

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: TRIAL TERM PART: 91  
- - - - -X

MICHAEL GAMBALE,

Plaintiff,

- against -

Index no.  
18694-09

400 FIFTH REALTY, LLC,  
PAVARINI MCGOVERN, LLC,

Defendants.

- - - - -X

141 Livingston Street  
Brooklyn, New York 11201  
January 29, 2014

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OFFICIAL COURT REPORTER



MANDELBAUM - CROSS - KAMINSKY

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1 (Whereupon, the jury entered the courtroom.)

2 THE COURT: You can all be seated.

3 Doctor, I remind you that you remain under  
4 oath.

5 Ladies and gentlemen, I hope you enjoyed your  
6 lunch. We're back up where we left off with  
7 cross-examination of the doctor.

8 CROSS-EXAMINATION

9 BY MR. KAMINSKY:

10 Q. Doctor, welcome back.

11 A. Thank you.

12 Q. You said that you were familiar with what  
13 construction workers do on a day-to-day basis.

14 A. Yes.

15 Q. Generally, what did Mr. Gambale do on a daily  
16 basis?

17 A. Well, with heavy construction, I mean, he was  
18 an ironworker, which are the workers that are putting  
19 up buildings in Manhattan.

20 Q. But what, specifically, did he do?

21 A. His job entailed, again, building of  
22 buildings. He was moving walls. He was doing heavy  
23 work, heavy lifting, bending, twisting.

24 Q. Do you know if he would carry rebar on his  
25 shoulder or how he would do it, what the process was?

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MANDELBAUM - CROSS - KAMINSKY

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1 A. Again, in the process of his work, at times,  
2 yes, he would carry rebar on his shoulder.

3 Q. And would he do this dozens of times a day?  
4 Hundreds of times a day?

5 A. Again, I can't comment on what he does exactly  
6 on a daily basis.

7 Q. But would he do hour after hour, day after  
8 day, month after month?

9 A. Again, what the job entails, yes. Would he do  
10 it every day? Again, that's his job description.

11 Q. I don't expect you to know -- it's not really  
12 a quiz, I'm just trying to make a point, if a person  
13 is doing that type of work and carrying items like  
14 that on the shoulder repetitively, over and over  
15 again, would you expect to see spasms or -- or  
16 something in the shoulder or the neck as a result of  
17 that. Yes, or no, or you don't know.

18 A. I'd say no, but with an explanation. I mean,  
19 would he develop a herniated disc because he was  
20 carrying heavy --

21 Q. Well, I'm just asking if you expect to see,  
22 perhaps, those types of disc desiccation that we spoke  
23 about, or is that not related to that at all?

24 A. The desiccation is almost an irrelevant  
25 finding.

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MANDELBAUM - CROSS - KAMINSKY

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1 Q. We'll talk about that. Let's talk about pain,  
2 then, because pain, regardless of how he got it, he  
3 has it, right, I think you're trying to say.

4 A. Yes.

5 Q. As a pain management expert, I would imagine  
6 you subscribe to different medical periodicals.

7 A. Yes.

8 Q. And you read about the latest studies, do you  
9 not, that talk about causes of pain and studies as to  
10 what can reduce pain?

11 A. Yes.

12 Q. Have you read any studies, or are you familiar  
13 with any studies, that associate smoking to back pain?

14 MR. MCCRORIE: Objection.

15 THE COURT: Overruled.

16 A. Again, I am not familiar with any specific  
17 related to smoking and back pain.

18 Q. Would you agree with the following statement:  
19 "Nicotine interacts with proteins, which have a key  
20 role in the central nervous system"?

21 A. Yes.

22 Q. So far so good?

23 A. Yes.

24 Q. Would you agree that nicotine, since it  
25 interacts with those proteins in the central nervous

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MANDELBAUM - CROSS - KAMINSKY

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1 system, has an effect on anxiety and pain? Yes or no.

2 Are we still good so far?

3 A. I don't necessarily agree with that statement.

4 Q. Okay. Do you agree that prolonged exposure to  
5 cigarettes upsets the function of these cells and  
6 eventually changes the way pain is processed? Would  
7 you agree with that?

8 A. Again, I don't fully agree with that  
9 statement.

10 THE COURT: Let's take a quick sidebar.

11 (Whereupon, a sidebar discussion was held off

12 the record at the Bench, out of the hearing of the

13 jury.)

14 Q. Sir, I'm just going to ask you, forgive me for  
15 looking at my phone, but are you familiar with the  
16 Journal of Bone and Joint Surgery?

17 A. No.

18 Q. Do you know, when you take -- you take a  
19 history from your patients, do you not?

20 A. Yes.

21 Q. And one of the things you ask them is if they  
22 smoke?

23 A. Correct.

24 Q. And you asked that of Mr. Gambale?

25 A. Yes.

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MANDELBAUM - CROSS - KAMINSKY

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1 Q. And he told you yes. Do you know when he  
2 started smoking, at what age?

3 A. No, I don't.

4 Q. Do you know how much he smokes?

5 A. I believe the first office note said at one  
6 pack per day.

7 Q. All right. I'm going to bring up -- I have a  
8 copy of your notes here, you have a copy of the file,  
9 I'm going to bring up some pages for it on PowerPoint

10 so you can see it.

11 Let's start with page five. That's what we  
12 were reading from before. This is where we said  
13 there's no fracture, correct.

14 A. Correct.

15 Q. And this is where you say that there  
16 was -- pain was improved after the discectomy,  
17 correct?

18 A. Part of the pain was improved, yes.

19 Q. And when I asked you before, physical therapy  
20 provides temporary relief, correct?

21 A. Correct.

22 Q. We've been over this page, so I'm going to  
23 skip through that.

24 The next page is page six, and this is when  
25 you're first meeting him and getting to know him, so

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MANDELBAUM - CROSS - KAMINSKY

7

1 this is like all the background information that  
2 you've done, correct?

3 A. Correct.

4 Q. And I just want to go down here to the part  
5 where it says "describing," it's hard to read your  
6 handwriting, but is that "alert and oriented times  
7 three"?

8 A. Yes, alert and oriented times three.

9 Q. All right. Guess about to page eight. And,  
10 again, this is all during your initial visit, correct?  
11 You're still getting to know him, taking a history.  
12 One of the things you do is take a family history,  
13 correct?

14 A. Correct.

15 Q. What's the significance of taking a family  
16 history?

17 A. You wanted to know what family history of  
18 medical problems there are, just as a universal  
19 history in any patient that comes into the office.

20 Q. And so here you noted that you checked off  
21 cancer next to his father and diabetes next to his  
22 mom, correct?

23 A. This is the form, by the way, the patient  
24 fills out on intake.

25 Q. Okay. Fine. So this is a self-filled -- it's

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1 still part of the history, but Mr. Gambale is giving  
2 you this information obviously to help you plan for  
3 treatment and things like that.

4 A. Yes.

5 Q. If we can just go to page ten. Here's  
6 where -- this is the first time where we've heard a  
7 lot about trigger point injections, and I would be  
8 right in saying that, of all your office records,  
9 maybe a third of the pages are forms like this  
10 discussing trigger point injections?

11 A. Correct.

12 Q. Okay. So I'm not going to go over all those  
13 pages, but the stack of pages I'm holding in my hand  
14 and the stack of pages you're holding in your hand, a  
15 third of them are just forms discussing trigger point  
16 injections?

17 A. Yes, those are the procedure notes for trigger  
18 points.

19 Q. Doctor, can you tell us, a trigger point  
20 injection is designed to help relieve some of the  
21 spasms, correct?

22 A. Correct.

23 Q. And it's a series of -- it's a needle, and  
24 it's like a bunch of pinches that you would, for lack  
25 of a better term, it's a --

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1 A. It's a needle, one and a half inch needle that  
2 is placed in muscle trigger point areas, muscle spasm

3 areas, and medication is injected.

4 Q. So when you say "trigger point," that's what  
5 that is, so we could -- we could stip all of that.

6 Let's go to page twelve. Now we're on 11/2,  
7 this note that you usually put all your dates up  
8 there. And on 11/2, again, here's that scale we were  
9 talking about, severity of pain, one to ten. He said  
10 five, correct?

11 A. Yes.

12 Q. And, again, that's him telling  
13 you -- that's -- we were talking about subjective  
14 versus objective, he is subjectively telling you his  
15 pain level is five.

16 A. Yes.

17 Q. Okay. And again, under "psych," can you tell  
18 us what those letters mean.

19 A. Alert and oriented times three.

20 Q. Obviously that's a good finding, you don't  
21 want anything other than that, correct?

22 A. Correct.

23 Q. Down here on your forms, this is the  
24 impression and plan of care. You told us you come up  
25 with a diagnosis and then you come up with a plan of

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1 treatment to ultimately help guide the patient through  
2 his -- while he's under your care, correct? And on  
3 most of your forms, if not all, the plan of care is 99  
4 percent the same?

5 A. Plan of the care is -- I wouldn't say 99  
6 percent, but, yes, similar.

7 Q. So on each of the forms I'm going to bring up,  
8 we'll see the impression/plan of care basically says  
9 all these things.

10 Let's go to -- next there are a bunch of pages  
11 about trigger points. Let's go to page 21.

12 This is what we talked about briefly, so I'm  
13 not going to spend a lot of time on it, but just so  
14 the jury can see it, I know it's hard to see it from  
15 over there, but MVA, that's a motor vehicle accident,  
16 correct?

17 A. Correct.

18 Q. So this is the day he had the motor vehicle  
19 accident, December 21 of 2010, he injured his low  
20 back, was evaluated by an ambulance attendant. And he  
21 described the pain that day as eight out of ten,  
22 correct?

23 A. Correct.

24 Q. And, again, your impression, plan of care, is

25 kind of the same as the last one if not identical,



1 correct?

2 A. Correct.

3 Q. And, you know, your plan includes things like  
4 deep tissue massage, those types of things, that's the  
5 care that he was getting from the physical therapist  
6 in those stack of records over there, correct?

