

is based on. And just so we have a clear record, is the 60 percent based upon your evaluation of Mr. Magloire on May 10, 2004?

A Yes.

Q Could you kindly explain what the percent rating is based on?

A The 60 percent rating is based on several factors. One is the evaluation of the physical exam findings on the range of motion in multiple planes, both on flexion, extension, rotation, lateral bending.

Also based on the neurologic examination that is present on both a motor sensory finding and reflex finding. Along with radiographic evaluations.

Q. Thank you. Doctor, now turning to your May 10, 2004, report, you indicated that Mr. Magloire has sustained a permanent and partial orthopedic disability secondary to the spinal cord injury, with weakness in the upper left extremity.

Can you explain to the jury what that means?

A In essence, the injury that had occurred to the cervical spine, resulting in the fracture and dislocation where the bone was broken and separated, there was a resulting injury to the nerves at the level of the lower neck at the C6-7 level, which injured the left-sided nerve root between C6-7, resulting in motor, meaning the strength, and also sensation, neurologic abnormalities in the left upper extremity. These injuries are permanent, and as a result, partial orthopedic disability has occurred.

Q Thank you, Doctor

Doctor, additionally, on the May 10, 2004, examination you stated that Mr. Magloire had sustained a C6-7 subluxation with tearing of the interspinous ligaments at C6-7 with cord deformation.

Could you kindly tell the jurors what that means?

A Again, a C6-7 subluxation represents that the neck has actually shifted in its normal anatomic alignment. The C6 vertebra subluxed, meaning it has shifted forward at the time of the accident, and tore the interspinous ligaments. Those are the soft inter structures connecting bone to bone.

The cord deformation represents the spinal cord which was deformed on the imaging studies at the time of the accident.

Q Thank you, Doctor.

Additionally, you stated in your May 10, 2004, evaluation that Mr. Magloire experiences weakness, paresthesias in the left upper extremity. He has sustained permanent paresthesias in the left upper arm.

Would you explain to the jurors specifically what that means?

A That represents there is numbness in the left upper arm area, as based on the sensory examination.

Q. And you also stated that Mr. Magloire had difficulty with daily living, with cleaning, and operating a motor vehicle. You are stating he has difficulty with them?

A Correct.

Q Additionally, you stated in your May 10, 2004, report that the patient, Mr. Magloire, sustained significant cervical instability due to the three-column injury to the cervical spine.

What is a three-column injury?

A Again looking at the model, the front of the neck, the middle of the neck and the back of the neck represent the three bony columns of the spine.

In order for there to be a subluxation or shifting of the neck forward, the actual columns, the three columns have to have been disrupted for there to have been a shift or subluxation.

Q Thank you.

You also stated in your May 10, 2004, report that Mr. Magloire is a candidate for steroid injections due to the degenerative disk changes.

Can you explain what that means?

A. The cervical degenerative changes are the degenerative processes that occur to the soft tissues. The treatment for that would include the steroid injections which reduce inflammation and pain.

Q Thank you.

Dr. Rafiy, are these injuries that Mr Magloire sustained to the cervical spine permanent?

A Yes.

Q Are they the direct result of the motor vehicle accident of January 25, 2002?

A Yes.

Q Dr. Rafiy., do you have a copy with you today of the bill for services rendered that you have submitted to the patient?

A Yes.

Q In your opinion, are these charges normal and customary in this area in accordance with your specialty in orthopedic surgery?

A Yes, they are.

MR. FRANKEL: I'm going to want to mark as an exhibit, the statement of services as Plaintiff's Exhibit 6 for identification, reflecting a total due \$8,994.35, broken down as \$6,889 medical services, \$2,104.84 for physical therapy.

THE VTDEOGRAPHER Going off the record It's 5:10 p.m.

(Plaintiff's Exhibit 6, Statement of services, marked for identification.)

THE VTDEOGRAPHER We are back on the record, continuing the deposition.

It's 5:14 p.m.

Q Dr Rafiy, the outstanding medical bills have been marked as Plaintiff's Exhibit for identification I just merely want to confirm for the record that the numbers that were stated previously are the accurate amounts that are currently outstanding?

A Correct.

Q Thank you.

Just going back to two brief issues, are the range of motion restrictions that you have discussed during your testimony today permanent?

A Yes.

Q And finally, what is an impairment rating? You indicated to the jurors before that Mr.

Magloire was 60 percent impaired What does that mean?

A Impairment rating represents the amount of disability compared to a normal individual of that age group, without the concomitant injury and comparative examination determining the amount of functional loss as a result of a subsequent injury.

Q So, is it fair to state, within a reasonable degree of medical certainty, that Mr. Magloire can do only 40 percent of what a person his age can do that does not have his injury?

A. Yes, approximately.

THE VTDEOGRAPHER: Going off the record. It's 5 16 p.m.

Going off the record. This is the end of Tape No. 1, deposition of Dr. Rafiy.

(Brief recess taken.)

MR. KARSMAN: The Plaintiff noticed the deposition for trial purposes, and I'm sorry he doesn't have the X rays. But, if the Defendant wanted them they should have subpoenaed them before the deposition.

MR. FRANKEL: All other records are here other than June 2002 X rays, and if your June 2000 records are here just in storage, why don't we put all this on the record so it's on the record.

If there is some kind of - I don't know what else to say. Your objection is noted for the record.

MR. BROWN: But here nor there. The question is, he took X rays on Monday by comparison. It wasn't noticed, of your Plaintiff's, to be used at trial, if necessary. And even though the doctor has testified the whole file is here, a subpoena wasn't put out.

