DR Brisson

SOLIS, JESUS v. HEALTH ADVOCATES FOR OLDER PEOPLE HOUSING DEVELOPMENT FUND COMPANY, INC. d/b/a CARNEGIE EAST HOUSE

CONTINUED TRIAL

FEBRUARY 1, 2012

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

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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.

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CONTINUED TRIAL

80 Centre Street
New York, N.Y.
February 1, 2012

B E F O R E:

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

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-CROSS/P. BRISSON, M.D./by MR. COHEN-

(Whereupon, the trial is continuing)

THE COURT OFFICER: Jury entering.

(Whereupon, the jury enters and resumes their respective seats)

THE COURT: I am ready when you are.

MR. COHEN: Well, we are on cross. I guess we have to call the doctor back up.

THE COURT: Come up.

(Witness takes the stand)

P A U L B R I S S O N , M.D., having been Previously sworn/affirmed, was examined And testified as follows:

THE COURT: Whenever you are ready.

MR. COHEN: Thanks, Judge.

CONTINUED CROSS-EXAMINATION

BY MR. COHEN:

Q. Good morning, Doctor.

A. Good morning sir.

Q. Thank you for coming back.

I just handed you the bills that you submitted last week on your direct testimony. If you could tell the jury what the exhibit number is on the front page, for the record?

A. 19, I believe.

Q. Plaintiff's 19 in evidence. Now, these bills

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that are there, are those records of what you billed for the services you provided or are they records of what you were paid for for the services that you provided?

A. It's both, sir. There is charges and credits. So charges and payments.

Q. I noticed on page 3, for example, there was information that says write-offs. Does it mean it might have been billed but wasn't paid?

A. Let me make sure. Let me check something. Yeah, it is a probably a code by the insurance company. So we wrote it off.

Q. According to my math, and tell me if I'm wrong, the total bill and paid by your office for your care and treatment to Mr. Solis brings it to $9,148.98, correct?

A. The summary doesn't give the math, but I will take your word for it. It is in that range, correct.

Q. That would include all of your office visits, x-rays, and surgery that you did on July 27, 2010, correct?

A. Medical care.

Q. Okay. So the answer is yes?

A. Yes.

Q. By the way, you mentioned on Friday that you were being paid $10,000 for the time away from your office and patients. Are you being paid today again for

the time away from your patients and your office?

A. No.

Q. You are not billing for this?

A. No.

Q. Okay. Now, have you spoken to anyone, anyone at all, since you left this courtroom on Friday in regard to Mr. Solis or in regard to this case or the testimony that you gave or the testimony that anybody else gave since you left the courtroom on Friday?

A. No.

Q. You did speak to counsel, obviously, to schedule your being here, today?

A. Correct.

Q. But nothing substantive?

A. Nothing related to the case.

Q. Nothing related to Mr. Solis's care and treatment, yes?

A. Nothing.

Q. On Friday when we last spoke, sir, we had discussed that the last time you saw Mr. Solis was on June 22, 2011. That was your last visit with the gentleman, is that true?

A. Correct, sir.

Q. And, at that time, sir, I do not want to go back all over what we did and so I will not, you were noticing

-CROSS/P. BRISSON, M.D./by MR. COHEN-

improvement, he was feeling better, regaining his strength and flexibility, he was rarely taking medication, but he had some residual, what you described as neck and back pain, is that true?

A. Correct.

Q. So you decided he should have a course of physical therapy of six to eight weeks, yes?

A. That was the recommendation, correct.

Q. The goal in prescribing the physical therapy, I believe you told the jury was to reduce the pain and increase the range of motion?

A. Correct.

Q. I believe you also told the jury that you never saw Mr. Solis again after that time and so you didn't know whether, in fact, he ever followed through with the physical therapy, is that true?

A. Yes.

Q. Now, can I assume that since you didn't know last Friday what transpired with Mr. Solis medically speaking after your last visit, and you didn't know if he went to physical therapy after your last visit in June of 2011, that you have not been in communications with Dr. Kaplan over that period of time from June of 2011 until the present?

A. This is correct. This is true.

-CROSS/P. BRISSON, M.D./by MR. COHEN-

Q. So you have not spoken with Dr. Kaplan and you have not spoken with Dr. Grimm from his office?

A. Correct.

Q. I believe, sir, if you go to your first note, October 26, 2009, which is your initial consultation?

A. Correct.

Q. On the second page under the impression, you wrote, in the very last sentence, he has a lumbar disk herniation with myelopathy, right?

A. Correct.

Q. Now, did you feel, sir, when you wrote that the lumbar disk herniation was caused by the accident of 3/22/08?

A. I felt that his symptoms were related to the accident described, yes.

Q. But the disk herniation was diagnosed by you, was it clinically or diagnostically based on the MRI film?

A. Recalling the testimony, a combination of everything. History, physical, ultimately EMG as well helped, imaging information.

Q. You did rely on part on the imaging information which would have been the 9/19/0 8 MRI, is that true?

A. The one I reviewed was that one, correct, 9/19/08.

-CROSS/P. BRISSON, M.D./by MR. COHEN-

Q. I believe you testified to the jury even though diagnostically on the MRI film he exhibited, in your opinion, a herniating disk at L5 S1, the herniation, in your view, was not the big problem in causing his radicular complaints. Is that a fair statement?