7 A. Correct.

8 Q. Okay. This speaks for itself, but the mere  
9 fact that he was in a motor vehicle suggests that he's  
10 capable of driving, correct?

11 A. I don't know if he was driving during that  
12 motor vehicle accident.

13 Q. But he could have been a passenger. That's a  
14 good point. Do you know how he got to your visits?  
15 Do you ask him? Do you know how he would get back and  
16 forth?

17 A. I don't recall. It may be documented in  
18 there, but I don't remember.

19 Q. Any reason he can't drive?

20 A. He can drive.

21 Q. Okay. Let's go -- again, we've got a lot of  
22 trigger point stuff, so I'm going to jump ahead to

23 page 42. Now we're up to March of 2011.

24 Again, you know, you've got a five out of ten,

25 and he says -- actually, he tells you, I guess,

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MANDELBAUM - CROSS - KAMINSKY

12

1 message, "TX" stands for treatment?

2 A. Yes.

3 Q. "Massage treatment helps to" -- arrow pointing  
4 down -- "decrease pain and increase range of motion,"  
5 correct?

6 A. Correct.

7 Q. So your plan is to have him go for massages.  
8 And the massages, according to the Plaintiff, seem to  
9 be working, it decreases the pain and increases range  
10 of motion, correct?

11 A. Correct.

12 Q. Okay. And is this his -- your signature down  
13 here?

14 A. Yes.

15 Q. Okay. Let's go to the next page, page 43.

16 This is the same day, March 21, 2011, treatment,  
17 message. Could you read the comments there? That's a  
18 little hard for me to read.

19 A. "Patient is extremely" -- I believe it says

20 "contracted" -- "but young and should do well."

21 Q. And then, after "should do well," you put two  
22 exclamation points, correct?

23 A. That's the therapist that did the massage,  
24 yes.

25 Q. Before the massage, his pain level was four to

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MANDELBAUM - CROSS - KAMINSKY

13

1 five, and after, I think that says "better," but  
2 that's scribble, so I don't know.

3 A. I think that says better, yes.

4 Q. Let's go to the next page. Okay. Here,  
5 remember I was asking you about the psychiatric part  
6 of the evaluation?

7 A. Yes.

8 Q. Here you right patient started to see a  
9 psychologist for anxiety 1X, one time per week,  
10 correct, Doctor?

11 A. Yes.

12 Q. And above that, you write C-0, complains of  
13 anxiety, SX. Does that mean subsequent?

14 A. Symptoms.

15 Q. Okay. "Complains of anxiety symptoms for the  
16 past month. Parents moved to Las Vegas, and he's  
17 moving in" -- and that's the symbol for

18 "with" -- "girlfriend," correct?

19 A. Correct.

20 Q. So is it fair of me to say that he first  
21 started to see a psychologist at the time his anxiety  
22 was attributable to his parents moving out and his  
23 moving in with his girlfriend?

24 A. I believe that it's well-documented that he  
25 had anxiety on the first office visit that was

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MANDELBAUM - CROSS - KAMINSKY

14

1 subsequent to the accident, and he was having anxiety  
2 and panic attacks, which was well-documented on that  
3 initial office visit. His parents moving away and his  
4 girlfriend moving in --

5 Q. Produced anxiety?

6 A. There's slight stress.

7 Q. Understandable.

8 A. Because he lost family.

9 Q. Okay. Let's go to the next page. And, again,  
10 just a quick note. Massage keeps to -- "massage helps  
11 to decrease pain and increase" -- what's that word?

12 Range of motion?

13 A. Range of motion.

14 Q. Okay. Again, your plan is to continue with

15 massage therapy, correct?

16 A. Correct.

17 Q. All right. Next page. Again, massages.

18 Could you read this for me. I just couldn't quite  
19 read that.

20 THE COURT: Referring to the comments section?

21 MR. KAMINSKY: Yes, Judge.

22 A. This is the therapist writing a note on the  
23 comments, states, I believe, it's the psychologist,  
24 something, began today. I can't make out that second  
25 word.

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MANDELBAUM - CROSS - KAMINSKY

15

1 Q. Okay. Let's go to the next page. And, again,  
2 you're following up on a regular basis what is  
3 happening at physical therapy, you're monitoring his  
4 medications. You're monitoring his physical therapy,  
5 you're not the one teaching him the exercises or doing  
6 the massages.

7 A. Right, there's a therapist there.

8 Q. You're prescribing that, and he comes in to  
9 see you, and you keep an eye on how everything's  
10 going. You're like managing what's going on?

11 A. Correct. The therapist is there in the office  
12 with us, and he's seen that therapist.

13 Q. The therapist is part of your office?

14 A. Yes.

15 Q. So this -- so if he goes, let's say he has an  
16 appointment for physical therapy, he just -- he's  
17 already in the building, just goes through a different  
18 door to see you?

19 A. Right, it's one office.

20 Q. Okay. Got it. And, again, deep tissue  
21 massage improves his symptoms, decreases pain and  
22 increases range of motion.

23 Let's go to the next page, page 48. Can you  
24 read this to us.

25 A. "Patient is not doing any exercises yet."

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1 That's -- I can't read that next word -- with -- with  
2 no -- okay. But the subsequent sentence says "but to  
3 expect change at this time would be silly."

4 Q. With a couple of exclamation points?

5 A. Yes. That's the comments of the therapist.

6 Q. Okay. Let's go to the next page. Again, this  
7 is close in time to when his parents are moving and  
8 he's moving in with his girlfriend, and here we have  
9 reference to panic attacks, correct?

10 A. Yes.

11 Q. And just to put it in the context of time,  
12 this is right when his parents are moving, correct?  
13 Within a month or so?

14 A. Again, he did have panic attacks.

15 Q. Doctor, you seem to try not to answer my  
16 question.

17 A. Well, I think --

18 Q. Listen to my question.

19 A. I think these panic attacks have been all  
20 along.

21 Q. Please listen to my question, okay.

22 A. Yes.

23 Q. He first started to see a psychiatrist when  
24 his parents were leaving, correct? And these panic  
25 attacks coincide --

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1 THE COURT: One question at a time.

2 A. Yes, but his parents leaving is irrelevant to  
3 when he saw the psychiatrist.

4 Q. Okay. And it says refer to psychiatrist.  
5 Okay. So you've got his parents leaving, the panic  
6 attacks, and now a referral to a psychiatrist.

7 A. On the contrary, he had panic attacks, his

8 parents left, and he had continued panic attacks.

9 Q. Let's go to page 51. Again, this is more  
10 massage treatment, and the comment here seems, "Unless  
11 he begins doing exercises with some regularity, there  
12 will be no improvement." Correct?

13 A. Correct.

14 Q. And that's what I had -- before lunch, that's  
15 what I started to question you about. When you come  
16 up with a strategy for a person to get better, that  
17 person's got to cooperate with you, correct?

18 A. Yes.

19 Q. You could have the best plan imaginable, but  
20 if he doesn't cooperate with you, that's kind of going  
21 to defeat what you're setting out to do. Yes or no or  
22 you can't answer it yes or no.

23 A. I can't answer it yes or no.

24 Q. Okay. Fair enough.

25 A. Can I explain?

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MANDELBAUM - CROSS - KAMINSKY

18

1 Q. No.

2 MR. MCCRORIE: Soon.

3 Q. Unless he starts doing exercises with some  
4 regularity, there will be no improvement.

5 Tell us, why do you come up with a -- remember  
6 all those things we went over that were almost the  
7 same visit, where do you come up with that plan?

8 A. Every office visit, there is a general plan on  
9 the patient to see how he's improving and to come up  
10 with the subsequent treatment.

11 Q. And would it be fair of me to say that he is  
12 more likely to have improvement if he follows your  
13 plan than if he doesn't? Yes or no.

14 A. It's not a yes or no answer.

15 Q. Okay. Whether it's a yes, no, maybe, or you  
16 don't know, a comment was made that there is not going  
17 to be any improvement unless he starts following the  
18 plan, true?

19 A. That is the comment by the therapist, not by  
20 the physician.

21 Q. Okay. But that's your therapist in your  
22 office who's right next door?

23 A. He can make comments, but --

24 Q. Okay. Fine.

25 A. -- at the same time, we are -- I mean, there

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1 are reasons why he may not be doing the therapy.

2 Q. Doctor, Doctor, fine. Now let's go to page

3 53. He's a five out of ten as far as pain. We see  
4 that up there in the top left-hand corner. And now  
5 he's reporting difficulty sleeping. He's now saying  
6 that he's seeing a psychologist -- does that say  
7 "every week"?

8 A. Yes.

9 Q. Every week for anxiety. Okay. Let's go to  
10 the next page. This time, is that a four out of ten,  
11 Doctor?

12 A. That is a four out of ten.

13 Q. Again, you know, massages, same thing,  
14 massages, same thing, continue medication. So it's,  
15 you know, kind of the same plan, right?

16 A. Yes.

17 Q. Let's go to the next page. Again, he goes for  
18 massage. Before the massage, his pain level's a four.  
19 Afterward, this is him reporting it, it's down to a  
20 one to a two, correct?

21 A. Correct.

22 Q. And in fairness, there are other pages in here  
23 where he reports pain at a seven or eight, true?

24 A. True.

25 Q. But on this particular visit, June 26 of 2011,

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1 he comes in for the massage, afterwards it's down to a  
2 one or a two.

3 Let's go to the next page. Now, here, you  
4 make a comment to the degeneration in his neck. And  
5 on this day, he's complaining it's a seven out of ten,  
6 correct?

7 A. Right.

8 Q. Let's go to page 58. Now, he's been  
9 complaining of sleep problems, right?

10 A. Yes.

11 Q. Okay. Tell me if I'm reading this right.

12 He has sleep problems -- problems sleeping,  
13 panic attacks, his neighbor jumps on the ceiling  
14 nightly and plays loud music.

