2006 WL 1310254 (N.Y.Sup.) (Expert Trial Transcript)
Supreme Court of New York.

ZUKOWSKI,
v.
GOKHVERS.

No. 28062-01.
2006.

(Transcript of Jeffrey Kaplan, M.D.)

Case Type: Construction & Industrial Accidents >> Fall
Case Type: Premises Liability >> Retail & Other Business Properties
Jurisdiction: New York
Name of Expert: Jeffrey Kaplan, M.D.
Area of Expertise: Health Care-Physicians & Health Professionals >> Orthopedic Surgeon

Representing: Unknown

MR. Mac DONNELL: Thank you, your Honor.

DIRECT EXAMINATION

BY MR. Mac DONNELL:

Q Good afternoon, Doctor.

A Hi.

Q Are you a medical doctor duly licensed to practice medicine in the State of New York?

A Yes.

Q And for how long have you been so licensed?

A In New York, since 1995.

Q Would you briefly tell the jury your educational background?

A Sure. I went to coverage at Yale University. After graduating from college, I went to medical school here in the city, at Columbia University. Following four years in medical school I did a five year training program in orthopedic surgery at Campbell Clinic, which is in Memphis, Tennessee. Campbell Clinic was the first orthopedic training program in the country.

After that training, I practiced in Tennessee and Mississippi for a short period of time and moved back to New York in 1995, where I have been in private practice ever since.

Q What is the nature of the practice you have here in New York?

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A Orthopedic surgery. I practice orthopedic surgery, which is the study of bones and joints and the supporting structures of the bones and joints. Things like muscles and tendons and cartilage and ligament injuries or abnormalities of those structures and trying to correct those or do something to make them function better.

Q Do you have any hospital affiliations here in the City of New York?

A I'm on the staff at several hospitals in the city. Roosevelt St. Lukes Hospital in Manhattan, Cabrini Medical Center, New York.

Q Do you have any teaching positions?

A I'm on the attending staff of those hospitals, meaning that I instruct the residents. Those are the guys who finish college and medical school and were training. So in my case is orthopedic residents.

I also train podiatry residents and I teach them techniques in orthopedic surgery and I lecture in it and do that on a weekly basis.

Q Are you a diplomate in the practice of orthopedic surgery?

A I'm a diplomate, which means that I have a diploma, meaning I'm board certified by the American Board of Orthopedic Surgery. That's a certification you can get after you finish your education and residency training, take a series of examinations over a series of years based on basic knowledge and based on your practice and the outcome of and things like that. If they feel you received a certain level you become board certified, and I have been since 1997.

Q Have you ever testified in court before, Doctor?

A Yes.

Q Have you testified for me in court before?

A Yes.

Q Approximately how many times have you testified in cases I was involved in?

A I don't know exactly, probably half dozen or so.

Q How about totally for Mr. Lurie's office?

A Again, I don't know, probably a dozen.

Q Are you being paid for your time you spend testifying in this case?

A Yes, for the time I spend and that I had to change my schedule, $5,500.

Q Is that the standard fee for orthopedic surgeons in the City of New York?

A Yes.

Q Doctor, did there come a time when you began to treat Mr. Zukowski for the injuries he sustained in the accident of June 1, 2000?

A Yes.

Q Could you tell us, Doctor, when for the first time that you saw Mr. Zukowski?

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Do you have your file, I have shown it to defense counsel so if you have to refer to it to refresh your recollection, with the Court's permission?

THE COURT: Yes, you may.

MR. Mac DONNELL: Thank you, your Honor. -

THE WITNESS: The first time I saw him in the office was April 24, 2002.

Q Now, in connection with your seeing Mr. Zukowski, at that time, and the subsequent treatments, did you receive and review various books, records and documents that you used in the course of your treatment of Mr. Zukowski?

A. Yes.

Q What records do you have as part of your file concerning the injuries that were sustained by Mr. Zukowski?

MR. BERNSTEIN: Objection.

THE COURT: Come up.

(Whereupon, a side-bar was held off the record.)

THE COURT: Go ahead.

Q Could you tell the jury the records you reviewed in connection with your treatment of Mr. Zukowski?

A Sure. I have records from the emergency room visit from 6/1/2000, from New York Health and Hospitals Corporation, from Coney Island Hospital. I have a series of MRI reports of the lumbar spine and a CT scan of the lumbar spine, as well.

I have an MRI report of the cervical spine and I have got some records from a Dr. Gray, rehabilitation specialist or a physiatrist and I believe those are the extent of my records.

Q Now, in connection with the treatment of Mr. Zukowski, you referred to MRI reports.

In the course of your treatment, did you actually obtain copies of the films that were made reference to in the reports?

A Yes, I did.

Q In connection with your treatment, did you review those MRI and CAT Scan films?

A Yes.

Q Did you utilize them in the course of your treatment of Mr. Zukowski?

A Yes.

Q Now, before we get to those, let's get to the first visit that you had with Mr. Zukowski in April of 2002. When Mr. Zukowski came there, did he make various complaints to you concerning his physical condition?

A Yes, he did.

Q What were those complaints?

A When I first saw him on April 24, 2002, he was complaining of pain in his low back, pain radiating into the buttocks on the right side, pain radiating down the thigh on the right.

He was also complaining of pain in the wrist on the right and pain -- I'm sorry, and numbness in his index and long finger and sometimes into his thumb.

Q Now, after these complaints -- by the way, did you take a history -- do you know what happened to him?

A Yes.

Q What did he tell you?

A He had a fall. He was working on a scaffold that fell. He had a fall with these injuries to his back and wrist.

Q Now, did you do a physical examination of him on April 24 of 2002?

A Yes, I did.

Q And could you tell the jury what your findings were upon physical examination?

A At the wrist, he had limited motion that included 60 degrees of extension of the wrist.

Q What is extension normally?

A Extension normally is about 85 to 90 degrees.

Q And what is extension?

A Extension is pulling the wrist up this way and extending it, as opposed to flexing it or bending it over and his flexion was to 20 degrees. So normally, if this is consider zero degrees or no movement, 20 degrees is approximately here and normal is between 80 to 90 degrees. So he had on the right, 60 degrees extension and 20 degrees of flexion.

He also had limited motion in the ability to turn the wrist over. Turning the wrist over has a name. Turning down is called pronation and turning it up is called supination, and normally, you can get to zero degrees or no turning. He cannot get all the way over like ten degrees supination. That's an important motion, because it's the motion that you use to hold something in your hand, like a cup of water or something like that.

He also had pain when we tried to move his wrist back and fourth. He had a positive sign called Tinel sign at the wrist and that's a nerve sign. What it is, the most common Tinel sign that most people know about is the funny bone. You bang your elbow and get that sort of pain down the course of a nerve. Anytime you tap on a nerve or bang it hard enough to get that pin feeling, that electric feeling, that's called a positive Tinel.

Normally, you can tap the nerves and you don't feel that shooting pain. In this case, a positive Tinel, he had at the wrist was tapping over his nerves, sending signals in the fingers that normally gets sensation from the nerves.

So it shows it's irritated or damaged nerve. Normally it doesn't do anything but when you tap on the wrist and get the signals down the fingers, you have damage and that's a positive Tinel.

There is another test for damage nerves, that's to put pressure on the nerve. You turn the hand down, it comes into the hand, it's called the medial nerve, all the way down the arm into the hand. If you turn the wrist down and hold it there, in an abnormal nerve, it will start to get tingling in the thumb, index and long finger by that nerve.

In a normal hand, you can do this for quite a long time. In fact, you can probably do it for ten or twenty minutes before you start feeling tingling. In the abnormal nerve, at twenty seconds bending his wrist, you stand to get strangulation of nerve,

indicating it's swollen or damaged and that gives the tingling in the hand, that indicates, again, abnormal damage or nerve in the wrist.

It was also noted that he had some swelling of the wrist on the right compared to the left with a ganglione cyst which is some swelling of the joint capsule, so joint fluid is coming out of the joint capsule. With regard to the low back, he had tenderness in the lumbar muscles. He had spasm present in the muscles.

Q What is spasm and what causes spasm?

A Spasm is tightening of the muscles and usually you receive that in a case where there is abnormality rather in the spine. The muscles are considered the secondary stabilizer to the spine. When the spine is not as stable as it should be, because of an injury, the muscles are very worn keeping the spinal motion to a minimum.

Any abnormal motion in the spine can be irritated nerve in the spinal cord or column. Spasm is something that can occur with someone with chronic back problems because the reflex in response by the body is to tighten down the muscles in order to decrease the motion of the spine to brace or form a girdle around the back, just like you wear a back brace if you have a back injury. So he had spasm in the lumbar muscles and he had limited motion findings as well he had motion of 80 degrees and normal motion would be 90 degrees.

Q How to you test that?

A You ask the patient to stand and have them bend over as far as they can and that's -- there was active motion, have them bending as far as they can and you check the difference between passive and active motion and in this case, it was 80 degrees. The extension was 30 degrees, which is within normal limits and lateral bending is 45 degrees, normal is sixty degrees. And his sensory examinations was okay and his reflexes were intact, at that time.

Q Now, did you take any X-rays the first time you saw him?

A I did. I took X-rays of his low back. X-rays are pictures that just show the bones and we saw no fractures or dislocations at that time, no evidence of any open fractures.

I took X-rays of his wrist which did show he had a previous fracture of his forearm. There are two bones, one is called distal radius and one is called ulnar. I'll show you this on X-rays. There was evidence of an opened fracture here at the wrist joint and evidence of the fracture at the very tip of the ulnar that had not healed called the nonunion or scar tissues were formed between the two pieces.

Q Let me stop you for a second.

The fracture on the wrist, you say it has not healed and you're seeing him two years after the accident.

What's significant about that fracture that hasn't healed at that point in time?

A That the fracture never healed and that's a source of pain, because you have abnormal motion and it's generally a painful area.

Q Now, you indicated, Doctor, that the fracture went into the joint.

Is that called an intraarticular fracture?

A Yes. There are several types of fractures but when it heals, it becomes less painful then when you first fractured it but in the long run, there is a setoff because the bones rub together and you can have has problems because of the fracture and often it can cause degeneration which can cause pain and over time it will cause more problems and more pain.

Q What happens with that joint when the bones are rubbing together?

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A It's called posttraumatic arthritis.

Arthritis, as you know can happen as you grow older and probably all of us will have some form of arthritis when we get older, but in this case, it comes from his fracture that goes into the joint.

Q Now, you took X-rays of Mr. Zukowski, is that correct?

A Yes.

MR. Mac DONNELL: With the Court's permission, may we show the evidence on the shadow box so the jury will understand?

THE COURT: Yes.

