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WASHINGTON MUNOZ,)
)
Plaintiff,)
)
vs.)
)
L.P. CIMINELLI, and)
PAINO ROOFING CO., INC.,)
)
Defendants.)

TRANSCRIPT
OF
TRIAL

Place: Middlesex County Courthouse
56 Paterson St.
New Brunswick, NJ 0803

Date: July 14, 2017
Volume 1 of 2
Page 1 to 200

BEFORE:

HONORABLE ANDREA G. CARTER-LATIMER, J.S.C., AND JURY

TRANSCRIPT ORDERED BY:

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Nicoletti Gonson Spinner, LLP

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1 THE COURT: What's -- what's on deck next?

2 MR. BERENGUER: Deposition read ins Your
3 Honor, and we were trying to work a couple things out
4 with Mr. Gulino, so we had asked Your Honor for some
5 additional time just to complete and finalize the dep
6 read ins in agreement with Mr. Gulino Your Honor.

7 THE COURT: So, I mean it's already 9:30 just
8 about, so how close are you to completing this? I mean
9 these folks have been here since 8:30, so --

10 MR. BERENGUER: Right.

11 THE COURT: -- how cl --

12 MR. BERENGUER: I understand Your Honor. I
13 think Mr. Clark just asked for an additional 10 to 15
14 more minutes.

15 THE COURT: Yes, that was -- that was about
16 10 minutes ago, right, so I mean we really kind of do
17 need to -- to get started. I -- I --

18 MR. BERENGUER: Okay.

19 THE COURT: -- you know I -- I don't like
20 having jurors report at 8:30. I mean if you guys knew
21 you needed some time, I could have asked them to come
22 in a little later, so that they're not sitting. You
23 know so just be mindful of that.

24 MR. BERENGUER: I understand Your Honor, and
25 we apologize for that.

1 THE COURT: Okay.

2 MR. BERENGUER: I'll try and get a hold of
3 Mr. Clark, I think he -- he's sitting nearby. I think
4 he just stepped out for a second maybe to the restroom
5 or whatnot, I'll try and get a hold of him.

6 THE COURT: Okay.

7 (Tape off)

8 MR. CLARK: I received defense counsel's
9 objections, et cetera to our deposition read ins, and
10 we've conferred and I believe -- and we have in fact
11 agreed upon everything. For many of them where he
12 objected, I just -- I just decided to not read them in.
13 And in some he asked for counter designations, and --
14 and I agreed. So, I don't think -- I don't want to
15 spend all the time to go through the pages and lines, I
16 trust that we're on the same page with defense counsel,
17 and we're just going to go forward with it.

18 THE COURT: Okay. And then after that you're
19 resting?

20 MR. CLARK: I believe so.

21 THE COURT: Okay.

22 MR. CLARK: Subject to you know exhibits and
23 counter --

24 THE COURT: Right.

25 MR. CLARK: -- rebuttal.

1 THE COURT: Right.

2 MR. CLARK: The only thing I do want to alert
3 Your Honor to is that with regard to Joel Mella
4 (phonetic), that's the person that we were read ins and
5 then kind of halfway through it was cut off. And Your
6 Honor made some comments with regard to well, he's here
7 why are we doing it this way? Again, we conferred with
8 counsel and we do intend to read in sections of that,
9 but we kind of had an intense exchange, not intense in
10 contra -- you know, but counsel's rev -- the rules, as
11 I understand it, defense counsel is comfortable with
12 the ones that we decided to read in. Even though this
13 witness is still here and I know Your Honor commented
14 about that, so I did want to alert the Court to that,
15 but I believe we're in agreement.

16 THE COURT: You're -- you're not objecting?

17 MR. GULINO: I'm sorry, objecting to him
18 reading it? No, no, no.

19 MR. CLARK: This is the Joel Mella stuff.

20 THE COURT: The Joel Mella.

21 MR. GULINO: I'm not objecting to you reading
22 this?

23 MR. CLARK: Right.

24 MR. GULINO: Yeah. But I -- I still intend
25 to call him.

1 THE COURT: Okay.

2 MR. GULINO: I'm not sure how -- when I
3 listen to it, but he's here let's put it that way.

4 THE COURT: Okay. All right, I believe we're
5 ready, yes.

6 THE SHERIFF'S OFFICER: Jury entering.

7 (Jury enter courtroom)

8 THE COURT: Good morning, thank you, please
9 be seated.

10 Mr. Clark.

11 MR. CLARK: Thank you Judge.

12 Good morning everyone.

13 JURORS: Good morning.

14 MR. CLARK: We're just -- just so you know
15 what we're doing, we're just going to read in parts of
16 four depositions. They're -- they're parts, I hope it
17 will go quick, and then we should rest after that just
18 so guys know what we're doing.

19 THE COURT: Proceed.

20 MR. CLARK: Okay. The first is the portions
21 of the deposition of Robert Beardsley -- to Bob
22 Beardsley, the deposition was taken on June 29 of 2016,
23 page 8,

24 Q "How long have you been one of the two safety
25 managers at LP Ciminelli?

1 A I need to explain to be sure we are correct, I'm
2 one of seven safety managers. There's another one and
3 myself, we are the two senior safety managers, we have
4 been there the longest, we have the most
5 responsibilities to clarify that for you. On and off
6 it's more than seven years, but I have doing this work,
7 actual safety work for 39 years."

8 The next is page 12,

9 Q "Let's now turn to the role in the project at
10 issue here. As you know the incident occurred on June
11 25, 2013 where Mr. Munoz was injured, can you tell me
12 your role in that specific project?

13 A Yes sir. I was the site safety manager at the
14 Meadowlands for LP Ciminelli."

15 The next is page 13,

16 Q "Did you receive any specific training to
17 head up the Meadowlands project?

18 A Okay, specific to the Meadowlands, yes. I helped
19 write the safety program for the Meadowlands. Again,
20 to clarify your question, there is a corporate safety
21 person, his name is Bob Overhoff, I work for Bob as
22 part of the corporate safety staff, but when I'm in the
23 field I work with the site team. But I was one of the
24 people who authored the original written safety program
25 for the Meadowlands CCP jobsite for Ciminelli."

1 The next is page 31,

2 Q "Now Mr. Beardsley, you said that Mr. Munoz
3 was told that he would no longer be able to work at the
4 Meadowlands?"

5 A Yes sir."

6 Q "Who told him that?"

7 A I did."

8 Q "In what, English?"

9 A There is a person there helping him to understand,
10 it may have been Mella, it may have been another one of
11 the hourly work group that came in with him to make
12 sure that he understood. He did not come see me alone,
13 meaning Washington Munoz, he had a person with him. I
14 would reflect to them questions, answers, statements to
15 the person who was with him. I honestly do not recall
16 who it was, but he was not alone and they would clarify
17 for him my side of the conversation. He seemed to
18 understand to be honest more then he let on. He seemed
19 to understand that, because he would immediately turn
20 to the gentleman next to him and they would have a
21 conversation. But I told him, because I had the
22 authority to tell people, basis my in the CCIP, that he
23 could not be on the site anymore."

24 The next is page 37,

25 Q "Who was contracted out to conducting the

1 roofing at the Meadowlands at the time of the incident
2 on June, 2013.

3 A Paino, Stephen Paino, he or one of his supervisors
4 would inspect their work areas."

5 The next is page 42, starts at line 10.

6 MR. GULINO: 44; right?

7 MR. CLARK: 42, just give me one second.

8 Just while we're pulling that up, I'm just
9 going to come back to that (indiscernible) page.

10 Under Beardsley?

11 MR. GULINO: No, you don't have a 42.

12 MR. CLARK: Under Beardsley?

13 MR. GULINO: Oh, Beardsley, let's see, 37 to
14 44, there's no 42.

15 MR. CLARK: Okay. The next is page 44,

16 Q "So, Paino was responsible for laying amongst
17 other things, laying down this black rubber membrane?

18 A Yes sir."

19 Q "Were you -- do you remember being on the
20 roof when Paino was working on the roof?"

21 And then there's a -- a -- there's a request
22 for clarification by counsel. And then counsel states,
23 "which roof are you talking about, all of them or just
24 generally?"

25 And then there's another question,

1 Q "Do you know the area where Mr. Washington
2 Munoz had the incident on June, 2013?

3 A Honestly, not being a smart ass I know exactly the
4 area that he alleged he had his incident, it was one of
5 the various roofs, flat roofs that I just described at
6 the Meadowlands."

7 Q "Do you remember did you at any time inspect
8 or do a site tour of that roof area?

9 A Yes sir."

10 Q "Did you find any problems or anything that
11 drew your attention to that area?

12 A On a daily basis grabbing any one day it's
13 possible that I found stuff that I would expect to
14 immediately be corrected on any of the roofs. For
15 example, if I go out there and some group was setting
16 up scaffold and they were putting planks underneath it
17 for OSHA, you correct it that day, boom, take care of
18 it. You go out there and it was colder then hell on
19 the roofs with the wind blowing, guys were not going to
20 be out there today, okay. So, to try and give a
21 general answer to your specific question on a daily
22 basis literally by the hour any walking working surface
23 at the Meadowlands could change depending on what was
24 going on in that area."

25 The next is page 47,

1 Q "Mr. Beardsley, I'm going to show you what's
2 been previously marked as Mella 5, do you know what
3 this is a picture of?

4 A Yes."

5 Q "What is that?

6 A That's a picture of a roof section with the roof
7 drains with their bonnets on it. It's not a
8 contemporary picture to the alleged time of Mr. Munoz's
9 injury, it's not a contemporary picture of that time."

10 Q "Why do you -- why do you say it's not what
11 was the difference?

12 A There's two drains and both have bonnets on it."

13 Q "What was the condition of the area seen in
14 this picture at the time of Mr. Munoz's incident?

15 A We have a picture somewhere that will show only
16 one hole in the roof, and no bonnets."

17 And then question,

18 Q "Is this what you're talking about?

19 A That's exactly what I am talking about."

20 "Can we get this marked as Beardsley 2?

21 Whereupon Beardsley 2 was marked for
22 identification."

23 Q "So, looking at Beardsley 2 what are we
24 looking at here?

25 A Okay. If you notice the date on it being the

1 27th, shortly after 7 o'clock in the morning I was
2 called by Carol Brauer, our risk manager, she asked me
3 to go up and make sure I took pictures of the area.
4 And what we're looking at in this specific picture is
5 the one hole in the floor in the alleged area that Mr.
6 -- of Mr. Munoz's incident. There's just one, it's a
7 -- it's hole penetration that went to a temporary drain
8 line. Because this is all exposed to the weather
9 temporary drain line, the permanent one was not
10 attached, the temporary one was which let the water
11 bleed off the roof during construction."

12 Q "Did you take that picture?

13 A I did."

14 Q "And you said it was taken or at least the
15 date on it was June 27th?

16 A I will swear it was taken on June 27th, I took the
17 picture Friday, June 27th."

18 Next is page 50,

19 Q "After Mr. Munoz reported his injury to you,
20 did you go up to the roof and inspect the roof?

21 A Yes. He reported it on the 27th -- he reported it
22 to me on the 26th -- strike that. Yes, after he
23 reported it on the 27th, he reported it to me on the
24 26th."

25 Q "Why don't you go -- why don't you go on the

1 26th?

2 A Because it was in the afternoon, we had a long
3 discussion in my office about the whole discipline
4 thing, helping him go with their authorization form and
5 everything else at the end of the day on Thursday, left
6 the job site, went to my apartment. Carol called me
7 later that day and said sh -- and she said Bob, make
8 sure you get some pictures of the jobsite. So, that's
9 why I went up the first thing on Friday morning and
10 took pictures."

11 Q "What's your understanding of the condition
12 of the roof on the date -- day of the incident?

13 A My understanding of the condition of it was very
14 sketch, there's no such word very sparsely explained to
15 me. It was very, very similar to this, because it was
16 near the end of the workday on Wednesday and there had
17 not been a whole lot of activity up there on Thursday,
18 and there is no activity when I got up there on Friday
19 morning no one was working when I took this picture."

20 Q "Would it surprise you if I told you that the
21 day of the incident that hole was covered by the black
22 plastic, the black membrane that you mentioned before?

23 A Based on my previous answer to your question about
24 conditions, no, that would not surprise me there could
25 have been any number of different things up there.

1 However, I didn't see evidence of that when I went up
2 there on Friday that, for example, a lot of things had
3 been moved or taken out of the way or anything. You
4 can see in this picture that this roofing area here the
5 work had been done, and had been completed or hadn't
6 been touched in some time basis, the residue that's
7 laying around here and so on. You're not seeing a lot
8 of evidence of workplace activity in that picture."

9 Q "So, you said that Paino Roofing would work
10 together with Country Side as far as making sure that
11 the coring was done and that the roof was completed
12 with the insulation and then the membrane on top of the
13 insulation?

14 A Yes sir."

15 Okay, the next is page -- I'm more than
16 halfway done just so you know, okay. So, at page 54,

17 Q "So, what I wanted to understand a little bit
18 better, the roofers would eventually put the plastic
19 membrane over on top of the roof?

20 A The rubber membrane."

21 Q "The rubber membrane?

22 A Uh-hum."

23 Q "If there was a hole that had been cored
24 there, would they just lay down the rubber membrane
25 over the hole, was that the practice?

1 A Well, they had to cut -- they had to cut a hole in
2 the membrane at the time, if at the time of the
3 construction you either needed to get water off the
4 roof or they were doing final application, final
5 installation of the drain system for the building, that
6 could be two different things. For example, if this
7 roof was a long way from being completed and from
8 looking at that picture it's a long way from total
9 application, the customer or even the construction
10 company's working under this roof they would say hey, I
11 came in the morning and that drain and such and such
12 has nothing on it, so when it rains the water pours
13 down into my work area. Can you put a temporary pipe
14 there? And they would literally, they being Country
15 Side, they would grab long pieces of PVC, find an
16 elbow, attach it temporarily to the underside of that
17 and just get the water the hell of some building way,
18 okay. But in terms of normal application yes, that's
19 how it would be. The hole that I am looking at was
20 waiting either for you know to take the temporary drain
21 down or it was waiting to say okay, we're done with
22 this roof, let's move to somewhere else. That's a
23 pretty typical thing, they were all over the building."

24 Page 56,

25 Q "I'm going to rephrase my question. Previous

1 testimony you said that there was a hole as you can see
2 here in Beardsley 2, that this hole was covered by this
3 rubber membrane, and that those who were walking on the
4 roof were not able to see this hole that was there?

5 A Not previous testimony from me."

6 Q "Not from you?

7 A No, that hole was there. Again, you can tell that
8 hole has been there for quite some time, because you
9 can see the dirt has accumulated here, okay."

10 Q "Who had the responsibility for laying down
11 the membrane, was that Paino Roofing?

12 A Paino Roofing."

13 Q "Who had the responsibility then of cutting
14 the member -- the rubber membrane to show that the hole
15 was there?

16 A Typically, that was also Paino Roofing. They
17 would come in and say okay, you put a pipe in there,
18 where is the pipe, and they would have some type of
19 locator. They didn't want to poke holes up through the
20 rubber. So, yes, when it was originally put down long
21 before this picture was taken, it would have been
22 smooth. But the guys would have had, the guys being
23 Paino, they would have had specific information that
24 okay, when we get whatever 2 feet out from the corner
25 of this, when we get 2 feet out from the corner of

1 that, we got to building a depression because the
2 Country Side are right now installing a pipe
3 underneath. Country Side would come to them and say to
4 them okay, the pipe is there, can you give us access to
5 the pipe? They would then cut a hole in it, and you
6 can see in this picture how they reinforced the hole by
7 putting another -- like another piece of rubber and
8 they would glue it down to reinforce the hole. So, the
9 first thing was the existence of the roof,
10 understanding had -- they had to do the installation
11 just so basis. So, you're going to put a drain there,
12 okay, we'll remember to depress it, otherwise it would
13 be perfectly flat all over the roof, and that done work
14 the water has nowhere to go."

15 Q "Was it a concern to you as the site safety
16 manager that one of those holes would be missed, and
17 the plastic membrane covering the hole would not be
18 cut?"

19 A The rubber membrane?"

20 Q "Excuse me, the rubber membrane, yes.

21 A Would it be a concern if the hole was there and
22 the rubber was not cut? No, that's pretty tough stuff,
23 and you're talking about a hole this big."

24 Q "Just give us a dimension?"

25 A Sorry, roughly 6 inch diameter, okay."

1 Q "Basically, your foot -- whoever that is,
2 your foot is going to cover that hole if you're walking
3 across that covered hole, okay. So you're not going to
4 have anything on your foot that's going to puncture
5 that rubber for your foot to drop there if I understand
6 your question? That's no, it would not be a concern to
7 me for somebody to say that's going to be a drain hole,
8 that wasn't a typical conversation."

9 Q "Was it your understanding that this would
10 have -- that -- was it your understanding that there
11 would be workers walking on this roof as part of their
12 job?"

13 A Oh, yeah, both construction workers and the
14 employees of the hotel just where that drain needed to
15 be. It was it ended up being you know I know you guys
16 caution me to shut up and all that stuff, but it ended
17 up being in the middle of the HVAC area for the whole
18 freakin facility, excuse my language. And that's the
19 way it was designed where whoever that is standing,
20 he's standing where all the HVAC units, so you have to
21 walk through there to go by that when it was first
22 installed. And now hell, five years from now the hole
23 is still exactly where it was put with that bonnet on
24 it, so you get the water off the roof that's where the
25 customer needed it to be."

1 Page 62, line 25,

2 Q "How large again did you say that hole was on
3 the roof?

4 A "I'm going to say 6 inch diameter."

5 Q "Do you think that a 6 inch ho -- di --
6 strike that. The question is do you think that a hole
7 6 inch diameter covered by a rubber membrane, do you
8 think that is on a roof where workers are going to be
9 traveling, do you think that's a dangerous condition?

10 A "Asked and answered, no sir."

11 The last read in from Mr. Beardsley is page
12 70,

13 Q "Is there an OSHA standard as far as covering
14 a hole on a roof for when there is construction going
15 on?

16 A "There is a myriad of OSHA standards which covers
17 holes in working surfaces, everything from if the hole
18 goes through to the next level, a hole that's larger
19 than 2 inches in diameter, you have to cover it to keep
20 a screwdriver from falling into the hole to the floor
21 below. If the hole is large enough for a human being
22 to fall through, then obviously it has to be hard
23 railed off, covered, a net applied or whatever, but
24 there is a hole. It depends on the hole, the hazard
25 underneath, the hazard to the people in the working

1 area, okay. Yes, so to answer your question yes, there
2 are a lot of different legislations for holes in
3 roofs."

4 That concludes the reading of Robert
5 Beardsley.

6 MR. GULINO: So, we're done with him.

7 MR. CLARK: Laz, do you want to do the next
8 one?

9 MR. BERENGUER: Sure.

10 MR. GULINO: Is this Ragusa?

11 MR. CLARK: We're on Ragusa.

12 MR. GULINO: Ragusa?

13 MR. CLARK: Ragusa, yeah.

14 MR. BERENGUER: This is the deposition Louis
15 Ragusa from Country Side Plumbing.

16 Start on page 6, lines 15 to 19,

17 Q "All right Mr. Louis Ragusa, what is your --
18 what is your job title?

19 A President."

20 Q President of where?

21 A Country Side Plumbing."

22 Page 7,

23 Q "Okay. What are you the president of Country
24 Side, tell me a little bit about Countryside and that
25 business?

1 A We install plumbing in commercial buildings."

2 Page 9,

3 Q "Okay. Let's now talk a little bit about
4 this project, which is the Meadowlands project back in
5 2013 or so. How did you come to know of this
6 Meadowlands project?

7 A We bid the job for LP Ciminelli, you now we were
8 awarded the job."

9 Q "Okay. When did the job begin for the
10 company?

11 A I'm going to say somewhere around 2011 I would
12 think."

13 Q And what was the job that you were awarded,
14 what were your responsibilities under that contract?

15 A Install plumbing."

16 Page 11,

17 Q "Did that involve installing drains?

18 A That's part of the plumbing, yes."

19 Q "What else did your job entail, drains and
20 what else?

21 A The plumbing, whatever plumbing you require inside
22 a building that was our job."

23 Page 16,

24 Q What was your role in this project?

25 A I own the company that's my role."

1 Q "You had some level of oversight on the
2 project?"

3 A I own the company."

4 Q "Did you have some level of oversight on the
5 project that was being conducted by your employees?"

6 A I own the company. I don't know what you're
7 looking for, I own the company."

8 Page 17,

9 Q "Okay. Was there any piping that was done
10 just underneath the roof?"

11 A There's roof drains underneath the roof."

12 Q "Your workers, they worked on the roof
13 drains; right?"

14 A Okay, that's correct."

15 Q "Okay. Tell me a little bit about that,
16 describe the roof drain work that they did?"

17 A The roof, if I remember correctly, was a deck
18 roofing with concrete pad poured on top. The roof
19 drains would be installed on top of the decking, and
20 the concrete pad will be poured around the roof
21 drains."

22 Q "Have you ever heard of the company Paino
23 Roofing?"

24 A Yes, I believe they were the roofer on the site."

25 Page 20, okay.

1 Q "Okay. Was their work in any way related to
2 the work that you were doing?

3 A I don't know, they're doing the roof we're doing
4 the roof drains."

5 Q "So, when your workers put the drains, then
6 the concrete was poured around the drains?

7 A Correct."

8 Q "And it was left in that condition to your
9 knowledge?

10 A It would be left in that condition, because that's
11 almost a finished product. The finished products after
12 that is putting the membrane and the insulation and the
13 membrane over the roof."

14 Q "And whose responsibility was that?

15 A The insulation and the membrane would be the
16 roofer I believe."

17 Page 24,

18 Q "Okay. So, looking at exhibit Beardsley 2,
19 which has been pre-marked from a previous deposition,
20 do you know what that is sir?

21 A Looks like the opening for the roof drain."

22 Q "Is that a -- would your workers leave the
23 opening of the roof drain in that condition after their
24 work was completed?

25 A We don't do that."

1 Q "You don't do what?

2 A We don't cut the roof drain, we don't cut the
3 membrane."

4 Q "Who cuts the membrane?

5 A The roofer."

6 Q "And who is that, Paino Roofing?

7 A If he was the roofer assigned to that, yes."

8 Q "So, in what condition do your workers leave
9 the roof drains, how does it look?

10 A The drain, the drain is installed and that's the
11 way it's left."

12 Q "Would this -- and so, what is this right
13 here? I'm pointing to around the roof drain, is this
14 the black rubber membrane or what I am lo -- what I'm
15 looking at here?

16 A This whole thing is the membrane."

17 Q "Okay.

18 A This might be an added piece of security for where
19 the -- they clamp down and hold down the ring so it
20 doesn't rip the roof."

21 Q "What is a hold down ring?

22 A That's what holds the membrane down to the roof
23 drain."

24 Page 28,

25 Q "We've had testimony about other people who

1 have said that Mr. Munoz was injured after there was a
2 hole and then there was a plastic membrane covering
3 that hole, and he was not able to see that would that
4 surprise you?

5 A Why was there a plastic membrane covering the
6 hole? Where is there a plastic membrane?"

7 Q "That's some of the testimony that we've
8 heard.

9 A I don't know, there would be no plastic membrane
10 covering nothing."

11 Page 31,

12 Q "Did you know who was in charge of Paino
13 Roofing, did you ever meet him?

14 A I've seen him on the site I guess."

15 Q "Did you ever have any discussions with him
16 regarding the transition of your work and the beginning
17 of his roofing work?

18 A My foreman would probably tell his guys we're done
19 with that side, you know, we're finished there. Here
20 -- here's the other parts to the roof. Here's the
21 basket and the hold down ring."

22 Q "Your foreman would give the basket and hold
23 down ring to Paino Roofing?

24 A Yeah, because they would be the ones to put it at
25 the end after they put the roof on."

1 Q "It was whose responsibility, your workers or
2 theirs?

3 A "Theirs."

4 Q "How come your workers would have the basket
5 and hold down rings?

6 A "Because they come with the roof drains."

7 Q "When would they give them over to Paino
8 Roofing?

9 A "Probably when we install the roof drain, because
10 we take them apart to install the roof drain and we
11 given them to Paino Roofing or we would store them in
12 the box until he gets that point, and then hand them
13 off to him to make sure nothing got lost."

