In The Matter Of:

Anthony Pate v.
Navillus Construction

Dr. Kim Busichio
December 13, 2016

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KIM BUSICHIO, PH.D.

STATE OF NEW YORK

WORKERS' COMPENSATION BOARD

ANTHONY PATE,

Claimant, Carrier No.:2B013757649114
WCB:G1408031
-VS- D/A:9/24/15

NAVILLUS CONSTRUCTION,

Employer,

ESIS,

Carrier.

Telephonic Deposition of KIM BUSICHIO, PH.D., taken pursuant to Workers' Compensation Law in the law offices of GOLDBERG SEGALLA, LLP, 665 Main Street, Buffalo, New York 14203-1425 on Tuesday, December 13, 2016, commencing at 11:04 a.m., held before Stephanie Aprea, Court Reporter and Notary Public in and for the State of New York.

APPEARANCES: THE LAW OFFICES OF JOSEPH A. ROMANO
BY: BERNARD C. HAN, ESQ.
(Via Telephone)
1776 Eastchester Road
Suite 220
Bronx, New York 10461
(914)965-1515
Appearing for the Claimant

GOLDBERG SEGALLA, LLP
BY: TODD M. JONES, ESQ.
(Via Telephone)
200 Garden City Plaza
Suite 520
Garden City, New York 11530-3203
(516)281-9800
Appearing for the Carrier

THE REPORTER: Will all parties stipulate that the doctor may be sworn in over the telephone and agree that the oath will carry the same force and effect as if the doctor was here in person?

MR. HAN: Yes.

MR. JONES: Yes.

K I M B U S I C H I O, PH.D., 952 5th Avenue, Suite 5B, New York, New York 10075, after being duly called and sworn, testified as follows:

VOIR DIRE EXAMINATION BY MR. HAN:

Q. Doctor, are you licensed to practice medicine in the State of New York?

A. Not medicine. Neuropsychology.

Q. Neuropsychology. Okay. Doctor, do you have a license in that area?

A. In clinical psychology in the State of New York, yes.

Q. And when were you licensed?

A. In 2007.

Q. And you attended a school for this license as well, Doctor, I'm assuming?

A. I attended -- in 2004 graduated with my PhD in

clinical psychology from Fairleigh Dickinson University. I went on to do a year of internship at NYU for neuropsychology and one year of traumatic brain injury and cognitive rehabilitation and assessment.

And then I went on to a two-year post-doctoral residency in neuropsychology at JFK Johnson Rehabilitation Head Institute. I did a year of inpatient and a year of outpatient of traumatic brain injury, concussion, and cognitive rehabilitation.

Q. Doctor, your license is in good standing?

A. Yes.

MR. HAN: Counsel, will you stipulate to the doctor's qualifications?

VOIR DIRE EXAMINATION BY MR. JONES:

Q. Doctor, you're not coded by the Board in this area, are you?

A. I'm not what? I couldn't hear you.

Q. Are you coded by the New York State Workers' Compensation Board in this area?

A. I'm coded PSY for Workers' Compensation.

Q. Okay. Is that your coding or is it Dr. Brown's coding?

A. No. My coding is PSY.

MR. JONES: Counsel, I will stipulate as the doctor's coded.

MR. HAN: All right. Great.

THE WITNESS: That's the Workers' Compensation rating code, if that's what you're asking, right? Yes. PSY.

MR. JONES: Okay.

MR. HAN: All right, Doctor, we can proceed.

EXAMINATION BY MR. HAN:

Q. Now, Doctor, in the course of your professional practice, have you treated a claimant by the name of Anthony Pate?

A. Yes.

Q. And with this injury that took place on 9/24/15?

A. Yes, it was.

Q. Did you take a history from Mr. Pate?

A. I did, yes.

Q. What was that history?

A. On 9/24/15, Mr. Pate was employed in construction. He was working as a flagman. He had poor recollection for the events that occurred. He was

hit by a car, knocked to the ground unconscious. The first thing he recalls is waking up at Bellevue Hospital. He was treated at Bellevue Hospital.

And then he was seen by Dr. Merola, Dr. Champey, and his treating neurologist, Dr. Hausknecht, who referred him to our center with a diagnosis of head trauma, post-concussion syndrome, mild traumatic brain injury. And he referred him to our center because of complaints of attention and memory related to the head injury and the traumatic brain injury and referred him for a neuropsychological assessment and treatment if needed.

