In The Matter Of:

JSOLIS v.

HEALTHADVOCATES

SOLIS KAPLAN

January 30, 2012

Sureme Civil Court Reporters

Original File JAN302012TRIAL.txt

Min-U-Script® with Word Index

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 62

----------X

JESUS SOLIS,

Plaintiff,

-against- Index No. 108282/08

HEALTH ADVOCATES FOR OLDER PEOPLE HOUSING DEVELOPMENT FUND COMPANY,INC. D/B/A CARNEGIE EAST HOUSE,

Defendant.

----------X

CONTINUED TRIAL 80 Centre Street
New York, N.Y.
January 30, 2012

B E F O R E:

THE HONORABLE GEOFFREY D. WRIGHT, Justice
(and a jury of 6)

A P P E A R A N C E S:

TROLMAN GLASER & LICHTMAN
Attorneys for Plaintiff
777 Third Avenue
New York, NY 10017
BY: DAVID B. CORLEY, ESQ.

FABIANI COHEN & HALL, LLP
Attorneys for Defendant
570 Lexington Avenue
New York, NY 10022
BY: STEPHEN M. COHEN, ESQ.

Carolyn Barna
Deborah Rothrock,
Senior Court Reporters

PROCEEDINGS

MR. CORLEY: On Friday, as the Court is aware, we were told by the court officer that two of the jurors in this matter had indicated somebody in the back was winking at them during the course of the trial.

THE COURT: We didn't go on the record, that is right.

MR. CORLEY: Because I had to put my doctor on the stand.

MR. COHEN: We did.

THE COURT: We had a chat. If we go on the record twice, it will not hurt nobody.

MR. COHEN: I thought we were on the record.

MR. CORLEY: The indication from the court officer was that the individual that they said was winking at them was the individual that we have now identified as Jeff Gordon who was the claims adjuster in this matter on behalf of Chartis, the carrier.

THE COURT: Not the race car driver.

MR. CORLEY: That's right.

We never really investigated exactly what happened. Because I was put into a position where I had to put my doctor on the stand at 2:15 or so.

THE COURT: I don't remember, but I think

two of the jurors said when they were looking around the room they caught his eye, they thought he was winking at him. But, on the other hand, I think the court clerk said she turned her head and he was winking at her, too. It may be just a habit or, you know, or nothing meant by it. But he winks a lot.

MR. CORLEY: Well, then I would like the jury to know that individual is clearly not, in any way, associated with my office. I mean.

THE COURT: We did bring -- I don't remember if it was on the record.

MR. COHEN: It is on the record. I am reading it.

THE COURT: We did bring the jurors in and I explained to them what he said. And they said it would not affect them in any way in being able to do their job in this case. Certainly I think the interview with the jurors was on the record. The rest of it, I don't know.

MR. CORLEY: I would like it clear to the jury so they do not believe the individual was, in any way, associated with my office. He's clearly part of the defense team here. If I may have been seen talking to him in the hall, I do not want the jury to associate that with --

PROCEEDINGS

THE COURT: What I said at the time was that the person in question is not an attorney for either side. I left it at that. Not an attorney for either side.

(Pause)

MR. COHEN: Are we doing anything with this?

THE COURT: We were letting the sirens pass before we finish our thoughts. But it went on so long we probably forgot where we were.

MR. COHEN: I think if we bring them back again and talk to them again about this issue after the Court has --

THE COURT: I think we did that. Now that you mention it, my memory was we did bring them in.

MR. COHEN: I have it on the record here.

THE COURT: They indicated they would not be affected by it.

MR. COHEN: I totally agree.

THE COURT: I gave an explanation.

MR. COHEN: I think it would be highly prejudicial to do it again.

THE COURT: I think it was addressed. We don't need to do it twice.

Off the record.

PROCEEDINGS

(Whereupon, a recess is held)

(The Plaintiff, having been previously sworn, resumes the witness stand)

(Official Spanish Court Interpreter is present)

(Juror entering)

THE COURT: You have reported to our court officer you saw the gentleman who was doing the winking?

THE JUROR: No.

COURT OFFICER: You said you saw Mr. Creepy.

THE JUROR: I saw him outside the jury room this morning. You are talking to me?

THE COURT: Yes. Because if there is a problem, we have to hear about it.

THE JUROR: I did not see any problem. The alternate girl last week saw the guy winking at her.

THE COURT: Because the guy you thought is not here in the building. He's where, maybe Long Island.

THE JUROR: Really? I thought I saw him. I wasn't reporting anything.

THE COURT: Okay.

COURT OFFICER: I have to do it.

CROSS/ J.SOLIS POLIDO / by MR. COHEN

THE JUROR: I shouldn't say anything.

THE COURT: We have to be careful.

THE JUROR: I was joking around.

THE COURT OFFICER: Jury entering.

(Jury enters)

THE COURT: Please be seated.

Who was questioning the witness?

MR. COHEN: I was, Judge.

THE COURT: Okay. We're ready. Go ahead.

MR. COHEN: All right. I am just waiting on you, Judge.

THE COURT: Go ahead.

CONTINUED CROSS-EXAMINATION

BY MR. COHEN:

Q. Good morning, Mr. Solis.

A. Good morning.

Q. When we last talked it was Friday and we were talking about the notations in Dr. Brisson's records regarding your recovery, do you recall that?

A. Yes.

Q. Have you spoken with anyone since Friday about your testimony?

A. No.

Q. You didn't speak to any of the doctors?

A. No.

CROSS/ J.SOLIS POLIDO / by MR. COHEN

Q. You didn't speak to any of your family members?

A. No.

Q. Did you speak to your lawyer?

A. No.

Q. Now, the last time you saw Dr. Brisson was June 22, 2011, does that sound about right?

A. I believe it is correct, yes.

Q. Dr. Brisson was here in the afternoon on Friday and he testified, Mr. Solis, that on June 22, 2011, the instruction to you was to come back within eight weeks for a continuing follow-up care treatment -- appointment. Sorry. But you never went back.

A. Yes.

Q. Can you tell us why you never went back to see Dr. Brisson?

A. I had been referred to another doctor for the pain.

Q. By Dr. Kaplan?

A. I believe so.

Q. You were still under the care of Dr. Brisson in June of 2011 for the surgery he did on your back in July of 2010, correct?

A. Yes.

Q. But you made the decision not to go back and see it through with him?

A. Yes, that is correct.

Q. And instead, what you are doing is you are seeing somebody referred to in Dr. Kaplan's office, yes?

A. Yes.

Q. Now, at the time of your last visit with Dr. Brisson in June of 2011, he made certain notations in his records about things that you said to him about your recovery. You were talking about that with respect to the earlier appointments with Dr. Brisson, do you remember?

A. Yes.

Q. And what Dr. Brisson wrote on June 22, 2011, which was 11 months after your surgery, was that you told him, at that time, you were noticing progressive improvement, is that a true statement?

A. Yes.

Q. According to what Dr. Brisson wrote in June 2011, at that time, you told him that overall you were doing much better?

A. Yes.

Q. According to what Dr. Brisson wrote on June 22, 2011, you told him, at that time, that you were very rarely taking any pain medication, is that a true statement?

A. Yes.

CROSS/ J.SOLIS POLIDO / by MR. COHEN

Q. You told him also, Mr. Solis, that you were regaining your strength in your back and your flexibility in your back, is that a true statement, sir?

A. Yes.

Q. Do you see yourself continuing to improve after this trial is over?

A. What I am thinking is improving based on, as I told you last time, the pain on my legs, on my buttocks, for me it was quite strong this pain. At one time I even thought I would never be able to walk again. But thanks to the surgery I have had the strength to have sensitivity in my legs, even on my buttocks.

As I said, the pain is getting better. I feel better. I feel better than before I had the surgery. I told Dr. Brisson that it was better before, than before the surgery.

I don't feel well enough to continue with the kind of work I did in the past. I feel that I cannot lift anything heavy. I feel that I cannot move, I cannot bend down, put on my shoes, put on my socks. I am unable to sleep. Last night I did not sleep at all.

Q. This trial has been stressful on you, hasn't it?

A. Yes.

Q. It's nerve racking to have to come into court for someone like yourself whose never done it before and

to testify before a jury?

A. It's not difficult being in front of the jury. I'm telling you the truth. The hard part for me, the difficult part is being sitting down in one fixed position for a long time. For example, say half-an-hour or so. I get tired being in one position continuously. Imagine all of the time that I have spent here sitting. This past week for me was quite difficult.

Q. Mr. Solis, you answered the question a long time ago. Thank you.

According to what Dr. Brisson wrote in his records, he says that it is important for you to keep active.

A. Yes.

Q. Do you keep yourself active?

A. I do my exercises at home.

Q. Stop right there. Let's talk about that. What exercises do you do at home?

A. The ones that were assigned to me in therapy.

Q. Okay. Describe them.

A. I would lean against the wall, I try to flex my legs somewhat. I try to hold myself upright on my legs, I sit on a chair, I lift one leg, I lift the other leg. Those exercises are the ones that help me out.

Q. Are you diligent in the exercises that you do at home, are you regular in those exercises?

CROSS/ J.SOLIS POLIDO / by MR. COHEN

A. I try to do them in the mornings when I have the opportunity to do so.

Q. So you are doing your exercises and keeping yourself active in order to help yourself get better, yes?

A. I try to help myself, yes.

Q. And you have been noticing continuing progressive improvement in your condition?

A. There are times when it helps me out. Then again, there are times also I notice it is not helping me out.

Q. On Friday, Mr. Solis, you talked about growing up on a cattle ranch, do you recall that?

A. Yes.

Q. Your father had horses, right?

A. Yes.

Q. And you told the jury that you were riding horses from a very early age, is that true?

A. Yes.

Q. How often growing up on the ranch would you ride horses?

A. Every time that I was sent to do it by my father. He would send me every other day but, for example, just to say drop off a kilo of salt, for example, for the cattle. And I will come back again or I

would just go around and ride around the terrain.

Q. What type of saddle did you use, if you used a saddle at all?

A. The saddle that is used, it is called a riding seat, the way I called it.

Q. Okay.

You rode growing up around the ranch to do your chores about every other day, is that your testimony?

A. Every time that my father would send me out for something.

Q. From what age to what age? When did you begin doing that and when did you stop doing that?

A. I would say anywhere between 10 and 16 years old more or less.

Q. When you started or when you stopped?

A. As I said before, in the past, not at all times was I in my town.

Q. Right.

I'm trying to get a sense, Mr. Solis, did you start riding on your father's ranch at his request at age 10 until age 16, is that what your testimony was?

A. Yes, he would send me to do errands, for example.

Q. Okay. All right.

MR. COHEN: Judge, thanks. I have nothing

REDIRECT/ J.SOLIS POLIDO / by MR. CORLEY

further.

THE COURT: Redirect.

MR. CORLEY: Just a couple of questions, Judge.

REDIRECT EXAMINATION

BY MR. CORLEY:

Q. Good morning, Mr. Solis.?

A. Good morning.

THE WITNESS: May I get up?

THE COURT: Yes.

Q. During the time that you were under the care of Dr. Brisson, were you also under the care of Dr. Kaplan?

A. Yes.

Q. And since the last time that you have seen Dr. Brisson, have you been seen in Dr. Kaplan's office subsequent to that?

A. Yes.

Q. And counsel pointed out -- withdrawn.

With regards to the condition with the pain going down your leg, has the surgery improved that?

A. Yes, quite a bit.

Q. And counsel made reference to information noted in Dr. Brisson's records. And you indicated in response just now that a lot of the pain you have is specifically when you are sitting. Is that a fair statement?

REDIRECT/ J.SOLIS POLIDO / by MR. CORLEY

A. Yes.

Q. And, in fact, Dr. Brisson notes that the patient is still complaining of some residual lower back pain, specifically during sitting the pain tends to be --

MR. COHEN: Objection. This is improper. He's reading from a record. He's not asking a question.