14 Page 33,

15 Q "Have you had any OSHA training?

16 A "No."

17 That concludes the reading of the deposition
18 of Louis Ragusa.

19 MR. CLARK: You're doing so well, you have
20 one more.

21 MR. BERENGUER: This is the deposition of
22 Stephen Paino from Paino Roofing.

23 Page 7,

24 Q "Okay. So, can you tell me a little bit
25 about the business that you own, what's the name of it?"

1 A Paino Roofing Company, Incorporated."

2 Page 10,

3 Q "Okay. Do you remember the job that you
4 contracted for at the Meadowlands?

5 A Yes."

6 Q "Tell me a little bit about that?

7 A We installed roof insulation, and a roof membrane
8 complete with sheet metal flashings."

9 Page 11,

10 Q "What size was the area of the roof that you
11 were installing roof insulation, and membrane with
12 metal flashing?

13 A It was the new structure that was built."

14 Q Do you remember the size of the area, the
15 footage?

16 A No, not off the top of my head."

17 Q "Can you make an estimate?

18 A In between 50 and 70,000 square feet."

19 Q "So, what is the process of installing roof
20 insulation with the membrane and the metal flashings?

21 A Well, the roof structure itself has to be prepared
22 for us by the other trades. Structural steel has to be
23 installed, metal deck needs to be installed, roof
24 drains need to be set, HVAC equipment needs to be set,
25 and then we can lay our insulation on the new deck and

1 the membrane on top of that."

2 Q "Were you working with any other companies?

3 A No."

4 Q "Were you -- so, as far as what's the process
5 of installing the roof insulation, if you just break it
6 down for me step-by-step?

7 A The I beams and the joist go up by the structural
8 steel company."

9 Q "And your company did that?

10 A No. The structural steel company did that."

11 Q "Okay.

12 A The deck gets installed by the structural steel
13 company. The mechanical trades do all their work
14 necessary, and then we can lay our roof on top of
15 that."

16 Page 30,

17 Q "You have said before that your company
18 places the strainer cover on top?

19 A Correct."

20 Q "Without the strainer is that the last step
21 that's done?

22 A The strainer is to prevent debris from going in
23 there."

24 Page 31, question, disregard.

25 Page 41,

1 Q "After it is cut -- what is the next stuff
2 after the rubber membrane is cut, what is the next step
3 in the process?

4 A You just put the bonnets on."

5 Q "The strainer covers the bonnets?

6 A Uh-huh. Yes.

7 Page 43,

8 Q "Now, you also mentioned that other companies
9 would typically place some sort of plywood thereto, if
10 they had to remove the bonnet?

11 A Yes."

12 Q "Or it wasn't present?

13 A Uh-huh."

14 Q "Do you know why there's no piece of plywood
15 there?

16 A No, that's up to each trade to protect the working
17 surface."

18 Q "Now, if looking at Beardsley 2 if this
19 working surface is damaged, would that damage the work
20 done by your company?

21 A Yes."

22 Q "So, you don't think it would be a good idea
23 to cover that with a piece of plywood by your company?

24 A If my work is done, I don't need to protect it,
25 whoever is working on top of it has to protect it."

1 Q "Isn't it your task or your company's task to
2 put the strainers or the bonnets on top of these -- the
3 drains?

4 A Correct."

5 Q "And not having the bonnets or the bonnets
6 not having that, excuse me. Not having the strainers
7 or the bonnets on here, would that potentially lead to
8 potential damage to the work that was done by your
9 company?

10 A No.

11 Q "How come?

12 A The only way this gets damaged is by something
13 being dropped on it or something, you know stepping on
14 something that goes through it puncturing it."

15 Q "Would your workmen leave -- leave this in
16 the condition that you see in Beardsley 2?

17 A Yes."

18 Q "You don't think that's unsafe?

19 A No."

20 Q "How come?

21 A I don't see anything that's unsafe there."

22 Q "It appears to be a hole, and you're saying
23 there's a drain underneath it?

24 A Correct."

25 Q "And you don't think that's unsafe if someone

1 is walking in the area?

2 A There's a drain under there, so no."

3 Q "Do you think someone can trip over that?

4 A No."

5 Page 46,

6 Q "When you -- you used to visit the site every
7 morning; correct?

8 A Yes."

9 Q "When you used to visit the site, I assume
10 that you knew the work that your team had done the
11 previous day?

12 A The previous day, the previous, the month, yeah."

13 MR. BERENGUER: That concludes the reading of
14 Stephen Paino from Paino Roofing.

15 MR. CLARK: I'll do the last too.

16 MR. BERENGUER: Okay.

17 MR. CLARK: Excuse me. This is --

18 MR. GULINO: Oh,

19 MR. CLARK: -- this is the exhibit that's
20 referred to in the Mella reading, so you can just take
21 a look at it.

22 MR. GULINO: Mella's talking about this?

23 MR. CLARK: Yeah, this -- we're going to --
24 just hold this. You're going to see it's going to be
25 referred to in the reading.

1 MR. GULINO: May we approach?

2 (At sidebar)

3 MR. CLARK: This is a tough one. So it's
4 right here, this reading.

5 MR. GULINO: This is exhibit number 4, what
6 page you at?

7 MR. CLARK: 48.

8 MR. GULINO: 48?

9 MR. CLARK: Line 20 and 21.

10 MR. GULINO: Line 20. I'm sorry Judge, I
11 apologize.

12 MR. CLARK: It's my fault, I should have
13 brought this up before.

14 MR. GULINO: No, no, we agreed on this, but I
15 just didn't (indiscernible)

16 MR. CLARK: 48. You have page 48 there?

17 MR. GULINO: Hopefully. Okay, here, do you
18 know the (indiscernible) June (indiscernible)

19 MR. CLARK: See, down here is where we refer
20 to where it's marked. And you said okay.

21 MR. GULINO: Okay.

22 MR. CLARK: 48, right there.

23 MR. GULINO: Yeah, I know, I understand that.

24 MR. CLARK: And you said okay.

25 MR. GULINO: We didn't talk about putting

1 this in, we stopped.

2 MR. CLARK: Right.

3 MR. GULINO: You went --

4 MR. CLARK: That's why --

5 MR. GULINO: -- from here and you jumped to
6 here.

7 MR. CLARK: Right.

8 MR. GULINO: So, now you're talking about you
9 want this to this which we didn't talk about. See, you
10 went straight to 9.

11 MR. CLARK: Yeah. Well, let's see.

12 MR. GULINO: Yes, I understand. I understand
13 what you're doing. I'm having a little bit of an issue
14 again Judge with the bonnets. Cause I think what
15 they're trying to do is say that if they were there, we
16 don't have a sanction and that's not what this case is
17 about.

18 MR. CLARK: I didn't -- I didn't mean to
19 argue the merits of this right now, that's not the
20 purpose. So, if he's simply saying don't use at this
21 time in the trial, I'm not fighting that that's why I
22 brought it up. I only do it, because this is Mella 4
23 which is referred to there, and I think it would make
24 sense. But if you don't want that that's fine.

25 THE COURT: Okay. Assume that's --

1 MR. CLARK: Okay.

2 THE COURT: (Indiscernible)

3 MR. CLARK: Okay.

4 (End of side bar discussion)

5 MR. CLARK: I just got five sections of Joel
6 Mella, and then we're finished.

7 MR. GULINO: Oh, I'm sorry, is that 48?

8 MR. CLARK: The first is page 36,

9 Q "Do you remember what you told him?

10 A He went through a hole."

11 Q "The day of the accident, June 25, were there
12 any supervisors" --

13 MR. GULINO: Excuse me, I'm sorry Mr. Clark,
14 what page are you on?

15 MR. CLARK: I'm sorry, it's page 36.

16 MR. GULINO: 46?

17 MR. CLARK: 36.

18 MR. GULINO: 36. Oh, okay.

19 MR. CLARK:

20 Q "The day of the accident, June 25, were there
21 any supervisors around?

22 A No."

23 Q "Was there anyone around that Mr. Munoz could
24 have reported the accident to?

25 A No."

1 Q "Do you know why?

2 A It was only us three working there, who else is
3 going to be up there. It is only us three, the bosses
4 don't go up there.

5 The next is page 48.

6 Q "So Mr. Mella, let's have this exhibit marked
7 as Mella 4."

8 Page 49,

9 "From that picture do you know where Mr.
10 Munoz was injured?

11 A Yes, right there."

12 Q "When --

13 Or statement by the counsel, "pointing to the
14 lower drain on the photograph."

15 The witness says, "the first one, the first
16 drain."

17 Okay, the next is page 51,

18 Q "And for this job what was your understanding
19 of who or where an accident was to be reported?

20 A What's that again?"

21 Q "As to this job what was your understanding
22 as to whom or where the accident should have been
23 reported?

24 A Safety guy."

25 Q "You mean that big tall guy?

1 A Bob."

2 Q "You saw him in one of those photographs?

3 A Yes, he was going to fire me. He was going to
4 throw off the job, because we didn't report it the next
5 day."

6 Q "Was Mr. Munoz fired from the job?

7 A After, I'm not really sure afterwards. I am not
8 sure."

9 Q "But he wanted both of you off the job?

10 A He wanted us both off the job, that's what I
11 know."

12 Page 54,

13 Q "As soon as it happened was the safety guy
14 there?

15 A No."

16 Q "And who is the safety guy?

17 A Bob."

18 Q "Do you know Bob's last name?

19 A No."

20 Q "Do you know why he wasn't there?

21 A No."

22 Q "Were there any supervisors there?

23 A No."

24 Q "Was there anyone he could have reported the
25 accident to there?

1 A No."

2 That concludes the readings. And we, the
3 plaintiff, rest subject to the things we talked about
4 earlier.

5 THE COURT: Okay.

6 MR. CLARK: Thank you.

7 THE COURT: All right.

8 MR. CLARK: Thank you.

9 THE COURT: So, we'll move next to the
10 defense.

11 MR. GULINO: Yes.

12 THE COURT: Mr. Gulino.

13 MR. GULINO: Before we begin may be have a
14 sidebar?

15 THE COURT: Sure.

16 (At sidebar)

17 MR. GULINO: I'll try this clients contact.
18 I would like to make my motions, if the plaintiff has
19 rested. Would you rather I hold off or do them now?
20 There's also an issue Your Honor I think on Dr.
21 Decter's deposition.

22 THE COURT: Right.

23 MR. GULINO: So, if we can work that out, I
24 can have my tech work on the video to save us time
25 later.

1 THE COURT: So, I'll give them -- I'll just
2 break now, and then have them -- I'll give them 30
3 minute, instead of the normal 15 and see where we're
4 get.

5 MR. GULINO: Okay.

6 THE COURT: All right.

7 (End of side bar discussion)

8 THE COURT: Members of the jury, we're going
9 to take our morning recess at this time. Please don't
10 talk about the case during the recess. It's going to
11 be a little bit longer, there's some issues that we
12 need to address outside of your presence. And so we'll
13 say your break will be 30 minutes, as opposed to the 15
14 minutes, all right. So, we'll see you back, please
15 don't talk about the case.

16 It is not 7:30.

17 UNIDENTIFIED SPEAKER: I'll buy batteries.

18 (Jury exit courtroom)

19 THE COURT: All right, you can be seated.

20 Mr. Gulino, you have a motion?

21 MR. GULINO: Yes Your Honor. Since the
22 plaintiff has formally rested, I would like to make a
23 motion before the Court for a directed verdict in favor
24 of the defendants.

25 The first motion I would like to make is on

1 behalf of Country Side Plumbing. Mr. Gallagher
2 testified Wednesday, he testified at length. He spoke
3 from his report which has been exchanged and, quite
4 frankly, he said not at all against Country Side
5 Plumbing. There was no proof presented against them,
6 except the deposition testimony read in this morning.
7 There is no expert testimony against them by Mr.
8 Gallaher as to what they violated or did not violate.
9 There has been no proof that their work in any way had
10 anything to do with the plaintiffs' alleged accident.
11 And as a result of that I hereby move to dismiss them
12 for lack of evidence.

13 THE COURT: Mr. Clark?

14 MR. CLARK: With re -- with regard to Country
15 Wide Plumbing, I just want to -- I want to jump ahead
16 to the effect of that and then come back, because it's
17 -- it's somewhat contingent upon the effect of that.
18 And I have -- I'm just trying to pull the case law to
19 my fingertips, but if County Wide were to be dismissed
20 the defendant should not be permitted to point the
21 finger at Country Wide, they don't go on the jury
22 verdict sheets, and there really shouldn't be any
23 argument about Country Wide or the effect of the
24 dismissal. If they were to be dismissed that should be
25 it, because the New Jersey case law is clear you can't

1 point the finger at a dismissed party. So, depending
2 on counsel's agreement or counsel's position on that, I
3 would then decide if I should oppose this motion or not
4 oppose this motion. Meaning -- cause I -- I -- that's
5 my --

6 MR. GULINO: I -- I don't think that that has
7 anything to do with the lack of evidence against
8 Country Wide. I think that's the issue before you is
9 that has the plaintiff presented enough proof that this
10 case should go to a jury against Country Wide, that's
11 all it's about.

12 I -- I would look like a fool if I were to
13 point fingers at Country Wide, when the Court would
14 then be instructing the jury that Country Wide is no
15 longer a defendant, because I have dismissed the case
16 against them. So, I'm not going to be doing it.

17 THE COURT: That answers your question.

18 MR. CLARK: And -- and I believe --

19 THE COURT: And is Country Wide or Country
20 Side?

21 MR. GULINO: Oh, yes, you're right, I think
22 it's --

23 THE COURT: I think you said Wi -- you said
24 Side, you said Wide, and then you went back to wide.

25 MR. GULINO: I'm thinking of insurance Judge.

1 MR. CLARK: I'm thinking of the diameter of
2 the hole.

3 MR. GULINO: It is with an S, Side, Country
4 Side.

5 THE COURT: Okay. All right. So --

6 MR. CLARK: Okay. So -- so, on that basis I
7 believe that counsel referred to that he would look
8 silly to do that. I don't know if he would look silly
9 or not, but I feel that that would be inconsistent with
10 the law because you can't point the finger at a
11 dismissed party. But and because I -- I don't have any
12 sort of agreement or anything, we oppose that motion,
13 feel there's sufficient evidence or/and that's it.
14 That's it, that's my response --

15 THE COURT: All right.

16 MR. CLARK: -- to that motion.

17 THE COURT: All right. So, I -- I have
18 reviewed my notes and, quite frankly, was anticipating
19 that this motion would be made. To the extent that
20 there -- there appears from this record to be --

21 MR. CLARK: Judge, you know what I apologize
22 for interrupting Your Honor.

23 THE COURT: Yes.

24 MR. CLARK: But I am not going to now oppose
25 the motion. I've thought about it, and I'm not going

1 to oppose the motion to dismiss that defendant.

2 THE COURT: Okay.

3 MR. CLARK: Thank you

4 THE COURT: So, the motion is granted.

5 MR. GULINO: I would like to make a motion,
6 obviously, on behalf of the other two defendants, as
7 well on different grounds. There was evidence put
8 forth against them, I have no issue with that. I don't
9 believe it's strong enough. D -- Mr. Gallagher
10 testified that there were four or five OSHA regulations
11 that he considered. One or two of them I think he
12 admitted that were not violated. The whole issue on
13 this case I think, as far as Mr. Gallagher is
14 concerned, is whether or not the flooring was
15 sufficient to hold up someone. Because we talked about
16 covers and holes, and, in fact, this was if we consider
17 it a hole and I don't agree to that, but if it were a
18 hole it was covered.

19 So, now the only thing left is whether or not
20 the integrity of the floor was sufficient enough to
21 hold somebody up, which it was. So, I -- I understand
22 that LP Ciminelli has the ultimate responsibility, and
23 we agree to that it's in the contract, I'm not worried
24 about that. But this is a negligence case and -- and
25 even though we have OSHA regulations against us and

1 there may be proof of negligence, I still believe that
2 the plaintiff has the burden of showing that this
3 condition existed for such a long period of time. Well
4 first of all, that's it's dangerous. And then second
5 of all, that it has existed for such a long period of
6 time that we should have known about this. And I
7 understand there's been no proof, and we've talked
8 about this, there were no OSHA violations issued on
9 this, there were no reported accidents before this.
10 This was an area that had been worked around and people
11 had been walking around it for -- for a decent amount
12 of time, and there were no complaints and no prior
13 accidents. And so I don't see how the violations that
14 have been claimed first of all apply.

15 I know I didn't have an expert, but I think
16 in my cross examination of Mr. Gallagher we talked
17 about holes, and we talked about two different kinds of
18 holes. He was very cute in that he said that a hole is
19 anything that's 2 and 1/2 -- 2 inches across at its
20 smallest I think dimension. But what he neglected to
21 fail was -- to say was that in the next section - and I
22 don't remember the number, I think it's 1501 - he was
23 talking about 1500 or 1501, and then I went to 1501 and
24 a few other ones. And I said to him you're talking
25 about fall protection, and if you look at these

1 statutes that you're -- that you're trying to apply
2 there for holes. And Mr. Beardsley talked about it,
3 they're for holes that go from one floor to another,
4 and they're there really to protect the people that are
5 below you and the people who are walking on the
6 surface, so they don't go through the hole. That's
7 what hole protection is all about. It's not about
8 what's on top of a drain, not at all. There might be
9 another statute out there or another regulation that
10 controls that, but this one doesn't.

11 And so on those grounds I'm moving to dismiss
12 both of them. We -- we know that Paino did the
13 roofing, I don't have an issue with that. And we know
14 that Ciminelli, as I said was the general --
15 construction manager that proof will come in. But I
16 don't think the plaintiff has adequately proven that
17 this condition is dangerous, and that these regulations
18 were violated. Thank you.

19 MR. CLARK: With -- with -- I submitted this
20 morning to the Court and counsel our proposed jury
21 charge, and the -- his motion is -- it's actually -- I
22 think it's relevant to the jury charge as well. And
23 it's also relevant to our in limine motion number 4.

24 So, I'll just -- I'll just step -- let me
25 just kind of step back from that -- from all that

1 stuff, and say that this is a negligence case. It's
2 you know some people look at construction cases and say
3 oh, OSHA, it's complicated, it's a construction case.
4 But these cases really aren't complicated, the
5 liability framework is -- is really no different than a
6 auto case. So, in a auto case you know you could have
7 a car accident and is there a question of negligence?
8 Sometimes in auto cases the plaintiff may allege that
9 there's been a violation of the motor vehicle statute.
10 But if the defendant did not violate a motor vehicle
11 statute, that doesn't mean the defendant gets out of
12 the case. And if -- and if it's alleged they did
13 violate the statute, but were never ticketed they also
14 don't get out of the case. If they did violate a motor
15 vehicle statute, the plaintiff doesn't on that basis
16 alone get summary judgment on liability. Statutes are
17 no different than industry standards, and they are
18 evidence upon which a jury can use to consider whether
19 or not the defendant ha -- was negligent under the
20 basic negligence jury charge.

21 And there's also when a party in a case
22 alleges a violation of a statute or a standard of
23 construction in industry standard. The model jury
24 charge 5.10H and 5.30D address that.

25 So, in this case defendants number one

1 argument is, a, there was no OSHA violation. That's
2 for the jury to determine. And even if the jury were
3 to determine there's no OSHA violation, that doesn't
4 mean the defendant is not responsible.

5 The other argument is that the OSHA
6 violations or the OSHA statutes and the industry --
7 well, the argument that was just made here is that the
8 OSHA standards at issue do not apply. And Mr.
9 Gallagher very clearly testified on both direct and
10 cross that those standards do apply from a safety
11 standpoint. Mr. Gallagher does not sit up there as an
12 OSHA official determining whether or not the defendant
13 was ticketed, no more than a police officer in a
14 intersection case would be able to get up there and
15 testify whether or not they should have been ticketed,
16 and why they were. Because this is not a criminal
17 case, and it is not -- it's not a law enforcement case,
18 it's an ordinary negligence case. And the place of
19 things like the statute and the OSHA standard is no
20 different than the other industry standards like the
21 Associated General Contractors of America, the National
22 Safety Council.

23 And under the McComish case, which is in our
24 brief, and I think -- I think that case really -- that
25 case really hits it. And I just -- Judge, is it all

1 right if I just get a minute or two? I don't like
2 doing this, wasting time, but it is an important quote.
3 Do you mind if I just take a minute or so to find it?

4 THE COURT: Sure.

5 MR. CLARK: If I can't find it, I'll move
6 on --

7 THE COURT: Sure.

8 MR. CLARK: -- if it's all right? I don't it
9 have it at my fingertips Judge, but I'll -- I'll
10 certainly make sure I have it for the charge
11 conference.

12 But basically what the McComish case says is
13 that industry standards are -- can be used as evidence.
14 But the thing that I wanted to point out what McComish
15 says is the defendant's own safety manual is also
16 considered an industry standard. And that was the
17 situation in McComish. And one of the exhibits that we
18 have marked into evidence are the safety manuals of
19 both defendants, plaintiff's exhibit 24 is one of them.
20 So, that is my response to defendant's argument that
21 there were no OSHA violations.

22 With response to the argument about notice
23 and knowledge, it's true that in an ordinary premises
24 liability case the defendant does have to have notice
25 and knowledge of a dangerous condition, so as to give

1 them an opportunity to cure the dangerous condition.
2 That's kind of basic premises liability law. And the
3 -- this is not a premises liability case, because the
4 defendants are not owners of the property. It's a bit
5 different, because it's a construction case.

6 Now, in the construction case -- in the
7 construction cases things like Alloway and Carvalho vs.
8 Toll Brothers, they definitely do talk about notice and
9 knowledge, because there has to be a fa -- there's a
10 fairness factor to a defendant in a construction case.
11 If there's an immediate hazard and the defendant has no
12 notice and knowledge about the hazard and they took
13 steps previously to prevent that ki -- and they took
14 steps previously to prevent that kind of hazard, how is
15 that fair to say they should be responsible when it
16 happened in a split second, and they didn't know
17 anything about it? And in those -- that's how notice
18 and knowledge comes in in a construction industry case.
19 But the reason notice and knowledge should -- is not a
20 basis for a directed verdict here is there's -- there's
21 really three reasons.

22 The first reason is that the defendants took
23 no steps to ward off this hazard. And that's why when
24 I opened I talked to the jury about how they got the
25 building plans long before, when they bid the job they

1 knew about it, they had the plans. Meaning they knew
2 that these drain holes were going to be here, they knew
3 from the beginning, and from all the testimony,
4 including after the incident testimony.

5 And by the way I did bring my pocket brief on
6 subsequent remedial measures. They said we don't guard
7 against this thing, they said it's not a problem. Yes,
8 we know about it, it doesn't surprise us. We don't
9 think it's a hazard, we don't do anything about it.
10 So, that goes with regard to notice and knowledge in
11 the sense that they never took steps, they knew this
12 hazard was going to develop on the jobsite, because the
13 mechanism when the drains get put in, how the roof is
14 put in, how they know there's a depression that there's
15 a time period when the bonnets are not put on. And the
16 defendants admit they don't do anything about that,
17 they don't think it's a hazard. Even after the
18 incident, they said no, we didn't do anything about it.
19 So, that goes to the first issue with regard to notice
20 and knowledge.

21 If this were an ordinary premises liability
22 case and we were suing the owner, there would be enough
23 evidence in the case on notice and knowledge. I just
24 read the deposition testimony of Mr. Beardsley where he
25 said he would inspect the case regularly, he was there

1 on a daily basis, that this condition had been like
2 that for a long time. There's deposition testimony was
3 just read in about Paino Roofing, how they had left it
4 in that condition. There was direct testimony from
5 Beardsley that this had been in this condition like
6 this for an extended period of time, and if it mattered
7 I could go back and pinpoint the testimony.

8 We have also marked into evidence as
9 plaintiff's exhibit 19, which is the daily construction
10 report information, and it shows that on May 5 -- 7 of
11 2013 Paino Roofing was working on the roof area. On
12 May 6th of 2013 Paino Roofing was working on the roof
13 area. On May 3rd of 2013 Country Side was doing the
14 storm draining in the roof area, and Paino Roofing was
15 working on the roof area. On April 26 of 2013 Country
16 Wide (sic) Plumbing, they are working on roof leader
17 drains, vents and carriers. Paino Roofing, they are
18 working on the Roof. May -- April 25 of 2013 County
19 Side Plumbing, they are working on the roof leader
20 drain, vents and carriers. Paino Roofing, they are
21 working on the roof. So, this sort of information
22 coupled with the testimony of the witnesses that was
23 read in, the discussion that Mr. Gallagher had about
24 notice and knowledge.

25 And I can tell Your Honor, sort of as an

1 aside or representation, when I talked to Mr. Gallagher
2 about a case one of the first things he asks about is
3 notice and knowledge. And I will represent to the
4 Court, as Mr. Gallagher has testified on cross
5 examination in other cases, that we may ask him about a
6 case and he'll say no, I can't help you on that case.
7 And I can represent that he does that when there's not
8 a notice and knowledge issue. And he was intent to
9 talk about the notice and knowledge issue. Because --
10 so with all that I think that the notice and knowledge
11 issue is sufficiently addressed in a workplace setting
12 case.

