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1 month-and-a half, two-months prior to this visit, and his pain
2 returned. He still had left leg pain, so that means that the
3 nerve irritation is still there, and that's what's significant.

4 Q Okay. What is the notation for the low back pain?

5 A Sorry?

6 Q What did you report his back pain was on that visit,
7 January 21st?

8 A He had pain still 8 out of 10.

9 Q How about the neck?

10 A Sorry?

11 Q His neck.

12 A Yes. Neck 6 out of 10.

13 Q What kind of treatment plan did you consider, if any,
14 moving forward?

15 A Moving forward, he had third epidural. He was seeing
16 Dr. Avanesov again for reevaluation. That was the plan.

17 Q I'm sorry?

18 A That was the plan.

19 Q Was there a request for him to come back to you?

20 A He came back on 2/11/2014 after seeing Dr. Avanesov,
21 who advised Mr. Depena to have a procedure called lumbar
22 discogram.

23 Q Okay. Tell the jury what a lumbar discogram is?

24 A Lumbar discogram is a diagnostic procedure. It's a
25 provocative test. It's not meant to help the pain.

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1 Q No fancy words.

2 A Okay. It's a procedure to reproduce someone's pain.

3 Q When you say provocative?

4 A Reproduction, to see if there's any, we can identify
5 the source of pain. Idea of this procedure is to insert needles
6 into the disc. Inject dye, take multiple x-rays, visualize the
7 spread of the dye, and at the same time ask the patient to see
8 if their pain is worse when we inject each individual disc.

9 Patient has no knowledge which disc is being injected.
10 The doctor in this case performed the procedure. He injected
11 L3-4 disc, L4-5, and L5-S1. He found that L4-L5 disc caused or
12 reproduced his symptoms. In other words, his pain was worse
13 when he injected the dye.

14 He also visualized the tear or a leak at L4-5 disc.
15 And L5 also caused symptoms, but it was contained. It was no
16 tears. And that report was given to Dr. Avanesov for the
17 review.

18 Q So who ordered that?

19 A It was ordered by Dr. Avanesov.

20 Q Do you have an understanding why Dr. Avanesov asked you
21 or your office to do that?

22 A Sure. Patient had, at that point, three epidural,
23 three injections in the lower back. They discussed surgical
24 option. Given the fact that there were two abnormal discs on
25 the MRI, Dr. Avanesov wanted to pinpoint exactly which of the

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1 discs is essentially causing his symptoms.

2 Q Okay. Now, your note that says procedure, discogram,
3 correct?

4 A Yes.

5 Q You see that. Okay. Now, at L3-4, it says pain
6 concordant, what does that mean?

7 A It means that, concordant means it travels the same
8 distribution as patient described. So in this case, it's lower
9 back, traveling to left leg.

10 Q Okay. And level L4-5 has pain concordant, yes, now
11 what does that mean?

12 A It means that when we pressurized the disc of contrast,
13 he reported pain. It was exactly the same distribution as his
14 normal pain.

15 Q I didn't get the last part?

16 A Once we injected or pressurized the disc at L4-5, he
17 reported the worsening of his baseline pain that he had prior to
18 the procedure.

19 Q Okay. It says a pattern, what does a pattern mean?

20 A Pattern we look at the dye, spread of the dye on the
21 screen. Dye will appear black on the screen. We look at
22 distribution of it. If it stays within the disc, we report it
23 as normal. If it leaks out of this space, we report an annular
24 tear.

25 Q Okay. So what is an annular tear at that level?

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1 A So annulus is the outer membrane of the disc. Nucleus
2 is the inside part of the disc. Annulus, once there's a tear,
3 we report it as annular tear. The outer membrane, it houses the
4 actual soft part of the disc.

5 Q What significance, if any, is that finding if there was
6 an annular tear at that level?

7 A Most of the tears are traumatic in nature. So
8 potentially this signifies that it's being used by an injury
9 that he sustained.

10 Q Okay. So what happens when there's a tear, a tear in
11 the annulus?

12 A It can cause pain.

13 Q Okay. But what happens to the disc?

14 A The disc can leak out of the tear, yes.

15 Q What leaks out?

16 A The gel.

17 Q Remember these are not doctors.

18 A Okay. Think of a jelly doughnut from Dunkin' Donuts.
19 The gel inside, the doughnut would be the annulus, and the gel,
20 it would be the nucleus of the jelly doughnut. So imagine
21 having a break or an opening in the jelly doughnut. If you're
22 squeezing that doughnut, jelly will leak out.