THE COURT: Sustained.

MR. CORLEY: He's making reference to --

THE COURT: At least rephrase it, I think.

Q. Well, I want you to assume that in Dr. Brisson's records --

MR. COHEN: Objection, Judge.

THE COURT: Come up.

(Whereupon, a discussion is held off the record in the robing room)

THE COURT: On the record.

Q. Mr. Solis.

A. Yes.

Q. Do you recall if you specifically told Dr. Brisson on 6/22 that your pain is more prominent during sitting?

A. Yes.

Q. And is that consistent with what you have told this jury?

REDIRECT/ J.SOLIS POLIDO / by MR. CORLEY

A. Yes.

MR. CORLEY: Thank you. No further questions.

THE COURT: Thank you, sir.

Do we have somebody else this morning?

MR. CORLEY: No, your Honor.

THE COURT: A short start but we will recommence at 2:00 to have the doctor here. So 2:00 we will come back and have the medical testimony. See you then.

(Whereupon, a recess is held until 2:00 p.m.)

(Continues on next page)

-Direct/Dr. Kaplan/by Mr. Corley-

A F T E R N O O N S E S S I O N.

MR. CORLEY: All right. Could I have this marked for identification? It is just bills.

(Whereupon, document is so marked Plaintiff's Exhibit 20 for identification.)

THE COURT OFFICER: Are we ready?

THE COURT: Yes.

(Whereupon, the jury enters the courtroom and the following is heard inside the hearing and presence of the jury.)

THE COURT: Ready when you are.

MR. CORLEY: Your Honor, we call Dr. Kaplan to the stand.

(Witness approaches the witness stand.)

THE COURT: You've already been sworn Dr. Kaplan.

THE WITNESS: Yes.

MR. CORLEY: May I approach?

THE COURT: Yes.

(Handing.)

CONTINUED

DIRECT EXAMINATION

BY MR. CORLEY:

Q Good afternoon, Doctor.

A Hi.

Q When we last left you, sir, we were talking about the

-Direct/Dr. Kaplan/by Mr. Corley-

MRI results.

Doctor, after you received the results of the MRI, did you refer the patient to Dr. Boppana?

A Yes.

Q And what was the reason that you referred the patient to Dr. Boppana?

A We got the MRI results. Again, just to backtrack, Mr. Solis had back pain when he first came in which I attributed initially to the sacral fracture. He continued to have back pain in the lumbar spine which showed some abnormalities that I felt could be responsible for his back pain and at that time pain going down his legs. So, I referred him to Dr. Boppana who is a neurologist to do a neurological work-up, including EMG studies, electrodiagnostic studies of the nerves and muscles of the low-back.

Q Could you turn to Dr. Boppana's note dated 11/3/08.

(Pausing.)

And regarding his physical findings, Doctor, could you take us through the first paragraph down.

MR. COHEN: Could we get a ruling first, your Honor?

THE COURT: Why?

MR. COHEN: Could we get a ruling on whether Dr. Boppana's records are in evidence.

THE COURT: They're part of his office file, are

-Direct/Dr. Kaplan/by Mr. Corley-

they not?

MR. COHEN: There's a lot of stuff in his file and it is subject to redaction and we have never done this.

THE COURT: Dr. Boppana is one of your collogues?

THE WITNESS: Yes, he is.

CONTINUED

DIRECT EXAMINATION:

Q Does Dr. Boppana write notes contemporaneous, at the time, he's seeing a patient?

A Yes.

Q And are those notes recorded somewhere?

A Yes, they're in our charts.

Q Is that kept in the same chart with the notes that you keep?

A Yes, it is.

Q Is that part of the office chart for the New York Orthopedic practice?

A Yes, it is.

THE COURT: Was this previously marked or not?

MR. CORLEY: Yes, it was marked into evidence.

THE COURT: It was marked as?

MR. CORLEY: I think it is marked as Plaintiff's Exhibit 13.

THE COURT OFFICER: Plaintiff's Exhibit 13, Judge.

(Pausing.)

-Direct/Dr. Kaplan/by Mr. Corley-

A These records have been moved around so many times it's hard --

THE COURT: I have a file in general as being in evidence. The question is: Would this be part of it? I think so.

MR. CORLEY: Yes.

Judge, may I approach?

THE COURT: Yes.

(Pausing.)

MR. CORLEY: If I may for a second --

THE COURT: Yes.

(Pausing.)

Q All right.

Doctor, he indicates that in his note his back pain radiates into his left leg. What is the significance of that, Doctor, pain radiating into the leg?

A Pain radiating from the back into the leg is usually initiated by a nerve that comes out of the low-back and usually indicates irritation at the nerve in the back although you feel it in the leg. The body is like a system of wiring. In order to turn a light on here, you switch a light on over there. Same thing in the body. Sometimes you feel pain in one area, even though it is caused from a switch in the other area.

Q And, Doctor, it indicates aggravated by forward flection and lifting. What is the significance of that, if any?

-Direct/Dr. Kaplan/by Mr. Corley-

A Sure. The activities of forward flection, as well as lifting, put pressure on the spinal column. With forward flexion you could have motion, abnormal motion on the joints of each other. With lifting you could have axial loading and pressure on the spinal column and that could irritate the nerve roots.

Q Is that consistent with the findings seen on the MRI films?

A Yes, it is.

Q He indicates that he's ambulating it differently too favoring his low-back pain. Is that consistent with those findings?

A That could be consistent with low-back pain, absolutely.

Q And he has lumbar paraspinal tenderness at multi levels with restricted lumbar extension and lumbar extension.

A He's talking about muscle spasms in the low-back, they become tender. The spasm are the body's response to abnormal motion in the back and attempted to really lockdown the joints so that there's less motion in abnormal joints and it's often associated with back problems.

Q And he finds a positive straight leg raising on the left. What is the significance of that?

A Straight leg raising is a test that is done either with a patient in the sitting position or the patient lying flat.

-Direct/Dr. Kaplan/by Mr. Corley-

And you literally raise the leg with it straight. What that does, it pulls -- may I see this model -- it literally pulls on the nerves. As the leg is pulled out straight you get a lengthening of the nerves which pulls in the low-back. And that can indicate an area of pathology in the low-back that is causing pain running down the leg simply by raising the leg straight. So that is a further indication of his back pain being caused by problems in the back.

Q And the findings of hypoactive right flexion and active left Achilles flexion?

A Hypoactive means less than as opposed to hyper meaning active.

Mr. Solis, by the neurologist's findings had a decreased reflection in the lower extremity, in the legs, at the Achilles tendon which is tapping on the Achilles tendon. Normally you get a little jerk of the ankle, that is normal. When it's hypoactive there's less than normal jerk and tapping on the Achilles tendon. There's another indication there's a problem in the nerve of that muscle. Normally if there's no pressure or irritation in the nerve you would have normal Achilles tendon flection. Achilles tendon flection is specifically at the L-5/S-1 area.

Q Then he indicates sensations grossly intact, though there's loss of sensation over the lateral left sole. What is significance of that?

-Direct/Dr. Kaplan/by Mr. Corley-

A Sensation is not nerve irritated finding. Grossly intact. Although there's some variable decreased sensation that actually goes along with this being an irritated nerve, than a nerve that has pressure on it. A nerve that has pressure on it decrease the flow of the signals of the nerve. You would expect to see numbness, dense numbness. Variable sensory findings go along with irritated nerve. You get some signal as opposed to none at all.

Q Take us through his impression at this time, Doctor.

A His impression on 11/3/08 is low-back injury status post fall. So that he feels he has a back injury. Lumbosacral disk herniation, an abnormality in the disk, and clinical lumbosacral radiculopathy. Again, pain in the legs, pain running down the legs, symptom in the lower extremity and back pain all coming from abnormalities in the back.

Q At what level would this be?

A It would be at L-5/S-1 in this case.

Q And the last -- his third impression?

A That's clinical lumbosacral radiculopathy.

Q Did he make any recommendations at that time?

A The recommendation at that time was a request made for EMS nerve studies. He also requested authorization to transforaminal lumbar epidural steroid injections. Steroidal anti-inflammatory injections decrease irritation in the nerve root or inflammation around disk injuries, or joint irritation,

or inflammation.

Q The purpose of the nerve conduction study and EMG studies is what?

A The purpose of the EMG is to sort of pick out why he's having pain which he believes is referable to the back in the lower extremities. It is a test that can be helpful as much to rule things in as to rule things out, meaning in this case Mr. Solis had muscular spasm in the lumbar spine but did not have pressure on the nerve root. That is a further indication that he has an abnormality at the back causing irritation of the nerve root, rather than causing pressure on a nerve root, and that he's having muscular spasms that could be documented by electrodiagnostic tests. It is an indication that his body is attempting to hold the joints of the low-back steady to decrease the motion and hopefully decrease motion.

Q Those results he's talking about, is that EMG done in your office?

A The EMG that was done showed findings consistent with involuntary bilateral para lumbar spasm, myospasm, muscular spasm. That is consistent with what I'm saying before, which is again those tests showed muscular spasm in the low spine. It did not show pressure on the nerve root which is consistent with irritation nerve root secondary to abnormal motion or chemical problems.

Q What causes a spasm, Doctor?

-Direct/Dr. Kaplan/by Mr. Corley-

A The spasm is a reflex response of the body to decrease the motion at the small joints of the spine and, thereafter, decrease irritation of the nerve roots just next to those joints. It is, again, as Dr. Boppana notes, involuntary. It is a reflex response. It is like the body putting on a low-back brace on itself.

Q He found the motor nerve conduction studies to be normal. Doctor, what is the significance of that?

A That is consistent with his diagnosis, which is you would not expect the motor nerve findings to be normal if there was pressure on the nerve root stopping the flow of nerve signals, which would be more consistent with a large herniated disk pressing on the nerve. This is more consistent with irritation of the nerve root, again, in this case because of abnormal motion instability.

Q And also sensory nerve conduction studies were normal, Doctor?

A Same thing. You could see sensory nerve changes when there's pressure on the nerve, decreased flow of nerve signals and he was not able to pick up any changes in the sensory findings and that again is consistent with irritation of the nerve.

Q Doctor, the records indicate that the electric diagnostic studies were done in your office on 12/19/2008. Could you explain to the jury exactly what is actually done

during this test to the patient?

A Sure. The test is a test of the flow of the nerve signals down the nerve roots from the low-back, in this case down to the lower extremities. There are two portions of the tests. One shows the speed of the flow of the electrical signals while the other shows the reaction of the muscles, that is the motor portion of an electrical stimulation.

The first part, the sensory portion -- the nerve flow portion rather --takes a measurement. You get stimulation at one end of the nerve, the base of the nerve, and a signal is recorded. As that stimulation fires down the nerve, an electrical signal is sent down the nerve from an electrical electrode which is a little patch put on the body and indicates how fast in a given length that nerve flow should be. His nerve flow was normal.

The other is the motor portion where an electrical signal again is given at the root of the nerve through electrical signal given on a patch on the skin, but it is picked up by a needle placed in the muscle to see when the muscle receives the nerve and contacts. So needles are placed along the muscles that are innervated giving nerve signals from certain nerves throughout the lower extremities. And as those signals are picked up in the nerve and through the needle, one can record whether there's actual flow in the nerves themselves.

Q Is that an uncomfortable or painful procedure for a

patient?

A Well, certainly you're having needles stuck into muscles all along the legs, yes.

Q And going to your note of 1/20 of 2009, doctor?

A Yes. Okay.

Q Could you take us through your notes, sir?

A My note indicates that Mr. Solis came back to the office on 1/20/2009. He was complaining of continued pain at the left foot and low-back. He told me that he was having worsening pain, increasing pain in the lower back and pain radiating to the left leg with some numbness and tingling he was concerned with.

