In The Matter Of:

James Dunne and Mindy Dunne v.
Bryant Park LLC, Durst Development

James Dunne/Dr. Andrew Merola
March 31, 2017

Laura Bisignano, Official Court Reporter

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX : PART 10
INDEX NO. 305445/08
----------x
JAMES DUNNE and MINDY DUNNE,
Plaintiffs,
Trial
-against-

BRYANT PARK LLC. DURST DEVELOPMENT LLC,
TISHMAN CONSTRUCTION CORPORATION and
REGIONAL SCAFFOLDING & HOISTING CO., INC.,
Defendants.

----------x

March 30, 2017
Bronx, New York

BEFORE: HON. LIZBETH GONAZLAEZ,

Justice.

APPEARANCES:

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LAURA J. BISIGNANO, OCR
Senior Court Reporter
Supreme Court

(Whereupon, the following takes place on the record in open court out of the presence of the jury among Mr. McCrorie, Mr. Acosta-Diaz, Mr. Kaminsky Mr. Abrahamsen, and the Court:)

THE COURT: Good morning, counsellors.

MR. KAMINSKY: Good morning, Your Honor.

MR. McCRORIE: Good morning, Your Honor.

THE COURT: We had occasion to have a conference call yesterday afternoon while court was not in session. Does anyone one wish to say anything for the record?

MR. KAMINSKY: Yes, Your Honor. Thank you for the opportunity.

We had made an application to conduct the deposition of a witness disclosed ---

THE COURT: Hold on one second. You're one of the jurors. Can you wait outside? Our officer will be with you in a minute.

Thank you.

MR. KAMINSKY: We had made an application ---

THE COURT: Just wait until the door closes.

Thank you.

MR. KAMINSKY: Our application was to conduct a limited deposition of a non-party witness disclosed by the plaintiff who we've been advised that plaintiff's intent to a call as a witness during this trial. It was the

plaintiff's position that a deposition should not be granted because this witness herself was a plaintiff, resulting from this same accident, and she had been deposed while she was a plaintiff in her personal lawsuit, which I believe was settled between the plaintiffs and my predecessor counsel.

I was provided a copy of that transcript which I thank the plaintiff's attorneys who had the chance to read it, and while there are some questions that do pertain to the issues in this case, being the nature of the incident itself.

I did not feel that the questioning was sufficient, and so I did ask for the opportunity to conduct a deposition. I think the fact that she was a plaintiff in her lawsuit and was questioned in that regard is a lot different than I would have conducted a deposition, knowing that she's going to be called as a witness in another person's lawsuit.

Your Honor has denied that application, but has kindly afforded me the opportunity to make a record.

Thank you.

THE COURT: Thank you.

MR. McCRORIE: Just very briefly, Your Honor. It's our position she was a party to this action ---

THE COURT: Can we have a person by name?

MR. McCRORIE: Marisal Alvarez. She's one of the

former plaintiffs in this action prior to it being severed for a damages only trials. She was fully deposed by predecessor counsel.

We would go no further than Your Honor's ruling, but no further than the testimony as to impact and movement of her body from Pages 40 to 45, using Your Honor's motor vehicle analogy from the pretrial phone conference, and have, of course, not referenced any injuries or any lawsuit or any pain, that she was feeling as a result of the accident.

That's it, Your Honor.

THE COURT: Thank you.

I've been clear with counsel for the parties that given the fact that this trial, it concerns damages, and not liability, there is going to be very limited questioning allowed with respect to the mechanism of the injury. I reviewed the deposition transcript independently, and with you over the phone and make several observations.

The witness in question, and I'm sorry -- What is her name again?

MR. McCRORIE: Marisel Alvarez, M-A-R-I-S-A-L.

THE COURT: The witness in question testified that the elevator began a free fall from the 9th floor. She indicated that the elevator operator was able to bring it under control at a given point, and then lost control of the

elevator again, and that it went into free fall, it hit the bottom. It hit the pit, which is a metal, has metal springs in it, and she indicated that will it was a hard impact.

The only issue here for the damages part is going to be whether the impact was soft or negligible or moderate, or heavy, hard. Those are terms that can relate to the injury. You can do some limited questioning with respect to free fall because of free fall certainly is different from something that falls gradually or proceeds gradually would be more correct. You can ask the questioning there, but you don't have to deviate into liability issues, and I think you have enough information from the deposition transcript with which to devise your trial strategy as well as your questioning.

(Whereupon, the following Plaintiff's Exhibits were so marked and received in evidence by the Court Reporter: 1, 2, 3, 4, 5, 6, 7, 8, 8A, 8b, 8C, 8d, 9, 10, 11, 11A, 12A, 13A, 14A, 15A, 12, 13, 13A, 13B, 14, 15, 16, 17, 17A, 18A, 19A, 20A, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 28A, 29, 30, 31, 32:)

(Whereupon, the jury enters the courtroom.)

(Whereupon, the following takes place on the record in open court in the presence of the jury among Mr. McCrorie, Mr. Acosta-Diaz, Mr. Abrahamsen, Mr. Kaminsky and the Court:)

THE COURT: Good morning, Jurors.

JURORS: Good morning.

THE COURT: Everyone please be seated.

Jurors, I have to apologize for the delay, but we're missing an alternate, and we've been waiting and no one called, and this is the first time that I've ever had this experience, so, it's kind -- I'm kind of flawed.

All of you are super important. Each one of you makes A very, very important contribution, and we cannot proceed without you. So, I just want you to know that even though we've been delayed and even though we've been set back by an hour, this is important, and you're especially important. Okay.

Okay. Are you ready to start? Is everybody ready.

You all have your coats on. Please, feel free to take off those coats. Okay.

JURORS: It was cold upstairs.

THE COURT: It was cold upstairs. Okay. You're going to warm up very soon.

Let me please remind you that I'm still on emergency duty this week, so I may have to leave the bench to just deal with an emergency application and then we'll just resume when I'm done. Okay.

You're good to go.

Thank you.

Jurors, excuse me one minute.

(Whereupon, there was a brief pause in the proceedings.)

THE COURT: Okay. Mr. McCrorie, are you ready to call the plaintiff's first witness?

MR. McCRORIE: Yes, we are, Your Honor.

THE COURT: And who is that person, please?

MR. McCRORIE: The plaintiff would be calling the plaintiff, James Dunne.

J A M E S D U N N E, a witness called on behalf of the Plaintiff, after being duly sworn, testified, as follows:

COURT OFFICER: Please have a seat.

COURT CLERK: Mr. Dunne, please state your name and address for the record.

THE WITNESS: My name is James Dunne. I live at 14 Circle Drive, Belmore, New York.

THE COURT: So, in this courtroom, which is so beautiful, we have very high ceilings and sound does not project. You have to speak in a big person voice, so that the jury can hear you.

THE WITNESS: Ah-ha.

THE COURT: Okay.

THE WITNESS: Sounds good.

THE COURT: Jurors, if you don't hear, just signify

in some way, because it's important that you hear everything.

Thank you. Mr. McCrorie, you may inquire.

THE WITNESS: Okay.

DIRECT EXAMINATION

BY MR. McCRORIE:

Q Good morning, Jamie.

A Good morning.

Q I'll speak a little louder. Maybe, that will make you speak louder. Remember the door.

A Yes.

Q Okay.

A Project.

Q Can you tell the jury for the record your date of birth and how old that makes you.

A I'm born April 7, 1967. That makes me forty-nine.

Q And the address that you just told the Court where you live. How long have you lived there?

A I've lived at the address for forty-eight years.

Q Well, very briefly, where were you born?

A I was born in Sunnyside, Queens.

Q And then, obviously, your parents moved there?

A Yeah. Moved there when I was about a year old.

Q What did your parents do for a living growing up?

A My father was a Local 638 steamfitter and my mother was

a stay at home mom.

Q How about your granddad?

A My grandfather was also a 638 steamfitter.

Q Do you have siblings?

A Yes, I do.

I'm the only oldest of three. I have one brother who's younger and my sister is the youngest of all.

Q I'm just doing it. If you don't mind a little louder, if you can, please?

A Okay.

Q Are you married?

A Yes, I am.

Q Just so I don't have to ask, when were you married and to who?

A I was married in 2005 to my wife, Mindy Lyons.

Q The last question about that Mindy will be testifying, but how long do you know Mindy?

A I've known Mindy since I've been about twenty-one.

Q The records might state James. They might state Jamie. What do you go by?

A I go by Jamie.

Q Okay. So, Jamie, were you involved in an accident may 20, 2008?

A Yes, I was.

Q Can you tell the jury your educational background, the

highest level you got to?

A Okay. I graduated high school. It took me an extra year more than most people because I wound up getting left back in twelfth grade.

Q So, when did you graduate and when?

A I graduated in 1986.

Q What did you do after high school graduation?

A You're talking workwise?

Q Well, no, did you try college?

A Yes, I tried college for a half a semester.

Q Where?

A Nassau County Community College.

Q What happened? What ---

A I didn't make it all the way through. School was very still very boring to me and everything else, and I just had trouble being able to write stuff down.

Q So, if we can do this. I just want to give the ---

Did you tell the jury what you did from the time you finished that half a semester of college up until the time you became a steamfitter? So, what did you do right after stopping college, that semester, half a semester?

A Okay. Well, during my last year of high school, I was working at the fish store. We were fileting fish. When I graduated from high school, I wound up being a delivery driver.

Q Just a little louder if you don't mind. I'll say that a

few times. After "the delivery driver" --

A Then, after that, that's when I wound up going to college for a half of semester, but which I didn't complete. But during that time I was working in a bed store.

After I'd go to class, I would go home and meet the delivery guy and we would meet up, with the delivery guy after school, and we would go do deliveries and deliver the beds.

Q Okay. What did you do after that workwise?

A After the water bed store, when I noticed that there was an opening up a lumber yard company down the street, I wound up applying for a job there, and I worked for the lumber.

Q Please speak a little louder for the court reporter, please.

THE COURT: Mr. Dunne, do you want to stand while you're in the witness box?

THE WITNESS: Well, I think --- I will try and sit down. You know what. Maybe, I will stand up. That might help me project a little bit better.

THE COURT: I'm not talking about project. I'm talking about if you're uncomfortable with sitting in the chair you may stand.

You don't have to ask. You can just do it.

THE WITNESS: Yes, I am. Get myself comfortable here, yes.

Q Okay. So, Jamie, could you just tell us what you did

after the --- You worked at the lumber yard, you said a year or two?

A About a year after that.

THE COURT: Counsel, excuse me, everything that counsel says is for the record. We will go off the record.

(Whereupon, there was an off the record discussion held in open court.)

Everybody just speak up.

Q Okay. Jamie, can you please tell the jury after the lumber yard, what are the jobs you had? You can give the time periods up until the time you got into 638?

A Okay. While I was working at the lumber yard, I was able to meet contractors that did home improvement.

Q Speak slower if you can.

A And they wound up seeing the way that I worked around the yard, and they always liked to have people around that worked the way I was doing with the work ethics that I had.

Q Jamie, I'm just going to ask you for the rest of the examination. Please don't ever tell us what anyone else said or what anyone else was thinking or thought. Okay.

A Okay.

Q It's only going to be from what you think, say and observe. Okay.

A Okay.

Q All right. Where did you work after the lumber yard?

A After the lumber yard, I wound up doing home improvements.

Q And if you can direct, I know the court reporter, instead of looking at the court reporter, if you look at the jury when you give your answer.

A I'm getting myself confused and baffled. I'm nervous to no end right now.

Q Understood, Jamie.

Can you please -- And could you please tell the jury how long did you do home improvements and what type of home improvements were you doing?

A We were doing a little bit of everything. One of the companies I worked for, they were called ---

Q Slow.

A -- from the ground to the roof. So, the renovation, new construction, roofs, windows, siding, whatever needed to be done in the people's house.

Q How long did you do that for?

A I did that around for three years.

Q What did you do after working in the home improvement industry?

A Well, that's when I wound up becoming a 638 steamfitter.

Q Can you tell the jury how you become a 638 steamfitter? What is the process?

A Okay. Well, I have a list that comes out every few

years that you sign up for, and when you're on that list, they will call you, and let you know when the testing date is.

So, you go down, you have you take a test. After the test, you go home. A few months later, you wound up getting another letter, seeing it might be accepted for an interview or you wouldn't be accepted.

I was fortunate enough to be accepted. So, I went down to an interview where you sat down with a bills agent in the local, a contractor from the local and a schoolteacher, and they would ask you questions, why you want to be in the business and everything like that and what --- how do you find out about this, and that's when I said that my grandfather and my father both worked for the steamfitters for forty years, and that's something I would love to do, because I saw the way my parents, especially my father, was able to go raise his kids and everything else, health insurance, benefits, we had vacation, checks. It was great.

I was never so proud in my life.

Q Why didn't you do it right out of high school after the twelfth grade?

A Because I'm not finishing high school on time because that would have been the first test I would have been able to take. If I didn't get left back, I would be able to get in the business, maybe, four years earlier if I didn't get left back.

Q Is that because the test isn't every year?

A No, it's not every year. It's like every four to five years they have the test.

Q Okay. We're going to then move on after this. But what age were you, what year was this when you got into Local 638, the steamfitters?

A I wound up getting into it in June of 1991.

Q And when did you first work in it?

A My first job as a steamfitter was 1992, the spring of.

Q Could you please ---

A Because ---

Q Tell the jury what a steamfitter is.

A One second, please.

Okay. A steamfitter, we work with pipe, we wound up doing fire suppression, air conditioning, heating, pneumatic piping, hydraulic piping, a little bit of everything, almost like a plumber, but we just don't deal with the weight product.

Q Can you tell the jury what an apprentice is, what a journeyman is, and if there's any time period with regard to those two words that you have to remain one?

A Okay. So, in the beginning you start out as an apprentice. It's a five year.

Q You just have to speak slower than you normally would. Louder, it might feel strange.

A Obey. I'm trying to talk this way, this way.

Q Okay. Jamie, if you just speak a little slower and

louder.

A Yeah.

Q Apprentice and journeyman please.

A Okay. I will --- '91, you start out as apprentice. It's a five year apprenticeship.

So, during those five years, you wound up getting jobs and you also go to school two days --- two days a month. You go to whatever day it is.

If you're a first year apprentice, it will be Monday, and so on and Tuesday and Friday, it be a fifty year apprentice. So, as an apprentice you -- get pay differential according to how many years you've been in the business.

Q Okay.

A So, for the first five years, you're considered an apprentice, and after that the next five years, that's when you're considered a journeyman steamfitter.

Q Is that what would be considered top pay?

A Yes, it would be top pay.

Q Okay. Were you a steamfitter from 1992 up until the date of the accident and thereafter for a period of time?

A Yes, I was.

Q Okay. During those seventeen years, did you only work as a steamfitter? Did you do something else?

A I worked as a steamfitter for seventeen years.

Q Your entire steamfitting record is in evidence, but what

was your understanding in May of 2008.

What was the journeyman making per hour and what were the equal benefits?

THE COURT: Counsel, step up for a second.

(Whereupon, a discussion is held at the bench, off the record, amongst the Court, Mr. McCrorie, Mr. Acosta-Diaz, Mr. Kaminsky and Mr. Abrahamsen out of the hearing of the jury.)

THE COURT: Thank you.

MR. McCRORIE: Yes, Your Honor.

Q I may have done my math a little wrong, including the time you worked this accident, which was what? When was your last day that you worked as a steamfitter in Local 638?

A 1/20 of '09.

Q Okay. So, taking from 1992, when you first began until 1/20 of '09, roughly doing the math, that's seventeen years, that's what ---

THE COURT: I'm sorry. Counsel, if I may? The testimony was that he did work as an apprentice in '91?

MR. McCRORIE: He took the test in '91 and first worked in '92.

THE COURT: Thank you.

MR. McCRORIE: Yes, Your Honor.

Sorry about that. No, no, no. Thank you for the clarification.

THE COURT: Okay.

Q And, so, my question was, did you only work as a steamfitter those years?

A Yes, I did. That's all I did.

Q And just in May of 2008, that year, what was the journeyman making?

A We were making about forty-eight dollars an hour plus benefits.

Q Okay.

THE COURT: You said forty-eight?

THE WITNESS: Forty-eight.

A Plus benefits.

Q And each and every of the years that you worked from 1992 through January 20th of 2009 was there a raise each and every year?

