

1 THE COURT OFFICER: Jury entering.

2 (Jury entering the courtroom)

3 THE COURT: Good morning. Please be
4 seated.

5 I heard we had a traffic problem
6 this morning. We control a lot of things,
7 that we can't control.

8 All right, Mr. Jeffreys, witness?

9 MR. JEFFREYS: Thank you, your
10 Honor. The defense calls Dr. Arthur
11 Bernhang.

12 THE COURT OFFICER: Watch your step.
13 Remain standing. The clerk will swear you
14 in over there.

15 D R. A R T H U R B E R N H A N G, the witness
16 herein, having been duly sworn, testified as
17 follows:

18 THE COURT: Your name and business
19 address, please.

20 THE WITNESS: Arthur Bernhang,
21 B-E-R-N-H-A-N-G, 124 Main Street,
22 Huntington, New York.

23 THE COURT: Have a seat, Doctor.

24 THE WITNESS: Thank you, your Honor.

25 THE COURT: Doctor, all witnesses

1 are -- sit down, please -- are suggested to
2 heed the following tips. As you know,
3 you're going to be asked some questions
4 this morning. Pay careful attention to the
5 question that's put to you and as best you
6 can limit your answer to the contents of
7 the question; okay?

8 THE WITNESS: Thank you, your Honor.

9 THE COURT: Although in life it is
10 not impolite to commence an answer before
11 the question is complete, because often
12 times in life we know exactly where the
13 question is going, and I repeat, that's not
14 impolite in the outside world,
15 unfortunately in court you have to wait --
16 as you know you have to wait for the answer
17 to be complete before you commence your
18 answer because my stenographer only has two
19 hands.

20 Number three, if you hear the word
21 objection, just stop until you get further
22 direction; okay?

23 THE WITNESS: Thank you, your Honor.

24 THE COURT: Thank you, sir.

25 You may proceed.

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1 DIRECT EXAMINATION

2 BY MR. JEFFREYS:

3 Q. Good morning, Dr. Bernhang.

4 A. Good morning, sir.

5 Q. Could you please make sure that you keep your
6 voice up nice and high so our members of the jury can
7 hear and I will do the same, okay?

8 A. Thank you.

9 Q. Doctor, can you tell the jury a little bit
10 about your educational background?

11 A. I'm a graduate of the Chicago Medical School
12 in 1959. I did my internship and residencies at the
13 Hospital for Joint Diseases in New York. I finished in
14 1964 and opened practice in Huntington and I've been in
15 private practice for orthopedics ever since, except for
16 two years during the Vietnam war when I served in the
17 United States Navy as a lieutenant commander and chief of
18 orthopedics Key West Naval Hospital.

19 I'm a board certified orthopedist, which means
20 I have -- bless you.

21 A JUROR: Sorry.

22 A. Which I've completed a residency program of
23 four years. I took several examinations and also a
24 fellow of the American Academy of -- American College of
25 Surgeons. I'm also a fellow of the International

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1 Arthroscopy and Knee Association, International Society
2 of Tramatologists and Fractures and former chief of the
3 orthopedic section of the Medical Society of the State of
4 New York.

5 Q. Doctor, in the past have you had any prior
6 hospital affiliations?

7 A. Huntington Hospital.

8 Q. And are you licensed to practice medicine in
9 any state?

10 A. Licensed to practice medicine in New York
11 State as well as Papua, New Guinea.

12 Q. Doctor, as part of your particular field have
13 you been involved in any publications of any articles?

14 A. Yes, I published several papers on the
15 fractures of the cervical spine in addition to many sport
16 medicine articles.

17 Q. And the sports medicine articles, what was
18 your primary focus there?

19 A. Tennis elbow, horseshoe injuries, various
20 others.

21 Q. In addition to your hospital affiliation in
22 Huntington Hospital, have you had any teaching or
23 academic affiliations?

24 A. Many years ago we were affiliated with
25 university -- Stony Brook and I was an assistant

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1 professor of orthopedic medicine at that time.

2 Q. And if I call -- if I recall correctly,
3 Doctor, you have testified for me as an orthopedist on
4 one prior occasion; is that correct?

5 A. I'll take your word for it.

6 Q. As an orthopedic surgeon, as part of your job
7 do you have occasion from time to time to review
8 diagnostic films of patients including x-rays, MRI's and
9 CAT scans?

10 A. Frequently.

11 Q. And is that review of your films something
12 that you have to do in your practice in orthopedic
13 surgery?

14 A. Yes, we do.

15 Q. Could you tell your jury -- the jury your
16 experience and training regarding reviewing diagnostic
17 films?

18 A. We take special courses. Advances come along
19 in MRI's and CT scans. Various other devices. You take
20 a course, you go away for three days and you try and
21 learn what you can.

22 You also go in and speak to the radiologists
23 and review your own records there, which is self taught.

24 Q. Prior to coming here today have you previously
25 given testimony in any court, tribunal or other

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1 administrative hearing?

2 A. Yes.

3 Q. And can you tell the jury where you've given
4 that prior testimony?

5 A. Mostly here in Riverhead. I think possibly
6 three times in the past -- this is the third time in the
7 past three years.

8 Q. And to come here today, did I ask you to close
9 down your practice for the day so you can come here and
10 give us some testimony?

11 A. You did.

12 Q. And for that are you charging me a fee?

13 A. I am.

14 Q. And what are you charging?

15 A. \$4,500.

16 MR. JEFFREYS: Your Honor, I offer
17 Dr. Arthur Bernhang to this Court as an
18 expert in the field of orthopedic surgery.

19 MR. ZLOTOLOW: No objection.

20 THE COURT: No objection. The --
21 the doctor is qualified as an expert.

22 MR. JEFFREYS: Thank you, your
23 Honor.

24 Q. Dr. Bernhang, I see that you brought with you
25 today a folder. Is that your file concerning Mr.

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1 Cicola's orthopedic examination?

2 A. It is.

3 Q. If you have to look at anything in that folder
4 to refresh your recollection, please feel free to do so,
5 but just tell us if you're reviewing anything; okay?

6 A. Yes, sir.

7 Q. At some point, Dr. Bernhang, the County
8 Attorney's Office asked you to perform two separate
9 orthopedic examinations and diagnostic film reviews of
10 Christopher Cicola; is that correct?

11 A. Two episodes. There was a third episode for
12 review of x-rays that was sent to my office.

13 Q. And when you completed your orthopedic
14 examinations you also completed reports concerning those
15 exams; correct?

16 A. That is correct.

17 Q. And the County of Suffolk paid you for
18 completing each examination and report; is that correct?

19 A. Correct.

20 Q. And how much have you been paid for those
21 examinations and reports?

22 A. I don't remember offhand. I don't have it
23 with me.

24 Q. And somewhere around two weeks ago did someone
25 from my office, maybe my secretary or somebody else from

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1 my office, tell you that this case was coming up on the
2 trial calendar?

3 A. Yes, they did.

4 Q. And you arranged your time to come here to
5 Court and testify and tell the jury about what your
6 findings were?

7 A. That's correct.

8 Q. At any point prior to this morning, at any
9 point prior to this morning in the hallway or here in the
10 courtroom have we spoken about this case?

11 A. Just this morning.

12 Q. Doctor, could you explain to this jury in lay
13 terms what the specialty of orthopedic surgery involves?

14 A. Orthopedic surgery concerns the muscles, the
15 bones, the joints, the nerves, the blood vessels that go
16 to the extremities, the ability to make you walk, propel
17 yourself, move your arms, strength, support yourself.

18 Q. We have in evidence as Plaintiff's Exhibit 7 a
19 spine model.

20 MR. JEFFREYS: Could the doctor be
21 shown the spine model, please, to assist
22 the jury?

23 THE COURT: Certainly.

24 (Whereupon, a spine model was handed
25 to the witness).

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1 THE COURT: Doctor, you can stand at
2 any time if it's more comfortable for you
3 to give your testimony.

4 THE WITNESS: Thank you.

5 Q. Doctor, as we're going to through this, it's
6 basically to refresh the jury, they've seen this spine
7 before.

8 We've heard earlier in this case that there
9 are many vertebrae in the back and each are designed by a
10 letter -- designated by a letter and a number; is that a
11 fair statement?

12 A. Correct. Yes, sir.

13 Q. And in this case could you tell the jury and
14 show them on the model that's in front of you where the
15 cervical spine is located?

16 A. The cervical spine would start from the top of
17 the spine, which is roughly the skull. The skull would
18 be here, with the first cervical vertebrae, which is C1.
19 There are seven cervical vertebrae, 12 dorsal, which are
20 the dorsal or thoracic, which is the ones that bear ribs,
21 five lumbar bones down below, which support your lower
22 back.

23 Q. And Doctor, what's the function of each of the
24 vertebrae? What do they do?

25 A. Each one -- the first two depend upon rotation

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1 of the head. The first seven allow you to bend and
2 extend your head and move from side to side and turn.
3 Most -- 50 percent or more of the turning occurs at the
4 first, C1/C2.

5 The thoracic spine is pretty well fixed
6 because of your rib cage as to how far you can move it
7 and bend it and that gives support to the structures.

8 The lower lumbar spine supporting mostly for
9 locomotion, to move you along through the hips and the
10 femurs as they go along.

11 Q. And between each of the vertebrae are there --
12 is there anything that separates them so that the bones
13 don't touch each other?

14 A. Yes, we call it the intervertebral disk.
15 Inter, between the two disks.

16 And the best way to think of it is like a
17 liquid-centered golf ball. You have a center which is
18 nucleus surrounded by rubber bands, which is the lumina,
19 and skin on the -- skin that holds the ligaments together
20 and this will apply -- allows compression force and
21 extension of the spine and it allows for motion of the
22 joints in the spine.

23 Besides the joints of the front of the back --
24 the spine, you also have small joints in the back which
25 we have called facet joints. Between the two facet

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1 joints the top and bottom is a hole in the bone which we
2 call a foramina, which is Latin, I think, for window and
3 through the foramina the nerves which are depicted here
4 by these yellow threads come out. The blood vessels run
5 with inside the bones through holes in the bones as well.
6 The bones are held together by ligaments. Ligaments hold
7 bones to each other, tendons attach muscles to bones and
8 there are tendons and muscles attached to all these
9 spinous processes back here for the attachment of muscles
10 of the back.

11 Q. And, Doctor, could you tell the jury in a
12 little more detail, I know you said a disk is like an
13 analogy to a liquid centered golf ball, but can you tell
14 the jury what the vertebral disks are actually made of?
15 Are they fibrous? Are they solid?

16 A. They are fibrous. They have a lot of water in
17 them when you're young.

18 As you get older the disks dry up, that's why
19 we get shorter as we get older. You lose your resiliency
20 and your flexibility as you get older. Of course
21 everything tightens, including the muscles and the
22 ligaments.

23 Q. And as you get older and that drying up and
24 shortening, is that a normal process of aging?

25 A. It is.

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1 MR. JEFFREYS: Thank you, Doctor. I

2 think we can put the spine aside for now.

3 Q. Doctor, when you perform an orthopedic
4 examination, do you perform certain recognized orthopedic
5 tests to see whether a patient's body is functioning
6 properly?

7 A. Yes.

8 Q. And that's what you did in this particular
9 referral; correct?

10 A. Correct.

11 Q. And a couple more things before we start
12 discussing the particular findings concerning Mr. Cicola.
13 Can you tell the jury what a patient's medical history
14 is? Just generally, what's a medical history?

15 A. History of those deformities or changes or
16 illnesses that has affected him over his existence.

17 Q. And where do you get the medical history from?

18 A. Generally we get it from the patient himself.

19 Q. And is it important for a physician to take a
20 medical history?

21 A. Very much so. Frequently you can determine
22 your diagnosis before you ever leave the consult room.

23 Q. And in this particular case did you take a
24 medical history of Mr. Cicola?

25 A. I did.

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1 Q. One other thing before we get on to the
2 specifics of your reports, can you tell the jury what the
3 difference is, if any, between a subjective finding as
4 opposed to an objective diagnosis or finding?

