In The Matter Of:

Dunne v.

1 Bryant Park, et al.

March 31, 2017

JoAnn DiDonato

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: CIVIL TERM PART IA-10
----------X
JAMES DUNNE and MINDY DUNNE,

Plaintiffs, TRIAL
Index No.
-against- 305445/08

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

Defendants.
----------X

851 Grand Concourse
Bronx, New York 10451
March 31, 2017

B E F O R E:

HONORABLE LIZBETH GONZALEZ,
Justice of the Supreme Court
(and a jury)

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JoAnn DiDonato
Senior Court Reporter

THE COURT OFFICER: All rise, jury entering.

(Whereupon, the jury enters the courtroom.)

THE COURT: Good morning, jurors. Where's your happy faces? Oh. Everyone have a seat, please.

We are going to continue this morning with the testimony of Dr. Merola. Mr. McCrorie is doing a direct examination of the witness. That will be followed by Mr. Kaminsky, who is cross-examination of the witness.

All right, we are good. Thank you.

Counsel, you may proceed.

MR. McCRORIE: Thank you, Your Honor.

A N D R E W M E R O L A, M.D., having been previously sworn, resumed the witness stand and continued to testify as follows:

CONTINUED DIRECT EXAMINATION

BY MR. MCCRORIE:

Q. Dr. Merola, I just wanted to ask you a question about I called it metal in his neck. So when we look at an MRI, you showed the jury 11A yesterday, what are the black marks on the post MRI in 2010 of the neck?

A. That's the plates and the screws.

Q. Can you tell the jury, I'd like you to assume that when he first went for his first MRI to the neck and back in August of 2008 they did X-rays of his eye orbits. Why is that, Doctor, and that he is a welder, a certified welder?

A. So when you do an MRI because it's a magnet, that magnet interacts with things that are metallic, but it interacts with specific types of metals, so the most common metal that we are familiar with is stainless steel or some type of steel alloy.

Those types of metals are highly magnetized by large magnets, which means two things. Number one, they get hot if they're placed into a magnet. They heat up. And, number two, they could potentially move. So a welder that's welding metal can sometimes get metal fragments in and/or around their eyes, and if there are small metal fragments in there and you're exposed to an MRI scanner you can generate heat around those metal fragments that can destroy the eye or eye tissue or the metal fragments can move and then destroy the eye or eye tissue because of their steel content.

The metal that we use for spinal implants is made out of titanium, so it doesn't have the same magnetic quality as a steel implant does, and that's why titanium implants can have MRIs done.

Orthopedic rods or nails that are used for fractures are also titanium, so that you can get an MRI with those types of metallic implants, so it depends on the metal that is used the amount of magnetization that happens when you're exposed to an MRI.

Q. Understanding your notes are here, they're marked in

as Plaintiff's 6, you also have seen Plaintiff's 4, the Medcor report; correct?

A. Yes.

Q. Okay. Does smoking cause desiccation?

A. Smoking can lead to dessication, yes.

Q. And does everyone have dessication, whether you smoke or not?

A. Yes.

MR. KAMINSKY: Objection, Judge.

THE COURT: I'll allow it.

Q. Can I just ask -- I want to ask a question. Does dessication -- everyone has it, but does dessication mean there's pain?

A. No.

Q. Does degeneration mean there's pain, whether it's in the spine or the arm or anywhere?

A. No.

Q. Does spurring equal pain?

A. No.

THE COURT: Sorry. Does what?

MR. McCRORIE: Spurring, S-P-U-R-R.

THE COURT: Thank you.

Q. And does a desiccated disc always herniate?

A. No.

Q. Doctor, we can -- before we have you go over these

surgeries, we were going through some of the notes.

Could you just go back to March of 2009? March 23rd is the note, I believe.

A. Yes.

Q. Can you tell the jury what about Dr. Epstein's opinion did you not concur with?

THE COURT: Sorry. This is Dr. Merola's note or --

MR. McCRORIE: Yes.

THE COURT: -- Dr. Epstein?

MR. McCRORIE: Doctor Merola's note.

Q. Is Dr. Epstein's note part of your file?

A. Yes.

Q. And not what Dr. Epstein says, what do you not concur with?

A. So I read the report and Dr. Epstein's examination failed to take into consideration --

MR. KAMINSKY: Objection.

THE COURT: Hold on one second. Step up, please.

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

(Whereupon, the following takes place on the record in open court in the hearing and presence of the jury.)

THE COURT: We have an objection. Counsel, do

you continue with your objection? We are going to mark this document.

MR. KAMINSKY: Based upon our discussions, I withdraw my objection.

THE COURT: Excellent. Let's mark this.

MR. McCRORIE: We are going to mark 34, Dr. Epstein's report in evidence, and we're going to mark -- I mean is it 33 or 34, Jasen?

MR. ABRAHAMSEN: 34.

MR. McCRORIE: 34 Dr. Epstein, 35 Dr. Das, from Dr. Merola's file.

(Whereupon items are received and marked in evidence as Plaintiffs' Exhibits 34 and 35.)

THE COURT OFFICER: Plaintiffs' Exhibits 34 and 35 so marked into evidence.

MR. McCRORIE: Yes.

THE COURT: There was an open question.

MR. McCRORIE: I will withdraw the question now that it's in evidence and ask about the actual report, Your Honor.

THE COURT: Thank you.

Q. Dr. Merola, first off, you're holding in evidence the report of a Nancy Epstein; correct?

A. Yes.

Q. Okay. On page two --

THE COURT: That would be thirty --

MR. McCRORIE: Thirty-four.

Q. On page two, the second full paragraph, I want you to read where it says: Of note, I did discuss. If you could read that out loud. Just tell us what that says.

A. Of note, I did discuss the fact that I am not an advocate nor do I truly believe in the utilization of epidural steroid injections.

Q. Do you concur or not concur with the fact that epidurals are useful tools when somebody has a herniated disc?

A. I concur that epidurals are a useful tool when a person has a disc herniation.

Q. Okay. On the paragraph above that where it states: There is no evidence of significant thecal sac or nerve root compression at any respective level, do you agree or disagree with that statement?

A. I disagree with that statement.

Q. Did you -- yesterday you said you had loupe magnification. Other than what you showed the jury on the MRI, the disc on the cord, did you physically see and personally see the disc on the cord at the cervical level?

A. Yes, I did.

Q. And did you physically see the disc in the lumbar spine compressing the nerve roots?

A. Yes.

Q. Did you take that disc out in the lumbar and free the nerves?

A. Yes.

Q. Did you take that disc off of the spinal cord and the cervical?

A. Yes.

Q. Just so we're clear, just so we're not confused here, do you believe epidurals were a good thing or a bad thing for Mr. Dunne to try?

A. I think they were a good thing for Mr. Dunne to try.

Q. I'd like you to -- you know about Dr. Schottenstein, who he is; correct?

A. Yes.

Q. So you don't have to say what he's doing, because he'll come in later, but you are aware that even after the surgery he's been getting epidurals?

A. Yes.

Q. And do you agree or disagree with the fact that the -- withdrawn.

Post-surgery, do you have information whether or not the epidurals have helped him?

A. Yes.

Q. What is your understanding of whether or not the epidurals have helped or not?

A. That they are helpful.

Q. Okay. Do you have -- can you discuss the physical examination of Nancy Epstein?

MR. KAMINSKY: Judge, I object to that. I don't know if he can do that.

THE COURT: You need to rephrase.

MR. McCRORIE: Okay.

Q. Not discuss it, do you --

THE COURT: First of all, you are talking about Dr. Epstein's physical examination of the plaintiff, not the examination of her.

MR. McCRORIE: Oh, yes, Your Honor.

Q. Dr. Merola, your knowledge of what Dr. Epstein did, just like when you write physical examination in your report you state the physical examination you did; correct?

A. Yes.

Q. The question I'm asking you is based on her note, what physical examination did she do or not do of Mr. Dunne?

A. She did an examination. She did a cursory neuro-examination of Mr. Dunne.

Q. What do you mean by that?

A. She did what's called a gross physical examination, a qualitative exam of cranial nerves, motor function of the arms and hands, motor function of the legs and feet.

Q. How did your exam differ of Mr. Dunne?

A. I additionally did what is known as provocative

testing. That is the compression distraction test, looked at reflexes and looked at sensation as well.

Q. The final page, the final paragraph, where she indicates she does not see evidence of a clearcut surgical lesion at either lumbar or cervical, do you agree or disagree with that?

A. Disagree.

THE COURT: Counsel, step up one minute, please.

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

(Whereupon, the following takes place on the record in open court in the hearing and presence of the jury.)

Q. Dr. Merola, understanding surgery had not been performed -- this note is 2/27 of '09 -- what does a surgical lesion mean?

A. A surgical lesion would be an anatomical abnormality that would be amenable to an operation. Frequent --

THE COURT: Doctor, could you speak in English, please?

THE WITNESS: Sure. It would mean something in the body that you could then address with an operation, so is there something for an operation to do.

Q. Such as a herniated disc?

A. Correct.

Q. Dr. Epstein wanted to do further testing called non-contrast CT. Did you believe at that point, approximately a year or nine months after the accident, after all of the conservative treatment, after the MRIs and X-rays, that a further CT would be necessary?

A. No.

Q. Why not?

MR. McCRORIE: Withdrawn.

Q. A CT, because a CT hadn't been done. Did you believe a CAT scan was necessary?

A. No.

Q. Why not?

A. The MRI films that we had an opportunity to look at correlated very closely with the physical findings reproducing nerve pain going into the arms and hands.

Q. Finally, she sent a copy of the report. Forget the first one, or Mr. Dunne. She sent a copy to his primary care physician. You see that?

A. Yes.

Q. Did she send a copy to the right Dr. Hausknecht or the wrong Dr. Hausknecht?

A. The -- a non-treating Dr. Hausknecht.

Q. An Allan Hausknecht on Long Island in Hewlett; correct?

A. Yes.

Q. Please tell the jury the Dr. Hausknecht that actually treated Dr. Dunne for the approximate nine months.

A. Dr. Aric, A-R-I-C, Hausknecht.

Q. Does he have an office in Hewlett, New York?

A. No.

Q. Where is Dr. -- the Dr. Hausknecht you referred Mr. Dunne to, where is his office?

A. Manhattan.

Q. And did -- on 37th Street; correct?

A. Yes.

Q. Were you copied on this, other than Mr. Dunne bringing it to you?

A. No.

Q. Okay. After Mr. Dunne came to you and said what Dr. Epstein had said, did you offer to send Mr. Dunne to someone else to see what they think?

A. Yes.

Q. Who is that?

A. Dr. Das.

Q. And do you have Dr. Das's report there?

A. Yes.

Q. When did Dr. Das see Mr. Dunne?

A. March 23rd.

Q. Did Dr. Das do provocative testing?

A. Yes.

Q. Did Dr. Das interpret the films?
A. Yes.
Q. Did Dr. Das concur or not concur with the fact that at this point surgery would be the final option?
A. He concurred with the need for surgery.
MR. KAMINSKY: I'm sorry. For which part of the body?
Q. For the -- what did he concur with, the surgery to what part?
A. The need for surgery to the neck.
Q. Okay. And at that point surgery to the neck was the only thing that was -- that was being done first according to Dr. Hudak; correct?
A. Yes.
Q. Now, I want to ask you this. Since the neck surgery has Mr. Dunne --
THE COURT: Since the next surgery?
MR. McCRORIE: Since the neck surgery.
THE COURT: I'm sorry. Neck, not next?
MR. McCRORIE: Neck, N-E-C-K.
Q. Since the cervical surgery in 2009, has Mr. Dunne continued to make complaints of pain to the cervical region?
A. Yes.
Q. Since the lumbar surgery of July 2010, has he continued to make complaints to the lumbar region?

A. Yes.

Q. I want to ask you, do you consider your surgery to the cervical region a success?

A. Yes.

Q. Why is that?

A. As a stabilization procedure, that is as a procedure to prevent nerves from getting worse, it has maintained his neurological status. In other words, we haven't had any severe progressive nerve dysfunction. That's the purpose of the surgery.

Q. In your notes when you discuss surgery to prevent the further neurological compromise and progression, what does that mean?

A. It means that pressure on the spinal cord and on the nerves would otherwise cause the nerves that go into the arms and hands to deteriorate. That means lose sensation, lose strength and lose the ability to properly use the arms and the hands.

Q. Had you not removed the disc that was actually touching the cervical spinal cord at C5-C6, what is your opinion of what would have occurred with Mr. Dunne?

MR. KAMINSKY: Objection.

THE COURT: Do you understand the question?

THE WITNESS: I think so.

THE COURT: Then I'll allow you to answer it.

A. Okay. What would have occurred is a progressive neurological condition where the spinal cord and the nerves would have suffered damage to become progressively weaker, causing difficulty using the arms and the hands.

Q. Had Mr. Dunne's cervical complaints and condition progressed from the time he first saw you until the time you told him you believed the surgery was required in January of 2009?

A. Yes.

Q. I just have the same question with the lumbar spine. Had you not performed the surgery to free up the disc that you say you visualized on an MRI and in loupe magnification touching the nerves at L4-L5, what would the result have been for Mr. Dunne had you not done the surgery?

A. A similar problem would occur, which is continued pressure and irritation and damage to the nerves going into the legs and feet. It would affect the ability to use the legs and the feet.

Q. Is a desiccated disc more susceptible to herniate with trauma than a non-desiccated disc?

A. A desiccated disc is more susceptible to a traumatic injury.

Q. And is the C5-C6 a common level for you to see for you to operate on?

A. C5-C6 is a common level to have a surgical procedure,

yes.

Q. How about the L4-L5 level, is that a common -- do you see that often when clients -- when patients come in to you?

A. Yes. L4-L5 is also a common area that undergoes surgery.

Q. Are those the areas where someone bends, where -- well, why is that?

A. C5-C6 is just about in the midpoint of the cervical spine, between your head and your shoulders, depending upon how long your neck is, and L4-L5 is the -- and it depends on how your lower back is built, but L4-L5 is an area above the level of the pelvis where the lower back has a tendency to pivot more.

Q. In the past nine years there have been -- we showed them to the jury. There have been three MRIs of the neck, three MRIs of the back and X-rays routinely.

What is the purpose of what is called serial, repeat, MRIs for a man with the issues such as Mr. Dunne, surgery and herniated discs at those levels in the neck and back?

A. So in Mr. Dunne's case the reason that we do X-ray studies and MRI studies over time is we are observing the mechanical component of the spinal column in the areas next to the fusion site, so we are looking at the discs above and below the area of the cervical fusion and the lumbar fusion.

Q. I'm going to start jumping a little more so we can get to the opinion questions, but can you quickly go to October of

2009? It's October 12th.

A. Yes.

Q. So in that note you talk about what you told the jury yesterday, he's wearing a bone stimulator?

A. Yes.

Q. Post-cervical surgery?

A. Yes.

Q. And so we are clear, yesterday you said there was no issue whatsoever regarding his smoking, meaning the things you told them there would be a risk of did not occur?

A. Correct.

Q. The pseudarthrosis?

A. Yes.

Q. And did he tell you that he had given up smoking for the period of time before and after -- he's still smoking now, but did he tell you that he listened to you and not smoked during that time period?

A. Yes.

Q. Up until the time -- period of time say about one year after the lumbar surgery, did you at one point start to see Mr. Dunne with less frequency than from before the surgery and followup of the surgery?

A. Yes.

Q. Just, I'm going to -- your notes are in evidence, so we'll just jump all the way to December 6, 2010, and you can

just let me know when you are there, Doctor.