A Yes. We voted on pay differential every three years. Usually --- I don't remember what the raises were back then. It was something different. We would have to vote on a contract and either agree or disagree to accept it.

Q Okay. Again, we'll that for the evidence later.

Can you tell the jury the name of the company you were employed by on May 20, 2008?

A Jdp Mechanical.

THE COURT: Jdp?

THE WITNESS: Jdp.

Q And it was spoken a little bit about on opening, but can you tell the jury how a steamfitter is employed for what period of time the number of employers? Just give them an idea of how it works?

A Okay. When you start off as apprentice, they have a little list that you get put on, and whenever the contract is called, that they need an apprentice on the job, they would get from the top of the list down slowly working their way.

Once you finish being an apprentice, that's when it's up to you to get your own jobs. That's when your reputation as a worker, your work ethics and how you are with others will get either more work or more employment.

Q What -- Is there a union hall for journeymen?

A To get jobs?

Q No. No.

A You get your jobs by calling up people you know, foreman's that you've worked, companies that you worked for. It's up to your own reputation and how you proved yourself on the jobs.

Q How does an apprentice get a job, that doesn't have a reputation from day one?

A As an apprentice, you're on a list. So, it does say if there's 500 apprentice, they start and call up an apprentice, and start with number 1 and write down a list. That way -- so you have to wait to get a job.

Q What does the word in your business as a journeyman shaping meaning, "S-H-A-P-I-N-G?"

A "Shaping," mean you do it one of two ways. You can either call up people you know or go around to the job sites that you know that are running, and put your name on a list. When they need to hire somebody, they would give you a call. But you're always better off knowing the people.

Q Okay. And just ---

THE COURT: I'm sorry. Let's just go off the record for a second.

Would you read back the last question and the answer, please?

(Whereupon, the court reporter reads back testimony as requested by the Court.)

THE COURT: Thank you.

Q Before when I asked you to explain to the jury how you get a job, do you work for the same employer for an entire career, something else, instead of going through your whole job history?

A Okay.

Q It will be in the record. Can you explain all the different names that are in there?

A Okay. Some people go to work and work for one company and one company only. I was taught you're better off knowing more companies and knowing more people, and more foremans.

So, this way you have a wider amount of people you can contact if you ever really need to get a job down the line.

Q So, for instance, how long were you working for Jdp on the date the incident --- accident occurred?

A Well, with that stint, I was working with them for probably about seven months.

Q How had you worked for Jdp on other --- what you call stints in the years leading up to that from '92?

A Yes. I worked with them numerous times before. They were a very good company.

Q Okay. Can you tell the jury what an average work week was, without overtime, what were they --- the number of hours in a work week can be for a steamfitter and most construction trades?

A We would work thirty-five years, five days a week, seven hours a day.

Q What were the typical hours to work on this project.

A The typical hours was about 7:00 a.m. to 2:00 p.m.

Q Was that standard in the industry?

A Yes. With the steamfitters, yes.

Q Jamie, during that entire time period, which is the '92, to 2008, did you have health coverage with the union?

A Yes, I did.

Q Did you utilize that health coverage for medical care?

A Yes, I would.

Q Would you --- Did you have what's called a primary care physician?

A Yes, I do.

THE COURT: Excuse me?

Would you excuse me for one second, please?

MR. McCRORIE: Of course.

THE COURT: Jurors, you can stand and stretch.

(Whereupon, there was a brief pause in the proceedings.)

THE COURT: Thank you, everyone. Let's resume.

Q Now, can you please give us the name of your primary care physician and for how long he's been your primary care physician?

A The doctor's name is Doctor Norman Turowsky. I've been probably seeing him since probably 1992 and '93.

THE COURT: How do you spell his last name?

MR. McCRORIE: T-U-R-O-W-S-K-Y?

THE WITNESS: Sounds good enough to me.

MR. McCRORIE: I think there's a W in there somewhere?

THE WITNESS: There's a W. I don't know.

THE COURT: Thank you.

Q So, Jamie, do you smoke cigarettes?

A Yes, I do.

Q What do you --- What is the amount you currently smoke

per day, I guess?
A Anywhere from about five to ten. I've gotten up closer to ten now for the past couple of weeks prior trying to get ready for this.
Q What does ten mean?
A Half a pack.
Q What was typical amount for you to smoke say during ---
MR. McCRORIE: Withdrawn.
Q For how long have you smoked? Has it been at least the career as a steamfitter?
A Yes.
Q Can you give a typical amount? What is an average, just so --
A Well, before it used to be about a pack and a half a day.
Q Okay. Have you ever quit smoking?
A Numerous times.
Q And when ---
I'll ask you questions about smoking after the accident a little later. Okay?
A Okay.
Q First of all, is that something you're proud of smoking?
A No. I hate it to no end. Our main goal is to quit.
Q Okay. Jamie, what did it mean to you to be a steamfitter?

A It meant everything. It was my identity when anybody asked me to do for a living; I would always be proud to admit that I'd be a steamfitter. Something I figured I would do a whole life. I figured I'd follow my father and grandfather's footsteps and do it forty years.

Q Did you enjoy it?

A Okay. I love it.

Q Can you tell the jury, it doesn't have to be everything, not in your whole career, but what does a steamfitter -- what did you do, the physical activity?

Describe what a steamfitter does in general, but make it what you did?

A I basically get to a job. You get a print, you would put the pipe up in the air. You would be setting up chillers.

Q Slower. If you don't mind, Jamie, please.

A I'm going to lose it. God this is the last thing I'd figure I am doing in my freakin life.

We would put fire springers in, we'd do refrigeration, air conditioning. We would be putting pipe up in the air, regular pipe up to get it up in the air, getting the hangers up in the air. It was fun.

I was like a kid working on a playground getting paid good, something that I'd actually doing all the freakin time. I can't believe this.

THE COURT: Just relax.

MR. KAMINSKY: Judge, can we take a break, please?
THE COURT: Yes.
THE WITNESS: No. I'm okay.
MR. KAMINSKY: Can we take a break?
MR. McCRORIE: Take a break.
THE COURT: Yes, let's take a break. You can go to the rest room.
COURT OFFICER: All rise, Jurors.
THE WITNESS: God almighty.
MR. McCRORIE: Don't ---
THE COURT: Just relax.
MR. McCRORIE: Please. Thank you.
THE WITNESS: I know it's okay.
THE COURT: You have to stay put until the jurors ---
Don't move.
MR. McCRORIE: Jamie, just wait.
THE COURT: And don't fall off.
THE WITNESS: I look every freakin time I walk over all over it.
MR. McCRORIE: I know you're listening to the Judge. Please listen to the Judge definitely. I know you're upset. We're going to take a break.
THE COURT: Yes, you can step down. Take a break.
Then you let me speak to the attorneys.

MR. McCRORIE: Please just don't speak after. You're not allowed to speak, especially in front of the jury.

THE COURT: You can talk to your wife.

THE WITNESS: That's the last thing I want to do right now.

THE COURT: Where is the jury?

(Whereupon, the Court declares a recess.)

(Continued on next page.)

LB-SN

COURT OFFICER: All rise. Jurors entering.

(Jurors enter the courtroom.)

THE COURT: Thank you, jurors. Everyone please be seated.

Mr. McCrorie, you may continue with your direct examination.

MR. McCrorie: Thank you, your Honor.

CONTINUED DIRECT EXAMINATION BY

MR. McCrorie:

Q. Jimmy, I want to move to the date of the accident. Okay?

A. Okay.

Q. All right. Approximately, what time did the accident occur on May 20, 2008?

A. Shortly before 12 o'clock, about ten to.

Q. Prior to the accident, what were you doing that day?

A. We were working up on the 53rd floor doing steam line and condensate lines, condensates the steam returning back to, you know, where it returns to steam.

Q. I want to remind you because you said we. That is fine. Just don't ever tell us what anyone else said.

What type of trade and the number of persons that is required to work as a steamfitter?

A. It's a two-man trade. That's why we use the word we. It's always --

THE COURT: Can you talk louder, please?

THE WITNESS: I'm trying. Yes. Yes. I'm trying.

THE COURT: What it is, Mr. Dunne, is that the acoustics in the courtroom are such that when you turn away from someone, your voice goes in the direction of your body, so since you're facing the jury, it's hard for me to hear you even though I'm right next to you.

So -- right. Perfect. Thank you.

Q. And louder than you think we should hear. Okay? So who was your partner?

A. My partner was John Toscani.

Q. How long was John Toscani your partner?

A. We have been teamed up for probably four or five years. We have known each other from the apprenticeship. We sat next to each other.

Q. Four or five years before the time of the accident?

A. Yes.

Q. Typically, how would you get to lunch -- don't do the day of the accident. How would you normally get to lunch?

A. Well, we would walk down from the 53rd floor and go to the 52nd floor and wait for the hoist to pick us up.

Q. Louder, please, for the Court and everyone.

A. We walk down from the 53rd to the 52nd floor to wait for the hoist to bring us down to lunch.

Q. When you say the word hoist, what does that mean?

A. Elevator. It's basically a construction elevator on the outside of a building you will see in Manhattan.

Q. How many hoists were there -- how many cabs or cars of the hoist were there at that job site when you would go to lunch?

A. Two.

Q. And what would happen, not the day of the accident, say the day before and the months you were there, you would get to lunch how?

A. Well, we go down, wait for the hoist at the 52nd floor. When the hoist would come up, we would get in and then we would go from the top usually down sometimes stopping in between, but then it would always come down to a point around the second floor. It would hit this one little spot. It would come down nice and easy and land at the loading dock level. You just stepped right on the loading dock and down and go your way for lunch.

Q. What level was the loading dock on?

A. About the first floor.

Q. Okay. What time did you get to work on the day of the accident?

A. I usually got there around 20 after 6 or 6:30.

Q. What time did you start work on the day of the accident doing what you just told the jury that you did, that job?

A. We would start at 7 a.m.

Q. Okay.

MR. McCrorie: With the Court's permission, we have stipulated into evidence, 1 and 2, 3. I would hold them up just to--

THE COURT: Are exhibits 1, 2 and 3 blow ups of photographs?

MR. McCrorie: Yes, your Honor.

THE COURT: Thank you.

Q. I'm going to have you look at this. If you could tell the jury what we are looking at in Plaintiff's 1?

A. That's the hoist outside of One Bryant Park.

Q. Where is One Bryant Park located?

A. Between 42nd and 43rd right on Sixth Avenue diagonal to where Bryant Park is.

Q. Jim, I'm going to point to two items, two boxes. What are they, the two --

A. Those are hoists.

Q. Okay. I'm just going to hold up Plaintiff's 2.

Can you just tell the jury what Plaintiff's 2 is?

A. Another picture of the hoist in the building.

Q. Okay. And is that the gate where the loading dock would be on the bottom?

A. Yes.

Q. Underneath the loading dock -- I'm just going to hold up Plaintiff's 3 for you.

What is Plaintiff's 3?

A. Steel springs at the bottom of the hoist.

Q. When you say they are at the bottom of the hoist --

A. They are down in the pit.

Q. Okay. We are not speaking about the date of the accident. On prior days you said it would come down slower from a certain point and stop around the loading dock?

A. Yes, around the second floor.

Q. Did you ever experience any abrupt stop or hitting of the springs prior to the date of the accident?

A. No. I never did.

Q. Okay. If you can tell us on the date of the accident what time you went to lunch?

A. We went to lunch around 10 to 12.

Q. And when you say we, who went to lunch with you?

A. My partner and I. Sorry.

Q. Okay. You could say what other people were there and what they did, just don't say what anyone said or felt or whatever. Okay?

What happened when the -- just tell the jury -- just take them up to the point when you got into the hoist. So what happened?

A. The day of the accident?

Q. Yes, sir.

A. We came down from the 53rd floor, walked out, got on

top of the hoist. As soon as the hoist came up, we were probably waiting there for about five minutes or so.

We got on. We were like one of the first 10 or 15 people on the car. We just keep getting in.

Q. Before you do that, is there an operator of that hoist or is it --

A. Yeah. Well, the operator has to bring the hoist up and down and open and close the doors.

Q. Okay. So when the doors open, were you the only one and your partner waiting for the hoist? Tell the jury how many people were with you.

A. There was a lot of people that day. As we got there, like I said, there was about 10 people in front of us, 15 may be. We came up and the next thing you know because the hoist took a little while that day, more people came, coming from the floors below, above, even where my partner John and I were working, then eventually when the hoist got there, the gentleman opened up the door. We got into the hoist. We work our way into the back of it and people just kept coming.

Q. I will just show you Plaintiff's 5.

A. That is the inside of the hoist.

Q. Okay. That is what the inside of the hoist looks like?

A. Yes, a big metal box with screening.

Q. Where did you get in the hoist? Where were you before the doors shut?

A. I was in the back right against the metal, the same side that the operator was on, probably about two thirds or three quarters inside the car towards the back.

Q. Tell the jury prior to leaving the 52nd floor how many other people got on that hoist.

A. Just kept squeezing in. I was standing in there and I went like this. I was standing up against the wall.

MR. McCrorie: For the record, his arms are crossed against his chest.

Q. Continue.

A. I was definitely not one of the big guys. I was just hanging out in there. The guy closes the door. We all go down. It starts going down.

Q. How many people were in the elevator at that time the hoist?

A. Sixty, sixty plus.

Q. How many rows of people and where were you situated?

A. I would say it was probably around six rows of ten and I was in the first row right on the same side where the operator was towards the back.

Q. Is that what you experienced in the months before?

A. Yeah, but not as bad.

Q. Okay. Continue. When you say not as bad, have you ever seen that many people in that hoist?

A. No, not as packed as it was that day.

Q. Okay. Continue, please.

A. So we all get in the elevator. The hoist doors close. The elevator comes down as normal. All of a sudden we hit one spot right around the second floor. That is when the elevator shook, shuttered and slammed down to the ground and it felt like a ton of bricks violently landing into the pit.

MR. McCrorie: For the record, indicating slapping his hand into his other hand.

Q. Could you tell the jury from the time it shook and shuttered until going into the pit, how long that took?

A. Split second.

MR. McCrorie: Indicating a snap of his finger.

Q. When you say went into the pit, was there any noise?

A. It almost sounds like a bomb going off. It almost felt like you heard a car crash and everything else. I never heard anything like that before.

Q. Could you tell the jury what, if any, movement of your body upon impact there was?

A. I think it was the most violent thing that I was ever involved in in my life. When it slammed into the pit, you had no control over the movement or anything else. You have nowhere to go. You just took the flex and it was basically a shock wave going from your feet up to your head, basically just went through your whole body, got twisted and jerked around.

Q. What, if anything, happened with your knees?

A. Knee slightly gave way and everything else.

MR. KAMINSKY: Objection to the leading questions, Judge.

THE COURT: Overruled.

Q. When you say you had no control over the movements of your body and you twisted, what parts of your body twisted?

A. My knees, my neck and my back.

Q. Where were you upon the final resting place of the hoist in relation to the loading dock where you would normally get off?

A. Basically, how we had to get off the hoist to get on the loading dock into the landing.

Q. Yes. Where were you?

A. Okay. I had to probably step about knee high to get from the inside of the hoist up on to the loading dock the way we would normally get out of the job site.

Q. Could you just give us the estimation of how, what the distance is?

A. That's about a foot and a half, two feet.

Q. Okay. Were you expecting the elevator to do that, the hoist?

A. No, I wasn't.

Q. Could you please tell us after the impact what, if anything, you were feeling?

A. Well, after we landed, we all started getting off of

the hoist. That's when I noticed a sharp pain in my shoulder actually in the traps there and that twinge in my back.

THE COURT: Sharp pain in the shoulder, in your shoulder and traps?

THE WITNESS: Yeah. Right here. This is where I felt a sharp pain.

MR. McCrorie: Indicating on his -- the area between the neck and his shoulder.

A. And my knees were hurting.

Q. What was your demeanor? How were you feeling?

A. Shocked. Confused. Dazed. Trying to figure out what the heck just happened to us. Basically the best way for me to describe it, Three Stooges and stuff like that, whenever they take two cymbals and smash it up against the guy's head and everything else. That is how I felt not knowing what the heck was going on. I was shaking. I was baffled. I never expected to expect anything like that have to happen in my life.

MR. McCrorie: Indicating shaking his head and rolling his eyes.

Q. How long was it until after the impact until you got off the hoist and if you could describe the process? How did that happen and how long it took?