A. That is a fair statement. I think we talked about instability or excess motion at that level at that segment.

Q. In your view, what was causing the radicular symptoms, the symptoms down the leg, was not a herniated disk pressing on a nerve root, but rather that hyper mobility of the L5 S1 segment which, in your view, caused nerve irritation. Is that a fair statement?

A. Fair in a sense that the motion with the small disk herniation led to the irritation we talked about. I mean, I do not want to discount entirely the fact he has a herniation, but if you were to take a herniation on so-called face value, his alone was not entrapping chronically or constantly.

But the motion with small herniation led from my clinical understanding to the irritation and complaints he expressed to me and described to us.

Q. Does this relate back, in your view, the excess motion at the L5 S1 level or segment of the spine, to the accident of 3/22/08?

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A. I have to go with the evidence and, therefore, the answer is yes. I measured approximately 30 degrees at L5 S1 which is -- it is too large of an arca motion, an angular motion at one level, especially L5 S1, which tends to be seated deeper in our sacrum and pelvis.

Q. I'm not questioning how you came to the conclusion that there was excess motion at L5 S1. What I'm simply asking is, you having come to the conclusion in October of 2009, did you also feel that was the product of the accident a year and-a-half earlier on March 22, 2008?

A. Based on facts I do know, the answer is yes.

Q. You are aware that Dr. Kaplan diagnosed a sacral fracture on 4/3/08?

A. It has been mentioned, I believe, yes.

Q. Now, in your view, Doctor, in your experience as an orthopedic surgeon treating people with issues concerning the back, are there activities that you feel should be avoided for somebody who has sustained a traumatic herniation to the L5 S1 disk and sufficient trauma to the spine to result in instability or increased motion at the L5 S1 level?

A. I think it -- knowing also the patient is symptomatic because we deal with symptomatic people, not asymptomatic people. I say so because you could have

-CROSS/P. BRISSON, M.D./by MR. COHEN-

asymptomatic hyper mobility, for example. Yes, any activity that entails frequent loading, frequent lifting, frequent flexion, extension, as examples, would lead to what I believe to be additional exposure to more symptoms.

Q. So in your view, then, for a patient who exhibits the type of findings that you found on Mr. Solis with respect to the lower back, you would recommend against excessive bending or lifting, for example?

A. Yes. Definitely.

Q. Okay. And assuming that the condition arises out of an accident, a traumatic event, for what period of time do you think it would be appropriate to restrict your patient's activities in respect to the lower back?

A. In the context of a patient like this gentleman, I think it is reasonable to assume a few months. If it was predictable, if it was predictable in a way that timelines or time periods would be useable and so on and so forth. I would dare to say a period of time. Unfortunately, clinical outcomes don't necessarily come out the way we hope or expect them to be.

But, in response to this question, certainly many months. Three to six months would be a reasonable period knowing the gentleman sustained a fairly significant trauma.

-CROSS/P. BRISSON, M.D./by MR. COHEN-

Q. Thank you, Doctor.

Doctor, have you had occasion to read the chart of Dr. Kaplan? Did he provide that to you when you first examined the patient?

A. From Dr. Kaplan's practice I have some of these notes. I don't know if I have what you're looking at.

Q. I'm looking so why don't you have a look as well. Do you have a note, it is two pages, the typewritten narrative report from Dr. Kaplan, and the date is June 11, 2008?

A. No. I have -- sir, I have some notes, short notes, but I do not have a narrative report.

Q. That's fine. I found it.

MR. COHEN: May I approach the witness?

THE COURT: Yes.

Q. I would like to show you two pages of an exhibit in evidence as Plaintiff's 13. It is a June 11, 2008 narrative report written by Dr. Kaplan. Do you have that in front of you, sir?

A. Yes, I do.

Q. Now, you can read actually right from it because it is in evidence, if you need to. I want to ask you some questions.

Would you agree that Dr. Kaplan made a diagnosis in this report and rendered an opinion as to the causal

-CROSS/P. BRISSON, M.D./by MR. COHEN-

connection between the diagnosed injury and the accident of 3/22/08?

A. I want to make sure I understand the question clearly. I mean, can you repeat it? I do see a calcaneous fracture. Maybe you can repeat the question.

Q. I will be happy to.

On Page 2, does the word diagnosis appear?

A. I see what you mean.

Q. Yes?

A. So Dr. Kaplan stipulate or made a final diagnosis of a left calcaneous fracture. And point out the fact it is associated with limited motion and pain.

Q. He went on to say that the accident of 3/22/08G] is the competent producing cause of the fracture to the heel, correct?

A. This is correct.

Q. Would you agree that was the only diagnosis Dr. Kaplan made in that June 11 of 2008 report?

A. A quick reading of the paragraph mentions only the calcaneous fracture.

Q. So the one diagnosis that he made on June 11, 2008 in that two-page narrative report was a calcaneal fracture on the left, fair enough?

A. Fair enough.

Q. By operation of elimination, then, it would be

-CROSS/P. BRISSON, M.D./by MR. COHEN-

fair to say as well he didn't make any diagnosis on June 11, 2008 with respect to --

MR. CORLEY: Objection as far as this doctor commenting on what Dr. Kaplan's diagnosis was. He has already testified with respect to that report and the purpose of that report. He's asking this doctor to render an opinion as to what Dr. Kaplan diagnosed.

MR. COHEN: I did not ask that.

THE COURT: Let me hear the question.

