

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE APPELLATE PANEL OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

The Honorable James F. Fraley, Jr., Family Court Judge

Appellant Case No. 2018-001516

W.C.C. File No.: 1421397

Unpublished Opinion Number 2020-UP-266; Filed December 9, 2020

Johnnie Bais, Employee,.....Petitioner,

v.

SCANA Corporation, Self-Insured Employer,.....Respondent.

APPENDIX
VOLUME II

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SC Court of Appeals

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**RECORD ON APPEAL
VOLUME II**

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Before the South Carolina
Workers' Compensation Commission
WCC File # 1421397

Johnnie Bias,
Employee,
Claimant,

v.

SCANA Corporation,
Employer,
Self-Insured Employer,
Defendant.

COPY

Deposition of: Terry Seagle

Location: 409 Park Avenue S.W.

Aiken, South Carolina

Date: Tuesday, December 20, 2016

Time: 9:52 a.m. - 10:18 a.m.

Court Reporter: Erica N. Creel

The deposition is taken pursuant to notice and/or
agreement, in the above-entitled cause pending in
the above-named court and pursuant to the
South Carolina Rules of Civil Procedure.

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S T I P U L A T I O N S

It is stipulated between counsel that this deposition is being taken pursuant to the South Carolina Rules of Civil Procedure and that all objections except as to the form of the question are reserved until the time of trial.

It is also stipulated between counsel for the respective parties and the deponent that the deponent will waive right to read and sign this transcript.

Thereupon,

Terry Seagle,
having been first duly sworn by the court reporter, testified as follows:

E X A M I N A T I O N

BY MR. SMITH:

Q Hi, Mr. Seagle, my name is Jake Smith. We met briefly off the record. The deposition today shouldn't take too long. Have you --

A Okay.

Q -- ever had your deposition taken before?

A Yes.

Q Okay. What was the context of that deposition?

1 A It was a Aiken County Sheriff's
2 Department.

3 Q Okay.

4 A I was a reserve deputy at the time.

5 Q How long ago was that?

6 A Ten, 12 years.

7 Q Okay. Well, I'm just going to refresh
8 your memory on a few things just to make sure we
9 have a clean and concise record. The first thing
10 is, just make sure all your answers to me are
11 verbal. As you can see, we have a court reporter
12 taking everything down. And she doesn't get to
13 take down shakes or nods of the head.

14 A That's right.

15 Q And the uh-huh -- try to avoid uh-huh's
16 and huh-uh's because they read the same on a
17 deposition and it can --

18 A Okay.

19 Q -- make it difficult to determine what
20 you were saying. Is that fair?

21 A Yes, sir.

22 Q If you don't understand any of my
23 questions for any reason, just ask me to repeat
24 them. Because you're under oath to tell the
25 truth, and if you're unable to understand what I'm

1 asking, then you can't tell the truth about it.

2 A Yes, sir.

3 Q Is that fair?

4 A Yes, sir.

5 Q Okay. And you're not under the
6 influence of anything today that would --

7 A No, sir.

8 Q -- influence your ability to tell the
9 truth?

10 A No, sir.

11 Q Okay. How far did you go in school,
12 Mr. Seagle?

13 A Twelfth grade.

14 Q Did you graduate twelfth grade?

15 A Yes, sir.

16 Q Where did you graduate from?

17 A Middle Valley High School.

18 Q Where is that?

19 A About ten miles from here up toward
20 Augusta.

21 Q And you had indicated that you were a
22 deputy sheriff at one point. How long were you a
23 deputy sheriff for?

24 A About ten years.

25 Q And how long have you been with SCANA?

1 A Thirty-three years.

2 Q Were you a deputy sheriff at the time
3 you were with SCANA?

4 A Yes, sir, I was a volunteer.

5 Q Okay.

6 A Yes, sir.

7 Q Have you worked anywhere other than
8 SCANA?

9 A No, sir.

10 Q Okay. How old are you?

11 A Except for the United States Navy. I
12 was in the Navy for --

13 Q Okay.

14 A -- four years. I'm sorry.

15 Q No problem. Navy for four years?

16 A Uh-huh.

17 Q When was that?

18 A Seventy-five to '80 -- around '80,
19 something like that.

20 Q And I didn't ask you this earlier, but
21 how old are you?

22 A Six -- 59 right now.

23 Q When do you turn 60?

24 A January 26th.

25 Q Oh, that sounded like it was right

1 around the corner the way you said it. And what's
2 your position right now out at SCANA?

3 A I am the safety and training
4 Coordinator.

5 Q Okay. How long have you been in that
6 position?

7 A Been in safety -- I mean training since
8 2009, I believe, and I picked up safety -- I'm not
9 completely sure. It was several years later.

10 Q Okay. In October of 2014, were you --
11 do you think you were in that safety position?

12 A Yes.

13 Q Okay. And we're here today for an
14 alleged injury -- or an injury to Mr. Johnny Bias
15 that occurred back in October of 2014. You aware
16 of that?

17 A Yes, sir.

18 Q Are you aware of that injury?

19 A Not really.

20 Q Okay. Did you know Johnny Bias?

21 A Yes.

22 Q Okay. How did you know Johnny Bias?
23 Just through --

24 A Through work.

25 Q -- employment? Okay. Did y'all ever

1 hang outside of work --

2 A No, sir.

3 Q -- or anything like that? Okay. And
4 in relation to -- to Johnny, or Mr. Bias, what was
5 your position? Were you a supervisor or did you
6 just kind of --

7 A No, sir. As a training coordinator,
8 safety person, I'm stuck out there as the --
9 actually by myself. I work directly with the
10 plant manager and report to him. So I'm not a
11 supervisor, but I do direct safety issues and/or
12 training.

13 Q And as a safety manager, is -- is -- or
14 as a safety person, is part of your job
15 documenting injuries?

16 A Yes, sir.

17 Q Okay. As SCANA, what the process of --
18 of documentation of an injury? If -- if somebody
19 goes to their supervisor, let's say, and says that
20 they have an injury at work, how does that all
21 play out?

22 A Normal procedure is we'll -- a
23 supervisor will call me. And the supervisor and
24 the employee will fill out a form. Then I'll get
25 the form, and we'll enter that form into a

1 computer program. The information in a computer
2 program. And at that point, of course, if the
3 man's injured, we'll make sure he gets medical
4 care first. Well, all that takes care -- takes --
5 and all that happens. But then after -- the
6 aftermath of that, we will -- again, we'll -- the
7 supervisor and him get together and write up some
8 kind of -- of report, and they'll give it to me,
9 and I'll enter it into the computer program.

10 Q Let me -- I just want to be sure I'm
11 clear. You said that after an injury the
12 supervisor would call you?

13 A Yes.

14 Q Okay. And --

15 A Or send me an email, either one.

16 Q Okay.

17 A I mean --

18 Q And then the supervisor and you would
19 fill out the form or --

20 A The supervisor --

21 Q -- the supervisor --

22 A -- and the employee --

23 Q Okay.

24 A -- that was injured.

25 Q And you said they would put it into the

1 system. What system is that?

2 A It's a -- the program is called
3 PeopleSoft.

4 Q Okay.

5 A I would enter it into the system.

6 Q Is there -- is it a specific form
7 that's filled out or is it just --

8 A It's a specific form we have for --

9 Q Okay.

10 A -- injuries.

11 Q Okay. And I guess in -- in this case
12 was -- who was Johnny's supervisor at the time?
13 Do you remember?

14 A Anthony Miles.

15 Q Okay. Is Mr. Miles still with SCANA?

16 A No, sir.

17 Q Okay. Do you know where he is?

18 A No, sir, I don't.

19 Q Okay.

20 A He kind of fell off the edge of the
21 earth.

22 Q Do you know how his employment came to
23 an end? Was he terminated?

24 A He resigned.

25 Q He resigned. And in this case, on

1 October 14th, did you get any phone call from
2 Anthony Miles regarding an injury to Mr. Bias?

3 A I got an email from Anthony.

4 Q And what was the email regarding?

5 A Regarding his injury.

6 Q Okay.

7 A That he just slipped and fell.

8 Q Regarding Johnny's injury?

9 A Yes, sir.

10 Q As far as the email is concerned, is
11 that something that's logged into an employment
12 file?

13 A I have it in my desk file.

14 Q Okay. If I were to subpoena an
15 employment file, would that something that gets
16 turned over?

17 A Yeah, if you subpoenaed it, I guess it
18 would.

19 Q Okay.

20 A I -- I don't know how legal that --
21 I -- I just -- I'm not a legal so...

22 MR. HAIGLER: Go off the record.

23 MR. SMITH: Yeah.

24 BY MR. SMITH:

25 Q Okay. I just got the email you were

1 referring to. I had a chance to read it. It
2 looks like that Anthony Miles sent you an email
3 about 11:00 in the morning on October 14th
4 indicating that Johnny reported slipping on steps
5 heading to the waste water treatment area?

6 A Yes, sir.

7 Q Okay. And I guess at that point it --
8 it looks like that he was indicating that his
9 backside, his hands, and his ankle were sore from
10 slipping on the step.

11 A Yes, sir.

12 Q Okay. Now I guess I shouldn't write on
13 it. Sorry. Was there any follow-up to this
14 email?

15 A Anthony Miles did all the follow-up.

16 Q Okay. Was there a -- a file -- I guess
17 what I'm asking is, there -- there was a follow-up
18 email to this or is the only email?

19 A That's the only email I have.

20 Q Okay. Do you remember whether or not
21 there was a -- another phone call or anything
22 after this regarding Johnny's --

23 A I talked --

24 Q -- condition?

25 A -- to Johnny the next day, and he

1 seemed to say he was -- he was okay with -- at
2 that point.

3 Q You talked with Johnny on the phone?

4 A Yes, sir.

5 Q Okay. Did he say anything about being
6 sore the next day?

7 A I don't remember.

8 Q Okay. And I guess -- was the report
9 that's here attached with this email, is that
10 something that was filled out by Anthony Miles or
11 filled --

12 A No, sir.

13 Q -- filled out by yourself?

14 A No, it was Anthony Miles.

15 Q Okay. So this is a report from the
16 PeopleSoft software?

17 A No, sir.

18 Q Oh.

19 A That's -- that's our internal document
20 to just sort of -- we had a -- an incident -- an
21 injury.

22 Q Regarding Mr. Bias's employment with
23 SCANA, do you know what his employment status is?

24 A No, sir.

25 Q At some point, did Mr. Bias request

1 treatment following his work accident?

2 A Not through me.

3 Q Okay. Did he request treatment through
4 somebody else?

5 A I don't know.

6 Q Okay. Who is the person that's in
7 charge of Workers' Comp claims at SCANA?

8 A I have no clue. I really don't know.

9 Q Is there a decision maker at SCANA that
10 kind of decides whether or not they can send
11 somebody to the doctor or not?

12 A If the employee requests to go to the
13 doctor, they will make sure he gets to the doctor
14 after an injury.

15 Q Are you aware of the status of
16 Mr. Bias's Workers' Compensation claim?

17 A No, sir.

18 Q Who is Elaine Price?

19 A She used to be an H.R. I don't think
20 that appointment is really current so...

21 Q Okay. Is there somebody at -- at SCANA
22 named D. Singletary?

23 A It's -- it's somebody at SCANA, yes.

24 Q Okay. What is D. Singletary's
25 position?

1 A I don't know. I've heard the name, but
2 I'm not sure.

3 Q Okay. And as far as the request for
4 treatment, you said that -- and correct me if I'm
5 wrong -- but you don't remember if he requested
6 treatment or he didn't request treatment?

7 A He did not request treatment through
8 me.

9 Q Through you. Is there somebody else
10 out there that he might request treatment through?

11 A Not really. He needs to go through --
12 really needs to go through me.

13 Q As far as the work accident, were there
14 any discussions with Anthony Miles following the
15 work accident?

16 A Not by me there wasn't.

17 Q Okay. Do you know of any discussions
18 that took place with Anthony Miles with anybody
19 else?

20 A No, sir.

21 Q Prior to October 14th, 2014, was Johnny
22 working out at SCANA?

23 A What --

24 Q I mean, was he doing his job out at
25 SCANA? Was he a good employee?

1 A Yes.

2 Q Okay.

3 A Yes.

4 Q As far as any write-ups or anything
5 like that, did he have any of those?

6 A I wouldn't know that.

7 Q Okay. Had he had any prior
8 Workers' Compensation claims?

9 A I would not know that either.

10 Q Okay. Had he had any prior work
11 accidents?

12 A Not to my knowledge. But again, that
13 was -- may have -- it could have been before I
14 took over so...

15 Q Okay. Do you know how long Mr. Bias
16 was employed out at SCANA?

17 A I would be guessing, but I would say
18 when the plant started somewhere around '94 --

19 Q Okay.

20 A -- '95 somewhere I guess.

21 Q So around 20 years at the time of the
22 accident? Is that fair to say?

23 A Yeah, probably so. And that's just a
24 guess because I don't...

25 Q Just a moment. And you indicated that

1 you were the person that puts in the PeopleSoft
2 accident report?

3 A Yes, sir.

4 Q Okay. Are you the one that actually
5 fills all out -- all that information out?

6 A Yes, sir.

7 Q Is Johnny currently working out at
8 SCANA?

9 A No.

10 Q Okay.

11 A Not at our facility.

12 Q Okay. And when you're doing the
13 PeopleSoft input on that incident report, where
14 are you gathering information from? Is that
15 directly from the employee, or is it from the
16 supervisor or...

17 A Generally before we put it in
18 PeopleSoft, we'll have a -- in--- investigation --
19 accident investigation. And from that accident
20 investigation, we'll determine cause and the -- of
21 the accident. And we'll put all the pertinent
22 information in at that time.

23 Q As far as the accident investigation
24 that takes place, is that something that you
25 conduct yourself, or is that something that's

1 other people do?

2 A Generally it's myself, the plant
3 manager, maintenance or superintendents. Also be
4 the supervisor, and quite often could be the vice
5 president.

6 Q And in this case, who's -- who's the
7 plant manager out there?

8 A Mark Folslend.

9 Q Mark?

10 A Folslend, F-O-L-S-L-E-N-D.

11 Q And who's the vice president?

12 A Jim --

13 Q Sorry to put you on the spot.

14 A Yeah. Jim Landers.

15 Q So --

16 A Sorry about that. Senior moment.

17 Q No problem. Were either of those
18 involved in this investigation?

19 A I don't remember. I -- I don't even
20 remember if we had an investigation on this. If
21 we just have an injury, and it doesn't go to
22 Workmen's Comp, then the investigation -- accident
23 investigation would be done by myself and maybe
24 the plant manager or the supervisor.

25 Q Okay.

1 A And that would be as far as it goes.

2 Q Okay.

3 A Now, if we have a Workmen's Comp case
4 and it's recordable -- OSHA recordable type thing,
5 then all those fellows -- people would be
6 involved.

7 Q Was this a Workers' Compensation case?

8 A I don't know. I don't remember.

9 Q As far as the investigation report or
10 investigation itself, is that something that's
11 done before or after a decision is made to admit a
12 case?

13 A I'm not quite understanding what you're
14 saying.

15 Q As -- as far as the investigation, do
16 you always investigate before admitting or denying
17 a case or do you --

18 A No, we don't -- we don't investigate.
19 If it comes into a -- if it's a OSHA recordable,
20 we have to send somebody to the doctor depending
21 on what they do. It could be an OSHA recordable.
22 If it's an OSHA recordable, then we would
23 investigate after the fact. We still fill out the
24 information in PeopleSoft to get it posted to
25 PeopleSoft. Then I got back and we'll put in any

1 kind of other pertinent information once the
2 investigation is complete.

3 Q Okay.

4 A But it's only on recordable accidents
5 now. It's not on just a injury that somebody
6 says, you know, I sprained my ankle and I don't
7 need to go to the doctor.

8 Q In this case, was this an OSHA
9 recordable case?

10 A I don't know.

11 Q Okay.

12 A I don't remember it being.

13 Q Okay. Are there any cameras out at the
14 facility?

15 A Yes.

16 Q As far as the cameras are concerned, is
17 that something -- is there a camera at the water
18 treatment area?

19 A I don't know if there's one pointed
20 that way or not. I'm not sure.

21 Q As part of an investigation, would you
22 go back and look at cameras?

23 A No, sir, I would not.

24 Q Okay. Would anybody do that?

25 A I'm not sure. They could, I guess, but

1 I'm...

2 Q Do you have any reason to doubt that
3 Mr. Bias had a fall on October 14th --

4 A No, sir.

5 Q -- 2014? Okay.

6 MR. SMITH: I think that's all the
7 questions I have, Mr. Seagle. Thank you --

8 THE DEPONENT: Okay.

9 MR. SMITH: -- for your time.

10 E X A M I N A T I O N

11 BY MR. HAIGLER:

12 Q Mr. Seagle, I've got just a couple of
13 follow-up questions. Were there any witnesses to
14 this injury that you know of?

15 A Not that I know of.

16 Q Okay. If on that form that you guys
17 complete it says witnesses -- that there were no
18 witnesses. Is that an accurate --

19 A If that's --

20 Q -- If --

21 A -- if that's what it says. Yes, sir.

22 Q Okay. If there are -- if there were
23 witnesses, would you have interviewed them?

24 A Yes, sir, on that form.

25 Q You would have named who they are and

1 then --

2 A Yes, sir.

3 Q -- possibly interviewed them?

4 A Yes, sir.

5 Q Okay. If -- I think you testified that
6 he called you -- or excuse me -- you called him
7 the day after to see how he was doing. Is that
8 right?

9 A Yes, sir.

10 Q If he had asked you for medical
11 treatment at that time, what would you have done?

12 A I would called the saf--- our safety
13 manager, and we'd have made an appointment for him
14 to get him seen by a doctor.

15 Q Any doubt in your mind that you would
16 have given him medical treatment had he asked for
17 it?

18 A No doubt in my mind at all.

19 Q Okay. Is that what you're supposed to
20 do?

21 A Yes, sir.

22 Q All right.

23 MR. HAIGLER: Thank you, sir.

24 FURTHER EXAMINATION

25 BY MR. SMITH:

1 Q If he didn't ask for medical treatment
2 that day, but asked for it three days later, would
3 you still do the same thing?

4 A If he called me and told me -- or --
5 that he needed medical attention, yes.

6 Q Okay.

7 MR. SMITH: Nothing further.

8 (Deponent Excused..)

9 (Whereupon, at 10:18 a.m.,
10 the taking of the foregoing
11 deposition was concluded.)
12
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1 State of South Carolina
2 Before the
3 South Carolina Workers' Compensation Commission
4 WCC File No.: 1421397

5 Johnnie Bias,)
6 Employee,)
7 Claimant,)
8 vs.) Deposition of
9 SCANA Corporation,) JUSTIN HUTCHESON, MD
Employer,) March 31, 2017
and)
Self-Insured,)
Carrier,)
Defendants.)

10

11

12

13 Deposition on oral examination of

14 JUSTIN HUTCHESON, MD, reported by

15 Donna Cheryl Kyzer, Court Reporter and Notary

16 Public in and for the State of South Carolina;

17 said deposition taken pursuant to notice of

18 deposition and in accordance with the South

19 Carolina Rules of Civil Procedure, at Carolinas

20 Center for the Advanced Management of Pain, 109

21 Midlands Court, Suite B, West Columbia, South

22 Carolina, commencing on Friday, March 31, 2017, at

23 the hour of 11:58 a.m.

24

25

ABC REPORTING SERVICE (803) 730-3015

JUSTIN HUTCHESON, MD 3-31-17

1 This deposition is taken in
2 accordance with the South Carolina Rules of Civil
3 Procedure.

4 It is agreed and stipulated by the
5 deponent and respective counsel that the reading
6 and signing of the deposition transcript by the
7 deponent is expressly waived.

8 WHEREUPON:

9 JUSTIN HUTCHESON, MD, being duly
10 sworn and cautioned to speak the truth, the whole
11 truth and nothing but the truth, testified as
12 follows:

13 EXAMINATION

14 BY MR. HAIGLER:

15 Q. Dr. Hutcheson, please state your full
16 name for the record.

17 A. Justin Kelby Hutcheson, MD.

18 Q. Okay. Dr. Hutcheson, my name is
19 Nick Haigler. You and I have met before in this
20 very room. I represent SCANA in Mr. Johnnie Bias'
21 workers' compensation claim. It's my
22 understanding that we're here to talk about,
23 obviously, the IME you conducted on March 22,
24 2016. Is that the only time you've seen him in
25 person?

ABC REPORTING SERVICE (803) 730-3015

JUSTIN HUTCHESON, MD 3-31-17

1 A. Yes.

2 Q. Okay. Any other visits scheduled
3 after March 22nd of '16?

4 A. No.

5 Q. Okay. And I also have a document
6 that you completed, a medical questionnaire dated
7 7-12-16. Do you have that?

8 A. I believe so. I mean yeah. I may be
9 missing a page or two, but I have something for
10 that date I think.

11 Q. Do you have a 14B dated 7-12-16?

12 A. Yes.

13 Q. Okay. And I have another medical
14 questionnaire also dated 7-12-16. I've got two
15 more actually, so that makes three medical
16 questionnaires.

17 A. This is what I've got.

18 (Witness tenders document.)

19 Q. All right. Fair enough. Okay. What
20 other medical records do you have?

21 A. None -- or a note from I believe a
22 Ross Rames' office visit. That's it.

23 Q. Were you given any other records
24 before the IME?

25 A. Yes.

ABC REPORTING SERVICE (803) 730-3015

JUSTIN HUTCHESON, MD 3-31-17

1 Q. Where are those?

2 A. Not in this chart. I don't know.

3 Q. Do you still have them in your
4 office?

5 A. Let's see. There are some records
6 scanned into this chart. I don't have paper
7 copies, though.

8 Q. Do you know what records you saw or
9 reviewed? Do you have any idea? I mean, are they
10 the ones in your chart? Do you know if you
11 actually saw those?

12 A. Yes. I -- I -- I reviewed these.

13 Q. Okay. How many pages do you have; do
14 you know?

15 A. 121.

16 Q. Okay. Were you given any kind of
17 letter from the Salley Law Firm?

18 A. Yes.

19 Q. Do you have a copy of that?

20 A. Yes.

21 Q. Do you mind if I see it?

22 A. It's on the computer.

23 Q. Can you print me a copy?

24 A. Yeah, more than likely. I'm going to
25 have to get --

ABC REPORTING SERVICE (803) 730-3015

1 Q. Ironically, there is a printer
2 directly to your right --
3 A. That one, I'm --
4 Q. -- that --
5 A. -- not --
6 Q. -- you're --
7 A. -- connected --
8 Q. -- touching.
9 A. -- to. Yes. Yes. That one is not
10 connected to me.
11 Okay. Let's see. We'll give that a
12 couple minutes and then I'll go get it. What
13 other questions?
14 Q. Is it -- is it being printed?
15 A. Yes. Yes.
16 Q. Okay.
17 A. It takes it a minute to go through
18 the system.
19 Q. That's fine. What do you charge for
20 an IME?
21 A. The same thing I charge here. 600 an
22 hour.
23 Q. Okay. And is that for -- what does
24 that include, record review, doing the evaluation
25 or out the door, turnkey?

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1 A. Hour of time.

2 Q. Okay. So how much did you charge for
3 this particular evaluation?

4 A. I believe 600. That's the standard
5 rate.

6 Q. But did it take more than an hour?

7 A. No.

8 Q. So your records review, seeing the
9 patient and writing this report did not take more
10 than an hour?

11 A. The writing can happen after. That's
12 not part of it, but seeing the patient and coming
13 to the opinion, whether I finish the note then or
14 later at home, I don't charge extra for it.
15 That's -- I don't charge for entering it into the
16 system.

17 Q. Did you charge for reviewing those
18 hundred and twenty-one pages of documents?

19 A. Yes.

20 Q. So reviewing that and seeing the
21 patient took an hour --

22 A. Yes.

23 Q. -- or less?

24 A. About an hour.

25 Q. Do you know how long you spent with

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1 the patient?

2 A. I don't recall.

3 Q. These questionnaires, what did you
4 charge for those?

5 A. I believe 15 minutes of time, so a
6 hundred and fifty.

7 Q. Per questionnaire?

8 A. No. Just 15 minutes of time.

9 Q. Okay.

10 A. Going to your point, workers' comp
11 pays me less than 2 percent of my collection, so
12 this isn't a big moneymaker for me.

13 Q. All right.

14 A. And so if that's why you're asking, I
15 honestly don't know what our practice charges.
16 It's not me. It's the practice's policy, so.

17 Q. Fair enough. Do you see a lot of
18 workers' comp patients?

19 A. No.

20 Q. Is there --

21 A. Less than 5 or 10 percent of my
22 practice is workers' comp.

23 Q. Do you prefer it that way?

24 A. I really don't have a preference.

25 Q. Okay. How many IMEs do you conduct

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1 for Mr. Salley's law firm on an annual basis?

2 A. I don't know.

3 Q. Multiple?

4 A. More than one, less than twenty. I
5 conduct IMEs for I believe them, for State
6 Accident, for Genex, for several carriers. None
7 of them are that frequent.

8 Q. All right. These questionnaires you
9 completed, these were just -- you didn't draft
10 these questions, did you?

11 A. Correct.

12 Q. You didn't even draft these
13 questionnaires. You were just given these to sign
14 if you agreed with the opinions; is that right?

15 A. Let's see. Did that -- to check yes
16 or no and fill in any information that needed --
17 yes. I think that's --

18 Q. Are you --

19 A. -- all I did.

20 Q. -- aware that if you -- that if --
21 are you aware that these documents wouldn't --
22 that you couldn't ask -- he couldn't ask you these
23 questions if we were in court?

24 A. I was not aware.

25 Q. Are you aware that these are leading

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1 statements?

2 A. Some of them. That's -- again, I
3 don't understand the --

4 Q. That's fine.

5 A. -- you know, the point. They seem no
6 different than records and questionnaires I filled
7 out for the State Accident Fund, Genex,
8 Med -- I can't remember the other company that
9 pays for IMEs or any of the other attorneys.
10 Okay?

11 Q. Okay. Doctor, can you see if you
12 have a copy of that letter that -- if it has been
13 printed?

14 A. Yes.

15 (A short break transpired.)

16 BY MR. HAIGLER:

17 Q. Okay. This is a five-page letter.
18 Did you read this letter before you saw the
19 patient?

20 A. I did.

21 Q. Is that part of the time that you
22 charge in that hour?

23 A. Yes.

24 Q. Okay.

25 A. Records review.

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1 Q. Do you have a copy of it pulled up
2 right now?

3 A. I can. Yes.

4 Q. That would be great. Thank you.

5 A. Go ahead.

6 Q. Under page -- or excuse me,
7 paragraph 3, it says, Prior to Mr. Bias'
8 work-related injury, it is my understanding that
9 he experienced lower back pain, left-sided buttock
10 pain and left posterior lateral leg pain in the L5
11 distribution, and then it mentions the surgery
12 that Dr. Poletti performed. Was that the complete
13 understanding you were given of his preexisting
14 medical conditions?

15 A. No.

16 Q. Well, what other understanding did
17 you get? Did you get records?

18 A. Yes.

19 Q. Okay. Did you get records that were
20 before October 14th of '14?

21 A. I believe so, and we discussed them,
22 and it's in my IME. Do you want to go through the
23 hundred and twenty pages or do you want to ask
24 questions about my opinion?

25 Q. I want to ask if you had any medical

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1 records.

2 A. Before the injury?

3 Q. Correct.

4 A. Okay. Sorry. The quality of these
5 is poor because they are now scanned in from a
6 printed copy, so looking for dates. That's from
7 Southeastern Spine from 2012. It looks like
8 October 12, 2012, a note from Dr. Poletti sometime
9 in October.

10 Q. 2014?

11 A. It said 2002.

12 Q. Okay.

13 A. 2001, 2000 --

14 Q. So you had records prior to?

15 A. Yes.

16 Q. Okay. That will -- that will
17 suffice. What was your understanding of his
18 condition just prior to the injury? Did you all
19 talk about that?

20 A. Yes. And the -- what looks like a
21 third line in my version of the IME, He was doing
22 well in his recovery per records until he fell at
23 work on 10-14-14, and it looks like he was --
24 going further down, Prior to the fall he was
25 taking two to three Norco, 10 milligrams per day.

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1 Since the fall, he -- he has
2 basically doubled that dose, taking four to five
3 Norco 10- per day plus other symptoms, so --

4 Q. Okay.

5 A. -- I tried to evaluate pre- and post-
6 and differences. Since you asked, there is also
7 depression starting after the fall, from the pain,
8 about his work, maybe his frustration,
9 irritability, lack of sleep, weird dreams, anger
10 issues. He is now seeing a psychologist for
11 these.

12 There is neurologic deficit in his
13 left leg. I believe he's got foot drop since the
14 fall plus some urinary incontinence issues that
15 have progressively developed --

16 Q. So --

17 A. -- that weren't present prior to the
18 fall.

19 Q. So the -- well, okay. Let me -- and
20 I think your questionnaires support this, but let
21 me make sure I understand your opinion.

22 A. I'm just reading off my IME, so
23 I'm --

24 Q. Okay. Fair enough. Are you on
25 page 1?

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1 A. Yes.

2 Q. You were reading so fast I had a hard
3 time keeping up with you. Okay. If you will, go
4 back to the letter. It looks like -- tell me when
5 you're there.

6 A. Okay.

7 Q. It looks like after the initial --
8 after that paragraph we just went over, you were
9 quoted a record from August the 6th of 2014. Is
10 that right?

11 A. Yes.

12 Q. I assume you were actually given this
13 report and -- do you know that or --

14 A. Yes. But, again, it's buried in a
15 hundred and twenty-one pages that is --

16 Q. Okay.

17 A. -- scanned in, so it would take me
18 about five or ten minutes to find it.

19 Q. That's fine. I guess -- all right.
20 And then the next summarization we have is October
21 22, 2014. Do you see that?

22 A. Yes.

23 Q. I assume you had that report as
24 well.

25 A. Yes.

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1 Q. Okay. Did you know he saw
2 Dr. Poletti on October the 15th of 2014?

3 MR. SMITH: I'm going to object
4 because I don't think it was Dr. Poletti that he
5 actually saw. He has a PA.

6 BY MR. HAIGLER:

7 Q. Do you know if you went to -- do you
8 know if he went to Dr. Poletti's office on October
9 the 15th of 2014?

10 A. If you give me a minute -- if you
11 have the note, that would help.

12 Q. I want to know if you had the note.
13 That's what --

14 A. Okay.

15 Q. -- I want to know.

16 A. What I'm saying is, I won't -- I'll
17 answer yes or no, but having seen what you've got
18 will make it a lot easier to identify.

19 Q. I need to know whether you had that
20 note when you --

21 A. Okay.

22 Q. -- had the -- did your IME.

23 A. Let's see. You were stating -- I'm
24 sorry. You're looking for which date on -- 2014?

25 Q. October 15, 2014.

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- 1 A. October 15, 2014. All right.
- 2 Sorry. 10-15-14, Lane Tuggle, PA-C.
- 3 Q. You had that report?
- 4 A. Yes.
- 5 Q. Okay. Do you know if you reviewed
- 6 that report?
- 7 A. Yes.
- 8 Q. Would you agree that's the day after
- 9 the accident?
- 10 A. Yes. You are correct.
- 11 Q. Okay. Can you show me where --
- 12 A. Let's see.
- 13 Q. -- in that report you --
- 14 A. It's --
- 15 Q. -- referenced he mentions --
- 16 A. Sorry. I was --
- 17 Q. -- the work-related injury the day
- 18 before?
- 19 A. He does not.
- 20 Q. Okay. So he doesn't reference a
- 21 work-related injury that happened the day before
- 22 allegedly; is that correct?
- 23 A. Correct.
- 24 Q. Doesn't reference any sort of
- 25 aggravation of his pain or increase of his pain?

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1 A. Not at all. Everything looks stable.

2 Q. Okay. In fact, it looks just like it
3 did in the prior report from August of 2014 that's
4 referenced in that letter; does it not?

5 A. It looks very unchanged or very
6 similar, so -- on the 8-6-14 note --

7 Q. Fair enough.

8 A. -- by Lane Tuggle, PA-C as well.

9 Q. Doctor, do you find it strange that
10 the letter that you were sent summarizing every
11 single report that came out of Dr. Poletti's
12 office after August the 6th of 2014 includes a
13 summary of every single report except for the
14 report the day after the accident? Does --

15 A. Yes.

16 Q. -- that -- does that -- is that
17 strange?

18 A. Yes.

19 Q. And is it further -- is it stranger
20 because that report references absolutely nothing
21 regarding an accident that allegedly occurred the
22 day before? Is that -- does that seem strange?

23 A. Not stranger because of various
24 reasons. Strange that it's not there.

25 Q. Okay. And why would that be strange?

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1 A. Because his notes are very thorough
2 on that summary, and the notes from the Spine
3 Institute are very detailed.

4 Q. Okay. Do you think that October 15th
5 note was -- that the summary of that report was
6 just accidentally left out of this five-page
7 letter or do you think it was intentionally left
8 out because it didn't reference a work-related
9 injury?

10 MR. SMITH: I'm going to object to
11 that. That's --

12 THE WITNESS: I --

13 MR. SMITH: -- speculating.

14 THE WITNESS: -- really --

15 BY MR. HAIGLER:

16 Q. You can ask -- you can answer that,
17 Doctor.

18 A. Sure. I don't know the mind-set of
19 the person writing it.

20 Q. Well --

21 A. My guess --

22 Q. -- the --

23 A. -- is --

24 Q. -- mind-set of the person writing it
25 is to try to get you to give an opinion.

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1 A. Sure.

2 Q. Wouldn't you agree, to give an
3 opinion that his problems are causally related to
4 an accident that occurred on October 14th --

5 MR. SMITH: Object to that. It's
6 speculation.

7 THE WITNESS: I don't know that, but
8 it is odd that the day after the accident they
9 have a visit that's basically status quo since the
10 last time.

11 MR. HAIGLER: Okay.

12 THE WITNESS: So --

13 BY MR. HAIGLER:

14 Q. Do you -- do you think you may have
15 missed that report when you were reviewing the
16 records?

17 A. No.

18 Q. Okay. Why didn't you comment on that
19 in your report?

20 A. Because the next part of the chart
21 was the MRI from 10-29-14, which shows issues, and
22 he had further problems, so you would have to
23 depose the -- Lane Tuggle, PA-C and ask them why
24 he has a normal note on, I'm sorry, my computer is
25 running slow, 10-15-14, but yet has medical

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1 justification for an MRI on 10-29-14, 15 -- two
2 weeks later. That -- that's their care, not mine,
3 so you would have to ask them.

4 Q. Well, you should be aware, because
5 it's in this summary, that he actually did go back
6 to Tuggle on the 22nd, eight days after the
7 alleged accident, and did complain of a
8 work-related injury, so that would probably --
9 wouldn't you agree, would probably support that
10 justification for that MRI seven days later?

11 A. Yep.

12 Q. Would that make more sense?

13 A. It would.

14 Q. But it would -- but it doesn't make
15 sense, does it, Doctor, why he didn't, the day
16 after the injury, reference any of that? In fact,
17 he was, according to that report from 10-15,
18 slightly improved.

19 A. You're right.

20 Q. Does that make any sense at all?

21 A. It does not.

22 Q. Okay. Would you have expected for
23 Mr. Bias to make mention of that when he went back
24 to his neurologist -- or neurosurgeon's office the
25 day after an alleged injury?

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1 MR. SMITH: I object.

2 THE WITNESS: I would.

3 MR. SMITH: Speculation.

4 MR. HAIGLER: Okay.

5 BY MR. HAIGLER:

6 Q. You would?

7 A. I would.

8 Q. Okay. And why is that?

9 A. Because if he had a new injury, it
10 would be pertinent to the surgeon who operated on
11 him.

12 Q. Okay. And, again, that is the only
13 report from Dr. Poletti that's not in this summary
14 from his attorney's office, in the letter they
15 sent you to do the IME. Would you agree with
16 that?

