In The Matter Of:

Barra v.

MTA

Repagination

April 15, 2016

Monica A. Martinez . Senior Court Reporter

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 13

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JOSEPH BARRA,

Plaintiff(s),

- against -

METROPOLITAN TRANSPORTATION AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY, MTA CAPITAL CONSTRUCTION, CITY OF NEW YORK, and NEW YORK CRANE & EQUIPMENT CORPORATION,

Defendant(s).

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Index No. 102339/2011

April 15, 2016
71 Thomas Street
New York, New York

B E F O R E: HONORABLE MANUEL J. MENDEZ, JSC, And a Jury

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Proceedings

THE COURT: On the record.

Mr. Morgan.

MR. MORGAN: Last night via e-mail I received the full complement of photographs that Mr. Joseph intends to use from plaintiff's Facebook page as ordered by the Court. There are a few of the photographs in there that I would like a ruling on from the Court. I haven't received a physical exchange, so I am having my office print them off of an e-mail so that I can bring those before the Court and get a ruling on a few of them.

THE COURT: How many is "a few"?

MR. MORGAN: There aren't actually a ton. There's maybe 20.

THE COURT: There's you need a ruling on?

MR. MORGAN: No. A ruling I need on, maybe, two or three.

In addition, this morning at about 7:30 I received -- I haven't had a chance to go through them, but, maybe, like a hundred photographs.

MR. JOSEPH: Absolutely not.

THE COURT: Do you know how many?

MR. JOSEPH: No, but I can explain what they are, if that makes it easier.

MR. MORGAN: I looked through a few. I don't know how many there are. I received an e-mail with a

number of them. They are photographs of gym equipment and people not named Joseph Barra doing workouts. I don't see how that is probative in any way. They know what -- he has already described the gym movements seen on the surveillance. And Mr. Barra is going to testify to what he does at the gym.

So to show people not the plaintiff doing workouts on machines, I don't see how that is authenticated or should be able to be used against Mr. Barra.

THE COURT: Okay.

MR. JOSEPH: Your Honor, would you like me to address that?

THE COURT: Sure.

MR. JOSEPH: I don't know which of those photographs I am going to be using. I literally within minutes after looking through the photographs e-mailed them to Mr. Morgan.

Your Honor, much of the photographs involve the gym equipment which Mr. Barra was observed using. The investigator is permitted to come in and testify as to what he observed. You said that. He took these photographs, it is my understanding, so the idea is to show, This is what combat ropes are, this is the machine I saw him using, this is the weight I saw him using, these are the medicine balls I saw him using.

Why can't he do that? It is not Mr. Barra. Mr. Barra can't say this is an invasion of privacy or that this was somehow photoshopped. It wasn't.

THE COURT: What you want to do is basically show the equipment and show how that equipment would be used by anyone using the equipment.

MR. JOSEPH: Right.

I believe the person in the photographs, Judge -- by the way, when plaintiff's counsel shows you the photograph you will recognize the person in the photographs. I believe it is Mr. Chau.

THE COURT: Mr. Chau, the investigator?

MR. JOSEPH: Yes.

MR. MORGAN: But the way someone else uses equipment has nothing to do with the way Mr. Barra uses the equipment. I think it is a stretch to show a perfectly healthy person using equipment as opposed to when Mr. Barra was using it.

Also, I don't remember the ruling that Mr. Chau was allowed to come in and testify to everything he saw.

MR. JOSEPH: I remember that ruling. It is on the record.

THE COURT: I think I did say that, yeah. Let me see. I write down the rulings.

MR. JOSEPH: I don't have the transcript with me,

but it was the first day you addressed this. And you said that -- and I am paraphrasing, of course, but the phrase you used was, He could testify as to what he saw with his own eyes.

THE COURT: Hold on.

(Brief pause)

THE COURT: I don't have that written down but we will look at the transcript. I believe that I did say that he can come in and testify as to what he saw when I precluded the video because of the edits. I did say that he could come in and testify as to what he saw.

MR. MORGAN: How about the photographs of someone else doing exercises? If he is going to testify about what he saw, let him testify to what he saw. He wants to have pictures of himself doing the exercises?

THE COURT: Well, in that respect, I don't know what this equipment is and how it would be used, but depending on the person's physical condition, they may use the equipment one way or another. Mr. Morgan has a point there, because, you know, I don't go to the gym but when I used to go to the gym I only used the exercise bike. I used to see people, you know, using that exercise bike and they were doing like 80 miles an hour yet I could barely move the pedals myself.

MR. JOSEPH: Your Honor, there is no video here.

Proceedings

THE COURT: I understand.

MR. JOSEPH: There is a picture of Mr. Chau with his hands on the handgrip. There is a picture of Mr. Chau with the combat ropes in his hand. That's what he is talking about.

THE COURT: All right. Let me see the photos before I rule.

MR. MORGAN: Another point on that, Judge, they are using it to impeach when there is no impeachment. My client will testify that that's what he does.

MR. JOSEPH: We don't know what he will testify to.

MR. MORGAN: If he doesn't commit perjury and testifies to what he has been doing at the gym, I don't see what the relevance is to putting in photographs showing what he testified to.

I mean, surveillance is to impeach. If he testifies to everything that is in the surveillance, I don't see --

THE COURT: Counsel, I don't want to rule in a vacuum.

MR. MORGAN: I understand.

THE COURT: I have to see the pictures.

MR. MORGAN: Okay.

Also, as to the investigator coming in and saying

what he saw, how is that impeaching Mr. Barra? First of all, other witnesses testified he already does those things. Mr. Barra will take the stand on Monday and go through what he does. If everything lines up, I don't see the need for an investigator to come in and --

MR. JOSEPH: So far they haven't said everything he does.

THE COURT: Mr. Joseph is going to put on a case and produce witnesses.

MR. MORGAN: I understand.

THE COURT: I can't preclude a witness he wants to put on without knowing what the witness will say. He may say something different from what your client says. He may say, I saw him use the exercise equipment without any difficulty. Your client may say, I did use it but it was painful, and I used it and I groaned and moaned. I don't know.

He was there, all right? Those photographs -- I have got to see the actual photographs before I make a ruling.

MR. MORGAN: Okay.

THE COURT: Is there anything else for the record?

MR. MORGAN: I need to mark a few exhibits.

(Exhibits received and marked in

Dr. Cushner - by Plaintiff - Direct

evidence as Plaintiff's Exhibit 24 land 25.)

(Exhibit marked for identification as Plaintiff's Exhibit 26.)

(Jury enters courtroom)

THE COURT: Good morning, everyone. Have a seat. Welcome back. We are continuing with the trial. We are still on plaintiff's case.

Mr. Morgan, your next witness, please.

MR. MORGAN: Plaintiff calls orthopedic surgeon, Dr. Cushner.

(Dr. Michael Cushner, MD, takes the witness stand and is duly sworn/affirmed.)

COURT OFFICER: State your name and business address for the record.

THE WITNESS: Michael Cushner, C-U-S-H-N-E-R, 73 Market Street, Yonkers, New York, 10710.

COURT OFFICER: Thank you.

THE COURT: You may inquire.

DR. MICHAEL CUSHNER, having been called on behalf of Plaintiff, first having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MORGAN:

Q Good morning, doctor. How are you?

A Fine, thank you.

Dr. Cushner - by Plaintiff - Direct

Q Please state your professional qualifications for the record.

A Yes. I am an orthopedic surgeon. I graduated University of Maryland School of Medicine in 1993. I did an orthopedic residency at the Medical University of South Carolina including a surgical internship and orthopedic residency. I then did specialty training at the South Lake Tahoe Orthopedic Institute in sports medicine and sports trauma.

Q Can you take us through your employment history?

A Yes.

After my fellowship I worked for Commonwealth Orthopedics in northern Virginia for about a year. Then I came to New York in 2001 initially working with Beth Israel Medical Group as their chief of orthopedics for Westchester County. Eventually I joined with Westmed Medical Group in 2006.

Q What is Westmed Medical Group?

A Westmed Medical Group is a multi-practice group, multiple specialties: Internal medicine, different surgical specialties, medicine specialties. I am in their orthopedic department.

Q Can you tell us what orthopedics is?

A Orthopedics is the treatment of the musculoskeletal system; so anything that involves motion, the muscles, the joints, the bones, also the nerves that make those things move.

Q Are you board certified in orthopedics, doctor?

A Yes, I am.

Q Could you tell us what that means?

A So there is an evaluation of your training. To be board certified you have to do a specific training in an approved residency. After your residency you take your written exam that covers orthopedic surgery. After you have been in practice for two years you actually do an oral exam where they review your operative cases. Then every ten years you get recertified with another written exam.

Q And what type of injuries do you normally treat?

A So I would consider my practice a general orthopedic practice with a specialty in sports medicine. We treat a lot of knees and shoulders, back injuries. We say "sports medicine," but whether you hurt your knee playing sports, at work, or walking to the store, it is basically the same thing. So a lot of shoulder and knee, but we also do fractures, so a little bit of everything.

Q Have you been qualified as an expert in the field of orthopedics in the past?

A I have.

Q About how many times have you been qualified and testified as an expert in court before?

A So in fifteen years, less than -- between ten and twelve.

Q Have you ever testified for my office before?

A I don't believe so.

Q Have you ever testified for Mr. Joseph's office before?

A Actually, I have once.

Q On approximately how many cases have you been retained by Mr. Joseph's law firm to evaluate people in lawsuits with orthopedic injuries, approximately?

A It hasn't been for a few years but initially when I first was in practice. Fifteen to twenty.

Q Thank you.

Doctor, were you asked at some point in time to draft a summary report and assessment of Joseph Barra with respect to the medical care that you provided him and that he received from other doctors?

A Yes.

Q Approximately when were you asked to do that?

A May I review my records?

Q Sure.

A September 2015.

Q And did you prepare a narrative report as a result of meeting with Mr. Barra and reviewing some of his treatment records?

A I did.

Q And at that time did you take a history from the plaintiff when you met with him?

A Yes. So the last visit where I met with him was also a treatment visit when I prepared the narrative, which was over the process of a few months after that reviewing records. Yes, we did get a history with that.

Q What treatment did you provide to him when you saw him in September?

A So we discussed his findings and he was given a cortisone shot to his shoulder.

Q What if anything did you rely on in addition to the history from the client when you prepared that report?

A There were a number of records sent for review from different treating physicians, I believe some hospital records as well.

Q And did you receive a fee for those professional services?

A I did.

Q Do you know what the fee was for the report?

A For the report it is $1,000.

Q Are you receiving a fee for your time testifying here today?

A Yes, I am.

Q What is that fee?

A It is $10,000.

Q Doctor, if you weren't in court here telling us about your care for Joseph Barra, what would you be doing instead?

A I would be operating right now.

Q Are those the usual and customary charges for a doctor in your specialty with your qualifications in this region?

A Yes.

Q Do you receive the same fee regardless of the outcome of this case?

A Correct.

Q Can you just give us an idea of what medical records you reviewed, and what, if anything, those findings showed?

A Yes.

So I reviewed his films, MRI films that I had seen before, the reports as well as the films; the medical records of neurologist Dr. Joseph Carcione, medical records of Dr. Daniel Cartledge, Dr. Bodnar, Dr. Salvati, Dr. Jeff Shapiro, my own medical records as well as one of my associates, Dr. Cy Blanco, records of Dr. Michael Tom, records from the Center of Cognition and Communication, treatment records of Dr. Dunne, Barbara Dunne, an independent medical report by Dr. Zager, and also medical reports from Dr. Douglas Schwartz and Dr. Richard Radna.

Q Thank you, doctor.

Now, do you have an independent recollection of the day Joseph Barra first came to your office?

A I don't.

Q Do you know when that was?

A Yes. It was August 6, 2010.

Q And when Mr. Barra came to your office did your office take a history from Mr. Barra?

A Yes.

Q And can you explain how that happens at Westmed?

A So typically with an injury, when they come in we have a medical assistant who brings them to the room. We work on electronic medical records through the computer. There are specific questions that you have to answer as part of the process for processing a visit. Those are done through the medical assistant.

In his particular case and in a number of my cases, they are also seen by a physician's assistant who does the initial cursory evaluation. Then I will come in and review the chart, review the patient, and dictate the note.

Q Is that process any different when you are working with an injured worker as opposed to someone else?

A Well, with an injured worker it is a different type of insurance so you have to --

MR. JOSEPH: Objection.

THE COURT: Sustained.

A With an injured worker there are certain records that have to be answered as part of the process of processing the visit.

Q That's every time you treat someone who was working as

opposed to someone who was not, correct?

MR. JOSEPH: Objection.

THE COURT: Counsel, can you approach?

(Off-the-record discussion held)

Q Now, the initial record created when Mr. Barra saw you August 6, 2010, could you tell us what it says?

A Yes.

So on the intake form it asked: "Where and how did the injury/illness happen?" The medical assistant wrote: "He was on top checking oil on crane. He slipped on wet surface as it was raining and he fell down to the ground. He went to Cornell Hospital."

Q Did you type the record or did someone else type those records?

A That intake portion of the form is done by the medical assistant.

Q Can you tell us what you did for Mr. Barra on that first visit? Feel free to consult your notes.

A Yes.

So the number one thing in treatment is examine him. He had marked limits in his ability to move his arm as well as pain and discomfort. We also were looking at his left foot. So the examination was concentrating on the right shoulder and left foot. And because of the findings we found there, we got him some antiinflammatory medication to help with

the pain, muscle relaxant as well as some pain medication. We also ordered further testing and ordered an MRI of his shoulder.

Q Okay.

Are you aware of other doctors that Mr. Barra was scheduled to see when you treated him in August of 2010?

A I believe so.

Q And do you treat patients with head injuries, doctor?

A I don't.

Q And if a patient comes to your office complaining of orthopedic injuries and head injuries, what do you tell the patient, if anything?

A Well, if they don't have an evaluation with a neurologist or neurosurgeon, we will get that for them. If they have that, then they are in the process.

Q Did that happen with Mr. Barra?

A It did.

Q What did you do next in treating Mr. Barra for the orthopedic injuries?

A So he did receive an MRI of his right shoulder, then followed up after that MRI.

Q And have you reviewed that MRI?

A Yes, I have.

MR. MORGAN: Your Honor, may I grab the easel?

THE COURT: Yes, you may.