Q. Doctor, what was your general assessment when you saw this claimant?

A. So we saw him on October 27th, 2015 for the first time. And he had cognitive deficits in the areas of initial acquisition, of learning and memory, both verbal and nonverbal. He had sustained visual attention and concentration, response inhibition, verbal functioning, and processing speed -- information processing speed deficits.

Q. Doctor, was there some form of diagnosis that you had after you saw the claimant?

A. Yes. The diagnostic impression was traumatic brain injury, post-concussion syndrome, and neuropsychological impairment secondary to the above.
Q. Doctor, overall, in terms of this individual's ability to work, do you have an opinion concerning degree of disability?
A. So you're talking about presently now, right? Not at the time --
Q. Well, at that time -- well, at that time initially, so I can just get an idea.
A. Initially, he was overall in the 4th percentile from a cognitive perspective. That means 96 percent of his peers from his age and education level were performing better than him on cognitive testing. So at that point, at 4th percentile with one percent attention and three percent executive functioning, I don't -- at that point he was not working, I didn't believe he could work at that time. And he's gone through a course --
Q. I'm sorry. Go ahead.
A. I was saying, he's gone through a course of cognitive treatment with us, and he's made significant improvement in specific areas. And he's made

significant improvement overall in terms of his cognitive functioning.

He is still having specific deficits in certain areas, which we're treating him for right now. But he's made dramatic improvement in areas of memory and areas of executive functioning, in areas of spatial skills, in verbal functioning, and his overall global cognitive score went up considerably also.

Q. Now, when was the most recent --

A. However -- I'm sorry. However, he is having significant problems in areas still of attention, processing speed, and other areas of cognition. But he did make significant gains in treatment.

Q. Now, in terms of, did you render any recent treatment for Mr. Pate?

A. Yes. So he's in treatment with us. Let's see. I'm taking a look right now.

11/29 is the last time in terms of therapy that we saw him. And that therapy was working in areas of memory, attention, and concentration, executive functioning, processing speed, all those areas. And I can go through some of the percentile in terms of how much improvement he's made in some of those areas

and then in other areas he's continuing to have difficulties. And those are the areas we're heavily working with him on.

Q. Okay. I can see a report -- give me a moment. It looks like it's been signed and dated November 8th, 2016. Do you have that report, Doctor?

A. I'll take a look. Let me just pull it out. November 8th you said?

Q. Yes. November 8th, 2016. It looks like there's a signature here. Dated 11/8/16.

A. 11/8/16. Is that a progress note?

Q. It's a C-4 medical note, actually.

A. I don't know.

Q. What's the most recent note that you have in front of you right now, Doctor?

A. I have a progress note for 11/4/2016.

Q. Let's look at the 11/4/2016 progress note, Doctor.

A. Sure.

Q. Was there an interim history that you took from the claimant?

A. In terms of a clinical interview again, is that what you're asking?

Q. Yes.

A. No. This was strictly cognitive exercises on the computer that we did with him on that date.
Q. On that date you actually saw the claimant, correct? You actually treated him?
A. On that date he was on the computer, so, no, I implement the treatment plan. So all treatment that he's doing is on the computer. And you have assistants that are sitting next to him ensuring that he understands all the instructions. So I didn't have to personally see him that day. I pull from the computer, and I adjust his treatment plan accordingly.
Q. When was the recent date that you actually personally saw the claimant?
A. I wouldn't be able to tell you that exactly. I know he saw Dr. Brown on 12/10. Let me look at Dr. Brown's note right now.

Yes. He saw him on 12/10. I have a note from Dr. Brown here. And Dr. Brown did an updated clinical history on how he was doing, I have that note. Personally, I don't see a handwritten note from me on a specific date, so I can't tell you exactly when.

Again, when patients come in, I see them informally. You know, I'll walk around, I'll make sure they're okay. But if I don't do a formal note, I won't be able to tell you the exact date I saw them.

Q. When was the last time you did like a formal note on this patient then?

A. Well, we do an initial neuropsychological assessment, and then I won't do a formal note unless we do a re-evaluation -- a re-assessment. And we did that on 12/10, but he just did the computer testing that day. And that was the day Dr. Brown had saw him.

So Dr. Brown or myself saw him on that day when he did the re-assessment, and then I take a look at the results and I adjust the treatment plan based on that.

Q. Basically, Doctor, what I'm trying to do at this point is the reason for the deposition, because there's an issue regarding degree of disability.