Q Is that consistent with the findings of Dr. Boppana on November 3rd, 2008?

A Yes. Dr. Boppana recorded what he called variable sensory changes. That is numbness and tingling in the lower extremity. I noted that he had seen Dr. Boppana and, again, I requested because Dr. Boppana had done through our office lumbar epidural steroid injections. I also performed what is called a branch block.

Q And a branch block; explain what that is?

A Yes. In the lower back a branch block is an injection of steroid preparation that is given around the facet joints in an attempt to decrease the irritation in the facet joint and the nerve that goes to the facet joint. That is different than the

-Direct/Dr. Kaplan/by Mr. Corley-

lumbar epidural block that Dr. Boppana spoke about which is specialized injections that go into the space between the vertebrae around the nerves themselves in this space called epidural space.

So I gave a branch block at each side to decrease the irritability and irritation in the nerve roots -- I'm sorry in the facet joints and the nerves that go to the facet joints called the lateral branch.

Q Is there any risk associated with the procedure?

A Any time you give injections there's risk of injections, especially with steroids there's risk of further irritation of the joints. Those are low risks in that particular procedure and much less risk procedure than the lumbar epidural block which is much deeper block given in a more difficult access space.

Q Besides being therapeutic to relieve pain, is it diagnostic?

A It can be diagnostic, in that if it does relieve pain, you know, you're in a good spot.

Q Did he have some relief as a result?

A Initially he did have relief from those injections.

Q What is the significants of that, Doctor?

A The significants of that is that by giving branch block injections we're localizing the area of pathology, the area of problems to the facet joint and abnormal motion at the L-5/S-1

motion segment.

Q Did you do anything with regard -- or did you have any findings with respect to the left calcaneus?

A The calcaneus, we took some x-rays on that day and we noted again that the fracture had united.

Q Is that a good sign?

A That is a good sign and it is what you would expect, the fracture eventually will grow together.

Q Did you provide him with any medication at that point?

A We did. We gave him a prescription for pain medication called Tramadol, as well as anti-inflammatory medication Ultram. We gave two forms one cream you rub on and one is a patch, both called Voltaren.

Q Where did he put the patch?

A Those patches are placed both on the back and you could use them anywhere really, on the leg as well.

Q Now, Doctor, the records indicate that there were epidural steroid injections 1/28, 4/16, and June 11th?

A Yes.

Q Sir, do you recognize what is depicted in Plaintiff's 7 for identification?

A Yes.

Q And what is this?

A That is an artist's rendering of how one does a transforaminal lumbar epidural injection.

-Direct/Dr. Kaplan/by Mr. Corley-

A Yes.

Q Is that what is done here?

A Yes.

Q Is this a fair and accurate diagram of how the procedure is performed?

A Yes.

MR. CORLEY: I would like to use the diagram for demonstrative purposes.

THE WITNESS: Yes.

MR. COHEN: Over objection.

THE COURT: Yes.

MR. CORLEY: Could you come down, Doctor, to the diagram and explain to the jury what was done on those three occasions.

(Witness complies.)

A Sure. This is an artist's rendering. The patient is placed facedown so that the lumbar spine is towards you. This shows marking the landmarks with the fingers, noting where the midline is of the lumbar spine. This actually is done with the aid of an X-ray machine as well to localize exactly where the needle is going. A needle is placed for transforaminal injection. The foramen is this nerve root where the comes out of the spinal column. The needle is placed through the skin, through the fat, through the muscle and directed with the aid of the X-ray machine into the spine, going close to the spine which

should keep you safe from hitting the nerve root as it exits through the same area and it is placed into the space called epidura space; the dura is the covering of the nerve root, epidural means just above that. A solution of steroid medication and numbing medicine like Marcaine or Lidocaine is also placed in this area. And the purpose of this, again, is to decrease any inflammation in the nerve roots, any inflammation in the area of the disk and also in the facet joints that are all in that area.

Q And are there any risks associated with doing this procedure?

A There are higher risks associated with doing this procedure. This is an injection that does go down in the area of the nerve roots and in the area of the epidural space. You could again have an infection like any time you pierce the skin, especially the with steroid injection you could have damage to the nerve roots, you could have damage to the dural tissue which covers the nerve root. You could get a leak of the cerebral spinal fluid and that could give you chronic headaches and pain. You could also get irritation from the nerve roots from the injections themselves, hopefully, that is a little risk. The other risks are higher risks. And that is as opposed to the injections which I was giving, which is into the area of the facet joint here (indicating) you could see that is a much more superficial injection.

-Direct/Dr. Kaplan/by Mr. Corley-

Q And through the course of your practice up until the time you saw Mr. Solis, under what circumstances would such procedure be prescribed?

A This procedure is prescribed in a stepwise long-standing back pain abnormality on MRI. Clinical MRI, failed therapy, failed oral medication, medication by patch and injections, reasonable use of the other injections meaning you would not keep doing this over and over again, the facet injections and at that point a epidural injection would be recommended.

Q The fact that there was a series of three injections, what is the significance of that?

A The series of three is done -- is the usual course, that you usually do them in series of three. Most people feel moderate to mild relief after the first, some people get all better. Most people feel significantly better after the second, if they're going to get better. The third, if you don't get better from the second, or if you're heading in that direction and they feel one more injections would make it even.

Q I want you to assume that Mr. Solis testified here that in fact he did have some relief as a result of the procedure, that the pain going down his leg was somewhat comforted for a short period of time. Is that consistent with this type of procedure?

A That is exactly what you would hope for in this

-Direct/Dr. Kaplan/by Mr. Corley-

procedure. You would hope for long-standing relief but hopefully pain getting less.

Q The fact that there's relief, what is the significants of that, if any?

A That shows in a physician's minds that there is ongoing problems, we're in the right area, we're able to decrease that pain with some intervention. The fact it comes back after time means that that intervention is temporary.

(Continued next page.)

DR. KAPLAN/DIRECT/ by MR. CORLEY

Q. Looking at your 4/28/09 note, Doctor, you indicated on 4/28/09 that he had epidural steroid injections at that time. Of course, looking at the chart, we know it was done on 4/16. He does feel some symptomatic relief?

A. That's correct.

Q. He continues to have back pain and pain which at night radiates with numbness down the left leg?

A. That's correct.

Q. What is the significance of that?

A. So that was after his first epidural injection. It was about 12 days after his first epidural injection he got symptomatic relief, but not total relief. He still had symptoms of radiculopathy with pain going down the legs. Inflammation is more common at night when people are trying to get to sleep, which is exactly what he's talking about at that time.

Q. Doctor, I am going to regress for a moment and then we will go forward with regards to the plan for treatment of his back. Going back to the note of 3/3/09?

A. Yes.

Q. Forget about any complaints about the back there. Could you talk about findings with regards to Mr. Solis' left and right heel?

A. Sure. At that time on 3/3/09 he had got some

custom molded shoes we had ordered for him and had been approved. He was wearing the shoes. He was having some swelling at the hind foot, the area we talked about, the subtalar joint. He was also having pain at the right lateral foot, so on the outside portion of the right side.

We went over his shoes with him. I modified them a little bit. I asked him to take them to the person who had made them for him, the pedorthotist for a revision.

Q. The pain he was having that you described there, was that as a result of residual pain from the injury or pain related to the shoes or what?

A. Certainly on the left I feel very comfortable saying it was from the injury. On the right, he did have pain. He also had limited hind foot motion, irritability in the hind foot that is not a normal finding.

Q. On both ankles?

A. That's correct.

Q. What is the significance of that almost a year later?

A. That is not a normal finding in someone who has not had a injury in the foot even with shoe wear. So I think he certainly has some residual irritability and abnormality about the foot on the right as well as on the left.

DR. KAPLAN/DIRECT/ by MR. CORLEY

Q. You indicated he had marked swelling at the sinus tarsi on the right. What is that?

A. Sinus tarsi is the area of the foot where you would normally see swelling in a calcaneous fracture, one that involved some sort of an injury to the subtalar joint or where he had irritability of the subtalar joint.

The subtalar joint is the joint, again, below the ankle between the talus, the ankle bone and the heel bone. And it is a little ball that you can see on the side of your foot. The sinus tarsi, that is where you see swelling when there is problems there.

Q. At this point in time, almost a year later, what is the significance of those findings with regards to his injuries that he sustained as a result of this accident?

A. Clearly he has ongoing problems even a year after the initial injury.

Q. Let's turn to Dr. Poppana's 8/19/09 note, Doctor.

A. Okay.

Q. You got it, sir?

A. Yes.

Q. And the last steroid injection was done on July 9, 2009; is that correct?

A. That's correct.

DR. KAPLAN/DIRECT/ by MR. CORLEY

Q. And findings with regard to he has back pain and stiffness, he has not improved significantly with conservative therapy, with lumbar steroids or analgesics and pain medication, physical therapy, which restricted activities.

A. Correct.

Q. He said he reviewed the EMG and re-reviewed MRIs. The examination revealed spasms, multiple lumbar paraspinal tenderness. What are we talking about, what is the significance?

A. We're talking about pain and spasm in the muscles of the low back. Again, consistent with ongoing problems with the low back, what the body is responding to in this way.

Q. He indicates in the recommendation I'm advising continued four weeks of physical therapy with gradual increase in activity. What is the purpose of physical therapy?

A. Physical therapy is to try to increase the ability to move better. And to try to decrease muscle spasm and strengthen the muscles of the paraspinous musculature.

Q. He says we will have a spine surgeon to evaluate. Why, at this point in time, now 18 months after the initial accident, are you talking about having

DR. KAPLAN/DIRECT/ by MR. CORLEY

him evaluated for a -- by a spine surgeon?

A. Mr. Solis, as Dr. Poppana noted in his note that day, and as I had talked about, had had oral medications, had physical therapy, had injections, continued to have low back pain, signs of irritability with motion, pain with motion, irritation of the nerve roots with motion. And so he had begun to look like he was exhausting conservative treatment. This is almost two years after his accident.

At a certain point, you feel that conservative treatment is either not working or is inappropriate. So Dr. Poppana, the neurologist, decided that he should be looked at by a spine specialist as his more invasive treatment, the injections, had not been satisfactory.

Q. Doctor, I want you to assume Dr. Brisson testified the other day that he first saw him on 10/26 of 2009, that he had diagnosed him with lumbar instability and that he felt that the abnormal motion based upon lumbar extension and flexion studies was a competent and contributing factor to cause of his back pain and pain going down his leg. When did you next see the patient after 10/26/09?

A. I saw him on 3/17/10, I believe.

Q. 3/17/10, right?

A. Yes.

DR. KAPLAN/DIRECT/ by MR. CORLEY

Q. Do you have that note, Doctor?

A. Yes.

Q. Could you take us through that note when you saw him?

A. Sure. He had continued to have complaints of pain at the right and left foot. It was worse on the left. He had continued complaints of persistent low back pain radiating to the lower leg on the right. I'm sorry. On the left. With numbness and tingling.

I again noted he had epidural steroid injection with Dr. Poppana with only mild relief. I noted he had seen Dr. Brisson and was waiting -- awaiting authorization for lumbar surgery. And that he was taking Ultram and Voltaren and tramadol and pain medication without adequate relief.

On exam he continued to have tenderness about the hind foot in that area called the sinus tarsi. He had pain with motion on the left and right as well. I noted he had severe spasm in the lumbar paraspinous musculature both on the right and left with positive straight leg raising on the left side.

Lumbar flexion was very limited, forward flexion to 30 degrees. Normal flexion is about 85 or 90 degrees. That would be 85 (indicating) or 90 is like this (indicating.) He was going forward about 30, bending

forward. He walked with antalgic gait, with a limp, which is a painful gait pattern.

