quality assurance or
17 quality control representative for Meredith?

18 A. Yes, quality control.

19 Q. And so he is on the job site daily also,
20 right?

21 A. Yes.

22 Q. And he is checking the job to make sure
23 that the various subcontractors are performing their
24 work in compliance with the contract documents,
25 correct?

1 A. That's correct.

2 Q. And he is also keeping an eye out for
3 safety?

4 A. Sure. Everybody was.

5 Q. And you've talked about a couple of the
6 Contractor Production Reports. You filled out those
7 reports every day, right?

8 A. Yes.

9 Q. You filled out one side and signed them
10 and Mr. Cullen filled out the other side and signed
11 them?

12 A. Yes.

13 Q. And the side that you filled out talked
14 about what work was being done and where and by
15 whom, that type of thing?

16 A. Yes, sir.

17 Q. Also mentioned whether there were any
18 safety meetings and whether any kind of actions had
19 to be taken about safety; is that right?

20 A. Yes.

21 Q. And then on Mr. Cullen's side of the
22 report he would list whether the work was being done
23 correctly, if it was being done in compliance with
24 the contract, those types of things?

25 A. Yes.

1 Q. And for all of the Contractor Production
2 Reports that were filled out from the beginning of
3 this job until the date of the accident, none of
4 them either as filled out by you or as filled out by
5 Mr. Cullen called into question the manner in which
6 Atlantic was setting, aligning and placing the
7 girts, correct?

8 A. Correct.

9 Q. Now, on the date of the accident, do you
10 remember some testimony that maybe as many as 40
11 girts had been set by that time?

12 A. Easily.

13 Q. And in your capacity as the
14 superintendent, being on the job site daily, you had
15 an opportunity to see these things actually being
16 set?

17 A. Yes.

18 Q. Would you agree with the testimony of
19 Mr. Doverspike and Mr. Brock that they are placed on
20 the bracket and then they have to be aligned with
21 other girts either next to them or below them,
22 sometimes they are hit with these mallets to move
23 them a little bit and they use a string line? Do
24 you agree with all that that; that's what you saw
25 out there?

1 A. Yes, sir. That was the methods that we
2 decided would be the best way to get to the end
3 result, yes.

4 Q. And then there would be a tack weld after
5 the alignment --

6 A. Yes.

7 Q. -- was set? That would be the alignment
8 not only of that particular girt but other girts as
9 well?

10 A. Yes.

11 Q. And then at a later time there would be a
12 final weld, sometimes called a production weld?

13 A. That's correct.

14 Q. And that would be a permanent weld all
15 along where the girt actually set on the clip?

16 A. Yes, sir.

17 Q. A much heavier, thicker, more durable
18 weld than a spot weld or a tack weld?

19 A. Yes, final weld.

20 Q. Now, Navy inspectors were out on that job
21 site as well, correct?

22 A. Daily. Generally daily.

23 Q. Mr. Taraba was the Navy inspector?

24 A. He was our CON rep, yes, sir.

25 Q. Did he have an opportunity to view what

1 you had an opportunity to view?

2 A. Yes.

3 Q. Any reason you know of he wouldn't see
4 the way these girls were being set and placed and
5 that type of thing?

6 A. What?

7 Q. As far as you know could he see how that
8 operation was taking place as well as you could?

9 A. Absolutely.

10 Q. And Mr. Taraba never issued to you a
11 citation, some written complaint about the way these
12 girls were being set?

13 A. No. If he could, he would have.

14 Q. Since you mention that, there was some
15 hostility on the job, was there not, between some
16 Meredith personnel and Mr. Taraba?

17 A. We didn't see eye to eye sometimes. We
18 didn't agree on everything, yes. I would say that.

19 Q. There were actually some incidents where
20 there were some severe shouting matches, vulgarities
21 being used to the point where Meredith actually
22 wrote a letter and complained to the Navy about
23 Mr. Taraba; isn't that so?

24 A. Something along those lines, yes, sir.

25 Q. Now, you talked about some production

1 reports that showed that safety issues did come up
2 from time to time. I want to make sure the jury
3 understands because the examples mention Atlantic
4 Welding. The safety infractions about tying off,
5 that has nothing to do with the girt, correct?

6 A. No, sir, not at all.

7 Q. That's when an employee doesn't tie
8 himself to a safety railing or safety rope so that
9 the employee won't fall off the building, right?

10 A. That's correct.

11 Q. And you had to remind Atlantic to do that
12 from time to time?

13 A. And other trades.

14 Q. And also I want to make sure it's clear
15 that when you met with Mr. Taraba at the very
16 beginning of the job and he had his list of things
17 about steel erection that he wanted to make sure was
18 covered, you mentioned about the need for bolting.
19 You agree that the girts didn't require bolting of
20 any kind, right?

21 A. No. They sat aside them.

22 Q. The bolting was for the vertical columns
23 that are bolted into the concrete?

24 A. That's one application of bolting that
25 was used there, yes, sir.

1 Q. And those bolts that were in the concrete
2 were actually set there by another contractor, not
3 by Atlantic?

4 A. Yes.

5 Q. And there was actually a problem where
6 Atlantic had to put its column into these
7 pre-existing bolt applications where it was out of
8 alignment?

9 A. Yes, there was.

10 Q. And the Navy wouldn't accept a building
11 without alignment in accordance with the plans and
12 specs, right?

13 A. No, not at all.

14 Q. Now, so far as you know, Mr. Bosley, is
15 it true that neither you nor any representative of
16 the Navy nor Mr. Cullen ever advised Atlantic about
17 any specific time frame that had to be followed in
18 which to finally secure the girts for the final
19 production weld?

20 A. No, sir.

21 Q. You are agreeing with me?

22 A. Yes, I am.

23 Q. You were asked about these girts being
24 laid for eight to ten hours. Do you recall
25 Mr. Brock's testimony that he would have put a tack

1 on this girt just before lunch?

2 A. I believe that's what he said, yes, sir.

3 Q. When was lunch typically on the job site?

4 A. Right around 12:00.

5 Q. When did the accident happen?

6 A. I'm going to say right around 2:00 to
7 3:00 if I remember correctly.

8 Q. If Mr. Brock is telling us the truth, if
9 he is remembering it correctly, then that girt had
10 been tack welded and was on the girt for two or
11 three hours before the accident happened, not eight
12 to ten hours?

13 A. That girt was set that day.

14 Q. You remember it was set that day?

15 A. Yes.

16 Q. Do you remember Mr. Godfrey's testimony,
17 Mr. Brock's testimony about the clip being missing
18 from that column?

19 A. Yes.

20 Q. Do you remember that clip didn't get
21 installed until the day of the accident?

22 A. That was a big to-do. Any alterations of
23 the fabrication of the steel in the field, the Navy
24 did not like that. I had to get permission if you
25 would to get that clip welded on there.

1 Q. So you have a specific recollection that
2 this girt was actually set the day of the accident?

3 A. That's what I remember.

4 Q. And you knew that there was welding going
5 on the day of the accident?

6 A. Yes. That's where they were working.

7 Q. And they were doing tack welding that
8 day, right?

9 A. I believe they were tack welding that day
10 and coming behind on the previous weld with the
11 production weld also.

12 Q. That was clearly visible to you, you
13 could see welders with the sparks and the bright
14 lights and their masks down; it was easy to see that
15 people were welding?

16 A. Yes, very apparent.

17 Q. Now, do you agree with all the witnesses
18 we have heard so far that the contract documents did
19 not require Atlantic to keep these girts in some
20 kind of a safety hoist?

21 A. Yes, I do.

22 Q. Now, you were pointed to some of your
23 deposition testimony where you were asked about
24 whether or not the girt should be in a hoist. Do
25 you recall that this girt was set with a forklift

1 and not with a hoist?

2 A. I believe it was a forklift.

3 Q. Now, you testified earlier that these
4 girts are heavy; is that right?

5 A. Yes.

6 Q. And they are sitting dead weight on the
7 clips, right?

8 A. Yes.

9 Q. And when you were asked whether in your
10 opinion they could remain overnight, I think you
11 said because overnight you are only worried about a
12 seismic event, talking about what an earthquake?

13 A. Yes, sir.

14 Q. A tornado of some kind?

15 A. Yes.

16 Q. Or a collision?

17 A. Yes.

18 Q. Do you agree that a tack weld is not
19 meant to prevent any of those three events?

20 A. No doubt.

21 Q. So the purpose of a tack weld, whether or
22 not it was on this girt, was not meant to keep the
23 girt from being knocked off the clips by a boom
24 truck, correct?

25 A. By a collision.

1 Q. Such as with a boom truck?

2 A. Such as with a boom truck.

3 Q. And it was not Atlantic's job to prevent
4 any collisions from occurring; do you agree with
5 that?

6 A. I couldn't see how they could possibly be
7 responsible for that, yes.

8 Q. Atlantic is not responsible for
9 coordinating other trades other than their own work,
10 correct?

11 A. That's correct.

12 Q. In fact, you told Mr. Godfrey that you
13 would use your best efforts to make sure nobody else
14 would work in their area when they were setting
15 their steel?

16 A. My best efforts, correct.

17 Q. As far as you know that's what
18 Mr. Godfrey thought on the day of this accident?

19 A. Absolutely.

20 Q. And nobody from Atlantic was present when
21 you had your discussions with the Wenger Tile
22 Company about their delivery, correct?

23 A. I don't believe so.

24 Q. And that's the purpose of what's called a
25 laydown area? Can you tell the jury what a laydown

1 area is? Am I using that term correctly, or a drop
2 zone?

3 A. A laydown area is a designated area on
4 the job site for materials. This is a loading area
5 if I would call it something.

6 Q. Would you agree with me that Atlantic had
7 no reason to think that any materials were going to
8 be off-loaded in the area where this accident
9 happened on the day it happened?

10 A. No, sir.

11 Q. No, they didn't know?

12 A. No, they did not know.

13 Q. Would you also agree that as far as
14 cordoning off, the contract didn't require Atlantic
15 to cordon off its work; is that correct?

16 A. I would say so, yes.

17 Q. And the Navy in any of these
18 preconstruction meetings didn't specifically raise
19 as an issue that it needed to cordon off its area,
20 correct?

21 A. That is correct.

22 Q. Now, I can imagine it's a little
23 nerve-wracking to be sitting up there and answering
24 questions and everybody is thumbing through
25 deposition transcripts, and "You said this on this

1 day," but I'm going to show you some testimony you
2 gave earlier in the deposition. I'm going to ask
3 you if it refreshes your recollection about what you
4 said in your deposition. Do you remember saying
5 that the girt that fell on the day of the accident
6 had been tack welded?

7 A. No. I don't remember saying that.

8 Q. I am going to show you your deposition,
9 and I'm going to look at Pages 52, 53 and 87. This
10 deposition was given by you at my office in August
11 of 1999; is that right, sir?

12 A. A year ago.

13 Q. Do you think you remembered things a year
14 ago better than you do today?

15 A. I would think so.

16 Q. Now, on Page 52 you were asked, "Did you
17 make any determination as to whether the boom --
18 excuse me -- whether the girt had been welded prior
19 to it becoming dislodged?" And you answered, "It
20 appeared that it had been"?

21 A. Yes.

22 Q. Do you remember giving that answer at
23 that time?

24 A. Yes, I do.

25 Q. And on Page 73 you were asked, "Now, you

1 testified today and you told Mr. Seoane the day
2 after it happened that you thought the girts were
3 tack welded." Do you remember saying yes, sir?

4 A. Yes. Apparently I did.

5 Q. Do you remember telling Mr. Seoane when
6 he came out to investigate that the girts had been
7 tacked?

8 A. Yes.

9 Q. That was in his report, wasn't it?

10 A. Yes, I believe it was.

11 Q. That you told him that they had been
12 tacked?

13 A. Yes.

14 Q. And on Page 87 at the bottom of the page
15 you were asked, "So you would have seen no reason to
16 rope off an area underneath this while there was
17 this beam that was not welded into final position or
18 even temporarily into position," and you answered,
19 "It was tack welded." Do you remember saying that?

20 A. Yes, I did.

21 Q. Does this refresh your recollection,
22 Mr. Bosley, whether that girt in your opinion had
23 been tack welded on the day of the incident?

24 MR. AUFENGER: Judge, I would ask him to
25 at least indicate what time he is talking about,

1 does he think it's today or afterwards or before?
2 It's a wide open question and I think it needs
3 clarification.

4 THE COURT: I think he said before the
5 accident. Maybe I heard the question wrong.

6 BY MR. NORRIS:

7 Q. Let me be clearer. You can't tell
8 anybody today that you made some specific
9 observation of the girt when it was on the clip
10 before it got knocked off, correct?

11 A. I would say I observed the girt on the
12 clip but not in an up-close fashion.

13 Q. Are you able to say when you observed it
14 on the clip you could see a spot weld?

15 A. No, I could not.

16 Q. Do you remember noting whether or not
17 there was a weld?

18 A. Not while it was in the air. What I
19 said, when I saw it on the truck I noted a weld.

20 Q. That's what I was getting to.

21 A. That's where the weld came from. That's
22 where I noticed that it had been spot welded, tack
23 welded or what have you.

24 Q. Do you remember in your deposition you
25 were shown the smaller version of this photograph

1 which is now Plaintiff's Exhibit 15?

2 A. Yes. That's what I saw.

3 Q. Do you remember saying when you came out
4 to the scene you looked to the site, that you did
5 see this on the girt?

6 A. Yes, I did.

7 Q. Does that look like a tack weld to you?

8 A. It appears to be. It's in the proper
9 location of where the clip would have been.

10 Q. Now, Mr. Seoane testified that he looked
11 at the girt and didn't see a tack weld.

12 A. I'm not sure what girt he was looking at.

13 Q. And Mr. Seoane said that he went with
14 you, maybe Mr. Cullen, either you or Mr. Cullen, and
15 he went up on a ladder with either you or Mr. Cullen
16 and he went up and he looked at the clip and saw
17 there wasn't a tack weld. Were you ever with
18 Mr. Seoane when he went up on a ladder and looked at
19 this clip?