A. Yes.

Q. I will ask you first a general question. Has there ever been a visit, including up until today, you know, today's date, from the time you first saw Mr. Dunne until the time you last saw Mr. Dunne in March of 2017, that he did not make a complaint of pain to his neck?

A. No.

Q. Has there ever been a time in your office that he had not made a complaint of pain to his lumbar, his back?

A. No.

Q. Has there ever been a time that you had not found spasm to both the neck and the back?

A. No.

Q. And once again -- withdrawn.

With regard to a herniated disc and a surgery to correct a herniated disc that's causing symptoms, how does spasm occur in either the neck or the back?

A. Spasm occurs as an involuntary contraction of the muscles of the neck and back to prevent the spine from going into a position that would otherwise reproduce pain.

Q. So using the December 6, 2010 note, you just note that James was placed on Valium from Dr. Aric Hausknecht, and it says it's for muscle spasm?

A. Yes.

Q. Could you just tell the jury why Valium is used for muscle spasm?

Sometimes there's a different connotation. What did Valium start as? I know sometimes people use it as an antidepressant. What did it start as?

A. Valium is a medication that acts on the central nervous system, that is the brain and the spinal cord, and it has multiple effects, so depending upon what the problem is you can use it for different things. And it is often used for patients that have chronic long-term muscular spasm which then reproduces pain, so in this case Valium is used as an anti-spasm medication.

Q. In any of your notes -- I just want to define another word. If you state: James should continue, it looks like psychiatric, but it's called physiatric care, what does that mean, physiatric care?

A. That is physical therapy, maintenance physical therapy. That's the third part of physical therapy that we spoke about yesterday, where physical therapy helps to maintain a patient's function.

Q. And now utilizing this note in the impression and the plan, if you state with both the cervical and lumbar surgeries that James continues to suffer from chronic permanent residual sequelae of both the cervical and lumbar radiculopathies, what do those words mean together, the sequelae and --

A. So it means that surgery was undertaken to prevent the nerve damage that he had from getting worse, but not to reverse that damage, and that he continued to have the residual damage to the neck and back regions that we continued to monitor from a medical perspective.

Q. Can you please tell the jury in spinal surgery, either in the neck or the back, what adjacent level segment breakdown is?

A. The adjacent segment is the segment that is immediately next to the area that has had the fusion, so it's the area above and the area below the fused segment.

Because the spine is mechanical and because a fusion is a mechanical process, every mechanical process can wear out over time depending upon the age of the patient and their physical requirements and the status of their discs, so we monitor patients for the adjacent segment over time to see whether or not those segments develop herniations or collapse or other problems that would require us to fix those areas, that is fuse those areas as well.

Q. Utilizing that note, and the jury will have the notes to see wherever else it is, but when you write each time after the back surgery he remains 100 percent totally disabled from all work duties, all working duties, what does that indicate? What were you indicating?

A. So at that time the opinion was he should avoid

working until we got to his maximum functional status.

Q. Has there ever been a time where you advised or told James it would be okay to go back to construction work, manual labor or steamfitting?

A. No.

Q. Did you find James Dunne to be a compliant patient?

A. Yes.

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

A. Yes.

Q. Can you go to the note of October 31, 2011?

A. Yes.

Q. Can you discuss with the jury if they see different types of medications being used at different times, what is the purpose with someone who has chronic sequelae from both lumbar and cervical radiculopathies of changing pain medications or muscle relaxers over the period of time?

A. Sometimes your body can develop a -- what we call a tolerance to a medicine, which means that if you're taking a medicine for a long period of time it may not work as well, so you either have to increase the dosage of the medication, which may not be good for you, or you can switch over to another medicine to see whether or not that might help.

Q. If you could use that note in the middle of the first paragraph where you state: He is still under the care of Dr. Hausknecht and on medications, can you read after that your

words and tell the jury what that means, which he indicates produces?

A. Which he indicates produced somnolence, which is sleepiness, and difficulty with concentration, so kind of a foggy mentation, kind of a foggy head and sleepiness from some of the medications.

Q. And now a year and a few months post the back surgery that you did, what in the next sentence did Mr. Dunne report to you?

A. He told me that he wanted to -- he was going to do some job retraining and to try to get back into the workforce.

THE COURT: I'm sorry?

THE WITNESS: Job, J-O-B, retraining to try to get back into the workforce.

Q. Okay. And when was he experiencing pain at that point as noted by you?

THE COURT: This is all relative to the December 6, 2010 note?

MR. McCRORIE: No. We went to October 31, 2011, Your Honor.

THE COURT: Thank you.

MR. McCRORIE: There were notes in between, but I just --

A. So at that time, in October of 2011, sitting for longer than about 20 minutes or standing for longer than 20

minutes was a problem. Bending, lifting and twisting were problems, trying to push or pull and trying to get down and stoop or crawl were also problems, that is, those were activities that reproduced symptoms.

Q. What does to incur recurrent pain and symptoms mean?

A. So those were activities that I recommended he avoid in order to not reproduce the pain.

Q. In your physical findings, just to define it in this one note -- it's in other notes, but when it says demonstrates an antalgic and kyphotic gait pattern with spasm and tenderness --

A. So gait pattern is the way you walk. Antalgic means that there is a bit of a limp. That means you spend more time on one leg than another, so you notice that it's not a smooth forward motion.

Kyphotic refers to being pitched forward, so instead of being completely and entirely upright and erect, if you feel the lower back and you observe the way the patient walks they're pitched forward a bit.

Q. I'll have you jump now to -- well --

THE COURT: Jurors, why don't you stand and stretch.

(Whereupon, there is a pause in the record.)

THE COURT: Okay, everybody.

Q. To move forward, I'm going to skip 2012. The notes

are there.

THE COURT: I'm sorry. Date?

MR. McCRORIE: I'm going to skip 2012 to move forward, and I will indicate there are no notes from 2012 to March 2014, so two years.

Q. Did you have any knowledge as to whether or not he was seeing Dr. Schottenstein beginning 2013, to start more aggressive pain management?

A. Yes.

Q. And --

THE COURT: How do you spell that?

MR. McCRORIE: Schottenstein, S-H-O-T-T-E-N-S-T-E-I-N.

THE WITNESS: It's S-C-H.

THE COURT: Thank you.

Q. Okay, so March 24, 2014, are you there in your notes, Doctor?

A. Yes.

Q. You indicate at that point since the last time he saw you he had gone to VESID, V-E-S-E-D (sic). What is your understanding of what VESID is?

A. It's a program that reassesses and tries to figure out the best ways to get patients into the workforce.

Q. Okay. If you could just go to the report in that same paragraph, what was he reporting he had been feeling since the

last time he saw you?

A. So he was having some headaches at that time, low back pain with pain radiating down the right side, somewhat worse than the left side, including some buttock pain. He was having some right leg give way, and the low back to some extent had gotten worse.

Q. Did Mr. Dunne, after the cervical surgery in 2009, did he report relief of the what was previously called severe shooting pains down his arms?

A. Yes.

Q. Over the years has the pain returned, but not to that level?

A. Yes.

Q. To some degree?

A. Correct.

Q. And could you explain to the jury how that could happen?

A. Well, the postoperative MRIs that we have looked at for Mr. Dunne show that we do have what we call subadjacent, that is below the level of the fusion, disc protrusion, disc herniation at C6-C7.

Q. You showed that to the jury yesterday, so we don't have to do it.

A. Yes.

Q. In your opinion has that increased from the date of

the first MRIs? Has it become a larger herniation?

A. Yes.

Q. Can you, using the end of that note, just picking this note to define two more words, in your notes when you talk about manifestation of mechanical axial pain or derangement to the neck and the back, what does that mean, mechanical axial pain, as opposed to some other kind of pain?

A. Mechanical means activity related. Axial means spinal, neck and back.

Q. Okay. On that date you requested another MRI --

A. Yes.

Q. -- to the neck and back?

A. Yes.

Q. On the next date you don't really -- Mr. Dunne, May 5th, 2014, had tried something called radiofrequency rhizotomy. Another doctor will explain exactly what that is, but is that a pain management treatment you agreed with?

A. Yes.

Q. Each time an MRI was performed on Mr. Dunne's neck or back, did you review it personally rather than relying on the radiologist report?

A. Yes.

Q. August 2014, jumping in your notes just to August 11th.

A. Yes.

Q. Again, there's two different types of medications. One is called T-I-Z-A-N-I-D-I-N-E. Another one is called Duexis, D-U-E-X-I-S. What were those producing with him, if anything it says?

A. Those were also producing that foggy headedness and some sleepy feelings.

Q. Okay. At the end of that note, actually December 15th, 2014 --

THE COURT: You're going back?

MR. McCRORIE: No, December 2014, getting closer to the --

THE COURT: Oh, December?

MR. McCRORIE: Yes.

Q. You indicate in that note a hundred percent totally disabled from work duties as a steamfitter.

A. Yes.

Q. Okay. When you state Mr. Dunne, it says trying to get him back into the workforce is difficult because of a combination of both good days and bad days from which he suffers and does continue to remain on medications, when you say good days and bad days, has there ever been a day he told you he wasn't in pain?

A. No.

Q. What do the words clinical correlation mean?

A. It means that when you have -- when you do or have a

test or a test result you then need to understand what that test result means in a patient's body, so tests can either be positive or negative in and of themselves, but they're meaningless unless you examine a patient to understand what the test manifests, shows in the actual patient, so you can't have a test without a patient. You need to put the two together. That's clinical correlation.

Q. Does a radiologist clinically correlate?

THE COURT: Excuse me one second.

(Whereupon, there is a pause in the record.)

Q. Does a radiologist clinically correlate?

MR. KAMINSKY: Objection.

Q. When a radiologist looks at a film up on the board and the patient is not in the room and not in the building, can he clinically correlate what he sees?

A. No.

Q. I'll go to June 29, 2015. On that date what is -- you say spinal range of motion was tested qualitatively at approximately 50 percent. What does qualitatively mean? And then you can tell us what the 50 percent means. What does that mean, I tested it qualitatively?

A. Qualitatively means without a specific numerical measurement. It's an opinion based on what you look at.

Q. And if sometimes it's 50 percent and sometimes it's 30 percent, what does that account -- what can you account that

for, the difference?

THE COURT: Counsel, would you step up, please.

Jurors, you can stand and stretch.

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

(Whereupon, the following takes place on the record in open court in the hearing and presence of the jury.)

Q. Doctor, I'm not going to point you to the notes. Just assume they're up there. On December 14th it states he's doing home therapy. What is that?

A. That means stretching and walking and basically maintaining his condition at home without the aid of a formal physical therapist.

Q. If it was not an issue regarding authorization, would you recommend that he do physical therapy?

MR. KAMINSKY: Objection, Judge. Now, can we approach now?

THE COURT: Yes.

MR. KAMINSKY: That's a problem.

THE COURT: Yes.

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

(Whereupon, the following takes place on the record in open court in the hearing and presence of the

jury.)

THE COURT: Objection sustained.

Q. What are nonsteroidal antiinflammatories?

A. Those are medications like ibuprofen, Advil or Aleve.

Q. July 25th of 2016, we're almost at the end of the notes, if you can go to that impression and plan.

A. Yes.

Q. Can you just read the first sentence and tell us what that means?

A. Some physical findings on examination today are consistent and concordant with an adjacent segment issue with respect to the cervical spine as well as the lumbar spine, and these are always considerations given mechanical reconstructions of the neck and back.

Q. In that exam and all of your exams, did you perform provocative testing that you told the jury about before in physical examination?

A. Yes.

Q. Just going to September 2016, in your impression and plan, --

A. Yes.

Q. -- did you have the benefit of the X-rays we showed the jury yesterday, both I think it's May and July of 2016?

A. Yes.

Q. Whatever the dates are, there were two dates in 2016

before September. Did you discuss the indications of any future surgeries with Mr. Dunne on those dates?

A. Yes.

Q. What did you note in your notes?

A. In my notes I talked about the neck and a time frame of about five to seven years, and I spoke about the lower back in the same time frame.

Q. When I ask you opinions, I'll ask your basis for that. Okay?

A. Yes.

Q. When did you last see Mr. Dunne?

A. March of this year.

Q. Okay. Did you do a complete physical examination?

A. Yes.

Q. Was Mr. Dunne still making complaints of pain to his neck and his back?

A. Yes.

Q. And did you still find similar findings as you had in the past?

A. Yes.

Q. Can you go to the March 16, 2017 note and the physical examination? If you can go to the end of the physical examination.

A. Yes.

Q. The rest of it is in evidence.

What does right quadriceps reflexive loss and right lower extremity atrophy proximally measured at 2.25 centimeters when compared to the contralateral side, what does that sentence mean?

A. That means that on the right side when you compare it to the left side the muscle is not as large as it is and that the reflex on the right knee is not equivalent to the reflex on the left knee.

THE COURT: Excuse me. The muscle is not as large in which?

THE WITNESS: Right. Right leg.

THE COURT: Right leg?

THE WITNESS: Correct.

THE COURT: So it's smaller?

THE WITNESS: Yes.

Q. What was the significance, if any, to you understanding Mr. Dunne's medical condition that you were treating him for?

A. It gives me an idea of what his nerve function is at that examination and that there are some nerve deficits in the legs.

Q. What causes atrophy?

A. A lack of an ability of the nerve to work normally when it's inside of the muscle.

Q. Okay. I'm going to ask you, I will be done with the

examination in just a few minutes. After asking questions, I'm going to give you a hypothetical. Okay?

I'd like you to assume that James Dunne was 41 years old on May 20th, 2008. He was working as a union steamfitter from 1992 to May 20th of 2008. I'd like you to assume that there had been no prior history of any neck or back pain other than one time telling a podiatrist that he had back soreness for a period of two weeks, which was cured with orthotics and cortisone injection into his heel for heel spurs. Okay?

A. Yes.

Q. I'd like you to assume that in his entire life up until that date of 5/20/2008 he'd never been to a chiropractor, spinal orthopedic, had no X-rays to the neck or back, no MRIs and no treatment whatsoever to the neck or back. Okay?

A. Yes.

Q. I'd like you to assume that he testified he did not have any pain to his neck or back and never had radicular radiating symptoms from either the neck or the back in his life prior to that date. Okay?

A. Yes.

Q. 5/20/08.

I'd like you to assume that Mr. Dunne testified that on May 20th of 2008, he was in a construction hoist accident that rapidly descended and hit hard and, as he says, violently into the pit below, into the springs below. Okay?

A. Yes.

Q. I'd like you to assume that he said it made a loud sound of a car crash, and further assume he testified that upon impact he had no control over the movement of his body and that his knees initially bent and that his body twisted, including both his neck and his back without his control. Okay?

A. Yes.

Q. I'd like you to further assume he did not hit the ground as he said he was with his arms folded in a packed elevator. Okay?

A. Yes.

Q. I'd like you to assume that immediately after he testified he felt dazed and shaken up and after about an hour -- withdrawn -- and that within that next hour while at lunch, and even stepping out of the elevator, he felt some pain in his knees, he felt pain in his back and he felt pain in the area on the left side of the trapezoid, the area between the neck and the shoulder. Okay?

A. Yes.

Q. I'd like you to assume that he reported to Medcor, the on-site emergency clinic on the site of the work site. Okay?

A. Yes.

Q. That was about, I believe, a half hour after the incident, give or take. And that he reported that he had low back pain, pain to his knees and what he thought and called his

left shoulder to the area of the trapezoid. Okay?

