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time.

MR. SHAPIRO: Defendant calls Dr.
Robert Israel.

R O B E R T I S R A E L, called as a witness
On behalf of the defendant, having been first
duly sworn testified as follows:

THE WITNESS: Robert I S R A E L.
Office address 942 Fifth Avenue, New
York, New York.

DIRECT EXAMINATION

BY MR. SHAPIRO:

Q. Dr. Israel, can you briefly tell me
your educational background?

A. I'm an orthopaedic surgeon. I got
my bachelors degree from Yeshiva College. I
went to New York Medical College for my medical
degree. I graduated in 1970. I did a straight
surgical internship at St. Claire's Hospital in
New York. I did two years of surgical
residency at St. Claire's Hospital in New York.
I then went into orthopaedic surgery. I did my
orthopaedic residency at NYU Hospital for Joint
Diseases. At the time I was there it was not
affiliated with NYU but with Mount Sinai. I

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2 did a senior elective in knee surgery at the
3 hospital for special surgery. I then did a
4 fellowship, Henry Friendenthal Fellowship.
5 What that means is after you complete your
6 orthopaedic training, the hospital sends you
7 out for further training and I did that with
8 the doctor that took care of the University of
9 Oklahoma football team. I did that for six
10 months at the University of Oklahoma. I worked
11 with Dr. James Nicholas at Lenox Hill Hospital
12 who was the doctor at the time for the New York
13 Jets. I went back to the Hospital for Joint
14 Disease and that's a stipulation of the
15 fellowship and I was director of Orthopaedics
16 there, for sports medicine, for three years.

17 Q. Are you board certified?

18 A. I am.

19 Q. Tell us what board certified means?

20 A. When you complete your orthopaedic
21 training you have to take a test. If you pass
22 the test it's given by the American Board of
23 Orthopaedic Surgery. If you pass the test you
24 are called board certified.

25 Q. Have you published some papers from

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time to time?

A. I have. Mostly early in my career when I was a director of sports medicine at the hospital. I have not in many years.

Q. Do you regularly see patients?

A. I do.

Q. Do you see patients of various types of ailments and injuries?

A. Orthopaedic ailments.

Q. Tell us what type of orthopaedic injuries you see?

A. Orthopaedic surgery as you probably know involves people that have fractures. They are also people who may damage their joint in various ways. If they are younger and it's a sports type of related injury. Usually it's the ligaments. Meniscus, cartilage. If people are older usually it's an arthritic process. People that injure their necks, their backs, their shoulders, ankles, knees. So pretty much involves all joint of the body. Also specialties in hand surgery, foot surgery and pediatric orthopaedics.

Q. You see patients with neck and back

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2 injuries. What percentage of your practice
3 would you say are patients with neck and back
4 injuries?

5 A. Probably about fifty percent.

6 Q. In general do you recommend at
7 times your patients, regardless of the injury
8 have surgery?

9 A. On occasion I will recommend
10 surgery.

11 Q. And do you sometimes do the surgery
12 yourself?

13 A. If it involves arthroscopic
14 surgery, joint replacement, I do it. If it's a
15 problem with your neck or back I refer them to
16 a specialist that my Hospital for Joint Disease
17 uses.

18 Q. Over the years have there been
19 times you've done spinal surgery as well?

20 A. Early in my career I did.

21 Q. Typically of the patients you see
22 fifty percent of the patients you see that have
23 neck or back complaints, what percentage would
24 you say you recommend for surgery?

25 A. Not very many.

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Q. Is there a reason for that?

A. They don't require surgery.

Q. Anything specific about neck and back surgery compared to other surgeries?

A. Well, there are a lot of criteria that would indicate whether or not you might benefit from neck and back surgery. There are a variety of different types of conditions that you can be suffering from if you have a neck or back problem. It would depend on the condition, number one. Number two, on what your anticipated response might be to the surgery.

MR. SHAPIRO: At this time I would like to offer Dr. Israel as an expert in the field of orthopaedic surgery.

THE COURT: Voir dire.

VOIR DIRE EXAMINATION

BY MR. GJELAG:

Q. Dr. Israel, good morning, sir. My name is Nick Gjelaaj. I represent Mr. Robles.

A. How do you spell it.

Q. It's pronounced Gjelaaj?

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Q. You can pronounce it that way.

A. I'm sorry. I don't mean to -- I want to address you appropriately.

Q. Counsel is fine. If I refer to you as doctor, that's fine. You told us about your academic background?

A. I told you about my education.

Q. That's your academic background?

A. There is more to it than just that.

Q. Is it fair to say, Doctor, that your specialty is the knees?

A. That's one of the areas I concentrate on. I would say that is not my specialty. My specialty is sports medicine. My specialty is also joint replacements. So I would not say that specifically is my specialty. It's an area that I have a lot of experience in.

Q. You were just asked if you ever performed a final surgery, do you recall that?

MR. SHAPIRO: This is beyond scope of voir dire.

MR. GJELAG: I'm questioning his expertise as a spinal specialty. I

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concede he's an expert in knees and sports medicine.

THE COURT: The proffer made by defendant is that he be offered as an expert in orthopaedics, not spinal surgery. The witness testified he would refer spine and back to other surgeons.

MR. SHAPIRO: He also testified that fifty percent of the patients he sees have neck and back injuries.

Q. The articles that you testified you wrote, do you recall that?

A. I do.

Q. They all had to do with the knees?

MR. SHAPIRO: Objection. Way beyond the scope of voir dire.

THE COURT: Sustained.

MR. GJELAG: I'll deal with it on cross. I could see he's an expert in orthopaedic surgery.

MR. SHAPIRO: That is what I offered him as.

THE COURT: The Court will qualify Dr. Israel as an expert in the area of

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orthopaedic surgery.

DIRECT EXAMINATION CONTINUED

BY MR. SHAPIRO:

Q. Dr. Israel, are you being paid for your time here today?

A. I am.

Q. What are you being paid?

A. \$7,000.

Q. If you were not here would you be back at your practice?

A. I would.

Q. Treating patients?

A. That's correct.

Q. You would be paid for that treatment?

A. I would like to be paid for that treatment.

Q. At times you perform surgeries?

A. I perform surgeries on a regular basis.

Q. What you do is you get paid for those surgeries?

A. I do.

Q. Since you are here you are not

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performing surgery this morning?

MR. GJELAG: Asked and answered.

THE COURT: Sustained.

Q. Have you testified at trials before?

A. I have.

Q. About how many trials have you testified at?

A. Well, over the course of my career, I started practice in 1977 when I completed my fellowship when I was director of orthopaedic surgery, sports medicine at the hospital. As you probably are aware a lot of orthopaedic involves litigation because there are various different types of injuries. So over the course of my career I've testified a great deal. I don't know exactly how many times I've testified. Recently I would say maybe once or twice a month.

Q. Over the years have you testified for both plaintiffs and defendants?

A. I have.

Q. Have you ever testified at a trial which I was the attorney?

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A. I don't recall ever doing that.

Q. Dr. Israel, where is your practice based?

MR. GJELAG: Objection. He already asked him.

THE COURT: I'll allow the question.

A. I have an office in New York. I have an office here in New Rochelle.

Q. In your practice do you have occasion to treat patients who have previously treated elsewhere?

A. I do.

Q. And when that happens, do you have a standard procedure?

MR. GJELAG: Objection.

THE COURT: Overruled.

A. I do.

Q. What do you do?

A. It depends on the problem. But in a typical patient that might have been operated elsewhere and then came to see me, I would certainly like to secure the records from the previous treatment because it may impact on how

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2 and what I would do for the person.

3 Q. How about a patient who had
4 conservative treatment elsewhere, is that
5 something you want to see?

6 A. I would want to see it. I would
7 want to see what is meant by conservative
8 treatment.

9 Q. Do you communicate at times with
10 the prior treating physician?

11 A. I try to. It's not the easiest.

12 Q. Why do you try to do that?

13 A. To get information from the
14 previous treating physician, specific
15 information that might help me in making any
16 recommendations for the person that I'm seeing.

17 Q. Would that be something you view as
18 significant, a decision whether to have surgery
19 at all?

20 MR. GJELAG: Objection.

21 THE COURT: Rephrase the question.

22 Q. Is getting information about the
23 prior conservative treatment something for you
24 in your view as important in assessing whether
25 the patient should have surgery?

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MR. GJELAG: Objection.

THE COURT: Should have had.

MR. SHAPIRO: Should have.

MR. GJELAG: Objection.

THE COURT: I'll allow it.

A. It would be.

Q. By the way, is it fair to say our office contacted you to do the independent medical examination of Mr. Robles?

A. Contacted my office.

Q. Do you receive referrals of patients from lawyers?

A. I do not.

Q. Is that something you view as common in the field of orthopaedic surgery?

MR. GJELAG: Objection.

THE COURT: Sustained.

Q. I want to direct your attention to your examination of Mr. Robles. Did you have an opportunity to meet with Mr. Robles?

A. I did.

Q. When was it?

A. I saw this gentleman October 6, 2010.

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THE COURT: The witness is reading from a document not in evidence.

Q. Dr. Israel, is that a copy of your report you have with you?

A. That is correct.

Q. Would that assist you in refreshing your memory about your examination of Mr. Robles?

A. It would.

THE COURT: We have to mark it as an exhibit. He can't read from it. This would be defendant's D.

(Marked Defendant's D for identification.)

Q. Prior to the time of examining Mr. Robles-- by the way, I used a term independent medical examination, tell the jury what that is?

A. I'm asked to perform independent medical exams for people that are involved in litigation. I usually at the request of some entity, an attorneys office or somebody like that. That's what I do.

Q. Is it fair to say you have not

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treated Mr. Robles, correct?

A. I haven't treated him. I can make recommendations for treatment if I see a person, but I do not treat them. There is no doctor/patient relationship between me and the people that I see.

Q. Prior to meeting with him did you have occasion to review some of his medical records?

A. I had some medical records. I think I had them about the time I saw him. I do not know whether it was prior or contemporaneously.

Q. At some point before you wrote your report regarding your examination did you have occasion to review medical records pertaining to Mr. Robles?

A. I did. I listed them in my report.

Q. Without referring to your report you can use it to refresh my memory. You can't read from your report. What records did you review?

A. I reviewed records from a Dr. Berkowitz, a Dr. Lattuga, a couple of operative

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reports.

THE COURT: The doctor is referring to the document. We'll take away the doctor and you testify from your memory. You can't read from a document not in evidence.

Q. Do you recall what you reviewed?

A. I do. I recall a record from Dr. Berkowitz and Dr. Lattuga, some operative reports, MRI reports, medical records from Greenwich Hospital, medical records from Franklin General Hospital. I believe EMG nerve conduction velocity tests and a report from a Dr. Daras.

Q. Doctor Daras?

A. Yes. Daras.

Q. At that time did you have occasion to review the actual MRI films?

A. I never saw the MRI films until today.

Q. Have you had an opportunity to see the MRI films that are in evidence?

A. I did.

Q. Perhaps with the assistance of the

1 shadow box I would like to you explain to the
2 jury what you saw on those MRI films?

3 A. Sure.

4 MR. GJELAG: Note my objection as I
5 stated earlier to this.

6 MR. SHAPIRO: The purpose of
7 addressing that prior was that we didn't
8 deal with it now.

9 MR. SHAPIRO: May I suggest he start
10 with the earlier one from March 7th.

11 A. This is the back and this is the
12 neck.

13 Q. I would like you to start with the
14 neck. Before we start is it fair to say you
15 regularly review MRI films as part of your
16 practice?

17 A. I do.

18 Q. Including your patients who have
19 neck and back injuries?

20 A. That's correct.

21 Q. Looking at the MRI from March 7,
22 2008, can you show the jury what you see, this
23 from four weeks after the accident?

24 A. When you look at these MRI, of the
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2 neck and back, they are sort of two types of
3 slices they take. One is called sagittal view,
4 it slices it in the middle and then to either
5 side. Then you have axial views, which is they
6 cut it like this. The first thing you see over
7 here on the sagittal views. This area here is
8 the spinal cord. The white area is the area
9 around the spinal cord. There is fluid in
10 there, different membranes that cover the
11 spinal cord. You also see here these are the
12 axial views. I only see five axial views.
13 Normally there are more. I suspect there are
14 more to this cervical MRI. What you are
15 looking for is this is the spinal cord.

16 THE COURT: You are blocking the
17 jurors.

18 MR. SHAPIRO: Could I ask if the
19 jurors cannot see they can alert the
20 Court.

21 THE COURT: It's obvious they can't
22 see, to me . Let's continue.

23 THE WITNESS: I have to see too,
24 otherwise I can't do this.

25 A. So these down here are the axial

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2 views. And this grayish area in the middle of
3 the light area, that's the spinal cord. And
4 this is the vertebral body. You notice these
5 are spinus process. These structures here are
6 called the lamina.