15 Could that be why he's having sleep problems?

16 A. It would contribute to anybody's lack of  
17 sleep.

18 Q. Okay. Thank you.

19 A. That's not why he's having panic attacks.

20 Q. Okay. But as far as sleeping problems, he's  
21 the one that volunteered to you that his neighbor  
22 JUMPS on the ceiling nightly and plays loud music,  
23 correct?

24 A. Correct.

25 Q. Okay. Let's go to the next page. Now we're



1 on September 13 of 2011. And it says -- I'm having a  
2 hard time reading this, if you could help me here.

3 A. Hasn't been taking Silenor, which is a sleep  
4 medication, since his sleeping pattern has been  
5 stable.

6 Q. Okay. His sleeping pattern has been stable.  
7 Do we know if this is when he moved out of his noisy  
8 apartment, or do we have a timeframe on this?

9 A. I don't have a timeframe on it.

10 Q. Okay. And you also make a note that, since he  
11 saw the psychologist -- and Mr. Gambale has told us  
12 this himself -- he's had good benefits from that, and  
13 he has decided not to see the psychiatrist that you  
14 recommended him to, correct?

15 A. He was evaluated by a psychologist in the  
16 past, good benefits, three sessions were -- and was  
17 discontinued. Patient did not see Dr. Kuhn, K-U-H-N.

18 Q. And then we've got more pages about trigger  
19 point injections. And now is when you switch over to  
20 the electronic form of taking notes, which I, for one,  
21 thank you. It's a lot easier to read.

22 Here, I'm going to ask you to take a look at

23 page 67. I'm not going to bring it up on the screen,  
24 but I'm going to ask you to look at page 67.

25 MR. MCCRORIE: Are they jumped, or do you have

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MANDELBAUM - CROSS - KAMINSKY

22

1 a date?

2 Q. That's my PowerPoint number, that's not going  
3 to help you very much.

4 A. If you have the date?

5 Q. Yes, page two of three from 11/8/11.

6 A. Yes.

7 Q. Okay. You ask him -- I think this is the  
8 first time, correct me if I'm wrong, where you ask a  
9 social history, and you ask him if he's a smoker and  
10 how often he smokes. And his answer to you was he  
11 smokes every day up to a pack a day. "How soon after  
12 you wake up do you smoke your first cigarette?" He  
13 says after an hour. And you ask him, "Are you  
14 interested in quitting?" And he says he's not ready  
15 to quit, correct?

16 A. Correct.

17 Q. Also on that page, just the general  
18 examination, general appearance, he's well-developed,  
19 well-nourished with no acute distress. Okay.

20 Let's go to page -- let me just check  
21 something first. Okay. Let's go to page seventy.

22 MR. MCCRORIE: Just the date if you don't  
23 mind, because it will be easier for all of us.

24 MR. KAMINSKY: Sure. It's 12/6/11.

25 Q. And, again, you know, are you following the

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MANDELBAUM - CROSS - KAMINSKY

23

1 same form that you did on your handwritten notes, all  
2 this time it's typewritten, here you're asking him  
3 about tobacco use, and he tells you the same thing,  
4 same amount of smoking, and he's not ready to quit,  
5 correct?

6 A. Correct.

7 Q. You ask him about review of symptoms, denies  
8 change in appetite, denies chills, denies fatigue,  
9 denies fever, denies headache, denies lightheadedness,  
10 denies sleep disturbance, denies weight gain, denies  
11 weight loss.

12 So that means you asked him all these things,  
13 and his answer to you is no, I don't have chills, I  
14 don't have headaches, et cetera, et cetera, correct?

15 A. Yes.

16 Q. Let's go to page 87, Doctor. It's your report  
17 of March 27 of 2012. Again, you continue to ask him

18 about tobacco use, so you wouldn't ask him if it  
19 wasn't important, true?

20 A. It's part of the electronic mode of the  
21 records, as you go down the form, it is one of the  
22 sections, and you definitely ask, and you click on it.

23 Q. And so the only reason you're asking him these  
24 questions is because it's part of your form, it  
25 doesn't really mean anything to you.

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MANDELBAUM - CROSS - KAMINSKY

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1 A. It means something, it's asked every office  
2 visit.

3 Q. And he gives you the same answer, he's smoking  
4 a pack of day, within an hour of waking up, and he's  
5 not ready to quit, right?

6 A. Correct.

7 Q. Okay. That's it for that.

8 Now, Doctor, would you -- we heard about the  
9 spinal cord stimulator that you're contemplating.

10 A. Yes.

11 Q. And the reason for that is because the trial  
12 showed a 50 percent reduction in Mr. Gambale's level  
13 of pain, which is quite an improvement, true?

14 A. Correct.

15 Q. Now, if it should turnout that merely by  
16 stopping smoking he could have a 50 percent reduction  
17 in pain, would you, as his pain care provider,  
18 recommend to him that, before he has a spinal cord  
19 stimulator implanted into his body, that he at least  
20 try quitting smoking?

21 MR. MCCRORIE: Objection.

22 THE COURT: Sustained.

23 MR. KAMINSKY: Subject to connection, Your  
24 Honor.

25 THE COURT: No, not unless you're ready to

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MANDELBAUM - CROSS - KAMINSKY

25

1 make an offer of proof.

2 Q. Are you recommending, or you have no position,  
3 on whether or not Mr. Gambale should stop smoking?

4 THE COURT: Separate question. Separate  
5 question, right?

6 MR. KAMINSKY: Yes, this is a separate  
7 question.

8 Q. Do you have a position, yes or no.

9 A. I believe, in general, everybody should not  
10 smoke, including Mr. Gambale.

11 Q. But not because of his spine, necessarily,  
12 just because --

13 A. There are health risks associated with  
14 smoking, it's well-documented.

15 Q. And to your knowledge, are the risks from  
16 smoking associated with back pain, are they  
17 well-documented or not?

18 MR. MCCRORIE: Objection. Asked and answered  
19 and ruled on.

20 THE COURT: It has been ruled on. Off the  
21 record.

22 MR. KAMINSKY: Judge, if you just want --

23 THE COURT: No, no.

24 (Whereupon, a sidebar discussion was held off  
25 the record at the Bench, out of the hearing of the

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MANDELBAUM - CROSS - KAMINSKY

26

1 jury.)

2 THE COURT: The objection has been sustained a  
3 couple of times. We're going to move on.

4 Q. Concerning the Plaintiff's back, do you know  
5 if -- does he have a herniated disc in his lumbar  
6 spine?

7 A. Yes.

8 Q. And do you know if that disc presented itself  
9 for the first time before or after this motor vehicle

10 accident?

11 A. He had symptoms of a herniated disc prior  
12 to --

13 Q. Listen to my question. Did the disc present  
14 itself on films before or after the motor vehicle  
15 accident?

16 A. I will look at the films. I mean, he had an  
17 MRI on October 4, 2011, that showed that L4-5 disc.

18 Q. And now I'm going to ask you to look at the  
19 MRIs of his back, if you have them.

20 A. That was his back.

21 Q. Right. I'm going to ask you to look in the  
22 MRIs of his back from before the motor vehicle  
23 accident.

24 A. Again, I don't have that MRI report on me.

25 Q. Thank you very much, Doctor. No further

↑

MANDELBAUM - REDIRECT - KAMINSKY

27

1 questions.

2 THE COURT: Redirect?

3 MR. MCCRORIE: Yes.

4 REDIRECT EXAMINATION

5 BY MR. MCCRORIE:

6 Q. Doctor, you testified about it, but I know  
7 it's your first time. July 23, 2009, there was a -- a

8 study done of Mr. Gambale's disc, correct?

9 A. Correct.

10 Q. Okay. Just so the record is clear, we know  
11 Mr. Gambale has had two fusions to date, correct?

12 A. Yes.

13 Q. Did the tobacco industry cause the need for  
14 Mr. Gambale's fusions? Yes or no.

15 A. No.

16 MR. KAMINSKY: Objection.

17 THE COURT: Sustained. As to form, sustained.

18 Q. Okay. You've already told the jury that the  
19 cause of his herniations was the board breaking and  
20 him suddenly falling with the several-hundred-pound  
21 item into the hole, correct?

22 A. Correct.

23 Q. Have you ever had a patient that smoked for  
24 about ten years, and all of a sudden needed a  
25 one-level fusion and then, a year later, a two-level

↑

MANDELBAUM - REDIRECT - KAMINSKY

28

1 fusion?

2 A. No.

3 Q. From smoking --

4 MR. KAMINSKY: Objection.

5 THE COURT: Overruled.

6 Q. You were trying to say something several times  
7 about how smoking can affect the fusion. Didn't you  
8 say that?

9 A. Yes, smoking can affect the healing process,  
10 especially postoperatively. In this case, he fused  
11 well afterwards.

12 Q. The fusion itself, holding up 8B, both Dr.  
13 Merola and the doctor at Hospital for Special Surgery,  
14 "took," meaning the bone that was -- the cadaver bone  
15 that was in between the two bones fused perfectly,  
16 correct?

17 A. Yes, it wasn't a question of healing, it  
18 healed well.

19 Q. That's what smoking would stop, if it was  
20 going to stop anything, a proper fusion, correct?

21 A. Correct.

22 Q. Now the two-level possession, where now the  
23 space is in two different levels, the second one  
24 actually took, and the neck is forever fused in a  
25 stiffer position because there is no disc there,

↑

1 correct?

2 A. Correct.

3 Q. So the smoking didn't affect the two-level  
4 fusion either?

5 A. Right.

6 Q. Although we didn't mark them in just yet, I  
7 saw, when Mr. Kaminsky, the other assistant, was  
8 putting up the records of the psychologist, there are  
9 other records.

10 A. Yes.

11 Q. And you said you reviewed all the records, but  
12 you brought only your records here, correct? The  
13 records that the psychologist started, March 24, 2011,  
14 gave you a history --

15 THE COURT: Show those your adversary.

16 MR. MCCRORIE: These are Dr. Robbins' records.

17 Q. Mr. Kaminsky was asking you if the cause of  
18 his anxiety was his parents flying off to Las Vegas,  
19 do you remember that?

