

SUPERIOR COURT OF JUSTICE

B E T W E E N :

KOSSAY EL-KHODR

Plaintiff

v.

RAYMOND LACKIE ET AL.

Defendant

CROSS-EXAMINATION OF HADASSAH LEBOVIC

BEFORE THE HONOURABLE JUSTICE G. TOSCANO-ROCCAMO
on April 20, 2015, in OTTAWA, Ontario.

APPEARANCES:

J. Obagi

Counsel for the Plaintiff

E. Quigley

Counsel for the Plaintiff

B. Percival

Counsel for the Defendant

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25 Transcript ordered: May 4, 2015
Transcript completed: July 6, 2015
Ordering Party Notified: July 7, 2015

30 **Legend**

(ph) - Indicates preceding word has been spelled phonetically.
[sic] - Indicates preceding word has been reproduced verbatim and is not a transcription error.

MONDAY, APRIL 20, 2015

...JURY PRESENT

5 HADASSAH LEOVIC: AFFIRM

THE COURT: Ms. Lebovic, you tend to be soft spoken. Could I ask you to keep the volume of your voice up, please, and to speak slowly and clearly for the benefit of the members of the jury and myself, and all...

MS. LEOVIC: Yes...

THE COURT: ...counsels?

MS. LEOVIC: ...I will. Can I just confirm that I can open my computer to refer to medical documents?

THE COURT: Again, you're speaking very quietly.

MS. LEOVIC: May I please refer to the medical documents?

THE COURT: You may refer to your file at any time when the questions begin.

MS. LEOVIC: Thank you.

THE COURT: So, if you want to turn it on if that helps you.

MS. LEOVIC: Thank you.

THE COURT: Mr. Obagi.

CROSS-EXAMINATION BY MR. OBAJI:

30 Q. Thank you, Your Honour. Ms. Lebovich(ph), have I got the pronunciation correct?

A. Almost.

Q. Help me with that?

A. Lebovic.

Q. Lebovic. I will try to get that right as we go through this examination. Ms. Lebovic, how long have you been an occupational therapist?

5 A. I believe since 2010, but I'd have to double check with my resume.

Q. All right. You don't have your resume with you here today?

A. I do, it's on file.

10 Q. Okay. Well, we'll let your computer boot up and at some point I'll back track and we'll come back to that question. And I understand that you presently are employed with a company called Siden Health Management, is that correct?

A. That's correct.

15 Q. And have you always worked there as an occupational therapist?

A. Can you please clarify that question?

Q. As an occupational therapist, have you always worked at Siden Health Management?

20 A. No, I have not.

Q. Okay. Do I understand that you may have done some occupational therapy with children early on in your career?

A. That's correct.

Q. And how long ago would that have been?

25 A. Approximately six years ago.

Q. So for the last six years, and that doesn't match up with when you became an occupational therapist, I suppose, 'cause you're saying you think it was 2010?

A. That I began working for Siden.

30 Q. I see. Okay. When did you first become an occupational therapist, registered?

A. I believe in 2009, but I'll confirm that when

I have a look at my resume.

Q. So other than a brief period of time where you worked with children, you've been working then most of your professional life with Siden Management?

A. That's correct.

Q. And it's my understanding that Siden Health Management is a firm which specializes in assessments performed for insurance companies across Ontario, is that correct?

A. That's correct.

Q. Indeed, if I check their website they tote(ph) independent medical assessments as one of their specialties, correct?

A. That's correct.

Q. And is it fair to say then that since you've been with them all you've been doing is insurance assessments?

A. That's correct.

Q. And when you do these assessments, I take it; the client is the insurance company? Correct?

A. For the purposes of, for the purposes of the company that I work for, yes. For my own purposes there are a number of clients involved.

Q. Well when you're retained by an insurance company to do an insurance assessment of an individual, what I'm asking you is the insurance company's your client, you'd disagree with that?

A. No, you're correct.

Q. All right. So that's who your client is when you're doing the insurance assessment, correct?

A. Correct.

Q. All right. And, I take it, that neither you nor Siden have any particular interest in the outcome of this particular case, is that correct?

A. Can you please clarify?

Q. Neither you nor Siden, your employer, have any interests in the outcome of this particular lawsuit?

5 A. For my own personal interests, I'd be interested in finding out the results, but, I mean, not in terms of anything else.

Q. But you're interested because your reputation or you're interested out of curiosity?

A. Curiosity not my reputation.

10 Q. All right. And in respect of this particular case, which brings you here today, your client is Royal Sun Alliance, correct?

A. Correct.

15 Q. And am I correct that you were not retained to do a full future care assessment...

A. Correct.

Q. ...of Kossay El-Khodr, correct?

A. Correct.

20 Q. You were only retained for the strict purpose of calculating the Form 1, which is used under the statutory accident benefit schedule as between Mr. El-Khodr and Royal Sun Alliance, correct?

A. Correct.

25 Q. And so you did not review anything that would've been outside of the Form 1 because that had no interest for Royal Sun Alliance, correct?

A. I reviewed the medical documentation provided to me.

30 Q. For the purpose of assessing a Form 1, attendant care needs under the Statutory Accident Benefit Schedule, correct?

A. Correct.

5 Q. Thank you. You are aware, as I understand it, that your client, Royal Sun Alliance, following receipt of your report decided not to rely on any part of your opinion contained in the report in reference to Kossay El-Khodr's Form 1 needs, correct?

A. I was not informed of the results.

Q. Okay. You are aware today...

A. I am aware...

Q. ...that Royal Sun...

10 A. ...today.

Q. ...Alliance has elected to ignore your assessment and preferred your colleague's assessment, Ms. Bhatnagar(ph), correct?

A. Correct.

15 Q. Are you aware that the reason given, and then we've heard from Liza Hadden, was that the adjuster for Royal Sun Alliance was herself surprised at your report? Are you aware of that?

A. No.

20 Q. And if Royal Sun Alliance, your client, is not relying on your report, Mr. El-Khodr's not relying on your report, we've now heard that report read into this trial on behalf of Mr. Lackie and Mr. McPhail, can you tell me when was the first time that you became aware that Mr. Lackie and Mr. McPhail were suddenly going to rely on your report in this
25 lawsuit?

A. On March 27th.

Q. Of this year?

A. Of this year.

30 Q. Prior to March 27th of this year, I take it, you didn't even know who Raymond Lackie or Mr. McPhail were?

A. Correct.

5 Q. I want to talk about the process of your report and how it's created. We've had that report read to the jury, or portions of it, and the report, as I understand it, begins with a summary of all of the medical documents that you say you reviewed, correct?

A. Correct.

Q. And if I look at that list of documents, without actually putting, pulling out the actual exhibit - put it up on my screen - do you have your report in front of you?

10 A. I do.

Q. All right, so your computer's up and running?

A. It is.

Q. All right.

15 THE COURT: Are you requesting that we follow along in the contents of the report, Mr. Obagi?

MR. OBAGI: I don't think it's necessary, Your Honour, to pull out the actual report at this point. What I will do is I'll put the report on the screen and bring the court's attention to those sections.

20 THE COURT: All right.

MR. OBAGI: And I'd like to draw your attention to rather than have the report handed out again.

THE COURT: Fair enough.

25 MR. OBAGI: Q. Just to (non-discernible) some identification, the document that appears on the screen behind you, Ms. Lebovic, that document is your report?

A. It is.

30 Q. The assessment took place, as I gather from the report, on March 31st, 2014?

A. That's correct.

Q. And you released your report on March 31,

2014, correct?

A. For the purposes of, I guess the, the way the report is written, it's typically the date of the report reflects the date of the assessment, and once it's a multi-disciplinary assessment, in which case the date of the report changes, based on when all of the documents are submitted.

Q. Is there any doubt when you look at this report that this report is dated March 31st, 2014?

A. You're correct.

Q. All right. So the assessment took place on March 31st, 2014, correct?

A. Correct.

Q. And the report is dated March 31st, 2014?

A. Correct.

Q. And just to identify the report for the record, of course, this is the document that's 32 pages in length, together with a Form 1 that is attached to it, correct?

A. Correct.

Q. When we look at the review of documentation, so the very first page of the report, and I'll zoom in on it, "This writer has reviewed all medical documentation provided." See that statement in your report?

