2000 WL 35725229 (N.Y.Sup.) (Expert Trial Transcript)
Supreme Court of New York.
New York County

Marek SZPAKOWSKI and Agnes Szpakowski,
v.
SHELBY REALTY, LLC, et al.

No. 2000-123412.
2000.

(Transcript of Dr. Ali Guy)

Case Type: Labor & Employment >> Work Place Injury
Jurisdiction: New York County, New York
Name of Expert: Dr. **Ali Guy**
Area of Expertise: Health Care-Physicians & Health Professionals >>Physiatrist/Rehabilitation Medicine
Area of Expertise: Health Care-Physicians & Health Professionals >> Internist

Representing: Plaintiff

THE COURT: Yeah.

THE OFFICER: All rise, jury entering.

THE COURT: Well, be seated.

Good morning, ladies and gentlemen. We are about to hear summations from the attorneys. Remember as I've explained to you before that what they say is not evidence. They are --

MR. KELNER: Your Honor, we do have a rebuttal witness. I remind you, we have discussed that.

THE COURT; Yes, my mistake. Call your witness.

This is rebuttal. Plaintiff is going to respond to some issues that were brought up by the defendants in their case, when they presented their evidence.

MR. KELNER: The plaintiffs recall Dr. Ali Guy.

THE OFFICER: Please have a seat.

May I remind the witness you, you are still under oath.

THE WITNESS: Yes.

THE OFFCER: Please state your name for the record.

THE WITNESS: My name is Dr. Ali Guy.

DIRECT EXAMINATION

BY MR. KEINER:

Q Dr. Guy, have you referred patients for radiological work, x-rays, CAT scans, et cetera to Dr. Cole and Lenox Hill Radiology for a period of time?

A Yes, sir, I have.

Q If I told you that there had been testimony that thet are among the worse doctors in New York what would your comment about with regard to that?

MR. ROENHECK: Objection, your Honor.

MR. KLEIN: Objection, your Honor.

THE COURT: I'll allow it.

A With all due respect, I would not be referring my patients to the worse doctors in the world, including my own eister-in-law. I have referred my own sister-in-law to Dr. Cole, and my own wife as well.

Second of all, I've known Dr. Cole for over ten years, he happens to be assistant professor of radiology at Columbia University. He happens to do a lot of research. He happens to have won for a paper that he did last year, he came in first prize for one of the best radiological scientific papers presented. So, with all due respect, in my opinion Dr. Cole is not the worse physician.

Q Thank you, doctor. And you said he teaches where?

A At Columbia University.

MR. ROSENHECK: Objection, your Honor.

THE COURT: I'll allow it.

Q Columbia University?

A Yes, sir.

Q And is that connected with Columbia Presbyterian Hospital?

A Yes, sir.

Q Okay. Doctor, I want you to assume there has been testimony that the entire disk was removed in the surgery. Did I ask you to review the films and the chart and the operative record indicating that the annulus and disk had been removed? And I asked you whether the entire disk was removed or whether a portion of the disk was removed.

A A portion of a disk was removed.

Q Can you prove that to us with the films that you have previously shown to us?

A Yes, CAT scan films.

Q will you please.

MR. KELNER: Your Honor, could we have the use of the shadow box?

THE COURT: Can you get shadow box.

MR. KELNER: I'11 withdraw the question until the court officer comes back, your Honor. Just in the interest of time.

THE COURT: Okay.

Q With regard to your --

THE COURT: The shadow box is right there. I'm sorry, it's right out there. No problem, all plugged in.

Q I'll re-put the question, doctor. Could you show us on the shadow box whether this disk is partially or totally removed.

THE COURT: What exhibit number?

THE WITNESS: I'm pulling it out from the folder. It's labeled Exhibit Number 15.

THE COURT: They' re marked?

MR. KLEIN: Yes.

THE COURT: Tell us what markings are on the film.

THE WITNESS: This one is not marked.

THE COURT: The markings were taken off?

MR. ROSENHECK: Those must be different ones he's looking at.

THE WITNESS: I'm pulling different ones to show that specific slice the beet.

THE COURT: We should mark it. We've got 15-1, 2, 3, 4, 5, 15-1 through 5, right?

MR. KLEIN: Right.