17 A. You got another hour?

18 Q. Well, let me ask it this way. Do you
19 have any reason, if I'm telling you that that's
20 the only report that wasn't included in the year
21 after -- in all of the visits that he had with
22 Poletti's office in the year after this alleged
23 accident that's not included in this summary,
24 would you -- would you have any reason to dispute
25 that if that's what I'm telling you?

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1 Here, I'll show you the letter. That
2 may help you. Would you agree that there are
3 summaries of numerous reports from Dr. Poletti's
4 office after October 14, 2014?

5 A. Yes.

6 Q. But not October 15, 2014.

7 A. No. But there is 30 pages of notes,
8 roughly, from before the injury that are not
9 summarized in this letter that are in the
10 documents I have.

11 Q. But don't you agree when we're trying
12 to figure out whether the gentleman has -- well,
13 one -- well, I'm not necessarily disputing he
14 had -- that --

15 A. Yeah.

16 Q. -- something has aggravated his
17 condition. I don't know that that's necessarily
18 in dispute, Doctor, but if we're trying to figure
19 out whether something that occurred on the 14th of
20 October aggravated that condition, wouldn't a
21 report from your neurosurgeon the day after be
22 pretty important?

23 A. It would.

24 MR. SMITH: And I'm going to object
25 because --

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1 MR. HAIGLER: I haven't finished --

2 MR. SMITH: -- I think it was --

3 MR. HAIGLER: -- my question.

4 MR. SMITH: -- the PA.

5 BY MR. HAIGLER:

6 Q. Wouldn't that be -- from the
7 neurosurgeon's office, wouldn't that be fairly
8 important --

9 A. It would.

10 Q. -- information to look at when trying
11 to determine when an aggravation occurred?

12 A. It would.

13 Q. Okay. Now, reading your
14 questionnaires and your report -- do you mind
15 if -- can we go to the questionnaires first, if
16 that's okay with you?

17 A. Sure.

18 Q. And I'm on the one that starts
19 with -- it looks like it says page 20 -- well, I
20 don't know what it says at the bottom, but it's
21 got five questions on the first page, the one I'm
22 on.

23 A. Okay. All right. Sure.

24 Q. And in the very first question you
25 give an opinion to a reasonable degree of medical

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1 certainty that he had an aggravation of a
2 preexisting condition that involved his back, his
3 left leg, his right leg, his urological system,
4 nervous system, resultant -- and resultant
5 psychological system. Fair --

6 A. Correct.

7 Q. -- enough?

8 A. Yes.

9 Q. Okay. And that was your opinion when
10 you filled this out?

11 A. Yes.

12 Q. When you say "urological symptom,"
13 are you aware he's having issues with erectile
14 dysfunction as well as some incontinence issues?

15 A. The only note I have to that is
16 Ross Rames' urology note on 5-27-16, which was
17 after my IME --

18 Q. What does --

19 A. -- for --

20 Q. -- Dr. Rames say?

21 A. -- bladder I believe. "Fecal
22 urgency, urinary urgency, urge incontinence,
23 nocturnal enuresis, erectile dysfunction,
24 ejaculatory dysfunction." These appear -- "these
25 issues appeared and worsened following his back

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1 injury and are more -- more likely than not, to a
2 reasonable degree of medical certainty, causally
3 linked."

4 "He has evidence of sacral nerve
5 dysfunction with absent bulbocavernosal reflex."

6 Those get hard to spell, so I --

7 "He will likely require further
8 treatment and evaluation of these issues, possibly
9 including" a bunch of urologic activities.

10 MR. SMITH: Do you want to just
11 submit that --

12 THE WITNESS: Yeah.

13 MR. SMITH: -- as an exhibit so
14 she'll have it?

15 THE WITNESS: I have a hard time
16 spelling those too.

17 MR. SMITH: Yeah. I think we can
18 submit that as an exhibit --

19 MR. HAIGLER: Yeah, we can submit it.

20 THE WITNESS: -- so --

21 MR. SMITH: -- just so --

22 THE WITNESS: But --

23 MR. SMITH: For spelling.

24 (PLF. EXH. 1, Ross Rames, MD, Medical
25 Record Dated 5/27/2016, was marked for

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1 identification.)

2 THE WITNESS: I did not have that,
3 obviously, at the time of my IME. I just had his
4 complaint of it. I'm going through his --

5 BY MR. HAIGLER:

6 Q. Well, let me ask you this. Did you
7 evaluate his urological system?

8 A. No.

9 Q. Did you evaluate his nervous system?

10 A. Yes.

11 Q. Okay. Did you evaluate his psyche?

12 A. Partially.

13 Q. Conduct tests?

14 A. Partially.

15 Q. What do you mean "partially"?

16 A. I'm not a thorough psychologist nor
17 am I board certified in psychiatry or psychology,
18 but the overlay with chronic pain, it is very
19 apparent, and we do some basic psychological
20 testing in our evaluation.

21 Q. Did you do any of that when you saw
22 him --

23 A. Yes.

24 Q. -- in March of '16?

25 A. Yes.

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1 Q. What did you do?

2 A. Let me catch up with you. I'm still
3 on the last question. Sorry.

4 Going back to your previous question,
5 I believe he was only having bladder control
6 issues for the most part. At least -- let's see.
7 Yes. I don't see any issues with fecal
8 incontinence at that point.

9 In terms of psychological testing,
10 it's a myriad of things, between appearance, how
11 he conducts himself during the interview, high
12 pain display, Waddell signs, anxiety, depressed
13 symptoms, subtle findings to blatant, obvious
14 anger issues can be assessed and often are, and
15 then are commented on as they are pertinent to
16 this.

17 Q. But you didn't do any formal testing?

18 A. Psychometric testing?

19 Q. Correct.

20 A. No. That's not part of a pain exam,
21 but he was depressed.

22 Q. Are you qualified to give an expert
23 opinion that he has a psychological injury?

24 A. No. But --

25 Q. Okay.

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1 A. -- my --

2 Q. Are you --

3 A. -- physical --

4 Q. -- qualified --

5 A. -- exam under the Board --

6 MR. SMITH: Let him --

7 A. -- of --

8 MR. SMITH: -- finish --

9 A. -- Medicine --

10 MR. SMITH: -- okay?

11 A. -- the State Board of South Carolina,
12 says he's depressed.

13 BY MR. HAIGLER:

14 Q. Who does?

15 A. The State Board of Medicine in South
16 Carolina and my MD and my anesthesia board and my
17 pain medicine fellowship and my pain medicine
18 boards, so, if you will, bear with me, let's
19 see, and 10 years of treating chronic pain
20 patients who -- I think most people can agree can
21 have some psychological issues, and that's why we
22 have two full-time psychologists.

23 His exam demonstrated depressed mood,
24 let's see, just a second here, but no significant
25 Waddell signs, and then I commented on his

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1 depressed symptoms that he described to me due to,
2 again, his pain, his loss of job and loss of
3 function, which is not uncommon for somebody who
4 has suffered a work injury -- or, excuse me, an
5 injury that has left them less functional.

6 Q. Okay. Are you -- I mean, he has had
7 this chronic pain, though, for the better part of
8 his adult life; has he not? You've got all the
9 records you've seen from 2001 where he has been
10 having this exact issue this whole time.

11 A. To some degree, yes. I think -- I
12 think the issue here is that it's worsened.
13 Again, he wasn't peeing himself. He didn't have
14 foot drop. He was fairly functional with some
15 chronic pain medicine. He didn't have an obvious
16 neurologic deficit, at least from the records I
17 reviewed.

18 Q. Okay. Let me --

19 A. Now he has a urological deficit as
20 determined by a urologist. He has got
21 psychological deficits determined by a
22 psychologist. He has evidence of nerve root
23 injury or cauda equina injuries, okay,
24 demonstrating his foot drop.

25 Q. Okay. Well, that's interesting,

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1 Doctor. You actually completed a questionnaire
2 just on the issue of foot drop; did you not?

3 A. Let me see. Yes.

4 Q. It said that to a reasonable degree
5 of medical certainty he has suffered impairment to
6 his lower extremities as a result of his
7 work-related injury, and you put foot drop.

8 A. Yes.

9 Q. Meaning as a result of this injury
10 that he had in October of 2014, he now has foot
11 drop.

12 A. Yes.

13 Q. And then in your report you also say,
14 and I'm on the assessment part, that since the
15 fall, he now wears an AFO brace, left foot, due to
16 foot drop. Is that what he told you?

17 A. And let's see. To the best of my
18 recollection he was wearing the brace prior to the
19 exam and I had him take it off.

20 Q. My point was that he told you that
21 that foot drop started --

22 A. After the injury.

23 Q. -- after the injury.

24 A. Yes.

25 Q. Okay. Let me show you a report,

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1 Doctor. This is a report from Dr. Poletti's
2 office, not Dr. Poletti, but it's dated 10-20-15.
3 Have you ever seen that report before today?

4 A. Okay. Bear with me. I think I was
5 at page 73 before. Sorry. Repeat the question.

6 Q. Have you ever seen that report before
7 today?

8 A. I do not recall. It's listed in the
9 letter, but it's not in the documents I have
10 scanned which could very well be that my computer
11 cut it off at a hundred and twenty pages and it
12 wouldn't store more than a hundred and twenty
13 pages.

14 Q. Okay. It's listed in the letter that
15 Mr. Smith's office sent you.

16 A. Yes. On October 20, 2000 -- or it
17 looks like 201, but Kimsey Cooper, PA, noted at
18 least. The letter isn't listed.

19 Q. Okay. But according to this note, he
20 had foot drop since his surgery in March of 2014.

21 A. Yes.

22 Q. That would be before this accident,
23 correct?

24 A. It would be.

25 Q. So that would be inconsistent with

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1 what's in --

2 A. It would be.

3 Q. With what he told you.

4 A. Yes, it would be inconsistent with
5 that.

6 Q. So your -- so your questionnaire --
7 that that accident caused -- or the foot drop
8 resulted from his work-related injury is not
9 right, is it? Am I correct?

10 A. Sorry. I am trying to find Poletti's
11 note where he documents left leg movements that's
12 worsened since the injury with the progression of
13 the disk herniations into the foramen on the left
14 side.

15 Q. You mean the left foot drop?

16 A. Yeah. Can I see what --

17 Q. Well --

18 A. -- you're --

19 Q. -- that's not the question, though.

20 The question in here was, did it result in --

21 A. No. Your question was, was I
22 mistaken. Can I see my --

23 Q. No. My --

24 A. Can I see the --

25 Q. -- question --

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1 A. -- letter?

2 Q. -- to you is very simply, Doctor, you
3 filled out a document --

4 A. Right. And --

5 Q. -- and you --

6 A. -- was I --

7 Q. -- have --

8 A. -- incorrect. No.

9 Q. Hold on a second.

10 A. Okay.

11 Q. You have filled out a document that
12 said his foot drop was the result of a
13 work-related injury.

14 A. Yes.

15 Q. You've also put in your report, not
16 in one location, but twice, that he did not have
17 foot drop prior to this accident, period. So it
18 couldn't have been worsened because he didn't have
19 it.

20 A. Correct.

21 Q. And I have shown you a report from
22 Dr. Poletti where he had foot drop after this
23 surgery.

24 A. That's from his PA. Can I see Dr. --
25 your letter?

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1 Q. Okay. So according to that note,
2 your report, whatever he told you in your report
3 that you put in here, and your questionnaire are
4 inaccurate; are they not?

5 A. Yeah.

6 Q. Okay. And so you filled out this
7 questionnaire and completed this report indicating
8 that this gentleman had foot drop as a result of
9 this injury when, in fact, you actually had a
10 document in your records that was sent to you by
11 Mr. Salley's office, in fact, it was even
12 summarized in the letter, indicating that he
13 actually didn't have foot drop as a result of
14 this, and you still completed this questionnaire.
15 Is that fair?

16 A. You're misstating it. The weakness,
17 if nothing else, worsened. Poletti's note -- and,
18 again, this is just off of the summary of all the
19 records reviewed, 2016. If I can see the letter,
20 I can find the date of Poletti's note, which will
21 save me a lot of time in the --

22 Q. That's not what you said in the
23 questionnaire. You didn't say worsened. You said
24 he didn't have it. You said "caused," so --
25 that's not what you were asked to -- that's not

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1 what you were asked to do, correct? You were
2 asked to give an opinion that his work-related
3 injury caused his foot drop, but that's not
4 actually the case, is it?

5 A. (No verbal response.)

6 Q. That's not actually the case, is it,
7 Dr. Hutcheson?

8 A. (No verbal response.)

9 Q. Doctor, can you answer my question?

10 MR. SMITH: I believe he is looking
11 through his notes.

12 THE WITNESS: The inconsistency is
13 there. It stands in contradiction to my
14 statement. I relied on the statement from
15 Dr. Poletti on 1-23-15, where he states, He was
16 noted to have increasing weakness in his leg,
17 difficulty with ambulation, all dated from the
18 visits on 10-22-14.

19 BY MR. HAIGLER:

20 Q. Okay. So you thought that meant that
21 as a result of this accident he had --

22 A. His foot drop.

23 Q. -- foot drop?

24 A. Yes. And that's what I was told.

25 Q. In fact, he had foot drop before this

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1 accident.

2 A. It looks like it. So I will amend
3 what I said to, "This appears to have worsened his
4 weakness in his left leg."

5 Q. Okay. And that's simply because you
6 don't want to have to withdraw your opinion as
7 being inaccurate and contrary to the medical
8 records; is that correct?

9 MR. SMITH: I'm going to object to
10 that. It's argumentative.

11 THE WITNESS: No. Because the
12 surgeon treating him, who isn't here, but I have
13 his records, notes increased weakness, and he was
14 the one who was actually treating the patient, or
15 the subject, during this time, and when he -- when
16 I saw him, he clearly had weakness and an AFO
17 brace.

18 BY MR. HAIGLER:

19 Q. But you missed that when you
20 originally evaluated him.

21 A. Yes.

22 Q. Okay. And you missed the report that
23 was included, not only in the letter, but that you
24 actually had in your file, that said he had foot
25 drop before this.

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1 A. That he had foot drop before this,
2 yes.

3 Q. So your questionnaire, as submitted,
4 was inaccurate, correct?

5 A. Correct.

6 Q. Do you find it disturbing that you
7 were asked to complete a questionnaire that
8 something caused something else, when, in fact,
9 there are records that were even submitted to you
10 that showed it didn't?

11 A. In general, I find this whole thing
12 frustrating but --

13 Q. Why is that, Doctor?

14 A. Oh, I think the whole goal is to try
15 and help this guy get better. There seems to be
16 clear evidence that he got worse after this
17 accident and that was a -- aggravated an old
18 injury. He certainly didn't have urinary
19 incontinence issues, unless you're going to show
20 me a report that I'm inaccurate on that.

21 His leg -- left leg weakness,
22 according to the surgeon treating him, certainly
23 got worse, which would be very consistent with
24 disk herniations into the left foramen at L4-5 and
25 L5-S1 and is supported by my exam of foot drop,

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1 the AFO brace.

2 Q. Which report were you referring --
3 were you looking at from Dr. Poletti?

4 A. 1-23-15.

5 Q. And you're saying in this report it
6 shows increased weakness in the left foot?

7 A. He was noted to have increasing
8 weakness in his leg.

9 Q. Where are you seeing that?

10 A. Second paragraph, second sentence.

11 Q. I must have a different report than
12 you do.

13 MR. SMITH: You might be looking at
14 1-21 report instead of 1-23.

15 THE WITNESS: So based on that, the
16 surgeon who had been in his back and reviewed the
17 MRIs thought his weakness was worse since the
18 fall.

19 BY MR. HAIGLER:

20 Q. How do we know that his increasing
21 weakness in his leg is the same thing as foot
22 drop?

23 A. Because that's the weakness where
24 his -- where his leg would --

25 Q. So you're --

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1 A. So, I mean, you can parse it out, but
2 he's not --

3 Q. So you're --

4 A. -- on trial.

5 Q. -- saying your opinion that you gave
6 in your report and in this questionnaire was based
7 upon that sentence? So you read that sentence and
8 came to that conclusion. Is that what you're
9 saying?

10 A. And the other parts of his chart that
11 describe the leg weakness that's worsening, the
12 patient's complaint of it, the MRI showing it, his
13 exam showing it.

14 Q. Okay. But you reached -- you sat
15 there for five minutes, six minutes while I waited
16 for you to answer my question until you could find
17 a report that showed that he had, quote, leg
18 weakness, not even foot weakness, leg weakness,
19 and it doesn't say anything about a brace. It
20 doesn't say anything about foot drop, but it says
21 increased leg weakness.

22 So that -- you -- so that's the
23 report that you found to support your opinion that
24 his foot drop was aggravated as a result of this
25 accident? That's what you're telling me? I just

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1 want to make sure I understand your opinion
2 clearly.

3 A. 3-23-15, positive straight left -- or
4 positive straight-leg raise, peripheral
5 pulses palpable. He has four out of five strength
6 in his left extremity during EHL extension and
7 ankle dorsiflexion.

8 Q. Can you slow -- I can't understand
9 you, Doctor. You're talking too fast for the
10 court reporter.

11 A. 3-23-15 -- we can review all of these
12 notes, but on exam he is a well-developed,
13 well-nourished male, alert and oriented times
14 three, in no acute distress. He is ambulatory
15 with slow antalgic gait.

16 My apologies.

17 He has a positive straight-leg raise,
18 peripheral pulses palpable. He has four --

19 Q. He had all this before, didn't he?
20 Did he not?

21 MR. SMITH: I object to that.

22 THE WITNESS: Where?

23 MR. SMITH: It is --

24 BY MR. HAIGLER:

25 Q. Did he not have all -- I mean, did he

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1 not have all of this, the weakness in his left
2 leg, before, which you didn't even know about
3 until I came in your office today?

4 A. Show me.

5 MR. SMITH: I'm going to object to
6 that. He just said that he did know about the
7 left leg weakness.

8 THE WITNESS: We did a --

9 MR. HAIGLER: Well, he just asked me
10 to show him, so is it -- does he know?

11 THE WITNESS: -- EH --

12 MR. HAIGLER: Or does he not?

13 THE WITNESS: EHL extension and ankle
14 dorsiflexion. So your question was, does the leg
15 weakness that's mentioned two months earlier refer
16 to his foot. The exams are very consistent. They
17 are not talking about proximal leg weakness.
18 They're talking about distal leg weakness of the
19 EHL and ankle dorsiflexion, which would be
20 consistent with foot drop.

21 So I don't have anything that's out
22 of sorts in the notes to say that they are talking
23 about a different part of the left leg.

24 BY MR. HAIGLER:

25 Q. But, again --

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1 A. You can parse out all of this as you
2 want, but it appears he has gotten worse.

3 Q. Okay. But all of this is being
4 brought to your attention by the defense attorney
5 coming here to examine you on this, not because
6 you actually reviewed the medical records you were
7 given and figured this out on your own; is that
8 correct?

9 MR. SMITH: I'm going to object to
10 that as he has testified --

11 MR. HAIGLER: You can --

12 MR. SMITH: -- about that.

13 MR. HAIGLER: -- answer the
14 question.

15 BY MR. HAIGLER:

16 Q. You can answer the question. Did you
17 know any of this before I came in here today?

18 A. Yes. He --

19 Q. Then --

20 A. He --

21 Q. -- why didn't your opinion -- why
22 didn't the questionnaire that you filled out, why
23 didn't the report that you completed for \$600
24 after reviewing all these medical records say that
25 he aggravated his preexisting foot drop? Why

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1 didn't it say that, then, if you reviewed all
2 these records?

3 A. You're right. That part should have
4 said aggravated foot drop.

5 Q. Okay. Thank you, Doctor.

6 Now, you're aware he had a
7 laminectomy and diskectomy in March of 2014; are
8 you not?

9 A. Yes.

10 Q. Okay. And you're aware that even
11 after that, he continued to have left leg
12 radicular symptoms and foot drop issues. You're
13 aware of that; are you not?

14 A. Yes.

15 Q. Okay. What was his impairment prior
16 to this injury?

17 A. I don't think I saw a 14B, so help
18 me --

19 Q. Well, I mean, just --

20 A. -- find it.

21 Q. -- based on what I just told -- what
22 you know about his preexisting condition, what
23 would his impairment have been?

24 A. I'd have to pull out the DRE.

25 Q. I brought a copy. I don't mind doing

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1 that. For the record, that's the Fifth Edition of
2 the AMA Guides; is it not?

3 A. Yes. It would probably be either
4 DRE III or DRE V, and it would be based on the
5 description and assessment of the weakness in his
6 leg, and I would defer to the surgeon evaluating
7 him at the time. Again, this is the same surgeon
8 who says it got worse.

9 So I'm not sure how you account for
10 aggravation of a preexisting issue because
11 obviously you're going from one category to -- to
12 another versus a new injury, you go from nothing
13 to obviously a brand new category of impairment.

14 So his original impairment would
15 probably be either DRE III, which would be my
16 guess, because they don't describe a DRE V
17 impairment rating, but, again, you would have to
18 ask Dr. Poletti.

19 Q. Okay.

20 A. Depending on the degree of weakness,
21 but none of that talks about his cauda equina
22 injury or impairment associated with that.

23 Q. Okay. And you gave him 20 -- it
24 looks like 26 percent whole person.

25 A. Yes.

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1 Q. So that would be Category V?

2 A. Yes.

3 Q. And what is that based on?

4 A. Let me see it. A couple things. He
5 is definitely DRE III. He is certainly having
6 radicular pain. So let me pull up his last MRI.
7 It's not listed. This may not be very simple.

8 MR. SMITH: Can I just give him the
9 copy I have to save some time?

10 MR. HAIGLER: Yeah. That would be
11 great.

12 MR. SMITH: Yeah.

13 MR. HAIGLER: Which MRI is that?

14 MR. SMITH: It's 10-29-14.

15 THE WITNESS: Thank you.

16 MR. HAIGLER: No problem. Now, if I
17 can put all this back in there.

18 THE WITNESS: All right. "Category
19 III and IV. That is, both radiculopathy and
20 alteration of motion segment integrity are
21 present; significant lower extremity impairment is
22 present as indicated by atrophy or loss of reflex,
23 pain with sensory changes within an anatomic" --

24 My apologies.

25 -- "distribution." In parenthesis,

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1 "dermatomal, EMG findings."

2 Basically, the fact that he had
3 evidence of cauda equina injury in the nerve root
4 and --

5 (Cell phone interruption.)

6 I'm sorry. That's my wife calling
7 me, so I apologize. I'm distracted.

8 I'll give that back to you.

9 The nerve root damage with his foot
10 drop, his incontinence, and the fact that he would
11 be fused, if he could be fused, so I rated him all
12 those. Either his original -- excuse me.

13 Either -- the injury with urinary
14 incontinence, without me assessing cauda injury
15 and sexual dysfunction and all those things that
16 Dr. Rames alluded to, I believe puts him at the --
17 what I said originally was 27 percent, and I
18 believe then said 26 percent and then gave one to
19 the leg, or the fact that he was going to be a
20 two-level fusion to fix this would automatically
21 put him to that DRE V.

22 BY MR. HAIGLER:

23 Q. Okay. Well, it looks like a fusion
24 puts him at Category IV. Is that not right?

25 A. Assuming he -- but he's not going to

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1 fix the -- the foot drop end of it, so he's still
2 going to have that. It's just -- keep it from
3 getting worse.

4 Q. But the foot drop, that 1 percent,
5 that's a preexisting impairment he had, correct?

6 MR. SMITH: I'm going to object to
7 that.

8 THE WITNESS: I believe it got
9 worse. I said --

10 BY MR. HAIGLER:

11 Q. How can it get -- how did -- I mean,
12 he had foot drop before or he never would have had
13 impairment, correct?

14 A. Right. But it could --

15 Q. How does -- if it's still -- it's
16 still a 1 percent.

17 A. You would have --

18 Q. He had --

19 A. -- to ask --

20 Q. -- impairment before.

21 A. You --

22 Q. How did --

23 A. -- would have --

24 Q. -- it get worse?

25 A. You would have to ask Dr. Poletti.

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1 He should -- Dr. Poletti's note described
2 worsening foraminal stenosis from the disk
3 herniations after the fall and worsening leg
4 weakness. I don't -- that -- that's pretty darn
5 clear to me.

6 Q. Okay. I'm asking -- well, that's
7 contrary to what your reports say; is it not?

8 A. Are we going back to whether it
9 caused or aggravated the foot drop?

10 Q. Well, you said it's pretty darn clear
11 to you. It's only clear to you today; is that
12 right?

13 MR. SMITH: I'm going to object to
14 that. This is argumentative at this point.

15 BY MR. HAIGLER:

16 Q. Okay. Your impairment rating, 1
17 percent to the left lower extremity, is based on
18 the foot drop, correct?

19 A. It is based on -- I believe the
20 commission wants -- if you have radicular pain,
21 they want some assessment -- impairment entailed
22 to -- or attributed to the extremity, and you can
23 only do that if there is a neurologic change.

24 Correct me if I'm wrong. You would
25 have to double-check with the commissioners. And

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1 then because he has loss of reflex, weakness
2 that's worsened, by the surgeon who is seeing him
3 since the injury, I attributed 1 percent.

4 Q. So the commission -- who told you the
5 commission wants that?

6 A. The last couple depositions I've
7 done.

8 Q. Okay. And who told you that?

9 A. I don't recall. The guy sitting in
10 your seat and sometimes the guy sitting in his
11 seat.

12 Q. Okay. Fair enough. The 1 percent is
13 based upon the foot drop; is it not?

14 A. It's based on --

15 MR. SMITH: Okay. I'm going to
16 object to asked and answered. I think he
17 testified that it was more than just the foot
18 drop.

19 BY MR. HAIGLER:

20 Q. Well, your questionnaire says he has
21 permanent impairment as a result of foot drop, so
22 I'm trying to figure out where that impairment is
23 calculated. That's what I want to know. It says
24 in your report -- in your questionnaire, 1 percent
25 left leg due to foot drop. I'm reading a

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1 questionnaire you completed. So am I able to
2 assume that that's your opinion, Doctor?

3 A. He has various neurologic deficits on
4 that side. He has the loss of -- weakness,
5 abnormal --

6 Q. Okay. Doctor, I'm reading --

7 A. -- reflex --

8 Q. -- your --

9 A. -- loss of --

10 Q. -- questionnaire -- I know.

11 A. And --

12 Q. I appreciate what you're --

13 A. -- he --

14 Q. -- saying.

15 A. He's got allodynia, so it could be
16 foot drop. That was the most noticeable.
17 Obviously that's been worsened, but he also has
18 loss of reflex, muscle weakness and --

19 Q. Well, it hasn't "obviously" been
20 worsened, because you missed it. Is that fair?

21 MR. SMITH: I'm going to object to
22 that.

23 THE WITNESS: No. I don't think
24 you've done anything to dispute that it's
25 worsened. You dispute that I didn't see that it

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1 had happened before.

2 MR. HAIGLER: Okay.

3 THE WITNESS: So.

4 BY MR. HAIGLER:

5 Q. In your questionnaire that you
6 completed for Mr. Smith's law firm you wrote in
7 your own words 1 percent --

8 A. Who is --

9 Q. -- foot drop.

10 A. Who is Mr. Smith?

11 Q. The gentleman sitting next to me.

12 A. Oh, okay. All right.

13 Q. Did you not put -- did you not relate
14 the 1 percent to his foot drop?

15 A. Yes.

16 Q. And we have discovered that he had
17 foot drop before.

18 A. Yes. And --

19 Q. So --

20 A. -- we've also --

21 Q. -- unless he had --

22 A. -- discovered that it has worsened.

23 MR. SMITH: You've go to let him
24 finish the --

25 BY MR. HAIGLER:

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1 Q. Okay. So once -- so did he have .5
2 percent impairment to his --

3 A. You would have to ask Dr. Poletti.
4 That's what I -- I --

5 Q. Well --

6 A. -- alluded --

7 Q. -- you --

8 A. -- to.

9 Q. -- gave the opinion. I need to ask
10 you.

11 A. Right. That goes back to what do you
12 do to assess aggravation. I can't tell you
13 clearly. I can only tell you where he is now.
14 It's up to you guys to argue how much of that is
15 due to, you know, previous compared to now.

16 Q. Okay. You testified that he -- that
17 part of this impairment rating had to do with his
18 cauda equina; is that correct?

19 A. It could. It could also be that if
20 he is going to be treated surgically, he's
21 automatically going to be a DRE V.

22 Q. But he's not going to be treated
23 surgically.

24 A. At the time I didn't know.

25 Q. Okay. But that --

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1 A. Because I had a surgeon saying he
2 needed this treatment --

3 Q. Fair enough.

4 A. -- that had not been done, that would
5 put him at a DRE V because, again, I have
6 worsening leg weakness.

7 Q. I understand.

8 A. I also have some urinary incontinence
9 issues, but, again, I recommended a urologist
10 evaluate the cauda equina issue and so --

11 Q. So if he has the surgery, obviously
12 his impairment -- if he has a fusion, his
13 impairment would be at least Category IV, possibly
14 Category V?

15 A. I would be very surprised if it would
16 be IV, but, yes, it would be more than likely V --

17 Q. But because he had --

18 A. -- plus --

19 Q. Okay.

20 A. -- cauda equina --

21 Q. And that --

22 A. -- assessment.

23 Q. And so you gave the opinion that he
24 had 26 percent whole person under the assumption
25 that he was going to have that fusion.

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1 MR. SMITH: I'm going to object to
2 that. I don't --

3 THE WITNESS: I gave it --

4 MR. SMITH: -- think that's --

5 BY MR. HAIGLER:

6 Q. Is that -- is that not what you said?

7 A. There were --

8 Q. I want to make sure I --

9 A. -- two different --

10 Q. -- understand.

11 A. -- lines of logic. There was -- he
12 is surgical. He needs surgery. He hasn't had it
13 yet. It's also that he has a significant
14 weakness, atrophy with urologic issues. You know,
15 with cauda equina issues, that clearly puts him to
16 a DRE V plus some assessment or consideration of
17 cauda equina, which was outside of the scope
18 because I couldn't evaluate him urologically.

19 Q. Have you seen anything diagnosing him
20 with cauda equina?

21 A. Dr. Rames.

22 Q. You've seen --

23 A. How are you going to assess spinal
24 cord injury? Damage to the sacral nerves. It's
25 damage to the cauda at some point from T-12 down.

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1 You know, he's got urologic injuries with foot
2 drop. That's -- that's -- every med student
3 learns that in their first year.

4 Q. Okay. Did you diagnose him with
5 that?

6 A. No. I suspected it, which is why I
7 wanted a urologic eval.

8 Q. Okay.

9 A. But, again, it's more than likely
10 there, unless you've got a good reason why this
11 guy has an injury, his leg gets weaker, his pain
12 gets worse, his medication doses go up, he becomes
13 less responsive with treatment and he starts
14 having some incontinence. Again --

15 Q. Well, I --

16 A. -- no matter who is sitting in that
17 chair, they're going to call me for malpractice if
18 I don't recognize cauda equina.

19 Q. Fair enough. I assume Dr. Rames is
20 going to -- does it say anything in there,
21 anything about whether he knew if he had prior
22 urological system issues in there, because he
23 did.

24 A. Are you asking me a question about
25 Dr. Rames' note? If so, let's talk about the

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1 points of it. We read his -- it certainly was
2 attributed to or aggravated by.

3 Q. Okay.

4 A. Let's see. I believe we've already
5 entered that.

6 Q. Don't --

7 A. Do you still have that --

8 Q. Are you --

9 A. -- document? I'm sorry.

10 Q. Are you surprised that Dr. Poletti --
11 that he has not had surgery yet if he is having
12 cauda equina?

13 MR. SMITH: I'm going to object to
14 that. That's just...

15 MR. HAIGLER: I mean --

16 THE WITNESS: I'm not often surprised
17 by how things seem to go slower through workers'
18 comp than they do for private insurance.

19 BY MR. HAIGLER:

20 Q. None of this is through workers'
21 comp, Doctor.

22 A. Okay. Then --

23 Q. It's all through private insurance.

24 Are you surprised he has not had surgery if he has
25 got cauda equina?

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1 MR. SMITH: And I'm going to object
2 to that.

3 THE WITNESS: I would defer to
4 Dr. Poletti, but Dr. Poletti wanted to do a
5 fusion. I saw the guy on 3-26. I don't know
6 what's happened to Dr. Poletti's assessment of
7 him or the patient since then.

8 MR. HAIGLER: Okay.

9 THE WITNESS: But he was a fusion
10 candidate then for significant neurologic
11 impairment, let's see, and bulbocavernosal
12 reflex. Yeah, that, to me, suggest that -- sacral
13 nerve dysfunction. The only way you're going to
14 get that is by damage to the spinal cord below
15 T-12, and you've got an MRI clearly showing
16 compression at the L5-S1 level. Yeah, it seems
17 pretty clear.

18 MR. HAIGLER: All right.

19 THE WITNESS: So how would you get
20 sacral nerve dysfunction without spinal cord
21 injury? You have a urologist. So the urologist
22 is saying it's not in his head, it's not ED.
23 He -- he has got spinal cord injury.

24 BY MR. HAIGLER:

25 Q. He was diagnosed with ED, wasn't he?

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1 A. Yes, but from a sacral nerve
2 dysfunction. I mean, you can't get an erection if
3 your nerve doesn't work.

4 Q. Are you aware he has had ED since
5 2006?

6 A. I'm not. I'm just reading you what
7 the urologist report --

8 Q. Okay.

9 A. -- says.

10 Q. All right.

11 A. And I'm also not aware whether he
12 pulls for Clemson or South Carolina, but, again.

13 Q. Okay. You note in your -- the last
14 page of your FCE -- or excuse me, your IME, the
15 work status per FCE 3-21-16, "But it's unlikely,
16 given the brace, leg weakness and urinary issues,
17 that he'll be able to return to employment in any
18 capacity."

19 But you would agree, Doctor, that he
20 has been working with that brace and leg weakness;
21 otherwise, he wouldn't have been injured on the
22 job.

23 A. Sorry. You're asking if the leg
24 weakness --

25 Q. Your report says that given his brace

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1 and leg weakness and urinary issues, he's not
2 going to be --

3 A. Right.

4 Q. -- able to go back to work, but he
5 was working with the brace and the leg weakness
6 before this accident.

7 A. Yes. And the leg weakness got worse,
8 according to my surgeon, and he is now peeing
9 himself, and according to Dr. Rames, he has got
10 almost fecal incontinence, so I'm not sure, but I
11 wouldn't want somebody like that sitting up and
12 answering --

13 Q. Okay.

14 A. -- the phone or addressing my
15 patients.

16 Q. Would you -- would you defer to
17 Dr. Rames as to whether he is employable from a
18 urinary standpoint?

19 A. Certainly.

20 Q. Okay. With regard to any urological
21 issues he has, I assume you need to defer to
22 Dr. Rames on that or some expert on that matter.
23 Is that fair?

24 A. To some degree. Other than noting
25 that he had them now, and I don't see any evidence

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1 of having them prior to the fall.

2 Q. Well, Doctor, I can see that, but I'm
3 not an expert to determine that. Would you agree
4 with that?

5 A. That you're not board certified in
6 pain and anesthesia, which includes assessment of
7 the --

8 Q. Are you --

9 A. -- of the spine.

10 Q. Are you a urologist?

11 A. I am not, but you asked and accepted
12 my neurologic assessment of this patient for a DRE
13 assessment, and I'm board certified to do that.

14 Q. Well, then why would you defer to --
15 why would you say he needs to see a urologist
16 then?

17 A. Because he has -- he has the
18 incontinence that needs to be worked up.

19 Q. Okay.

20 A. I believe that's called standard of
21 care.

22 Q. Okay. You put in here -- Doctor,
23 what does tend to lessen the period of disability
24 mean?

25 A. That if we don't treat him, he's not

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1 going to get better. If we do treat him, all
2 evidence suggests that pain management could
3 lessen pain. He would have improved function,
4 hopefully improved quality of life. That's our
5 whole goal. Otherwise, there would be no point in
6 us offering pain management, not only to workers'
7 comp injuries, but anybody.

8 Q. Are you aware, and I think you put it
9 in your report actually, so I know you're aware,
10 that the injections he has received and the
11 medication are managing his symptoms?