7 Q. Explain what a vertebral body is.

8 A. Your spinal cord is covered by this
9 boney canal. The boney canal the front part is
10 called the vertebral body. There are little
11 things that stick out called spinous. You have
12 transverse spinal process and posterior spinal
13 process. Between the pedicles and lamina you
14 have transverse and a posterior process. In
15 between vertebral bodies you have disks,
16 cushions. The disks have two components, an
17 outer called an anulus and inner called
18 nucleous fibrosis. The inner componenet is
19 gelatinous. If the outer component, the anulus
20 tears, the disk can herniate out. If it
21 herniates out and presses against a nerve root
22 then you get radiculopathy symptoms.
23 Radiculopathy means there are various different
24 reasons for neck and back injury. Could be
25 arthritis, could be you have a fracture, could

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2 be you have a strain, could be you have a
3 herniated disk. Our job as orthopaedic
4 surgeons is to differentiate the different
5 possible causes. The way we do that is number
6 one, by history. Radicular pain is a certain
7 type of pain. It's pain that shoots down the
8 arm or leg and is associated with numbness and
9 tingling. It has a certain particular pattern
10 depending on which nerve root it presses on.
11 Every nerve has two components. A sensory
12 component and a motor component. The sensory
13 component gives you numbness and tingling if
14 there is compromise of the nerve root. The
15 motor component gives you weakness. There are
16 corresponding findings on physical exam. When
17 we look at this we want to know do you have a
18 radicular -- are you having radicular symptoms
19 and if you do have them, what is the reason for
20 this. Sometimes it's because there is a bone
21 spur, especially in the neck sticking out and
22 pressing on the nerve root. Sometimes it's a
23 herniated disk. We use MRI, we use physical
24 exam which is a very important component. We
25 check reflexes and sensation and motor

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2 function. Then we go to the MRI and we look
3 for possible reasons if in fact based on your
4 history and physical exam we confirm that there
5 is a radicular element. You can have arthritis
6 in your neck or back and you may get pain that
7 runs into the legs. The quality of that pain
8 is different than it would be if you had
9 radicular symptoms. We refer to that as
10 referred pain. So referred pain simply means
11 pain running in the case of the neck and back
12 running into either the arms and legs. We want
13 to know whether it's referred or radicular. We
14 use all these different elements. I mention
15 nerve conduction velocity tests. That's an
16 element you use. MRI is another diagnostic
17 test. You try to correlate all those things
18 with the history, the history of how this might
19 have occurred, the course of how this problem
20 evolved and physical findings. When I look at
21 this, the way you see the darker area, can
22 everybody see, you can see that -- this is the
23 vertebral body. It tends to be grayish the
24 disk material tends to be blackish. You don't
25 necessarily on each level get the entire

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2 because of the angle of the cut. You see gray,
3 you see the spinal cord, the area around the
4 spinal cord. There may be a little disk
5 material here. A little here. This is mostly
6 vertebral body. I don't see anything pressing
7 on the spinal cord. And these areas here are
8 called the intravertebral foramina. When the
9 nerves come out the spinal cord they go through
10 these little holes. Usually it's at that point
11 where you see something like a herniated disk
12 or bone spur present. You are looking for
13 something like that to correlate to any
14 clinical findings.

15 Q. In looking at that film do you see
16 anything that you might describe as
17 degenerative?

18 MR. GJELAG: Objection.

19 THE COURT: Overruled.

20 A. Well, there appear to be some
21 degenerative changes in the disk spaces. Let
22 me explain to you what that is. As you get
23 older your disks dry out and so we refer to
24 that as disk desiccation. You could look over
25 here, you see a nice white area there, that's a

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2 disk that hasn't desiccated. When you do an
3 MRI it shows up as a white area. You see here
4 it's white and here it's dark. That is
5 desiccation. It means it's drying out a little
6 bit over there. It usually corresponds to some
7 degenerative changes. I'm trying to see the
8 small joint over here. I can't really make
9 them out very well. There may be a little bit
10 here.

11 Q. Do you see anything that might be
12 described as a bulge or herniated disk?

13 A. On the upper levels there might be
14 a few bulges.

15 Q. Tell the jury what is a bulge?

16 MR. GJELAG: Objection. He says
17 other levels.

18 MR. SHAPIRO: He said upper.

19 THE COURT: Specify them.

20 A. 2-3. 3-4. 4-5. 2-3. 3-4. 4-5.
21 Those levels.

22 Q. Tell the jury what a bulge disk is?

23 A. So now your disk material like
24 everything else in your body, it dries out it
25 doesn't have the same tension, your disk

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2 settles a little. The annulus bulges. Now
3 nothing is propping it up, as we get older
4 everything tends to sag a little. Happens in
5 the spine too.

6 Q. When you describe the desiccation
7 or bulge, is that a condition that develops
8 over time?

9 MR. GJELAG: Objection.

10 THE COURT: Overruled.

11 A. Usually, yes.

12 Q. Over how long a period of time,
13 days, months, years?

14 A. Usually of a relatively long period
15 of time.

16 Q. Do you see anything there that is
17 the type of injury that as being traumatically
18 induced say as a motor vehicle accident or
19 other type of high impact trauma?

20 MR. GJELAG: Objection.

21 MR. SHAPIRO: I'll rephrase.

22 Q. Do you see anything there that
23 would be the type of condition you've mentioned
24 things that develop over time, something as a
25 result of a sudden trauma?

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A. An acute process?

Q. Yes.

MR. GJELAG: Objection.

THE COURT: Sustained as to form.

Q. Do you see anything there that would be the result of trauma?

MR. GJELAG: Objection.

THE COURT: Leading.

Q. What you see there, what would you based on reviewing this and your experience as an orthopaedic surgeon, what would you view as having caused the condition you see on that film?

MR. GJELAG: Objection.

THE COURT: I'll allow the question. Move on.

A. I believe it's a degenerative process.

Q. I would also like you to show the jury the Exhibit 8, the lumbar spine?

A. These are sagittal views. I saw other views before.

MR. SHAPIRO: I'm asking about the lumbar MRI.

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THE COURT: Exhibit 3 and Exhibit 8. 8 is the film of the lumbar.

THE WITNESS: I say an axial view.

MR. GJELAG: I object.

MR. SHAPIRO: This is all plaintiff has offered into evidence. That's what we have.

MR. GJELAG: I would object to the colloquy between the doctor and Mr. Shapiro.

THE COURT: I sustained that objection.

Q. This is what we have in evidence so I would ask you to refer only to what you see there?

A. These are the sagittal views. You see here there is a white material. That's a normal type of disk. You see no space here, it's narrow. That would indicate a desiccation. Same thing up here. These are oblique views and they show the holes that the nerve roots come out of. So if you will, as you slice this and go off the mid-line you tend to get into the intravertebral foramina.

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2 That's what you see over here. If you had a
3 herniated disk you would expect it to go in
4 here and press on the nerve root. The nerve
5 root is this structure over here. You can't
6 see it over here. Here. This is the spinal
7 cord here. This is the most probably most
8 right in the middle of these pictures here.
9 You see narrow disk space here. A better space
10 here. Narrow there. Narrow there. Narrow
11 there. You see at multi levels some
12 degenerative process. You don't see a
13 herniated disk here.

14 MR. GJELAG: Objection. Over here.

15 Over here. Can the doctor specify?

16 THE WITNESS: I was pointing.

17 MR. GJELAG: I can't see.

18 Q. Doctor --

19 THE COURT: There is an objection.

20 Please specify when you say over here,
21 what you are referring to.

22 MR. GJELAG: I just need him to
23 identify the levels so I can mark it
24 down.

25 THE WITNESS: It looks like 4-5,

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and 5-1.

Q. Are you referring to L-4-5?

A. That is correct.

Q. Just so the jury understands.

A. L-5 S-1. The lowest part of the vertebra and sacral. L-5 S-1. Above that is 4-5. S-1 nerve root. L-4-5 is fifth nerve root. Above that, if this is 4-5 and this is 5-1. This is 3-4, 2-3. Those are all pretty good. 1-2 you see some degeneration. You see how narrow it is. T-12 L-1. You see degenerative process going up and down the spine.

Q. To your knowledge, typically when films like this get taken are there other views that get taken?

A. Axial views.

Q. Are those more helpful in terms of showing the jury?

MR. GJELAG: Objection.

THE COURT: Overruled.

Q. Are those helpful in terms of showing the jury?

A. Yes, as you saw--

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Q. Let me interrupt you. That's a
yes?

A. Yes.

MR. SHAPIRO: I would like to offer
all the films that came into evidence.
I assume plaintiff will not object.

(Side bar held off record.)

THE COURT: Please excuse the
jurors.

THE COURT: Doctor please step out.
(Jury exits courtroom.)

MR. GJELAG: I would object. Mr.
Shapiro is attempting to admit into
evidence portions of various sheets of
the lumbar MRI films which were never
placed in evidence through the
appropriate experts. I put in one sheet
of evidence through Dr. Lattuga. Mr.
Shapiro could have easily on cross
examination put in the rest of those
films. He chose not to. Now he comes
in here after various discussions we had
last week about different items in front
of the juror. Mr. Shapiro claiming he

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2 was irreparably harmed by a ruling
3 saying doesn't this show you went to
4 work. Today he comes in and through
5 this doctor tries to circumvent the
6 rules of evidence in front of the jury
7 by pulling out a document, a lumbar MRI
8 he cannot get into evidence through the
9 this doctor, only through Dr. Lattuga or
10 Dr. Daras or a 45 exchange. This was
11 prejudicial. He set this up with his
12 doctor. He asked his doctor would other
13 matches help you to attempt to put into
14 evidence films that have not been put
15 into evidence before. I'm flabbergasted
16 that he would attempt to do something
17 like this. That film should not come
18 into evidence. You don't have the right
19 person on the stand to get it into
20 evidence. I don't know what to do any
21 more. He never reviewed them before.
22 Now he knows which films are better and
23 which are not.

24 MR. SHAPIRO: The Court will recall
25 that I specifically said with the court

1
2 officer present can I take those films
3 outside to show to Dr. Israel. None of
4 this is any surprise. Dr. Israel made
5 clear he would like to talk about some
6 of the other films he saw not just the
7 one that is in evidence. That's where
8 that came from. The idea there is some
9 conspiracy, is absurd. This accusation
10 has been made many times during the
11 trial. It's baseless. Plaintiff's
12 counsel offered the MRI film, one MRI
13 film. One sheet out of several, of the
14 lumbar MRI, out of several that came in.
15 At the time he did so I did not
16 understand and so be it, he was taking
17 out part of a record and not offering
18 all the record in. Plaintiff's counsel
19 seems to be under the impression since
20 he did that, the rest of it can't come
21 in. I think it should have gone in in
22 the first place. It wasn't clear he
23 only offered part of the record. I'm
24 not sure how an attorney can do that.
25 That's what he did. Since he offered a

1
2 record, can we have the complete record
3 in there. I think that's fair.
4 Plaintiff's counsel doesn't even want
5 the jury to know what he did is offer
6 part of the record and not all. I think
7 it's appropriate to ask this doctor
8 could the rest him him. Plaintiff's
9 counsel objects.

10 THE COURT: Was there a 4532 A
11 exchange?

12 MR. GJELAG: There was not. And when
13 I offered the film into record I
14 specifically asked Dr. Lattuga, look at
15 these films, let us know which one helps
16 you business explain to the jury.

17 THE COURT: That's for Lattuga. We
18 have a separate doctor now.

19 MR. GJELAG: He could have put in the
20 records through my expert on cross. He
21 could have said did you review all of
22 these. He chose not to.

23 MR. SHAPIRO: Shame on me for not
24 catching when plaintiff offered MRI film
25 he didn't offer the whole packet. He

1
2 took part of it out. I missed that. I
3 don't think that precludes the rest
4 going in now and precludes the jury from
5 knowing he offered part of it.

6 THE COURT: If you are able to part
7 of it during your case with Dr. Lattuga
8 who was not the person who took them.

9 MR. GJELAG: He read them before the
10 surgery.

11 THE COURT: He also read them.

12 MR. GJELAG: Who?

13 THE COURT: Dr. Israel.

14 MR. GJELAG: Not until this morning.

15 THE COURT: Once they are in
16 evidence, a witness may express an
17 opinion as to what the photographs
18 reveal.

19 MR. GJELAG: I agree. The one in
20 evidence that we are referring to. He
21 cannot through this witness get in the
22 rest of the MRI films done of the back.

23 THE COURT: 4532 A says x-ray of
24 any party are admissible without calling
25 a physician to authenticate them

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2 provided there is photographic I
3 inscribed on the x-ray or MRI, the name
4 of the injured party, the date when
5 taken and name and address under who is
6 supervision was taken. Proper notice of
7 intention to offer the x-ray or MRI in
8 evidence at trial served on adversary
9 together with notice of x-rays with
10 notice the x-ray is available for
11 inspection. And accompanied of an
12 affidavit of such physician attesting to
13 the information and subscribed thereon
14 and if called as a witness in the action
15 he would so testify.

16 MR. GJELAG: We have none of that
17 here.

18 MR. SHAPIRO: That's not the issue
19 here. Plaintiff's counsel offered part
20 of it. I would like to offer the rest
21 of it. I didn't catch when he submitted
22 it, it was only part of that packet.
23 Didn't catch it. I thought he was
24 putting in the whole thing. You don't
25 cherry pick and put in one through nine.

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MR. GJELAG: He didn't catch it.

THE COURT: You are cherry picking out of the lot to use for your case. If two are admissible then the rest should be admissible.

MR. GJELAG: It's only one. The cervical and lumbar.

MR. SHAPIRO: This is lumbar. He took one out.

MR. GJELAG: My doctor took it out. He had an opportunity during cross to put in the films.

MR. SHAPIRO: The issue is for me I didn't catch he was offering part of the records. If I missed it, so be it. He said I'm offering part of them.

THE COURT: If I allow-- if he used half I will allow you to use what you will.

MR. GJELAG: That's improper to put them into evidence. We don't have the proper witness.

THE COURT: You didn't have the proper witness either.

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2 MR. GJELAG: I did. Have a witness
3 who relied on the film. He's allowed
4 to. I can get it in that way. I have
5 the name of the case.