THE WITNESS: This is an X-ray.

Q One moment.

How many did you bring do you know?

MR. Mac DONNELL: Your Honor, can we have them marked Plaintiff's Exhibit 1 2 and 3, your Honor?

THE COURT: Yes, Plaintiff's Exhibits 1, 2 and 3 received.

MR. Mac DONNELL: Thank you.

THE COURT: Any objection, Mr. Bernstein?

MR. BERNSTEIN: No, your Honor.

THE COURT: Then they're in evidence.

(Whereupon, Plaintiff's Exhibit 1, 2 and 3, previously marked for identification, is now received in evidence.)

THE WITNESS: Okay, this is an X-ray of the right wrist.

Q That's Plaintiff's 1?

A Yes, number one.

Q Okay?

A And what we are looking at is the right wrist, like this, and I told you there are two bones in the forearm, one is called the radius, which is the bigger bone, it comes to here, to the wrist here, there is the hand and you can see the thumb and this bone is called the ulnar and you can see how it sits on like a platform over here.

Q And what else can you tell us about Plaintiff's 1?

A When you're looking at a bone, at the joint surface, normally you have a small surface on each side of the bone. You see two things here, one is over here, from looking at this surface, you see an abnormality when you connect it to the ulnar, so that's a fracture. This is now two years after the accident and you can still see the fracture. That fracture has not grown together, this piece of the end of the ulnar bone and here this is the distal. Ulnar fracture intraarticular, meaning in the joint and can calls problems with movement, pain with movement.

Now, number one, I look at these all the time and you're further back than I am, but I think you have the opportunity to look at these more closely. Now, that is the fracture which has grown together and you can see the abnormality of the smooth surface right over here and it usually has a slick glossy surface that allows for movement. If you look at the end of a chicken bone, you see you can see that small area on top with the abnormality and the joint looks very smooth. If there is an abnormality that goes into the joint, that can cause problems because, as I say, you have an abnormal surface rubbing against the smooth surface of the other bone and this is an X-ray I took in the office the same day.

MR. Mac DONNELL: Plaintiff's 2 for the record, your Honor.

THE COURT: All right.

THE WITNESS: This is an attempt to show the surfaces that we're taking a picture of. This is done with a plain X-ray machine as opposed to CAT Scan machines, the old way of doing it, but that is what we have in our office as opposed to a radiologist's office.

What it helps us to is bring out the abnormal bones that I can see on a plain X-ray but more subtle and difficult to see, and a you'll be able to see this, I will put a mark here, and, again, you'll be able to look at that more closely, but you can see the step off right here.

Q What is a step off, Doctor?

A A step off is a normally smooth area on the bone and on the other side of the wrist there is a fracture and from the wear and tear of this, it steps off and that can cause the pain in the wrist. It's possible now that you have the symptoms of posttraumatic arthritis which causes pain and more problems as time goes on. And this is the last X-ray taken a year and a half after the first one.

MR. Mac DONNELL: This will be Plaintiff's 3.

THE COURT: Plaintiff's 3.

THE COURT: Plaintiff's 3, received in evidence so marked.

Q When was that taken?

A September 11, 2003.

Q About nine months ago?

A About five months ago and you can still see this round area over here, off the end of the ulnar, you can see by this area that's it is still not healed and I can tell you with as many certainty as I can tell you anything that it will never heal at this point. And, again, you can see the surface of the radius area here and here, the area of the step off where the fracture went through the joint surface and the bones grew together, but it grew together not with a smooth surface, but with a step off.

MR. Mac DONNELL: Will the Court's permission I would like to have Plaintiff's 5 marked the MRI taken of the lumbar spine and cervical spine and the folder with CAT Scans July 2000.

THE COURT: Three different dates.

MR. Mac DONNELL: Yes, your Honor.

THE COURT: So according to the dates --

MR. Mac DONNELL: We will not need these Judge, the CAT scans don't really do anything anyway, so we are just going to

use the folder that has the MRIs of the lumbar spine and the cervical spine. The cervical spine MRI are dated October 2000 and the lumbar is October of 2000.

MR. BERNSTEIN: Your Honor, if I may, I understand these are admitted subject to connection, pursuant to your discussion over at the bench?

MR. Mac DONNELL: Obviously.

THE COURT: Yes.

THE CLERK: Number four in evidence is so marked.

Number 5 in evidence, so marked.

THE COURT: And you will just use the model to demonstrate.

MR. Mac DONNELL: Right, with the Court's permission.

THE COURT: Yes.

MR. Mac DONNELL: Could we have that marked or deemed marked Plaintiff's 6 for identification?

THE COURT: Yes.

THE CLERK: Plaintiff's 6, marked for identification, model of the lumbar spine.

THE WITNESS: This is an MRI film. An MRI is a special study like an X-ray that can show bones and soft tissue better than a plain X-ray in certain ways and the way that it shows better is that a plain X-ray like we saw of the wrist just shows one dimensional picture, we just see front or back. This test takes a number of pictures and puts information into a computer and you can see many levels and look inside of many levels of the spine as you can see here.

Q Could you tell us what the spine is composed of?

A What we are looking at is a picture of the neck and spine in this case. The spinal column is made up of a number of different bones and between each bone is a padding called discs. The disc acts as, not only as a padding between the bones but also allows for some movement in the bones. One of the major purposes of the spine, besides giving us our structure and height, it protects the nerves running down from the brain into the arms and legs. At these levels, the spinal cord gives off a couple of branches that branch off and go running down my arm, my chest and in the low back running down the legs to give sensation to my legs.

So I will point to the levels where he has problems and that is, bulging disc L3-L4 and L4-L5, which you can see over here and over here, you can see the herniated disc at L5-S1 toward the right here and you can see how it indented the thecal sac. If you have an injury to the disc and it moves out of place for any reason, you have what is called a slipped or herniated disc and you can get pressure on the nerve core and that causes pain.

In this case we see the problem right here, and I circled that and you'll be able to see this better when you look up close. You have this jellylike core that acts as a shock absorber to cushion the vertebrae during movements of the spine and to minimize jarring when jumping or running and over time, with increasing age, intervertebral discs can wear out, becoming less supple and more susceptible to damage from injury.

Pointing over here, you will see a separate piece of disc material pushing back into the area of the spinal cord and spinal canal and to a lesser degree, you can see a similar finding at this area too and all of this is causing the pain that Mr. Zukowski had and continues to have.

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Q What is a herniated disc, Doctor?

A A herniated disc is where an intervertebral disc ruptures and part of the pulpy core protrudes which causes a painful and sometimes a disabling pressure on the nerve, which is called a pinched nerve.

Q Do we have the lumbar film?

A Yes.

MR. Mac DONNELL: For the record, this is Plaintiff's 5.

THE WITNESS: Now, again, we are looking at an MRI picture and it's a picture of the bones stacked one on top of the other with the discs between each bone and, again, I see the nerve core running down the back and in this case, this is a different computer tech. That thecal sac is not as bright white, but it is brighter and the nerve cord, you can see it there.

In this case, we follow the discs down. This is about somewhere in the center. If we follow the discs down, the discs between the lowest lumbar vertebrae and the sacrum, which is the tailbone you can see the bulging over here, bulging out, that's a representation of the herniated disc. We do have some minor bulging of the different levels, but there is definitely herniated discs at L5-S1.

Q Is that impinging on the thecal sac, also?

A Yes.

Q And the significance of the impingment is what.

A The impingement indicates that the nerve is taking up space -- I'm sorry, the disc is taking up space where the nerve normally is and with motion going on it can irritate the pressure on the nerve and cause problems with muscle function and feeling and cause pain.

Q Now, Doctor, looking at both cervical, Plaintiff's 4 and the lumbar, Plaintiff's 5, is there any indication thee that -- withdrawn.

In a human being, as we get older, is there a process that goes on in the spine where there is a degeneration or desiccation within the spinal column?

A Well, there is a process of aging that we all go through and you do get what's called some degeneration, not only in the spine, but most of your joints and the muscles throughout your body, sure.

Q At the time of this accident, Mr. Zukowski was 42 years old and I think we also know he had been working for at least seven or eight years as a mason doing construction work.

Is there any indication in the cervical spine and in his lumbar spine as to whether he has any natural ongoing degeneration?

A He does have some mild degeneration within the discs and you see that has some loss of water content, which is in the MRI of this technique. Water and fluid shows up as a gray signal like the spinal fluid. There is not complete loss of that white signal in the disc, meaning the disc still has a good amount of fluid in them, they're not badly degenerated, but at several levels, there are less fluid then other levels.

Q Doctor, in your opinion with a reasonable degree of medical certainty, what if anything is the medical significance of the fact that Mr. Zukowski had some desiccation or degeneration in his spinal column prior to the accident of June 1 of 2000?

A Well, as I say, it's abnormal normal findings. Everybody has some degeneration of their spine over time. If anything, I would make him more likely to have a serious injury from trauma. The normal stability of the spine as we know because of

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aging does degenerate somewhat over time in a normal way, but an injury on top of that, especially something like this is significant enough to cause a herniated disc or fractures which cause more of a problem certainly harder to come back from.

THE COURT: Let the record reflect that during the presentation, the doctor utilized Plaintiff's 6 for identification, which is the model to demonstrate to the jury.

Proceed, Mr. Mac Donnell.

MR. Mac DONNELL: Thank you.

Q Now, Doctor, you have continued to treat Mr. Zukowski from the first visit in April of 2002, right up until the present time, is that correct?

A That's correct.

Q When was the last time you actually saw Mr. Zukowski in your office?

A I last saw him about four weeks ago, on January 27 2004.

Q So let's go back to April.

After you have reviewed the documents that you discussed -- that we discussed with the jury, and after you examined him, did you come to any diagnosis, at that point, on the first visit, as to what the condition of Mr. Zukowski was?

A At that point, I felt that he had several diagnoses. One was that he had that wrist fracture that was described as intra-articular fracture both the radius and ulnar both bones of the wrist. That he had post traumatic injury to the nerve which was giving him the numbness and tingling of the index and long finger, which is called carpal tunnel syndrome, similar to the type of problem that some people get from wear and tear changes, damage to the medial nerve at the wrist. The medial nerve at the wrist is called the carpal tunnel, it's where the medial nerve lives at the wrist. So he had posttraumatic carpal tunnel syndrome or medial nerve injury at the wrist following his fracture of the wrist.

I felt that he had signs and symptoms of early posttraumatic arthritis at the wrist. I felt that he had lumbar low back pain syndrome and his symptoms consisted of what is called radiculopathy, and that is radiating pain down a nerve root. And usually, in cases like this, it's because of the damage to a disc, either with pressure or irritation of the nerve root it starts in the back and goes down the leg.