A. It was a slow process because it was a lot of people on the hoist, so basically it was just everybody had to start getting off and slowly stepping up one-by-one. It probably took

us, I would say a good minute to get off the hoist for everybody in there, minute, minute plus.

Q. Because of where you were situated, when did you get off in relation to others?

A. I was near the very end getting off.

Q. Jimmy, could you tell us when you got off the hoist, only what you said to anyone else, if anything, and what you did?

A. I wound up just getting off the hoist. It really wasn't much being muttered right there. Everybody was still in a shock.

MR. KAMINSKY: Objection.

Q. Just what you were feeling, Jimmy. Do it this way: What were you feeling when you stepped off the hoist?

A. Relieved to be off of it. Dazed, confused, shooken up.

Q. Did you say anything to anyone else without telling us if anyone said anything to you?

A. No. I really -- I don't remember saying anything until my partner and myself wind up getting to the deli. That's when we were just trying to figure out what happened to us and everything else, what we just went through.

Q. How long did you stay on that area after stepping out of the hoist before continuing to a deli?

A. Made sure we got off the landing area. Everybody went down into the street. We probably mulled around there a few

minutes, five minutes or so, then people started going off in their different directions and everything else.

Q. Did you go to where you were going to go had the incident not occurred? Were you going to a deli?

A. We were going to go to the deli, then we were actually going to sit in Bryant Park that day. We figured we would take advantage of the good weather. It was a sunny day.

We did wind up going to the deli. Instead of parking at the park, we stopped almost across the street on Sixth Avenue from where the job site was and sat on the steps over there.

Q. Okay. What was a lunchtime for you back then? What was the typical lunch?

A. Until 12:30.

Q. Did you take that lunch?

A. Yes.

Q. During that time period what, if anything, were you feeling?

A. That's when I had a sharp pain in the shoulder.

MR. McCrorie: Indicating the area between his neck and shoulder.

A. Felt my back tightening up. I was feeling this whole area tightening up. My knees were sore and then after that that's when we figured the best thing to do is go report the accident to the on-site medical clinic that they have there.

MR. McCrorie: Sorry. I have to do this again.

Touching both of the lower back and both sides of his base of his neck.

THE COURT: Let me just make a clarification because you keep saying sorry.

MR. McCrorie: Okay.

THE COURT: You don't need to. So whenever someone makes a gesture, a counsel may describe the gesture for the record since the record doesn't have eyes. All right.

MR. McCrorie: Thank you, your Honor.

THE COURT: Please, don't apologize again.

MR. McCrorie: Understood.

Q. I just want to ask how much you weighed on the date of the accident? What was your weight?

A. I weighed about 155 pounds, 150 pounds that day.

Q. How tall are you?

A. 5'10?

Q. How much do you weigh now?

A. I weigh about a buck 35, buck 40.

Q. What was your demeanor during that time when you were waiting, when you were eating lunch?

A. Demeanor? We were just still shocked.

Q. What do you mean by that?

A. We just still really didn't believe that we just went through what we went through.

Q. Just what you -- so what were you feeling other than what you told us before with your neck your shoulder, back, and knees?

A. I was shaken, nervous, confused. That's why we decided to go to the on-site medical clinic there provided by the contractors so --

Q. What is the name of that?

A. Medco.

Q. Med Corp.?

A. Yeah, Medco.

Q. Where was Med Corp. located on the job site?

A. On the first floor, the opposite side of where the hoist was.

Q. Just you, when you decided to go to Med Corp., when was that?

A. I figured once I finished eating my sandwich, we would head over there and report the accident that we were involved in.

Q. Just please tell us what you--you went to Med Corp. when?

A. Right around 12:30.

Q. Who did you see at Med Corp.?

A. Technician in the place.

Q. Had you ever been to Med Corp. before?

A. No, I have not.

Q. And how many technicians were there?
A. One or two. I know I only spoke to one of them.
Q. Were you seen right away?
A. No. No. When I got there it was probably about --
MR. KAMINSKY: Objection.
Q. Was there a time period between getting there and being seen that's all?
A. Yes.
Q. What was that time period?
A. Forty-five minutes to an hour.
Q. When you were seen by the technician, was that a male or female?
A. It was a guy, yeah, a male.
Q. Okay. What did you tell that person?
A. I told him that I was involved in the hoist crash. I had a sharp pain in my shoulder. I had a twinge in my back and that my knees were hurting me.
MR. McCrorie: Indicating the same areas between his neck and his shoulder his lower back and his knees.
Q. And when--I will withdraw that.
Did you ask for an ambulance?
A. No, I did not.
Q. Why not?
A. I just figured due to impact I will be able to shake it off and continue as normal.

Q. Did you go back to work after making your complaints of pain and reporting the hoist accident?

A. No. That's when I went downstairs to our shanty to change.

Q. Was that the end of the day?

A. It was very close to the end of the day.

Q. Okay. What did you do after that?

A. Well, after I talked to the person at Medco, I said I was going out. We went down to the shanty because we have work clothes, then we have go home clothes so we don't get other people dirty.

Q. What does that mean shanty?

A. It's basically like a changing sack for us.

Q. Changing what?

A. Change our clothes, keep our personal items.

Q. You called it a changing something. Okay. It's hard to hear. Just a little louder.

A. Okay.

Q. So after changing at the shanty, what did you do?

A. Well, as I was changing, I was taking off my work clothes. That's when all of a sudden I felt a blast from there right through my calf on my left side.

MR. McCrorie: Indicating low back down his left side.

A. I turned around. I thought somebody was around me

giving me zap with the extension cord being a wisenheimer. I saw nobody back there. That is when I really got nervous, got my go home clothes on, went to see the technician at Medco again.

Q. What did you tell the technician at Med Corp. again, after getting that feeling down your leg?

A. I told him what I just said there. That's when he told me I got introduced to my sciatic nerve.

THE COURT: I didn't hear you.

THE WITNESS: That I got introduced to my sciatic nerve.

Q. Not just your career, in your life, had you ever had any feeling like that going down either of your legs prior to the date of this accident?

A. No. Never.

Q. We heard that you had the primary care physician. Had you ever been to an orthopedic, back doctor or a chiropractor in your life prior to the date of this accident?

A. No, never.

Q. Have you ever had an x-ray or MRI to your neck or your back in your life prior to the date of this accident?

A. Never.

Q. So I asked the question about your back.

For your neck, in your life prior to this, the date of this accident, have you ever been to the doctor for

your neck or your back?

A. No, I have not.

Q. Or a chiropractor for your neck or back?

A. No, I have not.

Q. Taking your life and your career, before the date of this accident, you said you utilized your health coverage, but could you tell the jury if you ever had an incident where you had issues with your knee before this either knee?

A. Yes. Yes. I wound up having a meniscus surgery done on my left knee probably about four years before the accident.

Q. 2004?

A. Yeah.

Q. What was that orthopedic doctor's name?

A. Doctor Obedian.

Q. Was that work related or something else?

A. No. I was at the beach with my dog and everything else. The dog banged in my leg and that's when I learned about meniscus problems.

Q. What is your understanding of what eventually it was called; torn what?

A. A torn meniscus.

Q. Okay. Did you have a procedure to that torn meniscus?

A. Yes, I did.

Q. And in that -- after that procedure, did you miss time from work?

A. Yes, approximately four weeks.
Q. Did you do physical therapy for your knee after that accident, after that incident?
A. Yes, before and after.
Q. Okay. Meaning the surgery. You tried therapy first?
A. Yes.
Q. Was your left knee bothering you from the time you went back to work the few weeks later until the time this accident happened?
A. No, it was not.
Q. Did you ever go back to Obedian from 2004 to 2008?
A. No, I did not.
Q. Or any doctor for your left knee?
A. No, I did not.
Q. Just so the jury is clear, in this incident, May 20, 2008, did you eventually see doctors or a doctor for your knees?
A. Yes, I did.
Q. Which knees? Which knee?
A. Actually for both knees.
Q. Okay. Did you ever have a surgery for your knee after?
A. No, I did not.
Q. After this incident?
A. No.
Q. Do you plan on having it?
THE COURT: Excuse me. Left knee?

MR. McCrorie: He said both knees.

THE COURT: Right. That's why I'm asking. You asked about surgery for the knee. Left knee, right knee, both knees?

MR. McCrorie: That was misspeaking on my part. Thank you, your Honor.

Q. Did you have surgery to either of your knees after this incident?

A. No.

Q. Do you plan on getting any?

A. No.

Q. Did you treat with a doctor at all for your knees anymore?

A. No.

Q. Prior to having the surgery to your left knee in 2004, did you have an MRI to that knee?

A. Yes, I did.

Q. Other than that MRI to your left knee, have you ever had a MRI in your life prior to the date of this incident, May of 2008?

A. No. I never did.

Q. I just want to go through another incident.

Did you ever have any issue -- you said you've never been to a back doctor. Did you ever tell any type of doctor that you were feeling anything to your back, any sensation?

A. Yes. When I had the heel spurs back in 2004.
Q. Okay. What?
THE COURT: Sorry. Did you say heel spurs?
THE WITNESS: Yeah, heel spurs.
Q. So tell us --
THE COURT: Okay. The question is about the back?
MR. McCrorie: Yeah, it is.
Q. Tell the jury what you were feeling and when you found out about heel spurs. Who did you tell this to?
A. I told it to the foot doctor.
Q. Podiatrist?
A. Yes.
Q. What did you tell the foot doctor and what was done?
THE COURT: Counsel, this is post accident?
MR. McCrorie: This is 2004 before the meniscus tear.
THE COURT: Okay.
A. What was the question?
Q. What did you tell the podiatrist about your feet and what else you were feeling?
A. I told him I was getting sharp pains in the heel of my foot and actually I had a sore tender back.
Q. What did the doctor, podiatrist do for that?
A. He wound up setting me up with orthotics, something you put in your shoes and support your feet. Between the orthotics

and cortisone shots in my heel, it cured my heel spurs and I felt great after that.

Q. How long were you experiencing that soreness in your back that you went to the podiatrist for with your feet?

A. Well, as long as I was dealing with the heel spurs I was probably walking around with them for about two or three weeks after I had the Cortisone shorts, orthotics put into my shoes, I was fine.

Q. Okay. All right. And, in fact, when you went to Dr. Obedian and he took a history, did you tell him about the one time in your life you had soreness in your back for two weeks?

A. Yeah.

Q. And even when you had the soreness to your back after you got the injection to your heel and orthotics, did you ever see anyone again for your soreness to your back?

A. No. No. The orthotics worked.

Q. Okay. Did you ever have an -- other than this incident, have you ever had a lawsuit?

A. No.

Q. Did you ever have a work related accident other than or an incident we will call it other than this accident?

A. Yes. I had a hernia repair.

Q. Tell the jury when that was and what happened.

A. Hernia was probably -- it's hard to remember all the dates -- 2005, 2006. We were working. I moved a little piece

of equipment that we were bringing something in. I went to move it out. I twisted and all of a sudden I felt a little, actually probably around there a little pop out. I went to go see a doctor about it.

Q. Other than the hernia, was any other part of your body complained about?

A. Probably my knee, yeah.

Q. Okay. Other than the knee and what the hernia felt like, did you get treated for that?

A. Yes, I did.

Q. What did they do?

A. They wind up putting a patch on the inside of me, sticking the thing back in, sticking a patch in there and sewing it up.

Q. An operation?

A. An operation, yes.

Q. Did you miss time from work for that?

A. Yes, I did.

Q. For how long?

A. Probably about four or five weeks.

Q. All right. Finally, Jimmy, did you have -- before May of 2008 and 2007, did you have a surprise ulcer condition or--

A. Oh, yes, the perforated ulcer.

Q. Just tell us everything about that and what happened.

A. Well, I was actually complaining to a few doctors

earlier that I was feeling something because my brother had it, my mother had it.

Q. What were you feeling?

A. It was almost like flu like symptoms. I was feeling pain in my stomach, everything else. I wind up going to a doctor.

Q. Slower, louder, please.

A. He was telling me it was stomach flu, so about two weeks later after work on a Friday afternoon I was planning on going home. I think I made it probably about a block and a half, two blocks away from the job and I went right down to the ground on Seventh Avenue there.

I started sweating. The pain was excruciating. I just felt it everywhere. I was like okay, I have to get home, so I wound up getting myself up, getting to Penn Station, sweat pouring off me and everything else.

If anybody has ever went in Penn Station before, we all know not to go into the handicap stalls in those places. Well, I was on the ground on my hands and knees holding on to the toilet hoping I just would be able to throw up, feel better. That is all I thought it was.

Q. And what happened after that, Jimmy? What was the end result?

A. The end result wound up having to cut me open and fixing the hole that was in my stomach. It was caused by

something call H. pylori bacteria that you get sometimes that eats away your stomach lining.

Q. Did you know that you had that before?

A. No.

Q. Did you make it home or did you go to a hospital in the City from Penn Station?

A. I had my wife meet me at the train station in Bellmore to bring me to the hospital.

Q. Were you hospitalized for a period of time?

A. I was in the hospital for a week, yes.

Q. Did you go back to work after that?

A. Yes, I did.

Q. How long after you spent a week in the hospital for the perforated ulcer did you go back to work as a steamfitter?

A. Probably about four or five weeks after I was released from the hospital.

Q. In your entire career from 1992 until May 20th of 2008 did you ever take a day off as a steamfitter for any issues with your neck or back?

A. No, I did not.

Q. Can you tell us after -- we are going to back now after you went home to Med Corp., from Med Corp.

The day of the accident after getting home, you eventually went to sleep at night, that night?

A. Yes.

Q. What were you feeling, if anything, between the time that you got home and the time you went to bed? Could you tell the jury what you were experiencing?

A. Tightness up here, the top part across my bottom of my neck and between my two shoulders, my back. My knees were hurting me that day. I was told to go home, ice up and rest.

Q. Did you do that?

A. Yes, I did.

Q. Meaning did you do ice?

A. Yes, I did. Ice is nice.

Q. Did you take any medication?

A. No, not that day.

Q. Were you on any medication on the date of the incident before it happened in general?

A. Nexium for my stomach.

Q. Nexium only?

A. Yeah. Yeah.

Q. Okay. All right. When you went to sleep the night of the accident, what was your intention regarding going to work the next day?

A. All intention of waking up at 4:30 and going to work.

Q. Just taking the beginning of that year up until the time of the accident. Did you work full weeks?

A. Yes, I did.

Q. As a steamfitter, would you work any available hours

that were offered to you in your career?

A. Yes, because anything over your regular straight 35-hour week, anything over that is double time.

Q. When you woke up the next day, how were you feeling?

A. I felt like I was hit by a Mack Truck.

Q. What does that mean to you? Tell the jury the feelings that you had when you woke up?

A. My arms were sore. My legs were sore. My back was sore. My butt was sore. All across here was sore.

MR. McCrorie: Indicating both shoulders and neck.

A. So I figured the smart thing for me to do is take a day, ice up, relax and then I would be able to do it the following day.

Q. What time do you wake up to go -- especially back then -- that day in general, to get to work by 6:30?

A. I would be up at 4:30 every morning.

Q. What about -- so did you go to work that day, the day after the incident?

A. No. No. I didn't go back to work until that Friday.

Q. Okay. All right. Did you--the next day, did you plan to go to work?

A. Of course I did. Yes. Yes.

Q. What happened that day?

A. I still felt like crap. I figured I would listen to what the Medco guy said, take a little rest, ice it up, relax.

I figured, okay, that is two days, we should be pretty good. We have a three-day weekend coming up. I should be okay.

Q. For the record, what was the three-day weekend coming up?

A. Memorial Day weekend.

Q. Did you go to work the Friday, the third day?

A. Yes. I went to work Friday because I knew it would be a half-day because before a three-day weekend it's usually just wrapping stuff up, putting the stuff away, making sure it's secure for the three-day weekend. If you do not show up the Friday before a three-day weekend, you do not get holiday pay which is a day's pay.

Q. For the holiday?

A. For the holiday, yes, Monday.

Q. Did you work that day?

A. Yes, I went to work.

Q. Did you perform work?

A. Minimally. Like I said, we just put stuff away, wrap stuff up and everything else like that.

Q. How were you feeling?

A. I felt like crap. I was sore, achy.

Q. Don't tell us what he said or did. Was your partner there working with you to help you?

A. Yes, he was.

Q. Other than going to work, did you see anyone else or

did you go anywhere else on the work site on May 23, the Friday?