6 THE COURT: Didn't he look at the
7 film and rely upon the film.

8 MR. GJELAG: This morning. He
9 testified he never saw the film.

10 THE COURT: Didn't he look at the
11 film in his report.

12 MR. GJELAG: He did not. That was my
13 application this morning. He should be
14 precluded from looking at the films.

15 THE COURT: What did he base his
16 report on?

17 MR. GJELAG: The MRI report.

18 THE COURT: The documents in
19 question were in evidence. As long as
20 they are in evidence any competent
21 witness can testify as to those
22 documents. That was the basis of my
23 ruling this morning. You are saying the
24 documents are not in evidence. That's
25 your position. You are saying he cannot

1
2 offer them and he's not the appropriate
3 witness to offer those.

4 MR. GJELAG: Correct. He never
5 reviewed them until this morning. How
6 is there any reliability of films
7 through the doctor. He said on direct
8 he didn't have the films.

9 THE COURT: Give me two minutes on
10 this.

11 (Pause in proceedings.)

12 THE COURT: I'm going to allow the
13 document in and we are going to move on.
14 I note the plaintiff's objection. Can
15 we have the witness back on the witness
16 stand please.

17 (Jury enters the courtroom.)

18 MR. SHAPIRO: I offer the remainder
19 in evidence of the lumbar MRI.

20 THE COURT: That will be a separate
21 exhibit. Defendant's E.

22 (Marked Defendant's E in evidence.)

23 THE COURT: Continue.

24 Q. Dr. Israel, before the break you
25 showed the jury the lumbar MRI from October 28,

1
2 2008 and you had mentioned another angle might
3 be more helpful. Those are more in evidence.
4 Look at those films and whatever is more
5 helpful please use that.

6 A. As you saw with the cervical spine
7 you have axial views. These are axial views of
8 the lumbar spine. Level by level they are
9 taking various scenes, cervical are bigger
10 images. Here you see the pelvis, you see these
11 bones, that's the pelvis. You see this is the
12 sacrum and this is the sacroiliac joint. It's
13 not a perfect cut because over here you can see
14 the sacroiliac joint. This side you can't. It
15 should be symmetrical. It's a little off. But
16 we know that this is the sacrum, we see it
17 articulated with the sacroiliac joint. This is
18 the the tail of the spinal cord. We go up now.
19 You see how this is darker.

20 MR. SHAPIRO: If any juror can't see
21 please alert the Court. Maybe once he
22 points to the area to pull back.

23 A. I'll rotate this. The dark area is
24 the disk material. And this is the sacroiliac
25 joint and this is the sacrum. You see you

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2 should see it on both sides. We don't see
3 anything sticking out which is what you are
4 looking for. Remember I told you the gray area
5 is the vertebral body, the dark area is the
6 disk material. This is the gray area. This is
7 darker over here. You don't see anything out
8 of place. I know you will ask me about it.

9 MR. GJELAG: Objection.

10 THE COURT: Sustained.

11 MR. GJELAG: We have one lawyer.

12 THE COURT: Sustained. Stricken
13 from the record.

14 THE WITNESS: Sorry.

15 A. These all look pretty good. This
16 is 5-1. As we go up this is 4-5. Remember I
17 told you that there were these little joints in
18 the back, when you have arthritis it's here.
19 This is a little joint over here. Can you see
20 that. It looks narrow. Arthritis. Might be
21 the same as you see in a knee or hip. This is
22 relatively a small joint. The other thing you
23 look at is called the spinal stenosis which is
24 whether the spinal canal is tight. If you look
25 over here and you see this, it's the end of the

1
2 cord. As you go up and down, here it becomes
3 very narrow. So you have a bit of spinal
4 stenosis going on.

5 Q. Identify the level you are talking
6 about?

7 A. This looks like 4-5

8 Q. Doctors often say 4-5. Please use
9 the letter so we know what level you are
10 talking about.

11 A. That's pretty much all I see.

12 Q. I believe you told us before the
13 break that we had a few minutes ago that you
14 saw at L-1-2 and L-4-5 and L-5-1, S-1,
15 degeneration. Can you tell the jury what that
16 means?

17 MR. GJELAG: Objection, Your Honor.

18 It's not what he said.

19 Q. Tell the jury what you saw at those
20 levels?

21 A. I saw some degenerative disk
22 disease at that level. When you look at the
23 MRI there is some corresponding facet
24 arthroscopy.

25 Q. What is that?

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2 A. A little bit of arthritis. The
3 disks have narrowed down a little bit. They've
4 gotten dried out. When the disks narrow down
5 and dry out the small joint -- so now usually
6 your joint -- not the joint, the vertebral body
7 is separated. When that disk material dries
8 out and it settles a little bit, so now the
9 small joint in the back sort of slip a little
10 bit and you get facet arthroscopy.

11 Q. What typically causes those types
12 of you just mentioned arthritis, degenerative
13 disk disease?

14 A. Age, wear and tear.

15 Q. Is that something you see as common
16 in the general population as one ages?

17 A. Yes, you would.

18 Q. Now we heard a term used before, a
19 bulging disk. We also heard herniated disks.
20 What type of things cause a herniated disk?

21 MR. GJELAG: Objection. Asked and
22 answered.

23 MR. SHAPIRO: I don't believe so.

24 THE COURT: You may answer the
25 question.

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2 A. In general, a thing that--
3 herniated disk come in a variety of patterns.
4 Generally you see some kind of trauma. Acute
5 trauma which is what you asked me before or it
6 may be representative over time.

7 Q. And can you tell us what kind of
8 repetitive kind of trauma?

9 A. The normal wear and tear of every
10 day living. The things I normally do. Sports
11 activity, bending, lifting, things of that
12 sort.

13 Q. Do you in your practice sometimes
14 see people with herniated disk who haven't been
15 in a car accident at all?

16 A. I do.

17 Q. Is that something you consider
18 common?

19 MR. GJELAG: Objection.

20 THE COURT: Overruled.

21 A. Relatively common. Again there are
22 different levels of disk herniation. There is
23 a big robust disk herniation, a small disk
24 herniation. There are associated degenerative
25 changes so they come in all sorts of

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configurations.

Q. Did you see any of those big robust herniations on those MRI films you just showed the jury?

A. I did not.

Q. You very regularly in your practice review MRI films?

MR. GJELAG: Objection.

THE COURT: Sustained.

MR. SHAPIRO: Your Honor, may we approach.

THE COURT: Sure.

(Approach off the record.)

Q. I want to talk to you about your examination of Mr. Robles. You discussed your review of medical records. Did you ask Mr. Robles to give you a history?

A. I did.

Q. What did he tell you?

THE COURT: You can't read from the document.

A. I know. This gentleman told me he was involved in a car accident in February of 2008. The exact date was 2/6/2008.

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2 Q. Did he give you any other history
3 about any other incidents?

4 A. He did not.

5 Q. This accident happened-- this
6 examination happened on October 4, 2010?

7 A. I have to refer to my report.

8 Q. You can use your document to
9 refresh your memory.

10 A. October 6, 2010.

11 Q. Did he mention that he had been
12 involved in an incident a few months earlier in
13 April 2010 in which a rock fell on his head?

14 MR. GJELAG: Objection.

15 THE COURT: Sustained. Rephrase
16 the question.

17 Q. Did he mention any other incidents
18 in which he had been involved subsequent to the
19 motor vehicle accident of February 6, 2008?

20 MR. GJELAG: Objection.

21 THE COURT: Sustained to form.

22 Q. Did he mention any other incident
23 in which he had been involved?

24 MR. GJELAG: Objection.

25 THE COURT: Leading.

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2 Q. Did he say in terms of telling
3 history, did he say anything else besides the
4 motor vehicle accident on February 6, Tuesday?

5 MR. GJELAG: Objection.

6 THE COURT: You may answer the
7 question. We'll be here all day.

8 A. He did not.

9 Q. Assume for a moment, Dr. Israel,
10 that Mr. Robles was involved in an incident a
11 few months before this examination in which a
12 rock hit his head and he was taken to Greenwich
13 Hospital where it was noted he lost
14 consciousness and subsequently he saw a doctor
15 complaining of an increase in neck pain, is
16 that something that would be relevant to the
17 conclusion you would draw?

18 MR. GJELAG: Objection.

19 THE COURT: Overruled.

20 A. It would be.

21 Q. Do you depend on a patient or
22 someone you are examining to give you an
23 accurate history in making your assessment?

24 A. I do.

25 Q. And when the patient doesn't give

1
2 you all of their history, is that something
3 that has an impact on what your final diagnosis
4 is?

5 MR. GJELAG: Objection.

6 THE COURT: Form. Form.

7 MR. SHAPIRO: Rephrase the question.

8 Q. What happens when a patient does
9 not give you a full history?

10 MR. GJELAG: Objection.

11 THE COURT: Overruled.

12 A. It depends upon what questions I am
13 asked to answer.

14 Q. In terms of your assessment of the
15 cause of a patient, an examinee's condition --

16 MR. GJELAG: Objection.

17 THE COURT: Rephrase the question.

18 Q. In terms of assessing what has
19 caused a patient or examinee's condition --

20 MR. GJELAG: Objection.

21 THE COURT: Rephrase the question.

22 Q. When you are assessing-- in terms
23 of assessing the cause of a patient's
24 complaints, what happens when they don't give
25 you a full history?

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MR. GJELAG: Objection.

THE COURT: I'll allow it.

A. It may change my judgment as to what actually caused the problem that the patient was suffering from.

Q. Now in taking his history, did Mr. Robles give you his work history since the accident of February 6, 2008. Feel free to use your report to refresh your memory.

A. He did.

Q. What did he tell you?

A. He told me he stopped working as a taxicab driver and had not returned.

Q. And assume for a moment there was testimony already in the trial that Mr. Robles actually returned for a to work for a time, would that impact your assessment?

MR. GJELAG: Objection. Completely consistent with what he testified to.

He said he didn't return to work.

THE COURT: Overruled.

A. It would.

Q. And why is that?

A. Well, clearly if he was able to

1
2 return to work it would impact--

3 THE COURT: Side bar.

4 (Approach off the record.)

5 MR. GJELAG: You made a ruling
6 outside. Can he comply with the ruling.

7 MR. SHAPIRO: Your Honor said to
8 clarify the question which I will.

9 THE COURT: You can clarify it
10 after lunch. Remind me when you come
11 back. We are breaking for lunch. You
12 can't discuss the case. If anyone tries
13 to discuss it with you bring it to my
14 attention.

15 (Jury exits courtroom for a luncheon
16 recess.)

17 THE COURT: Doctor, you are under
18 oath. You cannot discuss your testimony
19 with the attorney. We are going to
20 start at 2 p.m.

21 (Case adjourned for a luncheon
22 recess.)

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

24 MR. SHAPIRO: This is the
25 radiologist. I would like her to look

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at the films.

THE COURT: A lot of these individuals coming in as experts have not seen the films before.

MR. GJELAG: Both witnesses are in the courtroom.

THE COURT: Will both witnesses step outside please.

(Witnesses exit courtroom.)

THE COURT: You are telling me these witnesses have not reviewed these films before coming here?

MR. SHAPIRO: Some films had not arrived.

MR. GJELAG: My experts testified that they saw the films prior to coming in to court.

THE COURT: Let's move ahead. Since all these documents in question are in evidence, they are introduced on the witness stand.

MR. SHAPIRO: I would like her to see it before she goes on the stand. He can cross that they didn't see them before.

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2 THE COURT: I'm not delaying this
3 trial for the witness to review. We are
4 moving ahead. If they see them for the
5 first time when they are on the witness
6 stand, then so be it.

7 MR. SHAPIRO: Two minutes. I was the
8 one who said on Thursday let's go
9 forward. Plaintiff's counsel wants to
10 wait a day and a half. And now I'm
11 penalized. The person didn't bring them
12 with them at the IME. They were not
13 exchanged.

14 THE COURT: The case was assigned
15 to me for trial. I'm of the impression
16 all discovery is complete and parties
17 are ready to proceed. The only
18 application made was to redact some
19 documents. I presume everything else is
20 in the proper form. I'm bringing the
21 jury in. Whatever is in evidence they
22 can look at. If you said to me this
23 morning you are having her come at a
24 quarter to two I would have made
25 arrangements for that. It's ten after

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two.

MR. SHAPIRO: She's here since one o'clock.

THE COURT: Let's finish this witness.

MR. GJELAG: Last week the reason I suggested we not proceed is because I want to give enough time to the juror who told us about his medical condition.

THE COURT: That's the way I understood it.

MR. GJELAG: As far as Mr. Shapiro's assertions there have been authorizations provided to Mr. Shapiro for the films. During discovery, Mr. Shapiro brought on an Order to Show Cause asking specifically for authorizations which were then provided. He withdraw them last week, the last item was the ambulance call report. He withdraws the Order to Show Cause.

THE COURT: A lot of this stuff should have been done in advance. We are way behind. Bring in the witness.

(Witness resumes the stand.)

(The jury enters the courtroom and
takes their seats in the jury box.)

THE COURT: Good afternoon.

DIRECT EXAMINATION CONTINUED

BY MR. SHAPIRO:

Q. Assume Mr. Robles told this
courtroom last week that he actually worked for
a few months in 2008 that would be something
you want to know about?

A. After the accident?

Q. After the accident.

A. It would be an important piece of
information.

Q. Assume for the moment that medical
records that are in evidence say he was
actually working until March 15, 2009 and had
been in and out of work since the accident,
would that be something you would want to know
about?

A. It would.

Q. I don't know if you've seen this.
It's part of Exhibit A.

MR. GJELAG: Objection.

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2 THE COURT: Sustained. You asked
3 the question. The doctor answered the
4 question.

5 Q. Why would that be relevant that he
6 was actually in and out of work until March 15,
7 2009?

8 MR. GJELAG: Objection.

9 THE COURT: Overruled.

10 A. It would give you some sense of the
11 degree of difficulty he was having with the
12 injuries that he reported as a result of this
13 accident.