MR. MORGAN: Your Honor, permission for the

doctor to come down and show what he saw?

THE COURT: He may.

(Brief pause)

Q Doctor, assume that Dr. Kolb, the radiologist, came in and explained the parts of the shoulder to the jury and what he saw in the MRI. But if you could, just explain what you did when you saw the MRI and how you treated the findings?

A Sure.

This is a view in this plain making cuts from front to back, this is the arm bone, and this is a very clear large rotator cuff tear. We talk about the rotator cuff muscle as four --

THE COURT: Counsel, can you just identify the exhibit, please, for the record?

MR. MORGAN: Sorry, your Honor. It is Plaintiff's 21A, for the record.

THE COURT: Okay.

A So we are talking about four muscles, but the one you are usually talking about in injuries is the supraspinatus. "Supra" because it is on the top. You should see a black signal coming all the way across to that black area there. That's where it inserted and it is pulled off. That white there is the space now. It is, actually, fluid from where it pulled off.

Q And do you have an opinion with a reasonable degree of medical certainty of whether or not a tear like that is

traumatic or degenerative in nature?

A That's a traumatic tear.

Q And what tells us that?

A The extent of where it is, that is pretty much the complete superspinatus, and the fluid in there at this point. You don't get bleeding with a degenerative tear like that. That's why it is degenerative, because it loses blood supply. And the fact is that a degenerative tear is usually more central, almost like a V where it is attached on the front and back. This is complete.

Q Is that consistent with a fall from a height?

MR. JOSEPH: Objection. Leading the witness.

THE COURT: Sustained.

Q Are you familiar with how Mr. Barra's accident occurred? Your findings consistent with that history?

MR. JOSEPH: Objection. He is still leading the witness.

THE COURT: Overruled.

A Well, the interesting thing about the rotator cuff is the mechanism varies greatly. It could be a fall from a height or even from standing. It could be from your arm hitting and transferring the weight into the shoulder. It could be from hitting it directly. It could be from a long pull. It is unlike other injuries, like an ACL injury in the knee is a very specific mechanism. So it is a contact injury from a fall of

some type, but it could be any number of points of contact.

Q Okay. Are you done with the MRI?

A Yes.

Q You can have a seat, thank you.

(Brief pause)

Q After reviewing the MIRI, doctor, what was next for Mr. Barra?

A With that size of rotator cuff tear, really the only treatment for it is surgical intervention.

Q Did you perform surgery on Mr. Barra?

A I did.

Q Do you have your operative report there, doctor?

A I do.

Q Can you take us through that?

A He had arthroscopic repair of the rotator cuff. That's when you put a camera into the joint. We do that through three or four small holes. We put a camera first inside the joint. From inside the joint you can look up at the rotator cuff. He had a large rotator cuff tear which was noted. He had some minor damage to the cartilage along the socket and the ball, and the labrum, which is the lining around the socket, had some minor fraying and tearing, but the predominant problem was the rotator cuff tear.

Then we redirect to above the muscle and we remove scar tissue that forms as part of the trauma. The bone

up here is called the acromion. It hooks a little bit naturally. We remove some of that hook so that when the repair occurs it is not pushing down on the repair. But the main part of the treatment is where the muscle pulls off from the bone we put stitches in the tendon, that's part of the muscle, and we reattach it to the bone with these devices called anchors. Anchors are small little -- they are a combination of absorbable, they're not plastic but it looks like plastic, as well as a small piece of metal. You drill them into the bone, and they have phalanges that shoot out so they hold there. And sutures attach to them, so when you tie it to the tendon you can tighten it and bring the tendon back down to the bone. And before you do that you actually scrape the bone and make it bleed. The tendon attached to bleeding bone is how it heals. So the sutures and the anchors bring it all together to allow your body to heal it.

Q Thank you, doctor.

I have what has been marked as Plaintiff's Exhibit 26 for identification only. Would you mind just showing the jury where the anchors would be placed?

A So this here (indicating) is probably the best picture of it. This is the rotator cuff and that's a tear. It should be attached down to the bone here. So you are actually just looking at the bone. This is the area where the tendon attaches. You are putting holes in there, and then you are

putting sutures in the tendon and tying it down to the bone.

Q And you said how many anchors?

A Four.

Q Is that a common procedure of yours?

A Rotator cuff repairs I do commonly, yes.

Q What about with the number of anchors, does that tell you anything with regards to the surgery?

A Four is on the upper level. Most repairs are one or two.

Q So did Mr. Barra require -- was it out of the ordinary, his --

MR. JOSEPH: Objection.

THE COURT: Rephrase the question, please.

Q Is there something you saw when you were looking at the tear through the scope that let you know he needed more anchors than your average?

A Right. It is by spacing. It is a more extensive tear than your common tear.

Q Now, when Dr. Kolb was in here Mr. Joseph talked about some areas of degeneration within the shoulder. Did you observe degeneration in the shoulder?

A Yes.

Where the clavicle comes into the shoulder, not the main shoulder joint but the area above it, he had some arthritis there. It's age appropriate. Everybody gets that.

There was some cartilage changes in the ball and socket, what we call grade 2 to 3, meaning -- think of the end of a chicken bone with that nice smooth surface that's normal but with little fissures and fraying. It is hard to say how much was degenerative and from the trauma. You can't really tell.

(Continued on next page)

Q. Any question whatsoever on the tear being traumatic versus degenerative?

A. No, the tear was a traumatic tear.

Q. Now, in addition to his right shoulder, did you treat other areas of Mr. Barra's body?

A. His left foot.

Q. And what did you -- what happened through the treatment of his left foot?

A. He had a strain of his foot. And it quickly became not really much of an issue. It got better.

Q. And as you continued to treat him, did you treat him for any other body parts?

A. We monitored his neck and his back. That was predominantly being treated by other physicians he was seeing Dr. Radna and Dr. Blanco eventually. So the medications that we prescribed initially helped everything. Surgery, and the main emphasis from my standpoint was a shoulder, but he was -- he had ongoing treatment for the spine.

Q. And did you have an opportunity to review the MRI films of the spine?

A. Yes.

Q. And can you explain the symptoms Mr. -- you were treating Mr. Barra for with regards to his cervical and lumbar spine?

Dr. Cushner - Plaintiff - Direct

MR. JOSEPH: Objection. That he personally was treating him?

THE COURT: That was the question.

MR. MORGAN: Yes. They are in his records.

MR. JOSEPH: Okay.

A. Can I --

Q. I am sorry.

MR. MORGAN: Your Honor, may I give the spine to Dr. Cushner?

THE COURT: Sure.

Q. Will this help you, Doctor?

A. Yes, I think so.

MR. JOSEPH: Identify it -- will you identify it for the record?

MR. MORGAN: Yes, it's Plaintiff's Exhibit 24.

A. So this -- this is the --

MR. MORGAN: Can I have this marked for I.D.?

(Whereupon, Plaintiff's Exhibit 27 marked for I.D. at this time.)

A. So this is the entire spine. This is the pelvis with the femur right there. And you see each level, you have the same basic setup; although a different shape, but you have the bones with a disc in between. The yellow is where the nerve exits. So this is the lumbar spine, but like I said, it's representative of each level. The patient

had some underlying degeneration, not from the accident, but age appropriate. As we get older the disc shrinks a little bit. It's like a jelly doughnut. So instead of it being like a fluffy jelly doughnut it gets flattened.

And also we get arthritis. These little areas here, just like a shoulder joint or knee joint, this allows you to bend and twist. So the pain he was having in the spine itself was predominantly from the joint portion of this. He has some degeneration of the disc but the trauma seemed to irritate it and pushed some of the jelly out against the nerve. So also I was treating the irritation of the nerve. Medications. Physical therapy. He also eventually had injections both to decrease the inflammation around that nerve as well as the joint itself.

Q. And were the injections done at WestMed, Doctor?

A. Yes.

Q. Do you know who performed those injections?

A. Dr. Tal Blanco did.

Q. And -- is it part of your practice when you treat someone who is referred for epidural steroid injections, that you send them to Dr. Blanco?

A. Yes, and he has some associates too.

Q. All right. Doctor, as part of your practice of treating patient with orthopedic injuries, do you have anything you do to check if they are exaggerating the

symptoms?

A. Yes. I mean, I have been doing it long enough that you get a feeling about somebody. But specifically the -- you know, what you are treating needs to make sense with injury and MRIs and X rays. So for the back, if the pain follows a pattern that you would expect from the disc or joint, then that makes sense.

Q. Do you have an opinion as to whether or not Joseph Barra was exaggerating the symptoms over the five-plus years you have been treating him?

MR. JOSEPH: Objection.

THE COURT: Overruled.

A. I don't believe he was.

Q. Looking at your narrative report that you prepared in October 2015, can you just tell me what Mr. Barra told you about his current complaints orthopedically?

A. So that was more in the last -- so we did a visit and did a separate narrative report. I think that was more on his last visit.

Q. Okay. You could refer to the visit or to your summary of the treatment. Whichever you need.

A. Got you.

Q. Okay.

A. So he reported that his shoulders were feeling better. And he actually said eighty percent better. And at

that point he was also seeing doctors in Florida. He still reported some pain, but that -- specifically with the shoulders, that he was eighty percent better.

Q. Did he tell you anything about his back? Or did you examine his back?

A. Well, his back on that last visit, he had recently had treatments and that he was still treating -- he still was requiring treatment for his back. Epidurals. And he described lower back pain and numbness with this.

Q. Doctor, based upon your treatment of Joseph Barra, and your review of his medical records and testing, do you have an opinion within a reasonable degree of medical certainty whether Joseph Barra is capable of working construction with his current orthopedic injuries?

A. I don't believe he could work a full-time construction job, no.

Q. Can you explain why?

A. So starting with the shoulder, the surgery works well. It works well, but within reason. But to do prolonged overhead activity or pulling, you are just asking for it not to do well. Besides the shoulder surgery, we don't move it right away. For four, five weeks you -- it has to heal. Right? The sutures that bring the muscle down to the bone aren't strong enough to let it start moving right away. So between the trauma, and the trauma of

surgery -- because surgery is another form of trauma -- and then the immobilization, it's very tough to get your full range of motion back. The mechanics are never the same. So if you are sitting at a desk typing, sure, you could go back to that. But to do any kind of job where you put pressure against that area, it's very uncomfortable. You are never going to get the full strength for that kind of thing. And you are also increasing the chance of arthritis developing later as well as failure of other repair.

Q. Now, you -- I believe testified in response to my last question that you don't feel he could do a full-time construction job. Can you explain what you mean by that?

A. Construction is a very broad category. So if you said, hey, could you drive this dump truck for an hour a day, of course he could do that. When you take the bigger picture of construction, I would say no.

Q. That is just based upon the orthopedic evaluation, correct?

A. Correct.

Q. And, Doctor, assuming that Joseph Barra joined the operating engineers in his early twenties and began his career as an operating engineer and crane operator in New York City and Florida, and that for the last four years he was with a company known as Skanska.

Assuming that in those thirty years of being a union

crane operator he was never without a job opportunity as a crane operator. Assuming that on August 5th, 2010, Joseph Barra fell off this crane due to a missing step that was approximately four feet off the ground while he was coming down from up above, so that his right side of his face smashed into the ground. Assuming that Joseph Barra began treating for injuries to his right shoulder, back, neck and head the day following this fall.

Assuming that Joseph Barra had an MRI of his left shoulder, that it showed a large rotator cuff tear, and a tear of the supraspinatus tendon. Assuming that Joseph Barra underwent surgery on September 10th to repair the tears. Assuming that Joseph Barra underwent lots of physical therapy, has had two Cortisone shots in his surgically repaired right shoulder. He commonly works with a physical trainer to strengthen his shoulder three times a week.

Assuming all that I stated, do you have an opinion within a reasonable degree of medical certainty as to what caused the injury to Joseph Barra's right shoulder?

A. Yes, the fall caused the injury.

Q. Assuming all I stated, do you have an opinion within a reasonable degree of certainty as to the permanency of the injury to his shoulder?

A. He does have a permanent injury.

Q. Assuming all that I stated, do you have an opinion

within a reasonable degree of medical certainty as to whether Joseph Barra could hold a full-time job in construction due to his --

A. He could not hold a full-time job.

Q. Assuming that following Joseph Barra's fall off the crane he began a course of treatment with your office and Dr. Richard Radna for injuries to his spine. Assuming that Joseph Barra underwent an MRI for his lower back, that showed herniated discs at L4/L3, L4/L5 and L5/S1, which limits his range of motion but continues to produce sporadic debilitating pain; and assuming that Joseph Barra underwent an MRI to his neck which showed three herniated discs causing restricted range of motion. Assuming that as a result -- assuming that as a result of the MRI results are consistent with symptoms Joseph Barra sustained and was prescribed narcotic pain medication as needed which he took on and off for more than three years.

Assuming all I stated, do you have an opinion within a reasonable degree of medical certainty as to what the cause of Mr. Barra's lumbar spine injury is?

A. It was from the fall.

Q. Assuming all I stated, do you have an opinion as to a medical certainty degree of certainty as to what caused the injury to Joseph Barra's cervical spine?

A. It was from the fall.

Q. Assuming all that -- all that I stated do you have an opinion within a reasonable degree of medical certainty as to the permanence of the injury to Joseph Barra's spine?

A. He has a permanent injury.

Q. Assuming all I stated, do you have an opinion within a reasonable degree of medical certainty as to whether or not Mr. Barra requires future medical care for the orthopedic injuries sustained in this accident?

A. He will need future care.

Q. Can you -- have you documented that care, Doctor?

A. Yes.

Q. Can you tell us what that is?

A. So, with regards to the shoulder, like I mentioned earlier, it's never going to be a normal shoulder. It's uneven forces. You are more prone to form tendinitis and bursitis. And typically someone with this type of injury, even if they don't go back to some heavy construction, just life, they will need intermittent injections of Cortisone. Try not to do it more than once a year, but between twelve and eighteen months they commonly need it.

There also is a risk for repeat surgery. So it's -- the rotator cuff repairs, it never repairs one hundred percent. In his case it's done well. But that same trauma that causes the tearing of the rotator cuff also causes the two bones to hit each other. And over time, five years, up

to fifteen years, you could get arthritis. It's a traumatic arthritis, but the cells, the cartilage cells die over time. So you may need injections more directed to the joint. You may need antiinflammatory medicines for it. If it progresses and the cartilage becomes loose, you sometimes need another arthroscopy to remove the flaking or loose cartilage. And in most severe cases you need --

MR. JOSEPH: Objection. Unless he will state to a degree of medical certainty if this is going to happen, Judge.

