TRANSCRIPT OF DR. ALI ERAJ GUY; 1990 Trial Trans. LEXIS 351

United States District Court for the Southern District of New York

89 Civ. 4397

April 10, 1990

Reporter
1990 Trial Trans. LEXIS 351 *

ERNEST L. WALKER, JR. Plaintiff, v. JOHN C. CLARKE and METRO-NORTH COMMUTER RAILROAD, Defendants.

Expert Name: Dr. ERAJ GUY, M.D., F.A.A.P.M.R.

Disclaimer

Certain information may have been removed or redacted. LexisNexis, its subsidiaries, affiliates and related entities bear no responsibility whatsoever for such content or any removal or redaction thereof.

Counsel

[*1] JESSE C. SABLE, Attorney for plaintiff.

LAWLOR & CAULFIELD, Attorneys for defendant Clarke, PETER CREEDON, of Counsel.

ROBERT BERGEN, Attorney for defendant Metro-North, HENRY W. HERBERT, of Counsel.

Judges

Before HON. MILTON POLLACK, District Judge

Proceedings

2

[1]
[2]MR. SABLE: I call Dr. Guy to the stand.

ALI GUY,

[3]called as a witness by the plaintiff, having
been duly sworn, testified as follows:

[4]THE COURT: What is your address?

[5]THE WITNESS: 7 Gramercy Park, New York,

[6]New York 10003.

[7]DIRECT EXAMINATION

[8]BY MR. SABLE: **[*2]**
[9]Q. Is that your office address, Doctor?

[10]A. That is my current office address.

[11]Q. Are you a duly licensed physician of the State of

[12]New York?

[13]A. I am.

[14]Q. Can you tell us about your educational

[15]background, the schools you attended and the hospitals you

[16]are affiliated with?

[17]A. OK. I did my undergraduate training at Queens

[18]College. I went to medical school to the University of

[19]Northeast, Dominican Republic. I graduated June of '81.

[20]I did one and a half years of residency at Mt.

[21]Sinai School of Medicine, internal medicine; one year of

[22]general surgery at Cabrini Medical Center, three years of

[23]physical medicine and rehabilitation --

[24]Q. Excuse me, Doctor, could you use the microphone?

[25]A. Three years of physical medicine and

[3]
[1]rehabilitation at Mt. Sinai School of Medicine; and I am

[2]currently board-certified in the field of physical medicine

[3]and rehabilitation, and the hospitals that I am affiliated

[4]with are Hospital for Joint Disease, Orthopedic Institute,

[5]Cabrini Medical Center, and Interfaith Medical Center in

[6]Brooklyn.

[7]Q. Do you have **[*3]** any other associations or

[8]professional relationships?

[9]A. Diplomate and fellow of the American Board of

[10]Physical Medicine and Rehabilitation.

[11]Q. Can you explain to us what you mean by a

[12]diplomate in physical medicine and rehabilitation?

[13]A. OK. Diplomate means that you are board-

[14]certified, or you have achieved the highest degree of

[15]expertise in your field of specialty.

[16]To achieve this, you will have to fulfill a

[17]three-year approved residency in approved residency training

[18]program, an eight-hour written exam, being in practice for

[19]at least one year, and then after that, pass an oral exam by

[20]a group of physicians who are considered experts in their

[21]field.

[22]Q. Can you explain what is meant by physical

[23]medicine first and then rehabilitation?

[24]A. Well, physical medicine and rehabilitation is one

[25]type. You deal basically with people with disability and

[4]
[1]you try to rehabilitate them. The field deals with

[2]orthopedic and neurological problems, problems relating to

[3]neck, back, spine, the different joints in the body,

[4]shoulder, elbow, knee, hip, etc. You try to bring them **[*4]** back

[5]to the level of activity before they had any injuries or any

[6]impairments or disabilities.

[7]Q. You said that includes both orthopedics and

[8]neurology, is that correct?

[9]A. Yes, orthopedic medicine, nonsurgical

[10]orthopedics.

[11]Q. Orthopedic medicine?

[12]A. Yes.

[13]Q. How does that differ from orthopedic surgery?

[14]A. Just what you just said. Orthopedic surgery

[15]deals more with surgery, whereas a person with my

[16]background, I deal more with nonsurgical aspects of

[17]orthopedic problems.

[18]Q. Neurology?

[19]A. Neurology, yes, also deal with neurology.

[20]Q. What is the field of neurology? What is involved

[21]in neurology?

[22]A. Well, nerves, the brain, different parts of the

[23]nervous system.

[24]Q. You studied in both of these fields?

[25]A. Yes.

[5]
[1]Q. In order to arrive at your specialty; is that

[2]right?

[3]A. That's right.

[4]Q. And you now specialize in physical medicine and

[5]rehabilitation?

[6]A. That's correct.

[7]Q. Is there a term used for your specialty beside

[8]that?

[9]A. Yes, physiatrist.

[10]Q. A physiatrist? **[*5]**
[11]A. Yes.

[12]Q. Now, Doctor, did there come a time when you saw

[13]Ernest Walker as a patient?

[14]A. Yes.

[15]Q. And did you bring your notes and records with

[16]you, Doctor?

[17]A. I did.

[18]Q. You may refer to them to refresh your

[19]recollection if necessary and tell us --first of all, you

[20]say you maintain your offices at 7 Gramercy Park?

[21]A. That's my present. My previous location was at

[22]247 Third Avenue, New York, New York, 10010.

[23]Q. Is that around 20th, 21st Street?

[24]A. Yes, it's around East 20th Street.

[25]Q. Now, when for the first time did you see Mr.

[6]
[1]Walker?

[2]A. First time I saw Mr. Walker was on March 9, 1989.

[3]Q. And did you obtain a history from him?

[4]A. I did.

[5]Q. What was that, sir?

[6]A. The history I obtained is that patient was 42

[7]years of age, that he had no prior history of injuries to

[8]his neck, back, or any of the extremities. He was working

[9]on the job as a Metro-North machinist, and he was involved

[10]in a car accident on --

[11]THE COURT: He was working on what?

[12]THE WITNESS: On the job as a Metro-North

[13] **[*6]** machinist.

[14]THE COURT: Machinist?

[15]THE WITNESS: Machinist.

[16]THE COURT: Is that what he told you, he was a

[17]machinist?

[18]THE WITNESS: He explained to me what his job

[19]was. I just assumed that it's mostly with mechanics.

[20]THE COURT: Did he tell you he was a machinist?

[21]THE WITNESS: The history that I have is that.

[22]THE COURT: That is what you put down?

[23]THE WITNESS: That is what I put down.

[24]THE COURT: You got the information from him?

[25]THE WITNESS: Yes.

[7]
[1]THE COURT: Go ahead.

[2]A. That he was well until 3/6/89 when he was

[3]involved in a car accident. He sustained injuries to his

[4]left knee, left shoulder. He didn't know if he had injured

[5]his back or not. And that he was seen at Dobbs Ferry

[6]emergency room, was seen by a Dr. Fong who had taken some

[7]x-rays of his knee and leg, and they were reportedly

[8]negative for any fracture.

[9]THE COURT: Give us the name of that doctor that

[10]took the x-rays.

[11]THE WITNESS: The doctor that treated him was Dr.

[12]Fong.

[13]THE COURT: Where?

[14]THE WITNESS: Dobbs Ferry emergency room.

[15] **[*7]** Q. Did you also receive a description from him of

[16]the happening of the accident?

[17]A. I think, to the best of my knowledge, he did not

[18]recall the details of the accident.

[19]THE COURT: Have you finished, or did we

[20]interrupt you?

[21]THE WITNESS: I still have a couple more things

[22]to add.

[23]Q. If you refer to your report of March 9.

[24]THE COURT: Go ahead.

[25]Q. Does that refresh your recollection?

[8]
[1]A. Yes.

[2]THE COURT: He may read that. Go ahead, read

[3]your report.

[4]A. Patient complained to me of severe pain in his

[5]left knee with clicking, swelling, and inability to walk.

[6]He wasn't sure if he had hurt his back. His main -- all his

[7]complaints were focusing around his left knee.

[8]Q. And what did you then do, sir?

[9]A. After my history, I examined him.

[10]Q. You examined him?

[11]A. Yes.

[12]Q. Can you explain what your examination consisted

[13]of?

[14]A. Yes. His appearance, he appeared in moderate

[15]distress secondary to severe pain present in his left knee

[16]from the grimaces on his face and from the way he was

[17]walking.

[18]Q. How did **[*8]** he walk?

[19]A. He walked with an antalgic gait. Antalgic gait

[20]means that they try to get off that extremity that hurts as

[21]fast as possible to mimimize the amount of pain present, and

[22]he limped.

[23]THE COURT: Did he come in with a crutch or a

[24]cane or something else?

[25]THE WITNESS: Yes, I don't have it written down,

[9]
[1]but I do remember him coming once with a pair of crutches

[2]and once with a cane.

[3]THE COURT: We are talking about the first time?

[4]THE WITNESS: I didn't report it, so I really

[5]can't remember.

[6]THE COURT: You record everything that you

[7]observe ordinarily when you take a history, isn't that

[8]right?

[9]THE WITNESS: Yes.

[10]Q. Did you personally take the history, Doctor?

[11]A. Yes, I do.

[12]Q. Now, you did an examination. Can you tell us

[13]what your examination consisted of and what your findings

[14]were?

[15]A. OK. On the extremities exam, when I examined his

[16]left knee it was very, very tender to touch. There was

[17]increased warmth sensation. There was a palpable swelling,

[18]effusion, or collection of liquid inside his knee joint.

[19]There was weakness **[*9]** of one of the ligaments in his knee

[20]joint. There was a great deal of clicking and resistance

[21]with the range of motion.

[22]I was unable to test all the normal knee

[23]maneuvers for tears of the meniscus and ligaments because of

[24]the severity of his pain, so it was a limited examination.

[25]Q. How would you test for those conditions?

[10]
[1]A. Well, you give resistance to the inner part of

[2]the knee, and you push the distal part of the leg and you

[3]see if it gives way.

[4]Then you do the same for the other side. Then

[5]you fold the front of the knee outwards to see if it gives.

[6]Then you do the same backwards to see if it gives.

[7]Q. But you weren't able to do that?

[8]A. I was not.

[9]Q. And the reason why you couldn't do that?

[10]A. Because the patient had a great deal of pain, and

[11]there was also fluid collection in his knee joint.

[12]Q. You spoke about audible clicks?

[13]A. Yes.

[14]Q. What is that?

[15]A. Well, you hear audible clicks usually when there

[16]is something caught inside the joint, either a piece of

[17]cartilage or piece of bone or fragment of some sort, where

[18] **[*10]** the normal range of motion is not smooth.

[19]Q. What did that suggest to you at that time?

[20]A. That either there was something broken inside,

[21]something had become loose or there was a torn meniscus or

[22]ligament.

[23]Q. What other parts of him did you examine at that

[24]time?