Q Was the radiculopathy that Mr. Zukowski was telling you about and that you found in your examination, consistent with the herniated disc at L5-S1?

A Yes.

Q How many times have you seen Mr. Zukowski up to the last visit?

A He has been treated in our office on, approximately eight visits.

Q Now, during the course of the treatment, I noticed that you had prescribed for him -- provided to him on the first visit, some type of a device to wear on his wrist?

A That's correct. He was put in a custom molded splint on his wrist. A splint is a support. In this case, it's a hard support to give some rigidity to the wrist and attempt to allow less inflammation to occur in the immediate medial nerve at the wrist.

Sometimes when you have posttraumatic arthritis at the wrist, ongoing pain and inflammation, it can cause inflammation in the adjacent tissues next to it like the medial nerve, so we splint the wrist in an attempt to decrease some of the pain.

Q Was he also wearing a lumbar brace when you saw him?

A I don't recall, specifically.

Q He was also seeing Dr. Gray at the time you first saw him, correct?

A That's correct.

Q And you advised him to continue seeing Dr. Gray, is that right?

A Yes. Dr. Gray is a doctor I know. He specializes in rehabilitation, physical therapy and I felt the proper course, at this point, when I first saw him was to continue with the physical therapy.

Q Now, after Dr. Gray ceased doing the physical therapy, I know you have seen him and examined him and treated him.

Was the physical therapy provided by Dr. Gray successful?

A Well, that's a tough question to answer.

Physical therapy in certain injuries, specifically where there is posttraumatic arthritis involved, damage to the nerve, can be successful in that in the - treatment of pain, it can treat the pain, it can't always correct the problem. So it was not successful in correcting the problem and giving him long-term permanent relief, but I think it did help reduce some the pain while he was doing the physical therapy.

Q Let's go to the last time that you saw Mr. Zukowski, approximately four weeks ago.

What if any findings did you make with respect to his wrist?

A With respect to his wrist, he really had no change in the motion of his wrist since we first saw him. He still has limited motion of the wrist. He still has complaints of numbness and tingling in the fingers. He still has a positive Tinel at the wrist and positive Phalen's.

Q Now, the Tinel and Phalen's tests come from the medial nerve compression and the carpal tunnel?

A That's correct.

Q The pain and limitation of motion comes from what, Doctor?

A That comes from the fracture and scar tissue that forms at the time of fracture as well as the abnormality of the joint surface which we talked about, the posttraumatic arthritis of the wrist.

Q With respect to the posttraumatic arthritis, the step off, the abnormality, is this something that will remain the same with respect to Mr. Zukowski, or is it something that will progress over the course of his lifetime?

A No, the natural history is that it does progress over time, especially in a case like this, where he has a fracture on one side of the joint with two bones coming together. He has an abnormality on one side which will cause wear and tear on the other side and that will become worse over time.

Q When you say it will become worse over time, Doctor, what will the symptomatology be with respect to Mr. Zukowski's current condition?

A Over time, he will have increasing pain, he will have decreased function and develop more pain with activities, and he will probably have the natural history would be that he would develop arthritis on both sides of the joint, meaning step off on both sides of the injury as that normally smooth surface has wear and tear. There is no way to correct that healed area. When I say

healed, where the bone is together in the abnormal fashion.

Q That was my next question.

With respects to the ongoing traumatic arthritis and the progressiveness of it over the course of his lifetime, is there any medical science to stop that from happening?

A There is nothing you can do from stopping that from happening, stopping the motion at the joint. As long as there is motion at the joint the surface, which is a coating of cartilage, live tissue will wear and tear over time. Medical science has not developed a replacement for that surface, the living cells. So the way to decrease the pain would be to decrease the motion at the point and that would be with a surgical procedure called a wrist fusion, which stops motion at the joint by fusing the bones of the wrist to the bones of the hands. That's a salvage procedure that will decrease the pain, but it also decreases the motion of the wrist, which will decrease not only the function of the wrist, but also the ability to grip with a solid grip. It's only done as a last resort, when that pain progresses over time.

Q Mr. Zukowski has, approximately a thirty year life expectancy.

Do you have an opinion, Doctor, with a reasonable degree of certainty, based upon your course of treatment, the X-rays you have taken, the observation concerning the conditions of the wrist, the step off, the arthritis and the wear and tear going on in the intraarticular joint, whether or not he will require a wrist fusion?

MR. BERNSTEIN: Objection.

THE COURT: Come up.

(Whereupon, a side-bar was held off the record.)

THE COURT: All right, go ahead.

MR. Mac DONNELL: Thank you.

Q Doctor, I noticed something before we move on about the reports and the treatment, I didn't notice that there is any complaints in or indications in your reports concerning the neck.

Has Mr. Zukowski complained to you to any significant degree concerning the neck problems that he is having?

A Throughout his problems he has complained of his neck pain intermittently. He does not have neck pain every time we see him. Certainly, the first time I saw him was the day he was not having neck pain, and I believe, if I understand him correctly, it's an intermittent problem, a chronic problem.

Q What if anything with respect to the herniated disc he has in his neck and the intermittent pain he has now, what do you see in terms of the future with respect to the neck?

A With regard to the type of injuries we see in his neck and the type of complaints he has in his neck, I do not believe this is a problem that now would be a surgical problem and future treatment would include continued physical therapy, because I -- like I say, he does feel better when he is having physical therapy, certainly would be expected.

He would need medication in the form of antiinflammatory medicine by prescription, pain medication when he had these flare-ups and possibly cervical steroid injections which can decrease inflammation that's not covered by medication by mouth.

Q Now, with respect to the injury that Mr. Zukowski has sustained, the herniated discs in his neck, do you have an opinion with a reasonable degree of medical certainty as to whether or not that injury is permanent?

A It certainly is permanent.

Q Do you have an opinion with a reasonable degree of medical certainty as to whether or not the neck injury -- withdrawn. I will continue with something else. We will move on to the wrist.

You have indicated and we talked about, Doctor, two things with respect to the wrist, the fracture, the intraarticular nature and arthritis and nerve damage and injury that's been done with the carpal tunnel.

With respect to the carpal tunnel, the nerve injury, what, if anything, with reasonable medical certainty is the prognosis and treatment that Mr. Zukowski will require for the medial nerve injury in his wrist?

A The treatment that is involved to treat this problem with the nerve is to do a surgery called a nerve decompression or carpal tunnel release, which is to release or divide to cut the soft tissues that lay on top of that nerve and try and take some pressure off of the nerve.

Now, this has been going on for a long period of time, so while I do expect he will get some decrease in his pain and symptoms of numbness and tingling, I don't believe he will get relief of all of his pain. This is been a long-standing problem and the nerve has been damaged for a long period of time.

Q How does the nerve get damaged like that and why doesn't it rejuvenate when you do the carpal tunnel surgery?

A The problem becomes, the nerve is a living tissue and when there is a fracture and this nerve is trapped between the bone that heals which normally heals slightly bigger then it was to begin with and the soft tissue on top of the nerve, which is a tough ligament and tendons that go to the fingers, you get scarring down the nerve. It tries to accommodate to the size that's left for it within this tight space between the bone and ligaments so it remains swollen and that's permanent damage to the nerve and nerve cells.

Q Will that ever rejuvenate?

A I don't expect it will.

Q Now, you discussed this carpal tunnel surgery with Mr. Zukowski, have you not?

A Yes, I have.

Q And I think you're waiting for authorization to proceed with the surgery?

A Correct, we were waiting for authorization.

Q Now, Doctor, can you, with a reasonable degree of certainty tell the jury -- first of all, the fair and reasonable costs in this city that would be attributed in doing a carpal tunnel surgery as you explained that to Mr. Zukowski with respect to the hospitalization, the surgical costs, anesthesia, whatever the elements are?

A Sure. With a carpal tunnel surgery, the usual and customary rate is approximately $5,000 for the surgery, usually done as an outpatient procedure. So it's approximately 600 to $1000 for the hospitalization, using the operating room and equipment, depending what equipment is used, and it does require an anesthesiologist to be there and that's, again, another 800 to $1,000 charge.

Now, following the surgery, you do a course of physical therapy, because you don't want scar tissue to reform, you want the hand to move. As I say, this carpal tunnel also contains the tendons to the fingers. You don't want them to scar down and get a stiff hand that requires physical therapy.

Usually a course of physical therapy is twice a week for six weeks. Those visits are about $100 to $150 a piece. Sometimes a second course of physical therapy - depending on the progress, twelve weeks of therapy twice a week. And usually the

postoperative period of medication that starts immediately and followed by antiinflammatory medication to cut down the inflammation and scar tissue.

Q And what is the approximate costs for the antiinflammatory and pain medication?

A Antiinflammatory is approximately $90 a month.

Q How many months would he have to use that post surgery?

A Post surgery, specifically for the wrist, probably a course of about three months.

Q Now, you have indicated to the jury that even after you do the carpal tunnel release and mild nerve release and he goes through all of this therapy and what have you, that he is still going have some type of deficit from that nerve damage what has been done?

A I would expect he would still not get all of his feeling back in his fingers. I would expect we can decrease the pain quite a bit, but he still may have intermittent pain.

Q And this intermittent pain that he will get following the surgery and loss of feeling in his fingers, is that permanent, Doctor?

A Yes, that is permanent.

Q Now, the wrist also has the components of the fracture that we talked about in the nerves of Mr. Zukowski.

What, if anything, do you see as being the course of treatment -- withdraw that.

What's the prognosis that you have with respect to the fracture that Mr. Zukowski suffered in his wrist?

MR. BERNSTEIN: Objection, your Honor. This had been asked and answered many times.

THE COURT: Come up here, come up.

(Whereupon, a side-bar was held off the record.)

Q Now, the arthritis and limitation of motion and the pain Mr. Zukowski has in his wrist from his fractures, not the carpal tunnel, those are permanent, Doctor?

A Yes. Not only permanent, but progressive.

Q Now, in terms of the treatment, leaving aside the question of surgery, what do you foresee as treatment that would be provided to Mr. Zukowski for the next thirty years concerning the fractures and the progressive nature of the injuries?

A The treatment, conservative treatment of arthritis of the wrist such as Mr. Zukowski has, would be supportive care, really, trying to decrease the pain as much as possible and that would be with antiinflammatory medication, occasional narcotic pain medication and bracing as in the brace that we give him before, and, of course, physical therapy.

Q Now, on a yearly basis, do you anticipate how many visits will he have to make, for example, to you, just for the purposes of treating the progressive nature of the wrist?

A It's a difficult question to answer, only because there is the problem of the carpal tunnel surgery, which he needs, and I have been attempting to get authorization for, because I think he needs it now, but we were only talking about the fracture of the wrist. I would like to see him, at least, four times a year, every three months or so to follow the progression and try and treat the symptoms of the posttraumatic arthritis.

