

MR. BROWN: You can note your objection Are you telling him not to answer it?

MR. FRANKEL: I'm objecting to the last question you asked, not any subsequent question. But yes, I object to that question I ask you to rephrase it.

THE VIDEOGRAPHER: We are back on the record It's 6:39 p.m.

Mr. Brown.

Q Is it possible, Doctor, that the degenerative changes in your medical opinion that you are seeing in that cervical disk are related at C --

A C5-6.

Q -- are related to other factors including possibly Mr. Magloire's work history and his age, and not related to the cervical fusion?

MR. FRANKEL: It's the same question.

THE VIDEOGRAPHER: Going off the record. It's 6:40 p.m.

MR. BROWN: We can go round and round.

MR. FRANKEL: Well, you asked the same question You didn't ask it with the right wording.

MR. BROWN: You want reasonable degree of medical.

MR. FRANKEL: You have to ask within a reasonable degree of medical certainty, can you state that the degeneration you found...

MR. BROWN: We'll short circuit the question. I'll do it one more time.

THE VIDEOGRAPHER: Back on the record It's 6 40 p.m.

Mr. Brown.

Q Doctor, with regard to degeneration of disks, what are some of the factors which in any person, not specifically this patient, cause degeneration?

A Degenerative factors of disk disease include progressive physiological aging, repetitive axle loading, injuries to the cervical spine, repetitive work stress injuries, compression type injuries to the disk, repetitive action loading from lifting, other concomitant medical conditions,

diabetes, rheumatoid arthritis.

Q And with respect to Mr. Magloire, in your medical opinion is there any other reason for why that disk is showing degeneration as of May 10, 2004, knowing the medical history of the patient, knowing the history of the patient and having treated him?

A Can I have that question reread.

Q Let me rephrase it.

Is there another reason other than what he has presented for the cervical fusion that could be the reason for the degeneration, knowing Mr. Magloire's medical history and past history from being a treating physician?

A Yes. There may be some overlap with his age group.

Q How about, do you know what his profession was?

A Yes.

Q What was that?

A He was a driver for UPS for 25 years and 10 months.

Q And the activities associated and duties associated with a UPS driver, could that be a factor in what you are describing as repetitive work? I don't want to try to rephrase. How did you phrase it about the repetitive? I don't know what you said when you discussed reasons for degeneration?

MR. FRANKEL: Excuse me.

THE VTDEOGRAPHER Going off the record. It's 6:43 pm.

MR. FRANKEL: I object to the characterization of what a UPS driver does How does he know what a UPS driver does?

MR. BROWN: General knowledge.

It's the duties.

MR. FRANKEL: I'm just saying, if you want to establish what a UPS driver does.

MR. BROWN: Well, I can't. But do you know what a FedEx man does?

MR. FRANKEL: Are you implying that he delivers packages? The question is, what does Dr. Rafiy know that a UPS driver does. So you are framing your question of foundation based on factors that are not in evidence. We don't know specifically what a UPS driver does.

Maybe you should have asked him to establish that foundation.

MR. BROWN: I actually don't have to, but we'll go back on.

THE VTDEOGRAPHER Back on at 6:44 p.m

Q Your records note Mr. Magloire's past employment, is that correct?

A. Yes.

Q Does it note or did you have discussion in your treatment with him what his duties were during that employment?

A Yes.

Q What, if anything, do you know about the duties Mr. Magloire did on a daily basis working for UPS?

A The duties as a driver for UPS included the operation and driving of the motor vehicle, and the delivery of parcels to different destinations.

Q Would that be some of the work-related activities that can cause degeneration of disks that you mentioned earlier when I asked you what are some factors that cause degeneration of disks?

A It may contribute.

Q And you discussed his age group as one factor Is there a particular -- more likely when you are 40 in the medical community as opposed to 50, something else that you could explain a little more about what his age factor has to do with the degeneration?

A Typically, after the age of 40 years all the degenerative changes may start to occur.

Q That's in the population at large?

A Correct.

Q Doctor, we discussed the ongoing forward treatment for Mr. Magloire, potential for chiropractic treatment?

A Correct.

Q And why is it that's a potential in the future and hasn't been part of his treatment at this time?

A It's a current modality that can be utilized with patients with neck pain.

Q Even patients who have had a fusion, you would recommend chiropractic care for that patient?

A Subsequent to the fusion, yes.

Q That manipulation after the fusion is completed, is that a word that you could use?

A Correct.

Q Manipulation is then okay?

A It's an accepted treatment modality.

Q And to your knowledge, has Mr Magloire had any chiropractic treatment?

A Not that I'm aware of.

Q And what's the indication as to future orthopedic visits that are going to be needed by Mr. Magloire for his care going forward?

A Future orthopedic treatments include periodic neurologic examination and evaluation for analgesics of meds.

Q What would that periodic spectrum be? Is there something you could say, quarterly or bimonthly, something else?

A Once every three to four months.

Q And there have been only two visits, though, since January 22, 2003, to yourself; is that correct?

A Correct.

Q So, there has been no frequency of visits to you on this number that you have just given us of once every three months?

THE VTDEOGRAPHER: Going off the record, 6:48 p.m.

MR. FRANKEL: I object to the question. It was asked and answered.

MR. BROWN: He just gave me a period the guy should see him and he hasn't.

MR. FRANKEL: You are repeating it. I consider it semihostile, and no facts. You are restating the facts. I'm just saying -- I don't disagree with what you said, I'm just saying it's already been established. You don't have to ask it times.