12 A. That they are or are not? I'm
13 sorry. What's your question?

14 Q. That they are. I'm reading. It
15 says, Patient does not want further back surgery.
16 ESIs help control pain. Pain meds are also
17 helping. That's what's in your report.

18 A. Yes, I'm aware that's in my report.

19 Q. Okay. So he was saying that those
20 things were benefiting him; is that right?

21 A. Yes.

22 Q. Okay. You were asked to complete a
23 questionnaire, and in your -- in your IME you put
24 this same stuff, and on the 14B you put the same
25 things, where you say this gentleman is going to

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1 need -- hold on a minute.

2 There are so many questionnaires, I'm
3 having a hard time figuring out where everything
4 is.

5 Okay. That he will need ongoing
6 medications, urine testing while on controlled
7 substances, DME. What's a DME?

8 A. Durable Medical Equipment, like the
9 foot brace, back brace, TENS unit.

10 Q. Okay. Injections, physical therapy,
11 imaging and a spinal cord stimulator. You put
12 that in every single one of your reports, don't
13 you?

14 A. No.

15 MR. SMITH: I'm going to object to
16 that.

17 THE WITNESS: If I see somebody that
18 doesn't have an indication for a stimulator,
19 that's not put in. If I see somebody that doesn't
20 need pain medicine or other things, it's not put
21 in. I've certainly given IMEs where I say the
22 patient is not a candidate for pain management for
23 various reasons, usually psychological or drug
24 abuse. Take your pick.

25 In this case, standard of care, for a

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1 guy who needs a two-level fusion, with leg
2 weakness that has increased, urinary dysfunction,
3 is he's going to need lifetime pain management,
4 whether he has surgery or not, because that
5 surgery is not going to repair all the nerve
6 damage.

7 It's probably not going to correct
8 all the urinary incontinence issues because there
9 is already scar tissue -- or not scar tissue, but
10 there is more compression of the nerve. This far
11 out from -- from the injury, getting full recovery
12 is less.

13 This guy is not going to jump back up
14 and be able to work, so he is going to have
15 continued dysfunction, continued depression for
16 his life and -- and he's --
17 BY MR. HAIGLER:

18 Q. How do you know that? How do you
19 know he's going to have --

20 A. Because I'm --

21 Q. -- continued --

22 A. -- board --

23 Q. -- depression?

24 A. -- certified in pain management, and
25 this is what I see. The last 60,000 patients I

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1 have seen make me think, you know what, how many
2 back surgeries has he had, what's the chance that
3 further back surgery is going to cure him?
4 Exponentially much lower than his first surgery.

5 Q. Okay.

6 A. He has a psychologist who -- and a
7 psychiatrist who are saying, hey, he has got
8 significant issues. He's got leg weakness. He's
9 got urinary incontinence. Dr. Rames' note says he
10 can barely have sex. Correct me if I'm wrong.
11 It's very few people that bounce back and then
12 don't need anything.

13 And he is benefiting from ongoing
14 treatment at the time I've seen him, which was
15 medicines, injections. I'm assuming they are
16 doing urinary drug screens because that's the
17 state board requirement and the federal
18 requirements.

19 DME, he has already got. He has
20 already done physical therapy and doing home
21 exercise, so everything there, except the
22 stimulator, was mentioned.

23 Q. Well, if those things are benefiting
24 him, then a stimulator wouldn't be necessary,
25 would it?

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- 1 A. It depends. You're asking what his
2 lifetime plan is. In these IMEs, a stimulator is
3 definitely indicated for somebody who --
- 4 Q. Indicated and something that he needs
5 are two different things --
- 6 A. Yes.
- 7 Q. -- would you agree with that?
- 8 A. Correct. Yes.
- 9 Q. So I may be indicated for a spinal
10 cord stimulator, but if what -- if the modalities
11 I'm using --
- 12 A. Sure.
- 13 Q. -- at present are making me where I'm
14 comfortable --
- 15 A. Then you wouldn't --
- 16 Q. -- then I'm --
- 17 A. -- need it.
- 18 Q. -- not going to go get a spinal cord
19 stimulator.
- 20 A. Correct.
- 21 Q. And you're not going to ask me to get
22 one, are you?
- 23 A. No. If --
- 24 Q. Okay.
- 25 A. -- he is --

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1 Q. So --

2 A. If you --

3 Q. -- if you say --

4 MR. SMITH: Wait. Wait. Wait.

5 You've got to let --

6 MR. HAIGLER: Hold on. I'm not --

7 MR. SMITH: -- him finish his
8 answer. You asked the question. Let him -- let
9 him answer it.

10 THE WITNESS: The guy has continued
11 dysfunction. Let's see. I think the idea is that
12 his shots are helping. He's only to a -- with
13 shots and meds, up until the point he saw me, his
14 pain was a six out of ten, which is moderate to
15 severe chronic pain.

16 If I, then, say, if you're happy
17 where you're at, great, fine, no big deal, but if
18 we could reduce that to a two or a one, which a
19 lot of -- of the -- the SENZA study and the
20 SUNBURST study both have level 1A evidence
21 suggesting they can, then somebody like this, I
22 think he would take it.

23 MR. HAIGLER: Okay.

24 THE WITNESS: But --

25 BY MR. HAIGLER:

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1 Q. Why has no one recommended that for
2 him?

3 A. You would have --

4 Q. Why --

5 A. -- to talk to Dr. Netherton and
6 Dr. Forrest, who are his treating pain doctors, at
7 least when I saw him. But he was --

8 Q. Okay. Well, let --

9 A. -- also being evaluated for the
10 injury and surgery, and I'm not sure that
11 Dr. Netherton commented on a stimulator, but in an
12 IME of what does this guy need, he's had multiple
13 back surgeries. He has radicular pain. The
14 stimulator has the best evidence out there for
15 pain reduction, narcotic reduction, functional
16 improvement, quality of life, period.

17 Q. Okay. And do you know why he came to
18 you, his lawyer sent him to you, to get this
19 opinion as opposed to his doctors who had been
20 treating him for the better part of 15 years down
21 in Charleston?

22 A. No.

23 Q. Does that make any sense at all?

24 A. Other than --

25 MR. SMITH: I'm going to object to

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JUSTIN HUTCHESON, MD 3-31-17

1 that. It --

2 A. -- you --

3 MR. SMITH: -- just calls --

4 A. -- get --

5 MR. SMITH: -- for --

6 A. -- multiple --

7 MR. SMITH: -- speculation.

8 A. -- medical opinions on --

9 BY MR. HAIGLER:

10 Q. Well, they never got a first medical
11 opinion. Do you know that?

12 MR. SMITH: Object. Calls for
13 speculation.

14 BY MR. HAIGLER:

15 Q. Have you seen any opinion from anyone
16 down at Southeastern Spine about his future pain
17 management needs?

18 A. No.

19 Q. Okay. So instead of going to get an
20 opinion from the -- don't you think it would be
21 reasonable to get an opinion from the doctor who
22 you've been -- practice you've been treating with
23 for 15 years for this condition before going
24 somewhere else?

25 MR. SMITH: I'm going to object.

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1 Calls for speculation.

2 BY MR. HAIGLER:

3 Q. He hasn't been back to see you, has
4 he, Doctor?

5 A. He's not my patient.

6 Q. So your opinion, as you sit here
7 today, is that he's absolutely -- not
8 absolutely -- that more likely than not he is
9 going to require a spinal cord stimulator?

10 A. Yes.

11 Q. You haven't seen him in over a year,
12 though, correct?

13 A. Correct.

14 Q. But you -- so you're saying that,
15 even though you haven't seen this patient but one
16 time, and that's your opinion?

17 A. If his pain level had been a one and
18 he wasn't on narcotics and he was working full
19 time --

20 Q. How do you know his pain level is not
21 a one right now?

22 A. You're asking my opinion as of 3-26
23 and --

24 Q. I'm asking your opinion as of today.

25 A. Sure.

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1 Q. Can you state right now to a
2 reasonable degree of medical certainty that he is
3 going to need a spinal cord stimulator?

4 A. More likely than not, absolutely.

5 Q. Okay. And do you have any idea what
6 condition he is in? Do you even know if he's
7 alive?

8 MR. SMITH: I'm going to object to
9 all these questions. This is going way --

10 THE WITNESS: I've seen no evidence
11 that he's not. The most recent notes from
12 Dr. Rames show continued dysfunction, continued
13 impairment, continued treatment.

14 BY MR. HAIGLER:

15 Q. When was that --

16 A. On various --

17 Q. -- report --

18 A. -- various --

19 Q. -- Doctor?

20 A. On Dr. Rames' note, on various pain
21 medications.

22 Q. What date -- what's the date of that
23 report?

24 A. 5-27-16.

25 Q. So almost a year ago?

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JUSTIN HUTCHESON, MD 3-31-17

1 A. Sure.

2 Q. Okay.

3 A. So he --

4 MR. HAIGLER: Those are all the
5 questions I have for you, Doctor. Thank you.

6 EXAMINATION

7 BY MR. SMITH:

8 Q. At the time of your evaluation, did
9 you feel like the medications and medical
10 treatments you were recommending was reasonable
11 and necessary care?

12 A. It's standard.

13 Q. Okay. As far as -- you were asked a
14 lot of questions about a 10-15-14 note that wasn't
15 in a letter that was sent over, but you were
16 provided that note, correct?

17 A. Correct.

18 Q. And you indicated earlier that you
19 feel this injury aggravated his left foot drop.

20 A. Yes.

21 Q. Okay. I'm going to hand you a note
22 from Southeastern Spine dated 8-6-2014. This
23 would have been the note prior to the work-related
24 accident. If you could, quickly review his
25 physical findings in that note.

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1 A. Well-developed, well-nourished male,
2 alert and oriented times three, no acute distress,
3 ambulatory with a nonantalgic gait, negative
4 straight-leg test bilaterally. He has no
5 worsening neurologic deficits on exam, slight
6 difficulty with toe rise on -- slight difficulty
7 with toe rise on the left, but this is improving.

8 Q. Okay. Is that physical examination
9 different than what you saw when you evaluated
10 Mr. --

11 A. Yes.

12 Q. -- Bias? Okay.

13 In what way is it different?

14 A. He had significant weakness on the
15 left side with dorsiflexion, and he had absent --
16 he had a positive straight-leg test on -- on the
17 right. He had decreased range of motion. He was
18 weak with dorsiflexion -- excuse me.

19 He had bilateral leg weakness,
20 proximal and distally, four-plus out of five,
21 except for a three-plus out of five on the left,
22 barely able to lift his foot above gravity, not
23 just slight difficulty with toe rise. He had loss
24 of reflex in his Achilles and he had allodynia on
25 the -- excuse me. Excuse me. He had numbness on

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JUSTIN HUTCHESON, MD 3-31-17

1 the left thigh to the foot and his right foot.

2 Q. Do you find it strange that this is a
3 denied case?

4 A. I'm pessimistic when it comes to
5 legal issues. That doesn't surprise me. It seems
6 pretty clear he has worsening signs of cauda
7 equina. I haven't seen anything that says the MRI
8 wasn't worse, his impairment hasn't gotten worse.

9 He has urinary issues. I -- he
10 didn't have those before. I don't have a good
11 reason to explain, whereas, before the injury, he
12 wasn't wetting himself, didn't appear to have
13 fecal incontinence issues and he was improving,
14 and now he has significant leg weakness on both
15 sides and unable to lift his left foot barely
16 against gravity.

17 Q. Okay. I want to hand you an e-mail
18 dated October 14, 2014. I submit that that's from
19 a supervisor that documented the slip-and-fall at
20 work.

21 A. Okay.

22 Q. Is it unusual that -- or do you find
23 it unusual that we wouldn't get that e-mail until
24 two years after the work accident?

25 A. If you could object to his

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1 speculation, I -- he can object to yours.

2 Q. Correct. Okay. Fair enough. Fair
3 enough.

4 Now, have you seen a report from
5 Dr. Gunter dated this year, January 2017?

6 A. No.

7 MR. SMITH: Okay. I'm going to let
8 him see it.

9 MR. HAIGLER: Okay.

10 THE WITNESS: Date of service
11 1-18-17, Brett C. Gunter, MD.

12 BY MR. SMITH:

13 Q. Right. And I'll give you a moment to
14 review.

15 A. If you can, just ask me the
16 questions. I'll focus better --

17 Q. Certainly.

18 A. -- for you.

19 Q. Certainly. If you could, go to his
20 assessment.

21 A. Complex clinical syndrome. I'm
22 sorry. Assessment one, low back pain; two,
23 bilateral lumbar radiculopathy. Assessment:
24 Complex clinical syndrome.

25 I'll give you this thing.

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1 His left hip and leg pain were
2 present prior to the injury. His back is more
3 severe since the injury and his right leg pain is
4 new since the injury.

5 Dr. Rames has addressed the issues
6 related to incontinence in order to make a
7 determination about whether there are any further
8 options with regard to this patient.

9 We would need to determine whether or
10 not he has a mechanistically stable spine and
11 whether or not he has nerve root entrapment. Once
12 that information is -- now we can make a
13 determination about whether any additional
14 treatment might be useful.

15 He ordered an MRI, AP and lateral,
16 flexion and extension films, and call thereafter.
17 The date of review was just the MRI from 10-29-14,
18 so he had no up-to-date on that.

19 Q. Is that similar to your assessment of
20 Mr. Bias?

21 A. Yes.

22 Q. All right. As far as your opinions
23 given in your IME and also in your questionnaires,
24 but for the left foot drop being an aggravated
25 condition, are your opinions still the same?

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JUSTIN HUTCHESON, MD 3-31-17

1 A. After an hour of review on 3-20 --
2 let me see. Let me make sure I don't have my date
3 wrong because I don't want to spend another hour.

4 On 3-22-16 and an hour and 20 minutes
5 of obvious, thorough review now, yes.

6 MR. SMITH: Okay. That's all the
7 questions I have.

8 MR. HAIGLER: Thank you, Doctor.

9 (The deposition concluded at
10 approximately 1:22 p.m.)
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1 State of South Carolina
2 Before the
3 South Carolina Workers' Compensation Commission
4 WCC File No.: 1421397

5 Johnnie Bias,)
6 Employee,)
7 Claimant,)
8 vs.) Deposition of
9 SCANA Corporation,) NICHOLAS LIND, PhD
10 Employer,) April 28, 2017
11 and)
12 Self-Insured,)
13 Carrier,)
14 Defendants.)

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Deposition on oral examination of
NICHOLAS LIND, PhD, reported by
Donna Cheryl Kyzer, Court Reporter and Notary
Public in and for the State of South Carolina;
said deposition taken pursuant to notice of
deposition and in accordance with the South
Carolina Rules of Civil Procedure, at Post Trauma
Resources, 1709 Laurel Street, Columbia, South
Carolina, commencing on Friday, April 28, 2017, at
the hour of 9:32 a.m.

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NICHOLAS LIND, PhD 4-28-17

1 This deposition is taken in
2 accordance with the South Carolina Rules of Civil
3 Procedure.

4 It is agreed and stipulated by the
5 deponent and respective counsel that the reading
6 and signing of the deposition transcript by the
7 deponent is expressly waived.

8 WHEREUPON:

9 NICHOLAS LIND, PhD, being duly sworn
10 and cautioned to speak the truth, the whole truth
11 and nothing but the truth, testified as follows:

12 EXAMINATION

13 BY MR. HAIGLER:

14 Q. Dr. Lind, please state your full
15 name for the record.

16 A. Nicholas Alexander Lind.

17 Q. Okay. Dr. Lind, my name is
18 Nick Haigler. You and I have met and spoken many
19 times before. I know you've been through the
20 deposition process. I represent SCANA in this
21 particular workers' compensation claim involving
22 Mr. Bias.

23 Before we go too far down the road,
24 it is my understanding you have completed -- or
25 what I have of yours is a March 16th of '16, 2016,

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NICHOLAS LIND, PhD 4-28-17

1 independent medical evaluation. Is that correct?

2 A. That's correct.

3 Q. And then a questionnaire that is
4 dated -- appears to be dated 2-15-17. Do you have
5 that document?

6 A. I'm not sure. I don't think I do.

7 Q. There it is.

8 A. Oh, okay. Thank you.

9 Q. Did you complete that?

10 A. I did.

11 Q. Okay. Are those -- with regard to
12 records that you personally created, is this it?

13 A. It is. That's it.

14 Q. Okay. Are there -- have you seen
15 him -- have you seen him since March 16th of 2016?

16 A. No.

17 Q. When you completed the questionnaire
18 a year later, did you see him as part of that
19 questionnaire?

20 A. No, I didn't.

21 Q. Okay. Were you given a letter from
22 Mr. Smith's office prior to completing this
23 initial evaluation?

24 A. I was, yes.

25 Q. Do you have a copy of that?

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NICHOLAS LIND, PhD 4-28-17

1 A. I do. I don't know if I have it back
2 here with me, but, yeah, I do have that --

3 Q. Okay.

4 A. -- in my office.

5 Q. Do you -- did you do an intake form,
6 some sort of form that he would have filled out
7 himself before --

8 A. Just the --

9 Q. -- you evaluated him?

10 A. Just the demographic information.

11 Q. Okay.

12 A. Outcome measures, which are
13 self-report, and then after the interview, a
14 measure that was done on the computer. Two
15 measures that were done on the computer.

16 Q. Okay. And do you have those results,
17 the tests and the results?

18 A. I do.

19 Q. Okay. We'll get into those in a
20 minute but I --

21 A. Okay.

22 Q. -- just wanted to see if you had
23 them.

24 A. And actually, I do have that, that
25 letter.

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1 Q. Oh, okay. Do you mind if I see that,
2 please?

3 A. Yeah.

4 Q. Thank you, sir.

5 A. Uh-huh.

6 MR. SMITH: I hate these binders.

7 That's going on the record. They're the worst.
8 They break all the time.

9 MR. HAIGLER: Okay. Can I have a
10 copy of this?

11 THE WITNESS: Uh-huh.

12 MR. HAIGLER: Can I have this? You
13 may want to make me a copy.

14 THE WITNESS: Yeah. I can make you a
15 copy.

16 MR. HAIGLER: Do you mind doing
17 that?

18 THE WITNESS: Huh-un. I don't mind.
19 You want that now?

20 MR. HAIGLER: Yes. If you don't
21 mind.

22 (A short break transpired.)

23 MR. HAIGLER: Thank you, sir.

24 Can we make this an Exhibit.

25 (DFT. EXH. 1, Letter Dated March 7,

NICHOLAS LIND, PhD 4-28-17

1 2016, was marked for identification.)

2 Here. I'll use this one.

3 MR. SMITH: Okay.

4 BY MR. HAIGLER:

5 Q. Now, Doctor, in addition to the
6 letter, you were given, it appears -- based upon
7 your report, on page 2 you note that the following
8 sources were reviewed, and those included
9 Southeastern Spine Institute, East Cooper Medical
10 Center, Sports Plus, which I believe is a physical
11 therapy place, Singleton Health Center, and then
12 the deposition of Dr. Poletti from just before
13 your evaluation. Are those the records you
14 reviewed prior to this report?

15 A. They are.

16 Q. Is that correct?

17 A. That's correct.

18 Q. You have in front of you a fairly
19 large volume of records. When was that particular
20 index provided to you?

21 A. With -- it was provided a few months
22 ago. We had scheduled a deposition.

23 Q. I think it was cancelled last minute
24 for some reason. I don't --

25 A. Yeah.

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1 Q. I don't remember why.

2 A. I can't remember that, when that was.

3 MR. SMITH: It's been scheduled I
4 think three or four times actually.

5 THE WITNESS: Right.

6 MR. HAIGLER: Yeah.

7 THE WITNESS: And I can't remember
8 when, if it was the first scheduling.

9 BY MR. HAIGLER:

10 Q. But you were given --

11 A. March 15th.

12 Q. You were given that after your
13 evaluation?

14 A. Right.

15 Q. And that --

16 A. Right.

17 Q. That volume of records includes
18 records not only -- not only the records that you
19 mentioned in your report that you reviewed but
20 also records that occurred after -- or that were
21 created after the report; is that right?

22 A. That's right.

23 Q. Okay. Have you reviewed all of those
24 records?

25 A. I have at various points in time.

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1 Q. Okay.

2 A. I did my best to cram this morning.

3 Q. Okay. And in addition, you have

4 probably, I don't know, 60 or so pages of VA

5 medical records; is that right?

6 A. That's right.

7 Q. When did you get these records?

8 A. The same time that I got these.

9 Q. Okay. Have you reviewed all of

10 these?

11 A. I have.

12 Q. There is numerous tabs on these. Are

13 these your tabs?

14 A. Those are mine, right.

15 Q. Okay. Did you have any of these

16 records before you saw the patient?

17 A. I did not.

18 Q. And some of them are dated prior to

19 your evaluation. Is that fair?

20 A. That's fair.

21 Q. Okay. What do you know about his

22 work injury?

23 A. I don't know much. According to his

24 self-report, it was raining and he slipped on some

25 steps and twisted -- twisted his left ankle and

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1 said that there were several injuries, but his
2 lowest -- lower back was his most significant, and
3 he described his current average pain and
4 considered it to be six on a zero-to-ten-point
5 scale.

6 Q. All right. Now, are you aware that
7 he has had prior back problems?

8 A. I am.

9 Q. What is your understanding of what
10 those problems were?

11 A. I mean, it sounds like it was pretty
12 chronic going back to -- it looks like going back
13 as far as 1983. Those were in records after I had
14 seen him.

15 Q. Okay. So you didn't have those
16 records when you initially saw him?

17 A. No.

18 Q. So let me make sure I'm clear. You
19 didn't have the records about his preexisting low
20 back problems when you saw him in March of 2016;
21 is that correct?

22 A. That's correct.

23 Q. Okay. Are you aware he has had prior
24 surgery on his back?

25 A. I am.

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1 Q. Are you aware that -- let me make
2 sure I'm giving you the correct date, and this is
3 page 26 of the Defendants' APAs. Are you aware
4 that in January of '93 he was given 20 percent
5 impairment to his lumbar spine and 10 percent
6 impairment to the cervical spine?

7 A. Yeah. I -- I saw those -- those
8 numbers, so.

9 Q. Okay. That was 24 years ago, wasn't
10 it?

11 A. That was.

12 Q. So at least for the last 24 years he
13 has had at least 20 percent impairment of his
14 lumbar spine.

15 A. Right.

16 Q. And then he saw Dr. Poletti starting
17 in the decade -- the 2000 decade, and are you
18 aware that I believe in 2004 he was given -- I
19 think it's in your -- maybe it's not. I don't --
20 I don't know where -- I don't know where I saw it,
21 but are you aware he was given 10 percent
22 impairment by Dr. Poletti from the 2004 procedure?

23 A. Right. On June 24, 2004.

24 Q. Okay.

25 A. Yeah. I did make a note of that.

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1 Q. Okay. And then I assume you are
2 aware he also had another back procedure in March
3 of '14, just seven months prior to this injury.

4 A. Right.

5 Q. Okay. And are you aware that we -- I
6 assume, since you reviewed Dr. Poletti's
7 deposition, that he attributed 15 percent
8 impairment as a result of that particular
9 surgery --

10 A. Right.

11 Q. -- of the lumbar spine.

12 A. That's correct.

13 Q. Okay. So is it fair to say that
14 Mr. Bias has had a 30-plus-year history of chronic
15 back pain that has prompted at least two
16 procedures on his lower back for radicular
17 problems as well as -- as well as back pain prior
18 to this injury?

19 A. That's correct.

20 Q. Okay. So he's been dealing with that
21 kind of chronic pain for a very long time.

22 A. That's right.

23 Q. All right. And you didn't -- you
24 didn't note any of that information when you
25 evaluated him in March of '16. Is that fair?

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1 A. That's fair.

2 Q. Okay. What is the date of this
3 accident?

4 A. 14 October 2014.

5 Q. Okay. And your opinion is -- it
6 appears your opinion is that the psychological
7 issues you have both diagnosed him with and
8 commented on regarding -- or just that you have
9 diagnosed him with, you opine were the result of
10 chronic pain; is that right?

11 A. That's correct.

12 Q. Okay. And when you gave that opinion
13 you were unaware -- I assume your assumption was
14 that that chronic pain was derived from the
15 accident that occurred in October of 2014.

16 A. Right. Yeah. And I think -- I
17 believe I made the statement that it -- that his
18 emotional distress was caused by that injury.

19 Q. Okay.

20 A. And I -- and I would amend that to
21 say that it was "aggravated by."

22 Q. Of course, that's because now you
23 know he has had chronic pain for --

24 A. For quite a while.

25 Q. Not since October of '14, but since

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1 1983.

2 A. Right. And the -- and through all
3 this VA documentation I think there is -- the one
4 note was that he had been on Ambien for 10 years,
5 and that was a note that was made I think in 2015.

6 So, you know, most people don't --
7 like when people go to get sleep medication they
8 don't consider that to be mental health treatment
9 necessarily, but that would suggest to me that
10 that would be secondary to pain, the -- the --
11 that would -- that's where my amendment would come
12 from, is --

13 Q. Okay.

14 A. -- that it does appear that he had
15 been struggling with sleep for 10 years, and this
16 injury -- assuming that there was an injury and it
17 affected him the way that he described it, then
18 that would be an aggravation. He might need some
19 sleep medication on top of that.

20 Q. Okay.

21 A. The Trazodone there --

22 Q. Did --

23 A. -- and Remeron.

24 Q. I'm sorry. Can you say that again?

25 A. Remeron.

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1 Q. Okay.

2 A. Something the VA likes to use.

3 Q. Okay. But is it fair to say that he
4 never -- and you interviewed him, it looks like,
5 based on your report, for an hour and a half.

6 A. Uh-huh.

7 Q. Is that correct?

8 A. That's correct.

9 Q. And not at any point during that
10 period did he tell you about his prior sleep
11 issues, use of Ambien, sexual dysfunction issues,
12 30 years of chronic back pain, two prior
13 surgeries, 20 percent impairment and 10 percent
14 impairment and 15 percent impairment by three
15 different -- by two different doctors. He never
16 divulged any of that to you?

17 MR. SMITH: I'm going to object to
18 the "impairment" portion of that because obviously
19 you're talking about impairment guides and
20 everything else.

21 MR. HAIGLER: Okay.

22 BY MR. HAIGLER:

23 Q. He didn't divulge any of the
24 information I just referenced to you during that
25 hour-and-a-half time you talked to him?

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1 A. He reported that he had been seen at
2 the VA approximately seven or eight months prior
3 to my evaluation and that he had been prescribed
4 antidepressant and sleep medications. He thought
5 that that had been helpful, and he said, ten to
6 twelve years ago he had been hurt at work, but he
7 did not file a claim.

8 Q. Okay.

9 A. Those were his words.

10 Q. Okay.

11 A. He was lowering himself down in a
12 hole and twisted his back.

13 Q. Okay. Did he tell you about a
14 10-plus-year history of sleep problems?

15 A. No.

16 Q. Did he tell you about sexual
17 dysfunction problems that date back to 2006?

18 MR. SMITH: I'm going to object to
19 the "sexual dysfunction problems."

20 THE WITNESS: No.

21 BY MR. HAIGLER:

22 Q. Did he tell you about the chronic
23 back pain he had been experiencing which resulted
24 in and necessitated two surgeries in the past 20
25 years or 24 years? Did he tell you about any of

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1 those facts?

2 A. No.

3 Q. And I assume when you're assessing
4 someone regarding mental health problems they may
5 have, whether they were -- especially if they are
6 alleging that they are the result -- as he was,
7 according to your report, the result of a worker's
8 comp claim or a workers' comp accident in October
9 of '14, the history I just asked you about, that
10 he didn't tell you about, would have been
11 particularly important; would it -- would it have
12 not?

13 A. It would have.

14 Q. In fact, it's so important that it
15 would have changed your opinion from "resulting
16 from" to aggravated.

17 A. Right. And the specific thing that
18 caught my eye was the -- the Ambien. He had --

19 Q. Okay.

20 A. -- been on Ambien for 10 years.

21 Q. Okay.

22 A. Right. So --

23 Q. We'll get there in a second --

24 A. Right.

25 Q. -- because I --

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1 A. Which is the emotional piece of it.

2 Q. Okay.

3 A. Right.

4 Q. We'll get there in a second. I

5 assume, based on your report, it's your

6 understanding that the accident occurred on

7 October 14th of 2014.

8 A. That's correct.

9 Q. Okay. I'm reading the letter. If

10 you will, look at the letter that Mr. Smith's

11 office wrote you. I think you will agree with me

12 that this letter is basically a summary of the

13 medical records post-accident. Is that fair?

14 A. That's fair.

15 Q. In fact, each paragraph starts with a

16 new note; is that right?

17 A. That's right.

18 Q. Would you agree that most of these

19 reports, if not all of them, are from

20 Dr. Poletti's office, if not Dr. Poletti himself?

21 A. Right.

22 Q. It looks like maybe one was from

23 Dr. Singleton, but the rest of these are from

24 Dr. Poletti's office. Is that fair?

25 A. That's fair.

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1 Q. Okay. Will you look on pages 1
2 and 2? Do you see any reference to a report dated
3 October 15, 2014?

4 A. Nope. But let me see here.

5 Q. If you can, speak up just a --

6 A. No, I don't see that.

7 Q. Okay. If he saw Dr. Poletti's -- or
8 went to Dr. Poletti's office on October the 15th
9 of 2014, how long after this accident would that
10 be?

11 A. That would be -- let me just -- that
12 would be the day of, right? October 14th you
13 said?

14 Q. He went on the 15th.

15 A. On the 15th.

16 Q. Would that be the day after?

17 A. The day after, right.

18 Q. Would that be a particularly
19 important report?

20 A. That would be.

21 Q. Is that because Dr. Poletti is not
22 only his long-time back surgeon but is also the
23 surgeon who has been treating him since this
24 injury?

25 MR. SMITH: I'm going to object --

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1 THE WITNESS: Uh-huh.

2 MR. SMITH: -- because he didn't see
3 Dr. Poletti.

4 MR. HAIGLER: Okay.

5 BY MR. HAIGLER:

6 Q. Is that -- is that important?

7 A. If he was to see his surgeon?

8 Q. Yes.

9 A. Yeah. I think --

10 Q. Or surgeon's office.

11 A. Right.

12 Q. Okay. I'm going to show you that
13 report, Dr. Lind. Do you know if you've seen that
14 before today?

15 A. I don't believe I have.

16 Q. Can you read that for me? And let me
17 know when you're finished.

18 A. Okay. Okay.

19 Q. Okay. Now, this report is dated the
20 day after his alleged injury.

21 A. That is correct.

22 Q. In anywhere in that report is that
23 injury mentioned?

24 A. It's not.

25 Q. Does it mention any worsening of his

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1 pre-existing lower back problems in this report?

2 A. No. It looks like a routine
3 follow-up.

4 Q. Okay. In fact, if you will, read the
5 third line of that report. Does it say, Today he
6 has minimal complaints?

7 A. That's correct.

8 Q. And he has greatly improved since
9 surgery.

10 A. That's correct.

11 Q. Does that report seem to be
12 consistent with someone having sustained an
13 aggravation or injury aggravation of their
14 pre-existing back condition the day before?

15 A. No.

16 MR. SMITH: I'm going to object to
17 that as it's -- you know, as far as the physical
18 impairment. The physical inefficiency, that's
19 outside the scope.

20 MR. HAIGLER: Okay.

21 BY MR. HAIGLER:

22 Q. But you agree this is an
23 inconsistent -- this report is inconsistent. Let
24 me ask it -- let me -- let me strike that
25 question. Let me rephrase it.

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1 Does it make any sense that he went
2 to see his surgeon's office, someone at -- went to
3 his surgeon's office the day after this accident
4 and not -- alleged accident, and did not mention
5 that accident?

6 MR. SMITH: I'm going to object to
7 that as that has already been testified to by
8 Dr. Poletti.

9 BY MR. HAIGLER:

10 Q. Does this make any sense?

11 A. Yeah. I would need to understand how
12 that was not mentioned.

13 Q. Okay. Does it seem reasonable that
14 would have been mentioned --

15 A. Right.

16 Q. -- if it precipitated all of this?

17 MR. SMITH: Same objection.

18 BY MR. HAIGLER:

19 Q. Is that fair?

20 A. That's fair.

21 Q. Okay. And in the letter that was
22 given to you by -- this five-page letter,
23 single-spaced letter, that was given to you by the
24 Salley Law Firm, that report is the only report
25 from Dr. Poletti during that period of time which

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1 is not referenced.

2 MR. SMITH: I'm going to object to
3 that.

4 BY MR. HAIGLER:

5 Q. Would you agree with that?

6 A. I have to take a look.

7 Q. Okay.

8 A. But --

9 Q. Well --

10 A. -- that --

11 Q. -- between --

12 A. -- note is not referenced.

13 Q. Well, the August of '14 note is
14 referenced.

15 A. Uh-huh.

16 Q. The October 22nd of '14 note is
17 referenced. There is two in -- two references to
18 a report in --

19 A. Uh-huh.

20 Q. -- October of -- October 29th of '14,
21 but yet there is no October 15th, the day after
22 the injury, referenced.

23 A. Right. That's correct.

24 Q. Is that a bit odd to you?

25 A. Right.

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1 MR. SMITH: I'm going to object.

2 Calls for speculation.

3 THE WITNESS: Right. Yeah. I would
4 just expect to see all the notes.

5 BY MR. HAIGLER:

6 Q. Okay. Do you think it was convenient
7 or do you think it was a coincidence that that
8 report was not mentioned in this letter?

9 MR. SMITH: And I'm going to object
10 to that --

11 THE WITNESS: Right.

12 MR. SMITH: -- as speculation.

13 THE WITNESS: I never know. It --
14 it --

15 MR. SMITH: I'm also going to object
16 in the fact that you were provided Dr. Poletti's
17 reports --

18 MR. HAIGLER: Okay.

19 THE WITNESS: Uh-huh.

20 MR. SMITH: -- from Southeastern
21 Spine.

22 MR. HAIGLER: Okay.

23 MR. SMITH: So he had the actual
24 reports from -- with him.

25 THE WITNESS: Okay. Right. So --

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1 and -- yeah. But -- yeah, I did. I had been
2 looking at that.

3 BY MR. HAIGLER:

4 Q. Okay. Fair enough. Let's move on to
5 your actual report under the History of Present
6 Illness. Can you turn to page 2 of your report,
7 Doctor.

8 A. Uh-huh.

9 Q. You note in the very -- in the second
10 paragraph of the HPI that he has had decreased
11 sleep since his injury, and you go on to reference
12 the sleep, that he is now sleeping three hours a
13 night as opposed to four or five hours prior to
14 the onset of pain.

15 First of all, neither one of those
16 two hours of sleep, three or four to five, is a
17 normal restored night -- restorative night of
18 sleep; is it not?

19 MR. SMITH: I'm going to object.
20 That's leading.

21 THE WITNESS: Right. It depends on
22 the age. You don't need as much sleep as you get
23 older. Some people can get by with four or five
24 hours of sleep, but you would expect about six.

25 BY MR. HAIGLER:

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1 Q. Okay. Fair enough. You weren't
2 given -- well, let me ask you this. Would you --
3 would you ever -- I mean, do you recommend someone
4 sleep four hours a night?

5 A. I recommend that they sleep closer to
6 six.

7 Q. Okay. All right. Now, in your first
8 sentence you note, Decrease in sleep since his
9 injuries.

10 A. Uh-huh.

11 Q. Is that what he told you?

12 A. It is.

13 Q. So I assume he didn't tell you that
14 he had been taking sleeping medication -- sleeping
15 medication since at least 2008.

16 A. Right. He did not, and it looks
17 like -- when you look at the VA notes, it looks
18 like he -- he did struggle with sleep after the
19 injury. They had prescribed some medications to
20 correct that, so -- so, again, I'm trying to --
21 when it comes to workers' comp injuries I'm trying
22 to figure out what somebody was experiencing
23 before the injury.

24 Q. Okay.

25 A. Trying to get them back to that, so

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1 it looked like he was struggling more with sleep
2 difficulties. They prescribed some Trazodone,
3 they prescribed some Remeron, and then I believe
4 that the last thing that they threw at him was the
5 Melatonin.