13 And the final argument that was made is that
14 this is not in fact a dangerous condition. It very
15 well may not be a dangerous condition six or eight
16 juror members decide, that's certainly free for them to
17 -- to make that call, and the jury charge reflects
18 that. But that's really a question of fact for the
19 jury. I could go on for a long time explaining why
20 there's a question of fact as to whether or not there
21 is a dangerous condition, but if I did I would just be
22 summarizing the testimony of Mr. Gallagher, the
23 testimony of the witnesses that we read in or had
24 testify, and I would be summarizing the photograph that
25 demonstrated.

1 So, for all those reasons we feel that the
2 motion for a directed verdict as to defendant, LP
3 Ciminelli Company and Paino Roofing Company, should be
4 denied at this time. Thank you Your Honor.

5 THE COURT: Okay.

6 MR. GULINO: May I just -- just for two
7 minutes Judge?

8 THE COURT: Very, very briefly.

9 MR. GULINO: Thank you, very briefly.

10 One, when we were talking about notice and
11 the witness saying no, it -- yeah, we don't consider
12 that a dangerous condition. That was subsequent to
13 this accident when they were told what it was. There's
14 nothing that -- that is in the record that says oh, I
15 knew about it before, and wouldn't consider it
16 dangerous. It's later where they said no, it's not
17 dangerous, it wasn't dangerous.

18 But with -- with Mr. Gallagher when we're
19 talking about the regulations that he was quoting,
20 they're all general, really -- really general, except
21 the one about the integrity of the floor. But even
22 that is legally insufficient. And -- and just if I
23 could just give you one quick example on that. We were
24 talking about I think it's regs of 1501 as I mentioned
25 before about the holes and anything over 6 feet. Tho

1 -- there are regs in there right there talking about
2 holes that say if -- if you're working from 6 feet or
3 above, you have to have a rail, that's a specific
4 regulation. And the only issue you'd ever have if you
5 didn't have a rail and the guy fell was whether or not
6 or you had a rail and he fell was the rail sufficient.
7 But -- but those are clear cut regulations to -- to
8 charge to a jury or to talk about to a jury. And --
9 and we don't have that here, we have just generalized
10 oh, it's a dangerous place. And I don't believe that
11 they -- they proved that. Thank you.

12 THE COURT: Okay.

13 MR. GULINO: I have another one after this, I
14 don't know if you want to hold on that or jump to
15 another one?

16 THE COURT: I'll just rule on this one, and
17 then you can move to the next one.

18 MR. GULINO: Okay.

19 THE COURT: So, at this juncture of the case
20 the Court is required on a motion for a directed
21 verdict to give the plaintiff the benefit of all
22 favorable and all reasonable inferences that can drawn
23 from the testimony. And so the question becomes
24 whether or not a reasonable fact finder could find,
25 based upon the evidence that's been presented, in the

1 plaintiff's favor.

2 And so the arguments presented here are
3 first, with respect to the evidence presented by the
4 plaintiff that there was a violation of either OSHA or
5 basic safety rules or industry standards, if you will.
6 The case law is very clear that whether there is
7 compliance with OSHA and/or industry standards or a
8 failure to comply, where there is compliance that
9 doesn't mean necessarily that the defendant was not
10 negligent, nor does a failure to comply mean that they
11 were. Certainly, the jury can consider either
12 compliance with or failure to comply with OSHA and/or
13 industry standards as evidence or lack of evidence of
14 negligence, but that clearly is a question for the jury
15 to determine.

16 And I'm satisfied based upon the evidence
17 that's presented that there is suffic -- a sufficient
18 basis that a reasonable fact finder could find that
19 there was a -- a violation, based upon the testimony of
20 the expert witness presented by the plaintiff, assuming
21 that the jury chooses to believe the testimony of the
22 expert presented. And, again, that's -- that's within
23 their province to do so. So, on that basis the motion
24 should not be -- be granted.

25 So, next is the issue of notice and/or

1 knowledge of this dangerous condition. And, quite
2 frankly, as I listen to the arguments presented by both
3 sides, I don't know whether at this juncture this is a
4 case where the ultimately, assuming -- well, I don't
5 know whether or not this is a case that notice and/or
6 knowledge of a dangerous condition is something that
7 the jury necessarily will need to be -- need to
8 consider. I think at this juncture there's certainly
9 enough evidence in the case to the extent that the jury
10 would be required to address the issue of notice.
11 There's certainly enough evidence in the case that a
12 reasonable fact finder could find that the defendants
13 had sufficient knowledge or the -- had they done
14 reasonable inspections, they would have discovered what
15 was -- is purported to be a dangerous condition.

16 So, given the plaintiff the benefit of the
17 favorable inferences, assuming at this juncture that
18 there is a requirement that notice or knowledge of this
19 dangerous condition be proven, the -- that -- the
20 motion cannot be granted on that basis.

21 And, lastly, with respect to the argument
22 that this is not a dangerous condition. Again, the --
23 the standard that applies is whether or not a
24 reasonable jury could based upon the evidence presented
25 and giving the plaintiff the benefit of all favorable

1 and all reasonable inferences that can be drawn from
2 the testimony, a reasonable jury could find in the
3 plaintiff's favor. And so for those reasons the motion
4 cannot be granted on that basis either.

5 MR. CLARK: Judge, may I just supplement with
6 like three sentences just for the record --

7 THE COURT: Sure.

8 MR. CLARK: -- in case this is reviewed by
9 anyone?

10 I failed to mention also on the notice and
11 knowledge condition that there's an allegation and
12 facts to support that at least one of the two
13 defendants created the dangerous condition. I.E., the
14 holes on the roof.

15 THE COURT: In which case there would be no
16 requirement that notice be provided, okay. And so --

17 MR. GULINO: Thank you Your Honor.

18 THE COURT: -- notice be proven rather.

19 MR. GULINO: The next two have to do with
20 damages.

21 And the first one is the shoulder. I'm
22 moving hereby to preclude any consideration by the jury
23 of a shoulder injury being caused by this accident, and
24 especially, especially, the need for surgeries. And
25 I'm basing that on a few things. The first thing was

1 that the plaintiff has always claimed that he fell on
2 his arm and his shoulder. The medical records in the
3 first place he went to, the first time he went to see
4 Dr. Helbig, all of his continued treatment, their
5 entire case has always been upon the fact that he fell
6 down on his shoulder and arm.

7 Mr. Mella, who has not testified yet, was 5
8 feet behind him and said he never fell. He never fell,
9 he stumbled.

10 Dr. Helbig in his testimony the other day I'm
11 pretty sure I got him on cross examination - I don't
12 have the record, I wish we had a court reporter we
13 don't obviously - but I said to him if it were found
14 that he did not fall on his arm and his shoulder, then
15 your surgeries weren't related. And he, and I -- I
16 stand corrected, said probably right. That is legally
17 and sufficient as a matter of law for this case to go
18 to a jury on medical causation, because the plaintiff
19 yesterday in hi -- my cross examination of him said I
20 did not fall on my arm and my shoulder. That's the big
21 crux, because Decter in his first report, and -- and
22 the Judge will hear him, and I know that really
23 shouldn't have anything to do on a directed verdict,
24 but he says I originally thought that he -- that the
25 first surgery was connected, because he fell on them

1 like Helbig did. And his testimony changes just like
2 Helbig's, and he says if he didn't fall on that
3 shoulder it's not related. And that's what Dr. Helbig
4 said on cross examination, he admitted to that. We
5 talked about it, I used the demonstrative evidence and
6 he used the -- I don't know if the Judge remembers, but
7 they used a bur and then they took the bone here, and
8 they took the bone there. And it was all congenital
9 conditions, nothing to do with trauma. And he based
10 his opinion that it was due to trauma, because he
11 firmly believed that the plaintiff fell on his arm and
12 his shoulder. He didn't, he admitted to that. So, now
13 they don't have enough proof to at least show the
14 mechanism of the injury. They need somebody else to
15 say or Dr. Helbig should have said well, if he didn't
16 fall on his arm and he didn't fall on his shoulder, the
17 surgery was still necessary because of the following,
18 they didn't. And when you -- when you don't have
19 enough proof to show the mechanism of your injury, then
20 you shouldn't be able to go to a jury on pure
21 speculation, and the plaintiff's layman's testimony
22 that I hurt my shoulder. Doesn't work that way. They
23 need an expert to come in and say that, and Dr. Helbig
24 admitted that if he did not fall on that arm and on
25 that shoulder, the surgeries were not necessary. And

1 that's the first surgery.

2 The second surgery for rotator cuff, there
3 was no rotator cuff the first time. Rotator cuff fully
4 intact. Plaintiff goes and gets an MRI two years later
5 and now they find - and Dr. Helbig used that MRI report
6 incoming to his opinion - and it said recent trauma.
7 Something happened in between, because now he had
8 edema, now he had fluid. And now the doctor does the
9 surgery to repair that rotator cuff, when it didn't
10 exist the first time. I don't know -- when I asked the
11 doctor when you looked at him the first time, you got
12 your camera right in there and you looked right at his
13 rotator cuff and it was intact. And two years later or
14 a year and a half or whatever it was when they did the
15 second surgery now it's torn, now he's got a rotator
16 cuff tear. Where did that come from? Didn't come from
17 the accident, he never fell. And -- and so I don't
18 think based upon the plaintiff's finally admitting,
19 because Mr. Mella was out there for three days and he
20 knew what he was going to say. He knew he was going to
21 say you didn't fall. His deposition testimony says he
22 fell down, his medical records say he fell down. But
23 when he got on the stand he finally said no I didn't
24 fall, because Mella was going to say he didn't fall, he
25 was 5 feet behind him. And Dr. Helbig said if he

1 didn't fall on it, they're probably not related. And
2 if they're probably not related, that's not within
3 reasonable medical -- within a reasonable degree of
4 medical certainty. It's not enough, and I think it
5 fails.

6 MR. CLARK: I'll just be brief.

7 MR. GULINO: Oh, I'm sorry, I'm not moving
8 for the elbow, I know he had a torn biceps tendon.
9 They didn't talk about it much, I didn't talk about it
10 much. But it's the shoulder Judge, that's really what
11 I'm moving for. And, of course the back, but I'm not
12 going to argue that right now.

13 THE COURT: Okay.

14 MR. CLARK: Judge, I'll be -- I'll be brief.

15 First of all, I respectfully disagree with
16 defense counsel's recollection of the testimony. But I
17 know that's normal, because people have different
18 recollections of testimony, which the jury charge
19 addresses and says that it's the jurors recollection
20 that matters. In that regard I will -- with regard to
21 saying that the first surgery is not related, the
22 second surgery is not related, I just think it's
23 appropriate for this part of the record to read the
24 relevant portion of Dr. Helbig's report, which he was
25 read into the record on redirect. In summary, Mr.

1 Washington Munoz sustained a partial rotator cuff tear
2 to the right shoulder with impingement syndrome that
3 necessitated two surgical procedures. He has a right
4 biceps tendon rupture. He has -- he then comments on
5 the back, but since they're not moving on the back I
6 will not read that. Since -- he continues to say since
7 he has treatment for almost two years and continues to
8 have significant symptomatology -- well, he goes on to
9 talk about his work. But in summary, he gives -- he
10 talks about the two injuries, which includes the two
11 surgeries.

12 And I'm not going to respond into any detail
13 about whether or not he fell or not fell and how he
14 fell, because I don't -- I don't think that would be a
15 basis to dismiss this claim, based on the totality of
16 the evidence and the explicit testimony from his
17 treating physician that the shoulder injury and both
18 surgeries were from that.

19 With regard to the argument that the shoulder
20 was fine upon the first MRI, that -- that portion was
21 also read into the record. The MRI is dated 7/19/2013,
22 the impression includes "partial rotator cuff tear of
23 the supraspinatus and infraspinatus portions." And
24 while it's true that he did testify that when he went
25 in to do the first surgery he was not able to see the

1 tear, he very clearly explained that several times
2 during his explanation, and it was because it was an
3 interstitial tear which cannot be seen in a surgery
4 which is picked up on an MRI. So, that is not a basis
5 to dismiss that claim.

6 And I would also note with the argument that
7 we don't have a dispute with the elbow injury, we're
8 just disputing the shoulder. And when they say they
9 don't dispute the elbow injury in reference to the
10 bicep tendon, the bicep tendon tear was in the shoulder
11 area as is shown on plaintiff's exhibit 9, which was
12 utilized at trial. So, for all those reasons we oppose
13 this motion. Thank you.

14 THE COURT: Okay. All right. As I have
15 indicated at this juncture of the case -- you wanted to
16 say --

17 MR. GULINO: I'm sorry Judge.

18 THE COURT: -- something else on it?

19 MR. GULINO: Yeah, just -- just Mr. Clark is
20 reading from the doctor's report to you in opposition
21 to my motion on his testimony. The report is not in
22 evidence, his testimony is what's in evidence. I'm
23 making a motion on what we heard in the courtroom under
24 oath, not on a report. He said if he didn't fall, it's
25 not connected. He admitted he didn't fall, it's not

1 connected.

2 The biceps tendon, he didn't do anything to
3 it. He never -- he never repaired it, he did nothing.

4 So, but -- but it's really the shoulder and
5 he said if he didn't fall on it, it's not connected.
6 And he didn't fall on it, plaintiff said that himself.

7 And just one other thing -- no, I think
8 that's it, thank you Judge.

9 THE COURT: All right. So, it is within this
10 jury's responsibility as fact finders to recall the
11 testimony that was presented, whether it be from an
12 expert, a layperson or the plaintiff himself. In this
13 case to the that the argument is that the plaintiff has
14 had a different version of how his injury occurred, a
15 jury will have to make a determination as to whether or
16 not in fact his versions of how his injury occurred did
17 in fact change. But a jury at this juncture in the
18 case has an expert or has heard from an expert witness
19 who has causally related the injury sustained by the
20 incident to the -- to his fall. They've causally
21 related his injury, his alleged shou -- injury to his
22 shoulder to the incident at hand. The fact that the
23 expert is posed with a hypothetical which includes the
24 -- a different version of the way in which the
25 plaintiff characterized how the accident happened, and

1 then says well, if it happened that way then perhaps
2 it's not. A jury will have to make a determination as
3 to how this accident happened, that's their role. And
4 once they make that determination whether or not the
5 injury alleged to have been sustained as a result of
6 this accident, whether or not the two coincide.

7 So, again, I have to give the -- the -- the
8 plaintiff the benefit of any favorable inferences that
9 can be drawn from this testimony. And assuming that
10 the jury finds that there wasn't a change in the way
11 the plaintiff presented his version of the accident,
12 then the jury would then be left with the expert having
13 said this is my understanding of how this accident
14 happened, and based upon that I causally relate his
15 injury to his accident. So, for those reasons the
16 motion cannot be granted.

17 Your next motion.

18 MR. GULINO: Okay. Finally, Your Honor, just
19 one more quickly, cause --

20 THE COURT: Sure.

21 MR. GULINO: -- it's probably the plaintiff's
22 largest claim right now --

23 THE COURT: Okay.

24 MR. GULINO: -- would be the lost wage claim.

25 THE COURT: Okay.

1 MR. GULINO: And -- and I -- and I -- the
2 Judge has allowed them to -- to resubmit it to the
3 Court and to the jury. The issue now becomes what
4 they're allowed to prove or to present to the jury, and
5 he's rested. And the big case I assume is called
6 Caldwell against Haines, and it's the Supreme Court of
7 New Jersey, July 6, 1994, and if I may. We have issues
8 with the -- with the not only the past because we only
9 have one paystub, we've got huge issues in the future
10 that I think is pure speculation. And if he gets
11 passed that, then the plaintiff's failed to - and I --
12 I'm quoting the Court if I may Judge - to rectify the
13 uncertainties that surround the application of oh, net
14 income evidence, and the confusion that arises from
15 unstructured current practice, the burden of proving
16 net income and personal injury and wrongful death
17 action should be placed clearly and squarely on the
18 plaintiff. In so doing we note that the burden of the
19 plaintiff should not be difficult to sustain, because
20 he or she should have easy access to proof of net
21 income. Most of the evidence, such as paystubs or tax
22 returns is readily at hand and will not involve
23 complicated calculations.

24 Now, I asked the plaintiff specifically on
25 cross examination do you remember -- do you remember

1 for a year and a half the Union sent you to your jobs,
2 the Union has your financial records, how much money
3 you make, who you worked for, and they bring in a
4 paystub, one paystub. They don't contact the Union to
5 have a rep come in here and say Washington Munoz was a
6 valued member of our Union, and these are his financial
7 records for a year and a half before the accident. And
8 now they're going to try to get to a jury without that.
9 Now, I understand they're "not" under their control,
10 but that's proved today according to the Caldwell
11 court.

12 THE COURT: Could you give me the citation on
13 that case?

14 MR. GULINO: I'm sorry.

15 THE COURT: I need the citation.

16 MR. GULINO: Oh, yes. 136 N.J. 422, and it's
17 -- I guess it was a September term of '93, and it was
18 decided on July 6, 1994. But my understanding it's
19 still -- it's till the law.

20 And -- and then if we're going -- forget
21 about trying to prove past and future whatever kind of
22 records tax -- lost income, they have the burden to
23 come in and do discounted to present value. Because we
24 know what's going to happen, they're going to come in
25 and say he was making \$1,000 a week.

1 Now, I know there's a charge that talks about
2 net income, but there is also under that case if you're
3 going to the future, let's say it's a I don't know,
4 let's say it's \$100,000 for future. They have to
5 present evidence to the jury of the taxes that come
6 off, the social security that comes off. And the court
7 says a defendant is entitled to have the recovery
8 discounted to present value -- to discount to a present
9 value that recognizes the party would have had to get
10 over his lifetime. So, they not only have to take into
11 consideration that net income under the -- under the
12 sta -- not the statute, the charge. But they have to
13 take that amount of money, and they have to present it
14 to the jury in present value. They can't just say it's
15 a \$1,000 a week, he's 47 years old, he's going to work
16 until he's 65, which they haven't brought in an expert
17 on his work life expectancy. I know you have not a
18 statute, but you have tables on life expectancy. But
19 for work life expectancy, they need somebody to come in
20 and say how long he was going to work.

21 Mr. Munoz on his direct didn't say I'm
22 working till I'm 65. We don't know how long he's going
23 to work. And if he was going to work that long, then
24 we have to look at how do you prove the present value.
25 They needed to present it to a jury, and they didn't.

1 I don't have that burden, they do. They're the ones
2 under that law that have to go to a jury, a case and
3 say 100,000 over his lifetime after the taxes are
4 removed, after the social is removed, after the
5 medicals are removed is \$40,000. But if we put -- how
6 much money do we have to put in the bank today to get
7 \$40,000 for the future? They didn't do that, and they
8 have a requirement to do that.

9 And so I'm going to ask the Court to dismiss
10 any claim for future, because of speculation and their
11 inability to do what they were supposed to do. This
12 case didn't come up last week, this case has been
13 around for three years, four ye -- three years. And
14 this isn't their first rodeo, they knew that they had
15 to present this evidence to the Court. And on the past
16 one paystub when he was a member of the Union for a
17 year and a half before, and they don't bring anybody in
18 to prove it that tells me something. That tells me
19 that they didn't have enough proof, and that the only
20 proof that they had was grasping at a straw which thank
21 goodness for them he still had one paystub.

22 And so for that Your Honor, I'm moving to
23 dismiss the causes of action for lost wages on legally
24 insufficient -- because it's legally insufficient as a
25 matter of law to get to a jury on that. Because in

1 order for them to make a determination about that, it
2 is -- and -- and Caldwell talks about that, pure
3 speculation on the part of the jury. And we can't have
4 speculation, we can't have them guessing. We can't
5 have them saying this would be wonderful, because Mr.
6 Munoz can't work anymore. Doesn't work that way. His
7 attorneys have the burden of proof to show to the jury
8 how they came -- because they're going to come to some
9 kind of a number. They're not going to say well, guess
10 what he can have whatever he wants or you give him what
11 you feel. They're going to have to prove some kind of
12 a number, and that jury has to make a determination.
13 And I don't think they're going to have enough facts at
14 all to even make a decision, except whether or not do
15 they like Mr. Munoz or not, or don't like the
16 defendants. And that's not what we do here on economic
17 loss. Thank you Your Honor.

18 MR. CLARK: Judge, on -- on this motion we
19 had filed a -- it's true it's not our first rodeo, and
20 meaning we get this issue a lot. And we have a brief
21 that we always submit on it, and we submitted it on
22 this case and we rely upon that.

23 And I'll just read one of the cases that we
24 cited in the brief was Hawkins. It's an unpublished
25 Appellate Division decision by Judges Shebell, Skillman

1 and Kleiner, and it's 1995 West Law 378462. And the
2 court says at page 9, and the quote I'm giving they
3 cite the published decisions. Defendant's requirement
4 that plaintiff produce documentary evidence of her net
5 income prior to the injury is without authority.
6 Plaintiff's testimony alone was sufficient to establish
7 her monthly net income. And then it cites to the Ruff
8 vs. -- the Ruff v. Weintraub case, 105 N.J. 233 at
9 236, Supreme Court 1987. It cites to the Cross case 60
10 N.J. Super. 53 at 72, it's an Appellate Division case
11 where cert was denied in 1960. And it also cites to
12 the case defendant relies upon, which is Caldwell v.
13 Haynes, 136 N.J. 422 at 437. The fact that -- and the
14 court continues, the fact that no paystubs or tax
15 returns were presented was a factor for the jury to
16 consider as to the weight to be given to plaintiff's
17 claim, and defendant was free to explore plaintiff's
18 net income on cross examination and through discovery.

19 And then the court goes on similarly, and
20 because this goes to the argument -- one thing I would
21 -- I would just note about wage claims is there an --
22 there is an inherent speculative nature to just about
23 every wage claim. It -- it's particularly poignant in
24 wrongful death cases. A 20 year old dies, let's say he
25 would have worked to you know 65, so he's got 35 years

1 left, so then they're asked to project it out. But he
2 could have died a week later or a month later or he
3 could have lived to be 120 or he could have gotten
4 fired or he could have been disabled. So, there's
5 inherently a speculative nature to wage claims, and the
6 courts recognize that.

7 And it's also somewhat easy to argue and make
8 it sound complicated and confusing, and then based on
9 that complicated, confusing model that's set up, the
10 plaintiff never did that complicated confusing stuff,
11 which has the undertones or the overtone of ergo you
12 need an economic expert. And the court addressed that
13 as well in the Hawkins case. It said similarly,
14 plaintiff was not required to present the testimony of
15 economic or employment experts in order to recover
16 damages for future lost wages. To recover damages for
17 future lost wages, there must be "evidence
18 demonstrating a reasonable probability that the
19 plaintiff's injuries will impair future earning
20 capacity. And then it cites to the 1989 Supreme Court
21 case of Lesniak, which was quoting a 1959 Supreme Court
22 case called Cole, and they said the Supreme Court
23 recognized in Lesniak that a reasonable probability of
24 future lost wages exists, when there is a permanent or
25 lasting injury that would obviously impair the ability

1 to earn.

2 So, we meet that somewhat bare minimum
3 standard set forth in the case law. If we didn't meet
4 that bare minimum standard, the moti -- the -- the
5 motion or -- or strike that. If we had to meet the
6 standard that defense counsel pr -- proposes be the new
7 rule in the State of New Jersey, which is that you need
8 paystubs or something and you have to prove the
9 calculations. Well, in evidence is plaintiff's exhibit
10 30 which is it's -- it's true it's not a whole litany
11 of paystubs and it's not ten years worth, but it is
12 sufficient and it does demonstrate the net wages in it.
13 And defense counsel says well, you should have gotten
14 the paystubs from the last -- from earlier in the year.
15 But the paystub demonstrates the year to date amounts,
16 and it gives the social security.

17 So, I think based on all that there is
18 sufficient evidence for the jury to consider the claim
19 for future wages.

20 MR. GULINO: If -- if the year to date amount
21 is only for Cooper. Now, if they're willing to state
22 that by June he only made \$4,000 a year, because he
23 doesn't know who else he worked for, I'm willing to
24 accept that that he's making \$8,000 a year, because
25 that's the only proof that they have. See, they don't

1 have proof that he worked for anyone else, except his
2 testimony. He only has Cooper, and he worked for
3 Cooper two or three months and made \$4,000. So now to
4 have him say well, here's my paycheck for that week I'm
5 making a 1,000 bucks a week or \$1,100 dollars a week.
6 That is so speculative for a jury to make a
7 determination on both the past and the future. He's 47
8 years old, he's going to have I don't know how many
9 years ahead he's -- they're going to be wanting from
10 this jury and there's no proof there, it shouldn't get
11 that far. They'll be guessing, they're not supposed to
12 guess. They're supposed to take evidence and they're
13 supposed to figure out what is the solution, and what
14 is the proper answer. Not say what do you think he
15 might have done? It doesn't work that way.