20 A. Yes.

21 Q. Do you ever see any records from the  
22 psychologist that treated him for that three- or  
23 four-month period that it wasn't his parents moving  
24 that caused him anxiety, it was, in fact, flashbacks  
25 to the accident, and that it's a miracle that he

↑

1 landed one flight down and wasn't dead?

2 A. Correct, that's what the psychiatrist wrote.

3 Q. Psychologist, you're using --

4 A. Psychologist.

5 Q. One is a medical doctor, one is a --

6 A. Therapist.

7 Q. Therapist. And he, most definitely, just saw  
8 a therapist for a short period of time, correct?

9 A. Correct.

10 Q. Any medication to deal with any mental health  
11 problems, you were prescribing to him?

12 A. Yes.

13 Q. And did you ever see in those records that he  
14 doesn't like taking meds all the time?

15 A. Yes.

16 Q. Doesn't want to take meds all the time, and  
17 he's seeing someone because that's causing him some  
18 stress in his life?

19 A. Yes.

20 Q. Did you ever see anything in the records of  
21 the psychologist treating him about people playing  
22 loud music, or did it just have to do with this  
23 accident?

24 A. It just had to do with the accident.

25 Q. When we get the clean copy, we'll put them in



1 subject to whatever number that is.

2 Let's just go back to the beginning of the  
3 cross-examination. A fall into a hole, whether it was  
4 twelve feet, four feet, you said it didn't make a  
5 difference. You were asked questions about whether or  
6 not the record said he hit his head, and he'll state  
7 for the record, even he said it, he didn't strike his  
8 head and cause a head injury.

9 Does the herniated disc injury come from  
10 hitting the head, or the spine whipping back and forth  
11 in the neck?

12 MR. KAMINSKY: Objection.

13 THE COURT: Sustained.

14 Q. Do you have to hit your head to sustain a  
15 herniated disc?

16 A. You don't have to hit your head to have a  
17 herniated disc. You could just have that severe  
18 jolting back and forth could cause that herniated  
19 disc.

20 Q. It could have even been caused just by the  
21 jolt of being sucked into a hole with a  
22 several-hundred-pound item you are carrying and the

23 floor came out from under you?

24 A. Yes.

25 Q. And it could come from when that item jams

↑

MANDELBAUM - REDIRECT - KAMINSKY

32

1 into the wall?

2 MR. KAMINSKY: Judge, objection at this point.

3 THE COURT: Overruled.

4 MR. KAMINSKY: Leading, Your Honor.

5 THE COURT: Leading, sustained.

6 Q. You said on the direct that you're not a  
7 radiologist, but you certainly have the ability to  
8 read films, correct?

9 A. Yes.

10 Q. And you talked about desiccation would mean  
11 that the discs lost a little water, and severe  
12 desiccation would mean the discs are a different size  
13 of the other discs, correct?

14 A. Yes.

15 Q. Notice the 7/23/09 x-ray of Mr. Gambale's  
16 cervical. Do all the discs appear to be the same  
17 height?

18 A. Yes.

19 Q. And the abnormalities, you told the jury, are

20 the discs that appear to be entering into the black  
21 part, the spinal canal?

22 A. Yes.

23 Q. Desiccation, in any event, you said was  
24 normal. What do you mean it's normal, desiccation?

25 A. Over time, discs will -- the natural

↑

MANDELBAUM - REDIRECT - KAMINSKY

33

1 progression of a disc, it will desiccate over time.

2 Q. Does everyone in this room right now have  
3 desiccation to some level to their discs?

4 A. Yes.

5 Q. Degeneration, that word, does degeneration  
6 equal herniation?

7 A. No.

8 Q. Does everyone in this room, because we're all  
9 over eighteen, have degeneration to some level in our  
10 discs?

11 A. Yes.

12 Q. And when -- okay. Fine. You were read from  
13 the films that were in evidence and the reports, that  
14 there was desiccation at certain levels, some disc  
15 desiccation that a radiologist saw on 7/23/09. Just  
16 to make it easier, there's no mention of disc  
17 desiccation at the level of the second fusion, C5-6,

18 right?

19 A. Yes.

20 Q. So at least that one that is clearly in the  
21 canal, the radiologist doesn't see any desiccation; is  
22 that correct?

23 A. Correct.

24 Q. A disc can herniate with or without  
25 desiccation, correct?

↑

MANDELBAUM - REDIRECT - KAMINSKY

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1 A. Correct.

2 Q. You just pointed out that in the thoracic  
3 spine, one MRI was done, and there was a mention of, I  
4 think it said, mild scoliosis. There have been many  
5 MRIs to the neck and back. Was there ever a mention  
6 of scoliosis in any of the MRIs to date to the neck or  
7 back?

8 A. No.

9 Q. And you also said scoliosis could be  
10 congenital, and you wanted to say something else.  
11 What else could scoliosis be?

12 A. It could be functional scoliosis. In other  
13 words, severe spasm on one side could actually cause  
14 the spine to shift on one side. You see it a lot in

15 the lower back, where someone's walking all tilted  
16 because everything's spasmed up. An x-ray is going to  
17 show that scoliosis.

18 Q. And, in fact, scoliosis would be -- the  
19 doctors and radiologists at Coney Island didn't say  
20 scoliosis, they said reversal do to spasm, correct?

21 A. Right. Obviously, there's spasm and it  
22 straightened out.

23 Q. I don't have the board, but if you could go to  
24 your note of the motor vehicle accident. That was on  
25 March -- I'm sorry, that was 12/21/10. And you were

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MANDELBAUM - REDIRECT - KAMINSKY

35

1 asked --

2 What I'd like you to point out, Doctor, as  
3 well, is the note immediately proceeding that,  
4 11/16/10, and also from 10/5/10, the two notes that  
5 are before the motor vehicle accident. And I  
6 just -- I understand that one was read in between  
7 10/5/10 and 11/16/10, but if I could show you this  
8 here, these are your notes, just to make it --

9 A. Yes.

10 Q. On October 5, 2010, the pain severity scale is  
11 eight to nine out of ten; is that right?

12 A. Yes.

13 Q. And that's before the motor vehicle accident,  
14 when it was actually a little lower at an eight?

15 A. Yes.

16 Q. The one immediately before the accident, the  
17 motor vehicle accident, 11/16/10, that was actually  
18 nine out of ten, it's greater than from before the  
19 accident; is that right?

20 A. Correct.

21 Q. And so, when he has this motor vehicle  
22 accident -- in fact you say, I was there, I believe it  
23 happened on the day of, because it says it's the motor  
24 vehicle accident, the same date as the note.

25 A. Right.

↑

1 Q. Okay. What does a zero, with a line through  
2 it, "changes" mean, right underneath "motor vehicle  
3 accident"?

4 A. No changes.

5 Q. And so I don't think the accident helped him,  
6 but certainly his pain scale was less than it was from  
7 a month before?

8 A. Correct.

9 Q. The fact that his pain scale is eight on one

10 time, five when he does the -- you know, another time  
11 when it was known he did massage, and that's it's back  
12 up at eight, what does that tell you with regard to  
13 why -- or whether or not Mr, Gambale is going to need  
14 continued physical therapy?

15 A. He'd likely need to continue physical therapy.  
16 It does help. But, again, sometimes physical therapy  
17 or massage is a temporary relief. It offers some  
18 relief, the spasm will return.

19 Q. You started seeing him after  
20 Advanced -- Victory Multi Medical Care shut down, but  
21 One-on-One Therapy has been seeing him three times a  
22 week. You are associated with One-on-One, that's not  
23 the three times a week he was going to the therapy?

24 A. No.

25 Q. That's a bonus or plus that your service

↑

1 provides in the pain management.

2 A. Right.

3 Q. And that motor vehicle accident on 12/21/10,  
4 you didn't state anything with regard to his neck, his  
5 major complaint, it didn't even bother him, from that  
6 accident?

7 A. No, it just states "injured lower back."

8 Q. And you still had the same impression on the  
9 bottom, it was post-cervical fusion, he needed to  
10 continue the meds, continue the therapy, and you gave  
11 him a trigger point injection, correct?

12 A. Correct.

13 Q. And he had C-spine spasm that date, just as he  
14 had the dates before and after.

15 A. Yes.

16 Q. I need you -- I don't know if it's up there,  
17 do you have the emergency room record up there?

18 A. I don't think so.

19 Q. It's a thin record with a blue sheet in front  
20 of it.

21 A. The Coney Island Hospital? Yes. It's here.

22 Q. Okay. So -- and I understand you said yes to  
23 a lot of things, and you are new doing this, but I  
24 want to go back to the note, not of the RN, but the  
25 physician's assistant on the bottom.

↑

1 You had said yes, that he is a doctor that did  
2 that exam, but I just want to go to the actual bottom  
3 of the note. When it says, "documented by," and it  
4 says next to that, Matthew Laghezza, PA, does that

5 mean the person that documented this document was a  
6 physicians assistant?

7 A. Yes.

8 Q. Right underneath that, when it says, "I have  
9 discussed these findings with an attending physician,"  
10 that means that that PA either called or spoke with a  
11 medical physician, not that the physician did the  
12 exams, correct?

13 A. Correct.

14 Q. And so when it says up there "nontender," that  
15 means that a physician's assistant noted that and  
16 that's what the physician's assistant found, correct?

17 A. Correct.

18 Q. We pointed out that was different from the  
19 medical doctor that we know did an exam an hour before  
20 his own doctor and found the decreased range of  
21 motion.

22 A. Correct.

23 Q. You also pointed out that he didn't strike his  
24 head. And, again, nowhere have you ever seen that he  
25 claimed he struck his head and that there was some

↑

1 head injury.

2 A. Correct.

3 Q. And the fact that it's highlighted that he  
4 didn't strike his head, does that change any of the  
5 opinions you gave on direct examination about his neck  
6 or back injuries?