23 Same thing. As to the tear, the gel will leak into the
24 area where the nerves are, cause nerve compression, it can cause
25 also a lot of irritation on the nerve and cause pain.

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1 Q What causes the irritation?

2 A The actual compression of the gel touching the nerve.

3 Q Well, how about the gel itself?

4 A Of course. It can cause irritation.

5 Q I'm not a doctor.

6 A Yes. The gel itself has got chemical mediators. So,
7 for example, if someone injurers their hand, or if you cut
8 yourself, first thing happens you have this red, tender area and
9 it's a chemical reaction, the body, you know, possess.

10 Same thing happens to lower back. If there's an impact
11 or an injury or a tear, same chemical mediator, it can irritate
12 the surrounding area and cause nerve irritation, cause muscle
13 spasm. Same reaction take place.

14 Q Okay. And was that the finding on your physical
15 examination when this discogram was performed?

16 A Yes.

17 Q Okay. So what happens if the gel leaks out, what
18 happens to the disc?

19 A It will decrease. The same thing, go back to my
20 example of the jelly doughnut. If that jelly leaks out, it's
21 going to collapse. Same thing here, the gel leaks out, the disc
22 will sag.

23 Q Okay. At the L4-L5 level, it says disc height...
24 what's that word?

25 A Will decrease.

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1 Q Is that consistent with a herniated disc, it loses the
2 gel?

3 A Yes.

4 Q Okay. What's the next level?

5 A L5-S1.

6 Q What were the findings there specifically, sir?

7 A There was concordant pain, the pattern was normal. So
8 there were no leaks, but the disc sack was also decreased.

9 Q Okay. Now, when was the next time that your office saw
10 Mr. Depena?

11 A I saw Mr. Depena again on 2/25/2014.

12 Q Okay. And I'm trying to move along, you did the
13 physical, what, if any complaints, did he make?

14 A He still had pain. Physical exam, essentially the
15 same.

16 Q Okay. As the prior visits?

17 A Yes.

18 Q Pretty much the same response?

19 A That's correct.

20 Q What, if any, pain medication did you prescribe?

21 A He was given prescription for Tramadol, which is
22 considered to be a mild narcotic, similar to Tylenol with
23 codeine.

24 Q The next time -- well, what was your diagnosis?

25 A Diagnosis remain the same. He had a lumbar

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1 radiculopathy, lumbar disc displacement, cervical radiculopathy,
2 and cervical disc displacement.

3 Q And what's the last... encounter.

4 A I'm sorry?

5 Q Number 5 under diagnosis?

6 A This is just, we did a routine drug test every time we
7 prescribe medication to patients that are controlled substances,
8 we test for consistencies.

9 Q And why do you do that?

10 A To make sure the patient is compliant when they take
11 their medication.

12 Q Okay. What was the finding?

13 A It was normal.

14 Q I'm sorry?

15 A He was complying.

16 Q And the prognosis for that?

17 A I think he still had fair prognosis.

18 Q So when was the next time did you see him?

19 A I saw him again on March 30, 2015.

20 Q Okay. And what was his complaints, if any?

21 A He returned to visit, he described that he had a
22 surgery with Dr. Avanesov to his lower back.

23 Q And what surgery would that be, sir?

24 A It was lumbar fusion at L4-5.

25 Q Okay. Was there a discectomy performed at some point

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1 in the care and treatment of Mr. Depena?

2 A It was after his lumbar fusion.

3 Q Okay. I'm trying to get, can you tell us the
4 difference between a discectomy and a fusion?

5 A Discectomy is a procedure where we insert a device into
6 a disc and through that device we remove a little bit of that
7 jelly material. That's called discectomy. The lumbar fusion,
8 that is an open surgery where a surgeon will place screws and
9 other fixators into the spine to open up the area involved.

10 Q Okay. Did you perform a discectomy on April 3rd, 2015?

11 A Discectomy was performed April 3rd, 2015, yes.

12 Q At what level?

13 A L5-S1.

14 Q Okay. Sir, when a fusion is performed, what, if
15 anything, happens to the level above and the level below?

16 MS. WALTERS-HINDS: Objection.

17 MR. PFLUGER: He's a doctor.

18 THE COURT: I'm going to allow it. Doctor, within
19 your own practice, how are you familiar with spinal fusion
20 treatments?