THE COURT: That is what he is saying.

MR. JOSEPH: No, he said it could.

THE COURT: Doctor?

THE WITNESS: Yes.

THE COURT: Is that what will happen to this patient?

THE WITNESS: Yes, he will have cartilage death.

MR. JOSEPH: No, I was objecting to what he was about to say, Judge. It's not to a degree of medical certainty.

THE COURT: Go ahead. Ask the question.

Q. Do you have an opinion within a reasonable degree of medical certainty as to whether or not Mr. Barra will require additional surgeries sometime in the next five to

fifteen years?

A. I believe he will need another surgery.

Q. And what about future care to his lumbar spine and cervical spine, Doctor?

A. So that has been more challenging for him, and you don't have the great operation just to cure it all. In the past five years now he's had multiple treatments with injections, pain medication including intermittent use of narcotic pain medication. So I would expect that he needs to be -- he needs to be diligent about consistently keeping his back strong and stretched. He will have intermittent exacerbations. You twist just the wrong way or lift something that may require therapy, the average person with this kind of problem needs six to ten therapy sessions every one to two years.

He's -- the injections will never cure him. So he will need those. No more than three a year. When you think of epidurals, you think of them as a series of three. Sometimes you get better with just one. I -- he will need one to three a year. And then medication as needed.

Q. And, Doctor, in this case did you have the opportunity to review the ambulance call report in the -- and the hospital report?

A. I think at one point I saw it.

MR. MORGAN: Your Honor, may I?

Dr. Cushner - Plaintiff - Direct

THE COURT: Can you identify the exhibit please?

MR. MORGAN: Plaintiff's Exhibit 15.

(Exhibit submitted.)

MR. JOSEPH: Objection, your Honor. This is not reflected in the medical records he says he reviewed.

THE COURT: But that is an exhibit in -- it's an exhibit in evidence.

Let's see where it goes.

MR. JOSEPH: Okay.

Q. I am holding a blowup of Plaintiff's Exhibit 15B. Doctor, you see this page?

A. Yes.

Q. Okay. Can you read for the jury --

THE COURT: You need to move.

MR. JOSEPH: Yes.

Q. Can you read for the jury where it states how the accident occurred?

A. "Found on ground at construction site. Patient states that he was stepping off a crane when something gave way."

Q. And --

A. And he --

Q. I am sorry. That is fine there.

Dr. Cushner - Plaintiff - Direct

A. Okay.

MR. JOSEPH: Wait a second. Is he cutting him off, Judge?

MR. MORGAN: I asked him how the accident happened. If he wants to continue reading --

A. Then --

Q. Go ahead.

A. Then he went -- and I can't tell the next word. Forward maybe.

(Brief pause.)

Q. You see the second page of the ambulance call report, Doctor? It looks like this.

A. Okay.

Q. Do you have that there?

(Brief pause.)

Q. Where it states what the patient's body parts he is complaining pain in. And it's about two-thirds of the way down the page on the left-hand side, could you read what that says?

A. "Neck" -- something -- "and shoulder pain."

"Neck, face and shoulder pain."

Q. Thank you, Doctor. And do you have the Physician's Record and Discharge?

A. Yes.

Q. Can you -- is that the last page?

Dr. Cushner - Plaintiff - Direct

(Brief pause.)

Q. All right. So at the bottom there is an area that says "shoulder pain", and then it gives instructions. You see that?

A. Yes.

Q. And this says for how many days the patient should not remove their shoulder immobilizer. Is an injury consistent with which you treated Mr. Barra, is that expected discharge instructions that you would see in a hospital report?

A. Yes.

Q. And one more page. I don't think it's blown-up. If you don't mind.

MR. MORGAN: I am sorry, your Honor. How have we been identifying the pages we have been reading from? Do you remember Mr. Joseph?

MR. JOSEPH: Yes, I actually --

MR. MORGAN: Just count them?

MR. JOSEPH: Describe --

MR. MORGAN: I'll describe it. The four corners of the document. Fair enough. The document is a page of the New York Presbyterian medical record wherein the bottom middle says chart copy.

In written -- on the right-hand corner under resident/PA, impression plan it says fall. And in the

right-hand side middle it gives a description of how the accident happened and what they observed.

Q. I will just ask Mr. Cushner to read how the hospital says --

A. Yes.

Q. If you could make it out?

A. "Status post fall, three to four feet off crane onto right side" -- "right side of face. Complaints of" -- I am sorry.

Q. That is okay. I know the middle there is hard to read.

When you get down to the bottom, can you read again what the doctor says?

A. Yes. "Fell, misstepped coming off crane."

Q. Thank you, Doctor. And did you have an opportunity to review Dr. Carcione's records in preparing your report?

A. Yes.

Q. And do you have those records in front of you, by any chance?

A. I don't.

Q. All right. We have them in evidence. I am trying to find the page I am looking for. Bear with me.

(Brief pause.)

MR. MORGAN: May I approach, your Honor?

THE COURT: You may.

Q. Showing you what has been marked as Plaintiff's Exhibit 18. They are a complete set of Dr. Carcione's records. On 8/17 Mr. Barra fills out an initial history of his accident. I will just ask you to read from the second page of that where the plaintiff describes how his accident happens.

Is that a document you reviewed in preparing your narrative report, Doctor?

A. I believe so.

Q. And can you read for the -- from the top of that document what it says?

A. Says "crane operator, top of crane, check oil, hears thunder, misstepped. Woke up in ambulance. Loss of conscious greater than ten minutes."

Q. Thank you, Doctor.

Now, when you prepared your narrative report, did you have an opportunity to take a history?

A. Yes.

Q. And what history did you take from Mr. Barra?

A. "On the date of injury patient was fifty-five years old working as a crane operator for S3 Tunnel Contractors. Was on top of the crane changing oil when there was an apparent thunderstorm. Reports missing a step and falling from crane."

Q. Thank you, Doctor.

Dr. Cushner - Plaintiff - Direct

Are the injuries and complaints reported in the hospital record along with the record you reviewed in preparation of your narrative consistent with the type of injury Mr. Barra -- I am sorry. Strike that question.

Are the injuries and descriptions of the injuries that you read in the hospital record coupled with the treating doctors' records consistent with Mr. Barra's injuries?

MR. JOSEPH: Objection.

THE COURT: Sustained.

Q. Doctor, is there anything in the hospital record or in the treating records that suggest to you that the injuries sustained by Mr. Barra are not -- happened in any other way?

MR. JOSEPH: Objection.

THE COURT: Overruled.

A. No, it's consistent.

MR. MORGAN: Thank you, Doctor.

THE COURT: Nothing further?

MR. MORGAN: No.

THE COURT: All right. Let's take a quick break. Five minutes. Do not discuss this case amongst yourselves or with anyone else. Five minutes.

(Whereupon, the jury panel exited the courtroom.)

Dr. Cushner - Plaintiff - Cross

(Whereupon, the jury panel entered the courtroom.)

THE COURT: All right. We are continuing with the trial now. Cross-examination of the witness by the defense.

Mr. Joseph.

CROSS-EXAMINATION

BY MR. JOSEPH:

Q. Good morning.

A. Good morning.

Q. Doctor, plaintiff presented to your office one day after the alleged accident; isn't that correct? Yes or no.

A. Yes.

Q. And when he presented to your office on August 6th, 2010, he already retained an attorney; isn't that correct? Yes or no.

A. Yes.

MR. MORGAN: Objection, your Honor. Could we approach for a second?

THE COURT: Sure. Come up.

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

THE COURT: Sustained. Strike it. Dismiss it from your minds.

Q. Now, Doctor, when he presented to your office on

that day on August 6th, 2010, he stated that on August 5th, 2010, he was on the top of the crane checking the oil. He slipped on a wet surface as it was -- as it just was raining and fell down to the ground, landing on his shoulder.

Isn't that correct? Yes or no.

A. That is what my record says.

Q. And when he presented to your office on August 6, 2010, it was important that you understand all of his significant complaints; isn't that correct? Yes or no.

A. I can't answer that with a yes or no.

Q. Well, Doctor, you were the first physician -- first physician as far as you knew that saw him after he left the hospital the day before; isn't that correct? Yes or no.

A. Yes.

Q. And if he had told you something significant about his injuries, on August 6th, 2010, you would have put it in your chart notes, right? Yes or no.

A. No.

Q. If he had told you that he was suffering from a head injury, you wouldn't have thought that was significant enough to put in your chart notes?

A. We do have in the notes that he was having head pain. We did know he was seeing a doctor afterwards and his head was evaluated in the emergency room. So the things that are most significant with a head injury after the fall,

you know, are you going to die or do you have a bleed. That is not what the orthopedist the day afterwards discusses. That is what the ER does. He was cleared by the emergency room, discharged, and had a follow-up with another doctor that deals with that.

Q. All right. Doctor, I am looking at your chart entries for August 6th. And it doesn't say -- do you have yours with you?

A. I do.

Q. Could you show me where you say he is complaining of head pain and going to another doctor about that later on in that chart note?

A. So under examine information --

Q. Can you show me?

A. Yes.

Q. Where does it say about another doctor?

A. I don't have that.

Q. So -- and, Doctor, this note from that date that your office provided me, what is this?

(Document submitted.)

A. So this --

Q. The highlights are mine.

A. That is the note, but it doesn't have the standard questions that are brought in when they come in. So this is all part of the electric medical record. I am not sure if

you just don't have the page or what happened with that. That is -- we work on electric medical records. And this is an exact copy of what the electric medical record shows.

Q. And nowhere in that chart note that you are describing does it say that he is going to a neurologist or any sort of other doctor for a head injury; isn't that correct? Yes or no.

A. In the electric record it may say it. It wouldn't say it in the note.

Q. Well, where is it in the electric record?

A. I have to look at the EMR. So the EMR, you would have different things. You would have standard information, everything from drugs to previous problems to past medical history and their follow-ups.

Q. So you are telling us that you didn't produce your entire chart pursuant to the subpoena?

A. Once again, that is -- we have an electric record department. It's not something that is printed out. I am not sure how that works with the electric medical records. But it may or may not be in the -- it's not in the note that he is seeing a neurosurgeon, but it is in the note that he had head pain.

Q. All right. And if he had complained of anything else significant about his head you would put that in there, right?

A. Not necessarily.

Q. Well, Doctor, if he complained of vertigo, wouldn't that be significant?

A. No. I am not doing an evaluation of -- a brain evaluation on him. Just like history of diabetes, I don't check his blood sugars. The thing that I think would concern me, if he hadn't seen an emergency room doctor. But things that will harm you, things that will cause problems are evaluated in the emergency room. My concentration is on the orthopedic side.

Q. If he said he was dizzy or unsteady on his gait, wouldn't you note it and say you need to see a neurologist?

A. Once again, I may not have even asked that. If he brought it forward, I don't know, it's not in my record.

Q. Well, when he came to you on August 6th did he -- he didn't tell you he struck his head, did he?

A. No.

Q. He didn't tell you that he lost consciousness, did he?

A. It's not in my record.

Q. Which -- well, that would be significant, right?

A. It would be, but also wouldn't be the line of questioning that we would ask him. Typically in an orthopedic exam when you make complaints of shoulder and foot pain you don't say did you lose consciousness. It's

not part of what we examine.

Q. When the patient comes in to you and says, you know, Doctor, I fell off the top of the crane yesterday and the following things happened to me; if he reported to you that he lost consciousness, wouldn't you have wrote that down?

A. We wouldn't have done a neurologic exam. That is part of the neurologic exam. The most important part is that he was evaluated in an emergency room. Whether or not we knew that a neurosurgeon was seeing him afterwards, which I think he did, but even if we didn't know that, they do the initial cursory evaluation. Just like they setup an evaluation for an orthopedist for him, they also del him what he needs to follow-up. I don't go into a neurologic exam. That wouldn't be appropriate.

Q. The hospital didn't setup an appointment with you?

A. Setup with an orthopedist.

Q. But not with you?

A. Not with me.

Q. You said you are a facility called Westmed?

A. Yes, correct.

Q. Westmed has doctors in multiple specialties?

A. Yes.

Q. Neurologists, Westmed has neurologists?

A. Yes.

Q. You also refer to neurologists outside of Westmed; is that right?

A. Typically not. If they have association with somebody I don't steer them away from their doctor.

Q. But Dr. Carcione is a neurologist, right?

A. Yeah. He is a neurologist and he specializes in electric studies.

Q. You have heard of him, right?

A. Very rarely.

Q. Okay. Now, when is the first time that you reviewed the hospital report and ambulance report that Mr. Morgan showed you earlier today?

A. I don't recall the date. It's vaguely familiar and that is why I couldn't recall what it said. It's a long time I have been seeing this patient so I don't recall the date.

Q. You have it there?

A. Yes.

(Document submitted.)

Q. Okay. Well, you didn't see him on the first day, right? You see those records --

A. It wouldn't be until later.

Q. Okay.

A. I think even after we maybe did the narrative. I didn't see it about the initial narrative. I don't recall

exactly.

Q. When you saw him on August 6, 2010, you already decided that he was totally disabled, right? Yes or no.

A. With one of the concerns you guys had before.

MR. MORGAN: Could we approach, your Honor?

THE COURT: Sure.

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

MR. JOSEPH: Your Honor, I will withdraw the question.

THE COURT: Withdrawn.

Q. Now, you are familiar with New York Presbyterian Hospital?

A. Yes.

Q. Okay. Would you agree that it's probably one of the best hospitals in the city?

A. Yes.

Q. Would you agree that it might even be one of the best hospitals in the country?

A. We will stick with the city for now.

Q. Well, you practiced in a lot of places, Doctor.

A. We will stick with the city.

Q. All right.

- Proceedings continue on next page -

Dr. Cushner - by Plaintiff - Cross

DIRECT EXAMINATION (CONTINUING)

BY MR. JOSEPH:

Q If Mr. Barra had reported to the doctors at New York Presbyterian that he had full range of motion of his right shoulder immediately prior to the accident and that he was unable to raise his arm as a result of the accident, they should have recorded that statement in their chart; correct, yes or no?

A It's not a yes or no answer.