7 A. No. He still had an injury to his neck, just  
8 did not strike as --

9 Q. It was also pointed out in your own notes that  
10 it says, "no acute distress," and it says that in the  
11 emergency room, despite the fact that they know he  
12 fell through a floor twelve feet, that he had pain all  
13 over his body. I just want to point out, no acute  
14 distress, that doesn't mean not in pain, correct?

15 A. No.

16 Q. Even in the note you wrote, no acute distress,  
17 you noted his pain was eight out of ten or whatever it  
18 was that day, correct?

19 A. Correct.

20 Q. The temporary relief that I just -- just to  
21 come back to physical therapy and pain meds, although  
22 they provide temporary relief, what would  
23 Mr. Gambale's physical condition and pain condition be  
24 like if he was on no meds and did no physical therapy?

25 A. His condition would be worse.

↑

1 Q. Would he continue to progressively get worse?

2 A. Yes.

3 Q. You talked about the trigger point injections  
4 on cross again. Are they -- and it was noted that  
5 one-third of your notes, the packet you have here,  
6 contains trigger point injections, and you go in and  
7 out at least approximately ten times.

8 Is that a painful -- it's an inch and a half,  
9 and you say it goes into the muscle. Is that painful  
10 for the patient to undergo?

11 A. Yes.

12 Q. The issue about if he did more exercises that  
13 the massage therapist noted, so that means if he did  
14 more than the three times a week and the one time a  
15 month, that the massage therapy was helping him out;  
16 is that right?

17 A. Yes.

18 Q. We don't know what she's saying, it's  
19 documented by she or he or whoever the therapist was,  
20 correct?

21 A. Yes.

22 Q. Did you find him to be a motivated patient?

23 A. He is a motivated patient.

24 Q. Was he motivated enough to undergo epidurals,

25 two surgeries, and have a spinal core stimulating



1 implanted in him.

2 A. Yes.

3 Q. And when it was said you requested spinal cord  
4 stimulator, you requested one and you were authorized  
5 for it, right?

6 A. Yes.

7 Q. And you've since put in authorization for the  
8 permanent spinal cord stimulating?

9 A. Yes.

10 Q. And you've spoken about it with Michael?

11 A. Yes.

12 Q. Are you contemplating it, or are you going to  
13 do it?

14 A. I'm going to do it.

15 Q. And understanding that you're not the  
16 psychologist, and you're not putting in for  
17 authorization for a psychologist, that has to be  
18 connected as causally related. Did you ever see the  
19 note of Dr. Hausknecht, the treating neurologist, from  
20 June 26, 2010, right after the first surgery fails,  
21 stating he has stress, anxiety, he's bugging out and  
22 wants to make an appointment with a psychologist, from

23 when the first surgery didn't relief his pain and  
24 didn't get him back to work?

25 A. Yes.

↑

BONILLA - DIRECT - MCCRORIE

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1 Q. Did you ever see that in the review?

2 A. Yes.

3 Q. Nothing further.

4 THE COURT: Re-cross?

5 MR. KAMINSKY: No.

6 THE COURT: Thank you, Doctor. You are  
7 excused.

8 (Witness excused.)

9 THE COURT: Mr. McCrorie, do we have your  
10 witness?

11 MR. KAMINSKY: Mr. Sacks just went outside.

12 For the record, we all Alex Bonilla.

13 THE COURT: Call Mr. Bonilla.

14 A L E X I S B O N I L L A, having first been duly  
15 sworn, was examined and testified as follows:

16 THE WITNESS: Alexis Bonilla, Metal Lathers  
17 Local 46 trust fund.

18 THE COURT: Counsel, your witness has been  
19 sworn.

20 MR. MCCRORIE: Thank you, Your Honor.

21 DIRECT EXAMINATION

22 BY MR. MCCRORIE:

23 Q. Good afternoon, sir. The jury is going to  
24 understand this in a very short while. What is your  
25 date of birth?

↑

BONILLA - DIRECT - MCCRORIE

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1 A. January 29, 1984.

2 Q. Happy birthday.

3 MR. KAMINSKY: What a great way to spend it.

4 Q. Have you ever testified in court before?

5 A. No.

6 Q. Can you tell the jury your title. You just  
7 told the Court Officer, and since it's your first time  
8 a jury's in the box over there, you can direct all  
9 your responses to the jury. I'll try to stand over  
10 here. Tell them your title, where you work.

11 A. I'm an administrative assistant for the Local  
12 46 trust fund office. We manage the funds and  
13 contributions from the employers, and we manage their  
14 welfare, their pension, and their annuity retirement  
15 accounts.

16 Q. I'm going to have you define some of those  
17 things a little later on.

18                   For how long have you been employed by Local  
19   46?

20       A.   I've been working at the Local 46 site for  
21   five years.

22       Q.   Can you just tell the jury just a little bit  
23   about your background.  Your educational level, where  
24   you went to do school, what degree you attained?

25       A.   I graduated from Hofstra University in 2007

↑

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1   with a Bachelor's in mathematics.  I've been employed  
2   by Audit Associates for the last eight years, and for  
3   the last five years, I've been working at the Local 46  
4   site.

5       Q.   Okay.  And your title was assistant fund  
6   administrator?

7       A.   Correct.

8       Q.   Can you tell us your duties as assistant fund  
9   administrator.  Tell them all, and we'll define some  
10   of the things later.

11       A.   What I do is, I manage the contributions that  
12   come in from the employers for the work that the  
13   lathers do.  And that consists of an hourly rate for  
14   each of the funds that they work for.  And they work

15 for the -- their medical coverage, dental coverage,  
16 scholarship funds, their annuity, their pension, and  
17 so on.

18           So I make sure that I manage the logging in of  
19 all of those contributions, so that each member, by  
20 the time of retirement, have all the services they  
21 need at the time for that.

22       Q. I'm going to ask you one question, and  
23 hopefully -- you can just tell the jury what Local 46  
24 is, and if you wanted to, tell them what rebar and  
25 lathing is, what you're saying.

↑

BONILLA - DIRECT - MCCRORIE

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1       A. Well, Local 46 is an ironworkers union. What  
2 they consist of is a lather, who installs the  
3 reinforcing steel on concrete structures, like a  
4 building, stadium. It's very heavy-duty work,  
5 carrying iron, slabs, et cetera.

6       Q. And how do Local 46 members get compensated  
7 for their work?

8       A. They work on an hourly wage rate based on the  
9 collective bargaining agreement.

10      Q. What is a collective bargaining agreement, or  
11 CBA? Tell the jury what that means.

12      A. The official document that binds the employer

13 with the union to -- it binds both the local and the  
14 employer to the standards of the job, where they  
15 should work, and the conditions and the compensation  
16 for all of its members.

17 Q. Are all employees of Local 46, are they all  
18 members?

19 A. Yes.

20 Q. When you say the union collective bargaining  
21 agreement binds the employers, does it also bind the  
22 people building the projects, the general contractors,  
23 the Pavarini McGovern's, part of that negotiation to  
24 pay the wage to have their building built?

25 A. Correct.

↑

BONILLA - DIRECT - MCCRORIE

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1 Q. The length of each contract, when is it  
2 typically renegotiated?

3 A. About three to four years.

4 Q. And you said you've been working in your  
5 position for five years?

6 A. Correct.

7 Q. Can you tell the jury the categories of  
8 workers in the union.

9 A. It's divided into two classes, the

10 apprenticeship class to then graduate to the  
11 journeyman class.

12 Q. How many members are there in the union?

13 A. There's about 2,000 members.

14 Q. And how often are applications -- how often is  
15 the application process opened to people that want to  
16 try to become a member?

17 A. About four years.

18 Q. Approximately every four years it opens up?

19 A. Every four years, yes.

20 Q. And approximately how many people apply every  
21 four years to try to become a member of the union?

22 A. Hundreds, hundreds try to apply for the  
23 position.

24 Q. And they go wait on a six-hour line or however  
25 many people are there?

↑

BONILLA - DIRECT - MCCRORIE

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1 A. Yes.

2 Q. How many people get accepted out of the  
3 hundreds and hundreds that wait on line?

4 A. About 50.

5 Q. 50 every four years?

6 A. Right.

7 Q. Have you ever met anyone from our firm, Sacks

8 & Sacks?

9 A. Yes.

10 Q. Have you ever met us before your involvement  
11 in this case?

12 A. No.

13 Q. You understand that it's your first time that  
14 you're testifying, did we meet prior to your  
15 testifying here today?

16 A. Yes.

17 Q. And did we ask you to get the business records  
18 of Local 46 as they relate to Mr. Gambale and his work  
19 history with Local 46?

20 A. Correct.

21 Q. And did we also ask you to bring the wage  
22 sheets and effective collective bargaining agreement?

23 A. Yes.

24 Q. And pension information?

25 A. Yes.



1 Q. Do you have that with you?

2 A. Yes, I do.

3 Q. Take that out, please. If you just separate  
4 them up there, we're going to -- I don't know, since

5 we --

6 MR. MCCRORIE: I don't know how Your Honor  
7 wants to do this. Should I take them and mark them  
8 myself?

9 THE COURT: They haven't previously been  
10 marked?

11 MR. MCCRORIE: No.

12 THE COURT: We'll mark them.

13 MR. MCCRORIE: Why don't we do this.

14 Q. Do you have the wage benefit sheets?

15 A. Yes.

16 Q. For how long did you go back?

17 A. 2003.

18 Q. If I deem those, with the Court's permission,  
19 for identification, number 30, are those the wage  
20 benefit sheets for the last ten years, including the  
21 current wage benefit sheets that are kept in the  
22 regular course of business of Local 46?