A. Yeah. Before I went upstairs I stopped to Medco, again to, tell him how I was feeling.

Q. What did you tell the Medco personnel how you were feeling?

A. That my back was tight, my butt was hurting, my legs were starting to hurt. My neck was tight.

Q. When you say your legs, just --

MR. McCrorie: Indicating you moved from your hip to knee.

Q. What do you mean your leg was hurting?

A. It just -- it was just hurting. It just -- I guess from the shock and everything from going down there. That's when he said just to rest up, try to take it easy and ice up when you get home.

Q. Okay. After the three-day weekend, did you go to work?

A. Yes, I did.

Q. Tell us what happened that weekend. How were you feeling over that Saturday, Sunday and Monday which you had off?

THE COURT: Jurors, stand and stretch, please. Everybody up.

Could you ask the question again or do you want it to be read back?

MR. McCrorie: Sure.

Q. Tell us what did you for the three-day weekend. Did

you--

A. No. Actually, all I did was lay around, take it easy, put ice on myself. I wound up taking pain pills that weekend. I figured that might help relax me, loosen things up and everything else.

Q. What kind of pain pills are you talking about?

A. The pain medication they gave me after I had the ulcer from when I went home, so I still had it around. I figured, okay, let me take one of these to see if that was going to loosen me up and help me out.

Q. Did it?

A. No. It helped me to go to sleep a little bit better and everything else. I planned on -- I planned on fishing that weekend. I planned on working around the house. We had a nice Memorial Weekend that came up and I was up on the couch or up in the bed. That's not the way I planned it.

Q. Did you work the week after?

A. The following four days, yes.

Q. And --

A. At least, yeah.

Q. Did you ever go back to Med Corp. the week after the accident?

A. I wind up going back there again on Tuesday.

Q. For what purpose?

A. To tell them exactly what I did over the weekend, how I

was feeling and everything else and that's when he suggested to me to go to a doctor and describe my complaints to him.

Q. Okay. Did you -- can you tell the jury after Med Corp., when is the first time you sought medical attention? When did you go to a doctor after this incident, excluding Med Corp.?

A. I would say to say it was Monday after Memorial Day.

(Continued on the next page.)

Q Okay. Who is the doctor that you went to?
A Doctor Merola.
Q Is that Andrew Merola?
A Yes.
THE COURT: I'm sorry. I'm sorry.
He saw --- You saw a doctor on a Monday after Memorial Day?
MR. McCRORIE: Yes, Your Honor.
THE WITNESS: The following week after we came back from the three day weekend.
THE COURT: The following ---
THE WITNESS: Yeah; I know I caught that.
Q What type of --- How did you find ---
MR. McCRORIE: Withdrawn.
Q You had been ---
You had been ivnvolved in a work related incident with the hernia; correct?
A Yes.
Q What type of doctor was your understanding was Doctor Merola?
A An orthopedic surgeon.
Q In what type of surgery?
A The spine.
Q How did you find, meaning how did you get to Doctor Merola? How did you hear about him?

A Well, when I was down the week after the --- during the week following Memorial weekend, I went complaining to the guys about how I was feeling and everything else.

Q Don't tell us what the guys said. So --- Tell us what you said.

A I was telling them how I was hurting, what I did the whole weekend, how I didn't do anything. I said, "I have no idea what's going on with my body," and that's when the gentleman recommended Doctor Merola to me, saying he's an orthopedic spine surgeon, he would be able to help you out with your complaints and he accepts Worker's Comp.

I couldn't get that out. Sorry.

Q Jamie, if, in the four weeks after your accident, including and understanding May 20th -- Memorial Day would have been off, if it indicates for the weeks that you have twenty-one hours the week after, the twenty-one hours the week after that, twenty-one hours the week after that, and fourteen hours the week after that, did you work full weeks after the incident?

A No, no, no.

Q Whatever the records and time indicates you worked, why were you not working full weeks after the incident?

A I just wasn't feeling correct. I wasn't feeling like myself.

Q Were you feeling any pain during those weeks?

A Yes, I was.

Q Please tell the jury --- Let's do this.

Before you saw Doctor Merola, what, if any, pain were you feeling during that week?

So, from the Memorial Day to Doctor Merola?

A Achy, sore, I would get stabbing pains in the shoulder area or neck area, the rear end, my legs were hurting me. In fact, my arms were aching to me.

MR. McCRORIE: Indicating the top of my arms from his shoulder.

A I just wasn't --- I wasn't myself any more.

Q Were you able to perform your duties as a steamfitter during those --- that week before seeing Doctor Merola?

A No. No, I wasn't able to climb. Do everything I used to love doing.

Q Prior to this accident, did you have any limitations in the movement to your neck or back in the years you were a steamfitter from 1992 to 2008, May?

A No. I was basically a spiderman on the job. I could go climb anywhere and get anything and get out of anything.

Q And the week after the accident, were you experiencing any limitations to your neck or your back?

A Yes, I was to the neck and the back.

Q Okay. Your words, if you could just tell us what you were experiencing?

A Stiff and rigid.

Q When you went to Doctor Merola, what complaints did you make to him?

A I told him that my back was hurting, and I left it at that with Doctor Merola.

Q Did you tell him how the accident happened?

A Yes; I explained the whole hoist crash and everything to him.

Q And when you say you told Doctor Merola about your back, what did you tell him about the other parts?

MR. KAMINSKY: Wait.

MR. McCRORIE: He just said, "I told him about the back."

MR. KAMINSKY: Object ---

THE COURT: Come up.

Jurors, you can stand and stretch.

(Whereupon, a discussion is held at the bench, off the record, amongst the Court, Mr. McCrorie, Mr. Abrahamsen, Mr. Acosta-Diaz, Mr. Kaminsky, out of the hearing of the jury.)

THE COURT: The objection is sustained.

Q You told Doctor Merola about your back or any other parts of your body hurting?

A Yes. That's when I told him the electric shock that went down my left leg. I told him I had a sharp pain in my shoulder and my knees were hurting.

Q Okay. You said the word, "zing," and then you said something else. Describe what you mean when you say the word, "zing."

A Like an electrical shock you get.

Q Did Doctor Merola refer you to any other medical providers?

A Yes. He referred me to Doctor Hausknecht, the neurologist.

Q What was your understanding of the type of doctor Doctor Hausknecht was?

A A neurologist.

Q Did you see Doctor Hausknecht?

A Yes, I did.

Q When?

A Either ---

Q When in relation to seeing Doctor Merola?

A Either later that week or beginning of the following week I did.

Q Can you just tell the jury back in 2008 where Doctor Merola's office was?

A Doctor Merola used to be --- his office used to be on 14th Street and Seventh Avenue directly across from St. Vincent's Hospital.

Q Okay. Has Doctor Merola had --- Do you still see Doctor Merola today?

A Yes, I do.
Q Do you still see Doctor Hausknecht today?
A Yes, I do.
Q Did Doctor Merola's office move since the first time you saw him?
A Yes.
Q Once, more than once?
A Twice.
Q And how about Doctor Hausknecht? Where is his office?
A He's on 37th in between Madison and Lexington.
Q And in your life prior to this accident, had you ever seen an orthopedic spine surgeon?
A No, I have not.
Q Had you ever seen prior to this accident a neurologist --
A No, I have not.
Q -- or any type of pain management doctor?
A No.
Q When you went to Doctor Hausknecht, what, if any, complaints did you make?
A Well, I told him I had a sharp pain in my shoulder.
MR. McCRORIE: Indicating the area between the shoulder.
A And my back was tight and about the zing that went down my left leg and my knees were sore, and that's when Doctor

Hausknecht explained to me that this is not my shoulder that was sore. It's actually came from my neck. He moved my shoulder around. Does that hurt? I'm like no. He goes, That's why it's coming from your neck.

MR. McCRORIE: Indicating circular motion with his left shoulder.

A The first learning of a medical experience after the crash.

Q What do you mean by that? What you just said?

A I never knew what a trapezoid was or anything else. I didn't know none of this stuff.

Q And just so we're clear, from that point forward, did you ever make another complaint about your shoulder, from the point that Doctor Hausknecht moved your arm and told you about your trapezoids?

A No.

Q And were you --- I'm just going to jump a little bit and we'll come back. Were you ever referred out specifically for a nonspine orthopedic for issues with your knees?

You know an orthopedic, but not a spine specialist?

A Yes, Doctor Touliopoulos.

Q Who referred to you Doctor Touliopoulos?

THE COURT: Spelled? T-O-U-L-I-S-O --

MR. McCRORIE: T-O-U-L-I-O ---

THE WITNESS: U-S.

MR. McCRORIE: L-O-U S

THE COURT: T-O-U-L-I-P-O-L-O-U-S?

Q Where was Doctor Touliopoulos' office located?

A He was in the same office as Doctor Merola. When Doctor Merola wasn't there, he would be using the offices Tuesdays through Fridays.

Q Over by St. Vincent?

A St. Vincent, 14th and Seventh Avenue, yes.

Q Okay. And what complaints did you make to Doctor Touliopoulos or Doctor DeMarco, the other doctor in that practice?

A My complaints was in my knees.

Q And did you make any complaints to that doctor about any other thing other than your knees?

A No. I told him about the shoulder, what Doctor Hausknecht said to him, and he confirmed what Doctor Hausknecht said about the shoulder.

Q Did you --- For what period of time did you see Doctor Touliopoulos?

A Probably towards sometime in the late --- mid to late '08.

Q There's another doctor. Did you see a Doctor DeMarco, a partner of his ---

A Yes, Doctor DeMarco, yes, I also saw him.

Q Do you --- Do you ---

You just told the jury before, but do you treat with anyone for your knees in the last few years?

A No, I have not.

Q Okay. Do you plan on doing anything with regard to your knees?

A No, no. They're okay.

Q Okay. Can you tell the jury, after seeing Doctor Hausknecht and Merola, were you put on any medication or were you prescribed any medications?

A Yes, I was.

Q Do you know the type or the name?

A Definitely in the beginning it was Amorex, Cymbalta. I didn't ask him for anything that was nonaddictive.

MR. McCRORIE: Say that again.

A I asked him for anything for that was nonaddictive.

Q And -- Did you go back to Doctor Merola after seeing Doctor Hausknecht and learning about your traps?

A Yes.

Q When you next went back to Doctor Merola what, if any, complaints did you make to Doctor Merola?

A I complained about the neck and the back pain and explained to him how I figured that way out.

Q Did Doctor Hausknecht refer you to any other medical providers or for any testing?

A Yes; I was prescribed physical therapy and chiropractic.

Q For what parts of your body? Were you prescribed the physical therapy and chiropractic?
A For my neck and my back.
Q Did you continue to work after seeing Doctor Hausknecht and Doctor Merola?
A Yes, I did.
Q Were you still in pain?
A Yes, I was.
Q To what parts of your body were you working with pain?
A My neck, my back and my legs.
Q Were you attending physical therapy and chiropractic during those times you were working, let's say, in the weeks and months after the accident?
A Yes, I was.
Q Were you taking medications during that time period?
A Yes. Very, very infrequently. Yeah.
Q And why was it infrequent?
A Because I --- I was more afraid of having the stomach ulcer thing happen again. I feel a little bit of a pain and that would get me nervous. I said, "I have a lot enough going on already. Don't need any more."
Q For how much longer did you work for Jdp on that job after the accident?
A Yeah. About five or six weeks.
Q What happened after the five or six weeks?

A We wound up getting laid off.

THE COURT: Counsel, step up, please.

(Whereupon, a discussion is held at the bench, off the record, amongst the Court, Mr. McCrorie, Mr. Acosta-Diaz, Mr. Abrahamsen, Mr. Kaminsky and the Court,) out of the hearing of the jury.)

THE COURT: Okay.

Jurors, we're going to break for lunch now and we're going to resume at two o'clock. You get out a little bit before one o'clock. It usually helps get your lunch a little sooner. You're always free to bring your own lunch, of course, and you can eat outside in the hallway or out doors if you wish. All right.

So, we'll see you at 2:00. You are free to have lunch with each other. You just can't discuss the case.

All right. So, if any of you watch basketball this is a great time to discuss hoops. If not, think of something else to talk about. See you soon.

(Whereupon, the jury exits the courtroom.)

(Whereupon, the luncheon recess was taken.)

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

(Whereupon, the skull was marked Plaintiff's Exhibit 33 for identification.)

(Whereupon, the jury enters the courtroom.)

(Whereupon, the following takes place on the record

in open court in the presence of Mr. McCrorie, Mr. Acosta-Diaz, Mr. Kaminsky, Mr. Abrahamsen and the Court:)

THE COURT: Where's your happy faces, Jurors? What happened?

It's good to see you back. Please have a seat.

So, jurors, just to a reminder you, know that we're down on Monday; right? And then we're up for the four days the following: Tuesday, Wednesday, Thursday, Friday. Okay.

If you see me checking my phone, it's because the Court email is on my I-phone and my I-pad and every device that I have.

When the Court email comes up, I have to check to see if it's an emergency application. Okay. So, don't think that I'm just texting and doing on other things while I'm up here on the bench.

All right. So, do you remember that I said to you that sometimes we take witnesses out of order in order to accommodate different schedules.

Well, we're going to do that now. We're going to change witnesses. We're not going to continue with the plaintiff.

Mr. McCrorie, who do you wish to call as the plaintiff's next witness?

MR. McCRORIE: Andrew Merola, M.D.

A N D R E W M E R O L A, a witness called on

behalf of the Plaintiff, after being duly sworn, testified, as follows:

COURT OFFICER: Please have a seat. Doctor, please state your name and your business address for the record.

THE WITNESS: Andrew Merola, M-E-R-O-L-A. 567 First Street, Brooklyn, New York, 11215.

THE COURT: Doctor, what is your area of specialty, please?

THE WITNESS: Orthopedic surgery.

THE COURT: Are you board certified?

THE WITNESS: Yes.

THE COURT: Thank you. Counsel, you may inquire.

MR. McCRORIE: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. McCRORIE:

Q Good afternoon, Doctor.

A Good afternoon.

Q Doctor Merola, can you please tell the jury for how long you've been duly licensed to practice medicine in the State of New York?

A I've been licensed since 1992.

Q And if you could give the jury the background of your education starting with undergraduate and taking us through medical school, where it was, and then we'll take it from there with internship and residency?

A I went to N.Y.U. for my undergraduate college studies. After I graduated N.Y.U. I went to Howard University in Washington D.C. for medical school. After I graduated medical school, I went to Downstate Medical Center in Brooklyn, New, York, for my residency in orthopedic surgery, and then after I completed that training I went to the University of Colorado, where I trained in spinal surgery.

Q As the first physician, I'll have you define some terms, internship, residency, fellowship.

A Internship is your first year after you graduate medical school, and in my case, since I was going into surgery, the first year was in general surgery.

After that internship is completed, you do a residency, which is in your specialty field.

I did four years of orthopedic surgery. A fellowship is training you do after you are a resident, and that was an additional year only in spinal surgery.

Q In your career, have you held any teaching positions, do you have awards, things like that, if you could tell the jury?

A So --- Yes. So, I'm an associate professor of orthopedic surgery. I teach medical students and residents, I do that at Downstate Medical Center, Mount Sinai and at New York Hospital as well. And as part of those duties, I also do research and I publish articles and papers.

Q The Judge had asked you the question, "board certified."

Can you explain first the significance of board certified and tell the jury what you are board certified within?

A So, being board certified means that you are --- you passed an academic requirement regarding your qualifications.

After you graduate your residency, you take a written examination, in my case, it was orthopedic surgery. You pass that written examination and have been in practice. That means dealing with patients on your own for a minimum of two years.

You then take the second half of the examination, which is an oral examination. It means you bring all of your patient records to a Board of Examiners that you then sit down with, and then they ask you questions about your patients.

When you pass both portions of that examination, you become board certified, and then that process repeats itself every ten years.

So, my first two years in practice ended in 1998. That was my first certification, so I was good until 2008. I recertified in 2008 until 2018.

I took my exam early, I took it last year, I passed, I'm good until 2028.

In the meantime, we're required to continue our education by taking examinations and doing testing and going to courses within that ten year period, which we then submit to the board, and then they examine us again every ten years.