THE COURT: This should be 7 and 8, correct? Let's mark them. Give them to the court reporter.

We'll mark them 7 and 8.

(Received and marked Plaintiff's Exhibit 15-7 and 15-8 in evidence.)

THE WITNESS: May I begin, Judge?

THE COURT: Yes, go ahead.

Q Just tell us the number you're using please, Dr. Guy?

A I'm using 15-7. This is page 9 of 13 pages.

Q What kind of film is that?

A There is the C T scan of the patient's lumbar spine.

Q Okay.

A Okay. What we're looking at here is, just to orient you, everything you see as white is bone. This is the screw, this is the screw. Metal and bone appear as white on the MRI. A disk appears as this gray, blackish material. Can you all see that? That's what normal disk looks like. And --

Q Question, doctor. I see that in some of the shotB.

A Right.

Q The gray is, appears darker?

A Yes.

Q And heavier.

A Yes.

Q Than in certain other shots, as if a paint brush is going on heavy rather than light.

A Right.

Q Why?

A As you are moving down the slices, you look for different things. You look -- The CAT scan shows you soft tissues and show you bone. So, some slices you appreciate more soft tissue, and some splices you appreciate more bone. So, you can have the best of both worlds.

So, this is the disk, this white portion is the bone. This is the level of L 2, L 3. This is the level of L 3, L 4. This is the level of L 3, L 4, okay? Now, I'm going over to the next.

Q So, were there portions, were there disks -- was there disk material there in all of these vertebrae?

A There is disk material in all of them. As you can see, if I were to cut this disk in half, you see disk material on the right side and left side.

Now I'm going to go to the level we're talking about. I want everybody to see what is normal. Now, I'm going to show you the part of the, the area that we're questioning. And once again what you're looking at here is, you're looking at the disk in this capacity. This is the spinous process, this is the transverse process. There is the disk, okay? Right in the center.

So, just to move along, next slice is page 11 of 13, and it's Exhibit 15-8. What we're looking at here, this is, this is the L 4 vertebra. This is the L 4, 5 disk space area. As you can see, this is the area that you questioned me, whether the entire disk was removed. The answer is no, half of it is removed. This is the left side, this is the right side. As you can see on the left side, half is removed. This is all bone. The right side, this grayish black material is all disk material. All disk material.

Q Thank you, doctor.

A You're welcome.

Q Doctor --

THE COURT; Do you want ?? to sit down?

Q On yes, please resume your seat. I'm sorry.

I want you to assume that Dr. Feu came to court and said that it was improper to do a CAT scan to get information in this case, and that the patient should only have gone for either an MRI or a myelogram. Now, and he used the word, he said that a mylogram is the gold standard, or language to that effect, in finding out information. First, does a CAT scan and an MRI give different information when you get to look at the film?

A Absolutely, yes.

Q Explain, please what is the difference?

A An MRI stands for magnetic resonance imaging. It is a test that's used for soft tissues. A CAT scan will give you both portions. It will give you information about bone, if there is a fracture to a vertebra. It will also give you information about soft tissue. The CAT scan has 13 slices, 13 pages. The first five or six pages gives you information only about bone. The remainder half gives you information about bone and soft tissue. So, it's the best test in the world. In fact, at the hospital they did the CAT scan in addition to the other tests as well, because they needed to have information. I needed to know what was happening at the L 4, L 5 level. I needed to know what was happening to that fracture. What it was doing to that nerve root, the neural foramina, as the nerve root exists. I need to know what was happening to the vertebral structure around the area of the fracture. The CAT scan was the best test. In fact, it was the most cost effective test at half the price of the mylogram and MRI.

Q Are there situations where an MRI is a better test to do to get certain types of information than a CAT scan?

A Yes. If you're looking for different objects, for soft tissue problems, yes. Here, I'm looking for both, bone problems and soft tissue problems.

Q Okay. Thank you, doctor. Now, with regard to a mylogram, tell this jury what a mylogram is.

A Mylogram is a test by which you take a long spinal needle, about six inches long, you do a spinal tap, and you insert a contrast dye into the spinal canal, and then you do a CAT scan to visualize all the structures that contrast dye enhances, magnifies the areas that you want to study. Shows the pictures a lot better.