20 A. I don't remember that.

21 Q. Now, Mr. Godfrey told you that it had
22 been tacked that day, didn't he?

23 A. I believe he did, yes, sir.

24 Q. Did anybody tell you that the girt hadn't
25 been tacked the day this incident happened?

1 A. No.

2 Q. Mr. Bosley, how long did you remain at
3 the accident scene after the accident happened?

4 A. I would say until -- I can't actually
5 say, but I was one of the last to leave. How about
6 that?

7 Q. The Navy told everybody they had to
8 leave?

9 A. It was time to go. They shut the
10 compound down and everybody out. It's a secured
11 area.

12 Q. At that time did you remain in the
13 general proximity of the truck and the girl that had
14 fallen?

15 A. Absolutely.

16 Q. Did anybody get up there and make a fake
17 weld on that beam?

18 A. Absolutely not.

19 Q. Could that have happened, sir?

20 A. If it did I think I would have seen it.

21 Q. Was the area secured by the Navy when you
22 left?

23 A. Yes.

24 Q. Was anybody allowed access back onto the
25 site after everybody was told to leave?

1 A. No.

2 Q. Now, a tack weld wouldn't have prevented
3 this accident, would it?

4 A. No.

5 MR. AUFENGER: He doesn't know. That's
6 speculation.

7 THE COURT: Sustained.

8 BY MR. NORRIS:

9 Q. Would an Activity Hazard Analysis have
10 prevented this accident, Mr. Bosley?

11 A. I can't see how.

12 Q. Mr. Taraba never requested you to give
13 him one, correct?

14 A. No, sir.

15 Q. And you never requested one of Virginia
16 Carolina Steel, correct?

17 A. No, sir.

18 Q. Nor did you ever request one of Atlantic
19 Welding & Fabricating?

20 A. No, I did not.

21 Q. Can you think of any hazard that was
22 involved in the steel erection process that the
23 government was not aware of either from your
24 conversations with Mr. Taraba at the very beginning
25 of the job when he provided you lists of concerns or

1 from his daily inspections or frequent inspections
2 to the site?

3 A. Would you please say that one more time?

4 Q. Can you think of any hazard that you
5 could have told the government about that they
6 weren't already aware of insofar as the steel
7 erection process was concerned?

8 A. Not that was already noted. No, sir.

9 Q. In your capacity as the project
10 superintendent you had to fill out a Significant
11 Incident Report which is marked as Plaintiff's
12 Exhibit 22?

13 A. Yes, sir.

14 Q. Did you do this -- the report is dated
15 November 14th of '96?

16 A. I believe I did it -- apparently I did it
17 that day.

18 Q. Do you say anywhere in this report that
19 the girt was not tack welded?

20 A. No, sir, I don't believe I did.

21 Q. Now, I think you were asked on
22 cross-examination by plaintiff's counsel were you
23 aware that when the government wrote their letter
24 complaining of this situation that they determined
25 that all kinds of girts hadn't been tack welded. Do

1 you remember being asked about that?

2 A. No. I was not.

3 Q. I wrote it down that you were asked
4 that. I think your answer was that you weren't
5 aware of that. Is the reason you weren't aware of
6 it because it wasn't true?

7 A. That's the way I see it, yes, sir.

8 Q. In fact, that letter from the government
9 saying certain things happened and certain
10 violations occurred wasn't accurate, was it?

11 A. It didn't appear to be, no.

12 Q. And, in fact, did you review in this case
13 Mr. Seoane's report?

14 A. No, I did not.

15 Q. Have you ever seen his report?
16 Mr. Seoane, if I can show you his report of November
17 15th of 1996, nowhere in his report does he say that
18 he went up on a ladder with you to look at clips;
19 would you agree with that?

20 A. I would have to take a few minutes to
21 read the whole report. Yes, it does. It says --

22 Q. Does he say that you went with him?

23 A. No. It doesn't say that I went with him,
24 but he said that he inspected the girt clips.

25 Q. But it doesn't say that you went up on

1 the ladder with him?

2 A. No.

3 Q. It doesn't say Mr. Cullen went with him?

4 A. No.

5 Q. It doesn't say anywhere in this report
6 that he found all kinds of girts that weren't
7 tacked. He only speaks as far as this one
8 particular girt?

9 A. As far as I have read, no, sir, it does
10 not state that.

11 Q. Now, after this accident happened, do you
12 remember you went to the Wenger people and asked
13 them why they were off-loading in this particular
14 area?

15 A. Yes.

16 Q. Didn't they tell you that they off-loaded
17 this area so they would have to carry the drywall a
18 lesser distance?

19 A. Yes. That was basically their answer.

20 Q. As a convenience to them?

21 A. Absolutely.

22 MR. NORRIS: That's all I have.

23 THE COURT: Redirect?

24 REDIRECT EXAMINATION

25 BY MS. SPENCE:

1 Q. You've never personally worked yourself
2 as a steel erector, have you?

3 A. No, I have not.

4 Q. I believe on Page 8 when counsel
5 questioned you about your deposition, wasn't he
6 asking you about your firsthand experience with
7 steel erection?

8 A. I believe that's what he was asking.

9 Q. Permission to approach the witness and
10 put in context what you were asked previously.
11 Would you go ahead and read from Line 16 to 22?

12 A. "QUESTION: Okay. Now, in any of your
13 construction experience do you have any firsthand
14 experience with steel erection?" My answer was,
15 "Not firsthand." And the question, "Okay. With
16 Contempra Building did you have any steel erection
17 experience with that company," and my answer was,
18 "No, sir." And then the question, "That was all
19 carpentry work?" "Yes, sir."

20 Q. But you have supervised steel erection?

21 A. Yes.

22 Q. What project had you seen steel tubes or
23 girts placed before?

24 A. It was project N-23 in Norfolk Naval
25 Base.

1 Q. And that was a renovation?

2 A. Yes. It was a renovation.

3 Q. Any difference in the procedure between
4 renovation and new construction?

5 A. It's all building a building to me.

6 Q. How big was N-23, how high?

7 A. That was -- well, where the steel was set
8 was actually in the clear story, which would have
9 been the third story.

10 Q. Now, you mentioned that you might have
11 let Mr. Shepherd off-load in the southeast corner if
12 you had been asked but that you would have done some
13 things first. You mentioned people?

14 A. Yes.

15 Q. What about checking security of the
16 beams?

17 A. I would have made sure he had adequate
18 off-loading area like he had in the first place.

19 Q. If that girt was right there --

20 A. It wouldn't have made any sense to work
21 in such tight quarters when we had a big open bay
22 like we had.

23 Q. But were you ever asked?

24 A. No, I was not.

25 Q. Where did you tell them to off-load?

1 A. In the first area over the low roof area
2 that they were set up that I saw.

3 Q. Did you discuss the methods of girt
4 erection with Godfrey or Doverspike before the girt
5 erection process got started?

6 A. Yes. We did have a meeting about that
7 because there were some concerns on the methods that
8 we would use and that's what we heard here is what
9 we concluded.

10 Q. Now, Mr. Aufenger asked you if you had
11 documented that meeting. Did you document every
12 single meeting or conversation you had with the
13 subcontractor?

14 A. Ma'am, I would have a Bible by now.

15 Q. Which meetings did you have to document?

16 A. The ones that the Navy requested.

17 Q. And which ones were those?

18 A. The safety meetings, the preconstruction
19 meetings, the daily reports.

20 Q. When you and Mr. Seoane walked the site,
21 did Mr. Cullen walk with you?

22 A. I don't remember.

23 Q. Did Mr. Cullen get up on any ladders?

24 A. I don't think so, no.

25 Q. What steel members have to be bolted or

1 welded before they are released from their hoists?

2 A. Structural beams that have a bolted
3 attachment would have to be bolted. You couldn't
4 just stand a column up without putting the nuts on
5 the anchor bolts, anything that was hoisted had to
6 be stabilized and secured before the hoists were
7 allowed to be removed.

8 Q. Did those provisions apply to tube steel
9 as far as you know?

10 A. As far as secured being welded, not
11 clearly, no.

12 Q. You said that there was nothing requiring
13 Atlantic Welding to rope off the area. Was there
14 anything requiring you to rope off the area where
15 Atlantic Welding was working?

16 A. No.

17 Q. Was the girt tacked to your knowledge
18 before this accident as far as you know?

19 A. As far as I know it would have been, yes.

20 Q. Then as far as you know did
21 Mr. Shepherd's boom truck break that tack?

22 A. That's what it appeared after the fact,
23 yes.

24 MS. SPENCE: That's all I have.

25 THE COURT: Thank you, sir. You may step

1 down. Ms. Spence, you said only one, but have you
2 changed your mind?

3 MS. SPENCE: I have not changed my mind.
4 That's it.

5 THE COURT: Do we have any rebuttal?

6 MR. SMIRCINA: One witness, Manny
7 Seoane.

8 THE COURT: You were previously sworn
9 when you were here the other day so you are still
10 under oath.

11 MANUAL SEOANE, called as a rebuttal
12 witness by and on behalf of the Plaintiff, having
13 been first duly sworn, was examined and testified as
14 follows:

15 DIRECT EXAMINATION (Rebuttal)

16 BY MR. SMIRCINA:

17 Q. Good afternoon, Mr. Seoane. Welcome
18 back. State your name again for the jury.

19 A. Manual Seoane.

20 Q. Are you a Navy safety investigator who
21 investigated the accident in November, 1996 for the
22 Dam Neck installation?

23 A. Yes.

24 Q. Will you please detail for the jury your
25 work history as it relates to welding, your work and

1 educational experience as relates to welding?

2 A. With the government, ongoing training for
3 welding inspections, again, not an internal type of
4 weld, visual inspections. For welding itself, I
5 took a five-month course in 1968. I took another
6 course in 1973 for pipe fitting and welding and,
7 again, various courses with the government for
8 inspection type work.

9 Q. What kind of course did you take in '68?

10 A. Welding. It was actually welding and
11 brazing as well.

12 Q. Where did that welding education take
13 place?

14 A. It was in the Navy and I took it also
15 prior, in 1966. That was in high school a welding
16 course.

17 Q. What about within the trade, did you ever
18 do any welding professionally at all?

19 A. While I was in the Navy I did, but not
20 out in the trades. I did it in the Navy.

21 Q. Concerning your work now for the Navy,
22 how long have you been responsible for checking
23 welds and welding of various kinds?

24 A. Twenty-two years.

25 Q. How many welds do you think you have

1 inspected during that time period?

2 A. I've got to say thousands. There are so
3 many on a job, different types of welds.

4 Q. Would you please explain how welding
5 works, how do people actually affix welds?

6 A. There are different types. The type that
7 we usually run into on our projects are for
8 structural steel, for construction itself. They
9 have a welding machine, DC current, discharging
10 current. They'll hook a ground lead to the
11 structural steel and then they would have another
12 lead called a stinger with a welding rod on it.
13 When it makes contact it completes the circuit and
14 melts the rod and the steel. Depending on the type
15 of steel you would increase the amperage which gives
16 you more heat and make the weld penetrations deeper.

17 Q. Do you have a picture of a welding
18 machine that you can show the jury?

19 A. Yes.

20 MR. SMIRCINA: Before we begin that, I
21 move to qualify him as an expert in the field of
22 welding.

23 MR. NORRIS: Objection. Mr. Seoane has
24 not been identified as an expert in the field of
25 welding. He was identified only to the issues

1 raised in his report.

2 MR. SMIRCINA: It's rebuttal. We don't
3 have to disclose.

4 MR. NORRIS: If we could approach. This
5 whole case is about welding.

6 THE COURT: Approach. As a matter of
7 fact, ladies and gentlemen, why don't you step in
8 the back room for a minute?

9 (The jury withdrew from the courtroom.)

10 MR. SMIRCINA: At the time we gave our
11 case in chief there was nobody that identified that
12 this was a tack weld in any way, shape or form.
13 Several witnesses have come forward, all of them
14 interested parties I might add, and said that this
15 black mark on this beam is tack welding, is evidence
16 of tack welding. I'm going to go no further with
17 him than explain how tack welding works, what's
18 actually done when there is a weld, have him view
19 the picture and have him explain to the jury why
20 this is not a tack weld. I don't see anything
21 improper about the testimony whatsoever. He has the
22 experience, he has the knowledge and the fact is
23 it's a critical point and issue and his voice should
24 be heard, and it's rebuttal.

25 MR. NORRIS: Your Honor, this case has

1 been about whether this girt was tack welded from
2 the first day and we asked the plaintiff from the
3 first day who your expert witnesses are going to be,
4 what are their opinions going to be. Nobody was
5 ever identified as an expert that the marks on the
6 photographs which is Plaintiff's Exhibit 15 do not
7 appear to be marks of a tack weld. That has never
8 been identified as expert testimony and we were
9 never told that Mr. Seoane would be offered as an
10 expert to say this is not a tack weld. That's the
11 crux of the case. It's the meat of the case and
12 it's nothing more than a ploy to hold that evidence
13 until after you put your case on in chief and call
14 it rebuttal. This is the whole --

15 THE COURT: By his own testimony that
16 mark wasn't on there when he inspected it, right,
17 and the burn wasn't on there when he inspected it?

18 MR. SMIRCINA: Yes. And now people have
19 identified that burn as a tack weld which was not in
20 our case.

21 THE COURT: If he asked him whether it
22 was a tack weld or wasn't a tack weld at the
23 beginning, you would have objected because --

24 MR. SMIRCINA: Heavens, no. I tried to
25 get this evidence in and Mr. Norris said we have not

1 identified. I said we're going to do it now or on
2 rebuttal which is my right.

3 MR. NORRIS: No. Your Honor, he tried to
4 get the witness to say does this look like a tack
5 weld. It's okay for him to say that wasn't there
6 when I looked at it, but this doesn't look like a
7 tack weld to me I objected and I said Mr. Seoane has
8 not been identified as an expert to express an
9 opinion on what does a tack weld look like, and you
10 sustained the objection and Mr. Smircina said, well,
11 I'm going to bring him back and say that. You
12 didn't rule on that but the issue hasn't changed
13 from your initial ruling that he is being asked to
14 offer an expert opinion he could have offered in
15 plaintiff's case in chief but for the fact he has
16 never been identified as an expert. I could have
17 taken his deposition and asked him stuff like why
18 does this look like a tack weld or not look like a
19 tack weld.

20 MR. SMIRCINA: It's rebuttal, Your
21 Honor. There are legal difficulties with getting
22 Navy personnel to express opinions. Those
23 difficulties have been breached. This is rebuttal
24 testimony. I could bring anybody in the world in
25 here, anybody to talk about that tack weld right

1 now, anybody if I qualified him as an expert in
2 welding. The fact that it's Mr. Seoane is only a
3 matter of happenstance and, therefore I am entitled
4 to put this evidence on.

5 THE COURT: Ms. Spence?

6 MS. SPENCE: If I might add, rebuttal
7 testimony is within the discretion of the Court and
8 often not granted when the testimony is cumulative
9 or part of what would have been, could have been and
10 already has been introduced in the plaintiff's case
11 in chief.

12 THE COURT: The plaintiff was under no
13 obligation to prove that that was a tack weld
14 because actually their contention is it wasn't tack
15 welded and I have a hunch they are going to argue
16 since their witness said it wasn't there that there
17 was no tack weld on there and from the questions
18 I've been hearing there probably would be some
19 mention to the fact that maybe it happened after the
20 accident happened. Be that as it may, that was not
21 part of their proof. It was part of your proof that
22 it was there and then you raised the issue that that
23 was a tack weld and that was there. It is perfectly
24 legitimate for them to put on rebuttal evidence as
25 to whether or not it's a tack weld after you-all put

1 on proof that your people said it was there and it
2 was a tack weld.