5 A. Subjective finding is the patient or the
6 claimant has to tell you what they are feeling. In other
7 words, while touching somebody says ouch, it hurts,
8 that's a subjective finding. If I find a scar and blood
9 there or something I can see, that's an objective
10 finding.

11 When you hit somebody with a rubber hammer and
12 the leg jumps up and down, that's an objective finding.

13 Subjective finding is to say squeeze my hand
14 or lift your arm up and they move it to what they feel
15 they wish you to know, is a subjective finding.

16 Q. So when you're saying the difference between
17 subjective finding and objective finding, is a subjective
18 finding something that the patient controls himself and
19 an objective finding is something that you can see by
20 some other medical or scientific method?

21 A. Essentially, yes.

22 Q. So if I were to tell you, Doctor, if you told
23 me to move my neck forward and I say oh, I have pain
24 right now, right now I have pain, that's -- that would be
25 a subjective finding?

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1 A. Correct.

2 Q. Because I can actually move all the way down?

3 A. Right.

4 Q. And other than me telling you that I have
5 pain, is there any other way orthopedically that you can
6 tell whether someone has pain?

7 A. Not really.

8 Q. So Doctor, in my example that I gave you, that
9 I have terrible pain going any further than, you know, 20
10 degrees of flexion of my neck, since that's a subjective
11 complaint, Doctor --

12 A. It is.

13 Q. I could be exaggerating to you; correct?

14 A. Correct.

15 Q. I could be telling you the truth; correct?

16 A. Correct.

17 Q. Or I could be lying outright to you; correct?

18 A. True.

19 Q. And is there any way for you to tell which of
20 the three, just by reference of pain?

21 A. Not by your reference of pain alone, no.

22 Q. But as an orthopedist, do you ultimately rely
23 on certain objective tests to substantiate whether the
24 patient's complaints of pain make any sense medically?

25 A. Correct.

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1 Q. And you make that determination by conducting
2 a physical examination; correct?

3 A. That is correct.

4 Q. And that's what you did in this case on two
5 different occasions with Mr. Cicola; correct?

6 A. Yes.

7 Q. Now, Doctor, if you could please turn to your
8 first physical examination of January 16th -- sorry, the
9 examination was January 11th, 2008 and your report is
10 January 16th, 2008.

11 A. Yes, sir.

12 Q. Do you have that in front of you?

13 Doctor, can you tell us where your examination
14 was performed?

15 A. My office, 124 Main Street in Huntington.

16 Q. And again, Doctor, this was your first
17 examination of Mr. Cicola?

18 A. Correct.

19 Q. Briefly, could you tell the jury what history
20 you took from Mr. Cicola?

21 A. That on January 11th, 2007, a year before I
22 examined him, he was the belted driver of a car stopped
23 at a red light and was rear ended by another vehicle. He
24 said he sustained injuries to his neck, upper back and
25 right shoulder. The car was drivable. He did not go to

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1 a emergency room and did not seek immediate medical care
2 but subsequently a few days later.

3 Q. A few days later he sought some care?

4 A. Subsequently.

5 Q. A few days later he sought some care?

6 A. Yes.

7 Q. At the time of his orthopedic examination, the
8 first one on January 11th, 2008, did Mr. Cicola make
9 complaints to you?

10 A. Yes.

11 Q. And what did he complain about?

12 A. May I refer to my record?

13 Q. Certainly, your Honor -- certainly, Doctor.

14 A. He said that his neck was still stiff and he
15 was having a headache for the past two weeks prior to my
16 examination. He said the pain radiates from his neck to
17 his head while watching television or doing strenuous
18 activities.

19 He says the neck becomes tiresome and he feels
20 that he has, quote, trapped muscles, unquote, which will
21 tire and ache.

22 He says the pain in his right shoulder comes
23 and goes and he had to have someone take down the
24 Christmas decorations because he couldn't reach up high
25 enough to do it himself.

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1 Q. Did he make any other complaints to you during
2 this first examination?

3 A. When asked what activities of daily living had
4 been modified he said household chores, exercise and
5 everything bothers him, even bending over.

6 Q. As an aid to performing your examination, did
7 you have the benefit of any medical records or diagnostic
8 films?

9 A. Yes, I did.

10 Q. And can you tell the jury what sort of
11 documents you had the aid of, in addition to seeing Mr.
12 Cicola?

13 A. I had written reports of x-rays and MRI's
14 which had been performed at the time of the -- shortly
15 after the accident. I had a chiropractic evaluation of
16 Dr. Schmidnoff (phonetic). I had a neurologic
17 consultation of Dr. Sathi, S-A-T-H-I, who said, I
18 believe -- quote, I believe --

19 MR. ZLOTOW: Objection.

20 Q. Just tell us what you reviewed, not what he
21 said.

22 THE COURT: Sustained.

23 A. Review of the chiropractor, review of MRI's of
24 the cervical spine and of the shoulder.

25 Q. Now at some point you also reviewed some

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1 diagnostic films in reference to this matter; correct?

2 A. Yes.

3 Q. Doctor, I'd like you to come down. We're
4 going to start with films from January 15th of 2007. I'd
5 like you to speak with the jury with the shadow box on
6 those.

7 (Witness steps in the well of the
8 courtroom).

9 MR. JEFFREYS: Can I have
10 Plaintiff's 9, please.

11 (Exhibits handed to counsel)

12 Q. We have the three films. Find out which one
13 you want to look at first.

14 A. This is an x-ray of his shoulder, the right
15 shoulder. The date is 1/15/2007. This is the clavicle,
16 which is the collarbone. The humerus. This over here is
17 some calcium deposits, which people sometimes develop in
18 various muscles and tendons called calcific bursitis.

19 Comes from doing repetitive work, wearing out a tendon
20 and getting the tendon feeling like -- can you see? Yes.

21 The calcific deposits must have preexisted the
22 accident.

23 This is what we call the glenohumeral joint.
24 The glenoid is like -- the cup. The humerus is the -- is
25 the arm bone. And essentially these are very heavy

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1 bones. Excuse me.

2 The patient was a weightlifter and so the
3 bones respond to living tissue, you give a lot of stress
4 to bones, they are going to cause them to get thicker and
5 bigger. It's normal. There may be a little narrowing of
6 the AC joint also. These are the ribs.

7 Q. Doctor, you told us and you told the jury that
8 the calcific deposits that you saw on that right shoulder
9 had to be preexisting. Why do you come to that
10 determination that they had to be preexisting?

11 A. Because the calcific -- the replacement of
12 degenerative tissue takes time over a period of months to
13 do. It is not an acute instant, you know, overnight
14 you're going to form more calcium in your body.

15 Q. Could you post the next film? I believe the
16 next film is going to be on the cervical spine.

17 A. This was January.

18 Q. January 15th.

19 A. These are the cervical spine. And the seven
20 cervical vertebra are aligned here in what we call a
21 normal curve, a normal lordosis. There is no evidence --
22 when your muscles go into spasm they will straighten out
23 the cervical spine. If the muscles are relaxed or in
24 normal configuration and everything else, you will have a
25 normal curve called the lordotic curve of a C in the

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1 neck.

2 As you remember on the statue, the neck curves
3 forward, the thoracic spine comes back and the lumbar
4 spine goes forward, again to balance.

5 This is an x-ray of the first two vertebrae
6 which I said cause 50 percent of rotation responsible.
7 It's a ring and pylon sort of thing. And they are very
8 highly specialized. Thank you. Highly specialized
9 bones.

10 The rest of the vertebrae here shows the disk
11 space is the dark spot here, here and here. And there is
12 narrowing here between the fifth and the sixth bone,
13 showing loss of fluid. The man was I think 36 or
14 something at the time of the accident, but this was
15 something for a person usually older, you start to see
16 degeneration and loss of fluid in the neck.

17 Q. And Doctor, when you speak about loss of
18 fluid, is that what you told us on the stand earlier that
19 over time you lose the fluid and you get shorter?

20 A. Correct.

21 Q. And that's part of the normal aging process?

22 A. It can be part of the normal aging process.
23 It also can be a part of deterioration after injury.

24 Q. For this particular gentleman that you saw
25 looking at that particular x-ray, is there any way for

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1 you to determine whether this was part of the normal
2 aging process or was it a degenerative condition?

3 THE COURT: Just yes or no, Doctor.

4 Q. Can you determine?

5 A. No.

6 Q. Ultimately, Doctor --

7 A. It had to be present for more than 10 days so
8 since the accident. It takes months or years for the
9 degeneration.

10 MR. ZLOTOLOW: I think you asked him
11 to answer yes or no.

12 THE COURT: Yeah.

13 Q. Ultimately, Doctor --

14 THE COURT: Wait, time out. You
15 move to strike everything -- everything
16 after yes or no?

17 MR. ZLOTOLOW: Yes, please.

18 THE COURT: That's sustained. The
19 jury -- after no, the jury will strike the
20 answer from their minds.

21 Q. Ultimately, Doctor, after --

22 THE COURT: But, however, you may
23 continue, Mr. Jeffreys.

24 MR. JEFFREYS: Thank you, your
25 Honor.

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1 Q. After making that review of the film, did you
2 come to any conclusions to a reasonable degree of medical
3 certainty in your field concerning what was going on at
4 C5/C6 of the plaintiff's back?

5 A. I don't think I understand your question.

6 Q. Did you make a conclusion about what was going
7 on at C5/C6?

8 A. I think that this shows -- for a 36-year-old
9 man it shows excessive wear or usage or injury to the
10 C5/C6 intervertebral disk.

11 Q. And did you find any degenerative process or
12 conditions at C5/C6.

13 A. Basically I only see the narrowing of the
14 C5/C6 vertebrae due to dehydration.

15 Q. Okay.

16 MR. JEFFREYS: Can the doctor be
17 shown Plaintiff's 10. We'll do all of the
18 films all at the same time.

19 Yeah, do the last film in
20 Plaintiff's 9 first.

21 MR. ZLOTOW: The last one was just
22 January 10th.

23 MR. JEFFREYS: Plaintiff's 9, all
24 these of Plaintiff's 9 together.

25 A. These are oblique, in other words, halfway

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1 x-rays of the neck. And what they are showing is the
2 holes through which the nerves go to the extremities and
3 that's the dark areas here between the two bones called
4 the foramina and you can't see but this look likes the
5 narrowing area over there and this is the other side.
6 You have one nerve come from the left and right side of
7 the neck and those are the bones through which they go.

8 Q. Can the doctor be shown Plaintiff's 10,
9 please?

10 (Document handed to the witness)

11 A. One of tests to find out if there is
12 abnormalities in bone is to extend the head all the way
13 back to increase the curve or to bend the neck down,
14 flexion, which changes the curves of the back.

15 In both of these sets of x-rays the views, the
16 move is symmetrical; there is no evidence here of
17 asymmetrical, that one of the bones is moving out of its
18 spot. And these are normal x-rays except for the
19 narrowing of the C5/C6 interval.

20 Q. And the narrowing of the C5/C6 area, what is
21 that called?

22 A. Narrowing of the C5/C6 space.

23 MR. ZLOTOW: Thank you.

24 Q. Is it traumatic, degenerative or something
25 else?

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1 MR. ZLOTOW: Nickname or anything.

2 A. It's dehydration of the intervertebral disk
3 which is dehydration or degeneration of the disk.

4 Q. And the last one, Doctor, for now, is
5 Plaintiff's Exhibit 7, please.

6 (Document handed to the witness)

7 Q. Which is an MR film.

8 THE COURT OFFICER: Seven is the
9 model.

10 MR. JEFFREYS: Oh, sorry, the MR
11 film of 2/13/07.

12 THE COURT OFFICER: That's number
13 eight.

14 MR. JEFFREYS: Number eight, please.

15 A. This is a -- there are many small films.
16 Unfortunately, it may be difficult to see.

17 This picture is taken not with x-rays, but
18 with magnetic fields and the bone and liquids and stuff
19 shows that the muscles, ligaments and spinal cord which
20 cannot be visualized on x-rays. This started probably in
21 1985 or so and has been developed over the past 25 years.
22 It's magic.

23 But the head is up here, the brain. The white
24 area coming down here is the spinal cord coming from the
25 brain and all these numbers here are indicating the

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1 various spaces. And you can see a slight bulge here.