A. Yes.

Q. I'd like you to assume that he stayed out of work for a period of two days. He came back to work, reported the same complaints of pain to Medcor again on that Friday, the 23rd of May, and that the week after he worked three out of the five days. One was a holiday, one he did not work, and that during that time he stated and testified he was still in pain to the areas of the trapezoid, the neck, the back and the knees. Okay?

A. Yes.

Q. I'd like you to further assume that he came to see you that Monday, June 2, 2008, and all the testimony and all the findings up until your testimony here today, including the MRI testing, the fact that he had been to physical therapy, chiropractic and the surgeries you performed occurred.

I know it's a weird way to ask it, but assume that that's so, everything you said and treated him with. Okay?

A. Yes.

Q. And then all of your physical examinations and findings, both objective and subjective, are in the record as you testified to them, and that is part of the hypothetical. Okay?

A. Yes.

Q. I'd like you to assume that the MRI findings, both before and after the MRI -- after the surgeries of cervical of

September 1, 2009 and the lumbar of July 6, 2010, I'd like you to assume that immediately after both of those surgeries, both the cervical and the lumbar, that the what is noted in your notes as severe radiating pain dissipated and he was left with progressive axial pain in both the neck and the back as noted and progressive radicular pain over a multiple year period leading from those surgeries to today. Okay?

A. Yes.

Q. First, I'd like to ask do you have an opinion with a reasonable degree of medical certainty as to the cause of the herniation at the C5-C6 level that you testified to and showed the jury?

MR. KAMINSKY: Objection.

THE COURT: Would you read that back, just the question?

MR. KAMINSKY: Yes, Judge, I am not objecting. I do not want Mr. McCrorie to read back the hypothetical portion. I'm objecting to the request for an opinion.

(Whereupon, the requested question was read back.)

THE COURT: I will allow it.

Q. The way you can answer it, please, is do you have an opinion?

A. Yes.

Q. What is your opinion?

MR. KAMINSKY: Objection.

THE COURT: I'll allow it.

A. My opinion is --

THE COURT: This is to a reasonable degree of medical certainty?

MR. McCRORIE: Yes.

Q. Doctor, in case I don't ask it, each and every time I'd ask that all of your opinions be stated to the jury with a reasonable degree of medical certainty.

If at any time during my questioning you cannot answer a question with reasonable medical certainty, you need to state so. Otherwise, we'll assume every opinion is with a reasonable degree of medical certainty. Okay?

A. Yes.

Q. I may still say it, but can you tell us your opinion?

A. My opinion is that the hoist accident resulted in a C5-C6 disc herniation.

Q. What is the basis of that opinion?

A. The history, my treatment of the patient, my review of the records, my surgical findings, the diagnostic imaging studies which we have had an opportunity to look at which correlate with the surgical findings, in sum and substance my entire interaction with the patient over the last nine years.

Q. You testified yesterday a herniation can be present but not cause symptoms?

A. Yes.

Q. That would be called what, asymptomatic?

A. Asymptomatic, correct.

Q. And can a herniation be caused by trauma or occur over time or both?

A. Yes, both.

Q. Okay. I would like you to assume, despite what your opinion is to the cause of the herniation in the neck, we are just going to talk about the C5.

I'd like you to assume that within Mr. Dunne's cervical spine, on May 19th, so before this accident, there was a preexisting asymptomatic herniated disc that wasn't pressing on anything or causing any compression or nerve root compression. Okay?

A. Yes.

Q. So I'd like you to assume it was preexisting and asymptomatic.

A. Yes.

Q. I'd like you to assume that after that hypothetical, which I won't read again, after the accident it immediately became symptomatic.

Do you have an opinion with a reasonable degree of medical certainty as to whether or not in that hypothetical, the second hypothetical, as to whether or not the accident caused the asymptomatic herniated disc to become symptomatic?

MR. KAMINSKY: Objection.

THE COURT: I'll allow it.

A. Yes.

Q. What is your opinion?

A. That under that circumstance a previously asymptomatic herniation would become symptomatic.

Q. What is your basis of your opinion?

A. The same thing that I had indicated before, which is the history, my treatment of the patient and the correlative findings.

Q. And the history, including there was no complaints or no medical history of radiating pain or neck pain; correct?

A. Yes.

Q. Can an asymptomatic herniated disc be made to become larger or worse with trauma?

A. Yes.

Q. Can a bulging disc become herniated with trauma?

A. Yes.

THE COURT: Sorry. With?

MR. McCRORIE: With trauma.

Q. If someone is desiccated more at the C5-C6 than the other levels of the cervical spine and there is a trauma such as the accident that occurred here, is the C5-C6 level the most likely to herniate?

A. It can be one of the likely levels to herniate, yes.

Q. What I mean is this. Is the weakest disc the most likely to herniate?

A. The weakest disc would be the most likely to herniate, yes.

THE COURT: I need clarification, please. Come up.

MR. McCRORIE: Certainly.

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

(Whereupon, the following takes place on the record in open court in the hearing and presence of the jury.)

Q. Whether it be Mr. Dunne or any patient, if their C5-C6 were the weakest, the most desiccated of discs in their spine on an MRI, would the C5-C6 be the most likely to herniate or rupture with a trauma?

A. Yes.

Q. Regardless of whether the C5-C6 was preexisting and asymptomatic or caused by the trauma, do you have an opinion with a reasonable degree of medical certainty as to the cause of the need for the cervical -- anterior cervical diskectomy and fusion that you performed in September of 2009?

MR. KAMINSKY: Objection.

Q. Regardless of whether the disc in Mr. Dunne's neck under the hypothetical is preexisting and asymptomatic or caused

by trauma of the accident, do you have an opinion as to what the cause of the surgery to relieve the symptoms was in either of those scenarios?

A. Yes.

MR. KAMINSKY: Objection.

THE COURT: Sustained.

Q. Why did you perform the surgery on his cervical spine with a reasonable degree of medical certainty?

A. The surgery was performed for the disc herniation that was a consequence of the accident.

Q. I just have to ask the same questions with the lumbar, and instead of saying the same basis if you could list the basis each time.

But, first, can you give us the basis of the answer you just gave for the cervical surgery?

A. My treatment of the patient, which includes my physical examinations, his history, the diagnostic imaging studies and my operative findings.

Q. Do you have an opinion with a reasonable degree of medical certainty as to the cause of the lumbar L4-L5 herniation under the same hypothetical I originally gave you?

MR. KAMINSKY: Objection.

THE COURT: I'll allow it as long as you understand the question.

THE WITNESS: Yes.

Q. The hypothetical hasn't changed. It won't change from the beginning, okay? So what is your opinion?

A. My opinion is that the lumbar disc herniation was caused by the elevator accident.

Q. What is the basis of your opinion?

A. My treatment of the patient, the history, physical findings, correlative diagnostic imaging studies and my operative findings as well.

Q. Taking that same question in the cervical but making it the lumbar, I'd like you to assume that Mr. Dunne had a preexisting lumbar herniation that was asymptomatic and not touching an exiting nerve root. There were no radicular symptoms or pain symptoms. Okay?

A. Yes.

Q. Do you have an opinion -- I'd like -- well, I'd like you to then assume the accident occurs and symptoms occur immediately, what you call acute onset in your notes. Okay?

A. Yes.

Q. Do you have an opinion with a reasonable degree of medical certainty as to the cause of the lumbar herniation at L4-L5 --

A. Yes.

MR. KAMINSKY: Objection.

Q. -- in Mr. Dunne?

THE COURT: I will allow it.

Q. What is your opinion with a reasonable degree of medical certainty?

A. My opinion is that the lumbar disc herniation was caused by the accident.

Q. What is the basis of your opinion?

A. The history of the patient, my physical findings, correlative diagnostic studies, my operative findings.

Q. So the question was it was previously asymptomatic, so what caused the symptoms, not the herniation?

MR. KAMINSKY: Objection.

MR. McCRORIE: I'll make the question clearer.

Q. You already told us your opinion was that the herniation was caused by the accident. Okay?

A. Yes.

Q. We are on a different question. Assume it's asymptomatic before. It's a herniation, but it's asymptomatic. And now after the accident it's symptomatic. Okay?

A. Yes.

Q. Do you have an opinion with a reasonable degree of medical certainty as to what caused it to become symptomatic?

A. The disc would be --

MR. KAMINSKY: Objection.

THE COURT: Didn't he just answer that?

MR. McCRORIE: No, but he answered the herniation was caused by it. The herniation is already there. I'm

asking the question about aggravation.

THE COURT: I see. I'll allow it.

A. The herniation would become symptomatic as a consequence of the accident.

Q. And in that scenario did the accident aggravate a preexisting asymptomatic herniated disc?

MR. KAMINSKY: Objection.

THE COURT: He just answered that question.

MR. McCRORIE: Okay.

THE COURT: Anything else?

MR. McCRORIE: Yes, Your Honor.

Q. Do you have an opinion with a reasonable degree of medical certainty, understanding you testified that he would require future surgeries to the neck and the back, do you have an opinion with a reasonable degree of medical certainty as to whether or not past the date of this trial Mr. Dunne will have further surgery to his cervical spine?

MR. KAMINSKY: Objection.

THE COURT: I'll allow it.

A. Yes.

(Continued on the next page...)

Q. And can you please tell the jury the type of procedure or surgery you believe, with reasonable certainty, medical certainty, Mr. Dunne will undergo?

A. With respect to the neck, it would be a spinal fusion of the adjacent segment. It's called a revision cervical discectomy and spinal fusion.

Q. And what is the basis for your opinion that he will require future surgery?

A. My treatment of the patient, in addition to post-operative diagnostic studies showing the subadjacent herniation.

Q. With a reasonable degree of medical certainty, do you have a time period when that will occur?

A. Yes.

Q. What is your opinion as to when that will occur?

A. For this patient, within five to seven years.

Q. What is the basis --

THE COURT: Excuse me, excuse me. There's two different segments of the body that have been in issue.

MR. McCRORIE: I think I'm only on the neck, your Honor.

THE COURT: You're asking only about the neck now?

MR. McCRORIE: Just about the neck first, your Honor.

THE COURT: This is how many years off, Doctor?

THE WITNESS: Five to seven.

Q. You understood the last answer to be C5-C6, that's already gone.

A. Yes.

Q. And which level would you --

A. C6-C7.

Q. Is that the disc you showed the jury yesterday in the 2015, underneath the level of the surgery in the 2015 MRI?

A. Yes.

Q. And did you review all of the subsequent MRIs and X-rays from the time you did your surgery to the neck in September 2009?

A. Yes.

Q. Did you put the basis for why it would be five to seven years, with a reasonable degree of certainty? Can you please do that?

A. Yes. Based on the diagnostic studies and my physical exam of the patient, the disc at C6-C7 would require a future surgery.

Q. What is the the current cost of a cervical fusion including the hospitalization and surgical fee for the cervical ACDF?

A. One hundred thousand.

Q. Do you have an opinion with a reasonable degree of

medical certainty as to whether beyond the date of this trial Mr. Dunne will undergo a lumbar surgery in the future?

A. Yes.

MR. KAMINSKY: Objection.

THE COURT: I'll allow it.

Q. What is your opinion of the type of procedure?

A. He would require a revision surgery at the adjacent segment, similar to what we've discussed regarding the neck.

Q. And do you have an opinion with a reasonable degree of medical certainty as to the time period that would occur?

A. Yes.

Q. What is your opinion?

A. That would also be likely to occur within five to seven years.

Q. Did you also likewise review the sets of MRIs after the lumbar surgery performed in July of 2010, the two follow-up MRIs and all of the X-rays that have been done?

A. Yes.

Q. What is the current cost of a lumbar laminectomy fusion at one level, including the hospital costs and the surgical costs?

A. Hospitals, surgical, implants, the entire process would be, for a low back lumbar revision, 125,000.

Q. Do you have an opinion with a reasonable degree of medical certainty as to whether into the future Mr. Dunne will

experience pain in his neck and his back beyond --

THE COURT: Step up, please.

(Whereupon, there was an off-the-record discussion at the bench, among the Court and counsel.)

Q. Before we go further, can you state on the record the level? I know you said the adjacent level. Which level of the lumbar spine would Mr. Dunne --

A. L5-S1.

Q. The level below L4-L5?

A. Correct.

Q. With a reasonable degree of medical certainty?

A. Yes.

Q. Do you have an opinion with a reasonable degree of medical certainty as to your opinion as to whether or not Mr. Dunne will continue to experience pain in the cervical and lumbar region beyond the date of this trial?

A. Yes.

Q. What is your opinion?

MR. KAMINSKY: Objection.

THE COURT: I'll allow it.

A. That he would continue to experience pain and symptoms to the neck and back.

Q. Can you please tell the jury, given your nine years of treatment with him, what time period into the future do you believe he will experience pain to the neck and the back to any

degree into the future?

A. This would be -- this is a chronic process that would be with him for the rest of his life.

Q. Do you have an opinion with a reasonable degree of medical certainty as to whether beyond the date of this trial he should, it is viable for him to continue to see yourself or any board certified spinal surgeon in follow-up treatment?

A. Yes.

Q. What is your opinion?

A. That he should continue to see a spinal surgeon for follow-up visits.

Q. Understanding the visits have gotten less and less, what is the minimum amount of visits on a yearly basis Mr. Dunne should, in your opinion, go to a board certified orthopedic spinal surgeon?

A. On average, it should be about every year or two years, depending upon his clinical symptoms.

Q. And what is the current cost of a visit to -- without X-rays, what's the current cost in a metropolitan area, board certified spinal surgeon, for the visit?

A. A follow-up visit, $250.00.

Q. That's inclusive of both body parts?

A. Yes.

Q. Meaning looking at both the neck and the back?

A. Yes.

Q. You discussed with the jury earlier that you believe he should get neck and back X-rays, the serial X-rays.

Do you have an opinion, with a reasonable degree medical certainty, as to whether or not into the future Mr. Dunne should continue at any interval to get X-rays to the neck and the back? Just X-rays first.

A. Yes.

Q. What is your opinion?

A. That he should have X-ray studies at least every several years to the neck and the back.

Q. By several years, can you be more specific?

A. Every two to three years.

Q. And that's given his particular condition?

A. Yes.

Q. Can you please tell the jury a series, and this would just be for one body part, is it the same for both the neck and the back series, there's several views?

A. Yes.

Q. So could you please tell the jury for one body part, either the neck or the back, what a series current cost of X-rays costs?

A. It's about $250.00.

Q. So if both were performed it would be $500.00?

A. Yes.

Q. Do you have an opinion with a reasonable degree of

medical certainty -- this is the final question -- as to whether or not Mr. Dunne should continue to get MRIs into the future to monitor both the conditions in his neck and his back?

A. Yes.

Q. What is your opinion?

A. That he should continue to have MRIs to both the neck and back.

Q. With what frequency?

A. For Mr. Dunne, I would say every two years.

Q. Is it the same price, current price for both lumbar or cervical MRI?

A. Yes.

Q. What is the current cost of an MRI?

A. About a thousand dollars per body part.

Q. Okay. Thank you, Doctor.

A. Thank you.

MR. McCRORIE: I have no further questions.

THE COURT: No further questions. All right. Jurors, we're going to take a break now. Okay, let me give you five.

THE COURT OFFICER: All rise. Jurors exiting.

(Jury exits.)

THE COURT: Counselors.

(Whereupon, there was an off-the-record discussion at the bench, among the Court and counsel.)

THE COURT OFFICER: All rise. Jurors entering.

(Jurors enter.)

THE COURT: Thank you, everyone. Please be seated.

Mr. Kaminsky, are you ready to conduct the cross-examination of this witness?

MR. KAMINSKY: Yes.

THE COURT: You may.

MR. KAMINSKY: Thank you, Judge.