23 A. Yes.

24 Q. And it's your job to keep them?

25 A. Yes.

↑

1 Q. And you retrieved them?

2 A. Yes.

3 MR. MCCRORIE: I offer them into evidence as a  
4 business record.

5 MR. KAMINSKY: No objection.

6 THE COURT: Without objection, accepted as  
7 Plaintiff's 30 in evidence.

8 (Whereupon, the above-mentioned item was  
9 admitted as Plaintiff's Exhibit 30 in evidence.)

10 Q. MR. MCCRORIE: I'm going to ask the same with  
11 regard to the pension fund rules and regulation. Is  
12 that a record normally kept --

13 MR. KAMINSKY: No objection.

14 MR. MCCRORIE: Okay.

15 THE COURT: Without objection, number 31 in  
16 evidence.

17 (Whereupon, the above-mentioned item was  
18 admitted as Plaintiff's Exhibit 31 in evidence.)

19 Q. Did we ask you for the pension accrual rating  
20 list for the last ten years?

21 A. Yes.

22 Q. In addition to the last ten years, did you  
23 even go back further from 1979 till now?

24 A. Yes.

25 Q. Are those records that you retrieved from your

↑

1 office?

2 A. Yes.

3 Q. Kept in the usual course of business?

4 A. Yes.

5 Q. I'd like those in as 32, Your Honor.

6 THE COURT: Without objection, they're  
7 accepted as Plaintiff's 32 in evidence.

8 (Whereupon, the above-mentioned item was  
9 admitted as Plaintiff's Exhibit 32 in evidence.)

10 Q. As Plaintiff's 33, I'd like the Metal Lathers  
11 Local 46 Welfare Trust Fund, is that the current one  
12 that you're using?

13 A. Yes.

14 MR. MCCRORIE: I'd like to move that --

15 MR. KAMINSKY: No objection.

16 THE COURT: Without objection, number 33 in  
17 evidence.

18 (Whereupon, the above-mentioned item was  
19 admitted as Plaintiff's Exhibit 33 in evidence.)

20 Q. And does -- did -- were you asked to bring the  
21 actuarial information from the company that audits the  
22 auditors, or audits you guys?

23 A. Yes.

24 Q. The Seigal (phonetic) Consulting Metal Lathers



1 is that good as of January, 2013?

2 A. Yes.

3 Q. And is that also kept in your regular course  
4 of business?

5 A. Yes.

6 MR. MCCRORIE: I move that in as Plaintiff's  
7 34, Judge.

8 MR. KAMINSKY: No objection.

9 THE COURT: 34 without objection.

10 (Whereupon, the above-mentioned item was  
11 admitted as Plaintiff's Exhibit 33 in evidence.)

12 Q. So, can you tell the jury, when someone  
13 becomes an apprentice, how long does that program go?

14 A. At the time that Mr. Gambale was an  
15 apprentice, you needed to complete the courses that  
16 you need for the graduation to a journeyman. And  
17 on -- in addition to that, you needed 2,500 hours  
18 worked before meeting the requirement.

19 Q. Incidentally, did we ask you to total the  
20 number of hours or to find out the total number of  
21 hours that Mr. Gambale worked?

22 A. Yes.

23 Q. Did he, in fact, make the 2,500 hours at the  
24 time of the accident?

25 A. Yes.



1 Q. Did he actually make it by 17 hours?

2 A. Yes.

3 Q. Had the accident -- so he had the required  
4 hours, correct?

5 A. Yes.

6 Q. Did we ask you to find out whether or not he  
7 finished the journeyman school, the weekly school that  
8 was part of the requirement?

9 A. Yes.

10 Q. And did he, in fact, finish that, even though  
11 it was post-accident?

12 A. Correct.

13 Q. Okay. And so if he were well enough to go  
14 back and work, he'd been a journeyman?

15 A. Correct.

16 Q. And that would have been the same rate as of  
17 2010?

18 A. Correct.

19 Q. If we could use the current wage sheets, we

20 have the sheets that were present at the time, that  
21 were -- because you have the last ten years, you have  
22 what was in effect at the time of this accident, but  
23 let's use today's rates.

24 Go through, if you can, for the jury, what a  
25 journeyman makes -- and, actually, before you do that,

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1 when someone's an apprentice, first year, second year,  
2 third year, are they making the same wage rate as a  
3 journeyman?

4 A. No.

5 Q. Explain the difference. You can use it either  
6 in -- either in real world or --

7 A. Well, the first-year apprentice is the lowest  
8 scale of earning that you can make at Local 46, which  
9 today is at \$17.71. The second year makes \$22.81.  
10 The third year makes \$27.91. And then the journeyman  
11 jumps up to \$50.73 per hour.

12 Q. Okay. And although an apprentice make less  
13 than a journeyman, does he still get the other  
14 benefits?

15 A. Yes.

16 Q. Why don't you go through and tell the jury,  
17 it's on the sheet, but do a -- a base wage -- and just

18 so we're clear, I'm looking at July, 2013, through  
19 June 30, 2014.

20 A. Correct.

21 Q. Okay. So a journeyman, his base wage is what?

22 A. Forty dollars.

23 Q. And for each hour he works, in addition to the  
24 forty dollars, what's the next benefit that he gets in  
25 the form of actual pay?

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1 A. Then he gets something called a vacation pay  
2 of \$9.30.

3 Q. Okay.

4 A. And the union dues for a \$1.43.

5 Q. And so the hourly taxable wage, you said, was  
6 around 50. But what is it exactly?

7 A. It's \$50.73.

8 Q. All right. Now, the rest of the funds, can  
9 you tell the jury the funds and the benefits that a  
10 worker would receive.

11 A. In addition to what the wage that -- that a  
12 lather makes, the employer has to contribute to his  
13 benefits, and that consists of several additional  
14 funds that come on his behalf per hour. And that

15 includes the trust fund, which is for his medical,  
16 dental -- which is also for his medical, his pension  
17 fund, his scholarship fund, his apprenticeship fund,  
18 promotional fund, and that all consists of the total  
19 benefit package of \$41.81 that an employer has to  
20 contribute aside from his wages.

21 Q. In addition to the \$50.73?

22 A. Yes.

23 Q. Can you tell the jury, in addition to that, is  
24 there health coverage afforded to a union member and  
25 his family, if he has a family?

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1 A. Yes.

2 Q. Can you tell the jury the value that coverage?

3 A. I --

4 Q. Single versus -- well, if someone has a young  
5 daughter, that counts as family coverage?

6 A. Yes.

7 Q. Can you tell the jury the value of the family  
8 coverage.

9 A. At the present time, the value would be at  
10 \$1,730 per month, and for a single person, \$584 a  
11 month.

12 Q. Can you tell the jury the difference between

13 an annuity and a pension.

14 A. The annuity is an interest-bearing account  
15 that is a supplement to the pension benefit, for when  
16 a member reaches the requirements to retire at  
17 retirement age. It's kept separate, and it's there  
18 for any kind of emergencies that might occur  
19 throughout their career.

20 By the time that you hit retirement age, it's  
21 at a healthy point, where it can really, you know,  
22 support the living cost at the time of retirement.

23 Q. Before I talk to you a little bit more  
24 about -- or you talk to the jury a little bit more  
25 about pension, the health coverage, does the health

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1 coverage, as most plans do, specifically exclude  
2 on-the-job injuries?

3 A. Correct.

4 Q. That would be the responsibilities of some  
5 other thing, if the worker is injured, the health care  
6 coverage does not apply?

7 A. Right. That would be --

8 Q. I'm sorry --

9 A. -- workers' comp.

10 Q. Okay. Different. I want you to talk to the  
11 jury as best as you can, as simply as you can, about  
12 the pension accrual system, the credit system, and how  
13 someone builds up credits in the pension.

14 A. Okay. To build the credit for Local 46, it's  
15 based on an hour -- hourly amount. You have to make  
16 225 hours in order to receive one pension credit; 900  
17 hours, you would receive four credits, which is equal  
18 to a vesting year. And you have to be vested in order  
19 to retire -- or to be qualified for retirement. And  
20 the accrual system is what we have that will determine  
21 the worth of every credit that you earn.

22 Q. So if you -- I'm just going to take this for  
23 one moment -- if you could tell the jury how  
24 much -- what are the -- what's the accrual system,  
25 what are the credits? Like, what does it take to get

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1 three credits, four credits, five credits, and when do  
2 you vest?

3 A. To get four credits, you need 900 hours. You  
4 can earn additional credits if you work more than the  
5 900, as an incentive to, you know, pump in more hours  
6 into the union. If you earn additional 600 hours  
7 after the 900, that's how you can earn an extra

8 pension credit.

9 Q. Okay. And what is the most amount of credits  
10 a union member can obtain in one year?

11 A. Eight.

12 Q. How do the credits translate into money at  
13 retirement?

14 A. With the accrual rate --

15 Q. Tell them what an accrual rate means, please.

16 A. The accrual rate is the worth of each pension  
17 credit. At the present time the value of the pension  
18 credit is at \$32.50. So when it comes time for  
19 retirement, and you meet the vesting surface and you  
20 meet all the credits that you need for a pension, it's  
21 a basic -- how much credits you have times whatever  
22 the credit is that as valid at the time of retirement.

23 Q. I'm actually going to -- I know you have it in  
24 the Gmail smaller version, I wanted to just give you a  
25 blowup of what's marked Plaintiff's 33 in evidence.

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1 Explain the accrual rate using the last ten years. We  
2 have also have in here from '79 on, but just use the  
3 last ten years.

4 A. So, you know, at the time now it's \$32.50. So

5 if you have, for example, a hundred credits, that will  
6 be translated into \$3,200 a month as your unreduced  
7 pension.

8 Q. And that you'd get in retirement?

9 A. Correct.

10 Q. In addition to the annuity that is being paid  
11 into?

12 A. Correct.

13 Q. And so, if someone were to work thirty years  
14 and accrue credits, it's, at the end, the total number  
15 of credits times -- if they were retiring in 2013,  
16 \$32.50?

17 A. Correct.

18 Q. And whatever the number between 8.1 and 32.50,  
19 however that increases, this chart shows at what rate  
20 the pension accrual rate actually increases.