Q Well, doctor, that would be indicative of the fall that he is describing actually caused the injury, right?

A I mean, I have to expand to give an answer to that.

Q Well, doctor, does it say in the ER records that he is unable to raise his right shoulder?

A I would have to look at the records.

Q (Handing)

THE COURT: What exhibit?

MR. JOSEPH: Exhibit 15 in evidence, your Honor.

A (Perusing) Can I take back my answer that they are one of the best hospitals in New York?

The musculoskeletal exam is limited to plus or minus. They wrote "plus." I don't see where it discusses range of motion in that. If there is something specific you want me to look at, I --

Q My question stands. You asked to look at the chart.

A They wrote "plus" meaning he had findings on

musculoskeletal exam. That's really their job, right? They are making sure you don't die. Whether you have active range of motion to 75 degrees but put passive to 110, there are all different variations that are important for other reasons, they see a lot of people, they want to make sure he wasn't going to die and the bone wasn't sticking out of his arm. They got an x-ray and wrote he had musculoskeletal findings.

Q You in your office took careful notes the next day?

A Took notes.

Q Careful?

A Okay, yes.

Q Did you write that he presented to your office in an immobilizer?

A We did not.

Q If he had presented to your -- and by "immobilizer" we mean a --

A A sling.

Q -- sling of some sort, correct?

A Correct.

Q If he presented to your office in a sling, wouldn't that have been significant; yes or no?

A No.

Q Okay.

Well, were you aware that he underwent an x-ray of the right shoulder at that hospital?

A I believe so.

Q Did you ever review the film or the radiologist's report, doctor?

A We asked for records, but I believe by the time the records came we had already had an MRI which would give us much more information.

Q Okay. I wasn't sure based upon your answer, have you seen those films and that report or not?

A I don't know if I ever saw the films. I just see the report in the record you handed me.

Q And the x-ray report reflects the prior injury to the right shoulder, correct?

MR. MORGAN: Objection.

THE COURT: Overruled.

A It says that there is a calcification and it may represent an old glenoid rim fracture.

Q So "old" doesn't mean within the past several hours, right?

A I guess the key word there is "may." The MRI didn't show that.

Q Or calcified labrum is also something that would have been around for a while, right?

A Yes. That's when I discussed earlier his findings on his labrum. That would be part of that.

Q Okay.

Dr. Cushner - by Plaintiff - Cross

And you prescribed an MRI of the right shoulder as you just said, correct?

A Yes.

Q And that was read by an independent radiologist named Michael Singer, correct?

A Correct.

Q And this MRI was performed at Empire Open MRI, correct?

A Yes.

Q They are in Yonkers?

A Yes.

Q Did you or your office refer Mr. Barra to this facility?

A Once again I have a problem as with our previous thing.

Q I wasn't aware of that.

MR. JOSEPH: Withdrawn, your Honor.

THE COURT: Okay.

Q Are you familiar with Dr. Singer?

A Yes.

Q Do you consider him competent?

A Yes.

Q Qualified?

A Yes.

Q You relied upon his MRI interpretation during the

Dr. Cushner - by Plaintiff - Cross

course of your treatment?

A Actually, I read my own MRIs.

Q Did you disagree with his interpretation?

A No.

Q Okay.

He found that there were superior and inferior osteophytes present?

A Correct.

Q Did you agree with that?

A Yes.

Q Would you agree that that is a degenerative condition?

A Correct. That was of the acromioclavicular joint which I discussed earlier.

Q Doctor, this MRI was taken six days after the alleged accident, correct?

A August 11, yes.

Q So clearly osteophytes would not have formed in the six days between the day of the accident and the day of the MRI, right?

A Correct. And this is the AC joint, not the shoulder joint.

Q He also found -- and he found the tear you described and showed us, right?

A Yes.

Q And he also said that there was significant arthrosis

of the acromioclavicular joint, correct?

A Correct.

Q Arthrosis is osteoarthritis, right?

A Yes.

Q So that's something that was in existence prior to this incident, right?

A Absolutely.

Q And that's a degenerative problem, right?

A Correct.

Q And arthritis is something that affects the joints, correct?

A In this case the acromioclavicular joint, not the shoulder joint.

Q But there is no reason to believe if he has arthritis in one joint he might not have it in another, correct?

MR. MORGAN: Objection, your Honor.

THE COURT: Overruled.

A He didn't -- well, he did on arthroscopic exam, not on MRI exam.

Q He did have it?

A Yes. The changes in cartilage I discussed, the fissures, that's arthritis.

Q Mr. Barra, did he have something called sloping acromions?

A Yes. That's that curve that I talked about, that's

the sloping acromion.

Q And that's something that somebody is born with, right?

A It develops in the first ten years.

Q Oh, sorry. But it certainly is not something that happens because you were in an accident?

A Correct.

Q And if you have a sloping acromion on one side you have it on the other side, correct?

A Typically.

Q And if you have a sloping acromion, that very likely leads to something called impingement syndrome; isn't that correct, yes or no?

A No.

Q It doesn't lead to impingement syndrome?

A It is the "very likely" that I couldn't answer yes to.

Q Can it lead to impingement syndrome, doctor?

A It can -- well, no it can't. That's not what causes the impingement syndrome.

Q What causes it?

A Impingement syndrome is a fancy word for bursitis like everybody's grandfather gets. The bursa, the sac between the acromion on the top and above your muscle it is like a thick spider web. As we get older it scars in. And pressure of that can cause scarring and inflammation of the bursa. They came up

with a fancy word "impingement syndrome" because you always get tendonitis with it.

Now, the reason I couldn't answer you directly with that is because about 40 percent of people have a type 2 acromion. And not 40 percent -- I wish 40 percent of the population had shoulder problems. That would be great.

Most people that have a type 2 acromion don't ever need surgery or have symptoms with this.

Q But that is considered a degenerative problem, the impingement syndrome?

A It is not a degenerative problem.

Q Is it a traumatic problem?

A In a very broad sense, meaning that life is trauma. Over time you reach across or you reach up.

Q Well, when you did your surgery you found that Mr. Barra also had impingement syndrome; is that right?

A Correct.

Q You corrected that?

A Yes.

Q And that had nothing to do with this fall?

A It did in that the scar tissue you have on the bursa, because of the trauma and the blood in the joint from the cuff tear, that makes the bursa even thicker. But the reason for removing the bone is to allow your repair to heal better. Nobody would leave that slope in there. You don't need it and

it would heal better without it.

Q And you would agree that Mr. Barra is left-side dominant, correct.

A I don't recall.

Q Well, when you treat somebody's shoulder, isn't that something you want to know, which side dominant they are?

A It doesn't matter. If you have a tear of your nondominant side, we are going to treat that as well.

Q He was a construction worker, right?

A Yes.

Q And did you have an understanding of what his job was as a construction worker?

A Heavy machinery operator, crane operator.

Q Crane operator.

Earlier today you told us somebody could post-surgery on a rotator cuff tear after recovery, obviously, operate a dump truck?

A What I said was somebody could drive a dump truck for a limited period of time. I think that's is what I said.

Q What is it about Mr. Barra's condition concerning his right shoulder that would prevent him from operating a crane?

A The difference is when you are just driving a car or a truck you are basically staying at 10 and 2, shoulder level or below so you can adapt that. Having to reach up or having to reach and pull is a completely different area even if you brace

it with your other side and use your other hand for whatever area.

The other problem is with the nature of a crane operator. If you get increased inflammation and get an involuntary pain withdrawal, with the dump truck you are driving you can control it with your other arm. Let's face it, when I do shoulder surgery on people and tell them not to drive, they all cheat and use their other arm and they do okay. But when you talk about heavy machinery or a crane where you have to use your arms forward, whether with bracing or pulling, it is another element of danger.

Q Well, are you saying that he has to keep constant pressure on a particular device in the crane while it is being lifted or descended?

A Not necessarily constant but intermittent, having to reach forward, having to grab on top; so anything that goes consistently for a long period of time. Even the dump truck he wouldn't be able to drive for four hours, six hours. It is that motion like that (indicating) and having to rely on that arm.

Q Well, doctor, you said you have done sports medicine?

A Correct.

Q You have operated on athletes?

A I have.

Q Some of them have had rotator cuff tears?

A Yes.

Q And they have gone on to play sports, professional sports?

A It's A little different, though. Like I said before, the rotator cuff is four muscles. Typically with my athlete it is the infraspinatus that we repair, the muscle that controls motion going forward, not on the top level. It is a different kind of repair and recovery. So though they are both rotator cuff, it is very different what we are dealing with.

Q Now, doctor, you have interviewed Mr. Barra just recently, right, back in the fall?

A Yes.

Q And did you ask him about what activities he participates in?

A I think we knew he was with a personal trainer and was staying active and working out.

Q Do you know what he was doing at the gym?

A Not exactly.

Q Are you familiar with what combat ropes are?

A Yes.

Q Is that something you would expect he would be able to do after having this rotator cuff repair?

A You can do it. I wouldn't recommend that he do it.

Q Are you familiar with Nautilus equipment?

A Yes.

Q If he were working on a nautilus machine where he

pulls the weight from behind him and over his head, is that something you would expect him to be able to do with this type of repair?

A Correct. Yes. That's actually with the caveat of low weight, multiple reps. That's, actually, part of the routine of recovery.

Q Do you know what a medicine ball is?

A I do.

Q Would you expect him to be able to throw down a medicine ball both on the right side and left side from above his head?

A Like over his head like that? (Indicating)

Q (Indicating) Like that or like that.

A He could do it but I wouldn't recommend it.

Q And you mentioned that even though you were not the treater that he also had some spinal issues, right?

A Correct.

Q And with the spinal issues, the lumbar spinal issues that you are aware of, would they preclude him from laying on his back on a bench at the gym, his hands over his head, you know, on a bar and him lifting his legs up above his head?

A No, it wouldn't preclude him. There are some modifications depending on how -- you have to do it based on how you're doing with it. But core lengthening is the basis of all back recovery. That's one method of core strengthening. I am

surprised he can do it, but God bless him.

Q With that medicine ball that we were just discussing, would you be surprised with his cervical complaints that he is doing something like that?

A Not so much the cervical.

Q What about the lumbar?

A The twisting part, again, I am sure he can do it. I am surprised it wouldn't bother him more. I wouldn't recommend him doing it.

Q If he were walking approximately 1.6 miles a day with his dog, would you be surprised he could do that with his spinal complaints?

A No, not at all.

Q Would you be surprised if he were able to walk on a treadmill with his spinal complaints?

A With or without the dog?

Q Without the dog. I assume it is a well-trained dog, but without the dog?

A I think that is fine too.

Q Now, doctor, do you consider yourself an excellent surgeon?

A Yes.

Q Okay. Do you think you did an excellent job on his shoulder?

A Tell me more.

Q I am asking.

A Yes.

Q And when you describe possible surgery to his right shoulder in the future, that's to a reasonable degree of medical certainty that he is going to need that surgery?

A Yes.

Q So all of your patients who have this surgery with this extent of a rotator cuff tear are coming back to you, is that what you are telling us?

A No.

Q Now, you told us that he had a cartilage injury as a result of this incident, correct?

A I suspect, yes.

Q Well, he had osteoarthritis in that shoulder before this incident, right?

A The AC joint.

Q But osteoarthritis includes degeneration of the cartilage, right?

A In the AC joint.

Q But here we had it in this joint, right?

A Correct.

Q Now, you wrote a report for Mr. Morgan, and you told him that Mr. Barra was kept in the hospital for the day for observation, correct?

A I think so, yes.

Dr. Cushner - by Plaintiff - Cross

Q And you also indicated that he woke up in the ambulance, right?

A Yes.

Q Okay. Do you still have Exhibit 15 there?

A I have it.

Q Okay.

MR. JOSEPH: Judge, those pages in that exhibit might not be in the same order. may I approach the witness?

THE COURT: You may.

(Brief pause)

Q Approximately what time did he arrive at triage at New York Presbyterian, doctor?

A 8:00 a.m.

Q What time was he discharged, doctor?

A 12:15.

Q In the afternoon?

A Correct.

Q So he wasn't kept there all day for observation, right?

A No.

Q Now, doctor, you have the ambulance report in front of you as well as part of the ER record, correct?

A Yes.

Q I know you are not a neurologist, all right, but you know you reported that he wakes up in the ambulance.

Dr. Cushner - by Plaintiff - Cross

I am taking you back to med school. Remember what GCS is, the Glasgow Coma Score?

A Yes.

Q The top score is 15 out of 15?

A Correct.

Q And if you take a look at -- if you want, I could point it out to you?

A I see it.

Q And they administered that test twice, right?

A Correct.

Q He scored 15 each time?

A Yes.

Q And his trauma scale -- his trauma score was 12 which means it was not a high emergency, right?

A It has been a while since I looked at trauma scores. I don't quite remember the criteria.

Q Fair enough, but he was alert and oriented in three spheres, right?

A Yes.

Q So that means he didn't wake up in the ambulance, right?

A I don't know. I mean, I am not familiar with the elements of the Glasgow. I know it is good and bad, but it has been a while since I have had to use it.

Q Okay.

Dr. Cushner - by Plaintiff - Cross

Now, Mr. Barra underwent a preoperative physical before you did the surgery; is that right?

A He did.

Q That was done at Westmed?

A I don't think I have that in my records. I am not sure where he had it done.

Q But you have the results of the exam, right? It is in Westmed records, correct?

A It may have gone -- I don't know if he had his surgery done at the ambulatory center. It may be at the Rye ASC which is a separate entity.

Q Who is Van Boren Reed?

A I don't know.

Q That's not somebody at Westmed?

A There are 400 of us now, I don't believe it is. It's not one I am familiar with. I don't believe he is.

Q Are these notes in the Westmed charts? Again, the highlighting is mine, doctor. (Handing)

A When they come from the medical records department they are not printed like the way I see them on an EMR.

Q What is the EMR?

A Sorry. That's the electronic medical record. What I see on the screen doesn't look like that, but I know it is a problem with how they print it out through the regular computer. That's definitely a history and physical. That may be one of

Dr. Cushner - by Plaintiff - Cross

the cardiologists. I am not sure. I am just not sure of that doctor.

Q Well, you needed to know that he passed a physical in order to do the surgery, right?

A Correct.

Q You knew he suffered from hypertension?

A Correct.

Q You knew he had elevated glucose?