3 You have made your record. You have
4 stated your objections and I understand you are
5 going to be upset with my ruling. Nonetheless, it's
6 going to stand. The jury is going to come back and
7 I'm going to let him ask the questions.

8 MR. NORRIS: Can I say one other thing?
9 Would the plaintiff be allowed to bring in a civil
10 engineer at this point never identified in
11 discovery?

12 THE COURT: In rebuttal, yes, they
13 would.

14 MR. NORRIS: I respectfully disagree.
15 Then there's no purpose to discovery.

16 THE COURT: I am beginning to believe as
17 Judge Russo does that it should be done away with,
18 but I'm not queen for a day yet so let's bring the
19 jury back.

20 (The jury was returned to the courtroom.)

21 MR. SMIRCINA: I believe I moved to
22 qualify him as an expert in welding and I take it it
23 has been granted by the Court?

24 THE COURT: Yes.

25 MR. NORRIS: Subject to questions on

1 cross-examination.

2 BY MR. SMIRCINA:

3 Q. Mr. Seoane, you have a diagram explaining
4 a welding machine for the benefit of the jury, do
5 you not?

6 A. Yes, I do.

7 Q. Would you show that to the jury and
8 explain it briefly?

9 A. What they are showing here is a power
10 source, is the welding machine itself. I have
11 copies.

12 THE COURT: Does it look unlike the
13 drawings that we have otherwise?

14 MR. SMIRCINA: I don't remember the
15 drawings off the top of my head.

16 THE WITNESS: The basics, the power
17 source is the welding machine. To complete a
18 circuit you would have to hook a clip, fork lead to
19 the structural steel, to the steel member, whatever
20 you are going to weld on. The other lead, the
21 stinger, has a welding rod in it. The power source
22 is here. Depending on the thickness of the material
23 you are going to use, type of rod, you would
24 increase your power rod for penetration. If either
25 one of these aren't in contact, you have no weld.

1 The clamp has to be in contact with the steel to
2 complete the circuit. It kind of acts like a
3 switch.

4 BY MR. SMIRCINA:

5 Q. Do you know what a tack weld looks like,
6 Mr. Seoane?

7 A. Yes.

8 Q. Using this diagram, would you please
9 explain a tack weld to the jury?

10 A. A tack weld, this area here, if this was
11 the clip that was set in position, steel column and
12 a steel girt, the tack weld would be put in a
13 position to hold this steel girt to this clip. This
14 would be a tack weld. Again, this would be
15 partial. If you were looking down on the clip and
16 this is the length of the clip, they would put a
17 small segment somewhere in the center to secure this
18 position.

19 Q. What would happen if a tack weld was
20 broken?

21 A. If the weld broke itself, as you can see
22 on the penetration of it you've got the steel girt
23 and the clip and the weld fills this area here. If
24 these two were separated, the weld would break
25 away. The weld would be either a half a weld on the

1 steel girt or you would still have fragments up on
2 the clip.

3 MR. SMIRCINA: I would move to identify
4 these exhibits into evidence.

5 MR. NORRIS: I object, Your Honor. First
6 of all, I haven't even seen them. Secondly, they
7 are full of speculation. If separated, they assume
8 where the tack weld is in relation to the clip.
9 None of this has been supported by any factual
10 foundation evidence for this witness. He has come
11 up with his own drawing, no trace of a tack weld --

12 THE COURT: I'll mark them for
13 identification at this point.

14 MR. SMIRCINA: I only seek to introduce
15 this picture.

16 THE COURT: Separate out what you want to
17 mark.

18 MR. SMIRCINA: We are going to go through
19 this one which I will give Mr. Norris a copy and
20 Ms. Spence.

21 THE COURT: So one, two or three?

22 MR. SMIRCINA: There are two pages. I
23 guess you could make it a unitary exhibit.

24 THE COURT: I'll staple them together and
25 mark them for Identification as Number 31.

1 (The document was marked for
2 identification by the Court as Plaintiff's Exhibit
3 31.)

4 BY MR. SMIRCINA:

5 Q. Now that I have torn up your paperwork,
6 Mr. Seoane -- you prepared this drawing, did you
7 not?

8 A. Yes.

9 Q. And this drawing is meant to represent an
10 eight inch by eight inch steel girt on the top of
11 the page; is that right?

12 A. Yes.

13 Q. And this is meant to represent the
14 bracket upon the girt in this case was resting
15 against the vertical column of the building?

16 A. The clip, yes.

17 Q. And you are saying the tack weld --

18 MR. NORRIS: Object to leading.

19 THE COURT: Sustained.

20 BY MR. SMIRCINA:

21 Q. What does this black mark represent?

22 A. A profile view of the tack weld.

23 Q. You are not trying to say the tack weld
24 would extend the entire length of the bracket, would
25 it?

1 A. No.

2 Q. How big would a tack weld typically be?

3 A. Close to three-quarters of an inch to an
4 inch.

5 MR. NORRIS: Object to the question and
6 answer. There is no foundation made that this
7 witness has been on this construction site before
8 the date of this investigation, how many tacks he
9 investigated, whether he took measurements, totally
10 without foundation.

11 THE COURT: Said he inspected thousands
12 of welds in the 29 years of the Navy. If you want
13 to make sure which ones are comparable to what is on
14 site, why don't you do that?

15 BY MR. SMIRCINA:

16 Q. How many welds of a tack weld variety do
17 you think you have looked at in your experience with
18 the Department of the Navy?

19 A. I would say compared to regular welds,
20 probably 30 percent.

21 Q. And how many welds do you think you have
22 looked at totally while working for the government?

23 A. In excess of thousands. It's an ongoing
24 thing.

25 Q. So you know what a tack weld looks like?

1 A. Yes.

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

4 A. Yes.

5 Q. And you have a general idea and a good
6 idea how big a tack weld should be?

7 A. Yes, sir.

8 MR. SMIRCINA: May I continue, Your
9 Honor?

10 THE COURT: How many tack welds have you
11 looked at or investigated on girts that are resting
12 on clips like the ones in the case today?

13 THE WITNESS: I would say it's in the
14 hundreds. It's a procedure when a girt is set, tack
15 weld is put into position. Other structural members
16 are tack welded into position.

17 THE COURT: I'm going to let him answer
18 the question.

19 BY MR. SMIRCINA:

20 Q. So the bottom part of the page of this
21 diagram you have a thing labeled "eight inch by
22 eight inch steel girt." What does that indicate?

23 A. That's a representation of the girt
24 itself.

25 Q. And what is the representation of the

1 semicircle pointed to, "tack weld if separated or
2 broken from clip"?

3 A. From past experience if a weld has broke
4 off of a tack weld, only part of the weld remains.
5 Where it would break and sever it would come off the
6 girt or clip or it can split and come a little off
7 each one.

8 Q. On this page, why don't you come down
9 again so the jury can see. This one would be a
10 little harder now. You have an eight inch by eight
11 inch steel girt here, representation of it?

12 A. Yes, sir.

13 Q. What is the small little square you have
14 here labeled?

15 A. A representation of the tack weld, the
16 location it would have been on a profile.

17 Q. Where would it have been exactly touching
18 both the girt and bracket?

19 A. Yes.

20 Q. Must touch the girt and bracket?

21 A. Yes. Definition of a tack weld is to
22 hold into position two pieces of metal and the
23 purposes of the tack weld. It wouldn't do any good
24 to be out here on the girt because it wouldn't hold
25 anything. The position is to hold it on the clip.

1 Q. Mr. Seoane, I have in my hand Plaintiff's
2 Exhibit 15. You've looked at this. You said you
3 looked at the girt that day, the next morning when
4 you came out and you saw no evidence of a tack weld?

5 A. No, sir.

6 Q. Why is this black dot not evidence of a
7 tack weld?

8 A. If this had been a tack weld, you would
9 have material -- this here is a bead that was run on
10 it. This is the flux that comes off the rod.

11 Q. What is a bead?

12 A. A welding bead where the electrode in the
13 picture that I had -- when the electrode comes down
14 to the metal and it's arcing, you would work a
15 swirled position to form the bead, again, for the
16 penetration. But that's what that would have been,
17 just a bead run.

18 Q. What are these black marks then?

19 A. This here, it's common to pick off a bead
20 that's been run and it's the glaze left over from
21 the flux from the rod itself. This here is also
22 common for a ground clamp to go on and held into
23 position. It will arc where it is attached.

24 Q. The bracket in this case is about three
25 inches from the edge, in other words, about three

1 inches of this beam would sit on the bracket. Is
2 that not right, a little less?

3 A. It would be back to the column maybe some
4 clearance, maybe an eighth of an inch depending on
5 the steel. It would set it down, the girt here, and
6 the tack weld would have been placed here
7 (indicating).

8 Q. How is it that this black mark got
9 there? We've had explanations that the electricity
10 jumped through that and made that mark somehow.

11 A. If this was up and the girt was down on
12 top, there is a probability to get arcing but you
13 wouldn't have it --

14 MR. NORRIS: Now he is testifying way
15 beyond what a tack weld looks like. Now he is
16 testifying to how the welding process works and
17 arcing and the currents and where they go.

18 THE COURT: Overruled.

19 BY MR. SMIRCINA:

20 Q. Please proceed, Mr. Seoane.

21 A. If the girt, the steel member, was
22 sitting on this piece here and there was arcing, the
23 arcing would be caused by the movement of the girt
24 and you would have other burn patterns as well.
25 This is stationary and solid. I had a picture of

1 typical clips used in construction practice. As far
2 as shop welding like the guys are welding at a
3 bench, the types of clamps that go on here, fit
4 basically this way and reaches in. Where it
5 attaches it will arc and cause a burn.

6 Q. In your opinion is there any way that
7 those two burn marks were made while that steel girt
8 was on that bracket?

9 A. In my opinion, no.

10 Q. And what is this little golden spot,
11 again?

12 A. It's a clean bead from the weld. It's
13 shiny. When welders are working and running the
14 bead, the glaze would be under. If they were to
15 chip this off, the entire piece back through here,
16 it would also look the same.

17 Q. So, in other words, this is a piece of
18 metal that has never been broken?

19 A. Correct.

20 Q. In your opinion?

21 A. Right.

22 MR. SMIRCINA: I move for the
23 introduction of the exhibits that have been
24 previously marked.

25 MR. NORRIS: I object, Your Honor. They

1 are replete with narrative comments from the
2 witness.

3 THE COURT: I'm going to mark them as
4 Number 31. You'll have them available to
5 cross-examine him. Do you have any other questions
6 for the witness?

7 MR. SMIRCINA: No, ma'am.

8 (The documents previously marked for
9 identification by the Court as Plaintiff's Exhibit
10 31, were received into evidence.)

11 CROSS-EXAMINATION (Rebuttal)

12 BY MR. NORRIS:

13 Q. So, Mr. Seoane, you are a welding expert;
14 is that what you are telling the jury?

15 A. As far as looking at welds.

16 Q. Are you a welding expert?

17 A. By LANTDIV I'm considered to be a
18 welding --

19 Q. Do you consider yourself to be an expert
20 welder?

21 A. That's a loaded question.

22 Q. You bet.

23 MR. AUFENGER: He's already been
24 recognized by the Court as an expert. It's a legal
25 question.

1 MR. NORRIS: Nobody asked Mr. Seoane.

2 MR. AUFENGER: For welded inspections.

3 THE COURT: He was qualified to look at
4 welds.

5 MR. NORRIS: Am I allowed to ask the
6 witness?

7 THE COURT: You are allowed.

8 BY MR. NORRIS:

9 Q. Do you consider yourself a welding
10 expert?

11 A. In the field of inspection.

12 Q. Have you ever been employed as a welder?

13 A. Yes, while with the Navy. I welded in
14 the Navy.

15 Q. In the private commercial field have you
16 ever been hired to do welding?

17 A. I worked with the government as an
18 inspector. No.

19 Q. Do you not understand my question? Have
20 you ever been hired out in the private field, in the
21 commercial field to do welding work?

22 A. No.

23 Q. Your sole experience is in inspecting
24 welds, right? You inspect welds?

25 A. Yes. I do inspect welds.

1 Q. For the Navy?

2 A. Yes.

3 Q. You never inspected any of the welds on
4 this job before this accident happened, correct?

5 A. No, sir.

6 Q. No, that's not correct?

7 A. No. I haven't. I wasn't there before
8 the day of the accident.

9 Q. The day of the accident was the -- the
10 day after the accident was the first time you had
11 been there?

12 A. Yes, sir.

13 Q. So you never saw how the girts were
14 placed, correct?

15 A. That's right.

16 Q. You never saw how the welders made their
17 tack welds, correct?

18 A. Not in this particular girt.

19 Q. Well, you never saw them work on any of
20 the girts, did you?

21 A. Yes, I did. It's in my deposition.

22 Q. Before the date of this accident had you
23 ever been out there and watched any of these welders
24 weld on any of these girts?

25 A. Not before the accident.

1 Q. Now, as I understand your testimony why
2 don't you just come out and say it, you are telling
3 the jury that somebody faked a weld on this; isn't
4 that what you are saying?

5 A. I'm saying that the weld was put on there
6 but it wasn't part of a tack weld.

7 Q. No. You are saying that this got on
8 there after you looked at it?

9 A. I'm saying there was no tack weld the day
10 that I went out there.

11 Q. Hang with me, Mr. Seoane. You are saying
12 that this -- these two marks were on this beam after
13 you looked at it; isn't that what you are saying?

14 A. That's what I'm saying.

15 Q. Because you don't remember seeing it when
16 you looked at it?

17 A. No, I don't.

18 Q. So if the Navy photographer testified he
19 took these pictures the day before you went out
20 there, he is mistaken?

21 A. If the Navy photographer made that
22 statement, I would state he was instructed to go out
23 after my investigation because I couldn't take
24 photographs.

25 Q. If the Navy photographer testified he

1 took this picture the day of the accident, when he
2 got there the plaintiff was on the ground, he is
3 mistaken; is that what you are saying?

4 A. I have no idea when he took the
5 photographs. I wasn't privy when he did that.

6 Q. When you did your inspection and you saw
7 that there wasn't any tack welding on the girt, that
8 was pretty important to you, wasn't it?

9 A. Yes, it was.

10 Q. And you said I want some pictures not
11 only of the girt but of the clips to show that they
12 weren't welded?

13 A. On the entire site, yes.

14 Q. And we have introduced 40 pictures taken
15 by the Navy photographer when he got there the day
16 of the accident and here they are. Now, I want you
17 to show me the picture of the girt at this end
18 without the welds on it the way you saw it.