[25]A. OK, I examined his back, I found it to be tender,

[11]
[1]upper and lower, and it was loaded with trigger points. On

[2]sensation there was diminished sensation to pinprick and

[3]touch on the inner part of his left calf and his left

[4]lateral thigh, and he was unable to walk normally. He

[5]walked with a great limp.

[6]Q. In examining his back, you mentioned that you

[7]found it was tender. Did you make any other objective

[8]findings?

[9]A. Yes, he had severe spasm in his upper and lower

[10]spine.

[11]Q. What are spasms?

[12]A. The definition of spasm is prolonged involuntary

[13]contraction of muscle.

[14]Q. Can you actually see that?

[15]A. Yes, you can palpate it. You can feel it.

[16]Normally when you touch a muscle, a muscle is soft. When

[17]you squeeze it it gives way like a sponge. When there is a

[18]lot of spasm **[*11]** and you push it, it's like hard, like a piece

[19]of wood.

[20]Q. And what is the significance of spasms?

[21]A. It connotes that there is an injury.

[22]Q. Is spasm pain-productive?

[23]A. Absolutely. It's very painful.

[24]Q. Where did you find spasm?

[25]A. The upper trapezius, that is the upper muscle in

[12]
[1]the back, the periscapular areas, that is the midback, and

[2]the lower paraspinals. That is the lower part of his back.

[3]Q. Did you do any other testing of his back?

[4]A. Yes, I checked for the range of motion, which was

[5]diminished secondary to the severe pain present, probably

[6]from the spasm. Later on I found out that there was other

[7]injuries there that could also contribute to the limitation

[8]of the range of motion.

[9]Q. Any other tests that you did at that time?

[10]A. Yes, I checked for the manual muscle power

[11]testing.

[12]Q. Pardon me?

[13]A. Manual muscle power testing. You check the power

[14]of the muscles, and I found out his left quadriceps and

[15]hamstrings were difficult to test because of the severe

[16]pain, but it appeared to be slightly diminished in terms of

[17] **[*12]** muscle power.

[18]Q. Where are the quadriceps and the hamstrings

[19]located?

[20]A. Can I stand up and show on myself?

[21]Q. Yes.

[22]THE COURT: Could you pause just a minute? I

[23]want to attend to something here.

[24]Is this gentleman here this afternoon?

[25]MR. CREEDON: No.

[13]
[1]THE COURT: The one you want to talk to is not

[2]here this afternoon?

[3]MR. CREEDON: Correct, sir.

[4]THE COURT: He can't be here tomorrow, you say?

[5]MR. CREEDON: That is his representation, Judge.

[6]THE COURT: You may issue a process.

[7]MR. CREEDON: Thank you, sir.

[8]THE COURT: That is all you need if you decide to

[9]issue it.

[10]MR. CREEDON: Will I be able to attend to that at

[11]this point, Judge?

[12]THE COURT: Come up here, will you. It seems to

[13]me I am talking ordinary English.

[14](The court and Mr. Creedon conferred at the

[15]side bar)

[16]Q. Doctor, I was asking you for the location of the

[17]hamstring muscles and the quadriceps.

[18]A. OK. To show on myself, the quadriceps are these

[19]groups of muscles in front of the proximal part of the leg,

[20]and the hamstrings **[*13]** are the muscle groups behind. The

[21]function of these muscles are to extend the knee and the

[22]functions of these muscles are to flex the knee, to bring

[23]the knee back.

[24]Q. And these you say you weren't able to test, is

[25]that right?

[14]
[1]A. That's right.

[2]Q. Did you do any neurological testing?

[3]A. Yes, I checked for sensation, which I mentioned

[4]was diminished on the calf and the lateral thigh. The

[5]reflexes were normal.

[6]Q. Diminished sensation, now, are you talking about

[7]the left leg?

[8]A. Yes.

[9]Q. What significance does that have?

[10]A. That there is a nerve root involvement.

[11]Q. Where?

[12]A. In the lumbar spine area, because the medial

[13]cough correlates to the L5-S1 nerve root which is the lowest

[14]part of the nerve roots in the back area, and the lateral

[15]thigh correlates to the L4-L5 nerve root area in the lumbar

[16]area.

[17]Q. Can you just explain what you were saying?

[18]When you say that those -- the nerve correlates

[19]to L4-L5, what are you saying exactly, sir, in layman's

[20]terms?

[21]A. I am saying that, based on the neurological

[22]examination, **[*14]** that there was indication of a nerve root

[23]injury to the lumbar spine, which is the lower part of your

[24]back.

[25]Q. You were testing his leg?

[15]
[1]A. Yes.

[2]Q. And you had diminished sensation, is that right?

[3]A. Yes.

[4]Q. And that gave you the basis for determining that

[5]there was injury to the lower back?

[6]A. That's right.

[7]Q. And is that based upon neurological studies?

[8]A. Yes, that's based on neurological examination.

[9]Q. Did that complete your examination at that time?

[10]A. Yes, I also examined his left shoulder, but I

[11]didn't document it on my records. It was documented on

[12]subsequent records. His left shoulder was tender to touch,

[13]and the range of motion was normal, but it was with pain.

[14]Q. What did you do after that examination, sir?

[15]A. OK, I immediately advised the patient of the

[16]possible injuries involved. I told him that he needs a

[17]special knee immobilizer to prevent him from injuring his

[18]knee more, and I told him that he has to see a knee

[19]specialist, a Dr. Ergas, as soon as possible.

[20]I referred him for MRI studies of the knee. **[*15]** I

[21]started him on physical therapy, advised him to mimimize his

[22]ambulatdion. I gave him a prescription for

[23]anti-inflammatory medication, which is Motrin, and a strong

[24]pain medication which is Tylenol with codeine, for control

[25]of his pain. And later I scheduled him for a series of

[16]
[1]diagnostic studies.

[2]Q. For what?

[3]A. A series of diagnostic studies.

[4]Q. And did you also advise him with regard to

[5]weight-bearing or anything of that nature?

[6]A. I did. I told him that he must keep off his

[7]knee, or keep the pressure to the knee to a minimum, and to

[8]keep his ambulation to a minimum.

[9]Q. Ambulation meaning walking?

[10]A. Ambulation, walking, yes.

[11]Q. You said you would advise him to get an

[12]immobilizer. Did you prescribe that? Did you write out a

[13]prescription for it?

[14]A. OK, initially, yes, I gave him a prescription,

[15]and I believe I told him which of the surgical supply stores

[16]near my office would have it. I wanted him to just go with

[17]the knee immobilizer until Dr. Ergas saw him and felt -- and

[18]give him what was appropriate for his injuries.

[19]Q. You also **[*16]** said you had ordered an MRI of the knee?

[20]A. Yes, that's correct.

[21]Q. By that, you mean you sent him somewhere to have

[22]this done, or did you do it yourself?

[23]A. No, I sent him to a special radiology group that

[24]does those studies.

[25]Q. What was the purpose of that?

[17]
[1]A. To see if I -- if there was any pair of any tear

[2]of any of the cartilages inside the knee joint.

[3]Q. Was that test done?

[4]A. Yes, it was.

[5]Q. You referred him to Dr. Ergas?

[6]A. Yes.

[7]Q. And when did you next see him?

[8]A. OK, I then saw him on 3/18/89.

[9]Q. And at that time, what did you do for him, and

[10]what complaints did you receive?

[11]A. He told me that the fact that he wore the

[12]immobilizer and he kept off his feet, the left knee had felt

[13]a little bit better. However, he still heard popping and

[14]clicking. He developed some side effects from Motrin, and

[15]we had to stop that. Then I examined him again.

[16]Q. Pardon me?

[17]A. Then I reexamined him.

[18]Q. And as a result of the reexamination, did you

[19]reach any further opinion with regard to his condition?

[20] **[*17]** A. Yes, I did. I reviewed the MRI film with him,

[21]and due to my surprise, it was read as normal.

[22]I discussed the case with Dr. Ergas over the

[23]phone. I told him I have a patient with these injuries,

[24]etc. and I spoke to the patient, that I still think there is

[25]something wrong with this knee although the x-rays and the

[18]
[1]MRI have not shown anything. That does not mean that there

[2]is nothing wrong inside the knee joint; that the next step

[3]to go is with an arthroscope to actually go inside the knee

[4]joint and take a look and she what's going on.

[5]Q. Had you yourself taken any x-rays of his knee?

[6]A. No, I did not.

[7]Q. And up to that point, this was March 14, he

[8]hadn't seen Dr. Ergas, had he?

[9]A. I don't know if he had or if he hadn't. I am not

[10]sure.

[11]Q. Dr. Ergas testified here this morning and stated

[12]that he saw him, I believe, on the 22nd for the first time.

[13]A. OK.

[14]Q. 22nd of March. Now, when you saw him this second

[15]time, did you find any further evidence of knee injury, that

[16]is, in other words, earlier you said the first examination

[17]you heard a clicking.

[18] **[*18]** THE COURT: Don't repeat what he said. You just

[19]ask your questions. Let the witness testify.

[20]Q. Did you find any further evidence of knee injury?

[21]A. I did.

[22]Q. What did you find, sir?

[23]A. I found the knee joint was still tender to touch,

[24]there was medial ligament laxity, which means that the

[25]ligament that controls the power or the movement of the

[19]
[1]inner part of the knee joint was loose, was giving way to

[2]resistance.

[3]Q. Is that a normal condition?

[4]A. No, that is a very abnormal condition. And I

[5]still found the knee joint to be swollen, and he was

[6]ambulating with a cane using a brace at that time.

[7]Q. Is that the immobilizer you are talking about?

[8]A. Yes.

[9]Q. Why did you refer him to Dr. Ergas in particular?

[10]A. Well, because Dr. Ergas has his expertise in knee

[11]arthroscopies, he is very good with knee arthroscopies, and

[12]I felt there is something wrong with the knee joint and I

[13]wanted it checked further.

[14]Q. Did you continue to see him after that?

[15]A. I did.

[16]Q. Can you just relate briefly to us what you did on

[17]the subsequent **[*19]** visits?

[18]A. Well, I started putting him on a rehabilitation

[19]or a physical therapy program to his knee and to his back.

[20]Q. What did that program consist of?

[21]A. To the knee it consisted of heat, electrical

[22]stimulation, ultrsasound, massage, and special exercises to

[23]try to strengthen the quadriceps muscles; and for his back,

[24]gave him heat, electrical stimulation, ultrsasound, and

[25]massage, and special techniques to break up the spasm and

[20]
[1]reduce the tenderness of the muscles.

[2]Q. Doctor, I am going to ask you to explain some of

[3]those terms to us, but the things that you mentioned, are

[4]these all recognized medical treatments in rehabilitation

[5]physical medicine?

[6]A. Absolutely.

[7]Q. And you used the term "ultrsasound". What is

[8]that, sir?

[9]A. Ultrsasound is a special modality used to deliver

[10]deep heat to the deep structures within an area, the back or

[11]the knee or the shoulder or the hip, wherever you place it.