21 THE WITNESS: I see quite a bit of patients that
22 have surgeries that have failed surgical options, that
23 continue to have chronic neck and back pain. I have been
24 treating patients for years, and I have reviewed multiple
25 cases.

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1 THE COURT: Do you treat patients who have had
2 spinal fusions?

3 THE WITNESS: Yes, I do, sir.

4 THE COURT: And do you deliver care to them as a
5 result of, or in following the course of treatment after the
6 fusion, do you understand what I mean?

7 THE WITNESS: Yes, I do. I do.

8 THE COURT: What do you do, you look at their
9 situation, administer medication, evaluate?

10 THE WITNESS: We evaluate, we administer medication
11 and certain procedures, injections, spinal cord stimulators,
12 locations where failed fusion procedures.

13 THE COURT: I'm going to allow the question and
14 answer. I don't know if there was an answer to your
15 question. You have to restate the question.

16 MR. PFLUGER: Is it all right for the reporter to
17 read it back, Judge?

18 THE COURT: If she can find it, sure.

19 (Whereupon the question was repeated by the court
20 reporter.)

21 THE COURT: The question is when a fusion is
22 performed, what happens to the, I guess it's the disc above
23 and below?

24 THE WITNESS: There is a phenomenon or a condition,
25 it's called adjacent level degeneration. It happens in

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1 patients who have fusions. They are more likely to have
2 problems above the surgical area or below.

3 This usually takes time to develop, a year, two
4 years, which it's an accelerated degenerative problem.
5 Which means the disc above or below will degenerate faster
6 versus someone who didn't have surgery. That may require
7 additional surgery that occurs or additional treatment.

8 Q What's the cause of that accelerated degeneration?

9 A It's mechanic. It's putting stress on different
10 levels.

11 Q Because of the fusion?

12 A Yes.

13 Q Okay. Now, just, I guess I can use the pecking order,
14 conservative treatment, physical therapy, acupuncture?

15 A Yes.

16 Q The next one would be injection?

17 A Yes.

18 Q What's after injection?

19 A Minor surgical procedures or surgery.

20 Q Okay. A discectomy, that's an office procedure,
21 correct?

22 A It's an office or a surgical type of procedure, yes.

23 Q And a fusion happens where?

24 A Most of the time in the hospital.

25 Q The discectomy that you performed, what, if any, risks

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1 were discussed with Mr. Depena?

2 A There are risks of anesthesia, there are risks of
3 infection, there is risk of bleeding and damage.

4 Q Okay. What's the worst that can happen to someone
5 undergoing that?

6 A Nerve damage, risk of anesthesia, unfortunately, it's
7 not full-blown general anesthesia, but we do give enough
8 anesthesia for someone to go to sleep. There are possible
9 adverse affects of anesthetics one can have.

10 Q You have your operative report there?

11 A Yes.

12 Q Are there risks listed in that operative report?

13 A Possible complication include infection, bleeding,
14 nerve damage, diskitis, which is infection of disc, death or
15 failure --

16 Q I'm sorry?

17 A Death or failure of the procedure. That's by the New
18 York State law. Those are the consent we have to administer to
19 patients, and we disclose all possibilities.

20 Q You just listed all of them there, correct?

21 A Yes.

22 Q Okay. And death is one of them?

23 A Yes.

24 Q Okay. Could you explain to the jury what you actually
25 did at that level, L5-S1?

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1 A Sure. The first thing was done, we insert a needle
2 into the L5-S1 disc.

3 Q How big is the needle?

4 A The needle is seven inches. We insert it inside the
5 disc. Inject a contrast dye, again, to visualize the space.
6 During this procedure, there was a leak, as I described prior,
7 at the discs before, L4-5, now it developed and leaked into
8 L5-S1.

9 Then that needle is removed. We use a larger needle to
10 insert inside the disc, a special device that removes part of
11 the jelly material from the disc itself.

12 Once that's done, because there is a leak, in this case
13 it was a small leak, we coil that leak just simply applying heat
14 at the outer membrane of the disc because it's elastic and
15 collagen, by applying heat, it will help to stick together. So
16 that's what was done.

17 Q Are you able to, if you can, I don't know if you can,
18 quantify the success rate because you punch a whole in something
19 that didn't have a whole, you apply heat to try to close the
20 whole --

21 MS. WALTERS-HINDS: Objection.

22 MR. PFLUGER: -- if it's not successful, what can
23 happen?

24 THE COURT: He's asking him what can happen.

25 Overruled.

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1 THE WITNESS: Still persistent pain, usually that
2 procedure doesn't work.