Q Can you please describe for the jury --- Do you have

your own practice?
A Yes.
Q Is there a name to your practice?
A The name is my name.
Q In June of 2008, were you part of another practice?
A Yes.
Q What was the name of that practice?
A University Orthopedics.
Q Of New York, LLC?
A Correct.
Q Where was University of Orthopedics, University Orthopedics located?
A Two main offices. One was in Manhattan. The other one was in Astoria, Queens.
Q Just the address in Manhattan.
A It was -- We are where the old St. Vincent's Hospital was, and now I forget your the address because we have not been there for a long time.
Q 36?
A Second Avenue.
Q 36 Second Avenue, when it was privileges at St. Vincent and perform surgeries there?
A Yes, I did, yes.
Q Can you tell the jury where you have privileges now and what privileges mean?

A Privileges mean you are allowed to take patients to the hospital and treat them in the hospital. In my case, it's surgery.

So, I have permission to admit patients to hospitals and to operate upon them at those hospitals. Present, I'm presently at Mount Sinai Hospital and New York Hospital.

Q And what type of patients do you see, what parts of the bodies do you deal with, is what I mean?

A My specialty is spinal surgery. So, I deal with neck and back problems in both children and adults.

Q And if someone has what's called appendicular injuries or injuries to the shoulders, the knees, the toes, the ankles, any joints, what do you do with patients that make complaints of that --- in addition to a spine?

A So, if there are patients that have an arm or a leg issue that is unrelated to the spine or related to the spine, if it's an arm and a leg, I generally refer that to my orthopedic colleagues who specialize in those specific joints.

Q How many spine surgeries do you perform in an average year?

A In an average year, I work with two other reconstructive surgeons and combine the three of us together to about two hundred or so cases per year.

Q And you each see each other's patients?

A Yes.

Q Have you testified in court before on behalf of your patients?

A Yes.

Q Have you ever testified in court before on behalf of a patient that was also a construction worker, a client of Sacks and Sacks?

A Yes.

Q And have you done that more than once?

A Yes.

Q And had you been cross examined by Mr. Kaminsky?

A Yes.

Q Are you on what's known as the health plan of any union construction --- construction unions?

A Yes.

Q What does that mean to be on the health plan of a union?

A So, when you're on any particular health plan, whatever it may be, it means that your name is on a list of physicians under your specific specialty that are then part of that billing program for that was unions or insurance plans, so you're listed as one of there providing doctors.

Q Does your practice accept work related accidents?

A Yes.

Q Did it June of 2008?

A Yes.

Q In your practice from 2008 and before, did you have a an

occasion, whether it be through the union or a work related accident, to treat construction workers?

A Yes.

Q Are you being paid for your time away from your practice, the surgeries, the rounds?

A Yes.

Q At what rate are you being paid?

A Six hundred and fifty dollars an hour for time away from the office.

Q And in addition to time away from the office testifying in court, did you meet with myself and prepare, understanding this case was at trial?

A Yes.

Q And during that time, did you select images of MRI and x-rays that would be demonstrative to discuss this matter with the jury?

A Yes.

Q Okay.

MR. McCRORIE: Just with the Court's permission, I don't know if I can give this to Kenny.

I am just going to hand up Plaintiff's 6 and 7 in evidence, and that's your record, even though you brought your record that's a copy of your office record, a copy of Doctor Hausknecht record and over here Plaintiff's 29 and 30 are St. Vincent's medical Center and the New York Methodist

Hospital records.

If you need them you can ask, and I will bring them up to you but ---

(Whereupon, Mr. McCrorie hands Plaintiff's Exhibit 6 and 7 in evidence to the witness via the court officer.)

Q If at any time you need to refer to your actual notes because they're in evidence, you could read from them. Okay?

A Yes.

Q Could you please ---

THE COURT: Counsel, he can't read --- Sorry they are in evidence.

MR. McCRORIE: They're in evidence, Your Honor, yes.

THE COURT: Yes.

Q If you need it to refresh your recollection or --- did you review your notes prior to testifying here?

A Yes.

Q Is James Dunne a patient of yours?

A Yes.

Q When did he come to be a patient of yours?

A I first saw Mr. Dunne in June of 2008.

Q And your notes would indicate the exact date; correct?

A Yes.

Q Could you please tell the jury, do you know how it is he became a patient of yours?

A I believe he was referred to me and I was working at University Orthopedics at the time. So, he would have come through the Emergency University Practice.

Q Okay. Do you know who referred him?

A No.

Q Do you --- Who is Doctor Aric Hausknecht?

A He is a neurologist.

Q In relation to your practice or the practice back in 2008, who was --- was there a neurologist within the University Orthopedics practice?

A There was no specific neurologist within that practice, no.

Q So, if you could just go to the note, the first note?

A Yes.

Q What is the date Mr. Dunne came to see you?

A June 2nd of 2008.

Q Okay. Just on your notes, because they're in evidence, other than the first note that says, "initial evaluation," when it states, "physical examination," what does that mean?

A Physical examination is where a doctor can examine a patient, feels a patient's body, tests certain portions of the body, and makes observations regarding how the body is working.

Q And what about impression and plan, what does that mean in your notes?

A After having spoken with the patient and then had an

opportunity to examine the patient. An impression and a plan are what are your thoughts regarding the diagnosis.

In other words, what is the medical surgical problem, and what's the plan? What are your recommendations regarding that particular problem?

Q Before we go further, other than your notes, I would just like you to define certain terms, as they mean to you in the medical field of spinal orthopedics or any medicine. What does "objective and subjective" mean?

A Objective is an observation or a test that a doctor performs upon a patient that a patient does not have any active imput regarding. For example, if you test a reflex, that reflex is not under the voluntary control of the patient. So, it would be objective.

If you palpate spasm, which is a contraction of the muscle, and muscles would contract in an involuntary manner in order to prevent you from placing a body part into a painful position. That would be an objective finding.

A subjective issue is generally something the patient tells you. For example, in the history, if a patient says, "I have pain in my back," that is subjective. It comes from the subject or the patient.

The examination then, in an objective way, tests to see what the cause of that particular subjective complaint is.

Q Could you please tell you us you used the word,

"diagnosis." What is a diagnosis and what is a prognosis?

A A diagnosis is what you believe the problem to be in a medical surgical sense. A prognosis is educated medical guess with respect to the future.

So, if you were to prognosticate something or to think about the future you would give a prognosis. If you had someone with a disease that was going to kill them, you would say, The prognosis was poor, because that disease would lead to death. If you had a condition where the prognosis was good, because a patient was continuing to get better in an excellent fashion, and you anticipated that it would continue to get better, you would say that the prognosis is excellent.

So, it's an educated guess regarding the future.

Q Can you please tell the jury what the words, "symptomatic" and the word, "asymptomatic" mean?

A A "symptom" is a problem that a patient has most often times related to some type of pain or dysfunction in their body. If something is symptomatic, it means that a condition within your body is causing a problem.

If a condition is "asymptomatic," without symptoms, it means that whatever condition exists within your body is not causing problem.

Q What does the word, "degeneration" mean?

A "Degeneration" is the opposite of generation. Birth through adulthood. Maturity is a process of generation. When

you are in your mother's womb and you are then born and you are growing, you are in the process of generation. You're getting taller.

You're getting bigger, your body is making new parts. When you have stopped making those new parts, you are now subject to wear and tear, and that wear and tear process, that happens to our bodies is the process of degeneration.

Q Can you tell the jury what disk desiccation is?

A A disk is a special cartilage piece of material that is located within the spinal column. Desiccation means that there --- when you look at the disk usually through an MRI or up close, the disk contains less water than a fully mature, young, disk. Desiccation basically means drying up of --- So, disk desiccation means a drying up of disks.

As you get older, your disks lose water content, much like the collagen in our skin losses water content as we get older, and that results in wrinkles on our spine skin. It's the same type of process.

Q Is it a myth or do people actually get shorter, people that live into later years?

A Your body does actually lose height. When you stand up completely and totally straight, and if you were to measure yourself at the age of ten, twenty and then you were to measure yourself at forty, fifty, sixty, and seventy and thereafter, you would gradually lose height over time because the tissues in your

body that contain water that are made of cartilage, lose the water, and they start to in a very slow position, fashion over the course of time shrink.

So, in your spinal column, all of the stacked up disks that are in your spinal column as they lose water content, that spinal column will shorten over the course of time.

Q Is there anyone above the age of twenty-two, three, four, that is immune to disk desiccation or degeneration?

A At this point in time, we have not found a way to reverse the normal aging process, so, all of us after the age of skeletal maturity are subject to disk desiccation, and the degenerative process to happens to all of your odd body parts.

Q What would be skeletal maturity in general?

A Little different than boys and girls. Girls are faster than boys and are generally mature at about the age of twelve or thirteen. Boys are generally mature somewhere around the age of about fifteen, plus or minus a year or two.

Q Can you tell the jury, other than desiccation, are there other forms of degeneration to the spine that occur within a human being after skeletal maturity?

A Yes.

Q What are the types of degeneration? What is it called medically?

A So, not only do the cartilage portions of your spine degenerate over time, but the bones that make up your spine can

also degenerate over time, and you can start to acquire a softness to those bones, which is known as osteoperosis, and you can also start to acquire a spurring of those bones which are known as bone spurs or osteophytes.

If you look at an older person's hands, you'll sometimes notice that they're knuckles are a bit bigger than the knuckles of a young person. That's because the joints in your fingers are starting to form some bone spurs within them, and that typically can happen to not only the joints of your hands and fingers, but any other joint in your body, including your spine.

Q I may have more later. But can you please define the word, "radiculopathy" for the jury?

A So, a "radiculopathy" is made of two words really. "Rad dic," which means, root, and in this case a nerve root, because when the nerves exit your spine, we call them roots. "Opathy" means a problem with.

Any time you see the word "opathy" attached to anything else, it means a problem with. So, a radiculopathy is a problem with a nerve root.

Q Turning to Mr. Dunne and your first evaluation of him, we'll go through some of the notes not all of them, but taking the first note.

What does "history" mean when a doctor says, "I took a history?"

A A "history" is a way of understanding when a particular

problem began, and what that particular problem is in terms of how it's affecting the patient.

Q What was the history Mr. Dunne relayed to you?

A There was a history of a free fall elevator accident on May 20th of 2008.

Q And what, if anything, did you relate to you about he was about, what he was feeling since that accident?

A So, the chief complaint, that is the major complaint, that the patient had on that day, was back pain with pain radiating down the left side of his legs, somewhat more than the right side.

Q Did you take a history of past medical or surgical history?

A Yes.

Q Okay. And what did you take the history of?

A He had had a prior left knee meniscal problem or a problem with the meniscus in the left knee and a prior peptic ulcer problem.

Q What, if any, prior spine conditions did he relate to you?

A No prior spinal conditions.

Q What type of physical examination did you do and what, if any, significant findings were there?

A So, I did a general examination focused on the chief complaint, which was the lower back, to examine and evaluate the

patient in the pain in the back with the symptoms that the patient was having going into his legs.

Q And what, if any, ---

MR. McCRORIE: Withdrawn.

Q Just define medically in a note when it says, "positive" and it says, "negative," what do they mean to you as a surgeon, positive and negative?

A Sometimes, they can mean different things, but in general, if we say, for example, in this case, the patient had a positive straight leg raise, it means that when I did that specific test, it showed a condition regarding the test itself in a general sense.

So, for example, and I'll just give you the example of this examination. A straight leg raise is a test where you pull on the sciatica nerve. The sciatica nerve is the large nerve that comes out of your lower back, travels through your buttock and down the back of your leg, and because that nerve travels all the way down your leg if you extend the knee, you stick the knee out, and you pull the foot back, you're actually now pulling on that nerve.

If that nerve is inflamed, which means if that nerve is being irritated, the involuntary response of the person's body will be to pull the leg away from that position. And that's the way you do a straight leg raise test.

If the test is positive, it means that when you're

pulling on the sciatica nerve, it reproduced symptoms that the patient involuntarily, moved away from.

So, it tells you that there is sciatica nerve inflammation or irritation.

Q Did you test his range of motion of the lumbar spine?

A Yes.

Q And what, if any, findings were there?

A So, I did what's known as a qualitative. Quantitative means you actually takes a measurement. "Quality" means you have a general sense for what something looks like, and in this case, I said that there was severely restricted low back or lumbar range of motion, and I knew that because there was palpable spasm in the lower back while I was testing the range of motion.

Q And what about his lower extremities? What, if any, finding?

A In the legs, the left side, what's known as achilles tendons reflexes, which is the tendon behind the back of your left ankle was not working, and that's a tendon reflexes that's controlled by the sciatica nerve. And then there was some left sided leg weakness more than right.

So, he had difficulty raising up on the heels and on the feet of the legs.

Q What was your impression and plan on that day, the first visit?

A So, on that day, I said that I believed him to be to

have an acute, which means a sudden onset, sciatica and inflammation of the large nerve, going down the legs with a low back disk derangement.

Difficult to say what exactly the problem with the disks were without an MRI, but the physical findings were indicative of a disk problem causing inflammation of the nerves going into the legs.

Q If you could continue with that note. What, if anything, did you suggest for him or do for him in that ---

A So, the first course of treatment when you have an inflamed or irritated nerve with a suspected disk problem is to, number one, try to not do anything to aggravate the nerve.

So, the first course is to avoid activities that cause more pain, because that is your body telling you to not do something, to not irritate the nerve.

So, the first course of treatment for any of these problems is to avoid activities that reproduce the symptoms, and that's the number one recommendation.

Number two, I suggested plain over the counter anti-inflammatory medicines, which would be something like Ibuprofen, Motrin or Aleve. Those medications are anti-inflammatory which means that they block the response that your body has to irritation. And in so doing, can give your body an opportunity to heal whatever that's causing that inflammation.

So, that's the second recommendation.

We talked about him having had a prior peptic ulcer, so being careful about taking those medicines, because they could aggravate prior ulcer problems. What else?

Q Did you prescribe any medication?

A Let's see, and I gave him a medication called Ultram, which is a type of pain medication that acts within the brain and the spinal cord to decrease painful symptoms.

Q Did you refer him out for any other physicians?

A I did. I sent him to a neurologist, Doctor Hausknecht.

Q For what reason did you send him to a neurologist?

A I sent him to the neurologist for --- he had evidence of a sciatic symptoms into the legs, and I sent him into neurology in order to do further testing for the legs.

THE COURT: I'm sorry. You said neurology?

THE WITNESS: Neuro, N-E-U-R-O.

Q Could you please tell the jury the difference between diagnostic testing on his x-ray, MRI, and CAT Scan or CT scan?

A An x-ray involves shooting radiation at your body, and then having a film, a piece of film, that absorbs that radiation. So, it's like shining a very bright light through your body, and it picks up bones, best, that's a plain x-ray.

A CT scan is multiple, rapid sequence x-rays, that are taken from multiple different angles, that are then put together with a computer program to give you a little more detail of the internal structure of your body. Also, very good for looking at

bone, because it's a special modified X-ray test.

MRI is a magnetic way, through using a very large powerful magnet to magnetize your body, to look at the water content of various portions of your body, to give more details detailed information regarding softer tissues, for example, disks and tendons and nerves.

Q As a board certified spinal surgeon, are you qualified to read x-rays, MRI/CT Scans?

A Yes.

Q Could you do that in your practice?

A Yes.

Q How often?

A Everyday.

Q Does your --- Do you retain within your practices there a radiologist to assist you in that?

A No.

Q Why not?

A I rely on my own reading of all of the films that I either take or have ordered to be taken because then I can correlate those films with an actual examination of a patient.

Q And, well, for instance, you don't take MRI yourself? You send them out?

A Correct.

Q Why don't you rely on the interpretation of the radiologist?

A When a radiologist writes a report, that ---

MR. KAMINSKY: Judge, I would object.

I don't think this is something that is appropriate.

THE COURT: Step up, step up.

(Whereupon, a discussion is held at the bench, off the record, amongst the Court, Mr. McCrorie, Mr. Acosta-Diaz Mr. Kaminsky, Mr. Abrahamsen, out of the hearing of the jury.)

(Continued on next page.)

LB-SN

THE COURT: Jurors, you could stand and stretch. You were in the middle of answering a question.

MR. KAMINSKY: Judge, sorry. Did the doctor -- I just want to --

THE COURT: He didn't answer the question because I asked you to come up.

MR. KAMINSKY: Was there an answer to the question because --

MR. McCrorie: No.