A. I see. Okay.

Q. So it would be helpful if you can testify to any recent treatment notes that you personally prepared yourself?

A. Yes. I can testify on his re-assessment on 12/10.
Q. 12/10. Okay.
A. That's his most recent evaluation here.
MR. JONES: I'm sorry to interrupt.
I believe we're taking Dr. Brown's testimony. Was 12/10 conducted by you, Doctor, or by Dr. Brown?
THE WITNESS: Okay. So Dr. Brown -- I have a note from Dr. Brown here.
See, when patients come in, Dr. Brown or I write a handwritten note. Most of the time both of us are in the office at the same time. I don't remember. I can't recall 12/10 exactly. I just see Dr. Brown's note here. So I know Dr. Brown definitely saw him that day. And he did the computerized assessment. So there would be no need for me to have seen him if he's just on the computer.
So that wasn't a formal neuropsych assessment. This is just a re-computerized assessment. It's different than your initial neuropsych. I have to see everyone for the initial neuropsych. But the re-assessments, Dr. Brown could see them or I could see them.
So Dr. Brown definitely saw him on 12/10/2016,

and I analyze and look at the assessment of the computer results, and I adjust the treatment plan. So I could talk about his results on December 10th, 2016.

CONTINUED EXAMINATION BY MR. HAN:

Q. Okay. So it's the results that you are going to be testifying to on that --

A. I will be testifying on the computerized testing results that he did on December 10th, 2016, not a clinical interview that I did with him. Dr. Brown did that.

Q. So, Doctor, can you just go over your notes regarding the recent assessment?

A. Yes. So based on the computerized assessment, the re-assessment that we did, he made significant improvement in areas of memory, in areas of executive functioning, in areas of spatial skills and verbal functioning, and overall global cognitive skills.

So just to give you an idea, he went to the 34th percentile in memory, he went to the 21st percentile in executive functioning, 75th percentile in spatial skills, verbal functioning 84th percentile. And then areas that he's still having significant difficulty

is attention and concentration, which was in the 4th percentile and processing speed was the 1st percentile. So those two areas are significantly low for him still.

Q. Okay. Now, overall, Doctor, based on your review of this assessment, are you able to indicate what degree of disability Mr. Pate would have?

A. Yes. Well, from a cognitive perspective. I can only do it from a cognitive perspective.

Q. That's fine.

A. Okay. So, overall, what we typically do is, we take a look at his overall performance during treatment and then the re-assessment. And he's made -- so when he first came in here, I would say he was at 96 percent disabled. So he's totally disabled when he first came in here from a cognitive perspective.

And now I would say he's partially disabled from a cognitive perspective, because his global cognitive score went from the 4th to the 19th percentile overall. So he's in the low-average range now in terms of overall cognitive performance. And when he came in here, he was in the impaired range, the borderline to impaired range. So he made significant

overall improvement. I would say he's partially impaired now. And he was totally impaired when he first came in.

Q. Would you be able to indicate what the degree of disability would be, Doctor, at this point in time?

A. Are you saying about like a percentage?

Q. Yes. Yes.

A. Let's see. Again, that would be -- it would be hard to give you the exact percentage, just because every domain is a little bit different. So I can give -- I can probably give you like an average. I could go look at each domain and then we can go through the percentage on each domain, if you want me to do that?

Q. How about this, Doctor -- now, Doctor, you are aware of what Mr. Pate did before this injury?

A. Sure. Yes. He's a flagman. I do know that, yes.

Q. Would he be able to go back to doing that job?

A. I know he wants to go back. I know that's his goal. I know he definitely wants to work. And in terms of some areas, I think that he definitely would be able to do that job. I do think he would have a little trouble with attention and concentration and processing speed, because you have to do that on that

job. You have to be aware of what's going on around you and your surroundings, and you have to be able to focus.

I think if he did -- if he did go back to that job, he would need to be supervised to make sure he's able to do the job properly and safely. Because if his attention and focus is not where it should be, which it's not, and he has any attention span problems, then that could be a significant problem in terms of his job and safety for him and others. So I would -- if he did go back, I would want him to be supervised to make sure that he's able to do that.

But I do believe that he would have trouble in terms of attention and processing speed, so I would not recommend, as a neuropsychologist, for him to independently do that without being supervised.

Q. If he were not --

A. That doesn't mean in the future after being supervised, if he's doing a good job and he continues some treatment with us, it doesn't mean -- if he continues to get better as he has, I'm sure he'll be able to work eventually without supervision.

But right now if you're asking me today, I

believe that he would need supervision if he wanted to go back, because I do think he'd have some trouble with attention and processing speed, which can cause safety concerns for him.

Q. Now, let's just say if he was not supervised at all, would he be able to do that job by himself?

A. I personally wouldn't want someone with these scores to go back without supervision because of the safety factors for others and himself. So, no, I don't believe that it would be a safe thing for him to do in terms of his cognitive performance.