14 Q. Did he mention any of that to you?

15 A. He did not.

16 Q. Let's go to your examination of Mr.
17 Robles. What did you do? If you need to
18 refresh my memory you may with your report.

19 A. I examined his neck, his lower
20 back, his right shoulder, both legs and both
21 arms.

22 Q. How did you do that?

23 A. Well, I did it the way we normally
24 examine people.

25 Q. Let's do one part of the body at a

1
2 time. The injuries claimed here are neck and
3 back. What did you do with regard to his neck?

4 A. Whenever you examine starting with
5 the neck an orthopaedic exam the first thing we
6 do is look at the patient. The way in which
7 you hold your head can give you a conclude as
8 to the degree of the problem that the patient
9 is experiencing and by that I mean your neck
10 normally curves slightly forward. Your upper
11 back curves slight go backward and lower back
12 curves slightly forward. There are medical
13 terms to describe it. The medical term for the
14 forward curvature is called lordosis. If you
15 are having muscle spasm, normally you lose that
16 lordosis. When you look at the silhouette of
17 the person, they probably hold their head
18 forward, when you palpate the neck, that is the
19 second part of the exam, that means touching.
20 So when you palpate the neck you would look for
21 number one tenderness and number two, muscle
22 spasm. Now tenderness is a little bit
23 different and complaining of pain. Tenderness
24 means that when I touch a particular site, it
25 is tender. So when you examine the neck, in

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2 the middle of the neck is the spinous process,
3 in between there are ligaments. On either side
4 of the neck are muscles. There is a big muscle
5 that begins at the base of the neck, the base
6 of the head, runs to both shoulders and then
7 runs back again to the upper part of the back,
8 the thoracic spine, that's called the trapezius
9 muscle. You are looking for tenderness and
10 muscle spasm. You can palpate each interspace
11 which corresponds to a disk level. If a person
12 has tenderness at a particular disk space then
13 that can help you focus on where exactly the
14 problem is. I examined this gentleman's neck,
15 I touched it and there was no tenderness and
16 there was no muscle spasm. Now he had had a
17 fusion at the time that I saw him.

18 Q. What do you mean he had had a
19 fusion?

20 A. One of the treatments for a problem
21 in the neck is to remove a disk and to fuse it.
22 It means that one segment, each segment has
23 about-- they vary where it is. In the lower
24 part of the neck there is about three degrees
25 of movement in each segment. You remove the

1
2 disk and you fuse that segment. That means you
3 eliminate movement at the that segment. That's
4 what a fusion is.

5 Q. Tell us what you found when you
6 examined him.

7 A. So he had no tenderness or spasm.

8 Q. Did you check his range of motion?

9 A. I did. There were two other tests
10 I did before that. One test is called a
11 cervical compression test. That's where you
12 put your hand on the person's head and apply
13 compression. You push down. Normally if there
14 is a radicular type of pain it usually would
15 aggravate those type of symptoms. The other
16 you do is a Spurling's test. By applying
17 pressure to the head, extending and rotating.
18 These maneuvers are designed to put pressure on
19 the nerve that would have some pressure and
20 depending upon the way in which the pain is
21 referred after you do that, you might draw some
22 conclusion about the nature of the underlying
23 problem. I did the cervical compression test
24 and Spurling's test and both were negative.
25 The next thing you do is range of motion. Bear

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2 in mind this gentleman already had a cervical
3 fusion. The forward flexion I found was 45
4 degrees. That was normal. Extension was 35.
5 That was not normal. Normal extension would be
6 60. Right rotation was 45. Normally that
7 would be 80. Left rotation was 55. Again that
8 normally would be 80. So there was limitation
9 of rotation. Lateral flexion, rotation is this
10 movement. Lateral flexion is this movement.
11 Right lateral flexion was there. Normally it's
12 45. And left lateral flexion was 25. A little
13 bit less. One of the things we do when you
14 have an injury to a nerve, a particular nerve,
15 you lose sensation and motor function. He said
16 when I tested him with a pin, we do light touch
17 and pin prick. He said he had diminished
18 sensation to pin prick and light touch.

19 Q. Before you get to the pin prick, is
20 range of motion an objective or subjective
21 test?

22 A. Objective means it's not dependent
23 on the person's response. It means you can do
24 it and it's not up to him to respond or to her
25 to respond. It's a determination you can make

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2 objectively. Subjective is you do a test and
3 you say can you move your head this and that
4 way and whoever it happens to be, in this case
5 Mr. Robles, he said this is what I'm capable of
6 doing. That's the difference between objective
7 and subjective.

8 Q. Would you consider range of motion
9 objective or subjective?

10 A. It's a combination depending on the
11 response.

12 Q. Do you know the patient to
13 cooperate in terms of how much they move?

14 A. They do, yes.

15 Q. You also talked about pin prick,
16 sensation. Tell the jury how objective or
17 subjective that test is?

18 A. When you stick somebody, it's a
19 little needle, it's designed to test sharpness
20 and not penetrate the skin. When you touch
21 somebody you ask them whether or not they can
22 feel it. If they feel it and you know it's
23 objective because they say they feel it. If
24 they say they don't it may depend on just how
25 the person responds to these particular tests.

1
2 Q. Did you do anything else with
3 regard to his cervical spine?

4 A. I did.

5 Q. What else did you do?

6 A. I tested muscle strength. The
7 muscle strength on a scale of one to five was
8 five over five. I tested his hand grasp and he
9 had a strong firm hand grasp and I also tested
10 for atrophy. Atrophy means the muscle
11 shrinking. If you have a lesion of a nerve
12 affecting a particular muscle you don't use
13 that muscle because it's not getting the
14 impulses from the brain. So the muscle will
15 atrophy. There was no atrophy that I could
16 tell when I examined this gentleman.

17 Q. Did you do any tests with regard to
18 his lumbar spine?

19 A. I did. There was some other tests
20 I did.

21 Q. I'm sorry. What else did you do?

22 A. We have a thing called stretch
23 reflexes. This is where we tap the tendons and
24 that stimulates a deep tendon reflex. There is
25 a sensory nerve in the tendon, when you stretch

1
2 it it sends a message to the spine and it gets
3 sent back and you have a muscle contraction.
4 That's an objective test. In the upper
5 extremities we use the triceps, biceps and
6 brachial radialis. Those are the tests you see
7 us hit people with little hammers. If they are
8 symmetrical then would one state so, it would
9 indicate that the sensory motor nerve to that
10 particular muscle was functioning.

11 Q. What did you find?

12 A. They were symmetrical.

13 Q. Meaning it's functional?

14 A. That's correct.

15 Q. Did you do any other tests on the
16 cervical spine?

17 A. I did not.

18 Q. Now tell us what I did on the
19 lumbar spine?

20 A. Just as I said with the cervical
21 spine you follow the same format. You look at
22 how they hold themselves. If someone is having
23 acute spasm, instead of standing up straight
24 they might be hunched over. You look for the
25 lordosis. This gentleman appeared to have

1
2 normal lordosis. He had a three inch curvature
3 incision. It was well healed. He had no
4 tenderness to palpation. He was able to walk
5 normally. There is a test that we do in the
6 lumbar spine that we don't do in the cervical
7 spine. It's called the straight leg raising
8 test. If you have a herniated disk that's
9 pressing on the nerve so that the nerve is sort
10 of tender over the disk, then you have
11 difficulty raising your leg. When you raise
12 your leg it increases the tension on the nerve
13 and it becomes more painful. It's a way of
14 gauging whether there is an ongoing problem
15 with a nerve usually from a disk. His straight
16 leg raising test was negative to 75 degrees.
17 And that's normal. His motion of the back is
18 he was able to bend 60 degrees, extend 30 and
19 laterally flexion 45 to either side. Those
20 were normal. He had intact sensation to pin
21 prick and light touch. Muscle strength was
22 five over five. And he had symmetrical
23 reflexes and no atrophy.

24 Q. Any other tests you did with regard
25 to the lumbar spine?

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A. No.

Q. Did you come to any conclusion with regard to Mr. Robles' ability to participate in work and activities of daily living?

A. Yes, I did.

Q. What did you conclude?

A. I thought he could return to work and activities of daily living without restrictions.

Q. That was based on your examination and review of the medical records?

A. That's correct.

Q. Has everything you said today been with a reasonable degree of medical certainty?

A. That is correct.

Q. Before I sit down, you have an office in Manhattan and New Rochelle?

A. I do.

Q. As far as you know are there orthopaedic surgeons in Westchester County who do spinal surgery?

MR. GJELAG: Objection.

THE COURT: Sustained.

Q. How about neurosurgeons?

MR. GJELAG: Objection.

THE COURT: Sustained.

MR. SHAPIRO: No further questions.

CROSS EXAMINATION

BY MR. GJELAG:

Q. You mentioned the word independent medical exam, do you recall that?

A. I do.

Q. Did His Honor hire you to examine Mr. Robles?

A. His Honor did not hire me.

Q. Did the Court hire you to examine Mr. Robles?

A. The Court did not.

Q. You were hired by the defendant, that's what you told this jury earlier, you were hired by the defendant; is that correct?

A. I believe they said they made the arrangements for me to do the exam.

Q. You were hired by the defendants, correct?

A. I was probably hired by someone associated with the defendants. I'm not sure. I don't know the process.

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2 Q. You were provided -- your name was
3 provided to the defendants by a company called
4 D and D Associates?

5 A. That's correct.

6 Q. And that's a company that finds
7 doctors that will examine patients and testify
8 in Court for defendants; is that correct?

9 MR. SHAPIRO: Objection.

10 THE COURT: Sustained.

11 Q. Nobody from my office asked you to
12 examine Mr. Robles; is that correct?

13 A. As far as I know you did not ask me
14 to examine him.

15 Q. And your fee is being paid by the
16 defendant; is that correct?

17 A. That is correct.

18 Q. So you did this examine on behalf
19 of the defendants, correct?

20 A. I did.

21 Q. And you were brought in to testify
22 today by the defendants?

23 A. They asked me to come in, yes.

24 Q. You've been doing this a long time
25 haven't you?

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A. I have.

Q. Since 2002, 3?

A. About 2002.

Q. You do about 30 to 40 a week?

A. That is correct.

Q. As a matter of fact some of the offices you listed, those are not offices where you see patients?

A. I see patients and do exams.

Q. You rent offices specifically for the purpose of examining claimants on behalf of the defendants, correct?

MR. SHAPIRO: Objection.

THE COURT: Sustained.

Q. The office that you examined Mr. Robles in, that's in Rye, correct?

A. No.

Q. Where was it?

A. 621 North Avenue.

Q. Is that an office where you treat patients?

A. It is.

Q. Is that an office where you see these claimants sent to you from defendants?

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MR. SHAPIRO: Objection.

THE COURT: Sustained.

Q. You do 30 to 40 a week. Are there there certain days you conduct these defense exams?

A. There are.

Q. Which days?

A. It varies from week to week. Usually, Tuesday, Wednesday and occasionally on Thursday.

Q. In the past you testify you do this two days a week?

A. Two to three days a week.

Q. You testified in the past?

A. You asked me what I'm doing right now. It's two to three.

Q. You see approximately twenty to fifteen a day?

A. It varies. That's roughly correct.

Q. Your exam is comprised of different components, correct?

A. You have to explain what you mean by that.

Q. Is it one component or more than

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one component that comprise your exam?

A. Counsellor, you have to explain what you mean by the term exam.

Q. I will. Okay. You take a history, correct?

A. That is correct.

Q. You have records in front of you?

A. That is correct.

Q. You look at the records?

A. I do.

Q. And then you examine the claimant?

A. That is correct.

Q. Isn't it true that all of that takes approximately fifteen to twenty minutes, correct?

A. That is not true.

Q. That is not true, it's not fifteen to twenty minutes?

A. It is not fifteen to twenty minutes. It depends upon the volume of records that I have to review. On average I would say it takes fifteen to twenty minutes to do the exam, take the history and depending on the volume of records that I need to review it

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could take longer or much longer.

Q. When you do these exams you've been referencing a report?

A. That is correct.

Q. You don't prepare that report while the patient is there, correct?

A. I do not.

Q. You dictate it?

A. I do not.

Q. Do you dictate it?

A. Sometimes I dictate it. Sometimes I transcriptionist constructs them out of my notes.

Q. Where are those notes today, doctor?

MR. SHAPIRO: Objection.

THE COURT: I'll allow the question.

Q. Where are those notes today?

THE COURT: Rephrase.

Q. The notes you just testified to, did you bring them with to you to Court?

A. I did not.

Q. I'm not the first question that

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asked you a question about notes?

MR. SHAPIRO: Objection.

THE COURT: Overruled.

A. You are not.

Q. You get asked this question every single time you testify, correct, doctor?

MR. SHAPIRO: Objection.

THE COURT: Overruled.

A. That's not true.

Q. That's not true. If I went through all the transcripts I have here and read through each one of the attorneys asking you about this note that would be incorrect?

A. That would be-- well, wait a minute. Incorrect in answer to your answer. I don't know what records you have over there.

Q. How much do you charge for an exam and a report?

A. \$150. If a lot of records, I may charge more.

Q. How much did you charge for this one?

A. Probably about \$150.

Q. Why do you say probably?

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A. I don't know exactly what I charged.

Q. You didn't bring your chart with you, correct?

MR. SHAPIRO: Objection.

THE COURT: Sustained.

Q. Did you bring a chart with you?

MR. SHAPIRO: Objection. He's not treating.

MR. GJELAG: A chart. He's an expert.

THE COURT: Rephrase.

Q. Did you bring any sort of file that you maintain doctor in regards to this case?

A. My files are on my computer.

Q. So your answer is no you didn't bring it?

A. I said to you-- my files are on my computer.

Q. You testified once to two times a month?

A. That's roughly.

THE COURT: There has to be a question and we have to wait for a

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minute and answer. The answer has to be complete before you ask the next question.