2 Q. When you say here, Doctor, what space is that?

3 A. Pointing to the spinous -- to the 5th and 6th
4 space.

5 There is a slight bulge with the disk where it
6 loses its elasticity, starts bulging, so this has lost
7 some of its elasticity and is bulging. And basically,
8 except for that, we don't find too much in this film at
9 all.

10 Q. All right, Doctor, for now if you can retake
11 the stand and put the shadow box down.

12 (Witness returns to the witness
13 stand.)

14 Q. Doctor, when you examined Mr. Cicola on that
15 first occasion, January 11th of 2008, did you see if he
16 had any ongoing medical treatment? Did you ask --

17 A. At the time I saw him he was not being seen by
18 a chiropractor, physiotherapist or physician. He had not
19 been under anybody's care for at least six weeks prior to
20 my seeing him.

21 Q. Did he tell you whether he had any past
22 medical history?

23 A. He said he did not have -- excuse me, he did
24 not relate any past injuries to his neck to me, no, sir.

25 Q. And when -- if he had related past medical

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1 history to you, would you have put that in your report?

2 A. I'm sorry, would you repeat that once more?

3 MR. ZLOTOW: Objection.

4 THE COURT: Time out. Stop.

5 Q. If he had related to you --

6 A. Yes.

7 THE COURT: He's objecting to the
8 question.

9 MR. JEFFREYS: I'm sorry.

10 THE COURT: The objection is
11 overruled.

12 You can answer the question.

13 A. Yes, I would have recorded it.

14 Q. And when Mr. Cicola came to your office for
15 his first examination, did you check his height and
16 weight?

17 A. Yes, I did.

18 Q. And how tall was he and what did he weigh?

19 A. He stood 5' 11" and weighed 205 pounds and was
20 right-handed.

21 Q. Did you give him any cautionary advice before
22 you began your physical examination?

23 A. Yes, not to do anything that hurts. I wasn't
24 there to hurt him.

25 Q. And in doing your examination are there

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1 certain guidelines, rules that you follow concerning
2 assessing each individual patient's abilities?

3 A. Yes.

4 Q. And could you tell the jury what guidelines
5 you used?

6 A. The American Academy of Orthopedic Surgeons
7 puts out range of motion books, examination books,
8 telling you the extent of motion of the various portions
9 of the body, measurements and how to take them.

10 We use a tape measure to measure the various
11 girth, the size of muscles, compare one side to the
12 other. If there is a normal side, in other words, Mr.
13 Cicola's left shoulder was not given a history of being
14 impaired, that would be the norm for him that we would
15 compare the motion of the right shoulder to the left
16 shoulder, because all people are different and although
17 they have averages that they publish, the best normal is
18 the opposite extremity, if it's in good condition.

19 Q. So if my left arm were to be normal and I
20 could raise it 45 degrees --

21 A. That would be normal for you.

22 Q. That would be normal for me. So that's how
23 you would judge the right arm?

24 A. Correct.

25 Q. So while an ordinary person who is not me may

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1 be able to abduct the arm completely to 90 degrees,
2 that's not my normal?

3 A. That's correct.

4 Q. And in your physical examination did you do
5 some testing concerning Mr. Cicola's ability to move
6 different parts of his body?

7 A. Yes.

8 Q. Did you do a cervical extension test?

9 A. Yes. I measured his cervical extension as to
10 how far he can lean up his head and we use a goniometer
11 which is a fancy measuring device to measure the ranges
12 of motion of the various -- various contortions I'm
13 asking him to do.

14 Q. And did you make a particular measurement of
15 the cervical extension for Mr. Cicola?

16 A. It was about 35 degrees.

17 Q. And did you do the same thing with his
18 cervical flexion?

19 A. Yes, it was 25 degrees.

20 Q. And the flexion is the downward movement of
21 the chin towards the chest; correct?

22 A. That's correct.

23 Q. And lateral flexion, what is that?

24 A. Bending your left ear towards your left
25 shoulder or your right ear towards your right shoulder.

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1 Q. And did you do that particular test with Mr.
2 Cicola?

3 A. Yes. And he did 35 on the left and 30 on the
4 right.

5 Q. And how about cervical rotation?

6 A. Cervical rotation would be looking over your
7 shoulder and that was 45.

8 Q. So it was 60 on the left and 45 on the right?

9 A. Correct.

10 Q. Did you test his shoulder for shoulder
11 abduction?

12 A. Yes. Here he -- I'm sorry.

13 Q. Shoulder abduction, is that the sideway
14 movement?

15 A. That's the sideways movement going up.

16 Q. And how high could Mr. Cicola lift that
17 shoulder?

18 A. 160 degrees on both sides.

19 Q. And did you check shoulder forward flexion?

20 A. That was 115 degrees for both shoulders.

21 Q. And shoulder external rotation?

22 A. External rotation is hold up position and that
23 was 85 and 85.

24 Q. And shoulder internal rotation?

25 A. Reaching behind you back action and that was

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1 15 degrees on both sides.

2 Q. Now, after you performed those tests, did you
3 come to any conclusions to a reasonable degree of medical
4 certainty concerning the plaintiff's ranges of motion?

5 A. I felt the ranges of motion were accompanied
6 by -- you know, facial expressions but would be
7 consistent with a three level degenerative disease of the
8 cervical spine noted on the MRI's that we just went over.

9 Q. Now, you did -- by the way, Doctor, what's
10 degenerative disease?

11 A. Degenerative disease is arthritis or in this
12 case combination of arthritis and the dehydration of the
13 disk space.

14 Q. And you didn't end your examination there, did
15 you?

16 A. No, I did reflexes. Used a rubber hammer
17 hitting the reflexes and at that time the reflex of the
18 elbow, which was an objective study, was symmetrical.

19 Q. So he was the same on both sides?

20 A. Correct.

21 Q. Did you do a -- did you do a Spurling's test?

22 A. I'm sorry?

23 Q. Did you do a Spurling's test?

24 A. Yes, I did.

25 Q. Can you tell the jury briefly what a

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1 Spurling's test is?

2 A. The Spurling's test is you take the neck and
3 flex it and twist it to the side and apply some pressure
4 on the top of the head. What we are doing is we're
5 closing the foramen, the holes through which the nerves
6 go. If there is any inflammation of the nerve you get a
7 report of pain radiating down the arm and this we call a
8 positive test.

9 If the person being examined says I feel
10 numbness or tingling in these two fingers, that's a
11 reason to know that the C7 nerve root is being pinched by
12 doing the Spurling's test. So it's more or less an
13 objective test.

14 Q. And when you did the Spurling's test on Mr.
15 Cicola, what was the result?

16 A. There was no radiculopathy reported, the
17 numbness or burning into the arm.

18 Q. Did you do other various provocative tests for
19 other parts of Mr. Cicola's body?

20 A. I checked the median carpal tunnel and the
21 ulnar nerve at the elbow. I did motions of the scapula,
22 isometric and isotonic contractor and essentially they
23 were all normal examinations of the neck.

24 Q. And when you did your physical examination did
25 you have the opportunity to view Mr. Cicola's body?

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1 A. Yes.

2 Q. Did you note something called multiple stria?

3 A. Yes.

4 Q. And what are multiple stria?

5 A. Stretch marks.

6 Q. Where did you have the stretch marks?

7 A. About the axilla of his shoulder.

8 Q. When you say axilla, can you use lay terms?

9 A. The armpit. This portion of the body that
10 encompassed the upper arm and the chest, in the armpit.

11 Q. And Doctor, in your experience what are the
12 various causes of stretch marks in that area?

13 A. In men, weight-lifting, doing heavy art --
14 women, birth marks, the stretch marks are stria.

15 Q. Did you do a Hawkins test?

16 A. A Hawkins test is performed with the shoulder
17 about 90 degrees. You ask the patient or the claimant to
18 hold -- to a resist strength and you twist the arm down
19 and doing so, if you get a report of pain, this is one of
20 the suggestions which is partially subjective, of course,
21 that he has a tendonitis or rotator cuff tear in the
22 shoulder.

23 Q. And did you do some other tests? We'll go
24 through them, a Napoleon's test?

25 A. Napoleon's test, you ask him to put his hands

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1 on his abdomen and put his hands on his elbow and he's
2 flexing his elbows forward and it's a test for the
3 internal rotators of the shoulder.

4 Q. And did you do something called a Hornblower's
5 test?

6 A. That's the extension test, again resistance,
7 and this would be the external rotators of the shoulder.

8 Q. An O'Brien's test?

9 A. O'Brien's test, excuse me, is pushing up on
10 the hands and that's for the internal structures of the
11 shoulder called the labrum.

12 Q. And a Jorgensen's (phonetic) test?

13 A. Jorgensen's test is turning your palm up
14 against resistance and this is bicipital tendonitis would
15 cause pain. He did not -- he had pain doing the Hawkins
16 test. He did not have pain doing the other tests.

17 Q. Now after you performed the test, reviewed the
18 records, looked at the films, did you make any
19 conclusions or have any opinions after this initial
20 medical examination to a reasonable degree of medical
21 certainty in your field of expertise?

22 A. I felt that while he may have sustained soft
23 tissue injuries to his neck, upper back and shoulders,
24 that these appeared to be revolved by time. There was
25 some preexisting evidence of the degenerative disk in his

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1 neck and the calcific tendonitis and the little arthritis
2 of the AC joint, the joint between the clavicle and the
3 scapula which preexisted and did not appear to be
4 materially or substantially affected by the motor vehicle
5 accident.

6 Q. And how could you come to the conclusion that
7 the areas that you just told us about had the preexisting
8 problem?

9 A. I'm sorry, would you repeat that?

10 Q. How did you come to the conclusion that the
11 areas that we just spoke about, you just told me about,
12 had preexisting problems?

13 MR. ZLOTOW: At that time?

14 A. Because of the basis of my examination and my
15 experience in examining people.

16 Q. Now at some point did the plaintiff at the
17 request of the County of Suffolk come back to your office
18 again for another physical examination?

19 A. Yes, he did.

20 Q. And was that examination conducted on April 21
21 of 2010?

22 A. Correct.

23 Q. And your report of that is memorialized on May
24 4th, 2010; correct?

25 A. Correct. May 4th.

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1 Q. Doctor, you can have the report in front of
2 you and if you need to refer to it, just tell the jury
3 that you're referring to it; okay?

4 Doctor, again, did you take a history of Mr.
5 Cicola when he came the second time?

6 A. Yes.

7 Q. And what did he tell you as far as his history
8 was going?

9 A. That there was a gradual worsening of the pain
10 in his neck and shoulders that occurred over 2008 after I
11 had examined him and that in November of 2008 the pain on
12 one occasion became so severe that he went to the
13 emergency room at Huntington Hospital and he subsequently
14 had surgery performed on November 19th, 2008 by Dr.
15 Alongi and performed a C4/5 diskectomy, which is to take
16 out the disk and to put in bone and a device to cause the
17 bones to fuse between C4 and C5 and try and reduce the
18 pain that he was having.

19 Q. Now you told us that Mr. Cicola reported to
20 you that he had a gradual worsening of pain?

21 A. Correct.

22 Q. Doctor, could you tell us when somebody
23 suffers from degenerative disease over time, does that
24 produce a gradual worsening of pain?

25 MR. ZLOTOW: Objection. All

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1 people?

2 THE COURT: What's the base of the
3 objection?

4 MR. ZLOTOW: Is it all people or
5 just this person?

6 MR. JEFFREYS: Just generally, in
7 his field.

8 THE COURT: Generically speaking?

9 MR. JEFFREYS: Yes, generically
10 speaking.

11 THE COURT: You may answer the
12 question, Doctor.

13 A. Yes, usually in those things it's part of the
14 aging process, a gradual increase in discomfort, gradual
15 decrease in motion.

16 Q. So there is an increase in aches and pains as
17 one gets older?

18 A. Yes.

19 Q. And that's the aging process that
20 unfortunately is part of degeneration?

21 A. Usually, yes, sir.

22 Q. And for Mr. Cicola, when he came to you on
23 this second occasion for the examination, did he make
24 complaints to you?