16 THE COURT: You're starting to --

17 MR. GULINO: Thank you.

18 THE COURT: -- repeat yourself.

19 So, we're going to take our 15 minute recess,
20 and then I'll give you my decision. And we still have
21 to address the -- the Dr. Decter's.

22 MR. GULINO: Yeah, Dr. Decter we still have
23 to talk about, right.

24 THE COURT: All right, let's take 15 minutes.

25 MR. GULINO: Oh Judge, if you -- if you just

1 want to know my schedule if you don't mind --

2 THE COURT: Sure.

3 MR. GULINO: -- I'm trying to --

4 THE COURT: Sure.

5 MR. GULINO: Okay. I'm trying to get my
6 three guys in and Dr. Decter's testimony, which should
7 be two hours, so we can finish by today, and I don't
8 have to put anything on on Monday.

9 THE COURT: Okay. So, then Monday you'll
10 likely close. And you know depending on what time you
11 finish today, we should -- we'll see whether we get
12 through a charge conference. But if not, then it'll
13 have to be early Monday morning, all right.

14 MR. CLARK: And Judge, if I can just say. I
15 mean perhaps another thing to consider would be to put
16 Decter on vid -- play his video Monday. And finish the
17 charge conference today, because we might want to know
18 what we're charging for the closings.

19 MR. GULINO: I just need to know -- I'm fine
20 with that Judge. My tech -- my tech guy is here, so
21 was going to take your ruling and say --

22 THE COURT: Right, right.

23 MR. GULINO: -- and then make that DVD,
24 that's fine with me.

25 THE COURT: Okay.

1 MR. GULINO: If -- but at least if we
2 could --

3 THE COURT: Fifteen.

4 MR. GULINO: -- have that decided by the end
5 of the day.

6 THE COURT: We (indiscernible)

7 MR. GULINO: Okay.

8 THE COURT: Thank you.

9 (Recess)

10 THE COURT: All right. So, the motion before
11 the Court addresses the plaintiff's claim for lost
12 wages, past and future lost earnings. Having reviewed
13 my notes in this case, having reviewed the relevant
14 case law, plaintiff's counsel is correct inasmuch as
15 with respect to the past lost earnings. I'm satisfied
16 on -- on the record as it presently exists, although
17 it's sparse, perhaps a jury finds that that is evidence
18 that's significant to establish the plaintiff's past
19 earnings and make an award appropriately based upon the
20 evidence presented to them. So, they have not only the
21 testimony of the plaintiff, but now in evidence is also
22 the testimony -- the -- the actual paystub itself
23 indicating the earnings gross, as well as net pay, and
24 the jury can extrapolate from that paystub any earnings
25 the plaintiff may have lost in the past.

1 The case law is clear that there is no
2 requirement that there be expert testimony. In fact,
3 the jury charge specifically addresses and has two
4 different versions of when expert testimony is
5 presented, and when expert testimony is not presented.
6 And, again, although the evidence is not very heavy,
7 it's -- it's -- it's one paystub is -- is -- is not
8 much evidence at all. A jury certainly could make some
9 calculations, based upon what might have been the
10 plaintiff's lost earnings.

11 On the future lost earnings claim, one of the
12 things that was addressed by the court in the Caldwell
13 case was the evidence that the jury considered in
14 ultimately reaching an award, which the reason it got
15 up to the Supreme Court level, was there was some
16 concern about the extent to which the jury had
17 sufficient evidence to make a determination on the
18 evidence that it had presented before it. And whether
19 -- whether or not that the -- much of the jury's
20 calculation of what ultimately was deemed to be an
21 excessive award was based upon some speculation or much
22 speculation, based upon the insufficiency of the
23 evidence that was presented.

24 So, here I searched my notes to determine
25 what evidence is there from which a jury could address

1 the issue of future lost earnings. And while certainly
2 perhaps you could take one paystub and predict that if
3 the plaintiff continued to do that type of work, then
4 perhaps it'd be some mechanism by which you could --
5 could calculate future lost earnings. But in this case
6 there's nothing in the record from -- there's -- the
7 record is devoid of any evidence whatsoever related to
8 the plaintiff's work life expectancy. Quite frankly, I
9 don't think there's anything in the record that
10 addresses necessarily even the plaintiff's that he
11 couldn't -- that he's permanently disabled in any way
12 or that he couldn't do any other type of work. The --
13 the record is -- is very sparse. What does a jury
14 consider in terms of addressing the claim for future
15 lost earnings?

16 And in the Cal -- quoting from the Caldwell
17 case, the court -- the court says a jury should
18 consider a plaintiff's work life expectancy, as well as
19 life expectancy in determining future lost income if --
20 this is in quotes - "if there is appropriate evidence
21 on the subject." So, here there's really -- there's
22 really no evidence on the subject of plaintiff's work
23 life expectancy, there is zero. So, the jury
24 ultimately would be engaging in sheer speculation about
25 here's a plaintiff who worked in the construction

1 industry, he also did some truck driving, he talked
2 about doing some MC'ing I believe, talking about the
3 fact that he loves music. So, there --- there was some
4 testimony about the things that he -- he -- he did, but
5 the question is how long would he have been expected to
6 do that type of work? Could he go back to that type of
7 work? There's just nothing in the -- in the record
8 that addresses that issue.

9 So, on -- on the record before the Court at
10 this time, the future lost claim to pr -- have that go
11 to the jury would be inviting nothing more than
12 speculation as far as what the plaintiff would be
13 losing in terms of his earnings in the future. So, I
14 will grant the motion as to the future lost claim. But
15 as to the past I'm satisfied that there's sufficient
16 evidence in the record that that should go to the jury
17 for determination.

18 All right.

19 MR. CLARK: Judge, may I --

20 THE COURT: Yes.

21 MR. CLARK: -- comment or --

22 THE COURT: Well, I don't need you to comment
23 necessarily, I know you don't like what I've --

24 MR. CLARK: Of course.

25 THE COURT: -- just ruled of course.

1 MR. CLARK: Of course. But I'm not -- I -- I
2 suppo -- I suppose I don't -- I don't want to go back
3 and kind of say oh, no, he said this, he said that. I
4 don't want to do that, Your Honor has reviewed it,
5 you've reviewed your notes. And although we may
6 disagree with I'm -- I'm not going to -- I'm not going
7 to jump at that.

8 But if -- if I may. I just spoke with
9 defense counsel and we did kind of -- we kind of close
10 -- we kind of rested kind of quick, cause we were under
11 the gun. And after he's agreed that we can read in two
12 interrogatory response of the defendants, even though
13 we technically rested.

14 But in that same vein, I'm -- I'm requesting
15 permission to briefly recall the plaintiff to the stand
16 to ask that specific question about how long would have
17 worked, that sort of thing. I mean I think we got
18 sufficient evidence of it in the terms of his work
19 history and his background and how he loved working and
20 -- and his life expectancy is up is in the jury charge.
21 But with regard to his work life expectancy, I'm simply
22 requesting the opportunity to re -- recall him either
23 now or even in rebuttal, because I know that I believe
24 Dr. Decter is going to comment on that. So, I think in
25 fairness you know given the claim and all that, I would

1 respectfully request the opportunity to call him and
2 just ask him really a couple of questions. As I said I
3 think there's a lot in there already on it, but given
4 Your Honor's ruling.

5 MR. GULINO: I -- I obviously object on -- on
6 a recall and all. This case as I said didn't happen
7 yesterday. I mean they knew about this, they
8 resubmitted this claim, and to recall him for these is
9 just not the way it's done, it's unfair to make. As a
10 rebuttal I'm not going to mention it. I mean and
11 rebuttal only goes to what I put on, and -- and all I
12 have is a couple of fact witnesses, and a doctor and
13 that's it. And what I remember I don't think we asked
14 the doctor if he can work again or not work again. I'm
15 pretty sure I didn't, my -- my whole thing was about
16 causation. So, I -- I will strenuously object to that.

17 What -- what -- I wouldn't mind if he wanted
18 to reopen on some of the things with LP Ciminelli. I
19 mean I can have the witness say it. I think one of
20 them was what, were the construction manager and the
21 other one was something else? I -- I -- otherwise I
22 have no objection to that part of what the plaintiff
23 would like to do Judge, it's up to you.

24 THE COURT: All right. So, you're like jack
25 in the box, you -- you -- you have to say something

1 again.

2 MR. CLARK: At least I'm keeping my hands
3 down though.

4 THE COURT: Yes, I appreciate that.

5 So, you -- you certainly can to the extent
6 that there is no objection --

7 MR. GULINO: Only for that -- only for that,
8 not to put the plaintiff back on, not --

9 THE COURT: I heard you.

10 MR. GULINO: -- reopen his case.

11 THE COURT: I heard you.

12 MR. GULINO: Okay, okay.

13 THE COURT: I have no problems hearing you --

14 MR. GULINO: Okay.

15 THE COURT: -- you're very loud.

16 So -- so, to the extent that there's no
17 objection to your request to read in those
18 interrogatories even having been rested, and I don't
19 know that you were under the gun necessarily to rest.
20 Because you know unfortunately a lot of this jury's
21 time has been wasted, and so nobody's shy about that
22 for sure. But in any event which is unfortunate. But
23 so, I'll allow you to read those -- those
24 interrogatories or the answers to them.

25 As far as reopening to allow the plaintiff to

1 testify, I think that that -- that really unfairly
2 prejudices the defense. I mean to wait to now hear not
3 only the arguments that were presented for the Court to
4 rule on it, and then now have you be given the
5 opportunity to supplement the record based upon the
6 Court's ruling I think is not fair to them. So, I
7 won't allow that. However, I am not making any
8 determination on whether or not it's appropriate for
9 rebuttal, based upon what the defense doctor testifies
10 to. All right, okay.

11 We need to -- I might as well just send the
12 jury to lunch at this point. Yes, why don't we just
13 send the jury to lunch. So, they'll come back at -- at
14 1:30, okay. All right, cause we'll -- we will break at
15 12:30. So be mindful of that as we address the
16 deposition testimony of Dr. Decter.

17 So, what I'll do I guess, I don't know
18 whether or not you're consenting to any of the requests
19 made by the plaintiff or we need through all of them.

20 MR. GULINO: On -- on --

21 THE COURT: On Dr. Decter's.

22 MR. GULINO: -- on Dr. Decter.

23 THE COURT: Yes.

24 MR. GULINO: Yes, I can address them, if
25 you'd -- if you'd allow me?

1 THE COURT: Sure.

2 MR. GULINO: He wants to -- the first one is
3 page 33 --

4 THE COURT: Right.

5 MR. GULINO: -- line 13 through 36 --

6 THE COURT: Are there any of them that you
7 are --

8 MR. GULINO: -- line 2.

9 THE COURT: -- consenting to?

10 MR. GULINO: I'm sorry.

11 THE COURT: Are there any of them that you
12 agree should be redacted --

13 MR. GULINO: Oh, that I'll allow --

14 THE COURT: -- or --

15 MR. GULINO: -- that I'll agree to?

16 THE COURT: Right. Oh, we can just go over
17 the ones that you don't.

18 MR. GULINO: Let me -- I'm thinking of one of
19 them Judge, if you don't mind. Most of them I'm going
20 to say no obviously.

21 THE COURT: Okay.

22 MR. GULINO: Let me see if --

23 THE COURT: So, we'll start number 1, and
24 then we'll just go down.

25 MR. GULINO: Okay, yeah.

1 THE COURT: Okay.

2 MR. GULINO: I think that's better Judge.

3 Okay. So, number 1 is 33, line 13 --

4 THE COURT: Through 36.

5 MR. GULINO: I believe Mr. Clark's objection
6 is that I had asked the doctor to speculate as to what
7 could possibly cause this injury, and I didn't. I
8 asked him to explain various terms that were used in
9 the operative report. Particularly, if we start on --
10 on page 33, Judge, it talks about impingement syndrome.
11 We talked about parts of the body, the acromion, we
12 talked about a downsloping acromion. I talked about
13 activities. We talked about what it is that cause not
14 his injury, but the condition that the doctor found.
15 And I don't think that's far afield. And I had asked
16 him to explain what these terms were, and that's what
17 he did. So, I -- I really don't think that what was
18 asked was improper. I do realize Mr. Berenguer did
19 object twice during that exchange, but I don't that
20 what I have asked for was out of the field, especially
21 in the fact that Dr. Helbig talked about the same stuff
22 that -- that Dr. Decter did.

23 THE COURT: Yes.

24 MR. CLARK: Judge, if I may. Cause just I
25 note we had the issue where defense counsel objected to

1 me calling the plaintiff for the issue.

2 I -- I want to note on Dr. Decter that,
3 number one, nowhere in this deposition transcript does
4 he state his reasons -- his opinions are within a
5 reasonable degree of medical probability. There's not
6 the question in the beginning, it's not throughout, and
7 it's not at the end. So, I mean before we get to all
8 these redactions, I would -- I would move to strike the
9 testimony, that question was never asked. And so
10 that's -- that's an important question.

11 MR. GULINO: I -- I think it was impli --
12 implicit that this was within a reasonable degree of
13 medical certainty. I didn't ask him the hypotheticals
14 that we would ask a plaintiff's doctor on the stand,
15 but Dr. Decter was certainly, certainly telling them
16 what his medical opinion was. And it was within a
17 reasonable degree of medical certainty without using
18 those terms. I don't think there's any doubt here in
19 all on that. And -- and if we parse the words, maybe
20 he didn't. No, he's satisfied the requirements. He
21 put them on notice as to exactly his opinion was. And
22 I think the jury can -- can -- make a determination
23 that he did say that.

24 THE COURT: All right. So, that motion was
25 not one that was part of what the Court --

1 MR. GULINO: And that's my other point I'm
2 sorry.

3 THE COURT: That -- that was not something
4 that the Court reviewed nor did I anticipate that, and
5 so I'm not going to address that particular motion at
6 this time. I have just so you now read through the
7 particular portion that are -- have been requested be
8 redacted. And I'm a -- prepared to address the issues
9 related to that. So, in terms of that -- that motion,
10 I'm not going to address.

11 Let's move on to --

12 MR. GULINO: Okay.

13 THE COURT: -- let's through the redactions.

14 MR. GULINO: So on -- yeah, I'm finished
15 arguing on page -- the first -- the first point page 33
16 Judge.

17 THE COURT: Okay. And did you want to be
18 heard on -- on that or I -- as I said I read what your
19 position is and -- but if you want to supplement the
20 record I'll allow you to do that.

21 MR. CLARK: No, as -- as long as you know
22 it's recognized for the record that my -- my brief
23 number 5, which contains my argument of April 26, 2017,
24 can be considered part of the record, that way I don't
25 have to repeat what's in there.

1 THE COURT: Okay.

2 MR. CLARK: S -- some of them I may want to
3 comment on --

4 THE COURT: Sure.

5 MR. CLARK: -- but this particular one I
6 think speaks for itself.

7 THE COURT: Okay.

8 MR. CLARK: Beyond -- you know not -- not
9 commenting on what I already submitted to the court.

10 THE COURT: Okay.

11 MR. GULINO: Okay. The next one is page 43
12 Your Honor.

13 THE COURT: 43, yes.

14 MR. GULINO: Page 43 was talking about that
15 it was speculation and it was outside the scope of his
16 report. Now, during the doctor's direct examination by
17 me, I asked him certain facts that he didn't know
18 about. The plaintiff's employment, which was the
19 biggest one, and so we talked about that. And these
20 are new facts, and it's not speculation, he's basing it
21 upon his experience as a doctor, and I was talking
22 about the fact that you know what he did. And we --
23 and we got into it with Dr. Helbig, the same thing,
24 repetitive stress, and he's a painter and he uses his
25 upper arms a lot, and things like that. So, I don't

1 think it was so far afield, because it was something
2 that the doctor didn't know about when he spoke with
3 the plaintiff and did his IME.

4 THE COURT: Okay.

5 MR. CLARK: Just this whole thing about we --
6 we had submitted a -- an in limine I believe brief on
7 that. But the point of these arguments is that on
8 direct examination of the defense expert, the parties
9 should not be able to say well, Doctor, could it have
10 been from this and could it have been from that and
11 could it have been from something else, maybe it's
12 this, maybe it's that. That's the idea here. Now, I
13 know there was cross examination, which is different,
14 in that -- along those lines. And I think it's a bit
15 more difficult to object to that on cross. But on
16 direct of the doctor to start speculating about those
17 kind of things, particularly when it was clearly
18 outside the report there was noth -- there was nothing
19 about that. That's the nature of my objection on this
20 whole line of thing.

21 And that also goes back to the prior role
22 well, it could be from congenital, it could be from
23 swimming, because he never concludes within a
24 reasonable degree of medical probability that the
25 complaints that he has today, that the positive

1 findings he has today are from any of those things.
2 That's really the basis of all that.

3 THE COURT: Okay. The next one.

4 MR. GULINO: So, the third one Judge is on
5 page 47, line 12-22.

6 MR. CLARK: I'll withdraw that that's fine,
7 we can agree.

8 MR. GULINO: Okay, so that's good.

9 Fourth, 74, line 1. This is from page 74,
10 line 2 through 76, line 5. And this is me going with
11 my doctor through an MRI report, and he also talks
12 about, if I'm no mistaken, I'm asking to explain on the
13 record definitions. I didn't talk about cau -- you
14 know anything else like that. I just wanted him to
15 explain when you read the MRI report and there are
16 certain medical terms that are mentioned, what do they
17 mean? And that's it just to put it in plain English
18 for the jury. It -- it's no backdoor, hearsay or
19 anything like that. He used the MRI report, he read
20 the films, so did Dr. Helbig, he read the films, read
21 the report that's what doctors do, that's what expert
22 medical experts do, they're allowed to depend on
23 hearsay. And this is all he's doing is explaining a
24 medical definition, that's all he's doing.

25 THE COURT: Okay. Your next one.

1 MR. CLARK: Judge, do -- do I need to comment
2 on that at all --

3 THE COURT: You don't have to.

4 MR. CLARK: -- the James vs. Ruiz?

5 THE COURT: Well, if you want to make your
6 argument, make your argument then. Just you're
7 throwing out James vs. Ruiz.

8 MR. CLARK: Yes. If I may, I just -- I just
9 -- I just Googled it and did it, but and I knew. So,
10 I'm just going to read off this. A New Jersey court
11 has banned the practice of expert witnesses improperly
12 testifying about the opinion of other experts during
13 trial. Known as bootstrapping, personal injury lawyers
14 use it to take advantage of expert witnesses, knowledge
15 of other opinions of other experts who are not present
16 at trial, effectively getting in evidence that was not
17 approved prior to the start of the trial. And so
18 basically that used to happen a lot, but with James vs.
19 Ruiz the law is very clear that you can't -- you can't
20 do that, they have to testify off that. So, I'm just
21 reminding you know the Court, and it's also -- it's all
22 in there in my papers. Thank you.

23 MR. GULINO: Number 5, Your Honor, is page
24 78, line 1 through page 80, line 15. First of all, if
25 I may tell the Court that -- the doctor submitted a

1 report based upon that which was exchanged with the
2 plaintiff's attorneys, which was objected to by the
3 plaintiff's attorneys, and which this court and
4 particularly this judge denied their motion. Your
5 Honor denied this motion, because they want -- they
6 were trying to bar his expert addendum report and
7 that's what this comes from, and you denied it, you
8 allowed it in. I don't know if the Judge wants to see
9 it, but it's your finding.

10 THE COURT: Sure.

11 MR. GULINO: There is some language that you
12 wrote in at the end.

13 MR. CLARK: Do you think after this trial the
14 Court will be surprised about the language she wrote in
15 that order?

16 MR. GULINO: What was that?

17 MR. CLARK: Do you think after this trial
18 she'll be surprised about the language she wrote in
19 that order?

20 MR. GULINO: You get along with people better
21 the longer you know them.

22 THE COURT: I see why I wrote that.

23 MR. GULINO: Impressions, right.

24 THE COURT: That is my handwriting.

25 MR. GULINO: And -- and my other argument

1 Your Honor is this. And -- and during that entire
2 time, this de bene deposition in lieu of trial
3 testimony there were no objections. So far the ones
4 that we've been talking about Mr. Berenguer objected,
5 but there's no objection here.

6 THE COURT: Okay. The next one 78, page 78,
7 line --

8 MR. GULINO: Six is page 82.

9 MR. CLARK: Oh, I'm sorry --

10 MR. GULINO: Oh.

11 MR. CLARK: -- it was 78 --

12 THE COURT: Yes.

13 MR. CLARK: -- can I just -- we're still on
14 that 78.

15 THE COURT: Yes.

16 MR. CLARK: Yeah, just briefly. That
17 objection number 5 in my item it was not that it was
18 outside the scope of the report, it was the James vs.
19 Ruiz. And Mr. Ber -- Berenguer had a ongoing objection
20 in various parts of the deposition about that idea, so
21 we note that.

22 THE COURT: Okay, next.

23 MR. GULINO: The next one Your Honor is
24 number 5, and that's page 82, line 4 through page 92,
25 line 25. In this particular instance the doctor was

1 testifying about the fact that he read an MRI film,
2 which is in his reports, and all he did is what he
3 found himself in reading the MRI films. And the
4 question right there is on page -- line 20 of page 82,
5 I said,

6 Q "Doctor, let me ask you this. Doctor, did you
7 use the MRI report and the films that you reviewed of
8 January 12th, 2015 to come to your opinion?"

9 This has to do I think with the lumbar -- I'm
10 not sure is it the lumbar that we were looking at. And
11 so all I did was ask him what his review was, I don't
12 think it's hearsay or speculation.

13 MR. CLARK: It's clear under James vs. Ruiz
14 it's okay to say I reviewed the film and this is what
15 it shows. But like I'm looking at page 83, question
16 line 5, I'm looking at this MRI report and it says
17 there is moderate to severe et cetera, et cetera, et
18 cetera, and that is exactly what James vs. Ruiz meant
19 to bar. They're backdooring in the opinion of the
20 radiologist expert without bringing the radiologist in.
21 When they came out with James vs. Ruiz, you had to send
22 your films to the expert. And they did send the films
23 to the expert and he commented on those films. We are
24 requesting that he not be permitted to comment on the
25 report, which is --

1 THE COURT: Did Dr. Helbig not comment on the
2 radiologist's report?

3 MR. CLARK: On -- in my recollection it was
4 only on cross examination. I don't as a practice do
5 that anymore, that was on cross examination not on
6 direct, he was going off the films. And yes, it was
7 just on -- it was on cross examination that that
8 happened.

9 THE COURT: So, is it -- is there a dispute
10 as to what's in the radiologist's report by both -- by
11 the different doctors?

12 MR. CLARK: No, there's no a dispute as to
13 what the report says, there's a dispute as to whether
14 or not the defense expert on direct examination should
15 be permitted to backdoor in the opinion of the
16 radiologist that read the report and concluded it shows
17 this.

18 THE COURT: But are the conclusions of the
19 radiologist something that's disputed by the doctors?
20 In other words, in James vs. Ruiz the concern was that
21 if you had -- if you had testimony from two different
22 doctors who -- plaintiff and defense each having a
23 different opinion, and then in order to sort of break
24 the tie you then bring in the testimony of a non-
25 testifying radiologist who happens to agree with one of

1 the doctors as sort of a tiebreaker, that was -- that
2 was much of the concern in -- in or the primary concern
3 in James vs. Ruiz.

4 MR. CLARK: I'm just reviewing basically his
5 report to refresh my memory about what -- about that
6 question, cause I think that's an important question.
7 Judge, I -- I can't without frankly going through the
8 testimony and listening to it answer that question
9 absolutely -- within you know an absolute direction.
10 But what I can -- what I can answer in an absolute way
11 is that our Dr. Helbig's interpretation of those MRI
12 films did not rubber -- rubberstamp or directly match
13 the interpretation on the MRI report. I mean that I
14 can definitely say. What he felt was important and
15 what it said exactly, I -- I would say that they did
16 not -- they did not match.

17 I mean one thing that does jump out is --
18 well, I -- I won't go in -- I mean the radiation -- I
19 mean I won't go in, but that cancer radiation thing. I
20 mean he didn't really testify about that. But I do --
21 so, that's the best I can say Judge.

22 THE COURT: Okay.

23 MR. CLARK: But -- but I think beyo -- like
24 beyond that too I don't believe they match, and when we
25 read this testimony the expert is getting like more

1 bolstered by the MRI re -- by the opinion of the non-
2 testifying doctor. So, you have tiebreaker issue, but
3 you also have its super that, like it's a -- it's a
4 bolstering issue as well. So, we don't have -- we
5 don't have a problem telling what -- what the -- what
6 his interpretation of the film is. But when he
7 bolsters and ties it to the MRI report, I think that's
8 problematic even without kind of analyzing the
9 testimony to direct -- directly and fully answer Your
10 Honor's first question.