MR. COHEN: Do you want me to repeat it --

THE COURT: Yes.

MR. COHEN: -- or have it read back?

Q. Is it fair to say there was no diagnosis in this report of June 11 of 2008 with respect to the lower back?

THE COURT: All right. You may answer.

A. In that document, there is no mention.

Q. Doctor, can you take a look at the top of Page 2 of that report. Do you see that, sir?

A. Yes, I do.

Q. It says he, meaning Mr. Solis, was last seen here today June 11, 2008; is that right?

A. That's what I read, correct.

Q. He has continued complaints of left heel pain, correct?

-CROSS/P. BRISSON, M.D./by MR. COHEN-

A. Correct.

Q. He is now ambulating in high top boots?

A. Correct.

Q. So he wasn't any longer using a cast or a splint on his heels, he was now wearing high top boots, according to what Dr. Kaplan wrote on June 11 of 2008, is that true?

A. Yeah. Although I am not sure how he treated him initially, if this is a stage down or stage up, depending how you look at it from treatment of a ankle or bad calcaneous fracture.

Q. The answer is yes, right? He's wearing boots now, not wearing a cast, he's not wearing a splint, according to what is in the record?

A. I mean, to read it textually, yes. I don't know what he means clinically. You have to ask him.

Q. I am asking you to read it --

A. Sure.

Q. -- if it is there?

A. I do not do foot and ankle. It is a high top boot.

Q. He had weaned himself from Vicodin to Ultram, is that true, is what it says there?

A. This is what I read, correct.

Q. Is Vicodin a narcotic pain medication?

-CROSS/P. BRISSON, M.D./by MR. COHEN-

A. Yes, it is.

Q. Ultram is an analgesic medication, right?

A. I think the gentleman is correct. It's narcotic like. But doesn't act on pain the same way narcotics do, so it is analgesic. Is not considered a narcotic.

Q. Thank you.

According to what Dr. Kaplan wrote, the Ultram, at this point, appeared to be covering Mr. Solis' pain, correct?

A. Based on the gentleman's note, correct.

Q. He had weaned himself from the cane at that time?

A. Correct.

Q. Further down the page under diagnosis, the next sentence, if you would, Doctor, Dr. Kaplan noted that Mr. Solis was anxious to return to work at this point, correct?

A. Correct.

Q. And Dr. Kaplan advised him that this would require the use of high top boots to limit his hind foot motion, correct?

A. Correct.

Q. He advised also he should use silastic gel heel inserts, is that true?

A. Correct.

-CROSS/P. BRISSON, M.D./by MR. COHEN-

Q. There were no restrictions made in this report under the diagnosis and recommendations for returning to work in respect to the lower back, is that true?

A. I mean, I could not comment on Dr. Kaplan's fact he did not mention about it. The same way I would not mention anything on his heel because I do not have the expertise.

Q. No. I'm not asking you to get into Dr. Kaplan's head as to why or why he didn't. I'm simply asking you is it a fact that in this two-page report of June 11, 2008, when Dr. Kaplan diagnosed the left heel fracture and was confronted with the prospect of Mr. Solis returning to work, he didn't provide, in this document in front of you, any restrictions whatsoever with respect to the lower back, is that true?

A. Lower back, no mention in this note.

Q. Okay. In your opinion, is the failure on the part of a doctor to restrict the activities of a construction worker who is asking to go back to work, in respect to the lower back, consistent with a traumatic lower back injury having occurred only two and-a-half months earlier?

A. Do you want to rephrase the question so I am sure I get all of the angles?

Q. Yes.

-CROSS/P. BRISSON, M.D./by MR. COHEN-

Dr. Kaplan wrote this report on June 11, 2008, right?

A. Correct.

Q. The accident we know occurred on March 22, 2008, so we're about three months' post-accident, can we agree on that?

A. Correct.

Q. And in this two-page report Dr. Kaplan diagnosed a fracture to the left heel, but he has no diagnosis with respect to the lower back injury, is that true?

A. This note does not reflect the low back injury component.

Q. That's what we're talking about.

A. Correct.

Q. And in this note when Mr. Solis, according to what Dr. Kaplan wrote, I know you were not there, Doctor, when Mr. Solis said I'm anxious to return to work in construction, what Dr. Kaplan said was, you need high top boots and silastic gel heel inserts, correct?

A. He mentioned that. Although I don't think he implied he could go back to work.

Q. Let's read exactly what he said to the jury, then tell me if I read it wrong. " 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 to use silastic gel

heel inserts."

Did I read it correctly, Doctor?

A. That is one paragraph of three, but the one you read is accurate, correct.

Q. Is there anything in there that suggests he didn't tell him that it was okay to go back to work?

A. I just read two lines later prognosis is poor which, again, you have to ask Dr. Kaplan what he meant.

Q. He did not say don't go back to work. He said this, meaning back to work, would require use of high top boots and silastic gel heel inserts; isn't that what he wrote?

A. He wrote it. But, I mean, even though I do only spinal surgery, I have to recertify every 10 years, for example, so I need to know something other than what I do.

MR. COHEN: I object. I simply asked the doctor if that is what Dr. Kaplan wrote.

THE COURT: Either he wrote it or didn't.

THE WITNESS: Repeat the question then.

Q. Is that what he wrote?

A. I do not read return to work here. I read what the gentleman read to you before, a description of what could be daily management of his pain. And I read the prognosis is poor. Somebody has to understand what the

doctor meant and I guess you will have to ask him again.