But it has a lot of risks associated with it. And it is usually done right before the surgery. The surgeon does it to determine where he is going to make the incision, where he's going to make the cuts. Where he's going to do the surgery. You don't do it routinely, because there is a lot of complications and dangers. If you like, I would mention some.

Q This is a test where I want you to assume a six inch needle is inserted into the spine and dye is shot into the spine. Is that a more invasive test than either a CAT scan or MRI?

A Absolutely.

Q Are there reasons in this case that you did not? Are there reasons you did not order a mylogram?

A There was absolutely no indication to do a C T scan with a mylogram in this situation. There was no reason to subject a patient to a dangerous study like this. For what reason?

Q What were the dangers of injecting dye into this person's spine?

A The first danger is you could develop an allergic reaction to the dye. That's the first thing. That could kill you on the spot. Number two, the contrast dye is nephrotoxic, it has a bad effect on the kidneys. In some people that effect is much higher than others.

Number three, when you stick a needle into the spinal canal, the cerebral spinal fluid leaks out. Once that leaks out, different organisms around the area, you could have just the best sterile technique in he world, you still have a chance of a material or organism get going into the spinal canal and causing a massive infection. Also, that leakage, once you do the spinal tap, that area takes seven to ten days to close. When you do a venal puncture in your arm, it takes maybe ten minutes, but that area takes seven to ten days to heal.

So, if you do - - That spinal fluid continues to leak, when you stand, you get a pounding, massive headache. You have to be on bed rest until that area heals, if it ever heals. Second, you have a side effect, you can develop what is called post traumatic arachnoiditis. That is the membrane that covers the nerve roots, that could get inflamed That could cause problems for life.

And next, if you go in with the needle six inches long and accidentally you nick one of the structures that was operated upon and hit it, it will cause major problems, pain. And if you hit a nerve root, it can cause paralysis. A six inch needle is a pretty big needle.

Q Is it painful to do a mylogram on the person?

A That's the least. That's the least.

Q Forget all the rest of it, does it cause pain to an individual to have a mylogram?

A Tremendous pain.

Q Okay. Thank you, doctor. Now, I want you to assume that Dr. Feuer questioned your EMGs. He said, in part -- I want to you assume that he said, I don't know which muscles these reflect, these are motion artifacts. He said that you didn't mark the numbers or the name of the patient in a particular spot. He said that you couldn't separate an old and a new nerve injury. Although I will state I don't know that other nerve injury we're talking about, other than this fall. But, he raised that issue. He said that these were technically inadequate EMGs with invalid headings. He said that it was his opinion that the patient was not at rest. And then he said various other things. Talk to us about your EMGa, doctor. Were these EMGs any good?

A Yes. First of all, I'm board certified in the field of physical medicine, rehabilitation medicine. I passed all my tests. I proved to everybody I can do my EMGs. When you take your boards, there is an EMG doctor. You do an EMG for this examiner. You have to prove that you know how to do an EMO. They test you, they do the profile. Also, I teach EMG.

Q Who do you teach EMGS to?

A The residents of N.Y.U.

Q Thank you.

A Second of all, I brought with me a diagram, different presentations from textbooks of EMGa. My tracing will look just like these textbook presentation. If I may be allowed to show them. If I have my EMO tracings back.

MR. KELNER: Yes, could we hand the doctor his tracings? And we have not shown those.

MR. KLEIN: I have an objection to that.

THE OFFICER: Counsel, please don't approach.

MR. KELNER: I'm sorry.

THE COURT: You have an objection, step up. I'11 hear your objection.

(Conference held at the bench between the Court and counsel, off the record.)

THE COURT: The objection is sustained.

MR. KELNER: Okay.

Q Doctor, do not -- Put the pages away of the book that you were talking about.

A Yes.

Q Can you demonstrate without that, as to when first the patient was improperly in notion. And these are motion artifacts?

A May I use that diagram to show what normal tracings lock like?

MR. KELNER; Could we do that, your Honor?

THE COURT: Yes.

THE WITNESS; May I step down, Judge?

MR. KELNER: Should I pass it up to him, your Honor?

MR. KLEIN: He's going to draw something?

MR. KELNER: He's going to draw something.

THE WITNESS: Yes.