25 A. Sorry. He subsequently had surgery performed

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1 on his cervical spine and had a second operation
2 performed on October 14th, 2009. He said he did well for
3 six months but lately he's been developing pain and
4 numbness in his left shoulder again. He said that he had
5 a stiff neck with persistent pain that is becoming more
6 progressive and radiating to his left hand.

7 Q. So the new complaints that he was telling you
8 were the surgery, the left hand or the left pain that he
9 was feeling or the left-sided pain that he was feeling.
10 Was there any other additional complaints of pain that
11 Mr. Cicola was telling you about?

12 A. He said that he did well for six months but
13 lately he's been developing pain and numbness in his left
14 shoulder again. He said --

15 Q. And as part of your second examination did you
16 also have some additional documentation to review with
17 your physical examination?

18 A. Yes, I did.

19 Q. Could you tell the jury -- just list it, the
20 documentation that you were able to review with that
21 second physical examination?

22 A. Reports of MRI of the right shoulder,
23 orthopedic note of Dr. Alongi, emergency room records of
24 Huntington Hospital, November 18th, 2008 when he was
25 complaining of the neck pain spasm and tingling of the

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1 right arm. Pulmonary consultation. An MRI report of the
2 cervical spine, November 18th. An operative record of
3 Dr. Alongi of November 19th, 2008. An MRI report of the
4 cervical spine performed on June 6th, 2009. CT scan of
5 the cervical spine. That's another form of study.
6 That's an x-ray. October 15th, 2009. An MR report of
7 the left shoulder on October 14th, 2009 which said in
8 part, quote, impression, no evidence of rotator cuff
9 tear, no known labral abnormalities, mild tendinosis of
10 the rotator cuff is suspected. An MRI of the cervical
11 spine, October 14th, 2009. Operative report of October
12 14th 2009 of Dr. Alongi performed an anterior cervical
13 fusion from C4 to C6.

14 Q. And those particular films that you told the
15 jury about, the MR report of the left shoulder performed
16 October 14th, 2009, the MRI of the cervical spine
17 performed October 14th, 2009 and the CT scan of the
18 cervical spine performed on October 15th, 2009, were
19 those all part of the Huntington Hospital records that
20 were sent to you?

21 A. Yes.

22 Q. And at the time that you saw Mr. Cicola for
23 his second appointment with you, was he still undergoing
24 any active treatment?

25 A. At the time he was not going to physical

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1 therapy or chiropractic care but he was still being seen
2 by Dr. Alongi, the surgeon who operated on him.

3 Q. At that point of the second physical exam with
4 you, did Mr. Cicola give you any past medical history?

5 A. He gave no other history-related injury.

6 Q. And at that point, for the second examination,
7 did you do a height and weight?

8 A. Yes, sir.

9 Q. And can you tell the jury when you saw him the
10 second time what was Mr. Cicola's height and weight?

11 A. Five foot 11 and he weighed 217 pounds.

12 Q. And did you have the opportunity to see the
13 condition of his body?

14 A. Yes.

15 Q. And could you describe the condition of his
16 body to the jury as you saw it?

17 A. He had two scars on his neck from the surgery
18 that he had undergone. I'm afraid -- he still had the
19 build of a weightlifter, still the physic of a
20 weightlifter.

21 Q. The musculature was still there?

22 A. Yes.

23 Q. Did he still have those stretch marks?

24 A. I didn't record them but I think those stretch
25 marks are permanent.

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1 Q. Again, did you caution Mr. Cicola concerning
2 his limitations in your examination?

3 A. I did.

4 Q. And it was the same cautions you had given
5 previously?

6 A. Yes, sir.

7 Q. Not to do anything that would cause pain?

8 A. Correct.

9 Q. And did you follow those same guidelines that
10 you told us previously with the norm of one person being
11 the unaffected side and you compared to unaffected side
12 to the affected side?

13 A. Yes, sir.

14 Q. Now Doctor, did you do an examination of the
15 plaintiff's cervical spine?

16 A. Yes, sir.

17 Q. And that included cervical extension?

18 A. Yes. 20 degrees.

19 Q. And did it include cervical flexion?

20 A. Also 20 degrees.

21 Q. And lateral flexion?

22 A. Was 25/25, left and right.

23 Q. And cervical rotation?

24 A. 55/55.

25 Q. So for each side that you could compare the

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1 right to left, both sides were the same?

2 A. Yes, sir.

3 Q. And did you also check out his shoulder?

4 A. Yes.

5 Q. Or his shoulders, plural.

6 Could you tell the jury what you saw in active
7 shoulder abduction?

8 A. He went to 155 degrees on both sides.

9 Q. And that's the motion lifting up from the
10 side?

11 A. Correct.

12 Q. And shoulder flexion, what was that?

13 A. It was 145 degrees on both sides.

14 Q. And external rotation?

15 A. It was 70 degrees on both sides.

16 Q. And internal rotation?

17 A. This time I measured him slightly different.

18 I had him reach behind his back and he was able to reach
19 the second lumbar vertebrae.

20 Q. On both sides?

21 A. Which is considered -- on both sides, yes,
22 sir.

23 Q. So since he was able to have the same degrees
24 of movement and the same reach in his shoulder, would
25 that be a normal finding for this particular gentleman?

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1 A. Yes, sir.

2 Q. Now, you also tested biceps reflex?

3 A. Yes.

4 Q. And what were the biceps reflex?

5 A. The biceps reflex is you take the rubber
6 hammer and hit the various tendons at the elbow and on
7 the left I could not find a reflex, on the right he had a
8 one plus.

9 Triceps reflex was the extension, that was
10 equal by both sides. And the brachial radialis, another
11 reflex was also zero on the left, one on the right,
12 showing some involvement of the nerves going to the left
13 shoulder and arm.

14 Q. So your reflex findings were all in reference
15 to the left side?

16 A. Yeah, and the loss of reflex findings were on
17 the left side.

18 Q. Did you find any loss of reflexes to the right
19 side on your exam?

20 A. No, I --

21 Q. And again, did you check the carpal tunnel
22 nerves?

23 A. Yes.

24 Q. And did you find anything there?

25 A. No, no evidence of carpal tunnel syndrome.

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1 Q. Did you check his sensitivity to see how his
2 sensory reactions were doing?

3 A. It seemed intact on both sides.

4 Q. Could you tell the jury how you come to that
5 particular conclusion, that sensory he's fine on both
6 sides?

7 A. Light touch. That's objective.

8 Q. And did you do a Hawkins test again?

9 A. Yes. It was negative on this occasion.

10 Q. And that's the test for the shoulder
11 impingement?

12 A. Yes, sir.

13 Q. And did you do any other tests?

14 A. An isometric and isotonic contractors of the
15 abducted arms.

16 He complains of pain over this spinous
17 process, C2, the muscles that go from the upper back to
18 the shoulder. Also when I checked him for -- excuse me,
19 grip strength using a Dynamometer he was stronger on the
20 left hand than the right hand, 70/40.

21 Q. And the Dynamometer, that was like a
22 subjective grip test you told us about at the beginning
23 of your testimony?

24 A. Well, you have him repeat it a number of times
25 and it's very difficult to fake that it way, so it's an

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1 objective finding.

2 Q. So your finding was he had decreased grip
3 strength in the right hand and greater grip strength in
4 the left hand?

5 A. Correct.

6 Q. But he had decreased reflexes in the left side
7 but normal reflexes on the right side?

8 A. Yes, sir.

9 Q. Doctor, now at the time that you had seen Mr.
10 Cicola for the second time on April 21st, 2010, you had
11 already had the benefit of one physical exam, the reviews
12 of the records for the first physical exam, the reviews
13 of the diagnostic films, the second physical exam, review
14 of more records and another examination, so based upon
15 everything that you had done with Mr. Cicola to that
16 point, did you have any opinions to a reasonable degree
17 of medical certainty in your particular field of
18 expertise concerning Mr. Cicola?

19 THE COURT: Yes or no, Doctor.

20 A. I'm sorry, your Honor, I was trying to find
21 the question.

22 Q. No problem. Did you have an opinion to a
23 reasonable degree of medical certainty concerning Mr.
24 Cicola?

25 A. Yes, I did.

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1 Q. And what was that opinion?

2 A. That he had a progressive cervical
3 radiculopathy.

4 Q. And what is progressive cervical
5 radiculopathy?

6 A. Increased numbness going into his hands.

7 Q. And did you make any other finding concerning
8 Mr. Cicola?

9 A. That he was status post cervical diskectomy
10 and fusion at the C4 to C5, C5 to C6.

11 Q. And you had previously told us from your first
12 examination that you had an opinion concerning
13 degenerative findings at C4/5, C5/6 and C6/7. Did that
14 change in your second exam?

15 MR. ZLOTOW: Objection.

16 THE COURT: Could you read that
17 back?

18 (Whereupon, the requested portion of
19 the record was read back.)

20 THE COURT: You have an objection to
21 that question? Basis of the objection?

22 MR. ZLOTOW: I think his testimony
23 was he saw something in C5/6. He didn't
24 say three. I believe he said --

25 THE COURT: So your objection is the

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1 predicate of the question --

2 MR. ZLOTOLOW: Yes.

3 THE COURT: -- is, in fact,

4 erroneous?

5 MR. ZLOTOLOW: Yes.

6 THE COURT: All right. Of course it
7 will be the jury's recollection that
8 controls.

9 I'll allow him to answer the
10 question.

11 Do you remember the question?

12 THE WITNESS: No, sir.

13 THE COURT: Neither do I. Let's
14 hear it again.

15 (Whereupon, the requested portion of
16 the record was read back.)

17 THE COURT: Now there are two
18 questions in there, see; break it down into
19 two questions, first to confirm -- confirm
20 that was the doctors' testimony earlier and
21 then ask the follow-up question.

22 MR. JEFFREYS: I will.

23 THE COURT: Thank you.

24 Q. Doctor, do you remember earlier when we spoke
25 about your examination on January 11th, 2008 that you had

Dr. Bernhang - Direct - Jeffreys

1 certain opinions concerning Mr. Cicola's degenerative
2 process?

3 A. Yes, sir.

4 Q. And Doctor, do you remember those opinions
5 about degenerative process concerning the C4/5, C5/6 and
6 C6/7 vertebrae?

7 A. I felt that while there was preexisting
8 evidence of degenerative changes of the cervical spine,
9 they had not been materially or substantially affected by
10 the motor vehicle accident of January 11th, 2007.

11 Q. And those degenerative conditions that you
12 found in the cervical spine, what you showed the jury on
13 the films, what we've spoken about your direct exam so
14 far, did that change in your second exam?

15 A. Yes, because he had been fused at this time at
16 C4 to C6.

17 Q. So all that was left was the cervical
18 radiculopathy; correct?

19 A. Correct.

20 Q. Now, Doctor, at some point were additional
21 films made available to you so that you could review
22 them?

23 A. Yes.

24 Q. And could you tell the jury what additional
25 films were made available to you?

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1 A. The MRI of the right shoulder of November
2 12th, 2008, 22 months following the captioned accident.
3 Previous x-ray of January 15th, 2007 of the right
4 shoulder. Report of the MRI of the cervical spine of
5 June 6th, 2009. X-ray report of January 15th, 2007. The
6 MRI of July 27th, 2010 and the x-rays of the cervical
7 spine dated July 207th, 2010. An MRI of December 22,
8 2010, 47 months following the captioned accident shows a
9 fusion C4/5 to be solid and the fusion at C5/6 to be
10 incomplete.

11 Q. Doctor, after looking at all of those films,
12 all the films that you told us about, did you make any
13 conclusions to a reasonable degree of medical certainty
14 concerning Mr. Cicola's condition?

15 A. Yes.

16 Q. And what were your conclusions?

17 A. That they were preexisting changes -- my
18 conclusions were I did not feel that the changes in C4/5,
19 C5/6 we saw initially on the films of 2008, when I
20 examined him, showed preexisting conditions that were not
21 materially or substantially affected by the motor vehicle
22 accident of whatever date it was.

23 Q. Of January 11th, 2007?

24 A. Yes.

25 MR. JEFFREYS: Doctor, I have

Dr. Bernhang - Cross - Zlotolow

1 nothing further. Thank you.