MR. KAMINSKY: Does the doctor say he does not rely on radiologists?

THE COURT: Excuse me. I'm going to allow that one question, then we are going to move on.

MR. KAMINSKY: Okay.

THE COURT: Okay. Do you recall the question, doctor?

THE WITNESS: Yes.

THE COURT: Okay. Can you answer the question?

THE WITNESS: Yes.

THE COURT: Please.

A. So when you read a report that a radiologist writes, the radiologist is using adjectives to describe a film. It would be the same way that if I were to look at a work of art, let's say a Picasso. Instead of looking at the Picasso, I was reading someone's impression of what they thought the Picasso

was. It was actually better to look at the Picasso to get your own idea of what you think the picture is so you know what the picture actually looks like rather than have someone tell you what they think it looks like.

Q. Dr. Merolla, after he went to -- after Mr. Dunne went to Dr. Hausknecht, did he return back to you?

A. Yes.

Q. Okay. We are going to go through this note, then we are going to have you do something with the anatomy.

When was the next visit?

A. My next visit was at the end of June, June 30th of 2008.

Q. Can you relate to us the complaints he had to you on that date?

A. So on that day in addition to the back, he was also having neck symptoms.

Q. How did you describe the neck symptoms?

A. Let's see. I said that he had a problem with his neck which he had not mentioned on the first visit that it was bothering him in addition to the pain in the lower back region.

Q. Was does progressive back pain mean?

A. In the sense that it was getting worse. The back pain in the first problem and then the neck pain getting worse over time.

Q. What does bilateral upper extremity pins and needles

mean?

A. Bilateral means both sides. Upper extremities are the arms and hands and then pins and needles are sensations that you get when you have some irritation in the nerves.

Q. Just reading your notes, what, if any, other complaints did he make to you after the bilateral pins and needles?

A. Let's see. Numbness and tingling as well as headaches.

Q. Okay. Did you perform a physical examination of his neck on that visit?

A. Yes.

Q. What did you find in the physical examination portion of your notes?

A. So, on that exam, there was palpable spasm in the neck and he had in the neck area a positive test known as a compression distraction maneuver. That's a test where you push down on the head and neck in an attempt to put pressure on the nerves coming out of the neck. They exit the neck then come into your arms and hands. So if you push down, you will compress those nerves and if you do that, they are going to reproduce pain. If you don't distract, that is, you pull up on the head and chin, you open the area where the nerves are taking pressure off of them, then you decrease symptoms. So he had what we call a positive compression distraction test indicative of some irritation in the nerves of the arms and hands.

Q. Can you tell the next time that you saw, what the date

of that visit is?

A. October 6, 2008.

Q. Going back to June 30, 2008, did you request permission or authorization to perform or to get a certain type of test?

A. Yes.

Q. What was the type of test you requested?

A. I requested two types of tests. I requested an MRI of the neck area and an MRI of the lower back area.

Q. Okay. At some point in October of 2008 or some point thereafter, did you actually see the MRIs yourself?

A. Yes.

Q. Okay. Prior to -- before -- withdrawn.

When he came to you again in October of 2008. Did you have any knowledge as to whether or not he was treating with Dr. Hausknecht and other medical providers, chiropractors, physical therapists?

A. Yes.

Q. And what is that? What is conservative management? What does that mean in medicine?

A. So when we talk about conservative care or conservative management, we mean non-surgical. Anything you do to treat a problem up to and not including surgery is conservative.

Q. Let's go into your note of October 27, 2008.

Do you indicate in that note that you actually reviewed the films yourself?

A. Yes.

Q. Okay. Could you first tell the jury what your findings were upon looking at the films?

A. My impression was that there was a large herniation at C-5, C-6.

Q. And, if you could, just tell the jury if there were any findings in the lumbar?

A. In the lumbar he had herniations at L-3, 4, 4, 5 and 5, 1.

Q. Could you please --

THE COURT: Sorry 3, 4, 4,5 and--

THE WITNESS: And 5, 1.

THE COURT: Thank you.

Q. Could you please define these words for the jury: Herniation, bulge, protrusion?

A. Protrusion means sticking out, so a protrusion can either have a bulge or a herniation. It's a very general term. A bulge means that the disc is sticking out of the area where the bones are in a uniformed fashion all the way around the bones. A herniation means the disc is sticking out from where the bones are in a more specific area, so it herniates into one section more than another, so herniation means symmetrical or in one area more than another. Bulge means in a very uniformed fashion everywhere, and protrusion just is a general term that means sticking out in some way, shape or form.

Q. Okay. Just prior to stepping down, could you just describe the general anatomy of the spine? Could you do it more specifically in a quicker fashion, but could you tell the jury what the vertebral bodies are compared to the disc, how many we have in the neck, back the thoracic spine?

A. In general, your spine is a column. It supports your head over your waist and your pelvis and your legs. The top of your spine is the cervical spine and there are seven bones in your neck.

The upper back is your thoracic spine. There are 12 bones there. In the lower back is your lumbar spine and there are five bones there. The part of the spine that connects to your pelvis is called the sacrum and that is generally one large triangular bone.

Q. Dr. Merolla, I'm holding up Plaintiff's 8 which is a film. Plaintiff's 9, which are lumbar and cervical MRIs and thereafter all the films are on discs.

Did something happen with technology since 2007, 8, around that time?

A. Yes.

Q. How are most films sent to you or given to you these days?

A. So these days, I actually log in a secure fashion, log into the computer at the MRI place, so I could get them on my computer screen. If you don't have the capability to log into

the computer, you could have a copy of the MRI film put on a CD or compact disc, so it's an electronic version of the film either by directly logging into the computer system or by getting it on a CD that you could then plug into your computer to view.

Q. What is a dermatone or dermatomal pattern?

A. Derm means skin. A dermatologist is a doctor who takes care of your skin. A dermatone is a specific area of skin that has a nerve associated with it. So your nerves do multiple things. They feel things. The area where you feel something is a dermatone and the specific nerves go into those dermatomes. Muscles have specific nerves that go into them as well and reflexes have specific nerves that control them. Dermatone skin, skin, nerve area.

Q. And could you please before you step down tell the jury with regard to the brain, the spinal cord and the cauda equina how they interact with exiting nerve roots?

A. So your brain and spinal cord are the areas that have, they are very dense, right. Your brain has all of the control switches, if you will, for everything that happens in your body. Those control switches then travel through a very large solid cable, that's your spinal cord and then each individual cable that goes into your arms and legs comes out as a nerve root. The spinal cord cable stops just around where your upper back and your lower back meet and then after that in your lower back

area it's all mostly just nerves and that bunch of nerves because they are all individually held within the canal look like the tail of a horse.

If you open up the spinal canal and that's why it's known as a cauda which means tail, equina, horse. So it looks like, they look like a horse's tail.

So your brain stops at the base of your skull. Your spinal cord continues into the lower portion of your upper back, upper portion of your lower back and then there is continuation of nerves call the horse's tail that are in the lumbar spinal canal.

MR. McCrorie: With the Court's permission, I'm going to have you step down and quickly show the jury the anatomy, then some other items.

THE COURT: Before do you that, doctor, jurors just as it is important that you be able to hear everything that goes on in the courtroom, it's very important that you be able to see anything that is presented to you.

So, now, you are going to have a demonstration of evidence introduced by the doctor. People in the back row are free to stand. Everybody is free to move as you need to. If you cannot see clearly, we will adjust what is being shown to you until it's at a distance that works. Okay?

So we are going to do a set up right now. You

could stand. You could stretch. You could move about while we are doing this. All right? Okay.

And, Mr. McCrorie, just indicate when you're ready for the doctor to step down.

MR. McCrorie: Yes.

THE COURT: Mr. Kaminsky, you and Jason could stand in the corner, if you wish, not because you're bad.

MR. KAMINSKY: Thank you, Judge.

Q. Okay. Doctor, you if you could step down.

THE COURT: Before you come down, first questions. Jurors, can you all see this board clearly? All of you? How about the juror at the end? Yes? Also how about you? You could see clearly? And how about you at this end? You could see clearly?

Okay. All right. If at any point you need to stand, please stand. If you need to move, like I said before, please feel free to move and if for whatever reason, let's say the doctor is pointing to something at the bottom and you can't see it, you let me know. All right. Just raise your hand and say something, not a problem. All right.

Q. Doctor, when you do come down, if you could after describing the anatomy, if you could tell the jury what an axial view is, what a sagittal view is, it will have more reference.

MR. McCrorie: Does your Honor mind if I stand back

there?

THE COURT: You could do that.

Q. Please use both the model which is Plaintiff's 33 for identification and the illustration 22 for identification?

A. So, the spine is a column --

THE COURT: Excuse me, one second. Jurors sometimes, I've been told by juries that that light over there bothers them, the light over the clerk. So if that light begins to bother you, just let me know. All right.

A. At the top of the column is the base of the skull. The cervical or the neck is right under that. The upper back is just below the cervical area and the lumbar spine is below the upper back. The pelvis is on the bottom and the sacrum is this large triangular bone inside the pelvis.

In between all of the bones are the discs and they act kind of like cushions in between the bones and exiting at every level of the spinal column is a nerve and the nerve gets it's name from the bone after which it exits.

For example, the nerves between C-5 and C-6 is the sixth nerve root. The bone between L-4 and L-5, the disc is the L-4, 5, disc. The nerve would be the fourth nerve exiting. Then the fifth nerve going down. So the numbers and the letters tell you more or less where each either disc bone or nerve is. Cervical is C. Thoracic is T. Lumbar is L. Sacrum is S.

Q. Could you explain what lordosis is and how it appears

to have an S too, but we look straight?

A. So if you are looking at the spine from front to back, you should be straight up and down. If you look at the spine from the side, your neck curves backwards a bit. That is called the lordosis. Your upper back curves forward a bit. That is called kyphosis and your lumbar spine bends backwards a bit. That is also a lordosis.

So on the side, for you to stand straight up and down it has to look like an S, because if it curves back, it has to go forward, then this comes back again so there is a balance to the way you stand. If you are looking at the spine from the side. If you look at it from the front, it's basically straight up and down.

Q. Before you told the jury about the cauda equina.

After you explain what sagittal and axial is, could you tell them if the spinal cord is solid until a certain point when it becomes the horse's tail into multiple parts?

THE COURT: Okay. Mr. McCrorie, you asked the doctor to do four totally different things. Let's simplify it a little bit, please.

MR. McCrorie: Sure.

Q. Is the spinal cord a full cord from the brain all the way through the L-5?

A. The spinal cord goes all the way down to the bottom part of the thoracic spine and upper part of the lumbar, so it

ends in that area, and after it ends in that area, it turns into the horse's tail or the cauda equina.

Q. What does axial and sagittal mean on an MRI and using the anatomy for it, 22?

A. Whenever you look at the side view, you are looking at a sagittal view. S, side. Sagittal, S, side-view. On the illustration, it is a side-view of the spinal column. On the model, it's us looking at it from the side. If you are looking at a regular human, you are looking at my side, that is a sagittal view.

An axial view means top down or bottom up. It really doesn't matter because either way you're going to see the same piece of anatomy. It's a lot like looking down an elevator shaft. If you were at the top of a building, you are looking down the shaft, that's the axial view. The opening of the elevator shaft, the opening is actually the canal and the middle of that canal where there is spinal cord shows a nice round spinal cord and we generally see that on the bottom of the axial view and on the top of the axial view is the vertebral body or disc.

Q. And the disc, can you talk about the annulus fibrosis and nucleus pulposus?

A. Best way to know about that, think about the disc like a jelly donut. It has two parts. It has an outer layer. This is what we all the annulus or ring. It's made up of interwoven

fibers that come together in order to hold the inner jelly like center in place. So there is an inner jelly like center. That is called the nucleus pulposus. It's held in place like this outer ring called the annulus fibrosis.

Q. If the annulus fibrosis is torn and the nucleus pulposus comes outside that ring, what is that called?

A. If the jelly comes outside the ring, it's then protruding, bulging or herniating, depending upon what the location is it's coming out of.

Q. On the model you are holding, the yellow nerve roots end, but could you use Plaintiff's 24 to describe how far into the body those nerve roots would extend out from the spinal cord?

A. So after the nerve roots come out of the spinal column --

THE COURT: Excuse me. Jurors, can you see? Top row, can you see? Okay.

A. After the nerve roots exits the spinal column, they exit individually, but they then join up with other nerves. That's called a plexus and this plexus of nerves then forms these cables. One set of cables goes down the front. Another cable goes down the back. The one that goes down the back is the sciatic nerve and one that comes down the front is the femoral nerve and then those cables depending upon what part of the leg they are in, form smaller and smaller cables all the way

down to your pinky and toes and the cables get smaller and smaller.

Each one of those cables contains fibers that is parts of the specific nerves that make up that sciatic nerve or the femoral nerve and they go into different muscles, so that is how we know whether or not a specific nerve is working properly in a muscle or not. They maintain specific reflexes and then they go into specific portions of skin which we talked about before called dermatomes and each one of those areas is supplied by a specific nerve.

So you can, for example, know that the S-1 dermatone is on the side of the foot. Five is towards the top. Four is a little bit closer towards the knee area and so on and it works the same way for the arms and the hands.

MR. KAMINSKY: I don't mean to interrupt, but are there any questions?

THE COURT: I think he's answering the question, but let's try to move on.

Q. When you say it works the same for the hands, does the neck also have extending out from its spinal cord, what -- does it also extend out?

A. Yes.

Q. To what part of the body?

A. It goes into the arms and the hands and basically all portions of your skin that envelope your body.

Q. I am just going to put up for illustration Plaintiff's 25. Can you please describe what you are looking at in 25?

A. So this is an illustration of a top down view or axial view of a cervical, that is, a neck vertebra with a disc sticking out in one specific area. Because it's in a specific area that it's sticking out, this is a herniation and it is touching a nerve root and coming into contact with the spinal cord.

Q. Okay. Noticing that is a female. Is this the same anatomy for male or female?

A. Yes.

Q. And, lastly, on dermatomes for at least the cervical region, could you just, you could hold it up, if you don't mind, Plaintiff's 23?

A. So with respect to, this is a projection of --

THE COURT: Jurors, can you see that?

A. This is a projection illustration of the back side of a patient. The head is on top and the back, the head is in the C-2 and the C-3 area. The neck is in the 4 and 3 area, shoulder 4 and 5, shoulder blade region 5 and 6, and lower back, lower shoulder blade region 6 and 7. Those are the areas of the skin that those particular nerves go into.

Q. Okay. All right. And could you show the jury where the trapezius is?

THE COURT: Counsel, can we get to questions that

are specific to the case, please?

MR. McCrorie: Yes.

Q. The trapezius on that thing that you are holding.

A. Trapezius is in the area of the shoulder and the shoulder blade.

Q. I'm going to put up for you now Plaintiff's 8A?

THE COURT: All right. So, now, this is where it gets more challenging.

Can you see? Yes?

Q. And I'm going to put up 8B and I will leave down here for you 8D and C for a little later on. Okay.

Doctor, I'm also going to hand you a red Sharpie pen. It clicks open. If at any time you are going to mark an item of evidence, please tell the record the number that you are marking and what you are doing.

But, first, could you tell us whose MRI this is and how do we know?

A. So this is an MRI of Mr. James Dunne. His name is on the MRI and the date of the MRI is August 25th of 2008.

Q. When you just --

THE COURT: Mr. McCrorie, the easel adjusts, so, why don't you adjust it, perhaps?

MR. McCrorie: I don't think it adjusts into the full board.

THE COURT: Does it go higher?

MR. McCrorie: I mean, if you don't mind the doctor holding it --

MR. KAMINSKY: It might go higher, but I don't think it will fit because of the--

THE COURT: Off the record.

(Whereupon, there is a discussion held off the record among the Court and counsel.)

Q. Are both of these films, the films that you just told the jury that you interpreted in October the ones that you ordered?

A. Yes.

Q. Okay. Why don't you do this: Could you just show where the brain, the spinal cord and the C-5, 6 discs are?

THE COURT: This is exhibit --

MR. McCrorie: This is 8A.