11 THE COURT: Okay.

12 MR. GULINO: There's one more I think Judge.

13 THE COURT: Sure.

14 MR. GULINO: This one is from page 93, line 1
15 through page 106, line 15, and that one deals again
16 with his review of the MRI film. And I asked him, he
17 read the films of the lumbar spine, and he talked about
18 his review of the film and I asked him questions
19 concerning that. What did they mean to him? And that
20 was also subject to that -- that motion before you, and
21 his addendum and the report. So, I'm not -- and
22 actually, I did here on page 106 I asked him, I said,

23 Q "Do you have an opinion within reasonable
24 degree of medical certainty whether or not the lower
25 back claim that he is now claiming was caused by the

1 accident?"

2 So, I -- I did at least on that one. But
3 this is really just the same thing. We -- we spent a
4 lot of time at this deposition on the lumbar spine and
5 his review of the films of the lumbar spine. And that
6 was subject to a motion, and it was because of a report
7 that was exchanged. And I think he's entitled to do
8 that.

9 MR. CLARK: Judge, just I know you're reading
10 something, but --

11 THE COURT: Yes.

12 MR. CLARK: -- if Your Honor were to make a
13 ruling that it -- you know he can talk about what he
14 saw in the films and not what the MRI report say. I
15 think we could probably go through and make those par
16 -- not without Your Honor having to go through ever
17 page and line in that. Cause I know there is a lot of
18 testimony that's encompassed in that idea, cause it was
19 kind of intermingled a bit.

20 THE COURT: Okay. So, on the first page 33,
21 lines 13 through page --

22 MR. CLARK: I'm sorry Judge, I can't hear
23 you.

24 THE COURT: Page 33. On the first objection
25 page 33, line 13 through 36, line 2.

1 MR. GULINO: So, it's in or out, I'm sorry?

2 THE COURT: No, I'm going through, I haven't
3 said anything yet.

4 MR. GULINO: Oh, okay.

5 THE COURT: Okay.

6 MR. GULINO: Cause I want to.

7 THE COURT: Okay. So, as I reviewed the
8 specific portion of Dr. Decter's testimony in the
9 transcript and reviewed that -- and I've done this or I
10 did this rather for the entire application before the
11 Court at this time to redact this -- the -- the
12 videotape deposition of Dr. Decter, because I thought
13 it was important to do so inasmuch as a jury will have
14 to make or give considerations to the opinions offered
15 by the two experts. And when -- where they contradict
16 it's important to allow the jury to have sufficient
17 information to address which experts they choose to
18 believe or not believe. So, to the extent that there
19 was testimony albeit by way of cross examination of Dr.
20 Helbig, the fact of the matter is the jury has now
21 heard the cross examination of the expert related to
22 the area discussed in -- in the lines that I have just
23 indicated. And to the extent that really now what's
24 happening is here is on direct the doctor's being
25 addressed -- asked to address these very same issues,

1 and what extent to any these factors played into his
2 decision ultimately is -- is something that the jury
3 should -- should consider.

4 I looked at the portions of the transcript
5 addressing where -- where the doctor talks about things
6 like swimmers, and base -- people that play baseball
7 and football and things like that. The fact of the
8 matter is I found those merely to just be sort of
9 examples of how he was trying to make the point that he
10 was trying to make. So, I don't find it to be such
11 that there is a need to redact that testimony. So, the
12 objection as it relates to that is -- is overruled.

13 So, 43 -- let's see, page 43, line 11 to 24.
14 All right. So, in this case I didn't find that there
15 is a need to redact this testimony either, again, to
16 the extent that this was testimony that was presented
17 in the case and, quite frankly, had this not been done
18 by way of a videotaped deposition, there is always the
19 ability to ask an expert to assume certain facts that
20 are in evidence. And so to the extent that there was
21 testimony related to and, in fact, some cross
22 examination on this issue, certainly the jury can
23 consider the questions posed here in that regard. So,
24 that objection is overruled.

25 74.

1 MR. CLARK: Jumped to 4.

2 THE COURT: 74, cause we skipped 3, 74. Here
3 again I don't -- I think there's often times the
4 argument that uses James vs. Ruiz as a basis to exclude
5 cross examination related to statements of non-
6 testifying doctors. And I don't think that James vs.
7 Ruiz necessarily stands for that proposition, because
8 to the extent that testifying doctors utilize reports
9 or findings of other non-testifying doctors to -- to
10 either form an opinion or consider a report and reject
11 what's contained within that report. The jury is
12 allowed to consider that. What is -- what was of
13 concern in James vs. Ruiz, and should be a concern for
14 this court is to the extent, and this goes for anywhere
15 throughout this -- the motion to have this transcript
16 redacted, to the extent that the doctor discusses the
17 specific findings of the radiologist, that area should
18 -- should -- there should be redactions. But the mere
19 fact that the doctor considered the report of the
20 radiologist is not necessarily in and of itself
21 something that's not admissible.

22 What's discussed in this particular portion
23 of the -- the transcript, includes things like you know
24 what are these medical terms, if you will, explain them
25 for the jury. And I think to the extent that -- that

1 they were discussed, it's -- it's certainly something
2 that's fair -- fair game for the expert now to explain
3 what those things mean. And I think although -- I
4 think the -- the line of questioning starts with and
5 you see the area where it says findings, it seems to
6 sort of be addressing the findings of the radiologist,
7 although I don't think my recollection of -- okay, here
8 we go, down to the end where it says I think the
9 radiologist is just reporting the facts -- the fact
10 that he does not see any fluid. That -- that portion I
11 don't think belongs, there shouldn't be anything about
12 what --

13 MR. CLARK: Can you ta --

14 THE COURT: -- the radiologist necessarily
15 was expressing. So, that has to be redacted out.

16 MR. GULINO: You want to redact part of that
17 Judge. Then --

18 THE COURT: The -- the portion --

19 MR. GULINO: -- can you just tell me where?

20 THE COURT: -- the portion related. I think
21 the radiologist is just reporting the facts -- the fact
22 that he does not see any fluid. So, I'm at line 20.

23 MR. GULINO: Re -- redact that?

24 THE COURT: Yes.

25 MR. GULINO: 17 to 22 --

1 THE COURT: 17 --

2 MR. GULINO: -- on page 75?

3 THE COURT: Yes.

4 MR. GULINO: Okay, I'll redact that.

5 THE COURT: Okay.

6 MR. GULINO: Lines -- oh -- 75, lines 17 to
7 22, I'm sorry.

8 THE COURT: 22.

9 Okay. So, 78 --

10 MR. GULINO: Yeah, 75.

11 THE COURT: -- 8. Okay. So, 78, line 1
12 through 80, line -- through page 80, line 15. Again,
13 this is an argument that primarily relies upon James
14 vs. Ruiz, and certainly the doctor is permitted to
15 review and examine statements made by non-testifying
16 doctors, and making some determinations as to what, if
17 anything, that opinion or finding does in terms of this
18 doctor's opinion. Here I didn't find that there was
19 necessarily backdooring statements of non-testifying
20 doctors. In fact, as indicated the doctor referenced
21 the fact that he himself had looked at the -- the MRI
22 of the lumbar spine, and proceeded to make some -- some
23 comments with respect to that. So, I'll overrule that
24 objection.

25 Page 82, line 4 through page 92, line --

1 MR. GULINO: Judge, just so I'm clear. On
2 number 4 we're going to redact page 75, on number --
3 point 5 everything is in?

4 THE COURT: Yes.

5 MR. GULINO: Okay.

6 THE COURT: Page 82.

7 MR. GULINO: Redact below, okay. Now, we're
8 looking at page 82, okay.

9 THE COURT: Okay, and I think the same -- the
10 same reasoning goes with respect to -- with respect to
11 this particular objection as I have indicated before.
12 So, the objection as to this is also overruled.

13 93, page 7. And the same logic applies to
14 the 93 -- page 93 rather, lines 1 through 106.

15 MR. CLARK: Judge, can we have the objections
16 redacted out, since the --

17 THE COURT: The objections you can redact out
18 for sure, yes.

19 MR. GULINO: I'm sorry.

20 THE COURT: You can go through and where
21 there is objections, you can go --

22 MR. GULINO: And redact.

23 THE COURT: -- and redact out the objections.

24 MR. GULINO: So, anytime Laz from 1 -- 93 to
25 106 objected?

1 MR. CLARK: It's throughout.

2 THE COURT: Throughout. So -- so, wherever
3 there is an objection can you just redact that out? In
4 other words --

5 MR. GULINO: Oh, oh, the word objection.

6 THE COURT: -- where the attorney says
7 objection, yes.

8 MR. GULINO: Oh, okay, between 93 and 106,
9 okay.

10 THE COURT: Yes. Throughout, so if there is
11 an objection just take it out.

12 MR. GULINO: Oh, okay.

13 THE COURT: So --

14 UNIDENTIFIED SPEAKER: I got it.

15 THE COURT: You got it.

16 MR. GULINO: For all of them, you got it?

17 UNIDENTIFIED SPEAKER: I got it.

18 THE COURT: He's -- he's back there nodding.

19 MR. GULINO: All right, anytime there's an
20 objection.

21 THE COURT: Yes.

22 MR. GULINO: So, that's in. And 82, Judge,
23 line 4 to 92, that was all in too as well?

24 THE COURT: That's in, yes.

25 MR. GULINO: Yes. So, the only one we're

1 going to really redact is page 75, and then any time
2 there was an objection.

3 THE COURT: Yes.

4 MR. GULINO: Just -- just -- I know you want
5 to break Judge, I figured we can get this guy out of
6 here. I know I had made a motion before you to exclude
7 certain things and I just want to make sure that we're
8 on the same page, so that I can tell the tech people.
9 So, you are allowing in the testimony, and I'll refer
10 to it on the record on page 115 to -- you're allowing
11 anything in that he had his business, CMO Exam Works I
12 believed. We had an arg --

13 THE COURT: Oh, yes.

14 MR. GULINO: -- you know we -- we discussed
15 that?

16 THE COURT: Yes, I think we sort of -- I
17 don't know that we delved into it with -- but I think
18 there was some arguments related to it, and I think I
19 indicated, at least for purposes of the opening on a
20 preliminary basis --

21 MR. GULINO: Oh, okay. Do you want to -- can
22 we renew them --

23 THE COURT: -- that --

24 MR. GULINO: -- or do you want to wait till
25 after lunch?

1 THE COURT: No. I mean so -- I mean I'll
2 hear you now --

3 MR. GULINO: Yes.

4 THE COURT: -- because I think I'm prepared
5 to address.

6 MR. GULINO: Thank you Your Honor.

7 THE COURT: So -- so, I'll tell you
8 preliminary where my thoughts were, and maybe you can
9 gear your arguments accordingly. So, the cross
10 examination related to the doctor's affiliation with
11 Exam Works, his having sold the practice, all of that
12 rela -- the questions related to that are fair game, it
13 goes to the financial bias of the expert potentially.
14 But any questions related to the doctor having been
15 censored, and I don't recall whether it was another
16 board or whatever that was. My recollection -- I don't
17 have a clear recollection as I sit here right now what
18 that was.

19 MR. GULINO: There -- there were -- if -- if
20 I'm not mistaken Judge, we had -- I had two objections
21 concerning his compensation. One had to do with Exam
22 Works, and then the other one had to do with his yearly
23 income.

24 THE COURT: With his year, okay. So, as far
25 as his yearly income is concerned, I don't see how you

1 -- how you separate out. And -- and I recall your
2 arguments being that -- that it was their question and
3 perhaps they would have -- could have -- should have
4 phrased it differently. But the question becomes
5 whether or not what you're asking is -- is the evidence
6 so prejudicial that it you know I just don't think that
7 it is.

8 But you want to make any further --

9 MR. GULINO: Yes please.

10 THE COURT: -- argument on it.

11 MR. GULINO: Please, thank you.

12 Yes, I think you know asking him how much
13 money he makes a year total income is one thing. I
14 could understand if they said to him how much money or
15 what is the percentage of your income attributable to
16 litigation, because the doctor still practices as an
17 orthopedic surgeon. He still performs shoulder
18 surgeries and knee surgeries. And so when the jury
19 sees this figure, they're -- they're saying look at all
20 the money this man makes and it must be all with
21 litigation, and it's not. I mean I --

22 THE COURT: But I think --

23 MR. GULINO: -- I think they had the
24 obligation, they were the ones who were questioning him
25 not me.

1 THE COURT: Right. But I think that it go --
2 if you look further down in the questioning my
3 recollection is that it was clarified further to
4 indicate how much or what portion of his earnings were
5 related to litigation. So, it doesn't stop merely at
6 what's your total income, and then somehow they're left
7 to speculate that all of that comes from litigation. I
8 think further down in the questioning they -- they sort
9 of break it up.

10 MR. GULINO: No. Well, I think what he did
11 was there was a 98 percent that's mentioned. But
12 that's talking about what's the percentage of who you
13 testify on behalf of, that's different then how much
14 money you make.

15 THE COURT: Well, that's --

16 MR. GULINO: That's on page 119. It starts
17 on 118 and it starts with line number 23, and they're
18 talking how many times he testifies.

19 Q "And what percentage of those times that you
20 testified in court was on behalf of defendants, Doctor?

21 A For the third time it's 98 percent of my medical
22 legal work, sir, is on behalf of the defendants."

23 THE COURT: My inclination was not to redact
24 that. You can move on to your next argument, so I can
25 get my staff to lunch. So, but I'll take a look at it

1 again.

2 I'm prepared to hear you on the --

3 MR. GULINO: Oh, on this?

4 THE COURT: Yes.

5 MR. GULINO: On the total income again?

6 THE COURT: Oh, no, no. No, more on that

7 please.

8 MR. GULINO: Oh, on the last one?

9 THE COURT: Yes.

10 MR. GULINO: Oh, the la -- all right. So,

11 the last motion I made --

12 THE COURT: What is that noise?

13 MR. GULINO: -- had to do with the fact

14 that --

15 MR. CLARK: It's (indiscernible)

16 THE COURT: Go ahead.

17 MR. GULINO: -- that the doctor was

18 questioned by Mr. Berenguer concerning whether or not

19 he -- there was a grievance filed against him, and it

20 had to do with the American Academy of Orthopedic

21 Surgeons. And the doctor admitted to that, because he

22 testified against a fellow member of that fraternal

23 organization. And I believe I had submitted with my

24 motions papers to the Court that this issue has been

25 decided three times previously the trial courts in this

1 State, I don't believe it's ever gone on appeal. I
2 believe two of the cases were in Essex County, one of
3 them might have been in Hudson County, and all of the
4 doctors -- all the judges agreed that this is an
5 organization, it is not a medical body or a
6 governmental body that has power and authority to do
7 that, and basically it's just a fraternity fight. And
8 that, therefore, there's no probative value and much
9 prejudicial value. And so all three of the times that
10 it's come up that I saw it's been excluded.

11 THE COURT: Okay. I have already indicated
12 my inclination to not allow that line of question. And
13 I think I indicated --

14 MR. GULINO: Okay.

15 THE COURT: -- to Mr. Clark I would allow you
16 to be heard on that if you wanted to be.

17 MR. CLARK: I've -- I've already been heard
18 on it earlier in -- in the trial, and at that point I
19 said it wasn't for testifying against another doctor,
20 it was for giving false testimony in an injury case.
21 And it was the Board of the American Association of
22 Orthopaedic Surgeons, and I think it goes to
23 credibility. But I know we're timed, so I'm not going
24 to comment further.

25 THE COURT: Okay. So, that portion of the

1 testimony will be redacted. I'm satisfied that that
2 even -- even assuming that it was a censor for
3 testifying falsely, the fact of the matter is -- I mean
4 we can use just about every and everything to say that
5 it affects someone's credibility. But we don't -- what
6 we don't do is simply say that perhaps if he did
7 testify falsely on one occasion, that we should assume
8 that he's now testifying falsely on this occasion or
9 that we should give any less weight to his testimony
10 because of it. We don't sort of based upon someone's
11 prior bad act, for lack of a better word, now say this
12 is a reason now not to believe what they're saying to
13 you now. So, that portion would be then.

14 MR. GULINO: I was just going to put it on
15 the record, if you don't mind Judge. So, what we will
16 redact is page 119, line 4 through 122, line 3.

17 THE COURT: Okay.

18 MR. GULINO: You guys got it, all right? The
19 last thing is going to be Mr. Berenguer saying I have
20 nothing further after the last question.

21 THE COURT: Okay.

22 MR. GULINO: Okay.

23 THE COURT: All right.

24 MR. GULINO: All right, thank you Judge.

25 THE COURT: And then as far as the -- the

1 compensation issue, I'll take a look at it again, but I
2 -- my staff needs to have lunch. So, I'll --as I said
3 over lunch hour I'll take a look at it. But my
4 inclination was not to redact that portion, all right.

5 So, I'll see you back in an hour.

6 (Lunch)

7 THE COURT: Okay. So, we're back on the
8 record.

9 I did look at the testimony of Dr. Decter
10 related to his compensation, and as I read the
11 testimony he appears to be saying that the total amount
12 of his compensation comes from Exam Works, and he was
13 not able to make any break down as to what part of that
14 comes from depositions, how much from testimony, he
15 indicates that's the total number. So, with that I
16 don't see any need now to redact it. That's his
17 testimony of how much he makes, and that amount
18 includes what he makes doing testimony, depositions,
19 and things of that sort, so it's all in that
20 litigation. All right, so that's that.

21 So, for this afternoon you have?

22 MR. GULINO: This afternoon I have three
23 witnesses. They're not going to be very long Judge,
24 so --

25 THE COURT: Okay.

1 MR. GULINO: -- hopefully we'll be done by
2 today. And then my plan is with your permission Monday
3 morning I put on Dr. Decter's video.

4 THE COURT: Okay.

5 MR. GULINO: It was two hours, now it's going
6 to be maybe an hour and 55 minutes or something.

7 THE COURT: Okay.

8 MR. GULINO: And I'm done.

9 THE COURT: Okay. All right, so we can get
10 started, and then we could release the jurors after
11 your witnesses that you're putting on, and then do our
12 charge conference.

13 MR. GULINO: Sure.

14 THE COURT: Okay.

15 MR. CLARK: Judge, I just want to just put
16 two things on the record if I can?

17 THE COURT: Sure.

18 MR. CLARK: If it's all right to try to ward
19 off sidebars the rest of today. One is with regard to
20 -- and I spoke to defense counsel about this, so he's
21 aware, I just wanted to alert. When Bob Beardsley
22 testifies, I just want him to prevent him from saying
23 what other peoples' opinions were about the hazard, you
24 know he talked to people, cause that kind of things in
25 his deposition. I'm just alerting to that.

1 And then the second thing we had made a
2 motion about -- in limine motion about hey, there's
3 been no prior accidents on the jobsite, OSHA didn't
4 issue a citation, and we talked about that.

5 So, those are the two issues I want to flag
6 for -- for these witnesses that are coming up that's
7 all.

8 MR. GULINO: No problem Judge. I -- I -- if
9 you can remind me before he gets on the stand, cause
10 he's not going to be the first guy. I will make sure I
11 talk to him --

12 THE COURT: Okay.

13 MR. GULINO: -- and make sure that doesn't
14 happen.

15 THE COURT: Sure.

16 MR. CLARK: And we were just going to read in
17 three interrogatory responses. Two from defendant
18 Paino, and one from LP Ciminelli.

19 MR. GULINO: Yes, you're going to read the
20 interrogs, fine.

21 THE COURT: You're going to do that first,
22 and then, okay.

23 MR. CLARK: Judge, I'm just going to run to
24 the bathroom real quick. I'll -- I'll be back before
25 they're seated. Is that all right?

1 THE COURT: As long as you're back, otherwise
2 we're going to get started without you.

3 MR. CLARK: Yeah, that's fine. You can get
4 moving --

5 THE COURT: Okay.

6 MR. CLARK: -- that's fine.

7 THE COURT: You're in good hands.

8 MR. CLARK: All right.

9 THE SHERIFF'S OFFICER: Jury entering.

10 (Jury enter courtroom)

11 THE COURT: All right, thank you, please be
12 seated.

13 All right. Members of the jury, thank you so
14 much for your patience. Despite many of the delays we
15 are nearing the end, so have no fear, all right.

16 So, on the plaintiff's case -- all right, so
17 the plaintiff rested, but I believe there are some
18 additional answers to interrogatories that the
19 plaintiff wants to read into the record or plaintiff's
20 counsel wants to read into the record.

21 So, I'll just tell you briefly what an
22 interrogatory is. And it is essentially another way in
23 which attorneys can get information about the case.
24 Remember I told you they can use depositions, which is
25 that question and period. Well, an interrogatory is

1 essentially the same thing, a question and answer, but
2 it's in written form. So, the attorney submits written
3 questions, and the persons that's asked to respond
4 submits a written response, and the response is done
5 with a certification that the answers that were
6 provided are true and accurate, all right.

7 So, counsel.

8 MR. BERENGUER: Good afternoon ladies and
9 gentlemen, now I'm reading from the supplemental
10 interrogatory of defendant, Paino Roofing. These
11 interrogatories were signed by Stephen Paino, the
12 president of Paino Roofing, and they were signed under
13 oath December 11, 2015.

14 Q "S-1, please state the name and address of
15 the person, firm or corporation which had the
16 responsibility or duty for the design, construction,
17 inspection and/or maintenance of the area in which the
18 accident in the complaint took place?"

19 The response, "Defendant states that LP
20 Ciminelli had overall supervisory responsibility for
21 the jobsite."

22 Q "S-10, who was the general contractor on the
23 job in question?"

24 The response, "Defendant states LP Ciminelli
25 was the construction manager at the premises."

1 Now, I'm going to read from the supplemental
2 interrogatories of LP Ciminelli. These were signed by
3 a LP Ciminelli representative on December 16, 2015.

4 Q "S-10, who was the general contractor on the
5 job in question?"

6 Response, "LP Ciminelli was the construction
7 manager at the premises."

8 That is all.

9 THE COURT: Okay. All right, so we'll turn
10 now to --

11 MR. GULINO: Thank you Your Honor.

12 THE COURT: -- the defense, Mr. --

13 MR. GULINO: At this time would you, Officer,
14 the defendants call Joel Mella to the stand.

15 THE COURT: He needs to be sworn in.

16 THE SHERIFF'S OFFICER: Do you use the Bible?

17 THE COURT: Is there a Bible over there? It
18 should be over here. You've been here too long.

19 THE SHERIFF'S OFFICER: Place your left hand
20 on the Bible, raise your right hand. State your name,
21 and spell your last name?

