

A. The next day, July 3, 2002.

Q What occurred at that visit?

A. The patient was reinstructed on the application of the external bone stimulator, again, the exercises to perform for his strengthening, and also further workup was to be ordered for electrodiagnostic studies due to the neurological irregularities.

Q And the next visit?

A August 5, 2002.

Q What occurred on that visit, Doctor?

A On August 5, 2002, I obtained, again, history, physical examination performed, and upper diagnostic nerve testing performed.

Q What were the results of those?

A The nerve conduction study of the nerves, of the median nerve and ulnar nerve did not show any carpal tunnel or any nerve entrapment of the wrist.

Q What were your recommendations or treatment for the patient then?

A To continue the external bone stimulator, to assist with the cervical fusion, continue with the physical therapy and have follow-up X ray.

Q Where was Mr Magloire sent for physical therapy?

A He had undergone physical therapy at Long Island Spine and Orthopedic Surgery, at 807 W. Old Country Road in Hicksville.

Q What was the purpose of the physical therapy?

A. The physical therapy served several purposes The main purpose is to retrain the neck muscles after they have been deconditioned and atrophied. Therefore, to strengthen the neck muscles supporting the bones and spinal column.

Also, to strengthen the upper motor of the arms. And also to obtain range of motion within the neck.

Q Did you receive copies of the progress notes from his physical therapy?

A Yes.

Q And how was Mr. Magloire progressing in the physical therapy between the various visits?

A The progression was steady, but restricted and guarded.

Q After August 2002, when did you next see Mr. Magloire?

A According to my records, I think I saw Mr. Magloire on August 7th, August 7, 2002

Q Could you kindly tell the jury what Mr. Magloire's condition was on that date?

A His condition remained similar. He was complaining of neck pain, sensory changes in his left upper arm, and an X ray was obtained of the neck, which showed the plates on both the front and back of the neck were well aligned. And the bone graft was in good position.

There was some starting moderate calculus formation of the bone graft at that time. He was then, again, reinstructed to use of the bone stimulator to assist with the fusion I advised him to continue with the physical therapy program And I had gone over the electrodiagnostic studies, recommending the conservative treatment and physical therapy program

Q Thank you.

Doctor, after August 7, 2002, when was the next time that you saw Mr. Magloire for treatment?

A September 19, 2002.

Q And on September 19, 2002, what were your observations with respect to Mr. Magloire?

A. He was complaining of neck pain and low back pain.

Q And after September 19, 2002, when did you next see him?

A January 8, 2003.

Q And on January 8, 2003, would you kindly tell the jury what Mr. Magloire's condition was on that date?

A His condition remains static, similar to his previous evaluations. Again, complaining of neck pain and low back pain. He had well-healed scars on the neck, both front and back, along with

the restricted range of motion of the neck in all planes.

He was advised to continue with the physical therapy and stretching program, and continued anti-inflammatory medications.

Q After January 8, 2003, when did you next see Mr. Magloire?

A January 22, 2003.

THE VTDEOGRAPHER We are going off the record.

MR. BROWN: We didn't have authorizations.

Mil FRANKEL I can give you new authorizations or whatever you require.

MR. BROWN: Off the record.

(Discussion off the record)

MR. FRANKEL: Plaintiff's counsel is consenting to provide an updated authorization to obtain a copy of Dr. Rafiy's records.

If you remember, defense counsel is, at least Wilson Elser is going to get a copy of Dr. Rafiy's file which has been marked as an exhibit at today's deposition, to be used at trial

THE VIDEOGRAPHER: Back on the record. It's 4:11 p m. Mr. Frankel

Q. Dr. Rafiy, would you kindly state for the jury the next time that you saw Mr. Magloire?

A January 22, 2003.

Q Dr. Rafiy, on January 22, 2003, what were your observations with respect to how Mr. Magloire was progressing?

A He was progressing with the full course of physical therapy, along with the stretching and strengthening modalities with some improvement. He did not have any improvement with the neck pain, with the Naprosyn. He continued to complain of neck pain and low back pain.

The therapy was continued and recommended new trial of different anti-inflammatory analgesic medications were started.

Q. What specifically were those analgesic medicines?

A Relafen.

Q What is Relafen?

A Anti-inflammatory medication which helps to take away pain, inflammation, and improve range of motion.

Q On January 22, 2003, was Mr. Magloire expressing to you that he was in pain?

A. Yes, sir.

Q. Was he expressing that he was having restriction in his motion?

A Yes.

Q Was he expressing the third symptom that Relafen could help was an issue?

A. Yes.

Q. After January 22, 2003 --

MR. BROWN: Objection.

THE VTDEOGRAPHER Off the record at 4.13 p.m.

MR. BROWN. I don't know what you mean. For clarification, what's the "third symptom"? I need you to clarify it.

MR. FRANKEL: Okay. Fine. We'll go back on.

THE VTDEOGRAPHER Back on the record at 4:13 p.m.

Q Dr. Rafiy, what were the three symptoms that required you prescribing Relafen?

A For the pain, inflammation and to improve the range of motion.

Q And on January 22, 2003, did Mr. Magloire have any inflammation?

A The inflammation could not be determined, but on an examination finding the restriction in range of motion was worse at that period of examination.

Q. When, the January 8, '03, exam?

A. Worse than his January 8, '03, examination.

Q Thank you.

Subsequent to January 22, 2003, when did you next see Mr. Magloire?

A May 10, 2004.

Q Doctor, what is your prognosis currently for Mr. Magloire?

A The prognosis for Mr. Magloire is guarded.

MR. BROWN: Objection.

THE VIDEOGRAPHER: Going off the record 4:14.