MR. BROWN: All right.

THE VTDEOGRAPHER: Back on the record. It's 6.49 p.m.

Q. Doctor, do you have a plan to have a future schedule of appointments with Mr. Magloire on this once-every-three-month period?

A Approximately.

Q. Does he have an appointment which would be for August of 2004?

A I recommended a follow-up in four months.

Q Do you know if he made that follow-up?

A I don't know.

Q And what about the records reflecting physical therapy that Mr. Magloire is engaging in at this time, meaning in May of 2004, is there anything in your record that would indicate that he is currently actively engaging in physical therapy?

A No.

Q When was the last time, according to your records, that Mr. Magloire had physical therapy?

A I don't have - I don't know.

Q I would bring it to you, but I don't have the chart in front of me

A I don't have the last therapy visit.

Q Was he in physical therapy, does it reflect in your May 2004 report?

A No. It's not stated.

Q How about the visit before that, which would be January 22, 2003?

A On January 22, 2003, physical therapy was continued.

Q What was the frequency and the time periods they were being continued, once a week, every six weeks?

A Three times a week per six-week intervals.

Q So let's say he starts the beginning of the six-week period January 22, 2003. That brings him to March 2003 for his physical therapy.

From that time period is there any way you could know if he had any physical therapy from March to your last time you saw him?

A I'm not aware if he has.

Q Would it be necessary for you to have written a prescription for him to continue physical therapy after the last session he was engaged in expired?

A Yes.

Q Do you recall the last time you wrote a physical therapy prescription for him?

A January of 2003.

Q Doctor, with regards to the radiological films, do you send them to a radiologist in regards to reading them?

A No.

Q Is that true for all your films or --

A All the films are read by me.

Q All your films are read by you?

A Correct.

Q And in your note, I believe it is November of 2002, you write a script for Viagra for Mr Magloire. Does your record reflect that?

A I'm sorry? What date?

Q November 6, 2002.

A No.

Q Do you have any indication in your file that --

A I did not indicate it.

Q Well, I can ask you questions while we look through the records. Do you recall prescribing Viagra for Mr. Magloire?

A I don't have an independent recollection.

Q Let me ask you some general questions. In your practice, do certain, some patients, obviously male patients, take Viagra?

A Yes.

Q. How about would a patient with, let's say, the same fusion as Mr. Magloire who's prescribed Viagra, is the Viagra and the need for it, erectile dysfunction, necessarily related to the cervical injury?

A. They may be.

Q And what are some of the factors that --

A. Patients with cervical cord injuries can get sexual dysfunction.

Q How about from your recollection of this particular patient ever complaining to you about erectile dysfunction issues?

A Yes.

Q Do you have a recollection of whether or not you related those deficiencies to his injuries

associated with the January 2002 accident?

A I did not determine a cause or relationship.

Q How about any recollection that a urological consult was recommended by yourself?

A On my last evaluation I recommended a urological follow-up.

Q. And that's meaning May 10, 2004?

A Correct.

Q Other than that, had you ever recommended a urological consult?

A No.

Q And although you can't find the note, just to clarify for the record and myself, you don't have an independent recollection of prescribing the prescription for Mr Magloire?

A I don't recall whether I did or did not.

THE VIDEOGRAPHER: We're going off the record, it's 6:57 p.m.

(Discussion off the record.)

MR. FRANKEL: The Plaintiff will consent to a request to -- if the Defendant requires -- a deposition of Dr. Rafiy subject to them paying Dr. Rafiy's fee and obtaining the services of a court reporter and videographer. That's all.

MR. BROWN: I think we discussed that agreement. And obviously, we would have to get the videographer and court reporter. And we would discuss the reasonable expert fee.

Is it fair to say versus \$4,000 and we can work with the doctor?

MR. FRANKEL: Yes, that's fair. In the event the magistrate judge requires a continuance, we'll help in any way possible so that you can conduct a further deposition.

MR. KARSMAN: We'll work that out. Yes.

MR. BROWN: Just before I do allow you redirect, it's been agreed, and if there are additional questions, the Defendants want some of which the records are not present, so the questioning cannot be conducted.

Obviously, in the future, if the deposition of Dr. Rafiy comes around again to the issue, the issues are covered, the Defendant will not attempt to belabor points encumbered by this deposition.

MR. FRANKEL: Yes. I would say we would object strenuously.

MR. BROWN: Yes. However, you cannot put limitations at this time on what the scope is based upon the answers of the doctor I am not going to ask him C V background, history, you are right.

MR. FRANKEL: But, the purpose of the further deposition is to discuss the June 6, 2002, the July 2, 2002, and the May 10, 2004, X rays, and any other tangible issues.

MR. BROWN: Associated with those X rays and treatment of Mr. Magloire.

MR. FRANKEL: Yes. And the Plaintiff's consent.

I just have a couple brief follow-up questions. We have to go back on.

MR. KARSMAN: Let the record show that this is redirect.

THE VIDEOGRAPHER: We are back on the record. It's 7:08 p m., continuing the deposition of Dr. Rafiy.

Mr. Frankel will begin his redirect.

MR. FRANKEL: Thank you very much.

REDIRECT EXAMINATION

BY MR. FRANKEL

Q Dr. Rafiy, just a couple of brief follow-up questions in redirect.

Does the failure to have the June 6, 2002, and July 2, 2002, X rays in your file right now change your opinion on any issue that has been discussed today?

A No.