CROSS EXAMINATION

BY MR. KAMINSKY:

Q. Good day, Doctor.

A. Good morning.

Q. You were asked a lot of questions at the end to assume certain things, remember?

A. Yes.

Q. I want you to assume that I haven't had a chance to ask any questions for two days and I'm anxious to ask some questions.

MR. ACOSTA-DIAZ: Objection.

Q. If I were to assume that you've testified many times before on behalf of plaintiff's attorney's law firm, would I be correct?

MR. McCRORIE: Objection, on behalf of the firm as opposed to a patient.

THE COURT: Rephrase it, counsel.

MR. KAMINSKY: Sure.

Q. Have you testified on behalf of the firm Mr. McCrorie is working with prior to today?

MR. McCRORIE: Objection. Same objection.

Q. Are you familiar with the firm?

THE COURT: You're asking if he testified because the law firm was sued?

MR. KAMINSKY: No, no, no.

THE COURT: Right. That's why you have to rephrase.

Q. Have you testified -- if I were to assume that you've previously testified for plaintiffs represented by this law firm, would I be correct?

A. Yes.

Q. And if I assumed you've done it numerous times, would I be correct?

A. I have done it on prior occasions, yes.

Q. And if I assumed it was more than ten, would I be correct?

A. If I were to guess, I would say yes.

Q. And if I assumed that in addition to testifying, you've also treated many patients represented by that law firm, would I be correct?

A. I have treated patients represented by the law firm,

yes.

Q. And if I assumed it was more than ten, would I be correct?

A. I would be inclined to assume more than ten patients, yes.

Q. If I assumed it was probably more than 25, would I be correct?

A. I would be guessing at the numbers, but as I say, I have taken care of patients, yes.

Q. And if I assumed it was probably more than 50, would I be correct?

A. I wouldn't be able to get into more specific numbers because I don't know what the exact numbers are.

Q. I understand.

A. Yes.

Q. But if I were to assume it might be 75 or even 100 over the course of your career --

MR. McCRORIE: Objection.

Q. Would I be correct?

THE COURT: Sustained.

Q. If I assumed that over the course of your career you have received significant compensation --

MR. McCRORIE: Objection, just to if he assumed, Judge. Ask the question.

THE COURT: Sustained.

Q. You've received significant compensation from this firm, true?

MR. McCRORIE: Objection.

Q. Over the course of your career?

THE COURT: Rephrase, counsel.

Q. What is the amount of compensation you're receiving for your appearances, yesterday and today?

A. $650 an hour for time away from the office.

Q. And the number --

MR. McCRORIE: Objection. Could we just approach?

THE COURT: Yes.

(Whereupon, there was an off-the-record discussion at the bench, among the Court and counsel.)

THE COURT: Rephrase. We will see if this clears up.

Q. You have received compensation to appear in court today, correct?

A. For time away from the office, yes.

Q. Understood. And that's been the case in other cases as well, correct?

A. Yes.

Q. In those other cases have you also received compensation for time you spent meeting with the attorneys?

A. In preparation for cases, yes.

Q. And would it be fair of me to say that prior to testifying today, you've had the opportunity to meet with Mr. Dunne's attorneys?

A. Yes.

Q. And when did that meeting take place?

A. Several weeks ago.

Q. Was it one meeting, more than one meeting?

A. One meeting.

Q. Was it in person?

A. Yes.

Q. Where did it take place?

A. At my office.

Q. And who was present?

A. Mr. McCrorie.

Q. And how long did that meeting take, approximately?

A. About an hour.

Q. And during the course of that meeting did you discuss generally the types of questions you would be asked and the types of answers you were giving?

A. Reviewed the facts of the case.

Q. I understand.

A. And the medical records.

Q. And did you, generally, go over the types of questions you were going to be asked and the opinions you were going to give, generally?

A. No specific questions, but just in terms of the flow of what was going to happen.

Q. Was it explained to you that an issue in this case was whether or not Mr. Dunne's injuries were caused by a traumatic event or caused by a preexisting condition? Was that discussed at all?

A. No. We talked about trauma versus degeneration.

Q. Okay. So then the answer is yes, you did discuss trauma and you did discuss degeneration, correct?

A. Yes.

Q. Okay. And is it fair of me to say that in virtually all the other cases that you've worked with Mr. McCrorie and this firm -- withdrawn.

Is it fair of me to say that on the other cases you've told us you've worked with this firm, one of the issues in those cases as well is whether or not something is due by trauma or something could be due by degeneration?

MR. McCRORIE: Objection.

THE COURT: Sustained.

Q. All right. You discussed the topic of trauma and you discussed the topic of degeneration, correct?

A. Yes.

Q. Did you discuss the MRI films during this meeting?

A. I looked at the films, yes.

THE COURT: Can both of you talk louder.

MR. McCRORIE: Sure.

THE COURT: Thank you.

Q. Now, would you agree with me that --

THE COURT: No, but louder.

MR. KAMINSKY: Okay.

THE COURT: Thank you.

Q. In this case there's a couple of different scenarios; and tell me if you agree with it. Mr. Dunne's injuries were either caused by a traumatic event, correct?

A. Yes.

Q. Or they could be due to a preexisting degenerative condition, correct?

A. Yes.

Q. Or they could be an underlying condition that would have gotten worse over time, correct?

A. These are three different scenarios.

Q. Yes?

A. Yes.

Q. Now in this case, in order to determine if something was caused by trauma, would it be important for you to know the extent of that trauma?

A. No.

Q. Okay. In fact, you don't necessarily know the extent of the traumatic event, true?

MR. McCRORIE: Objection.

THE COURT: Rephrase.

MR. KAMINSKY: Sure.

Q. In other words: You don't know specifically at what rate of speed the hoist made contact with the basement, true?

MR. McCRORIE: Objection.

THE COURT: Sustained.

Q. Do you know?

MR. McCRORIE: Objection.

THE COURT: Sustained.

Q. Concerning the trauma, the traumatic event in question in this case, okay?

A. Yes.

Q. As a result of this event did the plaintiff report any loss of consciousness?

A. There is a report --

Q. Did he report a loss of consciousness, yes or no?

A. One of the reports does indicate a brief loss of consciousness, yes.

Q. Okay. Did he call for an ambulance?

A. Not that I'm aware of, no.

Q. Did he go to the hospital?

A. No.

Q. Did he go to any doctor that day?

A. Just the on-site medical evaluation.

Q. All right. Let's talk about the on-site medical

evaluation, because this is the first time he discusses the incident with any medical personnel, correct?

A. Yes.

Q. And we can agree that Medcor at this location was an on-site medical facility, correct?

A. Yes.

Q. Okay. I want you -- well, first of all, are you aware that after the incident happened, Mr. Dunne stepped out of the hoist under his own power?

A. Yes.

Q. So we can agree that whatever the extent of this incident was, he did not need anyone's assistance to help him step out of the hoist, correct?

A. Yes.

Q. And can we agree that before he even went to Medcor, he went to lunch, correct?

A. I'm not sure.

Q. Do you know that?

A. I don't recall, no.

Q. I want you to assume that before he even went to Medcor, he stepped out of the hoist under his own power, it was lunch time, and he went to a delicatessen. Okay?

A. Yes.

Q. You didn't know that, did you?

A. No.

Q. Okay. I want you to assume that while he was at the delicatessen, he was sitting down on the curb eating a sandwich. Did you know that?

A. No.

MR. McCRORIE: Just objection to --

MR. KAMINSKY: Subject to connection. It's been testified to --

MR. McCRORIE: -- facing the jury while asking the witness a question.

MR. KAMINSKY: I'm allowed to do that.

MR. McCRORIE: I'm just objecting to it, your Honor.

THE COURT: Your voice is going out the door.

MR. KAMINSKY: You've asked me to speak up.

THE COURT: Yes, but not to speak up to the door. You have to look at me and ask the witness.

MR. McCRORIE: Objection, talking to the jury.

THE COURT: Yes.

MR. McCRORIE: And behind the podium. That's where we're supposed to be.

MR. KAMINSKY: Would you like me to stand behind the podium?

I always stand here it's here, it's easier.

THE COURT: You can stay there.

MR. KAMINSKY: Here?

THE COURT: Yes.

MR. KAMINSKY: Thank you.

Q. Were you aware, is it anywhere in your notes, that after the incident Mr. Dunne went to a delicatessen --

MR. McCRORIE: Judge, excuse me, Judge.

Q. Had a sandwich, and finished his lunch like he did every other day, were you aware of that, yes or no?

MR. McCRORIE: Objection. Asked and answered.

THE COURT: Sustained.

Q. Then after lunch he goes to Medcor. Okay? Let's look at what he told Medcor.

It says his chief complaint was low back and left shoulder pain; and this was on the date in question, correct?

A. Yes.

Q. It makes no reference to his neck, correct?

A. Other than the shoulder.

Q. Well, it makes no reference. Do you see the word "neck" in there anywhere?

A. No.

Q. And then the disposition is? Tell the jury.

THE COURT: Sorry?

MR. KAMINSKY: I asked him to read the disposition to the jury.

THE COURT: The disposition?

MR. KAMINSKY: Disposition.

MR. McCRORIE: It says here.
MR. KAMINSKY: In other words, when he left.
THE COURT: Sorry, is there a section of the report?
MR. KAMINSKY: Yes.
THE COURT: Called disposition?
MR. KAMINSKY: Yes.
THE COURT: Okay.
Q. What was the disposition?
A. Back to work.
Q. Then -- by the way, do you know the first time Mr. Dunne had any sort of conversation with an attorney after this incident, do you know what date that may have been?
MR. McCRORIE: Objection.
THE COURT: Step up.
(Whereupon, there was an off-the-record discussion at the bench, among the Court and counsel.)
THE COURT: Let's rephrase.
MR. KAMINSKY: Sure.
Q. Do you know if Mr. Dunne spoke with an attorney?
MR. McCRORIE: Objection.
Q. The day of, within a couple of days, or within a week of the incident?
MR. McCRORIE: Objection.
Q. Yes or no?

MR. KAMINSKY: And then I'll move on, Judge.
MR. McCRORIE: Still object.
THE COURT: I'll allow it, that one question.
A. No.
Q. Now, he did return to Medcor an additional time, correct?
A. Yes.
Q. And this was on May 23rd of 2008, three days after the occurrence, correct?
A. Yes.
Q. Let's take a look at that note. And it said: Patient walked into the Medcor office on 5/20 complaining of discomfort to left shoulder, lower back, and both knees.
THE COURT: You're reading from which is it?
Q. This-- Doctor, do you have the number in front of you?
MR. McCRORIE: This is marked, Exhibit 4 in evidence.
MR. KAMINSKY: Okay.
Q. It says, patient denies any loss of consciousness. Do you see that?
A. Yes.
Q. He denies weakness. Do you see that?
A. Yes.
Q. He denies-- what's the next word?

A. Hypoesthesia.
Q. And what is that?
THE COURT: What was the word?
THE WITNESS: Hypoesthesia, a decrease in sensation.
THE COURT: H-Y-P-O?
THE WITNESS: Yes, H-Y-P-O-E-S-T-H-E-S-I-A.
Q. And --
THE COURT: Wait a minute. And what is that?
THE WITNESS: Decrease in sensation.
THE COURT: Thank you.
Q. So three days after the incident he's denying any decrease in sensation, correct?
A. Yes.
Q. Three days after the incident he's telling Medcor that there was no loss of consciousness, true?
A. Yes.
Q. Three days after the accident he's telling Medcor he does not have any weakness, true?
A. Yes.
Q. And three days after the accident he is denying any paresthesia, correct?
A. Yes.
Q. What is paresthesia?
A. Alterations in sensation.

Q. Okay. So he's denying he has any of those things, true?

A. Yes.

Q. And it says the patient is here for reporting purposes only?

MR. McCRORIE: Just I'll only object to "he's denying". It's reported that he's denying it, whatever the tech wrote.

Q. Do you have any reason to believe that the person that recorded these statements from the plaintiff got it wrong?

THE COURT: Wait a second. What are we doing?

MR. KAMINSKY: We're reading from the records at Medcor.

THE COURT: Okay. You can read from the records. You cannot make comments from the counsel table.

MR. McCRORIE: Yes, your Honor.

THE COURT: If there's an issue, just come up to the bench.

MR. McCRORIE: Can we just approach then?

THE COURT: Yes, and we're not going to make gestures.

(Whereupon, there was an off-the-record discussion at the bench, among the Court and counsel.)

THE COURT: Thank you.

Q. Did I read the Medcor reports correctly?

A. Yes.

Q. And so when it's reported-- when I say it's reported that he denied all those things, that in fact is what was reported, true?

A. Yes.

Q. Okay.

THE COURT: That's what's written in the report?

THE WITNESS: Correct.

MR. KAMINSKY: Yes.

Q. Let's just make sure we're on the same page: Patient denies any loss of consciousness, weakness, hypoesthesia, or paresthesia. Okay?

THE COURT: Counsel, you're repeating.

MR. KAMINSKY: I'll move on.

THE COURT: Please.

Q. The next sentence says: "Patient is here for reporting purposes only and does not want any medical attention at this time." Did I read that correctly?

A. Yes.

Q. So according to what we've read so far concerning the nature of the incident, according to what the plaintiff reported, it was not significant enough to cause him to lose consciousness, correct?

A. Yes.

Q. It was not significant enough for him to experience

numbness, correct?

A. Yes.

Q. It was not --

MR. McCRORIE: Objection.

Q. It was not significant enough for him to experience --

THE COURT: Counsel, don't turn your back.

No, don't make faces at me.

MR. KAMINSKY: I'm sorry, Judge.

THE COURT: That's a bad thing to do.

MR. KAMINSKY: It's my style so I'll have to make a modification.

THE COURT: Thank you.

MR. KAMINSKY: I apologize.

THE COURT: Thank you.

Q. Patient did not report any loss of sensation, correct?

A. Yes.

Q. And so in your report, when you first saw him roughly ten days after the incident - correct? - you immediately concluded that his complaints were due to the incident, correct? In your very first note you made that determination, true?

A. Based on the patient's history and my physical exam, yes.

Q. Now, we know what he told Medcor so that gives us

some idea of the extent of the impact. Okay. We know it wasn't serious enough --

THE COURT: Counsel, don't. Do not give your opinions. Ask questions, please.

MR. KAMINSKY: Okay.

Q. Prior to that first note, you did not have the opportunity to review any MRIs of his spine because none had been taken yet, correct?

A. Yes.

Q. Okay. Now, concerning the question of whether or not something can be degenerative, you did acknowledge on direct examination - I believe it was yesterday and also again today - you did acknowledge that Mr. Dunne did have disc degeneration in his neck that pre-dated this incident, correct?

A. Yes.

Q. And you did acknowledge that Mr. Dunne did have disc degeneration in his spine that predated this accident, correct?

A. Yes.

Q. And in fact those were confirmed by the MRI films, true?

A. Yes.

Q. So, you were kind enough to help me during the break. You don't have to step down but, for instance, on Plaintiff's 8: This does show disc degeneration that pre-dated the accident, correct?

A. Yes.

Q. And you could see that because, as the jury knows, disc degeneration means loss of cushioning in the discs, correct?

MR. McCRORIE: Objection.

THE COURT: Those are two questions, counsel.

Q. Okay. Give us a refresher: What is disc degeneration?

A. Disc degeneration is part of the normal aging process whereby the disc gradually starts to lose water over the course of time.

