what the surgeon is recommending to do.

Q. And do you have an opinion as to a reasonable degree of medical certainty as to the permanency of his lower back injury?

A. Yes, I do.

Q. And what is that?

A. I believe, you know, you're not going to reverse the changes that you see on MRI. Even if you did surgery, you're manipulating the anatomy to make him have less pain, so whatever is done for him surgically would not restore him to normal, so whatever consequential injuries he has, I believe it's going to result in permanency.

Q. Okay. And do you know -- do you have an opinion as to a reasonable degree of medical certainty as to whether Mr. Molina would be able to perform any sort of manual labor at this time?

A. I do.

Q. And what is that?

A. I don't think he's fit for manual labor.

Q. Okay. Do you think that he could ever be fit for manual labor in the future?

A. In my opinion, no.

MS. BORDEN: Thank you, very much, Dr. Dassa.

CROSS-EXAMINATION

BY MR. LAQUERCIA:

Q. Good afternoon, Doctor. Would you mind if I remove this exhibit?

A. Not at all.

Q. Now, Doctor, you just recently saw the plaintiff in this case, correct?

A. That's correct.

Q. You're not treating him at this particular time?

A. I am not.

Q. When you examined him, it wasn't for the purposes of taking him on as a new patient so you could treat him?

A. That's correct.

Q. Before you took the stand, you said you reviewed a number of records.

Did you also in those records review the hospital record for Westchester Square Medical as to what the plaintiff claims happened to him?

A. I did review those records, but after the report was prepared --

Q. But you did review them?

A. Yes.

Q. And you agree with me the plaintiff said that he fell on steps, right?

A. Yes.

Q. All right. And I believe the records and other reports that were given or rather were made about the

plaintiff's accident speak to his hitting his right shoulder against the rail, correct?

A. Yes.

Q. All right. Now, you have never been asked the question, hypothetical or otherwise, as to whether that type of impact, that is a man who slips and falls on a staircase and hits his back against steps and his right shoulder, against a rail, would cause the injuries that he complained of, correct? I mean, today, you have haven't been asked?

A. That specific mechanism that you described?

Q. Yes.

A. It wasn't asked me in that way.

Q. So can we assume that that specific mechanism is the basis of any of your opinions given here today, that is specifically --

MS. BORDEN: Objection.

Q. -- that is specifically what the plaintiff testified in this court happened to him, that he fell, rather he slipped, his feet went out from under him, and he hit his back on steps and shoulder on the rails, correct?

MS. BORDEN: Objection as to the characterization of testimony.

THE COURT: If the doctor understands the question, he can answer it.

A. I don't understand the question.

Q. Well, Doctor, you've given opinions here today, but you were never asked the specifics about the testimony that was given in this court as to how the accident occurred, correct?

A. I mean --

Q. Yes or no, correct?

A. Today -- again, I know the details that you're describing. It was communicated to me by the patient. Was the counsel's direct examination did she go through that in detail? No, she did not.

Q. No. So you agree with me you've never been asked whether or not an accident such as this, that is where a person slips with his feet out descending stairs at no particular speed could cause a tear of the supraspinatus and the labrum?

A. I was not asked that in that way, no.

Q. And the same thing in terms of his hitting his back against the steps.

The testimony in this courtroom is that when he slipped, he fell down on the steps, he fell backwards as he was descending the staircase; is that correct?

A. That's correct.

Q. Now, can you tell the jury what a trauma is, a traumatic injury?

A. A traumatic -- what is traumatic --

Q. What a traumatic injury is?

A. Well, basically trauma is an event that causes or

inflicts tissue damage or injury to the body.

Q. All right. Now, in any of the reports that you read or any of the statements that were taken of the plaintiff describing how he was hurt, what is your understanding of the trauma that would cause the tears that you say were repaired, and we know according to the operating report, repaired to the right shoulder of the plaintiff by Dr. Ehrlich?

A. I think the cause of the trauma was the fall he sustained on the steps.

Q. And it was hitting his right shoulder, hitting the rail, handrail caused the tear?

A. Again, in specifics, if a person falls, I mean, that is one of the components that could have caused the injury is striking the shoulder. Also, he had described trying to catch himself, and had a wrenching of the shoulder before he struck the shoulder.

So there's several components of what he describes to me as his fall.

Q. Tell me where in the report, the hospital report for Westchester Square there's any mention written by any triage nurse or treating doctor when he was examined the day after the occurrence where he said he wrenched his shoulder?