A. I do.

Q. The writer is yourself?

A. Correct.

Q. Okay. And if I look at the list of documents that you say you reviewed, it begins with the OCF 19 submitted by David, Dr. Hillborn, and then it continues one full page single spaced, two full pages single spaced, three full pages single spaced, four full pages single spaced, five full pages single spaced, six full pages single spaced, and I would say half a page on page 7. Is that correct?

A. It is.

Q. And I did some quick math. It comes out to about 223 different reports that you reviewed in preparation of this report. Is that correct?

A. I don't know, but if you say so.

Q. All right. Well, if we take a look at the number of documents you reviewed, would you disagree with me that the number of documents you say you reviewed is over 200?

A. It appears so. I know that it was over 1300 pages.

Q. 1300 pages.

A. Correct.

Q. All right. And that's because some of the reports are quite a number of pages?

A. Correct.

Q. Some of them would go on for 30 pages, in fact, depending if, for instance, the catastrophic impairment assessments, correct?

A. Correct.

Q. All right. And then we get down to this area that says document review, and it says, "The following...."

THE COURT: What page is that, Mr. Obagi?

MR. OBAGI: Sorry, Your Honour. I'm at page 8. Sorry, the end of the list of documents.

THE COURT: Go ahead.

MR. OBAGI: Q. And there's a line there that says, "Document review. The following documentation is considered to be especially relevant to my current assessment." Do you see that?

A. Yes, I do.

Q. The word "my current assessment", I take it that means you?

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A. Correct.

Q. And this document review summary, about half a page on page 8, a full page, page 9, full page at page 10, and a full page at page 11. See that?

A. I do.

Q. Am I correct, Ms. Lebovich[sic], that you didn't write any of that four and a half pages of document review with respect to the sections that you believe were especially relevant?

A. As discussed previously, no.

Q. So when you say "the following documentation is especially relevant to my current assessment" this is not your review pulling out these references. This is somebody at Siden Health called the quality insurance individual who's doing this for you, correct?

A. Based on RSA's request, they ask that there, that we provide a summary, pertinent documents. I was not made aware of that, so QA made me aware of that and pulled out relevant documentation.

Q. Right. But I'm not interested in what RSA asked you to do. I'm interested in what the report that has been filed in this court says, because it says, "The following documentation's considered to be especially relevant to my current assessment." Is it fair to say that the extracts that are contained in those last three and a half pages don't come from your review of the documents, they come from somebody else's review of the documents?

A. I reviewed the documents and I agreed with the summaries provided.

Q. So let's take a step back, all right? You reviewed the 1300 pages of documents, correct?

A. Correct.

Q. And then somebody in your office sent you these four and a half pages, pre-printed to be placed into this report, and they asked you, "What do you think, Ms. Lebovich[sic], can we put these in your report?" and you said, "Yes."?

A. Correct.

Q. And is it correct to say that you didn't make a single change?

A. Correct.

Q. You accepted whatever this quality assurance person did in pulling out what you believed to be "especially relevant" and didn't change a line?

A. Correct.

Q. All right. So the person who believes, who created this list, this quality assurance person, I take it that she doesn't have any particular credentials?

A. I don't know her credentials.

Q. You don't know her credentials?

A. I don't.

Q. So a person with no credentials, that you know of, send you this assessment, sends you this summary and you accept it full stop without making any changes yet you don't know what that person's credentials are?

A. I went back and reviewed those particular assessment results and I agreed to include them in my report.

Q. Did you go back to the 1300 pages that you had reviewed and pull out other things that maybe you, as the registered occupational therapist in this case, might have considered relevant and added it to this list of documents?

A. No, I did not. I referred to other documentation within my report.

Q. Then we get to your qualifications at the

bottom of page 11, and we talked about that quickly. Do you have your computer up? Can you tell us when you first became registered as an occupational therapist in the province of Ontario?

5 A. Yes, one moment. I became registered in 2009.

Q. 2009?

A. Correct.

Q. So at the time that you did this assessment then you had been practicing for approximately five years?

10 A. Correct.

Q. And most of those five years were spent doing insurance assessments for Siden Health Management for various insurance companies across the province?

A. Correct.

15 Q. Okay(ph). Now you were kind enough to provide us with a copy of your invoice for the review of the 1300 pages and preparation of your 32 page report plus the Form 1. What I have on the screen - may I approach, Your Honour?

THE COURT: You may.

20 MR. OBAGI: Q. Is an invoice, I believe, relating to the services you provided in reference to this assessment?

A. Correct.

25 Q. And have I read this correctly that the fee that you charged for reviewing 1300 pages of medical reports, meeting with Mr. El-Khodr, and finalizing a 32 page report, together with completion of the Form 1 was \$463?

A. Correct.

MR. OBAGI: Your Honour, I'd like to put this in as the next exhibit...

30 COURT REGISTRAR: It's Exhibit 54.

MR. OBAGI: ...and I'd like to - I have a copy for the jury....

THE COURT: Exhibit 54.

EXHIBIT NUMBER 54 - Invoice by Hadassah Lebovic
dated March 31, 2014. Produced and marked.

MR. OBAGI: Q. I'm correct that this was the
entire invoice, correct?

A. Correct.

Q. And in preparing your 32 page report, plus the
Form 1, plus the review of 1300 medical documents, I take it, you
took notes?

A. On the medical documents provided?

Q. Yes?

A. I did not.

Q. You didn't take any notes?

A. I took notes of the, during the assessment
itself.

Q. All right. And I think you've provided me
with those notes. But what about the review, the 1300 medical
documents? Where are...

A. No, I....

Q. ...your notes?

A. I don't have notes.

Q. You don't have any stick it notes, you don't
have any highlights, you don't have anything?

A. No, I don't.

Q. So you reviewed 1300 pages of medical
documentation and you took no notes of it?

A. I had full reference to it at all times.

Q. Right. But I'm, I'm talking about the actual
review, as you were going through it, I would expect somebody
who's reviewing the medical report would be making comments,
would be making notes, would be highlighting certain things. Do
I understand you have absolutely none, no notes?

A. None.

Q. And with respect to the assessment, which resulted in the 32 page report on Mr. El-Khodr, can you confirm for me that these 3 pages, which appear to be written on the back of a consent form, on the back of a summary sheet, I guess is a referral form, are, in fact, the only notes you have of this entire assessment?

A. Correct.

Q. Well maybe take a moment, Ms. Lebovich[sic], and just review it just to make sure that I'm not incorrect?

THE COURT: Sorry, you said they were on the back of what?

MR. OBAGI: Q. The back of - the first set of notes, Your Honour, are on the back of the consent form. The second page of notes are on the back of page 2 of the referral sheet. The third page is on the back of the referral sheet. And I guess the fourth page is really not part of your notes, so, in fact, you really only have three pages? Is that correct?

A. It is. Can I please clarify that I have typed notes throughout the assessment that I included in my reports.

Q. You have typed notes throughout the assessment that you included in your report. What does that mean?

A. It means that I use a template from which I create my reports, and during the structured interview I typed my, my questions and my answers that I discussed with Mr. El-Khodr.

Q. Okay, well let's, let's turn to that in a minute, because I had thought that I'd asked you clearly "Can I have all your notes?", but can we just deal with this issue first? If we can make Ms. Lebovich's[sic] handwritten notes the next exhibit, Your Honour?

COURT REGISTRAR: Exhibit 55, Your Honour.

THE COURT: Yes.

EXHIBIT NUMBER 55 - Hadassah Lebovic's handwritten notes. Produced and marked.

MR. OBAGI: Q. Now, you were talking about other notes, and you wrote to our office on April 24th, or at least you produced for me a letter dated April 24th indicating, "To Whom It May Concern, attached, please find a copy of my handwritten notes during my assessment of Mr. El-Khodr on Monday, March 31st, 2014. These are the only clinical notes and records I have aside from those provided to me by the insurer through Siden Health Management." Can I show you that letter?

A. Yes.

Q. Did you write that letter?

A. I did.

Q. And the three pages of handwritten notes is what was attached to that letter?

A. Correct.

Q. Okay. Your Honour, if we can make that letter the next exhibit?

COURT REGISTRAR: Exhibit 56.