2 THE COURT: Cross?

3 MR. ZLOTOLOW: Certainly.

4 CROSS-EXAMINATION

5 BY MR. ZLOTOLOW:

6 Q. Good day, sir. How are you today?

7 A. Good morning. I have a frog in my throat.

8 Q. Do you need anything? I'll try to get through
9 this quickly for you.

10 A. Thank you.

11 Q. Let's see, where do we start? Let's start at
12 your first report of Mr. Cicola, January 16th of '08;
13 okay? At that time, when you did the report, you were
14 furnished at that time an MRI film; correct?

15 A. Yes, sir.

16 Q. And you were furnished the MRI film that you
17 demonstrated here today; correct, the --

18 A. Yes.

19 Q. The MRI?

20 A. February 13th of 2007.

21 Q. Right. February 13th, 2007; correct?

22 A. February 13th, 2007, yes, sir.

23 Q. You were furnished with that actual MRI film
24 on your first visit with Mr. Cicola; correct?

25 A. Yes, sir.

Dr. Bernhang - Cross - Zlotolow

1 Q. You had the film?

2 A. Yes, sir.

3 Q. And that film was taken about a month after
4 his accident; correct?

5 A. Yes, sir.

6 Q. And you reviewed that film at that time;
7 correct?

8 A. Yes, I did.

9 Q. And at that time you put a little note in your
10 report, examiner's note?

11 A. Um-hmm.

12 Q. It indicates, is this true, the MRI is
13 available to me and the disk protrusion seen at C4/5,
14 C5/6 and C6/7, you noted that; correct?

15 A. Yes, sir.

16 Q. All right. And earlier today when you
17 testified you looked over the MRI films and you indicated
18 that you saw a bulge at C5/C6; correct?

19 A. Yes, sir.

20 Q. And I think your statement was there is really
21 nothing else on this film to talk about; correct?

22 A. Correct.

23 Q. There was nothing else to talk about, except
24 for the bulge at C5/C6?

25 A. That is correct.

Dr. Bernhang - Cross - Zlotolow

1 Q. Right. That's the only thing that could be
2 appreciated. All right. At your -- when you viewed the
3 film with your report you noted some sort of protrusion
4 at 4/5, 5/6?

5 A. Bulge.

6 Q. Okay, whatever it is.

7 Now -- and then you wrote a report and you
8 examined this individual?

9 A. Yes, sir.

10 Q. Aside from the MRI of the neck and the MRI of
11 the shoulder -- and we could all agree with respect to
12 the shoulder it had calcification; correct?

13 A. Yes, sir.

14 Q. Now we could all agree that the findings on
15 the film, on any film from the neck are significant;
16 correct?

17 A. I'm sorry?

18 Q. Are they significant? Do you find them of any
19 significance?

20 A. The disk bulging shows some early wear and
21 tear of the -- of the disk space, yes, sir.

22 Q. Some early wear?

23 A. Yes.

24 Q. Let me ask you this question, from looking at
25 that film, could you tell whether somebody has pain?

Dr. Bernhang - Cross - Zlotolow

1 A. No.

2 Q. You indicated -- before we talked about
3 subjective and objective. You can't look at a film and
4 say, based on this, this person had pain or injury;
5 correct?

6 A. I agree. Yes, sir.

7 Q. So you can't say whether he had pain or injury
8 -- when you looked at the film you can't say whether he
9 had pain or injury before the film; correct?

10 A. Would you repeat that question.

11 Q. Just like you can't say whether he had pain or
12 injury when you look at the film, all right, you can't
13 say he had pain or injury before this; correct?

14 A. I don't understand the question.

15 Q. Okay. What my question is, if you can't tell
16 by looking at the film whether somebody is experiencing
17 pain or discomfort, you can't tell whether they are
18 experiencing pain or discomfort before that film;
19 correct?

20 A. Correct.

21 Q. All right. And you talked about the
22 degenerative changes. Degenerative changes don't
23 necessarily elicit symptoms; correct?

24 A. Correct.

25 Q. People have them and they may -- they may

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1 appreciate them, they may not?

2 A. Agreed.

3 Q. That all depends on the level of the
4 degeneration; correct?

5 A. Yes, sir.

6 Q. And the individual?

7 A. Yes, sir.

8 Q. Some people -- you know, everybody is
9 different?

10 A. Yes, sir.

11 Q. You agree?

12 Because pain is a subjective thing; right?

13 A. Yes, sir.

14 Q. Now with regard to history that you were
15 given, you've never heard anything, anywhere, despite
16 much trouble, of any accident or injury that occurred to
17 Mr. Cicola before this?

18 MR. JEFFREYS: Objection to the
19 form.

20 THE COURT: Sustained as to form.

21 Q. Now --

22 THE COURT: I'm not precluding you,
23 just sustained as to form.

24 MR. ZLOTOLOW: I understand.

25 Q. So you looked at that film and you did an exam

Dr. Bernhang - Cross - Zlotolow

1 at the time; correct?

2 A. Yes, sir.

3 Q. And your exam, it looks like the first thing
4 you do is ranges of motion; correct?

5 A. Yes.

6 Q. All right. And then in your field, as an
7 orthopedist, ranges of motion are important; correct?

8 A. Yes, sir.

9 Q. That's why you do those tests; correct?

10 A. Yes, sir.

11 Q. And you take very careful notes as to the
12 degrees of the ranges of motion?

13 A. Yes, sir.

14 Q. And on your visit with Mr. Cicola when he came
15 to you -- and if you can look at your report, please?

16 A. I have my report.

17 Q. Okay. He had cervical extension, you said, of
18 35?

19 A. Yes, sir.

20 Q. What you didn't answer and nobody asked you
21 about was, what is normal?

22 A. Normal can be up to 70 degrees, I think.

23 Q. Okay. You indicate in your report what normal
24 is; right? I'm not -- correct. Nice enough to put that
25 down, what normal is.

Dr. Bernhang - Cross - Zlotolow

1 A. I'm sorry, would you repeat that question.

2 Q. Yes. In your report you're nice enough to
3 make it easy on us you put down the norms; correct?
4 That's correct? Right?

5 You put down the findings and what's normal?

6 A. Yes, sir.

7 Q. So he had cervical range of motion was 35 out
8 of 70; correct?

9 A. Um-hmm.

10 Q. So that's about half?

11 A. Correct.

12 Q. All right. And he had cervical flexion, which
13 is what? What is cervical flexion?

14 A. Chin to the chest.

15 Q. Chin to the chest. He had cervical flexion of
16 25 out of 70?

17 A. That's what he demonstrated, yes, sir.

18 Q. And he had lateral flexion of -- what is that,
19 side to side?

20 A. Lateral is neck -- ear to neck -- ear to
21 shoulder.

22 Q. Ear to shoulder. That's this one?

23 A. Yes, sir.

24 Q. And he did right and left; correct?

25 A. Yes.

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1 Q. And both of those were restricted as well;
2 correct?

3 A. Correct.

4 Q. The normal on that is 45; correct?

5 A. Yes.

6 Q. And he had 35 going -- what was that left or
7 going right, 35 left?

8 A. And 30 right.

9 Q. And 30 right. Okay.

10 And as far as the rotation of his neck,
11 that's -- that's side to side?

12 A. Looking over your shoulder.

13 Q. Looking over your shoulder, he had 60 going
14 left and 45 going right?

15 A. Correct.

16 Q. Okay. And normal is 55?

17 A. Yes, sir.

18 Q. And then you did some shoulder tests and the
19 shoulder was more normal; correct? They were closer to
20 normal, right, the findings?

21 A. Well, the both sides were equal, therefore
22 they were normal, yes, sir.

23 Q. So the shoulders -- when he saw you, the
24 shoulders were pretty good, because we're not really
25 talking about shoulder here today, are we?

Dr. Bernhang - Cross - Zlotolow

- 1 A. No.
- 2 Q. No. The shoulders were okay; right?
- 3 A. Yes, sir.
- 4 Q. All right. But the neck, these were pretty
- 5 marked -- these were marked restrictions, weren't they?
- 6 Would you call them marked? There is a term you used
- 7 called marked restrictions; correct?
- 8 A. Okay. Or moderate.
- 9 Q. How do you term these?
- 10 A. Moderate.
- 11 Q. What do you call moderate?
- 12 A. 50 percent.
- 13 Q. Okay. Now the Spurling's test that you did at
- 14 that time was negative; correct? You were testing for
- 15 cervical radiculopathy?
- 16 A. Correct.
- 17 Q. So at that point when you wrote the report you
- 18 were -- you weren't saying that the man didn't have
- 19 significant findings in his neck; correct?
- 20 A. Correct.
- 21 Q. He had significant findings; correct?
- 22 A. I felt that he had resolved.
- 23 Q. So despite 50 percent restrictions in his
- 24 neck, you wrote that his injuries had resolved?
- 25 A. Yes, sir.

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1 Q. Okay. So despite marked restriction or
2 moderate restrictions in his neck, you wrote a report
3 that said they resolved?

4 A. But these range of motion of the cervical
5 spine is subjective and in the current day A.M.A.
6 recordings they don't record them at all except by
7 x-rays.

8 Q. But -- but then why did you do that?

9 A. This was -- this was requested in -- the State
10 of New York requests the standard to have the cervical
11 and lumbar spine ranges of motion recorded.

12 Q. Oh, is that because when you wrote the report
13 you were hired by the defendants in a lawsuit; correct?

14 A. Yes.

15 Q. And they request that you put cervical ranges
16 of motion?

17 A. No.

18 Q. No? Then who requests --

19 A. That's part of a normal examination.

20 Q. So it's part of a normal examination, but
21 insignificant. All right.

22 Now, you next -- now, you also indicated in
23 your report that the calcifications that he had in his
24 shoulder were consistent with a person who lifts weights;
25 correct?

Dr. Bernhang - Cross - Zlotolow

1 A. Sorry?

2 Q. You indicate in your report that
3 calcifications in his shoulder were consistent with
4 somebody who lifts weights; correct?

5 A. It can be, yes, sir.

6 Q. But you didn't write that in any way about his
7 neck, did you?

8 A. No, I did not.

9 Q. All right. And with regards to the findings
10 of the calcium and whatever, with regard to that, was
11 that a significant finding?

12 A. No.

13 Q. And you looked at the shoulders and the neck
14 separately; correct? They are not in any way connected?

15 A. Oh, they are.

16 Q. Well, in other words, are they -- you looked
17 at --

18 A. Some of the tests overlap.

19 Q. All right. And you've seen in your experience
20 that, you know, the people that have neck issues
21 sometimes have shoulder complaints, sometimes people with
22 shoulder complaints have neck issues; correct?

23 A. Correct.

24 Q. This is something that we see all the time;
25 right?

Dr. Bernhang - Cross - Zlotolow

1 A. Correct.

2 Q. And with regard to -- have you -- you're not
3 an orthopedic spine surgeon, are you?

4 A. I published pages on fractures of the spine.

5 Q. Do you --

6 A. I no longer operate.

7 Q. Have you ever operated on a cervical spine?

8 A. Sure.

9 Q. You've done neck surgery?

10 A. Yes.

11 Q. I know you no longer operate. When did you
12 stop operating?

13 A. 10 years ago because of my arthritis.

14 Q. That's okay. I'm sorry.

15 Now -- but as far as orthopedic spine surgery,
16 if you have a neck complaint and a shoulder complaint,
17 before you do a surgery on a neck you're going to make
18 sure that the problem is not emanating from the shoulder;
19 correct?

20 A. That would be prudent.

21 Q. That's the prudent thing to do; correct?

22 A. Yes, sir.

23 Q. Now when he came to you and you did this --
24 this exam and he told you his neck was stiff; correct?

25 A. This is in the second examination?

Dr. Bernhang - Cross - Zlotolow

1 Q. No, we're still on the first one. We're
2 almost done with the first one. He told you he had -- he
3 had issues with his neck?