Q. Okay. Now let's go back to the question you asked me to rephrase a few minutes ago. Is it good practice for a doctor treating a person who has just had a traumatic lower back injury, three months earlier, when asked by the patient if he can go back to work, to mention nothing about the lower back, and provide no restrictions at all with respect to the construction activities that the patient would now engage in. Is that good practice in your part?

A. I cannot speak for him. You have to ask him.

Q. I am asking you if you think it is good practice, being a doctor who treats people with spinal injuries and spinal complaints, when a patient says I want to go back to work in construction, to not mention anything to the patient about lower back restrictions, lifting, bending, the things you said you would do in your practice?

A. I mean, I understand your question. I really do. But I cannot answer for him. I don't know how he generates his medical reports in terms of a request. I think it established he had back pain after the accident or at the time of accident. I cannot speak for Dr. Kaplan. That is as simple as that.

Q. You won't tell us whether you think it good

practice if a doctor doesn't restrict the activities of a patient, two and-a-half months after a traumatic lower back injury, with respect to activities such as bending, lifting, the kinds of things you said you would restrict your patients for?

A. Counsel, I subscribe to the fact the more detailed information, more complete information, the better it is. I cannot comment on Dr. Kaplan since we know the gentleman complained of pain prior to that date. I just can't say more.

Q. I appreciate that.

Do you know if Mr. Solis returned to work at any time after June 11, 2008 when he presented to Dr. Kaplan and was anxious to get back to work on that day?

A. I'm not aware, sir. I don't know.

Q. Doctor, in your career, I assume you have treated many people with herniated disks?

A. Yes.

Q. I assume you have operated on many people with herniated disks?

A. I have operated on people, yes.

Q. On July 27, 2010, you removed the disk material at the L5 S1 level of the spine and you fused the area, is that true?

A. Correct.

-CROSS/P. BRISSON, M.D./by MR. COHEN-

Q. And the purpose of the fusion, obviously having removed the disk material, you had to put something in the space, yes?

A. Well, the purpose was to remove the excess motion. And yes, when you remove the disk which serves as a flexible spacer, I use it as so-called lumbar implant.

Q. That stops motion of L5 S1 segment which you believed was causing Mr. Solis pain?

A. This is correct.

Q. How much of the total spinal range of motion is represented by the L5 S1 segment of the spine?

A. I think it is fair to say something in the range of 10 to 20 degrees.

Q. Not 10 to 20 degrees. I'm talking about percentage. What percentage of the entire motion from the spine from the top of the cervical spine all the way down to the bottom of the lumbar spine is represented by that one segment of L5 S1, sir?

A. I see. I guess the best example for us discussing this question is, for example, reaching out on the floor if you drop something. This ability to reach on the floor, the motion, the flexion, full flexion say, is reflected or available because of mobile segments in the lumbar spine, low thoracic spine and hip joints. So

arca rotation of close to 160 degrees you would hav(possibly 10, 10 percent -- 10 to 15 percent say, restricted by virtue of L5 S1 involvement.

Q. 10 to 15 percent of the lumbar spine?

A. I do not want to say lumbar because that is not accurate. You have to count in hip joints which can compensate. You can have a patient with even more than one level fused and be very agile. But L5 is one -- is part of a mobile segment started from T10 to T11 and so forth, plus hips. If you fuse one level like L5 S1 you will lose 15 degrees, 20 degrees, out of 160. So that is what? Up to 20 percent maybe.

Q. 15 degrees out of 160 is 20 percent?

A. My math, 10 percent. You are right. I'll have to get my phone out for the calculator.

Q. The surgery that you did, how many times have you done a discectomy and lumbar fusion in your career?

A. Frequently. How many times?

Q. Give me a ballpark.

A. Thousands of times.

Q. This is not a new or experimental procedure, correct?

A. If it is new?.

Q. It is not?

A. No.

-CROSS/P. BRISSON, M.D./by MR. COHEN-

Q. It has been done in the medical community for years and years?

A. Decades.

Q. How long have you been doing it for, over 20 years?

A. Started in '89. 1989.

Q. Have you had success in your career with this type of surgery in the past?

A. I believe so, yes.

Q. One of the goals of the surgery is to reduce the mobility, the hyper mobility in the area and, therefore, to reduce the pain, correct?

A. As clinically understood for him, the answer is yes.

Q. The other goal would be to stabilize the area obviously?

A. I think for him the spectrum is for stability. He did not have too much nerve compression, although dynamically, meaning when he was active, he had leg complaint, so some irritation. The idea here is excess motion.

Q. Have any of the patients you operated on for lumbar fusion and discectomy gone on to lead active lifestyles after the surgery you performed?

A. Yes.

-CROSS/P. BRISSON, M.D./by MR. COHEN-

Q. You said people even with L5 S1 fusion or even two levels, I believe you said, can be agile, yes?

A. They can be flexible, correct.

Q. People with L5 S1 that you've treated have gone on to play tennis, for example?

A. Well, I mean, I mean tennis, for example, the concept an L5 S1 fusion in a healthy individual will not prevent resumption of activities that we would consider normal, tennis being one of them.

Q. So you would expect, hopefully, if everything goes well, the resumption of normal activities following the surgery of the type that you performed on Mr. Solis, is that a fair statement?