THE COURT: Thank you.

COURT REGISTRAR: (Non-discernible) 55, Your Honour.

THE COURT: Yes, I know, I have written it down, so.

EXHIBIT NUMBER 56 - Letter dated April 24, 2014 by Ms. Lebovic. Produced and marked.

MS. LEOVIC: Your Honour, I'd like to amend that, if possible, and say that this, as well, includes my reports but I thought that was understood.

THE COURT: I'm sorry?

MS. LEOVIC: I wanted to include, just amend this

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note stating that this, this information, as well includes my reports, my clinical notes and records, but I had not included that. I thought it was understood.

5 MR. OBAGI: Q. You're talking about the 32 page report?

A. Yes.

10 Q. Okay, what I'm talking about Ms. Lebovich[sic] is the notes that you took in preparation for that report. So I understand there's a report, we've all seen it, that's why we're here, but with respect to your notes, do we now have all of your notes relating to this assessment?

A. Yes.

15 Q. Now, in looking at the documents you had a chance to review, this 1300 page medical file, it included two reports of your colleague Ms. Bhatnagar, is that correct?

A. Correct.

20 Q. And this is a colleague of yours who's also employed with Siden Health, correct?

A. Correct.

25 Q. And, I take it, she also primarily only does insurance company examinations, correct?

A. I don't know.

Q. You don't know?

25 A. I don't know.

30 Q. All right. The template that you talk about, or you mentioned earlier, is that a template that all the occupational therapists use at Siden Health in preparing these assessments?

A. We've been provided with it, but we are allowed to amend it as we feel necessary or fit.

Q. And this template is something that's provided

to you by Siden Health Management?

A. Correct.

Q. And it's a template that you're required to use, subject to what minor variations you wish to make to it?

A. Correct.

Q. And you used that template in preparing the assessment of Mr. El-Khodr, correct?

A. Correct.

Q. All right. Now, given that Ms. Bhatnagar is also employed with Siden Health, I suspect she used the same template?

A. You can assume that.

Q. All right. And you're aware that Ms. Bhatnagar did also an assessment and a Form 1 initially, correct?

A. Correct.

Q. And you're also aware that she subsequently filed a second report after receiving further information from Liza Haddon and Laurie Warren indicating that she will need to revisit her assessment of attendant care needs due to some misinformation on her part, correct?

A. Correct.

Q. Now, I don't see in your report you referring to Ms. Bhatnagar's supplementary report in your summary. Oh, sorry, the summary wasn't prepared by you. It was prepared by somebody else, right? Correct?

A. That's correct.

Q. Okay. But you did indicate that you saw Ms. Bhatnagar's report, correct?

A. Correct.

Q. Do you have the report handy, the addendum report of Alexandra Bhatnagar?

A. Yes, I do.

Q. Gonna take you to page 2 of that report. Your Honour, this report is not filed on the evidence. It's simply one of the reports that's referenced in Ms. Lebovich's[sic] history of medical documents she reviewed.

5 THE COURT: All right.

MR. OBAGI: Q. At page 2 of her report, and I'm starting to read at the first full paragraph about three lines up from the, the end of that paragraph, "This writer was under impression that as part of his new living arrangement he will have access to supports and services as required. At the time of the initial assessment this writer was unable to assess his new living arrangement and to evaluate services available. This writer contacted both Ms. Hadden and Ms. Warren after receipt of their rebuttal reports and was provided, was advised that Mr. El-Khodr resided in a supported independent living environment with very minimal supports. Further supports were to be contracted through a company called Phoenix Network. This writer was unable to contact Mr. El-Khodr's treating psychiatrist, Dr. Jean Hall, as she was on medical leave. The most recent report from Dr. Hall on file, dated July 15th, 2013, states only that Mr. Khodr's living arrangements should be improved to ensure that he lives in an environment offering appropriate assistance and support."

25 She finally concludes, "With, given the new information provided by Ms. Warren and Ms. Hadden, as well as the conflicting information about Mr. El-Khodr's current living environment, it is recommended that an in-person assessment be undertaken to re-evaluate his attendant care needs while taking into, into consideration supports that are available. Signed, Alexandra(ph) Bhatnagar."

30 You read that report in the review of the 1300

pages?

A. I did.

Q. Ms. Bhatnagar was never sent back to complete her assessment, correct?

A. From my understanding, that's correct.

Q. Ms. Lebovich[sic], given that this was probably the most recent document in the medical review, dated March 6th, 2014, that's only 21 days before your assessment, did you contact Laurie Warren, the treating occupational therapist, to discuss this file?

A. I did not.

Q. You were aware from the medical review that Laurie Warren had been involved in Kossay El-Khodr's care since August of 2008, correct?

A. Correct.

Q. That's six years, at that point in time, correct?

A. Correct.

Q. You were aware that Ms. Laurie Warren was an occupational therapist?

A. Correct.

Q. Similar as yourself?

A. Correct.

Q. And that she had been providing occupational therapy assistance to Mr. El-Khodr for six years, correct?

A. Correct.

Q. Am I correct also, Ms. Lebovich[sic], that you never even tried to reach out to her?

A. I did not attempt to contact her.

Q. Thank you. Did you ever contact Ms. Hadden, the case manager?

A. I did not.

Q. You were aware this was a catastrophic file, correct?

A. I was.

Q. You would've been aware that case management was involved, correct?

A. From my review of the medical documentation, correct.

Q. You were also aware that Ms. Hadden was not only a case manager but also a registered OT?

A. Correct.

Q. And you were aware that she had been involved in Kossay's care since early 2012, correct?

A. Correct.

Q. And that as a case manager, you would be aware that one of her roles was to orchestrate and work together with all of the various professionals to make sure that all of Kossay's needs are met, correct?

A. Correct.

Q. And you'd also be aware that as a case manager if there were any documents missing or any reports that were not available to you that Liza Hadden would probably be able to get those reports for you?

A. Correct.

Q. You never tried to reach out to Liza Hadden did you?

A. I did not, as I stated before.

Q. What about Dr. Hall? You were aware that Kossay's psychologist since August of 2009 was a psychologist by the name of Dr. Jean Hall.

A. Correct.

Q. You were aware that he was seeing Dr. Jean Hall on average once every two weeks?

A. Correct.

Q. Since 2009, that's a period of merely(ph) four and a half years?

A. Correct.

Q. Did you reach out to her?

A. I did not.

Q. Ms. Lebovich[sic], what about the care that's available in the building itself? Ms. Bhatnagar indicates she needs to investigate what sort of supports that are available in the area where Mr. Kossay is living. Did you find out what supports are available to Kossay El-Khodr?

A. I did not.

Q. You made no inquiries whatsoever of the Phoenix Network?

A. No.

Q. You made no inquiries of the landlord of the building to determine if he has any supports available to him in that building?

A. No, I did not. I relied on what Mr. El-Khodr told me.

Q. Because Mr. El-Khodr would have a much better understanding of the needs and supports that are available to him then would his case manager?

A. Not necessarily.

Q. And, I take it, you would agree with me too that the occupational therapist, Laurie Warren, having been involved in the case for as long as she had would have also significantly more information about the supports available to him?

A. Than Mr. El-Khodr?

Q. Yes?

A. It's possible.

Q. As I understand, some of the portions of the report that were read by my friend, it was your conclusion on the assessment that you did not find any obvious cognitive impairments in Kossay El-Khodr, is that correct?

5 A. Correct, based on my assessment of him on that day.

Q. On that day?

A. Correct.

10 Q. You did note, however, there were some psychomotor delay, correct?

A. Correct.

Q. Yet, notwithstanding that, you did no cognitive testing whatsoever, correct?

A. Correct.

15 Q. Your predecessor, Ms. Bhatnagar, did do some cognitive testing, correct?

A. Correct.

Q. She did what's called the MOCA Test, the Montreal Cognitive Assessment, correct?

20 A. Correct.

Q. And he failed it, correct?

A. There's no pass or fail, but he failed within the moderately concerning area.

Q. Right. Because it's a score, right?

25 A. Correct.

Q. If he doesn't score high enough then he falls into the moderately impaired, correct?

A. Correct.

30 Q. And you saw that test done by Ms. Bhatnagar, correct?

A. Correct.

Q. And you saw the he fell into the moderately

impaired category, correct?