22 MR. MELLA VELASERO: Joel Mella Velasero
23 (phonetic).

24 J O E L M E L L A V E L A S E R O, DEFENSE WITNESS,
25 SWORN

1 THE SHERIFF'S OFFICER: Okay, just keep your
2 voice up.

3 THE COURT: You can be seated.

4 DIRECT EXAMINATION BY MR. GULINO:

5 Q Good morning Mr. Mella --

6 A Good morning.

7 Q -- or good afternoon.

8 A Good afternoon.

9 Q Do me a favor keep your voice up, okay.

10 A No problem.

11 Q And did we meet before today?

12 A Yes.

13 Q And have I met you in the last couple of
14 days?

15 A Yes.

16 Q And you've been in the courthouse?

17 A Yes.

18 Q How come?

19 A Been waiting to testify, three days I've been
20 sitting waiting wasting time.

21 Q All right. Were you subpoenaed to appear
22 today?

23 A Yes.

24 Q Were you subpoenaed by my office?

25 A Yes.

1 Q Were you subpoenaed by the plaintiff?

2 A Yeah. Yes.

3 Q Now, are you employed?

4 A Yes.

5 Q By whom?

6 A Cooper Plastering.

7 Q What kind of business are they?

8 A It's a construction company, plastering company.

9 Q And how long have you been employed by them?

10 A Well, I met him in 2005, but I started with him
11 back 2014 in the Meadowlands.

12 Q In 2013, in June were you employed by them?

13 A Yes.

14 Q And on the accident day of June 25th, 2013,
15 were you employed by them?

16 A Yes.

17 Q What was your title or position with Cooper
18 on that day?

19 A Regular work.

20 Q Now, did you become a foreman at some point
21 after that?

22 A Yeah, 2014.

23 Q And are you presently a foreman now?

24 A Yes.

25 Q Now, were you working for Cooper at the

1 Meadowlands Racetrack on June 25th, 2013?

2 A Yes.

3 Q And when you first started at that project,
4 did you undergo an orientation?

5 A Yes.

6 Q And was the orientation conducted by LP
7 Ciminelli?

8 A Correct.

9 Q And as part of the orientation were you given
10 certain instructions?

11 A Correct.

12 Q And were one of the instructions concerning
13 accident reporting?

14 A Correct.

15 Q What was your understanding of the duty of
16 the workers on accident reporting?

17 A If you get hurt, you report it the same day.

18 Q And is there a certain time period, an hour,
19 two hours, three hours, something like that?

20 A No, as soon as you get hurt you go right away.

21 Q Okay. Were you -- were you -- also at the
22 orientation, did they have any safety instructions,
23 things like that or classes or --

24 A Yeah, they give you safe -- well, he -- he tells
25 you instruct, he tells you don't do this.

1 Q What was the -- the overall job of Cooper at
2 the Meadowlands, what were you guys doing?

3 A We was doing EFIS, it's a system, it's like
4 stucco.

5 Q And stucco is on walls?

6 A On walls.

7 Q And is that the kind of stuff that -- that is
8 not smooth if you know what I mean or is it smooth
9 stucco?

10 A Well, the finish product is not smooth --

11 Q Okay.

12 A -- you know.

13 Q And the work that you would generally doing
14 was it inside or outside?

15 A Everything outside.

16 Q Everything was outside. Do you know the
17 plaintiff, Washington Munoz?

18 A Yes.

19 Q And were you one of his co-workers on the
20 date of the accident?

21 A Yes.

22 Q Were you with him at the time of his
23 accident?

24 A Yes.

25 Q What time did it occur?

1 A From 10:00 to 11:00, it was the morning from 10:00
2 to 11:00.

3 Q In the morning?

4 A Yeah.

5 Q Okay. And was there anyone else from Cooper
6 besides you and Mr. Munoz?

7 A There was another guy named Jose Rodriguez
8 (phonetic).

9 Q Jose Rodriguez. And are you a Union -- Union
10 member?

11 A Yes.

12 Q And Mr. Munoz is a Union member?

13 A Yes.

14 Q And Mr. Rodriguez?

15 A Correct.

16 Q And all -- was it Local 29?

17 A Correct.

18 Q That the Plasterers Union; right?

19 A Correct.

20 Q So before the accident, did the three of you
21 have someplace you were supposed to be going?

22 A Right.

23 Q What were you doing?

24 A Well, we was taking material going up to the roof,
25 we was working on the roof. I was working on the roof,

1 we went out, walked with tools and material up to the
2 roof. That's what we were -- we started there, that
3 was our first move early in the morning --

4 Q Okay.

5 A -- the roof. We didn't have nowhere else to go,
6 we just started working on the roof. So, that was our
7 major first -- first stop before anything was the roof.
8 We got up there, and get our scaffolds, hanging
9 scaffolds.

10 Q Okay. Now --

11 A We had to walk through the roof to get on the
12 scaffold.

13 Q Just before the accident, are you guys
14 heading to one particular place?

15 A Well, we was heading to the scaffold.

16 Q Yeah. And -- and were you going to work
17 somewhere on the roof?

18 A We was going to work on the scaffold.

19 Q Okay. And when I say working on the roof,
20 were you really going to be working on the walls --

21 A Correct.

22 Q -- that are on the roof?

23 A Correct.

24 Q Okay. Now, did you guys have equipment with
25 you?

1 A Well, we had tools.

2 Q Tools.

3 A We had tools, (indiscernible) trowels.

4 Q What -- what kind of tools?

5 A (Indiscernible) trowels, material.

6 Q Did you have any material?

7 A I think so we had material, we had tools you
8 know --

9 Q Okay.

10 A -- (indiscernible) trowels, something like that.

11 Q So, and what do you usually wear on your
12 feet, construction boots?

13 A Yeah, boots, regular boots.

14 Q So, at the moment of Mr. Munoz's accident,
15 where were you?

16 A I was in the roof. I was -- we was all walking,
17 it was my friend Jose, he was behind Munoz --

18 Q You know what --

19 A -- and I was behind him.

20 Q -- let me -- let me do this. Did there come
21 a time when the three of you got on the roof?

22 A And we were walking towards the scaffold.

23 Q And -- and when you get on the roof are you
24 walking in any kind of a file, single file, double
25 file, a group or what?

1 A No, single straight line, single.

2 Q And where were you in relation to Mr. Munoz?

3 A I don't understand.

4 Q Were you front of him, were you behind him?

5 A No, no, I was behind, behind.

6 Q Okay. And how far away were you at the time
7 of this accident --

8 A Like from --

9 Q -- from him?

10 A -- like from here from that gentleman over there,
11 sitting over there like.

12 Q 10 feet?

13 A 10 feet about.

14 Q And did there come a time when Mr. Munoz had
15 an accident?

16 A Yes, yeah.

17 Q And can you tell the jury what you saw?

18 A He was -- he's walking and he like crunched up, he
19 stepped in the hole (indiscernible) is a drain you
20 know.

21 Q When you say crunched up, can --

22 MR. GULINO: Your Honor, can I ask him to
23 stand and show the jury?

24 THE COURT: Sure.

25 THE WITNESS: You know like you're walking,

1 like you know you go like you know, that's basically
2 (indiscernible)

3 BY MR. GULINO:

4 Q Did -- did he ever fall down and land on his
5 shoulder?

6 A No.

7 Q Did he ever fall down and land on his elbow?

8 A No, because we would have helped him.

9 Q And he didn't fall down, right --

10 A No.

11 Q -- on the ground?

12 A No.

13 Q Okay. So, what happened immediately after
14 that, did he say anything to you?

15 A Well, yeah, he was trying to see if it goes away
16 the pain.

17 Q Did he make any complaints to you?

18 A Well, it hurts a little bit.

19 Q Okay. And -- and did you respond to him?

20 A Got a complaint.

21 Q And -- and what did you -- what did you say
22 to him?

23 MR. CLARK: Judge, objection.

24 MR. GULINO: Withdrawn, I'll withdraw the
25 question.

1 BY MR. GULINO:

2 Q Was there a discussion after his action as to
3 what should be done?

4 A Right, he should have --

5 Q What was the discussion?

6 A -- he should have gone and see Bob.

7 Q And whose Bob?

8 A Safety, safety guy.

9 Q And who do you know him to be employed by,
10 Ciminelli?

11 A Ciminelli, yes, yes.

12 Q Okay. And why were you going to see Bob?

13 A Cause he's the safety guy. You get hurt on the
14 job, you're supposed to see a safety guy.

15 Q Was that part of the rules that you learned
16 of when you had your orientation?

17 A Of course.

18 Q Did you receive a response from Mr. Munoz?

19 A What you mean?

20 Q Did he say anything back to you?

21 A No.

22 Q Did -- did he say yes, let's go or what, what
23 happened after?

24 A No, he wanted to wait it out, see if it goes away
25 the pain.

1 Q And from that moment that happened, did you
2 continue to work that day?

3 A Yes we did.

4 Q And did you work a full shift?

5 A Yes we did.

6 Q Did you take a break during lunch?

7 A Yes we did.

8 Q What is your shift usually?

9 A From 7:00 to 3:00.

10 Q 7:00 to --

11 A Eight hours. Eight hours, 7:00 to 3:00.

12 Q Okay. When -- when -- there's been testimony
13 that the accident occurred at 3:20 p.m. Do you agree
14 with that?

15 A No.

16 Q And let me ask you this.

17 A That time we go home.

18 Q There was testimony that at 3:20 p.m. you
19 guys were going to do work on a wall. Is that true?

20 A No.

21 Q And can you tell the jury why that's not
22 true?

23 A Because at that time I'm cleaning, I'm not working
24 at 3 o'clock. I'm cleaning my tools, at 2:30 I'm
25 cleaning my tools, you know I ain't working at 3

1 o'clock.

2 Q Did there --

3 A That's time to go home 3 o'clock.

4 Q I'm sorry.

5 A It's time to go home.

6 Q Did there come a time -- did you go home that
7 day --

8 A Of course.

9 Q -- after the shift?

10 A Yeah.

11 Q The next day did you see Mr. Munoz?

12 A Yes.

13 Q And when you saw him, what happened then?

14 A He wanted to report it.

15 Q And did you go with him to report it?

16 A Yes I did.

17 Q And -- and where did you guys go?

18 A We went to Bob, Safety Office. I went with Munoz,
19 and little Jimmie is son of the owner of the company.

20 Q Okay.

21 A Us three.

22 MR. GULINO: Now -- that's it. Thank you
23 Your Honor, that's all I have.

24 THE COURT: Cross?

25 MR. CLARK: Yes.

1 CROSS EXAMINATION BY MR. CLARK:

2 Q Just a few questions Mr. Mella. It's true
3 that we did subpoena you and we can't tell how the
4 trial is going to go, so as I said to you yesterday in
5 the hall we'll try to get you on as soon as we can, and
6 I have no intention of needlessly having you here. So,
7 do you understand that?

8 A No problem.

9 Q All right. And, incidentally, while you were
10 waiting around the last few days till it became your
11 turn to testify, you were getting paid; right?

12 A Yes.

13 MR. CLARK: Okay. Laz, can you just turn on
14 the projector real quick?

15 MR. BERENGUER: Sure.

16 BY MR. CLARK:

17 Q Just while Lazaro is turning on the project,
18 your shift is 7:00 to 3:00, but you guys you normally
19 get a lunch; right?

20 A We get a lunch.

21 Q So, like if it's eight hours --

22 A 11:00 -- yeah, 11:00 -- 11:45, 11:50 to 12:30.

23 Q 7:00 to 3:00 is --

24 A Put 3:15.

25 Q -- is eight hours, but --

1 A I'm talking about 3:15.

2 Q 3:15.

3 A 3:15 we out the door, but we usually clean up at
4 2:30, 2 -- you know what I'm saying.

5 Q All right, that's fine. And I just want to
6 go over the --

7 MR. CLARK: Do you have your exhibit D-37
8 please?

9 MR. GULINO: Let's see.

10 UNIDENTIFIED SPEAKER: Got a copy.

11 BY MR. CLARK:

12 Q Here, would you just take a look at D-37,
13 it's an exhibit that's in evidence. You don't have to
14 read the whole thing, but just take a quick look at
15 that. Have an opportunity to look at that; yes?

16 A Yeah.

17 Q All right. Does that look like the safety
18 orientation checklist that counsel had asked you about,
19 when you first --

20 A Yes.

21 Q -- go in they give you the rules?

22 A Yes.

23 Q All right. I just want to go down this and
24 ask you some questions about this.

25 MR. CLARK: Excuse me, if you please throw

1 that up, it's in evidence, and then we'll -- just grab
2 my laser pointer. Is it up Laz?

3 MR. BERENGUER: It's up.

4 MR. CLARK: All right. I have my laser
5 pointer.

6 BY MR. CLARK:

7 Q So, just -- just taking a look here when you
8 guys had that orientation look at this one rule. It
9 says up here housekeeping in all areas accessible to
10 the public will be maintained to the highest standard.
11 A clean as you go policy will be maintained. Do you
12 see that up there?

13 A Uh-hum.

14 MR. GULINO: Objection, out of the scope.

15 THE COURT: Any response?

16 MR. CLARK: The response is he asked him
17 about the safety orientation meeting and the rules that
18 were discussed.

19 THE COURT: Okay, overruled.

20 BY MR. CLARK:

21 Q Now, did they talk about that rule at the
22 safety orientation meeting about housekeeping, and the
23 clean as you go policy will be maintained?

24 A Yeah.

25 Q Did they say that the workers were going to

1 be fired if they didn't follow that one?

2 A I didn't hear that. I don't remember that.

3 Q It also says that obscene language will not
4 be tolerated on the project site. Did they talk about
5 that rule?

6 MR. GULINO: Objection, relevancy.

7 THE COURT: What's the relevancy?

8 MR. CLARK: It goes to the issue about the
9 enforcement of the firing rule, cause these are on the
10 same list of rules.

11 THE COURT: I'd ask that you take that down,
12 and you can certainly ask questions without the -- that
13 -- the use of that.

14 MR. CLARK: Okay, sure.

15 THE COURT: All right. Your objection is
16 overruled.

17 BY MR. CLARK:

18 Q Did they -- did they talk about that obscene
19 language rule?

20 A Yes.

21 Q There as testimony yesterday about Mr.
22 Beardsley's reaction when he went up after and saw the
23 holes on the roof, and he said something about the f'in
24 roofer?

25 MR. GULINO: Objection, out of the --

1 THE COURT: Sustained.

2 MR. GULINO: -- scope.

3 THE COURT: That -- that is sustained.

4 BY MR. CLARK:

5 Q Would Mr. Beardsley use obscene language from
6 time to time on the --

7 THE COURT: Sustained.

8 MR. GULINO: Objection, out of the scope.

9 THE COURT: The objection is sustained.

10 MR. CLARK: And just the -- the rule about
11 reporting, can you -- can I pop that rule up?

12 THE COURT: Well, you can ask him a question,
13 and then --

14 MR. CLARK: Okay.

15 THE COURT: -- see whether or not you need to
16 pop it up.

17 MR. CLARK: All right.

18 BY MR. CLARK:

19 Q I'm just going to read the -- this -- this
20 rule to you, if you can read along with me. Would you
21 mind Mr. Mella, just -- just read along with me on this
22 rule here. Do you have it?

23 MR. GULINO: Read it loud -- loud please.

24 THE WITNESS: Accident, including hazards all
25 would be reported immediately to your supervisor.

1 MR. CLARK: It's --

2 THE WITNESS: That's it.

3 BY MR. CLARK:

4 Q It's basically saying that they're supposed
5 to report -- be reported to your supervisor or foreman;
6 right?

7 A Right.

8 Q It doesn't say and then that supervisor or
9 foreman is supposed to report them to LP Ciminelli
10 within an hour; right?

11 A Right.

12 Q It doesn't say that they're supposed to
13 report it directly to the safety guy, the person that
14 gets hurt; right?

15 A Right.

16 Q That's fine, thanks.

17 And we read your deposition bef -- before you
18 came in, so I don't want to go through that in detail.
19 But basically when he put his -- stepped in that hole
20 and got hurt, there was no supervisor or anyone around
21 for him to report it to. Isn't that correct?

22 A In the roof it wasn't, but there's always a
23 foreman on the job. There's always a supervisor.

24 Q I'm going to show you the incident that was
25 filled out by LP Ciminelli, it's plaintiff's exhibit 22

1 which is in evidence. Can you take a look at that.

2 You've seen that before; right?

3 A I think so, yeah.

4 Q And what's the accident -- the time of the
5 accident up there on the ri -- upper right hand corner?

6 A 3:20.

7 Q And (indiscernible) your testimony is you
8 disagree that that's the accurate accident time?

9 A No.

10 Q Okay, thank you.

11 So, I'm just going to read part of your
12 deposition. I'm just going to read part of your
13 deposition to you.

14 THE COURT: Well, hold on. Is there a
15 question?

16 MR. CLARK: Yes.

17 THE COURT: Well as the question first.

18 MR. CLARK: Okay.

19 BY MR. CLARK:

20 Q When you testified at your deposition and you
21 said there was no one around that he could have
22 reported the incident to, are you saying now that you
23 just meant on the roof?

24 A On the roof.

25 MR. CLARK: Okay. So, Judge, I would like to

1 read the relevant portion of his deposition on that?

2 THE COURT: Sure.

3 MR. CLARK: I'll just -- we'll read together
4 if it's okay, I'm just going to make sure I read it
5 right.

6 MR. GULINO: Page and line please.

7 MR. CLARK: It's page 54.

8 MR. GULINO: 54, line what?

9 MR. CLARK: 18.

10 MR. GULINO: Just give me one second please.
11 Okay.

12 MR. CLARK: All right, so I'll just read it
13 out loud just -- just --

14 Q "As soon as it happened was the safety guy
15 there?

16 A No."

17 Q "And who is the safety guy?

18 A Bob."

19 Q "Do you know Bob's last name?

20 A No."

21 Q "Do you know why he wasn't -- why he wasn't
22 there?

23 A No."

24 Q "Were there any supervisors there?

25 A No."

1 Q "Was there anyone he could have reported the
2 accident to there?

3 A No."

4 BY MR. CLARK:

5 Q Did I read that correctly?

6 A Uh-hum.

7 Q All right. And you didn't say anything there
8 after or before about you meant just on the roof;
9 right?

10 A On the roof.

11 Q All right, that --

12 A Meant on the roof.

13 Q But it doesn't say -- you didn't say that --

14 MR. GULINO: Objection.

15 MR. CLARK: -- here in your deposition;

16 right?

17 MR. GULINO: There's no --

18 THE WITNESS: No.

19 MR. GULINO: -- inconsistency here. I
20 withdraw the question, I'm sorry. The objection.

21 MR. CLARK: That's all I have, thank you Your
22 Honor.

23 THE COURT: Okay.

24 MR. CLARK: Thank you.

25 THE COURT: Anything on redirect?

1 MR. GULINO: Very quickly.

2 THE COURT: Okay.

3 REDIRECT EXAMINATION BY MR. GULINO:

4 Q LP Ciminelli have a shed, an office?

5 A Yeah.

6 Q You guys know where it was?

7 A Yes.

8 Q And -- and you worked on that project for how
9 long?

10 A That was like my third day --

11 Q Okay.

12 A -- second day.

13 Q And Bob wasn't on the roof with you guys, was
14 he?

15 A No.

16 Q In -- in your experience at that site, you're
17 working there Bob around at some point in the shed or
18 in the office?

19 A Well, he always walk around. He always walk
20 around do his errands.

21 Q And -- and I were to say that Bob was the
22 first guy there and the last guy to leave --

23 A Yes.

24 Q -- would you agree with me?

25 A Yes.

1 MR. GULINO: Thank you. Nothing further.

2 THE COURT: Thank you, you can step down.

3 MR. MELLA: Thank you.

4 MR. GULINO: May I just have a moment to --
5 I'll get the witness in or do you have the officer do
6 it?

7 THE COURT: Yes, the officer can.

8 MR. GULINO: Okay. Stephen Paino.

9 THE SHERIFF'S OFFICER: Place your left hand
10 on the Bible, raise your right hand. State your name,
11 and spell your last name?

12 MR. PAINO: Stephen Paino, P-a-i-n-o.

13 S T E P H E N P A I N O, DEFENSE WITNESS, SWORN

14 THE SHERIFF'S OFFICER: You can have a seat.
15 Just keep your voice up.

16 MR. CLARK: Mind if we just do it here?

17 Can we now stay away from them, they've been
18 waiting around for three days?

19 MR. GULINO: What did you want me to stay
20 away from?

21 MR. CLARK: That they've been waiting for
22 three days.

23 MR. GULINO: Oh, oh I will. I will.

24 MR. CLARK: Great.

25 MR. GULINO: Okay. I will Judge.

1 THE COURT: You were sworn, you can be
2 seated, thank you.

3 MR. PAINO: Thank you.

4 THE COURT: Your witness. Your witness.

5 DIRECT EXAMINATION BY MR. GULINO:

6 Q Good afternoon Mr. Paino.

7 A How are you?

8 Q Keep your voice up, okay.

9 A I'll try.

10 Q All right, good. Friday afternoon, we all
11 want to go home, right. So, are you employed?

12 A Yes.

13 Q By whom?

14 A Paino Roofing Company.

15 Q Are you the owner of Paino Roofing Company?

16 A Yes I am.

17 Q When did it first start?

18 A 1969.

19 Q And was it started by family?

20 A My father.

21 Q And are you now the head of the company?

22 A I took over in 2008.

23 Q And what is the business of Paino -- Paino
24 Roofing?

25 A Mainly commercial, commercial roofing.

1 Q And what is the difference between commercial
2 roofing and a house roof?

3 A Commercial roofs are flat mainly, beside some odd
4 -- odd projects, but most of them are flat roofs.

5 Q Now, did there come a time when Paino Roofing
6 was retained or hired to do work at the Meadowlands
7 Racetrack?

8 A Correct.

9 Q And did they do that pursuant to a contract?

10 A Yes.

11 Q And was that a bidding process, things like
12 that?

13 A Yes.

14 Q And did you -- did you start -- your company
15 start to work at that project?

16 A Yes.

17 Q Can you give an approximation to the jury
18 when?

19 A Not off the top of my head.

20 Q Why don't we do this. If -- if the accident
21 occurred in June of 2013, can you give us an
22 approximation of when you would have started by?

23 A Somewhere around February maybe.

24 Q Okay. And did you -- did you hire workers to
25 do the work at the Meadowlands Racetrack?

1 A Some of them were our steady employees, and some
2 of them we got from the Union Hall.

3 Q And Paino Roofing, is it a Union Shop?

4 A Yes.

5 Q And so does that mean you only hire Union
6 workers?

7 A Correct.

8 Q And in your experience, are you a member of
9 that Union?

10 A Yes.

11 Q And is it 29 -- no, I'm sorry, what is it?

12 A We're Roofers Local 10.

13 Q Roofers, okay. Now, your workers that you
14 brought to that project, did they have to go through
15 orientation?

16 A Went through a site safety orientation, yes.

17 Q And was it the orientation that's put on by
18 LP Ciminelli?

19 A Yes it is.

20 Q And did every one of your employees who went
21 to that site to work have to go through that
22 orientation?

23 A Correct.

24 Q Now, obviously there was a time in which a
25 roof was placed on the -- near the Meadowlands

1 Racetrack?

2 A Yes.

3 Q And are you aware that the plaintiff is
4 claiming that he had an accident on June 25th, 2013 at
5 the Meadowlands Racetrack on a roof?

6 A The first we heard of it was when we were served.

7 Q And when you say when you were served, do you
8 mean when you were sued?

9 A Yes, correct.

10 Q Prior to that time did anyone ever tell you
11 that Mr. Munoz had an accident?

12 A No.

13 Q Now, can you describe for the jury the
14 process of putting the roof on in general, a flat roof?

15 A On this particular project?

16 Q Yeah.

17 A On this particular project we had to lay some
18 styrofoam insulation which creates a -- a smooth
19 surface for you to go over, because it was a Q decking,
20 which is a steel corrugated deck was the structure, so
21 we had to lay a couple layers of --

22 Q Let me stop you there. Corrugated means it's
23 like rippled?

24 A Not -- not circular, but rectangular.

25 Q Oh, okay.

1 A So, it's rippled in a rectangular, square edges
2 and stuff. But we had to lay a couple layers of
3 insulation boards on there to give an insulating value.
4 Sometimes there's only one layer, but in this one there
5 was a particularly high insulating value. So, it was
6 more than one layer of insulation, somewhere maybe
7 around 4 inches I believe total.

8 Q Okay.

9 A And then over that was a fully adhered EPBM rubber
10 membrane, which kind of looks like a inside of a car
11 tire.

12 Q Okay. And that membrane, how thick is it?

13 A .060

14 Q Like the sole of your shoe?

15 A Maybe a little thinner, but similar.

16 Q Now, when you -- when you put the roof on at
17 this project are drains underneath at some point
18 somewhere in different places?

19 A Well, the drains have to be underneath the
20 membrane just so the water flows on top of the membrane
21 and into the drain. If they didn't -- if the rain
22 wasn't underneath, the water would go under the drain.

23 Q Now, would it be fair to say, now you correct
24 me if I'm wrong, is -- is the roof pitched in areas to
25 allow water to flow towards the drains?

1 A There's some structural slope, and some slope made
2 out of the styrofoam.

3 Q And when you say structural slope, is that
4 from steel?

5 A Steel bar joist, yes.

6 Q And then some of it is from the styrofoam?

7 A Correct.

8 Q And what is the purpose of the slope?

9 A To make sure that the water doesn't pond on the
10 roof.

11 Q And what would happen if the water ponded on
12 a flat roof?

13 A Well, a couple things. The -- the roof membrane
14 would -- would be -- it would lose its integrity,
15 because it'll have water on it continuously. The --
16 the weight of the water all the time is not good for
17 the structure.

18 Q They'd be calling you back say --

19 A Yes. And --

20 Q -- Steve fix --

21 A -- potential cause leaks too.

22 Q Okay. Now, so the drains themselves they
23 have a uniform size circumference, diameter?

24 A Well, the dra -- the drains themselves are pretty
25 much the same size, but the outlet of the pipe --

1 Q Yes.

2 A -- might vary depending on the size of the roof
3 area. But that's --

4 Q What about the drain, what's the size?

5 A Typically they're about 11 inches, 12 inches.

6 Q Well, I'm talking about -- let me -- let me
7 -- I'm going to show you what has been admitted into
8 evidence as exhibit number 4.

9 A Can I put my glasses on?

10 THE COURT: I'm sorry.

11 THE WITNESS: Can I put my glasses on?

12 THE COURT: Sure.

13 THE WITNESS: I might have left in the car.

14 MR. CLARK: Judge, while he's doing this I
15 would just request a proper foundation that he was
16 there, saw it, and has personal knowledge of those
17 sizes.