[12]It transforms sound energy into heat energy.

[13]Q. Was the physical therapy done at your offers?

[14]A. Yes.

[15]Q. Who in your office administered **[*20]** physical therapy?

[16]A. Sometimes I would render the therapy myself, and

[17]sometimes my therapist would render the therapy.

[18]Q. In addition to that therapy, you mentioned

[19]something about injection, am I correct?

[20]A. Yes. I also gave him trigger-point injections.

[21]Q. Can you explain what trigger-point injections

[22]are?

[23]A. Well, trigger points are -- these lumps in the

[24]muscles in the back or the neck. What happens is, as a

[25]result of injury, the muscle fibers, instead of being

[21]
[1]interlaced in straight lines, they twist around the fibers.

[2]They form tiny knots.

[3]What happenx as a result of these knots,

[4]circulation to that small area of muscle becomes diminished

[5]and cut off completely. As a result, all the waste products

[6]of the muscle get trapped inside the muscle and they don't

[7]come out.

[8]As a result, you get excruciating pain, and you

[9]get further spasm from the pain, and then pain causes spasm,

[10]spasm causes pain, and you have a vicious cycle going around

[11]and around.

[12]Q. How do you break that cycle?

[13]A. What I do is I inject some lydocaine, which is a

[14] **[*21]** local anesthetic, I numb the area, then with a needle I try

[15]to break up the knots. I probe the needle into 12

[16]o'clock, 3 o'clock 6 o'clock, 9 o'clock, and 12 o'clock

[17]directions to try and break up all the knots, all the

[18]tangled fibers of the muscle and thereby release them.

[19]Q. What areas of the body did you give him these

[20]trigger-point injections?

[21]A. The upper trapezius.

[22]Q. Where is that again, sir?

[23]A. The upper part of your back right above the

[24]shoulder blades.

[25]Q. On both sides or one side?

[22]
[1]A. Both sides,

[2]Q. Both sides?

[3]A. Yes.

[4]Q. At any place else?

[5]A. I believe I also gave him an injection to one of

[6]his shoulders. Let me just check my records. Yes, on

[7]4/17/89 I gave him an injection to his left shoulder which

[8]consisted of 2 cc. of one percent lydocaine and 20

[9]milligrams of Depo-Medrol, which is a cortisone

[10]anti-inflammatory medication.

[11]Q. Now, you continued to see him during the same

[12]period of time that he was seeing Dr. Ergas, is that

[13]correct?

[14]A. That's correct.

[15]Q. And did you concentrate on any one **[*22]** particular

[16]area of his complaints?

[17]A. Well, initially, I was very concerned with his

[18]left knee, so all the emphasis went to the left knee. But

[19]once Dr. Ergas got involved into the picture, my emphasis on

[20]the left knee diminished and more emphasis went to the other

[21]parts of his body, namely left or right shoulders, the neck,

[22]the upper and lower back.

[23]Q. You hadn't mentioned the neck before. Had he

[24]complained about the neck to you?

[25]A. Well the trapezius muscle goes all the way up to

[23]
[1]the neck, so it controls neck as well.

[2]Q. I see. How often were you seeing him?

[3]A. I was seeing him on a regular basis two to three

[4]times per week.

[5]Q. And on each of those visits, would he be

[6]receiving physical therapy of the type that you described

[7]earlier?

[8]A. Yes.

[9]Q. And what seemed to be the reaction or his

[10]reaction to the physical therapy and trigger-point

[11]injections that he was receiving?

[12]A. Well, initially, he would be responding, the pain

[13]would diminish, the spasm would diminish. Later on it would

[14]keep coming back.

[15]Q. Did you change your **[*23]** treatment at any time when

[16]the pain returned?

[17]A. Well, I ran a series of diagnostic tests to see

[18]why that was happening.

[19]Q. When you say a series of diagnostic tests, what

[20]sort of tests did you do?

[21]A. I did electromyography, and I referred him for

[22]MRI studies of the lumbar spine, and I also sent him for a

[23]ultrasound of his shoulder.

[24]Q. First explain to us what do you mean by

[25]electromyography.

[24]
[1]A. OK, that's abbreviated as EMG. It's a test done

[2]-- I do the test myself. It's a test to see if there is any

[3]nerves damaged in any part of the -- in the spine. The test

[4]has three parts. The first part consists of placing small

[5]electrodes over different muscles in the lower extremity and

[6]checking different nerves. You stimulate it and you study

[7]the response.

[8]Q. Excuse me. Do you do this test yourself, sir?

[9]A. Yes, I do.

[10]Q. And is it done at your office?

[11]A. Yes.

[12]Q. Now you said you placed certain electrodes on his

[13]lower extremities?

[14]A. Yes.

[15]Q. How is that done?

[16]A. OK, you take special surface electrodes which are

[17] **[*24]** very, very small, about the size of a penny. You place them

[18]over the muscles in the foot because those muscles correlate

[19]to special nerves, and that particular nerve correlates to a

[20]special level in the lower spine. You check the different

[21]nerves and you study the response. You look for amplitude,

[22]the size of the nerve.

[23]Q. Where do you see the response?

[24]A. On the oscilloscope screen.

[25]Q. Some machine that you have in your office?

[25]
[1]A. Yes.

[2]Q. Is that also recorded at the same time?

[3]A. Yes.

[4]Q. When you did this test, what were the results of

[5]the test?

[6]A. Well, if I may just refresh my my memory. On

[7]11/27/89 the EMG studies of the back and lower extremities

[8]revealed a left L5 radiculopathy, which means that the fifth

[9]nerve root in the lumbar area was injured.

[10]At that time, I referred him for the MRI to see

[11]more why this was so.

[12]Q. You say you referred him to for an MRI?

[13]A. Yes.

[14]Q. Explain what you mean by referred him.

[15]A. I sent him to a special place that does those MRI

[16]studies, because an MRI is a very big machine. You **[*25]** can't

[17]keep it in your own office. And you need special personnel

[18]to perform that, and you need special neuroradiologists to

[19]read them.

[20]Q. And this was in November, did you say?

[21]A. Yes.

[22]Q. And can you explain a little bit about the MRI?

[23]What do the initials stand for, what does it do, what is the

[24]purpose of it?

[25]A. An MRI stands for magnetic resonance imaging.

[26]
[1]It's a special test that looks for soft tissue, namely, the

[2]disks, to see if there is any disks or any cartilages or any

[3]ligaments torn or out of their place.

[4]If you are doing an MRI of the lumbar area, what

[5]you are looking for basically is the disks to see if there

[6]is any rupture, any protrusion of the disks.

[7]Q. And did you receive the report of the MRI?

[8]A. I did.

[9]Q. And could you tell us what that report was?

[10]A. On 11/30/89 the, MRI was performed and the reports

[11]found that the patient to have two disks in his lower back

[12]namely the L4 and L5 and L5 SI disks.

[13]Q. Where approximately is that located?

[14]A. The L5-S1 is the lowest disk in your back. And

[15]the L4-5 is about two **[*26]** finger breadths above that one.

[16]Q. And this is your lower back that you are speaking

[17]about?

[18]A. That's right.

[19]Q. Is that right.

[20]Q. That's right.

[21]Q. Did that correlate with the examination that you

[22]had done, that electromyography?

[23]A. Absolutely. As I mentioned, it was my

[24]electrodiagnostic studies revealed that a left L5 nerve root

[25]problem, and these studies showed that two nerve roots -- I
27

[1]am sorry two disks were injured and one of the nerve roots

[2]was actually compressing on the fifth nerve root, namely,

[3]the L5 nerve root.

[4]Q. When you say the disks were injured, in what

[5]manner were they injured?

[6]MR. HAMMER: Objection, your Honor. I don't

[7]think he said they were injured. He said they were

[8]protruding.

[9]MR. SABLE: I thought I heard him. Did I

[10]misquote you doctor? I am sorry.

[11]A. I did say injured. I also used the word

[12]"protruding". I used both terms.

[13]Q. Can you explain the terms and can you explain the

[14]significance of what you are saying?

[15]A. Sometimes the MRI --MRI is not 100 percent

[16]efficient in picking up these injuries. **[*27]** Sometimes you may

[17]have to correlate with one or more tests, and MRI is

[18]approximately 90 percent sensitive. When you correlate an

[19]MRI with EMG study, it becomes 97 to 98 percent efficient in

[20]detecting problems.

[21]Whenever you have an EMG that shows abnormalities

[22]with a nerve root, it means that the protruding disk is no

[23]longer protruding because there is actually something that

[24]is compressing on the nerve root, and it could only be disk

[25]material that is protruding from the disk.

28

[1]Q. When it compresses the nerve root, what is the

[2]eFfect upon the patient?

[3]A. The patient gets referred pain down that

[4]extremity, there is numbness, there is tingling, there could

[5]be a loss of a reflex.

[6]Q. And are those other conditions that you found as

[7]well?

[8]A. Yes. I didn't find the loss of the reflex

[9]because the L5 does not have a reflex. The knee reflex

[10]correlates with the L4 and the ankle reflex correlates with

[11]the S1, so the L5 is in between the two. Therefore there

[12]was no reflex abnormal.

[13]But the lack of sensation in the lateral thigh

[14]and the medial calf correlates exactly **[*28]** with the L5 nerve

[15]root area.

[16]Q. Is there another term that is used with regard to

[17]-- you said injury and protrusion. What does "protrusion"

[18]mean exactly?

[19]A. Different radiologists use the word "protruding"

[20]in different ways.

[21]Q. Excuse me, Doctor. I should have asked you

[22]beforehand, and I am sorry:

[23]You are talking about a disk, and you are talking

[24]about the vertebrae.

[25]A. Yes.

29

[1]Q. Could you just explain anatomically about the

[2]location of the vertebra with the disk and what the disk is

[3]and what its purpose is?

[4]A. OK. You have approximately five vertebrae in

[5]your lumbar area, which is your lower back. Between each

[6]lumbar vertebra you have a disk. The disk acts as a shock

[7]absorber like your car. If you didn't have this disk

[8]material, every time you walked on the ground or concrete,

[9]the bone would be hitting against bone and you would be

[10]breaking your vertebra. So once the disk material

[11]THE COURT: Did you say breaking or grating?

[12]THE WITNESS: Breaking. It would break the

[13]actual vertebra.

[14]THE COURT: You mean the vertebra breaks off **[*29]** or

[15]is subject to being broken?

[16]THE WITNESS: I said you could break it.

[17]THE COURT: You could break it?

[18]THE WITNESS: Yes from, the impact.

[19]THE COURT: That is not a necessary impact, that

[20]is an occurrence of some kind that sometimes happens?

[21]THE WITNESS: Yes.

[22]THE COURT: You don't go breaking bones just by

[23]impact do you?

[24]THE WITNESS: You can.

[25]THE COURT: Of course you can. You can do a lot
30

[1]of things, but you don't do it ordinarily by impact.