A. Yes. I mean that is the goal, actually.

Q. Does a patient's age affect the likelihood of success?

A. That's correct. The younger, the better.

Q. Are there other factors that affect the likelihood of success such as whether one smokes cigarettes or other medical issues that might be relevant?

A. The answer is yes to that. Mr. Solis, just by virtue of a standalone anterior fusion, in my view, presented the best medical scenario possible for a successful fusion. So he doesn't smoke, he's not obese,

-CROSS/P. BRISSON, M.D./by MR. COHEN-

he's young, so on and so forth.

Q. On December 7, 2009, in fact, what you wrote in your office notes, Doctor, was that Mr. Solis is a young individual and, therefore, the anterior only fusion will be performed, he would like to resume a normal active life, tile is that true?

A. That is the goal of the surgery, correct.

Q. That is what you wrote in your report, sir?

A. I mean, that is what I say to patients for the most part. I am trying to find the lines so I can say yes from reading it, but it is very consistent with what I tell patients.

(Continues on next page)

-Cross/Dr. Brisson/by Mr. Cohen-

Q I don't want you to think that I'm misquoting you.

A I see it now.

Q Thank you.

A Yes.

Q So, when you anticipated doing the surgery, the particular procedure that you did for Mr. Solis, which was the anterior only fusion, it was your goal in part at that time to allow him to resume a normal active lifestyles in accordance with his wishes, yes?

A To give him the best opportunity. The answer is yes. Yes.

Q Okay. I believe you characterized Mr. Solis as being a nonsmoker with no other health issues and a young man as an ideal candidate for the type of surgery you were prescribing; is that true?

A Yes. And for the jury a standalone lumbar fusion versus an anterior fusion with posterior fixation with screws in the back, that can traumatize the muscles.

Q The standalone is the type that you did?

A Yes.

Q And you you did that so as to avoid traumatizing the dorsal muscles?

A The dorsal muscle to remove factors that could hamper some recovery patterns.

Q Okay. So this was, let's say, a less intrusive surgery

then you might otherwise have performed if he was not an ideal candidate?

A I don't know if intrusive is the word. But you get the idea by virtue of the fact we don't do retraction on the lumbar muscles. Some patients have difficulty with that incision after surgery.

Q Okay. Now, if you could turn to your first postoperative visit dated August 11th, 2010.

(Pausing.)

Do you have that in front of you?

A Yes.

Q I want to track his recovery very quickly by way of your office notes.

This was about two weeks postsurgery?

A Correct, recently, yes.

Q And based on what you wrote in the very first paragraph, you said the patient after surgery is noting improvement from his preoperative pain; is that true?

A That's what I wrote.

Q So that is two weeks postsurgery he's already noting an improvement from before the surgery, correct?

A Correct.

Q Now, at this time he was walking slowly with a walker but he had a limp -- I'm sorry no limp.

If you look in your second paragraph under physical

examination.

A Yes.

Q He's ambulating with a walk slowly, no associated limp; is that true?

A That's correct.

Q And to you as the doctor, he appeared to be improved; is that true?

A Yes, I was particularly satisfied with the fact that he did not have the tingling of the leg complaints.

Q Was he on track two weeks postsurgery in terms of the anticipated recovery?

A Yes.

Q Now, the plan at this time was for Mr. Solis to be active and to walk as much as possible, true? That is under what you wrote as plan?

A Yes, correct.

Q And you wanted him to be active, even though he's only two weeks post the fusion surgery. That's a good thing, correct?

A Correct.

Q And you wanted him to ween himself off the walker and move on to the cane and, eventually, ween himself off the cane as well, correct?

A Correct.

Q The next postoperative visit was about a month later on

-Cross/Dr. Brisson/by Mr. Cohen-

September 8th. If you could turn to that.

(Pausing.)

A I'm there.

Q So we're now six weeks postsurgery and four weeks after the August 11th visit, true?

A Correct.

Q Now, at this time Mr. Solis was walking without an assistive device and without a limp, correct?

A Correct.

Q So he had not only progressed past the walker that he had been using two weeks postsurgery, he had now past the cane and wasn't using anything at all, correct?

A From an ambulation standpoint, correct.

Q And he's walking without a limp, right? You observed him walk and he walked normally; is that true?

A Yes, that's right. Not using assisted device and no limp.

Q No limp?

A Yes.

Q That's good progress, right, six weeks postsurgery?

A Yes.

Q He had a limp before the surgery, correct?

A Right.

Q And he was actually using a cane before the surgery too, right?

A Yes.

Q And six weeks post-accident, not using any sort of ambulatory device like a cane and not limping represents very good progress in a very short period of time, correct?

A It is encouraging, correct.

Q Now, Mr. Solis at this visit on September 8, 2010, he noted improvement from his preoperative pain status, correct?

A Correct.

Q I could refer you, Doctor, if it makes it easier.

He did have some mild incisional pain and stiffness in the back, especially when he's twisting, right?

A Yes.

Q Is that unusual for a patient six weeks post lumbar fusion to have incisional pain or stiffness in the back when twisting?

A No, I think that is quite consistent.

Q Importantly, Doctor, he know longer had any lower extremity symptoms at all; isn't that true?

A That is what is observed, correct.

Q He denies any lower extremity symptoms, correct, you wrote that in the first paragraph, correct?

A Yes.

Q And, obviously, before the surgery he did have lower extremity symptoms that were quite troubling to him, correct?

A Correct.