21 A. Correct.

22 Q. Okay. I'm not going to ask you to do the  
23 math, but you can just put that down on the side.

24 What does vesting in a pension mean? Or tell  
25 us what vesting is and when someone can vest in a



1 pension in this union?

2 A. You're considered vested when you have five

3 full years of 900 hours each of those years. So in  
4 order for you to retire, you have to have  
5 that -- those five vesting years consecutively before  
6 you can even consider, you know, applying for your  
7 pension.

8 Q. Now, is there a minimum age you can retire in  
9 the union?

10 A. Yes.

11 Q. What is that?

12 A. 55.

13 Q. And when people retire, union members retire,  
14 who do they come to to retire?

15 A. They come and see me.

16 Q. You physically?

17 A. Yes.

18 Q. And so, for the last five years, can you tell  
19 the jury the average age of someone who comes to  
20 retire as a Local 46 ironworker.

21 A. About 62.

22 Q. And other than you saying that, did an outside  
23 agency, Seigal's Consulting, actually do studies on  
24 how often -- the age of retirement for Local 46  
25 ironworkers?

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1 A. Yes, they did.

2 Q. What was it?

3 MR. KAMINSKY: Objection, Your Honor.

4 THE COURT: What objection?

5 MR. KAMINSKY: That's in evidence? No  
6 objection.

7 THE COURT: Okay. Overruled.

8 Q. It's in the document?

9 A. Yes, they specifically said 62 is the average  
10 age of retirement.

11 Q. And, in fact, five percent out of 2,000 go  
12 under that?

13 A. Correct.

14 Q. Can you tell the jury, is there any major  
15 benefit you would lose if you got out and decided to  
16 be one of that five percent that left between 55 and  
17 62? What's a major benefit you would lose for life?

18 A. It's the medical coverage. At age 55, you  
19 would have to pay a portion of your benefit in order  
20 to continue to have coverage with Local 46.

21 Q. Is it known in the union that you stay until  
22 62, if you can?

23 A. Yes. Because at 62, your coverage is fully  
24 subsidized until 65 by Local 46. So you don't have to

25 pay out of your pension what it is to continue your



1 coverage with us.

2 Q. Can you go to the personal work record of  
3 Mr. Michael Gambale, Plaintiff's 31 in evidence.  
4 We'll mark it later, but you have it there.

5 Now, you said he had the 2,500 hours if you  
6 add those numbers up, but how many hours did  
7 Mr. Gambale work from October, 2007, until the end of  
8 that year?

9 A. 2,517.

10 Q. That's total everything. I'm just talking the  
11 first year.

12 A. Just the first year? That's 405.

13 Q. And how about the next full year, all of 2008?

14 A. 1,455.

15 Q. And how about from January of 2009 to the date  
16 of the accident, July 17?

17 A. 656.

18 Q. In general, do -- if you're in the union, and  
19 you build your reputation, when you become a  
20 journeyman, do you get more work or less work than the  
21 apprentices?

22 A. You'll get more work.

23 Q. So when you're an apprentice, that would be  
24 your lowest hours?

25 A. Correct.

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1 Q. In again, so like all unions, you build a  
2 reputation and the employer would keep you?

3 A. Correct.

4 Q. How has the industry been these days in terms  
5 of employment for the 2,000 members?

6 A. We have had full employment.

7 Q. Are you what's known as a specialized local?

8 A. Yes.

9 Q. You've worked on the World Trade Center jobs?

10 A. Yes.

11 Q. Full employment there?

12 A. Correct.

13 Q. Has your union, on two specific major projects  
14 that are going to go on for more than ten years, has  
15 your union taken a minor concession in exchange for  
16 something major?

17 A. Yes, they have.

18 Q. Tell the jury first, tell them about the  
19 Tappan Zee projects and the Hudson Yards project, and

20 what concession was made in exchange for what major  
21 benefit.

22 A. The concession that was made on these  
23 projects, because these are projects that are  
24 considered heavy in manpower and will last several  
25 years, so that we can compete in the non-union world,

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BONILLA - DIRECT - MCCRORIE

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1 we would have to cut back on the cost that would cost  
2 an employer to employ, you know, an ironworker.

3 So the concession that was made in these  
4 agreements is that on the benefits, the time and a  
5 half wouldn't be paid completely full at the rate that  
6 it would on a normal job. So the time and a half  
7 would only be earned on your wages, and not your  
8 annuity account.

9 Q. So the workers that work on these jobs,  
10 redoing the Tappan Zee Bridge and building the Hudson  
11 Yards, are going to lose two hours in their annuity  
12 and not hard money in their check.

13 A. Correct.

14 Q. And it's just those two jobs?

15 A. Correct.

16 Q. So it's not union-wide?

17 A. Correct.

18 Q. Did -- and if so, tell the jury what that  
19 means and why it's important in exchange for the  
20 concession. Did the union also negotiate for those  
21 jobs the bending and fabrication work?

22 A. Yes.

23 Q. What does that mean, and what does that equate  
24 to, in terms of the number of hours the union expects  
25 to add to give to their workers.

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1 A. Well, having the -- the prospect of having  
2 these two jobs, it just allows the worker to log in  
3 the hours he needs to build his annuity, which is on a  
4 dollar per hour basis, and it helps you build the  
5 amount of credits you can earn per year, so that when  
6 it comes time to retirement, instead of having a  
7 hundred credits, you might have 150 credits, which  
8 would be a lot higher.

9 Q. So speaking about loading and unloading rebar,  
10 right, and the fabricating of rebar and bending of the  
11 rebar, can you estimate the number of manpower hours  
12 that's adding, working that into the negotiations?

13 MR. KAMINSKY: Objection, Your Honor.

14 THE COURT: Subject to connection, we'll go

15 in.

16 A. That's out of my function.

17 Q. Have you ever had heard it was up to 1.5

18 million --

19 MR. KAMINSKY: Objection.

20 THE COURT: Sustained, sustained.

21 Q. Happy birthday. Enjoy your birthday. No

22 further questions.

23 THE COURT: Any questions?

24 MR. KAMINSKY: Yes, but can we have a sidebar?

25 THE COURT: Of course.

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1 (Whereupon, a sidebar discussion was held off  
2 the record at the Bench, out of the hearing of the  
3 jury.)

4 THE COURT: Defendant, do you have any cross  
5 for this witness?

6 MR. KAMINSKY: Maybe.

7 CROSS-EXAMINATION

8 BY MR. KAMINSKY:

9 Q. Happy birthday. What is the average  
10 unemployment rate for an apprentice working in Local  
11 46?

12 A. I don't have that data.

13 Q. To the best of your knowledge?

14 A. Well, that's a union function that I -- I  
15 don't have.

16 Q. You mentioned union/non-union. My client was  
17 using union workers at this construction site when  
18 Mr. Gambale was injured, correct?

19 A. Correct.

20 Q. There were other contractors, general  
21 contractors that would use non-union workers, correct?

22 A. Correct.

23 Q. Non-union workers, I would imagine, tend to be  
24 less expensive, just as -- because there's a  
25 general -- as a general statement?

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1 A. Correct.

2 Q. And so to compete with the lower hourly rates  
3 with non-union workers, the unions, in the past couple  
4 of years, have had to make concessions?

5 A. Correct.

6 Q. To make sure they don't lose work to non-union  
7 workers?

8 A. Correct.

9 Q. And some of the concessions have included

10 lower hourly benefits?

11 A. Correct.

12 Q. And even with that, there are other factors  
13 beyond a union's control as to how much work is  
14 available, correct?

15 A. Correct.

16 Q. So some years there's more work than other  
17 years?

18 A. Correct.

19 Q. Now, is there a difference between an  
20 ironworker and a metal lather?

21 A. Well, to my knowledge, they're the same.

22 Q. Isn't there a difference in earnings, a slight  
23 difference?

24 A. I'm not aware of that.

25 Q. Do you know if metal lathers earn a little bit

↑

1 less with a little bit less benefits than ironworkers?

2 A. You would have to let me know what you're  
3 referring to as an ironworker.

4 Q. Okay. Just so we're clear, we've been saying  
5 that Mr. Gambale's an ironworker. Mr. Gambale was a  
6 metal lather, correct?

7 A. Yes.

8 Q. And just like anything else, construction work  
9 is cyclical, correct?

10 A. Yes.

11 Q. There are years when the economy is booming,  
12 and I would imagine people are fully employed, they go  
13 down to the union hall, and they get called to a job,  
14 the job could last for a couple of weeks, a couple of  
15 months, correct?

16 A. Correct.

17 Q. And there are other times when people don't  
18 get called, correct?

19 A. Correct.

20 Q. And so there's no guarantee as to how many  
21 hours a member of the Local 46 is going to work in any  
22 given year, correct?

23 A. Correct.

24 Q. Some years they could work -- what would  
25 be -- a high amount would be 1,700, 1,800 hours a

↑

1 year?

2 A. I mean, the maximum you can earn is 3,300 for  
3 the end credits you can earn.

4 Q. There are years when people might work less

5 than a thousand, correct?

6 A. Correct.

7 Q. And you said that the -- most people retire at  
8 age 65 -- I'm sorry, 62. You said there are 2,000  
9 current members of the union.

10 A. Yes.

11 Q. Is there any guarantee that someone just  
12 starting out in the field is going to work full-time,  
13 be fully employed, to age 62?

14 A. No, there's no guarantee.

15 Q. There's no guarantee. People get hurt,  
16 correct?

17 A. That's part of the job, yes.

18 Q. What percentage of people do get hurt and have  
19 to leave the field before age 62?

20 A. I don't have that statistic.

21 Q. But it's not uncommon?

22 A. Right.

23 Q. So when you say the average retirement age is  
24 62, does that take into account the other people that,  
25 for whatever reason --

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1 A. Yes, it takes account to the entire  
2 population.