A I believe I saw that, yes.

Q And did they also find that he was denying depression, stress and anxiety?

A I am sorry, I didn't pay close attention when you showed me.

Q (Handing) If you want, you can look where I highlighted to make it easier.

A Yes.

Q All right.

When they described his mood and affect, they said "no appearance of anxiety, depression or agitation," correct?

A Correct.

Q Did you actually -- I mean, when he passed the physical, if that's part of the Westmed records you also saw the blood tests, right?

A It is not part of the Westmed records. I am not sure

if it was done at Westmed. I don't recall seeing that in there. I don't routinely review H&Ps unless they are not cleared.

MR. MORGAN: (To Mr. Joseph) May I see that before you hand it to him?

MR. JOSEPH: (Handing)

Q Are you telling us that this document is not in the Westmed file?

A I don't know. It is not in the ones I brought with me, but these aren't certified ones from the medical records department. This is just what I got it off the EMR of my records.

Q When you say "these are not certified from the medical records department," you are talking about the ones you brought with you?

A Yeah, the ones in my notebook.

Q Well, he had a fasting glucose of 144 milligrams per DL. That would be high, right?

A I think the new criteria would have it a little high, yeah. It changes. It was 120 for a while, but it may be a little lower now.

Q Normal range is 74 to 106 if you are not fasting, right?

A It has been a while since I treated anybody with diabetes, but it sounds right.

Q If you are fasting it should be 65 to 94?

A I don't know.

Q According to this chart, he was fasting beforehand, right?

A Sorry, I didn't pay attention when you showed me that.

Q (Handing)

A Yes, fasting ten hours.

Q They also have his A1C level at the high range in this chart as well, right?

A It was normal.

Q Just shy of normal, right?

A High range doesn't mean it is not normal. It was normal.

Q It was 5.9?

A Yes.

Q After fasting?

A Hemoglobin A1C has nothing to do with fasting. It is actually the most accurate test for blood sugar because it really measures what has been going on over the last month. If you fast for ten hours but the night before you had a lot of high sugar carb stuff, you will have high sugar the next day. So hemoglobin A1C is probably a more accurate way to look at it.

Q Doctor, you were describing his spinal treatment as well, right?

A Yes.

Q Your records that you have -- and I am looking at

Dr. Cushner - by Plaintiff - Cross

Exhibit 24 -- also include copies of the MRI reports from Empire Open MRI, correct?

A Correct.

Q You have a copy in front of you?

A I do. Thank you.

Q Now, the MRI of the neck, that's the cervical, correct?

A Yes.

Q At C5-6 Dr. Singer found what is called disc desiccation, correct?

A Yes.

Q That means that the water inside the disc is -- I don't know gone if it is evaporating, but it is in the process of leaving or has left the disc, right?

A Yes. The disc is leathery.

Q Right. And on the MRI it would look black or dark?

A Depending on which setting, yes.

Q Okay.

And that is a degenerative condition, correct?

A Yes.

Q And at C5-6 there was also a bulge, correct?

A Yes.

Q And it was associated with a dorsal bony ridge, correct?

A Yes.

Q That is a degenerative condition; isn't that correct, yes or no?

A Yes.

Q And at C6-7 there was ventral osteophyte formation, and there was also disc desiccation, correct?

A Yes.

Q Those are both degenerative conditions, correct?

A Correct.

Q So those conditions were not caused by this accident, correct?

A Correct.

Q And at C3-4 there was a herniation, correct?

A Yes.

Q This MRI cannot tell when that herniation occurred, correct?

A Correct.

Q And there is also a herniation at C4-5, correct?

A Correct.

Q And this MRI cannot tell when that occurred either; isn't that right?

A Yes.

Q But we do know that at C4-5 there was already disc desiccation, correct?

A Yes.

Q So we know that there was already a degenerative

process going on at that level; isn't that correct?

A Correct.

Q And that occurred prior to the incident, correct?

A Yes.

Q And you can have a herniation without trauma too, isn't that right?

A Yes.

Q Doctor, do you have in front of you the MRI report of the back, what you would call the lumbar spine here?

A Yes, I do.

Q That was also written by Dr. Singer, correct?

A Yes.

Q Okay.

At L2-3 he indicates that there is a loss of disc height?

A Yes.

Q That's a degenerative process, right?

A Correct.

Q At L2-3 he also sees ventral osteophyte formation, correct?

A Yes.

Q That is also a degenerative condition, correct?

A Yes.

Q It wasn't caused by this accident?

A No.

Dr. Cushner - by Plaintiff - Cross

Q At L3-4 he sees ventral osteophyte formation, correct?

A Yes.

Q Again, that is a degenerative condition which was not caused by this incident, correct?

A Correct.

Q There was a broad bulge of the disc present at that location too, right?

A Yes.

Q There was mild facet hypertrophy, correct?

A Correct.

Q Hypertrophy is a degenerative condition, correct?

A Yes, in this case.

Q It occurred over the course of time?

A Yes.

Q It didn't occur in the six days between the time of the alleged accident and the day of the MRI, correct?

A Correct.

Q So what we are seeing at L3-4 is also a degenerative condition and not caused by trauma, correct?

A Correct.

Q Okay.

And at L4-5 we see bilateral facet hypertrophy, correct?

A Yes.

Q That's something that occurred over the course of

time, correct?

A Correct.

Q And as a result, you see residual bulging disc material, correct?

A Not as a result. I think it is a separate thing.

Q Okay. But you see residual bulging disc material at that same location?

A Yes.

Q And that's also a degenerative condition, correct?

A That's a little vague because it is also in the realm of a herniation what the material is, so I don't know for sure.

(Continued on next page)

Q. You can't say that it was caused by this incident?

A. You can't say, no.

Q. And where there is an extruded herniation at that level, you can't say that that was caused by this incident either, can you? Based upon this MRI.

A. No, there is no specific date.

Q. All right. When you look at an MRI and you see a herniation, you -- it doesn't tell you how long the herniation has been in existence, correct?

A. Correct.

Q. All right. And as we said, a herniation could be caused by trauma or degenerative conditions, correct?

A. Yes, correct.

(Brief pause.)

Q. Doctor, when you looked at the MRI of the right shoulder, did you see edema?

A. There was fluid in the joint, but it was more of an effusion than edema.

Q. So is edema sometimes evidence of a recent injury?

A. It can be, but only for certain types of material.

Q. Okay. Such as?

A. So if you tear a muscle, hamstring pull, you will get edema. If you have a bad bone bruise you will get it. But in this case it's the tendon which has a blood supply with it, but the tissue can't hold the blood supply, so you

see the fluid in the joint as opposed to the tendon.

Q. I think you said the tendon pulls away from the bone?

A. It does.

Q. So wouldn't you see edema because it had pulled away from the bone?

A. So if you look at his -- the MRI picture, remember I said the black comes to the other black? So there is still a little bit -- tiny bit attached to the bone. Three millimeters off that it came. So it came more off the tendon than the actual bone.

Q. And the fluid that you saw is not necessarily the result of a recent trauma; is that correct?

A. It was.

Q. It was in this case, but it could be -- in other cases it's not? Is that what you are saying?

A. I mean, in this case it definitely was. I guess I could think of a scenario where you have fluid for other reasons, but the characteristics of this fluid, it definitely was from the trauma.

Q. And you could tell without a discussion with Mr. Barra, you could tell that that trauma occurred on August 5th?

A. I could tell it occurred within a couple weeks of when the MRI was done.

Dr. Dwyer - Plaintiff - Redirect

Q. And, Doctor, you said you evaluated cases for my office, right?

A. Yes.

Q. You and I never met, right?

A. I don't believe so.

Q. You and I never even spoke before this morning?

A. I don't think so.

Q. Would it be fair to say you haven't examined a case in my office for about ten years?

A. I think 2008, maybe.

Q. Okay.

A. Close.

Q. Was that when you were at Beth Israel?

A. Actually, when I switched over I still did a few.

Q. Okay.

MR. JOSEPH: Thank you, Doctor. No further questions.

THE COURT: Redirect?

MR. MORGAN: Just one, your Honor.

REDIRECT EXAMINATION

BY MR. MORGAN:

Q. Dr. Cushner, he talked about your narrative report. Can you just pull that up for one second if you have it there?

A. Yes.

Dr. Dwyer - Plaintiff - Recross

Q. If you look at page 2 of your report, I believe he suggested that you said that Mr. Barra was in the hospital all day long, and he walked up and showed you the hospital report that showed that he was discharged at 12:15 after being admitted at -- or appearing at 8:00.

Could you just read the third paragraph down on that page 2 as to what you wrote down for his time in the hospital?

A. "The patient was observed and discharged later that day."

Q. Is that consistent with what the hospital records say?

A. Yes.

MR. MORGAN: Nothing further.

MR. JOSEPH: Your Honor, may I have one?

THE COURT: Yes.

RECROSS-EXAMINATION

BY MR. JOSEPH:

Q. Doctor, two paragraphs above that, didn't you write, "he", meaning Mr. Barra, "stated that he had awoke again in the ambulance en route to the hospital at New York Columbia Presbyterian where he was kept for one day for observation?" Yes or no?

A. Yes.

MR. JOSEPH: Okay.

Proceedings

THE COURT: You may step down.

MR. MORGAN: Thank you, Doctor.

MR. JOSEPH: Thank you.

THE COURT: Can I see counsel please?

(Witness excused.)

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

THE COURT: All right. We don't have any other witnesses for you this morning. We will break at this point for lunch. We will reconvene at 2:15 when we will continue with the trial.

Remember, do not discuss this case amongst yourselves or with anyone else. Do not do any internet research about this case, the parties, the Court, the attorneys or any witnesses. Enjoy your lunch. See you back at 2:15.

COURT OFFICER: All rise.

(Whereupon, the jury panel exited the courtroom.)

(Whereupon, a luncheon recess was taken at this time.)

THE COURT: All right. Bring them in.

(Whereupon, the jury panel entered the courtroom.)

THE COURT: All right. Good afternoon

Dr. Dwyer - Plaintiff - Direct

everyone. Still on plaintiff's case.

(Whereupon, Plaintiff's Exhibits 28, 29, and 30 were received and marked into evidence at this time.)

THE COURT: All right. Your next witness.

MR. MORGAN: Dr. Debra Dwyer, economist.

THE COURT: Ms. Dwyer.

D E B R A D W Y E R, called by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

COURT OFFICER: State your -- in a loud and clear voice state your name, spelling your first name and spelling your last name for the record please.

THE WITNESS: Sure. Debra, D-E-B-R-A, and Dwyer, D-W-Y-E-R.

COURT OFFICER: Your address.

THE WITNESS: 17 Springbriar Lane, and that is in Centereach, New York, 11720.

COURT OFFICER: Thank you.

THE COURT: You may.

MR. MORGAN: Thank you.

DIRECT EXAMINATION

BY MR. MORGAN:

Q. Good afternoon, Ms. Dwyer. How are you?

A. Good. How are you doing this morning?

Q. I will stand at the back. If I could hear your

answers, I am sure all the jurors will hear your answers.

Please state your qualifications for the record.

A. Sure. I received my bachelor's degree in English literature and economics from Queens College in Flushing, New York. I went on to get my Master's and PhD. in labor and health economics from Cornell University. From there I did a post-doctoral fellowship at the Center for Policy Research in Syracuse University. I was recruited to the Social Security Administration, where I worked in the Division of Economic Research for a couple years and then I came to Stony Brook University where I am currently a Professor of Economics in the College of Engineering with affiliations in health sciences and also in economics.

Q. Can you -- I am sorry. Can you take me through -- is that everywhere you worked or is that just the academia part?

A. That is pretty much my professional career. I have been eighteen years at Stony Brook.

Q. When did you finish up your education?

A. In '96.

Q. Now, your current position is teaching economics?

A. So I am a professor at the university, which means I not only teach, and I taught everything from high school to the Ph.D. level, but I also do research in the areas of labor and health economics. I study education policies and

policies that effect children. And then I also sit on the Finance and Budget Committee. I am a University Senator and I do professional services for the National Science Foundation.

Q. Doctor, could you tell me what economics is?

A. Sure. Economics, broadly speaking, is how societies decide what they will do with their scarce resources. So that is very, very broad. There are specialists within economics and I am a specialist in studying the health and labor market. So that means I look at what is going on in the job markets and healthcare.

Q. And have you been qualified in the field of economics in the past?

A. Yes, I have.

Q. Approximately how often do you testify in cases like this?

MR. JOSEPH: I will object only to form. Cases like this, your Honor? If we could get more specific.

THE COURT: Take that one out.

Q. How often do you testify in court?

A. Probably about twelve to fifteen times a year.

Q. Did you conduct an analysis and prepare a series of reports in this case?

A. Yes.

Q. Did you receive a fee for those reports?

A. Yes, we did.

Q. And can you tell me what that fee is?

A. Sure. It was 3,200.

Q. And are you receiving a fee for your time here today?

A. Yes.

Q. And what is that?

A. $4,000 flat rate for preparation and being here.

Q. Are those usual and customary charges for an economist?

A. Yes, they are.

Q. Do you receive the same fee regardless of the outcome in this case?

A. Absolutely.

Q. What records did you review in conducting your analysis?

A. So there is two parts of the analysis. One has to do with lost earnings, so the economics of it. For that my sources were the union contract. So he was a member of Local 15A and I could go through that to get some of the benefits data. I also looked at some of the W-2 statements so I know what his earning capacity was. There were also some details from his employer on his participation.

Q. Okay.

A. And, sorry, the other part was that -- future

healthcare loss. So if he will require -- I am not a medical expert, so I rely on the reports of the medical experts, which is called the life care plan. Dr. Schuster provided such a plan, and that is what I used to project what the medical costs will be over the remainder of Mr. Barra's life.

Q. Dr. Dwyer, I want you to assume that Mr. Barra has a high school education; assume that Mr. Barra was a union crane operator since his early twenties up until the day this crane accident caused him to stop working; assuming that in 2006 Mr. Barra began working at Skanska and worked on heavy construction projects. Assuming during his four years with Skanska he continued to earn union raises, won a safety award and worked significant overtime. Assuming Mr. Barra was earning the top pay scale for his union at the time; assuming that in those four years at Skanska as a union crane operator, Mr. Barra worked over two thousand hours a year.