18 THE COURT: Is that an objection? Well,
19 there's no question yet --

20 MR. CLARK: Yeah.

21 THE COURT: -- I need to hear the question.

22 BY MR. GULINO:

23 Q Is --

24 MR. GULINO: I'm sorry Judge, may I approach?

25 THE COURT: Sure.

1 BY MR. GULINO:

2 Q Is what we're looking at in exhibit number 4
3 a typical drain on the roof at the Meadowlands?

4 A Correct.

5 Q And if we look at the top one which looks
6 like its cut out, can you give the jury an
7 approximation of that size?

8 MR. CLARK: Objection, foundation.

9 THE COURT: From looking at the photo?

10 MR. CLARK: Both, foundation and personal
11 knowledge --

12 THE COURT: Okay.

13 MR. CLARK: -- of that.

14 THE COURT: The objection is overruled.

15 BY MR. GULINO:

16 Q You can answer the question.

17 A It's approximately 4 inches.

18 Q Okay, 4 inches. Now, what is underneath this
19 cutout?

20 A That's -- there's a cast iron drain pan under
21 there.

22 Q It's like a bowl or something?

23 A I wouldn't necessarily say --

24 MR. CLARK: Judge, I'm just --

25 MR. GULINO: I'll -- I'll withdraw the

1 question.

2 BY MR. GULINO:

3 Q What is underneath there?

4 MR. CLARK: Objection, there's no per -- he
5 hasn't established a foundation of personal knowledge
6 of that drain.

7 BY MR. GULINO:

8 Q How about a typical drain, what would
9 generally be under --

10 A It's a -- it's a cast iron pan, but with an outlet
11 for a pipe to connect to.

12 Q And -- and if I were to -- is that what's
13 usually under there?

14 MR. CLARK: Judge, objection, under where?
15 Ju -- just with regard to this photo.

16 THE COURT: I think he said in a typical
17 drain. The question was rephrased.

18 MR. GULINO: Typical drain.

19 MR. CLARK: Fine.

20 BY MR. GULINO:

21 Q Was this drain that you just looked at in
22 exhibit number 4 atypical or a typical drain?

23 A It's typical.

24 Q So, is there a dip in the depth of that that
25 we just looked at on exhibit number 4 that 4 inch

1 across cutout, does it have a depth to it? Well, why
2 don't we do this. How far down does it go?

3 A The --

4 MR. CLARK: Judge, objection.

5 THE COURT: Does what go?

6 MR. GULINO: Okay.

7 BY MR. GULINO:

8 Q We have membrane that goes to the edges of
9 that drain; correct?

10 A Correct.

11 Q And the drain itself before it starts to turn
12 a little bit and get out, how far down does it go --

13 MR. CLARK: Objection, foundation.

14 MR. GULINO: -- on typical drains?

15 THE COURT: He's talking on a typical drain.

16 MR. GULINO: Yes, typical drain.

17 THE COURT: Okay.

18 THE WITNESS: About an inch and a half.

19 BY MR. GULINO:

20 Q An inch and a half. And is -- is the drains
21 that you put on at the Meadowlands Racetrack typical
22 drains?

23 A I didn't put the drains on.

24 Q I know, I'm sorry, you didn't put them on,
25 okay. Did you ever learn whether or not the drains

1 that were put on on the Meadowlands Racetrack roof were
2 (indiscernible)

3 A They are typical for the other installations that
4 we see on other projects.

5 Q So, it's 4 inches wide and it's an inch and a
6 half deep?

7 MR. CLARK: Objection, what is? Now, he's
8 going to this drain in that photo that he just said he
9 was never at, never saw.

10 THE COURT: Are we back to the typical drain
11 or the drain in the photo?

12 MR. GULINO: And you're -- you're correct,
13 I'm sorry, I'll try to straighten this out.

14 BY MR. GULINO:

15 Q Paino Roofing does not put the drains in;
16 correct?

17 A Correct.

18 Q And are there times when the roof is there
19 before the drain?

20 A No.

21 Q The drain is always there first?

22 A Correct.

23 Q And is the membrane then cut around the drain
24 to fit?

25 A Correct.

1 Q And is the styrofoam cut around to fit?

2 A Correct.

3 Q And is there a typical depth of that area
4 where the cutout is? Well, let me ask this. You used
5 the term an inch and a half deep, what -- what are you
6 talking about?

7 A The cast iron drains (indiscernible) on that
8 project.

9 Q And do they have cast iron --

10 A Correct.

11 Q -- on this project?

12 THE COURT: If he knows. Do you know?

13 BY MR. GULINO:

14 Q Do you know?

15 A I -- I saw all the drains on that project before
16 we roofed it.

17 Q And were the cast iron?

18 A Yes.

19 Q So, they were an inch and a half?

20 A Yes.

21 MR. GULINO: Okay. Nothing further, thank
22 you.

23 THE COURT: Cross?

24 CROSS EXAMINATION BY MR. CLARK:

25 Q Mr. Paino, your company has a safety manual;

1 correct?

2 A Correct.

3 Q I'll show you plaintiff's exhibit 25, it's an
4 exhibit which is in evidence. Do you recogni --

5 MR. GULINO: Objection, out of the scope.

6 THE COURT: Do you want to address the
7 objection?

8 MR. CLARK: The first question dealt with the
9 safety orientation, and I want to just ask about the
10 company's compliance and safety rules.

11 THE COURT: Overruled. It's overruled.

12 BY MR. CLARK:

13 Q Sir, do you recognize that for your safety
14 manual?

15 A Yes.

16 Q Okay. Now, you agree that in the
17 construction business there's a certain set of rules
18 that should be followed to prevent needless injuries to
19 workers. Do you agree with that?

20 A Yes.

21 Q And a lot of those rules are kind of set
22 forth in your company safety manual; right?

23 A That's for my employees.

24 Q And to protect your employees?

25 A Yes, correct.

1 Q Okay. Are there any provisions in your
2 company's safety manual for rules that have to be
3 followed by your employees to make sure other workers
4 on the jobsite are -- are made safe as well, so that
5 you guys don't cause injury to other people on the
6 jobsite. Do you have any rules about that or are your
7 rules just for your employees?

8 A I would say it's a slight combination. But like
9 -- if I could give a for instance. If we set up a
10 scaffold for my employees, we take it down when my
11 employees done, we don't leave it up for oth -- other
12 people. Our safety measures are typically for our
13 employees.

14 Q Cause you -- you agree that if basic sa --
15 workplace safety rules are not followed on a jobsite
16 that people can get hurt. You understand that?

17 A Absolutely.

18 Q And you're familiar with jobsite hazards;
19 correct?

20 A Yes.

21 Q And a hazard is a situation on a jobsite --
22 you would agree that a hazard is a situation on the
23 jobsite that could cause potential harm to workers.
24 You agree with that?

25 MR. GULINO: Objection.

1 THE COURT: Yes, let me see you at sidebar.

2 (At sidebar)

3 THE COURT: So, I'm assuming your objection
4 is this is beyond the scope of direct?

5 MR. GULINO: Yes.

6 THE COURT: Okay. Your response to the
7 objection? I mean, quite frankly, if you wanted this
8 in, why wou -- didn't you call this witness in your
9 case?

10 MR. CLARK: The response is that I'll withdraw
11 it at this time.

12 THE COURT: Okay.

13 (End of side bar discussion)

14 THE COURT: The objection is sustained.

15 BY MR. CLARK:

16 Q Did you visit the jobsite on June 25th, 2013?

17 A I can't remember the exact day.

18 Q And did you ever visit that jobsite?

19 A Yes.

20 Q But when you did, it would be very sporadic
21 and at the end; right? It got very widespread, because
22 you were finishing -- or strike that. When you visited
23 the jobsite it was very sporadic; correct?

24 MR. GULINO: Objection, timeframe. When end
25 is compared to when the accident occurred.

1 THE COURT: Rephrase your question.

2 BY THE COURT:

3 Q Did you ever visit the jobsite before June of
4 2013 do you now one way or the other?

5 A Yes.

6 Q Okay. And do you -- can you be more specific
7 about that or no?

8 A Whenever we got ready to roof a particular area, I
9 would have to go there and measure the area and order
10 the proper material for it.

11 Q And before you guys worked on the jobsite,
12 you knew that those drains had to be addressed, and
13 that the roofing had to be placed over and the holes
14 made; correct?

15 A That would be part of when I went there to
16 measure, I'd have to make sure that the roof was ready
17 and proper for us to -- the structure was proper for
18 us.

19 Q And that would have been like long before
20 June of 2013; right?

21 A It was pretty sporadic, meaning when they lay --
22 when they built the structure we had to follow them up.

23 MR. CLARK: Okay, that's fine, thank you.
24 Thank you for your time.

25 THE COURT: Anything further?

1 MR. GULINO: Nothing further Your Honor.

2 THE COURT: All right. Thank you, you may
3 step down.

4 MR. GULINO: Oh, I'm sorry, I'm sorry. I'm
5 sorry, I apologize.

6 THE WITNESS: Sit back down?

7 THE COURT: Yes, seems that way.

8 MR. GULINO: May I approach?

9 THE COURT: Yes.

10 MR. GULINO: Exhibit number 4.

11 REDIRECT EXAMINATION BY MR. GULINO:

12 Q I'm -- I'm pointing to the top of the photo
13 on exhibit number 4, is that a hole?

14 A A hole, no.

15 Q Yes. And why isn't it called a hole?

16 A Cause the drain is under that.

17 Q And what is a hole -- withdrawn. You've been
18 in the construction business for how many years?

19 MR. CLARK: Judge, objection. Now, we're --

20 THE WITNESS: Thirty years.

21 MR. CLARK: Objection, we're beyond the scope
22 of cross.

23 MR. GULINO: Nothing further.

24 THE COURT: Thank you, you may step down.

25 MR. GULINO: And we hereby call Robert

1 Beardsley, please.

2 THE SHERIFF'S OFFICER: Place your left hand
3 on the Bible, raise your right hand. State your name,
4 spell your last name?

5 MR. BEARDSLEY: Robert G. Beardsley, B-e-a-r-
6 d-s-l-e-y.

7 R O B E R T B E A R D S L E Y, DEFENSE WITNESS, SWORN

8 THE SHERIFF'S OFFICER: You could have a
9 seat.

10 DIRECT EXAMINATION BY MR. BEARDSLEY:

11 Q Good afternoon Bob.

12 A How are you sir?

13 Q You got to keep your voice up, okay?

14 A Okay.

15 Q Are you employed?

16 A Yes I am.

17 Q By whom?

18 A LP Ciminelli.

19 Q Can you tell the jury what is the business of
20 LP Ciminelli?

21 A Contracting, specializing in everything from
22 racinos, casinos, public education, higher education
23 construction.

24 Q And what is your position with that company?

25 A I'm one of three senior safety officers for the

1 company, corporate safety officers.

2 Q And can you tell the jury how long you've
3 been in the construction business total?

4 A The construction business, yes. The construction
5 business I've been in the -- in the construction part
6 of this about 12 years.

7 Q Okay. And -- and were you involved in -- in
8 safety before that or what?

9 A Yes, I've been involved for a total of it'll be 40
10 years next -- next summer.

11 Q Did there come a time when LP Ciminelli --
12 oh, do you on behalf of LP Ciminelli in your position,
13 is it safety manager, right, teach safety courses?

14 A Yes.

15 Q And do you teach them to workers at sites,
16 who come onsite?

17 A Sometimes, I also teach them to the corporate
18 staff, and all of our management people the OSHA 10 and
19 30 hour outreach courses.

20 Q Do you have any kind of certificate or
21 anything or --

22 A Yes.

23 Q And what kind of a certificate do you have?

24 A I have the certificate to teach those courses.
25 Also, in the American Society of Safety Engineers,

1 specialty in construction.

2 Q Now, did there come a time when LP Ciminelli
3 was hired to do work at the Meadowlands --

4 A Yes.

5 Q -- Racetrack?

6 A Excuse me, yes.

7 Q And do you have an understanding as to what
8 was -- why the work was going to be done? Were they
9 going to be doing something at the Meadowlands
10 Racetrack?

11 A Yes sir.

12 Q And what were they going to be doing?

13 A They were going to be building the new Meadowlands
14 Racetrack facility on the opposite side of the track
15 from the existing facility. It needed to be done in
16 time for the Super Bowl that was held at --

17 Q And what were they going to do for the Super
18 Bowl?

19 A Excuse me.

20 Q What were they going to use this space for at
21 the Super Bowl?

22 A It -- it originally opened in November just before
23 the Super Bowl as a racetrack facility. It also had
24 restaurants in it, it also had amenities areas for
25 people to gamble and watch the races. And then when it

1 came time for the Super Bowl, we had to abandon the
2 building -- they had to abandon the building, so that
3 it could be taken over by the television networks to
4 broadcast the Super Bowl.

5 Q When did you first get on that site, you
6 yourself?

7 A I was one of the first two Ciminelli employees on
8 the jobsite, it was roughly a year before we started
9 the construction, the actual physical construction.
10 And I was there helping to monitor on a monthly basis
11 the demolition of some existing (indiscernible) all
12 buildings.

13 Q Can you give the jury time when you first got
14 to the project?

15 A The actual dates?

16 Q What's that?

17 A The dates you mean?

18 Q Well, months, year.

19 A Oh. Yeah, it was about -- it was about -- I was
20 involved with that jobsite about a year before they
21 actually put down the footprint, and then the
22 subsequent building of the building.

23 Q What we're trying to do is find out the year
24 not -- what year was it? 2010, '12, '13, '09, what?
25 How about this, le -- I'll withdraw the question.

1 A Yeah, I'd --

2 Q How about this.

3 A -- I'd have to look it up.

4 Q How about -- how about --

5 A Getting old, sorry.

6 Q -- how about this, the accident -- Mr. Munoz
7 is claiming that he was injured on -- in late June,
8 2013.

9 A I was there.

10 Q How long had you been at this site before
11 that?

12 A Yeah, understood now. It would have been back in
13 late 2011.

14 Q Now, during the time were there -- were there
15 subcontractors hired?

16 A Yes.

17 Q And were they hired by LP Ciminelli?

18 A LP Ciminelli would put out bid notices, people
19 would respond. Attractive contractors we'd usually
20 pare it down to three, they would be descoped, and then
21 the bid was awarded to one of them according to all the
22 pertaining guidelines. Yes, we were responsible for
23 all that.

24 Q What -- what are the -- did you have anything
25 to do with accepting the bids?

1 A I was part of the descope process. They would ask
2 me this company's EMR, experience modification rate.
3 We got to talk to them, because it's high or on the
4 OSHA website this company has so many incidents or
5 whatever, and I was asked to review those so that we
6 were comfortable with the overall bid award.

7 Q It is a low bidding process?

8 A I believe it was, yes. I believe it was, yes.

9 Q Now, when the subcontractors employees came
10 to the site, did -- was there a requirement that they
11 undergo orientation?

12 A Yes.

13 Q And who conducted the orientation?

14 A 90 some percent of the time I did.

15 Q Can you tell the jury how many employees went
16 through your orientation class approximately or how
17 many employees total were there?

18 A Employees total, because it was more than just
19 hourly, it was anybody that was going to visit the site
20 on a regular basis and there was over 2,000.

21 Q And did you give this orientation frequently?

22 A Every mor -- every weekday morning at 7 a.m., yes
23 sir.

24 Q And -- and by the way, what time did you
25 generally get to the site?

1 A Because of that requirement, I was usually there
2 6:30 quarter 7:00 on a daily basis.

3 Q And can you tell the jury in the year 2013,
4 did you work five days a week?

5 A Minimum.

6 Q Minimum, okay. Why don't we do this. On
7 Monday to Friday I'm assuming you worked, can you give
8 the jury an indication of what your normal hours were?

9 A Yes. Nor -- normally it was the time I just until
10 4:30, 5:30, 6 o'clock depending on what was going on at
11 the jobsite, and I also did weekend duty on a rotating
12 basis with the rest of the team.

13 Q What was -- were each of the 2,000
14 approximately employees who attended the orientation,
15 were they required to sign like an attendance sheet or
16 say that they were there or saying that they
17 understood? Do you understand?

18 A Yes.

19 Q Why don't I do this. I'm going to --

20 MR. GULINO: May I approach Your Honor?

21 THE COURT: Yes.

22 BY MR. GULINO:

23 Q I'm going to show you what's -- what's
24 defendants exhibit 7, want you to look at that.

25 A Yup.

1 Q Do you recognize what it is?

2 A Yes sir I do.

3 Q And can you tell the jury what that is?

4 A Th -- what I'm -- what I'm -- what I have here is
5 the two different forms which we use, they're two
6 different forms. There was a complete orientation for
7 the typical hourly folks, the typical supervisors,
8 safety people and so on that came to the site. At the
9 end of that was a -- I read the safety orientation rule
10 about all conditions contained herein. And then
11 there's a shorter version when the owner would come to
12 us and say I have a supplier that's coming in here just
13 today, could you give them a briefer version. But this
14 is the standard form that we used for all the
15 orientations.

16 Q Do you know Washington Munoz?

17 A Yes I do.

18 Q And when I say do you know him, do you know
19 him as the plaintiff in this case?

20 A Yes I do.

21 Q Did you also know him from the project?

22 A I knew him from the project, yes.

23 Q Now, and can you tell the jury on a daily
24 basis what would be your duties as to I -- I keep
25 calling it the safety site management, what's the best

1 term to use?

2 A I was going to say babysitter, but that's not
3 right. What -- what I do out on the jobsite --

4 Q Well, what's your title first, what --
5 what's --

6 A Oh, my title now.

7 Q Well, no, then, I want to now --

8 A Then -- then was -- was site safety manager.

9 Q Okay, site safety manager. Can you tell the
10 jury back in June of 2013, what were your general
11 duties as a site safety manager every day?

12 A Within the scope of the jobsite, which was a CCIP,
13 contractor controlled insurance program, that meant
14 that Ciminelli had involvement in all aspects of the
15 jobsite, we were the project managers, construction
16 managers. So, that meant that I had to orient all the
17 people who came to the jobsite to our requirements and
18 our protocols on the jobsite. I had -- I -- I could
19 not do their training, but we would arrange training if
20 the company said my guys seem to be deficient in
21 whatever, Scissor lift. I also had to do -- conduct
22 all the parts of the meetings which involve safety.
23 Typically, for example, the weekly management meetings,
24 the superintendents. We would start all our safety
25 meetings talking about safety issues out on the site,

1 good things out on the site that we notice that needed
2 to be complimented and enforced.

3 And then I also did a lot of walking, a lot of
4 tours, a lot of inspections. A lot of, if you will,
5 confirmations. That folks would come, for example, and
6 sit down with me and we would do what were known as
7 JSA's, job safety analysis. And that would involve
8 them sitting and talking about how they were going to
9 do something out of the ordinary, and I had to go out
10 and make sure that that was done correctly. And then I
11 would also be from the owner, they would come to me,
12 for example, and say Bob, we're doing work over by our
13 office, which was away from the footprint of the
14 building. So, they'd say Bob, we need you to come over
15 there and monitor that for us, because there's extra
16 traffic or foot traffic or whatever and we need
17 somebody from your company there. So, it was
18 diversified every day.

19 I was also in charge of a company, any of the
20 different inspection crews that came on our site. OSHA
21 was about ten minutes, there was -- there's an OSHA
22 satellite office about ten --

23 Q Let --

24 A -- ten minutes.

25 Q -- let me interrupt you if I may for a

1 second. Is there -- did you ever hear of OSHA
2 Outreach?

3 A Yes.

4 Q What is that?

5 A That's what I teach.

6 Q That's what you talk -- you teach, okay.

7 A That -- that's what was -- that's what was giving
8 to --

9 Q And -- and who do you teach it to?

10 A I teach it to any member of our Ciminelli
11 management or our owners. And -- and the thing that I
12 was talking about, the reason why I brought up the
13 thing about the inspections is because anybody that
14 came on our site that didn't go through our office,
15 they had to be escorted. So, I was in charge of
16 handling any of the inspections if I was there, unless
17 I had a day off or whatever. I was in charge of
18 handling all those inspections in -- in addition to the
19 out -- outreach training.

20 Q Let's get back to that orientation quickly.

21 A Yup.

22 Q Obviously, as -- as with all of those
23 thousands of employees coming in, some of the English
24 is not their primary language; correct?

25 A Correct.

1 Q What do you do to ensure that they understand
2 your presentation?

3 A When we do the orientations one of the first thing
4 we say is does everybody habla ingles? And we would
5 usually make a little joke about it. We'd say like
6 habla ingles, parlez-vous francais, spreken ze deutsch,
7 and so on. And if we had people who indicated to us
8 that they did not understand English, then we would
9 have to find one of the folks - there was about four I
10 believe - who were interpreters. And we would have to
11 bring them in or we didn't have to, we would bring them
12 in to make sure the people understood what it was we
13 were talking about, cause the orientations took about
14 an hour. If people in the orientation said yes, I do
15 understand English, sometimes we would find out at the
16 end when they'd go to fill out the paperwork that they
17 didn't. So, then we would back to backtrack, and bring
18 an interpreter back in to make sure that was clear.

19 Q These orientation classes, did you have a
20 typical size of people?

21 A No. No, Joel, they would -- they would go from --
22 excuse me counselor, they -- they would go from 1 to
23 35.

24 Q It wasn't -- you didn't have 1,000 at a time,
25 you had 1 to 35?

1 A No. And the 35 is just honestly a guesstimate, I
2 think that's how many seats were there, I think.

3 Q Now, did you ever -- as part of your
4 orientation was there a policy that if an accident
5 occurred or if someone was injured they had to report
6 it to someone within a certain period of time?

7 A Yes sir.

8 Q And was that conveyed to the employees at the
9 orientation?

10 A Yes sir every time.

11 Q And can you tell the jury what is the purpose
12 of that -- that rule?

13 A Time distorts the facts. What we --

14 Q Can you give me an example, what do you mean?

15 A We tell them not only personal injury, but
16 property damage and so on that we -- Ciminelli needed
17 to know about an hour max. We needed to know that
18 something happened out on the jobsite. If they broke a
19 waterline, the waterline is going to do damage. If
20 they knock down electric, this created a hazard for
21 people on the site. If they got hurt to use the big
22 word it could become exacerbated. So, we made sure
23 that everybody understood that we needed to know within
24 an hours' time in the event of an unplanned incident,
25 i.e., an accident or something of that nature.

1 Q Did you yourself ever come in contact with
2 any of the subcontractors?

3 A All the time.

4 Q And did you have any involvement in what they
5 were doing, did you control any of their work or
6 anything like that?

7 A Unless something needed to be corrected, no.

8 Q Now, are you aware that Mr. Munoz has made a
9 claim that he was injured on June 25th, 2013?

10 A Yes.

11 Q And can you tell the jury when was the first
12 time that you found out about this?

13 A The next afternoon.

14 Q And when -- how did you find out?

15 A He came and advised me of that.

16 Q Did he come in with anybody else?

17 A Yes.

18 Q Okay. And where were you when he came in to
19 advise you?

20 A I believe I was in my cubicle in the office.

21 Q And where was that situated?

22 A It -- it was a separate building from the actual
23 project, but on -- on the -- on the site, on the
24 grounds.

25 Q And do you got a sign outside or something, I

1 mean does it say --

2 A Yes.

3 Q -- LP Ciminelli?

4 A Yes.

5 Q And when Mr. Munoz came in to tell you about
6 his accident, what did you do?

7 A Got out the incident report to fill that out, ask
8 him if he needed medical attention. Also, pointed out
9 to him that because he was a day late for reporting it,
10 he was -- his assignment to the jobsite was going to be
11 terminated.

12 Q Now, when you say end the assignment, what
13 does that mean?

14 A We don't -- we don't employ them, so you can't say
15 you're going to fire him. But his assignment to the
16 jobsite whether through his Union or through his
17 company was terminated, because of not abiding by the
18 orientation agreement.

19 Q Did you send him for medical help?

20 A I told him where he should go. I helped him
21 understand that it was a preferred provider State, and
22 that he should go -- our facility was Hackensack
23 Hospital. Yes I did.

24 MR. GULINO: May I approach?

25 THE COURT: Yes.

1 BY MR. GULINO:

2 Q I'm going to show you what's marked as
3 exhibit number 22, can you look at that please?

4 A Yup.

5 Q Do you recognize it?

6 A Yes I do.

7 Q And what do you recognize it to be?

8 A I recognize it to be the nonemployee accident
9 report that I filled out for Mr. Munoz.

10 Q Is that in your handwriting?

11 A Yes it is.

12 Q And did you take that when Mr. Munoz came in?

13 A Yes I did.

14 Q And did he communicate to you?

15 A He -- he was sitting there when I did this, yes.

16 Q Was there any difficulty with the language
17 between Mr. Munoz and yourself?

18 A I believe that there was.

19 Q Were you still able to communicate?

20 A Yes.

21 Q And how do you know if you were accurate?

22 A I believe as I recall -- no, I ask him this is --
23 I -- I would -- I would have a phrase where I would say
24 this is what I heard, is this what you said? And I
25 would -- I -- I used that phrase, a der -- whatever

1 derivation of that phrase to confirm what he told me.
2 It's got information on their, for example, his social
3 security number and stuff, you want to make sure that's
4 accurate.