A. Correct.

Q. But you decided not to do any testing of his cognitive abilities, correct?

5 A. Correct, this was extensively done throughout the year since the subject accident.

UNIDENTIFIED MALE COUNSEL: I'm sorry, Your Honour, I didn't hear.

THE COURT: You repeat?

10 UNIDENTIFIED MALE COUNSEL: Just repeat what you said, Ms....

A. Oh, what I said. I'm sorry. There was extensive cognitive testing done in the medical file. I did not feel I needed to do my own.

15 MR. OBAGI: Q. Yet, your conclusion is he has no cognitive impairments?

A. Based on my observations of him during the assessment.

20 Q. And you did not refer to any of the previous cognitive testing that was done by Ms. Bhatnagar did you?

A. I did not in my report.

Q. And, in fact, even in your conclusion you state that he has no cognitive impairments?

A. Based on my observations.

25 Q. Now there were psychiatric reports in that 1300 pages of medical documents, correct?

A. Correct.

30 Q. You would agree with me that a file of this nature, dealing with both cognitive and physical impairments, it would be important for you to have a good handle on all of the psychiatrists or psychologists who had assessed him in the past five years?

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A. Correct.

Q. All right. So were you missing any documents?

A. I was missing information related to the multiple hospital visits that Mr. El-Khodr reported to me having attended since the accident.

Q. All right. Anything else come to mind?

A. Not at the moment.

Q. All right. You were aware that Dr. Hall was the psychologist who had identified significant psychosocial disabilities in respect of Mr. Kossay El-Khodr's presentation?

A. Correct.

Q. I can pull up your report, and I'd like to go to Dr. Hall's reports. If I could bring you to Dr. Hall's reports which are listed at page 5 of 32. I'm just zoomed in on it right here. Do you see that list?

A. Yes, I do.

Q. Okay. I see the last two items: "Progress report number 2, Dr. Jean Hall, dated May 15th, 2011", do you see that?

A. I do.

Q. I see, "Progress report number 5 of Dr. Jean Hall, dated July 15th, 2013", do you see that?

A. I do.

Q. Can you tell me, Ms. Lebovich[sic], where's progress report 3 and 4?

A. It was not included in the medical documentation.

Q. And you didn't make any inquiries of Liza Hadden, the case manager, to obtain a copy of those reports?

A. I did not. I didn't feel it was necessary to my overall impressions and conclusions.

Q. And the last report from Dr. Jean Hall is

dated July 15th, 2013. Are you aware that there was a progress report number 6 dated January of 2014?

A. No.

Q. I'm sorry?

A. No, I did not. Or, no, I was not made aware.

Q. You would agree with me that a progress report from the psychologist dated less than two months prior to your assessment would be a document you would have wanted to review to assess the psychological condition and psychosocial?

A. I'd gleaned enough information from the medical documentation provided. Had it been included, I would certainly have reviewed it.

Q. That's not really what I'm asking you. What I'm asking you is whether it would've been useful for you to have the opinion of the treating psychologist with respect to Mr. Kossay El-Khodr's needs as at the time of your assessment. Are you suggesting it would not have been relevant to you?

A. I don't know, I haven't read the report, but I have read all of the other reports.

Q. Okay. You were aware from the treatment team's rebuttal reports that Dr. Hall was supportive of moving Kossay into a supported independent living environment call the Phoenix Network, which would provide him with 24/7 access to help him with his heightened stress and anxiety levels and his fears of being alone at night to manage his pain. You were aware of that were you not?

A. Yes.

Q. Yet you never picked up the phone to ask Liza Hadden, "Is there a more up to date report from Dr. Hall that I can review to understand why the team's recommending 24/7 access to care?"

A. No, I did not.

Q. All right. You would agree with me that that opinion would certainly be one that would be relevant to your assessment, correct?

A. I don't know what's in the report. I just know what she recommended on, in her report dated July 15th, 2013.

Q. Well I can tell you that this jury has heard the evidence of Dr. Hall, and they have heard her recommendation that he was a pri... - he's a prime candidate for the Phoenix Network, "which would provide him with 24/7 access to help him with his heightened stress and anxiety levels, and his fears of being alone at night to manage his increase in pain".

MR. PERCIVAL: Your Honour, again, may I say something in the absence of the jury?

THE COURT: And presumably, in the absence of the witness?

MR. PERCIVAL: Yes, Your Honour.

...JURY EXITS COURTROOM

...WITNESS EXITS COURTROOM

...COURT DEALS WITH OBJECTION AND FILES EXHIBIT NUMBER E.

EXHIBIT NUMBER E - Report dated March 6, 2014.

Produced and marked.

...JURY AND WITNESS RETURN TO COURTROOM

THE COURT: Members of Jury, Mr. Obagi is just going to finish up the area of questioning he's dealing with at the moment, and then we're going to take the afternoon break and he estimates another hour after that.

MR. OBAGI: Q. Ms. Lebovich[sic] we were talking about Dr. Hall and her recommendations, and with the evidence that this court has heard about 24/7 access to care, and my

question to you was that opinion from a registered psychologist who's been treating Mr. El-Khodr since 2009 would be a relevant opinion that you would want to consider in assessing Kossay El-Khodr's attendant care needs, correct?

5 A. Again, if it would've been provided to me, I certainly would have reviewed it.

Q. And had you picked up the phone and called Dr. Hall, you could've received it in that fashion as well?

A. Correct.

10 Q. Or, as we mentioned, Ms. Liza Hadden, which you did not do?

A. Correct.

Q. Nor did you ask Laurie Warren did you?

A. Correct.

15 Q. Now given that these progress reports are sent to the Royal Sun Alliance, you could've asked your own client to ensure that further documentation be provided to complete your records. You didn't do that either did you?

20 A. No, I did not. It was to my understanding that all relevant and up to date documentation had been provided to me.

25 Q. Right. But your understanding, and the person who provided you the documentation was clearly wrong because in your own summary you're missing two reports from Dr. Hall, correct?

A. Correct.

Q. And you don't have anything more current than July 15, 2013?

A. Correct.

30 Q. And you took no steps to rectify any of that?

A. Correct.

MR. OBAGI: Thank you. I'm gonna move on Your

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Honour to, to the next expert. So this would be a good time to take the afternoon break.

THE COURT: We'll take 20 minutes then.

...JURY EXITS THE COURTROOM

5

R E C E S S (3:30 p.m.)

U P O N R E S U M I N G :

10

...JURY ENTERS COURTROOM

...COURT ADDRESS JURY ON SCHEDULING

MR. OBAGI: Q. Ms. Lebovich[sic], I was about to talk about - we talked about Dr. Hall. I want to talk about Dr. Sudaby(ph) as well. You're aware that Dr. Sudaby is a psychiatrist that was retained by Royal Sun Alliance in order to do insurer examinations?

15

A. Correct.

Q. And he was asked to comment about psychosocial and cognitive difficulties Mr. El-Khodr was experiencing following, following the motor vehicle accident, correct?

20

A. Correct.

Q. One of the reports that was listed in the documents you reviewed is a report dated August 13th, 2010. Do you have that report handy?

25

A. I do.

Q. Your Honour, this is one of the plaintiff's section 52 reports, and I would ask the jurors if they would like to follow along to pull out their iPads and go to Exhibit Number 1.

30

THE COURT: Is that the one up on the screen?

MR. OBAGI: It is.

THE COURT: The large screen? Fair enough.

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MR. OBAGI: Q. Tab 177, and Exhibit Number 1.
This is a report dated August 13, 2010. So this is approximately
three and a half years following the motor vehicle accident,
correct?

5 A. Correct.

Q. And this is the psychiatrist who qualified to
give evidence and give a diagnosis with respect to psychological
conditions?

A. Correct.

10 Q. Before I bring you to any paragraphs, this
report, is it fair to say that this report is not referenced in
your document with you anywhere other than as a listed document?

UNIDENTIFIED MALE COUNSEL: Correct.