Q. Doctor, did you have a plan?

A. The plan, we requested some new custom molded shoes as the shoes he was wearing had worn out when you looked at them. They were no longer giving support. He was unable to wear his custom molded shoes at that time. He was given a new prescription for the medications, both Ultram and Voltaren. We added a medication called Lyrica. That is a medication given to decrease nerve mediated pain. It causes nerves to fire less easily. So that can decrease some of the pain caused by nerve mediated pain, as he's having in this case.

And we advised him to continue with pain management and with Dr. Brisson at that time.

Q. Essentially was that the plan until the surgery was approved?

A. Essentially, yes.

Q. Pain management?

A. Yes.

Q. The cost of the shoes, what was that?

A. These custom molded orthopedic shoes are about $800.

Q. I see the next time you saw him was on June 26th of 2009. It indicates -- you have pain radiating to the

DR. KAPLAN/DIRECT/ by MR. CORLEY

left lower extremities, numbness, paraesthesia, getting some benefit with Lyrica, although difficulty sleeping through the night through the pain. Is that something consistent with somebody who suffers from chronic pain?

A. Yes.

Q. Why?

A. As I noted before, nighttime pain is very indicative of inflammation. Inflammation around the nerve roots is causing numbness, tingling and pain in the legs when coming from the low back so that is consistent with him having some relief from the Lyrica, but it gets worse at night. It is not covered with the Lyrica.

Q. In your plan here, Doctor, you say you are referring him, at this point in time -- withdrawn.

At this point in time, do you have any idea when the surgery was going to be approved and performed?

A. No. He was still awaiting authorization for surgery that he was going to have with Dr. Brisson.

Q. You indicated you are referring him to Dr. Kushnerik for evaluation of radio frequency injections?

A. Right.

Q. Why?

A. Radio frequency injections is a needle placed in to the facet joint. A radio wave is placed through that

DR. KAPLAN/DIRECT/ by MR. CORLEY

needle to cauterize or burn the facet joint and the associated nerves. It is another very aggressive but obviously less -- more conservative than surgery attempt to deal with that pain.

It doesn't get to the root, meaning it does not stop abnormal motion, but can decrease the back pain associated with abnormal motion.

Q. Why if Dr. Brisson was requesting approval for or authorization for spine surgery would you even contemplate having this type of procedure done for him at this time?

A. Because you don't know how long it will take for authorization to occur. In cases like this, there is a very convoluted system that makes certain treatment measures difficult to obtain authorization for and you simply have to wait for them, unfortunately.

Q. Doctor, were you made aware, at some time, that the patient actually had the approval for surgery and that surgery was performed?

A. Yes.

Q. And I want you to assume the surgery was performed by Dr. Brisson on 7/27/ at Beekman Downtown Hospital, were you aware of that?

A. Yes.

Q. When did you see him next after the surgery?

DR. KAPLAN/DIRECT/ by MR. CORLEY

A. After the surgery, I saw him on 12/20/10. I'm sorry. No.

Q. I have a note of 3/25/11?

A. That's correct, 3/25/11. He came in, at that time, and was complaining of some pain in his feet. He was using his custom molded shoes. He indicated he had surgery with Dr. Brisson and he was having persistent pain in the heel and persistent pain in the low back. He's not having as much pain in the leg itself following the surgery.

Q. Is that significant?

A. That is significant. That means that the surgery was helpful. It got rid of the irritated nerve root. The pain coming from the low back. It is not uncommon for people to have persistent back pain following back surgery. Most of the time the back surgery is really done for the symptoms caused by the back problem, but not in the back itself.

Q. Did you have any findings with regard to the left heel?

A. He had tenderness about the heel with limited hind foot motion. He had some abnormality in the ankle, the joint, both some cracking and popping, which is common when you walk with a limp for a long period of time to start having adjacent joints give you some

problem. He had in the low back he had pain with motion. He had very limited motion in all planes.

Q. Was that something you would expect for a patient that had undergone surgery several months before?

A. Yes.

Q. Doctor, you next saw the patient on 5/18/11?

A. Okay.

Q. And can you take us through that briefly?

A. Sure. At that time, I noted he was complaining of increasing back pain with recent weather so he was having pain affected by the weather. He continued to use the shoes to walk because of the left foot and heel pain. He did have some back pain radiating to the groin and waist which is not uncommon with a lumbar fusion, again, around the area of where the sacrum -- pelvis meets the spine.

Q. Why is that?

A. The area that he had fused, again, was the lumbosacral junction. You can have pain from the surgery itself from scar tissue forming, things like that. That is not the same -- he's not experiencing the same pain he was having prior to the surgery. He's not having pain running down legs, but pain around the groin and sacrum -- sorry. The groin and waist.

Q. You saw him on July 8 of 2008, you indicated he

was having difficulty with left foot weight bearing, stair climbing and descent. What is the significance of that?

THE COURT: You may want to wait a second

(Pause.)

THE COURT: Okay.

A. Climbing up and down stairs is an activity that does put a lot of strain on the junction of the low back and pelvis because the way we normally go upstairs, your pelvis rotates forward. And tilts forward. So someone with lumbar fusion often has pain in the low back because they don't have normal motion in the area where we normally do most of the motion, so other areas have to compensate by moving more than normal. When you have an area of fusion.

Q. In looking at your 7/8 note and comparing that to your notes prior to Mr. Solis undergoing the surgery, was his condition benefited by the surgery in any way?

A. I definitely think that the surgery benefited him. I think he certainly had less pain in the legs. He had less pain on motion, although certainly activity still gives him pain. In a different way I think he has less pain, but I think he's still very, very restricted in certain activities he can do.

Q. I want to take you to a note a couple of months

DR. KAPLAN/DIRECT/ by MR. CORLEY

later on 9/30/11. The reason you saw him in July and two months later in September, what is the reason for the scheduling two months apart?

A. He had just recently had surgery. We also, you know, like to keep a handle on how he was still having fairly significant foot pain. When he came in he was complaining of foot pain. It was worse when he was walking for any period of time. Again, climbing stairs was problematic for him.

His low back was hurting him. In fact, he noted it was very troublesome, meaning giving him rather severe foot pain.

Q. Had that changed from your last note of 7/8/11 as far as pain is concerned?

A. Looking at the notes, the note from 9/30 of 2011, not really notes, things like very troublesome, severe pain. He still has pain radiating in the groin bilaterally. At that time, he also started noting or he started -- rather, he had sort of a depressed affect.

MR. COHEN: I object, Judge.

THE COURT: The objection is?

MR. COHEN: I think we should -- I will tell you if you want me to.

THE COURT: Okay.

(Whereupon, a discussion is held off the

DR. KAPLAN/DIRECT/ by MR. CORLEY

record in the robing room)

THE COURT: The last answer is stricken. The objection is sustained.

Q. Doctor, when did you next see the patient?

A. I saw the patient on 11/11/ of 2011.

Q. I have a note of 10/3 of 2011, do you see that?

MR. CORLEY: May I approach, your Honor?

THE COURT: Yes.

A. You asked when I saw him. That was Dr. Grimm's note.

Q. I'm sorry.

At some point was the patient seen in your office again on 10/3 of 2011? I apologize.

A. That's right.

Q. Who was he seen by at that time?

A. He was seen by Dr. Matthew Grimm.

Q. Who is he?

A. Dr. Grimm is a physician that's in my office now. He's a specialist in pain management.

Q. What was the purpose of sending him to a pain management specialist at this time?

A. Pain management is a more conservative means for treating chronic pain. Mr. Solis was having continued pain in his low back. At times quite severe and debilitating. I sent him to Dr. Grimm to see if there

were any steps we could take to try to control the low back pain.

Q. Take us through the note, first the history of the present illness?

A. He says this is a 30 year-old male presents with back pain. He says Mr. Solis was seen with a translator, which is routine. He has pain radiating in the low back. Patient has a history of spine surgery about a year ago with Dr. Brisson which did help with the weakness, pain, but he's noted increased pain over the past few months complaining of weakness at times -- I'm sorry. No complaints of weakness at this time. Just pain.

Pain is worse with flexion and extension of the back, as well as with rotation. So motions of the back were what caused him pain.

Q. What is the significance of that?

A. The significance of that, again, first we should say I think the surgery helped. No weakness, no pain running down the legs. He has pain associated with motions of the back which are flexion, bending forward, bending backwards and rotation. This area of the low back is fused.

So what is happening in Mr. Solis -- what happens in a case like this, is that the adjacent motion segments of

DR. KAPLAN/DIRECT/ by MR. CORLEY

the back, the other areas that move, are called upon to over move in order to allow someone to go about their daily business, to walk, to climb stairs. To do things like that.

So I believe Mr. Solis is beginning to have some compensatory problems in the adjacent segments which are causing him pain with motion. With motion he's caused to overstretch the facet joints. Caused to over pressure, to over use the disks, and the disk and vertebral junction above the area of fusion I think he's having pain from that.

Q. Doctor, his assessment at this time is lumbago, what is that?

A. Lumbago is a medical term for low back pain..

Q. He's recommending an MRI, what was the purpose of that?

A. The purpose of an MRI is several fold. The purpose of an MRI would be to be sure that the fusion did actually consolidate, meaning that area fused. Because if it does not, which is a risk, you could have back pain from that.

In this case, the fusion did incorporate, did fuse. And so it rules out other causes for problems. Disk herniations, fusion problems. It really leads us to believe that the pain is from the source that I just

DR. KAPLAN/DIRECT/ by MR. CORLEY

described, the over use of the adjacent areas in the spine.

Q. It talks about the treatment of facet injections versus transforaminal epidural injections pending MRI and request for re-EMG?

A. Yes.

Q. What did you want an EMG for?

A. Basically going through the same process that we described before, you are ruling out other causes of pain for thoroughness sake and then the facet injections versus the epidural steroid injections, again, is a way to treat the area with injections and some steroid medication in an attempt to decrease inflammation and irritation in the area.

Q. Is that the deal with the mechanical problem we talked about related to stress?

A. The mechanical problem causes inflammation, inflammation causing pain. So you try to decrease the pain by getting rid of the irritation and the inflammation in a relatively conservative way. Again, you can get rid of the abnormal mechanisms by doing fusion surgery.

But you do run into problems, number one, it is a big surgery, always some scarring involved. You can have continued pain. You can actually have pain, as this

gentleman is having, in adjacent areas that are caused to over work. So you try conservative things first as we have done before.

(Continues on next page)

Q And in fact, the request for MRI, was that approved?

A It was.

Q And the MRI results, you received a copy of them, sir?

A Yes.

Q And the films as well?

A Yes.

Q And the results we've been talking about to check to see whether or not the surgery was successful, what was your findings with regard to the MRI?

A The MRI did show that the fusion that occurred -- that the surgery was successful in causing an intrabody fusion, meaning a fusion between the body of the sacral and the first vertebrae and the lowest lumbar vertebrae L-5/S-1 area.

Q And I'm going to take you to your last note of 12/21/2011. Could you take us through that.

A On 12/21/2011 I saw Mr. Solis. He had continued low-back pain. Apparently we had cold weather around that time and that had aggravated his pain. He complained he had limited ability to stand in one position for any period of time. He had limited ability to tolerate walking. He had pain with walking both and standing at his foot and low-back.

Q Did you perform a physical examination?

A I did. On examine he had tenderness in the midline of the lumbar spine, as well as paraspinous muscle which is the trigger point area of muscle spasm which is tighter than the

rest of the back.

Q Is that consistent with the stress on the joints?

A Yes.

Q Continue please.

A And he had irritation in his nerve roots at that time because he had positive straight leg raising test. He had very limited hind foot motion on the left and tenderness at the left heel. My assessment at that time was that he had commuted left calcaneous fracture, he had right hind foot area, post traumatic low-back fusion at that time showing radiculopathy, irritation in the back causing irritation in the nerve roots running down the leg.

Q Okay.

And your plan was to continue with Dr. Grimm for pain management?