A. Again, I didn't see any of that in Westchester Square.

Q. And as you sit here today, because you reviewed all of the medical reports, Medalliance and all that stuff and

Surgicare and all that stuff, is there any place written where he said he wrenched his shoulder while he was falling as he was holding onto the rail of this staircase?

A. Specifically I didn't see in anything else.

Q. So what you just said, anything else, how something could make a tear like that would be a general hypothetical that it is possible that if a person is holding onto something and if he wrenches his shoulder, he could have a tear such as that, but as far as you know, there's never been any person, any medical practitioner, nurse, doctor, or surgeon who has ever written down anywhere that that's how this occurred; is that correct?

A. That's incorrect.

Q. Where is it?

A. Because I examined the patient, took a history, that's the history he provided to me.

Q. Can I ask you, may I interrupt, where in your notes does it show you wrote down that he told you that he wrenched his shoulder while holding onto the rail?

A. Again, I just recently saw him, so I have an independent recollection of that. I did not put those specific details in my report.

Q. I'm sorry. Would you not agree with me that writing down what would be the trauma that actually occurred, that actually happened and actually caused this accident would be a very material factor for you in establishing how this man

suffered the injury that you said was treated by Dr. Ehrlich?

A. I agree with you, and I did state that he had a slip and fall. Again, when people fall, it's not very accurate as they would describe the entire history of the fall. What he did describe to me in the space where I'm seeing him as a medical expert, I wasn't providing treatment for him.

If you look at Dr. Ehrlich's notes, he does speak to the fall, slip and fall as being a causative agent for it. There's no other pertinent history other than this fall as far as the specific whether he twisted to the right or twisted to the left, if he tumbled, he fell down. And that's significant enough history correlating with his MRI finding that allows me to draw those conclusions.

Q. All right. Now, you're drawing conclusions knowing that Dr. Ehrlich is not going to testify about what he found and what his reasons are as to why this person needed the surgery, correct?

MS. BORDEN: Objection.

THE COURT: Sustained.

Q. Well, do you know if Dr. Ehrlich is going to testify to what you said he made his findings were?

MS. BORDEN: Objection.

THE COURT: You can answer that.

A. I know Dr. Ehrlich is not testifying.

Q. Okay. So, Doctor, one of the things I didn't see in

your report or two things, the height and weight of the plaintiff in this case, correct?

A. That's correct.

Q. Would you agree with me that a person's height relative to a person's weight is significant with regard to degenerative changes in the person's spine from the cervical spine on down?

A. Yes.

Q. All right. Indeed, would you agree with me that the spine is carrying the upper half of the body and all of the weight of the body?

A. Yes.

Q. Okay. Now, do you know the height of the plaintiff?

A. I don't.

Q. Did you think it was significant to take the height of the plaintiff?

A. No.

Q. In any of the report, did you happen to see the height of the plaintiff being five-foot nine?

A. No.

Q. What about the weight of the plaintiff? Did you know that it's reported in the hospital reports that his weight was approximately 250 pounds, more or less?

A. I do recall seeing that.

Q. Now, would you agree with me that that places the

plaintiff in the category of being overweight?

A. For his height, yes.

Q. And would you agree with me, too, that being overweight would be more than a normal spinal column could handle in day-to-day work that a person does, correct?

A. Can you repeat that?

Q. Would you agree with me that being overweight would put more than the normal strain on the spinal column?

A. Again, if you're heavier than what you should be for your height, it's more stress across all your joints.

Q. And those little things you talked the about, the disks, you talked about thinking about a jelly doughnut, you squeeze, what have you.

Well, isn't it true, Doctor, that if you're working as an operation engineer, which the plaintiff testified that he did, that the twisting and turning and lifting with extra weight on your body would be an added stress and/or compressor on all of the disks in the body?

A. Yes.

Q. All right. And when a person gets to middle age, any person, isn't it true that there is typical arthritic changes that occur just from aging, correct?

A. Yes.

Q. Couple that with a person's weight, wouldn't you agree with me that the plaintiff's weight, itself, gives -- has given

rise to the degenerative changes found in the X rays at Westchester Square Medical?

A. I think it's a combination of his occupation, it's a combination of the weight, it's a combination of his function for 50 years.

Q. And all of these things happening before this fateful night when he slipped and fell going down the stairs, correct?

A. Yes.

Q. All right. So essentially, it's cumulative, correct?

A. If you're speaking of the degenerative changes, yes.

Q. Yes, sure. And that would be neck, back, lower spine, the whole thing, correct?

A. The whole thing.

Q. Now, if you were to please compare the operative reports of Dr. Ehrlich, which are now in evidence that you referred to, the first one for the right shoulder. The postoperative diagnosis shows right shoulder traumatic subacromial impingement, correct?