Q What would the yearly cost for the bracing be?

A The brace, it depends. If he can do with an offer the counter brace which are generally 50 to $60, or if he needs a custom molded brace to give him better support, which can run in the range of $150 to $200.

Q And the cost of the antiinflammatory and narcotic medication would be the same as before?

A Yes, about $90 a month.

Q And what do you foresee on a yearly basis with respect to the physical therapy with regard to the traumatic nature of the wrist fractures?

A Specifically, for the wrist, again, it's complicated by the fact that he needs the carpal tunnel surgery. If you put that aside and talk about the wrist, I would have him doing home exercises frequently and doing, probably a course of physical therapy a year just to maintain the motion he does have now, because you really don't want him to lose that and that would be the natural course of the progression.

Q Now, let's talk about the back.

In the last visit that Mr. Zukowski made to you, what, if any findings did you make with respect to the condition of the lower back and the herniation at L5-S1?

A With regards to the back, he continued to complain of low back pain, which is a persistent problem for him.

He continues to have signs of what I told you was called radiculopathy or radiating pain into the right leg. Pain, which I believe is from irritation or pressure on the nerve root, and one of the reasons I believe that is because he has a positive test called a straight leg raising test.

The straight leg raising test is a test for nerve root irritation that originates in the back. When the patient is sitting or laying down, if you pull and straighten the leg, this literally pulls on the nerve root because it's connected all the way down the leg like a wire, and if it pulls against an area of irritation or pinching from a disc, it creates the pain. Straightening the leg gives back pain, pain into the buttocks which causes pain in the thigh and all the way down the leg. He also appeared to have a decreased flexion at this point, that's a test of the muscles that are controlled by the nerves. By tapping on them you can get a jerk response. You have seen that on cartoons, when they tap on someone's knees and they fly up in the air. The real version of that is somewhat more subtle, but in his case, he appeared to have a decreased ankle flexion on the right and that is different then the first time I saw him and it really just represents chronic long-term irritation of the nerve and swelling of the impulse or electrical signals in a nerve.

Q What is causing that, Doctor?

A Irritation or pressure on the nerve from the injury to the back.

Q And the injury we are talking about is the herniated discs?

A That's right.

Q Solely relating to the herniated discs in the back and injury he suffered there, in terms of the future, is that something that is permanent, Doctor?

A Yes, absolutely.

Q Have you developed or do you have a course of treatment that you foresee that you can provide to Mr. Zukowski over the course of his lifetime with respect to this injury?

A Yes.

Q Can you tell us what that is, Doctor?

A It's similar to the cervical spine.

At this point, I think it should be managed conservatively, that includes epidural steroid injections, injections of steroid medication in the back. It involves imaging studies of the back, repeat MRIs. His last MRI was quite some time ago. Repeat nerve studies, and, at some point, may need an evaluation for surgery. But at this point, I think conservative treatment, epidural steroid injections, physical therapy and oral medication and perhaps bracing, which is sometimes I feel it's necessary, sometimes I don't, depending on the patient's weight, activities and things like that, I think is the best treatment for him.

Q In the ordinary course of treatment for Mr. Zukowski, as you described it, how many epidural -- first of all, what is an epidural steroid injection?

A And epidural steroid injection is an injection of steroid medication into this space where the nerve cord lifts called the epidural space and so an injection is given between the bones of the back and steroid medication is squirted into that area.

Steroid medication is a strong antiinflammatory and it helps get rid of any inflammation that causes irritation in the nerve roots or discs.

Q Are there any risks normal risks associated with this kind of injection or therapy?

A Absolutely. There are risks anytime you pierce the skin, the risk of an infection being taken from the skin into the area of the spine, you can get spinal infection. There is risk of damage to the nerve root, there is risk of a reaction to the medication, there are all kinds of serious risks associated with that and you have to weigh that against the possible benefits of getting rid of the inflammation if it's not covered with therapy and oral medication alone.

Q With respect to Mr. Zukowski, how often do you feel he will need epidural injections in his spinal column?

A It's impossible to say for certain, but with a degree of certainty, I can tell you that epidural steroid ?? successful after the first round of three injections and the pain comes back after a certain a period of time, they can be readministered two times a year.

Q And that's a series of three injections?

A Yes.

Q What's the cost of that?

A Generally those can be about 1,000, 1200.

Q For the three injections?

A For one injection.

Q Where do you give these injections, in the hospital or in your office?

A It depends on the facility. Usually they are given with a specialist in pain management it depends on his facilities.

Q Now, the studies that you were talking about needing, the MRI and CAT scans, how often do you think that will have to take place?

A Again, it depends on the symptoms he had are continued symptoms. His last MRI was about two and a half, three years ago and that should be repeated, at this point, if his symptoms do not improve with the physical therapy, with the steroid injections, then you have to start thinking about other interventions, possible surgical intervention and you would need repeat MRIs, at that time. So I can't really give an accurate answer to that question.

Q If we assume just what the relative costs of that?

A The same as the epidural injections. MRIs of the spine are generally in the 1000, $1200 range.

Q Now, therapy for the back now, not for the brace, what do you foresee in terms of cost of treatment to help Mr. Zukowski for ??

A I think he is going to need constant therapy on his back, meaning continued ?? in different degrees when he has pain twice a week for a course of six weeks.

Even in the best case scenario, he should be in therapy at least once a week to once a month to maintain what has -- as I told you, the muscles are the secondary stabilizers of the spine. And the reason some people have back spasm is an attempt to brace the spine. If you can develop your stomach muscles and your back muscles, you can naturally cut down on some irritability and discomfort of the nerve and spine. To treat him in the best way possible would be therapy once a week to once a month.

Q And that's the same amount for that, $100 to $150 for each session?

A Absolutely.

Q And this therapy as you envision it for the treatment of Mr. Zukowski is something that will go on for the rest of his life?

A Yes, he has this permanent injury in his spine and in order to deal with this permanency would be continuous therapy.

Q Now, Doctor, I want you to assume that back on June 1 of 2000, Mr. Zukowski was working for a company called Blue Jeans Construction. That he was a mason. That he had been working for that company doing masonry work and brick work for approximately three years. That on the day of June 1, 2000, he was standing on a scaffold about 17, 18 feet up in the air.

That the testimony has been that he came here to the United States 1994, that he didn't have a private physician, in fact, never gone to a doctor before the accident, that he was healthy, that he did not have any pains or disabilities in his neck or back or wrist, and on the afternoon of June 1, the scaffold upon which he was standing colaspased and he fell eighteen feet to the ground.

I want you to assume that he was taken to Coney Island Hospital and diagnosed with a fracture of the wrist, as you testified to from your own films, that it was an intraarticular -- there was a fracture of the distal radius, that this was a fracture of the ulnar, that the fracture of the ulnar has not healed and has not united and will not heal or unite.

I want you to further assume that MRIs were taken of him at the direction of Dr. Rusek and the MRI showed that he had bulging discs in the cervical spine and herniated discs at C4-5 and he has bulging discs in certain locations in his lumbar spine and he has the herniated disc at L4-5.

I want you to further assume that both of these discs are impinging upon the thecal sac.

Doctor, do you have an opinion with a reasonable degree of medical certainty as to whether or not the injuries that we have discussed were causally related to the accident that Mr. Zukowski suffered on June 1, 2000?

A The injuries that we have discussed, I believe were caused by the accident.

Q Could you tell us why, Doctor, with reasonable medical certainty?

A Absolutely. Given the history, the consistency of his complaints, imaging studies, which go along with the complaints, the MRI and the history that there was no problems prior to the accident, there has been continuous complaints and problems following the accident, within a reasonable degree of medical certainty, it appears the injuries we talked about were caused by the accident of June of 2000.

MR. Mac DONNELL: Could we mark this as Plaintiff's Exhibit 7?

(Whereupon, Plaintiff's Exhibit 7, was marked for identification.)

Q Doctor, you're looking at Plaintiff's 7 for identification. Can you identify that, please?

A This is a bill from our office for treatment and studies that were performed.

Q The amount of money that are reflected for the services on that bill, are they fair and reasonable in accordance with the practices here in the City of New York?

A These were usual customary rates of our office and/or in line with the other offices in Manhattan.

Q And the services that you provided as noted in that bill, were they necessary in the course of treatment for the injuries that were sustained by Mr. Zukowski?

A Yes, I believe they were.

MR. Mac DONNELL: I will offer it in evidence, your Honor.

THE COURT: Any objection?

MR. BERNSTEIN: May I see it, your Honor?

THE COURT: Yes.

MR. BERNSTEIN: May we approach, your Honor?

THE COURT: Yes, come up.

(Whereupon, a side-bar was held off the record.)

MR. BERNSTEIN: Your Honor, I have no objection subject to what was mentioned at the bench.

THE COURT: Very well.

THE COURT: Plaintiff's Exhibit 7, is in evidence.

THE CLERK: So marked.

(Whereupon, Plaintiff's Exhibit 7, previously marked for identification, is now received in evidence.)

Q Just a couple of more questions and we are done. Based upon the course of treatment that you have provided to Mr. Zukowski, and the findings that you testified to concerning the injuries that resulted from the accident, can you tell me whether or not, in your opinion, with a reasonable degree of medical certainty, whether Mr. Zukowski has any limitations with respect to lifting items?

A Yes, absolutely. With a herniated disc in the low back, two herniated discs in the neck, as well as painful and disfunction of his dominant hand, he is right-handed, he does have limitations because of the back and neck.

I would place his limitations lifting at no more than ten or fifteen pounds on a one time basis, probably no more than ten pounds on a repetitive basis.

Q Do you have an opinion with a reasonable degree of medical certainty as to whether he can sit at a desk?

A His injury to the low back has increased his ability to sit during the long periods of time. He needs frequent breaks to stretch the muscles.

Q What about his ability, again, with reasonable medical certainty, to stand?

A Same limitations.

Q And to walk?

A Standing requires normal function of the lumbar and cervical spine and in his case, he has decreased standing tolerance as well as sitting tolerance.

Q What about walking?

A The injury to the low back such as he has does decrease walking tolerance. With walking, you can have increase in pain in the lower back.

Q Bending, Doctor?

A Bending certainly would be limited because of the injury to the low back. He would have limited bending ability. He wouldn't be able to crawl, stoop without having pain in the low back.

Q Now, these findings with respect to the limitations, is that something which we can say has peaked out at this point and will remain the same or will that also be progressive with the rest of Mr. Zukowski's life?

A Again, not only is this permanent limitation, but, over time, his standing tolerance, walking, sitting tolerance will get progressively worse.