A Yes, that's correct.

Q Flexeril, what is that doctor? You had him on a drug?

A Yes, a muscle relaxer. Tramadol is pain medication.

Q And the prescription for that is what -- how much was prescribed?

A Tramadol is given three times a day, Flexeril is given twice a day. It can be taken up four times a day.

Q And you indicated you wanted additional physical therapy for strengthening, stretching, and range of motion at this time?

A Yes.

Q What is the point of that?

A The point of the therapy again is to make the muscles more comfortable, try to relieve the spasm; that in and of itself can relief some pain because pain is associated with muscular spasm. Also to do stretching to try to get little more motion in the joints above and below, again, they're being caused to over work from their normal. If we could stretch those joints out they could perhaps move a little more pain-free. That can cause some extra wear and tear in the joints but it can relieve some of the symptoms.

Q I want to take you to the last note from your office dated January 6, 2012.

A Yes.

Q And this is by Dr. Grimm?

A Yes.

Q And he indicates here, he still has continued low-back pain, pain worsen with extension of his back with prolonged sitting?

A Yes.

Q I want you to assume that Mr. Solis has testified that he has a problem when he's sitting. What is the source of the problem?

A Sitting is essentially forward flexion of the lumbar spine. When you're forward flexed it is the same position

you're in as you're sitting. When you sit you either lean forward in a flexed position or you're extended in an extended position. Being in that position for any period of time will hurt the abnormal joints in the back and cause pain, especially with muscular spasm present. It is difficult to fight that spasm.

Q And to follow up on what we just discussed in front of this jury with regard to his assessment and plan, could you take us through what he writes and what he's talking about?

A Yes.

He indicates that he's had low-back pain, findings are aggravated with extension as well as rotation and associated with radiculopathy, meaning muscle spasm and Dr. Grimm feels from that information that the joints that control flexion, extension, and rotation, the facet joints, are the source of the pain. He indicates that the patient at that point failed conservative management after the lumbar fusion. Conservative treatment of the other facet joints consisting of medications, some physical therapy, and some home exercises. He recommends facet joint injections to be performed at L-4/5 and again that is the level above the fusion, as well as L-5/S-1. The fusion again was in front and should reduce this motion significantly but you could have irritation in the nerves around those facet joints. He requested authorization for fluoroscopic guided or the X-ray machine to help guide the position of those facet

injections which is more sophisticated way of doing than just branch block injections that go in the area of the facets. And again, he prescribed some additional Tramadol for pain.

Q And he says he's recommending facet blocks in those areas for consideration of radiofrequency ablation in the foramen pending response to the blocks?

A The radiofrequency ablation is a radiofrequency, a current that essentially burns the nerve at the facet joint and for a period of time can give relief of pain.

Q And with regard to the radiofrequency ablation given, how often can you perform that procedure?

A It usually lasts for about a year. So the guidelines say that you could have radiofrequency ablation done at any given facet joint about once a year.

Q And, Doctor, as of 1/6 of 2012, do you have an opinion with a reasonable degree of medical culpability as to whether or not his back pain at that point in time is permanent?

A Yes.

Q And what is your opinion?

A My opinion is that at this time his back pain should be considered permanent.

Q Is it a condition that is going to -- could improve in the future, could it get worse, stay the same, or what?

A I don't think it will improve in a significant way in the future, meaning we could give some treatments conservative

treatment. I do believe even after the treatment he will have a period of feeling improvement, but that it will get worse again overtime. In a stepwise fashion, meaning I think if his pain --to use a graphic measurement is here (indicating) he gets a lot of pain, we could get him back to where he was. But overtime slowly he will have degeneration in the joints above the area of fusion and he will have continued pain in the low-back.

Q And with regard to the findings, with respect to his left heel at this point in time, are those findings permanent?

A I believe they are. He has significant pain in his left hind foot and about the heel and about the ankle. He wears custom molded shoes, it is the way he gets around. Those custom molded shoes last about a year. They need to be replaced about every year to be helpful. And he has pain from damage to the soft tissues, as well as damage to the bone, that I believe is permanent.

Q What about motion of the ankle and the hind foot?

A He has limited motion of the hind foot. Now it is pretty limited motion. That is consistent with his injury. He's showing some limitation and certainly crepitus in the ankle, popping and clinging in an abnormal joint, that is indicative of the problem inside the joint. And that again is slowing progression from the time of the fracture the consolidation of the fracture ongoing problems, abnormal gate,

and the adjacent joints being problematic.

Q What about his right foot, sir?

A His right foot, again, there was no fracture in the right foot. He has had consistent complaints of pain in the right foot. When I say consistent, consistent with the type of injury. He had pain initially. Pain that was bad above that they told him he had a fracture, we found no fracture. He had significant swelling, bruising in the foot that got better over the time he has problems trying to adjust to shoe wear. I think the big problem is the left foot and bigger problem low-back.

Q With regard to -- does Mr. Solis require any ongoing future treatment, sir?

A Sure.

Q What type of treatment will he need in the future?

A To stick with conservative treatment. We talked about shoe wear.

MR. COHEN: Objection, Judge, there's a ruling on this, your Honor.

THE COURT: Let's have another chat.

(Whereupon, a bench conference took place between counsel and the Court.)

THE COURT: The objection is overruled.

Q With regard to his orthopedic shoes, is that something that he will have to wear for the rest of his life?

A Yes.

Direct/Dr. Kaplan/by Mr. Corley

Q And how often will he have to get a new pair of shoes?

A Generally we change the shoes about once a year, they wear out.

Q And as far as his pain medication that he's on, is that something that he's going to have to continue with in the future?

A That is something that I believe he will continue to need. He's been using the same medications for long period of time. Those have been Tramadol, Ultram, and muscle relaxants, mostly Flexeril.

Q Are you familiar with the reasonable costs of these drugs?

A In general, yes.

Q With regard to the Tramadol, how many pills a month is he going to need?

A Tramadol three times a day, about 90 per day --

THE COURT: A month.

A A month sorry. I was trying to get one step ahead; 75, 80 cents per pill. So somewhere $160, $180.

Q With regard to the Flexeril, do you know what the reasonable cost of that drug is?

A About $90 a month. It is not as expensive.

Q And any other type of pain management treatment is he going to require?

A I would suspect again he got some improvements from a

series of epidural injections Dr. Grimm talked to him about radiofrequency injections. If he has one or the other one time a year, I think that would be reasonable.

Q Do you know what the reasonable cost for that type of treatment?

A The series of epidural injections is about $1,200 per injections, once a year, the radiofrequency is approximately the same.

Q What about medical treatment from a doctor?

A Generally, you know, at this point this is really chronic pain management. He would see me as an orthopedist maybe once a month at most, maybe once every other month, so six times a year. He would have to see a pain management guy probably every month. So he's seeing doctors eight to 12 -- 18 times a month, 12 to 18 times a month --

Q A year --

A I'm sorry, a year, correct.

And those visits, the usual and customary rate for the visits, depending how much time you're spending with the patient, how many things are going on, are about $150, $250 per visit. He'll need X-rays three to four films a year.

MR. COHEN: I object to that.

THE COURT: Sustained. I'll sustain this one. Go ahead.

MR. COHEN: Move to strike.

Direct/Dr. Kaplan/by Mr. Corley

MR. CORLEY: The basis?

THE COURT: Stricken.

THE COURT: Beyond the charter.

MR. CORLEY: Is that part of the medical treatment Judge?

MR. COHEN: Judge there's a ruling.

THE COURT: Let's go next question.

Q What about physical therapy, sir?

A I believe he would benefit from physical therapy, ideally, I believe once a week. And a gentleman like this who has had surgery who has chronic pain, just to keep him what we call tuned up or optimized so that he's as flexible and strong and pain free as possible would be ideal for him. Physical therapy is about $100 to $150.00 a visit by the way.

Q Is that something that he's going to require for the rest of his life?

A I believe that is optimal, yes.

Q Doctor, I want you to assume that on March 22nd of 2008, my client was working at a site on Second Avenue and fell from a height of somewhere between ten and 15 feet; that he landed on his heels and then down on his buttocks, and on his back; that he was taken to Metropolitan Hospital. And I want you to assume that the findings that are set forth in Metropolitan Hospital record.

I want you to further assume the findings of that are

noted in your records, that are noted with regard to Dr. Boppana's records and as well as the surgery that was performed by Dr. Brisson. Do you have an opinion with a reasonable degree of medical certainty as to whether the injuries as set forth in your medical records and in hospital, Metropolitan Hospital and Downtown Beekman Hospital, and surgery that was performed by Dr. Brisson, do you have an opinion with reasonable degree of medical probability as to whether or not the fall of March 22nd, 2008 was a competent producing cause of the injuries?

A Yes, I do.

Q And what is you opinion?

A I believe that that fall was a competent producing cause of the injuries to the foot, the sacrum, the low-back that we've been talking about.

MR. CORLEY: Give me one second, Judge.

THE COURT: Yes.

(Pausing.)

Q And with regard to his particular condition, Dr. Kaplan, are there activities that he is restricted in doing?

A He certainly is restricted in his ability to stand for any long periods of time, walk for any periods of time, even sit for any periods of time. He would be restricted from lifting, bending, stooping or crawling, certainly climbing ladders again. He would be restricted from a number of activities.

Q And is that permanent, doctor?

A Yes, I believe that is permanent.

MR. CORLEY: Thank you.

THE COURT: That is your way of saying you're done.

MR. CORLEY: Yes.

THE COURT: Quick five minutes and then we will start cross-examination.

(Whereupon, the jury exits the courtroom and the following is heard outside the hearing and presence of the jury.)

(Recess taken.)

(Whereupon, the jury enters the courtroom and the following is heard inside the hearing and presence of the jury.)

CROSS-EXAMINATION

BY MR. COHEN.

THE COURT: Please be seated. Let's continue.

MR. COHEN: Thanks, Judge.

Q Good afternoon Doctor?

A Good afternoon.

Q I always seem to get the witnesses with 40 minutes left. And I'm going to ask you please, if you can, to limit your answers to my questions to yes or no. If you can't answer it that way, you'll tell me so that I can either withdraw the question or allow you to elaborate. Okay?

A Sure.

Q And if we follow that protocol you have a chance of finishing today. Okay?

A Whatever we need to do.

Q Now, just before we broke, Doctor, you told the jury about various future expenses --

A Yes.

Q --that you felt that Mr. Solis would incur for medical treatment going into the future, yes?

A Yes.

Q And one of things you told the jury that Mr. Solis would have to continue to see you six times a year, correct?

A Approximately, that was an estimate.

Q An estimate?

A Yes.

Q And he would consider -- continue to see a pain management specialist like Dr. Grimm in your office up to 12 times a year, correct?

A Once a month, yeah.

Q And you told the jury that the usual and customary price for the six visits for yourself and for the 12 visits for Dr. Grimm was between $150 and $250 per visit, yes?

A Yes.

Q Am I correct, Doctor, that to date what your office has accepted every time Mr. Solis has come to visit you for care and treatment is $49.26?

A On certain occasions not every occasion.

Q Typical office visit you accept $49.26?

A Not at all. Typical Workers'-- on a Workers' Comp. we have statutory regulation which helpless tells how much to charge.

Q You say, Doctor, if you start explaining yourself on every question we'll be here tomorrow?

A If we have to be here tomorrow, we have to be here tomorrow.

MR. CORLEY: Could we approach for a moment?

THE COURT: It will come out on re-direct?

MR. CORLEY: No. One second.

(Whereupon, a bench conference took place between counsel and the Court.)

CROSS/DR. J. KAPLAN/by MR. COHEN

MR. COHEN: Proceed, Judge?

THE COURT: Proceed.

Q. Regardless of why you accept $49.26 for care and treatment you have rendered Mr. Solis over the past four years, the fact of the matter is that for the past four years on office visits for Mr. Solis, you have accepted $49.26 per visit, correct?