MR. BROWN: He didn't answer for May. You said, you saw him in May, and I think you left it open.

MR. FRANKEL: The problem is that you said, "objection," on the tape, so now it needs editing.

THE VIDEOGRAPHER: We're not going to. We can't do that.

MR. FRANKEL: Well, it's obvious we can't back it up now. We'll notify you when we are.

Just state what your objection is for her, then I'll respond to it.

MR. BROWN: I think there was a question pending. You said, what was done on May 10th. Then you went to his prognosis.

MR. FRANKEL: I'm going to get to the May 10th exam, so if you have an objection to the question, I'll rephrase it.

MR. BROWN: I do.

THE VIDEOGRAPHER: Back on the record. Continuing the deposition, it's 4:16 p.m

Q Dr. Rafiy, based upon your May 10, 2004, examination of Mr. Magloire, would you kindly tell the jury what your prognosis is for Mr. Magloire?

A The current prognosis, May 10, 2004, in reference to his cervical spine, is guarded.

Q Did you memorialize your findings from the May 10, 2004, examination?

A Yes.

MR. FRANKEL: I'm going to mark as an exhibit Dr. Rafiy's May 10, 2004, report as Plaintiff's Exhibit 3 for identification.

THE VIDEOGRAPHER: Off the record at 4:17.

(Plaintiff's Exhibit 3, 5/10/04 report, marked for identification.)

THE VIDEOGRAPHER: We are back on the record, continuing the deposition of Dr. Rafiy. It's 4:21 p.m.

Mr. Frankel, please continue.

Q Thank you.

Dr. Rafiy, on May 10, 2004, you observed Mr. Magloire once again; correct?

A Yes.

Q And would you kindly tell the jury what occurred during that visit?

A I performed a physical examination, history, obtained his current complaints, and obtained an up-to-date cervical spine X ray.

Q Okay. Would you kindly tell the jury, looking at Plaintiff's Exhibit 3 --

A Yes.

Q -- starting at the physical examination portion of the report, would you kindly tell the jury what your observations were?

A On physical examination of Mr. Magloire, the neck exam was performed, and visual inspection demonstrated there was a well-healed scar in front of the neck, and a well-healed scar in the back of the neck, each measuring four inches and 10 inches, respectively.

Range of motion was performed of the neck Again, there was noted restricted range of motion in the cervical spine in all planes. Lateral rotation was restricted to 45 degrees to the right and left.

Flexion restricted at 30 degrees. Extension 20 degrees lateral. Bending restricted 30 degrees to the right and left.

The neurological was performed on the right upper extremity. It was noted to be normal. The left arm demonstrated four over plus five motor in his shoulder abduction, in his ability to elevate his left shoulder. There was also noted decreased sensation in the left shoulder skin patch.

The reflexes were diminished bilaterally at one over two

Q Dr Rafiy, how do your May 10th observations differ, if at all, from the June 6, 2002, initial observations, or are they the same?

A The clinical findings and physical exam findings are similar, if not almost the same.

Q Now, Doctor, you indicated that you took X rays on May 10, 2004; correct?

A Yes.

Q How many X rays did you take?

A One series of cervical X ray films were obtained.

Q Could you explain to the jury what the word "series" means?

A Two separate views of the neck was obtained, a front view and a side view of the cervical spine were taken.

MR. FRANKEL: And I'm going to want to mark as Plaintiff's Exhibits 4 and the two X rays for identification.

THE VIDEOGRAPHER: Going off the record. It's 4:24 p.m.

(Plaintiff's Exhibits 4 and 5, X rays, marked for identification.)

THE VIDEOGRAPHER: Back on the record. It's 4:27.

MR. FRANKEL: These exhibits, Plaintiff's Exhibits 4 and 5, are going to be introduced at the trial of this matter.

MR. BROWN Counsel for the Defendants would just state at this time, it is agreed they are marked for identification purposes today.

They can take issues of if they are introduced at the time of trial, subject to disclosure rules between counsel at the time of trial.

MR. FRANKEL: That's fair, but they are going to be introduced at trial.

MR. BROWN: And at this point, we take it that they are ID'd.

MR. FRANKEL: Correct.

Q. So we have a clear record, Plaintiff's Exhibits 4 and 5 are, again, a series of cervical spine X rays of Mr. Magloire conducted on May 10, 2004; correct?

A Yes.

Q And Dr. Rafiy, would you kindly explain to the jury what Plaintiff's Exhibit 4 is.

MR. BROWN: If I can, just before we begin, if you could just give us what you would call what Exhibits 4 and 5, the views are?

MR. FRANKEL: I think he was going to explain what that is.

Q But, Doctor, can you explain for the jury what Plaintiff's Exhibit 4 is, specifically?

A Plaintiff's Exhibit 4, which is marked "Guy Magloire, May 10, 2004," is a radiograph or otherwise known as an X ray. This is a side view, otherwise known as a lateral view, of the cervical spine.

Prior to my showing of this Exhibit 4, I'm going to go back to the exhibit model, the model of the neck. In the way this radiograph X ray was taken, it was taken from the side, so we are looking at the bony structures of the neck starting from the top of the head to the bottom of the neck.

And looking at it from a side view, the X ray, starting from the top here, represents the skull. This is the upper cervical vertebra represented in white. They appear as white boxes. In between the white boxes are black spaces. Those are the cervical disks. In between the vertebral bodies located here, here, here (indicating) I'm going to show you a normal level.

If you look at this level at C3-C4, you see a vertebral body which is rectangular or square in shape, with a black space representing a normal hydrated disk. As I get down to the level of C6 and C7, from the side view one can see that there is the vertebral body marked above and one below, there is a very radiopaque, otherwise showing up as a very bright white image.