6 Q. Okay.

7 A. But it looked like it was helping.

8 Q. All right.

9 A. That it was getting him back to like
10 the four or five hours of sleep that he was
11 getting before.

12 Q. Okay. I'm sorry to have to refer to
13 these, but let me just look. Do you know how
14 long -- do you know if he was seeing the VA
15 Hospital before -- it looks like the earliest
16 record I have, that's in here, is May of '15. Do
17 you know if he was seeing the VA before May of
18 2015?

19 A. I don't know.

20 Q. Okay. So you don't know what his
21 medical history would be from the VA prior to this
22 date.

23 A. Right.

24 Q. Okay. Let me show you this report.
25 This is Defendants' APA page 32. Actually, I tell

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1 you what, Doctor, I've got another copy of it, so
2 I'm just going to give it to you so I don't have
3 to keep handing it back and forth to you.

4 Now, this is -- this is dated
5 September 15, 2004, which would have been 10 years
6 prior to his injury. The very bottom, No. 4, is
7 under the Assessment. What is noted?

8 A. Insomnia, chronic insomnia.

9 Q. Chronic insomnia.

10 A. Right.

11 Q. And he was prescribed Ambien back in
12 2004.

13 A. Right.

14 Q. 10 years ago.

15 A. Uh-huh.

16 Q. Actually, now it's 13 years ago.

17 A. Right.

18 Q. So that would have been 12 years
19 prior to when you saw him.

20 A. Uh-huh.

21 Q. Is that a yes?

22 A. That's correct.

23 Q. Okay. And "chronic insomnia" means
24 what?

25 A. Chronic difficulty sleeping.

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1 Q. And "chronic" meaning what?

2 A. Long term.

3 Q. Okay. So he has had it -- he had had
4 it for some decent period of time prior to this
5 visit.

6 A. That's correct.

7 Q. And he didn't tell you about that,
8 did he?

9 A. No, he did not.

10 Q. When you -- before you -- when you
11 saw him and interviewed him, he did not divulge
12 this to you, did he?

13 A. That's correct.

14 Q. Okay.

15 A. He --

16 Q. If you will turn --

17 A. He had said that he was sleeping only
18 four or five hours per night prior to the injury,
19 so he -- he wasn't sleeping great.

20 Q. Okay.

21 A. He -- he did -- you know, when I
22 asked him directly, he did divulge that to me.

23 Q. But he didn't tell you that he had
24 had chronic insomnia for 10 years and had been
25 taking Ambien during that period of time.

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1 A. No.

2 Q. That was --

3 A. He just --

4 Q. -- never --

5 A. -- said that --

6 Q. -- divulged to you.

7 A. He just said four or five hours per
8 night was normal for him prior to the injury.

9 Q. Okay. If you can, turn to page 37.

10 A. Okay.

11 Q. I think you also mentioned that in
12 addition to his issues sleeping, in this first
13 paragraph, he comments on his sex drive issues. I
14 think that's actually mentioned several times in
15 here, that sexual dysfunction that he mentioned
16 under the personal -- under the psychological
17 testing --

18 A. Uh-huh.

19 Q. -- and things of that nature. I
20 assume he never told you he had prior sexual
21 dysfunction, did he?

22 MR. SMITH: I'm going to object to
23 that. That's something that needs to be built up
24 in the record.

25 THE WITNESS: He just said that --

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1 that sex drive was down, relative to baseline,
2 after the injury. That was the only thing that --
3 that he and I discussed.

4 BY MR. HAIGLER:

5 Q. Okay. Did he tell you that he had
6 prior sexual dysfunction?

7 A. No.

8 MR. SMITH: Object to the form.

9 BY MR. HAIGLER:

10 Q. Okay. If you will, turn to page 37
11 of those documents at the very top. That same
12 medication, this is two years later, he is still
13 on Ambien, correct?

14 A. He is.

15 Q. And at the bottom it notes -- the
16 fourth thing under Assessment is what?

17 A. Impotence.

18 Q. And there he refuses Viagra.

19 A. Yeah.

20 Q. And I guess he wants to discuss it
21 with Dr. Jones. I don't know who Dr. Jones is
22 but -- so he had impotence even then.

23 A. Uh-huh.

24 Q. That was 10 years before you saw
25 him.

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1 A. Right.

2 Q. If you will, turn to page 38, and
3 this is from later on in 2006. Under Medications,
4 he is still on Ambien, correct?

5 A. Correct.

6 Q. If you will, turn to page 44 --
7 excuse me. 42. If you will, look -- and this is
8 a report from 2008. Moving down the line, if you
9 will, look under -- down at the -- under
10 Medications. It looks like one of the things he
11 has is impotence of organic origin. Do you see
12 that?

13 A. Uh-huh. I do.

14 Q. Okay. If you will, go to page 44.
15 This is from 2010. He still has a diagnosis -- or
16 current problems list of impotence of organic
17 origin, insomnia with sleep apnea. Did you know
18 he had sleep apnea?

19 A. I did not.

20 Q. And if you will, look on the next
21 page, page 45. Part of what he is taking is
22 Cialis orally; is that correct?

23 A. That's correct.

24 Q. Did you ever know he was taking
25 Cialis?

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1 A. No.

2 Q. If you will, turn to page 48. This
3 is from later on in 2010. He's still taking
4 Cialis; is that correct?

5 A. That's correct.

6 Q. Okay. If you will, turn to
7 pages 56, 57, 58 and 59, particularly 57 at the
8 top. He still has a diagnosis of insomnia with
9 sleep apnea and impotence of organic origin,
10 correct?

11 A. That's correct.

12 Q. Still taking sleep -- still taking
13 Cialis, correct?

14 A. That's correct.

15 Q. This is in 2011.

16 A. Uh-huh.

17 Q. Is that a yes?

18 A. That is yes.

19 Q. Okay. Now I would like to turn your
20 attention to page 58. If you will, turn it
21 there.

22 A. Okay.

23 Q. This is from 2012, yet a year later.
24 In the History of Present Illness, Patient needs
25 Ambien almost every other night. Patient gets to

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1 sleep fast but wakes up every two hours. Is that
2 what it says?

3 A. That's what it says.

4 Q. Okay. Still having impotence of
5 organic origin and insomnia with sleep apnea,
6 correct?

7 A. Correct.

8 Q. And that date is on here, that it was
9 dated back to 2006 for the insomnia and 2008 for
10 the impotence.

11 A. Right. That's correct.

12 Q. Okay. Had you seen any of these
13 reports before today?

14 A. No, I don't believe I did.

15 Q. Okay. And if you will, turn to page
16 59 down at the bottom. I assume -- I assume you
17 see where the diagnosis is, Insomnia with sleep
18 apnea.

19 A. Right.

20 Q. And then the very thing under
21 Impression says, Schedule sleep study.

22 A. Right.

23 Q. Okay. Do you know if that ever
24 occurred?

25 A. I'm not sure.

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1 Q. Have you ever been provided that
2 document?

3 A. I have not.

4 Q. All right. He's still on Ambien,
5 correct?

6 A. Correct.

7 Q. If you will, turn to page 62, where
8 yet another year later, in 2013, January of '13,
9 he still has those two same diagnoses; does he
10 not?

11 A. He does.

12 Q. Okay. And finally, if you will, turn
13 to pages 76 and 77. These are from his family
14 physician, and this report is less than three
15 weeks -- or three weeks prior to his accident.
16 Current medications, is Ambien on that list?

17 A. Let's see. Where are we looking at?
18 On the left-hand side?

19 Q. On the left side under Current --
20 9-23-14 report.

21 A. Uh-huh.

22 Q. Do you see --

23 A. You said page 77?

24 Q. 76. I'm sorry.

25 A. 76. Okay.

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1 Q. My apologies.

2 A. Okay. Yes, right there it is.

3 Q. So he's still taking Ambien in
4 September of 2014, three weeks before his
5 accident.

6 A. Right. Yes. And my understanding
7 was that he had been taking the Ambien for -- at
8 least according to the VA, for approximately 10
9 years.

10 Q. Okay. And then if you will, turn to
11 page 77. Part of the diagnosis is still insomnia,
12 which is why he was prescribed the Ambien.

13 A. Right.

14 Q. Is that right?

15 A. That's correct.

16 Q. And let me be clear. None of these
17 records were given to you nor was this divulged to
18 you by Mr. Bias himself when you evaluated him; is
19 that correct?

20 A. Right. That's correct.

21 Q. Okay. You also noted in this second
22 paragraph of your -- paragraph of your HPI that he
23 has lost interest in previously enjoyed
24 activities, activities of daily living for him; is
25 that correct?

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1 A. That's correct.

2 Q. And all of that was a result of this
3 accident, correct?

4 A. Right. That it was aggravated by the
5 accident.

6 Q. Okay. If you will, turn to page 70,
7 and this is Dr. Poletti's report. It's an East
8 Cooper Medical Center report, but I think
9 Dr. Poletti authored it. This was his
10 recommendation for surgery back in March of 2014.
11 Are you on page 70, Doctor?

12 A. I am.

13 Q. Okay. Under the HPI, does
14 Dr. Poletti note that he has diminished ADLs,
15 diminished sleep?

16 A. Right.

17 Q. Is that a yes?

18 A. That's correct.

19 Q. Okay. So he had diminished ADLs
20 before this accident as well; is that correct?

21 MR. SMITH: I'm going to object --

22 THE WITNESS: That's correct.

23 MR. SMITH: -- to that. There was
24 surgery in between this, and he went back to work
25 but -- you know.

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1 BY MR. HAIGLER:

2 Q. Now, under the previous injury
3 psychological treatment portion of your report you
4 note that he denied prior mental health treatment
5 or such -- or need for such services prior to his
6 injury, and before we got really started, you told
7 me that you just assumed that he didn't know that
8 Ambien may or may not qualify as mental health
9 treatment. Is that fair?

10 A. Right.

11 Q. Okay.

12 A. Right. When someone asks people
13 specifically about mental health treatment or the
14 need for mental health treatment they -- sometimes
15 it does not register with them.

16 Q. Okay. But you -- and then you note
17 that he had been seeking -- had sought treatment
18 through -- the VA had prescribed antidepressants
19 and sleep medications, but you didn't have any of
20 those records at this time, did you?

21 A. I did not.

22 Q. Did you ask for those records?

23 A. I did not.

24 Q. Okay. I'm reading this note from the
25 VA from November 5th of '15, and the first thing

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1 it notes in the Narrative part is that his mood is
2 okay but he continues to struggle with insomnia.

3 A. Right.

4 Q. Do you know whether -- do you have
5 any opinion as to whether that was just a
6 continuation of his prior issues with insomnia?
7 Do you have any --

8 A. It looked like -- somewhere along
9 there it looked like his -- his sleep was worse
10 off because of the -- the injury, which is what we
11 would expect if there -- if there was an
12 aggravation of pain, you would expect an
13 aggravation of sleep difficulties in that. He was
14 responding as you would expect if the medication
15 was helpful.

16 Q. Meaning what?

17 A. So it looked like he had been
18 prescribed Trazodone, which is a lot safer. I
19 don't like Ambien. I don't -- I don't know of a
20 lot of people who like Ambien, especially for
21 long-term use, and then he had benefited from
22 Remeron as well.

23 Q. Okay.

24 A. So he was -- he was responding as you
25 would expect.

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1 Q. Okay. And it looks like -- now, when
2 you say he had said he had an aggravation of his
3 prior sleep, that he wasn't sleeping quite as well
4 due to the aggravation, you're getting that from
5 the patient?

6 A. Somewhere in the -- in the VA
7 documentation. I'm not sure exactly where. Do
8 you mind if I take a look at this?

9 Q. Sure.

10 A. So he got back up -- there is a note
11 that he got back up to the five hours a night,
12 which suggests that it had -- that's what they --
13 you know, they were getting him back to baseline,
14 and that -- that was on November 15, 2016.

15 So that's -- that's what made me
16 think that there -- there was a decrease in sleep,
17 and that was after I had met with him, which is
18 consistent with what -- what he had told me, was
19 that his sleep was never great, but it was not --
20 it was even worse after the injury, so they
21 considered that to be a success, to get him back
22 to five hours.

23 Q. Okay. So he had -- if there had been
24 an aggravation, he had returned to baseline as to
25 his sleep by that point; is that correct?

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1 A. That's right. Yeah. So he -- they
2 messed around with Trazodone. He did not like
3 that. This was on November 5th of 2015.
4 Trazodone made him feel like he was in a fog, and
5 it looked like they had better luck with Remeron,
6 so they were trying to get him back to the five or
7 six hours.

8 Q. Okay. But, again, as far as any
9 reduction in sleep that he had, you were -- we
10 were all relying on the patient's comments on
11 that. I mean, you didn't test his sleep, did you?

12 A. No, I did not test his sleep.

13 Q. Okay. All right. Let me -- if we
14 can continue going through the report, let me ask
15 you this. Given what you now know about his prior
16 back problems which you did not know when you
17 first evaluated him, would you have expected him
18 to be having sleep issues, low energy, fatigue,
19 normal complaints that patients have with chronic
20 pain?

21 A. With -- without the injury?

22 Q. Yeah.

23 A. Yeah. Right. Right. I would expect
24 him to have some symptoms, so I was -- so I was
25 looking at the -- at Dr. Poletti's Conclusion,

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1 which was that, in his opinion, it was aggravated,
2 you know, so that's -- I -- I do the Reader's
3 Digest version. I take a look at the conclusions
4 and I take the professional's word for it, and
5 everything that he is describing is consistent
6 with an aggravation, so it's -- you know, it's --
7 we would expect him to have difficulties because
8 he had chronic pain and we would expect that to be
9 aggravated.

10 Q. Okay. But whether that aggravation
11 is -- meaning there was an aggravation, whether it
12 was work related or not.

13 A. Right.

14 Q. Okay.

15 MR. SMITH: I'm going to object to
16 that because the -- Dr. Poletti indicated it was
17 work related.

18 MR. HAIGLER: Jake, I'm not going to
19 let you to continue to make speaking objections.

20 MR. SMITH: I understand. I'm just
21 saying --

22 MR. HAIGLER: You can't testify into
23 the record.

24 MR. SMITH: I'm just saying --

25 MR. HAIGLER: You can ask questions

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1 when it's your turn, but you can't testify into
2 the record in response to my questions. You can
3 make objections that are legal objections, and I
4 will certainly let you do that but -- do you want
5 to make a legal objection?

6 MR. SMITH: Object to the form of the
7 prior question.

8 MR. HAIGLER: Okay.

9 BY MR. HAIGLER:

10 Q. And then, if we can, go to -- you
11 diagnosed him with adjustment disorder with
12 depressed mood. What is that?

13 A. Secondary to the pain and physical
14 limitations. So if the -- the pain and physical
15 limitations went away, then we would assume that
16 the depressed mood would go away and he would be
17 able to engage in the things he previously enjoyed
18 doing.

19 Q. Okay. Fair enough. And this was --
20 when you initially gave this -- when you provided
21 this report, all of this was a result of the
22 accident, correct?

23 A. Right.

24 Q. And now that you have been given new
25 information, you have changed your opinion --

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1 A. To aggravation.

2 Q. To an aggravation.

3 A. Right. And it looks like -- I mean,
4 when you look at the VA records, you know,
5 assuming that this is all accurate, it looks like
6 the -- the medication that was provided did return
7 him to his baseline.

8 Q. His preinjury baseline?

9 A. His preinjury baseline, right.

10 Q. Okay.

11 A. So that was the treatment that we
12 recommended. I don't know if they had any
13 individual therapy, but it looks like the
14 medication at least was effective.

15 Q. Okay. So if this was an aggravation,
16 was it a temporary aggravation?

17 A. No. Now it's "needs the medication"
18 in order to correct the sleep and the mood because
19 whenever you have the physical pain, it causes the
20 adrenaline to increase accordingly and the
21 adrenaline is what results in anxiety and the lack
22 of engagement in previously enjoyed activities,
23 which results in a depressed mood.

24 And there is only so much you can
25 do. Assuming that the pain is going to be there,

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1 you can just treat it, so that's the treatment
2 recommendation, is to get the sleep under control
3 and to prescribe an antidepressant for the mood.

4 Q. Okay. And your opinion in March of
5 last year was that his current mental health
6 issues are not affecting his ability to work in
7 any capacity. Is that still your opinion?

8 A. It is.

9 Q. Okay. Can we go to your -- do you
10 have a copy of your questionnaire?

11 A. That questionnaire?

12 Q. Correct.

13 A. Yes. I don't have -- just have the
14 questionnaire itself.

15 Q. That's fine.

16 A. All right.

17 Q. I'll take that back so I don't lose
18 it.

19 A. So just the standard patient --

20 Q. This document, do you have this?

21 A. Oh, okay. No, I don't have that
22 one --

23 Q. Okay.

24 A. -- a copy of that.

25 Q. I'm going to give you a copy of

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1 that. That is a document you completed?

2 A. Right.

3 Q. Can you read to me the first
4 question?

5 A. "Do you believe to a reasonable
6 degree of medical certainty that Mr. Johnnie Bias'
7 work-related psychological injury most probably
8 results from his performance of his work-related
9 physical injuries, job activities and/or
10 work-related aggravation of a preexisting
11 condition?"

12 Q. Can you tell me what that means? I
13 don't even understand that question. Can you --

14 A. My -- my impression is that the --
15 the difficulty he is experiencing is aggravated by
16 the work-related injury.

17 Q. Okay. Can I see that?

18 A. Yeah.

19 Q. Well, the question starts out, "Do
20 you believe to a reasonable degree of medical
21 certainty that the work-related psychological
22 injury most probably results from his performance
23 of his work-related injuries?" What does that
24 mean?

25 A. I just -- I took it to mean that --

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1 that it was an aggravation, right, so I -- I never
2 followed the legalese.

3 Q. Okay. Then it goes on to say, "His
4 job activities or his work-related aggravation of
5 a preexisting condition." It has to be one of
6 those three; does it not? Not all three.

7 A. Uh-huh.

8 Q. Is that fair?

9 A. Right. Let me take a look at that
10 again.

11 Q. I'm confused as to what the question
12 is asking you, which makes me -- your answer
13 confusing.

14 A. "Work-related psychological injury
15 most probably results" -- right. So I -- I took
16 that to mean, do I believe that the psychological
17 injury was due to either the -- his psychological
18 symptoms are due to either the injury itself
19 directly or an aggravation of a preexisting
20 condition.

21 Q. Or his job activities.

22 A. Right. So, yeah, I -- I just took it
23 to mean is it caused or aggravated.

24 Q. Okay. But you didn't specify which,
25 did you?

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1 A. I didn't.

2 Q. Okay. Well, if you can't tell us
3 whether it was a direct result or an aggravation,
4 you really can't give that opinion to a reasonable
5 degree of medical certainty, can you?

6 A. Right. I would say that that's -- in
7 my opinion it's an aggravation.

8 Q. Okay. And that's now based upon
9 evidence that you've seen today.

10 A. Right.

11 Q. Then your next -- the next question
12 is, "Do you most probably, to a reasonable degree
13 of medical certainty, believe that the medical
14 care, medical treatment or medications provided so
15 far have been reasonable, necessary and geared
16 toward lessening his period of disability?"

17 A. Right.

18 Q. And you checked "Yes." But it's my
19 understanding that you didn't actually know
20 anything about his medical care or his
21 psychological injury, other than what he told you,
22 or the treatment that he had been provided or the
23 medications he had been provided. You didn't --

24 A. I believe that that was -- that
25 questionnaire was completed when I got these

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1 records.

2 Q. Okay. Do you --

3 A. It was on the day that I got the
4 records.

5 Q. Do you know that?

6 A. I'm pretty sure that's when -- yes, I
7 do know that. That's when that was done, in
8 person, with the records in front of me.

9 Q. Did you have these VA records then?

10 A. I did.

11 Q. Are you sure?

12 A. Uh-huh. That's when I got them.

13 Q. Okay. Then your -- then the next
14 question is, "Do you believe most probably, to a
15 reasonable degree of medical certainty, that
16 Mr. Bias continues to require medical care,
17 medical treatment and/or medications prior to
18 maximum medical improvement?" And you checked
19 "Yes."

20 But you hadn't seen him at this point
21 in almost a year; is that correct?

22 A. Right.

23 Q. So did you actually know firsthand
24 what was required of him?

25 A. Just based on the last time I had

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1 seen him.

2 Q. Okay. So this opinion is geared --
3 it's basically a restatement of what you said in
4 March.

5 A. Right.

6 Q. You didn't actually know what his
7 psychological condition was in February of 2017.

8 A. Right.

9 Q. You didn't have --

10 A. It was just --

11 Q. -- any firsthand knowledge of that --

12 A. Not firsthand, no.

13 Q. -- clinical knowledge. No?

14 A. Right.

15 MR. HAIGLER:. Okay. Thank you,
16 Doctor. Those are all the questions I have for
17 you.

18 THE WITNESS: Okay.

19 EXAMINATION

20 BY MR. SMITH:

21 Q. A few follow-up questions. Dr. Lind,
22 you indicated that you did review the medical
23 records from the VA. In fact, the treatment that
24 is provided from the VA, is that -- is that
25 similar to the treatment that you were

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1 recommending as of your IME?

2 A. It is.

3 Q. And, in fact, I believe you testified
4 earlier it looked like the changes in the sleep
5 medications were actually helping Mr. Bias.

6 A. Right.

7 Q. How long did you expect Mr. Bias to
8 need the ongoing treatment for this psychological
9 condition?

10 A. As long as the physical pain
11 associated with that specific injury --

12 Q. Okay.

13 A. -- persist.

14 Q. And I think it's fair to say that
15 Dr. Poletti has related that physical pain to the
16 work accident, Dr. Hutcheson has related that pain
17 to the work accident, Dr. Gunter has related that
18 pain to the work accident; so is it fair to say
19 that the pain or the psychological symptoms that
20 are related to the pain are also related to the
21 work accident, in your opinion?

22 MR. HAIGLER: Object to the form of
23 that question.

24 THE WITNESS: Right. In my opinion
25 that -- it would -- I would base my opinion upon

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1 the subject matter experts.

2 BY MR. SMITH:

3 Q. And just so I'm clear, you indicated
4 that the records from the VA had changed your
5 opinion from "caused by" to "aggravated" --

6 A. Right.

7 Q. -- because there was documentation of
8 the use of Ambien.

9 A. That's correct.

10 Q. And you indicated that most patients
11 don't realize that Ambien is actually
12 psychological treatment.

13 A. Right.

14 Q. Okay. Did you see any indication in
15 the records regarding depression or anxiety prior
16 to this work accident?

17 A. Not prior to the accident, no.

18 Q. Mr. Haigler, a little bit ago, was
19 going into a lot of coincidences about a report
20 that was left out of the letter. Were you
21 provided the report from Southeastern Spine?

22 A. I was.

23 Q. As far as -- speaking of
24 coincidences, do you find it coincidental that
25 documentation of the work-related fall wasn't

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1 obtained until almost two years after the fall?

2 MR. HAIGLER: I'm going to object --

3 Q. Is that coincidental?

4 MR. HAIGLER: -- to the form of that
5 question.

6 THE WITNESS: I never know.

7 BY MR. SMITH:

8 Q. And as far as sleep, you indicated,
9 from the VA records, it looks like he did have an
10 aggravation of his sleep patterns that required a
11 change of medication; is that correct?

12 A. Right. So it looks like the
13 medication that they changed got him back to his
14 preinjury-, or at least what he was reporting was
15 his preinjury baseline.

16 Q. Based on that change in medication,
17 would you recommend that he receive the medication
18 ongoing?

19 A. I would.

20 Q. And would you recommend that he
21 receive psychological and psychiatric treatment
22 ongoing?

23 A. Right. See, most people benefit from
24 the quarterly visits, so it looks like what he is
25 receiving from the VA is -- is doing the trick, so

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1 you can kind of taper that down. It is my
2 experience that it can be tapered down to like a
3 maintenance. Frequency would be on a quarterly
4 basis.

5 Q. And just so I'm clear on your
6 testimony, you're testifying today that you
7 believe that Mr. Bias' psychological condition was
8 aggravated by his work-related injury.

9 A. Right.

10 Q. Have all your opinions been to a
11 reasonable degree of psychological certainty?

12 A. They have.

13 MR. SMITH: Okay. Nothing further.

14 Thank you.

15 REEXAMINATION

16 BY MR. HAIGLER:

17 Q. Doctor, what medications is he
18 currently taking for his psychological condition?

19 A. I believe it's Remeron, and the last
20 notes I saw, they were experimenting with an
21 antidepressant medication. I think it was
22 Cymbalta that they were experimenting with.

23 Q. Okay.

24 A. And --

25 Q. When I read it, he said he didn't

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1 want to take Cymbalta anymore.

2 A. Yeah. It looked like it went -- it
3 went back and forth because he didn't -- he didn't
4 like the way that made him feel, so, yes, it's not
5 the right antidepressant.

6 Q. Okay. He was already -- he has been
7 receiving -- you said he would need quarterly -- I
8 guess quarterly psychological evaluations or
9 treatment or whatever?

10 A. Right. For the maintenance, yeah.
11 So usually once people maintain, they just need
12 the -- the quarterly visits.

13 Q. To continue to get his prescriptions?

14 A. Right.

15 Q. Okay. Prescriptions for sleep
16 issues?

17 A. Uh-huh. Sleep and -- and mood.
18 Ideally it would be sleep and mood, so. The
19 sleep -- antidepressant medications, the older
20 ones that have been tried and true, they tend to
21 be less expensive.

22 Q. Okay. He was already getting that,
23 though, for the last --

24 A. Getting the --

25 Q. -- ten years, hasn't he?

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1 A. Getting the Ambien. You know, I
2 don't like the Ambien. I mean, they advertise
3 Ambien as non-habit-forming, but it's
4 habit-forming.

5 Q. But as far as what he has been
6 receiving, he has been receiving -- whether he
7 knew it or not, he has been receiving mental
8 health treatment for the better part of 10-plus
9 years.

10 A. Yeah, mental health. I would -- I
11 would call mental health treatment both the
12 therapy and the psychiatric care. With family
13 doctors, they prescribe those medications all the
14 time. They don't consider it mental health
15 treatment.

16 Q. Okay. Are you aware that, according
17 to this report which is dated, I want to make sure
18 I'm giving you the correct date, May 19th
19 of '15, which would have been eight months --
20 seven to eight months after his injury, the VA
21 gave the opinion that his sleep trouble is at
22 least as likely as not caused by his sleep
23 problems in the military? Are you aware of that?

24 A. Right. That's -- and that's pretty
25 standard, boilerplate, gives them permission to

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1 treat, so I think they kind of have to have that
2 in order to -- to treat, so it's -- it's a lower
3 threshold.

4 Q. But they're saying that his sleep
5 problems are the result of his military service.

6 A. Uh-huh. Right.

7 Q. Okay. And these are the same records
8 that you're relying on to give the opinion that
9 they're the result of his -- or were aggravated by
10 his work accident.

11 A. Right.

12 Q. Alleged work accident.

13 A. Right.

14 Q. Okay.

15 A. So you've got a lower threshold as
16 likely than not, rather than more likely than
17 not. They have a little bit more leniency.

18 Q. Do you think that you have -- I mean,
19 would you agree that a lot of the opinions that --
20 that you've provided today in your report and in
21 the questionnaire in a large part are based upon
22 the veracity of what Mr. Bias is telling you?

23 A. Right. And then the opinions of
24 the -- the other professionals, which they
25 probably rely to some -- at least some extent

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1 on --

2 Q. What he told them.

3 A. -- his veracity, right.

4 Q. Okay. In fact, if you read, and I
5 think you said you read -- according to your
6 report, read Dr. Poletti's report. When I asked
7 him about that report from October of 2015, he
8 agreed, as you probably saw, that that was
9 unusual, and he said that, Either he's -- Either
10 he is lying to me or he really got hurt. It
11 couldn't be one or the -- it had to be one or the
12 other.

13 A. Right.

14 MR. SMITH: I'm going to --

15 THE WITNESS: Yeah.

16 MR. SMITH: -- object to the --

17 THE WITNESS: I saw that --

18 MR. SMITH: -- form --

19 THE WITNESS: -- in his --

20 MR. SMITH: -- of that question.

21 THE WITNESS: -- deposition.

22 BY MR. HAIGLER:

23 Q. Did you see that in his deposition?

24 A. I did.

25 Q. Okay. And I assume it has to be one

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1 or the other.

2 A. Right.

3 Q. Would you agree that the -- that that
4 report and the lack of information regarding a
5 work accident the day before in that report raises
6 some questions as to the veracity of what he has
7 been -- of whether he was injured on the job?

8 A. Right.

9 MR. SMITH: Object to the form of
10 that question.

11 THE WITNESS: So, yeah, I -- I mean,
12 I'd just rely on Dr. Poletti's conclusion.

13 MR. HAIGLER: Okay. Thank you,
14 Doctor.

15 THE WITNESS: All right.

16 REEXAMINATION

17 BY MR. SMITH:

18 Q. I do have a follow-up. Bear with me
19 just one moment, Doctor.

20 A. Uh-huh.

21 Q. Dr. Lind, defense counsel just said
22 that Dr. Poletti indicated that it was unusual in
23 kind of a global stance. Dr. Poletti's actual
24 testimony was that it was unusual in the sense
25 that the work accident was not documented in the

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NICHOLAS LIND, PhD 4-28-17

1 fall; however, the symptoms that Mr. Bias was
2 experiencing were not unusual for that. In fact,
3 he said that it can normally -- it can sometimes
4 take 48 to 72 hours for a disk to protrude and
5 ultimately cause the pain symptoms.

6 So the note itself is not unusual. I
7 just want to be sure that you are aware of that.
8 And based on that, is that -- is that something
9 that's better left up to the spine surgeon in this
10 case?

11 A. Right. I just relied on his
12 conclusion.

13 Q. Okay. And his conclusion was that
14 this was an aggravation of a preexisting
15 condition; is that correct?

16 A. That's correct.

17 MR. SMITH: Nothing further.

18 MR. HAIGLER: Thanks, Doctor.

19 THE WITNESS: All right. Thank you.

20 MR. SMITH: I appreciate it.

21 (The deposition concluded at
22 approximately 10:38 a.m.)
23
24
25

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NICHOLAS LIND, PhD 4-28-17

1 CERTIFICATE OF REPORTER

2
3 I, Donna Cheryl Kyzer, Court Reporter
4 and Notary Public for the State of South Carolina
5 at Large, do hereby certify:

6 That the foregoing deposition was
7 taken before me on the date and at the time and
8 location stated on Page 1 of this transcript; that
9 the deponent was duly sworn to testify to the
10 truth, the whole truth and nothing but the truth;
11 that the testimony of the deponent and all
12 objections made at the time of the examination
13 were recorded by me and were thereafter
14 transcribed; that the foregoing deposition as
15 typed is a true, accurate and complete record of
16 the testimony of the deponent and of all
17 objections made at the time of the examination to
18 the best of my ability.

19 I further certify that I am neither
20 related to nor counsel for any party to the cause
21 pending or interested in the events thereof.

22 Witness my hand, I have hereunto
23 affixed my official seal this 29th day of April,
24 2017, at Lexington County, South Carolina.
25

22 Donna Cheryl Kyzer, Court Reporter,
23 Notary Public
24 State of South Carolina at Large.
25 My Commission expires:
October 5, 2022

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SALLEY LAW FIRM, P.A.

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March 7, 2016

Dr. Nicholas Lind
Post Trauma Resources
1709 Laurel Street
Columbia, S.C. 29201

RE: W.C.C. File No: February 13, 2008
Employee: Johnnie T. Bias
Employer: Scana Corporation
Date of Injury: 10/14/2014
Birth Date: 7/28/1956
Social Security No: 250-11-5493

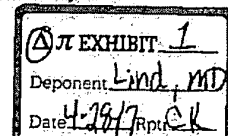
Dear Dr. Lind:

As advised, I represent Mr. Johnnie T. Bias in a workers' compensation matter. Mr. Bias is scheduled with you for an independent medical evaluation on March 16, 2016 at 10:00 a.m. Please find enclosed a copy of Mr. Bias' medical records.

Mr. Bias is a 59 year old, who worked for Scana Corporation as a Plant Analyst. On October 14, 2014, while in the furtherance of his work-related duties, he was walking down steps to go to the waste water ponds, when he stepped on a rock. Apparently, his foot twisted resulting in a fall with multiple injuries. It is my understanding, that he sustained injuries to his left foot, left ankle, left hand, left wrist, left arm, buttocks, back, right hip, right leg, right ankle, right foot left hip, left leg, nervous system, and resultant psychological.

Prior to Mr. Bias' work-related injury, it is my understanding that he experienced lower back pain, left-sided buttock pain and left posterolateral leg pain in an L5 distribution. On March 7, 2014, Dr. Poletti performed a redo laminectomy/discectomy at L5-S1.

On August 6, 2014, Lane Tuggle, PA-C noted, "he's approximately five months status post redo lam/disc at L5-S1 and a left sided L4-5 lam/disc for a herniation. He continues to do very well. He has had great improvement in his overall strength and mobility. He continues to have some weakness and numbness into his left foot, but this is greatly improved and continues to get better on a daily basis. He was released from physical therapy and given a home exercise program, which he's doing on a daily basis, and is doing very well with this. He continues to use Flector patches as well as 10/325 Norco for pain control. He continues to quantify his pain at a 3-4/10. He spoke to his employer regarding returning to work, as he has been out of work since his surgery, and states they have been understanding as far as having him return to work in a sedentary status. He feels they will



Dr. Nicholas Lind
March 7, 2016
Page 2

allow him to do a desk job at this point in time. Overall, he's continuing to progress very well."

On October 22, 2014, Laura Tuggle, PA-C noted, "He states a few days ago he was coming down a flight of stairs, slipped, and fell backwards on his tailbone. Since then, his left leg has felt "cold". He's having increasing weakness in this leg. He has low back pain that has always been on the left, but it's now lateralizing around to the right. He has difficulty with ambulation. He's currently taking more of the Hydrocodone and continue with Neurontin. He continues to have numbness in his left calf and foot, which is unchanged. He's also complaining of neck and shoulder blade pain... Physical Examination: He's ambulatory with antalgic gait. He has a positive straight leg raise. He has diminished reflexes on the left. He has difficulty with heel and toe rise on the left. He has slightly diminished range of motion of the lumbar spine... Imaging Findings: There's loss of disc height space at the L5-S1 level. Two views of the cervical spine were also reviewed. There appears to be multilevel spondylosis noted... At this point, I'm recommending an updated lumbar MRI scan to assess for a reherniation and he's in agreement."

On October 29, 2014, Dr. Poletti noted, "he has some increasing pain in his right side after a fall. I don't think he can work at this point. He would appear to have a recurrent herniation lateralizing to the left at 4-5. He also has some element of synovial cyst formation. This is on the right side at 5-1... Lumbar epidural injection was ordered. Norco 10-325 mg prescribed."

On October 29, 2014, lumbar spine MRI revealed, "moderately severe spondylosis with potential/probably nerve root compression at L1-2, L2-3, and L3-4. There is severe spondylosis with disc herniations and more probably root compression at L4-5 and L5-S1."

On January 21, 2015, Dr. Poletti noted, "he is getting worsening pain. He had this fall where he extended his disc herniation at L4-5 and L5-S1 after having successful surgery in March of last year. I do believe that his work-related injury most likely caused his discs to herniate further and is contributing to his inability to return to work. I think most likely he should consider operative intervention. It would involve wide decompressive laminectomy with ankylosis most likely from L4 through S1 possibly extending up to L3-4. This is a significant operation and something that I'm not sure would provide him complete relief, but most likely he will require. He had an injection, which has only given him some measure of relief..."

Diagnosis: Postlaminectomy syndrome, lumbar region... I want him off-duty status. He is going to follow up with me in one month's time. He remains with low back pain, buttocks pain, hip pain, positive straight leg raising, and toe and ankle dorsiflexion weakness on the right. I don't want him doing any exertional level work at this point."

