

1 Dr. Schuster - Plaintiff - Direct
 2 like, that is the issue. Okay? Totally ignored -- I mean,
 3 he has my report. Doesn't even really deal with it in any
 4 type of form. There are two things here also. The guy is
 5 sixty-one years old. He hasn't worked in five years.
 6 What happens to people who have these physical
 7 limitations, psychiatric problems, chronic pain, these
 8 difficulties? What is the likelihood of him getting hired?
 9 What is the likelihood of finding full-time work?
 10 Statistically.
 11 Well, you look at the statistics on this --
 12 MR. JOSEPH: Objection as to statistics, your
 13 Honor.
 14 THE COURT: Overruled.
 15 MR. JOSEPH: Not admissible, your Honor.
 16 THE COURT: Overruled. Go ahead.
 17 Q. Go ahead.
 18 A. You --
 19 Q. You could answer.
 20 A. The people with work disabilities work
 21 significantly less than people who do not have disabilities,
 22 particularly elderly people with disabilities. And he has
 23 multiple disabilities. So first question here would be,
 24 like, if he is able to work on a predictable regular basis
 25 and find a job that will pay him \$14.00 an hour, what are
 26 the chances of him finding work, sustaining work and -- that

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 2 This is basically correct.
 3 THE COURT: That is sustained.
 4 A. Whatever.
 5 MR. JOSEPH: Judge.
 6 THE COURT: Sustained.
 7 Q. Dr. Schuster, assuming that when Dr. Barra turned
 8 twenty-one years old, he joined the operating engineers and
 9 began a career as an operating engineer getting all the way
 10 to crane operator in New York City and Florida. And then
 11 for the last four years before his accident he was working
 12 for a company known as Skanska.
 13 Assuming on August 8th, 2010, Joseph Barra fell off
 14 his crane due to a missing step that was approximately four
 15 feet off the ground, while he was coming from up above,
 16 landed on the right side of his face and his right shoulder,
 17 causing serious injuries including a diffuse axial injury of
 18 the brain, concussion, and post-concussion syndrome, in
 19 addition to rotator cuff tear and herniated discs in his low
 20 back and neck. Assuming that Joseph Barra has already
 21 undergone surgery to his right shoulder where Dr. Cushner saw
 22 a complete tear in the rotator cuff with his own eyes.
 23 Assuming that Joseph Barra's residual symptoms
 24 including confusion, headaches, delayed mental action, memory
 25 loss, depression, low levels of local pain at base of his
 26 lower back, shooting pain into his eye, stiffness and

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 2 will be significantly reduced and totally ignored. The
 3 thing he does put in there is that construction workers work
 4 less than people who are not construction workers. So that
 5 is generally true, because construction workers who are
 6 dealing with heavy, heavy type of work tend to leave the
 7 work force earlier than people like who have sedentary types
 8 of job like a crane operator. That is completely
 9 irrelevant. The stat he needed to use, at age sixty if you
 10 are still in construction, you are a high school grad, how
 11 many years of work life are left for you to do? He doesn't
 12 say -- he just says that construction workers as a group
 13 work less than people who are not construction workers.
 14 But that doesn't tell you -- I mean, the analogy
 15 that he said isn't like -- when a man is born the average
 16 life expectancy is seventy-two years and woman is seventy-
 17 nine years approximately. If the guy is seventy-two years
 18 old he is not dead. If you live to seventy-two you are
 19 likely to live another eight or ten years if you're a male.
 20 I don't know the exact -- that is the idea. So that is the
 21 same thing you have to look at
 22 MR. JOSEPH: Objection, your Honor. He is not
 23 citing any tables. He just said he is basically
 24 guessing at those numbers.
 25 THE COURT: Overruled.
 26 A. These are right -- these are the work life tables.

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 2 sporadic pain in his surgically repaired right shoulder,
 3 which make tasks like judging, remembering information and
 4 completing tasks and maintaining consistent physical effort
 5 for eight consecutive hours virtually impossible.
 6 Assuming that Joseph Barra is unable to concentrate
 7 for extended periods of time and extreme difficulty spelling
 8 words that he used to handle with ease. Assuming that Joseph
 9 Barra's treating doctors including his orthopedic and
 10 neuropsychology have opined with a reasonable degree of medical
 11 certainty that Mr. Barra will never return to his previous
 12 employment as a crane operator or operating engineer as a
 13 result of his injuries. Assuming that the National
 14 Commission for the certification of crane operators, the
 15 Federal Licensing Commission who issued Joseph Barra's
 16 license, disqualifies crane operators who have shown evidence
 17 of physical defects or emotional instability that could
 18 render a hazard to the operator or others.
 19 Assuming that defendant's own expert witness, Peter
 20 Capotosto, stated in his vocational report that as a result
 21 of the injuries sustained by Mr. Barra he could no longer
 22 perform any construction work.
 23 Assuming all that I stated, do you have an opinion
 24 within a reasonable degree of vocational rehabilitation
 25 certainty as to what Joseph Barra is capable of doing in the
 26 competitive work force?