A. Correct.

15 MR. OBAGI: Q. Do you remember reviewing this
document?

A. I do.

20 Q. If I can take you to page 7 of that report.
I've highlighted for members of the jury the section that I'm
drawing your attention to. You would agree with me having
reviewed this report that you understood that Dr. Sudaby, a
psychiatrist, had diagnosed Mr. El-Khodr with a pain disorder
with psychological factors affecting physical condition with
major depression, single episode, and moderate without psychosis.

25 A. Correct.

Q. And a rule out of opiate dependence, correct?

A. Correct.

Q. And his general GAF rating was 50, correct?

A. Correct.

30 Q. And access for perceived high level of stress
relating to pain experiences. You see that?

A. I do.

Q. That's pretty consistent with what Dr. Hall was reporting all along in the progress reports, correct?

A. Correct.

Q. And the general conclusion from Dr. Sudaby: "There is no indication of pre-accident and psychiatric illness. I concur with other assessors that the motor vehicle accident in question has been causative of Mr. El-Khodr's pain disorder. Other assessors have given him a diagnosis of an adjustment disorder, however, I feel that he meets the diagnostic criteria, criteria for major depressive illness. I concur with other assessors that the underlying dependent personality style has left Mr. El-Khodr with few emotional mechanisms to respond to a motor vehicle accident and the resulting pain experiences. His limited intellectual functioning also interferes with his ability to adapt. I concur with other assessors that there is evidence of medication related sedation on the interview. This is related to his narcotic analgesics." Did you read that?

A. I did.

Q. All right. And you would agree with me that that has something to do with the cognitive deficits that he's, his team had indicated that were required as to why he needed 24/7 access to care, correct?

A. I would assume so.

Q. And if we go dig deeper into his report at page 8, and I'm reading from question 3, "Within the scope of your medical professional discipline do you concur with the diagnosis impairment descriptions provided by the various health practitioners, professionals to date, if not please provide details as to why?" "I generally concur with the diagnosis on the file for the psychological and psychiatric perspective. My disagreement is that I believe the Mr. El-Khodr has a major depressive illness and not just an adjustment disorder. He has

impairment in mood, energy, concentration, motivation, appetite and sleep, which are all signs and symptoms of a major depressive illness."

5 It goes on at question 4: "Within the scope of your medical professional discipline does the claim currently have any functional limitation and/or physical restrictions as a direct result of the injuries sustained in the accident? If so, please provide details. If there's any objective evidence to support ongoing symptomology in the concept of hurt versus harm are there any ongoing physical restrictions or limitations?" In 10 Dr. Sudaby's opinion, "It is outside of my field of expertise to comment on any physical restriction or limitation. Mr. El-Khodr does, does have significant limitations in mood, energy, concentration and motivation. This interferes with him 15 completing activities of daily living. It interferes with focus of task completion. It causes excessive focus on his pain experiences which interferes - we(ph) continue top of the next page - with self-directed activities. It is possible that the 20 opiate medications are contributing to this picture. The mental status examination was consistent with the psychiatric limitations noted. In my opinion, these limitations are a direct result of the motor vehicle accident." Did you read that...

25 A. I did.

Q. ...report?

A. I did.

Q. Finally, if we go to her, to Dr. Sudaby's conclusion at page 11: "Within the scope of the medical professional discipline does the (non-discernible) suffer from an 30 impairment as a direct result of injuries sustained in the accident that caused a complete inability to engage in any employment for which they're reasonably suited by education

training and experience. From a psychiatric perspective Mr. El-Khodr currently suffers from an impairment as a direct result of injuries sustained in the accident that causes complete inability to engage in any employment for which he's reasonably suited by education, training or experience." You read that?

A. I did.

Q. And Dr. Sudaby is also the author of the other report that he prepared for purposes of the CAT assessment, and he concluded that, in fact, Mr. El-Khodr had marked "impairment" in one of the four spheres, correct?

A. Correct.

Q. You don't refer to this report in the body of your report, is that correct?

A. Correct.

Q. Yet you reach a conclusion that there are no obvious cognitive difficulties with this gentleman, correct?

A. Correct, based on my observations of him (non-discernible) the assessment session.

Q. Right. Except that earlier what you said was the reason you didn't do cognitive testing is because many cognitive testing had been done prior. Is it fair to say that all of the cognitive testing that was done prior to your assessment concluded that there was cognitive impairment?

A. Correct.

Q. And you are the only person who's concluded no cognitive impairments in your review of the entire medical file in this matter, correct?

A. Correct.

Q. Now, you've made reference in your report to a brain injury and whether or not there's any evidence that a brain injury had occurred in the motor vehicle accident in January 9, 2007, correct?

A. Correct.

5 Q. Were you aware that two months prior to you seeing Mr. El-Khodr that he was assessed by the medical director the Acquired Brain Injury Rehabilitation Program at the Ottawa Hospital?

A. I was not.

10 Q. Are you familiar with the name of Dr. Shawn Marshall who's the medical director at the Acquired Brain Injury Rehabilitation Program?

A. No.

15 Q. And I take it, therefore, that you're not aware Dr. Marshall gave evidence in this courtroom that he disagreed with Dr. Judge's assessment as to whether or not a brain injury could be ruled out in this case. Were you aware of that?

A. I was not.

20 Q. And are you aware that Dr. Marshall assessed Mr. El-Khodr suffering from impairments and instrumental activities of daily living and in his participation level in the community requiring ongoing supports into the foreseeable future were you aware of that?

A. I was not.

25 Q. Dr. Marshall saw Mr. El-Khodr in January of 2014. You would agree with me that had you had access to Dr. Marshall's diagnosis and his consultation reports that that would've been quite relevant in your assessment of Kossay's attendant care needs, and, in particular, his psychosocial needs and cognitive impairments arising from the possible brain injury in the motor vehicle accident in January 9, 2007?

30 A. Possibly, but I need to review that.

Q. So Dr. Marshall's a psychiatrist. You have no qualifications to diagnose a brain injury, is that correct?

A. Correct.

Q. If the physiatrist has testified to this court that a brain injury could not be ruled out, arising from the January 7 - January 9, 2007 accident, you'd be in no position to contradict that opinion are you?

A. I'm not.

Q. And it would be contrary to your conclusions that your review of the medical evidence suggests that there was no evidence of a brain injury resulting from the motor vehicle accident, correct?

A. Based on my review of the file, correct.

Q. So it would appear that you're missing the most recent physiatry assessment from the medical director of the Acquired Brain Injury Rehabilitation Program?

A. Correct.

Q. Correct?

A. Correct.

Q. Now you had, we now move over to Laurie Warren, Laurie Warren being the treating occupational therapist. You had all of her reports?

A. Whatever's listed in the dock list is what I've been provided.

Q. A significant number of reports from her, you would agree with me?

A. Yes.

Q. Having treated him from August 2008 to March 2014, she would have had ample opportunity to make significant number of observations regarding his condition?

A. Correct.

Q. You would agree with me, she's an important source of information about Kossay El-Khodr's condition, his occupational therapy needs, and his progress since the motor

vehicle accident?

A. Correct, which I gleaned from her review of the reports.

5 Q. Right. Except that if we read your report, and we look at what you felt, or somebody at Siden Health felt it was the most important part of the medical file. I'm gonna bring it up, but, as I read it, you devoted three sentences to Laurie Warren. You agree?

A. Yes.

10 Q. The OT who'd been involved in his care from August 2008 to the present, whose reports you have, you devoted three sentences in your report. I'm gonna put them up here. It appears right at the very end of the report under page 11 of 32. Am I correct that that paragraph, which appears at page 11 of 32, is the only, if I can call it, "air time" that Laurie Warren is given in your report?

A. Correct.

20 Q. Let's read it. "In the occupational therapy report of Ms. Laurie Warren, dated January 10, 2014, Ms. Warren reports that Mr. El-Khodr requires assistance initiating these exercises, given his severe physical restrictions and decreased alertness, reaction time resulting from medication side effects." So there, she's talking about his need for assisted exercise, correct?

25 A. Correct.

Q. She noted "He's at risk for loss of balance and not initiating his exercises without support." So again, we're talking about his exercise program, correct?

A. Correct.

30 Q. Ms. Warren comments on psychological relaxation coping exercises that Mr. El-Khodr should be completing daily as prescribed by Dr. Jean Hall. Again,

exercises. Correct?