[2]THE WITNESS: If the impact is severe enough, you

[3]can.

[4]THE COURT: All right. Now suppose there is an

[5]impact and you don't know anything about the severity. Then

[6]what? It has no breaking effect, isn't that so?

[7]Go ahead.

[8]Q. You were explaining about the disk. What is the

[9]disk, sir?

[10]A. The disk has two parts. The outer part consists

[11]of cartilage material, which is soft bone. The inner part,

[12]called nucleus pulposis, is a gelatinous material inside.

[13]Now, there is two terms used to define disk

[14]problems, protrusion or herniation. Some radiologists call

[15]herniation protrusion **[*30]** and vice versa, but most physicians

[16]and most physiatrists, people in my area of expertise, our

[17]criteria for disk herniation means when it compresses on any

[18]of the nerve roots or neuro structures, namely, the spinal

[19]cort, or the nerve root.

[20]Q. Is that what you found in this case? Was that

[21]what the MRI showed?

[22]A. The MRI did not show, does not show the nerve

[23]root impingement or a compression of the nerve root. The

[24]EMG showed that. The MRI shows that the disk is out of its

[25]place, it's hitting the spinal cord. Sometimes it can show

[31]
[1]whether it's hitting on the nerve or not, but it's not very

[2]accurate in that determination.

[3]Q. You used the term herniated disk. Is that

[4]similar to the term slipped disk?

[5]MR. CREEDON: Objection.

[6]THE COURT: The doctor can define it. We want

[7]to hear what you have to say, whether a herniated disk is

[8]similar to a slipped disk.

[9]THE WITNESS: Slipped disk is layman's

[10]terminology.

[11]THE COURT: They are not the same thing?

[12]THE WITNESS: Not the same thing. To me as a --

[13]THE COURT: No, no, just answer the questions.

[14]This **[*31]** is not a forum for a lecture.

[15]THE WITNESS: OK.

[16]THE COURT: Just answer the questions.

[17]THE WITNESS: A slipped disk just simply means a

[18]disk out of its place.

[19]Q. Herniated disk is what you just explained to us,

[20]right?

[21]A. Yes.

[22]Q. It's the same thing?

[23]A. As a slipped disk?

[24]Q. Yes.

[25]A. No. As I said, slipped disk just means a disk is

[32]
[1]out of its place. It could be protruding or could be

[2]herniated. Doesn't mean one or the other. Just means out

[3]of its place.

[4]Q. Then it has no medical significance?

[5]A. No, not to a specialist.

[6]Q. I see. What is the treatment for this condition?

[7]A. OK, the most --

[8]THE COURT: Which condition are you referring

[9]to now?

[10]THE WITNESS: Bulging disk or herniated disk,

[11]both.

[12]Q. You are talking about Mr. Walker?

[13]A. Mr. Walker.

[14]Q. Yes.

[15]A. I believe in Mr. Walker's case one of the disks

[16]was protruding, one was herniated because it produced

[17]compression on a nerve root as picked up by the electric

[18]diagnostic studies.

[19]Q. And did you discuss this, **[*32]** for example, with Dr.

[20]Ergas at any time?

[21]A. Yes.

[22]Q. And was there any recommendations made?

[23]A. Well, Dr. Ergas wanted to send him to a back

[24]specialist that performed spinal surgery, and I spoke with

[25]him, I told him that after seeing his rehabilitation

33

[1]progress and discussing the suggestion with my patient, we

[2]don't want to go with that route just yet because the only

[3]indication for surgery for herniated disk is when you have

[4]progressive worsening of an neurological deficit, namely,

[5]loss of the of a reflex weakness of a muscle.

[6]Pain itself is not an indication for surgery.

[7]Maybe later on things will worsen. Then possibly we might

[8]consider it.

[9]Q. You have been treating him at that time for

[10]approximately nine months or so?

[11]A. Correct.

[12]Q. Is that right?

[13]A. Yes.

[14]Q. And what did you find with regard to his back

[15]condition? Had it gotten better or gotten worse during that

[16]period of time?

[17]A. It had gotten better with the physical therapy

[18]and as soon -- see, the problem Mr. Walker's case is very

[19]complicated. The knee injury would activate **[*33]** the back injury

[20]and the back injury would aggravate the knee injury because

[21]the two are related.

[22]As a result, every time his back would get

[23]better, the knee would act up and would aggravate the back.

[24]So we are going back and forth between the two problems.

[25]Q. I don't understand. When you say they are

[34]
[1]related, how are they related? How would they affect each

[2]other?

[3]A. The knee joint is a major weightbearing joint.

[4]I Once you have a problem with a major weightbearing joint,

[5]you tend to favor other structures of your body to

[6]compensate for the knee pain. As a result, you tilt your

[7]back to one side to compensate for the pain in the knee

[8]joint by trying to minimize the weight load on the knee

[9]joint.

[10]As a result, you stress the structures, the

[11]tendons, ligaments, and disks in your lower back area.

[12]So that gets aggravated. Then once we treated

[13]that and the knee, I mean everything would get better. But

[14]the overall cost of these two means remissions and

[15]exacerbations, improvements and worsening.

[16]THE COURT: What kind of exercises did you

[17]advise, therapy? Therapy **[*34]** means exercise, doesn't it?

[18]THE WITNESS: No, no.

[19]THE COURT: What is the therapy that you

[20]recommended?

[21]THE WITNESS: The therapy that he was given in

[22]the office or at home?

[23]THE COURT: Both. One at a time.

[24]THE WITNESS: The therapy that he was getting in

[25]the office consisted of hot packs to the knee joint and the
35

[1]back, electrical stimulation, ultrsasound, and special

[2]exercises to the knee joint giving him ankle weights,

[3]putting them around his knee joint, and asking him to try to

[4]straighten his knee joint to strengthen his quadriceps

[5]muscles.

[6]Q. Did you also recommend exercises at home or

[7]outside the office?

[8]A. I told him that the thrust, the main thrust of

[9]the exercises would have to be done by him at home. What we

[10]would do in the office are the things he can't do himself at

[11]home.

[12]THE COURT: What was he supposed to do at home?

[13]Describe them.

[14]A. Progressive resistance exercises which are to try

[15]to strengthen his muscles. For instance, for his upper

[16]extremities weights, try to get weights to increase the

[17]power of his shoulder muscles, **[*35]** use the biceps, the deltoid,

[18]the triceps muscles. And I also tried to strengthen the

[19]muscles in his quadriceps and hamstrings, again, with the

[20]weights.

[21]THE COURT: What weight?

[22]THE WITNESS: I told him he could use ankle

[23]weights for his lower extremity and for his upper.

[24]THE COURT: What avoirdupois did you prescribe?

[25]What weight measure did you use?
36

[1]THE WITNESS: I told him to pick a weight that he

[2]can do easily.

[3]THE COURT: What is a weight that you as a

[4]professional believe a man can do easily?

[5]THE WITNESS: Two to five pounds.

[6]THE COURT: Two to five pounds?

[7]THE WITNESS: Yes.

[8]THE COURT: What is a weight that a man can do

[9]easily when he wants to strengthen his shoulders?

[10]THE WITNESS: For his shoulders, depends on the

[11]size and weight of the person.

[12]THE COURT: All right. Talk about this man.

[13]THE WITNESS: This man is a pretty tall man,

[14]looks pretty strong. He had good muscle tone when I saw

[15]him, and I would say for his biceps he should be able to

[16]flex approximately 70 to 80 pounds, and he should be able to

[17]do elbow extensions **[*36]** with approximately 50 to 60 pounds.

[18]THE COURT: How does he do that? With his arms

[19]outstretched? Is that the way it's done?

[20]THE WITNESS: The biceps?

[21]THE COURT: The weights, how does he handle the

[22]weights?

[23]THE WITNESS: Depends on what you want to do,

[24]what muscle groups you want to strengthen. I told him to

[25]strengthen the shoulder group muscles so -- may I stand up?
37

[1]THE COURT: Sure.

[2]THE WITNESS: I told him to get some weights,

[3]dumbbells or free weights to curl this way (indicating) this

[4]way (indicating), and this way (indicating).

[5]I told him to avoid the overhead presses because

[6]that could injuryethe trapezius muscles more, and also the

[7]rotator cuff in one of his shoulders, that would aggravate

[8]that rotator cuff more. But this way would not aggravate it

[9]terribly.

[10]THE COURT: How do you treat a rotator cuff?

[11]THE WITNESS: Depends on the grade or the level

[12]of the rotator cuff. You have grade 1, grade 2, grade 3.

[13]Grades 1 and 2 are partial tears. Grade 3 is a complete

[14]tear. A grade 3 or complete tear, you have to go in with

[15]surgery and repair **[*37]** it. Based on the --

[16]Q. I am sorry, Doctor, you are speaking a little

[17]quickly. I didn't hear that.

[18]A. Based on the clinical studies that we have for

[19]Mr. Walker, it shows that he had a partial or incomplete

[20]tear, and the treatment of choice for that problem is

[21]physical therapy to try to diminish the pain, spasm in the

[22]shoulder area, and to try to strengthen the shoulder group

[23]muscles.

[24]THE COURT: You strengthen it by stretching the

[25]arms out like a cross and lifting, is that right?

38

[1]THE WITNESS: By stretching different muscle

[2]groups around the shoulder joint, biceps, triceps.

[3]THE COURT: What weight would you as a doctor

[4]recommend for therapy of a partial shoulder cuff tear?

[5]THE WITNESS: For a person such as Mr. Walker, I

[6]would tell him to start off with five and ten pounds and

[7]gradually work his way up.

[8]THE COURT: Work his way to how high?

[9]THE WITNESS: To how high? Up until the point of

[10]pain. Anything that produces pain is a sign to stop.

[11]THE COURT: That is so in any exercise, isn't it?

[12]THE WITNESS: That's true.

[13]THE COURT: Well, **[*38]** would you say that a person who

[14]has been able to use weights starting with three to five

[15]pounds and running upwards has a reasonably resolved injury?

[16]THE WITNESS: No, you don't resolve an incomplete

[17]tear of rotator cuff. What you do is -- what happens is you

[18]have bleeding around the tendon of the rotator cuff. As a

[19]result you have scar formation. And that becomes weakened

[20]so it can aggravate again in the near future, and you cannot

[21]do certain movements like overhead swings, overhead thrusts.

[22]Those things are definitely no-no's, so those he would not

[23]perform.

[24]THE COURT: How heavy can you use weights to go

[25]up to your shoulder level with a simple tear?

39

[1]THE WITNESS: Well, in terms of abduction, which

[2]is this movement (indicating), you could do that, like I

[3]said, up until you start having pain. Then you have to

[4]stop. By strengthening those muscle groups you take a let

[5]of the pressure off that incomplete tear of the rotator

[6]cuff.

[7]Q. You said you started Mr. Walker off with three to

[8]five pounds. And did he increase that?

[9]A. Yes, he progressively increased the weight.

[10] **[*39]** Q. Do you know what he is using now?