A. Yes.

Q. Supraspinatus tear and rotator cuff surgery?

A. Yes.

Q. Now, if you would like at the second report, which was done years after the occurrence, date of operation 21st of October in 2010, the postoperative diagnosis was left shoulder subacromial impingement with no mention, whatsoever, of trauma,

correct?

A. Yes.

Q. Now, Doctor, assume that the testimony has been that since February of 2009, the plaintiff hadn't done any work. He hadn't returned to his job since that time, he hadn't worked any other place, and he's essentially testified as I understand it that he's been at home.

Now, you were given an opinion that the surgery for the left shoulder was because of excessive use in wear, correct?

A. Yes.

Q. Now, do you have a history that you took of this plaintiff before you did your report, before you came here today about what exactly he did do if he wasn't working that would create such excessive tear that it would create as Dr. Ehrlich said left shoulder subacromial impingement? What happened?

A. Well, again, as I described before, with a rotator cuff tear and labral tear that is repaired, you can absolutely not move your arm for three months, your arm has to stay in a sling, which means even to do any type of activity of daily living, normal hygiene, having to care for himself, reach for things in the house, you know, if you're solely dependent upon one extremity, you can just with that activity incite the kinds of findings that Dr. Ehrlich found on those --°on his operative report.

Q. After patients are released from hospitals, they're

given instructions, correct?

A. Yes.

Q. After surgery.

And they're told to take medication, analgesics to stop the pain and to mind what they do.

Do you know of any instructions that were given by Dr. Ehrlich or any other treating physicians after the first surgery telling him that he had to care and watch how he used his left hand and arm?

A. General. I did not specifically see Dr. Ehrlich's postoperative instructions, but his standard, it is standard of care even when I do rotator cuff surgery, there is absolute prohibition of raising your arm above shoulder height actively.

Q. The left arm, you're talking about any instruction to the left arm to protect the left arm for overuse, so that you would be required to go in and have the impingement surgery?

A. Again, no, there's -- it's not practical, because you need to have some arm to care for yourself. So, again, most patients don't develop overuse, but there are certain preexisting conditions in his shoulder that made him susceptible to that.

Q. I see. And would those preexisting conditions of his shoulder be the fact he had arthritis in that left shoulder?

A. I think that's one component of it, yes.

Q. I think arthropathy, doesn't that speak to having

degenerative condition in the left shoulder?

A. Yes.

Q. And would you agree with me that the shoulders are bilateral, correct?

A. Yes.

Q. And people, whether they work, whether they're at play, whether they're sleeping, they're going to use both of their shoulders bilaterally constantly, correct?

A. Yes.

Q. So would you agree with me that if someone was going to have arthropathy in the left shoulder, there had to be already preexisting arthropathy in the right shoulder, as well?

A. Yes.

Q. Okay. I believe you testified, Doctor, that the plaintiff would have a fair prognosis for cervical spine, that is the neck?

A. Yes.

Q. Okay. And I believe you testified that he would have a moderate restricted range of motion, correct?

A. Yes.

Q. All right. Now, with regard to the work that he could do, all right, I believe you testified the Plaintiff could -- cannot do strenuous activity because of your findings; is that right?

A. Yes.

Q. But doesn't that also mean he can't do other work that is not strenuous?

A. Again, it would depend upon --

Q. Yes or no?

A. It depends. It's not a -- I can't answer that question yes or no. It's not a yes or no answer. I mean it's job description dependent.

Q. All right. Job description dependent.

So in the universal possibilities of probabilities of jobs out there, are there not jobs that do not require strenuous activity?

MS. BORDEN: Objection.

THE COURT: Overruled. You can answer.

A. Are there jobs?

Q. Are there jobs that do not require strenuous?

A. Yes, there are.

Q. So in so far as the plaintiff might qualify to do a non-strenuous job, he would be able to do that job and he would not be considered to be disabled from that kind of job, correct?

A. Again, it's job description dependent because the issue is not only strenuous activity.

Q. You said? I'm sorry?

A. Strenuous activity was really specifically addressed to his going back to work as a laborer. I don't feel he's functionally capable or should be doing that. There are other

issues when it comes to working that you have to assess when it comes to a lumbar spine condition. Even assume that sitting down in a chair is a position of -- that's a good position for a person with a disk herniation, it's actually the worst position for a disk herniation, so when I say it has to be job description dependent, will there be reasonable accommodations made for the patient to limit his sitting not more than 20 minutes at a time, to have him get up, move around, will there be accommodations for him possibly to be able to lay down during the course of the day, because that's the only position that adequately releases pressure on the disk spaces.