Assuming that Mr. Barra was a union crane operator making nearly $60 an hour with overtime pay, and over forty hours per week with benefits; assuming that those benefits included medical coverage, annuity plan contributions, pension plan contributions and vacation pay.

Assuming that Mr. Barra earned $175,000 and change in 2008, and $165,000 and change in 2009, and $69,000 in the

year of his accident, in the first seven months. Assuming that on August 5th, 2010, Mr. Barra was caused to fall from a defective crane due to a missing step; assuming that the fault caused traumatic brain injury with serious symptoms, a torn rotator cuff in his right shoulder requiring surgery and herniated disc in his lower back and neck.

Assuming that Mr. Barra has already undergone surgery on his right shoulder, two cortisone injections in his right shoulder, has been diagnosed with a diffuse axial injury in his brain by an objective PET scan, has undergone extensive neuropsychological testing and therapy all confirming his diagnosis.

Assuming that vocational rehabilitation expert, Dr. Schuster's opinion is that Mr. Barra is unable to work with his medical condition. Assuming that defendant's own vocational expert's opinion is that Mr. Barra is unable to work construction with his current medical conditions.

Assuming all I stated, do you have an opinion within a reasonability degree of economic certainty as to the lost income, medical coverage, annuity funding, pension funding, Social Security retirement income, sustained by Mr. Barra as a result of this accident?

A. I do.

Q. And what is that?

A. You want the total value?

Q. Well, how about --

MR. JOSEPH: What, will we get a breakdown or just going to be a total?

THE COURT: That is what I thought.

Q. Did you prepare a report, Doctor?

A. Yes, I did.

MR. MORGAN: May we mark that report?

THE COURT: Sure.

MR. MORGAN: Not the report. The calculations.

THE COURT: That is 31.

MR. MORGAN: No, it's not in evidence. This would be 31, yes, for I.D..

THE COURT: All right.

(Whereupon, Plaintiff's Exhibit 31 was marked for I.D. at this time.)

Q. I will just give the last two pages where the math is done. So we could have those marked and show those if the Judge allows.

(Brief pause.)

Q. I will show you what has been marked as Plaintiff's Exhibit 31.

A. Sure.

Q. Can you tell us what those two pages are?

A. Sure. As I said earlier, I conducted two types of loss analysis, one was for the lost earnings from the labor

market and one was the future losses expected from the health market given the medical services. Each of these charts represent that. The first is economic and the second one is healthcare.

Q. Is that your calculation based upon the information you told us you reviewed earlier?

A. Yes.

MR. MORGAN: Your Honor, at this time I offer that into evidence.

MR. JOSEPH: Permission to voir dire?

THE COURT: Voir dire.

MR. JOSEPH: Thank you.

THE COURT: You could hold on to that. He will ask you some questions.

You need the witness to step down for this?

MR. JOSEPH: If she'd like, sure. I don't want to speak to the jury but I don't want to block the view.

Everyone could see? Okay.

MR. MORGAN: May we approach just real quick before you get started?

MR. JOSEPH: Sure.

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

VOIR DIRE EXAMINATION

BY MR. JOSEPH:

Q. Doctor, you -- let's not block their view. All right. I am sorry.

You indicated in the first column, without telling the jurors the numbers, okay, you -- from 2016 through 2034 medical care and evaluations, right?

A. Yes, correct.

Q. And could you tell us what went into those numbers, just -- which care?

A. Okay. Could I take my notes so I --

Q. Oh, absolutely.

(Brief pause.)

Q. All right. So what care went into that first column?

A. So for medical and therapeutic I would have included --

Q. Medical care and evaluations I am talking about.

A. I am sorry.

Q. That first column. I am not trying to be argumentative.

A. I understand.

Q. This first column, which care?

A. We included primary care physicians.

Q. Even though it's no cost?

A. That would have -- oh, that would have been 0. I am going through the categories. Physiatrist and pain

management.

Q. Right?

A. Some of them are in ranges. So it would be $350 one time a year. Orthopedist, neurologists, spinal surgeon, and --

Q. Otorhinolaryngologist?

A. Yes. Thank you. Did not include physical therapy in this category because that falls into the next category.

Q. All right. Anything else?

A. There should be some on the next page.

Q. Okay.

A. This is the same thing, right? So okay. It doesn't look the same as mine. All right. So here I would use pain management again, orthopedist, spinal surgeon, neurologist, that one again, psychiatrist, psychologist. All under that category.

Q. Were those all things included in the medical care and --

A. That's right.

Q. I would like you to assume the following; that the jurors heard plaintiff's orthopedic surgeon this morning.

A. Yes.

Q. And he did not testify that plaintiff needs ongoing once a year care from a physiatrist or pain management specialist; that he didn't say that he would need to see

plaintiff once a year; that he didn't say that a neurologist would have to see plaintiff once a year; he didn't say that a neurosurgeon or spinal surgeon would have to see him once a year; that he didn't say an otorhinolaryngologist would have to see him once a year; and I don't think he said a physical therapist would see him once a year. I would like to you further assume --

MR. MORGAN: Your Honor?

MR. JOSEPH: It's all part of voir dire, your Honor.

MR. MORGAN: This is based upon Dr. Schuster who already testified.

THE COURT: Yes.

MR. JOSEPH: No, but Dr. Schuster was basing upon Dr. Cushner.

MR. MORGAN: Certain things. He sat here and said he is a board-certified case manager and he could tell you what treatment he needs.

THE COURT: Okay. Let's see where Mr. Joseph goes with this.

MR. JOSEPH: Okay.

Q. That Dr. Cushner did not state that plaintiff needed to see a physiatrist or pain management specialist eleven times a year; he didn't say he needed to see the orthopedist once or twice a year; he didn't say he needed to

see a neurologist as needed or neurospinal surgeon, an otorhinolaryngologist once a year, a physical therapist seven to twelve times a year. He didn't say any of that.

Do you have a calculation for column 1 entitled medical care and evaluation which does not include that care that we just described that the doctor didn't say plaintiff need?

A. All of my numbers are based upon Dr. Schuster's report.

Q. Okay.

A. The only ones that are not included are the ones where it says "as needed."

Q. Would you -- okay. So would you be able to calculate to this jury that same column without the --

A. With a computer.

Q. With a computer, but not with your calculator that you did in the hallway?

A. In the hallway I was doing other things without the calculator. I could give you an estimate if you tell me what to deduct.

Q. Okay. What about -- and what about therapeutic care and evaluation. What went into that column, Doctor?

A. Okay. So any physical therapy. That would go into that --

Q. I am sorry. I thought physical therapy was medical

care and evaluations. That is my fault. Okay.

(Brief pause.)

Q. So physical therapy on the second page as well?

A. Yes.

Q. The seven to twelve times a year?

A. Yes. And the next one. So on this one the cognitive remediation, the personal trainer, the massage therapist, and I believe we put these under diagnosis. It was something we spent a lot of time on. And I didn't bring all my documents, so we looked -- I believe we also put the steroid injections in there. Definitely the massage therapist, the personal trainer and cognitive remediation. And if I use my calculator I could tell you for sure.

Q. Doctor, the left shoulder cortisone injections, where did you put that?

A. That would be wherever I put any of these. Can I see this again? I didn't bring it over.

Q. Yes.

A. That would be therapeutic.

Q. I would like you to assume that Dr. Cushner did not testify that plaintiff would need left shoulder Cortisone injections as a result of this incident, would you be able to subtract that out?

A. Yes, that would be $225 a year over the remainder of his life at a rate of four percent.

Q. So you would be able to subtract that, right?

A. Yes.

MR. MORGAN: May I ask a question?

MR. JOSEPH: I am still voir diring.

THE COURT: No, you can't. He is doing the voir dire.

Q. And, Doctor, I would like you to assume that Dr. Cushner did not testify that plaintiff would need a right shoulder replacement.

Where did you include that?

A. I did not.

Q. Okay. And I would like you to assume that he did not testify that plaintiff would need a left shoulder arthroscopy and debridement.

Where did you include that?

A. I did not.

Q. Okay. I would like you to assume that Dr. Schuster testified that these laboratory tests would have to be performed anyway, whether he had the injury or not.

Where were they included on your chart?

A. Under lab test.

Q. Would you be able to subtract those out as well?

A. Yes.

Q. I would like you to assume that Dr. Cushner, where it says diagnostic tests, Dr. Cushner did not testify that

Dr. Dwyer - Plaintiff - Direct

plaintiff would need ongoing diagnostic tests.

Did you include --

THE COURT: Mr. Joseph, once again, I am not hearing anything going to the foundation of the document.

MR. JOSEPH: Well, I need to know where it is in the column.

THE COURT: No. That is Cross-examination of the witness.

MR. JOSEPH: All right.

THE COURT: That does not go to the admissibility of the document. It may go to the weight, and the jury will credit the document, but the -- it doesn't go to admissibility.

MR. JOSEPH: I have a challenge to the document to the extent that it's including costs for things that Dr. Cushner did not testify were necessary. And he is the only medical doctor they have heard from on that.

THE COURT: All right. That is something for Cross-examination of the witness. It is not something for voir dire.

Over objection, the document is in evidence. You may continue with your Direct Examination.

MR. MORGAN: Thank you.

DIRECT EXAMINATION

Dr. Dwyer - Plaintiff - Direct

BY MR. MORGAN: (Continued)

THE COURT: You may have a seat again.

MR. MORGAN: What I will do, I will bring out your chart so you could explain.

THE WITNESS: Okay.

(Whereupon, Plaintiff's Exhibit 31 was received and marked into evidence, and Plaintiff's Exhibit 31A was marked for I.D. at this time.)

THE COURT: All right.

MR. JOSEPH: Your Honor, is it all right if I move?

THE COURT: You may.

Q. Before we get started, Doctor, did we talk last night and I called you and said take everything of the left shoulder out?

A. Yes, you did.

Q. Take everything of the cane out, because Dr. Schuster said he wouldn't need it, and take everything with the home maintenance out?

A. Yes.

Q. Were you able to revise your report and come up with these numbers?

A. Yes.

Q. Thank you. Can you explain to the jury what these numbers mean?

A. Sure. I will grab my pen.

Q. Sure.

A. I left it.

(Brief pause.)

Q. Continue.

A. This first table, this first chart shows the losses from the labor market. He was a union employee. The categories we include are his earnings, his loss and his annuity. So that is like a 401K plan where he pays a contribution in. And it has value. The pension, which is based upon a formula. So a certain number of years of work, hours of work, and you get a pension from the time of retirement.

What I didn't include here is health insurance and Social Security. I could have just to be conservative. I chose not to. We stuck to these benefits. Let's start with the income loss. How much he would have earned. What I do is, I go back to the last full year of earnings, which is 2009. Since the accident occurred in 2010. In 2009 he earned -- Mr. Morgan already said this. $165,131. Right?

Now, in 2010 he said that he earned $69,112. If you subtract what he earned for that partial year in 2010 that he did work, to get the loss for the part of the year he didn't work, you would get $100,973.

The first full year of earnings loss then, the first

full year he didn't work at all was 2011. As you could see, I gave him a higher rate than the 165,131. It's $175,188 that he would have earned in 2011. That is based upon the Bureau of Labor statistics averages of wage growth.

So for the last twenty years wages have risen at an average rate of three percent per year. And so that raise represents -- that increase represents that raise. We do that every year and then you could see we stopped in the year 2020. And that is the year that Mr. Barra turns the age of sixty-five.

Now, his normal age of retirement under the Social Security system would have been sixty-six and change. We use sixty-five because that is the normal age under the union contract. And so we assume that he would have -- we retire at the age that he would get his full benefit from the union contract. That is why we pick sixty-five. He was born in March and we assumed he would retire in March, right, when he turns sixty-five. That is why he only has a partial year of earnings in that last year of work. That is when the pension starts. So he accrues less than his 401K plan. So this is based upon the contributions. And we start with his pension formula.

Now, the pension formula and the annuity are both based on the number of hours of work per year. So in the last year of work he worked two thousand three hundred forty-

seven hours. So that is a little bit over -- a lot of overtime, three hundred forty-seven hours. Because that fluctuates over the course of the four years, I took the average hours he worked for the four years, which is two thousand one hundred eighty-six hours. So that is what I used in this formula.

- Proceedings continue next page -

DIRECT EXAMINATION (CONTINUING)

BY MR. MORGAN:

A (Continuing) I followed the union contract and I calculate the formula to get these numbers. So based on that formula, he would have gotten $53,184 for his pension for the remainder of his life. As you can see, that I kept flat. That doesn't increase by inflation.

So the totals here in earnings, the total loss is $1,937,872. Again, that's over the course of his life. The loss in the annuity, those contributions are valued at $269,481 over the remainder of his life. And the pension is 744,576.

There is one piece of information I haven't given you yet, that is how long would he live. Obviously, there is uncertainty over the future, but what we use is the National center for Health Statistics. They produce these life tables that are based on a survival analysis. What they tell us is that for a man born in the year 1955, his life expectancy would be the age of 78.9. That brings us to the end of the year of 2034. So that's how we determine how long to grow these benefits to.

Do you want me to go to healthcare?

Q Yes. I can help you with the board.

(Brief pause)

A So this is it the future medical needs that Mr. Barra will need based upon the report of Dr. Schuster. So everything

hinges on Dr. Schuster's life care plan. I am not a medical doctor. I have no way of knowing with certainty what he would need over the course of his life.

I took all the categories and -- the report was broken down by a lot of specific services. I took them and lumped them into the categories as they would have been defined by the Bureau of Labor Statistics. So Medical Care and Evaluations is the summation of a whole bunch of procedures and treatments, visits and treatments that Dr. Schuster recommended. And what I did was I summed them across all of the categories of services that was recommended. Then I have to predict what those same exact services are going to cost next year and the year after that up until, again, the age of 78.9 when Mr. Barra is expected to die.

So I have to use growth rates. It is not the same as the labor market. Now we are talking about the health market where average prices have risen far faster than the general rate of inflation, meaning the prices go up faster. And on average over the last 25 years, healthcare prices have risen at a rate of 5 percent.

What I did was went to the Bureau of Labor Statistics and took the specific categories, the growth rate for specific categories. So the first thing I will do is tell you how the prices changed over time for each category.