[11]A. I believe it's about approximately 20 pounds.

[12]THE COURT: 20 pounds per arm?

[13]THE WITNESS: 20 pounds on each arm, that's

[14]correct.

[15]THE COURT: He didn't tear both arms, did he?

[16]THE WITNESS: No, one side.

[17]THE COURT: One side?

[18]THE WITNESS: Yes.

[19]THE COURT: So in effect, when he has his arms

[20]outstretched, he is handling 40 pounds of weight?

[21]THE WITNESS: That doesn't count. We only go one

[22]side, if you want to calculate weight.

[23]THE COURT: If you do one side, you are just

[24]strengthening one side, isn't that right?

[25]THE WITNESS: Well, in this case --

40

[1]THE COURT: And you are atrophying the other

[2]side; isn't that so?

[3]THE WITNESS: In this case he injured both his

[4]arms, both shoulders, left and right. The left initially

[5]was worse than the right.

[6]THE COURT: So that the result of it was that he

[7]was strengthening himself to the point where he could lift

[8]20 pounds with arms outstretched, 20 pounds apiece?

[9]THE WITNESS: Right.

[10]Q. You said, Doctor, normally a man of his size

[11] **[*40]** should be able to lift how much?

[12]A. OK, depends which movement you are talking about.

[13]To go through all the movements, the biceps movement or the

[14]arm, flexion, he should be able to do easy 80 pounds. In

[15]terms of abduction, which is this movement (indicating), he

[16]should be able to do again about 60 to 75 pounds, and he

[17]should be able to press --

[18]THE COURT: 60 to 75 pounds per hand?

[19]THE WITNESS: Per hand, per arm, yes.

[20]THE COURT: Have you ever tried to lift 60 or 75

[21]pounds yourself?

[22]THE WITNESS: I am very thin, I am very out of

[23]shape. I can do 50 pounds with ease.

[24]THE COURT: Really?

[25]THE WITNESS: Yes.

[41]
[1]THE COURT: All right.

[2]Q. But Mr. Walker had been a laborer, had he not?

[3]A. That's right, had a very strong physique.

[4]Q. The injury to the left shoulder you told us

[5]about, that was the partial tear. What was the injury to

[6]the right shoulder?

[7]A. OK. The injury on rotator cuff was to the right

[8]side. The left was --

[9]Q. I am sorry?

[10]A. Rotator cuff was on the right side. The injury

[11]to the left side was just a simple **[*41]** tendinitis.

[12]Q. What term is that, sir?

[13]A. Bicipital tendinitis.

[14]Q. What does that mean?

[15]A. An inflamed tendon in the biceps muscle.

[16]Q. And does that continue until today, that

[17]situation?

[18]A. I think he has -- last time I spoke with him he

[19]told me that it was much better. Sometimes it aggravates,

[20]gets aggravated and we have to treat it.

[21]Q. The last time that you saw him, you told us that

[22]you did the testing around November and December of 1989; is

[23]that correct?

[24]A. That's correct.

[25]Q. Now, from that time on, did you continue treating

[42]
[1]him?

[2]A. I did.

[3]Q. When was the last time that you saw him?

[4]A. Just recently, net too long ago. A few days ago-

[5]I am still treating him. Haven't stopped treating him.

[6]Last time I treated him, I believe, was 5th of April.

[7]Q. Just the other day?

[8]A. That's right.

[9]THE COURT: How often do you send for him?

[10]THE WITNESS: How often do I what?

[11]THE COURT: How often do you send for him?

[12]THE WITNESS: I send for him?

[13]THE COURT: Yes. How often do you tell him **[*42]** to

[14]come in?

[15]THE WITNESS: What I do is once I take care of a

[16]particular problem --

[17]THE COURT: Just tell me how often you ask him.

[18]THE WITNESS: I don't send for him. He sends for

[19]me.

[20]THE COURT: How often do you ask him to come in?

[21]THE WITNESS: When he has a problem, I ask him to

[22]come in two to three times a week.

[23]THE COURT: Two to three times a week?

[24]THE WITNESS: That's right.

[25]THE COURT: He has been coming in two or three
43

[1]times a week since he was hurt?

[2]THE WITNESS: No there were periods that I would

[3]stop the therapy, would stop the treatments because he had

[4]improved, but then he came back only to find aggravation of

[5]those problems,

[6]THE COURT: And how much do you charge for each

[7]of those two to three times a week?

[8]THE WITNESS: Depends on what modalities we use.

[9]We charge approximately -- well there is a no-fault fee for

[10]that. The fee for that is I believe $ 58 per treatment.

[11]THE COURT: So two to three times a week, there

[12]is a charge of $ 58 a treatment?

[13]THE WITNESS: That's correct.

[14]THE COURT: That's **[*43]** been going on since the time

[15]he was hurt?

[16]THE WITNESS: That's correct.

[17]Q. Doctor, up until the present time, what is the

[18]total amount of your bill?

[19]A. Approximately $ 12,000.

[20]THE COURT: Why is it approximately? Don't you

[21]know how much you charge?

[22]THE WITNESS: I have to make some additions; that

[23]is why I am saying. If you want the exact figure I can add,

[24]it up for you.

[25]Q. Will you do that, Doctor?
44

[1]A. Excuse me?

[2]Q. Would you do that?

[3]A. Sure.

[4](Pause)

[5]A. $ 11,434.

[6]Q. Doctor, you said you still are continuing to see

[7]him as a patient?

[8]A. That's correct.

[9]Q. Do you have an opinion based upon a reasonable

[10]degree of medical probability how long you will have to

[11]continue seeing him as a patient?

[12]A. Mr. Walker is going to need lifetime treatment on

[13]an as-needed basis.

[14]THE COURT: That is true of everybody, isn't that

[15]so? All of us are going to go to doctors on an as-needed

[16]basis; isn't that right?

[17]THE WITNESS: Not all of us have those injuries.

[18]THE COURT: That is all right. You **[*44]** added the

[19]word "as-needed basis", and I suppose I can foresee that I

[20]am going to have to see doctors for my lifetime as needed.

[21]Isn't that correct?

[22]Q. Doctor, let me ask you this instead:

[23]Did you recently make a diagnosis with regard to

[24]his present condition?

[25]A. Yes.

[45]
[1]Q. Can you refer to your notes and tell us what that

[2]diagnosis is?

[3]A. Well, I made five diagnoses for him. Shall I

[4]mention all five?

[5]Q. Yes, please.

[6]A. Left knee, medial meniscal tear with traumatic

[7]chondromalacia, status to left knee, arthroscopic surgery.

[8]No. 2, right shoulder rotator cuff tear.

[9]No. 3, L4-L5,L5-S1 disk protrusions.

[10]No. 4, left L5 radiculopathy due to nerve root

[11]compression due to disk herniation.

[12]No. 5, traumatic fibromyositis.

[13]Q. All right. Starting with the last one, what does

[14]traumatic fibromyositis mean? How do you define that?

[15]A. Fibromyositis a painful condition with reference

[16]to muscle. It results from several problems. It can result

[17]from injury, it can result from stress, it could result from

[18]certain endocrine --

[19] **[*45]** THE COURT: That is what causes it, but the

[20]lawyer wants to know what it is.

[21]THE WITNESS: OK.

[22]THE COURT: What is it?

[23]THE WITNESS: It's a condition where the muscles

[24]in the upper back, lower back, and neck muscles go into

[25]spasm and are filled with trigger points. The criteria for
46

[1]diagnosis is when you have two trigger points or more in two

[2]sites or more, you get the -- you meet the criteria for a

[3]diagnosis of fibromyositis.

[4]Q. And that is the condition that you have been

[5]treating him for up until the present time?

[6]A. That's correct.

[7]Q. Do you have an opinion whether that is a

[8]permanent condition, whether that traumatic fibromyositis is

[9]permanent?

[10]A. It can be permanent. The fact that it has still

[11]remained after a lengthy treatment, usually if it still

[12]persists after six months of therapy, you could say with a

[13]certain degree of medical certainty that it will become or

[14]it is a permanent problem.

[15]Q. Are you able to tell us whether he will continue,

[16]he will require the type of treatment that you have already

[17]explained to us that you have given him **[*46]** for these trigger-

[18]point injections? Will he require that in the future?

[19]A. Yes, he will require it in the future.

[20]Q. How about the L5 radiculopathy that you told us

[21]about due to the nerve root compression? Do you have an

[22]opinion based on a reasonable degree of medical probability

[23]whether that is a permanent condition?

[24]A. That is a definite problem that can only get

[25]worse.

47

[1]Q. Why is that, sir?

[2]A. Because once you have two disks involved in two

[3]crucial areas, namely, the lowest part of your spine and the

[4]level above it, you run the risk of herniating or protruding

[5]the other disks above it, and you run the risk of further

[6]injuring or further protruding or herniating the disk that

[7]is protruding. The disk problem only gets worse and it gets

[8]degenerated or becomes arthritic, and then you are left with

[9]the arthritic or arthritis of the spine at that level.

[10]THE COURT: Tell the jury what radiculopathy is.

[11]THE WITNESS: Radiculopathy is -- the RAD means

[12]nerve root. "Opathy" means any disturbance or malady to that

[13]particular problem. So radiculopathy means a problem **[*47]** with

[14]the nerve root.

[15]THE COURT: Is it an actual problem, or is a

[16]perceived problem?

[17]THE WITNESS: I don't understand the question.

[18]THE COURT: Is it an actual problem that you can

[19]physically demonstrate, or is it something that you believe

[20]that he might have?

[21]THE WITNESS: It's a problem you can demonstrate

[22]with the proper diagnostic tests.

[23]Q. Have you so demonstrated this particular

[24]condition?

[25]A. I have.

48

[1]Q. What study was that?

[2]A. The EMG studies.

[3]Q. How about the disk protrusion of L4-L5 and L5-S1?

[4]A. Those were documented by the MRI studies.

[5]Q. Well, do you have an opinion whether these are

[6]permanent?

[7]A. Yes. These are permanent.

[8]Q. Are they going to be pain-productive in the

[9]future?

[10]A. Absolutely.

[11]Q. And is the same thing true with regard to

[12]radiculopathy and the traumatic fibromyositis? Are they

[13]also going to be pain-productive in the future?

[14]A. Yes. The radiculopathy can cause -- can actually

[15]cause itself the fibromyositis and the trigger points, so

[16]you have a condition that is **[*48]** permanent, you have a nerve

[17]root that is permanently compressed, that is permanently

[18]continuously irritating the local muscles, tendons, and

[19]ligaments to that particular nerve root level; so what you

[20]have is constant, continuous irritation to a particular

[21]area. And when you treat it, it gets better but it keeps

[22]coming back.

[23]Q. Doctor, earlier you told us about rehabilitation,

[24]that your specialty was in the field of rehabilitation and

[25]physical therapy, and you explained rehabilitation is trying

49

[1]to restore the patient following trauma to his prior normal

[2]state, is that correct?