MR. Mac DONNELL: Nothing further.

THE COURT: Members of the jury, I'm going to give you all a ten minute recess. Remember, don't discuss the case, you have not heard all the testimony and keep an open mind.

(The jury leaves the courtroom.)

(A brief recess was taken and the case on trial continued as follows:)

THE COURT: All right, let's get the jury in, please.

(The jury enters the courtroom.)

THE COURT: All right, you may be seated.

Mr. Bernstein, you may cross-examine.

MR. BERNSTEIN: Thank you.

CROSS-EXAMINATION

BY MR. BERNSTEIN:

Q Good afternoon, Dr. Kaplan.

A Good afternoon.

Q Doctor, you told us that you have testified a number of times for plaintiff's counsel, for plaintiff's counsel's firm?

A Yes.

Q Can you tell me if you know approximately how many times you testified last year for plaintiff's attorney and when I mean plaintiff's attorney, I mean any plaintiff's attorney?

A I don't know. I don't keep track of that, so usually, it's once or twice a month.

Q So somewhere between ten and twenty times?

A Yes.

Q Would that be fair to say the same in 2002, 2001?

A I don't keep track, but, yes.

Q And the ten or twenty times that you testified for plaintiffs in court, you get paid $5500 a pop?

A When you say plaintiffs, it's usually on behalf of plaintiffs I'm treating. The check doesn't go to me, it goes to my company. It's four doctors and it's paying salaries, that I am not earning money for today in the office.

Q When you say you testify on behalf of patients you're also testifying on behalf of patients who were referred to you by Plaintiff's attorneys, correct?

A Sometimes, sure.

Q In fact in this case, Mr. Zukowski came to you upon a referral of his attorney, correct?

A I believe that's correct, yes.

Q He didn't come to you upon referral of some other doctor?

A That's correct, although I do know Dr. Gray.

Q In fact, often times when you testified, you testified in those same type of situations where your patients were referred, not by other doctors, but by lawyers such as Mr. Lurie's office, is that correct?

A Certainly that happens, sure.

Q Can you give me some idea of have percentage of your patients are referred to you by lawyers?

A I can't give you an idea. I don't know myself. It's not a huge percentage.

Q Your specialty is orthopedics, correct?

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A That's correct.

Q That's what you studied, that's what you did your internship and residency in?

A That's correct.

Q That's separate and apart from radiology, is that correct?

A Radiology is the study of X-rays. A portion of my training that I have been given in orthopedic surgery is learning how to read X-rays, CAT scans, MRIs, is part of what I teach to the residents. I'm not a board certified radiologist, I never said I was, but I do read X-rays a number of times a day and I do teach others how to read them.

Q But your specialty is orthopedics?

A Yes, but in order to be a good orthopedic, you have to be able to read X-rays.

Q And there are people called radiologists who specialize in reading X-rays?

A Radiologist is a doctor that's only trained in only reading X-rays. They have never done anything like orthopedics like I have, they have never examined patients on and a daily basis. That's their specialty, that's all they do.

Q When you say X-rays, your referring to MRIs or CAT Scans?

A Any radiologic test.

Q An MRI that you put up and showed to the jury before, those were taken by a radiologist, correct?

A Those were taken in a radiologist's office at the request of another type of doctor, not at the request of the radiologist.

Q Now, Dr. Kaplan, you first saw Mr. Zukowski in April of 2002, two years after the accident, is that correct?

A That's correct.

Q And that was upon the referral of his attorney, correct?

A That's correct.

It's my understanding that he felt he wanted a second opinion and he was referred by Mr. Lurie's firm to me.

Q And were you in fact aware that a law suit had already been filed as of the time Mr. Zukowski was referred to you by his attorney?

A I assume he had, because he had an attorney.

Q By the way, where is your office located?

A 69th Street between 3rd and Lexington.

Q Do you know where Mr. Zukowski lives?

A I don't know, but I can tell you.

Q Would it refresh your recollection if I tell you he lives in Brooklyn?

A Yes.

Q Do you know how he gets to your office?

A I don't ask him. I assume by public transportation.

Q And Dr. Gray's office is in Brooklyn, is that correct?

A He has an office in Manhattan and in Brooklyn.

Q And every time Mr. Zukowski comes to your office, he comes, presumably from Brooklyn up to your office?

A Absolutely.

A number of my patients come from Brooklyn, the Bronx, New Jersey.

Q On the occasions you have seen Mr. Zukowski, have you spoken to him?

A I have a full-time translator in my office.

Q And did you communicate with him directly or was it always through a translator?

A There is always a translator present. I communicate with him some. I speak very minimal Polish. I have a number of Polish patients and I have spoken to him directly and I usually rely on a translator.

Q And of those number of Polish patients, can you tell me what percentage of them have been referred by Mr. Lurie's office?

A I assume a small percent.

Q Do you recall having any conversations with Mr. Zukowski in English?

A I don't recall any conversations in English, no.

Q Do you know whether or not he came with an interpreter from his attorney's office on any occasion you saw him?

A I don't recall.

Q In any event, you took a medical history from him when you saw him 2002, April, correct?

A Yes.

Q Medical histories are important for you in treating a patient, is that correct?

A Yes.

Q It's important to find out as much as you can about the accident and the injury to determine the course of treatment, is that correct?

A To a certain degree.

Q It's important to determine whether or not an injury is as a result of an accident, isn't that correct, as well?

A Important in terms of what?

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Q Coming here and testifying as to whether an injury is or is not caused by the accident?

A Yes.

Q And it's important to find out how the accident occurred, correct?

A Yes.

Q It's important to find out what complaints that person made immediately after the accident, correct?

A Sure.

Q And you didn't see him until two years after the fact, correct?

A That's correct.

Q And did you ask Mr. Zukowski what complaints he made at the hospital immediately after the accident?

A No.

As we said, I was seeing him as a second opinion, so the first time I saw him, I interviewed him about his complaints of that day, which is what I was treating him for.

At that time, it was neck -- I'm sorry, low back pain and pain in the right wrist. He was, as I said, not having the neck pain, at that time.

I don't know if I interviewed him about his complaints at the hospital, but I certainly didn't note them.

Q Are you aware, sitting here today, do you know whether or not this man complained of any neck pain or pain radiating into his arms and shoulders when he first went to the hospital after the accident?

A I can certainly look at the hospital record.

Q Before you look at the record, do you have any independent recollection as to what he told them about, if anything?

A No, I don't recall.

Q Let me ask you, Doctor, in terms of whether or not a neck injury that he complained to you about at some point, we will get to when he complained to you about it, but, at some time, some point after you saw him April of 2002, in determining whether or not those complaints were related to the accident, wouldn't it be important for you to determine whether he made any complaints of neck problems when he went to the emergency room after the accident?

A To a certain degree, yes. To a certain degree, no.

Often times, when someone has an accident like Mr. Zukowski had, a large fall, especially with a fractured bone intraarticular fracture which is extremely painful, there in no denying that. Thi?? like ?? noted at ?? and the immediate treatment are for the things that need immediate treatment, such as a fractured thumb.

Q Doctor, I'm not asking you to make excuses for him.

What I'm asking you to do is tell us whether or not it is important for you to tell us whether, in your determination of causation, whether someone complaining of neck injury, made complaints of neck pain at the hospital?

A As I say, I will repeat myself, because I just answered that question.

Often times when people have injuries such as a fracture, in this case, an intraarticular fracture of the wrist, things like injuries to the neck are not fractures of the neck, that are not associated with immediate nerve damage, are not noted in the hospital record and are not listed as complaints. So I'm not making excuses, I'm just saying that often times, those complaints are not registered.

Q Do you remember whether the plaintiff told you that he complained of neck pain in the hospital?

A I don't recall. I looked at his hospital record and I can tell you, it's probably not listed just by the question you're asking me, but I don't think that means he didn't have any neck injuries from the time of his fall.

Q It doesn't mean he did either, is that correct?

A You're absolutely correct, I will not argue with you.

Q If somebody has a serious neck injury and goes to the hospital and tells them I seriously hurt my neck, would it be standard hospital procedure for the hospital to take X-rays?

A You're making a big assumption. I don't think somebody is going go and say I have a serious injury to my neck. If someone goes and complains of neck pain at the time of an accident that the emergency room doctor feels should be X-rayed, he will take an X-ray.

Q If someone goes in and says I have severe neck pain, is that something that would call for X-rays in the hospital, would that be good and accepted medical procedure?

A Depends who is manning the hospital at that time. If it were me and he said I have severe neck pain, I would probably get X-rays after an eighteen foot fall. So some people who do a physical examination feel there is no step off of the spine and there is motion of the neck and no exacerbation of pain and instead, treat the fracture of the wrist.

Q Are you aware of the fact there is X-rays taken of the back at the hospital?

A Yes.

Q No X-rays taken of the neck, is that your understanding?

A Yes.

Q To your knowledge, there was an examination done of the back, a physical examination by a doctor?

A I would have to refresh my recollection, because I don't recall right off the top of my head.

MR. Mac DONNELL: Is this limited to the hospital, Doctor?

MR. BERNSTEIN: The hospital.

THE WITNESS: Yes, there was an examination of the back.

Q And they found tenderness in the back, correct?

A All I see is no swelling.

Q Is there a word off to the right practically goes into the column, I believe it says no tenderness, as well?

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A I don't read that as tenderness, but I see the word you're talking about. Looking at it again, it begins with an F -- I'm not sure what that word is.

Q Now, are you aware of the fact that Mr. Zukowski went to the clinic at Coney Island Hospital on a number of occasions after the date of the accident?

A I don't recall that specifically. Let me see what the notes say here.

Q Did Mr. Zukowski tell you he went to physical therapy at Coney Island Hospital Clinic up until approximately the beginning of October of 2000, for three to four months?

A I don't recall specifically, but he did treat at Coney Island Hospital for a period of time.

Q And are you aware of the fact, Doctor, as to whether he made any complaints about his neck or back during the course of those several visits up until October of 2000 at Coney Island Hospital Clinic?

A It looks like only complaints of the wrist. It looks likes 6/12/2000 LBP, which stands for low back pain.

Q Is it fair to say that's the only reference in all of the Coney Island Hospital records of any back pain in one isolated reference on June 12?

A Let's see. What I'm reading and I'm looking at handwritten notes quickly, that is the only one I see, yes.

Q Would it be fair to say, Doctor, during the course of that therapy at Coney Island Hospital, that according to those notes, that the plaintiff did not make any complaints whatsoever of any neck pain from the date of accident until October of 2000?

MR. Mac DONNELL: Can we approach, your Honor please?

THE COURT: Come up.

(Whereupon, a side-bar was held off the record.)