For medical care, on average it rose at a rate of

4 percent; for therapeutic care, at a rate of 3 percent; for medication, pharmaceuticals went up a little faster than the others at 4.5 percent. Drug prices you probably heard have been rising at a faster rate than the general rate of inflation. For lab tests I used 4 percent. Equipment is -- equipment always rises slower than the general rate of inflation which is 3 percent, so that's 2 percent; housekeeper, 3 percent; and then the surgery for the right shoulder arthroscopy, 4 percent. And I will talk about why there is only one number there in a minute.

So what this means is that the medical care that Mr. Barra is going to need this year valued at $13,106 is going to cost $13,630 next year, the same exact services. So he is not getting more care, it is just that the prices are going to go up. Do that every year up until 2034, and there we have based on his birthday in March, so that's a smaller number, we have him dying early in the year so that's why that's a smaller number. So the total cost over the remainder of his life for medical care and evaluations according to Dr. Schuster's report, I will value that at $338,159. Doing the same thing for the therapeutic care and evaluations, things like physical therapy, $252,236. The medications, painkillers, depression medication is going to come out to $557,622. The cost of those tests $6,192.

Again, here I only included things like blood

work. I did not include MRIs or x-rays because Dr. Schuster did not give me any specifics. He said "as needed." Therefore, I assumed no need.

The equipment includes things like a TENS unit. That would be $5,890. He will require a housekeeper, and that's valued at $128,256.

Now, the surgery, he gave that to me in today's dollars. He said in five to fifteen years he would need a surgery, and the cost of that surgery would be $8,500. We pushed that out to ten years, and the value in ten years of that surgery would be $12,582. So that's the midpoint of five to fifteen years. We did the midpoint of the value of the services because he gave a range. And that's why there is only one value there.

If you sum all of these columns, the total future cost of healthcare -- and we start this May 1 so I don't use that full value in the first column -- is $1,300,938 in healthcare.

Q That would be the healthcare from now until he is expected to pass?

A Correct.

Q Is there anything else with your charts that you need to explain to the jury?

A I don't think so.

Q Okay. You can go back to the witness chair.

Dwyer - by Plaintiff - Cross

(Brief pause)

Q Doctor, based on the review of Mr. Barra's W-2s over the past few years and the union contract and the hours worked, do you have an opinion to a reasonable degree of certainty as to the accuracy of the numbers in the chart you just explained to the jury?

A Yes. They are very reasonable.

MR. MORGAN: I have nothing further at this time.

THE COURT: Cross?

MR. JOSEPH: Could I get a few minutes to set up?

THE COURT: All right. Let's take a quick break, five minutes.

(To the jury) Do not discuss this case among yourselves or with anyone else. Let's take five minutes.

(Jury steps out of courtroom)

(Short recess taken)

(Jury enters courtroom)

THE COURT: We are now proceeding with the cross-examination by defense.

MR. JOSEPH: Thank you, your Honor.

Q Good afternoon, doctor. I am Ron Joseph. I represent the defendants in this case.

A Good afternoon.

Q Doctor, could you please show us the contracts between the plaintiff's union local and the construction contractors in

New York City for the past ten years?

A For the past ten years? No, I don't have that with me.

Q Well, you indicated on direct examination, doctor, that Mr. Barra's income would increase by 3 percent a year; is that correct, yes or no?

A Yes.

Q Did you do an analysis of the contracts over the past ten years or fifteen years or twenty years to see if the operating engineers in the City of New York were actually getting 3 percent increases per year, yes or no?

A No.

Q So that's not specific to this location, meaning New York City, and it is not specific to this trade, meaning the operating engineers; isn't that correct, yes or no?

A Yes.

Q Would you agree, doctor, that on average construction workers in New York City have not been getting 3 percent raises per year for the past fifteen or twenty years; yes or no?

A I am not sure.

Q Would you agree that the wages of the operating engineers in the City of New York have not been increasing by 3 percent per year for the past fifteen or twenty years?

A Again, specifically not sure, but I would be surprised.

Q When you made the assumption that Mr. Barra's wages would increase by 3 percent per year, doctor, you did not actually consider his personal history, did you, yes or no?

A I did for the time that he was with that employer for the last four years.

Q For four years?

A Correct.

Q How about for all of his years in the construction industry in the City of New York?

A No.

Q Okay.

So you indicated that he earned approximately a ballpark of $165,000 in 2009; isn't that correct, yes or no?

A Yes.

Q You were aware that in 2008 he earned approximately $175,000; is that correct, yes or no?

A Yes.

Q So, in other words, his wages from 2008 to 2009 decreased approximately 5.7 percent; isn't that correct, yes or no?

A Yes, they decreased.

Q By that amount, right, 5.7 percent.

A I could do the math. Off the top of my head I am not sure.

Q They went down $10,000, right, give or take?

A Yeah, right.

Q $10,000 over $175,000 is approximately 5.7 percent?

A Correct.

Q You don't know the reason for that almost 6 percent decrease in that year, do you, yes or no?

A I do, yes.

Q What is the reason?

A That was one of the worst recessions we have had and just about all wages dropped during that time period.

Q So was there less work for the construction industry in New York City at that time?

A Fewer hours likely.

Q Okay.

Well, was he less motivated to work from 2008 to 2009?

A No.

Q You know that?

A Well, I have no reason to believe that.

Q You didn't speak to him about it?

A No, I did not.

Q You didn't ask him why he worked less?

A No.

Q Okay. So it is one of two things, either there was less work for him or he was less motivated, correct?

A Right.

Q You don't know which one it is?

A I have good reason to believe that it was the recession; but you are right, I don't know for sure.

Q Let me ask you something else. And I am sure every juror would like to know this and everybody in the courtroom would like to know this.

When are we going to have our next recession?

A I can't say with certainty, but we have such a thing as a business cycle which is precisely why we use averages. If I had based the projections for the future on the last couple of years, it would be extremely unfair because I would be taking the time period that we were at a trough or very low point in wage work.

What we see is this cyclical thing where you have peaks and troughs, and twenty years captures pretty much those peaks and troughs.

We are on an upward trend right now. We are heading for higher than 3 percent, I would predict, wage growth. It is going to fall again. History tells us it will fall again. My guess is about ten years it will start to fall again, but hopefully not as low as it did in 2009.

Q Well, doctor, let me ask you this: Have the wages of the construction workers, or, more specifically, the operating engineers in the City of New York, have they followed that exact 3 percent pattern that you described?

A I didn't look at it precisely. Typically union workers are more cushioned, so they don't experience as much of a decline as others, but I didn't look at it specifically.

Q They are more cushioned but the union can't control for how much construction is going to go on in the City of New York, correct?

A Correct.

Q And the union can't control for how much construction the City of New York is going to require cranes and other heavy equipment, correct?

A Correct.

Q Okay.

Doctor, he worked until August 5, 2010; is that right?

A Yes.

Q So he worked a little over seven months that year, right?

A Yes.

Q And he earned approximately $69,000 between January 1 and August 5, 2010; is that correct?

A Correct.

Q So, doctor, if you were to -- if he earned that amount during that little over seven months, he was on pace to earn approximately $118,000 in 2010; is that correct, yes or no?

A Not necessarily.

Q Well, doctor, let's do it this way. He earned $69,000, right?

A Uh-huh.

Q And we know that he worked for seven months out of twelve, right?

A Right.

Q And the amount that he would have earned over the course of that year if he worked 12 months we will call X, okay?

A Your math is probably correct. There is an assumption that underlies it.

Q Yes. Well, let's follow my assumption, doctor, okay?

A Okay.

Q So that means that if we multiply 69,000 times the 12 divided by 7 we get 118,000; don't we, yes or no?

A Yes.

Q So that means, doctor, that if he had earned -- you had him going up from 165,000 that year. If he had earned 118,000 rather than the amount that you said of -- well, I am not sure how much you are saying he would have earned. But he would have gone down under this calculation between 2009 and 2010. His income, not including benefits, would have decreased $47,000; isn't that correct, yes or no?

A Based on your assumptions, yes.

Q Well, you've made assumptions too in coming to your calculations too, correct?

A I am an expert.

Q So based upon that calculation, doctor, he was on pace to have a decrease in wages of 28.5 percent; is that correct?

A I would have to do the math. It was 170,000 that I used for the 2010 earnings that I subtracted the roughly 69,000 from. So --

Q I am not talking about 170,000 we are talking about if he had gone down from 165,000 as you said to 118,000 as I said, that's a decrease of 28.5 percent; isn't that correct, yes or no?

A I am doing it right now. (Brief pause) Yes, 28.5.

Q Okay.

If he earned $118,000 by working a full year in 2010, he was on pace to earn 32.6 percent less than he did in 2008; isn't that correct, yes or no?

A Yes.

Q You also assume that the employer's funding of the annuity would increase by 3 percent per year; is that correct, yes or no?

A Yes.

Q And those annuity contributions are based on the number of hours Mr. Barra worked or would have worked; is that correct, yes or no?

A Yes.

Q Okay.

If Mr. Barra was on pace to earn $118,000 in 2010 and we increase -- and we decrease that amount by 28.5 percent for 2011, he would have earned $84,370 in 2011; isn't that correct, yes or no?

A I didn't follow all that. Sorry.

Q All right. He went down 28.5 percent --

A Okay.

Q -- right?

A Okay.

Q On the assumption between 2009 and 2010, his income is reduced by 28.5 percent?

A Under that assumption, yes.

Q I want to take it one year further to 2011. Reduce it by 28.5 percent again. He would have been earning 84,370; is that correct, yes or no?

A Correct but not reasonable.

Q And we could keep doing that, right? We could take it down another 28.5 percent in 2012 to 60,325, can't we?

A We could.

Q Okay.

MR. MORGAN: (Inaudible)

MR. JOSEPH: Objection, your Honor, to his commentary.

MR. MORGAN: Sorry.

THE COURT: Sustained.

Q Doctor, have you seen Exhibit 28 in evidence?

A I have to see what it is.

Q (Handing)

A No.

Q All right.

Doctor, I would like you to assume that plaintiff has placed Exhibit 28 in evidence. And I would like you to assume that this is a certified record from his employer Skanska USA Civil Northeast. And I would like you to assume that on the bottom of the second page of this document, the first page being the certification, the bottom of the second page of this document says: "Date terminated, August 27, 2010. Reason for leaving, term involuntary, lack of force/reduce force."

Were you aware he was scheduled to be laid off, yes or no?

A No.

Q When you presented this jury with your calculations, you assumed that he was going to have continued employment for as long as he wanted to; is that correct, yes or no?

A Kind of -- well, yes. Yes. Can I explain?

Q No. I just asked you yes or no.

And if he were about to get laid off, that would affect your calculations; is that correct, yes or no?

A No.

Q Because you are going on averages?

A Because what I am calculating is his earnings potential in the labor market, not necessarily tied to one employer. So that is his value of his productivity. I may want to take into account a brief spell of unemployment. I have done that in the numbers, and it doesn't make much of a difference over the course of his life. Besides that, that is not my job to calculate where he is going to work, just what he is capable of earning.

Q Well, do you know how many jobs were available for Local 15 crane operators in 2010 in the City of New York?

A Given the recession, probably not as much as usual.

Q And do you know how many actual members of Local 15 or crane operators were in the City of New York back in 2010?

A No.

Q Doctor, was he unemployed at all in 2009?

A Not that I am aware.

Q What about 2008?

A Not that I'm aware.

Q Did you look at his work history as to how many years he actually worked in the construction industry, doctor?

A All I have is a record of what his hours were over the last ten or so years, and I didn't see a significant decline.

Q Really?

A I will have to pull it out and see again.

Q Doctor, would it be fair to say he entered the union

in 1975?

A I am not aware of when, but that's fair to say.

Q Okay.

Doctor, are you aware that the union records, which are Exhibit 29 in evidence, indicate that he did not work any hours in this union in 1976?

A I am not aware.

Q Are you aware that the same union records indicate that he did not work any hours in 1991?

A No, I'm not aware.

Q Are you aware that those same records indicate he did not work any hours in the construction industry in 1992?

MR. MORGAN: In New York, right?

MR. JOSEPH: Your Honor, again the comment. Do we have --

MR. MORGAN: Objection, your Honor.

THE COURT: Do you have an objection?

MR. MORGAN: I do.

THE COURT: Overruled.

Q Are you aware the same records indicate that he did not have any earnings in the construction industry in 1992?

A I am not aware, no.

Q Are you aware that the same union records indicate that he did not have any construction earnings in 1993?

A No.

Q Are you aware that he the same union records indicate he did not have any earnings in 1994?

A No.

Q Are you aware that the same union records indicate he did not have any construction earnings in 1995?

A No.

Q Are you aware that the same union records indicate that he did not have any construction earnings in 1996?

A No.

Q Are you aware that the same union records indicate he did not have any construction earnings in 1997?

A No.

Q Are you aware that the same union records indicate he did not have any construction earnings in 1998, 1999, 2000, 2001 and 2002?

A No, although I do have that the record starts in 2003.

Q Not 1975?

A Right. The data that I received was his participant basic data report from 2003 to 2010. I assumed I got an excerpt of it and that was sufficient.

Q Who gave that to you?

A From Mr. Morgan's office.

Q So plaintiff's attorney gave you incomplete records, is that what you are telling us?

A It was sufficient for the purposes of my analysis.

Q I see.

A I would have asked for more if I needed it.

Q If you knew there was more, you would have asked for it?

A If I needed it.

Q You indicated that you estimated that Mr. Barra would work until age 65; is that correct, yes or no?

A Yes.

Q Can you show us from his union records what the average age of retirement is for people of that occupation?

A From union records?

Q Yes.

A No.

Q You are familiar with what form 5500is, right?

A Yes.

Q That's something the union has to file with the government, right?

A Yes.

Q And that's going to indicate the average age of the people -- withdrawn.

That's something to do with the pension plan for the union, correct?

A Yes.

Q And they have to file that with the government, and they have to tell the government in form 5500 what the average

age of retirement is under that plan; isn't that correct, yes or no?

A I am not an expert in that area, but yes, I would imagine so.

Q So would it surprise you if the average age of retirement for this union local in the City of New York is age 61?

A For all types of workers?

Q No. For this union local?

A Okay.

Q All right. That's not 65, is it?

A No.

Q So as you sit here today you cannot tell this jury at what age the average crane operator in the City of New York is going to be when they retire; is that correct, yes or no?

A Yes.

Q And you practice with Dr. Leiken, right?

A Yes.

Q Who also teaches at Stony Brook?