19 A. Can I comment on these pictures?

20 Q. No, sir. I want you to tell me which of
21 the photographs shows this end of the girt without a
22 weld on it.

23 A. There aren't any.

24 Q. There aren't any?

25 A. Uh-huh.

1 Q. So either the Navy photographer dreamed
2 up in his head that he was there when the plaintiff
3 was lying on the ground and that he took all his
4 pictures that day and it took him about 45 minutes
5 to an hour to do it or you are mistaken that you
6 missed that tack weld; one of those two has to be
7 so, doesn't it?

8 A. Am I allowed to comment on these
9 pictures?

10 THE COURT: Answer counsel's question.

11 THE WITNESS: I didn't see him.

12 BY MR. NORRIS:

13 Q. Now, as I understand it, though, your
14 theory is that somebody came along to this girt and
15 they put a clamp here, isn't that your testimony,
16 right here?

17 A. Yes, sir.

18 Q. And that when they tried to strike this
19 burn, it wasn't a tack, right?

20 A. Right.

21 Q. Because you don't see any evidence of a
22 break here on this picture?

23 A. That's correct.

24 Q. You must be an expert in examining
25 photographs I take it; is that part of your

1 repertoire as well?

2 A. No. But I can tell what a tack weld is
3 from a photograph.

4 Q. Do you know who Ed Shelton is?

5 A. No idea.

6 Q. Do you know that he's been in the steel
7 business for over 30 years?

8 A. No.

9 Q. Did you know he said this looks like a
10 tack? He is mistaken, too?

11 A. No idea.

12 Q. Somebody put a clamp here and that
13 created an arc and this second mark here is an arc
14 from a clamp; is that your testimony?

15 A. That's my opinion.

16 Q. Now, what color is that girt? It's
17 painted, isn't it, Mr. Seoane?

18 A. Uh-huh.

19 Q. Just like this one. Look inside the
20 girt, is the inside painted?

21 A. No, sir.

22 Q. Now, you are an expert in welding, right,
23 and you showed the jury your diagram of how the
24 currents go and all that? If I put a clamp on here
25 and struck an arc, where is the current going to

1 go? Is it going to come out the paint or on the
2 inside?

3 A. Both.

4 Q. Both?

5 A. Both.

6 Q. You are saying it's going to come out
7 both ends?

8 A. Both.

9 Q. Doesn't the current go to the path of
10 least resistance?

11 A. Yes. It's an arc. What you are saying,
12 it would be an arc and because of the contact on
13 here it is not a complete tight fit. When that
14 clamp is on there any movement in arcing will cause
15 it to move up and down.

16 Q. Don't you agree with me that this paint
17 is going to resist the current?

18 A. It has more resistance than not painted,
19 but the mil thickness on this paint is nil.

20 Q. Now, did you tell me that if there had
21 been a tack and it got broken one of three things
22 would happen, either the weld would all be left on
23 the clip or the weld would be left on the girt or
24 there would be some both places?

25 A. Yes.

1 Q. If the weld were all left on the girt, if
2 you are wrong and if this is a tack, then when you
3 looked at the girt you wouldn't have seen the weld,
4 would you?

5 A. You would have seen the spot where the
6 weld was. It would have broke away and there would
7 also have been burning up on the clip itself.

8 Q. Mr. Seoane, when you were sitting out
9 here in the hallway getting ready to testify, did I
10 come up to you?

11 A. Yes.

12 Q. Did I say, "You know, you don't have to
13 talk to me if you don't want to"?

14 A. Yes, you did.

15 Q. I said, "What are you here to testify
16 about?" Do you remember that?

17 A. Sure do.

18 Q. Did you show me any of these diagrams?

19 A. No.

20 Q. Did you tell me any of this stuff about
21 your expertise in welding?

22 A. You didn't ask me.

23 Q. There was a lot of conflict between the
24 Navy and W. B. Meredith on this job, wasn't there?

25 A. I don't know about any conflict between

1 them. This was a simple investigation by my office.

2 Q. When I took your deposition, did you
3 admit there was conflict between the ROICC office
4 and W. B. Meredith, personality conflicts with
5 Mr. Taraba; you don't agree to that?

6 A. I don't remember that at all.

7 MR. NORRIS: That's all I have, Your
8 Honor.

9 THE COURT: Anything else? Witness is
10 excused?

11 MR. SMIRCINA: You are excused. We move
12 for admission of that document, ma'am.

13 THE COURT: It's admitted.

14 MR. NORRIS: I now have surrebuttal
15 evidence.

16 MR. AUFENGER: On what issue?

17 MR. NORRIS: On this issue.

18 MR. AUFENGER: If we could why don't we
19 take this outside the presence of the jury?

20 THE COURT: Mr. Seoane, you are free to
21 leave. Let the jury step in the back.

22 (The jury withdrew from the courtroom.)

23 MR. NORRIS: This is all brand new to me,
24 Your Honor. I think I should have a chance for the
25 jury to hear from Mr. Doverspike why that second

1 burn mark on that photograph could not have happened
2 from a clamp.

3 MR. AUFENGER: Judge, he's had four
4 experts qualified as welding experts. All four and
5 maybe five looked at the photographs and gave their
6 explanation as to why they thought it was a tack
7 weld and to have someone else come back would not be
8 rebuttal because they have already in their own case
9 presented evidence as to what that photograph
10 represented.

11 THE COURT: They didn't represent any
12 evidence because it wasn't brought up until you
13 brought it up that it was clamped up and as to that
14 that is new evidence and I am going to let him put
15 on the evidence.

16 MR. SMIRCINA: Thought as well --

17 THE COURT: One of you speak. We don't
18 get both of you. Jury back.

19 (The jury was returned to the courtroom.)

20 MR. NORRIS: Mr. Doverspike, please.

21 THE COURT: Mr. Doverspike, if you would,
22 please, you are still under oath, too.

23 SCOTT DOVERSPIKE, called as a surrebuttal
24 witness by and on behalf of Atlantic Welding, having
25 been first duly sworn, was examined and testified as

1 follows:

2 DIRECT EXAMINATION (Surrebuttal)

3 BY MR. NORRIS:

4 Q. See if I can calm down here enough to ask
5 you some questions, Mr. Doverspike. Now, I have not
6 had a chance to talk to you at all about these
7 diagrams that you have just been shown; is that
8 right?

9 A. No, sir. This is pretty new.

10 Q. Now, did you hear Mr. Seoane's testimony?

11 A. Yes.

12 Q. I want you to limit it to his theory,
13 that some feign --

14 MR. AUFENGER: I would object.

15 THE COURT: I think you can do it without
16 being quite so dramatic.

17 BY MR. NORRIS:

18 Q. Beg your pardon. That someone clamped a
19 welding clamp right where this little small spot is
20 and then manufactured some kind of a burn here and
21 not a tack. Now, if that had happened would that
22 mark be present in this photograph?

23 A. No. It wouldn't.

24 Q. Why not?

25 A. It goes back to what we was talking about

1 earlier. He had some pictures.

2 Q. Those didn't get into evidence.

3 A. Can I draw something for you?

4 Q. We have your drawing. Does this help at
5 all?

6 A. No. This is important for me because he
7 is talking about somebody going up and taking a
8 ground clamp and attaching the ground clamp to
9 this. You see the inside isn't painted, and that's
10 the way it's required for the contract. The
11 exterior is painted because it's exposed to the
12 elements until it is covered up in the building.

13 Let's go back to the ground clamp. How
14 that's made, it's made out of solid copper. There
15 is a coil in here. You have to use like two hands.
16 It's a really tough coil. It's a spring. You have
17 to use two hands and squeeze it and that opens this
18 up. Right in here you have a big lug. That's your
19 welding lead. What they do is take the insulation
20 off of the end of the lead so you have nothing but
21 solid copper. Then -- say it was put in the tube.

22 Q. What is this line here?

23 A. I'm trying to get a three-dimensional
24 view of the tube.

25 Q. Suppose it's like this, my thumb and

1 index finger are the two prongs of your clamp,
2 correct?

3 A. That's correct. It's common sense if
4 this is -- you are not going to penetrate to this as
5 opposed to bare metal. Bare metal, it's like a
6 piece of vinyl. You are not going to push
7 electricity through that. It's going to go through
8 the least resistance and that's the bare metal on
9 the inside. There is no reason -- right here in the
10 center there's a big rivet. It's a copper rivet
11 that joins these two together. It does go through
12 both of them, top and bottom, but it's going to
13 follow the path of least resistance which is on the
14 bottom and it wouldn't arc.

15 What's causing the arc going back to the
16 welding process, which he kind of failed to -- where
17 is that welding electrode? When I hire people I
18 train them to tack and what happens is if I would
19 take this -- even if it was bare metal, if I put it
20 right there nothing would happen. It's when you
21 bring it away, you create a gap. You have to -- I'm
22 shaking. I'm upset. You have to leave about an
23 eighth inch gap. What that does, this current, it's
24 an alternating current. This current because of
25 this gap makes an arc and that's where you get your

1 flash. If this was to go straight on it, if I was
2 to just put it right on it, you wouldn't have an
3 arc. That goes back to this: If there's something
4 in between the clamp, dirt, paint, rust, that's
5 where you are going to get the arc, but there is no
6 reason for it to arc because the clamp is on the
7 bottom. It's touching bare metal.

8 Q. If the Court will permit me, there is --
9 there are two black marks on the picture. And you
10 told us why this black mark wouldn't be there if
11 somebody came up after the fact and clamped onto
12 it?

13 A. Right.

14 Q. Why would it be there given that this is
15 painted if Mr. Brock put a tack on it when it was
16 sitting on the clip?

17 A. So now you have two painted surfaces.
18 You have two painted surfaces lying on top of each
19 other. That ground is coming up through the column
20 and it has to try to find a spot to come through.
21 Just the mill specs on angle because these are
22 rolled, you start out with a flat stock and roll it,
23 just the edges of it, if there's any mill specs or
24 anything on here it's going to fire off in the
25 highest spot so it can complete its cycle.

1 Q. So if Mr. Brock was welding at the
2 juncture between the clip and the angle, there is no
3 bare steel?

4 A. Nothing. That's why we are going back to
5 taping on it. You have to keep working at it to try
6 to get that current complete.

7 Q. And is this what a tack would look like
8 if it had been separated, the bigger part on this
9 picture?

10 A. Right.

11 MR. NORRIS: That's all I have.

12 THE COURT: Anything else?

13 MS. SPENCE: I have no questions.

14 CROSS-EXAMINATION (Surrebuttal)

15 BY MR. SMIRCINA:

16 Q. I asked you this on your direct
17 examination -- your cross-examination originally,
18 Defendants' Exhibit 15, Mr. Seoane says that's just
19 a bead of metal. What is that little yellow spot
20 there?

21 A. It's a tack.

22 Q. And --

23 A. There's other pictures that show that a
24 lot clearer. The same picture, there's other
25 pictures around here. I have seen them. They are a

1 little closer up and it will show you the metallic
2 finish on it.

3 Q. If this had been tacked, wouldn't it be
4 burned, too?

5 A. What?

6 Q. If this had been part of the tack weld
7 that welded the beam to the bracket, wouldn't it be
8 broken there?

9 A. No. Around the tack it would be broken,
10 just the way it is.

11 Q. I see. But you went up -- and the other
12 part of it would be up on the bracket?

13 A. Right.

14 Q. But you were up there and you didn't look
15 at the brackets?

16 A. No, I didn't because I seen the tack on
17 the tube.

18 Q. But you were right there to string the
19 wire?

20 A. Absolutely.

21 MR. NORRIS: This has nothing to do with
22 the rebuttal.

23 THE COURT: Gentlemen, you are making an
24 objection that it's beyond your direct examination?

25 MR. NORRIS: Yes, ma'am.

* * *

1 THE COURT: Have you looked at the
2 instructions?

3 MR. NORRIS: Yes, but I'm going to assume
4 there are some new ones based on how the evidence
5 came out.

6 THE COURT: Do you want to take 15 or 20
7 minutes and look at each other's instructions and
8 kind of take a breath and we can pick up from
9 there?

10 MR. AUFENGER: Although, Fay apparently
11 had to be out of here. She has a doctor's
12 appointment and so we wanted to get as much done as
13 we could and get through the instructions so we know
14 how to argue the case.

15 THE COURT: We can take a five-minute
16 break.

17 (A recess was taken at this time.)

18 MR. NORRIS: On behalf of Defendant
19 Meredith -- Atlantic Welding & Fabricating I would
20 move to strike the evidence and enter summary
21 judgment in favor of my client for all of the
22 reasons that I asserted to the Court at the
23 conclusion of the plaintiff's evidence, to renew the
24 plea in bar that we filed in this matter at the
25 commencement of the case.

1 THE COURT: Which is the plea of the
2 Workmen's Comp. which may end up being one of the
3 more interesting issues out of this case.

4 MR. NORRIS: Yes, ma'am. I want to
5 preserve the record, but I don't want to belabor the
6 point, but, Judge, I think the evidence in this case
7 is one of complete, absolute speculation for the
8 jury what should have been done to keep the beam
9 from falling. All the evidence that the jury has is
10 that supposedly my client has a duty to provide a
11 safe workplace for the plaintiff which I disagree
12 with as a matter of law and that the beam fell on
13 him through no fault of his own, and, therefore, the
14 beam either was not adequately secured or he should
15 have been alerted to the danger.

16 If it's not adequately secured, that's
17 not enough. The mere happening of the accident is
18 not evidence of negligence. There should have been
19 some testimony on behalf of the plaintiff of what
20 should have happened to keep the beam -- to keep the
21 beam secure. The testimony of Mr. Leland which is
22 uncontroverted is that no one can answer that
23 without facts that we don't have in this case.
24 Maybe it could have been answered, but the plaintiff
25 has not given you the facts or the jury the facts to

1 determine what should have been done to secure the
2 beam from a collision. Everybody agrees that the
3 beam doesn't have to withstand every imaginable
4 collision. So there must be some line where the
5 beam, if tack welded, kept in a sling, bolted,
6 clamped, whatever, should be able to withstand some
7 kind of impact but not a major impact. We have not
8 been told by the plaintiff what that is.

9 The evidence that I presented has said
10 that it is impossible from the evidence we have in
11 the case to reach that conclusion. So if the jury
12 can't speculate on what we failed to do -- I mean,
13 what securing should we have done that we failed to
14 do we can't be liable for failing to secure the
15 beam. That leaves the plaintiff as to my client
16 with alerting him to the notice of a potential
17 hazard. All of the evidence uncontroverted is that
18 my client was unaware of the off-loading activity,
19 never saw the plaintiff before the accident
20 happened, had not been told that the off-loading was
21 going to occur, had no duty -- excuse me -- I beg
22 your pardon -- had no authority for lack of a better
23 word under the contract to on its own cordon off an
24 area, but even Mr. Burg testified that they had
25 no -- that you can't impose upon them the obligation

1 to suggest cordoning off if they don't know there is
2 going to be that activity around them.