3 Q Okay. What about the leak?

4 A The leak will close. Once we apply the heat, usually
5 the leak will close.

6 Q Okay. If it doesn't, what happened?

7 A More pain, more symptoms.

8 Q Okay. What happens to the gel inside?

9 A It may leak out eventually if the leak or the tear gets
10 bigger with time.

11 Q Okay. So if I asked you, what was the result of
12 performing that discectomy at L5-S1?

13 A He returned after discectomy and he stated that he
14 still had lower back pain. So essentially back in May, a month
15 after the procedure, he still had the same symptoms as he
16 described.

17 Q I'm sorry. When was the next time?

18 A A month after the procedure, we saw him on May 6, 2015,
19 he still described lower back pain that was traveling down to
20 his left leg.

21 Q How about his neck, what was going on with his neck?

22 A His neck, he had complaints of neck pain -- I'm sorry.
23 That 5/6 visit was primarily pertaining to his lower back
24 problem. The neck pain was not addressed during that visit.

25 Q Okay. What pain medication, if any, did you prescribe

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1 after this procedure?

2 A He received prescription for Norco, which is
3 hydrocodone, five milligrams. He was taking one pill every four
4 to six hours.

5 Q How many times after April 3rd, 2015, did you see
6 Mr. Depena?

7 A I saw him about seven, eight times afterwards.

8 Q Can you tell us how he was doing, how was he
9 progressing or not progressing through those periods of visits
10 up to November 4, 2015?

11 A He still had symptoms. He had surgery in his neck,
12 which initially, according to him, alleviated his symptoms from
13 his neck.

14 Q Can I just stop you, forgive me. When was the lumbar
15 surgery?

16 A His lumbar surgery was...

17 Q I would like you to assume, just so we move along a
18 little bit, the surgery performed by Dr. Avanesov was April 22,
19 2014?

20 A Okay.

21 Q Okay. And that the cervical fusion was done on May 23,
22 2015?

23 A Okay.

24 Q Thereabouts. Could you just tell the jury, if you can,
25 what goes into a lumbar fusion at L4-L5, what are the components

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1 of it?

2 MS. WALTERS-HINDS: Objection.

3 THE COURT: You don't perform lumbar surgeries,
4 it's spinal fusions, correct?

5 THE WITNESS: That's correct, your Honor.

6 THE COURT: What's the basis, do you have any
7 knowledge about what goes on with it?

8 THE WITNESS: I do, but every fusion is different.
9 So, I would like to defer to Dr. Avanesov who did the
10 surgery.

11 Q All right. So, what are the complaints over the next
12 seven visits?

13 A He still had neck and back pain. He had episodes of
14 pain traveling through his left leg as he described, he had neck
15 pain with less symptoms in his left arm. Scale 7 out of 10
16 approximately in his neck, 8 out of 10 lower back.

17 I think his radiculopathy or symptoms of pain shooting
18 down his left arm improved overall, but his physical exam did
19 not change much after the surgery.

20 Q Well, if I ask you the \$64,000 question, the discectomy
21 that you performed on L5-S1 was that successful or not, or
22 something else?

23 A Probably not. He still had pain.

24 Q Is he still exhibiting, from the last time you saw him,
25 November 4, 2015, was he still complaining about the pain

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1 radiating down his left leg, numbness and tingling?

2 A Yes, he did.

3 Q What about his neck?

4 A Neck was only, across his neck, he did not complain of
5 left arm pain.

6 Q Okay. That was on November 4, 2015?

7 A That's correct.

8 Q What, if any complaints, about cervical pain and
9 numbness and tingling were there for the following visits, up to
10 the last visit?

11 A No. He only had neck pain.

12 Q Okay. And was there a scale?

13 A Approximately 8 out of 10.

14 Q Sir, it's written you have a date of service 11/4/2015,
15 correct?

16 A Yes, I do.

17 Q Okay. And you have neck pain 8 out of 10?

18 A Yes.

19 Q Dull, aching, sharpshooting pain?

20 A Yes.

21 Q Okay. If we take that note and compare it to the very
22 first note, is there any change in his condition from
23 October 15th?

24 A The only thing that's different is his pain was
25 traveling down to his left arm, with pins and needles and his