So, if we can move the court date forward, maybe we can do that.

MR. KARSMAN: Well, whatever references he has available he can discuss the prior X rays and the present X rays, he can do that. But, for purposes of what this video is going to be used, I want them up in the shadow box to have the comparison of, like the Plaintiff had the comparison of those two dates, are wanted by defense.

I don't know. I don't want to subpoena them, but if that's the case, we'll do it all over again.

MR. KARSMAN: I can't help you because I'm not there, Steve.

MR. FRANKEL: Why don't you ask all the questions that you have for the exception of the

June 2002 X-ray exams.

MR. BROWN: I'll conduct it how I want to. Let me go off the record about this.

(Discussion off the record)

THE VTDEOGRAPHER: We are back on the record, continuing the deposition of Dr. Rafiy. Our deposition will be continued by Mr. Brown of Wilson Elser.

EXAMINATION BY

MR. BROWN:

Q Doctor, I'm going to ask you some questions regarding your CV and work that way, and then get into the treatment of Mr. Magloire.

A Yes.

Q You're a treating physician of Mr. Magloire; correct, Doctor?

A Correct.

Q Have you been retained, however, in other cases as an expert, in medical cases?

A Yes.

Q Were they personal injury, medical malpractice, something else?

A For patients that I was treating in injury cases.

Q Have you ever testified as an outside expert, were you retained strictly for a plaintiff or defendant only to review the file and testify for purposes of trial?

A. On occasion.

Q How many is "on occasion" in a calendar year, would you say?

THE VTDEOGRAPHER Going off the record It's 5:43 p.m

MR. FRANKEL: I would just like to object to this whole line of questioning. It's palpably improper. He has been determined an expert in the field. But he has indicated that he has testified previously.

To what end are we going here again? It just seems irrelevant, palpably improper.

MR. KARSMAN: It's not also discussing the number of patients which a physician sees. I have had one of the top neurologists tell me he derived over \$600,000 of income in only testifying as an expert. And it may be an issue of whether you are only an expert as opposed to a practicing physician.

MR. FRANKEL: Okay. My objection stands This entire line is scandalous.

THE VTDEOGRAPHER Back on the record at 5:44 p.m.

Q How about outside where you have been retained for the purposes of litigation?

A On occasion.

Q And I believe on a calendar year you were trying to figure that out?

A. Three times, approximately, per calendar year

Q When you testified in 2003, those testimonies were for plaintiffs, defendants, something else?

A. For the plaintiff

Q And we have gotten through your fees for today. Is it fair to say that your fees are somewhere consistent with that when you testify as an expert?

A. Correct.

Q Doctor, the board certification, I have one question. Does that require renewal, if you will, for lack of a better word?

A Correct.

Q And when is the renewal for your certification?

A 2006

Q And what is required of you to apply for that renewal? Is it a certain number of surgeries you have to do, or publications?

A The requirement for board recertification is attendance of continued medical education of

approximately 150 credit hours two years prior to the recertification exam.

There is also a recertification examination which must be successfully completed.

Q And of the 150 hours, do you have those completed of the academic area. I don't know what you called it?

A They are continuing medical education units that - they are requirements by the year 2006, 150 credit hours must be completed.

Q And so what's the time period of the certification that's valid?

A It's a 10-year certification.

Q So in those 10 years, you have to do 150 hours of academic credits?

A No. It's within an approximately three-year period, completion of 150 credit hours.

Q Prior to the recertification?

A. Correct.

Q How many do you have of those? You are currently in that three-year window; correct?

A Yes.

Q How many of those do you have now?

A I would have approximately 60 percent of them.

Q Doctor, you have what's in front of you. what you have told us is the medical chart for Guy Magloire?

A. Correct.

Q And there's been some discussion that is your complete note chart. Is that the complete chart as it pertains to the radiological films?

A No.

Q Which films are not present with regard to that chart?

A The radiographic X rays of June 6, 2002.

THE VIDEOPHOTOGRAPHER Off the record. It's 5:48 p.m.

MR. BROWN. Now, Stan, do you want to take an opportunity to put a two-line statement with regards to that, or would you prefer it be to put an end to it? I'm open for suggestions.

MR. KARSMAN: Well, you established he doesn't have the X rays with him. I would want to, if we can get into it, I would just want to ask him if the presence or the lack of those X rays in any way affects or changes his testimony here today.

But, Steve can do that on redirect, I guess, if he has to.

MR. BROWN: Let me get this straight. I'm not calling into question his opinion of the treatment or course, I'm not getting into that. I wanted to establish prognosis through those with your client, and I'm not going to be able to do that, so I'm not looking to take the credibility on his treatment of your client.

I just want some issues to define the scope of the damage.

MR. KARSMAN: I was thinking maybe we can stipulate that. Why don't we agree on a stipulation on the transcript that through no fault of the doctors or the lawyers, those X rays are not available at this time. And that Dr. Rafiy will agree to make those X rays available.

And I guess, if you want, to provide you with a copy of them. And should you elect at a future date to redepose him on those X rays, that we would stipulate and agree that you have a right to do that.

MR. BROWN: We could state that they will be made available for review and questioning and discussions with the doctor and issues relative to the Plaintiff and the claims in this case.

MR. KARSMAN: Right. I would add to that that you will have to make the arrangements and be financially responsible for any additional deposition of Dr. Rafiy.

MR. BROWN: So noted. Okay. Now, that's all been on the written record. We'll go back on to the videotape.

MR. FRANKEL: Could we just go off the record for a second.

(Discussion off the record.)

THE VIDEOPHOTOGRAPHER: Back on the record. It's 5:52.