Q. Doctor you've testified that you testify in Court one to two times a month; is that correct?

A. I said on average that's probably correct.

Q. That's 12 to 24 times a year?

A. That's correct.

Q. This is no the first time you are cross examined by an attorney is it?

A. It is not.

Q. So you understand the rules. I'm asking you questions that call for yes or no answers, do you understand that?

MR. SHAPIRO: Objection.

THE COURT: Overruled. You understand, doctor.

A. What's the question.

(Read back.)

THE WITNESS: To be quite candid I don't understand the question the way in which it's framed I don't know how to

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

Q. You testify that you probably made 150 or 175 for this report?

A. That's correct.

Q. You don't know for sure?

A. That's correct.

Q. You don't have your file with you correct?

A. Which file are you referring to?

Q. The file in regards to your examination of Mr. Robles, you don't have it with you?

A. The medical records?

Q. Do you have anything other than your report that you brought to Court today?

A. I do not.

Q. In your report you stated that you reviewed a bunch of records?

A. That's correct.

Q. You reviewed Doug Berkowitz' records?

A. I did, one report.

Q. Where does it say one report?

A. 10/16/08.

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Q. Dr. Lattuga, did you review his reports?

A. I did.

Q. From 10/23/08 to 4/15 of 2010?

A. That is correct.

Q. Did you bring those records with you?

A. I did not.

MR. SHAPIRO: Objection. Those records are in evidence.

MR. GJELAG: I'm asking what he brought to Court.

THE COURT: Overruled.

Q. You brought the operative report for the cervical fusion?

A. I did not.

Q. Did you review it, I'm sorry.

A. I did.

Q. OR report. In your note you said OR, operative report, am I correct?

A. That is correct.

Q. And operative report that said it was traumatic induced disk herniation?

A. There are two reports. One is on

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2 3/31/08 and other is 8/18/09 and 8/18/09.

3 Q. 8/18 was the operative report of
4 the lumbar fusion that was done?

5 A. I believe so.

6 Q. You also reviewed records-- the MRI
7 report?

8 A. That is correct.

9 Q. You reviewed the MRI of the
10 cervical spine?

11 A. I reviewed the report.

12 Q. Before coming to Court today, isn't
13 it a fact that you never looked at the films of
14 the cervical spine or the lumbar spine
15 specifically the MRI that you showed the jury
16 before?

17 A. Before I came to Court I did not
18 look at these films.

19 Q. The first time you looked at them
20 was this morning, correct?

21 A. The first time that I looked at
22 these films was this morning.

23 Q. The records provided to you, who
24 gave them to you?

25 A. I'm not sure.

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Q. Was it provided by the defendant?

A. It may have been.

Q. Don't you think it's important for you to have looked-- withdrawn. Don't you think it's important for the the defendant to have provided you with the actual cervical and lumbar films?

A. I think it would be an important piece of information.

Q. Yes or no?

MR. SHAPIRO: Objection.

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

THE COURT: You will have redirect. This is cross examination.

Q. You would agree this is an important information?

A. It may have been an important piece of information.

Q. It may have been an important piece of information?

A. Yes.

Q. But you didn't have it?

A. I had the report. I had to rely upon the report.

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Q. And the report said there was a herniation in the neck?

A. I would have to look at it.

Q. Did it also say there was a herniation in the back?

A. I would have to look at the report for the neck and back.

Q. You disagree with those reports, don't you?

A. Do I personally disagree with those? Based on what I saw on the MRI, I would disagree.

Q. So to make sure I understand, Doctor, you said twenty to thirty reports a week, can I say thirty as an average?

A. You can say thirty or forty.

Q. I want it to be fair?

THE COURT: You are being argumentative.

MR. GJELAG: Can I take an average of the twenty.

THE COURT: Ask a question.

Q. Can we say 30 per week, doctor?

A. Counsellor, you can say whatever

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you want.

Q. Would it be fair to say you do approximately 30 examinations on behalf of defendants per week?

A. I think it would be accurate to say that I do between 30 and 40 a week.

Q. Let's go with the 30 number. That would equal \$372,000 per year, does that sound right?

A. That sounds right.

Q. You get this for doing exams on behalf of defendants?

A. That's correct.

Q. And generating reports?

A. That is correct.

Q. But you also testify one to two times a month?

A. That is correct.

Q. That's 12 to 24 times per year?

A. That's correct.

Q. \$7,000 a pop, doctor?

A. Roughly.

Q. If we take the twelve times a year, that comes out to \$84,000?

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A. Yes.

Q. And if we take the 24, that's \$168,000 a year?

A. That is correct.

Q. You make nearly half a million dollars per year examining claimants on behalf of defendants, generating reports and coming in to court to testify; is that correct?

A. That's correct.

Q. About \$500,000?

MR. SHAPIRO: Objection. Asked and answered.

MR. GJELAG: Subject to connection.

Q. You've been doing this since 2003?

A. That's correct.

Q. Nine years?

A. Correct.

Q. If we multiply the 4.5 million dollars since 2003 examining claimants for defendants, generating reports and coming in to court to testify; is that correct?

A. That is correct.

Q. And you are telling this jury that doesn't sway your testimony at all?

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A. What do you mean by that?

Q. You are making a lot of money,
close to five millin dollars?

A. What is the question?

MR. GJELAG: Judge.

THE COURT: Let him finish the
question.

Q. My question is despite the fact you
made almost five million dollars since 2003,
are you telling this jury you wouldn't bite the
hand that feeds you?

MR. SHAPIRO: Objection.

THE COURT: I sustain that
objection.

Q. I began questioning you earlier
about your schooling and your papers. Do you
recall that?

A. I do.

Q. Your focus is on knees, correct?

A. I do a lot of knees.

Q. Elbows?

A. I do some elbows.

Q. Hips?

A. I do a fair amount of hips.

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Q. No spines, correct?

A. I treat a lot of spine problems.

Q. Have you ever operated on someone--
have you ever operated on someone's neck or
back?

A. I have.

Q. When was that?

A. Probably twenty, thirty years ago.

Q. What kind of surgery was it, what I
mean by that, was it a fusion?

A. There were fusions, disks.

Q. Did you ever implant hardware into
someone's spine?

A. I do not believe so.

Q. Doctor, you've testified before,
correct?

A. Correct.

Q. You've testified in Staten Island?

A. True.

Q. Richmond County?

A. I don't know.

Q. Alex Kline v. Chase Finance Group.
Mr. Phil Tumberella asked you questions?

A. I don't recall.

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Q. Do you recall the following question and answer.

"Q. Would you agree with me, doctor, one thing you are not is a spine surgeon?

"A. I do not operate on spines."

MR. SHAPIRO: Objection.

THE COURT: Do you want a side bar.

MR. SHAPIRO: Yes.

(Approach off the record.)

Q. Every time you take the stand to testify you swear to tell the truth, the whole truth nothing but the truth?

A. That is correct.

Q. Do you recall being asked these questions and giving these answers.

"Q. Would you agree with me, doctor, one thing you are not is a spine surgeon?

"A. I do not operate on spines.

"Q. In fact have you ever done a spine surgery?

"A. I told you I do not operate on spines."

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Did you say that?

A. I don't know.

Q. Do you have any reason to doubt what I just read to you?

A. I have no reason to doubt it.

Q. This is very different than what you told this jury this morning?

A. I disagree.

Q. You told this jury you operated on necks and backs, didn't you, yes or no?

A. I have. I do not do it at the present time.

Q. So you don't do it at the present time. That's what you meant?

A. That's correct.

Q. When you told this jury earlier that you did in fact do spines you were incorrect, you were mistaken?

MR. SHAPIRO: Objection. He said twenty or thirty years ago.

THE COURT: Sustained.

Q. You don't deny what I just read to you?

MR. SHAPIRO: Objection.

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THE COURT: Sustained.

Q. Now you testified about the history you took from Mr. Robles; is that correct?

A. That is correct.

Q. Did you see any records of any complaints to the neck or back that occurred before this accident?

A. I would have to look through the records.

Q. Do so?

A. You would have to give them to me.

Q. You didn't bring the record with you?

THE COURT: Asked and answered.

Q. Did you see a single medical record provided to you by defendant that showed any treatment to Mr. Robles' neck or back prior to the date that this accident occurred?

A. Counsellor, as I said to you--

MR. GJELAG: Judge. It's yes or no. Either he saw records or he didn't. Please instruct the witness.

THE COURT: Did you see the records?

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THE WITNESS: I can't answer it the way it is asked.

THE COURT: The question is did you see those records, the records you are referring to, whether or not you saw the records?

THE WITNESS: I saw the records at the time I did the evaluation.

Q. My question is this, we've gone over the records you examined?

A. That's correct.

Q. Were you provided with any records whatsoever regarding Mr. Robles physical condition prior to February 6, 2008?

A. Not as far as I can tell.

Q. The answer is you were not provided with any, correct?

A. The answer is not as far as I can tell.

Q. Because none exists, correct?

THE WITNESS: Your Honor, it's a question I can't answer yes or no.

THE COURT: You have to respond to the question asked. If there is an

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objection I'll rule on the objection.

Q. You examined, I'll go through this quickly. You examined Berkowitz, Lattuga and the two OR records. That's on page one of your report?

A. That's correct.

Q. You examined the MRI of the lumbar spine taken 10/20/08, the report?

A. I did. Counsellor. Take it easy. When you say examined. I read the reports. I didn't examine them.

Q. What did you mean you didn't examine them. You didn't examine the records that are the basis for your opinion.

MR. SHAPIRO: Objection.

THE COURT: Sustained. He said he read the reports. I don't know what examine means.

Q. You read the MRI of the lumbar spine?

A. That is correct.

Q. And MRI, the cervical?

A. Yes.

Q. The CAT scan taken on 12/14/09?

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A. That is correct.

Q. You reviewed the Greenwich Hospital reports?

A. That's correct.

Q. You reviewed records of Dr. Daras?

A. That is correct.

Q. All the physical therapy records?

A. I reviewed the physical therapy records between 11/5/08 and 2/11/09.

Q. You reviewed the notes of Dr. Liu, correct?

A. I did between 3/18/08 and 1/13/09.

Q. Dr. Liu is a doctor who did injections on to Mr. Robles' spine?

MR. SHAPIRO: Objection.

THE COURT: Sustained.

Q. Did you review those records?

A. I did.

Q. You reviewed the EMG done on 2/29/08?

A. That is correct.

Q. And North Shore Franklin Hospital records?

A. That is correct.

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Q. If I told you North Shore was the place where Mr. Robles had the two surgeries, would you agree with me?

A. I would have to look at the records.

Q. These are the records you reviewed?

A. I would have to look at the records.

Q. Is there a single record you reviewed in here that lists any pain that Mr. Robles was having before this accident occurred?

A. I would have to go through those records.

Q. You can't answer my questions?

A. I cannot. I would have to go through the records.

Q. You spoke to him, correct?

A. I'm sorry.

Q. You spoke to him when you examined him?

A. I did.

Q. You asked him for a history?

A. I did.

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Q. Did you ask him if he had ever sustained any injuries to those body parts before this accident?

A. I did.

Q. What did he tell you?

A. He said he had not had any other injuries.

Q. Correct. Did you have any reason to believe that he was not being truthful to you?

A. I had no reason to believe or not believe it.

Q. You also asked him about medical history that was unrelated to this accident?

A. That is correct.

Q. He told you he had diabetes, correct?

A. He did.

Q. He volunteered that, correct?

A. That's correct.

Q. He didn't try to hide it from you, did he?

MR. SHAPIRO: Objection.

THE COURT: Sustained.

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Q. He was an accurate historian?

MR. SHAPIRO: Objection.

THE COURT: Move on. Sustained.

Q. Did he tell you what his current complaints were?

A. He did.

Q. What were they?

A. When I saw this gentleman on October 6, 2010, he said to me that he continued to have pain in his neck, his upper back, his lower back, his right shoulder, his right and left arms, his right left legs and he also said he had numbness in the arms and legs and he said that it was worse than it was at the time of the accident.

Q. And you told us--

MR. GJELAG: He keeps reading from the report. Can we take it away from him.

Q. The fact that he told you that he was experiencing pain, is that significant to you?

A. What do you mean by significant?

Q. Does it mean anything to you that

1
2 he was telling you he was having pain in his
3 neck and back?

4 A. It meant that he was still
5 complaining of pain in his neck and back and
6 arms and legs.

7 Q. And that was on-- what was the date
8 of this exam?

9 A. Can I look at the record?

10 Q. Yes.

11 A. It was October 6, 2010,
12 approximately a little over two years after the
13 accident.

14 Q. Did you examine him within the
15 first 30 days of the accident?

16 A. I did not.

17 Q. Did you exam him in the first 60
18 days of the accident?

19 A. I did not.

20 Q. Did you examine within first 90
21 days?

22 A. I did not.

23 Q. Did you exam him with the first 120
24 days of the accident?

25 A. I did not.

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2 Q. Did you examine him within the
3 first 150 days of the accident?

4 A. I did not.

5 Q. How about within the first 180 days
6 of the accident?

7 A. I did not.

8 Q. So you have no opinion as to what
9 his condition was within the first 180 days
10 after the accident; is that correct?

11 MR. SHAPIRO: Objection.

12 THE COURT: Overruled.

13 A. I would have to rely upon the notes
14 and history he gave me. If they are accurate
15 than he has whatever pain he described.

16 Q. So, in other words, for that period
17 you would did he ever to the treating
18 physician?

19 MR. SHAPIRO: Objection.

20 THE COURT: Sustained.

21 Q. Would you defer to the treating
22 physician in regards to Mr. Robles' physical
23 condition for the first 180 days after this
24 accident?