3 So if we are left to utter speculation
4 about why the beam fell, if my client had no -- we
5 weren't on notice that there was going to be someone
6 in our area, Mr. Bosley testified that Mr. Godfrey
7 was told he was always going to have his own area to
8 work on, he was not told Wenger was going to be
9 there that day, the only Atlantic employee
10 identified as being in the immediate area was
11 Mr. Brock who was welding, could not see the
12 plaintiff, was unaware of him, where is the notice
13 to us to warn? I mean, all law says if you have a
14 duty to warn, there is somebody that you have to
15 know to give the warning to. You have to be on
16 notice of that.

17 There is the Pearson case that we have
18 cited on the OSHA regulation, but, Judge, Pearson is
19 also a premises liability case. In Pearson a
20 fireman was on a construction site and fell through
21 the floor and argued that he wasn't given notice of
22 the danger and that the owner of the building and
23 the contractor who worked on the building knew or
24 should have known of the danger and had a duty to
25 warn him. The Supreme Court ruled that there was no

1 duty to notify the fireman. I will concede to the
2 Court that in that case the fireman was held to be
3 in a special class of people. He had what's called
4 some kind of -- I forget the type of privilege he
5 had. In other words, he had some special obligation
6 to be there.

7 THE COURT: It was different than the
8 general public and it was because they were going
9 into an emergency situation.

10 MR. NORRIS: Exactly. Mr. Shepherd is
11 not a member of the general public. He is there on
12 business. He is there for his employer. He is not
13 some stranger to the construction activity like a
14 member of the general public might be. The Supreme
15 Court in the Pearson case says you only have a duty
16 to warn that fireman if you know the fireman is
17 going to be there. I think by analogy we only have
18 a duty to warn Mr. Shepherd if we know Mr. Shepherd
19 is going to be there, especially when all the
20 evidence says we were told on this job that no one
21 else would be in our work area. I think the
22 plaintiff might have an argument here but for that
23 fact. The uncontroverted evidence is we were told
24 at the preconstruction meeting and henceforth that
25 you are going to have your own area to work in.

1 We're going to keep other trades away from you and
2 your only responsibility is to keep your own workers
3 safe.

4 That's the industry standards that were
5 incorporated into the Meredith contract, that a
6 steel erection contractor only owes a duty to keep
7 his own employees safe. The owner of the project
8 owes the responsibility to all others and the Navy
9 never required us to cordon off this area. If under
10 the industry standards that are incorporated into
11 the contract, if the owner has that responsibility
12 we had no duty to the plaintiff to warn him if we
13 had no idea he was going to be there.

14 I still argue to the Court respectfully
15 that in Virginia negligence must be measured by a
16 standard of care and that the standard of care in
17 construction must be measured by community
18 standards, very similar to medical malpractice.
19 There is certainly no law in Virginia that I know of
20 that holds the contractors to some national
21 standard. The Knudsen case that I cited to the
22 Court and the Mann v. Clowser case both spoke to
23 community standards. There is no evidence for this
24 jury and the evidence I put on from Mr. Leland and
25 Mr. Shelton were that the standards in this industry

1 were you didn't have to take these measures to
2 secure the girt before final placement and you
3 didn't have to cordon off your area while you were
4 in the process of erecting the girts. That's the
5 only standard this jury knows of right now.

6 There is one final argument I'll add to
7 everything you've already heard before, and it's a
8 new argument and it is what's called the Federal
9 Contractor Immunity Defense. The defense was raised
10 in the case of R. B. Hazard, Inc. versus John Panko,
11 240 Va. 438. I'll give the Court a copy of the
12 case. The following instruction was held by the
13 Supreme Court to be held as good law. I'm not
14 arguing instructions now. I'm making my motion to
15 strike. This is the law, that "Contractors who are
16 performing work for the United States Government are
17 immune from liability for negligent design or
18 installation methods of equipment if it is
19 established by the greater weight of the evidence
20 that each of the following elements is present."
21 I've got the burden on this defense, "One, the
22 contractors were provided with reasonably precise
23 drawings and specifications as they relate to design
24 and installation method." I had this case in front
25 of me when I asked Mr. Nicholas were the drawings

1 that you were given to bid on prepared by the
2 government, were they reasonably precise drawings
3 and specifications as they relate to design and
4 installation methods. He answered in the
5 affirmative. No one has contested that in this
6 case. "Two, the product produced by the contractors
7 complied with the government's drawings and
8 specifications as they relate to design and
9 installation method." I asked Mr. Nicholas that
10 question. I have asked other witnesses that
11 question. No one has disagreed. "Three, the
12 contractors informed appropriate government
13 officials of any safety hazards they were aware of
14 but the appropriate government officials were not
15 aware of." I asked Mr. Bosley --

16 THE COURT: Repeat that one more time.

17 MR. NORRIS: "The contractors informed
18 appropriate government officials of any safety
19 hazards they were aware of but the appropriate
20 government officials were not aware of." I asked
21 Mr. Bosley that when Mr. Taraba gave you all of
22 these safety concerns he had for the steel erection
23 work, was there anything about this that he was
24 unaware of and he testified no, the government was
25 fully aware of all of the hazards associated with

1 steelwork and certainly one of the hazards that has
2 been discussed in this case was something falling
3 down and injuring people. There is no evidence to
4 controvert any of those three burdens for the
5 government immunity defense.

6 I will tell the Court in my opinion this
7 defense takes this case out of the ordinary common
8 law. I think where the Court came down on my motion
9 to strike was, look, it's not enough for you to put
10 on evidence you complied with the plans and specs.
11 The plaintiff had some cases that says every
12 contractor who performs work has still got this duty
13 not to hurt people, not to do their work
14 negligently. I believe that Virginia's recognition
15 of the Government Contractor Immunity Defense takes
16 this to another level if I meet my burden on each of
17 those three issues, where it is enough to say the
18 plans and specifications are good ones, I complied
19 with them and there is no hazard that I could have
20 alerted the government to that they weren't aware of
21 that was the cause of this incident. I think that's
22 where we are in this case, so I add that to all of
23 the arguments I already made at the motion to strike
24 and my motions in limine and the plea in bar, and
25 that's where we are.

1 THE COURT: Do you have a copy of that?

2 MR. SMIRCINA: What was the cite, 240 Va.
3 438? Do you want response, Your Honor?

4 THE COURT: Do you want to look at that
5 case first?

6 MR. SMIRCINA: I might as well.

7 THE COURT: I do want response, but --

8 MR. NORRIS: By the way while we're
9 waiting, that case involved the erection of some
10 kind of a guard gate on a government complex. It
11 was a personal injury case. It wasn't a defective
12 workmanship case like Mann versus Clowser and
13 someone who visited the site was injured because the
14 gate failed to operate properly or collapsed and
15 hurt them. So it was a personal injury case.

16 THE COURT: Let me make sure I'm
17 reading --

18 MR. NORRIS: As a matter of fact, it was
19 a toe injury.

20 THE COURT: It sounds like Mr. Smircina
21 is all set with his argument for his side of the
22 case?

23 MR. SMIRCINA: Yes. Talk about the case
24 first since it's fresh in everybody's mind. This
25 case, number one, is a member of the military suing

1 the builder and the contractor to build a gate out
2 out at Fort Story. The defense of the contractor --
3 the defense claimed by the contractor is "Look, you
4 accepted my product. I told you what was wrong with
5 it. I built it the way you wanted me to and I
6 complied with your plans. Now, because of those
7 things I am immune from suit." That's what the
8 contractor immunity is.

9 That doesn't apply here. This was not a
10 finished product. We are claiming the negligent
11 erection of steel. They are saying we complied with
12 the plans and specs and our responsibility goes no
13 further. We say, yes, it does. It goes further.
14 You cannot create a hazardous condition on the work
15 site. You cannot erect steel in such a manner that
16 it endangers the safety of others on the work site
17 because that violates the applicable safety rules.

18 Mr. Norris is arguing, fine, but we built
19 it just like you said in the plans and specs, and
20 we're saying, no, with you didn't build it like in
21 the plans and specs because you don't follow safety
22 rules. There are two different issues. You can put
23 something up on a bracket and it can be a hazard but
24 that doesn't mean you can leave it up on a bracket
25 and leave a hazard there. There are two different

1 issues completely. That can be his defense and he
2 can argue that to the jury, but certainly we have
3 carried our burden of proof on the issues of whether
4 or not -- at least there is evidence a jury can
5 find, which I think is the standard here, that a
6 jury can find that an unreasonable hazard existed,
7 that it was created by Atlantic, that it wasn't
8 corrected by Atlantic, that it wasn't warranted by
9 Atlantic.

10 They never told the general contractor,
11 oh, by the way -- about the general contractor we
12 have a whole set of arguments, but in a nutshell
13 that's our case. We are saying that puts them in
14 violation of applicable standards for the safe
15 erection of steel that has really nothing to do with
16 whether or not the bracket is eight by three and the
17 girt is 29 by four and you put it 21 feet off the
18 ground. Those are two different things completely.
19 Now, the jury can be free to believe Mr. Norris and
20 find against us for that reason or any other reason,
21 but as far as carrying our burden of proof about the
22 motion to strike, this case is inapposite.

23 He can certainly try to prove to your
24 satisfaction that such an instruction should be
25 given. Of course, I will dispute whether that

1 instruction should be given, but it certainly
2 doesn't have much to do with a motion to strike
3 because the facts are completely different. There
4 the contractor is saying, "I built it just the way
5 you said so. You accepted it. You inspected it and
6 now somebody gets hurt by it and we're going to get
7 sued?"

8 That's not being said here. We are
9 saying you are responsible to build that building in
10 accordance with applicable safety standards. You
11 haven't done it. Mr. Norris is saying, well, we
12 built it just the way the plans and specs say, but
13 that is not the same thing. It's like I'm out in
14 left field and he is out in right field. The jury
15 can decide what applies. But on a motion to strike
16 we have carried our burden.

17 THE COURT: As to that issue I think they
18 have, too, but talk to me about contributory
19 negligence.

20 MR. SMIRCINA: Where do you want me to
21 begin?

22 THE COURT: As to Atlantic first.

23 MR. SMIRCINA: You mean as a matter of
24 law whether my client is contributorily negligent?
25 This is clearly a jury issue in the case all

1 around. The entire case is Mr. McGowan and
2 Mr. Ashley both say these sort of collisions happen
3 frequently. Mr. Walker says the same thing.
4 Mr. Shepherd says the same thing. The contact is
5 described between the boom arm and the beam as a
6 brushing, a noiseless brushing that their own expert
7 says only 180 pounds of force was necessary to
8 dislodge this beam. Now, the jury should decide
9 whether or not under the circumstances what Michael
10 Shepherd was doing was careless and reckless that
11 day. The fact that the beam came into contact with
12 the boom arm of the crane does not rest the issue
13 about that does not mean he is contributorily
14 negligent as a matter of law because his conduct has
15 to be viewed in light of what he did that day, how
16 he did it that day, what he was told that day and
17 what hazards were presented to him and what was in
18 his common knowledge.

19 If this is a brushing, I'm hard-pressed
20 to see how as a matter of law Michael Shepherd is
21 contributorily negligent because there has been
22 impassioned testimony by other witnesses that if
23 this beam were welded there is no way it would come
24 down. Darrell Ashley said that, John McGowan says
25 that. They saw the contact. They have seen contact

1 between a boom arm and steel before. They have seen
2 it whacked before, Allen Walker has. Michael
3 Shepherd testified the same thing and the beam
4 didn't come down. Why? Because it was secured.
5 This beam we argue was not secured. They are free
6 to find, the jury, that Michael Shepherd was
7 contributorily negligent if in light of all the
8 facts and circumstances they view his conduct as
9 unreasonable, as careless and wreckless in light of
10 all the circumstances of the case.

11 The instruction is plain. The arguments
12 can be made by both sides, but as a matter of law
13 Michael Shepherd isn't negligent because these
14 things happen and they don't happen simply because
15 or only because Michael Shepherd is negligent. He
16 strikes it softly. He brushes it. He lifts it
17 off. It comes dislodged, whatever, but as a matter
18 of law that is not contributorily negligent. That
19 is a question of fact for the jury to decide whether
20 or not he was operating that crane foolishly,
21 recklessly, carelessly. It's not for this Court to
22 take it out of the jury's hands given the fact that
23 McGowan and Ashley both say about his functioning of
24 the machine that day. It was fine. It was great.
25 No way should that beam come down with that

1 contact. If the jury wants to find it, that's one
2 thing. Don't take it away from the jury. It's a
3 jury decision all the way around.

4 THE COURT: I'll give Ms. Spence because
5 this is an issue, do you want to let her speak first
6 and then you can speak?

7 MS. SPENCE: First I should point out
8 that the facts regarding the contact between the
9 boom and the girt were that it lifted it up. It
10 lifted it up and out and Mr. Leland testified that
11 to lift it would take 1,700 pounds of force. The
12 180 was to push and that's not what happened. It
13 lifted, not pushed.

14 MR. SMIRCINA: That's in dispute. Sorry,
15 Fay.

16 MS. SPENCE: If they want to call it a
17 180-pound brush, they can call it that, but the
18 safety rules, uncontradicted evidence by everyone,
19 by his boss, Mr. Rymiszewski, by his co-worker,
20 Allen Walker, by his co-worker, Hewitt, by he,
21 himself, by the safety rules, they were not supposed
22 to touch any obstruction, not any contact, not 180
23 pounds, not 1,700 pounds, and he did so. The
24 question is not whether it was the sole proximate
25 cause. It was whether it was a proximate cause,

1 because any negligence of the plaintiff bars
2 recovery.

3 I have a case to cite. It's Virginia
4 Supreme Court case, District of Columbia versus
5 Coleman, 214 Va. 12. In that case the plaintiff had
6 recovered a \$300,000 jury verdict and the Virginia
7 Supreme Court overruled and gave final judgment as a
8 matter of law based on the plaintiff's contributory
9 negligence. The plaintiff was the operator of a
10 dump truck and after dumping his load he hit the
11 button to retrack his dump truck and continued
12 driving down the road. He didn't realize that his
13 dump truck had not come all the way down and it came
14 in contact with some high voltage wires that were
15 across the highway and caused him serious injury.
16 His failure to have the dump truck down was
17 considered contributory negligence as a matter of
18 law by the Virginia Supreme Court.