So is it in the hypothetical conceivable that he can do some type of work, yes, but it's job description dependent.

Is there a job out there that will allow him to do non-strenuous work, say, within the guideline of not sitting for prolonged period of time, allow him to lay down and conceivably allow him to work on medication he has to currently take for pain, again, I wouldn't have a person doing sedentary work in my office under those conditions.

Q. All right. You'd agree with me, though, that if a person can do not strenuous work, he's not totally disabled?

A. By definition, if you can do some type of work, you're not totally disabled.

MR. LAQUERCIA: Nothing further. Thank you, Doctor.

MS. BORDEN: I just have one quick follow-up.

REDIRECT EXAMINATION

BY MS. BORDEN:

Q. Doctor, you were asked about the degenerative changes in Mr. Molina's neck and back being cumulative in nature.

I would just like you to clarify for the ladies and gentlemen of the jury, what was degenerative in his neck and back versus what was traumatic as you read on the MRI's?

A. Well, you know, again, there were findings of the joints, the facet joints, the small joints of the spine, the vertebral bodies, there's some irregularities, which is basic wear and tear of the joint. There was some osteophyte formation.

These are all things that occur over time, and if you want to get into the specifics of his weight and the type of work that he did, you would normally find that in a person that's overweight that does strenuous work. There are other things in the spine like disk herniations, again, you have to tear tissue to have a disk herniation. You don't generally see disk herniations just with arthritis. Usually you'll see it with the trauma superimposed upon a preexisting condition like degenerative changes, and in this particular case, the only trauma that, again, is suggestive is the fall.

So, you know, in my opinion, and reviewing the MRI, there's unquestionable degenerative finding, but there are also

disk injuries that, again, if you told me he had no history of trauma, that I can say yes, everything there is from preexisting problems, but you had a functional person that did a strenuous occupation up until this event, and now he's not capable of doing that.

So there was some event that occurred to cause those changes in his spine that were not degenerative, that's the basis of my conclusions.

Q. And those bulges and herniations that you found, you believe those are traumatic in nature, correct?

A. Yes.

MS. BORDEN: Thank you. No further questions.

MR. LAQUERCIA: Nothing further.

THE COURT: You may step down. Thank you, Doctor.

(Whereupon, the witness was excused.)

THE COURT: Okay, ladies and gentlemen, we're going to break at this time. I remind you, do not discuss the case among yourselves, do not allow anyone to discuss the case with you. Do not do any independent research.

I'll see you back here tomorrow morning, 10:00.

THE COURT OFFICER: All rise, jury exiting.

(Jurors exited the courtroom.)

MR. LAQUERCIA: Good night, your Honor.

THE COURT: Okay. Good night.

(Whereupon, court is recessed and the case adjourned to Tuesday, October 25, 2011 at 10:00 a.m.)

A-274

TRANSCRIPT OF PROCEEDINGS, DATED OCTOBER 25, 2011 [A-274 - A-325]

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF BRONX: CIVIL TERM PART IA-29

----------X

LUIS MOLINA,

Plaintiff

Index No.

-against-

303734/2009

THE NEW YORK CITY TRANSIT AUTHORITY,

Defendant.

----------X

851 Grand Concourse
Bronx, New York 10451
October 25, 2011

B E F O R E:

HON. ROBERT E. TORRES, JSC, and a jury of six plus two alternates.

A P P E A R A N C E S:

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JANET CAMPOLO, RPR
Senior Court Reporter

PROCEEDINGS

(Whereupon, cleaning records were marked Defendant's exhibits B and C for identification.)

THE COURT: On the record, please.

MR. LAQUERCIA: If it please the Court, good morning, your Honor.

THE COURT: Good morning.

MR. LAQUERCIA: On behalf of the defendant, New York City Transit Authority, I had marked for identification a series of documents stapled together which purport to be and which will be offered as the summer and winter schedules in the year 2008 for several subway stations, one of which is Hunts Point Avenue station where plaintiff's accident occurred.

I have -- I received a subpoena, what purported to be a subpoena by counsel seeking documents, cleaning schedules and what have you, and I was told by Mr. Gerald Fraizer, F-R-A-I-Z-E-R, who is the claims manager for County of Bronx just last evening in front of 130 Livingston Street about 6:30 p.m., that this is all that they have. That is all that's kept as a record. Mr. Fraizer is in the court and he will be in court at 10:00 today, if not, unless I'm mistaken, but certainly if it's necessary and you need a further foundation for these things, we can offer this subject to connection.

Outside or actually in the courtroom today