25 MR. SHAPIRO: Objection.

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THE COURT: Rephrase the question please.

Q. Would you agree with me, doctor, that since you didn't see him in those first 180 days that his treating physician would be in a better position to comment on his physical condition during that time than you?

MR. SHAPIRO: Objection.

THE COURT: Sustained.

Q. You don't know if he was capable of working, physically if he was capable of working within the first 180 days after the accident, do you?

MR. SHAPIRO: Objection.

THE COURT: I'll allow it.

A. I do not.

Q. You have no idea if there were any limitations on his activities of daily living within the first 180 days after the accident?

MR. SHAPIRO: Objection.

THE COURT: Sustained.

Q. So you did an examination of his spine?

A. That's correct.

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Q. You did a range of motion exam?

A. That's correct.

Q. You found deficits in the range of motion?

A. That is correct.

Q. Extension, the normal is 60 degrees?

A. That's correct.

Q. His extension was 35?

A. That's correct.

Q. That's a significant limitation, isn't it?

MR. SHAPIRO: Objection.

THE COURT: Rephrase the question.

Q. How would you characterize that limitation, doctor?

A. I would; is that correct rise his extension as 35 and normal is 60.

Q. Nearly fifty percent less than normal?

MR. SHAPIRO: Objection.

THE COURT: Sustained.

MR. GJELAG: It's cross.

THE COURT: I understand. 35 over

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60 is not fifty percent.

MR. GJELAG: I said nearly fifty.

THE COURT: You may answer the question.

A. It would be close to fifty percent.

Q. And you examined his rotation as well?

A. I did.

Q. Normal being 80 degrees?

A. That is correct.

Q. You found 45 degrees?

A. I found right rotation 45 and left rotation 55.

Q. I was asking you about the right rotation. 45 degrees as opposed to a normal of 80, that's nearly fifty percent, correct?

A. That's correct.

Q. And left rotation normal is 80 degrees?

A. That's correct.

Q. And you mentioned his rotation was 55 degrees?

A. That is correct.

Q. That's a 25 degree loss of range of

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motion, doctor?

A. Yes.

Q. What's 80 minus 55?

THE COURT: Sustained. Don't be argumentative.

Q. Was 80 minus 55, 25?

A. That's correct.

Q. So he has a 25 degree loss range of motion?

A. That is correct.

Q. And right lateral flexion, 45 degrees is normal?

A. That is correct.

Q. When you measured him it was 30 degrees?

A. That is correct.

Q. A loss of one third of his range of motion?

A. That is correct.

Q. Left lateral flexion, the normal is 45 degrees?

A. That is correct.

Q. You noted 25 degrees?

A. That is correct.

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Q. It's a loss of 20 degrees?

A. That is correct.

Q. All these findings were two years after the accident?

A. That is correct.

Q. When you examined him these deficits and range of motion, they were permanent, correct?

MR. SHAPIRO: Objection.

THE COURT: I'll allow the question.

Q. By the time you examined him on 10/6/2010, these deficits in the range of motion in his neck they were permanent?

A. I cannot answer that question the way in which you ask it. I'll be happy to explain why.

Q. You can't or you won't?

MR. SHAPIRO: Objection.

THE COURT: Sustained.

Q. By the way, you also said that sensation to pin prick and light touch was abnormal?

A. That's correct.

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Q. How did you do that test, doctor?

A. There is a special device that we have to test nerve function, pin prick, light touch and also to test the reflexes. It's a hammer and it has these special pin prick devices that are designed specifically not to penetrate the skin but to give a sharp feel in a normal person. If I touch the various different parts of probably the hand and the arm and the person tells me that they do not feel normal, they don't feel a sharp or light touch, I so indicate in my report.

Q. I was a little confused, is that subjective or objective?

A. Subjective.

Q. So it's subjective because when you prick the person they have to say ouch?

A. They have to say-- normally what I do, if you want me to answer yet.

Q. Please answer what I'm asking. Your lawyer will get a chance.

MR. SHAPIRO: Objection.

Q. What portion of Mr. Robles neck or other part did you prick, which portion?

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A. I didn't prick his neck.

Q. What did you prick?

A. Normally when you test for sensation, at different levels there are different areas if the nerve is affected you would have diminished sensation. So I take this little needle that does not penetrate the skin but feels sharp and I touch the different areas and I ask the person did you feel that, did it feel sharp, if they respond affirmatively then I indicate that they had intact sensation to pin prick and to light touch. If they do not respond affirmatively then I indicate they did not.

Q. So the answer to my question is you prick their fingers, correct?

A. I'm not understanding the question you are asking me.

Q. The question I am asking you. Not the one you want to answer.

MR. SHAPIRO: Objection.

THE COURT: Sustained. You can't be argumentative.

THE WITNESS: That's not the

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question you asked me.

Q. When you prick somebody's finger, you sit there and you wait for them to say it hurts or I feel it?

A. You asked me whether they jumped or responded. I said I couldn't answer it the way in which you ask. I tried to explain to the jury what exactly I do. What I do, again, to repeat it, if you don't want me to repeat it, I won't.

Q. I'm asking you to answer the question.

A. The question you asked I couldn't answer and then you gave me --

THE COURT: Let him finish.

A. Then you gave me allowance to explain what I did. I tried to do that.

Q. I'm not concerned with what you do with other patients. Specifically in regard to Mr. Robles, did you prick his finger to check his sensation?

A. What do you mean--

Q. Yes or no. You've been in court more than I have. Yes or no?

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MR. SHAPIRO: Objection.

THE COURT: Sustained.

MR. SHAPIRO: I would ask to strike that and sanction counsel.

MR. GJELAG: Sanction me? Me?

MR. SHAPIRO: Yes, you.

Q. Did you prick his finger, yes or no?

A. I can't answer the question the way you in which ask.

Q. You found somebody abnormal?

A. The gentleman told me he did not feel when I pricked his arm hand.

Q. So you found something abnormal, correct?

A. I found that he reported he didn't have normal feeling.

Q. Are you telling this jury you didn't believe him?

A. I didn't believe him or not believe him. I reported what he told me.

Q. What is the significance of this, if anything?

A. Well, the significance is hard to

1
2 make sense of, it did not find any particular
3 pattern. I said whenever I tested him in the
4 upper extremities he didn't have normal pin
5 prick.

6 Q. He was post fusion?

7 A. That's correct.

8 Q. He had two of his levels fused?

9 A. That's correct.

10 Q. Your testimony today is him not
11 being able to feel the pin prick is a
12 non-anatomical finding, is that your testimony?

13 A. That's correct.

14 Q. Do you know Dr. Lattuga took the
15 stand and testified that the herniation in his
16 neck was related to the accident?

17 A. I don't know what Dr. Lattuga
18 testified to.

19 Q. Did you see the inside of Mr.
20 Robles' spine?

21 A. I did not.

22 Q. Do you know Dr. Lattuga testified
23 that he visualized the herniation himself, do
24 you know that?

25 MR. SHAPIRO: Objection.

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THE COURT: Overruled.

A. I don't know what Dr. Lattuga testified to.

Q. Dr. Lattuga what he told this jury he opened up the spine and looked in with glasses and saw the herniation, is it your testimony that he was inaccurate?

MR. SHAPIRO: Objection.

THE COURT: Overruled.

A. I would say I don't see that on the MRI.

Q. Do you know that Dr. Lattuga looked at the same film you did and showed the jury the herniation in the cervical spine?

A. I do not.

Q. But you would disagree with Dr. Lattuga on that as well, correct?

A. I would disagree with Dr. Lattuga if he said there was a herniation on the MRI.

Q. Are you aware what that Dr. Daras, a neurologist who examined Mr. Robles for about a year after the accident, are you aware he testified?

A. I'm not.

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Q. Are you aware he put the film on the shadow box and showed this jury the herniation?

MR. SHAPIRO: Objection.

THE COURT: Overruled.

A. I am not.

Q. So when Dr. Daras showed this jury the herniation and told them it was traumatically induced he would have been incorrect?

A. If--

Q. Yes or no?

A. I can't answer that yes or no. If you want me to explain why I can't, I would.

Q. If Dr. Daras told this jury that he looked at the film, as a matter of fact looked at the film in front of them, and when he looked at that film he told this jury there was a herniation there and it was causally related by the motor vehicle accident. My question to you is if that's what he testified to would he be correct or incorrect?

MR. SHAPIRO: Objection.

THE COURT: You may answer the

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question.

A. At what level?

Q. At C-6?

A. I did not see anything at C-6.

Q. But you saw some changes in the spine, cervical spine?

A. That's correct.

Q. How would you characterize those changes?

A. Degenerative changes.

Q. Mild, severe, something else?

A. I thought they were probably mild.

Q. What does mild mean?

A. Mild means mild as opposed to moderate or severe.

Q. So to make sure--

A. A small amount of degenerative changes.

Q. Let me make sure I understand, you just said mild, moderate and severe. Would mild be the least?

A. That's correct.

Q. Followed by moderate?

A. Yes.

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Q. Followed by severe?

A. Severe.

Q. So he had mild, the least?

A. I saw some mild degenerative changes.

Q. Some. You are not saying they were changes throughout the neck?

A. I think I listed the exact levels I saw the changes.

Q. But they were mild?

A. That's correct.

Q. Does the fact that he had some changes on his spine, does that have any clinical significance to you?

A. It may or may not.

Q. When people have a mild changes that doesn't necessarily mean they are experiencing pain, does it?

A. It doesn't necessarily mean they are experiencing pain or they are not experiencing pain. It doesn't necessarily mean if they are experiencing pain it's due to those changes.

Q. The changes alone that you saw in

1
2 the film, that wouldn't indicate to you that he
3 would need a surgery just with those changes
4 alone, would it?

5 A. It would not.

6 Q. Now Mr. Robles was 35 years old at
7 the time of the accident, are you aware of
8 that?

9 A. I am.

10 Q. So the mild degeneration that you
11 said, that's something normal for a person of
12 his age, correct?

13 MR. SHAPIRO: Objection. Objection
14 to the characterization.

15 THE COURT: Overruled.

16 A. I don't know exactly what you mean
17 by normal.

18 Q. You said you noted mild changes in
19 his neck?

20 A. That's correct.

21 Q. Would that be consistent with
22 someone who is 35 years old at the time that
23 this film was taken?

24 A. It might be.

25 Q. That's not something unusual,

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correct?

A. Well, as you get older, is it a yes or no or do you want to let me explain.

Q. My question deals specifically with a 35 year old man, not as we get older, not a 50 year old man, a 35 year old man, the findings that you saw on his neck, is that something normal for someone of his age?

MR. SHAPIRO: Objection to the form.

THE COURT: Overruled.

A. The way in which you frame the question makes it difficult for me to answer that question precisely. If you could restate the question in a different manner I might be able to answer it. If you give me leeway I will be happy to answer it and explain to you.

Q. 35 year old man, doctor?

A. Counsel, I just explained to you, the way in which you frame the question I can't answer it. If you want to give me an opportunity to explain it a little more. Can I do that?

Q. I will ask you a question. You are criticizing my question?

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A. I am not criticizing your question.

THE COURT: Gentlemen. Gentlemen.

You are really not suppose to ask
counsellor questions.

Q. You saw changes in the neck?

A. That is correct.

Q. You characterize them as mild?

A. That's correct.

Q. My question to you is the changes
that you saw in that cervical MRI, are they
something that would be normal for a man who is
35 years of age when that study was taken,
that's my question?

A. I will answer it again. I can't
answer it the way in which you ask it. I'll
explain to you why, if you want me to.

MR. GJELAG: No, Doctor. You
understand?

THE WITNESS: I don't understand.

THE COURT: I will order both
exchanges be stricken from the record.
Move on.

Q. Do you know what asymptomatic
condition is?

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A. Yes.

Q. What is that?

A. Doesn't cause any pain.

Q. The changes that you saw in the cervical MRI, can you tell us whether that condition caused Mr. Robles any pain at the time?

A. I cannot.

Q. You said there was mild changes. You are not saying he had arthritis in his neck, are you?

A. There might have been degenerative changes. I could not read the x-ray. It was not clear enough for me to say that. He had degenerative changes in the disk space.

Q. Mild degenerative changes?

A. Yes.

Q. Is your answer no, there was no arthritis?

A. I didn't say that. I said I could not see that on the MRI.

Q. Chances are it's not there, correct?

A. I wouldn't say that either.

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MR. GJELAG: Okay.

MR. SHAPIRO: Objection. I ask
counsel not to comment.

MR. GJELAG: I can't say okay.

THE COURT: No commentary after the
answer.

Q. Not everybody develops symptoms as
a result of a degenerative condition, right?

A. Is that yes or no?

Q. Yes it is.

A. I can't answer it the way you are
asking the question.

Q. You can't?

A. I cannot.

Q. Do you recall testifying in a case
named Dawn Oduor against Robert Huggins and
Doris Huggins in New York County?

A. I do not.

Q. Before Judge Mary Smith?

A. I do not.

Q. Do you remember the following
question and giving the following answer. I'll
go slow.

"Q. Let me ask you this. Not

1
2 everyone develops symptoms as a result of a
3 degenerative condition. Correct?

4 "A. I can't honestly answer that.
5 If you look at those people over a long period
6 of time if you are fifty years old are you
7 going to be a little sore or are you going to
8 have stiffness, going to have similar
9 limitations that you may not make a big deal
10 over, you are still have symptoms. When you
11 ask me the questions if there are arthritic
12 looking x-rays you don't have to develop
13 symptoms. I would say to you it may not be
14 that you are disabled from those symptoms but
15 you probably have some degree of symptoms like
16 soreness, stiffness, increase difficulty with
17 certain activities.