-Cross/Dr. Brisson/by Mr. Cohen-

Q Six weeks postsurgery we got really good and encouraging results, correct?

A Correct.

Q At this time, I believe you wrote, Doctor, under in the first paragraph that he was taking medication on a PRN basis; is that true?

A Yes.

Q PRN means as needed?

A As needed.

Q Which is progress from medication taken on a prophylactic basis, correct?

A Or regular basis.

Q Regular basis?

A Yes.

Q So, initially postsurgery, because obviously the surgery itself is a trauma, the recommendation by you is to take the medication on a regular basis just to keep pain level under control, correct?

A Correct.

Q And eventually as the patient continues to progress, now you recommend only taking the pain medication if the patient needs it, yes?

A Yes.

Q On September 8, 2010, about six weeks postsurgery, Mr. Solis was taking pain medication now only as needed; is that

right?

A That is what it reads, correct.

Q Now, Doctor, you did a straight leg raise test on this date, true?

A Yes.

Q And the jury knows that a straight leg raise test is a test where you actually lift the patient's legs if he's in a supine position, or if he's sitting you lift the patient's legs. And what you're looking for is to see if there's any nerve pain; is that true?

A Shooting past the knee and reaching the foot -- the answer is yes.

Q And you did that test and the straight leg raise test was negative?

A Yes.

Q Meaning he did not have that type of pain, correct?

A He did not have any evidence of irritation at that point inflammation of the nerve.

Q That is more progress, correct?

A The functioning is improving, yes.

Q And at this time, six weeks postsurgery, you recommended physical therapy, correct?

A Yes.

Q And the goal of physical therapy is to increase range of motion and decrease any residual pain; is that fair?

-Cross/Dr. Brisson/by Mr. Cohen-

A Correct, carry on with the improvement.

Q I'm sorry?

A Carry on with the improvement.

Q Thank you, Doctor.

Your next office visit was on November 3rd, 2010; is that true?

A Yes.

Q Mr. Solis noted some additional improvement in the lower back, yes, in the middle of your page on the first paragraph?

A Yes, I see that.

Q And he was still ambulating without any assistant device and without a limp, correct?

A Correct.

Q And he had started physical therapy under your good care and he's now using a treadmill and using a ball in order to increase his flexibility; is that true?

A That is what it reads, correct.

Q Could you describe for the jury what the ball involves? Is it one of the big gym balls that we see?

A Yeah. As you know it is a gym training program. You don't have to be under physical type of care, people do that to train, it is good way to develop dissymmetric, it is a good way to develop flexibility, particularly of the truck muscles.

Q The plan at this time was Mr. Solis to remain as active

as possible?

A Yes.

Q Why is it important for a patient with back issue who has just had the type of surgery that you prescribed to remain as active as possible?

A Well, the first aspect is that you minimize, hopefully, the amount of stiffness that comes from inability. We call that deconditioning or disuse syndrome. Our muscle groups don't tolerate inactivity. If we don't use them they stiffen up and atrophy. Those two processes are painful, especially if you try to get active again.

The gentleman was inactive for a long period of time, the surgery sets him back a little bit more, the training is essential for recovering normal function.

Q I know this sounds counter-intuitive to a layperson like myself. For example, with arthritis people with arthritis are actually encouraged to be active. Because if you give in to it and are inactive it actually can make you more stiff and more painful, true?

A Yes, there's a zone where you want to remain; sufficiently active, not overly, not necessarily inactive because otherwise it gets detrimental.

Q Thank you.

The next visit was on December 8, 2010?

A Correct.

-Cross/Dr. Brisson/by Mr. Cohen-

Q Is that true?

A Yes, correct.

Q And at that time we're about four months postsurgery, Mr. Solis described, I believe, what you wrote: Clinical improvement and a betterment of his condition when comparing to his operative status; is that true?

A Yes.

Q And he's continuing to progress. He's continuing to note a betterment in his condition, yes?

A That's what it says.

Q And clinical improvement means when you use the word "clinical" you're referring to what the patient feels, the symptoms?

A Well, I'm referring to what I recall and noted when he first came to see me, compared to what he is on that date.

Q I mean the word clinical. When you use the word clinical we're not talking about diagnostic study, you're talking about the patient?

A Yes.

Q So improvement, clinically, referring to improvement in the symptoms that brought him to the surgery in the first place, correct?

A Yes.

Q Now, at this time you wrote in your report and I am going to quote from you: "I have to admit this consultation is

a positive one with encouraging results." You wrote that?

A Yes.

Q That means what? That you were feeling good about the surgery that you did and the progress that Mr. Solis was making over this very short period of time, true?

A I mean it means that-- exactly. It means he recovered from the incisional pain. He seems to be more tolerant of activity, still had some stiffness. Getting out of a chair is difficult. But what I recall from the nerve irritation standpoint, from the recovery incisional viewpoint, he improved.

Q The stiffness that he was still experiencing four, five months postsurgery; difficulty getting out of a chair, that is not unusual in that time period, is it Doctor, following surgery like that?

A Yes, I think we have to be fair. As much as I think-- and know we can help individuals, we don't render them the same way they were before at one point in their life.

Q Okay.

Now, the next point January 25th, he had reduced his pain medication on an as needed basis to maybe every other day, is that what you wrote?

A That's what we took note of, correct.

Q That is more improvement. He's gone from maybe taking it regularly to taking it as needed, to now taking it maybe every other day, right?