MR. KLEIN: Oh, May we move around, your Honor?

THE COURT: Yes.

THE WITNESS: May I begin, Judge?

THE COURT: Yes.

A A normal tracing on an EMG looks like so. First it goes up, comes back down and continues. Goes up, comes down and continues. This is a normal tracing. This is called d normal motor unit, or a normal action potential.

Next we have what is called a positive sharp wave. A positive sharp wave indicates that there is muscle abnormality from the nerve root which supplies that specific muscle. The way a positive sharp wave is seen on an EMG is you have the normal, it goes down first, goes back up, come back down, continues. Goes back down again, goes up, continues, the major difference is it goes down first, it looks like a V. It goes down first. Normal goes up first. That is a major, major difference.

Then we have other abnormal criteria, which I will not go to, we'll be here until tomorrow. Next we have is when a patient, we do an EMG, you can not do this test unless the patient is at rest. If the patient starts to move, I can't continue. I can't see anything on my screen because my screen would look like this. There is what motion artifacts or motion interference pattern looks like. It looks like this. You can't see a thing. So, the most important thing is -- And once the patient moves, the needle is in the patient's arm, the more you move, the more pain you'rt going to have The patient is going to be smart, the patient is not going to move. The less you move, the less pain you have. Because you have a muscle in your arms, if you don't believe me, try putting a needle in your arm and try to move it, see how much pain you have.

THE COURT: I'll take your word for it.

A Okay. May I have my tracings back.

Q I don't have them. They must be up there.

A Right here. The first part you have the patient's name. The patient's name is right on top. This is my handwriting. I've been doing EMGs for over five years. This is way I do it I write the patient's name in my own handwriting. That's the way I was taught, that's the way I do it. There are EMG machines where you sit and print it in there. I choose to do it this way. And this is the normal motor unit for the electrical conduction etudy for that modem. This is the, thu results of that. This is actually needle EMG.

Q Start a little bit further back so everybody could see.

A Yes, this is the right L 3, L 4. So, the charge was, I was charged that I did not label the muscle. It's right here, right here in front of you. Right L 3, L 4. And these are all positive sharp waves. These downwards deflections look like, just like these positive sharp waves here. I count 1, 2, 3, 4, 5, 6 positive sharp waves. There is a most definite, a very abnormal problem at the right L 3, L 4 level.

Next, I have labeled right L 4, L 5. Again, these are 1, 2, 3, 4, 5, 6, 7 downwards deflections. These are all positive sharp waves. These four are most definitely abnormal.

Next I have the right L 4, L 5. Again you see this is the normal tracing here, then you see 1, 2, 3, 4, 5, 6, 7, 8, about ten downward deflections. These are all positive sharp waves.

Next I have the right vastuB medialia muscle, that' s the muscle in the inner thigh supplied by the L 3, L 4 nerve root. Again you see 1, 2, 3 positive sharp waves.

Next I have the next muscle, labeled again the right vastus medialis. Again, you see 1, 2 positive sharp waves.

Nex: I have the right tibialis anterior muscle. That's the muncle right on top of the shin. I have 1, 2, positive sharp waves.

When you put it all together, there is problems at L 4, L 5. There is problems at L 3, L 4. So you have a right sided L 3 to L 4 radiculopathy. What was the other question I was charged with?

Q Well, these are technically inadequate because the patient was moving?

A Again, if the patient was moving, you could not see a single downward deflection. You see something like this. And trust me, no patient wants to move though a painful EMG. You have a needle in the muscle. You move, you are going to feel the pain. Like having a spinal tap, you have a needle in the back, you move, you're going to feel the needle more.

Q Can you tell the difference between old and new? don't know why this is present, but is there in this case, is it old or new nerve injury?

A This has nothing to do with this case, about whether it is old or new. What I found is nothing new, this was found in the Bellvue Hospital records before I ever set eye on this patient, all over the records. The patient had a lumbar radiculopathy way before I came into the picture.

Q Okay. Thank you, doctor. Please resume your seat.

Doctor, Dr. Feuer said that this patient should not have good days and bad days, that there should not be variations in his condition, it should be the same all the time. Do you have an opinion with reasonable medical certainty that you can express as to whether you agree with that statement?