18 "Q. My question to you is very
19 concise, can a human being go through his or
20 her entire life with degenerative condition
21 that doesn't cause pain objection. Overruled.

22 "A. I think my answer and I tried
23 to make it clear is my experience is that they
24 probably do have symptoms but they don't
25 necessarily have major symptoms that require

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surgeries. "

Did you say that, Doctor?

A. Counsel if that's what my response is, I would say I said it. That really sort of speaks to the way in which you asked the question before.

Q. I asked you the same exact question--

A. You did not.

Q. I did not?

A. You did not.

Q. Let's go to the lumbar spine. The limitation and range of motion that you found, is that consistent with someone suffering from a herniated disk?

A. You mean just the limitation of motion? I would say no.

Q. Let's talk about the back, doctor. You told us in regard to the neck when somebody has a fusion the range of motion is eliminated. Would you say that?

MR. SHAPIRO: Objection.

THE COURT: Sustained.

Q. What did you say in regard to the

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range of motion in someone's neck after a fusion?

A. At each level there is about three degrees of movement. So if you have a fusion say at five and at six you would lose a total of about six, seven eight degrees of movement. That's usually what happens if you have fusions.

Q. Does the same thing hold true for a lumbar fusion?

A. Yes.

Q. You did an examine of Mr. Robles back as well, correct?

A. That's correct.

Q. You found no restrictions in range of motion?

A. That's correct.

Q. How can you justify that when you just told this jury that after someone has a fusion the range of motion in that area is lessened?

A. He probably compensated for it with hip movement.

MR. GJELAG: Oh. He probably

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compensated it.

MR. SHAPIRO: Objection.

THE COURT: You can't do that. No gestures or comments.

MR. GJELAG: None. Zero.

Q. You examined his back, Doctor?

A. I did.

Q. One of the tests that you did was forward flexion?

A. That's correct.

Q. Is that this?

A. That's correct.

Q. You said--

THE COURT: Doctor, you can't read.

THE WITNESS: I just looked at it. I didn't read it.

Q. When you say flexion, you mean bending down to touch your toes?

A. That's correct.

Q. And he was able to do that?

A. Yes.

Q. He was be able to bend down and at his toes?

A. Yes.

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Q. Are you aware, Doctor, he had a fusion done to his spine?

A. You don't have to show me the picture I know what a fusion looks like.

Q. How many levels?

A. I would have to look at the report.

MR. GJELAG: May I have this marked for identification.

(Marked Plaintiff's 16 for identification.)

Q. Does that refresh your recollection as to the type of surgery that was performed on Mr. Robles' back?

A. It does.

Q. What type of surgery was performed?

A. He had a fusion of L-4,5 and L-5 S-1.

Q. How many levels is that?

A. Two levels.

Q. Could Mr. Robles-- you saw him after the back surgery, correct?

A. That's correct.

Q. How would it be possible for Mr. Robles to bend down and touch his toes post a

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two level fusion, would it be possible?

A. When I explained to this gentleman earlier is that he compensated for the loss of motion in the back by flexing his hip.

Q. Is that your answer?

A. You asked me the question before. I replied to that. You are asking me the same question again. That is my reply.

Q. Doctor, again, from that Dawn Odour case v. Huggins before Judge Smith in Manhattan. I will ask you the following question and read you the answer:

"Q. Doctor, isn't it physically impossible for someone with a fusion to be able to bend down and touch their toes correct?

The Court: The question should be amended. Physically impossible. Is it not correct for someone to bend down with a fusion and touch their toes counsel. I'll adopt that. The witness: The answer is yes."

A. It's due to motion in the back. If they compensate with hip motion they can do it.

Q. Did I read this is correctly that

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it's physically impossible to do that?

A. I'm explaining what I meant when I said that. If you have any problem with that I'll explain it to you again.

Q. Do you know how many times Mr. Robles was examined by Dr. Daras?

A. By doctor who?

Q. Dr. Daras, the neurologist who treated him for one year?

A. I do not.

Q. Do you know how long he was treated by Dr. Lattuga?

A. I do not.

Q. Do you know how many physical therapy sessions Mr. Robles underwent?

MR. SHAPIRO: Objection.

MR. GJELAG: Does he know?

THE COURT: Overruled. Move on.

MR. GJELAG: I'm moving on, I promise.

Q. Do you know?

A. I would have to look at the records I reviewed.

Q. The records you didn't bring to

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Court with you?

MR. SHAPIRO: Objection.

THE COURT: Sustained.

Q. Doctor, some fusions work, some don't; is that correct?

A. That is correct.

Q. Have you ever examined a patient of yours that had a failed fusion to the back?

A. I have.

Q. Not a pretty thing, is it?

MR. SHAPIRO: Objection.

THE COURT: Sustained.

Q. The person that you examined in your office, is it person or persons?

A. I recall having a few people who had fusions who did not fuse. I can visualize them. I can't recall their names.

Q. Have you ever heard of something called failed back syndrome?

MR. SHAPIRO: Objection.

Q. Is that a medical term failed back syndrome?

THE COURT: Sustained.

Q. Are you familiar with the term

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failed back syndrome, the medical term?

MR. SHAPIRO: Objection.

THE COURT: I'll allow the question.

A. I've heard the term.

Q. Do you use the term yourself?

A. I usually many more specific when it comes to somebody who has surgery on the back and for some reason the surgery did not work, whether it was the fusion did not work, whether it's because there is a different level. Whether because there is some scarring. I refer more specifically. That's a broad generic term and I tend -- I don't use it. I know some doctors do.

Q. Doctor, in regards to the back, you noted a three inch surgical incision?

A. That's correct.

Q. Did you notice any sensory deficits?

A. I did not.

Q. You discussed his gait?

A. That's correct.

Q. You said his gait was normal?

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A. That is correct.

Q. Is there any mention in the report of Mr. Robles coming into your office with a cane?

A. I did not mention that.

Q. Why not?

A. Because first of all I didn't specify that I saw it. So I don't know whether he did or he didn't. But when I examined him he was not using a cane contain and he had a normal gait.

MR. SHAPIRO: Objection. Do you see the facial gestures. You saw it. I saw it and the jury saw it.

THE COURT: You need to ask a question and no comment or facial expression. Ask the question and get an answer.

Q. As you sit here today you don't recall whether or not Mr. Robles came to your office with a cane, do you?

A. I asked Mr. Robles to walk. He walked normally. I do not know whether he came into the office with a cane. When I examined

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he was able to walk without a cane, normally.

Q. Part of your review were Dr. Lattuga's records?

A. That's correct.

Q. Do you know in his records after the lumbar surgery was done there is not a single mention in there of him having a normal gait, are you aware of that?

A. I would have to look at those records.

Q. You also noted there was in terms of the right and level leg, you noted a normal pin prick of light sensation?

A. That's correct.

Q. What does that mean?

A. What I explained earlier.

Q. What is the significance of that?

A. No neurological findings of any residual deficits.

Q. None?

A. No.

Q. You list here there was an abnormal pin prick and light touch sensation?

A. Say that again.

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2 Q. Under right and left legs, there is
3 abnormal pin prick and light touch sensation,
4 do you see that?

5 A. That's correct.

6 Q. That's an abnormal finding, isn't
7 it?

8 A. Well, I do not know what you mean
9 by abnormal. This is a subjective finding.
10 When I touched him he said he could not feel
11 right and left leg.

12 Q. You didn't tell this jury, you told
13 them there was no neurological abnormality in
14 your exam, didn't you?

15 A. Except for the sensation.

16 Q. You didn't tell them this in regard
17 to the lumbar spine?

18 A. It's in my report.

19 Q. They don't have their report in
20 front of you?

21 A. My report sense abnormal sensation
22 in the leg.

23 Q. Which is something attributable to
24 the back?

25 A. It might be, it might be

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2 attributable to something else. Again no
3 discreet pattern to this that would enable me
4 to identify--

5 THE COURT: There is no question.

6 THE WITNESS: He asked me that
7 question actually.

8 Q. Right and left arms. You noted an
9 abnormal pin prick and light touch sensation,
10 doctor?

11 A. Yes.

12 Q. What, if anything, is the
13 significance of that?

14 A. Again as I explained to you
15 earlier, unless it has specific dermatone
16 pattern consistent with C-5-6, 6-7, it's
17 unclear why he had that abnormal sensation.

18 Q. But you are not denying whether or
19 not he had it, are you?

20 A. I explained to you earlier that
21 could be subjective.

22 Q. And that's what you are saying,
23 every time that he had a positive--

24 A. I'm saying there is an
25 inconsistencies.

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THE COURT: Doctor, wait until he is through with the question.

Q. Every time you've been questioned today about an abnormal pin prick and light sensation, have you not said that it's a subjective test, yes or no?

A. I believe I have.

Q. Now you came to some impressions?

A. That's correct.

Q. Status post surgical fusion?

A. That's correct.

Q. Status post lumbar fusion?

A. That's correct.

Q. Other reports you put down resolved, resolving?

A. With regard to what?

Q. Not in regard to this patient, in other reports you generate when you examine claimants on behalf of defendants, you use the term resolve or resolvant, haven't you?

MR. SHAPIRO: Objection.

THE COURT: Sustained.

Q. You said a resolved sprain of the right shoulder?

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A. That's correct.

Q. Are you aware there is no allegation of the right shoulder?

A. He alleged to me he hurt the shoulder in the accident.

Q. You said you looked at the records?

A. I depended on the history this gentleman gave me.

Q. The shoulder pain he was experiencing could that come from the neck?

A. It could.

Q. Did you look at the Bills of Particular in this case?

A. I did not have the Bill of Particulars.

Q. You had the medical records, correct?

A. I did.

Q. Did you see a single notation saying that he sprain the shoulder?

A. Objection.

MR. SHAPIRO: Objection.

THE COURT: Sustained.

Q. You said a sprain of bilateral

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arms?

A. Yes.

Q. What do you refer to when you say arm?

A. Yes.

Q. You said the sprain is resolved?

A. Yes.

Q. Are you aware there is not a single legs of sprain and bilateral arm?

A. I did not have the Bill of Particulars which as you know is documents. I am only responding to what he said to me which is that I hurt my arms, I hurt my legs, I hurt my shoulder.

Q. You had the medical records?

A. And I had Mr. Robles there telling me what he hurt.

Q. But you had the medical records, yes or no?

MR. SHAPIRO: Objection.

THE COURT: Sustained. He answered that multiple times.

Q. The pain that he was getting down his arms, could that be from the neck

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condition?

A. When I saw him? I don't believe so.

Q. The legs, you said he had a resolved sprain?

A. Yes.

Q. Are you aware there is no allegation that he sprained either leg?

A. Mr. Robles alleged to me he hurt his legs.

Q. The pain he had gawn down his legs, could have been from the back?

A. I do not believe so.

Q. Did you ever hear of the term radiculopathy?

A. There was no evidence of radiculopathy.

Q. Dr. Daras testified that he did have radiculopathy?

A. I would disagree with that.

Q. Would you disagree with Dr. Lattuga that he testified he had radiculopathy as well?

A. I saw no radiculopathy.

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2 THE COURT: Let's take a break.

3 Don't discuss the case. Step out.

4 (Recess at this time.)

5 Q. After you listed your impressions
6 in your report-- by the way, when you write an
7 impression, is that the same as diagnosis?

8 A. That is correct.

9 Q. You came to a conclusion about Mr.
10 Robles' disability; is that correct?

11 MR. SHAPIRO: Objection.

12 THE COURT: Rephrase the question.

13 Q. Did you come to a conclusion
14 regarding Mr. Robles disability in your report?

15 MR. SHAPIRO: Objection.

16 THE COURT: Rephrase the question.

17 Q. Did you comment on Mr. Robles'
18 disability in your report?

19 MR. SHAPIRO: Objection.

20 THE COURT: Side bar.

21 (Approach off the record.)

22 Q. After reviewing the medical
23 records, examining Mr. Robles, did you come to
24 a conclusion in regards to whether or not Mr.
25 Robles was disabled?

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A. I did.

Q. What was that conclusion, Doctor?

A. I believe he had a mild disability.

Q. Based on your review of the medical records and your examination of Mr. Robles, did you come to an opinion in regards as to what the cause of the condition in Mr. Robles' neck was?

A. I did.

Q. And what was that opinion?

A. I said if the history was correct it was cause and affect relationship between the diagnosis that I listed and the accident of record.

Q. The diagnosis that you list you mention cervical fusion, correct?

A. That is correct.

Q. And lumbar fusion?

A. That is correct.

Q. When you say that there was a cause and affect relationship between the diagnosis and accident, are you saying that the neck surgery, the cervical fusion was necessitated by the accident, doctor?

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MR. SHAPIRO: Objection.

THE COURT: I'll allow the question.

A. That's not what I said.

Q. You said in your report there was a cause and affect relationship between the diagnosis and the accident. Yes or no?

A. There is one preamble to that statement.

MR. SHAPIRO: Can he answer the question.

MR. GJELAG: The question I asked.

THE COURT: Counsel can redirect you.

Q. Did you or did you not say that, there was a cause and effect relationship between the diagnosis in your report and the reported accident, yes or no?

A. I did, if the history was correct.

Q. Again you didn't see any records at all regarding Mr. Robles physical condition before this accident, correct?

A. I did not.

Q. You have no reason to believe he

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had any treatment to his neck or back before this accident?

A. As I told you before, I have no reason to believe or not believe. I have no way of making a determination about that.

Q. The symptoms you were referring to was the pain and his neck going down his shoulders, correct, that's related to the accident?

A. What are you referring to now.

Q. I asked you a question. Is one of the symptoms related to the accident, the neck pain radiating down his shoulders?

A. When are you referring to this.

THE COURT: Rephrase the question.