Q. Now, let's assume we could agree that it's part of the normal aging process. Okay?

A. Yes.

Q. How old was Mr. Dunne at the time this incident happened?

A. 41.

Q. So you would expect in a 40 year-old person that there would be some disc degeneration, true?

A. Yes.

Q. Now, isn't it also true that the process of disc degeneration is not just determined by the aging process; it could be determined by other factors, correct? Just yes or no.

A. Yes.

Q. And those factors could include what a person does on

a day-to-day basis, correct?

A. To a certain extent, yes.

Q. Because disc degeneration is really wear and tear, correct?

A. Yes.

Q. So, for instance, if a person is a steamfitter, that might make the person more susceptible to wear and tear, correct?

A. It can.

Q. Now, Mr. Dunne was a steamfitter for seventeen years before this incident happened, are you aware of that?

A. Yes.

Q. What does a steamfitter do on a day-to-day basis?

THE COURT: If you know, Doctor.

A. Steamfitters are responsible for fitting and working pipes, and their activities include anything that's required in order to do that.

Q. Such as bending?

A. Yes.

Q. Such as lifting?

A. Yes.

Q. Such as carrying?

A. Yes.

Q. Such as twisting?

A. Yes.

Q. In other words, all the things that you restricted him from doing are the things that he was doing for 17 years before this incident happened, correct?

A. Yes.

Q. So, twisting for 17 years, eight hours a day, year after year, can that enhance this disc degeneration? Yes or no? Just yes or no.

THE COURT: If you can answer with a yes or no. If you can't, you may say so.

MR. McCRORIE: Just objection to "enhance."

THE COURT: Oh, yes. Counsel, sustained. Rephrase it.

Q. Can that affect the process of disc degeneration?

A. Yes.

Q. Bending day after day for 17 years, can that affect disc degeneration?

A. Yes.

Q. Carrying things for 17 years, can that affect disc degeneration?

A. Yes.

Q. Turning your neck, lifting heavy objects, climbing a ladder, squeezing under tight spaces, doing that eight hours a day, day after day, week after week, month after month, year after year, for 17 years, can that affect disc degeneration?

A. Yes.

Q. Okay. Now, in addition to all the daily activities the plaintiff was doing that you now told us could cause disc degeneration, which you've admitted you've seen on the MRI films, smoking can also affect disc degeneration, true?

A. Yes.

Q. In fact, your website links to an article that specifically discusses that, true?

A. Yes.

Q. Which is how I learned about it. Thank you.

And tell the jury, how does smoking affect the process of disc degeneration in a person's spinal column?

A. Smoking can cause degeneration of the discs within the spinal column, as it can cause changes in the collagen structure of any of the tissues in your body as well.

Q. And why is that, because it affects the circulation of blood?

A. It can, yes.

Q. Okay. Did Mr. Dunne smoke before this incident happened?

A. Yes.

Q. For how long and how much?

A. I don't recall the number of years.

Q. What if I told you it was for upwards of more than 20 years, a pack and a half a day. Okay? That's a lot, right?

A. Okay. Yes.

Q. And would you agree with me that that amount of smoking could absolutely affect the condition of a person's spine?

MR. McCRORIE: Objection.

Q. Yes or no?

MR. McCRORIE: Asked and answered.

THE COURT: Sustained.

MR. KAMINSKY: On what grounds, Judge? I'll rephrase it.

THE COURT: Absolutely.

MR. KAMINSKY: Thank you.

Q. Would you agree with me that that amount of smoking for that amount of time could affect a person's spinal column?

A. It may, yes.

Q. And it may affect disc degeneration, correct?

A. Yes.

Q. And it may affect the loss of water in that discs that we're speaking of, correct?

A. Yes.

Q. And that would be true for the neck and that would be true for the spine, the lumbar spine, correct?

A. Yes.

Q. Okay. So now we know what his previous activities were and we know what his smoking may have done to his back.

I want you to take this incident out of the equation.

Pretend it never happened. Okay?

Is it possible, that given his smoking habits, given what he does every day for 17 years, if he just would have continued to work and his discs would have continued to desiccate--

MR. McCRORIE: Objection, "possible."

MR. KAMINSKY: Well, that's how you -- could I ask my question?

MR. McCRORIE: Oh --

THE COURT: No talking to, counsel.

MR. McCRORIE: Objection, your Honor.

THE COURT: Thank you. Let's rephrase please.

MR. KAMINSKY: Okay.

Q. Take this incident out of the equation. Okay? You've told us he had disc desiccation. We know now how his daily activities affected his spine. We know what his smoking habits, how they may have affected his spine. Take this incident, May 2008, out of the equation. If he would have continued to work and continued to smoke and continued to do all those things that he did every single day, is it possible that over the course of time he still would have needed the surgery to his neck?

MR. McCRORIE: Objection.

THE COURT: Sustained.

MR. KAMINSKY: Okay.

THE COURT: Counsel, it wouldn't be over the course of time that's operative, it would be the date of the accident. So you're projecting. If you want to rephrase, you could do that, but you're projecting into the future.

MR. KAMINSKY: Yes.

THE COURT: Which is the problem.

MR. KAMINSKY: Okay.

Q. Now, you told us that the surgery that was performed on the neck was at what level?

A. C5-C6.

Q. Would you agree with me that C5 - I'm going to point; I'm not going to take the time to count - but roughly around here?

A. Yes.

Q. So in a person's neck --

MR. KAMINSKY: Judge, can I face the jury for demonstrative purpose?

THE COURT: Your neck, you pointed to the back of your head.

MR. KAMINSKY: I'm going to point to my neck area.

THE COURT: So you want to show them your back?

MR. KAMINSKY: All right.

THE COURT: I'm asking.

MR. KAMINSKY: I'll --

THE COURT: Because if you're pointing to your back and you're looking at them, they can't see where your finger is, true?

MR. KAMINSKY: True.

THE COURT: Thank you.

Q. Okay. Doctor, demonstrate for us on your neck where is C5-C6?

A. So C5-C6 is somewhere in the neighborhood of the mid-portion of the neck.

Q. And would you agree with me that that is the single most common area where an orthopedic surgeon such as yourself performs surgery due to wear and tear?

MR. McCRORIE: Objection.

THE COURT: You could answer.

A. It is one of the common areas, yes.

Q. And the back; the lumbar spine. At what level did you perform surgery?

A. L4-L5.

Q. Down around here, right?

A. Yes.

Q. I won't ask you to stand. Okay.

Would you agree with me that that area of the lumbar spine is the most common area for an orthopedic surgeon, such as yourself, to perform surgery on someone whose discs have

desiccated as a result of wear and tear?

A. It is one of the common areas, yes.

Q. Now, during the course of your career you've performed hundreds of these surgeries, correct?

A. Yes.

THE COURT: Counsel, come up.

(Whereupon, there was an off-the-record discussion at the bench, among the Court and counsel.)

Q. Doctor, actually for clarification purposes, you've probably done over a thousand of these surgeries, correct?

A. Yes.

Q. Is it fair of me to say that some of those surgeries are attributable to a traumatic event?

A. Yes.

Q. Is it fair of me to say that some of those surgeries are due to degenerative issues?

A. Yes.

Q. Now, the surgeries that are due to degenerative issues, are they most likely to be performed at the exact levels you performed the surgery on Mr. Dunne in his back?

A. The degenerative surgeries can occur at those levels.

Q. Thank you.

A. Yes.

Q. And you've done probably hundreds of surgeries at those levels on patients, due to degenerative problems, correct?

A. Yes.

Q. And were a number of those patients involved in construction related work, where it takes a toll on a person's spine, if you know?

A. I don't know.

Q. Okay. Just as an aside, you're aware of how your testimony affects all aspects of a trial, correct?

MR. McCRORIE: Objection.

Q. What I mean by that is --

THE COURT: Sustained.

Jurors, disregard what counsel just said.

MR. KAMINSKY: Okay.

Q. You were asked questions about how much certain things cost in the future, correct?

A. Yes.

Q. Are you aware the reasons you were asked that is because --

MR. McCRORIE: Objection.

THE COURT: Sustained.

Q. Would you agree with me that the more those things cost, the greater the potential is for a higher verdict?

MR. McCRORIE: Objection.

THE COURT: Sustained.

Q. Well, I'll ask it a different way.

You said the cost of seeing an orthopedic surgeon is

$250.00 per visit. Would you agree with me, yes or no - and I have your record in front of me if you would like to take a look at it - would you agree with me that your charge for a visit with Mr. Dunne was $64.00?

MR. McCRORIE: Objection. Could we approach?

THE COURT: Yes.

(Whereupon, there was an off-the-record discussion at the bench, among the Court and counsel.)

THE COURT: Do you withdraw that question?

MR. KAMINSKY: No, but I'll reserve it for later. I withdraw it at this time.

THE COURT: That's the same difference.

MR. KAMINSKY: Okay. I withdraw it at this time.

THE COURT: Thank you.

Q. Now, you spent a lot of time with these MRI films-- and I'm not going to hold them all up, but you testified about your opinions about what you saw on these films, correct?

A. Yes.

Q. Now, just so we're clear, you are a board-certified orthopedic surgeon, correct?

A. Yes.

Q. Which means you are certainly credentialled, and you're obviously very good at what you do. Your expertise is in performing surgery, correct?

A. Yes.

Q. In fact, you're education in this field is extensive and impressive, can we agree on that?

A. Thank you. Yes.

Q. My pleasure. In fact, I've had the chance to cross examine you many times before and you know --

THE COURT: Let's move on.

Q. You know I respect you.

THE COURT: Let's move on.

Q. Your expertise is an orthopedic surgeon, correct?

A. Yes.

Q. And you told us what it means to be board-certified orthopedic surgeon, correct?

A. Yes.

Q. Are you board certified in radiology?

A. No.

Q. Okay. So can we agree that just like you focused your medical education on orthopedics, to the point where you've become board certified, there's an entirely separate field of medicine called radiology?

A. Yes.

Q. And can we agree that a radiologist must go through the same extensive education and training to become a specialist in reading radiological films, just like you became a specialist in the field of orthopedics?

A. They go through their own specific training, yes.

Q. And just so we're clear, you are not a radiologist?
MR. McCRORIE: Objection.
THE COURT: Asked and answered.
Q. Fair of me to say that during the course of medical school you've taken a course in radiology here and there?
A. I mean I'm trained in radiology as part of my specialty, yes.
Q. Yes, I understand that. You are not a board certified radiologist?
MR. McCRORIE: Objection.
THE COURT: Counsel, you've repeated that quite a few times.
MR. KAMINSKY: Okay. No problem.
THE COURT: I have a problem.
MR. McCRORIE: Me too.
THE COURT: Let's move on.
MR. KAMINSKY: Judge, I've had twenty minutes as opposed to six hours, so I'm trying.
MR. McCRORIE: Objection. Objection.
Q. Would you expect a radiologist to ever perform orthopedic surgery?
A. No.
Q. You would expect a radiologist to defer to you, correct?
A. Yes.

Q. Conversely, isn't it very common for orthopedic surgeons to defer radiological interpretations to radiologists?

MR. McCRORIE: Objection.

THE COURT: I'll allow it.

A. It depends on the situation.

Q. Okay. Have you ever deferred to a radiologist?

A. I've --

Q. Yes or no?

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

Q. Okay. The first radiological report; do you have it in your file, Doctor, from Lenox Hill Radiology?

THE COURT: Exhibit?

MR. McCRORIE: May we approach just for a second?

(Whereupon, there was an off-the-record discussion at the bench, among the Court and counsel.)

-Transcript continued on next page-

(Whereupon, the following takes place on the record in open court in the hearing and presence of the jury.)

Q. Doctor, did you have an opportunity to review the films that were taken at Lenox Hill radiology?

A. Yes.

Q. Okay. Do you agree that those films show that the spinal cord signals are normal, yes or no?

A. Yes.

Q. Okay. And do you agree that those films show no impingement on the spinal cord?

MR. McCRORIE: Objection.

MR. KAMINSKY: I'll withdraw it. Forget it.

MR. McCRORIE: Which level?

Q. I'm sorry. This is the cervical spine, C5-C6.

A. I'm sorry. Could you say the question again?

Q. Yes. Do you agree that those films show no impingement on the spine at C5-C6?

MR. McCRORIE: Objection to the spine. I mean --

MR. KAMINSKY: The canal, the spinal column.

THE COURT: The spinal column?

MR. McCRORIE: Cord.

MR. KAMINSKY: The spinal cord.

A. No.

Q. You disagree?

A. Correct.
Q. Okay. Let's talk about the lumbar spine. They also took films of the lumbar spine.
THE COURT: Could we have a date?
MR. KAMINSKY: Yes. 8/27/08.
Q. Would you agree that those films show no impingement on the spinal cord at L3-L4, L4-L5, L5-S1?
MR. McCRORIE: Only objection in that there is not a spinal cord there. It is something else. It's called -- it's not the cord.
MR. KAMINSKY: You're right.
THE COURT: You need to rephrase, then.
MR. KAMINSKY: Okay.
Q. It's technically called the conus medullaris, which --
MR. McCRORIE: The cauda equina.
Q. -- you discussed before.
Would you agree that it says the discs are of normal height?
A. Yes.
Q. And that the signals into the spinal cord at those levels are unremarkable?
MR. McCRORIE: Objection.
Q. Do you agree?
THE COURT: I'll allow it.
Q. Do you agree or do you disagree?

A. Narrow signal and conus are unremarkable, yes.
Q. And that means that there is no impingement on the cord at those levels; correct?
MR. McCRORIE: Objection, just once again to the cord at those levels. It's technical, but --
THE COURT: You are referring to the spine from L4-L5 down to the sacral spine?
MR. KAMINSKY: Yes.
THE COURT: Does the cord go down to the sacral spine?
THE WITNESS: No.
THE COURT: So you need to rephrase your question.
Q. What was referred to earlier as the horse's tail, it shows no impingement; correct?
MR. McCRORIE: Objection, the film or the --
THE COURT: Are we speaking of the film?
MR. KAMINSKY: Yes.
THE COURT: Doctor, do you understand the question?
THE WITNESS: No.
Q. Does the signal at those levels show --
THE COURT: L4-L5, L5-L6 and L6-S1?
MR. KAMINSKY: Yes.
Q. According to those films are the signals unremarkable?

A. Yes.

MR. McCRORIE: Excuse me. According to the films or the reports?

THE COURT: Films, films.

Q. Now, you made reference to something called a compression test?

A. Yes.

Q. Tell us again, what is a compression test?

A. Compression test is where you push down on the head to narrow the nerve root openings in the cervical spine.

Q. Why do you do that?

A. You do that to provoke irritations in the nerves to see whether or not the nerves are symptomatic.

Q. If someone is suffering from some sort of difficulty, you would expect some sort of something to be evoked when you do that test; correct?

A. Yes.

Q. Okay. Have you reviewed the report of Dr. Hausknecht?

A. Yes.

Q. Okay. Now, on June 5th of '08, Dr. Hausknecht did a compression test on Mr. Dunne; correct?

THE COURT: Do you want to point to an area?

A. I'm looking for it. I don't see it.

MR. KAMINSKY: If I may approach.

THE COURT: Yes, you may.

Q. It's hard to read. It's small print.
A. This?
Q. (Pointing).
THE COURT: So do you have an answer, Doctor, because the two of you are speaking in a very low voice.
MR. McCRORIE: Just maybe the date of that report.
THE COURT: This report is what date?
MR. KAMINSKY: May 5th of 2008.
MR. McCRORIE: June 5th.
THE COURT: You said June?
MR. KAMINSKY: Correction. Correction, June 5th, 2008.
THE COURT: And what is your answer?
Q. Here's my question. Did Dr. Hausknecht perform the Spurling maneuver, which is also known as the compression test; correct?
A. No, they're two separate tests.
Q. Okay. Did he perform the compression test and did he note it to be normal, yes, no or you can't tell?
A. No.
THE COURT: Wait. Is the question -- is your answer, no, that there was no test or, no, that --
THE WITNESS: Correct, no, there was no test.
Q. What is the Spurling maneuver?