Q. It is an enlargement, doctor, of the actual films so we don't have to use a light box, correct?

A. Yes.

Q. Okay. So, please, just on this one, you could mark the discs?

A. So the brain is at the top of the image. This is a side-view image or sagittal MRI image of the neck. The brain is on top. The brain you could see that it's white and gray. The whiteness is the fluid that normally the brain floats in. That grayness is the switches in your brain, all of the special

switches that are in there and then you could see that that whiteness and the gray lines go into the canal of the spine that travel into the spinal canal. The gray line within the canal that I'm putting a line on is the cord and I'm outlining the cord on the MRI film.

To the left of the spinal canal and the spinal cord are the gray bones and I'm going to label them starting at the top Number 2, Number 3, 4, 5, 6, and 7. Those are the first and all bones of the cervical spine, 2 through 7. Number 1 is very hard to see and it's surrounds Number 2, so you can't really label it on the image, that's why we start with Number 2.

In between all of the bones we are looking at the discs and as we travel down the MRI view, I'm going to circle a herniation. That is a protrusion of disc material into the spinal canal on to the spinal cord at C-5, C-6, and you could see that when you looking at the side-view image it appears as though the cord is being pinched as if someone were taking their fingers and pinching it.

Q. Can I just have you use 8D? I don't know if we have another clip. 8D is the same date. 8D. Could you tell the jury what a T-1 image is, what a T-2 image is on an MRI and why they look different?

A. 8D. When you are looking at the spinal canal it appears to be more gray. You don't see the white water in the T-2. The reason is when the computer assembles a T-2 image, it

does not take into consideration the water signal as being white.

On the T-1 it shows up white and on the T-2 it does not, so on the T-2, we are actually seeing more of the grayness in the tissues than on the T-1. The T-1 image gives you more contrast. The T-2 has less contrast.

Q. Can you speak to the jury about how an MRI takes images and how?

For instance, I want you to point out there and there how something can look larger on one view and not the other view. How does a MRI take pictures?

A. It takes into consideration the water content of the discs and then the computer generates a gray scale image based on water content. So on the different images, the discs and the bones and the spinal cord can appear to be different shades of gray.

Q. I meant how. What is this right here? What is that?

A. So this is a disc in between 4 and 5. There is a disc where you could see some disc material protruding into the canal area between C-4 and C-5. You see it less clearly on the T-1. You see it a little bit more clearly. Sorry, less clearly on the T-2, but more clearly on the T-1.

Q. Okay. That is the sagittal view, correct?

A. Yes.

Q. Now, can you use -- I am just going to -- could you

tell the jury on the cervical sagittal image from 8/25/08 Number 8B, could you tell us what we are looking at here and how, you know, where the C-5, 6 disc is?

A. So we are looking at -- these are multiple top down views of the cervical spine and we know where they are located based on the image in the upper left. Each one of these lines represents a number cut of the cervical spine and when we get to the cuts on the first, second, on the third line, we could see that those, we are looking for a round and I'm marking a round spinal cord which you see very clearly in the top two lines and you see that the spinal cord starts to become squashed or compressed on the third line.

THE COURT: Mr. McCrorie, which exhibit is that, please?

MR. McCrorie: This is 8B.

Q. Could you tell the jury what's the one that you just did right here, which disc is that and what is scout film?

A. Scout film image, in the upper left hand corner, each number corresponds to the line where the image is taken, so if we go to Image Number 11, the 10 and the 11 section and to some extent the 12th section as well show you the area between C-5 and C-6, so you get an idea for what the spinal cord looks like in that region.

Q. Is the Image Number 11 the same as what you circled on Image Number 8A or Exhibit Number 8A?

A. It's the cut that we are looking at up to down. This is the side-view image is on the sagittal. The top view down image is on the axial.

Q. Okay. If I could put one more thing up. Excuse my back.

Without marking this one, could you please utilize Plaintiff's 8C. Is that an enlargement of 11?

A. Correct.

Q. And talk about the above and below images of 11 and what is different about the Image 11?

A. So if you look at the images above and below with respect to the cord and the amount of ripe fluid around the cord, you could see above Image 11 there is a round cord with a whiteness around it.

At 11 there is a cord that has been squashed into a little peanut with very little fluid around it. Below that area you see, again, the cord itself with fluid around it.

Q. What is the black image behind the circle behind it?

A. Those are the discs.

Q. On Image 11 and Image 8C is the disc touching the spinal cord?

A. Yes.

Q. Is that the type of finding you would expect to have caused the complaints Mr. Dunne was making to you?

A. Yes.

Q. I just want you to -- before I have you sit down, if you could just put up Image Number 9A, if you do not mind putting that on there, doctor, and I will put up 9B.

If you could just tell the jury what this is a film of, when it was taken and who it is?

A. So this is also an August 27th of 2008, James Dunne's image. It is 9A. This is the lower back. The bones, the bottom bone is S-1 for sacrum, then I will count up from there, 5, 4, 3, 2, and 1.

In between all of the bones, you could see the discs and behind all the bones and discs you could see this gray canal region. This is the cauda equina region. When you are looking at these discs in between 3 and 4, you could see that there is some disc material protruding in the canal region. There is disc material at the 4, 5 section protruding and less so at L-5, S-1.

Q. Doctor, do you see -- what is that protruding material? What would you call it?

A. So because this material is the same material as disc, it is disc material protruding into the canal.

Q. Is there disc degeneration in his back?

A. Yes.

Q. Is there other degeneration that you see in his back?

A. Yes.

Q. Is it anything that's the expected degeneration of a

41-year old?

A. Yes.

Q. Do you see anything abnormally degenerated in the lumbar disc images, either of the ones in front of you?

A. No.

Q. Before we move on, looking at his cervical spine, is there disc degeneration in these images which are 8B and 8A?

A. Yes.

Q. What is the degeneration that you see in the 8D and A?

A. So if you look at these images, you could see that the disc colors are somewhat dark. The darkness of disc color tells you that there is some fluid lost to those discs or disc desiccation and you could see also that in some areas there is also some spurring of the bones as well or some evidence of what we call osteophytes.

Q. Okay. Which would have been pre-existing?

A. Yes.

Q. Okay. Please continue with the interpretation of the axial view.

A. So the sagittal views are center cut images, side views of the center. The axial views give us a top down image of the different levels. The bottom -- this is 9B. The bottom of 9B is L-5, S-1 area. You could see there is a small central disc herniation at L-5, S-1 sticking into the canal.

MR. McCrorie: Indicating with a red pen on the

bottom row, fourth image up.

THE WITNESS: Correct.

A. At L-4, L-5 which is the section above that we see and we know that is between 17 through 19, we see that these images are the L-4, L-5 segment. You could see that there is a dark shadow that I'm outlining and that dark shadow is coming into the spinal canal area and is also coming into the area of the nerve root exits.

MR. McCrorie: Indicating with a red marker on 18 and 19.

A. We know that is different than the images above the area where we could see a round circular canal and we could see the exit room for the nerves without any dark shadows within them and that is not the case at L-4, L-5 where you could see disc coming into the canal and into the nerve root exit areas as well.

Q. Interpreting these and where you marked this for the jury, would you expect those conditions at the L-4, L-5 could evoke the symptoms that Mr. Dunne had complained to you about since the on set of sciatica?

A. Yes.

Q. Okay. If you could go back to the seat. We are going to -- you could keep that pen with you.

THE COURT: Jurors, do any of you need a restroom break? You are good?

Q. Doctor, if you could go to your December 8, 2008 note?
A. Yes.
Q. Could you please discuss what Mr. Dunne--withdrawn.
Did you have knowledge that he was continuing work as a steam fitter?
A. Yes.
Q. And in December of 2008, what were his complaints to you?
A. He had increasing pain in his neck and back areas with symptoms that were radiating down into the arms and hands, upper right side somewhat worse than left and in the low back into the legs.
Q. Was he having any pains with new things?
THE COURT: With the symptoms radiating to--
THE WITNESS: The legs as well.
THE COURT: Thank you.
Q. What did you indicate about his work?
A. I said that James is presently working and that he is trying to modify his duties as best as possible to ameliorate his symptoms.
Q. And how do you describe his pain?
A. Significant.
Q. Okay. Just right after that in that sentence, what was he reporting? What was happening now?
A. What we call Valsalva maneuver were also reproducing

symptoms. That's, for example, if you sneeze, when you get that sneeze, you put a lot of pressure on the inside of your body. Any time you put that pressure in there, that's called Valsalva maneuver. If you are having a bowel movement and you need to press, that is also Valsalva maneuver. Those increases in pressure on the inside of your body can also pressurize some disc areas as well and then reproduce symptoms.

Q. Doctor, could you tell us any positive significant findings first to the neck on that visit?

A. So there was decreased cervical motion which I indicated was 30 percent of normal. He had palpable spasm in the neck.

Q. Could you tell the jury what spasm means, whether it's objective or subjective?

A. Spasm is involuntary contraction of a muscle. That is objective. In other words, the patient doesn't have control over it.

Q. What does palpable mean?

A. Meaning you could feel it.

Q. Meaning you felt it?

A. Correct.

Q. Where was that spasm?

A. In the neck.

Q. Could you tell us any findings to the back?

A. There was also palpable spasm in the lower back and

that range of motion was restricted as well in the neck. He had a continued positive compression distraction maneuver and somewhat of a lost of the right side reflexes compared to the left.

Q. In discussing your findings at the neck and the back, the MRI findings, what does herniation with neural foraminal compromise at C-5, C-6 means?

A. So it means that that herniation is going into the area of the, where the nerve roots exit the spine. That is called the neural foramen. If there is herniation in the neuro foramen it will cause compromise or cutting off or pinching of the area where the nerve is.

Q. Okay. What was the plan or the impression or the plan on that date of what was going to be attempted?

A. So, at that time, the plan was, the impression was radiculopathy, cervical and lumbar, so nerve root problems, neck and low back and the plan was to consider injections which are called epidural steroids. Epidural steroid injections are injections of anti-inflammatory medication directly into the area where the nerves are. Instead of taking it by mouth, you would now inject it directly into the nerve areas to get a more directed administration of that medicine to get right on the nerves to try to prevent them from being inflamed.

(Continued on the next page.)

Q As indicated in your notes, did you talk to Mr. Dunne about what would happen if the epidurals did not fail after the physical therapy chiropractic and medication if they didn't relieve the symptoms?

A So, if during the course of treatment the symptoms did not get better or got worse, surgery was an option.

Q To what parts of his body got worse?

A The neck and the back.

Q Doctor, were you aware of testing that was done in September of 2008, and even after the surgeries, but in September of 2008, recall were called an EMG test?

A Yes.

Q And what is your understanding of the results of the EMG testing performed by Doctor Hausknecht?

A So, the EMG testing showed evidence of a lumbosacral radiculopathy, and something known as a "demyelinating neuropathy" at the wrists also known as carpal tunnel.

Q And what significance did that finding, if any, have to you, either finding?

A It tells you that there was what's ---

An EMG is a test of the electrical function of the nerve in a muscle. So, it tells you that there is an electrical instability within the L-5 and the S-1 muscles in the legs. It tells you that there was no electrical instability in the cervical muscles, but it tells you that there was some evidence

of electrical instability in the nerves at the wrists.

Q Can you ever have a radiculopathy without a positive EMG in this cervical region or in the lumbar region as well?

A Yes.

Q And if a disk is actually touching the spinal cord, can it cause radiculopathy?

A Yes.

THE COURT: I'm sorry, counsel. Your question was can you have a radiculopathy without a ---

MR. McCRORIE: With a --- I guess the negative EMG, but I asked it differently.

THE COURT: And your answer was, "yes," Doctor?

THE WITNESS: Yes.

Q Okay. So, did there come a time at the next visit, did you have any knowledge as to whether or not epidurals had been tried in that six week period.

A Yes.

Q Okay. What was going on in that visit? What was your examination and impression?

THE COURT: What are you talking about December 8th, and, counsel, you're saying?

MR. McCRORIE: January, 2009, the next visit.

THE COURT: Thank you.

MR. McCRORIE: Thank you, Your Honor. I'm sorry.

Q Okay. So, --- Doctor, if you could tell us what was

relayed to you that date and what your plan was on that date?

A So, at that time, Mr. Dunne had pain radiating or travelling into the arms and hands and down into the legs and feet.

He had had conservative treatment, but had not improved. Did an exam at that time. That continued to show both a cervical radiculopathy and a lumbar radiculopathy as well, and so at that time, we talked about surgery for both the neck and the back.

Q Was he with anyone? Was he accompanied by anyone?

A Yes.

Q How was he describing his pain on that date?

A Let's see.

Q In the first paragraph, Doctor?

A Severe pain radiating into the arms and hands and significant into the lower extremities.

He could --- He was having more and more difficulty moving his head around --

Q And what about the weekend before? Just take us through that note.

A He had been on bed rest the entire weekend prior to seeing me because he couldn't leave his home.

Q Did you make any recommendations regarding his continuation at work as a steamfitter?

A At that time, I made a recommendation that he should not

return.

Q And what does totally disabled, James' totally disabled from his duties, mean in your note?

A So, that would mean that I told him that I would not recommend any work or work related activities, no bending, no lifting, no twisting, no activities at all to aggravate any of these symptoms.

Q Did you request authorization to do surgery to any part of his body during that visit?

A Yes.

Q Not during, as a result of that visit?

A Yes.

Q To what --- What was the surgery request you made to what parts of the body?

A To both the neck and the back.

Q To the areas that you showed the jury before?

A Correct, yes.

Q Okay.

A Can you go to your --- You can skip a note or two to March 23, 2009.

THE COURT: Excuse me?

JURORS: Do you need a break?

THE COURT: Are you good? Let's take two minutes. Thank you.

(Whereupon, the jury exits the courtroom.)

(Whereupon, a short recess was taken.)

(Whereupon, the jury enters the courtroom.)

(Whereupon, the following takes place on the record in open court in the presence of the jury among Mr. McCrorie, Mr. Acosta-Diaz, Mr. Kaminsky, Mr. Abrahamsen, and the Court:)

Q Doctor, I believe when we took the break, we were at March 23, 2009?

A Yes.

Q Can you please tell the jury what, if anything, was relayed to you on that date?

A So, Mr. Dunne came back into the office. He continued to have both neck and back symptoms, which continued to bother him. He had had several second opinion examinations at that time, which we had an opportunity to talk about.

Q And what was your understanding of those?

A So, we had --- He had an examination from a Doctor Nancy Epstein who, according to James, appeared to be somewhat upset because she was not the primary treating surgery.

MR. KAMINSKY: Judge --

THE COURT: Sustained.

MR. KAMINSKY: Move to strike.

THE COURT: Sustained, sustained.

Excuse me. Jurors, you will disregard that.

Doctor, you can't say what someone else says to

you. Only the patient?

THE WITNESS: He did.

MR. KAMINSKY: Objection to ---

THE COURT: Yeah.

MR. KAMINSKY: -- Doctor Epstein's alleged state of mind.

THE COURT: Yes.

Jurors, and everyone would excuse me one moment.

(Whereupon there was a brief pause in the proceedings.)

THE COURT: Thank you all.

Q Doctor, without telling us what any other doctor thought, what was your understanding of just the names, not with where they're from, the doctors that he had seen and what he was told?

A So, he had had two opinions.

Q Okay. What were the names of those doctors?

A One Epstein, one Hudak.

Q And what was your ---

THE COURT: One what?

A Hudak, H-U-D-A-K.

Q What was your ---

THE COURT: Sorry.

H-U-D-A-K.

A Yes.

Q Okay. And why was Mr. --- Well, what was the purpose of Mr. Dunne telling you this?

A Because we were discussing surgery.

Q Okay. And what was your understanding of Doctor Hudack, not who he was, what --- what Mr. Dunne was telling him?

MR. KAMINSKY: Objection.

THE COURT: Let's rephrase that.

Q Okay. So, you told us about Doctor Epstein and what about Doctor Hudak without his ---

THE COURT: Counsel, step up, please.

(Whereupon, a discussion is held at the bench, off the record, amongst the Court, Mr. McCrorie, Mr. Acosta-Diaz, Mr. Kaminsky and Mr Abrahamsen out of the hearing of the jury.)

THE COURT: Excuse me. Are you going to be using the easel?

MR. McCRORIE: Just a moment. We had to get to the surgery, so I have to ---

THE COURT: All right.

Q Doctor Merola, what does concurrence mean as a doctor?

A Agree.

Q And what's the --- When someone disagrees, what is that non-concurrence? What is that called?

A I guess non-concurrence would be a good ---

Q Okay. Was there a concurrence with Doctor Epstein and

yourself?