A. Correct.

5 Q. Ms. Laurie Warren made recommendations that Mr. El-Khodr requires 24/7 supervisory care, and that the Phoenix Network would be the best place for him to get that care. You were asked to go in and do an assessment for Royal Sun Alliance and those three sentences is all you took from her reports?

A. That's correct.

10 Q. Thank you. One last thing about your report, while we have it up, you spent some time summarizing some MRI results as well, post-diagnostic imaging which appears at page 14 of 32. You see that?

A. I do.

15 Q. Half a page on post-diagnostic imaging reports, all of which are dated some eight years prior, correct?

A. Correct.

20 Q. And then if we go to the next page you, you devote another third of the page, if you will, the diagnostic imaging reports, correct?

A. Correct.

25 Q. You spent all that time in your report telling us about diagnostic imaging that was negative, correct?

A. Correct.

30 Q. And you agree with me, we've, we've certainly heard from Dr. Marshall that negative imaging doesn't necessarily mean that there was or was not a brain injury. Do you agree with that?

A. If you say so, I didn't, I wasn't here during that trial.

30 Q. Well let me ask you your knowledge. Do you understand that somebody who had negative imaging could nonetheless have a brain injury?

A. Yes.

Q. All right. And so spending almost a full page telling us about negative imaging results really doesn't tell you very much about the person's function does it?

A. No.

Q. And do I take this correctly that this part of the report, as opposed to the previous one, is the part that you drafted?

A. I don't know what you mean when you say "the previous report"?

Q. Well same report, different section. Do you remember the previous document review?

A. Yes.

Q. You told us somebody else drafted it?

A. Yes.

Q. And you plugged it in without making any changes to it, correct?

A. Correct.

Q. Now we're in page 12 of 32, it says "Overview to Find(ph) Identity". Are the, is this part of the report drafted by you or is this part drafted by some else?

A. No, it was drafted by myself.

Q. Okay. And so if I continue to page 14, which is the post-accident diagnostic imaging reports, you drafted this?

A. I did.

Q. All right. So you took the time to go over the medical reports and pull out all of the negative diagnostic imaging so you could put it in your report?

A. That's correct.

Q. All right. Let's talk for a moment then with respect to your assessment of Kossay El-Khodr. As I understand

it, that you spent approximately 110 minutes with Mr. El-Khodr?

A. That's correct.

Q. And throughout your evidence in cross-examination you continuously remind me that based on your observations on that day, correct?

A. Correct.

Q. And so would you agree with me that the person who would have the most observation over time of Kossay El-Khodr's condition and his true needs would be someone who, one had access to the full medical file up to date, and two, who would have been spending time with Mr. El-Khodr over a number of years to observe him?

A. Yes.

Q. And that person being, one, is Laurie Warren, you would agree?

A. Yes.

Q. Two, Liza Hadden?

A. Correct.

Q. And three, Dr. Hall?

A. Correct.

Q. And it would be fair to say to this jury that those three witnesses who were involved in his treatment for a number of years would have the ben... - the best benefit of understanding truly what Kossay El-Khodr's daily needs are?

A. Yes, they're an advantage.

Q. Well, would you agree with me that they're not just an, an advantage over you? They, in fact, have significantly more behavioural observations, source documentation, access to doctors such as Dr. Marshall, and so you're at quite a disadvantage compared to where they are over the years that they've had to observe Kossay El-Khodr?

A. Correct.

5 Q. And you would agree with me that it would be highly dangerous to extract an understanding of Kossay El-Khodr's needs based squarely on a review that took 110 minutes at one point in time in his life without all of the medical documentation?

A. No.

10 Q. So you're satisfied then that you are able to in 110 minute assessment determine what Kossay El-Khodr's needs are better than the treatment team who have been observing him over the last number of years. Is that what you're telling us?

A. I wouldn't say "better than".

Q. All right. What would you say?

15 A. I would say under the circumstances that I was given, I did my best, and under the circumstances that Laurie Warren and the other therapists are given, they've done their best.

Q. And they have much more information and observation available to them than you did?

A. Correct.

20 Q. I just want to touch upon some of the things that you comment about in your report briefly if I can. You make some references, and my friend read in about muscle, manual muscle testing. As I understand what that is, you would've asked Kossay to flex his bicep, and you would've pulled on his arm to see if he could pull it down, is that correct?

A. Correct.

Q. You're not using any measurements to do that?

A. No.

Q. You're not using any weights?

30 A. No.

Q. You're simply using the strength of your own hand?

A. Correct.

Q. So when you say in your report that there's normal muscle in all of the categories you list in your report, and I don't want to take you through them all, all you're saying is, is that he was able to withstran[sic] - withstand whatever pressure you chose to put against his arm, or his leg, or his shoulder?

A. As it, mm-hm, as it states here, I put the maximum possible strength.

Q. Your maximum possible strength?

A. Yes.

Q. Correct. And have you ever measured what your maximum possible strength is?

A. No. I believe it's normal.

Q. Your strength is normal. And I don't understand your comment about "normal". Are you suggesting that a personal trainer has the same strength as you would in order to do this test?

A. Perhaps not.

Q. So....

A. Normal, as I understand, it means functional.

Q. Okay, so functional meaning he can lift his hand against brow?

A. That's not functional.

Q. All right. So he can lift his hand while you're putting how much pressure on?

A. Maximum pressure.

Q. And have you been able to objectify what that means?

A. He can move his body against gravity to participate in functional testing, which does not require a full range of motion, and he's able to resist the full pressure placed

by myself.

Q. All right. And so looking at Mr. El-Khodr, he's about six something and you weigh how much? How tall are you?

A. Is that important?

Q. How tall are you, Ms. Lebovich[sic]?

A. I'd estimate five, three.

Q. And you're pretty small build?

A. I don't know, that's up to debate I guess.

Q. Okay. But is it fair to say that you're not doing any real measurements? This is a subjective test based on your own testing of his muscles, correct?

A. Yes, and based on training.

Q. You know your training goes back to 2009 when you started, correct?

A. Correct.

Q. All right. Now you also comment about his ability to feed himself and make meals, and it's your opinion, contrary to that of the treatment team, and contrary to that of Ms. Bhatnagar, that he's fully self-sufficient, correct?

A. His ability to be fully self-sufficient.

Q. Okay, so let's break that down then. As I understand, meal preparation, it involves a variety of steps. Do you agree?

A. Yes.

Q. And the first step is we have the cognitive ability to decide to plan a meal, correct?

A. Correct.

Q. Did you test his cognitive ability to plan a meal?

A. I did not.

Q. The second part of the test is once you

determine what it is you've decided to make you need to have the cognitive ability to go to the grocery store and determine the items you need to pick up, correct?

A. Correct.

5 Q. Did you test his ability to put together a list of items to prepare a meal?

A. I did not.

10 Q. The next step in the process would be to actually go to the grocery store, pick out your items and carry them home, correct?

A. Correct.

15 Q. And you understood that the grocery shopping was assisted by his nephew, correct?

A. Correct.

20 Q. Did you do any testing to determine how heavy of a grocery bag he was able to carry on his own?

A. I did not assess that directly.

25 Q. Right. The next step in the process is to come home, and, I would suggest to you, put the groceries away in the appropriate locations, fridge, freezer, counter, correct?

A. Correct.

30 Q. Did you assess his ability and intuitiveness to know where to put the groceries?

A. I did not.

35 Q. You were aware of evidence from Ms. Hadden that on occasion she attends at the home and tells him, "Kossay, you've gotta put that food out of the fridge and into the freezer because it's gonna go bad." Were you aware of that?

40 A. I'd have to refer back to the reports. I cannot recall from memory, but if it's in the reports then, then I've had reviewed them then, then certainly then, yes.

45 Q. You never assessed it?

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A. I never assessed it.

Q. Right. And then once he's put all the food away he needs to be able to plan the meal making. When do you put the chicken on? When do you put it in the oven? How do you prepare it? When do you prepare the salad? And anything else that goes along with it, correct?