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 2 MR. JOSEPH: Objection. Lack of foundation.
 3 THE COURT: Overruled.
 4 A. I do.
 5 Q. What is that opinion?
 6 A. He is not competitively employable.
 7 Q. And, Doctor, do you have an opinion to a reasonable
 8 degree of vocational rehabilitation, psychiatric and
 9 neuropsychologic certainty as to the cause of Mr. Barra
 10 being unable to work?
 11 A. I do.
 12 Q. What is that opinion?
 13 A. The accident and its sequelae.
 14 Q. Thank you, Doctor.
 15 MR. MORGAN: I have nothing further.
 16 THE COURT: Let's take a break before we
 17 proceed with the Cross-examination of the witness. Take
 18 five minutes. Do not discuss this case amongst
 19 yourselves, or with anyone else. Five minutes.
 20 COURT OFFICER: All rise. Jury exiting.
 21 (Whereupon, the jury panel exited the
 22 courtroom.)
 23 THE COURT: All right.
 24 MR. JOSEPH: Your Honor, during this break
 25 plaintiff's sister who was a witness in this case was
 26 weeping in the hallway. I understand this could be very

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 2 All right?
 3 MR. MORGAN: Okay.
 4 THE COURT: All right.
 5 MR. JOSEPH: My other application, your Honor,
 6 is he mentioned -- the witness, Dr. Schuster, mentioned
 7 workers -- he didn't just imply it, now he said it.
 8 THE COURT: He did.
 9 MR. JOSEPH: That should not be -- so now the
 10 jurors know there is Worker's Compensation involved.
 11 And they are not supposed to know that. I am asking for
 12 a mistrial.
 13 THE COURT: Well, I am denying it. I believe
 14 that the Court promptly sustained the objection, struck
 15 the statement from the record and directed the jury to
 16 disregard it and dismiss it from their minds.
 17 It was blurted-out inadvertently by the witness
 18 and I don't think it rises to the level of the granting
 19 of a mistrial. Exception is noted for the record.
 20 MR. JOSEPH: Thank you.
 21 MR. MORGAN: Thank you, your Honor.
 22 THE COURT: We are ready?
 23 MR. JOSEPH: Yes.
 24 THE COURT: Let's go. Let's get them. Doctor?
 25 (Whereupon, the witness retakes the stand at
 26 this time.)

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 2 emotional as well. But the problem is the jurors could
 3 see her.
 4 THE COURT: Okay.
 5 MR. JOSEPH: It's unfortunate because of the
 6 way we are situated in the courthouse. It's a small
 7 courthouse. I get it.
 8 THE COURT: Yes.
 9 MR. JOSEPH: But if she is going to be
 10 emotional in an area where the jurors could see her, I
 11 would ask that she leave the courthouse when she has
 12 these emotional issues. I don't want to taint the jury
 13 that way.
 14 THE COURT: You have to speak with the
 15 plaintiff's sister. And let her know that it's -- it's
 16 a touchy situation. We do not -- just like I tell them
 17 not to discuss the case among themselves or with anyone
 18 else, and like I said at the beginning of the trial,
 19 there should be no contact. You can send a message by
 20 your conduct.
 21 So to try to avoid any reason for the -- for a
 22 mistrial, I understand that emotions, at times you have
 23 no control over them, but to the extent that there is
 24 going to be some showing of emotion, it should not be
 25 done in front of the jury. And if it could not be
 26 controlled, maybe go outside for that.

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 2 COURT OFFICER: All rise. Jury entering.
 3 (Whereupon, the jury panel entered the
 4 courtroom.)
 5 THE COURT: All right. We are continuing with
 6 the trial. We are now on Cross-examination of the
 7 witness by the defendant.
 8 You may proceed.
 9 MR. JOSEPH: Thank you.
 10 CROSS-EXAMINATION
 11 BY MR. JOSEPH:
 12 Q. You are not a medical doctor; isn't that correct?
 13 Yes or no.
 14 A. That's correct.
 15 Q. And you said that you relied upon medical records
 16 and medical reports of other people to determine Mr. Barra's
 17 physical limitation; is that correct? Yes or no.
 18 A. Well, partially. Other things as well, but
 19 partially, certainly.
 20 Q. And, well, you commented about his physical
 21 limitations, right?
 22 A. I don't think I actually did.
 23 Q. Okay. Well, so his inability to work has nothing
 24 to do with physical limitations, is that what you are
 25 telling us? Yes or no.
 26 A. No, I am not saying that.