Now, again, if he continues improving in treatment, as he has, and his attention goes up and his processing speed goes up more, then maybe in the future he'll be able to do that independently. But if you're asking right today, I don't believe he'd be able to do that safely by himself. I think he needs supervision -- or he needs someone there to be watching.

MR. HAN: All right. Thank you for your time, Doctor.

EXAMINATION BY MR. JONES:

Q. Doctor, just a few questions in follow-up.

A. Yes. Sure.
Q. Are you familiar with the Workers' Compensation for disability; moderate, marked, and total?
A. Yes. I mean, I'm familiar with it. Yes, sure.
Q. In that sense, at this stage with a partial, what would you assign as a degree of disability?
A. Well, again, if I had to give you a percentage-wise -- because I don't have the papers in front of me. Usually the papers are in front of me that I can take a look at percentage-wise.

If I had to give you a percentage-wise, he's still more than, I would say, maybe 60 percent in that area overall disabled; maybe somewhere in that range. So more than half in terms of disability.

Q. Now, you indicated Dr. Brown conducted the assessment on 12/10. Can you tell from your notes the last time you conducted an assessment of the claimant or re-assessment?
A. Well, this was -- based on my notes, we -- I -- okay.

So in order to do this, I re-assess him every day he comes in. But you're talking about in person, right? You're talking about me personally doing a clinical interview?

Q. Right.
A. No. The only thing I can see here is the first time he came in was on 10/27/2015, I did a comprehensive clinical interview and set up a treatment plan for him. All the treatment is on the computer, so he wouldn't have to see me on a daily basis. I look at all the treatment and I adjust the treatment plan accordingly based on the results on the computer.

And then in terms of December 10th, 2016, it looks like he just -- it looks like he saw Dr. Brown that day. And then he went on the computer to do the re-assessment that day. And what I did is I take a look at the computerized assessment and I look at the results and analyze them. And then I adjust the treatment plan accordingly.

So it looks like the initial -- the time I did the clinical interview was on October 27th, 2015.

Q. The histories you provided in some of the C-4 forms, that you may not have in front of you, there's indication that he's never had an injury like this before; is that correct?
A. He has never had an injury like this before, no.
Q. When you initially interviewed him, were you able to

determine whether or not he previously had or been born with any concentration problems or memory problems, stuff like that?

A. No. He denied any prior injuries, any cognitive problems prior to the accident. All the cognitive problems started at the time of the accident and on.

Q. And I know you were asked if you understood what his job description was, but could you just briefly, for the record, indicate what his job title was or what his responsibilities are?

A. What I know is, as a flagman, I think on construction sites he's there to make sure people are safe. You know, keep them out of the zone where they're doing the construction. That's what I know of a flagman. I'm not sure if there's other responsibilities there.

But that's why I was talking about I don't believe in terms of without supervising, you know, he's dealing with safeties of others and himself, so his attention and processing speed has to improve before he can do that by himself.

Q. How is it that you test for concentration and processing speed? What would you be looking for to improve those two areas?

A. So what we do is -- in our treatment, what we do is, we focus specifically on sustained focus and attention. A lot of the time the problem with the attention and concentration is not being able to look at something for a brief second or two, it's being able to sustain that attention over time and not become distracted by, you know, extraneous stimuli on the screen.

So what we'll do is we'll have a target that he needs to be looking at, and we might have a distraction -- other distractions, and he's supposed to selectively attend to the target on the screen over time -- sustained attention over time. And that's our ability to be able to -- that's just an example of one of the tests we give him for that.

And then also processing speed -- his ability to respond -- his response time. So, again, being able to respond quickly and react. Reaction time, response time. That's all part of processing speed.

Q. Other than his self-reporting, is there any indication that he had quicker processing time before the injury or a better concentration?

A. Yes, well --

Q. Have you interviewed, for instance, anybody else he knows, family members or anything like that?

A. No. You can do that based on a neuropsychological evaluation. And the way I -- even though we test him after the fact, we give a test which was called the Raven Progressive Matrices Standard Test, which gives an estimate of his premorbid functioning prior to his injury, and that was in the 19th percentile.

So he was in the low-average range prior to his injury. All scores -- if someone does not have an injury, you're within one standard deviation of that. And if you fall below that, that's because of an injury that's happened to your brain.

Q. So for the record, Doctor, the 19th percent is what you estimated what he would have had beforehand. Where is he now on that testing?