[3]A. That's correct.

[4]Q. Now, with regard to Mr. Walker, how would you

[5]characterize him as of the last visit April 5, 1990?

[6]A. Well, I feel that in terms of rehabilitation, he

[7]has reached maximum rehabilitation, and he has definite

[8]permanent deficits.

[9]Q. And Doctor, do you have an opinion based upon a

[10]reasonable degree of medical probability whether he is

[11]capable of return to work at this time?

[12]A. Not his previous occupation.

[13]THE COURT: What was that?

[14]THE WITNESS: Namely, **[*49]** climbing up on roofs,

[15]fixing roofs, doing roofing, cutting.

[16]THE COURT: What physical labor can he do?

[17]THE WITNESS: Well, physical labor, none.

[18]THE COURT: Can't wield a shovel in the snow?

[19]THE WITNESS: No way, absolutely.

[20]Q. Doctor, one of the things that I want you to

[21]assume Mr. Walker testified he was doing duct work, working

[22]overhead which is arms up installing duct work for air

[23]passage, air conditioning, that sort of thing. Do you have

[24]an opinion whether he is capable of doing that type of work

[25]today?

50

[1]A. Well, as you recall, I previously mentioned that

[2]because of the rotator cuff tear, he cannot do overhead

[3]movements. That movement should be avoided completely. So

[4]the answer to your question is he cannot do that kind of

[5]work.

[6]Q. Doctor, do you believe, do you have an opinion

[7]whether future medical care and rehabilitation will restore

[8]him to an employable state?

[9]A. When you say employable state, it depends on what

[10]type of occupation you are referring to.

[11]Q. Well, with rehabilitation, I think the question

[12]is really addressed to do yourself. **[*50]**

[13]A. OK. In terms of labor, he cannot do any kind of

[14]labor work. In terms of work, well, let's analyze it. Here

[15]is a man who has a torn meniscus. He still has it, is going

[16]to have an arthritic knee for the rest of his 3ife. He has

[17]two disks in the lower back.

[18]He is not going to be able to hold down any kind

[19]of job on a permanent or regular basis.

[20]Now, in terms of him being able to do sitting or

[21]standing type of work, the answer is no. He cannot do any

[22]kind of labor work that requires him to sit or stand for any

[23]length of time. Any length of time, I mean more than four

[24]hours at a time.

[25]THE COURT: Did you prescribe a cane or crutches

[51]

[1]for him?

[2]THE WITNESS: At the present time, no, I have

[3]told him to try to resort to the full use of his own muscle

[4]powers because if he resorts to any cane or any braces at

[5]this time, he will only destroy the whole purpose of his

[6]rehabilitation, and that's namely to try to strengthen the

[7]muscles that were weakened before.

[8]THE COURT: As a matter of fact, when he comes to

[9]the office two or three times a week, he comes in under his

[10] **[*51]** own power without canes and without crutches; isn't that

[11]right?

[12]THE WITNESS: That's correct.

[13]Q. You told us earlier you prescribed an

[14]immobilizer. Did you prescribe any other type of surgical

[15]supports for him?

[16]A. I believe we spoke about a special knee brace, a

[17]Lenox Hill knee brace, and what I told him was, I told him

[18]that this is a very, very good brace for your problem, but

[19]unfortunately not everybody can tolerate wearing it. I told

[20]him to --

[21]Q. Why is that, sir?

[22]A. I told him to go to the special place that sells

[23]these braces to try it on, to see how it fits on you, and

[24]that will determine whether you can tolerate putting it on

[25]and wearing it on a regular basis or not.

[52]
[1]Q. Did he obtain a knee brace?

[2]A. If I recall correctly, I think he did.

[3]Q. And, Doctor, is this the type of brace that you

[4]have been talking about?

[5]A. That's right

[6]MR. SABLE: Can would he have this marked,

[7]please?

[8]Q. Can you, holding this, sir, explain the function

[9]of the brace?

[10]A. OK. This is what we would call as a Lenox Hill

[11]brace or a **[*52]** derotational brace. You have metal hinges on the

[12]inner and outer part of the knee to compensation for the

[13]weakened ligaments and tendons and cartilages that were

[14]injured in Mr. Walker's case.

[15]Also what this brace does, it gives you support

[16]in the front to prevent your knee from buckling. Also, it

[17]has straps in the back to give you extra support. You have

[18]an anterior force coming this way and you have another force

[19]posteriorly going anteriorly. These two forces add to the

[20]stability of the knee joint.

[21]Q. You recommended that he does not use that all the

[22]time; is that right?

[23]A. Yes. I told him not to use this all the time

[24]because if he did use it all the time he would only weaken

[25]his muscles.

53

[1]Q. When should he use it?

[2]A. Only when he is traveling to and from a place

[3]that requires him to walk a lot or to negotiate stairs, or

[4]he is going to be in a situation where he has to stand for a

[5]long period of time.

[6]THE COURT: When he walks into your office, does

[7]he wear the brace?

[8]THE WITNESS: At the present time, he is not.

[9]MR. SABLE: Thank you, Doctor. **[*53]**

[10](Plaintiffs Exhibit 4 was marked for

[11]identification)

[12]MR. CREEDON: May I inquire?

[13]THE COURT: Yes, certainly. I am waiting for

[14]you.

[15]CROSS EXAMINATION

[16]BY MR. CREEDON:

[17]Q. Doctor is it your testimony that there is no job

[18]that this man can hold? Is that your testimony here?

[19]A. My testimony is --

[20]THE COURT: Just answer yes or no. This is

[21]cross examination. Is that your testimony?

[22]THE WITNESS: I need to explain that.

[23]Q. Go right ahead.

[24]THE COURT: Just answer first and explain it

[25]later.

54

[1]THE WITNESS: At the present time, the answer to

[2]that question is yes, he is not able to hold any job.

[3]Q. Why is that?

[4]A. Based on, one, if he -- any kind of a job that

[5]requires him to sit or stand for any length of time, will

[6]aggravate his back condition and will aggravate his knee

[7]condition.

[8]Q. How about a job where sometimes he could sit and

[9]then some times he could stand?

[10]A. OK. How long will he sit how long will he stand?

[11]Q. You see our court reporter here, you see him.

[12]Two minutes ago he was standing taking **[*54]** notes, now he is

[13]sitting down taking notes.

[14]A. He can try to see if he can -- if a job can be --

[15]there is what is called vocational rehabilitation. What

[16]these people do is try to find out what his injuries are,

[17]what his problems are, and try to find a job that is

[18]suitable for his injuries.

[19]So he would be a good candidate to be referred

[20]for vocational rehabilitation.

[21]Q. What about a job, let's say, telemarketing where

[22]you call people on the phone? You sit down, talk on the

[23]phone, stand up, talk on the phone; he can do that, right?

[24]A. He can do that sometimes but when his pain

[25]aggravates, he cannot think clearly, and he would not want
55

[1]THE WITNESS: At the present time, the answer to

[2]that question is yes, he is not able to hold any job.

[3]Q. Why is that?

[4]A. Based on, one, if he -- any kind of a job that

[5]requires him to sit or stand for any length of time, will

[6]aggravate his back condition and will aggravate his knee

[7]condition.

[8]Q. How about a job where sometimes he could sit and

[9]then some times he could stand?

[10]A. OK. How long will he sit how **[*55]** long will he stand?

[11]Q. You see our court reporter here, you see him.

[12]Two minutes ago he was standing taking notes, now he is

[13]sitting down taking notes.

[14]A. He can try to see if he can -- if a job can be --

[15]there is what is called vocational rehabilitation. What

[16]these people do is try to find out what his injuries are,

[17]what his problems are, and try to find a job that is

[18]suitable for his injuries.

[19]So he would be a good candidate to be referred

[20]for vocational rehabilitation.

[21]Q. What about a job, let's say, telemarketing where

[22]you call people on the phone? You sit down, talk on the

[23]phone, stand up, talk on the phone; he can do that, right?

[24]A. He can do that sometimes but when his pain

[25]aggravates, he cannot think clearly, and he would not want

[56]
[1]A. Excuse me?

[2]Q. On a living person?

[3]A. Of course.

[4]Q. Do you do surgery yourself?

[5]A. Yes.

[6]Q. Did you do any in this case?

[7]A. In this particular case?

[8]Q. Yes.

[9]A. No, I did not do any surgery on Mr. Walker.

[10]Q. Let me see if I understand something. Your

[11]testimony is **[*56]** that he is permanently disabled from being able

[12]to hold virtually any sort of job because of injury to his

[13]back?

[14]A. Let me explain it. I am saying he is permanently

[15]and totally disabled for his present occupation.

[16]Q. I am not asking you about that. We will get to

[17]that in a minute.

[18]A. And at the present time, yes, he is permanently

[19]disabled to hold any type of occupation at the present time.

[20]Q. Because of his back?

[21]A. Because of his back and because of his knee.

[22]Q. You are calling that back injury a herniation,

[23]right?

[24]A. He has a herniated disk and he has a protruding

[25]disk.

57

[1]Q. You read to us five diagnoses. I presume you were

[2]reading from a report dated January 16, 1990?

[3]A. That's correct.

[4]Q. You show me where under those diagnoses you see

[5]the word herniation.

[6]Could you do that for me?

[7]A. No. 4, left L5 radiculopathy due to nerve

[8]compression from disk. Only a herniated disk can do that.

[9]Q. But the word is not in there, right?

[10]A. No, I left it out.

[11]Q. That is between the lines, the fact that he has **[*57]** a

[12]herniated disk that is going to give him a permanent

[13]disability? You didn't think that was important enough to

[14]put in this report?

[15]A. When you have a nerve root compression, that's

[16]what is important. You could have a disk herniation, and it

[17]may not actually compress on the nerve root. It can

[18]compress a different part of the nervous system, namely, the

[19]spinal cord.

[20]THE COURT: Wait a minute. Are you saying that

[21]you have a good hernia and a bad hernia? Is that what you

[22]say?

[23]THE WITNESS: I am saying this herniation has

[24]levels, as rotator cuff and as meniscal tears have levels.

[25]You have grade one, grade two, grade three. You can have a

58

[1]mild, moderate, or severe herniation. A severe herniation

[2]will take you right onto the operating table. A mild to

[3]moderate herniation would keep you out of the operating

[4]table or would keep you in a guarded situation.

[5]THE COURT: Does your report give you any idea of

[6]whether it's mild or middle or extensive or high? Is there

[7]anything like in there?

[8]MR. CREEDON: It's not there, Judge. Maybe it

[9]was another thing between the lines. **[*58]**
[10]THE WITNESS: No. Based on the injuries.

[11]THE COURT: I am talking about when you wrote the

[12]report.

[13]THE WITNESS: I did not put down the word.

[14]THE COURT: You didn't have in mind testifying at

[15]that time, did you?

[16]THE WITNESS: No, but if I had to, I'd gladly

[17]testify.

[18]Q. Who did you write this report for?