4 A. He felt he had stiffness in his neck.

5 Q. He told you that he was having difficulty
6 performing his daily activities; correct?

7 A. Um-hmm.

8 Q. And he indicated to you -- he gave you some
9 indications of some of the things he can't do; true?

10 A. Yes, sir.

11 Q. All right. And did you ever put in your
12 report that you didn't believe -- you didn't believe this
13 man?

14 A. No, I did not put that in my report.

15 Q. Did you ever put in your report that this --
16 these activities are inconsistent with the injuries that
17 he has?

18 A. No, I did not.

19 Q. Did you find that these activities that he's
20 restricted in are consistent with the complaints that he
21 had?

22 A. Yes.

23 Q. And they are consistent with the findings that
24 you had, as well?

25 A. Yes.

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1 Q. And when you saw him, how long did this exam
2 take?

3 A. I'm sorry, sir?

4 Q. How long did the exam take, that first exam?

5 A. Probably the entire 20 minutes.

6 Q. The entire 20 minutes?

7 A. Um-hmm.

8 Q. So you booked like 20-minute sessions for
9 this?

10 A. Yes.

11 Q. The exam that you did, the actual exam that
12 you did of this gentleman consisted of ranges of motion;
13 correct?

14 A. Um-hmm.

15 Q. And it consisted of a Spurling's test and a
16 couple other tests; correct?

17 A. Yes, sir.

18 Q. Now did you make any suggestions to the man
19 about --

20 A. Excuse me.

21 Q. Did you make any suggestions to him about
22 treatment options and things he should be doing?

23 A. That's -- there is no patient -- we avoid
24 giving suggestions to somebody who isn't established, so
25 I have not established a patient/doctor relationship and

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1 as such, I do not give comments or critique to the
2 claimant I'm examining as to what my thoughts are.

3 Q. Okay. So you didn't tell him --

4 A. It would be improper for me to do so.

5 Q. Okay. Now let's go, if we could -- so then
6 after that exam you came to learn that he came to have
7 spine surgery; correct? You came to learn that after
8 that exam he had spine surgery?

9 A. Yes.

10 Q. He had spine surgery about 10 or 11 months
11 later; correct?

12 A. Yes, sir.

13 Q. He had an anterior diskectomy, is that fair?

14 A. Correct.

15 Q. Now I'm going to show you the records. We'll
16 start with the first hospital record.

17 THE COURT: The hospital record?

18 MR. ZLOTOLOW: Yeah, the hospital --

19 I marked it up this time. I learned from
20 yesterday. I've got some tabs in here.

21 (Document handed to the witness)

22 THE COURT OFFICER: Plaintiff's

23 Exhibit 11 in evidence.

24 Q. All right, now, if you go to the first tab --

25 A. The 11/18/08?

Dr. Bernhang - Cross - Zlotolow

1 Q. You're familiar with Huntington Hospital;
2 correct?

3 A. Yes, sir.

4 Q. That's the hospital that you're affiliated
5 with; correct?

6 A. Correct. I'm on staff.

7 Q. And you know who Dr. Alongi is?

8 A. Yes, I do. He's a colleague.

9 Q. He's a colleague. Is he an orthopedic spine
10 surgeon?

11 A. He is.

12 Q. Who treats people at that location?

13 A. Yes, he does.

14 Q. Now, going to -- let's start with the first
15 page, the first page, where there is a physician's
16 attestation -- attestation statement; correct?

17 A. Yes.

18 Q. And what is that? What is a physician's
19 attestation?

20 A. I have -- I'm going to report my ignorance; I
21 don't know, either.

22 Q. You don't know either?

23 A. No.

24 Q. Any way, on the first page of the hospital
25 record they give him a principal diagnosis; correct?

Dr. Bernhang - Cross - Zlotolow

1 A. Yes, sir.

2 Q. What's his principal diagnosis?

3 A. Displacement of cervical intervertebral disk
4 without myelopathy.

5 Q. Okay. Now go to the second page, please.

6 A. Sorry.

7 Q. Go to the next, the next marked page.

8 A. And specified disorder --

9 Q. No, to the next marked page.

10 THE COURT: Doctor, I believe he's
11 suggesting that you move to the next marked
12 page.

13 Q. I'm not going to take you through you the
14 whole hospital record, just the highlights.

15 A. Yes, sir.

16 Q. The next is the admission record?

17 A. Yes, sir.

18 Q. Are you familiar with that document?

19 A. Um-hmm.

20 Q. And he has a final diagnosis on there?

21 A. HNP C4/5 cervical radiculitis.

22 Q. Okay, so the final diagnosis when he left was
23 HNP, is that herniated nucleus pulposus?

24 A. Yes.

25 Q. What is a herniated nucleus pulposus?

Dr. Bernhang - Cross - Zlotolow

1 A. I'm sorry?

2 Q. What is that herniated nucleus pulposis?

3 A. That is what I discussed when I was describing
4 with the disk, the liquid-center golf ball, the center of
5 the golf ball is the nucleus.

6 Q. So it's a herniated disk?

7 A. Disk.

8 Q. At C4/C5?

9 A. Correct.

10 Q. That was his diagnosis?

11 A. Yes, sir.

12 Q. And the diagnosis was also cervical
13 radiculitis?

14 A. Yes, sir.

15 Q. Now you found that on your second exam you
16 found cervical radiculitis?

17 A. Yes, sir.

18 Q. About you didn't find it on your first exam?

19 A. Correct.

20 Q. Now they indicate on that same page the
21 procedure that was performed?

22 A. Yes, sir.

23 Q. What was the procedure that was performed for
24 this gentleman?

25 A. Anterior cervical discectomy and fusion C4/5.

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1 with cage, C-A-G-E, open parenthesis, BMP, close
2 parenthesis and an anterior plate.

3 Q. Okay. Are you familiar with that procedure?

4 A. Yes, sir.

5 Q. Is that the procedure for cervical herniated
6 disks?

7 A. Yes, sir.

8 Q. Is that the appropriate procedure?

9 A. Yes.

10 Q. Now on the next marked page, please.

11 A. Yes, sir.

12 Q. All right. Is this a final summary?

13 A. It is.

14 Q. This outlines -- the doctor who performs the
15 surgery and is the admitting doctor, he outlines the
16 course of treatment and his findings?

17 A. Not necessarily the same doctor, but the
18 doctor involved in the case.

19 Q. And in this case did Dr. Alongi write the
20 final summary?

21 A. He did.

22 Q. And he outlined the history of a 37-year-old
23 male who presents with greater than one year history of
24 right-sided neck pain; is that correct?

25 A. Um-hmm. Yes, sir.

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1 Q. He indicates that tests were done in the
2 middle, in the neck section, tests were done; correct?

3 A. Yes.

4 Q. He had a positive foraminal closing and
5 Spurling's test?

6 A. Yes, sir. Yes, sir.

7 Q. So they did a foraminal closing and Spurling's
8 test?

9 A. Yes, sir.

10 Q. What are those?

11 A. The same thing.

12 Q. Those are the --

13 A. When you twist your neck and you're trying to
14 close the foramen with the nerve going through it.

15 Q. So before they did surgery on him they did
16 neurological testing to check --

17 A. Yes.

18 Q. Is that appropriate?

19 A. Yes.

20 Q. And in addition, Dr. Alongi outlines his
21 findings on hospital course, he indicates his reading of
22 the MRI; do you see that?

23 A. Yes, sir.

24 Q. And what was his -- what was his reading of --
25 well, before we go through that, they took an MRI at the

Dr. Bernhang - Cross - Zlotolow

1 hospital; correct?

2 A. Yes. On November 18th, 2008.

3 Q. Before they did surgery on his neck, they did
4 an MRI?

5 A. Yes, sir.

6 Q. And that's the gold standard, isn't it, to
7 find out what's going on?

8 A. That's one of them.

9 Q. Yes. That's the appropriate procedure?

10 A. Yes, sir.

11 Q. And you do that for many reasons; correct?

12 A. Correct.

13 Q. And in this case Dr. Alongi gave his read of
14 the MRI; correct?

15 A. Excuse me?

16 Q. He gave his read of that MRI right here in the
17 hospital discharge summary, the final summary?

18 A. It is felt --

19 Q. Yes. What did he find?

20 MR. JEFFREYS: Objection, your

21 Honor, to the form of the question, what he
22 found as opposed to what the record says.

23 THE COURT: It's sustained. What
24 the record -- how the record reads is one
25 thing. What he found may be something

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1 else.

2 MR. ZLOTOLOW: Oh, okay. I'm sorry.

3 Q. How does the record read as far as his reading
4 of it?

5 A. If we are both on the same line, the MRI of
6 the cervical spine was recorded with findings of a
7 central and right-sided disk herniation at C4/5 with a
8 small disk protrusion central at C5/6.

9 Q. Okay. Now the operation that was performed, I
10 think that's the next tab. Is that the next tab -- item
11 on there?

12 Now, going on to this operation, when the
13 operation is performed the doctor actually sees the
14 inside of a man's body; correct?

15 A. Yes, sir.

16 Q. How is that done?

17 A. I'm sorry.

18 Q. How is that done?

19 A. How does he see the disk?

20 Q. How does he see what's going on inside? His
21 own eyes?

22 A. Makes a surgical incision and if you take your
23 finger you can work your way behind the breathing tube,
24 the trachea and feel the bones of the spine and that's
25 where your approach is. You cut down and separate the

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1 muscles, you put in a retractor which is like bent forks
2 that hold the tissue apart. You put a needle into the
3 disk space that you want, you take an x-ray to verify
4 where you are in the spine because it can be confusing.
5 Once you've established where your point is, you then
6 excise the disk in any number of ways.

7 Q. All right. And when you do a surgery of this
8 type, you type up a detailed operative report; correct?

9 A. Yes, sir.

10 Q. And you outline exactly what was found and
11 exactly what was done; correct?

12 A. Um-hmm. Yes, sir.

13 Q. And that's for a surgeon to do that; correct?

14 A. Excuse me?

15 Q. Is that for a surgeon to do that?

16 A. Yes.

17 Q. And it's important to document their findings?

18 A. They document their findings that they find
19 most interesting, is the patient did well until May 20,
20 '09 at which time he began having increased neck and left
21 arm pain.

22 Q. Well, if you could, I think you're looking at
23 the '09 -- you might be looking at the wrong hospital
24 record. You might be looking at the '09. We're still in
25 '08.

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1 MR. JEFFREYS: It's whatever you
2 tagged.

3 MR. ZLOTOLOW: Is it mixed? May I?

4 THE COURT: You may approach.

5 THE WITNESS: This was the discharge
6 summary of '09.

7 MR. ZLOTOLOW: This was '08.

8 THE COURT: This is what you
9 flagged.

10 MR. ZLOTOLOW: This is the '09
11 operative report. Let's get you to the
12 '08. I'm sorry, we're going to go back to
13 the '08.

14 This was the '09 operative report.
15 How it was in this record, I don't know.

16 THE COURT: Let's get on the same
17 page.

18 MR. ZLOTOLOW: Okay.

19 THE COURT: Get the report you want
20 the doctor to see.

21 MR. ZLOTOLOW: For some reason in
22 the '08 hospital record we have the '09
23 operative report.

24 Q. Okay, sir, I found the '08. Keep -- I might
25 ask you about '09 later, so keep that --

Dr. Bernhang - Cross - Zlotolow

1 A. Okay.

2 Q. Okay. '08 operative report. Now, you put
3 down a preoperative diagnosis in your operative report;
4 correct?

5 A. Correct.

6 Q. What was the preoperative diagnosis?

7 A. Herniated nucleus pulposus C4-C5.

8 Q. So that means before the operation he believed
9 that that was the diagnosis?

10 A. Yes, sir.

11 Q. Okay. And don't -- and in an operative report
12 you put a postoperative diagnosis; correct?

13 A. Correct.

14 Q. And that is after you perform the surgery,
15 after you see what you see, you give a postoperative
16 diagnosis?

17 A. Correct.

18 Q. It's not always the same; correct?

19 A. Correct.

20 Q. All right. So what is the postoperative
21 diagnosis?

22 A. C4/C5 herniated disk.

23 Q. Okay. And if you could, they list the
24 operation. What was the actual operation, if you could
25 describe it in --

Dr. Bernhang - Cross - Zlotolow

1 A. Anterior diskectomy. As I said, you approach
2 the disk and remove it with a number of different
3 instruments. You also have PEEK, which is a cage, it's a
4 spacer, to hold the two bones apart and it has PM, bone
5 morphogenic protein, something to stimulate fusion of C4
6 to C5.