5 Q Okay. Did he indicate how the accident
6 happened? Did he say what happened to him?

7 A Yes, he --

8 Q And -- and --

9 A Yes, he told me that he was finishing the EFIS
10 work for the day. EFIS is a fancy name for a fancy
11 kind of stucco finish, okay. That he was finishing
12 work for the day, and he stepped on a roof -- a
13 depressed area by a drain and he fell over onto the
14 roof.

15 Q Let me ask you something. Is there a time on
16 that report that indicates when it was reported --
17 withdrawn. Does the report indicate the time that Mr.
18 Munoz said the accident happened?

19 A Yes.

20 Q And can you tell the jury what that time is?

21 A He told me it was 3:20 p.m. on 6/26.

22 Q And did you ever learn subsequent to that
23 whether that was accurate or not?

24 A I did learn that that was allegedly not accurate
25 that it was in the morning, it was not in the

1 afternoon.

2 Q Did you ever learn what time it was?

3 A I heard that it was --

4 MR. CLARK: Judge, hearsay; right?

5 THE COURT: The objection --

6 MR. GULINO: I'll withdraw the question.

7 THE COURT: Sustained.

8 MR. GULINO: You don't answer that question.

9 BY MR. GULINO:

10 Q Now --

11 A Thank you.

12 Q -- did -- when you indicated to Mr. Munoz
13 that his employment was terminated, did you tell him
14 why?

15 A Yes.

16 Q And can you repeat -- withdrawn. Was that
17 because he failed to report it?

18 A Yes, within the one hour.

19 Q And did he respond?

20 A Yes, he was upset.

21 Q Now, did Mr. Munoz ever indicate to you that
22 he tried to report the accident to you the day before,
23 but you weren't around?

24 A Yes.

25 Q Did anyone confirm that to you?

1 MR. CLARK: Objection, that would call --

2 THE COURT: Sustained.

3 MR. CLARK: -- for hearsay.

4 THE COURT: Sustained.

5 MR. CLARK: He said he --

6 BY MR. GULINO:

7 Q Why don't we do this. Did you respond to him
8 when he said that, that he tried to report it to you
9 the day before?

10 A Yes.

11 Q And what did you -- what -- how did you
12 response?

13 MR. CLARK: Objection, hearsay.

14 THE COURT: Well, I don't -- I don't know
15 what he's going to say. Are you --

16 MR. CLARK: It's an out of court --

17 THE COURT: -- if you're eliciting a hearsay
18 response, then the objection is sustained.

19 MR. CLARK: You know --

20 MR. GULINO: It's what's he said.

21 MR. CLARK: -- it's fine. I'm -- I'm going
22 to withdraw it, I actually want to know the answer to
23 that.

24 BY MR. GULINO:

25 Q What did you say?

1 A Okay, back up a minute what am I answering?

2 Q Okay.

3 A Sorry.

4 Q When he indicated to you that he tried to
5 report it the day before and you weren't around, did
6 you respond?

7 A Yes.

8 Q And what was your response?

9 A My response was I didn't understand that, because
10 I'm available all the time on the site. I was a well
11 known entity on the site. He had a phone number to the
12 site. His supervisors, all the supervisors knew how to
13 get a hold of me.

14 Q Did you discuss with him -- withdrawn. If I
15 were to tell you there had been testimony here today
16 that after you were informed -- withdrawn. If I were
17 to tell you that there was testimony before today that
18 after you were informed about his accident that you
19 said - and I'm paraphrasing - f'in roofers?

20 A No sir.

21 Q Okay. Now, did you ever in Mr. Munoz's
22 presence ever indicate as (indiscernible) for anyone on
23 this?

24 A No sir.

25 Q When you sent him to a doctor, did you ever

1 see him again?

2 A Yes.

3 Q When did you see him again?

4 A Actual physically see him, I saw him sometime
5 shortly thereafter he stopped in to see me again to ask
6 me about the situation, as best I can paraphrase it the
7 situation. And then I also saw him, he met with me and
8 other representatives from insurance and lawyers.

9 Q Now, let me ask you. Did there -- I'm going
10 to show you --

11 MR. CLARK: Did you want Beardsley-2?

12 MR. GULINO: Yeah, I'm looking --

13 MR. CLARK: That's -- that's over here.

14 BY MR. GULINO:

15 Q I'm going to show you what's admitted in to
16 evidence as exhibit number 4, do you recognize what
17 that depicts?

18 A I do.

19 Q And can you show it to the jury quickly?
20 What do you recognize that to be?

21 A It's a picture I took. And what it is is a
22 picture of the --

23 Q Hold on I'll (indiscernible) question
24 (indiscernible) When did you take it?

25 A The 27th.

1 Q Two days after the accident?

2 A Yes.

3 Q And is that exhibit number 4, is that time
4 stamped?

5 A Yes it is.

6 Q Date and time, can you read it for the jury
7 please?

8 A 6/27/2013 at 20 after 7:00 in the morning.

9 Q Did you take that photograph at the request
10 of anyone?

11 A Yes.

12 Q Who was that?

13 A Carol Brauer.

14 Q And who is she?

15 A Risk management coordinator for LP Ciminelli in
16 the Buffalo Office. Again, not to confuse the issue at
17 the time her name was Carol Laux, now it's Carol
18 Brauer, sorry.

19 Q Did you ever learn the purpose of you taking
20 that photograph?

21 A Yes.

22 Q What was the purpose?

23 A Just to remind her and -- and to demonstrate the
24 condition of the general area.

25 Q And do you ever learn whether or not the

1 condition that is depicted in exhibit 4 was any
2 different at the time of the accident?

3 A Did I ever learn it was different?

4 Q Yeah.

5 A No.

6 Q Do you walk in that area?

7 A Yes.

8 Q And let me ask you this going back to number
9 4, what do you recognize that area to be? What's
10 depicted in the photo?

11 A What's depicted in the photo is one of the
12 temporary drains, the floor, the drains were there to
13 remove storm water, and the area is still there today.
14 It's the finished roof for that section of area set
15 aside for HVAC units, heating, ventilation, and air
16 conditioning units for the -- for the hotel.

17 Q Is that area sloped?

18 A The area around the hole, yes sir.

19 Q What's the purpose of the slope?

20 A It's done that by design, so that the rainwater --
21 it's a flat roof, that black membrane is a flat
22 surface, so that the water has a natural place to
23 gravitate to to be drained from the roof.

24 Q And when you walk in that area, do you notice
25 that it's sloped?

1 A Yes.

2 Q And is that a usual condition on a flat roof
3 in a commercial setting like this?

4 A Yes sir.

5 Q When you say temporary drains, can you
6 explain to the jury why -- why, what -- what is a
7 temporary drain?

8 A Yeah, the -- the drain -- the drain that's in that
9 picture there was a couple of them in the area. The
10 drains that were there were obviously to get rid of the
11 water that was in that area. Because, for example, in
12 that picture the HVAC unit isn't sitting on the
13 stanchions, so they had to install all of that. But
14 th --

15 Q Let me stop you there. HVAC, they don't know
16 -- I don't think they know what that is?

17 A Yeah, yeah. Heating, ventilation, and air
18 conditioning, okay. The big units that you normally
19 see on top of buildings, the customer did not want them
20 to be seen from the road, so they put them in this --
21 basically a room with no ceiling. So, if it rained and
22 you didn't have those drains, that room would fill up
23 with about a foot of water. So, they put the drains in
24 to be part eventually of the permanent system, so that
25 the water would drain out. Those units had -- had a

1 pipe attached to them. If you were in the building
2 looking up, they had a pipe attached to them that would
3 just run the water over and out of the building. Now,
4 if you're in the building you can't see those drain
5 pipes, because they were there temporarily until the
6 permanent pipes which were hidden by the ceilings and
7 stuff were put in.

8 Q The condition that you see in exhibit number
9 is that a usual condition you'd see on a site like
10 that?

11 A Yes it is.

12 Q And when Mr. Mella -- not Mr. Mella, Mr.
13 Mella testified. Mr. Munoz told you about his accident
14 the day before, did he tell you physically what was
15 bothering him?

16 A Yes.

17 Q And do you recall what it was that he told
18 you that was physically bothering him?

19 A Yes, the lower right portion of his back just
20 above his beltline.

21 Q Did he say anything about his elbow?

22 A No.

23 Q Did he say anything about his shoulder?

24 A No sir.

25 Q I'm going to show you a photograph, it's a --

1 for the record it's a I guess we'd call it a photostat
2 or a copy of a photograph, attached to exhibit number
3 22. Do you recognize that?

4 A Yes sir.

5 Q And what do you recognize that to be?

6 A I recognize it to be the same area that we're
7 talking about before, but the -- the HVAC units are not
8 yet in place.

9 Q You have to turn it.

10 A I'm sorry.

11 Q I'm sorry.

12 A The HVAC units are not yet in place, these are
13 where the units would be set afterwards.

14 Q And --

15 A This has a date stamp on it as well.

16 Q Who took that photograph?

17 A I did.

18 Q And when did you take it?

19 A One minute after the first one, 6/27/13 at 7:21
20 a.m.

21 Q About a minute after the other one we just
22 showed the jury?

23 A Yes.

24 MR. GULINO: May I publish this to the jury
25 Your Honor?

1 THE COURT: I believe that -- is that one of
2 the ones in evidence?

3 MR. GULINO: Yes, it's attached --

4 THE COURT: Okay.

5 MR. GULINO: -- to 22.

6 THE COURT: Sure.

7 BY MR. GULINO:

8 Q Subse -- after -- after you filled out this
9 report and took these photographs, did you generate any
10 other paperwork about this? Let me -- let me re -- let
11 me rephra -- withdraw that question. Do you have like
12 a weekly report that you send up to the company?

13 A Yes.

14 Q And -- and was a weekly report sent up to the
15 company containing -- referring to this?

16 A Yes.

17 Q And can tell the jury approximately how many
18 get this?

19 A At the time I'm thinking 15, 20 at a minimum. It
20 goes to most of our senior management up in the Buffalo
21 Office. It also goes to all the rest of our corporate
22 safety staff. It also goes to requested members of the
23 owners team or similar.

24 Q (Indiscernible) okay.

25 A Yeah.

1 Q And what's the purpose of sending it to all
2 those people?

3 A It's a weekly synopsis of my opinions, my
4 observations, and my corrections or plaudits for our
5 jobsite, so that they have a weekly report of how the
6 jobsite's doing safety and compliance wise.

7 Q Do you know Joel Mella?

8 A I do.

9 Q Do -- was he out here?

10 A Yes he was.

11 Q And -- and was he also working at that site?

12 A Yes he was.

13 Q And did he come with you -- withdrawn. Did
14 he come with Mr. Munoz to come see you that day?

15 A I thought it was Mr. Cooper. Which -- which day
16 counselor?

17 Q I'm sorry.

18 A Which day come to see me, which day?

19 Q Yeah. On the afternoon when you were told on
20 6/26 by Mr. Munoz about his accident, did you go up
21 there then?

22 A No.

23 Q On the 26th?

24 A No.

25 Q The first time you went was the 27th in the

1 morning?

2 A Yes.

3 Q So, if there was testimony that you went up
4 with him that date after he reported it, that's not
5 true?

6 A That's not true.

7 MR. CLARK: I apologize, but I missed that
8 one.

9 MR. GULINO: I'm sorry.

10 MR. CLARK: I -- I missed what that was
11 there.

12 MR. GULINO: I'll -- I'll repeat the
13 question.

14 MR. CLARK: I'm assuming you like it, so you
15 don't mind repeating it. But go ahead, if I can hear
16 that again. Is that all right?

17 MR. GULINO: Do you want me to ask him again?

18 MR. CLARK: Yeah.

19 MR. GULINO: Okay.

20 MR. CLARK: Could you. I'm sorry.

21 BY MR. GULINO:

22 Q There was testimony that on the day Mr.
23 Munoz, in the afternoon of the 26th, came to you to
24 tell you about the accident, and the testimony was that
25 you accompanied him to the accident area. Is that

1 true?

2 A That is not true.

3 MR. CLARK: The next day or the day?

4 MR. GULINO: The 26th.

5 MR. CLARK: Oh, okay, got it, now I
6 understand.

7 MR. GULINO: Yeah, the 26th. You want me to
8 ask, I can to do it again?

9 MR. CLARK: You don't have to.

10 MR. GULINO: Nothing further Your Honor.

11 THE COURT: Okay. Cross.

12 MR. CLARK: Judge, it may be with regard to
13 breaking and stuff, I don't want to wear you today.

14 THE COURT: We've had a number of breaks
15 today, so then why don't -- why don't --

16 MR. CLARK: I just --

17 THE COURT: -- about -- anybody need a break?

18 JURORS: No.

19 MR. BERENGUER: The whole day was a break.

20 THE COURT: Nobody needs a break.

21 UNIDENTIFIED SPEAKER: Thanks anyway.

22 MR. CLARK: I -- I got a lot of stuff --
23 stuff here, but I want -- I want to try to go right
24 through it.

25 CROSS EXAMINATION BY MR. CLARK:

1 Q First of all we have this placed as exhibit
2 24, the LP Ciminelli safety manual. You're obviously
3 familiar with that; right?

4 A Yes sir.

5 Q You helped write it?

6 A Yes sir.

7 Q Okay. So, first of all you agree that LP
8 Ciminelli is accountable for the safety, wellbeing of
9 all the individuals on the company's jobsite. You
10 agree with that; correct?

11 A That's what it --

12 MR. GULINO: Objection, out of scope.

13 THE COURT: Overruled.

14 BY MR. CLARK:

15 Q And that includes that LP Ciminelli is
16 responsible to maintain safe and healthful working
17 conditions, so that needless injuries to workers don't
18 happen; right?

19 A Yes.

20 Q And do you agree that LP Ciminelli is
21 ultimately responsible for the safety of not only their
22 own direct employees, but all the subcontractors on the
23 site. You agree with that?

24 A Yes.

25 Q Now, there's been a lot of talk in this case

1 about my client having been essentially fired from the
2 job after this incident. You're aware of that issue;
3 right?

4 A He was not fired.

5 Q Would you allow him back to the jobsite after
6 this incident?

7 A No.

8 Q Now, in your company's safety manual you guys
9 actually have a disciplinary procedure; right?

10 A In the manual, yes.

11 Q And for a first offense the person gets a
12 written warning; right?

13 A Not necessarily.

14 Q So, I just want to show you the disciplinary
15 section of the documents here.

16 MR. CLARK: Is it all right if I --

17 THE COURT: Yes. Yes.

18 MR. CLARK: Okay. Laz, can we turn on the
19 projector?

20 BY MR. CLARK:

21 Q Do you see the --

22 MR. GULINO: Objection, it's out of the
23 scope.

24 THE COURT: Well, the objection is overruled.
25 Do we need the projector or can you just ask

1 a question, and if you need it you can put it up?

2 MR. CLARK: Okay.

3 THE COURT: Just to --

4 MR. CLARK: Thanks.

5 THE COURT: -- sort of move it along.

6 MR. CLARK: Yes, definitely.

7 THE COURT: Okay.

8 BY MR. CLARK:

9 Q Okay. You see the disciplinary procedure
10 here on page 51 of the manual?

11 A Yes.

12 Q And what does it say after first offense?

13 A Written warning.

14 Q What does it say after second offense?

15 A Suspension.

16 Q And what does it say after third offense?

17 A Termination.

18 Q With regard to what you didn't allow
19 Washington Muno -- strike that. With regard to why you
20 didn't allow the worker back onto the jobsite, did --
21 was that a first offense?

22 MR. GULINO: Objection.

23 THE WITNESS: Mr. Mu --

24 MR. GULINO: Relevancy.

25 THE COURT: You -- you say it's not relevant?

1 MR. GULINO: Yes.

2 THE COURT: You want to respond to the
3 objection?

4 MR. CLARK: Yes, I feel it is relevant. Much
5 of the defense in the case is that he was properly
6 thrown off the jobsite.

7 THE COURT: The objection is overruled.

8 THE WITNESS: Okay. Mr. Munoz was not a
9 Ciminelli --

10 BY MR. CLARK:

11 Q Sir, the question is was this his first
12 offense as far as you knew?

13 A As far as I knew, yes.

14 Q Now and by the way, this whole thing about
15 reporting in one hour if I get -- if I have my notes
16 correctly, you said the purpose of that is because time
17 starts the facts?

18 A No. Time distorts the facts.

19 Q Okay, time distorts the facts. So, the idea
20 is that if an incident happens, you want to get out
21 there as soon as possible so that you can capture what
22 happens; right?

23 A Not necessarily.

24 Q On a jobsite -- well -- well then what did
25 you mean by time distorts the fa -- well, strike that.

1 You have a one hour reporting requirement; right?

2 A Correct.

3 Q And that is so that they can be informed as
4 soon as possible and get right and document the
5 situation. Isn't that basically what it's about?

6 A No, correction to what you're trying to ask me to
7 answer, okay. If you have a person on our job -- on
8 the jobsite it was made clear in the orientation, sir,
9 that if they do not report an incident within an hour,
10 they are removed from the jobsite. It -- it does not
11 pertain to what they call the three strikes rule.
12 You're taking apples and orange.

13 Q But what's -- but -- but going back --

14 A Sir, you're taking apples and oranges sir.

15 Q So, just going back to because defense
16 counsel had asked a question of you. What is the
17 purpose of that rule? And I had worked -- I wrote time
18 starts the facts, but you said time distorts the facts.

19 A Yes, that's what I said.

20 Q And what do you mean time distorts the facts?
21 You mean you want to get out there as soon as possible
22 to get the correct facts; right?

23 A No sir, that's your interpretation, and I will not
24 agree with that.

25 Q Okay. So --

1 A What we're -- what we're talking about --

2 Q Just -- just please tell us what time
3 distorts the facts means then when you say that. What
4 -- what do you mean by that?

5 A Are you done?

6 THE COURT: That's the question.

7 THE WITNESS: Is it time to ask -- answer
8 your question now?

9 THE COURT: You can answer the question.

10 THE WITNESS: Thank you. Time distorts the
11 facts means that the longer the time goes on between
12 the event and the reporting of the event, time can
13 allow for people to get different interpretations of
14 what actually happened, and they may be thinking more
15 about alternative answers to what happened our on the
16 jobsite.

17 BY MR. CLARK:

18 Q So, basically you want to get out there so
19 you can capture --

20 A You keep saying you want to get out there. No,
21 what we want to do is get the facts for the situation
22 as soon as we can, and if we can do that in our
23 office --

24 Q And --

25 A -- that will do that. Did you hear my answer sir?

1 Q I -- I did hear your answer Mr. Beardsley.

2 A Well, you missed the one about time distorts the
3 facts, I want to make sure you're hearing me correctly.

4 Q I -- I did hear you okay, thank you.

5 A Okay, good.

6 Q And as part of getting the facts that's why
7 you went out there to take the picture; right?

8 A I went out there to confirm the area, yes sir.

9 Q Okay. Because -- and you want to get out
10 there as soon as possible because the area may change,
11 because as you say time distorts the facts; right?

12 A Correct.

13 Q Okay.

14 A But that picture doesn't indicate that.

15 Q So now --

16 A That picture does not indicate that.

17 Q Now, if I --

18 A That picture does not indicate that.

19 THE COURT: Okay. Sir, you have answered the
20 question.

21 THE WITNESS: Okay. Sorry Ma'am.

22 BY MR. CLARK:

23 Q So, I just -- I just -- I'm just -- sir, I'm
24 just typing in Google, June 25th, 2013 day of the week,
25 and it says that's a Tuesday. Do you have any reason

1 to disagree with that?

2 A I don't have a thing in front of me, no.

3 Q Okay. I just -- I just Googled and it says
4 Tue -- you don't have any reason to disagree, do you?

5 A No.

6 Q Okay. So now you testified under oath at
7 your deposition that you went up and took the pictures
8 on a Friday. Didn't you testify to that?

9 A It's been so long I guess, yes.

10 Q Now, you're saying that the worker came back
11 the next day to report it to you; right?

12 A Yes.

13 Q So, that would have been --

14 MR. GULINO: Objection. After he took the
15 picture or after the accident?

16 MR. CLARK: We'll -- we'll clarify.

17 THE COURT: You can clarify.

18 BY MR. CLARK:

19 Q So, you're saying that the worker came to you
20 the day after, that Wednesday the 26th to report the
21 situation to you; right?

22 A Correct.

23 Q So, Tuesday -- the 25th is a Tuesday, 26th is
24 a Wednesday, and you testified at your deposition that
25 you will swear that you took the picture on Friday;

1 right?

2 A That's what it says there, yes.

3 Q Okay. So, now also you had gotten the phone
4 call from your risk manager in the afternoon, and the
5 reason you didn't go the same day it got reported is
6 you said in your testimony because it was in the
7 afternoon. You had a long discussion in your office
8 about the whole discipline thing, helping him go with
9 their authorization form and everything else at the end
10 of the day.

11 MR. GULINO: Objection. Objection. Improper
12 use of the deposition, we don't know what page he's on,
13 what line he's on.

14 MR. CLARK: That -- that's fine.

15 BY MR. CLARK:

16 Q When you found out about it, you didn't go up
17 and take the pictures that day, you waited another day;
18 correct?

19 A Till the next morning, yes sir.

20 Q Okay.

21 A I didn't wait, I went the next morning.

22 Q Okay.

23 A Because of what you just described.

24 Q The -- so, you guys -- you guys essentially
25 you didn't let him on the job anymore after his first

1 offense, because capturing the information is so
2 important that you had to wait until at least the next
3 day or the Friday to go and capture the information;
4 right?

5 A It appears I was in error about the Friday. I was
6 in error on that, it was the next morning 7:20 a.m.

7 Q Do -- do you think LP Ciminelli might have
8 been in error at all for -- for firing this guy for --
9 for that one thing?

10 A We did not fire him.

11 Q Okay. Now, you had talked about the safety
12 orientation rules. And when you took the -- when you
13 took the picture Beardsley-2 here, you had said that
14 the -- that's the condition it was in when you took the
15 picture?

16 A Yes sir.

17 Q And I think the test -- counsel had asked you
18 that was also usually how it looked up there?

19 A Yes sir.

20 Q Okay. And then we also have the other
21 picture from the incident report. Do we -- do we have
22 that -- we have that one hand here. And in this
23 picture -- remember this picture?

24 A I do.

25 Q Do you see the water bottle there?

1 A I do.

2 Q That's -- that's debris; right?

3 A That's debris, yes sir.

4 Q And the white stuff all around, that's also
5 debris from cutting out the insulation, that white
6 stuff?

7 A I don't know what it's for.

8 Q And there's some buckets there?

9 A There's buckets there.

10 Q okay.

11 A To the side of the area.

12 Q So --

13 A To the two sides of it.

14 Q Now, one of the rules that you guys talked
15 about in your safety orientation is that contractors
16 and subcontractors are responsible to maintain
17 housekeeping of their work areas, and that a clean as
18 you go policy will be maintained. You're aware of that
19 rule; right?

20 A Yes I am.

21 Q And that's actually a worker safety rule;
22 right?

23 MR. GULINO: Objection Your Honor, relevancy,
24 it's not a debris case.

25 THE COURT: What's the relevancy?

1 MR. CLARK: The relevance is that it -- it's
2 -- the defense is that they justifiably fired him for
3 violating some rule.

4 THE WITNESS: We did not fi --

5 MR. CLARK: I believe it's relevant Judge --

6 THE WITNESS: I just want it to be true Your
7 Honor.

8 THE COURT: Okay.

9 MR. CLARK: I believe it's relevant Judge
10 just because it's on the safety orientation checklist
11 rules, and it goes to the credibility and issue with
12 regard to the purpose of the firing.

13 THE COURT: The objection is overrule -- the
14 objection is sustained rather. Move on.

15 BY MR. CLARK:

16 Q But the housekeeping rules and clean as you
17 go, that's -- those are safety rules, right, sir?

18 A They can be applied to the 1926 standards if
19 they're improper, yes sir.

20 Q Because if workers are walking around on the
21 jobsite and there's debris around, boards with nails up
22 and things like that, they can trip and get injured;
23 right?

24 MR. GULINO: Objection.

25 **(Continuation of the day's proceedings in Volume 2)**