A. Spurling's maneuver is rotation of the head and then flexion to one side.

Q. Okay. Is that to evoke some sort of a response?

A. Yes.

MR. KAMINSKY: Okay, so let me rephrase my question.

Q. Did Dr. Hausknecht perform the Spurling maneuver?

A. Yes.

Q. Was that determined to be negative?

A. Yes.

Q. Okay. So, in other words, when he twisted his head, his neck, to see if there was pain, which you just told us is the reason you do that test and you would expect to see pain, Dr. Hausknecht actually did that test and that test was negative; correct?

A. Yes.

Q. Okay.

THE COURT: Counsels, step up, please.

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

(Whereupon, the following takes place on the record in open court in the hearing and presence of the jury.)

THE COURT: Jurors, we are having a little bit of difficulty with respect to time. Can we try to resume at

2:00? It's not a lot of time for any of us, even for me, and I am in the building. Can we do that?

Okay, so let me let you go right now, and I will see you. I will see you at 2:00 p.m. Okay, thank you.

THE COURT: All rise, jurors exiting.

(Whereupon, the jury exits the courtroom.)

THE COURT: Everybody go.

(Whereupon, there was a luncheon recess taken and the case adjourned to 2:00 p.m.)

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

THE COURT: Any issues? We are good? We are good? Okay, let's bring the jury in.

THE COURT OFFICER: All rise, jurors entering.

(Whereupon, the jury enters the courtroom.)

THE COURT: Thank you, everyone. Please be seated.

Mr. Kaminsky, you may resume your cross-examination of the witness.

MR. KAMINSKY: Thank you.

A N D R E W M E R O L A, M.D., having been previously sworn, resumed the witness stand and continued to testify as follows:

CONTINUED CROSS-EXAMINATION

BY MR. KAMINSKY:

Q. Sorry we weren't able to finish you before lunch.

I asked you if the plaintiff, the nature of the impact was sufficient enough to cause Mr. Dunne to suffer a loss of consciousness. You remember?

A. Yes.

Q. And you told me that there was a reference to that somewhere in the records?

A. Yes.

Q. Now, you were kind enough to let me look at portions of the materials you brought to court during the break. I want to ask you the reference you were talking about, is the reference contained in the records of Dr. Schottenstein?

A. Actually, I was talking about a Dr. Hudak.

Q. Okay. Let's talk about the reference that's in Dr. Schottenstein. You're aware that he's an expert who is going to come to court and testify?

THE COURT: I'm sorry. You're aware what?

Q. He's going to come to court and testify, just like you are, during the plaintiffs' case; correct?

A. Yes.

Q. Okay. In his records he says Mr. Dunne is a 45-year-old male who was involved in an accident, he had head trauma and loss of consciousness for several seconds.

Okay, I'll give you these back. I just wanted -- before I forget.

Now, head trauma and loss of consciousness for several

seconds, that is apparently -- we can infer that's what Mr. Dunne told Dr. Schottenstein on February 1st of 2013; correct?

A. As reported in Dr. Schottenstein's note, yes.

Q. Now, is that consistent or inconsistent with what Mr. Dunne told Medcor on the day of the incident, where he said he did not lose consciousness?

A. Correct, that is not consistent with what is written in the Medcor note.

Q. Okay. So as time progresses, Mr. Dunne's account of what transpired seems to get a little more exaggerated; true?

MR. McCRORIE: Objection.

THE COURT: Sustained. Jurors, you will disregard counsel's opinion, please.

Q. Well, suffering loss of consciousness is more serious than not suffering loss of consciousness; true?

A. Can be.

Q. Okay. All things being equal, would you prefer your patients suffer a loss of consciousness or not suffer a loss of consciousness?

MR. McCRORIE: Objection.

THE COURT: Sustained.

MR. KAMINSKY: Okay, withdrawn.

Q. On the Medcor, the day of the incident, no loss of consciousness; correct?

A. Yes.
Q. Did he tell you he suffered a loss of consciousness?
A. No.
Q. Okay. Now, I asked you about all the prior surgeries you had performed in your career, and you've done a lot. Now, you indicated in this case you described the surgery as a success; correct?
A. Yes.
Q. Both surgeries; correct?
A. Yes.
Q. Okay. And I agree with you, they were a success. There were no complications or anything; correct?
A. Yes.
Q. Okay. Now, is it fair of me to say that during your career you have performed what is called multilevel fusions?
A. Yes.
Q. Okay. And multilevel fusions would be fusing multiple discs together; correct?
A. Yes.
Q. Now, in this case you did what is called a single level fusion; correct?
A. Yes.
Q. Okay. And briefly, in layman's terms, just tell the jury what is the difference between a single level fusion and a multiple level fusion, and if you could step down with the

Court's permission we can use this model.

A. I don't think I have to, but --

Q. I agree. You probably don't. Okay, go ahead.

A. A single level just means one segment, C5-C6 or L4-L5. That's one segment across a disc. A multilevel would involve more than one segment.

Q. And you have performed probably hundreds of multilevel fusions; correct?

A. Yes.

Q. Okay. All things being equal, okay, I know every case is different, all things being equal a single level fusion is not as serious as, and I'm not minimizing a surgery. Every surgery has risks, every surgery. We know that. But all things being equal, a single level fusion is not as serious as a multilevel fusion; true?

MR. McCRORIE: Objection.

THE COURT: I will allow the doctor to answer it.

Q. Just yes or no or I can't answer that.

A. I can't answer that in a simple yes-no.

Q. Okay, that's fine. But you can answer that in this case you performed a single level fusion in the neck?

A. Yes.

Q. And you can answer that in this case you performed a single level fusion in the spine?

A. Yes.

Q. Lower back?
A. Yes.
Q. And that's what we see in what you used earlier, Plaintiff's 19A, this shows the single level; correct?
A. Yes.
Q. That's of the neck. And, similarly, you showed us the single level fusion in the lower back; correct?
A. Yes.
Q. Now, you said -- by the way, what was the cost of the original hospital, everything else, your fees, what was the cost of the surgery to the spine, to --
MR. McCRORIE: Objection.
Q. -- the neck?
MR. McCRORIE: May we approach?
THE COURT: Say it again.
MR. McCRORIE: Objection. May we approach?
THE COURT: Yes.
(Whereupon, there is a discussion held off the record, at the bench, among the Court and counsel.)
(Whereupon, the following takes place on the record in open court in the hearing and presence of the jury.)
THE COURT: Do you wish to withdraw that question, counselor?
MR. KAMINSKY: For now, yes.

THE COURT: Thank you.

Q. What is your understanding of Mr. Dunne's past medical history before this incident?

A. He had had a prior problem with his knee, and he had had a prior problem with an ulcer in his stomach.

Q. Okay. Do you know if he required surgery for his knee?

A. I believe he had a knee surgery, yes.

Q. Do you know if he missed time from work?

A. I do not know.

Q. Do you know when the surgery was for the ulcer?

A. I do not know.

Q. Do you know if he missed time from work as a result of that?

A. I don't know.

Q. Do you know if he had any prior issues with his back?

A. None that I was aware of, no.

Q. Do you know if there was an instance where he missed time from work because of a prior instance with his back?

A. No.

Q. Is that something that would be important to you?

A. No.

Q. Just yes, no or --

A. No.

Q. Okay. Do you know if there were any other surgeries?

A. No.
Q. Do you know if he had a hernia?
A. Yes.
Q. That required -- okay. So that is an additional one; correct?
A. I believe he had a hernia, yes.
Q. Do you know if he missed any time from work as a result of that?
A. I don't know.
Q. Given the fact that he had a prior hernia, prior ulcer, prior problem with his knee, all that required surgical intervention, all that necessitated him to miss time from work, four weeks, five weeks, six weeks at a time, taking this incident out of the equation and knowing what we know about his already existing disc degeneration throughout his spinal column, could that -- could those issues -- let's include the smoking -- could all of those issues affect his ability to work as a steamfitter?
MR. McCRORIE: Objection.
Q. Yes, no or you can't answer it?
MR. McCRORIE: Objection.
THE COURT: Do you understand the question, Doctor?
THE WITNESS: Not completely, no.
THE COURT: Please rephrase.

MR. KAMINSKY: Sure.

Q. You told us you know about -- withdrawn.

I want you to assume before this incident he missed time from work, approximately four to five weeks, because of a hernia that required surgery. I want you to assume that before this incident he missed another five weeks from work because of a perforated ulcer that required surgery.

I want you to assume that prior to this incident he missed several weeks -- I believe it was four weeks if I remember the testimony -- from work because of surgery to his knee. I want you also to assume that he missed some time from work because of a prior problem with his back --

MR. McCRORIE: Objection.

Q. Because of a prior problem that affected his back --

MR. McCRORIE: Objection.

Q. -- that was treated --

THE COURT: Sustained.

MR. McCRORIE: No missed time. Heel spurs.

Q. Let's focus, so that we can move it along. Let's focus on the hernia, the ulcer, the knee surgery, the missed time from work associated with all of those, the fact that you already told us that he had preexisting disc degeneration in his spinal column.

Given all of those issues is it reasonable to assume that even if you take this incident out of the equation and the

disc degeneration continued to progress because of what he does every day, is it reasonable to assume that those issues could have an effect on Mr. Dunne's ability to work as a steamfitter?

MR. McCRORIE: Objection.

Q. Yes, no or you can't answer?

MR. McCRORIE: Objection.

THE COURT: I'll allow it.

Are you able to understand the question now?

THE WITNESS: Yes.

THE COURT: Okay.

A. No.

Q. Just yes -- no?

A. Correct, yes, no. Correct, no.

Q. Now, just so we are clear, degeneration has nothing to do with trauma; correct?

A. They're two separate issues.

Q. Right, I agree they are two separate issues. One is something that could be caused by a traumatic event and one is something that takes time to develop; right?

A. Trauma is an event. Degeneration is a time-related issue.

Q. Yes, that's what I said.

A. Yes.

Q. Trauma is something that happens because of an event and degeneration is something that takes time?

A. Yes.

Q. Okay. And on the MRIs that were taken before the surgery, you have pointed out the degeneration.

Could you, with the Court's permission, step down?

THE COURT: Let's wait until he -- you ready?

MR. KAMINSKY: Yes.

Q. Plaintiffs' 8A, just remind the jury what we are looking at.

A. Side view image MRI of the neck.

Q. Okay. And from that view would you point out on Mr. Dunne's neck where you see degeneration?

A. So you see that the discs which are in between the bones have a darker signal than the bright fluid signal of the spinal fluid, so that is consistent with some disc dessication.

THE COURT: Doctor, if you don't mind, would you just turn about and just show me what you showed the jury, because I can't see. Just point it out.

THE WITNESS: (Pointing).

Q. I'm sorry, Doctor, just the MRIs are generally black and white; correct?

A. Yes.

Q. And they show contrast; correct?

A. Yes.

Q. And they are -- they're done with magnets; correct?

A. Yes.

Q. And they can pick up water in discs and give off a bright color; correct?

A. Yes.

Q. And so someone looking at the films, if you see that the whiteness has turned grayish, that suggests a loss of water and the signal that is shown isn't bright; correct?

A. Yes.

Q. Okay. So now with that understanding, would you show the jury where you see that loss of color, which is indicative of the loss of water in the disc, which means that there is desiccation?

A. Sure. So you see it in the discs in between the bones.

Q. Okay. And you're pointing to different levels. Could you tell us what levels you're pointing to?

A. Well, I'm essentially pointing to all the levels within the cervical spine.

Q. Okay, so --

THE COURT: Doctor, could you turn around and show me?

THE WITNESS: Yes. Each level --

THE COURT: But you can't -- if you're going to speak, speak loudly so they can hear you.

THE WITNESS: So each level of the cervical spine, all the disc spaces (indicating).

THE COURT: Thank you.

Q. Okay. So if you would, Doctor, before the incident happened you've told us desiccation takes time to develop. It takes years to develop; correct?

A. Yes.

Q. Okay. What is the date that this film was taken?

A. This film is August 25th of 2008.

Q. Okay. August 25th of 2008.

Now, with the understanding that it takes years for the discs to desiccate to the point where they lose enough water so that it shows up grayish on an MRI, we are seeing disc desiccation?

THE COURT: Are you asking a question?

MR. KAMINSKY: Yes.

MR. McCRORIE: Objection. Objection to --

MR. KAMINSKY: Yes.

MR. McCRORIE: -- the testimony, because all discs desiccate. He's saying they --

THE COURT: Wait, wait. Don't you start doing the same thing.

Ask your question, please.

MR. KAMINSKY: Sure.

Q. What we're seeing --

THE COURT: Would you agree would be at the beginning of a question.

MR. KAMINSKY: That's one way to do it.

THE COURT: That's one way of doing it.

Q. And just like I said they teach you in law school to stop before lunch, when the Judge suggests how to ask a question would you agree, would you agree that what we are seeing on this MRI are conditions in the plaintiff's cervical spine that existed before the incident?

A. Yes, the desiccation is.

Q. Okay. Thank you. Stay here. I'm sorry.

Just point out, if you would, point out if you would the level where you ultimately performed surgery?

A. C5-C6.

Q. Okay. And would you agree, I believe you already told us, that's an area generally associated with wear and tear; correct?

A. Yes.

Q. Okay. And would you agree that Mr. Dunne's job for 17 years involved a significant amount of wear and tear on his cervical spine based upon what you know he did every day as a steamfitter; true?

MR. McCRORIE: Objection.

THE COURT: If you can answer it yes or no, or if you can't answer it either way just say that.

THE WITNESS: I can't answer it yes or no.

THE COURT: Thank you.

Is there a reason why the witness is there?

MR. KAMINSKY: I was going to show him the lumbar spine.

THE COURT: Okay, because --

MR. KAMINSKY: You can go back to your seat, that's fine.

(Whereupon, the witness resumes testifying from the witness stand.)

Q. I'm going to see if there's a reason why you can't answer that yes or no, and I will see if I could maybe add some more facts to help you.

As a steamfitter, I want you to assume that -- by the way, before testifying today did you read Mr. Dunne's deposition?

A. No.

Q. Did you read the portions of any testimony, perhaps even the beginnings of his trial testimony where he described --

MR. McCRORIE: Objection.

THE COURT: Sustained. He said no.

Q. Okay. Did you ask him what he did day to day?

THE COURT: Counsel, are you asking the doctor whether he spoke to the plaintiff?

MR. KAMINSKY: Yes.

THE COURT: Since the beginning of the trial?

MR. KAMINSKY: No, at any time.

THE COURT: What?

MR. KAMINSKY: At any time.

Well, let me withdraw it.

Q. Let me try to make it -- you said you can't answer it yes or no, okay.

I want you to assume that Mr. Dunne has given sworn testimony that his job for 17 years includes bending, lifting, twisting, climbing into small spaces. He testified that he often hung from the air. I want you to assume that he has to lift heavy objects.

THE COURT: Didn't you ask this question already?

MR. KAMINSKY: No.

THE COURT: A long time ago?

MR. KAMINSKY: I've only been asking questions for about an hour. You may be getting me confused with Mr. McCrorie.

THE COURT: No, I don't confuse men, counsel.

MR. KAMINSKY: Good one, okay.