Q. Dr. Lattuga, his records are in evidence, noted pain radiating down Mr. Robles neck down his shoulders?

A. When are you referring to this.

Q. I'll make this easier. I want you to assume that there was testimony in this case that Mr. Robles never had any treatment to his neck, never had any treatment to his back, no physical therapy, no MRI, no pain medication,

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2 no treatment whatsoever, I want you to further
3 assume on February 6, 2008 Mr. Robles was
4 involved in a motor vehicle accident, prior to
5 that date he never made a complain of pain in
6 his neck or back. Assume further that Mr.
7 Robles presented to the hospital began a course
8 of treatment with Dr. Daras, Dr. Liu, physical
9 therapy and with Dr. Lattuga, can you assume
10 all that?

11 A. If you ask me to assume it, I will.

12 Q. I want to you assume, assume Dr.
13 Lattuga did a cervical fusion as well as a
14 lumbar fusion, can you assume that?

15 A. If you ask me to I will.

16 Q. Based on that assumption, isn't it
17 a fact that the competent producing cause of
18 the symptoms and the surgeries that Mr. Robles
19 underwent was the motor vehicle accident which
20 he was involved in on February 6 of 2008?

21 MR. SHAPIRO: Objection.

22 THE COURT: Sustained. Form.

23 Q. You saw him for fifteen minutes,
24 doctor?

25 MR. SHAPIRO: Objection. Asked and

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answered.

THE COURT: Sustained.

Q. Do you know how many times Dr. Daras examined Mr. Robles?

MR. SHAPIRO: Objection. Asked and answered.

THE COURT: Sustained. Any further questions so we can move on?

Q. By the way, do you have a specific recollection as to how long you examined Mr. Robles?

MR. SHAPIRO: Objection. Asked and answered.

THE COURT: You may answer that question.

A. I do not have a specific recollection.

Q. But your standard time on these examinations is ten to fifteen minutes?

THE COURT: Sustained. We went through this.

MR. GJELAG: Nothing further.

THE COURT: Redirect.

REDIRECT EXAMINATION

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BY MR. SHAPIRO:

Q. You were asked a lot of questions about earning an income from doing these?

A. That's correct.

Q. You also examine patients regularly?

A. I examine and treat patients on a regular basis.

Q. The majority of work you do relates to treatment of patients rather than independent medical examinations.

THE COURT: I'll allow that.

A. That's correct.

Q. Is it fair to say over the last nine years since 2003 you also made millions of dollars treating patients?

A. That's correct.

Q. And from time to time over the years you get called to testify on behalf of patients that you treat, correct?

A. That is true.

Q. You testify under oath in those cases as well?

A. That is correct.

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2 Q. You were also asked questions if
3 you saw any records from before the accident of
4 February 6, 2008. Do you recall that?

5 A. I do.

6 Q. Did Mr. Robles bring with him any
7 medical records relating to any treatment for
8 anything prior to February 6, 2008?

9 A. He did not.

10 Q. Did Mr. Robles tell you the names
11 of any doctors he's seen of any kind before
12 February 6, 2008?

13 A. He did not.

14 Q. You were asked questions about what
15 Dr. Lattuga had testified during this trial
16 last week. If I told you, assume for the
17 moment a document in evidence is a report from
18 Dr. Lattuga that says a cervical MRI from March
19 7, 2008 says mild diffused degenerative disk
20 disease with straightening of the cervical
21 curvature, is that consistent with what you
22 said today?

23 A. It is.

24 Q. And I note that Dr. Lattuga in his
25 report also referred to a right sided proximal

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2 for remedial herniated disk at C-6-7 deforming
3 the anterior aspect of the sac and appears to
4 be comprising the right C-7 root?

5 MR. GJELAG: The date?

6 MR. SHAPIRO: October 23, 2008. I'm
7 reading from his report in evidence.

8 Q. Assume that was said. Would it
9 surprise you that the cervical disk surgery
10 that Dr. Lattuga did was actually at the C-4-5,
11 5-6 level, not C-6-7?

12 A. It would be unusual to operate at a
13 different level if in fact that's where you
14 thought the problem was.

15 Q. You referred a couple of moments
16 ago, you were asked about a mild disability,
17 how would you characterize it. How would that
18 impact Mr. Robles' ability to work and to
19 perform activities of daily living?

20 A. It should not impact his ability
21 whatsoever. What I was referring to was when
22 you have fusions, you lose a little bit of
23 movement. That's what I mean by mild
24 disability. Payton Manning is going to play
25 professional football --

MR. GJELAG: Objection.

THE COURT: Sustained.

Q. If you can describe without referring to a specific patient or person. Go on with your answer.

A. When you have a fusion it eliminates the movement between whatever level you are fusing. You have some restriction of movement. On ordinary circumstances when the fusion is good there is no more pain, no more malfunction and aside from some restriction of motion you are able to perform everything.

Q. By the way, you were asked some questions about Mr. Robles giving you his history. Did he mention to you whether he was wearing a seatbelt at the time?

MR. GJELAG: Objection.

THE COURT: Overruled.

A. He did not.

Q. That would be relevant for your analyses and assessment of his condition and to what caused it, correct?

MR. GJELAG: Objection.

Q. Would that be something you would

1
2 want to know about as to what might be the
3 cause of his injuries?

4 A. It would be a useful piece of
5 information.

6 Q. In your experience treating
7 patients, is a seatbelt something that has an
8 impact on the severity of their injuries?

9 MR. GJELAJ: Objection.

10 THE COURT: Sustained.

11 Q. You were trying to say something
12 when you were asked about Mr. Robles giving you
13 his history and whether it causally related to
14 the accident. Something you wanted to add?

15 MR. GJELAJ: What's the question.

16 THE COURT: I sustained. I don't
17 know what the question is.

18 Q. Is it your understanding that Mr.
19 Robles' cervical fusion and lumbar fusion were
20 caused by this accident?

21 A. No.

22 Q. Why is that?

23 A. When I looked at the MRI earlier I
24 did not see any significant cause for doing
25 fusionS at L-4-5, L-5 S-1 or C-4-5 and 5-6.

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2 Q. Assume we have medical records in
3 evidence that say for a number of months even a
4 year after the accident Mr. Robles had a normal
5 gait and even Dr. Lattuga the surgeon found no
6 tenderness to palpation spasm in the lower
7 back, no spasm in the lower back, excuse me,
8 how does that impact what you are saying in
9 terms of whether it was caused by the accident?

10 A. Yes. Sustain. Rephrase.

11 Q. Assume we've had testimony in
12 evidence indicating that Mr. Robles had normal
13 gait and had no tenderness on palpation of the
14 lower back, no spasm in the lower back, Dr.
15 Lattuga wrote he had normal range of motion in
16 the lower back, as much as a year after the
17 accident. How if at all does that impact your
18 testimony as to whether the motor vehicle
19 accident of February 6, 2008 was the cause of
20 his lumbar fusion surgery?

21 A. He had no pain. You have a normal
22 gait. Normal motion. You have no neurological
23 dysfunction. Whatever problem you may have had
24 as a result of the accident had resolved. And
25 so one would not attribute the fusion later on

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2 to the accident.

3 MR. SHAPIRO: I have no further
4 questions recross.

5 RECROSS EXAMINATION

6 BY MR. GJELAG:

7 Q. Dr. Israel, when you do these
8 examinations. On behalf of defendants, when
9 you do these examinations on behalf of the
10 defendant, does the claimant ever bring in his
11 medical records?

12 A. Yes.

13 Q. Really?

14 MR. SHAPIRO: Objection. Here we go
15 again. Must there be a commentary after
16 the answer.

17 THE COURT: You can't. When the
18 answer is over that's it.

19 Q. Isn't it a fact when you are
20 retained to perform these examinations the
21 records are provided to you by defense counsel
22 ahead of the appointment?

23 A. I can't answer the way the question
24 is asked. It's variable.

25 THE COURT: That's the answer.

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THE WITNESS: He wants yes or no answers.

Q. Are you provided with records from defendants, medical records?

A. Yes.

Q. And you are provided these records most of the time before the claimant even comes into your office; is that correct?

A. I would say so.

Q. So the fact that he didn't bring in any medical records is not something unusual, is it?

A. It's not usual or unusual. The people when they come in and are given the appointment, they are requested to bring all their medical records or what they can lay their hands on including actual MRI's. Many people do. Some do not.

Q. Were you able to come to a conclusion, a proper conclusion, without looking at the actual films?

A. Say that again.

MR. SHAPIRO: Objection. Outside the scope of redirect.

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THE COURT: Sustained.

Q. When the claimant came to you, you testified he didn't have the actual films, correct?

MR. SHAPIRO: Objection.

MR. GJELAG: Subject to connection. I'm not beating a dead horse.

THE COURT: I'll allow you some latitude.

Q. Did he bring you the films?

A. He did not.

Q. Did you think they were important, the actual films?

MR. SHAPIRO: Objection. These were asked already.

THE COURT: Go ahead.

Q. Did you think that was important?

A. You have to ask the question again. What are you referring to?

Q. Referring to the films, the MRI films of the lumbar and cervical spine?

A. I already testified I think they are important.

Q. Did you ever tell defense counsel

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2 that claimant didn't bring me the films, please
3 provide them to me ?

4 MR. SHAPIRO: Objection.

5 THE COURT: Overruled.

6 Q. Did you ever do that?

7 A. I routinely do that.

8 Q. But you didn't do that in this
9 case?

10 MR. SHAPIRO: Objection.

11 A. I did not say that.

12 Q. Where in your report does it say
13 that you are asking defense counsel to provide
14 you with films?

15 A. You didn't ask me that.

16 Q. I didn't?

17 A. You did not.

18 Q. Did you or--

19 A. You asked me did it say it in the
20 report. You are asking me what I routinely do.
21 I routinely ask for it.

22 Q. You are saying you have a specific
23 recollection of requesting the MRI films in
24 this case?

25 A. I'm saying--

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Q. Yes or no?

MR. GJELAG: Judge.

MR. SHAPIRO: Can he answer the question.

MR. GJELAG: Judge please.

THE COURT: It's a serious semantic problem. You have to be specific with the questions and then you'll get a specific answer.

Q. You said that's your normal practice, requesting films from defense counsel if the claimant didn't bring it?

A. That is correct.

Q. Do you have a specific recollection in this case of requesting defense counsel for the copies of those films?

A. I do not have a specific recollection.

Q. But you are telling us you did do it?

A. I am telling you that I routinely--

MR. SHAPIRO: Objection.

THE COURT: Sustained.

Q. This examine was done in 2010?

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A. That is correct.

Q. Two years ago?

A. That is correct.

Q. You've seen approximately three thousand claimants sent to you by defense counsel?

THE COURT: Sustained. Move on.

Q. You were asked questions about range of motion in Mr. Robles' spine. Do you recall that, Doctor?

A. Which question? I was asked a lot of questions about range of motion.

Q. Do you recall Mr. Shapiro asking you questions about Mr. Robles' range of motion in his lumbar spine. Do you recall that?

A. I was asked a number of questions. Which question?

Q. The one in reference to Dr. Lattuga, do you recall those questions?

A. I do.

Q. You said he did not note any sort of restriction in the range of motion in the lumbar spine; is that correct?

A. Mr. Shapiro--

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MR. SHAPIRO: I object to that.

THE COURT: Sustained.

Q. You didn't notice any restrictions in the range of motion of Mr. Robles' spine based on the records of Dr. Lattuga; is that correct?

MR. SHAPIRO: Objection.

THE COURT: Sustained.

Q. Did you review the records of Dr. Daras?

MR. SHAPIRO: Objection.

THE COURT: Sustained. I don't know the scope.

Q. Would it surprise you if Dr. Daras--

THE COURT: Sustained.

MR. GJELAG: Can we approach. This is relevant.

(Approach off the record.)

MR. GJELAG: Withdrawn.

Q. Do you remember reviewing Dr. Lattuga's report of February 2009?

A. I do not.

Q. If I told you in that report, the

1
2 date is April 15, 2010. I apologize.

3 MR. SHAPIRO: Objection. Totally
4 different time frame.

5 MR. SHAPIRO: I did. I said the year
6 after the accident.

7 Q. Would it surprise you if I told you
8 that Dr. Lattuga after the lumbar surgery was
9 done never again noted a normal gait?

10 MR. SHAPIRO: Objection.

11 THE COURT: Sustained.

12 Q. Would it surprise you, if you look
13 at Dr. Lattuga's records and it's noted all
14 over restriction --

15 MR. SHAPIRO: Objection.

16 THE COURT: Sustained.

17 Q. You are in a better position than
18 Dr. Daras, Dr. Lattuga, and all the rest of the
19 physicians who treated this man to say whether
20 or not these injuries he sustained as a result
21 of this accident?

22 MR. SHAPIRO: Objection. Sounds like
23 summation.

24 THE COURT: Sustained.

25 MR. GJELAG: I have nothing further.

1
2 THE COURT: Thank you, Doctor.

3 (Witness excused.)

4 THE COURT: Members of the jury we
5 are breaking now. We have to start on
6 time tomorrow. Be here by 9:30 so we
7 can start at 9:30 sharp. We can try to
8 resolve this matter tomorrow. Tomorrow
9 we will make a determination as to how
10 we are going to do it. I don't know how
11 long summations will take. You can't
12 discuss the case. You know my
13 admonitions.

14 (Jury exits the courtroom.)

15 MR. SHAPIRO: He testified about the
16 films, it's cumulative.

17 MR. GJELAG: I would seek a missing
18 witness charge.

19 MR. SHAPIRO: She was here today to
20 testify.

21 THE COURT: Let's not get into
22 those issues. She should be here
23 tomorrow.

24 (Adjourned to February 7, 2012.)
25