19 MR. NORRIS: Your Honor, I think the
20 evidence that we put on in our case in chief
21 bolstered the evidence in the plaintiff's case. You
22 are not supposed to touch it or come into any
23 contact when you are operating the boom especially
24 with a spotter and especially with a close fit.
25 Everybody in this case has admitted, everybody,

1 they've said we do it all the time, but everybody
2 has said it's a close fit. If you are not supposed
3 to make any kind of contact with the structure and
4 you do, then you have made a mistake and that's
5 negligence. Not only did they make contact once,
6 they made contact twice. It's like saying, "You
7 know, I was speeding and I borrowed your car and you
8 didn't have your brakes working right. Well, your
9 brakes not working right is what caused my accident
10 if I rear-ended somebody." But the speeding was the
11 first cause. Even assuming that a jury can find the
12 girl wasn't secure, that couldn't have been the
13 cause of the accident if it hadn't been hit,
14 touched, brushed, pushed or lifted. If there had
15 been no contact, there is no evidence that this
16 accident would have happened, none. The sole reason
17 the girl came down is because of the contact between
18 the boom and the girl which every manual and every
19 industry standard and even Mr. Burg admitted in the
20 plaintiff's own case and even which the plaintiff
21 admitted is not supposed to happen. The fact that
22 it happens all the time does not make it a lack of
23 negligence.

24 MR. SMIRCINA: If I could be heard just
25 briefly again, number one, the clearance was

1 testified to be three to four inches.

2 THE COURT: His own testimony was he
3 wasn't even looking there. He didn't see it. He
4 was looking at the prongs at the bottom. He didn't
5 even see it until he heard him call his name.

6 MR. SMIRCINA: That doesn't necessarily
7 mean he was operating the crane in a negligent
8 manner. Besides, any negligence he might have still
9 has to be a proximate cause of the injury. If this
10 beam doesn't come down, if it's tack welded, if
11 people believe that based on the evidence and they
12 are certainly free to do it based on the evidence
13 presented, even if he was contributorily negligent
14 it does not bar his recovery. To my way of
15 thinking, they have to prove that he was careless
16 and reckless in the operation of his crane. They
17 are free to argue what they want. The fact that he
18 brushes this beam is not the type of carelessness or
19 recklessness that should be contributory negligence
20 as a matter of law.

21 If he is told not to go in there, if he
22 is told the beam is unsecure and he tries to do it,
23 that's the type of contributory negligence as a
24 matter of law, but this type where he is operating
25 the crane the way he operates it every day all the

1 time, it's not unusual or not uncommon for a boom to
2 come in contact with a beam, that beams never come
3 down. Nobody who testified in this has ever seen a
4 beam come down and many people have testified that a
5 boom arm hits the beam more than regularly, then it
6 is a jury question all the way around.

7 MR. AUFENGER: Judge, if you took an
8 automobile accident by analogy and I'm sure you've
9 tried many of those, you can be doing 35
10 miles-an-hour in a 30 mile-an-hour zone and you can
11 admit to that as the plaintiff in the case, but
12 that's not necessarily the proximate cause of the
13 accident. It still is a jury question and it's in
14 the purview of the jury to determine whether the
15 negligence, if there is any, is a proximate cause.
16 Certainly there is no evidence that this beam would
17 have come off had it been secured. That's our
18 position, that it would not have come off had it
19 been secured.

20 THE COURT: That doesn't even matter. It
21 really doesn't. I don't know how the jury is going
22 to get past it. I know everybody on the other side
23 of the room is going to be real upset and I have my
24 questions, but I suppose the only way you can
25 argue -- I'm not going to give you your closing

1 argument. There are I suppose a few ways that one
2 can see a way around it, maybe that there is at
3 least evidence of it at this time but you-all have a
4 tough row to hoe.

5 MS. SPENCE: Can we get an instruction
6 that he was contributorily negligent as a matter of
7 law and just leave the proximate causation to the
8 jury?

9 THE COURT: No, because I don't think
10 that's the issue. If he contributes to that,
11 hitting it, it's going to make it fall and that is a
12 proximate cause, so I don't really think it is an
13 issue of proximate cause. I really think it's an
14 issue of whether they determine -- if they believe
15 that he was given permission to unload in that space
16 then there was testimony I suppose that they could
17 say that he would assume that it was a safe place to
18 unload and I suppose from that -- but that's a
19 factual question of whether or not the assumptions
20 that he had were they reasonable and was that
21 contributory negligence under the circumstances, and
22 I suppose you can argue that there is a factual
23 dispute about whether he had permission to be in
24 that area or not or about the cable coming down or
25 not.

1 MS. SPENCE: Even assuming he had
2 permission to be there and we were at fault, he
3 still was not supposed to hit the beam and he was
4 supposed to be looking at it and have his spotter
5 looking at it.

6 MR. NORRIS: If this was an automobile
7 case and he said I didn't see the car coming through
8 the light until I hit it and it was open and
9 obvious, it's contributory negligence as a matter of
10 law.

11 MR. SMIRCINA: No, it's not.

12 THE COURT: I know where this has been
13 going through the whole trial and I don't know that
14 it necessarily is. I've sent them to the jury with
15 questions like that, with evidence like that and I'm
16 going to let this go to the jury.

17 I will note exceptions to all objections
18 that were contrary to everybody's case. Feel free
19 to put whatever else you need on the record.

20 MR. AUFENGER: The plaintiff would move
21 to strike the defendants' defenses as to
22 contributory negligence and ask the Court to order
23 as a matter of law that the defendants were
24 negligent on the basis of violation of OSHA as
25 proffered by the testimony of Mr. Burg and as other

1 evidence has been presented in this case, for
2 violation of the Army Corps of Engineers safety
3 manual as a matter of law, for not having a Safety
4 Hazard Analysis which was required by the contract,
5 and as evidence in the case not only was the
6 defendant, Meredith, but the defendant, Atlantic,
7 was required to have an Activity Hazard Analysis and
8 because the evidence I believe is clear and
9 overwhelming that this girt, in fact, was not
10 secured, and as Mr. Burg testified to and others if
11 the girt had been secured the accident wouldn't have
12 happened. The defendants didn't undertake to either
13 secure the girt or warn off. For those reasons, we
14 ask as a matter of law the defendants' defense be
15 struck.

16 THE COURT: Denied, and, Ms. Spence, I
17 know you renewed all of your motions to strike. I
18 kicked out the contributory negligence because
19 that's been troubling to me through this
20 proceeding. For all the other reasons you said,
21 they are renewed and denied. Let's look at the
22 instructions.

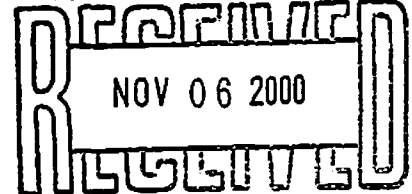
23 (A discussion was held off the record.)

24 THE COURT: On the ones offered, offered
25 and refused, I'm going to do A, B, C. Plaintiff's A

CERTIFIED ORIGINAL

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

CLERK
SUPREME COURT OF VIRGINIA

MICHAEL A. SHEPHERD,

Plaintiff,

v.

W. B. MEREDITH, II, INC.,

et al.,

Defendants.

LAW NO.

CL98-2952

TRANSCRIPT OF PROCEEDINGS

Virginia Beach, Virginia

July 24, 2000

DAY 7

Before:

THE HONORABLE A. BONWILL SHOCKLEY, Judge,
and a Jury

 TAYLOE ASSOCIATES, INC.

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SEP 5 2000

Norfolk, Virginia

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23 Also Present: Michael Shepherd, Margaret

24 Davis, Robert Bosley, and Scott Doverspike

25

1 I may be a reasonable person but I'm not necessarily
2 a reasonable person operating a boom truck and it
3 sort of further defines a reasonable boom truck
4 operator. That's somebody of the same -- age
5 doesn't particularly matter but it would be somebody
6 of the same occupation, a boom truck operator, level
7 of experience and knowledge.

8 MR. AUFENGER: Over our objection,
9 please.

10 MR. SMIRCINA: You are taking out the
11 word "discretion"?

12 THE COURT: The degree of care which
13 persons of the same occupation, experience,
14 education and knowledge would exercise under the
15 circumstances of this case.

16 "OSHA is not designed to make a general
17 contractor insure the safe workplace is necessarily
18 risk free."

19 MS. SPENCE: It's out of the Pike case.
20 That's a statement of law.

21 MR. AUFENGER: It's our understanding
22 that you ruled that a violation of OSHA is not
23 negligence as a matter of law and to give this
24 instruction I believe would take the matter out of
25 context and give undue influence to this and would

1 prejudice the plaintiff.

2 MS. SPENCE: Your Honor, they had their
3 expert sit up there and testify that if an accident
4 happened other than an act of God or employee
5 misconduct it was an OSHA violation.

6 MR. AUFENGER: He didn't quite say that.

7 MS. SPENCE: Yes, he did.

8 MR. AUFENGER: But it's our position that
9 the defendants opened the door, in that regard
10 specifically asked Mr. Burg, the OSHA expert,
11 whether or not he found any OSHA violations.

12 THE COURT: Isn't that really saying the
13 same thing, that the one you offered on the OSHA
14 regulations is, "As a matter of law OSHA violations
15 do not necessarily establish negligence of the
16 defendant. The evidence may be considered by you
17 alone whether they exercised ordinary care"? You
18 are saying in here do not automatically establish
19 any negligence of the defendants in the long
20 instruction.

21 MS. SPENCE: When they consider whether
22 or not the OSHA violation is negligence, I think
23 they should also understand that regardless of what
24 an expert says, the law is that OSHA does not
25 guarantee the safety of anyone.

1 THE COURT: To be honest with you, I
2 think that's probably more confusing and I don't
3 know that it adds to anything. You are certainly
4 entitled to argue that a reasonable --

5 MR. SMIRCINA: And Mr. Burg did agree
6 with that statement to be sure, but to instruct them
7 on it is not --

8 MR. NORRIS: I'm going to have a similar
9 instruction, Your Honor.

10 THE COURT: Is it any different than
11 theirs? Can you join in this one or hand me yours
12 while we're talking about it so we don't have to go
13 through it twice?

14 MR. NORRIS: Your Honor, the difference
15 with mine is that it makes no reference to OSHA.

16 THE COURT: And actually it does say it a
17 little bit differently.

18 MS. SPENCE: I think that's like the next
19 one that I have that you object to.

20 THE COURT: That's like Meredith's next
21 one. I'm going to flip this one over as D refused,
22 and then you each are offering one.

23 MR. SMIRCINA: That's going to be E
24 refused?

25 THE COURT: Not only did Meredith offer

1 general's responsibility.

2 MR. AUFENGER: There is testimony.

3 MS. SPENCE: There is testimony it was
4 still their responsibility because the Army Corps of
5 Engineers' regulations were incorporated into the
6 specs and it required it and it specifically says
7 the subcontractor.

8 THE COURT: On each job.

9 MR. AUFENGER: And they had to comply
10 with the Army Corps of Engineers safety manual.

11 THE COURT: I'm going to give it, but
12 we're going to put in the title.

13 The next one is "As a matter of law any
14 failure of Atlantic Welding to tack weld the girt
15 was not a proximate cause."

16 MR. AUFENGER: We strenuously object to
17 that.

18 THE COURT: I don't think that's a
19 correct statement.

20 MS. SPENCE: Note my exception.

21 THE COURT: There was some evidence that
22 it did matter. There was some evidence that it
23 didn't matter.

24 MR. NORRIS: I don't recall any evidence
25 that the accident wouldn't have happened if it had

1 been tack welded.

2 MS. SPENCE: It's true. Even Seoane --

3 MR. SMIRCINA: Darrell Ashley says point
4 blank if that beam was welded it doesn't come down.

5 THE COURT: Tack welded.

6 MR. SMIRCINA: That's what he says.

7 MR. NORRIS: I would like to see that.

8 MS. SPENCE: I'm talking about the
9 experts in this case, Seoane, Burg, they all say
10 they couldn't say.

11 MR. SMIRCINA: They all say they have a
12 duty to secure it. Page 98, "Well, if you've seen
13 people do it with half an inch Mr. Shepherd
14 shouldn't have hit the girt?" "Shouldn't have."
15 "As far as who is concerned, as far as you are
16 concerned?" "As far as anybody is concerned." If
17 the girt was welded in place it never should have
18 come down.

19 MS. SPENCE: Welded isn't tack welded.

20 MR. SMIRCINA: He was talking about tack
21 welded all day long through the testimony.

22 THE COURT: I heard that myself and I was
23 waiting for somebody to clear that back up with
24 him. No. But I'm not going to permit it.

25 MS. SPENCE: I understand. Note my

1 exception.

2 THE COURT: This is Defendant Meredith
3 E.

4 The next ones are the lookout
5 instructions.

6 MR. AUFENGER: The plaintiff objects to
7 both of those as not being the law in the case and
8 actually a misstatement of the law. Certainly they
9 are taken out of the model jury instructions for
10 automobile operators and in this case we have boom
11 truck operator, and to be required to maintain the
12 duty and care of a prudent truck operator which has
13 been testified to and to pull these different items
14 out takes it out of context, is prejudicial and
15 necessarily the law or the facts that were testified
16 to in this case. The Court has already approved an
17 instruction, the one that was modified. Maybe it
18 was the one you just handed back. No, it wasn't,
19 but the one that was modified as to what ordinary
20 care is and the ordinary intelligence and so forth
21 and that covers this.

22 THE COURT: He definitely was under a
23 duty to keep a proper lookout. The next one under
24 that is talking about the duty to keep a proper
25 lookout, to look in all directions for the

Instruction No. _____

OSHA is not designed to make a general contractor the insurer of the safety of workmen at the site. A safe workplace is not necessarily risk free.

A. M. M. D. 120

INSTRUCTION NO.

As a matter of law, any failure of Atlantic Welding to tack weld the girt was not the proximate cause of the accident involved in this suit.

meredith
E
12/6/00

INSTRUCTION NO. /

You are the judges of the facts, the credibility of the witnesses, and the weight of the evidence. You may consider the appearance and manner of the witnesses on the stand, their intelligence, their opportunity for knowing the truth and for having observed the things about which they testified, their interest in the outcome of the case, their bias, and, if any have been shown, their prior inconsistent statements, or whether they have knowingly testified untruthfully as to any material fact in the case.

You may not arbitrarily disregard believable testimony of a witness. However, after you have considered all the evidence in the case, then you may accept or discard all or part of the testimony of a witness as you think proper.

You are entitled to use your common sense in judging any testimony. From these things and all other circumstances of the case, you may determine which witnesses are more believable and weigh their testimony accordingly.

Instruction No. 2

Your verdict must be based on the facts as you find them and on the law contained in all of these instructions.

The issues in this case are:

- (1) Were the defendants, W. B. Meredith, II, Inc. and Robert Bosley negligent?
- (2) If they were negligent, was their negligence a proximate cause of the accident?

On these issues the plaintiff has the burden of proof.

- (3) Was the plaintiff negligent?
- (4) If he was negligent, was his negligence a proximate cause of the accident?

On these issues the defendants have the burden of proof.

- (5) If the plaintiff is entitled to recover, what is the amount of his damages?

On this issue the plaintiff has the burden of proof.

Your decision on these issues must be governed by the instructions that follow.

run 12/5/10

Instruction No. 3

Your verdict must be based on the facts as you find them and on the law contained in all of these instructions.