-Cross/Dr. Brisson/by Mr. Cohen-

A That's what I read, correct.

Q And the plan to remain active for the reasons that you already told the jury, correct?

A Correct.

Q March 9th, Doctor, the next office visit, you wrote that Mr. Solis voluntarily and clearly admitted to you that the surgery had helped him and that, for instance, the numbness that was so annoying and so painful in the right lower extremity is resolved, correct?

A Yes.

Q Resolved means gone?

A Gone.

Q Okay.

He was still taking medication maybe every other day at this time?

A As specified as before, correct.

Q Than the plan was to improve through his physical fitness?

A As mentioned a few times, correct.

Q And that is the same thing that we talked about, remain active, keep active, use the treadmill, go to the ball for flexibility?

A Developing good active level to encourage him -- the answer is yes.

Q All right.

-Cross/Dr. Brisson/by Mr. Cohen-

Now, on the last office visit which was June 22, the last time that you saw him, you wrote that: Overall the patient is doing much better, correct?

A Correct.

Q And you noted that he was noticing progressive improvement, correct?

A Correct.

Q Progressive means that it continued, improvement continues; is that true?

A Correct.

Q So, over the course of the 11 months following your surgery, Mr. Solis continued to feel better and to report to you that he was progressively getting better?

A Correct.

Q At this time you wrote that he was regaining his strength and flexibility, correct?

A Correct.

Q This is in the low-back are we talking about strength and flexibility or in general?

A No, I think you have to look at my notes as being focussed on the back.

Q Okay.

So, the back flexibility and strength through remaining active on the treadmill and the ball and working on his physical fitness is improving and continuing to improve; is that true?

-Cross/Dr. Brisson/by Mr. Cohen-

A Correct.

Q And at this time, Doctor, you wrote that he was very rarely taking pain medication, yes?

A That's what he told us.

Q So now we progressed over the course of 11 months from regular medication, to as needed basis, to every other day, and now 11 months after your good surgery to rarely taking pain medication, yes?

A That's what the note reflects.

Q That is very positive course of recovery, would you agree?

A Correct.

Q Now, I acknowledge, Doctor, you said the other day that he continues to have some residual nagging back pain at this time and you wanted him to go to physical therapy so you recommend the physical therapy. But we don't know what happened from your perspective after that time?

A I don't know, correct.

Q Now, based on the records that we just discussed, your treatment, your documentation of his progress over the course of 11 months following the surgery, would you agree, sir, that what we observed in those records seems like a very good recovery?

A Indicators are positive, yes. The answer is yes.

Q Yes. And you feel you were right to do the surgery that you did?

-Cross/Dr. Brisson/by Mr. Cohen-

A I believe so.

Q And you do feel the surgery was a successful?

A It helped his back pain, the answer is yes.

Q It helped his leg pain, it helped him not to limp, it helped him to stop using a cane, it helped him to very rarely take pain medication, correct?

A Yes, the surgery helped him.

Q Helped him to regain flexibility and strength in lower back, yes?

A Yes.

Q Would you like to see him again in order to assess his progress?

A Of course. I have no reason not to.

Q We're still within the 24-month period that you mentioned last week of possible recovery, yes?

A Correct.

Q So we don't know until --if you want to make that 24 months firm until the end of July, 2012, as to what the ultimate outcome of the surgery that you perform in 2010 would be; fair statement?

A Fair statement. Although we have a symptom distribution, the margin of improvement, if carried on should be much less than what we see in the first year or 18 months.

Q Are you aware that Dr. Kaplan did MRI done on October 6, 2011?

A October 6, 2011, no.

Q Nobody told you about that?

A I mean two -- I have not seen the gentleman, I don't know.

Q Right. But counsel did not show you an MRI report from October 6, 2011?

A If he has --

Q If you don't remember you can tell me. I'm not trying to trick you.

A If he did I don't recall specifically.

MR. COHEN: If I may approach the witness.

THE COURT: Yes.

MR. COHEN: Thank you.

Q I would like to show you the report from Lenox Hill Radiology which comes out of Dr. Kaplan's file in evidence as Plaintiff's Exhibit 13. I would like to show you.

(Handing.)

Would you pleased to note that as of October 6, 2011, the fusion that you performed on July 27, 2010, was solid, there were no herniations or disk bulges noted. And there's no report of any degeneration in the remaining disks, the vertebra or the facet joints. Would you be pleased to know that?

A In the way the gentleman surmised it, it is accurate, there's no mention other than the surgical site.

Q That is very positive MRI reading 15 months after the

-Redirect/Dr. Brisson/by Mr. Corley-

type of surgery that you performed?

A It is an MRI indicating that indeed what the gentleman said is correct.

MR. COHEN: Thank you. I have no further.

THE COURT: Anything?

MR. CORLEY: Briefly, your Honor.

REDIRECT EXAMINATION

BY MR. CORLEY:

Q Doctor, all the records that have been marked as Plaintiff's Exhibit 16 in evidence, these are records that are kept in the regular course of your business with respect to Mr. Solis?

A Yes.

Q And when you see a patient you make entries into notes as set forth in Plaintiff's 16?

A Correct.

Q And it is part of your regular business to do so?

A Correct.

Q And it is part of your regular business to maintain those reports?

A Yes, correct.

MR. CORLEY: I offer them into evidence.

MR. COHEN: I object. You cannot do that on re-direct. It is improper redirect.