A. Correct.

Q. A meal preparation is actually pretty complicated task, correct?

A. Correct.

Q. And, I take it; you never assessed any of those tasks did you?

A. No, as I stated before.

Q. Right. What you saw, and what you observed was him opening the freezer, correct?

A. Correct.

Q. Taking out a Ziploc bag with a frozen, with some frozen meal in it, correct?

A. Correct.

Q. Do you have any idea what was in that frozen meal?

A. Prepared chicken.

Q. Prepared chicken. Do you know who prepared the chicken?

A. I do not.

Q. Did he not tell you that his nephew often times brings some food and cooks for him?

A. Correct.

Q. So you did know or had some in... - some idea who prepared the chicken didn't you?

A. We could assume so.

Q. All right. So let's assume that. And you saw

him take the Ziploc bag and put it in the microwave, correct?

A. Incorrect.

Q. All right. Did you see him put it in the microwave?

A. No.

Q. So you just saw him take the Ziploc bag with the frozen chicken pre-prepared and put it on the counter?

A. Correct.

Q. Is that what you saw?

A. Correct.

Q. And on the basis of that you concluded he was fully independent in meal preparation, correct?

A. Not on the basis of that solely.

Q. All right. So given that we've broken down the areas of meal preparation, how did you assess his ability to prepare a meal if you didn't assess any of the previous steps that we talked about?

A. I don't necessarily have to observe or assess those specific tasks to be able to make my conclusions. As I stated in the report, and as I've stated before, I used results of functional testing, casual and informal observations as well as I review the file.

Q. What about the cognitive, Ms. Lebovic? We've talked, we've gone through some reports here from Dr. Hall and Dr. Sudaby. You don't mention cognitive deficiencies at all, and even in your evidence today you don't?

A. Well I can, I can tell you today what, when I say "cognitive efficiencies or inefficiencies" what I'm referring to.

Q. What do you need to tell me today? I'm looking at your report...

A. Okay.

Q. ...and I see you say that there are no obvious cognitive deficiencies, and you've already admitted to me you never tested them?

A. Correct.

Q. And you relied on the medical file that you had?

A. Correct.

Q. And the medical file you had indicated that there were cognitive deficiencies?

A. Correct. I appreciate that you did not wish for me to repeat myself in terms of my observations so I will not.

Q. I don't understand that, but, okay, let's, let's move on then. With respect to stairs, I understand Ms. Bhatnagar assessed his ability to climb stairs, did she not?

A. She did.

Q. And she indicated that she had some observations about his ability to manage stairs, correct?

A. Correct.

Q. And she documents those problems in her report, correct?

A. Correct.

Q. A report that you had access to, correct?

A. Correct.

Q. And, as I understand it, the information you had about stair climbing is he told you, "he" being Mr. El-Khodr, that he uses Nordic poles to climb stairs?

A. Yes.

Q. That's what he told you?

A. Yes.

Q. And you knew from Ms. Bhatnagar that he has a double step gait pattern...

A. That's what...

Q. ...correct?

A. ...he demonstrated, correct.

5 Q. And as I understand, a double step gait pattern is somebody who steps on the first step, brings his next foot up, goes to the next step, brings his next foot up?

A. Yes, so in layman's terms, taking one step at a time, yes.

10 Q. Correct. And that he holds on to the railing?

A. Correct.

Q. Yet, you understood that he was actually doing that with two Nordic poles in his hands, taking a one-step approach with two Nordic poles, one in his left, one in his right hand, that's your understanding of how he manages stairs?

15 A. That's what he told me, correct.

Q. That's what he told you?

A. Correct.

20 Q. And notwithstanding that Ms. Bhatnagar identified problems with the stairs, you didn't even bother taking him to a set of stairs did you?

A. I don't know if I would agree that there's problems with negotiating stairs in that manner.

25 Q. All right. Just answer the question I put to you then. Did you take him out and observe him managing stairs?

A. I did not.

30 Q. Yet you concluded in your report that he was fully independent and capable of managing stairs independently, correct?

A. Correct.

Q. And you never viewed him doing it did you?

A. I did not, as I just stated.

Q. Thank you. You also state in your report that

his walk was such that it was, the, the walk - (non-discernible) wording - it was walking at an "expected" pace, I think is the word you used. Do you remember using that word?

A. I see it in my report, correct.

5 Q. Well just read that to us then. What do you say about that again?

A. "Mr. El-Khodr ambulated with a reciprocal gait pattern without mobility aids at an expected pace."

Q. When you say....

10 THE COURT: Where is that? What page is that, Mr. Obagi?

MR. OBAGI: Twenty, I think it's page 21.

MS. LEBOVIC: It's referred to twice on page 25, and...

15 MR. OBAGI: I think it's 21.

MS. LEBOVIC: ...and page 21.

MR. OBAGI: Q. "At an expected pace". Is that an expected pace of an elderly?

A. Is he elderly?

20 Q. The expected pace, Ms. Lebovich[sic], was it the expected pace of a healthy 51 year old male? Is that what you're saying?

A. I'm, I'm sorry, I mis... - I misunderstood what you said. Did you say healthy or elderly?

25 Q. Okay, I'm gonna back up for a second. You say he walks at an expected pace, "expected pace of a 51 year old healthy male" is that what you meant?

A. Correct.

30 Q. So you saw him walking, ambulating with that gait pattern, and based on those observations you believed that he walks the same way as any 51 year old healthy male?

A. During my assessment.

Q. And your assessment obviously talks about his gait?

A. Correct.

Q. Well explain that to me? I didn't think most healthy 51 year old males have a gait pattern, a reciprocal gait pattern.

A. I'm not sure what you would like me to clarify.

Q. You observed Mr. El-Khodr ambulating with a reciprocal gait pattern, correct?

A. Correct.

Q. Does an average 51 year old male, healthy, having a reciprocal gait pattern when ambulating?

A. Yes.

Q. All right. Without mobility aids?

A. Yes.

Q. And so when you saw him walking you're telling me that his walk is the same as a healthy 51 year old male?

A. Yes.

Q. All right. And if we look at the subjective report, Mr. El-Khodr - again, I'm reading from page 21 of your report. Are you there?

A. I am.

Q. All right. I'll put it up so the jury can follow along here. So I'm reading from page 21, gait and balance. "Mr. El-Khodr reported current independence with ambulation without the use of mobility aids. He reported that when ambulating on uneven surfaces, such as snow covered ground, he uses walking sticks bilaterally, which his occupational therapist provided to him." Is that complaint typical of a healthy 51 year old male?

A. No.

5 Q. And if we go to stair climbing, "Mr. El-Khodr reported that he's able to negotiate stairs but with difficulty and reported that he holds on to the railing for support. He reported that when he walks he experiences lightning(ph) in the lower back and a crunchy sensation in the knees, especially in the morning hours. He reported that as the day progresses and he ambulates more the crunchy sensation in his knees subside. Is that normal for a healthy 51 year old male?

A. No.

10 THE COURT: Where was that reference again?

MR. OBAGI: Your Honour, I'm on page 21 next to stair climbing subjective...

THE COURT: Ah, yes.

15 MR. OBAGI: Q. ...report. Now on page 24 of your report, which was not read by my friend, there's a comment with respect to grooming. Just before I go there, Ms. Lebovich[sic], did you test this man's balance?

A. Not formally.

Q. You didn't do...

20 A. More in....

Q. ...a bird test?

A. I did not.

25 Q. Thank you. So back to the grooming tasks, your current subjective report - so, Your Honour, we're at page 24 of 32 - Mr. El-Khodr reported current independence with shaving with difficulty. He reported his beard is shaved when he goes for haircuts. He reported current independence with fingernail care, reporting that he was previously receiving assistance with fingernail care. He reported that his nephew cuts his toenails but that his toenails do not require frequent care. He reported that his nephew has also cut Mr. El-Khodr's
30 fingernails has almost cut into the skin on his fingers." And

your observation, "Mr. El-Khodr demonstrated functional range of motion, strength, sitting and standing tolerances for grooming tasks." That's you report?

A. Yes, that's what I wrote.

5 Q. You also made a note earlier on in your report that you observed him putting on a pair of socks, correct?

A. Correct.

Q. So you actually had him put on a pair of socks for you so you can observe this?

10 A. Correct.

Q. And my understanding of your observations is that he lied on the bed; using one hand put a sock on his right foot using his right hand and then used his left hand to put his sock on his left foot, correct?