On January 23, 2015, Dr. Poletti noted, "I saw Mr. Bias today. I have previously dictated a note documenting his fall on 10/14/14 with increasing back and right leg pain. Mr. Bias iterated this to my physician assistant when he was seen on 10/22/14. He was noted to be having increasing weakness in his leg. On 10/22/14 the note which I reviewed today states: "He has low back pain, which has always been on the left; but it is now lateralizing around to the right." He was noted to

Dr. Nicholas Lind
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have "difficulty with ambulation" on 10/22/14.... It should be noted that Mr. Bias was seen by my physician assistant on 10/15/14 for a seven-month follow-up after his surgery. At that point his fall was not mentioned in the note... I certainly do think that it is more likely than not that his increase in right leg pain as documented on 10/22/14 was the direct result of his fall. He has been consistent in this complaint. I hold this opinion true to a reasonable degree of medical certainty most probably."

On February 23, 2015, Justin Swain, PA-C noted, "He continues to have pain and overall dysfunction. On exam today, he has sitting intolerance and a slow antalgic gait. He has pain with extension and positive straight leg raising. No further neurologic decline is detected.... I recommend a course of a Medrol Dosepak. We will see him back in the next four months time for evaluation.

On March 23, 2015, Lane Tuggle, PA-C noted, "he states his symptoms have been unchanged. He continues to have back pain and leg pain. He is beginning to have some right-sided pain complaints. He continues to have weakness in his left leg. He was given a Medrol Dosepak after his last visit and states this helped significantly. He continues to require Neurontin and Norco... On exam, he is a well-developed, well-nourished male, alert and oriented x3 in no acute distress. He is ambulatory with slow antalgic gait. He has positive straight leg raise. Peripheral pulses are palpable. He has 4/5 strength in his left extremity regarding EHL extension and ankle dorsiflexion. He has diminished range of motion of his lumbar spine... We discussed his generalized precautions and restrictions. We will continue to monitor him. His situation is unchanged. We will see him back in the office in 2 months time for reevaluation."

On April 28, 2015, Dr. Singleton noted, "Depression Screening: PHQ-2. In last 2 weeks have you been bothered by little interest or pleasure in doing things? Yes. Feeling down, depressed, or hopeless? Yes. PHQ-9 little interest or pleasure in doing things? Several days. Feeling down depressed or hopeless? Several days. Trouble falling or staying asleep, or sleeping too much? Several days. Feeling tired or having little energy? More than half the days. Poor appetite or overeating? Several days. Feeling bad about yourself or that you are a failure, or have let yourself or your family down? Several days. Moving or speaking so slowly that other people could have noticed; or the opposite, being so fidgety or restless that you have been moving around a lot more than usual. Not at all. Thought that you would be better off dead or hurting yourself in some way? Not at all. Total Score, 8, Interpretation, Mild Depression. Fell several months ago, and broke the fall with his arms and hands. Since that time there has been a progressive problem with dropping things as a result of numbness. He also has pain in his wrists... Mild arthritic changes present; mild crepitus knees; left wrist pain with mild grip weakness compared with right... Assessment:
1. Obstructive chronic bronchitis. 2. Essential hypertension. 3. Degeneration of lumbar or lumbosacral intervertebral disc. 4. Allergic rhinitis. 5. Insomnia. 6. Hyperlipidemia. 7. Seaceous cyst."

On June 17, 2015, Lane Tuggle, PA-C, noted "3 month follow up. He continues to complain of back pain and right greater than left leg pain. He has numbness in his right bit toe. He feels his

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pain complaints have been unchanged. He also complains of neck pain and right shoulder pain. He has been dropping things on the right. He states he had been thinking about returning to a chiropractor as he has been through chiropractic care years ago for his neck which helped. He continues to require Norco for pain control but does not take this daily. He also takes Neurontin... X-rays from October of last year reviewed. He has multilevel loss of disc height space and spondylosis... He is wearing a left AFO. He has restricted ROM. He has no worsening neurologic deficits. He continues to have diminished strength with left EHL extension. He is tender to palpation across his right trapezius. He has positive straight leg raise... Will continue to monitor him. Recommend surgical intervention. He is unable to work secondary to lumbar pathology. I will give him an order for PT for lumbar and cervical spine. I will have him undergo routine drugs screen and prescribe Medrol Dosepak. Move forward with a cervical MRI. He will return in 8 weeks after PT."

On August 17, 2015, Justin Swain, PA-C noted, "reported persistent back pain and right sided buttock and leg pain. He has pain somewhat in the L5 distribution on the right. He states that he has also had continued neck pain. On exam, continued limited motion in his lumbar spine, pain with extension. He has positive SLR, particularly on the right. He has continued evidence of diminished EHL and ADL from the left... Diagnosis: Postlaminectomy syndrome lumbar region... Plan: History of disc disruption with significant foraminal narrowing. He has a history of laminectomy... I have refilled his Hydrocodone today. I recommend he continue with physical therapy. Transforaminal/lumbar injection was ordered. The patient is to call if pain persists or gets worse... Patient is to return in 6-8 weeks for follow up."

On October 20, 2015, Kimsey Cooper, PA-C noted, "continues to have significant foraminal narrowing and nerve root compression at the L5 and S1 level bilaterally causing back and mostly right lower extremity pain. He also continues to have difficulty with ambulation secondary to foot drop on the left and has been wearing an ankle foot orthotic since his surgery... Examination: Ambulatory with antalgic gait. His left lower extremity he has diminished EHL, ankle plantar and dorsiflexion and is wearing an AFO. On the right he has 5 out of 5 strength with the above-mentioned exam. He has 5 out of 5 strength bilaterally with hip flexion, hip abduction and adduction. He does have pain in his back with hip abduction on the right... Diagnosis: Chronic pain syndromes. Postlaminectomy syndrome, not elsewhere classified... Injection ordered. On October 20 2015, Dr. Forest performed right and left L5 transforaminal epidural steroid injection."

On December 1, 2015, Amanda Harridge, PA-C noted, "he is ambulatory with an antalgic gait and a presence of an AFO on his left side. He has positive straight leg raise at less than 30 degrees reproducing back pain only... Diagnosis: chronic pain syndrome. Post-laminectomy syndrome... Plan: repeat injection if patient calls. Patient return in 3 months for follow up."

On February 3, 2016, Dr. Poletti indicated in his deposition that Mr. Bias has reached maximum medical improvement with a 20% impairment rating (deposition transcript page 31, lines 12-22). Additionally, Dr. Poletti indicated that Mr. Bias would not be able to do full time sedentary

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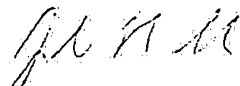
work (deposition transcript page 33, lines 5-15) and didn't think that he could return to any type of employment (deposition transcript page 34, lines 19-25).

Today, it is my understanding that Mr. Bias continues to experience chronic back pain with radiation into his legs, depression and sleep disturbances secondary to pain.

We would like your opinion as to whether or not Mr. Bias has suffered a work-related injury directly or as an aggravation of a pre-existing condition. We would like your opinion as to a reasonable degree of medical certainty as to whether or not Mr. Bias has reached maximum medical improvement as to his work-related injuries. If not at maximum medical improvement, what course of medical treatment that is reasonable, necessary and geared toward tending to lessen the period of disability for his work-related injuries? If not at maximum medical improvement, please opine as to his work status/restrictions, if any. If at maximum medical improvement, what degree of permanent impairment(s) pursuant to the AMA Guide to the Evaluation of Permanent Impairment, 5th Edition will not Mr. Bias have, if any, to his work-related injuries? What work-related injury permanent impairment(s), if any, does he have as to any other body parts? Will he have permanent restrictions? If so, please identify those, including, but not limited to, positional lifting, pushing, pulling, overhead lifting, overhead reaching, standing, uneven surfaces, sitting, climbing, crawling, stooping, squatting, kneeling, bending and twisting restrictions, if any. Also, what recommendations, if any, do you have for future medication, pain management, future treatment (surgical or conservative), all of which are reasonable, necessary and geared toward tending to lessen his period of disability for his work-related injuries? What other work-related injury affect(s) and/or loss of use on other body part(s), if any, will he have? Please kindly also state whether your future medical care recommendations, if any, will most probably to a reasonable degree of medical certainty tend to lessen the period of disability for not Mr. Bias' work-related injuries in accord with the attached workers' compensation medical statute, S.C. Code Ann. §42-15-60, and the seminal attached case of *Dodge v. Brucoli*. Please note that future medical care as referenced in the *Dodge* case is allowed even after maximum medical improvement that tends to lessen the period of disability for claimant's work-related injuries through maintaining their level of function. Please kindly state all your findings and opinions regarding not Mr. Bias most probably to a reasonable degree of medical certainty, if possible.

Thank you for your assistance. If you have any questions or comments, please do not hesitate to contact me. We look forward to receiving your report.

Sincerely,



Jacob M. Smith, Esquire
jsmith@salleylawfirm.com

JMS:sc
Enclosures

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State of South Carolina
Before the
South Carolina Workers' Compensation
Commission
WCC File No.: 1421397

Johnnie Bias,	)	
Employee,	)	
Claimant,	)	
vs.	)	
SCANA Corporation,	)	Deposition of
Employer,	)	IVAN LAMOTTA, MD
and	)	June 1, 2017
Self-Insured,	)	
Carrier,	)	
<u>Defendants.</u>	)	

Deposition on oral examination of
IVAN LAMOTTA, MD, reported by
Shelley Burgoyne, Court Reporter and Notary
Public in and for the State of South Carolina;
said deposition taken pursuant to notice of
deposition and in accordance with the South
Carolina Rules of Civil Procedure, at
Midlands Orthopaedics and Neurosurgery, 1013
Lake Murray Boulevard, Irmo, South Carolina,
commencing on Thursday, June 1, 2017, at the
hour of 12:25 p.m.

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IVAN LAMOTTA, MD 06-01-2017

1 This deposition is taken in accordance
2 with the South Carolina Rules of Civil
3 Procedure.

4 It is agreed and stipulated by the
5 deponent and respective counsel that the
6 reading and signing of the deposition
7 transcript by the deponent is expressly
8 waived.

9 WHEREUPON:

10 IVAN LAMOTTA, MD, being duly sworn and
11 cautioned to speak the truth, the whole truth
12 and nothing but the truth, testified as
13 follows:

14 EXAMINATION

15 BY MR. HAIGLER:

16 Q. Dr. LaMotta, please state your full
17 name for the record.

18 A. Ivan, middle initial "E" stands for
19 Estaban, last name is LaMotta, L-A-M-O-T-T-A.

20 Q. Okay. Dr. LaMotta, my name is
21 Nick Haigler. I've deposed you several times
22 before. I represent SCANA Corporation in this
23 workers' compensation claim involving
24 Mr. Johnnie Bias.

25 I don't think we need to go through

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1 any of your credentials. You are a board
2 certified surgeon; is that correct?

3 A. Correct.

4 Q. Spine surgeon?

5 A. Yes.

6 Q. Okay. And that will be that. No
7 issues there.

8 It's my understanding that you have
9 conducted a one-time evaluation of Mr. Bias
10 that was -- that was done in September of
11 2016. Is that right?

12 A. Yes.

13 Q. I'm not going to go through every
14 single page of your report, but it looks
15 like -- and I -- it looks like you have a copy
16 of it in front of you. Is that correct?

17 A. Yes.

18 Q. It looks like there is an initial
19 three or four paragraphs which kind of
20 outline -- it looks like it may be a summary
21 of medical records. Is that fair?

22 A. Yes. Whenever I get a -- I guess a
23 request for an IME, I summarize the records
24 as -- as best as I can and then go into the
25 examination, review imaging studies and

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IVAN LAMOTTA, MD 06-01-2017

1 examine the patient and come up with an
2 assessment and plan.

3 Q. Okay. Fair enough. Do you know if
4 you were given -- provided a letter from this
5 law firm that asked you to do this with any
6 kind of request?

7 A. I typically am, and they ask me to
8 review the records and they ask me to, you
9 know, see if there is any relationship,
10 causation, probable causation, between the
11 diagnosis and the accident and see if there is
12 anything else that can be done for the
13 patient.

14 If the patient is at MMI, I am
15 typically asked to give an impairment rating.
16 Just standard stuff.

17 Q. Standard workers' comp stuff.

18 A. Correct.

19 Q. All right. Do you -- do you have a
20 copy of that letter?

21 A. Again, it's probably with the stack of
22 records with the IME chart. I -- I do not
23 have that in front of me.

24 Q. Is that something you could secure?

25 MR. HAIGLER: Do you have a copy?

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1 MR. SMITH: Not with me, no.

2 THE WITNESS: I would have to ask my
3 secretary, see if she has the letter.

4 BY MR. HAIGLER:

5 Q. I mean, she -- we don't have to -- she
6 can get it while -- if she can search for it
7 while we're keep -- keep going just so we
8 don't belabor things, that would be fine,
9 but --

10 A. I mean --

11 Q. If you don't --

12 A. -- give me two --

13 Q. -- mind asking her.

14 A. Two seconds.

15 Q. Yeah.

16 A. Let me see if --

17 Q. I appreciate it.

18 A. -- she has that, if she can get that
19 for us.

20 (A short break transpired.)

21 BY MR. HAIGLER:

22 Q. Have you had any conversations with
23 the Salley Law Firm in preparation for this
24 deposition?

25 A. We met on Tuesday, went over my IME.

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1 Q. Okay. And what was discussed, just --

2 A. My independent medical evaluation. I
3 was also provided with an IME by
4 Dr. Brett Gunter. I was provided one
5 additional specific record from
6 Southeastern Spine Institute dated 10-15-14.
7 I was also provided an e-mail, 10-14-14, by an
8 Anthony going towards a Terri Seagal.

9 Q. Okay. The -- fair enough. How long
10 did that meeting last?

11 A. Five minutes.

12 Q. As it pertains to that 10-15-14
13 report, what was discussed, Doctor? Do you
14 remember?

15 A. Nothing specifically. Just that --
16 you know, that there is such a document and
17 for me to be aware of it.

18 Q. Do you understand that the date of
19 that report is the day after his alleged
20 injury?

21 A. Correct.

22 Q. Okay. Do you know if you were
23 provided that before today or before Tuesday?
24 Excuse me.

25 A. Again, the big stack of records with

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1 the independent medical evaluation, you know,
2 usually tends to be something like
3 this(indicating) or similar, pretty thick, so
4 we go -- I usually go page by page and try to
5 summarize, like over here, every specific
6 date, where the patient has been seen, who saw
7 the patient.

8 As you can understand, I mean, we may
9 not catch 100 percent of the entries in that
10 record, so I -- I can't tell you specifically
11 if I went over this page or not when I was
12 reviewing that thick stack of records or thick
13 chart.

14 Q. I got you. I understand. In
15 reviewing your summary of the records, you --
16 and I'm looking at your actual report. I'm on
17 the bottom of the first page of your report,
18 which is page 12 of Claimant's APAs, and you
19 note that -- you record some stuff from
20 8-6-14. I think you -- if you see that?

21 A. Yes.

22 Q. And then the next report you document
23 is 10-22-14.

24 A. Correct.

25 Q. You don't -- you do not mention

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IVAN LAMOTTA, MD 06-01-2017

1 anything about 10-15-14. Is that -- at least
2 based on your report. Is that fair?

3 A. Yes.

4 Q. Okay. Given that you were asked to
5 comment on causation and given that the
6 accident was alleged to have occurred on
7 10-14-14, if you had seen that report or if it
8 were provided to you, do you think you would
9 have made mention of a -- of a report from the
10 Southeastern Spine Institute, his treating
11 physician for a very long time for his back,
12 do you think you would have made mention of
13 that -- of the findings in that report?

14 A. Yes.

15 Q. Do you think that report is relevant
16 as to causation?

17 A. I think it's relevant in terms of
18 completeness of the record. Obviously, I -- I
19 do -- there is enough evidence in the record
20 afterwards that led me to -- that led me to
21 the conclusion of -- of -- that it's stated in
22 my discussion notes as far as the causation
23 and all that, but, yes, it -- it would have
24 been nice to include that in my evaluation.

25 Q. If you -- if you were not provided

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1 that document when those records were sent to
2 your office, meaning you wouldn't have seen
3 it, do you -- would you have had questions as
4 to why that document was not provided to you?

5 MR. SMITH: I'm going to object. That
6 calls for speculation.

7 THE WITNESS: If this record was kept
8 away from me on purpose, I mean, I would
9 question it, but, I mean, typically, you know,
10 they -- they give me the chart as -- as best
11 as -- as best as they have gathered all the
12 information and the records. I mean, there
13 are -- there are usually a lot of pages, some
14 are relevant, some are not, so I'm not going
15 to say whether or not that was done on purpose
16 or not.

17 BY MR. HAIGLER:

18 Q. Okay. Doctor, what is your
19 understanding of -- what is your understanding
20 of his preexisting back conditions?

21 A. So as the record states, obviously, it
22 looks like the gentleman had a previous --
23 he's had two previous back surgeries.

24 Q. Okay. And you -- I assume you got
25 that from the records. Is that correct?

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IVAN LAMOTTA, MD 06-01-2017

1 A. Correct.

2 Q. It looks like -- and I'm reading the
3 third -- well, page 2. About halfway down you
4 note that he had his first back herniation in
5 1983. That would have been about 33 years
6 before you saw him.

7 A. Yes.

8 Q. All right. And you said his -- and
9 then your next statement is -- well, surgery
10 was performed. The next statement is his
11 next -- his next back herniation was in March
12 of '14; is that correct?

13 A. Yes.

14 Q. What was your understanding of his
15 problems between 1983, in that 31-year period,
16 and 2014?

17 A. My understanding is that he was
18 doing -- he was doing better. Obviously, up
19 until the point where he herniated and needed
20 surgery again.

21 Q. Okay. You also note that -- right
22 after that you said this was also treated with
23 surgery in 2014. You also note the problems
24 were exclusively on the left side, and then --
25 and then in 10-14 you note that he has

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IVAN LAMOTTA, MD 06-01-2017

1 worsening left leg problems and then new right
2 leg problems. Is that right?

3 A. Correct.

4 Q. So are you saying that prior to --

5 A. In addition to the bowel and bladder
6 problems.

7 Q. Correct. Okay. Sorry. My apologies.

8 Are you saying that before October of
9 2014 this gentleman never had right leg
10 concerns, radiculopathy-type issues? Is that
11 what I'm reading from that?

12 A. Well, I'm -- I guess it's never good
13 to use the word "never," but it appears that
14 predominantly his issues were left-sided.

15 As you can probably imagine, we did
16 not review records from 1983 to 2014, so we
17 have to obviously take into consideration what
18 the -- what the patient reports to us, and
19 obviously we assume that that is honest and --
20 and truthful, so if he tells us that he wasn't
21 having any problems with the right side, then
22 we have to believe that.

23 Q. Okay. Doctor, I -- I hate to do this,
24 but I needed to go through a few records for
25 you, and I'm going to try to do this as

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1 quickly as I can and as respectful with your
2 time as I can.

3 I'm going to hand you a copy of our
4 records just so I don't have to keep handing
5 you back and forth, so at the bottom -- at the
6 bottom there is a page number.

7 A. Yes.

8 Q. Right there. I will refer to that to
9 help you get to where you need to be. I'm
10 going to represent to you -- and you -- you
11 are welcome to look through all these, but the
12 first 22 pages are medical records from
13 different doctors he treated with, primarily
14 Dr. Moskow and Dr. Belton, all the way up to
15 1987, which included that prior surgery you
16 talked about --

17 A. Sure.

18 Q. -- regarding his back.

19 Now, I'm not going to go through those
20 because you've -- you had some knowledge of
21 that part of his medical history. Is that
22 fair?

23 A. Yes.

24 Q. All right. If you will, flip to page
25 24. This is a report dated December 4, 1992,

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1 that would have been ten years after his
2 initial surgery, and based upon this report,
3 Doctor, it appears as though -- it appears as
4 though he had reherniated his L4-5 disk
5 causing left lumbar radiculopathy. At least
6 that's based upon the impression. Is that
7 what -- is that what you see?

8 A. Yes.

9 Q. Okay. And if you will, read down
10 about -- the paragraph starts, In 1985. Do
11 you see that?

12 A. Yes.

13 Q. It says, In 1985 he had low back
14 surgery for disk disease and thereafter
15 returned to full activities without any
16 difficulty whatsoever until this motor vehicle
17 accident. You weren't -- you weren't aware or
18 provided any records regarding a reinjury ten
19 years after the initial surgery, were you?

20 A. No.

21 Q. And this is the same level of his low
22 back that we are currently dealing with.

23 A. Yes.

24 Q. Or at least part of the same --

25 A. Yes. Part of the -- inclusive of.

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1 Q. Okay. If you will, turn to page 26.

2 A. 26 you said?

3 Q. Yes. And I may have highlighted that
4 for you. If I did, that will be helpful, but
5 was he assigned by Dr. Epstein a 20 percent
6 impairment of the lumbar spine in January of
7 1993?

8 A. Yes.

9 Q. Were you aware of this before today?

10 A. No.

11 Q. Okay. If you will, turn to pages 28
12 and 29. Particularly page 29 will be easier.
13 This is a -- is this a report from
14 Denmark Medical Center dated September 12,
15 2002, now 20 years after that first surgery?

16 A. September the 1st, I believe, or
17 7-1-02.

18 Q. It looks like 7 -- it might be -- I
19 don't know. Sometime in September 2002.

20 A. July.

21 MR. SMITH: July 7th -- July 1st --

22 MR. HAIGLER: I guess. Yeah. Okay.
23 This is page 29? There we go. Sorry.

24 THE WITNESS: Wrong page. Yeah,
25 7-12-02.

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1 BY MR. HAIGLER:

2 Q. Okay. And if you look down -- and --
3 and I know this is hard to read, but under the
4 history section does it note that he also
5 states cold sensation down to foot
6 intermittently times three weeks?

7 A. Yes.

8 Q. Okay. And if you will, turn to the
9 prior report from July of 2002, page 28 of
10 Defendants' APAs. At the top, again, it's
11 noted that -- that he has got back,
12 intermittent left leg pain and his diagnosis
13 is actually back pain, continues to take
14 Motrin 600 milligrams. Is that what you read?

15 A. Yes.

16 Q. Okay. So we're now -- we're now
17 20 years post that first surgery; is that
18 correct?

19 A. (No verbal response.)

20 Q. And if you will, turn to page 30,
21 Doctor. We're in 2003 now. Is he still
22 carrying a diagnosis of chronic lower back
23 pain?

24 A. Yes.

25 Q. Still on medications for that?

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1 A. Yes.

2 Q. Okay. If I can get you to turn to
3 page 44 -- excuse me, page 47. My apologies.
4 This is a report from Dr. Jones at the
5 Low Country Health Care System. This was his
6 family provider, I think, at that point in
7 time. And this is a report dated March 22,
8 2010, which would have been just four and a
9 half years prior to when he had this injury.
10 What kind of complaints did he have with
11 regard to radiating pain?

12 A. Are you referring to the chief
13 complaint area?

14 Q. Correct.

15 A. So it's states chief complaint --

16 Q. Well, I'm -- I'm referring to the back
17 pain under musculoskeletal.

18 A. Okay. So back pain bilaterally
19 radiates to the right leg, achy, deep, dull,
20 excruciating, severity is constant, the
21 duration is continuous, symptoms have not
22 changed a great deal recently, pain is
23 associated with bending -- bending over,
24 prolonged sitting, he has tried bedrest,
25 family history is not pertinent.

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1 Q. Okay.

2 A. Has not been at work since February
3 15, 2010, due to back pain.

4 Q. Okay. And that's just three and a
5 half years before this; is that correct?

6 A. Yes.

7 Q. And that evidence is that at least at
8 that point he complained of prior right leg
9 radiculopathy.

10 MR. SMITH: I'm -- I'm going to
11 object.

12 MR. HAIGLER: Well, right --

13 MR. SMITH: That's what the record
14 says, but I'm going to object to that being
15 his complaints.

16 BY MR. HAIGLER:

17 Q. Does that appear to be his complaints,
18 Doctor?

19 A. Per the record it appears that he's
20 complaining of pain radiating into the right
21 leg.

22 Q. Okay. And then I -- and this is
23 Claimant's APA, page 82. I need to go back
24 to -- this is Dr. Poletti's report from 2001.
25 I hate to jump back to 2001, but does he --

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1 does he indicate the MRI indicates he had a
2 recurrent herniation of that disk?

3 A. Yes.

4 Q. Okay. Thank you. And, again, this is
5 September -- and this is page 85 of Claimant's
6 APAs. That's September of 2002. He is still
7 treating with Dr. Poletti for that back
8 condition and left leg symptoms. Is that
9 fair?

10 A. Yes.

11 Q. Okay. Thank you. You hadn't seen, at
12 least according to your report, any of these
13 records before today. Is that fair?

14 A. That's correct.

15 Q. Okay. I'm going to show you this from
16 2004. Doctor, did Dr. Poletti assign him an
17 impairment rating of 10 percent at that point
18 in time due to radiculopathy?

19 A. Yes.

20 Q. Okay. And then going back to 2010,
21 where we were just looking, and I asked you
22 about his right leg, he goes back to
23 Southeastern Spine. Is he -- is he
24 complaining to them as well of right leg
25 problems?

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1 MR. SMITH: What is the date of that
2 report?

3 MR. HAIGLER: It's page 90 -- 89 of
4 your APAs.

5 THE WITNESS: Yes.

6 BY MR. HAIGLER:

7 Q. Okay. Is it noted that there is a --
8 a reherniation of the disk at that point?

9 A. (No verbal response.)

10 Q. I'm sorry. This may be the report
11 that shows that. This is an addendum to that
12 report, page 90. Does it look like there is
13 still a herniation in that particular disk
14 based on that review of the MRI in February of
15 2010?

16 A. Yes. It states disk disruption
17 slightly to the right of the L4-5 level.

18 Q. Okay. But there is still a herniation
19 at that point, is that correct, according to
20 that report?

21 A. Yes.

22 Q. Okay. And here is the --
23 Dr. Poletti's actual note, and this is from
24 February 23rd of 2010. If you will, look at
25 the last full paragraph. He actually notes

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1 that there is a recurrent herniation at that
2 point, at least in his opinion. Is that fair?

3 A. Yes.

4 Q. Okay. And then I think I've got two
5 more to show you. This is from October. Page
6 94 of Claimant's APA. October 12, 2012. Is
7 he continuing -- is he having the same issues
8 he has been dealing with all along? Returning
9 to Dr. Poletti for another flare-up; is
10 that -- is that what it looks like?

11 A. Yes.

12 Q. Okay. Had you seen any of these
13 reports before today at least based on your
14 report?

15 A. Not prior to 2014.

16 Q. Okay. And then this is, I think, when
17 he went back right before his surgery in '14.
18 He went back in December of '13. Was he
19 having more problems with the left leg?

20 A. In this particular one it says that he
21 does not have any significant right-sided
22 symptoms, so no weakness, no bowel or bladder
23 incontinence, so predominantly left-sided
24 symptoms, December 2013.

25 Q. Okay. Is it uncommon, Doctor, for

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1 symptoms -- especially in a patient with
2 this -- this kind of back issue, for symptoms
3 to kind of go between legs depending on -- I
4 mean, during --

5 A. It -- so MRI has shown nerve
6 compression on both sides, so it is common,
7 not uncommon, to have alternating symptoms
8 between extremities.

9 Q. Okay. And I'm going to represent to
10 you, Doctor, that after pretty much every
11 single one of these visits I showed you, he
12 had an injection in his lumbar spine, which
13 cooled his symptoms for a period of time,
14 which is why you see him go for six months to
15 nine months, maybe a year, sometimes even two
16 years, without going back to Dr. Poletti's
17 office.

18 And then I want to show you this
19 report. This is page 108 of Claimant's APAs.
20 This is March 3, 2014, which would have been
21 seven months -- a little less than seven
22 months prior to his alleged injury. What were
23 the nature of his complaints at that point?

24 A. Marked increase in his back and leg
25 pain. He developed progressive weakness in

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1 his leg.

2 Q. Did he have foot drop?

3 A. Yes, foot drop, absent Achilles tendon
4 reflex.

5 Q. Okay. Another herniation at the
6 L4-5 -- between L4 and S1. Is that fair?

7 A. Yes.

8 Q. Okay. So when I read your report and
9 you say he had his first -- and I'm just
10 reading your -- your report. He had his first
11 back herniation in '83. His next was in 2014.
12 There is -- he's had a long history of lumbar
13 spine problems; is that -- continuous lumbar
14 spine problems. Is that fair?

15 A. Yes.

16 Q. Okay. Multiple herniations over time?

17 A. Correct.

18 Q. Multiple -- I mean, he has had -- he
19 has had treatment basically almost on an
20 annual basis since 1983. Is that fair?

21 A. Yes.

22 Q. Okay. Based upon your report, did
23 you -- did you have this type of history as to
24 what his actual condition had looked like for
25 the last 35 years before you evaluated him?

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1 A. Not spanning that back -- no. That
2 far.

3 Q. And based upon some of the records I
4 showed you from 2010, his problems were not
5 exclusively on the left side. They did
6 occasionally move to the right. Is that fair?

7 MR. SMITH: I'm going to object that
8 that's what the records say.

9 MR. HAIGLER: You can answer that.

10 THE WITNESS: Yes. The records
11 suggest that he was having significant
12 right-sided symptoms as well.

13 BY MR. HAIGLER:

14 Q. Given the 34 plus years of recurrent
15 herniations, two back surgeries, multiple
16 injections, he's been on medication for a long
17 time, given what you just saw in medical
18 records and -- and I didn't show you
19 everything, but what I -- what I did show you,
20 how fragile was his back in October of 2014?
21 I mean, what -- I mean, what -- what kind of
22 condition would -- I mean, if that were your
23 patient, I mean, what -- what -- how fragile
24 do you think his back would be?

25 A. I mean, I guess I wouldn't necessarily

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1 use the -- use fragile, but he would be
2 extremely prone to redevelop symptoms and
3 worsening symptoms.

4 Q. Okay. Would it take a lot less to
5 cause such a thing?

6 A. Definitely.

7 Q. Okay. As of after this last surgery
8 in March of 2014, if he were your patient and
9 you gave him an impairment rating, what would
10 it be?

11 MR. SMITH: I'm going to object to
12 that. Calls for speculation.

13 THE WITNESS: Probably --

14 BY MR. HAIGLER:

15 Q. Well, let me first say this. There is
16 no doubt he had prior impairment to his lumbar
17 spine before this injury. Is that -- is that
18 a fair statement?

19 A. Yes.

20 Q. Okay. What would -- I mean, as close
21 to an estimate as you can give us, what would
22 it be?

23 A. It would be between 10, 15 percent.

24 Q. Okay. And you gave him -- and when
25 you evaluated him -- an impairment rating

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1 of -- sorry. Let me make sure I'm saying this
2 correctly.

3 I assume 10 to 15 percent whole
4 person?

5 A. Yes.

6 Q. You gave him 24 percent whole person.
7 How did we get another 14 or 9 to 14 percent
8 whole person based upon where he is now or
9 when you evaluated him versus where he was
10 just before this injury?

11 A. Well, again, I did not have all the
12 records that you have been showing me, and I
13 was not aware -- as you can see in my
14 medical -- independent medical evaluation,
15 taking into consideration what I was provided
16 and the patient history, I was under the
17 impression that patient was fine up until '83.
18 He gets the surgery. He does great up until
19 his 2014 surgery, and then he continues to do
20 well up until the time of the accident, and,
21 obviously, that's not the case.

22 You also have to take into
23 consideration that instead of two levels,
24 which is clearly documented in the record,
25 L4-5 and L5-S1, now he has three records --

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1 three levels involved because he now has also
2 severe stenosis at the level L3-L4 in addition
3 to bowel and bladder problems, which is
4 consistent with significant stenosis in the
5 lumbar spine, so it is -- taking everything
6 into consideration, his level of impairment,
7 as well as the evaluation by Tracy Hill, the
8 physical therapist that does the impairment
9 ratings as well...

10 Q. Okay. So you are saying that the L3-4
11 level is now involved from a stenosis level?

12 A. Certainly.

13 Q. And that's increasing the impairment
14 rating -- that's part -- part of what
15 increased the impairment rating?

16 A. Correct.

17 Q. Doctor, I want to show you --

18 A. And in addition to the bowel and
19 bladder problem.

20 Q. Right. Okay. And we will get there
21 in a second, but I want to show you this
22 report from February of '14. This is the MRI
23 report. It is page 106 of Claimant's APAs. I
24 don't know that you have seen that before
25 today. It's not referenced in your report, I

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1 don't believe, but looking at the L3-4 level,
2 did he have moderate to severe stenosis at
3 that point in time?

4 A. Yes.

5 Q. Is that similar to the stenosis that
6 you just commented on?

7 A. Yes.

8 Q. Okay. So as it pertains to
9 impairment -- and you didn't know that when
10 you told me 10 to 15 percent whole person --
11 would that have increased his impairment at
12 that point in time?

13 A. Yes.

14 Q. Okay. So what is -- am I
15 understanding then that the difference between
16 his current level of impairment and his prior
17 level of impairment is the urinary and bladder
18 incontinence issues?

19 MR. SMITH: I'm going to object to
20 that.

21 THE WITNESS: That's correct.

22 BY MR. HAIGLER:

23 Q. Okay. Doctor, what would it take --
24 you know, what would it take to cause a
25 reherniation? I mean, we know he alleged that

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1 he fell down steps and that caused the
2 reherniation in October of 2015. Is that the
3 only thing that could have caused -- I mean,
4 what -- what kinds of -- I mean, could it have
5 been something simple or could it have been --
6 I mean, what would have caused it given the
7 shape of his back at that point in time?
8 What --

9 MR. SMITH: I'm going to object.
10 Calls for speculation.

11 BY MR. HAIGLER:

12 Q. I mean, would you have been surprised
13 if he came in and said something otherwise
14 silly created these problems?

15 A. Well, there are many things that can
16 cause a herniation, and somebody with an
17 extremely bad back, it may be part of the --
18 even part of the natural history.

19 I mean, sometimes there are --
20 patients may be genetically predisposed to
21 having herniations, which a simple twist
22 and -- a simple twist and -- while you are
23 asleep can cause a herniation, so anything
24 from twisting to sneezing to coughing to
25 falling to major car accidents can cause

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1 herniations.

2 Q. Okay. Now I'm going to -- that report
3 that you have from 10-15-14, can you grab that
4 for me?

5 A. Yeah.

6 Q. Just so -- just to make it a little
7 bit easier. You agree if he got hurt on
8 10-14, this would have been the day after?

9 A. Yes.

10 Q. Okay. And when he presents to
11 Dr. Poletti's office -- I don't think he saw
12 Dr. Poletti, I think he saw Dr. -- PA
13 Lane Tuggle -- did he note in the history of
14 present illness today he has minimal
15 complaints?

16 A. Yes.

17 Q. Greatly improved since surgery?

18 A. Yes.

19 Q. But he still notes that he continues
20 to have some numbness in his left foot and
21 calf, but feels a slight improvement. Is that
22 fair?

23 A. Yes.

24 Q. Okay. And I'm just reading the
25 report. I just want to make sure you -- it

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1 says he is still taking it -- at the very
2 bottom of that paragraph, still taking his
3 Norco in the afternoon after work, but overall
4 he is quite pleased with his progress.

5 A. That's correct.

6 Q. Okay. And then if you will, go to the
7 physical exam. He is in no acute distress.
8 He's got nonantalgic gait, which means he's --
9 I presume his gait is normal. Is that
10 correct?

11 A. Yes.

12 Q. He's got negative straight leg raise.
13 What does that tell you?

14 A. That he doesn't have is a positive
15 straight leg raise, which may be suggestive of
16 a herniated disk.

17 Q. Okay. That he has no worsening of
18 his -- of his neurological deficits that are
19 noted at least based upon this report.

20 A. Correct.

21 Q. Would you be surprised if he fell down
22 a set of stairs, that he didn't -- if he
23 didn't have immediate back pain?