A No.

Q Was there a concurrence with Doctor Hudak and yourself?

A Yes.

Q Was --- What, if anything, did you do with James and the MRI films that day, you know, when he was talking to you about the other doctors' opinions?

A I correlated the MRI films with a physical examination.

Q Okay. Did you show him the MRI again?

A Yes.

Q And did you do that for the next?

A Yes.

Q Did you at some point after March 23, 2009 receive authorization to do the surgery to Mr. Dunne's neck?

A Yes.

Q When did you receive that authorization? Just the approximate time period.

A It must have come before the surgery and after the visit. So, the surgery was in September of 2009, and I saw him in March, and then, April. So, sometime between spring and fall of 2009.

Q What is the --- What did you receive authorization to do? What type of surgery? What is it called?

A The name of the surgery is an anterior which means through the front, cervical, or the neck.

"Discectomy," removal of disk and spinal fusion, which is a stabilization of the bones.

Q What do doctors, such as yourself, orthopedic spine surgeons, call that for short in an acronym?

A ACDF.

Q Okay. At that time that you performed the neck surgery, you still had requested --- you told the jury you requested a January surgery for both the neck and the back; right?

A Yes.

THE COURT: Excuse me.

(Whereupon, there was a brief pause in the proceedings.)

Q Just ---

THE COURT: Counsel, just one second. I'm going to have my clerk take it down, review it, and then I'll see it for being a little easier. Yes, because when I finish four more, just the applications to deal with.

Counsel, thank you.

Q I know I'm going to jump here, Doctor, but I want you to come down and explain them both at once, instead of going back and forth. Did you eventually, after he went through ---

MR. McCRORIE: Withdrawn.

Q Did Mr. Dunne do physical rehabilitation after the neck surgery? You already said he did it before. Did he do any after the neck surgery?

A Yes.
Q Okay.
THE COURT: Counsel, counsel, did you give --- I'm sorry. You are really jumping.
MR. McCRORIE: I said September, 2009, he did the neck surgery.
THE COURT: Please come up.
(Whereupon, a discussion is held at the bench, off the record, amongst the Court, Mr. McCrorie, Mr. Acosta-Diaz, Mr. Kaminsky, Mr. Abrahamsen, out of the hearing of the jury.)
Q Doctor Merola, I don't mean to rush this. Give us the date that you did the anterior cervical discectomy and cervical fusion on Mr. Dunne?
A September 1, 2009.
Q Can you give us the date that you did the back surgery on Mr. Dunne?
A July 6, 2010.
Q Did Mr. Dunne require physical therapy and rehabilitation after his neck fusion?
A Yes.
Q I know --- Did you know that he had seen physical therapy both before and after the neck surgery?
A Yes.
Q And both before and after the back surgery?

A Yes.

Q What is the purpose of physical therapy in conservative treatment when someone has a confirmed herniated disk before surgery, meaning in the hopes of avoiding surgery?

A It's one of the conservative treatment options that help give your body an opportunity to heal that disk area to see if you can --- if the symptoms get better and the condition improves.

Q Okay. And after the surgery, what is the purpose of physical therapy?

A After the surgery, the purpose is to ---

Three things, right after surgery, you're doing therapy in order to decrease the stiffness that you get from the actual procedure itself and improve range of motion and decrease pain in the acute postoperative period, and then there's a period of time where you're trying to improve function, and then there comes a period of time where you basically maintain function.

So, there are three levels of therapy after surgery. One, decrease the effects of the actual surgery itself; two, improve function, and three, prevent a deterioration and function. That's called maintenance.

Q Okay. Did you continue to see him and treat him between the time of the neck surgery in September of 2009 and the back surgery in July of 2010?

A Yes.

Q Did you get authorization to do that back surgery?
A Yes.
Q And were you aware if he was still treating with Doctor Hausknecht in physical therapy?
A Yes.
Q Okay. If you could find your operative reports? I'm going to leave the hospital records from both St. Vincent and Methodist here, and I'm going to ask you to step down once again and describe the surgeries that you performed upon Mr. Dunne with the Court's permission?
THE COURT: Yes.
(Whereupon, the witness steps down from the witness stand.)
Q So, do you have your operative report or you --
Okay. I'm going to put up, it's Plaintiff's 27B, --- 27. If you could just, either I could move it, if you could tell the jury what they're looking at and explain the surgery that you performed on Mr. Dunne, and I think if you turn it a little bit straighter, it might be better.
You might have to come around.
A So, this is a board describing the procedure to the neck which we call an ACDF, which was done at the C-5/ C-6 level. That's the level where on the MRI, we saw that the disk was putting pressure on the spinal cord.
The operation starts off with, if you look in the right,

upper right hand corner of the illustration, what's known as an exposure.

So, an exposure is when you actually expose or get an opportunity to look at the body parts that you're operating on, and in this case, that's done by making an incision in the neck area on the front side of the neck.

After that incision is made, you then move the overlying structures away from the area where the disk is. So, directly in front, you're --- Your windpipe and your vocal cords are in the front, and then your esophagus or your food tube is right behind so that you move those to the side, and then you move the blood vessels underneath your muscles on the side of your neck to the other side, and if you put your finger in there, you actually feel some hard stuff in the back of your neck, that's your disks and your bones.

So, they take pretty much right in that area. So, when we move these structures out of the way, we're looking directly at the front of the bones and the disk.

We then take an x-ray in the operating room, and then compare the x-ray to the MRI, so we make sure we know exactly the right segment that we're operating on.

After we confirm that, we then start to very carefully remove the disk, see that we can get to the area where the herniation is. So, we remove the disk from the front to the back and we're doing this with special magnification, so that we can

see each portion of the disk as we're taking it away, and we finally get to the area where the annulus is, and we follow the annulus, that's the ring.

We follow the tear in the annulus to a section of the spinal canal which we call the posterior longitudinal ligament. It's just the area where the bones are attached to each other. And in that segment, during this operation, I described what's called a "rant."

MR. McCRORIE: R-A-N-T?

A It doesn't mean that you're paying rent. When we say "rant" in surgical terms, it means a tear or a rupture of that ligament.

Q How do you see that, Doctor?

A So, you're looking at that with a magnifying lens on your eyes. You're wearing eyeglasses with magnifying lenses on them, and then a light that illuminates the area. It's important because you don't want too touch of the spinal cord, because if you touch the cord offer, you put any pressure on it, you're going to cause damage to that area.

So, we actually see where the rant is or where the tear is and gently pluck out the herniation from the canal.

Now, once you remove the herniation, you can actually see the cord. So, you're looking at the spinal cord, and so you know that the pressure is off the cord, because you can look at it. You can see it.

And there's also a small, very small, metallic device, we call it a nerve root probe, so you can put it into the area where the herniation was to make sure that there's no disk left inside there, putting pressure on the spinal cord.

Then, what you do is, so, now you've taken the disk out. So, there's no more disk in between these two bones.

So, if you were to stand up and start walking around, these two bones would collapse down onto each other, and then your spinal cord's back there, and then if those bones collapsed you'd --- you basically be paralyzed, so, you can't let that happen.

So, now, you need to rebuild or reconstruct the area that you just took the disk out of. So, what you do is, you have to shave away the vertebral body, that is the portions of the bone on the top, and on the bottom to basically make a box that you then put this plastic device into.

This plastic device is --- It's like a shim, like a shim that you would put under a piece of furniture to level it out, if you had an uneven floor in your house, but this device jacks up the bones, so it puts them back into that normal position, and it holds them there so that that they could eventually heal together.

To prevent that device from popping out, if you were to cough or sneeze or fall on the ground, you put a metallic plate that's attached to the bones with two screws, so it's --- it

holds --- it acts as a buttress.

We call it a buttress. It basically holds that device in place until those bones heal together.

Q Is that called "fusion?"

A That's the process of a fusion. That means that those bones are healed together, and they are no longer moving so that the area where the disk was causing the problem to the cord can no longer cause that problem to the spinal cord, because you've now immobilized it and stabilized it. So, you're stabilizing the condition by doing this fusion process.

Q Were you aware that Mr. Dunne was a smoker and had been for twenty years or so before the accident?

A Yes.

Q Did you discuss with Mr. Dunne any risks of fusion associated with smoking?

A So, in order for these bones to grow together, to cause them to become one bone, that's the fusion process. Smoking can have an influence on that, so we do a couple of things.

Number one, we recommend not smoking and number two, we use after the surgery, we use something called a "bone growth stimulator."

When you're doing this procedure, it's afterwards. It's an external device that you wear on your neck that actually generates a very tiny electrical current, and that electrical current actually stimulates your body to make bone.

So, if you have a patient that's --- has a risk factor for what we call a pseudoarthrosis, or a failure to heal, and you use a both growth stimulator, you'll get these bones to heal themselves together because your bone is being told to make bone from this little electrical device that you wear.

Q Do you want to show you ---

Have you taken or ordered multiple x-rays since he'd he's had his fusion?

A Yes.

Q I just want to show you from May of 2016, 17-A, did Mr. Dunne suffer any pseudoarthrosis or failure of the fusion?

A No.

Q Does have a solid fusion?

A Yes.

Q Has he always had a solid fusion?

A Yes.

Q Okay. So, the smoking did not effect the healing process for his fusion?

A Correct.

Q If I could just -- I just want to just have --

Okay. I'm just going to put up an MRI from October of 2015. It is Plaintiff's 16-A.

I'm going to put up one from July 20th of 2012, and I'd like you to reference both 8A and 8C, where you indicated there was a herniation touching the cord at the level prior to the

fusion.

Can you make any comment about 13A and 16A as to whether or not there is anything touching the cord after you did your surgery?

A I'm just going to label the bones at C-5 and C-6.

MR. McCRORIE: Indicating with a red marker on both exhibits.

A So, if you go to the C-5/C-6 area, you can see that there is a --- there's white line in front of and behind the spinal cord, at C-5/ C-6. A white line in front of and behind the spinal cord at C-5/C-6.

There is a disk protrusion at C-6/C-7, which you can see in 2012, I'll just circle that, and in 2015 as well I'll circle that. That's something to monitor over time, but you can see the postoperatively that compression at 5/6 is improved if you compare it to the preoperative side-view image.

Q And if you look at the sagittal view, the disk material that is actually touching the cord on 8-C that you testified to is all of that disk material removed?

A Correct.

Q Okay. Can you tell the jury what the risks of this surgery were as related to Mr. Dunne?

A So, the first risk ---

MR. KAMINSKY: Objection, Judge.

THE COURT: Sorry.

MR. McCRORIE: You can do it ---

MR. KAMINSKY: Objection.

Q From here, we'll just stick with ---

THE COURT: Hold on. Hold on.

Would you repeat the question, please?

(Whereupon, the court reporter reads back testimony as requested by the Court.)

THE COURT: Bench, please.

(Whereupon, a discussion is held at the bench, off the record, amongst the Court, Mr. McCrorie, Mr. Acosta-Diaz Mr. Kaminsky and Mr. Abrahamsen, out of the hearing of the jury.)

THE COURT: That was asked and answered. So, the objection is sustained.

Q Okay. I'm going to take down the ---

THE COURT: Are we going to continue with the demonstrative?

MR. McCRORIE: Yes, Your Honor. Just with the --

THE COURT: Give me one second, Mr. McCrorie.

MR. McCRORIE: Yes, Your Honor.

(Whereupon. There was a brief pause in the proceedings.)

Q Doctor, tomorrow, when we finish up, I'll have you talk about treatment after the neck, but can you move now to the surgery you performed on Mr. Mr. Dunne on 7/6/10, and if you

could use the two exhibits for Part 1 and 2?

Let me just read it for the record.

28 and 28A. Please describe for the jury ---

THE COURT: There's only one exhibit there, counsel.

MR. McCRORIE: Excuse me?

There's one behind it.

THE COURT: Oh, it's hiding.

MR. McCRORIE: We snuck it in there.

Q Please tell the jury what you performed in this procedure.

A So, the lower back is a little different than the neck because in the lower back, you approach it from the lower back area, from behind instead of in front, and the reason is, there's no spinal cord down here. It's that cauda equina.

You're actually allowed to move those nerves out of the way because you won't damage them by touching them. Whereas, with the spinal cord, you can't touch it.

So, you have to come from the front in order to not t touch it. On the back side, you can move the nerves out of the way, so you can come through the back. And, so, we do the same thing.

We make an exposure, which is an incision in this case over the lower back. After we get it exposed, same thing, we take an x-ray, we look at the x-ray and the MRI to make sure we

know exactly where we are, and then we start to take the pressure off the nerves, by in this case, removing what's called the lamina and the lamina ---

Q You need this?

A Sure.

(Whereupon, Mr. McCrorie hands Plaintiff's Exhibit Number 33 for identification to the witness, via the court officer.)

MR. McCRORIE: Handing Number 33, the model.

A The lamina is the covering; it's the bony roof of the spinal canal. So, by removing the lamina, you've now taken the roof off of the spinal canal. You can actually see the nerves. You gently move them out of the way. Then the disk is sitting right there, so, that you can now remove the disk from the back, forward, and get all the pressure off those nerves.

Now, same process, after the disk is taken away, we need to stabilize those bones, so, now, they don't collapse, and then cause a problem with these nerves. Because, now, when you stand up, you have your entire body weight from your head all the way down to your waist, sitting on these bones.

So, what we do is, we remove the disk, and then, we put the same kind of a shim, or a plastic device, in between the bones which we slip in from the back side, and then we lock the bones together, with screws, only instead of being attached to a plate in the lower back, they're attached to two separate rods

because the lower back bones are a bit larger than the neck bones are, and on the right and on the left side in order to get the best tailored fit to make the fusion happen, it just works out better to use a rod attached to the screws, and that's the fusion process in order to get these bones to heal together.

We take the bone that we removed, we grind it up into a special little space, which we call bone graft, and then we kind of glue those bones together, and this entire construct here, you can see in an x-ray, has the screws and the rods, and the little shim, the shim looks as like these little metallic balls because it's plastic. You need to put some metal balls in the plastic so you know where it is on an x-ray. And that's the laminectomy, discectomy and spinal fusion, L-4/L-5 segment, which is the area where most of the disk was touching the nerves.

Q Just as you testified for the neck, did you do x-rays to --- after his back surgery, just as you did with the neck surgery, did you do x-rays to the back?

Here's one, 18A taken May 13, 2016?

A Yes.

Q Did he have the same risk for pseudoarthrosis in the back than he had for the neck with smoking?

A Yes.

Q And did you make the same recommendation that he stop smoking for a period of time?

A Yes.

Q Did he have a pseudoarthrosis or failure to fuse in the back at any time?

A No.

Q And what we're looking at here, is it a solid fusion?

A Yes.

Q In both the x-ray photos, both 18A for the back and the one for the neck, are those --- is that hardware inside him permanently?

A Yes.

Q I believe that's --- That's on all the exhibits.

THE COURT: Okay.

We're going to stop for now. Doctor, return to the stand for a minute.

Doctor, we need you here in the morning. And will you leave your records here?

THE WITNESS: Sure.

THE COURT: We'll return whatever you have afterwards?

THE WITNESS: Sure.

THE COURT: You may step down, and you may leave if you wish.

THE WITNESS: Thank you.

THE COURT: So, Jurors, we are finished for today. We will see you tomorrow at 9:45, and this time we will start on time.

All right. Please be true to my directive that you not discuss the case. You can see how having anyone make any comments on anything that goes on here makes absolutely no sense. You have to be here to listen and to see for yourself. You can't have someone say, "They missed this or didn't they talk about that or you know what that means?" Look at how much you learn in the course of a day.

All right. So, we see you tomorrow fresh and healthy and ready to go. Okay. Thank you very much.

COURT OFFICER: All rise. Jurors exiting.

(Whereupon, the jury exits the courtroom.)

(Whereupon, the following takes place on the record in open court out of the presence of the jury among Mr. McCrorie, Mr. Acosta-Diaz, Mr. Kaminsky, Mr. Abrahamsen, and the Court:)

THE COURT: Counsellor, do you have anything to address before we say goodbye?

MR. McCRORIE: No.

MR. KAMINSKY: No. I feel guilty. I didn't speak today. I feel like I ---

THE COURT: Tomorrow, you'll earn your pay.

MR. KAMINSKY: I hope so.

THE COURT: Thank you very much.

(Whereupon, the proceedings were adjourned to March 31, 2017.)

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