[19]A. This was written for the insurance company and

[20]also for the attorney, Mr. Sable.

[21]Q. Well, if you are writing for people like that,

[22]don't you write it in anticipation of testifying at a trial?

[23]A. Not necessarily.

[24]Q. How many times this year did you testify at

[25]trials, by the way?
59

[1]A. This year?

[2]Q. Yes.?

[3]A. Starting from January 1990?

[4]Q. Well, start from January 1990.

[5]A. I'd say about three times.

[6]Q. And how much are you getting paid to be here

[7]today?

[8]A. I charge by the hour, charge $ 300 an hour.

[9]Q. When was it that you sent Mr. Walker for an MRI

[10]for his back?

[11]A. His back?

[12]Q. Yes?

[13]A. I believe it was November of '89.

[14]Q. Why did you let eight months **[*59]** go by before you had

[15]that? That is the best diagnostic test, is that right?

[16]A. Yes it's one of the best, yes.

[17]Q. Why did eight months go by before he had that

[18]test to see whether or not he had a herniated disk?

[19]A. Because his condition was improving at the time.

[20]It would improve, then it would get worse, then it would

[21]improve and get worse. At that point I felt obligated to

[22]find out why that was happening.

[23]Q. Isn't it a fact that when you found out that he

[24]had this condition, did you begin to treat him differently?

[25]A. Well, I started to treat him with paraspinal
60

[1]nerve blocks to take the irritation around the area and I

[2]told him to be cautious, more cautious of certain

[3]activities, namely bending, lifting, prolonged sitting, and

[4]standing.

[5]Q. If you told him those things back in March, isn't

[6]there a possibility that he never would have developed this

[7]condition?

[8]A. If I told him these conditions back in March?

[9]Q. If you gave him those precautions, if you treated

[10]him in that fashion back in March when he first come to you

[11]with these complaints that **[*60]** you testified to, isn't there a

[12]possibility that he would never have developed these

[13]conditions?

[14]A. Not true, no, because he had already had these

[15]problems, these conditions.

[16]Q. But you didn't know it?

[17]A. I didn't know.

[18]Q. You let it go for eight months without being

[19]treated if it were that sort of condition?

[20]A. It was being treated and he was abstaining from

[21]any kind of activity to prolonged sitting, standing,

[22]bending, lifting, pulling, pushing.

[23]Q. You don't think he should have surgery for his

[24]back at this point?

[25]A. At the present time, no.

[61]
[1]Q. But Dr. Ergas thinks he should?

[2]A. No, as my discussion with him, he felt he should

[3]be evaluated by a specialist, for him to determine.

[4]Q. He didn't tell you that he recommended spinal

[5]surgery?

[6]A. What he told me was he recommended that he see a

[7]special spinal surgeon to evaluate, to see whether he needs

[8]that surgery or not.

[9]Q. If he said something different some place else,

[10]maybe this morning, that would be different from what he

[11]told you, right?

[12]A. No.

[13] **[*61]** Q. And you say that you and the doctor disagree on

[14]that, and you said that an MRI was read of Mr. Walker's knee

[15]and there were negative results?

[16]A. That's right.

[17]Q. You disagree with that?

[18]A. No, that is what the MRI report said.

[19]Q. You told us you disagreed with that doctor's

[20]interpretation?

[21]A. I said I was shocked at the report.

[22]Q. So if you and that doctor disagreed, and you and

[23]Dr. Ergas disagreed --

[24]MR. SABLE: Objection, your Honor. He is not,

[25]The lawyer keeps characterizing it.

62

[1]THE COURT: Reframe the question, please.

[2]MR. SABLE: Thank you.

[3]MR. CREEDON: Yes, your Honor.

[4]Q. You tail us what your opinion is concerning the

[5]degree of loss of the function of Mr. Walker's left knee.

[6]A. A very generous disability, I'd say in terms of

[7]being very conservative, I'd say about 30, 35 percent.

[8]Q. That would be in spite of the fact that he has

[9]the ability to flex that knee to 130 degrees?

[10]A. That is not the criteria you use to determine

[11]disability.

[12]Q. Did you use that criteria in determining

[13]disability?

[14] **[*62]** A. There are many factors in terms of criteria for

[15]determining disability.

[16]Q. Is that one of them?

[17]A. That is one of them.

[18]Q. Did you use it in this case?

[19]A. Yes.

[20]Q. Let me ask you this: Did you have to, in

[21]addition to reports that you prepared for attorneys in this

[22]case, prepare additional reports where you were asked to

[23]indicate whether or not a condition might result in a

[24]permanent deferment, restriction, loss of function, or

[25]disfigurement, and then describe how that condition or what
63

[1]that condition might be if the answer were yes?

[2]A. You are asking if I was asked to perform such a

[3]report?

[4]Q. Yes.

[5]A. I could check my records. I usually do that

[6]routinely.

[7]Q. Let me show you these items.

[8]To refresh his recollection, your Honor.

[9]THE COURT: Go ahead.

[10]MR. CREEDON: Do we need to have them marked for

[11]identification?

[12]THE COURT: Go ahead.

[13]Q. I don't want to you describe to the jury

[14]necessarily what these are, but I'd like you to take a look

[15]at them and refer to under paragraph or line entry 4A,

[16]questions **[*63]** that are asked there. Just look at them, read

[17]them to yourself, and when you do I am going do ask you a

[18]few questions.

[19]A. You want me to read it?

[20]Q. To yourself.

[21]A. OK.

[22](Pause)

[23]Q. First of all, were you required to prepare such

[24]reports or did you in this case prepare such reports?

[25]A. Yes.

64

[1]Q. On April 17, did you indicate that there might be

[2]a permanent disability or loss of function?

[3]A. Yes.

[4]Q. Did you describe what that might be?

[5]A. No.

[6]Q. On May 24, did you indicate there might be a

[7]permanent disability or loss of function?

[8]A. Yes.

[9]Q. And you ascribed that to what sort of problem?

[10]A. Knee instability.

[11]Q. On June 28, did you indicate there might be a

[12]permanent loss of function or a disability?

[13]A. Yes.

[14]Q. Did you describe that as attributable to

[15]anything?

[16]A. I didn't describe it because it was previously

[17]described.

[18]Q. I want to know what is next to the word "yes"

[19]which says describe what -- when I am asking these

[20]questions --.

[21]MR. SABLE: Are you asking **[*64]** him to read from it?

[22]MR. CREEDON: No, I am not asking him to read

[23]from it.

[24]MR. SABLE: Your Honor, I object.

[25]THE COURT: What is that?

65

[1]MR. SABLE: I am objecting to the question.

[2]THE COURT: The witness said that he would have

[3]to look at his reports to refresh his recollection. Now the

[4]lawyer helped him out by making it unnecessary for him to

[5]search through his reports.

[6]Take your reports back. Let him look at his own

[7]reports to refresh his own recollection. He's got the

[8]duplicate there, he says.

[9]Q. Do you have copies of those, Doctor?

[10]THE COURT: We can go about it the longer way

[11]or the shorter way.

[12]A. I believe I have copies, yes.

[13]MR. CREEDON: Do you want him to search for it or

[14]can he use those? I made notes of what I want to ask.

[15]THE COURT: Are you able to to recite what 4A

[16]says without looking at it, or do you need to refresh your

[17]recollection by looking at it?

[18]THE WITNESS: I need to refresh my recollection.

[19]THE COURT: Go ahead and refresh your

[20]recollection and testify.

[21]THE WITNESS: What is the question? **[*65]**

[22]Q. On October 13 did you make an indication there

[23]might be a permanent loss of function or a disability?

[24]A. Yes.

[25]Q. You described that as attributable to what?

66

[1]A. Recurrent left knee pain.

[2]Q. By the way, October 13, in that same report, did

[3]you indicate that the patient was showing satisfactory

[4]progress?

[5]A. Yes, I did.

[6]Q. What did that mean?

[7]A. That he was making improvement at the time.

[8]Q. Steady from when?

[9]A. From the initial, the very first time I saw him.

[10]Q. From March until October you characterized that

[11]progress as steady?

[12]A. Steady, slow, improving, yes.

[13]Q. Can you tell me whether or not October 18 in a

[14]report like that you made indication whether or not there

[15]might be a permanent disability or loss of function?

[16]A. That is not my report.

[17]Q. All right. Let me ask you about the first four

[18]reports that are yours. Can you show me anywhere in any of

[19]those reports any mention of the phrase or the word,

[20]"rotator cuff" or, "herniated disk"?

[21]A. Well, the rotator cuff injury --

[22]THE COURT: **[*66]** Just a minute now. You certainly

[23]are an intelligent man, and you understand English, and the

[24]words are simple. Is there anywhere in that report the use

[25]of the words "rotator cuff" or the use of the words

[67]
[1]"herniated disk?"

[2]That calls for to you look, see, and answer

[3]directly.

[4]THE WITNESS: OK. This answer needs to be

[5]explained. It cannot be answered with a yes or no

[6]statement.

[7]THE COURT: You mean to say that you cannot read

[8]what is on this?

[9]THE WITNESS: Yes, I can read it.

[10]THE COURT: Is there anything that you read that

[11]uses the words "herniated disk"?

[12]THE WITNESS: No, there is not.

[13]THE COURT: Is there anything on there that uses

[14]the words "rotator cuff"?

[15]THE WITNESS: No.

[16]THE COURT: Next question.

[17]MR. CREEDON: No other questions. Thank

[18]you, sir.

[19]MR. SABLE: May I see those documents?

[20]THE COURT: Wait a minute. There is another

[21]cross examination.

[22]MR. HERBERT: May I have an opportunity to see

[23]what records the doctor has brought with him to the

[24]courtroom?

[25]THE COURT: What is that?

68

[1]MR. **[*67]** HERBERT: May I have an opportunity to see

[2]what records the doctor has brought with him that he used

[3]today in testifying?

[4]THE COURT: Yes, of course. Ask him.

[5]MR. HERBERT: Could we have a short recess so I

[6]can look them over?

[7]THE COURT: Go ahead. I haven't called it a day

[8]yet. The jury isn't tired, I don't think.

[9]MR. SABLE: In the meantime, may I look at those

[10]other documents, your Honor?

[11]THE COURT: Certainly.

[12]MR. SABLE: Thank you.

[13]THE COURT: Why doesn't the jury take a

[14]ten-minute recess while these lawyers look at those papers.

[15](Recess)

[16](In open court, jury present)

[17]THE COURT: For the jury's consideration, we will

[18]suspend at a quarter to 5 if that is all right, unless

[19]somebody has an urgent appointment. I'd like to get this

[20]case moving so it doesn't hold you up indefinitely.

[21]All right, Mr. Herbert, move along rapidly and

[22]make it short.

[23]MR. HERBERT: Thank you, Judge. Will do.

[24]CROSS EXAMINATION

[25]BY MR. HERBERT:

69

[1]Q. Doctor, I am sorry, I didn't get the name of the

[2]medical school that you graduated from.