A. Okay. So his attention is in the 4th percentile and his processing speed is in the 1st percentile. Now, his memory went even beyond that, it went to the 34th percentile. And his executive functioning is in the 21st percentile. And verbal function is 84th. So he went up significantly in other areas. It's just his attention and processing speed is in the 4th and the

1st, which are significantly low and due to the injury.

Q. Was there anything so far as his activities of daily living that are being limited because of these results? Are you restricting him from driving a car, for instance, or doing his own chores, that type of deal?

A. In terms of -- Dr. Brown is the one that did the -- you have to ask Dr. Brown that, because he's the one that asked the driving questions to him in terms of that when he saw him. And I don't even know if he is or if he's not right now.

Again, my clinical interview was in October 27th, 2015, and Dr. Brown is the one that saw him on December 10th. So if you want to ask him about driving, Dr. Brown I know asked that question. Dr. Brown talked to him about driving, I'm sure.

Q. Had he driven on that first exam date?

A. On the first exam date? I'll take a look right now and see what we have here. Give me a second.

I'm just looking at Dr. Brown's initial note. If you can just give me a few minutes here. I'm trying to find if Dr. Brown asked that question. Is

says last car here. So he might have taken a car here the first time. But, again, this is Dr. Brown's note. I'm going based on Dr. Brown's note right now. So my notes are typed in history; it's the evaluation. So I don't have anything in terms of driving on my note, but Dr. Brown does have -- he'd be the one that asks that question. It says he took a car. I don't know if he came by himself. Let me see.

It says alone car. So, no, it looks like he came by himself in the car on the first time. That was 10/27/2015.

Now, on the second one, Dr. Brown wrote drive, but I don't know if he came alone or with someone. I'm looking at Dr. Brown's note. This is all Dr. Brown's note. Nothing to do with what I had asked.

Q. When he conducts a computer testing, are there restrictions or home exercises to conduct each time he comes in?

A. So what happens is, the patient comes in, we do the computerized exercises, they get the scores, and then I take a look at all the scores, and we adjust the

treatment plan. So there are some stuff to do at home, which a lot of the patients do at home on the date they're not here; however, we don't have any way of monitoring that at home. So the only thing that we monitor are the exercises they do during the session here. And I adjust -- I implement the treatment plan and adjust the treatment plan accordingly.

Q. Doctor, can you tell from the test results when the claimant first began to exhibit with what would be considered a partial disability? Like, how long was he rendered totally --

A. I could take a look. Give me a second.

Do you have the progress note in front of you? It's called the progress outpatient rehabilitation treatment plan progress report. Do you have that in front of you at all?

Q. We have the original attached to the C-4s. We have C-4 forms.

A. So in treatment, what we do is -- just to explain what I'm looking at here, our treatment progress report, I put accuracy percentages next to each month. So, for example, on executive functioning,

which I said he made a significant improvement in, in November 2015 he was at the 40th percentile in terms of the cognitive skills that he was doing during the session. And he went to the 63rd percentile by April 2016, but that was with clinician assistance. So he was still at that point in April -- I would say in April 2016 he still needed clinical assistance, but he was significantly improving.

So I would say within four, five months here of treatment, I'm looking at right now, probably about six months of treatment he started making from total disability to more partial disability, and continued partial disability with increased complexity on the exercises it looks like.

So what happens, when a patient starts improving in certain areas, we increase the complexity, or I will increase the complexity of the exercises so that we can challenge them to move up to the next level of cognitive rehabilitation. You have the basic, the moderate, the more higher-level exercises.

So the patient starts in the basic level, and we get them to the moderate level, you also have to challenge them to see if they can get back to the

higher levels. So that's what we did in our assessment treatment with him.

MR. JONES: Doctor, I appreciate it. I have nothing further at this time.

MR. HAN: I have nothing on redirect. Thank you, Doctor.

(Whereupon, the deposition of Dr. Kim Busichio concluded at 11:35 a.m.)

* * * *

STATE OF NEW YORK)

ss:

COUNTY OF WESTCHESTER)

I DO HEREBY CERTIFY as a Notary Public in and for the State of New York, that I did attend and report the foregoing deposition, which was taken down by me in a verbatim manner by means of machine shorthand. Further, that the deposition was then reduced to writing in my presence and under my direction. That the deposition was taken to be used in the foregoing entitled action. That the said deponent, before examination, was duly sworn to testify to the truth, the whole truth and nothing but the truth, relative to said action.

Stephanie Aprea
Notary Public No. 01AP6030223
State of New York
My commission expires
September 7, 2017

A

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