15 A. Correct. But he was not laying down, he was sitting.

Q. He was sitting. You would agree with me, Ms. Lebovich[sic], that's an adaptive pattern?

A. Typically, yes.

20 Q. Typically of somebody who has functional limitations who can't put their socks on will do so using one hand?

A. Correct.

25 Q. It's an adaptive behaviour. You don't refer to it as an adaptive behaviour anywhere in your report do you?

A. I did not.

Q. Now if he's unable to use both of his hands to put on a pair of socks can you tell me how is he supposed to cut his toenails?

30 A. I don't know that he's unable to. That's what he demonstrated.

Q. Well let me ask you, did you observe or ask

him to proceed to cut his own toenails?

A. I did not.

Q. Yet the Form 1 that you were specifically asked to complete, correct me if I'm wrong, specifically requires you to determine whether or not the patient can or cannot cut his own toenails?

A. Correct.

Q. And your conclusion on the Form 1 was zero minutes for toenail clipping, correct?

A. Correct.

Q. So you reached the conclusion, without any observation or testing, that Mr. El-Khoder could cut his own toenails?

A. That's not correct.

Q. All right. Did you observe Mr. El-Khodr cutting his toenails?

A. I did not.

Q. Did you reach a conclusion that he was capable of cutting his own toenails?

A. I did.

Q. And on the basis of the observations with the sock or on some other observation?

A. Both. Some other observation as well as the sock.

Q. All right. So you saw him being unable to put on a pair of socks with both hands. That doesn't lead you to believe he can cut his toenails does it?

A. That's what he demonstrated. What he's actually capable of doing may not be what he demonstrated.

Q. I see. So you believed that what he demonstrated to you, when you asked him to, was less than he was capable of demonstrating was....

A. I don't know that.

Q. Well if you don't know that then how do you reach the conclusion that he's able to cut his toenails?

5 A. Because he demonstrated functional ranges of motion and strength and positioning to be able to cut his toenails.

Q. Okay. That's interesting. 'Cause I would think being able to bend your back to get to your toenails would be one of the functional that he needs to be able to show?

10 A. Correct.

Q. And I think you observed him picking up a slipper off the floor, correct?

A. Correct.

15 Q. And if I understand your description of his movements in picking up the slipper was he held on to the side of the table, bent down and picked up the slipper, correct?

A. Correct.

Q. And he said to you, "If I don't hold the table I'm gonna fall on my face."?

20 A. Correct.

25 Q. So that observation, plus your observation of him putting his sock on, and the muscle testing, the subjective muscle testing that you don't have any numbers for, is what led you to conclude that he's capable of bending all the way down to cut his toenails?

A. Plus active range of motion testing.

Q. Did you test his grip strength?

A. I did not.

30 Q. Would've been useful to be able to determine whether he can hold a grocery bag wouldn't it?

A. It might be.

Q. With respect to psychosocial questions, and

the need for 24/7 access to care, did you run any anxiety testing on him? Pers....

A. I did not.

Q. You have access to the personal health questionnaire number 9 don't you?

A. I do.

Q. You didn't run that test?

A. I did not.

Q. Were you aware that he has a neurological injury to his big toe? That he has a drop toe?

A. Based on review of the medical file, yes.

Q. I didn't see that anywhere in your report that he has a neurological deficit to his big toe that drops. Am I right?

A. Correct.

Q. And if I understand that particular functional disability, if you don't have the right shoes your toe, or if you're walking barefoot, has a tendency to drop and could be a significant tripping hazard, correct?

A. Correct.

Q. It's not mentioned anywhere in your report.

A. Can you please clarify how that's dropped toe results in, what that resulted from?

Q. No. I'm just asking you if you knew he had a neurological deficit to his left toe when you were assessing his function, and you've told me you were aware of it. You also told me that you didn't refer to it anywhere in your report. Does it matter?

A. Not for the purposes of self-care tasks.

Q. Well but wouldn't you notice somebody with a dropped toe like that with a neurological deficit in the manner in which he walks?

A. No, not necessarily.

Q. You didn't notice it?

A. I did not notice it.

Q. All right. I'm going back to my previous question. If Laurie Warren, Liza Hadden and Dr. Hall all noticed it, they had a much better opportunity to make those observations than you did, correct?

A. It's possible.

MR. OBAGI: Can I have a minute, Your Honour?

THE COURT: Mm-hm.

MR. OBAGI: Q. You mentioned doing range of motion testing. Did you actually ask him to bend down and touch his toes?

A. I did.

Q. You did. All right. And if we go to your, your assessment, with respect to functional abilities, the only one I'm looking at is neck flexion. In your report, you say "he has full neck flexion"?

A. Correct.

THE COURT: Where are you referring to...

MR. OBAGI: Sorry...

THE COURT: ...now?

MR. OBAGI: ...Your Honour, page 18 of 32. Can you describe for me neck flexion, can you do it?

A. Yes. So it's touching your chin to your chest in this manner.

Q. And you indicated he had no difficulty with that at all?

A. He did not.

Q. That's contrary to your previous assessment by Miss - the previous assessment by Ms. Bhatnagar isn't it?

A. It is.

Q. And the same with extension, can you tell us, you found moderate, moderately restricted range of motion in extension, whereas, Ms. Bhatnagar found severe restriction, correct?

5 A. Correct.

Q. Can you show me the extension neck?

A. The full range of motion? Yeah, so it's looking up to the ceiling as far back as you can go.

Q. So that's the test you did with him?

10 A. Yes.

Q. You asked him to look up to the ceiling?

A. Yes.

Q. And you concluded he had moderately restricted range of motion?

15 A. That's what he demonstrated.

Q. And your lateral flexion?

A. Do you want me to demonstrate that...

Q. Yes?

20 A. ...for you? So that's, I'm trying to touch your ear to your shoulder as far as you can go. We don't have complete ability to do that but full is considered 45 degrees on either side.

Q. And he was seriously, severely restricted?

A. Yes.

25 Q. And then finally, with respect to the rotation of the neck, can you describe that for us?

30 A. So that's looking to one side as far as you can go. So looking to your left, so the, the chin is aligned with the shoulder as much as, as full, as much as the full range will allow.

Q. All right. Do we have those measurements on your handwritten notes anywhere?

A. No.

Q. Thank you. You spent about an hour, 110 minutes in the assessment. How much time did it take you to write this report?

5 A. I haven't documented it so it would have to be a hazardous guess.

Q. And the invoice that we saw earlier today, \$400 is for the report, correct?

A. Correct.

10 Q. Which included the review and the assessment, correct?

A. Correct.

Q. And \$63, I think, was for completing the Form 1?

15 A. That's correct.

Q. Thank you. No further....

MR. PERCIVAL: No re-examination, Your Honour.

MR. OBAGI: Hold on, Your Honour.

MR. PERCIVAL: I'm sorry, I thought....

20 MR. OBAGI: That's okay.

MR. PERCIVAL: Sorry.

MR. OBAGI: Q. My colleague always has an interesting final question. You indicated you did your best in this assessment. Wouldn't you agree with me that doing your best would've involved contacting the treatment team to get a much better understanding of Kossay El-Khodr's condition over the past 25 eight years?

A. No, I didn't feel that was necessary in coming to my conclusions.

30 Q. Just like you didn't feel it was necessary to complete the medical records that we're missing, correct?

A. That's typically based on whether the

insurance company requests it or not.

5 Q. But what I'm saying is you didn't feel it was necessary to update and get a complete copy of the medical records even though it was apparent on its face that you were missing relevant records, correct?

A. Correct. Because, as far as I was concerned, I had been provided with the most recent documentation. I think we're mutually referring to Dr. Hall's progress report?

10 Q. I'm referring to Dr. Halls progress reports, which are missing, right, reports 3 and 4, which you knew were missing?

A. Yes.

Q. Presumably?

A. Mm-hm.

15 Q. I'm referring to the fact that the most recent report of Dr. Hall was missing, correct?

A. Correct.

Q. The report of Dr. Marshall is nowhere to be found?

20 A. Correct.

Q. And you didn't take any steps to ensure that the medical file you were reviewing was full and complete, correct?

A. No, I didn't take any further steps.

25 MR. OBAGI: Thank you. Those are my questions.

Hadassah Lebovic - Cr-Ex.
El-Khodr v Lackie et al.

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