MR. CORLEY: He made reference to them, he read

-Redirect/Dr. Brisson/by Mr. Corley-

from them, I'm offering them in evidence.

MR. COHEN: I can reference them, Judge, the witness is on the stand. If he wanted them in evidence he had an obligation to offer them into evidence on his direct case.

THE COURT: I will overrule it. Go ahead.

MR. CORLEY: I can offer at any time.

MR. COHEN: No, you can't.

THE COURT: I'm going to overrule the objection. What are we up to?

MR. CORLEY: Exhibit 16.

(Whereupon, document is so marked as Plaintiff's Exhibit 16 in evidence.)

Q Now, Doctor, throughout the course of your records, do you characterize the patient's disability?

A Yes, I can characterize it.

Q When you last saw him on 6/22/2011. Did you characterize his disability at that time?

A Yes, I did.

Q How did you characterize his disability?

A I characterized his disability as one where he cannot carry the heavy physical occupation that he was doing until his accident.

Q Did you make reference to him as total?

A Correct.

-Recross/Dr. Brisson/by Mr. Cohen-

Q And, Doctor, you have never seen the patient since then?

A No, I have not.

Q So you have no idea what -- how he is today, correct?

A This is correct.

Q And, Doctor, can a fusion cause stress on the facet joints?

A At the level of argument?

Q Yes.

A Yes.

Q Can that cause facet pain?

A It is a risk. It is risk of lumbar fusion. The answer is yes.

MR. CORLEY: Thank you. No further questions.

MR. COHEN: All right.

RE-CROSS EXAMINATION

BY MR. COHEN:

Q All right. Doctor, when you were referring to Mr. Solis as being disabled on June 22, 2011, I believe you said to the jury he was disabled from carrying on the heavy physical activities in the job that he did before?

A Yes, correct.

Q Obviously you're not saying that he's disabled from working in any capacity. You're only saying that he can't do the heavy physical activities that he did before the surgery?

-Redirect/Dr. Brisson/by Mr. Corley-

A Correct. The answer is, yes.

Q And with respect to the question that counsel just asked you about, the facet joints; would you agree that the MRI report of October 6, 2011, does not show any evidence of degeneration or enlargement of the facet joints?

A There's no mention about anything about facet joints.

MR. COHEN: Thank you. Nothing further.

Redirect EXAMINATION

BY MR. CORLEY:

Q In order to have pain from stress on the facet joints, do you have to see degeneration?

A It is not an obligation, no.

THE COURT: Thank you, Doctor.

THE WITNESS: Thank you.

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

THE COURT: All right.

Members of the Jury, we have one more witness to go but we can't --he's not available today, I think it is the doctor, correct?

MR. CORLEY: Yes, it is Dr. Kaplan.

THE COURT: We're going to let you go for the day right now.

Counsel and I have some work to do to get ready for Friday. You'll have tomorrow off and we will see you 9:30

-Proceedings-

on Friday for our last witness and, ideally, we'll sum up and charge and give this to you Friday afternoon, maybe even earlier if the witness is short.

As usual when we break, particularly when we have a long break, don't discuss the testimony with anybody and certainly don't makeup your minds yet. We'll see you Friday morning.

THE COURT OFFICER: Leave your note pads and come with me.

(Whereupon, the jury leaves the courtroom.)

MR. CORLEY: I have the certified bill from the Downtown Beekman Hospital for the surgery that we will mark and offer into evidence.

THE COURT: Has it been discussed before?

MR. CORLEY: No it has not been.

THE COURT: All right. New York Downtown Hospital.

(Whereupon, document is so marked as Plaintiff's Exhibit 21 in evidence.)

THE COURT: What about exhibit 20? In evidence?

MR. CORLEY: Yes.

MR. COHEN: He can offer the bills in evidence but we have to come to an agreement as to what was paid.

THE COURT: Fine.

MR. COHEN: He cannot collect what was billed, only what was paid. And these records do not-- they reflect

-Proceedings-

both numbers is what I'm saying.

THE COURT: All right. Subject to whatever.

MR. COHEN: Yes. Whatever we can agree on because whatever the jury can award is what was paid.

THE COURT: I understand.

MR. COHEN: Okay.

Well, I know if it is still due it can be sued on and they could sue.

MR. CORLEY: That is what you will hear-- we could do that off the record. These are bills that they're still pursuing.

MR. COHEN: They don't pursue in Workers' Compensation.

THE COURT: This could be done off the record.

(Whereupon, the trial stood in recess until Friday, February 3, 2012.)

PROCEEDINGS

THE COURT: Mr. Cohen, do you have some objections or exceptions?

MR. COHEN: Yes.

I would ask the Court to note my exceptions to the charge in the Court's refusal to charge PJI 1:20 Circumstantial Evidence, PJI 2.282 Pre-existing injury or condition. And the refusal of the Court to charge the plaintiff's life expectancy to age 41.9, in accordance with Table Two in the 1-B Volume of the PJI. The Court intends, instead, to charge 44.5.

THE COURT: Which is General Life Expectancy Table. Exception noted.

MR. COHEN: Thank you, Judge.

THE COURT: Mr. Corley, do you have any exceptions?

MR. CORLEY: I don't have any exceptions.

THE COURT: See you Friday morning.

MR. COHEN: Thank you for doing this today.

(Whereupon, the trial is adjourned to February 3, 2012.)

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