24 MR. SMITH: I'm going to object.
25 Calls for speculation.

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1 BY MR. HAIGLER:

2 Q. Given the shape that his back was in
3 on October the 14th, would that surprise you?

4 MR. SMITH: I'm going to object
5 because that's against the weight of the
6 evidence.

7 THE WITNESS: If you have a fall or an
8 accident, it may be not unusual for you to
9 experience the -- the full effect of a fall or
10 an accident. For example, when you take a
11 look at folks that have been in a car
12 accident, they're actually hurting -- if you
13 examine them right away, they may not be
14 hurting, but if you reexamine them 48 hours --
15 then they start having all these aches and
16 pains elsewhere, so a fall can be very
17 similar, so it doesn't not surprise me that he
18 may not have had an acute increase in his
19 pain.

20 BY MR. HAIGLER:

21 Q. Is that normally the case in folks who
22 are otherwise healthy in their lumbar spine?

23 A. Typically, yes.

24 Q. Okay. A guy with this kind of lumbar
25 spine, would you have expected there to be

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1 some immediate sense of an exacerbation of his
2 problems?

3 MR. SMITH: I'm going to object.
4 Asked and answered.

5 THE WITNESS: I would have expected
6 him to report increase in pain, yes.

7 BY MR. HAIGLER:

8 Q. Okay. Does the report that he gave
9 Lane Tuggle on 10-15-14 -- if he had come to
10 you on 10-15-14 and given this report and then
11 said he got -- later on told you he got hurt
12 on 10-14, would that have surprised you? If
13 he had come in and said, I'm -- I feel great,
14 I'm very pleased, I'm not having any -- any
15 problems, no straight leg raise, no acute
16 distress, would that report have surprised you
17 given the fact that the day before he is
18 saying he got hurt at work?

19 MR. SMITH: I'm going to object.
20 Calls for speculation.

21 THE WITNESS: That report would
22 surprise me, yes.

23 BY MR. HAIGLER:

24 Q. Okay. Now, Doctor, you have mentioned
25 that there are other things that could have

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1 caused or can cause a reherniation or
2 herniation, but in this case a reherniation,
3 including things like -- it could have been
4 anything, a car accident, rolling over in bed,
5 coughing, sneezing, things of nature. Is that
6 fair?

7 A. Yes.

8 Q. That was your testimony earlier; is
9 that right?

10 A. Yes.

11 Q. If you will, Doctor -- and you have it
12 right in front of you. If you will, turn to
13 page 88, which is under tab 5 of those
14 documents I gave you right here. Do you mind?

15 A. Do you have the MRI examination from
16 February 2014 and his MRI examination from --

17 Q. October of '14?

18 A. October '14.

19 Q. I'm sure we do. Can we get there in a
20 second?

21 A. Sure.

22 Q. Okay. But your testimony earlier was
23 that even given the shape that his back was in
24 in October of 2014, even something small like
25 sneezing or coughing could have caused a

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1 reherniation.

2 A. But here is the thing. I -- looking
3 back at his records, I -- I don't think that
4 he herniated. I think that he had those
5 herniations all along.

6 Q. Okay. Could have caused an increase
7 in his symptoms.

8 A. Yes.

9 Q. It could have worsened the herniation.

10 A. Yes.

11 Q. Okay. So what your -- your testimony
12 earlier still applies to the fact that
13 those -- that type of mechanism could worsen
14 the condition he's already susceptible or I
15 think prone back -- you said earlier -- was
16 in. Fair?

17 A. Yes.

18 Q. All right. If you will, turn to page
19 88 in what I just gave you. Just a couple of
20 documents I want you to look at. This is a
21 report from --

22 A. 88?

23 Q. Yes. I'm sorry, Doctor. This is a
24 report from his pulmonologist. What is the
25 date of this document?

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1 A. 10-17-14.

2 Q. Which would have been three days after
3 his accident and two days after he went to
4 Lane Tuggle; is that right?

5 A. Yes.

6 Q. Okay. Were his complaints at this
7 time cough, congestion, wheezing, shortness of
8 breath that he says has been present for six
9 years though worse recently?

10 A. Yes.

11 Q. Okay. Is he diagnosed with persistent
12 cough?

13 A. Yes.

14 Q. Okay. Are you aware he's had COPD?

15 A. Yes.

16 Q. Okay. Is there any mention of a work
17 accident in here?

18 A. No.

19 Q. Okay. Could this type of persistent
20 coughing have caused the increase in symptoms
21 he experienced?

22 MR. SMITH: I'm going to object.

23 Calls for speculation.

24 BY MR. HAIGLER:

25 Q. I mean, for example, Doctor, if he

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1 came in and said I've been coughing like crazy
2 and my back in now killing me and his back was
3 in the shape that it was in, based on your
4 earlier testimony, that wouldn't be uncommon,
5 would it?

6 MR. SMITH: Object. Calls for
7 speculation.

8 THE WITNESS: That's correct, but over
9 here they're recording that his back pain is
10 resolved.

11 BY MR. HAIGLER:

12 Q. Okay. Well, that I think -- do we
13 agree that that can't possibly be the case
14 based upon his --

15 A. That's correct.

16 Q. Okay. But if he came in to you -- I
17 mean, he clearly was in -- coughing enough to
18 go to a pulmonologist on 10-17-2000- or having
19 symptoms of a pulmonary nature bad enough to
20 go to a pulmonologist on 10-17-14. Is that
21 fair?

22 MR. SMITH: I'm going to object to
23 that.

24 THE WITNESS: Yes.

25 BY MR. HAIGLER:

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1 Q. Could those type of symptoms have
2 caused the problems he is now experiencing in
3 his lower back?

4 MR. SMITH: I'm going to object to
5 that. Calls for speculation.

6 THE WITNESS: I mean, I guess
7 theoretically they could, yes.

8 BY MR. HAIGLER:

9 Q. Okay. If his testimony is, the reason
10 he didn't say anything to Lane Tuggle on 10-15
11 was that he wasn't having problems and that it
12 was four or five days later when he started
13 having problems and three days later he was
14 coughing to the point of going to a
15 pulmonologist and your testimony has already
16 been that this could have caused the issues
17 that he was dealing with, it could have caused
18 an increase in his symptoms --

19 MR. SMITH: I'm going to object to
20 that as --

21 MR. HAIGLER: I need to ask my
22 question first.

23 MR. SMITH: Okay.

24 BY MR. HAIGLER:

25 Q. Then how do we know, Doctor, whether

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1 it was the -- well, let me ask you this. Let
2 me scratch that question. Let me scratch that
3 question.

4 You didn't have this report before
5 today, did you?

6 A. (No verbal response.)

7 Q. You've never seen this.

8 A. I saw it on Tuesday. I briefly
9 glanced at it.

10 Q. This -- these two pulmonary reports?

11 A. This one right here.

12 Q. Okay. Who -- who gave that to you?

13 A. The patient's attorney did.

14 Q. Okay.

15 A. Well, I went over them. I didn't keep
16 them.

17 Q. Let me show you another document. Are
18 you aware he treats at the VA Hospital?

19 A. That I am not aware of.

20 Q. Okay. Let me show you two records
21 from the VA. These are from January of '16,
22 2016. I know this is after the accident,
23 but this is January 28, 2016. I've
24 highlighted what I would like for you to read,
25 but you are welcome to read the entire report.

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1 Does he note coughing and having back pain
2 while coughing?

3 A. Yes.

4 Q. Okay. So according to that report,
5 it's not unusual for that or at least it --
6 it's happened at least once before before
7 today. Is that fair?

8 A. Yes.

9 MR. SMITH: I'm going to --

10 MR. HAIGLER: Okay. Thank you. I
11 would like to make this an exhibit, if you
12 can.

13 Any objection, Jake?

14 MR. SMITH: No objection.

15 (DFT. EXH. 1, Progress Notes, Dated
16 1-28-2016, was marked for identification.)

17 BY MR. HAIGLER:

18 Q. So I guess my question is, if you
19 weren't -- when you gave the opinion -- and
20 I -- I mean, when you gave the opinion that
21 what you saw on his lumbar spine was causally
22 related to the fall that he had -- that he
23 told you he had in October of 2014, you gave
24 that opinion, one, without seeing all the
25 medical records prior. Is that fair?

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1 A. Yes.

2 Q. And, two, without seeing these two
3 pulmonology or this pulmonology report that
4 I've shown you on page 88 of Defendants' APAs.
5 You didn't have that before then -- before
6 either. Is that fair?

7 A. Yes.

8 Q. Okay. And your testimony today has
9 been that exactly what he complained of on
10 October 17, 2014, could have caused the
11 increase in his symptoms. Is that fair?

12 A. They could have, yes.

13 Q. All right. If he had come to your
14 office and said that that was -- I mean, if he
15 had come in and said, Doctor, I've been
16 coughing like crazy. I think it's caused my
17 back to worsen or herniate again or whatever
18 the case may be, given the condition his back
19 was in October 17, 2014, would that have
20 surprised you?

21 A. When -- if -- if this particular
22 patient came back to my office, I would have a
23 really hard time believing him, what he tells
24 me, so.

25 Q. Why is that?

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1 A. Because on his record, you know, it --
2 he -- he has stated that his back was doing
3 great, which is not the case; he had said that
4 he never had any right lower extremity
5 symptoms, which is not true, so it would be a
6 little hard to believe what causes what in
7 him.

8 Q. Okay. Let me ask this question then.
9 Based upon the reports between October
10 the 14th(sic), which is the 15 -- October 15
11 and the October 17, based on those two
12 reports, can you state to a reasonable degree
13 of medical certainty now whether it was either
14 the fall or his persistent coughing that
15 caused the problems in his disk, which he said
16 himself in testimony developed four, five or
17 six days after his fall on October the 14th?

18 MR. SMITH: I'm going --

19 Q. Can you give an opinion to a
20 reasonable degree of medical certainty knowing
21 what you know now?

22 MR. SMITH: And I'm going to object to
23 that question as I think that's against the
24 evidence as far as the client's testimony.

25 MR. HAIGLER: Okay. You can answer

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1 that, Doctor.

2 THE WITNESS: So having reviewed his
3 previous records going back to after his
4 initial surgery in 1983, I believe that the
5 symptoms that he's experiencing are more
6 likely than not to be just continuing
7 deterioration of his lumbar spine and a
8 worsening of his lumbar spine based on the
9 natural history of his initial -- of his
10 pathology, and not necessarily the accident,
11 the fall, and not necessarily the coughing
12 spell that he had in 10-17. You know, through
13 the record you see that he is doing better,
14 worse, better, worse, better, worse, and
15 somebody who has disk problems will have a
16 tendency to continue to slowly deteriorate
17 over time.

18 MR. HAIGLER:

19 Q. Okay. So where he is at now, he
20 was -- I mean, it's -- it's not unexpected
21 that he would have been there regardless of
22 whether he had some accident in the middle. I
23 mean, he's --

24 A. Correct.

25 Q. Okay.

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1 A. And this may be necessarily why he
2 doesn't necessarily complain of pain right
3 after his fall on 10-15, but he alleges that
4 he's doing fine perhaps that particular day,
5 but --

6 Q. Okay. Are you aware his -- the
7 problems that he has or he complains of with
8 regard to his left leg and right leg have even
9 waxed and waned and gone back and forth since
10 October 14, 2014? Would that surprise you?

11 A. No.

12 MR. SMITH: I'm going to object to
13 that.

14 BY MR. HAIGLER:

15 Q. Okay. And is that because of the
16 nature of the injury he had or the problems he
17 has had for the last 35 years?

18 A. Correct.

19 Q. Okay. I'm just about finished,
20 Doctor. The -- let me show you one -- there
21 is a urology report, which you commented on in
22 your records. It's from Dr. Rames, and I'm
23 going to have you look at it. I assume based
24 on your report that you saw this when you
25 evaluated him, so I will -- I won't ask you if

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1 you did, but --

2 A. Yes.

3 Q. -- you note in your report that he
4 has -- there are -- you said there is also
5 impairment of the bladder, which is 24
6 percent, and sexual dysfunction impairment,
7 which is 9 percent. I assume you were -- were
8 you adopting that report as -- as something
9 that he was dealing with?

10 A. Correct.

11 Q. Okay. Now, if you will, read
12 Dr. Rames' report at the top -- I think it's
13 on -- well, let me see what page it's on. I'm
14 not going to make you mess around and figure
15 out -- okay. This page right here. It
16 says -- does it -- does Dr. Rames note that he
17 has been having this bladder issue for a year?

18 A. Yes.

19 Q. Okay. Thank you. And in -- under the
20 ED sections, it's all caps, the next to last
21 highlighted section, does he note that this
22 appeared as a result of this particular
23 injury? It might be in the higher section.
24 I'm not sure. Let me look.

25 Yes. Starts with, These -- these

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1 issues. Does he note that these issues
2 appeared, the ED and the urinary issues
3 appeared, after this injury?

4 A. Yes.

5 Q. Okay. Thank you. So if he said he
6 has been having these problems for a year
7 prior to May of 2016, that would be at least
8 May of 2015.

9 A. Correct.

10 Q. All right. I'm going to quickly go
11 through a couple of these. I apologize for
12 having to keep flipping back and forth. This
13 is Dr. Poletti's report, and I assume as a
14 surgeon, a back surgeon, especially with a
15 gentleman that has this kind of history, you
16 are going to ask him every time whether he has
17 any bowel or incontinence issues. Is that
18 fair?

19 A. Yes.

20 Q. And is that because if he's got that
21 condition, that's something that needs to be
22 dealt with to make sure there is not some
23 other issue -- I mean, it's a serious concern,
24 is it not?

25 A. Yes.

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1 Q. Okay. In that -- in that report from
2 Dr. Poletti -- that's page 142 of Claimant's
3 APAs -- did he ask him, according to the
4 report, about bladder issues?

5 A. Yes.

6 Q. And what did he say?

7 A. That the patient denied loss -- denies
8 loss of bowel and bladder function or
9 paralysis.

10 Q. Thank you. This is August of 2015.
11 Did he again deny that?

12 A. Yes.

13 Q. Thank you. This is October of 2015.
14 Did he again deny that?

15 A. Yes.

16 Q. Okay. Did he also note in here that
17 he has a -- has been wearing an ankle foot
18 orthotic since his surgery in 2014?

19 A. Yes.

20 Q. Thank you. December of 2015 does he
21 note anything about bladder issues, bowel
22 incontinence? In fact, does he also note that
23 there is no change in his medical history
24 since his last appointment?

25 A. That's correct.

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1 Q. Okay. And then, Doctor, I want to
2 show you one more report. This is one month
3 prior to when Dr. Rames gave his opinion that
4 he had been having bowel and bladder problems
5 for a year. Did he note there were no bowel
6 and bladder problems?

7 A. Yes.

8 Q. Okay. You laughed. Why is that?

9 A. Again, because there is such an
10 inconsistency, what -- what he reports to one
11 doctor and doesn't report to the other.

12 Q. Okay. Does it make any sense to you
13 why he would have, for one year prior to that
14 Dr. Rames report, indicated to Dr. Poletti's
15 office, who has been treating him for the
16 better part of 15 years, that he was not
17 having any bladder or bowel issues and yet
18 Dr. Rames says he has been having it for a
19 year? That's -- that's inconsistent; is it
20 not?

21 A. Yes.

22 Q. Does that make any sense to you as a
23 physician?

24 MR. SMITH: I'm going to object to
25 that. It calls for speculation.

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1 THE WITNESS: I -- I don't know why he
2 would be not honest with the one physician and
3 more detailed with the other.

4 BY MR. HAIGLER:

5 Q. How can the report from Dr. Rames, in
6 your opinion, support that his -- that he is
7 having urinary issues when everything prior to
8 what is in that report says he was not?

9 A. Can you we repeat the question?

10 Q. Sure. How can Dr. Rames -- well, let
11 me ask you this. Did Dr. Rames conduct any
12 testing as far as you can see to test for
13 bowel or bladder incontinence?

14 A. The only thing that he did was a
15 bulbocavernosus reflex, but, of course, he --
16 those are -- the bowel and bladder
17 incontinence, those are symptoms that you have
18 to get from the patient, so unless he urinates
19 in your office and defecates in your office,
20 you can't really -- you have to take the words
21 patient -- the patient's word for it.

22 Q. Okay. And we know, at least based on
23 Poletti's report, that the patient's word is
24 inconsistent as to those symptoms. Is that
25 fair?

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1 MR. SMITH: I'm going to object.

2 THE WITNESS: Yes.

3 BY MR. HAIGLER:

4 Q. Okay. And he also diagnosed him
5 with -- and I think the 9 percent was related
6 to sexual dysfunction issues, erectile
7 dysfunction specifically. Is that fair?

8 A. Yes.

9 Q. Okay. Doctor, if you will, turn --
10 and I'm -- I'm just about finished. If you
11 will, turn to page 41 of that report I just
12 gave you -- those documents I just gave you.
13 This is a report from his family physician,
14 2008, October of 2008, and underneath there he
15 has got a prescription for Levitra. Do you
16 know what Levitra is?

17 A. I believe it's one of the medications
18 that is used for erectile dysfunction.

19 Q. Okay. If you will, turn to the next
20 page. Under the diagnosis section, is he
21 diagnosed with impotence of organic origin?

22 A. Yes.

23 Q. Doctor, I'm going to represent to you
24 that the next pages -- all the way to page --
25 well, I'm just going to tell you this. Let's

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1 just go to page 58, if you will. This is a
2 report, same provider, dated January of 2012.
3 If you will, look under the problem list. It
4 says, Impotence organic origin. He's been
5 carry, at least for almost three and a half
6 years, a diagnosis of that; is that correct?
7 Excuse me. Yeah, three and half years. Is
8 that right?

9 A. Yes.

10 Q. And if you will, look down under
11 medication history, down on that same page.
12 Does it say that he's currently actively
13 taking Cialis and has been taking that since
14 February of 2010?

15 A. Yes.

16 Q. Would that be inconsistent with
17 Dr. Rames' statement that all -- that his
18 sexual dysfunction, specifically his erectile
19 dysfunction, appeared as a result of the fall
20 in October of 2014?

21 A. Yes.

22 Q. Is that yet another inconsistency in
23 this case?

24 A. Correct.

25 MR. SMITH: I'm going to object to

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1 that last question as I believe he says it
2 appeared or got worse since, but okay.

3 BY MR. HAIGLER:

4 Q. Doctor, does it concern you when you
5 are asked to give an IME and you are not given
6 all the medical records that may be relevant
7 to what you are evaluating?

8 A. Well, it -- it obviously puts me in an
9 awkward position because my IME is not
10 conclusive enough since you've presented so
11 many other medical records that point in a
12 different direction.

13 Q. Okay. And let me just address pain
14 management quickly. Are you aware that prior
15 to this injury he was taking Neurontin, Norco,
16 was wearing a foot brace and had a history of
17 taking -- having multiple injections, two back
18 surgeries and using a TENS unit? Are you
19 aware he's had all those modalities before
20 this?

21 A. Some of those. Not all of those.

22 Q. Which ones were you unaware of?

23 A. The TENS unit and the multiple
24 sustained injections up until this point.

25 Q. Okay. Well, I want you to assume that

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1 that's actually been the case for the last 10
2 to 15 years, that he's been getting these
3 injections. Given where he was after his
4 second surgery, if you were his treating
5 doctor, would you have told him, listen, you
6 are going to need certain medical treatment
7 going forward to kind of keep you functioning?
8 Would you have told him that?

9 A. Yes.

10 Q. Would things such as medications, that
11 foot brace, injections periodically, maybe a
12 TENS unit, would those types of things have
13 been things that you would have told him, hey,
14 you may need these going forward?

15 A. Definitely.

16 Q. Okay. Are you aware that he was
17 evaluated by Dr. Hutcheson?

18 A. Yes.

19 Q. Okay. I'm going to show you page --
20 Dr. Hutcheson's report. Under the comment
21 sections, I've highlighted it for you. Does
22 Dr. Hutcheson -- let me make sure I'm reading
23 it correctly -- note -- and I'm reading the
24 since fall part. Will you -- will you read
25 that for me?

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1 A. It says, Fall, now wears AFO brace,
2 left foot, due to foot drop, left leg numbness
3 is new since -- new since fall, has four out
4 of five at L4-L5, recurrent pain since fall.
5 Dr. Poletti had offered him surgery, but
6 patient does not really want further back
7 surgery.

8 Q. Okay. Based upon everything you have
9 seen, is anything in that statement, other
10 than maybe the surgical part, accurate?

11 A. No.

12 Q. Okay. Then I want to show you this
13 last page of Dr. Hutcheson's report. This is
14 page 25 of Claimant's APA. Where it says,
15 Work status, will you read that work status
16 part?

17 A. Work status per FCE, 3-21-16, but it
18 is unlikely given AFO brace, left leg
19 weakness, urinary issues, that will be
20 employable in any capacity.

21 Q. Okay. Let me -- so Dr. Hutcheson says
22 based upon the brace, the weakness in the
23 left -- I assume the left leg, but we will
24 just say leg, and the urinary issues, that he
25 will be unemployable in any capacity. That's

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1 his opinion; is that right?

2 A. Yes.

3 Q. Despite what the FCE says?

4 A. Correct.

5 Q. Well, we know he had the AFO brace
6 before the accident. Correct?

7 A. Yes.

8 Q. So he was working with that. We know
9 he had leg weakness before the accident, did
10 we not?

11 A. Yes.

12 MR. SMITH: I'm going to object to
13 that.

14 BY MR. HAIGLER:

15 Q. Okay. And he was working with that
16 condition. Fair enough?

17 A. Yes.

18 MR. SMITH: I'm going to object to
19 that as well.

20 BY MR. HAIGLER:

21 Q. And as to the urinary issues, would
22 you agree, Doctor, that that's in question as
23 to whether that's even part of this particular
24 injury based upon what you've seen today? Is
25 that fair?

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1 MR. SMITH: I'm going to object to
2 that as well.

3 THE WITNESS: Yes.

4 BY MR. HAIGLER:

5 Q. So if you take the urinary issues out
6 of this, Dr. Hutcheson says he can't -- that
7 he is unemployable in any capacity due to the
8 brace and the leg weakness, but you would
9 agree, Doctor, that he was actually working
10 for a substantial period of time with both of
11 those? Would you agree with that?

12 A. Yes.

13 MR. HAIGLER: Okay. Doctor, those are
14 all the questions I have for you. Thank you.

15 EXAMINATION

16 BY MR. SMITH:

17 Q. I've got some follow-up questions,
18 Dr. LaMotta. This is a document from
19 Southeastern Spine dated August of 2014, and
20 that would be after the surgery in March. If
21 you could, just tell me what his condition is
22 looking like at that point.

23 A. It says that he is approximately five
24 months status post redo lam- disk L5-S1 on
25 left-sided lam- disk L4-5 for herniation,

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1 continues to do very well, has had great
2 improvement in his overall strength and
3 mobility, continues to have some weakness and
4 numbness into the left foot, but is -- this is
5 greatly improved and continues to get better
6 on a daily basis.

7 Q. Okay. And as far as the injury is
8 concerned, you were provided an e-mail that
9 documented a fall at work on 10-14-14,
10 correct?

11 A. Yes.

12 Q. And in that e-mail does it note that
13 he was having soreness in his back or in his
14 buttocks?

15 A. Yes.

16 Q. Is that unusual to have that following
17 a fall of that nature?

18 A. No.

19 Q. And I believe that you indicated
20 earlier that it was not unusual to have
21 delayed symptoms for 48 hours, 72 hours,
22 following an injury such as this, correct?

23 A. Yes.

24 Q. As far as your report from 10-15-14,
25 can you tell whether or not that is a routine

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1 follow up to a surgery or if that was
2 something that was scheduled by the client?

3 MR. HAIGLER: I'm going to object to
4 that. That calls for speculation.

5 THE WITNESS: It looks like it's a
6 two-month follow-up, it's a routine follow-up
7 appointment.

8 BY MR. SMITH:

9 Q. And here is a note from 10-22-14, and
10 can you tell based on the initial portion of
11 that whether or not that is a routine
12 follow-up or if that was scheduled in?

13 A. No. This is a work-in appointment for
14 10-22-14.

15 Q. Okay. So with the work-in
16 appointment, is it fair to say that something
17 happened that caused him to call
18 Southeastern Spine and go back?

19 MR. HAIGLER: I'm going to object.
20 That calls for speculation.

21 THE WITNESS: Clearly he had a spike
22 in his symptoms and wanted to be seen.

23 BY MR. SMITH:

24 Q. Okay. And as far as treatment is
25 concerned, has -- this client has been

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1. evaluated by multiple spine surgeons, correct?

2. A. Yes.

3. Q. He was evaluated by Dr. Gunter and I
4 stipulate that that was at the defendants'
5 request for an IME. Is that fair?

6. A. Yes.

7. Q. As far as -- you had indicated earlier
8 that there was a question as far as the right
9 leg symptoms associated with Mr. Bias; is that
10 correct?

11. A. Yes.

12. Q. And I'm sorry. I -- I will be as
13 quickly -- quick as I can with this. There is
14 a report from Dr. Poletti's office following
15 the injury dated -- there we go. I'm sorry.
16 A lot of paperwork. Dated 1-21-15. In that
17 report does Dr. Poletti indicate that this
18 patient was having primarily left leg symptoms
19 prior to an injury?

20. A. Yes.

21. Q. Okay. And as has been presented to
22 you, Dr. Poletti was treating Mr. Bias since
23 2001. Is that fair to say?

24. A. Yes.

25. Q. Okay. Is Dr. Poletti in the best

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1 position to talk about his prior symptoms?

2 A. Well, he's the one that is most
3 familiar with the patient --

4 Q. Okay.

5 A. -- because he has been seeing him for
6 several years.

7 Q. Okay. And it indicates that the right
8 leg symptoms have appeared and the left leg
9 symptoms got worsened or were worsened as a
10 result of the fall, correct?

11 MR. HAIGLER: I'm going to -- withdraw
12 my objection.

13 Go ahead.

14 THE WITNESS: In this particular
15 entry, yes, although we have seen many, many
16 documents showing that he had alternating
17 increase in pain in the legs, both legs.

18 BY MR. SMITH:

19 Q. As of August 2014, was he having -- is
20 there any documentation that he was having any
21 problems with the right leg?

22 A. The documents do not show that.

23 Q. Okay. Following the fall, it
24 indicates that he is having symptoms with the
25 right leg, correct?

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1 A. Correct.

2 Q. Okay. As far as Dr. Gunter's report,
3 does Dr. Gunter indicate that the left leg
4 symptoms have worsened, the right legs
5 symptoms are new, in his report?

6 A. (No verbal response.)

7 Q. And I would point to the bottom of
8 page or middle of page 2, the bottom -- right
9 above review of systems, Doctor?

10 A. It says that he has the left-sided
11 symptoms only prior to the job injury, which
12 is incorrect; his lower back pain since the
13 fall is more severe; his right leg pain is
14 new, which is incorrect from -- now from
15 before the fall; his urinary symptoms are new
16 since the fall.

17 Q. Have you been provided anything since
18 March of '14, since that surgery, that
19 indicates this guy had, that Mr. Bias had, any
20 right leg symptoms?

21 A. I didn't keep track of all the dates
22 specifically, but I believe we didn't
23 specifically look at anything since the last
24 surgery to now.

25 Q. Is it unusual for an e-mail that would

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1 document the fall -- strike that.

2 As far as Dr. Poletti's testimony in
3 his deposition, he indicated that he felt that
4 this was an aggravation of a preexisting
5 condition, and I'm going to present to you a
6 question that was asked from defense counsel
7 as far as -- I've -- I've highlighted it for
8 your reading, but it says, I'm asking -- I'm
9 just asking you to assume that the fall was
10 unwitnessed and not document until after you
11 saw him. Is that accurate?

12 A. That's not accurate.

13 Q. Okay.

14 A. It has been documented.

15 Q. So there is documentation of a fall.
16 There are -- would you agree with me that from
17 the August note to the January note there was
18 increasing symptoms?

19 A. Yes.

20 Q. And would you agree with me that an
21 MRI was done on 10-29 of '14 regarding
22 Mr. Bias?

23 A. Yes.

24 Q. And as far as that MRI is concerned,
25 would you agree that there were changes shown

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1 since the prior MRI?

2 A. Do you have the February 2014 MRI?

3 Q. I do.

4 MR. HAIGLER: Just for the record,
5 we're -- "MRI," we're talking about MRI
6 reports not the actual MRI.

7 MR. SMITH: I apologize.

8 MR. HAIGLER: I've probably got it.

9 MR. SMITH: Yeah. Here you go.

10 THE WITNESS: So, actually, looking at
11 these two, these are very similar findings
12 between the February 2014 and 10-2014 MRIs.

13 BY MR. SMITH:

14 Q. Okay. Would you agree that there was
15 a surgery performed between those two?

16 A. Yes.

17 Q. Okay. As far as the symptoms are
18 concerned, as far as Mr. Bias' symptoms are
19 concerned, is it fair to say they've been
20 aggravated at some point in October of 2014?
21 Correct?

22 A. Again, taking into consideration that
23 he has a history of very inconsistent
24 reporting to doctors, that he -- he -- on his
25 10-22-15 -- '14 entry there does appear to be

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1 increase in symptoms.

2 Q. Okay. And if you have a documented
3 injury of 10-14-14 and Dr. -- it appears that
4 Dr. Gunter and Dr. Poletti both related it to
5 the work accident at this point --

6 MR. HAIGLER: I'm going to object to
7 that. That is -- that -- that is a
8 mischaracterization of the evidence.

9 BY MR. SMITH:

10 Q. Okay. They related it at this point.
11 Would you say to a reasonable degree of
12 medical certainty that Mr. Bias' symptoms or
13 condition was aggravated by his work accident?

14 A. So Dr. Gunter's report states that his
15 back pain is more severe and his right leg
16 pain is new since the injury, which again
17 we -- we've now established that that's not
18 true, and Dr. Poletti's report and testimony
19 does appear to say that they think that it is
20 worst -- worse since his fall in October '14.

21 Now, whether or not I can say that the
22 fall itself, to a reasonable degree of medical
23 certainty, has caused a worsening of his
24 symptoms, I -- I can't say that because there
25 is ample evidence in the medical record that

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1 he's waxing and waning of his back pain, leg
2 pain with alternating intermittent symptoms of
3 both of his lower extremities, in addition to
4 sexual dysfunction extending all the way back
5 to -- to 2004 or 2008, I believe.

6 Q. Okay. As far as the right leg
7 symptoms, I have written down here that it was
8 2010. It was -- I saw one record of right leg
9 pain and a family doctor record -- it was a
10 family doctor record of that, as far as right
11 leg pain. As far as Dr. Poletti is concerned,
12 his testimony has been that the right leg pain
13 is new since the injury.

14 A. That's not new. That's not true.

15 Q. Okay. Is it -- and, Dr. LaMotta, I'm
16 almost done. I've got a few more questions.

17 As far as your opinion is concerned,
18 is it consistent with a fall -- does a -- can
19 a fall such as -- as documented in the
20 e-mail -- is a fall such as that -- can that
21 cause a herniation or cause an increase in
22 symptoms?

23 MR. HAIGLER: I'm going to object.
24 That has been asked and answered.

25 THE WITNESS: It can, yes.

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1 BY MR. SMITH:

2 Q. Okay. As far as any psychological
3 symptoms associated with the patient's
4 condition, would you defer to the
5 psychologist, Dr. Lynd, in this case?

6 A. Again, I believe that this gentleman
7 probably could have used psychiatric help long
8 ago because of the chronicity of his symptoms,
9 so, again, that's more likely related to his
10 spine condition as opposed to any type of
11 injury.

12 Q. Okay. Did you note positive straight
13 leg raise when you evaluated Mr. Bias?

14 A. Did I do one?

15 Q. Yes.

16 A. That is the part of the routine spine
17 exam, so I'm sure I did.

18 Q. And on page --

19 MR. HAIGLER: It's on page 5 of your
20 report.

21 MR. SMITH: And I see page -- yeah.
22 That's correct.

23 MR. HAIGLER: It's at the bottom of
24 the neurological systems sections, I think. I
25 don't want to speak for anybody.

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1 MR. SMITH: That's correct.

2 BY MR. SMITH:

3 Q. And for your records, I'm --

4 A. Yeah.

5 Q. I'm looking at this.

6 Okay. So that was a yes?

7 A. Yes.

8 Q. Okay. And it's fair to say that in
9 August of 2014 he had a negative straight leg
10 raise based on the report from
11 Southeastern Spine.

12 A. That's correct.

13 MR. SMITH: Okay. Nothing further.

14 REEXAMINATION

15 BY MR. HAIGLER:

16 Q. One question, Doctor. There is no
17 doubt and I think you testified that he -- his
18 symptoms increased based upon that October 22,
19 2014, note. His -- his symptoms were worse.
20 Fair enough?

21 A. Yes.

22 Q. But your testimony here today to a
23 reasonable degree of medical certainty is that
24 you can't say whether that was the natural
25 progression of his preexisting condition,

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1 whether that was caused by a fall at work,
2 whether that was caused by coughing, and you
3 can't give that opinion because -- in part
4 because of the inconsistency of some of his
5 statements to his physicians. Is that a fair
6 summarization of your testimony?

7 A. That's correct.

8 MR. HAIGLER: Thank you, Doctor.

9 REEXAMINATION

10 BY MR. SMITH:

11 Q. Would you believe that Dr. Poletti is
12 in a better position talking about his prior
13 condition based on his records?

14 MR. HAIGLER: Object to asked and
15 answered.

16 THE WITNESS: Again, he has known the
17 patient for 16 years, since 2001, so, I mean,
18 obviously he has a lot more familiarity with
19 the patient and history with the patient, but
20 my opinions today are based on the -- all the
21 reviewed records in addition to my examination
22 and history with the patient.

23 MR. SMITH: Okay. Nothing further.

24 MR. HAIGLER: Thank you, Dr. LaMotta.

25 (The deposition concluded at

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1 approximately 1:44 p.m.)

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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AUG 16 2018

SC Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

SCWCC File No. 1421397

Johnnie Bias,.....Appellant,

MM

vs.

SCANA Corporation,.....Respondents.

NOTICE OF APPEAL

Pursuant to S.C. Code Ann. § 42-17-60, Johnnie Bias hereby appeals the Appellate Panel Decision and Order of the South Carolina Workers' Compensation Commission, filed on July 19, 2018. Appellant received a copy of the original Order on July 19, 2018.

August 13, 2018.

JMS
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BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. FILE NUMBER: 1421397

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AUG 16 2018
SC Court of Appeals

Johnnie Bias,
Claimant

v.

SCANA Corporation,
Employer, and

Companion TPA,
Carrier/Respondents.

AFFIDAVIT OF SERVICE

I certify that I have served the Notice of Appeal on Respondents and the South Carolina Workers' Compensation Commission by depositing a copy of it in the United States Mail on August 13, 2018, addressed as follows:

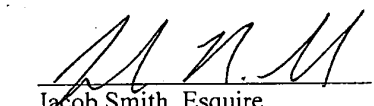
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Ms. Amy Bracy
S.C. Workers' Compensation Commission
1333 Main Street, Suite 500
Post Office Box 1715
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Document: Notice of Appeal – Appeal from the South Carolina Workers' Compensation Commission

Date of Mailing: August 13, 2018


Jacob Smith, Esquire
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Sworn before me this
13 day of August, 2018


Notary Public for South Carolina
My Commission Expires: 6/29/2021



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August 13, 2018

The Honorable Jenny Abbott Kitchings
CLERK OF THE COURT OF APPEALS
P.O. Box 11629
Columbia, SC 29211

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AUG 16 2018

SC Court of Appeals

RE: Johnnie Bias v. SCANA Corporation
WCC File No. 1421397

Dear Ms. Kitchings,

Enclosed for filing is a Notice of Appeal in the above-referenced matter. Also, enclosed are the following:

1. Affidavit of Service of the Notice of Appeal;
2. A copy of the judgment, which is to be challenged on appeal;
3. A filing fee of \$100.00.
4. A letter to the court reporter seeking status of hearing transcript

By copy of this letter, I am herewith serving counsels for the employer, Grady L. Beard, Esq. and Nicolas L Haigler, Esq., with the Notice, as well as the S.C. Workers' Compensation Commission.

Thank you for your assistance in this matter and if you have any questions, please do not hesitate to contact me.