7 PEEK is another of the intervertebral disk
8 device and the anterior plate is placed between the two
9 bones in the front to hold everything together.

10 Q. Okay. So when the doctor did the report or
11 did the operation to report his findings, he wasn't
12 looking at a film, he was actually looking at the
13 anatomy; correct?

14 A. Correct.

15 Q. Do you believe that a person has a better view
16 of the anatomy that way or do they have a better view on
17 film?

18 A. No, you actually you don't see the herniated
19 disk when you approach from the front. So your view of
20 it is probably better in the MRI than it is on the
21 operating room.

22 Q. Interesting.

23 Now the -- now is this, based on your
24 findings, is this operation appropriate?

25 A. I'm sorry?

Dr. Bernhang - Cross - Zlotolow

1 Q. Based on the findings that you had, was this
2 an appropriate operation?

3 A. I decline.

4 Q. Okay. Now would a person, would a surgeon --

5 A. I'm sorry.

6 Q. Would a -- would you perform a one-level
7 discectomy on multi-level degenerative disk disease?

8 MR. JEFFREYS: Objection.

9 THE COURT: Sustained. Sustained.

10 He doesn't have to answer that question.

11 MR. ZLOTOLOW: All right.

12 Q. Now, in addition, at the hospital, that
13 hospital has an MRI machine; correct?

14 A. Yes, sir.

15 Q. It has a fine MRI machine; correct? They have
16 a good magnet, as they say? That's what they call it;
17 right?

18 A. Correct.

19 Q. Some MRI's are better than others; correct?

20 A. I'm sorry?

21 Q. Some MRI's are better than others?

22 A. Yes.

23 Q. Where you can see things better?

24 A. Yes, sir.

25 Q. Hospitals usually have better ones; right?

Dr. Bernhang - Cross - Zlotolow

1 A. They can.

2 Q. They could. Okay.

3 Now, go to -- I have it marked there. Could
4 you go to the actual MRI read, the read of the MRI before
5 the surgery?

6 A. Is that also flagged?

7 Q. It's flagged, yeah. I'm learning, slowly.

8 THE COURT: How far back is it in
9 the report?

10 MR. ZLOTOLOW: I think it might be
11 the last one that I have -- I think it's
12 the last one.

13 THE COURT: Fine.

14 Q. So at the hospital they did an MRI; correct?

15 A. Yes, sir.

16 Q. Because they are not going to perform a
17 diskectomy unless they confirm the findings; correct?

18 A. Yes, sir.

19 Q. And did they -- and what was -- what is the
20 impression, what is the impression from --

21 A. Quote, small central disk herniation at C4-C5
22 indenting the ventral subarachnoid space. Small left
23 paracentral disk herniation at C5-C6."

24 Q. Okay. Now -- thank you.

25 Now in that hospital stay -- have you reviewed

Dr. Bernhang - Cross - Zlotolow

1 that record?

2 A. I'm sorry?

3 Q. Have you reviewed that record, the entire
4 record?

5 A. I don't remember reviewing it, no.

6 Q. In that hospital stay do you know
7 approximately how long the patient was there?

8 A. Probably in today's standards three or four
9 days.

10 Q. Okay. And do you know if anybody in the
11 hospital ever used the terms degenerative disk disease?

12 A. Could you speak a little louder?

13 Q. Do you know anybody at the hospital at that
14 admission in 2008 when he came in for the surgery ever
15 used the terms degenerative disk disease?

16 A. Every -- you have --

17 Q. I'm asking in that hospital record.

18 MR. JEFFREYS: Keep your voice up.

19 He can't hear you.

20 Q. In that hospital record when he came to that
21 hospital for that surgery in November of '08, he had
22 MRI's and surgery and saw multiple doctors. Did anybody
23 use the term degenerative disk disease? Is it anywhere?

24 A. That's what I'm not aware of, sir. I haven't
25 reviewed the chart.

Dr. Bernhang - Cross - Zlotolow

1 Q. Okay. Now onto the next, the next surgery
2 that he had. It will be in there. We'll just use that
3 record. Everything you need to know is in the operative
4 report, isn't it?

5 A. Should be.

6 Q. It should be, right? Okay. Let's just talk
7 about the operative report.

8 THE COURT: Of which admission, '09?

9 MR. ZLOTOLOW: For the '09
10 admission, yes.

11 A. I have the '08 in front of me.

12 Q. I know, but for some reason the '09 operative
13 report is in there. Must have gotten them mixed up. Oh,
14 we took the tab out. Oh, no.

15 I have it in the other one. Yeah, it's in
16 both. There you go, give that to him, please.

17 THE COURT OFFICER: Plaintiff's 13
18 in evidence.

19 (Document handed to the witness)

20 THE COURT: Thank you.

21 Doctor, are you looking at the '09
22 operative report.

23 THE WITNESS: I'm looking at it now,
24 your Honor.

25 THE COURT: You may inquire.

Dr. Bernhang - Cross - Zlotolow

1 Q. Looking at the operative report, what was his
2 preoperative diagnosis?

3 A. Herniated nucleus pulposus C5-C6, two status
4 post anterior cervical diskectomy and fusion with plates
5 C4-C5.

6 Q. Now C4/5 was the disk that was fused earlier;
7 correct?

8 A. Correct.

9 Q. And in your experience is it common after a
10 fusion of one disk to have issues with the adjacent
11 disks?

12 A. You can, yes, sir.

13 Q. Is that one of the things that you warn about?

14 A. Yes.

15 Q. When you tell your patient that one of the
16 problems that you have with fusing one disk is that the
17 ones above it and below it may be affected?

18 A. Are more at risk.

19 Q. Yes. They are more at risk to degenerate and
20 fail; correct?

21 A. Yes.

22 Q. And in this case the preoperative diagnosis
23 was herniated disk 4/5 -- I'm sorry, C5/6?

24 A. Correct.

25 Q. And what is the postoperative diagnosis?

Dr. Bernhang - Cross - Zlotolow

1 A. One herniated nucleus pulposus C5 disk C6, two
2 status post anterior cervical diskectomy and fusion with
3 plate C4-C5.

4 Q. Okay. Now, the -- what do they refer to when
5 they talk about indications?

6 A. I'm sorry?

7 Q. What do they refer to when they talk in the
8 record of indications?

9 A. Indications is the reason you're doing the
10 surgery, the basis or your reasoning.

11 Q. And does it have an indication in this
12 hospital record?

13 A. Yes.

14 Q. What is the indication for the surgery?

15 A. Quote, "The patient is a 38-year-old gentleman
16 who initially underwent anterior cervical diskectomy with
17 fusion at C4-C5 in November of 2008. Following surgery
18 the patient did well with resolution of his neck and arm
19 symptoms. The patient did well until May, 2009 at which
20 time he began to have increasing neck and left arm pain.
21 His neck and left arm pain had persisted despite several
22 treatments. His pain became so severe that he came to
23 the emergency room of Huntington Hospital and
24 subsequently admitted. MRI of the cervical spine
25 demonstrated a left-sided disk herniation at C5-C6. CAT

Dr. Bernhang - Cross - Zlotolow

1 scan demonstrated spinal fusion at C4-C5".

2 Q. Okay. So is it fair to say at this point he's
3 now experiencing left-sided pains?

4 A. Yes, sir.

5 Q. And they did -- and the MRI confirmed
6 a left-sided herniated disk at 5/6?

7 A. Yes, sir.

8 Q. And that was the indication for the surgery?

9 A. Yes, sir.

10 Q. And just as before, Dr. Alongi did a detailed
11 operative report?

12 A. Yes, sir. I -- yeah.

13 Q. Now, do you ever see anywhere in this hospital
14 record where Dr. Alongi stated anything about
15 degenerative disk disease?

16 MR. JEFFREYS: Your Honor, are we
17 limiting it to Dr. Alongi?

18 MR. ZLOTOLOW: Dr. Alongi.

19 MR. JEFFREYS: Or in the entire
20 hospital record?

21 THE COURT: The question is limited
22 to Dr. Alongi.

23 A. Do you want me to go read through the whole
24 record to see if he does.

25 Q. Have you read the record before?

Dr. Bernhang - Cross - Zlotolow

1 A. No.

2 Q. Okay. I guess the record will speak for
3 itself; okay? I'm not going to make you read through it.

4 Okay, so after he has these two surgeries he
5 then comes back to you; correct?

6 A. Could you speak a little louder?

7 Q. After Mr. Cicola has these two surgeries he
8 comes back to see you again; correct?

9 A. Yes.

10 Q. You were asked to see him just the way you
11 were asked the first time?

12 A. Yes, sir.

13 Q. Now just for the record, we didn't ask you to
14 see him, did we?

15 A. No.

16 Q. You were asked by the defendant to see him?

17 A. Correct.

18 Q. And you were asked by the defendant the first
19 time and the second time; correct?

20 A. Yes, sir.

21 Q. And all your reports are addressed to them?

22 A. Yes, sir.

23 Q. And in fact, they are addressed -- the last
24 one is addressed to Mr. Jeffreys himself?

25 A. Yes, sir.

Dr. Bernhang - Cross - Zlotolow

1 Q. The -- now the next time you see him you do
2 pretty much the same exam, don't you?

3 A. Pretty much.

4 Q. Is it -- is there anything that you did in the
5 second exam that you didn't do in the first?

6 A. The Jaymar dynamometer, offhand.

7 Q. So you did the Jaymar dynamometer?

8 A. Test.

9 Q. So just to go through it, you did the -- you
10 checked his ranges of motion?

11 A. Yes, sir.

12 Q. And the cervical extension now was 20;
13 correct?

14 A. Yes, sir.

15 Q. It had been -- on your last exam it had been
16 35; correct?

17 A. Correct.

18 Q. So it got worse?

19 A. Yes, sir.

20 Q. All right. And the cervical flexion is now
21 20?

22 A. Correct.

23 Q. It had been 25. It got worse; right?

24 A. I'm sorry, I missed --

25 Q. The cervical flexion is now 20, it had been

Dr. Bernhang - Cross - Zlotolow

1 25?

2 A. The question here is the A.M.A. had new
3 disability guidelines that do not include specific ranges
4 of spinal motion. Because these are difficult, you're
5 asking somebody to do it. They can volunteer or they
6 don't have to cooperate with the examination.

7 Q. Sir, you -- you did these tests, though;
8 correct? These are the tests that you did?

9 A. I put down "consistent with established New
10 York practice in evaluation such as this, such findings
11 are included." Doesn't mean I believe them.

12 Q. Okay. All right. But these are -- you
13 performed the tests and you put down your findings?

14 A. That's correct, I put down what I found on the
15 examination.

16 Q. If you don't believe in them, that's -- you
17 know, that's fine, you've already said that. But you did
18 these tests?

19 A. Yes, sir.

20 Q. And you found the cervical flexion was now --
21 it's still the same test that you did the first time that
22 you didn't believe them; right?

23 A. Yes.

24 Q. You didn't like them in January of '08?

25 MR. JEFFREYS: Objection to form.

Dr. Bernhang - Cross - Zlotolow

1 THE COURT: Sustained.

2 Q. You didn't believe in them in January of '08?

3 THE COURT: First -- I'm sustaining
4 the objection.

5 MR. JEFFREYS: Objection.

6 THE COURT: Rephrase your question.

7 Q. Okay, in January of '08 you didn't like these
8 tests; correct?

9 MR. JEFFREYS: Objection.

10 THE COURT: Overruled. Can you --
11 do you understand what he's asking you?

12 A. It's not -- it's not whether I like them or
13 not, it's whether I believe in them or not. I don't
14 believe in them most times.