Q. Would those types of activities being performed by a steamfitter on a day-to-day basis lead to wear and tear?

A. Yes.

Q. Okay. And would they lead to wear and tear at the exact location where you did surgery on his neck?

A. Yes.

Q. Okay. Same background, same background questions.

I'm sorry. Withdrawn.

Same facts, bending, lifting, twisting, would all those things lead to wear and tear at the exact level where you performed a single level fusion in Mr. Dunne's lumbar spine?

A. Yes.

Q. You mentioned the term on direct examination bone spur. Okay? Tell the jury again, what is a bone spur?

A. It's an outgrowth of bone in an area where you see an articulation, which means where bones come together, either through a joint or where bones come close to each other.

Q. And is that often the result of arthritic changes?

A. It's the result of degeneration, yes.

Q. That was going to be my next question.

Arthritic changes, it's another way of saying degeneration; correct?

A. No.

Q. Okay, then I stand corrected.

The bone spurs that you told us about are the result of disc degeneration; correct?

A. Yes, the degenerative process.

Q. Okay. And the bone spurs which are the result of the degenerative process have nothing to do with this incident; correct?

A. No.

Q. No, they don't, or, no, I am not correct or you can't

say?

A. I can't say yes or no.

Q. Okay. You also mentioned the term osteophytes?

A. Yes.

Q. Tell the jury what that is.

A. It's identical to a bone spur.

Q. Okay, same thing. Associated with degeneration; correct?

A. Yes.

Q. That's one of the bone spurs, osteophytes, when a person has disc degeneration one of the ways the body responds to that is through either trying to build more bone or a bone spur; correct?

A. Yes.

Q. Okay. And that's something that is associated and takes a long time to happen; correct?

A. Yes.

Q. And so if you see that on the films we can safely agree that those conditions took years to develop; correct?

A. Yes.

Q. And so we can safely agree instead of saying I can't answer that question yes or no, we can safely agree --

MR. KAMINSKY: I'm sorry. Was there something?

MR. ACOSTA-DIAZ: No.

THE COURT: Stop, stop.

MR. KAMINSKY: I thought he was --

MR. McCRORIE: He was talking to me.

MR. KAMINSKY: Okay, then I apologize.

THE COURT: Stop, stop, please.

Q. If those bone spurs and osteophytes are observable on the films and you told us they take years to develop, can we agree that they predate this incident?

A. Yes.

Q. Okay. You also told us about herniations; correct?

A. Yes.

Q. And a herniation is when the -- you described it as the jelly-like -- you know what? This is a better picture.

MR. KAMINSKY: I'm referring just for demonstrative purposes to 9 -- what is that, Jim, 9A?

MR. McCRORIE: 9A.

MR. KAMINSKY: 9A, okay, for demonstrative purposes.

Q. You described a herniation as when --

THE COURT: Counsel, if you're asking the witness a question you have to show the witness the picture, and if you want to angle it to the jury fine, but if you show it only to the jury the witness can't see it.

Q. The picture is secondary to the point I want to try and make, and that is a herniation is when what you described as the jelly-like substance in a disc that protects the vertebrae

or the bones from coming into contact with each other, the herniation is when that jelly-like substance protrudes from the disc; correct?

A. Yes.

Q. Comes out of the disc; correct?

A. Yes.

Q. Now, herniations are also something that can be the result of wear and tear over time; correct?

A. Yes.

Q. Okay. And would you agree with me that the films, just like they show disc degeneration, also show herniation?

A. The films do show herniations, yes.

Q. Okay. And herniation is something -- can we agree that that could be attributable to wear and tear?

MR. McCRORIE: Objection, asked and answered.

Q. Well, you told us herniation can be attributable to wear and tear; correct?

THE COURT: Yes, counsel, but let's move on, please. We can't ask the same questions.

MR. KAMINSKY: Judge, I know we're pressed for time. I'm doing my best.

THE COURT: It has nothing to do with time.

MR. KAMINSKY: Okay.

THE COURT: It has to do with not asking the same question.

Q. Okay. Now, just like a disc can degenerate and worsen over time -- I mean that's by its very definition a disc that is degenerating worsens over time; correct?

A. The disc continues to degenerate over time, yes.

Q. Yes. It doesn't stop degenerating and start to get better. It continues to get worse; correct?

A. It continues the degenerative process.

Q. Which is another way of saying it continues to worsen; correct?

A. No, not --

Q. Okay, I'll accept your language.

A. Okay.

Q. It continues to degenerate?

A. Yes.

Q. And just like a disc continues to degenerate, a herniation doesn't repair itself; correct?

A. It can.

Q. Okay. It can also --

THE COURT: It can repair itself?

THE WITNESS: Yes.

THE COURT: Herniation?

THE WITNESS: Yes.

Q. It can also worsen; correct?

A. Yes.

Q. And a herniation, which can be attributable to wear

and tear, can get worse if the person continues to do those activities; correct?

A. In general, yes.

Q. Okay. Now, did you by any chance take a look at Mr. Dunne's work history?

A. No.

Q. Do you have any idea how many hours he worked in any of the 17 years before the incident?

A. I don't have the hour total.

Q. Okay. But can we agree as a general rule -- this is just a general rule. Can we agree that the more hours he worked the more wear and tear he was putting on his spine?

A. Yes.

Q. Okay. And that could also be affected by working in cold weather and other things; correct?

There's a lot of variables. I realize -- you know what? I shouldn't ask you that. It's not your field of expertise, and I apologize.

But can we agree the number of hours he works doing that type of repetitive thing over and over again adds to the wear and tear?

A. Yes.

Q. Okay. Now, I asked you if you knew what Mr. Dunne did after this incident occurred, and there were some things you were not aware of; correct?

A. Yes.

Q. For instance, you were not aware that he stepped out of the hoist on his own power; correct?

MR. McCRORIE: Objection.

THE COURT: Yes, this was asked and answered. Let's move on, please.

MR. KAMINSKY: Okay.

Q. Let's pick up where I left off with him going to a delicatessen, ordering lunch and having a sandwich, sitting on the curb in front of the delicatessen in which he usually --

THE COURT: You went past that, counsel. We got to the Medcor place.

MR. KAMINSKY: Oh, you're right, Judge. Thank you.

Q. After Medcor do you know what he did?

A. In what time frame?

Q. That day, the day this incident happened.

A. I believe according to the Medcor documents they disposed him as back to work.

Q. Okay. And are you aware that he then took the train back to the train station and drove home, okay.

I want you to assume that he did not seek any medical treatment during the Memorial Day weekend. Okay? He did go to work the Friday before the Memorial Day weekend.

Now, we're back. It's after Memorial Day. Do you

know if he worked that week?

THE COURT: Counsel, are you going to ask questions within the doctor's expertise?

MR. KAMINSKY: Yes, do you know if he worked that week.

THE COURT: But that's not a medical question.

MR. KAMINSKY: Okay.

THE COURT: Are we going to ask questions within the doctor's expertise, please?

MR. KAMINSKY: Sure, okay.

Q. In considering the nature of the incident, would it be important for you to know whether or not a patient was or was not capable of returning to work?

MR. McCRORIE: Objection.

THE COURT: Do you understand the question, Doctor?

THE WITNESS: Not completely, no.

THE COURT: Could you rephrase, please?

MR. KAMINSKY: Sure.

Q. As his treating physician, is it important for you to know if your patient is capable of returning to work following an incident?

A. Yes.

Q. Okay. Could you tell me, did Mr. Dunne return to work the week following this incident, yes or no?

A. Yes.

MR. McCRORIE: Objection. It's fine. The question is out.

THE COURT: Sorry?

MR. McCRORIE: That's fine, Your Honor. I will withdraw it.

THE COURT: I didn't hear anything.

MR. KAMINSKY: He said yes.

THE COURT: Who?

MR. KAMINSKY: Him.

MR. McCRORIE: I said --

MR. KAMINSKY: Oh, who cares about him?

Q. Okay. Do you know if he returned to work the second week after the accident?

A. I don't recall.

Q. Do you know if he returned to work the third week after the accident?

A. I'd have to look at the entire sheet of his working hours.

Q. Safe to say you have no idea?

A. I do know that --

MR. McCRORIE: Objection.

THE COURT: Sustained.

Q. Safe to say you don't know specifically when he returned to work after the accident and how many hours per week

he worked; correct?

A. I do not have that memorized, correct.

Q. I don't expect you to.

THE COURT: Anything else?

MR. KAMINSKY: Yes.

THE COURT: Let's move on.

MR. KAMINSKY: Okay.

Q. We mentioned Dr. Hausknecht. After Dr. Hausknecht came the MRIs that were interpreted by Dr. Kolb; correct?

A. Yes.

Q. And those -- the interpretation by Dr. Kolb was no impingement; correct?

MR. McCRORIE: Objection.

THE COURT: Wait one second. Cobb?

MR. KAMINSKY: Kolb, K-O-L-B.

MR. McCRORIE: Kolb. Can we just approach, though?

THE COURT: Please.

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

(Whereupon, the following takes place on the record in open court in the hearing and presence of the jury.)

THE COURT: Do you withdraw that question, counsel?

MR. KAMINSKY: Yes.

THE COURT: Thank you.

Q. There were EMG reports that were done; correct?

A. Yes.

THE COURT: At what time, please?

MR. McCRORIE: Multiple.

Q. There were several. You had the opportunity to review the reports and the findings?

A. Yes.

Q. Would you agree with me that the EMG reports show no nerve issues in the neck?

A. Yes.

Q. Okay. What is an EMG?

THE COURT: What is what?

MR. KAMINSKY: EMG.

A. It's a test of the way a nerve behaves inside of a muscle. The M of the EMG means how the nerve is behaving when it's inside of a muscle.

Q. What is that test looking for and what -- describe how the test is administered.

A. So the nerve has multiple cables within the nerve. One of those is sensory, so you can feel. The other one is a pain fiber that senses pain. One is for a reflex. One is for the way the muscle works.

The EMG is looking at how the nerve works in the

muscle fiber portion of the cable. The nerve is stimulated with an electrical current and then the response of the nerve to the current stimulation is recorded and then it's compared to see whether or not the electrical impulse goes across the nerve rapidly or slowly or not at all.

Q. Okay. And the significance of that would be what?

A. To tell you about the muscle fiber portion of the nerve.

Q. Okay. And when that test was administered to Mr. Dunne, it showed that there was no nerve issue in the neck; correct?

THE COURT: That was asked and answered, counsel.

MR. KAMINSKY: Okay, I wanted the jury to understand what the test was so, all right, if I asked it I asked it.

Q. It also showed carpal tunnel; correct?

A. Yes.

Q. What is carpal tunnel?

A. The carpal tunnel is an area of the wrist where the nerve that goes into the front of your hand passes through, so it's a tunnel over the carpus, which is the bones of your wrist.

Q. Okay. And can we agree that carpal tunnel is generally associated with repetitive movements?

A. It can be, yes.

Q. So sometimes you hear about people that type a lot or

people that do the same thing over and over again that is associated with carpal tunnel; correct?

A. Yes.

Q. And can we agree that just like Mr. Dunne's activities could lead to wear and tear on his spinal column, the repetitive nature of his using his hands, using the tools, climbing, the things he did for all those years could cause carpal tunnel syndrome?

A. Yes.

Q. In fact, that's what happened here; correct? Yes, no or you don't know?

A. I can't answer that yes or no.

Q. Okay, that's fine.

He had been diagnosed with carpal tunnel syndrome?

MR. McCRORIE: Objection.

THE COURT: Sustained.

MR. KAMINSKY: Withdrawn.

Q. The EMG reports suggest carpal tunnel syndrome?

A. Yes.

Q. Let's talk a little bit about the report you made reference to by Dr. Nancy Epstein.

Now, you said you disagreed with some of her findings; correct?

A. Yes.

Q. Okay. She says that there is no evidence of nerve

compression; correct?

A. Yes.

Q. And she says that the straight leg raising is negative; correct?

A. Yes.

Q. Her findings as to the lack of nerve root compression at any of the respective levels, her findings are consistent with the findings of the radiologist, Dr. Kolb; correct?

A. No.

Q. Dr. Kolb on the issue of whether or not --

MR. McCRORIE: Objection, Your Honor, Dr. Kolb.

THE COURT: Sustained.

MR. McCRORIE: If he could be instructed not to reference it.

MR. KAMINSKY: Okay.

THE COURT: Jurors, you can stand and stretch.

(Whereupon, there is a pause in the record.)

THE COURT: Okay.

Q. Just for the record, the surgery that was performed on his neck was performed approximately a year and a half after this incident; correct?

A. Yes.

Q. And --

THE COURT: A year and a half after the accident?

MR. KAMINSKY: Yes.

THE COURT: All right.

Q. And the surgery to his back was performed about two and a half years -- no, not quite -- about two years, a little over two years after the incident; correct?

A. Yes.

Q. Okay. And, again, do you know to what extent, if any, Mr. Dunne continued to work during the time frame of May 2008 up to the time you ultimately performed the surgery?

Do you know or you don't?

A. I have a general idea, so --

THE COURT: Excuse me. When you say until the time you performed the surgery, you mean the first surgery?

MR. KAMINSKY: Let's start with the first surgery.

A. Yes. I do know that he had made efforts to return to some type of duties, yes.

Q. Okay. Do you know when he first complained of problems with his knee?

A. No.

Q. Do you know when he first had an MRI of his knee?

A. No.

THE COURT: Counsel, do you want to show him the dates?

MR. KAMINSKY: First, I want to see if he knows or he doesn't know.

Q. Do you know if there was a complaint of back pain as far back as 2003?

A. I'm aware of the back being related to his feet.

Q. Okay. Do you know which doctor he gave the complaint of back pain to?

A. No.

Q. Okay. Did you ever see the records of Dr. Obedian?

THE COURT: Doctor who?

MR. McCRORIE: Obedian.

MR. KAMINSKY: Yes.

A. No.

Q. Did Mr. Dunne's attorneys provide you with certain records to review before testifying today?

A. I just brought in whatever was in my chart from the office.

Q. Are there other materials that you have in your office that you did not bring to court today?

A. No.

Q. Do you know when he had the left knee arthroscopy?

A. No.

MR. KAMINSKY: For the record, the left knee arthroscopy was January 24, 2005.

THE COURT: Are you asking a question or are you just testing the doctor's memory as to -- I mean --

MR. KAMINSKY: I want the jury to have an

understanding as --

MR. McCRORIE: We can put it into evidence if you want.

MR. KAMINSKY: Okay. I have an idea. How about you and I stipulate that the date of the left knee arthroscopy was January 24, 2005?

MR. McCRORIE: We can put the entire record in, but whatever you want.

MR. KAMINSKY: No, this will speed it along.

MR. McCRORIE: Agreed.

MR. KAMINSKY: Agreed?

MR. McCRORIE: Agreed.

MR. KAMINSKY: Can we agree that --

THE COURT: Wait, wait.

MR. KAMINSKY: January 24, 2005.

THE COURT: Thank you.

MR. KAMINSKY: Left knee arthroscopy.

MR. McCRORIE: And can we agree that Dr. Obedian on that date, the first date --

MR. KAMINSKY: We can stipulate that the date of the record from Dr. Obedian is dated November 1st, 2004.

Q. In Dr. Obedian's record, which you have not had the chance to see --

MR. KAMINSKY: May I approach?

THE COURT: Please.

MR. McCRORIE: Again, you can put it in, but --

MR. KAMINSKY: I'm sorry. May I approach?

THE COURT: Yes.

Q. Doctor, I guess what's typical for a doctor when a patient comes for the first time you give them --

THE COURT: Don't give your opinion, please. Ask a question.

MR. KAMINSKY: Okay.