Sincerely yours,

Jacob M. Smith, Esq
jsmith@smithandjoneslaw.com

Enclosures

cc: Grady Beard, Esq.
Nicolas L Haigler, Esq.
SCWCC

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AUG 16 2018

SC Court of Appeals



Smith & Jones Law, LLC
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The Honorable Jenny Abbott Kitchings
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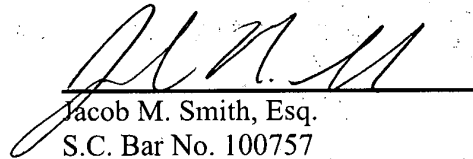
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Certificate of Counsel

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

December 14, 2018



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DEC 31 2018

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Case Number 2018-001516

Johnnie Bias, Employee, Appellant,

v.

SCANA Corporation, Self-Insured Employer, Respondent.

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DEC 31 2018
SC Court of Appeals

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE COMMISSION ERR IN FAILING TO FIND THAT BIAS SUSTAINED A COMPENSABLE WORK-RELATED INJURY WHERE THE COMMISSION'S FINDING THAT BIAS DID NOT SUSTAIN A COMPENSABLE WORK-RELATED INJURY IS NOT SUPPORTED BY THE EVIDENCE?
- II. DID THE COMMISSION IMPROPERLY CONSIDER (i) THAT BIAS WAS RECEIVING SOCIAL SECURITY DISABILITY BENEFITS AND (ii) THAT BIAS'S MEDICAL TREATMENT HAD BEEN PAID BY HIS HEALTH INSURANCE PROVIDER IN DECIDING BIAS DID NOT SUSTAIN A COMPENSABLE WORK-RELATED INJURY?

STATEMENT OF THE CASE

This matter arises from a work-related injury sustained by Appellant/Claimant, Johnnie Bias, ("Bias") on October 14, 2014. The Respondent/Defendant, SCANA Corporation, ("SCANA") denied the claim.

Bias filed a Form 50, Request for a Hearing, on January 24, 2017, seeking benefits for an injury by accident and/or aggravation of a pre-existing condition to his left hip, left leg, left ankle, left hand, left wrist, left arm, buttocks, back, right hip, right leg, right ankle, right foot, nervous system, bladder, urological system, penis and psychological overlay. (R. p. 47). On February 23, 2017, SCANA filed a Form 51, denying Bias sustained an injury by accident arising out of and in the course of his employment. (R. p. 52).

A hearing was held on September 19, 2017, in front of Commissioner Avery B. Wilkerson, Jr. ("Single Commissioner") At the hearing, Bias contended that (1) he suffered a work-related injury to his back, left leg, right leg, bladder, urological system, penis, and resultant psychological as affirmatively found by Dr. Poletti, Dr. Rames, Dr. Gunter, Dr. Lind, and Dr. Hutcheson; (2) he was entitled to past, present and future medical treatment and care due to his work-related injuries, as affirmatively found by Dr. Poletti, Dr. Rames, Dr. Gunter, Dr. Lind, and Dr. Hutcheson; (3) he was entitled to additional medical treatment, as he had not reached maximum medical improvement for all work-related injuries; (4) he was entitled to back TTD, as he did not return to work following his October 14, 2014 work-related injury as he was written out of work by Dr. Poletti, and was subsequently terminated; and (5) if deemed to be at maximum medical improvement, Bias contended he was permanently and totally disabled under S.C. Code §42-9-10, as a combination of his work-related injuries resulted in the complete destruction of his earning

capacity and alternatively under S.C. Code §42-9-30, as he was permanently and totally disabled after suffering greater than fifty-percent (50%) loss of use to his back. (R. pp. 8-9).

On January 18, 2018, the Single Commissioner issued his Order finding that Bias did not sustain a compensable injury by accident on October 14, 2014. (R. p. 38). Furthermore, while the Single Commissioner found that not all of Bias's issues preexisted the date of his injury, the Single Commissioner concluded that Bias did not sustain a compensable aggravation of a pre-existing condition on October 14, 2014, and that he was not entitled to any benefits under the South Carolina Workers' Compensation Act. (R. p. 36).

On January 29, 2018, Bias filed a Form 30, Request for Commission Review. (R. pp. 55-58). Oral arguments were held before the South Carolina Workers' Compensation Commission ("Commission") on April 16, 2018. (R. p. 414). On July 19, 2018, the Commission affirmed the Order of the Single Commissioner, without making any additional Findings of Fact or Conclusions of Law. (R. p. 41). Bias timely filed a Notice of Appeal with the South Carolina Court of Appeals on August 13, 2018. (R. p. 712).

STATEMENT OF FACTS

Bias, a 61-year-old military veteran, was employed with SCANA for a period of seventeen years. (R. p. 118, lines 7-8; p. 120, lines 4-8). Bias admittedly had a pre-existing lower back condition. (R. p. 122, lines 18-23). In 1983, Bias underwent surgery on his lower back due to a herniated disc. (R. p. 123, lines 3-5). In 2001, Bias began treating with Dr. Steven Poletti at Southeastern Spine Institute for low back and left leg pain. (R. p. 293). Bias continued to intermittently treat with Dr. Poletti in the years leading up to his work accident. (R. p. 123, lines 9-19). Prior to his injury at work on October 14, 2014, Bias's lower back and radicular symptoms were predominantly left-sided. (R. p. 349). Bias did complain of some right leg pain to Dr. Poletti's office in February of 2010; however, his right leg symptoms resolved following an injection. (R. p. 124, line 17 – p. 126, line 6; pp. 302-303; pp. 307-308).

On October 12, 2012, Bias returned to Dr. Poletti's office with complaints of back and left leg radicular symptoms. (R. p. 308). After a period of conservative treatment, Bias continued to complain of back and left leg symptoms. (R. p. 322). As a result, Dr. Poletti ultimately recommended and performed a redo laminectomy/discectomy at L5-S1 and laminectomy/discectomy at L4-L5 on March 7, 2014. (R. p. 322; pp. 327-331). Following that surgery, Bias's symptoms and pain significantly improved, and he ultimately returned to work with SCANA. (R. p. 127, lines 19-25; p. 146, line 23 – p. 147, line 9; p. 332; pp. 336-338; p. 464, lines 6-11). In fact, at his deposition, Dr. Poletti confirmed Bias's condition improved after his surgery in March 2014, and that Bias returned to work with minimal pain complaints. (R. p. 463, line 24 – p. 464, line 5).

While working for SCANA on October 14, 2014, Bias was walking down a flight of concrete stairs to check on a problem at a pond, when he slipped on some rocks and fell on his backside. (R. p. 122, lines 2-17). Bias immediately notified his supervisor, Anthony Miles, of his accident, and Bias informed his supervisor that he was having pain in his buttocks, both hands and left ankle. (R. p. 122, lines 2-17; p. 129, lines 9-12; p. 400). On the same date, Bias's supervisor sent an email detailing Bias's fall and injuries. (R. p. 400; p. 488, line 25 – p. 489, line 9).

On October 15, 2014, the day after his fall at work, Bias presented to Dr. Poletti's Physician Assistant Lane Tuggle for a previously scheduled follow-up appointment. (R. p. 130, line 22 – p. 131, line 2). Admittedly, at this appointment, Bias did not mention his documented fall at work from the day before, as he was not having any significant new symptoms at that time. (R. p. 130, lines 3-20; p. 453, lines 16-18). Dr. Poletti testified it was not inconsistent or unusual for a patient to not complain of symptoms immediately after an accident. (R. p. 458, lines 12-21; p. 473, line 11 – p. 474, line 3; p. 474, line 17 – p. 475, line 10). Dr. Poletti noted pain can increase over a few days following an injury and this would not be an abnormal occurrence. Id. Dr. LaMotta also testified it was not unusual to not experience the full effect of a fall or accident right away and noted it may take up to 48 hours for pain to materialize. (R. p. 674, lines 7-19).

A few days following his accident, Bias began experiencing low back pain radiating into his right leg, increased weakness, difficulty ambulating and left leg coldness and numbness. (R. p. 213, line 2 – p. 214, line 22; pp. 341-342; p. 455, lines 10-12). As a result of his new and increasing symptoms, Bias contacted SCANA and requested medical treatment. (R. p. 131, line 12 – p. 132, line 10). SCANA scheduled Bias for an appointment

with Dr. Weisglass; however, SCANA subsequently cancelled the appointment with Dr. Weisglass and instructed Bias to seek treatment with his personal physician. Id.

On October 22, 2014, eight days after his work accident, Bias was seen by Dr. Poletti's Physician's Assistant as a work-in appointment. (R. pp. 341-342). At that visit, Bias described his work accident and complained of increased weakness, difficulty ambulating, and numbness and a cold feeling in his left leg. Id. Notably, Bias also reported that since the fall, he was experiencing increasing back pain and a new complaint of radiating pain down his right leg. Id. During examination, Bias was noted to have antalgic gait, positive straight leg raise, diminished reflexes on the left, difficulty with heel and toe raise on the left and slightly diminished range of motion of the lumbar spine. Id. Due to concerns that Bias had suffered a re-herniation in his back, a lumbar MRI was ordered. (R. p. 342).

On October 29, 2014, Bias underwent an MRI of his lumbar spine and returned for a follow up appointment with Dr. Poletti. (R. pp. 343-345). At which time, Dr. Poletti noted Bias had increasing right-sided pain following the fall. Id. Dr. Poletti also reviewed the lumbar MRI and opined that it revealed a recurrent herniation. (R. p. 343). Dr. Poletti discussed surgical intervention at that time and opined Bias was unable to return to work. (R. p. 343; p. 464, lines 15-25).

On January 7, 2015, Dr. Poletti opined that Bias's L4-5 disc reherniation and his worsening back and leg pain were caused by his fall at work on October 14, 2014. (R. p. 349). Bias continued to treat with Dr. Poletti, and throughout his treatment, Dr. Poletti noted Bias's ongoing back pain, buttocks pain, hip pain, positive straight leg raise, bilateral leg weakness, difficulty with ambulation, urological dysfunction, including increased

urinary urgency, changing and increasing medications, numbness, cold sensations in the left leg, nerve damage, and increasing pain levels. (R. pp. 352-355; p. 361; pp. 363-365). Dr. Poletti opined Bias was a candidate for a lumbar fusion, but he was unsure if it would improve Bias's condition. (R. p. 465, lines 14-16).

On March 16, 2016, Bias was seen by Dr. Nicholas Lind, PsyD, a clinical psychologist with Post Trauma Resources, for an independent psychological evaluation. (R. pp. 268-271). Dr. Lind diagnosed Bias with Adjustment Disorder with Depressed Mood, and he opined Bias's psychological condition was aggravated as a result of his October 14, 2014 work injuries. (R. pp. 268-272; p. 613, line 21 – p. 614, line 5; p. 616, lines 8-15; p. 623, lines 14-16; p. 625, lines 2-7; p. 630, lines 8-15; p. 631, lines 5-9; p. 634, lines 7-11; p. 637, lines 13-16). Dr. Lind recommended routine psychological and psychiatric treatment for as long as his pain persisted, medication to control his sleep disorder and an antidepressant for mood disorder. (R. pp. 268-272; p. 621, line 17 – p. 622, line 3; p. 628, lines 7-11; p. 630, line 16 – p. 631, line 4). Dr. Lind indicated Bias was not at maximum medical improvement for his psychological injuries. (R. p. 270; p. 272).

On March 22, 2016, Bias was seen by Dr. Justin Hutcheson with Carolina Center for Advanced Management of Pain for a pain management evaluation. (R. pp. 259-262). Dr. Hutcheson noted Bias experienced left leg numbness, right leg pain, worsening foot drop, significant depressive symptoms and urological incontinence since his fall at work on October 14, 2014. (R. p. 261; p. 513, lines 5-11; p. 527, lines 4-16). Dr. Hutcheson opined Bias's fall at work aggravated his pre-existing condition. (R. pp. 261-262; p. 537, lines 4-20; p. 571, lines 18-20; p. 575, line 22 – p. 576, line 5). He further opined that Bias would need lifetime pain management care to include ongoing medications, injections,

physical therapy, imaging, durable medical equipment (for leg weakness, incontinence, back pain) and a spinal cord stimulator. (R. pp. 261-262; p. 571, lines 8-12). Dr. Hutcheson also indicated that Bias would need additional psychological care and urological treatment as a result of his work injury. (R. pp. 261-264). Dr. Hutcheson subsequently completed a Form 14B noting Bias sustained 26% whole person impairment for the lumbar spine as a result of his work injury. (R. p. 264).

On May 27, 2016, Bias was seen by Dr. Ross Rames, a urologist with MUSC, for an independent medical evaluation. (R. pp. 254-257). Dr. Rames diagnosed Bias with urinary urgency, fecal urgency, urge incontinence and erectile dysfunction as a result of his October 14, 2014 work accident. Id. Dr. Rames noted evidence of sacral nerve dysfunction with absent bulbocavernosus reflex. Id. Dr. Rames opined Bias would require further treatment. Id.

Bias presented to Dr. Ivan LaMotta with Midlands Orthopaedics and Neurosurgery for an evaluation on September 8, 2016. (R. pp. 249-253). Dr. LaMotta opined that Bias sustained an aggravation of his pre-existing condition due to his October 14, 2014 work-related accident. (R. p. 252). However, in his deposition, while Dr. LaMotta testified that Bias's symptoms worsened after his fall at work, he was unable to testify to a reasonable degree of medical certainty as to the cause of the worsening. (R. p. 709, line 16 – p. 710, line 7).

On December 20, 2016, over two years after Bias's fall at work, the deposition of Mr. Terry Seagle, the Safety and Training Coordinator at SCANA, was conducted. (R. p. 485, lines 3-4). During that deposition, and for the first time, it was revealed that there was

an email between Bias's direct supervisor, Anthony Miles, and Mr. Seagle documenting Bias's fall and injuries on October 14, 2014. (R. p. 400; p. 488, line 25 – p. 489, line 9).

On January 18, 2017, SCANA sent Bias to Dr. Brett Gunter for an independent medical evaluation. (R. pp. 366-369). Dr. Gunter's assessment was complex clinical syndrome, and he opined that Bias's back pain was more severe and his right leg pain was a new symptom since his work accident on October 14, 2014. Id. Dr. Gunter recommended an updated MRI in order to determine Bias's further treatment options. Id.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act establishes the standard for judicial review of decisions by the Appellate Panel of the Workers' Compensation Commission. Fredrick v. Wellman, Inc., 385 S.C. 8, 682 S.E.2d 516 (Ct. App. 2009). Under the scope of review established in the Administrative Procedures Act, an appellate court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, but may reverse or modify the Commission's decision if the appellant's substantial rights have been prejudiced because the decision is affected by an error of law or is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." See Stone v. Traylor Bros., Inc., 360 S.C. 271, 600 S.E.2d 551 (Ct. App. 2004).

Section 1-23-380(A)(5) of the South Carolina Code specifically provides:

The Court may reverse or modify the decision if substantial rights of the Appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are . . . (d) affected by other error of law; (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. . . .

S.C. Code Ann. § 1-23-380(A)(5) (2007) (Emphasis Added).

Thus, "review is limited to deciding whether the Commission's decision is unsupported by substantial evidence or is controlled by some error of law." Rodriguez v. Romero, 363 S.C. 80, 610 S.E.2d 488 (2005)(citing Hendricks v. Pickens County, 335 S.C. 405, 517 S.E.2d 698 (Ct. App. 1999)). The "substantial evidence" required to support the factual findings of the Commission is not a mere scintilla of evidence, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the

conclusion the Commission reached in order to justify its action. See Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76 (Ct. App. 1995); Sharpe v. Case Produce, Inc., 336 S.C. 154, 519 S.E.2d 102 (1999).

Additionally, an award from the Commission cannot be based upon mere possibilities, probabilities, surmise or conjectures. Broughton v. South Carolina Game & Fish Dept., 219 S.C. 50, 64 S.E.2d 152 (1951). If the findings of the Commission are based on surmise, speculation or conjecture, then the issue becomes one of law for the court and not of fact for the Commission. Herndon v. Morgan Mills, Inc., 246 S.C. 201, 143 S.E.2d 376 (1965).

ARGUMENT

I.

The Commission erred in failing to find that Bias sustained a compensable injury by accident arising out of and in the course of his employment with SCANA on October 14, 2014.

The South Carolina Workers' Compensation Act allows a claimant who has a pre-existing condition to receive benefits for a subsequent work-related disability if he establishes by a preponderance of the evidence that the subsequent injury aggravated the pre-existing condition. *See* S.C. Code §42-9-35 (2007); Burnette v. City of Greenville, 401 S.C. 417, 737 S.E.2d 200 (Ct. App. 2012). Pursuant to S.C. Code §42-9-35, an employee is entitled to compensation benefits if the employee can "establish by a preponderance of the evidence, including medical evidence, that: (1) the subsequent injury aggravated the preexisting condition or permanent physical impairment; or (2) the preexisting condition or the permanent physical impairment aggravates the subsequent injury."

In the present case, substantial evidence in the record does not support the Commission's finding that Bias failed to meet his burden of proving he sustained a compensable injury or aggravation of his pre-existing back condition on October 14, 2014. Instead, the overwhelming evidence in this case, including Bias's physical complaints, the objective findings and the medical testimony, clearly establishes that Bias sustained a compensable injury.

Bias had a pre-existing lower back condition, which required him to undergo surgery on March 7, 2014. (R. pp. 322; pp. 327-331). While Bias admittedly had some continued back pain and radicular pain down his left leg, his pain had significantly improved following surgery. (R. p. 127, lines 19-25; p. 146, line 23 – p. 147, line 9; p. 332;

pp. 336-338; p. 464, lines 6-11). On August 6, 2014, Dr. Poletti's Physician's Assistant confirmed Bias had great improvement in his overall strength and mobility and had minimal pain complaints, with some residual weakness and numbness in his left foot that was greatly improved and was continuing to get better. (R. p. 337). Bias was able to return to work and perform his job duties at SCANA. (R. p. 127, lines 19-25). Additionally, Dr. Poletti, who performed the surgery in March 2014, confirmed Bias had a significant improvement with his pain following his surgery and leading up to his work accident. (R. p. 463, line 24 – p. 464, line 5).

On October 14, 2014, Bias was walking down a flight of concrete steps at SCANA in order to check a problem at a pond, when he slipped on some rocks, fell and landed on his backside. (R. p. 121, line 24 – p. 122, line 17). Bias immediately notified his supervisor, Anthony Miles, of his accident, and Bias informed his supervisor that he was having pain in his buttocks, both hands and left ankle. (R. p. 122, lines 2-17; p. 129, lines 9-12; p. 400). Mr. Miles sent an email to Mr. Terry Seagle, the Safety and Training Coordinator at SCANA, documenting Bias's accident and injuries. (R. p. 400).

On October 15, 2014, the day after his injury, Bias presented for a routine, scheduled follow-up appointment with Dr. Poletti's office. (R. p. 130, line 22 – p. 131, line 2). Bias admittedly did not report the fall to Dr. Poletti's Physician's Assistant during his appointment on October 15, 2014, because his problems from the fall had not manifested, and he was just experiencing soreness in his buttocks at that time. (R. p. 131, lines 12-22; p. 203, lines 10-15; p. 205, lines 6-8; p. 209, lines 15-20; p. 210, lines 1-7). Bias testified that the soreness continued, and a few days later, he began experiencing pain on his right side and his entire left leg felt cold. (R. p. 131, lines 12-22). At that time, Bias requested

medical treatment from SCANA. (R. p. 131, line 12 – p. 132, line 10). While SCANA initially scheduled Bias for an appointment with Dr. Weisglass in Charleston, SCANA ultimately cancelled this appointment and Bias had to seek treatment on his own. Id. Bias immediately called and scheduled an appointment and followed up with Dr. Poletti's office. (R. p. 132, line 19 – p. 133, line 11). On October 22, 2014, just eight days after his work accident, Bias presented to Dr. Poletti's Physician's Assistant with complaints of low back pain lateralizing to the right side, increased weakness on his left side, and difficulty ambulating. (R. pp. 341-342). Not only was Bias having worsening symptoms in his back and left leg, he was also having new symptoms in his right leg. Id. Even though these symptoms had not manifested at the time of the October 15, 2014 visit, Dr. Poletti testified it was not inconsistent or unusual for a patient to have a delay in symptomology and that pain can increase over a few days following an injury. (R. p. 458, lines 12-21; p. 473, line 11 – p. 474, line 3; p. 474, line 17 – p. 475, line 10). Additionally, Dr. LaMotta testified it was not unusual for a patient to not experience the full effect of a fall or accident right away and it may take up to 48 hours for a pain to materialize. (R. p. 674, lines 7-19).

The medical records and testimony clearly shows that the work accident caused Bias to develop increased back and left leg symptoms and new symptoms in his right leg. Bias underwent an MRI on October 29, 2014, that revealed a recurrent disc herniation. (R. p. 343). There were new findings revealed by that MRI, including a downward migration of the disk that was not present prior to the March 7, 2014 surgery. (R. pp. 344-345; p. 457, lines 9-14). Dr. Poletti testified that Bias's back pain was worse when he was evaluated on October 22, 2014. (R. p. 463, lines 15-18). Dr. Poletti noted that Bias's right-sided complaints were new symptoms following his October 14, 2014 fall. (R. p. 476, lines 8-

13). On January 7, 2015, Bias followed up with Dr. Poletti, and in his report from that day,

Dr. Poletti stated:

Mr. Bias is somebody I've known for some time. He's had decompressive laminectomy in February of 2014 and was doing well and had returned to work. On 10/14/2014 he slipped and fell while at work and *after this* began having severe right-sided leg pain. I should note that his preoperative symptoms were of back and left leg pain, and these left leg symptoms had improved. **After the fall he began having some increasing weakness into the left leg and some pain into the right leg, which he had not had before.** When I saw him on 10/29/2014, we recommended that he have an MRI scan; and **this MRI scan demonstrated a worsening of his disc at the L4-5 level lateralizing to the right. This is consistent with injuries sustained in a slip and fall. I believe to a reasonable degree of medical certainty most probably that his fall of 10/14/2014 caused his L4-5 disc to re-herniate and is contributing to the worsening of his back and leg pain.** He is unable to work at this point.

(R. p. 349) (Emphasis Added). Dr. Poletti, who treated Bias both before and after his work injury, confirmed in his deposition that Bias's work accident aggravated his preexisting condition.

Q: [Mr. Smith] And I know that you've stated this in your note, but just for the record, is it still your opinion today that Mr. Bias' current condition is more likely than not a work-related aggravation of a preexisting condition?

A: Yes, that's my opinion.

(R. p. 478, line 23 – p. 479, line 3) (Emphasis Added).

Dr. Hutcheson also opined Bias's fall at work aggravated his pre-existing condition.

(R. pp. 261-262; p. 537, lines 14-20; p. 571, lines 18-20; p. 575, line 22 – p. 576, line 5).

He further opined that Bias would need lifetime pain management care to include ongoing medications, injections, physical therapy, imaging, durable medical equipment (for leg

weakness, incontinence, back pain), and a spinal cord stimulator. (R. pp. 261-262; p. 571, lines 8-12). Dr. Hutcheson also indicated that Bias would need additional psychological care and urological treatment as a result of his work injury. (R. p. 261; p. 264).

During the deposition of Mr. Terry Seagle on December 20, 2016, over two years after the work accident, the interoffice email documenting Bias's accident and injuries was turned over to Bias's attorney. (R. p. 400; p. 488, line 25 – p. 489, line 9). In fact, this email was not turned over until questions were asked about any interoffice correspondence documenting Bias's work accident. (R. p. 488, line 25 – p. 490, line 6). Mr. Seagle then admitted the email should have been something that was turned over with the employment file. Id. However, on April 13, 2015, a year and half before Mr. Seagle's deposition, Bias's counsel did subpoena the employment file, and this email was not turned over. (R. pp. 395-399). Prior to this deposition, defense counsel asked questions to Dr. Poletti in his deposition indicating Bias's October 14, 2014 work accident was undocumented. (R. p. 459, lines 10-17).

On January 18, 2017, after Mr. Seagle's deposition, SCANA sent Bias to Dr. Brett Gunter for an independent medical evaluation. (R. pp. 366-369). Dr. Gunter opined that Bias's back pain was more severe and his right leg pain was a new symptom since his work accident on October 14, 2014.

Assessment: Complex clinical syndrome. His LEFT hip and leg pain was present prior to the injury. **His back pain is more severe since the injury and his RIGHT leg pain is new since the injury.** Dr. Rames has addressed the issues related to incontinence. In order to make a determination about whether there are any further options with regard to this patient we would need to determine whether [or] not he has a mechanically stable spine and whether or not he has nerve root entrapment. Once that information is [k]now[n]

we can make a determination about whether any additional treatment might be useful.

(R. p. 369) (Emphasis Added).

In addition, Dr. Lind diagnosed Bias with Adjustment Disorder with Depressed Mood following his work accident, and he opined Bias's psychological condition was aggravated as a result of his October 14, 2014 work injuries. (R. pp. 268-272; p. 613, line 21 – p. 614, line 5; p. 616, lines 8-15; p. 623, lines 14-16; p. 625, lines 2-7; p. 630, lines 8-15; p. 631, lines 5-9; p. 634, lines 7-11; p. 637, lines 13-16).

Furthermore, Dr. Rames, a urologist with MUSC, diagnosed Bias with urinary urgency, fecal urgency, urge incontinence and erectile dysfunction as a result of his October 14, 2014 work accident. (R. pp. 254-257).

The only physician that did not affirmatively state that Bias's work accident aggravated his pre-existing condition was Dr. LaMotta. While Dr. LaMotta originally indicated that Bias sustained an aggravation of his pre-existing condition, he was unable to state that in his deposition. (R. p. 252). Instead, he acknowledged that Bias's symptoms worsened after his fall at work, but he could not testify to a reasonable degree of medical certainty as to the cause of the worsening. (R. p. 709, line 16 – p. 710, line 7). It is important to note that Dr. LaMotta did not state that the work accident was not the cause of Bias's increasing symptoms. Id.

The medical evidence and testimony proves that Bias sustained an injury by accident arising out of and in the course of his employment due to his October 14, 2014 work accident. Dr. Poletti, the doctor who treated Bias before and after his work accident, unequivocally stated that there were changes on the MRI film and new corresponding symptomology that he causally related to the work accident to a reasonable degree of

medical certainty. Also, Dr. Hutcheson opined that Bias sustained an aggravation of his pre-existing condition. SCANA's own IME expert, Dr. Gunter, noted Bias's increasing and new symptoms since his work accident. Furthermore, Dr. Lind testified that Bias sustained an aggravation of his pre-existing psychological condition, and Dr. Rames diagnosed Bias with urinary urgency, fecal urgency, urge incontinence and erectile dysfunction as a result of his October 14, 2014 work accident. Despite the overwhelming evidence in this case, the Commission found Bias did not sustain an aggravation of a pre-existing condition. The Commission correctly noted that not all of Bias's issues pre-existed the date of injury; however, the Commission went on to find that Bias's symptoms were the natural progression of his pre-existing symptomology. This finding is wholly not supported by the evidence, as no doctor opined that Bias's symptomology was the natural progression of his pre-existing condition.

The substantial evidence does not support the Commission's finding in this case that Bias did not suffer a compensable injury by accident to his back, left leg, right leg, urological system, bladder, penis and resultant psychological on or about October 14, 2014, while in the course and scope of his employment. Instead, when viewing the record as a whole, it is clear that Bias sustained a compensable work-related injury.

II.

The Commission improperly considered (i) that Bias was receiving Social Security Disability benefits and (ii) that Bias's medical treatment had been paid by his health insurance provider in deciding Appellant did not sustain a compensable work-related injury.

In Solomon v. W.B. Easton, Inc., 307 S.C. 518, 415 S.E.2d 841 (Ct. App. 1992), the Court of Appeals noted that "additionally, awards and records of the Social Security Administration ordinarily cannot be relied upon to support or deny a workers' compensation claim." citing 2B Arthur Larson, *The Law of Workmen's Compensation*, Section 79.71(B) (1989).

The Single Commissioner erred in considering Bias's receipt of Social Security Disability and Long Term Disability benefits as well as his medical insurance payments when rendering the decision that Bias did not sustain a compensable injury. Immediately following the testimony by Bias, the Single Commissioner asked a question regarding whether Bias was receiving Long Term Disability and Social Security Disability benefits. (R. p. 240, lines 4-7). He followed up that question by asking Bias whether or not he received those benefits because he told "them you cannot work," to which Bias responded in the affirmative. (R. p. 241, lines 21-24). The Single Commissioner then pointed out that:

"we can't get workers' comp and we can't get long – it's either – it's either or, okay? And with those reports, if he's filed them and he's getting them, there's something in those reports; I don't know what it is. It may be good, it might be bad; I don't know. I don't know what's in the reports. But if you're getting long term disability, I'm fine with that. You're getting Social Security Disability; I'm fine with that, okay? The long term concerns me a little bit in that I don't know how you get both."

(R. p. 244, lines 6-18). The Single Commissioner also stated that if he were to find the claim compensable, then Bias would have to reimburse the Long Term Disability carrier for all the money that he received for the prior two and a half years. (R. p. 246, lines 5-17). Whether or not Bias would have to reimburse benefits he received from Long Term Disability or Social Security Disability has no bearing on his workers' compensation claim; however, the Single Commissioner clearly put weight into Bias's receipt of those benefits, in noting in the Order Instructions that Bias was getting Long Term Disability and Social Security Disability. (R. p. 2; p. 37). Similarly, the Single Commissioner also noted that all of Bias's medical treatment was paid by his health insurance provider. Id.

It is clear that the Single Commissioner improperly considered that Bias was receiving Long Term Disability and Social Security Disability since the work accident in finding that Bias did not sustain a compensable work-related injury on October 14, 2014. As pointed out above, the Single Commissioner's first question following the testimony of Bias was in regard to his receipt of Long Term Disability benefits. Based on the questions and comments by the Single Commissioner, it is also clear that he considered the fact that Bias would have to pay some benefits back if he were to receive workers' compensation benefits, in stating that Bias would not be allowed to get both workers' compensation and his outside benefits. In a similar fashion, the Single Commissioner points out that his health insurance carrier has paid for his medical treatment since the date of the alleged injury.

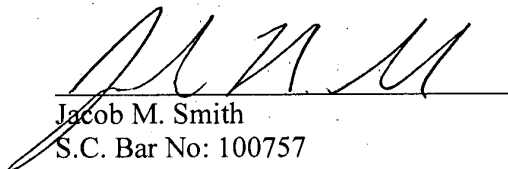
Bias contends that the Commission erred in considering his receipt of Social Security Disability, Long Term Disability and health insurance benefits in determining that he did not sustain a compensable injury.

CONCLUSION

Based on the foregoing, the only reasonable inference to be drawn from the substantial evidence in the record is that Bias sustained a compensable injury by accident arising out of and in the course of his employment on October 14, 2014. Furthermore, it is clear that the Commission improperly considered Bias's receipt of Long Term Disability, Social Security Disability and health insurance benefits when reaching the decision to deny this claim. Accordingly, Appellant Bias respectfully requests that this Court issue an Order reversing the Commission's decision that Bias did not sustain a compensable injury by accident arising out of and in the course of his employment on October 14, 2014, and remand the case back to the Commission for a determination of Bias's entitlement to benefits under the Act.

Respectfully Submitted,

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December 22, 2018

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE APPELLATE PANEL OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellate Case No.: 2018-001516
W.C.C. File No. : 1421397

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DEC 31 2018
SC Court of Appeals

Johnnie Bias, Employee, ... Appellant,

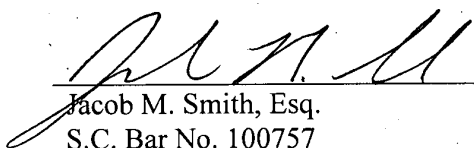
v.

SCANA Corporation, Self-Insured Employer, ... Respondent.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

December 22, 2018



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE APPELLATE PANEL OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellate Case No.: 2018-001516
W.C.C. File No.: 14211397

Johnnie Bias, Employee/Claimant, ... Appellant,

v.

SCANA Corporation, Self-Insured Employer, ... Respondent.

FINAL BRIEF OF RESPONDENT

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SC Court of Appeals

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STATEMENT OF THE CASE

This is a workers' compensation appeal by Johnnie Bias ("Claimant" or "Appellant") from the Decision and Order of the Full Commission Appellate Panel ("Full Commission" or "Commission"), filed on July 19, 2018, which unanimously affirmed the Decision and Order of the Hearing Commissioner. This brief is submitted by SCANA Corporation ("Defendant" or "Respondent") in response to Claimant's appeal.

This claim was before the South Carolina Workers' Compensation Commission pursuant to Claimant's Form 50, Request for a Hearing, filed on January 24, 2017, and Respondent's Form 51, filed on February 23, 2017. Claimant contends he sustained a compensable injury by accident involving his back, left leg, right leg, urological system, bladder, penis, and resultant psychological, that he is not at maximum medical improvement (MMI) and that if he is, he is permanently and totally disabled pursuant to Section 42-9-10 of the South Carolina Code. Respondent maintains Claimant's condition is the natural progression of a preexisting condition, and that he failed to meet his burden of proving a compensable injury by accident under Section 42-1-160 and Section 42-9-35 of the South Carolina Code. Commissioner Avery B. Wilkerson, Jr. (Single Commissioner) conducted the Hearing on the Forms 50 and 51 on September 19, 2017. He issued his Order on January 18, 2018, finding Claimant did not sustain a compensable injury by accident on October 14, 2014, nor did he sustain a compensable aggravation of a pre-existing condition on October 14, 2014. Accordingly, the single commissioner found Claimant was not entitled to any benefits under the South Carolina Workers' Compensation Act.

Claimant timely filed a Form 30, Request for Commission Review and oral arguments were held before a panel of three commissioners on April 16, 2018. The full commission affirmed the

order of the single commissioner in its entirety on July 19, 2018. Claimant then timely filed his Notice of Appeal with the South Carolina Court of Appeals on August 13, 2018.

STATEMENT OF THE FACTS

This matter involves an alleged accident on October 14, 2014, while the claimant was under the employ of Respondent. (R. p. 122). The claimant alleges he fell down a flight of concrete steps when he slipped on some rocks, purportedly injuring his back and numerous other body parts. (R. p. 122). The claimant has an extensive history of back issues and medical treatment for his back including surgery in the 1980's and more recently in 2014, performed by Dr. Steven Poletti, with whom he began treating for his back in 2001. (R. p. 123). He confirmed at the Hearing he has treated for back pain consistently since the 1980's and has treated specifically for lower back problems, left leg problems, and radicular issues for over thirty (30) years. (R. p. 122). At the time of the Hearing, the claimant testified he has left foot drop and numbness in his left foot and calf, left side pain that goes across his buttocks, right side lower back pain across his hip and down his right leg and foot, and numbness in his right foot which he related to his alleged accident. (R. pp. 134-135). He also complained of urinary incontinence and erectile issues, but conceded he had prior erectile dysfunction. (R. p. 135).

At the time of his surgery in March 2014, the claimant stated he began having pain in his back with left leg and right leg symptomology in 2010. (R. pp. 123-124). The claimant's surgery in March 2014 was necessitated by an increase in the herniation of his disc and foot drop. (R. p. 122). Since the March 2014 surgery, he has been wearing a brace prescribed by Dr. Poletti for his left foot drop. (R. p. 193).

According to the claimant, while his back condition had improved since his surgery in March 2014, he admitted experiencing pain in his back the morning of his alleged fall and taking

medication for back pain that day. (R. p. 200). The claimant's fall was unwitnessed, but he reported his accident to his supervisor, Anthony Miles, the day it happened, yet did not go to a doctor because the claimant did not think it was warranted at that time. (R. p. 129). In fact, he had a previously scheduled appointment at Southeastern Spine the following day, October 15, 2014, at which time he made no mention of the purported fall, and in fact, reported doing well. (R. pp. 129-130; 339). He returned to Southeastern Spine on October 22, 2014 and at that time reported the alleged accident, complaining of a cold sensation on his left side. (R. pp. 132; 341). The claimant conceded at the Hearing that he has had this cold sensation prior to his alleged fall. (R. pp. 181-182). He continued to treat with Dr. Poletti who opined he had a recurrent herniation lateralizing to the left at 4-5. (R. p. 343). Dr. Poletti performed an L3-4 lumbar epidural steroid injection and diagnosed the claimant with lumbar radiculitis. (R. p. 346).