A Yes. That is one of the most absurd things I've ever heard in my entire life. Like saying you have a normal person not having good or bad days. There is nothing wrong with me, I have good days and bad days sometimes. A patient that has metal screws and rods and fixators in his spine, the laws of physics, cold contracts everything, heat expands everything. You specifically told you're not going to have more pain in the cold weather? The patient still has weakness. You're not going to tell me that this patient is not going to have good days and bad days. Most definitely will. This is the nature of these conditions that are permanent. The CAT scan, the recent x-rays show traumatic arthrtis setting in. You mean to tell me arthritis, you don't have good days and bad days? Absolutely do.

Q Doctor, did I ask you to take a look --

MR. KELER: This is my last series of questions, your Honor.

0 -- at the Bellvue Hospital clinic record of Marek Szpakowski which has been entered into evidence?

A It's right there.

Q Is that in this pile?

A Right there.

THE OFFICER: Counselor.

Q. Could you please take that out and take a look at it, please.

THE OFFICER: All?

MR. KELNER: Give him the folder. There is a Bellvue record, and he'll identify it.

A Yes.

Q Now, what exhibit are you referring to?

A It says defendant's exhibits. This is the Bellvue --

THE COURT: Whoa, whoa. Are they marked?

0 There should be a marking on the back perhaps, doctor. Could you turn it over.

A Yes, there is. Defendant's Exhibit D.

Q Exhibit?

A D.

MR. KELNER: D?

THE COURT: Let me aee it.

Exhibit D, yea.

THE OFFICER: Everything in that folder is in evidence, Judge.

THE COURT: Okay.

Q Doctor, what date was that clinic visit?

A There was a neurosurgical clinic aate of 1-16, 2001.

Q Okay. I want you to assume that Dr. Feuer took the witness stand and said that that indicated that this patienc was discharged from their care, and that he did not need all of the treatment that you said, that you indicated that he needed for the future. That he was put those question. I'm not going to waste time going through all the different categories of treatment, but you previously testified to what treatment he needed.

A Yes.

Q Could you please take a look at that exhibit and tell us whether it would be deceptive to say that that exhibit indicated that this patient was discharged from care.

MR. KLEIN: Objection, your Honor.

THE COURT; Overruled.

A Yes. This note says, the last two lines discharged from clinic, return PRN, means as needed. Continue with physical therapy and continue with occupational therapy.

Q Read exactly what it says in terms of continuing treatments. Read the exact words, please.

A 'Continue with P T slash 0 T." P T stands for physician therapy. 0 T stands for occupational therapy.

MR. KELNER: Could I ask the Court if the doctor could circle that part that says, continue?

MR. ROSENHECK: Circle the whole thing.

MR. KELNER; I have a right to ask him anvthing I want, your Honor.

THE COURT; I understand.

MR. ROSENHECK: Your Honor, circle the whole thing?

THE COURT; Let's leave the circles out.

MR. KELNER: Could I see that exhibit for one second, please.

Q Would it be continue with P T slash O T, and that would be about 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 lines up from the bottom of the page? Is that what we are referring to, doctor?

A Right here.

Q About ten lines up from the bottom of the page?

A The last line.

Q The last line in the center of the page, it's a little bit written on the lower right side.

MR. KELNER; I ask that the jury be allowed t see this exhibit at this time, your Honor.

MR. ROSENHECK: Absolutely, your Honor, let them see it. Also the lines above it.

MR. KLEIN: No objection.

THE COURT: The whole page.

(The exhibit is handed to the jurors.)

THE COURT: Do you have anymore questions?

MR. KELNER: No, your Honor, I don't.

THE COURT: Okay, cross examination.

MR. ROSENHECK: Let the jurors finish looking at that, then I'11 start, your Honor. Yes, no?

THE COURT: Yean, okay. If that's what you prefer.

MR. ROSENHECK: Yeah, let them look at it. That's what we want them to do.

MR. KELNER: Could we mark that sketch as -- Actually, I don't know what the number would be, but I'd like to offer that sketch into evidence.

MR. ROSENHECK: No objection, your Honor. If you want to mark it later, we can do it as well.

THE COURT: We can mark it now.

MR. KLEIN: Your Honor, I have an objection.