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1 Dr. Schuster - Plaintiff - Cross
 2 Q. So did you rely upon the records and reports of
 3 medical providers to make a determination about his physical
 4 limitations? Yes or no.
 5 A. Partially, yes. Of course.
 6 Q. Okay. And I just want to make sure, you said you
 7 are a vocational rehabilitation counselor, right?
 8 A. No.
 9 Q. You are not?
 10 A. No. I am -- I -- my job is more of an evaluator
 11 than a counselor.
 12 Q. Well, you weren't retained in this case to attempt
 13 to get Mr. Barra back to work; isn't that correct? Yes or
 14 no.
 15 A. That is true.
 16 Q. And you never provided him with any vocational
 17 rehabilitation services; isn't that correct? Yes or no.
 18 A. I can't answer the question the way you phrase it.
 19 If you let me explain I will be happy to do so.
 20 Q. You were retained by his lawyer; isn't that
 21 correct? Yes or no.
 22 A. Correct.
 23 Q. You were retained by his lawyer not to get him back
 24 to work, but to provide expert testimony in this case; isn't
 25 that correct? Yes or no.
 26 A. Maybe. That is --

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1 Dr. Schuster - Plaintiff - Cross
 2 Q. Maybe?
 3 A. Because you got to let me explain it. I can't
 4 answer yes or no the way you told it. If you allow me to
 5 talk about it --
 6 Q. You could do that if Mr. Morgan wants to do
 7 Redirect.
 8 A. Okay.
 9 Q. You were not retained to help find him a job; isn't
 10 that correct? Yes or no.
 11 A. I would say -- I was not retained for that purpose,
 12 that is correct. That is yes.
 13 Q. And each state has a state-run vocational
 14 rehabilitation program; isn't that correct? Yes or no.
 15 A. Of course.
 16 Q. You are saying of course. The jury doesn't know
 17 that?
 18 A. Yes, of course. And I work for the one in New
 19 York.
 20 Q. And right now the New York State program, as you
 21 said, is called ACCES-VR; isn't that correct?
 22 A. It is.
 23 Q. And ACCES-VR helps individuals with a variety of
 24 disabilities to help find a job; isn't that correct? Yes or
 25 no.
 26 A. Yes, true.

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1 Dr. Schuster - Plaintiff - Cross
 2 Q. And they provide free services to those individuals
 3 to help find a job; isn't that correct? Yes or no.
 4 A. Depending upon other circumstances, yes, in
 5 general.
 6 Q. And you did not refer Mr. Barra to ACCES-VR; isn't
 7 that correct?
 8 A. Absolutely, correct.
 9 Q. And, now, the State of Florida where he now resides
 10 has a similar program through the Division of Vocational
 11 Rehabilitation, also known as DVR; isn't that correct? Yes
 12 or no.
 13 A. It is.
 14 Q. And Florida DVR provides the following services,
 15 isn't this correct, diagnostic vocational reevaluation,
 16 vocational guidance and counselling ongoing, career
 17 inspiration and planning services, vocational skill
 18 training, academic remediation and training, job seeking
 19 skills and training, job placement services which could
 20 include the -- which could include Office of Financial
 21 Incentives to potential employers, identification and
 22 implication of work place assistive technology, other job
 23 accommodations, job coaching and job retention services;
 24 isn't that correct? Yes or no.
 25 A. Seems about right. Pretty much the same thing
 26 through all the states.

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1 Dr. Schuster - Plaintiff - Cross
 2 Q. You did not refer Mr. Barra to the Florida Division
 3 of Vocational Rehabilitation; isn't that correct? Yes or
 4 no.
 5 A. That is correct. I will be happy to explain why I
 6 didn't, but that is correct.
 7 Q. You could do that if you want with Mr. Morgan.
 8 A. I shall, okay.
 9 Q. And the Florida Department of -- Florida DVR also
 10 has something called Employ Florida, right?
 11 A. Has what?
 12 Q. Has a program called Employ Florida?
 13 A. I don't know.
 14 Q. What do you mean you don't know? You -- I saw on
 15 this life care plan that you got, you have an office down in
 16 Miami.
 17 A. No, I don't have an office in Miami. There is a
 18 sister office in Miami. I don't work out of the Miami
 19 office.
 20 Q. So you don't know anything about the services down
 21 there?
 22 A. I know something about the services, but I don't
 23 know anything that specific about Florida DVR. But I will
 24 take your word for it that they have that service, that is
 25 fine.
 26 Q. And does Employ Florida link all the states work