Q Dr. Kaplan, let me simply ask you this.

If you were to learn that from the date of the accident, June of 2000, up until October 2 of 2000, that Mr. Zukowski made absolutely no complaint concerning any pain in his neck or shoulders or his arms, would that have any impact on your opinions in this case?

A It's my understanding that Mr. Zukowski did have pain in his neck and his back from the time of the accident.

Now, whether he complained of it or whether it was marked by a doctor who was looking at his wrist, I can't tell you.

Q Would that affect your opinion, Doctor, you're here to testify as to your opinion. You told us your opinion was based on history and a number of other things?

A That's right.

Q If were you to learn that history received a lack of complaints concerning the neck for several months at the hospital, would that affect your opinion at all?

A You're talking about a lack of documented complaints?

You're talking about him going to an orthopedic clinic where he has a wrist fracture and he is being treated specifically for his wrist when I have spoken to him and the history from Mr. Zukowski is of neck and back pain since the time of the

accident no, it does not change my opinion.

Q Would it change your opinion on October of 2000, when he went to the clinic, he complained of wrist pain and he indicated he had no other medical problems?

A That would not change my opinion.

Q Are you aware of the fact that Mr. Zukowski saw a hand surgeon by the name of Dr. Roger?

A I know Dr. Roger, yes.

Q And is he a hand surgeon?

A Correct.

Q And a hand surgeon is someone who specializes in the hand?

A Yes.

Q Are you aware that Mr. Zukowski saw Dr. Roger from October 2000, until March of 2001?

A I'm not aware of the dates, but I know he saw him.

Q And if were you to learn that on November 20, 2000, that Mr. Zukowski told Dr. Roger --

MR. Mac DONNELL: Same objection.

THE COURT: All right.

MR. BERNSTEIN:

Q That he had less pain, improvement of his grasp and increased range of motion, would that affect your opinion as to the permanency and seriousness of the injury?

A Certainly not.

When you have a fracture that's fresh and healing, it's extremely painful. As the bone grows together it naturally gets less painful. It doesn't mean he is pain free and it doesn't mean the joint surface which I showed you is normal but you would expect from the time of the fracture, for the first several months and you're talking about four months for it to get less acutely painful, certainly.

Q Doctor, let's talk for a few minutes about your treatment and Mr. Zukowski's visits to your office.

The first visit was on April 24, 2002, is that correct?

A That's correct.

Q And isn't it fair to say on that occasion, he had no complaint to you about his neck?

A Yes.

Q In fact, if he had complained about his neck, that's something you would have noted in your report and records, is that correct?

A Yes.

Q And he didn't complain the first same you saw him on April 24, 2002, of any pain radiating down his shoulders and arms?

A That's correct.

Q Did you examine his neck?

A I don't believe I did.

Q If, again, he had made any complaints or indications that he had problems with his neck as of April of 2002, you would have examined that, right?

A That's correct.

Q Did he complain to you about any headaches when you saw him on April 24, 2002?

A I don't treat headaches.

Q Did he complain to you of any headaches?

A I don't recall.

Q Now, you have talked about how he lacked a certain amount of supination?

A That's correct.

Q And when you say he lacked ten degrees of supination, does that mean he had full pronation?

A Yes, I believe he had full pronation.

Q Is there something called adduction and abduction?

A Not of the wrist.

Q What is that, adduction?

A The shoulder.

Q How about the arms or forearm of the wrist?

A No.

Q How about radial or ulnar deviations?

A That's movement of the wrist side to side.

Q Was there any deficit on that when you saw him in April of 2002?

A I don't recall and I didn't mark it.

Q Is it fair to say if you did mark it as having any deficits, in all likelihood, that would have been an abnormal finding of ulnar and medial deviation?

A Or I forgot to mark it.

Q You also talk about lumbar range of motion. You said he had flexion 80 out of 90 degrees, is that correct?

A Correct.

Q And his reflexes were in tact?

A That's correct.

Q What if any significance is there if his reflexes were in tact?

A It indicates as I told you, he does have decreased reflexes. You see a progression of when he was first seen with this nerve deficit from the back, when I first saw him he was having pain, but he did not have a nerve deficit.

Q Sensory was also in tact on April of 2002, is that correct?

A Right.

Q Can you tell the members of the jury the affect or meaning of that?

A It means he can feel everything.

Q You took X-rays of the lumbar spine, is that correct?

A That's correct.

Q And have you ever had an opportunity to look at the lumbar X-rays taken at the hospital?

A No.

Q Did you find any degenerative disc disease when you took X-rays in April of 2002?

A That's not something you generally see in a plain X-ray. X-rays are pictures of the bones as opposed to the MRI, which shows soft tissue better, it shows the discs.

Q Can't degenerative disc disease be seen through bony abnormalities?

A At the late ??, but not always.

Q And were you aware of the fact that the hospital X-rays taken on the date of the accident showed lumbar degenerative disc disease on the date of the X-rays?

MR. Mac DONNELL: Same objection.

THE COURT: Same ruling.

Q Are you aware of that?

A Sure.

Q And that degenerative disc disease seen at the lumbar spine taken at the hospital is not something that would have developed in the few hours from the time of the accident until the time X-rays were taken?

A No, absolutely not. He was forty years old, he is working in construction. I would expect him to have some degenerative changes. I clearly didn't note them as severe and I have not had the opportunity to see the hospital records, but I don't suppose they have gotten better between the time at the hospital and my X-rays.

Q Now, from that first visit, Doctor, you were recommending carpal tunnel release surgery, were you not?

A That's correct.

Q And you made a diagnosis or that you mentioned before, is it fair to say you made no diagnosis with respect to the neck as to that April 2002 visit?

A Correct.

Q And, at that time, Mr. Zukowski was treating with Dr. Gray?

A Yes.

Q Dr. Gray was his primary physician, at that time?

A No. Up to that point, Dr. Gray was directing his physical therapy.

Q After April 24, 2002, you didn't see Mr. Zukowski until almost a year later, is that correct?

A Yes. I advised him to continue with his physical therapy and rehabilitation.

Q And the next time you saw him was February 2003, correct?

A Yes.

Q An on that occasion, isn't it true Mr. Zukowski did not make any complaints to you at all concerning the neck, is that correct, that he didn't complain of severe neck pain?

A Not at that time.

Q Didn't complain of pain radiating down his shoulders?

A That's correct.

Q Did you examine his neck?

A No.

Q If he made any complaints, you would have examined him and reported your findings, correct?

A Yes.

Q Is it fair to say when you saw him in February 2003, there were no motor or sensory deficits?

A That's correct.

Q And you also did an examination of his wrist on February of 2003, is that correct?

A That's correct.

Q At that point, were there any deficits with respect to supination pronation, radial or ulnar deviation?

A They're not listed here.

Q So that indicates more likely than not that he-had full supination and pronation?

A It indicates that I focused on the large deficit of flexion and extension.

Q That was with respect to what?

A His wrist.

Q And it was important enough in April of 2002, to indicate he was lacking ten degrees of supination, but it was not important to mention it February 2003?

A It has nothing do with whether it's important or not. It simply has to do with doing an examination. Sometimes certain elements are left out in favor of things 'I feel are more important.

Q Now, you saw him again April 10, 2003?

A April 10, 2003, yes, correct.

Q And once again, isn't it true, Doctor, that Mr. Zukowski made no complaints, whatsoever about the back. No severe -- I'm sorry, the neck, severe neck pain, no radiating pain down his shoulders, nothing about that?

A To me, that's correct.

Q And once again, you didn't examine the neck because there were no complaints concerning it, correct?

A In front of me, at that time, were continued back pain.

Q Doctor, I'm asking you about the neck?

A The complaint to me were continuing low back pain.

Q Doctor, can you please answer my question?

THE COURT: Dr. Kaplan, only answer the question that's asked of you.

THE WITNESS: I'm trying to.

THE COURT: Do the best you can and just listen to the question, sir.

Q Doctor, on April 10, 2003, were there any complaints concerning the neck?

THE COURT: Just the neck, if there were any complaints.

THE WITNESS: There were no complaints of pain in his neck that I recorded.

Q The next time you saw him was June 2, 2003, correct?

A That's correct.

Q Once again, no complaints concerning the neck there, Doctor?

A To me, that's correct.

Q To you?

A Yes.

Q Did he complain to somebody else in your office on that date?

A Not in my office.

Q Once again, no complaints of severe neck pain, no complaints of pain radiating down the shoulders, is that correct?

A That's correct.

Q So by then, that was the fourth visit that he had not made to you any complaints concerning neck or pain radiating down the shoulders or arms?

A That's correct.

Q The next visit is on July 15, 2003. Any complaint about the neck?

A No. Talking about the low back pain again, and wrist.

Q Once again, no complaint July of 2003, no complaints about the neck, correct?

A That's right.

Q Doctor, as of that point, had you even mentioned in any of your reports the fact there has been this cervical MRI that you discussed today, isn't that correct?

A That's correct, because as I was trying to say before, the complaints I'm getting are complaints of low back pain and wrist pain, which is what I focused on as an orthopedist.

Q You saw him September 11, 2003, correct?

A Correct.

Q And again, no complaints about the neck, no pain radiating down the shoulder and arm?

A That's correct, what I recorded.

Q If it was a complaint, this man came in and said I'm having severe neck pain or neck pain or intermittent neck pain, if he made any complaints at all, you would have recorded it, wouldn't you, Doctor?

A Again, it depends what his complaints were. If his complaints were that he had intermittent neck pain when he comes to me for treatment of low back and wrist, not necessarily am I going to put down everything we have talked about. It's a matter of practicality and how much time I can spend with the individual patient, how much I can get into a note, so I don't think -- as I said, his major complaint was the low back and wrist pain. His neck pain, it comes and goes and I'm focused on the wrist and low pack, which I think is the major complaint.

Q Doctor, do you have any independent recollection as to whether he made any complaints, whatsoever, up until say September 11, 2003, regarding any neck pain whether intermittent or otherwise?

A I don't recall.

Q The only thing we know for sure is you didn't make any record of any complaints of neck pain, is that correct?

A Yes.

Q Now October 22, 2003, Doctor, isn't it fair to say that's first time, October 22, 2003, that you make any reference to the neck, if I can help you perhaps, Doctor?

A I can do it myself.

Q There you mention for the first time there was a cervical MRI taken three weeks earlier, isn't that correct?

A That's correct.

Q Did he complain to you though on that occasion that he was having any neck pain or problems or pain radiating down the shoulders?

A That was not part of his complaints, at that time.

Q So you mentioned the cervical MRI, but that was not accompanied by any complaint this man had concerning any type of pain of in the neck, correct?

A Correct.