15 Q. And you didn't believe in them in '08?

16 A. No.

17 Q. And you didn't believe in them in 2010 when
18 you did the same ones?

19 A. 2010 they were more believable.

20 Q. Okay. They were more believable?

21 A. Sure. The man had a fused neck now in two
22 levels.

23 Q. So now when a man has a fused neck; right?

24 A. Yes, sir.

25 Q. All right, so -- so we're going to throw out

Dr. Bernhang - Cross - Zlotolow

1 the '08 findings and let's talk about the more believable
2 findings in 2010; okay?

3 A. All right.

4 Q. All right. Cervical extension was 20?

5 A. Yes, sir.

6 Q. All right. Is that a significant restriction?

7 A. Yes.

8 Q. Okay. And is that because of the cervical
9 fusion?

10 A. Yes.

11 Q. Because when you fuse -- when you fuse a spine
12 at two levels --

13 A. You lose something.

14 Q. You're going to lose your ability to extend;
15 correct?

16 A. Yes, sir.

17 Q. All right. And that's a common finding, I
18 mean it's not -- it's not specific to this person?

19 A. It's the degree that we object to.

20 Q. Okay. All right.

21 So a fusion of the neck will affect your
22 cervical extension?

23 A. Yes.

24 Q. And the cervical flexion, as well?

25 A. Correct, sir.

Dr. Bernhang - Cross - Zlotolow

1 Q. And on those tests you found that they were --
2 are they marked or moderate restrictions at this point?

3 A. At this point I would say marked to moderate.

4 Q. So now the restrictions are marked. How do we
5 defined marked?

6 A. 75 percent.

7 Excuse me, I think 66 and a third percent, by
8 definition of the Workmen's Compensation board, which
9 we're using.

10 Q. So it's two-thirds?

11 A. Two-thirds.

12 Q. Two-thirds restricted and that is in the
13 mobility of the neck?

14 A. Correct.

15 Q. And that finding was in -- that was in May of
16 2010 -- April of 2010; correct?

17 A. Correct.

18 Q. And his last -- his last cervical fusion was
19 May of '09?

20 A. Yes, sir.

21 Q. Okay. Now those ranges of motion that you
22 found on that time, are those permanent ranges of motion?

23 A. I cannot tell you.

24 Q. Are they likely to get better?

25 A. Probably -- there should be some, but I can't

Dr. Bernhang - Cross - Zlotolow

1 tell for sure.

2 Q. Okay. You indicated in your testimony before
3 that there is -- that this is a progressive situation;
4 correct?

5 A. Not at those levels any more. If they're
6 fused, they're fused.

7 Q. Okay. So the progression has stopped?

8 A. Yes, sir.

9 Q. And you -- when you -- when you write a report
10 you have an impression, don't you? You put down some
11 sort of impression?

12 A. Yes, sir.

13 Q. And what is -- how do you define impression?

14 A. The gestalt of the whole thing.

15 Q. You're speaking Yiddish? Are you speaking
16 Yiddish to me?

17 A. It's German, actually.

18 Q. It's German? Okay.

19 A. It's a common term used. The whole bag; the
20 examination, the x-rays, the history, everything else.

21 Q. Goes into the --

22 A. You come to an opinion.

23 Q. Goes into the impression, that's your opinion
24 on a case; right?

25 A. Correct.

Dr. Bernhang - Cross - Zlotolow

1 Q. The impression?

2 A. Correct.

3 Q. And in this case the impression was status
4 post anterior cervical diskectomy and fusion at C4/5;
5 right? And status post anterior diskectomy and cervical
6 fusion at C5/6; correct?

7 A. Correct.

8 Q. And you also indicate Spurling's test is
9 positive for cervical radiculopathy as he reports
10 pressure in the cervical spine but no radicular symptoms,
11 that was in your --

12 A. That's what he found, yes.

13 Q. And right underneath it for impression you
14 wrote, progressive cervical radiculopathy?

15 A. Yes, sir.

16 Q. That means the radiculopathy is going to
17 progress?

18 A. That means it has progressed.

19 Q. Okay. So radiculopathy has progressed to this
20 point and that was your impression; correct?

21 A. Yes, sir.

22 Q. That was the end of your impression?

23 A. Correct.

24 Q. That's all you wrote?

25 A. That's all I wrote.

Dr. Bernhang - Cross - Zlotolow

1 Q. Okay. At that point you didn't write not
2 causally related to his car accident?

3 A. I'm sorry?

4 Q. At that point you did not write not causally
5 related to his car accident in your impression?

6 A. No, I did not.

7 Q. I was going to ask you some questions that you
8 get all the times about how often do you testify.

9 THE COURT: Just ask the questions.

10 Q. Sir, how many times have you come to court?

11 A. I think this is the third time in three years.

12 Q. All right. Are you slowing down a little bit?

13 A. Little bit.

14 Q. Okay, over what period of time have you come
15 to court to testify in cases?

16 A. I've testified -- as an orthopedist you are
17 always involved in accident programs, you're testifying
18 for your patients or against your patients.

19 Q. I just want to know in general how many times
20 over the last 30 years.

21 A. The last 30 years?

22 Q. 30 years. I'm not going to go past 30 years,
23 I promise.

24 A. I don't know, really.

25 Q. Okay. All right.

Dr. Bernhang - Redirect - Jeffreys

1 MR. ZLOTOW: Thank you, sir.

2 THE COURT: Redirect?

3 MR. JEFFREYS: Thank you, your

4 Honor.

5 REDIRECT EXAMINATION

6 BY MR. JEFFREYS:

7 MR. JEFFREYS: It's actually very

8 short.

9 Q. Doctor, on cross-examination the plaintiff's
10 counsel talked a little bit about the limitation on range
11 of motion just generally; correct?

12 A. Correct.

13 Q. Can degenerative processes cause limitation of
14 range of motion?

15 A. Yes.

16 MR. ZLOTOW: Objection.

17 It's too late. I'm sorry.

18 THE COURT: Are you objecting? The
19 answer is out. Are you moving to strike
20 it?

21 MR. ZLOTOW: Yes.

22 THE COURT: Overruled. It stands.

23 Q. And for this particular examination the first
24 examination that you did in 2008 you made certain
25 conclusions after your range of motion testing; correct?

Dr. Bernhang - Redirect - Jeffreys

1 A. Correct.

2 Q. And could you tell the jury what your
3 conclusions were after your range of motion testing?

4 MR. ZLOTOLOW: Objection. Outside
5 the scope and asked and answered.

6 THE COURT: Overruled.

7 You can answer that, Doctor.

8 THE WITNESS: I'm sorry?

9 THE COURT: You may answer the
10 question.

11 THE WITNESS: Thank you. I'm sorry,
12 your Honor.

13 A. My conclusions were that while there was
14 preexisting evidence of degenerative changes in the
15 cervical spine and preexisting AC joint arthropathy, it
16 does not appear that these were materially or
17 substantially affected by the motor vehicle accident of
18 January 11th, 2007.

19 Q. And immediately after you did your or reported
20 your range of motion testing of the cervical spine and
21 the shoulder, did you also make some notations there
22 concerning your findings about degenerative issues on
23 page 5 of your report?

24 MR. ZLOTOLOW: Objection.

25 THE COURT: Overruled.

Dr. Bernhang - Redirect - Jeffreys

1 A. The active ranges of motion on the neck noted
2 above are accompanied by grimaces of discomfort and would
3 be consistent with a three level degenerative disease of
4 the cervical spine noted in the February 13th, 2007 MRI
5 which must have preexisted the accident of January 11th,
6 2007.

7 Q. Thank you, Doctor.

8 In addition the plaintiff's counsel spoke with
9 you a little bit about normal ranges of motion; correct?

10 A. Yes, sir.

11 Q. The normal ranges of motion that you talk
12 about in your report, are those national averages?

13 A. The ones that I reported are the A.M.A.'s --
14 excuse me, the American Orthopedic Association clinical
15 measurement of joint motion, 1993. But they are
16 averages. Everybody here can -- some can touch your
17 toes, some can only bend down as far as touching your
18 knees, this is normal for you, it's not necessarily a
19 gymnast who can put their hand flat on the floor, it's
20 not abnormal.

21 Q. And for you -- excuse me, for Mr. Cicola, if
22 normal would be somebody of his height, weight, body type
23 and everything else that make up his life makes his
24 normal; correct?

25 A. Correct.

Dr. Bernhang - Redirect - Jeffreys

1 Q. And that's what you test when you do your
2 exams; correct?

3 A. Yes.

4 Q. And one other thing, the cervical range of
5 motion after the surgery happened, after he shows up for
6 his second physical exam with you in 2010, he has had two
7 cervical surgeries at that point; correct?

8 A. Correct.

9 Q. Did it surprise you, Doctor, that he had a
10 decreased cervical range of motion at that point?

11 A. Not at all.

12 Q. And why wouldn't it surprise you at that
13 point?

14 A. Because he had a two level cervical fusion.

15 Q. So his spine that allows him to move had been
16 fused together at two of the potential movement levels?

17 A. It's not unusual to get a 10 percent loss of
18 function at each level you add.

19 Q. And is that pretty much what your findings
20 were here?

21 A. Yes, sir.

22 MR. JEFFREYS: Thank you, Doctor.

23 Nothing further.

24 THE COURT: Recross?

25 RECROSS-EXAMINATION

Dr. Bernhang - Recross - Zlotolow

1 BY MR. ZLOTOLOW:

2 Q. So -- I'm sorry, just -- so these findings
3 relative to loss of range of motion, what does that mean
4 to the patient? What does that mean to him?

5 A. In function?

6 Q. Yeah.

7 A. It's all according to what his occupation is.
8 I'm not being facetious, but it's according to whether he
9 is -- at some people it is minor because you have gotten
10 rid of the pain by doing the surgery, the loss of motion
11 is paid for by loss of motion versus pain. 70 percent --
12 as I said, each level of fusion is about 10 percent loss
13 of motion.

14 Q. So when we talk about loss of function --

15 A. Loss of motion.

16 Q. Yeah, but you mentioned function. You say
17 that would depend on his activities; correct?

18 A. Correct.

19 Q. All right, so whatever -- whatever limitations
20 he has on his activities would be his own?

21 A. Correct.

22 Q. Depending on his lifestyle or what he does or
23 what he used to do and all of that?

24 A. Yes, sir.

25 Q. Right?

Dr. Bernhang - Recross - Zlotolow

1 Now, as a matter of course, for a patient like
2 this, are there certain activities they shouldn't do?

3 A. Bungee jumping.

4 Q. They shouldn't bungee jump? There are other
5 things?

6 A. Yes.

7 Q. You mentioned that. He shouldn't -- you know,
8 somebody with a spinal fusion shouldn't be playing --
9 getting banged around; correct?

10 A. Correct.

11 Q. That would cause them to --

12 A. You wouldn't go to the Six Flags too
13 frequently.

14 Q. You wouldn't do that.

15 What other things wouldn't you do?

16 A. Ride the bumping cars.

17 Q. Okay. What else? What else shouldn't he do?

18 The question is, should he curb his activities
19 in any way?

20 A. There are certain activities, yes, I would
21 curb.

22 Q. Like?

23 MR. JEFFREYS: Objection, your

24 Honor.

25 THE COURT: Sustained.

Dr. Bernhang - Recross - Zlotolow

1 MR. ZLOTOLOW: Thank you.

2 THE COURT: Anything, Mr. Jeffreys?

3 MR. JEFFREYS: Nothing further, your

4 Honor.

5 THE COURT: Doctor, thank you for
6 coming in. You may step down. Appreciate
7 it.

8 THE WITNESS: Thank you, your Honor.

9 THE COURT: Both of you at sidebar.

10 (Discussion held off the record)

11 THE COURT: Mr. Jeffreys, I believe
12 the defense has a witness?

13 MR. JEFFREYS: Yes, the defense
14 calls Deputy Sheriff Sergeant Evans.

15 THE COURT OFFICER: Remain standing.

16 THE COURT CLERK: Raise your right
17 hand.

18 D E P U T Y S H E R I F F S E R G E A N T

19 T H O M A S E V A N S, the witness herein,

20 having been duly sworn, testified as follows:

21 THE COURT CLERK: Your name, shield
22 and command, please.

23 THE WITNESS: Sergeant Thomas M
24 Evans, shield 67. My command is the
25 enforcement bureau, 830.