The issues in this case are:

- (1) Was the defendant, Atlantic Welding & Fabricating, Inc., negligent?
- (2) If it was negligent, was its negligence a proximate cause of the accident?

On these issues the plaintiff has the burden of proof.

- (3) Was the plaintiff negligent?
- (4) If he was negligent, was his negligence a proximate cause of the accident?

On these issues the defendants have the burden of proof.

- (5) If the plaintiff is entitled to recover, what is the amount of his damages?

On this issue the plaintiff has the burden of proof.

Your decision on these issues must be governed by the instructions that follow.

INSTRUCTION NO. 4

The fact there was an accident and that the plaintiff was injured does not, of itself, entitle the plaintiff to recover.

Instruction No. 5

The plaintiff has the burden of proving by the greater weight of the evidence that the defendants, W. B. Meredith, II, Inc. and Robert Bosley, were negligent and that the defendants' negligence proximately caused the accident and any of the injuries to the plaintiff.

2/24/00
1.25

Instruction No. 6

The plaintiff has the burden of proving by the greater weight of the evidence that the defendant, Atlantic Welding & Fabricating, Inc., was negligent and that the defendant's negligence proximately caused the accident and any of the injuries to the plaintiff.

... 7/26/00
14

Instruction No. 7

The Court instructs the Jury that an Employer has a duty to exercise ordinary care to prevent foreseeable hazards.

in 2/26/00
HS

Instruction No. 8

Negligence is the failure to use ordinary care. Ordinary care is the care a reasonable person would have used under the circumstances of this case.

Instruction No. 9

Each of the parties has a right to assume that one another will use ordinary care until they realize or in the exercise of ordinary care should realize that another is not going to do so

2.11.11 9/26/00
WBS

Instruction No: 10

If two or more persons or corporations are negligent , and if the negligence of each, proximately caused the plaintiff's injury, then each is liable to the plaintiff for his injury. This is true even if the negligence of one is greater than the negligence of the others.

Instruction No. 11

Evidence has been introduced that the defendants violated OSHA provisions.

As a matter of law, OSHA violations do not automatically establish any negligence of the defendants. However, this evidence may be considered by you, along with the other evidence, in determining whether the defendants exercised ordinary care.

2-11-11
12/24/10
h.s.

Instruction No. 12

Evidence has been introduced that the defendants violated United States Army Corps of Engineers Safety Manual provisions. As a matter of law, United States Army Corps of Engineers Safety Manual violations do not automatically establish any negligence of the defendants. However, this evidence may be considered by you, along with the other evidence, in determining whether the defendants exercised ordinary care.

Instruction No. 13

The greater weight of all the evidence is sometimes called the preponderance of the evidence. It is that evidence which you find more persuasive. The testimony of one witness whom you believe can be the greater weight of the evidence.

Gunn
12/1/00

Instruction No: 14

A proximate cause of an accident, injury, or damage is a cause which in natural and continuous sequence produces the accident, injury, or damage. It is a cause without which the accident, injury, or damage would not have occurred. The evidence tending to show proximate cause must be sufficient to take the question out of the realm of mere conjecture, or speculation.

Lin
7/20/00
1489

Instruction No. 15

The Court instructs the jury that:

Contributory negligence is the failure to act as a reasonable person would have acted for his own safety under the circumstances of this case.

Instruction No. 16

The Court instructs the jury that:

When the defendant claims contributory negligence as a defense, he has the burden of proving by the greater weight of the evidence that the plaintiff was negligent and that this negligence was a proximate cause of the plaintiff's injuries. Contributory negligence may be shown by the defendant's evidence or by the plaintiff's evidence.

Gunn
7/28/00
MLB

INSTRUCTION NO. 17

If you find from the greater weight of the evidence that both the plaintiff and the defendants were negligent and that their negligence proximately contributed to the accident, you may not compare the negligence of the parties. Any negligence of the plaintiff which was a proximate cause of the accident will bar the plaintiff from recovering.

Summa
7/26/00
HS

Instruction No: 18

The operator of a boom truck has a duty to use ordinary care to keep a proper lookout. The duty to keep a proper lookout requires a person to use ordinary care to look in all directions for conditions that would affect him, to see what a reasonable person would have seen, and to react as a reasonable person would have acted to avoid an accident under the circumstances.

Sumner
7/26/00
115

Instruction No: 19

The Court instructs the jury that an operator of a crane or boom truck has a duty prior to loading or off-loading materials to use ordinary care to see that the area in which such work is to be performed is safe and free of hazards. Such efforts may include, but are not limited to, making reasonable inquiry of persons knowledgeable of the area whether there are unreasonable or unknown dangers or risks to the performance of the operation of the crane or boom truck. If a crane operator fails to make such a determination, then he is negligent.

Instruction No: 20

The Court instructs the jury that the defendant Meredith owed the non-delegable duty to the plaintiff, in the exercise of ordinary care, to take reasonable safety measures regarding a danger it knew existed, or in the exercise of ordinary care should have known existed, so as to make the premises reasonably safe for the work to be undertaken by the plaintiff, or to warn the plaintiff as to any dangerous condition it knew or should have known existed.

Instruction No. 21

The Court instructs the Jury that the general contractor on a construction site has the overall responsibility for the coordination of trades, for the selection of areas where materials are to be off-loaded, and for providing adequate notice to sub-contractors of the activities of other contractors, material men and delivery men.

Sumner 12/10/00
... 2.5

Instruction No: 22

The Court instructs the jury that a contractor has a duty to perform its work in accordance with plans and specifications provided to it by the owner and/or the owner's representatives and agents, including the general contractor and in a manner exercising ordinary care to make the work reasonably safe and in compliance with industry standards. In determining whether it performed its work in a good and workmanlike fashion, you must consider the requirements of good usage and accepted principles in building construction in this community.

Instruction No: 23

The Court instructs the jury that where the defendants as occupier of the premises which are not open to the public knows or have reason to know of the presence on the premises of a dangerous condition such occupiers have a duty to use reasonable care to make the conditions safe or to warn such person of the danger only when the occupiers know or have reason to know of the presence of such person on the premises and that such person is unaware of the danger.

INSTRUCTION NO. 24

The Court instructs the jury that you may consider evidence of the standards in the industry in order to determine whether a party exercised ordinary care in the performance of its work. A party is not under a duty to exceed standards in the industry in which it was performing its work.

Instruction No: 25

The Court instructs the jury that the defendant's did not guarantee the safety of others exposed to the project site on which they were performing their work. They owed to such persons only a duty to exercise ordinary care in performance of their work.

Instruction No: 26

A general contractor is not liable for the negligence of a subcontractor unless it knew or should have known that the subcontractor failed to use ordinary care in the performance of it's duties.

Instruction No: 27

The standard by which a person's conduct is to be measured is that degree of care which persons of the same occupation, experience, education, and knowledge would exercise under the circumstances of this case.

Fin
12/24/00
AS

Instruction No: 28

An Employer is liable for all damages proximately caused by the negligence of his Employee while acting within the scope of his employment.

As a matter of law, defendant Robert Bosley was an employee of W. B. Meredith, II, Inc. If you find that the defendant Robert Bosley was negligent, then as a matter of law W. B. Meredith, II, Inc. was negligent as well.

Instruction No: 29

As a matter of law, the mere failure of the defendants to complete the Activity Hazard Analysis on the form required by the Army Corps of Engineers Manual was not the proximate cause of the accident involved in this suit.

INSTRUCTION NO. 30

Any fact that may be proved by direct evidence may be proved by circumstantial evidence; that is, you may draw all reasonable and legitimate inferences and deductions from the evidence.

7/26/00
RMS

INSTRUCTION NO. 31

In considering the weight to be given to the testimony of an expert witness, you should consider the basis for his opinion, the manner by which he arrived at it, and the underlying facts and data upon which he relied.

min 156/00

Instruction No: 32

The Court instructs the jury that a contractor has a duty to perform its work in accordance with plans and specifications provided to it by the owner and/or the owner's representatives and agents, including the general contractor and in a manner exercising ordinary care to make the work reasonably safe and in compliance with industry standards. In determining whether it performed its work in a good and workmanlike fashion, you must consider the requirements of good usage and accepted principles in building construction in this community. Unless you find from a preponderance of the evidence that Atlantic & Fabricating did not exercise ordinary care to perform its work in a reasonably safe manner, then you shall find your verdict for Atlantic Welding & Fabricating.

Gunn
7/26/00
ABJ

INSTRUCTION NO. 33

You shall find your verdict for the plaintiff and against Robert Bosley and W.B. Meredith if the plaintiff has proved by the greater weight of the evidence that:

1) Robert Bosley and W.B. Meredith were negligent; and that

2) their negligence was a proximate cause of the plaintiff's accident and damages.

You shall find your verdict for the plaintiff and against Atlantic Welding if the plaintiff has proved by the greater weight of the evidence that:

1) Atlantic Welding was negligent; and that

2) Atlantic Welding's negligence was a proximate cause of the plaintiff's accident and damages.

You shall find your verdict for the plaintiff and against all defendants if the plaintiff has proved by the greater weight of the evidence that:

1) All defendants were negligent; and that

2) The negligence of all defendants was a proximate cause of the plaintiff's accident and damages.

Sumner
7/26/60
HS

You shall find your verdict for either or all
defendants if:

1) As to that defendant, the plaintiff has failed to
prove either negligence or proximate cause; or

2) You find by the greater weight of the evidence
that the plaintiff was contributorily negligent and that
his contributory negligence was a proximate cause of the
accident.

Instruction No. 34

If you find your verdict for the plaintiff, then in determining the damages to which he is entitled, you shall consider any of the following which you believe by the greater weight of the evidence was caused by the negligence of the defendants:

- (1) any bodily injuries he sustained and their effect on his health according to their degree and probable duration;
- (2) any physical pain and mental anguish he suffered in the past, and any that he may be reasonably expected to suffer in the future;
- (3) any disfigurement or deformity and any associated humiliation or embarrassment;
- (4) any inconvenience caused in the past;
- (5) any medical expenses incurred in the past;
- (6) any earnings he lost because he was unable to work at his calling, and
- (7) any loss of earnings and lessening of earning capacity, or either, that he may reasonably be expected to sustain in the future.

Your verdict shall be for such sum as will fully and fairly compensate the plaintiff for the damages sustained as a result of the defendants' negligence.

Given
7/26/00
MB

Instruction No. 35

The Court instructs the jury that:

In considering the plaintiff's claim for diminished earning capacity, you may consider along with all other evidence his earning history prior to the accident in question and compare such history to his earnings after the accident for the purpose of determining whether the plaintiff has, in fact, sustained any diminished earning capacity.

On this issue, the plaintiff has the burden of proof.

Gavin
7/26/00
WBS

Instruction No. 36

The burden is on the plaintiff to prove by the greater weight of the evidence each item of damage he claims and to prove that each item was caused by the defendants' negligence. He is not required to prove the exact amount of his damages, but he must show sufficient facts and circumstances to permit you to make a reasonable estimate of each item. If the plaintiff fails to do so, then he cannot recover for that item.

Gunn
7/20/00
HLS

Instruction No. 37

You should consider the life expectancy figure introduced as evidence along with any other evidence relating to the health, constitution, and habits of the plaintiff, Michael A. Shepherd, in determining his life expectancy.

Sumner
7/26/00

LIFE EXPECTANCY PURSUANT TO
§8.01-419 OF THE VIRGINIA CODE

AGE

MALE

35

39.6

INSTRUCTION NO. 38

You must not base your verdict in any way upon sympathy, bias, guesswork or speculation. Your verdict must be based solely upon the evidence and instructions of the court.

Instruction No. 39

The Court instructs the jury that:

You must not consider any matter that was rejected or stricken by the Court. It is not evidence and should be disregarded.

Instruction No. 40

The Court instructs the jury that:

The amount sued for is not evidence in this case; you should not consider it as evidence in arriving at your verdict.

Instruction No. 4/

The Court instructs the jury that:

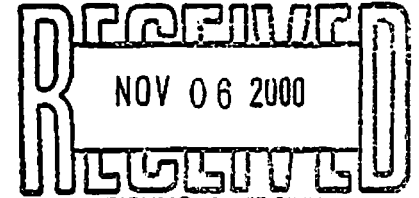
When one of the parties testifies unequivocally to facts within his own knowledge, those statements of fact and the necessary inferences from them are binding upon him. He cannot rely on other evidence in conflict with his own testimony to strengthen his case.

However, you must consider his testimony as a whole, and you must consider a statement made in one part of his testimony in the light of any explanation or clarification made elsewhere in his testimony.

CERTIFIED ORIGINAL

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

CLERK
SUPREME COURT OF VIRGINIA

MICHAEL A. SHEPHERD,

Plaintiff,

v.

W. B. MEREDITH, II, INC.,

et al.,

Defendants.

RICHMOND, VIRGINIA
LAW NO.

CL98-2952

TRANSCRIPT OF PROCEEDINGS

Virginia Beach, Virginia

July 24, 2000

DAY 8

Before:

THE HONORABLE A. BONWILL SHOCKLEY, Judge,
and a Jury

TAYLOE ASSOCIATES, INC.

Registered Professional Reporters

FILED

Telephone: (757) 461-1984

SEP 5 2000

Norfolk, Virginia

1 Appearances:

2 On behalf of the Plaintiff:

3 BLAIR E. SMIRCINA, ESQUIRE

4 RICHARD F. AUFENGER, III, ESQUIRE

5 Kalfus & Nachman, P.C.

6 870 North Military Highway, Suite 300

7 Post Office Box 12889

8 Norfolk, Virginia 23541-0889

9 (757) 461-4900

10 On behalf of W. B. Meredith, II, Inc.:

11 FAY F. SPENCE, ESQUIRE

12 Robey, Spence & Drash

13 Dominion Tower, Suite 1630

14 999 Waterside Drive

15 Norfolk, Virginia 23510

16 (757) 624-9649

17 On behalf of Atlantic Welding & Fabrication:

18 JOHN S. NORRIS, JR., ESQUIRE

19 Norris & St. Clair, P.C.

20 440 Viking Drive, Suite 230

21 Virginia Beach, Virginia 23452-7308

22 (757) 498-7700

23 Also Present: Michael Shepherd, Margaret

24 Davis, Robert Bosley, Scott Doverspike

1 apply to the instruction, "Evidence has been
2 introduced that the defendants violated OSHA
3 provisions as a matter of law," since the defendants
4 did, in fact, violate a safety provision which was
5 enacted for the safety benefit of the plaintiff.
6 Plaintiff was a member of that class and negligence,
7 per se instruction should have been offered in the
8 case.

9 MR. SMIRCINA: As to Instruction F
10 offered by the plaintiff and refused by the judge in
11 this case, the plaintiff objects on the grounds that
12 were previously stated yesterday when the
13 instruction was being debated in court and adopts
14 those grounds here today.