A. For the visit excluding x-rays and other treatment.

Q. Of course. Can I assume, Doctor, that the level of care that you give to a patient would be the same regardless of whether you accept $49.26 for a visit or $250 for a visit?

A. Yes.

Q. What you are telling this jury, then, is if Worker's Compensation is paying the bills, you will accept $49.26, but if my client is paying the bills, you want $250 an hour?

MR. CORLEY: Objection, your Honor.

THE COURT: Sustained as to form.

A. That is ridiculous.

Q. Doctor, how much did your office accept for the fluoroscopic epidural steroid injections that Dr. Poppana did?

A. Whatever Worker's Compensation tells us we are

allowed to charge.

Q. You put your bills in evidence?

A. Absolutely.

Q. You brought them to court. I assume you know what they say, right?

A. I don't know what they say. I know what we charge on usual customarily visits. I know what Worker's Compensation pays us and what we have to adjust for our bills.

Q. What you accept for a fluoroscopic steroid injection is $717, correct?

A. If that's what is on the bill, that is correct. Yes.

Q. If Mr. Solis needs a fluoroscopic epidural injection in the future, you will charge him $1,200, right?

A. If he's no longer covered by Worker's Comp, he's like everyone else subject to the usual and customary rates.

Q. Does he get a better fluoroscopic epidural injection if he pays 1,200 bucks?

A. Absolutely not.

Q. He gets the same injection that you are willing to give him now and for the past four years for $717, correct?

A. There are doctors who charge $5,000 for that. I assume it is the same procedure.

Q. We're not talking about other doctors, Doctor. We're talking about you. Please limit your answers to my questions, okay?

A. I am trying to characterize these honestly, so I am trying to answer questions without the implications that you are making.

Yes, someone gets the same injection whether we are allowed to charge $700 or whether we charge the usual and customary rate which is $1,200 or whether someone else charges 5,000, it is the same injection.

Q. But that other person is not here. We're talking about you. And what you accepted for a fluoroscopic epidural steroid injection is $717, yes?

A. That is what we are allowed to accept, yes.

Q. That is what you have accepted. No one is putting your arm behind your back and telling you you have to see Worker's Compensation patients, are they? Are you forced to see Worker's Compensation patients?

A. I certainly am not. It is a choice I make because I believe it is the right thing to do.

Q. It is a choice you make. You are willing to accept $717 for a fluoroscopic steroid injection, correct?

CROSS/DR. J. KAPLAN/by MR. COHEN

A. If that is what the law tells me to do, I do it.

Q. That is your choice?

A. That is my choice to see those patients. Certainly not my choice to accept that. That is what I have to do.

Q. You accept it?

A. I would much rather accept $1,200 which I think is a more fair price.

Q. I am sure you would, but you don't, do you?

A. I can't, sir.

Q. Similarly, you make the choice because you don't have to see Mr. Solis to accept $49.26 for an office visit, correct?

A. I accept that because it is the law.

Q. Right?

A. When he's no longer covered by Worker's Compensation, I am not expected to accept that.

Q. Right. That is when you intend to bill five times more?

A. That is when I intend to bill what is the moderate usual customary rates.

Q. Five times more than you accepted for the past four years?

A. Again, other doctors charge much more. That's right. Exactly.

CROSS/DR. J. KAPLAN/by MR. COHEN

MR. COHEN: Judge, I am asking to strike that testimony.

THE COURT: You are both steering off form. You have an answer. Go onto the next question.

Q. What about the physical therapy? You told the jury that the visits were 100 to 150, usual and customary, and what you have been willing to accept for the past four years is $67.60, is that true?

A. Again, that is what we have to.

Q. You can say yes or no.

A. It is not a yes or no question because you are asking if I'm willing. It is what I have to do. I would rather not, but that is what we accept because we treat Worker's Compensation patients. It is part of orthopedic surgery.

Q. You can send him out to somebody else for physical therapy, right?

A. I absolutely could.

Q. You don't have to do it in your office and collect a fee for the physical therapy, right?

A. I do not have to.

Q. You choose to do that?

A. I absolutely do.

Q. You do that with the knowledge that the most

that they are willing to give you is $67.60 a visit?

A. It is a business decision. That is what they pay us. It is an ethical decision I take Worker's Compensation.

Q. So for four years --

A. Correct.

Q. -- you have been accepting $67.60 for PT, but going forward, if he comes to you, you will charge between 100 and 150, is that true?

A. If he comes to me or if goes anywhere else in the city, he will get charged more. It is not me, it is everyone in the city.

Q. We're talking about you, Doctor.

A. That is not a fair characterization, sir.

Q. You told the jury what you would charge. I am not interested in any other doctor in this city. I am sure there are doctors who charge more and doctors who charge less.

You are the doctor on the witness stand, okay. So limit your answers, please, to you and your office, okay?

A. Sure.

Q. Thank you.

Now, by the way, the orthopedic shoes that you have recommended --

A. Yes.

Q. -- cost $800 a pop, right?

A. Yes, that's correct.

Q. Can you take a look at your office records, please, Doctor. Begin with the first time you saw Mr. Solis on April 3, 2008?

A. Yes.

Q. Am I correct that on that date Mr. Solis made complaints with respect to his right foot and you found the right foot to be extremely tender?

A. Yes.

Q. Okay. Am I correct that you saw Mr. Solis subsequently on April 15, 2008?

A. Yes.

Q. Am I correct, Doctor, according to your note, there is no reference in there of right foot pain?

A. According to my note, he returns, he had a CT scan.

Q. No, Doctor. Don't read the note, please.

Does the note record any complaint of right foot pain or discomfort?

A. Again, I don't believe -- you are asking a question. If I answer yes or no, it is mischaracterizing it. I don't think it is a yes or no question.

Q. The words on the page that you wrote, do any say right foot pain?

A. They don't say right foot pain or left. They merely record the CT scan findings.

Q. Negative on the right, positive on the left?

A. That's correct.

Q. But your record of 4/3 records right foot pain, yes?

A. He had right foot pain, yes.

Q. Your record of 4/15 does not record right foot pain, is that true?

A. It is not a record of any pain, but a record of CT scan findings.

Q. There is no complaint of pain with the foot. There is complaint of pain in the back. So it was a record of some pain, wasn't it, Doctor?

A. There is neither -- there is not a record of any examination of or complaints about the foot. There is a CT scan record he had a left calcaneous fracture.

Q. Let's look on the 6/11/08 narrative report. On examination, Doctor, Page 2, you write he was last seen here today, 6/11/08, he has continued complaints of left heel pain.

Am I correct that there is no reference on June 11, 2008 of any complaints with respect to the right foot or right heel?

A. Yes, you are.

CROSS/DR. J. KAPLAN/by MR. COHEN

Q. So we have no complaints recorded by you on the 15th of April, and we have no complaints recorded by you on June 11th of 2008; is that correct?

A. Of the right foot, yes.

Q. That's what I'm talking about.

A. Yes.

Q. On July 22, 2008, there was another office note by you. And tell me if I'm wrong, but there is no reference or record by you of any complaint to the right foot by Mr. Solis?

A. Let's see. He's complaining of left foot pain about the foot and heel and continued lower back pain at that time.

Q. No right foot pain, right?

A. That is right, there is none recorded. We are treating the fracture and severe pain in the low back.

Q. You write down in the records when he complains of pain, don't you?

A. We triage things because I cannot write everything the patient writes down. At this point, I am seeing as we talked about the majority of the problem is the fracture of the calcaneous and pain in the back he's complaining about, at this point.

Q. Are you telling the jury if he came to you on July 28 of 2008 and said to you, and said to you that he

had right foot pain, you wouldn't write it down?

A. If my thought was his pain was getting better, I wouldn't necessarily write it down. I wrote down what we're treating and major things.

Q. So you were not treating for the right foot; isn't that correct?

A. That's correct.

Q. Obviously what he said to you, if he said anything to you, was not significant enough for you to make a record of it?

A. I think I didn't think it was severe at that time. I think the active treatment was for the left foot and low back at that time.

Q. We have gone through four office visits, only one of which references right foot pain, which was the first one on 4/3/08.

Take a look, if you would, Doctor, on September 15th, 2008. Am I correct that there is no record by you of any complaint of pain with respect to the right foot?

A. That's correct.

Q. And there is no record of any complaint of pain by you in your note of 10/27/08 or 12/8/08 or 1/20/09; isn't that correct?

A. Again, that is not a strict yes or no question because those notes are for different reasons, although

you are breezing by them. 10/27 is simply a review of MRI. There is no noted complaint of left -- of right hind foot pain in the other notes, that's correct, because, at that time, I would have expected him to have discomfort, but it is getting better. I don't believe it was a significant problem at that time.

Q. Am I correct, Doctor, that with the exception of your initial note on 4/3/08, there is no record by you, no recorded complaint of right foot pain on 4/15/08, 7/22/08, 6/11/08, 9/15/08, 10/27/08, 12/8/08 and 1/20/09?

A. That's correct.

Q. In fact, the first time after April 3, 2008 that you do record complaints of right foot pain were in March of 2009 after you got him these orthopedic shoes that you think he should wear for the rest of his life, isn't that true?

A. That is how the record reads, correct.

Q. It is your record, right?

A. That is right.

Q. Now, you told the jury, sir, that in Dr. Grimm's opinion, because you didn't write his notes, he thinks that Mr. Solis could benefit from facet joint injections, correct?

A. Correct.

Q. He wrote that note on January 6 of 2012?

A. Okay. Yes.

Q. All right. Those injections have not occurred, right?

A. That's correct.

Q. Am I correct that on October 3rd, 2011, Dr. Grimm recommended a different type of injection that likewise didn't occur? I believe you told the jury facet injection versus epidural steroid injection.

A. Facet injection and epidural injections, that's correct. 1/6/12 also recommending facet injections.

Q. Right?

A. Yes.

Q. So the facet injections he recommended on October 3rd of 2011, those never occurred either, right?

A. Well, he's got to get authorization for them. They have not occurred.

Q. They have not occurred?

A. Because there is no authorization for them.

Q. Did you file authorization?

A. Absolutely.

Q. What kind of a form do you use?

A. C 4 form.

Q. Did you bring it with you?

A. No. It is sent to Worker's Compensation.

Q. You do not keep a copy of it?

CROSS/DR. J. KAPLAN/by MR. COHEN

A. Not in this chart.

Q. You have more records back at the office?

A. No. There are forms sent to the Worker's Compensation Board. Those are called C 4, C 4.2 forms that request authorization.

Q. You don't keep copies?

A. That's correct.

Q. That is your entire file in front of you?

A. This is my medical record, that's correct.

Q. You told the jury on your note of 6/26/10 that you referred Mr. Solis to Dr. Kushnerik for radio frequency injections, correct?

A. Let's see what the date was.

Q. You said it about 10 minutes ago.

A. I was looking for the date.

Q. Do you have it in front of you?

A. I do.

Q. On that date, you recommended radio frequency injections and referral to Dr. Kushnerik, correct?

A. That's correct.

Q. He never saw Dr. Kushnerik;isn't that right?

A. I don't believe he did.

Q. He never had the radio frequency injections, correct?

A. That's correct.

CROSS/DR. J. KAPLAN/by MR. COHEN

Q. You don't know for a fact if he's going to undergo facet joint injections in the future, right?

A. Do I know for a fact? I don't know until it has happened. It is a request we have made and a recommendation that we have made. It is my belief he would benefit from that.

Q. You told the jury, Doctor, by the way, this will be the last question on this subject, that the tramadol or Ultram that you prescribed, 50 milligrams, 90 pills a month, cost $160 to $180?