Q You mentioned that the cervical symptom is quiescent?

A Correct.

Q What does that mean?

A They come and go.

When we were seeing him here, cervical symptoms were not something I felt were that serious.

Q Now, the MRI, also, Doctor, didn't the MRI show some osteophytes and desiccation and degenerative disc disease, the cervical MRI?

A Again, it shows some normal degenerative findings, yes.

Q You didn't mention that in your report, did you?

A I don't think it's important for my report.

Q And in fact, Doctor, on October 2, 2003, Mr. Zukowski was telling you that he had more problems with his back at that point then his wrist; isn't that correct?

A Yes, that's correct.

Again, this is happening over time. I have been seeing this guy since April of 2002, and I have seen him on a fairly regular basis. Some days he has pain here, some days he has pain there, that's normal, that's active related pain, that's weather related pain from these type of injuries.

Q That's from the wrist and back, correct?

A Correct.

Q But there is nothing in any of your records up to that point about any complaints, whatsoever, concerning the neck or shoulders, correct?

A Again, that's not a primary complaint and there is nothing in my records of that, correct.

Q Now, Doctor, on that occasion, October 2, 2003, didn't you make a note in your records that the surgery, the carpal tunnel surgery that you're recommending were authorized, but the patient didn't want surgery again, at that point in time?

A The surgery was authorized and, at that point, he was having primarily back pain. Since then the company that's given us the authorization has gone into liquidation an no longer authorized the surgery.

Q At that point, he didn't want the surgery, October 2, 2003, correct?

A Again, he has more than the one thing going on here.

Q Doctor, I'm asking a simple question, perhaps if you answer it.

Did he indicate, at that point that he did not want to undergo the surgery October 2, 2003?

A You're not asking a simple question, you're oversimplifying.

THE COURT: Can you answer it yes or no?

THE WITNESS: No.

THE COURT: But you can't ask questions, Doctor, only the attorneys can. See if you can answer it.

Q Now, Doctor, in November 12, 2003 another doctor, I don't believe it was you, another doctor from your office saw Mr. Zukowski, is that correct?

A November 2003?

Q Yes?

A Yes.

Q And once again, there is no reference to any complaints concerning the neck; isn't that correct?

A That's correct.

Q In fact, the neck was examined though and the doctor who performed that examination found that Mr. Zukowski had full range of motion of the neck as of November 12, 2003, isn't that correct?

A That's correct.

Q Once again, there was no diagnosis in any of your records or reports concerning the neck, is that correct, Doctor?

A Dr. Bender's notes, that's correct.

Q So, as of November 12, 2003, you had seen this fellow on a number of occasions and you had not made any diagnosis concerning any neck problems or cervical disc herniations, had you?

A I'm not sure what you're asking me, if the cervical disc herniation was noted from an MRI report of October 22, 2003.

Q But that wasn't accompanied by any complaint?

A Correct.

Q People have herniations, bulges and problems without pain, right?

A Absolutely.

Q Doctor, you saw Mr. Zukowski again on December 11, 2003, correct or if not you, perhaps somebody in your office?

A Yes.

Q Once again, Doctor, no complaints concerning the neck or any pain going into the shoulders or arms?

A That's correct.

Q And on that occasion, didn't the doctor make a notation, December 11, 2003, that authorization had been received for the carpal tunnel surgery, but plaintiff was not interested in having the surgery, at that time?

A Not at that time, that's correct.

Q Now --

A My primary concerns remains with the lumbar region.

Q You last saw him in February 2004, correct?

A Yes.

Q And at that time, he complained of his lumbar region and wrist, correct?

A Yes.

Q Once again, when you last saw him a couple of weeks ago, there was no complaint of Mr. Zukowski making any complaints of pain in the neck or pain radiating down the shoulders?

A From the visit four weeks ago, I do have an independent recollection of him complaining about his neck and pain radiating down from the neck. I had no treatment for that.

Q Did you examine him?

A I did not examine his neck, at that point.

Q He complained about the neck, you're coming in here today telling us he has herniated discs caused by this accident and you didn't examine the neck?

A There is nothing to do for that, at this point. It's not a surgical problem, it's a problem best treated conservatively.

Q Doctor, you knew on the visits of November of 2003 was the one and only time somebody from your office even examined Mr. Zukowski's neck and that he had full range of motion?

A That's correct.

Q And did you determine whether or not he had full range of motion or any objective findings as of January 27, 2004?

A An objective finding is a finding such as nerve deficits, atrophy or things like that. He does not have objective findings except for the MRI, which shows herniated discs. These other things give him problems intermittently and that's what he is complaining of, they're not things that I'm primarily treating, so the fact that I don't have a list of complaints only indicate that I am primarily concerned with his problems I feel are the bigger problems, which is low back and the wrist.

Q By the way, Doctor, you talked about epidural steroid injections.

In the four years since the date of the accident, almost four years, to your knowledge, has Mr. Zukowski ever had an epidural steroid injection?

A Absolutely not. That is for progressive problems. I'm not saying he needs it today, I'm saying he needs epidural injections in future treatments.

Q Doctor, could you tell the members of the jury what is degeneration?

A Degeneration is wear and tear changes in the body.

Q What is desiccation?

A Desiccation is loss of water within a body tissue as I was showing you on the MRI. In a disc, you can see different levels of desiccation. Mild desiccation is what we saw on the MRI. Severe would be a darker disc and a normal disc is bright white, like some of the other discs in his spine.

Q Tell us what osteophytes are?

A Bone spurs.

Q Is that something shown on an X-ray?

A It can, sometimes, sure.

Q These things generally take years to develope, do they not?

A They do.

Q I'm talking about degeneration, desiccation, osteophytes, it takes years?

A Desiccation happens more quickly than osteophytes, they can take years to develop.

Q And osteophytes can not be formed by an accident that happened June 11, 2000 as seen on films within a very short period of time thereafter?

A Absolutely not.

As we said before, he had some degeneration, I believe before this, as anyone would have at age 40, working manual labor and it makes him more susceptible to have a more serious injury with trauma.

Q Doctor, you don't have the benefit, do you, of comparing the MRIs that were taken after the accident to any MRIs taken before the accident, correct?

A Absolutely not.

Q If we had the ability to do that, we would know whether or not the conditions that you found after the accident were or were not there before the accident?

A If you took it a second before the accident and a second after the accident, you would have the ability to do that. In the absence of that, you have must go by the patient's history, and in this case, with regard to his back he has had persistent complaints of back pain recorded to us after the accident and nothing before. In fact, he had a clean work history before.

Q You keep telling us about --

A He had neck also, and a --

Q You keep telling us about intermittent complaints about the neck;

When were they made?

A I have an independent recollection from the last time I visited with him, and trying to answer your question with a yes or no and if I'm not putting it in my notes, I don't consider that as a major problem which is in the given time period I spend with the patient when I can get into the notes.

Q Doctor, you testified here today that the herniated disc that you say are in this man's cervical spine were caused by this accident?

A I said with a reasonable degree of medical certainty, given the fact he had no complaints of pain before, he has never had a broken bone, he never had treatment before, and given the fact that he had an MRI, had treatment after the accident, appears with a degree of medical certainty that these discs are related to this accident. And certainly, the intermittent pain associated with them.

Q Doctor, you left something out. You said he didn't have pain before the accident, but when did he first have pain after the accident with respect to the neck?

A I can't give you an exact date.

Q Without knowing that, you're still comfortable, Doctor, telling this jury that to a reasonable degree of medical certainty that the cervical herniations were caused by this accident?

A Given the fact that he did not have an accident since June of 2001, and given the fact that he had no complaints prior to 2001, that's best as I can do, I'm as certain as I can about it.

Q Bulging and herniated discs can be asymptomatic, correct?

A Yes.

Q People walk around with them without having any pain or symptoms, whatsoever, correct?

A You're absolutely right.

Q And you're aware of Mr. Zukowski's past history in terms of doing heavy work, heavy lifting?

A Correct.

Q And those types of activities can contribute towards herniated discs, correct?

A Correct.

Q Herniated discs have many causes, correct?

A Correct.

Q Lifting, bending, you can sneeze and have a herniated disc, correct?

A Yes.

Q And Doctor, hasn't medical research shown that many people, especially people older than forty years old have herniated discs and are walking around with herniated discs without having any pain or problems?

A That's the key point. Those discs are asymptomatic. As I say, I can't tell you with one hundred percent certainty that the discs are herniated at the time of the accident but from the symptoms associated with that disc and the history coming from that accident and the best possible degree of medical certainty I can give, it would appear that the discs were injured in that accident and that the herniation is related to the accident can I say with one hundred percent certainty, absolutely not.

Q You told us the symptoms associated.

What symptoms does the plaintiff have associated with that?

Intermittent pain, that can't arise to a level that you didn't make any notations in any of your records. That is your only justification for saying herniated discs is caused by this accident?

A Again, he had no symptoms prior to that and that he had them since, yes.

Q In reaching that determination have you factored at all into that consideration whether this man made any complaints at the hospital or any complaints at the hospital or anyone else of any neck pain?

A Absolutely.

Q And if you learned that he never made any of those complaints, that would not affect your opinion that the herniated discs causally related to this accident?

A I said it one hundred times, I will repeat myself, again.

I can't tell you with one hundred percent certainty whether the disc herniation occurred -- as you said, it can happen from sneezing, but he had no symptoms prior to the accident and he had symptom since and he has not had another accident. So it appears to me with a reasonable degree of medical certainty, which is what I'm doing today and the best medical judgment I can give is the symptoms he is having from the accident and the herniation of the discs are related to the accident.

Q You don't --

A The injury to the discs are related to the accident.

Q The fact is, you don't really know, do you?

A I just got finished answering you got. I can't say with one hundred percent certainty, but I was not asked to do that, I was asked to give you an opinion within medical knowledge and I have and treatment that I have given to thousands of patients over the years as to the best of my ability, given the history that I repeated over and over, I can say that I feel these discs, and certainly the symptoms associated with them are causally related to the accident.

Q Doctor, pain is subjective, is it not?

A Absolutely.

Q And when you examine a patient such as Mr. Zukowski, you rely in part on his subjective complaints of pain, isn't that true?

A That's correct.

Q If somebody tells you my neck hurts or back hurts or something else hurts, you can take an X-ray to determine whether there is pain, can you not?

A Is someone smashes their hand with a hammer and it's bleeding, you're able to tell, but just because a patient says they have pain, you need objective findings of pain.

Q Doctor, there are a lot of ways that you as a doctor, and all doctors rely on a complaint that the patient makes to them, correct?

A To some degree.

Q Such as when you did certain tests, like range of motion tests, you rely on complaints of pain or a patient telling you I can't move this any further, is that correct?