15 MS. SPENCE: Object to the Court's
16 refusal of proposed Defense Instruction D which
17 states, "OSHA is not designed to make a general
18 contractor the insurer of the safety of workmen on
19 the site. A safe workplace is not necessarily risk
20 free." The language in this instruction was taken
21 directly from Pike versus Department of Labor &
22 Industry, 222 Va. 317, Pages 322, 1981. Because the
23 trial court over defense objection admitted evidence
24 of OSHA violations, all of which were generic, for
25 failing to provide a safe workplace or a competent

1 supervisor or to have an adequate safety plan as
2 opposed to any violation of any specific do this,
3 don't do that regulation, the defense was entitled
4 to make sure that the jury understood that providing
5 a safe workplace did not make the general contractor
6 a guarantor of the safety of the workmen, and denial
7 of this instruction was error.

8 Defense also objects to the Court's
9 refusal of Defense Instruction E which states, "As a
10 matter of law any failure of Atlantic Welding to
11 tack weld the girt was not the proximate cause of
12 the accident involved in this suit." The evidence
13 from plaintiff's own experts, Manny Seoane and Frank
14 Burg, was that a tack weld -- they could not say
15 that a tack weld would have prevented this
16 accident. No one said that it would have. John
17 McGowan acknowledged that plaintiff's boom was
18 easily capable of breaking a tack weld. Defense
19 expert Leland presented scientific calculations
20 based on the size of the weld seen on the beam to
21 show that the force required to break that tack weld
22 was within the lifting capacity of plaintiff's boom
23 crane and opined that not only would a tack weld
24 have not prevented it, that, in fact, it was welded
25 and the weld didn't prevent the accident. That

1 being the evidence there was no evidence at all from
2 which the jury could infer without speculation that
3 the failure to tack weld, if they found such failure
4 to have existed, was a proximate cause of the
5 accident.

6 MR. SMIRCINA: As to Instruction Number
7 24 beginning, "The Court instructs the jury that you
8 may consider evidence of the standards in the
9 industry in order to determine whether a party
10 exercised ordinary care in the performance of its
11 work. The party is not under a duty to exercise
12 standards in the industry in which it was performing
13 its work," this is an inaccurate exposition of the
14 law and the facts as set forth in the evidence in
15 this case. The standards cited by the defendant,
16 Atlantic Welding & Fabricating, simply do not apply
17 to safety issues involved in the case. It is
18 comparing two things that are not equivalent and are
19 not relevant. The standards of the industry in
20 performing steel erection have nothing to do with
21 the safety standards that they are under. One is a
22 question of what they must do. The other is the
23 issue of how they must do it.

24 As this instruction deals only with what
25 must be done in terms of placing a steel girt on a

1 bracket, it is inaccurate because the sole issue in
2 the case from the plaintiff's perspective is whether
3 or not the manner in which it was performed met
4 applicable safety standards.

5 As to Instruction Number 25, beginning,
6 "The Court instructs the jury the defendants did not
7 guarantee the safety of others exposed to the
8 project site on which they were performing their
9 work," it is the plaintiff's position that violation
10 of any standard of care in OSHA or the Army Corps of
11 Engineers safety manual constitutes negligence, per
12 se, that the standard then -- that this instruction,
13 therefore, does not properly set forth the law in
14 light of the fact that a violation of OSHA or the
15 Army Corps of Engineers safety manual is established
16 by the same standard of care and the jury should
17 have been instructed that such actions were
18 negligence, per se.

19 MS. SPENCE: For the record, on behalf of
20 defendants, Bosley and Meredith, I renew my
21 objection to the Court's Instructions 11 and 12
22 telling the jury that the evidence of OSHA
23 violations and failures to comply with the Army
24 Corps of Engineers safety manual could be considered
25 along with other evidence in determining whether the

1 defendants were negligent. The only alleged
2 violation that the United States Army Corps of
3 Engineers manual was the failure to complete the
4 Activity Hazard Analysis and as a matter of law that
5 was not the proximate cause of this accident, and I
6 think it was misleading to the jury that they could
7 consider that in determining whether the defendants
8 were negligent.

9 As for the OSHA provisions, the only OSHA
10 violations cited by their witness which was Mr. Burg
11 was the failure to keep the workplace free of
12 hazards which is contrary to Virginia law which is
13 the mere happening of an accident is not
14 negligence. Burg went on to state that the
15 contractor had had a nondelegable duty for safety
16 which he violated but that was a conclusory
17 statement or opinion on his part without
18 substantiation and shouldn't have been the basis for
19 the jury to be able to determine negligence and the
20 failure to provide a competent superintendent and
21 the failure to have a safety program, again, were
22 opinions with no factual evidence.

23 The only evidence was there was a safety
24 program which included weekly safety meetings, a
25 company safety handbook given to each employee and

1 numerous exhibits showed the number of times that
2 safety measures were taken, jobs were stopped
3 because of safety concerns. So the opinions of
4 Mr. Burg regarding OSHA violations were misleading,
5 contrary to Virginia law, and should not have been
6 considered in any event because plaintiff was not
7 within the class of persons intended to be protected
8 by OSHA. I also rely on any other arguments made by
9 counsel for Atlantic in that regard.

10 MR. NORRIS: On behalf of Atlantic
11 Welding & Fabricating, I would like to preserve for
12 the record the following objections to jury
13 instructions that have been granted and to
14 instructions offered on behalf of Atlantic Welding
15 that were refused: Atlantic objects to Instruction
16 Number 7 on the grounds that the plaintiff was not
17 an employee of Atlantic and that we owed no duty to
18 exercise ordinary care as an employer.

19 Atlantic objects to Instruction Number 9
20 to the extent it included the plaintiff for the
21 reason that the plaintiff was unfamiliar with the
22 construction area, had not performed any type of
23 inspection, had not made any type of inquiry of the
24 nature of the work that was going on and, therefore,
25 had no right to assume that Atlantic had or had not

* * *

1 attention each and every one of you gave your best
2 time and attention in this. Thank you very much. I
3 hope it's been at least an interesting experience
4 for you. Have a nice day and thank you, and you are
5 excused.

6 (The jury was excused.)

7 THE COURT: I assume Mr. Norris has no
8 quarrel with that verdict?

9 MR. NORRIS: Did I misunderstand the
10 verdict?

11 THE COURT: It was for the plaintiff
12 against W. B. Meredith and Bosley and for Atlantic.
13 I thought you misunderstood the verdict. But I
14 would imagine Ms. Spence would like to say something
15 at this point for the record?

16 MS. SPENCE: I move to set aside the
17 verdict as contrary to the law and the evidence
18 particularly on the grounds that the evidence
19 established contributory negligence as a matter of
20 law.

21 MR. SMIRCINA: In response we say the
22 issues were all fully litigated. The instructions
23 were made. The jury deliberated for an extended
24 period. There were expansive and well-reasoned
25 arguments on all sides and the jury resolved the

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

MICHAEL A. SHEPHERD,

Plaintiff,

v.

AT LAW NO. CL982952

W. B. MEREDITH, II, INC.

and

ATLANTIC WELDING & FABRICATING, INC.,

Defendants.

ORDER

On July 18, 19, 20, 21, 24, 25, 26, and 27, 2000, CAME THE PARTIES, plaintiff and defendants, in person and by counsel, and came as well a jury, to-wit: Amber C. Biliouris, Pamela A. Gallop, Wesley L. Handy, Lee M. Martin, Jr., David A. Shoemake, Nellouise S. Stepp, and Sandra A. Youngson, who were duly sworn the truth to speak upon the issued joined.

THEREUPON, at the conclusion of the plaintiff's evidence, the defendants, by counsel, moved the Court to strike the plaintiff's evidence and to enter judgment in their behalf, which motion after having been fully heard and maturely considered by the Court, is overruled, to which action of the Court, the defendants noted their exception.

THEREUPON, at the conclusion of all of the evidence, the defendants, by counsel, renewed their motion heretofore made to strike the plaintiff's evidence and to enter judgment in

their behalf, which motion after having been fully heard and maturely considered by the Court, is overruled, to which action of the Court, the defendants noted their exception.

THEREUPON, at the conclusion of all of the evidence, the plaintiff, by counsel, moved the Court to strike the defendants' evidence and to enter judgment in his behalf, which motion after having been fully heard and maturely considered by the Court, was overruled, to which action of the Court, the plaintiff noted his exception.

And the jury having heard all of the evidence and argument of the parties, retired to its chamber to consider its verdict and after some time returned into Court with a verdict in the following words: "We, the jury, find in favor of the plaintiff, Michael A. Shepherd, against the defendants, W. B. Meredith, II, Inc. and Robert Bosley, and for the defendant, Atlantic Welding & Fabricating, Inc. and assess plaintiff's damages at \$325,000.00."

THEREUPON, the Court polled the aforesaid jurors as to their said verdict, to which said poll the aforesaid jurors replied that the verdict herein reported was his or her verdict.

THEREUPON, the defendants, W. B. Meredith, II, Inc. and Robert Bosley, by counsel, moved the Court to set aside the verdict as being contrary to the law and evidence, which motion after having been fully heard and maturely considered by the Court, is overruled, to which action of the Court, the defendants W. B. Meredith, II, Inc. and Robert Bosley note their exception.

The plaintiff, by counsel, moved this Court to set aside the verdict in part, as to its finding for the defendant, Atlantic Welding & Fabricating, Inc., as contrary to the law and evidence, which Motion after being fully heard by the Court is overruled, to which action the plaintiff noted his exception.

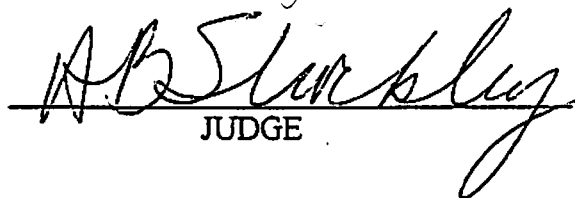
WHEREUPON, it is considered and ORDERED by the Court that the Plaintiff, Michael A. Shepherd, recover and have final judgment against W.B. Meredith, II, Inc. and Robert Bosley, in the amount of Three Hundred Twenty Five Thousand Dollars (\$325,000.00) plus his costs expended herein with interest to accrue at the statutory rate of interest applicable to judgments; and

it is further ORDERED that final judgment shall be entered in favor of Atlantic Welding & Fabricating, Inc.; and

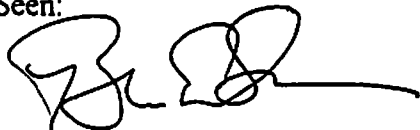
it is further ORDERED that, for reasons stated in the open Court, each and all of the parties preserve their properly made objections and noted objections to rulings made by the Court as reflected in the record of trial, including, but not limited to, the Plea in Bar made and argued by

the defendants in this matter; and a surety bond is set at \$375,000 for W.B. Meredith, II ~~and~~ to suspend execution pending an appeal (if noted).
it is further ORDERED that this matter be removed from the open docket of this Court.

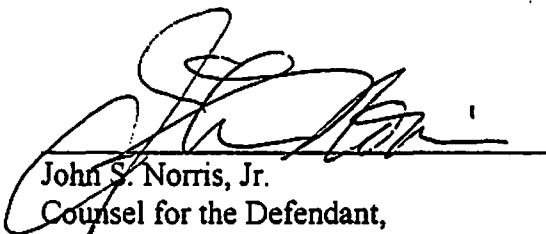
Entered this 11 day of August, 2000.


JUDGE


Seen:



Blair E. Smircina
Counsel for the Plaintiff,
Michael A. Shepherd


John S. Norris, Jr.
Counsel for the Defendant,
Atlantic Welding & Fabricating, Inc.

SEEN AND OBJECTED TO:
for the reasons stated to the Court on the record.


Fay F. Spence
Counsel for the Defendants,
W. B. Meredith, II, Inc. and Robert Bosley

ASSIGNMENTS OF ERROR

- I. THE TRIAL COURT ERRED IN ALLOWING PLAINTIFF TO PROCEED WITH HIS COMMON LAW NEGLIGENCE SUIT AGAINST BOSLEY AND W.B. MEREDITH, II, INC., HIS STATUTORY FELLOW EMPLOYEES ON THE GOVERNMENT OWNED CONSTRUCTION PROJECT.
- II. THE TRIAL COURT ERRED IN ALLOWING PLAINTIFF, INJURED WHILE OPERATING A BOOM CRANE ON A CONSTRUCTION PROJECT, TO PROCEED WITH HIS COMMON LAW NEGLIGENCE SUIT AGAINST THE PROJECT SUPERINTENDENT AND THE GENERAL CONTRACTOR, HIS STATUTORY EMPLOYER.
- III. THE TRIAL COURT ERRED IN ALLOWING PLAINTIFF'S EXPERT TO TESTIFY THAT DEFENDANTS WERE IN VIOLATION OF OSHA, BECAUSE HIS OPINION THAT THE ACCIDENT WOULD NOT HAVE HAPPENED IF THE WORKPLACE WERE SAFE IS NOT PROPER EVIDENCE OF NEGLIGENCE AND IS CONTRARY TO VIRGINIA LAW.
- IV. THE TRIAL COURT ERRED IN REFUSING DEFENDANTS' INSTRUCTION D, THAT OSHA IS NOT DESIGNED TO MAKE A GENERAL CONTRACTOR THE INSURER OF THE SAFETY OF WORKMEN ON THE SITE.
- V. THE TRIAL COURT ERRED IN GRANTING INSTRUCTION NUMBER 11, ALLOWING THE JURY TO CONSIDER EVIDENCE OF OSHA VIOLATIONS IN DETERMINING WHETHER DEFENDANTS WERE NEGLIGENT.
- VI. THE TRIAL COURT ERRED IN ALLOWING PLAINTIFF'S EXPERT TO TESTIFY ABOUT ANY ALLEGED OSHA VIOLATIONS BECAUSE PLAINTIFF WAS NOT A MEMBER OF THE CLASS THAT OSHA LEGISLATION WAS INTENDED TO PROTECT.
- VII. THE TRIAL COURT ERRED IN FAILING TO FIND PLAINTIFF CONTRIBUTORILY NEGLIGENT AS A MATTER OF LAW FOR KNOCKING THE STEEL GIRT ONTO HIMSELF.
- VIII. THE TRIAL COURT ERRED IN FAILING TO STRIKE PLAINTIFF'S EVIDENCE ON THE GROUNDS THAT ANY NEGLIGENCE OF DEFENDANTS WAS NOT THE PROXIMATE CAUSE OF THE ACCIDENT AS A MATTER OF LAW.
- IX. THE TRIAL COURT ERRED IN REFUSING DEFENDANTS' INSTRUCTION E, THAT AS A MATTER OF LAW, ANY FAILURE TO TACK WELD THE GIRT WAS NOT A PROXIMATE CAUSE OF THE ACCIDENT.