A. Approximately.

Q. Is that also usual and customary?

A. I have no control of that.

Q. Where do you get the numbers?

A. That is what the pharmacy tells us.

Q. I would like to show you some bills for tramadol that you have prescribed.

MR. COHEN: If I could mark this as A.

(Whereupon, the referred to items were marked as Defendant's Exhibit A for identification, as of this date.)

Q. Doctor, the bills that Mr. Solis has been paying for tramadol, 90 pills, 50 milligrams, are $64.69; isn't that correct?

A. That's correct.

CROSS/DR. J. KAPLAN/by MR. COHEN

Q. Less than half, really about a third of what you told the jury the cost was, right?

A. If you call the pharmacy and ask what the cost of 90 pills of tramadol is, the information you will get is what I told you. Clearly, this is Worker's Compensation rates. Pharmacies make the same decision that we make. Do I accept it? You have to. This is not my bill. It is a pharmacy's bill. They do the same thing we do.

Q. What pharmacy did you call?

A. What's that?

Q. What pharmacy did you call?

A. We have called. We have been asked this before.

Q. What do you mean? I'm not talking about we.

THE COURT: The royal we I think he said.

THE WITNESS: Yes. Thank you.

MR. COHEN: He cannot testify about the royal we if somebody in the office --

MR. CORLEY: He testified to that.

Q. Did you make a call?

A. I have made telephone calls, yes.

Q. Did you make phone calls in connection with this case and ask how much it costs?

A. Absolutely not. It is a phone call I have made in the past. You can call Duane Reade, CVS, those

pharmacies give an estimated range. I gave you a range because I have gotten a range.

Q. Doctor, this is obviously not the first time you have testified in court?

A. That's correct.

Q. You have also testified in Worker's Compensation proceedings, do you?

A. If called to, sure. Have to.

Q. Have you testified before in depositions or video?

A. Yes.

Q. Can you tell the jury how many times all tolled you have testified before in court, in a Worker's Compensation proceeding, and on deposition or video?

A. I have no idea. Court probably once or twice a month I am in court.

Q. Back up. In court once or twice a month?

A. That's correct. On average. Worker's Compensation Board hearings, they come at random. It is probably, you know, there are 15 minute depositions on a phone usually. Those are maybe once a month or twice a month. It depends on the time of year when courts are open. Video deposition I have probably done two in my 20 year career.

Q. You find yourself in court between 12 and 24

times a year?

A. On average, sure.

Q. Can you tell the jury what percentage of the patients in your practice are involved in lawsuits?

A. I have no idea. It is not a huge percent.

Q. Do you get referrals from lawyers?

A. I do.

Q. Did you get a referral in this case?

A. I believe Mr. Corley's office did refer this gentleman, yes.

Q. In fact, on your initial intake note, there is a preprinted form for attorneys for the name and telephone number, correct?

A. That is simply information that we can release -- sorry. That is a name we can release information to, medical information, yeah.

Q. What you wrote next to attorney was TGL?

A. That is what was written there, TGL.

Q. Trolman, Glaser & Lichtman?

A. Yes.

Q. You know the firm well enough to abbreviate it?

A. I do not write that. That is something -- TGL is easier to write than Trolman, Glaser, Lichtman, I guess.

Q. Have you ever treated a patient that was

represented by TGL prior to today?

A. By Trolman, Glaser, Lichtman? Yes, sure.

Q. How many times?

A. I have no idea.

Q. More than 10?

A. In 20 years, sure.

Q. More than 20?

A. I doubt it.

Q. Have you ever testified before for his firm?

A. I have.

Q. How many times?

A. I have testified for Mr. Corley two or three times.

Q. What about for other people in his firm?

A. I am not sure who is in the firm.

Q. Trolman, Glaser, Lichtman.

A. Never testified for Trolman, never testified for Lichtman.

Q. Have you on occasion seen people who are not your patients for examinations strictly for litigation purpose?

A. Absolutely.

Q. How many times have you done that?

A. I do that with some frequency both for defendants, as you know, you are really well aware of.

CROSS/DR. J. KAPLAN/by MR. COHEN

Q. No, I don't know.

A. I think you do. And for plaintiffs. I will see a patient as an expert witness. Someone will ask me to see them and render expert opinion.

Q. How many times have you testified for the defendants?

THE COURT: Over his career?

Q. Let's say 12 to 20 times a year, 24 times a year, how many times have you testified for defendants in a given year?

A. I would say at the most I have testified for defendants is twice in a given year. The majority of what I do, great majority or reason I am here is testifying for patients like Mr. Solis, people I have treated for years.

So the number of people I see as an expert one time evaluation as you're saying is approximately 50/50 defendants versus plaintiffs. But as far as when I'm here in court, usually I am here on behalf of a plaintiff because it is someone I have been treating for a long time.

Q. You are in private practice?

A. Yes.

Q. Your organization is known as New York Orthopedic Sports Medicine and Trauma?

A. NY Ortho Sports Medicine and Trauma.

Q. P.C., what does that stand for, professional corporation?

A. Yes.

Q. Are you the owner?

A. Yes.

Q. Sole owner?

A. Yes.

Q. So Dr. Grimms works for you?

A. That's correct.

Q. Dr. Poppana worked for you at some point?

A. That's correct.

Q. Do you have any ownership interest in any other facilities that provide medical services for individuals?

A. No.

Q. Do you have any ownership interest in any other organization that provides services to the legal community?

A. No.

Q. How many doctors do you have in the organization currently besides yourself and Dr. Grimm?

A. Dr. Grimm, pain management physician. Dr. Eric Crone who is an orthopedic surgeon.

Q. Does Dr. Crone testify as well?

A. He would testify if he was asked to, sure. Part

of being an orthopedist.

Q. Sorry?

A. Part of being an orthopedist.

Q. Do you know how often he testifies?

A. He probably testified once or twice in the last five years.

Q. If he testifies does money come into the P.C. or does he keep it himself?

A. A portion he keeps as part of his compensation. And a portion of it goes into the P.C. which overall pays for overhead, people that work there, things like that. His insurance.

Q. What about Dr. Grimm, does he testify?

A. No.

Q. Does he see patients for litigation like you said you do or who are not treated by your P.C.?

A. He would, sure. He's very new to the practice.

Q. What about Dr. Crone, does he see patients for litigation purposes?

A. You mean as an expert witness?

Q. Yes.

A. Sure.

Q. Dr. Brisson testified that in 2009 when you referred Mr. Solis to him, he was renting space in your office, is that a fair statement?

A. That's correct.

Q. When did he leave?

A. I don't recall exactly when he left.

Q. What is your understanding as to his specialty?

A. He's an orthopedic surgeon who specialize in spine surgery.

Q. Have you referred patients to him in the past?

A. Yes.

Q. Do you continue to refer patients to him?

A. Yes.

Q. Why do you refer patients to someone like Dr. Brisson who is an orthopedic surgeon with a specialty in the spine?

A. If I feel someone needs spine surgery, I often refer them to physicians who have had extra training in the spine. I believe that doing spinal surgery should be done by someone who does surgery all of the time. Dr. Brisson is one of several physicians who I refer cases to.

Q. Can you tell the jury how much you are being compensated for testifying today?

A. The office receives a fee of $6,500 for my canceling my office from about 10:30 on so I can get here on time.

Q. Did you also bill $6,500 when you were here on

Thursday?

A. Yes.

Q. Did you meet with Mr. Corley at any time prior to today to prepare for your testimony either for today or for Thursday?

A. I met with Mr. Corley to explain the medical chart that I had and my feelings about what Mr. Solis' injuries were, sure.

Q. Was that on one occasion or more than one occasion?

A. One.

Q. Did you charge for that?

A. No.

Q. No charge for that?

A. That's correct.

Q. Did you intend to bill for that?

A. I think a bill was submitted, yes.

Q. How much?

A. We usually bill, if that was an hour, probably $200.

Q. Did you bring those bills with you, by the way?

A. No.

Q. Did you write any reports for Mr. Corley's firm?

A. There is a report that was written September 23 of 2010 and a report written March 16 of 2009. Those are

CROSS/DR. J. KAPLAN/by MR. COHEN

reports that were written with diagnoses for purposes of exchange with the defendant, for the purpose of the case. Those are $450.

Q. Those reports of September 23, 2010, March 16, 2009, I believe you just said were reports that were prepared by you for counsel so that he could exchange it with the defendants in the litigation, is that true?

A. That is my understanding of why they are necessary, yes.

Q. Would that include the report that you did for June 11, 2009?

A. No. That is a report written as we talked about specifically --

MR. CORLEY: 2008.

THE WITNESS: Sorry?

MR. CORLEY: 2008.

A. The June 11, 2008 report is a report I wrote specifically to talk about the injuries to the left calcaneous with the antecedent history that the gentleman had a bilateral calcaneous fracture and why I got the CT scan.

Q. Who did you write that report for?

A. That would have been to the Worker's Compensation Board.

Q. Am I correct, Doctor, and it is in evidence, the

CROSS/DR. J. KAPLAN/by MR. COHEN

jury will see it when they deliberate, that the format for the report that you wrote for Mr. Corley's firm on March 16, 2009 and the report that you wrote for Mr. Corley's firm on September 23, 2010 is exactly the same as the format for the report that you wrote on June 11 of 2008?

A. This is the way I write medical reports.

Q. You just wrote the patient's name, right?

A. Mm-Mm.

Q. I would like to show you some documents.

MR. COHEN: If I can have these marked collectively, Judge, as --

THE COURT: B, I believe.

MR. COHEN: B. There are five doctor progress reports, you mentioned C-4-2.

(Whereupon, the referred to items were marked collectively as Defendant's Exhibit B for identification, as of this date.)

Q. Doctor, what's been marked for identification as Defendant's Exhibit B, these are five, what are they called, Worker's Compensation Board reports of treating physician?

A. Yes.

Q. They are all signed by you?

A. That's correct.

CROSS/DR. J. KAPLAN/by MR. COHEN

Q. These are reports that you submit to the Worker's Compensation Board?

A. Yes.

Q. After a visit or after a diagnosis or something along those lines?

A. After I have seen the patient, examined him, rendered treatment, yeah.

Q. Am I correct, sir, that on June 11, 2008, that was an office visit, you saw Mr. Solis on that date?

A. Yes.

Q. At that time you went through the history that had led up to that point as you know, yes?

A. Yes.

Q. You talked about the April 3rd time when he first saw you, correct?

A. Yes.

Q. You talked about the April 15th time which was the next time he saw you?

A. Yes.

Q. June 11 was the third time he saw you?

A. Yes.

Q. You had benefit of the Metropolitan Hospital records at this time, correct?

A. Yes.

Q. So you went through the Metropolitan Hospital

records and the tests that were done at the Metropolitan Hospital, correct?

A. Yes.

Q. And then you mentioned that you had sent Mr. Solis out for bilateral CT scans, correct?

A. Yes.

Q. It is your testimony that this report of June 11, 2008, in the identical format of the two reports that you prepared for counsel for litigation, was not a report prepared for counsel for litigation, but was prepared for the Worker's Compensation Board in order to explain why you sent Mr. Solis out for bilateral calcaneous CT scans in addition to the x-rays?

A. That's correct. It is a medical report. It is the same format that I use for medical reports. But it is strictly talking about his calcaneous and justifying my medical treatment for the calcaneous fracture and what I felt his problems were.

I mean, look at it. If it were a report for counsel, I could have put in bilateral calcaneous injuries, but I'm justifying why I put in his calcaneous fracture, why I had him for extra tests for that.

Q. Exactly. You made a diagnosis in this report, did you not?

A. I did.

CROSS/DR. J. KAPLAN/by MR. COHEN

Q. The one and only diagnosis in this report was a left calcaneous fracture; is that right?

A. That is correct. That was the purpose of the report.

Q. You made no diagnosis with respect to the right foot, correct?

A. That's correct.

Q. You made no diagnosis with respect to the lower back?

A. Correct.

Q. You had seen him allegedly for lower back complaints on 4/3/08 and 4/15/08?

A. Yes.

Q. You took an x-ray that you said showed a fractured sacrum, yes?

A. Yes.

Q. When you wrote a diagnosis in a written report, the only diagnosis that you made was with respect to the left heel, correct?