THE COURT: Overruled.

This is 21, I believe. Twenty-one.

(Received and marked Plaintiff's Exhibit 21 in evidence.)

THE COURT: Finished?

Peter, they're finished.

Okay, let's start with the cross examination.

MR. ROSENHECK: Thank you, your Honor

CROSS EXAMINATION

BY MR. ROSENHECK:

Q Hi, Dr. Guy.

A Good morning, sir.

Q Weather conditions can effect a person?

A Yes, air.

Q You're absolutely are about that?

A Yes sir.

Q Okay.

A Sometimes yes, sometimes no. Sometimes more than others. But generally speaking, it can yes.

Q It can. What kind of weather conditions can effect?

A Extreme temperature, rain, snoc, cold weather, humidity.

Q This kind of weather is going to make somebody feel worse, potentially?

A It can, yes. As the weather gets cold their joints, wheher it is a --

Q Not cold, the other, you said rain, humidity?

A Barometric pressure going up. If you go to every headache clinic ir. New York, when it rains heavy, the headache clinics' telephone ring of the wall. Barometric pressure drops, tension in the spine and in the brain increases, muscles become contracted. So, laws of physics, cold contracts, heat expands. If you take a torch to a piece of metal, what happens? Metal expands.

Q Even in April?

A You were talking about rain, I'm talking about rain.

Q I'm sorry. Okay. Rain and humidity, I'm sorry. Please finish.

A Streams of temperature. Arid this condition is also subject to remissions, exacerbation, good days, bad days.

Q And this effects nerves too?

A Effects nerves too, yes sir.

Q Your EMG showed problems on the right side, correct?

A Yes, sir.

Q And the CAT scan showed problems on the left?

A CAT scan showed problems on both sides.

Q There was no disk on the right, I thought.

A The nerve root damage is also on the right.

Q I'm sorry, the herniation is on the left side?

A I was told not to mention that word today. I c:an't talk about that.

2 Okay, fair enough.

MR. KELNER; Your Honor, that was pursuant to your ruling.

THE COURT: I understand that. I understand that.

MR. KELNER: Be sure that we're following your ruling.

THE COURT: He withdrew it anyway.

MR. I withdraw the question. I have no more questions.

MR. KLEIN: Can I have that exhibit that was passed to the jurors please.

CROSS EXAMINATION

BY MR. KLEIN

Q Doctor, what is O T?

A Occupational therapy.

Q And Mr. Szpakowski told to continue occupational therapy, right?

A Yes.

Q Help him get a job in the future?

A Occupational therapy has many tasks. It usually covers the upper extremities and also cognitive, and also helps with behavioral problems, anxiety, depression, mood. 0 T covers all those areas.

Q And the lettering.

MR. KLEIN: I don't want to approach the witness.

Q The IMT says doing well, correct?

A Yes, sir. That's what it says.

Q That refers to Mr. Szpakowski doing well?

A Yes, sir.

Q Thank you.

A You're welcome.

REDIRECT EXAMINATION

BY MR. KELNER:

Q Doctor, doing well in the context of what his injury was and healing at the time?

MR. ROSENHECK: Objection, your Honor.

THE COURT: Sustained.

Q What does well mean?

MR. ROSENHECK: Objection, your Honor.

MR. KELNER: I withdraw it. I have no further questions.

THE COURT: Thank you doctor, you're excused.

THE WITNESS: You're welcome.

THE COURT: All right, we'll take a break.

MR. ROSENHECK: Thank you, your Honor.

THE OFFICER: All rise.

(The jurors leave the courtroom.)

THE COURT: Take about ten minutes. Will that be enough?

MR. RQSENHECK: Fifteen, I've got to run to the bathroom. I want to look at a couple of things and get it straight. Thanks.

(After the recess.)

THE COURT: Are you ready?

MR. KLEIN: I'm ready, your Honor.

THE OFFICER: All rise, jury entering.

THE COURT: Be seated.

Okay, we are now going to hear from the attorneys in summation. I just want to remind you once again that what the attorneys say is not evidence, they're just summing up, telling you what their recollection is of what transpired during the trial, and from their point of view.

But just remember, as I've told you before, since you are the judges of the facts, it is your recollection of what transpired in the trial that

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