Notably, around the time of his alleged accident, claimant treated with Dr. Dan Love on October 17, 2014, for bronchitis, shortness of breath, persistent coughing and chronic obstructive pulmonary disease and had been treating for a persistent cough since September 2014. (R. pp. 205-206). According to an in-take questionnaire with Dr. Poletti's office, the claimant indicated that excessive coughing/sneezing sometimes aggravated his back. (R. p. 284).

The claimant obtained multiple independent medical examinations (IME) for this claim, and each of Claimant's IME doctors—Dr. Justin Hutcheson, Dr. Nicholas Lind, and Dr. Ivan LaMotta—were provided with an extensive letter from the claimant's attorney explaining the claimant's alleged accident and symptoms. (R. pp. 401-413, 639-643). Each letter outlines all of the medical treatment the claimant received from August 2014, through December 2015, but inexplicably omits the appointment the claimant had the day following his accident with

Southeastern Spine on October 15, 2014 at which he made no mention of a work-related fall. (R. pp. 401-413, 639-643).

He treated with Dr. Lind for an independent psychological evaluation who related the claimant's psychological issues to his alleged work accident. (R. p. 270). However, during Dr. Lind's deposition, he confirmed the claimant withheld material information from him at his appointment, namely his preexisting sleep problems and history of sexual dysfunction. (R. pp. 603, 609).

Dr. Hutcheson evaluated the claimant on March 22, 2016 and opined the claimant had been doing well in his recovery from his March 2014 surgery until he fell at work. (R. p. 259). He noted the claimant began wearing a foot brace following the fall and began suffering from left leg numbness and a re-herniated disc which were new since the fall. (R. p. 261). He opined the claimant would need medication, a foot brace, injections, physical therapy, x-rays, and MRI's of his back for the rest of his life due to his alleged work injury. (R. p. 259).

However, during his deposition and after being shown multiple preexisting medical records, Dr. Hutcheson admitted his questionnaire and IME report were "inaccurate" and "inconsistent." (R. pp. 532-534, 537). This was based partially upon the claimant's withholding of the fact that he had used the foot brace for foot drop intermittently prior to his alleged fall. (R. p. 530). In fact, the claimant confirmed at the Hearing he had been receiving all of the forms of treatment Dr. Hutcheson opined were necessary, for the last thirty years. (R. p. 231). Dr. Hutcheson confirmed the letter he received from claimant's counsel prior to conducting his IME omitted the claimant's appointment with Dr. Poletti's office the day following his alleged fall. (R. pp. 401-405, 514-516). He said he found it "strange" that appointment was omitted and agreed it does not make sense that in a report the day after the alleged accident the claimant reported he was

slightly improved and made no mention of a fall. (R. pp. 517, 520). Dr. Hutcheson testified the report from October 15, 2014, would be important in a causation analysis. (R. p. 520).

The claimant was also evaluated by a urologist, Dr. Ross Rames, on May 27, 2016, who opined the claimant's problems, including erectile dysfunction, urinary urgency, and fecal urgency "appeared and worsened following his back injury." (R. p. 255). However, at an appointment with Dr. Poletti one month prior to his appointment with Dr. Rames, the claimant reported no bowel or bladder issues. (R. p. 362). In fact, all of the claimant's medical records from a year prior to his appointment with Dr. Rames fail to mention any such issues. This was in direct conflict to the claimant's report to Dr. Rames that he began experiencing incontinence issues in the spring of 2015. During the course of his treatment with Dr. Poletti, the claimant denied any bowel or incontinence issues. (R. pp. 356-359).

Dr. LaMotta conducted an IME at the request of the claimant's attorney on September 8, 2016. He opined the claimant sustained an aggravation of his pre-existing condition due to his alleged accident. (R. p. 252). During his deposition, however, Dr. LaMotta reviewed multiple preexisting medical records that contradicted what the claimant said at his IME and testified he would have a difficult time believing the claimant if he was one of his patients due to the inconsistency between the records and what the claimant told him. (R. p. 684). When asked about the omission of the report from Dr. Poletti's office from October 15, 2014, the day following the purported accident when the claimant failed to even mention a fall to his doctor, Dr. LaMotta's testimony was as follows:

- Q: Doctor, does it concern you when you are asking to give an IME and you are not given all the medical records that may be relevant to what you are evaluating?
- A: Well, it – it obviously puts me in an awkward position because my IME is not conclusive enough since you've presented so many other medical records that point in a different direction.

(R. p. 694).

Ultimately, Dr. LaMotta confirmed his testimony to a reasonable degree of medical certainty was that he could not say whether the claimant's symptoms were the natural progression of his preexisting condition, caused by coughing, or by an alleged fall at work. (R. p. 707). Furthermore, when questioned about the necessity of continued medical treatment in the form of medication, a foot brace, injections, physical therapy, x-rays, and MRI's of his back for the rest of his life, Dr. LaMotta opined the claimant would need the continued treatment regardless of whether he fell in October 2014. (R. p. 695).

Per the Full Commission Decision and Order dated July 19, 2018, the Commission determined the greater weight of the evidence indicated the claimant had a longstanding history of back problems, including two surgeries, multiple injections, physical therapy, and medication managements from 1988 through March 2014. The Commission found the claimant received prior impairment ratings to his low back, including a 20% impairment to his low back in 1993 from Dr. Epstein, 10% impairment to his back from Dr. Poletti in 2004, and 15% impairment to the back from Dr. Poletti because of the March 2014 surgery. The Commission found the claimant's prior medical problems included longstanding low back pain, bilateral radiculopathy, impotence, and sleep apnea. The Commission further found the claimant's complaints of back, right leg, and left leg issues since his alleged injury on October 14, 2014, are similar to those he experienced prior to the alleged date of injury and are the natural progression of his pre-existing symptomology. The Commission found the claimant's urological issues also naturally progressed from his pre-existing symptoms. The Commission found the claimant's psychological issues were the result of the claimant's ongoing symptoms over the last several decades. The Commission did make findings regarding the claimant's receipt of long-term disability and Social Security Disability benefits and

that his medical treatment has been paid by his group health insurance carrier. Furthermore, the Commission found the claimant was not entitled to benefits under the Act, as he failed to meet his burden of proving he sustained a compensable injury or aggravation of his longstanding and significant pre-existing back condition on October 14, 2014. Finally, the Commission found the alleged injuries to the claimant's right leg, left leg, left hip, left ankle, buttocks, right hip, right ankle, right foot, nervous system, bladder, urological system, penis, and psyche were not compensable.

STANDARD OF REVIEW

The Administrative Procedures Act ("APA") governs review of decisions of the South Carolina Workers' Compensation Commission by the Court of Appeals. S.C. CODE ANN. § 1-23-380 (Supp. 2006); Lark v. Bi-Lo, Inc., 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981). Under the APA, the decisions of the South Carolina Workers' Compensation Commission may be reversed, modified, or remanded if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are affected by error of law. S.C. CODE ANN. § 1-23-380(A)(6)(d)(Supp. 2006).

Furthermore, decisions of the Workers' Compensation Commission may be reversed, modified or set aside if unsupported by reliable, probative, or substantial evidence on the whole record. Ellis v. Spartan Mills, 276 S.C. 216, 218, 277 S.E.2d 590, 591 (1981); Lark, supra.; S.C. CODE ANN. § 1-23-380(A)(6)(e). "Substantial evidence is 'not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action.'" Etheredge v. Monsanto Co., 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002)(quoting Miller v. State Roofing Co., 312 S.C. 452, 454, 441 S.E.2d 323, 324-25

(1994)); Broughton v. South of the Border, 336 S.C. 488, 495, 520 S.E.2d 634, 637 (Ct. App.

1999). As the South Carolina Supreme Court observed,

a decision of the Workers' Compensation Commission will not be overturned by a reviewing court unless it is clearly unsupported by substantial evidence in the record. Substantial evidence is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached to justify its action. Quantitatively, substantial evidence is something less than the weight of the evidence.

Howell v. Pac. Columbia Mills, 291 S.C. 469, 471, 354 S.E.2d 384, 385 (1987)(internal citations omitted). Finally, a decision may be reversed or modified if arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. S.C. CODE ANN. § 1-23-380(A)(6)(f).

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE COMMISSION'S FINDING CLAIMANT FAILED TO MEET HIS BURDEN OF PROVING HE SUSTAINED A COMPENSABLE INJURY BY ACCIDENT OR AGGRAVATION OF HIS LONGSTANDING AND SIGNIFICANT PREEXISTING BACK CONDITION

Substantial evidence in the record supports the Commission's denial of this claim, finding the claimant failed to meet his burden of proving a compensable injury by accident or aggravation of a preexisting condition.

A. The IME's on which the claimant relies to support his claim were conducted following the review of incomplete evidence.

As an initial matter, each of the IME's the claimant secured were properly discounted by the Commission as they were conducted following the review of incomplete evidence. Each of the claimant's IME doctors – Dr. LaMotta, Dr. Hutcheson, and Dr. Lind – received a letter which purported to summarize the voluminous medical records that were submitted in preparation for the IME. (R. pp. 401-413, 639-643). The letter, which framed these doctors' understanding of the claimant's medical background and course of treatment from the alleged injury, omitted an appointment with Southeastern Spine the day after the claimant's alleged fall. (R. pp. 401-413, 639-643). It is an obviously troublesome report for the claimant, as he failed to mention *the day after* his alleged fall any such event, and furthermore reported his back was doing well. This was a clear attempt by the claimant's counsel to veil pertinent evidence which supports the respondent's position that there was no compensable injury. Dr. Lind and Dr. Hutcheson noted it was "strange," and "odd," that the summary of the October 15, 2014 report was omitted from the letter. (R. pp. 517, 598). However, the respondent does not find it odd or strange – rather they find it to be a clear attempt to blunt the force of bad evidence for the claimant. If the IME doctors cannot rely upon the claimant's counsel to provide them with an unedited version of the claimant's

treatment, then certainly the Commission cannot expect those doctors to provide an accurate and complete evaluation upon which it can base a compensability determination.

B. Substantial evidence supports the Commission's conclusion that Claimant failed to meet his burden of proof.

Even if the claimant's condition has worsened since mid-October 2014, substantial evidence supports the Commission's conclusion that the worsening was not necessarily caused by the claimant's alleged fall and that the claimant failed to meet his burden of proof. According to South Carolina law, "[t]he claimant has the burden of proving facts that will bring the injury within the workers' compensation law, and such award must not be based on surmise, conjecture or speculation." Crisp v. SouthCo., 401 S.C. 627, 641, 738 S.E.2d 835, 842 (2013). The respondent maintains the worsening of the claimant's state was likely caused by the continued deterioration of the claimant's long-standing back condition. (R. p. 695). The claimant's complaints at the time of the hearing were of left foot drop and numbness in his left foot and calf, left-side pain that goes across his buttocks, right side lower back pain across his hip and down his right leg and foot, and numbness in his right foot. (R. pp. 134-135). He also complained of urinary incontinence and erectile issues. (R. p. 135). According to relevant caselaw, "the right of a claimant to compensation for exacerbation of a pre-existing condition arises only where there is a dormant condition which has produced no disability, but which becomes disabling by reason of the aggravating injury." Hargrove v. Titan Textile Co., 360 S.C. 276, 295, 599 S.E.2d 604, 614 (2004). Under these circumstances, it would be a gross mischaracterization of the evidence to describe the claimant's underlying condition as "dormant."

Under the claimant's own admission, he has treated for back pain for the last thirty years, including a surgery in March 2014, just seven months prior to his purported fall. (R. p. 123). At the time of that procedure, the claimant was suffering from pain in his back, left leg, and right leg

symptomology, beginning in 2010. (R. pp. 123-124). Since the 1980's, the claimant has treated with Dr. Jones, Dr. Poletti, and other physicians, receiving treatment in the form of injections, medication, at least two operations, and the use of a TENS unit. (R. p. 158). The medical records indicate, and the claimant admitted he complained of right side low back, buttock, and right lower extremity pain in 2010, and pain radiating down both legs as a result of a motor vehicle accident in 1992. (R. pp. 168-170). He confirmed during the Hearing this evidence conflicts with his deposition testimony in which he claimed he had no prior issues with his right leg. (R. pp. 168-170). He admitted to taking medication for his back the very morning of his fall and said he was experiencing some back issues around that time. (R. p. 200).

Dr. Epstein treated the claimant in 1993 and assigned him 20% impairment to his lumbar spine and opined his condition would worsen in the future and he would require one or more disc surgeries. (R. p. 378). He treated with Denmark Medical Center from 2001 to 2005 for pain radiating down his left leg, neuropathy and chronic back pain, and treating with pain medication. (R. p. 175). He began treating with Dr. Jones in 2006 who continued to prescribe him the same medications until he returned to Dr. Poletti in 2010. (R. p. 175).

After the back surgery with Dr. Poletti in 2014, the claimant wore a brace for his left foot drop. (R. p. 193). Despite this use of the brace following the surgery, the claimant told Dr. Hutcheson he began wearing the brace only after his fall in October 2014, an inconsistency which led Dr. Hutcheson to withdraw his questionnaire in which he opined the claimant's foot drop was caused by his alleged fall in October 2014. (R. pp. 532-534, 537). Dr. LaMotta was shown the statement from Dr. Hutcheson's IME, that the claimant "now wears AFO brace, left foot, due to foot drop, left leg numbness is new since . . . fall, has four out of five at L4-5, recurrent pain since fall," and confirmed the statement was inaccurate. (R. p. 695).

The claimant's complaints of impotence and urinary incontinence are also suspect in that they are either inconsistent with contemporaneous medical records, or a continuation of prior issues. In considering the impotence issues the claimant alleges were caused by his fall, he admitted at the hearing he has treated for similar issues since 1992 that came and went. (R. pp. 135, 177, 377). He was even offered a prescription for Viagra in 2006, which he declined. He took Levitra or Cialis periodically from 2008 to 2012. (R. p. 178, 379). The claimant's complaints of urinary incontinence are called into question by the lack of any mention of same in any of Dr. Poletti's records from May of 2015 to May of 2016, the period of time during which the claimant told Dr. Rames he was suffering from incontinence. (R. p. 220, 255).

Dr. LaMotta performed an IME of the claimant in September 2016 and opined the claimant's problems were casually-related to his alleged fall by way of an aggravation of a pre-existing condition. (R. p. 252). However, during his deposition, Dr. LaMotta confirmed he was not sure if he was provided the report from Dr. Poletti's office from the day following the claimant's alleged fall, and that it was not in the letter summarizing all of the claimant's prior treatment. (R. pp. 406-413, 650-651). It became apparent during Dr. LaMotta's deposition that he was unaware of the claimant's many back issues between his back herniation in 1983 and re-herniation and surgery in 2014. Dr. LaMotta's understanding of the 31-year-period between 1983 and 2014 was that the claimant was doing better until he re-herniated in March 2014 and needed surgery. (R. p. 653). However, he was presented with multiple medical records disproving that assumption.¹ Dr. LaMotta stated during his deposition that according to the records he received, the claimant's issues were predominantly on his left side before October 2014, an opinion which he admitted was

¹ Specifically, Dr. LaMotta was shown a report of a re-herniation in 1992, a 20% impairment rating to the lumbar spine in 1993, back pain radiating to the right leg from 2010, record of a disc herniation in 2010, and the assignment of a 10% impairment rating in 2004.

based upon the claimant's own statements rather than a review of the records from 1983. (R. p. 654).

He confirmed during his deposition that the claimant has had a long history of continuous lumbar spine problems including multiple herniations over time, of which he was not aware prior to the deposition. (R. p. 665). He also confirmed the claimant was having right-sided symptoms during that time. (R. p. 666). He concluded that given the years of recurrent herniations, two back surgeries, multiple injections and use of medication, the claimant was extremely prone to redeveloping and worsening of symptoms leading up to his accident in 2014. (R. p. 667). Importantly, he also noted back herniations can be caused by things such as a simple twist while sleeping, sneezing, or coughing. (R. p. 671). When reviewing the report from Dr. Poletti's office from the day following the claimant's alleged fall, which stated he was in no acute distress and was greatly improved since surgery, he stated that he would have expected someone with the claimant's pre-existing condition, if aggravated, to have experienced immediate pain following a fall. (R. p. 675). Finally, Dr. LaMotta, one of the claimant's chosen independent medical examiners, opined that the symptoms the claimant was experiencing were more likely than not just continuing deterioration of his lumbar spine and a worsening of his lumbar spine condition based upon the natural history of his pathology and not necessarily the alleged fall. (R. pp. 685-686). He noted this "may be necessarily why he doesn't complain of pain right after his fall on 10-15, but he alleges that he's doing fine perhaps that particular day." (R. pp. 685-686). According to Dr. LaMotta, it was not unexpected that the claimant be in his present condition regardless of an accident. (R. pp. 685-686).

In reviewing the MRI's from February 2014 and October 2014, Dr. LaMotta opined they were very similar and stated he could not say to within a reasonable degree of medical certainty that a

fall in October 2014 caused a worsening of the claimant's symptoms "because there is ample medical evidence of the claimant's back pain waxing and waning, alternating leg pain with intermittent symptoms of both lower extremities in addition to sexual dysfunction as early as 2008." (R. p. 707). Dr. LaMotta also opined the claimant "could have used psychiatric help long ago because of the chronicity of his symptoms" and that his psychological issues were likely the result of his longstanding spine condition rather than any type of injury. (R. p. 708). Dr. LaMotta's deposition occurred just days prior to the initially scheduled Hearing in June 2017, making his the only medical deposition where the IME doctor had the benefit of viewing *all* of the claimant's relevant medical records.

Dr. Poletti, the claimant's long-time treating physician, confirmed the claimant's leg pain alternated from side to side and that on at least one occasion he treated him for right leg pain. (R. p. 448). He confirmed in his deposition that given the claimant's pre-existing condition, he could develop new symptoms without a trauma or accident and that his opinion casually relating the claimant's symptoms to his alleged work accident was based only upon the claimant's statements. (R. pp. 455-456). He opined that the disc herniation in the claimant's MRI from October 29, 2014 could have been caused by trauma or by "activities of daily living." (R. p. 457). Dr. Poletti agreed it was unusual that in the report from his office from October 15, 2014, there was no documentation of a fall from the day before. (R. p. 475). Furthermore, of note in Dr. Poletti's deposition testimony, was his insistence that he is a "patient advocate." (R. pp. 458, 473). If Dr. Poletti is an advocate for the claimant, he cannot also profess to provide an impartial medical opinion regarding causation.

Based upon the evidence including medical records, deposition testimony, and the claimant's own Hearing testimony, the claimant's symptomology was not dormant and was continuously

waxing and waning for the last thirty years. The claimant contends Dr. Poletti, Dr. Hutcheson, Dr. Rames and Dr. Lind support his allegation of an injury or aggravation of a pre-existing condition due to an October 14, 2014 accident. However, Dr. Poletti admitted his opinion was based only upon the claimant's own statements. (R. pp. 455-456). Dr. Hutcheson completely withdrew his opinion regarding the claimant's left foot drop based upon the fact that the claimant withheld his prior use of the foot brace. (R. pp. 532-534, 537). Dr. Rames's opinion was contradicted by the records from Dr. Poletti's office in which the claimant made no claim of incontinence, and Dr. Lind was unaware of the claimant's prior use of sleep aids or his years of issues with impotence. (R. pp. 603, 609). Additionally, Dr. LaMotta completely reversed his opinion that the claimant's symptomology was casually related to a fall at work. (R. p. 707). Furthermore, Dr. Hutcheson and Dr. Lind's IME's were both based upon manipulated evidence in that they were given an inaccurate summary of the claimant's course of treatment. Accordingly, substantial evidence in this case supports the Commission's finding that the claimant failed to meet his burden of establishing an exacerbation of a pre-existing condition.

II. THERE IS NO EVIDENCE TO SUPPORT THE CLAIMANT'S CONTENTION THAT THE COMMISSION IMPROPERLY RELIED UPON THE CLAIMANT'S RECEIPT OF SOCIAL SECURITY DISABILITY, LONG TERM DISABILITY, AND USE OF MEDICAL INSURANCE TO COVER HIS TREATMENT IN DETERMINING THE CLAIMANT DID NOT SUSTAIN A COMPENSABLE WORK-RELATED INJURY

The claimant attempts to create an appealable issue by arguing the Commission "erred in considering [Claimant's] receipt of Social Security Disability and Long Term disability benefits as well as his medical insurance payments when rendering the decision that [Claimant] did not sustain a compensable injury." However, while it is indisputable that the Commission found the claimant received long-term disability and Social Security Disability benefits, there is no evidence the Commission "relied" on these findings of fact as the claimant suggests.

The claimant cites to Solomon v. W.B. Easton, Inc., 307 S.C. 518, 415 S.E.2d 841 (1992), in making his argument that the Commission cannot consider a claimant's receipt of Social Security Disability in determining issues of compensability. In Solomon, the claimant wanted the Commission to consider his disability rating from the Social Security Administration. Id. at 521, 415 S.E.2d at 843. While the Court of Appeals found this argument unpreserved, it noted such records "ordinarily cannot be relied upon to support or deny a workers' compensation claim." Id. Here, there is no evidence that the Commission relied upon any records from the Social Security Administration in determining the claimant failed to meet his burden of proof.

The claimant quotes a section from the Hearing transcript during which the Single Commissioner questioned the claimant about his receipt of these benefits following his testimony. However, the colloquy quoted was merely the Single Commissioner making sure the claimant was aware of his inability to collect both workers' compensation and disability benefits. As Claimant's brief notes, whether the claimant would have to reimburse benefits he received for disability has no bearing on his workers' compensation claim, and there is no evidence indicating the Hearing Commissioner felt otherwise. Claimant contends the Commission improperly relied upon Claimant's receipt of disability benefits by noting the Commission listed the claimant's receipt of Social Security Disability and long-term disability benefits in the Findings of Fact. However, there is no mention of either in the Conclusions of Law; nor has the claimant shown any nexus between those Findings of Fact and the Commission's decision.

The claimant mentions the Commission also noted the claimant's health insurance carrier paid for his medical treatment. However, as there is no citation to any legal authority that such a consideration constitutes reversible error, Respondent considers this argument to be abandoned. See Glasscock, Inc. v. U.S. Fidelity and Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App.

2001) ("South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review.")

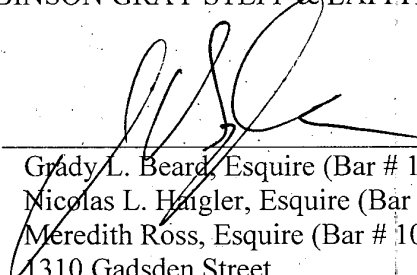
As the claimant has presented no evidence the Commission improperly *relied* upon his receipt of disability benefits and abandoned his argument regarding his private health insurance, there is no reversible error.

CONCLUSION

Based upon the foregoing, the Respondent respectfully requests the Court of Appeals to affirm the Decision and Order of the South Carolina Workers' Compensation Commission.

Respectfully submitted,

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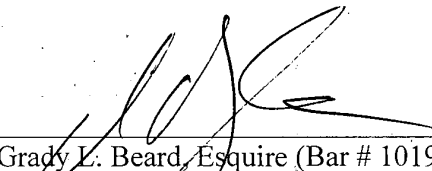
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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Final Brief of the Respondent complies with Rule 211 (b), SCACR.



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SC Court of Appeals

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Johnnie Bias, Employee, Appellant,

v.

SCANA Corporation, Self-Insured Employer,
Respondent.

Appellate Case No. 2018-001516

Appeal From South Carolina Workers' Compensation
Commission

Unpublished Opinion No. 2020-UP-266
Submitted June 1, 2020 – Filed September 9, 2020

AFFIRMED

Jacob Milton Smith, of Smith & Jones Law, LLC, of
Lexington, for Appellant.

Grady Larry Beard, Nicolas Lee Haigler, and Meredith
Ross, all of Robinson Gray Stepp & Laffitte, LLC, of
Columbia, for Respondent.

PER CURIAM: Johnnie Bias appeals an order of the Appellate Panel of the South Carolina Workers' Compensation Commission (the Commission), arguing the Commission erred in (1) failing to find he sustained a compensable

work-related injury and (2) improperly considering evidence of his Social Security and health insurance benefits. We affirm.

Substantial evidence supports the Commission's finding that Bias's symptomology following his October 14, 2014, fall at work represented the natural progression of his pre-existing health conditions. *See Hargrove v. Titan Textile Co.*, 360 S.C. 276, 288, 599 S.E.2d 604, 610 (Ct. App. 2004) ("The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions of the Workers' Compensation Commission."); *id.* ("A reviewing court may reverse or modify a decision of an agency if the findings, inferences, conclusions or decisions of that agency are 'clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.'" (quoting *Bursey v. S.C. Dep't of Health & Env'tl. Control*, 360 S.C. 135, 141, 600 S.E.2d 80, 85 (Ct. App. 2004))); *id.* at 289, 599 S.E.2d at 610-11 ("This [c]ourt's review is limited to deciding whether the Commission's decision is unsupported by substantial evidence or is controlled by some error of law."); *id.* ("Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action."); *Etheredge v. Monsanto Co.*, 349 S.C. 451, 455-56, 562 S.E.2d 679, 681 (Ct. App. 2002) ("The appellate court is prohibited from overturning findings of fact of the Commission, unless there is no reasonable probability the facts could be as related by the witness upon whose testimony the finding was based."). Here, all of the medical evidence and Bias's own testimony indicates Bias suffered from back pain for thirty-years, requiring two surgeries. Additionally, Bias received treatment for urological and psychological issues prior to his accident. *See Hargrove*, 360 S.C. at 295, 599 S.E.2d at 614 ("The right of a claimant to compensation for aggravation of a pre-existing condition arises only where there is a dormant condition which has produced no disability but which becomes disabling by reason of the aggravating injury."). The Commission evaluated conflicting evidence indicating Bias's symptomology was either (a) aggravated by the October 2014 accident or (b) the natural progression of a pre-existing condition. We find the Commission's findings of fact are supported by substantial evidence and decline to set aside its view of the conflicting evidence in the record. *See Hargrove*, 360 S.C. at 295, 599 S.E.2d at 614 ("Where there is a conflict in the evidence from the same or different witnesses, the [Commission]'s

findings of fact may not be set aside."). Accordingly, we affirm the Commission's determination that Bias suffered a non-compensable injury.¹

AFFIRMED.²

HUFF, THOMAS, and MCDONALD, JJ., concur.

¹ We affirm because the Commission's conclusion that Bias suffered a non-compensable injury is supported by substantial evidence. *See Hargrove*, 360 S.C. at 289, 599 S.E.2d at 610-11 ("This [c]ourt's review is limited to deciding whether the Commission's decision is unsupported by substantial evidence or is controlled by some error of law."). As the orders do not suggest the single commissioner or the Commission relied upon Bias's receipt of Social Security or health insurance benefits to determine compensability, we find no error in the Commission's decision. *See Hargrove v. Carolina Orthopaedic Surgery Assocs., PA*, 389 S.C. 119, 125, 697 S.E.2d 641, 644 (Ct. App. 2010) (finding no error when a single commissioner referenced the claimant's retirement and Social Security benefits but did not use the receipt of such benefits "for the purposes of justifying the decision to deny" the claim); *Solomon v. W.B. Easton, Inc.*, 307 S.C. 518, 521, 415 S.E.2d 841, 843 (Ct. App. 1992) ("[A]wards and records of the Social Security Administration ordinarily cannot be relied upon to support or deny a workers' compensation claim.").

² We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

SC Court of Appeals

Unpublished Opinion No. 2020-UP-266 (Filed September 9, 2020)

Johnnie Bias, Employee, Appellant,

v.

SCANA Corporation, Self-Insured Employer, Respondent.

PETITION FOR REHEARING

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ARGUMENT FOR REHEARING

This is an appeal involving a workers' compensation case. Appellant Johnnie Bias ("Bias"), by and through his undersigned counsel, hereby files this Petition for Rehearing pursuant to Rules 221 and 240, SCACR. On September 9, 2020, this Court filed an unpublished opinion, Bias v. SCANA Corporation, affirming the South Carolina Workers' Compensation Commission's Order. Unpublished Opinion No. 2020-UP-266 (Ct. App. – filed September 9, 2020). As grounds for this Petition, Appellant respectfully argues that this Court erred in ruling substantial evidence supported the Commission's finding that Appellant did not sustain a compensable work injury.

- I. **This Court erred in ruling substantial evidence supported the conclusion that appellant's symptomology represented the natural progression of his health condition and that he did not sustain an aggravation of a pre-existing condition.**

Section 42-9-35 of the South Carolina Code provides:

The employee shall establish by a preponderance of the evidence, including medical evidence, that: (1) the subsequent injury aggravated the preexisting condition or permanent physical impairment...(B) The commission may award compensation benefits to an employee who has a permanent physical impairment or preexisting condition and who incurs a subsequent disability from an injury arising out of and in the course of his employment for the resulting disability of the permanent physical impairment or preexisting condition and the subsequent injury.

S.C. Code Ann § 42-9-35 (Supp. 2010). "Medical evidence" is defined as "expert opinion or testimony stated to a reasonable degree of medical certainty, documents, records, or other material that is offered by a licensed health care provider." *Id.*

When a pre-existing condition or disease is accelerated or aggravated by injury or accident arising out of an in the course of the employment, the resulting disability is a compensable injury. Brown v. R.L. Jordan Oil Co., 291 S.C. 272, 353 Se.E.2d 280 (1987). A condition is compensable unless it is due solely to the natural progression of a pre-existing condition. Mullinax v. Winn-

Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76 (Ct. App. 1995). The right of a claimant to compensation for an aggravation of a pre-existing condition arises only where there is a dormant condition which has produced no disability, but which becomes disabling by reason of the aggravating injury. Hargrove v. Titan Textile Co., 360 S.C. 276, 599 S.E.2d 604 (Ct. App. 2004). Disability in workers' compensation cases is to be measured by loss of earning capacity. Coleman v. Quality Concrete Products, Inc., 245 S.C. 625, 142 S.E.2d 43 (1965).

While Bias admittedly had a pre-existing low back condition prior to his work injury, that condition had not prevented him from returning to, and performing, his job. (R. p. 127, lines 19-25; p. 146, line 23 – p. 147, line 9; p. 332; pp. 336-338; p. 464, lines 6-11). In fact, Dr. Poletti, the doctor who had previously performed surgery on Bias's pre-existing back condition, confirmed that Bias had significant improvement in his condition prior to his work accident. (R. p. 463, line 24 – p. 464, line 5). Prior to his work injury, Bias's lower back and radicular symptoms were left-sided and were improving. (R. p. 349).

On October 14, 2014, Bias was walking down a flight of concrete steps at SCANA in order to check a problem at a pond, when he slipped on some rocks, fell and landed on his backside. (R. p. 122, lines 2-17). Bias immediately notified his supervisor of his accident, and Bias informed his supervisor that he was having pain in his buttocks, both hands and left ankle. (R. p. 122, lines 2-17; p. 129, lines 9-12; p. 400). An email was sent to Mr. Terry Seagle, the Safety and Training Coordinator at SCANA, documenting Bias's accident and injuries. (R. p. 400; p. 488, line 25 – p. 489, line 9). Additional symptoms began manifesting shortly after the incident, which doctors opined was consistent with Bias's injury. (R. p. 458, lines 12-21; p. 473, line 11 – p. 474, line 3; p. 474, line 17 – p. 475, line 10; R. p. 674, lines 7-19). Dr. Poletti and Dr. Gunter, Respondents' own expert, not only noted increasing lower back and left sided symptomology, **but new**

symptomology on the right side following the injury. (R. p. 349; pp. 366-369) (Emphasis Added). Furthermore, **an MRI performed on October 29, 2014, fifteen days after the injury, revealed a recurrent disc herniation.** (R. p. 343) (Emphasis Added). Bias has not been able to return to work since his work injury due to his new condition, caused by the fall at work. (R. p. 264).

This Court noted in its decision that **“Bias received treatment for urological...issues prior to this accident.”** (Emphasis Added). However, this is inconsistent with the record, as Bias never complained of or treated for his absent bulbocavernosus reflex, urinary incontinence, urge incontinence, or nocturnal enuresis prior to his work accident. (R. p. 43). Dr. Gunter, Respondents’ own expert, confirmed that “[Bias] had the left sided symptoms only prior to the on the job injury. His lower back pain since the fall is more severe. His right leg pain is new from before the fall. **His urinary symptoms are new since the fall.**” (R. p. 367) (Emphasis Added). There is no evidence in the record that supports the conclusion that Bias’s urological issues naturally progressed from his pre-existing condition. Rather, the overwhelming evidence in the record supports that his urological symptoms are a direct result of his fall at work on October 14, 2014.

Of the six doctors that evaluated Bias following his work injury, five, including his treating physician for nearly 15 years, affirmatively indicated new or worsening symptoms due to his work injury. (R. p. 349; p. 478, line 23 – p. 479, line 3; pp. 261-262; p. 537, lines 14-20; p. 571, lines 18-20; p. 575, line 22 – p. 576, line 5; pp. 366-369; pp. 268-272; p. 613, line 21 – p. 614, line 5; p. 616, lines 8-15; p. 623, lines 14-16; p. 625, lines 2-7; p. 630, lines 815; p. 631, lines 5-9; p. 634, lines 7-11; p. 637, lines 13-16; pp. 254-257) (Emphasis Added). Only Dr. LaMotta, while noting that it was a possibility that Bias sustained a work-related aggravation of a pre-existing condition, was unable to opine to a reasonable degree of medical certainty whether

Bias sustained an aggravation of a pre-existing condition due to his work injury, if there was some other cause of his symptoms or if his symptoms were the natural progression of his pre-existing condition. (R. p. 709, lines 22-25; p. 710, lines 1-7). **The medical evidence, as defined by S.C. Code Ann. § 42-9-35, only supports the conclusion that Bias sustained an aggravation of a pre-existing condition. There is no medical evidence, stated to a reasonable degree of medical certainty, that supports the position that Bias's symptomology stemmed solely from the natural progression of his pre-existing condition.** (Emphasis Added).

This court is correct in its standard of review, noting "substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action." Etheredge v. Monsanto Co., 349 S.C. 451, 455-56, 562 S.E.2d 679, 681 (Ct. App. 2002). This Court's application of that standard was in error given there is no medical evidence, stated to a reasonable degree of medical certainty, supporting a conclusion that Bias's condition stemmed from a natural progression of his pre-existing health condition. Instead, the medical evidence stated to a reasonable degree of medical certainty supports the conclusion that Bias sustained an aggravation of a pre-existing condition due to his work injury. Furthermore, while Bias undoubtedly had a pre-existing condition prior to his work injury, there is no evidence in the record that the condition was disabling, as Bias had always been able to return to, and perform, his job until this work injury. Lastly, prior to his work injury, Bias was not having any active right leg symptoms, absent bulbocavernosus reflex, urinary incontinence, urge incontinence, or nocturnal enuresis. In fact, the record clearly establishes that these conditions developed following his work injury. These dormant and/or new conditions only manifested after Bias slipped, fell and landed on the concrete steps at work on October 14, 2014.

CONCLUSION

Based on the argument set forth above, Appellant Bias respectfully submits that this Court erred in ruling (1) that Bias did not sustain an aggravation of a pre-existing condition and (2) that substantial evidence supported the Commission's finding that Bias's symptomology, following his fall at work on October 14, 2014, represented the natural progression of his pre-existing health conditions. For the foregoing reasons, Appellant Bias requests this Court grant the petition for rehearing, reconsider this Court's original opinion, and reverse the Commission's decision and remand the case back to the Commission for a determination of Bias's entitlement to benefits under the Act.

Respectfully Submitted,

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September 24, 2020

The South Carolina Court of Appeals

Johnnie Bias, Employee, Appellant,

v.

SCANA Corporation, Self-Insured Employer,
Respondent.

Appellate Case No. 2018-001516

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas C. Huff

J.

Paul C. Thomas

J.

Stephen L. Arnold

J.

Columbia, South Carolina

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