[3] **[*68]** A. University of Northeast, abbreviated as UNNE,

[4]the Dominican Republic.

[5]Q. I see. Thank you.

[6]Doctor, when you saw him for the first time, he

[7]was complaining about a left knee and his left shoulder?

[8]A. He was initially complaining of basically the

[9]left knee, left shoulder.

[10]Q. And he wasn't sure if he injured his back?

[11]A. That's right, that is the history he gave me.

[12]Q. With respect to your examination, you performed a

[13]straight-leg raising test, did you not, on that initial

[14]visit?

[15]A. That's correct.

[16]Q. And is that in connection with the examination of

[17]his back?

[18]A. OK, usually --

[19]Q. Is it in connection with the examination of his

[20]back?

[21]A. Yes, that's in connection with his back.

[22]Q. And the straight-leg raising was 90 degrees

[23]bilaterally. That is normal is it not?

[24]A. Yes, that's normal but it was with pain.

[25]Q. Does your report say that when you examined the
70

[1]straight-leg raising with 90 degrees bilaterally with pain?

[2]A. No, it does not mention it.

[3]Q. I didn't think so. All right. You found that

[4] **[*69]** the active range of motion was within normal limits for all

[5]four extremities, is that right?

[6]A. That's correct.

[7]Q. That is a normal finding too?

[8]A. That's correct.

[9]Q. You told us that you prescribed among other

[10]things Motrin, which you had to discontinue; that was an

[11]anti-inflammatory medication?

[12]A. Anti-inflammatory and analgesic.

[13]Q. You also prescribed Tylenol, you say, with

[14]codeine?

[15]A. That's correct.

[16]Q. Weren't you aware that Mr. Walker is allergic to

[17]codeine?

[18]A. The only thing that he told me he was allergic to

[19]is pencillin.

[20]Q. Have you seen the hospital record for Joint

[21]Diseases when he was admitted there in August of 1989?

[22]A. I don't believe I had the opportunity to see the

[23]entire record.

[24]Q. According to the record which is in evidence, I

[25]believe, it stated that he is allergic to both penicillin

[71]
[1]and codeine.

[2]A. I don't think he's allergic to codeine. He

[3]certainly never told me that.

[4]THE COURT: Do you dispute the hospital record?

[5]THE WITNESS: No, ask the patient.

[6]THE COURT: I **[*70]** don't need to ask the patient. I

[7]am asking you whether you dispute the hospital record.

[8]THE WITNESS: The history he gave --

[9]THE COURT: You know, Doctor, you can help

[10]shorten this by just responding directly to the questions.

[11]Leave the trial to Mr. Sable. He is quite good.

[12]Q. With respect to what you have referred to as a

[13]protrusion of the disks, as far as you know were any x-rays

[14]obtained of his lumbosacral spine?

[15]A. As far as I know, no.

[16]Q. You didn't request any, did you?

[17]A. No, I wasn't expecting any problem on -- to be

[18]found on x-ray.

[19]Q. Disks can degenerate because of age or because of

[20]excessive labor, can they not?

[21]A. Yes.

[22]Q. And when disks degenerate through natural wear

[23]and tear or heavy labor, it can cause the disks to protrude,

[24]can they not?

[25]A. It may.
72

[1]Q. You told us that Mr. Walker has reached maximum

[2]rehabilitation?

[3]A. In terms of improvement.

[4]Q. You treated him quite extensively, did you not?

[5]A. That's correct.

[6]Q. And did you treat him to build up the muscles

[7]above the patella?

[8] **[*71]** A. Yes, the quadriceps.

[9]Q. The quadriceps. Did you treat him for that?

[10]Did you give him exercise and treatment for that?

[11]A. Yes, I did.

[12]Q. Did the extensive treatments and exercises that

[13]you prescribed improve and build up the quadriceps muscles?

[14]A. Yes, they did.

[15]Q. When did you notice that change?

[16]A. As per my exam of 3/29/90, I conducted an active

[17]range of motion and a muscle-power testing. On that date I

[18]found that his muscles were grossly normal on the manual

[19]muscle power testing scale

[20]Q. You spoke of vocational rehabilitation?

[21]A. That's correct.

[22]Q. Have you referred Mr. Walker for vocational

[23]rehabilitation?

[24]A. Not yet but that's -- that has been discussed

[25]before in the past.

73

[1]Q. You are not suggesting that Mr. Walker is

[2]incapable of being rehabilitated vocadtionally, are you?

[3]A. I am saying that that is for that department to

[4]evaluate and determine.

[5]Q. Are you in rehabilitation yourself?

[6]A. Yes, I am.

[7]Q. And you are interested in seeing persons get back

[8]into the job force, are you not?

[9] **[*72]** A. That's right

[10]Q. Vocationally rehabilitation can be obtained in

[11]New York City, can it not?

[12]A. That's right.

[13]Q. Free of charge?

[14]A. Free of charge.

[15]Q. There is one other report, I believe, that was in

[16]your documents, and this is a report dated by you February

[17]22, 1990; is that right?

[18]A. Can I see the report?

[19]Yes.

[20]Q. In that report, you have set forth your diagnosis

[21]of Mr. Walker's condition?

[22]A. This was filled out by my secretary. It's not my

[23]handwriting. I just signed it.

[24]Q. Do you read it over before you sign it?

[25]A. Yes.

74

[1]Q. All right. Your diagnosis is set forth in that

[2]report, is it not?

[3]A. This is not a complete diagnosis.

[4]Q. Just is it, is your diagnosis set forth? is

[5]there a diagnosis set forth in that report?

[6]A. Yes there is a diagnosis but it's not complete.

[7]Q. The diagnosis that you have set forth in that

[8]report makes no mention, does it, of a herniated disk or a

[9]protrusion disk, does it?

[10]A. No. As I mentioned --

[11]Q. And makes no mention of rotator cuff?

[12]A. No, **[*73]** it does not.

[13]Q. Thank you, Doctor.

[14]THE COURT: What is the date of that, Mr.

[15]Herbert?

[16]MR. HERBERT: February 22, 1990.

[17]THE COURT: Is that diagnosis in evidence?

[18]MR. HERBERT: May I have that marked, please, as

[19]defendant Metro-North Exhibit A for identification.

[20]THE COURT: Any objection, Mr. Creedon.

[21]MR. HERBERT: Which I will offer into evidence.

[22]MR. CREEDON: None, sir.

[23]THE COURT: Any objection, Mr. Sable?

[24]MR. SABLE: I haven't seen it, your Honor.

[25]May I?
75

[1](Pause)

[2]THE COURT: No further questions, Mr. Herbert?

[3]MR. HERBERT: No further questions, your Honor.

[4]THE COURT: Mr. Sable, any redirect?

[5]MR. SABLE: Yes, your Honor. I have no objection

[6]to this going into evidence.

[7](Defendant Metro-North Exhibit A for

[8]identification was received in evidence).

[9]MR. SABLE: Would you land this to the doctor,

[10]plaintiff's Exhibit 5.

[11]REDIRECT EXAMINATION

[12]BY MR. SABLE:

[13]Q. Doctor, those papers that were just handed to

[14]you, those are the papers that you were asked to look at

[15]previously, is that correct, **[*74]** by the attorney?

[16]A. That's correct.

[17]Q. And you were asked a series of questions there

[18]with regard to that paper. First of all could you tell us

[19]what those papers are?

[20]A. These are medical reports addressed to the

[21]Metro-North Commuter Railroad.

[22]Q. Is that a usual form that is filled out by

[23]yourself or by your staff?

[24]A. By my staff.

[25]Q. It's done by your staff?

76

[1]A. Yes, sometimes it's done by me, sometimes it's

[2]done by my staff.

[3]Q. There are five papers there running from April

[4]17, if I remember correctly, to October 18 of 1989. Is that

[5]correct?

[6]A. That's correct.

[7]Q. You were asked with respect to those reports

[8]whether there is any mention there with regard to a

[9]herniated disk in any of those reports or rotator cuff

[10]injury.

[11]Do you recall the questions?

[12]A. Yes, I recall the questions.

[13]Q. Can you explain your answer, sir?

[14]A. Sure. As you recall, the date of the MRI and the

[15]date of the initiation of my diagnostic testing didn't start

[16]until in November. The first diagnostic study which I

[17]rendered was 11/27/89, which **[*75]** is after the dates of these

[18]reports. And the MRI dates were 11/30/89 and the ultrasound

[19]to shoulder was 12/4/89, so that is why they couldn't be put

[20]on these records.

[21]Q. The most recent report that you were shown?

[22]A. The most recent report was still that of my

[23]secretary who just copied the previous reports, and I signed

[24]them because it looked correct. I don't rely on' these as my

[25]complete diagnosis. I usually render a tight report to
77

[1]Metro-North, as I did back in the beginning and in January

[2]of 1990. These are reports I go by.

[3]Q. Let's talk about vocational rehabilitation,

[4]Doctor. You are familiar with that, are you not?

[5]A. Yes, I am.

[6]Q. Is a person's prior education important with

[7]regard to vocational rehabilitation?

[8]A. It's very important.

[9]Q. Is a person's prior work history important with

[10]regard to with regard to vocational rehabilitation?

[11]A. Absolutely.

[12]Q. Doctor, assuming that Mr. Walker testified that

[13]he attended a trade school, trade school high school and

[14]learned sheetmetal work, among other things, and that since

[15]that time, the **[*76]** work that he has done has been primarily

[16]sheetmetal as well as other laboring work, could you tell us

[17]or express an opinion whether he is presently suited to do

[18]telemarketing?

[19]MR. CREEDON: I object, Judge. This witness ahs

[20]indicated he is not competent to testify in that area.

[21]THE COURT: Sustained.

[22]Q. Can you explain what telemarketing is?

[23]MR. CREEDON: Same objection, Judge.

[24]THE COURT: Sustained.

[25]Q. Doctor, based upon the statements that I have

[78]
[1]asked to you assuma, what areas would you say that he is

[2]best suited for today?

[3]MR. CREEDON: Same objection, sir.

[4]THE COURT: Now wait a minute, are you asking him

[5]to go back on his statement? He says he is not suited for

[6]anything. He just admitted that is what his testimony was.

[7]I was sitting here and heard him say that he is not suited

[8]for anything at this time, and you used the word "today" in

[9]your question.

[10]MR. SABLE: The doctor further stated --

[11]THE COURT: Please ask a question and I will

[12]rule on it.

[13]Q. You were asked questions with regard to

[14]vocational rehabilitation.

[15] **[*77]** A. Right.

[16]Q. Whether Mr. Walker would be a candidate for

[17]vocational rehabilitation.

[18]A. Every person can be a candidate. Doesn't mean

[19]that something can become of it. Everybody is a candidate.

[20]Q. I see. So lastly, do you think at the present

[21]time that he is capable of any type of work?

[22]A. At the present time, no.

[23]MR. SABLE: I have nothing further.

[24]THE COURT: Thank you very much. You excused.

[25]oOo