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 2 force services, both state and local to provide a network of
 3 job placement resources and services? Yes or no.
 4 A. I presume it does. I did not research that
 5 directly but I am taking your word for it that you took this
 6 off of a job site and that is what it says.
 7 Q. Wait a second, sir. If you are here to testify as
 8 an expert about what he can and can't do, shouldn't you know
 9 what is available to him? Yes or no.
 10 A. I know -- I can't tell you what is available to him
 11 in every state throughout the union. That is ridiculous.
 12 Certainly I could tell you there are VR services available
 13 in Florida, in New York. If you are an appropriate
 14 candidate for those services. And that is the issue.
 15 Q. Well, sir -- Doctor, nobody is asking you about the
 16 fifty states of the union. He didn't move to Alaska. He
 17 didn't move to Hawaii, Los Angeles or any of those places.
 18 You knew he moved to Florida. You knew that when you wrote
 19 your reports, did your assessments; isn't that correct? Yes
 20 or no.
 21 A. That's correct.
 22 Q. And Florida has something called one-stop centers
 23 located right near his sister, don't they?
 24 A. I didn't investigate specifically what they have in
 25 Florida VR services.
 26 Q. Okay.

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1 Dr. Schuster - Plaintiff - Cross
 2 A. It was premature to do that.
 3 Q. All right.
 4 A. At the very least.
 5 Q. Did you not refer him to the Florida Department of
 6 Labor, Employ Florida program; isn't that correct?
 7 A. Absolutely not.
 8 Q. Sir, I'd like you to assume that this jury has
 9 heard, or will hear testimony that -- well -- withdrawn.
 10 Mr. Barra told you when you met with him that he
 11 was -- that he couldn't drive a car?
 12 A. No. He drives nervously. He could drive slowly,
 13 but very uncomfortably.
 14 Q. So he could drive?
 15 A. Can he drive.
 16 Q. I'd like you to assume that this jury has heard or
 17 will hear testimony showing that Mr. Barra drives a car,
 18 Mr. Barra walks his dog to a dog park each day and the
 19 distance is approximately eight-tenths of a mile in each
 20 direction, regularly goes to the gym where he uses Nautilus
 21 type equipment to lift weights with his arms and shoulders,
 22 that he lies on his back on a bench, puts his hands on a bar
 23 above him and raises his legs above his head, that he walks
 24 on a treadmill, that he throws a medicine ball to the
 25 ground, both to the left and to his right, that he is able
 26 to lie down backwards on a large yoga ball, and stretch his

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1 Dr. Schuster - Plaintiff - Cross
 2 back, able to do exercises with both arms called combat
 3 ropes. I would like you to further assume that this jury
 4 heard testimony that Mr. Barra went on vacation at least
 5 five times since the alleged accident. He has been on at
 6 least two cruises, travelled to Sedona, Arizona, Costa Rica
 7 and Mexico.
 8 Are these activities consistent with what your
 9 understanding was of Mr. Barra's capabilities when you wrote
 10 your reports? Yes or no.
 11 A. Physical capabilities, they were consistent.
 12 Q. He could do all those?
 13 A. He has a personal trainer. Of course he was going
 14 to the gym all the time. Of course he walked the dog. He
 15 told me he was driving. The issue is not -- I think I
 16 already said the issue is not his physical limitations. If
 17 it was just his physical limitations I would refer him to
 18 the VR services. I do this at least one-third of the time
 19 with the legal cases that I get. We send it off and send
 20 these people off to OVR or VESID or whatever state they are
 21 in. I do it all the time. He is -- it's not applicable to
 22 this gentleman, not because of his physical limitations.
 23 Q. What percentage of your practice is devoted to
 24 providing assessments, opinions and testimony for attorneys
 25 for litigation?
 26 A. Okay. About up till about three years ago, eighty,

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1 Dr. Schuster - Plaintiff - Cross
 2 eighty-five percent of the people I would see had nothing to
 3 do with litigation.
 4 Q. Right.
 5 A. Three years ago -- I will be seventy next month.
 6 Three years ago I had another psychologist working with me,
 7 I downsized, now it's about fifty-fifty non-litigation/
 8 litigation.
 9 Q. Your rate is currently \$375 an hour?
 10 A. No, 385 this year.
 11 Q. 385 this -- you raised it since the fall?
 12 A. No, it was 385 last year too. Probably four years
 13 ago when I did it it was probably 350.
 14 Q. Okay. So when did you -- all right. So today you
 15 are -- here you are charging 375 an hour?
 16 A. No, the same fee we started with.
 17 Q. 350?
 18 A. Whatever fee we started with is the fee.
 19 Q. How many hours have you devoted to meeting with
 20 Mr. Barra, testing him and preparing reports?
 21 A. Both reports? Oh, it has to be twenty, twenty-five
 22 hours all together. Look at the record. Twenty,
 23 twenty-five, thirty hours. It's a lot.
 24 Q. And did you confer with Mr. Morgan at all prior to
 25 trial?
 26 A. Forty-five minutes yesterday.