3 Q. Okay. And what about weather? Is that a  
4 factor?

5 A. Yes.

6 Q. What about the overall economy? That's a  
7 factor?

8 A. That's a factor too.

9 Q. So the fact that you have had to make these  
10 concessions in recent years, is that an indication  
11 that there is no guarantee that Mr. Gambale, or anyone  
12 for that matter, would work full-time, day after day,  
13 week after week, month after month, year after year,  
14 to age 62?

15 A. Correct.

16 Q. Now, I just want to talk about retiring at age  
17 55. Because, correct me if I'm wrong, if your  
18 pension's fully vested, you would get everything at  
19 age 55?

20 A. Correct.

21 Q. That you would get at age 62, except health  
22 coverage?

23 A. And the accrual rate at the time that you  
24 retire.

25 Q. Right. Conceivably, the accrual rate at age

↑

1 62 might be more than it is at age 55?

2 A. Correct.

3 Q. But you are entitled, if you have the pensions  
4 vested, a member of this local, can retire at  
5 age -- what's called early retirement?

6 A. Right.

7 Q. And there's an incentive to do that, because  
8 if people retire, you can bring on younger people.

9 A. Correct.

10 Q. And so people are incentivized to retire at  
11 age 55, correct?

12 A. I wouldn't say that that way.

13 Q. But if you retire at age 55, you get all your  
14 pension benefits, if they have --

15 A. Right, there's no penalty. It's not reduced  
16 or anything. What you do lose is the ability to earn  
17 your full benefit at 62, as opposed to 55.

18 Q. And you also have to work another seven years?

19 A. Correct.

20 Q. So it's a tradeoff?

21 A. Right.

22 Q. And so, according to the pension fund  
23 agreement, am I correct that a member would become  
24 eligible for early retirement at age 55 if that person

25 has earned at least sixty pension credits?



BONILLA - CROSS - KAMINSKY

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1 A. Correct.

2 Q. And you told us 900 hours would be four  
3 pension credits?

4 A. Correct.

5 Q. And so at four pension credits a year, at 900  
6 hours a year, to reach sixty pension credits would be  
7 fifteen years?

8 A. Right.

9 Q. Isn't it true that recently, within the past  
10 year or so, 86 percent of the members of Local 46  
11 voted in favor of cutting their overall compensation  
12 package by fifteen percent?

13 A. That's outside of my function, but that was  
14 what took place.

15 Q. So they agreed to a fifteen percent reduction.  
16 So if an economist were to come in and say that the  
17 wages are increasing five percent every year in base  
18 and based projections on that, that would not be  
19 correct, true?

20 A. No.

21 MR. MCCRORIE: No, it would not be true? You

22 have --

23 A. I mean, what was cut back was the benefit, but  
24 the wage of the men did not decrease.

25 Q. The overall compensation package?

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BONILLA - CROSS - KAMINSKY

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1 A. Okay.

2 Q. Whatever you want to call it, wages, benefits,  
3 annuity, vacation days, sick days --

4 A. The complete package.

5 Q. Whatever you want to call it, the entire  
6 package at the end of the day, the union voted to  
7 accept, and this is part of the collective bargaining  
8 agreement, they voted overwhelmingly, more than eight  
9 out of ten, because of the economic conditions, and  
10 the fact that they are losing work and weren't fully  
11 employed, they voted to accept a fifteen percent  
12 reduction, correct?

13 A. Correct, okay, yes.

14 Q. And so, if an economist were called to court  
15 and testified that Mr. Gambale's earnings would have  
16 been increasing, his total compensation package would  
17 have been increasing five percent a year as he got  
18 older, that wouldn't be true, would it?

19 A. That's where I disagree.

20 Q. Okay. If you disagree, you disagree. Just  
21 say you disagree.

22 A. Yes, sorry, okay.

23 Q. You know what, it's your birthday. What the  
24 heck, all right. But the fact is that the union  
25 workers have to compete with non-union workers?

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BONILLA - CROSS - KAMINSKY

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1 A. Yes.

2 Q. Which results in their having to give  
3 concessions. If it was a different economy, they  
4 might not have to give those concessions, correct?

5 A. Correct.

6 Q. Would you agree with me that, according to  
7 recent studies, workers over the age of 55 represent  
8 less than eight percent of the actual --

9 MR. MCCRORIE: Objection.

10 THE COURT: Sustained.

11 MR. KAMINSKY: Okay.

12 THE COURT: You're quoting into the record.

13 Q. Now, do you know if less than eight percent of  
14 the current active members of Local 46 are over the  
15 age of 55? Do you know? Yes or no.

16 A. No.

17 Q. Now, you mentioned that employers have to

18 contribute to -- let's talk about the vacation fund,  
19 okay.

20           Isn't it true that the -- again, as part of  
21 the concessions, the contributions from the employers  
22 to the union members actually decreased one dollar an  
23 hour between the period of July, 2011, to 2012?

24           A. Well, in 2011, it was nine dollars, and in  
25 2012, it was \$9.50. And that is a deduction from the

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BONILLA - REDIRECT - MCCORIE

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1 member's pay to be included into his benefit when the  
2 employer contributes.

3           THE COURT: Just a heads-up that it's about  
4 fifteen minutes before closing time.

5           MR. KAMINSKY: Judge, if we take a two-minute  
6 break, maybe I'm done for the day.

7           THE COURT: I'm not rushing you, I just want  
8 you to work it the way it works for you.

9           We're in recess for two minutes.

10           Sir, please remember that you're under oath.  
11 Please don't talk about your testimony.

12           (Whereupon, a brief recess was taken.)

13           (Whereupon, the jury entered the courtroom.)

14           THE COURT: Counsel, do you have any other

15 questions on cross?

16 MR. KAMINSKY: Nothing further.

17 THE COURT: Do you have any redirect?

18 MR. MCCRORIE: Yes, Your Honor.

19 REDIRECT EXAMINATION

20 BY MR. MCCRORIE:

21 Q. Mr. Bonilla, you'll be out of here soon.

22 Just so we can make this clear, the  
23 concession -- Mr. Kaminsky said it was one dollar an  
24 hour, it's actually two dollars an hour in the  
25 annuity, correct?

↑

BONILLA - REDIRECT - MCCRORIE

75

1 A. Correct.

2 Q. And that wasn't from every job, that was for  
3 two major jobs, we talked about them, the Tappan Zee  
4 and the Hudson Yards?

5 A. Correct.

6 Q. And in exchange for the two dollars an hour,  
7 not in hard money, in the annuity fund, the workers  
8 won guaranteed work for an extended period of time?

9 A. Correct.

10 Q. Thereby making them more money?

11 A. Correct.

12 Q. Giving them more hours than they've ever had?

13 A. Correct.

14 Q. That's what they have the union for, to figure  
15 those things out?

16 A. Correct.

17 Q. So, I know you knew, and you were just saying  
18 yes, but two dollars an hour doesn't mean fifteen  
19 percent of the package, that's close to a hundred  
20 dollars an hour in an annuity?

21 A. Correct.

22 Q. Okay. If an economist were called here on the  
23 other side to say that workers don't average out at  
24 retiring at 62, that would be incorrect, right?

25 A. Correct.

↑

1 Q. The -- you said that -- on the direct, that  
2 there was full employment, something about apprentices  
3 could work less. When you said there was full  
4 employment currently, given those concessions,  
5 currently, does that include the apprentices?

6 A. Yes.

7 Q. You were asked about the jump of hours, good  
8 times, bad times, it's actually in evidence. Has  
9 there been actuarial documentation in the last ten

10 years, including the biggest recession this country  
11 has seen since the Great Depression, has there been  
12 actuarial numbers for the average number of hours for  
13 the Local 46 workers?

14 A. Yes.

15 Q. And I'll save you time, does it come out to  
16 1,550 hours?

17 A. Yes.

18 THE COURT: Per annum?

19 Q. Per year?

20 A. Per year, yes.

21 Q. So if our economist goes under 1,400, he's  
22 being conservative, he's taking less than the average?

23 MR. KAMINSKY: Objection, leading.

24 THE COURT: Overruled.

25 Q. He would be going less than the average number

↑

1 that we know?

2 A. Correct.

3 Q. That is done in the study.

4 Now, the name of the union, just because we  
5 want to get this straight, was it a lather -- I want  
6 to just read it. It's Local 46 Metallic Lather's  
7 Union and Reinforcing Ironworkers, all one union,

8 correct?

9 A. Correct.

10 Q. When someone is doing work building a concrete  
11 superstructure, they're an ironworker?

12 A. Correct.

13 Q. That was what Mr. Gambale was.

14 A. Yes, he was.

15 Q. What does being "in the green" mean? You were  
16 asked questions about if someone were to leave at 55,  
17 we know they're going to lose health coverage, they're  
18 going to lose the wage that they would have made for  
19 the next seven years, from 55 to 62, right?

20 A. Correct.

21 Q. Which would come out to a lot of money. They  
22 would lose the annuity, the accrual rate, they're  
23 going to lose that, and they're not going to be able  
24 to get the increases, whatever that math works out to,  
25 each year?



1 A. Yes, they would.

2 Q. In addition to losing health coverage for  
3 life?

4 A. Correct.

5 Q. And that's probably why the majority --

6 MR. KAMINSKY: Objection.

7 THE COURT: Sustained.

8 Q. That's fine. Thank you. Have good birthday.

9 THE COURT: Any re-cross?

10 MR. KAMINSKY: No.

11 THE COURT: Sir, you are excused. Have a good  
12 weekend.

13 (Witness excused.)

14 THE COURT: We're going to recess now. We'll  
15 be back here same time tomorrow, 9:30. Please make sure  
16 you leave time to get up the stairs. Remember that you  
17 may not discuss the case, either amongst yourselves or  
18 with anyone else, obviously, until we have jury  
19 deliberations.

20 Please don't speak to any of the witnesses,  
21 the parties, the attorneys, any of their employees or  
22 agents. Don't speak to anybody about the case. Thank  
23 you. Enjoy your evening.

24

25