A Yes.

Q The two of you travel around to these trials and give this testimony about economics, right?

A Yes.

MR. MORGAN: Objection, your Honor.

THE COURT: Sustained. Rephrase.

Q The two of you have a practice together when you are not teaching, and part of that practice is to testify in litigation on behalf of plaintiffs, is correct?

A Yes.

Q And the two of you, no matter what the statistics are, no matter what the form 5500s say, always say when it comes to construction worker they are going to work to age 65; isn't that what you do?

A That's reasonable, yes.

Q Well, it is reasonable, but wouldn't it be more accurate to actually look at form 5500 instead of making a blanket assumption for all cases?

A I actually never thought to look at the 5500s, honestly. I am not sure how publicly available they are. Are they publicly available? Can you share them with me?

Q You can get them from the union like everybody else.

A As an expert economist that does research in this area, we never assume the age under the age that you can collect social security benefits, which is 62. I do know that when you tell me that there is an average from some document -- and I believe that there is a high nonresponse rate on those 5500s, but when you tell me that you are using an average, I am not sure who is included in the average, I don't know how many years; but I can tell you that retirement ages are going up again. So you need to take some of that into account when you

Dwyer - by Plaintiff - Cross

make these decisions.

(Continued on next page)

Q. And you said shortly before that you testified up to fifteen times year?

A. Correct.

Q. Would all those times be for plaintiffs?

A. Yes.

Q. And how many economic analyses do you perform per year?

A. Myself, probably about four or five together with Dr. Leiken. I am not sure. He is usually the initial point of contact.

Q. And how many of these economic analyses that you participate in -- well, withdrawn.

How many of these economic analyses do you participate in with Dr. Leiken per year?

A. That is what I am not really sure of. He does the report. I approve it, sign it, but I am not sure how many he is doing. The only time I really get involved is when I do this, I replicate the whole work. So you get two for the price of one.

Q. So, in other words, he does the work, and if he is too busy you come to court?

A. Yes.

Q. All right. And how many economic analyses do you get involved in per year involving union construction workers?

A. Probably two or three.

Q. Now, Doctor, you heard -- I did some voir dire earlier today. And I will revisit some of those issues, okay?

A. Yes.

Q. Can you step down? I will keep this here so I don't have to switch back and forth.

THE COURT: That is fine with me.

Q. I'd like you to assume that the jurors heard from Dr. Cushner today.

A. Yes.

Q. Plaintiff's treating orthopedic surgeon. And I'd like you to assume that Dr. Cushner didn't say that plaintiff needs treatment from a physiatrist or pain management specialist once a year; that he didn't say that plaintiff would need to see an orthopedist once a year; that he didn't say that plaintiff would need a neurologist once a year; that he didn't say he would need a neurosurgeon or spinal surgeon once a year; that he did not say he would need an otorhinolaryngologist once a year; that he did not say that he would need a physical therapist once a year; that he did not say that he would need a physiatrist, pain management specialist eleven times year; that he would not need to see an orthopedist, neurologist as needed for the rest of his life, and he did not -- and he did not mention

anything about seeing an otorhinolaryngologist once a year; he did not mention seeing physical therapist.

And I want you to make all those assumptions. I'd like you to further assume that he did not say that Mr. Barra does not need to see -- excuse me -- that he did not say that Mr. Barra needs to see a personal trainer fifty to one hundred times a year; he did not say that he needs a massage therapist fifty to seventy times per year; that he did not say that plaintiff needs left shoulder Cortisone injections once or twice a year for the rest of his life -- and you are saying that you didn't put the shoulder replacement or left shoulder arthroscopy in, correct?

A. Yes, correct.

Q. Okay. I'd like you to further assume that Dr. Schuster said these -- plaintiff would most likely need these blood tests that you described anyway, whether he was injured or not.

A. Okay.

Q. When did you -- withdrawn. When you -- when you did a calculation for orthopedic and adaptive equipment, is it my understanding, correct, that you took out the need for a cane?

A. Yes.

Q. And you took out, on support there, you took out the need for home maintenance, correct?

A. Yes, correct.

Q. And so based upon that, credit --

MR. MORGAN: I just object to the characterization of the testimony, your Honor.

THE COURT: Overruled.

Q. Okay. Doctor, based upon those assumptions that Dr. Cushner did not say that he needs what Dr. Schuster assumed he needed that we just described, I would like you to recalculate medical care evaluations, therapy and care evaluations?

A. If I heard you correctly, you want me to remove everything?

Q. No, just recalculate. I want to see how it will reflect based upon Dr. Cushner's testimony.

A. I -- well, I thought, if I heard you correctly, you removed every category for medical --

Q. Oh, I don't know. I thought there was still some in there for psychological and psychiatric.

A. All right. Well, I have that here.

Q. And I did not remove the need for the surgery on the right shoulder.

A. Okay. So psychiatrist and psychologist, the total value for the first year for psychiatrist was $1,628. For the psychologist it's $7,175 per year. So we are talking roughly 8,500 for a year is all that would remain. And for

this first column. And then we would have to grow that at four percent, so if we are removing probably about forty percent of it, you would deduct probably about forty percent.

Q. All right. What about the therapeutic care and evaluations, what about that column?

A. So I believe you removed all of that. Personal trainer, massage, injections, cognitive --

Q. I did not remove cognitive.

A. So the cognitive value was roughly -- let's see. 5,952.

Q. So if the jury were to believe that he needed cognitive therapy for the rest of his life it would be 5,000 what per year?

A. 952.

Q. 5,952?

A. Sorry. 6,448.

Q. 6,448, otherwise column 2 would be 0?

A. Correct.

Q. All right. If Dr. Schuster said that the lab tests would have had to have been performed anyway, whether he had an injury or not, we could subtract this whole column which says lab tests; is that correct?

A. That's correct.

Q. All right. And you could sit down again, Doctor.

(Witness complies.)

Q. So, Doctor, are you familiar with something called the Affordable Care Act?

A. Yes.

Q. Under the Affordable Care Act everybody is required to have health insurance, correct?

A. Correct.

Q. And --

A. Or pay a penalty.

Q. Sorry?

A. Or pay a penalty.

Q. Or pay a penalty.

Basically everybody is required to have it, right?

MR. MORGAN: Objection, your Honor. Could we approach?

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

THE COURT: I will sustain your objection. Sustained. You may continue.

MR. JOSEPH: Thank you, your Honor.

Q. And, Doctor, it was your assumption that he would start collecting his pension at age sixty-five; is that correct?

A. Yes.

Q. You know he is collecting a pension now?

MR. MORGAN: Objection, your Honor. Could we approach?

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

THE COURT: Let's take a break. Do not discuss this case. Five minutes.

(Whereupon, the jury panel exited the courtroom.)

COURT OFFICER: All rise.

(Whereupon, the jury panel entered the courtroom.)

Q. Doctor, were you aware that he is collecting a pension?

A. I assumed he would be.

Q. All right. And I'd like you to assume, Doctor, that he filed for his pension in approximately January 2011, and then it was retroactive to approximately September 2010 and he has been collecting approximately $1,402 per month.

Would that in any way affect your calculation of the lost pension benefits that you described?

A. No.

Q. So how much -- when you did these calculations, how much did you assume he would collect between September 2010 and the time he retired at age sixty-five, as you said?

A. The pension calculation that I made was based on

the difference between what he would have gotten and what he is getting. So I didn't account for what he -- the amount he accrued already that he would get. So that $53,184 represents the amount of pension in addition to what he is getting that he would have gotten had he completed his work life.

Q. All right. And, Doctor, when you did this you assumed that he would not get retirement benefits, that he was incapable of working and receiving a salary now and getting retirement benefits from another job; is that correct?

MR. MORGAN: Objection to form.

THE COURT: You may answer. Overruled.

A. I am not sure I understand. I think what you are saying, he was unable to find any employment up until age sixty-five.

Q. Correct.

A. Yes.

Q. So if he actually were employable and able to find employment for age sixty-five, or whatever the average age of retirement would be for his union, you would have to take that into consideration, correct?

A. Correct.

(Brief pause.)

Q. And, Doctor, when you were testifying on Direct you

assumed an average on the benefits, but an increase in the wages. Did I understand that correctly? You assumed his wages wouldn't go up three percent per year?

A. Yes.

Q. You assumed the benefits, when you did that -- oh, I am sorry.

You assumed he had been making $165,000 per year. But when you did the benefits you did an average of the benefits, right?

A. I did an average of hours worked.

Q. To calculate the benefits?

A. Yes.

Q. You didn't do an average of hours worked when you calculated his anticipated wages; isn't that correct? Yes or no. You based it off the $165,000?

A. Yes.

MR. JOSEPH: Thank you. No further questions.

THE COURT: Redirect.

MR. MORGAN: Thank you, your Honor.

REDIRECT EXAMINATION

BY MR. MORGAN:

Q. I don't know if you remember because I know you answered some questions there, but when Mr. Joseph was asking you questions about this formula --

MR. MORGAN: It's not marked, Judge.

THE COURT: I know.

MR. MORGAN: The writing of counsel.

Q. I know you continued and you said you are making assumptions, you are making assumptions.

Can you explain what you meant by that? And could you explain why -- what you wanted to say about this number, this 69,000 equals 7/12X?

A. So the assumption that is being made there is that it's not seasonal work. And, so, overtime and the number of hours and the demand for construction workers might be seasonal; meaning, you get a clump of your hours certain times of the year, say the summer or early fall. And so it's an assumption to say that you could smooth out that projection evenly and that the same number of hours he worked in January would be the same number of hours he would worked in September.

Q. And when you did your calculations, how did you average the hours?

A. Okay. So the hours, it probably is somewhat of an underestimate to take the average over the last five years or so because of the recession. And so it's somewhat conservative to use that 2,100 number that I used when during a non-recessionary period he was up to twenty-five hundred hours. So I only did that for the benefit. For the actual salary I did not do that. I just used the last full

year of earnings as representative which, keep in mind, was during the recession.

Q. And yesterday Dr. Schuster testified. And he talked about this retirement age and this average retirement age for a construction worker. I want you to assume that he testified that the average number is taken for people who are just entering the construction work force, meaning the average person on day one of grabbing their lunch box and going to work, is that they would go to age sixty-one.

And that that -- included in that are people that suffered serious injuries before that age, people that are not made out to be construction workers, but he said once someone reaches the age of fifty-five where Mr. Barra is, he doesn't fall under the same statistical number as someone who is just starting out in construction.

Could you explain what he means by that?

MR. JOSEPH: Objection.

THE COURT: Sustained.

Q. Do you have an opinion as to Mr. Joseph's -- do you have an opinion as to Mr. Joseph's -- the average retirement age for construction workers that he used on his Cross-examination?

A. Yes. What I was trying to explain before was that I need to know how those averages were calculated. It really doesn't sound right to me. What does make sense to

me is that people self-report when they will -- so I am an expert in this area. This is what I do a lot of research in.

So when people self-report their retirement, they are close, but they are not exactly right. And often times people retire earlier and that they say because they experience some sort of shock, or, retire later when there is no health shock. Most of the time if there is no health shock they retire later and they self-report. There is also something called a survival probability. And it's conditional on working -- your probability of working another year goes up. So taking all that into account, my biggest concern with that sixty-one, I don't know who responded to those questions. I don't know how the data was collected. I don't know what time period it was collected and I don't know the response rate.

MR. MORGAN: Give me a second.

(Brief pause.)

Q. You were talking about on Cross-examination, you were asked a question about reasonable wage increase.

Could you explain the wage increase you used in your figures to the jury?

A. Yes.

Q. And how you got them?

A. So it's pretty standard in our research. We do

have to grow wages for workers when we try to do projections. And we use three percent. And the reason we use that, again, is that business cycle that I talked about before. You don't want to take just a few years. They could be an anomaly. So you want to smooth it out over a time period. So we use twenty years.

Now, for union workers they tend to follow the same business cycle, except the wage increases tend to be slightly higher on average. So three percent seems very reasonable to me.

Q. I want you to assume that we've already heard testimony, and that we will hear testimony on Monday that Mr. Barra not only worked as a crane operator in New York, but there was a time when he worked as a crane operator in Florida.

Would that -- and in Cross-examination Mr. Joseph said -- I want you to assume that he works zero hours in construction and he ran through a bunch of years.

Do you have an opinion -- if knowing how many hours he works as a crane operator in Florida, if that would help you in answering his questions on Cross-examination?

MR. JOSEPH: Objection.

THE COURT: Overruled. You could answer.

A. Yes.

Q. Okay.

A. So if I am informed that there is a large spell of non-work, I would ask about it and I would want to know where. Again, I don't base my numbers on where they work. It's how they work. And the work capacity. So if it's in Florida or New York it doesn't make a difference.

MR. MORGAN: Thank you, Doctor.

THE COURT: All right. Re-cross.

MR. JOSEPH: Thank you, your Honor.

RECROSS-EXAMINATION

BY MR. JOSEPH:

Q. Doctor, when the union files Form 5500 with the government, it's taking an average -- the average age of the people that are retired, correct?

MR. MORGAN: Objection, your Honor.

THE COURT: Overruled.

A. An average age among those who report.

Q. Well, if somebody isn't earning a living and they are drawing a pension, then they have retired, right?

A. Yes.

Q. All right. And, Doctor, you were talking about Bureau of Labor Statistics, three percent across the country for all occupations, right?

A. Yes.

Q. And that includes people who work on Wall Street?

A. Yes.

Q. Includes professional athletes?

A. Yes.

Q. And, Doctor, you said if you were to see a large gap of years where somebody didn't work, I think you called it non-work, you would make an inquiry, right?

A. Yes.

Q. You weren't shown those years so you didn't make an inquiry in this case; isn't that right?

A. That's correct.

MR. JOSEPH: Thank you. No further questions.

THE COURT: Thank you. You may step out.

(Witness excused.)

THE COURT: Can you come up?

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

THE COURT: All right. So we are going to break at this point. We will reconvene on Monday, 9:30 in the morning, when we will continue with the trial.

Remember, do not discuss this case among yourselves or with anyone else. Do not do any internet search about this case, the parties, the Court, the attorneys, or any witness. Enjoy the rest of your day and enjoy the weekend. See you Monday 9:30.

COURT OFFICER: All rise.

(Whereupon, the case was adjourned to April 18, 2016, at 9:30 a.m.)

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