A I tried to take the objective complaints out of my notes and I will note active and passive motion and if there is a difference between it I will note it.

Active motion is asking the patient to move as far as he can. Passive motion is then trying force the joint in the direction you asked the patient to move in. If there is a difference, there is usually a painful component and the patient is limited by pain if there is functional component meaning that wouldn't go any further. That to me is what is noted.

Q Doctor, is it fair to say to a certain extent, your own range of motion test is based on your subjective observation?

A I'm not sure what you're asking me.

Q If you, Doctor, examined Mr. Zukowski on one day and another doctor examined him on another day after, there may be differences in the tests of flexion and extension and range of motion?

A There should not be a big different if they are they are done the same way.

Q And if there were a difference, let's assume on one occasion, Mr. Zukowski is examined by a doctor and they find flexion of 80 degrees in the lumbar spine and another doctor examines him and there is only 50 degrees of flexion in the lumbar spine, would there be any explanation for that in your opinion?

A There are a number of explanations, where you test them, the way you measure.

Q Would it also be based on the plaintiff's own subjective complaints?

A It depends how the physician conducted the examination.

Again, I try to eliminate the subjective portion of the exam.

Q But a patient to some extent has the ability to be manipulative as to the test, is that correct?

A He shouldn't, but if the exam is not done properly, sure.

Q By the way, Dr. Kaplan, when you examined Mr. Zukowski, was there any atrophy of the right arm?

A I don't recall.

Q If there was, am I correct in assuming that you would have made a notation of that?

A Not necessarily.

Q Doctor, have you ever heard of the term secondary gain?

A Sure.

Q Tell the members of the jury what that is?

A Secondary gain is when, in a case like this, a patient either gives you false complaints or magnifies the complaints in order to benefit from those false complaints that would be a secondary gain.

A this case, if Mr. Zukowski came to me and complained every time I saw him about his neck pain, he would try to magnify the complaint of neck pain. That's not the case here.

Q So here, he just never complained to you, right?

A He didn't magnify the complaints and therefore, I feel that his biggest complaint and injuries are the back and the wrist.

Q And secondary gain is also where somebody may exaggerate their complaints in order to receive monetary awards, is that correct?

MR. Mac DONNELL: Objection.

THE COURT: Sustained.

Q Doctor, we met in court a couple of times, have we not?

A You said so, I don't remember. I guess you didn't make a big impression.

Q Do you remember last January, across the street, a fellow by the name of Safer (phonetic) from Pennsylvania?

A Sure.

Q That was a case where were you retained by his attorney, also, were you not?

A I don't recall how it came to me.

Q And that was a case where he had been treated by another doctor and two or three years after the fact, he was referred to you by Chris Goria, (phonetic), an attorney?

A I don't recall who the attorney was.

Q And have you seen Mr. Safer since that trial was over?

A When was the trial?

Q The trial was in January of 2003?

A Probably, yes.

Q And did you perform surgery on him, sir?

A I don't recall. I believe I have performed surgery on him.

Q Do you recall a fellow by the name of Cabasis, it was a case that you got back in June of 2001?

A I have a couple of patients with the name Cabasis.

Q That was a fellow that you testified was going to need surgery in the future?

A I don't recall, specifically.

Q He never came back to you after that law suit was over, did he?

A I don't recall. He probably did, sure.

Q You never performed that surgery that you said would be a necessary procedure, did you, Doctor?

A I don't recall. Probably did, sure. If I said it was necessary it was probably done.

Q Do you have any recollection of it having been done?

A I don't recall. I have several patients by the name Cabasis.

Q. Do you have a recollection of Mr. Safer, performing surgery on him?

A I believe I did.

Q When was that?

A I don't recall specifically. I do ten, 15 surgeries a week.

MR. BERNSTEIN: Nothing further.

THE COURT: Any redirect.

MR. Mac DONNELL: Yes.

REDIRECT EXAMINATION

BY MR. Mac DONNELL:

Q You were asked a whole lot of questions by Mr. Bernstein concerning the neck, and specifically, he asked you a whole series of questions that related solely and exclusively to the Coney Island Hospital and records of the Coney Island Hospital when Mr. Zukowski was going there for treatment of his wrist.

Do you remember all those questions you were asked?

A Yes.

Q Isn't it true that simultaneously going to the Coney Island Clinic, Mr. Zukowski was going to Dr. Rusek, the same doctor who referred him to Ultra Diagnostics for the MRI -- for the MRI of both his neck and his back and that while he was being

treated by Dr. Rusek starting only eight or nine days after the accident, he was being treated for his neck, for his back and for his wrist?

A That's true.

Q So while Mr. Zukowski may not have made complaints at that time when he was being treated solely for his wrist at the clinic, he was seeing a medical doctor simultaneously and complaining about his neck, back and the wrist, isn't that correct?

MR. BERNSTEIN: Objection.

THE COURT: You brought it up, I will allow it.

THE WITNESS: Yes.

Q Then he went to see Dr. Scott Gray, who you told this jury you know?

A Yes.

Q He is a physiatrist and Dr. Gray is a doctor who does physical therapy and tries to help people with deficits, correct?

A Correct.

Q You told us you have all of Dr. Gray's records right in your folder and you reviewed them in connection with your treatment of Mr. Zukowski, correct?

A That's correct.

Q And isn't it true for almost two and a half years while Mr. Zukowski was going for treatment by Dr. Gray, he was complaining and being treated for his neck, for his back and for his wrist?

MR. BERNSTEIN: Objection.

THE COURT: Sustained.

Q Didn't Dr. Gray give physical therapy to Mr. Zukowski for his neck, back and wrist?

MR. BERNSTEIN: Objection.

THE COURT: Sustained. Come up.

(Whereupon, a side-bar was held off the record.)

Q You were questioned earlier on in your cross about that you testify in court and that you testified on behalf of your patient and you're here.

Is there a correlation since to the treatment of trauma related injuries between people who have been injured with lawsuits and people who come to see you to be treated?

A I think there is, clearly. Orthopedics is treatment for injuries to the bones and joints and it includes things like fractures, herniated discs. These usually occur because of accident usually and often accidents occur and people end up in lawsuits.

If I am treating a patient, I often feel obligated to come to court, if I am asked to do that, to explain their injuries and the treatment they need.

Q Is there anything in the X-rays that you took when you first saw Mr. Zukowski, or the MRIs that you have testified about that were taken pursuant to Dr. Rusek's direction both of the neck and back that can indicate any source of pain complaints, tingling or anything of that nature with regard to that?

A No.

Q You testified that there was no evidence and Mr. Zukowski told you he was in good health, right?

A That's right, yes.

Q And you testified that he never suffered an injury to his neck, back or wrist, correct?

A Correct.

Q Would there be any reason in the normal course of events to take an MRI of his neck and back if he hadn't sustained an injury?

A It would not normally occur, correct.

Q Therefore, in the vast majority of cases that you see, you never see an MRI taken of an injured part of a patient before the accident if they were injured in the accident, correct?

A That's correct.

Q And you see the MRI and everything after the accident?

A That's right.

Q And you draw your conclusions with reasonable medical certainty based upon that?

A That is correct.

Q Is it unusual in the ordinary course and based upon your experience, for someone to suffer a herniated disc and to have a manifestation of it show up a month, two, three, even four or more down the road?

A Absolutely.

An injury to the disc can occur at the time of an accident and this is a progressive problem and the symptoms that Mr. Mac Donnell called manifestation symptoms can occur later down the road. Usually they are associated with instability of the spine as I showed you in that model. That's a condition that occurs over time. The symptoms come from things that occur over time.

Q Is there anything you have seen in any medical report, MRI or X-ray that would indicate to you as a treating doctor of Mr. Zukowski, that his complaints are not related to the eighteen foot fall he had off the scaffold on June 1, 2000?

A I have not seen any.

Q And, again, just to be clear, the injury to the neck, the herniated disc which is shown on the MRI, it's essentially been quiescent up until this morning?

A That it comes and goes, that's right.

Q It's not his major problem?

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A I don't think it is.

Q But since he has a 30 year life expectancy, is this also progressive along with the back and wrist?

A Absolutely, that's the point. It's a progressive problem, it will likely get worse over time.

Q So the cervical radiculopathy noted in your notes of September of 2003, may have been the first manifestation that you noted with reasonable medical certainty and anticipated for in 2005, 2006, 2007, and for the next thirty years, Doctor, is going to get progressively worse?

A I think there is a misreading. I don't recognize a cervical radiculopathy which is that radiating radiculopathy. He does have numbness and tingling in the fingers from his carpal tunnel and one of the reasons you can get that is from cervical radiculopathy. So we recommend a test to try and sort that out. So I believe the symptoms from the neck is intermittent and will get progressively worse over time.

MR. Mac DONNELL: Nothing further.

THE COURT: Thank you.

Recross?

MR. BERNSTEIN: Briefly.

RECROSS-EXAMINATION

BY MR. BERNSTEIN:

Q Dr. Kaplan, you would agree, would you not, that it's possible that Mr. Zukowski had herniated discs in the neck prior to the date of the accident?

MR. Mac DONNELL: Objection to possible, Judge.

THE COURT: Rephrase that. Anything is possible.

Q Doctor, Mr. Zukowski could have developed the herniated discs in the back and the neck prior to the accident, correct?

MR. Mac DONNELL: Objection your Honor, there is no foundation for that.

THE COURT: I will allow it.

THE WITNESS: As I said, I would -- I can't tell you when the disc herniations occurred.

MR. BERNSTEIN: Your Honor, nothing further.

MR. Mac DONNELL: Your Honor, briefly.

RE-REDIRECT EXAMINATION

BY MR. Mac DONNELL:

Q Assuming that they were before, based upon all of the evidence, were there any complaints with respect to it?

A The point that I have been trying to make is the herniation, I can't tell you with one hundred percent certainty whether they were before or after.

The likelihood is given the history that he had a neck injury which occurred at that time, that it going to be a progressive problem and continue to be a progressive problem.

MR. Mac DONNELL: Thank you.

THE COURT: Anything else?

MR. BERNSTEIN: No, your Honor.

THE COURT: Thank you, Doctor, you're excused. Come up.

(Whereupon, a side-bar was held off the record.)

THE COURT: Members of the jury, you were very attentive today. It's five o'clock, you're doing a good job, so I'm going give you a present of coming in at 10:30 tomorrow morning, okay 10:30. Until then, enjoy the evening and remember, keep an open mind and don't discuss the case among yourselves.

(The jury leaves the courtroom.)

THE COURT: All right, 10:30 tomorrow morning.

(The case on trial was adjourned to February 24, 2004).

(Case continued on next page.)

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