Q. Did Dr. Obedian have a checklist that he asked his patients to fill out?

A. Yes.

Q. And is one of the questions on the checklist did you ever have back pain?

A. Yes.

Q. How did Mr. Dunne answer that question?

A. Yes, once.

Q. Okay. So we are aware of back pain going back to probably 2003; correct?

A. Once.

Q. Okay. Now, following the accident we have established that he went to work the week of May 27th, which was a four-day week. I want you to assume that he worked 21 hours that week. Okay?

A. Yes.

Q. And the first time he goes to visit you is

January 2nd; correct?

A. June 2nd.

Q. What am I saying? June 2nd, correct?

A. Yes.

Q. The following week, the week of June 3rd, I want you to assume he worked 21 hours. Okay?

A. Yes.

Q. June 10th, 21 hours?

THE COURT: Examine me one second.

(Whereupon, there is a pause in the record.)

(Continued on the next page...)

Q. The week of June 17th, 14 hours; the week of June 24th, 35 hours. Then he returns to see you again on June 30th in 2008. There's a notation in your record that he forgot to tell you the first time he saw you that he had -- that his neck was bothering him, correct?

A. Yes.

Q. So the first time he sees you, the ten days after the incident, he makes no reference to his neck, correct?

A. Yes.

Q. And then the next time he comes to see you several weeks later, he says to you 'Dr. Merola, I forgot to tell you that my neck is bothering me'?

A. Yes.

Q. Week of July 1st, he works 28 hours; the week of July 8th, he works 35 hours; the week of July 15th, he works 35 hours; week of August 5th, he works 43 hours; August 12th, 35 hours --

THE COURT: Do we have a question?

MR. KAMINSKY: Yes.

Q. August 19th, 35 hours.

Is it significant to you, yes or no, that following this incident Mr. Dunne was capable of returning to work as a steamfitter, doing the work he was doing before the incident happened? It's either relevant to you, or it's not relevant to you, or you can't answer yes or no.

A. Not relevant.

Q. Not relevant. Okay.

Now, on August 25th of 2008, that's when he has a MRI of his cervical spine at Lenox Hill Radiology, correct?

A. Yes.

Q. And those show herniations at C4-5, the disc between those two bones, C5-6, and C6-7, correct?

A. Yes.

Q. Now, would you agree that the most common causes for herniations at those levels are degenerative problems that develop over time?

MR. McCRORIE: Objection.

THE COURT: You've asked that question.

Sustained.

Q. The MRIs on August 27th of the lumbar spine showed a herniation at L-3, L4-5, and L5-S1, correct?

A. Yes.

THE COURT: Would you repeat those?

THE WITNESS: Sure. L3 to 4, L4 to 5, and L5-S1.

THE COURT: Thank you.

Q. Now, you've told us that herniations take -- a herniation that is as a result of degenerative changes can take a long time to develop and show up on films, correct?

A. Yes.

Q. Yet within months of this incident, they're clearly

showing up on films, correct?

MR. McCRORIE: Objection.

Q. Correct?

MR. McCRORIE: Objection.

THE COURT: Sustained.

MR. KAMINSKY: Form of the question, Judge? Okay.

THE COURT: Yes.

Q. Doctor, are the herniations-- would you agree with me that the herniations, within months of this incident, were showing up on MRI films?

A. Yes.

Q. And if we go into September, he's still working 36 hours a week, 35 hours a week; and then on September 25th he has an EMG of the lower extremities by Dr. Hausknecht, correct?

A. Yes.

Q. And the EMG shows bilateral median neuropathy, correct?

A. Yes.

Q. That's carpal tunnel syndrome, correct?

A. It's not the syndrome. It just shows that this is an abnormality in the electrical conduction of the nerve through the carpal tunnel.

Q. Okay. Maybe I'm using the terminology wrong. I accept your terminology. Thank you.

And can we agree with this condition is caused by repetitive movement?

MR. McCRORIE: Objection. Asked and answered.

THE COURT: Sustained. Asked and answered.

Could we have some new questions, please?

MR. KAMINSKY: Sure.

THE COURT: Or new area of inquiry.

MR. KAMINSKY: Okay.

Q. From September to October, he is working 35 hours a week, 51 hours a week, 35 hours a week, 35 hours a week, 35 hours a week --

THE COURT: Is this a question?

MR. KAMINSKY: Yes.

Q. Are you aware that going into November of 2008, he's working 28 hours a week, 35 hours a week, 35 hours a week--

MR. McCRORIE: Objection.

THE COURT: Sustained. Jurors, you will disregard.

Q. Is it even possible that someone with a significant acute trauma would be able to work, for instance, 58 hours a week?

MR. McCRORIE: Objection.

Q. During the week of December 16, 2008; yes, no, or you can't answer?

THE COURT: Step up.

(Whereupon, there was an off-the-record discussion at the bench, among the Court and counsel.)

THE COURT: All right. Restroom break. Thank you. Take five.

THE COURT OFFICER: All rise. Jurors exiting.

(Jury exits.)

(Brief recess taken.)

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(Whereupon, the following transpired in open court, in the presence of all parties:)

THE COURT OFFICER: All rise. Jurors entering.

(Jurors enter.)

THE COURT: Thank you, everyone. Please be seated.

CROSS EXAMINATION (CONTINUED)

BY MR. KAMINSKY:

Q. Doctor, we have to finish today at 3:30. If we don't, you have to come back next week. So I'm going to stop my questioning. Mr. McCrorie has indicated he needs ten minutes to do redirect.

I want to ask you one last question. The bone spurs and the osteophytes, can they cause radicular pain?

A. They can, in a general sense, yes.

Q. And they predated this occurrence, correct?

A. And there are some preexisting osteophytes, yes.

Q. Thank you.

THE COURT: Thank you.

You may redirect.

REDIRECT EXAMINATION

BY MR. McCRORIE:

Q. Doctor, you said this osteophyte can cause pain and doesn't have to cause pain. Can a disc that herniates after trauma push the cord into an osteophyte?

A. Yes.

Q. Would that cause pain?

A. Yes.

Q. Just I'll point to it, the Dr. Obedian record, we agreed that it was November 1st, 2004 on an intake sheet for his knee issue.

It said he checked off in his own handwriting he had pain one time. When did he say that one time was, in his handwriting, how many months before?

A. It says eight months ago.

Q. And let's go to Medcor. Medcor, on the top of it it says Medcor.

THE COURT: What was the date, I'm sorry?

MR. McCRORIE: 11/1/'04, for Dr. Obedian.

Q. For Medcor, it says Medcor then it says One Bryant Park LLC, one of the defendants in this matter. That's what's on the top of the letterhead there.

I'd like you to assume that, if you see on the bottom, treated by Robert Liebman (phon.), there's no M.D. or no designation after the name, correct?

A. Yes.

Q. A non-medical doctor can't administer medical attention, correct?

A. Correct.

Q. Was there any physical examination performed at Medcor before they told him to go back to work?

A. No.

Q. And also there could be no compression or distraction, or if he said that his shoulder hurt and pointed to his shoulder there would have been no physical examination of his shoulder by a non-medical doctor, correct?

A. Yes.

THE COURT: I'm sorry, your question was about non-medical personal can't administer --

MR. McCRORIE: Medical care or medical attention I think that is.

THE COURT: Thank you.

Q. He did deny past medical history of any similar complaints of either low back pain or shoulder or his knees, you saw that?

A. Yes.

Q. Does the fact that he didn't go in an ambulance take

away any of your opinions you gave to the jury that the herniations were caused by this accident, both the neck and the back?

A. No.

Q. In Dr. Epstein's report, when she writes that all of the changes she sees are only very mild changes in the cervical spine and in the lumbar spine, do you agree that the desiccation you see in the 41-year-old James Dunne is mild and expected for a 41-year old?

A. Yes.

Q. Would you expect to see the same degenerative changes in any 41-year old, whether they did construction or not?

A. Yes.

Q. In the areas at C5-C6 and L4-5 you said are the most commonly -- it's the most common place to degenerate?

A. One of, yes.

Q. Okay. And so it could be possible to degenerate in those two levels more so than other levels?

A. Yes.

Q. Would those two levels, if they are degenerated more than the other levels, be the most likely to herniate upon a trauma?

A. Yes.

Q. Mr. Kaminsky asked you if some of the surgeries you have performed on the neck and back are from trauma and some are

just from degeneration, correct?

A. Yes.

Q. Are some of the surgeries you performed on patients on previously asymptomatic conditions that become symptomatic and cause the need for surgery from a trauma?

A. Yes.

Q. In Mr. Dunne's scenario, did smoking cause his herniation in either the neck or the back?

A. No.

Q. What caused the herniation in his neck?

MR. KAMINSKY: Objection.

MR. McCRORIE: Okay. Withdrawn for that.

Q. If Mr. Dunne's neck and/or back were in -- withdrawn.

Did the hernia, ulcer, or heel spur that he previously had, or the knee meniscus tear in 2004, did any of those medical conditions contribute to either the herniated discs in the neck or the back?

A. No.

Q. If Mr. Dunne's cervical or lumbar spine were in such an advanced degenerative condition that his discs were going to start herniating spontaneously, can you tell the jury why that hasn't occurred in the last nine years?

MR. KAMINSKY: Objection.

THE COURT: Sustained.

Q. Why nothing?

MR. KAMINSKY: Objection.

THE COURT: Sustained.

Anything else?

MR. McCRORIE: Yes, your Honor, just very briefly.

Q. Do you feel you have expertise in reading the films of your patients?

MR. KAMINSKY: Objection.

Q. The MRI films?

MR. KAMINSKY: Objection.

THE COURT: Rephrase.

Q. You were asked questions about whether a radiologist is more qualified than you to read films; do you remember that?

A. Yes.

Q. Do you feel you have entirely full and complete qualifications to look at and interpret the films of your client's --.

MR. KAMINSKY: Objection.

Q. -- both neck and back?

MR. KAMINSKY: Objection.

THE COURT: Rephrase.

Q. Are you qualified to interpret and read an MRI?

MR. KAMINSKY: Objection.

THE COURT: I will allow that.

Q. In both the neck and the back?

MR. KAMINSKY: In his opinion.

MR. McCRORIE: Yes.

MR. KAMINSKY: I'll stipulate that in his opinion he believes he's qualified.

THE COURT: No, it's not in his opinion.

Is he qualified?

A. Yes.

Q. When you physically told the jury you saw the herniation in both the neck and the back in loupe magnification, were there any radiologists in the operating room?

A. No.

Q. I know Mr. Dunne didn't use the words "loss of consciousness" to you, but I'd like you to assume he told the jury something about the Three Stooges, he felt as if someone hit his head with cymbals and he was rattled and dazed. Did he tell you he was dazed and confused after the hit, after the fall?

A. Yes.

Q. Regarding the EMG, just so we're clear, you showed the jury that the disc at the C5-C6 is actually touching the cord, there is no space between the disc and the cord, correct?

A. Yes.

Q. And that you removed that?

A. Yes.

Q. Would a disc actually touching the spinal cord, would

that cause radiculopathy?

A. Yes.

Q. And using this model, Plaintiff's 33, a disc can either herniate out onto the cord or it could herniate to an exiting nerve root, such as this one here, right?

A. Yes.

Q. The exiting nerve root would be more likely to show up, if it's pushing out on an exiting nerve root that extends down to the leg, that would be more likely to show up on an EMG for radiculopathy?

MR. KAMINSKY: Objection.

THE COURT: Rephrase.

Q. Can you have a negative EMG and radiculopathy to either the neck or the back?

A. Yes.

MR. McCRORIE: I think my time is up.

THE COURT: Yes.

MR. KAMINSKY: Judge, thirty seconds? Thirty seconds.

THE COURT: Are you done, Mr. McCrorie?

MR. McCRORIE: Just.

Q. You testified on direct that you --

MR. McCRORIE: You have the thirty seconds, I promise.

THE COURT: Excuse me. Okay, we could breathe

for one second.

Okay. Ask your question and then you could ask your question.

Q. You testified on direct, I had you go through the note, you testified each time that he was working in pain, that he was attempting to go to work and that he was finding it hard to stay at work, it was progressive. You knew he was back at work as a steamfitter, correct?

A. Yes.

Q. And you've been a surgeon since 1992?

A. Yes.

Q. From the time you started accepting work accident cases and became on the list of unions of construction workers, do you have an understanding, a full understanding of what a steamfitter does?

A. Yes.

Q. Did you know up until the time you told him just don't go to work on January 19th, 2009, did you know he was putting in hours?

A. Yes.

Q. Did you know the number of hours?

A. Not total, no.

Q. And --

MR. McCRORIE: I have nothing further. Thank you.

THE COURT: Thank you.

MR. KAMINSKY: If I may, just thirty seconds.

RECROSS EXAMINATION

BY MR. KAMINSKY:

Q. Doctor, would you agree with me that your records from the first time he saw you --

THE COURT: Speak louder.

MR. KAMINSKY: Yes.

Q. In your records, you did not record him saying anything about being dazed or confused, true?

Yes or no or you don't remember? Just yes, no, or--

A. Yes, it --

Q. Yes, no, or you don't remember?

A. Umm, with -- I can't answer.

Q. As you sit here today do you have a specific recollection of ten years ago of him saying 'I was dazed and confused'?

A. Umm.

Q. Yes or no?

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

Q. Okay. So if it's not in your records, it's not in your records, correct?

A. Yes.

Q. Okay. Now, this alleged adjacent level breakdown --

MR. McCRORIE: Objection.

Q. That hasn't happened?

MR. McCRORIE: Objection.

THE COURT: Sustained.

Q. Correct?

THE COURT: Sustained, sustained.

Q. Last question. After you performed your surgery you sent the disc out for pathology report and the report came back as disc desiccation, correct?

A. Yes.

Q. Thank you.

MR. McCRORIE: Objection -- I mean not objection.

REDIRECT EXAMINATION

BY MR. McCRORIE:

Q. Does every disc you send out on every single operation come back as degenerative from pathology?

A. Yes.

Q. In every single surgery, correct?

A. Yes.

Q. Is every disc above --

MR. KAMINSKY: Objection, Judge.

Q. Is every disc above the age of maturity degenerated?

THE COURT: You opened up this box.

MR. KAMINSKY: No problem.

THE COURT: I didn't.

MR. KAMINSKY: Okay. I'm happy with the answer.

Thank you.

Q. Is every disc above the age of maturity, is it degenerated to some level?

A. Yes.

Q. And when you perform a surgery --

MR. KAMINSKY: Judge, now we're beyond the scope.

THE COURT: Yes, now we're going beyond the scope of recross.

MR. McCRORIE: Okay. I have nothing further.

THE COURT: Thank you.

Anything else?

MR. KAMINSKY: Thank you, Doctor. All the best.

THE WITNESS: Thank you.

THE COURT: Thank you, Doctor. You may step down.

(Witness excused.)

.h2 ~ Proceedings

THE COURT: Jurors, we will see each other again on Tuesday. Don't come on Monday. We'll see you on Tuesday, we'll see you at 9:45 and we will resume taking testimony once again.

I don't understand how you all have kept your coats on. This place is so warm.

MR. McCRORIE: It's colder over there.

THE COURT: Maybe it is colder over there, but up

here, maybe because I'm closer to the lights, it is very warm. Anyways, have a wonderful weekend, stay healthy please, take care of yourselves, and we'll see you soon.

THE COURT OFFICER: All rise. Jurors exiting.

THE COURT: And don't talk about the case. Don't talk about the case, whatever you do.

(Jury exits.)

(Whereupon, the matter is adjourned to April 4, 2017.)

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