A. That's correct.

(Continues on next page)

Cross/Dr. Kaplan/by Mr. Cohen

Q You didn't even make a diagnosis on the right saying that there was no fracture on the right side. You just said there was a fracture on the left side, correct?

A I think that report makes it very clear there's no fracture on the right side and that was the purpose of that note.

Q Did you write anything about the right side in the diagnosis?

A I noted that there was no fracture in the right side, right.

Q Did you doctor --

A That is certainly the implication.

Q I did not ask for implication. What did you write under diagnosis? It is in evidence. You could read to the jury?

A I will do that, sir.

It says let's see -- CT scan.

Q No Page 2 under diagnosis all in capital letters?

A I can't read what I wrote in my report only what you asked me to read.

Q Yes, exactly, you're here to answer questions.

A I'm trying to answers questions.

Q Please read what you wrote in all caps under diagnosis?

A I'm trying to understand exactly what you want. You're asking very specific things.

Cross/Dr. Kaplan/by Mr. Cohen

Q Let's not have a debate here?

THE COURT: That's my suggestion.

A Diagnosis left calcaneus fracture that was the diagnosis I was trying to get across to the Workers' Compensation board.

Q Can I ask you, on those C4.2 forms, reports of treating doctor to the Workers' Compensation Board, am I correct that those forms that you submit to the Workers' Compensation Board. Each one of them has a Workers' Comp Board case number?

A They do, yes.

Q And each one of them, the reports that you prepare and submit to the Workers' Compensation Board, has a patient account number?

A It should, yes.

Q And each one of those reports has a Workers' Compensation authorization code for you, correct?

A It should, yes.

Q I imagine Workers' Compensation Board has thousands of people to deal with, correct?

A I imagine.

Q What?

A I would not know.

Q Well, on the bottom of the page, on Page 1 there's a section for describing diagnostic tests that were rendered, correct?

A Yes, uh-huh.

Q And C.T scan is diagnostic test; isn't it?

A Yes, but not that I rendered.

Q You rendered diagnostic tests that goes on there otherwise it doesn't?

A You're correct.

Q What about diagnosis?

A That would mean that I charge for a test that I didn't do, which I would never do.

Q On Page 2 there's specific area of whether patient needs diagnostic tests or referrals; is that correct?

A Could you show me specifically what you're talking about.

MR. COHEN: May I approach Judge.

THE COURT: Yes.

(Pausing.)

Q I'm talking about this form that we're talking about, number five, on the form. Can you read that to the jury?

A Sure. This is from examination of 3/16.

Q Just the preprinted form. There's a section on that preprinted form for diagnostic tests that you recommend and referrals, correct?

A Yes.

Q So, if you refer someone out for diagnostic test, you could check it off on the box in the form that you submit to the

Workers' Compensation Board with the proper identification information for the individual who needs the test, yes?

A Yes, you can.

Q Am I correct that this report that you say you did for the Workers' Compensation Board from June 11, 2008, is even addressed to the Workers' Compensation Board?

A No, it's not. But my notes go stapled this form to the Workers' Compensation Board, that is the only way that they get paid if the note is on the form.

Q So you're saying the June 11, 2008 report was stapled to the form?

A It would have been stapled to the bill of June 8th-- we would have contacted the adjustor who is representative of the insurance company to try to work through the problems, yes.

Q You didn't put any identifying information whatsoever on the June 11, 2008, report that you drafted and you say was for the Workers' Compensation Board other than the name Jesus Solis, correct?

A Jesus Solis Pulido which is this gentleman's name and it goes with the form.

Q The form that you don't keep copies of right, doctor?

A The form goes to the Workers' Compensation Board, the information on the form is input into computer but not on the form. It then will be printed on to a form.

Q You don't have those forms, the form that you say that

goes along with the June 11, 2008, report?

A You have them.

Q I don't have June 11, 2008. Do you have it?

A I don't but the Workers' Compensation Board does, likely.

Q They do because you know you did it, right, you remember doing it?

A I don't remember doing it. I would hope that it was done. I don't do the forms personally. Obviously I have a billing person that does them, but that is the way it works.

Q Do you think it is good for a doctor to submit copies to the Workers' Compensation Board that you sign as verified and accurate?

A I can't remember them two years later.

Q Please let me finish --and not even keep copy of that?

A I have the information that was on the form in the computer. It is not printed on the form. You could type it out so that it gets printed on the form. We don't keep the forms themselves.

Q Let me ask you a question on Page 2 of that June 11, 2008 report, that you say was for the Workers' Compensation Board, you have a stamp there that says dictated but not read to expedite mailing?

A Yes, that's correct.

Q You dictate this report that you're going to submit to

the Workers' Compensation Board to explain things, but you don't take the time to read it?

A I unfortunately don't feel I have the time to read every single one, yes.

Q Didn't you put the exact same notation on the two reports that you did for counsel?

A That's our usual form, in that I definitely have a chance to read through them and make corrections. Sometimes they're typographical error, there's no question, we're not a; perfect.

Q So the answer is yes, the June 11, 2008 report has the same stamp on it that says dictated not read to expedite mailing as to two reports that you sent to counsel?

A Sure. Even again, that is the medical report, even the two reports that you're referring to as the ones that I sent to counsel are sent to the Workers' Compensation Boards because they're records of an office visit and treatment that we rendered the patient.

Q You already told the jury you prepared those reports for counsel so that he could exchange them in litigation, yes?

A They serve dual purposes.

Q They were not prepared by you for the Workers' Compensation Board?

A A portion of that is prepared for the Workers' Compensation Board. The record of the physical examination and

the treatment that has been performed, the Workers' Compensation uses that information as well.

Q So what you meant to say to the jury, when you told them that the two reports from 2009 and 2010 that you prepared for counsel for the litigation, so that he could share it with me, was that this is a dual purpose document that goes for the Workers' Comp. Board and also benefits counsel in the litigation, is that right?

A No. That's not at all what I meant to say. And I would appreciate if you didn't interpret in front of the jury what I said.

You asked me if I prepared reports for the office of Mr. Corley and I said, yes. I'm giving you a straightforward answer. Those reports are also, in addition, used for Workers' Compensation as a record of treatment and diagnosis. You could twist it all you want. I'm laying it out as best I can for you.

MR. COHEN: Your Honor, I'm going to ask to strike the comment.

THE COURT: I think you're both guilty of going far afield.

MR. COHEN: Counsel can object if I'm guilty. I'm objecting for the doctor.

THE COURT: Both of you stay on a straight and narrow path.

Q Doctor, in this report that you prepared on June 11,

2008 you wrote, and I quote: "He is anxious to return to work at this point. I have advised him that will require the use of high top boots to limit his hind foot motion. I have also advised him on the use of silastic gel heel inserts, correct?

A Correct.

Q So at or about June 11th Mr. Solis came to you and said: I'm anxious to go back to work?

A He wanted to go back to work.

Q And your response to him was that going back to work would require the use of high top boots to limit his hind foot motion and the use of silastic gel heel inserts, correct?

A With regard to his heel, yes, that's correct.

Q You did not put anything in your report restricting him in regard to his back, right?

A Not in that note of June 6th.

Q This is the one we're talking about.

A That is what I'm answering. Please be straightforward.

Q The diagnosis and the one that includes the reference to Mr. Solis returning to work three months after the accident, you didn't place any restrictions in that document at all in respect to his back; isn't that true?

A That is correct.

Q There was no diagnosis with respect to the back, correct?

A It is not a note about his back, that's correct.

Q It is a note about him and the treatment that you gave him for the last three months, right?

A And we've been talking about for the last hour.

Q Well, I have not had you for an hour, Doctor?

A This is a note that is explanatory of his heel problem and the treatment and the diagnosis of that in my mind.

Q Do you think it was responsible on your part if this man had a back injury to tell him on June 11, 2008, that if he wanted to return to work, all he needed was high top boots and gel heel inserts?

A I think it is perfectly responsible in the context which is, he had a sacral fracture that is expected to heal, that is what I thought the back pain was from. I thought it was perfectly reasonable in context of the calcaneus fracture. A gentleman who is anxious to go back to work, I'm all for it. This gentleman has not made it back to work and his sacral fracture healed, he had continued back problems and things did not go exactly as we wanted them to, that is very unfortunate for the gentleman. He would love to go back to work. It did not happen. It is not irrelevant on my part. It is the way the body works.

Q Do you know if he returned to work after June 11, 2008?

A I am not aware of him returning back to work for any significant period of time.

Q You don't know either way?

A As far as I know he did not.

Q Did you make a record of it in your office note?

A I have never sent him back, I will put it that way.

Q He could go back to work with high top boots and gel inserts?

A I did not say back to work. I said if he were to go back to work he would, essentially, have to have silastic gel inserts and high top boots.

Q Three months after the accident, if he were to go back to work, what he needed to do was to wear high top boots and gel heel inserts, correct, according to what you wrote?

A With regard to his heel he would definitely have to wear some sort of padding because of the damage to the soft tissue and high top boots or some type of boot like he's wearing now limits his hind foot motion, that would be the only possible way to go back to work. It did not happen that way.

Q You're telling the jury that you wrote a report that had very hard brackets around only one of the injuries without regard for the other injuries. As you saw them; is that true?

A What I am saying is, what I have said over and over. This is was a report regarding his hind foot. That was the most significant possibly limited injury at that time as I saw it. Because I thought his fracture would heal and the calcaneus fracture would heal. It is not the way it happened. It happens infrequently in medicine actually it is not irresponsible on

anybody's part.

Q Did you know on June 11, 2008 that he should have restrictions with respect to his back if he was going back to work?

A If he had back pain. But it is not reported on that day because we were focusing on the hind foot.

Q If he did not have back pain because it is not reported on that day because you were focusing on the heel, the answer would be no that he could go back to work without restrictions on his back?

A That is not yes or no question. You're making too much false assumptions.

Q False assumptions?

A That is what I think you're doing, yes.

Q Was there any record of back pain June 11, 2008?

A There's no record not saying he did not have back pain. It was not significant in context of what I was writing about. You're asking --you're holding me to standard --I admit I cannot necessarily live up to your standard.

Q When you said in your report that he could go back to work with silastic heel inserts and high top boots. Did you provide any restrictions on him going back to work in construction on his back, don't lift, don't bend, don't squat. Did you do any of that in this report?

A No. If he had sacral fracture as a source of his pain,

those restrictions would not have been the problem. The problem would have been the hind foot, in which case when he was ready to go back to work, he would require inserts and high top boots.

Q He was ready on that day, wasn't he?

A He was ready? I did not send him back to work. He's not-- medically this gentleman not able to go back to work.

Q You did not say disabled?

A It is not in that most it is C-4 forms.

Q The one that we'll never see because you did not keep copy of?

A I don't know how you got these C-4 forms but you could get the other on the same way.

Q From your office?

A You could get them from the Workers' Compensation Board --

THE COURT: One more question this afternoon.

A --these are available to you.

MR. COHEN: I can't do one more question.

THE COURT: Then we'll break for the day. We will reconvene at 9:30, whatever the doctor's schedule is he and Mr. Corley will work on it.

THE COURT OFFICER: All right. Jurors leave your notebooks and come with me.

(Whereupon, the jury exits the courtroom.)

THE COURT: All right. See you tomorrow.

Cross/Dr. Kaplan/by Mr. Cohen

MR. COHEN: 9:30.

MR. CORLEY: Thank you.

(Whereupon, the trial adjourned to January 31, 2012 at 9:30 a.m.)

* * *

C

D

E

Q

R